

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

ORIGINAL

APPLICATION OF THE NEW MEXICO OIL AND GAS
ASSOCIATION FOR AMENDMENT OF CERTAIN PROVISIONS OF
TITLE 19, CHAPTER 15 OF THE NEW MEXICO
ADMINISTRATIVE CODE CONCERNING PITS, CLOSED-LOOP
SYSTEMS, BELOW GRADE TANKS AND SUMPS AND OTHER
ALTERNATIVE METHODS RELATED TO THE FORE GOING
MATTERS, STATE-WIDE.

CASE NO. 14784 AND 14785

VOLUME 13

September 25, 2012

9:00 a.m.

Wendell Chino Building

1220 South St. Francis Drive

Porter Hall, Room 102

Santa Fe, New Mexico

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GREG BLOOM, Commissioner

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(Note: In session at 9:00).

CHAIRWOMAN BAILEY: It's 9:02 on Tuesday,
September 25th. This is a meeting of the Oil
Conservation Commission. We are in the process of
deliberating Consolidated Cases 14784 and 14785,
which is the application of New Mexico Oil and Gas
Association and the Independent Petroleum
Association of New Mexico for revision of the
current Rule 17.

We are just continuing the deliberations
from yesterday, so we are now back on the record
ready to go to where we stopped for that the day,
which is deliberation of 19.15.17.9D having to do
with filing the permit application.

First suggestion is to strike the
language "and exceptions" pursuant to 19.15.17 NMAC.
But to continue with the rest of the sentence, "An

1 operator shall file an application to request
2 approval to construct a permanent pit," and striking
3 again the same language, "or request an exception
4 pursuant to 19.15.17 NMAC and providing a copy to
5 the appropriate division district office."

6 Now, this is saying that the permanent
7 pits are processed in Santa Fe by the Environmental
8 Bureau with copies of the permit application or
9 approval given to the appropriate division district
10 office.

11 The current reference that is being made
12 is to the exceptions portion of the current rule,
13 and I expect that we will be hitting that section
14 sometime later this week.

15 So do you have an opinion on deletion of
16 the words "and exceptions requested pursuant to
17 19.15.17.15"?

18 COMMISSIONER BALCH: Really it seems to be
19 cleaning up and making it -- making the rule defined
20 in areas where it's not well defined, so cleaning
21 up, I think.

22 COMMISSIONER BLOOM: Is this just for
23 exceptions for permanent pits?

24 CHAIRWOMAN BAILEY: Yes, because the title
25 is Permanent Pits.

1 COMMISSIONER BALCH: What I was trying to
2 say is I think the proposed amendments have changed
3 and deal with exceptions and variances in a
4 completely different section instead of spreading
5 them throughout the rule.

6 COMMISSIONER BLOOM: Yes. Then I would
7 agree we should leave the first one and the second
8 one. Yeah, leave both of them.

9 CHAIRWOMAN BAILEY: Okay. And Paragraph 2
10 under D strikes, "The application to temporary pits,
11 closed-loop systems and below-grade tanks" and has
12 it apply only to multi-well fluid management pits
13 for requesting use in construction of the multi-well
14 fluid management pit and how they should go about
15 doing that with the district office.

16 COMMISSIONER BLOOM: We are removing the
17 language because we are no longer permitting
18 closed-loop systems and below-grade tanks.

19 CHAIRWOMAN BAILEY: That is correct.

20 COMMISSIONER BALCH: And they are adding a
21 new category of multi-well fluid management pits.

22 CHAIRWOMAN BAILEY: We all agree to remove
23 the language that's marked out?

24 COMMISSIONER BLOOM: Yes, agreed.

25 COMMISSIONER BALCH: Yes.

1 CHAIRWOMAN BAILEY: Do commissioners
2 choose to go back to the areas that we have delayed
3 or shall we go forward into the next Section 10?
4 What is your preference?

5 COMMISSIONER BLOOM: I would prefer to
6 move forward. We will be dealing with some of the
7 same issues that were on the table yesterday in
8 terms of low chloride fluids and siting issues.
9 That could go either way, but I think going forward
10 we would get into some interesting territory.

11 COMMISSIONER BALCH: I concur with
12 Commissioner Bloom. I think discussing the issues
13 in text will bring greater clarity.

14 CHAIRWOMAN BAILEY: I agree, but before we
15 leave the section we need to have a motion to
16 approve the areas that we have all indicated we
17 agree on. Do I hear such a motion?

18 COMMISSIONER BALCH: I will make that
19 motion.

20 COMMISSIONER BLOOM: I second the motion.

21 CHAIRWOMAN BAILEY: All in favor? Aye.

22 COMMISSIONER BLOOM: Aye.

23 COMMISSIONER BALCH: Aye.

24 CHAIRWOMAN BAILEY: None opposed. Now we
25 go into 19.15.17.10, Siting Requirements, where the

1 first suggestion is in A1 to add the application to
2 a multi-well fluid management pit, as far as the
3 siting requirements are concerned, along with the
4 temporary pit. Do we agree that we need to add the
5 multi-well fluid management pit to siting
6 requirements?

7 COMMISSIONER BLOOM: Yes, I agree to that.

8 COMMISSIONER BALCH: I think that there
9 was -- we maybe ought to discuss this a little bit.
10 There was testimony and cross-examination to the
11 extent that perhaps multi-well management pits
12 should have different siting criteria than other
13 temporary pits, even though they are different in
14 size.

15 Before we include that, I would like to
16 have a discussion on whether we think they should be
17 lumped together or should be a separate category.

18 COMMISSIONER BLOOM: Commissioner Balch, I
19 would agree with you, and perhaps we include
20 multi-well fluid management pit here, and if we need
21 different siting requirements we could list those
22 underneath or perhaps put them in separate sections
23 as we have done with permanent pits.

24 COMMISSIONER BALCH: Looks like the way
25 it's done right now, under A you have 1, which was

1 previously temporary pits and is now temporary pits
2 and multi-well pits, and then you have 2, which is
3 permanent pits. So we can maybe pass by it now and
4 discuss later about siting criteria.

5 CHAIRWOMAN BAILEY: Okay. Because --

6 COMMISSIONER BALCH: And see if it needs
7 its own category or not.

8 CHAIRWOMAN BAILEY: So we will discuss the
9 rest of A1 with the understanding that at this point
10 it only applies to temporary pits and would not add
11 any multi-well fluid management pits as part of the
12 discussion of A1, correct?

13 COMMISSIONER BLOOM: Correct.

14 COMMISSIONER BALCH: Sure, but I think if
15 the opportunity arises to discuss siting criteria
16 perhaps both should be discussed at the same time
17 because in some senses they are similar in that they
18 are not permanent, but the scale and contents of the
19 pits are different.

20 CHAIRWOMAN BAILEY: Because they are a
21 hybrid.

22 COMMISSIONER BALCH: Yes.

23 CHAIRWOMAN BAILEY: Then A1A, the first
24 suggested change has to do with specifying
25 unconfined groundwater. Now, we deleted any kind of

1 reference to distinctions between confined and
2 unconfined.

3 COMMISSIONER BLOOM: Madam Chair, might I
4 suggest that we do a search on the document and
5 remove unconfined and confined throughout?

6 CHAIRWOMAN BAILEY: Yes. Theresa will do
7 that at a later time.

8 COMMISSIONER BLOOM: Very good.

9 CHAIRWOMAN BAILEY: The next suggested
10 change is to remove the reference to the temporary
11 pit, which would make it applicable to both the
12 temporary and multi-well fluid management pits so we
13 can't really do that at this point.

14 COMMISSIONER BALCH: I think you probably
15 can. If we conclude that they are the same animal
16 in terms of siting, it doesn't matter if you remove
17 the word "temporary" or not. If you decide to have
18 the third category for multi-well pits then you can
19 duplicate all the text in that category and then
20 modify criteria as necessary.

21 CHAIRWOMAN BAILEY: So we can come back to
22 it?

23 COMMISSIONER BALCH: I think we can get
24 rid of the word "temporary." It doesn't change the
25 discussion.

1 COMMISSIONER BLOOM: Because it's under a
2 section on temporary pits?

3 COMMISSIONER BALCH: Temporary and/or
4 multi-well fluid management pits.

5 CHAIRWOMAN BAILEY: Deleting the
6 language "or below-grade tank" so we agree on this
7 one?

8 COMMISSIONER BALCH: Yes.

9 COMMISSIONER BLOOM: I may have some
10 reservations about that, depending on where this
11 goes and what we see as an appropriate distance
12 between groundwater and below-grade tank.

13 CHAIRWOMAN BAILEY: Okay. We skipped over
14 the distance between groundwater and the bottom of
15 the pit or the tank, and that's probably up for some
16 discussion on whether or not we change the current
17 requirement for 50 feet to the proposed 25 feet.

18 COMMISSIONER BALCH: As I recall
19 correctly, I think we still have a discussion on low
20 chloride fluids.

21 CHAIRWOMAN BAILEY: Yes. Because this
22 paragraph as it's presented would only apply to low
23 chloride fluid. Otherwise, where unconfined is less
24 than 50 feet -- it's a complex paragraph.

25 COMMISSIONER BLOOM: Madam Chair, might I

1 suggest we have a discussion about appropriate
2 distances to groundwater and then perhaps after that
3 low chloride fluids?

4 CHAIRWOMAN BAILEY: Okay.

5 COMMISSIONER BALCH: Those two discussions
6 might well be entwined.

7 CHAIRWOMAN BAILEY: They clearly are.

8 COMMISSIONER BALCH: Seems that we reached
9 a point where we have to have that discussion.

10 CHAIRWOMAN BAILEY: We have reached that
11 point. Commissioner Bloom, do you have something?

12 COMMISSIONER BLOOM: Sure. I appreciate
13 the work that Mr. Mullins did on his modeling, but
14 I'm concerned that the model didn't reflect what we
15 saw in some of the cases. One of Mr. Mullins'
16 findings when we asked him to go back and do a
17 little more calculation about fluids moving down 25
18 feet and over 100 feet. He came back with findings
19 of that occurring over a period of 950 years in
20 Southeastern New Mexico and over 111,000 years in
21 Northwestern New Mexico.

22 Mr. Mullins was asked by OGAP, Mr. Jantz,
23 if he verified his results with real world data and
24 he replied no, that he didn't look at a leak and
25 then go back and try to recreate that through his

1 model.

2 I made a list of some of the real world
3 releases and incidents that we discussed during the
4 hearing, and Dr. Neeper spoke to going out during
5 the time period of the last Pit Rule group in 2007
6 with Marbob and looking at a couple sites, one of
7 which at least Marbob had selected. And he spoke
8 about well 49. This is on Transcript Page 1161. It
9 was a well from 1976, 31 years old, and there he
10 found the leading edge of the chloride plume at 25
11 to 30 feet.

12 So we saw movement of about one foot per
13 year, which is much greater than what Mr. Mullins'
14 model said, which was somewhere in the range of
15 approximately a millimeter a year. With Well 321,
16 that well was spud in 2000 and closed. They went
17 out six years later. There was a pit liner there,
18 and the plume was seen or salt concentrations at 20
19 feet and 30 to 35 feet.

20 The comment from Marbob, according to
21 Dr. Neeper, was the liner didn't seem to do any good
22 there. Dr. Neeper said he didn't know what it would
23 look like in 100 years.

24 Interestingly, one of the things that he
25 pointed out was salt rose to the top against the

1 inside of the top liner showing where the migration
2 of salt was, having a discussion about liner caps.
3 Testimony from Irvin Boyd, the rancher from Eunice,
4 he gave a sworn statement. He works in the oil and
5 gas industry to support his ranch and the pipeline
6 there. He said he had a company, Lacy Resources,
7 working on his ranch.

8 He asked for a closed-loop system.
9 Interestingly enough, they said no, it would cost an
10 extra \$30,000, so they went ahead and used a
11 temporary pit and he got a call in 2007 during the
12 Pit Rule hearing and they had seen -- they had a
13 leak. The plume went down to about 30 feet.
14 Groundwater was at 50 feet, so that was just within
15 a period of a year or so.

16 Then we saw some other cases that were
17 mentioned by Ms. Martin for OGAP. AP 81 Chevron
18 Mark was spudded in January of 2006, excavated in
19 January of '07. That was one year and -- about one
20 year there. They found chlorides in the range of
21 5,000 to 10,000 milligrams per kilogram at ten feet,
22 so again, we are seeing a transit of ten feet in a
23 period of about a year.

24 Pride Energy, which was spudded in
25 November of 2004, was closed March of 2005. In 2008

1 a sample was taken, and in this case, interestingly
2 the chloride plume moved 150 feet horizontally in
3 that time. At 14 feet of depth the chloride plume
4 was at a concentration of 1500 to 4200 milligrams
5 per kilograms, 20 feet 450 to 2600 milligrams per
6 kilogram and at 30 feet, 300 to 800. It looked like
7 the plume stopped at 30 feet, so that was over about
8 a four-year period and calculated at a velocity of
9 about 90 feet per year, and horizontal travel was my
10 estimate with 150 feet for about four years you're
11 talking 35 to 40 feet a year.

12 There are a couple more wells that
13 Ms. Martin brought up, but I think the cases that we
14 are seeing in the real world, the movement of
15 chlorides is sometimes at much greater velocity than
16 what Mr. Mullins' model anticipated.

17 COMMISSIONER BALCH: I think that you are
18 correct, but the context may be a little different
19 than what Mr. Mullins was modeling and Dr. Neeper
20 was modeling as well. It was transport through a
21 dried out pit -- well, not necessarily a dried out
22 pit in the case of Dr. Neeper's study. And the
23 cases that you are talking about were brought up by
24 Ms. Martin were more related to liquid spills. So
25 liquid spills are really under the domain of a Spill

1 Rule, and I'm not sure how that interplays with what
2 we are trying to discuss today. If we could have a
3 clarification.

4 CHAIRWOMAN BAILEY: The reference to the
5 Spill Rule comes into the closure plans in the
6 requirements that this Commission will put for
7 closure requirements, depending if there is evidence
8 of a spill beneath a liner or beneath -- say a
9 below-grade tank. That's where the spill and the
10 abatement plans come into play.

11 COMMISSIONER BALCH: Right. So if there's
12 a spill, I believe it's about five barrels?
13 Anything above five barrels has to be -- it's a
14 pretty small -- one to five barrels, I think. I
15 don't know the exact number. But if there's a spill
16 it has to be reported and then there will be some
17 plan for digging out the soil.

18 So all the cases you discussed, I think,
19 was before any of those rules were put into place.
20 So if you did have a liquid spill in 1971, nobody
21 would do anything about it. If you had a liquid
22 spill now, then we have to go out there and
23 sometimes at great expense dig out all the affected
24 material.

25 I can think of at least one case in

1 Southeastern New Mexico where a reclamation like
2 that has exceeded half a million dollars, so there's
3 penalties for having a spill.

4 So there is really two things you are
5 talking about. You are talking about the liquid
6 phase where the liquids are in the pit, and then you
7 are talking about what do you do with the material
8 afterwards. Most of the modeling had to do with
9 what's left afterwards because the pit is closed.

10 I saw a little -- the thing that I saw
11 that was consistent in the real data provided to us,
12 both by Dr. Buchanan and Dr. Neeper, was the salt
13 bulge. And to the extent Mr. Mullins did not model
14 an exact case, I would have to agree. However, the
15 models that he used have been proven for other solid
16 waste disposal and are commonly used in landfills
17 and other applications across the United States. So
18 the model itself has been vetted.

19 That model does not predict a salt bulge,
20 and the reason his results were different from
21 Dr. Neeper's was his assumptions about infiltration.
22 That's the main difference right there. If you
23 assume that there will be infiltration then you
24 might attempt the model like that which Dr. Neeper
25 used, where with a steady state flow boundary. A

1 steady stay flow boundary in most simulation
2 modeling such as where we do with a reservoir
3 simulation for oil, you use that when you expect a
4 constant flux. So a good example of a case where
5 you would use a steady stay boundary is where you
6 have water in a water flood always coming into the
7 system so you want the edge of your model, you
8 always want an influx of water. That's when you use
9 the steady stay boundary. Otherwise, you use what
10 we call the open boundary and that allows flow in
11 either direction.

12 So the assumption in Dr. Neeper's model
13 was there would be infiltration. What I found
14 interesting about Mr. Mullins' use of real world
15 data is he did use actual predicted infiltration
16 rates based on precipitation for the areas of the
17 model and he came up with no infiltration that would
18 get water transported to the water table at the
19 depths of the model.

20 The significance of that is that I think
21 dry material is going to be pretty safe, and then
22 you take the other evidence that we saw, the
23 physical evidence that was presented both by
24 Dr. Neeper and Dr. Buchanan was the existence of the
25 salt bulge. Neither model predicts the salt bulge.

1 But the salt bulge is also based on infiltration
2 rate, and the depth to which the materials will
3 deposit in the soil is dependent upon the rate at
4 which water comes down above it.

5 What the record shows, the geologic
6 record, is that in the major producing areas of New
7 Mexico that's going to be a fairly shallow depth,
8 somewhere 15 to 25 feet or so from the cases we saw.

9 Obviously, there's many more cases that
10 could be looked at where you come up with a
11 conclusive statement, but I think that geologically
12 or hydrologically speaking, that doesn't indicate
13 that the infiltration rates that do not necessarily
14 drive water to great depths have been consistent
15 over some time period of thousands of years.

16 But I want to reiterate, I think, that
17 there is a Spill Rule and that there's a difference
18 between a release during operations or a tank that
19 has a backhoe back into it and has a leak sprung in
20 it and you have a release and then the solid part of
21 the waste.

22 So I think most of the examples presented
23 in rebuttal by Ms. Martin were examples of things
24 where you had the leaks. Those would have been
25 before you had the Spill Rule that would cause an

1 immediate response to a leak and also before there
2 were any significant guidelines for closure and
3 burial?

4 COMMISSIONER BLOOM: Just to clarify, the
5 cases that Ms. Martin presented that I am referring
6 to are from '06, '05 --

7 COMMISSIONER BALCH: And earlier, I
8 believe.

9 COMMISSIONER BLOOM: Those were -- I
10 mentioned two and those were from '06 and '05.

11 COMMISSIONER BALCH: I remember her table
12 and that table was pretty sparse on data since
13 around that time period. So Rule 50 was put into
14 play when? Rule 50 was the preceding rule to Rule
15 19, and I think --

16 CHAIRWOMAN BAILEY: I can't give you the
17 exact year.

18 COMMISSIONER BALCH: I remember looking at
19 C144 forms for Rule 50 and it was a one-page
20 document. You had to use a liner and other than
21 that there wasn't a whole lot of specifications.
22 There wasn't the siting criteria to the degree that
23 you have in Rule 17. But it does show that pits in
24 that era had contamination problems.

25 COMMISSIONER BLOOM: Sure. But I want to

1 point out that those two cases were from '05
2 and '06.

3 COMMISSIONER BALCH: Rule 19 went into
4 play in '08.

5 CHAIRWOMAN BAILEY: Rule 17.

6 COMMISSIONER BALCH: In '08.

7 COMMISSIONER BLOOM: I think that's been
8 understood, but liners were used. I think what I am
9 more interested in is the speed of the movement.
10 Horizontal traveled 150 feet and --

11 COMMISSIONER BALCH: I think what you are
12 talking about is sheet flow fluid from a broken pit
13 or a tank spill or something like that, which is
14 going to give you that immediate transport. As soon
15 as you break the pit or the tank you are going to
16 have a flow of liquid that goes across the surface
17 and that will give you higher transport rates.

18 COMMISSIONER BLOOM: That went to --

19 COMMISSIONER BALCH: I think in one case
20 she said 100 feet.

21 COMMISSIONER BLOOM: This one went down to
22 about 30 feet vertically and 150 horizontal. My
23 understanding was that was a pit but we can
24 certainly check.

25 COMMISSIONER BALCH: Was that one of the

1 specific cases?

2 COMMISSIONER BLOOM: Yeah, Pride Energy.

3 In the transcript it's Page 2211.

4 CHAIRWOMAN BAILEY: While you two are
5 looking for that specific citation, I would like to
6 bring out what Rule 29, the notification rule, does
7 say. It says, "A minor release means an
8 unauthorized release of a volume greater than five
9 barrels but not more than 25 barrels or greater than
10 50 MCF but less than 500 MCF of gases. A major
11 release is an unauthorized release of a volume
12 excluding gases in excess of 25 barrels." So we
13 have those correct numbers in the record. Did you
14 find your citation?

15 COMMISSIONER BALCH: There's a couple
16 Pride Energy cases. Are you talking about AP 78 or
17 77?

18 COMMISSIONER BLOOM: AP 78.

19 COMMISSIONER BALCH: Spud date 2004.
20 Completed -- here is another?

21 COMMISSIONER BLOOM: Let me -- if I could
22 read from the transcript. She says, "The second one
23 I looked at would be 1878. You go down, that's the
24 third one down after AP 81. It's Pride Energy
25 Company. As you can see, there's five sites. I

1 picked one of them. This would be for Reserve Pit
 2 No. 15 in South Four Lakes Unit. Again, the things
 3 that I looked at, number one, was the drill date was
 4 November 4th. The well was completed actually in
 5 March 2005. September of 2005 they submitted the
 6 C104 form to allow transport of the products.
 7 August of 2007 the pit closure form was submitted.
 8 That's C144. That was basically -- they completed
 9 the well in 2005" --

10 COMMISSIONER BALCH: Mr. Bloom, can I get
 11 on the same page with you?

12 COMMISSIONER BLOOM: Page 2211.

13 COMMISSIONER BALCH: That's of the
 14 transcript?

15 COMMISSIONER BLOOM: Yeah, the transcript.

16 COMMISSIONER BALCH: Go ahead.

17 COMMISSIONER BLOOM: "They completed the
 18 well in 2005 so they didn't submit the form until
 19 August of 2007 and they had to revise it in December
 20 of 2007. They started doing initial groundwater
 21 sampling in 2008, which would be just about three
 22 years after the well was completed. The reason for
 23 potential pollution was 'brine from the pit migrated
 24 through the vadose zone to groundwater via saturated
 25 flow during operation of drilling pit regarding the

1 drying process.'" "

2 COMMISSIONER BALCH: This is Pride Energy
3 No. 14?

4 COMMISSIONER BLOOM: Yes. It says Reserve
5 Pit 15.

6 COMMISSIONER BALCH: Yes. Spud date 2004.
7 So that indicates to me the pit was sitting there
8 for three years or thereabouts and that for some
9 period of that time it had brine in it. That's
10 not -- what is the timeline now under Rule 19? Much
11 shorter.

12 CHAIRWOMAN BAILEY: Rule 17.

13 COMMISSIONER BALCH: Rule 17. I'm stuck
14 on Rule 19.

15 CHAIRWOMAN BAILEY: That's all right.

16 COMMISSIONER BALCH: Rule 17. I think now
17 that there is a six-month closure, right?

18 CHAIRWOMAN BAILEY: Yes.

19 COMMISSIONER BALCH: So you would not have
20 a pit sitting out there for three years, which the
21 longer it sits there, obviously the greater chance
22 it has to have something go wrong with it.

23 COMMISSIONER BLOOM: The well was
24 completed in March of 2005. August of 2007 the pit
25 closure form was submitted.

1 COMMISSIONER BALCH: That's almost three
2 years later from the spud date. So when they spud
3 it they are going to have the pit in place and
4 fluids circulating. So, you know, I think to me
5 that we want to be protective, and the reason there
6 was a Rule 17 is because people want to protect
7 groundwater and they had examples like the one you
8 talked about, Exhibit 6B, where you did have a
9 release from a pit.

10 Since -- when was the Spill Rule? That's
11 relatively new as well, wasn't it?

12 CHAIRWOMAN BAILEY: Somewhere in that
13 vicinity. Let me find the exact date for you.
14 Effective date December 1, 2008.

15 COMMISSIONER BALCH: Okay. So the cases
16 that we're talking about where you have a release
17 and contamination, if they were to happen today, a
18 large release like that, it would be reported.
19 There would be an abatement plan. You would have an
20 environmental consulting company go out and
21 determine what is the best way to clean up the
22 defective material and they would most likely have
23 to dig it up and haul it all away.

24 At the same time, around 2007/2008, Rule
25 17 was put in place, and part of that was limiting

1 the length of time that you would have a temporary
2 pit laying around, which decreases the odds of a
3 spill occurring.

4 So, you know, we can look at some of these
5 cases and say they were the inspiration for the work
6 that was done in 2007 and 2008 to increase the
7 regulations, but I'm not sure that we can use it to
8 judge the effectiveness of current siting criteria
9 except a little bit anecdotally. You said you saw
10 horizontal contamination higher than 50 feet from
11 apparently a pretty good-sized pit release. That's
12 my take on that.

13 I think that we had a lot less testimony
14 on horizontal criteria than we did on vertical. All
15 the modeling was focused on vertical. A lot of the
16 transport discussion was on vertical as well. I
17 think there was some testimony on horizontal but it
18 was not nearly as detailed as it was for vertical
19 migration.

20 CHAIRWOMAN BAILEY: For the record, I
21 would like to point out that under Current Rule
22 19.15.17.13A7, "An operator shall close any other
23 permitted temporary pit within six months from the
24 date that the operator releases the drilling or
25 workover rig. The appropriate division district

1 office may grant an extension not to exceed three
2 months." So there's a maximum of nine months for a
3 testimony pit to remain open after the release of
4 the rig.

5 COMMISSIONER BLOOM: Currently how soon do
6 liquids have to be taken out of the pit? Is that 30
7 days, I believe? I believe NMOGA wanted to go to 60
8 on that.

9 CHAIRWOMAN BAILEY: It says, "The operator
10 of a temporary pit shall remove all liquids from the
11 temporary pit prior to closure and dispose of the
12 liquids in a division approved facility or recycle,
13 reuse or reclaim."

14 COMMISSIONER BLOOM: I'm looking at the
15 operational requirements, Section 12 for temporary
16 pits, B4. The language is currently, "The operator
17 shall remove all free liquids from a temporary pit
18 within 30 days from the date the operator releases
19 the drilling or workover rig."

20 COMMISSIONER BALCH: You said that was
21 under the discussion of modifications of 60 days?

22 COMMISSIONER BLOOM: Yes, from 30 to 60.

23 COMMISSIONER BALCH: Do you remember any
24 testimony about why they wanted that change?

25 COMMISSIONER BLOOM: Yes, it was because

1 the current climate, it's often hard to get a crew
2 out there to take out the liquids.

3 CHAIRWOMAN BAILEY: I would like to
4 address some of the comments you made.

5 COMMISSIONER BALCH: Whether the equipment
6 was available as well.

7 CHAIRWOMAN BAILEY: There's been evolution
8 of oil and gas regulations as far as protection of
9 freshwater is concerned from no lining at all to
10 having lined pits. We have gone from having unlined
11 pits and really no burial at any depth at all, and
12 there's certainly, for many of those contamination
13 cases, they did not have removal of the fluids and
14 mixing of the pit contents to pass the point filter
15 test, which we now have as part of the closure
16 requirements.

17 The contamination cases represent past
18 practices, past sins. We do not have a submittal of
19 our proposal to change the lining requirements for
20 temporary pits. We do have proposals or responses
21 concerning burial of the pits, reclamation that
22 would prevent salt migration. We have very
23 important, in my mind, modeling to show the
24 concentration of the chlorides once it reaches
25 groundwater.

1 I think we not only have to look at
2 whether or not the chlorides will be transported to
3 groundwater but also at what concentration will the
4 chlorides arrive and the maximum concentration that
5 can be expected if certain reclamation requirements
6 are taken care of.

7 Those concentrations are at such a minimal
8 amount that they would not create a drinking water
9 problem for the groundwater that is below the pit if
10 those reclamation requirements are made.

11 Past practices, past sins did not have
12 revegetation standards such as we are going to be
13 deliberating in this case. There were often
14 problems with burial. There was certainly no mixing
15 of the pit contents to remove as much of the fluids
16 as possibly could be removed.

17 I think we have the opportunity here to
18 remove the barbed wire from the gate that I talked
19 about yesterday where we don't need to have
20 padlocks, electronic locks, electrification and
21 barbed wire on the gate to prevent problems. I
22 think with the potential for taking care of the
23 reclamation requirements with understanding of what
24 the maximum chloride concentrations are, that we do
25 have this opportunity to reduce some of the

1 unnecessary requirements that have been put on
2 industry, but still we will have protection of
3 freshwater.

4 COMMISSIONER BLOOM: One thing, and I
5 mentioned this during cross-examination during the
6 hearing, was that as regulators, right now we are
7 seeing a rule that appears to have worked. We
8 haven't seen incidents since 2008. Nobody could
9 find an incident where a pit led to groundwater
10 contamination, if I'm correct. It seems like what
11 we have is working and as regulators we want to
12 protect the resources, protect groundwater. We want
13 to do so in a way that doesn't move costs so high
14 that it prevents extraction of oil and gas and
15 resources.

16 There was some testimony by Dr. Bartlit
17 that having these regulations in place creates jobs.
18 I don't think as regulators we want to make
19 regulations to create jobs. That's not what we are
20 here to do. You wouldn't want to ratchet up
21 regulations so high it squeezes out jobs in
22 environmental services, for example.

23 We have a rule that works and we are being
24 out to scale it back, and I'm concerned that we
25 haven't heard much about possible waste. We haven't

1 heard if there's been economic penalty put on
2 industry that's affecting its ability to operate in
3 New Mexico.

4 COMMISSIONER BALCH: These guys
5 particularly, and I always bring this up, they are
6 very tenacious. They will find a way to do what
7 they can. I think that the argument by is not going
8 to stop us but make it more expensive and slow it
9 down. NMOGA in their closing says, and I think this
10 is what they tried to present in testimony, "The
11 current rule creates a maze that operators have to
12 work through to try to get applications for pits and
13 below-grade tanks approved and this has, because of
14 the ambiguities in the rule, resulted in confusion
15 and inconsistent interpretations of the rule between
16 division district offices. The regulatory
17 uncertainty this creates discourages development,
18 which reduces the ultimate recovery of oil and gas.
19 Third, it creates regulatory delay. An industry
20 that has thousands of pending permit applications is
21 simply not able to administer the rule it asked the
22 Commission to adopt."

23 So a 25-foot concrete wall will definitely
24 stop a baseball but so will a cinder block wall.
25 And I think to me what industry is asking us to do

1 is take the rule which has been shown to be
2 protective, make sure that it still is as protective
3 but streamline it and fix the things that aren't
4 necessary for that protection. On the other hand --

5 COMMISSIONER BLOOM: I agree with you. I
6 think we have already adopted some changes that will
7 clarify definitions, make inspection work easier,
8 reduce different interpretations of statute. We
9 have taken a long line of below-grade tank
10 permitting off of the shelf of registration, so I
11 would agree that some of those things we can do and
12 clarify.

13 COMMISSIONER BALCH: So when you go around
14 the state -- and there's a lot of discussion about
15 the expense of closed-loop systems -- I think
16 everybody agreed that there was some additional
17 expense. The debate was really over how much it
18 would be, and I think that's probably the situation.
19 Particularly early on when there wasn't very many
20 systems available.

21 I do spend a lot of time in my day job as
22 a researcher at the Petroleum Center of New Mexico
23 Tech working with producers. That's the mandate of
24 that research group is to enhance recovery in New
25 Mexico, much like State Land Office wants to

1 maximize the leasing values that they can get, and
2 the Oil Conservation Division is supposed to get as
3 much oil produced as can be done safely and
4 effectively.

5 When you talk to producers, you hear them
6 complain. Maybe they don't have evidence for their
7 complaints, but sometimes the perception all by
8 itself is simply enough to cause a problem, at least
9 initially. But you would expect that to go away
10 over some time period if there really is an unfound
11 concern.

12 If just being able to use closed-loop
13 systems would solve the problem effectively, cost
14 effectively without impacting operations, I think
15 they would still not be complaining four or five
16 years later. They would have settled into the new
17 paradigm and been happy with it. And they are still
18 complaining about it today. I think particularly
19 the smaller operators that do have smaller margins,
20 and if you take something -- I think even
21 Ms. Denomy, the witness for OGAP on economics, comes
22 down to an accounting of making a business decision,
23 and if you have a million dollars to spend and you
24 expect to get five million back, that's the way you
25 do it. If the number comes up at \$999,999 you will

1 say yes. If it comes to one million and one dollars
2 you will say no. So even a relatively small expense
3 can have an impact when your margins are small
4 enough, and a number of our operators do have small
5 margins.

6 So I think that as regulators, and from my
7 opinion as a regulator, you want to do everything
8 you possibly can for our subsidiary role to protect
9 the human health and safety, groundwater and surface
10 water things like that, and you also want to make an
11 environment that encourages the development of
12 resources which are very important to the State of
13 New Mexico in a number of ways.

14 That's why I think we are discussing these
15 changes. I think the reason in this particular
16 hearing there was a lot of discussion about vertical
17 migration is because if you are allowed to have
18 on-site burial, it does remove the need to dry,
19 clean, truck and haul to a waste site where you can
20 concentrate the material at some expense but also
21 some environmental impact. You do have a greater
22 amount of truck traffic. You have more greenhouse
23 gases put in the air, and at that site where you are
24 concentrating the waste you would increase the risk
25 at that particular location.

1 Now, I don't know the exact number.
2 Probably nobody really does know the exact number,
3 but there's been somewhere over 100,000 wells
4 drilled in New Mexico since the 1920s, and until
5 fairly recently regulations pretty much did not
6 exist in a contemporary sense and they have been
7 evolving, like Commissioner Bailey said.

8 The idea is in any evolutionary process is
9 you don't just make added changes. Things that are
10 not effective should also be looked at or adjusted.
11 So you don't always make things necessarily more
12 stringent if less stringent does the job at less
13 cost to the stakeholders, which in my opinion is
14 pretty much everybody in the state of New Mexico.

15 On that same note, these hundreds of
16 thousands of wells, many of them drilled with things
17 like diesel or heavy brine, stabilizing drilling
18 fluids, if there had been a substantial history of
19 those operations causing groundwater contamination,
20 that should have been completely obvious by now, 90
21 years later. And the reason why I think it's not is
22 because of the geologic conditions in New Mexico
23 where we have low infiltration rates and the salt
24 will go to a certain distance in the soil driven by
25 that infiltration rate and then just stops. It

1 doesn't go anywhere.

2 CHAIRWOMAN BAILEY: But to ensure that the
3 salt bulge does not continue in a downward way,
4 there are several factors that need to be --

5 COMMISSIONER BALCH: If you apply
6 infiltration. If you apply infiltration. An
7 example of infiltration would be if you don't have a
8 liner. So if you are taking the ten-foot water
9 column and you keep adding water to it, of course,
10 because it's going somewhere, that's going to
11 artificially increase the infiltration rate at that
12 location.

13 Similarly, if you have a spill or a leak
14 you will have the same thing, but it will be more of
15 a dynamic event. You will have a very short burst
16 of change to the infiltration. You will have
17 contamination to some depth at some distance, and
18 once there's no longer additive flux of fluids, the
19 infiltration rate will go back to whatever the
20 background is. You will still have the contaminated
21 area and I think that's where the Spill Rule was
22 designed to come in and alleviate those areas.

23 CHAIRWOMAN BAILEY: With the abatement
24 plan.

25 COMMISSIONER BALCH: With the abatement

1 plan, which I think are pretty expensive. I think
2 the biggest single control -- you know, if you are a
3 small company and you are worried about your bottom
4 line, having a half a million dollar cleanup is not
5 going to help your bottom line. So they have a
6 strong incentive to make sure that they don't have
7 large spills, and I think that's why the safety
8 reference since 2007 and 2008 has been so good.

9 I'm just saying I think it's worth looking
10 at the rule again and making adjustments where it's
11 prudent and not assuming that if we make any changes
12 it will affect the objections. We are here to
13 determine what's protective, and we now have a few
14 more years of evidence than they had when they did
15 the first rule.

16 So it's very likely in a few years that
17 somebody will look at it again, so it's not set in
18 stone. I don't know how many pit rules there's
19 been.

20 CHAIRWOMAN BAILEY: Two.

21 COMMISSIONER BALCH: Two. Then the
22 modifications in 2009 and now there's a proposed
23 modification in 2012.

24 CHAIRWOMAN BAILEY: You just made a very
25 important comment; that we are not here to reduce

1 protection of water.

2 COMMISSIONER BALCH: Absolutely not.

3 CHAIRWOMAN BAILEY: We will maintain
4 protection of water, but we don't need to have some
5 of these over-the-top requirements that create
6 enforcement issues as well as expensive, unnecessary
7 requirements of the operators.

8 COMMISSIONER BALCH: I think there's been
9 a lot of testimony as to the rule not being able to
10 be -- the rule as it is currently presented is not
11 being effectively administered because there's just
12 not enough people to do the job that was put on it.
13 And I think yesterday we were discussing the data
14 that is available and to some extent the rule
15 doesn't -- there's -- the data doesn't exist to
16 provide the information that would let you make the
17 determination that was required by the rule. So the
18 best thing you can do is make sure that you're
19 adequately -- you want to be as protective as you
20 can be, but you also don't want to run into a
21 situation where people can't do anything.

22 COMMISSIONER BLOOM: I understand that.
23 Chairman Bailey, you mentioned expense, and
24 Commissioner Balch, you talked about hearing from
25 independents, small independents that there are

1 impacts here. But I haven't seen much testimony to
2 the negative impacts of this rule on industry.

3 COMMISSIONER BALCH: There was a lot of
4 testimony and it's kind of surprising to me because
5 a lot of it was based upon rig count. When I looked
6 at rig count data, I couldn't see a correlation
7 between rig count and actual drilling activity, and
8 if you want to discuss this in more detail I can dig
9 out my calculations and notes. But the thing that
10 struck me was that -- and the reason I think the rig
11 count is not a good indicator is because what you
12 are doing with those rigs is pretty important. So
13 ten years ago when you were drilling a lot of coal
14 and methane wells in the San Juan Basin the rig
15 count could be very high but it's because you are
16 only at the drill site for two or three weeks. They
17 are shallow wells so the --

18 COMMISSIONER BLOOM: I think you noticed a
19 divorce between rig count and spud.

20 COMMISSIONER BALCH: Spud, yes. I thought
21 spud date was more important. When you looked at
22 spud date you did see a depression and you continue
23 to see a depression between, say, Texas where they
24 don't have a rule, and I think even Colorado, where
25 they have a different rule.

1 COMMISSIONER BLOOM: That was intriguing
2 but --

3 COMMISSIONER BALCH: I don't think rig
4 count is indicative.

5 COMMISSIONER BLOOM: For a while we heard
6 that out in the world -- we didn't necessarily hear
7 it here, that the rig count was depressed because of
8 the Pit Rule, but I think we saw that rig count
9 around the time they were rolling in nation-wide.
10 If we look at the difference between rig count and
11 spud date, which we didn't really hear too much
12 testimony on why we would see that split, I would
13 still think it might have something to do with the
14 sort of wells being drilled and not seeing
15 shallower, low, shallower gas wells that we might
16 have seen in the past.

17 COMMISSIONER BALCH: Right now one of the
18 most active plays in Southeast New Mexico is a big
19 commingling play called the Yeso. There are a
20 couple of other plays that contribute to that, but
21 those are short wells, short spacing. Step out and
22 drill and they just keep pumping them out, so rig
23 count would naturally be high because of that. But
24 if you are only drilling really deep wells it's
25 going to change.

1 So I did, as you mentioned, I did go back
2 and looked at spud counts. This is -- I did rigs
3 per well and that's how I came up with the reason
4 for spud date being perhaps a little more
5 appropriate measure of activity. Even with that,
6 I'm looking at in 2007 there were 1728 wells spudded
7 with 83 rigs, which is 21 wells per rig. In 2011
8 there are 990 wells spudded, so that's half of the
9 number in 2007 and you have a much more favorable
10 environment for oil drilling and a much less
11 favorable for gas drilling now than you did in 2007.

12 So activity in the Northwest is very low
13 and in the Southeast is very high. That may be a
14 factor as well. You are getting 12 wells per rig in
15 2011 with 81 rigs operating. So the number of
16 operating rigs really hasn't changed between 2007
17 and 2011. So essentially there was a dip. Some of
18 it was nation-wide and some of it was regional, but
19 we are more or less flat to where we were in 2007 or
20 so, but everybody else around us is higher.

21 COMMISSIONER BLOOM: Your testimony that
22 rig count tracks commodity prices?

23 COMMISSIONER BALCH: Well, if you look --
24 it's like anything else that you try to track like
25 that. If you look at rig counts nation-wide then it

1 will track more closely the commodity prices. If
2 you look at rig counts locally, we have the impact
3 of things like what is it you are drilling? Is it
4 oil versus gas, liquids-rich gas, things like that.
5 How shallow are the plays, how deep are the plays?
6 So the narrower you look the less connected anything
7 will be to a commodity price.

8 COMMISSIONER BLOOM: If there was found a
9 decline in wells per rig in 2007 and 2011, doesn't
10 some of that depend on what sort of wells are being
11 drilled and what depth people are going to?

12 COMMISSIONER BALCH: Absolutely.

13 COMMISSIONER BLOOM: Do you have that
14 data?

15 COMMISSIONER BALCH: We have the number of
16 wells that were operating, which is essentially the
17 same. I would posit, and I think it was proposed in
18 testimony by Mr. Scott in particular, that if we
19 were tracking the price of oil and development
20 trends across the United States that you would have
21 more rigs in New Mexico now than you would have in
22 2007. So I think there has been a depression in
23 activity and how do you separate out what the causes
24 of that were? Were they solely economic? Were they
25 in part because of Rule 17? Were they because of

1 the change in commodity prices from oil being --

2 COMMISSIONER BLOOM: I'm just not sure
3 that we have seen something conclusive about Rule 17
4 impacting oil and gas activity. Rig counts are back
5 up. We don't necessarily know why we are seeing
6 less wells per rig. It might have more to do with
7 the depth per --

8 COMMISSIONER BALCH: Well, and the change
9 of horizontal technology so you are spending more
10 time at a particular well.

11 COMMISSIONER BLOOM: When Mr. Scott was --

12 COMMISSIONER BALCH: I think the point is,
13 though, if you have the 20 percent growth in the
14 industry nation-wide -- and I am throwing the number
15 out, it's not real -- you expect to see 20 percent
16 more activity in New Mexico now than you would have
17 in the same time period. You don't. You see the
18 same number of active rigs.

19 COMMISSIONER BLOOM: I don't know if that
20 would -- I don't know if I would see that the same
21 way, because you have sudden new growth elsewhere
22 like the Baca --

23 COMMISSIONER BALCH: Baca and Marcellus
24 are big.

25 COMMISSIONER BLOOM: -- and their plays,

1 so it's a little bit different.

2 COMMISSIONER BALCH: Those are gas plays.
3 Most of the big new shale plays are gas plays and
4 they are the reason why conventional or
5 unconventional -- I hate to say the word traditional
6 unconventional gas, but basically pipe gas, which is
7 what we have in the San Juan Basin is conventional
8 and unconventional and coal bed methane gas. You
9 have a depression in that activity now because of
10 the successful shale plays. It made gas very cheap
11 and a lot of the gas is closer to the end point of
12 of where it will be used, which are the large cities
13 on the East Coast.

14 The connection, I think, is tenuous. But
15 I really will go back to my statement that these
16 producers are pretty tenacious people. If there
17 wasn't an impact, I don't think they would have
18 complained about it five years later. They would
19 have just adjusted.

20 COMMISSIONER BLOOM: Back to the producer
21 and claims of cost increases. I mean, I don't know
22 that I saw much evidence of that here.

23 COMMISSIONER BALCH: There was evidence
24 presented by Mr. Scott.

25 COMMISSIONER BLOOM: On a number of wells.

1 COMMISSIONER BALCH: A number of wells.
2 There was also public comment from a producer in --
3 the Largo. So there was evidence presented that
4 showed changing cost and even -- every witness that
5 was cross-examined about that the cost of using
6 closed-loop systems said that they were more
7 expensive. The argument really was what the
8 difference was.

9 So if it is more expensive, there will at
10 some level be an economic impact. The economic
11 impacts in the oil industry affect small producers
12 to a greater degree than they affect larger
13 producers. They can't absorb even relatively small
14 changes as easily as a large company can.

15 I'm sure you read the paper but, for
16 example, Papa John's Pizza said it would cost them
17 eleven cents more a pizza for the health care
18 report. They are a large company. They have a
19 large distribution chain. They can soak up eleven
20 cents change in the cost of pizza. But the local
21 pizza shop on the corner may have a different take
22 and it make cost them charge \$3 more a pizza.

23 That's what I am really talking about.
24 The fact that we have so many small producers in New
25 Mexico, the impacts of changes in economics are

1 going to be magnified.

2 COMMISSIONER BLOOM: To get back to the
3 independent that came in to public comment, Largo, I
4 felt for him, but the gist of the cost overrun was
5 they didn't forecast transportation, which we agree
6 today was probably necessary.

7 COMMISSIONER BALCH: But what impacts
8 transportation cost?

9 COMMISSIONER BLOOM: No, I understand
10 that.

11 COMMISSIONER BALCH: If you have to move
12 tanks then you need trucks. If you have to move
13 fluids you have to have trucks. If you have to move
14 solids you have to have trucks. If you don't have
15 enough trucks, guess what happens. You have the law
16 of supply and demand. The demand is high, the price
17 goes up. There's a reason right now that a guy with
18 a CDL can make \$100,000 a year in West Texas.

19 COMMISSIONER BLOOM: Sure.

20 COMMISSIONER BALCH: High demand.

21 COMMISSIONER BLOOM: Right. We heard from
22 the company about cost overruns. We heard from
23 Mr. Scott on a handful of wells that he drilled and
24 some experience with closed-loop systems. One thing
25 he said was a typical -- we heard from Conoco which

1 said that 80 percent of their wells used the pit, 20
2 percent were closed-loop. Some of those they would
3 have used anyhow because they would inside maybe a
4 municipal limit. They came in around \$100,000 a
5 well extra. They asked for a breakdown and I don't
6 know that we got the breakdown. He wasn't a
7 financial person.

8 That's it. That's the sum total of what I
9 saw in terms of presented economic impact.

10 COMMISSIONER BALCH: There was the
11 testimony of Ms. Denomy as well, which I think she
12 was presented as an expert in accounting and she
13 also had some experience in a family-owned small
14 company in Colorado, but I think one thing that was
15 uniform in all the testimony that was presented was
16 that it did cost more. The argument was how much
17 and what the impact would be of those changes in
18 cost.

19 COMMISSIONER BLOOM: There was some talk
20 about the offset of not having environmental legacy.
21 You heard from the small producers that you work
22 with. I talked to other producers at my job and I
23 hear comments saying we are doing closed-loop
24 systems now because we are looking at selling
25 something off or mergers. We don't want to have the

1 environmental legacy on the ground. So there are
2 companies that have wholesale adopted closed-loop
3 systems, which made that bridge. So I think at the
4 end of the day we have to stick with what we heard
5 in front of us and understand that there's other
6 folks out there as well.

7 COMMISSIONER BALCH: I think Mr. Smith has
8 pointed out on several occasions that we are allowed
9 to bring our own experience and understanding into
10 the discussion and that's really what we are doing
11 now. I really thought that there was testimony that
12 there was an added expense, and my interpretation is
13 any added expense will affect operations at some
14 level. To do a detailed economic study would
15 probably take a couple years, so we won't have that
16 answer today.

17 COMMISSIONER BLOOM: Sure. I would agree
18 that when you add regulations there's an added cost
19 to it. I'm just not hearing that these costs were
20 destroying industry in New Mexico. I see a rig
21 count that went down with rig count around the
22 nation during the recession when oil prices were
23 low. It's coming back up. I think we heard
24 testimony from Mr. Scott about how does State Land
25 Office leasing work? Still good. Records. Money

1 is there. And out of the major producers in New
2 Mexico, we heard from Conoco, heard from two
3 independents. I just didn't hear a clamor or a
4 chorus of folks saying this made New Mexico an
5 impossible place to invest.

6 COMMISSIONER BALCH: Not impossible, just
7 less likely. I think that was the argument.

8 MR. SMITH: I want to make sure that I
9 have been understood. You are absolutely right,
10 Commissioner Balch. I think you can bring in your
11 own expertise into your deliberations and in the
12 exercise of your judgment. It needs to be expertise
13 that you possess, so if you are bringing in
14 expertise that you have, I think that's fine and
15 that's part of what you are supposed to do here.

16 CHAIRWOMAN BAILEY: The discussion on
17 economics can continue for hours. The discussion on
18 whether or not there is a negative impact that
19 affects drinking water standards at any depth for
20 freshwater can go on for hours. It is apparent that
21 there are philosophical differences among the
22 members of the Commission.

23 COMMISSIONER BALCH: I just want to point
24 out Mr. Scott's exhibits one more time, because I
25 think there is evidence that there was a suppression

1 of activity tied at the same time as the
2 implementation on Rule 17.

3 If we go to Exhibit 15 in the IPANM book,
4 I think the last two slides are pretty telling to
5 me. The second to the last slide is just --
6 actually the second to the last page in the entire
7 book, so it's rig count, Eddy, Chavez and Lea
8 Counties. If you want to use rig count, which I
9 think is something of a disconnect unless you are
10 comparing apples and apples, and what Mr. Scott
11 attempted to do here was to compare three counties
12 in New Mexico in The southeast with the equivalent
13 three counties in Texas.

14 The slide you're looking at there, the
15 second to the last slide, would be Eddy, Lea and
16 Chavez Counties shows perhaps slightly increasing --

17 COMMISSIONER BLOOM: I'm sorry. If we are
18 looking at -- let's make sure we are looking at the
19 same page here. I'm seeing the top line is the
20 total on Chavez, Eddy and Lea, not Texas.

21 COMMISSIONER BALCH: Texas is on the next
22 slide. That's the comparison.

23 COMMISSIONER BLOOM: Okay.

24 COMMISSIONER BALCH: But I wanted to lay
25 some groundwork here. You see something that's

1 pretty flat really from about 2008. You have a
2 depression in '09 in the price of oil and you have
3 an increase up through about '11 and then it
4 stabilizes.

5 If you go to the last slide, you see rig
6 counts. You have your three counties in New Mexico
7 on the bottom. They have the red line. You see the
8 same dip around the middle of 2008 and 2009. You
9 see a steady increase up to about 11 and then it
10 goes flat.

11 At the same time, the people around us are
12 continuing to climb. They did have an economic dip
13 just like we saw, but overall they are continuing to
14 climb as the price of the resources has gone up. I
15 think that this slide does show that something
16 changed in New Mexico to cause less development
17 activity compared to right across the border of
18 Texas. That was Mr. Scott's evidence. So I think
19 there is testimony to that effect. Whether you
20 agree with it or not, that's up to you.

21 COMMISSIONER BLOOM: No, I see the same
22 trend lines there that you do. That could be
23 related to different developments and formations in
24 Texas. I don't know --

25 COMMISSIONER BALCH: It could be but --

1 COMMISSIONER BLOOM: I didn't hear an
2 explanation.

3 COMMISSIONER BALCH: If you're down near
4 the Permian Basin you have approximately 30 stack
5 plays and the Permian Basin doesn't stop at the
6 border of New Mexico. The Permian Basin goes across
7 the border into Texas so you have the same 30 stack
8 plays, one foot in New Mexico and one foot in Texas.
9 So he is comparing apples and oranges in those two
10 slides. He's comparing the Permian Basin
11 development in three counties in New Mexico that are
12 adjacent to the Texas border and three counties in
13 Texas that are adjacent to the New Mexico border or
14 right across from each other. Essentially the same
15 geology, essentially the same rocks. You would
16 presume essentially the same development principles
17 and you see one take off and one not take off. So
18 something changed in New Mexico. Mr. Scott
19 testified that he believed it was a direct result of
20 the Pit Rule.

21 COMMISSIONER BLOOM: What if I asked you
22 the opposite? What if I asked if the Pit Rule was
23 the cause, why did activity come back? Why didn't
24 it stay low?

25 COMMISSIONER BALCH: You are talking about

1 the depression in 2009. That's an outside limit.
2 That's going to be the depression of the price of
3 oil that caused the change for everybody.

4 COMMISSIONER BLOOM: But I don't know if
5 you can say that any recovery is related to simply
6 commodity prices but any movement out of sync with
7 Texas is simply related to the rig count -- I'm
8 sorry, to the Pit Rule.

9 COMMISSIONER BALCH: I can't say that.
10 I'm telling you what Mr. Scott testified and I'm
11 showing you his diagram which I think supports
12 something changing in New Mexico, because New Mexico
13 does have -- we are comparing the economic impact
14 that was nation-wide or Permian Basin-wide, anyway.
15 That dip was recovered from and you went back to the
16 same level of development that you had in 2008 or
17 2007. The three adjacent counties in Texas had a
18 briefer depression from whatever that unknown
19 external impact was and otherwise showed a steady
20 increase in development activity.

21 COMMISSIONER BLOOM: Chairman Bailey, I
22 understand where we are going and that we could have
23 this, I think, back and forth for quite some time.
24 And I would just lay out there that simply one of
25 the reasons that these changes are being requested

1 is because there's an unnecessary impact on
2 industry. I don't believe I have seen evidence --
3 sufficient evidence of that. I have seen rig count
4 come back up. I have heard the testimony from
5 Mr. Scott that stuff looked good in New Mexico.
6 Land Office leasing is good. People still want
7 tracts here.

8 I'm not sure that the rules need to be
9 scaled back just to keep industry going and growing
10 in New Mexico, and I think we are in agreement that
11 we want to protect our water and the health of the
12 people of New Mexico, the environment as we are
13 making these changes. We want to do things that are
14 protective. And I think we ought to make any
15 changes that won't have an impact on the environment
16 but I don't think we ought to be making changes for
17 some of the gross economic reasons that were
18 presented to us.

19 And I'm fine with removing parts of --
20 changing parts of the Pit Rule that just haven't
21 worked or caused confusion in enforcement --
22 definitions, some permitting and registration such
23 as we did with below-grade tanks.

24 COMMISSIONER BALCH: There is a bit of a
25 competing argument if you look in the findings. I

1 think NMOGA and IPANM made the argument that we were
2 tasked -- I think correctly -- with administering
3 the Oil and Gas Act and that we were supposed to,
4 because of that, first prevent waste, and second,
5 protect correlative rights, and then the word
6 reasonable -- let's see if I can find the exact
7 wording here.

8 CHAIRWOMAN BAILEY: Are you looking for
9 the phrase "reasonable protection of waters
10 designated by" --

11 COMMISSIONER BALCH: It wasn't so much
12 there was, I guess, another use of the word
13 reasonable and it had to do with -- I just found it
14 interesting because both OGAP and NMOGA referenced
15 the same case and came up with different
16 conclusions. OGAP's main argument was, and I think
17 it mirrors a little bit of what you've been saying,
18 that we shouldn't do things for the convenience of
19 industry, right?

20 COMMISSIONER BLOOM: That OGAP says that?

21 COMMISSIONER BALCH: That's what OGAP
22 says. I'll cite the first finding of fact. "No
23 evidence in the record established any reason other
24 than the alleged convenience and financial gain of
25 oil and gas operators for amending or reconsidering

1 the Pit Rule." That's the one side. Here we go.
2 It's Findings 20 and 21 that I think are the
3 counterpoints to OGAP.

4 Finding 20 by NMOGA, "The Commission and
5 Division are required by law to carry out all the
6 duties imposed on them by the Act and may not
7 consider part of their legislative mandate while
8 ignoring other parts of their statutory
9 responsibilities."

10 Finding 21. "To carry out its statutory
11 responsibilities when considering proposed revisions
12 to the rules, the Commission is required to balance
13 its duties to prevent waste and protect correlative
14 rights against the responsibilities to provide
15 reasonable protection of fresh water, public health
16 and the environment to the end it meets all the
17 responsibilities imposed on it by the New Mexico
18 legislature."

19 The word balance, I think, is really what
20 we are trying to argue about here. And where we
21 have an impact on industry, whether it's proven to
22 you or not, you do contribute or you could
23 contribute to waste in the interpretation of waste
24 as being resources left undeveloped.

25 I think OGAP would argue that just because

1 we don't now, they still exist and could be
2 developed in some future. So balance for us is our
3 two primary responsibilities and then our secondary
4 responsibilities.

5 COMMISSIONER BLOOM: I wonder if we are
6 making -- might be fruitful to talk about waste and
7 No. 18, Finding 18 by NMOGA. The Oil and Gas Act
8 defined it as "The locating, spacing, drilling,
9 equipping, operating or producing of any wells in a
10 manner to reduce or tend to reduce the total
11 quantity of crude petroleum oil and natural gas." I
12 mean, I'm not going to speak for OGAP, but I think
13 that's --

14 COMMISSIONER BALCH: Ultimately covered
15 under the rule.

16 COMMISSIONER BLOOM: Right. We haven't
17 spoiled a resource that's it's still there, but by
18 imposing costs you could have a de facto waste
19 because the resources are no longer available.

20 COMMISSIONER BALCH: Not economically
21 recoverable.

22 COMMISSIONER BLOOM: You could extend if
23 out to mean that, but I don't know that you
24 necessarily have to interpret it that way.

25 COMMISSIONER BALCH: Well, I think the

1 case that was cited again by both parties was
2 Continental Oil. I think it was in closing. You
3 might know more about the Continental Oil case than
4 I do. All I heard was the citations.

5 CHAIRWOMAN BAILEY: I'm not a lawyer so I
6 can't speak to it.

7 MR. SMITH: I just knew it. I just knew
8 it. Let me review the Continental Oil case and I
9 will be able to answer questions about it.

10 COMMISSIONER BALCH: I think it was in the
11 concluding statements.

12 COMMISSIONER BLOOM: It's in -- IPANM
13 makes reference to it. If you count back the pages,
14 Page 14. There's a bold heading, "Statutory
15 authority of the OCD does not include protection of
16 waters not designated by the State Engineer."

17 COMMISSIONER BALCH: This is why I was
18 saying we would probably have to discuss this
19 yesterday, because I think the way we interpret that
20 mandate impacts how you review changes. There was
21 two interpretations. I'm obviously not a lawyer.

22 COMMISSIONER BLOOM: So are you referring
23 to the Continental -- the rulings put emphasis on
24 reasonable?

25 COMMISSIONER BALCH: Yes.

1 COMMISSIONER BLOOM: Asking if there's
2 balance? The quote is, specifically "70-2-12B15
3 grants the Division the authority to regulate the
4 disposition of water produced or used in connection
5 with the drilling for or producing of oil or gas or
6 both and to direct the surface or subsurface
7 disposal of water, including disposition by use in
8 drilling for or protection of oil or gas in road
9 construction or maintenance or other construction,
10 in the generation of electricity or in other
11 industrial uses in a manner that will afford
12 reasonable protection against contamination of fresh
13 water supplies designated by the State Engineer."

14 COMMISSIONER BALCH: I apologize if we are
15 going too far off track.

16 CHAIRWOMAN BAILEY: Well, we do need to
17 come back to what's proposed between us for the
18 change of the rule. Going into philosophical
19 differences I don't think is productive, because you
20 can talk about that for weeks and --

21 COMMISSIONER BALCH: I agree 100 percent.

22 CHAIRWOMAN BAILEY: But when it comes to
23 defining or to examining what is reasonable
24 protection of water supplies as designated by the
25 legislature where it says specifically, "In a manner

1 that will afford reasonable protection against
2 contamination of freshwater supplies designated by
3 the State Engineer," then it's up to this Commission
4 to maybe not be dogmatic in its philosophical
5 differences but to try to reach some sort of
6 agreement as to what is reasonable protection.

7 If we find, after we have explored this
8 thoroughly, that we cannot reach a unanimous
9 agreement on different points, what we can do is
10 simply say that the record should show that the
11 majority of the Commission reached agreement on a
12 specific item. That's been done in the past. The
13 order will reflect that a majority of the
14 Commission, but that should be only invoked after we
15 have had discussion to see if we can't work with
16 each other to find that balance and to leave
17 behind -- and maybe even compromise in some ways.

18 So we can find a workable solution so that
19 we are performing the requirements given to this
20 Commission by the legislature in affording
21 reasonable protection against contamination of
22 freshwater supplies.

23 That charge has been changed in many of
24 the newspaper articles and in much of the media,
25 much of the political action groups of the public

1 interest groups. The polarization between the two
2 groups is very distressing when we all need to work
3 together to ensure that we have a viable industry
4 that is profitable to the industry and to the State
5 and to the beneficiaries of the trust as the Land
6 Office is charged so that we can reach some sort of
7 agreement which will result in an order that is not
8 punitive, that affords reasonable protection, that
9 allows free enterprise.

10 I believe that we have spent enough time
11 on airing the philosophical differences; that we do
12 need to try to work together to reach some sort of
13 order that we have been charged with, examining this
14 proposal, these confined proposals. With that, I
15 think we should take a 15-minute break so we can
16 redirect our focus on what we have before us. We
17 shall come back at ten till 11:00.

18 (Note: The hearing stood in recess at
19 10:35 to 10:50.)

20 CHAIRWOMAN BAILEY: Back on the record.
21 To clarify some points from our morning discussion,
22 the differences between us can be boiled down to the
23 differences in interpretation of the evidence that
24 has been presented to us, and I think that's what we
25 are working from, as far as this case is concerned.

1 I have asked our Commission counsel if he wants to
2 talk to us about the Continental case, and he said
3 that he would do research over lunchtime, but he is
4 asking for specific questions on what you want out
5 of the Continental case. So if you could help him
6 by something the specific questions about what you
7 want him to research over lunch.

8 COMMISSIONER BALCH: I think the language
9 on reasonable balance is important to me.

10 MR. SMITH: I'm sorry?

11 COMMISSIONER BALCH: Reasonable balance.
12 I want to understand how that's been interpreted.

13 MR. SMITH: It's good that it's going to
14 be something easy to answer. Are you on board with
15 that, Commissioner?

16 COMMISSIONER BLOOM: That's fine.

17 COMMISSIONER BALCH: That's really the
18 only thing, different interpretations of what that
19 meant.

20 CHAIRWOMAN BAILEY: All right.

21 MR. SMITH: I will warn you, reasonable is
22 used in the law all the time. You will see
23 references to reasonable man standard, reasonable
24 balance, reasonable this, reasonable that.

25 COMMISSIONER BALCH: It may not be

1 significant if --

2 MR. SMITH: Well, no. I mean, I think it
3 isn't that it isn't significant, it's that it is
4 difficult to pin down. But I will read this and we
5 can talk about it.

6 COMMISSIONER BALCH: Well, for me, when I
7 was reading the closings and the findings, the
8 petitioners in general are asking for reasonable
9 balance of the regulations, in the regulations for
10 protection and preventing waste. And I think OGAP's
11 argument was we had to be protective without being
12 reasonable, just protective of groundwater. So that
13 case was cited as part of how the Commission is
14 supposed to understand their obligations, and that's
15 really what I was curious about, the interpretation
16 of that particular phrase, to make sure I do my job
17 the way the legislature intends it to be done.

18 MR. SMITH: Okay.

19 COMMISSIONER BLOOM: That will be helpful.
20 If it adds anything to the conversation, that would
21 be helpful.

22 CHAIRWOMAN BAILEY: So at this point we
23 have hit the stumbling block on the depth to
24 groundwater as far as siting requirements in A1A.
25 Shall we delay any further discussion on the depth

1 to groundwater until we hear what reasonable
2 protection means? Or would you prefer to discuss
3 the difference between 50 and 25 feet as the
4 limitation for the depth to groundwater below the
5 bottom of the pit?

6 COMMISSIONER BALCH: If we --

7 COMMISSIONER BLOOM: A quick suggestion.
8 If Mr. Balch would like to hear what Mr. Smith comes
9 back with, perhaps we could jump ahead to design and
10 construction specifications and that would get us
11 out of the discussion of depth to groundwater. That
12 might occupy us for an hour until lunch.

13 COMMISSIONER BALCH: I figure the same
14 thing. Doc 11 and doc 12 are constructional and
15 operational requirements.

16 CHAIRWOMAN BAILEY: All right. Why don't
17 we go ahead to 19.15.17.11 and the first suggested
18 change is in Section B, to delete the language
19 relating to closed-loop systems as far as
20 stockpiling the topsoil is concerned. Do either of
21 you have an opinion on that?

22 COMMISSIONER BALCH: My understanding was
23 the deletion was because with a closed-loop system
24 you are doing it on the existing pad and you would
25 have no need to stockpile topsoil.

1 CHAIRWOMAN BAILEY: That's my
2 understanding. Commissioner Balch? Do you have a
3 comment on that?

4 COMMISSIONER BLOOM: I think you are
5 referring to Commissioner Bloom.

6 CHAIRWOMAN BAILEY: I'm sorry. I am
7 looking at you and saying the wrong word.

8 COMMISSIONER BLOOM: We all blend
9 together. I'm sorry, would you repeat that again?

10 COMMISSIONER BALCH: Okay. I think the
11 argument for the closed-loop system is that the
12 closed-loop system will be operated primarily on the
13 pad where they have already graded and flattened it
14 and brought in gravel, things like that.

15 COMMISSIONER BLOOM: There might not be a
16 need for removal of soil. That was my understanding
17 as well. I would be fine with adopting that change.

18 CHAIRWOMAN BAILEY: So we will delete "or
19 closed-loop system" from Section B. Going down to
20 Section C, there are also suggested deletions of
21 closed-loop system as it applies to signs. Do the
22 two of you agree that we can delete closed-loop
23 system in both of those lines under Section C?

24 COMMISSIONER BALCH: The "or" at the end
25 of all that is "or is located on a site where there

1 is an existing well, signed in compliance with
 2 19.15.16.8 NMAC," the regulation that I'm not
 3 familiar with, "that is operated by the same
 4 operator." What's the purpose of the sign?

5 CHAIRWOMAN BAILEY: So that people will
 6 know who the operator is where this facility is
 7 located.

8 COMMISSIONER BALCH: And in the normal
 9 well pad there will be a sign.

10 CHAIRWOMAN BAILEY: It is required.

11 COMMISSIONER BALCH: And if the
 12 closed-loop system is on the well pad there's
 13 already a sign.

14 COMMISSIONER BLOOM: I believe NMOGA said
 15 as well that there's always a continual presence
 16 within the closed-loop system, so I would be fine
 17 with that.

18 CHAIRWOMAN BAILEY: We will delete
 19 closed-loop system in both instances in Section C
 20 there. Then we will go to Section D, Fencing. The
 21 suggestion is made to change the word "prevent" to
 22 "deter unauthorized access." The operator shall
 23 fence or enclose the pit or below-grade tank in a
 24 manner that prevents or deters unauthorized access?

25 COMMISSIONER BLOOM: Madam Chair, I would

1 support that change. It's unreasonable to expect
2 that a fence could be constructed that would
3 absolutely prevent people from getting on to the
4 site, so I think deter would be sufficient.

5 COMMISSIONER BALCH: There's some standard
6 specifications for fencing?

7 CHAIRWOMAN BAILEY: Yes.

8 COMMISSIONER BALCH: Then I have no
9 problem with that.

10 CHAIRWOMAN BAILEY: Okay. The next change
11 is in D2 that would remove fencing to enclose a
12 below-grade tank located within 1,000 feet of a
13 residence. We will get to the second change in a
14 minute.

15 COMMISSIONER BLOOM: Madam Chair, I
16 believe this was being removed -- the testimony we
17 heard said that the below-grade tank would be on the
18 drill site which would have a fence around it so
19 that a second fence is not necessary. Is that your
20 recollection?

21 COMMISSIONER BALCH: I think there are
22 various versions of the rule. Maybe it's better to
23 just ask so we would know is there normally a fence
24 in that situation around the entire site?

25 CHAIRWOMAN BAILEY: Around a well site?

1 COMMISSIONER BALCH: Yes.

2 CHAIRWOMAN BAILEY: Around a well site,
3 yes. But --

4 COMMISSIONER BALCH: A drilling pad?

5 CHAIRWOMAN BAILEY: Not necessarily.

6 COMMISSIONER BALCH: I kind of think the
7 important distinction comes in with the addition of
8 "an occupied residence."

9 CHAIRWOMAN BAILEY: So we should look at
10 those two proposals in conjunction with each other.

11 COMMISSIONER BALCH: So if you are within
12 a certain distance of a building or facility, you
13 have to have a fence around your operating wellhead.

14 CHAIRWOMAN BAILEY: Yes.

15 COMMISSIONER BALCH: But while you are
16 drilling you don't necessarily have to have one.

17 CHAIRWOMAN BAILEY: No, but we are talking
18 about whether or not it will include below-grade
19 tank within --

20 COMMISSIONER BALCH: Which is more of a
21 permanent structure on a pad.

22 CHAIRWOMAN BAILEY: Right. Which may not
23 be related to current drilling operations. It could
24 be part of the production facility. Should
25 operators fence a below-grade tank.

1 COMMISSIONER BALCH: And there's no other
2 stipulations for fencing an above-grade tank, for
3 example?

4 COMMISSIONER BLOOM: I believe that this
5 fencing exists because the sides are visible so
6 there's a risk that somebody could fall in perhaps?

7 CHAIRWOMAN BAILEY: I think it influences
8 access to the pipes, the piping involved in the
9 tank, to try to deter --

10 COMMISSIONER BALCH: Don't want a kid from
11 a nearby school coming over and turning a valve?

12 CHAIRWOMAN BAILEY: Exactly.

13 COMMISSIONER BLOOM: To my recollection
14 from the testimony on this when I originally saw it
15 I thought why wouldn't we want to fence a
16 below-grade tank, and what I recall hearing is there
17 was already a fence around the site.

18 COMMISSIONER BALCH: If there's already a
19 fence around the site I don't think it's an issue.

20 CHAIRWOMAN BAILEY: So we will --

21 COMMISSIONER BLOOM: We could add language
22 saying the operational fence includes -- saying
23 below-grade tank does not need a fence if there's
24 already one at the site? Something along those
25 lines.

1 CHAIRWOMAN BAILEY: I think the emphasis
2 should be on whether or not its location is near an
3 occupied residence, school, hospital, institution or
4 church with a security fence at least six feet in
5 height with two strands of barbed wire at the top
6 and the gates are closed and locked. I think we
7 need to look at that entire paragraph to get a sense
8 of what this involves.

9 COMMISSIONER BALCH: I think the concern
10 is brought about by occupied. You could have a
11 structure that's not been used for a long period of
12 time.

13 CHAIRWOMAN BAILEY: Right.

14 COMMISSIONER BALCH: And if you are
15 wandering around the back of New Mexico you will
16 often find a half torn down Catholic church in a
17 town that doesn't exist anymore, and the existing
18 rule would make you site away from that location.
19 On the other hand, if you say occupied, it's just
20 temporarily unoccupied.

21 CHAIRWOMAN BAILEY: It's a rental house
22 that's in between tenants.

23 COMMISSIONER BALCH: Exactly. So we are
24 trying to swap gray areas. I guess I don't know
25 what the intent -- the intent is if you are close to

1 a place where there are going to be people you want
2 to have fencing around your facilities. That's the
3 intent of the regulation.

4 CHAIRWOMAN BAILEY: Right. We could put
5 in a modifier, "of a permanently occupied."
6 Consistently?

7 COMMISSIONER BALCH: Sometimes -- and this
8 may not be a good example, but, for example, in
9 Socorro about 15 years ago they built an elementary
10 school and they built it on a vacant lot next to the
11 bar and then the bar was forced to close because
12 they were too close to the school. If you leave the
13 language as occupied, then while nobody is in there
14 they don't have to fence it but if somebody moves in
15 would they then be forced to fence it to be in
16 compliance.

17 CHAIRWOMAN BAILEY: Yes.

18 COMMISSIONER BALCH: So maybe it's not
19 really an issue. If there is nobody there they
20 don't have to fence it. If somebody moves in they
21 have to fence it.

22 CHAIRWOMAN BAILEY: So you are suggesting
23 that we do include the words "an occupied permanent
24 residence"?

25 COMMISSIONER BLOOM: On the way to work I

1 was thinking about something like an occupied
2 permanent residence or a residence that could be
3 occupied or something like that, and it gets you
4 away from the thing that's three adobe walls and a
5 crashed-in roof. But maybe occupied works then
6 as-is.

7 COMMISSIONER BALCH: As long as there's
8 another mechanism already in existence, we shouldn't
9 need to specifically regulate it.

10 CHAIRWOMAN BAILEY: Or if it becomes
11 occupied they would have to fence it according to
12 the rule.

13 COMMISSIONER BALCH: That would be up to
14 the inspector to determine or up to the operator, I
15 suppose.

16 CHAIRWOMAN BAILEY: Well, I'm sure the
17 occupant would bring that to the OCD's notice or
18 should.

19 COMMISSIONER BALCH: Regardless, they
20 would be subject to the penalty.

21 CHAIRWOMAN BAILEY: Exactly. So shall we
22 include the words "an occupied" and delete "or
23 below-grade tank"?

24 COMMISSIONER BLOOM: So I wouldn't have
25 any trouble removing it if we are certain that the

1 site would be fenced.

2 COMMISSIONER BALCH: In the exhibits that
3 were shown of below-grade tanks they did not appear
4 to be -- they could be open to the air but they
5 always had a metal walkway or mesh on top of it.

6 COMMISSIONER BLOOM: Looking at NMOGA
7 Exhibit 5-1 --

8 COMMISSIONER BALCH: Exactly what I was
9 thinking about.

10 COMMISSIONER BLOOM: Now, I think this
11 phase here, though, it could be a falling hazard for
12 people and/or animals.

13 CHAIRWOMAN BAILEY: But with that exhibit
14 there is the periphery fence.

15 COMMISSIONER BLOOM: There is one visible.

16 CHAIRWOMAN BAILEY: So we do have
17 periphery fences.

18 COMMISSIONER BALCH: The below-grade tank
19 is really going to come into existence during the
20 operational phase of the well, and at that point the
21 wellhead will be fenced if you are near a structure
22 or if you are on somebody's farmland and they don't
23 want their cattle falling in. So it may not be
24 necessary.

25 CHAIRWOMAN BAILEY: Look at the next

1 paragraph. It talks about fencing any pit or
2 below-grade tank to exclude livestock, so we have
3 below-grade tanks fenced to exclude issues
4 concerning livestock.

5 COMMISSIONER BALCH: The barbed wire fence
6 won't stop a ten-year-old boy but he will sure know
7 that he is not supposed to go in there.

8 CHAIRWOMAN BAILEY: If we have the
9 periphery fence we don't need to have the additional
10 fence around the tank.

11 COMMISSIONER BLOOM: Right.

12 CHAIRWOMAN BAILEY: So have we --

13 COMMISSIONER BALCH: I think we can delete
14 it.

15 CHAIRWOMAN BAILEY: Delete "or below-grade
16 tank"?

17 COMMISSIONER BALCH: Yes.

18 COMMISSIONER BLOOM: Yes.

19 CHAIRWOMAN BAILEY: Include, "An occupied"
20 and move down to Paragraph 3 where the proposal is
21 to strike the sentence, "The appropriate division
22 district office may approve an alternative to this
23 requirement if the operator demonstrates that an
24 alternative process provides equivalent or better
25 protection." And that has to do with fencing a pit

1 or below-grade tank for excluding livestock.
2 Because the following paragraph deals with
3 alternatives to these requirements, so that sentence
4 could be deleted because we have the following
5 paragraph which will deal with that issue.

6 COMMISSIONER BALCH: It's the catch-all.

7 CHAIRWOMAN BAILEY: Right. So Paragraph
8 3, we go ahead and delete that sentence?

9 COMMISSIONER BLOOM: Agreed.

10 COMMISSIONER BALCH: Yes.

11 CHAIRWOMAN BAILEY: Okay. Theresa. And
12 now we can go ahead and look at Paragraph 4, which
13 does talk about alternatives to the fencing
14 requirement. Right off the bat I would like to
15 change the word "shall" to the word "may". The
16 appropriate division district office may approve.
17 Do you both agree with that?

18 COMMISSIONER BALCH: Yes.

19 COMMISSIONER BLOOM: Yes.

20 CHAIRWOMAN BAILEY: This allows
21 alternatives if they provide equivalent protection.
22 And then we have a change in the language back to
23 what the statutes say. It removes "livestock,
24 wildlife or human safety" and inserts "public health
25 and the environment or reasonable protection of

1 freshwater as designated by the State Engineer." Do
2 you have opinions on the last sentence?

3 COMMISSIONER BLOOM: OCD adds that?

4 CHAIRWOMAN BAILEY: OCD made a change to
5 the may approve rather than the shall approve.

6 COMMISSIONER BALCH: When you are
7 demonstrating protection of -- well, no. That's
8 something that we discussed or it came up in
9 cross-examination. Maybe we could get the
10 alternative one in here.

11 COMMISSIONER BLOOM: That would be
12 helpful.

13 CHAIRWOMAN BAILEY: We have agreed to
14 change the word "shall" to "may." The OCD Findings
15 of Fact Notice of Modifications retained livestock,
16 wildlife or human safety. But that does not show
17 either support or denial of the OCD. It was simply
18 enforcement.

19 COMMISSIONER BALCH: This is a completely
20 new addition to the rule. There were arguments from
21 NMOGA that livestock was not in our list of
22 considerations?

23 CHAIRWOMAN BAILEY: That was IPANM.

24 COMMISSIONER BALCH: IPANM.

25 CHAIRWOMAN BAILEY: Did not agree with

1 including livestock.

2 COMMISSIONER BALCH: And the alternative
3 language was?

4 CHAIRWOMAN BAILEY: "Public health and the
5 environment or reasonable protection of freshwater."
6 So it depends on how you interpret public health and
7 the environment as what protections are included.
8 Whether that includes livestock, wildlife or human
9 safety.

10 COMMISSIONER BALCH: Public health and the
11 environment is the same terminology that exists in
12 other OCD rules? Maybe the environment, livestock
13 and wildlife.

14 CHAIRWOMAN BAILEY: It's a matter of how
15 broadly do you interpret. There's no specific
16 definition.

17 COMMISSIONER BALCH: Do you have an
18 opinion, Mr. Bloom?

19 COMMISSIONER BLOOM: Actually, it would be
20 helpful for me if I could read this other amendment
21 that we're talking about. Theresa, can you bring
22 that up?

23 COMMISSIONER BALCH: It's right below
24 that.

25 COMMISSIONER BLOOM: Looks like the same.

1 So now we are talking about environmental
2 protections to livestock, wildlife or public safety?

3 COMMISSIONER BALCH: That's stricken in
4 the second version, so it's protection to public
5 health and the environment and then I think there
6 was something else about --

7 CHAIRWOMAN BAILEY: Or reasonable
8 protection of freshwater.

9 COMMISSIONER BLOOM: I remember Ms.
10 Gerholt cross-examining somebody on the environment
11 and asking do cattle not make up part of the
12 environment and therefore wouldn't they be
13 protected, and I think the answer was yes.

14 COMMISSIONER BALCH: And wildlife.

15 COMMISSIONER BLOOM: But regardless what
16 the answer was, I think we could have livestock
17 included in the environment. How does fencing
18 affect freshwater? Why that would be included?

19 CHAIRWOMAN BAILEY: That would be one of
20 the criteria for the appropriate division district
21 office to determine approval of an alternative that
22 affords protection to whatever we interpret needs to
23 be protected or reasonable protection of freshwater.
24 That does seem to be superfluous in that sentence,
25 doesn't it?

1 COMMISSIONER BALCH: I guess the
2 environment to me would also include freshwater.

3 COMMISSIONER BLOOM: We are talking about
4 specifically alternatives to fencing a temporary
5 pit, below-grade tank. So we could then delete
6 freshwater?

7 CHAIRWOMAN BAILEY: Yes.

8 COMMISSIONER BLOOM: Okay.

9 CHAIRWOMAN BAILEY: So do we choose to
10 specify livestock, wildlife and human safety?

11 COMMISSIONER BALCH: Or public health and
12 the environment.

13 CHAIRWOMAN BAILEY: Or use the terms
14 public health and the environment?

15 COMMISSIONER BLOOM: Livestock, public
16 health, health and the environment.

17 COMMISSIONER BALCH: I think that the
18 public health and the environment provides enough
19 protection.

20 CHAIRWOMAN BAILEY: It does, but when it's
21 that broad it's pretty hard to enforce because
22 that's open to interpretation by inspectors.

23 COMMISSIONER BALCH: In this case, though,
24 they are only asking for a variance essentially that
25 would change to another requirement, so they are

1 going to be trying to demonstrate some precise --
2 they are going to be trying to determine that
3 something is protected to a particular aspect of
4 that site. And then it will be up to the judgment
5 of the district office.

6 COMMISSIONER BLOOM: Let me offer this
7 because we are still talking about fencing and we
8 might want to include livestock and wildlife because
9 there are often concerns about is a fence
10 cattle-proof. Some fences, if you don't get enough
11 barbed wire they will go through it. There's also
12 fences that livestock can get hung up on, antelope,
13 deer as well, so those, I think, are often common
14 considerations that Game & Fish and other folks have
15 with fencing.

16 So I think it might be important if we're
17 discussing it to have livestock and wildlife be
18 included along with public safety. If we threw in
19 environment, that would cover water or whatever else
20 may be of interest or concern.

21 CHAIRWOMAN BAILEY: So are you still
22 thinking?

23 COMMISSIONER BALCH: I'm going to guess
24 that the specifications in 3, "The operator shall
25 fence to exclude livestock with a four-foot fence

1 that has at least four strands of barbed wire evenly
2 spaced in the interval between one foot and four
3 foot above the ground," that must be a livestock or
4 cattle-proof fence. Certainly an antelope would
5 ignore that and bound right over.

6 CHAIRWOMAN BAILEY: And then the last
7 sentence of that paragraph.

8 COMMISSIONER BALCH: So in 3, in the
9 existing language, the word livestock and wildlife
10 are both used.

11 CHAIRWOMAN BAILEY: Yes, and that is the
12 criteria for fencing. Now, alternatives are what
13 are addressed in Paragraph 4. Do we want the
14 alternatives to reflect the same requirements of 3
15 as far as protection is concerned?

16 COMMISSIONER BALCH: Which is basically
17 livestock, wildlife, and then the overall protects
18 human safety.

19 CHAIRWOMAN BAILEY: Right.

20 COMMISSIONER BALCH: I think if you use
21 the secondary wording, which is public health and
22 environment, that that's probably too broad for the
23 rule as regards fencing. You are probably better
24 off to specifically talk about what you are trying
25 to protect.

1 CHAIRWOMAN BAILEY: So you agree that with
2 Commissioner Bloom to include the words "livestock,
3 wildlife or human safety"?

4 COMMISSIONER BALCH: I guess the initial
5 wording with the change of the word "shall" to
6 "may," I'm comfortable with that.

7 CHAIRWOMAN BAILEY: Yes.

8 COMMISSIONER BALCH: I guess I like the
9 first version of No. 4.

10 CHAIRWOMAN BAILEY: Okay. There was also
11 the question whether or not the alternative needed
12 to provide equivalent or better protections. That's
13 also included.

14 COMMISSIONER BALCH: The original one was
15 equivalent protections?

16 CHAIRWOMAN BAILEY: Do we want equivalent?

17 COMMISSIONER BLOOM: No.

18 CHAIRWOMAN BAILEY: Or better?

19 COMMISSIONER BALCH: Equivalent or better.

20 COMMISSIONER BLOOM: Equivalent or better,
21 yes. I think --

22 COMMISSIONER BALCH: The intent there is
23 if you have something that's better, you are not
24 stuck with the rule. If you can provide something
25 that is better or more protective, then they should

1 be allowed to do that without having to get an
2 exception.

3 CHAIRWOMAN BAILEY: Okay. So we are
4 agreed to use the upper Paragraph 4 and to delete
5 the bottom Paragraph 4; is that correct?

6 COMMISSIONER BALCH: Yes.

7 COMMISSIONER BLOOM: Correct. And I would
8 just offer do we want to include environment in
9 there broadly?

10 COMMISSIONER BALCH: Well, I think that
11 when you are talking about this being applied to
12 fencing, I'm trying to figure out what I can do
13 about the environment with a fence.

14 COMMISSIONER BLOOM: Superfluous.

15 CHAIRWOMAN BAILEY: Then we will go on to
16 netting. The proposal is to include the multi-well
17 fluid management pits and to delete the word
18 "permanent" for open top tank for screening and
19 netting. We do have netting requirements for
20 permanent pits. Should we include multi-well fluid
21 management pits in the same category for netting?

22 COMMISSIONER BLOOM: I think those changes
23 seem appropriate.

24 COMMISSIONER BALCH: I think so, too. You
25 are probably going to have a much larger surface

1 area, so I'm not sure how practical netting is, but
2 you do have otherwise -- non-hazardous to wildlife
3 and I think that's important. If they are permanent
4 they will be there longer than a temporary pit.

5 CHAIRWOMAN BAILEY: Yes. So we will
6 include the language, "a multi-well fluid management
7 pit." Do we want to delete the word "permanent" for
8 an open top tank for screening?

9 COMMISSIONER BLOOM: I can't see why we
10 wouldn't want to do that.

11 CHAIRWOMAN BAILEY: Okay. So we will
12 accept both changes in Paragraph E. Then we skip
13 down to Section F2 and we are looking at the
14 proposal to change the slope requirements from two
15 to one to whatever does not place undue stress and
16 are consistent with the angle of repose. We did
17 have quite a bit of testimony on that.
18 Commissioners, do you have opinions on whether or
19 not we should change the slope requirements and to
20 accept angle of repose and under stress?

21 COMMISSIONER BLOOM: We probably spent too
22 much time on angle of repose during the hearing, but
23 I would prefer to see the existing language.

24 COMMISSIONER BALCH: I think for me I like
25 to optimize processes, and if you have to go out as

1 a regulator and calculate the angle of repose on
2 every pit, and I think that was brought out in
3 testimony, it would be hard to visually inspect.
4 Whereas two to one you definitely could inspect.
5 The counter argument was, well, what if one side of
6 your pit is a rock wall. Then you can't get two to
7 one.

8 COMMISSIONER BLOOM: I think Dr. Neeper
9 gave us an example where he did just that and he had
10 a collapse on the rock wall.

11 COMMISSIONER BALCH: So for ease of
12 regulation, I think the alternate wording suggested
13 there does put a little more burden on the
14 inspector. I'm trying to remember back to my
15 geology days again. I do think that the angle of
16 repose of two to one is something similar to what
17 you have for sand or beads or something like that,
18 which would be pretty much a worse case scenario.

19 CHAIRWOMAN BAILEY: Well, the sand or
20 beads is the angle of repose.

21 COMMISSIONER BALCH: Right. If you drop
22 sand in the hour glass it's two to one. Anything
23 else will be more cohesive and have a different
24 angle of repose that is, I think, less than two to
25 one or more than.

1 CHAIRWOMAN BAILEY: Isn't it three to one?

2 COMMISSIONER BALCH: It might be three to
3 one.

4 CHAIRWOMAN BAILEY: I think it's three to
5 one.

6 COMMISSIONER BALCH: I'm going from
7 memory.

8 CHAIRWOMAN BAILEY: So am I.

9 COMMISSIONER BALCH: Do you recall why it
10 was two to one in the initial Rule 17?

11 CHAIRWOMAN BAILEY: I think it was to
12 prevent unnecessary collapse of the slope under
13 stress. It does require more area to sometimes have
14 that two to one rather than angle of repose. But
15 the whole point was that we want to protect the
16 integrity of the liner.

17 COMMISSIONER BALCH: Well, I'm actually
18 not very uncomfortable at all with the first part of
19 the addition where it says, "Do not place undue
20 stress upon the liner."

21 COMMISSIONER BLOOM: I thought about that,
22 too. You could put an "and."

23 COMMISSIONER BALCH: Or you could say,
24 "The operator shall construct the temporary pit so
25 the slopes are no steeper than two to one or do not

1 place undue stress upon the liner," and maybe at
2 that point you would want to have --

3 COMMISSIONER BLOOM: I think the problem
4 is --

5 COMMISSIONER BALCH: -- after they were
6 approved instead of just having it happened.

7 COMMISSIONER BLOOM: My concern with "or"
8 is it would be difficult for an inspector to
9 understand if there's undue stress. It's rather
10 ambiguous. Two to one makes it easy for the
11 inspector and provides that there not be undue
12 stress on the liner.

13 COMMISSIONER BALCH: I believe the
14 inspector questioned on the matter said exactly the
15 same thing. He could go out there and see that it's
16 two to one and it's not an issue.

17 In other places we have tried to remove
18 the interpretative elements and make it so things
19 are clear and easily applied.

20 CHAIRWOMAN BAILEY: So both of you would
21 like to retain the current language of "no steeper
22 than two horizontal to one vertical, 2H to 1V"?

23 COMMISSIONER BALCH: I think that's
24 probably better language than the second language.
25 Now, in testimony it was brought out what if you're

1 in a situation where you cannot get the two to one
2 angle? What happens then? Right now nothing
3 happens. You can't do it.

4 CHAIRWOMAN BAILEY: No, we have the
5 following sentence. It says, "The district office
6 may approve an alternative."

7 COMMISSIONER BALCH: All right. So
8 there's already a solution to the problem.

9 CHAIRWOMAN BAILEY: Okay. So we will not
10 accept the proposed language and we will retain the
11 current language. Then we go on down to F7 that has
12 to do with the edges of the liner, and it says, "The
13 anchor trench shall be 18 inches deep unless
14 encountered bedrock provides equivalent anchoring."
15 Do either of you have an opinion on the proposal?

16 COMMISSIONER BLOOM: One comment that
17 struck me at the time I first saw this, that -- this
18 is silly but it doesn't actually say it has to be
19 anchored to the bedrock. I don't know if you want
20 to add, "Unless encountered bedrock provides
21 equivalent anchoring in the liner."

22 CHAIRWOMAN BAILEY: Do you want to -- do
23 you have an opinion on this phrase?

24 COMMISSIONER BLOOM: I guess I would move
25 to add, "And the liner is anchored to it."

1 Chairwoman Bailey, you have been dealing with the
2 interpretation of the regulations here for a while
3 and if understanding this is clear, it's fine.

4 COMMISSIONER BALCH: What about something
5 that says, "Unless anchored to encountered bedrock
6 providing equal anchoring"?

7 COMMISSIONER BLOOM: One more time.

8 COMMISSIONER BALCH: "Unless anchoring to
9 encountered bedrock provides equivalent anchoring."

10 CHAIRWOMAN BAILEY: Okay. That includes
11 Commissioner Bloom's concern.

12 COMMISSIONER BLOOM: Could you repeat that
13 for Theresa?

14 CHAIRWOMAN BAILEY: "Unless anchoring to
15 encountered bedrock provides equivalent anchoring."

16 COMMISSIONER BALCH: Yes. After the
17 "unless" on the last line.

18 CHAIRWOMAN BAILEY: Are we in agreement
19 with that language there?

20 COMMISSIONER BLOOM: Yes. Thank you,
21 Commissioner Balch.

22 CHAIRWOMAN BAILEY: Okay. Going on down
23 to Paragraph 11. We are deleting "unconfined."
24 Going on down to G, Permanent Pits, No. 4, this
25 brings up the question of reasonable and public

1 safety. I think we should delay comment on
2 reasonable until after we hear what our attorney
3 says.

4 COMMISSIONER BLOOM: It might be a
5 different reasonable. I'm sorry, where are we
6 looking at? I don't have a change highlighted
7 there.

8 CHAIRWOMAN BAILEY: G, Permanent Pits, No.
9 4, that begins, "The Environmental Bureau in the
10 Division's Santa Fe office." Are you there?

11 COMMISSIONER BLOOM: Yes.

12 COMMISSIONER BALCH: Yeah. I'm not seeing
13 where anybody suggested a change.

14 CHAIRWOMAN BAILEY: IPANM.

15 COMMISSIONER BALCH: Was this in a
16 closing?

17 CHAIRWOMAN BAILEY: It was part of their
18 submittal.

19 COMMISSIONER BALCH: I guess I am looking
20 at the NMOGA version.

21 CHAIRWOMAN BAILEY: The IPANM version
22 includes the word "reasonably protects freshwater"
23 for an alternative liner and deletes the
24 word "safety" for public safety.

25 COMMISSIONER BALCH: So you probably need

1 to put those in and highlight this in red. I don't
2 have a copy.

3 COMMISSIONER BLOOM: Add "reasonably" and
4 delete "safety."

5 COMMISSIONER BALCH: It's just two words.
6 If you go to "protects freshwater" right in front of
7 that, the alternative liner reasonably protects
8 freshwater. What's the other one?

9 CHAIRWOMAN BAILEY: Deletes the
10 word "safety."

11 COMMISSIONER BALCH: So put a strike
12 through on the word "safety." I think you can
13 convert that whole thing to red underline, I guess.
14 Then I think we can wait on this until we have an
15 interpretation on reasonable.

16 MR. SMITH: You are really hoping for a
17 lot.

18 COMMISSIONER BLOOM: Let me suggest that
19 we are look to go Mr. Smith as a definition of
20 reasonable --

21 CHAIRWOMAN BAILEY: Reasonable protection.

22 COMMISSIONER BLOOM: Why would we want
23 to -- I mean, either it protects water or reasonably
24 protects water?

25 COMMISSIONER BALCH: Okay. So I think the

1 crux of the argument, and I don't want to go too far
2 off so please stop me if I do, Chairwoman Bailey.
3 The crux of the argument is you can ultimately
4 protect the source of freshwater by doing something.
5 You can build a five foot thick wall, stainless
6 steel tank all the way around the source and nothing
7 can get in or out. Or you can do something lesser
8 that has the same amount of protection.

9 COMMISSIONER BLOOM: Let me say this. The
10 sentence goes on to say, "Protects freshwater as
11 effectively as the specified media." Are we going
12 to reasonably protect freshwater effectively? No,
13 we are going to protect freshwater effectively.

14 COMMISSIONER BALCH: In this case I think
15 the word is unnecessary.

16 CHAIRWOMAN BAILEY: I agree.

17 COMMISSIONER BALCH: Because it's already
18 amended by, "As effectively as the specified media."

19 CHAIRWOMAN BAILEY: So we will not accept
20 the insertion of the word "reasonably." Do we want
21 to delete the word "safety"? I think the argument
22 is that safety is a portion of public health,
23 according to some of the testimony that we heard.

24 COMMISSIONER BLOOM: I would agree with
25 that.

1 COMMISSIONER BALCH: I would agree as
2 well.

3 CHAIRWOMAN BAILEY: So do we need to have
4 the word "safety" here?

5 COMMISSIONER BALCH: I think it's already
6 encompassed public health.

7 COMMISSIONER BLOOM: I would move to
8 remove "safety."

9 CHAIRWOMAN BAILEY: We will delete the
10 word "safety." And that takes us to drying pads.
11 We can begin this or we can start lunch and
12 reconvene at 1:00 o'clock.

13 COMMISSIONER BLOOM: Let's take it on.

14 COMMISSIONER BALCH: We can go on a little
15 bit longer.

16 CHAIRWOMAN BAILEY: Works for me. The
17 suggestion is to insert the words "drying pads
18 associated with closed-loop systems" so that we know
19 that we are dealing with a specific portion or a
20 specific aspect of closed-loop systems. It would
21 just be the drying pads. The suggestion is to
22 delete "operator shall design, construct a
23 closed-loop system to ensure the confinement of oil,
24 gas or water to prevent uncontrolled releases" and
25 "The operator of a closed-loop system that uses

1 temporary pits for solids management shall comply
2 with the requirements of temporary pits."

3 COMMISSIONER BALCH: We have already
4 separated closed-loop systems from temporary pits.
5 For one, I believe the testimony that was presented
6 was that closed-loop systems are inherently designed
7 to ensure the confinement of oil, gas or water or to
8 prevent uncontrolled releases, so this is
9 superfluous.

10 COMMISSIONER BLOOM: Mr. Balch, to go back
11 to Line 2 for a second. What we removed from the
12 definition of closed-loop systems was saying that --
13 so the definition has gone from "closed-loop system
14 means a system that uses above-ground steel tanks
15 for the management of drilling or workover fluids,"
16 and we deleted "without using below-grade tanks or
17 pits." So this now means that a closed-loop system
18 could use a pit for solids management?

19 COMMISSIONER BALCH: No. In my
20 understanding the closed-loop system has no -- all
21 of the fluid movement between the wellbore and where
22 you are mixing your mud and all that stuff is done
23 through tanks and pipes. There's no contact with a
24 pit of any sort.

25 COMMISSIONER BLOOM: Okay.

1 COMMISSIONER BALCH: If it did have
2 contact, it wouldn't be a closed-loop system. Is
3 that correct?

4 CHAIRWOMAN BAILEY: I believe so. I mean,
5 we look at the way a closed-loop system is designed
6 and it does incorporate shale shakers and tanks to
7 have the solids fall out into specific areas.

8 COMMISSIONER BALCH: Onto the drying pad.

9 CHAIRWOMAN BAILEY: Right.

10 COMMISSIONER BALCH: Which is then usually
11 rolled up and hauled away. The salts are removed
12 that way. It's only the salts on the drying pad.
13 You are not putting -- you are putting wet rocks,
14 but the wet rocks will pretty quickly become dry
15 rocks. So I think it came down to you're asking
16 them to design and construct something that's
17 already designed and constructed to do what you are
18 asking it to do in 1. We encountered that yesterday
19 in another area.

20 The other -- I think it was when you were
21 talking about separating closed-loop systems from
22 pits, because if you are going to have closed-loop
23 system which is subject just to a registration and
24 pits, which are subjected to a regulatory process,
25 the closed-loop system no longer needs to comply

1 with the rule if they are already separated.

2 COMMISSIONER BLOOM: Okay.

3 CHAIRWOMAN BAILEY: And for clarification,
4 the closed-loop system just simply requires
5 notification, not registration.

6 COMMISSIONER BALCH: Right.

7 CHAIRWOMAN BAILEY: So we can delete
8 Section 2. We have not yet reached a decision on
9 Section 1 for designing and constructing the
10 closed-loop system to ensure the confinement of oil,
11 gas or water to prevent uncontrolled releases. That
12 appears to be a catch-all in case there is a spill
13 from a closed-loop system. But spills are recorded
14 under the Spill Rule, 29. This is simply requiring
15 a design of construction that would anticipate.

16 COMMISSIONER BALCH: Yeah, which is what
17 they try and do anyway. Now, I do remember in the
18 testimony from -- I think it was Mr. Scott that if
19 you do have a problem with a closed-loop system it
20 may not be able to anticipate it. So --

21 CHAIRWOMAN BAILEY: If you have a burp?

22 COMMISSIONER BALCH: Yeah, right. So his
23 argument there was you can design it however you
24 want but there's no way you can ensure that it will
25 100 percent of the time always prevent any spill or

1 release. However, if there is a spill or release,
2 it then goes to the Spill Rule. I think that was
3 what his testimony was.

4 CHAIRWOMAN BAILEY: I have to agree with
5 that.

6 COMMISSIONER BLOOM: Yeah, I don't think
7 that Line 1 serves any purpose. I think that --

8 COMMISSIONER BALCH: If you knew how to
9 prevent the uncontrolled release, you would already
10 do it.

11 CHAIRWOMAN BAILEY: So we will go ahead
12 and delete 1 and 2 as suggested, correct?

13 COMMISSIONER BALCH: Yes.

14 COMMISSIONER BLOOM: Yes.

15 CHAIRWOMAN BAILEY: That takes us to I.

16 COMMISSIONER BALCH: There was a word in
17 I2?

18 COMMISSIONER BLOOM: Below-grade tanks.

19 CHAIRWOMAN BAILEY: In below-grade tanks
20 I4A there was discussion on the ambiguous term "or
21 alarm" that was suggested for insertion and there
22 had been some suggestions on how to make that more
23 specific to what kind of alarm.

24 COMMISSIONER BLOOM: There was one thing
25 we missed up above.

1 COMMISSIONER BALCH: In 2A there was a
2 deletion of one word, "system," in the NMOGA
3 version. Right there. It's still there.

4 CHAIRWOMAN BAILEY: Oh, okay. I don't
5 have that on mine. There it is. That seems to me
6 to be an obvious deletion.

7 COMMISSIONER BLOOM: There's no other
8 mention of below-grade tank system.

9 CHAIRWOMAN BAILEY: So go ahead and
10 delete "system." And now we can go to the question
11 of alarm and how we can be specific in what kind of
12 alarm rather than something that just rings on its
13 own forever out in the middle of nowhere.

14 COMMISSIONER BALCH: Like the tree falling
15 in the forest when nobody is around?

16 CHAIRWOMAN BAILEY: Exactly.

17 COMMISSIONER BALCH: I think those are
18 recommendations more to require a shutoff and
19 control device and manual controls.

20 CHAIRWOMAN BAILEY: It says the OCD
21 recommendation was to --

22 COMMISSIONER BALCH: Remove the words "or
23 alarm" and add "high level shutoff control device
24 and manual controls."

25 COMMISSIONER BLOOM: I don't think they

1 are --

2 COMMISSIONER BALCH: It's already in
3 there.

4 COMMISSIONER BLOOM: The OCD recommended
5 not including alarm in the language.

6 CHAIRWOMAN BAILEY: That's what it appears
7 to be.

8 COMMISSIONER BLOOM: I would support not
9 including "or alarm." One of the concerns we heard
10 about the automatic shutoff control is it can often
11 go off when the lines freeze and it creates a mess.
12 There's nothing stopping an operator from installing
13 an alarm. I have seen some of the systems with a
14 call-out. Automatically they could set the alarm to
15 go off before the automatic shutoff went off and
16 that would give them time to get out there. If for
17 some reason the equipment was down, there wasn't a
18 connection and people couldn't get out there because
19 of bad weather or whatever, the automatic shutoff
20 would still be in place.

21 COMMISSIONER BALCH: I think if you delete
22 the "or alarm" and leave it the way it is, then as
23 Mr. Bloom said, you leave it in the range of best
24 management practices, and ultimately if you can't
25 get out there you could have a spill that you would

1 not want to have. So I think I would support not
2 including the "or alarm."

3 CHAIRWOMAN BAILEY: In the OCD Findings of
4 fact Page 7, they do discuss the question. It says,
5 "The alarm alone is insufficient because there may
6 not be a person present to hear the alarm and
7 respond. A call-back alarm system or a remotely
8 monitored alarm system would allow for an operator
9 to quickly address a potential overflow of a
10 below-grade tank."

11 We could include that specificity and call
12 it a call-back alarm or a remotely monitored alarm
13 system.

14 COMMISSIONER BALCH: So you are suggesting
15 keeping the "or alarm" and extending that to include
16 the OCD's suggested language?

17 CHAIRWOMAN BAILEY: Yes, that's what I am
18 suggesting, so there can be this remote notice back
19 to the office, wherever it is. So that there's a
20 call-back or a remotely monitored alarm system.

21 COMMISSIONER BALCH: I believe the
22 testimony for having the "or alarm," and I think you
23 alluded to it in your discussion, Mr. Bloom, was
24 that these high level shutoff control devices are
25 not necessarily very reliable with the current

1 technology, so providing the alternative might not
2 be a bad thing, providing it's going to provide
3 equal or better protection.

4 CHAIRWOMAN BAILEY: I think it provides
5 enhanced protection to have an alarm that's
6 monitored somewhere back at the office.

7 COMMISSIONER BALCH: One concern Mr. Bloom
8 also brought up was what if somebody can't respond
9 to the alarm? Weather or something like that.
10 Frequently in the northwest you can get remote areas
11 bogged down with mud and snow in the winter for
12 significant periods of time. I believe that was
13 also brought out in the testimony. Hopefully the
14 best management practice would not have you relying
15 solely on the alarm in a situation like this,
16 whether it was remotely monitored or not.

17 COMMISSIONER BLOOM: That's my concern.
18 It would be towards requiring a shutoff control
19 device and if somebody wants to install an alarm so
20 they can get out ahead of it, they can do so.

21 CHAIRWOMAN BAILEY: So you are suggesting
22 changing the "or" to an "and"?

23 COMMISSIONER BLOOM: No, I would not
24 include alarm. I would not include that phrase.
25 Industry knows that they can go out and add an

1 alarm, but there is still going to be a shutoff.

2 CHAIRWOMAN BAILEY: Okay.

3 COMMISSIONER BALCH: I think that leaves
4 the best practices for them to determine how best to
5 control the situation.

6 COMMISSIONER BLOOM: I would just add, I
7 don't know if the company was doing this kind of
8 technology maybe a year or two ago, and you are
9 probably well aware of these companies as well.
10 They offer other services, too, in terms of
11 reporting other problems at a location or sending
12 out information to a company when a tank needs
13 emptying, a collection tank needs emptying, things
14 like that. So they are already being adopted
15 currently.

16 CHAIRWOMAN BAILEY: Okay. So we are in
17 agreement not to include the words "or
18 alarm," correct?

19 COMMISSIONER BALCH: The only thing you
20 can do if you want to leave flexibility would be to
21 remove "or alarm" and some language that, again,
22 allowed for equivalent or better solution, and that
23 would be more on a case-by-case basis. If somebody
24 came up with something that would be determined to
25 be equally or better protecting, some system, maybe

1 they should have an option to --

2 CHAIRWOMAN BAILEY: Request a variance?

3 COMMISSIONER BALCH: Yes.

4 CHAIRWOMAN BAILEY: Which is an area that
5 we will look at towards the end of this
6 deliberation. There's a whole section on exceptions
7 and variances. One of the suggested sentences in
8 the section on exceptions and variances, "Except as
9 provided below in Subparagraph C, an operator may
10 apply to the appropriate division district office
11 for a variance to any of the provisions of 19.15.17
12 NMAC." So if we delete the words "or alarm" that
13 does not shut the door for an operator to request a
14 variance.

15 COMMISSIONER BALCH: As long as we approve
16 the section on variances.

17 CHAIRWOMAN BAILEY: It all hinges on that.
18 Okay. So we will delete the words "or alarm."
19 Going to Paragraph 5 --

20 COMMISSIONER BALCH: There's another
21 strike.

22 CHAIRWOMAN BAILEY: Yes, in B. For
23 deletion of the word "other," for "all other
24 below-grade tanks in which side walls are not open."
25 It seems to me that we can delete that "other."

1 COMMISSIONER BALCH: I don't see any
2 reason for it to be there.

3 COMMISSIONER BLOOM: I don't think it adds
4 anything.

5 CHAIRWOMAN BAILEY: So we will delete the
6 word "other." Now we will go to 5. But it's now
7 noon.

8 COMMISSIONER BALCH: We are coming up on a
9 couple pages where there are significant changes.
10 If we want to break this might be a good place to
11 break.

12 COMMISSIONER BLOOM: I think that's fine.

13 CHAIRWOMAN BAILEY: Okay. Until ten after
14 1:00.

15 (Note: The hearing stood in recess at
16 12:00 to 1:10.)

17 CHAIRWOMAN BAILEY: We will go back on the
18 record. When we broke before lunch, we were about
19 to begin discussions on I5, which has to do with
20 below-grade tank constructed deleting the date and
21 putting in the effective date of this amendment,
22 removing the language that has the side walls open
23 for visual inspection and removing the language that
24 is not included in Paragraph 6 of the reference of
25 Part 11. Do either of you have a position on those

1 suggested changes, deleting the old effective date,
2 inserting in the language, "The effective date of
3 this amendment," removing the language on side walls
4 open for visual inspection and removing the language
5 citing another portion of the rule?

6 COMMISSIONER BALCH: That's including has
7 the side walls open for visual inspection, right?

8 CHAIRWOMAN BAILEY: Yes.

9 COMMISSIONER BALCH: This is essentially
10 the grandfather clause to eliminate having to deal
11 with 10,000 legacy tax?

12 CHAIRWOMAN BAILEY: Yes.

13 COMMISSIONER BALCH: These are tanks where
14 you can visually inspect all the way around it from
15 top to bottom. Side walls open to visual
16 inspection.

17 CHAIRWOMAN BAILEY: I think the first
18 question is simple. Get rid of the old date and put
19 in the effective date of this amendment.

20 COMMISSIONER BALCH: Yes.

21 COMMISSIONER BLOOM: Yes.

22 CHAIRWOMAN BAILEY: Theresa, we can go
23 ahead and make that change. Now it has the caveat
24 of "a below-grade tank constructed and installed
25 prior to the effective date of this amendment having

1 side walls open for visual inspection" and not
2 meeting certain requirements.

3 COMMISSIONER BALCH: I think the testimony
4 on this had to do with making them a place for
5 10,000 tanks would be very expensive and since they
6 have not leaked to this point they probably were
7 adequately installed in the first place, even if
8 they don't meet the letter of the new regulation.

9 CHAIRWOMAN BAILEY: It may be helpful to
10 look at the paragraph below that is being struck
11 out.

12 COMMISSIONER BLOOM: That's what I was
13 spending some time on.

14 CHAIRWOMAN BAILEY: That language requires
15 closure of tanks that were not installed correctly.
16 So my opinion is that the suggested language removes
17 those old tanks that have been brought up to
18 standards. It updates so that we are now just
19 registering below-grade tanks rather than permitting
20 below-grade tanks.

21 COMMISSIONER BLOOM: Commissioners, I just
22 had one concern when I was looking at 6 as a
23 possible deletion. That is that it gives five years
24 after June 16, 2008 so that would be June 16, 2013,
25 about ten months from now. It is saying the

1 operator of the below-grade tank prior to June 16,
2 2008 with a single wall or any portion that's not
3 feasible shall equip or retrofit to the
4 above-mentioned four criteria, either come into
5 compliance with 1 through 4 above or it has to be
6 closed. By deleting this are we getting rid of that
7 requirement in any single-walled tanks that don't
8 meet those requirements 1 through 4 above in the
9 affirmative.

10 COMMISSIONER BALCH: I think the addition
11 of the language has the side walls open for visual
12 inspection would cover those cases that would need
13 to be removed by 2013 so those would still need to
14 be retrofitted or removed, I think. Any tank that
15 does not have -- any below-grade tank that is
16 single-walled and does not have all sides available
17 for visual inspection would still have to be
18 removed. There's just not a deadline, I guess.

19 CHAIRWOMAN BAILEY: In the upper paragraph
20 it says, "If the existing below-grade tank does not
21 demonstrate integrity, the operator shall promptly
22 remove that below-grade tank."

23 COMMISSIONER BALCH: Promptly.

24 CHAIRWOMAN BAILEY: "From service and
25 comply with closure requirements." So if it doesn't

1 demonstrate integrity it will have to be removed or
2 removed from service and closure requirements. Then
3 it is also saying that the current tanks that were
4 installed prior to the work we do now. If it
5 doesn't meet all the requirements of 1 through 4
6 they are not required to equip or retrofit as long
7 as they demonstrate integrity the.

8 COMMISSIONER BALCH: I think that since
9 the time of Rule 17 none of these -- we are only
10 talking about tanks that were installed prior to
11 Rule 17 because there would not have been any tanks
12 permitted in the last five years that would not meet
13 the criteria. And I think there was the estimate
14 of, I think, 10,000 or so backed-logged tanks, which
15 indicates to me there's about 10,000 of those tanks.
16 So the question is, what to do with the 10,000
17 legacy tanks?

18 CHAIRWOMAN BAILEY: The proposal says that
19 we have the criteria as whether or not they are
20 demonstrating integrity. If they are not
21 demonstrating integrity they have to close.

22 COMMISSIONER BALCH: And promptly take
23 them out of service.

24 COMMISSIONER BLOOM: That answers one of
25 my questions. What about a below-grade tank that

1 doesn't have the side walls for visual inspection?

2 What happens to that?

3 COMMISSIONER BALCH: It does not
4 specifically say, but I think there would have to be
5 a rule to put it out of service.

6 COMMISSIONER BLOOM: Right. I think we
7 need to include language. Otherwise, I think we
8 just allow them to keep going.

9 COMMISSIONER BALCH: Now, were those
10 tanks -- are they still out there or are they all
11 taken care of from 2008?

12 CHAIRWOMAN BAILEY: Well, they have until
13 2013.

14 COMMISSIONER BALCH: So there could still
15 be some out there?

16 CHAIRWOMAN BAILEY: Yeah.

17 COMMISSIONER BALCH: Probably are, because
18 all the permits are backlogged.

19 CHAIRWOMAN BAILEY: So what would you
20 suggest?

21 COMMISSIONER BLOOM: I don't know. I
22 think we have a problem there.

23 COMMISSIONER BALCH: Well, we have a newly
24 worded part of the regulation that says you have to
25 be able to visually inspect a single-walled tank on

1 all sides. And then if it doesn't comply it has to
2 be promptly removed, and there's no definition on
3 promptly. In fact, I don't know if we don't know
4 how many there are. With the proposed registration,
5 what sort of information do you think would be on a
6 registration? Is this something that the division
7 would pick a form for?

8 CHAIRWOMAN BAILEY: It would be an
9 amendment or an editing of one of the forms that's
10 in place, the C144, which is already just a
11 checklist of things that have been done and what
12 this means.

13 COMMISSIONER BALCH: There would be a box
14 that says it complies with 1 through 4 or it
15 doesn't. If it doesn't, I think Mr. Bloom's concern
16 is what happens then?

17 CHAIRWOMAN BAILEY: Right.

18 COMMISSIONER BLOOM: If we just leave that
19 in there what would happen then?

20 COMMISSIONER BALCH: Well, they would have
21 to be promptly removed. Once they are registered
22 and listed as not in compliance they would have to
23 be removed from service and closed. Keep in mind
24 that these were supposed to be promptly permitted as
25 well five years ago.

1 CHAIRWOMAN BAILEY: Which is to say you
2 could not have them for five years?

3 COMMISSIONER BALCH: Right. So I'm not
4 sure what promptly does.

5 CHAIRWOMAN BAILEY: But since we are not
6 permitting here, we are simply registering
7 below-grade tanks, the key is in the operational
8 requirements maybe for below-grade tanks.

9 COMMISSIONER BALCH: Maybe this is not a
10 terribly huge issue, because the first thing you are
11 going to do is promptly remove it from service if it
12 doesn't comply with the regulation.

13 COMMISSIONER BLOOM: I'm sorry, under 6?

14 COMMISSIONER BALCH: Under 5 now. You
15 would promptly remove it from service. It might
16 take you a while to go through the closure and have
17 it all the way and all that, but if you remove it
18 from service I'm assuming you are going to close it
19 and not circulate fluids through it. Or am I
20 assuming too much?

21 CHAIRWOMAN BAILEY: Remove it from service
22 means you are not putting anything else in it.

23 COMMISSIONER BALCH: Other than what's in
24 it already. I mean, to say promptly removed from
25 service and drained?

1 CHAIRWOMAN BAILEY: That would be
2 important.

3 COMMISSIONER BALCH: Then it doesn't
4 necessarily matter how long it sits there waiting to
5 be remediated or removed.

6 CHAIRWOMAN BAILEY: That would work.

7 COMMISSIONER BLOOM: I think I am still
8 stuck on the previous question. What happens to
9 existing below-grade tank that doesn't have the
10 single-walled or a portion of the side walls below
11 the ground surface and not visible?

12 COMMISSIONER BALCH: I think what 5 is
13 saying is if it doesn't meet Criteria 1 through 4
14 and does not have all portions of the wall visible,
15 so I guess if any portion is against the berm or
16 whatever, it would have to be promptly removed from
17 service and then closed.

18 CHAIRWOMAN BAILEY: If it does not
19 demonstrate integrity.

20 COMMISSIONER BALCH: That's a key point.

21 COMMISSIONER BLOOM: No, but I think it's
22 only going to be the ones where the side walls are
23 open for visual inspection. If it's not, this
24 doesn't apply, 5 doesn't apply.

25 COMMISSIONER BALCH: Well, does not

1 demonstrate integrity would allow a tank that could
2 not be visually inspected on all sides. What does
3 demonstrate integrity could stay in operation. Do
4 we have any idea how many of those are out there?

5 CHAIRWOMAN BAILEY: We have no way of
6 knowing.

7 COMMISSIONER BALCH: I mean, if you wait
8 long enough, the life cycle of an oil or gas well is
9 such that in 20 years or so they will all be gone,
10 just by natural effect of production going down.
11 How does the tank demonstrate integrity? You
12 visually inspect it to see if it's leaking. If you
13 can't visually inspect part of the tank, how can it
14 demonstrate integrity?

15 CHAIRWOMAN BAILEY: You'll never know
16 until you remove the tank.

17 COMMISSIONER BALCH: It would be nice to
18 know how many of those are out there.

19 CHAIRWOMAN BAILEY: There's no way to know
20 that.

21 COMMISSIONER BLOOM: So there could still
22 be single-walled tanks where some of the sides
23 aren't visible out in the field. Those don't have
24 to be removed until 2013, correct?

25 COMMISSIONER BALCH: Well, the way this is

1 reading now, if you have a legacy tank that does not
2 meet all the criteria but has demonstrated
3 integrity, it could stay in place. The question is
4 how can it demonstrate integrity if you can't
5 visually inspect all sides? Was that discussed at
6 all in the testimony?

7 CHAIRWOMAN BAILEY: Oh, yes. It was.

8 COMMISSIONER BALCH: It might be worth
9 looking at the record on that. My mind is not fresh
10 on it.

11 COMMISSIONER BLOOM: Yeah, exactly.

12 CHAIRWOMAN BAILEY: I think one of the
13 more objectionable parts of 6 is that an operator is
14 required to promptly remove the below-grade tank and
15 install a below-grade tank that complies with those
16 portions. If we simply change in Paragraph 6 the
17 June 16, 2008 date to the language, "The effective
18 date of this amendment," retain the portion that
19 gives the five-year deadline up until June 13th or
20 June 2013, that might take care of Commissioner
21 Bloom's problem.

22 COMMISSIONER BLOOM: I think that's right.

23 COMMISSIONER BALCH: Could we make that
24 modification so we can compare them side by side?

25 CHAIRWOMAN BAILEY: But we would also

1 delete that portion of the next to the last sentence
2 that requires installation of another tank that
3 complies.

4 COMMISSIONER BALCH: Because they may not
5 want to put another tank in.

6 CHAIRWOMAN BAILEY: And if they do, they
7 would register it and meet the operational
8 requirements of the current amendment. We would
9 strike the June 16, 2008. Not that one, the one up
10 above. Yeah. Retain the other one because that
11 gives the original deadline that Commissioner Bloom
12 was looking for. And then delete the portion of
13 that next to the last sentence after the reference
14 to 19.15.17.13. I mean 11.

15 COMMISSIONER BALCH: You want to go to the
16 middle of the block you have highlighted where it
17 says "and install a below-grade tank."

18 CHAIRWOMAN BAILEY: Yeah.

19 COMMISSIONER BALCH: Delete from there to
20 the end of the sentence. Delete that, I think.

21 CHAIRWOMAN BAILEY: Yes.

22 COMMISSIONER BALCH: There was additional
23 language "for removal."

24 COMMISSIONER BLOOM: I think that
25 generally would meet the need there as you proposed

1 it, chairman Bailey.

2 CHAIRWOMAN BAILEY: We have an incomplete
3 sentence there. 1 through 4 of Subsection I, blah
4 blah blah "or close it if the tank does not
5 demonstrate integrity."

6 COMMISSIONER BLOOM: It should be comma.

7 CHAIRWOMAN BAILEY: Comma, the operator.
8 No, I was wrong.

9 COMMISSIONER BALCH: If you look at the
10 language in the other revision, "If the existing
11 below-grade tank does not demonstrate integrity, the
12 operator shall promptly remove it from service and
13 comply with the closure requirements," I think that
14 language is still good and should stay included.

15 CHAIRWOMAN BAILEY: So if we go back to
16 the other No. 5, change June 16, 2008 or delete that
17 except "the effective date of this amendment." And
18 has the side walls opened. Okay.

19 COMMISSIONER BALCH: I guess we have two
20 situations here. We have single-walled tanks, which
21 to have a single-walled tank now you have to have
22 visual inspection on all sides but then you also
23 have tanks that exist out there that are
24 single-walled but do not have every wall available
25 for inspection.

1 CHAIRWOMAN BAILEY: Okay. On the upper
2 Paragraph 5, that language in the fourth line that
3 says "and is not included in Paragraph 6," that
4 should be struck because there is no Paragraph 6 of
5 I.

6 COMMISSIONER BLOOM: Well --

7 COMMISSIONER BALCH: We are thinking about
8 replacing it.

9 COMMISSIONER BLOOM: Yeah, but I would
10 agree we should remove that language.

11 CHAIRWOMAN BAILEY: Okay. We reached that
12 point.

13 COMMISSIONER BALCH: So the next question
14 is, if you have one of those tanks, it does not meet
15 the requirements of the new regulation, Rule 17 or
16 this revision, if they are not required to comply
17 with Paragraphs 1 through 4 which describe the
18 installation, as long as it demonstrates integrity,
19 I think the question is how can it demonstrate
20 integrity if you can't examine it?

21 COMMISSIONER BLOOM: But you can, right?
22 Because it has the side walls open for visual
23 inspection.

24 COMMISSIONER BALCH: We are talking about
25 the ones that may not have all walls available.

1 COMMISSIONER BLOOM: I think that would be
2 in 6, right? Oh, that's only single-walled --

3 COMMISSIONER BALCH: These are all
4 single-walled tanks.

5 COMMISSIONER BLOOM: Can't they be
6 double-walled below-grade tanks?

7 CHAIRWOMAN BAILEY: They can be. It's a
8 matter of whether or not they meet the standards
9 that were set up in the Pit Rule.

10 COMMISSIONER BLOOM: What if we got rid of
11 single-walled in 6 below? That would address
12 anything that -- any tank where the sides aren't
13 alterable?

14 COMMISSIONER BALCH: I think the solution
15 is if you have a tank that is not going to have
16 visible walls is to use a double-walled tank.

17 COMMISSIONER BLOOM: Okay.

18 COMMISSIONER BALCH: So the intent of the
19 original six was to have tanks that did not meet the
20 new rule removed within five years.

21 CHAIRWOMAN BAILEY: If it was
22 singled-walled.

23 COMMISSIONER BALCH: If it was single
24 walled, period. All of those tanks would be
25 removed. The new rule has -- the new Paragraph 5

1 does not force removal of them if you can see all
2 sides or if they can demonstrate integrity if you
3 can't see all sides. It comes back to my question
4 of reasonable.

5 CHAIRWOMAN BAILEY: I thought we would
6 reach the question after we completed the section
7 and went on to multi-well pit.

8 COMMISSIONER BALCH: We don't know what
9 percentage of these fit into the classifications
10 because nobody knows anything about them except for
11 the operators. The registration would take care of
12 that and you would at least know how many you are
13 dealing with. Permitting was supposed to take care
14 of that but proved to be unwieldy. So without
15 knowing how many there are out there, we are
16 challenged with coming up with a rule that deals
17 with it, and that's why I think the reasonable
18 protection has to be addressed.

19 MR. SMITH: Do you want to talk about
20 reasonability now?

21 CHAIRWOMAN BAILEY: If you want to. Let's
22 go.

23 MR. SMITH: Okay. I started out looking
24 at the Continental case that was cited by everyone,
25 and I have to say that I found it to be relatively

1 useless with respect to the concerns that you have
2 voiced. The Continental case was a case that
3 surrounded a change in the formula for computing
4 allowables, and the Commission changed from just
5 pure acreage to acreage and including deliverables,
6 and the Court ultimately decided -- the appellate
7 court decided that the trial court did not have
8 findings adequate to change the allowable formula.
9 Actually, the Commission.

10 And I thought I don't get it, so I looked
11 at the propositions that the various people
12 submitting statements to the Commission, the
13 propositions for which they cited Continental.

14 As nearly as I can tell, NMOGA cited
15 Continental for the proposition that the Commission
16 has to take into account waste when it's
17 promulgating its regulations and reasons that the
18 Pit Rule discourages development and, therefore,
19 creates waste and that it's appropriate then for the
20 Commission to take into account discouragement of
21 development.

22 IPANM cites it for the proposition that
23 the primary concerns of the Commission are
24 prevention of waste and the protection of
25 correlative rights. OGAP cites it for the

1 proposition that the Commission only has the
2 authority granted by the legislature and that that
3 doesn't include taking into account the economic
4 well-being of operators because that's not a
5 prevention of waste.

6 So it looks to me like the issue for which
7 Continental is being cited has to do with whether
8 you all can take into account the economic impact on
9 the industry in the promulgation of your
10 regulations.

11 So looking at that and trying to figure
12 out what that has to do with reasonableness, I have
13 these thoughts, okay? It seems to me that there is
14 an implied requirement that your regulations and any
15 regulations be reasonable. We are going to get to
16 what that means later on maybe. And that means that
17 I think that you have to identify your goal, what
18 you want the regulations or the amendments to
19 accomplish, determine whether they accomplish that
20 goal and then determine whether there are
21 consequences other than accomplishment of that goal
22 that need to be reviewed.

23 It would seem to me that from a common
24 sense perspective that the economic effect on the
25 State and on the people that are being regulated is

1 one of the things that you would take into account.

2 I looked in the statute, failing
3 everything else turning to the law, and in the
4 enumeration of powers that you all have, and this is
5 one that you have already cited, this is 70-2-12B15.
6 There's a cite there to reasonable protection
7 against contamination, which begs the question what
8 does reasonable mean. I looked further, and in that
9 same section under Subparagraph 22 there is a
10 citation to the Water Quality Act as guidance for
11 regulations that you should adopt for the
12 disposition of non-domestic wastes. I looked for a
13 definition of non-domestic wastes and I didn't find
14 it.

15 The point is, the subsection in the Water
16 Quality Act that is cited is 74-6-4 Subsection E.
17 That portion of the Water Quality Act addresses the
18 duties and powers of the Commission, which I take to
19 be WQCC. And in adopting regulations for the
20 prevention or abatement of water pollution, this
21 section goes on to say, "Regulations may specify a
22 standard of performance for new sources that
23 reflects the greatest reduction in the concentration
24 of water contaminants that the Commission determines
25 to be achievable through application of the best

1 available demonstrated control technology,
2 processes, operating methods or other alternatives,
3 including, where practicable, a standard permitting
4 no discharge of pollutants. In making the
5 regulations, the Commission shall give weight it
6 deems appropriate to all relevant facts and
7 circumstances, including" -- and this, I think, is
8 the important part of the Oil and Gas Act that cites
9 you over here to give you guidance in adopting
10 regulations.

11 So some of the factors, and this is not an
12 exclusive list, I don't believe, that the WQCC is to
13 take into account and I believe that you are to take
14 into account as appropriate are "the character and
15 degree of injury to or interference with health,
16 welfare, environment and property, the public
17 interest, including the social and economic value of
18 the sources of water contaminants, technical
19 practicability and economic reasonableness of
20 reducing or eliminating water contaminants from the
21 sources involved, and previous experience with
22 equipment and methods available to control the water
23 contaminants involved." And then it goes on with
24 some other factors to take into account.

25 But it seems to me from looking at this

1 that the Oil & Gas Act, by incorporating and
2 referencing specifically this section of the Water
3 Quality Act, it confirms that it is allowable for
4 you to take into account economic consequences of
5 your regulations on the State and on the industry as
6 well.

7 Now, it looks to me like that's the story
8 for Continental, and as I read all of this you can
9 take into account the economic factors. The
10 question still remains, what is reasonableness? And
11 under the law you will find reasonable is used all
12 over the place.

13 Just making a couple notes from the things
14 that occur to me, you will see references to
15 reasonable person, reasonable time, reasonable
16 opportunity, reasonable place, reasonable manner,
17 reasonable care. And courts will be happy to tell
18 you what is reasonable with respect to those various
19 things in particular situations.

20 I haven't found a case where the courts
21 will say, "And if you are interested in what
22 reasonableness is generally, here it is." So I
23 don't think that you are going to find that.

24 Now, this is just me kind of thinking in
25 desperation, what do I tell these people? That

1 reasonableness implies, first of all, a context; and
2 second, it's a limitation. So if you are to give
3 reasonable protection, the operative word there is
4 protection. It's supposed to be protection. But
5 reasonableness is a limitation on what that means,
6 and it seems to me that it implies a risk benefit
7 analysis, and that is, you look at the benefit of
8 what it is you are about to do and evaluate the
9 risks of doing that.

10 And I think also that risk has two
11 components. Risk is not only the likelihood of an
12 occurrence but it is also the severity of that
13 occurrence, the consequence of it. And you have to
14 weigh those two in order to determine what the risk
15 is. When you determine what the risk is, then you
16 look at the benefit, and ultimately reasonableness
17 is a matter of judgment, which I know is not a whole
18 lot of help to you guys. I don't know that I would
19 call it a matter of balancing competing interests.
20 I would say it's a matter of identifying the benefit
21 and weighing against the risk and I don't know that
22 that's the same thing as balancing two things,
23 saying well, this is enough protection and we are
24 going to weigh it against economic cost and this
25 looks like a pretty good balance.

1 I don't think that's the issue. I think
2 the issue is what is the benefit you want, what is
3 the risk, and then you evaluate whether that benefit
4 is worth that risk.

5 That's the best I can come up with, you
6 guys. I do think you have the authority to take
7 into account economic consequences, but I can't tell
8 you as a lawyer a perfect explanation for
9 reasonableness, except to say that it's a limit and
10 it's a matter of judgment and that I think it is a
11 risk/benefit analysis.

12 COMMISSIONER BALCH: Essentially
13 reasonableness is left to the judge? What is
14 reasonable in a particular instance is left to the
15 judge?

16 MR. SMITH: Some have said the law is what
17 the judge ate for breakfast. I don't think it's
18 quite that arbitrary.

19 COMMISSIONER BALCH: But in practice,
20 perhaps, and that's why there are appeals?

21 MR. SMITH: Well, in practice, the weight
22 is on you all to determine, based on your expertise
23 and the evidence before you, what the benefit is to
24 making the changes and what the risks are, and I
25 think the risks, again, there's two components

1 there. One is likelihood and the other is severity
2 of the occurrence?

3 COMMISSIONER BALCH: Dr. Thomas had a
4 lecture on risk for us.

5 MR. SMITH: I'm saying this in an effort
6 to keep my job. It's the only answer I have with
7 you.

8 COMMISSIONER BLOOM: Your job wasn't on
9 the line there, but you did give up your lunch, I
10 notice, so thank you.

11 COMMISSIONER BALCH: So I guess reasonable
12 is somewhat personal, but I do like the idea of it
13 not being a balancing effort and at the risk being
14 too philosophical for Jami, the idea of the risk
15 versus the reward analysis would probably simplify
16 what we have to do.

17 MR. SMITH: I didn't mean to do that.

18 COMMISSIONER BALCH: Simplify what we mean
19 to do?

20 MR. SMITH: No.

21 COMMISSIONER BALCH: It's complex enough.

22 CHAIRWOMAN BAILEY: It also goes to the
23 point of do you need the barbed wire on the gate?

24 COMMISSIONER BALCH: That's the question
25 that each of us as individuals has to determine

1 whether it's reasonable to have the barbed wire or
2 reasonable to remove it. That gave us some
3 guidance. Thank you.

4 MR. SMITH: Oh, good.

5 COMMISSIONER BLOOM: Helpful reminder.
6 Thank you.

7 CHAIRWOMAN BAILEY: I'm looking for the
8 regulation of the Water Quality Control regulations
9 that discusses discharge of fluids that may reach
10 groundwater, and it could take me some time to find
11 this or I could run upstairs and get my highlighted
12 copy of the Water Quality Control regs, but there is
13 a section that discusses release of contaminants up
14 to the standards of 3103, which is the reference
15 that's always made for groundwater standards, which
16 means that that explains why I am so focused on
17 looking at the concentrations of chlorides, the
18 maximum concentrations of chlorides that can reach
19 freshwater. That's assuming that whatever water it
20 reaches is considered -- has quality good enough for
21 drinking water standards for humans.

22 If the maximum chloride concentration for
23 freshwater in the aquifer will not be above the
24 standards, then I believe we can allow what is, in
25 essence, a discharge that will reach groundwater but

1 remain below the drinking water standards of 3103.

2 And Mr. Mullins' modeling of the chloride
3 transport, both vertically and horizontally, shows
4 that given those certain conditions, water-based
5 drilling fluids with the low chlorides as they
6 define them at 15,000 milligrams per liter would not
7 contaminate freshwater supplies above drinking water
8 standards.

9 To me, that means that we are still
10 protecting groundwater because it's not exceeding
11 those standards, and that release up to that point
12 is allowed under Water Quality Control Commission
13 regulations. So with our determination that we will
14 and have to and need to and desire to protect
15 groundwater supplies, I think that we can look at
16 the testimony, use our own expertise and experience
17 and determine a rule that doesn't necessarily
18 require the barbed wire on the gate but does allow
19 certain practices to be used in New Mexico under
20 these conditions that we specify. That's my
21 interpretation of what we need to look at when we
22 are looking at these proposals.

23 COMMISSIONER BALCH: And to what level --
24 if a contaminant does enter the water supply even if
25 it's below the interpretation of the commissioners

1 as to what's reasonable, the law says that it's
2 reasonable to X limit.

3 CHAIRWOMAN BAILEY: Correct.

4 COMMISSIONER BALCH: In fact, the law says
5 that you can go above that limit if you have enough
6 reward, but I don't think that that's somewhere we
7 can go if we can avoid it.

8 CHAIRWOMAN BAILEY: If we can avoid it, I
9 would very much like to stay with the guidance that
10 the Water Quality Control regulation gives us.

11 COMMISSIONER BALCH: That's certainly
12 defensible under appeal, I would hope.

13 MR. SMITH: If you are talking about water
14 quality standards, I think that's advisable to stick
15 with what you have there.

16 COMMISSIONER BLOOM: I don't think I --

17 MR. SMITH: That's not -- as I understand
18 it, you all the are not discussing those standards
19 at this point. You are discussing the likelihood of
20 any contaminant reaching the groundwater to have
21 some sort of effect on the water quality; isn't that
22 where you are right now?

23 COMMISSIONER BLOOM: Close.

24 COMMISSIONER BALCH: There's effect on the
25 water quality and then there's a legal cap on what

1 sort of impact can they make before you are out of
2 compliance with the Water Quality Control Act.

3 CHAIRWOMAN BAILEY: You cannot exceed the
4 standards.

5 COMMISSIONER BALCH: If it's 1,000 TDS
6 solids or 1,000 parts per million chloride.

7 CHAIRWOMAN BAILEY: 250.

8 COMMISSIONER BALCH: You can't exceed
9 that. I think what Commissioner Bailey is saying is
10 as Mr. Mullins' model demonstrated is in some period
11 of time which, I guess, we will all have to decide
12 is reasonable, if you don't exceed that limit then
13 we start the discussion of risk versus reward.

14 MR. SMITH: How would you know that
15 without knowing the specifics of the quality of the
16 water that you're worried about?

17 COMMISSIONER BALCH: You don't. If the
18 water is 249 and you add one -- I'm sorry, 249.5 and
19 you add one, you are exceeding the quality, right?
20 If it's 20 and you add 229, then you are not
21 exceeding it. So the gray area is probably why
22 lawyers invented the word reasonable.

23 MR. SMITH: It's also why we don't sit on
24 commissions.

25 COMMISSIONER BLOOM: Chairman Bailey, I

1 don't know that I would disagree with that approach
2 to looking at what the impact might be. Keeping any
3 release within the limits of water standards seems
4 perhaps a good way to move forward. I just have
5 questions about the model as well, and I still do.
6 That's where we can separate it.

7 CHAIRWOMAN BAILEY: Okay.

8 COMMISSIONER BALCH: Great.

9 CHAIRWOMAN BAILEY: Then we can go back.
10 Are we ready to go back to our discussions
11 concerning this question?

12 COMMISSIONER BALCH: So maybe the way to
13 phrase it is does leaving existing non-compliant
14 single-wall tanks that you cannot visually inspect
15 on all sides provide reasonable protection of
16 groundwater?

17 COMMISSIONER BLOOM: I thought those had
18 to be removed by 2013.

19 COMMISSIONER BALCH: But that language is
20 stricken in the revision. What's proposed to us is
21 that those would be left in play.

22 CHAIRWOMAN BAILEY: If they demonstrate
23 integrity.

24 COMMISSIONER BALCH: Yes. And then my
25 next question was how do you demonstrate integrity

1 if you can't inspect all sides. Of course, you
2 could drain the tank and go inside with a flashlight
3 and see if it looks okay on the inside. I don't
4 know how practical or how often that is done or if
5 it's done. Probably never. So maybe the first
6 question is do we want tanks like that left in
7 service?

8 CHAIRWOMAN BAILEY: I would feel more
9 comfortable leaving the restriction in of the
10 single-wall tanks that are not visible because of
11 the potential for leakage in areas that we cannot
12 see underneath them.

13 COMMISSIONER BALCH: Undetected leaks.

14 CHAIRWOMAN BAILEY: Undetected leaks.

15 COMMISSIONER BLOOM: Leaving 6 in with the
16 modifications we have added?

17 CHAIRWOMAN BAILEY: Yes.

18 COMMISSIONER BLOOM: Okay. I would agree
19 with that.

20 CHAIRWOMAN BAILEY: And henceforth tanks
21 will simply be registered but they must meet certain
22 standards.

23 COMMISSIONER BALCH: Which are supposed to
24 be protective.

25 CHAIRWOMAN BAILEY: Yes.

1 COMMISSIONER BALCH: So in that
2 situation -- I just want to put this out there.
3 There's 10,000 pending tank permits. We don't know
4 if all of them are complying or none of them would
5 be visually complying. Actually, another difference
6 between 5 and 6 is the, "Has the side walls open for
7 visual inspection." In 6, those would not be
8 allowed to remain, I don't think.

9 CHAIRWOMAN BAILEY: And where a portion --

10 COMMISSIONER BLOOM: Correct. That was my
11 interpretation.

12 COMMISSIONER BALCH: All right. So it
13 does cover that. Say there's 25 percent of them
14 that are not in compliance. Is ten months a
15 reasonable time to remove them from service?
16 Understanding that they have already had three or
17 four years to anticipate getting rid of them is the
18 question I'm asking you guys.

19 CHAIRWOMAN BAILEY: They have already had
20 three-and-a-half to four years.

21 COMMISSIONER BALCH: So the additional
22 time would probably give them more like eight months
23 by the time the rule is published. Would that be a
24 reasonable amount of time?

25 CHAIRWOMAN BAILEY: The good operators

1 will have already taken them out.

2 COMMISSIONER BALCH: One would hope so.

3 COMMISSIONER BLOOM: Yes.

4 COMMISSIONER BALCH: Then I think let's go
5 through 6 again. I think maybe we can be in
6 agreement. So 1 through 4 will allow the
7 single-walled tank as long as you can see all sides
8 of it. It's on the appropriate foundation. It's
9 constructed of materials resistant to contents and
10 resistant to the damage from sunlight.

11 COMMISSIONER BLOOM: If I'm understanding
12 this correctly, if we accepted these changes as we
13 see them up there currently, anything except a
14 double-walled tank that's in contact with -- doesn't
15 have all sides exposed would be removed. If there's
16 a double-walled tank --

17 COMMISSIONER BALCH: Any covered side
18 unless it was doubled-walled. But I couldn't find
19 the unless it was double-walled, unless that's
20 implicit somewhere.

21 CHAIRWOMAN BAILEY: Five applies to all
22 tanks whether it's single or double because we are
23 not specifying which kind.

24 COMMISSIONER BALCH: And 6?

25 CHAIRWOMAN BAILEY: Applies to

1 single-wall.

2 COMMISSIONER BALCH: Six seems to imply
3 that -- okay. So it's only singling out
4 single-walled tanks that have a covered side, so
5 double-walled tanks would be okay if it has a side
6 cover because of the existence of the double wall
7 and you can open it up and see if there's damage to
8 the integrity.

9 COMMISSIONER BLOOM: No. 5, would that get
10 us in trouble?

11 COMMISSIONER BALCH: I think it would.

12 COMMISSIONER BLOOM: Because they might
13 not have all sides available for inspection. So
14 then they fall outside of regulations. So No. 5
15 would be limited to single-walled tanks?

16 COMMISSIONER BALCH: Are we discussing
17 using what is labeled 6 and stricken through there?
18 That used to be 5, I believe.

19 COMMISSIONER BLOOM: No, 5 existed
20 previously.

21 COMMISSIONER BALCH: So we are adding back
22 6 with some modifications and then we are going to
23 need to edit and modify 5 as well to make sure.

24 COMMISSIONER BLOOM: Yeah.

25 COMMISSIONER BALCH: We don't throw the

1 baby out with the bath water. Unless we're
2 completely confused.

3 CHAIRWOMAN BAILEY: Well, the proposal is
4 to totally eliminate 6 and simply focus on 5, which
5 would apply to all tanks, whether they are single or
6 double.

7 COMMISSIONER BLOOM: But it doesn't
8 address tanks where the side walls are not fit for
9 visual inspection.

10 COMMISSIONER BALCH: So Mr. Bloom pointed
11 out, and I think correctly, that under 5, if you had
12 a double-walled tank that was up against a bank, you
13 would have to remove it.

14 CHAIRWOMAN BAILEY: Right. I don't think
15 we necessarily want to do that.

16 COMMISSIONER BLOOM: No. So I think maybe
17 we can clear up one thing. The recommended deletion
18 at the end of Paragraph 5, do we agree that we no
19 longer need that?

20 CHAIRWOMAN BAILEY: Yes.

21 COMMISSIONER BALCH: Yes.

22 CHAIRWOMAN BAILEY: Yes.

23 COMMISSIONER BLOOM: Okay. We can get rid
24 of that.

25 COMMISSIONER BALCH: The new text is

1 smaller.

2 COMMISSIONER BLOOM: So if we said up in
3 5, "The operator of a single-wall below-grade tank."

4 COMMISSIONER BALCH: Single-wall
5 below-grade tank. Okay.

6 CHAIRWOMAN BAILEY: Is not required to
7 retrofit as long as it demonstrates integrity.

8 COMMISSIONER BLOOM: Correct.

9 CHAIRWOMAN BAILEY: If the single-wall
10 below-grade tank does not demonstrate integrity,
11 operator shall promptly remove that tank from
12 service and comply with closure.

13 COMMISSIONER BALCH: I think we discussed
14 drain and remove. Drain tanks and then remove from
15 service.

16 COMMISSIONER BLOOM: Drain and remove?

17 CHAIRWOMAN BAILEY: Shall promptly drain
18 the contents and remove the below-grade tank from
19 service?

20 COMMISSIONER BLOOM: I think you want to
21 put -- so it should read, "The operator shall
22 promptly drain the tank and remove from that
23 service."

24 COMMISSIONER BALCH: Remove the
25 below-grade tank. I think you want to say

1 below-grade tank, drain the below-grade tank and
2 remove from service and comply with the closure
3 requirements of 19.15.17.

4 COMMISSIONER BLOOM: We are getting there.

5 CHAIRWOMAN BAILEY: And delete 6 in
6 entirety.

7 COMMISSIONER BLOOM: Wait.

8 COMMISSIONER BALCH: We have the language
9 regarding five years of 2008.

10 COMMISSIONER BLOOM: Leave 6 when the case
11 is such that there's a single-walled tank that does
12 not have all of its sides visible.

13 COMMISSIONER BALCH: So the only thing we
14 are really missing in 5 now is in the case of
15 single-wall, non-compliant tanks that you cannot
16 visually inspect on all sides except for, that you
17 will promptly drain them and remove them, and
18 there's no timeline on that. "Promptly drain
19 contents" will take care of the risk portion of it.

20 COMMISSIONER BLOOM: It might be helpful
21 if we can step back and say what are we trying to do
22 with this language, right? We started fresh and --

23 COMMISSIONER BALCH: I think what we are
24 trying to do, my interpretation, if you have a
25 grandfathered tank that you can visually inspect on

1 all sides, you don't have to retrofit it to the new
2 standards. If you have a single-walled tank that
3 you cannot visually inspect on all sides, it needs
4 to be removed by June 16, 2013. If it doesn't
5 comply, the first thing you need to do is promptly
6 drain the contents and then prepare to close it
7 using 19.17.13.

8 So the only thing missing in 5 is the
9 language in five years after June 16, 2008. Where
10 is the best place to work that in? You could have a
11 truncated Paragraph 6.

12 CHAIRWOMAN BAILEY: What we can do is in 5
13 have it apply to single-walled tanks that do have
14 the side walls open, which means that we would not
15 be deleting that language. Then in No. 6 we would
16 have the operator of the below-grade tank --

17 COMMISSIONER BALCH: So take everything --
18 the last sentence of 5 would become a new Paragraph
19 6 with some of the language.

20 CHAIRWOMAN BAILEY: Right.

21 COMMISSIONER BLOOM: Are you going to
22 retain 6?

23 CHAIRWOMAN BAILEY: Well, that's what we
24 are exploring the idea of. Retaining 6, but making
25 it specific to single-walled tanks that do not have

1 side walls open.

2 COMMISSIONER BLOOM: Okay.

3 CHAIRWOMAN BAILEY: That cannot
4 demonstrate integrity. So 5 would apply to
5 single-walled with side walls open. Six would apply
6 to single-walls with side walls not visible.

7 COMMISSIONER BLOOM: Okay.

8 COMMISSIONER BALCH: Maybe you could just
9 hit return right now. That last sentence, if you
10 make that a new paragraph. Add language to
11 describe --

12 COMMISSIONER BLOOM: Don't we need the
13 language in 6?

14 CHAIRWOMAN BAILEY: Let's leave it in 5
15 and keep 6 but change it to deal only with
16 single-walls where we can't see the side walls.

17 COMMISSIONER BLOOM: Let's try that. Look
18 at 6.

19 COMMISSIONER BALCH: Actually, all that
20 first sentence covers the language.

21 COMMISSIONER BLOOM: On No. 6, wouldn't we
22 say "The operator of a single-walled below-grade
23 tank"?

24 CHAIRWOMAN BAILEY: Yes, to make it
25 specific to that.

1 COMMISSIONER BLOOM: After the effective
2 date of this amendment we will get rid of that,
3 correct?

4 CHAIRWOMAN BAILEY: And then we will
5 change the date from -- the whole phrase, "Within
6 five years from June 16, 2008," we will change that
7 to "by June 16, 2013."

8 COMMISSIONER BLOOM: Yes.

9 COMMISSIONER BALCH: Then to be consistent
10 you are leaving -- Once you change the promptly
11 remove from service to match the language in the
12 bottom of 5.

13 COMMISSIONER BLOOM: Yes.

14 CHAIRWOMAN BAILEY: The phrase "by June
15 16, 2013" should actually go after the words "or
16 close it by June 16, 2013, if the tank does not
17 demonstrate integrity." We just need to move the
18 phrase over a couple words.

19 COMMISSIONER BALCH: Shift it one comma.

20 CHAIRWOMAN BAILEY: Yes.

21 COMMISSIONER BALCH: Could I ask you a
22 question?

23 MR. SMITH: Yes.

24 COMMISSIONER BALCH: All of the
25 wordsmithing and the language in the rule have to

1 be -- we have to do all of that before it goes to --
2 we have to do that in the process? We can't change
3 the wording or something like that?

4 MR. SMITH: I don't know. I will have to
5 look.

6 CHAIRWOMAN BAILEY: Are we happy with
7 those two paragraphs?

8 COMMISSIONER BALCH: Shouldn't it say,
9 "And remove the below-grade tank from service"?
10 Sounds a little awkward. "Promptly drain the
11 below-grade tank and remove it" -- seems like there
12 needs to be something there. "Remove it from
13 service."

14 COMMISSIONER BLOOM: "Remove it from
15 service."

16 MR. SMITH: Commissioner Balch, I am
17 informed by someone who has done a lot of regulating
18 in the past that in order to submit these for
19 recording, official recording with the State, they
20 have to be reformatted, spelling errors and
21 grammatical errors have to be corrected.

22 COMMISSIONER BALCH: So if we miss a typo
23 we will not be forever --

24 MR. SMITH: That's right.

25 CHAIRWOMAN BAILEY: Theresa, we need to

1 change a few words here and there. In 6 down at the
2 bottom, "The operator shall promptly drain the
3 below-grade tank." Go up three lines. Remove that
4 word "and" and put a comma after "tank." So we
5 have, "drain the below-grade tank, remove from
6 service and comply with the closure requirements."

7 COMMISSIONER BLOOM: How about remove it
8 from service?

9 COMMISSIONER BALCH: I think remove it
10 from service in both of those paragraphs.

11 CHAIRWOMAN BAILEY: Up above also?

12 COMMISSIONER BALCH: And if somebody wants
13 to insert "below-grade tank."

14 CHAIRWOMAN BAILEY: There are a few words
15 after the end of the sentence. It says "that
16 below-grade tank," that needs to be deleted.

17 COMMISSIONER BLOOM: Less fragmented 6.

18 COMMISSIONER BALCH: All the way to the
19 end.

20 COMMISSIONER BLOOM: Do we prefer
21 single-wall or single-walled?

22 CHAIRWOMAN BAILEY: E-D, walled. Are we
23 happy with those two paragraphs?

24 COMMISSIONER BLOOM: I think we are there.

25 CHAIRWOMAN BAILEY: So we want to remove

1 the strikeout in 6 because we are keeping 6. All
2 right. Then we can move along.

3 COMMISSIONER BLOOM: Commissioners, one
4 point of clarification, I guess, for myself. We
5 mentioned single-walled tanks. Do we want to
6 mention double-walled in any context for clarity?

7 COMMISSIONER BALCH: These are pretty
8 specific to the case of single-walled tanks. The
9 double-walled tanks has inherent added protection.
10 Or is there another place where it shows up?

11 COMMISSIONER BLOOM: We were discussing
12 design and construction specifications for
13 below-grade tanks.

14 COMMISSIONER BALCH: Is that Page 17, 1
15 through 4? That covers a whole lot of things.

16 COMMISSIONER BLOOM: I don't think we need
17 anything that says double-walled tanks are not
18 subject to these conditions.

19 CHAIRWOMAN BAILEY: I don't think we need
20 to add that if we are making it specific to
21 single-walled.

22 COMMISSIONER BLOOM: I think you are
23 right. I'm fine with moving on.

24 CHAIRWOMAN BAILEY: Okay. Does anybody
25 need a break?

1 COMMISSIONER BLOOM: Yeah, quick bathroom
2 break. Five or ten.

3 CHAIRWOMAN BAILEY: Come back at 2:30.

4 (Note: The hearing stood in recess at
5 2:22 to 2:32.)

6 COMMISSIONER BALCH: I think there's
7 something bothering both of us about double-walled
8 tanks in 5 and 6 that we just wrote.

9 COMMISSIONER BLOOM: I think I'm okay with
10 it. I don't know. What are you thinking?

11 COMMISSIONER BALCH: Okay. What this does
12 not include is a double-walled tank that doesn't
13 meet 1 through 4.

14 CHAIRWOMAN BAILEY: If you go back up to
15 Paragraph A on that page, it talks about
16 construction of use of below-grade tanks that do not
17 have double walls.

18 COMMISSIONER BALCH: I guess I am
19 wondering if there's any legacy double-walled tanks
20 that will have a properly constructed foundation, et
21 cetera.

22 CHAIRWOMAN BAILEY: In the next 20 years
23 there will be.

24 COMMISSIONER BALCH: Are there now? Is
25 there such a thing as a double-walled tank?

1 CHAIRWOMAN BAILEY: Oh, yeah.

2 COMMISSIONER BALCH: There could be before
3 this rule a double-walled tank that's out there
4 that's not built using the requirements of I, that
5 should perhaps be a legacy tank if it has integrity.

6 CHAIRWOMAN BAILEY: So in either 5 or 6,
7 the last portion where we say, "If the existing
8 below-grade tank does not demonstrate
9 integrity," that could be made specific to "if the
10 existing single or below-grade tank does not
11 demonstrate integrity, the operator shall promptly
12 remove." Or that could be a separate?

13 COMMISSIONER BALCH: Well, what we did in
14 5, if you look at the wording in the very first
15 sentence of 5 is we changed it -- I think it was a
16 change by IPANM or OCD because I'm looking at the
17 NMOGA version. Their version says, "The operator of
18 a below-grade tank."

19 CHAIRWOMAN BAILEY: We changed it. We put
20 in single-walled.

21 COMMISSIONER BALCH: So in doing that, we
22 eliminated double-walled tanks being discussed in
23 this paragraph and similarly in Paragraph 6. I want
24 to make sure --

25 COMMISSIONER BLOOM: Right, because could

1 there be a double-walled tank that doesn't meet --

2 COMMISSIONER BALCH: I1 through 4.

3 CHAIRWOMAN BAILEY: So we could remove the
4 single-walled requirement and have it apply to all
5 below-grade tanks.

6 COMMISSIONER BALCH: For 5, I think that's
7 just fine. For 6, we might have to change something
8 so that a double-walled tank -- maybe we don't have
9 to specify single-wall in either of those except for
10 the case where you have a double-walled tank that --
11 you might have to change the first sentence of 6 a
12 little bit and take the single-wall out of the first
13 part of paragraph 5. Paragraph 5 could cover any
14 tank -- no, it doesn't.

15 COMMISSIONER BLOOM: I was trying to read
16 through it and imagine what would happen if it had
17 single-walled.

18 COMMISSIONER BALCH: In 5 we are also
19 specifying, "Has the side walls open for visual
20 inspection." You could just say "or have double
21 walls." I don't know.

22 CHAIRWOMAN BAILEY: Now you are getting
23 too --

24 COMMISSIONER BALCH: Like I said, it was
25 crude.

1 CHAIRWOMAN BAILEY: But your concern is
2 that we are letting double-walled tanks that don't
3 meet the integrity test continue?

4 COMMISSIONER BALCH: We're not talking
5 about them at all, and in theory in section I1
6 through 4 we said below-grade tanks have to meet
7 these four criteria and it's probably appropriate to
8 allow a double-walled tank that is currently
9 existing that has demonstrated integrity to exist,
10 and that's not included in 5 or 6 unless it has all
11 of the side walls open for visual inspection.

12 COMMISSIONER BLOOM: If there is a legacy
13 double-walled tank out there that doesn't
14 demonstrate integrity, it could still continue,
15 right?

16 COMMISSIONER BALCH: Yes.

17 COMMISSIONER BLOOM: What if we just did a
18 Paragraph 7 that addressed double-walled tanks?

19 CHAIRWOMAN BAILEY: Or No. 6, just remove
20 the single-wall and that would apply to all
21 below-grade tanks.

22 COMMISSIONER BALCH: If you did that, then
23 a double-walled tank that had one of its or a
24 portion of its sides covered, it would have to be
25 removed.

1 CHAIRWOMAN BAILEY: If it does not
2 demonstrate integrity.

3 COMMISSIONER BALCH: Okay. So there's a
4 way to verify the integrity of double-walled tank.
5 Okay. I think if you take the single-walled out
6 there.

7 COMMISSIONER BLOOM: Actually, I think we
8 are in trouble if we do that. Because that
9 double-walled tank would then have to be -- if part
10 of it is not visible it would have to be retrofitted
11 or equipped to comply with 1 through 4 or be closed,
12 right?

13 COMMISSIONER BALCH: Right.

14 CHAIRWOMAN BAILEY: If it's leaking.

15 COMMISSIONER BLOOM: No, but if one of the
16 sides is not visible and can't be brought into
17 compliance with 1 through 4, it would have to be
18 closed.

19 CHAIRWOMAN BAILEY: If it doesn't
20 demonstrate integrity.

21 COMMISSIONER BALCH: Well, it still has
22 the visible inspection on it.

23 COMMISSIONER BLOOM: If you said the
24 operator of a double-walled tank installed prior to
25 the effective date or a portion of the tank wall is

1 below the ground surface and not visible, he shall
2 equip or retrofit it to comply with Paragraphs 1
3 through 4 or they would have to close it.

4 CHAIRWOMAN BAILEY: The last part of the
5 sentence. Close it by June 2013 if the tank does
6 not demonstrate integrity.

7 COMMISSIONER BLOOM: But do we want to
8 make -- are we trying to make double-walled tanks
9 come into compliance with 1 through 4?

10 COMMISSIONER BALCH: Right. In 6 if they
11 don't comply with 1 to 4 you have to remove them.

12 CHAIRWOMAN BAILEY: That's the purpose of
13 the last phrase. "If the tank does not demonstrate
14 integrity."

15 MR. SMITH: Maybe you want to take the
16 demonstrate integrity portion and put it after the
17 word "shall, shall demonstrate a tank's integrity
18 or" --

19 COMMISSIONER BALCH: If you could
20 demonstrate by saying we have double walls and
21 opened up a port and made sure there was no fluid or
22 leakage.

23 CHAIRWOMAN BAILEY: So that whole phrase,
24 "If the tank does not demonstrate integrity," can be
25 moved to go after the first --

1 COMMISSIONER BLOOM: Just copy and paste
2 that in case we need to go back to it. I'm
3 wondering if we just might say --

4 MR. SMITH: So you are looking at three
5 options.

6 COMMISSIONER BALCH: I think we have 5 is
7 fine. We are just trying to make sure we don't
8 throw out legacy double-walled tank that don't meet
9 I1 through 4 but otherwise have integrity. That's
10 the intent.

11 COMMISSIONER BLOOM: What if we just
12 crafted a paragraph for double-walled tanks? The
13 operator of the double-walled tank constructed and
14 installed prior to the effective date of this
15 amendment --

16 COMMISSIONER BALCH: You could probably
17 remove that part, because we are really only worried
18 about --

19 COMMISSIONER BLOOM: Get rid of anything
20 that says "and where any portion of the" -- yeah,
21 get rid of that. Great. Delete that, please.

22 COMMISSIONER BALCH: That might do it.
23 Then I would say "If the existing double-walled
24 below-grade tank does not demonstrate integrity,"
25 and then everything else is the same.

1 CHAIRWOMAN BAILEY: So we will number that
2 as No. 7.

3 COMMISSIONER BLOOM: Now, is this what we
4 want to do with double walled below-grade tanks?

5 COMMISSIONER BALCH: What I think we want
6 to do is we are only dealing with legacy tanks in
7 these three paragraphs, I think. So in 7, my
8 intent, which may not be your intent, is if there's
9 a legacy double-walled tank that does not meet 1
10 through 4 but otherwise demonstrates integrity, it's
11 grandfathered in. If it doesn't demonstrate
12 integrity, it has to be drained, removed and closed.

13 COMMISSIONER BLOOM: Do we want the
14 language from 5 above that, which is that it doesn't
15 meet the requirements but -- that's what we want,
16 right?

17 COMMISSIONER BALCH: No, we are talking
18 about the sentence above that.

19 COMMISSIONER BLOOM: Starting with "does."

20 COMMISSIONER BALCH: Let's go back just a
21 couple words.

22 COMMISSIONER BLOOM: Copy that and paste
23 that below. And 7.

24 COMMISSIONER BALCH: Paste it in the same
25 place where you removed it from 5. So it would be,

1 "The date of this amendment shall" -- is that where
2 that goes? So instead of shall, it's "which does
3 not." It's already in there.

4 COMMISSIONER BLOOM: Integrity. Okay.
5 That's right.

6 COMMISSIONER BALCH: Now we have the same
7 language to be removed.

8 COMMISSIONER BLOOM: Delete where it says
9 "equip or retrofit the below-grade tank."

10 COMMISSIONER BALCH: Not that.

11 COMMISSIONER BLOOM: Sorry, the next one
12 down. There you go. Get rid of that.

13 COMMISSIONER BALCH: I think we wanted to
14 keep that part.

15 COMMISSIONER BLOOM: Oh, sorry.

16 COMMISSIONER BALCH: Who would have
17 thought this would be the most complex part of the
18 regulation.

19 CHAIRWOMAN BAILEY: The word "which" needs
20 to be changed to "and" because otherwise you are
21 referring to the amendment not meeting the
22 requirements.

23 COMMISSIONER BALCH: So what we really
24 need now is some language that indicates if it does
25 not become retrofitted it has to be removed.

1 COMMISSIONER BLOOM: By that date.

2 COMMISSIONER BALCH: So if you go to the
3 language --

4 COMMISSIONER BLOOM: Maybe we could go and
5 take the last sentence from the previous paragraph,
6 copy and paste that.

7 COMMISSIONER BALCH: Right after the word
8 "integrity" on the second line up, between
9 "integrity" and "equip." Back a little bit more.
10 About five words back. Right there. Right after
11 the period with integrity is where you want to paste
12 that. I think you can delete the remainder of what
13 you just inserted. I think we still have some
14 deletions but it's closer.

15 CHAIRWOMAN BAILEY: And which does not
16 meet all the requirements?

17 COMMISSIONER BALCH: So I think we are
18 trying to make a 7 that covers everything done in 5
19 and 6 for single-walled, so you still have to have
20 the ability to retrofit if they choose to do so. So
21 if it does not demonstrate integrity, the operator
22 needs to retrofit it or properly drain and remove.

23 COMMISSIONER BLOOM: I don't know about
24 that. I think if it meets -- if it doesn't meet 1
25 through 4 but demonstrates integrity it can

1 continue, right?

2 COMMISSIONER BALCH: Or it could be
3 retrofitted or removed. If it doesn't demonstrate
4 integrity.

5 COMMISSIONER BLOOM: But if it
6 demonstrates integrity it could be repaired?

7 COMMISSIONER BALCH: Maybe there's extra
8 language in there at the moment. After -- right
9 there where it starts with equip?

10 COMMISSIONER BLOOM: You need everything
11 else, correct?

12 CHAIRWOMAN BAILEY: Now, we want to keep
13 the last portion for closing, so you delete up to
14 the end of NMAC, the line above. There.

15 COMMISSIONER BLOOM: Back one.

16 CHAIRWOMAN BAILEY: Back two. After NMAC.
17 There.

18 COMMISSIONER BLOOM: Try deleting that.

19 COMMISSIONER BALCH: I think if you delete
20 the last sentence now, that would be fine.

21 COMMISSIONER BLOOM: Yeah.

22 CHAIRWOMAN BAILEY: So that sentence can
23 be deleted.

24 COMMISSIONER BLOOM: I think I'm finally
25 happy with that.

1 COMMISSIONER BALCH: Read the last
2 sentence. I'm not sure that works. Oh, I see.
3 There's an "or close" --

4 COMMISSIONER BLOOM: Two closes. I don't
5 know that this --

6 COMMISSIONER BALCH: Did we lose something
7 that we didn't need to lose? Hit Control Z real
8 quick.

9 COMMISSIONER BLOOM: Does this need a
10 date?

11 COMMISSIONER BALCH: There was a date.

12 COMMISSIONER BLOOM: It's there but I
13 don't know that we need it.

14 COMMISSIONER BALCH: It would have been
15 addressed by the original regulation, right?

16 CHAIRWOMAN BAILEY: Well, it says if it
17 was constructed and installed prior to the effective
18 date of this amendment.

19 COMMISSIONER BALCH: That could be --

20 CHAIRWOMAN BAILEY: So it's grandfathering
21 in the double-walled below-grade tanks that don't
22 meet the requirements and may not demonstrate
23 integrity, then they shall promptly drain, remove
24 from service or comply with closure.

25 COMMISSIONER BLOOM: Wouldn't we close it

1 immediately if it doesn't meet integrity?

2 COMMISSIONER BALCH: Well, the first thing
3 you do, closure is a process. You have to do X, Y
4 and Z.

5 COMMISSIONER BLOOM: Remove it from
6 service, I guess.

7 COMMISSIONER BALCH: Draining is removing
8 the risk and the rest of it can take as long as it
9 needs to, I suppose. Draining and remove from
10 service.

11 COMMISSIONER BLOOM: I'm wondering if we
12 deleted everything after the last NMAC there.

13 CHAIRWOMAN BAILEY: I think that's a good
14 idea.

15 COMMISSIONER BLOOM: Maybe that's what we
16 want to do.

17 COMMISSIONER BALCH: Are we being
18 consistent enough?

19 MR. SMITH: I think so.

20 COMMISSIONER BALCH: Then I'm happy with
21 this.

22 CHAIRWOMAN BAILEY: So we have 5, 6 and 7.
23 I would like to go back to some comments I made
24 concerning the Water Quality Control Commission and
25 what the regulations are concerning discharges.

1 20.6.2.3101 of the Water Quality Control Commission
2 regulations says that "The purpose of Sections
3 20.6.2.3000 through 20.6.2.3114 NMAC controlling
4 discharges onto or below the surface of the ground
5 is to protect all groundwater in the state of New
6 Mexico which has an existing concentration of 10,000
7 milligrams per liter or less TDS for present and
8 potential future use as domestic and agricultural
9 water supply and to protect those segments of
10 surface water," and it goes on.

11 Sections 20.6.2.3000 through 20.6.2.3114
12 NMAC are written so that in general, one, "If the
13 existing concentration of any water contaminant in
14 groundwater is in conformance with the standard of
15 20.6.2.3103 NMAC" -- and here is the part that I was
16 referencing -- "degradation of the groundwater up to
17 the limit of the standards will be allowed, and if
18 the existing concentration of any water contaminant
19 in groundwater exceeds the standard of Section
20 20.6.2.3103 NMAC, no degradation of the groundwater
21 beyond the existing concentration will be allowed."

22 So that was the reference I was making as
23 far as allowing the concentration that Mr. Mullins
24 was indicating would be the maximum that would reach
25 groundwater. And if that groundwater is below the

1 standards, the industry proposes that it will still
2 be allowable under the Water Quality Control
3 Commission regulations.

4 COMMISSIONER BLOOM: Mr. Mullins gave us
5 chlorides but not TDS, correct?

6 CHAIRWOMAN BAILEY: Right.

7 COMMISSIONER BALCH: I think so.

8 COMMISSIONER BLOOM: TDS limit is 250?

9 CHAIRWOMAN BAILEY: No.

10 COMMISSIONER BLOOM: I'm sorry, the
11 chloride limit.

12 CHAIRWOMAN BAILEY: Chloride limit is 250
13 for domestic water supply. That's 250 milligrams
14 per liter.

15 COMMISSIONER BALCH: And protected water
16 is everything below 10,000 TDS.

17 CHAIRWOMAN BAILEY: Right. Okay. So
18 that's in the record now. So we can continue on to
19 J having to do with multi-well fluid management
20 pits, and this is a whole new section to talk about
21 the design and construction of the pit to ensure
22 confinement of liquids to prevent unauthorized
23 releases, and it talks about the liner that is
24 required, and as was brought out, there is nothing
25 in the rule that says they are requiring a

1 geomembrane bottom liner?

2 It gives geomembrane liner and leak
3 detection system requirements without respect for
4 the leak detection system, and it gives a thickness
5 requirement for the geomembrane liner.

6 Commissioners, do you have opinions on any part of
7 this section or all of the section?

8 COMMISSIONER BLOOM: I think it might be
9 helpful if we can review what we talked about
10 yesterday for the multi-well pits.

11 CHAIRWOMAN BAILEY: Yes.

12 COMMISSIONER BLOOM: I remember we
13 discussed in terms of the liners going with what's
14 described permanently for permanent pits.

15 CHAIRWOMAN BAILEY: Right.

16 COMMISSIONER BLOOM: I'm just trying to
17 find where we went over that. Did we draft some
18 language for that?

19 COMMISSIONER BALCH: We had a definition,
20 I think, because that is mostly complete except for
21 the on-site and off-site component. Page 2. I
22 think we are looking at the same attachment.

23 COMMISSIONER BLOOM: I'm looking at what
24 Theresa sent us yesterday after we finished. Maybe
25 if we want to scroll up to the definitions.

1 COMMISSIONER BALCH: Yeah, because I
2 didn't print that out. It should be on Page 2.

3 COMMISSIONER BLOOM: K. Scroll to K,
4 please. All right.

5 CHAIRWOMAN BAILEY: And your comment was?

6 COMMISSIONER BLOOM: So I guess we have
7 that there that we drafted yesterday and then I was
8 just trying to remember if we drafted any language
9 about liner standards for multi-well pits.

10 COMMISSIONER BALCH: In section --

11 COMMISSIONER BLOOM: I see where it is.

12 COMMISSIONER BALCH: 17.9B4.

13 COMMISSIONER BLOOM: Okay.

14 COMMISSIONER BALCH: We were talking about
15 permit registration application. We also talked
16 about multi-well pits.

17 COMMISSIONER BLOOM: I need to review
18 that.

19 COMMISSIONER BALCH: Should be on Page 7.

20 COMMISSIONER BLOOM: Looks like we did not
21 draft any language pertaining to --

22 COMMISSIONER BALCH: We had discussion
23 about -- there was another place in here. We had
24 some discussion -- actually, I think it was in that
25 section -- about whether or not they were

1 appropriately grouped as temporary pits or if they
2 should be with the permanent pits or they should be
3 a third classification.

4 CHAIRWOMAN BAILEY: I had thrown out the
5 idea that maybe multi-well fluid management pits
6 would fall under the same permit requirements as a
7 permanent pit.

8 COMMISSIONER BALCH: But I think they were
9 also not a temporary pit.

10 CHAIRWOMAN BAILEY: Right. They are a
11 hybrid between a permanent pit and the temporary
12 pit, as far as I can see.

13 COMMISSIONER BALCH: So really a third
14 classification with its own set of siting criteria,
15 liners would probably be appropriate to discuss.

16 CHAIRWOMAN BAILEY: Yes.

17 COMMISSIONER BALCH: I concur with that.

18 COMMISSIONER BLOOM: It would help going
19 back to the definition of on-site/off-site. I give
20 that a little thought every evening. I think on or
21 off-site could work, particularly when we are
22 talking about a multi-well fluid management pit
23 which would be fluids out to development or unit, so
24 would that be agreeable?

25 COMMISSIONER BALCH: You want something

1 that large with potential impact to be sited
2 correctly, not sited -- you want them to be able to
3 site it where they can comply. It may or may not be
4 right on-site.

5 COMMISSIONER BLOOM: I guess I'm trying to
6 think if there's any down side to have it off-site
7 of the drilling location. I'm not sure I can think
8 of any.

9 CHAIRWOMAN BAILEY: I think as long as it
10 meets the siting requirements that we impose on
11 them, I think the construction is what we need to
12 talk about, what those standards are as far as
13 whether or not we are requiring geomembrane liners
14 similar to temporary pits or similar to permanent
15 pits. If we are requiring the leak detection
16 system, do we need to go into the same deal that a
17 permanent pit leak detection system requires? I
18 think that's the point of this Section J.

19 COMMISSIONER BALCH: So does that mean we
20 can go back to the definition K and take out the
21 highlighting? I think we can all agree about
22 on-site or off-site.

23 CHAIRWOMAN BAILEY: I believe we can.

24 COMMISSIONER BALCH: In that definition?

25 COMMISSIONER BLOOM: I believe we can.

1 COMMISSIONER BALCH: Now, in the broader
2 context of on-site or off-site we also talked about
3 a temporary pit that might be used by two wells or
4 used by a drilling.

5 COMMISSIONER BLOOM: I think I am still
6 struggling with that one. Why don't we come back to
7 that one.

8 COMMISSIONER BALCH: So the highlighting
9 in K can be removed and I think we can move to adopt
10 that section, Section K.

11 CHAIRWOMAN BAILEY: Okay. Do I hear a
12 motion to adopt it?

13 COMMISSIONER BLOOM: So moved.

14 COMMISSIONER BALCH: And second.

15 CHAIRWOMAN BAILEY: All in favor? Aye.

16 COMMISSIONER BLOOM: Aye.

17 COMMISSIONER BALCH: Aye.

18 CHAIRWOMAN BAILEY: None opposed. Okay.

19 For construction of a multi-well fluid management
20 pit we have for guidance construction requirements
21 that are part of temporary pits and we have
22 construction requirements that are part of permanent
23 pits. If we want to have a comparison, the
24 construction requirements for temporary pits are
25 under Section F that talks about the foundation and

1 the slope and allows 20 mil string reinforced LLDPE
2 or equivalent. The permanent pit requirements are
3 in Section G and they talk about a foundation
4 construction with inside grade of the levee a
5 certain slope and the outside grade of three to one
6 instead of the two to one, with criteria for the
7 levee's top, for their width and installation of an
8 anchor trench.

9 The permanent pit requires both an upper
10 and a secondary lower liner with a leak detection
11 and the liners have to be 30 mil flexible PVC or 60
12 mil HDPE liner or an equivalent liner material with
13 certain specific hydraulic conductivity.

14 Do either of you want to adopt what's
15 given, which does not strictly follow either one of
16 the examples that we have here? Or to hybridize
17 them? It's given that we want to have a pit
18 designed and constructed to ensure confinement of
19 liquids to prevent unauthorized releases, so I think
20 we can just focus on No. 2 concerning the
21 construction and foundation and the anterior slopes.

22 The proposed language includes wording for
23 construction of a pit so the slope does not place
24 undue stress upon the liner and is consistent with
25 the angle of repose. Earlier, we did not allow that

1 one.

2 COMMISSIONER BALCH: How about if we
3 change the language back to "or no steeper than two
4 horizontal feet to one vertical feet."

5 CHAIRWOMAN BAILEY: Exactly.

6 COMMISSIONER BALCH: That was for -- the
7 primary purpose for not trying to be fancy about the
8 calculation was for ease of inspection.

9 CHAIRWOMAN BAILEY: Much easier to
10 enforce.

11 COMMISSIONER BALCH: Enforce. I think
12 multi-well fluid management pits are probably going
13 to be more closely examined, particularly initially
14 than a temporary pit. So you would hope that an
15 engineering design for such a pit would include a
16 description of the appropriate angle for the sides
17 if it was different from two to one.

18 CHAIRWOMAN BAILEY: But it may not
19 necessarily justify why it's more appropriate. But
20 what I'm hearing, we replace the language in 2 that
21 says that the slope does not place undue stress upon
22 the liner and is consistent with the angle of repose
23 with the language that we agreed to under temporary
24 pit --

25 COMMISSIONER BALCH: And which also exists

1 in permanent pits.

2 CHAIRWOMAN BAILEY: Right.

3 COMMISSIONER BALCH: So it's consistent.

4 CHAIRWOMAN BAILEY: So the interior slope
5 is no steeper than two horizontal feet to one
6 vertical foot, you could go to the temporary pit
7 paragraph.

8 COMMISSIONER BALCH: Page 14 or so.

9 CHAIRWOMAN BAILEY: F, copy the sentence
10 that says, "The operator shall construct a temporary
11 pit." Just that one sentence.

12 COMMISSIONER BALCH: I think we can go
13 past Section J. You can't fight Microsoft. If you
14 start with "the operator shall construct," and
15 delete from there to the end of the sentence we can
16 give you the new language.

17 CHAIRWOMAN BAILEY: Let's take a
18 five-minute break.

19 (Note: The deposition stood in recess at
20 3:11 to 3:16.)

21 CHAIRWOMAN BAILEY: We are back on the
22 record. The discussion had to do with the slope of
23 the multi-well fluid management pit where we were
24 going to use the same slope requirements of the
25 temporary pit for the slope requirements of the

1 multi-well fluid management pit. So the sentence
2 that is highlighted would be deleted and the
3 sentence would read, "The operator shall construct a
4 multi-well fluid management pit so that the slopes
5 are no steeper than two horizontal feet to one
6 vertical foot (2H:1V)."

7 COMMISSIONER BLOOM: Madam Chair, if we
8 were to stay with the permanent pit and construct
9 the guidelines here, the permanent pit has outside
10 grade no steeper than two horizontal to one vertical
11 foot.

12 CHAIRWOMAN BAILEY: Yes.

13 COMMISSIONER BLOOM: Do we want to
14 consider or discuss whether that would be
15 appropriate here?

16 COMMISSIONER BALCH: To me we're going to
17 talk risk versus reward. The reward of the
18 multi-well fluid management pit, the reason why I
19 think it's important is so you can streamline and
20 make more efficient operations, reduce waste and
21 reduce traffic on roads, gas tanks, et cetera. The
22 risk, because you are dealing with larger volumes of
23 water, is that the release would have a greater
24 impact. So you do want to have a stronger
25 protection and the permanent pit has a well defined

1 berm for inside and outside dimensions.

2 CHAIRWOMAN BAILEY: So we could take the
3 last two sentences of G1 where it says, "The levee
4 shall have an outside grade no steeper than three
5 horizontal feet to one vertical foot, (3H:1V); the
6 levy's top shall be wide enough to install an anchor
7 trench and provide adequate room for inspection and
8 maintenance." Is that what you are proposing to add
9 to the --

10 COMMISSIONER BLOOM: I am proposing we
11 discuss that.

12 COMMISSIONER BALCH: I think my answer was
13 I would support a very well built containment for
14 something that could be 80, 100 acre feet
15 potentially. You want to have a very large, very
16 secure containment.

17 COMMISSIONER BLOOM: As we have
18 constructed this until now, it could be out there
19 for four years, correct?

20 CHAIRWOMAN BAILEY: Yes.

21 COMMISSIONER BALCH: In theory, yes.

22 COMMISSIONER BLOOM: So I propose using
23 that language again.

24 CHAIRWOMAN BAILEY: Then we are all in
25 agreement with adding that sentence to J2?

1 COMMISSIONER BALCH: That would be after
2 the 2H:1V. I think it's also important to leave the
3 language in there that says that the appropriate
4 division office may approve an alternative if the
5 operator demonstrates he can construct and operate
6 the pit in a safe manner -- I wonder if we want to
7 change the language to the standard we have already
8 used in other places of equivalent or better.

9 CHAIRWOMAN BAILEY: Should we highlight
10 that language?

11 COMMISSIONER BALCH: We can read it the
12 way it is now. I think the place where you have to
13 change it is where it says, "To construct and
14 operate the pit in a safe manner to prevent" -- if
15 we are going to be consistent instead in that area
16 have "the equivalent or better protection."

17 CHAIRWOMAN BAILEY: So provide equivalent
18 or better protection against contamination of
19 freshwater and to protect public health and the
20 environment?

21 COMMISSIONER BALCH: Something along those
22 lines. Do you recall, Commissioner Bloom, where we
23 used that before?

24 COMMISSIONER BLOOM: Right. I would be
25 supportive of something along those lines.

1 COMMISSIONER BALCH: We used an equivalent
2 or better standard in other places so far, and the
3 way this one reads, it doesn't have to be
4 equivalent. It could just be safe. Now, I presume
5 that that's going to mean it's going to be better or
6 equivalent. We may want to be more clear that it
7 has to be equivalent or better.

8 CHAIRWOMAN BAILEY: So we could include
9 that language, as I said a while ago. Only I can't
10 remember what I said a while ago. Can construct and
11 operate the pit in a manner that is --

12 COMMISSIONER BALCH: That provides
13 equivalent or better.

14 CHAIRWOMAN BAILEY: That's right. To
15 operate the pit --

16 COMMISSIONER BALCH: Operate the pit --

17 CHAIRWOMAN BAILEY: In a manner that
18 provides --

19 COMMISSIONER BALCH: Equivalent or better
20 protection. And I think you could say "to
21 freshwater, public health" and take out "to prevent
22 contamination."

23 COMMISSIONER BLOOM: Freshwater, public
24 health and the environment?

25 COMMISSIONER BALCH: Yes.

1 CHAIRWOMAN BAILEY: Because that will
2 allow construction in the area where topographic
3 problems may arise that would prevent that type of a
4 requirement.

5 COMMISSIONER BALCH: And I think more
6 importantly -- that's philosophical again -- one of
7 the complaints that was brought up in the testimony
8 about the original Rule 17 was that it was not
9 flexible enough to allow for improvements. If you
10 came up with a better way to do it, the only way you
11 could do it was with an exception. This allows the
12 possibility of coming up with a better way than we
13 defined and it should let the rule last longer.

14 CHAIRWOMAN BAILEY: We can go to the next
15 paragraph that has to do with the liners and leak
16 detection system. If we are unhappy with that
17 particular paragraph we can borrow from either the
18 temporary pit section that says -- that deals
19 with --

20 COMMISSIONER BLOOM: Madam Chair, before
21 we move on, may I point out the permanent pit
22 specifies that most changes would have to be
23 approved by the Environmental Bureau and the
24 Division Santa Fe Office?

25 CHAIRWOMAN BAILEY: For permanent pits,

1 yes.

2 COMMISSIONER BLOOM: For permanent pits.

3 COMMISSIONER BALCH: Permanent pits.

4 COMMISSIONER BLOOM: Are we comfortable
5 referring this to the division?

6 CHAIRWOMAN BAILEY: The district, the
7 appropriate district area, yes.

8 COMMISSIONER BALCH: I think I'm
9 comfortable with it because it is not going to be
10 there -- it's going to be there at most between two
11 and four years, whereas the permanent pit could be
12 there for 30 years, and I think you definitely want
13 to have oversight for something that will be there
14 that long.

15 COMMISSIONER BLOOM: The district office
16 will have an engineering staff or some people with
17 background to make --

18 CHAIRWOMAN BAILEY: They currently approve
19 designs for temporary pits. It would not be a
20 stretch for them to be able to evaluate the design
21 of a multi-well pit.

22 COMMISSIONER BLOOM: Okay.

23 COMMISSIONER BALCH: And if that person in
24 the district office wasn't there, they would pass it
25 on to the office in Santa Fe, I would imagine.

1 CHAIRWOMAN BAILEY: Yes, there's a lot of
2 consultation back and forth.

3 COMMISSIONER BLOOM: Okay. Great. So we
4 move on to the liner and leak detection system?

5 CHAIRWOMAN BAILEY: Yes, Paragraph 3. We
6 do have a model under permanent pits. Paragraphs 2
7 and 3 deal with liners and leak detection systems,
8 as does Paragraph 4, so it would be 2, 3 and 4 as
9 far as selection of the liners.

10 COMMISSIONER BLOOM: Madam Chair, I would
11 be comfortable in using that same language from
12 Sections 2, 3 and 4 and including that in the
13 descriptions of the multi-well fluid management pit,
14 and I would suggest we consider adding the language
15 about anchoring in the bedrock or the -- I guess we
16 don't have to do that. We could then potentially
17 move that language over.

18 CHAIRWOMAN BAILEY: So copy the language
19 in G2, 3 and 4 paragraphs?

20 COMMISSIONER BLOOM: Correct.

21 CHAIRWOMAN BAILEY: The problem --

22 COMMISSIONER BALCH: I think we are still
23 discussing that.

24 CHAIRWOMAN BAILEY: Some of the issues --
25 and I'm not sure that it's arising here -- is the

1 specificity of detailed things such as the hydraulic
2 conductivity of a geomembrane liner. It already
3 specifies that it needs to be a 30 mil flexible PVC
4 or 60 mil HDPE liner or an equivalent liner that is
5 approved.

6 COMMISSIONER BLOOM: So one would hope
7 that those already have a hydraulic conductivity no
8 greater than one times ten to the negative nine --

9 CHAIRWOMAN BAILEY: Exactly. I don't know
10 that we need to go into this detail if we are just
11 going to adopt Paragraphs 2, 3 and 4 and change it
12 from division Santa Fe office to the appropriate
13 division district office.

14 COMMISSIONER BALCH: One of the reasons I
15 like things at the district level is that those are
16 people that are on the ground familiar with the
17 conditions, and I think from an initial assessment
18 of anything they will be more qualified than
19 somebody who is 200 miles away in a not so
20 air-conditioned office.

21 CHAIRWOMAN BAILEY: I strongly agree with
22 you. So is there anymore discussion on copying
23 Paragraphs 2, 3 and 4 from permanent pits and
24 inserting them instead of Paragraph 3 that's been
25 proposed to us?

1 COMMISSIONER BALCH: I want to make sure.
2 Let me run by the language here. I believe that's
3 acceptable to me. Also I'm curious about the
4 differences between essentially 4 -- I haven't read
5 them yet -- in J and Section 5 which has to do with
6 liner seams.

7 CHAIRWOMAN BAILEY: That comes next.

8 COMMISSIONER BLOOM: That will be the next
9 one. We move down on the multi-well fluid
10 management pits.

11 CHAIRWOMAN BAILEY: Theresa, go ahead and
12 copy Paragraphs 2, 3 and 4 from Section G and insert
13 them in place of the Proposed Paragraph 3 that we
14 have here. And that gives a multi-well fluid
15 management pit the same protection for upper and
16 secondary liners, geomembrane liners with leak
17 detection systems that may be -- that I believe are
18 necessary for pits that have no size limitations, no
19 volume limitations, that would be holding six
20 million gallons of water or more.

21 COMMISSIONER BALCH: I think it's
22 appropriate to treat them in the way you would a
23 permanent pit as far as the level of protection that
24 you give the environment from a fluid release. It's
25 very critical. Because a fluid release of that size

1 will have significant sheet flow, will have
2 significant infiltration and I think you are
3 actually protecting the operators here, because if
4 there was a release that's going to be one heck of a
5 cleanup.

6 CHAIRWOMAN BAILEY: If we look at
7 Paragraph 5 under the permanent pits, having to do
8 with the installation and how the liner seam should
9 be oriented in testing the seams, those requirements
10 that are so very specific as to even setting the air
11 pressure that should be required for testing, I
12 don't know that we need to get that specific again.
13 I'm looking at Paragraph 4 to see if that is
14 sufficient.

15 COMMISSIONER BALCH: I'm going to guess
16 the permanent pits are not terribly common.

17 CHAIRWOMAN BAILEY: They are not that
18 common. They are not rare, but the number is not
19 overwhelming.

20 COMMISSIONER BALCH: There were no
21 suggested changes by the parties to permanent pits.

22 CHAIRWOMAN BAILEY: Exactly.

23 COMMISSIONER BLOOM: During the
24 construction of permanent pits, isn't it probably
25 standard fare for some of the crews that work on

1 these to have such specificity as is desirable in
2 this case?

3 CHAIRWOMAN BAILEY: I don't know that an
4 OCD inspector would be able to tell whether or not a
5 seam was tested between 33 and 37 PSI.

6 COMMISSIONER BALCH: Seems awfully
7 specific.

8 CHAIRWOMAN BAILEY: It does. And I am
9 wondering if Paragraph 4 doesn't summarize the
10 salient points; that the company that is actually
11 installing one of these would be able to take care
12 of.

13 COMMISSIONER BLOOM: One of the
14 differences is that Paragraph 4 for the multi-well
15 fluid management pits doesn't require testing of the
16 seam and in Paragraph 5 we see that a test is
17 required but there's a lot of detail there. What if
18 we include language in Paragraph 4, the multi-well
19 fluid management pits that requires a test.

20 CHAIRWOMAN BAILEY: We could put it in
21 that second sentence. "The operator shall use
22 factory welded seams where possible. Field seams
23 shall be tested against leakage. Field seams shall
24 be tested to" --

25 COMMISSIONER BALCH: I would suggest an

1 alternative.

2 CHAIRWOMAN BAILEY: What do you have?

3 COMMISSIONER BALCH: If you take Paragraph
4 5 from the permanent pits definition for installing
5 the liner, and you remove the second and third
6 sentences, would the remainder of that accomplish
7 the goal?

8 CHAIRWOMAN BAILEY: Well, the second
9 sentence has to do --

10 COMMISSIONER BALCH: I'm sorry, the third
11 and fourth sentences. I missed a period there.
12 Where it starts with, "The operator shall ensure."
13 Actually, you might keep it up to "seamed" and lose
14 the specific information on how you are doing that,
15 because that will be a best practice that will be
16 more suited to the installation companies since you
17 will have the professionals.

18 Then if you remove everything from "hot
19 wedge" down to "shut off from the pocket," you
20 remove the specificity while retaining more -- I
21 think maybe what Mr. Bloom is trying to do is keep a
22 higher attention to the seams than is necessary for
23 a six to 12-month temporary pit with a smaller
24 volume.

25 COMMISSIONER BLOOM: Correct.

1 COMMISSIONER BALCH: Does that satisfy?

2 COMMISSIONER BLOOM: That would work.

3 COMMISSIONER BALCH: And do you think that
4 causes a complication?

5 CHAIRWOMAN BAILEY: No, I think that's a
6 nice compromise on that one.

7 COMMISSIONER BLOOM: So if we go to
8 Section G5 and you go to where --

9 CHAIRWOMAN BAILEY: Just copy the whole
10 thing over and then we can delete the sentences that
11 we need to.

12 COMMISSIONER BALCH: Now, that will be
13 easier than what I was going to try to do. Insert
14 it instead of Paragraph 4 in J.

15 COMMISSIONER BLOOM: Right. That
16 Paragraph 4, delete what 4 said.

17 COMMISSIONER BALCH: Go down to where the
18 first parentheses is to where it has "hot wedge."
19 Go to the beginning of the parentheses and delete
20 down to about four lines down where it says "pocket"
21 all the way on the other side. On the right-hand
22 side.

23 COMMISSIONER BLOOM: Go down another line.

24 COMMISSIONER BALCH: All the way to the
25 end. Delete that section there.

1 COMMISSIONER BLOOM: Then I might suggest
2 that on the last sentence we add at the end of that
3 so it would read, "Qualified personnel shall perform
4 field seaming and testing of field seams."

5 COMMISSIONER BALCH: I'm going to guess
6 that part of the field seam process is making sure
7 that the seam is going to work. It might be
8 redundant.

9 COMMISSIONER BLOOM: Just a reminder.

10 CHAIRWOMAN BAILEY: So you want to insert
11 in there "and testing."

12 COMMISSIONER BLOOM: And testing.

13 COMMISSIONER BALCH: That's less
14 redundant.

15 COMMISSIONER BLOOM: Okay. That will
16 work.

17 CHAIRWOMAN BAILEY: We are good. On to
18 Proposed Paragraph 5, "Construction shall avoid
19 excessive stress/strain on the liner."

20 COMMISSIONER BLOOM: I think we could
21 delete that. It seems to be --

22 COMMISSIONER BALCH: That's going to be
23 part of that.

24 COMMISSIONER BLOOM: Part of the standard
25 of putting in a liner.

1 COMMISSIONER BALCH: That's why you use
2 qualified personnel.

3 CHAIRWOMAN BAILEY: That's right. Instead
4 of having 5 -- oh, okay. Yes. That's fine. Go
5 ahead and delete 5. Go to 6, "Geotextile is
6 required under the liner." We have taken care of
7 that when we copied over sections from permanent
8 pit.

9 COMMISSIONER BALCH: How to grade it,
10 remove rocks and what not. That's already covered.

11 CHAIRWOMAN BAILEY: So can we delete
12 suggested language 6?

13 COMMISSIONER BLOOM: Where did we include
14 that?

15 COMMISSIONER BALCH: It's in the language
16 that we borrowed from the permanent pit. Each
17 permanent pit -- it's actually in the beginning
18 of -- it's in 2 of J, "The pit shall have a properly
19 constructed foundation and interior slopes
20 consisting of a firm, unyielding base, smooth and
21 free from rocks, debris, sharp edges or
22 irregularities," so I think that might be redundant.

23 CHAIRWOMAN BAILEY: Theresa, can you go up
24 a portion to make sure that we have that? Okay, we
25 have that right there. So we don't really need to

1 have it in 6, do we?

2 COMMISSIONER BLOOM: Where do we have it?

3 In 2?

4 CHAIRWOMAN BAILEY: We have it right
5 there. She is highlighting it.

6 COMMISSIONER BALCH: Basically, the firm
7 unyielding base will require them to do something,
8 either clay or geotextile base. I think that's
9 probably better left to professionals than us
10 telling them how to do it.

11 CHAIRWOMAN BAILEY: We need that
12 highlighted language because we received --

13 COMMISSIONER BALCH: Oh, yes.

14 COMMISSIONER BLOOM: So what we are saying
15 is repair the foundation by removing rocks, debris,
16 sharp edges but we are not requiring geotextile
17 liner.

18 COMMISSIONER BALCH: It's more than that.
19 You will have the foundation and interior slopes
20 consisting of a firm, unyielding base. You would
21 use a geotextile in a place where you may have
22 exposed bedrock and you wanted to smooth it out so
23 you have a smooth and unyielding base. So what you
24 are requiring them to do is what they are suggesting
25 in 6. You are just telling them exactly how to do

1 it.

2 CHAIRWOMAN BAILEY: Not necessarily,
3 because there's a difference between the geomembrane
4 liner and the geotextile that goes under that liner,
5 and 6 is requiring the geotextile to go under that
6 secondary liner to prevent or to further protect
7 that liner from any problems that may be
8 encountered.

9 COMMISSIONER BALCH: If you think we need
10 to be specific on a firm and unyielding base, that
11 that should probably be in there.

12 COMMISSIONER BLOOM: We could leave it.
13 If you look at the current proposed language for
14 fluid management pits, 2 above has the language
15 about "pit shall have a properly constructed
16 foundation and interior slopes consisting of a firm
17 and unyielding base," but then they elected to add
18 geo "textiles required."

19 COMMISSIONER BALCH: I think if you are
20 going to leave the language in, I would probably
21 leave it as a separate line item like this.

22 CHAIRWOMAN BAILEY: Are we leaving 6 as
23 proposed?

24 COMMISSIONER BLOOM: I think we should
25 leave it. Might it make sense to move it up?

1 CHAIRWOMAN BAILEY: To be a part of No. 2?

2 COMMISSIONER BLOOM: Correct. Since it
3 deals with preparing the base.

4 COMMISSIONER BALCH: Then it should go
5 between Sentence 1 and 2 of 2?

6 COMMISSIONER BLOOM: Yes.

7 CHAIRWOMAN BAILEY: Or should it go after
8 the first sentence in 3?

9 COMMISSIONER BALCH: It seems to really
10 have to do with the construction of the foundation.

11 CHAIRWOMAN BAILEY: Okay. So it goes in
12 2.

13 COMMISSIONER BLOOM: I think what is 2
14 right now, could you put that Paragraph 3 after the
15 end of the first sentence.

16 COMMISSIONER BALCH: Right after rupture
17 or tear?

18 COMMISSIONER BLOOM: There you go.

19 COMMISSIONER BALCH: That makes more
20 sense.

21 CHAIRWOMAN BAILEY: Then we go to
22 anchoring the edges of all liners in the bottom of
23 the compacted, earth-filled trench that's at least
24 18 inches deep. We have already copied in this
25 sentence.

1 COMMISSIONER BLOOM: Correct.

2 CHAIRWOMAN BAILEY: So we don't really
3 need to have this. We already have it up above, so
4 we don't need to have Proposed Sentence No. 7 or
5 Paragraph 7.

6 COMMISSIONER BLOOM: Okay.

7 COMMISSIONER BALCH: Agreed.

8 CHAIRWOMAN BAILEY: So we are deleting 7.

9 COMMISSIONER BALCH: I think 8 is
10 important because you are going to be having perhaps
11 larger than normal fluids, so I would leave that.

12 CHAIRWOMAN BAILEY: Okay. I agree.

13 COMMISSIONER BLOOM: The language from the
14 permanent pit Paragraph 6 is similar but a little
15 bit different. We might want to just compare them.

16 COMMISSIONER BALCH: I think they are
17 trying to say the same thing, but we may want to
18 borrow the language from permanent pits just to be
19 consistent.

20 CHAIRWOMAN BAILEY: Theresa, please copy
21 that in.

22 COMMISSIONER BALCH: That would be G6. I
23 think it wouldn't be anything remarkably different.
24 As long as the language in G6 is clear enough.

25 COMMISSIONER BLOOM: It's quite similar to

1 "shall not penetrate the liner."

2 COMMISSIONER BALCH: I think it says the
3 same thing but it uses different words.

4 COMMISSIONER BLOOM: Yes, exactly.

5 CHAIRWOMAN BAILEY: And insert it in place
6 of No. 8 of the proposed language. Then we need to
7 address the leak detection system which is in G7.

8 COMMISSIONER BALCH: Well, there's also
9 G2. Did we adopt G2? I think we did. "Each
10 permanent pit shall contain at a minimum a primary
11 upper liner, secondary lower liner for the leak
12 detection system appropriate to the site's
13 conditions."

14 CHAIRWOMAN BAILEY: I think we need to be
15 a little more specific than that.

16 COMMISSIONER BALCH: Okay.

17 CHAIRWOMAN BAILEY: But less specific than
18 what the current Paragraph 7 is. I think, once
19 again, it goes into more detail than is necessary.

20 COMMISSIONER BALCH: I think we have
21 adopted some of that language already.

22 CHAIRWOMAN BAILEY: But there are really
23 different kinds of leak detection systems, and not
24 all of them require visual monitoring. I mean,
25 there are a lot of details in Paragraph 7.

1 COMMISSIONER BLOOM: For example, down
2 towards the bottom you see, "The slope of the
3 interior sub-grade and of drainage lines and
4 laterals should be at least a 2 percent grade" and
5 it goes on to say "i.e., two feet vertical drop per
6 100 vertical feet."

7 CHAIRWOMAN BAILEY: Could you go down to
8 Paragraph 7, Theresa?

9 COMMISSIONER BALCH: Permanent pits?
10 Okay. Thank you.

11 COMMISSIONER BLOOM: Can we copy that and
12 move it down?

13 CHAIRWOMAN BAILEY: Yes, I think that
14 would be a good idea.

15 COMMISSIONER BLOOM: To the multi-well
16 fluid management pits.

17 CHAIRWOMAN BAILEY: In place of the
18 proposed Sentence 9. And you can delete the upper
19 sentence, please.

20 COMMISSIONER BLOOM: I recommend that we
21 delete the language starting at "i.e. two vertical
22 feet drop per 100 horizontal feet."

23 CHAIRWOMAN BAILEY: That necessarily
24 should go, yes, but I'm also thinking that language
25 after the sentence, "The leak detection system shall

1 constant of a properly designed drainage and
2 collection and removal system placed above the lower
3 geomembrane liner in depressions in slope to
4 facilitate the earliest possible leak detection."

5 If we start deleting typing -- and the
6 following sentence, "The material the operator
7 places shall be sufficiently permeable," I'm not
8 sure how much of that is necessary.

9 COMMISSIONER BALCH: I think you are
10 getting very specific about the design, and in my
11 opinion you want the regulation to reflect the
12 intent and allow best practices.

13 COMMISSIONER BLOOM: I agree with that.

14 COMMISSIONER BALCH: In the application.

15 CHAIRWOMAN BAILEY: So we could delete
16 everything beginning with the word "piping" and all
17 the way down but leaving the last sentence, changing
18 that -- yes, go ahead and delete. Changing the last
19 sentence to reflect that "The operator may install
20 an alternative method that the appropriate division
21 district office approves," and that would delete
22 "the Environmental Bureau in Santa Fe." Are we
23 happy with that?

24 COMMISSIONER BALCH: I think the intent is
25 to protect against leaks and detect them as early as

1 possible, and that captures that.

2 CHAIRWOMAN BAILEY: We are giving a
3 performance standard.

4 COMMISSIONER BLOOM: I agree with that.

5 CHAIRWOMAN BAILEY: That takes us to
6 Proposed Paragraph 10, "The operator shall design
7 and construct the pit to prevent run-on of surface
8 water. A berm, ditch, proper sloping or other
9 diversion shall surround the pit to prevent run-on
10 of surface water," which is essentially Paragraph 11
11 under permanent pits.

12 COMMISSIONER BALCH: Do we want to adopt
13 the same for consistency?

14 CHAIRWOMAN BAILEY: Shall we copy the
15 Paragraph 11 of permanent pits?

16 COMMISSIONER BLOOM: Yes, that will be
17 acceptable.

18 COMMISSIONER BALCH: Permanent pits, so
19 G11. That would be a multi-well fluid management
20 pit instead of a permanent pit. Multi-well fluid
21 management pit. Instead of multi management,
22 multi-well fluid management pit. You have to
23 replace the other permanent in the sentence with the
24 same phrase.

25 CHAIRWOMAN BAILEY: And delete the

1 language just above it. Okay. That takes us to
2 Section K.

3 MR. SMITH: Actually, I'm sorry. I think
4 there are other spots in here where you have
5 references to permanent pits.

6 CHAIRWOMAN BAILEY: That we need to clean
7 up the language?

8 MR. SMITH: You should probably check.

9 COMMISSIONER BALCH: Go up to 1 and we'll
10 read through it. Or if you can do a word search
11 from that point on the word "permanent."

12 MR. SMITH: First occurrence I know of is
13 in 3.

14 CHAIRWOMAN BAILEY: Right there.

15 COMMISSIONER BALCH: Oh, yes.

16 CHAIRWOMAN BAILEY: Okay, we need to
17 change "the Environmental Bureau of the Santa Fe
18 division office" to "the appropriate division
19 district office." And that's also in the first line
20 of that paragraph.

21 COMMISSIONER BALCH: I think you have to
22 take out "the Environmental Bureau" at the very
23 beginning of that sentence. It should read, "The
24 appropriate division district office."

25 CHAIRWOMAN BAILEY: And delete the next

1 few words. Paragraph 4 seems to be fine. Here is
2 the permanent pits. Okay. Next paragraph? I think
3 we're good.

4 MR. SMITH: Make a note to go back and
5 doublecheck that just in case.

6 CHAIRWOMAN BAILEY: The next section has
7 to do with burial trenches, closure and the way that
8 the liner should be constructed.

9 COMMISSIONER BLOOM: Madam Chair, if I
10 may, I'm going to have some concerns about deletion
11 of on-site burial, and perhaps we could deal with
12 that when we get to the section on closure after we
13 come back to this later and take on some of the
14 other recommendations and see if we can make it
15 through some of the operational requirements this
16 afternoon?

17 CHAIRWOMAN BAILEY: I agree with you that
18 that's an area where we will probably spend a lot of
19 time and we need to be fresh in order to do that.
20 So we would go on to 19.15.17.12, Operational
21 Requirements. The first proposed language change is
22 in A1, with the deletion of the words "closed-loop
23 system" as far as operate and maintain to contain
24 liquids and solids and maintain the integrity of the
25 liner, liner system or secondary containment

1 system." Since we are not permitting closed-loop
2 systems, we are simply being notified, the OCD is
3 being notified of the use of closed-loop systems, is
4 it appropriate to remove that language from this
5 paragraph?

6 COMMISSIONER BALCH: I think what you want
7 to delete is from closed-loop system through sump.
8 Would that be correct?

9 CHAIRWOMAN BAILEY: No, my copy says only
10 deleting closed-loop system.

11 COMMISSIONER BLOOM: I'm looking at that
12 version. I'm sorry, why again would we want to
13 delete closed-loop system?

14 CHAIRWOMAN BAILEY: Because the OCD will
15 simply be notified of the use of a closed-loop
16 system. They will not be permitting or registering
17 closed-loop systems.

18 COMMISSIONER BLOOM: Okay. As I'm looking
19 at this, it's simply about operating that system, so
20 they would operate it to contain liquids and solids
21 and the integrity of the liner, the liner system,
22 prevent contamination of freshwater, protect public
23 health and the environment. So I don't know that I
24 would remove it, because I think the closed-loop
25 systems should still be operated in a manner to

1 prevent contamination to the environment.

2 COMMISSIONER BALCH: Is this the IPANM
3 change?

4 CHAIRWOMAN BAILEY: Apparently so.

5 COMMISSIONER BALCH: You have that up
6 there but it's not highlighted. Because there's
7 also a closed-loop in the description of A.

8 CHAIRWOMAN BAILEY: That's right. So why
9 delete it in 1 if it's included in A?

10 COMMISSIONER BLOOM: I'm sorry?

11 COMMISSIONER BALCH: Just in the general
12 specifications there's also a closed-loop system.

13 COMMISSIONER BLOOM: May I ask, are there
14 guidelines for the operation of the closed-loop
15 system further down in the section here? Temporary
16 pits, permanent, below-grade tanks, sumps,
17 multi-well fluid management pits. I don't know that
18 there's any.

19 COMMISSIONER BALCH: I think the initial
20 regulation was addressing its closed-loops,
21 below-grade tanks and sumps all in one broad
22 category, several of which we have now separated out
23 as notification and others we have separated out as
24 registration. The operational requirements, I
25 think, would necessarily apply to things that are

1 registered, tanks and sumps and things like that.

2 But the closed-loop system I think we had
3 determined that you just want to know they are using
4 it. You don't want to tell them how to do it.

5 CHAIRWOMAN BAILEY: The concern has to do
6 with the drying pads associated with the closed-loop
7 system.

8 COMMISSIONER BALCH: Okay. So the risk is
9 from the material going through the drying pads and
10 contaminating the ground. So there's a risk and
11 therefore it should be addressed in the operational
12 requirements?

13 CHAIRWOMAN BAILEY: I think it's logical
14 to do that, particularly since closed-loop system is
15 included in the first sentence of A, the
16 introductory sentence there, which says that there
17 are requirements, yet as Commissioner Bloom pointed
18 out, there are no requirements that mention
19 closed-loop systems, so that may have been an error
20 on IPANM's part or it could be that --

21 COMMISSIONER BALCH: Well, in 5 there's a
22 mention of closed-loop systems in A, in 1, in 5.

23 CHAIRWOMAN BAILEY: But they have been
24 struck all the way through.

25 COMMISSIONER BALCH: Maybe we should talk

1 a little bit about the risk associated with the
2 drying pads.

3 COMMISSIONER BLOOM: Are drying pads
4 mentioned in the operational requirements?

5 CHAIRWOMAN BAILEY: I don't see that term
6 used in this section.

7 COMMISSIONER BALCH: They were brought up
8 in the findings of New Mexico Citizens for Clean Air
9 and Water.

10 CHAIRWOMAN BAILEY: Dr. Neeper testified
11 that drying pads left on the surface would leave
12 chlorides on the surface which would prevent any
13 kind of plant growth.

14 COMMISSIONER BLOOM: If we get to that,
15 wouldn't it be in closure?

16 CHAIRWOMAN BAILEY: It would be, as far as
17 what to do with any kind of waste material that's
18 left on location.

19 COMMISSIONER BLOOM: From the drying pad.

20 COMMISSIONER BALCH: How are the drying
21 pads typically located? Are they just mats rolled
22 out on the ground? Are they rolled out on a
23 contained pad or a liner material or anything like
24 that? How is that typically done?

25 CHAIRWOMAN BAILEY: I have not seen them

1 except in photographs.

2 COMMISSIONER BALCH: How do you remember
3 them being pictured?

4 CHAIRWOMAN BAILEY: I remember them in a
5 shallow hole actually. Just kind of spread out on
6 the surface of the ground.

7 COMMISSIONER BALCH: So if -- I hate to be
8 in the situation where we are trying to guess what
9 these things are made out of. The question would be
10 in my mind are they permeable, and apparently
11 Dr. Neeper thinks that they are.

12 CHAIRWOMAN BAILEY: Yes.

13 COMMISSIONER BALCH: And that basically
14 the shaker is going to have solids, rocks, chunks
15 that come out of the wellbore that they don't want
16 to recirculate in the mud.

17 CHAIRWOMAN BAILEY: Let's go back to H. H
18 deals specifically with drying pads associated with
19 closed-loop systems. H we have already discussed
20 and talked about.

21 COMMISSIONER BLOOM: Of section?

22 COMMISSIONER BALCH: Associated with
23 closed-loop systems. Around Page 17.

24 COMMISSIONER BLOOM: I see it.

25 COMMISSIONER BALCH: That's in the

1 previous section.

2 CHAIRWOMAN BAILEY: The one we discussed
3 earlier. Appropriate liners that prevent
4 contamination.

5 COMMISSIONER BALCH: So now you are going
6 to put them on a liner of some sort or a shallow
7 trench with a liner so they are not just being
8 thrown out on the ground.

9 CHAIRWOMAN BAILEY: And there are sumps to
10 collect liquids and there are berms to prevent
11 run-on.

12 COMMISSIONER BALCH: So in that sense, I
13 think we don't necessarily need to have them in the
14 operational requirements and that concern of
15 Dr. Neeper should be addressed by H1, 2 and 3.

16 MR. SMITH: May I say this? As I read the
17 section in Dr. Neeper's closing statement, he seems
18 to be concerned not just about protection of water
19 but about the deterioration of vegetation.

20 COMMISSIONER BALCH: Okay. So the way it
21 is proposed in 17.11 that we deal with drying pads
22 in closed-loop systems is that you essentially, the
23 way it's described in 1, 2 and 3, you make a shallow
24 trench, you will put in a liner, there will be a
25 berm to prevent run-on.

1 MR. SMITH: Okay.

2 COMMISSIONER BALCH: There will be a sump
3 to collect fluids and a method for collection of
4 solids. So the concerns, I think, by Dr. Neeper is
5 that if you went out to the site, the closed-loop
6 systems might have a drying pad just thrown on the
7 ground with no protection. In that case there would
8 be a risk to surface salt contamination.

9 I think that H1, 2 and 3 in 17.11 address
10 that concern. 1 is appropriate liners that prevent
11 contamination of pressure water; 2 is sumps to
12 facilitate the collection of liquids; and 3 is berms
13 that prevent run-on of surface water. So in the
14 sense that you are disrupting the surface in order
15 to make a safe place, you don't have the permanent
16 salt right there.

17 CHAIRWOMAN BAILEY: H discusses design and
18 construction for drying pads. 12A discusses
19 operation and maintenance of drying pads, so in H we
20 have required design and construction that will
21 prevent contamination of freshwater and protect
22 public health and the environment. In 12A we are
23 not requiring operation and maintenance to fit those
24 same standards.

25 COMMISSIONER BALCH: If you go with the

1 IPANM corrections.

2 CHAIRWOMAN BAILEY: If we delete
3 closed-loop systems from --

4 COMMISSIONER BALCH: If we leave the
5 closed-loop systems in there -- we are discussing
6 the installation. We should discuss the operation.

7 MR. SMITH: If you think there's a need to
8 discuss their operation. I mean, you don't need to
9 do stuff just for symmetry, but if you think there's
10 an issue there, there's a possibility of operating
11 and maintaining so that it's going to have an
12 adverse effect, then it's certainly appropriate.

13 COMMISSIONER BLOOM: Let me add something
14 here. We may perhaps want to add a section under
15 operational requirements for closed-loop systems.
16 Dr. Neeper pointed out on Page 12 of his closing
17 argument that the proposed rule does not require
18 repair of a leak at a sump or closed-loop system.
19 The code has no requirement to repair a leak at a
20 sump or closed-loop system. There's no technical
21 testimony indicating that the leaks should not be
22 repaired in a timely manner.

23 COMMISSIONER BALCH: Well, okay. I think
24 that by default a leak at a sump or probably even a
25 closed-loop system would fall under the Spill Rule

1 if there was a release. Sumps in general, although
2 we didn't put a size limit on them, are fairly
3 small. It would probably be under the remediation
4 requirement, for that matter.

5 CHAIRWOMAN BAILEY: Because they are only
6 supposed to contain de minimis for a short period of
7 time.

8 COMMISSIONER BALCH: Similarly with
9 closed-loop drying pads. You are not applying
10 significant liquid to that pad. You are basically
11 shaking out wet rock fragments on to it.

12 COMMISSIONER BLOOM: I'm wondering if he
13 might be referring to a leak somewhere else in the
14 closed-loop system.

15 COMMISSIONER BALCH: Well, maybe that
16 might be the case, but in H1, 2 and 3 where you are
17 describing the use of the drying pads. There's a
18 sump there that would catch the liquids, so there is
19 a safety mechanism. I don't know how you would get
20 five barrels -- if you prevent run-on, I don't see
21 how you would get five barrels of fluid there unless
22 the system failed, at which time you would be
23 looking at a release that would be dealt with by the
24 Spill Rule. If the closed-loop system sprang a leak
25 and started spraying water all over the place, that

1 would fall under the Spill rule, correct?

2 CHAIRWOMAN BAILEY: It would, and also I
3 question the enforceability of how do we enforce a
4 ban against prevention of freshwater and protection
5 of public health from the closed-loop system other
6 than through the Spill Rule.

7 COMMISSIONER BLOOM: As I read down more,
8 I think I see where Dr. Neeper's concern comes in.
9 It's under Section 12A, Paragraph 5. "If the pit"
10 and the proposal is to delete "closed-loop system or
11 sump," the proposal is to delete that.

12 CHAIRWOMAN BAILEY: I lost you.

13 COMMISSIONER BLOOM: Under operational
14 requirements, go down to 5. NMOGA has proposed
15 deleting closed-loop system or sump.

16 CHAIRWOMAN BAILEY: Yes, I see.

17 COMMISSIONER BLOOM: That, as it stands,
18 doesn't particularly work very well for closed-loop
19 because it talks about the operator shall remove all
20 equipment above the damage or leak within 48 hours
21 and the closed-loop system might not necessarily
22 have a liquid above.

23 COMMISSIONER BALCH: It's much more likely
24 in a closed-loop system if you had a release of
25 water that comes from a failure of a pipe or a

1 fitting.

2 COMMISSIONER BLOOM: Exactly.

3 COMMISSIONER BALCH: Which will be more
4 similar to like a salt water disposal pipeline
5 spill, which is very clearly defined under the Spill
6 Rule, I think.

7 COMMISSIONER BLOOM: I don't know. I
8 guess I would ask -- I don't know why we would
9 delete closed-loop system from 5. If we leave it in
10 there we have reason to leave closed-loop system in
11 the other parts preceding that of Section 12.

12 COMMISSIONER BALCH: I think the problem
13 with that Commissioner Bailey, is the enforceability
14 issue. I think the reason why the Spill Rule has a
15 lower limit on spills that are reported is probably
16 related to enforceability. If the spill is small, I
17 think the Spill Rule will interpret it necessarily,
18 but I think the assumption would be that it's not
19 going to cause a significant harm.

20 CHAIRWOMAN BAILEY: A minor release as
21 opposed to a major release.

22 COMMISSIONER BALCH: Right.

23 CHAIRWOMAN BAILEY: Which is why we have
24 the different volumes reported under each category.

25 COMMISSIONER BALCH: So in a similar

1 sense, if you had -- I think there's a couple cases
2 that might be concerning you, and I want the words
3 in your mouth. The first is if the sump overflows.
4 The second one might be if there's a failure in the
5 closed-loop system for some reason. If the
6 closed-loop system fails it will be during
7 operation. There will be people there and somebody
8 will say, "Oh, my God, the pipe broke. There's
9 water flying everywhere, turn it off."

10 COMMISSIONER BLOOM: What if the tank
11 leaked and it wasn't discovered until the tank was
12 moved?

13 COMMISSIONER BALCH: Related to the
14 closed-loop system?

15 COMMISSIONER BLOOM: Yes.

16 COMMISSIONER BALCH: There would be a wet
17 spot under the tank. I don't know what happens in
18 that case.

19 CHAIRWOMAN BAILEY: We will have to
20 address that when we get to testing the soils as to
21 how you address --

22 COMMISSIONER BALCH: That's a closure
23 question. However, we're not specifically
24 regulating under the proposed operations closed-loop
25 systems.

1 CHAIRWOMAN BAILEY: Correct. You are
2 putting them in the category of part of the
3 closed-loop system that we don't need to --

4 COMMISSIONER BALCH: On the other hand,
5 the closed-loop system is going to be installed on
6 top of a drilling pad which is a compacted material
7 and will provide some protection anyway.

8 COMMISSIONER BLOOM: That's true.

9 COMMISSIONER BALCH: So maybe -- I think
10 that the most likely scenarios, the risk, if you
11 will, is for a closed-loop system to fail in some
12 catastrophic manner which would probably be
13 identified immediately and shut off. And the other
14 one would be you have a large rain event or
15 something and you have an overflow of the sump, at
16 which point your greatest risk would be from the
17 material that's in the sump being diluted by some
18 amount and spread across some area. I think all
19 these sumps are sided by berms, right?

20 CHAIRWOMAN BAILEY: Right.

21 COMMISSIONER BALCH: They are bermed, so
22 you would have some way to try to at least minimize
23 that overflow and you are never going to be able to
24 stop everything. I think one of the cases brought
25 out in the testimony was an example from Wyoming

1 where they had a very large spring runoff and a lot
2 of the drilling pits were overrun by that. But you
3 can't necessarily predict the one 50 year or
4 100-year event.

5 So the risk, though, in the case of a sump
6 is a relatively small volume, probably less than 15
7 barrels or so, 500 gallons, is what they typically
8 would run, being diluted and spread across an area.
9 The risk from the closed-loop system I think would
10 be during the operation and it would be most likely
11 immediately addressed by the crew that's working
12 there.

13 CHAIRWOMAN BAILEY: Probably a short-term
14 leak of a limited amount, limited volume of fluid.

15 COMMISSIONER BALCH: Similarly if you have
16 a tank associated with a closed-loop system that has
17 a small leak in it, that tank is going to be there
18 for a couple weeks and it's going to be on a pad so
19 you probably will notice water coming out. If it
20 was -- and why we are registering and examining
21 permanent tanks or below-grade tanks is those leaks
22 would be around for years and that's why you want to
23 make sure that you may attention to them. Because
24 over years then you'll have a significant leakage.

25 COMMISSIONER BLOOM: I guess one other

1 concern I have against removing the closed-loop
2 system from this language which requires repairs is
3 you wouldn't have any history or follow any trends
4 if those were developing in the closed-loop systems.

5 COMMISSIONER BALCH: I think to do that
6 you have to go back to the registering or permitting
7 of closed-loop systems. There's a notification.

8 COMMISSIONER BLOOM: Yeah.

9 COMMISSIONER BALCH: The only other thing
10 you could do -- perhaps there's a solution if you
11 add in the language in registration or notification
12 of a closed-loop system leak, notify when you close
13 it and if there were any associated spills greater
14 than -- but it still goes back to the Spill Rule.
15 If they are operating and they have a release
16 greater than five barrels they have to report it.
17 If it's less than five barrels it will on the pad
18 and already be picked up.

19 COMMISSIONER BLOOM: Right.

20 COMMISSIONER BALCH: So I think we run the
21 risk of doubling the regulation.

22 CHAIRWOMAN BAILEY: So in summary, do we
23 need to go ahead and delete the language of
24 closed-loop system in 12A1 or are we leaving that
25 reference to closed-loop system in 12A1?

1 COMMISSIONER BALCH: I think in A1,
2 leaving it in or taking it out really doesn't have
3 an impact.

4 CHAIRWOMAN BAILEY: Particularly since it
5 is remaining in the introductory sentence for A,
6 "General specifications. Shall maintain operating
7 pit or closed-loop system in accordance with the
8 following requirements." But there are no
9 requirements that are specifically aimed towards
10 closed-loop systems --

11 COMMISSIONER BALCH: Not in the
12 modifications.

13 CHAIRWOMAN BAILEY: -- if we remove that
14 language in A1.

15 COMMISSIONER BALCH: It's really kind of a
16 nudge. It's a reminder to operate it.

17 COMMISSIONER BLOOM: I guess I would say
18 leave it, but --

19 CHAIRWOMAN BAILEY: It doesn't hurt
20 anything by being there. It's setting a standard.

21 COMMISSIONER BLOOM: Exactly.

22 MR. SMITH: Are you all's version of
23 closed-loop system crossed out of A1?

24 CHAIRWOMAN BAILEY: In my version it is.

25 COMMISSIONER BALCH: A1 but not in A, and

1 it's crossed out in 5 as well.

2 MR. SMITH: Because it isn't crossed out
3 in A1 in --

4 COMMISSIONER BALCH: In the NMOGA
5 proposal. I think the second version of the
6 proposal. That was IPANM's recommendation.

7 MR. SMITH: When was that submitted? Do
8 you know?

9 CHAIRWOMAN BAILEY: From the IPANM? The
10 27th.

11 COMMISSIONER BALCH: Maybe if we deal with
12 5 first then 1 and A will be --

13 CHAIRWOMAN BAILEY: It will become
14 apparent. Okay. Let's go to Paragraph 2 that has
15 reasonably inserted in my version. It's not
16 inserted in your version.

17 COMMISSIONER BLOOM: Where is that?

18 CHAIRWOMAN BAILEY: Paragraph 2 I have,
19 "The operator shall recycle, reuse or reclaim or
20 dispose of all drilling fluids in a manner approved
21 by the division rules that reasonably prevents the
22 contamination of freshwater and protects public
23 health and the environment."

24 MR. SMITH: The inference there is the
25 division rules might unreasonably prevent

1 contamination. I don't think you want to build that
2 into your document.

3 COMMISSIONER BALCH: I think the sticky
4 point is the word "prevents" because that's an
5 absolute.

6 MR. SMITH: I understand that.

7 COMMISSIONER BALCH: You probably want to
8 change the word "prevents" to "protects" or
9 something like that instead.

10 CHAIRWOMAN BAILEY: Or we don't include
11 the word at all.

12 COMMISSIONER BALCH: I don't know if you
13 can prevent anything absolutely.

14 MR. SMITH: You can just take everything
15 out after division rules. Why do you have to
16 qualify division rules at all?

17 COMMISSIONER BALCH: The division rules
18 already hold that you need to protect public health,
19 safety and water.

20 COMMISSIONER BLOOM: Are we qualifying the
21 manner?

22 CHAIRWOMAN BAILEY: In a manner approved
23 by division rules. If we remove the comma after
24 manner, that puts all "recycle, reclaim, reuse or
25 disposal of all drilling fluids" under the

1 jurisdiction of the division rules.

2 COMMISSIONER BALCH: That's pretty much
3 everything you would do with them. Other places in
4 the rule already state about public safety and all
5 that.

6 CHAIRWOMAN BAILEY: I'm not sure that the
7 division wants to get into every request to reuse
8 drilling mud at another location or recycle drilling
9 mud for use at another well.

10 COMMISSIONER BALCH: Actually, you
11 probably want to encourage the reuse of fluids.

12 CHAIRWOMAN BAILEY: Yes, we do. And it
13 would simply create a problem and a time delay if
14 every request to recycle, reuse or reclaim drilling
15 fluids -- now, disposal is something that we are
16 involved with, but I'm not sure --

17 COMMISSIONER BALCH: But division rules, I
18 think if you stop there and take out the comma, as
19 suggested, I think it would capture the intent.

20 CHAIRWOMAN BAILEY: Okay.

21 MR. SMITH: Well, in reality, division
22 rules don't really approve manners, do they?

23 CHAIRWOMAN BAILEY: Oh, yeah.

24 MR. SMITH: They set forth --

25 COMMISSIONER BALCH: They tell you how to

1 do it.

2 MR. SMITH: Procedures.

3 COMMISSIONER BALCH: You can put in
4 procedures.

5 MR. SMITH: Well, no. My concern is with
6 the word "approval."

7 COMMISSIONER BALCH: Designated?

8 CHAIRWOMAN BAILEY: If we have a rule that
9 requires approval of recycling or reuse, then
10 whatever they do for recycling and reuse would fall
11 under that all-inclusive category of division rules.

12 MR. SMITH: Consistent with division
13 rules?

14 CHAIRWOMAN BAILEY: That would not require
15 a process.

16 COMMISSIONER BLOOM: I think that could
17 work.

18 COMMISSIONER BALCH: So remove "approved"
19 and "by" and replace "by" with "with."

20 CHAIRWOMAN BAILEY: I like that.

21 COMMISSIONER BALCH: Are you okay with
22 that?

23 COMMISSIONER BLOOM: I will be okay with
24 that.

25 COMMISSIONER BALCH: I think it's fine.

1 COMMISSIONER BLOOM: We have outlined we
2 are operating in a manner to prevent contamination
3 of freshwater, protect public health and the
4 environment above and we are asking people to
5 recycle, reuse or reclaim, so yes.

6 CHAIRWOMAN BAILEY: Then we go to
7 Paragraph 4. "If any pit liner's integrity is
8 compromised or any penetration of the liner occurs
9 above the liquid's surface, then the operator shall"
10 and the proposed language is "notify the division
11 district office within 48 hours of the discovery
12 with a verbal plan," which changes notification
13 requirements for potential leaks in the liner.

14 The OCD has a suggested language
15 replacement. "If any pit liner's integrity is
16 compromised above the liquid's surface, then the
17 operator shall repair the damage or replace the
18 liner within 48 hours of discovery or seek a
19 variance from the appropriate division district
20 office."

21 COMMISSIONER BALCH: I think the concern
22 here was you had 48 hours to report it under the
23 existing Rule 17 and then what? Then you didn't do
24 anything until somebody told you what to do. So the
25 risk is if you have a problem within the pit liner's

1 integrity, the risk is you will have a leak. And
2 the thing that you want to do right away is fix it.
3 So I kind of like the idea of fix it and then we
4 will figure out how to take it from there. Do
5 something right away.

6 CHAIRWOMAN BAILEY: I don't see that we
7 need to delay approval of how to fix it when an
8 operator can go ahead and fix it and notify the
9 district office that they had repaired it.

10 COMMISSIONER BALCH: Even if they have a
11 roll of duct tape they can at least patch the hole
12 and call you. If you tell them to do more than duct
13 tape they can do more, but you stop the leak in the
14 short-term.

15 CHAIRWOMAN BAILEY: Commissioner Bloom, do
16 you have an opinion on No. 4?

17 COMMISSIONER BLOOM: I thought that OCD's
18 language looked acceptable. I wanted to review that
19 one more time.

20 COMMISSIONER BALCH: Their modification
21 seems to be specific to the case of a tear in the
22 liner above the liquid surface.

23 COMMISSIONER BLOOM: They both are, but 5
24 below addresses penetration that's not necessarily
25 above the liquid surface.

1 COMMISSIONER BALCH: Since I misread 4
2 already and I clearly misunderstood what OCD's
3 modification said, that might be better written.

4 COMMISSIONER BLOOM: That's better written
5 than the OCD's requirement that a repair take place
6 within 48 hours, not that it be initiated within 48
7 hours.

8 CHAIRWOMAN BAILEY: So we could strike the
9 proposed language that says "notify the division
10 district office within 48 hours of the discovery
11 with a verbal plan," and have the sentence read,
12 "Then the operator shall repair the damage or
13 replace."

14 COMMISSIONER BALCH: "Initiate
15 replacement" I think would be better. It might not
16 be something that you can do immediately.

17 CHAIRWOMAN BAILEY: "Or initiate
18 replacement of the liner within 48 hours or seek a
19 variance from the appropriate district office."

20 COMMISSIONER BALCH: I think I still think
21 that the OCD recommendation is a little more clear
22 than what we have now. Their recommendation for
23 that section is that it reads, "If any pit liner's
24 integrity is compromised above the liquid surface,
25 then the operator shall repair the damage or replace

1 the liner within 48 hours of discovery or seek
2 variance with the appropriate division district
3 office."

4 CHAIRWOMAN BAILEY: That's what I support.

5 COMMISSIONER BALCH: I think that's very
6 clear. Since we are dealing with below the liquid
7 surface in 5, that clearly states what you are doing
8 with 4.

9 CHAIRWOMAN BAILEY: Thank you for giving
10 the hard copy to Theresa so she can have an easier
11 time. It's a quarter to 5:00 and I think we are all
12 pretty loopy at this point.

13 COMMISSIONER BALCH: Is it possible to
14 replace the liner in 48 hours?

15 CHAIRWOMAN BAILEY: That's why we say
16 initiate.

17 COMMISSIONER BALCH: Initiate replacement.

18 CHAIRWOMAN BAILEY: It will probably be
19 pretty difficult but you can initiate replacement of
20 the liner within 48 hours of discovery or seek a
21 variance.

22 COMMISSIONER BLOOM: Repair the damage or
23 initiate replacement of the liner within 48 hours of
24 discovery.

25 COMMISSIONER BALCH: Or seek a variance.

1 Seeking a replacement might be making a phone call.

2 MR. SMITH: Initiating repair or
3 replacement.

4 CHAIRWOMAN BAILEY: Replacement.

5 MR. SMITH: So you want to take initiate
6 out there. That should be repair.

7 COMMISSIONER BALCH: Four or five words
8 down the line. There you go. Now change "replace"
9 to "replacement of, or seek a variance from the
10 appropriate division district office."

11 CHAIRWOMAN BAILEY: I like that.

12 COMMISSIONER BALCH: And they have a Spill
13 Rule that keeps them from wanting to leave liquid in
14 the pits.

15 CHAIRWOMAN BAILEY: So Theresa, if you
16 would delete the paragraph above. Yes. I think
17 this is a good stopping point.

18 COMMISSIONER BLOOM: Can we push down to
19 the end of general specifications? I think we are
20 close.

21 CHAIRWOMAN BAILEY: The next, Paragraph 5
22 has to do with leak below the liquid surface. Do we
23 want to delete "the closed-loop system or sump" from
24 this paragraph?

25 COMMISSIONER BLOOM: We have --

1 COMMISSIONER BALCH: There's no pit liner
2 with a sump. There's no pit liner with a
3 closed-loop system.

4 COMMISSIONER BLOOM: If the sump develops
5 a leak.

6 CHAIRWOMAN BAILEY: Below the liquid
7 surface.

8 COMMISSIONER BLOOM: Then the operator
9 should remove the liquid above the damage of the
10 leak within 48 hours of discovery. Do we want the
11 same for closed-loop system, too? It gets tricky
12 but --

13 COMMISSIONER BALCH: I think if we are
14 going to go with notification for operation of
15 closed-loop system then you have to rely on the
16 Spill Rule --

17 COMMISSIONER BLOOM: Okay.

18 COMMISSIONER BALCH: -- for enforcement of
19 any leaks.

20 CHAIRWOMAN BAILEY: So we would delete
21 "closed-loop system" in the first line and the
22 second line and sump, which should only be holding
23 de minimis volumes for a short periods of time. So
24 we have all agreed to delete "closed-loop system or
25 sump" in the first line and the second line. Do we

1 want to delete "below-grade tank" in the second
2 line?

3 COMMISSIONER BLOOM: Below-grade tank is
4 referenced above it, so I think it might be
5 duplicative to have it again.

6 COMMISSIONER BALCH: If you read it, "If a
7 pit or below-grade tank develops a leak or any of
8 the pit liner occurs below the liquid surface, then
9 the operator shall remove all liquid above the
10 damage or leak within 48 hours of the discovery."
11 If you read it through without the cross-outs and
12 additions I think it makes sense to take out the
13 second "below-grade tank."

14 COMMISSIONER BLOOM: Yes, I agree.

15 CHAIRWOMAN BAILEY: I agree.

16 COMMISSIONER BALCH: It's repetitive.

17 CHAIRWOMAN BAILEY: Then the process is to
18 remove all liquids within 48 hours of discovery,
19 notify the division district office and repair
20 damage or replace the pit liner of below-grade
21 tanks. Shouldn't it have the same initiation within
22 48 hours?

23 COMMISSIONER BALCH: So if you took the
24 initiate replacement to the end of -- if you start
25 with "initiate replacement" and go to the end of 4

1 and replace everything after 4 right there, would
2 that do it? I believe in testimony the concern was
3 that the original Rule 17 forced replacement even if
4 the repair would fix the problem below the liquid
5 line, tear or leak.

6 CHAIRWOMAN BAILEY: So we should insert
7 "initiate repair or replacement? "Repair of the
8 damage or replacement of the liner"?

9 COMMISSIONER BALCH: They are already
10 removing all the liquids, so you remove the risk,
11 which I think is critical. So I think initiating
12 the repair or replacement within 48 hours is fine or
13 go for the variance.

14 COMMISSIONER BLOOM: The first appearance
15 of damage, would that be better replaced with leak?
16 You definitely don't want the "or" after the leak
17 there.

18 CHAIRWOMAN BAILEY: Shall remove all
19 liquid, comma.

20 COMMISSIONER BALCH: And a comma after
21 "discovery."

22 COMMISSIONER BLOOM: We might clean up the
23 beginning a little bit, too, and just say, "If a
24 below-grade tank develops a leak or if any
25 penetration" -- nevermind.

1 COMMISSIONER BALCH: I think you really
2 want to have a stop after leak and then if you
3 could -- maybe I should propose that it reads, "Then
4 the operator shall remove all liquids above the
5 leak. Then initiate repair of the damage or
6 replacement of the liner within 48 hours of the
7 discovery or seek a variance." That way you ensure
8 that the fluids are removed properly.

9 CHAIRWOMAN BAILEY: Then "The operator
10 shall initiate."

11 COMMISSIONER BALCH: Because if we left it
12 the way it was, they could have just called for a
13 variance without emptying the liquids.

14 COMMISSIONER BLOOM: Remove the liquids
15 immediately or in 48 hours.

16 COMMISSIONER BALCH: I think we used the
17 word "promptly" before.

18 CHAIRWOMAN BAILEY: "Shall promptly
19 remove"?

20 COMMISSIONER BALCH: "Shall promptly
21 remove all liquid."" What's the lawyer have to say
22 about promptly?

23 MR. SMITH: As long as it's reasonably
24 promptly.

25 COMMISSIONER BLOOM: Put that in there,

1 reasonably promptly.

2 MR. SMITH: I think better off -- oh,
3 promptly remove.

4 COMMISSIONER BLOOM: In this case it would
5 be seen as something inside of 48 hours.

6 MR. SMITH: You have not used promptly
7 elsewhere, have you?

8 COMMISSIONER BALCH: Yeah, we have another
9 instance of the word "promptly." It's for when we
10 were talking about the below-grade tanks that were
11 found to be --

12 MR. SMITH: Damaged?

13 COMMISSIONER BALCH: Not up to code. We
14 had the words "promptly drain" and then we went on
15 to remove and close the site. "Removal, replace and
16 close," so we had the word "promptly" before in that
17 context. Maybe the thing to do is move the 48 hours
18 up and say, "Then the operator shall within 48
19 hours." Then "initiate repair of the damage or
20 replacement of the liner or seek a variance." Take
21 the highlighted phrase and replace the word
22 "promptly" there. Does that make it better?

23 MR. SMITH: Well, is within 48 hours
24 promptly, as far as you're concerned?

25 COMMISSIONER BLOOM: I think that's pretty

1 much what we had before. Yes.

2 CHAIRWOMAN BAILEY: The comma after
3 "liquid" should be deleted.

4 COMMISSIONER BALCH: I think you can take
5 the operator out of the next sentence. It's already
6 implied.

7 MR. SMITH: No.

8 CHAIRWOMAN BAILEY: You have to have a
9 complete sentence. There would be no subject then.

10 MR. SMITH: You need to take the comma
11 out, I think, after the first occurrence of "liner"
12 in the second line. There you go.

13 COMMISSIONER BLOOM: Now it sounds like
14 the operator doesn't have to initiate repair or
15 replacement necessarily within 48 hours.

16 COMMISSIONER BALCH: We were already
17 talking about that.

18 MR. SMITH: Why don't you just say "within
19 48 hours of discovery, one, remove; two, initiate
20 repair, or seek a variance"?

21 COMMISSIONER BALCH: What happens in the
22 case where you can't get a truck out within 48
23 hours?

24 COMMISSIONER BLOOM: That's just initiate
25 replacement, right? So it would be okay.

1 COMMISSIONER BALCH: We have them removing
2 liquids within 48 hours. Obviously, you want it to
3 be as fast as possible.

4 COMMISSIONER BLOOM: That's what we had
5 there before.

6 COMMISSIONER BALCH: Within 48 hours of
7 discovery.

8 COMMISSIONER BLOOM: The existing language
9 is "The operator shall remove all liquid above the
10 damage within 48 hours."

11 CHAIRWOMAN BAILEY: I think the important
12 point is that the below-grade tank or pit should be
13 taken out of service until the leak or damage is
14 repaired. We should not require repair or
15 replacement of the liner if they determine that they
16 need to completely replace the tank.

17 COMMISSIONER BALCH: So maybe the thing to
18 do so is say, "Then the operator shall remove all
19 liquid above the leak, remove the pit or tank from
20 service." And remove the pit or tank from service.
21 Anything else would be up to them.

22 CHAIRWOMAN BAILEY: However they want to
23 fix the problem.

24 COMMISSIONER BALCH: It would be a pit or
25 tank or tank or pit.

1 MR. SMITH: Well, now, I'm sorry. I find
2 that sentence confusing because you are going to
3 have them remove liquid above the leak. That would
4 seem to imply that there could be liquid below the
5 leak. If there's liquid in the tank below the leak
6 how are they going to remove it from service.

7 COMMISSIONER BLOOM: That would be perhaps
8 implied.

9 CHAIRWOMAN BAILEY: And discontinue or
10 prevent additional fluids.

11 COMMISSIONER BALCH: If you have a tear in
12 the liner, a hole in the tank I think is different
13 from a tear in the liner. A hole in the tank, if
14 you get the liquids beneath the hole, the hole is
15 probably not going to expand. The tear in the
16 liner, if you leave liquids or load on the liner it
17 will expand and become larger.

18 CHAIRWOMAN BAILEY: The stress on the
19 liner continues.

20 COMMISSIONER BALCH: Right. So maybe the
21 thing to do is separate them. What's the intent?
22 The intent is to remove the risk of the leak. So
23 you need to remove the fluids that are going to
24 cause the leak. In the case of a tank that might be
25 different from the case of the lined pit. Once the

1 risk is removed, I don't think it's necessary to say
2 "repair, replace" or whatever. They will have to do
3 something. If we tell them they have to repair it
4 they will repair it but the better thing may be to
5 replace it or put a temporary tank or any number of
6 options.

7 COMMISSIONER BLOOM: It might be the last
8 day.

9 COMMISSIONER BALCH: Then they have the
10 fix the pit.

11 MR. SMITH: So you want them to remove the
12 liquid and discontinue use.

13 COMMISSIONER BALCH: Remove it from
14 service, yeah.

15 COMMISSIONER BLOOM: It would be easier to
16 separate pit and below-grade tank here and knock
17 them out?

18 COMMISSIONER BALCH: Have a 5 and a 6
19 instead of a 5? I think that might be better.

20 CHAIRWOMAN BAILEY: The whole concept
21 would be to discontinue additional fluids into
22 either the tank or the pit.

23 COMMISSIONER BALCH: The pit or tank has
24 to go out of service, and you have to get the liquid
25 level to a point where it's no longer a risk. And

1 in a lined pit, that would probably be all fluids.

2 CHAIRWOMAN BAILEY: So if they have
3 additional fluids; and two, the tank after they
4 remove the liquid above the leak.

5 COMMISSIONER BALCH: They remove the
6 liquid, remove the risk, and take it out of service
7 to maintain the risk being removed. I think you
8 still want to take it out of service. What was the
9 word we used when we talked about tanks? No longer
10 has structural integrity. It doesn't function the
11 way it's supposed to so it can't be used that way.

12 COMMISSIONER BLOOM: Why don't we leave 5
13 how it was and then in the second sentence, "Then
14 the operator can initiate can repair of the damage
15 or replace the liner or seek a variance"?

16 COMMISSIONER BALCH: Are we going to do
17 the pit first?

18 COMMISSIONER BLOOM: We don't need to
19 separate that. You could just --

20 COMMISSIONER BALCH: I think you have two
21 separate types of risk associated with the two types
22 of fluid containment. Because the tank is a rigid
23 structure generally. Steel with fiberglass or
24 composite. If you have a puncture it's probably not
25 going to get bigger if you remove the liquid above

1 that point. In a pit, you have a tear in the liner,
2 you leave the liquids in the pit, even if it's below
3 that tear you are still putting stress on the liner
4 and the tear could continue to spread down, which
5 would trigger another response cycle.

6 CHAIRWOMAN BAILEY: The language of 5 that
7 was originally given to us says, "develops a leak or
8 if any penetration of the pit liner occurs below the
9 liquid surface then the operator shall remove all
10 liquid above the damage or leak within 48 hours of
11 the discovery, notify the appropriate division
12 district office pursuant to Spill Rule and repair
13 the damage or replace the pit liner or below-grade
14 tank as applicable."

15 That seems to cover all of the issues and
16 we have worked around this for quite some time and
17 agreed that that language really is what needs to be
18 said.

19 COMMISSIONER BALCH: I think that maybe
20 falls where you might want to stop the initial risk
21 and slap a band-aid on it and work on fixing it.
22 Full circle.

23 COMMISSIONER BLOOM: Yeah.

24 CHAIRWOMAN BAILEY: So are we agreed to
25 use that language that was part of the original

1 proposed language?

2 COMMISSIONER BLOOM: I think so.

3 CHAIRWOMAN BAILEY: We will give Theresa
4 time to do that.

5 COMMISSIONER BLOOM: Do we have underlined
6 text anywhere else in the Pit Rule such as 4?

7 CHAIRWOMAN BAILEY: Run that by me again.

8 COMMISSIONER BLOOM: Do we have underlined
9 text anywhere else in the pit rule?

10 COMMISSIONER BALCH: It might be a track
11 changes thing.

12 CHAIRWOMAN BAILEY: Yes, in the next
13 section we do under temporary pits and under
14 below-grade tanks. We have quite a bit.

15 COMMISSIONER BALCH: The reason they put
16 an "or," that's actually track changes because they
17 had to change the conjunction when they removed the
18 list of four things. Since they had this, this and
19 that, they have this or that.

20 COMMISSIONER BLOOM: Okay.

21 MR. SMITH: Is that what you want in 5?
22 You have remove the liquid. You don't have anything
23 about repairing.

24 COMMISSIONER BALCH: There's some material
25 missing between -- at the end of discovery. 48

1 hours of discovery, comma. I think your first
2 instinct was better, stop until tomorrow.

3 COMMISSIONER BLOOM: Do you want to
4 add "or seek a variance"?

5 COMMISSIONER BALCH: So right now, if they
6 have a leak below the liquid line they need to drain
7 it, they need to notify the appropriate division
8 office and repair the damage or replace it as
9 applicable, which gives them two options, and the
10 third might be to remove it from service. It's
11 already removed from as far as, but seems like they
12 have to then repair or replace it.

13 CHAIRWOMAN BAILEY: So really we don't
14 need a variance when we have a leak like that.
15 Okay. The last thing to contemplate in the
16 operational requirements Part A is whether or not to
17 require the maintenance of an oil absorbent boom or
18 other device to contain and remove oil from a pit's
19 surface. We had testimony on that to indicate that
20 that was unnecessary. They would call the truck
21 whenever there was sufficient oil for that to be
22 there; that booms deteriorate over time and --

23 COMMISSIONER BALCH: You might have to
24 pull it out of the closet and it falls apart.

25 COMMISSIONER BLOOM: I think we also heard

1 testimony that they went to deploy a boom and it
2 didn't work, which indicates a need for one.

3 COMMISSIONER BALCH: And testimony in
4 regards to this particular issue was if we tell them
5 to use a boom they won't have other options
6 available. They will rely on the boom. So it kind
7 of boxes them in to one response.

8 CHAIRWOMAN BAILEY: So Commissioner Balch,
9 do you --

10 COMMISSIONER BALCH: I prefer striking
11 that section.

12 CHAIRWOMAN BAILEY: Commissioner Bloom?
13 How do you feel?

14 COMMISSIONER BLOOM: Actually, I want to
15 keep it. I heard that someone reached for it, could
16 have used a boom. So it would have been good to
17 have one. It should have been kept in working
18 condition. If we want to make other options
19 available, I think we could do that.

20 COMMISSIONER BALCH: It does say "or other
21 device," but the other device from testimony there
22 would be a pumper truck and you can't leave that
23 on-site. You can get one.

24 CHAIRWOMAN BAILEY: I'm about to sneeze.

25 COMMISSIONER BALCH: What is the purpose

1 of the oil absorbent boom if you think about it?
2 They are used certainly in open water oil spills to
3 contain the oil from its natural chemical tendency
4 to spread into a very thin layer across a large
5 area. If you already have an enclosed pit, what are
6 you containing? You are using the boom to keep the
7 oil on one-half of the pit instead of spreading
8 across the entire pit? But by the time you notice
9 it, it's significant enough to cover the entire pit,
10 it's probably going to have already covered the
11 entire pit.

12 If you're going to use it to try to
13 contain a surface spill because there was a breach
14 in a berm or there was a run-on or something like
15 that, does an oil absorbent boom work the same way
16 when it's sitting on mud as it does when it's
17 sitting on water? I mean, I guess I don't know if
18 it necessarily does anything to reduce risk,
19 particularly in the case of an oil spill in a pit,
20 which is already contained and relatively small in
21 size. You are going to keep the oil in half the
22 pit?

23 COMMISSIONER BLOOM: I think we have heard
24 circumstances where one was needed. There was an
25 analogy during the hearing that, for example, OSHA

1 requires first aid kits at work sites or places of
2 work. Should they get rid of them and simply say,
3 "Call an ambulance?"

4 COMMISSIONER BALCH: I remember that
5 analogy.

6 CHAIRWOMAN BAILEY: A critical question is
7 how soon does oil have to be removed from the
8 surface of the pit if there's enough oil on the pit
9 to require corralling and removal? If it is a
10 critical situation, a boom is not going to be
11 sufficient to take care of the problem and a pumper
12 truck will have to be called in. If it is not a
13 critical situation then if it takes an hour or two
14 hours for a pumper truck to arrive to remove the oil
15 it doesn't make any difference.

16 COMMISSIONER BLOOM: Are there any
17 situations where there could be oil somewhere
18 outside of the pit at the site?

19 COMMISSIONER BALCH: That's why I am
20 wondering what a boom does if you are sticking it in
21 the mud? Does it do anything? I don't know that it
22 does.

23 COMMISSIONER BLOOM: It worked on sandy
24 beaches on spills.

25 COMMISSIONER BALCH: I suppose what is the

1 intent of having the boom on-site? If it's to
2 contain a large spill of oil moving across the land
3 surface, that's one issue. If it's to contain
4 within a relatively small pit or oil to one side of
5 it, I don't think it does anything. I think by the
6 time you notice it it's already covering the entire
7 pit anyway. If you have a very large release of oil
8 and it's spreading across land, then maybe it might
9 be something, but if your boom is designed to the
10 dimensions of a circulating mud pit, it may not be
11 long enough to do any good in that situation either.
12 So I guess I just don't know.

13 CHAIRWOMAN BAILEY: Let's think on this.

14 COMMISSIONER BLOOM: That's fine.

15 CHAIRWOMAN BAILEY: It's 5:15. We can
16 begin with this in the morning so we will reconvene
17 tomorrow morning at 9:00 o'clock.

18 (Note: The proceedings were adjourned for
19 the day at 5:15.)

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REPORTER'S CERTIFICATE

I, JAN GIBSON, Certified Court Reporter for the State of New Mexico, do hereby certify that I reported the foregoing proceedings in stenographic shorthand and that the foregoing pages are a true and correct transcript of those proceedings and was reduced to printed form under my direct supervision.

I FURTHER CERTIFY that I am neither employed by nor related to any of the parties or attorneys in this case and that I have no interest in the final disposition of this case.


JAN GIBSON, CCR-RPR-CRR
New Mexico CCR No. 194
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