

STATE OF NEW MEXICO  
ENERGY, MINERALS, AND NATURAL RESOURCES DEPARTMENT  
OIL CONSERVATION DIVISION

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 FOREGOING  
MATTERS, STATE-WIDE.

CASE NOS. 14784 AND 14785

TRANSCRIPT OF PROCEEDINGS

VOLUME 15

COMMISSION MEETING  
September 27, 2012  
Santa Fe, New Mexico

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THE COMMISSION:  
JAMI BAILEY, Chairperson

GREG BLOOM, Commissioner  
DR. ROBERT BALCH, Commissioner  
MARK A. SMITH, Esq.

FLORENE DAVIDSON, Commission Clerk  
KIM ROMERO

REPORTED BY: PAUL BACA, CCR #112  
PAUL BACA COURT REPORTERS  
500 4th Street, NW, Suite 105

1 CHAIRPERSON BAILEY: It is 9:00 on  
2 Thursday, September 27th, 2012.

3 This is a meeting of the Oil Conservation  
4 Commission for the purpose of deliberating  
5 Consolidated Cases 14784 and 14785. We are  
6 continuing deliberations that we began on Monday,  
7 September 24th.

8 All three commissioners are here, and so  
9 we do have a quorum.

10 Commissioners, I was looking over the work  
11 that we did yesterday, and I see that there's a  
12 couple of areas that we need to clean up before we  
13 go much farther. Is it your pleasure that we go  
14 ahead and take care of those now before they get  
15 lost in the...

16 COMMISSIONER BLOOM: Absolutely.

17 COMMISSIONER BALCH: Sure.

18 CHAIRPERSON BAILEY: Okay. I'm looking  
19 specifically at 19.15.17.11, having to do with  
20 "Design and Construction Specifications."

21 COMMISSIONER BLOOM: What part are we  
22 looking at?

23 CHAIRPERSON BAILEY: Section D(4), having  
24 to do with fencing.

25 COMMISSIONER BLOOM: What were your

1 concerns in that?

2 CHAIRPERSON BAILEY: At the very last  
3 phrase of D (4) it says livestock, wildlife, or  
4 human safety as one of the conditions for variance.

5 But due to the work we did on variances  
6 yesterday, that phrase should be consistent with  
7 better protections to public health, et cetera. And  
8 the exact phrase is found in variance 3B.

9 COMMISSIONER BLOOM: The fresh water,  
10 public health, and environment?

11 CHAIRPERSON BAILEY: Exactly.

12 COMMISSIONER BALCH: Every time I said  
13 protections to -- better protections, to have used  
14 that other phrase.

15 COMMISSIONER BLOOM: So it was fresh  
16 water, public health, and the environment.

17 COMMISSIONER BALCH: Public health and the  
18 environment.

19 We have been taking the environment to  
20 include wildlife and livestock and public health to  
21 include safety.

22 CHAIRPERSON BAILEY: So do we agree on  
23 making that change?

24 COMMISSIONER BLOOM: Madam Chair, my only  
25 concern would be that fencing does particularly

1 relate to livestock and wildlife. And I think we  
2 might want to consider leaving that in or naming it  
3 in addition to.

4 CHAIRPERSON BAILEY: We are creating a  
5 contradiction -- an enforcement problem if we have  
6 the conditions for a variance in 3B naming public  
7 health -- water, public health, and the environment,  
8 and a change in those conditions to the criteria for  
9 number 4. I'm just trying not to create a problem  
10 for enforcement.

11 COMMISSIONER BALCH: If we go to 3 --  
12 there's another 3 right above that, the additional  
13 requirements of fencing to protect the wildlife in  
14 particular areas. So it's specifically pointing out  
15 wildlife for fences in that location.

16 And there is another place in here where  
17 they're describing the barbed wire fences, and  
18 those -- when we had our discussion more directly to  
19 livestock.

20 COMMISSIONER BLOOM: Okay. I think this  
21 language would be sufficient, then, particularly as  
22 to who will be cognizant of cattle and fencing. The  
23 four-strand is in there, so I think we'll be fine.

24 CHAIRPERSON BAILEY: So are we agreed to  
25 change that phrase?



1 COMMISSIONER BLOOM: Agreed.

2 COMMISSIONER BALCH: Agreed.

3 CHAIRPERSON BAILEY: Okay. The next one  
4 that I saw was...

5 Okay. Delete "livestock, wildlife, or  
6 human safety," and change it to, what, "fresh water,  
7 public health, and the environment."

8 COMMISSIONER BALCH: A comma after "fresh  
9 water."

10 CHAIRPERSON BAILEY: Okay. And delete the  
11 "S" on "protection."

12 Are we happy with that now?

13 COMMISSIONER BLOOM: I believe that will  
14 work.

15 CHAIRPERSON BAILEY: Okay. Thank you.

16 Then let's go to Section 19.15.17.14,  
17 which is "Emergency Actions."

18 COMMISSIONER BLOOM: We are looking at  
19 about page 42, further down.

20 COMMISSIONER BALCH: Right there.

21 CHAIRPERSON BAILEY: Okay. When we  
22 reworked the definition for "emergency pit" and  
23 reworked number D, paragraph D, we eliminated the  
24 need for paragraph E, because the very first  
25 sentence of paragraph A says: "In an emergency, an

1 operator may construct a pit without a permit to  
2 contain fluids," et cetera, where the first sentence  
3 of E says: "This section does not authorize  
4 construction or use of an emergency pit." So we  
5 have created a contradiction right there.

6 In paragraph D we say that if an emergency  
7 lasts more than 48 hours they need to seek approval  
8 for the continued use and shall remove all the  
9 fluids within 48 hours after cessation of use, which  
10 means that E is redundant when it talks about  
11 removal of fluids within 48 hours.

12 COMMISSIONER BLOOM: Madam Chair, what  
13 about the existing language stating that such a pit  
14 might be required by EPA?

15 COMMISSIONER BALCH: That's, I think, more  
16 of a longer-term emergency. I think the EPA would  
17 be involved in something after 48 hours.

18 COMMISSIONER BLOOM: I was wondering if  
19 that was part of a possible EPA modification or  
20 something to -- to a site that would be required,  
21 due to federal law, to have a pit being used in an  
22 emergency on a site.

23 CHAIRPERSON BAILEY: That's a real  
24 stretch, to have EPA have any kind of authority for  
25 having a pit on New Mexico lands.

1 COMMISSIONER BLOOM: I would agree. Do we  
2 know why that was in there originally or...

3 CHAIRPERSON BAILEY: It may have just been  
4 borrowed from other regulations.

5 COMMISSIONER BALCH: Okay. It seems to me  
6 that there's an EPA regulation that the operator in  
7 that emergency would have to deal with them directly  
8 on that federal issue versus a state issue.

9 CHAIRPERSON BAILEY: Only when it comes to  
10 underground injection control.

11 COMMISSIONER BALCH: UIC programs?

12 CHAIRPERSON BAILEY: UIC programs. That's  
13 the only place.

14 COMMISSIONER BALCH: So if the operator is  
15 having an emergency and has a UIC permit, they will  
16 already be cognizant of EPA requirements.

17 COMMISSIONER BLOOM: And it's -- so I  
18 think if it were to be related to spill prevention  
19 it would not necessarily be termed an emergency pit;  
20 it could be something else.

21 COMMISSIONER BALCH: Right. But if we go  
22 back to 2 and 10, the rest of that is that an  
23 emergency release will -- you want to minimize that  
24 area affected by emergency release.

25 So our intent is really A through D, to

1 deal with --

2 COMMISSIONER BLOOM: Agreed. I would be  
3 fine with moving --

4 COMMISSIONER BALCH: -- deal with the  
5 immediate problem.

6 CHAIRPERSON BAILEY: So we will delete  
7 paragraph E in its entirety.

8 The following section for "Exceptions and  
9 Variances," 19.15.17.15, "Exceptions and Variances."

10 If you scroll down to B4a -- yes.

11 At the end of that first line of 4a, I  
12 believe it says "U-N" and it needs to say U-N-D-E-R,  
13 "under."

14 COMMISSIONER BALCH: Under.

15 CHAIRPERSON BAILEY: Okay. And I seem to  
16 have skipped one.

17 Scrolling back up to 19.15.17.12,  
18 "Operational Requirements."

19 COMMISSIONER BLOOM: Page 22,  
20 approximately, and 23.

21 CHAIRPERSON BAILEY: Okay. If we go down  
22 to B (4), we have the "60 days from the date the  
23 operator releases the last drilling or workover rig  
24 associated with the relevant application for permit  
25 to drill."

1           The APD is applicable to a well. The  
2 temporary pit is permitted separately, so it's not a  
3 reference to the relevant application for permit to  
4 drill; it should be associated with the relevant pit  
5 permit.

6           COMMISSIONER BALCH: Okay.

7           CHAIRPERSON BAILEY: And we will be  
8 dealing with pit permits when we get to --

9           COMMISSIONER BALCH: This could be  
10 construed to allowing you two years. I think you do  
11 want to tie it to the pit permit.

12          CHAIRPERSON BAILEY: Yes. Because an APD  
13 has to do with one well.

14          COMMISSIONER BLOOM: And the pit permit  
15 would specify the APDs.

16          COMMISSIONER BALCH: That are associated  
17 with it.

18          CHAIRPERSON BAILEY: Yes.

19          COMMISSIONER BLOOM: That are associated  
20 with it. Okay. That is fine. Yeah. That's one  
21 that -- I was thinking through some other things.

22                 This will be fine. Thank you.

23          CHAIRPERSON BAILEY: Okay. So, Kim, we  
24 will change that phrase "application for permit to  
25 drill" to "the relevant pit permit."

1           Okay. Those were the problems that I  
2     discovered from last night.

3           We were in the process of looking at  
4     exceptions under 19.15.17.15.

5           COMMISSIONER BALCH: Somewhere around  
6     page 44 or 45.

7           CHAIRPERSON BAILEY: And we had gone  
8     through the process for hearings and exceptions and  
9     what all will be required.

10          And in C5, beginning with C4 and C5, in  
11     that area, we talked about sending notice out for  
12     comments and setting the exception for hearing.

13          But what we did not include was the  
14     authority of the director to administratively take  
15     care of orders or exceptions that did not receive  
16     comments or did not merit a hearing.

17          If you scroll down, Kim, to the  
18     crossed-out areas in through there.

19          COMMISSIONER BALCH: We are talking about  
20     5?

21          CHAIRPERSON BAILEY: Okay. Well, 4 has a  
22     sentence at the very beginning, and I can read it  
23     off: "The Santa Fe office may grant the exception  
24     administratively if the Santa Fe office receives no  
25     comments or requests for hearing within the time for

1 commenting established in that reference."

2 COMMISSIONER BLOOM: That disappeared.

3 COMMISSIONER BALCH: We may have moved  
4 that up to -- we may have moved that up already, and  
5 we had been working on that when we stopped  
6 yesterday.

7 COMMISSIONER BLOOM: It's interesting. I  
8 show that on what Theresa sent us last night  
9 paragraph 4 is still lined out.

10 CHAIRPERSON BAILEY: Uh-huh.

11 COMMISSIONER BLOOM: But here, it's gone.

12 COMMISSIONER BALCH: I think we moved it  
13 up. Maybe the version wasn't quite saved.

14 The language in 4 here, I think -- no, 5.  
15 Let's see. All right.

16 In 5 is where we were working on that  
17 language last night when we stopped.

18 CHAIRPERSON BAILEY: And that's "if the  
19 director determines a need for a hearing."

20 But it does not give the director the  
21 authority for approval of the exception without a  
22 hearing.

23 COMMISSIONER BALCH: Right.

24 CHAIRPERSON BAILEY: So we need to add a  
25 sentence in there, which is the first part of the

1     crossed-out 4 on my copy.

2                 COMMISSIONER BLOOM:   Okay.   Do we need to  
3     continue on with established -- this is paragraph 3  
4     of subsection A, that link carry over?

5                 CHAIRPERSON BAILEY:   I can barely make  
6     that out.   We may not need to have that if we put  
7     the period after the comment -- "for commenting."

8                 COMMISSIONER BLOOM:   Okay.   And then the  
9     rest of the language in that?

10                CHAIRPERSON BAILEY:   Is crossed out..

11                COMMISSIONER BLOOM:   We would leave  
12     crossed out.   Okay.

13                CHAIRPERSON BAILEY:   Right.   But we would  
14     also add the first couple of lines of paragraph 5,  
15     where it says:   "If the director does not determine  
16     that a hearing is necessary due to technical merit,  
17     significant public interest, or otherwise."

18                COMMISSIONER BALCH:   Doesn't that go after  
19     sentence one --

20                CHAIRPERSON BAILEY:   Uh-huh.

21                COMMISSIONER BALCH:   -- and before the  
22     sentence that begins:   "If the director determines  
23     that a request for hearing presents issues."

24                So we want to have a case where it does  
25     not present issues, there's no comment.



1 COMMISSIONER BLOOM: Right.

2 CHAIRPERSON BAILEY: So we can have a --  
3 include another additional paragraph before we list  
4 what the application needs to have. We can have a  
5 new paragraph 7 that incorporates what to do if --

6 COMMISSIONER BLOOM: Scroll down to 7.

7 CHAIRPERSON BAILEY: Yes.

8 COMMISSIONER BLOOM: This would be a  
9 new -- 7 will become 8 and then...

10 CHAIRPERSON BAILEY: Yes.

11 COMMISSIONER BLOOM: Okay. So...

12 CHAIRPERSON BAILEY: While she's doing  
13 that, commissioners, do you have any changes from  
14 yesterday's work that we should think about?

15 COMMISSIONER BLOOM: Nothing that I can  
16 think of, Madam Chair.

17 COMMISSIONER BALCH: I focused on the  
18 material we need to cover today.

19 CHAIRPERSON BAILEY: Okay. Well, shall we  
20 agree on where we go next, after she takes care of  
21 this?

22 COMMISSIONER BALCH: After the remaining  
23 part of the crossed-out portions -- we'll probably  
24 have to address those. There's a Section B,  
25 "Alternative Methods," which is now no longer

1 relevant.

2 CHAIRPERSON BAILEY: I believe that we can  
3 delete the entire Section B that has the -- is  
4 crossed out.

5 COMMISSIONER BALCH: Because we've created  
6 a --

7 CHAIRPERSON BAILEY: A process already.

8 COMMISSIONER BALCH: -- a process already.

9 COMMISSIONER BLOOM: Yes, that would be  
10 fine.

11 CHAIRPERSON BAILEY: Okay. And then,  
12 Greg, if you could show her the first portion of the  
13 crossed out 5.

14 COMMISSIONER BLOOM: Is that still down  
15 there?

16 CHAIRPERSON BAILEY: Is it still there?

17 COMMISSIONER BALCH: It's pulled down.

18 CHAIRPERSON BAILEY: Yes. Okay.

19 You'll want to copy the first complete  
20 sentence and put it at the end of where you have  
21 just typed.

22 Then we will need to clean that up a bit.  
23 And we'll scratch -- we'll delete the words "the  
24 environmental bureau in the divisions."

25 And delete "in the divisions."

1 COMMISSIONER BLOOM: And then we added  
2 "the" in front of "Santa Fe."

3 CHAIRPERSON BAILEY: Do you-all agree with  
4 that paragraph?

5 COMMISSIONER BLOOM: Yes, I believe that  
6 will work.

7 COMMISSIONER BALCH: Yes.

8 CHAIRPERSON BAILEY: Yes, both agree?

9 COMMISSIONER BLOOM: Agreed. I think we  
10 need to go down and perhaps delete the rest of what  
11 remained.

12 CHAIRPERSON BAILEY: Okay. If you will  
13 scroll all the way down to the next -- yes, all of  
14 that crossed-out area needs to be deleted.

15 COMMISSIONER BALCH: All of 5 and all of  
16 Section B.

17 CHAIRPERSON BAILEY: Yes.

18 COMMISSIONER BLOOM: Should we next look  
19 at permit approvals, Section 16?

20 CHAIRPERSON BAILEY: All right. That's  
21 next in line here.

22 In the title, the suggestion is made to  
23 delete the words "or variance."

24 Since we've dealt with variance in the  
25 previous section, shall we go ahead and delete the

1 words in this title?

2 COMMISSIONER BALCH: This is -- yes.

3 CHAIRPERSON BAILEY: Yes?

4 COMMISSIONER BLOOM: I think that would  
5 make sense, yes.

6 CHAIRPERSON BAILEY: Okay.

7 Then in 16A, the very first line we can  
8 delete "and variances at the top." Yes, "and  
9 variances."

10 Now, the OCD has some suggested language.  
11 Instead of A, B, and C -- do you have the OCD  
12 suggested language?

13 COMMISSIONER BALCH: I do.

14 COMMISSIONER BLOOM: Yes.

15 CHAIRPERSON BAILEY: What the language  
16 does is agree that within 30 days of receiving any  
17 kind of application the division shall make an  
18 administrative completeness determination or provide  
19 written notice of deficiencies to the applicant.  
20 The application will be considered complete if  
21 written notice is not provided by the division  
22 within the 30-day evaluation period. It's not  
23 approving an application after 30 days, it's saying  
24 that the application is complete, by default.

25 COMMISSIONER BLOOM: Yes, Madam Chair. I

1 would -- I hear your concerns about the proposal  
2 which would deem an application or permit approved  
3 if no response had been received in 30 days.

4 And I just have one question about the OCD  
5 language. I think it may be addressed in C.

6 If the division issues a denial, then it  
7 will state why the petition was denied. Is that  
8 correct?

9 CHAIRPERSON BAILEY: Yes. C says  
10 specifically that an application will be evaluated  
11 under the Oil and Gas Act or the regulation and  
12 notify the applicant.

13 COMMISSIONER BALCH: Of the cause for  
14 denial or additional information?

15 CHAIRPERSON BAILEY: Right.

16 COMMISSIONER BLOOM: Now, it says --  
17 looking up at B above, the second sentence, it says  
18 if the division does not take action within 60 days  
19 the application is deemed denied.

20 So in those cases the division would not  
21 give a reason why they didn't take action or...

22 COMMISSIONER BALCH: This really comes  
23 down to the arguments that we had in testimony.

24 What the proponents of the modifications  
25 were seeking was a way to make sure that the

1 timeline kept moving along.

2 COMMISSIONER BLOOM: Correct.

3 COMMISSIONER BALCH: The problem with that  
4 is if you have -- in my opinion, the problem with  
5 that is if you have applications automatically  
6 approved, as in their suggested language, then you  
7 have the risk of unvetted processes or procedures or  
8 locations being used.

9 So even if there is a default on the side  
10 of the division, the division doesn't do their job,  
11 it's lost in a pile of paper or something, the OCD  
12 version does at least put a time line on it where 60  
13 days later they can go to hearing.

14 It's probably not -- you know, in a  
15 perfect world, everybody's application is going to  
16 be reviewed in a timely manner, no documents will  
17 get lost, and whatnot.

18 I think we ought -- but in reality,  
19 sometimes things do get lost.

20 We also had testimony that if somebody was  
21 in the process of an application there might be some  
22 contact with the division district office  
23 periodically in that process, so that the risk of an  
24 application really being lost was small; it's more  
25 of whether or not the application was complete.

1 CHAIRPERSON BAILEY: That's a large part  
2 of it.

3 COMMISSIONER BALCH: And I think that the  
4 OCD language does at least address that.

5 There's probably not a perfect solution to  
6 this, but you really don't want to have unvetted  
7 permits.

8 COMMISSIONER BLOOM: I fully agree with  
9 that.

10 CHAIRPERSON BAILEY: So, commissioners, do  
11 you approve of the language as submitted by the OCD  
12 to replace A, B, and C?

13 COMMISSIONER BLOOM: Yes, Madam Chair.

14 We would be replacing A and B here with A,  
15 B, and C, as proposed by the OCD, correct?

16 CHAIRPERSON BAILEY: That's correct.  
17 We're not replacing C at this point.

18 COMMISSIONER BALCH: Mr. Smith reminded me  
19 that another part of this discussion and testimony  
20 was, I believe by the industry side, that the permit  
21 approval process needed some streamlining.

22 I'm not sure if we concluded that that  
23 would really have to be done on the division side  
24 rather than through this rulemaking.

25 CHAIRPERSON BAILEY: I think most of the

1 delays that have been encountered have been trying  
2 to enforce the rule as it is currently written.

3 By working through this amendment I  
4 believe that most, if not all, of the complaints  
5 will probably be limited because of the changes that  
6 we are possibly making here.

7 COMMISSIONER BLOOM: Correct. Because if  
8 we look at the existing language, there's no time  
9 line in A.

10 CHAIRPERSON BAILEY: That's right.

11 COMMISSIONER BALCH: And then Mr. Gantner,  
12 in his direct testimony -- I don't have the  
13 citation, but it was very early on -- directly in  
14 response to questions said that the rule was very  
15 hard to navigate.

16 CHAIRPERSON BAILEY: That's correct.

17 So while she is doing that, we can look at  
18 the current paragraph C with the proposed changes  
19 and consider what we want to do with those, with C  
20 and D.

21 COMMISSIONER BALCH: Well, the OCD  
22 language replaced A, B, C, and D.

23 CHAIRPERSON BAILEY: No, it replaced A and  
24 B. The "Conditions" are still under --

25 COMMISSIONER BALCH: This would be D,



1 then?

2 CHAIRPERSON BAILEY: Yes. It would become  
3 a D.

4 COMMISSIONER BALCH: Yes. Their A, B, and  
5 C will be replacing A and B?

6 CHAIRPERSON BAILEY: Yes.

7 COMMISSIONER BLOOM: Under C we might  
8 remove "safety."

9 COMMISSIONER BALCH: Fresh water, public  
10 health, and the environment.

11 CHAIRPERSON BAILEY: And we have the word  
12 "reasonable" in there, too.

13 Is that in your copy? I have it in mine.  
14 That is a suggestion.

15 COMMISSIONER BLOOM: I do not see that,  
16 no.

17 CHAIRPERSON BAILEY: It's not in your  
18 copy?

19 The line would read: "The division may  
20 impose conditions or requirements that it determines  
21 are necessary and proper for the reasonable  
22 protection."

23 I believe we had a lengthy discussion  
24 about "reasonable."

25 COMMISSIONER BALCH: We did have a

1 discussion on reasonable. And I think that the  
2 bottom line was it was really up to the discretion  
3 of the judge to determine what was reasonable in the  
4 case.

5 CHAIRPERSON BAILEY: Exactly.

6 COMMISSIONER BALCH: In that case, the  
7 judge would be a district officer or whoever was  
8 assigned review of that permit, and so that would  
9 have to be discretionary.

10 And everywhere else we have used the  
11 language -- usually we use "equivalent" or "better."  
12 But every other place we've used language that ended  
13 with "protection of fresh water, public health, and  
14 the environment."

15 CHAIRPERSON BAILEY: Uh-huh.

16 COMMISSIONER BALCH: We've not applied  
17 "reasonable."

18 CHAIRPERSON BAILEY: So when she's done,  
19 we will agree to delete the word "reasonable" from  
20 the opinion?

21 COMMISSIONER BLOOM: Yes.

22 CHAIRPERSON BAILEY: And do we want to  
23 ensure that only Oil and Gas Act and only OCD  
24 regulations are used in the evaluation? This  
25 narrows it from possibly EPA regulations and water

1 quality control regulations.

2 COMMISSIONER BALCH: It seems, to the  
3 point that the Oil and Gas Act authorizes the  
4 division, that if -- and that there are already  
5 natural constraints, that they have to deal with  
6 statutes from other outside entities. So it's  
7 redundant to have it specifically stated.

8 I think it's more clear that people know  
9 which regulations they're dealing with, and if there  
10 are other regulations which supersede that, that  
11 would become apparent.

12 CHAIRPERSON BAILEY: They're not immune  
13 from the authority of other regulations.

14 COMMISSIONER BALCH: Right.

15 CHAIRPERSON BAILEY: So by including this  
16 language we are simply giving guidance to the  
17 compliance officers, that they look to the Oil and  
18 Gas Act and to the oil and gas regulations.

19 So when she's ready for us we'll be able  
20 to work with that.

21 COMMISSIONER BLOOM: We will add that to  
22 "Conditions"?

23 CHAIRPERSON BAILEY: Yes.

24 COMMISSIONER BLOOM: Okay. Very good.

25 CHAIRPERSON BAILEY: In the following

1 paragraph, D, the suggestion has been made that the  
2 division may deny in writing an application for a  
3 permit.

4 COMMISSIONER BALCH: I think any denial,  
5 which would be subsequently up for the appeal  
6 process, should be in writing.

7 CHAIRPERSON BAILEY: I never support  
8 verbal decisions.

9 COMMISSIONER BALCH: Handshake deals will  
10 get you in trouble.

11 CHAIRPERSON BAILEY: Yes, they will.

12 COMMISSIONER BALCH: That was either --  
13 that, apparently, might be more an OCD change,  
14 because my version doesn't have that.

15 CHAIRPERSON BAILEY: Yes. This,  
16 apparently, is an opinion.

17 COMMISSIONER BLOOM: This would be to add  
18 that the division will provide a written denial?

19 CHAIRPERSON BAILEY: Yes.

20 COMMISSIONER BLOOM: Okay. I agree with  
21 that.

22 Might I just say that the language towards  
23 the end is redundant. I don't know if it fits with  
24 some of the other language used versus -- for  
25 example, "applications do not sufficiently

1 demonstrate that the operator can construct,  
2 operate, and close the proposed pit..."

3 COMMISSIONER BALCH: That poses the  
4 systems are not --

5 COMMISSIONER BLOOM: Subject.

6 CHAIRPERSON BAILEY: -- permitted.

7 COMMISSIONER BALCH: Below-grade tanks  
8 aren't permitted either. They're registered.

9 CHAIRPERSON BAILEY: That is right.

10 COMMISSIONER BALCH: So we are really  
11 looking at pits of various types.

12 COMMISSIONER BLOOM: Then it says "fresh  
13 water, public health, safety, or the environment."

14 CHAIRPERSON BAILEY: So delete "safety,"  
15 then?

16 COMMISSIONER BLOOM: Safety.

17 COMMISSIONER BALCH: Do we want to change  
18 that "without" to be -- "without detriment" to be  
19 "protective of," to be consistent with our other  
20 language?

21 CHAIRPERSON BAILEY: So they "do not  
22 sufficiently demonstrate that the operator can  
23 construct, operate, and close the proposed pit, or  
24 proposed alternative."

25 COMMISSIONER BALCH: I think you actually

1 might want to go to the full language of "equivalent  
2 or better protection of."

3 COMMISSIONER BLOOM: Not "equal or  
4 better"?

5 COMMISSIONER BALCH: Equivalent, or  
6 whatever we have been using. Equivalent or greater,  
7 something like that.

8 COMMISSIONER BLOOM: Okay.

9 CHAIRPERSON BAILEY: So "close the  
10 proposed pit or proposed alternative without equal  
11 or better protection."

12 COMMISSIONER BALCH: What's the exact  
13 language that we used.

14 CHAIRPERSON BAILEY: Equal or better?

15 COMMISSIONER BALCH: Okay. Equal or  
16 better.

17 COMMISSIONER BLOOM: Okay.

18 Might we turn to discussion of Section A?

19 CHAIRPERSON BAILEY: Well, we still have  
20 one more.

21 COMMISSIONER BLOOM: I'm sorry. E.

22 CHAIRPERSON BAILEY: So remove the word  
23 "safety."

24 COMMISSIONER BLOOM: And also, it talks  
25 about -- the third sentence -- "any modification

1 that is equivalent to an exception of any paragraph  
2 of the 19.15.17 NMAC should be subject to the notice  
3 and approval procedures prior to an exception."

4 CHAIRPERSON BAILEY: I'm sorry. I just  
5 found your sentence.

6 Any modification done is equivalent what?

7 COMMISSIONER BLOOM: "To an exception of  
8 any paragraph of 19.15.17 NMAC should be subject to  
9 the notice and approval procedures required for an  
10 exception."

11 I just want to make sure that's fine as it  
12 stands.

13 COMMISSIONER BALCH: Actually, you may  
14 want to say for --

15 CHAIRPERSON BAILEY: Because we have  
16 noticed --

17 COMMISSIONER BALCH: We have noticed for  
18 variances as well.

19 CHAIRPERSON BAILEY: We don't have notice  
20 requirements for variance.

21 COMMISSIONER BLOOM: Do we even need that  
22 sentence in there? Because if it's an exception,  
23 it's going to be dealt with as an exception. If  
24 it's a variance, it would be a variance.

25 CHAIRPERSON BAILEY: I think this sentence

1 does create ambiguity, by having that sentence. We  
2 could just delete that entire sentence.

3 COMMISSIONER BLOOM: The following  
4 sentence says: "The division may revoke, suspend,  
5 or impose additional operating conditions or  
6 limitations on a permit at any time, after notice  
7 and opportunity for a hearing."

8 It doesn't give a time span or, really,  
9 length to...

10 COMMISSIONER BALCH: It does sort of seem  
11 to be a catchall that, basically, would allow them  
12 to modify anything after the fact.

13 CHAIRPERSON BAILEY: If the division  
14 determines that there has been a material breach of  
15 statutes or rules.

16 COMMISSIONER BALCH: Okay. And that it's  
17 necessary for protection of fresh water, public  
18 health, or the environment.

19 COMMISSIONER BLOOM: Well, I think it goes  
20 on, then, I'm sorry, to talk about that -- that  
21 process.

22 CHAIRPERSON BAILEY: This gives the cease  
23 operations authority.

24 COMMISSIONER BALCH: This is necessary in  
25 case something was done wrong on either side.



1 CHAIRPERSON BAILEY: Yes.

2 COMMISSIONER BALCH: I don't know if the  
3 last part, an emergency...

4 COMMISSIONER BLOOM: The --

5 COMMISSIONER BALCH: We would probably  
6 have to change the language there for public health.

7 COMMISSIONER BLOOM: It says "the operator  
8 shall have 10 days after receipt of notification to  
9 request a hearing."

10 It doesn't say what amount of time the OCD  
11 has to set a hearing.

12 COMMISSIONER BALCH: That's set up by the  
13 rule we were talking about yesterday having to do  
14 with hearings.

15 CHAIRPERSON BAILEY: Well, rule --

16 COMMISSIONER BALCH: Rule 8.4, or  
17 something like that.

18 CHAIRPERSON BAILEY: It's Rule 4.

19 COMMISSIONER BALCH: Rule 4.

20 CHAIRPERSON BAILEY: And how to go ahead  
21 and initiate a hearing and what kind of notice is  
22 required.

23 COMMISSIONER BLOOM: Do you want to cite  
24 that, adding in "pursuant to," or "as per"?

25 CHAIRPERSON BAILEY: We can.

1 "And the operator shall have 10 days after  
2 receipt of notification to request a hearing  
3 pursuant to 19.15.4."

4 Is that right?

5 COMMISSIONER BLOOM: That might make  
6 sense.

7 CHAIRPERSON BAILEY: And then we come to  
8 F, which would be "Transfer of a permit."

9 The second sentence should be deleted,  
10 and -- well, up through "NMAC," and then a capital  
11 "T" for: "The division's approval of an application  
12 to transfer," is associated -- "will constitute  
13 approval of the transfer of the permit."

14 Okay. But below-grade tanks are not  
15 permitted, they're registered.

16 COMMISSIONER BLOOM: I would agree.

17 CHAIRPERSON BAILEY: So we would remove  
18 the word "tank" in both places.

19 COMMISSIONER BLOOM: Madam Chair, we may  
20 in the future have a well without a permitted pit,  
21 because we may have a pit that is serving -- I guess  
22 any pit is going to be associated with at least one  
23 well.

24 COMMISSIONER BALCH: At least one well.

25 COMMISSIONER BLOOM: So it still works.

1 CHAIRPERSON BAILEY: Okay. So you are  
2 ready for us to look at A and B and C, which was the  
3 OCD language.

4 COMMISSIONER BLOOM: You need a word after  
5 "deficiencies."

6 CHAIRPERSON BAILEY: The last line of A,  
7 "within" needs to be one word.

8 Okay. Then are we agreed that those -- A,  
9 B, and C are acceptable?

10 COMMISSIONER BLOOM: Agreed.

11 COMMISSIONER BALCH: Agreed.

12 CHAIRPERSON BAILEY: Okay.

13 Going on down to B, that paragraph that's  
14 listed under B, that whole thing should be deleted.

15 Then for "Conditions," that becomes  
16 paragraph D.

17 The word "safety" on the third line needs  
18 to be deleted.

19 What is our stop phrase? Was it "and" or  
20 "or"?

21 COMMISSIONER BLOOM: It's typically "and."  
22 But I think in cases of a denial it could be "or,"  
23 because you could deny for --

24 COMMISSIONER BALCH: Any of the three  
25 reasons.

1 COMMISSIONER BLOOM: -- any of the three  
2 reasons. But I think this would be an "and."

3 CHAIRPERSON BAILEY: Okay. There is --

4 COMMISSIONER BALCH: This one is --

5 CHAIRPERSON BAILEY: Oh, wait. It's  
6 missing a sentence here. "Safety or the environment  
7 provided the conditions."

8 Commissioner, again, would you give her  
9 your copy of that portion of it so that she can...

10 COMMISSIONER BLOOM: I don't have that on  
11 mine.

12 COMMISSIONER BALCH: I don't have it  
13 either.

14 CHAIRPERSON BAILEY: Oh, okay.

15 COMMISSIONER BALCH: I haven't been  
16 tracking that.

17 CHAIRPERSON BAILEY: All right. Then  
18 scrolling down to D, the first line, "The division  
19 may deny."

20 COMMISSIONER BALCH: That would become E.

21 CHAIRPERSON BAILEY: That becomes E, yes.

22 On the first line it says: "The division  
23 may deny," and insert the words after "deny," "in  
24 writing."

25 Then the fourth line down we have the

1 words "closed-loop system." That -- those words  
2 should be deleted.

3 COMMISSIONER BALCH: And below-grade tank.

4 CHAIRPERSON BAILEY: And "below-grade  
5 tank," right beside it.

6 And then where it says "without," change  
7 that to "with equal or better protection of," and  
8 then delete "detriment to" the following words.

9 Okay. The following paragraph should be  
10 renumbered F.

11 COMMISSIONER BALCH: Madam Chair?

12 CHAIRPERSON BAILEY: Yes.

13 COMMISSIONER BALCH: I think there's still  
14 two things we need to fix on E.

15 CHAIRPERSON BAILEY: Okay. What else  
16 needs to be...

17 COMMISSIONER BALCH: We have "better  
18 protection of fresh water, public health, and the  
19 environment."

20 CHAIRPERSON BAILEY: Oh.

21 COMMISSIONER BALCH: "Or the environment,"  
22 in this case.

23 CHAIRPERSON BAILEY: We need to delete the  
24 word "safety."

25 COMMISSIONER BALCH: And then I have a --

1 a question for the commissioners.

2 CHAIRPERSON BAILEY: Okay.

3 COMMISSIONER BALCH: "Denial of  
4 application. The division may deny in writing an  
5 application for a permit."

6 CHAIRPERSON BAILEY: So we could put a  
7 comma after "deny" and after "writing"?

8 COMMISSIONER BALCH: Well, I'm wondering  
9 if this allows them to deny verbally, if you say  
10 "may deny in writing."

11 CHAIRPERSON BAILEY: Well, you have to go  
12 to the next paragraph -- the next few lines, the  
13 following clauses: "If it finds the application and  
14 the materials that the operator submitted for the  
15 application do not demonstrate..."

16 You're right.

17 COMMISSIONER BALCH: I'm reading it as  
18 being optional, "may deny."

19 CHAIRPERSON BAILEY: So you want to put  
20 the word "shall"?

21 COMMISSIONER BALCH: I think that's the  
22 procedure anyway, right? These are always denied in  
23 writing?

24 CHAIRPERSON BAILEY: No, they are not  
25 always.

1 COMMISSIONER BALCH: Should they always be  
2 denied in writing?

3 CHAIRPERSON BAILEY: Yes, I believe they  
4 should.

5 COMMISSIONER BALCH: Then "shall" would be  
6 a better word than "may."

7 COMMISSIONER BLOOM: That fixes it.

8 CHAIRPERSON BAILEY: And delete the word  
9 "may," right?

10 Are we okay with E?

11 COMMISSIONER BALCH: Yes.

12 COMMISSIONER BLOOM: Yes.

13 CHAIRPERSON BAILEY: Okay. Scroll on down  
14 to F.

15 In the third sentence it says: "Any  
16 modification" should be -- that whole sentence  
17 should be deleted.

18 Then coming up from the bottom, maybe the  
19 fourth line from the bottom, we have "after the  
20 receipt of notification to request a hearing."

21 Instead of a period -- where your cursor  
22 is, yes.

23 Instead of a period, add the words  
24 "pursuant to 19.15.4 NMAC."

25 Okay. The next two lines down we have the

1 word "safety" at the end of the next-to-the-last  
2 line.

3 COMMISSIONER BALCH: "Public health and  
4 safety, or the environment." Remove the word  
5 "safety."

6 And this, I think, is also in lower case.

7 COMMISSIONER BLOOM: I would agree.

8 CHAIRPERSON BAILEY: Okay. The next  
9 paragraph should be G. And the entire second  
10 sentence that begins with "Except for" should be  
11 deleted.

12 No, stop after NMAC. Don't delete the  
13 words after "NMAC." Delete that. Then "the"  
14 becomes a capital "the."

15 Following along that sentence we have  
16 "below-grade tank or closed-loop system."

17 COMMISSIONER BLOOM: Just go up a couple  
18 of lines.

19 CHAIRPERSON BAILEY: You'll delete  
20 "below-grade tank or closed-loop system."

21 And also in the line above that we have  
22 "below-grade tank or closed-loop system." And  
23 delete the comma that's just before your cursor.

24 COMMISSIONER BALCH: And the remainder of  
25 that language has to deal with the grandfather tanks



1 which we have already dealt with in another section.

2 CHAIRPERSON BAILEY: Right. So all of  
3 that language that has the crossout can be deleted.

4 Then G becomes H, right?

5 COMMISSIONER BLOOM: Yes.

6 CHAIRPERSON BAILEY: And H becomes I down  
7 below.

8 COMMISSIONER BALCH: 19.15.14.1206 through  
9 1215, that's the specific regulations regarding OCD  
10 hearings?

11 CHAIRPERSON BAILEY: Right. And so,  
12 really, that's unnecessary. That's redundant,  
13 because we inserted 19.15.4 in paragraph F.

14 COMMISSIONER BLOOM: What's the difference  
15 between 4 and 14?

16 CHAIRPERSON BAILEY: 4 has to do with  
17 drilling permits -- I mean 14 has to do with  
18 drilling permits, and so that is an incorrect --

19 COMMISSIONER BALCH: That's not a  
20 correct --

21 CHAIRPERSON BAILEY: -- citation anyway.  
22 So let's go ahead and delete, right? Because we  
23 have already covered it.

24 COMMISSIONER BLOOM: I would agree.

25 CHAIRPERSON BAILEY: Okay.

1           So, Kim, if you would just go ahead and  
2   delete that.

3           So shall we read that over, think about  
4   it, take a break for 10 minutes and come back at 10  
5   after and be able to vote on whether or not to  
6   approve it as it stands here?

7           COMMISSIONER BLOOM: Madam Chair, that's  
8   fine. Thank you.

9           (A recess was taken from 10:00 a.m. to  
10   10:11 a.m.)

11          CHAIRPERSON BAILEY: Okay. We should have  
12   been reviewing the changes that we made in  
13   19.15.17.16.

14          Commissioners, do I hear a motion for  
15   adoption of the new changes as we have gone through  
16   this section?

17          COMMISSIONER BLOOM: Yes, I so move.

18          COMMISSIONER BALCH: And I will second.

19          CHAIRPERSON BAILEY: All those in favor?  
20   Aye.

21          COMMISSIONER BALCH: Aye.

22          COMMISSIONER BLOOM: Aye.

23          CHAIRPERSON BAILEY: None opposed.

24          Passes 3 to 0.

25          CHAIRPERSON BAILEY: I believe that we

1 cannot address the areas that we skipped over, such  
2 as closure, reclamation, siting, until we discuss  
3 the low chloride fluids, drilling fluids, because  
4 that does determine a lot of the decisions that are  
5 made as far as those other categories are concerned.

6 COMMISSIONER BALCH: A lot of the  
7 discussion is -- is essentially intertwined.

8 CHAIRPERSON BAILEY: Yes, it is.

9 COMMISSIONER BALCH: But I think we  
10 should, as you say, address the low chloride -- low  
11 chloride fluids first. Because without it, we don't  
12 context.

13 CHAIRPERSON BAILEY: That's right.

14 COMMISSIONER BLOOM: That puts us back up  
15 in definitions, correct?

16 CHAIRPERSON BAILEY: Yes.

17 So page 2, Kim.

18 COMMISSIONER BALCH: Is this our last  
19 definition?

20 CHAIRPERSON BAILEY: Well, restore. We  
21 don't really get to restore until we talk about  
22 reclamation. So it's the last -- it's the pivotal  
23 one here.

24 Do I hear discussion on chloride fluids?

25 COMMISSIONER BALCH: Well, there was

1 actually quite a bit of discussion and testimony  
2 about low chloride fluids.

3 I think in particular -- well, okay. So  
4 there was a 30,000-foot view which came from Mr. Dan  
5 Neeper.

6 And then there were low chloride fluids  
7 also discussed by technical experts Arthur and  
8 Thomas.

9 If you place in the record for  
10 Mr. Gantner, who I thought was perhaps relevant,  
11 that starts on page 55, line 6:

12 "Okay. So we are talking now about  
13 siting, temporary pit siting. Water -- again, to  
14 draw this distinction that one class doesn't fit  
15 all, we said that water-based drilling muds were  
16 addressed by adding low chloride drilling fluids to  
17 the definition.

18 "At first we didn't have a number. We  
19 just said low chlorides. Then we began looking for  
20 numbers. We came up with 15,000 milligrams per  
21 liter threshold for low chloride drilling fluids.

22 "Now, this distinction will accommodate  
23 water-based fluids in the San Juan Basin, and that's  
24 what" --

25 I'm sorry. The next part is a question on

1 direct:

2 "Now, this distinction will accommodate  
3 water-based fluids in the San Juan Basin, and that's  
4 what it's intended to do?"

5 And Gantner's response was:

6 "That's correct. It would distinguish the  
7 difference between brine-type muds and low --  
8 water-based drilling fluids."

9 And then the other important part about  
10 that -- so part of Mr. Gantner's argument was a  
11 practical aspect.

12 And a part of that was through analysis  
13 and other product process knowledge. Because when  
14 they look at other states -- and this is line 11 on  
15 page 56:

16 "Texas has a definition for low chlorides,  
17 and it's set at 3,000, but it's strictly for how you  
18 dispose of the materials. They say if you are less  
19 than 3,000 milligrams per liter or kilogram of  
20 chlorides, then you can land-spread it."

21 So if you have dry rocks that have salt on  
22 them, you can just throw them out on the ground.

23 Okay. You can land-spread the cuttings.

24 "If it's above that, you have to dispose  
25 in place" -- by burial, presumably. "But they don't

1 prohibit a pit based on chlorides or a low chloride  
2 number."

3 It continues to talk about Colorado.

4 "Colorado had something more to the  
5 thinking that we were. They said that if you had  
6 low chloride fluids, and they defined it at 15,000,  
7 you didn't need to get a permit from the commission.  
8 You could go ahead and have a pit without a permit.  
9 Above that threshold, they said you have to have a  
10 permit for that level. So 15,000 seemed reasonable  
11 on that."

12 And then the final paragraph I thought of  
13 Mr. Gantner's testimony that was relevant, it's on  
14 page 57, lines 3 through 8:

15 "The other thing that we used on  
16 occasion -- the other thing that we used on  
17 occasions, a material called KCL," slickwater, and  
18 "which is usually a 2 percent solution for drilling.  
19 Occasionally, you need that to control the well."

20 So this is an operational constraint.

21 "And that would fall just below that  
22 15,000 number. I think if you ran the math, the  
23 chloride comes to about 12- or 13,000" for 2 percent  
24 KCL solution.

25 I paraphrased a little bit there at the

1 end.

2 Do you want me to continue with the direct  
3 citations?

4 COMMISSIONER BLOOM: If you have others,  
5 sure. They are helpful references.

6 COMMISSIONER BALCH: Okay. So Mr. Thomas  
7 mostly talked about the chloride fluids in the  
8 context of risk and the pathways for  
9 transportability.

10 The reference I have is on page 465, lines  
11 6 through 22, that the risk is in the  
12 transportability.

13 And, let's see.

14 COMMISSIONER BLOOM: As in risk in  
15 transport?

16 COMMISSIONER BALCH: Transport is if there  
17 is a release of that fluid from the pit. That was  
18 the context that was used there.

19 Let's see. Mr. Arthur, on page 525, lines  
20 7 through 25. This was -- he was --

21 COMMISSIONER BLOOM: Before we go on.

22 From Dr. Thomas, I believe his slide,  
23 Exhibit 11, Slide 14, mentioned adverse effect of  
24 chlorides on plant growth.

25 COMMISSIONER BALCH: Right. That's why

1 I'm bringing up the risk and the pathways. Because  
2 a lot of the argument for low chloride fluid was  
3 that you were reducing the risk to a manageable  
4 level. And that was a justification for changing  
5 siting and closure requirements for those cases.

6 Chloride was particularly talked about by  
7 the technical experts Arthur and Thomas, because  
8 with a good marker they could use that -- they could  
9 assume if the chloride was there that the other  
10 constituents of concern, which they boiled down to  
11 TPH and benzene and chloride were present or could  
12 be potentially present.

13 All right. Mr. Arthur's testimony on  
14 page 525, lines 7 through 25.

15 Although it was questioned about closure,  
16 he went on at great length about the primary risk of  
17 a fluid release is going to be during the  
18 operational phase. He was very adamant in all of  
19 his testimony that once it was dried and mixed and  
20 stabilized, that there was very low transport risk.  
21 And that was even lower in the case of the low  
22 chloride fluids versus traditional drilling mud.

23 COMMISSIONER BLOOM: Do you recall if -- I  
24 seem to remember Mr. Arthur saying that a fluid  
25 release could be a surface release or spill, as



1 well. Is that correct?

2 COMMISSIONER BALCH: Yes. And that would  
3 be covered by the spill rule on this.

4 COMMISSIONER BLOOM: Yes.

5 COMMISSIONER BALCH: Actually, a lot of  
6 the larger chloride releases that I am aware of are  
7 things like pipeline failure, where piping produced  
8 water to expose a site and get a leak in the  
9 pipeline, nobody notices it for a couple of days,  
10 and you have a large spill.

11 So I'm going to page 540, lines 3 through  
12 15. This is where Mr. Arthur is talking about the  
13 difference between high and low chloride fluids.

14 So I just moved on from Mr. Thomas -- or  
15 Dr. Thomas. Let me see if I can find the -- I'm  
16 sorry. That's at the beginning of Volume 3, if  
17 you're looking at the PDF, if you're tracking your  
18 document that way.

19 Page 540, lines 3 through 15 reads -- it's  
20 a question. I think this was on direct:

21 "And then back on page 2 -- I apologize  
22 for jumping back and forth -- there is a definition  
23 of low chloride fluids. And what's the reason that  
24 the proposed industry revisions differentiate  
25 between low chloride and non-chloride fluids?"

1 And the answer from Mr. Arthur was:

2 "You know, when -- when you're -- when  
3 you're dealing with water, really, from a different  
4 number of different perspectives and not just with  
5 pits, but in this perspective pit, is that if I have  
6 a low chloride fluid versus a fluid that may --  
7 maybe is very high in chloride, 200,000 milligrams  
8 per liter TDS, treating those the same, managing  
9 those the same, really doesn't make sense  
10 technically."

11 And then on page 541 there was a defining  
12 question on that. The question was:

13 "And as both a petroleum and environmental  
14 engineer, does the level at which this distinction  
15 is set, 15,000 milligrams per liter, make sense to  
16 you?"

17 And the answer was: "It does. You know  
18 when -- and I could just think of the number of  
19 different contexts, but relative to what we're  
20 dealing with and what I've seen from EPA and a  
21 number of states, that is a pretty good cutoff."

22 Let's see. On page 548, he was talking  
23 about siting criteria with respect to low chlorides.  
24 It starts at the bottom, line 23. And there is a  
25 question, again:

1 "In the first section here under 1A, we  
2 talk about changing the depth to groundwater from 50  
3 to 25 feet below pits. And there is a distinction  
4 there for low chloride fluids. And again for  
5 50 feet, if it's not a low chloride fluid, what's  
6 the rationale for that change?"

7 Mr. Arthur's answer on page 549, lines 4  
8 through 17, essentially:

9 "When we look at some of the setback  
10 requirements -- and this occurs, Eric, really kind  
11 of throughout these -- this part of the rule  
12 section. But what we are really trying to do is  
13 distinguish -- really, a couple of things.

14 "But one is that we have low chloride  
15 fluids versus fluids that are not low chloride  
16 fluids. So we're trying to adjust for those, and  
17 then to look at what is appropriate based on --  
18 based on what we believe is appropriate.

19 "And why would it be appropriate" -- and  
20 this is a question:

21 "And why would it be appropriate to have a  
22 lower -- why would it be appropriate to have a lower  
23 depth to a low chloride fluid?"

24 And the answer was:

25 "Because there is less -- less risk,

1 less -- you know, less perceived risk, less  
2 endangerment. It's a fresher water."

3 So it's coming back to the  
4 transportability.

5 And then --

6 COMMISSIONER BLOOM: Say that again,  
7 less --

8 COMMISSIONER BALCH: Less perceived risk  
9 and less endangerment -- less risk, less perceived  
10 risk, and less endangerment. It's fresher water,  
11 was his conclusion.

12 COMMISSIONER BLOOM: Commissioner Balch,  
13 could we cover here sort of a risk/benefit ratio or  
14 what -- what sort of savings does the industry get  
15 when you go from being able to site something at  
16 25 feet above groundwater to -- from 50 feet?

17 COMMISSIONER BALCH: Well, I'm actually  
18 getting to the arguments from that point of view.  
19 And I want to stress that the arguments, as I heard  
20 them and then as I reviewed the transcripts, is  
21 really risk based and then response based.

22 If you have a risk -- if you have a lower  
23 chloride fluid you can -- you are more agile in your  
24 response than if you have high chloride fluid. You  
25 can deal with it more effectively over a shorter

1 period of time.

2 So on page 550 of the transcript, line 6,  
3 there's another -- he's continuing his discussion.  
4 And he says:

5 "What typically happens, even if you have,  
6 say, some leak or something like that, unless it's a  
7 drastic leak, you want to have -- you want to be  
8 able to have time to be able to respond. And the  
9 importance and significance of response, you know, I  
10 think depends a little bit on the chloride content.

11 "But even from a longer-term period after  
12 closure, when we talk about" -- I don't have to  
13 repeat all of these "you knows."

14 "Once we have gotten a closure, you know,  
15 and it's just -- just what you see is -- you don't  
16 tend to see from, say, a closed pit that you're  
17 going to have 100,000, say, milligrams per liter  
18 chlorides moving down and going on forever. It  
19 equalizes. It disperses. It dilutes. So we see it  
20 getting smaller and smaller over time. And that's  
21 less of an issue with a lower -- or a low chloride  
22 fluid than a high chloride fluid."

23 So basically the risk, according to what  
24 Mr. Arthur has adduced, in my opinion -- and then if  
25 you specify a low chloride fluid as you disperse

1     that plume across an area, you diminish the risk  
2     even more.

3                 COMMISSIONER BLOOM: I think we have seen  
4     that in most of the cases we have looked at with  
5     respect to chlorides moving down.

6                 COMMISSIONER BALCH: He goes on. I don't  
7     know if you want me to keep talking about this.

8                 But page 551, lines 10 through 14, he  
9     uses -- this is in response -- that the response  
10    time justifies closure setbacks, for example, to  
11    rivers and things like that.

12                And then on page 551, line 15, through  
13    page 552, line 16, he directly says as smaller  
14    setbacks are protected, and that includes wetlands.

15                And -- on page 553, line 22, to page 554,  
16    line 5.

17                And I think that's most of what I have on  
18    chlorides.

19                So just to summarize what I thought the  
20    industry argument was, you're reducing your -- the  
21    reason that they were using low chloride fluids is  
22    because the risk was low and it reduced the chance  
23    that the response would be able to adequately deal  
24    with it; and, therefore, the setbacks could be  
25    closer, both vertically and horizontally. And that,

1 operationally, it fit in -- it was in line with what  
2 other states had done.

3 And also, operationally, they sometimes  
4 used a KCL water in the northwest, and that would  
5 still be under that limit. And that would be  
6 something that would be for safety -- used for  
7 safety.

8 So that's what I had. I don't know what  
9 you might have found that you could add to that.

10 COMMISSIONER BLOOM: I would -- I guess I  
11 would agree with you that chlorides tend to  
12 disperse, or that the contamination level tends to  
13 drop off with travel or distance from the site or  
14 where something happens. I mean, we certainly have  
15 seen that in some of the cases that Dr. Neeper did.

16 In some of the cases that Ms. Martin  
17 cited, we see that the chlorides tail off and kind  
18 of reduce as they move down -- downward.

19 They can still -- I think what matters,  
20 though, is what level they are at and what that  
21 means. And I think -- I don't know if you've  
22 tracked some of Dr. Neeper's concerns about  
23 chlorides. He speaks to a threat there, plans  
24 that -- we have fluids that are at the  
25 15,000 milligrams per liter level, bearing in mind

1     that seawater is about 19,000 milligrams.

2                   COMMISSIONER BALCH:   Seawater is about  
3     30,000.

4                   COMMISSIONER BLOOM:   I'm sorry?

5                   COMMISSIONER BALCH:   Seawater is about  
6     30,000.

7                   COMMISSIONER BLOOM:   Okay.   I had 19.

8                   COMMISSIONER BALCH:   I actually paid --  
9     well, I'm not going to qualify that.   I paid close  
10    attention to all of the testimony, but I paid  
11    particular attention to the -- the testimony and  
12    modeling done by Dr. Neeper and also by Mr. Mullins,  
13    because that's an area that I have some expertise  
14    in.

15                   I think the risk-based argument that was  
16    presented by NMOGA was based on the idea that most  
17    of your risk is going to be during the operational  
18    phase.   And if you build your model based on the  
19    operational phase, characteristically, you may have  
20    infiltration rates that would give you results  
21    consistent with modeling of Dr. Neeper.

22                   And if you look at what Mr. Mullins did,  
23    he primarily did modeling based on the post-closure  
24    phase, where you have material mixed, isolated,  
25    dried, and buried.



1           So I would definitely agree with  
2   Dr. Neeper. If you have 15,000 parts per million  
3   chloride water on the surface as a pond, or directly  
4   impacting those first few inches of soil, you are  
5   going to have an impact on plants. There's no doubt  
6   about that.

7           CHAIRPERSON BAILEY: But the question  
8   before us right now is whether or not we should make  
9   a distinction between low chloride and high  
10   chloride, and to put a level for definition of the  
11   low chloride fluid at 15,000.

12          COMMISSIONER BALCH: Well, we --

13          CHAIRPERSON BAILEY: We will get into  
14   further discussions concerning siting and closure  
15   and reclamation.

16          COMMISSIONER BALCH: So maybe if I can go  
17   back to the risk-based argument.

18                The idea is if you have a -- say you have  
19   a pond or you have a pit, and it's 15,000 CL in it  
20   and it fails catastrophically, every bit of liquid  
21   in there spreads out across the land.

22                You'll have an area that's affected. And  
23   as we get away from the pit the effects will  
24   diminish.

25          COMMISSIONER BLOOM: Can I ask you a

1 question?

2 COMMISSIONER BALCH: Sure.

3 COMMISSIONER BLOOM: How does  
4 15,000 milligrams per liter translate to milligrams  
5 per kilogram?

6 COMMISSIONER BALCH: This is where Mr.- --  
7 Mr.- -- Dr. Thomas made a distinction of why they  
8 went with liters versus kilograms. And that's  
9 because, to Dr. Thomas, all the risk was in the  
10 transportability, the pathways. And the liquids  
11 provided a transportation pathway, and solids really  
12 didn't.

13 And his estimation, particularly when you  
14 consider the bentonite muds and the clays -- and I  
15 remember you cross-examining him on that pretty  
16 extensively, so I'm not going to belabor that point.

17 So...

18 CHAIRPERSON BAILEY: Milligrams per liter  
19 deals with fluids --

20 COMMISSIONER BALCH: Right.

21 CHAIRPERSON BAILEY: Where kilograms per  
22 liter will --

23 COMMISSIONER BLOOM: I was wondering how  
24 you translated that. I think somebody mentioned  
25 that in their testimony. I can't remember what it

1 was. It was the equivalent of what would  
2 15,000 milligrams per liter be and milligrams per  
3 kilograms.

4 COMMISSIONER BALCH: In some places they  
5 use them interchangeably, which is probably not  
6 correct.

7 CHAIRPERSON BAILEY: It isn't.

8 COMMISSIONER BALCH: It would really  
9 depend upon the material that you're looking at.  
10 But certainly as you dry things out you would tend  
11 to concentrate things, which I think is why they  
12 have the 3-to-1 mix there --

13 CHAIRPERSON BAILEY: For the  
14 stabilization.

15 COMMISSIONER BALCH: -- for stabilization.

16 So if you basically concentrate your  
17 material by three times, as you turn it into a  
18 solid, you then mix it to get it back to that 15,000  
19 level.

20 COMMISSIONER BLOOM: The reason I ask this  
21 is because Dr. Neeper talked about how you get what  
22 he called a death zone, on page 1261 of the  
23 transcript, when chlorides are at 10,000 milligrams  
24 per liter or higher.

25 And then in his work, when we talked about

1 a pit that had been buried and was looking at the  
2 surface, it looked like salt had come up. And the  
3 only thing he found out there was snakeweed, which  
4 is around page 1115 of the transcript.

5 Then he found what's called a death zone,  
6 and found that the death zone was created in areas  
7 where chlorides were at 250 to 4,000 milligrams per  
8 kilogram.

9 COMMISSIONER BALCH: That was in the  
10 surface of the soil.

11 COMMISSIONER BLOOM: Correct.

12 COMMISSIONER BALCH: And I think that's  
13 probably true, if you were to have those levels  
14 there.

15 I mean, there were some arguments by  
16 Dr. Buchanan in rebuttal that native plants in the  
17 southwest have a higher salt tolerance than you  
18 might have in Missouri or something like that.

19 CHAIRPERSON BAILEY: It's --

20 COMMISSIONER BALCH: It's apples and  
21 oranges.

22 CHAIRPERSON BAILEY: Yes.

23 COMMISSIONER BALCH: Because what we're  
24 faced with, what's proposed to us to do is not going  
25 back to something like those pits that Dr. Neeper

1 examined; it's going -- it's modifying Rule 17,  
2 which is four or five years old, and there hasn't  
3 been any problems ever since then that anybody has  
4 ever identified, surface or otherwise.

5 COMMISSIONER BLOOM: Which I cited one  
6 reason maybe not to change the rule. And I gave the  
7 example during the hearing that if we had really  
8 good measures for preventing deep sea catastrophes,  
9 drilling catastrophes, and we want to scale it back,  
10 then we end up with a Deepwater Horizon/Macondo type  
11 of accident.

12 So I don't know that current success  
13 should be cited as a reason to scale things back.

14 COMMISSIONER BALCH: Well, I think if you  
15 go to 603, then we can come back to Mr. Arthur's  
16 testimony.

17 It's page 603. And this is the argument  
18 that Commissioner Bailey has brought up a couple of  
19 times. And that is: How much protection do you  
20 really need?

21 Basically, if you have the same level of  
22 protection at a lower concentration, at a lower  
23 setback, why have the higher setback if it does  
24 cause issues otherwise, such as increases to  
25 operating costs, and then potentially reductions to

1 land sales from the land office or -- or I mean when  
2 you sell the land, you get more money from that, you  
3 also get a royalty right. So nothing -- the other  
4 thing, you don't get that royalty money. I may not  
5 understand how the land office works very well.

6 CHAIRPERSON BAILEY: Once again we are  
7 getting away from the focus of what we need to deal  
8 with at this moment.

9 COMMISSIONER BALCH: But I think that  
10 this --

11 CHAIRPERSON BAILEY: We will get to siting  
12 requirements. We will get to reclamation  
13 requirements. We will get to closure.

14 At this moment we need to determine if we  
15 have a definition to deal with.

16 COMMISSIONER BALCH: Maybe my  
17 interpretation is incorrect. But I think that for  
18 Mr. Bloom to make that definition he wants a little  
19 more comfort with some of the other involved  
20 concepts. And I won't belabor it much longer.

21 But if I can put one or two more points  
22 out.

23 COMMISSIONER BLOOM: And I will just go  
24 ahead and I'll state my concerns after that.

25 COMMISSIONER BALCH: Okay.

1           So on page 603, this is Mr. Arthur.

2           And the question is:

3           "How would New Mexico's rules stack up  
4   against other major producing states, even with the  
5   industry revisions included in them?

6           "Well, one of the things we tried to do as  
7   part of this -- I wanted to look at exactly that.  
8   So if you -- if you look just very generally at the  
9   oil and gas producing states, you know, there's  
10   about 33 states that do this."

11          And if you -- if we look at -- if you  
12   remember -- and it talks about earlier...

13          If I can paraphrase this?

14          CHAIRPERSON BAILEY:   Sure.

15          COMMISSIONER BALCH:    Okay.

16          CHAIRPERSON BAILEY:    Because it's --  
17   everyone can go to the transcript if they want the  
18   specifics.

19          COMMISSIONER BALCH:    It's lines 4  
20   through -- 4, on page 603, through 17 on page 605.  
21   So I'm probably not even going to read the entire  
22   thing.

23          But he basically concludes that even  
24   with -- with every recommendation from NMOGA and  
25   IPANM, that we would still have by far the most

1 stringent regulations of all the oil producing  
2 states. It would be more protective than anybody  
3 else, even with the modifications. That's -- was  
4 his opinion. And -- in looking at it from a  
5 risk-based approach.

6 So I think that's all I had on that.

7 CHAIRPERSON BAILEY: Commissioner Bloom,  
8 you had some concerns?

9 COMMISSIONER BLOOM: Yes. So my -- I have  
10 dual concerns. I think the reason that we have been  
11 discussing what -- the significance of this point  
12 that's been offered by NMOGA, that  
13 15,000 milliliters per liter is important because it  
14 crosses over to siting. And if we permitted low  
15 chloride fluids it would be another area allowing  
16 them to be at 25 feet to groundwater.

17 And I think we've seen a significant  
18 number of cases here where Dr. Neeper and Ms. Martin  
19 have had somebody come give public testimony. As  
20 well, there might have been -- I'm blanking on his  
21 name.

22 But there were quite a few cases where  
23 chlorides got down into the 30, 40, 45-foot range.

24 Mr. Boyd, I was thinking of, who came in.

25 So if we agree to the definition, we could



1 be agreeing to the siting requirements or vice  
2 versa. So I'm just concerned about it from that --  
3 from that angle.

4 COMMISSIONER BALCH: Maybe this is another  
5 apples and oranges thing, you know.

6 The risk, I think -- and I agree with the  
7 experts that the risk is in transportability, so you  
8 are looking at the operational phase.

9 The release is going to occur when the  
10 fluid's in the pit and there's a breach of the pit.

11 A lot of the cases that were brought up  
12 that had contaminant transport, chloride in  
13 particular, to the distances that you're talking  
14 about, were unlined pits or pits that were not lined  
15 under even Rule 50 standards or the initial Rule 17  
16 standards.

17 So you're not -- you're looking at a  
18 scenario where things were not monitored very well  
19 in the past. And if you had a release, or you might  
20 have fluid sitting there in the pit for two years  
21 and the liners degrade, if there was a liner, and  
22 you have lots of material moving.

23 The risk is, in a modern pit defined under  
24 Rule 17, or I think even under proposed  
25 modifications to Rule 17, are still going to be in

1 transport.

2 But we have reduced that transport risk by  
3 reducing the amount of time a fluid is going to be  
4 in the pit.

5 If you're -- in changing setbacks, you're  
6 reducing the amount of chlorides that can be in that  
7 pit. If -- and you are having people inspect the  
8 pits more often, keeping a log of it.

9 If there is a leak you have a response  
10 time to deal with it, instead of looking at the pit  
11 three years after a leak occurred without any  
12 remediation having occurred at that point.

13 Yes, you're going to see transport,  
14 because you have a head of chloride-loaded water  
15 that nobody is doing anything to stop its movement.

16 But if the same leak were to occur in a  
17 modern pit under any version of Rule 17 we are  
18 considering, then there would be a much more  
19 immediate response. And the experts testified that  
20 at the low chlorides that risk was reduced even  
21 more.

22 So if you had a leak in a pit right now,  
23 the worst it would be is a week before somebody  
24 noticed, and then there would be an immediate  
25 response under the spill rule to that, and it would

1 never make it to that 25 feet. And that's the  
2 justification for having a low chloride fluid. It  
3 reduces the risks even further than if you had a  
4 high chloride fluid.

5 But not only that, the policies in place,  
6 even in modifications, are such that the response  
7 time would be much, much faster than for the legacy  
8 pits that did have problems.

9 COMMISSIONER BLOOM: In two of the pits  
10 that -- and I'm wrapping up here, Madam Chairman.

11 The two pits that concerned me were the  
12 Pride Energy 1878, which was spudded in November of  
13 2004, and then it was completed in March of 2005.  
14 Sampling was in '08.

15 You have water. You have chlorides moving  
16 at the velocity of 9 to 90 feet per year. And there  
17 was horizontal movement of 150 feet, with chlorides  
18 at 14 feet up to 4,200 milligrams per kilogram, and  
19 20 feet up to 2,600 milligrams per kilogram. So...

20 And then the other one was the AP94  
21 Marbob. And that was spudded April '05. And in the  
22 soil investigation two years later, this had a --  
23 this pit had a 12-mil liner in Rule 50, and you end  
24 up with 45 feet below the pit level, 3,500 parts per  
25 mil of chloride.

1           So these transport rates I find  
2   concerning, where we have -- we could have temporary  
3   pits with fluids in them for 14 months, and then we  
4   have this -- this chloride, which can affect plant  
5   life.

6           COMMISSIONER BALCH: I might also want to  
7   differentiate between transport rate and transport  
8   distance.

9           In the cases that you're talking about, we  
10   have a well spudded, so the pit is put into place  
11   around that time, and we know that. So it's 2004  
12   for Pride Energy -- both cases, really, 77 and 78,  
13   closure around 2007, so three years of essentially  
14   nobody looking at that pit. You don't know when the  
15   leak occurred, how it occurred, what the problem  
16   was. Both of those pits would have used Rule 50, I  
17   believe.

18          CHAIRPERSON BAILEY: With a thinner liner?

19          COMMISSIONER BALCH: With a thinner liner.

20          So rate is not -- it's probably not the  
21   correct way to discuss the results of those leaks,  
22   because you don't know when the release occurred.  
23   That rate -- the rate could have been an inch per  
24   year. And if you multiply that by three years, then  
25   you have your 200 feet or whatever.

1 I think most of the modeling on both sides  
2 show that the -- that in general, the rates are not  
3 that quick. You wouldn't see 100, 150 feet away of  
4 chloride in a week. You might see it after a couple  
5 of years.

6 And that's really only -- and then the  
7 drivers for that, also discussed by Mr. Arthur --  
8 and I could probably find the citation if you wanted  
9 it -- is you have to have a continuing influx of  
10 fluid to maintain a rate of flux, right?

11 To keep it pushing, you have to keep  
12 adding fluid to it. If you don't add fluid to it  
13 it's going to go to a certain point and stop.

14 CHAIRPERSON BAILEY: Similar to the head  
15 that Dr. Neeper discussed.

16 COMMISSIONER BALCH: Yes. And then the  
17 Marbob case. Here we have a well spudded in 2005.  
18 In 2007, when they -- when they looked at it, they  
19 identified a compromised pit. Again, two years.  
20 They don't know when the pit was compromised. You  
21 don't know how long or at what concentration rate  
22 was in there. The rate is impossible to predict.  
23 All you can see is the impact of what happened.

24 And I would -- I would posit that with the  
25 protections that we have in there, you have to look

1 at the pit while it's in operation once a week and  
2 report on it once a month, I believe. Is that what  
3 we came up with?

4 CHAIRPERSON BAILEY: I believe so.

5 COMMISSIONER BALCH: So the longest time  
6 period you're going to have between a release -- and  
7 it's probably going to be less, because people are  
8 out there on that site while it's in operation, for  
9 the most part.

10 But even if they drilled a well and  
11 they're just waiting for it to get pumped off, at  
12 least once a week they're going to be looking at it.  
13 So the greatest time period you're going to have  
14 without an inspection of some sort is going to be a  
15 week.

16 And the spill rule -- I think we had  
17 testimony during the hearing that the results of not  
18 dealing with a leak that is greater than 5 barrels  
19 is pretty painful. It can be quite expensive.

20 There's an incentive that did not exist at  
21 the time of AP94 or AP77 or AP78 to control your  
22 fluids. The spill rule came into play in 2008, I  
23 believe.

24 CHAIRPERSON BAILEY: I believe there has  
25 been a spill rule in effect. Now it's been amended,

1 and that is probably when.

2 COMMISSIONER BLOOM: First of all, do you  
3 have any concerns about a leak, a compromise of the  
4 liner that is probably small but steady over the  
5 course of the year? I could see if there -- you  
6 know if somebody tried to drill-bit into the pit and  
7 you've got a six-inch hole, you might see the fluid  
8 level comes down noticeably overnight. But if it's  
9 smaller than that, just from a rock puncture or  
10 something...

11 COMMISSIONER BALCH: This comes around  
12 to -- this comes around to closure, which  
13 Commissioner Bailey doesn't want us to talk about  
14 yet. But when you close it, you're looking to see  
15 if there's any wet or discolored soil, things like  
16 that, and then you have to test.

17 So if you're not careful about how you run  
18 your pit, you're going to once again trigger that  
19 testing, and then you're going to trigger the spill  
20 rule if it exceeds that limit.

21 So I think, again, you're being  
22 protective. And the fact that we have much more  
23 oversight at all levels, you have much better  
24 designed pits, you have thicker liners, you have  
25 operational constraints of what can go into those

1 pits. You can't throw your drill bit in there. If  
2 you do you're going to get a fine, if somebody comes  
3 out there and finds a drill bit.

4 I think when you tie that into risk, via  
5 Dr. Thomas' argument of response time and  
6 Mr. Arthur's argument of response time, you're not  
7 going to see those kind of releases that were  
8 brought up, and I think rightfully brought up,  
9 because they are a sign of what could happen.

10 But I think that what was demonstrated to  
11 me, from the testimony of the experts, was that that  
12 is extremely unlikely to occur. The risk is very  
13 low under the constraints of Rule 17 as proposed.

14 I don't know if that answers your  
15 question.

16 COMMISSIONER BLOOM: Thank you.

17 Madam Chair, I'll say I'm generally not in  
18 support of the newly-proposed low chloride fluid  
19 classification or definition. So if it's something  
20 that you'd like to proceed with, I know you can do  
21 that.

22 COMMISSIONER BALCH: I've had this happen  
23 before. And I think Commissioner Bailey will maybe  
24 frown at me. But I really think it's important that  
25 we have a consensus wherever possible. So if I



1 could understand where your concerns are from and  
2 then maybe address them, I would try to do so.

3 If you think that would be a futile  
4 exercise then we could just move on and we can deal  
5 with other consensus.

6 COMMISSIONER BLOOM: The -- part of my  
7 concerns that I have with the low chloride fluid  
8 classification is how it affects siting. And so we  
9 can turn to the siting and look at that. But...

10 COMMISSIONER BALCH: Well, we are just  
11 talking about low chloride fluid, the definitions,  
12 now, and siting would be a later discussion.

13 If you don't think the low chloride fluids  
14 warrant the different siting criteria, that would be  
15 a discussion for later on.

16 CHAIRPERSON BAILEY: That's what I keep  
17 trying to say here.

18 COMMISSIONER BALCH: I want to lay the  
19 foundation.

20 CHAIRPERSON BAILEY: All we want is a  
21 definition, and then we can determine whether or not  
22 we should have siting requirements that take that  
23 into account or closure requirements or reclamation  
24 requirements or operational requirements, once we  
25 have this definition.

1                   COMMISSIONER BLOOM: Okay. Then I guess  
2 the next question -- because part of the definition  
3 is what is a good level to set low chloride fluid  
4 at, what we consider low.

5                   You know, there -- I've heard testimony  
6 about the possible toxicity on plants at around  
7 10,000. We have New Mexico Game and Fish asking  
8 that low chloride fluids be left at no level higher  
9 than 3,000 milligrams per liter.

10                  We have heard some conflicting testimony  
11 about the effects of chlorides on plants. And that  
12 is something that has to deal with closure, and it  
13 also comes in up front here as well.

14                  So is the 15,000 milligrams per liter  
15 where you-all want to be?

16                  COMMISSIONER BALCH: Well, I'll restate my  
17 opinion. And that is that the risk is primarily in  
18 the operational phase. We have good monitoring  
19 during that phase, and the transportability is  
20 lower, much lower, once you stabilize whatever is  
21 left in the pit after you've drained off the fluids.  
22 So your risk is of a release during operation.

23                  And at the 15,000 milligrams of chloride  
24 per liter level, I'm comfortable with that level of  
25 risk. I think it's very low, that you would have --

1 if you did have a release it would be noticed. If  
2 it was large enough under the spill rule to impact  
3 surface fauna, which is basically you have an  
4 overflow of the water, then it would be remediated.  
5 It would be resolved. It wouldn't just be left  
6 behind.

7 So I think it's protective. And in the  
8 sense that it allows for operation in the San Juan  
9 Basin of KCL-drilled wells under that standard, I  
10 would support it.

11 CHAIRPERSON BAILEY: The brine water  
12 that's required for drilling, which we have  
13 testimony goes 12- to 13,000 parts per million, is  
14 essential for the safe operation of any kind of  
15 drilling operation.

16 There are multi-purposes for the use of  
17 brine water in preparation of drilling wells. It is  
18 a safety factor as well as an operational factor for  
19 preventing swelling of clays, for example, so we  
20 don't -- so we are able to drill to the depths that  
21 oil and gas wells need to go to.

22 Because of the inherent concentration of  
23 chlorides in drilling muds by using brine water, KCL  
24 water, I believe 15,000 is a reasonable cutoff for  
25 the definition of low chlorides.

1           It is comparable to Colorado, which has  
2   very strict environmental regulations for drilling.  
3   It is more protective than the Texas requirement  
4   that allows land farming of 3,000 parts per million  
5   that remain at the surface.

6           With the 15,000 milligrams per liter we  
7   have before us areas where we can determine safety  
8   regulations that will protect safety, human health,  
9   the environment. That's what we are charged with  
10  doing.

11           And I think that that 15,000 is a  
12  justifiable level for going farther in determining  
13  the use of low chloride fluids and the remediation  
14  that will be required.

15           COMMISSIONER BLOOM: Let me ask you this.

16           Does -- I don't remember where the low  
17  chloride fluids impact the pit rule. And right now  
18  I'm blanking on it, if it is anywhere outside of --  
19  outside of the siting requirements in Section 10.

20           COMMISSIONER BALCH: It's primarily -- I  
21  think the primary impact of chlorides is going to be  
22  in closure. Can you --

23           COMMISSIONER BLOOM: I guess -- and that's  
24  where the apples and oranges thing is. The amount  
25  of chlorides in the pit at the end of the process

1 does not necessarily depend on whether a low  
2 chloride fluid was used up front.

3 COMMISSIONER BALCH: It will impact it to  
4 some degree. Because if you have a -- basically  
5 have a mud at the bottom of the pit, its very  
6 constituents, one of them is going to be the fluid  
7 that is carrying it that has a higher concentration  
8 of salt. Then, after you pump off the fluids, there  
9 will still be a higher concentration in that mud.  
10 And that's where the distinction comes in, but that  
11 will be more of a closure discussion.

12 COMMISSIONER BLOOM: Yeah. I think that's  
13 fine. I think originally I may have -- yesterday or  
14 Monday may have inflated some of my concerns about  
15 chlorides as to other facts.

16 But my understanding of where low chloride  
17 fluids comes into play in the amendments to the pit  
18 rule is really in Section 10, where we get into --  
19 we get into siting on -- and so I guess I'm opposed  
20 to having low chloride fluids if they only exist to  
21 reduce distance to groundwater and surface water.  
22 Okay?

23 CHAIRPERSON BAILEY: The modeling that was  
24 done by Mr. Mullins was based on 15,000 parts per  
25 million.

1           And so when we have discussion on this  
2 modeling, then that, I think, is one of the basic  
3 assumptions. And so we have to take into account  
4 and work with that definition.

5           COMMISSIONER BLOOM: I think we can take  
6 into account that he modeled 15,000 milligrams per  
7 liter, and then he shows how that shakes out --  
8 comes out in the model. And I expressed some of my  
9 concerns about his modeling.

10          COMMISSIONER BALCH: But I think that may  
11 be better discussed when we are talking about --  
12 about siting and closure.

13          The tentative, at least acceptance of a  
14 definition of low chloride fluids is necessary  
15 before we even begin that discussion. If there's no  
16 low chloride fluids, maybe there's no point in  
17 discussing Sections 10 and 11, right, with regards  
18 to siting criteria in particular.

19          So I think we have to have some sort of a  
20 definition, even if it's tentative, that we can base  
21 our discussion on.

22          And all of the evidence that was presented  
23 by the industry side, NMOGA and IPANM, had to do  
24 with that chloride level. And they did establish a  
25 basis for that level in Colorado.

1           Mr. Arthur stated in a broad sense that  
2   New Mexico regulations were more stringent even  
3   under all of the modifications.

4           Mr.- -- or, I'm sorry. Dr. Thomas --

5           COMMISSIONER BLOOM: I would qualify  
6   Mr. Arthur's testimony as saying that we're the most  
7   strict state.

8           COMMISSIONER BALCH: Well, I can give you  
9   the citation if you want it. He did say that.

10          COMMISSIONER BLOOM: I think I still have  
11   it. He said that:

12                 "New Mexico's liner requirements are more  
13   stringent than four out of the six states that I  
14   chose in this comparative analysis. New Mexico's  
15   freeboards meet or exceed all other six states.  
16   New Mexico has more detailed setback requirements  
17   than all the other six states."

18           I'm not sure -- I can't recall what six  
19   states they were. But, you know, previously he was  
20   talking about this 33-state analysis and...

21          COMMISSIONER BALCH: I asked him about the  
22   six states in my examination of Mr. Arthur.

23          COMMISSIONER BLOOM: So liners are  
24   required for at least some pits in 23 states,  
25   require some sort of minimum freeboard in 16 states.

1 So if you look at Colorado and New Mexico and  
2 Texas...

3 COMMISSIONER BALCH: If we go to page 604  
4 and 605, there's a couple of pages there saying --

5 COMMISSIONER BLOOM: Yeah.

6 COMMISSIONER BALCH: -- and you may have  
7 missed part of what his response was.

8 My question on page 605 at line 9 -- and  
9 this goes to my statement of he broadly said our  
10 rules are more stringent than anybody else's.

11 The question was:

12 "And even with the revisions to proposed  
13 Rule 17, does that have an impact on New Mexico's  
14 leading position in how they regulate the impacts of  
15 pits, or does that leave us still as one of the  
16 leading states?"

17 And the answer was:

18 "I would say that with the proposed  
19 rules -- the proposed Rule 17 is more detailed and  
20 stringent than regulation rules in most of the other  
21 states managing oil and gas production, and  
22 especially with high levels of current oil and gas  
23 development."

24 So that does qualify that statement a  
25 little bit.



1                   COMMISSIONER BLOOM: And one of the things  
2 I discussed with Mr. Arthur was do we necessarily  
3 want to set our levels based on what other states  
4 are at?

5                   If you compare us to the six more  
6 stringent states, or if you compare us to the six  
7 least regulated states, of course they're regulated  
8 by comparison. So...

9                   COMMISSIONER BALCH: Well, I think in  
10 general, you don't want to base your regulations  
11 solely upon some other state's practice. For  
12 example, we might look at the Texas standard, which  
13 some people might think is too low.

14                  But the other example on the other side,  
15 the standard that was taken by NMOGA was the 15,000  
16 chloride standard. And Colorado was, by no means, a  
17 conservative when it comes to regulating waste.

18                  I think that's a -- I think the 15,000  
19 level, besides being operationally important for use  
20 of the KCL water, is essentially -- you know, even  
21 if you don't want to talk about, right now, closure  
22 or disposal on site, the difference between the  
23 closed-loop system and being able to use a pit is  
24 also determined by the low chloride fluids, and to  
25 some extent the proposed setbacks for those.

1 Closed-loop systems are not appropriate  
2 everywhere. That was testified to.

3 There was a lot of testimony about the  
4 cost. And I -- there are some citations I can give  
5 you directly from Mr. Gantner, I think in  
6 particular, and his experience of \$105,000 per well  
7 additional cost for a closed-loop system.

8 Basically, the way I interpreted the  
9 direct testimony was that the current rule did not  
10 allow practices that would really be safe, and  
11 that's why they were asking for these things to be  
12 relaxed a little bit -- not removed, not taken down  
13 to the Texas level, perhaps, but lowered to  
14 something that made a little more business sense,  
15 but still provided a low risk, but you would not be  
16 as protective of public health, environment, and  
17 fresh water.

18 COMMISSIONER BLOOM: I may have gone  
19 astray a little bit again. Again, I -- I can't join  
20 you in adopting this definition right now. If we  
21 want to set it aside, look at siting requirements,  
22 and do so.

23 CHAIRPERSON BAILEY: The siting  
24 requirements proposed changes are based on low  
25 chloride fluids. If you take a moment to go over to

1 Section 2.

2 COMMISSIONER BLOOM: No, and I certainly  
3 understand that. And if we are moving forward with  
4 this definition I don't support a temporary pit even  
5 with low chloride fluids. It distances -- as close  
6 as 25 feet to the groundwater.

7 COMMISSIONER BALCH: But I think that's a  
8 separate issue of why you think it's a low chloride  
9 fluid or not. I mean if you are at a point where  
10 you can't say that 15,000 is a low chloride fluid,  
11 then we are possibly not going to get past that.

12 COMMISSIONER BLOOM: Yeah. I mean that's  
13 the point I'm at right now.

14 COMMISSIONER BALCH: So we can either  
15 agree to discuss siting closure with that  
16 understanding that it's based upon the proposed  
17 definition, or we can adopt the definition -- or we  
18 can try to adopt the definition without Mr. Bloom's  
19 support.

20 CHAIRPERSON BAILEY: I think that we  
21 should go ahead and go to siting, and maybe we can  
22 find a common ground.

23 If Mr. Bloom's concerns have to do with  
24 low chloride, as defined, then we will have that  
25 siting discussion. Or if there -- we'll just see

1     how that discussion goes.

2                   COMMISSIONER BLOOM:   Okay.   Sure.

3                   COMMISSIONER BALCH:   Let me ask one more  
4     question of you.

5                   COMMISSIONER BLOOM:   Okay.

6                   COMMISSIONER BALCH:   Do you think that a  
7     discussion of siting closure would make the  
8     definition more clear in your mind, or is there just  
9     no chance you're ever going to accept the definition  
10    of low chloride fluids at 15,000?

11                  COMMISSIONER BLOOM:   If you change the  
12    siting requirements I would be in favor of adopting  
13    it, because it essentially wouldn't matter.   So I'm  
14    not going to do that.

15                  CHAIRPERSON BAILEY:   Okay.   So let's go on  
16    to siting.   If we can't reach any agreements with  
17    that, then we'll just have to go ahead and not have  
18    a consensus, or just have a majority of the  
19    commission.

20                  If we will go to 19.15.17.10, "Siting  
21    Requirements."

22                  The first proposed language is to include  
23    multi-well fluid management pits in the siting  
24    requirements, and to remove below-grade tank as  
25    being constrained by siting requirements.

1 COMMISSIONER BALCH: Okay. So the way  
2 this section is organized, you have A, then you have  
3 (1) and (2). (1) is "Temporary/Multi-Well Pits,"  
4 and (2) is "Permanent Pits."

5 CHAIRPERSON BAILEY: Right.

6 COMMISSIONER BALCH: I would say that we  
7 probably ought to look at multi-well pit and siting  
8 requirements separately from temporary pits.

9 CHAIRPERSON BAILEY: Okay.

10 COMMISSIONER BALCH: And then that would  
11 be A (1), (2), and (3).

12 CHAIRPERSON BAILEY: Yes. So we can begin  
13 with simply looking at siting requirements for  
14 temporary pits.

15 COMMISSIONER BLOOM: And come back and  
16 look at multi-well?

17 COMMISSIONER BALCH: Well, I'm saying  
18 because of the logical progression of the temporary,  
19 multi-well, and the permanent.

20 CHAIRPERSON BAILEY: Right.

21 COMMISSIONER BLOOM: Okay.

22 COMMISSIONER BALCH: Because you have  
23 temporary, permanent, and the hybrid.

24 CHAIRPERSON BAILEY: So dealing only with  
25 temporary pits, subsection A, we have already agreed

1 not to have the distinction between confined or  
2 unconfined waters. So in A we can delete  
3 "unconfined," which appears to have already been  
4 done.

5 COMMISSIONER BALCH: I don't think we want  
6 to -- I mean, I think we had a word search done on  
7 that word.

8 CHAIRPERSON BAILEY: Okay.

9 COMMISSIONER BALCH: Do you want to delete  
10 the "or multi-well fluid management pit on  
11 below-grade tank"?

12 CHAIRPERSON BAILEY: I think we have  
13 agreed to do that and save it for a different  
14 section.

15 COMMISSIONER BLOOM: That's fine.

16 CHAIRPERSON BAILEY: So just a colon after  
17 "temporary pit."

18 The question before us now is whether or  
19 not, A, an operator can locate a temporary pit where  
20 groundwater is less than 25 feet below the  
21 surface -- or below the bottom of the pit, if that  
22 pit contains low chloride fluid.

23 If the pit contains higher -- or fluid  
24 that does not meet a definition of low chloride  
25 fluid, then groundwater must be 50 feet below the

1 bottom of the pit.

2 COMMISSIONER BALCH: Which is the current.

3 CHAIRPERSON BAILEY: Which is the current  
4 regulation.

5 COMMISSIONER BALCH: Would it be helpful  
6 to look at an exhibit that tabulates the siting  
7 requirements?

8 COMMISSIONER BLOOM: I think what happened  
9 here is, the proposal was to have groundwater at  
10 25 feet below the bottom of the pit when it was  
11 unconfined groundwater; otherwise, it was going to  
12 be at 50 feet.

13 CHAIRPERSON BAILEY: But we've eliminated  
14 that distinction for confined or unconfined. So  
15 we're saying where groundwater is less.

16 COMMISSIONER BLOOM: Right. So then I  
17 think it would be -- by not recognizing groundwater,  
18 don't we then leave behind the proposed change to  
19 25B? Because that was only to be for an area where  
20 there was confined groundwater.

21 COMMISSIONER BALCH: Well, I think the  
22 intent -- I think the intent was that if you -- my  
23 interpretation is that if you have low chloride that  
24 it's is 25. If you have high -- anything else,  
25 that's 50. And confined or unconfined, we have

1 removed that distinction.

2 COMMISSIONER BLOOM: Because the proposal  
3 was if there was unconfined groundwater at less than  
4 25 feet, I guess only a low chloride fluid could be  
5 used?

6 COMMISSIONER BALCH: Maybe. We could  
7 refer to NMOGA Exhibit 3-6, which was the exhibit  
8 Mr. Hansely used when he was discussing his part of  
9 the rule.

10 This is why I think the intent was based  
11 upon the florals in the drilling fluid, based on  
12 where the groundwater was confined or otherwise.

13 And this shows the changes to siting  
14 requirements. Essentially, if you're above low  
15 chlorides, then the siting requirements would be  
16 unchanged from the existing Rule 17, and they would  
17 be reduced in four categories if they were low  
18 chloride. They would be reduced in groundwater  
19 depth, they would be reduced in distance to a  
20 watercourse, reduced in distance to a water well,  
21 and reduced to a wetland.

22 CHAIRPERSON BAILEY: But if it doesn't  
23 qualify as low chloride, then there are no changes.

24 COMMISSIONER BALCH: No changes were  
25 requested.



1           CHAIRPERSON BAILEY: That's right. So  
2       it's only for low chloride fluids.

3           COMMISSIONER BLOOM: Okay.

4           CHAIRPERSON BAILEY: So we need to  
5       determine if we have that -- that definition for low  
6       chloride fluids, if we can change the distance to  
7       groundwater from the bottom of the pit.

8           COMMISSIONER BALCH: I think they would  
9       pick the instruction of the lower chloride  
10      content -- much of which, by the way, as it was also  
11      pointed out by Mr. Arthur, is bound chloride, not  
12      free to form particle salts, as potassium chloride.

13           That -- and with the response time, based  
14      upon the inspection level at a minimum of every  
15      week, more often during operation, when something is  
16      likely to go wrong. But I would be comfortable with  
17      that.

18           CHAIRPERSON BAILEY: And at this point,  
19      I'd like to bring out Mr. Mullins' model, which had  
20      to do with distance to groundwater 25 feet, given  
21      low chloride fluids, and the concentration of  
22      chlorides that would be found if regulation is  
23      performed and closure is performed in the way it's  
24      been proposed or it -- yes.

25           What are the possibilities, and do we

1 interpret Mr. Mullins' calculations and the  
2 concentrations, which I think is the key to  
3 everything.

4 COMMISSIONER BALCH: Okay. So for  
5 Mr. Mullins' modeling, his modeling was really for  
6 the case of a closed site. It wasn't for  
7 infiltration with a hydraulic head. It was for  
8 natural infiltration using rainfall rates that he  
9 attained from historic data.

10 CHAIRPERSON BAILEY: Right.

11 COMMISSIONER BALCH: And to the extent  
12 that it's inadvisable to model much longer than the  
13 data that you have, the key input data that he has  
14 is probably 50 years' worth of weather data.

15 So you're looking at around 50 years of  
16 meaningful model in anybody's case that uses that  
17 infiltration rate.

18 But we are really not looking, here, at  
19 that issue. We are looking at siting for the  
20 operational phase where you are going to get fluids  
21 that are there temporarily in a light head. If  
22 there's a leak, there will be a response. And the  
23 risk in that case is low, and also different than  
24 the risk of the stabilized and dry material left on  
25 site, which we'll talk about during closure.

1 CHAIRPERSON BAILEY: You're right.

2 COMMISSIONER BALCH: So I think that's why  
3 I'm comfortable with changing this distance. It's  
4 not because of Mr. Mullins' modeling. That will  
5 come up later in a different context. But it's  
6 because you're going to have, at most, a week of  
7 fluid draining.

8 There is a defined system for checking  
9 whether your pit is structurally working, and there  
10 is a defined response in this and in the spill rule  
11 for what you do. There would be a response. It  
12 wouldn't sit there for two to three years with a  
13 hydraulic head on it pumping water down into the  
14 water table. It would only be for a very short  
15 period of time for which, when a leak was  
16 identified, it would be drained, we would move the  
17 head, you'd remove the force that is pushing the  
18 fluid.

19 CHAIRPERSON BAILEY: And we have  
20 determined the length of time that we would allow  
21 fluids, even with extensions of time.

22 COMMISSIONER BALCH: Yes.

23 CHAIRPERSON BAILEY: And during the --

24 COMMISSIONER BALCH: And during that time  
25 there would be a weekly inspection. So the longest

1 you'd have of unabated significant release would be  
2 a week. And that would be protective, and was  
3 presented as -- in testimony -- as protective, based  
4 on the risk of the release. And if there was a  
5 release, you could respond to it for a breach of  
6 groundwater at a 25-foot depth.

7 I believe that is in Mr. Thomas'  
8 testimony. I have the citation, but not...

9 COMMISSIONER BLOOM: What was the last  
10 part again? If there was a leak, you could --

11 COMMISSIONER BALCH: You would respond to  
12 it within a week. So you don't have a year or two  
13 years of hydraulic pushing fluid. You're going to  
14 have a contained leak due to the fact that you would  
15 notice it in a week. If it was a tear in the liner  
16 or you saw the fluid level drop, you would pump all  
17 the fluid off within 48 hours. Okay? So nine days  
18 would be the effective length that a leak could be  
19 pushing fluid into the ground.

20 And the evidence that was presented to us  
21 by the experts was that in that case it would not  
22 reach groundwater within nine days, or they said it  
23 would be protected, which can be implied to mean  
24 that.

25 Now, Dr. Neeper's models I think also did

1 not say that they would be there within nine days.

2 And that was assuming infiltration rates that we are  
3 talking about.

4 COMMISSIONER BALCH: Okay. So that's the  
5 risk side of it.

6 What's the reward side of it?

7 The reward side of it is you can allow the  
8 operator to be more flexible in their operations.  
9 They don't have to use a closed-loop system.  
10 Potentially, in our discussion of closure, they may  
11 not have to necessarily haul the waste offsite.  
12 That's for a different discussion.

13 They can use the correct operation for a  
14 site. There are some places that a closed-loop  
15 system would be better, other places they wouldn't  
16 be. And we'll talk about the siting for tanks later  
17 on. I think they actually recommend that the  
18 groundwater below a tank be 10 feet, because it is  
19 protective. I mean, is contained in the tank.

20 Basically, we're not leaving these things  
21 laying around like we used to. We're keeping a  
22 close eye on them. Any release -- significant  
23 release that would trigger this spill rule and  
24 remediation process would, at most, have a nine-day  
25 period when the leak was occurring.

1 CHAIRPERSON BAILEY: It's a better  
2 precautionary design and construction.

3 COMMISSIONER BALCH: And better design  
4 construction.

5 So the reward is I guess, if you will --  
6 and Mr. Smith said we could use that as a  
7 consideration -- is that if we reduce operating  
8 costs or allow flexible operating costs, you allow  
9 flexible operating procedures to release costs and  
10 more capital is available for other development by  
11 leases drilling other wells. And that benefits the  
12 state of New Mexico which, to me, is very important.

13 COMMISSIONER BLOOM: Waste is -- it's on  
14 the waste case, though, because -- but I think oil  
15 and gas is still there. Maybe at a future time  
16 there will be technologies which allow for this  
17 extraction and that it, therefore, becomes  
18 economical again.

19 And I give the case, for example, of we  
20 are now exploiting oil shales that we couldn't have  
21 exploited 20 years ago. We could have gone down  
22 straight into them; it wasn't economically viable.  
23 But now that oil is recoverable because you can go  
24 through horizontally and directionally drill it.

25 COMMISSIONER BALCH: But I want to also

1 bring up the point that it's not as operationally  
2 safe to try to drill along horizontal, such as what  
3 you need for a shale well, in a closed-loop system.

4 So the question -- I think you maybe  
5 address this in your interpretation of Continental  
6 versus SEC. When is the lease defined? What is  
7 waste in the context of time?

8 Because you are correct. They argue that  
9 the oil and gas is still there. So...

10 MR. SMITH: No, I didn't address that.  
11 The issue was -- yesterday, we talked about the --  
12 the issue was whether, as I perceived it, was  
13 whether you could take the economics of the industry  
14 into account. And my recollection is that NMOGA  
15 argued that it was a matter of waste if it -- if  
16 development was discouraged. And OGAP argued that  
17 if it's left in the ground that doesn't mean it's  
18 waste because it can still be pulled out later on.

19 And those arguments, however, were in  
20 service, I believe, of whether economics could be  
21 taken into account.

22 And my answer to you was that I believe  
23 that economics could be taken into account. I  
24 didn't rely on the definition of waste; I relied on  
25 the necessity of regulations being reasonable and a

1 citation to the Clean Water Act that discussed  
2 economics of a project.

3 So I didn't really answer the question on  
4 whether waste means producing in such a way that it  
5 neutralizes a particular area or whether it means  
6 not encouraging development. I didn't answer that.

7 COMMISSIONER BALCH: In the context of  
8 some of the permits for acid gas injection wells  
9 that come before the commission, I remember an  
10 example through my own experience. Waste would  
11 be -- there would be arguments, perhaps, that if you  
12 have that acid gas injection well there you would  
13 isolate or dilute or in other ways damage the  
14 producibility of some other zone or area of interest  
15 nearby.

16 And it seems like waste, when we have  
17 talked about it for -- in commission hearings, and I  
18 understand that you have only been involved in the  
19 pit rule hearing -- has been looked at a little more  
20 short-term than forever.

21 You know we look at it as if you cause an  
22 impact over the near future to producibility of oil  
23 and gas then we cause waste. That has been argued  
24 to us before.

25 Now, OGAP's argument is that it will



1 always be there.

2 So looking at the numeration of powers --  
3 and this is just the other powers. It doesn't  
4 really talk about the waste in it. I don't have a  
5 page that talks about waste and correlative rights.

6 MR. SMITH: There are several definitions  
7 of waste.

8 COMMISSIONER BALCH: Well, and then I also  
9 just brought up the word "correlative rights."

10 Our first duty is to prevent waste.

11 The second one is to produce -- or to  
12 prevent correlative -- or preserve correlative  
13 rights.

14 And then we have a list of 22 other powers  
15 that we have.

16 So the reason I think that in my mind I  
17 have interpreted waste as more of a short-term thing  
18 is because of the correlative rights side of the  
19 issue.

20 So if you make it uneconomical for a  
21 company to produce their gas lease, you have removed  
22 their right to that resource, in a sense.

23 I'm not sure that's the way correlative  
24 rights has been interpreted.

25 MR. SMITH: That is an even more than

1 over-lunch question.

2 CHAIRPERSON BAILEY: Because we also have  
3 the definition of correlative rights in the OCD  
4 regulations.

5 COMMISSIONER BALCH: Okay.

6 CHAIRPERSON BAILEY: I have it here, if  
7 you'd like to look at it over lunch.

8 COMMISSIONER BALCH: Is this waste issue  
9 of such importance that we have to resolve whether a  
10 thousand years' worth of not producing it versus a  
11 time of years not producing it is waste? How  
12 important is the waste issue to you?

13 COMMISSIONER BLOOM: I think it's a  
14 fundamental issue of the hearing. It's one of them,  
15 and protection of water and public health. But...

16 COMMISSIONER BALCH: Well, will it help  
17 you to have that clarified?

18 COMMISSIONER BLOOM: Well --

19 COMMISSIONER BALCH: It's unlikely to  
20 change?

21 COMMISSIONER BLOOM: I think I know where  
22 I stand on it. And that is that -- and that is that  
23 regulations such as these aren't creating a waste of  
24 the resource. And waste is if we are going to do  
25 things that would allow, for example, spacing so

1 close, there's so much penetration of formations  
2 they crash pressure and then -- you know, sort of  
3 the things from the early days of oil and gas.

4 That's one of the reasons you find the  
5 creation of the OCD, for example. And there are --  
6 the regulations they may think are uneconomical at  
7 some points, but it doesn't mean that the resource  
8 has been wasted.

9 And I think I expressed, perhaps on  
10 Monday, that I haven't seen particular evidence of  
11 waste. And I have heard little evidence about the  
12 effects of acquiring a closed-loop system on the  
13 economics of the companies.

14 COMMISSIONER BALCH: Well, there was a lot  
15 of testimony on the closed-loop system and the  
16 impact of the costs of operations.

17 COMMISSIONER BLOOM: Well, I -- I mean, I  
18 guess I don't qualify a few minutes of Mr. Gantner's  
19 testimony as significant when we didn't even have a  
20 breakdown of what those costs were. We asked for  
21 it, we didn't receive it. He didn't know if it even  
22 included the taxable implications of how does that  
23 reduce the cost, by the time you take that out of  
24 your profit.

25 COMMISSIONER BALCH: We talked about this

1 on Monday. There was Mr. Gantner's testimony, there  
2 was Ms. Denomy's testimony, there was testimony from  
3 Mr. Scott. And there was at-length discussion, so I  
4 don't think it's insignificant testimony.

5 Now whether the specifics were to what you  
6 want, I'm not sure if you would ever get to an  
7 agreement on that. But everybody that we asked said  
8 that there was some cost, whether it was a penny or  
9 \$300,000, some cost.

10 COMMISSIONER BLOOM: No, I wouldn't  
11 disagree with that.

12 COMMISSIONER BALCH: So there is some  
13 impact on that. At some level you will have an  
14 impact on production. And I --

15 COMMISSIONER BLOOM: But I didn't hear,  
16 for example, Conoco saying, you know, we can't  
17 operate in New Mexico.

18 I didn't see companies coming in --

19 COMMISSIONER BALCH: Well, they can  
20 operate -- he did not say that. But he did say in  
21 his direct testimony that if they weren't forced to  
22 use closed-loop systems in 100 percent of their  
23 operations, and instead could use it in 20 percent  
24 where it's appropriate, that that additional capital  
25 would be used for further development.

1           Further development means more wells, more  
2   gas, more state revenues. And I think we did say we  
3   were entitled to look at production of revenues of  
4   the state as potential costs.

5           MR. SMITH: I think that you can look at  
6   the economic impact of your regulations, you know,  
7   to the state and to the regulated community. I  
8   would like to say this, though, before you go too  
9   much further down the waste discussion.

10           There are some definitions, several  
11   definitions of waste, actually, I think, in the Act.  
12   I don't know whether those will resolve the issue,  
13   at least as I perceive it, between Commissioner  
14   Bloom and Commissioner Balch on the definition of  
15   waste.

16           Those -- that controversy, I can't promise  
17   you this. But I believe that controversy to be  
18   unresolved. And if you go either way predicated on  
19   your definition of waste, then I think you are, in  
20   either case, going to wind up leaving it to a Court  
21   to make that determination.

22           If you are able to resolve the  
23   practicalities of your differences without focusing  
24   on the definition of waste, I think in all  
25   likelihood wherever you land on it you are going to

1 land on safer regulatory ground.

2 And as I say, I can't promise you that  
3 it's unresolved, but I believe that it is in that  
4 stage.

5 CHAIRPERSON BAILEY: Thank you for those  
6 comments.

7 COMMISSIONER BALCH: Well, then, I will  
8 not base my definition on waste. I will, instead,  
9 base it on revenues to the state.

10 COMMISSIONER BLOOM: We heard Mr. Scott  
11 say a few words about that. And that was his belief  
12 that the state land office is doing quite well on  
13 its sales. And we have seen over the time that the  
14 pit rule has been in effect, almost, an increase of  
15 what we have seen in the monthly lease sale. It was  
16 \$100 million last year.

17 COMMISSIONER BALCH: I think that's --  
18 this is an apples and oranges thing. We -- on  
19 Monday, again, we looked at Mr. Scott's comparison  
20 of three counties in New Mexico and three counties  
21 in Texas. We started out with a 2-to-1 development  
22 difference between Texas and New Mexico in  
23 essentially the same rock. And everybody had a  
24 little economic downturn.

25 The price of oil skyrocketed. You saw a

1 lot of development in Texas, maybe up to 5- or  
2 6-to-1 compared to development in New Mexico, which  
3 was steady, compared to the time of the  
4 implementation of the pit rule.

5 COMMISSIONER BLOOM: And we don't know  
6 what else might have been happening in Texas at that  
7 time. If there was one company driving production  
8 of certain units there to work new formations.

9 COMMISSIONER BALCH: If you were talking  
10 about a month or a few months I would agree. If you  
11 were talking about a period of four or five years of  
12 data, and you would maybe see a blip if it was one  
13 company.

14 If it's systematic, then you see a trend.  
15 Now, the trend is that there was a lot more  
16 development in Texas than there was in New Mexico  
17 for the same global economic conditions.

18 COMMISSIONER BLOOM: I just don't know  
19 that we have heard enough there to say that  
20 production is up in New Mexico. We didn't hear  
21 testimony to that. So...

22 COMMISSIONER BALCH: Actually, we have  
23 exhibits that were talked about at great extent that  
24 show the counts the same still five years later.  
25 And it dipped in the interim and then it slowly

1 recovered to that level and then went, essentially,  
2 flat.

3 While at the same time you have an  
4 increase in Texas, a dip for something that also  
5 affected New Mexico, and then a much steeper  
6 increase in recount in Texas.

7 So I think there really was enough  
8 evidence presented, and we did cross-examine  
9 Mr. Scott at great length.

10 Where we have a different interpretation  
11 of his testimony -- I think there may be differences  
12 in interpretation. But I don't think there's a  
13 paucity of evidence presented to us. What we do  
14 with that evidence is up to us as individuals.

15 COMMISSIONER BLOOM: Okay. Well, I'll  
16 respectfully disagree there and leave it at that.

17 CHAIRPERSON BAILEY: If we go back to this  
18 19.15.17.10.A (1), Commissioner Bloom, would you be  
19 more comfortable having a qualifier for the low  
20 chloride fluid, if it were water-based, to be within  
21 25 feet?

22 COMMISSIONER BLOOM: Madam Chairman, I'm  
23 still concerned about possible leaks of liner that  
24 could go undetected, that there's not a significant  
25 drop of water level so much in a week that it would



1 be noticed. It could be out there for 10 months or  
2 more.

3 I think we have seen -- you know,  
4 fortunately the current rule may have worked too  
5 well. We don't have examples of pits that have  
6 leaked. And --

7 CHAIRPERSON BAILEY: Because we're not  
8 changing the design and construction requirements  
9 for a temporary pit. We are retaining that thicker  
10 liner material.

11 COMMISSIONER BLOOM: But now we are  
12 leaving some -- I understand that. That is one  
13 reason I feel comfortable allowing the fluids to be  
14 in the pit a little bit longer, that we have,  
15 usually, multi-well temporary pits.

16 When I look at some of the cases that  
17 Dr. Neeper presented, Mr. Boyd, and Ms. Martin, I  
18 see Dr. Neeper's Well 49 leaching of the chlorides  
19 25 to 30 feet; Well 321 leaching of the chlorides 30  
20 to 35 feet; Mr. Boyd, 30 feet -- chlorides  
21 penetrating to 30 feet with groundwater at 50 feet.

22 EP81 Chevron down to 20 feet is where that  
23 one ended.

24 Pride Energy 1878 down to 30 feet. He  
25 modeled it at 20 feet.

1           So this area, I think, is pretty  
2     vulnerable between 25 and 50 feet. So that's --  
3     that's why I'm opposed to having pits sited over  
4     groundwater at 25-plus feet.

5           CHAIRPERSON BAILEY: Then why don't we  
6     drop A for just a short time and go to B and see if  
7     we can find any kind of common ground for changing  
8     the distance for low chloride fluids to a  
9     continuously flowing watercourse.

10          COMMISSIONER BLOOM: Okay.

11          CHAIRPERSON BAILEY: Because currently,  
12     that siting requirement is 300 feet to a  
13     continuously flowing watercourse, which we have  
14     tightened up the definition for.

15          The suggested change is to take this to  
16     100 feet for low chloride fluids or 200 feet of any  
17     other significant watercourse, which is the same, or  
18     lakebed, sinkhole, or playa lake.

19          COMMISSIONER BLOOM: The only change here  
20     would be if the pit has low chloride fluids, the  
21     setback goes from 300 feet to 100 feet for a  
22     continuously flowing watercourse.

23          CHAIRPERSON BAILEY: Correct.

24          COMMISSIONER BLOOM: What modeling did we  
25     see about horizontal transport?

1                   COMMISSIONER BALCH: The horizontal  
2 transport modeling was what happened to the  
3 chlorides once you reached the water table  
4 surface -- subsurface.

5                   The evidence that I found in the  
6 transcript, and from my recollection of the  
7 testimony, had to do with an assortment of experts  
8 saying, again, the risk is low because the response  
9 would resolve the issue before the water would make  
10 it that 100 feet.

11                  Particularly, Mr. Arthur -- well, again,  
12 the citation from before considering the operational  
13 phase.

14                  So again, that intense monitoring on  
15 closing the pit, we had a large release. The  
16 response would be the -- the risk before it would  
17 reach that distance.

18                  At the end of each of these -- the  
19 witnesses presented by NMOGA, Mr. Carr or Mr. Hiser,  
20 depending on who was questioning them, would ask  
21 them if the rules as presented were protective, and  
22 they all agreed that they were, so it's their  
23 testimony.

24                  There was cross-examination, and I think  
25 we were all left with our interpretation of that.

1 But there was testimony that it was not modeled.

2 And I'll let you know -- this is a very  
3 brief philosophical side point. I am a modeler, and  
4 I don't trust them further than I can throw them. I  
5 prefer to rely on physical data.

6 And to the extent that physical data was  
7 presented I have a higher comfort level -- I have a  
8 comfort level with many of the criteria that were  
9 suggested, particularly because of the salt.

10 The fact that we're talking about 25 feet  
11 from the bottom of the pit you have a shorter  
12 response period and you have a defined mitigation  
13 response.

14 Those flows aren't going to make it down  
15 there in the time that they have before they are  
16 dealt with. Or, according to the expert testimony,  
17 it's not going to make it across the surface either,  
18 in those cases, even under sheath flow. And this  
19 alleges you would have an even greater reduction of  
20 risk because of the chloride concentration.

21 And you know, I think Mr. Arthur said that  
22 he didn't even think that 15,000 limit was -- was  
23 high enough. He thought it was conservative.

24 So it really depends on your  
25 interpretation of the evidence and what you -- what

1 you think was meaningful or whether -- whether they  
2 presented enough to make a judgment, in your  
3 estimation.

4 COMMISSIONER BLOOM: Now, look at the  
5 closing from New Mexico Citizens for Clean Air and  
6 Water, Dr. Neepor and Dr. Arthur, on Finding 13:

7 "Transcript contains no technical  
8 testimony to demonstrate that the numerical values  
9 of the horizontal and vertical separations of pits  
10 and tanks from water provide adequate protection."

11 COMMISSIONER BALCH: I have a note in my  
12 pad that it was due to the fact that the original  
13 siting criteria was also similarly arbitrarily  
14 decided.

15 So basically, the -- there was not a  
16 technical model of the sheath flow, and you could  
17 have done hydrology and made a calculation of the  
18 sheath flow. Nobody did that.

19 In that respect, there's no technical  
20 testimony. However, there was testimony of  
21 technical experts in those areas that said that that  
22 did not pose a risk and it was protected.

23 Again, that really depends on how much  
24 value you put on the testimony of any particular  
25 person.

1           COMMISSIONER BLOOM: Do we have any way  
2 to -- I don't -- I'm not sure I understand what the  
3 risk is because I didn't hear testimony to it. I  
4 didn't see a model of it.

5           What are the benefits? How many -- how  
6 much oil or gas can be accessed because there is a  
7 setback of 300 feet from the edge of a river versus  
8 100-foot from the edge of the river?

9           COMMISSIONER BALCH: Well, if you go to  
10 the discussion of the pits -- and there was some  
11 sidebar. And an example that was given was because  
12 pits were lumped in with -- tanks were lumped in  
13 with pits and the 50-foot depth flow of the tank,  
14 and it disallowed the use of below-grade tanks in  
15 places where groundwater was shallower than 50 feet.

16           Because of that, and because they used  
17 gravity drainage to operate their separators and  
18 storage, particularly in the northwest, that they  
19 then would have to build up land so that they could  
20 still have gravity drainage to an above-ground tank  
21 instead of a below-grade tank.

22           So that was a particular example there.  
23 So it primarily becomes operational expense of force  
24 of the use of a closed system.

25           COMMISSIONER BLOOM: That's vertical,

1     though. I'm thinking -- I'm asking about horizontal  
2     here. I'm sorry.

3                 COMMISSIONER BALCH: No, it really came  
4     down to the experts saying that -- that a release  
5     would not reach the river before it was responded  
6     to, even at 100 feet. They felt that the original  
7     regulation was overly protective.

8                 COMMISSIONER BLOOM: What does it -- what  
9     does it cost an operator if they, say, lease a  
10    section or a half section from the state land  
11    office, and the northern edge of it borders a river  
12    and they have to be 300 feet south of that, and  
13    that's not something they could -- you know could  
14    measure?

15                COMMISSIONER BALCH: If the economics  
16    dictate that they would -- that they would prefer to  
17    use a pit, then where the setback comes into play is  
18    it tells them where they can drill a well on the  
19    site. And there may or may not be an appropriate  
20    location that allows them to use that setback.

21                So it closes down -- potentially could  
22    close down locations to drilling at all or drilling  
23    in a more expensive way. That was the testimony  
24    that was argued. That is what was argued by NMOGA  
25    and others. So the risk is an unmitigated surface

1 flow releasing the pit fluids into a streambed.

2 The other side, the cost is greater  
3 operational expenses and possibly an elimination of  
4 the possibility of drilling a particular site,  
5 depending on topography and a number of other  
6 factors: Access on where you can put a road, all  
7 kinds of things like that. That was their whole  
8 argument, and it was really kind of based on the  
9 economics.

10 And then the experts said that those newly  
11 defined limits were protective or equally  
12 protective.

13 COMMISSIONER BLOOM: But I didn't see  
14 Conoco or another company come in and say we had to  
15 use closed-loop systems because we couldn't get away  
16 from -- we couldn't get out of the setback  
17 requirement on the parcel we had, or -- you know, we  
18 couldn't -- we couldn't go, you know, across the  
19 river and then drill it horizontally.

20 You know, it's hypotheticals to create a  
21 two-thirds reduction in distance to a river, or it  
22 depends upon the watercourse.

23 CHAIRPERSON BAILEY: I think we need to  
24 bear in mind that we are only talking about this  
25 reduction for the lower chloride fluids. That the



1 higher chloride fluids that have a higher potential  
2 for contamination, if they are there, are not being  
3 changed. Those that act for the category of  
4 other -- of higher chlorides -- will still remain at  
5 the 300-foot limitation. That the hundred-foot  
6 would only apply to those drilling fluids that have  
7 that reduced amount of chlorides.

8 I think that is necessary to bear in mind,  
9 that the higher potential for contamination of the  
10 surface water is reduced by reducing the chlorides  
11 that would be in that temporary pit.

12 COMMISSIONER BLOOM: The chlorides are  
13 reduced over other pits, but then there are other  
14 chemicals in the other waste in the pit as well.

15 COMMISSIONER BALCH: Well, there was  
16 extensive testimony -- I think there were 3103 or  
17 3203 chemicals in Rule 17 that would have to be  
18 followed.

19 Again, Mr. Arthur and Dr. Thomas -- and  
20 then I think also -- I think there were other  
21 ones -- their testimony was that you could  
22 effectively boil that down to three constituents of  
23 concern: Chloride, which makes a great marker.  
24 This -- Dr. Thomas testified that he didn't think  
25 chloride was really that dangerous but it was a good

1 marker of the TPH and the benzene.

2 So those are -- those are the things that  
3 the experts said you ought to be worried about,  
4 because they pose the real risk to the environment,  
5 public health, and fresh water.

6 We can -- we haven't talked yet about  
7 closures, so we haven't gone into the TPH and  
8 benzene and all of that stuff. But basically, what  
9 they said was those are the things you have to worry  
10 about. And when you're talking about a release  
11 from --

12 COMMISSIONER BLOOM: I would agree with  
13 that, that it's those three.

14 COMMISSIONER BALCH: So when you're  
15 talking about a release from the pit that would flow  
16 across the surface of low chloride fluid, you are  
17 primarily looking at drilling mud with potassium  
18 chloride. You would have, at most, traces of the  
19 other two constituents, benzene and others. You  
20 would not have significant amounts of benzene or  
21 other hydrocarbons.

22 So in the context of their testimony, they  
23 felt the -- that the remediation time, the response  
24 time, would allow that reduced setback.

25 CHAIRPERSON BAILEY: Commissioner Bloom?

1                   COMMISSIONER BLOOM: I mean, I'm not --  
2 I'm not -- I can't get there on the low chloride  
3 fluid. I think the two-thirds reduction in setback  
4 between the pit, and if you use the term  
5 "watercourses," is just too much for the risk to  
6 outweigh the benefits. I didn't hear testimony as  
7 to what those benefits could be, particularly on the  
8 horizontal setbacks.

9                   CHAIRPERSON BAILEY: So have the  
10 deliberations enabled you to make any kind of  
11 agreement on either paragraphs A or B?

12                  COMMISSIONER BLOOM: No. I would move to  
13 keep those unchanged, as they are.

14                  CHAIRPERSON BAILEY: Well, Commissioner  
15 Balch, I don't think we'll be able to reach your  
16 desire to have total agreement on either the  
17 definition or --

18                  COMMISSIONER BALCH: You are going to make  
19 me lose sleep. I hate unresolved things.

20                  CHAIRPERSON BAILEY: I know.

21                  COMMISSIONER BALCH: Okay. So maybe I'll  
22 just ask a question, out of curiosity.

23                         So we have come to a conclusion, and we  
24 have a rule that we agree on 97 percent of  
25 everything, and there's that 3 percent we don't

1 agree on, what happens then?

2 CHAIRPERSON BAILEY: In the findings we  
3 can say the majority of the commission agreed that,  
4 and then list whatever.

5 COMMISSIONER BALCH: So point by point  
6 where the disagreement was?

7 CHAIRPERSON BAILEY: That's what we have  
8 done before, in the past.

9 COMMISSIONER BALCH: Okay. And then if we  
10 come up with a different standard that you are  
11 comfortable with, are you going to sign it in the --

12 COMMISSIONER BLOOM: Well, I think if it  
13 said a majority I would sign, yes.

14 CHAIRPERSON BAILEY: Yes, because that is  
15 an accurate reflection of what our deliberations  
16 were.

17 COMMISSIONER BALCH: So I'm not -- I  
18 absolutely respect your -- your opinion and your --  
19 if your conscience dictates that you can't, that you  
20 can't reach the same conclusion as we do, we see the  
21 evidence differently, then it's okay if we disagree.

22 CHAIRPERSON BAILEY: That's what we have  
23 done in the past, and that's what -- it's an option  
24 for us today if we can't reach total agreement.

25 So at this point, before we break for

1 lunch, what we can do is have a vote on the  
2 definition for low chloride fluids.

3 Then we can have a vote on A(1) (a) and  
4 (b) that has been extensively deliberated over  
5 today.

6 COMMISSIONER BALCH: I have another  
7 question, I guess. Because in a lot of the -- a lot  
8 of the process has been not only looking at the  
9 intent for what was proposed, but also changing the  
10 language to be more effective.

11 If we have to make a change to the  
12 language in a section, certainly your input would be  
13 valuable, regardless of whether you agree or not.

14 COMMISSIONER BLOOM: I think there are  
15 some things here that we might agree on, and further  
16 on, too, in the section, there are other things that  
17 I have some changes on.

18 COMMISSIONER BALCH: So we may have to  
19 wordsmith, maybe, 1 and 2 a little bit anyway, or we  
20 should at least look at the wording as a result of  
21 changes to other components, besides there was the  
22 removal of the unconfined groundwater and things  
23 like that. So things may have gotten jumbled up a  
24 little bit.

25 CHAIRPERSON BAILEY: Then let's do that

1 now, so that we can have at least that settled  
2 before we break for lunch.

3 Did you want to change the definition of  
4 "low chloride fluids," which is found on page 2?  
5 Did you want to include the words "water-based  
6 fluids" that contain 15,000?

7 COMMISSIONER BALCH: I think all fluids  
8 are water-based, in a sense, so it would be  
9 redundant.

10 CHAIRPERSON BAILEY: That would eliminate  
11 the hydrocarbon-based fluids.

12 COMMISSIONER BLOOM: So then the issue is  
13 having hydrocarbon-based fluids at 25 feet above  
14 ground?

15 COMMISSIONER BALCH: I would agree with  
16 that addition.

17 CHAIRPERSON BAILEY: Okay. So the  
18 definition for "low chloride fluids" means "fluids  
19 that contain" -- means "water-based fluids that  
20 contain." Is that what you would like to see?

21 COMMISSIONER BALCH: Yes.

22 CHAIRPERSON BAILEY: Then --

23 COMMISSIONER BALCH: I'll make a motion to  
24 adopt -- a motion to adopt the definition of low  
25 chloride fluids.

1 CHAIRPERSON BAILEY: I second.

2 All those in favor?

3 COMMISSIONER BALCH: Aye.

4 CHAIRPERSON BAILEY: Aye.

5 Those opposed?

6 COMMISSIONER BLOOM: Nay.

7 CHAIRPERSON BAILEY: Okay.

8 Motion passes 2 to 1.

9 We can now move on to page 9 for siting  
10 requirements.

11 A (1), we have already removed the words  
12 "or multi-well fluid management or below-grade  
13 tank."

14 So we are only specifically looking at  
15 temporary pit siting.

16 In (a) we have already removed  
17 "unconfined."

18 We have the proposal to change the 50 feet  
19 to 25 feet. I believe we have agreed to 25 feet as  
20 part of our discussion, so delete 50.

21 COMMISSIONER BALCH: You can accept the  
22 deletion of the below-grade tank?

23 CHAIRPERSON BAILEY: Uh-huh.

24 COMMISSIONER BLOOM: Well, I'll just  
25 indicate my objection to the change to 25 feet.

1 COMMISSIONER BALCH: We'll vote on it.

2 CHAIRPERSON BAILEY: We will vote, yes.

3 Otherwise, where -- and then we deleted  
4 "unconfined" again.

5 "Otherwise, where groundwater is less than  
6 50 feet below the bottom of the pit."

7 There was testimony to include, along with  
8 "cavitate and coal bed methane well," to include  
9 "underground balance, drilling, workover, or  
10 completion operations."

11 COMMISSIONER BLOOM: IPANM's version.

12 CHAIRPERSON BAILEY: Yes, IPANM's version.

13 I personally do not support the inclusion  
14 of "underground balance, drilling, workover, or  
15 completion operations."

16 Commissioner Balch, do you remember that  
17 discussion, and would you like to see those  
18 included?

19 COMMISSIONER BALCH: Where would those  
20 words go? I'm sorry?

21 CHAIRPERSON BAILEY: After "coal bed  
22 methane well", or "underground balance, drilling,  
23 workover, or completion operations."

24 COMMISSIONER BALCH: You know, I'm  
25 comfortable with leaving it out and let that be



1     dealt with through variance, if an operator were to  
2     find themselves in that particular situation.

3                 CHAIRPERSON BAILEY:   Okay.

4                 And the appropriate -- finds, based upon  
5     the operator's demonstration, that will protect.  
6     And then we have eliminated "unconfined" again.

7                 And temporary pit.   We need to retain the  
8     "temporary" in that last line.

9                 So does that read as we need to have it?

10                Now, we are leaving it out -- yes.

11                We're not deleting it, we are keeping it.

12                COMMISSIONER BALCH:   Retaining it.

13                CHAIRPERSON BAILEY:   Okay.   Then going to  
14     (b) .

15                COMMISSIONER BALCH:   Mr. Bloom, even  
16     though we don't agree on the points, I definitely  
17     appreciate your help with wordsmithing.

18                CHAIRPERSON BAILEY:   Well, the OCD had  
19     some suggested language for (b) that said "within  
20     100 feet of any continuously flowing watercourse or  
21     other significant watercourse or lakebed, sinkhole,  
22     or playa lake measured from the ordinary high-water  
23     mark."

24                COMMISSIONER BALCH:   I would just like to  
25     read the modification myself here.

1           COMMISSIONER BLOOM: I'm wondering if the  
2 intention of the proponents was going to include  
3 continuously flowing watercourse, have been changing  
4 that setback and not the setback for the rest of  
5 that statement, which is -- that include such things  
6 as lakebed, sinkholes, and playa lake.

7           COMMISSIONER BALCH: I think if you look  
8 at Exhibit 3-6, that appears to be the intent. They  
9 did not intend -- they only intended to change it  
10 for watercourses, not to playas or sinkholes or  
11 anything like that.

12           CHAIRPERSON BAILEY: Oh, okay. I can see  
13 where that confusion came from.

14           So we could just leave it as proposed,  
15 then?

16           COMMISSIONER BALCH: I think so.

17           COMMISSIONER BLOOM: I think you might  
18 have an extra "a" in there.

19           COMMISSIONER BALCH: Yeah. I don't  
20 think --

21           COMMISSIONER BLOOM: After the word "any"  
22 in line (b).

23           CHAIRPERSON BAILEY: Okay. We are not  
24 deleting that area in green.

25           COMMISSIONER BLOOM: Is that under IPANM's

1 proposal or...

2 CHAIRPERSON BAILEY: I'm not sure where  
3 that came from.

4 COMMISSIONER BALCH: Back on Table 368.  
5 That's where they actually proposed the change.

6 CHAIRPERSON BAILEY: Oh, okay.

7 COMMISSIONER BALCH: And this limits us to  
8 groundwater and watercourses, water wells, and  
9 wetlands --

10 CHAIRPERSON BAILEY: Right.

11 COMMISSIONER BALCH: -- or low playa  
12 chlorides only.

13 So essentially, the only thing we are  
14 doing is providing an exception for low chloride  
15 fluids to 100 feet instead of to 300 feet.

16 CHAIRPERSON BAILEY: Water-based, yes.

17 COMMISSIONER BALCH: Well, and that's in  
18 the definition.

19 CHAIRPERSON BAILEY: That's part of the  
20 definition, yes.

21 COMMISSIONER BLOOM: Now, the parentheses  
22 there for the rest of that seems to differ a little  
23 bit from what was set out in terms of variance or  
24 exceptions.

25 COMMISSIONER BALCH: We can probably

1 delete any -- I think you can take out everything  
2 after "unless," because the variance and exception  
3 clauses cover the entire document.

4 And those -- both of those clauses have  
5 the statement in there of fresh water, public  
6 health, and the environment.

7 CHAIRPERSON BAILEY: Yes, that can be  
8 taken out.

9 COMMISSIONER BALCH: That will save a  
10 tree.

11 COMMISSIONER BLOOM: In considering  
12 exceptions and variances, you might want to discuss,  
13 if we wish to include changes to setbacks, as a --  
14 as a variance or an exception.

15 CHAIRPERSON BAILEY: I don't think we need  
16 to go through the hearing of public comments and  
17 everything else. I mean, is it to the gravity? Do  
18 we see it as the gravity of...

19 COMMISSIONER BLOOM: I think with water  
20 being the precious resource that it is, would --  
21 would we not want an opportunity for the public to  
22 comment if somebody wanted to put a temporary pit at  
23 50 feet from the side of a river, for example?

24 COMMISSIONER BALCH: I would -- I would  
25 support language that led to an interpretation of

1 setback changes for low chloride fluids being left  
2 at the level of an exception. And that would invite  
3 public comment and any involved parties.

4 But the other setbacks I think should be  
5 left to a variance because they are greater, and  
6 there may be more cases for -- you know, really, you  
7 are at 299 feet. That might be a reasonable  
8 variance that would be taken care of  
9 administratively.

10 But for the case of the low chloride  
11 fluids where we are decreasing the setbacks, that  
12 might be something that would be appropriately -- if  
13 you're asking for less than that, then you probably  
14 need to go to an exception.

15 CHAIRPERSON BAILEY: And you support that,  
16 do you, Mr. Bloom?

17 COMMISSIONER BLOOM: So that the -- inside  
18 any distances that are set for low chloride fluids,  
19 either it be a low chloride or other fluid, would  
20 then rise to the level of an exception? I think  
21 that would make sense.

22 COMMISSIONER BALCH: The reduced setbacks  
23 that would -- the fluids -- would be an exception  
24 level. Other setbacks would be a variance level.  
25 That is essentially what I'm trying to say.

1 Remember, when we talked about variances  
2 and exceptions, we wanted exceptions that were  
3 clearly not administratively resolvable.

4 COMMISSIONER BLOOM: Yes. I think I could  
5 come around on that, particularly because I would  
6 hope that the staff at the OCD district office would  
7 be sensitive to that, you know.

8 COMMISSIONER BALCH: This would require a  
9 bit of wording --

10 CHAIRPERSON BAILEY: We need to correct a  
11 sentence, then, to indicate that --

12 COMMISSIONER BALCH: At the pleasure of  
13 the commissioner, I would like to check on that.

14 CHAIRPERSON BAILEY: Okay. Why don't we  
15 take a lunch break and be back at 1:15.

16 Does that give you adequate time?

17 COMMISSIONER BALCH: Yes.

18 CHAIRPERSON BAILEY: Okay.

19 MR. SMITH: Before do you that, could I  
20 just say a couple of things about the waste issue,  
21 just so you are aware? And this, by no means,  
22 resolves the issue that you-all were talking about.

23 There was a case from the New Mexico  
24 Supreme Court in 1975. For the record, Rutter and  
25 Wilbanks, 87 New Mexico 286.

1           And the issue was raised with regard to  
2   whether the commission's finding regarding waste was  
3   sufficient to be upheld. It had to do with the  
4   non- -- with nonstandard proration units.

5           But the point is the commission found that  
6   having to drill a third well under certain  
7   circumstances would create economic waste, and the  
8   Court held that the finding on economic waste was  
9   sufficient to uphold the commission.

10           Now so you are aware, that was in '75. As  
11   nearly as I can tell, two years later the -- just a  
12   second -- the Statutory Unitization Act was adopted.  
13   And waste, there, is defined as -- in addition to  
14   the other definitions of waste -- shall include both  
15   economic and physical waste resulting, or that could  
16   reasonably be expected to result, from the  
17   development and operation separately of tracts that  
18   could best be developed and operated as a unit.

19           And when you put that together with the  
20   Rutter case, I'm not entirely certain where that  
21   leaves you with respect to the ability to use  
22   economic waste broadly in a definition of waste.

23           I still believe in adopting regulations  
24   that you can take into account the economics on the  
25   industry. But I wanted to tell you that at least

1 waste, as economic waste, is, to some extent,  
2 addressed.

3 There may be better answers out there, but  
4 I'm -- this is -- I think that we are looking at a  
5 Law Review article.

6 COMMISSIONER BALCH: Well, in the  
7 Continental case, that was decided in '71, so all of  
8 this is post.

9 COMMISSIONER BLOOM: What was the second  
10 case, Mark?

11 MR. SMITH: Rutter and Wilbanks, 87  
12 New Mexico 286, 1975.

13 COMMISSIONER BALCH: In the '71 to '75  
14 area, as well.

15 MR. SMITH: But I don't know how to fit  
16 that in with later statutory adoption. So I'm not  
17 telling you that it's definitive. I'm just telling  
18 you that economic waste, as waste, has been  
19 addressed at least in that context.

20 CHAIRPERSON BAILEY: We will reconvene at  
21 1:20.

22 And then we will take a short break a few  
23 minutes before 2:00 for a function upstairs that  
24 you-all are invited to.

25 So we will see you in an hour and 10



1 minutes.

2 (A recess was taken from 12:10 p.m. to  
3 1:21 p.m.)

4 CHAIRPERSON BAILEY: We are back on the  
5 record.

6 We were discussing the need to insert some  
7 sentences in 19.15.17.10.A (1) (a), and (b) to  
8 indicate that -- changes from the prescribed  
9 proximity limitations.

10 COMMISSIONER BALCH: Madam Chair?

11 CHAIRPERSON BAILEY: Yes.

12 COMMISSIONER BALCH: We were discussing  
13 having the reduced setbacks for low chloride drum  
14 pits having exception levels rather than variations.

15 I'm wondering if we should separate  
16 temporary pits to low chloride and other, and then  
17 define things separately so we can clearly state  
18 these are exception level, these are everything  
19 else, by the -- that would be, as a result, a  
20 variation level.

21 CHAIRPERSON BAILEY: That would be for  
22 paragraphs (a) and (b) and (d) and (f). Okay.

23 So I see where you're going with that.

24 COMMISSIONER BALCH: It just might be more  
25 clear what is facing an exception.

1                   COMMISSIONER BLOOM:   Would you say your  
2   recommendation again?

3                   COMMISSIONER BALCH:   Well, we're talking  
4   about temporary pits, multi-well pits, and then  
5   we'll talk about permanent pits after that.

6                   There are some setback changes that we're  
7   going to vote on for low chloride fluids.   And we --  
8   immediately before we left, we had discussed that  
9   changes -- that anybody seeking a difference from  
10   that, those shorter setbacks, would need an  
11   exception rather than a variance.

12                  Yesterday, when we were talking about  
13   exceptions and variances, we wanted to allow  
14   variances to cover the entire document except for  
15   where we explicitly pointed out an exception was  
16   needed.   It might be more clear if we separate low  
17   chloride and regular drilling temporary pits so that  
18   we can just have one line that says these setbacks  
19   are subject to exceptions if the change is sought,  
20   rather than a variation.

21                  COMMISSIONER BLOOM:   Or perhaps we could  
22   add language saying exceptions -- operator shall  
23   seek an exception when seeking to locate a pit  
24   inside distances set for low chloride fluids.

25                  COMMISSIONER BALCH:   That's true.

1 CHAIRPERSON BAILEY: And that can be a  
2 sentence right up at the very beginning of (a),  
3 rather than having to...

4 COMMISSIONER BLOOM: So even if the  
5 temporary pit didn't have low chloride fluids, it  
6 would -- somebody would have to seek an exception --

7 COMMISSIONER BALCH: Well, normally  
8 when --

9 COMMISSIONER BLOOM: -- if they want to go  
10 within 100 feet of a river or a watercourse.

11 COMMISSIONER BALCH: I guess maybe we  
12 would want to put in a clause, and that's where it  
13 seems to go, in the things we've talked about, where  
14 there is an explicit statement where you can have a  
15 variance, and I think we're going to remove those.  
16 But they have them located at the bottom of the  
17 section.

18 CHAIRPERSON BAILEY: So you are suggesting  
19 that we have a subparagraph (j) to deal with  
20 exceptions and variances for...

21 COMMISSIONER BALCH: That would probably  
22 work.

23 CHAIRPERSON BAILEY: Okay. So with that  
24 in mind, let's just look at paragraph (a).

25 We have already agreed, and agreed to

1 disagree, on paragraphs (a) and (b).

2 Then why don't we go ahead with (c), and  
3 when we get down to (j), then we can craft that  
4 language.

5 (c) has the recommendation of adding  
6 "occupied" to a permanent residence, school,  
7 hospital, institution, or church.

8 COMMISSIONER BLOOM: Well --

9 CHAIRPERSON BAILEY: We wrestled with that  
10 earlier, and I believe it was yesterday.

11 COMMISSIONER BALCH: Right. We didn't  
12 want two crumbling adobe walls and a caved-in tin  
13 roof to be a permanent residence necessarily.

14 CHAIRPERSON BAILEY: Exactly.

15 COMMISSIONER BALCH: We also didn't want  
16 an empty house to be unoccupied or be inferred that  
17 it would always be unoccupied during the duration of  
18 an operation.

19 I believe that we talked about it in the  
20 context of below-grade tanks.

21 I remember discussion over -- around this  
22 word "occupied."

23 CHAIRPERSON BAILEY: Uh-huh.

24 COMMISSIONER BALCH: And I think the  
25 reason they wanted to put "occupied" was because of

1 the first case -- the first example I made of two  
2 crumbling walls and a caved-in roof.

3 But it seems like common sense would  
4 really tell you whether something was a permanent  
5 residence or not.

6 Now, I remember on the -- well, I'm not  
7 sure that there's really -- common sense, I'm not  
8 sure there is a problem with taking out "occupied."  
9 Somebody should be able to say this is a residence,  
10 this is not a residence.

11 COMMISSIONER BLOOM: Or we could --  
12 Chairman Bailey suggested if somebody moves back in  
13 it's occupied, and if someone were to go out and  
14 look at a house and, you know, the lawn is neatly  
15 kept but people are on vacation for a week, I think  
16 they would intuit that it's still an occupied house.  
17 Perhaps we'll leave occupied and just leave it at  
18 that. I don't know that that will --

19 COMMISSIONER BALCH: That it's up to the  
20 operator to determine whether it's occupied or not?

21 COMMISSIONER BLOOM: Yeah. And if the  
22 person that's there gets upset then they could say,  
23 well, yeah, this is an occupied house. And all they  
24 would have to show is a certificate of occupancy and  
25 show that they spend time there.

1                   COMMISSIONER BALCH: The responsibility is  
2     on the operator, to stay within the confines --

3                   CHAIRPERSON BAILEY: I think that was the  
4     crux of how we made our decision, was if somebody  
5     moves back in then they are in violation.

6                   COMMISSIONER BALCH: I gave the example of  
7     the school built next to a tavern which then had to  
8     close.

9                   CHAIRPERSON BAILEY: Right. So then our  
10    decision would be to insert the word "occupied." So  
11    we will accept that change.

12                  Okay. Paragraph (d). The suggestion is  
13    to change the location next to a private, domestic  
14    fresh water well or spring used by five households  
15    or whatever.

16                  So first, shall we look at whether or not  
17    we're going to consider shortening that distance  
18    from a temporary pit to a private fresh water well  
19    or a spring used by -- and Dr. Neeper had some  
20    comments that a spring shouldn't have to be used by  
21    less than five households.

22                  COMMISSIONER BALCH: I think a spring is a  
23    spring.

24                  CHAIRPERSON BAILEY: That's right.

25                  COMMISSIONER BALCH: You want to preserve

1 its usability.

2 On the other hand, I did want to point out  
3 in the record -- again, this is Mr. Arthur. I just  
4 wanted to -- this really struck me while I was  
5 rereading it last night.

6 And it's around line -- I'm sorry,  
7 page 567, lines 9 through 16.

8 He's talking about New Mexico, that the  
9 setbacks for a septic system of 4 feet above  
10 groundwater and 100 feet from -- and 100 feet  
11 vertically -- or horizontally.

12 CHAIRPERSON BAILEY: Horizontally.

13 COMMISSIONER BALCH: Which is fairly  
14 striking, because Mr. -- Dr. Thomas said that  
15 septic waste was way more hazardous than was  
16 typically found in a pit at all, much less a low  
17 chloride fluid pit.

18 So I think that I obviously don't advocate  
19 going to 4 feet above groundwater, but the hundred  
20 is going to be protected for the same reasons we  
21 talked about at great length this morning for a low  
22 chloride fluid.

23 COMMISSIONER BLOOM: I don't know that I  
24 would argue septic tanks, because that has such an  
25 effect on groundwater across the state that we are

1 still grappling with how to deal with that.

2 COMMISSIONER BALCH: Well, we are talking  
3 about the level of law and the regulation, the bar.  
4 He was saying that he didn't understand it either,  
5 that 4 feet was just simply not far enough, but 400  
6 feet --

7 COMMISSIONER BLOOM: No, too much  
8 contamination.

9 COMMISSIONER BALCH: Yes.  
10 This one is significant because they also  
11 changed the setbacks for other wells to 300 feet  
12 from 500 feet.

13 CHAIRPERSON BAILEY: Yes. Or a thousand  
14 feet, for (d) being changed from a thousand to 300.

15 COMMISSIONER BALCH: Okay. That's  
16 misrepresented in Table 3-6 from NMOGA's exhibit.  
17 The fresh water well current rule is a thousand feet  
18 from a well.

19 CHAIRPERSON BAILEY: I'm looking for it.  
20 Siting requirements, 10 (d). The current  
21 requirements, within 500 feet of a private, domestic  
22 fresh water well or spring used by less than five  
23 households for domestic --

24 COMMISSIONER BALCH: Okay.

25 CHAIRPERSON BAILEY: -- or within a



1 thousand feet of any other fresh water well or  
2 spring in existence at the time of the initial  
3 application.

4 COMMISSIONER BLOOM: Can I ask why we  
5 wouldn't care about a spring used by more than five  
6 households?

7 CHAIRPERSON BAILEY: Oh, but we do.

8 COMMISSIONER BLOOM: I guess I don't  
9 understand why it was...

10 CHAIRPERSON BAILEY: Why it was drafted  
11 that way? Probably because during the heat of the  
12 moment.

13 COMMISSIONER BLOOM: Right. Okay.

14 CHAIRPERSON BAILEY: So yes, whatever we  
15 do we'll need to change the location of the word  
16 "spring" so that it's not being modified by less  
17 than five households.

18 COMMISSIONER BALCH: Now remember, this is  
19 for the operational phase. This is while the  
20 liquids are there temporarily.

21 CHAIRPERSON BAILEY: Uh-huh.

22 COMMISSIONER BALCH: You are less  
23 concerned, I think, because of response time, spill  
24 rule, and mitigation. With it reaching groundwater,  
25 we are worried about an overland impact from the pit

1 to these features.

2 CHAIRPERSON BAILEY: The suggested changes  
3 reflect the same footages as in paragraph (b) above.  
4 Because in (b) above, most of us agreed to 100 feet  
5 between the pit and the continuously flowing  
6 watercourse, and so the difference between a  
7 continuously flowing watercourse and a private,  
8 domestic fresh water well.

9 COMMISSIONER BALCH: That would be more  
10 protected.

11 CHAIRPERSON BAILEY: Right.

12 COMMISSIONER BALCH: Because it's  
13 subsurface.

14 CHAIRPERSON BAILEY: Right.

15 COMMISSIONER BALCH: So I'm comfortable  
16 with the change as presented by, now, NMOGA, for low  
17 chloride fluids only.

18 Now, the other change is to 300 feet  
19 for --

20 CHAIRPERSON BAILEY: Any other fresh water  
21 well or spring.

22 COMMISSIONER BALCH: Other -- no, for  
23 other drilling pits where you didn't have low  
24 chloride fluids, you could go to 300 instead of 500.

25 According to our table, the text there --

1 I'm not sure if that adequately represents the  
2 table.

3 CHAIRPERSON BAILEY: Yes. I think the  
4 text reflects that higher chloride pits could be  
5 within 300 feet.

6 COMMISSIONER BALCH: Okay. And that is  
7 what their Table 3-6 shows. And I think 300 feet,  
8 even for higher chloride fluids, is still going to  
9 be more protective for the same reasons that we  
10 discussed for the low chloride fluids, in that you  
11 have a maximum period of time at which the flow can  
12 be occurring, and the response time and mitigation  
13 under the spill rule would repair the damage before  
14 it had an impact.

15 I would not be comfortable when we had the  
16 100 feet, but 300 feet to 500 would be reasonable.

17 CHAIRPERSON BAILEY: No, it's a thousand  
18 right now. It's a thousand feet of any other fresh  
19 water well or spring.

20 The 500 feet is confined to a fresh water  
21 well or spring used by less than five households.  
22 So there is a family use of that well. It is  
23 currently at 500 feet.

24 The thousand feet would be for a well  
25 that's used by more than five, as currently.

1 COMMISSIONER BALCH: That would include  
2 municipal oil well fields?

3 CHAIRPERSON BAILEY: No, that --

4 COMMISSIONER BALCH: Water well fields?

5 CHAIRPERSON BAILEY: -- that's a separate  
6 paragraph.

7 COMMISSIONER BALCH: Okay.

8 CHAIRPERSON BAILEY: So if we have a  
9 community using one water well, a temporary pit, as  
10 it stands, as the current rule says, has to be  
11 outside of a thousand feet.

12 COMMISSIONER BALCH: Right.

13 CHAIRPERSON BAILEY: The drawdown for a  
14 well used by more than five households would be a  
15 factor in any kind of below-ground plume that might  
16 arise.

17 COMMISSIONER BALCH: Which would be more  
18 likely to occur in on-site disposal rather than in  
19 the operational phase where impacts would be  
20 temporary surface-related or near-surface-related  
21 and then mitigated quickly.

22 CHAIRPERSON BAILEY: We would have more  
23 people impacted.

24 COMMISSIONER BALCH: The risk is -- the  
25 risk is increased because of the number of people

1 involved --

2 CHAIRPERSON BAILEY: Right.

3 COMMISSIONER BALCH: -- rather than the  
4 risk of the flow.

5 CHAIRPERSON BAILEY: Right.

6 COMMISSIONER BALCH: I can understand  
7 that.

8 What is your opinion on it?

9 CHAIRPERSON BAILEY: My opinion is that  
10 for low chloride fluids we can lower it to 100 feet,  
11 the same as we have for a continuously flowing  
12 watercourse. And -- and for -- I will stop it right  
13 there.

14 But I am not in favor for higher level  
15 chloride fluids to be in temporary pits within  
16 300 feet of a water well used by any number of  
17 people or a spring.

18 So I'm not in favor of the way this  
19 particular paragraph is written. Because the way  
20 this is written, it allows high chloride fluids to  
21 be within 300 feet of a community water well or a  
22 spring.

23 COMMISSIONER BALCH: I think I would have  
24 to agree with you, because of the greater number of  
25 people that could be affected. Even though the risk

1 is still small, the reward is diminished by the  
2 number of people that could be impacted.

3 CHAIRPERSON BAILEY: So we could change  
4 the location of the phrase where only low chloride  
5 fluids are used and put it towards the end of that  
6 sentence, making it modify both the private,  
7 domestic water well and spring used for domestic or  
8 stock watering purposes and any other fresh water  
9 well or spring.

10 Do you see what I'm saying?

11 COMMISSIONER BALCH: Yes.

12 CHAIRPERSON BAILEY: So this paragraph  
13 would apply -- the changes that we make in this  
14 paragraph would only be allowed for the low chloride  
15 fluids.

16 COMMISSIONER BALCH: That would make  
17 sense. And we should get some wording up there and  
18 look at it.

19 CHAIRPERSON BAILEY: Okay.

20 Kim, if you would highlight "where only  
21 low chloride fluids are used."

22 COMMISSIONER BALCH: That would be moved  
23 to the end of that paragraph?

24 CHAIRPERSON BAILEY: Yes, to the very end,  
25 or at the very beginning.

1 COMMISSIONER BALCH: I think it's more  
2 clear to lay out what the limits are for most cases  
3 and then point out the exception.

4 CHAIRPERSON BAILEY: Okay. So put it to  
5 the very end of that sentence.

6 And now we can --

7 MS. ROMERO: Do you want to take out the  
8 500?

9 CHAIRPERSON BAILEY: I believe so, yes.

10 COMMISSIONER BALCH: No.

11 CHAIRPERSON BAILEY: No?

12 COMMISSIONER BALCH: I thought the top  
13 part was going to be referring to the other fluids.  
14 So we would want to leave the existing standard for  
15 other, which could be higher chloride fluids.

16 CHAIRPERSON BAILEY: Well, what I was  
17 talking about was allowing 100 feet in the first  
18 instance.

19 COMMISSIONER BALCH: All right. Okay.  
20 Yes.

21 CHAIRPERSON BAILEY: So go ahead and  
22 remove "500." Go ahead and remove "by less than  
23 five households."

24 No. No, put it back. That may not be  
25 correct.

1           Otherwise, within 300 feet -- yes. Go  
2 ahead and subtract the thousand feet. Subtract the  
3 thousand.

4           So now we need to put in the footages for  
5 other concentrations.

6           COMMISSIONER BALCH: Okay. So we want  
7 this to go "within 100 feet of private, domestic  
8 fresh water well or spring used by less than five  
9 households for domestic or stock watering purposes;  
10 otherwise, within 300 feet of any other fresh water  
11 well or spring in existence at the time of the  
12 initial application where only low chloride fluids  
13 are used."

14          CHAIRPERSON BAILEY: I still think that  
15 that phrase needs to go at the very beginning.

16          COMMISSIONER BALCH: I think so, too, the  
17 way it's written out.

18          CHAIRPERSON BAILEY: So that's at the  
19 beginning of that paragraph.

20          COMMISSIONER BALCH: Must you say "a pit  
21 must be located greater than 100 feet from"?

22          CHAIRPERSON BAILEY: We don't want it  
23 confined to the --

24          COMMISSIONER BALCH: Probably not.

25          CHAIRPERSON BAILEY: That defeats the



1 purpose here.

2 COMMISSIONER BALCH: The temporary pit,  
3 because we are talking about temporary pits.

4 CHAIRPERSON BAILEY: Right.

5 COMMISSIONER BALCH: The temporary pit.

6 CHAIRPERSON BAILEY: Where only low  
7 chloride fluids are used, comma, beyond the hundred  
8 feet of the...

9 COMMISSIONER BALCH: Just take out the  
10 "within."

11 CHAIRPERSON BAILEY: Yes.

12 COMMISSIONER BALCH: Now in the same  
13 paragraph, do we describe the other situation or do  
14 we make a new paragraph for the other situation?

15 CHAIRPERSON BAILEY: Well, we're getting  
16 it all confused. Because if you look to the top,  
17 the opening of this entire thing is "Except as  
18 otherwise provided in 19.15.17 NMAC, an operator  
19 shall not locate a temporary pit."

20 COMMISSIONER BLOOM: You actually want it  
21 to say "within."

22 CHAIRPERSON BAILEY: Right.

23 COMMISSIONER BALCH: "Shall not within."  
24 Okay.

25 CHAIRPERSON BAILEY: Yes. So go back to

1 "within."

2 COMMISSIONER BALCH: So then at the end of  
3 this paragraph you say "otherwise," and then we have  
4 the language for the existing Rule 17.

5 CHAIRPERSON BAILEY: Uh-huh.

6 MR. SMITH: If you want the 300 feet to  
7 apply to low chlorides, I think you want to change  
8 "otherwise" to "and," unless I misunderstand what  
9 you're up to here.

10 CHAIRPERSON BAILEY: You're correct.  
11 That's correct. The "otherwise" can go at the end  
12 of that sentence to indicate --

13 COMMISSIONER BLOOM: What follows.

14 CHAIRPERSON BAILEY: -- what follows, yes.

15 COMMISSIONER BALCH: Wouldn't it be "or"?  
16 You are talking about two separate sentences.

17 CHAIRPERSON BAILEY: Okay. So "or."

18 COMMISSIONER BALCH: Then there needs to  
19 be an "otherwise" at the end of it.

20 CHAIRPERSON BAILEY: Right. A period, and  
21 then a new sentence. "Otherwise..."

22 COMMISSIONER BALCH: But then what was  
23 the -- 300 feet.

24 CHAIRPERSON BAILEY: 500 was the original.

25 COMMISSIONER BALCH: Of a domestic fresh

1 water.

2 CHAIRPERSON BAILEY: Yes.

3 COMMISSIONER BALCH: Okay. 500 feet.

4 CHAIRPERSON BAILEY: And then you can copy  
5 everything after 100 up above there.

6 COMMISSIONER BALCH: In the same --

7 CHAIRPERSON BAILEY: No, no, in the same  
8 paragraph we are working on. Copy everything above  
9 there.

10 COMMISSIONER BALCH: Down to the period?

11 CHAIRPERSON BAILEY: Uh-huh. And put it  
12 after the 500 feet.

13 And then change the 300 to a thousand.

14 So paragraph (d) will read: "where only  
15 low chloride fluids are used within 100 feet of a  
16 private, domestic fresh water well or spring used by  
17 less than five households for domestic or stock  
18 watering purposes, or within 300 feet of any other  
19 fresh water well or spring in existence at the time  
20 of the initial application. Otherwise, within  
21 500 feet of a private, domestic fresh water well or  
22 spring used by less than five households for  
23 domestic or stock watering purposes, or within a  
24 thousand feet of any other fresh water well or  
25 spring in existence at the time of the initial

1 application."

2 COMMISSIONER BALCH: It looks fine to me.

3 COMMISSIONER BLOOM: I wonder if "where  
4 only low chloride fluids are used" should go towards  
5 the end. Because right now it reads an operator  
6 shall not locate a temporary pit where only low  
7 chloride fluids are used within 100 feet of a...

8 COMMISSIONER BALCH: We had it at the end  
9 of --

10 COMMISSIONER BLOOM: I think that makes  
11 more sense. Because another reading: "An operator  
12 shall not locate a temporary pit within 100 feet of  
13 a private, domestic fresh water well or spring,"  
14 et cetera, et cetera, "or within 300 feet" --  
15 perhaps you could put at the end "when it's a low  
16 chloride fluid pit," or something like that.

17 COMMISSIONER BALCH: I think if you put it  
18 at the end you run the risk of someone reading half  
19 of the rule thinking it was 100 to 300 for  
20 everything.

21 COMMISSIONER BLOOM: Right. And I hear  
22 it -- I hear you on that, too.

23 COMMISSIONER BALCH: So this is a  
24 qualifier that immediately affects the first two  
25 criteria. And then you have a case which is

1 everything else, where you have a different new  
2 criteria.

3 Moving the low chloride fluids to the end  
4 of that first sentence would be equivalent to moving  
5 the "otherwise" to the end of the second sentence,  
6 perhaps.

7 I think it makes more sense the way it's  
8 written now.

9 CHAIRPERSON BAILEY: As long as we are  
10 sure that that comma after "used" stays there,  
11 because that's the important grammatical...

12 COMMISSIONER BLOOM: Yeah. It should  
13 probably work. I don't know that there's a better  
14 way.

15 CHAIRPERSON BAILEY: Yeah.

16 COMMISSIONER BALCH: Not without turning  
17 it into several subsections.

18 MR. SMITH: Well, you could use romanettes  
19 if you want it to be clearer. You could put a  
20 romanette one before the first occurrence of within,  
21 and then you could put a romanette two in front of  
22 the next occurrence of within, and I think that  
23 would make it clearer that your low chloride  
24 modifier would apply to both parts.

25 CHAIRPERSON BAILEY: If you would help Kim

1 with that.

2 COMMISSIONER BLOOM: It does clear it up a  
3 little bit. Thank you.

4 CHAIRPERSON BAILEY: Commissioner Bloom,  
5 you did not have much to say when we were  
6 manipulating that paragraph.

7 Do you have any comments on allowing low  
8 chloride fluids to be closer for private, domestic  
9 water wells or springs?

10 COMMISSIONER BLOOM: I'll just note my  
11 opposition to the inclusion of low chloride fluids  
12 in general. So...

13 CHAIRPERSON BAILEY: Okay. Then we can go  
14 on to paragraph (e), which has to do with  
15 incorporated municipal boundaries or within the  
16 defined municipal wellhead protection area, which is  
17 a change from the current fresh water well field,  
18 which says that there is a definition for wellhead  
19 protection areas in current OCD regulations.

20 COMMISSIONER BALCH: 15.2.7.

21 CHAIRPERSON BAILEY: Or covered under a  
22 municipal ordinance adopted pursuant to statutory  
23 guidance, unless the municipality specifically  
24 approves.

25 COMMISSIONER BALCH: I think the wellhead

1 protection area and then the defined statute is  
2 better than the fresh water well field.

3 CHAIRPERSON BAILEY: I agree.

4 COMMISSIONER BLOOM: Are we citing the  
5 correct section of the NMAC?

6 CHAIRPERSON BAILEY: I can double-check  
7 for definitions. 15.2.7.

8 We do have a wellhead protection area  
9 defined in 15.2.7.

10 COMMISSIONER BALCH: What's that  
11 definition?

12 CHAIRPERSON BAILEY: "A wellhead  
13 protection area means the area within 200 horizontal  
14 feet of a private, domestic fresh water well or  
15 spring used by less than five households for  
16 domestic or stock watering purposes, or within a  
17 thousand horizontal feet of any other fresh water  
18 well or spring.

19 "Wellhead protection area does not include  
20 areas around water wells drilled after an existing  
21 oil or gas waste storage treatment or disposal site  
22 was established."

23 So the limitations for a wellhead  
24 protection area are 200 horizontal feet for a  
25 private, domestic well.

1           COMMISSIONER BALCH: And that's from my --  
2   when I'm jogging around Socorro, these areas are  
3   fenced, the wellheads that are within a municipal  
4   boundary.

5           COMMISSIONER BLOOM: I just might ask if  
6   we have introduced a contradiction between (d) and  
7   (e).

8           COMMISSIONER BALCH: The 100 versus the  
9   200?

10          COMMISSIONER BLOOM: Yes.

11          COMMISSIONER BALCH: Well, I think (e)  
12   specifically addresses municipal water sources,  
13   whereas (d) reflects sources that are not  
14   necessarily controlled by a municipality.

15          CHAIRPERSON BAILEY: Except wellhead  
16   protection area also does address well or spring  
17   used by less than five households, the same as right  
18   here.

19          COMMISSIONER BALCH: I think to be  
20   consistent we have no choice but to change that 100  
21   feet to 200 feet.

22          CHAIRPERSON BAILEY: I think that we do  
23   need to do that.

24          That is the first romanette. Then we are  
25   changing it.



1           Okay. For wellhead protection areas we  
2   are keeping the 1,000 feet for higher chloride.

3           So is there consensus for (e), the way it  
4   is written now?

5           COMMISSIONER BALCH: I think so.

6           COMMISSIONER BLOOM: Yes.

7           COMMISSIONER BALCH: It points to the  
8   relevant statute.

9           CHAIRPERSON BAILEY: Yes.

10          MR. SMITH: I would like to raise an  
11   issue, to make sure that there isn't any confusion  
12   here.

13          The phrase covered under municipal  
14   ordinance under 3-27-3, what do you-all perceive  
15   that to modify? Because it was modifying fresh  
16   water well field. And if that's taken out --

17          COMMISSIONER BALCH: Wellhead protection  
18   area.

19          MR. SMITH: Okay. So...

20          COMMISSIONER BALCH: As defined by the  
21   statute.

22          MR. SMITH: As defined by the rule, you  
23   mean?

24          COMMISSIONER BALCH: 15.2.7, yes.

25          COMMISSIONER BLOOM: That's defined by and

1 then covered by.

2 MR. SMITH: Okay. So you are talking  
3 about within boundaries or defined municipal  
4 wellhead protection area, as defined by -- and then  
5 you're talking about the wellhead protection area  
6 being covered under the municipal ordinance?

7 COMMISSIONER BALCH: So the "covered under  
8 municipal ordinance" may not necessarily be  
9 necessary if we already have that in the definition  
10 of NMAC 15.2.7?

11 MR. SMITH: Well, is it already in there?  
12 I'm just -- I'm looking at 3-27-3. And what it says  
13 is: "For the purpose of acquiring, maintaining,  
14 contracting for, condemning or protecting its water  
15 facilities and water from pollution.

16 "The jurisdiction of the municipality  
17 extends within and without its boundary to:

18 "1, all territory occupied by the water  
19 facilities.

20 "2, all reservoirs, streams, and other  
21 sources supplying the reservoirs and streams.

22 "And, 3, and five miles above the point  
23 from which the water is taken."

24 CHAIRPERSON BAILEY: I think we need to  
25 keep that thought in mind. But it's now 2:00, and

1 Florene needs to go upstairs along with the rest of  
2 us.

3 So we will simply take a break until 2:30.  
4 And you are all invited to go upstairs for a  
5 celebration commemorating or honoring Florene for  
6 her 50-year anniversary with the OCD.

7 (A recess was taken from 1:58 p.m. to 2:40  
8 p.m.)

9 CHAIRPERSON BAILEY: We are going back on  
10 the record.

11 When we took our break we had just  
12 finished discussing definitions of municipal  
13 wellhead protection areas.

14 I want to point out that the OCD  
15 definition that is referenced by 19.15.2.7 is for a  
16 wellhead protection area not a municipal wellhead  
17 protection area. 15 -- 19.15.2.7 does not define  
18 municipal wellhead protection areas.

19 So I think it is important that we delete  
20 that word "municipal" referenced by that citation.

21 COMMISSIONER BALCH: So it would be  
22 covered under an ordinance pursuant to?

23 CHAIRPERSON BAILEY: So it would read  
24 "within incorporated municipal boundaries or within  
25 a defined wellhead protection area, as defined."

1 Do you have comments on that?

2 COMMISSIONER BLOOM: I think that sounds  
3 appropriate.

4 COMMISSIONER BALCH: Okay.

5 CHAIRPERSON BAILEY: Okay. So --

6 COMMISSIONER BALCH: Well, now --

7 COMMISSIONER BLOOM: Because that NMAC  
8 mentions municipal, right?

9 CHAIRPERSON BAILEY: No. That NMAC does  
10 not mention municipal, which is why I believe it  
11 needs to be deleted at that point, not in the line  
12 above.

13 COMMISSIONER BALCH: And then the next  
14 sentence after that comma, we were talking about  
15 municipal.

16 MR. SMITH: Now wellhead protection area,  
17 just to get a size on it, is what, within 200  
18 horizontal feet of water -- paraphrasing, of course.  
19 Okay.

20 So that's the 200 and 1,000, basically the  
21 same sort of reference you have up here using a well  
22 or a spring, right, for five households?

23 CHAIRPERSON BAILEY: Yes.

24 MR. SMITH: Okay. Now, my concern is only  
25 with how that relates to Section 3-27-3 in the

1 statutes.

2 CHAIRPERSON BAILEY: Which would apply  
3 only to municipal.

4 COMMISSIONER BALCH: Well, I think a  
5 municipal ordinance would be something that would be  
6 put into place by that city. I'm not sure how --

7 MR. SMITH: The way it read before, you  
8 couldn't have -- what is this, a temporary pit  
9 you're dealing with here?

10 CHAIRPERSON BAILEY: Yes.

11 MR. SMITH: You couldn't have a temporary  
12 pit within incorporated municipal boundaries or  
13 within a defined municipal --

14 CHAIRPERSON BAILEY: Fresh water well  
15 field.

16 MR. SMITH: -- fresh water well field  
17 covered under 3-27-3.

18 The 3-27-3 looks, to me, like it's a  
19 jurisdictional statute for a municipality.

20 COMMISSIONER BALCH: So does that mean if  
21 you fall within their jurisdiction you have to  
22 have -- take that agreement, right?

23 CHAIRPERSON BAILEY: Well, the problem is  
24 we should not be incorporating, as defined by NMAC,  
25 19.15.2.7, if we're talking about a municipal

1 wellhead protection area. Because that citation  
2 does not define a municipal wellhead protection  
3 area.

4 MR. SMITH: Well, I don't think there's a  
5 municipal wellhead protection area defined in that  
6 statute either.

7 What it says is, originally, municipal  
8 fresh water well field. And I guess the question is  
9 whether a fresh water well field is equivalent to a  
10 wellhead protection area or -- I mean as I read this  
11 now, the way it is, you could put a pit within a  
12 fresh water well field covered by this particular  
13 statute if it wasn't within a wellhead protection  
14 area.

15 And I have to tell you, I don't know what  
16 that means, other grammatically -- other than  
17 grammatically. But what my concern is, are you  
18 doing something here that will allow -- well, is  
19 wellhead protection area a smaller area than fresh  
20 water well field? And if it is, then I think that  
21 you are reducing the amount of protection to the  
22 municipality. And I don't know that I have a real  
23 complaint with that, it's just whether it's --

24 CHAIRPERSON BAILEY: Inadvertent  
25 consequence.

1 MR. SMITH: Yes.

2 COMMISSIONER BALCH: I guess I don't know  
3 anything about this, except for that even in the  
4 city the size of Socorro, 8,000 people, their  
5 wellhead production area is defined. When I jog  
6 past wells they have fences and signs.

7 CHAIRPERSON BAILEY: The other alternative  
8 is not to incorporate any changes at all and leave  
9 it as it has been in the current rule.

10 MR. SMITH: I'm afraid I don't -- I mean,  
11 I don't know the consequences of that in terms of...

12 COMMISSIONER BALCH: There wasn't a lot of  
13 testimony about this particular...

14 CHAIRPERSON BAILEY: To justify that  
15 change.

16 COMMISSIONER BALCH: I don't recall.  
17 There may be something in the record that addressed  
18 this, but I don't think there was. I think it was  
19 really more of an approach -- and if we are going to  
20 run afoul of the regulations, we may want to be  
21 fairly broad. That way they have to go to the  
22 appropriate statute for guidance.

23 CHAIRPERSON BAILEY: Right.

24 MR. SMITH: Well, I want to hasten to add,  
25 now, I'm not telling you you are going to run afoul

1 of the statute. I'm just trying to figure out  
2 whether you are or not. And I don't know the answer  
3 to that.

4 COMMISSIONER BALCH: Well, I don't know if  
5 there would be a fresh water well field that  
6 wouldn't be part of a wellhead protection area. If  
7 there was, maybe you would want to have the ability  
8 to go back. Say you got down to a very small city  
9 of a couple hundred people. And there may be a city  
10 that size, I don't know.

11 CHAIRPERSON BAILEY: I suggest that we not  
12 incorporate the suggested changes and maintain the  
13 current language as it's written.

14 COMMISSIONER BLOOM: That would be fine.

15 COMMISSIONER BALCH: I'll agree, if that's  
16 the consensus at this point.

17 CHAIRPERSON BAILEY: Okay.

18 COMMISSIONER BALCH: Since there wasn't a  
19 lot of testimony about this.

20 COMMISSIONER BLOOM: It hasn't seemed to  
21 land in anyones lap as a major issue.

22 CHAIRPERSON BAILEY: I have not heard of  
23 any problems connected --

24 COMMISSIONER BALCH: I don't think it  
25 changes anything in application. Because I think in



1 application, to discover if you are within one of  
2 those you have to contact a municipality that it's  
3 close to. I don't think there's -- there's no data  
4 out there without direct contact. So...

5 CHAIRPERSON BAILEY: So for all of  
6 paragraph (e), we'll reject all suggested changes.

7 And now we can go to paragraph (f), which  
8 has to do with 100 feet of a wetland where only low  
9 chloride fluids are used; otherwise, within 300 feet  
10 of a wetland.

11 Dr. Buchanan, in his rebuttal testimony,  
12 made the statement that wet areas -- and I'm  
13 paraphrasing, because I don't have his words in  
14 front of me. And maybe I've misinterpreted them.

15 That wet areas need protection as far as  
16 plants are concerned.

17 COMMISSIONER BLOOM: Because you get  
18 saturated flow and velocities.

19 CHAIRPERSON BAILEY: Because of the  
20 saturated flow.

21 COMMISSIONER BALCH: And I think, you  
22 know, in that same part of his rebuttal testimony, I  
23 asked him a direct question regarding that issue.

24 And the response was, if you were that  
25 close to a wetland, you would probably already have

1 a shallower water table than is allowed, so it's not  
2 really an issue.

3 CHAIRPERSON BAILEY: So the question is:  
4 Do we want to minimize or change the distance from a  
5 temporary pit to a wetland? If there are no  
6 chlorides, to establish 100 feet; if high chlorides,  
7 to establish 300 feet?

8 COMMISSIONER BALCH: Now, these are  
9 operational concerns. So the risk argument is that  
10 you would mitigate before it arrived at it.

11 But I think Dr. Buchanan's statement that  
12 if you were that close to a wetland -- and for that  
13 matter, I think we were talking about rivers -- that  
14 you would probably already be eliminated because of  
15 the depth of groundwater requirement.

16 And if the depth to groundwater was not an  
17 issue, that would probably mean that that particular  
18 wetland or stream would not be a significant  
19 watercourse. It would be a small or self-contained  
20 or perched.

21 Now, I am paraphrasing there. That's not  
22 what he said.

23 CHAIRPERSON BAILEY: No, but that's your  
24 interpretation of what he said.

25 COMMISSIONER BALCH: That's my

1 interpretation. So basically, he wasn't concerned  
2 about the siting criteria here, because he felt that  
3 if you were close enough to endanger a wetland, or a  
4 river, then you would already be too shallow as far  
5 as the water table, and you would not be able to  
6 site it there anyway.

7 CHAIRPERSON BAILEY: Within the 25 feet?

8 COMMISSIONER BALCH: The 25 feet vertical,  
9 yes.

10 COMMISSIONER BLOOM: So I could think of  
11 areas where you would have bluffs up above, wetlands  
12 down below a river or a lake, so you might be above  
13 groundwater but still be in proximity to wetlands.

14 COMMISSIONER BALCH: Right. The risk  
15 standard that was presented to us was the overland  
16 flow. This is for temporary pits. When we talk  
17 about closure or tanks, we have a different  
18 conversation, or anything that's subsurface.

19 But for overland, basically all of these  
20 experts that have been presented said that the  
21 100-foot distance, with response time and  
22 mitigation, would not allow that to occur.

23 Now if you have a situation where you are  
24 near a river, the way the water table works is as  
25 you go away from the river, your water table slopes

1 down. So close to the river your water table is at  
2 the level of the river. And as you get away from  
3 it, it goes down.

4 Dr. Buchanan's comment, as I recall it,  
5 was that if you were within 100 feet of the river,  
6 if it was a significant place on a river, where  
7 there would be a higher level of risk, then you  
8 would already -- you would not be able to place it  
9 there because you would already be within 25 feet of  
10 the water table.

11 And remember, we are talking about low  
12 chloride fluids. So 50 would remain for everything  
13 else as it is.

14 CHAIRPERSON BAILEY: 500?

15 COMMISSIONER BALCH: Yes. Well, 500.

16 CHAIRPERSON BAILEY: Now, they're changing  
17 it to 300.

18 COMMISSIONER BALCH: Well, they're  
19 requesting a change to 300.

20 CHAIRPERSON BAILEY: Uh-huh.

21 COMMISSIONER BALCH: Now on the other  
22 hand, a wetland almost -- well, there's a couple of  
23 kinds of wetlands I could think of. You have a kind  
24 that occur along rivers, and it would be sort of  
25 tangential to the flow path.

1           And then you might have an isolated  
2 wetland. An isolated wetland would have -- it would  
3 be a greater risk to that if there was an exposure,  
4 then, to something that was on the side of a river.

5           So I guess I really don't know. But that  
6 is the testimony that was presented to us.

7           CHAIRPERSON BAILEY: And in -- for the  
8 sake of consistency, if we have agreed to 100 feet  
9 to a continuously flowing watercourse, what is the  
10 difference -- and why shouldn't we allow 100 feet of  
11 a wetland?

12           COMMISSIONER BALCH: Basically, why would  
13 one be protected and the other not?

14           CHAIRPERSON BAILEY: Exactly.

15           COMMISSIONER BALCH: So I would -- I would  
16 accept the change in the language for the case of  
17 low chloride fluids only.

18           And then again, with the caveat at the end  
19 that an exception rather than a variation would have  
20 to be sought if you were desiring to go under that  
21 limit.

22           CHAIRPERSON BAILEY: And along that same  
23 vein, we have accepted 300 feet distance from a  
24 continuously flowing watercourse for high chloride.

25           COMMISSIONER BALCH: That would be

1 consistent.

2 CHAIRPERSON BAILEY: That would be  
3 consistent if we accepted 300 feet for a wetland for  
4 high chloride fluids.

5 COMMISSIONER BALCH: And this would refer  
6 back to the citations I gave earlier about the risk  
7 and response.

8 Do you want me to give those to you again,  
9 for the record?

10 MR. SMITH: No, that's -- that's fine.  
11 I'll find them.

12 COMMISSIONER BALCH: And the rest of the  
13 changes in (g) there, I think, are just because they  
14 had temporary and multi-well, and then the  
15 below-grade tanks. So we probably want to keep the  
16 "temporary" and remove the "below-grade tank" in  
17 (g).

18 CHAIRPERSON BAILEY: Okay. So we have  
19 already agreed on (f) or not?

20 COMMISSIONER BALCH: To the extent that we  
21 are going to agree?

22 COMMISSIONER BLOOM: I think so. I would  
23 lean towards keeping the setbacks the same. If  
24 you-all want to proceed with (f), you may.

25 CHAIRPERSON BAILEY: Under the current

1 rule for temporary pits, a temporary pit is with  
2 the -- allowed within 200 feet of any other  
3 significant watercourse.

4 So within -- under this regulation, under  
5 300 feet is even increasing the distance between the  
6 wetland and the other significant watercourse or  
7 sinkhole or playa.

8 COMMISSIONER BALCH: Where is that at?

9 CHAIRPERSON BAILEY: Under the current  
10 Rule 19.15.17.10.A (1) (b).

11 COMMISSIONER BLOOM: The current rules are  
12 300 feet for a potentially flowing watercourse.

13 CHAIRPERSON BAILEY: And 200 feet of any  
14 water -- other significant watercourse, sinkhole, or  
15 playa lake.

16 COMMISSIONER BALCH: I think those would  
17 probably more correctly be treated similarly. A  
18 water well and water well fields are something  
19 different.

20 CHAIRPERSON BAILEY: Yes.

21 COMMISSIONER BALCH: So we would perhaps  
22 be better off in A (1), or (1) (a) -- are you  
23 proposing that we equalize those two distances?

24 CHAIRPERSON BAILEY: No. I'm proposing  
25 that we go ahead and adopt (f) with the

1 understanding that it's more protective of the  
2 wetland now than maybe it was before.

3 COMMISSIONER BALCH: That sounds good.

4 COMMISSIONER BLOOM: Wasn't it 500 feet  
5 before?

6 CHAIRPERSON BAILEY: Well, it was 500 feet  
7 before. But it's difficult for me to reconcile the  
8 difference between 500 feet for a wetland and  
9 200 feet for any other significant watercourse or  
10 lakebed, sinkhole, or playa.

11 COMMISSIONER BLOOM: Maybe I wasn't there  
12 because of the view that spreads of -- a spread of  
13 fluid in a wetland can -- contamination can move  
14 quickly, and it can be hard to -- hard to extract.  
15 It's not like a river, where you have the water  
16 running through it.

17 COMMISSIONER BALCH: Well, as Commissioner  
18 Bailey just stated, that was more protective than  
19 that -- than the generic part of the regulation that  
20 was in the existing Rule 17.

21 So I think we are okay with 300 feet.

22 CHAIRPERSON BAILEY: Then shall we go to  
23 paragraph (g)? Are you ready for that?

24 COMMISSIONER BALCH: I think "temporary"  
25 needs to stay in, and we can remove "or below-grade



1 tanks."

2 CHAIRPERSON BAILEY: I agree with that.

3 So, Kim, have you already done that?

4 Yes.

5 MR. SMITH: Just to make certain, was  
6 there testimony about wetlands at all?

7 COMMISSIONER BALCH: It was incorporated  
8 in the rebuttal testimony of Mr. Buchanan, and the  
9 direct testimony of -- to some extent -- Dr. Thomas,  
10 and to a greater extent Mr. Arthur.

11 MR. SMITH: Okay. Thank you.

12 CHAIRPERSON BAILEY: And then we go to  
13 (h): "within an unstable area, unless the operator  
14 demonstrates that it is incorporated in engineering  
15 measures."

16 I think "temporary" should stay at that  
17 point, so we reject the deletion there, yes?

18 And do delete "or below-grade tanks."

19 COMMISSIONER BLOOM: Correct.

20 CHAIRPERSON BAILEY: All right.

21 COMMISSIONER BALCH: "Within a 100-year  
22 floodplain," which makes sense.

23 CHAIRPERSON BAILEY: Okay. Shall we --

24 COMMISSIONER BALCH: We wanted to include  
25 a (j).

1 CHAIRPERSON BAILEY: Well, we fixed that  
2 up above, didn't we, when we included the language  
3 up above?

4 COMMISSIONER BALCH: I think the language  
5 (j) that we were talking about had to do with a  
6 variation would not be applicable to siting criteria  
7 for low chloride. The modified -- these particular  
8 siting criteria for low chloride fluids, and that an  
9 exception would have to be applied for.

10 CHAIRPERSON BAILEY: Then let's go ahead  
11 and craft a sentence for (j) and create (j).

12 COMMISSIONER BALCH: It would have to  
13 point to the sections that have the low chloride  
14 fluid changed to --

15 CHAIRPERSON BAILEY: Okay.

16 COMMISSIONER BALCH: -- to that.

17 CHAIRPERSON BAILEY: So you do that, and  
18 I'll highlight where we have that.

19 COMMISSIONER BLOOM: We are writing the  
20 variance exception language now?

21 CHAIRPERSON BAILEY: Yes.

22 COMMISSIONER BLOOM: So could it read,  
23 perhaps, variances will be permitted above -- except  
24 in cases where the operator seeks to move inside  
25 distances set for low chloride fluids, in which case

1 an exception would be sought?

2 COMMISSIONER BALCH: Well, the way we have  
3 been talking about variances and exceptions is that  
4 variances would be applicable to anything we don't  
5 specifically say required an exception.

6 COMMISSIONER BLOOM: That's what I was  
7 saying.

8 CHAIRPERSON BAILEY: Yeah. So you  
9 succinctly put by combining it all into one  
10 sentence.

11 Okay.

12 COMMISSIONER BLOOM: So we might -- do we  
13 even need to mention variances, since it's assuming?

14 COMMISSIONER BALCH: I don't think we need  
15 to mention variances.

16 COMMISSIONER BLOOM: Okay. So,  
17 "operators" --

18 COMMISSIONER BALCH: Would require an  
19 exception to --

20 COMMISSIONER BLOOM: -- "will require an  
21 exception to move a temporary pit inside" -- or  
22 locate -- sorry, locate -- I'm sorry. Change "move"  
23 to "locate a temporary pit inside setbacks indicated  
24 for low chloride fluids."

25 COMMISSIONER BALCH: And then we probably

1 actually want to point to the sections that have  
2 those in it.

3 CHAIRPERSON BAILEY: And that is  
4 19.15.17.10.A.1 (a), (b), (d), and (f).

5 COMMISSIONER BLOOM: I just have one  
6 concern, and that would be with (c).

7 Could somebody be able to seek only a  
8 variance to occupy within 300 feet of a residence or  
9 school, hospital?

10 COMMISSIONER BALCH: Well, they could --  
11 okay. Where is this? In (c)?

12 COMMISSIONER BLOOM: Yes.

13 CHAIRPERSON BAILEY: And that's the  
14 distance to a home, school, hospital, or church.

15 COMMISSIONER BALCH: Well, this particular  
16 language is only addressing the four siting changes  
17 from low chloride fluids.

18 If you wanted that other portion of this  
19 to be exception only, probably you could include it  
20 at the end of that section instead.

21 CHAIRPERSON BAILEY: Because (c) applies  
22 to all kinds of fluids, high and low fluids.

23 COMMISSIONER BALCH: Right.

24 COMMISSIONER BLOOM: What if we said -- we  
25 modify (j) to say: "Operators will require an

1 exception to locate a temporary pit inside setbacks  
2 set in (c) above, which would be 19.15.17.A.1 (c),  
3 or where indicated for low chloride fluids"?

4 CHAIRPERSON BAILEY: The problem with that  
5 is that (a), (b), and (c) make that distinction  
6 between low chloride and high chloride. So what you  
7 would be doing there is making high chloride changes  
8 also.

9 COMMISSIONER BALCH: Where you already  
10 have the more protective higher setbacks.

11 I think it might be better to go to  
12 Section (c) and look at it and see if we can just  
13 add the exception clause at the end of that  
14 paragraph (c). A (1) (a) -- A (1) (c): "within 300  
15 feet from an occupied permanent residence, school,  
16 hospital, institution, or church in existence at the  
17 time of initial application."

18 The question brought forth by Mr. Bloom  
19 was: Does this rise to the level of an exception?  
20 Or maybe that was a statement by Mr. Bloom, that he  
21 thought it did.

22 COMMISSIONER BLOOM: I'm asking if we want  
23 to make that an exception, or would somebody need an  
24 exception to go within 100 feet of a building  
25 mentioned there?

1 CHAIRPERSON BAILEY: I don't believe that  
2 a district office is going to allow 100 feet, that  
3 large of a change.

4 COMMISSIONER BLOOM: Okay.

5 CHAIRPERSON BAILEY: That large of a  
6 difference between that 300 feet. I think that  
7 is -- that's really not necessary, to rise to that  
8 level.

9 COMMISSIONER BALCH: I would concur.

10 CHAIRPERSON BAILEY: Okay. So we have --

11 COMMISSIONER BALCH: So we now need to  
12 copy this entire Section A, relabel it B, and do it  
13 for multi-well management pit, fluid management  
14 pits?

15 MR. SMITH: Well, you might want to go  
16 back. I think there is a change you might want to  
17 make in the last section that you wrote, which is  
18 where -- where you have "Operators will require."

19 The operator isn't really requiring  
20 anything. I think you might want to change it to  
21 "Operators must obtain."

22 COMMISSIONER BALCH: Okay.

23 COMMISSIONER BLOOM: "An exception." I  
24 agree with that.

25 COMMISSIONER BALCH: That is better.

1 COMMISSIONER BLOOM: I think I might have  
2 meant to say that prior.

3 COMMISSIONER BALCH: Good language,  
4 Mr. Smith.

5 CHAIRPERSON BAILEY: Before we do that,  
6 shall we just go ahead and vote on this section?

7 COMMISSIONER BALCH: Sure.

8 CHAIRPERSON BAILEY: Okay.

9 Do I hear a motion to incorporate the  
10 changes as we have discussed in 19.15.17.10.A, as  
11 they pertain to temporary pits?

12 COMMISSIONER BALCH: Do we want to go  
13 through line by line, or is it better just to have a  
14 blanket for the entire section?

15 CHAIRPERSON BAILEY: We could go portion  
16 by portion if there is some parts that...

17 MR. SMITH: He could say, "I opt out of  
18 this part of (a), (b), (d), and (f)."

19 COMMISSIONER BLOOM: Why don't we go  
20 quickly by paragraph.

21 CHAIRPERSON BAILEY: Okay. So for  
22 19.15.17.10.A (1) (a), yes.

23 COMMISSIONER BLOOM: I move that we vote  
24 by --

25 COMMISSIONER BALCH: I will move that we

1     accept (a) .

2                   CHAIRPERSON BAILEY:   As --

3                   COMMISSIONER BALCH:   As written.

4                   CHAIRPERSON BAILEY:   -- written and

5     deliberated.

6                   I second that motion.

7                   All those in favor?

8                   Aye.

9                   COMMISSIONER BALCH:   Aye.

10                  CHAIRPERSON BAILEY:   All those opposed,

11     nay?

12                  COMMISSIONER BLOOM:   Nay.

13                  CHAIRPERSON BAILEY:   One nay.

14                  So for subparagraph (b), do I hear a

15     motion to accept paragraph (b) as deliberated and

16     written?

17                  COMMISSIONER BALCH:   I will make that

18     motion.

19                  CHAIRPERSON BAILEY:   I will second it.

20                  All those in favor?

21                  Aye.

22                  COMMISSIONER BALCH:   Aye.

23                  CHAIRPERSON BAILEY:   All those opposed?

24                  COMMISSIONER BLOOM:   Nay.

25                  CHAIRPERSON BAILEY:   One nay.



1 So for subparagraph (c)?

2 COMMISSIONER BLOOM: I will move to vote  
3 on subparagraph (c).

4 CHAIRPERSON BAILEY: Is there a second?

5 COMMISSIONER BALCH: I will second.

6 CHAIRPERSON BAILEY: All those in favor?

7 Aye.

8 COMMISSIONER BALCH: Aye.

9 COMMISSIONER BLOOM: Aye.

10 CHAIRPERSON BAILEY: Motion passes 3-0.

11 For subparagraph (d), do I hear a motion  
12 to accept paragraph (d), as deliberated and written?

13 COMMISSIONER BALCH: I will make that  
14 motion.

15 CHAIRPERSON BAILEY: I second that motion.

16 All those in favor?

17 COMMISSIONER BALCH: Aye.

18 CHAIRPERSON BAILEY: Aye.

19 All those opposed?

20 COMMISSIONER BLOOM: Nay.

21 CHAIRPERSON BAILEY: One nay.

22 For subparagraph (e), it was agreed not to  
23 change the current subparagraph (e), not to change  
24 the current regulation concerning incorporated  
25 municipal boundaries.

1 Do I hear a motion to maintain the current  
2 regulation in this subparagraph?

3 COMMISSIONER BLOOM: Yes, I so move.

4 COMMISSIONER BALCH: And I will second.

5 CHAIRPERSON BAILEY: All those in favor?  
6 Aye.

7 COMMISSIONER BALCH: Aye.

8 COMMISSIONER BLOOM: Aye.

9 Motion passes 3-0.

10 CHAIRPERSON BAILEY: For subparagraph (f),  
11 do I hear a motion to accept the language as  
12 deliberated and as shown on the screen?

13 COMMISSIONER BALCH: I will make that  
14 motion.

15 CHAIRPERSON BAILEY: I will second it.  
16 All those in favor?

17 COMMISSIONER BALCH: Aye.

18 CHAIRPERSON BAILEY: Aye.

19 All those opposed?

20 COMMISSIONER BLOOM: Nay.

21 CHAIRPERSON BAILEY: One nay.

22 For subparagraph (g).

23 COMMISSIONER BLOOM: And (h).

24 CHAIRPERSON BAILEY: And (h).

25 COMMISSIONER BALCH: And (i).

1 CHAIRPERSON BAILEY: And (i).

2 COMMISSIONER BALCH: And probably for (j),  
3 as well.

4 Well, no, (j) has not been...

5 CHAIRPERSON BAILEY: For subparagraphs  
6 (g), (h), and (i), do I hear a motion to accept the  
7 changes as written up on the screen?

8 COMMISSIONER BLOOM: Yes, I so move.

9 COMMISSIONER BALCH: And I will second.

10 CHAIRPERSON BAILEY: All those in favor?  
11 Aye.

12 COMMISSIONER BALCH: Aye.

13 COMMISSIONER BLOOM: Aye.

14 CHAIRPERSON BAILEY: So for subparagraph  
15 (j), that requires an exception for certain  
16 conditions concerning low chloride fluids, do I hear  
17 a motion to accept that language?

18 COMMISSIONER BALCH: I will move to accept  
19 that language.

20 CHAIRPERSON BAILEY: I second it.

21 All those in favor?

22 COMMISSIONER BALCH: Aye.

23 CHAIRPERSON BAILEY: Aye.

24 All those opposed?

25 COMMISSIONER BLOOM: I guess I'm in favor

1 of that.

2 CHAIRPERSON BAILEY: Okay. So I hear a  
3 third -- three ayes. Okay.

4 Motion passes, 3-0.

5 Now, we can copy that entire Section 1.

6 COMMISSIONER BLOOM: Madam Chair?

7 CHAIRPERSON BAILEY: Yes.

8 COMMISSIONER BLOOM: May I suggest that we  
9 consider treating multi-well fluid management pits  
10 as permanent pits for the purpose of siting?

11 COMMISSIONER BALCH: That might simplify  
12 things.

13 CHAIRPERSON BAILEY: It certainly does.  
14 That's the way I have it in my notes.

15 So instead of copying -- I'm sorry if you  
16 have already started doing that. If you'll scroll  
17 down to (2), that begins: "An operator shall not  
18 locate a permanent pit," and -- yes, right there at  
19 the bottom -- and include the words "or" --

20 COMMISSIONER BALCH: -- "multi-well fluid  
21 management pit."

22 COMMISSIONER BLOOM: Do you want to change  
23 "multi-wall" and make that "multi-well"?

24 COMMISSIONER BALCH: Otherwise, the  
25 permanent pit language is unchanged. Is that right?

1 COMMISSIONER BLOOM: One suggested change  
2 on (e).

3 COMMISSIONER BALCH: Well, there's  
4 "unconfined water," which we have already removed, I  
5 think.

6 CHAIRPERSON BAILEY: If you will scroll  
7 down to (d).

8 COMMISSIONER BLOOM: I believe we need --

9 CHAIRPERSON BAILEY: We did not accept the  
10 deletion of that when we were talking about distance  
11 for a temporary pit because of the --

12 COMMISSIONER BLOOM: So I'm confused why,  
13 here, we would only have a setback for a well that  
14 less than five houses depends on of 500 feet, but  
15 then any other well is a thousand feet.

16 So if no one is -- if no households are  
17 using it, it gets a thousand feet of protection, but  
18 if five houses, four houses are using it, it only  
19 gets 500?

20 COMMISSIONER BALCH: Well, the language  
21 that we are deleting makes it more specific to less  
22 than five households, which I think leads you to  
23 believe that everything else is going to be greater  
24 than five households.

25 Does anybody recall in the testimony, when

1 we were talking about the number of households?

2 CHAIRPERSON BAILEY: I don't recall  
3 testimony, no.

4 COMMISSIONER BLOOM: I don't either.

5 COMMISSIONER BALCH: Okay. So there's  
6 less than five households, it looks like the  
7 suggested language --

8 CHAIRPERSON BAILEY: Makes it more  
9 protective of everybody. If we delete that: "An  
10 operator shall not locate a permanent pit within  
11 500 feet of the well or spring used for domestic or  
12 stock watering purposes."

13 COMMISSIONER BALCH: Five households, it  
14 really just seems very arbitrary.

15 COMMISSIONER BLOOM: Well, it looks like  
16 we have a -- perhaps IPA was trying to put it back  
17 in. We have it up there in green.

18 COMMISSIONER BALCH: Or OCD.

19 COMMISSIONER BLOOM: Or OCD.

20 MR. SMITH: I think that five household  
21 number may have been borrowed from another statute  
22 or rule, just based on what we have looked at today.

23 CHAIRPERSON BAILEY: But doesn't it become  
24 more protective of --

25 COMMISSIONER BALCH: I think if somebody

1 is using the water you want to protect it.

2 CHAIRPERSON BAILEY: Yeah.

3 COMMISSIONER BALCH: I don't care if it's  
4 1, 2, 3, 4, 5, or 20.

5 COMMISSIONER BLOOM: But then it's less  
6 protected than the water that no one is using.

7 COMMISSIONER BALCH: Well, I don't think  
8 that "any other fresh water" means that no one is  
9 using it.

10 COMMISSIONER BLOOM: Well, if it's a -- if  
11 the fresh water well or spring it's a thousand feet.  
12 But if it's being used for domestic water or  
13 livestock --

14 COMMISSIONER BALCH: Well, one of them is  
15 a private --

16 COMMISSIONER BLOOM: -- then it's 500  
17 feet.

18 COMMISSIONER BALCH: -- a private,  
19 domestic well or spring, which I think -- I think  
20 that maybe the "private" is the distinction.

21 COMMISSIONER BLOOM: I guess my question  
22 still stands. What distance are wells protected  
23 above?

24 CHAIRPERSON BAILEY: 200 for low chloride,  
25 300 --

1 COMMISSIONER BALCH: For other.

2 CHAIRPERSON BAILEY: -- for other.

3 COMMISSIONER BLOOM: Yeah. So this is --  
4 this is setbacks for permanent pits, then multi-well  
5 fluid management pits, which could have potentially  
6 on average four times more water.

7 COMMISSIONER BALCH: I think if you  
8 stopped after "watering purposes," and just apply  
9 500-foot limitation, you would probably be  
10 protected.

11 CHAIRPERSON BAILEY: But maintain that  
12 last clause "in existence at the time of initial  
13 application."

14 COMMISSIONER BALCH: Right. I would get  
15 rid of the "or within 1,000 feet of any other." It  
16 doesn't add anything. And why would it be more  
17 protective of something that wasn't being used,  
18 necessarily?

19 MR. SMITH: If I could just interject.

20 The less than five households standard, I  
21 think, has been borrowed from the definition of  
22 wellhead protection area, because the five household  
23 standard is used in that definition at 19.15.2.7,  
24 subparagraph 8.

25 CHAIRPERSON BAILEY: And it's probably,



1     there, borrowed from water quality control or the  
2     state engineer.

3                 MR. SMITH:   That, I don't want to  
4     speculate to.

5                 COMMISSIONER BALCH:   But again, if we  
6     remove that language we become more protective on  
7     that.   It doesn't violate those statutes.

8                 MR. SMITH:   Well, I'm not -- I wasn't  
9     saying this for violation.   I was speaking to the  
10    notion of whether the five households was arbitrary.

11                COMMISSIONER BALCH:   I'm thinking the most  
12    common case would be one household or something like  
13    that.

14                COMMISSIONER BLOOM:   Yes.

15                COMMISSIONER BALCH:   That would be a case  
16    that would occur.

17                But I guess again, I would just state that  
18    if you are going to be protective -- I think you  
19    would be protective at 500 feet, and that would  
20    apply to pretty much any caseload, so you could  
21    simplify this language.

22                MR. SMITH:   And that's based on the  
23    testimony that you have previously cited in this  
24    discussion.

25                COMMISSIONER BALCH:   Based on the

1 testimony that we have.

2 And again, we are talking here about sites  
3 that are going to be monitored on a regular basis.  
4 They are permanent, but they also have a double  
5 liner, so the groundwater is protected. They're  
6 bermed. They have overlap of the liner.

7 CHAIRPERSON BAILEY: Heavier liner.

8 COMMISSIONER BALCH: Heavier liners.

9 And if you are protected at 100 feet for a  
10 temporary pit with a lower standard than that, at  
11 500 feet you are going to be protected...

12 COMMISSIONER BLOOM: Is there a proposal?  
13 Where are we at?

14 COMMISSIONER BALCH: The proposal is to  
15 strike the "less than five households" and strike  
16 the "or within a thousand feet of any other fresh  
17 water well or spring."

18 So it would read "within 500 feet of a  
19 private, domestic fresh water well or spring used  
20 for domestic or stock watering purposes in existence  
21 at the time of the initial application."

22 MR. SMITH: May I ask a question,  
23 Dr. Balch, just to get this straight?

24 Did you -- because I want to make sure  
25 that you-all are working through these consistently.

1           Did you earlier reference the amount of  
2       drawdown by more than five households and how that  
3       could affect the concentrations?

4           CHAIRPERSON BAILEY: I mentioned that that  
5       may enhance, but that was not testimony during the  
6       hearing. It was my knowledge of drawdown.

7           COMMISSIONER BALCH: And when we are  
8       talking about -- earlier, when I talked about  
9       temporary pits in the same section, my point was  
10      that we are talking about operational water that  
11      won't be there. That is not going to be impacted in  
12      the groundwater. We are talking about surface flow  
13      risk. And similarly, for the permanent events, we  
14      have others. So I think the same standard applies.

15           When we talk about closure, then we will  
16      have another discussion.

17           COMMISSIONER BLOOM: If you delete "or  
18      within 1,000 feet of any fresh water well or  
19      spring," might you want to delete "private and  
20      domestic," so that we're not...

21           COMMISSIONER BALCH: Just any fresh water  
22      well or spring used for domestic or stock watering  
23      purposes?

24           COMMISSIONER BLOOM: Or not used -- used  
25      or not used. I don't know.

1 CHAIRPERSON BAILEY: That would make  
2 sense.

3 COMMISSIONER BLOOM: Maybe not even --

4 CHAIRPERSON BAILEY: Dr. Neeper was very  
5 clear that a spring should not have to be used in  
6 order to be protected.

7 COMMISSIONER BALCH: And I agree with  
8 that.

9 CHAIRPERSON BAILEY: With that in mind, we  
10 could say "within 500 feet of a spring, comma, or a  
11 fresh water well used for domestic or stock watering  
12 purposes in existence at the time of the initial  
13 application."

14 COMMISSIONER BALCH: That would solve it.

15 Fresh water spring. So within 500 feet of  
16 a fresh water -- actually it would just be a spring,  
17 a fresh water spring?

18 CHAIRPERSON BAILEY: Within 500 feet of a  
19 spring -- or -- after spring put the words "or fresh  
20 water well."

21 All right. Are we happy with (d), as it  
22 is written up there?

23 COMMISSIONER BLOOM: I don't know that I  
24 support the reduction from 1,000 to 500. But...

25 COMMISSIONER BALCH: What was protected

1 under a thousand I'm not sure was well defined.

2 The existing statute had 500 feet for  
3 spring or fresh water well that was used by less  
4 than five people. So I think we are equally  
5 protected.

6 CHAIRPERSON BAILEY: Should we go on to  
7 paragraph (e), or did you have --

8 COMMISSIONER BLOOM: No, we can move on to  
9 (e).

10 CHAIRPERSON BAILEY: Okay.

11 COMMISSIONER BLOOM: We can go back on  
12 that one.

13 CHAIRPERSON BAILEY: (e) is the same as  
14 what we discussed for temporary pits and chose not  
15 to change that language.

16 COMMISSIONER BALCH: I suggest we don't  
17 change the language in (e).

18 So are you in agreement with that,  
19 Commissioner Bloom?

20 COMMISSIONER BLOOM: I would agree.

21 CHAIRPERSON BAILEY: Okay. (f): "Within  
22 500 feet of a wetland."

23 No suggested changes have been made all  
24 the way down until we get to (3). So that --

25 COMMISSIONER BALCH: That would finish

1 up --

2 CHAIRPERSON BAILEY: -- concludes our  
3 discussion on that.

4 COMMISSIONER BALCH: That would combine  
5 multi-well and permanent into that second category,  
6 and we made all the changes that need to be made.

7 CHAIRPERSON BAILEY: And when we were  
8 talking about exceptions and variances, did we  
9 specifically talk about permanent pits and  
10 multi-well fluid management pits being covered  
11 under --

12 COMMISSIONER BALCH: I remember discussing  
13 permanent pits.

14 COMMISSIONER BLOOM: We did cover that.

15 CHAIRPERSON BAILEY: Actually, we need to  
16 have an additional paragraph here to explain that  
17 exceptions would have to be requested.

18 Can we borrow (j) from under Section (1)?  
19 I think we can start there.

20 Are we all in agreement that multi-well  
21 pits and permanent pit siting variations would  
22 really be an exception?

23 CHAIRPERSON BAILEY: Yes.

24 COMMISSIONER BLOOM: Correct, yes.

25 COMMISSIONER BALCH: So here you would

1 say: "Operators must obtain an exception to locate  
2 a permanent pit or a multi-well fluid management  
3 pit" well, "fluid management pit."

4 You can leave "temporary pit inside  
5 setbacks indicated," and then you can delete "for  
6 low chloride fluids."

7 And would it be indicated in 19.15.17.10A  
8 (2)?

9 COMMISSIONER BLOOM: (2).

10 COMMISSIONER BALCH: And then delete the  
11 (a), (b), (c), (d) -- (a), (b), (d), (f).

12 CHAIRPERSON BAILEY: Correct.

13 Okay. As we voted on the exceptions and  
14 siting for temporary pit, shall we vote on the  
15 permanent pit and multi-well fluid management  
16 section, so that we could then move on?

17 COMMISSIONER BLOOM: Yes. Would it be  
18 allowable --

19 And, Mr. Smith, you know, can we vote --  
20 we can move to just vote -- I don't know whether  
21 they're paragraphs or subparagraphs now?

22 COMMISSIONER BALCH: Well, we can probably  
23 do everything down to the 500 feet, and then  
24 everything below it, if you would like.

25 COMMISSIONER BLOOM: I don't know if we

1 need to move for -- if I have a movement and then a  
2 second to vote on every line, or can we move to vote  
3 on a section at a time?

4 MR. SMITH: I think you can vote however  
5 you want when you want. I don't think you need a  
6 motion or a second.

7 COMMISSIONER BALCH: So essentially, we  
8 want to vote on everything above the paragraph where  
9 we are discussing the 500-foot, and then that  
10 section, and then everything below it, I think we  
11 can vote on as to a block.

12 So it would be (2). Is that correct?

13 COMMISSIONER BLOOM: That's correct.

14 CHAIRPERSON BAILEY: So do I hear a motion  
15 to accept and make changes in 19.15.17.10A (2) (a)  
16 through (c)?

17 COMMISSIONER BLOOM: I so move.

18 COMMISSIONER BALCH: I will second it.

19 CHAIRPERSON BAILEY: All those in favor?

20 Aye.

21 COMMISSIONER BALCH: Aye.

22 COMMISSIONER BLOOM: Aye.

23 CHAIRPERSON BAILEY: And then for  
24 paragraph (d), is there a motion to adopt the  
25 changes that were made there?



1 COMMISSIONER BALCH: I will make that  
2 motion.

3 CHAIRPERSON BAILEY: Second.  
4 All those in favor?

5 COMMISSIONER BALCH: Aye.

6 CHAIRPERSON BAILEY: Aye.  
7 All those opposed?

8 COMMISSIONER BLOOM: Nay.

9 CHAIRPERSON BAILEY: One nay.  
10 And then for paragraphs (e) through (j),  
11 do I hear a motion to adopt the language as we have  
12 discussed?

13 COMMISSIONER BLOOM: Yes, I so move.

14 COMMISSIONER BALCH: And I will second.

15 CHAIRPERSON BAILEY: All those in favor?  
16 Aye.

17 COMMISSIONER BALCH: Aye.

18 COMMISSIONER BLOOM: Aye.

19 CHAIRPERSON BAILEY: All right. We can  
20 move on to what do we do with material excavated  
21 from a pit's construction, as far as siting of that  
22 pit's construction.

23 (3) (a) suggests that we change that from  
24 300 feet to 100 feet. And OCD suggests that we  
25 change that from "continuously flowing watercourse"

1 to "continuously flowing watercourse or a flowing  
2 significant watercourse," so to add in the "flowing  
3 significant watercourse," along with the  
4 "continuously flowing."

5 COMMISSIONER BALCH: There wasn't a lot of  
6 testimony on this. I think that the testimony that  
7 I do recall was, what's the problem with the pile of  
8 dirt?

9 CHAIRPERSON BAILEY: And this is a pile of  
10 dirt that is excavated during the pit's  
11 construction. It has not yet been contaminated with  
12 any kind of chemicals, fluids, or whatever else.

13 COMMISSIONER BALCH: Right.

14 COMMISSIONER BLOOM: I think I would be  
15 supportive of these changes, particularly because I  
16 can't imagine too many areas near wetlands that are  
17 also in floodplains.

18 COMMISSIONER BALCH: I also -- I think  
19 there was -- there was testimony that said they were  
20 really just looking for flexibility in the word  
21 "piling."

22 CHAIRPERSON BAILEY: So, Kim, would you  
23 please add in under (3) (a), where it says  
24 "continuously flowing watercourse," add in the words  
25 "or a flowing significant watercourse."

1                   COMMISSIONER BALCH: So a flowing  
2     significant watercourse might be something like the  
3     Rio Salado, where it passes I-25 at the rest stop  
4     down there around exit 175 or so.

5                   One or two months out of the year it may  
6     have water in it, but it's a significant  
7     watercourse.

8                   This is saying that you're differentiating  
9     the 8 or 10 months of the year when it has no water  
10    in it from when it does, and what if your operation  
11    overlaps those time periods? You would be in and  
12    out of compliance if it rained upstream that  
13    afternoon.

14                  COMMISSIONER BLOOM: Therefore, you would  
15    think it would make sense to include that?

16                  COMMISSIONER BALCH: Well, I'm not sure it  
17    would make sense to include it.

18                  I also think we're talking about a pile of  
19    dirt. So I'm not sure what the risk is that it  
20    would pose to a significant watercourse.

21                  I would say "significant watercourse" and  
22    not "flowing significant watercourse," if you wanted  
23    to have --

24                  CHAIRPERSON BAILEY: And then we would  
25    delete "other significant watercourse" from the next

1 phrase that has the 200-foot limitation.

2 COMMISSIONER BALCH: "200 feet from a  
3 lakebed, sinkhole, or playa," that's fine.

4 CHAIRPERSON BAILEY: So the suggestion was  
5 made to just add "significant watercourse."

6 COMMISSIONER BALCH: Well, I would just  
7 take out the word "flowing" because --

8 COMMISSIONER BLOOM: Well --

9 COMMISSIONER BALCH: -- you would end up  
10 with a situation where your compliance goes in and  
11 out, depending upon the weather.

12 COMMISSIONER BLOOM: If it's flowing or  
13 not. I would agree.

14 CHAIRPERSON BAILEY: So how would you have  
15 it read?

16 COMMISSIONER BALCH: "Within 300 feet  
17 of -- within a -- of a continuous flowing  
18 watercourse or significant watercourse, or 200 feet  
19 of any other significant" -- or I guess I would say  
20 "or 200 feet of any other lakebed, sinkhole, or  
21 playa lake."

22 CHAIRPERSON BAILEY: So we are changing  
23 the location of "significant watercourse" from down  
24 below to up above.

25 And the suggestion was to change it to 100

1 feet rather than 300 feet, up in the first line of  
2 (3) (a).

3 COMMISSIONER BALCH: I thought we were  
4 changing it to 300.

5 CHAIRPERSON BAILEY: No, it is at 300, to  
6 remove it. To change it from 300 from 100 was the  
7 proposal.

8 COMMISSIONER BALCH: Or within. Okay.  
9 Yes.

10 MR. SMITH: Do you intend to give more  
11 protection to lakebeds and sinkholes than you do  
12 significant watercourses?

13 COMMISSIONER BALCH: That's an interesting  
14 feature of this. And that's why I was talking about  
15 flowing watercourses versus flowing significant  
16 watercourses. Why would you have a different level  
17 of protection? They're both watercourses.

18 So lakebeds, sinkholes, playas would be  
19 another broad category of potential surfaces where  
20 you would -- surfaces of water.

21 CHAIRPERSON BAILEY: As was pointed out,  
22 does it make sense for additional protection from a  
23 pile of dirt for a playa lake? Or is 100 feet a  
24 reasonable distance from --

25 COMMISSIONER BLOOM: You will be stacking

1 dirt 30 feet from -- 30 yards from a sinkhole.

2 COMMISSIONER BALCH: Well, I mean you  
3 might lose your pile of dirt, I suppose.

4 COMMISSIONER BLOOM: Or your tractor.

5 COMMISSIONER BALCH: I'm not sure if there  
6 really needs to be a differentiation. If you just  
7 lump all the water features into one category within  
8 100 feet it should be fine.

9 COMMISSIONER BLOOM: Including wetlands?

10 COMMISSIONER BALCH: Well, wetlands you're  
11 talking about in (b).

12 COMMISSIONER BLOOM: Yeah.

13 CHAIRPERSON BAILEY: Okay. So in (a) we  
14 can delete "continuously flowing." Is that what you  
15 are saying?

16 COMMISSIONER BALCH: Well, "continuously  
17 flowing" is one of the things we have to define.

18 CHAIRPERSON BAILEY: Yes. And we have  
19 "significant."

20 COMMISSIONER BALCH: Well, I think I would  
21 keep the language all the way up to where it says  
22 "or 200 feet," and I would delete "or 200 feet" all  
23 the way over to the "or" in front of "lakebed," I  
24 guess. Yeah. I would leave that.

25 And then that would give you 100 feet from

1 all of those five features.

2 CHAIRPERSON BAILEY: Yes, I think we have  
3 agreed to that.

4 COMMISSIONER BALCH: And then you will  
5 have to take out the other "or" up there and turn it  
6 into a comma in the first line. Take it out and  
7 replace it with a comma after "watercourse."

8 I think you can take out the "or" in front  
9 of "lakebed" as well.

10 And I don't know if we need the language  
11 on alternate distance, because that could be taken  
12 care of by a variance, unless you want to leave it  
13 in there for some reason.

14 CHAIRPERSON BAILEY: No, because it gives  
15 the same criteria that we would be judging the  
16 variance anyway. So we could put the period after  
17 the parentheses high-water mark.

18 And then delete the rest of (a), yes.

19 COMMISSIONER BALCH: I guess that period  
20 has to become a semicolon, to be consistent.

21 All right. Now, wetlands. Previously, it  
22 was within 500 feet of a wetland, and they're asking  
23 for 100 feet of a wetland.

24 We had this discussion with siting for  
25 permanent and multi-well pits and also for temporary

1 pits. I believe we have temporary pits at 100-foot,  
2 and it was protected where a river would be  
3 protected over a wetland, as well. And we are,  
4 again, talking about a pile of dirt.

5 MR. SMITH: Let me ask you.

6 Is the evidence to which you refer on this  
7 the comment about what's wrong with a pile of dirt?  
8 Was there any further evidence on this?

9 COMMISSIONER BALCH: Are we allowed to use  
10 common sense?

11 MR. SMITH: It's very rare for  
12 commissions.

13 I'm sorry. I couldn't help that.

14 I think you are allowed to use common  
15 sense.

16 COMMISSIONER BALCH: The worst danger is  
17 in washing it away, and I suppose that is the risk.

18 MR. SMITH: Well, there is the possibility  
19 of creating silt in the waterbed.

20 CHAIRPERSON BAILEY: Which is covered  
21 under federal regulations, as far as --

22 COMMISSIONER BLOOM: Storm water?

23 CHAIRPERSON BAILEY: -- storm water and  
24 additional sedimentation into rivers. I think  
25 federal regulations cover that for waters of the US.



1                   MR. SMITH: We don't know what those  
2 federal regulations are.

3                   CHAIRPERSON BAILEY: No, but they enforce  
4 theirs, and we are only looking at OCD, Oil and Gas  
5 Act, and OCD regulations.

6                   COMMISSIONER BALCH: If we were to say 100  
7 feet of a wetland, we could move wetland up after  
8 watercourse in (a), and I would be in favor of  
9 removing (c) entirely.

10                  CHAIRPERSON BAILEY: Mr. Bloom, do you  
11 have thoughts on that?

12                  COMMISSIONER BLOOM: I'm trying to  
13 remember if I ever heard of any particular  
14 reservations about silt in wetlands. That's  
15 generally a flat area, so I'm not sure it exists.

16                  COMMISSIONER BALCH: Your absolute  
17 worst-case scenario is going to be where you have  
18 such a great amount of sheath flow across the area  
19 where you have your pile of dirt that the entire  
20 thing washes into your wetland or river or whatever,  
21 at which point you would probably have other erosion  
22 problems that would be more than your pile of dirt.  
23 I just don't know --

24                  COMMISSIONER BLOOM: This is all the  
25 context of this not being in a 100-year floodplain.

1 COMMISSIONER BALCH: The 100-year  
2 floodplain is pretty broad. I think most of  
3 Socorro -- the city of Socorro is within a 100-year  
4 floodplain, for example.

5 COMMISSIONER BLOOM: I think we can move  
6 wetland up, then.

7 CHAIRPERSON BAILEY: Okay.

8 COMMISSIONER BALCH: So wetland, right  
9 there where your cursor is, and then remove (b) and  
10 (c).

11 Do we need subsection (a) if there's no  
12 subsection (b)?

13 CHAIRPERSON BAILEY: Then it all becomes  
14 one big sentence under (3).

15 MR. SMITH: Madam Chair, could we take a  
16 10-minute break?

17 CHAIRPERSON BAILEY: Let's take a 10  
18 minute break.

19 We'll come back at five to 4:00.

20 (A recess was taken from 3:44 p.m. to 3:50  
21 p.m.)

22 CHAIRPERSON BAILEY: Back on the record.

23 During the break I debated concerning the  
24 discussion that we just had concerning locating  
25 material excavated from the pit's construction.

1           What was presented to us was to change the  
2 setbacks for a continuously flowing watercourse and  
3 not for any other -- and for wetland, but not for  
4 any other changes within that section.

5           We had minimal, if any, discussion during  
6 the hearing. So the evidence for doing any crossing  
7 out or deleting of the current regulations in some  
8 areas would be questionable.

9           Yes, we rely on our expertise and our  
10 common sense to a certain degree. But without  
11 having the evidence in the record it may be  
12 difficult to justify wholesale deletion of certain  
13 areas, when we don't have the opportunity for any  
14 discussion or any evidence taken for this particular  
15 section.

16           COMMISSIONER BALCH: Did we modify  
17 anything in (a) that we should not have? There was  
18 a 200-foot setback for lakebed, sinkhole, playa  
19 lakes. That was not...

20           CHAIRPERSON BAILEY: No. The only  
21 requested modification was for the hundred feet in  
22 the first line. And then --

23           COMMISSIONER BALCH: Then it was 200 feet  
24 for lakebed, sinkhole, or playa lakes.

25           CHAIRPERSON BAILEY: That was always

1 there. That was not requested for change.

2 COMMISSIONER BALCH: Could we at least put  
3 a return after watercourse and make a new (b) for  
4 lakebed, sinkhole, or playa that has the same  
5 language as original, and have that back to  
6 200 feet? Because...

7 CHAIRPERSON BAILEY: Yes. Okay.

8 COMMISSIONER BLOOM: Maybe put wetland and  
9 continuously flowing watercourse above?

10 MR. SMITH: My concern is this. For your  
11 other setback and the other siting requirements you  
12 have a host of evidence related to soil physics and  
13 everything else. You don't really have -- that I  
14 know of -- any evidence with respect to this  
15 allegedly innocuous pile of dirt.

16 COMMISSIONER BALCH: My understanding of  
17 the way the rule is formed under this commission,  
18 the variances will have to take care of this.

19 MR. SMITH: Ah. I think they would have  
20 to take care of that. So my question is whether you  
21 have the evidence before you necessary to change the  
22 setback requirements for a pile of dirt.

23 COMMISSIONER BALCH: Okay. So 200 feet  
24 from a lakebed, sinkhole, or playa lake.

25 Now we can talk about the hundred feet for

1 a wetland.

2 CHAIRPERSON BAILEY: Well, up in the first  
3 line, (a), we need to have a --

4 COMMISSIONER BALCH: Well, there was a  
5 suggested change to add a flowing significant  
6 watercourse.

7 CHAIRPERSON BAILEY: Yes.

8 COMMISSIONER BALCH: So we do have some  
9 discretion there.

10 CHAIRPERSON BAILEY: So we can put "or"  
11 between watercourse and (a).

12 COMMISSIONER BALCH: All right.

13 COMMISSIONER BLOOM: Could we just move  
14 wetland up there, since the setback is supposed to  
15 be the same?

16 COMMISSIONER BALCH: Well, if we accept  
17 the change we would be able to do that.

18 MR. SMITH: No. I mean formatting is  
19 another matter. I think the first issue is do you  
20 have the evidence before you to make the change to a  
21 100-foot setback?

22 COMMISSIONER BALCH: I think there is  
23 evidence or testimony for the 100-foot setback in  
24 the context of pit ruling waste, which is going to  
25 be, in my opinion, more dangerous than a pile of

1 dirt.

2 CHAIRPERSON BAILEY: We have the ability  
3 to be consistent between the distance from a  
4 temporary pit to a wetland, and the material  
5 excavated from that pit to a wetland.

6 So we -- we could be consistent in our  
7 setbacks for both the temporary pit and the dirt  
8 excavated for that pit.

9 MR. SMITH: If you are certain that  
10 threats from a pile of dirt are the same category of  
11 threat that you could have from a pit, then I  
12 believe that you could analogize that.

13 The issue is do you have a basis for  
14 believing?

15 COMMISSIONER BALCH: I could probably give  
16 you citations from Dr. Thomas, where he talks about  
17 the risk is in the transport. The liquids are more  
18 transportable than solids.

19 MR. SMITH: Okay.

20 COMMISSIONER BALCH: He has that language  
21 in his testimony, that a liquid is apparently more  
22 able to transport a threat than a solid.

23 So if we can then draw a conclusion that  
24 pile dirt removed from the pit is a solid, whereas  
25 the liquids that go into the pit are liquid, are we

1 allowed to make that connection?

2 MR. SMITH: If you have that kind of  
3 evidence. I mean, certainly, you exercise reason on  
4 your evidence, and you don't need to cite -- well,  
5 no. Actually, that would be helpful. Why don't you  
6 do that. We will put it in the record.

7 COMMISSIONER BALCH: It's going to be in  
8 pages 465, 466, and 467 of Dr. Thomas' testimony,  
9 his direct testimony.

10 And I'm referring to the risk is in the  
11 transportability, the pathways for a hazardous  
12 material to go from a source to the place where the  
13 hazard has an impact.

14 And then he talks directly that closure  
15 lowers the risk because you are taking it from a  
16 liquid to a solid state.

17 Would that be sufficient?

18 MR. SMITH: If -- I mean, that's not  
19 really up to me.

20 If, as a scientist and in your expertise,  
21 you believe that that evidence allows you to  
22 conclude that this pile of dirt can have setbacks  
23 similar to or less than other things that you are  
24 addressing, then you can do what you want to with  
25 it.

1 COMMISSIONER BALCH: And that other thing  
2 is the liquid that would be in a pit. I would make  
3 that connection.

4 MR. SMITH: Okay.

5 COMMISSIONER BALCH: And those are the  
6 pages that you want to look at for the citation.

7 MR. SMITH: I will find them in the  
8 transcript.

9 CHAIRPERSON BAILEY: Commissioner Bloom,  
10 you were going to make a comment?

11 COMMISSIONER BLOOM: I am fine, thank you.

12 CHAIRPERSON BAILEY: Okay.

13 So we are back to the formatting of (3) to  
14 reflect the commission's decisions of 100 feet of  
15 the watercourse, 200 feet of lakebed, within 100  
16 feet of a wetland, which is consistent with the 100  
17 feet that we have for the temporary pit.

18 COMMISSIONER BALCH: And within a 100-year  
19 floodplain, nobody asked anybody about that, so  
20 there it is.

21 CHAIRPERSON BAILEY: Okay. So can we go  
22 on to paragraph (4) now, or do we...

23 COMMISSIONER BLOOM: Yes. We can move on,  
24 yes.

25 CHAIRPERSON BAILEY: Okay. The suggested



1 language is for locations -- siting locations for a  
2 below-grade tank.

3 The first one is within 100 feet of a  
4 continuously flowing watercourse or any other  
5 significant watercourse or lakebed, sinkhole, or  
6 playa lake, unless there is a variance given.

7 The hundred feet that is suggested is  
8 equivalent to the temporary pit in A (b).

9 COMMISSIONER BALCH: Mr. Hasely  
10 testified -- I'm going to guess it was for a  
11 significant amount of time.

12 To summarize his testimony, starting at  
13 page 152 and ending at page 205 of the transcript --  
14 I can give you specific citations if you want.

15 It had to do with the purpose of the  
16 tanks, which is primarily the below-grade range.

17 He talked about siting on page 167.

18 Closure, which we are not talking about at  
19 this time.

20 And his testimony was that a tank is  
21 inherently more protected than a pit; therefore,  
22 having it share setbacks for a pit as it comes to  
23 current Rule 17, was unreasonable.

24 And that's really all the testimony that  
25 we have. He was really the only one who testified

1 about tanks. There was not a lot of discussion  
2 about that.

3 With that said, I think 100 feet is  
4 protective for a tank, much as a temporary pit. We  
5 found that 100 feet was protective.

6 I guess that's probably conservative,  
7 because the pit is going to have a berm and other  
8 features, which -- I'm sorry, a tank, not a berm.

9 If there is a puncture in it, fluid will  
10 be leaking in that area around the tank.

11 CHAIRPERSON BAILEY: So, Commissioner  
12 Bloom? It was --

13 COMMISSIONER BALCH: Essentially, between  
14 line 52 and page 205 -- or page 152 and page 205 of  
15 the transcript, where Mr. Hasely was testifying  
16 about below-grade tanks, he covered issues  
17 surrounding siting and the appropriateness of those  
18 sitings.

19 His testimony can be boiled down to a tank  
20 is inherently more protective than -- it's not a  
21 pit. And since we, as a commission, determined that  
22 100 feet was safe for a temporary pit, then 100 feet  
23 is definitely safe for a more protective tank.

24 COMMISSIONER BLOOM: You said that there  
25 is a berm?

1           COMMISSIONER BALCH: Well, there's a --  
2   no, there's not necessarily a berm for a below-grade  
3   tank. But you have a tank, and then you have that  
4   empty space. The empty space is what catches  
5   anything that would come from the -- from the tank.

6           COMMISSIONER BLOOM: But there are sides  
7   and there's a pad underneath and...

8           COMMISSIONER BALCH: So...

9           CHAIRPERSON BAILEY: Looking at (a), we  
10   have already agreed that we could strike the  
11   language after the paragraph -- the parentheses mark  
12   behind "mark." So because we are covering the  
13   criteria for a change approved -- a variance change  
14   approved by the division district office, so that  
15   the criteria on making any decisions of a variance  
16   is already covered as far as this below-grade tank  
17   location is concerned.

18           Shall we go ahead and strike from "unless"  
19   all the way down to the end of that sentence?

20           COMMISSIONER BALCH: Yes.

21           And in the same section of testimony  
22   Mr. Hasely also addressed it. He addressed all the  
23   siting criteria. And he was asked directly if it  
24   was protective, and he said yes, for the reasons  
25   stated for our discussion in (a).

1           CHAIRPERSON BAILEY: For temporary pits we  
2     have a setback of 200 feet from a private, domestic  
3     water well or spring. Here again, we need to change  
4     the location of the word "spring." So it would be  
5     within 100 feet of a spring or a private, domestic  
6     fresh water well used for public or livestock  
7     consumption, because of the testimony of Dr. Neeper,  
8     who said that a spring did not need to be used in  
9     order to be protectable.

10           Now the question is, for a temporary pit,  
11     we have 200-foot setback.

12           For a permanent pit we have 500-foot  
13     setback.

14           We changed the distance setback for a  
15     private, domestic water well based on language in  
16     the definition for a wellhead protection area. And  
17     that was our justification for making it 200 feet,  
18     because the wellhead protection area means the area  
19     within 200 horizontal feet of a domestic water well,  
20     et cetera.

21           So it's logical, to me, to have this  
22     setback for a tank the same as for a wellhead  
23     protection area as defined in the OCD regulations.

24           COMMISSIONER BALCH: I think even though  
25     it's more protective, if you already have a

1 definition 200 feet you should stick to that.

2 CHAIRPERSON BAILEY: Do you agree with  
3 that, Commissioner?

4 COMMISSIONER BLOOM: I would agree with  
5 that.

6 CHAIRPERSON BAILEY: All right. So (b)  
7 would say "200 feet of a spring or private, domestic  
8 fresh water well used for public or livestock  
9 consumption."

10 (c) has the hundred-foot setback for a  
11 wetland, which is consistent with our setback for a  
12 temporary pit pile of dirt.

13 Do we agree with the hundred feet setback  
14 for a below-grade tank?

15 COMMISSIONER BALCH: It should be more  
16 than protected.

17 COMMISSIONER BLOOM: I mean, I guess I  
18 have some reservations or somewhat of a quandary.  
19 It's about 30 yards to a wetland.

20 CHAIRPERSON BAILEY: A tank is surrounded  
21 by a berm. And if there are certain requirements  
22 for the volume, it needs to be one and a half times?

23 COMMISSIONER BALCH: It's designed to  
24 capture the entire volume of the tank.

25 CHAIRPERSON BAILEY: Okay.

1 COMMISSIONER BLOOM: And then it has the  
2 liner inside, which is 30 or 60 mil, depending.

3 COMMISSIONER BALCH: Something like that.

4 COMMISSIONER BLOOM: I think I found that.

5 COMMISSIONER BALCH: And then this goes  
6 back to the risk and response time.

7 Basically, you have adequate time to  
8 respond to that catastrophic failure of the tank  
9 before it can escape that.

10 COMMISSIONER BLOOM: Again, the liner is  
11 something consist with 30 mil flexible PVC or 60 mil  
12 HDPE liner, or equivalent liner material.

13 Yes, I believe that would be acceptable.

14 CHAIRPERSON BAILEY: Okay. So we will  
15 maintain that hundred feet.

16 And then the next question has to do with  
17 where -- depth to groundwater, we have eliminated  
18 that, is less than 10 feet below the bottom of the  
19 tank. Is there discussion on the 10-foot level?

20 COMMISSIONER BALCH: There's a -- I can  
21 give a citation on page 152, I think, if you want to  
22 have something on the record.

23 This is Mr. Feldewert asking Mr. Hasely --  
24 asking Mr. Hasely about below-grade tanks and if he  
25 could describe for the commission what their

1 purposes were in the oilfield.

2 And the answer was that:

3 "First and foremost, it's, as in the name,  
4 it's a tank. Not a pit, it's a vessel. The exact  
5 construction is what is set on the surface of the  
6 ground. And then the other part of the definition  
7 is it's below grade. So it's located down in an  
8 excavation.

9 "The main reason to have it below grade is  
10 to allow gravity drainage, like I think Mr. Gantner  
11 mentioned.

12 "And the main reason to have it below grade  
13 is to allow gravity drainage. A lot of the wells in  
14 the northwest, low pressure -- are low pressure, and  
15 so draining water off the separators, draining water  
16 off of -- water that gets to the produced oil tank,  
17 gravity drainage allows that to go and not sit in  
18 the pipe, which causes freezing problems and other  
19 operational problems. So it's a below-grade tank,  
20 and it's used to collect and store the water,  
21 produced water."

22 So it's primarily water, produced water.

23 It was clear at 11:30 p.m. It's not so  
24 clear at 4:20.

25 It goes on to talk about the stretching of

1 the -- the size, roughly 5,000 gallons or so on  
2 average.

3 Okay. On page 167 or so Mr. Feldewort was  
4 asking about the changes to siting requirements.

5 On page 168, line 16, Mr. Feldewort asked  
6 him:

7 "Would you agree that because of the  
8 nature of the vessel that below-grade tanks should  
9 have different siting requirements than temporary  
10 pits?"

11 We talked about this a little while ago.

12 "Yes, I feel that way. As I mentioned in  
13 the beginning, it's a tank. It's not an earthen  
14 pit. It's the same vessel."

15 It's in an excavation. You have added a  
16 layer of protection to the environment.

17 The next question was:

18 "Will this allow you flexibility?"

19 It may have been in Mr. Gantner's  
20 testimony where I read this, and I didn't highlight  
21 it, unfortunately.

22 But there was discussion in the testimony  
23 that -- there was discussion in testimony that  
24 because of the siting requirements of the  
25 below-grade tanks being similar to that of a



1 temporary pit, that extra construction was needed in  
2 order to have gravity drainage if your site was too  
3 close to the level of groundwater.

4 And that caused an excessive amount of  
5 cost. Now, this is definitely Mr. Gantner's  
6 testimony. That was the primary concern from  
7 Mr. Gantner, was that the siting requirements for  
8 tanks was overly restrictive considering the  
9 additional protection that they gave compared to a  
10 temporary pit.

11 And because of that, additional costs were  
12 incurred by operators in certain areas due to low  
13 pressure and gravity drainage requirements for the  
14 use of a tank, which is to remove water from  
15 separators and oil storage tanks.

16 CHAIRPERSON BAILEY: I think if I talked  
17 about the current OCD rule, to give some comfort  
18 level here, 19.15.18.16 is titled "Tanks, Oil Tanks,  
19 Firewalls, and Tank Identification."

20 It says:

21 "No person shall restore or retain oil in  
22 earthen reservoirs or in open receptacles. Dikes or  
23 firewalls are not required except an operator shall  
24 erect and maintain firewalls around permanent oil  
25 tanks or tank batteries that are within the

1 corporate limits of a city, town, village, or where  
2 such tanks are closer than 150 feet to a producing  
3 oil or gas well or 500 feet to a highway or  
4 inhabited dwelling or closer than a thousand feet to  
5 a school or church or where the tanks are so located  
6 that the division deems them an objectionable  
7 hazard.

8 "Where firewalls are required, firewalls  
9 shall form a reservoir having a capacity one-third  
10 larger than the capacity of the enclosed tank or  
11 tanks."

12 So I believe that might add some comfort  
13 level.

14 COMMISSIONER BLOOM: Thank you. In terms  
15 of horizontal proximity?

16 CHAIRPERSON BAILEY: Yes.

17 COMMISSIONER BLOOM: Yes.

18 COMMISSIONER BALCH: Okay. The Gantner  
19 citation that I just made from memory is actually on  
20 page 62, starting at line 9 and going into -- going  
21 to the end of that page, line 25.

22 CHAIRPERSON BAILEY: Is there a distance,  
23 Commissioner Bloom, that you would feel more  
24 comfortable, such as 25 feet?

25 COMMISSIONER BLOOM: I think that would

1 work for me. 10 feet is just too much proximity to  
2 groundwater. But 25, I could see where that  
3 would -- where the liner and the tank would be a  
4 protective system, coupled with the automatic  
5 shutoff.

6 COMMISSIONER BALCH: So the analogy is  
7 yes, the tank is more protective in and of itself.  
8 However, if it's breached, you are then dealing with  
9 a temporary pit situation, and you want to match  
10 that language for temporary pits?

11 COMMISSIONER BLOOM: Not that it matches.  
12 But...

13 COMMISSIONER BALCH: Well, it had the same  
14 distances that we have established for low chloride  
15 fluids, but not for other fluids.

16 COMMISSIONER BLOOM: Correct.

17 COMMISSIONER BALCH: I think that 10 feet  
18 is protective, but 25 feet does not bother me  
19 either. I think that the risk is, is you -- when  
20 you do impact the flexibility that Mr. Gantner, and  
21 then later Mr. Hasely alluded to, however, there is  
22 the possibility of a variance, so that could be  
23 dealt with on a -- at the district level and  
24 hopefully be resolved relatively easily.

25 CHAIRPERSON BAILEY: So we could change

1 the 10 feet to 25 feet. And then would that make  
2 that entire Section (4) acceptable to all three  
3 commissioners?

4 MR. SMITH: Let me ask you if I may,  
5 before you do that.

6 Do you need the adjectives "private and  
7 domestic" in (4) (a)?

8 COMMISSIONER BALCH: We removed "private  
9 and domestic" when we were talking about temporary  
10 pits.

11 CHAIRPERSON BAILEY: Yes, we did. So I  
12 would not mind if that was removed, so that it would  
13 apply to any fresh water well used for public or  
14 livestock consumption.

15 COMMISSIONER BALCH: "Spring or fresh  
16 water well."

17 CHAIRPERSON BAILEY: Exactly.

18 COMMISSIONER BLOOM: So we delete "private  
19 and domestic"?

20 CHAIRPERSON BAILEY: Yes.

21 Did we vote on Section (3) concerning  
22 dirt?

23 COMMISSIONER BALCH: I don't think we did.

24 CHAIRPERSON BAILEY: I don't think we did.

25 Let's go back to (3) and vote on that so

1 that we can maintain a nice orderly approval,  
2 because we'll be breaking pretty quick here.

3 COMMISSIONER BLOOM: Yes, Madam Chair. I  
4 move that we vote on Section (3).

5 CHAIRPERSON BAILEY: Do I hear --

6 COMMISSIONER BALCH: I will second the  
7 motion.

8 CHAIRPERSON BAILEY: Okay.

9 Commissioner Bloom voted --

10 COMMISSIONER BLOOM: I would move that we  
11 vote on Section (3), which indicates setbacks for  
12 material excavated from a pit's construction.

13 CHAIRPERSON BAILEY: Okay. Do you move to  
14 accept the 100-foot distance for watercourses and  
15 lakebeds, et cetera, as written up?

16 COMMISSIONER BLOOM: 200 feet from a  
17 lakebed, 100 feet from a wetland within a 100-year  
18 floodplain.

19 CHAIRPERSON BAILEY: Okay. So we have 200  
20 feet -- no, it's 100 feet for continuously flowing  
21 watercourse.

22 COMMISSIONER BALCH: 200 feet from a  
23 lakebed, sinkhole, or playa; 100 feet from a  
24 wetland; or within a 100-year floodplain.

25 I would second the motion.

1 CHAIRPERSON BAILEY: All those in favor?

2 Aye.

3 COMMISSIONER BALCH: Aye.

4 COMMISSIONER BLOOM: Aye.

5 CHAIRPERSON BAILEY: All of those -- no  
6 one opposed.

7 Now for subsection (4) that we have just  
8 discussed, do I hear a motion to accept the changes  
9 as we have indicated on the draft document?

10 COMMISSIONER BLOOM: Yes, I so move.

11 COMMISSIONER BALCH: I will second that.

12 CHAIRPERSON BAILEY: All those in favor?  
13 Aye.

14 COMMISSIONER BALCH: Aye.

15 COMMISSIONER BLOOM: Aye.

16 CHAIRPERSON BAILEY: All right.

17 Now, we can go to Section B concerning an  
18 emergency pit.

19 The suggestion has been -- well, we have  
20 changed the definition of emergency pit to reflect a  
21 pit that's constructed in an emergency. So there  
22 would really be no change from B at all.

23 COMMISSIONER BALCH: Well, there's no  
24 suggested change either.

25 CHAIRPERSON BAILEY: Right. So now we can

1 move to C, where the first suggestion is in C (1)  
2 that an operator shall not implement an on-site  
3 closure method where groundwater is less than -- and  
4 suggested changes from 50 to 25 feet below the  
5 bottom of the buried waste.

6 COMMISSIONER BLOOM: And that --  
7 originally, "unconfined" was in there?

8 CHAIRPERSON BAILEY: Uh-huh. But we are  
9 deleting the unconfined limitation.

10 COMMISSIONER BLOOM: Correct. Okay.

11 CHAIRPERSON BAILEY: So the question  
12 before us is whether it should be 50 feet or  
13 25 feet.

14 COMMISSIONER BALCH: We have a whole  
15 Section 19.15.17.13 on closure and site reclamation  
16 requirements.

17 CHAIRPERSON BAILEY: Yes.

18 COMMISSIONER BALCH: How is this section  
19 distinct from what will be discussed there?

20 CHAIRPERSON BAILEY: This is in -- this  
21 has to do with the depth to water. It doesn't have  
22 to do with horizontal. Okay.

23 C (1) has vertical distance, where C (3)  
24 has horizontal distance. In fact, C (3), (4), (5),  
25 (6), (7).

1           COMMISSIONER BLOOM: And then the -- I  
2 believe the closure -- the section on closure we get  
3 more into --

4           COMMISSIONER BALCH: I believe we can  
5 tackle this section then.

6           CHAIRPERSON BAILEY: Do we want to have  
7 C (1) discussion now or does that properly belong in  
8 the latter section having to do with closure?  
9 Because this one has to do with vertical distance  
10 rather than horizontal distance, as (3) through  
11 (10).

12          COMMISSIONER BALCH: Well, it appears that  
13 all of the site requirements -- and now we are at  
14 the point where we are talking about site  
15 requirements for on-site closure.

16          CHAIRPERSON BAILEY: Yes.

17          COMMISSIONER BALCH: We're covering this  
18 section. So...

19          COMMISSIONER BLOOM: If I may, is there  
20 anything else we could spend the remaining time on?  
21 This maybe would be a good place to start on Monday,  
22 because I believe the only thing we have left is  
23 closure at that point, correct?

24          CHAIRPERSON BAILEY: Closure and  
25 reclamation.



1 COMMISSIONER BLOOM: Yeah.

2 CHAIRPERSON BAILEY: Closure and  
3 reclamation.

4 COMMISSIONER BALCH: We could look at  
5 closure and reclamation.

6 CHAIRPERSON BAILEY: It's 4:30. We  
7 have --

8 COMMISSIONER BLOOM: I'm not sure my brain  
9 can make the leap at this point.

10 COMMISSIONER BALCH: Section 13 was  
11 completely rewritten from the original.

12 CHAIRPERSON BAILEY: Exactly. What we can  
13 do is stop at this point, come back to this on  
14 Monday at 9:00, where we will talk about on-site  
15 closure methods that are presented here in C, along  
16 with the other sections that we have not yet --

17 COMMISSIONER BALCH: I think the only  
18 section we haven't looked at is 13.

19 CHAIRPERSON BAILEY: So possibly if we  
20 think about all of this over a period of time and  
21 come back on Monday at 9:00.

22 COMMISSIONER BALCH: I think that's a good  
23 break point, because we are moving from --

24 CHAIRPERSON BAILEY: Okay. Yes. Why  
25 don't we highlight in yellow -- just that line for C

1 in yellow.

2 COMMISSIONER BALCH: That is where we  
3 stopped.

4 CHAIRPERSON BAILEY: Yes.

5 COMMISSIONER BALCH: We are shifting gears  
6 from the horizontal testimony, which was primarily  
7 experience based, to the vertical siting which was  
8 largely modeling based. So...

9 CHAIRPERSON BAILEY: For the first two  
10 portions, but not for the succeeding.

11 COMMISSIONER BALCH: I suspect there will  
12 be a lot of discussion on the vertical portion.

13 CHAIRPERSON BAILEY: I'm sure there will  
14 be.

15 So we are -- we will continue on Monday.  
16 We are done for the day today.

17 (Proceedings concluded.)

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## CERTIFICATE

I, Paul Baca, RPR, CCR in and for the  
State of New Mexico, do hereby certify that the  
above and foregoing contains a true and correct  
record, produced to the best of my ability via  
machine shorthand and computer-aided transcription,  
of the proceedings had in this matter.

A handwritten signature in cursive script that reads "Paul Baca". The signature is written in dark ink and is positioned above a horizontal line.

PAUL BACA, RPR, CCR  
Certified Court Reporter #112  
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