

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 17

COMMISSION MEETING  
October 4, 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  
THERESA DURAN-SANCHEZ

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

1 CHAIRPERSON BAILEY: Good morning.

2 This is Thursday, October 4. It is the  
3 meeting of the Oil Conservation Commission for the  
4 purpose of continuing deliberations in Consolidated  
5 Cases 14784 and 14785.

6 All three commissioners are here, so we do  
7 have a quorum.

8 Commissioners, I looked over the proposed  
9 draft rule that was a result of day 5 of  
10 deliberations, and I came across some areas where we  
11 needed to reduce the ambiguity where we could, and  
12 then make some corrections and just point out some  
13 areas where we could possibly run into conflict.

14 The first comment I have is on page 2,  
15 having to do with the definition of "permanent pit."

16 The concept for the permanent pit, in my  
17 mind, has always been to limit it to collection,  
18 retention, or storage of produced water or brine.

19 The way this is written could mean  
20 anything unless we take off the words "including  
21 pit." So it would read: "'Permanent pit' means a  
22 pit used for collection, retention, or storage of  
23 produced water or brine," et cetera.

24 COMMISSIONER BLOOM: I would agree with  
25 that. It makes it seem like it's including any

1 other sort of pit.

2 CHAIRPERSON BAILEY: Anything.

3 I think we need that specificity, so  
4 please delete those words.

5 The next comment I have is on the  
6 definition of "temporary pit," just as a heads-up  
7 that we need to be very careful that we are skirting  
8 the definitions of centralized facility. So we just  
9 need to keep aware that in Rule 2, temporary pits  
10 are specifically excluded from surface waste  
11 management facilities. So we need to be very clear  
12 in our rule that we're not inadvertently making any  
13 change to that.

14 COMMISSIONER BALCH: Can I ask a question  
15 about that?

16 CHAIRPERSON BAILEY: Yes.

17 COMMISSIONER BALCH: One of the kinds of  
18 conceptual models that we discussed was  
19 centralization of the waste for several pits,  
20 perhaps.

21 CHAIRPERSON BAILEY: Centralized  
22 facilities are specifically included in surface  
23 waste management facility Rule 36.

24 COMMISSIONER BALCH: Right. So are we --  
25 that's what you are talking about we have to be

1 careful of?

2 CHAIRPERSON BAILEY: Yes.

3 COMMISSIONER BALCH: Because you could  
4 imagine some extreme scenario or something that  
5 would have 100 wells and they're trying to put all  
6 the waste in one location.

7 CHAIRPERSON BAILEY: And then it becomes  
8 very questionable.

9 In that definition for temporary pit it  
10 says, on the third line, next-to-the-last sentence,  
11 next-to-the-last word, "must be located at one of  
12 the relevant well drilling locations."

13 Do we want to replace the word "relevant"  
14 with the words "associated permitted well  
15 locations"?

16 COMMISSIONER BLOOM: I would support that  
17 change, yes.

18 COMMISSIONER BALCH: Yes. That would  
19 probably resolve your other issue as well. Because  
20 if somebody sent in a permit with 96 wells on it  
21 then it probably won't get passed.

22 CHAIRPERSON BAILEY: Yes. So please  
23 replace the word "relevant" with "associated  
24 permitted."

25 My next comment goes all the way to

1 page 7. We have talked several times about the  
2 placement of the word "spring" in the siting  
3 requirements of 10 A, so that we are ensuring that a  
4 spring doesn't have to be used by five households or  
5 domestic or stock watering purposes.

6 On page 9, under (6) (b), there is the  
7 word -- the way it's written "within 200 feet of a  
8 spring or a fresh water well." And I think that  
9 makes it very clear that the public -- that the use  
10 applies only to the fresh water well and not to the  
11 spring, by the insertion of the word "a."

12 So if we go back to page 7 A (1) (d) --  
13 no, it's farther on down under "siting." Yes,  
14 scroll on down under (d). Yes.

15 If we insert the word "a" on that second  
16 line in (d) before "private," so it reads "200 feet  
17 of a spring or a private domestic water well."

18 Do you-all agree that that makes that very  
19 clear now, or better than it was?

20 COMMISSIONER BLOOM: So essentially, we  
21 are saying the spring doesn't have to be used by  
22 five households?

23 CHAIRPERSON BAILEY: Right.

24 COMMISSIONER BALCH: Right.

25 COMMISSIONER BLOOM: What if we have

1 within 200 feet of a private domestic fresh water  
2 well used by less than five households or a  
3 spring -- well, the spring doesn't have to be used,  
4 so maybe it would come after watering purposes.

5 COMMISSIONER BALCH: I think I'd like to  
6 have the spring in the front because it's by itself,  
7 and then everything else applies to private domestic  
8 fresh water well. I think it's fairly clear with  
9 the "a" added.

10 CHAIRPERSON BAILEY: Okay?

11 COMMISSIONER BLOOM: Okay. I will be fine  
12 with that.

13 CHAIRPERSON BAILEY: Okay. That insertion  
14 also needs to be made in the red portion of (d),  
15 then, scrolling on down. There, yes.

16 And also scrolling on down to (3) (d) for  
17 "a" fresh water.

18 On page 12, we are talking design and  
19 construction specifications. Under "Fencing," (4),  
20 so that is D (4). The appropriate division  
21 district.

22 No, I think you have gone too far. D (4).  
23 Yeah, in red.

24 We talked about alternatives, the division  
25 district office may approve alternatives. Do we

1 want to be consistent in the use of "variance"  
2 instead of "alternatives," to make it very clear  
3 that it's a variance that would have to be resolved?

4 COMMISSIONER BLOOM: I would agree with  
5 that.

6 COMMISSIONER BALCH: There's that. And  
7 then there's also kind of a blanket applicability in  
8 variance under the rule. We are basically saying  
9 it's a variance, but later on we are saying there is  
10 no variance.

11 CHAIRPERSON BAILEY: But we wanted to be  
12 sure to indicate where an exception was necessary  
13 and where a variance would be required.

14 COMMISSIONER BALCH: Right. I think we  
15 need to be specific where an exception was required,  
16 more than anything else --

17 CHAIRPERSON BAILEY: Anything else was a  
18 variance.

19 COMMISSIONER BALCH: -- by default it  
20 would be the subject of a potential variance.

21 CHAIRPERSON BAILEY: Right.

22 COMMISSIONER BALCH: I think we are  
23 identifying it for a better protection.

24 CHAIRPERSON BAILEY: So you don't think  
25 that word replacement is necessary?

1                   COMMISSIONER BALCH: Well, I don't know.  
2 I guess I don't know if the paragraph is necessary.  
3                   Well, you are approving the alternative.  
4 I think, basically, you are saying they can have a  
5 variance.

6                   CHAIRPERSON BAILEY: Uh-huh. But  
7 everything can have a variance unless it's an  
8 exception.

9                   COMMISSIONER BALCH: But I guess I don't  
10 know if this paragraph is really needed.

11                  CHAIRPERSON BAILEY: Well, let's  
12 double-check what it says under variances.

13                  Under variances, in Section 15 (a).  
14 "Definitions for variance means authorization from  
15 the appropriate division district office to depart  
16 from the requirements of 19.15.17 NMAC." Very  
17 broad, very general. So I might agree with you that  
18 that entire paragraph is unnecessary.

19                  COMMISSIONER BALCH: I think we scrubbed  
20 out a couple of other places with that similar  
21 language.

22                  COMMISSIONER BLOOM: I would agree. It's  
23 for fencing, so it's not something we are trying to  
24 underscore.

25                  CHAIRPERSON BAILEY: So why don't we go

1 back to page 12, (11) (d) (4) -- that's it -- and  
2 just delete that entire paragraph.

3 Page 17, under -- we are still under  
4 "Operation Design and Construction." This has to do  
5 with design and construction of multi-well fluid  
6 management pits, so it's 11 J (4): "The primary" --  
7 yes, you're in the right area. Yes, between (4) and  
8 (5).

9 In (4), the third line says that the  
10 membrane liner shall consist of certain  
11 specifications or an equivalent liner that the  
12 division's Santa Fe office approves.

13 Multi-well fluid management pits are  
14 permitted by the district office, so I believe it is  
15 the division's district office that needs to do the  
16 approval of any change.

17 COMMISSIONER BLOOM: Very good. Yes.

18 CHAIRPERSON BAILEY: Do you agree?

19 COMMISSIONER BALCH: Yes.

20 CHAIRPERSON BAILEY: Okay.

21 COMMISSIONER BALCH: We spoke to that at  
22 great length in other sections with similar language  
23 and wanted the site specific analogy to the district  
24 office to apply to this.

25 CHAIRPERSON BAILEY: Exactly.

1           And I believe that brings us to the design  
2 and construction specifications for burial trenches  
3 on page 18, which is logically just scrolling on  
4 down.

5           COMMISSIONER BLOOM: We left this until  
6 after we finished with the closure, correct?

7           CHAIRPERSON BAILEY: Yes, we did.

8           COMMISSIONER BLOOM: Yes.

9           CHAIRPERSON BAILEY: So in that case, we  
10 can go to something I just wanted to point out to  
11 the commissioners. That for the definition of  
12 temporary pit -- you don't need to go scrolling back  
13 to it yet. We say "temporary pits must be closed in  
14 less than one year from the spud date of the first  
15 well using the pit."

16           That's what we agreed to under Q,  
17 definition of temporary pit.

18           On page 21, under "Operational  
19 Requirements" -- and here we do need to go to  
20 page 21, 12 B (4). It says: "The operator shall  
21 remove all free liquids from the surface of the  
22 temporary pit within 60 days from the date the  
23 operator releases the last drilling or workover rig  
24 associated with the relevant pit permit."

25           Okay. We have that on there.

1           And then on page 35, which we have not yet  
2 gotten to, there is another potential conflict with  
3 the length of time that a pit can be...

4           I just want us to keep to the front of our  
5 minds how long is a temporary pit and what actions  
6 need to be taken at what time.

7           COMMISSIONER BALCH: You know, I think we  
8 discussed -- we actually discussed this. I remember  
9 Mr. Bloom and I having a long conversation about  
10 really wanting to limit the age of these temporary  
11 pits to a year plus the closure. So I think we  
12 ought to repair the other language in that, rather  
13 than having to revisit that conversation.

14           So for example, I'm not sure if we would  
15 want to be specifying the last drilling or workover  
16 associated with the relevant pit permit, because  
17 that could circumvent the -- or if you want to have  
18 it this way that's fine. But I think the one year  
19 plus the extension is the absolute, right?

20           COMMISSIONER BLOOM: Yes. I thought we  
21 talked about the temporary pits extending out to a  
22 maximum of 14 months, at least 12, plus 2 months.

23           COMMISSIONER BALCH: Plus a 2-month  
24 extension.

25           COMMISSIONER BLOOM: Yeah.

1           COMMISSIONER BALCH: So I'm not sure if  
2 this directly conflicts with that, but we maybe want  
3 to get it a little more clear.

4           We probably don't need the language of  
5 "the date the operator releases the last drilling or  
6 workover rig," since the closure deadline is already  
7 fixed earlier in the rule.

8           Basically, this would limit how many pits  
9 an operator would put on, too -- how many wells an  
10 operator would --

11          COMMISSIONER BLOOM: The reason we might  
12 want to keep that language in there is that --  
13 suppose there are two pads associated with a  
14 temporary pit and everything is finished within 8  
15 months. If we didn't have this language in there,  
16 then it could sit open for 12 plus 2.

17          COMMISSIONER BALCH: I see, yeah.

18          COMMISSIONER BLOOM: So I think this is  
19 probably important. But what we might want to do is  
20 remove the last line, should get an extension of  
21 another 2 months to remove the free liquids from the  
22 surface of the temporary pit. And...

23          COMMISSIONER BALCH: Or point it back to  
24 the other finding that we set in the previous part  
25 of the rule.

1 CHAIRPERSON BAILEY: Well, the timing that  
2 was set in the definition of the pit "must be closed  
3 in less than one year from the spud date of the  
4 first well."

5 COMMISSIONER BALCH: Right. But I see  
6 Mr. Bloom's point. You really want them to also be  
7 drilling fluids off the --

8 CHAIRPERSON BAILEY: Within 60 days.

9 COMMISSIONER BALCH: -- of the last well.  
10 So you might keep the language here, but  
11 then maybe point -- I don't know if you want to  
12 point back to the definition of -- the time line  
13 definition, or maybe it doesn't matter.

14 CHAIRPERSON BAILEY: I think keeping the  
15 notation on the C-105 or the C-103, what the date is  
16 for the drilling or workover rig's release, is  
17 important to give the calendar for when those 60  
18 days begin and end. Otherwise, it's pretty unclear.  
19 When do you start your 60 days?

20 COMMISSIONER BALCH: Right. The timing is  
21 important.

22 Mr. Smith, do you think it is clear? I'm  
23 not so much focusing on this language. But earlier,  
24 we defined a temporary pit as being closed within  
25 one year with a small extension. Is that going to

1 cause confusion?

2 MR. SMITH: Just a second.

3 I don't think so.

4 CHAIRPERSON BAILEY: Okay.

5 COMMISSIONER BLOOM: Madam Chair, one  
6 question for you. Does "closed" mean that  
7 operations have ceased or does it mean that  
8 operations have ceased and liquids have been  
9 removed?

10 Then I think we would have, perhaps, a  
11 contradiction here if we are saying that. Or maybe  
12 it would just indicate that the liquids need to be  
13 removed within that year.

14 COMMISSIONER BALCH: Well, I think they  
15 have to be. By the definition of "temporary," they  
16 have to be removed within a year plus a 60-day  
17 extension. So you wouldn't probably make a design  
18 that would keep your liquids in there longer.  
19 That's self-limiting.

20 CHAIRPERSON BAILEY: And when we get to  
21 closure requirements, I think that that shows that  
22 this is a term of "in effect," and that we are very  
23 specific later on in this rule of what "closure"  
24 means, because we have closure reports, we have  
25 closure processes. It's a word of art, a term of

1 art, I think.

2 COMMISSIONER BLOOM: So if I'm an operator  
3 looking at these new rules, I look at temporary pit  
4 and I see a temporary pit must be closed in less  
5 than one year from the spud date of the first well  
6 using the pit.

7 So I say, okay, it's closed. But then do  
8 I have 60 days to get the liquids off?

9 COMMISSIONER BALCH: Well, that's what  
10 this is saying. This is saying you have -- once  
11 you're not using the pit anymore you need to remove  
12 the liquids within 60 days. It doesn't mean you  
13 have to close the pit within 60 days, it means you  
14 have to remove liquids, which is really the risk.

15 CHAIRPERSON BAILEY: And the closure plans  
16 will indicate what the process is for -- because a  
17 closure plan has to be approved before that permit  
18 is allowed.

19 COMMISSIONER BLOOM: Right.

20 MR. SMITH: Let me make sure that I'm not  
21 confused.

22 When I told you I thought it was clear, it  
23 seems to me that these provisions overlap, that they  
24 have a year to get it closed from the first spud  
25 date. And during that year, at some point, they are

1 going to have 60 days to remove the liquid, and  
2 that's going to be from the last -- the release of  
3 the last rig.

4 In my view, this doesn't give the operator  
5 an additional 60 days, and I think that is pretty  
6 clear. If you intend otherwise, then my previous  
7 answer to you is wrong.

8 COMMISSIONER BALCH: That's exactly what  
9 we intend.

10 COMMISSIONER BLOOM: I guess this might be  
11 another issue, too, is that 60 days -- the initial  
12 60 days to remove the liquids, is that inside the  
13 first year? And if so, is the extension 2 extra  
14 months after the 12 months or does that all have to  
15 take place within 12 months?

16 CHAIRPERSON BAILEY: It all has to happen  
17 within 12 months.

18 COMMISSIONER BLOOM: So --

19 CHAIRPERSON BAILEY: If you spud a well,  
20 however many wells you want to close or remove the  
21 liquids after that last well is taken care of. But  
22 from the -- you go back to the calendaring of that  
23 first well that was spudded.

24 COMMISSIONER BLOOM: Would it be more  
25 clear if we added something here that said this

1 shall -- this 60 days plus an extension shall be  
2 concluded within 12 months from the spud date, just  
3 to remove any ambiguity?

4 CHAIRPERSON BAILEY: As in repeating what  
5 the sentence says?

6 COMMISSIONER BALCH: I'm not sure that  
7 there's any ambiguity. I mean, Mr. Smith was able  
8 to directly interpret the intent.

9 CHAIRPERSON BAILEY: It would just be a  
10 repetition of the sentence in the definition itself.

11 COMMISSIONER BALCH: I think, basically,  
12 your operational plan for the pit and your closure  
13 plan are going to be set within that one-year time  
14 line.

15 COMMISSIONER BLOOM: Okay.

16 COMMISSIONER BALCH: If you ran into a  
17 problem, that's when you would be asking for the  
18 60-day extension. You wouldn't be building in the  
19 60-day extension onto your plan, or you shouldn't  
20 be. And it shouldn't be approved if you did.

21 COMMISSIONER BLOOM: But then you see it  
22 as 12 months plus 2 months?

23 COMMISSIONER BALCH: It's 12 months -- for  
24 the closure, we did give them a possibility of a  
25 60-day extension, I believe.

1                   CHAIRPERSON BAILEY: There's no extension  
2 for the 12 months. The 2 months has to do with the  
3 60-day removal of fluids.

4                   COMMISSIONER BALCH: Okay.

5                   COMMISSIONER BLOOM: So I would -- I mean  
6 I think what I'm seeing here is we might have three  
7 different interpretations of what we're reading  
8 here, so we may need to clarify.

9                   So you're saying everything will happen  
10 within a year.

11                  CHAIRPERSON BAILEY: Uh-huh.

12                  COMMISSIONER BLOOM: Mr. Balch said  
13 12-months, and they could get 2 extra months, and  
14 I'm thinking the way it reads is 12-months plus 4  
15 months.

16                  COMMISSIONER BALCH: I think we have to be  
17 clear that the 2 months here applies only to the  
18 removal of the liquids. It does not extend the time  
19 line of the temporary pit, although I presume they  
20 could ask for an extension if needed.

21                  CHAIRPERSON BAILEY: Yes, there's always  
22 that potential.

23                  COMMISSIONER BALCH: Maybe Mr. Bloom is  
24 correct. The thing we could do at the very end of  
25 this paragraph would be to just say not to exceed

1 the 12-month lifespan of the temporary pit.

2 CHAIRPERSON BAILEY: So it would be a  
3 comma after "months" at the end?

4 MR. SMITH: Why don't you just put in a  
5 separate sentence that says something like nothing  
6 in this paragraph (4) shall be interpreted to  
7 relieve the operator of the obligation under  
8 whatever paragraph it is to close the pit in one  
9 year.

10 CHAIRPERSON BAILEY: Isn't it just easier  
11 to say "not to exceed"? I mean, just because the  
12 current rule has so many citations back and forth,  
13 back and forth, you never really are sure which  
14 citation is going where. I mean...

15 MR. SMITH: Well, my concern is if you  
16 don't -- if you don't cite the paragraph you are  
17 trying to clarify its relationship with, you're  
18 probably not really clarifying.

19 COMMISSIONER BALCH: Can we just say not  
20 to exceed temporary pit lifespan defined in, and  
21 then point at the definition, the 19.15.17?

22 MR. SMITH: You could do that.

23 COMMISSIONER BALCH: -- 19.1, and then  
24 whatever the definition was?

25 COMMISSIONER BLOOM: Not to exceed the

1 temporary lifespan of 12 months as per 19.15.17.1  
2 NMAC.

3 MR. SMITH: Well, I think I would use the  
4 word "under" as opposed to "as per" --

5 CHAIRPERSON BAILEY: 19.15.17.7.Q NMAC.  
6 In Q we reference one year. We don't  
7 spell it 12 months.

8 COMMISSIONER BALCH: So if someone in the  
9 11th month came to ask for an extension they would  
10 not get more than 30 days in their extension. I  
11 think that makes sense.

12 COMMISSIONER BLOOM: Correct.

13 CHAIRPERSON BAILEY: Okay. If you go up  
14 to paragraph (2), the same section, "circumstance",  
15 in the first line needs to have an S on it at the  
16 end, "for temporary extenuating circumstances."

17 "May maintain a freeboard."

18 COMMISSIONER BALCH: Would that be "an  
19 operator" or "operators"?

20 CHAIRPERSON BAILEY: "An operator."

21 COMMISSIONER BALCH: "In such  
22 circumstances the operator shall maintain a log," in  
23 the next line down. I think it would be "the  
24 operator."

25 COMMISSIONER BLOOM: I would agree.

1 CHAIRPERSON BAILEY: Let's go on down to  
2 Section 13, "Closure and Site Reclamation  
3 Requirements."

4 The very beginning under the title should  
5 be an A for closure plans, not a C.

6 We could combine paragraphs (1) and (2) to  
7 say "closure plans for a multi-well fluid management  
8 pit shall be filed with the appropriate division  
9 district office and shall describe," and that  
10 eliminates number (2).

11 To put it up there after the first "shall"  
12 in the first line, yes. "Shall be filed with the  
13 appropriate division district office and shall  
14 describe."

15 Does that work for you-all?

16 COMMISSIONER BLOOM: Yes.

17 COMMISSIONER BALCH: Yes.

18 CHAIRPERSON BAILEY: And then (2) can be  
19 deleted.

20 Is it time for us to discuss that yellow  
21 highlighted paragraph (1)?

22 COMMISSIONER BALCH: I think we were in  
23 the process of finishing...

24 CHAIRPERSON BAILEY: We had gotten quite a  
25 bit farther down. We had talked through this

1 section for the closure and the reclamation  
2 requirements. We had gone up until the massive  
3 deletions several pages back.

4 This was late in the day, I think we were  
5 all...

6 This requires an operator closing on-site  
7 closure to give proposal A and proposal B, rather  
8 than just a proposal A for closure. It seems to me  
9 like this is an unusual thing, to require an  
10 operator to come up with two different ways of  
11 closure.

12 COMMISSIONER BALCH: I don't even think  
13 it's two. This would include the universe of  
14 possible alternatives if they can, by rule, be  
15 required to supply their initial closure plan.

16 COMMISSIONER BLOOM: So, okay. I might be  
17 a step behind here. So actually, this is saying  
18 that an operator has to submit a closure plan and  
19 alternative closure plans?

20 CHAIRPERSON BAILEY: Yes.

21 COMMISSIONER BLOOM: Right. And I believe  
22 the testimony was that this becomes time consuming,  
23 and if the closure plan is not sufficient then the  
24 division would let the operator know.

25 CHAIRPERSON BAILEY: Yes.

1 COMMISSIONER BALCH: And then they would  
2 come up with an alternative with equally --  
3 equivalent or better protection.

4 CHAIRPERSON BAILEY: Yes.

5 COMMISSIONER BLOOM: I would be okay with  
6 removing this as proposed.

7 CHAIRPERSON BAILEY: To delete that entire  
8 paragraph (1)?

9 COMMISSIONER BLOOM: Agreed.

10 CHAIRPERSON BAILEY: Okay. Then A becomes  
11 B.

12 And then we can scroll down to the next  
13 yellow highlighted area which has to do with  
14 "closure where wastes are destined for burial in  
15 place or into nearby division-approved pits or  
16 trenches."

17 I'm not sure that we resolved whether or  
18 not we would limit the number of pit wastes that  
19 would be moved into a nearby temporary pit or burial  
20 trench.

21 COMMISSIONER BALCH: I think that we  
22 actually have, because we have a hard time line of a  
23 year for the closure of a temporary pit.

24 There's going to be some physical limit on  
25 how many wells you could permit under one pit and

1 complete within a year. So there is a limit. That  
2 limit is not specifically defined as 2 or 3 or 9 or  
3 29 or whatever, but there's going to be some  
4 operational constraints on how many you do. And  
5 whether we want to be more specific is probably the  
6 question that needs to be discussed.

7 CHAIRPERSON BAILEY: And that's why I  
8 bring it up, because it's not a specific limitation  
9 where we could easily put in a limitation in that  
10 third line from the bottom where the word is "from  
11 another" and put one other or whatever we chose.  
12 Yes.

13 COMMISSIONER BALCH: "Adjacent," something  
14 like that.

15 You know, I believe that the testimony  
16 going back a few days earlier, where we were talking  
17 about this -- it may have been Mr. Lane. Mr. Lane's  
18 testimony about doing multiple pits out of one --  
19 multiple drilling pads off of one pit. And he  
20 seemed to think that exceeding two would be an  
21 extraordinary circumstance for that sort of  
22 operation. You wouldn't co-locate more than two  
23 drilling pads.

24 CHAIRPERSON BAILEY: So this is an  
25 operational constraint that we really don't need to

1 cause a limitation, particularly if they have nine  
2 laterals coming off of a horizontal well using one  
3 temporary pit. I agree with you. We don't.

4 COMMISSIONER BALCH: We want that to  
5 occur.

6 CHAIRPERSON BAILEY: Yes, we do. We don't  
7 want to change this paragraph, then. It's just  
8 something that struck me as a possible area. But  
9 the more I think through it the more I agree that we  
10 would want to have that one temporary pit for...

11 COMMISSIONER BALCH: And you know, if  
12 somebody came up with a development plan where you  
13 were going to bend the intent of the rule, that  
14 development plan or closure plan would have to be  
15 approved by the division or Santa Fe, depending on  
16 what type of pit it is. And that would have to be  
17 approved by the division district office, and you  
18 would hope that they would say 193 drills going into  
19 this one pit are too many.

20 COMMISSIONER BLOOM: I guess my concern is  
21 that the language "development plan" could mean a  
22 lot of waste just going into one pit for final  
23 burial. If it just read "a lease," I think we would  
24 understand -- we would know we were dealing with a  
25 smaller universe of potential pits.

1 CHAIRPERSON BAILEY: Well, in that yellow  
2 highlighted area of closure, B -- well, it's not  
3 yellow anymore -- we have that last sentence that  
4 says it all has to be under the control and  
5 management of the operator/producer, which would  
6 imply either it's communitized, unitized, or one  
7 lease.

8 COMMISSIONER BLOOM: Okay. So the units  
9 are quite extensive.

10 CHAIRPERSON BAILEY: Oh, yes.

11 COMMISSIONER BLOOM: So...

12 COMMISSIONER BALCH: And again, it could  
13 be very hard because you could have hundreds of  
14 wells.

15 COMMISSIONER BLOOM: So then you could  
16 actually have a lot of -- you could have 30 --

17 COMMISSIONER BALCH: Well, by the time  
18 you're unitizing most of those wells have already  
19 been replaced.

20 CHAIRPERSON BAILEY: Not for an  
21 exploratory unit.

22 COMMISSIONER BALCH: I recall discussing  
23 this on Thursday -- on Monday, and I thought that we  
24 had gotten to the place where we were thinking that  
25 centralizing waste would actually be a good thing,

1 because then you don't have -- or you're not going  
2 to need this ultimate scenario, especially if you  
3 have more spacing with a waste pit every 600 feet in  
4 parts of New Mexico.

5 CHAIRPERSON BAILEY: Well, with all of the  
6 multilateral horizontal wells that are being drilled  
7 having one temporary pit that holds the waste, or  
8 recycles the mud used for each one of those, I think  
9 is a real positive way that we can reduce the  
10 problem and encourage the reuse of drilling wells.

11 COMMISSIONER BALCH: And then the limits  
12 that are in Table II -- and I know we haven't  
13 discussed them explicitly yet. If you start to  
14 concentrate your waste because of those  
15 multiply-added operations you may not be able to  
16 meet the requirements for on-site closure anyway.

17 CHAIRPERSON BAILEY: That is right. I  
18 hadn't really thought about that, but that's right.

19 COMMISSIONER BLOOM: That is true.

20 CHAIRPERSON BAILEY: Okay. So shall we  
21 just leave that the way it was written, then?

22 And we can scroll down to C (5).

23 Yes. The very last section, the very last  
24 few words there, "the stabilized waste does not  
25 exceed the criteria in Table I of 19.15.17.13 NMAC

1 or a division-approved alternative concentration  
2 limit."

3 I would suggest that we have the language,  
4 instead of "division-approved alternative  
5 concentration limit," to say "concentration limit  
6 approved by a division district office variance."

7 COMMISSIONER BALCH: Well, I would say  
8 that you could stop that paragraph at "NMAC,"  
9 because we already have variance language elsewhere  
10 the document that covers everything that's not an  
11 exception.

12 CHAIRPERSON BAILEY: You're right. Just  
13 like we did for the other paragraph today.

14 COMMISSIONER BLOOM: I wonder if variance  
15 or alternatives to table -- the new Table I  
16 shouldn't be -- rise to the occasion of an  
17 exception.

18 COMMISSIONER BALCH: You know, that's a  
19 tough call, I think, because you want, I think, the  
20 division district offices to be evaluating those  
21 scenarios. And if you are -- if you are asking to  
22 exceed a limit by 1 percent, that's different than  
23 asking to exceed it by a thousand percent. A  
24 thousand percent, I think you are looking at a  
25 variance, where 1 percent, that should be more of

1 the discretion of the district office.

2 So I'm not sure how to -- how to address  
3 that. Or do you trust the division district office  
4 to say no, in the case where it's too high?

5 CHAIRPERSON BAILEY: Currently, the  
6 division district offices look to Santa Fe for  
7 guidance for cleanup to whatever standards are set.

8 It's always a consultation. They will go  
9 with the standards, but if there are questions they  
10 always are in consultation with the Santa Fe group.

11 A lot probably depends on how we handle  
12 Table I. I would almost think that we could delay  
13 debate on that until after we see what we come up  
14 with for Table I, because I have some suggestions on  
15 that one, too.

16 COMMISSIONER BALCH: I still think this  
17 language should be stricken, in either case. And  
18 then maybe highlight the paragraph, and we will come  
19 back to it, because we will either decide that it  
20 needs an exception or it will be covered by the  
21 variance rule.

22 COMMISSIONER BLOOM: By the variance. I  
23 would agree.

24 CHAIRPERSON BAILEY: The way the following  
25 paragraph (6) is written could be changed for the

1 very first part to read: "Upon contents meeting the  
2 constituent concentrations in Table I" of blah,  
3 blah, "the operator may either proceed to dispose of  
4 wastes," and then continue with the rest of the  
5 paragraph.

6 Are we happy with the way those first  
7 three lines are written? Because this is a  
8 negative, when we could turn it into a positive  
9 sentence.

10 COMMISSIONER BLOOM: Along the lines if --  
11 I think after "appropriate stabilization," if  
12 contents are less than any of the constituent  
13 concentrations, along those lines.

14 CHAIRPERSON BAILEY: Upon contents, or if  
15 after appropriate stabilization the contents meet  
16 the constituent concentrations in Table I, the  
17 operator may -- it just seemed to be a very awkward  
18 sentence construction here to me.

19 But if you-all are happy with it that's  
20 fine. It just seemed like it could be improved.

21 COMMISSIONER BALCH: Well, maybe if you  
22 went -- after "do not exceed," to where it says "any  
23 of the constituent concentrations," we could just  
24 say "limits defined in Table I." That would shorten  
25 it. I don't know if it would make it less awkward.

1           COMMISSIONER BLOOM:  If we say "meet," it  
2 might mean it has to come in at the same level or...

3           CHAIRPERSON BAILEY:  Yes.  So -- okay.  
4 That's fine.  It was just an idea.

5           COMMISSIONER BLOOM:  Okay.

6           CHAIRPERSON BAILEY:  If we scroll on down  
7 to (9) (a), Commissioner Balch was concerned about  
8 where the sampling would take place.

9           If we added the sentence at the end of (a)  
10 "in compliance with 19.15.17.13 C, the operator will  
11 provide notice prior to sampling," as the notice is  
12 required later on, that would provide the district  
13 office an opportunity to witness the sampling, if  
14 they are provided notice.

15           Would that alleviate your question  
16 concerning how an operator would be sampling any  
17 areas underneath the liner?

18           COMMISSIONER BALCH:  Well, I talked  
19 with -- at great length with, I believe Dr. Thomas,  
20 about appropriate sampling because that's an issue  
21 that you -- you can end up with two completely  
22 different sampling results, depending upon how the  
23 sampling --

24           CHAIRPERSON BAILEY:  Yes, you could,  
25 completely skewed results.

1           COMMISSIONER BALCH: So I think that this  
2 is a place where you would at least want the  
3 opportunity for some oversight.

4           CHAIRPERSON BAILEY: Right. Okay. So at  
5 the end of that sentence, "in compliance with  
6 19.15.17.13 C, the operator will provide notice  
7 prior to sampling."

8           We haven't yet gotten there, but it has to  
9 do with closure notice.

10          COMMISSIONER BALCH: Right. And the time  
11 line.

12          CHAIRPERSON BAILEY: Not yet.

13          But as it stands, it's "shall provide  
14 notice at least 72 hours but not more than one  
15 week."

16          And that brings us to the large deleted  
17 areas after this particular portion.

18          There are -- with the use of the table,  
19 much of this deleted portion can be removed. I  
20 think it's a matter of looking at each section and  
21 saying, have we dealt with this in another way or  
22 another area.

23          So I would suggest that we look at what's  
24 crossed out, deleted -- proposal for deletion for  
25 all of B, which has to do with closure methods for

1 temporary pits, and see if we have handled -- or  
2 will handle with that table -- all of the aspects  
3 that are brought out in the various subsections  
4 there.

5 COMMISSIONER BLOOM: Actually, I believe  
6 we have found alternative methods for disposal here  
7 of temporary pit waste.

8 I still have questions about off-site or  
9 off-pad burial as allowed in B above, but I think we  
10 have worked through this, and some of the  
11 subsections of B related to levels of benzene, BTEX,  
12 TPH, and chlorides are currently addressed in what  
13 has now become Table I.

14 COMMISSIONER BALCH: Paragraph B is  
15 covered now by paragraphs A and B, so that is  
16 replaceable. We have talked about waste excavation  
17 and removal, and now the table that would define  
18 those standards.

19 CHAIRPERSON BAILEY: The only section that  
20 I question is in B (1) (c), which has to do with "if  
21 the operator of the division determines that a  
22 release has occurred, then the operator shall comply  
23 with 15 -- 19.15.29 NMAC and 19.15.30 NMAC, as  
24 appropriate."

25 Looking at that referenced Rule 29, it has

1 to do with the notification, the reporting, and  
2 findings. But there is one portion of 29 that  
3 requires a responsible person to "complete  
4 division-approved correction action for releases  
5 that endanger public health or the environment. The  
6 responsible person shall address releases in  
7 accordance with the remediation plan submitted to  
8 and approved by the division or with an abatement  
9 plan submitted in accordance with 19.15.30," which  
10 is the other rule that is referenced here.

11 I would suggest that we retain that  
12 language so that we can use 29 and 30 to require  
13 abatement or remediation.

14 COMMISSIONER BALCH: Now Mr. Smith, at the  
15 beginning of the day, was cautioning us about  
16 wholesale deletions. Do we have to line by line go  
17 through and say approved of a deletion with a  
18 justification or can we justify blocks of it that  
19 have been replaced largely by the table or other  
20 text?

21 MR. SMITH: I think if you delete  
22 something it needs to be either because you have  
23 superseded it with another change that was based on  
24 evidence placed before you or because evidence  
25 placed before you supports the deletion, regardless

1 of whether there has been a superseding section.

2 And I think you can do that in blocks if the blocks  
3 meet that test.

4 But if there is a portion that is being  
5 proposed to be deleted and there hasn't been any  
6 evidence placed in the record to support that  
7 deletion, either because it's been superseded or  
8 otherwise, then I think you don't have what you need  
9 in order to remove it.

10 COMMISSIONER BALCH: So if we were to say,  
11 for example, Section B that's stricken out is  
12 replaced by section -- new Sections A and B that we  
13 deliberated based on testimony --

14 CHAIRPERSON BAILEY: And Table I.

15 COMMISSIONER BALCH: -- and the definition  
16 of the table for clarification, with the exception  
17 of B (1) (3) (c), we accept striking the language?  
18 I mean there's a little piece of it that we think  
19 might need to be retained, but really is more a  
20 broad definition that would then become probably a C  
21 or a B (10) or something like that.

22 MR. SMITH: You said D, right? You're  
23 looking at --

24 COMMISSIONER BALCH: No, it's C. It's the  
25 highlighted portion there.

1 MR. SMITH: Oh, okay.

2 COMMISSIONER BALCH: It's a little piece  
3 of -- it's in the middle of the page, and a quarter  
4 of text.

5 COMMISSIONER BLOOM: With respect to that  
6 specifically, I would assume that was covered, for  
7 example, in the new Section A when we have A (3)  
8 (b): "If the results exceed any of the parameters  
9 exceeded in Table I the division may require  
10 additional delineation upon review of the results,  
11 and the operator must receive approval before  
12 proceeding with complete closure."

13 We do have that in there.

14 COMMISSIONER BALCH: So we --

15 COMMISSIONER BLOOM: We might want to  
16 specify --

17 COMMISSIONER BALCH: We might want to put  
18 the pointers in there.

19 COMMISSIONER BLOOM: Yeah. Rule 29 and so  
20 on, and 30. But perhaps that would solve this  
21 issue.

22 CHAIRPERSON BAILEY: Where were you  
23 referencing?

24 COMMISSIONER BLOOM: On A above.

25 CHAIRPERSON BAILEY: Okay. 13 A, "Closure

1 plans"?

2 COMMISSIONER BLOOM: Yes. (3) (b) -- I'm  
3 sorry. Yes, (3) (b).

4 COMMISSIONER BALCH: Then you could just  
5 say "subject to 19.13" -- or "19.15.29 and 19.15.30  
6 NMAC."

7 COMMISSIONER BLOOM: These are a little  
8 different, though. I mean, one is if the operator  
9 determines that -- the existing language is if the  
10 operator determines a spill -- a release has  
11 occurred, then the operator has to comply with that.  
12 And the current language is more along the lines of  
13 if the five-point composite sample shows that  
14 parameters are exceeded, the division may require  
15 additional delineation.

16 COMMISSIONER BALCH: Well, I would say  
17 that we do have language that addresses that  
18 concern.

19 CHAIRPERSON BAILEY: Yes, we do.

20 COMMISSIONER BALCH: We just don't  
21 specifically state the statutes -- or regulation,  
22 not statutes, right?

23 CHAIRPERSON BAILEY: So shall we insert 29  
24 and 30 in there? Or this -- I think it's covered  
25 there. I had not realized that we had taken care of

1 it. All right.

2 So in my mind, then, all of the proposed  
3 Section B has been taken care of elsewhere in A and  
4 B. So we could delete, at this point, all of  
5 Section B as proposed.

6 COMMISSIONER BALCH: I would agree with  
7 that.

8 CHAIRPERSON BAILEY: Do you agree with  
9 that, Commissioner Bloom?

10 COMMISSIONER BLOOM: My only question is,  
11 would it be helpful for OCD to have some mention, as  
12 Mr. Balch pointed out, of Rule 29 and Rule 30? Or  
13 would it just be assumed that the office would be  
14 keeping those things in mind as they proceed forward  
15 with a mitigation plan?

16 COMMISSIONER BALCH: Delineation.

17 CHAIRPERSON BAILEY: I think that we don't  
18 need to have that reference, because 29 is so vague  
19 anyway, that we could just go along -- you're  
20 frowning, Mr. Smith.

21 MR. SMITH: Well, I'm having trouble  
22 remembering what you put in previously. But if you  
23 have, based on the evidence, closure requirements  
24 that you believe, for instance, replace the  
25 requirement here, for instance, on constructing with

1 the prescribed soil cover, recontouring, and  
2 revegetating, then I think that you could take that  
3 out.

4 COMMISSIONER BALCH: The reclamation we  
5 haven't quite gotten to yet, but it will be  
6 resolved. This issue will be resolved in that  
7 section. Do we have to wait to strike this section  
8 until we have that discussion?

9 MR. SMITH: I think it wouldn't hurt to  
10 make sure that you have requirements that are based  
11 on the evidence that supersede these.

12 CHAIRPERSON BAILEY: Okay. We'll just  
13 wait and strike B after we deal with the remainder  
14 of the rule that still needs to be addressed.

15 COMMISSIONER BALCH: I imagine the same  
16 thing is going to occur with C.

17 MR. SMITH: To ensure that the changes  
18 that you are making are based on evidence that was  
19 placed before you and that they supersede this or  
20 restate it in a different way or something like  
21 that.

22 CHAIRPERSON BAILEY: Then it may be more  
23 efficient for us to skip all of these deleted pages  
24 and go directly to the next area for discussion, and  
25 then we can go back.

1 COMMISSIONER BLOOM: That would be  
2 "Closure Notice"?

3 CHAIRPERSON BAILEY: Yes, it would be.  
4 Page 34, "Closure Notice."

5 COMMISSIONER BLOOM: Madam Chair, a quick  
6 restroom break perhaps?

7 CHAIRPERSON BAILEY: Oh, all right. Why  
8 don't we do that. Come back at 10 after.

9 (A recess was taken from 9:58 a.m. to  
10 10:10 a.m.)

11 CHAIRPERSON BAILEY: Okay. I believe we  
12 were at closure notice. And the first topic has to  
13 do with notification of the surface owner, as part  
14 of the deleted language.

15 Commissioners, do you have an opinion on  
16 that?

17 Did we have any testimony that anyone  
18 recalls having to do with closure notice to surface  
19 owners?

20 COMMISSIONER BLOOM: That's fuzzy.

21 COMMISSIONER BALCH: I'm trying to  
22 remember. In the -- the closure notice is basically  
23 a notice to -- a notice that you are getting ready  
24 to close the pit. You have already filed your  
25 closure plan. Is that correct?

1                   CHAIRPERSON BAILEY: And the closure plan  
2 has to be approved as part of the permit application  
3 process.

4                   COMMISSIONER BALCH: Right.

5                   CHAIRPERSON BAILEY: This paragraph says  
6 that the operator shall notify the surface owner on  
7 the closure of the pit or the tank, where the  
8 operator has approval for the closure.

9                   COMMISSIONER BALCH: Which seems  
10 completely redundant, because they would have  
11 already had some notification that it was going to  
12 happen.

13                   CHAIRPERSON BAILEY: Not necessarily.  
14 Under SOPA there would be agreements, but we don't  
15 enforce SOPA. That's the Surface Owner Protection  
16 Act.

17                   COMMISSIONER BALCH: Well, let me --

18                   COMMISSIONER BLOOM: SOPA doesn't affect  
19 the state land office either.

20                   COMMISSIONER BALCH: Okay. Well, let me  
21 put the plan on its head. You're in closure --  
22 you're getting ready to close the pit, and then you  
23 have to notify the surface owner. If there has to  
24 be a notification of the surface owner it should be  
25 at the time that you are planning on closing that

1 site, not at the end of your operation and you're  
2 getting ready to close out the site.

3 CHAIRPERSON BAILEY: That's correct.

4 COMMISSIONER BLOOM: Say that again. I'm  
5 sorry, I didn't hear you.

6 COMMISSIONER BALCH: It seems like an  
7 illogical place to have notice. If you were going  
8 to require notice it should have been when you were  
9 filing your closure plan or your site plan, not when  
10 you're all done with your operations getting ready  
11 to close then you say, "Oh, by the way, we are going  
12 to leave this stuff here."

13 I'm not sure if we addressed that  
14 elsewhere earlier in the process or not. But  
15 regardless, this seems out of place.

16 CHAIRPERSON BAILEY: Under filing of a  
17 permit application, the filing only goes to the  
18 appropriate division district office, and the permit  
19 application does include a closure plan. The  
20 surface owner is not notified that a permit  
21 application is on hand other than the OCD posts an  
22 electronic notice of the number and the locations of  
23 wells that have APDs.

24 COMMISSIONER BLOOM: Commissioners, I  
25 didn't find anything in the OCD or NMOGA's findings

1 of fact or closing statements about closure notice.

2 I think I would be opposed to the removal  
3 of Section (1), in that I believe surface owners  
4 should have an understanding of where any contents  
5 are buried on their property.

6 CHAIRPERSON BAILEY: Well, that can be  
7 handled under placement of a -- under a different  
8 method, rather than sending the certified mail with  
9 evidence of mailing. That can be done by requiring  
10 a pipe with the -- a location on it.

11 COMMISSIONER BLOOM: Well, I'm thinking  
12 about the state land office. Or I guess it's a  
13 little different for private owners, fee owners.  
14 But...

15 COMMISSIONER BALCH: Would this language  
16 require notifying the state land office? You said  
17 they weren't protective under SOPA.

18 COMMISSIONER BLOOM: Correct. So yes,  
19 maybe with a surface owner, where we have -- we  
20 typically have surface and subsurface rights in the  
21 same locations. There are scenarios where we split  
22 a state, where we have the subsurface and not the  
23 surface acreage.

24 COMMISSIONER BALCH: And I've read through  
25 it a couple of times, yes.

1                   COMMISSIONER BLOOM: And so one of the  
2 things that I'm thinking of is we often have  
3 overlapping uses of land. So an area might be used  
4 for oil and gas, and then you get a company that  
5 comes in -- one thing that comes to mind right now  
6 is Pegasus wanting to have open tracts in  
7 southeastern New Mexico. And they come to the state  
8 land office, look for a -- a commercial lease, and  
9 we would want to have, in our tract books or  
10 something in the lease records, as to where waste  
11 was buried so we could see it immediately.

12                   COMMISSIONER BALCH: The way it -- it took  
13 me a couple of readings to get through it. But the  
14 way this reads would not say you are giving notice,  
15 one, that you're going to close it, and it's going  
16 to be when you -- if you have approval for on-site  
17 closure then you notify them?

18                   CHAIRPERSON BAILEY: Well, it's written so  
19 badly. First, I would like to address Commissioner  
20 Bloom's concerns, is that the same plugging  
21 requirement that we have for plugging in the  
22 abandonment of wells, the placement of -- where is  
23 it? In 19.15.25.10 B, there's the requirement that:  
24 "An operator shall mark the exact location of a  
25 plugged and abandoned well with a steel marker not

1 less than 4 inches in diameter set in cement and  
2 extending 4 feet above mean ground level."

3 That's a very effective marker to indicate  
4 where a P and A'd well is located. It could also be  
5 a very effective marker for where a buried pit or  
6 trench would be located.

7 COMMISSIONER BLOOM: Is there such  
8 language currently in the rule for pit closures, a  
9 requirement for a marker?

10 CHAIRPERSON BAILEY: There is -- yes. On  
11 page 30 of the crossed-out proposed deleted areas  
12 under F. So that would be -- F (d) requires  
13 placement of steel marker at the center of an  
14 on-site burial. That would be one area I've  
15 highlighted that either needs to be taken care of in  
16 another section or we can't delete, because there  
17 wasn't any testimony heard.

18 COMMISSIONER BALCH: Well, there was broad  
19 testimony about this section and previous other  
20 parts of this section where they were trying to  
21 increase clarity and remove redundancy.

22 CHAIRPERSON BAILEY: Yes.

23 COMMISSIONER BALCH: So some of the  
24 deletions may have been justified on that basis, of  
25 making a more clear rule. In particular, looking at

1 Mr. Gantner's testimony, on page 69. He was asked  
2 about the closure section.

3 He said: "The section itself, the actual  
4 title of 19.15.17.13 says "Closure and Reclamation."  
5 We left that off because I'm not going to talk about  
6 that. But this section of the current pit rule was  
7 really cumbersome. Andrew Hoff, with BP, and I, we  
8 worked on this for a whole day trying to improve the  
9 clarity and reduce redundancy of the section. We  
10 did so from taking it from six pages to three.

11 "Part of what we accomplished was the  
12 tables establishing scientifically supportable  
13 thresholds," which they then had Dr. Thomas and  
14 others address, and removing redundant texts.

15 So there was very broad testimony about  
16 all of these deletions. A lot of them were for  
17 purposes of clarity and removing redundancy.

18 I don't think there's any specific  
19 testimony on this paragraph; at least I haven't  
20 found it yet.

21 I'm still searching for "closure" on that  
22 first page -- or that first day.

23 I think the way this reads now -- and if I  
24 read it again I may come up with a different  
25 conclusion -- is that if you get permission -- even

1 if you get permission -- if you get permission to  
2 close on site, then you notify the surface owner.

3 Is that the -- that's the way I read the  
4 intent of this paragraph the way it's written.

5 COMMISSIONER BLOOM: Yes.

6 COMMISSIONER BALCH: It's not at all clear  
7 that that's what it means. It took me a few tries  
8 to get that from it.

9 COMMISSIONER BLOOM: Well, I think the  
10 intent is -- the bottom-line intent is that the  
11 surface owner would then know where the on-site  
12 closure is so they can note it in their records.

13 And great -- you know, potentially making  
14 some changes here, where we have off-pad closure --  
15 off-site closures, we might need to delete "on-site"  
16 to keep the intent of this the same and add in  
17 multi-well fluid management pit also, to update it.  
18 But certainly, we don't have to remove this from the  
19 rule as it stands.

20 CHAIRPERSON BAILEY: So if we don't delete  
21 it we can -- have we dealt with on-site closure of  
22 multi-well fluid management pits? We have --

23 COMMISSIONER BLOOM: So in 13 -- Section  
24 13 (1) it says: "Closure for a multi-well fluid  
25 management pit shall describe the proposed

1 procedures and protocols for the removal of all  
2 unused stimulation fluids and the disposition of  
3 liner materials and other pit contents."

4 CHAIRPERSON BAILEY: So we are not  
5 allowing on-site burial of the contents or the  
6 liners of the multi-well fluid management pits. So  
7 closure of a multi-well fluid management pit maybe  
8 doesn't belong in the consideration that we are  
9 looking at for on-site burial, because there's not  
10 going to be any.

11 COMMISSIONER BALCH: Well, except for the  
12 extent they have to test under the liner.

13 CHAIRPERSON BAILEY: Right. But that's  
14 for remediation purposes, not for burial purposes.

15 COMMISSIONER BLOOM: So I would agree that  
16 we do not need number (3).

17 COMMISSIONER BALCH: I'm sorry. I was  
18 searching through the transcript. Did we come to a  
19 conclusion on paragraph (1)?

20 CHAIRPERSON BAILEY: No, we didn't. I  
21 think that I'm understanding the consensus is that  
22 we do not delete paragraph (1), but maybe reword it  
23 to clarify when that notification by certified  
24 mail/return receipt happens, and if it happens only  
25 for on-site burial.

1                   COMMISSIONER BLOOM: That is interesting.  
2     Because the permanent pit, currently, cannot be left  
3     on-site -- can't have on-site burial or closure. So  
4     I wonder if the intent was to allow the surface  
5     owner to go out and look at the -- watch the closing  
6     operations or something like that.

7                   CHAIRPERSON BAILEY: Or is it simply  
8     notice that they are shutting down operations?

9                   COMMISSIONER BLOOM: Yes.

10                  CHAIRPERSON BAILEY: I mean, to me,  
11     that's -- that's an unnecessary action, if they are  
12     just shutting down operations. Because all of this  
13     is closure. It's not burial, it's not anything  
14     other than notification that operations are being  
15     shut down under a closure plan. And operators  
16     notify the district for shutting down operations at  
17     a temporary pit or below-grade tank.

18                  COMMISSIONER BALCH: It really just says  
19     you are going to be -- okay. So this is saying you  
20     have to notify the surface owner when you're going  
21     to shut down your surface operations and go into  
22     production operations, does it not?

23                  So this doesn't have anything to do with  
24     closure of a pit or anything. It's just one of the  
25     things that triggers notification of a surface

1 owner.

2           You know, I'm looking at OCD's comments,  
3 and they have nothing here against striking this  
4 sentence. And I think there was testimony about  
5 trying to remove redundancy and unnecessary unclear  
6 language. And this may -- may be in that category.

7           And the concerns that Mr. Bloom has,  
8 particularly with respect to working at the state  
9 land office, may be better addressed in a different  
10 area or later in the section.

11           CHAIRPERSON BAILEY: So that we do ensure  
12 that there is a permanent marker would take care of  
13 your concerns for an operator leaving a buried pit  
14 without any kind of notice on the ground, because it  
15 will be under discussion for putting it in the C-105  
16 and C-102.

17           COMMISSIONER BALCH: Correct.

18           COMMISSIONER BLOOM: Believing this  
19 language is important, too, in that it gives the  
20 land office the opportunity to make note of where  
21 the -- where a pit is being buried, potentially.

22           CHAIRPERSON BAILEY: Well, notice of where  
23 it's going to be buried will be accomplished on the  
24 filing of the C-105 and C-103 and the permanent  
25 marker, if we agree to that.

1 COMMISSIONER BLOOM: Okay.

2 COMMISSIONER BALCH: Yeah. I think this  
3 language falls under the category of redundant  
4 language.

5 CHAIRPERSON BAILEY: It's certainly  
6 unclear.

7 COMMISSIONER BALCH: And it's unclear.

8 CHAIRPERSON BAILEY: I mean if we can't  
9 even figure out what it is, how can anybody else?

10 MR. SMITH: I would caution you that  
11 notice is typically a very sensitive issue. And I  
12 think that in something like this you want to be  
13 careful to have something in front of you that  
14 addresses why this notice provision should be  
15 deleted. And I would be careful about making  
16 assumptions in that regard.

17 COMMISSIONER BALCH: Well, the way this  
18 reads now you virtually have to make assumptions  
19 about what it means and what its intent is. There's  
20 no clear language in this paragraph as to what its  
21 intent is.

22 I just read it again and got a completely  
23 different conclusion.

24 MR. SMITH: I'm sympathetic with that.  
25 There is a difference between the regulators and

1 operators, unfortunately, having to make assumptions  
2 in terms of what it means and you-all making  
3 assumptions in order to change the rule.

4 COMMISSIONER BALCH: What's not in this  
5 paragraph is when -- when this is supposed to occur.  
6 If you have a -- a pit, a very permanent below-grade  
7 tank or otherwise, or plan for on-site closure, you  
8 are required to notice the surface owner by  
9 certified mail.

10 Do you do that when you file your -- your  
11 plan, your C-144? Do you do it when you are going  
12 to close the pit? When?

13 MR. SMITH: If you have testimony  
14 regarding the clarity of portions of this rule,  
15 including this portion, and if you read it as  
16 unclear, I think that you may have enough to clarify  
17 it. I don't know that that gives you enough to  
18 delete it.

19 COMMISSIONER BALCH: So you would say  
20 removing some sort of a notice requirement -- we  
21 would have to replace some sort of a notice  
22 requirement elsewhere or in some different language  
23 to strike this -- this paragraph?

24 MR. SMITH: You can strike this paragraph  
25 if you have evidence in the record supporting the

1 striking of it.

2 COMMISSIONER BALCH: Well, there --

3 MR. SMITH: If you have evidence in the  
4 record supporting the clarification of it, then I  
5 think that you could clarify it.

6 COMMISSIONER BLOOM: I thought I  
7 remembered Ms. Foster asking somebody some  
8 questions -- some were related to this, about who's  
9 the surface owner, or who are we actually notifying,  
10 along the lines of is it the lessee? Is it the  
11 state land office? There's some ambiguity that  
12 might relate more to a subsequent section.

13 But as I read this again, then it would  
14 seem to say that it's almost -- there were two times  
15 when the surface owner could be notified, and it  
16 almost says that the operator can pick.

17 COMMISSIONER BALCH: Yeah.

18 COMMISSIONER BLOOM: I mean, one would be  
19 the operator shall notify when there's a plan to  
20 close, or when the operator has approval for on-site  
21 closure. That's really different.

22 So the plan to close might come at the  
23 beginning.

24 CHAIRPERSON BAILEY: For the permit  
25 application.

1           COMMISSIONER BALCH: Not to mention the  
2 fact that at least the way we are currently  
3 discussing the system, you may not know for sure if  
4 you're going to have on-site closure until you have  
5 done your -- your testing of contents and mixing  
6 stabilization and all of that.

7           CHAIRPERSON BAILEY: That's right.

8           COMMISSIONER BALCH: So you will have a  
9 plan to close on site, but the alternative would be  
10 to haul off.

11           So let me ask again. In the process as it  
12 stands now, is there ever any explicit involvement  
13 of the landowner besides their operating agreement?

14           CHAIRPERSON BAILEY: We do not -- are not  
15 privy to SOPA agreements. We do not have SOPA  
16 agreements on file. We have no knowledge of what  
17 occurs between the operators and the surface owners  
18 as a part of the SOPA agreements.

19           COMMISSIONER BALCH: So is the surface  
20 owner ever notified that you plan to build a  
21 temporary pit?

22           CHAIRPERSON BAILEY: I can't tell you what  
23 SOPA even requires.

24           COMMISSIONER BALCH: Because that's the  
25 thing that really confuses me about this language.

1 MR. SMITH: If timing is your concern, you  
2 may want to look at this in the context of the rest  
3 of the provisions under closure notice.

4 I'm not sure what is in (3) --

5 CHAIRPERSON BAILEY: And closure operation  
6 encompasses more than just the backfilling. It  
7 encompasses the testing of the soils, it encompasses  
8 the backfilling and replacement of earthen material  
9 and topsoil and revegetation. So closure is a  
10 process; it's not a one-event situation.

11 MR. SMITH: I -- I would suggest to you  
12 that, in reading this section in its entirety, that  
13 with respect to timing you may reasonably interpret  
14 this section, particularly the first one where you  
15 are seeing ambiguity with regard to timing --

16 COMMISSIONER BALCH: Well, it just seems  
17 odd that --

18 MR. SMITH: -- that you can reasonably  
19 interpret that section to be requiring notice in  
20 temporal proximity to the closure process that is  
21 based on number (2), number (3), and the fact that  
22 in number (1) -- would you go up a little bit for me  
23 please -- you -- sufficient notice is to the address  
24 and the surface owner that's reflected in the County  
25 tax records.

1           It would make sense to me, given that and  
2 the provisions of (2) and (3), that if you're  
3 concerned about clarity in number (1) for timing,  
4 and since you have something in the record with  
5 respect to this being unclear, or this section being  
6 unclear, you could clarify it by putting something  
7 in there that would indicate that the notice in  
8 number (1) is required at some point around the time  
9 the closure process begins.

10           COMMISSIONER BALCH: Here's the confusion  
11 that I think that I'm still having with this.

12           All of the discussions involving notice  
13 were also circling around SOPA, which is a statute,  
14 not a rule. So this can't supersede that, I think  
15 in any way, right?

16           The -- I think the proponents of the  
17 changes felt that SOPA would give them the notice  
18 that something was going to happen, and then that  
19 would meet the notice requirement here, which really  
20 just says you have to give them a notice of -- at  
21 some undescribed time -- that you're going to, at  
22 some point, close the pit or tank on that site. It  
23 could be any time. It could be day one, it could be  
24 in their SOPA, it could be --

25           CHAIRPERSON BAILEY: Just prior to the

1 beginning --

2 COMMISSIONER BALCH: -- the week before  
3 bulldozers come out.

4 CHAIRPERSON BAILEY: Yeah.

5 COMMISSIONER BALCH: I mean, it could  
6 be...

7 COMMISSIONER BLOOM: The rest of the  
8 section focuses more on the closure end. I think as  
9 Mr. Smith pointed out, take that as some guidance  
10 and then fix (1) above, perhaps, the operator shall  
11 notify the surface owner when there has been  
12 approval for on-site closure.

13 CHAIRPERSON BAILEY: Or it could be fixed  
14 to say the operator shall notify the surface owner  
15 by certified mail/return receipt requested prior to  
16 any closure operation for a temporary pit, permanent  
17 pit, below-grade tank. That's borrowing language  
18 from paragraph (2), down -- or the next paragraph  
19 down.

20 COMMISSIONER BLOOM: Yes.

21 COMMISSIONER BALCH: Can I ask a question  
22 from the state land office perspective? And both of  
23 you have that perspective.

24 So for my clarity here, you say you are  
25 not involved with SOPA. However --

1                   COMMISSIONER BLOOM:  SOPA excludes the  
2 state land office.

3                   COMMISSIONER BALCH:  Excludes the state  
4 land office.  So presumably, notice that something  
5 is going to happen at that site will be part of your  
6 agreement, your SOPA agreement, if you are not the  
7 state land office.  So you would know something was  
8 going to happen and what their intent was.

9                   COMMISSIONER BLOOM:  Right.

10                  COMMISSIONER BALCH:  You would have  
11 already had some kind of notice.

12                  If the state land office doesn't have  
13 that -- and you mentioned a Rule 99 or 100 or  
14 something like that?

15                  CHAIRPERSON BAILEY:  Rule 100 does not  
16 require that.

17                  COMMISSIONER BALCH:  Now, is there a way  
18 that the state land office can say, as part of their  
19 lease agreement?

20                  CHAIRPERSON BAILEY:  No.  You can't change  
21 the lease agreement.

22                  COMMISSIONER BLOOM:  It's set by the  
23 legislature.

24                  COMMISSIONER BALCH:  Okay.  So your  
25 concern, I think, is that --

1           COMMISSIONER BLOOM: We can't make any  
2 rules in-house that would somehow limit the lease.

3           COMMISSIONER BALCH: I think NMOGA's  
4 witnesses argued that the redundancy really is that  
5 SOPA is going to take care of a lot of notification  
6 issues. However, in the case of the state land  
7 office, that is not the true case.

8           COMMISSIONER BLOOM: The state land office  
9 holds 40 percent of the land in the Permian Basin.

10          COMMISSIONER BALCH: So if there is some  
11 language somewhere, maybe here, maybe somewhere  
12 else, that said -- well, I don't know if you could  
13 say something like that. But if you could say if  
14 not already addressed in SOPA, notice of intent to  
15 place and then subsequently remove, whatever, would  
16 be given to the surface owner.

17                 But this is really odd to me, that you  
18 could have a scenario where -- and I think where  
19 your concern comes from is you don't know what they  
20 are doing, and then all of a sudden there's a notice  
21 that they're closing on site, with no prior notice  
22 that they planned to. I know nothing in your  
23 agreement about how that would be resolved.

24          CHAIRPERSON BAILEY: Unless we use the  
25 language from the paragraph below that gives an

1 indication of when this notice should be given to  
2 the surface owner, and because that notice is given  
3 to the OCD prior to any closure operation, we could  
4 have that same language reflect the notice for  
5 surface owners.

6 MR. SMITH: I'm looking at SOPA now. And  
7 there are a variety of things of which the surface  
8 owner is required to get notice, but I don't see  
9 anything that requires anything like a notice at the  
10 time of closure.

11 CHAIRPERSON BAILEY: Then we don't need to  
12 assert that responsibility.

13 COMMISSIONER BALCH: I don't think so.

14 CHAIRPERSON BAILEY: Because the Oil and  
15 Gas Act does not give us that responsibility.

16 COMMISSIONER BALCH: You know, at some  
17 point you are going to be filing your closure plan.  
18 If there was any sort of notice to be given, I think  
19 that would be the appropriate time to give it, not  
20 prior -- 72 hours before they close or anything like  
21 that. But again, like you just said...

22 CHAIRPERSON BAILEY: The Oil and Gas Act  
23 does not give us that responsibility. SOPA does not  
24 give us that responsibility. We would be usurping  
25 that from the SOPA statutes.

1                   COMMISSIONER BALCH: So SOPA would cover  
2 everybody but the state land office and maybe BLM,  
3 but presumably they have their own lease  
4 requirements. And maybe the state land office just  
5 has to figure out a way to get notice, because we're  
6 not required to.

7                   CHAIRPERSON BAILEY: Well, the main  
8 concern for the land office is being able to  
9 distinguish where on the lands the pit closure  
10 occurs. And that -- if that's accomplished with a  
11 permanent steel marker the same as the plugging and  
12 abandonment of a well.

13                   COMMISSIONER BALCH: And it would also be  
14 on the plat.

15                   CHAIRPERSON BAILEY: It would be on  
16 that -- yes. It would have to come on the C-105 and  
17 the C-102. So there would be --

18                   COMMISSIONER BLOOM: That would be  
19 sufficient, yeah.

20                   COMMISSIONER BALCH: I guess we don't need  
21 a paragraph (1).

22                   MR. SMITH: It has been requested to be  
23 deleted. Do you have evidence -- or do you have  
24 argument that was made before you -- that supports  
25 the deletion? Or are you simply deleting it?

1 Because the former is allowed --

2 COMMISSIONER BALCH: Well, this --

3 MR. SMITH: -- the latter, I think, is  
4 not.

5 COMMISSIONER BALCH: I think the  
6 conclusion that I personally have made from the  
7 discussion is that it's redundant.

8 MR. SMITH: It what?

9 COMMISSIONER BALCH: It's redundant. This  
10 issue is already resolved elsewhere.

11 MR. SMITH: That notice is required?

12 COMMISSIONER BALCH: Either in SOPA or  
13 through the C-103.

14 MR. SMITH: I do not believe that it is  
15 addressed in SOPA.

16 COMMISSIONER BLOOM: But the -- doesn't  
17 SOPA give the surface owner the opportunity to  
18 create the terms under which --

19 MR. SMITH: Yes, I believe that does.

20 COMMISSIONER BLOOM: -- the operator goes  
21 out on their land?

22 I guess there's also times where  
23 there's -- agreement isn't reached and then they  
24 bond in, right?

25 CHAIRPERSON BAILEY: Yes.

1                   COMMISSIONER BLOOM: And then there is no  
2 notification. So...

3                   CHAIRPERSON BAILEY: In the interest of  
4 trying to get forward, let's just put this on hold  
5 along with a lot of other stuff and just highlight  
6 it in yellow and see if we can't mull it around in  
7 the back of our minds while we deal with the other  
8 portions that are before us. Because, obviously, we  
9 are not coming to any kind of resolution. Any two  
10 of us haven't come to any resolution on this. So...

11                  COMMISSIONER BALCH: Well, not that -- not  
12 that what Mr. Smith said was inappropriate.

13                  CHAIRPERSON BAILEY: Well, we have spent  
14 adequate time debating the pros and cons. And maybe  
15 we could move on to the next paragraph. Let's just  
16 highlight that in yellow and see if we have any  
17 issues with the following paragraph.

18                  I do, for the next paragraph. The first  
19 line of what's labeled there as (3) says  
20 notification of the environmental bureau, and I  
21 think we can strike that and have it simply say the  
22 Santa Fe office, because this deals with a permanent  
23 pit closure, which is processed in the Santa Fe  
24 office. And that also happens in three different  
25 places in that paragraph.

1 Did you catch all three?

2 Commissioners, are you in agreement with  
3 those four paragraphs under "Closure Notice"?

4 COMMISSIONER BLOOM: On the new suggested  
5 (3), there is verbal notification of the potential  
6 to close a multi-well fluid management pit  
7 sufficient for OCD's purposes.

8 CHAIRPERSON BAILEY: The multi-well fluid  
9 management pit would be in the district. Do they  
10 need to have written notification? It would never  
11 hurt. I don't like verbal anythings.

12 COMMISSIONER BLOOM: I would agree.

13 CHAIRPERSON BAILEY: So "written" is  
14 probably a very good addition that could be put in  
15 where?

16 COMMISSIONER BALCH: I would just replace  
17 "verbally or by other means" with "in writing."

18 COMMISSIONER BLOOM: There you go.

19 Does that mean that -- I could see the  
20 letter going out 72 hours before and it doesn't  
21 arrive for a week.

22 COMMISSIONER BALCH: Well, does e-mail  
23 count as writing?

24 CHAIRPERSON BAILEY: Yes, it does.

25 COMMISSIONER BLOOM: What if a letter is

1 put in the mail and...

2 CHAIRPERSON BAILEY: So we could specify.

3 COMMISSIONER BLOOM: Say "via e-mail"  
4 instead of "in writing"?

5 CHAIRPERSON BAILEY: The problem with  
6 that, if it goes to one person's e-mail, then they  
7 may be on vacation for a week.

8 COMMISSIONER BLOOM: But we could say  
9 should notify in writing at least one week...

10 COMMISSIONER BALCH: I guess that's  
11 probably -- one could get a phone call.

12 COMMISSIONER BLOOM: We could say two  
13 weeks. These things could be out there anywhere  
14 from two to four years. I don't think there's going  
15 to be a crash. I couldn't imagine a rush to close.

16 COMMISSIONER BALCH: So really, the time  
17 window is between 72 hours and a week?

18 CHAIRPERSON BAILEY: But we could change  
19 it between one week and two weeks.

20 For temporary pit/below-grade tank we have  
21 72 hours to one week. And that's verbally or other  
22 means also, so that both of these need to be  
23 considered at the same time.

24 The OCD did not object to 72 hours.

25 COMMISSIONER BALCH: No, or the use of the

1 word "verbally."

2           Could you give it verbally and then in  
3 writing? Because what if you couldn't get ahold of  
4 anybody? Verbally and then in writing?

5           CHAIRPERSON BAILEY: Sure. Let's go with  
6 "shall notify the office verbally and in writing at  
7 least 72 hours."

8           COMMISSIONER BLOOM: Okay.

9           CHAIRPERSON BAILEY: And that goes both in  
10 the paragraph below the deleted area and in the  
11 paragraph in red.

12           COMMISSIONER BLOOM: So in (2) we would  
13 read "verbally or by other means at least 72 hours,"  
14 and then add the suggested language from NMOGA?

15           CHAIRPERSON BAILEY: Which is "and in  
16 writing."

17           Okay. Are we in agreement, then, for the  
18 rest of closure notice except for the first one,  
19 Commissioners?

20           COMMISSIONER BALCH: Yes.

21           COMMISSIONER BLOOM: Yes.

22           CHAIRPERSON BAILEY: And now we'll go to a  
23 "Closure Report." So -- "Closure Completion."

24           Have we really defined what closure -- how  
25 do we know when completion is? Is that after

1 they've reseeded? Is that after they've pushed dirt  
2 back? Is that -- what is closure completion?

3 COMMISSIONER BALCH: Well, there's Section  
4 F on reclamation, which describes everything  
5 associated with that.

6 You know, I believe Dr. Buchanan testified  
7 that pinning a hard number upon when a site was  
8 reclaimed is a difficult thing to do. You see  
9 little variations. You want to seed your different  
10 vegetation at times that are appropriate for seeding  
11 it rather than within some rules, guidelines.

12 So there's a couple of different things  
13 that this could refer to as closing completion. The  
14 first would be the site is -- you know, operations  
15 have been completed. You've substantially initiated  
16 reclamation operations. That would be one time.  
17 The other time would be after it's completely  
18 reclaimed, and that could be a year later.

19 When does the division need to know, I  
20 guess is probably the better question.

21 CHAIRPERSON BAILEY: In order to release a  
22 lease -- because this is very important for the land  
23 office in determining when a lease should be  
24 expired. It's a matter of before or after reseeded  
25 or revegetation. So if revegetation can take years,

1 we don't want a lease still active just waiting on  
2 the proper revegetation standards to be met.

3 But you do want to have all of the ground  
4 disturbance activities completed, which would  
5 include the backfilling and preparation of the  
6 surface for revegetation.

7 COMMISSIONER BALCH: Contour and other --

8 CHAIRPERSON BAILEY: Yes. So in my mind,  
9 closure completion could occur when -- contouring  
10 and other ground-disturbing activities. That leaves  
11 it so wide open that you'd never get a lease  
12 expired.

13 When plugging and abandonment and  
14 recontouring operations have been completed and  
15 approved by the division, to me, that's closure  
16 completion.

17 COMMISSIONER BALCH: So closure, to the  
18 division, is when the site is completely done being  
19 used.

20 CHAIRPERSON BAILEY: Yes.

21 COMMISSIONER BALCH: But in the context of  
22 this section, you could be moving from the drilling  
23 phase to your operational phase and have closure of  
24 a temporary pit and still have other operations  
25 continuing at the site.

1                   CHAIRPERSON BAILEY: The permit  
2 application requirements don't give us any help as  
3 to what should be included in a closure plan or when  
4 a closure plan is finished. It's simply a wide open  
5 question as to what a closure plan -- what the  
6 process that needs to be included or when you know  
7 there's been completion of that closure plan.

8                   COMMISSIONER BALCH: I might suggest that  
9 we hold off on this section until we discuss  
10 reclamation. We may be able to order the process  
11 such that we can say the closure report comes within  
12 60 days of Step 3 or Step G or something in the  
13 reclamation part of the rule.

14                   CHAIRPERSON BAILEY: Okay. So why don't  
15 we put that in yellow. Well, just that portion of  
16 it, just "Closure Completion."

17                   COMMISSIONER BALCH: There may be some  
18 obvious place that strikes us.

19                   CHAIRPERSON BAILEY: The operator shall  
20 submit -- because whatever happens we'll want to  
21 have a report on a C-144 that includes the sampling  
22 results, information required, plot plan -- what is  
23 a plot plan?

24                   COMMISSIONER BALCH: Maybe it's supposed  
25 to be plat.

1 CHAIRPERSON BAILEY: A plat plan?

2 COMMISSIONER BALCH: Are we allowed to  
3 resolve typos and grammatical problems that leads to  
4 confusion?

5 MR. SMITH: Yes.

6 CHAIRPERSON BAILEY: Actually, closure  
7 completion is very well defined in the remainder of  
8 that paragraph. Because closure completion, as  
9 reported on C-144 has to document sampling results;  
10 other information required; backfilling; capping and  
11 covering details; certification that they have  
12 complied with their approved closure plan, whatever  
13 that covers in the application; and the plat on 105.

14 So actually, the closure completion is  
15 fairly well lined out in that paragraph. So maybe  
16 we don't need to put it in yellow in that -- if we  
17 approve of this paragraph we can just leave it as  
18 is.

19 COMMISSIONER BLOOM: I would be okay with  
20 that.

21 CHAIRPERSON BAILEY: Are you okay with  
22 that, Commissioner Balch, except figuring out what a  
23 plot plan is?

24 COMMISSIONER BALCH: It might be a  
25 simplification to remove everything after the word

1 "activities," down to and including the end of that  
2 sentence.

3 CHAIRPERSON BAILEY: Well, we need to  
4 understand what all is part of closure completion,  
5 and those explain what all is a part of that  
6 completion process.

7 I wouldn't mind deleting a plot plan,  
8 because that doesn't make any sense.

9 COMMISSIONER BALCH: I could only imagine  
10 that they are referring to updating the plat to  
11 reflect any changes that may have occurred and  
12 things like that; location of the waste, if there is  
13 any waste left on site.

14 CHAIRPERSON BAILEY: Well, that's part of  
15 the last part of that last sentence, a plat of the  
16 pit location on Form 105.

17 COMMISSIONER BALCH: I don't know what  
18 they mean by "plot plan."

19 CHAIRPERSON BAILEY: I move that we delete  
20 the words "a plot plan," because they don't make any  
21 sense. They are not clear and possibly even a typo,  
22 for all we know.

23 COMMISSIONER BLOOM: I would agree.

24 COMMISSIONER BALCH: Now my thought on  
25 this might be that -- and Dr. Buchanan was pretty

1 adamant -- that a good reclamation would not  
2 necessarily recreate existing contours; it would,  
3 instead, create contours that limited opportunities  
4 for infiltration and erosion. So if you change the  
5 contours of the area does that mean you reflect it  
6 on the plat?

7 COMMISSIONER BLOOM: I guess I'm  
8 unfamiliar. I don't know if they show content here.

9 CHAIRPERSON BAILEY: No, they don't.

10 COMMISSIONER BALCH: No, they just show  
11 area.

12 I wonder if that's what they are trying to  
13 get at with the plot plan.

14 I think eliminating the language is  
15 probably a good solution, or we may be talking about  
16 it all the way up to lunch.

17 CHAIRPERSON BAILEY: Right. So let's  
18 delete "a plot plan" in that third line, yes, and  
19 detail -- yes.

20 Are we okay? Then we can go to the  
21 next -- we can remove the yellow from "Closure  
22 Completion," because we agreed that that was  
23 explained adequately in that paragraph.

24 If we go to the red paragraph (2) there,  
25 if the operator elects to conduct burial, the

1 operator shall report on C-105.

2 COMMISSIONER BALCH: That would address  
3 the state land office concern.

4 COMMISSIONER BLOOM: Yes.

5 CHAIRPERSON BAILEY: Okay. So we agree to  
6 keep that.

7 We can delete that green line now.

8 Okay. Going to the next paragraph which  
9 is labeled F, or is that E?

10 E, "Timing requirements for closure"  
11 requires an operator to "close a pit, drying pad  
12 associated with a closed-loop system or below-grade  
13 tanks within the following time periods."

14 All of these time periods are past and we  
15 are no longer allowing unlined temporary pits.

16 Permanent pits that are not -- permanent  
17 pits that are not permitted or unlined permanent  
18 pits.

19 Can this be cut, because they are no  
20 longer applicable? The deadlines are past, and we  
21 are no longer allowing these conditions to occur.

22 COMMISSIONER BLOOM: I have seen requests  
23 for removal of outdated language, irrelevant  
24 outdated language in other parts of the NMOGA  
25 proposals.

1 CHAIRPERSON BAILEY: Yes.

2 COMMISSIONER BALCH: You know, in other  
3 portions of the document we have stricken language  
4 about specific deadlines which are no longer  
5 relevant.

6 COMMISSIONER BLOOM: I believe we can  
7 remove.

8 CHAIRPERSON BAILEY: Okay. We can remove  
9 paragraphs labeled (1), (2), and (3).

10 And go down to what's labeled as  
11 paragraph (4): "An operator shall close any other  
12 permitted pit." At the very last line of that it  
13 references the environmental bureau.

14 COMMISSIONER BALCH: We still have E that  
15 now is still kind of hanging.

16 CHAIRPERSON BAILEY: Well, E now belongs  
17 to this paragraph under consideration. So "timing  
18 requirements for closure" goes down to the next  
19 paragraph in black there that's labeled (4): "An  
20 operator shall close any other permitted permanent  
21 pit within 60 days."

22 So that still goes under this title under  
23 this subsection. So we agreed to delete what is  
24 crossed out up there, already.

25 COMMISSIONER BLOOM: In (4)?

1 CHAIRPERSON BAILEY: In (4) and (5).

2 COMMISSIONER BLOOM: I think (4) we  
3 addressed when we talked about below-grade tanks,  
4 correct?

5 CHAIRPERSON BAILEY: Yes.

6 COMMISSIONER BALCH: We completely -- we  
7 did rework the grandfather tanks.

8 CHAIRPERSON BAILEY: So we can delete (4)  
9 and (5).

10 COMMISSIONER BLOOM: Yes.

11 MR. SMITH: What about your time frame in  
12 (4)? Is this no longer an issue because of other  
13 provisions you have in there?

14 COMMISSIONER BALCH: We have the same  
15 language. We actually have June of 2013, as stated  
16 in the below-grade tank section.

17 MR. SMITH: Okay.

18 CHAIRPERSON BAILEY: So now what's labeled  
19 as 4 comes up, becomes number (1).

20 COMMISSIONER BLOOM: We can delete A in  
21 front of "Timing Requirements," correct, so that  
22 would be E?

23 CHAIRPERSON BAILEY: Yes.

24 And "Timing Requirements for Closure."  
25 Here, we are dealing with a permanent pit in the

1 next paragraph.

2 Oh, first, before we leave (1), let's  
3 delete environmental bureau.

4 And then the following paragraph becomes  
5 labeled under (2).

6 COMMISSIONER BALCH: We can delete -- we  
7 can accept the deletion of that last sentence in E,  
8 correct?

9 CHAIRPERSON BAILEY: Yes, I believe we  
10 can.

11 COMMISSIONER BLOOM: I thought that was  
12 dealt with elsewhere.

13 CHAIRPERSON BAILEY: Yes.

14 Okay. Before we leave, what has become of  
15 paragraph (1), that talks about closure of permanent  
16 pit within 60 days? I have a note that it might  
17 conflict with the definition in paragraph -- on  
18 page 3 for definitions.

19 COMMISSIONER BLOOM: So you think that  
20 might conflict with the definition of permanent pit?  
21 I thought we had addressed that somewhere else.

22 COMMISSIONER BALCH: A lot of places we  
23 made the 60 days, and then one 60-day extension  
24 possible.

25 CHAIRPERSON BAILEY: Okay. I'm not

1 finding it. I'm not seeing that there is a conflict  
2 anymore, so we have obviously taken care of that.

3 So we can go down to the next paragraph  
4 that begins: "An operator shall close any other  
5 permitted temporary pit," and we've talked about  
6 that this morning. And we agreed to accept the  
7 language of this paragraph, which is now labeled  
8 number (2).

9 COMMISSIONER BLOOM: Doesn't the beginning  
10 of (2) create a conflict because -- "An operator  
11 shall close any other permitted temporary pit within  
12 six months."

13 COMMISSIONER BALCH: You know, I think  
14 that --

15 COMMISSIONER BLOOM: They might not have  
16 six months, but they would have to do it within that  
17 time, right? If somebody has a temporary pit and  
18 uses it for three months they could have six months  
19 to close it --

20 COMMISSIONER BALCH: Instead of within --

21 COMMISSIONER BLOOM: -- but if they had a  
22 temporary pit that's serving a number of wells and  
23 they go out to ten months they don't have an extra  
24 six, if this is okay.

25 CHAIRPERSON BAILEY: This could run up

1 against whether or not to extend that one year. If  
2 they close that last -- or if they release that last  
3 drilling rig a month before that year is up.  
4 Because they have 60 days to remove the fluid, so  
5 there is that potential that they would run up  
6 against that one-year time line.

7 COMMISSIONER BLOOM: Before they get to  
8 the six months. I think that's okay. I don't think  
9 that's a --

10 COMMISSIONER BALCH: This is -- this is  
11 all closure, right? I don't think it's a problem.

12 CHAIRPERSON BAILEY: Okay. So we can  
13 leave that paragraph.

14 COMMISSIONER BLOOM: Is that okay for the  
15 purpose of multi-well fluid management pits?

16 COMMISSIONER BALCH: Well, that was my  
17 next question, was: Do we need to have a third  
18 definition, or do we just add multi-well management  
19 up there with the permanent pit?

20 CHAIRPERSON BAILEY: In our definition for  
21 multi-well fluid management we require it to be  
22 closed -- may remain in use until all wells with  
23 approved application for permit to drill are  
24 identified or completed. Extensions for APDs go to  
25 hearing.

1           COMMISSIONER BALCH: And again, this is  
2 just closure.

3           CHAIRPERSON BAILEY: Why does it say "any  
4 other"? Why do we have "other"? Because it was  
5 referring back to those deleted paragraphs. We can  
6 delete the word "other" for sure.

7           It would be "a permitted -- shall close a  
8 permitted temporary pit or fluid management pit."

9           COMMISSIONER BALCH: That's one  
10 possibility. The other possibility is to have its  
11 own sentence. But virtually every other way that  
12 we've treated this is permanent pit or --

13           COMMISSIONER BLOOM: I believe for  
14 consistency he should add "temporary multi-well  
15 fluid management pit" to the one above.

16           COMMISSIONER BALCH: You can delete what's  
17 highlighted.

18           CHAIRPERSON BAILEY: Okay. And then the  
19 paragraph above would be dealing with permanent  
20 pits. We could add the words "or multi-well fluid  
21 management pit" up at the top.

22           COMMISSIONER BLOOM: We can get rid of  
23 "other," also, right?

24           CHAIRPERSON BAILEY: Yes.

25           "Within 60 days of cessation of

1 operation," scratch the "of the permanent pit."

2 Well, the problem there is we have the  
3 Santa Fe office approving permanent pits and  
4 multi-fluid management.

5 COMMISSIONER BALCH: Okay. So it needs a  
6 new paragraph.

7 CHAIRPERSON BAILEY: "In accordance with a  
8 closure plan approved by the appropriate office."

9 COMMISSIONER BLOOM: Okay. Does  
10 "permitted" serve any purpose in either (1) or (2)?  
11 Are there unpermitted that are dealt with elsewhere?

12 COMMISSIONER BALCH: There are other  
13 issues for unpermitted.

14 CHAIRPERSON BAILEY: Just in case there's  
15 one out there that is a leftover from many years  
16 past, probably.

17 So we scratch "of the permanent" in the  
18 middle line there. "Cessation of operation of the  
19 pit," so scratch "permanent."

20 Yes? Are we okay?

21 COMMISSIONER BLOOM: Yes.

22 CHAIRPERSON BAILEY: Okay. We can go on  
23 down to what was (6) and now becomes (3).

24 COMMISSIONER BLOOM: Can we get rid of  
25 that 2008 language?

1 CHAIRPERSON BAILEY: It seems to me like  
2 we can.

3 COMMISSIONER BLOOM: So it would just be:  
4 "An operator shall close a drying pad used for a  
5 closed-loop system..."

6 CHAIRPERSON BAILEY: Well, we are not  
7 permitting those anymore, anyway.

8 COMMISSIONER BLOOM: That's right. So we  
9 can get rid of that. That was due within six  
10 months. So get rid of anything from "permitted" to  
11 the end of "NMAC." Is that right?

12 COMMISSIONER BALCH: That would be  
13 appropriate, I think.

14 CHAIRPERSON BAILEY: Yes.

15 We are okay with the rest of that  
16 paragraph?

17 COMMISSIONER BLOOM: What about the last  
18 sentence? I'm just wondering how that shakes out in  
19 terms of variance or exceptions.

20 CHAIRPERSON BAILEY: Yes. That would be  
21 the variance. So that means that we can just delete  
22 that last sentence.

23 COMMISSIONER BALCH: Well, we  
24 differentiated extension granting in other places  
25 differently than a variance. It seems to me that a

1 variance would be if you wanted a different  
2 extension or an additional extension.

3 A lot of places we say enclosed within 60  
4 days, the appropriate division district office may  
5 grant an extension of 60 days.

6 If you don't specifically state the amount  
7 of time of the extension, it's up to the variance,  
8 and that could be a longer period of time.

9 COMMISSIONER BLOOM: It could be longer,  
10 you're saying?

11 COMMISSIONER BALCH: Well, it could be  
12 indefinite.

13 COMMISSIONER BLOOM: Yeah.

14 COMMISSIONER BALCH: So I think leaving in  
15 the time periods of extensions would not really be  
16 like a variance; that that would be an expectation  
17 that if you close it, in X amount of time you may  
18 have X amount more time granted administratively  
19 without going through a variation or exception  
20 process.

21 CHAIRPERSON BAILEY: And then a variance  
22 would come in after that extension.

23 COMMISSIONER BALCH: If they say we need  
24 three months or we need seven months, then they are  
25 looking for a variance.

1 COMMISSIONER BLOOM: Yeah.

2 CHAIRPERSON BAILEY: I agree with that.  
3 So we will keep that last sentence.

4 Okay. Going on to what becomes  
5 paragraph (4), "Closure of a below-grade tank." We  
6 can delete the "permitted" because below-grade tanks  
7 are no longer permitted; they're registered.

8 Okay. We don't have transitional  
9 provisions anymore, so we can't --

10 COMMISSIONER BALCH: Well, we still do  
11 have a June 13 deadline.

12 CHAIRPERSON BAILEY: That's right. Okay.

13 COMMISSIONER BALCH: But we may want  
14 these -- there's certainly a lot of this language  
15 that's not required.

16 You may want to keep what's in green and  
17 then point it to the appropriate paragraph.

18 CHAIRPERSON BAILEY: Yes, because the red  
19 is duplicative of what's in green.

20 COMMISSIONER BLOOM: Now, do we want to  
21 change 60 days to six months?

22 COMMISSIONER BALCH: You know, I think a  
23 lot of the testimony that had to do with time lines  
24 was really for operational constraints. You had  
25 examples of you can't get a truck out there because

1 all the CDLs are driving brine trucks.

2 The risk component of the tank, and to  
3 some degree of even the pit, is really during the  
4 operational phase where you have fluids in them. We  
5 have addressed those time lines with 60 days.

6 The request has been made for a change to  
7 six months. Really, the empty tank is not providing  
8 a real risk.

9 COMMISSIONER BLOOM: Does it drain within  
10 60 days?

11 COMMISSIONER BALCH: Well, that's a good  
12 question.

13 CHAIRPERSON BAILEY: I'm looking at the  
14 operational requirements for below-grade tanks in  
15 Section 12 D concerning below-grade tanks.

16 I don't see -- we have monthly  
17 inspections. We have prevention of overtopping. We  
18 have demonstration of integrity and repair of damage  
19 and closure, according to what we are working with  
20 now.

21 COMMISSIONER BALCH: Okay. So maybe the  
22 thing to do would -- you have a 60-day requirement  
23 for draining it and then six months for removal.

24 COMMISSIONER BLOOM: "An operator shall  
25 drain a below-grade tank within 60 days."

1 CHAIRPERSON BAILEY: "Shall remove all  
2 contents," rather than say "drain." "Shall remove  
3 all contents of the below-grade tank."

4 COMMISSIONER BALCH: We had that before.

5 CHAIRPERSON BAILEY: And in fact, I think  
6 this language, rather than having to reinvent the  
7 wheel, it's somewhere in the deleted pages having to  
8 do with closure of below-grade tanks.

9 COMMISSIONER BALCH: Okay.

10 CHAIRPERSON BAILEY: On page 28 we have  
11 "Closure methods for below-grade tanks." And the  
12 first three paragraphs, I think, are very  
13 appropriate for closure of a below-grade tank,  
14 because it deals with removal of liquids and sludge,  
15 disposing of the tank itself, reclaiming in the  
16 manner approved, and removal of on-site equipment  
17 associated with it, because there's so much that's  
18 just left on the location so many times.

19 COMMISSIONER BALCH: Okay.

20 CHAIRPERSON BAILEY: What do the  
21 commissioners think about wholesale copying of those  
22 first 3 paragraphs of the original pit -- rule  
23 concerning closure methods for below-grade tanks?

24 COMMISSIONER BALCH: I would support that.

25 COMMISSIONER BLOOM: That looks good.

1 CHAIRPERSON BAILEY: Okay. Can you find  
2 that, Theresa, on page 28, E?

3 Those first three paragraphs. And put  
4 those in Section 13, where we were discussing  
5 below-grade tanks in paragraph (4).

6 COMMISSIONER BALCH: Do we want to borrow  
7 the header from that?

8 CHAIRPERSON BAILEY: Sure.

9 COMMISSIONER BALCH: It basically says:  
10 "Closure method for below-grade tanks."

11 CHAIRPERSON BAILEY: So we could delete  
12 everything that's --

13 COMMISSIONER BALCH: "Closure methods for  
14 below-grade tanks."

15 CHAIRPERSON BAILEY: So the red words in  
16 the title there, (4) should be deleted.

17 "Shall close a below-grade tank within" --  
18 do we want 60 days or six months?

19 COMMISSIONER BALCH: I don't see why six  
20 months would be a problem. Once you remove the  
21 material you have removed the risk of transport of  
22 any materials.

23 CHAIRPERSON BAILEY: Okay. If we point it  
24 to the following paragraph (1). So within six  
25 months following completion of removal of the

1 liquids and sludge.

2 COMMISSIONER BALCH: Really, at the time  
3 you remove the liquids it's still in operation.

4 CHAIRPERSON BAILEY: Not necessarily. It  
5 may not be receiving any new, but it's --

6 COMMISSIONER BALCH: But it's fulfilling  
7 its duty as a tank to store liquids.

8 CHAIRPERSON BAILEY: Well, it's just  
9 storing again. So how should that language go?

10 "An operator shall close below-grade tank  
11 within six months of completion of paragraph (1)  
12 below."

13 Now, I know you are going to have to  
14 replace that with a real citation. I understand  
15 that.

16 COMMISSIONER BALCH: I would say "a  
17 closure, as defined," and then point.

18 CHAIRPERSON BAILEY: Okay.

19 COMMISSIONER BALCH: "Closure methods for  
20 below-grade tanks" then becomes subheading (5)?

21 CHAIRPERSON BAILEY: Not all of it. Only  
22 the paragraph (1) down below.

23 COMMISSIONER BALCH: How do we really want  
24 this structured? It should be clear.

25 COMMISSIONER BLOOM: It looks like it

1 might be 19.15.17.13 NMAC.

2 CHAIRPERSON BAILEY: "Within six months of  
3 completion of closure method defined," and then  
4 scratch the rest of the sentence.

5 COMMISSIONER BLOOM: Scratch everything  
6 after that NMAC.

7 CHAIRPERSON BAILEY: Yes.

8 COMMISSIONER BALCH: Why don't we just  
9 point it to the paragraph right below?

10 CHAIRPERSON BAILEY: Yes.

11 COMMISSIONER BALCH: So it seems like  
12 merging that paragraph below up there might be a  
13 little more clear.

14 So we can just say: "An operator shall  
15 close a below-grade tank within six months of," and  
16 then use the "removal of liquids and sludge from --  
17 removal of liquid and sludge."

18 COMMISSIONER BLOOM: "An operator shall  
19 close a below-grade tank within six months of  
20 cessation of the tank's operation"?

21 COMMISSIONER BALCH: There's kind of two  
22 things I'm not sure that we are clear on about here.

23 The first is, when does a tank go out of  
24 service, which to me is really an operational  
25 decision.

1 CHAIRPERSON BAILEY: Uh-huh.

2 COMMISSIONER BALCH: Because you may have  
3 it sit there for a few months doing nothing, but  
4 then use it again in the spring.

5 COMMISSIONER BLOOM: Could it say --

6 COMMISSIONER BALCH: I would just say  
7 something like: "An operator shall close a  
8 below-grade tank within six months of" --

9 COMMISSIONER BLOOM: Cessation of  
10 operations?

11 COMMISSIONER BALCH: -- "cessation of  
12 operations."

13 COMMISSIONER BLOOM: Do you want the  
14 liquids and sludge removal within 60 days of  
15 cessation of operation?

16 COMMISSIONER BALCH: Yes, I think so.

17 COMMISSIONER BLOOM: Well, if we -- could  
18 (4) just be closure methods for below-grade tanks,  
19 and then we'd say within -- (1) would be: "Within  
20 60 days of cessation of operations the operator  
21 shall remove liquids and sludge," and then (2) would  
22 be: "Within six months the operator will remove the  
23 below-grade tank"?

24 COMMISSIONER BALCH: In the manner  
25 specified in (3). That would be much clearer.

1           COMMISSIONER BLOOM: Theresa, let's go up  
2 to (4) and say -- just put -- take "Closure methods  
3 for below-grade tanks" and bring that up right after  
4 (4). Make it after the (4).

5           COMMISSIONER BALCH: And then --

6           COMMISSIONER BLOOM: Actually, make that  
7 (1). Actually, use the (1) that's already there.

8           COMMISSIONER BALCH: I think the thing to  
9 do is delete the rest of what's in (4) and then just  
10 modify (1), (2), and (3).

11          COMMISSIONER BLOOM: Okay.

12          CHAIRPERSON BAILEY: And then that  
13 sentence goes away.

14                 And then we insert the words. And then  
15 paragraph (1) would read: "The operator shall  
16 remove liquids and sludge within 60 days of  
17 cessation of operations."

18                 It would be "within 60 days of."

19          COMMISSIONER BLOOM: Do you want to put  
20 that in the front?

21          CHAIRPERSON BAILEY: Yes, it's really  
22 awkward.

23          COMMISSIONER BALCH: "Within 60 days of  
24 the cessation of operations."

25          COMMISSIONER BLOOM: Yes, just put that at

1 the front of the sentence.

2 COMMISSIONER BALCH: And then a comma.

3 COMMISSIONER BLOOM: Yes, that's good.

4 And then (2) below would be --

5 CHAIRPERSON BAILEY: "Within six months of  
6 cessation of operations." Okay.

7 COMMISSIONER BLOOM: Could we bring (3) up  
8 as part of (2), so it's covered within six months?

9 CHAIRPERSON BAILEY: I like that.  
10 Okay. That takes care of closure of  
11 below-grade tank.

12 We can now move on to what becomes  
13 paragraph (c). Well, becomes number (5), actually,  
14 for closure of multi-well fluid management pit,  
15 within six months from the date.

16 We have two options here. The second  
17 option removes drilling and relies on cessation of  
18 stimulation operations.

19 COMMISSIONER BALCH: These are for  
20 drilling.

21 CHAIRPERSON BAILEY: Right.

22 COMMISSIONER BLOOM: We should probably  
23 work off of the --

24 CHAIRPERSON BAILEY: The top paragraph,  
25 and delete the bottom paragraph there in green.

1                   Are we okay with that?

2                   COMMISSIONER BLOOM: Do we want a -- I'm  
3 sorry. Do we need "drilling" on (5)?

4                   COMMISSIONER BALCH: No, drilling needs to  
5 go.

6                   COMMISSIONER BLOOM: I'm just wondering,  
7 with respect to the multi-well fluid management  
8 pits, I think that's correct. It would be all wells  
9 identified in the permit, right? Because that will  
10 talk about any the plan of development or...

11                   COMMISSIONER BALCH: Yeah. And the APD is  
12 really what provides the time line.

13                   CHAIRPERSON BAILEY: And the list of wells  
14 with approved APDs.

15                   COMMISSIONER BLOOM: Yes. So that should  
16 work, then.

17                   CHAIRPERSON BAILEY: Yes, I think so.

18                   COMMISSIONER BALCH: And we have allowed  
19 six-month extensions for every other closure, so  
20 there's no reason not to leave it here.

21                   COMMISSIONER BLOOM: Yes. It's in the  
22 specification of permanent pits. So...

23                   CHAIRPERSON BAILEY: Okay. And then we  
24 come to site contouring and reclamation.

25                   Do we want to handle that now or after

1 lunch?

2 COMMISSIONER BALCH: Why don't we -- if  
3 you don't mind, if we could handle that after lunch.  
4 I'm going to take a wild guess and assume we are  
5 going to be here tomorrow morning.

6 CHAIRPERSON BAILEY: I would assume so, if  
7 for no other reason than to review in total what  
8 we've done, as I have done, to ensure that we have  
9 consistency and it's proper.

10 Okay. So shall we take a break and come  
11 back at 1:00? Would that give you adequate time?

12 (A recess was taken from 11:42 a.m. to  
13 1:01 p.m.)

14 CHAIRPERSON BAILEY: We'll go back on the  
15 record.

16 When we broke for lunch we had come to  
17 Section F of 13, dealing with "Reclamation of pit  
18 locations, on-site burial locations, and drying pad  
19 locations."

20 And the first topic under that is "Site  
21 Contouring."

22 If you will recall very early in the  
23 discussions, we put the definition for "restore" in  
24 highlighted yellow. Because as far as I have found,  
25 the use of the word "restore" is used only in this

1 paragraph, in about the seventh line down, which  
2 says -- where it says: "The operator shall  
3 substantially restore the impacted surface area to  
4 the condition."

5 The definition for "restore" means "to  
6 return the site to its former condition in the  
7 manner and to the extent required by applicable  
8 provisions to this rule."

9 So I think at this point we could either  
10 remove the yellow from the definition of restore or  
11 use a different term in this paragraph.

12 COMMISSIONER BLOOM: Madam Chair, are you  
13 moving to accept the definition of restore?

14 CHAIRPERSON BAILEY: Yes, I am.

15 COMMISSIONER BLOOM: I think that would be  
16 acceptable.

17 COMMISSIONER BALCH: I think as long as we  
18 are careful not to -- as Dr. Buchanan would say --  
19 well, as he said in his testimony -- forced  
20 reclamation, to be completely restored to exactly  
21 the way it was before, it may not be the best thing  
22 in all cases.

23 CHAIRPERSON BAILEY: It may not. But we  
24 need to be very careful about what requirements we  
25 do put on.

1                   COMMISSIONER BALCH: Well, I think in  
2 returning to its former condition, and then with the  
3 qualifiers in the manner and to the extent required,  
4 reclamations does take care of it.

5                   Where I'm saying we need to be careful is  
6 to make sure that we -- we don't write a regulation  
7 that says you do a list of things, where that list  
8 of best practices may alter in some future.

9                   COMMISSIONER BLOOM: Mr. Balch, also on  
10 page 38 the language reads that: "The operator  
11 shall substantially restore." I think that leaves  
12 some room.

13                   COMMISSIONER BALCH: Right.

14                   CHAIRPERSON BAILEY: Okay. So may we go  
15 back to the definitions on page 2 for restore and  
16 remove the yellow highlighted area?

17                   COMMISSIONER BALCH: And also the  
18 deletion.

19                   CHAIRPERSON BAILEY: Well, keep the  
20 definition. Okay.

21                   So then we are back to page 36. And if  
22 the rest of that paragraph of site contouring meets  
23 our approval...

24                   COMMISSIONER BLOOM: D (2) up above, I  
25 guess I am not sure what that is referring back to.

1 COMMISSIONER BALCH: Well, D (2) in the  
2 proposed modifications is -- has to do with  
3 reporting the exact location for an on-site burial.  
4 I'm not sure what that would have to do with this,  
5 as well.

6 CHAIRPERSON BAILEY: Placement of soil  
7 cover comes on the next page, so it's actually F  
8 (2).

9 COMMISSIONER BALCH: I think it's  
10 referring to the paragraph two paragraphs down.

11 CHAIRPERSON BAILEY: Yes. That is where  
12 soil cover designs are discussed. On the next page  
13 below the green line it says "the above," "Soil  
14 cover designs."

15 COMMISSIONER BALCH: It would be F (2).

16 CHAIRPERSON BAILEY: Page 37.

17 COMMISSIONER BLOOM: Shall we read through  
18 soil cover designs? I guess we could just wait  
19 until we get there.

20 CHAIRPERSON BAILEY: I think we'll have  
21 some changes in it.

22 COMMISSIONER BLOOM: Yeah.

23 COMMISSIONER BALCH: I don't think we  
24 pointed to it, and referencing it is fine.

25 CHAIRPERSON BAILEY: Okay. And the

1    recontour that approximates the original. Because  
2    it approximates it, it doesn't have to be exact, and  
3    blends with the surrounding topography and  
4    revegetated according to F (3), and F (3) is just a  
5    couple of paragraphs down.

6            COMMISSIONER BLOOM: That's very good.

7            CHAIRPERSON BAILEY: So are we okay with  
8    that paragraph, the first one under site contour?

9            COMMISSIONER BLOOM: Yes.

10           COMMISSIONER BALCH: Yes.

11           CHAIRPERSON BAILEY: Then we go to  
12    subparagraph (b), which inserts the word  
13    "recontouring" as open for alternatives, as long as  
14    the alternative prevents erosion, protects fresh  
15    water, public health, and the environment.

16           COMMISSIONER BLOOM: I agree with that.  
17    And I think it addresses against some of the other  
18    concerns that you had, Mr. Balch.

19           COMMISSIONER BALCH: Yes. I think it's  
20    important to have that ability. The goal is to  
21    prevent erosion.

22           COMMISSIONER BLOOM: Absolutely. Okay.

23           CHAIRPERSON BAILEY: So that paragraph is  
24    acceptable.

25           And then we will go to the new paragraph

1 (c), which would allow areas that are needed for  
2 production operations or subsequent drilling to be  
3 compacted, covered, paved, or otherwise stabilized  
4 and maintained, which I think is a sensible way to  
5 handle reclamation on a well site, if it's going to  
6 be in use in the future.

7 COMMISSIONER BLOOM: I would agree with  
8 that. We heard some testimony to that effect.

9 COMMISSIONER BALCH: Again, you are really  
10 just wanting to make sure you are not running water  
11 off the pad into an area where...

12 CHAIRPERSON BAILEY: Okay. So all of this  
13 Section (1) for site contouring is approved.

14 And then we can go to soil cover designs.

15 Now, I have some concerns over number (2)  
16 (a) for the soil cover, where the pit contents or  
17 contaminated soil have been removed to replace only  
18 with 1 foot of topsoil or suitable vegetation.

19 COMMISSIONER BLOOM: I understand your  
20 concerns there. Have you thought of some potential  
21 language that would better meet our goals?

22 CHAIRPERSON BAILEY: Well, actually, I  
23 have. I would believe that we were shown in many  
24 different ways by several different people to  
25 testify that in order to ensure that salt does not

1 rise to the surface we need to have 4 feet of  
2 material from the surface to the source of the salt.

3 COMMISSIONER BALCH: Are we looking at 2  
4 (a) or (2) (b)?

5 CHAIRPERSON BAILEY: We are looking at  
6 both of them, actually.

7 COMMISSIONER BALCH: Okay.

8 CHAIRPERSON BAILEY: (2) (b) requires the  
9 4 feet of non-waste.

10 COMMISSIONER BALCH: You know, in -- for  
11 (2) (a), originally, there was a model that had some  
12 limits that all of us wanted put there.

13 But I think the way we addressed that was  
14 really to -- for substantial reclamation, if there  
15 were more contaminants that were there, just to be  
16 covered by 1 foot.

17 So I think (a) still covers that case, and  
18 we wouldn't have a situation where we would be  
19 burying the salt at less than a foot or around a  
20 foot.

21 CHAIRPERSON BAILEY: But we also talked  
22 about the rooting zone for revegetation, for some of  
23 the deeper-rooted shrubs such as the four-wing  
24 saltbrush.

25 COMMISSIONER BALCH: But I think we're

1 going to remove all the contaminations. So I think  
2 it says a foot --

3 CHAIRPERSON BAILEY: Uh-huh.

4 COMMISSIONER BALCH: -- or the background  
5 thickness. So the background thickness would be  
6 appropriate for vegetation that is already in the  
7 area.

8 CHAIRPERSON BAILEY: We have a pit, we  
9 have removed the pit. This doesn't call for  
10 backfilling of 3-foot of clean material. This says  
11 you can have a pit, recontour it so it blends with  
12 the topography, and put a foot.

13 COMMISSIONER BALCH: But this is also a  
14 drying pad location.

15 CHAIRPERSON BAILEY: It's not only a  
16 drying pad.

17 COMMISSIONER BALCH: Well, I mean it could  
18 also be a drying pad location where it would not be  
19 appropriate to build a mound with 4 feet of material  
20 above it.

21 COMMISSIONER BLOOM: That's a good point.  
22 Maybe we need to segregate those.

23 COMMISSIONER BALCH: I agree with you. If  
24 there's is a pit, then you would want to make sure  
25 you have material for plants to --

1 CHAIRPERSON BAILEY: Adequate rooting.

2 COMMISSIONER BALCH: -- adequate rooting  
3 down to 4 feet.

4 CHAIRPERSON BAILEY: Right.

5 COMMISSIONER BALCH: And there was an  
6 awful lot of testimony throughout the redirect  
7 examination of Dr. Buchanan on that subject  
8 particularly.

9 CHAIRPERSON BAILEY: But for the drying  
10 pad area --

11 COMMISSIONER BALCH: You're probably going  
12 to --

13 CHAIRPERSON BAILEY: -- and I can  
14 understand how that should be, yes.

15 COMMISSIONER BALCH: You're just going to  
16 scrape up a few inches of soil if your test is  
17 negative.

18 CHAIRPERSON BAILEY: Then why don't we  
19 separate out drying pad areas from other conditions  
20 in which we would be removing pit contents?

21 COMMISSIONER BALCH: I'm looking at  
22 reclamation of pit, A; on-site burial locations, A;  
23 drying pad locations. So, yes, they are not in the  
24 same category.

25 CHAIRPERSON BAILEY: Good.

1           Okay. The soil cover for closures of  
2 drying pit areas, the areas.

3           COMMISSIONER BLOOM: Drying pad areas?

4           CHAIRPERSON BAILEY: Or closures of drying  
5 pads associated with closed-loop systems.

6           COMMISSIONER BALCH: Could I make a  
7 suggestion for clarity?

8           CHAIRPERSON BAILEY: Uh-huh.

9           COMMISSIONER BALCH: That we have a (2)  
10 and a (3) here, and that (2) would regard the drying  
11 pad areas and then have (a) as a subparagraph; and  
12 then have a (3), which would have paragraph (b).

13          CHAIRPERSON BAILEY: Soil cover designs  
14 for pits?

15          COMMISSIONER BALCH: Yes.

16          COMMISSIONER BLOOM: Say that again. So  
17 one will be for pits and the other --

18          COMMISSIONER BALCH: One will be for pits  
19 and on-site burial. The other one will be for  
20 drying pad locations.

21          CHAIRPERSON BAILEY: So it will be --  
22 "Soil cover designs for drying pits associated with  
23 closed-loop systems," would be the title of (2).

24          COMMISSIONER BALCH: Yes.

25          MR. SMITH: Could you repeat that, please?

1 CHAIRPERSON BAILEY: "Associated with  
2 closed-loop systems."

3 I can accept it as it is written now.

4 Then we would insert, after (a), (3):  
5 "Soil cover designs..."

6 COMMISSIONER BLOOM: I think for (a) we  
7 would have to change the language to: "The soil  
8 closures where the operator has removed the drying  
9 pad."

10 CHAIRPERSON BAILEY: Yes.

11 COMMISSIONER BALCH: Or remediated down  
12 into the soil.

13 CHAIRPERSON BAILEY: Yes.

14 COMMISSIONER BALCH: I think it would be  
15 "where the operator has remediated the contaminated  
16 soil to the division's satisfaction."

17 COMMISSIONER BLOOM: Theresa, in (2) (a)  
18 we would change "pit contents" to "drying pad."

19 COMMISSIONER BALCH: I think you would  
20 actually just say "where the operator," and then  
21 remove "has removed the pit contents or" --

22 CHAIRPERSON BAILEY: Don't forget "pit."  
23 "Pit" has to be removed.

24 COMMISSIONER BALCH: That's what I mean.  
25 So the part she has highlighted, I think if we

1 remove that, it will make sense. "Where the  
2 operator has remediated the contaminated soil to the  
3 division's satisfaction."

4 COMMISSIONER BLOOM: It might not  
5 necessarily be contaminated soil.

6 COMMISSIONER BALCH: Okay. You're right.  
7 So you would have to have "remove the drying pad."

8 COMMISSIONER BLOOM: So should "pit  
9 contents" be changed to "drying pad"?

10 COMMISSIONER BALCH: This would be an  
11 "and," wouldn't it, instead of "or"?

12 CHAIRPERSON BAILEY: We could go back and  
13 look at the deleted language on page 28 that talked  
14 about closure methods for closed-loop systems, which  
15 actually doesn't give us a whole lot of help.

16 COMMISSIONER BALCH: Okay. Maybe if you  
17 replace the "or" after "drying pad" with "and if  
18 necessary, remediate contaminated soil"? That would  
19 take care of that.

20 I think that's all the components. There  
21 may still need to be some wordsmithing that needs to  
22 be done.

23 CHAIRPERSON BAILEY: "Has removed the  
24 drying pad contents and liner."

25 COMMISSIONER BALCH: "And liner."

1                   COMMISSIONER BLOOM: Yes, that would be  
2 consistent.

3                   COMMISSIONER BALCH: A comma after "drying  
4 pad."

5                   CHAIRPERSON BAILEY: Yes.

6                   COMMISSIONER BALCH: And then "contents"  
7 would be plural.

8                   CHAIRPERSON BAILEY: The comma doesn't  
9 make sense. It's "the drying pad contents and  
10 liner, and if necessary, remediated."

11                   And it's "remediation to concentrations  
12 listed in Table I." Because in Table I I'm going to  
13 suggest that we have a separate category for the  
14 surface to 4 feet for concentrations of chlorides.

15                   COMMISSIONER BALCH: Okay.

16                   CHAIRPERSON BAILEY: So if we replace that  
17 language of -- yes. "And if necessary, remediated  
18 to the concentrations for surface listed in  
19 Table I."

20                   COMMISSIONER BALCH: Would that be  
21 "remediated to the concentration specified for  
22 surface closure listed in Table I"?

23                   CHAIRPERSON BAILEY: However we want to  
24 put that, sure.

25                   "Specified for closure in Table I." Okay.

1 "For closure of surface," and then blah, blah, blah.

2 COMMISSIONER BALCH: I think if we just  
3 say "for closure in Table I," we will make Table I  
4 clear as to what is surface.

5 CHAIRPERSON BAILEY: I agree with that.  
6 Okay.

7 A period after "Table I." And then delete  
8 the following words "contaminated soil to the  
9 division's satisfaction."

10 COMMISSIONER BALCH: And then in the  
11 second line, "concentration" should be plural  
12 because we're talking about more than one --

13 COMMISSIONER BLOOM: Probably a comma  
14 after "Table I."

15 CHAIRPERSON BAILEY: All right.  
16 Yes. I think we have taken care of that.

17 Then the title for (3) would be "Soil  
18 cover designs for" --

19 COMMISSIONER BALCH: That would go back to  
20 the original title --

21 CHAIRPERSON BAILEY: -- pits?

22 COMMISSIONER BALCH: -- for the most part.

23 COMMISSIONER BLOOM: Go up to F, the title  
24 there for "Reclamation of pit locations, on-site  
25 burial locations, and drying pad locations."

1                   COMMISSIONER BALCH: Well, we don't need  
2 the drying pad locations.

3                   CHAIRPERSON BAILEY: Okay. So don't put  
4 the word "pits" there.

5                   But we go back to the title of F and copy  
6 that portion that says "Reclamation of pit  
7 locations, on-site burial locations, and below-grade  
8 tanks," or just "below-grade tanks" go with the...

9                   COMMISSIONER BALCH: You know, I think  
10 that these below-grade tanks, they are a lined  
11 enclosure, and it's below grade.

12                  CHAIRPERSON BAILEY: Uh-huh.

13                  COMMISSIONER BLOOM: So essentially, it  
14 would be filling in the hole where the tank is.

15                  COMMISSIONER BALCH: So it seems that this  
16 would probably be appropriate. I suppose the  
17 worst-case scenario would be you would have to dig  
18 out a little bit more material if you had a  
19 shallower tank.

20                  CHAIRPERSON BAILEY: If you have a leak  
21 you're going to dig out a substantial amount of  
22 material.

23                  COMMISSIONER BALCH: Well, if there is no  
24 leak?

25                  CHAIRPERSON BAILEY: If there's no leak --

1           COMMISSIONER BALCH: Then you would have  
2 to dig a little bit out, if you had a 3-foot --

3           CHAIRPERSON BAILEY: To bring it to  
4 whatever the concentration is, and then put a foot  
5 onto it after it's been contoured.

6           So maybe we could include below-grade  
7 tanks with the drying pad paragraph.

8           COMMISSIONER BLOOM: Okay. How do we get  
9 back there? I'm sorry.

10          CHAIRPERSON BAILEY: The soil cover  
11 designs for --

12          COMMISSIONER BLOOM: Yes. I just wondered  
13 how -- why we would put it with closed-loop systems.

14          CHAIRPERSON BAILEY: Because they would be  
15 shallow. They would not necessarily need to be dug  
16 down 4 feet, as long as the soil beneath the  
17 closed-loop system liner meets the criteria that we  
18 will establish in Table I for surface to 4 feet.

19          COMMISSIONER BLOOM: I was thinking of  
20 some of the pictures we saw, I think it was in  
21 NMOGA's presentation, what a below-grade tank looks  
22 like. It's probably that the hole might be going  
23 down multiple feet and...

24          CHAIRPERSON BAILEY: Well, we are  
25 requiring contouring of everything.

1 COMMISSIONER BLOOM: Yes.

2 COMMISSIONER BALCH: I think that the  
3 below-grade tanks probably are going to have to fit  
4 in either their own category or in with pits.

5 Because I recall those same images. We  
6 are looking at things which could -- probably are  
7 not going to be 1-foot thick.

8 CHAIRPERSON BAILEY: Okay.

9 COMMISSIONER BALCH: You are probably  
10 looking at a more thorough reclamation, regardless  
11 of the contamination. It's probably going to have  
12 to be substantially backfilled. The drying pad  
13 locations with the closed-loop systems, we are  
14 looking at something that is very near surface.  
15 Everything else is -- has penetrated the ground.

16 CHAIRPERSON BAILEY: Then I agree. Let's  
17 put below-grade tanks in the title for --

18 COMMISSIONER BLOOM: (3).

19 CHAIRPERSON BAILEY: -- (3), yes.

20 So yes, it's there. So now that covers  
21 the universe.

22 COMMISSIONER BLOOM: I guess that would  
23 become (3)(a), right?

24 CHAIRPERSON BAILEY: Yes.

25 COMMISSIONER BLOOM: I think we need to

1 get that to reflect temporary --

2 CHAIRPERSON BAILEY: Well, we have  
3 multi-well --

4 COMMISSIONER BALCH: This would --

5 CHAIRPERSON BAILEY: -- pits.

6 COMMISSIONER BLOOM: I guess it would.  
7 Okay.

8 CHAIRPERSON BAILEY: Dr. Buchanan was very  
9 clear that we couldn't and should not have  
10 compacted.

11 COMMISSIONER BLOOM: I think that's fine  
12 to remove that, because the closure plan would  
13 address whether it should be compacted or whatnot.

14 CHAIRPERSON BAILEY: So let's delete  
15 "compacted" from that paragraph.

16 COMMISSIONER BALCH: Yes.

17 CHAIRPERSON BAILEY: And I have asked to  
18 have inserted -- everywhere else we had  
19 non-waste-containing waste material to have  
20 non-waste-uncontain- -- non-waste-containing -- we  
21 have thrown in the word "uncontaminated." Now,  
22 where does it belong?

23 COMMISSIONER BALCH: Between "containing"  
24 and "earthen material."

25 CHAIRPERSON BAILEY: Non-waste-containing

1 uncontaminated earthen material.

2 COMMISSIONER BALCH: Do we need a comma  
3 after "containing" also?

4 COMMISSIONER BLOOM: So I guess it's  
5 implied that the soil cover goes on top of the  
6 4 feet of non-waste-containing uncontaminated  
7 earthen material? It's maybe not so clear, or is  
8 that included -- is that going to be the top foot of  
9 the 4 feet?

10 COMMISSIONER BALCH: I think that the  
11 4 feet is the depth of burial. So you could have at  
12 least -- you would have at least 1 foot of topsoil  
13 or whatever the background was. If the background  
14 is 3 feet you would have -- 3 feet out of your 4  
15 would be topsoil. If you have 3 inches, then it  
16 would be 1 foot.

17 CHAIRPERSON BAILEY: If you wanted to be  
18 very, very specific, which we do, you could say "the  
19 soil cover on the earthen material shall include  
20 either the background," to be very clear where the  
21 soil cover goes.

22 COMMISSIONER BALCH: Well, I think it's  
23 pretty clear right now what it's saying. If you  
24 have 4 feet of material above your waste, or the  
25 bottom of whatever you have done -- you may have

1 more. For example, if you have an 8-foot-deep pit  
2 you would have more than 4 feet, because you're  
3 bringing up to ground level.

4 But this is saying that top 4 feet has to  
5 be non-waste-containing uncontaminated earthen  
6 material, of which some percentage of it is going to  
7 be topsoil. Well, at least 25 percent of it is  
8 going to be topsoil.

9 CHAIRPERSON BAILEY: To result in a  
10 minimum of 4 feet.

11 COMMISSIONER BALCH: Yes. So in practice,  
12 you will probably have more on some sites.

13 COMMISSIONER BLOOM: I would say: "The  
14 soil cover shall include the background thickness,"  
15 so if it's more, you would have more topsoil, and  
16 the minimum is 1 foot.

17 COMMISSIONER BALCH: Well, I think it says  
18 that already.

19 CHAIRPERSON BAILEY: Whichever is greater.

20 COMMISSIONER BALCH: It says: "The soil  
21 cover shall include either the background thickness  
22 of topsoil or 1 foot of suitable material to  
23 establish vegetation of the site, whichever is  
24 greater."

25 So if you had 3 feet of background

1 topsoil -- which is pretty unlikely. But if you did  
2 you would have to put 3 feet as part of your 4-foot  
3 of earthen material. If you had 3 inches, you would  
4 have to put a foot.

5 COMMISSIONER BLOOM: Okay. I agree. I  
6 think we are okay. Sorry.

7 CHAIRPERSON BAILEY: Okay.

8 COMMISSIONER BLOOM: It looks like that  
9 other (a) is an IPA.

10 CHAIRPERSON BAILEY: The green, I think --

11 COMMISSIONER BALCH: It's alternate  
12 language.

13 CHAIRPERSON BAILEY: -- is alternate, and  
14 we can delete that.

15 And then (c): "Operator shall construct  
16 the soil cover to the site's existing grade and  
17 prevent ponding of water and erosion of the cover  
18 material."

19 Dr. Neeper was very clear about ponding on  
20 the material.

21 COMMISSIONER BALCH: Now, this should  
22 actually become (4), right?

23 CHAIRPERSON BAILEY: It can be -- no. It  
24 needs to apply to both soil cover designs for drying  
25 pads and soil cover designs for everything else.

1 COMMISSIONER BLOOM: We repeat it above?

2 COMMISSIONER BALCH: Well, it's either  
3 repeat it above or make it into paragraph (4).

4 CHAIRPERSON BAILEY: Let's make it into  
5 paragraph (4). And that way, it...

6 COMMISSIONER BALCH: It's global to  
7 reclamation.

8 CHAIRPERSON BAILEY: Yes.

9 Okay. Then we can go down to the language  
10 in green.

11 We have already addressed that in "Site  
12 Contouring" up above. That was our paragraph (c)  
13 under site contouring. So I don't see that we need  
14 to have it repeated here. Do you?

15 COMMISSIONER BLOOM: I don't know that we  
16 need to have it under site contouring and under soil  
17 cover designs.

18 CHAIRPERSON BAILEY: So shall we delete it  
19 here?

20 COMMISSIONER BALCH: Essentially, if  
21 you're -- if you're applying (c) in site contouring,  
22 then it would be unneeded until you got to the point  
23 where you are going to do reclamation, which would  
24 be at some later time.

25 CHAIRPERSON BAILEY: Yes. So let's go

1 ahead and delete that paragraph in this location.

2 And that brings us to "Reclamation and  
3 Revegetation."

4 COMMISSIONER BALCH: Which is now (5).

5 CHAIRPERSON BAILEY: And specifically,  
6 looking at: "Reclamation of areas no longer in use.  
7 All areas disturbed by the closure of pits and  
8 below-grade tanks, except what's needed for  
9 subsequent operations, shall be reclaimed as early  
10 and nearly as practicable to their original  
11 condition for their final land use, and shall be  
12 maintained to control dust and minimize erosion to  
13 the extent practicable."

14 Can we accept that introductory paragraph  
15 under (5) (a)?

16 I think it allows for partial reclamation  
17 of a well site, leaving open only those areas that  
18 are needed for continued use of operations.

19 Are we in agreement to leave (5) (a)?

20 COMMISSIONER BLOOM: Yes.

21 COMMISSIONER BALCH: Yes.

22 CHAIRPERSON BAILEY: (5) (b): "Topsoils  
23 and subsoils replaced to the original relative  
24 positions and contour as near as practicable to  
25 achieve erosion control and long-term stability.

1 The area will then be reseeded in the first  
2 favorable growing season following closure of a pit  
3 or pad or tank."

4 Can we accept that paragraph?

5 COMMISSIONER BALCH: I'm not sure if, in  
6 the first sentence, we really need the "as near as  
7 practicable."

8 CHAIRPERSON BAILEY: Because we earlier  
9 referenced approximating the original contouring.

10 COMMISSIONER BALCH: And I think that the  
11 goal -- and I believe we could probably give you  
12 about 50 citations from Dr. Buchanan's testimony --  
13 was to achieve erosion control and long-term  
14 stability, not to mesh the contour as close as you  
15 could.

16 CHAIRPERSON BAILEY: But we don't want to  
17 allow moonscapes, either, where we have 15-foot  
18 holes in the ground where a pit used to be.

19 So what -- we could replace "as near as  
20 practicable" to the same language that we used in  
21 site contouring. So it says: "Shall be replaced to  
22 their original relative positions and contoured to  
23 the approximate original contour, to prevent erosion  
24 control."

25 COMMISSIONER BALCH: I think that would be

1 better than "as near as practicable."

2 CHAIRPERSON BAILEY: Well, it reflects and  
3 is consistent with the language that we have in F  
4 (1) (a). "And contour to the approximate original  
5 contouring."

6 Are we happy with that now?

7 MR. SMITH: I think you could just put,  
8 after "positions," "and to the approximate original  
9 contour."

10 CHAIRPERSON BAILEY: Yes. That makes a  
11 lot of sense.

12 COMMISSIONER BALCH: Can I -- I would like  
13 to read a citation, if I could find it, from  
14 Dr. Buchanan.

15 He didn't like the term "approximate  
16 original configuration," that was in the Rule 17.  
17 And we are sort of around that same kind of language  
18 here. He liked "final surface configuration." But  
19 I would like to look at his citation real quick, if  
20 you don't mind.

21 I've highlighted it for a reason. I can't  
22 remember why.

23 CHAIRPERSON BAILEY: We need to get it  
24 right, so we can certainly take time for you to look  
25 it up.

1           COMMISSIONER BALCH: And if you want to  
2 look, I have it on page 833, lines 1 through 12.

3           Actually, the discussion starts on  
4 page 832, line 19. And Dr. Buchanan is asking --  
5 he's being asked the question under direct:

6           "Now, before you move on to the questions  
7 about erosion, a lot of times in older reclamation  
8 practice we talked about restoring things to its  
9 natural or original contour.

10           "If the original natural contour is not  
11 geomorphically stable, is that a good idea?"

12           And Dr. Buchanan responds:

13           "That is right, it's not. It is not a  
14 good idea, and we did that in the early years. We  
15 AOC'd everything. Approximate original contour,  
16 AOC. By law we were to AOC.

17           "And you know what we did? We FSC'd it.  
18 That's not in here, so just write it down, the  
19 letters, FSC, final surface configuration. We went  
20 from AOC to a final surface configuration that was  
21 stable.

22           "Generally, with the final FSC" --

23           This is another question of him:

24           "Generally, with the final FSC, as you  
25 just said, we were trying to approximate the

1 original contour to the extent we can, but we take  
2 out those features of it that may have made it  
3 geomorphically unstable?"

4 Answer: "We are trying to get away from  
5 the instability."

6 CHAIRPERSON BAILEY: I think we need to  
7 understand that Dr. Buchanan was talking from the  
8 point -- the viewpoint of coal surface mining  
9 reclamation. Because when he says that by law they  
10 had to do it a certain way, that is under the SMCRA,  
11 which is what -- surface mining control and  
12 reclamation. And in the discussions for coal  
13 surface mining reclamation, the problems with the  
14 benches, that were developed as a part of the  
15 approximate original contours, were not stable.

16 And so there has been a bit -- large  
17 change in the -- that philosophy, as far as I  
18 understand it.

19 So when he is talking about the geomorphic  
20 stability, I don't think he's talking about 15-foot  
21 holes in the ground.

22 COMMISSIONER BALCH: No, I don't think he  
23 is. I don't think that -- and we want to make sure  
24 that that doesn't happen. Although I would suspect  
25 that that wouldn't be stable and would certainly

1 allow pooling anyway, so it would not be allowed.

2 CHAIRPERSON BAILEY: I agree with you  
3 there.

4 COMMISSIONER BALCH: I think that he was  
5 asked a number of questions around this issue, also,  
6 on cross-examination.

7 COMMISSIONER BLOOM: I don't think there's  
8 any disagreement here that we want to find contours  
9 that help with erosion control, particularly if they  
10 are not --

11 COMMISSIONER BALCH: Well, I'm just saying  
12 we want to -- how can we say it correctly, I think  
13 is probably the larger issue.

14 CHAIRPERSON BAILEY: I think so. I think  
15 that we don't have an issue with recontouring where  
16 it's not exactly matching foot by foot of the  
17 contour, but so that we are not allowing ponding or  
18 moonscapes or blowouts.

19 COMMISSIONER BLOOM: Could we say  
20 "replaced to the original relative position and  
21 contour, and so that erosion control and long-term  
22 stability are achieved," along those lines?

23 COMMISSIONER BALCH: Well, I guess I was  
24 just saying the language that we had in there might  
25 imply some other regulatory or statutory meaning,

1 this "approximate original contour."

2 COMMISSIONER BLOOM: I mean, maybe we're  
3 talking about trying to do two things. One is  
4 getting back to original relative positions and  
5 contours, but also so as to prevent erosion and  
6 ponding and allow for long-term stability, or  
7 something along those lines, and spell it out that  
8 way so that all of those things are considered.

9 COMMISSIONER BALCH: And I think he called  
10 it final surface configuration. And you're trying  
11 to -- basically, it's a modification. We're trying  
12 to approximate the original contour to the extent we  
13 can, but we take out those features of it that may  
14 have made it geomorphically unstable. So we are  
15 making it better than it was before for erosion  
16 control, pooling, whatever you want.

17 COMMISSIONER BLOOM: All right. Is there  
18 some language that comes to mind that can get us  
19 there? I'm willing to support it.

20 CHAIRPERSON BAILEY: I am, too, but let's  
21 just find the words.

22 COMMISSIONER BALCH: Well, I think I -- my  
23 only concern, and maybe this is -- maybe I have just  
24 been listening to the lawyers too much, so you can  
25 help me if I'm -- I'm just walking down some

1 unnecessary path.

2 MR. SMITH: I would like to say, first of  
3 all, that's not really possible, to listen to the  
4 lawyers too much.

5 COMMISSIONER BALCH: AOC is a term that is  
6 known out there in reclamation, that they have an  
7 abbreviation for it. So if we use the words here,  
8 "approximates the original contour," somebody  
9 reading that from a reclamation standpoint could say  
10 oh, AOC. That's what we'll do, or that's what we  
11 have to do.

12 Whereas Dr. Buchanan's emphasis was on an  
13 FSC, which is a final surface configuration that was  
14 stable.

15 CHAIRPERSON BAILEY: So we could say  
16 "topsoils and subsoils shall be replaced to their  
17 original relative positions and contoured to achieve  
18 erosion control and long-term stability."

19 See, that's deleting almost all of that  
20 sentence.

21 COMMISSIONER BLOOM: That would be good.  
22 To contour so as to --

23 CHAIRPERSON BAILEY: Just delete all the  
24 way down to "achieve erosion control."

25 COMMISSIONER BLOOM: And add a "so as to."

1 MR. SMITH: The one thing that you leave  
2 off there maybe is -- it allows for the change, does  
3 it not, the way you have it, in surface water  
4 patterns?

5 You could have erosion control and  
6 long-term stability and still pretty drastically  
7 change surface water flow.

8 You may think that's okay, but I'm just --  
9 that's one thing that seems to me that you lose by  
10 taking out the language of "original contouring."

11 CHAIRPERSON BAILEY: Which is the  
12 justification for requiring AOC in many different  
13 areas, mining and et cetera.

14 COMMISSIONER BALCH: But I think if you  
15 are replacing it to original relative positions you  
16 are more or less following the rule that you are  
17 trying to make it fit in with the surrounding  
18 terrain. But you are also looking at it with a mind  
19 of limiting erosion and being stable in the  
20 long-term. Because if you're going to sequester  
21 material there you want it to be stable as long as  
22 possible; forever, ideally.

23 MR. SMITH: You could put in, in order to  
24 avoid the problem that you were thinking of, "to  
25 achieve erosion control, long-term stability, and

1 preservation of surface flow patterns," or something  
2 like that, if that's something that you want to do.

3 COMMISSIONER BLOOM: Do you guys want to  
4 restore surface flow patterns?

5 CHAIRPERSON BAILEY: If they are  
6 established by nature.

7 COMMISSIONER BALCH: Yes.

8 Well, what I was looking for in the  
9 definition, to be honest, was -- because there was a  
10 lot of dialogue with Dr. Buchanan about how best  
11 practices and reclamation have changed over time.

12 If we want a regulation that is going to  
13 last a while, we don't want to be too narrow and  
14 constrain the ability of people to generate new best  
15 practices.

16 What we are interested in, I think -- what  
17 I'm interested in from a regulatory point of view --  
18 is the end result which is stability. I don't want  
19 pooling, I don't want erosion.

20 CHAIRPERSON BAILEY: And by the addition  
21 of the suggested language "for preservation of  
22 surface flow patterns," that would prevent unusual  
23 or different erosions of the surrounding areas that  
24 would be impacted by changes made for --

25 COMMISSIONER BALCH: You don't want to

1 have your little one area to be stable and  
2 everything else around it erode away.

3 CHAIRPERSON BAILEY: Uh-huh. So I think  
4 it would be a good idea to include that language  
5 concerning the preservation of surface flow  
6 patterns.

7 Do you two agree?

8 COMMISSIONER BLOOM: Does that add  
9 anything to the concept of long-term stability?

10 COMMISSIONER BALCH: Well, I think it  
11 does.

12 COMMISSIONER BLOOM: Doesn't long-term  
13 stability include preservation of surface flow  
14 patterns?

15 CHAIRPERSON BAILEY: Not necessarily.  
16 Long-term stability can be inferred to only apply to  
17 that specific location where the surface flow  
18 patterns would encompass a larger area and create  
19 the concept of impact outside of that specific  
20 location.

21 COMMISSIONER BALCH: An example might be  
22 you could have a small tributary to a -- you know,  
23 some fourth order of tributary to an arroyo that  
24 cuts across one corner of your area that you are  
25 reclaiming.

1           If you take that and you then direct it  
2 completely around your area you have done something  
3 to achieve erosion control for your specific area.  
4 But that diversion from the natural channeling or  
5 the flow of the surface water could then cause more  
6 erosion somewhere else, and you don't want to have  
7 that happen either.

8           So I think that's a good addition.

9           COMMISSIONER BLOOM: People understand  
10 what that means?

11          MR. SMITH: It should probably be "surface  
12 water flood patterns."

13          CHAIRPERSON BAILEY: Uh-huh.

14          COMMISSIONER BALCH: I think people like  
15 Dr. Buchanan, who are doing these reclamations,  
16 would --

17          CHAIRPERSON BAILEY: They would understand  
18 this.

19          COMMISSIONER BALCH: -- understand this  
20 mandate.

21          COMMISSIONER BLOOM: Okay.

22          COMMISSIONER BALCH: It's not to do an  
23 AOC, I guess is what I was concerned about.

24          CHAIRPERSON BAILEY: Then we can go to the  
25 next paragraph (c): "Reclamation of all disturbed

1 areas no longer in use shall be considered  
2 complete," so this is final evaluation, "when all  
3 ground surface activities have been completed and  
4 all disturbed areas have either been built on,  
5 compacted, covered, paved, or otherwise stabilized  
6 to minimize erosion, or a uniform vegetative cover  
7 has been established."

8           There was some discussion about having  
9 "compacted" in there and the ability of some  
10 operators to not ever revegetate if they just  
11 compact the whole thing.

12           COMMISSIONER BALCH: Well, the way it  
13 reads gives you compaction as an option to --

14           CHAIRPERSON BAILEY: Yes.

15           COMMISSIONER BALCH: -- instead of.

16           CHAIRPERSON BAILEY: Instead of.

17           COMMISSIONER BALCH: And not just for  
18 specific cases, but for any case.

19           CHAIRPERSON BAILEY: For anything. Yes.

20           COMMISSIONER BALCH: Maybe there are  
21 specific cases where compacting would be the most  
22 appropriate thing to do, at least in the interim.

23           CHAIRPERSON BAILEY: If the  
24 after-reclamation land use is a parking lot, well,  
25 yeah, you want to compact it. But if it's

1 rangeland, as so much of the land is down in the  
2 southeast, compaction is not appropriate, and paving  
3 isn't appropriate.

4 COMMISSIONER BALCH: Well, there was a  
5 good amount of discussion about reclamation. Some  
6 of the concerns that were brought up by Mr. Jantz on  
7 cross-examination, and also by Dr. Neeper, of his  
8 cross-examination of himself, was about what happens  
9 if you build your basketball court on top of that  
10 site, and then 30 years from now it no longer has  
11 that purpose --

12 CHAIRPERSON BAILEY: Right.

13 COMMISSIONER BALCH: -- then who is  
14 responsible for the reclamation, or do you even know  
15 if there's a site that needs reclamation?

16 And I think those were the two concerns  
17 that were brought up.

18 COMMISSIONER BLOOM: I think another one  
19 of -- maybe Dr. Neeper brought it up in his findings  
20 of fact -- is that it would seem like because of  
21 that -- or in the middle, you can either compact,  
22 cover, or pave, or you could do a vegetative  
23 restoration.

24 So I can imagine something where the only  
25 conceivable use -- well, not to mention too much --

1 a lot of land that has a pad on it is -- or pit on  
2 it -- is only going to be simply used for grazing.  
3 And it makes it sound like you can get away from  
4 doing vegetative cover if you decide to compact  
5 cover or pave.

6 COMMISSIONER BALCH: Well, we have -- we  
7 have already had language a little bit earlier on in  
8 this section that allowed for partial -- partial  
9 recovery, at least in the interim.

10 And sometimes, when you're -- when you're  
11 contemplating one of these long paragraphs it helps  
12 me to go back and look at what -- what is being  
13 intended.

14 What is being intended, I think, is that  
15 you will vegetatively reclaim, unless you have some  
16 specific good reason to do so -- and here's the  
17 important language -- that would be equally  
18 equivalent or better protection which, to me, sounds  
19 like if you're not doing a vegetative reclamation  
20 you should be seeking a variance.

21 CHAIRPERSON BAILEY: Uh-huh.

22 COMMISSIONER BALCH: So you might be able  
23 to simplify this dramatically if you distill it down  
24 to that, and that would still allow someone to do  
25 something different, but they would need to have it

1 vetted at least at the district office level.

2 CHAIRPERSON BAILEY: So --

3 COMMISSIONER BALCH: I would say when all  
4 disturbed areas have been reclaimed or otherwise  
5 stabilized in such a way as to minimize erosion to  
6 the extent practicable, maybe we'd want to give it a  
7 time limit as well.

8 COMMISSIONER BLOOM: I think it's laid out  
9 pretty well in (a) above, where we have "shall be  
10 reclaimed as early and as nearly as practicable to  
11 the original condition or their final land use."

12 COMMISSIONER BALCH: Okay. So if we just  
13 point to (a), we might be able to then go down to  
14 the specifics of 7 percent cover and whatnot.

15 CHAIRPERSON BAILEY: I think that's a  
16 great idea. So we would go into (a) and copy the  
17 phrase "or their final land use, and shall be  
18 maintained to control dust and minimize erosion" --  
19 no, I'm sorry. Nevermind.

20 "Shall be considered complete with all  
21 areas -- all disturbed areas."

22 We could just delete "and all disturbed  
23 areas that have either been built on, compacted,  
24 covered, paved, or otherwise stabilized in such a  
25 way so as to minimize erosion to the extent

1 practicable." Delete all the way down to "or a  
2 uniform vegetative cover has been established."

3 COMMISSIONER BALCH: Because we already  
4 covered the specific cases that we would not need a  
5 variance for, and everything else they would need to  
6 apply for a variance.

7 CHAIRPERSON BAILEY: Yes.

8 COMMISSIONER BLOOM: So delete "that" and  
9 put in "and"?

10 COMMISSIONER BALCH: "And a uniform  
11 vegetative cover has been established."

12 COMMISSIONER BLOOM: Yeah. I think this  
13 would be better.

14 CHAIRPERSON BAILEY: Okay.

15 COMMISSIONER BALCH: And then change the  
16 "or" to an "and."

17 CHAIRPERSON BAILEY: Then we have some  
18 alternative language here to indicate that -- the  
19 predisturbance standards with forbs, shrubs, and  
20 grasses.

21 COMMISSIONER BLOOM: Somewhere in here it  
22 would consider putting in native, or something along  
23 that line. I know that's a slightly charged word  
24 because it gets into what's native.

25 COMMISSIONER BALCH: Well, we talked for a

1 while about what was native on the first or second  
2 day of deliberation.

3 COMMISSIONER BLOOM: Yes. Is it native to  
4 the lease or is it to the county or the region?

5 CHAIRPERSON BAILEY: Or the region or the  
6 entire western part of the USA.

7 COMMISSIONER BALCH: What language did we  
8 use? Was it in a definition?

9 CHAIRPERSON BAILEY: It was so early in  
10 the deliberation it seems like it may have been.

11 COMMISSIONER BALCH: Are we talking about  
12 life-form ratio in the definition? "'Life-form  
13 ratio' means the relative percentage of regionally  
14 native plant species in each of the following  
15 qualifications: shrubs, forbs, and grasses."

16 So if we wanted to use our definition that  
17 might shorten the text.

18 COMMISSIONER BLOOM: Predisturbance  
19 life-form ratios?

20 COMMISSIONER BALCH: Yes. Well, it's  
21 already there in the red text, "that reflects the  
22 life-form ratio." So I think that already builds in  
23 the -- what we have in the definition, which is  
24 regionally native.

25 CHAIRPERSON BAILEY: I believe the

1 difference between the last part of the red  
2 sentences and the green is that in the red area it  
3 reflects a life-form ratio of plus or minus  
4 50 percent of predisturbance levels, where that  
5 50 percent requirement is not in the green wording.

6 COMMISSIONER BALCH: Okay.

7 CHAIRPERSON BAILEY: So with the red, the  
8 vegetative cover has to have that ratio, 50 percent  
9 of the predisturbance, and the green only  
10 requires -- doesn't specify what those ratios would  
11 be or should be.

12 COMMISSIONER BALCH: Let me see. I have a  
13 couple of notes on life-form ratio. Let me see if  
14 anything is relevant to the discussion.

15 CHAIRPERSON BAILEY: Okay. It appears as  
16 though that language in the red would more closely  
17 approximate what the original condition was.

18 COMMISSIONER BALCH: Dr. Buchanan, when he  
19 was talking about life-form ratio, was really  
20 talking about within categories: forbs, shrubs,  
21 grass.

22 CHAIRPERSON BAILEY: Then I suggest that  
23 we delete the green language and use what was  
24 submitted in the red language, as far as the  
25 standards for defining the reclamation.

1                   COMMISSIONER BALCH: Broadly taking  
2 Dr. Buchanan's testimony was that he wanted  
3 flexibility.

4                   CHAIRPERSON BAILEY: Yes. But he was also  
5 very clear that those ratios between the forbs,  
6 shrubs, and grasses was part of the whole community  
7 of plants.

8                   So do you agree that we should delete the  
9 area of the sentence in green?

10                  COMMISSIONER BLOOM: I would agree with  
11 that.

12                  COMMISSIONER BALCH: I think it restricts  
13 best practices. So, yes.

14                  CHAIRPERSON BAILEY: Okay.

15                  COMMISSIONER BLOOM: How do we interpret  
16 the life-form ratio of plus or minus 50 percent? I  
17 mean, it's essentially saying uniform vegetative  
18 cover that has been established that reflects "the  
19 relative percentage of regionally native plant  
20 species in each of the following classifications:  
21 shrubs, forbs, and grasses."

22                  Does that mean that there's a 50 percent  
23 difference in the number of shrubs, versus forbs  
24 versus grasses?

25                  COMMISSIONER BALCH: The way I read is if

1 you have -- if 50 percent of your area was grass  
2 before, that this would allow you to have 25 to  
3 75 percent grass after the reclamation; and  
4 similarly for forbs and shrubs.

5 CHAIRPERSON BAILEY: That was my  
6 interpretation.

7 COMMISSIONER BALCH: So it gives you some  
8 flexibility in receiving -- and that may actually  
9 help with a faster reclamation, because Dr. Buchanan  
10 talked quite a bit about the appropriate time to  
11 seed, appropriate seasons.

12 COMMISSIONER BLOOM: Okay. I'm good with  
13 it.

14 CHAIRPERSON BAILEY: And then the  
15 following paragraph (4) says that federal or tribal  
16 agencies have the right to have their alternative  
17 revegetation and reclamation obligations.

18 COMMISSIONER BLOOM: That's interesting  
19 language. It certainly makes me think if we include  
20 it here -- or should it appear elsewhere in the  
21 document where there are actually other federal and  
22 tribal agencies that might have -- but I don't know  
23 where that would be.

24 COMMISSIONER BALCH: Well, here's my  
25 question.

1 COMMISSIONER BLOOM: Do we footnote that  
2 everywhere?

3 COMMISSIONER BALCH: If you have an  
4 alternative regulatory or contractual requirement, I  
5 think it's pretty obvious that if it's stricter,  
6 that it wouldn't conflict with what we're trying to  
7 do here.

8 CHAIRPERSON BAILEY: If it's equal or  
9 better.

10 COMMISSIONER BALCH: If it's equal or  
11 better.

12 What if their requirement is lesser? Now  
13 a lot of places in regulations you'll see language  
14 to the extent of, you know, this applies -- if you  
15 have two competing regulations the stricter one  
16 usually applies, I believe.

17 I've seen it in context of greenhouse gas  
18 at state levels versus federal levels, for example.  
19 So -- and this is really -- it seems like a really  
20 interesting legal thing to put in there at the end  
21 of the section.

22 CHAIRPERSON BAILEY: We could add at the  
23 end of the sentence "if requirements are equal or  
24 better to -- for the protection of water and the  
25 environment."

1                   COMMISSIONER BALCH: Could we even do  
2 that?

3                   COMMISSIONER BLOOM: What's better in  
4 the --

5                   CHAIRPERSON BAILEY: Yeah. I mean, that's  
6 a very relative judgment.

7                   COMMISSIONER BALCH: What happens if we  
8 write these reclamation standards for pits and then  
9 a surface owner or the BLM or a tribe says, no, we  
10 want this done instead, and it's not as protective  
11 as what we have come up with?

12                   This says that their requirements would  
13 supersede our requirements.

14                   COMMISSIONER BLOOM: A surface owner could  
15 say, I want some grass that's indigenous to Siberia.

16                   COMMISSIONER BALCH: I want Kentucky  
17 bluegrass so I can play golf on it, or something  
18 like that.

19                   CHAIRPERSON BAILEY: A real-life example  
20 is that we had an operator who wanted to not have to  
21 revegetate because the surface owner happened to be  
22 a working interest in the company and didn't want to  
23 spend the money for revegetation. He owned the  
24 property, he owned the surface, and he said he did  
25 not want revegetation, which is included in this

1 paragraph.

2 MR. SMITH: You're requiring exceptions,  
3 aren't you, for changes in closure requirements?

4 COMMISSIONER BALCH: Well, it depends.

5 MR. SMITH: That is, it couldn't be  
6 addressed with a variance.

7 COMMISSIONER BALCH: Some things mostly  
8 associated with multi-well and permanent pits are at  
9 the exception level; most everything else is a  
10 variation.

11 On the one hand, we could have a surface  
12 owner that would like something that would exceed  
13 this protective level done.

14 On the other hand, you may have an example  
15 like Commissioner Bailey just gave of somebody  
16 saying just don't reclaim it at all. The problem  
17 there is you might impact your next-door neighbor.

18 MR. SMITH: I think, in that instance, the  
19 operator would have to either seek an exception or a  
20 variance, one of the two.

21 COMMISSIONER BALCH: At which point you  
22 wouldn't need this language at all.

23 COMMISSIONER BLOOM: I think an exception  
24 would work -- I'm sorry, a variance.

25 COMMISSIONER BALCH: Well, if it's a

1 variance you don't need the language at all.

2 CHAIRPERSON BAILEY: And this happens time  
3 and again on federal lands, where their reclamation  
4 requirements have, in the past, been very different  
5 from what the OCD reclamation requirements were.

6 If we make it into an exception or a  
7 variance we have a lot of OCD personnel spending a  
8 lot of time saying, yeah, it's federal. Go ahead  
9 and do what they say. Yeah, it's federal. You  
10 know, permit after permit after permit.

11 COMMISSIONER BALCH: Do you think it's  
12 better to leave this language and then add an  
13 "equivalent or better protection"?

14 CHAIRPERSON BAILEY: I think so, if that  
15 is enforceable.

16 COMMISSIONER BLOOM: And it might be good  
17 to leave in federal and tribal. But do you want to  
18 leave in specific agreements with surface owners?

19 CHAIRPERSON BAILEY: And anything having  
20 to do with the surface owner becomes a variance or  
21 an exception. Is that what we choose to do?

22 COMMISSIONER BALCH: I think it would be  
23 a -- a variance would be the way to go, because most  
24 of this stuff you would be -- it should be pretty  
25 obvious if someone comes up and says we want to...

1 CHAIRPERSON BAILEY: Not revegetate at  
2 all, which it got kicked up to Santa Fe.

3 COMMISSIONER BALCH: Well, if they said  
4 not revegetate at all because we are going to do  
5 this and it's going to be -- going to provide  
6 equivalent or better protection. Then if it's clear  
7 that it would, then the division district office  
8 would say okay. If not, they would kick it  
9 upstairs, right?

10 CHAIRPERSON BAILEY: If they justify it  
11 that way, yes.

12 COMMISSIONER BALCH: Well, if they kept  
13 pushing the issue and they were denied, then it  
14 would go to hearing.

15 CHAIRPERSON BAILEY: Yes.

16 COMMISSIONER BALCH: And then there would  
17 be the appropriate notifications and all of that.

18 So my understanding of the state land  
19 office and the surface owner is that you are  
20 somewhat restricted in your -- can you make a -- it  
21 sounds like the lease agreement had a large impact  
22 on your operational agreements with the companies.

23 COMMISSIONER BLOOM: Yes.

24 CHAIRPERSON BAILEY: The land office  
25 relies heavily on the OCD requirements for

1 reclamation and vegetation.

2 COMMISSIONER BLOOM: Yes.

3 CHAIRPERSON BAILEY: So it's not likely  
4 that you guys would seek to have some different  
5 reclamation standard.

6 COMMISSIONER BLOOM: No.

7 COMMISSIONER BALCH: Plus the other  
8 stakeholder, and we're not interested in that  
9 stakeholder.

10 COMMISSIONER BLOOM: So this was  
11 suggestive language, then?

12 COMMISSIONER BALCH: I think if you just  
13 add --

14 MR. SMITH: You're talking about putting  
15 something in that would say, I don't know, provided  
16 that the alternatives will provide equal or greater  
17 protection to, and then your litany the operator may  
18 request a variance to the revegetation and  
19 reclamation obligation under this rule --

20 COMMISSIONER BALCH: Well, I think we  
21 would just stop at after "if the alternative  
22 provides equivalent or better protection to fresh  
23 water, public health, and the environment," because  
24 the variation part of the rule specifically says  
25 that if it's not an exception you can apply for a

1 variance.

2 COMMISSIONER BLOOM: What if we took out  
3 "or imposed by specific agreements with the surface  
4 owners"?

5 CHAIRPERSON BAILEY: That way, if a  
6 surface owner has a -- different reclamations, they  
7 could seek a variance.

8 COMMISSIONER BALCH: They could still go  
9 to a variance, yeah.

10 CHAIRPERSON BAILEY: So delete "imposed by  
11 specific agreements with surface owners." That it  
12 would be "imposed by other applicable federal or  
13 tribal agencies shall supersede these provisions and  
14 govern the obligations."

15 MR. SMITH: You are sort of pre-assenting  
16 there to your regulation being preempted by other  
17 laws, and they may not be.

18 There may be other laws that speak to  
19 these sorts of obligations, but it doesn't mean that  
20 they necessarily have a preemptive effect.

21 CHAIRPERSON BAILEY: BLM? BLM  
22 requirements for operators have preempted OCD  
23 reclamation.

24 MR. SMITH: On BLM property, I'm sure  
25 that's true.

1           COMMISSIONER BALCH: And I would guess the  
2 same for tribal lands.

3           MR. SMITH: Well, you have something  
4 awfully broad here.

5           CHAIRPERSON BAILEY: That's true.

6           MR. SMITH: And I would be careful about  
7 tailoring it to what you know about BLM or  
8 supposedly about tribes.

9           I mean if you're preempted, you're  
10 preempted. If you're not, you're not.

11          COMMISSIONER BLOOM: Yes. Mr. Smith makes  
12 a point, that it's -- what we are proposing here  
13 doesn't say revegetation or reclamation obligations  
14 imposed by the applicable federal or tribal agencies  
15 on their land when superseding these provisions.  
16 It's almost saying that if they supersede they  
17 should go by federal or Indian guidelines.

18          CHAIRPERSON BAILEY: Ah, good catch.

19          COMMISSIONER BALCH: And I think it may  
20 not hurt to add "provide such alternatives that  
21 provide equivalent or better protection" at the end,  
22 regardless.

23          COMMISSIONER BLOOM: Let me ask this  
24 question. There was no language of this sort  
25 previously?

1 CHAIRPERSON BAILEY: No, there wasn't.

2 COMMISSIONER BLOOM: Was there any  
3 testimony as to why we would want to add this? If  
4 there isn't, maybe we just reject it.

5 COMMISSIONER BALCH: Well, it's -- one of  
6 our mandates is we have prevention of waste, we have  
7 preservation of correlative rights, and then we  
8 have -- I think we have 19 or 20 other enumerated  
9 things that we are supposed to do.

10 And one -- and we have sort of distilled  
11 those down to three broad categories: fresh water,  
12 public health, and the environment.

13 So I think the rule is supposed to be  
14 protective of those three things in particular,  
15 which broadly encompasses most of our enumerated  
16 responsibilities. So I think you do want to have  
17 language here that would preclude someone doing less  
18 without seeking a variance to the rule.

19 COMMISSIONER BLOOM: I think this maybe  
20 opens up more territory than...

21 COMMISSIONER BALCH: Well, we certainly  
22 can't leave it the way it is because it -- and this  
23 is proposed language. This is not --

24 COMMISSIONER BLOOM: I'm saying we could  
25 reject this.

1 COMMISSIONER BALCH: We could reject the  
2 entire thing.

3 COMMISSIONER BLOOM: Then if anybody wants  
4 to bring up --

5 CHAIRPERSON BAILEY: Any kind of variance.

6 COMMISSIONER BLOOM: -- a variance or come  
7 forward and say, well, this is -- this is guided by  
8 federal guideline.

9 COMMISSIONER BALCH: BLM says we have to  
10 do this, the tribe says we have to do that. And  
11 then we have already determined some variances could  
12 be as simple as a phone call to the district office.

13 CHAIRPERSON BAILEY: But we don't want  
14 district personnel to have to process and deal with  
15 variances filed because of BLM requirements.

16 COMMISSIONER BLOOM: So it could be  
17 "revegetation reclamation obligations imposed by  
18 other applicable federal or tribal agencies" --

19 CHAIRPERSON BAILEY: On their --

20 COMMISSIONER BLOOM: -- "on their land" --

21 COMMISSIONER BALCH: "On their land" --

22 CHAIRPERSON BAILEY: -- "on their managed  
23 land."

24 COMMISSIONER BLOOM: -- "that would  
25 supercede" --

1 MR. SMITH: Was there any testimony about  
2 either real or theoretical conflicts that this rule  
3 poses with other regulators?

4 CHAIRPERSON BAILEY: Not that I recall.

5 COMMISSIONER BALCH: There was maybe some  
6 very short discussion around -- around BLM issues,  
7 but nothing substantively pointing at this section.

8 But this is a recommended language by the  
9 proponents.

10 MR. SMITH: No, I understand -- I  
11 understand that. But you know, you want to make  
12 recommended changes that are supported by the record  
13 before you or that are logical extensions of other  
14 changes that are supported by the record before you.

15 COMMISSIONER BALCH: Well, I think that  
16 may go back to the discussion we were having about  
17 protections. We want to make this rule, in all  
18 instances, protective. And if this language is not  
19 clear on that it would allow less protection. We  
20 can't leave it in the way it's written.

21 MR. SMITH: Do not your variance and  
22 exception provisions require across the board that  
23 variances and exceptions will be made only to the  
24 extent that they provide equal or better protection?

25 COMMISSIONER BALCH: Absolutely.

1 MR. SMITH: So if you pull this out and  
2 someone wants to alter their obligations under this  
3 rule, they will have -- for whatever reason -- they  
4 will have to seek a variance or an exception, right?

5 COMMISSIONER BALCH: That would be right.

6 MR. SMITH: That's your protection, then.

7 COMMISSIONER BALCH: And then Commissioner  
8 Bailey brought the point up you have thousands of  
9 sites that are administered by the BLM, and then you  
10 have a thousand variations, potentially, to the rule  
11 that would have to be sought.

12 And another direct issue that was brought  
13 up by the proponents of this was to make it clear  
14 and easily administrated.

15 CHAIRPERSON BAILEY: And prevent conflict.

16 COMMISSIONER BALCH: And prevent conflict.

17 CHAIRPERSON BAILEY: This is a source of  
18 conflict or a question.

19 MR. SMITH: That may be enough to justify  
20 something like this.

21 But do -- do I understand correctly, then,  
22 Madam Chair, that you wish for this, for lack of a  
23 better word, "preemption," to be automatic?

24 CHAIRPERSON BAILEY: For revegetation and  
25 reclamation on federal or Indian lands managed by

1 those agencies, yes, so that our personnel don't  
2 have to spend the time to process a variance for  
3 thousands and thousands of permits.

4 COMMISSIONER BLOOM: Because the  
5 alternative -- there is really no alternative there.  
6 The OCD can insist that the guidelines be followed  
7 on federal land, correct?

8 COMMISSIONER BALCH: I don't think so. I  
9 mean, it does work -- you know, it works the other  
10 direction --

11 COMMISSIONER BLOOM: I mean, if you can't  
12 have a --

13 COMMISSIONER BALCH: If the federal  
14 statute or regulation is stiffer than ours we have  
15 to go by federal. I don't think it works the other  
16 way around.

17 CHAIRPERSON BAILEY: No, it doesn't.

18 COMMISSIONER BALCH: So I think that that  
19 would probably be the way to go. Specify "on their  
20 managed lands," and then just take out the language  
21 we have discussed earlier, and then not add anything  
22 to it, because we can't enforce that.

23 MR. SMITH: I cannot speak specifically to  
24 this. But I do think that in the area of mining,  
25 for instance, if the state has stiffer regulations

1 than BLM does, for instance, the BLM regs say that  
2 you must comply with the stiffer regs.

3 COMMISSIONER BALCH: So they have a -- you  
4 must use the stiffer regulation.

5 COMMISSIONER BLOOM: That would probably  
6 be a -- BLM, yeah, in a situation where there's  
7 state and BLM lands involved in one mining project,  
8 correct, if it was all on state?

9 MR. SMITH: Yeah. Yeah. Right. Well, or  
10 if it's just BLM land, because the state still  
11 regulates mining on BLM land.

12 COMMISSIONER BLOOM: Okay.

13 COMMISSIONER BALCH: All right. So it  
14 seems the most appropriate thing to do might be to  
15 add in the language about "managed on their."

16 CHAIRPERSON BAILEY: So after "tribal  
17 agencies" insert the language "on lands managed by  
18 those agencies."

19 Delete "or imposed by specific agreements  
20 with surface owners."

21 COMMISSIONER BALCH: And now do we want to  
22 add the language of "provided the alternative  
23 provides equivalent or better protection to fresh  
24 water, public health, and the environment"?

25 COMMISSIONER BLOOM: I don't think we -- I

1 don't know that we can.

2 COMMISSIONER BALCH: Well, I think  
3 Mr. Smith just said that at least for mining  
4 reclamation and BLM, that if you had a more  
5 stringent state regulation that we would follow  
6 that.

7 CHAIRPERSON BAILEY: So it doesn't hurt to  
8 include that language, does it? Does it --

9 MR. SMITH: Well, to the extent -- to the  
10 extent the law governing the oil patch is different  
11 from the law governing mining, you might be stepping  
12 on some toes.

13 COMMISSIONER BLOOM: Then the OCD employee  
14 that's reading through this could say, well, I'm not  
15 going to allow you to revegetate and reclaim to BLM  
16 standards because I don't think it's --

17 COMMISSIONER BALCH: It's not as good as  
18 ours.

19 COMMISSIONER BLOOM: -- protective, yes.  
20 I mean --

21 MR. SMITH: We could try it.

22 COMMISSIONER BLOOM: -- I don't know if we  
23 could do it.

24 MR. SMITH: And at that point --

25 CHAIRPERSON BAILEY: Well, we don't have

1 an MOU with BLM at this point either.

2 MR. SMITH: At that point it would be  
3 worked out, I would assume --

4 CHAIRPERSON BAILEY: Yeah. We try not  
5 to --

6 MR. SMITH: -- between OCD and BLM.

7 CHAIRPERSON BAILEY: We do our best not to  
8 provide conflicting requirements.

9 COMMISSIONER BALCH: So the real goal is  
10 just to make sure that we don't have a thousand  
11 variances being sought.

12 CHAIRPERSON BAILEY: Yes.

13 COMMISSIONER BALCH: So I think the  
14 language the way it is now, to remove one of the two  
15 at the end of the second line would be reflective of  
16 that.

17 COMMISSIONER BLOOM: Do we want to call  
18 this other requirements or something?

19 COMMISSIONER BALCH: Other regulatory  
20 requirements. I don't think "contractual" belongs  
21 in there either.

22 COMMISSIONER BLOOM: No, not anymore.  
23 That was related to surface owner.

24 CHAIRPERSON BAILEY: Okay. So the title  
25 of (4) --

1 MR. SMITH: You know, I think that you can  
2 add your provided -- the proviso that you were  
3 talking about, Commissioner Balch. As I appreciate  
4 your obligation to protect the environment, it is  
5 not simply to protect the environment for a  
6 particular landowner, it is to protect the  
7 environment.

8 CHAIRPERSON BAILEY: Okay.

9 COMMISSIONER BALCH: All right. We still  
10 need to change the language up here.

11 CHAIRPERSON BAILEY: Yes. In title (4),  
12 replace the word "alternative" with "other." Remove  
13 the words "or contractual." At the end of that  
14 paragraph, at the end of "provisions," put a comma,  
15 "provided the alternative requirements" --

16 COMMISSIONER BALCH: Other requirements.

17 CHAIRPERSON BAILEY: Oh. "Provided the  
18 other requirements," I'm sorry, "provide equal or  
19 better" --

20 COMMISSIONER BALCH: I think we've used  
21 "equivalent," right?

22 CHAIRPERSON BAILEY: Did we use  
23 "equivalent"?

24 COMMISSIONER BALCH: Didn't we use  
25 "equivalent or better"? As long as we're

1 consistent, in the end, it doesn't matter.

2 CHAIRPERSON BAILEY: "Provide equal or  
3 better protection of fresh water, human -- public  
4 health, and the environment."

5 Okay. Are we happy with that paragraph,  
6 then?

7 COMMISSIONER BALCH: "Happy" might be a  
8 stretch, but... It's the most innocuous  
9 paragraph --

10 COMMISSIONER BLOOM: Do we need  
11 "applicable" in there?

12 COMMISSIONER BALCH: Yes, I think we do,  
13 because it may not be just BLM. It could be  
14 something else.

15 CHAIRPERSON BAILEY: It could be EPA  
16 trying to do something.

17 COMMISSIONER BALCH: It could be an EPA  
18 regulatory agency or it could be any number of -- it  
19 could be a tribal agency.

20 COMMISSIONER BLOOM: But they would still  
21 be applicable by definition.

22 CHAIRPERSON BAILEY: But we have narrowed  
23 it to those agencies that are managing the land.

24 COMMISSIONER BLOOM: Yeah. I don't think  
25 we need "applicable."

1           CHAIRPERSON BAILEY: But it could be NRC  
2 on BLM land.

3           Okay. Why don't we look at the proposed  
4 crossed-out language just below, to ensure that we  
5 can cross that out while we are in this area.

6           COMMISSIONER BLOOM: Yes. There's  
7 actually something down there that might make sense  
8 to include up above. And that was --

9           COMMISSIONER BALCH: Let's just go through  
10 it line by line.

11          COMMISSIONER BLOOM: Yeah.

12          COMMISSIONER BALCH: We have replaced --  
13 substantially replaced revegetation with reclamation  
14 and revegetation in (3).

15          COMMISSIONER BLOOM: We can get rid of  
16 that.

17          CHAIRPERSON BAILEY: Okay.

18          COMMISSIONER BALCH: And instead of having  
19 specific requirements we have, instead, imposed a  
20 life-form ratio and surface cover. So I think...

21          CHAIRPERSON BAILEY: We can get rid of  
22 paragraphs (1) and (2), then.

23          COMMISSIONER BALCH: Yes.

24          COMMISSIONER BLOOM: Is (3) implicit in  
25 what we created above?

1 COMMISSIONER BALCH: Well, you don't have  
2 70 percent cover until you successfully --

3 COMMISSIONER BLOOM: You're not successful  
4 until you have 70 percent coverage?

5 COMMISSIONER BALCH: Right.

6 CHAIRPERSON BAILEY: True.

7 COMMISSIONER BALCH: So (3) can go.

8 And we have also said in the first  
9 appropriate growing season, so (4) is also now --

10 CHAIRPERSON BAILEY: The first favorable  
11 growing season, so that covers any problem with  
12 drought. So we can eliminate (4).

13 And (5) is notification of division when  
14 it has successfully achieved vegetation.

15 COMMISSIONER BALCH: Right. And I think  
16 that that may be...

17 COMMISSIONER BLOOM: Maybe up above in  
18 what is (c) we would need to add something about  
19 notification and the ratios.

20 COMMISSIONER BALCH: I think you don't  
21 want notification every time you are seeding.

22 Dr. Buchanan presented a scenario where  
23 you might go out and do your contour and your  
24 geomorphology, and then a month or so later when  
25 it's getting ready to start raining, you would plant

1 your seeds, and then you plant your forbs in March,  
2 and so on and so forth. But do you really want a  
3 notification every time they plant a seed?

4 CHAIRPERSON BAILEY: Why don't we change  
5 that to "the operator shall notify the division when  
6 reclamation is complete," and that reflects the  
7 language of (c).

8 And what are we going to do with it if  
9 they notify us?

10 COMMISSIONER BLOOM: Exactly. That's what  
11 I was --

12 CHAIRPERSON BAILEY: What difference -- I  
13 mean...

14 COMMISSIONER BLOOM: Yeah. They'll notify  
15 the division when --

16 COMMISSIONER BALCH: When reclamation and  
17 revegetation is complete.

18 CHAIRPERSON BAILEY: Right.

19 COMMISSIONER BLOOM: Notify for inspection  
20 or...

21 CHAIRPERSON BAILEY: Yeah. What are we  
22 going to do?

23 COMMISSIONER BALCH: Well, that's the next  
24 question.

25 COMMISSIONER BLOOM: Maybe when these

1 conditions are met the operator shall notify the  
2 division for final signoff or certification or...

3 COMMISSIONER BALCH: What happens when  
4 they are done with reclamation? Is there some  
5 certification letter that's put on file somewhere?

6 CHAIRPERSON BAILEY: Not that we have  
7 written in here, no.

8 COMMISSIONER BALCH: You know, I think  
9 there was discussion or testimony about -- I think  
10 it was in cross-examination of Dr. Buchanan. So you  
11 go and you reclaim the site, and then two months  
12 later it's failed.

13 CHAIRPERSON BAILEY: I know where this is  
14 useful. It's for bond release.

15 COMMISSIONER BALCH: For bond release?

16 CHAIRPERSON BAILEY: Yeah. Because in  
17 some areas that would be the condition for bond  
18 release. So the operator shall notify the division  
19 when reclamation and revegetation are complete.

20 COMMISSIONER BALCH: And we're calling it  
21 reclamation and revegetation.

22 CHAIRPERSON BAILEY: And revegetation are  
23 complete.

24 COMMISSIONER BLOOM: The bond may be  
25 released when --

1                   CHAIRPERSON BAILEY: Well, we don't even  
2 have to say that. That's just what would happen.  
3 That's why we would want to be notified.

4                   COMMISSIONER BALCH: And presuming where  
5 there would be some inspections of that for the  
6 release of the bond.

7                   CHAIRPERSON BAILEY: Yes.

8                   And that sentence could become the last  
9 sentence of (c) up above.

10                  COMMISSIONER BALCH: Or (d), in Section  
11 (3), if you wanted to have it -- if we put it into  
12 (3) or (c) of (3), then it cuts specifically to  
13 that.

14                  It excludes the other regulatory  
15 requirements? Maybe you want to have it as a (5),  
16 so it would cover all reclamation revegetation.

17                  CHAIRPERSON BAILEY: So it would be at the  
18 end of (5) (c).

19                  COMMISSIONER BALCH: Well, it will become  
20 (5).

21                  CHAIRPERSON BAILEY: Okay. Before you  
22 move it, though, you will want to delete the  
23 language in there that should be deleted, as in  
24 after the word "complete," you would have that  
25 deletion.

1 Yes. Now it can be moved up to the end of  
2 (c).

3 COMMISSIONER BLOOM: I think Commissioner  
4 Balch and I were thinking it might actually remain  
5 as (5) down below, and that perhaps --

6 COMMISSIONER BALCH: Even if there was  
7 another regulatory requirement and a different  
8 reclamation, the division would still want to know  
9 when it was complete, right?

10 CHAIRPERSON BAILEY: Oh, now I see. Okay.

11 COMMISSIONER BALCH: So I think you'd  
12 still want to have --

13 CHAIRPERSON BAILEY: Okay. Nevermind.

14 COMMISSIONER BALCH: If you control Z a  
15 couple of times it will probably fix itself.

16 There you go.

17 CHAIRPERSON BAILEY: Let's take a break.

18 Why don't we come back at 10 till.

19 (A recess was taken from 2:37 p.m. to 2:52  
20 p.m.)

21 CHAIRPERSON BAILEY: Commissioner Bloom,  
22 we talked about marking a pit location with a steel  
23 marker, but we didn't actually include it in any  
24 part of what we covered this afternoon.

25 I was looking at D, "Closure Report, for a

1 logical place to put any requirement that we may  
2 choose, if we choose.

3 COMMISSIONER BLOOM: I think that happened  
4 when we failed to -- or we stopped going through the  
5 proposed deletions, correct?

6 CHAIRPERSON BAILEY: Yes.

7 COMMISSIONER BALCH: I think D (3) could  
8 specify that segment.

9 CHAIRPERSON BAILEY: That's exactly what I  
10 was going to propose.

11 On page 30 of the pages and pages of  
12 deleted language, so that would be old F (1) (d),  
13 that begins with: "The operator shall place a steel  
14 marker at the center of the on-site burial."

15 Have you found where I'm talking?

16 COMMISSIONER BLOOM: Yes.

17 CHAIRPERSON BAILEY: "The steel marker  
18 shall be not less than 4 inches," et cetera,  
19 et cetera, et cetera.

20 We could, if the commission chooses, copy  
21 that paragraph and insert it as D (3) under "Closure  
22 Report," so that on-site burials would be marked not  
23 only in C-105, but also with a steel marker.

24 COMMISSIONER BLOOM: We don't need  
25 anything below that, do we?

1 CHAIRPERSON BAILEY: Well, because we  
2 already have that in D (1).

3 COMMISSIONER BLOOM: Right.

4 CHAIRPERSON BAILEY: Yes.

5 COMMISSIONER BLOOM: Yeah. So we could  
6 take that down and cut it out there.

7 CHAIRPERSON BAILEY: Yes. Copy it and put  
8 it under D, as D (3) in Section 13 that we have been  
9 working with.

10 Do we all agree?

11 COMMISSIONER BALCH: The only thing that  
12 tickles the back of my mind on this, as I recall,  
13 somebody at some point -- not in the hearing, it was  
14 outside of this -- noting that there was some  
15 constraint on how high aboveground we could have  
16 things because of the --

17 COMMISSIONER BLOOM: For the lesser  
18 prairie chicken habitat and things like that.

19 COMMISSIONER BALCH: Yeah, something like  
20 that. I don't know if they --

21 CHAIRPERSON BAILEY: Well, (c) is the same  
22 as the -- that 4 feet is the same as the plugging  
23 requirement for a well.

24 COMMISSIONER BALCH: Okay. I'm presuming  
25 that's going to be --

1                   COMMISSIONER BLOOM: Fencing -- cattle  
2 fencing as well.

3                   CHAIRPERSON BAILEY: Uh-huh.

4                   COMMISSIONER BALCH: Okay. No conflict  
5 with something else structural.

6                   CHAIRPERSON BAILEY: Not that we're aware  
7 of.

8                   COMMISSIONER BLOOM: I guess a variance  
9 could be sought if --

10                  COMMISSIONER BALCH: We just don't --  
11 again, you just don't want to --

12                  COMMISSIONER BLOOM: -- if somebody was  
13 trying to comply with the CCA, for example.

14                  COMMISSIONER BALCH: You don't want to  
15 have someone --

16                  COMMISSIONER BLOOM: That's an important  
17 consideration.

18                  CHAIRPERSON BAILEY: Or if there's an  
19 irrigation problem with the pipe 4 feet above the  
20 ground interfering with an irrigation system.  
21 That's another area where a variance may be  
22 necessary.

23                  Okay. Now we have come to Table I, unless  
24 we want to go back and talk about other areas that  
25 we put off.

1                   COMMISSIONER BALCH: I think what we could  
2 do --

3                   COMMISSIONER BLOOM: I think that  
4 probably --

5                   CHAIRPERSON BAILEY: But I think a lot of  
6 what we put off is predicated on Table I.

7                   I would propose that we add another  
8 category to Table I that would apply to all depths  
9 of groundwater, and from the surface to 4 feet below  
10 the surface of the ground, which is the rooting zone  
11 and topsoil for revegetation.

12                  I propose this because all of the  
13 testimony and -- has been predicated on the  
14 revegetation requirement in order to prevent  
15 downward migration of salts.

16                  So to me, and also with Dr. Neeper's  
17 testimony on page 1,295, where I asked him what the  
18 limit he recommended to be for chlorides at the  
19 surface for revegetation.

20                  And on line 12 on page 1,295 I asked if he  
21 was recommending no more than 600 milligram per  
22 kilogram of chloride within the top 4 feet of the  
23 surface.

24                  And he responded:

25                  "That's what I would recommend. If you

1 made it 700, it would be fine for the surface waste  
2 facilities. I think they put up to a thousand at  
3 one point. I think that's pushing it, but that's  
4 the region in which I would put it. That 600 might  
5 really be 700 for the equivalent of EC4," which is  
6 the limit he set for revegetation.

7 So we have several different values that  
8 we could put for chlorides.

9 COMMISSIONER BLOOM: What was the initial  
10 one he said?

11 CHAIRPERSON BAILEY: The initial one he  
12 said was 600, and that's what he recommends.

13 COMMISSIONER BLOOM: Milligrams per  
14 kilogram?

15 CHAIRPERSON BAILEY: Yes.

16 COMMISSIONER BALCH: At the surface.

17 CHAIRPERSON BAILEY: At the surface.

18 He also said 700 would be fine for surface  
19 waste facilities.

20 COMMISSIONER BLOOM: That's interesting,  
21 because I thought he testified to a near sterilizing  
22 effect at 450.

23 CHAIRPERSON BAILEY: This is on  
24 page 1,295, lines 12 through 23.

25 He had testified that the EC4 was about

1 equivalent to 600 milligrams per kilogram, and that  
2 was the limit he recommends.

3           So when we are looking at Table I, we  
4 could move that block that says "Depth to  
5 Groundwater" down a row. We would be adding a row  
6 only for that block and establishing, at the top of  
7 that table, "Constituent, Chloride; Method, EPA  
8 300.1; Limit," 600 or 700, whatever we choose here,  
9 for that area which is from the surface to 4 feet  
10 below the surface of ground.

11           COMMISSIONER BALCH: I'm starting to  
12 wonder if we might need to have two tables, because  
13 most of the criteria in the rest of this table have  
14 to do with on-site burial.

15           CHAIRPERSON BAILEY: Uh-huh.

16           COMMISSIONER BALCH: Whereas, chlorides at  
17 the surface would apply to pretty much all  
18 situations.

19           CHAIRPERSON BAILEY: All situations, yes.

20           COMMISSIONER BALCH: So maybe we don't  
21 need a table if we could just include it in the text  
22 appropriately for that scenario.

23           CHAIRPERSON BAILEY: We have so many  
24 different locations where we talk about closure of  
25 pits in this area and closure of drying pads in that

1 area, we need to have one global comment, or  
2 statement.

3 COMMISSIONER BALCH: One place where it's  
4 clear.

5 CHAIRPERSON BAILEY: Yes.

6 COMMISSIONER BALCH: But I don't know if  
7 adding it to this table does that.

8 CHAIRPERSON BAILEY: Well --

9 COMMISSIONER BALCH: You could have a  
10 separate -- you could have a truncated Table I in  
11 the original proposal that addressed the scenario  
12 that you are talking about, and that would cover --  
13 that would cover any surface condition after  
14 remediation or reclamation.

15 CHAIRPERSON BAILEY: For reclamation.

16 COMMISSIONER BALCH: For reclamation.

17 CHAIRPERSON BAILEY: In order to have  
18 reclamation, the surface down to 4 feet can be no  
19 more than 700 milligrams.

20 COMMISSIONER BALCH: So when we were  
21 talking about reclamation in the text, when we are  
22 describing that earthen uncontaminated material,  
23 could we not just put in the criteria of less than  
24 600 milligrams of chloride?

25 CHAIRPERSON BAILEY: So you are talking

1 about F: "Reclamation of pit locations, on-site  
2 burial locations, and drying pad locations"?

3 COMMISSIONER BALCH: Yes.

4 CHAIRPERSON BAILEY: That doesn't talk  
5 about below-grade tanks.

6 COMMISSIONER BALCH: Well, we could also  
7 add the same language to the section on below-grade  
8 tanks, or we could add a separate small table that  
9 would -- both of those sections would point to.

10 But if the only thing it's saying is  
11 600 milligrams of chloride or less, then I'm not  
12 sure it's important as a table.

13 CHAIRPERSON BAILEY: Okay. What we could  
14 do is at F, instead of going from the title of F  
15 into site contouring --

16 COMMISSIONER BLOOM: What page are we on  
17 now?

18 CHAIRPERSON BAILEY: Page 36.  
19 We could put it before --

20 COMMISSIONER BALCH: We could just put as  
21 a new (1) --

22 CHAIRPERSON BAILEY: Uh-huh.

23 COMMISSIONER BALCH: -- and then renumber  
24 everything from there.

25 Let's see. Where do we talk about the

1 4-foot of material?

2 CHAIRPERSON BAILEY: In "Soil cover  
3 designs."

4 COMMISSIONER BALCH: That is in F also?

5 CHAIRPERSON BAILEY: Yes. That's F (2).

6 COMMISSIONER BALCH: Okay. (F) (2).

7 CHAIRPERSON BAILEY: For drying pads. And  
8 then for pits, that could be --

9 COMMISSIONER BALCH: If we only really  
10 need to refer to it in one or two places, it might  
11 not warrant a table.

12 CHAIRPERSON BAILEY: Uh-huh.

13 COMMISSIONER BALCH: And we could put it  
14 here, instead of saying "to the concentration  
15 specified by in closure of Table I," you replace  
16 that language with the limit, whatever we establish  
17 that to be.

18 And then I think that there was -- also,  
19 we would want to do it in (3).

20 CHAIRPERSON BAILEY: Which deals with  
21 pits, tanks, and on-site --

22 COMMISSIONER BALCH: And here you could  
23 just say "a minimum of 4 feet of  
24 non-waste-containing uncontaminated earthen material  
25 with chlorides."

1                   CHAIRPERSON BAILEY: "With chloride  
2 concentration."

3                   COMMISSIONER BALCH: -- "concentrations  
4 less than" --

5                   CHAIRPERSON BAILEY: "Less than 600  
6 milligrams per kilogram."

7                   COMMISSIONER BALCH: I would be  
8 comfortable with that.

9                   CHAIRPERSON BAILEY: Okay. Let's go ahead  
10 and put it in both of those areas.

11                   COMMISSIONER BALCH: Would you be all  
12 right with that, Mr. Bloom?

13                   COMMISSIONER BLOOM: Yes.

14                   In going back and reviewing the section of  
15 testimony -- and it was actually Dr. Neeper saying  
16 that a recovered site -- and he was doing some  
17 sampling and found areas where there were chlorides  
18 that were 2- to 4,000 and nothing was growing there.  
19 But he said that some things could survive. He  
20 found grass growing in areas where there was  
21 chlorides up to 400. So...

22                   COMMISSIONER BALCH: And apparently 700 is  
23 an appropriate standard for other types of waste  
24 facilities, so this is a little more conservative  
25 than that.

1 CHAIRPERSON BAILEY: That's 600 milligrams  
2 per kilogram.

3 COMMISSIONER BLOOM: MG over KG.

4 CHAIRPERSON BAILEY: Okay. And that also  
5 goes up above. Yes.

6 COMMISSIONER BALCH: And then you can  
7 delete the -- after the "milligrams per kilogram,"  
8 down to the "shall." You can say "and shall consist  
9 of."

10 Would that work?

11 CHAIRPERSON BAILEY: That works for me.  
12 And that will ensure that we can have revegetation  
13 of the surface, which is one of the bases for  
14 allowing the on-site closure to begin with.

15 COMMISSIONER BALCH: All right.

16 So now back to Table I.

17 CHAIRPERSON BAILEY: Yes. We --

18 MR. SMITH: But do you -- I'm sorry.

19 Do you want the word "and" after your  
20 citation to 600 milligrams per kilogram or do you  
21 want a comma there?

22 COMMISSIONER BALCH: Well, you are  
23 describing what the thickness has to be, and then  
24 you are describing what the chloride content of the  
25 material that you are covering can be at its

1 greatest amount. So they are really two separate  
2 components of the criteria.

3 CHAIRPERSON BAILEY: Yes, but is also an  
4 insertion after --

5 COMMISSIONER BLOOM: I'm having trouble  
6 reading that and making sense of it.

7 MR. SMITH: Well, you -- well, you -- I  
8 mean if you omit some of the interjected clauses,  
9 the basic function of this sentence is to say that  
10 the soil cover for closures shall consist of, is  
11 that right, and everything in between is  
12 describing...

13 COMMISSIONER BALCH: So you're thinking  
14 make a subparagraph (a) that would have the chloride  
15 limit, pull that out of the middle there?

16 MR. SMITH: No. If I understand what  
17 you're getting at here, I would think -- I would  
18 think that you would remove the "and" after  
19 "milligrams per kilogram," and put in a comma, so  
20 that the "shall" goes back to soil cover for  
21 closures.

22 COMMISSIONER BALCH: Why don't we try  
23 that.

24 MR. SMITH: And everything after  
25 "closures," the "where the operator has removed,"

1 down to "600 milligrams per kilogram" is really  
2 modifying the word -- the phrase "soil cover for  
3 closures," right?

4 COMMISSIONER BALCH: I think that's pretty  
5 clear.

6 MR. SMITH: Okay. Okay.

7 COMMISSIONER BLOOM: Yes. That makes  
8 sense to me now.

9 CHAIRPERSON BAILEY: Well, the phrase in  
10 there "to establish vegetation at the site" seems to  
11 be in the wrong place.

12 COMMISSIONER BALCH: This is soil design.  
13 I don't know if we actually need to explicitly state  
14 "to establish vegetation at the site." That's  
15 covered in later sections.

16 CHAIRPERSON BAILEY: We could delete those  
17 words and maybe remove some confusion. "Shall  
18 consist of the background thickness of topsoil or 1  
19 foot of suitable material, whichever is greater."

20 I think that makes sense now.

21 COMMISSIONER BLOOM: Yes.

22 CHAIRPERSON BAILEY: Are we in agreement?

23 COMMISSIONER BALCH: Yes.

24 CHAIRPERSON BAILEY: Okay. Now, to

25 Table I.

1           No matter what value we put on chloride at  
2 the very first category, that needs to change from  
3 milligram per liter to milligram per kilogram, the  
4 same there and in the category below.

5           COMMISSIONER BALCH: Now, was that a typo?

6           CHAIRPERSON BAILEY: Yes, it certainly has  
7 to be, because everything else is milligram to  
8 kilogram.

9           COMMISSIONER BALCH: Because we're talking  
10 about dry material.

11          CHAIRPERSON BAILEY: And we're talking  
12 about soils, yes.

13          COMMISSIONER BALCH: Okay.

14          CHAIRPERSON BAILEY: So --

15          COMMISSIONER BALCH: Unless that EPA 300.1  
16 test saturates the material. I don't know.

17          CHAIRPERSON BAILEY: Well, we are talking  
18 waste.

19          COMMISSIONER BALCH: Okay.

20          CHAIRPERSON BAILEY: Okay. Now, we can  
21 talk about what the values are.

22          COMMISSIONER BLOOM: I'm sorry. In the  
23 upper left-hand corner, I think that should still be  
24 liters there, because that's the groundwater  
25 where --

1 CHAIRPERSON BAILEY: Uh-huh.

2 COMMISSIONER BLOOM: Right?

3 CHAIRPERSON BAILEY: Yes. We're talking  
4 water there.

5 COMMISSIONER BLOOM: That's still liters.

6 CHAIRPERSON BAILEY: Should we work with  
7 the title?

8 COMMISSIONER BALCH: Well, let's fix the  
9 title first.

10 COMMISSIONER BLOOM: These wastes may not  
11 be necessarily left in place.

12 COMMISSIONER BALCH: Well, it may not  
13 necessarily --

14 CHAIRPERSON BAILEY: It's temporary pits.

15 COMMISSIONER BALCH: Yeah. The purpose of  
16 the table, the way we work around to it, is to  
17 define limits at which point you could then apply  
18 cover and reclamation.

19 So you could, in one instance, look at  
20 this table after testing the -- below your removed  
21 below-grade tanks, you cross-reference your depth to  
22 groundwater, and then look to see if -- your  
23 five-point test -- to see if you're at the limit or  
24 not.

25 The other case would be you might actually

1 have material left on site that you have stabilized  
2 and mixed, whatever, and then you do the same thing.

3 So we don't want to necessarily say "for  
4 waste left in place," in the title. It could just  
5 be closure criteria.

6 CHAIRPERSON BAILEY: It works for me. It  
7 makes it pretty broad. And that way, it also --

8 COMMISSIONER BALCH: It applies to every  
9 situation you have referenced this table to, yes.

10 COMMISSIONER BLOOM: Yes.

11 CHAIRPERSON BAILEY: Okay. So let's  
12 delete that language.

13 COMMISSIONER BALCH: Okay. Do you want to  
14 work down the depth table?

15 CHAIRPERSON BAILEY: Yes. I think we  
16 should just start on the top and work on down.

17 COMMISSIONER BALCH: All of the witnesses  
18 for NMOGA that referenced this table were asked  
19 under their direct examination whether these limits  
20 were protective, and they all said yes.

21 IPANM did not directly address this table.  
22 However Mr. Mullins, under examination about his  
23 model criteria, said that in his model criteria,  
24 where they were different from previous models,  
25 reflected the values in this table. So that's --

1 the relevancy of his models are designed around this  
2 table.

3 CHAIRPERSON BAILEY: And he modeled at  
4 25 feet below the bottom of the trench.

5 COMMISSIONER BALCH: So this was the most  
6 conservative case.

7 In his examination he referred to IPANM  
8 Exhibit 13, which is a soil and groundwater research  
9 bulletin, non-aqueous phase liquid mobility and  
10 limits of the soil.

11 He testified that all of the limits on  
12 this table were well below limits established in  
13 this document as well.

14 So I just wanted to throw that out as kind  
15 of a broad background of where and how appropriate  
16 these levels might be. So if you are looking in --  
17 it's on page 3 of Exhibit 13 of IPANM. It has a  
18 table, and it has benzene in gasoline and diesel  
19 range organics.

20 And chlorides, of course, we have  
21 discussed extensively elsewhere.

22 CHAIRPERSON BAILEY: Page 3 of Exhibit 13,  
23 IPANM?

24 COMMISSIONER BALCH: Yes.

25 A good example of that is the benzene

1 limit is 53,000, and in every category here it's 10.  
2 But that was the specific discussion that occurred  
3 in the testimony, so I wanted to present that.

4 CHAIRPERSON BAILEY: Recurrent benzene  
5 limits.

6 COMMISSIONER BLOOM: 0.2 milligrams per  
7 kilogram?

8 CHAIRPERSON BAILEY: Yes.

9 COMMISSIONER BALCH: Yes.

10 CHAIRPERSON BAILEY: Which is a far cry  
11 from 10, much less 53,000.

12 COMMISSIONER BALCH: Well, it's 20 times  
13 greater.

14 CHAIRPERSON BAILEY: 50 times.

15 COMMISSIONER BALCH: It's many, many more  
16 times.

17 CHAIRPERSON BAILEY: Yes.

18 COMMISSIONER BALCH: Several orders of  
19 magnitude.

20 CHAIRPERSON BAILEY: Exactly.

21 COMMISSIONER BALCH: Well, okay. Let's  
22 maybe talk a little bit more about the structure of  
23 the table.

24 For BTEX and benzene, those limits don't  
25 change regardless of the depth. So all we have to

1 really do is decide if the limits are appropriate.  
2 TPH does increase with depth, and chloride increases  
3 with depth to groundwater.

4 Dr. Thomas, under cross-examination, said  
5 that a hundred or a thousand milligrams per kilogram  
6 of benzene would be protective for on-site disposal  
7 in unsaturated materials.

8 A hundred or a thousand are greater than  
9 10 and greater than .2. They're also -- it's also  
10 well less than 53,000.

11 CHAIRPERSON BAILEY: Uh-huh.

12 COMMISSIONER BALCH: So we have quite a  
13 range of values that were presented to us. These  
14 are the values that were put into the table, and I  
15 think that there was some testimony to the effect  
16 that these were safe values that would allow  
17 operational flexibility.

18 CHAIRPERSON BAILEY: I don't recall that  
19 there was any conflicting testimony put on by either  
20 citizens for clean air and water or through OGAP, as  
21 far as the level for benzene.

22 There was conflicting presentations on  
23 chlorides, but I don't recall that there was any  
24 argument against the levels that were recommended in  
25 this table for benzene.

1           COMMISSIONER BALCH: I don't recall any  
2 either. And that is also why I did some research on  
3 my own. And I think I have discussed that already  
4 during our deliberations. That when you pump gas  
5 you can be exposed to 20 milligrams of benzene.  
6 That was actually from Dr. Thomas' testimony.

7           Benzene is a risk in the liquid phase. It  
8 can transport great distances through water in a  
9 liquid phase.

10           In soil, benzene degrades pretty quickly.  
11 So you are looking, really, at those degraded  
12 components going up through the soil or venting into  
13 the atmosphere before you bury it, as the vector.

14           And a lot of these vectors for benzene,  
15 BTEX, and TPH were not really discussed, except for  
16 in the context of witnesses being asked if they were  
17 protective limits, which they always said yes.

18           And then Mr. Mullins pointed to the  
19 document Exhibit 13.

20           CHAIRPERSON BAILEY: And I can resolve  
21 this, that BTEX and benzene are aromatic  
22 hydrocarbons that oxidize, given appropriate  
23 remediation. Stripping is one of the techniques for  
24 remediation.

25           If they are found at 25 feet below the

1 bottom of the trench, then the exposure is limited  
2 to its concentration in groundwater movements.

3 COMMISSIONER BALCH: Well, first of all,  
4 it has to be -- it has to be there, and it's not  
5 necessarily stable in soil.

6 So you would have to have -- again, I  
7 think this really comes back to benzene in a pit is  
8 dangerous during the operational phase.

9 CHAIRPERSON BAILEY: Because the contact  
10 is --

11 COMMISSIONER BALCH: Because it's in  
12 fluid. And if you had a release you would have  
13 greater infiltration than you would have if it was  
14 stabilized and then buried.

15 CHAIRPERSON BAILEY: And the impact to  
16 public health is higher at -- during the operational  
17 phase than it is during the burial phase of the  
18 reclamation.

19 COMMISSIONER BALCH: We established that  
20 weekly inspection and a two-day response by  
21 operators that would -- that allowed us to adopt  
22 siting criteria, not just for low chloride, but for  
23 any chlorides. Some of it can be kept from the  
24 previous Rule 17. The response time was attributed  
25 as to the greatest offense, and I think we have

1 established a protective response time.

2           Once you mix the benzene and BTEX  
3 aromatics in the soil and stabilize them, you are  
4 going to accelerate degradation and they are going  
5 to be isolated from the water table.

6           Chloride transport in a downward direction  
7 were estimated to be processes -- estimated by  
8 Dr. Buchanan to be processes that occurred over a  
9 thousand years, and then modeled in two different  
10 ways, which we have discussed, one which I  
11 characterized as more of a -- of a worst-case  
12 scenario, and one which is more a representative  
13 scenario.

14           Chloride was also discussed quite a bit in  
15 testimony as being a marker. If you saw the  
16 chlorides you could see the other stuff, in theory.  
17 There wasn't a lot of discussion about transport of  
18 benzene or BTEX or any of your gasoline or diesel  
19 range organics.

20           How is benzene going to get into a pit  
21 fluid, might be the question to ask.

22           CHAIRPERSON BAILEY: A multi-well fluid  
23 management pit is going to have benzene.

24           COMMISSIONER BALCH: But that's going to  
25 be completely removed.

1 CHAIRPERSON BAILEY: That is right. Any  
2 kind of stimulation fluid, even in a temporary pit,  
3 would be the source of a waste in place.

4 COMMISSIONER BALCH: And that would be  
5 similar for BTEX. That could be chloride.

6 CHAIRPERSON BAILEY: Right.

7 COMMISSIONER BALCH: And the gasoline  
8 range and diesel range organics?

9 CHAIRPERSON BAILEY: I do believe so.

10 COMMISSIONER BALCH: Similar.

11 COMMISSIONER BLOOM: Benzene is a corral,  
12 yeah.

13 COMMISSIONER BALCH: Yeah.

14 So to me, the greatest level of protection  
15 you want to have during the operational phase, and I  
16 think we have done as good as you can without having  
17 somebody sit there and watch the pit 24 hours a day  
18 and limiting transport risk.

19 And then there's also the spillover, which  
20 takes up if there's a more catastrophic failure of  
21 some system.

22 CHAIRPERSON BAILEY: I hear justification  
23 for the levels of BTEX and benzene in both 25 feet  
24 below the surface of the bottom of the trench or pit  
25 and 51 to 100 feet below the bottom of the trench or

1 pit.

2 COMMISSIONER BALCH: They do increase  
3 the -- the only thing that increases going downward  
4 is chloride and TPH. Basically, the further  
5 transport distance you have the lower the risk of  
6 contamination of chlorides. That's pretty obvious.

7 The TPH, I think, is going to become very  
8 stable in the waste material.

9 CHAIRPERSON BAILEY: It oxidizes and  
10 degrades.

11 COMMISSIONER BALCH: Yes. So the  
12 long-term concern of having these components in  
13 buried waste is really in two directions. You have  
14 a direction down, where it's --

15 CHAIRPERSON BAILEY: It can impact fresh  
16 water.

17 COMMISSIONER BALCH: -- it can impact  
18 groundwater.

19 I think -- I think it's going to be  
20 reasonably protective, and the chloride modeling  
21 showed that those are long-term processes.

22 And I don't think that TPH, BTEX, and  
23 benzene are as long-lived -- and certainly not as  
24 long-lived as chloride. But they are not long-lived  
25 enough to impact groundwater on the scales of time

1 that chloride transport through the soil appears to  
2 be occurring, both from the physical evidence  
3 presented in the pit examples of Dr. Buchanan and  
4 Dr. Neeper, but also in the modeling.

5 CHAIRPERSON BAILEY: Physical and chemical  
6 reactions within burial would, over time, eliminate  
7 TPH, BTEX, and benzene.

8 COMMISSIONER BALCH: So the next question  
9 is impact upwards. And that was discussed much less  
10 in regards to BTEX, benzene, and TPH. It was  
11 discussed with chlorides.

12 Dr. Buchanan, in his testimony, said that  
13 he'd looked at over 6,000 soil profiles and examined  
14 over 8,000 soil samples. And he was pretty adamant  
15 that it was hard to move those salts up by more  
16 than, say, 6 to 12 inches, and usually much less  
17 than 6 would be where the concentrations would  
18 occur. So chloride upper movement is probably  
19 relatively safe.

20 CHAIRPERSON BAILEY: Particularly when we  
21 have it protected by 4 feet of uncontaminated soil  
22 with -- what was it -- 600 milligrams or less.

23 COMMISSIONER BALCH: And benzene is not  
24 toxic to plants. BTEX and TPH, I think, could be.

25 But again, it's how long are they exposed

1 and how long before this material degrades.

2 And we did not get a lot of direct  
3 testimony, except for the various experts were asked  
4 if this was detected.

5 And then Mr. Mullins referenced to the  
6 Exhibit 13 soil and groundwater research bulletin,  
7 non-aqueous phase liquid mobility and limits of the  
8 soil. And their limits were all much higher than  
9 what was presented here for BTEX, TPH, and benzene.

10 CHAIRPERSON BAILEY: I believe we have  
11 enough testimony in the record to be able to accept  
12 at least those concentrations for TPH, BTEX, and  
13 benzene.

14 Do you agree?

15 COMMISSIONER BLOOM: On benzene, I will  
16 point out that we didn't see modeling of benzene  
17 transport.

18 COMMISSIONER BALCH: No.

19 COMMISSIONER BLOOM: And Dr. Thomas, he  
20 spoke about benzene and how to slide the NMOGA to  
21 1115, pointing out that benzene is a bone marrow  
22 poison and a carcinogen, and although present in the  
23 pits at low concentration, many regulatory agencies  
24 consider any exposure to a carcinogen to be  
25 unacceptable, so that -- that causes me some

1 concern.

2           Again, I am looking for cost/benefit. I'm  
3 looking for a bit of a cost/benefit analysis here,  
4 and I didn't see either. I don't know how an  
5 industry operator would be gaining by increasing the  
6 benzene levels 50-fold.

7           We didn't hear testimony about what a  
8 typical benzene level is in pits around New Mexico.

9           I also don't support the change because I  
10 haven't seen a compound risk analysis. And one of  
11 the things we are doing -- we would be doing is  
12 increasing benzene 50-fold, decreasing the distance  
13 to groundwater by up to 50 percent, reducing the  
14 distance to surface water horizontally by a third,  
15 and having liners potentially in the field almost  
16 twice as long as they were in temporary pits  
17 previously.

18           So I think that the risk is actually  
19 changing in kind of a multiplier effect there. It's  
20 just one on top of the other.

21           COMMISSIONER BALCH: We discussed this on  
22 Monday. We were talking about benzene, and I can't  
23 remember the context. But I think I pointed to that  
24 Dr. Thomas liked to talk about benzene. It's -- I  
25 had a number of different citations, and I can

1 provide them to you, or you can look them up in the  
2 transcript from Monday.

3 He really did not feel that these levels  
4 were unprotective, particularly the example I said  
5 of even 20 milligrams just putting gasoline in your  
6 car.

7 The risk, as he presented it, was in the  
8 transport. And once it's stabilized, it's not as  
9 transportable.

10 The --

11 COMMISSIONER BLOOM: Here's another -- I  
12 guess what we are being asked to take on faith is  
13 that these newly suggested levels are somehow going  
14 to result in savings to industry.

15 COMMISSIONER BALCH: Well, I think that --

16 COMMISSIONER BLOOM: But if they result to  
17 savings in industry, then that means that there's  
18 not waste. And I would have already disputed the,  
19 perhaps, debatable link between economic costs and  
20 waste.

21 I think there's a -- a balance that has to  
22 be struck there.

23 COMMISSIONER BALCH: Sure.

24 COMMISSIONER BLOOM: And again, I haven't  
25 heard anything about what the benefits are and a

1 little bit more about what the possible cost of  
2 increasing these could be.

3 COMMISSIONER BALCH: I mean, a nationally  
4 known toxicologist did talk down the risk of benzene  
5 in particular. So I think you do have to take into  
6 account evidence from -- from a witness like that.

7 And much like I did put a lot of weight on  
8 Dr. Buchanan's testimony, because he is nationally  
9 known and awarded for his reclamation efforts. And  
10 he is very familiar with desert soils of New Mexico  
11 in general, and would be -- I think it would be  
12 limiting to -- to try and disregard their  
13 experience, even if they are not directly giving you  
14 a model. But their experience with contaminate  
15 flow -- I think Mr. Arthur, also.

16 And that's a much more applied -- he was a  
17 much more applied person and has worked with the EPA  
18 and other types of waste sites, and also oil and gas  
19 waste sites across the country.

20 His experience led him to be able to say  
21 that these levels were protective.

22 And while we do have an increase of  
23 50-fold on benzene, for example, it is 5,000 times  
24 lower than what is -- what is cited in the mobility  
25 report in the soils and groundwater research

1 bulletin.

2 I think the mobility is not a terribly --  
3 it comes down to -- to what you're looking at in the  
4 risk. And in the fluid phase, I think benzene is  
5 very dangerous. I don't think there's any doubt  
6 about that.

7 In the stabilized state, these are  
8 aromatic hydrocarbons that will drain very quickly,  
9 and then you're going to bury them down 4 feet.

10 Now, I'm not a chemical engineer or a  
11 chemist, so I can't give you personal experience on  
12 these numbers. All I can say is that the witnesses  
13 that were asked about this did say they are  
14 protective.

15 And we didn't have a lot of  
16 counter-discussion to that, as Commissioner Bailey  
17 pointed out.

18 COMMISSIONER BLOOM: I think it was more  
19 in some of the lines of questioning that we heard.

20 And I certainly respect Dr. Thomas' work  
21 in toxicology. I think he's probably a little less  
22 qualified to speak to transporting. He said that  
23 those were -- those are experiences he's gained over  
24 the years by working in industry and talking with  
25 folks and working on some of these issues for --

1           COMMISSIONER BALCH: Well, he wasn't the  
2 only one that talked about transport and liquid  
3 phase/operation phase being the primary risk. Just  
4 about all of the witnesses addressed that.

5           And a lot of them did address it from an  
6 experiential point of view. I will give you that.

7           COMMISSIONER BLOOM: And Dr. Thomas talked  
8 and described the difference between -- I think it  
9 was, what, risk and hazard, for example. It's risky  
10 to step out in front of a bus, but it's not  
11 hazardous if it's five blocks away.

12           The reason he said that benzene isn't  
13 going to move into water is because he believed the  
14 bentonite clay and the drilling fluids -- or the  
15 drilling mud would -- would stop that.

16           And I think we head into some slipperier  
17 territory there. His belief in that seemed to be  
18 boundless or endless, as he was asked if it could  
19 handle a hundred or a thousand milligrams per  
20 kilogram benzene. He said that that would be fine,  
21 he thought it would be protective.

22           COMMISSIONER BALCH: Yes. His risk  
23 discussion is on page 448, lines 12 through 23 of  
24 the transcript. But we have essentially discussed  
25 that.

1           But after he gives his best example he  
2 goes on, on line 14 page 448:

3           "Similarly, with chemicals. You -- you  
4 have got to have an exposure in order to have a  
5 risk. You can have the world's most toxic chemical,  
6 but if there is no exposure there is no risk.

7           "It becomes important in a regulatory  
8 setting because it is the risk that determines  
9 whether or not regulation is warranted. It's not a  
10 hazard, it's a risk. Because the terms get thrown  
11 about so loosely, I think it's important to make  
12 sure we all understand the vocabulary."

13           So that's really where his risk versus  
14 hazardous discussion is.

15           Is there any -- maybe we should see  
16 what -- where we have some commonality on this  
17 table.

18           COMMISSIONER BLOOM: I think one thing  
19 that I really don't believe has changed much is  
20 BTEX. It's coming a little closer to groundwater  
21 from where it was before. And previously, you  
22 couldn't bury it on site or bury it -- bury the  
23 waste if groundwater was between 25 and 50 feet.

24           I guess it's only the case where it's a  
25 low chloride fluid, correct?

1           But I believe the limit for BTEX  
2 previously was between 50 and 100 feet, and beyond  
3 100 feet was 50 milligrams per kilogram. So I don't  
4 really see much change there, so that's, I don't  
5 think, much of an issue.

6           CHAIRPERSON BAILEY: We can agree on  
7 concentrations for BTEX in both categories 25 to 50  
8 feet and 51 to 100 feet?

9           COMMISSIONER BALCH: I would say so.

10          COMMISSIONER BLOOM: Again, as far as -- I  
11 support it. I will support the current standards,  
12 but I didn't support the low chloride fluid, so  
13 that's a little different issue. But certainly  
14 beyond 50 feet.

15          CHAIRPERSON BAILEY: Okay. Can we reach  
16 commonality for TPH?

17          COMMISSIONER BALCH: TPH, for the shallow  
18 burial, what's the existing rule?

19          COMMISSIONER BLOOM: I want to think --  
20 unless I wrote it down wrong, 2,500, but I may be  
21 wrong.

22                 It's 2,500.

23          COMMISSIONER BALCH: I'll take your word.

24          COMMISSIONER BLOOM: If we are looking at  
25 the deleted material, for example, on -- I guess I'm

1 looking at NMOGA's Exhibit A, Attachment A, on page  
2 32. "In-place burial is where groundwater would be  
3 between 50 and 100 feet below the bottom of the  
4 buried waste. Operator shall collect a minimum of  
5 five-point composite sample."

6 COMMISSIONER BALCH: 2,500.

7 CHAIRPERSON BAILEY: Thank you.

8 COMMISSIONER BALCH: That's for 50 to 100.

9 COMMISSIONER BLOOM: And I think beyond  
10 100 it's still 2,500.

11 COMMISSIONER BALCH: But they didn't have  
12 anything from 25 to 50, right?

13 COMMISSIONER BLOOM: Correct.

14 COMMISSIONER BALCH: So they actually  
15 reduced the TPH for...

16 CHAIRPERSON BAILEY: 51 to 100 feet.

17 COMMISSIONER BALCH: Well, we created this  
18 category. I think we -- well, we renumbered. We  
19 did the distances from the original table.

20 CHAIRPERSON BAILEY: Well, the original  
21 table was 50.

22 COMMISSIONER BALCH: It was greater than  
23 50.

24 CHAIRPERSON BAILEY: 50 to 100 feet,  
25 because it was below the -- there was greater.

1           COMMISSIONER BALCH: So I guess you're --  
2 with, again, the same caveat that you --

3           COMMISSIONER BLOOM: To support the change  
4 in distances, yes, I guess we could adopt the  
5 proposed TPH levels.

6           CHAIRPERSON BAILEY: Okay.

7           COMMISSIONER BALCH: I think, while we're  
8 on TPH for greater than 100 feet, I would go with  
9 the previous standard of 2,500. Nobody asked us to  
10 specifically define 25 -- greater than 100 feet.

11           Also, in -- in their closure criteria, in  
12 the original Table I, "Closure Criteria for Soils  
13 Beneath Pits and Below-Grade Tanks," they had for  
14 depths of -- for greater than 100 feet of depth to  
15 groundwater they had 5,000 milligrams per kilogram.

16           And while we incorporated these two tables  
17 together, we didn't yet discuss this particular  
18 case, greater than 100 feet below the bottom of the  
19 trench or pit.

20           So we could either adopt the existing Rule  
21 17 2,500 milligrams per kilogram or we could adopt  
22 the 5,000 from greater than 100 in the original  
23 Table I on page 41 on NMOGA.

24           MR. SMITH: Commissioner Balch, just to  
25 make this perfectly clear, these proposals that you

1 are now discussing are based on the testimony  
2 regarding soil physics as well as Dr. Thomas'  
3 toxicology testimony?

4 COMMISSIONER BALCH: Most of the limits  
5 presented for the tables, except for chloride, which  
6 was discussed extensively by both sides, were cited  
7 by all of the witnesses that were asked about them  
8 as being protective.

9 And in some cases, these limits are lower  
10 than -- are more constraining than was in the  
11 previous rule.

12 Presumably, nobody is going to have a  
13 problem if we make it more constraining. We are  
14 trying to be -- well, not nobody.

15 We are trying to be as consistent as we  
16 can be where we have guidance. If we don't have  
17 guidance, we can look to existing Rule 17.

18 MR. SMITH: Okay. Good.

19 COMMISSIONER BALCH: So existing Rule 17  
20 is 2,500. We did have some guidance for greater  
21 than 100 feet in the original Table I of 5,000 for  
22 TPH.

23 COMMISSIONER BLOOM: Mr. Balch, you're  
24 talking about chloride currently?

25 COMMISSIONER BALCH: I'm talking about

1 TPH.

2 COMMISSIONER BLOOM: TPH at --

3 COMMISSIONER BALCH: Chloride was --

4 COMMISSIONER BLOOM: -- at greater than  
5 100 feet.

6 COMMISSIONER BALCH: Yes.

7 COMMISSIONER BLOOM: Yes. I think 2,500  
8 was in the existing rule. We could carry over.

9 COMMISSIONER BALCH: In TPH, how does TPH  
10 factor into oil-based wells?

11 CHAIRPERSON BAILEY: It's going to have a  
12 huge impact. Because if it is a diesel-based  
13 drilling fluid it's going to permeate the --

14 COMMISSIONER BALCH: Mud.

15 CHAIRPERSON BAILEY: -- mud completely and  
16 will raise the limits, I would assume, above the  
17 limits that we have here in the Table I.

18 COMMISSIONER BALCH: And from the  
19 testimony we have, those diesel-based fluids are  
20 primarily used in Southeast New Mexico.

21 CHAIRPERSON BAILEY: Yes.

22 COMMISSIONER BALCH: Water-based in  
23 northwest.

24 CHAIRPERSON BAILEY: Well, primarily, but  
25 because of the formations that are drilled through.

1 COMMISSIONER BALCH: It's more  
2 operational.

3 CHAIRPERSON BAILEY: It is an  
4 operational --

5 COMMISSIONER BALCH: Shallow you can use  
6 fresh water.

7 CHAIRPERSON BAILEY: Well, clay. It's a  
8 matter of the clay. Because water-based will induce  
9 clay swelling which creates problems for drilling.

10 COMMISSIONER BALCH: Well, the testimony  
11 that was given for the original Table I, when you're  
12 below 100 feet they suggest the TPH level of 5,000.

13 If you have something of 2,500 --

14 COMMISSIONER BLOOM: That was the table to  
15 indicate when testing should be done.

16 CHAIRPERSON BAILEY: Right.

17 COMMISSIONER BLOOM: Now --

18 COMMISSIONER BALCH: Right. But it does  
19 give -- it does give some --

20 COMMISSIONER BLOOM: Which means that when  
21 there's remediation, so it's apples and oranges.

22 COMMISSIONER BALCH: Okay.

23 If you look at table -- this is under a  
24 different Table I. We're talking about Exhibit 13  
25 that Mr. Mullins pointed out.

1           And you look at gasoline range gasoline,  
2           you are looking at 3,400 to 80,000. On diesel,  
3           7,700 to 34,000.

4           CHAIRPERSON BAILEY: So if we use --

5           COMMISSIONER BALCH: These limits are  
6           still well below --

7           CHAIRPERSON BAILEY: And protective of the  
8           fresh water.

9           COMMISSIONER BALCH: Witnesses said they  
10          were protective at 5,000.

11          CHAIRPERSON BAILEY: With groundwater  
12          greater than 100 feet below the bottom of the trench  
13          and the pit, the migration of TPH may not play a  
14          huge role in the value of the -- or the protection  
15          of the fresh water.

16          So the TPH that we have up there for  
17          2,500, relying back to the current rule, I think, is  
18          very justifiable.

19          COMMISSIONER BALCH: That's also what they  
20          had for TPH in 51 to 100 feet.

21          CHAIRPERSON BAILEY: Yes.

22          COMMISSIONER BALCH: But again, I think  
23          you want to err on the side of being more protective  
24          of the groundwater.

25          Okay. So 2,500 for greater than 100 feet?

1                   CHAIRPERSON BAILEY: I could agree to  
2 that.

3                   COMMISSIONER BLOOM: I could agree to  
4 that.

5                   COMMISSIONER BALCH: I think also, since  
6 BTEX and benzene are the aromatic components, you  
7 are primarily worried about whatever degredational  
8 components will migrate upward through the soil. It  
9 doesn't matter what the depth is. Those limits  
10 stayed the same for both of the presented cases, and  
11 I think they should be the same for the greater than  
12 100 case as well.

13                   COMMISSIONER BLOOM: I think we could  
14 agree that BTEX could be 50 milligrams per kilogram  
15 because that's what it was previously.

16                   COMMISSIONER BALCH: Okay.

17                   CHAIRPERSON BAILEY: And benzene at 10  
18 below 100 feet?

19                   COMMISSIONER BALCH: I think that, based  
20 on the testimony, that I am comfortable with the  
21 benzene level of 10.

22                   COMMISSIONER BLOOM: I don't agree with  
23 changes to the benzene levels, as I have stated here  
24 recently. But...

25                   COMMISSIONER BALCH: Well, we can go -- we

1 can go through and --

2 COMMISSIONER BLOOM: Yes.

3 COMMISSIONER BALCH: -- line by line.

4 COMMISSIONER BLOOM: Sure.

5 CHAIRPERSON BAILEY: But if we're going to  
6 maintain 10, then it makes sense to maintain 10 at  
7 that level also.

8 COMMISSIONER BLOOM: Sure. I would agree.

9 CHAIRPERSON BAILEY: Okay. Which leaves  
10 us with chlorides.

11 COMMISSIONER BALCH: We had some  
12 discussion on Monday about chlorides. And I think  
13 that I was able to conclude from that discussion  
14 that greater than 100 feet there was very little  
15 risk from chlorides and that there shouldn't  
16 necessarily be a limit at all.

17 COMMISSIONER BLOOM: Can you refresh my  
18 memory as to what Mr. Mullins modeled the distance  
19 of the chlorides that traveled 25 feet down and 100  
20 feet up? What was the initial chloride  
21 concentration? Was it 15,000?

22 CHAIRPERSON BAILEY: It was below  
23 chloride, yes.

24 COMMISSIONER BALCH: Which corresponded to  
25 the -- what's now the 51 to 100 case with one --

1 3-to-1 mixing ratio. So your pit contents would be  
2 15,000, you mix it down to 5,000, and then you would  
3 run your models.

4 CHAIRPERSON BAILEY: The graphs that  
5 indicated the salt bulge all indicated -- every  
6 single one of them indicated that the chloride  
7 concentration returned to normal, or to that --

8 COMMISSIONER BALCH: No, not to normal.

9 CHAIRPERSON BAILEY: Well, to its natural  
10 concentration.

11 COMMISSIONER BALCH: Well, that's not  
12 exactly what Dr. Buchanan said, and I asked him  
13 twice on -- on examination, once during his direct  
14 and once during his redirect.

15 And he very explicitly stated that if you  
16 had chlorides above it you would increase the  
17 concentrations at the level of the salt bulge, but  
18 you would not increase the depth of the salt bulge.  
19 It's a little bit different.

20 CHAIRPERSON BAILEY: But I'm talking about  
21 below the salt bulge.

22 COMMISSIONER BALCH: Below the salt bulge.

23 CHAIRPERSON BAILEY: Below the salt bulge,  
24 the return to the natural chloride concentrations  
25 occurred well before 100 feet.

1                   COMMISSIONER BALCH: Yes. In fact, I  
2 think all the examples I had were between 10 and  
3 25 feet.

4                   CHAIRPERSON BAILEY: Every single one. So  
5 I have no problem with whatever concentration of  
6 chlorides we have.

7                   COMMISSIONER BALCH: Well, I would propose  
8 putting N/A for greater than 100 feet on the  
9 chlorides.

10                  CHAIRPERSON BAILEY: Because we've had  
11 testimony for hours and hours on the salt bulge and  
12 below the salt bulge, where it returns to  
13 background, put it that way.

14                  So I would agree that for chlorides we  
15 could put N/A.

16                  COMMISSIONER BALCH: On --

17                  CHAIRPERSON BAILEY: No. Greater than 100  
18 feet, yes. And then we could eliminate the EPA  
19 method in the middle column, because it doesn't  
20 matter what you -- the process you use to analyze  
21 it.

22                  COMMISSIONER BLOOM: Is that a not  
23 applicable or...

24                  COMMISSIONER BALCH: Not applicable, yes.

25                  COMMISSIONER BLOOM: Okay.

1 CHAIRPERSON BAILEY: And now we come to  
2 chloride concentration, both 25 to 50 and 51 to 100.

3 COMMISSIONER BALCH: So the 20 -- those  
4 are -- those were the cases that were modeled. It  
5 was demonstrated by Mr. Mullins. So those are the  
6 cases where we have predicted data for southeast and  
7 northwest New Mexico.

8 CHAIRPERSON BAILEY: And showed that the  
9 concentration of chlorides was essentially  
10 negligible.

11 COMMISSIONER BALCH: Within time spans  
12 that were consistent with Dr. Buchanan's  
13 understanding of the formation of -- natural  
14 formation of the salt bulge, on the order of  
15 thousands of years, would not see, at those  
16 concentrations, transport at groundwater in those  
17 depths.

18 CHAIRPERSON BAILEY: But this is also with  
19 the understanding that we have 4 feet of un- -- or  
20 less than 600 milligrams per kilogram for the  
21 surface, and that these concentrations would only  
22 begin at 4 feet below the surface.

23 COMMISSIONER BALCH: At a minimum of  
24 4 feet.

25 CHAIRPERSON BAILEY: Right.

1                   COMMISSIONER BALCH: And in practice,  
2 probably more than 4 feet.

3                   CHAIRPERSON BAILEY: Potentially.

4                   COMMISSIONER BALCH: Well, if you have an  
5 8-foot-deep pit that you backfill. You will  
6 backfill it with some material, which we don't know  
7 what it's going to be.

8                   CHAIRPERSON BAILEY: Uh-huh.

9                   COMMISSIONER BALCH: It will be whatever  
10 they piled up when they dug out the pit. And then  
11 there will be 600 milligrams per -- of chloride for  
12 4 feet.

13                   CHAIRPERSON BAILEY: Right.

14                   COMMISSIONER BALCH: So I think you have  
15 adequate protection.

16                   CHAIRPERSON BAILEY: So the  
17 2,500 milligrams per liter begins at 4 feet and runs  
18 to 25 to 50 feet below the bottom of the trench.

19                   I think that having that concentration of  
20 chlorides is not going to be detrimental to fresh  
21 water, it's not going to be detrimental to the  
22 establishment of vegetation, which is part of the  
23 process of ensuring that chlorides do not -- are not  
24 transported vertically.

25                   I can agree with the 2,500 feet at that

1 point -- I mean the 2,500 milligrams per kilogram.

2 COMMISSIONER BALCH: The only other thing  
3 that we have not really addressed, that was  
4 discussed at length by both sides in the testimony,  
5 was the top liner.

6 COMMISSIONER BLOOM: The top liner.

7 CHAIRPERSON BAILEY: Exactly.

8 COMMISSIONER BLOOM: That's one of my  
9 reservations about the 5,000 milligrams per  
10 kilogram. And I have some reservations about moving  
11 up from 500 milligrams of chloride, as the rule  
12 currently reads, the depth, because it's 50 feet  
13 previously.

14 I did -- I would agree that there is a  
15 salt bulge. It looks like it can be at sometimes  
16 around 25 feet or 30 feet, or -- given some of the  
17 different cases we have looked at.

18 COMMISSIONER BALCH: Well, we are also  
19 depending on Dr. Buchanan's experience in  
20 New Mexico, where he says that those ranges are  
21 consistent with his observations.

22 So we get to extend that a little bit,  
23 because we were lucky enough to have a nationally  
24 recognized soils and remediation expert talk to us  
25 who is also a resident of New Mexico and does a lot

1 of his work here. So I think we can extend that.

2 The real question comes down to do you  
3 need to have a top cover or not.

4 CHAIRPERSON BAILEY: Dr. Buchanan was very  
5 clear that he does not recommend having that top  
6 liner.

7 But Dr. Neeper, as I understood -- I can't  
8 say what Dr. Neeper said. I just remember that  
9 Dr. Neeper -- that Dr. Buchanan was very clear not  
10 to have the upper --

11 COMMISSIONER BLOOM: Dr. Neeper made two  
12 relevant points I can think of. One was that when  
13 excavating some pits for -- I believe it was  
14 Marbob -- that he found a salt layer that had risen  
15 up to the top of the liner, for example.

16 CHAIRPERSON BAILEY: Yes.

17 COMMISSIONER BLOOM: And then he also  
18 stated that he felt that salt could migrate up, I  
19 believe it was 12 to 24 inches, and get into the  
20 root zone for some plants, and chlorides can have an  
21 impact on plants.

22 CHAIRPERSON BAILEY: With no top liner, we  
23 could have the bathtub effect, where infiltration  
24 remains within the bathtub, or the taco, as it was  
25 called in previous hearings.

1                   COMMISSIONER BALCH: Well, we also had  
2 testimony that these liners are not -- are not  
3 forever.

4                   CHAIRPERSON BAILEY: Right.

5                   COMMISSIONER BALCH: They are 200 to 300  
6 years or so, and it's effectively not going to be a  
7 liner anymore. You may still have pieces of it  
8 there, but...

9                   My -- my thought is that if you have a top  
10 liner -- you know, there wasn't -- I don't think  
11 there was a terribly strong opinion about the top  
12 liner from anybody, even from Dr. Buchanan. He  
13 suggested that it wasn't necessary.

14                   But from what I remember of his -- his  
15 testimony, I think on rebuttal, on questioning that  
16 was asked -- you know, the roots are going to find a  
17 way. They will just poke a hole right through the  
18 liner. Anybody that's ever put down gravel on their  
19 yard with a plastic layer underneath it will see  
20 weeds the next year.

21                   So having it may not be of great benefit,  
22 but I don't think anybody really said that not  
23 having it would be a great benefit either.

24                   CHAIRPERSON BAILEY: True.

25                   COMMISSIONER BALCH: Now, both of the

1 current closure standards under Rule 17 -- and I  
2 don't remember exactly how the burritos and the  
3 tacos and all of that works. But one is a foldover  
4 of the liner, which essentially gives you a top  
5 liner.

6 CHAIRPERSON BAILEY: Well, not completely,  
7 because it would only be the edges going into --

8 COMMISSIONER BALCH: Okay.

9 CHAIRPERSON BAILEY: -- and so the middle  
10 would not be covered.

11 COMMISSIONER BALCH: So that's the taco.

12 CHAIRPERSON BAILEY: Right. That's the  
13 taco --

14 COMMISSIONER BALCH: Not the tostada.

15 CHAIRPERSON BAILEY: The bathtub, yes.

16 COMMISSIONER BALCH: More like a tostada.

17 And then you have the burrito, where  
18 you've folded it over completely.

19 CHAIRPERSON BAILEY: Folded it over, and  
20 then you add a top liner to cover it.

21 COMMISSIONER BALCH: And then you add a  
22 top liner.

23 CHAIRPERSON BAILEY: Yes.

24 COMMISSIONER BALCH: Mr. Bloom, are you  
25 going to feel more comfortable with these limits if

1 there's a top liner? Because I didn't see strong  
2 evidence one way or the other.

3 COMMISSIONER BLOOM: Yeah. Dr. Thomas  
4 mentioned that he thought -- he said he would prefer  
5 a cover, he thought it would be good, something  
6 along those lines.

7 COMMISSIONER BALCH: He may have been  
8 thinking of it from more of a benzene or BTEX  
9 context, where you're going to give those volatile  
10 components more chance to interact with the  
11 material, although he did say benzene is not toxic  
12 to plants. So...

13 Without a lot of guidance on it, the  
14 original rule had a top liner, right.

15 CHAIRPERSON BAILEY: The original rule,  
16 which is found on page 33 of -- under "On-site  
17 Trench Burial," subparagraph (i) talks about  
18 installing "a geomembrane cover over the excavated  
19 material in the line trench. The operator shall  
20 design and construct the geomembrane cover in  
21 accordance with the requirements specified"  
22 elsewhere.

23 "The operator shall cover the geomembrane  
24 liner -- lined and covered, filled, trench with  
25 compacted materials."

1           So the original rule does require a  
2 geomembrane cover.

3           COMMISSIONER BALCH: For 50 to 100 feet,  
4 but not for greater than 100.

5           COMMISSIONER BLOOM: It looks like it's  
6 for both of them.

7           CHAIRPERSON BAILEY: It is for both of  
8 them.

9           COMMISSIONER BALCH: It is for both of  
10 them? Okay.

11          CHAIRPERSON BAILEY: If we incorporated  
12 that paragraph, which is a geomembrane liner, it's  
13 not an HDPE, it's not an impervious liner. So...

14          COMMISSIONER BLOOM: If it's not  
15 impervious, I don't know --

16          CHAIRPERSON BAILEY: What's the point?

17          COMMISSIONER BLOOM: -- what's the point?

18          COMMISSIONER BALCH: Well, did you have,  
19 like you said Dr. Thomas -- and I have a citation  
20 for the same thing. He said it can't hurt,  
21 essentially.

22          COMMISSIONER BLOOM: Does Dr. Buchanan  
23 feel that the -- he mentioned that he felt that the  
24 liner could retard the root growth of some plants.

25          CHAIRPERSON BAILEY: Yes. Because some of

1 those, like the four-wing saltbush, can have roots  
2 that go beyond the 4 feet.

3 COMMISSIONER BLOOM: If that happens, does  
4 that leave, then, the chlorides to migrate upwards  
5 through the grade effector, if the chlorides move  
6 upwards, if there's something that has roots down to  
7 that zone?

8 CHAIRPERSON BAILEY: The roots aren't  
9 going to transport the chlorides upwards, they are  
10 simply going to withdraw from the chloride  
11 concentration.

12 COMMISSIONER BALCH: With my limited  
13 understanding of roots -- and we did have quite a  
14 dissertation given to us -- was that the roots  
15 essentially act as a filter. And what would happen  
16 is the roots would -- the area surrounding the roots  
17 would clog up with the salt and then they would  
18 essentially drown -- or not drown, but they would  
19 die from lack of water.

20 CHAIRPERSON BAILEY: Yes. The root dies  
21 back from the chloride concentration.

22 COMMISSIONER BALCH: I'm not concerned  
23 that that would necessarily kill the plants, as long  
24 as it had access to other sources of fluid. But I'm  
25 not -- that's way beyond my area of expertise.

1           And I don't think we have -- I'm not sure  
2 we had any discussion about that.

3           I guess the question on the liner is: Do  
4 you want to have something which will be temporary,  
5 in the grand scale of things, a couple hundred  
6 years, that will be able to shed water while  
7 everything above it is establishing itself, or if  
8 that's not necessary.

9           CHAIRPERSON BAILEY: Dr. Buchanan was  
10 clear that he did not recommend a top liner.

11           In the original rule, I'm finding where  
12 the top liner was described as a geomembrane liner.  
13 The geomembrane liner is not impervious to fluid  
14 transport.

15           COMMISSIONER BALCH: So the purpose of the  
16 geomembrane was to prevent root growth through?

17           CHAIRPERSON BAILEY: I believe so, and  
18 also to prevent settling of the upper fill into the  
19 lower area where the pit is located. So that would  
20 prevent the -- the lowering of the surface, which  
21 allows --

22           COMMISSIONER BALCH: So it's --

23           CHAIRPERSON BAILEY: -- so it's the site.

24           COMMISSIONER BALCH: -- more of a  
25 geomorphology than...

1           CHAIRPERSON BAILEY: That is my  
2 understanding. Because when I look back, it only  
3 talks about a geomembrane cover. And what other  
4 reasons could there be if it's not impervious?

5           COMMISSIONER BALCH: So we're not trying  
6 to control infiltration, which is why Dr. Buchanan  
7 wouldn't say that.

8           I went through last night, and I was  
9 searching for -- for liners in the transcript. I  
10 think we pretty much covered all of the examples  
11 that were brought up.

12          CHAIRPERSON BAILEY: I think so. So can  
13 we resolve our discussion for chlorides?

14          We have resolved our questions on TPH and  
15 BTEX and benzene, I believe, for the three  
16 categories. Is that correct?

17          But we are hung up on chlorides. And if  
18 the previous rule doesn't really require --

19          COMMISSIONER BALCH: So would the  
20 geomembrane stop the upward salt migration? The  
21 upward salt migration is what --

22          CHAIRPERSON BAILEY: No. The geomembrane  
23 is pervious to fluids.

24          COMMISSIONER BALCH: Well, if it's  
25 salts -- it was testified to here that the salts are

1 really only going to move in a saturated form.

2 CHAIRPERSON BAILEY: True.

3 COMMISSIONER BALCH: So the membrane --  
4 not the membrane, but the liner that he may have  
5 been looking at -- and then you have saturated  
6 chlorides.

7 CHAIRPERSON BAILEY: Yes, you could have.

8 COMMISSIONER BALCH: I don't think  
9 anything is going to stop the roots from going  
10 through a liner of any sort --

11 CHAIRPERSON BAILEY: Over time.

12 COMMISSIONER BALCH: -- over time.

13 A geomembrane liner, which is specified in  
14 the original Rule 17, which may have been why many  
15 of the witnesses have talked about it and said it  
16 wasn't necessary, does not prevent infiltration. In  
17 fact, infiltration may be a good thing if you think  
18 about salt bulge. It's basically transporting the  
19 chlorides to a level where they are stable over long  
20 periods of time.

21 CHAIRPERSON BAILEY: So we can't use a  
22 liner as a factor in the chloride concentrations.

23 COMMISSIONER BALCH: I think it's not  
24 relevant to that discussion.

25 COMMISSIONER BLOOM: It's not going to

1 be -- it's permeable to...

2 COMMISSIONER BALCH: If there's saturated  
3 flow, which is the situation which would give you  
4 upward migration of chlorides, it's not going to  
5 stop it.

6 And for infiltration, it's not going to  
7 stop water, so it's not going to stop it.

8 I didn't see anything that directly said a  
9 liner was necessary. A number of people said they  
10 weren't necessary.

11 I think Dr. Thomas' testimony was really  
12 probably not thinking about chlorides, he was  
13 probably thinking more of your volatiles --

14 COMMISSIONER BLOOM: Yes.

15 COMMISSIONER BALCH: -- which is going to  
16 be a short-lived problem.

17 If you wanted to have something to stop  
18 upward migration of volatiles, then you would want a  
19 plastic liner.

20 CHAIRPERSON BAILEY: HDPE or equivalent.

21 COMMISSIONER BALCH: Yeah, which would  
22 also shed water. Which is why I think Dr. Buchanan  
23 is right.

24 CHAIRPERSON BAILEY: Right.

25 COMMISSIONER BALCH: He wanted to have as

1 little disruption from the natural process, or the  
2 way I interpret his testimony, would make me believe  
3 that.

4 COMMISSIONER BLOOM: Well, what I'm  
5 looking at -- I can support burial in the 25 to  
6 50-foot to groundwater range.

7 And the 51 to 100-foot, we're seeing this  
8 increase from a thousand milligrams to  
9 5,000 milligrams per kilogram. And I have some  
10 reservation about the type of modeling, and is this  
11 just waste, or is it just economic impact? What's  
12 the cost, the benefit?

13 I don't support this change to  
14 5,000 milligrams to kilograms issue.

15 COMMISSIONER BALCH: What about the liner  
16 issue? Because if we need to have a liner, it needs  
17 to go into the text somewhere.

18 COMMISSIONER BLOOM: Yeah.

19 CHAIRPERSON BAILEY: Other than that, we  
20 can just start -- line item through some of these  
21 things.

22 COMMISSIONER BLOOM: No, I guess I can't  
23 see how a top liner would seem to make any  
24 difference, if it's not -- if it's not impermeable.  
25 And just a geomembrane liner, I can't see any sense

1 to it. I don't think that it's strong enough to  
2 prevent subsidence. It's not going to limit the  
3 movement of fluids. And we have heard that it could  
4 be to the detriment of revegetation, as Dr. Buchanan  
5 testified. So...

6 CHAIRPERSON BAILEY: Okay. So we may be  
7 at the point where we have either reached an  
8 agreement or not on Table I.

9 COMMISSIONER BALCH: I suspect we are not  
10 going to change with any more discussion.

11 CHAIRPERSON BAILEY: I don't believe we  
12 are.

13 So it's a matter of, Commissioners, do you  
14 support Table I as shown on the screen with those  
15 concentrations?

16 COMMISSIONER BALCH: Do you want to do it  
17 by depth range or is that going to make a  
18 difference, Mr. Bloom?

19 COMMISSIONER BLOOM: I --

20 COMMISSIONER BALCH: Or by constituent?

21 COMMISSIONER BLOOM: We could do it -- we  
22 could run down the list or...

23 CHAIRPERSON BAILEY: Okay. Then let's  
24 vote on chloride concentration at 25 to 50 feet  
25 below the bottom of the trench/pit.

1 Commissioner Bloom, do you support  
2 2,500 milligrams per kilogram?

3 COMMISSIONER BLOOM: No, I do not.

4 CHAIRPERSON BAILEY: Commissioner Balch,  
5 do you?

6 COMMISSIONER BALCH: I do.

7 CHAIRPERSON BAILEY: I do, also. So at  
8 this point, it's the majority of the commission  
9 agrees to that concentration.

10 For TPH, which is GRO plus DRO at 25 to  
11 50 feet, Commissioner Bloom, do you support  
12 100 milligrams per kilogram?

13 COMMISSIONER BLOOM: No, I do not.

14 CHAIRPERSON BAILEY: Commissioner Balch,  
15 do you?

16 COMMISSIONER BALCH: I do.

17 CHAIRPERSON BAILEY: I also do.

18 So this is an example of the majority of  
19 the commission supports 100 milligrams per kilogram.

20 For BTEX in the 25 to 50 feet below the  
21 bottom of the trench or pit we have a 50 milligram  
22 per kilogram.

23 Commissioner Bloom, do you accept or  
24 support 50 milligrams per kilogram?

25 COMMISSIONER BLOOM: I don't support that,

1 only because I don't support the burial in that  
2 25-foot to 50-foot to groundwater range.

3 CHAIRPERSON BAILEY: Commissioner Balch,  
4 do you support 50?

5 COMMISSIONER BALCH: I support that range.

6 CHAIRPERSON BAILEY: I do, too.

7 So the majority of the commission agrees  
8 to the 50.

9 And for benzene, Commissioner Bloom, you  
10 do not support 10 milligrams per kilogram?

11 COMMISSIONER BLOOM: No, I do not.

12 CHAIRPERSON BAILEY: Commissioner Balch,  
13 do you?

14 COMMISSIONER BALCH: I do support it.

15 CHAIRPERSON BAILEY: So the majority of  
16 the commission agrees to 10 milligrams per kilogram.

17 For the category of 51 to 100 feet below  
18 the bottom of the trench or pit we have a proposal  
19 for chlorides at 5,000 milligrams per kilogram.

20 Commissioner Bloom, do you support 5,000?

21 COMMISSIONER BLOOM: No.

22 CHAIRPERSON BAILEY: Commissioner Balch,  
23 do you?

24 COMMISSIONER BALCH: I do.

25 CHAIRPERSON BAILEY: I also do.

1                   So this is -- the majority of the  
2                   commission supports 5,000.

3                   For TPH at a thousand, Commissioner Bloom,  
4                   do you support 1,000 TPH?

5                   COMMISSIONER BLOOM: I do. I believe that  
6                   is --

7                   COMMISSIONER BALCH: It's lower than the  
8                   existing level.

9                   COMMISSIONER BLOOM: -- it's lower than  
10                  the existing level, yes.

11                  CHAIRPERSON BAILEY: Commissioner Balch,  
12                  do you?

13                  COMMISSIONER BALCH: I also support it.

14                  CHAIRPERSON BAILEY: So we have -- all  
15                  three commissioners support 1,000 milligrams per  
16                  kilogram.

17                  For BTEX at 50 milligrams per kilogram,  
18                  Commissioner Bloom, do you support that?

19                  COMMISSIONER BLOOM: Yes, I do. That's  
20                  the same as the existing one.

21                  COMMISSIONER BALCH: And I support it.

22                  CHAIRPERSON BAILEY: So all three  
23                  commissioners support 50 milligrams per kilogram.

24                  For benzene, 10 milligrams per kilogram in  
25                  the category of 51 to 100 feet below the bottom of

1 the trench or pit.

2 Commissioner Bloom?

3 COMMISSIONER BLOOM: No, I do not.

4 COMMISSIONER BALCH: And I do.

5 CHAIRPERSON BAILEY: So we have the  
6 majority of the commission supporting that value.

7 For greater than 100 feet below the bottom  
8 of the trench or pit we have "not applicable" for  
9 chloride concentration.

10 Commissioner Bloom, do you support that?

11 COMMISSIONER BLOOM: No, I do not.

12 CHAIRPERSON BAILEY: No, you do not?

13 COMMISSIONER BLOOM: I do not, no.

14 COMMISSIONER BALCH: I do support it.

15 CHAIRPERSON BAILEY: Commissioner Balch --  
16 so this is the majority of the commission supports  
17 the N/A, the not applicable category.

18 For TPH at 2,500 milligrams per kilogram.

19 Commissioner Bloom?

20 COMMISSIONER BLOOM: Yes, I am supportive  
21 of that. That's the same as the existing rule.

22 CHAIRPERSON BAILEY: Commissioner Balch?

23 COMMISSIONER BALCH: I support it as well.

24 CHAIRPERSON BAILEY: So all three  
25 commissioners support that category, that

1 concentration.

2 BTEX at 50 milligrams per kilogram.

3 Commissioner Bloom?

4 COMMISSIONER BLOOM: Yes, that remains  
5 unchanged.

6 COMMISSIONER BALCH: And I support it.

7 CHAIRPERSON BAILEY: So all three  
8 commissioners support that value.

9 Benzene for 10 milligrams per kilogram.  
10 Commissioner Bloom?

11 COMMISSIONER BLOOM: No, I do not.

12 COMMISSIONER BALCH: And I do.

13 CHAIRPERSON BAILEY: So the majority of  
14 the commission supports that value.

15 We have now reached a con- -- a majority  
16 of the commission supporting Table I as presented.

17 We can now use that decision for -- in  
18 those areas where Table I has been cited as a  
19 reference in previous sections.

20 That is the next-to-the-last area.

21 In Section 15, having to do with  
22 "Exceptions and Variances," Section C we have  
23 highlighted in yellow. It's towards the end of the  
24 document, almost.

25 Can we reach any agreement for whether or

1 not an operator has to apply to the Santa Fe office  
2 for an exception?

3 COMMISSIONER BALCH: This is -- the reason  
4 I think we highlighted this is because we hadn't  
5 completely fleshed out our thoughts on exceptions  
6 versus variances.

7 CHAIRPERSON BAILEY: And this was a  
8 stopping point, wasn't it?

9 COMMISSIONER BALCH: Yes.

10 CHAIRPERSON BAILEY: Okay. So we can  
11 remove the yellow designation there.

12 COMMISSIONER BLOOM: That would be an  
13 operator may apply or shall apply. I guess "may  
14 apply" in this instance.

15 COMMISSIONER BALCH: They don't have to  
16 apply for an exception if they don't want to.

17 CHAIRPERSON BAILEY: They may.

18 Okay. Then it's a matter of going back  
19 through the entire draft rule.

20 COMMISSIONER BALCH: Madam Chair, since we  
21 have just finished the section on closure and  
22 reclamation, I would suggest that we look at the  
23 deletions there while it's still fresh in our mind.

24 CHAIRPERSON BAILEY: While they are still  
25 fresh in our mind.

1 COMMISSIONER BLOOM: Yes.

2 CHAIRPERSON BAILEY: Okay. We can go to  
3 page 26. We have already talked about deleting all  
4 of Section B.

5 COMMISSIONER BALCH: So we have addressed  
6 now everything in subsection (i) of B, and (1) of B,  
7 which I think was why we decided not to -- and (2)  
8 of B, which is why we decided not to go ahead with  
9 deleting this earlier. So I think we can now delete  
10 this.

11 CHAIRPERSON BAILEY: Yes, we can, because  
12 we have just worked on the concentrations of the  
13 referenced constituents according to depth to  
14 groundwater.

15 So B (1) (ii).

16 COMMISSIONER BLOOM: So I would move that  
17 we strike all of Section B here, because we have  
18 come up with language related to closure of  
19 temporary pits. We have established a table to set  
20 maximum contaminant levels for disposal.

21 COMMISSIONER BALCH: We've discussed  
22 on-site burial and alternative closure methods.

23 COMMISSIONER BLOOM: Yes.

24 CHAIRPERSON BAILEY: So all of Section B  
25 can be deleted.

1 Closure methods for permanent pits. We  
2 included permanent pits as -- in the area  
3 concerning --

4 COMMISSIONER BALCH: Limits here also go  
5 back to Table I.

6 Closure sampling we have addressed also in  
7 the revised Sections A and B.

8 CHAIRPERSON BAILEY: Yes. Because in --  
9 the closure reports are at Section E "Timing  
10 Requirements for Closure."

11 We have included permanent pits and all  
12 pits. We say an operator shall close a pit within  
13 the following time lines.

14 COMMISSIONER BALCH: So I think we can  
15 delete all of Section C.

16 CHAIRPERSON BAILEY: I agree.

17 COMMISSIONER BLOOM: Yes.

18 CHAIRPERSON BAILEY: Section D, having to  
19 do with closure for closed-loop systems. We took  
20 care of that.

21 As far as the waste removal --

22 COMMISSIONER BALCH: On-site burial.

23 CHAIRPERSON BAILEY: -- on-site burial.

24 COMMISSIONER BALCH: And then variances  
25 cover Section (3).

1           So I think we can delete all of Section D.

2           CHAIRPERSON BAILEY: So we can delete all  
3 of Section D.

4           Now, Section E, concerning below-grade  
5 tanks. We've copied some of that language into the  
6 other areas.

7           COMMISSIONER BALCH: I think the rest of  
8 it all has to do with concentration, which are now  
9 dealt with in Table I; and sampling, which is dealt  
10 with in (a) and (b).

11          CHAIRPERSON BAILEY: So we can delete all  
12 of Section E.

13          Are we agreed?

14          COMMISSIONER BLOOM: Yes, agreed.

15          CHAIRPERSON BAILEY: On to Section F.  
16 There is included in here the provision for notice  
17 to the surface owner. We have not resolved that,  
18 and that could be the next point that we talk about.

19          The remainder of Section F (2) has been  
20 dealt with as far as concentrations and placing  
21 steel markers.

22          Deed notice. We have not talked about  
23 that, have we? So that should go on that discussion  
24 concerning...

25          COMMISSIONER BLOOM: Where is that, Madam

1 Chair?

2 CHAIRPERSON BAILEY: On page 30, F.

3 COMMISSIONER BLOOM: Yes, I see it.

4 COMMISSIONER BALCH: F (1) (b) is the  
5 surface owner --

6 CHAIRPERSON BAILEY: Yes.

7 COMMISSIONER BALCH: -- notification.

8 CHAIRPERSON BAILEY: And F (f) has to do  
9 with deed notices.

10 COMMISSIONER BALCH: Well, I think aside  
11 from those two sections, everything else has been  
12 dealt with in Table I and in Sections A and B.

13 CHAIRPERSON BAILEY: And we can delete  
14 everything else except for those two.

15 COMMISSIONER BALCH: So down to there.

16 CHAIRPERSON BAILEY: Yes.

17 COMMISSIONER BALCH: And from there down  
18 to (f).

19 CHAIRPERSON BAILEY: No, not the -- okay.

20 COMMISSIONER BALCH: And now, down to the  
21 end of this section.

22 I'm sorry, down to "Closure Notice."

23 Okay. And those two will probably go into  
24 "Closure Notice."

25 CHAIRPERSON BAILEY: Yes. We will have to

1 discuss those.

2 COMMISSIONER BALCH: Scroll to the top of  
3 the very next page, is where we were talking about  
4 closure notice.

5 CHAIRPERSON BAILEY: All right. We had  
6 begun the discussion on notice to the surface owner  
7 that was proposed, as we deleted the paragraph under  
8 closure notice, and we never did really resolve that  
9 question whether or not to delete that paragraph.

10 We really did not have very much  
11 discussion, and there's ambiguity as to when this  
12 closure notice should be provided to the surface  
13 owner.

14 Commission's counsel has recommended that  
15 we be very cautious in deleting any paragraph  
16 concerning notice.

17 COMMISSIONER BALCH: I have no problems  
18 with notice at all. I would just like it to be  
19 clear about when.

20 CHAIRPERSON BAILEY: When.

21 COMMISSIONER BALCH: And what.

22 CHAIRPERSON BAILEY: Yes. So we should  
23 remove the proposed -- yes, you already have it  
24 there.

25 So now we need to wordsmith this to

1 indicate when this notice should be provided,  
2 whether it is provided at the application -- but the  
3 application is a process that's negotiated between  
4 the division and the operator.

5 MR. SMITH: And just to be clear, this is  
6 based on testimony regarding a lack of clarity in  
7 the rules that make them difficult to deal with for  
8 operators. Is that correct?

9 COMMISSIONER BALCH: And the redundancy,  
10 if we identify that this notice is already provided  
11 elsewhere.

12 But primarily, clarity. None of us can  
13 make any sense of this paragraph, and it's suggested  
14 for deletion.

15 COMMISSIONER BLOOM: We could have  
16 something along the lines of "The operator shall  
17 notify the surface owner by certified mail/return  
18 receipt requested, that the operator has approval  
19 for on-site closure for pits or below-grade tanks."

20 COMMISSIONER BALCH: Well, I mean, some --  
21 I think this is for more than just on-site closure,  
22 though. This is for any closure of a pit or a tank.

23 So a multi-well or permanent pit you would  
24 be removing everything and there wouldn't be  
25 anything on site.

1           For a temporary pit there may or may not  
2 be material left on site.

3           And for a below-grade tank there will be  
4 removal, possibly remediation, but nothing left  
5 on-site.

6           MR. SMITH: If you are concerned about the  
7 timing, and everything else is all right here, you  
8 could put in a second sentence that simply  
9 establishes a time, presumably before the closure  
10 process is begun, for the notice to be given.

11           CHAIRPERSON BAILEY: It could reflect the  
12 same language that we have in the paragraph below,  
13 where the appropriate division district office is  
14 notified at least 72 hours, but not more than one  
15 week, prior to any closure operation.

16           We could borrow that language if we want  
17 to have that short of a time span.

18           COMMISSIONER BLOOM: It would probably be  
19 good to include the operator's name and the  
20 location, too. Otherwise, it's just saying that you  
21 could send a postcard that says...

22           COMMISSIONER BALCH: As long as it's  
23 certified mail --

24           COMMISSIONER BLOOM: Yeah.

25           COMMISSIONER BALCH: -- they could send a

1 postcard.

2 COMMISSIONER BLOOM: I'm going to close a  
3 well on your land. It doesn't have to specify the  
4 name or location. It doesn't have to include API.

5 CHAIRPERSON BAILEY: That is pretty vague,  
6 isn't it.

7 COMMISSIONER BLOOM: Yeah.

8 COMMISSIONER BALCH: Well, going back to  
9 what this is supposed to mean -- I think I'm on -- I  
10 went over this two or three times to figure out what  
11 this is supposed to do.

12 But I think what it's supposed to do is  
13 just to say you are closing the site. And the  
14 reason somebody might be curious about that is they  
15 would want to make sure it was remediated correctly.  
16 They might want to know if something was left there.

17 CHAIRPERSON BAILEY: So that they could be  
18 witness to the closure operation.

19 COMMISSIONER BALCH: So I think on the one  
20 hand in Section (2) and (3) we have -- or in Section  
21 (2) we have division notice of between 72 hours and  
22 a week prior. The surface owners might want more  
23 time than that.

24 CHAIRPERSON BAILEY: I would think so.  
25 They may be on vacation for a week.

1           COMMISSIONER BALCH: So it seems to me the  
2 appropriate time to notify them that you are going  
3 to -- it's weird -- but when you're going to close  
4 the site is when you open the site.

5           CHAIRPERSON BAILEY: But you will not know  
6 the closure methods until after you've tested the  
7 soils beneath any kind of liner or on the surface.

8           COMMISSIONER BALCH: So administratively,  
9 how much of a time window do you want from site  
10 cessation of operation and closure of the site to  
11 occur? Because that's really the window during  
12 which you would be notifying people.

13          CHAIRPERSON BAILEY: And that varies  
14 according to the closure requirements for temporary  
15 pits or for permanent pits.

16          COMMISSIONER BALCH: Now the other thing  
17 is, here, this is -- this refers simply to notice.  
18 It doesn't talk about what you do with the notice or  
19 if you can do anything with a notice besides just be  
20 notified.

21          CHAIRPERSON BAILEY: It does not provide  
22 appeal or required input.

23          COMMISSIONER BALCH: Well, you would hope  
24 you would actually be well past that point, anyway,  
25 before it occurs. So it's really simply a

1 notification that they are closing.

2 CHAIRPERSON BAILEY: That they are going  
3 to have equipment out there doing something.

4 COMMISSIONER BALCH: So I think if you  
5 want to simplify this as much as you can, you want  
6 to have as clear a notice as possible, or feasible,  
7 and that's really all you have to do to fix this.

8 COMMISSIONER BLOOM: We could almost add  
9 something -- delete number (1) above and add  
10 something to number (2) that says: "The operator  
11 shall also notify the surface owner" -- you could  
12 use that language up above -- "one month before  
13 closure."

14 COMMISSIONER BALCH: However, they may not  
15 know when the closure is going to be that far in  
16 advance.

17 COMMISSIONER BLOOM: Yeah.

18 COMMISSIONER BALCH: The other thing --  
19 and maybe you have the best way to do it. I mean,  
20 it is a notice, so the time window, I guess, is not  
21 as important. Even if they are on vacation they  
22 come home, they go to the mailbox, they will see the  
23 notice, and then they will know.

24 CHAIRPERSON BAILEY: Which takes us back  
25 to the 72 hours, but not more than one week.

1                   COMMISSIONER BALCH: So if you take  
2 Section (2) and just add a sentence after "notify  
3 the appropriate division office verbally and in  
4 writing," at the end of that sentence.

5                   CHAIRPERSON BAILEY: Or put it before.

6                   COMMISSIONER BALCH: Or put it before.

7                   CHAIRPERSON BAILEY: "Shall notify the  
8 surface owner and the appropriate division district  
9 office."

10                  COMMISSIONER BALCH: I believe you want to  
11 say the surface owner in writing, using the  
12 certified mail language above, and then the division  
13 office could be verbally and in writing.

14                  COMMISSIONER BLOOM: That's tricky.

15                  CHAIRPERSON BAILEY: Why don't we keep the  
16 yellow paragraph, because we do want to insert some  
17 of what needs to be in that notice, as Commissioner  
18 Bloom brought out. So let's keep that paragraph and  
19 have it say: "The operator shall notify the surface  
20 owner by certified mail/return receipt requested  
21 that the operator plans -- plans closure operations  
22 at least 72 hours, but not more than one week, prior  
23 to any closure operation," which is simply copying  
24 the sentence out of paragraph 2.

25                  COMMISSIONER BALCH: So at the same time

1 as they notify the division district office they  
2 notify the surface owner. I think we can't do any  
3 better than that. And it's just a notification, so  
4 that should be sufficient.

5 CHAIRPERSON BAILEY: And then we can  
6 eliminate the rest of that sentence. Eliminate the  
7 rest of that sentence after "operation."

8 Add a sentence that: "Notice shall  
9 include well name, API number, and location."

10 COMMISSIONER BALCH: And then they could  
11 file the information with the division.

12 I think the rest of it is fine.

13 MR. SMITH: Now, is this all pit closure?

14 COMMISSIONER BALCH: This is any closure.  
15 So this is the three different flavors of pits and  
16 below-grade tanks and closed-loop system surface  
17 drying pads. Anything you're closing.

18 CHAIRPERSON BAILEY: Are we in agreement  
19 with this?

20 COMMISSIONER BLOOM: That will work.

21 CHAIRPERSON BAILEY: Okay. Then we can  
22 take the yellow --

23 COMMISSIONER BLOOM: Particularly because  
24 the fee owner can, through SOPA, request earlier  
25 notifications.

1 COMMISSIONER BALCH: Sure.

2 Now, I think we can go back to the  
3 beginning and start over again.

4 CHAIRPERSON BAILEY: Well, no. No, we --

5 COMMISSIONER BALCH: There was one more  
6 thing?

7 CHAIRPERSON BAILEY: There was one more  
8 thing.

9 COMMISSIONER BLOOM: The permitting --

10 CHAIRPERSON BAILEY: It was the deed  
11 notice question.

12 COMMISSIONER BALCH: Oh, right.

13 CHAIRPERSON BAILEY: Whether or not the  
14 operator shall file a deed notice identifying the  
15 exact location of the on-site burial with the county  
16 clerk.

17 COMMISSIONER BALCH: The (d) can be  
18 deleted.

19 Do you want to add (f) as another part of  
20 closure notice?

21 COMMISSIONER BLOOM: That's what we need  
22 to discuss. And I believe there was testimony that  
23 a deed notice can't be filed on federal lands.

24 COMMISSIONER BALCH: There was also  
25 testimony -- I think it was by Mr. Hasely -- that

1 this information is already on the C-103 or C-105.

2 CHAIRPERSON BAILEY: And we are requiring  
3 the pipe 4 feet -- on the ground. We will have it  
4 on C-105. So...

5 COMMISSIONER BLOOM: I imagine the deed  
6 notice would be important when -- if we want to --  
7 the owner of private lands would want to sell his or  
8 her property.

9 COMMISSIONER BALCH: If you want to keep  
10 language like this you might want to have to qualify  
11 it by "if appropriate, file a deed notice." But  
12 what was --

13 CHAIRPERSON BAILEY: Yes. And who  
14 determines if it's appropriate or not.

15 COMMISSIONER BALCH: Maybe this would go  
16 back to the SOPA.

17 COMMISSIONER BLOOM: Folks think that --  
18 to have that in there, I don't know.

19 COMMISSIONER BALCH: Well, on the one  
20 hand, it was -- the point was raised that you can't  
21 do this on federal land.

22 COMMISSIONER BLOOM: I don't know about  
23 state land, how that would affect it.

24 COMMISSIONER BALCH: So it would seem to  
25 be something that would be specific to the surface

1 owner. The surface owner would have to specify the  
2 requirements for something like this. And we do  
3 have -- and is the same information available  
4 elsewhere?

5 CHAIRPERSON BAILEY: Both on the ground,  
6 physically.

7 COMMISSIONER BLOOM: You could say: "The  
8 operator shall file a deed notice identifying the  
9 exact location of the on-site burial with the county  
10 clerk in the county where the on-site burial occurs  
11 on private -- somewhere on private lands," or  
12 something like that, or fee -- fee lands or...

13 COMMISSIONER BALCH: Well, I think the  
14 reason the language is here is, you know, if you go  
15 to sell a piece of your ranch, and say they want to  
16 put their house on it. And the bank, during the  
17 mortgage process, is going to do a deed search. And  
18 this is the kind of information that you want to  
19 have on that.

20 How that applies to -- I guess that  
21 doesn't apply to federal land anyway. Would it  
22 really just apply to private landowners?

23 CHAIRPERSON BAILEY: Yes. Because it  
24 can't apply to state land either.

25 COMMISSIONER BALCH: So I think if you

1 specified this when the on-site burial occurs on  
2 private land --

3 CHAIRPERSON BAILEY: The operator shall  
4 file a deed notice identifying the exact location.

5 COMMISSIONER BLOOM: There we go.

6 CHAIRPERSON BAILEY: And it would become  
7 (5).

8 COMMISSIONER BALCH: And I think if you --  
9 if you go to the very beginning of that sentence:  
10 "When the on-site burial occurs" -- I would just  
11 say: "When on-site burial occurs," because it's not  
12 always going to happen.

13 CHAIRPERSON BAILEY: Right. Okay. That  
14 took care of the deletion of those portions of F (f)  
15 and F (1) (b). So the entire Section B has now been  
16 either dealt with in other ways or deleted.

17 Okay. It's a quarter to 5:00. We could  
18 review this overnight. If Theresa can e-mail to us  
19 the draft as it now stands at the end of this day,  
20 and we can review it overnight. And then at 9:00  
21 tomorrow morning we'll talk about what may be left,  
22 what we may have skipped, or what areas we feel need  
23 better consideration.

24 COMMISSIONER BALCH: Well, I thought about  
25 this just a little bit as well. I think it's

1 important to consider that the rule that we end up  
2 with is going to be usable, it's going to be easily  
3 administered, and then also appropriately protective  
4 of fresh water, public health, and the environment.

5 We don't want to end up with unanticipated  
6 consequences if we can foresee them. I guess that  
7 is the whole idea.

8 CHAIRPERSON BAILEY: Which gives us this  
9 evening to review.

10 COMMISSIONER BALCH: Have we gone through  
11 everything except --

12 CHAIRPERSON BAILEY: I think that we can  
13 agree that we will reconvene, or continue this case,  
14 to 9:00 tomorrow morning.

15 COMMISSIONER BALCH: I think Mr. Bloom had  
16 a question that should still be on the record.

17 COMMISSIONER BLOOM: I think we still need  
18 to review permit approvals, commission's denials,  
19 certifications, because there was some language in  
20 there saying that if a reply was not received in 30  
21 days it would be deemed approved.

22 COMMISSIONER BALCH: I thought we had --

23 CHAIRPERSON BAILEY: I thought we had  
24 changed that, that it was denied, and that they  
25 could appeal.

1                   COMMISSIONER BLOOM:  Maybe we could go  
2 through that.

3                   CHAIRPERSON BAILEY:  Okay.  Let's flag  
4 that in our reading.

5                   COMMISSIONER BLOOM:  Other than that, I  
6 think we have gone through the entire ruling.

7                   CHAIRPERSON BAILEY:  I think so, but we  
8 can ensure that.

9                   We're off the record.

10                   (Proceedings concluded.)

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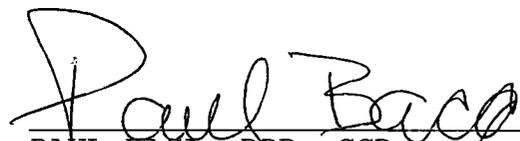
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I, Paul Baca, RPR, CCR in and for the State of New Mexico, do hereby certify that the above and foregoing contains a true and correct record, produced to the best of my ability via machine shorthand and computer-aided transcription, of the proceedings had in this matter.

  
PAUL BACA, RPR, CCR  
Certified Court Reporter #112  
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