

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

ORIGINAL

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

CASE NO. 14784 AND 14785

VOLUME 25

February 13, 2013
9:00 a.m.
1220 South St. Francis Drive
Porter Hall, Room 102
Santa Fe, New Mexico

THE COMMISSION:

JAMI BAILEY, Chairperson

GREG BLOOM, Commissioner

DR. ROBERT BALCH, Commissioner

MARK SMITH, Esq.

FLORENE DAVIDSON, COMMISSION CLERK

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1 (Note: In session at 9:00.)

2 CHAIRPERSON BAILEY: It's 9:00 o'clock on
3 Wednesday, February 13th. This is the meeting of
4 the Oil Conservation Commission. Commissioner Greg
5 Bloom is here as the designee of the Commissioner of
6 Public Lands; Commissioner Dr. Robert Balch, who is
7 designee of the Secretary of Energy, Minerals and
8 Natural Resources is present; and I am Jami Bailey,
9 Director of the Oil Conservation Commission, so all
10 three commissioners are present and a quorum is here
11 today.

12 We are continuing deliberations for
13 Consolidated Cases No. 14784 and 14785, which are
14 the Applications of the New Mexico Oil and Gas
15 Association and the Independent Petroleum
16 Association of New Mexico for Amendment of Certain
17 Provisions of Title 19, Chapter 15 of the New Mexico
18 Administrative Code Concerning Pits, Closed-loop
19 Systems, Below-grade Tanks, Sumps and other
20 Alternative Methods Related to the Foregoing and
21 Amending Other Rules to Conform with Changes
22 State-wide. These are deliberations of the
23 Commission so there are no public comments allowed
24 at this time and no comments from the audience will
25 be appreciated.

1 Commissioners, we have before us and up on
2 the screen a draft that we have been deliberating on
3 for quite some time. This one has undergone some
4 editing and changes with the legal counsel and our
5 recorder. Would you please explain to us,
6 Mr. Smith, what the draft is and what the highlights
7 mean that we are looking at?

8 MR. SMITH: Sure. This should represent
9 the changes that you all thus far have agreed to in
10 the rule that were made realtime by Theresa. As you
11 know, she also forwarded to you a Compare Write that
12 is done mechanically, which I think you should all
13 look at, but I think part of the significance of
14 what is on the screen would be the highlights, and
15 the highlights are changes that either Theresa made
16 or that I made in the interim since your last
17 meeting that you have not seen. These are not
18 changes that should really make any substantial
19 difference, but nonetheless, I think that we should
20 go through this quickly so you can see them, and
21 they were things like Theresa going through and
22 finding, you know, that we would say "under" in some
23 instances when we were referring to a
24 section, "Under section blah blah blah" and other
25 times it would be "Pursuant to section blah blah

1 blah." They don't have to be consistent but at
2 times it would make a difference. I went through
3 and looked at those.

4 We checked cross-references to make sure
5 that you were referencing the right section, because
6 as you know, there was a lot of bouncing around and
7 changing, so I think there are one or two of those,
8 those types of things. Can you think of anything
9 else that you and I looked at, Theresa?

10 MS. DURANES-SAENZ: And/or.

11 MR. SMITH: Oh, yeah. You are not allowed
12 by Records to use and/or in a rule, and I think that
13 there was at least one instance of that and I had to
14 go in and make some changes there to accommodate
15 that. But again, all those are highlighted so you
16 all can look at them and make sure that we haven't
17 done anything that you don't want done.

18 MS. DURANES-SAENZ: The subsections. You
19 can't have a Subsection A without a Subsection B.

20 CHAIRPERSON BAILEY: So conforming to
21 formatting requirements of the records.

22 MR. SMITH: That's right. So if you had a
23 Subsection A without a Subsection B in a particular
24 part of the rule, we took out the Subsection A and
25 moved it so it would be all in one section as

1 Records requires. But again, that will be
2 highlighted so you can see all that. So I would
3 suggest that we just ask Theresa to scroll through
4 this and stop and look at the highlights as you go.

5 You will see highlights like these, and
6 again, that's for a requirement of Records noting
7 each subsection that the prior instance of NMAC has
8 been repealed and it's been replaced by this
9 subsection. So you are going to see those all the
10 way through this version that's on the screen, the
11 ones that you really need to be concerned about
12 other than the ones we are looking at right here.

13 CHAIRPERSON BAILEY: And if the
14 commissioners have any suggested changes as we go
15 along, that would be the appropriate time to bring
16 those up.

17 MR. SMITH: Yeah. And once you get those
18 done, this is sort of a -- this isn't as substantive
19 as what you will be doing later on, so once you run
20 through these you may actually have some serious
21 discussion about changes that you want to make.

22 CHAIRPERSON BAILEY: So we can look at
23 Sections 1, 2, 3, 4, 5 and 6, see the references
24 that are highlighted and go ahead and accept those.
25 Is that the will of the Commission?

1 COMMISSIONER BLOOM: I'm sorry, what's
2 happening with the ones outlined in yellow?

3 MR. SMITH: This tells you that the prior
4 section, 19-15-1-1 NMAC, has been repealed and this
5 is replacing it. This is something that is required
6 by the Records Center. It's basically to give
7 history.

8 COMMISSIONER BLOOM: So we need to add
9 that language when it's submitted to records?

10 MR. SMITH: This will be added when it's
11 submitted to records, right. What you are looking
12 at is a version that pending any changes you all
13 make in further deliberations, this would be the
14 format that it will be submitted to records. Right,
15 Theresa?

16 MS. DURANES-SAENZ: Correct.

17 COMMISSIONER BLOOM: I'm fine with those.

18 DR. BALCH: I'm fine as well.

19 CHAIRPERSON BAILEY: So we can scroll on
20 down to Section 7. At the end of 7 we have the same
21 highlighting. In Section 8 we have highlighting to
22 put in a hard date, and that hard date will be
23 determined by the date of signing of this order; is
24 that correct?

25 MR. SMITH: Well, if you will look at the

1 handout that Theresa just gave you, this shows the
2 deadline by which the final version of the rules
3 each month or twice each month has to be submitted
4 to the New Mexico Register, and then the publication
5 date. The publication date would be the effective
6 date of the new rule, so depending on what you're
7 after in 19.15.17.8C, you could put in there the
8 publication date after you sign the order.

9 CHAIRPERSON BAILEY: Okay. So we can
10 accept that highlighting and go on to the highlight
11 at the end of Section 8 and accept that?

12 COMMISSIONER BLOOM: Correct.

13 DR. BALCH: We actually want to use the
14 highlighting on the hard date until we get to that
15 point so we don't forget it.

16 CHAIRPERSON BAILEY: I think we need to.
17 Then we can scroll on down to the end of Subsection
18 9 where we have more cross-referencing and then in
19 Section 10 under Siting Requirements we have some
20 highlighted paragraphs. 19.15.17.10, Siting
21 Requirements, A1B is highlighted.

22 COMMISSIONER BLOOM: Looks like that was
23 just reformatting. It appears to be fine to me.

24 CHAIRPERSON BAILEY: And the same with
25 Paragraph D.

1 DR. BALCH: I think they are most reading
2 correctly.

3 CHAIRPERSON BAILEY: Okay.

4 MR. SMITH: Let me ask real quickly if I
5 may, Theresa, do you remember why we reformatted
6 that?

7 MS. DURANES-SAENZ: It's not acceptable to
8 have "within" as a single word under B, so we moved
9 B1 and B2 -- or B1 up and D1 and D2 up so that
10 "within" does not stand alone.

11 MR. SMITH: The way it was apparently
12 before was under B, for instance, it said, "B,
13 within," and then you moved down another line and
14 you had the Romanette 1, Romanette 2, so we had to
15 move Romanette 1 and 2 up so it would fall after the
16 word within.

17 CHAIRPERSON BAILEY: These are formatting
18 issues?

19 MR. SMITH: That's all. Right.

20 COMMISSIONER BLOOM: It looks a little
21 cleaner that way.

22 CHAIRPERSON BAILEY: Then we can continue
23 scrolling, accept the reference at the end of
24 Section 10. Scrolling on down, so Section 11G,
25 which was a reference cross-check, so we can accept

1 that. Is that the will? And then scrolling on
2 down --

3 COMMISSIONER BLOOM: I'm sorry, I'm not
4 sure -- how does that read?

5 MR. SMITH: I'm not sure where you are.

6 CHAIRPERSON BAILEY: The highlighted
7 section says, "Before it is 19.15.17. NMAC."

8 DR. BALCH: There's a missing word.

9 MR. SMITH: Wait a minute. Where are you?

10 DR. BALCH: Page 8 of the working
11 document. The sentence no longer makes sense.

12 COMMISSIONER BLOOM: This is permanent
13 pits?

14 MR. SMITH: Oh, I think -- is that why we
15 highlighted it? We highlighted it because of that.

16 DR. BALCH: This is the language that we
17 largely left alone because nobody asked for a change
18 so we can go back to the original and see if someone
19 erased a couple words.

20 COMMISSIONER BLOOM: I think if we took
21 out 19.15.17 NMAC it might make sense.

22 CHAIRPERSON BAILEY: The original rule
23 simply deletes that highlighted area. The original
24 rule reads, "May inspect the leak detection system
25 before it's covered."

1 DR. BALCH: So actually, the only thing
2 that's apparently inserted incorrectly is the
3 19.15.17 NMAC. If you delete that it reverts back
4 to the original language.

5 COMMISSIONER BLOOM: That looks good.

6 CHAIRPERSON BAILEY: Then I5, the
7 word "that" is highlighted.

8 MR. SMITH: That may have been a which or
9 something. I think that's a grammatical change that
10 I made. Or it may not have had the word "that" in
11 there. Yeah. I think it probably read, "That has
12 the side wall open for visual inspection and does
13 not meet," and I put the "that" in for clarity.

14 CHAIRPERSON BAILEY: Commissioners, do you
15 agree?

16 DR. BALCH: I agree.

17 COMMISSIONER BLOOM: Seems fine.

18 CHAIRPERSON BAILEY: Then we can scroll
19 down to the end of 17.11 and accept the reference
20 there and continue scrolling to 19.15.17.12,
21 Operational Requirements D6 on Page 11.

22 MR. SMITH: This is a cross-reference
23 change. I believe that it read G, and given the
24 changes made I think it should read H, but again,
25 that's something you all need to doublecheck on.

1 COMMISSIONER BLOOM: So H is reclamation
2 of pit locations, on-site burial locations and
3 drying pad locations.

4 CHAIRPERSON BAILEY: And it contains the
5 tables. Is it Paragraph 2 or Paragraph 5?

6 DR. BALCH: Paragraph 2 covers just
7 removal of the tank where the tables are strictly
8 dealing with pits. Table 1 and 2. So Paragraph 2,
9 I think, is the correct site.

10 CHAIRPERSON BAILEY: But Table 1 has to do
11 with closure criteria for soils?

12 DR. BALCH: Right, but in D-6 we are
13 talking about below-grade tanks.

14 CHAIRPERSON BAILEY: Which should be
15 included in Table 1, Title, which is one of the
16 suggestions I made, because later on in 13 we
17 reference that Table 1 includes below-grade tanks.

18 DR. BALCH: I guess I thought that
19 Paragraph 2 Section H wasn't intended to resolve the
20 issue of below-grade tanks without having them
21 included in the tables.

22 COMMISSIONER BLOOM: I think that's right,
23 for drying pads.

24 DR. BALCH: Right. Basically we want to
25 make sure that the location that they are only going

1 to put up to a foot of soil over will have at most
2 600 milligrams per kilogram of chlorides. In both
3 Table 1 and Table 2 you're going to have a situation
4 where you have substantial ground cover, four feet
5 regardless.

6 CHAIRPERSON BAILEY: If there has been a
7 leak from the tank, then those soils will need to be
8 tested to indicate the depth of that leak, and
9 that's where Table 1 is referenced in 13C3, that the
10 operator shall test the soils beneath the pit,
11 drying pad, closed-loop system or below-grade tank
12 as follows. That's in 13C.

13 DR. BALCH: All right. So perhaps we have
14 to have more discussion as part of the --

15 MR. SMITH: Well, let me ask you, though,
16 before you come back to it, if you were going to
17 reference something other than the table, do you
18 agree that Subsection H Paragraph 2 is what you
19 would be referencing?

20 CHAIRPERSON BAILEY: Subsection H, yes,
21 but not necessarily Paragraph 2.

22 MR. SMITH: All right.

23 CHAIRPERSON BAILEY: Within that same
24 sentence structure I found some ambiguity in the
25 sentence that says, "If the wet or discolored soil

1 exceeds the standards set forth in Paragraph 2."
2 The word "exceeds" is ambiguous. It can be taken as
3 both achieves or goes farther than. I would suggest
4 that we change that language to, "If the wet or
5 discolored soil concentrations of contaminants is
6 less than the standards set forth in paragraph
7 whatever of Subsection H blah blah, then the
8 operator shall proceed with the closure
9 requirements," because the closure requirements
10 should not proceed until after there is assurance
11 that the concentrations of contaminant is less than
12 that standard.

13 COMMISSIONER BLOOM: I think that would
14 make sense to make that change.

15 CHAIRPERSON BAILEY: I think there was
16 confusion there over the definition of exceeds at
17 that point.

18 COMMISSIONER BLOOM: We may have other
19 cases in the document where we use exceeds. We
20 could find and replace those throughout.

21 DR. BALCH: Perhaps we should finish going
22 through these changes and then we can start our way
23 through the document.

24 CHAIRPERSON BAILEY: This is wordsmithing
25 rather than substantive change. It's just to

1 relieve the ambiguity that may be present because of
2 the wording of the sentence.

3 DR. BALCH: Largely those are the changes
4 I have so maybe I'm predicating the discussion on my
5 own analysis?

6 CHAIRPERSON BAILEY: Okay. So can we go
7 ahead and put in, "If the wet or discolored soil
8 concentrations of contaminants are less than the
9 standard." You might want to highlight that so we
10 can --

11 MR. SMITH: I think that should probably
12 read --

13 CHAIRPERSON BAILEY: It's in the second
14 sentence it needs to go. In the sentence below the
15 one you just put it in. Okay. It goes in the
16 following sentence.

17 MR. SMITH: I think you may want the
18 highlighted section to come between the word "the"
19 and "wet" so it reads, "If the concentrations of
20 contaminants in the wet or discolored soil are less
21 than."

22 CHAIRPERSON BAILEY: So in that insertion
23 that was just put into that sentence after the word
24 "contaminants," put in the words "in the wet or
25 discolored soil."

1 MR. SMITH: Well, what you are concerned
2 about is the concentration of contaminants being
3 less than. So I think you want to say, "If the
4 concentration of contaminants in the wet" -- that's
5 right. Then you can delete the first instance of
6 wet or discolored soil that you just highlighted
7 there, Theresa. Take out the word "wet." "If the
8 concentration of contaminants in the wet or
9 discolored soil are less than." I think that's what
10 you want.

11 DR. BALCH: Now it makes sense.

12 COMMISSIONER BLOOM: It would be
13 concentration is less than.

14 MR. SMITH: Right.

15 COMMISSIONER BLOOM: Change "are" to "is."

16 DR. BALCH: This may require further
17 discussion, because I think the way it's set up
18 right now in Paragraph 2 Section H, you are only
19 looking at chlorides for the situation, and I think
20 you're wondering if you need to include that in
21 Table 1.

22 CHAIRPERSON BAILEY: Because we do
23 reference that.

24 DR. BALCH: Which has more than one
25 constituent, than chlorides. In that case if you

1 are looking at a contaminant, you are looking at
2 one.

3 CHAIRPERSON BAILEY: So highlight that,
4 because this really is a discussion going to the
5 next section.

6 DR. BALCH: Yes. However, the first
7 highlighting on the next sentence probably needs to
8 be replaced with -- well, the word that was there
9 before was "exceeds" and I don't know if you want to
10 talk about the word "exceeds" or not.

11 CHAIRPERSON BAILEY: That's appropriate, I
12 think, in the first sentence.

13 DR. BALCH: Is that appropriate legal
14 terminology?

15 MR. SMITH: Yes, but I think grammatically
16 don't you want to, in the first sentence, don't you
17 want to make the same sort of change that you made
18 to the one that is now highlighted? That is, do you
19 not want it to read, "The operator shall demonstrate
20 to the division whether the concentration of
21 contaminants in the wet or discolored soil exceeds
22 the standards"?

23 DR. BALCH: I don't think you need to.
24 The first part is really your protocol for when you
25 remove the pad you have to inspect. If you inspect

1 and there's no wet or discolored soil you are done.
2 How would you demonstrate that to the division? You
3 demonstrate by a check box on a form, I presume, or
4 a short written statement that there was no apparent
5 leak. However, if there is wet or discolored soil,
6 the second sentence deals with that situation, and
7 that's where you do the testing that's set up by the
8 regulation and then do the remediation that's
9 required.

10 MR. SMITH: But both of the sentences
11 presume the existence of wet or discolored soil.
12 The one that you don't want to change says, "The
13 operator shall demonstrate to the division whether
14 the wet or discolored soil." There's no option
15 there for it not to be wet or discolored.

16 DR. BALCH: Then there probably ought to
17 be another sentence in there, I would presume, that
18 would lead to the proceeding with closure
19 requirements 19.15.17.13 NMAC after "or" involved
20 the first part of the Paragraph 6. Because you're
21 right, it doesn't tell you what to do if there's no
22 wet or discolored soil.

23 CHAIRPERSON BAILEY: The very first
24 sentence in Paragraph 6 says, "Inspection shall be
25 made and document any areas that are wet,

1 discolored." So that allows the observation.

2 COMMISSIONER BLOOM: One concern I would
3 have is if there's no noticeable areas of wet or
4 discolored soil, then there would be no testing at
5 all?

6 DR. BALCH: No, there wouldn't be any
7 testing if there was no evidence of a leak.

8 CHAIRPERSON BAILEY: No evidence of a
9 leak.

10 DR. BALCH: Perhaps if you say, "The
11 operator shall demonstrate to the division and
12 document when wet or discolored soil exceeds the
13 standards in 2." Would that be more clear?

14 CHAIRPERSON BAILEY: No, because they may
15 not document it and it falls out of the --

16 DR. BALCH: Right. Okay. So maybe there
17 needs to be another sentence after the first
18 sentence that tells them they can proceed with
19 closure requirements if there was no wet or
20 discolored soil.

21 CHAIRPERSON BAILEY: Well, we can insert
22 that phrase in the sentence that we just worked on.
23 If there's no evidence of wet or discolored soil
24 or --

25 DR. BALCH: Or the concentrations are less

1 than set forth in Paragraph 2.

2 CHAIRPERSON BAILEY: Does that do it?

3 DR. BALCH: Do you want to use the
4 word "evidence" or do you want to say, "If there is
5 no wet or discolored soil"? I believe that
6 clarifies the issue.

7 MR. SMITH: I think so, and again,
8 remember, my only concern is months or years hence
9 whether this will wind up being a source of
10 confusion. I still am not clear why you want to
11 reference concentration of contaminants in the
12 highlighted area, but in the sentence just before
13 it, you simply want to refer to the wet or
14 discolored soil as opposed to the concentration of
15 contaminants in the wet or discolored soil. I don't
16 see the distinction there.

17 DR. BALCH: I think that's a good point.
18 In the sentence right before that, right there where
19 the cursor is, right before the word "wet" if you
20 put "concentration of contaminants." Because we're
21 really not talking about the wet or discolored soil,
22 we are talking about the contaminants concentration.

23 MR. SMITH: If they make this change,
24 Theresa, the very next instance of "exceeds" -- wait
25 a minute. No, that's right.

1 CHAIRPERSON BAILEY: That would come back
2 to the way it was before by that insertion. Because
3 that "exceeds" in the sentence that we just worked
4 on brings up the ambiguity. You can't have the word
5 "exceeds" in that first yellow highlighted sentence.
6 "The operator shall demonstrate to the division
7 whether the concentration of contaminants in the wet
8 or discolored soil." We are just repeating what the
9 following sentence says.

10 MR. SMITH: Well, what you are really
11 saying, I think, in the sentence that you are now
12 talking about is you want the operator to measure
13 the level of concentration and then you go on to say
14 if it's less, they can proceed.

15 CHAIRPERSON BAILEY: Yes.

16 MR. SMITH: So maybe the thing to do in
17 the sentence that you are now considering is say,
18 "The operator shall demonstrate to the division the
19 level of the concentration" or "the amount of
20 concentration" or whatever you want to use there,
21 "of the contaminants in the wet or discolored soil."
22 Or "with respect to the standards set forth in."

23 DR. BALCH: If you say, "The operator
24 shall measure and report to the division the
25 concentration of contaminants in the wet or

1 discolored soil." Period. "Or as set forth in
2 Paragraph 2."

3 MR. SMITH: Right.

4 CHAIRPERSON BAILEY: So repeat that. "The
5 operator shall demonstrate to the division" --

6 MR. SMITH: No, "The operator shall
7 measure and report to the division the concentration
8 of contaminants in the wet or discolored soil with
9 respect to the standards set forth in Paragraph 2 of
10 Subsection H," blah blah blah.

11 COMMISSIONER BLOOM: You don't report to
12 the concentration of contaminants at the end? "The
13 operator shall measure the concentration of
14 contaminants in the wet or discolored soil with
15 respect to the standards set forth in Paragraph 2 of
16 Subsection H and report its findings to the
17 division."

18 MR. SMITH: I think you are better off the
19 way it is.

20 COMMISSIONER BLOOM: I think that works
21 there. Yeah.

22 CHAIRPERSON BAILEY: Are we agreed on that
23 language as it's written?

24 COMMISSIONER BLOOM: Yes.

25 DR. BALCH: I think it makes sense to me.

1 CHAIRPERSON BAILEY: Okay, but we are
2 still discussing which paragraph is referenced in
3 Subsection H.

4 DR. BALCH: Right.

5 CHAIRPERSON BAILEY: And we won't resolve
6 that until we get to the next page. So if we scroll
7 down to 19.15.17.13, Closure and Reclamation
8 Requirements, we had quite a bit of highlighting in
9 Subsection A, Closure Plans. There's the highlight
10 for "pursuant to." That's just to conform all of
11 the references to the same language; is that right?

12 MR. SMITH: I don't know whether that was
13 under -- you may have some "unders" in here, but
14 when I looked at it I thought they were fine. This
15 may have been an "under" and I thought "pursuant to"
16 was better there.

17 CHAIRPERSON BAILEY: Then Subparagraph B,
18 the whole sentence is highlighted.

19 MR. SMITH: I think that's reformatting.

20 MS. DURANES-SAENZ: Correct.

21 MR. SMITH: You may have had a Romanette 1
22 in there or something.

23 COMMISSIONER BLOOM: That used to be A1
24 and it simply became a B.

25 MR. SMITH: Oh, that's right. That's why

1 you will notice all of the capital letters after
2 that are also highlighted.

3 CHAIRPERSON BAILEY: Okay. So shall we go
4 down to C1? That's also a reference to pursuant to
5 a section. And then in C2 we have questions
6 concerning excavating and/or removing.

7 COMMISSIONER BLOOM: So do we get rid of
8 excavating and/or? Do they still mean the same
9 thing?

10 MR. SMITH: Yeah, I think that's why they
11 are all highlighted there. It seems to me if -- I
12 mean, you can't remove unless you excavate, can you?
13 Isn't excavating a precondition or a subset of
14 removing?

15 DR. BALCH: Only because the drying pad is
16 for a closed-loop system. Normally you have --
17 well, I suppose you would call it a very, very
18 shallow -- it could even be flat surface of the
19 liner and berm, right?

20 CHAIRPERSON BAILEY: Right.

21 DR. BALCH: So I think the excavation part
22 is redundant.

23 CHAIRPERSON BAILEY: Then let's go ahead
24 and delete "excavating and/or" and leave the
25 word "removing" which covers all circumstances. In

1 17.13C3, "The operator tests soils beneath the pit,
2 drying pad or closed-loop system or below-grade
3 tank," and then in 3A there's the reference to Table
4 1. So it seems to me that if those areas are
5 analyzed for constituents listed in Table 1, then
6 Table 1 should have the title expanded to include
7 soils beneath below-grade tanks, drying pads,
8 closed-loop systems and pits.

9 COMMISSIONER BLOOM: So go down to Page 15
10 and add that to the title?

11 DR. BALCH: Actually, I'm wondering if it
12 might be better just to say, "Closure criteria for
13 soils where contents are removed." The reason we
14 had discussion about this before was when you go to
15 close a below-grade tank you would not necessarily
16 have four feet of topsoil.

17 CHAIRPERSON BAILEY: Unless you had to
18 excavate it because of the leak.

19 DR. BALCH: Unless you had to excavate it.
20 But even if you have to excavate it, you might go
21 out with the shovel and five-gallon bucket and
22 quickly discover it's just a surface stain and you
23 are done.

24 CHAIRPERSON BAILEY: Or it has gone down
25 ten feet.

1 DR. BALCH: And you keep digging until you
2 find the bottom of it. At that point -- I think the
3 reason why we limited Table 1 in the last
4 discussion, and maybe we need to go back and change
5 that -- is that Table 1 was really dealing with a
6 situation where you knew there was going to be a
7 full remediation of the site with four feet of soil,
8 and you knew that the concentrations of contaminants
9 would be safe from the environment.

10 CHAIRPERSON BAILEY: I disagree with you.

11 DR. BALCH: Okay. That's just what I
12 remember.

13 CHAIRPERSON BAILEY: Right. I think Table
14 1 was developed -- and I can find the original
15 application -- to apply to below-grade tanks,
16 closed-loop systems, drying pads for closed-loop
17 systems and pits.

18 DR. BALCH: Where contents were removed?

19 CHAIRPERSON BAILEY: Yes, and I think we
20 need to be consistent in the requirement.

21 DR. BALCH: Okay. So I guess there's two
22 approaches. You could throw everything in the title
23 where you could take out beneath pits, and it could
24 be applying to the situation we're talking about.

25 CHAIRPERSON BAILEY: But I think it leaves

1 questions in an operator's mind if we are not
2 consistent with what we are saying in 13C.

3 DR. BALCH: You would need to add in not
4 only pits, you would need to add tanks and drying
5 pads associated with closed-loop systems.

6 CHAIRPERSON BAILEY: Yes, which would be
7 the second line of Table 1's heading?

8 COMMISSIONER BLOOM: I would agree with
9 that.

10 DR. BALCH: Okay.

11 CHAIRPERSON BAILEY: So shall we scroll on
12 down to Table 1? The heading, "Closure Criteria for
13 Soils Beneath Below-grade Tanks, Drying Pads
14 Associated with Closed-loop Systems and Pits." And
15 that's consistent with what the language is in 13C3.

16 DR. BALCH: And that's probably --

17 COMMISSIONER BLOOM: You might look at the
18 title for Table 2 as well since we're down there.
19 Closure criteria for waste left in place in
20 temporary pits but not waste left in place for
21 burial trenches. Or burial trenches and waste left
22 in place for temporary pits.

23 CHAIRPERSON BAILEY: Okay.

24 COMMISSIONER BLOOM: Burial trenches up
25 to -- put an "and."

1 DR. BALCH: So in D 6 on Page 11 --

2 CHAIRPERSON BAILEY: I think that would be
3 a lot easier so there's no confusion over what
4 paragraph to reference.

5 DR. BALCH: Fine.

6 CHAIRPERSON BAILEY: Yes, D6, wet or
7 discolored soils. No, 12D6 on Page 11. There. So
8 removing the reference to Paragraph 2 and just
9 referencing Table 1 or Subsection H. Mr. Smith,
10 does that make sense to just say Table 1 of
11 Subsection H?

12 COMMISSIONER BLOOM: It's interesting,
13 because I guess perhaps that's the best we can do to
14 describe the position of Table 1 as being in
15 Subsection H.

16 MR. SMITH: You don't have a subsection
17 after H. H is the last one, so it would seem to me
18 that you should be able to put Table 1 of
19 19.15.17.13.

20 DR. BALCH: I don't think we used
21 Subsection H anywhere else we referenced tables,
22 so -- let me check that.

23 CHAIRPERSON BAILEY: Whatever records and
24 archives requires is what we will do, right?

25 DR. BALCH: In other places we say in

1 Table 1 of 19.15.17.13 NMAC." Table 2 of. That's
2 still Table 1.

3 CHAIRPERSON BAILEY: Are we all on the
4 same page? Let's scroll on down to 19.15.17.13 and
5 look at some of the other highlighted words. C3C
6 appears to be just a formatting thing.

7 MR. SMITH: I'm sorry, 13 what was the
8 cite again?

9 CHAIRPERSON BAILEY: 13C3C on Page 12.

10 MR. SMITH: Right. That's because of the
11 highlight above where you see 13B. We changed that
12 to B as opposed to -- what did we have before?
13 Romanette 1, Theresa? You had B as the subset of A
14 under 13 and Records won't take that.

15 CHAIRPERSON BAILEY: Okay. And that
16 discussion can hold forth for the following
17 highlighted words listed and set forth.

18 MR. SMITH: Listed and set forth was like
19 under and pursuant to. They weren't used
20 consistently or were maybe a little confusing, I
21 thought, so I went through to see if I thought
22 listed or set forth was better.

23 CHAIRPERSON BAILEY: Okay. Commissioners,
24 do you want to accept those highlighted words all
25 the way through D6?

1 DR. BALCH: Yes.

2 COMMISSIONER BLOOM: Do we
3 need "respectively" in there?

4 CHAIRPERSON BAILEY: That's the next
5 question.

6 MR. SMITH: Well, I will have to look, but
7 this seems to indicate that F has to do with
8 temporary --

9 DR. BALCH: Design.

10 MR. SMITH: Oh, I see, and K is
11 construction?

12 DR. BALCH: Yes, I believe so. No. 11 has
13 to do with design and construction. So F is
14 temporary pits. "Operator shall design and
15 construct a temporary pit in accordance with the
16 following requirements." I think K must have to do
17 with the burial trenches.

18 MR. SMITH: F is temporary pits and K must
19 be burial trenches. Yeah, that's right. F is
20 temporary pits and K is burial trenches.

21 CHAIRPERSON BAILEY: Why do we even need
22 that sentence? It seems redundant. Why do we have
23 to repeat it again?

24 COMMISSIONER BLOOM: I agree. We don't
25 use that everywhere.

1 DR. BALCH: Right. At this point they
2 have already designed and constructed the temporary
3 pit, so --

4 CHAIRPERSON BAILEY: Should we delete the
5 last sentence?

6 DR. BALCH: I think so.

7 COMMISSIONER BLOOM: I would agree with
8 that.

9 CHAIRPERSON BAILEY: Are we in agreement
10 with that? Mr. Smith, do you have --

11 MR. SMITH: No, I think that's perfectly
12 acceptable. Although I hasten to add if you kept
13 it, you would want the respectively.

14 CHAIRPERSON BAILEY: Let's scroll on down
15 to 13D8C where we have highlighted the letter H as a
16 reference for covering the pit with non-waste
17 containing earth materials.

18 DR. BALCH: This might be a correct
19 rendition of Paragraph 2.

20 CHAIRPERSON BAILEY: Shouldn't that be
21 Paragraph 3?

22 DR. BALCH: Yes, Paragraph 2 really has to
23 do with a different situation.

24 CHAIRPERSON BAILEY: And Paragraph 3 has
25 to do with soil cover designs for pits in on-site

1 burials.

2 DR. BALCH: Paragraph 3 is Subsection H.
3 8C.

4 CHAIRPERSON BAILEY: We skipped over that
5 one. Down in 8C, yes. H is fine, but it should
6 reference Paragraph 3, not Paragraph 2. Shall we go
7 back up to 7 where you were highlighting C?

8 DR. BALCH: Subsection C.

9 CHAIRPERSON BAILEY: Here we have another
10 issue with the word "exceeds."

11 DR. BALCH: So Subsection C is removal and
12 disposal off-site in an approved disposal facility.

13 CHAIRPERSON BAILEY: So there is no
14 problem with the word "exceeds" here?

15 DR. BALCH: I don't think so. This is
16 basically -- you can't demonstrate that the
17 concentrations are below the limits in Table 2, you
18 have to remove everything and haul it off.

19 CHAIRPERSON BAILEY: Yes.

20 COMMISSIONER BLOOM: I think that would
21 still create the problem where exceeding could be
22 used in a positive or negative context. If the
23 contents were above the levels in Table 2, it would
24 exceed them but if they were below they could also
25 be exceeding them in that they were coming in

1 underneath and performing.

2 CHAIRPERSON BAILEY: Because of the
3 ambiguity.

4 DR. BALCH: Also the thing you're really
5 talking about is the contaminant concentrations and
6 that's not even mentioned in this paragraph.

7 CHAIRPERSON BAILEY: So if the
8 concentration of contaminants of the contents -- if
9 the concentration of contaminants in the contents.
10 At the very beginning of Paragraph 7. Before that
11 word. "If the concentration of contaminants in the
12 contents are higher" -- down below in the second
13 line. Replace the word "exceed." Are higher than.
14 Does that take care of the problem?

15 COMMISSIONER BLOOM: I think it does.

16 MR. SMITH: I don't know that you had a
17 problem but I think this works fine. But if you are
18 going to do this, I would suggest that you have
19 Theresa search for the word "exceed" and make this
20 change consistently throughout to the extent you
21 think you have the same issue any place. I mean,
22 you don't want to be inconsistent in the language
23 that you use.

24 CHAIRPERSON BAILEY: But we need to
25 evaluate each instance.

1 MR. SMITH: That's right. She needs to
2 search live online so you could look at each
3 instance of "exceed" and decide whether you
4 want "higher than" for consistency's sake.

5 CHAIRPERSON BAILEY: Shall we do that
6 after we go through the last few pages?

7 MR. SMITH: It's up to you guys.

8 DR. BALCH: This is still unclear to me.
9 Would it be better if you said, "If the
10 concentration of any contaminants of the contents
11 after mixing the soil or non-waste material, three
12 to one, et cetera are higher than concentrations
13 shown in Table 2."

14 COMMISSIONER BLOOM: Concentration of any
15 contaminant?

16 DR. BALCH: Yeah. Then you can remove the
17 end of the sentence. "Are higher than constituents
18 concentration shown in Table 2." You can remove
19 that.

20 CHAIRPERSON BAILEY: I think that's a good
21 specificity there.

22 MR. SMITH: I think you want to change
23 the "are" to "is", too, wouldn't you?

24 DR. BALCH: I think it's confusing because
25 you have multiple constituents.

1 CHAIRPERSON BAILEY: The beginning of the
2 third line. Shall we do the search for "exceed"
3 now?

4 COMMISSIONER BLOOM: Sure. While it's
5 still fresh in our minds.

6 MR. SMITH: I still think you have a
7 grammar problem in 7 but I don't think it's worth
8 your time to deal with it, to tell you the honest
9 truth.

10 COMMISSIONER BLOOM: I think we're okay
11 there. "Shall not exceed ten acre feet."

12 CHAIRPERSON BAILEY: I think that's fine.
13 That's fine. I think that's fine. That's 13C?

14 COMMISSIONER BLOOM: That's 13C3B.

15 CHAIRPERSON BAILEY: Yes. You should
16 change the language there, I believe.

17 DR. BALCH: If any contaminant
18 concentration is greater than any of the parameters
19 listed in Table 1. I think you can keep deleting
20 there.

21 MR. SMITH: Is greater what you used?
22 Didn't you use higher last time?

23 DR. BALCH: Higher is fine. I think we
24 used higher before.

25 CHAIRPERSON BAILEY: Okay. And where is

1 the next one?

2 DR. BALCH: Right below it.

3 MR. SMITH: Didn't you delete the second
4 instance of "any" in the last revision you made?

5 CHAIRPERSON BAILEY: Yes, we did. I'm
6 trying to find the word.

7 MR. SMITH: It would read, "If any
8 contaminant concentration is higher than."

9 DR. BALCH: Parameters listed in.

10 MR. SMITH: Right. You want to put in
11 a "it" there, Theresa.

12 CHAIRPERSON BAILEY: Then make the same
13 change in the following paragraph.

14 DR. BALCH: I'm wondering if that might be
15 okay the way it is. Well, it's not very clear what
16 it's pointing to. If all contaminant concentrations
17 are lower.

18 MR. SMITH: Do you want to say less than
19 or equal to? What are you going to do if they are
20 equal?

21 DR. BALCH: If you say lower, that
22 includes equal. Equal would not be lower.

23 MR. SMITH: Higher also includes equal.

24 DR. BALCH: That's true.

25 MR. SMITH: So you don't have anything

1 there for what happens if you hit it right on the
2 mark.

3 CHAIRPERSON BAILEY: Then you resample
4 because the odds of that happening are great.

5 COMMISSIONER BLOOM: Greater than or equal
6 to?

7 DR. BALCH: Okay. The parameters of Table
8 1 and 2 are a limit. So presumably if you were to
9 hit it dead on, that should be allowed. That's how
10 limit is defined.

11 COMMISSIONER BLOOM: I would agree.

12 DR. BALCH: It would be higher than that
13 where you would have the issue. So the instances
14 where we've used higher are already safe. We would
15 want to say less than or equal to here.

16 MR. SMITH: Do you want Theresa to make --
17 I think they want the syntax of C to match the
18 syntax of B so it would be, "If any contaminant
19 concentration is less than or equal to the
20 parameters listed."

21 DR. BALCH: Instead of saying all
22 contaminants?

23 MR. SMITH: Right. Exactly so.

24 DR. BALCH: Are less than or equal to the
25 parameters.

1 MR. SMITH: You need to make
2 concentrations plural in this one.

3 DR. BALCH: Let's do 5.

4 CHAIRPERSON BAILEY: It would read, "The
5 concentration of contaminants in the stabilized
6 waste are not" --

7 DR. BALCH: Are not higher than.

8 CHAIRPERSON BAILEY: Are not higher than
9 the criteria. So it would be -- are you ready,
10 Theresa?

11 MS. DURANES-SAENZ: Yes.

12 CHAIRPERSON BAILEY: So at the beginning
13 of that phrase after the word "the," it's
14 between "the stabilized," so it will say, "The
15 concentration of any contaminant in the stabilized
16 waste is not higher than," and delete that.

17 DR. BALCH: Do you want to replace the
18 criteria with parameters?

19 COMMISSIONER BLOOM: Yes, I think that
20 would be better, parameters.

21 CHAIRPERSON BAILEY: At the end of that
22 line, the word "criteria."

23 DR. BALCH: Actually, "The criteria"
24 should be replaced with the word "parameters."
25 That's what we did in the last instance.

1 COMMISSIONER BLOOM: Not higher than the
2 parameters or parameters?

3 DR. BALCH: I think we can leave in "the."

4 CHAIRPERSON BAILEY: The same changes for
5 do not exceed.

6 DR. BALCH: I think the place you would
7 put it there would be, "If, after appropriate
8 stabilization, concentration of contaminants in the
9 contents."

10 CHAIRPERSON BAILEY: Is it "in the
11 contaminants"?

12 DR. BALCH: Yes. Now, that would be "all
13 contaminants." And then where it says, "Do not
14 exceed," it would be, "Are less than or equal to."

15 COMMISSIONER BLOOM: "Is. Is less than or
16 equal to." Equal to rather than "legal."

17 CHAIRPERSON BAILEY: We know what your
18 words are used to typing.

19 DR. BALCH: You can take out the "or."

20 COMMISSIONER BLOOM: Should it read, "Less
21 than or equal to levels in Table 2"?

22 CHAIRPERSON BAILEY: Less than or equal to
23 the concentration of --

24 DR. BALCH: To the parameters.

25 CHAIRPERSON BAILEY: "To the parameters,"

1 yes. "To the parameters of."

2 DR. BALCH: I think you can take out the
3 constituents concentrations.

4 CHAIRPERSON BAILEY: Okay. On to the
5 next "exceed."

6 COMMISSIONER BLOOM: There was also above
7 any of the parameters. There's also higher than in
8 the parameters.

9 CHAIRPERSON BAILEY: Okay. Sure. We can
10 change "that exceed" to "are higher than."

11 DR. BALCH: Wouldn't you want to put in
12 the results of any contaminant concentration?

13 CHAIRPERSON BAILEY: It's the results of
14 the analyses.

15 MR. SMITH: Well, you deleted the results
16 language before. I mean, it seems to me that you
17 are better off being as consistent as you can in any
18 of this language.

19 CHAIRPERSON BAILEY: If the contaminant
20 concentrations -- if any contaminant concentration.

21 DR. BALCH: Is higher.

22 CHAIRPERSON BAILEY: And delete the next
23 word. And we can use the same --

24 COMMISSIONER BLOOM: I think we can get
25 rid of that second "a." Get rid of any of, right?

1 CHAIRPERSON BAILEY: Use that in C.

2 COMMISSIONER BLOOM: You can drop "any of"
3 also.

4 DR. BALCH: Less than or equal to, right?

5 COMMISSIONER BLOOM: It should be higher
6 than.

7 CHAIRPERSON BAILEY: No, no.

8 DR. BALCH: In C we are talking about the
9 case where they are lower. In C it should read, "If
10 all contaminant concentrations are less than or
11 equal to," and at the very beginning it would
12 be "all."

13 CHAIRPERSON BAILEY: "If all." Would you
14 like a break?

15 (Note: The hearing stood in recess at
16 10:21 to 10:30.)

17 CHAIRPERSON BAILEY: Our next "exceed"
18 is --

19 DR. BALCH: Those look to be all right to
20 me.

21 CHAIRPERSON BAILEY: While we are right
22 here, does it make sense, G2 allows an extension of
23 three months for a temporary pit and G3 allows three
24 months for closure of a drying pad. The extension
25 time for a drying pad is greater than the extension

1 time for a temporary pit.

2 DR. BALCH: Kind of unusual.

3 CHAIRPERSON BAILEY: It is unusual.

4 DR. BALCH: Is that leftover language from
5 the rule?

6 CHAIRPERSON BAILEY: Yes.

7 DR. BALCH: I think it would make logical
8 sense --

9 CHAIRPERSON BAILEY: We have to leave it
10 alone, don't we?

11 DR. BALCH: I think there were instances
12 where you could make a logical conclusion to make a
13 rule consistent.

14 MR. SMITH: Well, you can, but this
15 strikes me as being substantive. I mean, for all
16 you know evidence was taken that for some reason or
17 another while unimaginable to you now may have
18 justified the distinction in the earlier hearings.
19 I would let it go.

20 DR. BALCH: All right.

21 MR. SMITH: Unless you recall any evidence
22 having been taken that will be helpful to you.

23 COMMISSIONER BLOOM: No.

24 CHAIRPERSON BAILEY: None.

25 COMMISSIONER BLOOM: Also not to exceed

1 six months.

2 DR. BALCH: I think those instances
3 of "exceed" are all appropriate.

4 COMMISSIONER BLOOM: Yeah.

5 MS. DURANES-SAENZ: Okay.

6 CHAIRPERSON BAILEY: Are we at F?

7 COMMISSIONER BLOOM: 13F, top of Page 14.

8 CHAIRPERSON BAILEY: So that reference is
9 saying that -- it's a catch-all.

10 COMMISSIONER BLOOM: We need to say that
11 all information required by the rule will be
12 submitted? Seems to be redundant again.

13 CHAIRPERSON BAILEY: We could say,
14 "Additional information required by 19.15.17."
15 Because it's requiring the closure report
16 attachments and there may be additional information
17 required. Or do we even need that?

18 COMMISSIONER BLOOM: Because if there's
19 additional information required somewhere else in
20 the rule, then it would be stating it. So I'm not
21 sure we need to add that.

22 DR. BALCH: Seems like you would either --
23 the other approach might be to take out some of the
24 other language such as sampling results, et cetera,
25 and just have information. It doesn't really

1 provide a laundry list.

2 COMMISSIONER BLOOM: You could almost end
3 it after "with necessary attachments for closure
4 activities."

5 CHAIRPERSON BAILEY: If this is old
6 language from the current rule, that's where it came
7 from.

8 DR. BALCH: Is that something that we have
9 to leave? We're just clarifying, removing redundant
10 language.

11 MR. SMITH: I don't think you are helping
12 that much by removing it. I think if I were you I
13 would leave it be.

14 DR. BALCH: That works.

15 MR. SMITH: I mean, unless you find
16 something really compelling I wouldn't mess with the
17 prior language.

18 CHAIRPERSON BAILEY: Because it's located
19 in Section 13J.

20 DR. BALCH: Basically what it starts to do
21 is provide a laundry list of everything you have to
22 do for a closure report and then defaults to
23 information required by the rule as a whole in the
24 middle of the laundry list and adds one more item.
25 I mean, it's just clarity. You're right, it doesn't

1 really matter.

2 CHAIRPERSON BAILEY: And we received no
3 testimony on it so we will leave that and then go
4 down to Paragraph 2 referencing Subsection D for
5 reporting exact location on form C-105.

6 DR. BALCH: So D is closure on-site. That
7 looks to be the right citation.

8 CHAIRPERSON BAILEY: Yes. Shall we leave
9 that? And go down to the next -- did we conclude
10 all of the "exceeds"?

11 MS. DURANES-SAENZ: Yes.

12 CHAIRPERSON BAILEY: Then let's go down to
13 section H of 13. And we have highlighted what
14 subsection for soil cover and contouring. So it's
15 just referencing the paragraph below? And the
16 reclamation -- so I see those highlighted Hs as
17 correct. Are you in agreement?

18 DR. BALCH: Yes.

19 COMMISSIONER BLOOM: Looks right.

20 CHAIRPERSON BAILEY: Then we can scroll
21 down to the large highlighted area. Is there
22 discussion on why this is highlighted like this?
23 Mr. Smith?

24 MR. SMITH: I'm trying to recall. Is this
25 a formatting problem, do you remember, Theresa? I

1 think it's probably one of those portions that had a
2 Subsection A without a B.

3 CHAIRPERSON BAILEY: I believe that we had
4 agreed to the language.

5 DR. BALCH: The language is fine.

6 MR. SMITH: Yeah, there wouldn't have been
7 a substantive change.

8 CHAIRPERSON BAILEY: Okay. So we can
9 accept that highlighted change. And then we have
10 worked on the title for Table 1. And we can scroll
11 down to Table 2. And we worked on the title for
12 that, so --

13 DR. BALCH: Shouldn't that be "waste left
14 in place"?

15 CHAIRPERSON BAILEY: Yes.

16 DR. BALCH: "Closure criteria for burial
17 trenches and waste left in place for temporary
18 pits."

19 CHAIRPERSON BAILEY: And then scrolling on
20 down, the next highlighted area is 19.15.17.15A4.

21 COMMISSIONER BLOOM: Is that an additional
22 there, "For hearing"?

23 CHAIRPERSON BAILEY: Yes. I believe it
24 is, just being very specific as to what that
25 application is.

1 DR. BALCH: It makes it clear.

2 CHAIRPERSON BAILEY: So we are okay for
3 that "for hearing," I guess. Scrolling on down to B
4 3. "That is given." That appears to be inserted
5 for reference and we need to check those
6 cross-references to Paragraph 6 of Subsection B.

7 COMMISSIONER BLOOM: So that's 6 below.

8 MR. SMITH: I think 3 needs to be changed.
9 "Receipt of notice that is given pursuant to this
10 subpart."

11 CHAIRPERSON BAILEY: You want to insert
12 the word "pursuant" there?

13 MR. SMITH: Yes.

14 DR. BALCH: I think that's the intent.

15 CHAIRPERSON BAILEY: Okay. So we can
16 accept that. And then the references to Paragraph 6
17 in Subsection B down below, do you agree with that?
18 Because Paragraph 6 references notice to anyone.

19 DR. BALCH: Okay.

20 CHAIRPERSON BAILEY: And then I think we
21 can accept the rest of the highlighted yellow at the
22 end of the section giving the history of the rule.
23 Commissioners, do you have other language changes
24 that you would like to discuss or any other
25 suggestions?

1 DR. BALCH: I have a short list.

2 CHAIRPERSON BAILEY: Okay.

3 DR. BALCH: Mr. Bloom?

4 COMMISSIONER BLOOM: I have a few as well.

5 DR. BALCH: Should we just work through
6 from the beginning and maybe do a read-through?
7 Particularly in the areas we changed something it
8 would be nice to look at one more time.

9 CHAIRPERSON BAILEY: I think that would be
10 an excellent idea.

11 MR. SMITH: I'm sorry?

12 DR. BALCH: We are just going to read
13 through and if we have a comment on a section we
14 will address it then, I believe.

15 CHAIRPERSON BAILEY: Okay.

16 DR. BALCH: Rather than jumping back and
17 forth.

18 CHAIRPERSON BAILEY: Would you like to
19 begin? Where is the first one?

20 DR. BALCH: Do you have anything in
21 Definition?

22 COMMISSIONER BLOOM: It wasn't wording,
23 but I was just reading through it again. On
24 Definition D for continuously flowing watercourse,
25 we include washes and arroyos and throughout the

1 rule we have siting setback requirements for
2 continuously flowing watercourses but this would
3 mean that there would be none for arroyos. I want
4 to make sure that --

5 DR. BALCH: There's significant
6 watercourse. That's the counter definition in E
7 which catches the arroyos and other ephemeral
8 streams.

9 COMMISSIONER BLOOM: And then in the
10 siting requirements, we have continuously flowing
11 watercourse and other significant watercourse so the
12 arroyos would be included.

13 CHAIRPERSON BAILEY: That's good.

14 DR. BALCH: On J, one comment. Low
15 chloride fluids means water-based fluids that
16 contain less than 15,000 milligrams per liter of
17 chlorides determined by field or laboratory
18 analysis. I'm not sure we really need to change
19 that. I thought we needed a common after chloride,
20 or "as determined by field or laboratory analysis."
21 That's what I read last night. This morning it
22 didn't look as meaty.

23 CHAIRPERSON BAILEY: It certainly doesn't
24 hurt to have it stand out that way, so put a comma,
25 "As determined."

1 DR. BALCH: I think comma "or." Not the
2 word "or."

3 CHAIRPERSON BAILEY: Maybe we don't need
4 the comma is what you're saying?

5 DR. BALCH: Yeah, either the comma or the
6 "as."

7 COMMISSIONER BLOOM: Chloride doesn't need
8 to be capitalized, does it?

9 CHAIRPERSON BAILEY: No. Anything else on
10 Page 1?

11 COMMISSIONER BLOOM: No.

12 DR. BALCH: I didn't have anything.

13 COMMISSIONER BLOOM: I'm sorry, do we need
14 to -- the changed language, does it need to be in
15 red for Records?

16 MR. SMITH: No.

17 COMMISSIONER BLOOM: So the red is just
18 for our benefit?

19 MR. SMITH: The red is just for your
20 benefit. The other --

21 COMMISSIONER BLOOM: I mentioned that
22 because I noticed a few places where we made changes
23 that aren't highlighted in red. Emergency pit, I
24 think we made changes to that. Making it a pit
25 constructed during an emergency. Isn't that

1 language we changed?

2 CHAIRPERSON BAILEY: There was discussion
3 on where that phrase needed to be, yes.

4 COMMISSIONER BLOOM: Used to be that it
5 could read such that you could have a preconstructed
6 emergency pit?

7 MR. SMITH: If you look at the document
8 that Theresa sent you that was done on Compare
9 Write, that will show you everything that was
10 changed.

11 DR. BALCH: We did make a change to the
12 definition of emergency pit.

13 COMMISSIONER BLOOM: That's fine. If we
14 don't need to add the red to the document, that's
15 fine.

16 DR. BALCH: You're right. The reason we
17 changed it is that it was a little bit ambiguous.
18 It sounded like it could have had the emergency pit
19 built before the emergency.

20 CHAIRPERSON BAILEY: So any discussion?

21 COMMISSIONER BLOOM: On T, the last
22 definition on visible, the last four words, I wonder
23 if that should read "on a pit's liquid surface"
24 or "on the pit liquid surface."

25 CHAIRPERSON BAILEY: So turn pit into a

1 possessive with the apostrophe S?

2 COMMISSIONER BLOOM: Yes, so it would read
3 "on the pit's liquid surface."

4 CHAIRPERSON BAILEY: Anything else on Page
5 2.

6 COMMISSIONER BLOOM: Yes, a question on
7 Section 8B. "The division may issue a single permit
8 for all pits or division-approved alternative
9 methods associated with a single application for
10 permit to drill." What are other division-approved
11 alternative methods?

12 CHAIRPERSON BAILEY: I think it's just
13 leaving the door open for someone to prove that
14 something -- new technology, new liners, new
15 something or other that are shown to be as
16 protective of water, public health and the
17 environment could be discussed. I think it's
18 keeping the door open for any future advances that
19 could be coming down.

20 DR. BALCH: The example that I saw was
21 above-ground storage and what looks kind of like a
22 backyard swimming pool. That will be an
23 alternative, perhaps. Basically it doesn't force --
24 it allows best practices. If someone comes up with
25 a better way to do it you don't want to go back --

1 CHAIRPERSON BAILEY: For a rule change.

2 COMMISSIONER BLOOM: That's what I was
3 hoping it was. I couldn't think of anything
4 specific. That's fine.

5 CHAIRPERSON BAILEY: Anything else on Page
6 2? Then let's go to Page 3. Any suggestions there?

7 DR. BALCH: No.

8 CHAIRPERSON BAILEY: Oh, I would just like
9 to comment that now that below-grade tanks are
10 registered and not go through the permitting process
11 as they were before, the previous rule required
12 permitting and we have 10,000 permit applications
13 for these below-grade tanks. What I propose to do
14 as director of the division is to morph all of those
15 permit applications into registrations so that
16 operators do not have to resubmit any information on
17 those below-grade tanks and then we can process them
18 as registration and send the necessary information
19 without undue refileing by operators. So we could go
20 on to Page 4.

21 DR. BALCH: I didn't have anything on Page
22 4, but I noticed in Paragraph A3B.

23 CHAIRPERSON BAILEY: There's a green mark?

24 DR. BALCH: There's a green mark on my
25 copy but not on the screen. Oh, yes, there is. We

1 didn't catch that the first time through the
2 document.

3 MS. DURANES-SAENZ: It's formatting.

4 DR. BALCH: Why is it green instead of
5 yellow?

6 MS. DURANES-SAENZ: Records sent it to us
7 in green.

8 DR. BALCH: Okay. So we dare not change
9 that.

10 MR. SMITH: No, that will come out.

11 COMMISSIONER BLOOM: Madam Chair, were you
12 proposing to change some of the language on
13 below-grade tanks then to get us from -- to allow
14 for the transition from permitting to registration?

15 CHAIRPERSON BAILEY: No, because there was
16 no testimony on it. That is a director decision to
17 morph those into registration.

18 DR. BALCH: You have two choices. You can
19 make them resubmit or process it internally. Is
20 that what you're saying?

21 CHAIRPERSON BAILEY: Yes.

22 COMMISSIONER BLOOM: Where are we now?

23 CHAIRPERSON BAILEY: On Page 5.

24 COMMISSIONER BLOOM: I'm sorry, I'm
25 working off the January 18th changes. I got that

1 this weekend.

2 DR. BALCH: Maybe the section on citation
3 would be better.

4 COMMISSIONER BLOOM: In terms of siting
5 requirements --

6 DR. BALCH: I have something in Section A
7 5. I'm sorry, A6. It's really just a language
8 thing. In Section 4 above we say, "The operator
9 must obtain," and here we say, "Operators must
10 obtain," so for consistency shouldn't we have "The
11 operators" in both of those? Or "the operator"?

12 CHAIRPERSON BAILEY: Okay. So we will
13 change operators to the operator.

14 COMMISSIONER BLOOM: Actually, we have --
15 looking through this, we have an operator and the
16 next is the operator, an operator, the operator
17 followed by an operator, operators and an operator.

18 MR. SMITH: If you are going to change
19 them to be consistent I think an is probably the way
20 to go.

21 CHAIRPERSON BAILEY: Okay.

22 COMMISSIONER BLOOM: If we could scroll
23 back up to the top of siting, Section 10. Scroll
24 down.

25 CHAIRPERSON BAILEY: 10A2.

1 DR. BALCH: So an operator.

2 CHAIRPERSON BAILEY: Scroll down to 4.

3 Scroll down to 6. We will just keep an eye out for
4 the inconsistency. Do we have anything else in
5 17.10?

6 COMMISSIONER BLOOM: One thing I wanted to
7 bring up was making any departure from the siting
8 requirements for on-site closure an exception.

9 DR. BALCH: The way we have it set up now,
10 if I recall correctly, is that they need an
11 exception if they are going to fall below the least
12 stringent requirements which is for a low chloride
13 fluid and the variance above that. I think I'm
14 comfortable with leaving that that way. So you need
15 an exception if you are going to go below the least
16 stringent requirements and a variance --

17 COMMISSIONER BLOOM: Correct. So this
18 will be -- if it's on-site -- no, on-site could
19 be -- doesn't mean necessarily that it's going to
20 be --

21 DR. BALCH: Is it the capital on-site like
22 in the definition?

23 COMMISSIONER BLOOM: I'm looking at
24 Section 10. It's actually -- C above Design and
25 Construction Specification. Go down to 11 and it's

1 right above that.

2 CHAIRPERSON BAILEY: Okay. So C deals
3 with bans on on-site closure.

4 COMMISSIONER BLOOM: On-site doesn't
5 necessarily mean that -- it could be on the lease
6 but doesn't mean we are just going to bury pit
7 contents in the pit and fill over it, right?

8 DR. BALCH: This is where you can't do it
9 on-site. I think the question might be on C whether
10 you want the little on-site or capital on-site. I
11 don't know.

12 CHAIRPERSON BAILEY: But that does create
13 confusion. So we need to change this word on-site
14 in C to indicate exactly what we're talking about.
15 Because in other areas on-site means a lease.

16 COMMISSIONER BLOOM: We defined on-site in
17 definitions.

18 CHAIRPERSON BAILEY: So we need to
19 determine if we want to use that definition for this
20 section or not.

21 DR. BALCH: So on-site means within the
22 boundaries of of a single lease where exploration
23 and production waste is generated.

24 CHAIRPERSON BAILEY: The confusion arises
25 in C2 when you have a ban for siting closure within

1 100 feet, and if we are talking about on-site, that
2 could be a lease that covers thousands of acres.

3 DR. BALCH: That would be where you would
4 go from burial in place to burial in trench.

5 CHAIRPERSON BAILEY: And that's what we
6 may need to substitute here. "An operator shall not
7 implement burial closure in place"?

8 DR. BALCH: Trench burial or burial in
9 place. We may get specific about it.

10 COMMISSIONER BLOOM: It would be hard to
11 do burial in place inside the limits. You couldn't
12 do it unless you sought a variance or exception.

13 DR. BALCH: You wouldn't be able to have a
14 pit there anyway for the most part.

15 COMMISSIONER BLOOM: That's right.

16 CHAIRPERSON BAILEY: Or well site closure.
17 Operator shall not implement trench or well site --

18 DR. BALCH: Trench or in-place burial.

19 CHAIRPERSON BAILEY: Yeah, in place.

20 DR. BALCH: It would be, "An operator
21 shall not implement burial trench or in-place
22 closure," and then you list methods.

23 CHAIRPERSON BAILEY: "An operator shall
24 not implement trench or in-place closure," colon.

25 COMMISSIONER BLOOM: Change "burial" to

1 "closure."

2 DR. BALCH: Colon right there, I think.

3 CHAIRPERSON BAILEY: Yes, that relieves
4 that confusion.

5 DR. BALCH: There's a definition of burial
6 trench? No. Okay.

7 COMMISSIONER BLOOM: If somebody wanted to
8 move inside those limits, then they could seek a
9 variance?

10 DR. BALCH: I think inside -- the way we
11 have it written is inside the least stringent set of
12 criteria, siting criteria, which would be the low
13 chloride fluids, you would need an exception.

14 COMMISSIONER BLOOM: But you could locate
15 a burial trench with a variance, not an exception,
16 inside the boundaries set for low chloride fluids.

17 DR. BALCH: No, between the --

18 CHAIRPERSON BAILEY: Concentric circles.
19 So we have the inner circle --

20 DR. BALCH: There's an exception. The
21 exception should be rare and hardly ever --

22 CHAIRPERSON BAILEY: I have to agree.

23 DR. BALCH: Fracking is an exception
24 anyway, so I think that's the intent. It should be
25 for really -- you would have to really have a strong

1 desire to exceed any of the limits in the
2 regulations with the exception because of the
3 expense and the time involved.

4 COMMISSIONER BLOOM: If somebody wanted to
5 put a burial trench within 50 feet of a continuously
6 flowing watercourse, we are saying that they could
7 do that with a variance?

8 DR. BALCH: No.

9 CHAIRPERSON BAILEY: Because 50 feet of
10 the watercourse is the low chloride fluid inner
11 circle. And to go inside of that --

12 COMMISSIONER BLOOM: That's to put a low
13 chloride fluid pit, but if you were to go off the
14 drill pad with a burial trench, you could do that
15 with a variance. If you wanted to go, say, within
16 50 feet. Because we haven't set any limits for
17 where the burial trench can go.

18 CHAIRPERSON BAILEY: That's right. I have
19 brought that out a couple of times. We don't have
20 any distinction between burial trenches and in-place
21 pits.

22 COMMISSIONER BLOOM: But they will be
23 distinct, right?

24 DR. BALCH: Then they should follow the
25 same siting criteria.

1 CHAIRPERSON BAILEY: They should.

2 DR. BALCH: I'm not sure we have that
3 clearly labeled.

4 COMMISSIONER BLOOM: I'm not sure we do.
5 If you look at siting requirements for trench
6 burial, I think it would require an exception.

7 DR. BALCH: Once we made all of our
8 changes, we may want to go through the whole thing
9 again.

10 CHAIRPERSON BAILEY: Okay, but do you have
11 a suggestion on what we need to do here,
12 Commissioner Bloom?

13 COMMISSIONER BLOOM: Perhaps what I would
14 propose is language saying that -- is there existing
15 language? "The operator must obtain an exception to
16 locate a burial trench inside setbacks set forth in
17 Paragraph 1 of Subsection A of 19.15.17.10 NMAC."
18 Essentially the setbacks for low chloride fluids.

19 CHAIRPERSON BAILEY: The burial trench is
20 not going to have any more nasties than the in-place
21 pit.

22 COMMISSIONER BLOOM: The in-place can't go
23 inside the -- can't go inside these boundaries
24 because we have already limited that up above where
25 we have the siting requirements for low chloride

1 fluids and pits not containing low chloride fluids.

2 CHAIRPERSON BAILEY: But we don't have any
3 differences in contaminant levels.

4 DR. BALCH: I'm wondering if the place to
5 address this might be a little further out in A4
6 where it's outlined, where the exceptions and
7 variances are required. If you just said, "The
8 operator must obtain a variance to locate a
9 temporary pit or burial trench," I think that might
10 resolve the issue. You would have it there and then
11 in the second sentence for exceptions as well.

12 COMMISSIONER BLOOM: I think that would
13 work.

14 DR. BALCH: That's certainly the intent.

15 CHAIRPERSON BAILEY: Yes. So we could
16 have 4 that would be 19.15.17.10A4 to read, "An
17 operator must obtain a variance to locate a
18 temporary pit or burial trench containing low
19 chloride fluids"?

20 DR. BALCH: Yes.

21 COMMISSIONER BLOOM: Maybe move "or burial
22 trench" to after low chloride fluids.

23 DR. BALCH: Right. Then take the "or
24 burial trench" language and copy that. Then go to
25 the next sentence in 4 and put it after "non-low

1 chloride fluids." No, hang on. I think right
2 after "temporary pit." It would be fine there.

3 COMMISSIONER BLOOM: Burial trench
4 wouldn't contain non-chloride fluids.

5 DR. BALCH: The problem is, we are not
6 dealing with liquids in this section -- I mean, we
7 are dealing with liquids in this section, not solid
8 waste.

9 COMMISSIONER BLOOM: I think if you put it
10 after non low chloride fluids.

11 MR. SMITH: I think your sentence
12 structure needs to be the same.

13 CHAIRPERSON BAILEY: Yes. So burial
14 trench needs to go after the word "locate."
15 Change "or" to "a."

16 MR. SMITH: Now you are containing low
17 chloride fluids and it reads as though it modified
18 burial trench. In the prior sentence you put
19 "burial trench" after "low chloride fluids." Why
20 not do the same thing in this sentence?

21 CHAIRPERSON BAILEY: Okay.

22 DR. BALCH: The goal is you want to have
23 the solid waste that is in a burial trench involving
24 the same criteria for siting as the temporary pit,
25 because the temporary pit could be buried on-site.

1 The only thing that makes this sound a little bit
2 awkward for me is the fact that we are talking about
3 fluids in the pit, whereas a burial trench is the
4 solid residuals plus mixing of the waste.

5 CHAIRPERSON BAILEY: Which is also
6 influenced by Table 2.

7 DR. BALCH: Right.

8 COMMISSIONER BLOOM: Mr. Balch, could we
9 address your concerns by moving "non-low chloride
10 fluids" in front of "temporary pit" and getting rid
11 of "containing"? So it would be --

12 DR. BALCH: Temporary pit.

13 COMMISSIONER BLOOM: Locate a non-low
14 chloride fluid pit or burial trench?

15 DR. BALCH: I think it would be a burial
16 trench -- in that case -- in the first sentence --

17 CHAIRPERSON BAILEY: You can
18 delete "containing."

19 DR. BALCH: Right.

20 COMMISSIONER BLOOM: You can do that in
21 the sentence above as well.

22 DR. BALCH: Actually I like the way it
23 reads in the first sentence better. Actually, I
24 think it's fine the way it is. Both of them are
25 fine.

1 COMMISSIONER BLOOM: So back to where we
2 were?

3 DR. BALCH: "The operator must obtain a
4 variance to locate a temporary pit containing
5 non-low chloride fluids or burial trench inside
6 setbacks set forth in Paragraph 3." But the burial
7 trench in the first sentence is not the same as the
8 burial trench in the second sentence. This
9 reinststitutes the issue of the burial trench even
10 with non-low chloride fluid generated materials
11 inside the setbacks for closed-loop, so I think you
12 have to modify burial trench in Paragraph 4. The
13 burial trench -- it might be easier to make a new
14 paragraph.

15 Here is my concern. The way it reads now,
16 I think, you can have a non-low chloride fluid pit
17 and you wouldn't be able to site it without a
18 variance inside of that lower limit, but the waste
19 from that pit could be sited in the low chloride.

20 CHAIRPERSON BAILEY: Let's fix it.

21 DR. BALCH: What if you said, "The
22 operator must obtain a variance to locate a pit
23 containing non-low chloride fluid or an associated
24 burial trench."

25 CHAIRPERSON BAILEY: Remember, we can have

1 multiple pit contents in a burial trench so it may
2 be combining low chloride fluid temporary pit with
3 the high chlorides.

4 DR. BALCH: I think the real issue is I'm
5 not sure if we have anywhere in here a place that
6 specifically says what the siting criteria for
7 burial trench is.

8 CHAIRPERSON BAILEY: We don't.

9 DR. BALCH: So I'm wondering if fixing it
10 here is not going to fix the problem. We really
11 need somewhere saying burial trenches follow the
12 same criteria for temporary pits.

13 CHAIRPERSON BAILEY: If the burial trench
14 has solids and contaminant levels are dictated in
15 Table 2.

16 COMMISSIONER BLOOM: One other thing that
17 I considered, and I don't know if this would help,
18 would be if above, perhaps under 1 or 3, just
19 saying -- where it reads, "An operator shall not
20 locate a temporary pit containing fluids that are
21 not low chloride fluids." If we added in there
22 something along the lines of a burial trench.
23 "Operator shall not locate a burial trench or a
24 temporary pit containing fluids that are non-low
25 chloride fluids." Or down at the very end of the

1 section when we first started talking about this,
2 put something at the end saying moving inside these
3 setbacks would require an exception.

4 DR. BALCH: I think it almost might be
5 better to leave all the language that we have the
6 way it was and add a paragraph somewhere in there
7 that specifically deals with burial trenches.
8 Because right now we have temporary pits -- 1 is
9 temporary pits containing low chloride fluids; 2 is
10 the exceptions for that; 3 is non-low chloride
11 temporary pit fluids; 4 is where you can get a
12 variance or exception to that; 5 is permanent or
13 multi-well fluid management sits; 6 is the exception
14 there. Then you talk about 7, you have material
15 excavated; and 8 you have below-grade tanks. So I
16 would put it between 6 and 7 and talk about burial
17 trenches there.

18 MR. SMITH: If you do that, if you put it
19 at the very end, you won't have to worry about any
20 internal references used.

21 DR. BALCH: I just worry we are trying to
22 mix our apples and oranges a little bit too much, I
23 think.

24 COMMISSIONER BLOOM: What if we add it to
25 6, Burial Trench? Does that get us where we want to

1 go?

2 DR. BALCH: You don't need to have a very
3 extensive thing on burial trenches. I would just
4 have something that reads a lot like 6 that
5 specifically deals with burial trenches.

6 CHAIRPERSON BAILEY: If we go over to
7 Section 13 where we're talking about closure, 13D
8 deals with closure where wastes are destined for
9 burial in place or into nearby division-approved
10 pits or trenches. Under that Section D2 for burial
11 or pits or trenches, they have to comply with siting
12 criteria set forth in Subsection C.

13 COMMISSIONER BLOOM: What page? I'm
14 sorry.

15 CHAIRPERSON BAILEY: Page 12. It's
16 19.15.17.13D3, requires closure compliance with
17 siting criteria of Section C of 10, which I think
18 covers your problem.

19 DR. BALCH: The only thing you might want
20 to really add at the end is if there's an exception
21 for less than that. There's really nothing for
22 somebody that wants to do less than. I guess now
23 it's explicitly not allowed.

24 CHAIRPERSON BAILEY: Not allowed.

25 DR. BALCH: Which I am okay with because

1 the burial trench is going to be flexible. You can
2 locate it in the best place on your site.

3 COMMISSIONER BLOOM: But on that one,
4 Madam Chair, would the operator be able to seek a
5 variance to go inside the boundaries?

6 DR. BALCH: For a burial trench?

7 COMMISSIONER BLOOM: Yeah.

8 DR. BALCH: Right now there's no
9 allowance. The blanket variance exception.
10 Anything can have a variance but it doesn't
11 specifically say exception. So I think you wouldn't
12 want to put language that says you need an exception
13 to have the burial trenches -- no, I'm reading C
14 again. To go within the siting criteria for on-site
15 closure.

16 CHAIRPERSON BAILEY: By neglecting to put
17 requirements for burial of waste in a trench as
18 opposed to an in-place pit burial, there would not
19 necessarily be a higher concentration of
20 contaminants in the trench than there are in the
21 temporary pit burial, in-place burial.

22 COMMISSIONER BLOOM: I would agree with
23 that, but in some instances we have required
24 exceptions for siting of pits and also for a default
25 for siting of in-place burial. But for a burial

1 trench, apparently with a variance you could attempt
2 to site a burial trench in a location that's 50 feet
3 to groundwater.

4 CHAIRPERSON BAILEY: Which is the same
5 requirements for the in-place burial would apply to
6 the same contaminants in the trench burial. What we
7 do for in-place pit burial is not distinguished for
8 contaminant levels from in-place trench burials.

9 DR. BALCH: I think the concern that
10 Mr. Bloom has and I think that I share, though, is
11 about our general language on exception and
12 variances. And what we say essentially is unless we
13 say you have to have an exception, the whole thing
14 is open to a variance at the division level. So if
15 you want to be sure that the burial trench has the
16 same siting criteria as on-site closure, you
17 probably also have to do the same thing you did for
18 us at closure, and specifically say if you want to
19 go under these siting criteria you need to have an
20 exception or variance, depending upon if your --
21 inside the low chloride or non low chloride limits.
22 Does that sum it up?

23 COMMISSIONER BLOOM: Yes.

24 DR. BALCH: Okay.

25 CHAIRPERSON BAILEY: So are you suggesting

1 that the variance for in-place burial?

2 DR. BALCH: Right now the way it is, "The
3 operator must obtain a variance to locate a
4 temporary pit containing non-low chloride fluids
5 inside setbacks contained in Paragraph 3. The
6 operator must obtain an exception to locate a
7 temporary pit containing non-low chloride fluids
8 inside setbacks set forth in Paragraph 1." So
9 Paragraph 3 is the low chloride temporary pit and
10 1 -- no, 1 is the low chloride and 3 is the non-low
11 chloride.

12 CHAIRPERSON BAILEY: Okay.

13 DR. BALCH: So in C below -- are you able
14 to backtrack the changes we made?

15 MS. DURANES-SAENZ: Yes.

16 DR. BALCH: Where did you find the
17 language on -- I will try to find out where we need
18 to have burial trenches.

19 CHAIRPERSON BAILEY: But what I'm seeing
20 is burial trenches not distinguished from an
21 in-place burial.

22 COMMISSIONER BLOOM: It is distinguished
23 in that it can currently be put inside the siting
24 limits of low chloride fluid pits without an
25 exception. We don't allow that for in-place burial.

1 DR. BALCH: Can I show the commissioners
2 my drawing?

3 MR. SMITH: Show them the drawing.

4 DR. BALCH: If this is your pit, it's
5 okay. If this is a non-low chloride pit, you can
6 get a variance to put it inside of the low chloride
7 limits. Here you just can't put it, period. I'm
8 sorry, you would need an exception. So that's kind
9 of where we are with the non-low chlorides. For
10 chlorides -- I'm sorry, for low chlorides I think we
11 have it -- you move one of the rings and this
12 becomes the variance for the low chlorides.

13 COMMISSIONER BLOOM: That's still an
14 exception.

15 DR. BALCH: That's still an exception, but
16 the concern, I think, that Mr. Bloom has is you
17 could have a pit here -- I'm sorry, a pit here and
18 translate the contents to a burial trench inside of
19 this limit without seeking a variance the way it's
20 currently worded.

21 COMMISSIONER BLOOM: Or you could go into
22 here without getting an exception.

23 DR. BALCH: Or even in here without an
24 exception the way it's written. Or you could get
25 into here with a variance and here with nothing,

1 might be a better way to say it.

2 CHAIRPERSON BAILEY: So this applies to
3 both on-site burial and trench burial?

4 DR. BALCH: Well, trench burial -- on-site
5 burial we specifically said where you can get a
6 variance and where you have to have an exception.
7 But for burial --

8 CHAIRPERSON BAILEY: No, the pit you have
9 done.

10 DR. BALCH: Right. Not the burial.

11 CHAIRPERSON BAILEY: Right.

12 DR. BALCH: So maybe if we found a place
13 in Section 13 if we --

14 CHAIRPERSON BAILEY: It says it has to
15 comply with the siting requirements.

16 DR. BALCH: That's Section C of 10?

17 CHAIRPERSON BAILEY: Yes.

18 DR. BALCH: So I would think somewhere in
19 C, which looks like it was -- looks like we have a
20 C1 and then A, B, C, D, E, F, G? Is that correct,
21 Theresa? Because you can't have an A without a B?

22 MS. DURANES-SAENZ: Yes.

23 DR. BALCH: If you took 1 and turned it to
24 A, B, C, D with similar language to what is in
25 Paragraph 4 above, that would resolve the issue.

1 CHAIRPERSON BAILEY: Let's try it. So C1
2 becomes C-A?

3 DR. BALCH: Go up to the language from 4
4 and copy that. Put that at the end of C. So it
5 would be at the end of -- keep going to the end.
6 Okay. Put that there. Now, this would be the new
7 C2 and everything else would be renumbered. Let's
8 make sure this will work before we make the change.

9 CHAIRPERSON BAILEY: Are you sure you
10 don't want it at the end of C9?

11 DR. BALCH: C1 -- I think it needs to have
12 a C1 and then lower case A, B, C, D, E, F, G instead
13 of 2 through 9. I'm thinking we want to keep the
14 siting criteria separate in C1 and C2 says here is
15 where you get an exception or variance.

16 CHAIRPERSON BAILEY: Okay. So continue
17 scrolling down. Okay. Here we change the language
18 to burials.

19 DR. BALCH: On-site closures or burials.

20 CHAIRPERSON BAILEY: This becomes B.

21 DR. BALCH: C2.

22 COMMISSIONER BLOOM: No, I believe it's --
23 we have C1 through 9.

24 DR. BALCH: We have A, B, C, D, E, F, G
25 and they made us reformat that. Now I am proposing

1 a C2.

2 COMMISSIONER BLOOM: Wouldn't it be C10
3 though?

4 DR. BALCH: C1 there, change that to A.
5 What did we have it as before? Do you see what I'm
6 trying to do?

7 MR. SMITH: No.

8 DR. BALCH: Nobody understands what I'm
9 trying to do.

10 CHAIRPERSON BAILEY: You want 2 to become
11 A? A subset of 1?

12 DR. BALCH: I think 1 would be A.

13 MR. SMITH: No, 1 has to be 1.

14 COMMISSIONER BLOOM: I think your addition
15 down at the bottom would be fine. It could stand as
16 a 10.

17 DR. BALCH: I'm just looking at the way we
18 formatted other sections like this.

19 MR. SMITH: Why not make it a D?

20 DR. BALCH: Well, the pointer goes to C in
21 on-site closure and burial trenches where it says to
22 look for siting criteria. That's the reason. If
23 you go back to siting requirements and go all the
24 way up to A and look at the way it's formatted, you
25 have A1, "An operator shall not operate," and then

1 you have the Criteria A through 5. Then you have 2
2 with the exception language. I'm just saying
3 reformat C to match the formatting of A and B.

4 CHAIRPERSON BAILEY: So 2 becomes A --

5 DR. BALCH: In section C at the end of 10.
6 So go to the first part where it says in --

7 COMMISSIONER BLOOM: Should we make C
8 closure for --

9 DR. BALCH: C would be closure for burial
10 trenches and on-site --

11 CHAIRPERSON BAILEY: In-place --

12 DR. BALCH: Burial trenches and in-place.

13 CHAIRPERSON BAILEY: An operator shall not
14 implement.

15 DR. BALCH: That's going to be the new 1.
16 That will become the new 1.

17 COMMISSIONER BLOOM: The current 1 will
18 become A.

19 MR. SMITH: Then you are going to take the
20 last and turn it into C2.

21 DR. BALCH: C2. That would match the
22 language elsewhere in this section. That becomes 2.

23 MR. SMITH: I think you have some spacing
24 issues.

25 MS. DURANES-SAENZ: I would have to

1 doublecheck.

2 DR. BALCH: From a pit.

3 CHAIRPERSON BAILEY: That's creating a
4 problem with the standards in Table 2.

5 DR. BALCH: Okay. So what would you
6 recommend? You can make it, "An operator must
7 obtain a variance to locate a burial trench inside
8 the setbacks set forth in Paragraph 3" or an
9 exception goes to Paragraph 1, and that would
10 probably fix it up.

11 CHAIRPERSON BAILEY: Do you want to
12 include in-place burial?

13 COMMISSIONER BLOOM: Because you could
14 have multiple pits being located on one site.

15 DR. BALCH: That's why we said only
16 non-low chloride fluids.

17 CHAIRPERSON BAILEY: That creates problems
18 with this.

19 DR. BALCH: Essentially the same language
20 but --

21 CHAIRPERSON BAILEY: If we don't have
22 testimony.

23 DR. BALCH: The temporary pit, if you are
24 burying in place, will already have met the siting
25 criteria. The burial trench is the situation we are

1 trying to worry about, so I think we are okay. We
2 can limit this to burial trench and I think this
3 will fix the problem. You can delete the part you
4 have highlighted and replace in the second sentence,
5 non-low chloride temporary pit and delete that as
6 well. All the way to burial trench. Keep burial
7 trench. You added burial trenches in there.

8 COMMISSIONER BLOOM: Scroll up to 4 above
9 and delete that language.

10 DR. BALCH: You can delete "or burial
11 trench" in both of those sentences and I think that
12 fixes it.

13 COMMISSIONER BLOOM: Yeah, that was it.
14 Thank you.

15 DR. BALCH: C is where closure points to,
16 so that would be -- the citation would still be
17 correct.

18 CHAIRPERSON BAILEY: Is this a good place
19 to take a break and come back at 1:00 o'clock?

20 COMMISSIONER BLOOM: That works. The next
21 thing I had, and I think it was the only major thing
22 I have left to discuss is -- I'll just mention it
23 now in case anybody wants to look at it over lunch.
24 That is where you get down to construction of
25 below-grade tanks.

1 CHAIRPERSON BAILEY: What page?

2 COMMISSIONER BLOOM: Sorry. it must have
3 been --

4 CHAIRPERSON BAILEY: Section 11?

5 COMMISSIONER BLOOM: Going down to I,
6 yeah. Scroll down to I. It says, "An operator
7 shall construct a below-grade tank in accordance
8 with one of the following designs." I think we need
9 a colon at the end of designs, but as I read on, it
10 seems there's only one design option.

11 DR. BALCH: A, B and C.

12 COMMISSIONER BLOOM: It's saying double
13 walls, so that says you can have single walls and
14 double walls. If we keep reading, it says, "The
15 operator shall equip below-grade tanks designed in
16 this matter with properly operating automatic high
17 level shutoff control." So that's the
18 single-walled, right?

19 CHAIRPERSON BAILEY: Yes.

20 COMMISSIONER BLOOM: Now, there's a
21 double-walled tank. It looks like it doesn't need a
22 high level shutoff control device. Apparently that
23 doesn't need the double geomembrane liner
24 underneath.

25 CHAIRPERSON BAILEY: You don't need the

1 liner because you have the double walls.

2 DR. BALCH: Steel liner basically.

3 CHAIRPERSON BAILEY: It's the overflow
4 alarm that wasn't carried through.

5 COMMISSIONER BLOOM: I think that's what I
6 picked up on there is that you could have a --

7 CHAIRPERSON BAILEY: Shutoff control.

8 COMMISSIONER BLOOM: You could have a
9 double-walled tank that would not necessarily have a
10 shutoff control.

11 CHAIRPERSON BAILEY: I think that will be
12 not too much debate on that one.

13 DR. BALCH: The only thing I have left,
14 and one more thing of perhaps substance and it's
15 really just language, so I don't think that will
16 take very long either, and then there was a place
17 where I noticed that we have design and construction
18 for the permanent pits, multi-well pits, temporary
19 pits. And then to tanks, closed-loop systems and
20 all that stuff. I'm sorry, then we add in the
21 multi-well fluid management at the bottom of those
22 sections. An example might be --

23 CHAIRPERSON BAILEY: Page 9?

24 DR. BALCH: Page 9J. It seems to me it
25 would be better right after the --

1 COMMISSIONER BLOOM: Maybe after permanent
2 pits?

3 DR. BALCH: Yeah. That's really -- I
4 don't think it's important. It's just
5 organizational and maybe that's too much of a hassle
6 to fix with all of the citations.

7 COMMISSIONER BLOOM: I agree it would be
8 more elegant but maybe not worth the effort.

9 DR. BALCH: There's a couple places where
10 we had the same thing, where we added multi-well
11 fluid management pits at the end of the section.

12 CHAIRPERSON BAILEY: And we have the
13 limitation on permanent pits that we do not have for
14 multi-well fluid management pits so we would have to
15 make exceptions. Let's come back at 1:00.

16 (Note: The hearing stood in recess at
17 11:45 to 1:00.)

18 CHAIRPERSON BAILEY: There were a few more
19 areas for discussion. Commissioner Bloom, I think
20 you were talking about design and construction
21 specifications for below-grade tanks.

22 COMMISSIONER BLOOM: That's correct.

23 CHAIRPERSON BAILEY: That will be
24 19.15.17.11L?

25 COMMISSIONER BLOOM: I.

1 CHAIRPERSON BAILEY: Oh, yes.

2 DR. BALCH: Is there a reason why there's
3 a colon at 4?

4 COMMISSIONER BLOOM: I think there should
5 be a colon there. What page are you all looking at?

6 DR. BALCH: Page 8. Paragraph 4.

7 CHAIRPERSON BAILEY: A colon after the
8 word "designs." Commissioner Bloom, you noticed
9 that for single-walled below-grade tanks there was a
10 requirement for equipment of an automatic high level
11 shutoff control device and manual controls to
12 prevent overflows?

13 COMMISSIONER BLOOM: Correct. It does not
14 appear that would be apply to the double-walled
15 below-grade tanks.

16 CHAIRPERSON BAILEY: So are you suggesting
17 that we put that sentence in 4A, "The operator shall
18 equip below-grade tanks designed in this manner with
19 a properly operated automatic high level shutoff
20 control device and manual controls to prevent
21 overflow," to copy that and to put it in --

22 COMMISSIONER BLOOM: We might add it to B.

23 CHAIRPERSON BAILEY: -- 4B?

24 COMMISSIONER BLOOM: Yes.

25 CHAIRPERSON BAILEY: Right after the

1 word "capability" in that first sentence?

2 COMMISSIONER BLOOM: Yes.

3 MR. SMITH: Well, now, this is not
4 language that you have added, is it? Isn't this I4
5 original language?

6 DR. BALCH: Sure looks like it.

7 MR. SMITH: And B, right?

8 COMMISSIONER BLOOM: I think any changes
9 here would be along the lines of fixing an error we
10 saw in the previous rule.

11 DR. BALCH: This may have been previous
12 testimony as to why a double-walled tank wouldn't
13 need to have an automatic shutoff. I don't know.

14 COMMISSIONER BLOOM: I can't imagine why
15 that would be because you still have the same
16 concerns about overtopping. I think this was --

17 CHAIRPERSON BAILEY: That is original
18 language in the current rule, and B is exactly the
19 same as what it was, so this language has not been
20 changed.

21 MR. SMITH: I certainly understand your
22 point, Commissioner Bloom. And you all have, I
23 think, legitimately made changes for consistency's
24 sake and so forth that you noticed as you went
25 through. This does, however, seem to me to be a

1 substantive change. Unless you had some evidence on
2 it, I would again, like the one earlier this
3 morning, caution you about making a change like
4 this.

5 COMMISSIONER BLOOM: We did have
6 considerable testimony on the conversation about the
7 shutoff control device and there was some suggested
8 language that would have allowed for monitoring in
9 case of this -- rather, in place of this.

10 CHAIRPERSON BAILEY: There was discussion
11 about an audible alarm that only the cows in the
12 pasture could hear?

13 COMMISSIONER BLOOM: Correct. So I think
14 we did give this some consideration and decided that
15 the shutoff control devices were appropriate for
16 below-grade tanks. And here I think we have seen
17 where they were perhaps unintentionally admitted
18 from single-walled tanks.

19 DR. BALCH: For any of them it may have
20 been explicit about what type of alarm to have
21 because in I3 above, "The operator shall construct a
22 below-grade tank to prevent overflow," so I don't
23 know if there's some other design criteria used by
24 the automatic shutoff to prevent overflow but they
25 are already stipulated to prevent overflow.

1 MR. SMITH: I would advise against making
2 the change.

3 CHAIRPERSON BAILEY: Because it is
4 substantive.

5 DR. BALCH: I think it's covered by 3
6 anyway. Doesn't it specifically tell them they have
7 to put in an overflow valve, but if they don't they
8 are probably not going to be in compliance with I3?
9 I notice that a lot of language that we did change
10 from the previous rule were things that specifically
11 pointed out something that had already been
12 described earlier in the rule as a subsection. This
13 might be something left over like that.

14 COMMISSIONER BLOOM: Mr. Smith, what's the
15 potential ramifications of making this change even
16 though it wasn't solicited despite some conversation
17 on it and the general need for having the automatic
18 shutoff control device?

19 MR. SMITH: What it would be if you made
20 the change and there wasn't evidence in the record
21 to support it and it was not the kind of --

22 COMMISSIONER BLOOM: I think the evidence
23 was there but it wasn't requested by the proponents.

24 MR. SMITH: It doesn't have to be
25 requested. I think if you have the evidence you can

1 make the changes as long as it is a logical
2 outgrowth of changes that were requested and
3 published. I don't think logical outgrowth is the
4 term of art, but you get the point.

5 COMMISSIONER BLOOM: Yes.

6 MR. SMITH: It needs to be a change that
7 someone could imagine you guys might reach or an
8 issue you might reach given the kinds of changes
9 that were requested and that were noticed up. This
10 is a matter of notice to the public of the kinds of
11 changes you are making. If someone could envision
12 that a change of this type might be made based on
13 the amendments that were requested, if there's
14 evidence in the record to support it then I think
15 you can make that change.

16 DR. BALCH: In Section 4 I'm not sure we
17 can have the colon. They really have three cases.
18 You have a below-grade tank that does not have
19 double walls, right? Then they have a large list of
20 construction criteria that is in that section. If
21 you then go to a double-walled tank which is
22 below-grade, all you really have to have is the;
23 leak detection capability. You don't have to have
24 the specific criteria. And then we have a catch-all
25 for C which says that you can provide an alternative

1 as long as it's equally protective. We were talking
2 about -- I barely remember talking about overflow
3 with regard to tanks. We talked about overflow with
4 regard with to pits.

5 CHAIRPERSON BAILEY: Well, I have the
6 application and the application wanted to insert the
7 words "and alarm" after the words "high level
8 shutoff control device." This was the final thing.
9 So that's the only place that an alarm was discussed
10 was in 4A.

11 DR. BALCH: We talked about the alarm
12 being ineffective.

13 CHAIRPERSON BAILEY: Right. Only cows.

14 DR. BALCH: Even if it was to a facility,
15 what would be the response time? So the distinction
16 really here between A and B is whether the tank is
17 walled or not walled. I'm wondering if the
18 overtopping they are talking about has to do with
19 the tank or has to do with the berms. I don't know.
20 This section is not very clear to me. In 3, "The
21 operator shall construct a below-grade tank to
22 prevent overflow and the collection of surface water
23 run-on." Overflow, I think, there refers to the
24 tank filling up and water coming out the top or
25 bursting a seam or whatever. I think that

1 prevention is going to require some kind of
2 automatic shutoff.

3 CHAIRPERSON BAILEY: It doesn't say to
4 deter overflow.

5 COMMISSIONER BLOOM: It says to prevent.
6 We can rely on that and when the registrations come
7 through, the OCD can look and see if they include
8 the automatic shutoff.

9 DR. BALCH: Most likely scenario is the
10 operator will have multiple tanks and they will want
11 to register them and they will have a design and
12 that design will have to be approved by the
13 division.

14 CHAIRPERSON BAILEY: And we have already
15 allowed for a standard design that would be
16 acceptable. Did you have other areas?

17 COMMISSIONER BLOOM: No, that was it.
18 Thank you.

19 CHAIRPERSON BAILEY: Mr. Balch, you said
20 you had areas?

21 DR. BALCH: Besides reorganizing which may
22 be more work than it's worth. In 19.15.17.12F5, it
23 says, "The operator shall remove all fluids within
24 60 days of the date the operator ceases all
25 operations in compliance with the permit." I guess

1 I'm not sure what "in compliance with the pit
2 permit" is supposed to mean.

3 CHAIRPERSON BAILEY: This is multi-well
4 fluid management pit and we had it linked to the
5 APDs of the wells that would be connected to that
6 multi-well fluid management pit.

7 DR. BALCH: I'm wondering if compliance is
8 the right word. I know what it's supposed to be but
9 I don't know if compliance is the right word.

10 CHAIRPERSON BAILEY: Pursuant to?

11 DR. BALCH: Something like that.

12 CHAIRPERSON BAILEY: Would you prefer the
13 words "pursuant to the pit permit"?

14 DR. BALCH: I could certainly be talked
15 down from my concern. I'm not sure what it means in
16 this context.

17 COMMISSIONER BLOOM: What if we edited the
18 sentence after operations?

19 DR. BALCH: "Associated with the pit
20 permit" might be a better word to say it.

21 CHAIRPERSON BAILEY: Let's do that,
22 "associated with."

23 DR. BALCH: "Associated with the pit
24 permit" and take out the "in" in front of that word.
25 I think we used similar language elsewhere. I want

1 to say that I didn't have anything else but let me
2 scan through. That was all.

3 CHAIRPERSON BAILEY: So are we through
4 making our suggestions on this draft?

5 COMMISSIONER BLOOM: I'm sorry, I did see
6 one other thing. Bottom of 13 just before Table 1.
7 5B. The recommendation in vegetation. This is a
8 disturbed area. "Then shall be reseeded in the
9 first favorable growing season." I wonder if it
10 might make sense to add something along the lines
11 of "within 12 months" or how long do we wait?

12 DR. BALCH: Dr. Buchanan was fairly
13 insistent upon the first available growing season,
14 and I seem to recall that the argument was yes, it
15 could be the appropriate time to plant the seeds but
16 if you were in a drought year, for example, you may
17 not have the water and it may be a failed effort
18 anyway. He seemed to be against hard deadlines and
19 preferring best practices. I guess the question is,
20 is this too much leeway for leaving it there?
21 Obviously they can't have the site closed until they
22 are done with remediation and reseeded and site
23 reclamations, I imagine, sometimes are in the
24 couple-years category before they're completely
25 done.

1 CHAIRPERSON BAILEY: Which runs into a
2 problem with land office leases that are based on
3 production, not on closure of well sites and this
4 would leave it open to how long could an operator go
5 back into a lease that they no longer own in order
6 to reclaim that site. So that's where a lot of your
7 problem is.

8 COMMISSIONER BLOOM: That would be a
9 problem for us then. I hadn't thought of that.

10 DR. BALCH: How does that work, Mr. Bloom?
11 I want to be educated, if you don't mind. If you
12 have a lease from the land office and you stop
13 producing and --

14 COMMISSIONER BLOOM: I would have to go
15 back and look at it.

16 DR. BALCH: Then you reclaim the site.
17 What is the current time? Does it specify how long
18 the reclamation is supposed to take or when they
19 should be completely off-site?

20 CHAIRPERSON BAILEY: The rule specifies
21 reseeding at least twice, doesn't it?

22 COMMISSIONER BLOOM: I started six or nine
23 months ago.

24 CHAIRPERSON BAILEY: So the lands
25 definition office rule does cover revegetation but

1 it doesn't say it has to be done within five years.

2 DR. BALCH: I think that was
3 Dr. Buchanan's argument. It has to progress at its
4 own natural -- there's a rate that recovery will
5 occur in and it's based upon the seasons and when to
6 plant the seed, appropriate timing, et cetera.

7 CHAIRPERSON BAILEY: Depends on moisture.

8 DR. BALCH: Right.

9 CHAIRPERSON BAILEY: How dry is the
10 winter, how dry is the spring. Because most
11 favorable growing seasons begin for reseeding in
12 June and July right before the monsoons.

13 DR. BALCH: I guess if the end goal is
14 that you have the site recovered to an approximate
15 original condition and is the timing of that
16 important or just -- the process has to begin at X
17 but does it have to end at Y or can it end when it's
18 done? It won't be signed off on until it's done.

19 MR. SMITH: I can tell you that in mining,
20 I don't know for sure that I am speaking to your
21 concern, but I know in mining they will hold on to
22 enough financial assurance to cover reveg for the
23 12-year grass-growing period.

24 CHAIRPERSON BAILEY: They have that
25 ability, yes.

1 MR. SMITH: I'm not making that
2 suggestion. I'm just telling you.

3 DR. BALCH: First day of the growing
4 season was language that was proposed.

5 COMMISSIONER BLOOM: I believe it was. I
6 think Dr. Buchanan talked about that.

7 DR. BALCH: I think there was a
8 substantial discussion.

9 COMMISSIONER BLOOM: On final read-through
10 I was paying particularly close attention to the
11 language that's ambiguous and favorable hit me, and
12 I thought well, in a drought the first favorable
13 growing season is going to be 20 years from now and
14 there's never reseeding. At some point I think you
15 just have to do it. Maybe it's 24 months.

16 DR. BALCH: If the seeds, say, plant in
17 late spring and you go out and put the seeds down
18 and there's no water and they never sprout --

19 CHAIRPERSON BAILEY: The current rule
20 says, "The first growing season after the operator
21 closes the pit, trench, drying pad, below-grade
22 tank, et cetera, the operator shall seed or plant
23 the disturbed areas." So the current rule is the
24 first growing season, but that ignores the fact that
25 there's not been any snow or not been any rain or

1 last year the monsoon failed. So --

2 COMMISSIONER BLOOM: In April do we know
3 if we are going to get a favorable growing season in
4 June or July?

5 CHAIRPERSON BAILEY: Not necessarily.

6 COMMISSIONER BLOOM: Maybe we leave it the
7 first growing season and you put the seeds down and
8 hope the monsoons are pretty sufficient.

9 DR. BALCH: I'm a pretty big fan of
10 allowing best practices, and I think for
11 revegetation Dr. Buchanan also made that argument,
12 that best practices should really dominate the
13 process. I guess what I would like to understand
14 better is what is the regulatory window where time
15 is allowed for revegetation currently?

16 CHAIRPERSON BAILEY: Currently it says the
17 first growing season.

18 DR. BALCH: But when do you get to sign
19 off on the revegetation effort? Do you have to be
20 done within 18 months of closing your site? Twelve
21 months? Or is there no specified time? I mean,
22 obviously --

23 CHAIRPERSON BAILEY: Paragraph 5C tells
24 you the standard for the closing. It says,
25 "Reclamation shall be considered complete at this

1 point."

2 DR. BALCH: It doesn't say it has to be
3 done in eleven months or 14 months or 16 months, two
4 weeks five days, three hours and 23 minutes. It
5 says it has to be done when it's done. C is a
6 standard.

7 CHAIRPERSON BAILEY: Part of my concern is
8 revegetation is an essential component of the
9 modeling that was done that allowed the standards
10 that we set for burial. With that absolutely
11 necessary component, we predicated everything else
12 on revegetation.

13 DR. BALCH: So what if it fails?

14 CHAIRPERSON BAILEY: If it fails, you do
15 it again.

16 DR. BALCH: There's no hard deadline for
17 that process being done.

18 CHAIRPERSON BAILEY: And that's going to
19 cause a lot of enforcement problems unless we have
20 something that says within two years or within --

21 DR. BALCH: Which may be impossible?

22 CHAIRPERSON BAILEY: It may be impossible.
23 We may be in a seven-year drought but we have to
24 choose something in order to ensure that that
25 component of the modeling system, because it's a

1 system.

2 DR. BALCH: And Dr. Buchanan's argument
3 was your best chance of success was to wait for the
4 first favorable growing season rather than just the
5 first growing season, which could be somewhat
6 arbitrary, particularly with different kinds of
7 seeds that you plant at different times of the year.

8 COMMISSIONER BLOOM: I don't know of
9 anything that you just don't plant probably in May
10 or June.

11 DR. BALCH: There's going to be stuff.
12 You know, going to farming, you plant winter wheat
13 in the fall.

14 CHAIRPERSON BAILEY: We are not talking
15 introduced species.

16 DR. BALCH: I know that, but there's
17 probably -- for example, I know the Russian thistle
18 tends to seed over the summer. That's when it's
19 blooming, when there are other things that seed
20 later in the fall, trees in particular. So if you
21 start go between forbs and trees the shrubs and
22 grasses, the favorable growing season might be
23 different for each of those. If you just change it
24 to the first growing season, it may become somewhat
25 arbitrary. Do you plant everything in the first

1 growing season or just the appropriate seeds in the
2 growing season and wait until the next growing
3 season to plant the next batch of seeds for the
4 forbs and the next one for the grasses?

5 CHAIRPERSON BAILEY: Favorable for each
6 species is the way I'm going to interpret this.

7 DR. BALCH: Right.

8 CHAIRPERSON BAILEY: But we do have this
9 distribution of 70 percent of predisturbance levels,
10 excluding noxious fumes.

11 COMMISSIONER BLOOM: Let me ask this
12 question. Does seeding ever occur more than one
13 time for -- isn't seeding just always done at once?

14 DR. BALCH: I don't think so.

15 COMMISSIONER BLOOM: One fell swoop or do
16 people go out and two months later lay down more
17 seed?

18 DR. BALCH: I'm hate to try to compare my
19 vegetable garden in the backyard to reseeding an oil
20 patch, but you don't plant things at the same time.
21 You plant them at different times.

22 CHAIRPERSON BAILEY: An operator is not
23 going to want the expense of mobilizing the seeding
24 equipment and the personnel, et cetera. They are
25 going to want to put the seeds out before the

1 monsoon.

2 COMMISSIONER BLOOM: Exactly.

3 CHAIRPERSON BAILEY: I would keep it as
4 the language is stated here, "in the first favorable
5 growing season," because it's absolutely pointless
6 to put it out when we are in a drought. You don't
7 need to feed all the birds and the mice.

8 COMMISSIONER BLOOM: What about first
9 favorable growing season within 24 months? Same
10 problem?

11 DR. BALCH: I think it's the same problem.
12 An operator will have to have a bond for this part
13 of the operation, right?

14 CHAIRPERSON BAILEY: No, the bond is for
15 flooding.

16 DR. BALCH: So it's really nothing except
17 for enforcement giving them a fine. That's the
18 stigma. So I think you just have to really on the
19 stick. If they don't do it and it's not deemed to
20 be a reasonable time, I imagine there's something
21 that could be done.

22 COMMISSIONER BLOOM: Okay.

23 CHAIRPERSON BAILEY: We will be taking up
24 Rule 5 at some point. It will be ambiguous. It's a
25 matter of opinion when the first favorable growing

1 season is but there's no point in asking the
2 operator to go out five different times. There are
3 techniques that could be used, but I don't see how
4 we can be more specific.

5 COMMISSIONER BLOOM: Okay.

6 DR. BALCH: Rule 5 has to do with
7 enforcement?

8 CHAIRPERSON BAILEY: Enforcement. Do we
9 have other areas?

10 COMMISSIONER BLOOM: I don't believe so.
11 Section 15 on exceptions and variances, I went back
12 to the original rule to look that over and the
13 current rule reads that the operator may apply to
14 the Environmental Bureau in the Division Santa Fe
15 office for an exception to a requirement or
16 provision. Other than the permit requirements of
17 19.15.17.8 NMAC, the exception requirements of
18 19.15.17.16 NMAC or the permit approval, revocation,
19 suspension, modification or transfer requirements of
20 19.15.17.16 NMAC. So essentially it's saying you
21 can't request a variance from the variance
22 requirements. You can't request an exception from
23 things like permit approval, denial, revocation,
24 suspension. The proponents asked that language be
25 removed, and I wanted to make sure that we are not

1 creating something where all the sudden we have
2 variances going to the district office for the rule
3 itself. Does that make sense?

4 CHAIRPERSON BAILEY: I think what we have
5 tried to do was to assure that items of large
6 concern were made into exceptions. And otherwise
7 the districts have the local knowledge to be able to
8 process applications for variances for things that
9 are not of major concern as long as the district's
10 still protecting groundwater, public health and the
11 environment.

12 DR. BALCH: Equal or better protection.

13 CHAIRPERSON BAILEY: Yeah.

14 DR. BALCH: Also, I think it's important
15 to note that variances are not automatic. If
16 someone makes a request of a variance for something
17 that's unusual that will be out of purview of the
18 district office, I would hope they would deny it or
19 ask Santa Fe.

20 CHAIRPERSON BAILEY: Well, 15A5 says that
21 such an application can be set for hearing and that
22 automatically comes to Santa Fe before the
23 examiners.

24 DR. BALCH: Right. So I think that
25 basically in practice a variance for something that

1 would be unusual at that level would be punted and
2 if they didn't it would go to the Santa Fe office.

3 CHAIRPERSON BAILEY: Oh, yeah.

4 DR. BALCH: So I think it's
5 self-repairing. I don't think there's an issue
6 there.

7 COMMISSIONER BLOOM: Doesn't seem like a
8 threat to the integrity of the rule. I flagged
9 something, 7 in the same section.

10 CHAIRPERSON BAILEY: Denies the exception?

11 COMMISSIONER BLOOM: "The Santa Fe office
12 may grant the exception administratively if the
13 Santa Fe office receives no comments or requests for
14 hearing within the time for commenting."

15 DR. BALCH: I remember the discussion.
16 Essentially you have a discussion where nobody
17 basically is going to challenge this and then it
18 would be up to the director to determine if the
19 hearing is still necessary or could be granted
20 administratively. But if anybody has a -- I think
21 if anybody has a comment or request then that would
22 negate the second part of that. That would make it
23 so the director could not make that decision.

24 CHAIRPERSON BAILEY: As long as the
25 objection has to do with substance and technical

1 merit.

2 COMMISSIONER BLOOM: Then if you could
3 help me with the last line. "If the director does
4 not determine that a hearing is necessary for the
5 technical merits, public interest or otherwise, then
6 the Santa Fe office may grant the exception without
7 a hearing." Then we add "notwithstanding the filing
8 of the request for hearing."

9 CHAIRPERSON BAILEY: If somebody from the
10 street may request a hearing on a topic, but their
11 request has no technical merit and is frivolous,
12 then even though they have made an application for a
13 hearing it could still be denied.

14 DR. BALCH: I'm imagining this to be a
15 pretty rare case. Basically, the way we set it up,
16 anything that would be an exception level is
17 probably going to have interest to somebody.

18 COMMISSIONER BLOOM: What does
19 notwithstanding the filing of the request for
20 hearing mean?

21 CHAIRPERSON BAILEY: Even though this
22 party has applied for hearing, it's not going to
23 happen.

24 COMMISSIONER BLOOM: Okay. I don't know
25 if there's a way to spell that out more clearly but

1 I can live with that.

2 DR. BALCH: Is that clear legally?

3 MR. SMITH: I don't know whether you need
4 that or not.

5 COMMISSIONER BLOOM: Because we just said
6 "as necessary due to technical merit or in the
7 public interest."

8 MR. SMITH: Yeah. No. 6 appears to
9 indicate that the hearing is not a matter of right;
10 that you have to have someone first of all
11 withstanding and then they have to request the
12 hearing. Then the director has to determine that
13 the request presents issues that have technical
14 merit or are of a significant interest. Then the
15 director may -- this is discretionary -- cause the
16 hearing to be set. Then 8 goes on to say, "If the
17 director" -- actually, it might be better to say,
18 "If the director determines a hearing is not
19 necessary due to technical merit, significant public
20 interest, blah blah, may grant the exception without
21 a hearing." I think you can strike the
22 notwithstanding.

23 CHAIRPERSON BAILEY: Okay. So the
24 sentence would say, "If the director does determine
25 that a hearing is not necessary"?

1 MR. SMITH: "If the director determines
2 that a hearing is not necessary."

3 COMMISSIONER BLOOM: That's what I was
4 thinking about last night. I think that gets us
5 there.

6 MR. SMITH: "If the director determines
7 that the hearing is not necessary." And then it
8 continues on the way it's written. Then I think you
9 can put a period here and strike "notwithstanding."

10 DR. BALCH: That's a lot more clear.

11 MR. SMITH: Although it would make more
12 sense to me to either incorporate 8 at the end of 6
13 or put it after 6. Frankly, I think the best thing
14 for you to do there to make it clearer is take your
15 language from 8 as you have now edited it and put it
16 at the end of what currently is 6.

17 DR. BALCH: All of that language?

18 MR. SMITH: Yeah. Then you have a long
19 Paragraph 6 but it's plain then, I think, that 6
20 addresses what happens if a hearing is requested and
21 what the director may or may not do in response to
22 that request.

23 CHAIRPERSON BAILEY: Okay. So we can move
24 that second sentence of 8 to the end of 6 and delete
25 the first sentence of 8 all together?

1 MR. SMITH: I think you can put everything
2 in 8.

3 CHAIRPERSON BAILEY: Everything in 8 can
4 go to the end of 6.

5 MR. SMITH: Yeah.

6 CHAIRPERSON BAILEY: So 7 stays the same
7 but 9 becomes 8.

8 MR. SMITH: Right. And it might make more
9 sense. I haven't been watching what you were doing,
10 Theresa. Have you already done what you --

11 MS. DURANES-SAENZ: I can undo it if you
12 need me to.

13 MR. SMITH: It might make more sense to
14 take the sentence, "The Santa Fe may grant the
15 exception administratively," and move that entire
16 sentence, which it stops after the
17 word "commenting." There you go. It might make
18 more sense to take that and move that to the end of
19 Paragraph 6, make that the last sentence.

20 COMMISSIONER BLOOM: I would agree with
21 that.

22 DR. BALCH: I think so.

23 MR. SMITH: Now you have the request being
24 made in the first sentence, the director determining
25 that a hearing is necessary and setting it in the

1 second sentence, and the third sentence you have the
2 director determined that a hearing is not necessary,
3 and in the last sentence you have what happens if no
4 hearing is requested at all.

5 CHAIRPERSON BAILEY: Well, I like logic.

6 COMMISSIONER BLOOM: I have two more
7 things in Section 16. One was a typo, and the other
8 more substantial. If you go down to E, Theresa.
9 The word -- scroll down more. Right above the red
10 there, it says, "If addition conditions." It should
11 be, "If additional conditions." Does that work for
12 everybody?

13 DR. BALCH: Yes.

14 COMMISSIONER BLOOM: And then up above in
15 E on Denial of Application, "equal or better
16 protection," I'm not sure that fits there. I will
17 give you a second to read that. I had trouble
18 making sense of that.

19 CHAIRPERSON BAILEY: It can be reworked.
20 Seems like we are missing a couple words here.

21 COMMISSIONER BLOOM: I think we should
22 take out "equal and better." Basically we are
23 saying the division shall deny in writing the
24 application for permit if it sees a problem because
25 it doesn't protect freshwater, public health and the

1 environment and adding equal or better -- I'm not
2 sure there's anything to contrast that to.

3 DR. BALCH: That's true. What is it equal
4 or better to?

5 CHAIRPERSON BAILEY: Our proposed
6 alternative --

7 DR. BALCH: In the manner that is
8 protective of freshwater, public health and the
9 environment.

10 CHAIRPERSON BAILEY: Yes. In the manner
11 that is protective of freshwater, public health and
12 the environment? Does that make sense?

13 DR. BALCH: Manner.

14 COMMISSIONER BLOOM: Yes, that's good. I
15 have one other question. Burial trench, we would
16 not be putting liquids in the burial trench,
17 correct?

18 DR. BALCH: No.

19 COMMISSIONER BLOOM: So look at Closure,
20 19.15.17.11K, so a little bit above Section 12
21 actually, Burial Trenches. K1 reads, "The operator
22 shall design and construct a burial trench to ensure
23 the confinement of liquids to prevent releases."

24 DR. BALCH: We're not confining liquids.
25 We discussed this before when we wrote it. I think

1 it's that we are designing it so if liquids were to
2 get into the pit they would be confined. Perhaps
3 it's not clear.

4 CHAIRPERSON BAILEY: No, but we are having
5 the protective cover.

6 COMMISSIONER BLOOM: It should be graded
7 such that there shouldn't be water running on to it.

8 CHAIRPERSON BAILEY: Let's delete K1?

9 MR. SMITH: Do you want to make it clear
10 there that it should be constructed so that liquids
11 don't get through the trench?

12 DR. BALCH: I think that's already taken
13 care of in the design provisions.

14 COMMISSIONER BLOOM: I'm not sure it is.

15 CHAIRPERSON BAILEY: It should be in 13D.

16 DR. BALCH: D3, 4. That's in 8B.

17 CHAIRPERSON BAILEY: Site contour.

18 DR. BALCH: D8B would seem to resolve the
19 question that we were just talking about in the
20 other paragraph. "Install a geomembrane cover over
21 the waste material in the lined trench or temporary
22 pit in a manner that prevents collection
23 infiltration water." That's really what you are
24 trying to keep out.

25 CHAIRPERSON BAILEY: Which should be

1 referenced in H having to do so with site
2 contouring, because that's where you would --

3 DR. BALCH: This is existing language.
4 There's a typo also.

5 MR. SMITH: Wait, before you go on do you
6 want to put a colon after requirements in the
7 section you were just looking at, K?

8 COMMISSIONER BLOOM: We are past that.

9 DR. BALCH: If you go to 8B, I noticed a
10 typo. We can fix typos. This paragraph seems to
11 address a concern that we were just discussing in
12 Paragraph 1 that Commissioner Bloom had pointed out
13 of why are we protecting liquids. I think you don't
14 want liquids to get into the pit and then flow
15 through.

16 CHAIRPERSON BAILEY: 8B does cover that.

17 DR. BALCH: 8B covers that. I think we
18 can remove that Paragraph 1.

19 CHAIRPERSON BAILEY: Yes, remove K1.

20 DR. BALCH: That would fix the colon also.

21 MR. SMITH: Good, because that was preying
22 on me, of course.

23 MS. DURANES-SAENZ: I don't know if our
24 guys will accept the colon.

25 MR. SMITH: Then we will have to change it

1 on several things because we have changed it to a
2 colon on other ones.

3 CHAIRPERSON BAILEY: Does that take care
4 of all your suggestions, Commissioner Bloom?

5 COMMISSIONER BLOOM: Yes.

6 CHAIRPERSON BAILEY: Do you have any
7 additional comments or suggestions, Commissioner
8 Balch?

9 DR. BALCH: I do not.

10 CHAIRPERSON BAILEY: And I do not. At
11 this point --

12 COMMISSIONER BLOOM: I'm sorry,
13 commissioner Bailey, did we talk about a potential
14 limit on the volume size of the multi-well fluid
15 management pit?

16 CHAIRPERSON BAILEY: No, there was not a
17 volume limitation. There was no permanent pits
18 which is why we had a separate section for design.

19 COMMISSIONER BLOOM: We are fine leaving
20 it for one on the multi-well fluid management pit
21 because it's dictated by the number of wells out
22 there and operational constraints? Okay.

23 CHAIRPERSON BAILEY: I suggest that we
24 have another printout, another clean copy given to
25 us for our review before we take a vote on the

1 different sections so that we can have that final
2 run-through before we adopt it as what we would like
3 to see. So Theresa, if you could print out a clean
4 copy of what we have accomplished today and then we
5 have a chance to review it. Commissioner Bloom, how
6 long do you think it would take? We do have a
7 regularly scheduled Commission hearing tomorrow
8 which should not last all day, but yet I can't give
9 any kind of definite time that it would be
10 concluded.

11 DR. BALCH: Madam Chair, scheduling, if
12 schedules allow, I don't think it will take very
13 long to conduct the next review. Maybe Friday
14 morning we could take care of it? That will ensure
15 you have time for tomorrow.

16 COMMISSIONER BLOOM: Friday morning I have
17 to be at the Roundhouse at 9:30.

18 DR. BALCH: Do you know when you will be
19 done?

20 COMMISSIONER BLOOM: I think by 11:30.

21 CHAIRPERSON BAILEY: So Friday afternoon,
22 1:00 o'clock, for a final vote on the final review
23 and vote?

24 DR. BALCH: Works for me.

25 CHAIRPERSON BAILEY: We will continue

1 deliberations until Friday at 1:00 o'clock.

2 MR. SMITH: For clarity, it would be the
3 case that you would like to continue the practice of
4 what you are reviewing to have your changes in red,
5 correct? For what you are going to look at for this
6 coming Friday?

7 CHAIRPERSON BAILEY: It doesn't help me to
8 have it in red. All in black is fine with me.

9 DR. BALCH: We made enough changes today
10 that we want to review some of the editing we have
11 done and be ready to have our votes after we fix
12 things like grammatical problems.

13 MR. SMITH: Would you mind if your changes
14 continue to be shown in red for your review in
15 Friday?

16 CHAIRPERSON BAILEY: I wouldn't mind.

17 MR. SMITH: Let's do that. I think it's
18 best.

19 CHAIRPERSON BAILEY: Is there anything
20 else that we can or need to do today?

21 COMMISSIONER BLOOM: I can't think of what
22 it would be.

23 DR. BALCH: I think we are done.

24 CHAIRPERSON BAILEY: Then we will continue
25 Friday at 1:00 o'clock. Thank you very much.

1 (Note: Hearing adjourned at 2:00).

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REPORTER'S CERTIFICATE

I, JAN GIBSON, Certified Court Reporter for the State of New Mexico, do hereby certify that I reported the foregoing proceedings in stenographic shorthand and that the foregoing pages are a true and correct transcript of those proceedings and was reduced to printed form under my direct supervision.

I FURTHER CERTIFY that I am neither employed by nor related to any of the parties or attorneys in this case and that I have no interest in the final disposition of this case.



JAN GIBSON, CCR-RPR-CRR
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