

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

IN THE MATTER OF THE HEARING CALLED BY)
THE OIL CONSERVATION COMMISSION FOR THE)
PURPOSE OF CONSIDERING:)

APPLICATION OF GANDY MARLEY, INC., TO)
MODIFY THEIR EXISTING NMOCD RULE 711)
PERMIT NO. NM-01-019 SO THEY MAY ACCEPT)
SALT-CONTAMINATED OILFIELD WASTES,)
CHAVES COUNTY, NEW MEXICO)

CASE NO. 13,480

ORIGINAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS

COMMISSION HEARING

BEFORE: MARK E. FESMIRE, CHAIRMAN
JAMI BAILEY, COMMISSIONER
WILLIAM C. OLSON, COMMISSIONER

October 12th, 2005

Santa Fe, New Mexico

2005 OCT 20 AM 9 05

This matter came on for hearing before the Oil Conservation Commission, MARK E. FESMIRE, Chairman, on Wednesday, October 12th, 2005, at the New Mexico Energy, Minerals and Natural Resources Department, 1220 South Saint Francis Drive, Room 102, Santa Fe, New Mexico, Steven T. Brenner, Certified Court Reporter No. 7 for the State of New Mexico.

* * *

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I N D E X

October 12th, 2005
Commission Hearing
CASE NO. 13,480

	PAGE
SUBMISSIONS BY APPLICANT AND CRI (NOT OFFERED OR ADMITTED)	3
APPEARANCES	4
OPENING STATEMENTS: By Mr. Domenici	7
By Mr. Feldewert	21
DELIBERATION BY THE COMMISSION	46
VOTE OF THE COMMISSION	82
COMMISSIONERS' STATEMENTS OF REASONS FOR ADOPTING THIS ORDER:	
Commissioner Bailey	84
Chairman Fesmire	85
REPORTER'S CERTIFICATE	92

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SUBMISSIONS BY APPLICANT AND CRI
(NOT OFFERED OR ADMITTED)

Submission by the Applicant, not offered or admitted:

Identified

Design (marked Exhibit A) 26

* * *

Submission by CRI, not offered or admitted:

Identified

Order No. R-12,306-B 32

* * *

A P P E A R A N C E S

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By: MICHAEL H. FELDEWERT

* * *

1 WHEREUPON, the following proceedings were had at
2 9:00 a.m.:

3 CHAIRMAN FESMIRE: At this time we'll call the
4 special meeting of the New Mexico Oil Conservation
5 Commission on Wednesday, October 12th, 2005, to order.
6 This meeting is held specifically to address the
7 continuation of Cause Number 13,480, the Application of
8 Gandy Marley, Inc., to modify their existing NMOCD permit,
9 Number NM-01-019, so that they may accept salt-contaminated
10 wastes at a facility in Chaves County, New Mexico.

11 This meeting is called pursuant to Order Number
12 R-12,306-D that granted in part and denied in part
13 Applicant's motion, and since I think everybody here is
14 pretty much familiar with the procedural -- Mike, did you
15 want to wait for your client?

16 MR. FELDEWERT: I think you can go ahead --

17 CHAIRMAN FESMIRE: Okay --

18 MR. FELDEWERT: -- that's all right.

19 CHAIRMAN FESMIRE: -- I think everybody here is
20 pretty much acquainted with the procedural nuances that
21 have gotten us here to this point, so I think we'll just
22 ask the Applicant and Movant to begin.

23 Mr. Domenici, do you have any witnesses today?

24 MR. DOMENICI: Yes, we have Bill Marley.

25 CHAIRMAN FESMIRE: Okay.

1 MR. DOMENICI: I'd like to make a brief opening
2 statement also, if I may.

3 CHAIRMAN FESMIRE: Okay, let's go ahead and get
4 the witnesses sworn.

5 Mr. Feldewert, do you have any witnesses?

6 MR. FELDEWERT: I was not -- My understanding of
7 this hearing today was to, according to the Order, consider
8 their -- the sole purpose was to consider their proposed
9 order. I was not aware that this was going to be any kind
10 of an evidentiary hearing or that there was going to be any
11 kind of a record in terms of testimony or evidence taken
12 today, so we have not -- we do not have any witnesses, and
13 I'm not -- my understanding in reading the Commission's
14 Order, that this was for the sole purposes of presenting
15 the order that they had attached to their motion and
16 nothing else.

17 CHAIRMAN FESMIRE: Mr. Domenici, your witness is
18 simply to clarify any questions that we might have on the
19 Order?

20 MR. DOMENICI: That's correct.

21 CHAIRMAN FESMIRE: Mr. Feldewert, would you have
22 any objection to that?

23 MR. FELDEWERT: Don't have any objection to that.

24 CHAIRMAN FESMIRE: Okay. Mr. Domenici, would you
25 ask your witness to stand and be sworn, please?

1 (Thereupon, the witness was sworn.)

2 CHAIRMAN FESMIRE: Mr. Domenici, are you
3 prepared?

4 MR. DOMENICI: Yes. And I understand from your
5 opening, Mr. Chairman, that you're indicating that the
6 parties understand the procedural history. Just so we have
7 a clear record, I would like to go into that at least a
8 little bit. I know Mr. Olson is somewhat new to the
9 Commission and to this matter, so I'd like to highlight a
10 few of the procedural -- important matters, from our -- at
11 least my client's perspective.

12 We are here because of the ruling that took place
13 September 15th, and a closed session took place that day.
14 Mr. Olson's predecessor was present, as I understand it.
15 Mr. Brooks was present, and then a the two other
16 Commissioners were here.

17 My clients were here with me that day. We had
18 filed a motion for a stay prior to that hearing. Actually,
19 we filed one with the Division first, and you had denied
20 that, Mr. Chairman. Then we had filed asking the
21 Commission to hear that issue. The Commission scheduled a
22 session, indicated it would be a closed session. We were
23 here in attendance. The closed session took place for
24 about -- over an hour, I don't know exactly how long.

25 And then the closed session opened up, there was

1 a statement on the record by several of the Commissioners,
2 and there was a clear indication that the stay request was
3 granted by a motion that was seconded and then voted on,
4 and the vote was two to one granting our request for a
5 stay.

6 There was a full docket that day, as I understood
7 it, and so I think Mr. Brooks indicated that he would need
8 to prepare the Order sometime later that day for execution
9 by the Commission.

10 We then left the hearing, and apparently later
11 that day the matter came back in front of the Commission,
12 back on the record, and there was discussion that the Order
13 couldn't be prepared that day, by Mr. Brooks, and there was
14 discussion as to the mechanics of how the Order would be
15 accomplished, and it was rescheduled for approximately
16 eight days later, for a session not to re-hear any matters,
17 not to reopen or reconsider, but simply to have an order
18 entered.

19 What we set forth in our motion -- and I think
20 this is important -- our motion for today, is, beginning
21 with that verbal ruling, my client began the preparations
22 to begin implementing the stay.

23 And what the stay is, just so we are clear, is to
24 open up one cell in our landfarm that would be part of our
25 permit modification that would become a landfill cell. And

1 so we were asking to open that cell and allow us to begin
2 taking landfill material into that cell.

3 We had indicated in our papers -- there wasn't
4 any testimony on this, but in our filings -- that we were
5 attempting to track the earlier decision that had been
6 entered by you, again, Mr. Chairman, as Division Director,
7 on our permit modification request. And that was a long
8 decision, as you recall -- and I don't know if Mr. Olson
9 has had a chance to read that, but I think Ms. Bailey
10 probably has -- and there was a lot of aspects to that
11 decision.

12 And essentially that decision said, we are not
13 going to grant your modification request because of public-
14 notice concerns. We are going to make some technical --
15 and there's probably some questions -- technical
16 suggestions, technical requirements, technical comments.
17 I'm not sure exactly what the effect of those are, but
18 there's a whole section of that decision with technical
19 information and technical determinations of some form, as
20 the result of a full evidentiary hearing in front of the
21 Division, in front a Hearing Examiner.

22 And in that -- and as part of that, just to even
23 amplify it a little further, the way that hearing was
24 conducted, a hearing took place, and then Ed Martin on
25 behalf of the Division prepared recommendations similar to

1 a draft permit. But it was prepared at the end of the
2 hearing. The record was left open, and then those
3 recommendations were put into the record, and then the
4 Hearing Examiner, working with the Director, issued this
5 decision.

6 So we actually have a document from the Division
7 suggesting what they would think is appropriate for this
8 facility after a full hearing. We have a decision from you
9 as the Director, I think, suggesting, after a full hearing,
10 what you think is appropriate for this facility.

11 And then we have a decision saying, because the
12 public notice was inadequate, we are denying your request
13 for modification; we are, however, suggesting that you
14 refile it directly with the Commission.

15 What we did is, we then filed an appeal of that
16 decision, and we have subsequently asked to continue that
17 appeal, because our intention is to do what your ordered,
18 Mr. Chairman, and file an application that attempts to meet
19 all of the suggestions or comments or determination set
20 forth both by Mr. Martin and by you as the Director.

21 When you met in closed session -- and I know that
22 Mr. Olson wasn't there, but the two of you were -- when you
23 met in closed session you had been told by us and were
24 taking it on good faith that we were preparing and working
25 diligently to prepare this Application, and your decision

1 indicated the stay would be granted, but we would have to
2 come back in front of the Commission and show progress on
3 the Application, and also show progress on notice.

4 What we have actually done is, we filed the
5 Application last Thursday. We have copies of the
6 Application here. The way the Rules worked is -- there are
7 several ways notice can work in these permit processes, and
8 the regs are not all that clear, but we provided written
9 notice to the adjacent property owners and to the county.
10 We will -- After we receive a completeness determination,
11 we will then be required to provide notice through
12 newspaper publication and the more broad formal notice.

13 So we have provided some notification. We have
14 verified that and confirmed that in the Application as --
15 and there's a section in the application checklist of this
16 kind of notice. There's also a requirement in Rule 711 for
17 notice after the completeness determination.

18 We don't know when the completeness determination
19 will take place. We are prepared to facilitate that, work
20 in any way we can to expedite that. The permit Application
21 contains engineering drawings, stamped engineering
22 drawings, it contains the geologic -- hydrogeologic
23 information in more detail, it contains contingency plans
24 in more detail.

25 We have attempted to meet both the Rule 711

1 requirements and the requirements or suggestions from the
2 Order that was issued by you as the Director, Mr. Chairman,
3 in that application. It took us a while to do that.
4 That's why it wasn't ready the last meeting; it took -- we
5 had the engineering firm working on this, we've done some
6 compaction tests of our clay to see how it's going to
7 compact.

8 What we had proposed at the last meeting and what
9 was agreed upon by a two-to-one vote, at least our
10 perception, was that we would be allowed to operate on an
11 interim basis while this permit was going -- coming back in
12 front of the Commission. We suggested at that time that we
13 would use a one-foot clay liner in the bottom of the cell,
14 we would install leachate collection. Both of these were
15 recommended in the earlier decision. We indicated at that
16 time that the engineering design for those would have to be
17 approved before we could start construction.

18 We actually have the engineering design now --
19 it's part of our Application -- and we are proposing to use
20 the same design drawings and the same design parameters
21 that is in the Application. So we have a design that is
22 available to the public. And I don't know that we even
23 need to go through the next -- the step of having staff,
24 OCD staff, review that design. Since it's actually -- it's
25 on file now, we would like to have that design itself be

1 allowed.

2 CHAIRMAN FESMIRE: Okay, Mr. Domenici, to make
3 sure that I understand, you're proposing to basically
4 accept salt in a cell during the interim prior to your
5 application being reviewed in a facility that is the same
6 design as you're proposing in your Application; is that
7 correct?

8 MR. DOMENICI: That's correct --

9 CHAIRMAN FESMIRE: Okay.

10 MR. DOMENICI: -- that's correct. And we
11 anticipate -- what we would do, Mr. Chairman, is, we -- in
12 order to satisfy that design, to construct that design, you
13 have to excavate into -- the clay starts at about 13 feet
14 below grade. We would have to excavate into that clay, we
15 would have to verify the compaction of that clay. We would
16 then lay our leachate collection piping on top of the clay.
17 We would then put soil on top of the collection, so that's
18 on top of the clay and on top of the piping. And then that
19 would be where we would be allowed to dispose of waste.

20 We do not anticipate we would need the entire
21 cell. We would start at one end of the cell and we would
22 begin constructing towards the other end, and we would
23 construct a sufficient capacity to take waste that we think
24 we might take during the pendency of the Application. But
25 we will meet the construction guidelines.

1 If for some reason our Application is denied or
2 changed, we would be in a position to close that cell at
3 that point and discontinue completely or modify the rest of
4 the cell. We think that's an appropriate way to provide
5 protection to the environment, ample protection to the
6 environment, and not -- and also not penalize us, frankly,
7 which is how we feel in looking back at this.

8 We were accepting salt-contaminated waste, as
9 you're aware, and then a letter was issued March, 2005,
10 immediately requiring termination of acceptance of that
11 material and indicating that the emergency process could be
12 allowed to continue taking material. We went through the
13 emergency process, which transitioned into the permit-
14 modification process, and really was on such an expedited
15 basis that there was no way that the notice requirements
16 could have been met.

17 So there was, in our opinion, not a meaningful
18 opportunity for us to continue taking material with a
19 unilateral, you know, immediate modification to our permit,
20 in hindsight, which -- and hindsight is always 20-20. And
21 I'm not sure why that was, but a lot of it is because there
22 was a need to expedite our appeal since, to expedite our
23 initial permit process. And then when we were in that
24 process there were complaints and claims about the public
25 notice, that all the data to support that permit had to

1 have been available before that process began. Virtually,
2 that was impossible. We would have had to know that we
3 were going to be shut down or had a large -- longer time-
4 frame to do that.

5 And that's why it's taken us some time, why we
6 have a more detailed Application, and why we think that we
7 meet the requirements, frankly, for a stay, which is that
8 there is a likelihood of success we are going to be granted
9 a permit, there is -- there's harm to us in that prior to
10 March 4th, 2005, we had huge commitments to our facility,
11 both on the customer side and on our capital side and on
12 our ongoing operational side. All three of those -- we
13 were operating at a very high volume on March 4th. And on
14 March 5th we were essentially required to do nothing except
15 go through this emergency process. So we had ample -- and
16 other reliance and harm early on.

17 And then that arose again September 15th. When
18 we came in here and heard that we were going to be allowed
19 to operate, we contacted customers, we began excavating the
20 location that we're anticipating to do this activity, we
21 began lining up both operational resources, making other
22 plans and necessary expenditures and operations to be able
23 to operate.

24 And then on the 23rd we are told -- basically
25 it's unclear what we are told on the 23rd, and that kind of

1 brings us up procedurally to where we are at. Apparently
2 on the 23rd, that was Mr. Olson's first day on the
3 Commission -- I'm not sure if it was your first hearing,
4 but one of your first days -- and Ms. Bailey made a motion
5 to approve the Order, and it wasn't seconded.

6 And Mr. Olson indicated -- and I've seen the
7 transcript -- that you weren't prepared, you hadn't been
8 involved in the earlier decisions and you weren't prepared
9 to rule on it -- or participate, I guess, is really the
10 accurate way to indicate it -- and so it died for lack of a
11 second.

12 Obviously this concerned us greatly, because
13 there's a record of the decision of the Commission that is
14 not really disputed as to what actually took place on the
15 15th, the two-to-one vote. But you have had some time, Mr.
16 Olson -- I don't know if you've had a chance to do anything
17 with that time, but you have had time.

18 We have made progress, I want to assure you. We
19 have filed the Application, we have completed our
20 engineering, we have completed our compaction analysis.
21 The compaction is greatly in excess of what's required in
22 both Mr. Martin's suggested conditions and also in your
23 Order. So the clay is -- Based on the compaction tests,
24 the clay is the equivalent, using your compaction, of three
25 times what you had suggested, Mr. Chairman, since the

1 compaction is much higher. So we think the facility is
2 amply protective of the environment.

3 We think we are also making progress on the
4 Application side and are likely to move forward through the
5 permit process. I don't know exactly when that would come
6 up for hearing at the Commission. As I indicated, it
7 depends on really two factors, the completeness
8 determination and then your schedule, the Commission's
9 schedule. I think it could occur as early as your December
10 meeting, if you have a December meeting. I'm not sure if
11 you do have a scheduled December meeting.

12 CHAIRMAN FESMIRE: We have a scheduled December
13 meeting.

14 MR. DOMENICI: What day would that be?

15 CHAIRMAN FESMIRE: I believe it's the 8th.

16 MS. DAVIDSON: I believe so.

17 CHAIRMAN FESMIRE: About.

18 MR. DOMENICI: It could occur as early as
19 December 8th. I think from our standpoint, as soon as the
20 completeness determination is made, the public comment
21 period needs to open for 30 days, and then we would be
22 ready for a hearing.

23 Now, there are new proposed rules that extend
24 that out, and they allow for basically a draft permit
25 stage, where the Division would actually come in and

1 comment on our -- not just make a completeness
2 determination, actually make a substantive determination.
3 That wasn't done the last hearing, it's not really
4 contemplated by the current regs, and so I don't know if
5 there's any anticipation as to how the Division would
6 participate in this hearing. But if they choose to, it
7 would -- that might extend that period out, if they're
8 going to issue a preliminary determination or a draft
9 permit or something along those lines.

10 The hearing in front of the Division took three
11 days, and then the decision took -- and I'm just talking
12 off the top of my head -- roughly 30 to 40 days to be
13 issued. So we are talking -- and this is why we are here
14 for a stay.

15 Our concern is, even if everything goes well and
16 we happen to go to hearing December 8th, if it went like
17 the last hearing we might not receive a decision until --
18 and we have holidays in there and all that -- till perhaps
19 late January. If the hearing does not take place until
20 January, we might not be receiving a decision until March
21 or so.

22 And we're sitting here in early October and we
23 were here September 15th with a stay, and so we're
24 concerned that between September 15th and, say, March, that
25 we would not be in a position to operate, we would have the

1 obligations that we were under to continue, our customers
2 would have to make decisions either to stockpile material
3 or to use alternative locations.

4 And it wouldn't be -- with no reason for it.
5 There's no technical reason why our Application will not be
6 granted. The only real substantive reason from the OCD
7 hearing was public notice. Now, there were comments on the
8 technical issues, and we don't want to ignore those. In
9 fact, we tried to address all those, we tried to take all
10 of those into account and either accept them verbatim or
11 put some other engineering control in that would be the
12 equivalent.

13 So we think legally you have the authority, and
14 you already indicated once that you have the authority, to
15 grant a stay. We think substantively we're entitled to the
16 stay; we've made the demonstration, and you've already
17 indicated once that that's correct. We think that we have
18 confirmed the interim measures that you were going to check
19 on at the next meeting, based on that last decision. The
20 application -- primarily an application was on file and was
21 on file and was being diligently pursued. We have
22 confirmed that that is actually the case, the application
23 is on file.

24 We have also, I think, made it clear as to what
25 our interim construction will be. We actually have design

1 drawings that -- Lorraine, do you have those? We're
2 collating back here right now. -- that are out of our
3 permit application, available to the public. We don't need
4 to go meet with your engineers off the record or anything
5 like that. We can submit those today, make them part of
6 the record, we can actually attach them to the Order, would
7 be our suggestion.

8 And so we think it's appropriate to enter that
9 Order. We think it's -- frankly think it's mandatory to
10 enter that order. It's already been decided by this
11 Commission. There's nothing indicating anywhere that the
12 Order we present differs from what the Commission has
13 already ruled.

14 The only thing that does differ is, previously we
15 said the engineering designs -- our construction couldn't
16 start until the engineering designs were accepted. We now
17 have those designs available, we can attach them, actually
18 reference them in the Order.

19 So given that, I don't know that we need
20 evidence. But we are prepared to put on Bill Marley, who
21 can verify the status of the permit application, who can
22 verify the compaction tests that have been performed and
23 can verify the actions that the Applicant has taken since
24 March 4th -- the detriment to the Applicant since March 4th
25 and the actions that the Applicant took on September 15th,

1 based on the decision of the Commission.

2 CHAIRMAN FESMIRE: I think Mr. Marley would be
3 limited to answering questions on the Order that you've
4 presented itself, but we'll reserve that for a minute.

5 MR. DOMENICI: Okay.

6 CHAIRMAN FESMIRE: Mr. Feldewert, would you like
7 to make an opening statement?

8 MR. FELDEWERT: Yes, because I think the purpose
9 of this hearing, as I understand it, and the way it's been
10 presented in the Commission's Order R-12,306-D, the purpose
11 of said hearing is to present a proposed order in this case
12 to the full Commission. And so the only issue before you
13 today, and the only issue I'm prepared to address today, is
14 whether, as Mr. Domenici says, it's mandatory for you to
15 enter the order that has been presented and attached to
16 their emergency motion.

17 This is not a hearing on the merits of their stay
18 request, this is a hearing on their proposed order. This
19 is not a hearing to have evidence presented on whether or
20 not a stay should be granted.

21 This Commission, in its September 23rd meeting,
22 essentially has -- in the transcript, as reflected by their
23 attorney, essentially created a situation where their order
24 was negated. So the Commission has, in effect, voted not
25 to adopt that order. You voted not, at that hearing, to

1 grant a stay.

2 The only orders that have been entered in this
3 case is Order 12,306-B, which denied their Application for
4 procedural issues, notice issues, and because of technical
5 concerns with their Application that goes beyond this idea
6 of whether they should use a clay liner that they say is
7 going to work, and whether they should or should not have
8 the leachate collection system that they now say they're
9 going to have. There were other technical concerns raised
10 in that Order.

11 And the other Order is 12,306-C, which denied
12 their request for a stay.

13 Now, if they took action that is inconsistent
14 with either one of those orders that are in place, that is
15 their fault. That is not the fault of the Division or the
16 Commission, because there is not a decision until an order
17 has been entered. I would not advise my client to proceed
18 until we had a written order.

19 So to the extent that they have acted
20 inconsistent with those Orders, that's not your problem.
21 And the only question before you today is whether it's
22 mandatory to enter this proposed order. And I'm prepared
23 to offer legal arguments as to why that's not the case.
24 That's what I'm prepared to do today.

25 But here's what's -- concerns me, and that is, we

1 come here today, and they have -- say now, well, we filed
2 our Application last Thursday, we filed our new and
3 improved Application. It's not yet deemed complete, it's
4 not yet in a position to present to the public. We don't
5 know when that will be done. We are still in the
6 permitting process. We are still in the process of getting
7 an Application -- or they are still in the process of
8 getting a viable Application ready for consideration by
9 this Commission. They're still collating their designs to
10 present it to the public.

11 They suggest that it's going to be fine, we've
12 got a great Application now, we've addressed all your
13 technical concerns. This Application -- these cells are
14 going to be fine, go ahead and let us take this waste now.
15 Okay? Before we have any hearing, before we have any
16 public comment, before we have any scrutiny over this
17 Application.

18 We -- They are asking you to move completely
19 outside of the permitting process. Essentially they're
20 saying, Let's just ignore Rule 711, give us special interim
21 authority, let us go ahead and use these cells that we
22 think's going to work.

23 But what happens if it doesn't? I mean, what
24 happens if we have our public hearing and we have our
25 scrutiny that Rule 711 talks about, and there's some

1 problems with their new and improved cell? Maybe it's not
2 deep enough, maybe there's some berming issues, maybe
3 there's some horizontal-migration issues, all the concerns
4 that the Division expressed in their Order, and we now have
5 to change that cell. Are we going to go back in and dig up
6 that waste and move it out, or are we just going to leave
7 it there and hope that it's okay?

8 I mean, that's the problem with proceeding on an
9 interim temporary authority, is that what happens if things
10 change, and how does that look? I mean, why are we here
11 and spending so much time and effort trying to go outside
12 of the Rule 711 procedure?

13 I mean, Rule 711 is there for a reason. It's a
14 pain, no doubt about that. Okay? It's a pain. You've got
15 to jump through a lot of hoops to get your authority. But
16 it's there for a reason. And I'm prepared to argue why
17 it's there. And that's why I'm prepared to argue why it's
18 not mandatory for you to enter their proposed order,
19 because essentially, fundamentally, what it asks is that
20 you afford them special treatment, that you take them
21 outside of the general permitting authority, and that you
22 grant them immediate authority to accept waste in some cell
23 whose design we're just now getting today that they think
24 is going to work.

25 I don't think that -- a), it's not good policy;

1 b), I don't think this Commission or the Division has the
2 authority to go outside of the Rule 711 permitting process
3 and grant temporary authority; and c), the only record, the
4 only facts that we have in this case is what's in Order
5 12,306-B. These are the findings -- these are the record
6 -- that's the record in this case.

7 And these findings do not support granting GMI
8 special authority or taking them outside the permitting
9 process or allowing them to suddenly take the salt-
10 contaminated waste without first getting a viable
11 application with notice to the public and a public hearing
12 and a public scrutiny and a meaningful participation by the
13 public that is called for in 711.

14 MR. DOMENICI: If I could briefly respond?

15 CHAIRMAN FESMIRE: Why don't you go ahead and
16 present your proposed order? Is it the one that we
17 received in the packet?

18 MR. DOMENICI: Yes, it is.

19 CHAIRMAN FESMIRE: And you said there were going
20 to be some attachments.

21 MR. DOMENICI: We would like to attach the
22 design.

23 MS. HOLLINGSWORTH: And there -- We have problems
24 with your copying machine. They will be back in just a
25 minute.

1 CHAIRMAN FESMIRE: Okay.

2 MR. DOMENICI: We have -- we do have --

3 MS. HOLLINGSWORTH: We have the large version,
4 we're just trying to get some --

5 CHAIRMAN FESMIRE: Okay, why don't you go ahead
6 and present your order and make your arguments, and we'll
7 allow Mr. Feldewert to review the order and respond, hear
8 closing arguments, and decide.

9 MR. DOMENICI: This would be, if I could mark
10 this as Exhibit A and attach it to the proposed order. It
11 will be Exhibit A to the proposed order.

12 MR. BROOKS: Okay.

13 MR. FELDEWERT: Pete, is this whole thing Exhibit
14 A?

15 MR. DOMENICI: Yes.

16 What I'd like to hand you, Mr. Chairman, if I
17 could, I think the proposed order was attached, so this is
18 the same proposed order attached to Exhibit A, which is
19 "Facility Design and Construction".

20 CHAIRMAN FESMIRE: And you're making copies?

21 MR. DOMENICI: Those are the -- and we're making
22 copies, yes.

23 CHAIRMAN FESMIRE: And that is the same order
24 that you filed?

25 MR. DOMENICI: Yes, it is, it's the same verbatim

1 -- same order.

2 CHAIRMAN FESMIRE: Okay.

3 MR. DOMENICI: I'll just wind up quickly. I
4 think the important part for the Commission to focus on is
5 that we are in an appeal process, that's why we're in front
6 of the Commission. We have a *de novo* appeal on file of an
7 Order from you, Mr. Chairman, as the Director. And as part
8 of your role on the *de novo* appeal, you are entitled to
9 grant stays or other forms of interim relief if certain
10 conditions are met, and we think those conditions are met.
11 So I think you clearly have jurisdiction, and you have
12 authority to do what is being proposed.

13 I think the concern -- one of our concerns is,
14 Mr. Feldewert's argument that this shouldn't be done
15 essentially asks to unwind your March 4th, 2005, letter,
16 Mr. Chairman, because in your letter you told parties,
17 accept the -- my decision to modify your permit
18 unilaterally, because I am giving you some due-process
19 rights so you can continue to operate. That is directly
20 contradictory to his position that there should be no
21 interim operation.

22 So were you to accept his position, your March
23 4th Order and the path you set my client on is totally
24 undermined by what he is suggesting. We are actually
25 asking that you follow the course you set on March 4th.

1 And the policy behind your March 4th Order, I
2 think, is what really is at issue. And the merits of that
3 policy are that the Division was able to accomplish a
4 substantial reduction of facilities taking salt, in a very
5 quick way, without having 22 facilities go through hearings
6 -- which is what the new Rule requires, by the way. The
7 new Rule says that the Division can't modify a permit
8 without a hearing. And you did it without a hearing, but
9 you did that to accomplish the greater goal by saying for
10 some facilities we think it's appropriate to give you a
11 path where you can continue to operate while you are going
12 through our modification process.

13 What he proposes now is basically say that was
14 improper. He is challenging your original course of this
15 agency on March 4th. We are trying to work with that
16 original course and the policy and your authorization as a
17 Commission, which says if you go through a hearing at the
18 Division level and you appeal, which we've done, and you
19 said file a new application as the Director, to the
20 Commission, which we've done -- all of that indicates to us
21 that there was an anticipation/expectation that certain
22 facilities would have an opportunity to continue to
23 operate.

24 We're trying to take advantage of that. We -- I
25 think we have amply shown we will protect the environment,

1 we have taken into account all the technical comments of
2 the staff, of the Division decision, of our own engineers,
3 and we think the public will be amply protected by this.
4 It will actually allow waste to be disposed of. Any
5 concerns regarding inadequacy of the interim facility can
6 be addressed.

7 At the end of our hearing if something says, You
8 get no permit, we would expect something to address our
9 interim operation, either you will say you have to close
10 it, you have to move it. Whatever it says, we're prepared
11 to live with.

12 So there's not going to be any permanent harm or
13 risk to the environment. If there is, we're taking that
14 risk, we're not asking the agency to take that.

15 So there really is no policy merit to their
16 argument, unless your entire March 4th decision and course
17 of conduct -- which frankly they suggested. They forced
18 you to do that, they pushed you to do that, and now -- and
19 you left an opening for parties that would be severely
20 impacted by their suggestion. Now they are saying, You
21 really should close that option and make that where that
22 wasn't a meaningful option.

23 So I would --

24 CHAIRMAN FESMIRE: Mr. Domenici, may I ask a
25 question?

1 MR. DOMENICI: Yes.

2 CHAIRMAN FESMIRE: Aren't you in effect arguing
3 that our March 4th letter predetermined the outcome of the
4 hearings that were afforded in that letter?

5 MR. DOMENICI: I can't explain -- I don't know
6 why it would predetermine that.

7 CHAIRMAN FESMIRE: While the opportunity for
8 notice and hearing was provided in that letter --

9 MR. DOMENICI: Yes.

10 CHAIRMAN FESMIRE: -- there was no
11 predetermination of the outcome of those hearings, was
12 there?

13 MR. DOMENICI: In hindsight, to the extent that
14 -- that in the middle of our hearing, against testimony by
15 the agency, by the way, a finding was made by you that the
16 Application has to contain the entire -- basically the
17 entire record that's going to be presented at the hearing,
18 even though Mr. Martin testified that had not been the
19 practice up until that point in time, your avenue did not,
20 in effect, provide a meaningful -- it didn't predetermine
21 the substantive decisions, but procedurally it made it
22 extremely difficult for anyone to actually go through an
23 expedited hearing with an application and obtain the kind
24 of relief that was suggested by your -- but subsequently it
25 did not predetermine anything.

1 And in fact, the hearing in front of your Hearing
2 Examiner was a very thorough hearing on the technical
3 merits of this facility, on the requirements of 711, what
4 should be appropriate. So that hearing, substantively, was
5 very effective and substantial. And that's why there's
6 such a long, detailed decision.

7 But procedurally and from a timing standpoint,
8 I'm not sure your March 4th letter actually did provide an
9 opportunity, because when we applied for an emergency
10 application, our hearing date was already scheduled in
11 front of the Division.

12 And when we showed up for the hearing to extend
13 that emergency application, one of the issues was, is this
14 going to be a very short, interim process? And that was
15 addressed by the Division by saying, Yes, this is already
16 scheduled for hearing, and telling the public, Yes, this is
17 already scheduled for hearing.

18 So as an example, to go out and drill wells and
19 send that data to a lab and get that data back, there was
20 not enough time in there to actually do that and have that
21 as part of an application that met that hearing deadline.

22 And I think you're aware of that, because one of
23 the applications was dismissed. Artesia Aeration was so
24 obviously deficient that it didn't even make it to a
25 hearing.

1 So I don't think substantively you decision
2 decided anything. It was predetermined, it was -- left it
3 open for the proper hearing process. Procedurally, I don't
4 think it was a meaningful -- particularly meaningful
5 process. It did allow some emergency relief under your
6 emergency guidelines, which are very short and can be
7 extended for another period of time, contingent upon a
8 quick, full hearing. That doesn't really match up with how
9 your decision interprets Rule 711.

10 So with that, that's all we have. We would like
11 to have the order entered with those drawings, and we would
12 like to move forward.

13 CHAIRMAN FESMIRE: Mr. Feldewert, would you like
14 to respond?

15 MR. FELDEWERT: If I may approach?

16 CHAIRMAN FESMIRE: You may.

17 MR. FELDEWERT: I'm going to be referring to this
18 order...

19 MR. DOMENICI: Mr. Chairman, before they -- I
20 understood this hearing was noticed for all pending
21 motions, and we do have a motion for standing on file,
22 asking to strike CRI's response on the stay. There was no
23 response filed by CRI on that motion. And so we think that
24 is part of this hearing, it's notice for part of this
25 hearing, and we do object to CRI's participation.

1 CHAIRMAN FESMIRE: Okay. Mr. Domenici, what -- I
2 guess I don't agree with you on the notice for all motions.
3 Wasn't the order for this hearing pretty specific on
4 presentment of the order?

5 MR. DOMENICI: Well, okay, the order. But when
6 it's -- the notification of the hearing itself.

7 CHAIRMAN FESMIRE: Okay.

8 MR. DOMENICI: The docket notice indicated all
9 motions.

10 CHAIRMAN FESMIRE: Okay.

11 MR. DOMENICI: So I don't know if standing was
12 contemplated or not, but we do not want to waive that by
13 not raising it.

14 CHAIRMAN FESMIRE: Okay, it's noted. I don't
15 want to get into that issue at this time, but it is noted
16 and preserved.

17 MR. DOMENICI: Thank you.

18 CHAIRMAN FESMIRE: Mr. Feldewert?

19 MR. FELDEWERT: As I mentioned, by asking you to
20 enter this order, fundamentally what they are asking is for
21 a special exemption from those stringent Rule 711
22 permitting requirements. There's no doubt about that in my
23 mind. It was after they failed to meet their -- those
24 stringent requirements with their first application.

25 They talk about due-process concerns, stepping

1 all the way back to your March 4th letter. Well, after
2 that March 4th letter went out, this -- the Division
3 entered -- granted them emergency authority to accept waste
4 and extended that authority on what turned out to be bad
5 information.

6 After a thorough hearing, as they talked about,
7 occurred in May, it was very clear and this Division found
8 that that emergency authority had been based on bad
9 information that they had provided.

10 We then had a very thorough hearing on their
11 Application, in which they presented their case and the
12 Division determined that they had failed to meet the
13 stringent requirements of Rule 711.

14 So I think you can have some comfort here that
15 they have had plenty of due process. So that should not be
16 a concern for this Commission. They have had ample
17 opportunity since the first quarter of this year to present
18 to this -- to the Division, a viable application to operate
19 their proposed facility, and they failed. That's not your
20 fault, that's their fault.

21 Now, I -- getting back to this idea of whether
22 you should enter this order here today, which would
23 essentially grant them special treatment and exempt them
24 from the Rule 711 requirements, I can't think of any
25 operator out there or any potential applicant that wouldn't

1 want this same type of special treatment.

2 As I mentioned, Rule 711 is -- it's a pain. I
3 mean, there's a lot of hoops that you've got to jump
4 through to get your authority. But it's a pain for a
5 reason, and those hoops are there for a reason, and the
6 Division articulated that reason in this order.

7 If you turn to page 15 of Order R-12,306-B, the
8 Division here, under the Technical Issues section, noted
9 that there are sound policy reasons for requiring
10 facilities to meet the high standards in Rule 711 before
11 accepting non-remediable oilfield waste. This Division
12 said, "The proposed permit modification represents a
13 fundamental and substantial change from GMI's existing
14 landfarm operation to a landfill facility and would entail
15 permanent disposal of salt-contaminated waste that can
16 never be re-mediated..."

17 COMMISSIONER BAILEY: What paragraph are you on?

18 MR. FELDEWERT: I'm sorry, I'm on the first
19 paragraph under "Technical Issues": "...that can never be
20 re-mediated..." I'm about halfway down, Commissioner
21 Bailey.

22 COMMISSIONER BAILEY: I see.

23 MR. FELDEWERT: "...as well as the likely
24 occasional disposal of materials that would be considered
25 hazardous, in the absence of the RCRA oil field exemption."

1 Here's the policy: "To ensure protection of the
2 public health and the environment, both today and in the
3 future, such applications should strictly adhere to all
4 Division permitting rules and guidelines and follow all
5 industry best practices available for the design,
6 construction, operation, closure, and post closure of
7 landfills. The permit application should be sufficiently
8 detailed and the operator's compliance record with the
9 Division should be of...sufficient quality to reasonably
10 ensure the facility will protect public health and the
11 environment. Based on these standards, the following
12 issues...of concern..." -- "...the following issues are of
13 concern in GMI's application." And then they talk about
14 the technical concerns they have.

15 Now, what they're asking you to do is just kind
16 of cast this policy aside, then. Let's just ignore the
17 important policies behind Rule 711. And I suggest they're
18 asking you to commit serious error in proposing their order
19 here today.

20 First of all, there is not yet a sufficiently
21 detailed application pending before this Commission that is
22 ripe for public review and comment. We're still getting
23 and collating part of their Application.

24 There is no application pending before you yet
25 that addresses all of these technical concerns -- that we

1 know of, that addresses all these technical concerns that
2 have been raised by the Division. They promise that there
3 is, they promise they're in the process of doing that. But
4 we're not there yet.

5 And Rule 711 doesn't say that you can come to the
6 Division with some engineering designs and meet with your
7 technical staff and on that basis alone receive temporary
8 or interim authority to start accepting this waste. That's
9 not what the Rule says. Because this type of what I would
10 call behind-the-scenes, backdoor permitting doesn't foster
11 the policies that the Division expressed in this Order, and
12 it doesn't promote public confidence in the permitting
13 process.

14 And so I submit to you that if you adopt their
15 order here today and give them this temporary authority,
16 essentially what you're saying is that the Rule 711
17 permitting process and all the stringent hoops you've got
18 to run through and all the public review and all the public
19 scrutiny that it anticipates is really just a meaningless
20 formality.

21 Secondly, there is no authority in the Oil and
22 Gas Act or Rule 711 to arbitrarily pre-permit landfills.
23 Rule 711 clearly requires that an applicant must meet
24 technical submissions, public notice, public review, and
25 financial assurance obligations that are set forth in Rule

1 711.B before the Division or the Commission has the
2 authority to authorize the operation of a landfill.

3 So I submit that they're asking you to step
4 outside the permitting authority that you have under your
5 Rules and under the Statute. There is no provision for
6 temporary authority. You've got to jump through all of
7 those hoops before you can give -- before this Commission
8 or the Division is in a position to grant them authority to
9 operate as a landfill.

10 Third, the Commission does not have the record or
11 the findings to grant GMI's -- or to issue GMI's -- enter
12 their order or give them special permitting authority. The
13 only facts found after a public hearing are contained in
14 this Order right here that I just handed to you.

15 And as we noted to you, and as they have talked
16 about, this Order was entered after a two-day, very
17 thorough hearing by the Division and its Examiner. And
18 they found, after having conducted that hearing, that very
19 thorough hearing, that there were more concerns than just
20 the idea of whether you should use a one-foot clay liner at
21 the compaction that they suggest. They found more concerns
22 than just the absence of a leachate detection system.

23 Their concerns included such things as the depth
24 of this cell. There was concern their cell wasn't deep
25 enough. They had concerns -- they expressed concerns about

1 waste placement within the cells, concerns about the
2 compatibility of the proposed waste with their one-foot
3 clay liner. They raised concerns about the management of
4 the waste, about the horizontal movement. Not the vertical
5 movement, the horizontal movement of contaminated waste.
6 There was concern raised about the monitoring and closure
7 of their proposed cells, the capping of those cells, and
8 the revegetation of those cells.

9 I mean, those are the types -- or shouldn't those
10 types of concerns be fully aired in a hearing before we
11 grant any authority for them to operate a landfill?

12 But there are other facts found by the Division
13 in this Order that bear even more directly, I think, on the
14 issue that's before you. If you turn to page 18 of this
15 Order and you look at the top of the page, "Additionally,
16 GMI's emergency application represented that an impermeable
17 redbed clay barrier of approximately 150 feet existed
18 between GMI's landfarm and groundwater below it. In fact,
19 such a barrier does not exist below GMI's landfarm."

20 The second paragraph, "While the emergency
21 application may have been hastily prepared by GMI resulting
22 in errors, the Division now knows, as does GMI, that key
23 findings relied up to issue the Emergency Order and the
24 extension..." -- that's that -- what I just walked through
25 a while ago -- "...are no longer valid. For that reason,

1 and because this Order constitutes a determination on GMI's
2 application, the Emergency Order Extension is no longer in
3 effect and GMI must immediately comply with the Division's
4 March 4th letter."

5 They had their due process, and after having that
6 due process, the Division found that the information that
7 they gave to you for purposes of issuing that emergency
8 order is faulty, it's no longer valid. Key findings that
9 were utilized to issue that emergency order are no longer
10 valid. That is what -- the record that we have today.

11 The second point that I think is of importance
12 here on this page is the last paragraph. And the first
13 sentence talks about your -- the Division's statutory
14 duties, but I want to move on to the second sentence, about
15 five lines down. Begins with, "In evaluating whether..."
16 And this Division found, "In evaluating whether GMI's
17 application will protect the public health and the
18 environment, and in administering the Water Quality Act as
19 provided by..." and then they cite the statute "...GMI's
20 past record of performance, or in this instance non
21 performance, is a relevant consideration in acting upon
22 GMI's application. Although the Order in this matter will
23 not dispose of GMI's application in its entirety, if GMI's
24 application is ultimately granted, or granted with
25 conditions, a period of time (possibly six months to one

1 year) should be required for GMI to first demonstrate that
2 it can comply with [the Division's] reporting requirements
3 before it should be allowed to operate a landfill
4 facility."

5 Now, this inability -- this finding of GMI's
6 inability to meet its existing permitting obligations has a
7 direct bearing on whether you should give them the order
8 that they propose today. I mean, these findings were
9 issued after a two-day hearing, the submission of findings
10 and conclusions with citation to the record, and careful
11 consideration of the record by the Division, its Hearing
12 Officer, its attorney and its Director.

13 And I submit to you that you do not have a record
14 before you to now say that these findings are wrong and
15 that GMI should immediately proceed with authority to
16 operate a landfill to accept, as this Division recognized,
17 what is essentially dangerous waste.

18 They had their opportunity to file an application
19 and meet all the requirements of Rule 711. They failed to
20 do that. When they finally get around to filing a viable
21 application and to providing notice of that application for
22 public review, then this Commission will be in a position
23 to determine whether they should operate a landfill under
24 these design proposals or any other design proposals that
25 they come up with as part of their application.

1 But we're not -- And you also made a point to
2 determine what timetable should be reasonable to determine
3 whether they could meet their permitting obligations before
4 you give them -- their existing permitting obligations,
5 before you give them a new permit.

6 But now is not the time to do that. Now is not
7 the time to grant them special authority to operate an
8 oilfield waste landfill. And I submit to you that you
9 don't have the authority or the record to set aside the
10 high permitting standards of Rule 711.

11 And instead, what this body should be doing is
12 supporting the Division's effort to apply these high
13 permitting standards to all proposed oil and gas landfills
14 in New Mexico. And for that reason we then ask you today
15 to deny their request for a -- their proposed order, which
16 is the only issue before you. Because essentially what it
17 will do is send a wrong message and essentially bypass Rule
18 711 and render its hoops, its, you know, obligations a
19 meaningless formality. That's what this order is going to
20 do.

21 CHAIRMAN FESMIRE: Mr. Feldewert, a quick
22 question. Are you arguing that the findings of the
23 Division Hearing Examiner are binding on the Commission?

24 MR. FELDEWERT: I'm saying -- I'm saying -- Are
25 they binding? When you have a hearing, I think it's -- on

1 a de novo review you have -- you are free to reconsider
2 these findings.

3 What I'm saying is, at this point in time the
4 only thing we have in the record, because the only hearing
5 we've had, is what's in here, and that there's simply no
6 findings that are in the record to support the proposition
7 that they should be granted special treatment.

8 CHAIRMAN FESMIRE: Mr. Domenici, do you have
9 anything --

10 MR. DOMENICI: Yeah, just that --

11 CHAIRMAN FESMIRE: -- in closing?

12 MR. DOMENICI: -- there's substantial other
13 information in the record. The request for review of the
14 denial, which is what you're here on, contains information
15 essentially addressing these concerns, and that was
16 unrebutted in the record. That's actually the status of
17 the record, is, the decision was issued, and yet -- and
18 there was an emergency order. It was contemplated the
19 emergency order would stay in effect indefinitely for
20 someone to go through the application process. And it was
21 granted in that sense.

22 And then it was -- it was -- by your order, Mr.
23 Chairman, it was canceled, the emergency order was
24 canceled. And what we're asking is for the Commission, as
25 part of their appeal, part of this appeal, to stay that

1 part of the Division's decision, to say the part setting
2 aside or canceling the emergency order, we as the
3 Commission are going to stay because we think you have a
4 substantial success -- chance for success on the merits,
5 and the other elements for a stay are allowed. And we're
6 allowed to request that.

7 It's contemplated by the nature of that original
8 emergency request that both the Division and the Commission
9 would have the ability to allow certain operators to
10 operate while they're applying for an application, while
11 they're going through an application process. You
12 suggested that on March 4th. So to say now that you can't
13 do that, that's totally inconsistent. And we did operate
14 under that. And when we were operating under that, and
15 when we went into that hearing, we didn't have a clay
16 liner, and we didn't have a record of the geology that we
17 did through the hearing.

18 But the record shows that a clay liner with the
19 accurate geological information is sufficient. That's what
20 Mr. Martin's testimony, which is in the record, at the
21 hearing shows. That's -- And then we amplified that in our
22 request for a stay.

23 We also addressed the compliance issue. It's in
24 the record, it's unrebutted. We settled the case for this
25 noncompliance for a \$2000 penalty. So to say that a \$2000

1 penalty is equal to saying you can't operate -- We've
2 already resolved that. That would be a -- First of all,
3 that would be a kind of double jeopardy, to say we're going
4 to assess you a \$2000 penalty and then come in without any
5 hearing and say you can't operate. That's been resolved
6 for \$2000. That's an indication of the magnitude of that
7 problem. It was a paperwork problem. It's in the record.

8 There's also a record of three quarters of
9 reporting that took place in 2005. So both of those were
10 submitted to say, you as the Commission should review the
11 decision of the Division, with some additional information,
12 to set aside that emergency order, and you should stay
13 that.

14 So there is a record on the -- actually on the
15 key points that Mr. Feldewert just pointed out. The
16 geology, the protection of the environment and the
17 compliance history. So those are in the record and those
18 support your decision, and the entire procedure supports
19 your authority to do what we're asking.

20 CHAIRMAN FESMIRE: Mr. Feldewert, do you want the
21 last word?

22 MR. FELDEWERT: I've said what I came here to
23 say.

24 CHAIRMAN FESMIRE: Anything else we need to take
25 up today?

1 MR. FELDEWERT: No.

2 MR. DOMENICI: Nothing further.

3 (Off the record)

4 CHAIRMAN FESMIRE: Do you all need to go into
5 executive session to -- take it under advisement?

6 COMMISSIONER BAILEY: No, I think we ought to
7 make our decision publicly, right here.

8 CHAIRMAN FESMIRE: Discuss it publicly?

9 COMMISSIONER BAILEY: Yeah.

10 MR. BROOKS: Well, the Commission has the right
11 to go into executive session, if there is a motion, and the
12 Commission can vote on that motion, if there's a motion to
13 go into executive session. Unless and until the Commission
14 votes to go into executive session, then the Commission
15 would continue in open session.

16 CHAIRMAN FESMIRE: Is there a motion to go into
17 executive session?

18 COMMISSIONER OLSON: I don't know that I see a
19 need to go into executive session myself.

20 CHAIRMAN FESMIRE: Okay, so we'll make the
21 decision in open session.

22 Mr. Domenici, did you have those copies?

23 MR. DOMENICI: Yes, and these are smaller, they
24 attach better.

25 CHAIRMAN FESMIRE: Since I didn't bring a

1 magnifying glass, we may need the bigger one.

2 MR. DOMENICI: Oh, okay, well -- that's fine.

3 MR. BROOKS: There is some confusion here in that
4 the stamp placed, at least on the copy I was handed here of
5 this set of exhibits, is an exhibit stamp, which indicates
6 it's an exhibit being offered into evidence at this
7 hearing. But the Chair declared that this was not an
8 evidentiary hearing. My understanding was that it was
9 proposed to be attached as an exhibit to this order; is
10 that correct --

11 MR. DOMENICI: That's correct --

12 MR. BROOKS: -- Mr. Domenici?

13 MR. DOMENICI: -- yes.

14 MR. BROOKS: Okay, so it's not an exhibit in this
15 hearing, it's proposed for attachment to the order. Okay.

16 MR. DOMENICI: Okay, that's correct.

17 MR. BROOKS: Thank you.

18 CHAIRMAN FESMIRE: Mr. Domenici, did you leave
19 the big copies of Plate 7?

20 MR. DOMENICI: Yes, they should be in front of
21 Mr. Brooks there.

22 CHAIRMAN FESMIRE: Okay. Are you ready to talk
23 for a minute?

24 On Plate 7, the floor drain detail at the top of
25 the slope and the side slope riser detail --

1 MR. DOMENICI: Yes.

2 CHAIRMAN FESMIRE: -- we're talking about a one-
3 foot operations layer that's intended to be permeable,
4 correct?

5 MR. DOMENICI: Yes.

6 CHAIRMAN FESMIRE: And then a -- under that is
7 the one-foot clay layer?

8 MR. MARLEY: No, sir.

9 CHAIRMAN FESMIRE: No?

10 MR. MARLEY: Geocomposite.

11 CHAIRMAN FESMIRE: So there's a geocomposite
12 leachate collection system. Then --

13 MR. MARLEY: Then the clay layer, sir.

14 CHAIRMAN FESMIRE: Mr. Feldewert, would you
15 object if I asked them what a geo- -- what particular
16 geocomposite they were talking about?

17 MR. FELDEWERT: I'm not going to -- No, would
18 not. Obviously, we have not had a chance to review any of
19 these, and I note that they're not for construction but for
20 permitting purposes only, whatever that means.

21 CHAIRMAN FESMIRE: Well, we would -- we would
22 make sure that anything we agreed to was in the order.

23 What is -- what exactly are you proposing for the
24 geocomposite leachate collection system?

25 MR. MARLEY: Geocomposite membrane is a poly

1 liner that's -- in simple terms, layman's terms, it's --
2 the poly is built like expanded metal, it's got holes in
3 it, and then it's got felt above it and felt below, or
4 sandwiched in between two pieces of felt, or whatever the
5 proper terminology is, but it looks like that.

6 CHAIRMAN FESMIRE: Okay, and --

7 MR. MARLEY: And is a pathway for -- basically
8 for any leachate to travel through -- pathway of least
9 resistance to travel through to the leachate collection
10 piping.

11 CHAIRMAN FESMIRE: Okay, and is it an impermeable
12 -- at least on the bottom, is it impermeable?

13 MR. MARLEY: Not on the bottom, sir.

14 CHAIRMAN FESMIRE: But on that middle layer?

15 MR. MARLEY: It's a -- it's -- What it is is,
16 it's a pathway for when that leachate goes through. It's
17 not classified as a secondary liner, if that's what you're
18 asking.

19 CHAIRMAN FESMIRE: Right.

20 MR. MARLEY: It's an easy pathway. It's a
21 capillary break. It gives that leachate a place to travel
22 freely to the leachate collection piping. It's a very
23 standard design in landfill design.

24 CHAIRMAN FESMIRE: So you've got a permeable
25 operations layer above the geocomposite leachate collection

1 system, above a one-foot clay liner, compacted to what
2 permeability?

3 MR. MARLEY: The clay -- the analysis results we
4 had, the clay that's below the landfill cell is 2.8×10^{-8} .
5 One foot of that would be equivalent of -- in permeability,
6 at 90 percent, modified compaction. If you dumped it up to
7 95 it would be even more impermeable, but would be
8 equivalent to a 3.57-foot layer of clay that is 1×10^{-7} ,
9 which is standard in liner design and construction.

10 CHAIRMAN FESMIRE: Do you have any?

11 COMMISSIONER BAILEY: No, not on the design.

12 COMMISSIONER OLSON: I don't have any questions
13 on the design.

14 CHAIRMAN FESMIRE: Okay. The only thing that
15 concerns me is that, you know, we've got a double-liner
16 requirement, and I'm not sure that we would approve a
17 system that is not double-lined. The leachate collection
18 system would require some continuous collection and
19 maintenance, would it not?

20 MR. MARLEY: Yes, uh-huh.

21 CHAIRMAN FESMIRE: Is there any compaction of the
22 subgrade? It's not clear to me in the design.

23 MR. MARLEY: The subgrade will have to be
24 compacted -- your first lift of clay, and we will be down
25 in the clay. Like I said, we hit clay at 12, 13 feet, so

1 you have extra clay on top -- or below it. *In situ* it was
2 probably better than it was when we compacted. The lower
3 we know that we're at 10^{-9}

4 CHAIRMAN FESMIRE: Okay. We're talking about the
5 proposed order?

6 COMMISSIONER BAILEY: Sure.

7 CHAIRMAN FESMIRE: What did you want to --

8 COMMISSIONER BAILEY: Huh?

9 CHAIRMAN FESMIRE: What did you want to say about
10 the proposed order?

11 COMMISSIONER BAILEY: About these proceedings. I
12 think I bring fresh eyes to the situation, because I have
13 not been writing letters or signing orders, regrettably,
14 but I haven't been involved with Gandy Marley discharge
15 plans over the years. That's not been any part of my job,
16 as it may have been with Bill or with you. So I think I
17 bring common sense, rather than this technical load that
18 everyone carries here.

19 First, I would like to clarify a
20 mischaracterization that Mr. Feldewert made about the Order
21 on September the 15th. I believe what you said was that
22 the Commission voted to deny the order. I think it's a
23 very fine point, but the Commission did not vote to deny
24 the Order. The Commission simply did not vote to sign the
25 order. There was no second on the motion to sign the

1 order. So it's a fine point. But the devil is in the
2 details, isn't it?

3 As we've heard today, in Order Number R-12,306-B,
4 on page 5, Mr. Martin in his paragraph under d., second to
5 the last paragraph, says that "The permit as presented so
6 far..." -- and that was back in May -- was actionable
7 except for the problems with the public notice.

8 So, so many of these problems, technical
9 problems, is my understanding, would be stipulations to a
10 permit approved by the Division, as has been done in the
11 past. So this Order is telling me that technically this
12 permit could have been approved except for stipulations
13 that would have been attached to the approval of the permit
14 and the public notice.

15 And then on page 17, as Mr. Feldewert pointed out
16 today, the groundwater at 150 feet below the landfarm was
17 -- actually had a TDS of less than 5000 p.p.m. That's
18 telling me that after 10 years of accepting salt-containing
19 waste there's not been an adverse affect on groundwater
20 that would constitute an immediate threat to human health
21 or the environment. To me, that evidence negates any
22 problem of an immediate threat to human health and the
23 environment.

24 How long, Mark, will it take, for the Division to
25 review the completeness?

1 CHAIRMAN FESMIRE: My estimate would be, you
2 know, less than 30 days.

3 COMMISSIONER BAILEY: Okay. So the review for
4 completeness will be issued before the November hearing?

5 CHAIRMAN FESMIRE: I can't commit to that, but I
6 would guess that it would, yes.

7 COMMISSIONER BAILEY: I do not believe that Gandy
8 Marley is asking for an exception to Rule 711. I don't
9 believe they're asking for the requirements of 711 to be
10 set aside. I believe they have acted in a timely manner
11 throughout this entire process, the entire series of
12 events, and if anything the OCD has not, by taking so much
13 time to issue the orders.

14 I believe that this order that's been presented
15 with its exhibit of the engineering diagrams reflects what
16 the Commission decided September 15th, and that decision I
17 stay by. I still believe in the thought process and the
18 arguments that we went through that day, which indicates
19 that after 10 years there has not been any demonstrated
20 contamination of the groundwater that poses an immediate
21 threat to human health or the environment.

22 In addition, this site is not listed on the OCD's
23 record of groundwater impact sites on the Web, further
24 evidence to me that this company should be allowed to
25 accept, on an interim basis, salt-contaminated waste

1 material into their cell, until their permit is reviewed
2 thoroughly by this Commission.

3 Those are my comments.

4 CHAIRMAN FESMIRE: Commissioner Olson?

5 COMMISSIONER OLSON: Well, I have some opinions
6 on this as well, but I guess I seem to still come back to
7 the same problem. This order is asking to ratify the
8 decision from September 15th, which was deliberations of
9 the Commission, which I was not a part of. So I think as
10 it stands with this, I'm still in the same position. Since
11 I was not part of the discussions, it does not seem
12 appropriate to me to be voting on the approval of something
13 that I did not -- was not a party to. So I still see that
14 -- with the way this order is written, I still have the
15 same -- the same problem that I had at the last meeting.
16 That's not getting into any of the technical issues with
17 this.

18 I do have some concerns that the public
19 participation process should be followed. I think that's
20 the whole purpose -- One of the main purposes of 711 is to
21 give a mechanism for the public to participate and have a
22 voice in decisions that are made by the agency and by the
23 Commission.

24 But notwithstanding all that, I guess it goes
25 back to my same problem that I don't think I can

1 participate in approving an order that I was not a party
2 to.

3 CHAIRMAN FESMIRE: The Commission can draft its
4 own order. They can take any or all of the proposed order,
5 or none of it, if they see fit. I think the decision --
6 Would you feel uncomfortable making a decision on the -- on
7 the facts before you?

8 COMMISSIONER OLSON: Not on the facts before me.
9 On trying to ratify the previous decision, which I wasn't a
10 part of, I don't think I can do. But as far as the facts
11 in front of us, I don't have a problem in voting on that.
12 I've reviewed all the documents that have been provided,
13 previous orders and -- as well as the motions that came to
14 me, so...

15 I do have a concern, though, about this not being
16 subject to public participation process and then the
17 precedent that it sets for future applications. There
18 isn't a mechanism within 711 that allows for these types of
19 activities to occur, and I think that is a -- if there was
20 some type of a mechanism, I guess we'd have some way to
21 move forward on that, but I don't see a mechanism to do
22 that. And I think that the main focus of 711 is to have
23 that public participation process, so...

24 I mean, I don't know -- There's a lot of
25 technical information that's presented here. I don't know

1 that it's gotten any critical review yet by the Division or
2 by any other parties that may have participated in the last
3 hearing as well.

4 I see we also have Don Neeper here, who also
5 participated in the previous hearing, and some of these
6 parties may have concerns about the construction. I know I
7 don't -- just on initial glance at this, I don't know that
8 I do or not, you know, because it's just been presented to
9 us.

10 CHAIRMAN FESMIRE: Commissioner, do you have a
11 response?

12 COMMISSIONER BAILEY: Yeah, I do. I was part of
13 the original development of Rule 711, many years ago.
14 Public participation was not the focus of Rule 711. It has
15 not been the focus of Rule 711. The focus of 711 was to
16 ensure protection of the environment, protection of
17 groundwater, as OCD was charged at the time that 711 was
18 developed and approved.

19 CHAIRMAN FESMIRE: Well, like I said,
20 Commissioners, we're free to craft our own order and put
21 any provision or stipulation in there that's supported by
22 the evidence.

23 The only thing that bothers me about the proposed
24 facility is that it is a single-liner system, and I
25 understand that this is probably technically state of the

1 art, but I'm concerned that we would approve an order today
2 that would not be approved pursuant to the Rules in the
3 future.

4 Mr. Domenici?

5 MR. DOMENICI: May I respond to that?

6 CHAIRMAN FESMIRE: You may.

7 MR. DOMENICI: That came up yesterday, we had --
8 we were -- had a meeting on the Rules. And I researched
9 that last night because Mr. Brooks asked for something in
10 writing by Friday. And I think the -- it's crystal clear,
11 and we'll put this in writing on the Rules part, but it's
12 crystal clear that the new Rules do not apply to this
13 Application.

14 CHAIRMAN FESMIRE: That's correct.

15 MR. DOMENICI: That, in fact, would be an
16 outright violation of the New Mexico Constitution, which
17 does not allow the Legislature, or an agency with
18 legislative authorization, to change the requirements of a
19 pending matter. A pending case is what the Constitution
20 says, but there's case law that makes it clear, those new
21 Rules cannot apply to this facility.

22 CHAIRMAN FESMIRE: Do you think that this
23 facility qualifies under the current Rule 711?

24 MR. DOMENICI: Absolutely. The current Rule 711
25 is that -- protective of groundwater -- protective of fresh

1 water, quote, and there is no fresh water. The water at
2 150 feet -- or it's actually a little less, 117 feet --
3 doesn't meet the definition of fresh water. And that was
4 one of the problems with the problems with the public
5 notice, is, there was an allegation that we didn't properly
6 public notice that issue that would be coming at that
7 original hearing. That is part of this Application, that
8 we are asking for public notice requirements to be met.

9 And the reason is, there's no present or
10 reasonably foreseeable use of this -- This is isolated
11 perched water that has been in place millions of years, so
12 it's not going to move. So it wouldn't impact any other
13 water, even if it was contaminated. It has over 8000 TDS,
14 which is not usable for livestock, which -- substantially
15 over any potential livestock use. The volumes are
16 extremely low, the volumes are too low for any other kind
17 of use. So there is no -- there's not enough water, and
18 it's not of enough quality, where it would -- meets the
19 definition of fresh water. And I think that would be
20 easily established at the next hearing.

21 If it isn't, then the double-liner requirement
22 might be placed for the rest of the facility, conceivably,
23 but I don't think that's going to happen. And if it did,
24 we would have a small amount of this facility -- I would
25 remind you, Mr. Chairman, the emergency order didn't

1 require any line, that we operated under. And as Ms.
2 Bailey says, the facility is operating without any liner
3 for 10 years. And we actually have soil samples for how
4 far that salt has moved. It's not even -- It's only a
5 matter of feet. It's not even close to the 150 feet, it's
6 -- it's not mobile, it's on top of 20 feet of clay that we
7 now have compaction data on.

8 And what the -- even the new regs, what they say
9 is, you need a double liner unless you've convinced the
10 Division that what you propose adequately protects fresh
11 water. So it allows for technical review based on site
12 circumstances. And we think this system will satisfy
13 current Rule 11 [sic], we think actually we'd meet the
14 exception under the new proposed Rules.

15 So yes, I think this is -- absence of totally
16 prescriptive requirement that says no facility without a
17 double liner can be permitted, which I don't think is even
18 what the new Rule contemplates -- we think is adequate,
19 more than adequate.

20 CHAIRMAN FESMIRE: Mr. Domenici, one of the
21 things that you said concerned me, that -- you know, that
22 there is water down there. Granted, you argue that it's
23 8000 p.p.m. on a -- I mean TDS on a perched --

24 MR. DOMENICI: Yes.

25 CHAIRMAN FESMIRE: -- in a perched system, even

1 if that were true, wouldn't we need to hold a hearing to
2 grant that deviance from the requirements of 711?

3 MR. DOMENICI: Yes, you would.

4 CHAIRMAN FESMIRE: Okay. And if we were to go
5 ahead and approve this prior to holding that hearing on the
6 Application, aren't we presupposing the outcome of that
7 hearing?

8 MR. DOMENICI: No, I don't think so, because we
9 are not asking you to approve this based on a determination
10 that that was not fresh water. Given the geology of that
11 location, regardless of the characterization of that water
12 resources, this protects that resource.

13 And in fact, that's what Mr. Martin's testimony
14 said, his testimony and his proposed permit conditions, and
15 that's what this decision suggests. This decision -- in
16 fact, there's a direct dispute between this decision and
17 the proposed Rules. This decision does not require a
18 double liner. In the technical section, it does not
19 suggest or even mandate a double liner.

20 And it didn't decide that this was not a
21 freshwater resource. It state -- after hearing, saying,
22 You didn't meet the requirements so we're not going to
23 exempt it as fresh water, you need a clay liner, is what
24 this decision says, and that's what we matched.

25 So no, I don't think that's a problem at all. I

1 think --

2 CHAIRMAN FESMIRE: And your client would be
3 willing to bear the risk if we were to approve this in a
4 temporary order, your client would be willing to bear the
5 risk of it not being approved -- of this design not being
6 approved and the consequences of having to basically
7 remediate that cell. Is that --

8 MR. DOMENICI: I think so, let me verify that. I
9 think that's -- Yes. Yes, I mean, if some other conditions
10 come up in the hearing for the rest of the facility -- as
11 an example, a double liner, which we don't expect but it
12 could be possible; we're not asking you to predispose that
13 issue -- we would have to remediate, we'd probably relocate
14 this onto the double-lined section.

15 We don't expect that, but yes, we're prepared to
16 do that, and the order can certainly say that. If we're
17 saying it on the record, the order can reflect it.

18 CHAIRMAN FESMIRE: What would be the disadvantage
19 -- and I realize that it might throw the design off, but
20 what was the reason for the geosynthetic liner? What was
21 the reason for a geosynthetic collection system instead of
22 a liner?

23 MR. DOMENICI: The geosynthetic was sand, to
24 facilitate the leachate section, so there was a question of
25 what's the best way to quickly construct a facility where

1 the leachate collection operates.

2 CHAIRMAN FESMIRE: Well, you know, the cost had
3 to be similar. Is there -- I mean, why not use the double
4 liner and not be having this argument?

5 MR. MARLEY: If I may --

6 MR. DOMENICI: Yeah.

7 MR. MARLEY: -- with a double liner you need to
8 use leachate collection or leak detection between them, so
9 you go ahead and use a geocomposite below.

10 MR. DOMENICI: Could we have a few minutes --

11 CHAIRMAN FESMIRE: Sure --

12 MR. DOMENICI: -- to respond to that question?

13 CHAIRMAN FESMIRE: -- why not take about a five-
14 minute -- or a 10-minute recess, and reconvene at a quarter
15 till?

16 (Thereupon, a recess was taken at 10:37 a.m.)

17 (The following proceedings had at 10:46 a.m.)

18 CHAIRMAN FESMIRE: Mr. Domenici, I believe your
19 client was going to talk to us about the relative cost of a
20 dual liner as opposed to the system we've got here.

21 MR. DOMENICI: Yes, he's prepared to address
22 that.

23 MR. MARLEY: With a leachate collection,
24 capillary break takes the head off of the water or the
25 leachate, the driving force that pushes it down through the

1 clay. When you remove your leachate periodically, that
2 removes that head, that force.

3 However, if the Commission is so inclined, we
4 would be prepared to install a 40-mil poly liner in
5 addition. Pending the outcome of the hearing, if the
6 hearing decides that single liner, clay liner, is
7 substantial, we would at that point like to stop with that
8 secondary liner.

9 CHAIRMAN FESMIRE: To my thinking, you know,
10 while this may be a perfectly wonderful design, you know,
11 we'd still need to -- if we're going to go outside what
12 we've done traditionally, we would need to do something
13 like that for this, pending a hearing on this design for
14 your other cells. If we could fashion an order that would
15 do that, I think -- Could you accept something like that?

16 COMMISSIONER OLSON: I probably would still just
17 kind of have a problem with the going outside the precedent
18 that was set for going outside the 711 process.

19 MR. FELDEWERT: Can I comment?

20 CHAIRMAN FESMIRE: You may, Mr. Feldewert.

21 MR. FELDEWERT: I've been sitting silent as we've
22 been having this discussion back and forth, in which we're
23 still now talking about some additional revisions to a
24 proposed plan that they have, all for the purpose, it
25 appears to me, of trying to short-circuit the Rule 711

1 process.

2 Now, you know, we have questions -- and I'm
3 getting back to this point, and that is that we still have
4 questions about design --

5 CHAIRMAN FESMIRE: About the -- ?

6 MR. FELDEWERT: The design.

7 CHAIRMAN FESMIRE: Okay.

8 MR. FELDEWERT: You all still have questions.
9 Okay? That's without going through the public review
10 process, and you have questions about the design. There's
11 a -- and whether it's going to be protective of the
12 environment.

13 Now Commissioner Bailey, I would -- I recognize
14 your thoughts, I understand your thoughts and your -- the
15 process at which you arrived at your conclusion. But I
16 submit that your focus there was on fresh water, and as an
17 aside I will note that's where it is now. I mean, it
18 qualifies as fresh water until we have a public
19 determination otherwise, which we do not.

20 And up to now, all they have been operating is a
21 landfarm. Not a landfill, a landfarm. And the testing
22 shows that the soil in the area of the landfarm is 40 to 50
23 times the background levels. So we have salt contamination
24 on this landfarm, which was a concern raised by the
25 Division and which they wanted to address as raised in this

1 -- as talked about in this Order.

2 But that's landfarming operations. We're talking
3 about something fundamentally different now, a landfill.
4 And as the Commission -- Division noted in this Order on
5 page 16, there's not only concerns about vertical migration
6 from a landfill, which would impact the fresh water, but
7 horizontal migration from this landfill that affects the
8 surface environment.

9 So I wouldn't draw too much comfort in just being
10 concerned about whether you believe or don't believe it's
11 going to impact fresh water, because we don't have the
12 evidence of that determination yet from a landfill. And
13 that doesn't deal with the horizontal issues.

14 But the issue here is whether you should be
15 issuing approval to operate a landfill when we still -- or
16 have questions about the design and before we go through
17 that Rule 711 process.

18 It's like, you know, we're in the baseball
19 season. You guys are the umpires, and they're asking you
20 to determine whether their pitch is a ball or a strike
21 before it's even thrown. Before we're even ready to throw
22 the pitch, they're asking you to determine whether it's a
23 ball or a strike. They promise it's going to be a strike.

24 But we can't go on promises, we have to go on
25 what is presented and as you go through the process.

1 That's why the process is there. So we're not at the ball
2 game yet, and you cannot make a determination whether they
3 have thrown a ball or a strike yet, until we are ready to
4 have a ball game.

5 And we're not ready to have a ball game here.
6 They don't have a viable application, and there's in Rule
7 711 or the Oil and Gas Act that allows you to permit a
8 landfill in the State of New Mexico without going through
9 the permitting process of Rule 711 and jumping through all
10 the hoops that are required under Rule 711.

11 MR. DOMENICI: Mr. Fesmire, I don't want to beat
12 a dead horse, but we're asking you, the Commission, to
13 reinstate an emergency order. It's already -- has been in
14 effect, and actually we did operate as a landfill under the
15 emergency order for three months or so.

16 So the concept that this is asking for something
17 under 711 -- we already had a permit under 711, and we
18 still have a permit under 711. That permit was modified
19 unilaterally by you, setting forth a way to operate while
20 an application process was processed.

21 So this is different than someone coming in on a
22 new facility saying, I'd like to build this facility here,
23 I don't have a permit, I haven't been taking salts, I
24 haven't been stopped immediately for taking salts, I
25 haven't been told that I could continue to take salts if I

1 do certain things. That's the circumstance here.

2 And I think that's important for Mr. Olson. I
3 know if he's after -- you're after the fact and you're in a
4 position basically to ignore the March 4th letter, that's
5 extremely unfortunate for my clients, because the March 4th
6 letter was a huge reality to this Division and to my
7 clients.

8 And we're trying to find it here, but it
9 basically says, if the landfarm identified above, my
10 client, wishes to accept oilfield waste contaminated with
11 salts, you will need to file an application to modify the
12 permit -- so we already have a permit, 711 permit -- and
13 follow the notice requirements.

14 Then it goes on, Landfarms that wish to accept
15 oilfield contaminated waste while their application for
16 permit modification is pending -- exactly where we are --
17 may apply for an emergency order under OCD Rule 1202.

18 So I don't think it's that unusual that we would
19 be asking for what we're asking for today. It's not at all
20 outside of what we were instructed to do. And it's really
21 the system that was set up by the Division to modify
22 permits. NMED can't do that, there's no other agency that
23 can modify a permit unilaterally without a hearing. That's
24 how your discharge permits are handled, your -- all your
25 permits.

1 So it gave the Division an opportunity to shut
2 down a lot of facilities extremely quickly, and it set us
3 on this path, and we're still on the path. That's what
4 I've said before. This is not a new facility saying, We're
5 going to file for 711, you know, sometime out in the
6 future. This is an existing 711 facility with a
7 modification request.

8 And in that regard, I think this combination
9 makes a lot of sense. It's totally protective of the
10 environment, it meets exactly what your letter intended, it
11 recognizes all the data we've gathered in the interim.

12 COMMISSIONER BAILEY: Isn't that the whole point
13 of this exhibit, is simply to show us the progress that
14 you've made? Because at this point we're not ruling on
15 whether or not this is an adequate set of drawings.

16 MR. DOMENICI: Well, this --

17 COMMISSIONER BAILEY: In my mind, this was simply
18 an indication that you've been making adequate progress
19 towards giving the Division an application that was
20 complete in accordance with Rule 711.

21 MR. DOMENICI: That's what we understood we were
22 supposed to do tomorrow at the regularly scheduled meeting
23 based on the hearing, the last hearing. We asked for it on
24 an emergency basis, we thought we might get it done a
25 little sooner, and we're glad it's being done today. I

1 know the Commission is very busy. But yeah, that's exactly
2 what we're trying to accomplish.

3 CHAIRMAN FESMIRE: And Mr. Domenici, what kind of
4 wastes -- if we were to draft an order, what kind of wastes
5 would your client want to accept into this facility that
6 they were talking about?

7 MR. DOMENICI: During -- under the emergency
8 order?

9 CHAIRMAN FESMIRE: Under the emergency order.

10 MR. MARLEY: This won't set any precedent with
11 the liner or the waste streams, right?

12 CHAIRMAN FESMIRE: Right. I mean --

13 MR. DOMENICI: This is just under the emergency
14 order.

15 MR. MARLEY: Chloride-contaminated soil cuttings
16 and chloride-contaminated soils from saltwater -- produced
17 water spills, if need to be, and drill mud.

18 CHAIRMAN FESMIRE: And not general oilfield
19 wastes. If we were to craft an order like that, it
20 wouldn't include -- that didn't include general oilfield
21 wastes --

22 MR. MARLEY: No, sir.

23 CHAIRMAN FESMIRE: That --

24 COMMISSIONER OLSON: I don't know that that's
25 necessarily my problem. I mean if it's double-lined, I --

1 on a technical basis, it seems like a state-of-the-art-
2 designed facility, you know. I just --

3 CHAIRMAN FESMIRE: Well --

4 COMMISSIONER OLSON: -- you know, I just kind of
5 worry about the process. At least that's my main concern.

6 COMMISSIONER BAILEY: But is it circumventing the
7 process? He's simply showing us that he's made progress,
8 which is all that was required. This is not a hearing on
9 whether or not it's adequate, this is not a hearing on
10 their permit. It's a hearing to show that they have made
11 progress on the requirements.

12 COMMISSIONER OLSON: I would agree they've made
13 progress. It still seems to me like we're somewhat
14 prejudging the Application.

15 COMMISSIONER BAILEY: Not to me, I'm not.

16 COMMISSIONER OLSON: It seems to appear that way
17 to me, so...

18 CHAIRMAN FESMIRE: There comes a time when you
19 don't know what to do. This is one of them.

20 Where would we put that second liner in your
21 design, or would we --

22 MR. MARLEY: Between the clay and the
23 geocomposite.

24 CHAIRMAN FESMIRE: Above the geocomposite?

25 MR. MARLEY: Yes, sir.

1 CHAIRMAN FESMIRE: Okay, so you've got two liners
2 there --

3 MR. DOMENICI: Above -- Did you say above the
4 geocomposite?

5 MR. MARLEY: You put it above the geocomposite.
6 That way the geocomposite acts as a leachate and still
7 continues to take away the -- any leakage where you have no
8 head, no pressure, your double-lined facility.

9 MR. DOMENICI: Clay?

10 MR. MARLEY: Clay liner, geocomposite.

11 CHAIRMAN FESMIRE: Well, wouldn't your leachate
12 collection system then be nothing more than a leak-
13 detection system?

14 MR. MARLEY: No, if you put the -- if you put the
15 poly below the geocomposite --

16 CHAIRMAN FESMIRE: Okay, I'm sorry, I
17 misunderstood.

18 MR. MARLEY: -- under the leachate collection,
19 still a leachate collection.

20 CHAIRMAN FESMIRE: Okay.

21 MR. MARLEY: And Mr. Feldewert had problems with
22 migration that way, outwards. With the geocomposite
23 leachate collection system, it is a capillary break which
24 takes that migration and slams it right down into that
25 leachate collection pipe, so that prevents your outward

1 movement.

2 CHAIRMAN FESMIRE: The Chair is open to any
3 motion, just about.

4 (Laughter)

5 COMMISSIONER BAILEY: I move that we adopt the
6 order presented to the Commission, which does include two
7 areas of additional language from what was part of the
8 September 15th order.

9 CHAIRMAN FESMIRE: Madame Commissioner, I don't
10 think that I could accept -- you know, for instance, some
11 of the references to the September 15th Order. I don't
12 think I could support that.

13 I think I could support the -- an order that
14 adopted the design as modified as we've talked about today.
15 But I don't think I could --

16 COMMISSIONER BAILEY: To allow interim acceptance
17 of materials until there is an order on their Application
18 for permit modification under Rule 711.

19 CHAIRMAN FESMIRE: Right.

20 COMMISSIONER BAILEY: Let's go for it.

21 (Laughter)

22 CHAIRMAN FESMIRE: But I am sensitive to Mr.
23 Olson's concerns, and I think we would have to address that
24 before we can continue.

25 What we're looking at is one cell, you know,

1 allow them to basically continue taking the wastes that
2 they were taking prior to our order, the salt-contaminated
3 soils pursuant to this design with the additional liner, we
4 draft the order.

5 But like I said, I am sensitive to your concerns.

6 COMMISSIONER OLSON: Well, the only thing I can
7 think of would be, there's some discussion by the Applicant
8 that they would remove the wastes and properly dispose of
9 them if it's either not approved, or -- they would need to
10 be modified as such if it had to be even -- I don't know.
11 I'm thinking, for example, maybe if the result of the
12 hearing was it needed a double liner and leak detection,
13 you know.

14 I don't really see that as part of this, I'm just
15 thinking of other options that could come out as a result
16 of a hearing. And if there was some direction in the order
17 that wastes would be removed if it's denied, or it would be
18 so modified as -- in accordance with an approved permit,
19 that may be acceptable. I think that --

20 COMMISSIONER BAILEY: It's reasonable.

21 COMMISSIONER OLSON: I mean, I think they've --
22 they committed to that already here today.

23 CHAIRMAN FESMIRE: Yeah, they -- some of these
24 things ought to be alternative commitments. It seems like
25 that's getting --

1 MR. DOMENICI: I think we would be prepared to
2 agree to that with -- if we could -- when you say
3 "removed", if we could say "or closed in place with some
4 proper closure". Because if that occurs and there's not a
5 lot of waste there, I think, you know, some kind of cap
6 might satisfy any concerns that -- say there wasn't
7 leachate, you know, say --- what you're saying, leak-
8 detection. That would be pretty drastic to help you remove
9 it for that, but if there's something that says you can't
10 use it anymore and you have to close it, or we could at
11 least have the option to propose --

12 COMMISSIONER OLSON: Right.

13 MR. DOMENICI: -- the best way to cease using it
14 and obtain closure of that part of it.

15 CHAIRMAN FESMIRE: Mr. Feldewert, did you have a
16 comment on that?

17 MR. FELDEWERT: This is not a hearing on a new
18 proposed design. We have not seen this, we have not had
19 any opportunity to comment on this, and neither has the
20 general public. I submit to you that without a hearing, a
21 merits hearing, on this proposed design, as a matter of
22 procedure under Rule 711 and as a matter of due process
23 generally, you cannot go -- you cannot make a determination
24 as to whether this design is going to be appropriate to
25 protect the public health and the environment.

1 This is not part of the motion that was filed
2 with this body today, and it was not presented until today
3 at the last minute, once again presenting modifications as
4 we move along here. And you are not in a position, as a
5 matter of procedure or within Rule 711, in which you can
6 suddenly adopt a design on an interim basis that will allow
7 them to operate as a landfill. Those procedures have to be
8 followed.

9 And if you go down this path, you're going to --
10 it's subject to challenge, you're committing error. You
11 don't have a record --

12 MR. DOMENICI: If I could, I think we --

13 MR. FELDEWERT: -- because -- I'm sorry, let me
14 finish. -- because -- I'm sorry, but Mr. Marley is not an
15 engineer. He's not -- he didn't design these, he's not
16 qualified to talk about what these do or what they're going
17 to do, what they're going to be protective of. We don't
18 have an engineer here today, we haven't had an opportunity
19 to cross-examine any engineer here today. We have not had
20 any notice of these design plans.

21 We are not -- I'd submit, you are not in a
22 position -- you do not have a record and you're not
23 procedurally in a position in which you can adopt an order
24 that says these design plans are going to be fine, it's
25 going to be protective of public health and the environment

1 and you can go ahead and move on to accept this waste until
2 we have some hearing on whether this is acceptable.

3 That's back-door permitting, that's behind-the-
4 scenes permitting. And it's bad policy, and it's subject
5 to challenge.

6 CHAIRMAN FESMIRE: Mr. Domenici?

7 MR. DOMENICI: I would just state, the proposed
8 order said that the design would have to be approved by the
9 Division. So I think you're certainly within your rights
10 to order what design the Division would accept, and it
11 would be within what -- our proposed form of order.

12 And so there's no -- I don't think there's a
13 problem with notice, it's exactly what we came to present
14 that order, there's a section in there about the design.
15 It contemplated at the last hearing that your staff would
16 approve it, and I think that as long you know what the
17 staff should approve, I think that's what your order should
18 say, this is what the staff will approve. And we're well
19 within the Order that it's noticed on today, and I think
20 anything can be challenged.

21 CHAIRMAN FESMIRE: Commissioner, do you have any
22 further comment?

23 COMMISSIONER BAILEY: It is still my
24 understanding that these design drawings are simply an
25 illustration of the progress and that we are not signing an

1 order based on the quality of the design of the cells.

2 CHAIRMAN FESMIRE: Commissioner Olson?

3 COMMISSIONER OLSON: I mean, I tend to agree with
4 them. That's my problem, you know, with looking at this,
5 that it is outside the process. That's -- you know, I
6 still -- bugs me. And I know this would help to resolve
7 concerns, I don't think on a threat to health and the
8 environment, I expect, would really not be there,
9 especially in a short term. You know, you place some --
10 you know, I don't know if -- I don't recall that there's
11 any time limits on this, but -- you know, it is a short-
12 term action, but I just -- I admit I kind of do have to
13 agree with them on the procedural aspects of things that's
14 presented that's not part of a public review process and
15 participation process. That still bothers me, but...

16 I guess that's just a big issue for me at the
17 moment, especially since the Environment Department is in a
18 big push on public involvement processes, and there's quite
19 a bit going on at the moment within our Department on those
20 issues.

21 MR. DOMENICI: I would just ask that you weigh
22 that with the fact that you modified the permit
23 unilaterally and you provided a path, and we're on that
24 path. And so I understand there's a push for public
25 involvement, but there's got to be some protection there

1 for permittees from -- really, arbitrary action.

2 This is -- what -- legally, what you've provided
3 was a post-deprivation due process. You've already
4 deprived my clients of something they were permitted to do.

5 CHAIRMAN FESMIRE: But there's a lot of precedent
6 for that. I mean, I don't think that would -- that
7 argument would hold water. We had to take emergency
8 action.

9 MR. DOMENICI: Well, I'm not saying you couldn't
10 do it, but you had to provide a process --

11 CHAIRMAN FESMIRE: Right.

12 MR. DOMENICI: -- and that's the process we're
13 in, and what we're being faced with is saying the process
14 we suggested doesn't allow public -- doesn't meet other
15 objectives of public participation.

16 And that's really where this comes down, is, it's
17 a process that was suggested to us to take this forward.
18 And now the complaint that that doesn't allow public
19 participation may affect whether it was a meaningful
20 process. That's our concern. And we think it was
21 meaningful. There's been ample public participation in
22 this.

23 And what we proposed and what was actually voted
24 on, you know, Commissioner Olson, was designs approved by
25 staff. This is substantially more open than that. Part of

1 that's just strictly timing. We had the -- we didn't have
2 the drawings prepared earlier. They were only prepared the
3 day we filed this -- or the day or so, we -- it's been hard
4 to get the engineers to work this as quickly as we want.

5 But now we have drawings. They would be attached
6 to an order, as opposed to negotiated with staff. So I
7 think it's actually enhanced the public process. You know,
8 at least the Commission has been able to see the drawings,
9 as opposed to simply delegating to staff. It provides much
10 more certainty to all of us as to what the design is going
11 to be. We won't have to re-address that issue, so...

12 And -- and I think there -- I think there's some
13 legitimate concerns. I think we have various substantial
14 concerns too, and I think this meets the balance as best we
15 can.

16 CHAIRMAN FESMIRE: I too am concerned about the
17 due process argument, and I'm concerned that the -- about
18 the notice argument, that there's a significant need, I
19 think the record reflects, for additional salt disposal.

20 Gandy Marley has agreed to take wastes that --
21 they've presented a good design which they've modified to
22 make even better. They're in a position -- a place where
23 -- I would be hard to put to imagine more adequate siting
24 for a facility.

25 It just comes down to notice versus due process,

1 I think.

2 COMMISSIONER BAILEY: But there will be adequate
3 public notice for their complete application.

4 CHAIRMAN FESMIRE: And they've also agreed to
5 remove it if they don't... Or close it, properly close it.

6 COMMISSIONER BAILEY: I move that we draft an
7 order allowing Gandy Marley to accept salt-contaminated
8 waste for disposal in the cell, constructed in accordance
9 with these preliminary drawings, with the understanding
10 that any waste disposed of in these -- in this cell, may
11 need to be removed or properly closed, pending decision
12 based on their application for modification of their 711
13 permit.

14 CHAIRMAN FESMIRE: Do we want to specify the
15 salt-contaminated soils -- salt- and hydrocarbon-
16 contaminated soils --

17 COMMISSIONER BAILEY: -- which may need to be
18 removed or closed in accordance with Division requirements.

19 CHAIRMAN FESMIRE: The design as modified, with
20 the addition of an impermeable 40-mil --

21 COMMISSIONER BAILEY: Sure.

22 CHAIRMAN FESMIRE: -- poly liner?

23 MR. MARLEY: Yes, sir.

24 CHAIRMAN FESMIRE: Is there a second?

25 COMMISSIONER OLSON: I'll second it for, I guess,

1 discussion purposes.

2 CHAIRMAN FESMIRE: Okay, what discussion?

3 COMMISSIONER OLSON: I guess -- I think one of
4 the things you might want to consider is putting some type
5 of a time limit on the -- this, to show that it's truly an
6 interim action. I think that would probably help in the
7 public perception that goes along with that.

8 CHAIRMAN FESMIRE: Interim action? What do you
9 mean?

10 COMMISSIONER OLSON: That this is not a final
11 action on the facility, that it is just of a limited nature
12 until the permit is actually approved. I don't know what
13 an anticipated permit time would be, whether that would be
14 six months or something like that, I don't know, for
15 getting through the hearing process.

16 I guess I'm just still concerned on the process
17 issues that go along with this. I don't know if that's --
18 this is falling outside of the process that is allowed. I
19 understand it's a different -- kind of a different beast,
20 but it still seems that it's a permitting action, at the
21 same time, that's being done partially outside of the
22 permitting process at the moment for the wastes.

23 I understand that they have been accepting some
24 of these wastes before, before it was cut off last spring,
25 but it still at that point, then, required them to follow

1 the permitting process which, then, this is not really --

2 CHAIRMAN FESMIRE: What sort of time frame would
3 you think reasonable?

4 COMMISSIONER OLSON: Oh, I think maybe six months
5 if this is going to hearing in -- potentially in December?

6 CHAIRMAN FESMIRE: Or -- six months or final
7 action on their permit application, or just the six months?

8 COMMISSIONER OLSON: I'd say six months or final
9 action, yeah.

10 CHAIRMAN FESMIRE: Would you accept that --

11 COMMISSIONER BAILEY: Yes.

12 CHAIRMAN FESMIRE: -- modification?

13 COMMISSIONER OLSON: I think I still have the
14 problem with I don't know if I could support it just
15 because of the process issues at the same time, you know,
16 of the order, so...

17 CHAIRMAN FESMIRE: Any other discussion?

18 COMMISSIONER BAILEY: No.

19 CHAIRMAN FESMIRE: Now we'll find out. All those
20 in favor of the motion as modified signify by saying aye.

21 COMMISSIONER BAILEY: Aye.

22 CHAIRMAN FESMIRE: I get to vote last.

23 COMMISSIONER OLSON: Vote no.

24 CHAIRMAN FESMIRE: I vote aye. The motion
25 passes.

1 The Commission will draft -- the Commission
2 counsel will draft an order allowing Gandy Marley to accept
3 salt-contaminated -- salt- and hydrocarbon-contaminated
4 soils in the single cell for the limited period of time of
5 six months or until the final action on their permit
6 application, whichever is greater --

7 MR. BROOKS: Whichever is greater, or whichever
8 is less?

9 CHAIRMAN FESMIRE: I think we intend it to be six
10 months or the final action on the permit application.

11 MR. BROOKS: So that if the final action takes
12 more than six months, it will still continue in effect
13 until the final application?

14 CHAIRMAN FESMIRE: At the -- I think that's what
15 we intended.

16 MR. BROOKS: Thank you.

17 CHAIRMAN FESMIRE: And the order will reflect
18 that the design will be as presented, with the addition of
19 a 40-mil poly liner.

20 Anything else that I missed in the notes?

21 COMMISSIONER BAILEY: I don't think so.

22 COMMISSIONER OLSON: Did you mention the removal
23 of --

24 COMMISSIONER BAILEY: The removal -- the cover --

25 COMMISSIONER OLSON: -- dispose or --

1 CHAIRMAN FESMIRE: And that upon final action of
2 the -- on the permit for application, that if that
3 application is not granted, that this cell will be closed
4 or all salt-contaminated materials removed and properly
5 disposed of according to OCD regulation.

6 COMMISSIONER OLSON: And I'd maybe just like
7 the -- you know, the record to reflect that I believe, just
8 based upon what we're seeing for technical merits on this,
9 that -- and as to what is being said in the order, most
10 likely would be protective of public health and the
11 environment, but without this following the process, public
12 participation process as set out in rule 711, I don't feel
13 that I can vote for it.

14 CHAIRMAN FESMIRE: Any further comment?

15 MR. BROOKS: Mr. Chairman, Commissioner Bailey
16 and Commissioner Olson, I have not been asked by my clients
17 here for any legal advice, and therefore I have not
18 volunteered any. However, if I am to be instructed to
19 prepare an order, I need to understand the reasons that the
20 Commission wishes to state for adopting this order, an
21 explanation the Commission wishes me to include in that
22 order for the reasons for doing so.

23 CHAIRMAN FESMIRE: Commissioner Bailey, would you
24 like to add to the record?

25 COMMISSIONER BAILEY: I believe this series of

1 events that we have observed were set in motion by the OCD
2 in their original order -- what was that, -B? -- and so
3 Commissioner Olson's reservations concerning due public
4 notice and public participation were directed by the
5 Division to take the route that the company took.

6 I see after 10 years no harm, no documented harm,
7 has been presented to this Commission, and so I believe
8 that an interim period of time for them to continue to
9 accept the same waste that they accepted for 10 years
10 without any demonstrated harm to the environment is
11 reasonable and is not capricious or arbitrary in any way,
12 but does not guarantee that the permit modification that
13 will be brought before this Commission is predetermined.

14 CHAIRMAN FESMIRE: Commissioner Olson, do you
15 want to add anything to the record?

16 COMMISSIONER OLSON: No, I think I've -- what I
17 said just a few minutes ago would cover my vote.

18 CHAIRMAN FESMIRE: The reasons that I voted to
19 take this position was that the initial impetus behind the
20 March letter was to provide input for stakeholders. But at
21 the same time we had to be mindful of the rights of the
22 operators who are operating under valid OCD permits.

23 I think that the action that we've taken today is
24 a valid balancing of those two concerns. The Applicant has
25 provided a design that I think is valid and is acceptable

1 to the Commission as modified with the addition of the
2 second liner. I think there's a high probability that this
3 design will withstand any further scrutiny in the
4 permitting process and that the design will protect human
5 health and the environment and prevent the contamination of
6 water at the site.

7 And that's all I have to say.

8 Are there any comments -- other comments from the
9 parties?

10 MR. DOMENICI: No, nothing further for us.

11 CHAIRMAN FESMIRE: Mr. Feldewert?

12 MR. FELDEWERT: Other than the problems I've
13 already raised about the procedures.

14 MR. BROOKS: One more question, I'm sorry, Mr.
15 Chairman, but for purposes -- a couple of questions,
16 actually, for purposes of presenting this order.

17 First of all, do you -- Is it the sense of the
18 Commission, or the determination of the Commission, that
19 these exhibits that were tendered, or any part thereof, be
20 attached to the order, or simply that they be referred to
21 as matters that the Commission has reviewed?

22 CHAIRMAN FESMIRE: I think it would be imperative
23 that the design document submitted by Applicant be attached
24 to the order and that the order accurately reflect the
25 modifications that we've made today.

1 MR. BROOKS: And the only one that I understood
2 was the addition of the 40-mil liner. Is that correct, or
3 is there anything else that was changed from the exhibits
4 that were submitted?

5 CHAIRMAN FESMIRE: I think that's the only change
6 in the design as presented.

7 Mr. Feldewert, is that your understanding?

8 MR. FELDEWERT: I have not seen -- I didn't take
9 careful notes. I'll have to -- I have not seen the written
10 order. When do you propose to make a determination on the
11 written order?

12 MR. BROOKS: That was going to be my next
13 question. When does the Commission wish this order,
14 proposed order, to be presented for consideration by the
15 Commission?

16 CHAIRMAN FESMIRE: The Commission will be meeting
17 again tomorrow. Can you prepare it in that period of time?

18 MR. BROOKS: I believe that I can.

19 CHAIRMAN FESMIRE: Okay.

20 MR. BROOKS: I would ask, however, if it would be
21 possible for Mr. Brenner to provide a transcript of that
22 portion of the discussion that followed the vote, the
23 Commissioners' explanations of their reasons, so that I can
24 be sure to get that properly incorporated that in the
25 order.

1 If that can be done in the next couple of hours,
2 I would appreciate that.

3 CHAIRMAN FESMIRE: So we'll try to get that on
4 Wednesday's -- take care of that --

5 COMMISSIONER BAILEY: Thursday's --

6 CHAIRMAN FESMIRE: Thursday's --

7 MR. BROOKS: Yes, I believe this is Wednesday.

8 CHAIRMAN FESMIRE: This is Wednesday. Skip to
9 Monday.

10 MR. FELDEWERT: So tomorrow's hearing?

11 CHAIRMAN FESMIRE: Tomorrow's hearing.

12 MR. FELDEWERT: And I assume then that it's not
13 effective until entry tomorrow?

14 CHAIRMAN FESMIRE: That would be --

15 MR. BROOKS: I believe that would be -- I believe
16 Mr. Feldewert's position that he has taken earlier in the
17 proceeding that the Commission acts only by written order
18 is a valid position and that until the order is signed the
19 Commission has not acted.

20 CHAIRMAN FESMIRE: Okay. Mr. Domenici --

21 MR. DOMENICI: Yes --

22 CHAIRMAN FESMIRE: -- anything else?

23 MR. DOMENICI: -- is there any anticipation of
24 when that might occur during the hearing?

25 CHAIRMAN FESMIRE: Probably late in the hearing.

1 We have some other issues, and we may not -- we may have to
2 continue it until Friday, if the rulemaking portion of that
3 hearing goes --

4 MR. DOMENICI: So it would be after the
5 rulemaking?

6 CHAIRMAN FESMIRE: Right.

7 MR. FELDEWERT: Could I request that the
8 Commission -- I'm trying to think this out. I think my
9 partner Bill Carr will be here at the hearing --

10 CHAIRMAN FESMIRE: I think he will too --

11 MR. FELDEWERT: -- Thursday.

12 CHAIRMAN FESMIRE: -- since he represents about
13 half a dozen people.

14 MR. FELDEWERT: If you could give -- I would ask
15 that prior to the Commission considering that order, if
16 they could just give us an opportunity to have notice of
17 that, so that we could be present.

18 CHAIRMAN FESMIRE: Sure.

19 MR. BROOKS: I would make a personal request that
20 the matter, if it is to be considered -- either be
21 considered at the adjournment on Thursday evening or first
22 thing Friday, if the hearing appears to be going to
23 continue the full two days, I had anticipated being
24 available for the full hearing tomorrow, but based on the
25 statement that another attorney was going to be

1 representing the Commission in that matter, I have revised
2 my plans in order -- with the view of leaving at noon on
3 Friday.

4 And because I have expended a certain amount of
5 money in that expectation --

6 (Laughter)

7 MR. BROOKS: -- based on what I was told
8 yesterday afternoon, I would greatly appreciate not having
9 to be here Friday afternoon.

10 CHAIRMAN FESMIRE: If we don't get to it
11 Thursday, we'll try to attend to this matter, then, first
12 thing Friday morning.

13 MR. BROOKS: That will be greatly appreciated.

14 CHAIRMAN FESMIRE: Okay. Anything else?

15 MR. DOMENICI: No.

16 CHAIRMAN FESMIRE: With that, we will ask that
17 counsel draft that proposed order and get it to the
18 individual Commissioners as quickly as possible, and we
19 will take it up at the next regularly scheduled Commission
20 hearing.

21 Is there a motion to adjourn?

22 COMMISSIONER BAILEY: I move we adjourn.

23 COMMISSIONER OLSON: Second.

24 CHAIRMAN FESMIRE: All those in favor?

25 COMMISSIONER BAILEY: Aye.

1 COMMISSIONER OLSON: Aye.

2 CHAIRMAN FESMIRE: The hearing is adjourned at
3 11:30 a.m. Thank you.

4 (Thereupon, these proceedings were concluded at
5 11:30 a.m.)

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CERTIFICATE OF REPORTER

STATE OF NEW MEXICO)
) ss.
COUNTY OF SANTA FE)

I, Steven T. Brenner, Certified Court Reporter and Notary Public, HEREBY CERTIFY that the foregoing transcript of proceedings before the Oil Conservation Commission was reported by me; that I transcribed my notes; and that the foregoing is a true and accurate record of the proceedings.

I FURTHER CERTIFY that I am not a relative or employee of any of the parties or attorneys involved in this matter and that I have no personal interest in the final disposition of this matter.

WITNESS MY HAND AND SEAL October 16th, 2005.



STEVEN T. BRENNER
CCR No. 7

My commission expires: October 16th, 2006