

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 THE NEW MEXICO OIL)
CONSERVATION DIVISION FOR REPEAL OF)
EXISTING RULE 50 CONCERNING PITS AND)
BELOW GRADE TANKS AND ADOPTION OF A)
NEW RULE GOVERNING PITS, BELOW GRADE)
TANKS, CLOSED LOOP SYSTEMS AND OTHER)
ALTERNATIVE METHODS TO THE FOREGOING,)
AND AMENDING OTHER RULES TO MAKE)
CONFORMING CHANGES; STATEWIDE)

CASE NO. 14,015

ORIGINAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS

COMMISSION HEARING

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

Volume III - November 6th, 2007

Santa Fe, New Mexico

This matter came on for hearing before the Oil Conservation Commission, MARK E. FESMIRE, Chairman, on Tuesday, November 6th, 2007, at Morgan Hall, State Land Office Building, 310 Old Santa Fe Trail, Santa Fe, New Mexico, Steven T. Brenner, Certified Court Reporter No. 7 for the State of New Mexico.

* * *

STEVEN T. BRENNER, CCR
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 Commission Hearing
 CASE NO. 14,015

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A P P E A R A N C E S

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(Continued...)

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(Continued...)

A P P E A R A N C E S (Continued)

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* * *

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

3 CHAIRMAN FESMIRE: Let's go on the record. Let
4 the record reflect that it's nine o'clock a.m. on Tuesday,
5 November 6th, 2007. This is a meeting, a special meeting
6 -- actually the continuation of a special meeting of the
7 New Mexico Oil Conservation Commission.

8 The record should also reflect that because of a
9 power outage in Porter Hall, we have moved to Morgan Hall
10 in the State Land Office building. The notice of that move
11 was announced before the adjournment of the Commission
12 meeting on Monday, November 5th, that signs to the effect
13 and giving the address -- signs to the effect that the
14 meeting had been moved and giving the address were also
15 posted on all the doors to Porter Hall and the entrance to
16 the Chino building, the location of Porter Hall.

17 Let the record that Commissioner Bailey,
18 Commissioner Fesmire and Commissioner Olson are all
19 present, we therefore have a quorum, and the case before us
20 is Case Number 14,015, in the matter of the Application of
21 the New Mexico Oil Conservation Division for repeal of
22 existing Rule 50 concerning pits and below grade tanks and
23 adoption of new rules governing pits, below grade tanks,
24 closed loop systems and other alternative methods to the
25 foregoing, and amending other rules to conforming changes;

1 statewide.

2 At this time we'll take the entry of appearance
3 -- or the reaffirmation of the entry of appearance, I
4 guess, of the attorneys present. We'll start with Mr.
5 Brooks.

6 MR. BROOKS: David Brooks of the Energy, Minerals
7 and Natural Resources Department, for the Oil Conservation
8 Division.

9 CHAIRMAN FESMIRE: Ms. Foster?

10 MS. FOSTER: Karin Foster on behalf of the
11 Independent Petroleum of Association of New Mexico.

12 CHAIRMAN FESMIRE: Mr. Hiser?

13 MR. HISER: Eric Hiser on behalf of the New
14 Mexico industry committee and Yates Petroleum Corporation.

15 CHAIRMAN FESMIRE: Mr. Carr?

16 MR. CARR: William F. Carr on behalf of the New
17 Mexico Oil and Gas Association, the New Mexico industry
18 committee, and ConocoPhillips.

19 CHAIRMAN FESMIRE: Ms. Belin?

20 MS. BELIN: Lettie Belin for the New Mexico
21 Citizens for Clean Air and Water.

22 MR. JANTZ: Eric Jantz, New Mexico Environmental
23 Law Center, for the Oil and Gas Accountability Project.

24 CHAIRMAN FESMIRE: And Mr. Huffaker?

25 MR. HUFFAKER: Gregory Huffaker here for

1 Controlled Recovery, Inc.

2 CHAIRMAN FESMIRE: There have been at least one
3 other party who've made an entry of appearance, filed an
4 entry of appearance with the Commission clerk, who is not
5 present. If they come in I will stop the proceedings at a
6 convenient time and get them to make their entry of
7 appearance.

8 Yesterday when we sort of hurriedly adjourned, we
9 were in the middle of the cross-examination of one of the
10 State's witnesses. But yesterday, because one of the
11 attorneys couldn't be there on time, we left pending some
12 housekeeping matters that I think we need to take up now,
13 and the first one is the motion to compel by the
14 Independent Petroleum Association of New Mexico concerning
15 the Small Business Regulatory Relief Act.

16 Ms. Foster, you filed this motion?

17 MS. FOSTER: Yes, sir, I did.

18 CHAIRMAN FESMIRE: Do you have anything to add?

19 MS. FOSTER: Well, I believe that it was
20 discussed sufficiently yesterday. I believe that I
21 understand what the Commission's ruling is, but if you'd
22 like to reiterate for the record that would be fine with
23 me. Thank you.

24 CHAIRMAN FESMIRE: Okay. Mr. Brooks, have you
25 complied -- at the end of the meeting on the 22nd of

1 October, the Commission -- the Chair instructed you to
2 comply with this -- with the Act. Have you done so?

3 MR. BROOKS: Mr. Chairman, members of the
4 Commission, I refer to the response that was filed in this
5 case. I want to be as complete and accurate in informing
6 the Commission where we are as possible so the Commission
7 could make appropriate ruling.

8 The Division's interpretation of this Act is that
9 the only thing the Division is required to do prior to the
10 adoption of this by the Commission is to give notice to the
11 Small Business Regulatory and -- I believe it's Committee,
12 I don't remember the exact style of that agency, and I
13 don't have the Act in front of me, but the agency is an
14 adjunct of the Economic Development Department, and there
15 is a requirement that an agency proposing rules give
16 notice.

17 The other requirements of the Act pre-enactment
18 -- the other requirements of the Act that apply prior to
19 enactment are that the agency will consider the effects on
20 small business. Since that directive is directed to the
21 agency that adopts regulations, we construe that as being
22 the obligation of the Commission to consider that matter.

23 We will present some evidence, primarily through
24 our witness Mr. Chavez, which has relevance to that issue.
25 However we do not regard it as being an issue on which we

1 have the burden of proof. We are merely presenting
2 evidence. The Commission can consider that issue. It's
3 not directed by the statute to refrain from enacting a rule
4 because it has an effect on small business if the
5 Commission concludes that it does. So...

6 And the remaining obligations that Ms. Foster has
7 pointed out in her motion, we believe, only apply after
8 enactment of the rules.

9 There is a directive to agencies to periodically
10 review their rules, including both pre-existing rules --
11 that is, before that statute was passed -- and new rules
12 they subsequently adopt, and to assess them in the light of
13 various factors. However, that section of the statute, as
14 I say, we contend applies only to existing rules after
15 they're adopted and does not apply to the rulemaking
16 process.

17 So coming back to your question, Have we
18 complied? The only thing we are required to comply with is
19 the notice, in our view.

20 The notice requirement states that we will notify
21 the Small Business Regulatory Advisory Committee of a
22 proposed rulemaking at the time that the public notice is
23 given.

24 Now we made an effort to comply with that. At
25 the time the public notices were sent to the newspaper and

1 to the docket distribution list of the Commission, we also
2 sent those notices, as Exhibits 1 and 2 will reflect, to
3 Mr. John Tull. That is my responsibility because we had
4 that name on our list. He was the person responsible for
5 administering the Small Business Regulatory Committee's
6 affairs at the time we did our last rulemaking
7 approximately one year ago.

8 I was unaware of the fact, at the time that I
9 prepared those notices, that he no longer occupies that
10 position. Mr. Tull did receive that. When we became aware
11 that Mr. Tull no longer occupied that position, and that
12 was on October 14th of 2007, we then gave notice to Kelly
13 O'Donnell, who is presently the responsible person, we
14 understand, to whom that notice should have been given.

15 So the notice has been given, it was probably not
16 effectively given on the date on which it was required to
17 be given, however we are aware of no provision of that Act
18 or anywhere else which states that delay in giving that
19 notice beyond the time stated invalidates the proceeding or
20 requires a change in the hearing date.

21 So our position would be that we are in
22 compliance.

23 CHAIRMAN FESMIRE: Okay. Ms. Foster, is that
24 sufficient to comply with your motion, or do you want to
25 preserve --

1 MS. FOSTER: Well, I reserve all my rights of
2 appeal on this issue. I believe that the statute has not
3 been complied with sufficiently.

4 In my motion I did specifically request for a
5 copy of the notice that was provided to the advisory
6 commission. If I didn't provide it -- if I didn't put it
7 in my written request, I do believe that I did ask for it
8 orally when I made the presentation. I believe it was on
9 the 22nd. I have not seen a copy of that motion.

10 The statute specifically states as well that the
11 advisory commission must be notified at the same time as
12 persons who request advance notice of the ruling. And as
13 Mr. Brooks stated, that notice was not given to the
14 appropriate person at the -- in the Economic Development
15 Department, the advisory commission individual who's
16 responsible, until October 14th.

17 We further contend that -- we further contend
18 that basically this is a modification of an existing rule,
19 and therefore the provisions of the Small Business
20 Regulatory Relief Act that mandate that an agency must
21 review the economic effects of a rule, particularly as they
22 pertain to small business, do come into play in this
23 instance, because this is a modification of an existing
24 rule.

25 And if you read the statute, it basically says if

1 an agency is going to be reviewing its rules prior -- after
2 the date of the promulgation of the Act, which was July 1,
3 2005, and prior to 2010, that these economic factors must
4 be considered.

5 Now if the OCC, in your capacity as the Chairman
6 of the OCC and the Commission, is going to consider
7 economic evidence as part of this hearing, again I would
8 have liked to have had the proper advisory commission be
9 notified and have the information that the agency was
10 intending to present to you, oversight board, so that that
11 advisory commission could be adequately notified in case
12 that we as a small business entity have any issues with
13 this rule.

14 It's my understanding of -- reading of the
15 statute, that that advisory commission is to protect the
16 small business entities of the State of New Mexico and that
17 if there is any sort of a question as to rulemaking
18 processes affecting small business entities, that advisory
19 commission is at our disposal for assistance.

20 But if I don't have any information to give them,
21 based on what the OCD is intending to present, I have
22 nothing to give to the advisory commission. So therefore
23 my rights under this Act have been basically vitiated.

24 CHAIRMAN FESMIRE: And your argument is that you
25 have rights under this Act. And is the Commission in any

1 way your client?

2 MS. FOSTER: No, the Commission is not my client,
3 but I have rights as a small business entity of the State
4 of New Mexico that clearly will be affected by this rule.

5 CHAIRMAN FESMIRE: And does the rule require that
6 you receive a copy of that announcement to the Commission?

7 MS. FOSTER: No, it does not, but I requested one
8 in my motion.

9 CHAIRMAN FESMIRE: Okay, and has that been
10 complied with yet?

11 MS. FOSTER: No, I have not received a copy of
12 that letter to the advisory commission.

13 CHAIRMAN FESMIRE: Mr. Fesmire, my impression was
14 that a copy was attached to our response and that that was
15 served on Ms. Foster by e-mail. Give me a moment, I will
16 check the file here.

17 It does not appear that I have a copy of the
18 e-mail attached to the -- to my copy, and because our
19 e-mail system is down, it will probably be impossible for
20 me to retrieve another copy to provide to Ms. Foster until
21 our e-mail system comes back up, but I will undertake to do
22 so as soon as that occurs.

23 CHAIRMAN FESMIRE: But you believe a copy was
24 sent to her with your response to the motion?

25 MR. BROOKS: That was my recollection. Now the

1 Commission clerk can check to see if a hard copy of that is
2 attached to the response that was filed with the
3 Commission.

4 CHAIRMAN FESMIRE: Okay.

5 MR. BROOKS: If not, I stand corrected.

6 CHAIRMAN FESMIRE: Okay. If Mr. Brooks would be
7 so kind as to, as soon as possible, make sure that she gets
8 a copy of that, we're going -- the Chair is of the opinion
9 that that is a courtesy rather than a requirement under the
10 statute. We will provide it as soon as possible, and we
11 are going to -- I am going to overrule your motion.

12 MS. FOSTER: Thank you.

13 CHAIRMAN FESMIRE: The next motion is a request
14 for alternative dispute resolution. Ms. Foster, this is
15 your motion. Do you have anything further to add?

16 MS. FOSTER: Well, in light of the Small Business
17 Regulatory Relief Act which we believe complies, but also
18 the other issues, specifically the task force process that
19 went on, we don't believe that we had the opportunity to
20 discuss the economics as they impacted small businesses,
21 and we don't believe that the task force, which was not an
22 alternate dispute resolution adjudication, really addressed
23 the small business issues.

24 And again, as a business entity and association,
25 industry association, that is impacted by this rule, both

1 economic and the environmental effects which we will
2 present in our testimony, and I believe has already been
3 testified to yesterday, we believe that we would have the
4 right under the Alternate Dispute Resolution Act, which was
5 passed -- I'm sorry, the official name of the Act is the
6 Governmental Alternate Dispute Resolution Act, which was
7 passed by the Legislature this year, 2007, and became
8 effective July 1, 2007 -- that we would have the right,
9 since this is a formal rulemaking process, to ask for
10 formal adjudication, formal alternate dispute resolution
11 with a formal mediator and facilitator in that process.

12 CHAIRMAN FESMIRE: Okay, and you understand that
13 this has already been through the stakeholder process,
14 through the task force process and that the Chair is of the
15 opinion that any further attempt at remediation -- "at
16 remediation" -- at mediation would be probably
17 unsuccessful. Also it's my reading of the statute that
18 that procedure is voluntary and that it is discretionary on
19 the Commission whether or not to pursue it; is that
20 correct?

21 MS. FOSTER: Yes, it is. It is voluntary, that's
22 correct.

23 CHAIRMAN FESMIRE: Okay, the Chair will therefore
24 overrule that motion also.

25 MS. FOSTER: Thank you.

1 COMMISSIONER BAILEY: Before that subject is put
2 away, I would like to ensure that since the Division
3 attorney has stated that it's up to the Commission to make
4 a determination about its impact on small businesses, that
5 Mr. Chavez, you said, would be the Division person to
6 testify on that topic?

7 MR. BROOKS: Well, first -- That is correct, Mr.
8 Chavez will offer some testimony on that subject. What I
9 said and what I believe that the Act justifies is that the
10 Commission will consider the effects on small business. I
11 do not believe the Act requires the Commission find that it
12 will not have an adverse effect on small business, I don't
13 believe that is a prerequisite to enactment of the rule.
14 But it does say the Commission will consider the effects on
15 small business.

16 We will present evidence through Mr. Chavez to
17 the effect that in the long run the rules we propose may
18 even save money for the industry. But that's in that
19 context.

20 COMMISSIONER BAILEY: In that regard, I would
21 like to bring up a website of the Department of Energy and
22 a financial statement that was issued in September of this
23 year concerning the contrast between the total revenues and
24 the total income that are attributed to oil and gas
25 producers as independents. That website is at

1 <http://www.eia.doe.gov/emeu/perfpro/news>, and I'm sure you
2 can find it from that. It's titled Financial News for
3 Independent Energy Companies, Second Quarter, 2007, and I
4 would like to see that as part of his testimony.

5 MR. BROOKS: Thank you, Commissioner.

6 CHAIRMAN FESMIRE: The next motion before the
7 Commission -- Hang on just a second.

8 (Off the record)

9 CHAIRMAN FESMIRE: The next motion before the
10 Commission is the Oil Conservation Division's motion to
11 strike IPANM's prehearing statement, witnesses and
12 exhibits.

13 Mr. Brooks, this is your motion.

14 MR. BROOKS: Mr. -- Honorable Chairman and
15 Commissioners, I have presented this motion, I guess,
16 somewhat reluctantly. As an attorney I'm not in a position
17 to waive the rights of my client. At the same time,
18 throughout my career I've never been a fan of exclusionary
19 rules. I would suggest that the Commission clerk, who is
20 present, can verify or refute the facts that are asserted
21 in my motion and the Commission can make an appropriate
22 decision as to what it feels is the appropriate course of
23 action to follow in this case.

24 CHAIRMAN FESMIRE: Ms. Foster, have you seen the
25 motion?

1 MS. FOSTER: I have.

2 CHAIRMAN FESMIRE: And are there any facts in
3 there in dispute?

4 MS. FOSTER: I don't believe so, no.

5 CHAIRMAN FESMIRE: Okay, Mr. Brooks, continue.
6 We'll accept the facts as asserted.

7 MR. BROOKS: Thank you. I -- As I said, I've
8 never been a fan of exclusionary rules. I do believe that
9 our rule provides -- I do believe the rule has not been
10 complied with, and under the rule it is within the power
11 and right of the Commission to limit IPANM to factual
12 testimony and general comment and not to receive any
13 technical testimony and exhibits.

14 I believe the Commission has the discretion to
15 apply that rule or to waive it in the interest of whatever
16 interests -- whatever hardship the Commission feels that it
17 imposes on the party or the Commission, so I leave that to
18 the Commission's discretion.

19 CHAIRMAN FESMIRE: Ms. Foster?

20 MS. FOSTER: Well, in terms of a hardship issue,
21 I mean, I am a new attorney to this process and that is not
22 an excuse for my having filed the exhibits 30 minutes late.
23 However, it was my understanding that this Commission on a
24 routine basis has accepted prehearing statements late. I
25 do apologize if they were late, and if the Commission seeks

1 to strike all those exhibits, I feel that I could probably
2 still refer to them in cross-examination to question
3 witnesses.

4 A lot of those exhibits did end up in that
5 packet, and that's one of the reasons why it was so large,
6 because I was intending to at least give the Commission --
7 or the Division, the ability to look at documentation prior
8 to my cross-examining them on those documents. If the
9 Commission would like to throw all those exhibits out, then
10 we would really have no grounds for opposition at this
11 time.

12 I would commend the Commission on the
13 professional working relationship that Ms. Davidson extends
14 to industry as well as all the parties here. She's been
15 very easy and professional to work with and I apologize if
16 I've made her job more difficult.

17 CHAIRMAN FESMIRE: Okay. Ms. Foster, I'm, you
18 know, not a big fan of not following the rules. But as
19 you've noticed, our rules are a little bit fle- -- You
20 disagree?

21 MR. YAHNEY: Yes.

22 CHAIRMAN FESMIRE: Okay, what's your name?

23 MR. YAHNEY: My name's Gordon.

24 CHAIRMAN FESMIRE: Okay, I wish you'd make a
25 statement during public statement portion, please.

1 MR. YAHNEY: I'm not making any kind of
2 statement.

3 CHAIRMAN FESMIRE: Mr. Gordon, would you please
4 make a statement during the public comment period before
5 lunch this afternoon, okay? If you have something to say,
6 that's the time to say it.

7 Ms. Foster, I was on the verge of saying due to
8 the importance of this hearing and the importance of what
9 your clients have to say I'm going to deny this motion. I
10 came real close to not doing that. Okay? So we'll deny
11 this motion and proceed.

12 Thank you, all.

13 Are there any other motions that don't involve
14 scheduling before the Commission?

15 MS. BELIN: Mr. Chairman, members of the
16 Commission, there is a procedural -- a looming procedural
17 dispute between New Mexico Citizens for Clean Air and Water
18 and the industry that I think might be best to take up at
19 this time, because it has to do with how we conduct our
20 cross-examination.

21 CHAIRMAN FESMIRE: Okay, and what is that?

22 MS. BELIN: I'll let industry speak for
23 themselves, but counsel has informed me -- in our
24 prehearing statement we noted that we intended for both --
25 for either Dr. Neepor our technical witness, or myself, to

1 be conducting cross-examination.

2 When the hearing got postponed, we have some
3 scheduling problems and difficulties, and so that we would
4 be efficient with our cross-examination it might be either
5 one of us, and he has been duly authorized by this
6 organization. Industry has informed me that they will
7 oppose that arrangement, so I thought we ought to just deal
8 with that right now.

9 CHAIRMAN FESMIRE: Okay. Mr. Hiser, are you
10 speaking for industry?

11 MR. HISER: Mr. Chairman, members of the
12 Commission, the issue is, the New Mexico industry committee
13 has no objection to Dr. Neeper serving either as a
14 representative for the New Mexico Citizens for Clean Air
15 and Water or as an expert witness for the New Mexico
16 Citizens for Clean Air and Water, but we are troubled by a
17 person trying to play both roles at the same hearing
18 because it can lead to confusion as to whether the person
19 is speaking in their expert capacity, whether they're
20 speaking in their advocate capacity, and it makes it very
21 difficult to know what is cross-examinable and what is not,
22 whether we can cross-examine him on the questions that he's
23 asking and all that, and it's just something that's
24 generally not done in the American system of sort of doing
25 hearings.

1 And so we agree with Lettie that it would be good
2 to get this issue sort of resolved beforehand. It's not
3 that we have any particular objection to Dr. Neeper, but
4 it's a concern about the confusion of the roles that may
5 arise.

6 CHAIRMAN FESMIRE: Mr. Hiser, how could we
7 accomplish their goals and still comply with your -- with
8 what is a valid point here?

9 MR. HISER: Mr. Chairman, members of the
10 Commission, I wish that I had a really good solution for
11 that quandary. I know that in some cases Dr. Bartlit,
12 who's the chairman of New Mexico Citizens for Clean Air and
13 Water, may be available, and certainly as the chairman of
14 that he would be qualified as a representative of that
15 organization. We'd be happy to accept him as the
16 representative in cases where Lettie might not be able to
17 attend. Similarly, they may have another person they could
18 designate to do that, or -- I think they really need Dr.
19 Neeper as their witness, and so to me it seems that he's
20 more appropriate as their witness. But I'm not in a
21 position, obviously to instruct the New Mexico Citizens for
22 how best to use their personnel.

23 CHAIRMAN FESMIRE: Ms. Belin, given that he does
24 have a valid point on the dichotomy of the roles, how would
25 you address it?

1 MS. BELIN: Might I respond?

2 CHAIRMAN FESMIRE: Yes, ma'am.

3 MS. BELIN: First of all, the rules. If you look
4 at the rules, we have fully complied with the rules.
5 There's nothing in the rules prohibiting this sort of
6 arrangement. I would just remind the Commission that this
7 is a rulemaking proceeding, it's not a jury trial, it's not
8 even an adjudicatory proceeding, and the rules of evidence,
9 the rules of civil procedure, cannot apply here.

10 And more important, going to the objective of the
11 rulemaking process as stated in the Commissions rules, the
12 rules emphasize that the hearings are to be conducted so as
13 to provide a reasonable opportunity for all persons to be
14 heard, without making the hearing unreasonably lengthy or
15 cumbersome, without unnecessary repetition.

16 They also state their objectives for encouraging
17 participation in the hearings, for making possible
18 effective presentation by members of the public, for
19 allowing all participants a reasonable opportunity. I
20 would note that other agencies, the Mining Commission,
21 other boards and commissions, certainly allow this type of
22 procedure that we'd be doing today.

23 And as a practical matter, I mean, even if I can
24 be here, I assure you it will be more efficient, less
25 cumbersome, more effective to allow Dr. Neeper to ask

1 questions directly than for him to be writing out questions
2 and passing them to me, and then when there are follow-up
3 questions, having the problems ensuing with that.

4 I would also note that in the surface waste rule
5 hearing, Dr. Neeper participated in both capacities without
6 objection from Mr. Hiser, without objection from industry,
7 and no one had any problem with that. I would venture to
8 say that Dr. Neeper was -- he certainly would respond if
9 anybody has a problem with any particular question that
10 he'd ask, that he will listen and do whatever he can to
11 accommodate that.

12 We are really trying to make this an efficient
13 process that gets the facts out. I think everyone knows
14 the Commission members are certainly capable of
15 differentiating between Dr. Neeper as a cross-examiner and
16 this witness. I really think this will help get
17 information out in an efficient and reasonable manner.

18 And as the Commission has just relaxed its rules
19 right now for industry -- We aren't even asking that you
20 relax the rules, we just ask that we be able to participate
21 according to the rules.

22 CHAIRMAN FESMIRE: Okay, Ms. Belin, when Dr.
23 Neeper makes a statement as a prelude to a question or
24 anything else, I would advise that that would be open to
25 cross-examination from -- to the extent that it is a

1 statement. Would that be satisfactory?

2 MS. BELIN: That would be satisfactory, and I
3 will certainly -- we will discuss it. He will minimize
4 that, he will only say in his question the minimum that he
5 has to say to make the question clear.

6 CHAIRMAN FESMIRE: Okay. Mr. Hiser, would that
7 be satisfactory to you?

8 MR. HISER: Mr. Chairman, members of the
9 Commission, obviously our goal is to reach the best result
10 for the State of New Mexico. Whatever you believe may be
11 most appropriate.

12 CHAIRMAN FESMIRE: Okay. Ms. Belin, we will do
13 it that way if -- in acting as his representative capacity,
14 if Dr. Neeper makes a statement, the counsel present will
15 have the opportunity to cross-examine him on those
16 statements.

17 MS. BELIN: Thank you very much.

18 CHAIRMAN FESMIRE: Thank you, ma'am.

19 Are there any other matters before the
20 Commission, before we go back into the evidentiary portion?
21 Okay.

22 I believe, Mr. Brooks, your witness -- your
23 witnesses, were being cross-examined, and the person who
24 indicated that they were to be cross-examined is not
25 present.

1 MS. BELIN: I had a couple of questions.

2 CHAIRMAN FESMIRE: Okay. Ms. Belin, would you
3 like to begin then?

4 MS. BELIN: Where would you like me to --

5 CHAIRMAN FESMIRE: Ms. Belin, would you like to
6 stand at the podium? And since you're facing the wrong
7 direction, could you speak up?

8 MS. BELIN: I'm the right direction for you --

9 CHAIRMAN FESMIRE: The right direction for us,
10 but the wrong direction for them to hear.

11 MS. BELIN: Yes, I'll try to speak up.

12 WAYNE PRICE and GLENN VON GONTEN (Continued)
13 the witnesses herein, having been previously duly sworn
14 upon their oaths, were examined and testified as follows:

15 EXAMINATION

16 BY MS. BELIN:

17 Q. Good morning, Mr. Price.

18 A. (By witness Price) Good morning.

19 Q. I believe -- I just have a few questions. I
20 think during your cross-examination the topic of closure
21 standards for deep-trench burial arose. My first question
22 is, are there other witnesses that will be addressing that
23 more than you?

24 A. (By Mr. Price) Yes, there will be Mr. Brad
25 Jones.

1 Q. Okay.

2 A. (By Mr. Price) He'll go into detail, line by
3 line, on that issue.

4 Q. I'll direct my questions on that to him, then.

5 Also in cross-examination yesterday, there was a
6 dialogue between you and Ms. Foster about out of state
7 members on the task force. Well, actually it was about
8 OGAP and the fact that perhaps they are based out of New
9 Mexico. Were there any industry members on that task
10 force?

11 A. (By Mr. Price) Yes.

12 Q. Were any of them from out of state?

13 A. (By Mr. Price) I think there was one, yes.

14 Q. Do you think there was one, or there was one?

15 A. (By Mr. Price) I'm pretty sure there was one.

16 Q. So there were out-of-state members of the task
17 force from both the industry side and from the public?

18 A. (By Mr. Price) I know on the industry side there
19 was. I'm not sure about the landowners. I'm sure they
20 were all -- I think they were all inside the state. Just
21 let me think a minute.

22 I believe the only out-of-state member was the
23 industry task force, one member.

24 Q. Thank you. Another topic that came up in cross-
25 examination was in talking about the 100-mile limit, that

1 wells within 100 miles of the permitted landfills would
2 have to dispose -- transport and dispose to the permitted
3 facilities. And there was discussion about some of those
4 facilities in the northwestern part of the state and
5 southern Colorado and the possibility that at some point
6 they might stop accepting oil and gas waste. Do you
7 remember that dialogue?

8 A. (By Mr. Price) I do remember.

9 Q. So if we assume that at some point in the future
10 the permitted landfills in the northwest were actually
11 filled and decide not to accept any more oil and gas waste,
12 is there any reason that the industry or the industry
13 committee could not cooperate establish some sort of
14 approved landfill as the need arises?

15 A. (By Mr. Price) Well, anyone could be an
16 applicant to put a landfill in. We're not limited on who
17 could apply to put a landfill in.

18 Q. So if some facilities fill up, would you expect
19 that there will be efforts to establish additional
20 facilities?

21 A. (By Mr. Price) Oh, absolutely.

22 MS. BELIN: Thank you, I have no further
23 questions.

24 CHAIRMAN FESMIRE: Mr. Jantz, did you have any
25 questions?

1 MR. JANTZ: I do, Mr. Commissioner.

2 MS. FOSTER: Mr. Chairman, if I might ask a
3 question concerning OGAP, yesterday there was a gentleman i
4 the room who I believe identified himself as an OGAP
5 attorney. Just in terms of notification and conversations
6 with OGAP, I would just like to ask some clarification as
7 to who is their lead attorney, for lack of a better word.

8 CHAIRMAN FESMIRE: Okay, Mr. Jantz, would you
9 respond?

10 MR. JANTZ: Yes, Mr. Chairman and members of the
11 Commission, Ms. Foster. I'm the lead attorney on this pit
12 rule hearing for OGAP. Mr. Frederick who has entered his
13 appearance in this matter is also staff attorney at the law
14 center will be second-chairing in my absence.

15 EXAMINATION

16 BY MR. JANTZ:

17 Q. Good morning, Mr. Price.

18 A. (By Mr. Price) Good morning.

19 Q. There were a couple -- there was some discussion
20 during your direct examination and during your cross-
21 examination about staffing issues at OCD. Could you tell
22 me, remind me again, how much staff you had to conduct
23 inspections and to make sure that the current rules are
24 complied with?

25 A. (By Mr. Price) The Environmental Bureau consists

1 of five members including myself, and we have an
2 environmental engineer or representative in each of the
3 districts. So there would be a total of eight people just
4 from the environmental standpoint.

5 Q. Eight folks?

6 A. (By Mr. Price) Yes, for the whole state.

7 Q. And I think in your direct testimony you also
8 mentioned that there was some backup, something like 200
9 permits, applications, on your floor?

10 A. (By Mr. Price) At least.

11 Q. Okay. And those are all under the current rule,
12 right?

13 A. (By Mr. Price) Yes.

14 Q. Now it's my understanding that it's your opinion
15 that this new pit rule will make environmental protection
16 easier, or will better -- this new rule will better be able
17 to protect the environment; is that correct?

18 A. (By Mr. Price) That's my opinion.

19 Q. Okay. Will it also make it easier for OCD to
20 administer the Act, Oil and Gas Act, and the rules?

21 A. (By Mr. Price) Yes.

22 Q. Thank you. Let's talk a little bit about
23 economic information. I think it was you -- it may have
24 been Mr. von Gonten -- who testified about the price per
25 well. It was something like \$30,000 to \$80,000 per well

1 for estimated -- estimated to dig and haul; is that
2 correct? Was that you?

3 A. (By Mr. Price) That was me.

4 Q. Okay. And where did you -- could you remind me
5 of how you arrove [sic] at that information?

6 A. (By Mr. Price) Well, myself and my staff, we
7 made various telephone calls to disposal and trucking
8 companies, and that's where we came up with those
9 estimates.

10 Q. Okay. Did you get any input about that during
11 the process of this rulemaking from industry about the
12 economic effects that this rule might have on them?

13 A. (By Mr. Price) Are you talking about during the
14 task force?

15 Q. During the task force.

16 A. (By Mr. Price) I didn't, because I only sat in
17 on the task force probably the last two events. Mr. von
18 Gonten was there more than I was, and so was Mr. Hansen.
19 So those would probably be better questions for them.

20 Q. Mr. von Gonten, could you answer the question?

21 A. (By witness von Gonten) Well, I didn't testify
22 yet about the task force proceedings, but we did hear from
23 one industry representative that they had at least one case
24 that they were familiar of -- familiar with, where there
25 were similar wells located close together, where they

1 actually did a dig-and-haul, and it was \$100,000 more, is
2 the anecdotal discussion that we had.

3 Q. Was that the extent of the industry input, to
4 your recollection?

5 A. (By witness von Gonten) From industry, yes. I
6 think there was a presentation by -- kind of a slide show
7 from -- that discussed case studies with a closed loop
8 system, and it was more -- there was more case studies,
9 there were some that were more expensive and some where
10 they thought there was a cost savings.

11 Q. So industry folks during the task force
12 proceedings didn't present you with any data showing a
13 significant economic on industry; is that correct?

14 A. (By witness von Gonten) They did not.

15 Q. Okay, they didn't bring in individual operators
16 to express their concerns with the economic impacts; is
17 that right as well?

18 A. (By witness von Gonten) I would say the task
19 force represented -- there were four members of the task
20 force, and my recollection is that they -- their general
21 opinion was that it was going to be more expensive on the
22 issue of digging and hauling pit contents rather than doing
23 on-site disposal.

24 Q. But nothing specific?

25 A. (By witness von Gonten) No, there was no --

1 there was no handouts, there was no case studies presented
2 that showed those economics

3 Q. Aside from the task force, have any members of
4 industry approached you with specific economic data about
5 adverse economic impact?

6 A. (By witness Price) No.

7 Q. Either of you?

8 A. (By witness von Gonten) Not that I'm aware of.

9 MR. JANTZ: Thank you. I have nothing further.

10 CHAIRMAN FESMIRE: Mr. Frederick, are you here
11 yet?

12 MR. JANTZ: Mr. Frederick is not here, he won't
13 be here today.

14 CHAIRMAN FESMIRE: Okay, and he understood that
15 he might not get a chance to cross-examine these witnesses
16 on the subjects he was wanting to talk about --

17 MR. JANTZ: I think --

18 CHAIRMAN FESMIRE: -- not being --

19 MR. JANTZ: -- he understands that, yes.

20 CHAIRMAN FESMIRE: Okay. Commissioner Bailey, do
21 you have any questions?

22 COMMISSIONER BAILEY: Yes, I do.

23 EXAMINATION

24 BY COMMISSIONER BAILEY:

25 Q. I feel rather like Paul Harvey, wondering what's

1 the rest of the story here.

2 (Laughter)

3 Q. You opened your testimony with a series of
4 photographs of pits in various conditions. Can you tell me
5 what action OCD took when it saw all of these pits?

6 A. (By witness von Gonten) I can answer that. No,
7 I can't answer that, because those were slides that were
8 taken by our district offices. The cases only get referred
9 to the Santa Fe office and the Environmental Bureau when
10 there is no groundwater contamination. Those were part of
11 the administrative record. I set a time frame to search
12 through our files, our photos, JPG files, and I went
13 through each district and just culled out and collected
14 anything that looked like a pit or below-grade tank.

15 That collection of photographs was winnowed down
16 to the final 106 by date. We culled out any blurry
17 photographs, we culled out anything that were obvious
18 duplications and repetitious.

19 Q. Your strategy was obviously to create an
20 emotional impact, by beginning your testimony with 106
21 dirty, oil pits that some were not fenced, some --
22 practically none of them had netting.

23 And my concern is that under the current Rule 50
24 OCD has the authority to enforce torn pits, torn liners,
25 lack of netting, lack of fencing. I am -- rather than

1 having the dismay that I think you wanted to create towards
2 industry, I'm angry that OCD has not enforced Rule 50,
3 because there are clear portions of Rule 50 that discuss
4 containment, the liners that are maintained, properly
5 managed, lined drilling pits, no measurable layers of oil.
6 These are already on the books and need to be enforced, as
7 they have been a rule since 2004.

8 So that's why I'm very curious to know what
9 enforcement actions were taken to take care of these issues
10 that you're using as evidence for creating a more stringent
11 rule that may or not get enforced. So let's start with
12 your testimony, because that started the attitude.

13 Was the BLM a member of the task force committee?

14 A. (By witness von Gonten) No.

15 Q. Were any native American groups on the task force
16 committee?

17 A. (By witness von Gonten) No.

18 Q. Would the proposed rule apply to federal or to
19 native American lands?

20 A. (By witness von Gonten) I don't think I know the
21 answer to that.

22 A. (By witness Price) I do. It would apply to
23 federal lands, but not necessarily native lands.

24 Q. Are the current BLM rules more or less stringent
25 than this proposed rule?

1 A. (By witness Price) Less stringent because,
2 Commissioner Bailey, the BLM primary emphasis is for
3 surface restoration, and our primary emphasis is for
4 protection of groundwater. Not to say that we don't
5 protect the environment but when the BLM and we work
6 jointly together, generally they handle the surface and we
7 handle the issue of groundwater contamination, or vadose
8 zone contamination that might contaminate groundwater.

9 Q. But that does bring up a topic that I did want to
10 ask about. Who in your group will be talking about surface
11 restoration and revegetation?

12 A. (By witness Price) Actually Mr. Brad Jones.

13 Q. Mr. Brad Jones?

14 A. (By witness Price) Yes.

15 Q. Then I'll look forward to talking with him.

16 A. (By witness Price) Okay.

17 CHAIRMAN FESMIRE: Did you hear that, Brad?

18 Q. (By Commissioner Bailey) How many new wells were
19 drilled last year?

20 A. (By witness Price) We actually -- I think we
21 queried that, and it was about 1200.

22 A. (By witness von Gonten) Approximately.

23 A. (By witness Price) Approximately 1200 in the
24 whole state.

25 Q. So that's about 1200 new drilling pits that would

1 have to go through this permitting process?

2 A. (By witness Price) Yes.

3 Q. On an average, maybe?

4 A. (By witness Price) Yes.

5 Q. Okay. There are four landfills that are
6 permitted in the southeast?

7 A. (By witness Price) Correct.

8 Q. Under the proposed rule, would the entire
9 southeastern oil and gas industry be -- there are many
10 different ways of putting this -- only be able to deal with
11 the four current landfills with their problems with
12 acceptance of waste and their prices that have been
13 established?

14 A. (By witness Price) Commissioner Bailey, I'm
15 sorry, I don't understand the question. Would -- What is
16 the question now? Would --

17 Q. Are you putting the entire southeastern oil and
18 gas industry as hostage to four owners of disposal for --

19 A. (By witness Price) That's a --

20 Q. -- drilling pits?

21 A. (By witness Price) -- really good question, and
22 we've actually had internal discussions that we do not
23 believe we are. I think the free market will drive itself,
24 and we'll actually see more facilities apply to be open.
25 Actually, we've had a number of inquiries on that --

1 Q. How long --

2 A. (By witness Price) -- in the southeast.

3 Q. -- would it take to permit a new landfill, given
4 all of the public meetings and hearings and background
5 information? What would be a reasonable time line for --

6 A. (By witness Price) I think six months would be
7 fast.

8 Q. But a year would probably be closer to the mark?

9 A. (By witness Price) Yes.

10 Q. We've heard testimony that -- or comments, that
11 enforcement of the new rule would force operators to go to
12 other states, Oklahoma, Texas, Wyoming. Are those state
13 rules as stringent as this proposed rule?

14 A. (By witness Price) No.

15 Q. So New Mexico would have the strongest rule
16 throughout the entire region?

17 A. (By witness Price) Yes.

18 Q. Including federal and indian --

19 A. (By witness Price) That is correct.

20 Q. -- property?

21 A. (By witness Price) That's correct.

22 Q. But yet you talk about there's a national trend.
23 Obviously it doesn't apply to the southwest or western
24 United States.

25 A. (By witness Price) Well, when I said a national

1 trend, Commissioner Bailey, what I was referring, there's a
2 national trend to dispose of solid waste into municipal
3 landfills. I wasn't necessarily saying there's a national
4 trend for oilfield waste to go into facilities. We're
5 probably taking the first step in that arena.

6 Q. One of the requirements is to remove the liquids
7 from a drilling pit within a short period of time. What is
8 that?

9 A. (By witness Price) Thirty to -- Thirty days.

10 Q. Thirty days.

11 CHAIRMAN FESMIRE: Under the current rule or
12 under the proposed rule?

13 Q. (By Commissioner Bailey) Under the proposed
14 rule.

15 A. (By witness Price) Thirty days, and fifteen days
16 for a workover pit.

17 Q. And so cleanup or dismantling of a drilling pit
18 is actually a two-step operation. First you take off the
19 liquids, and then the solids would be drying, correct?

20 A. (By witness Price) Correct.

21 Q. And in areas where it's less than 50 feet, it
22 would be part of a drying pad, as part of a closed loop
23 system?

24 A. (By witness Price) Well, it could be, yes,
25 uh-huh. Or they could -- the one slide I showed you, some

1 wastes can be put directly into a dumpster-type -- and
2 actually railed and hauled off at that same time, and no
3 drying pad is required. It's just that some companies
4 would choose to use a drying pad, others may not.

5 Q. Okay. The liquids -- where do they go in the
6 northwest?

7 A. (By witness Price) I'm sorry?

8 Q. Where do the liquids go in the northwest?

9 A. (By witness Price) There are a number of
10 facilities that we have. We have disposal facilities that
11 can take liquids, OCD-permitted facilities.

12 Q. And then the solids, there are no OCD-permitted
13 locations?

14 A. (By witness Price) There are landfarms that are
15 permitted. However, I will admit that when we were
16 promulgating the surface waste management rule, we were
17 basically informed that there are no salts in the northwest
18 and so it's not an issue. But after the rule was
19 promulgated in the past and we had the 1000 parts per
20 million in there, we found out that there were a lot of --
21 well, there were salts up there and our landfills couldn't
22 take it.

23 And so that created an issue about where we do
24 need a permanent landfill.

25 CHAIRMAN FESMIRE: Landfills or landfarms?

1 WITNESS PRICE: There were landfarms that could
2 not take it, but that created an issue where we saw a need
3 for a landfill. And so that's when we got with the New
4 Mexico Environment Department, to make sure that they had
5 capacity to take this. And Ed Hansen and Brad Jones, who
6 used to work over in that division, was very instrumental
7 in getting that set up so those type of wastes could be
8 taken to a facility.

9 Q. (By Commissioner Bailey) Several times, at least
10 twice, you mentioned the fact if you cut the source,
11 there's no contamination. I'm assuming that you meant once
12 there is no fluid as a driving force, the solids of the
13 drilling pit would not be a large source of contamination?

14 A. (By witness Price) Well, what I mean to say,
15 that that's a general hydraulic -- a hydraulic principle,
16 that if you take the head off of it and take -- if you
17 remove the liquid source, then it certainly would reduce
18 the probability of groundwater contamination in a short
19 time period.

20 If I implied that there would be no contamination
21 from waste that's buried, then I led you astray because
22 there could be but it would just take longer.

23 Q. And depending on the geology?

24 A. (By witness Price) Absolutely.

25 Q. Which brings up page 18 of the graphs.

1 A. (By witness Price) Which exhibit, Commissioner?
2 6 maybe?

3 Q. It must be 6.

4 A. (By witness Price) Oh, here it is.

5 Q. Okay, page 19.

6 A. (By witness Price) Exhibit 6?

7 Q. Yes -- no -- Yes.

8 A. (By witness Price) 19.

9 Q. Modeling results. It has the two different
10 responses according to 10-by-10 or 30-by-30 pit?

11 A. (By witness Price) Yes, yes. This is a for an
12 unlined pit.

13 WITNESS VON GONTEN: Excuse me, Commissioner
14 Bailey, would you like to see this on the screen?

15 COMMISSIONER BAILEY: I have my copy, but the
16 audience may like to see it.

17 Q. (By Commissioner Bailey) Well, first my question
18 should be the inputs. I understand that modeling is
19 absolutely dependent on the inputs for the model.

20 A. (By witness Price) Yes, that's correct.

21 Q. And on the previous page, page 18, it talks about
22 some of the inputs using 5000 milligrams per liter
23 chloride.

24 A. (By witness Price) Yes.

25 Q. Is that representative of the waters that we find

1 in the northwestern part of the state?

2 A. (By witness Price) Yes, we feel it is. Mr. von
3 Gonten will testify to the sampling results that we had,
4 and we -- actually, that might be a little bit low.

5 Q. Is this for a particular formation, or is this
6 the source of most of the water, which comes from the base
7 of the Fruitland Coal?

8 A. (By witness Price) In this particular case, we
9 chose to model 5000 milligrams per liter because it seemed
10 to be a median of what we found in our sampling program, in
11 -- actually in the pits.

12 Q. So I should wait until testimony later to really
13 ask about these --

14 A. (By witness Price) Well, Mr. von Gonten -- That
15 would probably be a good time to do that. Mr. von Gonten
16 will certainly testify to what we found.

17 Q. Okay, because this was found in the pits, in the
18 vulnerable area?

19 A. (By witness Price) Yes. Well, it was found --
20 it was found in pits in the northwest. And as to whether
21 in the vulnerable area or nonvulnerable area, I don't think
22 we differentiated between that, did we?

23 WITNESS VON GONTEN: We did not.

24 WITNESS PRICE: We did not.

25 Q. (By Commissioner Bailey) Okay. Because if this

1 was in the vulnerable area, obviously it would have been
2 lined?

3 A. (By witness Price) Well, this is just an example
4 of where we're making our case here for unlined pits. This
5 is for the presentation where we were more or less pleading
6 with the Commission that this would be the final appeal to
7 eliminate any unlined pits in the State of New Mexico, and
8 we were showing here just as small as one barrel per day,
9 which we would consider a continual source, will
10 contaminate groundwater --

11 Q. And unlined pits --

12 A. (By witness Price) -- and fairly quickly too.

13 Q. -- are not going to be found in the vulnerable
14 area or the expanded vulnerable area?

15 A. (By witness Price) I'm sorry, Commissioner?

16 Q. Unlined pits will not be found in either the
17 vulnerable area or the expanded vulnerable area, under
18 Order 7940?

19 A. (By witness Price) Well, that begs the question
20 of -- they could be, because under the last rule that we
21 had, if a person would register those unlined pits, they
22 were allowed to continue to have them, and we have logged
23 2000 of those, primarily in the northwest. So yes, there
24 are unlined pits up there.

25 Q. Another matter of enforcement?

1 A. (By witness Price) Well, they're allowed. Under
2 the current rule they were actually more or less
3 grandfathered in.

4 And so we're just making a plea that -- And by
5 the way, this was a task force -- this was consensus, that
6 even I think Mr. Carr had pointed out, said, We're with you
7 on this, no more unlined pits in New Mexico. And we
8 applaud the industry for taking that step.

9 Q. Yes, and I also do. But on any exhibits or
10 presentations, I'm a stickler for accuracy --

11 A. (By witness Price) Right.

12 Q. -- and for real-life, real-world presentations.

13 A. (By witness Price) Yes.

14 Q. And so when I see something that says less than
15 50 feet for an unlined pit with 5000 milligrams per liter
16 I'm questioning, Is this real-world?

17 A. (By witness Price) Commissioner Bailey, we
18 really do think this is real-world. This was modeled at 50
19 feet using 5000 milligrams per liter, which is certainly up
20 there, and a very, very small quantity, less than one
21 barrel per day. So we do think it's real.

22 Q. Was geology, lithology taken into account --

23 A. (By witness Price) The answer --

24 Q. -- for this modeling?

25 A. (By witness Price) -- to that question is yes in

1 the modeling. However, I did not do this particular
2 modeling. Mr. Ed Hansen did, and he will testify in detail
3 to the input parameters and the output parameters.

4 Q. Okay.

5 A. (By witness Price) Yeah.

6 Q. I will save some of that for him.

7 I am unfamiliar with closed loop systems. You
8 need to educate me about closed loop systems.

9 A. (By witness Price) Okay.

10 Q. If -- My first question has to do with the size
11 of the footprint of a closed loop system for a well to be
12 drilled to 14,000 total depth. With the compaction of the
13 soil, what size -- and the drying pads, what size of an
14 area are we talking about that will be --

15 A. (By witness Price) Can I show you a picture?

16 Q. I would love to see a picture.

17 A. (By witness Price) Ed, go to -- Let's see.

18 We're kind of jumping ahead to Mr. von Gonten's testimony,
19 but we'd be glad to show you a picture.

20 Q. Okay.

21 A. (By witness Price) We'll bring one up. We
22 actually visited a drying pad during our sampling, we
23 actually sampled one too, so...

24 CHAIRMAN FESMIRE: Can you all hear in the back?

25 WITNESS PRICE: Pretty interesting process.

1 (Off the record)

2 WITNESS PRICE: Commissioner Bailey, we're trying
3 to go to 13B, page number 1, closed loop drying area,
4 southeast. We actually visited a site that had a closed
5 loop system and a drying pad, and this kind of -- Ed, go
6 back. There you go.

7 This kind of gives you an idea. We're standing
8 on the mud tanks, the mud-mix tanks, and that kind of gives
9 you the area. It does extend more to the left a little
10 bit, probably an equal distance of what you're seeing
11 there. So I'm saying that you only -- you see the trench
12 on the right? There's an actual liner underneath all of
13 that on that particular drying pad. But as you can see,
14 there's very little if any liquids at all, and so they're
15 able to really take this material off rather quickly. So
16 that's an example of the drying pad right there.

17 Now for the most part, we think the drying pad --
18 we know the drying pad for most cases is smaller than the
19 conventional-production drilling pit. However, there were
20 a couple examples, and I think one of the representatives
21 from Marbob had actually indicated to me that he had seen
22 some where the footprint was quite a bit bigger. I don't
23 know the reason why. But for the most part, we think the
24 footprint will be smaller. And Mr. Carl Chavez is going to
25 testify in length to this.

1 Q. (By Commissioner Bailey) Really?

2 A. (By witness Price) Yes.

3 Q. I'll look forward to that.

4 It seems like, without having scale there, that
5 that's a rather tall berm?

6 A. (By witness Price) That's not a berm, that's
7 actually the cuttings. This is a rather deep well down
8 southeast of -- or south of Carlsbad, southwest of
9 Carlsbad.

10 They were actually on the west side of the river,
11 so -- They were out of the Salado formation, so the salts,
12 if I'm not mistaken, were fairly low in this particular
13 pit. When we sampled it, I think our salt levels were
14 pretty low because they didn't go through a salt section.

15 Q. And that lined trench, what does it go to? It
16 looks like it just --

17 A. (By witness Price) Well, it just went to a
18 little sump and they kept it drained out. They had a hose
19 over there that they threw over there, and they kept that
20 drained out and dried the whole time, because they could
21 use the water back in the drilling system.

22 Q. I just don't see where it goes to, it just seems
23 to --

24 A. (By witness Price) Well, you can't --

25 Q. -- disappear --

1 A. (By witness Price) -- there's a -- there's a
2 sump back on this left-hand side. They just had a hose
3 over there that they had a continual pump on it, and they
4 were just pumping -- There wasn't a whole lot of water
5 there, and they were pumping out of the sump, back into the
6 mud tanks.

7 So we thought that was great because that
8 decreased the chance or reduced any sort of head pressure
9 or any large amount of water that you -- you know, it just
10 actually pretty well makes it where you're not going to
11 have a groundwater contamination case, because you don't
12 have any head pressure there or water for that to happen.

13 Companies -- Of course, this wasn't required
14 under the rules, and as you can see, this company was --

15 CHAIRMAN FESMIRE: Hang on, Mr. Price.

16 MS. FOSTER: Mr. Fesmire, I would just like to
17 note for the record that I do not have this exhibit in my
18 records. I've done an extensive search of the OCD CD that
19 they gave me, and I have part -- 13B, part 2, but not 13B,
20 part 1. So I don't believe those pictures have been made
21 available to us.

22 WITNESS VON GONTEN: It may be mislabeled. Could
23 you check 13C, please?

24 MS. FOSTER: 13C? 13C, part 3.

25 WITNESS VON GONTEN: It should just be labeled

1 13C.

2 MS. FOSTER: Okay, thank you. For the record
3 it's listed as 13C, part 3. Thank you.

4 WITNESS PRICE: Do you have it? Okay, good.

5 Q. (By Commissioner Bailey) And you just said it
6 again: Remove the fluids, and the solids do not pose as
7 great a source of contamination?

8 A. (By witness Price) On a short-term basis that's
9 absolutely correct.

10 Q. All right.

11 A. (By witness Price) And I have a presentation
12 that I'll go into that aspect.

13 Q. You were asked the question, is it going to be
14 easier to administer the new rule than it is the current
15 Rule 50, which appeared to be violated and no enforcement.
16 How is it easier to enforce the proposed new rule than the
17 current Rule 50?

18 A. (By witness Price) Well, the number one reason
19 is that the guidelines will be in the rule now, and our
20 attorneys have repeatedly told us that when -- for example,
21 the 12-mil liner is in the guidelines now. And so
22 therefore if you went out there and a company was using a
23 6-mil liner and it was tearing and they went right back and
24 used another 6-mil liner, it's not in the rule and we
25 couldn't force them to use a better liner so it wouldn't

1 rip and tear.

2 So we're attempting to put the guidelines in the
3 rule, as we talked about during the task force and make our
4 rules a little bit more legally enforceable. I'm not an
5 attorney, so I get this advice from our attorneys.

6 Q. So even though a rule may say, in general, pits,
7 sumps and below-grade tanks shall be designed, constructed
8 and operated so as to contain liquids and solids to prevent
9 contamination of fresh water, that each drilling pit shall
10 have a single liner and maintain to prevent contamination
11 and to protect public health and the environment -- You're
12 saying that those are not enforceable?

13 A. (By witness Price) No, I'm not saying that. I'm
14 not saying that. I'm just saying that once you get into
15 those proceedings, that the enforceability becomes a little
16 bit arbitrary.

17 I've been in those type of situations before, and
18 when you have very prescriptive design requirements, it's
19 easier to have a case than if you don't have.

20 COMMISSIONER BAILEY: That's all I have.

21 CHAIRMAN FESMIRE: Commissioner Olson?

22 EXAMINATION

23 BY COMMISSIONER OLSON:

24 Q. Thank you. I might follow up on something that
25 Commissioner Bailey had. I guess I was curious why the BLM

1 wasn't on the task force, because you were saying that they
2 deal with surface-use issues, but part of the new rule
3 involves re-vegetation for surface use. So I guess I was
4 kind of curious why they --

5 A. (By witness Price) Commissioner Olson, I
6 can't --

7 Q. -- for that purpose.

8 A. (By witness Price) -- I can't really answer that
9 question. I wasn't in the loop of the process that
10 selected the task force.

11 Q. Would Mr. Jones maybe know?

12 A. (By witness Price) No, Mr. Jones would not know.

13 Q. Okay. Do you have any estimates of the volumes
14 of drilling mud that's going to be generated per year?

15 A. (By witness Price) We have not actually put the
16 pencil to it to estimate that. That could be done fairly
17 easily. It would be a rough estimate, but if you take 1000
18 new drilling sites times 1000 yards, and that's probably
19 pretty close.

20 Q. Okay. And I guess -- as you were mentioning for
21 southeastern New Mexico, you've only got four landfill
22 facilities?

23 A. (By witness Price) That's correct.

24 Q. Correct?

25 A. (By witness Price) Correct.

1 Q. And how long would these facilities be able to
2 accept 1000 times 1000 yards of drilling muds before they
3 filled up?

4 A. (By witness Price) We have not made that study.

5 Q. And maybe to clarify something, I guess what
6 happens when a disposal facility -- It's my understanding
7 that when a disposal facility is not available within 100
8 miles of the site, then they can dispose of the muds on-
9 site?

10 A. (By witness Price) They can do a deep-burial
11 trench as another option on site if they meet the siting
12 requirements, correct.

13 Q. If they meet the siting requirements?

14 A. (By witness Price) Right.

15 Q. So you have pretty good confidence that if they
16 meet the siting criteria, they're not going to cause
17 groundwater contamination?

18 A. (By witness Price) If they meet the siting
19 requirements, if they meet the closure standards. And we
20 feel that -- and Mr. Hansen will show the modeling, we have
21 modeled that. It still shows contamination, but it's --
22 it's way out in the future.

23 Q. So I guess why would we need to require them to
24 take it to centralized facility, if that's going to be
25 protective --

1 A. (By witness Price) Well --

2 Q. -- of water quality?

3 A. (By witness Price) -- the biggest reason is the
4 cumulative impact and effect. Mr. Hansen will show in his
5 modeling that you add up thousands of pits in these areas,
6 and you're going to have a cumulative effect.

7 And as I stated yesterday, we feel that from a
8 regulatory agency we can certainly regulate one facility
9 much better than we can thousands of them. And it's more
10 of a -- it's an oversight and regulatory, and we think that
11 having all this waste in one location, it's going to be
12 handled for us and much easier in the future and for the
13 state.

14 We have thousands of sites out there which we
15 can't possibly get to, to make sure that each one of them
16 is going to be closed properly, and we just feel very
17 confident that this is the way to go. And there is a trend
18 in the United States. As you know, if you take waste, your
19 waste generally lands up -- winds in a landfill somewhere.
20 And also we can put financial assurances on these
21 facilities, whereas we're not allowed to have financial
22 assurances of bonding on pits.

23 Q. Well, I guess that kind of comes back to what I
24 was saying before about the existing facilities, that it
25 seems like we don't have a lot of existing facilities right

1 now. Isn't that a point of concern, then, that there's not
2 enough places to take these wastes to at this time?

3 A. (By witness Price) Well, right now we have four
4 facilities in the southeast, and I can assure you that
5 three out of the four has ample capacity. We do have one
6 facility that is getting close to wanting to expand. They
7 have the room to expand, but they're going to have to
8 expand under the new part 36, and they're reluctant to
9 spend the money to do that.

10 Q. And is that an existing facility that's currently
11 unlined?

12 A. (By witness Price) Yes.

13 Q. So under the -- they would have to come in and
14 meet the new rules, and any expansion of that facility
15 would have to --

16 A. (By witness Price) -- have to be double-lined
17 with leak detection.

18 Q. Double-lined with leak detection.

19 A. (By witness Price) That's correct.

20 Q. And then I had a couple questions on some of your
21 slides, just to understand them a little better. I was
22 looking under Exhibit 6, under -- on page 15, slide 15.

23 A. (By witness Price) Slide which one? Or page
24 which one? 15?

25 Q. Yeah, slide 15 or page 15.

1 A. (By witness Price) Yes.

2 Q. And I guess maybe you've explained this, maybe I
3 missed that in your explanation. But maybe you could go
4 over the slide again. I'm somewhat confused by what it's
5 representing. Under the 2005 numbers that you're listing
6 here are 400 confirmed pit groundwater contamination cases?

7 A. (By witness Price) Correct.

8 Q. That's -- Is that 400 that are total up to 2005,
9 or is that 400 in --

10 A. (By witness Price) No, that's 400 confirmed
11 groundwater pit cases that are still open. They have a --
12 There were some that were more than that, but they've been
13 closed properly, and so therefore...

14 I think during the 2003 pit rule testimony, I
15 believe Mr. Anderson had pointed out, there were 500 and
16 something. But we counted -- as of 2005 in our database,
17 we actually counted approximately 400 confirmed pit
18 groundwater cases.

19 Q. I guess I was a little confused by "confirmed".
20 Do you mean that there --

21 A. (By witness Price) We actually counted them in
22 the database.

23 Q. Right, but they're still open? Those are cases
24 that are still open, not ones that have been closed?

25 A. (By witness Price) These are groundwater --

1 actual groundwater cases where the pit has caused
2 groundwater contamination, and they're not closed, they're
3 still open. The cases are ongoing.

4 Q. So the actual number of groundwater contamination
5 cases, if you included sites that are closed, is a larger
6 number than the 400?

7 A. (By witness Price) Yes.

8 Q. Do you know how much larger?

9 A. (By witness Price) I'm sorry, Commissioner, I
10 don't.

11 Q. And these are for unlined pits; is that correct?

12 A. (By witness Price) That is correct.

13 Q. And then under your 2007 numbers you list 150
14 abatement cases. Is that actual abatement plans or --

15 A. (By witness Price) Those are -- No, we haven't
16 actually issued abatement plans for each one. We have a
17 list that we're going to do that, and we just haven't done
18 that. But they're on our internal list that we have that
19 will be -- at least 250 of these will become a high
20 priority on abatement cases.

21 We have another 154 that we don't -- that we are
22 thinking that the groundwater impact is so low that we may
23 not have to have an abatement plan issued. Abatement plans
24 are very cumbersome for both the staff and the operator.

25 And then we have another 200 estimated pit cases

1 -- literally, that's an estimate between what Mr. von
2 Gonten and I and Mr. Hansen -- we literally have them on
3 our floor, and that's an estimate.

4 Q. So see if I understand that correctly then.
5 Roughly you have approximately -- in 2007 you have
6 approximately five hundred --

7 A. (By witness Price) That's correct.

8 Q. -- four cases of groundwater contamination from
9 unlined pits?

10 A. (By witness Price) From unlined pits, that's
11 correct, Commissioner.

12 Q. So it's an increase of 104 cases in two years?

13 A. (By witness Price) Yes, sir.

14 Q. And then again, I guess that's not the total
15 number, that's just active cases. That's not the total
16 number of cases --

17 A. (By witness Price) That is correct.

18 Q. Okay. Thank you, that helps me out a little.

19 And then maybe I'll look at page 24 under that
20 same exhibit.

21 A. (By witness Price) Yes.

22 Q. You're listing there in the center that the best
23 estimate is that there's 2000 unlined pits remaining in the
24 state?

25 A. (By witness Price) That's correct.

1 Q. Where are most of these located?

2 A. (By witness Price) In the northwest.

3 Q. So most of those are in the nonvulnerable area of
4 the northwest?

5 A. (By witness Price) I can't tell you if they're
6 in the vulnerable area or the nonvulnerable area. I can
7 just tell you that they're in the northwest.

8 Q. Do you know how many of them were in the
9 southeast, or did you break it down that far?

10 A. (By witness Price) I did not. Almost -- We did
11 not include the southeast pits in this estimate. I had a
12 staff member take all of the -- and before we got this is,
13 we actually have a database -- The 2003 rule required
14 registration, and this is what we roughly counted in the
15 pits that were registered at the district, unlined pits
16 that were registered at the district. And so we had a
17 staff member that just counted these pits. And that's an
18 estimate, but I think it's within plus or minus 10 percent.

19 I do believe that there are -- you could probably
20 add another 200 to that for the southeast. That would be a
21 guess on my part.

22 Q. And then for the location of those 200 in the
23 southeast, those are largely going to be in the exempted
24 area that's -- the 3221 exempted area?

25 A. (By witness Price) That is correct,

1 Commissioner.

2 Q. I guess maybe I'll look at -- Oh, this is Mr. von
3 Gonten's testimony. I guess that would be a question for
4 him on Exhibit 12.

5 A. (By witness Price) Does Mr. von Gonten need to
6 sit down, or should he stand for your question?

7 Q. I only have a couple, so I think it's...

8 I was looking at page 19 in Exhibit 12.

9 A. (By witness von Gonten) Water wells located in
10 nonvulnerable areas?

11 Q. Right. And I guess what I was wondering was,
12 what -- is there any information on what the depth to water
13 was in these area?

14 A. (By witness von Gonten) No, Commissioner Olson,
15 only the general exhibit that I showed, that in the area of
16 San Juan County and Rio Arriba County, which is where most
17 of these water wells are located, the depth to groundwater
18 was less than 60 feet, 80 to 90 percent of the time.

19 I did not -- with this database I wasn't able to
20 query the information on that water well.

21 Q. Okay.

22 A. (By witness von Gonten) That information is
23 probably available on the State Engineer's database.

24 Q. Because I was curious whether these would meet
25 the siting criteria for potential burial on site. So

1 you're saying you don't have that information?

2 A. (By witness von Gonten) That information is
3 probably available. I did not -- with this software that I
4 was using I wasn't able to integrate, I was just able to
5 get the location plotted on this map.

6 Q. I guess maybe a similar question on page 27 of
7 Exhibit 12 as well, listing a lot of the water wells that
8 are in the exempted area in southeastern New Mexico.

9 A. (By witness von Gonten) Correct, I was not -- I
10 did not query the depth to water in these 64 water wells
11 either, for the same reason.

12 COMMISSIONER OLSON: Okay, I guess that's all I
13 have at this time.

14 EXAMINATION

15 BY CHAIRMAN FESMIRE:

16 Q. Mr. Price, going to Exhibit 12-37 again -- let me
17 start with 6-15, I'm sorry.

18 A. (By witness Price) 6-15?

19 Q. Yes. By my hearing under questioning from
20 Commissioner Bailey, did you say that that 400 confirmed
21 groundwater pit cases all came from unlined pits?

22 A. (By witness Price) Yes.

23 Q. And none of those were lined?

24 A. (By witness Price) Commissioner, I'm almost
25 positive that in 2005 when we looked at the database we

1 were looking for unlined pits, because it fitted into our
2 presentation for unlined pits, that's correct. I'm not
3 saying that there's not lined pits that haven't
4 contaminated groundwater, but in this particular case these
5 are unlined pits.

6 Q. Okay. And so the pictures you showed us of
7 failed liners, they wouldn't be included in this?

8 A. (By witness Price) Oh, no, sir. No, no.

9 Q. In Ms. Foster's cross-examination, she started
10 talking about the idea of having to haul from a well that
11 was located just across the section line from a facility.
12 Do you remember that line of questioning?

13 A. (By witness Price) I do.

14 Q. Why would an operator want to haul to the
15 facility from a well that was close to that facility?

16 A. (By witness Price) Why would he?

17 Q. Yes.

18 A. (By witness Price) His disposal costs would be
19 extremely cheap compared to probably burying it on site if
20 he's right next door to it.

21 Q. So it would be cheaper for him to haul it to the
22 next section than to bury it on site?

23 A. (By witness Price) Absolutely.

24 Q. So this could be kind of a self-correcting
25 problem out to some radius where the costs to dig and haul

1 are less than the costs to bury on site, right?

2 A. (By witness Price) Yes.

3 Q. And I know you probably haven't done anything
4 like that, and would you be able to give an estimate of how
5 far that was under the --

6 A. (By witness Price) No, we actually didn't do
7 that. But I will say that my lower number, \$30,000, was a
8 90-mile haul. So that was on the low end. We had -- we
9 actually had a surface waste management operator give us
10 that number if everything went right and so forth, so
11 forth. And then on the other side it could have went up to
12 \$80,000. And so that number could be a lot cheaper,
13 depending upon if they're closer.

14 Q. Okay. So there really wouldn't be a situation,
15 under most circumstances, where you would have -- it would
16 be more expedient or less expensive for the operator to
17 leave the -- to dig and haul and leave the material in
18 place when he's got a close facility; is that correct?

19 A. (By witness Price) Oh, that's correct.

20 Q. Okay. Now the slide show that you showed at the
21 beginning of your testimony, what was the purpose of that
22 slide show?

23 A. (By witness Price) It was just to give a general
24 overview and set the stage for what this whole case is
25 about. It's about pits and no more, no less. And we were

1 just trying -- It's like Mr. von Gonten had testified, we
2 were trying to show that we have problems out there that we
3 just need to address.

4 Q. Now, a lot of those pictures in the slide show,
5 and I think you said there were 106, they showed torn
6 liners. How would this rule address those torn liners?

7 A. (By witness Price) How does this rule address
8 them?

9 Q. How does the proposed rule address the torn
10 liners?

11 A. (By witness Price) Well, if you have a torn
12 liner, there's specific prescriptive language in there that
13 indicates that they have to do something right away.

14 Q. Are most of the liners out there 20-mil, like you
15 were proposing in this?

16 A. (By witness Price) No.

17 Q. No?

18 A. (By witness Price) No, they were not.

19 Q. So --

20 A. (By witness Price) They were less than --
21 They're less than 20-mil.

22 Q. Okay, so this rule would make those liners
23 sturdier in essence; is that right?

24 A. (By witness Price) Minimum of 20-mil, that's
25 correct.

1 Q. Okay. And a lot of the failures, I think,
2 according to the pretrial statement and some of the
3 exhibits, you're going to show that there have been an
4 awful lot of failures in 12-mil liners, aren't you?

5 A. (By witness Price) Yes.

6 Q. And that is a significant part of what the
7 problem is now, is it not?

8 A. (By witness Price) Yes, it is.

9 Q. Let's talk about the MOU with the -- up in the
10 northwest, with the Environment Department that allows them
11 -- that allows operators to haul to -- is it -- I keep
12 wanting to say hazardous waste, but it's not. It's
13 industrial waste, or is it --

14 A. (By witness Price) It's industrial waste.

15 Q. Industrial waste facilities.

16 A. (By witness Price) Yes.

17 Q. How long as that been in place?

18 A. (By witness Price) The MOU that we have now?
19 Approximately seven months.

20 Q. Okay, and how long is it for?

21 A. (By witness Price) Well, it's for until next
22 April.

23 Q. Okay. So it was essentially a year from the time
24 it was put in place?

25 A. (By witness Price) Yes.

1 Q. And to take advantage of that, the operator has
2 to apply through the OCD, does it not?

3 A. (By witness Price) Correct.

4 Q. How often has that been done?

5 A. (By witness Price) I would have to ask one of my
6 staff members who handles that.

7 Q. Okay, who should I ask?

8 A. (By witness Price) Mr. Jones.

9 Q. Mr. Jones, okay.

10 If there is not a facility available within 100
11 miles, what happens to the -- Let's use, for example, the
12 colored circle, 100-mile-radius circles that you had on
13 there.

14 A. (By witness Price) Yes.

15 Q. If there is not a facility available, what
16 happens to the waste?

17 A. (By witness Price) Well, they have another
18 option. They could go into the option of deep-trench
19 burial.

20 Q. Okay. So if a facility never becomes available
21 in the northwest away from 100 miles from the out-of-state
22 facilities, what happens to the waste?

23 A. (By witness Price) I'm sorry, repeat the
24 question, because I --

25 Q. Okay. If a facility never gets built in the

1 northwest and the operators are not within a hundred miles
2 of the out-of-state facilities --

3 A. (By witness Price) Uh-huh.

4 Q. -- what happens to the wastes that they generate
5 at a drilling site?

6 A. (By witness Price) Well, they would be allowed
7 to deep-trench bury.

8 Q. If they meet the other siting criteria?

9 A. (By witness Price) Oh, yes, of course.

10 Q. Okay. So if a facility doesn't get built, then
11 they have that option?

12 A. (By witness Price) They do have that option.

13 CHAIRMAN FESMIRE: I don't think I have any other
14 questions.

15 COMMISSIONER BAILEY: I have one comment to
16 follow up.

17 CHAIRMAN FESMIRE: Commissioner?

18 FURTHER EXAMINATION

19 BY COMMISSIONER BAILEY:

20 Q. (By Commissioner Bailey) If no facility is built
21 in the northwest, the option is to bury it in a deep-trench
22 pit on site, if the siting requirements are met and if the
23 surface owner gives permission, according to your proposed
24 rule?

25 A. (By witness Price) Yes.

1 Q. If the surface owner refuses permission, what
2 happens?

3 A. (By witness Price) They can't bury it on his
4 property.

5 COMMISSIONER BAILEY: Thank you.

6 CHAIRMAN FESMIRE: Who is the -- Oh, go ahead.

7 COMMISSIONER OLSON: No, go ahead. Follow up on
8 that question.

9 FURTHER EXAMINATION

10 BY CHAIRMAN FESMIRE:

11 Q. Who is the surface owner for most of the wells in
12 the northwest?

13 A. (By witness Price) BLM.

14 Q. Have they indicated that they will allow a deep-
15 trench burial under the proper conditions?

16 A. (By witness Price) Yes.

17 CHAIRMAN FESMIRE: Commissioner Olson?

18 FURTHER EXAMINATION

19 BY COMMISSIONER OLSON:

20 Q. Yeah, just to follow up a little, I guess on the
21 -- when we were looking at the issue of the cost of deep
22 burial versus going to another facility close by, as the
23 Chair was mentioning, is there any estimate of the cost of
24 complying with the proposed rule for deep-trench burial?

25 A. (By witness Price) Commissioner, are you asking

1 us if our agency did a cost on that?

2 Q. Yeah, I was wondering --

3 A. (By witness Price) No, we --

4 Q. -- what approximate cost would be for the deep-
5 trench burial versus potentially disposal facility.

6 A. (By witness Price) We did look at that one day.
7 We were in our conference room, we were kicking around
8 numbers. And I would -- I think one of my staff members
9 can probably come up with that. I don't have the number
10 for you right now. But we had a special meeting on that,
11 we kicked these numbers around, and I remember that we had
12 discussed it. And I believe either Brad Jones or Ed Hansen
13 or Carl Chavez will have that number. I don't have the
14 number.

15 Q. Okay. So Mr. Chavez --

16 A. (By witness Price) I think Carl -- or Mr.
17 Chavez, will have that number.

18 Q. Okay.

19 A. (By witness Price) Yeah.

20 Q. And then --

21 CHAIRMAN FESMIRE: We sure are loading up Mr.
22 Chavez. He's last.

23 Q. (By Commissioner Olson) And then it mentioned
24 the out-of-state facilities. Are they constructed the same
25 as the New Mexico facilities?

1 A. (By witness Price) Once again, Mr. Chavez will
2 check that out. And I don't have any answer for you, but
3 he can answer that.

4 CHAIRMAN FESMIRE: Every time you say something,
5 Mr. Chavez writes something else down.

6 COMMISSIONER OLSON: That's all I have, thanks.

7 CHAIRMAN FESMIRE: Mr. Brooks, do you have a
8 recross?

9 MR. BROOKS: Redirect, your Honor.

10 CHAIRMAN FESMIRE: I'm sorry, redirect.

11 MR. BROOKS: Brief, briefly. Attorneys always
12 say that.

13 REDIRECT EXAMINATION

14 BY MR. BROOKS:

15 Q. Mr. Price, it's just been mentioned that you had
16 referred a number of things to Mr. Chavez. Actually, Mr.
17 Chavez is just out there chomping at the bit to get up here
18 on the stand?

19 A. (By witness Price) Yes, he is.

20 Q. Okay, I'm going to be very brief.

21 First of all, with regard to the slide show of
22 the pits that were shown, you testified that you did not
23 know what if any enforcement action was taken; is that
24 correct? Is that your testimony?

25 A. (By witness Price) That's correct.

1 Q. And you were not testifying that none had been?

2 A. (By witness Price) I was not.

3 Q. Would that be a district responsibility?

4 A. (By witness Price) Yes.

5 Q. Involving, no doubt, our enforcement attorneys?

6 A. (By witness Price) Yes.

7 Q. But not involving the Environmental Bureau in the
8 Santa Fe office?

9 A. (By witness Price) Generally not.

10 Q. Okay. Now the Chairman asked you, with regard to
11 those pictures, was not the requirement of liner thickness
12 relevant, so I won't re-ask that question that the Chair
13 asked. But were there a number of pits in that slide show
14 that had defective anchoring of the pit liners?

15 A. (By witness Price) Yes.

16 Q. Does our new rule have some specific prescriptive
17 requirements about how liners are to be anchored?

18 A. (By witness Price) Yes.

19 Q. In your opinion, would that new rule, if it were
20 followed, obviate some of the problems that existed with
21 some of those photographs?

22 A. (By witness Price) Absolutely.

23 Q. You were asked a number of questions about the
24 existing landfills.

25 A. (By witness Price) Yes.

1 Q. And I believe you said that there are two of the
2 landfills that are not lined?

3 A. (By witness Price) In the southeast.

4 Q. And those are two of the four that OCD permitted?

5 A. (By witness Price) Yes.

6 Q. Were those permitted by hearing order?

7 A. (By witness Price) Yes.

8 Q. And does that mean that the specific facts would
9 have been considered at a hearing before either a Division
10 Examiner or the Commission?

11 A. (By witness Price) Yes.

12 Q. I believe you also testified to your knowledge
13 about the groundwater, that there is not groundwater in the
14 vicinity of those -- protectible groundwater in the
15 vicinity of those facilities?

16 A. (By witness Price) Well when you say in the
17 vicinity, I don't think I meant that. I said directly
18 underneath them.

19 Q. Okay, very good. Now for new landfills, the
20 standards are set forth in part 36?

21 A. (By witness Price) Yes.

22 Q. Are those standards considerably more protective
23 than those we impose for deep-trench burial under the
24 proposed part 17?

25 A. (By witness Price) Yes.

1 It's certainly -- Commissioner Bailey had talked
2 about geological conditions, and of course it could vary
3 either way. And so that's why --

4 Glenn, back up to -- that's why we wanted to
5 leave some leeway here before it actually hit groundwater,
6 and also for porosity changes.

7 Next slide.

8 Q. Now -- Well, before you go on to the next slide,
9 go back to the other slide.

10 A. Go back.

11 Q. At that rate of flow that you're showing there,
12 how long would it take it to reach the 30-foot-down level?

13 A. Okay, I've got a slide that shows that.

14 Q. Okay, well, I'll wait.

15 CHAIRMAN FESMIRE: You'll wait and ask that after
16 it's answered?

17 THE WITNESS: Next slide.

18 And this is just another porosity range for
19 sediments, pretty typical. Used 20-percent porosity.

20 And once again, that's just another permeability
21 for sediments.

22 Next slide.

23 This right here is just a typical volumetric
24 water content versus pressure head, and this is typical,
25 this is just conceptual. What I just want to point out

1 here is that when the saturated soil that you saw on the
2 blue begins to drain down a little bit, then the volumetric
3 water content decreases. And of course as it decreases,
4 then the pressure head decreases here.

5 Next slide.

6 And then what I want to show here, as your
7 pressure head begins to decrease, then your hydraulic
8 conductivity changes by the order of magnitudes of tens.
9 And so basically when you're saturated, yeah, pretty good,
10 you know, the flow is fairly fast. And then when it drains
11 down it slows down. Doesn't stop, but it does slow down
12 drastically.

13 Now here is -- I had one of the staff members,
14 Leonard Lowe, actually, one of our engineers, did some
15 estimated time of fluid movement.

16 Go to the next slide real quick.

17 And here are the equations he used. They're just
18 typical Darcy's equations, a velocity equation, nothing
19 fancy here. Steady-state, basic hydrology principles.

20 Back up a slide now.

21 And what we calculated is, it could take six days
22 to go 30 feet, it could be plus and minus several days
23 there, and then -- but the next 20 feet could take as much
24 as 400 days. And so we feel pretty comfortable with the 50
25 feet.

1 Next slide.

2 Q. (By Mr. Brooks) Now that was the slide -- that
3 last slide --

4 A. Go back.

5 Q. -- was the slide you were referring to where you
6 said that you were going to show, and you estimate it would
7 take six days to get down to 30 feet?

8 A. That's an estimate.

9 Q. And then 400 days to get down the remaining 20
10 feet to 50 feet of groundwater?

11 A. That's correct.

12 Q. So if you allowed pits at a higher -- or closer
13 to groundwater, the -- based on this work would you
14 conclude that the contamination could reach those -- the
15 groundwater, from pits closer to groundwater, a whole lot
16 faster, not just proportionately faster?

17 A. Well, the equations we used were linear. But to
18 answer your question, the closer you put the pit to
19 groundwater, then the higher probability you're going to
20 have, if you have a leak, that you impact groundwater.

21 Q. Go ahead.

22 A. Next. Next one.

23 Now here's a real-time example. This Chesapeake
24 Williams 14 Federal Number 1 actually shows up on one of
25 our drilling pit slides where we say they have contaminated

1 groundwater. This particular one -- and I'm going to talk
2 a lot about chloride enveloping in the vadose zone.

3 But what I want to show you here is, here's an
4 example where the 50-foot safety net actually worked. Now
5 we did have groundwater contamination, we had an impact.
6 But once the head was taken off, as you can see how these
7 chloride levels have -- it's really high. Down here at
8 borehole number 3 we've got 5000 parts per million. Now
9 that's in the soil. Just a general rule of thumb, if you
10 multiply that times 5 you'll get pore water concentration.
11 As you can see, that's quite a bit higher than the
12 standards.

13 Next slide.

14 This is just groundwater depth of between 50 and
15 60 feet. As you can see, the 50 foot acted as a temporary
16 safety net.

17 Next slide.

18 Now we did have an impact here, but the impact
19 was very slight. And since then, this is beginning to
20 clean up. Of course, we've got monitor wells in here to
21 monitor the progress.

22 And so my point is that in this particular case
23 it was closed, but the 50 foot did -- even though it
24 impacted groundwater, it did provide us enough of a safety
25 net that we had a very slight impact. Unfortunately, we

1 had to put monitor wells in, and we've got to continue to
2 monitor this.

3 Next slide.

4 Now, 50-foot-to-groundwater justification. Of
5 course, this was a task force nonconsensus item. Values
6 ranged from two to 100 feet. This agency would certainly
7 like 100 feet better than 50, but 50 feet has seemed to
8 work in the past. For example, 50 foot has been
9 established ranking criteria since 1993. Fifty feet
10 appeared in the nonvulnerable area criteria in R-7940. Now
11 we think that might have been inappropriately applied,
12 because it's only been applied for benzene and not for
13 chloride, and so that's why I have it in red there.

14 The new part 36 surface waste management facility
15 rules uses 50 feet as a siting criteria to ponds. OCD
16 district policy uses 50 feet as a dig-and-haul scenario in
17 the southeast, not necessarily in the northwest.

18 A big one here is, the task force told us that
19 the 50 will provide industry the continued use of pits. If
20 we went to 100 foot, they felt that it would overburden the
21 amount of closed loop systems out there and they just
22 simply wouldn't have a closed loop system or a company to
23 supply a closed loop system, and they just would not be
24 able to drill.

25 And so the burden of 50 feet actually was placed

1 upon the industry when there was a nonconsensus, and so we
2 think 50 feet will work as long as we have the new
3 prescriptive pit and design installation requirements.

4 Now, all bets are off if we're not given that.
5 We feel that we have the new liner requirements, the
6 insulation requirements, using a minimum of 20-mil liner,
7 and the new monitoring requirements, then we feel that the
8 50 feet will provide a safety net in the case of a pit
9 liner failure.

10 Next slide.

11 Q. Now, Mr. Price, are there quite a lot of areas in
12 southeastern New Mexico where groundwater is deeper than 50
13 feet but shallower than 100 feet?

14 A. Yes.

15 Q. So using a 50-foot -- using a 50-foot rule rather
16 than a 100-foot rule will provide a lot more opportunity
17 for industry to operate with pits, as compared to 100 foot?

18 A. That's correct.

19 Q. Continue.

20 A. Next slide. Conclusions, the case for the 50-
21 foot separation. The rule requires stringent prescriptive
22 controls, the new proposed rule. Fifty foot is widely
23 used. Fifty-foot requirement would cover most sensitive
24 areas such as river bottoms.

25 And -- Now there's a mistake here, I believe.

1 The rule requires -- Oh, no. The rule requires dewatering
2 in 30 days and closed in three months. That's wrong.
3 Please correct your slides, that's supposed to be six
4 months.

5 So we feel like if they get the water off in 30
6 days, remove the source, then we feel very confident that
7 50 feet is a good number.

8 And of course the new rules require that all pits
9 be required to be sampled in the vadose zone. That way, in
10 the future we'll know that these things -- if for example
11 they have a failure, then we're going to know how deep it's
12 gone and so forth. And so we feel that sampling is a very
13 important part of the new rule.

14 Next slide.

15 So, what does the 50-foot separation do for us?
16 It does not, and I want to repeat, does not provide long-
17 term protection to groundwater if a source is available.
18 We're talking about the liquids are still there. It does
19 not provide a long-term protection.

20 Next slide.

21 We do think that the 50-foot separation should
22 provide a short-term protection of groundwater if the new
23 prescriptive methods are employed. Now I'm talking about
24 the new liners, the new ways of installing liners, new
25 monitoring requirements, and the fact that we'll be able to

1 sample underneath these pits now, to know whether they've
2 actually contaminated the vadose zone or not.

3 Okay, I would like to go ahead and do my next two
4 and then cross, if that's okay?

5 Q. Yes, please do.

6 A. Infiltration. This is -- We're going to be
7 talking a lot about modeling. We're going to talk about,
8 in New Mexico is there actual infiltration and is there
9 aquifer recharge? You'll hear some specialists or some
10 people say that there is no aquifer recharge, you'll hear
11 some say that it's limited.

12 But anyway, this is just one slide and I just
13 want to point out, I had presented this in the surface
14 waste management rule that this was a report done by the
15 Geological Survey, water source, in conjunction with the
16 State Engineer's Office, and they basically -- a 20-year
17 study, estimated a recharge of approximately a quarter to a
18 half inch per year.

19 In their long-term study it turned out that .38
20 inches per year was a good number. I might add that in all
21 fairness here is that there is -- there is some controversy
22 on whether this recharge -- how this recharge occurs and
23 where it occurs in depressed areas or focal playa-lake
24 areas, or whether it's diffuse on flat land, so forth, or
25 whether there's plant growth. So there's a lot of

1 variability in this.

2 But the bottom line is, yes, we do have recharge
3 in New Mexico and it does happen.

4 One of the observations that we've noted is that
5 we have data showing the rise of groundwater in monitor
6 wells located in Lea County. We have a few wells showing a
7 recharge of the local aquifer to rise as much as 10 feet.
8 And I know in one instance there was a playa lake nearby,
9 which may be attributed to that, but then again we had some
10 other areas where it rose nine, 10 feet, and it was on flat
11 land and we couldn't really tell if it was influenced
12 except a diffuse -- this normal infiltration. I will say
13 it was probably in a sandy area, though, which should be
14 expected.

15 Other wells are actually known to decrease during
16 this time, so it's a very dynamic situation out there.

17 Now the next slide I have is a determination of
18 chloride donation, and I would like to go drive, if that's
19 possible, down there. It would help my presentation if I
20 could be at the computer.

21 MR. BROOKS: Yes, the witness is requesting to
22 sit at the computer to give his testimony. Will that be
23 acceptable to the Commission?

24 CHAIRMAN FESMIRE: Is there any objection from
25 the attorneys?

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1 MR. CARR: No objection.

2 MR. HISER: No objection.

3 CHAIRMAN FESMIRE: Okay. Go ahead, Mr. Price.

4 THE WITNESS: Are you going to be able to hear me
5 okay?

6 COURT REPORTER: Yes, sir.

7 THE WITNESS: I have a tendency to talk loud
8 because I'm hard of hearing.

9 Okay, in the proposed rule we have proposed to
10 use 250 milligrams per kilogram as a soil screening level
11 for a chloride delineation number.

12 Once again, I want to absolutely make sure that
13 everyone understands that this is a general delineation.
14 It is not necessarily for cleanup. And I want to show you
15 some real-time excellent data that we have. There's a
16 company, Rice Engineering, down in the southeast part of
17 the state, has a very, very large saltwater system in which
18 they dispose of saltwater.

19 It's -- the infrastructure of that system --
20 approximately five, six, seven years ago, began to fail,
21 and we began to experience a lot of contamination.

22 Q. (By Mr. Brooks) Okay. Mr. Price, before you go
23 on I want to make sure that everyone understands the
24 concept that you're testifying about here. And to do that
25 I would like to refer to the proposed rule.

1 The proposed rule requires testing of the soils
2 beneath the temporary pit, correct?

3 A. Correct.

4 Q. And that would be done at the time of closure?

5 A. Yes.

6 Q. Okay. And one of the screening levels which the
7 operator is required to identify is 250 milligrams per
8 liter of chloride?

9 A. Yes.

10 Q. Now if the operator identifies more than 250
11 milligrams per liter of chloride, and it's more than the
12 background --

13 A. Yes.

14 Q. Now if it's less than the background he doesn't
15 have to do anything, right? If it's over 250 milligrams
16 per liter, but the background is over 250 milligrams per
17 liter --

18 A. They can stop --

19 Q. Okay, but if the background is less than 250
20 milligrams per liter --

21 CHAIRMAN FESMIRE: Mr. Brooks, could you speak
22 up?

23 Q. (By Mr. Brooks) If the background is less than
24 250 milligrams per liter, but the operator identifies more
25 than 250 milligrams per liter, what does the rule require

1 the operator to do?

2 A. Delineate.

3 Q. And what does that mean?

4 A. That just means trace or chase the system down,
5 either with a shovel or a hoe, a backhoe, whatever, just to
6 find out how far the contamination has gone.

7 Q. And is he required to report to the Division?

8 A. Yes.

9 Q. Then the rule says, I believe, if the operator or
10 the Division determines that a release has occurred, then
11 the operator shall comply with Rule 116 and Rule 19, as
12 appropriate.

13 A. Yes.

14 Q. Now those rules do not necessarily -- let me --
15 Do those rules necessarily require in every case that the
16 operator do a complete cleanup?

17 A. No.

18 Q. So then the 250-milligram-per-liter standard, is
19 that merely a standard for determining whether the operator
20 has to investigate and report, as opposed to a standard for
21 determining whether the operator has to clean up?

22 A. Correct.

23 Q. Okay. And that basically is what you're saying
24 when you say that it's a delineation standard and not a
25 cleanup standard; is that --

1 A. Yes.

2 Q. All right. If I've misstated the concept in any
3 respect, please clarify it, because I had great difficulty
4 understanding it myself.

5 A. You were very good, that's correct.

6 MS. FOSTER: Commissioner Fesmire, again I would
7 state my objection that -- it's a standing objection based
8 on what Mr. Fesmire -- Mr. Brooks just stated. He
9 believes, he himself, that -- in the questions that he's
10 making, he is stating -- making statements that he's asking
11 the witness to agree to, and that is really a cross-
12 examination format, not a format used on direct
13 examination.

14 CHAIRMAN FESMIRE: Mr. Brooks, would you lead
15 your -- except for foundation matters, would you limit your
16 questions to nonleading questions, please?

17 MR. BROOKS: I will endeavor to do so, Mr.
18 Chairman.

19 CHAIRMAN FESMIRE: I'm sure Mrs. Foster -- Ms.
20 Foster will correct you if you don't. In other words, I
21 sustain the objection.

22 THE WITNESS: Can I move on?

23 Q. (By Mr. Brooks) Proceed.

24 A. Okay. A number of years ago -- I say a number of
25 years ago, this is probably around 2000 or so, Rice

1 Engineering -- once again, they came in with a generic
2 client to try to -- and they have hundreds of these sites.
3 We have probably logged in -- I'm guessing 500 to 700 of
4 these type sites. Not all of them have contaminated
5 groundwater, but in order to expedite the process --
6 they've done an excellent job, they've spent lots of money,
7 they're doing an investigation, cleaning it up and
8 rebuilding the infrastructure. It's been a win-win between
9 the agency and the company and for the environment.

10 One of the things that we try to scratch our
11 heads and try to figure out is, how do we determine, just
12 by taking a few samples of groundwater, the probability
13 that groundwater is going to be contaminated?

14 And so some time ago we described that we would
15 use some sort of simple trend analysis. And what I mean by
16 trend analysis, and I'll just kind of -- if I can draw that
17 here, I'll just show you real quick.

18 Anytime on an upward trend, if you connect the
19 troughs that are going up -- let's see if that's going to
20 work or not -- you connect the troughs going up like this.
21 And then when this crosses over, that means the trend has
22 changed. And then you connect the troughs going down, and
23 you project them on down.

24 Now what we have found, and it's been fairly
25 accurate -- here, for example, is the groundwater standard,

1 right here -- we have found that anytime this trend line --
2 and actually this trend line should be a little bit higher
3 -- anytime this trend line is higher than -- when this
4 trend line is above standard, when it crosses where
5 groundwater is estimated to be, then we have a pretty good
6 idea that groundwater may be impacted -- and I'll say may
7 be impacted -- then that would further cause another
8 investigation.

9 And so in this particular case, indeed, they
10 found groundwater at 33 feet. It was impacted with
11 chlorides.

12 Now the industry has proposed that this
13 delineation number stop at 5000 parts per million, and I
14 just want to show you in this particular case, as you can
15 see, these are really low numbers here, all of these are
16 low numbers, yet we've still got a groundwater impact.

17 Now admittedly this particular site, if I
18 remember right -- we've got hundreds of these -- this was a
19 slight impact, and it certainly wasn't anything really
20 major.

21 Going to the next slide, here's another example.
22 Once again, if you draw a trend line over the troughs you
23 can see that the trend is clearly up, 250 parts per million
24 would be about down here, and you can see that if you --
25 groundwater estimation -- if you estimate ground- -- for

1 example, if you estimate groundwater at 80 feet, for
2 example, then you can see the trend line is above the
3 standard, and there's a higher probability that you can get
4 contaminated groundwater. In this particular case,
5 chloride impact to groundwater was encountered at 105.

6 Now all of these are Rice's reports.

7 And I think what's extremely important when you
8 chase chlorides, whether it's from -- I showed you a
9 drilling pit a while ago -- whether it's from a drilling
10 pit, a single source, a single-time event, or even a
11 multiple release, we find this enveloping taking place, we
12 find this oscillation all the time. And if --

13 Q. Now let me stop you just a minute, Mr. Price.
14 What are you talking about when you say enveloping?

15 A. Well, as you can see, the oscillation that's
16 occurring, we see that all the time. And you can see, for
17 example, here where it started off at 6000 parts per
18 million, and it went all the way down to 1500 parts per
19 million. An one might say, Well, there's a decreasing
20 trend here, so we can stop.

21 But as you can see, it popped right back up and
22 went all the way up to 9000, went all the way up to 11,000,
23 and then groundwater was impacted at 105 feet.

24 The reason this is low, most likely is, you're in
25 the water and it's diluted.

1 Q. Now is this one plume of chlorides that's moving
2 down through the --

3 A. I can't answer that. I don't know the answer to
4 that, that's not determined. This was at a junction-box
5 site, the Justis H-2, and so you can't really answer that.

6 But I can show you -- I do know that one-time
7 releases repeat this pattern. And so we see this
8 enveloping happening all the time.

9 Now I think what's really important here, if 5000
10 parts per million is the standard where they stop -- and
11 that's what the industry is proposing -- then we would see
12 the first 10 feet. And then when we got here we would have
13 to stop. We'd stop there, we'd stop there, we'd stop
14 there, we'd stop there, we'd stop there.

15 And so basically, we would not have the ability
16 to chase this down to determine if the groundwater is
17 contaminated. And as you can see, groundwater has been
18 contaminated.

19 And so that's why we feel very confident that 250
20 parts per million has been used by us in the past. It's a
21 very good number. And as you can see, if we go to anything
22 higher than that, then basically we tie the industry's
23 hands -- I'm sorry, we tie the agency's hands on allowing
24 us to determine if groundwater has been impacted.

25 Q. Now Mr. Price, is this enveloping typical of the

1 way a chloride plume moves through the vadose zone?

2 A. Yes, we see it over and over and over.

3 Q. And given this enveloping, is a relatively low
4 chloride number such as 250 p.p.m. in one detection
5 location consistent with a probability of a considerably
6 higher number at a deeper level?

7 A. It's possible to see false negatives like that.

8 Q. And could that occur at any level where you test
9 it?

10 A. Yes, yes, it will. We've got tons of data that
11 prove that.

12 Now here's a really interesting one. This is
13 where you have this -- you have an uptrend and then you
14 have long-term downtrend. And once again, if you take 250
15 parts per million and if you -- let's say you think
16 groundwater is in the area of 70 feet, for example. If
17 this trend line is above the standard, then we have found
18 that -- and this really works good. Now it's not -- it's
19 not without its faults. And I will tell you right now,
20 don't try this on the stock market, it's not going to work.

21 (Laughter)

22 THE WITNESS: You'll --

23 Q. (By Mr. Brooks) It is often applied, though?

24 A. You'll lose money. But anyway, we found that
25 it's just a good technical tool. It's not without its

1 faults.

2 But here's another example. If you use 5000, we
3 stop right there, we stop right there. We'd stop there,
4 we'd stop there, there. And as you can see all the way
5 down, and we have groundwater impact at 75 feet. And so
6 once again we have this impact here.

7 Q. Would determining a trend line require several
8 observations at different levels?

9 A. It generally requires a minimum of two troughs or
10 two peaks.

11 Q. And in your opinion, is a trend line a more
12 accurate predictor of the levels of contamination that will
13 reach groundwater than is a single observation?

14 A. Yes.

15 Q. Continue.

16 A. Now this one here is tough. You can't -- you
17 know, you can't really determine what's going on here. I
18 guess what's significant here is that you have 6000, and
19 then the next one is 1500. And so we would actually -- if
20 the standard was higher than -- if the standard was 5000,
21 then we would stop there. And of course once again, they
22 did find that this had a groundwater impact, so...

23 Here's another good one, connecting, see where
24 the trend lines went up. And if you -- of course, this is
25 a guesstimate -- you know, if you have reasonable data to

1 show that groundwater is at a certain depth out here, you
2 take 250 parts per million, you draw this line. And then
3 if we have an estimated depth, as you can see, the trend
4 line is above the standard, so chances are you're going to
5 impact groundwater. Once again, it's not an exact science,
6 it's just a tool that we use. And once again you can see
7 here that until you get down to this 30 feet, does it
8 exceed the 5000 parts per million?

9 And so almost every one of these cases that I've
10 showed you is that the agency would not be able to
11 determine if groundwater is impacted if we have a higher
12 delineation number than what we're proposing for 250.

13 Q. Now Mr. Price, given that the -- according to
14 your testimony, the chloride levels at lower levels in the
15 vadose zone could be considerably higher than that detected
16 just below the pit, could you argue for -- could you argue
17 for a lower delineation level than 250 parts per million?

18 MS. FOSTER: Objection.

19 MR. BROOKS: Okay, let me rephrase it.

20 CHAIRMAN FESMIRE: I'm assuming you mean leading.

21 Q. (By Mr. Brooks) Based on your presentation,
22 could you say scientifically that you would be justified in
23 imposing a delineation level actually lower than 250 parts
24 per million?

25 A. On drilling pits I would say no. And the reason

1 is, is the -- that's a good question. I'd like to address
2 that.

3 Q. Okay, go ahead.

4 A. I would say not. I think 250 is the number, it's
5 a good number, and I'll show you why here.

6 First of all, let me finish this slide up here.
7 Chloride levels can cycle in the vadose zone, as we can
8 see.

9 False negatives are very common.

10 250 milligrams is a good conservative number. It
11 is based on numerous sampling events.

12 And a high chloride level standard may stop
13 delineation prematurely and may prevent discovery of
14 groundwater contamination.

15 Now I want to address what you had just said.
16 I'm going to have to go to like an Excel spreadsheet and --

17 CHAIRMAN FESMIRE: Mr. Price --

18 THE WITNESS: Yes?

19 CHAIRMAN FESMIRE: -- if you provide that
20 spreadsheet, has it been provided to counsel?

21 THE WITNESS: No.

22 CHAIRMAN FESMIRE: Okay.

23 THE WITNESS: It's just a talking point where
24 I'll back something out. I can tell you what it is, but
25 graphically I'll be able to explain it a lot better --

1 CHAIRMAN FESMIRE: But you're not going to
2 attempt to -- you're not going to attempt to get it in
3 evidence?

4 THE WITNESS: I'm sorry?

5 CHAIRMAN FESMIRE: You're not going to attempt to
6 get it in evidence, Mr. Brooks?

7 MR. BROOKS: I wasn't -- didn't even know about
8 it until Mr. Price raised it, so I did not plan to offer it
9 in evidence, no.

10 CHAIRMAN FESMIRE: Okay. I will allow you to use
11 it as a demonstrative exhibit, but it won't become part of
12 the record.

13 THE WITNESS: Okay, very good. And I need to --
14 (Off the record)

15 THE WITNESS: I think I can just graphically do
16 this. We'll just type in 250 parts per million. That
17 would be the standard that we're wanting -- Now I will put
18 a number of five in, and I'll explain all of these numbers,
19 and I'll put a number of what I'd call the -- call it the
20 Hiser number, and I'll put another number in here.

21 Now I want to get -- I'm going to -- I just have
22 to talk this through.

23 If you take a soil sample of 250 parts per
24 million on a -- I say a drilling pit, which is generally a
25 half acre or less -- if you multiply that times five -- Oh,

1 I'm sorry, let me do this. If you multiply that times
2 five, then you get a number of 1250, and let me explain
3 that.

4 Five is the default number that EPA would use --
5 If you have soil that's got 250 parts per million chloride
6 in it, you can multiply it times five. Then your pore
7 water concentration that's actually -- that's in the vadose
8 zone, that's in the water, is about 1250 parts per million.
9 Your pore water concentration is always higher than the
10 soil concentration.

11 This five is the default number that you take the
12 dry bulk density, 1.5, divided by .3 for the porosity,
13 that's an EPA default number. It can vary.

14 And then you can take what I call the Hiser
15 number where you divide it by 20, which would be a DAF of
16 20. You come up with 62.

17 Now what is 62? Why is that significant? That
18 is the normal background level that we see in the Ogallala.
19 As a matter of fact, I think Mr. -- Dr. Dan Stephens will
20 show in his presentations that actually the Ogallala is
21 about 66.

22 And so my point here is that I was asked if we
23 should go to a lower number. I don't think so. I think
24 250 would be very protective of the groundwater, and it
25 wouldn't exceed the background standard. And that's the

1 reason I'm saying that I think 250 -- we don't need to go
2 any lower than 250, 250 should be a good number.

3 And I really had to do that graphically. It
4 would be hard to do that any other way.

5 I believe that -- so everyone can get a copy of
6 that. And --

7 Q. (By Mr. Brooks) Does that conclude your
8 presentation --

9 A. That does conclude.

10 Q. -- Mr. Price? Thank you.

11 Mr. Price -- Hold on one second here. Okay. Mr.
12 Price, were Exhibits 9, 10 and 10A prepared by you or from
13 published sources -- or assembled by you from published
14 sources?

15 A. Yes.

16 MR. BROOKS: Mr. Chairman, we will tender
17 Exhibits 9, 10 and 10A?

18 CHAIRMAN FESMIRE: Is there any objection?

19 MR. CARR: No objection.

20 CHAIRMAN FESMIRE: Exhibits 9, 10 and 10A will be
21 admitted to the record.

22 MR. BROOKS: Pass the witness.

23 CHAIRMAN FESMIRE: Ms. Foster, do you have any
24 questions of this witness?

25 MS. FOSTER: Not at this time.

1 CHAIRMAN FESMIRE: Mr. Hiser?

2 MR. HISER: I do. It will take me a minute or
3 two to put my head around them, though.

4 Let's see, we started with -- Mr. Price, your
5 exhibit started with 9; is that correct? And then went
6 forward?

7 Yeah, why don't you talk to the Chairman?

8 MS. FOSTER: Mr. Chairman, I actually do have one
9 or two questions, which I -- Could I ask them while Mr.
10 Hiser is getting ready for his cross-examination?

11 CHAIRMAN FESMIRE: Sounds like a pretty good use
12 of time.

13 MR. HISER: Thank you.

14 MS. FOSTER: Thank you.

15 CROSS-EXAMINATION

16 BY MS. FOSTER:

17 Q. Okay. Mr. Price, I would ask you to go to page
18 17 of your Exhibit 9, I believe it is.

19 A. Yes.

20 Q. Okay, I just wanted to make sure that I
21 understand that statement appropriately, and that statement
22 basically on that slide says that a 50-foot separation does
23 not provide long-term protection of groundwater if a source
24 is available. And when you're saying a source, that is a
25 continuing chloride source --

1 A. Yes.

2 Q. -- going down into the vadose zone --

3 A. Yes.

4 Q. -- correct?

5 A. Yes.

6 Q. All right. And again, when we're talking about
7 temporary pits, how long is a source on top of a location
8 in a temporary pit, under the new rule?

9 A. Under the new rule?

10 Q. Under your proposed rule for a temporary pit, how
11 long will you have chlorides --

12 A. After the rig -- Oh, I'm sorry.

13 Q. -- on location?

14 A. After the rig leaves, 30 days.

15 Q. Thirty days?

16 A. Right.

17 Q. So a source will only be available for 30 days,
18 in the temporary pit scenario --

19 A. Yes.

20 Q. -- correct?

21 And in order for it to migrate, you're assuming
22 in your scenario that you have a sufficient enough tear in
23 your liner to release a quantity of chlorides in the levels
24 that -- the 5000 level, correct?

25 A. Yeah -- Yes.

1 Q. And you're also assuming in your statements that
2 your groundwater has a porosity level of 10^3 , correct?

3 A. No, the 10^3 was the saturated hydraulic
4 conductivity of the vadose zone, 10^{-3} .

5 Q. 10^{-3} .

6 A. One foot per day.

7 Q. All right. And the 10^{-3} is assuming that you
8 have consistent materials in that vadose zone amount.
9 There's two vadose zone levels, if I'm correct. You have
10 the first 30 feet, and then you have your -- the line
11 there, and then the second 30 feet is a different porosity;
12 is that correct?

13 A. No, it's the same porosity and same homogeneous,
14 isotropic material.

15 Q. So you have homogeneous material throughout that
16 50-foot vadose zone --

17 A. Yes.

18 Q. -- is the assumption that's made in your
19 modeling?

20 A. Yes.

21 Q. And how is it again that you arrived at the 10^{-3}
22 level for porosity?

23 A. I wonder if you could go to the slide -- Right
24 there. Middle-of-the-road, semi-pervious material. Also I
25 can say that it's the same number that Ed Hansen used in

1 his modeling, and so it was close enough that I thought
2 that would be good to use. Obviously you can go this way
3 or you can go this way. There's no question about it, the
4 porosity could change, but --

5 Q. All right, is that number demonstrated in any
6 peer-reviewed literature, the use of that number for
7 modeling?

8 A. The answer to that question is yes, but not in
9 this presentation. You know, it is in our modeling. And
10 so -- you can ask our -- Ed Hansen how he came about that
11 number, and I think we can -- I think we can answer your
12 question.

13 Q. Okay, I will ask Mr. Hansen, then.

14 And then just -- my final question is, just
15 referring to the Rice Operating locations that you showed
16 several slides --

17 A. Yes.

18 Q. -- and I won't ask you to pull those up again.

19 A. Do you want them up, or -- ?

20 Q. No, no, no, that's okay. I just have one
21 question. And those slides -- or those locations all had
22 only a one-time release, correct?

23 A. I don't know the answer to that question. No, we
24 don't know that.

25 Q. Okay, so you don't know how long the release

1 period was, but --

2 A. We do not.

3 MS. FOSTER: Okay, thank you. I have no further
4 questions.

5 CHAIRMAN FESMIRE: Mr. Hiser, are you ready?

6 MR. HISER: Yes, thank you, Mr. Chairman.

7 CROSS-EXAMINATION

8 BY MR. HISER:

9 Q. Mr. Price, going back to your Exhibit 9, I think
10 slide 8, you presented an S-curve basically showing fluvial
11 sand. Aren't fluvial sands typically associated with
12 watercourses?

13 A. Once again, this particular slide is only for
14 conceptual viewing. It has nothing to do with the actual
15 hydraulic conductivity that I selected. It was only for
16 people to understand that if the volumetric water content
17 decreases, the pressure head changes --

18 And then the next slide, Glenn.

19 -- and then if the pressure head changes, then
20 the hydraulic conductivity changes drastically.

21 Q. Okay.

22 A. That's the only reason I put it up there.

23 Q. And then you presented us with a number of fluid
24 calculations in terms of the movement --

25 A. Yeah.

1 Q. -- and that bases around slide 11, I think. And
2 I have a couple questions about this, and they may not all
3 be tied specifically to this equation.

4 First of all, why did you use the 0.2 for the
5 unsaturated zone porosity, and isn't that more typical of
6 the porosity in a saturated zone than an unsaturate zone?

7 A. Good point, but let me show you why I did it.

8 Glenn, go to the slide where it shows that the
9 water has left the pit and gone down. Go back, back, keep
10 going -- Oh, right there.

11 The reason I used .2 is kind of worst-case. For
12 example, if I would have used something higher, then this
13 wetting front would have been up in here, somewhere.

14 Q. Yeah, but Mr. Price, are you not then assuming
15 that the pit has failed, and then assuming the pit has
16 failed on top of the already failed pit, and hence
17 accelerating your movement? Because before the pit fails,
18 this should be an unsaturated zone, should it not?

19 A. Oh, it would be unsaturated, yeah.

20 Q. So why then are you using a saturated zone
21 conductivity for the initial failure?

22 A. I did not integrate it from zero to 30 feet,
23 you're absolutely right, there would be some difference in
24 it. But if it was dry enough, then it would probably be
25 higher than the saturated hydraulic conductivity, starting

1 off. And then as the wetting front moves down, then it
2 would just continue to move. It's not unusual for us to
3 see water movement that fast. We've seen that before.

4 Q. But you would agree that at least initially the
5 porosity would be different than the .2 that was used?

6 A. Absolutely.

7 Q. How did you determine your K_{us} value?

8 A. Okay, once again that was 100 times -- two orders
9 of magnitude that I selected, and I basically picked it
10 knowing that where the saturated hydraulic conductivity is
11 1, it's not unusual to see two orders of magnitude for the
12 unsaturated hydraulic conductivity. It could be more,
13 could be less.

14 Q. Do you know what the water content would be at
15 that --

16 A. No --

17 Q. -- number that --

18 A. -- I didn't calculate it.

19 Q. Now in the calculation of the wetting front
20 travel time, did you use that also to calculate how fast
21 the contaminant or the chloride would travel with it?

22 A. Say that again.

23 Q. How did you calculate the different -- or was
24 there a difference in how you calculated the rate of travel
25 of the wetting front, versus the rate of travel of the

1 contaminants?

2 A. I used a saturated hydraulic conductivity of one
3 foot per day to calculate the rate of travel from the
4 surface down to 30 feet.

5 Q. Okay.

6 A. Right. And I divided by the porosity to get the
7 velocity, and then used the velocity to determine the
8 number of days that it would take.

9 Q. Okay, and it's your belief that it's the correct
10 way to do that?

11 A. I certainly do. I think it's one way of doing
12 it.

13 Q. Okay. And is it appropriate to use total
14 porosity for contaminant velocity if the soil is not
15 saturated?

16 A. Not necessarily. It could go either way.

17 Q. Now I think that you also presented some
18 inferences that you wanted to draw from wells in the area
19 of the Ogallala aquifer as to whether there is or is not
20 recharge; is that correct?

21 A. Right. Glenn, go to the --

22 Q. That may be in the next exhibit, Exhibit 10. I
23 think you said that you -- for example, OCD has data
24 showing the rise in groundwater monitor wells located in
25 Lea County --

1 A. Yes.

2 Q. -- which is slide number 1 in Exhibit 10.

3 A. It's a separate PowerPoint, Glenn, it's called
4 infiltration --

5 Q. I don't know that we need the slide for it.

6 A. Oh, there you go.

7 Q. The question, really, Mr. Price, is, do you
8 expect that water levels in wells can rise to other
9 processes than recharge?

10 A. I don't understand the question.

11 Q. Can -- If I have a monitor well, which is what
12 you're looking at --

13 A. Right.

14 Q. -- and it shows an increase in the water table
15 level, can that increase occur as a result of other
16 processes besides recharge?

17 A. Yes.

18 Q. Can you give us a couple of examples of those
19 other processes?

20 A. If you have a mounding effect from contamination.

21 Q. Or -- ?

22 A. You're allowed to lead, aren't you?

23 Q. I'm allowed to lead.

24 (Laughter)

25 Q. I'm allowed to lead, but it was fun watching you.

1 (Laughter)

2 Q. What about a cessation of pumping in the vicinity
3 of the area?

4 A. Yes.

5 Q. Okay. And in fact, cessation of pumping, if it
6 was in --

7 A. Or the absence of a withdrawal.

8 Q. Absence of withdrawal --

9 A. Yes.

10 Q. -- would be typically -- sometimes would cause a
11 fairly fast rebound?

12 A. That's correct.

13 Q. Another question is --

14 A. But can I say that in these particular wells, we
15 didn't -- there were no noted irrigation wells within a
16 one-mile radius of these.

17 Q. And you checked for that?

18 A. I was going to say, I don't think there was any
19 effect from irrigation wells or --

20 Q. I see. And does water-level rise in an aquifer
21 -- can that be due to preferential refill in other sections
22 of the aquifer?

23 A. Yes.

24 Q. Now, if we go to the Rice exhibits, which I think
25 is 10A -- I may have that wrong -- you had a couple of

1 slides, and here we're showing a variety of this. And I
2 will beg the Chairman's indulgence if I inadvertently
3 repeat a question from Ms. Foster; I wasn't completely
4 focused on what she was saying.

5 CHAIRMAN FESMIRE: Well, Mr. Hiser, would this be
6 a good place to break for lunch?

7 MR. HISER: This would be a great place to break
8 for lunch.

9 (Laughter)

10 CHAIRMAN FESMIRE: Okay. Before we break for
11 lunch -- and Mr. Hiser doesn't know this but it's going to
12 be a break for everybody but the attorneys at first -- is
13 there anybody out there who is signed in, who would like to
14 make a public statement before we leave, including Mr.
15 Gordon? Anybody?

16 Mr. Gordon, would you like to make a --

17 MR. YAHNEY: I would like to make a statement at
18 some point, but I don't know that I want to do it right
19 now.

20 CHAIRMAN FESMIRE: Okay, you'll get the chance
21 before lunch and before we quit every day, so at some point
22 we look forward to your statement.

23 Is there anyone else who would have a statement
24 that they'd like to make today?

25 Okay, we're not going to adjourn, we're going to

1 take a lunch break, and I'm going to ask the attorneys to
2 hang behind, because we need to talk about scheduling. And
3 the rest of you, you enjoy lunch in downtown Santa Fe.

4 We'll reconvene at one o'clock. And there may be
5 some -- we may need to go on the record at that time to put
6 some information on the record, so you all may have a
7 little bit longer than you think.

8 (Thereupon, noon recess was taken at 11:45 a.m.)

9 (The following proceedings had at 1:00 p.m.)

10 CHAIRMAN FESMIRE: At this time we're going to
11 reconvene the Tuesday, November 6th, 2007, meeting of the
12 New Mexico Oil Conservation Commission. Let the record
13 reflect that we've returned from lunch, the time is 1:00
14 p.m., that Commissioners Bailey, Olson and Fesmire are all
15 present, we therefore have a quorum.

16 And we will continue where we left off, which --
17 I think, Mr. Hiser, you were cross-examining Mr. Price?

18 MR. HISER: Yes, Mr. Chairman, that's correct.
19 Thank you.

20 Q. (By Mr. Hiser) Mr. Price, what I'd like to do
21 now is to look at a couple of the photos and the chart that
22 you showed about Rice Operating Company, and the photos
23 seem to show that these are mostly pipeline leaks or
24 pipeline junction box leaks; is that true?

25 A. That's true.

1 Q. And in this you expressed a concern about
2 something that you call enveloping?

3 A. Enveloping.

4 Q. Enveloping?

5 A. Right.

6 Q. And if we go, then, to Exhibit 2 and 3 -- or
7 pages 2 and 3 of this exhibit -- and the technology went to
8 sleep, so we'll wait for a minute. There we go.

9 And as I understand it, when you're concerned
10 about enveloping, looking at the chart on the left, it's a
11 case where, for example, as you go down in depth you have a
12 low spot, and then it goes back up to a higher number, and
13 then it goes down to a lower concentration.

14 A. Yes.

15 Q. And you've seen this in some of the chloride
16 spills?

17 A. This is a pattern that we routinely see over and
18 over and over, but at different magnitudes, of course.

19 Q. And so if we look, then, at the next exhibit,
20 which is number 3, we sort of see the same thing but in a
21 slightly different way that that loop was put together?

22 A. Yes.

23 Q. Now Mr. Price, with this concern can you explain
24 for me how that lower level of concentration appears -- for
25 example, the 30, 40 and 50 feet -- how is that occurring

1 here?

2 A. I do not have an explanation for that.

3 Q. So do you think that that could be as a result of
4 the leaching of the salts and the chlorides from those
5 layers over time, down into the lower layer?

6 A. Are you saying -- Are you saying why is it low
7 and not decreasing from a linear -- from a high to a low?
8 Is that your question?

9 Q. No, my question is, how are we getting these
10 lower numbers in the sort of depth area here in the 20- to
11 50-foot range?

12 A. This is real data that they've -- from sampling,
13 and they just simply plotted -- Rice Engineering plotted
14 this, I didn't.

15 Q. So you are not prepared at this time to advance
16 any type of mechanistic understanding of how this curve
17 came about?

18 A. I am not.

19 Q. Okay. Now you also gave an example of how you
20 would calculate why it wasn't appropriate to go lower than
21 250.

22 A. I did.

23 Q. And you did that up here on the screen as sort of
24 a demonstrative, for the benefit of the Commission?

25 A. I did.

1 Q. And one of those factors that you had, which you
2 call the Hiser factor --

3 A. Yes.

4 Q. -- is actually a dilution attenuation factor; is
5 that not correct?

6 A. That is correct.

7 Q. And that dilution attenuation factor is one
8 that's been developed sort of empirically by EPA?

9 A. Yes.

10 Q. And does that dilution attenuation factor vary
11 with the size of the source of the contamination?

12 A. Yes, it does.

13 Q. And so it may be larger or smaller than the 20
14 that you placed on the screen?

15 A. That's correct.

16 Q. And generally the smaller it is, the larger that
17 DAF becomes?

18 A. Okay.

19 Q. And then one last question on delineation that
20 you presented. You talked a little bit about how you
21 wanted to use the delineation. Did you ever explain to us
22 how the cleanup would be then handled, how you would
23 establish what would be an appropriate cleanup layer, or is
24 that going to be coming up subsequently?

25 A. I did not discuss it.

1 MR. HISER: Okay. I'd love to -- but I'm not
2 sure it's within the scope, so I don't know that I can ask
3 him that next question.

4 CHAIRMAN FESMIRE: You might ask and see what Mr.
5 Brooks says.

6 MR. HISER: All right, I will ask and see what
7 Mr. Brooks says.

8 Q. (By Mr. Hiser) And that is, so we do the
9 delineation to the 250. What is the Bureau's approach
10 going to be to setting the cleanup, then, of an area that
11 might be over that 250?

12 MR. BROOKS: I have no objection to that
13 question.

14 THE WITNESS: You do or don't?

15 MR. BROOKS: I have no objection.

16 (Laughter)

17 THE WITNESS: Mr. Hiser, that generally is on a
18 case-by-case basis, and we do not have guidance at this
19 time on those particular cleanup levels.

20 MR. HISER: Okay, thank you. That concludes my
21 questions for Mr. Price, Mr. Chairman.

22 CHAIRMAN FESMIRE: Okay. Mr. Carr?

23 MR. CARR: No questions.

24 CHAIRMAN FESMIRE: And Ms. Foster, you have no
25 questions of this witness?

1 MS. FOSTER: No, thank you.

2 CHAIRMAN FESMIRE: Ms. Belin, did you have
3 questions of this witness?

4 MS. BELIN: I have a couple, yes.

5 EXAMINATION

6 BY MS. BELIN:

7 Q. Mr. Price, maybe I misheard you but in cross-
8 examination did you say that under the proposed rule
9 liquids would only be in temporary pits only -- no more
10 than 30 days?

11 A. Well, if that part of the rule is enacted, once
12 the rig has left then the rule is asking that they dewater
13 the pits within 30 days.

14 Q. And it allows the District to extend that up to
15 three more months, does it not?

16 A. That is correct.

17 Q. And then someone could, through the exception
18 procedure, get a further delay?

19 A. Yes.

20 Q. And also the liquids would be in the temporary
21 pits during the pit operation, as well, so the liquids
22 could be in the pits for many months under this rule?

23 A. Yes.

24 MS. BELIN: I have no further questions.

25 CHAIRMAN FESMIRE: Mr. Jantz, do you have any

1 questions of this witness?

2 MR. JANTZ: No, Mr. Chairman.

3 CHAIRMAN FESMIRE: Commissioner Bailey?

4 COMMISSIONER BAILEY: Just a couple.

5 EXAMINATION

6 BY COMMISSIONER BAILEY:

7 Q. Does lithology play a role in this chloride
8 signature that you showed us from the Rice --

9 A. Yes, but we have -- Commissioner Bailey, as part
10 of our study is -- Rice Engineering hired a consultant to
11 try to qualify that, but their study is not done yet.

12 Q. When do you expect them to be done?

13 A. I don't know, that's -- we're not requiring them
14 to do it, so when they get it done then they could get it
15 to us.

16 Q. But for us to decide on the rule, all we can say
17 at this point is that lithology may have -- may change that
18 signature considerably?

19 A. Oh, I think it will. But I think the bottom line
20 here is that these sites are across -- primarily in Lea
21 County, but they vary. They're on top of the Ogallala,
22 they're off the Ogallala, they're off the Caprock. And so
23 the geology varies somewhat, they're in areas where there's
24 clay.

25 And so I guess I would like to hang my hat on the

1 fact that the six or so examples that you saw, I literally
2 have a hundred or so of those, of which we have pretty well
3 -- the signature and the pattern just always seem to repeat
4 itself.

5 Q. Shift gears.

6 A. I'm sorry.

7 Q. Let's shift gears a second.

8 A. Okay.

9 Q. Earlier you said there were about 1200 wells that
10 were drilled last year? New drills?

11 A. Mr. von Gonten and I did a quick query on RBDMS
12 -- that's our database system -- and that's the approximate
13 amount that we come up with for the state.

14 Q. How many available closed loop systems do you
15 know about in the state?

16 A. I don't have that number.

17 Q. Because I know this past year there was a real
18 problem with drilling wells because of rig availability for
19 those companies that did not own their own rigs. I'm just
20 curious if anybody has a handle on closed loop system
21 availability?

22 A. That was one of the reasons that was expressed in
23 the task force, and that the industry members -- that's one
24 of the reasons they like the 50 feet. They expressed that
25 50 feet would be more -- Let me put it this way, let me

1 back up a little bit.

2 That was not during the task force, that was
3 after the task force. And in a meeting with industry they
4 indicated that they could probably live with 50 feet but
5 they couldn't live with 100 feet because there wouldn't be
6 enough closed loop systems to accommodate them.

7 COMMISSIONER BAILEY: Thank you, that's all I
8 have.

9 CHAIRMAN FESMIRE: Commissioner Olson?

10 EXAMINATION

11 BY COMMISSIONER OLSON:

12 Q. Well, I guess just following along the lines of
13 lithology, have you seen similar instances in dealing with
14 oil movement through the subsurface, where you'll see --
15 just due to the lithology you'll see changes in, you know,
16 TPH or BTEX concentrations at depth?

17 A. Generally on oil spills it's more of a linear
18 function going from high to low than cycling. I have seen
19 that, but my experience is that when you have oil spills
20 they generally start off with a high TPH and end up with a
21 very low TPH and it doesn't cycle a whole lot.

22 COMMISSIONER OLSON: Okay, that's all I have.

23 EXAMINATION

24 BY CHAIRMAN FESMIRE:

25 Q. Mr. Price, you were asked earlier about a cleanup

1 standard as opposed to the delineation standard?

2 A. Yes.

3 Q. And you said that there had been no guidance in
4 that. Why is that?

5 A. We have guidance for hydrocarbons, but we do not
6 have guidance on salts.

7 Q. Okay, and -- in the cleanups, you mean?

8 A. Under our Rule 116 we have leak and spill
9 guidance that has a ranking criteria, and that ranking
10 criteria is tied to hydrocarbons, but we do not have
11 rankings for salts.

12 Q. Do you think that's something that needs to be
13 addressed in the future?

14 A. Yes.

15 Q. Now Commissioner Bailey asked you about the
16 number of closed loop systems. We know of operators who
17 are building closed loop systems at the present time, don't
18 we?

19 A. Yes.

20 Q. Are they building a few closed loop systems, or
21 are they building a lot of closed loop systems?

22 A. I don't know the exact number, but I understand
23 that they are manufacturing quite a few, and I understand
24 that there are a number of companies that are utilizing
25 closed loop systems.

1 CHAIRMAN FESMIRE: I have no further questions.
2 Mr. Brooks, do you have any redirect of this
3 witness?

4 MR. BROOKS: No redirect, Mr. Chairman.

5 CHAIRMAN FESMIRE: Okay. Mr. Price, thank you
6 very much.

7 Mr. Brooks, do you have your next witness ready?

8 MR. BROOKS: We would like to recall Mr. von
9 Gonten.

10 CHAIRMAN FESMIRE: Mr. von Gonten, let the record
11 reflect that you've been previously sworn. You remember
12 that, don't you?

13 MR. VON GONTEN: Yes, sir.

14 GLENN VON GONTEN,
15 the witness herein, after having been previously duly sworn
16 upon his oath, was examined and testified as follows:

17 DIRECT EXAMINATION (Resumed)

18 BY MR. BROOKS:

19 Q. Good afternoon, Mr. von Gonten.

20 A. Mr. Brooks, good afternoon.

21 CHAIRMAN FESMIRE: Speak up, guys.

22 Q. (By Mr. Brooks) Before I go into your -- or
23 before you start your technical presentation, I would like
24 to call your attention to what has been marked Exhibit
25 Number 6 -- I'm sorry, Exhibit Number 8 in the exhibit

1 notebook. Now on our exhibit list we have titled Exhibit
2 Number 8 -- find our exhibit list here. Oh, here it is.
3 -- we have entitled that LFC Economic Assessments. Now
4 that was not prepared by the Legislative Finance Committee,
5 was it?

6 A. No, these two paragraphs were not.

7 Q. Okay, who did prepare it?

8 A. Director Haug -- I believe that's her correct
9 name, Sandra Haug -- is the Administrative Services
10 division director in the Energy, Minerals and Natural
11 Resources, prepared a draft and then asked that OCD staff
12 review it for appropriate modifications.

13 Q. And did you participate in that review?

14 A. I did.

15 Q. Okay. Now do we even know if this was delivered
16 to the Legislative Finance Committee?

17 A. I do not know.

18 Q. But that was the purpose for which it was
19 solicited?

20 A. This was a couple of paragraphs. The document
21 that I saw during discussions was over 600 pages long, and
22 when it was due to be delivered -- it seemed to be like in
23 the next day or so -- there was some rush about reviewing
24 this.

25 Q. Okay. Would you read, beginning at the --

1 beginning at the paragraph break there, would you read the
2 first two sentences in that paragraph?

3 MS. FOSTER: Objection. Since Mr. van Gonten is
4 not the author of this document I would ask that the State
5 produce the author of this document if he would like to get
6 this into evidence.

7 CHAIRMAN FESMIRE: Okay, I think this is a
8 foundational exhibit and probably should be admitted over
9 objection.

10 THE WITNESS: Excuse me, Mr. Chairman, I'm going
11 to need about five minutes to go plug a leak.

12 CHAIRMAN FESMIRE: Okay, we're going to be in
13 recess for about five minutes, or however long it takes Mr.
14 von Gonten to quit bleeding.

15 (Thereupon, a recess was taken at 1:18 p.m.)

16 (The following proceedings had at 1:27 p.m.)

17 CHAIRMAN FESMIRE: Okay, let's go back on the
18 record. I believe, Mr. Brooks, you were beginning your
19 direct examination of Mr. von Gonten.

20 MR. BROOKS: That's correct.

21 Q. (By Mr. Brooks) Mr. von Gonten, you heard the
22 objection that Ms. Foster made to Exhibit 8 and the Chair's
23 ruling. Was it -- Were you one of the authors of this
24 document?

25 A. Yes. There was at least two other OCD staff that

1 reviewed it.

2 Q. Okay. Then I will again ask you to start at the
3 paragraph break and read the first two sentences of the
4 second paragraph.

5 A. Statewide, the oil and gas industry produced 60.9
6 million barrels of oil and 1591 billion cubic feet (BCF) of
7 gas during 2006. The upfront costs associated with
8 compliance with the proposed pit rule are estimated at \$30
9 million statewide by the Division and \$150 million by
10 industry.

11 Q. Okay. The statement that they were estimated at
12 \$30 billion [sic] -- Well, no. First of all, look at the
13 first sentence. Where did you --

14 MS. FOSTER: Mr. Chairman, I would object again
15 to the nature of questioning. If he wants to get this as a
16 foundational document in, that would be fine. But I would
17 like to have the opportunity to voir dire the witness as to
18 the nature of this document and whether he truly was an
19 author, et cetera, before substantive questions concerning
20 what is in this document are asked.

21 CHAIRMAN FESMIRE: Okay. Mr. Brooks, I'm going
22 to allow her to take the witness on voir dire --

23 MR. BROOKS: Okay.

24 CHAIRMAN FESMIRE: -- and establish the -- I
25 guess the authorship of the --

1 MS. FOSTER: Yes.

2 CHAIRMAN FESMIRE: -- of the document? Okay.

3 VOIR DIRE EXAMINATION

4 BY MS. FOSTER:

5 Q. Yes. Mr. von Gonten, you stated that you were
6 one of the authors of this document?

7 A. Yes, I reviewed it for technical merit.

8 Q. Okay, you reviewed it, but you did not write it?

9 A. I did not write it.

10 Q. Okay. So these two paragraphs that we're talking
11 about here you did not personally write?

12 A. I filled in the blanks as requested by the
13 Division Director.

14 Q. All right, and which blanks was it that you
15 filled in?

16 A. The 60.9 million barrels of oil and the
17 production of gas.

18 Q. And that was based on OCD information that you
19 had at your disposal?

20 A. Yes.

21 Q. And in terms of the economic analysis numbers,
22 are you familiar with the discussion that we've had
23 concerning economic analysis numbers prior to your
24 testimony?

25 A. I've heard the discussion. Economics has been

1 brought up several times in the past two days.

2 Q. Okay. And if you were so involved with this
3 document, why was it that you didn't tell the Commission
4 that you knew what the economics of the proposed pit rule
5 would be?

6 A. I did not provide any of these dollar amounts.

7 Q. Okay. So does that mean that you're not familiar
8 with those dollar amounts and how they were reached at?

9 A. That's true, I don't.

10 Q. Okay, so you don't know what factors were taken
11 into with the statement that the OCD -- or the associated
12 costs of compliance with the proposed rule are estimated to
13 be \$30 million?

14 A. That's correct.

15 MS. FOSTER: Okay, I have no further questions
16 for this witness.

17 And I would again object to this document being
18 entered as an exhibit.

19 CHAIRMAN FESMIRE: I'll sustain the objection to
20 this document.

21 I think the numbers would be relatively easy to
22 arrive at using today's prices and those production
23 figures, but I'm not going to allow the admission of this
24 document.

25 MR. BROOKS: Very good.

DIRECT EXAMINATION (Resumed)

BY MR. BROOKS:

Q. Mr. von Gonten, you may continue with your -- you may begin your next technical presentation.

A. That would be Exhibit 13. The first few slides we'll be talking about, just a review of OCD's proposed rulemaking process and the public input on the pit rule. This is somewhat a duplication of what Mr. Price presented yesterday.

We held four public outreach meetings between December, 2006, and January, 2007. The meetings were held in Farmington, Artesia, Hobbs and Santa Fe.

And the goals were to identify possible deficiencies in the current pit rule, explain the rulemaking process to citizens, and receive public input prior to beginning the process of proposing new rules from concerned citizens, landowners, other regulatory agencies, oil and gas companies, service companies, industry groups and environmental groups.

The pit task force consisted originally of 14 members selected by the Governor's office, and a copy of the letter to task force members dated March 13th, 2007, is included as an exhibit. I believe that's included in Exhibit 14.

A copy of OCD's summary of the proposed

1 rulemaking process and public input dated March 29th, 2007,
2 is also included in that same exhibit.

3 The task force was facilitated by the Energy,
4 Minerals and Natural Resources Department Deputy Secretary,
5 Mr. Reese Fullerton.

6 The task force meetings were open to the public
7 and they held from April 16th to July 11th, 2007.

8 The next slide is a list -- a laundry list of
9 issues that may be addressed by the pit task force, and
10 there's -- I won't read through all these, but it was
11 fairly broad in scope and everything was on the table.

12 The next slide, 4.

13 The next milestone in the task force was the pit
14 rule task force report. Operating by consensus, the pit
15 rule task force submitted its pit rule report to Mr. Daniel
16 Sanchez, OCD's compliance and enforcement manager, on July
17 11th, 2007. OCD then drafted a new pit rule, part 17, and
18 handed it to the task force members for review and comment
19 on August 13th, 2007. The task force notes are included as
20 the Exhibit 14.

21 Moving on to the formal rulemaking process, OCD
22 considered the task force report and the task force
23 members' individual comments when drafting its proposed
24 rule for the formal rulemaking process.

25 OCD then developed its final draft pit rule and

1 filed it with the Oil Conservation Commission as part of
2 the formal rulemaking process and posted it on the OCD
3 website on September 21st, 2007.

4 We proceeded by first identifying problems with
5 Rule 50.

6 Since the original pit rule, Rule 50, was issued
7 in 2004, OCD has become aware of several major deficiencies
8 with that rule. Although Rule 50 generally included
9 general performance standards, it generally lacked
10 enforceable technical standards. Our files are full of
11 photos of pits that have been clearly compromised. General
12 performance or narrative standards are not enough.

13 At this point I was going to present the
14 statewide slide show, and at the end of that slide show I
15 was going to transition to the condition of the pits that
16 we actually inspected when we were conducting the OCD pit
17 sampling program earlier this year.

18 Q. Now Mr. von Gonten, the statewide slide show is
19 the same one that was shown to the Commission yesterday
20 morning; is that correct?

21 A. Yes, sir.

22 MR. BROOKS: Then I believe we should ask the
23 Commission's pleasure if they want to see it again in this
24 context or if they would prefer that we go on to the
25 exhibits they have not yet seen.

1 CHAIRMAN FESMIRE: Commissioner Bailey?

2 COMMISSIONER BAILEY: I've seen it.

3 CHAIRMAN FESMIRE: Commissioner Olson?

4 COMMISSIONER OLSON: I guess, what's the purpose
5 of seeing it again.

6 CHAIRMAN FESMIRE: I think the consensus of the
7 Commission is, we don't need to do it again.

8 MR. BROOKS: Okay. Mr. von Gonten also has
9 another slide show that is different from that and in
10 addition to that. So I'm going to then, with the
11 Commission's indulgence, ask him to present the one that --
12 and I want to ask him some questions about that first.

13 CHAIRMAN FESMIRE: Okay. Mr. Brooks, go ahead.

14 Q. (By Mr. Brooks) Okay. Mr. von Gonten, the slide
15 show that we showed to the Commission yesterday, is that
16 Exhibit 13A?

17 A. Yes, it is.

18 Q. Okay. Now what is Exhibit 13B?

19 A. If it's in their binders correctly, it probably
20 should have been the liner observations of the southeast,
21 but it may be incorrectly entered into the exhibit binders
22 as liner observations of the northwest.

23 Q. I believe that it is in my binder, the southeast.
24 It's labeled SE.

25 CHAIRMAN FESMIRE: Is that the one that says

1 Closed Loop Drying Area in the Southeast?

2 MR. BROOKS: That's what my binder says.

3 THE WITNESS: We can begin with that one.

4 Q. (By Mr. Brooks) Well, I wanted to ask you some
5 things about that first. What -- How were the pits that
6 are included in this selected?

7 A. OCD put together a pit sampling program. It took
8 a little while to get it operational, but it was conducted
9 in late May and early June of 2007. OCD, operating within
10 a budget, decided that it would do a comprehensive, fairly
11 broad-spectrum sampling program for as many pits as we
12 could get done in a certain amount of time and get that
13 information to the public, including the task force.

14 The pits were selected from a list provided to us
15 by the district offices. The district inspectors did not
16 have any direct input on the selection of it, and we had no
17 prior knowledge of which pits were going to be there or
18 what condition they would be in, if they would actually be
19 ready for inspection.

20 We went to the field, mobilized twice, once in
21 the northwest and once in the southeast. I'll be giving
22 more details on the actual sampling results. But the
23 District office, as I said, provided us a list of pits that
24 they had pending for closure, were notified by the industry
25 of the status of these pits, four currently active drilling

1 pits.

2 We did what I would refer to as a pseudo-random
3 selection. We --

4 Q. Why do you call it pseudo?

5 A. Because it wasn't truly random, because if we
6 were truly random we would have been going all over the
7 county from one pit to the next.

8 We actually scheduled it with some sense of
9 practicality of where these pits were located. And we also
10 consulted with members of the industry who also went along
11 as witnesses, and they accommodated us in finding out the
12 status of these pits and whether they were actually already
13 closed, in which case there was no point in going by. That
14 happened to us several times in the northwest on the first
15 day.

16 So it was not a pure random-number-generated
17 selection of where we would go. We modified that by
18 finding out that some pits had already been closed.

19 We also gave some consideration to the fact that
20 we didn't want to double up on any one particular operator.
21 So if their name came up a second time we might, after
22 discussion with the district folks and the industry folks,
23 elect to go do another site that was lower down on the
24 list.

25 Q. Now are the photographs included in Exhibits 13B

1 and 13C photographs of the actual pits that you sampled?

2 A. Yes, they are.

3 Q. Were they taken at or about the time that you
4 sampled them?

5 A. Yes.

6 Q. Were you a part of the team that did this
7 sampling?

8 A. I was a part of the team that sampled in the
9 northwest.

10 Q. Okay. Now who actually took these pictures?

11 A. Oh, they were probably taken by any -- could have
12 been taken by any member of the Environmental Bureau.
13 Probably the majority of them were taken by Mr. Leonard
14 Lowe.

15 MS. FOSTER: I'm sorry, what was that name?

16 THE WITNESS: Leonard Lowe.

17 Q. (By Mr. Brooks) And did I understand you to say
18 you were not part of the team in the southeast?

19 A. That is correct.

20 MR. BROOKS: Mr. Chairman, because I understand
21 that we're proceeding by strict rules of evidence here,
22 unlike some OCD proceedings, I will ask if it pleases the
23 Commission if we can go ahead and show Exhibit Number 13B
24 relating to the southeast along with 13C relating to the
25 northwest, even though this witness probably cannot provide

1 the foundation testimony for these photographs, on the
2 representation that we will have another member of the
3 staff who can do so, we'll recall to the stand later. But
4 whatever the Commission's pleasure is.

5 CHAIRMAN FESMIRE: Mr. Brooks, our rules allow us
6 not to proceed strictly by the rules of evidence, and I
7 don't think we are. There was a specific reason for not
8 allowing the last exhibit in, and --

9 MR. BROOKS: I understand. I'm not complaining
10 of the Chair's ruling, I'm merely asking for instructions.

11 CHAIRMAN FESMIRE: Why don't you go ahead and
12 show us the slide show?

13 Q. (By Mr. Brooks) Very good. Before we do, with
14 regard to 13B, which is -- 13C, which is the one for the
15 northwest, Mr. von Gonten, which is the one we're going to
16 show after 13B --

17 A. Yes, sir.

18 Q. -- you were a part of the team that did those --

19 A. Yes.

20 Q. And did you -- have you looked at those
21 photographs that are included in Exhibit 13C?

22 A. Yes.

23 Q. Do they fairly and accurately represent the
24 condition of the pits that the team inspected at the time
25 of the inspection?

1 A. Yes, they do.

2 Q. Okay, and I will recall another witness to ask
3 those questions with regard to 13B. You may proceed.

4 A. One point I note is that when we received our --
5 This is the slide show, Ed. Why don't you turn off the
6 slide show and just manually walk through it. That's page
7 3. Go back a couple. What was my point?

8 These photographs were posted on OCD's web page,
9 as I believe I mentioned in my testimony about the
10 rulemaking process, so all of these photographs had been
11 available for inspection by the public for several months.

12 The first slide -- the one before this, Ed -- as
13 I said, this was a closed loop drying area. We only saw a
14 couple of closed loop -- OCD only witnessed operations at
15 perhaps a single closed loop drying area. We're not going
16 to be showing all the slides, but they're selected from the
17 larger number of photographs that we took during our
18 inspection to illustrate certain points.

19 This is, as Mr. Price discussed, a drying pad.
20 You can see that this is located on a liner and that there
21 is a lined trench which collects runoff from the cuttings.
22 And the dark material in the back left foreground is drill
23 cuttings that have been bulldozed into that corner.

24 Next slide, please.

25 This is showing a pit in the southeast -- there's

1 the location, township, section and range -- that is a
2 typical horseshoe. It's a fairly large pit. And what's
3 noteworthy about this pit is the amount of fluids that --
4 or hydrocarbons that are visible on this pit, yet it's been
5 drying for a protracted period of time. By looking at the
6 water level, that could have indicated that they drew off a
7 significant amount of water, it could have been
8 evaporation.

9 You can see on the inner horseshoe the cuttings
10 have partly filled the right-hand part, and there's a berm
11 that divides the inner horseshoe from -- into segments, and
12 that allows the settling of the cuttings.

13 Next, please.

14 This is a pit that actually shows a different
15 configuration. This is showing that there were two
16 separate pits rather than a horseshoe, which is more or
17 less one contiguous pit area. These are separated by slide
18 area. This is different liner material than we normally
19 saw. You occasionally do see the white liner material.

20 What's noteworthy here, I guess, is that there's
21 a barbed-wire that's perhaps livestock proof, but it may
22 not keep out wildlife. We also see -- this particular
23 slide, we're not seeing much in the way of berms around
24 this pit. There could be a problem with run-on or runoff
25 into or out of that pit. And on the back near midground

1 you see the removed stockpiled soils from the pit
2 excavation.

3 Next, please.

4 This is depicting our sampling techniques. We
5 have -- Mr. Price is in the pit collecting a soil or sludge
6 sample from the bottom of the pit, and you can see the
7 general steep nature of the sidewalls in this photograph.

8 Next, please.

9 This is a picture that was selected to show what
10 problems can occur when there's not proper preparation of
11 the pit location. There was some boulder or perhaps
12 caliche on that one sidewall, and the pit liner has been
13 compromised. And you can see that it's also been
14 compromised beneath the fluid level.

15 Next, please.

16 We did encounter one dead bird in the pits.

17 And the next slide, please.

18 This is again showing a fairly large pit. You
19 can see that there was a pretty large capacity. We would
20 estimate this to be eight feet or deeper. We can see the
21 barbed wire in the foreground.

22 Again, in the immediate foreground there's a
23 little bit of a problem with the run-on/runoff, there's not
24 much of a berm. And you can see this is a pit that has
25 probably been around for a long period of time.

1 Next.

2 This is also showing fluids on the pit,
3 hydrocarbon on the pit, and also showing the side slopes
4 and lack of adequate berming, at least on one side.

5 Next, please.

6 That's probably a photograph of the same pit
7 showing a different perspective on the hydrocarbons on the
8 fluids.

9 Next, please.

10 MS. FOSTER: Mr. Chairman, I would object to the
11 witness's statements, This is probably and, This is -- you
12 know, his personal opinion of what it is there. If he
13 wants to talk about these pictures in terms of a factual
14 nature and in terms of an expert who works for OCD and has
15 gone out and sampled the pits, then that's fine. But we
16 would ask that any of his personal, you know, speculative
17 statements pertaining to the pictures be left out.

18 CHAIRMAN FESMIRE: As an expert he can give his
19 opinion, can't he?

20 MS. FOSTER: Yes, he can give his opinion, if
21 that's a part of the case.

22 CHAIRMAN FESMIRE: Okay, Mr. von Gonten, please,
23 if it's -- if you have an opinion, please state it as an
24 opinion. If you know for a fact, please state it as a
25 fact.

1 THE WITNESS: Yes, sir.

2 MS. FOSTER: Thank you.

3 THE WITNESS: Next slide, please.

4 This photograph is showing a rather large pit.
5 We're showing again on the right-hand side the problem with
6 the lack of berming.

7 Next slide, please.

8 This is a photograph showing one of the common
9 problems that we saw, is when there was run-on/runoff
10 problems. On the left half of this photograph the surface
11 sediment has been washed into the pit because of the lack
12 of adequate berming, and in the middle part of the
13 photograph the pit has been compromised and run-on is
14 actually occurring underneath the liner.

15 Next photograph, please.

16 This is showing sampling, a photograph of our
17 staff.

18 Next photograph.

19 Another photograph of a horseshoe pit. One of
20 the problems here that we noted was the lack of fencing on
21 the side to the apron.

22 Next photograph, please.

23 This is also showing problems with the run-
24 on/runoff, and if you look closely at this liner material
25 you can see that this is woven material, and this is one of

1 the types of liner that we would recommend against. I
2 think if you look in the left foreground you can actually
3 see where the woven material has actually failed, and you
4 can see some gaps in it.

5 Next slide, please.

6 This is another photograph of a horseshoe pit.

7 Next slide, please.

8 This is showing a site that does have some berms
9 around the well [sic]. Rather than using an anchor trench
10 as we'll be recommending in the proposed rule, this
11 operator has chosen to sandbag the liner material over the
12 top of the berms, rather than anchoring it. And you can
13 see on the right hand part of the photograph that that has
14 not worked completely.

15 Next photograph, please.

16 Another photograph of a horseshoe showing the
17 general lack of adequate berms and also some problems with
18 the side slope stability.

19 Next photograph, please.

20 This is a photograph of a horseshoe in the
21 southeast.

22 And the next slide.

23 This is a general overview. There's not any
24 particular problems here. I would point out the stockpiled
25 material on the back right -- I would point out that

1 there's not -- there is a berm here, however the liner
2 doesn't cross over the top of the liner, and it's not clear
3 from this photograph whether that liner is actually
4 underneath the bermed material in the foreground.

5 Next slide, please.

6 This is showing a problem that we referred to
7 during task force as wind-whip. This is due to inadequate
8 anchor trenching and inadequate berms, and the pits have
9 been here for a long enough period of time to be impacted
10 by high winds, and the liner material has been blown into
11 the pit.

12 Next slide, please.

13 This is showing inadequate anchor trenching or
14 inadequate -- the liner is not adequately secured in this
15 photograph, and you can see the caliche material which is
16 going to be very problematic for installation of pits.

17 Next slide, please.

18 This is showing an unlined pit that does have
19 netting. The netting here has sagged into the water, and
20 any waterfowl could be negatively impacted by landing on
21 that water.

22 MS. FOSTER: Objection. Is that the witness's
23 opinion, Mr. Chairman?

24 CHAIRMAN FESMIRE: I think he stated it as an
25 opinion.

1 MS. FOSTER: I don't believe he did, sir.

2 CHAIRMAN FESMIRE: I'll overrule the objection.
3 Go ahead.

4 THE WITNESS: Next slide, please.

5 This is an unlined pit, the same one that we saw
6 in the previous slide, and you can see the discharge from
7 the end of the pipe into the unlined pit.

8 Next slide, please.

9 At this pit this was, as Mr. Price said on his
10 testimony, this was -- this photograph was taken from a
11 nearby residence back towards the pit location, if I
12 remember Mr. Price's discussion correctly.

13 Next pit -- Next slide, please.

14 And this is a photograph of the house from which
15 the previous photograph was taken.

16 Shall I move on to 13C, Mr. Brooks?

17 Q. (By Mr. Brooks) Proceed.

18 A. The next set of slides are the -- some selected
19 slides from the pits that we inspected and sampled in the
20 northwest. This is San Juan County, and this particular
21 photograph you can see in the back stockpiled soil, you can
22 see a general lack of berming on this side, you can also
23 see a hogwire fence as opposed to a barbed-wire fence that
24 is being used to keep out livestock.

25 I'll say generally, most of the pits we saw had a

1 fence of this type in the northwest.

2 Next slide, please.

3 This is a detailed photograph showing some people
4 are still using stitched pit liners. One of our pit
5 proposals, our pit rule proposals, will be liner material
6 will be properly seamed. Obviously something that is
7 stitched together has the ability to leak through that
8 stitched seam.

9 Next photograph, please.

10 This is -- and I forget the correct name for this
11 green vessel, but it is used during the so-called
12 cavitation process on a coalbed methane well and there may
13 be also flaring on the backstop.

14 This is an important point in the pit rule, is
15 that -- In this particular case you can see that the pit is
16 lined, and it's not clear from this photograph, and I just
17 don't remember, but I think those are coalbed -- coal fines
18 that are black and look like the same liner material. But
19 the channel leading into that pit was actually lined with
20 coalbed fines. You don't see any of the staining or the
21 actual sooty material that occurs on the backstop of this
22 liner, but that is part and parcel of the coalbed methane
23 cavitation process.

24 Next slide, please.

25 This is a photograph showing that there are some

1 run-on/runoff problems and that there is some trash being
2 put into the pit. It's either washed in or was tossed in.

3 Next photograph, please.

4 This is one of the larger pits that we saw in the
5 northwest. The general observation from OCD was that pits
6 were larger in the southeast. This was a fairly large pit,
7 I would estimate it to be maybe 12 feet deep. This was in
8 generally good shape, but there was some material that was
9 floating on the surface of this, and you can see a kind of
10 ring around the pit that we were not able to identify. It
11 might have been some sort of cement or completion material.

12 MS. FOSTER: Objection.

13 THE WITNESS: That is my opinion.

14 MS. FOSTER: Thank you.

15 CHAIRMAN FESMIRE: Overruled.

16 THE WITNESS: Next slide, please.

17 This is the same site that we were seeing some
18 run-on/runoff problems. Again, not a proper berm and not a
19 proper anchor trench, and it led to a problem with both
20 run-on and what also is occurring is run-under, I guess,
21 underneath the liner material.

22 Next photograph.

23 This is showing that a fencepost or another post
24 has been actually driven through the liner material. This
25 could lead to liner failure.

1 Next photograph.

2 Another photograph showing liner failure, could
3 be associated with the tear initiated by a fencepost.

4 Next photograph, please.

5 This is another location, and we'll see, I think,
6 another slide. This on a side slope, which is fairly
7 common in the northwest, from our observations, and we can
8 see that there's very low freeboard on this well, and it
9 has apparently been overflowing.

10 Next slide.

11 This is that photograph looking the other
12 direction. The photograph was actually taken between where
13 the people are in the foreground and the backstop. This is
14 also a site where they have actually been flaring into a
15 backstop. Our pit rule would state that you would not be
16 required to line that backstop. And in this particular
17 case they have lined the channel leading into the pit.

18 Next slide.

19 Another photograph of the same site, looking back
20 towards where the two people were in the foreground. In
21 this particular case you might think that that's a tear in
22 the back part, on the higher part of the sidewall. In
23 fact, that is a little dirt washing into it, but that is
24 not a tear, it is not a liner failure. You have to fold
25 the material to get it to fit into the liner.

1 Next slide, please.

2 However, there were some failures observed in
3 this pit. There's some small tears. It's not clear where
4 they were with this waterline at one particular time.

5 Next photograph, please.

6 This is a pit that had a lot of hydrocarbon on
7 top of it, and this is Rio Arriba County, and we actually
8 did use our dipper to sweep away the free hydrocarbon on
9 the surface before we actually took our sample, but you can
10 see the sample container has been heavily impacted by the
11 free product or the free hydrocarbon on the surface.

12 Next slide, please.

13 This is a photograph showing the woven material
14 on that same site, and you can see the tears in the woven
15 material. It's got a frayed edge.

16 Next photograph, please.

17 A close-up of the 12- -- what we assume to be
18 12-mil -- that's my opinion -- material, and you can see
19 the woven nature. It looks like burlap, it doesn't look
20 like impervious liner material.

21 Next slide, please.

22 Another problem where the liner has failed right
23 into the edge of the pit. This is almost a vertical
24 overhead shot, looking straight -- barely in front of the
25 photographer's feet, for reference, and you can see that

1 the tear has occurred, actually, just above the water line
2 or fluid level.

3 Next slide, please.

4 This is a photograph showing some run-on.

5 Next photograph, please.

6 This is a photograph showing the stockpiled
7 material, the nature of the hogwire fence, lack of berm
8 between the fence and the edge of the pit, very little
9 freeboard here, and I believe there's also hydrocarbon if I
10 remember this site correctly.

11 Next photograph, please.

12 This is actually showing a bench. There actually
13 was a lined bench that the two staff are actually kneeling
14 on and taking their samples, and again there's hydrocarbon
15 along the margin of this pit and...

16 Next slide, please.

17 Showing some tears. These are not just shadows,
18 these are actual tears in the liner material that were on
19 that bench that they were kneeling on.

20 Next photograph, please.

21 This again is showing a backstop. You can see
22 the gray staining on the backstop material, the stockpiled
23 material, and this is where flaring was occurring. This is
24 one where the pit has risen to a level that it's actually
25 backflowing into the unlined channel that drains into the

1 pit. Hydrocarbons are visible on the surface.

2 Next photograph.

3 This is again showing a site with inadequate
4 berms. It also shows the fence staked through the
5 material, and also showing very little freeboard.

6 Next, please.

7 This is a larger pit in the northwest, just
8 basically showing the size and the amount of cuttings.

9 Next slide.

10 And this is another photograph of a fencepost
11 being staked through the liner material and inadequate
12 berming.

13 Next, please.

14 At this site we have another example from inside
15 the pit of a tear that was in the -- actually in the pit.
16 And you can also see a trench, which indicates a run-
17 on/runoff problem. Actually, surface sediment is actually
18 being washed into the pit, and under the new pit rules
19 that's material that's going to have to be dealt with.

20 Next, please.

21 And again, this was one that shows hydrocarbons
22 on the water and also trash and debris floating in the pit.

23 That's it for this presentation.

24 Q. (By Mr. Brooks) Okay, you may proceed with your
25 technical presentation, then, Mr. von Gonten, with the

1 Commission's permission.

2 CHAIRMAN FESMIRE: Are we at Tab 14?

3 MR. BROOKS: Yes.

4 THE WITNESS: Tab 14 should actually be part of
5 the task force e-mails. They were rather voluminous and we
6 did not print them all out. They're included on the CDs.
7 I was not planning any discussion of the exhibit, just
8 offering it in for completeness.

9 My next discussion will be on Exhibit 15. I'd
10 like to discuss in these set of slides the results of OCD's
11 2007 pit sampling program.

12 Go ahead.

13 And our question was, What is in that pit? And
14 this question came about because during the outreach
15 process in February and January many citizens or
16 individuals asked the question about what is being managed
17 in oil- and gas-field pits.

18 We also had some discussion of this issue during
19 task force.

20 Next slide, please.

21 During the four public outreach sessions that OCD
22 held in December and January -- Excuse me one moment. In
23 January, 2007, to gain input on OCD's proposed pit
24 rulemaking, OCD heard many individuals ask for information
25 on the contents of various oil and gas pits.

1 From May 22nd to June 1st, 2007, OCD staff
2 collected aqueous and non-aqueous samples to answer the
3 questions raised during the pit rulemaking outreach
4 meetings.

5 Next, please.

6 Following a sampling and analysis plan that
7 specified the field sampling protocols, laboratory analysis
8 and quality assurance/quality control (QA/QC) procedures,
9 OCD collected 25 aqueous and non-aqueous samples from
10 drilling, workover, reserve pits or tanks in the southeast
11 in May, 2007, and 12 samples from the northwest in June,
12 2007.

13 And a copy of our OCD exhibit is included in
14 Exhibit 17. 17 is also what we refer to as OCD's pit
15 sampling compendium, and it includes hard copies of all the
16 lab results that we received, and a CD has been provided
17 because of the volume to the various other binders.

18 Q. (By Mr. Brooks) And this pit sampling program
19 was the sampling of the pits that you just described in
20 your previous testimony about how they were selected?

21 A. Yes, sir.

22 Q. Continue.

23 A. OCD collected samples of pit contents and
24 drilling fluids using pre-cleaned disposable dippers and
25 scoops in appropriately preserved sample containers, that

1 is, glass jars and bottles and plastic bottles.

2 Next slide, please.

3 Here's a photograph of OCD staff collecting a
4 sludge sample from the bottom of a pit.

5 Next slide, please.

6 During its pit sampling program, OCD surveyed the
7 pit locations using GPS, sketched a site plan, inspected
8 the site and photographed the pits and sites.

9 Next photograph.

10 Here are OCD staff actually screening a sample
11 and writing notes.

12 Next slide, please.

13 Common problems include non-anchored or breached
14 liner, lack of proper sub-base and berm construction, oil
15 on pits, rips and tears in the liner.

16 Next slide, please.

17 I'll go through these quickly, you've seen these
18 before. This is actually an inadequately anchor problem.

19 Next.

20 This is hydrocarbon on the pit.

21 Next, please.

22 This is due to inadequate construction.

23 Next, please.

24 Continuing with common problems, we saw liner
25 seam problems, both orientation and stitched seams. We saw

1 sediment run-on and runoff problems into and under liners,
2 we saw a lack of netting to exclude birds, and we saw
3 unlined pits.

4 A few photographs to illustrate these.

5 This is an example of one of the technical
6 standards that is specified in the proposed rule that will
7 require that a seamed pit liner actually be oriented so
8 that the seam runs into and out of the pit rather than
9 along the side slope.

10 Next slide, please.

11 This is showing a stitched liner that would be
12 prohibited.

13 Next, please.

14 This is demonstrating the run-on/runoff problems.

15 Next, please.

16 This is showing the run-on/runoff problems from a
17 closer perspective. This shows the run-on on the left,
18 into the pit, and it shows that the liner is being breached
19 and sediment is actually going underneath the liner and
20 causing a problem with the stabilization of the slope.

21 Next, please.

22 The dead bird that we encountered.

23 Next, please.

24 This is showing an unlined pit that is netted,
25 however the netting is inadequate to keep birds off the

1 water.

2 Next, please.

3 OCD collected judgmental aqueous and non-aqueous
4 samples which we then analyzed for volatile organic
5 compounds, VOCs, semi-volatile compounds, SVOCs, gasoline-
6 range and diesel-range organics, GRO and DRO, polynuclear
7 aromatic hydrocarbons, PAHs, total extractable petroleum
8 hydrocarbons, TPH, total metals and general chemistry
9 cations and anions, which we refer to as general chemistry.

10 Section 4 from our sampling analysis plan
11 specifies that judgmental sampling is the subjective
12 selection of sampling locations at a site based on
13 historical information, visual inspection, and on best
14 professional judgment of the sampling team. OCD will use
15 judgmental sampling to identify pit sample locations that
16 exhibit visual staining, sheen on water, and/or odor
17 detection by using a PID monitor to screen for VOCs.
18 Consequently, judgmental sampling has no randomization
19 associated with the sampling strategy, precluding any
20 statistical interpretation of the sampling results.

21 This language is actually borrowed from the EPA
22 document, and the important point is that we went out and
23 tried to take as many samples as we could with our budget,
24 but we did not follow the same protocols that I understand
25 that the industry committee followed when they used

1 randomly selected locations, both horizontally and
2 vertically. Ours were surface grabs, we almost always took
3 our first sample in the pit of the sludge below what was
4 apparently the location of the shale shaker, and then moved
5 around grabbing three other samples and compositing them.

6 Q. Now were you trying to select hot spots to
7 sample?

8 A. We presumed that most contamination would occur
9 at the entry point into the pit, but actually I don't think
10 that we really changed our locations based on a PID
11 screening number. It was basically just trying to get a
12 representative sample from the bottom of the pit.

13 Q. Now if I understood correctly, you said one --
14 you took one under the shale shaker, and the others -- were
15 they random or --

16 A. No, they were usually in the corner. Or if it
17 was a narrow pit -- there was one pit that was fairly
18 linear, more like a trench than a pit. In that particular
19 case we went down the axis of the it. If there were still
20 very -- And these pits were in various stages, so we had to
21 modify our sampling locations by practicality. We weren't
22 going to wade out into free fluids.

23 Q. Was there an effort to get a distribution so that
24 not all the samples would be in the same part of the pit?

25 A. Well, they were all taken from different parts of

1 the pit. They were separated by maybe 10s of feet.

2 Q. Continue.

3 A. Then to summarize, then, we had judgmental
4 sampling. We collected 25 samples from the southeast and
5 12 samples from the northwest, and these samples were
6 analyzed using EPA methods for the following constituents:

7 We analyzed for 69 volatile compounds by method
8 8260B, a total of 93 semi-volatile compounds by 8270, and
9 GRO-DRO by method 8015 modified, 17 PAHs by 8270C.

10 I should point out that because we used the same
11 method for the semi-volatiles and the polyaromatic
12 hydrocarbons, that some constituents were reported twice in
13 our lab reports.

14 TPH was analyzed by EPA method 418.1. We
15 analyzed a total of seven RCRA metals by methods 6010B and
16 6020, and 7470A and 7471A, which is for mercury.

17 And we analyzed another 14 general chemistry
18 analytes by the method specified in 40 CFR 136.3.

19 Next slide, please.

20 As I mentioned earlier, when we got the results
21 back we put summaries of the analytical results as
22 submitted to us by our lab, along with the photographs of
23 the pits that we took, and the photographs that I showed in
24 Exhibits 13B and -C were a subset of the total number of
25 photographs that we took. And we provided copies to the

1 pit rule task force members in July of 2007.

2 Next, please.

3 We generated 25 separate analytical reports for
4 the web page. And the reason that those numbers don't
5 quite match up is that in the southeast they actually
6 sampled one pit maybe for solids and fluids, whereas in the
7 northwest we went to a different site. We took only either
8 solids or sludge or soils, depending on what you want to
9 refer to them as, or fluids.

10 Each report includes photographs depicting the
11 general pit conditions encountered in the field and a
12 summary of the analytical results. And as I mentioned, a
13 compendium of OCD's reports is included as Exhibit 17.

14 Next.

15 I imported the separate analytical reports into
16 Excel spreadsheets to better summarize the data, and the
17 data were subdivided for review by a matrix that is soil
18 and sludge versus water and fluids, and by geography,
19 northwest versus the southeast.

20 And now to present the results of the pit
21 sampling data, Mr. Brooks, this is where I would like to
22 provide the alternate revised copies.

23 (Off the record)

24 Q. (By Mr. Brooks) Okay, you're going to be showing
25 those? Oh, I see, this is where in your presentation, Mr.

1 von Gonten? Exhibit 16?

2 A. That's correct.

3 Q. Okay --

4 MR. PRICE: How many copies did you make?

5 THE WITNESS: They're all right there.

6 MR. PRICE: These are separate copies --

7 THE WITNESS: Yes.

8 MR. PRICE: Okay, so I need to get --

9 Q. (By Mr. Brooks) Mr. von Gonten, you have some
10 revised and corrected spreadsheets that you propose to
11 substitute in lieu of those in Exhibit 16; is that correct?

12 A. Yes, sir, that is correct.

13 Q. Now why are you proposing to substitute new
14 versions of Exhibit 16?

15 A. When reviewing my exhibits for these proceedings,
16 I noticed that I had some errors in certain columns in the
17 spreadsheets. Particularly, the problem was that the lab
18 gave us -- did not give us an Excel spreadsheet. I had to
19 prepare that myself.

20 We were given several -- I want to say between
21 150 and 200 individual reports by the lab that were called
22 comma-separated value files, and I had to manually import
23 those into an Excel spreadsheet. And in doing so, I
24 noticed that the order of the constituents listed by the
25 lab was not the same between the sludge samples and between

1 the water samples. And so some numbers were actually
2 associated with the wrong compounds.

3 Q. Mr. von Gonten, is Exhibit 17, the compendium, is
4 that the actual reports --

5 A. The -- Yes, those are the original paper copies
6 that were submitted to us.

7 Q. Did you prepare Exhibit 16 using the data from
8 Exhibit 17?

9 A. I actually prepared it using the electronic
10 copies which were submitted. As I said, there was 150 to
11 200 reports submitted to OCD by the laboratory. Each one
12 was for -- for example, there were close to 35 analyses.
13 Each analysis would include four suites or four reports.
14 For example, the semi-volatiles were one report, the
15 volatiles were another, the PAHs were a third, and the
16 general chemistry and the metals were a fourth report.

17 So for each report I actually had to compile four
18 smaller reports, and the lab for some reason did not always
19 submit the data in the same order in that comma-separated
20 value file.

21 Q. And in effect, did you make some errors in
22 copying the data from --

23 A. Yes --

24 Q. -- the source, Exhibit 17, into Exhibit 16?

25 A. Yes, I did.

1 Q. And did these errors that you made, did they
2 affect -- materially affect your conclusions?

3 A. No, it did not.

4 Q. Did they change anything in the tables that you
5 -- or in the summaries that you're going to submit as a
6 part of Exhibit 15, that is --

7 A. Not that I --

8 Q. -- on pages 26, 27 and following in Exhibit 15?

9 A. Not that I'm aware of.

10 Q. When did you discover that you had made this
11 mistake in preparation of Exhibit 16?

12 A. I believe that it was about 10 days ago. And so
13 last week I began work -- I think I discovered it on a
14 Friday, and I began working on it on Monday. It took a day
15 and a half or so to make sure that I'd made the proper
16 revisions.

17 Q. When did you complete the revision?

18 A. Well, I don't remember what day it was. It was
19 something like Wednesday of last week.

20 MR. BROOKS: Mr. Chairman, honorable
21 Commissioners, in the interest of having a fully accurate
22 report, although we recognize that this exhibit was not
23 available at the time it was submitted for attachment to
24 the prehearing statement, we would request to substitute
25 the revised Exhibit 16 for the Exhibit 16 that is included

1 in the exhibit books.

2 CHAIRMAN FESMIRE: Ms. Foster, do you have any
3 objection?

4 MS. FOSTER: I do.

5 CHAIRMAN FESMIRE: And it is -- ?

6 MS. FOSTER: Mr. Chairman, the objection that I
7 would have is that this witness, as he just stated, took
8 four days -- I think it was from Friday, Monday, Tuesday,
9 Wednesday; those are four working days -- to complete his
10 revisions. It seems to make the implication that there was
11 quite a lot of revisions that needed to be done, and I
12 would like to have the opportunity to look at both reports
13 side by side, to --

14 CHAIRMAN FESMIRE: If it's introduced into
15 evidence, would you have that opportunity and the chance to
16 cross-examine him on the differences?

17 MS. FOSTER: Well, I wouldn't be able to cross-
18 examine him this afternoon. I would need to be able to
19 look at the original report that he submitted as part of
20 the exhibits and then this new report, because if it took
21 him four to days to do revisions there's quite a few
22 revisions, I'm sure.

23 CHAIRMAN FESMIRE: Okay. Mr. Hiser, do you have
24 any objections?

25 MR. HISER: I think that she stated it well.

1 CHAIRMAN FESMIRE: Mr. Carr?

2 MR. CARR: And I'll support Ms. Foster in her
3 objection.

4 CHAIRMAN FESMIRE: Okay. Ms. Belin, do you have
5 an objection?

6 MS. BELIN: I have no objection.

7 CHAIRMAN FESMIRE: And Mr. Jantz?

8 MR. JANTZ: No objection.

9 MR. BROOKS: Mr. Chairman, we would have no
10 objection to making Mr. von Gonten available for further
11 cross-examination later in the week if counsel feels that
12 that is necessary.

13 CHAIRMAN FESMIRE: Okay. With that provision
14 we'll go ahead and accept the revisions.

15 MR. BROOKS: Okay. Would you pass those, then,
16 to the Commissioners and counsel?

17 CHAIRMAN FESMIRE: Ms. Foster, I'm going to put
18 it on your shoulders to request a recross-examination of
19 Mr. von Gonten at some point --

20 MS. FOSTER: Okay, thank you.

21 CHAIRMAN FESMIRE: -- before the end of the week,
22 okay?

23 MS. FOSTER: Yes, I will do that.

24 CHAIRMAN FESMIRE: This is replacement Exhibit
25 16?

1 MR. BROOKS: Yes, your Honor, that is the case.

2 And if the Commission is ready, I will instruct
3 Mr. von Gonten to proceed with his technical presentation.

4 CHAIRMAN FESMIRE: Commissioner Bailey, are you
5 ready?

6 COMMISSIONER BAILEY: Ready.

7 CHAIRMAN FESMIRE: Commissioner Olson?

8 COMMISSIONER OLSON: (Nods)

9 CHAIRMAN FESMIRE: Okay, let's go.

10 Q. (By Mr. Brooks) You may proceed, Mr. von Gonten.

11 A. There are eight spreadsheets that I'll be walking
12 through. I will give you an overall summary.

13 As you can see on the left-hand column, which is
14 titled constituents and analytical methods, that column
15 should be on all eight of these.

16 The locations are shown here on the column B
17 through M. This is actually from the southeast, and it's
18 colored blue to indicate that it was a water sample. And
19 there's four segments of each report.

20 On the left-hand column you see the 17 PAHs by
21 8270. Further down, 93 semi-volatiles by 8260C [sic].

22 Moving down the table a page or so, you can see
23 that there are 69 volatiles by 8260B.

24 And the last segment is on the 24 general
25 chemistry inorganics, et cetera, by various EPA methods.

1 Obviously there's a lot of information here, and
2 I'm not going to take the Commission's time by going
3 through each one. We're presenting the data, and then we
4 will be summarizing the data.

5 But you can see that the concentrations
6 determined are depicted in each cell, and if it is not
7 detected -- if it's a non-detect, the detection limit is
8 displayed in that cell, so you see a "less than". For
9 example, on the top page, acenaphthylene in CL-6 was less
10 than .01. And the units are given over in the far right-
11 hand column, in milligrams per liter.

12 And also the column next to the -- column L
13 depicts the maximum value detected in the southeast. And
14 actually, a lot of my summary spreadsheets will be using
15 that value.

16 Next, please. The next one is southeast, yes,
17 table 2. This is showing those results from the southeast
18 again. It's shown in kind of a tan color to indicate that
19 it was a sludge or soil. Again, column A is constituents
20 and analytical methods. The individual locations are
21 columns B through actually N, and you can see that column O
22 and P are the maximum value, and the units in the right-
23 column -- units are depicted in column P.

24 Again, it's the same suite of materials. Again,
25 the non-detects are actually given -- or the detection

1 limit is given if it's a non-detect.

2 Continue on to tab 3, please. I'm going to walk
3 a little bit through this one because this is from the
4 northwest, and this is showing the same information, the
5 same list of constituents, the same format with the site
6 locations depicted in columns B through G, the maximum
7 concentration in column H, and the units are depicted in
8 column I.

9 If you'll scroll down, Mr. Hansen, I want to look
10 at the general chemistry.

11 I think it's particularly noteworthy, in the
12 general chemistry column -- excuse me while I find this.

13 I would call your attention underneath the 24
14 general chemistry or the compounds, that chloride is listed
15 about six down, and this is one of the interesting things.
16 This is actually from the liquids in the pits, the pit
17 fluids, and you can see the concentration of chloride in
18 the pit was -- the first site was 1210, 7800 in the second
19 site, 3400 in the third site, 4280 in the fourth site, 3940
20 in the fourth site [sic], fifth site was 2500, and the last
21 site was 7810 -- or actually that's the maximum, I'm sorry.

22 CHAIRMAN FESMIRE: So chlorides were above 1200
23 in every -- these are liquid content pits sampled?

24 THE WITNESS: Yes, sir.

25 CHAIRMAN FESMIRE: And some as high as 7800?

1 THE WITNESS: From our sampling.

2 As you would expect, the total dissolved solids,
3 which is also shown there on -- What line is that? Yes,
4 thank you, on row 199, it is also elevated as you would
5 expect, and -- from a fairly elevated chloride content.

6 You can see that the last three compounds there
7 are reporting the total reported hydrocarbons, or TPH, and
8 then we have also the other GRO and DRO concentrations,
9 which show that the concentration in the fluids ranged up
10 to -- for DRO to be 534, in the max.

11 I'd like to also move to tab 4 now and scroll
12 down also again to the same general chemistry. Again I'd
13 call to your attention, the chloride content here ranged
14 from 417 to a maximum of 5290 milligrams per kilogram.

15 And --

16 Q. (By Mr. Brooks) Now these are all northwest
17 samples?

18 A. These are all northwest samples.

19 And then I'd like to move on to a summary table.
20 The next tab, please, 5. This is the state's summary. We
21 have the same constituent list, we have the maximum in the
22 sludge or solids detected in the northwest in column B.
23 Column C is the sludge and solids in the southeast. Column
24 D is the units. Column E is the max detected in the
25 northwest for fluids, and column F is the maximum detected

1 in the southeast.

2 And units have been converted here from the
3 original parts per million and milligrams per kilogram or
4 milligrams per liter to be micrograms per kilogram and
5 micrograms per liter.

6 Again, you can review these and determine that --
7 This was, I think, our best slide to actually determine --
8 to answer the question, What was detected? And I'll have a
9 final summary slide when I return to Exhibit 15, to count
10 all these up.

11 You can see that some constituents were detected
12 in one area of the state that were not detected at all,
13 much less have a maximum value, in the southeast.
14 Difficult to say, except there's a lot of variability in
15 what we detected.

16 Tab 6, please.

17 This is a rather busy slide, and I have two other
18 slides that will break this up, but just for completeness
19 this is same information, plus this time I've included for
20 reference -- the columns now include -- as I just
21 previously mentioned on tab 5, I've added the industry
22 committee's solid/sludge pit contents, total fraction, the
23 industry committee's solid/sludge pit contents analyzed by
24 so-called soluble fraction, analyzed after TCLP.

25 For comparison I also included the RCRA TCLP

1 standards, the NMED residential soil screening levels, the
2 New Mexico Environment Department soil screening levels for
3 protection of groundwater with a DAF of 1, and the final
4 column is the WQCC 3103 standards.

5 This is too busy to make anything out at this
6 scale, so let's move to tab 7.

7 This is combining all the results from -- that we
8 had at the time that I prepared this, of the solids or
9 sludge. The industry committee's exhibit that deals with
10 their results by Dr. Thomas, I believe, will be presenting
11 that as some modifications to it, and those were not
12 included in this exhibit.

13 You see some light-blue shading, and that is a
14 flag that indicates that -- if you scroll down to the
15 bottom, please, Mr. Hansen -- the blue shading indicates
16 that it was a constituent that would have exceeded the ED
17 soil screening levels for the protection of groundwater
18 with a DAF of 1.

19 The constituents that are highlighted with a red
20 outline are constituents that would have exceeded or did
21 exceed New Mexico Environment's soil screening levels.

22 The constituents that are just actually -- just
23 total lead, exceeded EPA's TCLP 20-times rule for totals.
24 And basically what that 20-time rule states is that if you
25 have a total analysis of some material that you determine

1 to see whether it fails or passes the toxicity
2 characteristic leaching procedure, you may use that number
3 and multiply -- or actually -- Let me get this straight.

4 You divide it by 20. It's a 20-to-1 dilution
5 factor, so that you would determine that -- The total
6 fraction divided by 20, if that does not exceed the EPA
7 TCLP concentration, then EPA allows you to use that
8 information rather than running the TCLP on your waste,
9 which is an additional cost.

10 You can use the total fraction information and
11 divide that by 20 to make a determination on your waste,
12 whether it's hazardous or not.

13 Then -- So one constituent -- that is, lead --
14 exceeded the TCLP 20-times rule. Eight constituents
15 exceeded the soil screening levels. 25 constituents
16 exceeded the ED soil screening levels for the protection of
17 groundwater using a DAF factor of 1.

18 Next, please?

19 And this final one here, again has -- I've
20 analyzed this and I've gone through this, and I am
21 comparing our results with the maximum. I did not compare
22 all of the sites and count them up individually, but just
23 for the purposes of making an observation and summarizing
24 this, I did use the maximum value and compared it to an
25 appropriate standard.

1 Here we're looking again at the TCLP standards
2 and the Water Quality Control Commission 3103 groundwater
3 standards, tables A and B.

4 I determined that six constituents exceeded the
5 TCLP regulatory level specified at 40 CFR 264, and 18
6 constituents exceeded the WQCC groundwater standard
7 specified at 20.6.2.3103.

8 And for these summary bullets or blocks at the
9 bottom of these spreadsheets I also analyzed the industry
10 committee's results. Here you see this is for the soluble
11 fraction. Part of the block has been truncated, but it was
12 analyzed after TCLP, which involved taking a sample and
13 diluting it 20-fold before running the analysis.

14 For my final summary slides back on Exhibit 15 I
15 used only OCD's data.

16 I'd like to return back now and resume Exhibit
17 15.

18 Q. What page?

19 A. That's a good question.

20 Yes, we should begin on page 26.

21 Okay, we're summarizing using OCD's pit sampling
22 program results only.

23 I determined that 11 of the 17 PAHs were detected
24 in the northwest. In the southwest the ratio was four out
25 of 17.

1 In the northwest for the semi-volatiles --

2 Q. Excuse me. Was this detected in one or more
3 pits --

4 A. Yes.

5 Q. -- that were sampled?

6 A. At least one positive detect is what this slide
7 is --

8 Q. Continue.

9 A. 12 out of 93 semi-volatiles were detected in the
10 northwest, seven out of 93 were detected in the southeast.

11 Fourteen out of 69 volatiles were detected, and
12 14 out of 69 were also detected in the southeast.

13 And there were 19 out of 23 general chemistry
14 inorganics, et cetera, were detected in the northwest, and
15 the southeast it was 21 out of 23.

16 Next page, please.

17 I'll start off with the bottom line by pointing
18 out that now I'm reporting 24 general chemistry, and that's
19 because with solids there's no point in reporting or
20 analyzing for total dissolved solids, that makes no sense.
21 So there was one additional analyte for the water samples.

22 Eleven out of 17 PAHs were detected positively in
23 the northwest, nine out of 17 in the southeast.

24 Nine out of 93 semi-volatiles were detected in
25 the northwest, 10 out of 93 in the southeast.

1 Fifteen out of 69 volatiles, and 13 out of 69
2 volatiles, northwest and southeast, respectively.

3 And as I pointed out, 20 out of 24 general
4 chemistry parameters in the northwest, and 22 out of 24 in
5 the southeast for the water results.

6 Q. All right. Now chlorides is included in general
7 chemistry?

8 A. Yes, sir, it is.

9 Q. And also -- does that also include metals?

10 A. The metals are reported in that bottom series of
11 rows that includes the RCRA metals.

12 Q. But is that included in the general chemistry --

13 A. Yes, it is.

14 Q. -- category?

15 A. Yes, it is.

16 Q. Continue.

17 A. Next slide.

18 I used -- again, as I mentioned, I used the
19 maximum value to characterize the constituents present in
20 the pits, and I recalculated some results to milligrams per
21 kilogram for the soils and sludge, and micrograms per liter
22 -- excuse me, micrograms per kilogram for the soils and
23 sludge, and micrograms per kilogram -- micrograms per liter
24 for water and fluids.

25 Q. Now did that recalculation change the values or

1 just the units?

2 A. It changes the units. It moves the decimal place
3 three places.

4 Q. Continue.

5 A. Next slide, please.

6 As I mentioned, the tables did include the WQCC
7 standards for groundwater, the TCLP, the -- NMED's 2006
8 soil screening levels, and -- both for residential and for
9 protection of groundwater -- and some of the industry
10 committee's data for comparison with OCD's results.

11 Next slide.

12 Approximately 77 -- Excuse me. Approximately 77
13 constituents were detected in at least one sludge or soil
14 sample or liquid/water sample.

15 Next slide.

16 Five OCD samples failed the toxicity
17 characteristic leaching procedure test. And except for the
18 statutory RCRA exemption, these pits would have been
19 determined to contain characteristically hazardous waste.

20 Next.

21 The TCLP test is used by EPA to determine whether
22 a waste is characteristically hazardous.

23 The industry committee used the TCLP test to
24 determine, according to their report provided to the task
25 force, environmental mobility and bioavailability.

1 Next slide.

2 The use of TCLP is not recommended by EPA
3 Superfund in its Risk Assessment Guidance for Superfund,
4 referred to as RAGS, and the industry's use of the TCLP
5 test in its sampling program was not useful in determining
6 what constituents are actually present in the pit contents.

7 Q. Now Mr. von Gonten, would you explain why that is
8 true?

9 A. There is a 20-to-1 dilution factor that occurs.

10 Q. Okay, continue.

11 A. I should have pointed out when I was walking
12 through the exhibits on 16, on the slides -- or the tabs
13 that actually depicted OCD's results versus the industry's
14 results, there were a lot of blank pages, blank cells.

15 There were also some constituents that were
16 detected by industry, and I believe Dr. Thomas's
17 presentation points out that these were lab surrogates, and
18 they were not actually part of the tests -- they were
19 actually a laboratory part of the test, they're not
20 actually a constituent that was detected in the sample that
21 was being analyzed.

22 So there was a different list, but apparently
23 industry used similar methods for analyzing its -- some
24 similar methods for analyzing its samples. And they only
25 analyzed for sludge, they did not analyze for pit fluids.

1 Next, please.

2 Based on our data, five constituents that would
3 have exceeded the TCL- -- five constituents would have
4 exceeded the TCLP test for liquids, using no dilution. And
5 you just use the straight fluid itself, you don't do an
6 extract as you do with solids.

7 Q. And again, is this in one or more pits?

8 A. This is at least one pit.

9 Q. Continue.

10 A. They include arsenic, lead, mercury, 2,4-
11 Dinitrotoluene, 2-Methylnaphthalene.

12 Next, please.

13 Based on OCD's data, lead would have exceeded the
14 TCLP test for solids, using the 20-times dilution of totals
15 test or procedure, and would be considered
16 characteristically hazardous except for the RCRA exemption.

17 Continue.

18 Although pit fluids are certainly not
19 groundwater, 17 constituents were present in OCD pit fluid
20 samples at concentrations that exceed the WQCC Groundwater
21 3103 standards. These constituents include --

22 Next slide.

23 -- naphthalene, benzo(a)pyrene, phenol, benzene,
24 toluene, meta- and para-xylene combined, chloride,
25 fluoride, sulfate, pH, total dissolved solids, total

1 arsenic, total barium, total cadmium, total chromium, total
2 mercury and total lead.

3 Next slide, please.

4 Despite industry's attempts to characterize pit
5 contents as being "benign" and avoid any reference to
6 "waste" during the task force meetings, OCD's analytical
7 data clearly demonstrate that drilling, workover and
8 production pits contain several dozens of constituents.

9 Next, please.

10 All constituents are toxic to some degree. This
11 is the first law of toxicology. The dose makes the poison,
12 which was attributed to Paracelsus, and I don't remember
13 when he lived, but it was perhaps 2000 years ago. This has
14 been known for many centuries.

15 Except for the RCRA exemption, some constituents
16 were present at concentrations that would be
17 characteristically hazardous at other sites.

18 Next slide, please.

19 Drilling, workover and production pits all handle
20 large volumes of liquids and solids. The liquids and
21 solids are oilfield waste, as defined, and must be handled
22 appropriately so that human health and the environment are
23 protected. Sensible and appropriate waste management is
24 required.

25 Next, please.

1 To summarize our pit sampling program, we sampled
2 for a relatively large suite of constituents. We did not
3 attempt to conduct a science project, because it is not
4 relevant to proper oilfield waste management.

5 Q. Now what exactly do you mean when you say you did
6 not attempt to conduct a science project?

7 A. We took a fair number of samples, but you could
8 have made it far more complicated. You could have
9 considered the geology, the depth of the well, the
10 formations that were penetrated and the cuttings managed in
11 the pits. We could have also subdivided it according to
12 the mud program that the operators were using.

13 Q. Is that statement that you did not attempt to
14 conduct a science project mean that the sampling program
15 was, in your opinion, not scientific?

16 A. Oh, no, it does not. It was a scientific
17 project, but it was not an academic science project.

18 I guess my point is that it could have been far
19 more comprehensive. If we took and analyzed for 200-
20 something constituents, you could analyze for twice that or
21 three times that.

22 And I should point out that industry did analyze
23 for other suites of constituents that we did not. They
24 did, and we wanted to after the fact but we just didn't
25 think about it. For example, NORM, naturally occurring

1 radioactive material, would have been another excellent
2 suite for us to have analyzed for. They also, I believe,
3 analyzed for polychlorinated biphenyls, PCBs, that we did
4 not.

5 So there are other suites of constituents that
6 could have been analyzed for. We drew the line where we
7 did. We thought we got a comprehensive, broad look at what
8 is in the pits.

9 Q. Is there anything about the analysis that you did
10 not do which undermines your confidence in the results as
11 far as the analysis that you did?

12 A. No. I think we could have always done more, but
13 what we did was adequate to characterize the pit contents.

14 Q. Continue.

15 A. The point is that neither the number of
16 constituents nor the concentration of the constituents
17 changes the RCRA exemption. Oilfield wastes are exempt
18 from RCRA hazardous waste management regulations. However,
19 oilfield wastes must still be managed appropriately.

20 Q. Now I believe we've gone over this, but I want to
21 be sure that everybody's clear on it. I believe we went
22 over it with Mr. Price, but I want to be sure everybody's
23 clear.

24 What does the RCRA exemption exempt oilfield
25 wastes from?

1 A. It excludes it from the requirement to be managed
2 as hazardous waste.

3 Q. And what subdivision of the RCRA Act is that --

4 A. That is RCRA Subtitle C and its implementing
5 regulations.

6 Q. Now does it exclude oilfield wastes from other
7 provisions of RCRA, other than those included in Subtitle
8 C?

9 A. No, it does not.

10 Q. And where in RCRA does the provision prohibiting
11 open dumps appear?

12 A. Well, it does occur in the definition of open
13 dump as contained in the -- RCRA, the act itself and
14 statute, federal statute.

15 Q. But is it in Subtitle C?

16 A. I should know the answer to this. I don't know
17 that the -- Certainly I think there's a distinction between
18 the statutory definition of open dump and the regulations.
19 I don't --

20 Q. I think that's not an important point, because I
21 believe we can cite law to the court without a sponsoring
22 witness, so we will go into that matter at a later time.
23 Thank you.

24 CHAIRMAN FESMIRE: You're objecting to your own
25 question?

1 (Laughter)

2 MR. BROOKS: I did not attempt to answer it, but
3 I believe we can cite this matter to the Commission, and
4 will do so. And I will not attempt to answer it, but I
5 will attempt to present the materials from which the
6 Commission can derive an answer.

7 You may continue, Mr. von Gonten.

8 CHAIRMAN FESMIRE: Mr. Brooks, would this be a
9 good time to take a break?

10 MR. BROOKS: It would be -- Well, how much longer
11 do you have, Mr. von Gonten?

12 CHAIRMAN FESMIRE: About eight pages, nine, 10
13 pages?

14 THE WITNESS: For this section, yes, about eight
15 pages.

16 MR. BROOKS: Let's see, but -- and you also have
17 the oilfield waste management program?

18 THE WITNESS: Yes, sir.

19 MR. BROOKS: We can go ahead and take a break
20 now.

21 CHAIRMAN FESMIRE: Okay, we'll take a break and
22 reconvene at three o'clock by that clock, please.

23 (Thereupon, a recess was taken at 2:47 p.m.)

24 (The following proceedings had at 3:00 p.m.)

25 CHAIRMAN FESMIRE: Okay, let's go back on the

1 record. Let the record reflect that we're back after the
2 break. It's three o'clock p.m. on Tuesday, November 6th,
3 2007. Again, let the record reflect that Commissioner
4 Bailey, Commissioner Olson and Commissioner Fesmire are all
5 present. I believe we were in the middle of the direct
6 examination of Mr. von Gonten.

7 Mr. Brooks, would you proceed, please?

8 Q. (By Mr. Brooks) Thank you. Mr. von Gonten, you
9 may continue with your technical presentation.

10 A. Slide 43, please. Thank you.

11 Part 17 specifies both the general and technical
12 standards that -- it should be general performance
13 standards and technical standards, that will ensure that
14 oilfield waste that is generated in pits and below-grade
15 tanks is managed and disposed of properly.

16 Next slide.

17 The industry committee sampled six New Mexico
18 sites for soils and sludges only and submitted a data
19 summary report to the pit rule task force.

20 Industry committee report provided average and
21 concentration range data -- that is, minimum and maximum
22 values -- but did not provide at that time the actual
23 laboratory summary reports.

24 No sampling analysis plan was provided.

25 Next slide.

1 No photos documenting the condition of pits was
2 provided. VOCs were collected after the samples were
3 composited in the field, which means that the samples were
4 biased low for volatiles. Laboratory reports with QA/QC
5 were not provided. Industry did use EPA methods similar to
6 those used by OCD except for the "soluble" fraction in the
7 use of TCLP.

8 Next slide, please.

9 Industry task force representatives accompanied
10 OCD on both of our sampling programs, both the one in the
11 southeast and the northwest. Industry task force "split"
12 soil and sludge samples with OCD.

13 Next sample [sic], please.

14 I'd like to discuss other investigations of
15 oilfield waste, primarily by EPA. In EPA's 1987 report to
16 Congress, which was entitled Management of Wastes from the
17 Exploration, Development and Production of Crude Oil,
18 Natural Gas and Geothermal Energy --

19 Next slide.

20 -- EPA conducted some sampling, and they were
21 focused on produced water and drilling muds, and they
22 sampled -- EPA sampled a total of 42 sludge samples, 59
23 liquid samples at 19 drill sites, 23 production sites, four
24 centralized pits and three centralized treatment facilities
25 for the following constituents:

1 Next slide, please.

2 There was a total here of 534 total analytes.

3 They analyzed for volatiles, semi-volatiles, dioxins and
4 furans, pesticides, herbicides, as well as metals. And
5 then they also analyzed for conventional analytes by wet
6 chemistry, and that was equivalent to our general
7 chemistry, and they also determined the waste
8 characteristics, whether they were corrosive, ignitable or
9 reactive.

10 And they had a total of 534 analytes, we had --
11 in OCD's sampling program we had a little bit over 200
12 samples.

13 EPA --

14 Next slide.

15 -- detected 134 constituents out of the 534
16 analytes. That's about a 1-out-of-3 ratio of positive
17 detects, and that's about what OCD observed.

18 Next sample [sic].

19 Other studies of crude oil, produced water and
20 hydrocarbon constituents, excluding oilfield services
21 waste, were analyzed by EPA in a report of 2000 entitled
22 the Associated Waste Report. They detected 72 positively
23 detected constituents in completion and workover wastes.

24 Also in 2000 EPA reported, in its Sector Notebook
25 Project - Oil and Gas Extraction Industry, a single table,

1 table 5, for produced water effluent concentrations. They
2 detected 47 constituents.

3 Okay, so what's in that pit? What did OCD
4 determine?

5 In our final summary I would point out that we
6 sampled -- we note that temporary and permanent pits,
7 below-grade tanks and sumps are used to manage large
8 volumes of fluids and solids. The fluids and solids
9 contain several dozen, if not hundreds or even thousands,
10 of compounds and isomers. EPA has determined that these
11 fluids and solids do not need to be handled as hazardous
12 waste.

13 Next.

14 The fluids and solids managed in pits during the
15 active life of the pit are "product" when being used for
16 the intended purposes and are not "wastes".

17 Next, please.

18 During the active life of a pit -- or the pit --
19 fluids may be released into the environment as a result of
20 leaks and spills. The same fluid that was a "product" is
21 classified now as a "waste" when it is released into the
22 environment, and it must be handled appropriately.

23 Next.

24 After active life of the pit, all fluids and
25 solids become "waste" at some point and must be handled

1 appropriately at closure. However, when recycled or re-
2 used, pit contents are not "waste".

3 I should point out that Mr. Chavez, among his
4 other presentations, will be addressing what's called P2 or
5 pollution prevention, and he will be talking about
6 recycling and re-using.

7 Finally, part 17, the new proposed pit rule,
8 specifies both the general performance standards and the
9 enforceable technical standards that are necessary to
10 ensure that the oil and gas industry manages and disposes
11 of oilfield wastes appropriately.

12 That's all of 15 and 16.

13 Q. Thank you. And with the indulgence of the
14 Commission, you may continue with your technical
15 presentation, Exhibit Number 18, regarding exploration and
16 production waste management.

17 A. Yes, I would refer to Exhibit 17, which again was
18 a voluminous OCD pit sampling compendium, and all the
19 results have placed in there on CD.

20 Exhibit 18 is entitled Exploration and Production
21 and Waste Management.

22 Next slide, please.

23 This is repetitious, I apologize, but what is
24 part 17?

25 OCD determined that "sensible waste management"

1 for exploration and production wastes, just as with part
2 36, originally known as Rule 53, could best be achieved by
3 requiring industry to follow specified best management
4 plans using the best demonstrated available technology, or
5 BDAT, while still allowing the opportunity for exceptions
6 under appropriate circumstances.

7 And what I mean by this is, the best management
8 plan is basically what we're proposing in our pit rule 17.
9 The best demonstrated available technology is the closed
10 loop system, combined with appropriately lined pits or
11 appropriately lined deep-trench -- deep-burial trenches.

12 Next, please.

13 Part 17 is also designed to strike a balance
14 between the operator's need for practicability and the
15 OCD's need for enforceability by specifying both general
16 performance standards and technical standards.

17 Q. While you're mentioning that, there were some
18 questions raised this morning about the existence of these
19 prescriptive standards.

20 If you have prescriptive standards, is an
21 operator in violation just because what they do does not
22 conform to that prescriptive standard?

23 A. Yes, if it's specified in regulation, they would
24 be in violation. If it says 20-mil and they haven't gotten
25 the exception, then they would be in violation of the

1 requirement that specifies 20-mil.

2 Q. Now if you were going to enforce a performance
3 standard, on the other hand, what would you have to do, if
4 you felt the operator's -- what the operator was doing did
5 not meet that performance standard?

6 A. A general performance standard says something
7 along the lines of protect human health and the
8 environment, make sure that the contents are managed
9 appropriately. That can be interpreted even by people who
10 -- respectively disagreeing among themselves with what that
11 means. Companies could disagree with what is meant by
12 that, the OCD could have another interpretation.

13 It's a good over-arching goal that we should all
14 strive for, is to protect human health and the environment,
15 but it may not tell a prudent operator exactly what we mean
16 by that. And they may determine that 12-mil is fine, or
17 even 6-mil is fine, with their experience. Our experience
18 would dictate, and what we're recommending to the
19 Commission in the proposed rules, is that 20-mil be the
20 standard, for example.

21 Q. And if you were to undertake to enforce a
22 performance standard, would you have to potentially present
23 evidence to a decision-maker to show that what you were
24 requiring was actually necessary?

25 A. I think so. I think that there could be two

1 scenarios.

2 One is, an inspector goes out to a site, and
3 perhaps they go out to a site before the pit liner, for
4 example, is actually installed, and has a discussion with
5 them saying, That's not an adequate anchor trench. They
6 can have that discussion before any sort of potential
7 violation would occur, and they could work things out.

8 But if it happens after the fact that an
9 inspector goes out to a site and sees that, well, the winds
10 have whipped up and blown the liner into the pit because
11 there wasn't an adequate anchor trench, you could make the
12 argument that it was never appropriate in the first place.
13 But I think that some operators would take exception to
14 that and argue that in their experience they didn't have to
15 have a berm, they didn't have to have an anchor trench, and
16 that they were using something that they were comfortable
17 with. And so it would lead to an argument that might need
18 to be resolved by setting a hearing before a Hearing
19 Examiner or before the Commission.

20 Q. Can a performance standard -- I'm sorry, can a
21 prescriptive rule, then, be enforced with considerably less
22 expenditure of enforcement time, in your opinion, than a
23 general performance standard?

24 A. I think clearly it could.

25 Q. Continue.

1 A. Next slide, please.

2 The next few slides are all taken from this EPA
3 publication entitled *Exemption of Oil and Gas Exploration*
4 *and Production Wastes from Federal Hazardous Waste*
5 *Regulations*. This is the most recent in a series of
6 brochures issued by EPA to help industry with the
7 understanding where the RCRA guidance helps them or could
8 hurt them.

9 Next, please.

10 It starts off by saying, Sensible waste
11 management begins with "good housekeeping." Prudent
12 operators design exploration and production facilities and
13 processes to minimize potential environmental threats and
14 legal liabilities. EPA promotes sensible waste management
15 practices through a number of joint efforts with
16 organizations such as API -- which is the American
17 Petroleum Institute -- individual states, and the
18 Interstate Oil and Gas Compact Commission, IOGCC. The
19 following waste management suggestions have been compiled
20 from publications produced by these organizations as well
21 as from literature available from industry trade
22 associations, trade journals, and EPA.

23 Next.

24 These are some of the suggested waste management
25 practices that EPA published in this document, and the ones

1 in red are particularly relevant to the pit rule that we're
2 talking about today.

3 EPA recommends that you use closed loop mud
4 systems when practical, particularly with oil-based muds.

5 Operators should review material safety data
6 sheets, MSDSs, of materials used, and select less toxic
7 alternatives when possible.

8 Operators should minimize waste generation, such
9 as by designing systems with the smallest volumes possible,
10 e.g. -- for example, drilling mud systems.

11 Operators should reduce the amount of excess
12 fluids entering reserve and production pits.

13 These are general performance standards that I
14 think it's very hard to argue with.

15 Continue.

16 EPA suggests that operators keep all non-exempt
17 wastes out of reserve or production pits.

18 Operators should design the drilling pad to
19 contain storm water and rigwash.

20 Operators should recycle and re-use oil-based
21 muds and high density brines when practical.

22 Operators should perform routine equipment
23 inspections and maintenance to prevent leaks and emissions.
24 Obviously, an ounce of prevention is worth a pound of cure.

25 Next, please.

1 EPA suggests that operators reclaim oil debris
2 and tankbottoms when practical.

3 They should minimize the volume of materials
4 stored at facilities.

5 They should construct adequate berms around
6 materials and waste storage areas to contain spills. And
7 these are berms around product storage areas rather than
8 the drilling pits, I should point out.

9 Operators should perform routine inspections of
10 materials and waste storage areas to locate damaged or
11 leaking containers.

12 And finally, operators should train their
13 personnel to use sensible waste management practices.

14 Next.

15 I'd like now to talk about OCD's position on the
16 100-mile-radius provision. We've required it and put it
17 into the proposed rule because we do not want to encourage
18 industry to dispose of pit contents on-site, because on-
19 site disposal is the least desirable type of waste
20 management.

21 OCD --

22 MR. HISER: Objection to that, Mr. Chairman. Is
23 the witness purporting to state that as a matter of fact or
24 as a matter of his personal or professional opinion?

25 CHAIRMAN FESMIRE: Mr. Brooks?

1 MR. BROOKS: May I ask the witness that question?

2 CHAIRMAN FESMIRE: Sounds like a real good one.
3 Might have to ask it, since it's been raised.

4 MR. BROOKS: I think I would have to ask the
5 witness that question.

6 CHAIRMAN FESMIRE: Okay.

7 Q. (By Mr. Brooks) Mr. von Gonten, you are -- you
8 have spent a lot of your professional career working with
9 waste management, have you not?

10 A. Yes, I have.

11 Q. And is it your opinion as a professional in that
12 field -- when you say on this slide that on-site disposal
13 is the least desirable type of waste management, is that
14 your opinion based on your expertise and experience in that
15 field?

16 A. It is, and also based on training. It is also
17 part of pollution prevention that will be discussed by a
18 later testimony by OCD staff.

19 Q. Is it also based on your review of the
20 literature, professional literature on the subject of --

21 A. It is.

22 Q. -- waste management?

23 A. I'll continue?

24 CHAIRMAN FESMIRE: Just a second. Does that --
25 Mr. Hiser, does that satisfy your objection?

1 MR. HISER: I believe you clarified it's his
2 opinion, thank you.

3 CHAIRMAN FESMIRE: Thank you.

4 Continue, Mr. Brooks.

5 Q. (By Mr. Brooks) You may continue.

6 A. I'd also point out that this is more than my
7 opinion; I'm speaking for the Environmental Bureau. When
8 we sat down and went through the various drafts line by
9 line, we actually discussed what was needed and why.

10 MR. HISER: Mr. Chairman, I then have to rise to
11 make my objection one more time. Previously we were told
12 that it was his professional opinion as a witness, now I'm
13 told that it's his speaking on behalf of the Environmental
14 Bureau. So is this an advocacy position by the Bureau, or
15 is this his professional opinion as an expert witness?
16 It's not clear to me which he's speaking as.

17 CHAIRMAN FESMIRE: Well, Mr. Hiser, I think he's
18 been clear in that it is both, and I'll overrule your
19 objection.

20 MR. HISER: Thank you.

21 THE WITNESS: To continue, on-site disposal in
22 New Mexico has led to an unknown and unknowable number of
23 unmarked pits, probably several hundred thousand open
24 dumps.

25 Next, please.

1 The 100-mile-radius provision, continu- --
2 further discussion on that. The cumulative effect of these
3 sites is of concern to OCD because it cannot be calculated
4 with certainty. But it certainly must have a strongly
5 negative impact on the environment, because the
6 unstabilized waste contents have the potential to migrate
7 vertically downward and contaminate well water and migrate
8 horizontally to contaminate the surface water.

9 MS. FOSTER: Objection. The nature of my
10 objection, Mr. Chairman, is that this statement is
11 completely and wholly speculative. And again, if this is
12 his personal opinion as an expert, I think he should state
13 as such, that it's his personal opinion.

14 CHAIRMAN FESMIRE: I'm going to overrule the
15 objection. I think he's been qualified as an expert and is
16 testifying as an expert and has indicated, where it needs
17 to be, what is his personal opinion and what's his
18 professional opinion. I would sustain an objection to his
19 personal opinion, but where it's based on his professional
20 knowledge and expertise, I would overrule the objection.

21 MS. FOSTER: Okay, but again, as to the nature of
22 the speculation in this statement that is made --

23 CHAIRMAN FESMIRE: Ms. Foster, would you like a
24 running objection, then?

25 MS. FOSTER: I would --

1 CHAIRMAN FESMIRE: Okay.

2 MS. FOSTER: -- to any speculative statements
3 that this witness would make, yes, thank you.

4 CHAIRMAN FESMIRE: Okay, I'm going to overrule
5 the objection, but we will note that there is a running
6 objection to his personal opinion -- or to his opinion as
7 stated in his testimony.

8 MS. FOSTER: Thank you.

9 THE WITNESS: Continue, please?

10 Q. (By Mr. Brooks) Continue.

11 A. On-site disposal of pit contents in disposal
12 trenches or where a pit has been abandoned after being --
13 after bulldozing fill on top of unstabilized oilfield
14 wastes means that there will always be the risk that
15 individuals would dig or trench into the dump and cause
16 additional new releases.

17 This has actually happened in the State of New
18 Mexico. This is a site which is referred to as the
19 Westgate case. This is a site where a house was
20 constructed on an old pit location and had to be razed to
21 the ground.

22 Next slide.

23 The contamination at the old site was so great
24 that they actually had to put up a -- I would refer to this
25 as a containment building over the location while they were

1 conducting remediation.

2 Next, please.

3 The only reason, really, to allow on-site
4 disposal in the future is when there is a clear economic
5 burden that results as a consequence of new operations
6 outside the existing infrastructure of the oil and gas
7 waste management industry.

8 If there are new discoveries made in New Mexico
9 which lead to a new trend located in an area not serviced
10 by the oil and gas waste management industry, then market
11 forces will step in to fill that gap, in my opinion.

12 Continue?

13 Q. Continue.

14 A. Industry should not be allowed to dispose of
15 oilfield waste on-site except in certain limited
16 circumstances, that is, only with landowner or surface
17 owner approval and only in properly engineered deep
18 trenches.

19 And I should point out that they should also have
20 to meet the siting criteria.

21 Next, move to the TPH closure standard for a
22 deep-trench burial.

23 We have proposed a 2500-milligram-per-kilogram
24 TPH standard for on-site disposal in a deep-trench burial.
25 We did so because it encourages the operators to promptly

1 remove the free oil and condensate from pits, and we don't
2 believe that operators should be allowed to leave
3 hydrocarbon soil in place because that is not proper waste
4 management. And the 2500 standard is also consistent with
5 part 36 and has already been reviewed and approved by the
6 Oil Conservation Commission.

7 Next, please.

8 If a trench has been compromised, then it is a
9 conservative -- the 2500 number is a conservative and
10 protective concentration.

11 Volatile fractions -- for example, BTEX, benzene,
12 toluene, ethylbenzene and xylenes -- usually will have
13 almost been completely volatilized in our experience.

14 It is consistent with, but not identical to, the
15 ED 1000-milligram-per-kilogram standard which is used for
16 the solid waste landfills.

17 Q. Now when you say "it", are you talking about the
18 2500-milligrams-per-kilogram TDH standard for deep-trench
19 burial?

20 A. Yes.

21 Q. Continue, page 18.

22 OCD's data shows that the 2500-milligrams-per-
23 kilogram standard is achievable, even in landfarm with
24 degraded heavy hydrocarbons. And this was an issue that
25 was discussed at some length in the surface waste

1 management facility rulemaking.

2 It ensures that --

3 Q. Now I'll interrupt you on that. In that
4 proceeding did OCD do some sampling and analysis of
5 landfarm --

6 A. We did.

7 Q. -- wastes?

8 And is your opinion based in part on the results
9 of those -- that sampling?

10 A. Yes, that is the OCD data that I am referring to.

11 Q. Continue.

12 A. The standard ensures that oily waste will not
13 aerobically degrade after initially being buried, followed
14 by a long-term anaerobic degradation resulting in the
15 formation of organic acids or other undesirable degradation
16 by-products such as gases.

17 Next page, please.

18 Sampling data have documented, OCD sampling data
19 -- and I'm referring now to the pit sampling program of
20 2007 -- have documented that organic compounds are
21 routinely managed by industry in pits and that testing and
22 treatment for these organics should logically be part of
23 the closure and disposal process pursuant to subsection A
24 of 19.15.17.11 NMAC. And that's the proposed rule
25 citation.

1 Q. (By Mr. Brooks) Okay. Mr. von Gonten, I'm going
2 to ask you about Exhibits 13, 15, 16 and 18. Were those
3 exhibits prepared by you -- were those exhibits, with the
4 exception -- There's some photographs in some of those
5 exhibits, but with the exception of those photographs in
6 those exhibits, were those exhibits prepared by you or
7 compiled by you from published data sources?

8 A. Yes, they were.

9 MS. FOSTER: I'm sorry, Mr. Chairman, could I
10 have that list again? And does that include Exhibit 13B
11 and 13C?

12 MR. BROOKS: Does not.

13 MS. FOSTER: It's just 13, and then the rest of
14 the list again?

15 MR. BROOKS: 13, 15, 16 and 18.

16 MS. FOSTER: Thank you.

17 MR. BROOKS: I'm sorry, I should exclude 16
18 because there's special considerations with regard to 16.
19 Let's say 13, 15 and 18.

20 THE WITNESS: The answer is, I prepared them.

21 Q. (By Mr. Brooks) Okay. Now, looking at the
22 exhibit -- at the photographs that are included in 15, are
23 these photographs copies of photographs that are also
24 included in 13B or 13C?

25 A. I'm sorry, repeat the question.

1 Q. The photographs that are included in Exhibit 15,
2 are they copies of photographs that are also included in
3 Exhibit 13B or 13C?

4 A. Some of them are. Some of them are only found in
5 Exhibit 15.

6 Q. Okay, can you tell me which ones are only found
7 in Exhibit 15?

8 A. Exhibit 15, slide 5, I don't believe, was shown
9 previously, and it was used to illustrate OCD staff
10 actually collecting samples.

11 Q. Now slide 5, was that a part of the southeast
12 investigation or the northwest?

13 A. That was actually the southeast.

14 Q. Okay, continue.

15 A. Slide 7 was not included, as far as I can
16 recollect, in 13B and -C.

17 CHAIRMAN FESMIRE: Boy, they've got some homely
18 employees, don't they?

19 (Laughter)

20 Q. (By Mr. Brooks) And was slide 7 of Exhibit 15 a
21 part of the southeast or the northwest investigation?

22 A. It was from the northwest.

23 Q. Okay. Does slide 7 fairly and accurately
24 represent what occurred there and --

25 A. Yes, it does --

1 Q. Okay. Continue then --

2 A. -- it was to illustrate a point of OCD staff
3 collecting information about the pit.

4 Q. And is it a fair and accurate representation of
5 what was done?

6 A. Yes, it was.

7 Q. Okay, continue.

8 A. I think in Exhibit 15 we did see slide 10, so
9 that's a repeat. Slide --

10 Q. What about slide 9?

11 A. I think that is also a repeat. That is from the
12 southeast.

13 Q. Okay, and slide 11?

14 A. Slide 11, I would say that these photographs were
15 -- may have been zoomed into, to make a point in my
16 presentation on Exhibit 15, so they may not be the exact
17 same slide, but --

18 Q. They're copies of the same --

19 A. -- they are a copy of a part of each slide.

20 Q. Okay.

21 A. Slide 11 is a duplicate of either Exhibit 13B or
22 -C. Slide 13 is new.

23 Q. Okay --

24 A. I believe this is a slide of the southeast.

25 Q. Okay, slide 14?

1 A. 14 is a slide that was taken from the northwest,
2 I believe, and is a closeup of a stitched seam.

3 Q. And I seem to recall that the not so close up was
4 in Exhibit 13B; is that correct?

5 A. That's correct.

6 Q. Okay, slide 15?

7 A. Slide 15 is a duplicate slide, and that was
8 taken, I believe, in the southeast.

9 Q. Slide 16?

10 A. That is also a duplicate.

11 Q. And I know that 17 was, but -- That's the dead
12 bird, correct?

13 A. Correct.

14 Q. And slide 18, that's -- we've got several copies
15 of that in --

16 A. Yes, it has been prominently displayed in several
17 exhibits.

18 Q. Okay. Now with regard to OCD Exhibit 16, was
19 that prepared by you from the data that is included in the
20 compendium -- what you call the compendium that is OCD
21 Exhibit 17?

22 MS. FOSTER: Objection. Exhibit 16 is the one
23 that you were going to give us some time to compare the
24 original exhibit that was given to us and the changes that
25 Mr. van Gonten made over that four-day period. So then

1 again I would ask for some time, if you gave me to the end
2 of the week, Mr. Chairman, to review the two documents, and
3 then I would ask at that time, if necessary, to have Mr.
4 van Gonten come back on the stand for cross-examination as
5 it pertained to that exhibit.

6 MR. BROOKS: I believe we've already agreed to
7 that, Ms. Foster.

8 CHAIRMAN FESMIRE: Ms. Foster, I guess I don't
9 understand. Are you objecting to admission on that basis,
10 or --

11 MS. FOSTER: Yes, I am, I'm objecting to the
12 admission or discussion of Exhibit 16 at this time. I
13 believe just a minute ago Mr. Brooks stated that there was
14 a question, considerations with Exhibit 16, so he wasn't
15 going to move it into evidence at this time.

16 CHAIRMAN FESMIRE: Mr. Brooks?

17 MR. BROOKS: I don't recall what I stated, Mr.
18 Chairman. I did state that we would agree to have Mr. von
19 Gonten available for cross-examination with regard to the
20 revised Exhibit 16 after counsel has had an opportunity to
21 review.

22 CHAIRMAN FESMIRE: Okay. Ms. Foster, I think
23 your question is to accuracy, and the question here is to
24 admissibility, and I think we'll go ahead. And if Mr.
25 Brooks is going to move in that direction, I will consider

1 it when he moves that.

2 MR. BROOKS: Thank you, Mr. Chairman.

3 Q. (By Mr. Brooks) Now Exhibit 17, is it the actual
4 data report that -- is that the actual data report that was
5 made to you by the laboratories that did the analysis for
6 the Oil Conservation Division's sampling program?

7 A. It includes all the paper copies that were
8 submitted to the OCD by the laboratory.

9 Q. Okay --

10 THE WITNESS: Mr. Brooks, may I discuss something
11 with you?

12 MR. BROOKS: Pardon me?

13 THE WITNESS: May I discuss something with you
14 before we continue?

15 MR. BROOKS: Mr. Chairman, may I have a moment to
16 discuss a matter with the witness?

17 CHAIRMAN FESMIRE: Is there an objection to that?

18 MR. CARR: (Shakes head)

19 MR. HISER: (Shakes head)

20 CHAIRMAN FESMIRE: Since there's no objection,
21 we'll allow a conference. I'm not sure we want to get into
22 this habit.

23 MR. BROOKS: I agree with that, Mr. Chairman.

24 (Off the record)

25 MR. BROOKS: Mr. Chairman, Mr. von Gonten has

1 pointed out to me that he has not had an opportunity to
2 make one of his presentations and would like to do so at
3 this time. It was my mistake that I did not ask him to do
4 so.

5 CHAIRMAN FESMIRE: Okay, what are we going to do
6 with the foundational work you've done on the --

7 MR. BROOKS: I think it would be probably
8 efficient, since that is fresh in the court's mind, if I go
9 ahead and tender the exhibits that I've already laid a
10 foundation for.

11 CHAIRMAN FESMIRE: Okay, let's do this. You
12 haven't passed the witness, so --

13 MR. BROOKS: I have not passed the witness, Mr.
14 Chairman.

15 CHAIRMAN FESMIRE: Okay.

16 MR. BROOKS: Thank you, Mr. Chairman.

17 Now the exhibit that -- I think I may have an
18 incomplete copy, I apologize.

19 At this time we would tender into evidence
20 Exhibits 13, 13C -- I'm sorry, 13B, that's -- no. No, no,
21 no, no. I was right the first time. 13C, that's the
22 northwest pictorial presentation, 15, 16, 17 and 18.

23 CHAIRMAN FESMIRE: Any objections?

24 MR. HISER: Mr. Chairman, we would object to
25 Exhibit 13 insofar as it contains page 3. My objection can

1 be redressed by stipulation if Mr. Brooks would be amenable
2 to it, and that stipulation would be to the fact that
3 although these may be addressed by the pit task force, it
4 does not mean that they actually were addressed by the pit
5 task force, or necessarily by this Commission either. I
6 simply wish to make sure that there's not a presumption
7 that these topics have been addressed and that's not yet in
8 the record.

9 MR. BROOKS: Now I'm sorry, what is it you're
10 objecting -- which --

11 MR. HISER: It's Exhibit 13, page 3.

12 MR. BROOKS: Exhibit 13, page 3.

13 May I ask the witness a question about this at
14 this point?

15 CHAIRMAN FESMIRE: I'll tell you what. Why don't
16 you just ask the witness which of these proposed issues
17 were addressed at the meeting, and we can address Mr.
18 Hiser's objection if he asks that question.

19 MR. BROOKS: Well, of course the concern I would
20 have is that Mr. von Gonten did not participate in all of
21 the task force meetings, so he would not be in a position
22 to testify comprehensively to what was discussed.

23 CHAIRMAN FESMIRE: Okay, but he would know -- he
24 would have personal knowledge of some of these?

25 MR. BROOKS: He would have personal knowledge of

1 some of these.

2 CHAIRMAN FESMIRE: And I suggest, and I think Mr.
3 Hiser will agree with me, that if you were to address that
4 question to him and you were to identify which issues were
5 covered, that -- and we could stipulate that the other
6 issues haven't been testified to yet.

7 MR. BROOKS: Okay. Thank you, Mr. Chairman.

8 CHAIRMAN FESMIRE: Mr. Hiser, would that satisfy
9 your objection?

10 MR. HISER: Yes, it would, Mr. Chairman.

11 Q. (By Mr. Brooks) Okay. Mr. von Gonten, can you
12 testify from this list as to which of these issues were
13 discussed in the task force meetings that you were a party
14 to?

15 A. Yes, I can. I should point out that I believe
16 that this was included in Secretary Prukop's letter to the
17 members of the task force, and I believe that was also
18 included in Exhibit 14, which is on CD.

19 But to answer the question, my recollection of
20 task force -- Perhaps I could point out the ones that I
21 don't think were, rather than the ones that were, if that
22 would be acceptable?

23 CHAIRMAN FESMIRE: Anything that you can do
24 quickly.

25 THE WITNESS: On the left-hand column, about

1 fourth from the bottom, I'm not certain what was meant by
2 general water quality issues. We certainly did talk about
3 groundwater a great deal and just peripherally, if I
4 remember correctly, about surface water.

5 I don't remember any discussions about air
6 quality issues.

7 I don't remember any discussion on task force
8 about regional economics, although that was brought up at
9 the public outreach meetings as an issue.

10 I don't remember being involved with any
11 discussions about public notice, and I don't remember deed
12 notices.

13 Although it was probably always an issue that was
14 there, I don't remember a specific discussion about
15 cumulative impacts --

16 MS. FOSTER: Objection as to -- Objection as to
17 his statement, there probably was a statement. If he was
18 not there for the whole hearing, he cannot speculate as to
19 what was discussed when he was not there.

20 CHAIRMAN FESMIRE: I think that's pretty clear in
21 the context, but Mr. von Gonten, would you simply state,
22 you know, what you remember, and not speculate?

23 THE WITNESS: I'm addressing what I remember
24 happened when I was on task force.

25 CHAIRMAN FESMIRE: Okay.

1 THE WITNESS: To continue, I don't remember a
2 detailed discussion about cumulative impacts, I don't
3 remember a detailed discussion about environmental justice
4 issues, I don't remember discussing in any detail about the
5 inconsistency issues with OCD in Rule 202.

6 I think those are the ones that I don't recall
7 actually being addressed, but they were on the agenda.

8 CHAIRMAN FESMIRE: Okay. Does that satisfy your
9 objection, Mr. Hiser?

10 MR. HISER: Thank you, Mr. Chairman.

11 MR. BROOKS: Mr. Chairman, the -- Mr. Jones who
12 has not yet testified -- for reasons that you may relate
13 to, I call him Mr. Jones the lesser -- will be able to
14 testify to what went on in the meetings of the task force
15 committee that Mr. von Gonten was not present at.

16 CHAIRMAN FESMIRE: Okay.

17 MR. BROOKS: Also, I don't recall if I tendered
18 Exhibit 14. I didn't mean to, because I have to ask one
19 other question of the witness before I tender Exhibit 14.

20 CHAIRMAN FESMIRE: Exhibit 14 hasn't been
21 tendered yet.

22 MR. BROOKS: Okay, very good. I believe I have
23 tendered the ones I intended to, but if you need me to
24 reiterate them I will do so.

25 CHAIRMAN FESMIRE: Let me read them to you: 13,

1 13C, 15, 16, 17 and 18.

2 MR. BROOKS: I believe that is correct, Mr.
3 Chairman.

4 CHAIRMAN FESMIRE: Are there any further
5 objections to those exhibits?

6 MS. FOSTER: Yes, Mr. Chairman, I've got quite a
7 few objections.

8 On page 6 of Exhibit 13, I would ask that the
9 bottom line on that slide be stricken, because there's some
10 inconsistencies in that statement.

11 CHAIRMAN FESMIRE: The bottom line on page 6?

12 MS. FOSTER: Yes, the sentence saying, OCD files
13 are full of photos of pits that have been clearly
14 compromised. I would either like a clarification that
15 those pits are temporary or permanent pits, drilling pits
16 or otherwise --

17 CHAIRMAN FESMIRE: Denied, I don't think there's
18 -- I think there's sufficient evidence to support that
19 statement.

20 MS. FOSTER: Okay, well then I believe that the
21 statement is much too general to be included in the
22 statement -- in that exhibit. And in that instance, that
23 statement, I believe, is extremely inflammatory.

24 MR. BROOKS: Mr. Chairman, it's subject to cross-
25 examination.

1 CHAIRMAN FESMIRE: That is correct. Deny that
2 objection.

3 MS. FOSTER: Okay. As to Exhibit 13C, I would
4 like to go through the slides, because again the same
5 objection would be it is unclear in the testimony that's
6 occurred whether those are permanent pits or temporary
7 pits.

8 CHAIRMAN FESMIRE: Again, that is subject to
9 cross-examination. You can cover those during your cross-
10 examination of this witness.

11 MS. FOSTER: Okay, I will do so.

12 CHAIRMAN FESMIRE: So that objection is denied.

13 MS. FOSTER: And -- 18 -- I don't believe I have
14 any specific objections to 16, 17 or 18 that I can't handle
15 on cross-examination. Thank you.

16 CHAIRMAN FESMIRE: Okay. So are there any
17 residual objections to the introduction of these exhibits?

18 MR. HISER: No objection.

19 CHAIRMAN FESMIRE: Ms. Belin?

20 MS. BELIN: No objection.

21 CHAIRMAN FESMIRE: Mr. Jantz?

22 MR. JANTZ: No objection.

23 CHAIRMAN FESMIRE: Mr. Carr, get you to --

24 MR. CARR: No objection.

25 CHAIRMAN FESMIRE: Okay. With that, State's

1 Exhibits 13, 13C as amended, 15, 16, 17 and 18 are admitted
2 into evidence.

3 Q. (By Mr. Brooks) Very good. Mr. von Gonten, with
4 respect to Exhibit 14 would you state again for the record
5 what Exhibit 14 consists of?

6 A. It consists of all the e-mail that was circulated
7 to the members of the task force, and also various summary
8 documents that were generated by the task force and
9 submitted via e-mail to the members of the task force.

10 Normally the way it works is, the task force
11 facilitator, Mr. Reese Fullerton, would be responsible for
12 getting the summary notes written up, and those would be
13 distributed to the task force members, and there's routine
14 e-mail correspondence between the various task force
15 members.

16 MR. BROOKS: Okay. Mr. Chairman, we will tender
17 Exhibit Number 14 for the limited purpose of showing what
18 was discussed or what was considered by the task force. We
19 do not offer it for the truth of the matters stated in the
20 communications included.

21 CHAIRMAN FESMIRE: Any objection?

22 MS. FOSTER: Yes, your Honor.

23 CHAIRMAN FESMIRE: We're going to get a duet
24 here, okay.

25 MS. FOSTER: Go ahead, after you.

1 MR. HISER: Mr. Chairman, I guess I'm a little
2 bit troubled by this being inconsistent with the rules that
3 were set forth by the Secretary of EMNRD, which was that
4 the task force would meet and that the task force would
5 then deliver an opinion in the form of a report that would
6 be sort of the results of what the task force was doing. I
7 don't know that the task force members contemplated that
8 all their e-mail and other stuff is suddenly going to be
9 entered into the record here.

10 And so it seems to me that the sense of that
11 whole thing was that there would be a final report of the
12 task force which would be entered into the record of this
13 proceeding, to which we as industry don't have an
14 objection.

15 But I guess I'm caught a little bit askance at
16 the idea of having the whole proceeding itself entered into
17 the record of this proceeding, since we didn't participate
18 in that in the sense of being the industry committee as the
19 industry committee, per se.

20 CHAIRMAN FESMIRE: Mr. Brooks, do you have a
21 response to that?

22 MR. BROOKS: As I say, I am offering it only for
23 the purpose of showing what the task force -- what
24 exchanges occurred between the task force. I'm not sure if
25 Mr. Hiser is making a relevancy objection or if he's making

1 a privilege -- some kind of privilege objection.

2 MR. HISER: I guess that Mr. Hiser's objection
3 basically is that the rules of the task force was that
4 there would be a final consensus report, things were either
5 in consensus or not in consensus. And by introducing this,
6 which includes other discussions, essentially the Division
7 is seeking to go around the agreement of the ground rules
8 of the task force by now seeking to identify positions that
9 members may have been taking, which is inconsistent with
10 the concept of a consensus or nonconsensus binder for the
11 task force. If that makes sense.

12 CHAIRMAN FESMIRE: I'm not getting your point.

13 MR. HISER: My point is that the agreement was
14 that things would come from the task force by consensus or
15 not at all. By introducing the background discussions
16 between the task force members, one is now taking up issues
17 where there was not a consensus finding, and we're now
18 getting the positions of task force members, which seems to
19 me inconsistent with the ground rules of the game that were
20 established by the Secretary of the Department of Energy,
21 Minerals and Natural Resources, the Secretary.

22 CHAIRMAN FESMIRE: Do you have access to the
23 document that sets those ground rules?

24 MR. HISER: I may, but not instantaneously. I'm
25 sure that since there are task force members sitting behind

1 me, they may have access to that.

2 CHAIRMAN FESMIRE: Okay. Since it's getting late
3 in the day what I'm going to do is defer a decision on that
4 objection and tomorrow morning let you bring me the --

5 MR. HISER: I would appreciate that, Mr.
6 Chairman, because then I can check with the task force
7 members, since they may have an opinion on that matter too,
8 and I may have more to share with the --

9 CHAIRMAN FESMIRE: Okay.

10 MR. HISER: -- Commission. Thank you.

11 CHAIRMAN FESMIRE: Thank you.

12 MR. BROOKS: Very good.

13 CHAIRMAN FESMIRE: Mr. Brooks, so we will not at
14 this time admit 14 --

15 MR. BROOKS: Very good.

16 CHAIRMAN FESMIRE: -- pending an investigation of
17 the facts surrounding the objection.

18 MS. FOSTER: Mr. Chairman, IPANM would also have
19 an objection to that motion, and we would also intend to
20 have a discussion with the Commission about that same
21 exhibit tomorrow. The objection is actually on a little
22 bit different grounds than what were stated by Mr. Hiser.

23 CHAIRMAN FESMIRE: Okay, and what would those
24 grounds be?

25 MS. FOSTER: Well, those grounds are that I don't

1 believe that the task force members themselves had an
2 understanding that their communications, which they
3 believed were person-to-person conversations with members
4 of the OCD, would become part of this official record.

5 And in fact, if these are going to be taken -- I
6 understand that they're not taken for the truth of the
7 matter asserted, but that these communications are just
8 going to be reported for the fact that these communications
9 did occur and what the nature was of those conversations,
10 or the topic matter of those conversations were, then we
11 would have to add every single task force member onto our
12 witness list and have them discuss and respond to the
13 allegations that are in these e-mails concerning the
14 discussions that occurred, and what was the consensus and
15 what was not.

16 CHAIRMAN FESMIRE: Don't you think --

17 MS. FOSTER: Again, you know, we would agree with
18 Mr. Hiser's statement that we believe that putting these
19 into evidence without the consensus -- basically, it does
20 an end run around the consensus nature and facilitative
21 nature of what that task force was supposed to be.

22 CHAIRMAN FESMIRE: But these meetings were open
23 to the public, they were public meetings, these documents
24 were sent, and this is not disclosing the contents of the
25 documents but simply the fact that they were sent and that

1 these discussions were had.

2 Q. If -- in order -- I would respectfully request
3 the Chairman, then, in terms of -- in terms of -- I have a
4 four- or five-page document here that outlines Exhibit
5 Number 14, and it does have the name of the sender, and it
6 does have, I believe, the name or the topic number -- topic
7 of the e-mail that was sent.

8 Again, if the task force members were not aware
9 that this was going to become part of the public record,
10 these were e-mail communications between two parties, this
11 is not a conversation that occurred during a public meeting
12 -- then, you know, I would respectfully request the ability
13 to have task force members respond to any e-mails that are
14 attributed to them in this document.

15 CHAIRMAN FESMIRE: Now you can present those
16 witnesses as rebuttal witnesses, can you not?

17 MS. FOSTER: Would you like me to do that, Mr.
18 Chairman?

19 CHAIRMAN FESMIRE: Yes, if you feel the need when
20 the time comes to rebut statements that have been made in
21 these e-mails, perhaps we need to handle it that way.

22 This is an open process, this was a public
23 process, public meetings, open to the public. The contents
24 of these e-mails were discussed at these meetings.

25 I'll consider it overnight, and this will be the

1 first issue that we take up in the morning.

2 MS. FOSTER: Thank you.

3 CHAIRMAN FESMIRE: Okay?

4 Mr. Brooks, were you --

5 Q. (By Mr. Brooks) Mr. von Gonten, I am a little
6 bit confused about what the presentation was that you did
7 not make. Can you clarify that for us?

8 A. Yes, sir. I got through Exhibit 13 as far as
9 page 6. At that point I presented the slide shows, which
10 are Exhibits 13B and -C. We should have resumed on page 7
11 of Exhibit 13, rather than moving on to Exhibit 15.

12 Q. Okay, you may then, with the indulgence of the
13 Commission, resume your presentation beginning with page 7
14 of Exhibit 13.

15 MS. FOSTER: Mr. Chairman, then, since this is
16 technically offered into evidence and is accepted as
17 evidence, could I respectfully request that that be
18 withdrawn from evidence at this time until we have the
19 end -- to the end of the presentation, and we can have
20 another discussion if necessary at that time?

21 CHAIRMAN FESMIRE: I'll grant that, yes.

22 MS. FOSTER: Thank you.

23 Q. (By Mr. Brooks) Okay, you may continue.

24 A. It became clear -- The problems with Rule 50
25 continued. It became clear to OCD that major problems

1 existed with the way that industry was designing,
2 installing and operating its pits, particularly temporary
3 pits such as drilling and workover pits.

4 Next, please.

5 I'd like to now -- That was, in fact, a summary
6 of the slide shows.

7 And the next topic is regulatory overview. I'm
8 going to begin by discussing some provisions of the Solid
9 Waste Disposal Act, commonly known as RCRA, which is
10 codified at 42 United States Code 6901 *et seq.* Section
11 1004 says, As used in this Act -- and it's definition
12 (14) -- the term "open dump" means any facility or site
13 where solid waste is disposed of, which is not a sanitary
14 landfill, which meets the criteria promulgated under
15 Section 4004 and which is not a facility for disposal of
16 hazardous waste.

17 Next slide, please.

18 Section 1003, backing up one section, states the
19 objectives. The objectives of this Act -- that is, RCRA --
20 are to promote the protection of health and environment and
21 to conserve valuable material and energy resources by --
22 part of that -- if I were a lawyer I would use the term
23 *inter alia* -- it states in section 1003, subsection (3),
24 prohibiting future open dumping on the land and requiring
25 the conversion of existing open dumps to facilities which

1 do not pose a danger to the environment or to health.

2 Next slide, please.

3 Section 1004, again back to definitions,
4 subsection (3), The term "disposal" means the discharge,
5 deposit, injection, dumping, spilling, leaking, or placing
6 any solid waste or hazardous waste into or on any land or
7 water so that such solid waste or hazardous waste or any
8 constituent thereof may enter the environment or be emitted
9 into the air or discharged into any waters, including
10 ground waters.

11 I'd like to next move to EPA's discussion of
12 2002, the exemption of oil and gas exploration and
13 production wastes from federal hazardous waste regulations.

14 Next.

15 In December of 1978 -- Excuse me.

16 In December of 1978, EPA proposed hazardous waste
17 management standards that included reduced requirements for
18 several types of large volume wastes. Generally, EPA
19 believed these large volume "special wastes" are lower in
20 toxicity than other wastes being regulated as hazardous
21 waste under RCRA.

22 Next, please.

23 Subsequently, Congress exempted these wastes from
24 the RCRA Subtitle C hazardous waste regulations pending a
25 study and regulatory determination by EPA. In 1988, EPA

1 issued a regulatory determination stating that control of
2 exploration and production wastes under RCRA Subtitle C
3 regulations is not warranted.

4 Continuing, next slide.

5 Hence, exploration and production wastes have
6 remained exempt from Subtitle C regulations. The RCRA
7 Subtitle C exemption, however, did not preclude these
8 wastes from control under state regulations, under the less
9 stringent RCRA Subtitle D solid waste regulations, or under
10 other federal regulations.

11 Continuing.

12 In addition, although they are relieved from
13 regulation as hazardous wastes, the exemption does not mean
14 that these wastes could not present a hazard to human
15 health and the environment if improperly managed.

16 Next.

17 In general, the exempt status of an exploration
18 and production waste depends on how the material was used
19 or generated as waste, not necessarily whether the material
20 is hazardous or toxic. For example, some exempt
21 exploration and production waste might be harmful to human
22 health and the environment, and many non-exempt wastes
23 might not be as harmful.

24 It is important to remember that all exploration
25 and production wastes require proper management to ensure

1 issued a regulatory determination stating that control of
2 exploration and production wastes under RCRA Subtitle C
3 regulations is not warranted.

4 Continuing, next slide.

5 Hence, exploration and production wastes have
6 remained exempt from Subtitle C regulations. The RCRA
7 Subtitle C exemption, however, did not preclude these
8 wastes from control under state regulations, under the less
9 stringent RCRA Subtitle D solid waste regulations, or under
10 other federal regulations.

11 Continuing.

12 In addition, although they are relieved from
13 regulation as hazardous wastes, the exemption does not mean
14 that these wastes could not present a hazard to human
15 health and the environment if improperly managed.

16 Next.

17 In general, the exempt status of an exploration
18 and production waste depends on how the material was used
19 or generated as waste, not necessarily whether the material
20 is hazardous or toxic. For example, some exempt
21 exploration and production waste might be harmful to human
22 health and the environment, and many non-exempt wastes
23 might not be as harmful.

24 It is important to remember that all exploration
25 and production wastes require proper management to ensure

1 protection of human health and the environment.

2 Continue.

3 EPA goes on to have a plain-language discussion
4 of some common misunderstandings, misconceptions.

5 One common misunderstanding is that all exempt
6 wastes are harmless to human and the environment, where in
7 fact EPA has determined that certain exempt wastes, while
8 excluded from RCRA Subtitle C hazardous waste control,
9 might still be harmful to human health and the environment
10 if not properly managed. The exemption relieves wastes
11 that are uniquely associated with the exploration and
12 production of oil and gas from regulation as hazardous
13 wastes under RCRA Subtitle C but does not indicate the
14 hazard potential of the exempt waste.

15 Continues, Additionally, some of these wastes
16 might still be subject to state hazardous or nonhazardous
17 waste regulations or other federal regulations, such as the
18 hazardous materials transportation regulations and the
19 National Pollutants Discharge Elimination System or state
20 discharge regulations unless specifically exempted from
21 regulation under those laws.

22 Another common misunderstanding is, A waste
23 exempt from RCRA Subtitle C regulation is also exempt from
24 state and other federal waste management regulations, when
25 in fact the EPA states, The exemption applies only to the

1 federal requirements of RCRA Subtitle C. A waste that is
2 exempt from RCRA Subtitle C regulation might be subject to
3 more stringent or broader state hazardous or non-hazardous
4 waste regulations and other state and federal program
5 regulations. For example, oil and gas exploration and
6 production wastes are subject to regulation under the Clean
7 Air Act, the Clean Water Act, the Safe Drinking Water Act,
8 and the Oil Pollution Act of 1990.

9 Continue -- Sir?

10 Q. Mr. von Gonten, the next two slides are
11 quotations from the New Mexico Oil and Gas Act, and I
12 believe that the Commission is probably extremely familiar
13 with the provisions of the New Mexico Oil and Gas Act, so I
14 would ask that you -- in the interest of time, that you
15 just describe what provisions it is -- in general terms,
16 what provisions these are and do not read them.

17 A. Yes, sir. The Oil and Gas Act authorizes the
18 Division to regulate the disposition of produced water and
19 to regulate the disposition of nondomestic waste associated
20 with exploration, development and production and to
21 regulate the disposition of nondomestic waste from the
22 oilfield service industry, transportation of hydrocarbons
23 and the treatment of natural gas or refinement of crude
24 oil.

25 Q. Thank you.

1 A. I would like to continue. The next, please.

2 Q. Please continue.

3 A. The definition of oilfield waste is as follows:
4 Oilfield waste shall mean waste generated in conjunction
5 with the exploration for, drilling for, production of,
6 refining of, processing of, gathering of or transportation
7 of crude oil, natural gas or carbon dioxide; waste
8 generated from oilfield service company operations; and
9 waste generated from oilfield remediation or abatement
10 activity, regardless of the date of release. Oilfield
11 waste does not include waste not generally associated with
12 oil and gas industry operations such as tires, appliances
13 or ordinary garbage or refuse unless generated at a
14 Division-regulated facility and does not include sewage,
15 regardless of the source.

16 Q. Mr. von Gonten, was this the definition that was
17 adopted by the Commission in the proceeding about one year
18 ago?

19 A. I'm not sure when it was adopted. It is a part
20 of the present OCD Rules.

21 Q. Very good, the record will reflect on that.
22 Continue.

23 A. Next slide.

24 Summarize the regulatory overview.

25 Large volumes of RCRA-exempt oilfield waste are

1 generated during exploration and production operations and
2 by service companies.

3 Continue.

4 Q. Continue.

5 A. OCD has a statutory mandate to regulate the
6 disposal of oilfield waste, which is the "disposition of
7 nondomestic wastes" and the disposition of produced water.

8 The use of "open dumps" has been prohibited by
9 federal statute. Therefore, the use of unlined pits, which
10 meets the definition of "open dumps", should generally be
11 prohibited.

12 Q. Now Mr. von Gonten, is it not also possible that
13 a lined pit could be an open dump?

14 A. If it doesn't meet the criteria specified in the
15 statute.

16 Q. And the criteria specified in the statute --
17 there is a section reference, I believe, in the statute
18 that you read where those criteria are specified.

19 A. Well, it refers to sanitary land- -- or, excuse
20 me --

21 Q. Right.

22 A. -- yes, sanitary landfills --

23 Q. Okay --

24 A. -- and hazardous waste.

25 Q. -- my point -- the point I'm simply asking you is

1 -- You've already answered it. Go ahead.

2 A. Continue.

3 Oilfield waste should be disposed of in OCD-
4 approved surface waste management facilities or, in limited
5 circumstances, in properly designed on-site "deep-trench
6 burials."

7 Continue.

8 Q. Continue.

9 A. The next two slides are taken from the so-called
10 STRONGER report, the State Review of Oil and Natural Gas
11 Environmental Regulations. This report is dated 2001.

12 Finding I.9: OCD R-3221-C, the "no-pit" order
13 for southeastern New Mexico, exempts pits which receive up
14 to one barrel of produced water a day from each 40-acre
15 spacing unit, not to exceed a total of 16 barrels of
16 produced water a day.

17 Recommendation I.9: OCD should review and
18 evaluate the technical basis for the "low-volume" exemption
19 in Order R-3221-C to ensure that fresh groundwater in
20 southeastern New Mexico is adequately protected.

21 It parenthetically refers to IOGCC Guidelines,
22 sections 5.1.A and 5.1.C.

23 Q. To conclude, the next page.

24 OCD's response at that time was, Data obtained
25 from OCD studies and recent pit closures have shown that

1 very small volume discharges have resulted in groundwater
2 contamination. Rules are being drafted that will prohibit
3 the use of pits that can adversely impact groundwater.

4 Follow-up review comments: This recommendation
5 has been met. OCD is commended for completing review of
6 the low volume exemption and is adopting rules for the
7 protection of groundwater.

8 And that concludes Exhibit 13.

9 Q. Thank you. And so I won't make the same mistake
10 a second time, does that include all of the presentations
11 you are making here?

12 A. Yes, sir, I believe it does.

13 Q. Mr. von Gonten, I asked you this once before, but
14 since this exhibit has been withdrawn from evidence I will
15 ask you again. Is OCD Exhibit Number 13, which I believe
16 does not contain any photographs -- is OCD Exhibit Number
17 13 -- was that prepared by you or compiled by you from
18 published sources?

19 A. It was.

20 MR. BROOKS: Mr. Chairman, we'll tender in
21 evidence OCD Exhibit Number 13.

22 CHAIRMAN FESMIRE: Any objection?

23 MR. HISER: Just the objection from before in
24 terms of the one page -- No, sorry, that's a different --

25 CHAIRMAN FESMIRE: That's 14.

1 MR. HISER: That's taken care of. No objection,
2 your Honor.

3 CHAIRMAN FESMIRE: Okay. Any objection, Mr.
4 Carr?

5 MR. CARR: No objection.

6 CHAIRMAN FESMIRE: Ms. Foster?

7 MS. FOSTER: No objection.

8 CHAIRMAN FESMIRE: Okay. Ms. Belin?

9 MS. BELIN: No objection.

10 CHAIRMAN FESMIRE: Mr. Jantz?

11 MR. JANTZ: No objection.

12 CHAIRMAN FESMIRE: Okay, Exhibit Number 13 will
13 be admitted.

14 MR. BROOKS: Thank you, your Honor. We'll tender
15 the -- we'll pass the witness.

16 CHAIRMAN FESMIRE: Okay. Ms. Fo- -- Oh, Mr.
17 Carr?

18 MR. CARR: I have just a few questions.

19 CROSS-EXAMINATION

20 BY MR. CARR:

21 Q. Mr. von Gonten, when you were testifying about
22 the OCD sampling, you referred to judgmental sampling; is
23 that correct?

24 A. Yes, sir.

25 Q. When you do judgmental sampling, is it fair to

1 say what you're actually doing is going out and looking for
2 problems?

3 A. Yes.

4 Q. And when you went out on this sampling program,
5 you were able to find and share with us problems concerning
6 everything from tears in liners, to wind problems, to
7 anchoring problems, things of that nature; is that right?

8 A. I'm a bit confused. At first you were referring
9 to sampling program versus the inspection?

10 Q. You went out and you sampled evidence. When you
11 go out to the site, as part of your inspection you were
12 able to find and share with us tears in linings?

13 A. Yes.

14 Q. And you were able to show us anchoring problems?

15 A. Yes, sir.

16 Q. And wind problems?

17 A. Yes, sir.

18 Q. Is there anything under Rule 50, or any authority
19 that you have under Rule 50, that would permit you to
20 require correction of those situations?

21 A. It's a general performance standard, and that
22 would be something that the district inspector, at their
23 discretion, would have the opportunity to take up with the
24 operator.

25 Q. And they could require that those situations be

1 corrected?

2 A. They could.

3 Q. You talked about a 100-mile rule. The 100 miles
4 is arbitrary; isn't that fair to say?

5 A. It was not derived from an analytical equation,
6 so yes, sir, it is.

7 Q. It's no more accurate, necessarily, than 98 or
8 102. It's just a number that the Division selected; isn't
9 that fair to say?

10 A. That is correct.

11 Q. And the intent of having a 100-mile rule is to,
12 if I understood you, discourage on-site disposal?

13 A. Yes.

14 Q. The rule you're proposing doesn't prohibit on-
15 site disposal?

16 A. It does if it's -- generally speaking, there can
17 be an exception, but yes, it does if they're less than 100
18 miles from an OCD-approved facility.

19 Q. If we're more than 100 miles and we meet other
20 conditions, then we could close on-site?

21 A. As long as they had landowner approval.

22 Q. And when they are allowed in these circumstances
23 to close on-site, there are standards they have to meet?

24 A. Yes.

25 Q. There are siting requirements they have to meet?

1 A. That is correct.

2 Q. But when they're closing on-site, the goal, is it
3 not fair to say, is to assure that what they're doing, even
4 when they're outside this 100-mile limit, is protective of
5 groundwater, the environment and human health?

6 A. Yes.

7 Q. Now if I'm within 100 miles of an approved
8 facility and I meet all the standards and the siting
9 requirements and I have no landowner objection, I still
10 have to dig and haul; isn't that correct?

11 A. That is what we are proposing to the Commission.

12 Q. And the only reason, really, you have these
13 requirements in the rule that allow you to close on site is
14 that you anticipate there could be development in new areas
15 outside this 100-mile area?

16 A. Yes, we gave some consideration. We always
17 talked about -- generally, we feel a good rule should be
18 reasonably understandable but also have a -- the
19 opportunity to have exceptions. We thought that this would
20 be one that it would probably be good to have an
21 alternative standard.

22 Q. The alternative standard -- Dig-and-haul is the
23 standard within 100 miles, so the alternative standard
24 would be something that we could come in and show you
25 through the exception process; isn't that right?

1 A. You always have the opportunity to go through the
2 exception process, but I think that the deep-trench burial,
3 on-site disposal, if you meet the other criteria and you're
4 more than 100 miles, I think that you can do that without
5 going through the exception. I think that's -- there are
6 probably other people more versed in the requirements of
7 the rule than I am --

8 Q. But that's because it's protective of human
9 health and the environment; isn't that right?

10 A. Yes, if they meet all their standards.

11 Q. And if it's more than 100 miles and protective of
12 human health and the environment it's all right, but if
13 it's less than 100 miles it is not; is that -- is that what
14 you're saying?

15 A. We're saying that sensible waste management
16 dictates that you should use an OCD-approved landfill for
17 long-term or permanent disposal.

18 Q. Even if it could be more economically done on-
19 site and protective of human health and the environment?

20 A. Yes, we don't think it would be as protective of
21 human health and the environment.

22 Q. So that will be as protective as dig-and-haul?

23 A. That is correct.

24 Q. Now, if I'm -- I think you testified that the
25 rules were designed to allow an opportunity for exception.

1 A. Yes, sir.

2 Q. And the standard for getting an exception is that
3 you have to show that you have equivalent or better
4 protection than what's otherwise provided in the closure
5 provisions in the rule?

6 A. That's my understanding, but I should point out
7 that was not my direct testimony, and Mr. Jones will be
8 going through those provisions in detail.

9 Q. All right. You did testify, though, the goal of
10 the rules was to provide -- allow operators opportunities
11 for exceptions?

12 A. Yes.

13 Q. And the standard for those exceptions is
14 equivalent or better protection, is it not?

15 A. I believe it is.

16 Q. And that even if we were to come in and seek an
17 exception that was protective of human health and the
18 environment, that's not going to be considered unless it's
19 equivalent to dig-and-haul within 100 miles?

20 A. I think they would be considered. You always
21 have the opportunity to bring an exception to the Division.

22 Q. But we would have to show you, to get the
23 exception, that what we're proposing does more than be
24 protective of human health and the environment; isn't that
25 right?

1 A. Well, it would meet that general performance
2 standard, but you might have to look at a different
3 technical standard.

4 Q. But if dig-and-haul is more protective than your
5 standards, and we have to show that it's more protective or
6 -- more protective than dig-and-haul, then we to get an
7 exception have to do more than prove we're protective of
8 human health and the environment; isn't that right?

9 A. No, you just have to show that it is more
10 protective than the dig-and-haul scenario.

11 Q. But that is more protective, you said, than your
12 standards that would be protective of human health and the
13 environment; isn't that your testimony?

14 A. My testimony is that dig-and-haul and disposal in
15 an OCD-permitted landfill, which is permitted and has
16 monitoring and so on, is more protective than on-site
17 disposal in a deep-trench -- deep-burial trench.

18 Q. And to get an exception we have to show that at
19 least -- with this dig-and-haul?

20 A. That's right, my understanding.

21 MR. CARR: Thank you.

22 CHAIRMAN FESMIRE: Mr. Hiser?

23 Ms. Foster?

24 MS. FOSTER: Thank you, Mr. Chairman.

25 CHAIRMAN FESMIRE: How long are you going to

1 take, Ms. Foster, do you think?

2 MS. FOSTER: Probably about two hours. I intend
3 to go through everything --

4 (Laughter)

5 CHAIRMAN FESMIRE: Okay, we're going to continue
6 this in the morning. I've got some general announcements
7 to make, and we're going to take comments, and then we'll
8 proceed with this in the morning.

9 Is there anyone who wishes to make a comment,
10 either a sworn statement of -- I mean a statement of
11 position on the record or sworn testimony at this time?

12 Okay, let the record reflect that no one wished
13 to make a statement at this time.

14 This morning at the lunch break, the attorneys
15 broke and met to discuss the schedule. And the way the
16 schedule is going to work:

17 We're going to meet tomorrow at 9:30 a.m. in this
18 room, and we're going to go to six o'clock. And on
19 Thursday the 8th we're going to meet -- I mean -- excuse
20 me, I said -- on Wednesday we'll meet at nine o'clock.

21 On Thursday we'll meet at 9:30. The regular OCC
22 meeting will occur at nine o'clock. We have some business
23 we have to take care of. Anybody who's interested is
24 welcome to come, but I don't anticipate starting this
25 hearing until 9:30 on Thursday the 8th.

1 On Friday the 9th we'll meet at nine o'clock and
2 go to six o'clock in this room.

3 And then I've been told that the electricity will
4 be fixed in Porter Hall. We're going to meet Saturday the
5 10th at nine o'clock in Porter Hall and go until six
6 o'clock. And in order to facilitate some of the expert
7 witnesses and to minimize the costs of this hearing, we're
8 going to dedicate Friday the 9th, from the beginning until
9 he's complete, to Dr. Stephens -- I'm sorry, in the
10 afternoon? Okay, he'll be here in the afternoon for sure.
11 Okay. Dr. Stephens will be the witness from one o'clock
12 until he finishes.

13 And we will continue until six o'clock on the
14 10th, Saturday, nine o'clock to six o'clock.

15 We're going to take the 11th, Sunday, off.

16 The 12th, Monday, which is a state holiday, will
17 not be for those of you who wish to attend, because we will
18 be meeting in Porter Hall. We're meeting in Porter Hall on
19 Saturday the 10th, and from then on. We meet here this
20 week, but starting Saturday we meet in Porter Hall. On
21 Monday the 12th we will go from 9:00 to 6:00.

22 On Tuesday the 13th we will go from 9:00 to 6:00,
23 again in Porter Hall. The first witness that day will be
24 the OGAP witnesses, and that's the only day they can be
25 there.

1 We will meet Wednesday the 14th from 9:00 to 6:00
2 in Porter Hall.

3 Thursday the 15th from 9:00 to 6:00 in Porter
4 Hall.

5 And Friday the 16th we're going to take off. On
6 Thursday we'll re-evaluate where we are, how much time
7 we've got. But that's the schedule for the next two weeks.

8 I'm going to go over it again in a little more
9 organized fashion.

10 Wednesday the 7th, 9:00 to 6:00 in this room.

11 Thursday the 8th, 9:30 to 6:00 in this room, with
12 the regular OCC Commission at nine o'clock, from 9:00 to
13 9:30, Commission meeting.

14 On Friday the 9th, in this room from 9:00 to
15 6:00. That day, at least the afternoon portion of that day
16 will be dedicated to Dr. Stephens' testimony.

17 On Saturday the 10th in Porter Hall, over in the
18 other building, from 9:00 to 6:00.

19 Sunday the 11th is off.

20 Monday the 12th from 9:00 to 6:00 in Porter Hall.

21 Tuesday the 13th from 9:00 to 6:00 in Porter
22 Hall, but that date will be dedicated to the OGAP
23 witnesses.

24 On Wednesday the 14th, 9:00 to 6:00 in Porter
25 Hall.

1 Thursday the 15th, 9:00 to 6:00 in Porter Hall,
2 and we will re-evaluate the schedule then.

3 Does everybody understand that? Any questions?

4 Okay. And we're going to get off early today,
5 because I don't want to -- don't think we need to start a
6 two-hour cross-examination and break it 15 minutes into it.

7 MS. FOSTER: Thank you, Mr. Chairman.

8 CHAIRMAN FESMIRE: So we'll reconvene tomorrow
9 morning at nine o'clock in this room.

10 Thank you all very much.

11 (Thereupon, evening recess was taken at 4:15
12 p.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 November 21st, 2007.



STEVEN T. BRENNER
CCR No. 7

My commission expires: October 16th, 2010