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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:)CASE BER 2007-07-AQ
SOUTHERN MONTANA ELECTRIC)
GENERATION AND TRANSMISSION)
COOPERATIVE - HIGHWOOD)
GENERATING STATION)
AIR QUALITY PERMIT NO. 3423-00)

TRANSCRIPT OF PROCEEDINGS
BOARD DELIBERATIONS

Heard at the City-County Building
316 North Park Avenue, Room 33
Helena, Montana
April 21, 2008
10:30 a.m.

BEFORE CHAIRMAN JOSEPH RUSSELL,
BOARD MEMBERS LARRY MIRES, HEIDI KAISER, GAYLE
SKUNKCAP, BILL ROSSBACH; ROBIN SHROPSHIRE;
and DON MARBLE (By telephone)

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1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 CHAIRMAN RUSSELL: We're going to go
5 ahead and get started. We're going to hear kind
6 of a -- some sort of "oral closing argument/last
7 time to speak to the Board" probably, without
8 questions being provided to you. Try to keep it
9 somewhat brief, and we'll get through this, and
10 we'll take a lunch break, and then we'll be back
11 at it after lunch. But the order, we're just
12 going to down MEIC, the Department, and then SME.
13 So Abigail.

14 MS. DILLEN: Thank you, Mr. Chairman,
15 members of the Board. First let me thank you for
16 all the time that you're continuing to spend on
17 this case, and personally thank you for
18 accommodating my schedule, and regenerating this
19 meeting. I appreciate it.

20 It's been four months since we last met,
21 but two basic questions remain the same. One is:
22 Is it possible to do a BACT analysis for PM2.5?
23 And two, if so, is it worth sending DEQ and SME
24 back to the drawing board to look at options that
25 weren't considered during the PM-10 BACT process?

1 Are there options that could achieve meaningful
2 reduction of PM2.5 from the Highwood coal plant?
3 I think the supplemental briefing and the briefing
4 that's been submitted to you highlights the fact
5 that the transcript answers those questions in the
6 affirmative.

7 On the first: Is it possible to do a
8 PM2.5 BACT analysis? I want to spend just a few
9 moments on the standard -- on the burden of proof
10 that DEQ and SME have to prove impossibility.
11 This is a situation where all the parties agree
12 PM2.5 is a regulated pollutant; BACT requirements
13 apply. We know you had to do a BACT analysis for
14 PM2.5, it's agreed that an analysis was not done
15 specifically for PM2.5, and the argument is, "It's
16 okay. We did a surrogate. We know it's not the
17 same as an analysis for PM2.5. We know we haven't
18 ensured the maximum achievable reduction of PM2.5,
19 but surrogate analysis for PM10 is the best that
20 we could do." That's an argument that doing a
21 PM2.5 analysis is impossible.

22 Now, the Courts do not require anyone to
23 do the impossible. Of course, they don't. But if
24 you want to rely on an impossibility defense, the
25 Courts require a strong showing from you. Is

1 government an entity -- excuse me. If the
2 Government and SME want to say that they could not
3 do a BACT analysis for PM2.5, and that's why they
4 didn't, the onus is on them to make that showing,
5 and they have not made that showing to you.

6 Now, the argument about whether PM2.5
7 analysis is possible centers around emission
8 factors. What do you need to know to do a BACT
9 analysis? You need to know how much this boiler
10 is going to emit in the way of PM2.5; you need to
11 know what controls are out there, how well they
12 work, and how much they cost.

13 What Eric Merchant said in his testimony
14 -- and this is at Page 353 of the transcript --
15 was: "Had I had a reliable way of estimating
16 PM2.5 emissions, I believe that I could have
17 conducted a BACT analysis specific to PM2.5." So
18 the whole ball game here is: Was there
19 information available about how much PM2.5 was
20 emitted?

21 Now, Hal Taylor -- who was the only
22 person we who spoke to who ever worked on the
23 vendor side, boiler makers, the only person who
24 spent time himself figuring out what particulate
25 matter a boiler emits, and developing controls for

1 those emissions -- told you that he could expect
2 any boiler manufacturer to have that information.
3 DEQ and SME have said, "Well, that seems
4 speculative," but that's not what the permitting
5 process in this case shows.

6 Joe Leirow testified when he needed to
7 get information sufficient to do an analysis of
8 condensible emissions, he was able to get it. We
9 know that condensible emissions are PM2.5
10 emissions.

11 Eric Merchant thought to ask for this
12 information. He didn't receive it, but the record
13 doesn't say why. No one has testified that
14 information regarding this boiler's emissions was
15 unavailable. And given Mr. Taylor's testimony
16 that he would expect it to be available, DEQ and
17 SME cannot meet their burden of proof to show that
18 it was impossible.

19 Now, the question of whether we had
20 enough information about the controls that are
21 available, and what their efficiencies are, and
22 whether you could price them out and do a BACT
23 analysis, again, Mr. Taylor is the only expert in
24 this case who is qualified to talk about
25 particulate matter control technologies, and his

1 testimony was, "I could do it. If I were given
2 the specs on this facility, there is enough
3 literature out there about the control options,
4 and the efficiencies, and the pricing, I would be
5 able to do that analysis."

6 And Eric Merchant himself said that the
7 one catch was emission factors. The record shows
8 that the emission factors were there, were likely
9 there for this facility. It's not been proven
10 otherwise. There has not been an adequate showing
11 of impossibility in this case.

12 And one more point in that regard. Mr.
13 Leirow, when it came time to do modeling for
14 PM2.5, he testified that he didn't need to ask
15 about information on the boiler because he had it;
16 and as we stand here today, we know that the
17 uncontrolled particulate matter emissions that are
18 anticipated from this plant are 140 tons per year.
19 Mr. McCutchen said those emissions are going to be
20 PM2.5 emissions. We know what the PM2.5
21 consequences are here.

22 So that brings us to the second
23 question: Is there more that SME could do, and
24 are there alternatives that are worth looking at?

25 Mr. Taylor pointed out, too, one, the

1 best available bags, membrane bags, the top of the
2 line, weren't looked at; two, the combination that
3 EPA looked in the Deserit permit adding a wet
4 electrostatic precipitator, an ESP, beyond the
5 baghouse to up your control of condensible
6 particulate matter.

7 Now, SME and DEQ could have looked for
8 an expert on particulate control technologies to
9 come and say under oath to you that membrane bags
10 are not in widespread use, that they wouldn't work
11 at the Highwood coal plant, that they'd be too
12 expensive; but they didn't do that. They didn't
13 qualify an expert on control technologies, and I
14 suspect there may be a reason for that, which is
15 that no one would be willing to say that under
16 oath. This is a technology that is available and
17 should have been considered.

18 With respect to a fabric filter baghouse
19 plus an ESP, they have said that, "This is absurd.
20 We would never look at this combination because
21 it's too expensive," but EPA looked at it. The
22 very exhibit that they presented to you, the
23 Deserit permit, has a fairly detailed analysis of
24 this option. EPA clearly felt that it was
25 necessary to look at it. They never hired someone

1 who was willing to come say under oath that if you
2 run the numbers for the Highwood coal plant, and
3 if you looked at pricing as a whole linked
4 technology system as opposed to one technology at
5 a time, that this would be a prohibitively
6 expensive option. As we stand here today, we
7 don't know that.

8 I think it's important to keep in mind
9 exactly what my clients, MEIC and CCE, are asking
10 for. They're not asking for installation of a wet
11 ESP; they're not asking for installation of
12 membrane bags. No one has done the analysis to
13 see whether those options are feasible yet. But
14 what Hal Taylor has shown the Board is that these
15 are options that exist, and should be considered,
16 and do have the potential to reduce PM2.5
17 emissions.

18 And in this regard, I think talking
19 about concrete possibilities is important. EPA,
20 when it looked at using a wet ESP in combination
21 with fabric filter baghouse, thought you could get
22 an additional 86 percent of control of particulate
23 emissions. In this case, that would mean 86
24 percent of 140 tons. That's over 112 tons of
25 PM2.5 each year that we could possibly control.

1 And the only reason -- If we don't look at that,
2 we will be issuing this permit to the Highwood
3 coal plant on an assumption about what's
4 infeasible, and that runs precisely contrary to
5 what BACT is all about.

6 BACT, you've heard over and over again
7 that no other state has required PM2.5 analysis
8 yet; no other state has required a power plant to
9 install a wet ESP after a fabric filter baghouse.
10 But BACT is a dynamic process. The whole point is
11 that it pushes the envelope, and asks permittees,
12 "What today is the best you can do?," not what the
13 last plant that was built in 1970, or 1980, or
14 1986 did, but "What can you do in 2008 to reduce
15 this pollutant?," that has become more and more of
16 concern the more that EPA looks into it.

17 And in that regard, BACT is about first
18 times, and in this case you're being asked to
19 trust EPA, rely on this surrogate policy that's
20 been in place since 1997. But over the last eight
21 years, EPA's credibility has been undermined by
22 increased efforts to create loopholes in the Clean
23 Air Act. Most recently -- I know the Board is
24 well aware of this -- the Courts have told EPA
25 that it was over reaching and trying to let power

1 plants slip out of their responsibilities to
2 control mercury. Now this plant has to go back
3 and look at maximum viable control technology
4 requirements for mercury, because EPA was trying
5 to give an illegal free pass through a cap and
6 trade program.

7 Let's not have the same result with
8 PM2.5. Just because EPA is saying that you can
9 postpone compliance, with clear requirements that
10 everyone here agrees upon, doesn't mean that that
11 is legal. EPA has been told at least five times
12 in the last four years by the Federal Courts that
13 it's operating illegally in its implementation of
14 the Clean Air Act.

15 And finally, another theme -- and it's
16 one that I know rightly concerns this Board -- is
17 fairness to SME. If everyone thought that the
18 landscape was that you could rely on this
19 surrogate policy, is it fair to ask them now to do
20 extra analysis?

21 Well, I have two answers to that. One
22 is: Again, we're not asking for any particular
23 controls to be installed. We don't know what is
24 the best option yet. We're asking for further
25 analysis to be done. That's not a terribly

1 burdensome remedy when the request is to build a
2 power plant that would be in operation for decades
3 to come.

4 Two, BACT is about keeping room open for
5 development. The National Ambient Air Quality
6 Standards operate as ultimately a cap on how much
7 development you can have in any given place. This
8 facility is going to use up 95 percent of the
9 PM2.5 NAAQS. That's going to make it harder for
10 the next facility to come in and build. It's
11 going to have a responsibility to keep its PM2.5
12 emissions down to levels that may prove
13 unachievable. So by asking this facility to do
14 the analysis, figure out the very best it can do
15 in the way of PM2.5, this Board will be creating
16 room for other businesses to build in Montana.

17 I'd like to, if I may, end here, but
18 reserve a few minutes for rebuttal, if I may.

19 CHAIRMAN RUSSELL: All right. Thank
20 you.

21 MR. RUSOFF: Good morning. For the
22 record, I'm David Rusoff, staff attorney for the
23 Montana Department of Environmental Quality.

24 There are only two main questions that
25 the Board needs to answer in this case, as Ms.

1 Dillen just told you, as the Petitioners in the
2 case identified in their prehearing memo, or the
3 parties' prehearing memo. Those questions are
4 whether the Department violated BACT requirements
5 by making a BACT determination for PM2.5 by using
6 PM10 as a surrogate; and whether the Department's
7 BACT determination for PM10 violated BACT
8 requirements.

9 At least four members of this Board, or
10 a majority of the Board members, already answered
11 those questions for themselves at the Board's last
12 deliberations in the case, and their answer on
13 both claims was no, the Department had not acted
14 unlawfully.

15 And the Department is entitled to
16 judgment in its favor in this case. The fact that
17 you may be left with questions is not sufficient
18 for the Petitioners to prevail in the case. It
19 was their burden to resolve in their favor any
20 questions that must be answered in order for you
21 to find that the Department's decision was
22 unlawful.

23 The evidence material to the
24 Petitioners' first claim is the Department
25 followed the same procedure followed by the other

1 permitting authorities in the country in making a
2 BACT determination for PM2.5. As Petitioners' own
3 witness Hal Taylor testified, SME conducted a BACT
4 analysis for PM2.5 using PM10 as surrogate. And
5 the Petitioners provided no evidence that any
6 other permitting authority in the country had made
7 a BACT determination for PM2.5 without using PM10
8 as a surrogate.

9 But the record also shows that the
10 Department went further than was required under
11 EPA surrogate policy, and ensured to very
12 conservative modeling against the PM2.5 ambient
13 standards rather than the PM10 standards that the
14 SME facility would not cause a violation of the
15 PM2.5 ambient standards which are set at levels
16 that are intended to protect the public health and
17 welfare.

18 The Petitioners' case regarding their
19 first claim, as Ms. Dillen essentially just
20 summarized, was their witness Hal Taylor's
21 speculation in response to the question of whether
22 SME's boiler vendor could have provided PM2.5
23 emission rate information, and Taylor speculated
24 that, quote, "I think they could give me an
25 answer," end quote. Taylor did not testify that

1 this information is available, and Taylor did not
2 testify that he has ever obtained any PM2.5
3 emission rates for any emission source.

4 On the contrary, the record shows that
5 Taylor has never performed any BACT analysis for
6 PM2.5, and he's never advised any of his clients
7 that they need to perform a BACT analysis for
8 PM2.5.

9 New Source Review expert Gary McCutchen
10 testified that PM2.5 emission rates are not
11 available; and Eric Merchant -- who has made a
12 couple hundred BACT determinations, essentially
13 all of which he testified involved making BACT
14 determinations for particulate matter -- testified
15 that he looked for PM2.5 emission rate
16 information, and could not find it.

17 Gary McCutchen testified that without an
18 approved reference method test, a person can't
19 just obtain PM2.5 emission rates from a vendor, as
20 Ms. Dillen has argued, for use in a BACT analysis,
21 because it's necessary to be able to use the same
22 method to determine compliance with any limit that
23 has been set. And Mr. McCutchen testified that
24 having a test method that's reliable and
25 repeatable is necessary to determine the

1 uncontrolled emission rate of a pollutant and the
2 efficiencies of available control technologies,
3 and the reliable test methods are the core of the
4 BACT process.

5 This is consistent with EPA's statement
6 in the preamble to its April 25, 2007 PM2.5
7 non-attainment area SIP development regulations
8 that are in the record, in which EPA stated,
9 quote, "We agree that coordinating the test method
10 with a pollutant defined by the emissions limit is
11 critical to an effective PM2.5 regulation."

12 McCutchen testified that because
13 reliable approved test methods are not available
14 for PM2.5, reliable PM2.5 emission rates are not
15 available, and it's not possible to proceed beyond
16 Step 2 of the five step BACT analysis.

17 And record shows that as of April of
18 2007, there continue to be serious concerns about
19 reliability of all of the methods that could be
20 used to measure PM2.5. Based on those concerns,
21 EPA stated in that same rule notice that I just
22 referred to, which is in the record, that based on
23 concerns for the reliability of the test methods,
24 it was appropriate to further validate all of
25 those methods, including Method 202 and

1 Conditional Methods 39 and 40.

2 But the more important point I think to
3 keep in mind is that the record doesn't show,
4 regardless of the status of any of those test
5 methods that could be used to measure PM2.5, that
6 any method has been used to develop the PM2.5
7 emission rate information that would be necessary
8 to conduct a PM2.5 specific BACT analysis, which
9 is why regulatory agencies like the State of
10 Montana are relying on the surrogate policy.

11 The Department and SME cited to the
12 Board the Friends of the Chattahoochee case, in
13 which Georgia's Office of Administrative Hearings
14 granted summary judgment for Georgia Environmental
15 Protection Division, ruling as a matter of law
16 that it was lawful to use PM10 as a surrogate for
17 PM2.5 in the permit analysis for the proposed coal
18 fired power plant in that state. And the
19 Petitioners have cited no decisions in which any
20 regulatory authority or Court has ruled that it is
21 unlawful to follow that surrogate policy.

22 So if this Board finds that the
23 Department acted unlawfully, it would be the only
24 regulatory authority in the country that has done
25 that.

1 There have been some questions by Board
2 members regarding control of condensible
3 particulate emissions. Because condensible
4 particulate is not in a particulate form until it
5 reaches the ambient atmosphere outside the exit
6 stack for the emission unit, condensible
7 particulate is controlled through controlling the
8 precursors to condensible particulate, and those
9 precursors are controlled through the controls for
10 filterable particulate and SO2 largely.

11 As shown in the Department's permit
12 analysis, in relying on the surrogate policy, the
13 Department did evaluate each constituent of
14 condensible particulate matter pursuant to the top
15 down method, which is not required, but which the
16 Department generally follows; and that the
17 Department required the top control for each of
18 those constituents.

19 On the other hand, due to the lack of
20 reliable information concerning condensible PM
21 emissions, EPA's most recent position is that
22 permitting authorities may omit condensible limits
23 altogether, but the Department did not do that.
24 Also Hal Taylor, the Petitioners' witness,
25 testified that for the most part, most people

1 don't try to control the condensible portion, in
2 his words.

3 So it is undisputed that no power plant
4 permit includes an emission limit specifically for
5 PM2.5, and it's undisputed that no permitting
6 authority has made a BACT determination for PM2.5
7 without using the same surrogate policy that the
8 Department relied on in this case.

9 So did the Petitioners prove by a
10 preponderance of the evidence that it was unlawful
11 for the Department to make a BACT determination
12 for PM2.5 in the only means reasonably possible at
13 that time? The answer is no, because emission
14 rates necessary to make a PM2.5 specific BACT
15 determination were not available; reliable test
16 methods to determine compliance were not
17 available; and also basically the Department had
18 no reason to believe that use of the surrogate
19 policy would even be challenged.

20 In one of the cases that Petitioners
21 cited in this case, the Alabama Power Company
22 versus Kosell (phonetic) case, the Court ruled
23 regarding what the standard is when there is an
24 impracticality or impossibility for compliance
25 with a regulatory provision, and the Court said,

1 quote, "Considerations of administrative necessity
2 may be a basis for finding implied authority for
3 an administrative approach not explicitly provided
4 in the statute. The relevance of such
5 considerations to the regulatory process has long
6 been recognized. The corollary principle is
7 observed by the Courts when practical
8 considerations make it impossible for the agency
9 to carry out its mandate."

10 And the Department has shown that
11 practical considerations did prevent the
12 Department from making a BACT determination for
13 PM2.5 without following the surrogate policy
14 followed by EPA and other permitting authorities
15 in the country.

16 So there just isn't any factual or legal
17 basis for the Board to find that it was unlawful
18 for the Department to rely on that surrogate
19 policy, which is still recommended by EPA, and
20 which is followed by all of other permitting
21 authorities, and which was the only practical and
22 reasonably possible means for the Department to
23 evaluate fine particulate matter emissions from
24 the SME facility.

25 Regarding the Petitioners' claim

1 regarding the adequacy of the Department's BACT
2 determination for PM10, the evidence material to
3 Petitioners' claim is that the Department's BACT
4 determination for PM10 reflects the maximum
5 reductions for both filterable and condensible
6 PM10 that SME's boiler could be expected to
7 consistently achieve. The evidence of the
8 Department's determination was based upon applying
9 the uncontrolled emission rates for the coal to be
10 combusted by SME's CFB boiler to what the
11 Department determined to constitute the top
12 controls for both filterable and condensible PM2.5
13 -- or excuse me -- condensible PM10.

14 The Petitioners' witness Hal Taylor
15 testified that that's the same method that he uses
16 in his own BACT work. He testified that he's
17 never looked at emission limits for other
18 facilities, but rather, quote, "I've only given
19 the limit that the BACT analysis showed that the
20 equipment could do," end quote, and he testified
21 that the reason for that is because BACT is a
22 case-by-case analysis.

23 But the evidence shows that the
24 Department also went a step further than the
25 Petitioners' own witness said he would have done,

1 and the Department looked at limits that have been
2 permitted for other similar emission sources, and
3 saw that the limits that the Department determined
4 the top controls for both filterable and
5 condensible PM10 could achieve at the SME facility
6 were near the top of the range for filterable
7 emissions, were very close to the top, with many
8 limits being quite a bit lower, and were right
9 around the middle of the range for limits for
10 condensibles, even though a lot of condensible
11 emission limits haven't been set, and EPA has
12 mentioned isn't actually requiring that they be
13 set at this time.

14 The Petitioners have claimed that the
15 Department's BACT determination was unlawful
16 because SME and the Department didn't evaluate use
17 of membrane bags, or the combination of membrane
18 bags followed by a wet ESP for the same pollutant.
19 However, again, the Petitioners failed to prove
20 that any permitting authority has required either
21 membrane bags or a wet ESP after a fabric filter
22 baghouse as part of a BACT determination, so it's
23 not something that you're going to see in the
24 RACT/BACT/LAER Clearinghouse.

25 Despite the number of commercial

1 utilities in this country, the Petitioners
2 presented no evidence that any commercial utility
3 power plant is using membrane bags, let alone
4 being required to do so pursuant to a BACT
5 determination. And neither New Source Review
6 expert Gary McCutchen nor Eric Merchant had even
7 heard of membrane bags prior to this case.

8 And Petitioners' witness Hal Taylor
9 testified that membrane bags cost twice as much as
10 normal fabric filter bags. He testified that he
11 couldn't say that they would have a higher control
12 efficiency than the 99.85 percent control
13 efficiency relied on by the Department in setting
14 the filterable limit for the SME facility; and
15 Taylor even testified that membrane bags cannot be
16 found listed in the RACT/BACT/LAER Clearinghouse.

17 The record also shows that membrane bags
18 can cause pressure drop, resulting in significant
19 loss of energy, and McCutchen's opinion was that
20 membrane bags are somewhere in the stage between
21 research and development, in the pilot scale study
22 stage, and that they would not be considered an
23 available control technology for BACT analysis
24 purposes.

25 So the Petitioners failed to prove that

1 membrane bags should be considered and available
2 technology for BACT purposes.

3 And as we've discussed, the Petitioners
4 also argue that the Department's determination was
5 unlawful because the Department did not evaluate
6 what's been referred to as a linked technology, or
7 a combination of a fabric filter baghouse followed
8 by a wet electrostatic precipitator or ESP. So
9 the question is whether the requirement to
10 identify all of the available control technologies
11 means that any combination of control technologies
12 that a party challenging a permit might be able to
13 conceive of to control the same pollutant must be
14 evaluated, and the answer to that question is no,
15 that that's not required.

16 Gary McCutchen testified that there has
17 to be consideration of practicality due to time
18 and resources that go into a BACT analysis and
19 BACT determination; and Petitioners' provided no
20 evidence that any facility has ever been required,
21 pursuant to a BACT requirement, to install a wet
22 ESP after a fabric filter baghouse.

23 And the only evidence that this has ever
24 even been evaluated was in the Deserit permit
25 documents, which the Department and SME admitted

1 into the record, and that permit decision was
2 issued after the Department had made its decision
3 in this case. And for that permit, EPA stated
4 that that was the only control that might -- in
5 EPA's words -- provide a higher control efficiency
6 than a fabric filter baghouse by itself, but EPA
7 concluded that, quote, "Even the most conservative
8 analysis demonstrates that addition of a wet ESP
9 to the proposed WCFU --" in that case -- "would be
10 economically prohibitive for BACT."

11 And in its brief, MEIC asserted that in
12 the Deserit permit, EPA did not specifically
13 identify the top control devices for filterable
14 PM10; and that statement may be misleading if you
15 look at the actual EPA permit documents for the
16 Deserit facility. What EPA stated was that the
17 two potential technologies for controlling
18 filterable particulate from a coal fired boiler
19 are fabric filtration and electrostatic
20 precipitation. EPA then ranked fabric filtration
21 as the top control technology over wet ESP, and
22 that's the same technology required by the
23 Department for the SME facility.

24 MEIC also argued in its briefs that SME
25 and the Department evaluated only filterable PM,

1 and not filterable PM10; and if you look at the
2 SME's permit application, the Department's permit
3 determination, that is just not correct. I won't
4 go over all the references. You have those
5 documents. But SME's analysis is of PM/PM10, and
6 if you look in the Department's permit
7 determination, in several places it's clear that
8 both PM and PM10 controls are being evaluated, and
9 that the table that ranks those controls is
10 captioned, quote, "PM/PM10."

11 The Petitioners assume that PM2.5
12 specific BACT determination would result in
13 requiring different controls for the SME facility
14 for PM2.5 emissions than those required for PM10.
15 However, we can't know what the result of a PM2.5
16 specific BACT analysis would be without the
17 reliable PM2.5 emission rate information that the
18 record shows isn't available.

19 We do know, though, that the PM10 and
20 SO2 controls which are being required by the
21 Department for the SME facility do also control
22 both filterable and condensible PM2.5. We simply
23 just don't know what the control efficiencies
24 would be in a PM2.5 specific BACT analysis. So
25 it's not appropriate to assume that a BACT

1 determination would or would not be different if
2 it were possible to conduct a BACT analysis for
3 PM2.5 without relying on the PM10 surrogate
4 policy.

5 In summary, it's undisputed that in
6 relying on EPA's surrogate policy, the Department
7 merely followed the same surrogate policy followed
8 by the other state permitting authorities in the
9 country, and the Department really had no reason
10 to believe that that wasn't the appropriate
11 approach to take in this case.

12 The Department did require SME to
13 install what the Department determined to
14 constitute the top controls for both filterable
15 and condensible PM10; and in doing so, the
16 Department followed the same process that SME's
17 witness Hal Taylor said that he follows in his own
18 BACT work, basing the emission limits on the
19 control efficiencies of the top controls.

20 New Source Review expert Gary McCutchen
21 testified that the Department of Environmental
22 Quality's BACT determinations are among the best
23 in the country, and that DEQ's BACT determination
24 in this particular case was appropriate. The
25 National Park Service commented that the control

1 technologies the Department determined constitute
2 BACT for the HGS, "Are the best available," end
3 quote, and then quote, "Overall, MDEQ's BACT
4 analysis is among the best we have seen."

5 The Department did the best it could by
6 following the only practical and reasonably
7 possible means to make a BACT determination for
8 PM2.5, and by setting BACT determined PM10 limits
9 at the maximum reductions the top controls
10 reasonably could be expected to achieve at the SME
11 facility day in and day out over the life of the
12 facility. And that's what BACT is.

13 The Petitioners have failed to meet
14 their burden of proof by a preponderance of the
15 evidence that the Department's decision was
16 unlawful, and the Department asks that the Board
17 enter judgment in the Department's favor. Thank
18 you very much for your time.

19 CHAIRMAN RUSSELL: Thanks, David.

20 MR. REICH: Good morning, Mr. Chair,
21 members of the BER. My name is Kenneth Reich, and
22 I represent Southern Montana Electric.

23 Before getting into some of the
24 arguments that have been already addressed today,
25 and are certainly addressed in great detail in our

1 briefs, I just wanted to start by saying the real
2 issue before the Board is the adequacy of the BACT
3 analysis done by DEQ. And as the top BACT expert
4 in the country, Gary McCutchen, testified,
5 "Montana is one of the best states," quote, "so
6 far as BACT analysis is concerned." The BACT
7 analyses performed by SME and approved by the
8 State in this case was, quote unquote, "proper and
9 appropriate." The National Park Service basically
10 said the same thing.

11 So the issue is not whether DEQ could
12 have done better, whether they had discretion that
13 they didn't exercise. The issue is whether, in
14 your review of this permit, whether DEQ erred as a
15 matter of law. MEIC has failed in its proof, and
16 as the majority of this Board has already stated
17 in the prior hearing, there has been no proof of a
18 violation of law, and that's the standard that you
19 have to look at.

20 Now, all of the parties have briefed
21 probably exhaustively the points in this case,
22 maybe over exhaustively. I will just address
23 several of the points raised by MEIC.

24 First of all, the surrogate analysis.
25 Did MEIC prove that it was improper and illegal

1 for DEQ to use a surrogate analysis? And the
2 answer is a resounding no. DEQ followed current
3 EPA guidance. All states follow this guidance.
4 MEIC has never identified a single permit in the
5 United States that sets a PM2.5 limit for a power
6 plant, and our research has indicated that even
7 today there is no power plant in the United States
8 that has set for it a PM2.5 limit.

9 The Deserit permit, issued by EPA
10 shortly after this permit was issued, also found
11 that the surrogate analysis was appropriate, and
12 set limits that were actually higher for both
13 filterable and condensible PM than did this DEQ
14 permit.

15 MEIC has not identified any authority
16 that supports that a surrogate analysis is
17 improper; whereas we have identified authority, a
18 Georgia case, the Chattahoochee case, that it is.

19 You've heard voluminous testimony from
20 Mr. McCutchen and Mr. Merchant from the
21 Department. You've seen the EPA exhibits that
22 indicate that as of today, there are still
23 problems with doing a PM2.5 analysis. That has
24 caused EPA to continue to recommend the surrogate
25 analysis, the primary problem being the lack of

1 reliable emission factors -- and I want to stress
2 that -- reliable emission factors, and the lack of
3 modeling guidance.

4 Furthermore, PSD for PM2.5 is not even a
5 complete program. There are no increments that
6 have yet been identified by EPA for PSD. So if a
7 source wanted to figure out whether it was using
8 up increments or not, there is no standards under
9 which it can determine that. That's why no states
10 yet have set a PM2.5 standard. That's why EPA
11 didn't in Deserit.

12 You've heard a lot about Mr. Taylor and
13 his testimony about emission factors, but the
14 point is: MEIC had a burden to prove that there
15 are emission factors, and the best they could do
16 was put up Mr. Taylor to say he thought he could
17 get those from a boiler maker, but he's never done
18 so, he's not aware of any power plant in the
19 country that's ever done so, he couldn't identify
20 any specific emission factors. So the data is not
21 there. You also heard testimony from Mr.
22 McCutchen and from Mr. Merchant that they're not
23 aware of any emission factors.

24 The fact is that one cannot speculate
25 about whether emission factors might be out there.

1 The burden was on MEIC to show that they were
2 there; they didn't meet that burden.

3 I think it's also important for this
4 Board, in its appellate jurisdiction and also as a
5 Board that sets regulations and policy for the
6 State on environmental issues, to understand that
7 this permit has been characterized as not doing
8 anything about PM2.5. That's entirely untrue.

9 Uncontrolled emissions from this
10 facility are approximately 90,000 tons of PM --
11 90,000 tons of PM -- which includes PM10 and
12 PM2.5. The reductions that this plant will obtain
13 with the top controls that have been identified in
14 the BACT analysis bring the total of 90,000 down
15 to 300 tons. Of course, everybody would like to
16 say, "Well, let's get rid of the last 300 tons,"
17 but of course, that's the issue with a BACT
18 analysis, is you have to look at the practicality
19 and the cost effectiveness of getting those last
20 deductions; and if they're just out of this world
21 costly, BACT does not require you to do it. But
22 just stop for a second. 90,000 tons down to 300
23 tons; 162 condensable, the rest filterable. So
24 most of the PM, including most of the PM2.5,
25 contained within PM and PM10 has been controlled.

1 Unlike most permits in this country, DEQ
2 did set a condensible limit in this permit, and as
3 it's undisputed that condensible emissions are
4 essentially PM2.5. So there is a control, and not
5 only a control, a permit limit for condensibles.
6 And that condensible limit in total, .014, is
7 about the most stringent in the country. It's
8 more stringent than the analysis, the condensible
9 limit set by Deserit, just months after the DEQ
10 permit was issued. The total condensibles are
11 basically among the lowest in the country, as are
12 the total filterables.

13 Now, the top technologies to control
14 PM2.5, as I indicated, both direct and condensible
15 and precursors have all been evaluated by DEQ,
16 including wet ESP's, and they have been analyzed
17 and the top controls were chosen. Fabric filters
18 controlled sulphuric acid mist as well as -- which
19 is a component of condensible PM -- sorry --
20 PM2.5. The controlled condensibles component, the
21 major components, sulphuric acid mist. The
22 filterables are controlled by the fabric filter as
23 well.

24 The flue gas and sulphurization system
25 restricts sulphur, and therefore restricts the

1 development of sulphuric acid mist, which is a
2 component of condensibles. And the sulphur
3 levels, the SO2 levels for this permit are among
4 the lowest in the country; and compared to
5 Deserit, again, are lower. I believe they're the
6 second lowest in the state.

7 So you've got a total package that does
8 control, not only direct PM2.5, but the precursors
9 in the condensibles.

10 Further, you've heard that by doing the
11 surrogate analysis, you're overstating PM2.5. DEQ
12 overstated it, and yet it then compared the
13 potential emissions from this plant against the
14 health based standard -- which is the NAAQS -- for
15 PM2.5, and found that it was well within that
16 standard. So the health is protected by this
17 permit analysis; the surrogate analysis gave you a
18 more conservative and over-protective way to
19 control PM2.5; most of the PM2.5 has been
20 controlled; and anything that would be left, we
21 submit and Deserit found, would simply be not cost
22 effective, and that's been testified to.

23 Now, MEIC didn't stress today what they
24 said in their briefs about the limits for PM10
25 being too high. I don't know if they've abandoned

1 that argument. I assume they haven't, so I'll
2 just address it very briefly.

3 As I stated, DEQ did identify the top
4 filterable and condensible controls, and analyzed
5 them in the BACT analysis. DEQ rejected SME's
6 proposed total limit of .030, and took it down to
7 .026; they rejected SME's proposed filterable
8 limit of .015, and took that down to .012.

9 So this was not a rubber stamp by DEQ.
10 DEQ looked hard at this permit, they looked hard
11 at the analyses, and they came with up with
12 tighter limits. And in the case of filterable PM,
13 PM10, they came up with a different technology,
14 namely the teflon coated or the equivalent bags as
15 opposed to the filter bags, the cloth bags that
16 SME had proposed.

17 Furthermore, as we've indicated, they
18 did set a condensible limit. That wasn't
19 something that EPA required, and it wasn't
20 something that SME had proposed because of the
21 difficulty of measuring condensibles.
22 Nonetheless, DEQ did set a condensible limit, and
23 again that's one of the lowest in the country.

24 So DEQ did its job, it did its job
25 properly. And the proof really is the Deserit

1 permit issued shortly after the DEQ permit, which
2 went through very similar analyses on all of the
3 pollutants, and ended up with a higher filterable
4 and condensible rate. In fact, if you look at
5 Deserit closely, they set a .03 limit for PM10
6 filterable and condensible, as compared to SME's
7 .026, so it's higher; but also there is a safety
8 valve to go to .045, substantially higher than
9 SME's; and the reason for the safety valve is the
10 difficulty of measuring and controlling
11 condensibles.

12 So this permit does set limits that are
13 among the best in the country. And if you look
14 closely again at the Deserit permit, which is in
15 the exhibits, you'll find that the Deserit permit
16 analyzed all of the other lower limits that were
17 found around the country, and distinguished them
18 just as Mr. McCutchen did, based on the fact that
19 they used eastern coal, with a higher heat rate,
20 therefore enabling a lower PM limit.

21 As we stressed at the hearing, BACT is
22 not LAER. BACT does not require the setting of
23 the lowest limit for a permit. BACT is a
24 technology driven process, and under BACT, you
25 have to look at the technologies, and you only

1 look at the other permit limits out there as kind
2 of a check to make sure that what you have
3 identified is the best technology, getting you the
4 best reductions.

5 In fact, Mr. Taylor testified he never
6 uses the RACT/BACT/LAER Clearinghouse of EPA to
7 figure out his technology. He just goes to the
8 technology. In this case, Mr. McCutchen testified
9 that you can use that clearinghouse as a guide,
10 but it doesn't require a lower permit limit. Mr.
11 Merchant said he used it as a guide, and you have
12 full analysis of it in the Deserit permit.

13 The issue here, as I said, is not a
14 question of whether BER is stepping into the shoes
15 of DEQ and saying, "If we were doing this BACT
16 analysis, would we have done it differently?" The
17 issue, as the Chattahoochee Hearing Officer found
18 at Page 70 of the decision that's in the exhibits,
19 "The maximum degree of reduction must be
20 considered in light of the level of reduction that
21 could be sustained at all times, rather than a
22 consideration of the absolute maximum."

23 "Additionally, as the EAB has held --"
24 EAB is the Environmental Appeals Board -- "the
25 discretion to make this determination must reside

1 with the permit writer," in this case the EPD, or
2 in our case the DEQ. The discretion is with the
3 permit writer. You can't step into their shoes
4 and simply say, "You know, we might have done it
5 differently," unless you can find they violated
6 the law.

7 As Mr. McCutchen said and as I indicated
8 at the top, the BACT analysis here was proper and
9 appropriate; and DEQ did a proper, and
10 appropriate, and excellent BACT analysis.

11 The third point is about whether DEQ
12 should have analyzed other technologies. Well, in
13 terms of wet ESP, that was analyzed. For
14 condensibles, I said in my brief that it was
15 analyzed for filterables. That was a mistake, and
16 I apologize. It wasn't analyzed for filterables.
17 Dry ESP was analyzed for filterables, and that
18 makes sense because when you have a dry system
19 like SME is proposing here, you normally line up a
20 dry control with that.

21 But for condensibles, which have the
22 majority of the PM2.5, wet ESP was analyzed, and
23 it wasn't chosen for the reasons set out in the
24 permit and the permit analysis.

25 Why was a fabric filter chosen? A

1 fabric filter was chosen not only because it got
2 at least equal controls to a wet ESP, but also it
3 captures SO₂, unlike a wet ESP. It captures it
4 because limestone builds up in the fabric filter,
5 and that enables further SO₂ capture.

6 You also heard about the concerns with
7 wet ESP's buildup of wastewater and other concerns
8 that Mr. Taylor admitted to, and Mr. McCutchen
9 testified about.

10 Filterable, as we've said, was
11 controlled by a fabric filter, and that was the
12 top control. That was found by both DEQ and by
13 Deserit.

14 Why was there no consideration of a wet
15 ESP and a fabric filter in series? The reason is
16 because no one has demonstrated that for a coal
17 fired power plant, and BACT is a question of
18 availability and feasibility, and you just don't
19 identify a control technology that's never been
20 used anywhere. Moreover, as I said, the Deserit
21 analysis did show that the wet ESP with a fabric
22 filter was prohibitively expensive, and it was
23 proper for DEQ not to have analyzed it. It would
24 have been a waste of time to analyze something
25 that wouldn't be cost effective.

1 And I submit it would be a waste of time
2 to remand this matter back to DEQ to do an
3 analysis that Deserit did several months after the
4 DEQ permit was issued, and found was just off the
5 charts in terms of cost.

6 The same applies to the membrane filter.
7 Why is it DEQ didn't analyze a membrane filter?
8 Because no one has used a membrane filter at a
9 power plant, and even Mr. Taylor testified that
10 he's not aware of any use of a membrane filter at
11 a power plant. Again, it's not an available
12 technology. It's not -- We're not in the world of
13 theory here, we're in the world of practicality.
14 It's not been demonstrated anywhere for power
15 plants, and the fact that it might have been
16 demonstrated for metallurgical processes really is
17 irrelevant because that's a very different
18 process, with very different emissions, and very
19 different controls.

20 There was also testimony, uncontroverted
21 testimony, that the one study of membranes at a
22 power plant indicated the membrane filters had
23 failed. It was also indicated that they're twice
24 as expensive as fabric filters. So should DEQ
25 have analyzed membrane filters? No. They're not

1 demonstrated for power plants. That's been
2 testified to by all witnesses, including Mr.
3 Taylor. And again, they don't have the co-benefit
4 control of reducing SO₂, and that was also
5 testified.

6 So MEIC has not proven that DEQ failed
7 to review available and feasible technologies, and
8 the proof is on them, not on SME or the State.
9 The real proof of the pudding on the controls is:
10 Look at the limits. The limits for filterables
11 and condensibles are among the lowest in the
12 country, and that proves that the top technology
13 was looked at.

14 Before I conclude, I wanted to just
15 quickly respond to a couple of points made by Ms.
16 Dillen in her opening. I think the first point
17 about the burden of impossibility being on DEQ and
18 SME has been addressed by Mr. Rusoff, but
19 basically that case isn't relevant here. The
20 burden stays on MEIC to prove its case. And in
21 terms of whether it was feasible to do a PM_{2.5}
22 analysis, there is plenty of testimony in the
23 record that it wasn't.

24 She also made a point that -- I think
25 frankly a reckless point -- that SME would have

1 put up a witness to testify about the
2 unavailability of emission factors if we had one.
3 Well, that's just an inference that this Board
4 can't draw. It's just speculation. The point is
5 you've heard the testimony, you have to rely on
6 the testimony in the record.

7 Another point she made was about
8 fairness, and she said SME's plant will eat up
9 most of the increment for PM2.5. Well, that's
10 just not true. If you look at the permit
11 analysis, SME's emissions alone eat up about 30
12 percent, and you have to look at other plants that
13 have been built or not built to see what the rest
14 is. But SME alone doesn't use up most of that
15 increment.

16 In conclusion -- and I would like to
17 leave a few minutes for rebuttal and for questions
18 obviously. What you have here is a valid, legal,
19 proper, and appropriate BACT analysis; and MEIC
20 did not meet its burden to show otherwise. The
21 surrogate analysis has been followed all around
22 the country, and it's proper and appropriate, and
23 certainly was not illegal. It also overestimated
24 PM2.5, and included something that EPA doesn't
25 require, which is a condensible analysis and a

1 condensible limit.

2 The PM10 limits are based on the top
3 technologies for filterable and condensible, and
4 that capture plenty of PM2.5. MEIC can't show and
5 didn't show that DEQ erred in setting those
6 limits, if that is still part of their case. And
7 finally, MEIC has not proven that DEQ failed in
8 analyzing available and feasible technologies.
9 Those were evaluated. Wet ESP was certainly
10 evaluated. The combination that we've already
11 talked, the membrane we've talked about, those
12 aren't available, and certainly not cost effective
13 technologies.

14 I submit that your role here, as I said,
15 is not to step into the shoes of DEQ. You're not
16 doing a BACT analysis yourself. You're trying to
17 decide whether or not DEQ erred as a matter of law
18 in doing the BACT analysis it did, and I think the
19 answer is a resounding no, they did not err as a
20 matter of law. BER must affirm this permit based
21 on the evidence and the arguments.

22 Now, similar to our discussion, when we
23 were talking about the CO2 issue, if BER has
24 concerns generally about PM2.5 emissions from
25 power plants, and the numerous other industrial

1 facilities around the state that emit PM2.5, then
2 address this in an even handed fair way across the
3 board, not as a retroactive rulemaking that
4 singles out one particular source. The fact is
5 that older power plants and older industrial
6 plants emit plenty of unregulated PM2.5, and a lot
7 more. Certainly the larger power plants emit
8 much, much more than this modern plant will ever
9 emit, and those would not be the subject of any
10 ruling that you make with respect to SME.

11 So if the Board's concern is about
12 PM2.5, address it across the board as a matter of
13 policy, not retroactively. We submit that you
14 should find that DEQ made an excellent BACT
15 analysis here, and followed all of the
16 requirements in doing so.

17 And in case I don't get to say this in
18 further remarks, there has been a long period of
19 time since this appeal was filed, so this appeal
20 was filed in late May, early June of 2007. We're
21 now into our eleventh month. Some of the delays
22 have been unavoidable. Some of the delays frankly
23 I think were avoidable.

24 The dilemma that faces SME is it has a
25 permit with a commence construction date of

1 November 30th, 2008. We're eleven months into
2 that eighteen month period. If this appeal
3 continues to languish, basically the permit will
4 be extinguished without any action by the Board or
5 anybody else. It will just go away because the
6 deadline will pass, and that would be a travesty
7 not only for the customers of SME, but really
8 would be a travesty for all concerned, because
9 that would have meant you would have wasted eleven
10 months of your time reviewing this permit, and
11 trying to get it right; and then if the permit
12 expires, there will be another BACT analysis,
13 another appeal, and you'll be going through this
14 for the next two years.

15 What I'm saying is -- and I hope that
16 the Board agrees -- the time is ripe to make a
17 decision. Of course we want you to make the
18 decision that supports the State and us, but we
19 need a decision one way or the other. Basically
20 the way this system is set up, delays and appeals
21 basically, as I said, can make a permit go away
22 really without any decision. It's basically --
23 Unfortunately it's a very unfair process to the
24 permittee, and I believe it's unfair to the
25 public, and unfair to you as members who may have

1 to go through this whole process once again.

2 So I urge you to make a decision today,
3 and I urge you to make it in our favor. Thank
4 you.

5 CHAIRMAN RUSSELL: We've talked about
6 the need to probably do lunch before noon to keep
7 it so we don't get stuck in the lunch rush.
8 Abigail, how much time do you think you wanted for
9 rebuttal?

10 MS. DILLEN: I need to make just really
11 two quick points.

12 CHAIRMAN RUSSELL: Let's close this
13 morning with the rebuttal, and then we'll have
14 this afternoon for questions. Then we'll go back
15 in the order we started.

16 MS. DILLEN: I just want to respond to a
17 couple of things that Mr. Reich said. He said
18 that the National Park Service had said basically
19 the same thing that Gary McCutchen had said, that
20 this was a proper and appropriate analysis. Well,
21 that's not what National Park Service said. They
22 said, "A lot of this permit looks good to us, but
23 we don't understand why these particulate matter
24 limits are so high."

25 Everybody is pointing to the Desert

1 permit as an example of how to do a BACT analysis.
2 Well, we don't agree with everything that Deserit
3 permit says. If you look at it, one thing they do
4 is explain the limits and why they're not lower,
5 why they're not as low as other limits around the
6 country. DEQ never did that; SME never did that.
7 That's not in the record. I haven't spent a lot
8 of time on it today because I feel like we've beat
9 that horse thoroughly in the hearing, but we
10 certainly do maintain that it's a problem that
11 these limits are not the lowest in the country,
12 and there is no explanation as to why.

13 As Mr. Reich said, the proof, according
14 to him, the proof is in the pudding because these
15 limits are low. Our response to that is: We
16 don't know why they're not lower, and we suspect
17 that if other top control technologies were
18 considered, we might get to the lower limits that
19 have been permitted elsewhere around the country.

20 Second, I just want to address the point
21 that's been made repeatedly in the briefing and
22 again here today, that Mr. Taylor never asked a
23 boiler manufacturer for information. Mr. Taylor
24 was the boiler manufacturer for ten years. He's
25 in a very good position to say what boiler

1 manufacturers know and don't know.

2 And finally, I want to end with some
3 testimony that Mr. McCutchen gave at the hearing
4 in response to a question by Mr. Marble. Mr.
5 Marble said, and this is on Page 497 of the
6 transcript, "This plant is going to be built, and
7 the new standards aren't going to provide to help
8 to make sure it's built properly, the very best
9 that can be done."

10 And Mr. McCutchen said, "That is
11 correct. Now, if we're talking about just
12 filterable, all that 140 or so tons coming out
13 after all of the controls that they are mandated
14 to put on this particular facility, ought to be
15 very fine particles. So if there is any more
16 efficient control technologies on, what they will
17 be controlling will be essentially all PM2.5."

18 "So you don't necessarily have to switch
19 over to PM2.5 to get more controls of fine
20 particles. All you have to do is improve the
21 efficiency, or find higher efficiency control
22 technologies that pass the top down BACT test,
23 including the cost effectiveness. So there could
24 be a focus on, or a more intensified focus through
25 the Board on looking to make sure that the highest

1 level, most recent technologies have been
2 evaluated."

3 For example, you could say that. I
4 never liked doing things retroactively when I was
5 at the agency, but you could say, "From 'X' day
6 forward, we want every BACT analysis to include
7 for filterable PM2.5, and look at membrane
8 filters." As soon as they are proven out to the
9 satisfaction of the people involved, yourself and
10 the agency, those would start being considered in
11 a BACT analysis. These are things you can do now
12 to -- I'm sorry. I got way off base."

13 Well, I think Mr. McCutchen did get off
14 base from the perspective of his clients; but from
15 my perspective, I think he was saying something
16 very useful to the Board. Right now you could
17 take an intensified focus on control of
18 particulate matter, and what you would be
19 capturing is more PM2.5 from this plant. If there
20 are possibilities out there, we have to look at
21 them. We can't just assume that they're not
22 available.

23 DEQ and SME have not proven that the
24 options that MEIC has presented are infeasible,
25 and I think we would sell ourselves short if we

1 allow this plant to be built without looking at
2 the state of the art technologies that do exist,
3 and that have the potential to reduce emissions
4 from this plant.

5 CHAIRMAN RUSSELL: Thank you. The
6 Department.

7 MR. RUSOFF: Thank you, Mr. Chairman,
8 members of the Board. Again, this is David Rusoff
9 for the Department. I just have one correction,
10 and just a couple of very brief responses to Ms.
11 Dillen's comments.

12 Mr. Reich stated that the Department did
13 not evaluate wet ESP for filterable particulate,
14 and that is not correct. If you take a look at
15 DEQ and SME Exhibit 7, which is the Department's
16 permit analysis, there are several references to
17 wet ESP in the analysis for filterable
18 particulate, as well as condensible particulate.

19 Then the only comment that I'd like to
20 respond to that Ms. Dillen made was in regards to
21 the lack of explanation for why the Department
22 determined that the SME plant couldn't reasonably
23 achieve lower emission limits, and that we don't
24 know that maybe those limits could be achievable
25 with other control technologies, and she referred

1 to the discussion in the Deserit permit.

2 If you look at Page 63 of the permit
3 analysis for the Deserit facility, EPA states,
4 "With the exception of the AES PRCP plant, all
5 other plants operating CFB boilers with PM/PM10
6 emission limits utilized fabric filters for
7 control of filterable PM/PM 10 emissions," and if
8 you look at Page 62, the limit for the AES PRCP
9 plant for PM10 is 0.015, substantially higher than
10 the 0.012 limit imposed by the Department for the
11 SME facility. Thank you very much.

12 CHAIRMAN RUSSELL: Thank you.

13 MR. REICH: Thank you, Mr. Chair. I'll
14 just respond to a couple of points.

15 With respect to whether limits could be
16 lower, there is a discussion in both the SME
17 analysis, and then it's adopted by DEQ -- and I
18 can get you the page numbers in a second -- as to
19 why those permit limits, the lower permit limits
20 weren't chosen, and that discussion was certainly
21 ratified by the Deserit very detailed analysis.
22 You can't suspect that there would be the ability
23 to get lower permits. There has to be some proof
24 that you could get lower permits, and MEIC has not
25 sustained that proof.

1 As to the McCutchen quote, Ms. Dillen
2 did read it accurately, but unfortunately she left
3 out a very important last part of that quote, and
4 this is at Page 498 where after Mr. McCutchen
5 said, "These are things you can do now to," and he
6 said, "I'm sorry. I got way off base." Question:
7 "Keep going." "There are things you could do now.
8 I would just urge you not to do them
9 retroactivity, based on my difficulties trying to
10 do anything retroactively while I was at EPA, and
11 the consequences of that."

12 So he was telling the Board what I was
13 telling the Board, which is if you want to set a
14 policy that certain technologies have to be looked
15 at, or a policy that DEQ has to evaluate the
16 feasibility of doing a PM2.5 analysis
17 specifically, you could set that policy; but as
18 Mr. McCutchen testified, don't do that
19 retroactively, don't do that in the context of one
20 permit, where the permittee and the Department
21 were following all of the rules in effect at the
22 time. That's all I have. Thank you.

23 CHAIRMAN RUSSELL: So we will take a
24 break, recess. We will commence again at 1:00,
25 and maybe right -- we'll just meet and try to

1 figure out what we should do for lunch now, and
2 we're in recess until 1:00.

3 (Lunch recess taken)

4 CHAIRMAN RUSSELL: We're going to go
5 ahead and get back into session. This is the time
6 when -- if Board members have any questions for
7 the parties, they can ask them now. So we'll get
8 into it. Is there anyone who would like to ask
9 any of the parties a question regarding the
10 record?

11 MR. MARBLE: Kris, this is Don. I'm
12 having a little trouble hearing what was being
13 said there because it was cutting in and out. I
14 wonder if you could repeat it.

15 CHAIRMAN RUSSELL: Don, we just started
16 again, and just asked if any of the Board members
17 had a question for any of the parties before we
18 take further action, or take any action.

19 MR. MARBLE: I don't have any questions,
20 but I do have a -- Well, when it gets to be time
21 to vote, I have a little statement I want to make.

22 CHAIRMAN RUSSELL: All right.

23 MR. MARBLE: You cut in and out there,
24 so I didn't hear you.

25 CHAIRMAN RUSSELL: Okay, Don.

1 MR. MARBLE: Joe, do you want me to say
2 something, or are we just questioning now?

3 CHAIRMAN RUSSELL: If you have a
4 statement, you can certainly make it now.

5 MR. MARBLE: Okay. Well, I'll just go
6 ahead. And I apologize for my voice, it's a
7 little raggedy, and if anybody has trouble hearing
8 me, please just stop me, and I'll try and do
9 better.

10 But I have been following along, as
11 everybody knows, this rule, and I was thinking
12 back to the time we passed the mercury rule. EPA
13 had said that we had to have -- include cap and
14 trade, and we did -- and the way I read the
15 federal law, it seemed quite clear that it didn't
16 fit with mercury, but -- So it went along with
17 EPA, and sure enough, the Federal Court disallowed
18 cap and trade for mercury pollution. Mercury is a
19 pollution, and although I realize that's not all
20 of the way to the Supreme Court yet. And we
21 included cap and trade.

22 Then recently a Federal Court -- then
23 EPA said we couldn't regulate CO2, and basically
24 the Supreme Court said, "Well, yes, in some cases,
25 states could do so."

1 So I don't give whole lot of credibility
2 to the current EPA Administration as to what their
3 goals are as far as protecting our health and
4 environment, and their credibility is kind of low
5 in my eyes.

6 So when it comes to another dangerous
7 pollutant that we've learned an awful lot about in
8 a short time here, PM2.5, I learned that EPA has
9 been working on a valid test, a BACT test for
10 PM2.5, and they had seemed like it was kind of
11 always around the corner, and they were working on
12 it, and working on it, and almost done, that's
13 almost completed, and all this.

14 And it's pretty unfair, I think, to tell
15 the states, "Well, you go ahead and use it." It's
16 really not adopted as federal law, as I understand
17 it, and it's not -- we haven't adopted it as
18 Montana rules and/or law. It's just a guideline.
19 And so I think we're expected to just go ahead and
20 use this old surrogate rule for this coal plant
21 issue in Great Falls, and it really causes me some
22 concern.

23 If there is a better of way of measuring
24 PM2.5 or controlling PM2.5, and it comes out in
25 the next two months or the next few years, and we

1 approve this rule as it stands, or this permit as
2 it stands, the people of Great Falls are going to
3 go on for decades having their coal plant 2.5 air
4 pollution techniques controlled by an old
5 technology, that since we're told we can't
6 upgrade, and force them to open up and upgrade the
7 method of control.

8 And so it's my understanding that it's a
9 very complex situation, but DEQ and SME did not
10 really do a top down BACT for PM2.5 that didn't
11 use the surrogate model. And I know this isn't a
12 debate whether they had to do a top down or not,
13 but there is some argument that once they started
14 looking at that idea, they should have.

15 And so passing this permit or approving
16 this permit using the surrogate model in this case
17 isn't going to be good enough for me. And when I
18 went on board, I swore to uphold the Constitution.
19 I realize it's not a constitutional law issue, but
20 we all swore to protect the environment and health
21 of our citizens. And in my mind anyway, maybe
22 this is a little grandstanding, but by approving
23 this permit, I would feel like I was not doing my
24 duty as it stands.

25 So I believe the Petitioners have met

1 their burden to show that the present permit
2 should not be approved, and it should be remanded
3 for further consideration along the issue of
4 coming up with a real top down BACT for the PM2.5
5 that doesn't use the surrogate method.

6 So anyway, that's my feeling, and I'm
7 ready to make a motion, but maybe that's not
8 timely. Anybody there?

9 CHAIRMAN RUSSELL: Yes. Thank you, Don.
10 Any further comments or questions?

11 MR. SKUNKCAP: Mr. Chairman, I have a
12 question, comment. I don't know if it's going to
13 be for SME or Abby.

14 They're both stating that SME and DEQ
15 did nothing improper on there. I guess my
16 question is: What are the repercussions if it
17 does go back to DEQ, and we do find that, because
18 of SME's statement that Taylor said he thought he
19 could get better numbers. And I guess maybe if
20 Abby could explain that, or SME.

21 MR. MARBLE: I can't hear.

22 MR. SKUNKCAP: Don, I asked Abby or SME
23 to explain about Taylor. SME stated that Taylor
24 did not have better numbers on there, that he only
25 stated that he thought he could get better

1 numbers. And Abby is at the podium now, and I
2 think she's going to answer it now. Sorry, Mr.
3 Chairman.

4 MS. DILLEN: I'll do my best, Mr.
5 Skunkcap.

6 MEIC didn't try to come up with its own
7 BACT analysis in this case. We don't have all the
8 numbers, we don't have all of the application
9 materials that were submitted in this instance.
10 So we couldn't hire someone to do a BACT analysis.

11 What Mr. Taylor was able to say is, "I
12 don't think it's impossible to do a BACT analysis.
13 I think you could probably get the numbers from
14 Alstem, and if you require them to provide it,
15 they have millions of dollars at stake here to
16 sell this boiler," and his sense, based on ten
17 years of working for a boiler manufacturer and
18 specifically looking at PM emissions, was that
19 Alstem could probably provide those numbers if
20 they were required to by DEQ.

21 So the point that we're making is: If
22 the Board decides that DEQ didn't get enough
23 information here, and there is more to be done on
24 remand, we could ask those questions of Alstem, we
25 could figure out the numbers, and we could do some

1 further investigation on what controls are
2 available, and how well they would work. Does
3 that help?

4 MR. SKUNKCAP: Say that last part again,
5 please. If you did get it back, you can --

6 MS. DILLEN: Well, what would happen is
7 if the Board were to agree with MEIC and to say,
8 "We don't think that the analysis for PM2.5 is all
9 there yet," what would happen is that Eric
10 Merchant, for instance, would collaborate with
11 SME, and perhaps Bison, and their other
12 consultants, and say, "Okay. Let's ask Alstem:
13 Do they have information about the PM2.5 rates?"
14 I would suspect we would have to see what Alstem
15 says, but given that they want to sell this
16 boiler, and they want this power plant to be
17 built, they've already done test burns, they
18 already have a pretty good idea of what these
19 emissions are, they know what the condensibles
20 are, and they already know what the filterables
21 are.

22 So the way we see it is everyone would
23 just go back and look at the numbers, and do some
24 additional research on what the control
25 technologies are, and run the numbers, and figure

1 out what makes sense; but that analysis hasn't
2 been done yet. What we're asking is that it be
3 done now before this permit is finally approved
4 and the plant is built.

5 MR. SKUNKCAP: Thank you, Abby. Thank
6 you. Mr. Chairman. I guess my question probably
7 would be for Katherine or you, Mr. Chairman. I'm
8 not sure if you can direct it who whoever.

9 But if the Board -- Well, we're talking
10 about a time line here on -- SME stated it's been
11 a long time. And what are the repercussions, or
12 what happens if it does go back to the Department?
13 Did you understand that? What are the
14 repercussions?

15 MS. ORR: I'd be glad to try to answer
16 that for you only to a certain extent, because
17 there are some practicalities that would come to
18 play that I couldn't tell you about the timing.

19 But if this went back to the Department
20 on remand, then another BACT analysis would be
21 performed; and from what I've seen, that does tend
22 to take awhile. And then I think that SME would
23 have to apply for an amendment to their existing
24 permit to extend the construction period again.

25 MR. SKUNKCAP: So what if it went the

1 other way? Would the Department look into further
2 analysis of those numbers across the board, like
3 SME states, and not retro?

4 MS. ORR: If I understand correctly,
5 you're asking: What happens if there is no
6 remand? Is that what you're asking?

7 MR. SKUNKCAP: (Nods head)

8 MS. ORR: Then the permit would be
9 issued, and the considerations in this hearing
10 probably wouldn't come to play unless there was a
11 modification of the permit.

12 MR. SKUNKCAP: Thank you, Ms. Orr.
13 That's all the questions I have, Mr. Chairman.
14 Thank you.

15 MR. REICH: Mr. Chair, if I could just
16 respond to Mr. Skunkcap's question, which I think
17 was whether Mr. Taylor had testified that there
18 were numbers, or he could get numbers. And as we
19 said in our briefs, he speculated he could get
20 numbers; but he also said that he's never gotten
21 PM2.5 numbers for a power boiler in this
22 situation, he's never done a BACT analysis for a
23 utility boiler, he's never specified a PM2.5
24 technology for a power boiler.

25 And the only evidence that they've put

1 forth -- And again, it's their burden -- the
2 question was from Ms. Dillen, "If I asked you to
3 call a boiler maker today, and ask Riley, for
4 instance, at Alstem, 'What's coming out of your
5 boiler in terms of PM2.5 emissions?,' would they
6 be able to give you an answer?" And he said, "Once
7 I specified, again, my size, my fuels, and that
8 type of thing, I think they could give me an
9 answer."

10 So he's not -- That's a pretty weak read
11 on which to send this permit back, particularly
12 since you heard from a nationwide expert on BACT
13 who said that in performing BACT analyses for
14 power plants -- which he's done, Mr. Taylor hasn't
15 been done -- he's not been able to find that
16 information. He further that testified that that
17 information isn't necessarily information you take
18 from a boiler maker, because the testing methods
19 are kind of all over the block in terms of their
20 accuracy.

21 And what you want to know is that you
22 have consistent numbers that could be met
23 consistently by your client, by the boiler maker.
24 You don't want to just get a number from the
25 vendor that they think you could meet, but then

1 because of the test method, perhaps it's
2 inaccurate, and then you can't meet it, because
3 then you put the power boiler in a situation where
4 they can't meet their limit.

5 Mr. Merchant, the DEQ witness, testified
6 that he's not aware of any available information
7 on emission factors, the information that Mr.
8 Taylor said, "I believe I could get."

9 So MEIC has not met its burden to show
10 that there are such emission factors available.
11 All he did was speculate, and I don't think that
12 this Board can send this permit back on the basis
13 of speculation.

14 As to your second question about the
15 across the board point that I made, perhaps in
16 response to your question and to Ms. Orr's
17 comment, I do think that the Board could do an
18 across the board analysis and policy on PM2.5 that
19 would apply to all sources of PM2.5, not just
20 power plants, but any other industry -- and there
21 are many industries that emit PM2.5 -- so that if
22 you really want to go after this problem, you're
23 not just retroactively addressing it to one
24 particular power plant, you're addressing it
25 across the board. Did that answer your question?

1 MR. SKUNKCAP: Thank you.

2 CHAIRMAN RUSSELL: Further questions or
3 comments?

4 MR. ROSSBACH: Let me just make a
5 comment to that last point. The testimony from
6 Mr. Merchant was that he could have required SME
7 to provide that information, even though he
8 elected to rely on the surrogate method instead,
9 that he did request information from them, and did
10 not get it, and didn't follow up on it.

11 Mr. Leirow testified that he didn't
12 specifically ask for particulate emission
13 information, but he had a good indication of PM2.5
14 emissions with the condensible portion.

15 Alstem had conducted a test burn with
16 subbituminous coal for SME.

17 So there was a lot of information in the
18 record that would indicate that there was
19 certainly the opportunity that was not taken for
20 the Department to inquire as to what the 2.5
21 emission was for this particular boiler. And that
22 is of record, so I don't think we need to rely
23 totally on Mr. Taylor's statement about the
24 availability of this information.

25 MR. REICH: I did want to comment on

1 that last comment by Commissioner Rossbach. Mr.
2 Leirow did testify that he asked for PM2.5
3 information for one of the sources at Highwood
4 Station, and he specifically testified that Alstem
5 said they didn't have that information. So I
6 think that record has to be corrected. That was
7 in response to a question from Commissioner
8 Rossbach.

9 CHAIRMAN RUSSELL: Robin.

10 MS. SHROPSHIRE: My recollection was
11 that at one point, there was a request made, but
12 they didn't receive that information. The fact
13 that that information was not available is a
14 different answer. My understanding was that the
15 information was not sent, not that the information
16 wasn't available.

17 CHAIRMAN RUSSELL: Abigail.

18 MS. DILLEN: I just want to make sure
19 the record is clear on this point because it's so
20 important, and we have provided all of the
21 citations in the record which Mr. Rossbach just
22 referenced.

23 But Ms. Shropshire, your understanding
24 is correct with respect to the emissions from the
25 boiler. Mr. Merchant's testimony was that he had

1 requested such information, and there was no
2 response, and he didn't follow up.

3 The testimony to which Mr. Reich was
4 just referring involved material baghouses, the
5 material handling. That's a completely different
6 issue from the baghouse, from the boiler, and it's
7 not relevant to your consideration here.

8 MS. SHROPSHIRE: I'll just make a couple
9 of comments.

10 CHAIRMAN RUSSELL: Robin.

11 MS. SHROPSHIRE: I'd just like to follow
12 up with some of the comments that Don Marble made,
13 and I agree with most of what he has said. On the
14 record we heard that the intention was that a top
15 down BACT analysis would be done, and I think it's
16 clear from the record in many instances that a top
17 down BACT was not conducted, that there were
18 instances where permits were looked at, and
19 emission rates were looked at, as a means of
20 coming up with an emission rate, rather than
21 looking at technologies that are available as the
22 first step. And I think the record speaks clearly
23 on that, that if a top down approach was intended,
24 that in fact it was not conducted.

25 On a separate note, there has been a lot

1 of discussion about the Seitz memo, and my
2 personal belief -- and I'll just read here. "In
3 view of the significant technical difficulties
4 that now exist with respect to PM2.5 monitoring
5 emissions, estimation, and modeling, EPA believes
6 that PM10 may properly be used as a surrogate."

7 And I think the point that I believe is
8 that it may be difficult to model PM2.5, and it
9 may be difficult to measure it, but the same
10 problems occur with mercury, and we still take
11 that seriously. And I don't think -- I think in
12 my opinion the Seitz memo was misapplied. I don't
13 think the Seitz memo intended for technologies to
14 control PM2.5 to not be used directly, and I don't
15 think that PM2.5 was addressed as it should have
16 been.

17 And I'd like to move that we remand this
18 back to DEQ to do a top down BACT analysis
19 including a PM2.5 analysis.

20 CHAIRMAN RUSSELL: Is there a second?

21 MR. MARBLE: Second.

22 CHAIRMAN RUSSELL: It's been moved and
23 seconded. Further discussion?

24 MR. MIRES: Mr. Chairman. Respectfully
25 to Robin and to Don, I agree with a whole lot of

1 what they're saying here, and I have a lot of
2 concerns about how this is going in regards to the
3 PM issue, and the 2.5, and that concerns me
4 greatly, as well as the health and welfare of
5 people in the Great Falls area.

6 But at the time that the permit was
7 issued, I really do not believe that the
8 Department erred, and I don't think they violated
9 the rules and the statutes. I think they did it
10 in good faith and in good judgment. Subsequent
11 information coming out has indicated that they
12 should have gone further, and as I stated in
13 January, I'm very disappointed in SME's firm, as
14 well as the Department, for not carrying this to a
15 much greater extent, and anticipating this type of
16 an issue developing, since this is such a
17 sensitive issue to begin with.

18 And that's the part that has me really
19 concerned. I don't think that they violated as
20 it's been brought in front of us, but at the same
21 token, I'm concerned about the permit going
22 forward and being stranded with a problem child
23 sitting in the Great Falls area. And I just keep
24 wondering -- and Ms. Orr alluded to a comment
25 earlier, or made a statement earlier, and I didn't

1 quite catch it, and I think it was in relationship
2 to one of Gayle's questions, or maybe it was
3 Robin's. I don't know.

4 Without it being remanded back, is there
5 a way that it can go forward as it was, but some
6 modification be stuck on here to control it in the
7 future? Is there some middle ground that we can
8 come at here without a total go back on this deal?
9 Because I'm not sure that's been official either
10 at this point. Does that make sense, what I'm
11 asking?

12 CHAIRMAN RUSSELL: And I would say that
13 we can't do anything.

14 MR. MIRES: There is nothing that we
15 can --

16 CHAIRMAN RUSSELL: No. We have a matter
17 in front of us, a contested case, and we have to
18 decide on that. The parties could certainly do
19 that, and they have in the past. I think it was
20 part of the Roundup decision that was modified by
21 the parties after the Board made a decision, or
22 maybe not. But there have been subsequent --

23 MR. MIRES: Is that doable in this case,
24 Mr. Chairman?

25 CHAIRMAN RUSSELL: It's up to the

1 parties.

2 MR. MIRES: Is that a question we can
3 pose to the parties?

4 CHAIRMAN RUSSELL: Right now I don't
5 think we'll get an answer, but --

6 MR. MIRES: I could understand that,
7 too.

8 CHAIRMAN RUSSELL: I'll bet after a
9 decision is made they might be a little more
10 amenable to making it.

11 MR. MIRES: I guess my position is that
12 I'm still stuck where I was in January. I don't
13 think I could ever vote that they violated the
14 rules and regulations, but I'm very disappointed
15 that they didn't carry it to the full extent. But
16 I'm more concerned about when it does go forward,
17 without some kind of agreement between them to
18 address the issue, where we stand. Are we going
19 to end up in court anyway?

20 CHAIRMAN RUSSELL: We won't, but --

21 MR. MIRES: The case, the issue. I
22 would suspect it will.

23 CHAIRMAN RUSSELL: Well, I guess there
24 is a few issues that I have that are of deep
25 concern to me, and that's the code specifically

1 not giving a clear picture of 2.5. In the Code of
2 Federal Regulations, there just wasn't a clear
3 picture of how to move forward with 2.5.

4 And as many know, top down BACT has been
5 a big issue with me over the years, and basically
6 I'm still struggling with this whole concept, and
7 I've asked if -- I think I've asked Katherine the
8 difference between a top down BACT analysis and
9 utilizing a top down BACT approach, which was part
10 of the record here, and what might be the
11 difference of that.

12 I'm concerned -- and maybe I just don't
13 know the EPA, the Alaska case enough to understand
14 what their failure to do a top down BACT has --
15 what ramifications it has on this case. But as
16 you know, I've been an advocate of trying to get a
17 regulatory approach to top down BACT, and I think
18 if that would have happened, this would have been
19 much more clear. It's not clear to me on moving
20 forward if top down BACT was required. If there
21 are cases out there that make it more clear, if
22 this Board should consider that -- was there a
23 full top down BACT done in this, or a top down
24 BACT approach, and what was appropriate. And I'm
25 sure that --

1 MS. ORR: Are you asking?

2 CHAIRMAN RUSSELL: I am.

3 MS. ORR: Mr. Chairman, unfortunately I
4 cannot remember the case, but it was cited by
5 MEIC. There is no case, including the Alaska
6 case, which says that a top down BACT analysis,
7 first of all, is required.

8 The way I look at the way the cases fall
9 out is: The elements of the statute or the rule
10 must be adequately considered, and those elements
11 have to do with technical feasibility, economic
12 feasibility, after you have chosen the top control
13 measures. And when I say top control measures,
14 you're striving to achieve maximum reduction right
15 at the top, and that's why I would say it that
16 way.

17 The Alaska case involved a situation
18 where there was a determination to go forward with
19 a permit, and then it was determined that it would
20 have a high -- or to not go forward, and then it
21 was determined that there would be a high impact
22 on the community; and the finding in the record
23 was that it would cost a lot of jobs, and the US
24 Supreme Court said that's not a sufficient
25 economic analysis. One was done there.

1 So in this case, you have to ask
2 yourselves were the elements followed basically.
3 And so in answer to your question, I think what
4 I'm telling you is that it has to be a top down
5 BACT approach, if that makes sense.

6 CHAIRMAN RUSSELL: Well, it does, and
7 that just means that you follow those five steps.

8 MS. ORR: Those five steps have to be
9 considered in the consideration in the overall
10 analysis. That's what I would say.

11 CHAIRMAN RUSSELL: But is that different
12 than if it were couched in a regulatory framework?

13 MS. ORR: Well, that issue has come up
14 here, if I'm understanding correctly what you're
15 asking. Does it have to exist in a rule before
16 the Board says a top down BACT analysis in the NSR
17 Manual is required? No, I don't think so, because
18 the nature of this very rule is that it's a matter
19 of discretion to implement the definition of BACT,
20 which in itself is quite specific as to the
21 elements. And there is quite a lot of case law
22 out there that doesn't even involve the existence
23 of a regulatory framework for conducting a BACT
24 analysis, other than the NSR Manual.

25 MR. ROSSBACH: In other words, what

1 you're saying is that basically you have to follow
2 the five steps, and that's all that's -- Really
3 how you follow the five steps, it may be somewhat
4 different from case to case, but you have to start
5 with Step 1, and go to Step 2, and go -- I mean
6 that's what a BACT analysis is. That's the
7 skeleton upon which everything has to be put.

8 MS. ORR: Right. And the intent behind
9 the language in the rule, which very closely
10 reflects the language in the federal statute for a
11 definition of BACT, is that you start with an
12 understanding of what is the best technology to
13 achieve the maximum reduction, and then you look
14 at what are reasons to undertake some other
15 approach, and you have to put in the record why it
16 is that you're not following the top approaches
17 basically. That would be my understanding of it.

18 CHAIRMAN RUSSELL: One would argue that
19 a true top down BACT would have chosen a different
20 combustion.

21 MS. ORR: Well, that is an issue that
22 has not been raised in this case.

23 CHAIRMAN RUSSELL: And probably a good
24 thing. But some would say that that the
25 combustion technique in a true regulatory top down

1 BACT framework would be something to question.

2 MS. ORR: Yes.

3 CHAIRMAN RUSSELL: But it wasn't

4 questioned here.

5 MS. ORR: Right.

6 CHAIRMAN RUSSELL: Gayle.

7 MR. SKUNKCAP: Mr. Chairman, is there

8 still a motion on the table?

9 CHAIRMAN RUSSELL: There is a motion,
10 and it's been seconded.

11 MR. ROSSBACH: Can I make a comment on
12 that top down in the Alaska case?

13 CHAIRMAN RUSSELL: Sure.

14 MR. ROSSBACH: I understand your
15 concern, and I agree with your concern about the
16 -- should we be talking about boiler technology to
17 begin with. But I think even if we don't consider
18 different boiler technologies, the problem that I
19 have is I look at the Alaska case, which was
20 affirmed by the United States Supreme Court. It
21 says that, "Although the top down approach is not
22 mandated, if a state purports to follow this
23 method, it must do so in a reasoned and justified
24 manner."

25 Mr. Merchant testified that SME did use

1 a top down approach, that there is ample evidence
2 in the record that the DEQ was intending to use a
3 top down approach. And when you look at the case
4 law on what does that mean in terms of top control
5 technology, as Katherine says, you've got to look
6 at the most stringent in terms of control
7 effectiveness. That's what the manual says. It
8 also says that you need to not only examine the
9 most stringent, you look at not only -- you look
10 at all potential alternatives. You look out there
11 -- and Mr. McCutchen said. You look at everything
12 out there that is available, including
13 technologies that have been used to meet LAER
14 limits.

15 And I guess that's my fundamental
16 problem here, is that we had testimony from a
17 number of witnesses that -- including even in the
18 Deserit permit, that there were other alternatives
19 out there -- membrane technology, membrane bag,
20 combinations with a wet ESP downstream, a number
21 of other control technologies -- which never got
22 into Step 1, and that's my problem is we did not
23 have a proper Step 1.

24 And from not having a proper Step 1 in
25 terms of identifying all of these other

1 technologies -- and I heard a lot of testimony and
2 argument today, "Well, they weren't feasible.
3 They weren't economic. They'd already been
4 excluded in other cases. No one else uses them,"
5 all of that, is all Step 2, 3, and 4. Those are
6 the types of analyses that get done after Step 1.
7 And I think the problem here is that we didn't do
8 enough to look into Step 1.

9 Mr. Merchant said he'd never heard of
10 membrane bags. Well, Mr. Leirow, I believe, said
11 that he'd heard of them; Mr. McCutchen had heard
12 of them; Mr. McCutchen was aware of them, and
13 suggested that they would be something that we
14 could include in our requirements.

15 So that's my problem that we really --
16 that the Department didn't do enough on Step 1,
17 and from that, all kinds of other problems flow.
18 It may very well be that once they go to Step 2
19 and 3, we find out that it wouldn't have worked,
20 or that it's not feasible, or that it's not
21 economic. But you've got to start with the proper
22 Step 1, and that's where I come down.

23 The other thing that I have a big
24 problem with is -- and I never heard anyone tell
25 me that there was something that had to be done in

1 terms of the economic analysis -- but I don't see
2 where when you're looking at, for example,
3 baghouse followed by wet ESP, that says that you
4 have to look at the economic cost benefit of each
5 technology separately. I don't see why you
6 wouldn't want to look at the combination
7 technology together, and see what the cost is of
8 both of them together, to find out what the
9 ultimate recovery was, what the benefit was, and
10 how much it cost to get to there.

11 There is nothing I see in any of the
12 regulations that says, "Well, you can't include
13 wet ESP as a secondary technology because it would
14 never be cost effective." Well, why don't you
15 look at them both together? I don't see any
16 reason why we're not allowed to look at them both
17 together.

18 So that's a side point that I think is
19 important, if this thing does get remanded, to be
20 looking at really what is the best we can do
21 economically and feasibly, and I don't think we've
22 done that. I think we took sort of the easy way
23 out. We relied on information that was given to
24 the DEQ. When we tried to raise questions, when
25 Mr. Merchant asked questions, and didn't get

1 answers, the matter was dropped.

2 I think we have an obligation to our
3 citizens to do more, to really dig. Membrane
4 technologies are out there. They're known.
5 They're used. And the fact that Mr. Merchant
6 didn't even know about them is troubling to me
7 honestly, that that's something that could have
8 required just a little bit of looking, and maybe
9 we would have found out more.

10 So those are my concerns. And we don't
11 have -- Even if we don't do a full-on alternative
12 boiler technology top down BACT, I think once we
13 decide we're going to do a top down BACT, we have
14 to do a complete and thorough detailed one,
15 looking at all potentially available -- including
16 innovative -- technologies. That's what the NSR
17 says, and that's what some of the cases say as
18 well.

19 CHAIRMAN RUSSELL: Further comments?

20 MR. SKUNKCAP: Mr. Chairman, could you
21 tell me the motion again, and the second, please?

22 CHAIRMAN RUSSELL: It was moved by Robin
23 to basically remand the permit back to the
24 Department for a top down BACT PM2.5 analysis.
25 Would that be a correct statement?

1 MS. SHROPSHIRE: That's what I said. I
2 don't know if there is any suggestions on --

3 CHAIRMAN RUSSELL: That's the motion. I
4 think it was seconded by Don.

5 MR. ROSSBACH: I guess my only comment
6 is that I don't want to prejudge 2.5 versus
7 surrogates. And so in my view, I would request a
8 friendly amendment to say, "Remand for purposes of
9 doing a better BACT," and that might include 2.5
10 to look at it. If there is available emissions
11 data, fine. If there is not, and they've done
12 everything they can, fine.

13 I don't want to prejudge 2.5 either. To
14 me the point is that we didn't start with Step 1
15 and look at everything, and then Step 2, then you
16 have to look at 2.5, and see if there is
17 information available about 2.5. Maybe in fact
18 there isn't information available about 2.5. But
19 they didn't even try to get that information.

20 So from my point of view, I would
21 propose a friendly amendment that you just say,
22 "Remand for appropriate and more detailed and
23 thorough BACT."

24 MS. SHROPSHIRE: Top down BACT.

25 MR. ROSSBACH: Top down BACT. Will you

1 take that amendment?

2 MS. SHROPSHIRE: That's fine.

3 CHAIRMAN RUSSELL: Is that okay with
4 you, Don?

5 MR. MARBLE: If Bill could speak into
6 the microphone.

7 MR. ROSSBACH: Don, what I'm saying is
8 that rather than make a specific recommendation as
9 a part of this motion that they have to do a 2.5
10 BACT, because maybe in fact when they do -- when
11 they look at outside, and try to obtain emission
12 information, maybe in fact that they won't be able
13 to do that from a practical point of view.

14 My point is so that I'm asking for a
15 friendly amendment to take out that specific part
16 of the motion, and just direct them to remand it
17 for an appropriate and thorough top down BACT.
18 Would you take that as a friendly amendment for
19 the motion? Is that --

20 MS. SHROPSHIRE: I just want to clarify
21 that I do think that PM2.5 should be addressed in
22 initially.

23 MR. ROSSBACH: Absolutely.

24 MS. SHROPSHIRE: But it's not just
25 necessarily PM2.5. I do think that -- and again,

1 as I said before, that the Seitz memo was
2 misapplied. I think that there are technologies
3 that do address PM2.5, and I think it should be
4 considered as part of the top down BACT analysis.

5 MR. ROSSBACH: I agree, but it may be
6 that there is not -- that they have a difficult
7 time because of test methods and others. But we
8 didn't even try, is what I was saying.

9 MS. SHROPSHIRE: Okay.

10 MR. MARBLE: My problem is if we're just
11 going to do it over and use this surrogate method,
12 I don't --

13 MR. ROSSBACH: No, we're not saying
14 that.

15 MS. SHROPSHIRE: That's what I just
16 wanted to clarify, that we're not using the
17 surrogate method for technologies.

18 MR. MARBLE: Robin, do you agree with
19 Bill's suggestion?

20 MS. SHROPSHIRE: I do.

21 MR. MARBLE: Then I'll agree.

22 MS. SHROPSHIRE: And I don't know if
23 this is too detailed of a motion, but in that top
24 down BACT, I think that linked technologies, as
25 Bill was referring to earlier, should be

1 considered.

2 CHAIRMAN RUSSELL: I guess maybe that is
3 getting a little bit too much detail.

4 I have some questions for the parties,
5 and I'm going to just go down the row. Abigail,
6 what is the first step in top down BACT?

7 MS. DILLEN: Mr. Russell, the first step
8 is identifying the available control technologies.

9 CHAIRMAN RUSSELL: All available
10 technologies?

11 MS. DILLEN: Yes.

12 CHAIRMAN RUSSELL: If you do a thorough
13 top down BACT.

14 MS. DILLEN: Yes.

15 CHAIRMAN RUSSELL: Do you believe that
16 that takes into effect the combustion
17 technologies?

18 MS. DILLEN: You know, I don't know that
19 you could make an across the board statement about
20 that. I think it depends upon what the facility
21 is, and what would constitute redesign and what
22 wouldn't. It's not an issue before the Board, and
23 because it isn't, I don't think we've had the kind
24 of concrete adversarial exploration of that issue,
25 and I don't think it's one that you need to reach

1 for purposes of this case.

2 CHAIRMAN RUSSELL: Does the Department
3 concur with that Step 1 of top down BACT?

4 MR. RUSOFF: The Department concurs that
5 the NSR Manual states that under EPA's recommended
6 top down BACT process, that the first step is to
7 identify all available control technology options,
8 if that's the question.

9 CHAIRMAN RUSSELL: That's the question.

10 MR. RUSOFF: Okay. Again, that assumes
11 that you're finding that top down BACT is
12 required.

13 CHAIRMAN RUSSELL: Ken, do you agree
14 with --

15 MR. REICH: Well, I agree in principle,
16 but the details are always where the devil goes,
17 and the devil is it's available technologies; and
18 the evidence in the record is pretty clear, is
19 very clear, that neither membrane bags, nor the
20 linkage of a wet ESP and fabric filter or a
21 membrane bag have ever been considered available
22 technologies for coal fired boilers. And so I
23 don't think that top down BACT starts with every
24 technology that is out there, whether demonstrated
25 or not. That's not the purpose, it's to find

1 technologies that have been demonstrated at the
2 type of source that's under consideration.

3 And again, the evidence in the record is
4 that none of these technologies testified to by
5 Mr. Taylor had been demonstrated at this type of
6 source, and Deserit confirmed that for the linked
7 technology. And as I said in my opening
8 statement, even if you thought that the Department
9 should have considered the linked technology in
10 its own analysis, it would be -- essentially a
11 remand would be a waste of everybody's energy,
12 because the Department would come back and
13 basically do the same analysis that EPA did, and
14 find that the cost is prohibitive. So I think
15 that's just not effective.

16 And in terms of the combustion
17 technology, I agree with Abigail and Dave, I
18 suppose. It's not in the record, it's not a part
19 of the appeal, and I further think that just about
20 all of the authority out there says that you don't
21 reconfigure the source when you do a BACT
22 analysis. Thanks.

23 MR. ROSSBACH: I'd like to make a
24 comment on that. The whole point of Step 1 is to
25 look at all available, and just because no one

1 else has considered it doesn't mean it's not
2 available. The point is that at some point,
3 you're going to add a new technology. Just
4 because they've never been used in any other prior
5 BACT doesn't mean that -- that would mean that the
6 BACT analysis would be stuck in 1960 or whenever
7 the first BACT analysis was done. You've got to
8 keep looking further. That's the point.

9 The second point is: I'm somewhat
10 disturbed with the use of the suggestion that it
11 would be a waste of time. The whole point is that
12 we're not supposed to jump the steps. We're
13 supposed to not prejudge it. We're supposed to
14 take the steps one at a time. We don't know
15 whether it would be a waste of time until we
16 actually do it.

17 It may be that if the analysis done at
18 this particular plant -- and we're all told that
19 it has to be a case-by-case analysis -- it may
20 very well come out differently than what was done
21 at the Deserit plant. The Deserit plant -- I
22 don't know how they did their analysis, and I
23 don't know what technologies they used, or what
24 emission factors they did use. The point is it's
25 not a waste of time. To say that it's a waste of

1 time is not a justifiable or relevant argument to
2 be made. You have to start with No. 1, Step 1,
3 and then we find out what happens.

4 MR. SKUNKCAP: Mr. Chairman, I have a
5 question for David. Is that possible?

6 CHAIRMAN RUSSELL: Sure.

7 MR. SKUNKCAP: How much of this energy
8 is going to be here? How much is shipped out?
9 And like Bill said, at what point in time are we
10 going to make these decisions? Like SME and the
11 Department states that, "We followed all the
12 guidelines," but what happens -- and we go on with
13 this. But what happens if another power plant
14 opens up in the Gulch? Is it just going to be the
15 same thing or not?

16 MR. RUSOFF: Mr. Skunkcap, I'm not sure
17 that I fully understood the question. The last
18 part of the question was: "What happens if a
19 power plant opens up in the Gulch"?

20 MR. SKUNKCAP: Well, west of Helena.

21 MR. RUSOFF: There are a lot of
22 different analyses that have to be done in
23 compliance with -- a lot of different regulations
24 have to be demonstrated in order to get an air
25 quality permit to construct a power plant. I

1 think it's very unlikely that a power plant today
2 is going to be built on Last Chance Gulch. And
3 then there was a --

4 MR. SKUNKCAP: How much energy is going
5 to be here in Montana? Plus if SME and the
6 Department followed all these guidelines, if one
7 was to open in the Gulch tomorrow, or next month,
8 or so, would it go along with these same
9 guidelines, or what point in time are we going to
10 make these decisions? Like Bill stated, we don't
11 know until we cross that line -- I mean if we do
12 further BACT on that. I guess we have a motion on
13 the table and a second already on that.

14 MR. RUSOFF: I think I understand. You
15 actually have two additional questions. And my
16 understanding, the record that I have anyway
17 regarding the proposed SME facility, is that that
18 energy would be used mostly within Montana, and I
19 think there is a few customers in Wyoming that
20 also are part of the SME cooperative. There is
21 nothing in the record that I'm aware of that
22 indicates that any of that electricity otherwise
23 would go outside of Montana. I think SME has
24 60,000 customers, I believe, and mostly in
25 Montana.

1 MR. SKUNKCAP: What percent in Montana?

2 MR. RUSOFF: I think virtually -- Almost
3 all of them are in Montana, but my recollection --
4 and Mr. Reich can probably answer this better than
5 I can.

6 MR. SKUNKCAP: This particular plant,
7 the Highwood plant, what percent of that would be
8 in Montana?

9 MR. RUSOFF: My understanding is that
10 the Highwood plant is proposed to replace the
11 energy sources that are now serving the SME
12 cooperative's customers, and almost all of those
13 customers are in Montana, but I believe that there
14 are a few in a small section of Wyoming.

15 MS. DILLEN: Mr. Russell, I have to
16 object.

17 MR. SKUNKCAP: So 80 percent, 90
18 percent?

19 MS. DILLEN: Mr. Skunkcap, can I just
20 make one thing clear? None of this is in the
21 record, and these issues are disputed, and Mr.
22 Rusoff is testifying to facts that we can't -- he
23 has no ability to prove them to you. My
24 understanding is quite different from his, but
25 none of these figures are in the record. And so I

1 just want to lodge this objection, and I want you
2 to understand that Mr. Rusoff is simply
3 testifying, but none of these things does he have
4 any evidence of, and they're not in the record.

5 MR. SKUNKCAP: That's fine. I guess
6 back to my first question. If it was open west of
7 Helena, at what point in time would it be the same
8 ones as --

9 MR. RUSOFF: Well, I think the way that
10 I have to answer your question -- and correct me
11 if I'm not understanding, or let me know if I'm
12 not answering your question -- is if the Board's
13 decision is that every air quality permit
14 application must provide PM2.5 emission rate
15 information, and must supply a top down BACT
16 analysis, I think that that will substantially
17 change the way that the Department's air quality
18 program is operated. They permit all sorts of
19 different facilities, from gravel crushers up to
20 power plants.

21 A power plant, I guess, would have -- An
22 applicant for another power plant would have to
23 provide whatever information you're requiring SME
24 to provide to the Department, or we will deny the
25 application based on your decision in this case.

1 We'll just tell them that it's not a complete
2 application because it doesn't provide PM2.5
3 emission rate information, if in fact that's your
4 decision ultimately.

5 If I'm not answering your question,
6 please let me know.

7 MR. SKUNKCAP: That's fine. I'm just --

8 MR. RUSOFF: We'll apply the same
9 standards that you require us to apply to SME to
10 the next application that we receive for a power
11 plant, if we receive one.

12 CHAIRMAN RUSSELL: In all cases, do you
13 believe you would do that? If we make a decision
14 that -- If we remand this back for a top down BACT
15 approach, do you believe that that, at that point,
16 would have basically a basis for a rule on our
17 decision?

18 MR. RUSOFF: Mr. Chairman, I wasn't
19 saying that that would -- that the Board would
20 have to adopt a rule, if that's your question.
21 The Board has already decided not to adopt a rule
22 that would require the Department to follow the --
23 and permit applicants to follow the five step top
24 down BACT process.

25 If the decision that you ultimately

1 issue in this case is that the Department is
2 required to follow the top down, EPA's five step
3 top down BACT process, then without something in
4 the decision distinguishing coal fired power
5 plants from other types of facilities, then I
6 think we would tell applicants that their
7 application needs to be in that format.

8 MR. MIRES: If I'm understanding that
9 correctly, if we pass this motion, isn't that some
10 form of rulemaking? Wouldn't that be rulemaking?

11 MS. SHROPSHIRE: That's his
12 interpretation.

13 CHAIRMAN RUSSELL: I disagree with that.

14 MR. MIRES: If I understood what Mr.
15 Rusoff just said, isn't that what we would be
16 doing here?

17 CHAIRMAN RUSSELL: I think that's what I
18 heard David say, but I guess I disagree with that.

19 MR. RUSOFF: Could I just clarify what I
20 think I'm saying anyway. I understood Counsel for
21 the Board to state that the Department is required
22 to follow the five steps in the NSR Manual,
23 although not necessarily in any particular order.
24 That's a five step BACT analysis.

25 The definition of BACT is what we

1 follow, and I think as correctly as has been
2 discussed here, Eric Merchant testified that the
3 Department generally tries to follow the NSR
4 Manual's recommended approach, and we thought that
5 we had done that in this case.

6 CHAIRMAN RUSSELL: Well, from the
7 definition of BACT to a five step BACT approach,
8 there is a big difference.

9 MR. RUSOFF: I very much agree with
10 that.

11 CHAIRMAN RUSSELL: There is a big
12 difference between what the definition of BACT is
13 and what the BACT approach does. I'm still -- We
14 were told in Roundup that a BACT approach was
15 somewhat used, but that doesn't mean -- There is a
16 difference between the depth that I see in a top
17 down BACT analysis includes and what a top down
18 BACT approach does. I mean it's just logical.
19 You just go through your steps. Why wouldn't you
20 use those?

21 I'm confounded with the fact that we
22 talked about an approach using those steps, the
23 way we would go through, versus just a definition
24 in the Administrative Rules that states, "The best
25 available control technology has to factor in,

1 economics," and all of those other things, based
2 on the controls that you select.

3 MR. RUSOFF: Well, there is a lot of
4 history behind the EPA's recommended approach, and
5 I don't know if you want me to get into that or
6 not. I'm sure that -- If I'm not understanding
7 your question, let me know. It's not totally
8 clear to me how your order will be written, but I
9 understood the discussion so far to be in the vein
10 that the Department is required to do a five step
11 BACT analysis approach process.

12 And I'm just saying if that's the
13 Board's rule, all I was trying to say was that I
14 think any other power plant application, or
15 application for any other type of facility,
16 without some distinction in the Board's ruling,
17 would be required to be in that format. And as
18 you know, Mr. Chairman, the Board specifically
19 rejected that a couple of years ago. But if the
20 decision today is different, then that's the
21 decision that we'll follow.

22 CHAIRMAN RUSSELL: Well, that makes
23 sense. We don't want to go down this path again.

24 More questions or comments?

25 MR. SKUNKCAP: So is that a back door

1 policy then, if --

2 MR. MIRES: Back door rulemaking.

3 MR. ROSSBACH: I don't think -- There is
4 a difference between rulemaking and possibly a
5 precedent that there may be here. What we're
6 saying is -- what I'm saying at least is that the
7 Department has said that, "In this case, we are
8 doing top down BACT." And my view is they didn't
9 do it properly, because the first step in top down
10 BACT -- which they have said they were using -- is
11 determining all of the available control
12 technologies that are out there, including the
13 most stringent ones, the highest best technologies
14 available to reduce to the maximum the emissions.

15 And in my view, the facts in the record
16 are that they didn't look at all of the best ones,
17 and that once they look at all of the best ones,
18 then they look at them for technological
19 feasibility, economic feasibility, and go through
20 the other five steps. My problem is that they
21 agreed that they were doing -- there is no dispute
22 that they were doing a top down BACT in this case;
23 and once they decide to do that, they have to use
24 the steps, in my view. That's what the case law
25 says.

1 And how they use those steps, and what
2 they come out with, is a case-by-case analysis,
3 and I don't think they used the first step right.
4 That's where they went wrong, in my view.

5 MS. KAISER: And you don't think they
6 looked at all the available technologies?

7 MR. ROSSBACH: Yes. I don't think they
8 looked at all of the available technologies, and
9 used Steps 2, 3, 4, and 5 to look at the economics
10 of them, and discount them, and determine whether
11 they were feasible or not, like they were required
12 to do in this case.

13 MS. KAISER: I guess they were not
14 required to use a top down BACT analysis, correct?
15 I mean that's --

16 MR. ROSSBACH: Once they decide to do
17 it, they have to do it right.

18 MS. KAISER: Follow the steps.

19 MR. ROSSBACH: We could later make a
20 rule, or reconsider the rule of whether we should
21 require them to do a top down BACT. All we are
22 doing is saying, "Once you decided to do it, you
23 didn't do it right in this case," that's all, and
24 that's the only precedent that I think is being --

25 I don't think Mr. Rusoff -- I mean I

1 appreciate what Mr. Rusoff is saying, but I don't
2 think he's correct that this creates some rule
3 that they have to apply to every other case. I
4 don't believe that that's true. We're just ruling
5 on this case.

6 MS. KAISER: I know. I guess in having
7 done alternatives analysis, looking at different
8 methods and ways of doing cleanups -- this is
9 unrelated to this plant -- you kind of do a
10 screening of those alternatives based on what
11 other analyses have been done. I guess that's
12 what I'm saying is that other BACT analyses were
13 looked at for similar coal fired power plants.
14 Sometimes there is that screening that's done
15 actually kind of informally. And unfortunately
16 I'm just speculating right now. But it saves some
17 steps.

18 MR. ROSSBACH: Right, but I think the
19 saving the steps is the problem. If you're going
20 to do it, you do the Steps 1, 2, 3, 4, and 5. I
21 think you can't jump ahead and say --

22 MS. KAISER: Oh, I agree. I guess
23 they're just eliminating technologies.

24 MR. ROSSBACH: I don't think you can.
25 That's what Steps 2, 3, and 4 do.

1 MS. SHROPSHIRE: If you're eliminating a
2 technology for economic reasons before you
3 evaluate the technology, you're not doing Step 1
4 properly.

5 MS. KAISER: Or if you eliminate it
6 because it's not technically practical.

7 MR. ROSSBACH: That's Step 2. So you
8 don't -- That's the whole point, is what I'm
9 saying, is you've got to start with Step 1, and
10 include everything, and then you eliminate them
11 through Step 2, 3, and 4. And they didn't do
12 that. They just jumped to conclusions.

13 MR. SKUNKCAP: Mr. Chairman, I have a
14 comment. What was asked about the back door
15 policy, and being what I was brought onto the
16 Board for, for the wildlife, I'm the Director of
17 the Blackfeet Fish and Wildlife, and that was what
18 I was brought on for, for the wildlife point of
19 view on that. But in this, I believe the human
20 life takes all -- takes precedence over this.

21 Ganon (phonetic) means Great White
22 Father, and that's what the Blackfeet refer to
23 Brian Schweitzer. The president also is referred
24 to that, the Great White Father. And today on the
25 hill he's meeting with all the tribes in Montana.

1 That's going on right now.

2 And below that are three tribes, me
3 being the past Chairman of the Montana Wyoming
4 Tribal Fish and Wildlife Commission. There is
5 three tribes that are below that, plus other
6 people on the Highline that is going to affect.
7 Fort Belknap was the last one to be affected by
8 this, and they're still paying for that.

9 I asked Mr. Rusoff about what would
10 happen if another plant opened west of Helena,
11 would these guidelines -- would the Department do
12 more. Yes, I believe they can do more.

13 Like I said, I was hired for the
14 wildlife on this Board, and my expertise is in
15 that, but human life takes precedence over all of
16 this. And right now there is a big deal going on
17 with the Highline, and not just the tribes, but
18 other people of Montana on the Highline. That is
19 their water source up in that area. And with all
20 of the pollutants in there.

21 You know, I'm all for the jobs and the
22 economy that it supports, or that it would bring
23 to Montanans, because they do need the money; but
24 sticking with my realm of what I was hired for on
25 this, I'm going to put my vote out now, Mr.

1 Chairman, and I'm going to vote for Ms.
2 Shropshire's motion on the table, because I
3 believe humans --

4 I don't want to see this happen again.
5 It happened to Fort Belknap; and non-tribal
6 members, it's going to affect them all down there.
7 And I think we can do it better, and I don't want
8 to make -- The way it was explained, like it
9 wasn't back door policy on there, that they can do
10 it.

11 So with that said, my vote is for Ms.
12 Shropshire's. And that's all the comments I have,
13 and all the questions I have, Mr. Chairman.

14 CHAIRMAN RUSSELL: Thanks, Gayle.
15 Further comments?

16 MR. MIRES: Mr. Chairman, I'm still a
17 little bit confused here, and hopefully Katherine
18 can maybe straighten me out.

19 The motion as it's stated and put forth
20 with the friendly amendment on it, is there any
21 way that that can be misconstrued as this Board
22 writing a policy, kind of like it was indicated
23 here? Does that question makes sense, what I'm
24 asking here? I'm a little bit concerned about
25 that.

1 MS. ORR: Mr. Mires, there are many ways
2 that the Board can act, as well as the Department
3 for that matter. In this context, the Board is
4 reviewing a challenge to a permit decision. It's
5 a contested case, and the Board has the authority
6 to apply the various cases and the various rules
7 to say whether or not the permit was properly
8 issued.

9 I don't think it could be construed as a
10 rulemaking. As a matter of fact, there are three
11 rules that apply here: The definition of BACT,
12 and then 17.8.749 and 17.8.752, which require that
13 there be a BACT analysis done. So there is a rule
14 out there already that says that you have to apply
15 the BACT definition.

16 In that we're pulling together other
17 cases from around the country, and a proper
18 interpretation of the rule, there are always going
19 to be gray areas. We don't have a black letter
20 rule yet that says exactly what the steps should
21 be, but there are plenty of cases out there, I
22 think, that guide us in what it is that's required
23 when you do a BACT analysis, and that's the
24 juncture that the Board finds itself with today.

25 So I don't think it would be construed

1 as a rulemaking.

2 MR. ROSSBACH: I guess that's all. I
3 guess -- I think all we're doing is telling them
4 to go back and do it over. It doesn't say
5 anything more than that effectively.

6 MR. MIRES: It would be just that part
7 of the permit in the application?

8 MR. ROSSBACH: Right.

9 MR. MIRES: To address just that
10 specific issue.

11 MR. ROSSBACH: That's exactly it.

12 MS. KAISER: So by supporting this
13 motion, are we saying that DEQ acted unlawfully in
14 doing the BACT analysis for PM2.5?

15 MR. ROSSBACH: Well, the terminology
16 "unlawfully," I guess we're saying that they
17 didn't do it properly, that they didn't follow the
18 law per se, yes. We're either going to say yes or
19 no. I don't know. If you feel uncomfortable
20 saying they did it unlawfully, we're saying that
21 they did it improperly, they didn't follow the
22 laws and their own guidelines, the NSR Manual,
23 things like that.

24 CHAIRMAN RUSSELL: We're going to take a
25 ten minute break.

1 (Recess taken)

2 CHAIRMAN RUSSELL: Ken, were you going
3 to respond to a question that was asked before the
4 break?

5 MR. REICH: Was there a question asked
6 before the break? Mr. Chairman, members of the
7 Board, I'm not responding to a specific question.
8 I guess I'm responding more generally. I do want
9 to know what the scope of the remand is that the
10 Board is considering, if it does vote on that.

11 But before I get there, I wanted to
12 point out, at least in SME's position, opinion,
13 what the Board seems to be doing in terms of this
14 remand is applying a whole new standard to BACT
15 that's closer to LAER than it is to BACT, and I
16 think this is being done after the fact without
17 proper notice.

18 There was a proper BACT analysis done
19 here -- that's according to the leading BACT
20 expert in the country -- and what you're doing is
21 requiring perfection, not reasonableness. So when
22 I said "waste of time," perhaps that was an
23 imprudent phrase, but what I meant is:

24 There is plenty of testimony in the
25 record and evidence in the record, including the

1 Deserit permit, to show that other available
2 technologies have been evaluated, and they fall
3 out, whether it's cost effectiveness or other
4 reasons; and the other technologies that were
5 listed by MEIC's expert -- who is not a boiler
6 expert, and not a BACT expert -- have not been
7 evaluated anywhere else. And I think the Board is
8 on very thin ground if it relies on that kind of
9 testimony to say that available technologies were
10 not looked at.

11 In terms of Mr. Skunkcap's question
12 about policy and after the fact policy, I think
13 this is after the fact policy making, particularly
14 in terms of the type of BACT analysis you're
15 wanting the Department to redo.

16 And responding directly to your concern,
17 Commissioner Skunkcap, if the Board and you have a
18 concern specifically about PM2.5 emissions, as I
19 said, there are huge amounts of PM2.5 emissions
20 currently being emitted from a number of coal
21 fired plants and other industries in the state,
22 none of which will be affected by this ruling.

23 So if you truly wish to address the
24 issue statewide, then rather than doing this on a
25 permit by permit basis, you do it as a statewide

1 policy, just as you were thinking about doing for
2 CO2. That would be more fair to everybody, and it
3 would get you a much bigger bang for the buck than
4 simply asking this permit to go back and come back
5 up.

6 Now, I did want to address a question to
7 the Board members as to the scope of the remand.
8 As I understand it, and I think as the Board
9 understands it, there were two issues that were
10 raised on appeal in this case: One was the issue
11 of CO2, which you've already decided. The second
12 was the issue of PM2.5.

13 So I guess I'm confused, and would like
14 guidance from the Board in terms of what you're
15 thinking about for a remand, because if it's
16 anything beyond 2.5, then I think that would be
17 certainly improper to be taking the whole permit
18 out of the picture. And I think the Department
19 wants to address that as well.

20 Depending on your vote, then I will
21 address other issues in terms of timing, but I'll
22 leave to those to your vote. Thank you.

23 MR. SKUNKCAP: Mr. Chairman, I want to
24 make myself clear. My comments were specifically
25 on my expertise, and not for the rest of the

1 Board, and your waste of time and perfection, that
2 just makes me upset. I don't know where you're
3 from, and if you're not from Montana, and you're
4 not living northeast of this power plant, those
5 people are affected by that. But my comments are
6 from my expertise, and it's not from the -- I
7 don't speak for the rest of the Board. It's one
8 vote. I'm one vote on that.

9 And that's my experience here. This is
10 my home. Montana is my home. I'm a Montanan,
11 too. And it's not statewide. I was talking about
12 the Highline where it's going to affect this area.
13 But your waste of time and perfection, at what
14 point are we going to watch out for human -- You
15 know, my expertise is wildlife, but it's not --
16 Common sense tells me that the human life --

17 Because we visited, had a site visit on
18 Fort Belknap, and I don't know if you've ever seen
19 that out there, but I suggest you make a trip out
20 there, and see what this does to people. You
21 know, not just the tribal members there, but other
22 Montanans, too, are going to be affected by this.
23 I know that this pollution affects wildlife, but
24 like I said, common sense tells me human form
25 takes precedence over this.

1 MR. REICH: And the only response I
2 could make is that there was an analysis of the
3 human health effects, and this plant won't have
4 those human health effects, but I certainly
5 understand your opinion. I didn't mean to imply
6 anything different. Thank you.

7 MS. KAISER: I have a question for the
8 Department, I think would probably be the best to
9 answer it. And I don't have the permit in front
10 of me, and I don't recall what the permit
11 requirements were for a regulatory review period.
12 Is there a five year review, or a ten year review
13 period, where current regulations are reviewed
14 specific to that facility? Do you understand?
15 You look skeptical.

16 MR. RUSOFF: Ms. Kaiser, is your
17 question -- I'm not sure I do understand. Is your
18 question whether or not there is a regular period
19 of reviewing the Board's air quality rules for
20 changes, or permits for changes?

21 MS. KAISER: Reviewing the permit limits
22 with respect to current regulations, and also
23 technologies. I'm vaguely familiar with some
24 permits, and there is that annual -- or there is a
25 review period that you go through to make sure

1 that any new rules or regs may apply, or any new
2 technologies may be more appropriate. Can you
3 speak to that?

4 MR. RUSOFF: There isn't any regular
5 review period for outstanding air quality
6 preconstruction permits, which is what this permit
7 is. The Board does have a rule that allows an
8 amendment of a permit to conform the permit to the
9 Board's rules, so if the Board were to change a
10 rule that would affect a permit -- for example, a
11 permit requires that the owner/operator do
12 something in particular, and the Board has changed
13 that rule, such that that requirement in the
14 permit is no longer consistent with the Board's
15 new rule -- then there is a permit amendment
16 process for that.

17 But there isn't any process for revising
18 a permit to change the emission limits or
19 technology requirements, unless the owner/operator
20 modifies the facility or an emitting unit at the
21 facility in a manner that triggers a BACT analysis
22 or a LAER analysis, depending on whether it's an
23 attainment area or non-attainment area. Does that
24 answer your question?

25 MS. KAISER: So it's more from an

1 operational standpoint of the facility, like you
2 said, whether they undergo a major overhaul, or
3 they put on a new boiler or whatever.

4 MR. RUSOFF: Exactly. For example, in
5 this case, if SME were to modify its CFB boiler in
6 a manner that affected a regulated pollutant
7 that's subject to the BACT requirement, then as
8 part of their application to modify that emitting
9 unit, SME would need to submit a BACT analysis for
10 each pollutant that would be affected.

11 MS. KAISER: Thank you.

12 MR. SKUNKCAP: Mr. Chairman, I have a
13 question for you. The motion that's on the table,
14 can it be amended any more? Is that it, what
15 Heidi asked about that? The reason I'm asking is
16 because -- I want to use this as an example -- has
17 something that we could review within three years?

18 The wolves have been in the press a lot,
19 too, and we were required to make a management
20 plan, but we want to revisit it every three years
21 as needed in case we have to modify it or fix it
22 as needed then.

23 Can this -- because I do want the
24 industry in there for Montanans, too. But is
25 there a way that it could be revisited every five

1 years or ten years like that? I mean in the
2 motion -- that we go back and revisit it or not,
3 or just leave it, or what?

4 The comment that was made by SME was
5 this is a waste of time, and perfection, that
6 upsets me, and I don't really want to be pushed
7 like that.

8 CHAIRMAN RUSSELL: First of all, I think
9 there is a difference between settling this case
10 and writing a rule. And if we end up writing a
11 rule with some basis around how we settle this
12 case, then certainly the permit will be modified
13 to reflect a more stringent air pollution control,
14 or a National Ambient Air Quality Standard, when
15 they modify a permit. I don't know -- I think
16 with mercury, we actually did put in some specific
17 benchmark times, but that would be more to the
18 rule.

19 But it's easy when the permit is open
20 for amendment, but there is no reason why a rule
21 couldn't be written to -- Let's say we address PM
22 fine in a rule, that we set some benchmark out
23 there that would require them to meet a higher
24 standard, five, ten, fifteen years out, or even a
25 shorter duration.

1 MR. SKUNKCAP: Thank you, Mr. Chairman.
2 I've said all that I'm going to say, and I'm not
3 going to say anymore. Thanks.

4 MR. ROSSBACH: Maybe Katherine can
5 correct me, or certainly Dave can correct me on
6 this. Basically there is nothing we can do today
7 to say they need to remand -- that they're going
8 to review the permit every five years or anything
9 like that. What we have today is basically an
10 up/down decision: They go back and do it over, or
11 they don't have to do it over. That's all we can
12 decide today. Go ahead.

13 MR. MIRES: In doing it over, would it
14 be just the PM portion of it or the whole permit?

15 MR. ROSSBACH: Just the PM2.5.

16 CHAIRMAN RUSSELL: What we're going to
17 ask them to do is a BACT analysis on particulate
18 matter. That's what we're going to ask them to
19 do. MEIC has stated that they need to do a BACT
20 analysis for PM2.5.

21 MR. MIRES: But Mr. Chairman, the
22 original issue was did they violate the laws.
23 Isn't that what the question is here before us or
24 not?

25 CHAIRMAN RUSSELL: Well, that's why we

1 have a contested case, because a party believes
2 that the Department had the ability to do a higher
3 level of BACT analysis than they did.

4 MR. ROSSBACH: I don't think any other
5 part of the permit is at issue. It's only that
6 part of the permit, I think to answer directly
7 what Larry was concerned about. We're not making
8 them go back and look at every other part of the
9 permit.

10 CHAIRMAN RUSSELL: We may not be asking
11 them to do anything with the permit. What we're
12 asking them to do is perform a BACT analysis, if
13 that's how the motion goes.

14 MR. RUSOFF: Mr. Chairman, could I just
15 ask for clarification on this? Because this is
16 going to be -- depending on your vote may be very
17 critical to how the Department proceeds.

18 I'd just ask you to clarify the motion
19 that is voted on in regard to Mr. Mires's question
20 as to the scope of the particulate BACT analysis
21 on remand. I heard you state, Mr. Chairman, that
22 the remand would be for particulate, and I've
23 heard other folks, other commission members
24 talking about PM2.5. So it would be very helpful
25 to the Department if the motion that's being voted

1 on is very clear in regard to whether or not, for
2 example, the PM10 analysis is being remanded, or
3 whether it's just to do another BACT analysis
4 specifically for PM2.5.

5 And also in that same regard, if you can
6 clarify in the motion -- and maybe I'm the only
7 person that's not clear, too -- but how the use of
8 the surrogate policy enters into that. I heard
9 Mr. Rossbach state that -- I believe his
10 perspective was that he was not prejudging that we
11 would or wouldn't use the surrogate policy. But
12 if there is anything you can put your motion that
13 clarifies that for the Department, that would be
14 extremely helpful to us. Thank you very much.

15 CHAIRMAN RUSSELL: Thanks, David. And
16 these are some of the same questions that I think
17 we need to resolve before we move forward on this.

18 MR. MARBLE: This is Don. I wonder if
19 someone could read from the record what is the
20 language of the motion as amended.

21 MR. ROSSBACH: Do you want to restate
22 it?

23 MS. SHROPSHIRE: I can restate it. We
24 can clarify it for --

25 MR. ROSSBACH: Do you want to restate

1 it, and take a second on it, or how do you want to
2 do that?

3 CHAIRMAN RUSSELL: Do you want to pull
4 the other one and restate a motion?

5 MS. SHROPSHIRE: That's fine.

6 CHAIRMAN RUSSELL: Is that okay? Don,
7 is that okay if we pull that, and actually have
8 another motion? Because it was added on to,
9 friendly amendment. I would just as soon, if we
10 could, strike that motion and start over.

11 MR. ROSSBACH: It would be another
12 amendment to that motion, but to keep --

13 CHAIRMAN RUSSELL: Well, I think you can
14 start over, and it will be clearer.

15 MR. ROSSBACH: Without a vote?

16 CHAIRMAN RUSSELL: Yes, if Don --

17 MR. MARBLE: Another motion, I'll strike
18 it and start over with a new motion.

19 CHAIRMAN RUSSELL: If you would concur
20 with Robin's rescission of that motion, Robin will
21 restate the motion, and we'll capture it, and
22 we'll move from there.

23 MR. MARBLE: So restate a new motion.

24 MS. SHROPSHIRE: So let me restate the
25 motion. I move that we remand the permit back to

1 the DEQ to do a top down BACT analysis for PM2.5.

2 MR. MARBLE: I wonder, does that mean
3 that they could still just go back and use the
4 surrogate method or --

5 MS. SHROPSHIRE: No. I don't think --
6 My motion does not -- I don't think that they
7 should use a surrogate method.

8 MR. MARBLE: Say that again?

9 MS. SHROPSHIRE: No, because I think
10 that they have to -- they can't use a surrogate
11 method, in my opinion, if they address PM2.5
12 specifically.

13 MR. MARBLE: I agree with what your
14 motion is, and I second it.

15 MS. SHROPSHIRE: I just want to be clear
16 that that includes both condensibles and
17 particulate components.

18 MR. MARBLE: And I second your motion,
19 and agree to withdraw the other one.

20 MS. SHROPSHIRE: I would also just add
21 that I think that that probably means that the
22 PM10 portion needs to be redone also, because it's
23 incorporated in that.

24 MR. MARBLE: Okay.

25 MS. SHROPSHIRE: Does that make sense?

1 MR. MARBLE: That's okay with me, and I
2 second that.

3 MS. SHROPSHIRE: I'm not sure that the
4 PM2.5 can be done without redoing -- Well, anyway,
5 I want them to -- Let me just state this again --
6 remand the permit to DEQ to do a top down BACT
7 analysis that addresses PM2.5 specifically not
8 using the surrogate method, and addresses both
9 condensible and particulate portions of 2.5.

10 MR. MARBLE: That sounds just exactly
11 what I would like to see.

12 MR. ROSSBACH: Joe is shaking his head.

13 MS. SHROPSHIRE: Is that too confusing?

14 MR. MARBLE: There is a motion and a
15 second. I would like to vote. I'm getting tired.

16 CHAIRMAN RUSSELL: I'm not tired yet.

17 MR. ROSSBACH: What was your concern
18 about just calling it particulate?

19 CHAIRMAN RUSSELL: Well, I think MEIC
20 wants -- believes the Department should have done
21 a top down BACT, based on what is stated in the
22 closing, that you believe a top down BACT for
23 PM2.5 is not impossible. But there are parts of
24 the record that say that it's clear that using
25 PM10 as a surrogate is the standard right now.

1 Even though there may be other methods out there,
2 they haven't been -- they're not -- they have not
3 been adopted by EPA as a reference method.

4 MR. MARBLE: Just a suggestion --

5 MS. SHROPSHIRE: I want to be clear that
6 that's one of the reasons that I'm making this
7 motion, is that I think that that surrogate method
8 was misapplied, that it was not intended for
9 technologies. There is a difference between doing
10 a modeling and actually choosing a technology, and
11 I think that it was misapplied.

12 CHAIRMAN RUSSELL: Although we have
13 CFR's that state --

14 MS. SHROPSHIRE: That's my opinion.

15 CHAIRMAN RUSSELL: -- and it should
16 include condensibles and filterables, but that
17 would have to be done if they're going to do it.

18 MS. SHROPSHIRE: I want to make sure it
19 wasn't just -- I wanted to be clear that it was
20 for both.

21 MR. ROSSBACH: Joe, how would you
22 rephrase it?

23 CHAIRMAN RUSSELL: No, I can't -- I
24 don't know how to rephrase it yet.

25 MR. ROSSBACH: You said you were

1 suggesting that --

2 MR. MARBLE: This is Don. I'd like to
3 see them have to do a good faith top down BACT for
4 PM2.5 without using a surrogate. I realize every
5 just has relied on this thing of EPA, but somebody
6 somewhere has got to break through, and give it a
7 try, and come up with something better. It's got
8 to be done eventually. It might as well be done
9 right here in Montana in Great Falls, instead of
10 just keep saying, "Oh, well, EPA says -- EPA is
11 almost ready, and EPA is going to do it next
12 week," and EPA never gets around to doing it.

13 And I think we've got to bite the bullet
14 and say, "Okay. Let's do it," and if there is
15 problems, the problems will be clear and
16 explained, and who knows what will happen. But
17 I'm just tired of relying on EPA, and using them
18 as an excuse to not do it right. I'd like to try
19 and do it right, realizing it will be the first
20 time, but somebody has got to do it. Anyway I'm
21 ready to vote.

22 MR. MIRES: Mr. Chairman, not that I
23 disagree with where you're going with this
24 concept, but it appears to me that we're rewriting
25 the policies that were on the books when they

1 applied for the permit, and I have a problem with
2 that concept. I understand where we're going, but
3 I still don't think -- with the rules that the
4 State had to work with and SME had to work with at
5 the time, I don't think they violated the law.
6 And this sounds to me like we're coming back in
7 and writing a requirement in here that was not
8 there when they applied for the permit to begin
9 with.

10 And I don't disagree that we've got a
11 health issue with human life factor. I understand
12 that concept. And I am concerned that if you
13 issue the permit, you could have a problem with
14 it, and that's why I like this five year review
15 thing, if there was a way to do it, but I know we
16 can't do that. I guess I'm not sure I can support
17 the amendment as it is at this point in time.

18 MR. ROSSBACH: I guess my concern is
19 that I don't think -- I respectfully don't agree
20 with Larry that we're changing the rules, because
21 the rules have not -- the surrogate method has
22 been since 1997, and it is something that is --
23 maybe used. It's not a requirement. But since
24 then, there have been a lot of changes and
25 suggestions that the local departments can use

1 other available test methods, other ways of
2 looking at it.

3 And I don't think that there is anything
4 that we are doing here that is necessarily
5 changing the rules. I think the rules have been
6 the same, and that there is -- the BACT analysis
7 that would be done in the last two years is going
8 to be different than a BACT analysis that would
9 have been done in 1997; but I don't think a BACT
10 analysis done in 2007 is going to be any
11 different, or a lot different than one done in
12 2006 when they first applied for it, or 2005. I
13 think they still needed to look at the most
14 stringent technologies, which they didn't do.
15 That hasn't changed.

16 CHAIRMAN RUSSELL: But that's different
17 than the motion.

18 MR. ROSSBACH: I understand that, and I
19 have problems with Robin's motion. I will say
20 that.

21 CHAIRMAN RUSSELL: I do, too. And I
22 think, from what my perspective is, is a BACT
23 analysis probably could have been done better, and
24 I think that there might have been some analyses
25 that were done that weren't clearly made part of

1 the record, that were dismissed. Whether they've
2 been dismissed because they did the work and
3 didn't believe it needed to be part of the record,
4 I don't know. But whether it be top down BACT or
5 just BACT, they probably didn't look at the most
6 stringent control technologies, and dismissed
7 those.

8 MR. ROSSBACH: Right.

9 CHAIRMAN RUSSELL: But that doesn't go
10 to the motion that says you can't use a surrogate,
11 and that may --

12 MS. SHROPSHIRE: And I think -- When Mr.
13 Reich got up initially to give his testimony, he
14 said, "What we're here to talk about today is the
15 adequacy of the BACT analysis," and I agree with
16 that. And so again, I'd like you guys to be happy
17 with my motion, in that it makes sense, it makes
18 sense to everybody.

19 And so as far as the surrogate portion
20 goes, I'm not sure that that contributes to the
21 motion at all, and so I want to be clear that I
22 don't -- The intention was to do a top down BACT
23 analysis, I think it's clear that that wasn't
24 done, and I'm happy to have suggestions on a
25 motion that meets that.

1 CHAIRMAN RUSSELL: But if you leave --
2 Not using the surrogate method in means that they
3 have to do a specific PM2.5. That may not be
4 probable. It may not be impossible, but it may
5 not be possible.

6 MS. SHROPSHIRE: And I'm just thinking
7 in terms of the condensibles portion which may be
8 part of PM10 also, but I think it primarily is the
9 2.5, which is the health, big health issue is the
10 one that I want to make sure is addressed properly
11 in the BACT analysis, and I think wasn't.

12 MR. MIRES: Couldn't the amendment just
13 -- or couldn't just the motion be that they do a
14 proper top down BACT analysis?

15 MR. ROSSBACH: For particulate.

16 MR. MIRES: For particulate.

17 MR. ROSSBACH: Which I think is what Joe
18 was saying at the beginning.

19 MR. MIRES: Wouldn't that cover the
20 bases on it?

21 MR. ROSSBACH: In my view, it would,
22 because I think they would all know that if they
23 come back and don't do it again, they're not going
24 to get a permit again. So I think we're all going
25 to be looking at how they do it the next time; and

1 if they come in and do a totally detailed 2.5, try
2 to find test methods that work, somehow or another
3 it doesn't work, and they've got a reasonable
4 justification for how they came up with it other
5 than just blanket acceptance of the surrogate,
6 then it may pass muster. I don't want to prejudge
7 it, and that's why I'm more comfortable with --

8 MR. MIREs: That's where I'm concerned.

9 MS. SHROPSHIRE: I'm happy to change
10 that to moving that we remand it to DEQ to do a
11 proper top down BACT analysis.

12 MR. ROSSBACH: For particulate. Don,
13 Will you accept that amendment?

14 MR. MARBLE: I had a little trouble
15 hearing it.

16 MR. ROSSBACH: Don, the issue that's
17 come up is people are concerned about being too
18 specific in this motion to prejudge how it has to
19 be done, and I think we're going to get more votes
20 if we have a general remand that says, "Remand for
21 doing a thorough and proper top down analysis for
22 BACT for particulates," and not be specific about
23 whether they can or cannot use surrogates.

24 MR. MARBLE: Well, is that your
25 recommendation?

1 MR. ROSSBACH: That's what I would like
2 to see, and that's what Robin and Joe would like
3 to see.

4 MR. MARBLE: I guess I'd go along with
5 that, although if they come in with using the
6 surrogate again, and don't use a good faith effort
7 on the other one, and then consider that. But
8 maybe just to help to get this thing moving, I'll
9 go along with what you recommend.

10 MS. SHROPSHIRE: I want to be clear,
11 too, that my intention with this motion is not to
12 be setting policy or doing rulemaking. We're
13 addressing one particular component of this
14 permit, and it is not rulemaking. That's my
15 opinion.

16 CHAIRMAN RUSSELL: I agree with that.

17 MR. MARBLE: I'll agree to amend the
18 motion again if whoever made the motion agrees.

19 MS. SHROPSHIRE: Larry, are you okay
20 with that?

21 MR. MIRES: Do you want to restate it
22 for me, please?

23 MS. SHROPSHIRE: I move we remand the
24 permit to DEQ to do a proper top down BACT
25 analysis for particulate matter.

1 MR. MARBLE: Okay.

2 MS. KAISER: Don't we have to be
3 specific for 2.5? Is that the issue?

4 MR. ROSSBACH: I don't think we have to
5 be that specific. Katherine, do you think we have
6 to be any more specific than that?

7 MS. ORR: Well, it would be good to hear
8 from the Department.

9 MR. RUSOFF: I just have a question.

10 CHAIRMAN RUSSELL: Can you answer the
11 question, though?

12 MR. RUSOFF: This David Rusoff for the
13 Department. I guess my question is whether SME
14 has permit limits for PM10 or -- Again, I've heard
15 PM2.5 and particulate, and it's going to make a
16 big difference, depending on how this vote comes
17 out, if you do vote to remand the permit in terms
18 of our requirements that we'll place on the permit
19 applicant, whether we're requiring them to do a --
20 submit a BACT analysis for PM10 and PM2.5 and PM,
21 or just PM2.5.

22 MS. SHROPSHIRE: This may be
23 inappropriate, but if the surrogate analysis
24 worked, you might think that the results would be
25 the same.

1 MR. RUSOFF: Is that a question? I'm
2 sorry.

3 MS. SHROPSHIRE: No, that's -- I want to
4 make sure that we're protecting public health, and
5 I want to make sure -- and I'm not sure. I want
6 to make sure that the motion makes sense in the
7 context of what we're doing, but --

8 MR. ROSSBACH: We're also going to have
9 a separate set of findings and specific
10 terminology in a specific order, so some of that
11 is going to come out more specifically as we go
12 forward.

13 MR. RUSOFF: Mr. Chairman, members of
14 the Board, I guess I'm just asking that in your
15 vote, in your order, that it would be clear to the
16 Department whether or not the conditions of SME's
17 permit concerning the PM10 remain in effect or
18 not.

19 MS. SHROPSHIRE: Which one -- Are you
20 saying that -- Which one do you think is more
21 protective of public health?

22 MR. RUSOFF: Mr. Chairman, members of
23 the Board, do you want me to answer that question?

24 CHAIRMAN RUSSELL: Well, how about just
25 tell us what the American Lung Association

1 believes is more important. You don't have to
2 answer that.

3 MR. RUSOFF: Well, I'm obviously not a
4 toxicologist, or qualified to testify concerning
5 the levels at which public health is protected
6 other than what the standards are set at, and
7 they're different standards, Board Member
8 Shropshire, obviously for PM2.5 and PM10. That's
9 the only answer I could give you.

10 MS. SHROPSHIRE: And PM2.5 is regulated,
11 so --

12 MR. RUSOFF: Yes, of course it is.

13 MS. SHROPSHIRE: -- if we do a top down
14 BACT analysis for particulate matter, that would
15 include PM2.5 as a separate contaminant.

16 MR. RUSOFF: Exactly. I guess that's
17 the question I'm trying to get at, is the scope of
18 the remand, whether or not it includes PM and
19 PM10, which was done in the permit, as well as
20 PM2.5, or whether we tell SME -- or the Board
21 tells SME that they have a valid permit in terms
22 of PM10 emissions, just not in terms of PM2.5,
23 that that's --

24 MR. ROSSBACH: I think what we're saying
25 is particulate in its entirety. That includes

1 PM10 and PM2.5. That's what we're saying.

2 MR. RUSOFF: That was my question, if
3 that's the motion. I just had heard it phrased
4 differently.

5 MR. ROSSBACH: Well, the issue is: Did
6 you use the most stringent technologies for
7 preventing particulate emissions? And that
8 includes both PM10 and PM2.5.

9 MR. RUSOFF: Okay. That wasn't the
10 motion that I heard. That's why I'm saying --

11 MR. ROSSBACH: It says: Do a top down
12 BACT for particulate.

13 CHAIRMAN RUSSELL: When this case came
14 before us, the legal questions around particulate
15 matter were: Is PM10 a pollutant subject to
16 regulation? Is PM2.5 a pollutant subject to
17 regulation? I think David said -- David actually
18 said it was regulated, but I think that there is
19 -- wasn't it -- Recently it was basically stated
20 that it was a pollutant. Isn't that as far as
21 we've gotten on PM2.5, is that it is now a
22 pollutant?

23 MS. ORR: Mr. Chairman, it's a pollutant
24 subject to regulation.

25 CHAIRMAN RUSSELL: Subject to

1 regulation. But the difference is there aren't a
2 lot of regulations built around PM2.5.

3 MS. ORR: Right.

4 MR. ROSSBACH: But it is still one that
5 requires a BACT analysis.

6 MS. SHROPSHIRE: An individual, yes.

7 CHAIRMAN RUSSELL: But the question that
8 came from MEIC was about PM2.5, as I recall.
9 Because it's a pollutant subject to regulation,
10 they believed that the Department should have done
11 a PM2.5 BACT analysis, and I think that is what we
12 have to -- that's the conclusion we have to draw,
13 don't we? Granted, I think if it's -- If PM10 is
14 still considered a good surrogate, I think we're
15 missing something with condensibles, but --

16 MR. REICH: Mr. Chair, if I just might.
17 The reply brief of MEIC specifically requests a
18 remand for a BACT analysis for PM2.5, so I don't
19 think you're -- I think if you remand it for
20 PM2.5, you're doing exactly what MEIC requested
21 you to do. If you go beyond that, I respectfully
22 don't think that's the subject of the request or
23 the appeal.

24 CHAIRMAN RUSSELL: Well, I think Robin's
25 motion is correct. It needs to be a top down BACT

1 on PM2.5.

2 MR. ROSSBACH: She said particulate.

3 CHAIRMAN RUSSELL: No, the second time
4 you restated it, you said PM 2.5. I wrote it down.

5 MS. SHROPSHIRE: No, that was the second
6 one.

7 CHAIRMAN RUSSELL: The last motion was
8 specific to top down BACT on PM2.5; Don said okay
9 on that; and then you stated not using a surrogate
10 method. And I wrote the motion down. Is that
11 what you wrote down?

12 MS. BREWER: That was prior.

13 MS. SHROPSHIRE: But I think that that's
14 maybe being redundant, but --

15 CHAIRMAN RUSSELL: What would be
16 redundant?

17 MS. SHROPSHIRE: If you were doing one
18 for PM2.5 specifically, you wouldn't be using a
19 surrogate.

20 CHAIRMAN RUSSELL: But you didn't say
21 specifically. You said "not using a surrogate
22 method," and then you stated, "to include
23 condensibles and filterables."

24 MR. ROSSBACH: That was the first one.
25 That's not what the last one was.

1 MS. BREWER: The last one is: She moved
2 that we remand the permit back to DEQ to do a
3 proper top down BACT analysis for particulate
4 matter. That was the last one.

5 CHAIRMAN RUSSELL: The very last one?

6 MS. BREWER: Yes.

7 CHAIRMAN RUSSELL: Not the first one?

8 MR. ROSSBACH: No.

9 CHAIRMAN RUSSELL: I just thought you
10 said that. I think we -- If it's going to
11 remanded, it should be for a PM2.5 analysis.

12 MS. SHROPSHIRE: That's why --

13 MR. ROSSBACH: Okay. I didn't think so.

14 MS. SHROPSHIRE: I wanted to clarify
15 that.

16 CHAIRMAN RUSSELL: I don't know how we
17 can do any other --

18 MR. ROSSBACH: Then we're saying that
19 the PM10 was adequate?

20 MS. SHROPSHIRE: That was my concern was
21 that --

22 CHAIRMAN RUSSELL: I wish I had the
23 original petition because --

24 MS. DILLEN: It's possible I could be of
25 help. I hope so. We have asked that a remand be

1 ordered for a PM2.5 analysis. Now, if it's the
2 case that it's truly impossible to do a PM2.5
3 analysis, presumably that could be documented on
4 the record, and then a surrogate analysis would be
5 done again, and the best control technologies
6 would be considered for PM10. But if it's
7 possible to do a PM2.5 analysis as you've ordered,
8 then it will be done, and PM2.5 will be considered
9 explicitly. That is what we're requesting.

10 MS. SHROPSHIRE: That makes sense.

11 CHAIRMAN RUSSELL: That makes a lot of
12 sense. So who is going to be the final judge on
13 if 2.5 couldn't be done?

14 MR. ROSSBACH: We are.

15 MS. DILLEN: I have every faith in the
16 Department that they want to do this right, and if
17 they don't look specifically at PM2.5, and try
18 their very best to do it, I think all of us in
19 this room will be very surprised.

20 CHAIRMAN RUSSELL: And because I asked
21 the question on Step 1 of top down BACT, I just
22 wanted to put in here that, "Air pollution control
23 technologies and techniques include the
24 application of production process or available
25 methods, systems, and techniques, including fuel

1 cleaning, or treatment, or innovative fuel
2 combustion techniques for control." Just so I can
3 cloud this whole top down BACT just a little bit
4 more.

5 MR. ROSSBACH: So you can beat your
6 other dead horse.

7 CHAIRMAN RUSSELL: We talked about
8 combustion sources, and it is a part of sub (1).

9 MR. ROSSBACH: I'm with you.

10 MS. SHROPSHIRE: Can we clear the plate
11 and I'll say that one more time, just to be clear?

12 CHAIRMAN RUSSELL: Go ahead.

13 MS. SHROPSHIRE: I move that we remand
14 the permit back to DEQ for them to do a top down
15 BACT analysis on PM2.5.

16 MR. ROSSBACH: Don, do you have the
17 second?

18 MR. MARBLE: Second. Question.

19 CHAIRMAN RUSSELL: Are you calling for a
20 question?

21 MR. MARBLE: Yes.

22 CHAIRMAN RUSSELL: Not yet, Don.

23 MR. REICH: Mr. Chair, Mr. Reich. If I
24 might, I'm afraid you have muddied the waters,
25 because if what you're saying is that a top down

1 BACT analysis for PM2.5 needs to look at other
2 combustion technologies, different from the CFB
3 boiler, then I think you've totally expanded the
4 scope of not only the hearing, but the remand,
5 well beyond what anybody has asked for, and I
6 don't think it's legal in any case.

7 CHAIRMAN RUSSELL: I would disagree with
8 you because that's what it says, but I think we're
9 going to -- We need to make sure that the motion
10 is on the boiler technology that was submitted in
11 the permit.

12 MR. REICH: Thank you.

13 CHAIRMAN RUSSELL: That's not why I read
14 that. Why I read it is this whole issue -- I'm
15 going to beat my dead horse again. The whole
16 issue around top down BACT is a very thorough
17 comprehensive analysis of all technologies that
18 are available to be examined; and quite frankly,
19 this fell short of that. In my estimate, it fell
20 way short of a top down BACT, because every time
21 top down BACT is used with Montana, without some
22 regulatory framework, it bothers me a tremendous
23 amount, because you're not doing it. Just by
24 definition, top down BACT is not being done in
25 Montana.

1 But we'll go back to the fact that any
2 BACT analysis should always look at the most
3 stringent control technologies that are out there,
4 and this probably fell short of that anyway; but
5 at least documented, it fell short.

6 MR. REICH: Just as long as -- I just
7 want to make sure. Are you clarifying that if you
8 do vote on this particular motion, and remand,
9 that the remand will be restricted to technologies
10 that are add-on technologies to the CFB boiler
11 that is already part of permit application?
12 Because otherwise, we're into a totally different
13 analysis.

14 CHAIRMAN RUSSELL: Not if we're going to
15 ask you to do a top down BACT approach. I think
16 that anything that's been suggested within what
17 was submitted by Bison and after the fact needs to
18 be fully looked at, look at it through the steps.

19 MR. REICH: We fully intend to do that,
20 but if the Board is saying that we need to look at
21 new combustion technology, I think that's --

22 CHAIRMAN RUSSELL: I've already stated
23 you're not. I'm just stating the fact that we're
24 not doing a top down BACT.

25 MR. REICH: Thank you.

1 MR. ROSSBACH: Question.

2 CHAIRMAN RUSSELL: Are we calling for
3 the question again?

4 MR. ROSSBACH: Yes.

5 MR. MARBLE: Question.

6 CHAIRMAN RUSSELL: All right. All those
7 in favor of remanding the permit to DEQ to conduct
8 a top down BACT on --- top down BACT on PM2.5,
9 signify saying aye.

10 (Response)

11 CHAIRMAN RUSSELL: Opposed.

12 MS. KAISER: Opposed.

13 CHAIRMAN RUSSELL: It carried six to
14 one.

15 MR. MARBLE: Do we need a roll call?

16 CHAIRMAN RUSSELL: No.

17 MR. ROSSBACH: Six to one, Don.

18 MR. MARBLE: I have to leave the meeting
19 now. I'm sorry.

20 CHAIRMAN RUSSELL: All right. Thank
21 you.

22 MR. MARBLE: Thanks for everybody's
23 courtesy.

24 CHAIRMAN RUSSELL: Don, can you hold on
25 for just a few minutes?

1 MR. MARBLE: Yes.

2 CHAIRMAN RUSSELL: We pretty much have
3 concluded, but that doesn't mean that we have --
4 we're not ready to have some document for signing.
5 So Katherine, do you need anything else of us
6 right now via some motion before we move on?

7 MS. ORR: No, Mr. Chairman, all that
8 could be discussed -- I don't know if Don needs to
9 be involved -- is do you want to have a phone call
10 over a document, or do you want to discuss the
11 draft that I might generate for the next May
12 meeting?

13 MR. ROSSBACH: When is the May meeting?

14 MS. BREWER: The 30th.

15 MR. MARBLE: Do you need me for a
16 quorum?

17 CHAIRMAN RUSSELL: No, Don. I think
18 we're good then. We'll get back to you.

19 MR. MARBLE: I've just got to go.

20 CHAIRMAN RUSSELL: Thanks, Don.

21 (Mr. Marble leaves the meeting)

22 CHAIRMAN RUSSELL: I guess I would want
23 to see us get this thing done as soon as
24 practicable. It is best for the parties that we
25 get this thing -- we don't wait until May 30th.

1 MR. ROSSBACH: Katherine, can you
2 circulate a draft? What's the fastest you can
3 circulate a draft among the Board?

4 MS. ORR: It will probably take me a
5 couple of weeks.

6 MR. ROSSBACH: Then can we have a phone
7 call? I'm sensitive to the parties' need to get a
8 final order. If we're two weeks -- Can we put a
9 date on it? Can you give yourself a deadline so
10 that we can work from that date?

11 MS. ORR: Sure. I think May 11th is a
12 Monday; is that right?

13 MR. ROSSBACH: Yes.

14 MS. ORR: How about May 11th?

15 MS. BREWER: 12th.

16 CHAIRMAN RUSSELL: I'm pretty sure I get
17 on the plane for San Diego early afternoon, so it
18 would have to be first thing in the morning.

19 MR. ROSSBACH: But we're not talking
20 about the phone call, we're talking about just
21 getting a draft.

22 CHAIRMAN RUSSELL: Just getting the
23 draft out?

24 MR. ROSSBACH: Yes.

25 MS. ORR: And then maybe have a

1 telephone call on the 16th.

2 MS. KAISER: I'm traveling on the 16th.

3 MS. ORR: I could try for May 5th, and
4 then have the phone call on May 12th.

5 CHAIRMAN RUSSELL: It would have to be
6 in the morning.

7 MS. ORR: Okay.

8 CHAIRMAN RUSSELL: I'll be out of
9 country until the 11th, and then I'm sure my
10 flight will be an afternoon flight because I'm
11 going to the west coast.

12 MS. ORR: Are you here the week of May
13 12th, or available?

14 CHAIRMAN RUSSELL: Well, I'll be
15 available the Thursday and Friday of that week.
16 Friday would be better.

17 MS. ORR: I'm out, so Thursday.

18 CHAIRMAN RUSSELL: Thursday.

19 MR. ROSSBACH: Thursday, May 15th.

20 MS. ORR: If that works for everyone
21 else.

22 MS. BREWER: Thursday is the 15th.

23 MS. ORR: To recap -- and I don't know
24 how this fits with everyone -- but I would get a
25 draft out to everybody on the 5th, and then we

1 would have a conference call on the 15th.

2 MR. ROSSBACH: I'll be traveling, but
3 I'll find time to get it. Kris, will you
4 circulate time suggestions or something like that
5 for us early, mid-morning?

6 MR. REICH: Just two questions, Mr.
7 Chairman, members of the Board. One question is:
8 Will we, will the parties be able to see a copy of
9 the draft before you vote on it? Is that your
10 standard procedure, or not your standard
11 procedure? Again, it's so important, that I think
12 we get an opportunity to make sure that it's --

13 CHAIRMAN RUSSELL: I don't think we're
14 going to let you comment on it, though.

15 MR. REICH: Well, if there is no
16 comment, then I guess we don't need to see it.

17 MS. ORR: I think our procedure would
18 not be to -- At some point we have to let go of
19 our line to the parties and make an independent
20 decision, and then throw it out, if you want to
21 appeal it.

22 MR. REICH: I understand. I'm trying to
23 avoid another set of appeals if we can avoid that.
24 That's all.

25 MR. ROSSBACH: Will the parties be

1 included in the phone call at the end when we're
2 making the decision?

3 MS. ORR: I guess my recommendation is
4 they can certainly listen.

5 MR. ROSSBACH: If there was some burning
6 comment that were critical, I would not be opposed
7 to some -- I don't want to do hours of phone call,
8 but if there were some specific thing that were
9 totally problematic for one party or other, it
10 might help, as Mr. Reich suggested, avoid some
11 elements of a later appeal or whatever. That
12 would be helpful.

13 MS. ORR: I know. It would. It's not a
14 normal procedure, but --

15 MR. ROSSBACH: Why don't we let them
16 participate and we'll see.

17 MS. ORR: What we could do -- Obviously
18 the concern is to reopen the record on facts or
19 anything like that.

20 MR. REICH: Are you talking about
21 writing a decision, or just the text of the order
22 on remand?

23 MS. ORR: What I was thinking of is --
24 what I typically do with decisions is generate --
25 now not as a decision maker, but simply to

1 suggest, based on what I've heard, findings of
2 fact, conclusions of law, and then they would go
3 through those item by item, and see if it comports
4 with their judgment, and then adopt it.

5 MR. REICH: Yes, I don't think we're
6 looking -- At least Southern Montana is not
7 looking to -- We're not looking to reopen the
8 record certainly. We're not necessarily looking
9 to comment on the findings of fact and conclusions
10 of law, because those could be handled on an
11 appeal. I'm more concerned with the exact scope
12 of the order that you issue on remand, and I guess
13 I'd like to see that before your hearing, because
14 I won't have anything to look at at the hearing.
15 So that was my only question.

16 MS. ORR: One approach could be that you
17 submit a suggestion for the way this should go,
18 both parties.

19 CHAIRMAN RUSSELL: Once we leave, it's
20 up to Katherine to put this thing together, so
21 whatever Katherine believes.

22 MS. ORR: We get into a whole different
23 realm now if we have the parties submit proposed
24 findings of fact and conclusions of law. That's
25 very difficult for the decision makers to get

1 their minds around.

2 MR. REICH: Could I just consult with
3 the State for a minute?

4 I can speak for the Department and also
5 for Southern Montana. We're not inclined to
6 submit separate findings of fact and conclusions
7 of law for your consideration; but we would like
8 -- at least Southern would like to have a review
9 of the document prior to the -- strike that. We'd
10 like to have a review of the order prior to the
11 hearing, just because, again, if we try to comment
12 on the date of the hearing without seeing
13 anything, it won't be very fruitful.

14 MS. ORR: I guess what I would say is we
15 wouldn't be obtaining your comment. It would be a
16 very unusual thing to do.

17 MR. REICH: I understand, but this is a
18 very substantive decision, certainly for Southern,
19 and I think for the Department.

20 MS. ORR: I guess what I'd recommend is
21 if you have something you want to submit that you
22 suggest by way of a process or an order, we could
23 certainly have that for the record, and I would
24 say the same thing for MEIC.

25 MR. REICH: We will consider that. The

1 other question I had for the Board, or it was
2 really a point that I wanted to make to the Board
3 I made earlier. Our permit is running down and
4 perhaps running out by November, without either a
5 tolling or a suspension of PM2.5, if nothing else.

6 So I would ask the Board to put into its
7 order either a further order that the permit is
8 tolled for the period of time during which this
9 BACT review goes on, or in the alternative an
10 order suspending any construction activity that
11 would relate to PM2.5, but allow any other
12 construction activity to go on; because otherwise
13 by the time the final decision is issued, this
14 permit expires, and then we've all wasted our
15 time, to use a phrase that I got criticized for
16 earlier. We really have. Then we're right back
17 to square one on every pollutant.

18 CHAIRMAN RUSSELL: David or John, can we
19 do either or both?

20 MR. RUSOFF: This is David Rusoff for
21 the Department again. The Department's position
22 has been that a partial remand would not be a
23 tolling of the commencement of construction
24 deadline in an air quality preconstruction permit.
25 That's the position we've always taken in the

1 past. For example, the Board rules allow the
2 Board to revoke part or all of a permit, and I
3 would view this as being a similar circumstance.

4 So certainly I think that it's
5 appropriate for the Board's order to clarify
6 exactly what the status of the permit is, but our
7 position would be that the permit would remain
8 valid except for those portions that the Board
9 remands to the Department for further analysis.

10 CHAIRMAN RUSSELL: With that in mind,
11 would it -- Is there a lot of uncertainty around
12 moving -- I may be asking the wrong person -- but
13 is there a lot of uncertainty around moving
14 forward? Because we're not remanding the permit
15 entirely. We're asking for a BACT analysis.

16 MR. RUSOFF: I think that's a better
17 question probably for SME. From our position, I
18 don't know that we have an answer again, but it's
19 not our permit. We would just be -- As I
20 understand the vote here today, we would just be
21 -- the Board is invalidating the PM2.5 portion of
22 the permit decision, and so we would take the
23 position that SME does not have a permit to emit
24 PM2.5, or construct any device that emits PM2.5.

25 I guess in this case -- excuse me --

1 we're talking about the CFB boiler. It would not
2 have a permit to construct a CFB boiler. But we
3 are talking about a large facility that has lots
4 of emitting units that are included in the permit.
5 So it would be helpful to us for the Board's order
6 to clarify that, but our position would be that
7 the rest of the permit remains valid, and SME
8 could commence construction on anything else.

9 CHAIRMAN RUSSELL: But I think from Ken
10 and my discussion up here, we're not asking for
11 the boiler technology to be revisited. So there
12 is some certainty with the fact that we're not
13 going to come back at some point, and state that
14 that was a combustion type that needed to be
15 revised in the permit. We've already stated that
16 CFB is fine. So that takes a lot of the
17 uncertainty out of the moving forward, as I would
18 presume, unless you built all your emission
19 controls first.

20 MR. RUSOFF: I don't think that's
21 inconsistent with what I'm stating as the
22 Department's position. I don't think that's SME's
23 position, as I understood Mr. Reich's request to
24 the Board. But I was just trying to respond to
25 his request, as I understood it, that the permit

1 be stayed.

2 MS. ORR: Mr. Chairman, I would suggest
3 that they submit their request in writing by way
4 of a motion, and then we can analyze it, and maybe
5 look at it on May 14th; because there are some
6 procedural issues here, and I wouldn't be able to
7 answer it, I don't think, without looking at the
8 rules.

9 MR. REICH: Perhaps that's the best
10 approach, but I wanted to clarify. I certainly
11 don't read the rules to mean that we couldn't
12 start construction on the boiler if that part of
13 the permit wasn't remanded, because the PM2.5
14 controls are after boiler controls, or after the
15 flue gas controls. So I don't see why we couldn't
16 start construction on the boiler, and I don't
17 understand the Department position, but we can
18 address that in our draft of an order, if that's
19 the Board's --

20 CHAIRMAN RUSSELL: I don't know. I'm
21 just having some real synapses problems here. But
22 I tend to agree with you, that if the Board has
23 pretty much stated that their decision doesn't
24 change the boiler technology, then any controls
25 would have to fit with the technology that fits

1 the boiler technology.

2 MR. REICH: Correct.

3 CHAIRMAN RUSSELL: Right? I know it
4 would be easier and better if it was put in
5 writing, but isn't that -- that was the statement
6 that we're not changing the boiler technology, so
7 you wouldn't need your permit stayed for any
8 length of time except for on PM2.5.

9 MR. REICH: We're in a classic Catch-22.
10 We have seven months to go, to either get
11 contracts in place with significant penalties
12 attached -- which means you need to get financing
13 obviously for those contracts -- or construct; and
14 if the Department takes the position you can't
15 construct the boiler, the Department may also take
16 the position that when we start constructing, we
17 haven't constructed sufficiently to have commenced
18 construction. Then we're in that Catch-22. So
19 that's the problem we have. That's what I raised
20 earlier.

21 If we're allowed to construct the
22 boiler, and assuming we can get that done by
23 November 30th, then our permit stays in effect
24 except for the PM2.5 issues, and we go ahead; and
25 the alternative way of doing it is toll the permit

1 for the period of time it takes to do the PM2.5
2 BACT analysis.

3 So if the BER would prefer that we put
4 in this in writing, send you some draft orders, we
5 can do that.

6 CHAIRMAN RUSSELL: The other problem,
7 though, is this is Montana, and construction
8 season will be pretty much over at that same time.
9 So it seems like other than trying to be
10 expeditious in our movement, you're going to run
11 out of construction season anyway if you're going
12 to get any concrete poured.

13 MR. ROSSBACH: I guess my only question
14 is: From the point of view of sequencing, I think
15 you are -- that is SME is sort of on notice that
16 there may be control technologies that you don't
17 want to go forward in such a way that you go down
18 a road that, engineering wise or construction
19 wise, that you may have to back off on because
20 something comes out of the control technologies.
21 As long as you go forward in a way that doesn't
22 preclude control technologies, I don't know what
23 the problem would be.

24 MR. REICH: That's a risk we're
25 certainly aware of and are willing to take.

1 MR. ROSSBACH: That's what it seems to
2 me that's what's at issue here.

3 MR. REICH: But I do have a concern with
4 what the Department just said, and perhaps we can
5 straighten that out.

6 CHAIRMAN RUSSELL: Because you heard
7 what I heard David say, that there could be some
8 issues around the boiler.

9 MR. REICH: Yes, I did hear that.

10 CHAIRMAN RUSSELL: But that's not what
11 -- At least that's not what I wanted to hear, and
12 it's not what I believed would be the -- what
13 should have been said.

14 MR. REICH: Well, you can invite the
15 Department to reconsider. I'd like to have them
16 reconsider.

17 CHAIRMAN RUSSELL: Because I heard you
18 say, David, that there was some issues around
19 moving forward with that boiler, and that's what
20 you heard, too, right?

21 MR. REICH: Exactly. That's why I
22 popped up.

23 CHAIRMAN RUSSELL: Really fast.

24 MR. REICH: Very fast.

25 CHAIRMAN RUSSELL: Abigail.

1 MS. DILLEN: It seems to me we haven't
2 had the benefit of briefing what the remedy should
3 be, and it seems like all of us could put together
4 something pretty quickly in a timely fashion so
5 that Katherine can have an informed recommendation
6 for you. But it does sound like there are some
7 differences. And I want to highlight what Mr.
8 Rossbach has said. There are ways that you can
9 construct this boiler that might not preclude
10 certain technologies, but might make it more
11 expensive.

12 We would of course want to make sure
13 that no commitment of resources was made that
14 would preclude the best possible solution in this
15 regard, and I think we should craft it carefully.
16 I don't see why we can't submit ten pages of
17 briefing each on what makes sense, and Katherine
18 can look at it, look at the rules, and give you
19 all an informed recommendation.

20 CHAIRMAN RUSSELL: So Katherine, you're
21 still shooting to get things out to the Board on
22 Monday the 5th?

23 MS. ORR: Yes.

24 CHAIRMAN RUSSELL: That would include
25 the parties.

1 MS. ORR: Mr. Chairman, those documents
2 would come in, and I think I'd probably have a
3 recommendation ready for you on the 15th.

4 CHAIRMAN RUSSELL: Really that's
5 probably the best we can do. That's --

6 MS. ORR: We have to see how complicated
7 it is, but that's something to shoot for.

8 CHAIRMAN RUSSELL: Anything else,
9 Katherine?

10 MS. ORR: I did just look at my
11 calendar. Would May 14th work at all, or does
12 that not work? I'm supposed to be going on a trip
13 starting the 15th actually.

14 CHAIRMAN RUSSELL: The 14th is Thursday,
15 right?

16 MS. BREWER: Wednesday.

17 MS. ORR: If that doesn't work, I can
18 change my trip if need be, but I was just going to
19 ask.

20 CHAIRMAN RUSSELL: I'd really like to
21 participate, but if I can't do it via phone --

22 MS. ORR: Let's just keep the 15th, and
23 then --

24 MR. MIRES: Can we do it via phone?

25 MS. ORR: Yes. Let's just shoot for the

1 15th.

2 MR. ROSSBACH: Move to adjourn.

3 CHAIRMAN RUSSELL: It's been moved. Is
4 there a second?

5 MR. SKUNKCAP: Second.

6 CHAIRMAN RUSSELL: We did public comment
7 before the hearing. I don't see any public out
8 there that probably wants to address us now. Is
9 there anyone in the audience that would like to
10 address the Board before we adjourn on a matter
11 that wasn't before us today?

12 (No response)

13 CHAIRMAN RUSSELL: Seeing none. It's
14 been moved. Is there a second?

15 MS. SHROPSHIRE: Second.

16 CHAIRMAN RUSSELL: All those in favor,
17 signify by saying aye.

18 (Response)

19 CHAIRMAN RUSSELL: Opposed.

20 (No response)

21 (The proceedings were concluded

22 at 4:05 p.m.)

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C E R T I F I C A T E

STATE OF MONTANA)

: SS.

COUNTY OF LEWIS & CLARK)

I, LAURIE CRUTCHER, RPR, Court Reporter,
Notary Public in and for the County of Lewis &
Clark, State of Montana, do hereby certify:

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing -153- pages contain a true
record of the proceedings to the best of my
ability.

IN WITNESS WHEREOF, I have hereunto set my
hand and affixed my notarial seal
this day of , 2008.

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires
March 9, 2012.