

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
July 25, 2014)

TRANSCRIPT OF PROCEEDINGS

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
July 25, 2014
9:00 a.m.

BEFORE CHAIRMAN ROBIN SHROPSHIRE,
BOARD MEMBERS LARRY MIRES, MARIETTA CANTY,
JOSEPH RUSSELL, CHRIS TWEETEN, and HEIDI KAISER

PREPARED BY: LAURIE CRUTCHER, RPR
COURT REPORTER, NOTARY PUBLIC

1 WHEREUPON, the following proceedings were
2 had and testimony taken, to-wit:

3 * * * * *

4 CHAIRMAN SHROPSHIRE: It is 9:01, and
5 I'll call this meeting of the Board of
6 Environmental Review to order. I think we're all
7 here except for Joan who is in the Bob Marshall.
8 So we'll go ahead and get started.

9 The first thing on the agenda is review
10 and approval of the minutes. Any comments?
11 Discussion?

12 MR. MIRES: I would move we approve the
13 minutes.

14 CHAIRMAN SHROPSHIRE: It's been moved by
15 Larry. Is there a second?

16 MR. TWEETEN: Second.

17 CHAIRMAN SHROPSHIRE: It's been seconded
18 by Chris. Any discussion?

19 (No response)

20 CHAIRMAN SHROPSHIRE: All those in
21 favor, signify by saying aye.

22 (Response)

23 CHAIRMAN SHROPSHIRE: Opposed.

24 (No response)

25 CHAIRMAN SHROPSHIRE: Motion carries

1 unanimously.

2 The next item on the agenda are briefing
3 items and the contested case updates. Ben, can
4 you step us through that, please.

5 MR. BEN REED: Absolutely, Madam Chair.
6 With respect to the enforcement cases assigned to
7 the Hearing Officer, as you can see, the Trailer
8 Terrace Mobile Park is coming up for either
9 settlement or prehearing schedule. I haven't
10 heard anything from the parties about settlement,
11 so I anticipate that this will go to a hearing.

12 The Sunrise Motel case, I'm waiting for
13 the Sunrise Motel to respond to the Department's
14 motion for summary judgment.

15 As to the non-enforcement cases, the
16 YELP case, I anticipate seeing a status report
17 from the parties by August 1st. I got a call from
18 the attorney representing YELP that indicated that
19 he was going to attempt to settle this matter with
20 the Department, or that he anticipated that it was
21 ripe for settlement, but I haven't seen anything
22 jointly from the parties or separately that would
23 indicate that.

24 And there has been no movement on the
25 Western Energy case.

1 On the Signal Peak Energy, we received
2 on the 7th of July MEIC's reply in support of
3 their motion for summary judgment. All the
4 parties believe that the motions for summary
5 judgment are going to be -- that we'll be able to
6 finalize this case based on motions for summary
7 judgment without a hearing. I anticipate that
8 that will be the case, and I anticipate being able
9 to brief the Board more fully on this at the next
10 meeting in September.

11 CHAIRMAN SHROPSHIRE: Thanks, Ben. Any
12 questions from the Board?

13 MR. TWEETEN: I have one. Ben, with
14 respect to the Western Energy, the last sentence
15 of the summary says that a modified permit will be
16 made available on June 9th. Has that been done?

17 MR. BEN REED: Not as far as I know,
18 sir.

19 MR. TWEETEN: Just curious.

20 CHAIRMAN SHROPSHIRE: Moving on, the
21 next item on the agenda are action items and
22 initiation of rulemaking. So the first one is
23 initiation of rulemaking related to the Montana
24 Pollutant Discharge Elimination System permits.
25 Are we going to have some discussion on that?

1 MR. LIVERS: Madam Chair, members of the
2 Board, for the record, my name is Tom Livers,
3 Deputy Director of the Department of Environmental
4 Quality. We'll have a summary and presentation by
5 Tom Reid of our Water Protection Bureau and walk
6 us through the initiation highlights.

7 MR. TOM REID: Madam Chair, members of
8 the Board, good morning. My name is Tom Reid, and
9 I work in the Water Protection Bureau in the
10 Permitting Compliance Division.

11 Today we're asking that the Board
12 initiate rulemaking to amend and repeal a number
13 of rules that are part of the Montana Pollutant
14 Discharge Elimination System, or MPDES permit
15 program. The MPDES program regulates the
16 discharge of pollutants from point sources into
17 State waters, and the Department is delegated to
18 administer the Federal NPDES program under the
19 Federal Clean Water Act.

20 The rules that generally constitute the
21 MPDES rules are found in Subchapters 11, 12, 13,
22 and 14, and the matter before us today are
23 amendment of Subchapter 11 having to do with storm
24 water, and 13 which is the general MPDES permit
25 program. So I will start and give you some

1 background on where we're at on these rules, and
2 then kind of walk you through the rules, and see
3 if there is any questions. Please stop me at any
4 time.

5 First I'd like to hand out -- and I put
6 these out on the board -- some last minute
7 corrections that came up that we'll go over as I
8 go through the rules. These are fairly minor.
9 EPA provided us comments on Friday, and so some of
10 these reflect those comments.

11 Most of the rules in Subchapter 13 were
12 effective in 1989, and they have not been amended
13 since then with some notable exceptions. So the
14 Federal Clean Water Act has been amended a number
15 of times, and so has the Federal NPDES rule, so
16 we're basically playing a catch up game here.

17 The notable exceptions were in 1996, we
18 did amend Subchapter 14 and update the
19 pretreatment rules. In 2003 we initiated the
20 storm water rules which are in Subchapter 11, and
21 haven't been updated since, so that's what we're
22 working on today. In 2006 and again in 2012, we
23 amended the CAFO regulations, which have been
24 under revision at the Federal level since 2000.

25 In 2009 EPA looked at our rules and

1 said, "They're way out of date. You need to
2 update them," so the progress where we're at so
3 far is we've been before the Board with three
4 different rulemaking packages since 2011. This is
5 the fourth in that series, and we would expect to
6 have two more.

7 Kind of the side boards that we operate
8 under, under the Federal program, we have to adopt
9 rules at least as stringent as the Federal rules
10 in order to maintain primacy, and under Montana
11 statutes, our rules could be no more stringent
12 than the Federal rules, so we really don't have a
13 lot of room to add discretion. We can be more
14 stringent if there is a specific reason to be more
15 stringent, and in the last subchapter we did add
16 some State requirements having to do with water
17 quality standards that aren't in the Federal
18 rules.

19 These rules were sent to EPA back in May
20 as part of this cooperative agreement to work with
21 EPA on updating our rules. Like I said, they
22 provided comments, and they were very favorable,
23 and comments they pointed out a few things.

24 On June 4th we mailed these rules out to
25 stakeholders, about 110 interested individuals.

1 In that mailing we announced a meeting on June
2 25th to seek input from anyone who had interest in
3 them, and I was the only one that attended that
4 meeting, so we didn't have a lot of comments or
5 controversy.

6 On June 30th we took these rules to
7 WPCAC, gave a presentation to WPCAC, and we had
8 unanimous support to recommend to initiate
9 rulemaking before the Board.

10 So with that said, I'm going to start,
11 if there is no questions at this point, just run
12 through some of the rationale for some of these
13 rule changes beginning on the first page of the
14 rule package, Purpose and Scope.

15 The amendments here are again to clean
16 up some of the language that's in Subchapter 11
17 and make it equivalent to the Federal rule. We
18 have terminology in Rule 1 there that says
19 "potential pollutants." Well, there is no such
20 potential pollutants. Either you're a pollutant
21 or you're not. And so there is a lot of that.

22 And I also have to back up and say since
23 a lot of these rules haven't been amended since
24 1989 or 2003, when we go into a rule, we have to
25 update the formatting, and so a lot of this is

1 updated formatting and cross-referencing, so I'm
2 not going to go into that level of detail here.
3 So the introduction to all three of those
4 chapters, 11, 12, 13, and 14 will look the same
5 with these amendments.

6 Going on to Page 2 were definitions. We
7 are proposing to repeal three rules in Subchapter
8 11, and therefore some of these rules are no
9 longer in the subchapter, such as final
10 stabilization, SWPPP, which is the Storm Water
11 Pollution Prevention Plan. So those definitions
12 are being deleted. Those are definitions are
13 still in the applicable general permits for those
14 categories.

15 One of the things that we did when we
16 adopted the rules in 2003 was we split out mining
17 oil and gas from the industrial and large
18 construction projects. Under the Federal rules,
19 those are all part of what's called storm water
20 discharges associated with construction activity.
21 So we're basically putting that back in to make it
22 look like the Federal rule, and that's been a
23 cause -- a lot of the changes in this subchapter
24 are a result of that, but we believe in the end
25 that that will be beneficial to these rules, and

1 that they will be a lot more effective and
2 consistent with the Federal rule.

3 We're deleting the reference to surface
4 water, and just relying on the definition of state
5 waters. EPA has notified us that that definition
6 of surface water is not consistent with the
7 Federal Clean Water Act, but the State definition
8 in statute is, so we'll rely on that.

9 We're adding some new definitions:
10 Significant materials having to do with industrial
11 sites. If you store significant materials
12 outside, and storm water comes into contact with
13 them and runs off in a point source, then you need
14 a storm water permit, in addition to the
15 industrial categories that are listed there. So
16 that's it for the Definitions section.

17 Skip to Page 7 which is Permit
18 Requirements. Again, there is no substantive
19 change here. Because of the changes in the
20 definitions and putting things back together, the
21 way the Federal rule reads we've had to amend this
22 section, and clarify. We're not broadening the
23 rule, we're not making any new activities subject
24 to storm water permits, but we're just clarifying
25 that those rules will be the same as the Federal

1 rule.

2 And again in two there, removing some
3 words missing that was put into our rules that
4 seems to qualify who needs a storm water permit,
5 so that we can be clear on who needs a storm water
6 permit. I'm looking on Page 8 there at the top,
7 "Routinely composed entirely of storm water."
8 That's kind of an awkward phrase, and it has no
9 equivalent part in the Federal rules.

10 When EPA reviews these rules, when they
11 see something like that, they ask us -- we have to
12 provide an explanation as to how we're going to
13 interpret that, and we don't have a good
14 explanation, so it is a lot easier just to align
15 our rules with Federal rules so that they are
16 consistent.

17 Basically this section has to do with
18 who needs storm water permits. The storm water
19 permit program was broken into two phases, Phase 1
20 and 2, based on the 1987 amendments to the Federal
21 Clean Water Act, and so this rule establishes who
22 is in Phase 1 and who is in Phase 2, and again,
23 we're not changing any of that.

24 Moving on to Page 11, these are
25 exclusions, and this probably takes a little more

1 explanation because of some of the history that
2 was involved here and timing of when we adopted
3 rules and when EPA admitted the Federal Clean
4 Water Act, or Congress admitted the Act.

5 There has always been an exemption for
6 mining oil and gas activities provided that the
7 discharge does not -- For certain activities, oil
8 and gas exploration, production, processing,
9 treatment operations, and transmission facilities,
10 provided that the discharges from those activities
11 do not violate water quality standards, have a
12 reportable release of a hazardous material, and
13 that's all well defined in rule. And we're
14 keeping those incorporations.

15 Again, we adopted those rules in 2003.
16 In 2005 Congress amended the Federal Clean Water
17 Act to include construction activities as part of
18 the definition of oil and gas exploration, so
19 we've included that, and this is on Page 11 under
20 1106(c). The second part of that is the
21 definition right out of the Federal Clean Water
22 Act.

23 In 2006 EPA promulgated rules. They
24 were immediately sued. They tried to extend this.
25 And so in 2007, they went back to the 2005 rule,

1 which is basically what we have here. So our
2 rules, which were adopted in 2003, required
3 construction activities at oil and gas facilities
4 to get storm water permits. So this is now
5 consistent with the Federal Clean Water Act
6 requirements and the national requirements.

7 Next page, Page 12, there is really no
8 substantive changes. In 1107, again, that's just
9 a matter of cross-referencing because we're
10 cleaning up definitions.

11 The application procedures for small
12 MS4's. We have seven municipal separate storm
13 sewer systems. We have seven designated municipal
14 separate storm sewer systems in Montana. All
15 those to date and historically have been covered
16 under general permits.

17 We have never had in our rules -- we're
18 amending the general permit rules. We'll get to
19 that in a minute. But we have never had in our
20 rules what the application procedures would be if
21 an MS4 decided on its own, or we required under
22 these rules, that an MS4 get an individual permit.
23 So this clarifies and it follows the Federal rule,
24 clarifies that the application procedures for an
25 individual MPDES permit for a small MS4 would be

1 the same as for a medium MS4. Medium is 100,000
2 people or more; small is under 100,000. So all of
3 our municipal small MS4's are under 100,000. But
4 one could elect to get coverage rather than a
5 general permit under an individual permit.

6 So that's what this does here, and we
7 incorporated those Federal application
8 requirements by reference rather than putting them
9 into State rule.

10 So that ends Subchapter 11. Any
11 questions so far?

12 (No response)

13 MR. TOM REID: On Page 14 is 1341, which
14 is the general permit rule. Basically this rule
15 package started out to be this rule only, but
16 because storm water permits rely so heavily on
17 general permitting, once we changed the general
18 permit rule, we didn't have any choice but to go
19 back and correct Subchapter 11 to align it with
20 the general permit rule.

21 This rule basically has not been amended
22 since 1989. It deviates significantly from the
23 Federal rule, so there is quite of bit strike-out
24 and quite of adoption of new rule, and we do rely
25 heavily on general permits.

1 So the first under 1341(1), we've
2 deleted all these various categories that were put
3 in the rule in 1989. I should say that not all
4 states are delegated for general permits. There
5 are five MPDES programs that states are delegated
6 for, and we are delegated for three of those
7 programs, but not biosolids and pretreatment.
8 Those are retained by EPA. General permits, we
9 are delegated to issue general permits in the
10 State of Montana, and we have been since I think
11 about 1983.

12 So I don't know why these rules -- I've
13 gone back and looked at the record, and I don't
14 know why they were specifically identified. The
15 whole idea of a general permit is not to begin a
16 rulemaking process, but it is to actually issue
17 permits that reduces the administrative burden of
18 the Department. We have 1,000 storm water
19 construction permits. We can't issue individual
20 permits for all that. And there may be a new
21 category.

22 Some of these categories are not subject
23 to MPDES permits, so the question was always,
24 "Well, are we trying to extend the Federal rule by
25 saying that road salt operations are subject to

1 permits?" That wasn't the intent. It is easier,
2 and has been our philosophy that these should be
3 stricken, and that we should adopt the Federal
4 language for how you determine the categories of
5 general permit. And that's basically what the
6 first 1(a) is, is categories that are subject to
7 general permits, and this wouldn't affect who all
8 is affected, or what facilities are regulated
9 under general permits.

10 And this is where the first typo that we
11 would like to point out is, and that hopefully the
12 Board will acknowledge if they move forward with
13 rulemaking. On the bottom of Page 14 there, there
14 is (a)(i), and it says, "Designated panning area,"
15 and so it is supposed to refer to planning area,
16 designated planning area under Section 208 and 303
17 of Federal Clean Water Act.

18 And then the other corrections are on
19 the next page. At least all of the errors were in
20 -- pretty concise here. And this is one that EPA
21 pointed out. On Page 15 under (c), 1(c), about
22 the middle of the page, "Where sources with a
23 specific category or subcategory of discharges are
24 subject to water quality based limits proposed
25 pursuant to 40 CFR 122.44(d)," we would just

1 strike the (d) because Federal rule just says
2 122.44. Water quality based limits are addressed
3 in (d), so I just put in (d), and they pointed out
4 that it is broader than that.

5 And then the other change, again I don't
6 think it is substantial, would be in two of that
7 page, and it would be on Page 15, and we would
8 strike the wording, "EPA has 90 days from the date
9 it receives a proposed permit to comment upon,
10 object, or make recommendations with respect to
11 the proposed general permit."

12 The 90 day requirement is in 40 CFR 123,
13 and it is not affected by this rulemaking. It has
14 always been 90 days after EPA receives the
15 proposed permit. A proposed permit is after we
16 respond to the comments, and then we issue it. It
17 is not effective for 90 days. All I was trying to
18 do there was call attention to this other rule.

19 And EPA pointed out that -- and they're
20 right -- is if they did object to a permit, it may
21 be more than 90 days. That's the net effect of
22 this. So it is saying simply that this 90 day
23 period is out there, and they have the right to
24 object to a permit. On an individual permit it is
25 30 days, and they can extend it to 90, but with

1 general permits, they take the full 90 days.

2 The rest of Subchapter -- this 1341 is
3 general permits, is basically the administration
4 of general permits. Under the old rules, the
5 Department, the 1989 rules, the Department
6 required a permit application for coverage under a
7 general permit. That's not the way it works at
8 the Federal level. We use NOI's, and we have used
9 NOI's for storm water permits, and that was built
10 in Subchapter 11.

11 This just clarifies that now that
12 process is available, the NOI -- Notice of Intent
13 -- can be used with all general permits. The
14 Legislature amended the Water Quality Act to give
15 us that authority, and I don't remember the date
16 on that. I think it was 2003 maybe or 2005.

17 So again, most of this is bringing this
18 rule up to speed with the Federal rule so we can
19 have equivalence between the State rule and the
20 Federal rule.

21 And finally, 1341 is what we call
22 standard conditions. These conditions, basically
23 there are 14 standard conditions. Because of the
24 formatting, it turned out I think to be 22. But
25 they go into every MPDES permit, and we just

1 needed to bring those up to date. They include
2 things like on Page 23, we've increased the
3 penalty amounts for civil penalties, and again,
4 that comes right out of statute, the Montana Water
5 Quality Act. The Legislature upped the penalties,
6 the civil penalties from \$10,000 to \$25,000
7 several sessions ago, and so we're just updating
8 this language.

9 There is now new language which again
10 comes from the Montana Water Quality Act that for
11 a second or wilful violation, it's up to \$50,000
12 per day for a violation, and up to two years of
13 imprisonment or both. And then we also have now
14 administrative penalties of \$10,000 per violation
15 up to \$100,000. So this is all standard language
16 that goes into the permit, and so we've just
17 updated that.

18 We've updated some other minor
19 references to sewage sludge and toxic effluent
20 standards that are under the Federal Clean Water
21 Act under Section 307 and 405 for sludge.

22 On Page 24 there is -- 16 is a new
23 provision having to do with falsification of
24 records. So this is all stuff that goes into the
25 permit, so the permittee knows that, and they have

1 a contract basically. They can discharge, but at
2 minimum, it is subject to these conditions. All
3 MPDES permits have to have these standard
4 conditions in them.

5 And with that, I'm finished with this
6 presentation. I'd be happy to answer any
7 questions.

8 CHAIRMAN SHROPSHIRE: Questions from the
9 Board? Joe.

10 MR. RUSSELL: Just a quick question,
11 Tom. There is no conflict between the new
12 violations section and any DEQ violation
13 procedures that have been adopted in the past?

14 MR. TOM REID: Not that I'm aware of.
15 John is back there. These provisions have been in
16 statute, and I think John would implement through
17 an enforcement action the language of the statute
18 perhaps, but I'd defer to John Arrigo.

19 MR. ARRIGO: Mr. Chairman, members of
20 the Board, my name is John Arrigo. I'm the
21 Administrator of the DEQ Enforcement Division.

22 And as you know, the Board promulgated
23 rules which define how we calculate penalties.
24 We're aware of the statutory maximums when we do
25 these penalty calculations, and factor that into

1 our final penalties, so there is no conflict
2 between what's in these rules, the law, or our
3 penalty rules.

4 MR. RUSSELL: Thanks.

5 MR. TWEETEN: In Subsection (4) of 1342,
6 when you talk about the criminal penalties, I
7 assume those are set forth in statute, and you're
8 just sort of referring to them in the regulation;
9 is that correct?

10 MR. TOM REID: Madam Chair, Mr. Tweeten.
11 Yes, we are just referencing those. EPA for state
12 programs sets -- The Federal Clean Water Act
13 penalties are much higher than the state
14 penalties. They're on the order of a million
15 dollars. But the minimums are like \$5,000 for a
16 state program. So we're kind of in the middle
17 with the state, so the Legislature sets those in
18 the Montana Water Quality Act in the enforcement
19 section, and those are what John was referring to.
20 So those are set for Montana in statute, yes.

21 MR. TWEETEN: Thank you.

22 CHAIRMAN SHROPSHIRE: I have a question.
23 What do you anticipate in terms of public comment
24 on this rule?

25 MR. TOM REID: Madam Chair, members of

1 the Board. We've just had some inquiries about
2 how we would interpret these, but we haven't had
3 any groups that have been opposed to them or seen
4 problems with them. I know that we've tried to
5 work with the stakeholders by sending it out.
6 We're happy to have input back from EPA because
7 these are some things that -- there were some
8 issues in there that -- We're really interpreting
9 their rules and putting them in here. So it was
10 good to hear that we were in concurrence with
11 those. So I don't anticipate a lot of comment on
12 these rules.

13 CHAIRMAN SHROPSHIRE: All right. Thank
14 you.

15 MR. MIRES: Is this an area where we
16 would ask on small business impact analysis?

17 CHAIRMAN SHROPSHIRE: Good question. I
18 don't know the answer.

19 MR. TOM REID: Madam Chair, Larry Mires,
20 we have prepared a small business impact analysis,
21 and the conclusion was -- and I think it is in the
22 statement No. 9 -- that there will be no impact.
23 The net effect of this is that some facilities now
24 that need to get a permit will not have to get a
25 permit, some of those oil and gas activities. And

1 I can provide that to you, and we will provide
2 that in the record.

3 MR. MIRES: Madam Chair. Looking at the
4 small impact analysis on Page 3, and it has left
5 me a little bit confused. It says, "It is likely
6 additional costs from this rule would be felt on
7 the front end of each development in terms of
8 engineering design," and you've got numbers in
9 there that range from \$1,000 cost for average for
10 the first two years up to just over a million
11 dollars, and then it says it is unlikely that the
12 additional costs would shut down most projects.

13 What I'm seeing it saying is there the
14 potential of a \$10 million cost in here that could
15 be felt on the long run. I'm trying to get my
16 head around how that could not affect a project.

17 MR. TOM REID: Madam Chair, Mr. Mires.
18 I believe that's not the small business impact
19 assessment for this rule package. That may be --

20 MR. MIRES: Did I get in the wrong
21 packet here somehow?

22 MR. TOM REID: Our conclusions were much
23 different, and there was no cost associated with
24 the small business impact.

25 MR. MIRES: I could be on the wrong one.

1 You're probably right on this one. It was sitting
2 under II(B)(1). I'm in the wrong one. I'm sorry.
3 I'm in the wrong one, flipped down to the wrong
4 area. Sorry.

5 MR. TOM REID: So I'll let the next crew
6 answer that one.

7 MR. MIRES: They can expect it. They
8 can get their answer ready now.

9 MR. TOM REID: Any other questions?

10 (No response)

11 CHAIRMAN SHROPSHIRE: Thanks, Tom.

12 MR. TOM REID: Thank you.

13 CHAIRMAN SHROPSHIRE: Is there anybody
14 from the public who would like to comment on this?

15 MR. ALLES: Good morning, Madam Chair.
16 My name is Ron Alles. I'm City Manager for
17 Helena, Montana. Are we on Action Item III(a)(1)
18 before I comment?

19 MR. LIVERS: Yes.

20 MR. ALLES: Thank you. I'm going to be
21 very general right now. Actually I'm representing
22 the City of Helena, and as well all the other MS4
23 cities involved. They asked that I come and
24 testify, and at least get on record that we will
25 be back in a month or when you take this action

1 item up. It is very significant, in our opinion,
2 in terms of our MS4 permits. And I'll just
3 highlight a couple of items, and assure you that
4 the next time you take this up, we'll have a more
5 elaborate response to some of the issues as it
6 relates to the MS4, in part this removal of
7 surface waters and exchanging that with State
8 waters.

9 And to give you an example, in the City
10 of Helena, we define our MS4 system probably as
11 all the curbs, gutters, streets, pipes, that get
12 the water, that storm water, to the hole that gets
13 dug in a development that is designed to treat
14 that MS4 water.

15 And I think at least the surface water
16 definition excludes those from certain treatments
17 to get there. We actually use that system, and
18 that pit that's dry for 95 percent of the year is
19 the methodology to treat that water before it ever
20 hits the groundwater system. And so it would seem
21 that as we change that definition to State waters,
22 and we have to start treating before it ever hits
23 that treatment system, it is going to be very
24 problematic and costly to the City of Helena and
25 the other MS4 cities.

1 So that just gives you a flavor of
2 what's coming in a month or two, or when you
3 decide to take this up, but we're going to take a
4 very I guess coordinated approach. We've been
5 meeting on this. We're trying to work through our
6 MS4 permit renewal process, which I think is
7 coming up toward the end of December anyway, and
8 this definition has a significant impact on how
9 those rules will get applied.

10 So I think we're going to have to spend
11 a lot more time on this definition, and what that
12 means to cities and probably any of the other
13 folks that are regulated. So thank you. And I
14 think I have some staff here. If you get into
15 really detailed questions, I might have to refer
16 to them, but I have a pretty good understanding of
17 what this means to us. So thank you.

18 CHAIRMAN SHROPSHIRE: Thanks, Mr. Alles.
19 Does anybody have questions?

20 (No response)

21 CHAIRMAN SHROPSHIRE: Any other members
22 of the public who would like to comment?

23 (No response)

24 CHAIRMAN SHROPSHIRE: All right. I
25 guess I'll entertain a motion to initiate -- Let

1 me take a step back. Ben, are you available to be
2 a Hearing Examiner for this?

3 MR. BEN REED: Yes, I am.

4 CHAIRMAN SHROPSHIRE: Any interest from
5 the Board, any discussion of whether or not this
6 should be assigned to Ben? No comments?

7 MR. RUSSELL: I think we should see what
8 the comment comes back. We've done this before
9 where we take it to a Hearing Examiner, it gets
10 pretty dicey, and then we may end up having to
11 hear a little bit more about it at that time and
12 with your recommendations. So I would like to see
13 it assigned to a Hearing Examiner.

14 MR. TWEETEN: Madam Chair. The only
15 caution I'd have is that once we initiate
16 rulemaking, we have to finish in six months. So
17 if this does turn out to be a more extensive
18 conversation with the cities about their issues,
19 we need to keep that six month deadline in mind.
20 There is no reason not to, it's just something to
21 remember, that we don't have an unlimited amount
22 of time to deal with this rule once we initiate.

23 CHAIRMAN SHROPSHIRE: Marietta, you look
24 like you had a comment.

25 MS. CANTY: I'm wondering if we should

1 wait and we hear from the MS4 before we initiate,
2 knowing that timeline. Or maybe Tom, do you want
3 to discuss that some with us? Because I followed
4 it when you talked about changing that definition,
5 but how do you see that impacting the rule if it
6 greatly impacts the MS4's?

7 MR. TOM REID: Madam Chair, Ms. Canty.
8 I'm a little bit confused by the comment. Any
9 discharge to groundwater, which State water is
10 defined as waters on the surface, and then waters
11 underneath the ground which is groundwater, and we
12 have groundwater rules and permitting program.

13 But under Subchapter 11, and in the
14 statute, discharges of storm water to groundwater
15 are exempt from permitting requirements, so
16 they're not addressed in the MS4. And so I don't
17 know what the full range of the issues are. I
18 guess we'll have to hear those, and see what they
19 are. But the definition in statute, the way I
20 understand -- and perhaps not -- is we can't adopt
21 rules that amend the statute, and that's what
22 we've done here.

23 MR. LIVERS: Madam Chair, members of the
24 Board. Maybe I can talk a little bit about
25 process, and open to any corrections or

1 clarifications if I've got it a little wrong.

2 Mr. Tweeten is right of course about the
3 time frame. We also have a general permit that is
4 set to expire at the end of this calendar year, so
5 that's part of the impetus on the Department's
6 part for going forward at this time.

7 There are some ongoing discussions.
8 We've had some stakeholders meetings with a
9 variety of folks, including the MS4's, and those
10 discussions continue. I think Mr. Alles
11 characterized it accurately that they still have
12 concerns. I think we still have some things we're
13 hoping to work through. And so we're continuing
14 on a pretty aggressive time frame to try to get
15 resolution.

16 I guess it would be the Department's
17 interest that we go ahead and initiate at this
18 point. If for some reason we're not able to
19 acceptably resolve some of the disagreements, we
20 may be in a position of having to look at some
21 sort of administrative exception. It is a little
22 bit more complicated with a general permit than it
23 is individual discharge permits, so we're hoping
24 to avoid that if possible. But I guess that would
25 be the Department's interest.

1 MR. TWEETEN: Madam Chair, Tom. I
2 understood Tom to say that the main impetus behind
3 this rule was to bring our regulations into sync
4 with the Federal rules. I'm just curious as to
5 how much leeway you think the Department has to
6 come up with a different language that might be
7 sufficient to deal with the cities' concerns and
8 still be in compliance with the Federal rule.

9 MR. LIVERS: Madam Chair, Mr. Tweeten.
10 I'm not sure I can answer that. The interest with
11 the MS4's deals with storm water. I don't know if
12 there is somebody in the audience who could maybe
13 do a better, more detailed call on that.
14 Typically we do have a fairly narrow window to
15 walk, as Tom described, in terms of State
16 restrictions and Federal restrictions, but I don't
17 know if someone else can accurately characterize
18 just how much discretion we've got on the storm
19 water piece.

20 MR. TWEETEN: I just raise the question
21 because it seems to me that you may not have a lot
22 of maneuvering room to negotiate something with
23 the cities that is going to work. I'm not
24 suggesting a negotiated rulemaking by any stretch,
25 but maybe the best thing to do would be to

1 initiate the rulemaking, see where you get, and
2 adopt the rule that we need to adopt; and if for
3 some reason any stakeholders think we're not in
4 compliance with law, then they've got legal
5 recourse they can take at that point.

6 MR. LIVERS: I think that would make
7 sense. The only thing I guess I'd add is this is
8 a national issue, and states are at various points
9 in progress on trying to update storm water
10 treatment. It is a big issue for cities. There
11 has been some difference in approach among
12 different states, so that suggests there is some
13 latitude in there, some discretion in terms of how
14 you accomplish. Maybe not a lot of discretion on
15 what needs to be accomplished, but in terms of how
16 you go about that. There must be some -- I think
17 there is some discretion there. So that may be
18 where it lies.

19 MR. TWEETEN: Okay. Thanks.

20 CHAIRMAN SHROPSHIRE: Any further
21 discussion?

22 MS. CANTY: I might just add that maybe
23 we should go ahead and propose rulemaking, but
24 letting Tom and his group know that that's an area
25 of research that we need to work on, is what other

1 states are doing, and how to not affect the MS4's
2 as much as we can.

3 MR. TOM REID: Yes. Madam Chair, Ms.
4 Canty. We can certainly do that. Obviously this
5 is going to be a comment, so we have to respond to
6 comments, so that will flesh this issue out in my
7 opinion.

8 CHAIRMAN SHROPSHIRE: All right. I
9 would entertain a motion to initiate rulemaking in
10 this matter with the modifications to the proposed
11 rules contained in the errata sheet provided by
12 the Department, and appoint Ben Reed as the
13 Hearing Examiner.

14 MR. TWEETEN: So moved.

15 CHAIRMAN SHROPSHIRE: It's been moved by
16 Chris.

17 MS. CANTY: I'll second the motion.

18 CHAIRMAN SHROPSHIRE: Seconded by
19 Marietta.

20 MR. LIVERS: Madam Chair, I don't want
21 to influence the Board, but I do want to point out
22 that if there is a possibility the Board may
23 choose to hear this itself, you might be better
24 off procedurally just not explicitly appointing a
25 Hearing Examiner, because we've done that in the

1 past where the default then is Mr. Reed would go
2 ahead and do all the preparatory work, and you
3 could cross that bridge when you got to it if you
4 wanted to. So that's a possibility.

5 CHAIRMAN SHROPSHIRE: So when I say
6 appoint, and not say permanent Hearing Examiner,
7 can it be assumed that it is interim?

8 MR. LIVERS: Yes. And Mr. North just
9 pointed out that was dealing with contested cases,
10 not rulemaking. That was a mistake on my part.
11 So go ahead and leave the --

12 CHAIRMAN SHROPSHIRE: So the motion
13 stands.

14 MR. TWEETEN: Sure.

15 CHAIRMAN SHROPSHIRE: So it has been
16 moved by Chris, seconded by Marietta. Any further
17 discussion?

18 (No response)

19 CHAIRMAN SHROPSHIRE: All those in
20 favor, signify by saying aye.

21 (Response)

22 CHAIRMAN SHROPSHIRE: Opposed.

23 (No response)

24 CHAIRMAN SHROPSHIRE: Motion carries
25 unanimously.

1 We're going to skip the next agenda
2 item, and move to Item III(B)(2) because we need
3 to adopt things in III(B)(2) before we get to
4 III(B)(1).

5 MR. RUSSELL: Didn't we just do (B)(1)?

6 CHAIRMAN SHROPSHIRE: We did III(A)(1),
7 now we're doing III(B)(2), agenda item three bravo
8 two.

9 MR. TWEETEN: At what page in the packet
10 does that begin?

11 MS. CANTY: On top of Page 3 of the
12 agenda.

13 CHAIRMAN SHROPSHIRE: It starts on Page
14 107 of the PDF file, I think. Mr. Pizzini.

15 MR. PIZZINI: Good morning, Madam Chair,
16 members of the Board. For the record, my name is
17 Eugene Pizzini. I'm the Monitoring Reporting
18 Section Supervisor for the Public Water Supply
19 Section, Montana DEQ.

20 At its January 21st, 2014 Board hearing,
21 the Board initiated rulemaking to amend the
22 Administrative Rules of Montana dealing with the
23 regulation of public water supplies. This is a
24 joint rulemaking of Department and Board rules to
25 amend Administrative Rules of Montana 17.38.101

1 and 17.36.345. The proposed amendments would
2 update the adoption by reference of Department
3 Circulars DEQ1, DEQ3, adopt by reference new
4 Department Circular DEQ10 detailing design
5 standards for the use of springs for public water
6 systems, and new Department Circular DEQ 16
7 detailing design standards for the use of sisterns
8 to serve non-community public water supply
9 systems.

10 The Secretary of State states that
11 Administrative Rules are agency regulations,
12 standards, or statements of applicability that
13 implement, interpret, or set law or policy. A
14 rule may be specific in and of itself, or it may
15 adopt by reference other documents that may
16 further clarify requirements. The circulars
17 described above are designed and are proposed to
18 be adopted by reference into the applicable ARMs.
19 This gives the circulars the force of rule without
20 requiring all of the information described in
21 those documents to be published in the rules
22 themselves.

23 In addition, because the rules allow for
24 deviations to the standards, applicants may
25 propose alternatives to the circulars if they are

1 able to show that the proposal is as protective as
2 that required in the standard.

3 A brief summary of the major changes
4 proposed for DEQ1 and DEQ3 was included in your
5 Board packet. Rachel Clark, our Engineering
6 Section Supervisor, is available should you have
7 specific technical questions related to the
8 circulars.

9 On March 7th, 2014, a public hearing was
10 held. At the close of the comment period, the
11 Board had received ten general comments. Of the
12 ten comments, DEQ concurred with nine of the
13 comments, and has proposed necessary changes to
14 incorporate those comments.

15 The one remaining comment deals with the
16 drill and drive method of grouting wells. In this
17 method, as the well is drilled, a bag of bentonite
18 is opened and allowed to fill the void around the
19 well casing as it is driven. This is also known
20 as continuous feed grouting. The Department
21 proposed to eliminate this method of grouting for
22 public water supply wells. Comments received
23 stated that in some soil type, this method
24 provides the best seal, and saves time and money.

25 The Department proposes to remove the

1 strict prohibition language for drill and drive
2 grouting, and could consider its use through
3 deviation process. This will allow for Department
4 review of site specific conditions.

5 The remaining proposed amendments are
6 clarification of existing rules, and received no
7 comments.

8 Therefore the Department recommends
9 adoption of the proposed amendments set forth in
10 the notice of public hearing on proposed
11 amendments as amended in the notice of amendment.
12 Thank you.

13 CHAIRMAN SHROPSHIRE: Any questions from
14 the Board?

15 MR. MIRES: Madam Chair. Mr. Pizzini,
16 as I understand, you're modifying the drill and
17 drive, or you're taking it completely out of
18 there, that change that you initially made?

19 MR. PIZZINI: Madam Chair, Mr. Mires.
20 Originally we intended to completely eliminate the
21 potential of drill and drive. After receiving
22 comments, we are not comfortable with putting it
23 back in, but what we're proposing to do is to
24 remove the strict prohibition so that it can be at
25 least considered. So if somebody says, "In this

1 case, because of this soil type, we think it is
2 the best option," they can submit it to us through
3 the deviation process, we review it; if we agree,
4 we allow it. So it is just removing the strict
5 prohibition.

6 MR. RUSSELL: So is that clear who can
7 submit that, who can submit the request? And what
8 kind of criteria will you use to say, "Okay. You
9 can use this substandard grouting technique"?

10 MR. PIZZINI: Madam Chair, I get to
11 refer this one to our technical expert.

12 MS. CLARK: Madam Chair, I'm Rachel
13 Clark with the Public Water Supply Bureau.

14 Deviations can be submitted for
15 basically any project. To deviate from the design
16 standards, for community water systems, they'd
17 have to be submitted by a professional engineer.
18 For non-community systems, they don't have to be
19 submitted by a professional engineer. What we
20 would look at in this particular case would be
21 depth to water, whether there is confining layers,
22 what the soil looks like at that specific
23 location.

24 MR. RUSSELL: And you'd know that before
25 they started packing that grout as they drove the

1 casing?

2 MS. CLARK: We'd ask for that
3 information in order to evaluate the deviation
4 request from surrounding well logs.

5 MR. RUSSELL: Because if someone just
6 took it upon themselves to do that, and it showed
7 up, and you didn't agree with it, there would be a
8 considerable amount of money to be reinvested to
9 make it comply.

10 MS. CLARK: Correct. That's why we
11 would review the standards for drilling the well
12 before they drill it in theory.

13 MR. RUSSELL: If it was a public water
14 supply, it would be pretty easy because all of the
15 stuff would be happening. I can see allowing this
16 window to open, it could be a little problematic,
17 because of after the fact requests.

18 MS. CLARK: We still have -- The
19 requirement is still there to have the one and a
20 half inches of grout around the outside of the
21 casing. It is just we've removed one line that
22 said, "Under no circumstances will those be
23 considered." So the standard is still the same,
24 it just made it clear that they could apply for a
25 deviation.

1 MR. TWEETEN: Ms. Clark, are the
2 criteria for evaluating the application for
3 deviation, do those appear in statute or in rule
4 somewhere that the applicant can rely on?

5 MS. CLARK: The general criteria we look
6 at is in the first chapter of DEQ1 and DEQ3,
7 essentially whether it is as protective of public
8 health.

9 MR. TWEETEN: But it doesn't get any
10 more specific than that?

11 MS. CLARK: No. There is so many
12 standards, it would be impossible to try and give
13 criteria for each section.

14 CHAIRMAN SHROPSHIRE: Any other
15 questions?

16 (No response)

17 CHAIRMAN SHROPSHIRE: Thank you.
18 Anybody from the public that would like to comment
19 on this?

20 MS. CANTY: Madam Chair, I just have one
21 question and I guess it is for Rachel. It just
22 comes from having worked with a lot of drillers in
23 my life. If they go ahead and do this without
24 getting the deviation beforehand, then what
25 happens?

1 MS. CLARK: They're required to submit
2 as-builts for all public water system construction
3 projects, so we would know that when the as-builts
4 are submitted with the well log, we would point
5 out that this does not comply with current
6 standards. They could apply for a deviation after
7 the fact, but we're not inclined to approve them
8 if they could have resolved this beforehand. But
9 again, we'd look at the specific lithology in that
10 particular well, and if the deviation wasn't
11 granted, they get to go back and correct it.

12 MS. CANTY: Okay. Thank you.

13 MS. KAISER: I just have a comment. If
14 for a public water supply well construction has to
15 be approved prior to installation, so if they put
16 it in before you see their proposed design,
17 they're in violation; is that correct?

18 MS. CLARK: Correct. Yes. That would
19 be illegal construction. Yes.

20 CHAIRMAN SHROPSHIRE: Well, if there's
21 no further discussion, I would entertain a motion
22 to adopt the Hearing Examiner's report, the House
23 Bill 311 and 521 analyses, the Department's
24 proposed responses to comments and rules in
25 Circulars DEQ1, DEQ3, DEQ10, and DEQ16 with

1 modifications indicated, and the draft notice of
2 amendment.

3 MR. RUSSELL: I would so move.

4 MS. KAISER: I'll second.

5 CHAIRMAN SHROPSHIRE: Moved by Joe,
6 seconded by Heidi. Any further discussion?

7 MR. TWEETEN: Just a comment, I guess.
8 I'm all for the flexibility to consider site
9 specific issues, and strict prohibitions can get
10 in the way of projects that need to be done just
11 because the -- or make them more expensive, I
12 guess. But I hope we're not setting up a
13 situation where the applicant faces a sort of an
14 impossible chore in trying to satisfy the
15 Department that a deviation is warranted in a
16 certain situation.

17 And based on the answers to my
18 questions, I guess I'm not 100 percent sure that
19 an applicant asking for one of these deviations is
20 going to know what they have to show in order to
21 satisfy the Department in any given circumstance.
22 So it may become a complicated process, but on the
23 whole, I think that the flexibility is a good
24 idea, so I think the motion is well taken, and
25 I'll support it. I just want to ask the

1 Department to be careful in making sure that any
2 applicant gets a fair shake at trying to prove
3 that they're entitled to one of these deviations.

4 CHAIRMAN SHROPSHIRE: All those in
5 favor, signify by saying aye.

6 (Response)

7 CHAIRMAN SHROPSHIRE: Opposed.

8 (No response)

9 CHAIRMAN SHROPSHIRE: Motion carries
10 unanimously.

11 So now we will move to the previous
12 Agenda Item III(B)(1).

13 MS. KINGERY: Madam Chair, members of
14 the Board. My name is Barb Kingery. I'm with the
15 Subdivision Section at DEQ here. And we have
16 before you for your consideration for adoption
17 today a draft notice of amendment to a number of
18 rules, 17.36.320, 321, 322, 323, and 325, which
19 are joint Board and Department rules; 17.36.912
20 and 918, which are a statement of standard Board
21 rules, Department rules; 17.38.101 and 17.38.106,
22 and those are public water rules. So if you can
23 bear with me, I'm going to jump around a little
24 bit here.

25 17.36.106, that's what we'll begin with

1 here. That's the last one. And luckily I'm
2 prepared for this. You guys just adopted
3 amendments to Circulars 1, 3, 10, and 16. What
4 17.38.106 did is it took those new chapter
5 numbers, and corresponded them to our fee
6 schedule. So there was no increase in fees as
7 part of 17.38.106. It was just strictly a
8 bookkeeping kind of thing to make sure that the
9 fees charged matched the chapter numbers for these
10 new circulars and the revisions that luckily you
11 guys just adopted. So that was the one that was
12 sort of hanging out there. I thought, "Boy, I
13 hope that one goes through."

14 So 17.38.106 talks about fees and that
15 sort of structure. I'm going to go back and do a
16 little history here.

17 We went before you guys back in April to
18 initiate rulemaking on these rules, and then we
19 held a hearing May 19th. Two people showed up;
20 one made comments, and one did not. One just
21 listened. And then we had a comment period that
22 ended May 22nd on these rules.

23 We received comments from six different
24 people, and I think those were included as part of
25 your Board package. Those comments primarily

1 dealt with the 17.36 rules. These are the
2 subdivision rules that are adopted by reference by
3 the public water rules, which is the 17.38.101.

4 In those rules, primarily the comments
5 that we received as part of our draft notice were
6 primarily clean-up or clarification kinds of
7 things that we received, and we agreed with a
8 number of them. And you have those as part of
9 your package, and these have been proposed
10 changes.

11 A number of them were outside the scope
12 of this particular rulemaking, and you may see
13 those in a future package coming your way. They
14 were good comments and ones that we will consider
15 in a future package, but they were outside the
16 scope of this particular notice.

17 As part of your package, we also
18 included our takings analysis, and our small
19 business impact analysis which Mr. Mires referred
20 to before. When you're talking about subdivisions
21 and you're talking about land and land values, it
22 is a very difficult thing to quantify, and we
23 found this small business impact analysis
24 particularly challenging in that regard.

25 There is a couple of rules in here, one

1 being that we require a 100 percent replacement
2 area for a drainfield. That's new. It was part
3 of the approved DEQ4 package that you approved
4 back in November of 2013, but we put it in the
5 rule here. And when you're talking about land
6 values over periods of time, prices go up very
7 quickly, and we tried to be as broad as possible.
8 In some cases those may apply, and in some cases
9 they might not.

10 That's where that \$10 million came from.
11 We were trying to sort of project over a ten year
12 period that additional land that might be required
13 as part of a replacement area, or the different
14 requirements that we require for a professional
15 engineer to be included in there. So I wanted to
16 just sort of point that out to you. We tried to
17 be as conservative as possible there.

18 All in all it has been a very great
19 process. Through the comment period, I think we
20 received wonderful suggestions, which you guys
21 have in front of you there. And I would encourage
22 you to look at it and consider these for final
23 adoption, and I'll be available if you have any
24 questions.

25 CHAIRMAN SHROPSHIRE: Thanks, Barb. Any

1 questions?

2 MR. MIRES: If you ask early, you get
3 your early answer.

4 CHAIRMAN SHROPSHIRE: Are you satisfied?

5 MR. MIRES: Yes.

6 CHAIRMAN SHROPSHIRE: Any members of the
7 public wish to comment on this?

8 (No response)

9 CHAIRMAN SHROPSHIRE: Well, I would
10 entertain a motion to adopt the Hearing Examiner's
11 report, the House Bill 521, 311, and small
12 business impact analyses, proposed responses to
13 comments, and the rules with modifications
14 indicated in the draft notice of amendment.

15 MR. MIRES: I would so move.

16 CHAIRMAN SHROPSHIRE: It's been moved by
17 Larry.

18 MS. CANTY: I'll second the motion.

19 CHAIRMAN SHROPSHIRE: Seconded by
20 Marietta.

21 MR. RUSSELL: A quick question before we
22 -- So the small business analysis, that clearly is
23 a very conservative approach. Will someone in the
24 Legislature look at this and say -- and I know
25 there is no sponsor. We're not working towards

1 adoption of a statute that requires a rule. But
2 you know, there is other sides to this story on
3 small business, and the fact that they could still
4 obtain a waiver if they --

5 Literally if they're already in place,
6 and they have to replace a system, and they have
7 to replace it over the top of it, they're not
8 gaining -- they're not losing any land, or they're
9 not having to acquire additional land. So being
10 in the field for a long time doing this stuff, it
11 seems -- it is not like they're setting this
12 drainfield replacement aside, and putting a fence
13 around it, and saying you can't ever use it.

14 So you have to be a little careful that
15 we're setting this up and saying, "No, you can't
16 use this." You have to put constraints on the
17 use. People use it. They put grass over it, they
18 irrigate it. If you don't watch out, and you get
19 down the line a little bit, they put shops over
20 them, and all of a sudden there is no impact until
21 they go back and they get a waiver because they
22 don't have any other land but what's there.

23 And yes, they have to hire an engineer,
24 but oftentimes from where they were to where
25 they're going, the size of the drainfield changes

1 anyway, and they need an engineer to put a similar
2 drainfield in the same spot because our siting
3 criteria and wastewater generation has increased
4 so much over the last twenty years.

5 So I wouldn't put -- I know we have to
6 adopt it, but it concerns me that we're thinking
7 that onsite sewage treatment has this significant
8 impact just because of this rule change. I don't
9 think it does, but that's just an opinion.

10 CHAIRMAN SHROPSHIRE: Well, thank you
11 for that comment. All those in favor, signify by
12 saying aye.

13 (Response)

14 CHAIRMAN SHROPSHIRE: Opposed.

15 (No response)

16 CHAIRMAN SHROPSHIRE: Motion carries
17 unanimously.

18 This is probably a good breaking point.
19 We'll take a ten minute break.

20 (Recess taken)

21 CHAIRMAN SHROPSHIRE: Why don't we go
22 ahead and get started. The next item on the
23 agenda is Item III(B)(3), Montana base numeric
24 nutrient standards.

25 MR. MATHIEUS: Good morning, Madam

1 Chair, members of the Board. For the record, my
2 name is George Mathieus, and I'm Administrator of
3 the Planning Division here at the Department.

4 I almost want somebody to pinch me. It
5 is hard to believe this day is here. So before
6 you today are the nutrient numeric nutrient
7 criteria, and I just thought I'd say a couple of
8 things about it.

9 As you know, the Department has been
10 collecting data on this effort since about 2000.
11 We implemented a pretty massive public outreach
12 and stakeholder process back in around 2007. As I
13 indicated on May 30th before this Board, we had
14 public hearings. Both public hearings we had for
15 both the nutrient criteria and our variance
16 process were held on the same day.

17 The comments that we received were -- it
18 is funny. I'll pause for a minute. I've been
19 doing this for long I could do it in my sleep, and
20 seriously it's hard to believe I'm standing here
21 today because it is a big day. So bear with me.
22 It is unbelievable, and I'm getting a little
23 verklempt, because those who know me, I talk a
24 lot. Let me just take a step back.

25 As I indicated on May 30th, we received

1 a pretty equal amount of opposition and support
2 for this project, and actually the opposition was
3 just related to a couple specific provisions
4 within the rule itself, but generally we received
5 good support for the package. A reminder to the
6 Board that this is sort of a parallel -- we had
7 two parallel rulemakings. We had the variance
8 process and we had the numeric criteria. The
9 Department adopted the variance process this
10 morning.

11 On May 30th, we indicated that the
12 Department recommended to the Board to not adopt
13 and just specifically the Flathead Lake numeric
14 standards. We had some discussion back in May on
15 the rationale behind that, but simply just enough
16 comments from public that we needed to sort of
17 take a step back, slow down, and do a more
18 thorough job, and so we're moving forward with
19 that process.

20 There are amendments that we prepared as
21 a result of the public comments, and we're
22 prepared to discuss those today if necessary. So
23 I guess with that, it is as simple as the
24 Department recommends adoption of DEQ Circular
25 12A, and the amendments of the rules that are in

1 the notice.

2 I would like to just take a minute to
3 thank folks. This has been a monumental process.
4 From the public process standpoint, we had a huge
5 support group, a huge partnership, everywhere from
6 legislators, to cities, to businesses across the
7 state. So I'd really like to thank our partners
8 that partnered with us on this, developed working
9 on these numbers and our variance process. It is
10 something to be proud of.

11 There is a lot of people in this agency
12 that worked on this process across divisions,
13 almost too many to name specifically, but I would
14 like to personally thank Dr. Mike Suplee. This
15 nutrient package I guess could be characterized as
16 his life's work, and it is pretty impressive what
17 he's done, and it is pretty impressive the ability
18 he has to articulate some pretty complex science
19 issues to other Ph.D.'s and school kids frankly.

20 So with that I'll sit down, and I have
21 people much smarter than I that can entertain any
22 questions that you may have. Thank you.

23 CHAIRMAN SHROPSHIRE: Any questions from
24 the Board?

25 MS. KAISER: I have some.

1 CHAIRMAN SHROPSHIRE: To whom would you
2 like to address those?

3 MS. KAISER: Well, I guess I can
4 address, ask George if he can point me in the
5 right direction perhaps.

6 And I guess just to start with, my
7 question, my first question is on the private
8 property assessment portion that -- I guess the
9 takings, if I'm using the right terminology.
10 There is several questions that are asked, and one
11 of them is: "Does the action have a severe impact
12 on the value of a property?," and the box that was
13 checked was no.

14 And I guess I have to -- help me
15 understand how if an entity cannot meet the
16 nutrient criteria, and cannot get a variance, how
17 does that not impact a property that depends on a
18 discharge permit in order to create value, a/k/a a
19 natural resource project?

20 MR. MATHIEUS: Madam Chair, Ms. Kaiser.
21 I can answer part of that question, and I might
22 defer to someone else to get into the details of
23 that assessment, but I'll respond to a specific
24 statement that you made, and whether or not
25 someone can not get a variance. And it is right

1 in 75.5.313 that every one is eligible for a
2 general variance, so to clarify that.

3 MS. KAISER: Then walk me through the
4 process. An entity goes through the exercise of
5 proving "A," that there is not technology that can
6 help them meet the discharge limit, or they have
7 an economic situation, so then the Department
8 proceeds with a variance, correct?

9 MR. MATHIEUS: Madam Chair, Ms. Kaiser.
10 That's partially correct. Let me see if I can
11 help.

12 So in statute, in rule, we have everyone
13 automatically can get a general variance. Those
14 permit limits, they're in statute, and we've put
15 them in rule. Sort of what you're describing. So
16 back to the options we have for variances. That's
17 the general variance. So anyone can come in and
18 apply for general variance. Economic tests, all
19 that has already been done. We've already done
20 it. So anybody can get a variance.

21 But there may be a situation where a
22 small town or a business doesn't believe that they
23 can meet that general variance, so then they have
24 the opportunity to apply for an individual
25 variance. So to keep it simple, we would have to

1 go through the same types of analyses, an economic
2 analysis, and see in fact what their number might
3 look like. So how we did it before, we did it
4 statewide. We just said it would cause a hardship
5 for folks to meet this number.

6 In a case where someone can't meet the
7 numbers that we've already set, then we can go
8 through that for them specifically, to their
9 specific case.

10 MS. KAISER: So an individual variance,
11 then do you establish site specific limits?

12 MR. MATHIEUS: Madam Chair, Ms. Kaiser.
13 In a sense it would be -- I guess you could call
14 it would be site specific variance numbers, so
15 that we would establish their permit limits. So
16 in rule right now, for example, and in the
17 statute, we've established limits of ten and one,
18 ten total nitrogen parts per million and one
19 phosphorus, and that's for the larger dischargers.

20 If someone can't meet those numbers, and
21 we can show through their individual variance
22 process their numbers might be 12 and 1.5.

23 MS. KAISER: So then in that process is
24 basically another rulemaking that goes in front of
25 the Board; is that correct?

1 MR. MATHIEUS: Madam Chair, Ms. Kaiser.
2 That's correct.

3 CHAIRMAN SHROPSHIRE: For the variance
4 process, it would come to the Board? I thought
5 that was the DEQ's -- within DEQ's purview.

6 MR. MATHIEUS: Correct. That's my
7 mistake.

8 MS. KAISER: But that's for a general
9 variance.

10 MR. MATHIEUS: Madam Chair, Ms. Kaiser.
11 That would be for an individual variance, which is
12 the Department's rulemaking authority.

13 MS. KAISER: So how do you -- I guess
14 that is the segue into my next question. It seems
15 that in general these limits cannot be met
16 currently, and the Department acknowledges that by
17 allowing twenty years for dischargers to meet the
18 limits and develop a technology. How do you see
19 that impacting the Department as far as workload
20 in reviewing these discharge permit applications
21 or renewals?

22 MR. MATHIEUS: Madam Chair, Ms. Kaiser.
23 We don't see it as a large workload for the
24 agency, and here is why. In 2011, when we worked
25 with the Nutrient Work Group to develop Senate

1 Bill 367, prior to that we had just one option for
2 a variance, and that was an individual variance.

3 When we created the general variance
4 option through working with the group, that
5 presented us with an opportunity to sort of come
6 up with numbers that were reasonable for water
7 quality and for Montana. So it is as simple as
8 applying for that variance. We've already
9 indicated that they could get it, and it shouldn't
10 be any additional workload. Where there will be
11 some additional workload is on the individual
12 variance side, but we don't anticipate a lot of
13 those.

14 MS. KAISER: And you see the application
15 of a variance equitable between public and private
16 sectors?

17 MR. MATHIEUS: Madam Chair, Ms. Kaiser.
18 Yes. There is the analyses for public sector are
19 much more vetted nationally than for private, for
20 private sector. I will say that. And there are
21 issues with proprietary information and things of
22 that nature, but I think we've worked through them
23 so far.

24 MS. KAISER: I have some other
25 additional comments, but I'll address it maybe at

1 the end of the question period if somebody else
2 wants to ask some.

3 MR. MIRES: Madam Chair, can I follow up
4 on Heidi's question. If a variance was denied by
5 the Department, individuals or the entity could
6 appeal that to the Board, couldn't they, and then
7 the Board take that up, and then could the Board
8 overturn that rule that the Department came up
9 with?

10 MR. MATHIEUS: Madam Chair, Mr. Mires.
11 I'd like to direct that to Chief Legal Counsel.

12 MR. NORTH: Madam Chair, Mr. Mires. No,
13 that would not be -- If the refusal to grant an
14 individual variance was denied by the Department,
15 that would I think then trigger a right to appeal
16 to District Court, but not to the Board.

17 MR. MIRES: Okay. Thank you.

18 CHAIRMAN SHROPSHIRE: Any more
19 questions?

20 MS. CANTY: Madam Chair, I'll pipe in.
21 When I reviewed this, I guess I was kind of in awe
22 at the number of comments and number of pages that
23 we had to read. And I'm just wondering how
24 confident you feel that you've addressed all of
25 the comments, in particular like the ones from

1 EPA. It is too much for I think us to make sure
2 that they've all been addressed, but how confident
3 are you that those comments have been addressed
4 equitably?

5 MR. MATHIEUS: Madam Chair, Ms. Canty.
6 I'm confident that we've adequately addressed all
7 of the comments, and I think what helped us do
8 that is we had such a strong public process, and
9 work specifically with the group, and EPA was part
10 of that process. Maybe part of my demeanor today
11 is such that I'm sort of exhausted from countless
12 hours on phone calls and teleconference calls with
13 EPA Washington, Denver, and Montana, and equally
14 as much with some of the key partners that we
15 partnered with on this process.

16 So I think at the end of the day, it
17 came down to one comment that we maybe were not
18 able to accommodate, but I think we've been
19 working with those stakeholders, and maybe come up
20 with a solution that you may hear about from them
21 today. But I would say as a whole, I think we
22 were able to address them. We've been doing it
23 since 2007, so there weren't any surprises.

24 MS. CANTY: Okay. Thank you.

25 CHAIRMAN SHROPSHIRE: Further comments,

1 questions for the Department?

2 MS. KAISER: I have one more question.
3 The EPA has the authority to reject a variance, is
4 that correct, that the State would issue?

5 MR. MATHIEUS: Madam Chair, Ms. Kaiser.
6 The EPA does have, as you know, authority over
7 this rulemaking, which are the standards. I
8 believe they also have that same authority over
9 our rulemaking of the variance. That's correct.

10 MS. KAISER: So what happens to the
11 discharger if that variance is rejected by the
12 EPA?

13 MR. MATHIEUS: Madam Chair, Ms. Canty.
14 I'd like to stand up here and say that it's pretty
15 unlikely that that's going to happen. As I
16 indicated, the dialogue and the discussions from
17 EPA, Denver, Montana, all the way to DC, has been
18 such that they support this rule package. And so
19 by approving that rule package -- it's probably
20 not using the right terminology -- but we'll have
21 that authority, if you will, to grant those
22 variances.

23 But let's say, for example in your
24 hypothetical example, that a variance was not
25 authorized, and that would happen in a specific

1 permit, so it could be in the case of an
2 individual variance. Then I guess procedurally
3 I'm not sure what would happen. I might have to
4 ask for help on that. But then that entity would
5 have to meet the permit limits as they were
6 designed, I guess, to put it simply.

7 MS. KAISER: So if they couldn't, they
8 would be out of business?

9 MR. MATHIEUS: That's a possibility, but
10 it is unlikely. It is unlikely because of the way
11 we tied this whole package together. The way we
12 tied it together was that those -- Again, I know
13 it is odd that we have two parallel rulemaking
14 processes, but they really are closely married, as
15 you're aware; and if any part of that gets broken
16 up, then we've put those protections in there to
17 avoid that.

18 MS. KAISER: Thank you.

19 CHAIRMAN SHROPSHIRE: Further questions?

20 MS. CANTY: Madam Chair, I have another
21 question. When I was reviewing through this, and
22 going back and looking at the economic analysis
23 that was done for like 2011, 2012, and I think it
24 was if entities had to meet the nutrient standards
25 at that time, what it would cost them, and so then

1 kind of going into the variance process.

2 But I sort of had this thought when I
3 was looking at it, because those numbers are
4 pretty substantial. Do we have any numbers,
5 statistics, on the contribution of nonpoint
6 sources to this problem -- agriculture, fertilizer
7 runoff, stockyards, those sorts of things? And I
8 just started to think about: Are we spending a
9 lot of money for municipalities and private
10 businesses for a small amount of the problem? Are
11 these other source a big problem, or do we know
12 that?

13 Because I don't know the right answer.
14 Do they have to pay as well at some point? But if
15 we're spending of a lot of money to fix 10 percent
16 of the problem, let's say, and it is 90 percent
17 from agriculture, then I'm just wondering about
18 the equity of that.

19 I know I kind of brought this up before
20 with Flathead Lake, and the septic tanks and
21 fertilizers there, but do we have any statistics
22 -- maybe this is a question for Dr. Suplee -- on
23 what we think the contribution is from other
24 sources, the nonpoint sources?

25 MR. MATHIEUS: Madam Chair, Ms. Canty.

1 Off the top of my head, I don't have specific
2 statistics on what those numbers look like, but
3 what I can say is that it varies across the state.
4 And yes, nonpoint sources are a contributor to
5 nutrients in the watersheds of Montana.

6 Recognizing that early on, we brought
7 the nonpoint source community to the table with
8 us. While there aren't the specific regulatory
9 controls, if you will, over nonpoint sources than
10 there are point sources, the Department has been
11 working towards maybe what I should call the
12 nutrient reduction strategy, which is really sort
13 of the bigger picture of all this, where we've
14 been looking at -- we had the trading policy that
15 this Board adopted I believe last December; we had
16 reuse statute and rule. So just trying to bring
17 in those nonpoint sources to help reduce the
18 problem.

19 When we developed the implementation
20 part of this process, we really took into account
21 -- because what you're saying today has been said
22 to the agency over, and over, and over, and over,
23 and so we really try to incorporate comments into
24 our implementation strategies so that we could
25 avoid exactly what you're talking about.

1 The total maximum daily load program is
2 an avenue where they do define that, and they do
3 go into a specific water body or watershed and say
4 "'X' amount of load is coming from this source,
5 and this source, and this source." So we have
6 those mechanisms. I don't have an overall
7 statistic at my fingertips, but I will say that
8 they are a source, septics, and other nonpoint
9 sources.

10 MS. KAISER: I think this is a very
11 noble and needed effort, but I think to get
12 serious about the problem, there has to be some
13 accountability for the nonpoint sources. Going
14 through a huge effort of setting limits, that not
15 only we have limits in a rule package, we have to
16 have a variance rulemaking in order to make that
17 limit package workable, because nobody can meet
18 those limits.

19 I don't think we've fully evaluated the
20 consequences of these rules. And that's my
21 opinion, and I'm sorry, George, to rain on this
22 day of yours, but that's how I feel. I think the
23 Flathead Lake approach should maybe be applied to
24 the whole rule package, not just Flathead Lake.

25 MR. RUSSELL: I shouldn't bring Flathead

1 into this. First of all, there is no such septic
2 system contribution in Flathead. I just want you
3 to know.

4 MS. CANTY: I do get your sarcasm.

5 MR. RUSSELL: And the other thing is --

6 CHAIRMAN SHROPSHIRE: Joe, would you
7 like to say something?

8 MR. RUSSELL: Yes, I would. Thanks.

9 Over 50 percent of the nutrient contribution in
10 Flathead Lake is naturally occurring and cannot be
11 controlled. And so I know we have a municipality
12 out here, and I deal with it all the time. What
13 are we going to do about these nonpoint sources?

14 I agree that we should do some more
15 about nonpoint sources, and oftentimes these rules
16 look like they're pointing right at POTW's and
17 major dischargers, but I don't really believe
18 that. And I think that some think Helena has put
19 a lot into their wastewater treatment system;
20 Kalispell as we know has done a lot; and they're
21 victims of their own success at times. It is too
22 bad that a lot of them didn't take maybe a
23 Whitefish approach and not do anything until they
24 were forced to do stuff. Sorry about that, but
25 that is the fact.

1 But I mean you are talking about
2 millions of gallons in one source, and we're
3 talking about a myriad of septic systems that are
4 in the Flathead that use uniform pressure. So
5 anything that was put in after 2007 is a fairly
6 significant increase in quality discharge. So
7 we've worked at that. We understand that there is
8 also 40 year old septic systems that are probably
9 three feet off of a water body that are
10 contributing, but they're contributing 150 gallons
11 a day, not a million gallons a day of capacity.

12 So I don't think you've ignored this,
13 and I know from a Flathead Lake TMDL, we continue
14 to work on this. I don't think the trading --
15 Quite frankly I don't think the trading rule goes
16 far enough to help municipalities. I look at it
17 and go, "That's not a good trading rule." I would
18 have liked it to be a little bit more liberal for
19 municipalities to gain a little bit more nutrient
20 back, but it didn't. It is not going to do that
21 much in practicality.

22 It sounds good, and it is a feel good
23 rule, but is it really going to -- Over time when
24 a municipality is faced with bringing on 200
25 homes, and knowing that that impact is going to be

1 significant on their discharge, what are we going
2 to do then? These are things that we still need
3 to face.

4 I don't think that -- I mean I've been
5 through this. I've been through numeric, changing
6 narrative standards to numeric standards. I like
7 where we're going here. I'm very supportive of
8 it. Are there going to be some bumps in the road?
9 Absolutely. But I do believe in George and his
10 crew that they'll work through some of this stuff,
11 and make the variance process work towards keeping
12 development moving forward. But that doesn't mean
13 you don't want to apply the highest standard to
14 meet -- the highest treatment standard to start to
15 meet this stuff.

16 So I'm supportive of what we've done,
17 and clearly I'm going to move forward with rule
18 adoption here.

19 CHAIRMAN SHROPSHIRE: Good discussion.
20 Any other questions for the Department?

21 (No response)

22 CHAIRMAN SHROPSHIRE: We'll still have
23 probably opportunity for that, but any members of
24 the public that would like to comment?

25 MR. GALT: Madam Chairman, members of

1 the review board, for the record, my name is Dave
2 Galt, and I'm the Executive Director of the
3 Montana Petroleum Association. We've been
4 involved in the Nutrient Working Group since its
5 inception, and were integral in having a Nutrient
6 Working Group in the first place.

7 I appreciate knowing that the variance
8 process has been adopted. The question of whether
9 you can achieve the bottom standard, I don't think
10 anybody disputes that you cannot achieve the
11 bottom standard; and the variance process creates
12 a mechanism. Hopefully we can get there in 20
13 years, and we appreciate that.

14 When it comes to our comments, we stood
15 opposed to this rule, and we had four comments and
16 four reasons that we did. Three of those were
17 about language in the circular itself that we
18 thought ought to be clarified, and one was over
19 nonseverability clause, and I want to talk a
20 little bit about that.

21 I understand also that the rule hearing
22 is closed, and I will not add any additional
23 information other than what was in our comments.

24 Frankly, the severability clause has
25 been our key point since day one, and what

1 severability language is in here is a result of
2 the efforts of the Montana Petroleum Association
3 to put it in there. And essentially what is being
4 adopted is if there is a lawsuit that subsequently
5 voids, for a better term, the variance process,
6 then the numeric criteria falls; and then
7 secondly, if the EPA fails to adopt the whole
8 variance process part of this thing when they
9 approve the rule package, then the numeric
10 criteria would fail.

11 Our chief concern was we go through this
12 whole process, we went through the Legislature,
13 and the idea of mandatory variance on the general
14 variance side through Senate Bill 367. If you
15 remove the variance process, and leave numeric
16 standards, this thing is a disaster. That's in
17 there.

18 In the process of talking and looking at
19 responses, we also asked the Department to add
20 language that would suggest if a permit is voided
21 because it has a general variance, then the
22 numeric criteria would be rejected. That's the
23 language that's not in here. That's the language
24 that the senior EPA folks have said, "We're not
25 going to put that language in here. If that

1 language is in here, this rule package will not be
2 adopted." That's how this thing was presented to
3 us.

4 So at the end of the day, we also
5 recognize that if you don't have the standards,
6 then you don't have the variance; if you don't
7 have the variance, you don't have the standards;
8 and if you don't have either, you're going to see
9 the numeric or the narrative part of the permit
10 include and be interpreted to include numeric
11 standards. So we understand where this thing is
12 going. We believe that eventually the rule has to
13 be adopted, but we wanted to make sure you
14 understood our concern.

15 I believe that's central to the concern
16 that Ms. Kaiser brought up. My understanding of
17 this, and our understanding, is that if the EPA --
18 and essentially that's the answer to our comment,
19 Comment 10 in your packet. If the EPA approves
20 the whole process, the numeric standards and the
21 variance, then it is not going to reject a permit
22 because it has a variance in it. So the
23 Department is saying our request for that language
24 is redundant.

25 We disagree with that. We've looked at

1 the standards that EPA can reject a permit, and
2 frankly you could drive the freight train through
3 them, and that's why we asked for that additional
4 language. So if the EPA won't approve the package
5 with the standards in them, in an administrative
6 rule package, our response to the Department was
7 then industry, Montana Petroleum Association, and
8 the Department of Environmental Quality, and the
9 current administration should go hand in hand to
10 the Legislature and put that statute. That is
11 what we're talking about. I don't know where
12 that's at right now, but we're kicking that around
13 as well.

14 The other thing that I would also like
15 to mention has to do with just the statement
16 regarding the legislative intent, and what we're
17 really trying to get here, and why this is so
18 important.

19 When you look at the general variance
20 thing, we took the economic impacts off the table
21 for the private sector when the Legislature agreed
22 that adoption of numeric standards would cause
23 significant and widespread impacts across the
24 state. That's a given, and I believe Dr. Blend
25 and the Department has done considerable economic

1 analysis to support that concept in the event that
2 that happens.

3 I think that's all of the comments that
4 I'd like to make on behalf of the Montana
5 Petroleum Association, and I have one more favor I
6 guess to ask of the Chair and the Review Board. I
7 was requested -- I had a series of flurries of
8 text messages from Tammy Johnson, Executive
9 Director of the Montana Mining Association. Her
10 car broke down on the way here, and she asked me
11 if I'd offer a few comments on behalf of the
12 Montana Mining Association. Would you allow that?

13 They were also opposed to the rule.
14 They supported our position on severability in the
15 language.

16 They had one other issue, and I think
17 that it is in Comment 14 in our packet. They're
18 very concerned about the nutrient package not
19 allowing new business. I don't know of a refinery
20 being developed for a new source in Montana. I
21 represent four of them. But there are a
22 significant number of potential new businesses
23 that would have a discharge permit, and they're
24 members of the mining association, and they're
25 very concerned about that.

1 And I would assume that if they couldn't
2 meet the general variance, they would have to
3 apply for the individual variance, and they're
4 concerned about how that would work, in particular
5 how that associates and how this whole numeric
6 standard process would relate to the nondeg
7 standard, and whether or not that would preclude
8 them from having a discharge permit at all.

9 So with that on behalf of the Montana
10 Mining Association, I make that comment, and I'll
11 sit down. Thank you.

12 CHAIRMAN SHROPSHIRE: Any questions?

13 (No response)

14 CHAIRMAN SHROPSHIRE: I have a question.
15 I don't know who would be able to answer this.
16 But on the petroleum side, what are the largest
17 source of nutrients from in the petroleum
18 industry?

19 MR. GALT: I don't see anybody else
20 standing up there. For the record, Dave Galt,
21 Executive Director of the Montana Petroleum
22 Association.

23 We've been working on the nutrient
24 project specifically representing three
25 dischargers on the Yellowstone: The Exxon Mobile

1 Refinery, the Phillips 66 Refinery, the Cenex CHS,
2 Incorporated refinery. So that would be, in our
3 view -- the one in Great Falls discharges their
4 water into the City. They weren't involved
5 directly in our group within MPA. That would be
6 my understanding of the biggest nutrient
7 dischargers in our business.

8 CHAIRMAN SHROPSHIRE: And I was more
9 specifically interested in what is the source of
10 the nutrients.

11 MR. MATHIEUS: Madam Chair, again, for
12 the record George Mathieus. I'm pretty sure it is
13 just their wastewater, just the same as we're
14 talking about a municipality is their wastewater
15 discharge.

16 CHAIRMAN SHROPSHIRE: It is not part of
17 industrial process outside of wastewater?

18 MR. MATHIEUS: I don't believe so.

19 CHAIRMAN SHROPSHIRE: Thanks.

20 MR. TWEETEN: Dave, I have a question
21 for you if you might. I don't know if you can
22 answer this, or whether this is something that has
23 to be referred to your Legal Counsel. It's kind
24 of an inside baseball administrative law question.

25 Your objection to the severability

1 language, is it based on an argument that the
2 rules as proposed by DEQ exceed their statutory
3 jurisdiction, or do you just think it is a bad
4 idea as a matter of discretion?

5 MR. GALT: Madam Chair, Mr. Tweeten. I
6 believe that genesis for the additional language
7 on the permit -- and I'm talking outside my area
8 of expertise, and we do have Legal Counsel
9 retained for this -- had to do primarily with
10 response back from EPA on their authority, and why
11 they felt that it was redundant if the permit was
12 approved; and they cited Federal regulations and
13 the ability that they have to reject a permit.

14 And based on our Legal Counsel -- and we
15 have significant Legal Counsel looking at this --
16 based on their ultimate review of the authority
17 and the comments made by EPA back to DEQ, we
18 believe that EPA still has the ability to deny a
19 permit if it has the variance in it. And that's
20 the genesis of this. That's my understanding, and
21 that's our concern.

22 MR. TWEETEN: Thanks.

23 CHAIRMAN SHROPSHIRE: Any other
24 questions?

25 (No response)

1 CHAIRMAN SHROPSHIRE: All right. Joe,
2 you look like you're thinking.

3 MR. RUSSELL: What we're presuming is
4 the EPA is going to go grab our nutrient
5 standards, tell DEQ they did a bad job, and
6 they're going to reject the permit that they just
7 went through a process to issue.

8 I kind of defer back to what George
9 said. It seems highly unlikely that they would
10 intervene, and if we've done our work with our
11 standards and the process, it seems like that
12 would be -- There is one of these comments that
13 just says the standards are arbitrary and
14 capricious. That seems like it would be a very
15 arbitrary act by the EPA to employ our standards,
16 and say we didn't do a good job, we're going to
17 deny the permit.

18 So although it may be plausible, it
19 doesn't seem very likely. I mean it just doesn't
20 seem very likely to me that that would occur. But
21 I understand your concern. I'm concerned anytime
22 EPA is sitting out there looking at what's going
23 on in Montana, and that's a very generalized
24 comment. But if we followed our rule, and they do
25 adopt our rule, how could they not follow it? It

1 seems so unlikely.

2 CHAIRMAN SHROPSHIRE: All right.
3 George, thank you. Having said that, I would
4 entertain a motion to adopt the Hearing Examiner's
5 report, the House Bill 311 and 521 analyses, the
6 Department's proposed responses to comment and the
7 rules in Circular DEQ-12A, with the modifications
8 indicated in the draft notice of amendment. Do I
9 have a motion?

10 MR. RUSSELL: You do. I would move.

11 CHAIRMAN SHROPSHIRE: It has been moved
12 by Joe. Is there a second?

13 MR. TWEETEN: I'll second.

14 CHAIRMAN SHROPSHIRE: Seconded by Chris.
15 Any further discussion?

16 (No response)

17 CHAIRMAN SHROPSHIRE: All those in
18 favor, signify by saying aye.

19 (Response)

20 CHAIRMAN SHROPSHIRE: Opposed.

21 MS. KAISER: Opposed.

22 CHAIRMAN SHROPSHIRE: Motion carries
23 five to one. Good discussion. Thanks, everybody.

24 Moving on to final action on contested
25 cases. Agenda Item C(1). Ben, do you want to

1 update us on that?

2 MR. BEN REED: Yes, Madam Chair. I'll
3 be brief.

4 In C(1) for M2Green Redevelopment, there
5 was a stipulation for the dismissal of this
6 administrative appeal. In a nutshell, the parties
7 agreed that this was not the proper venue for this
8 appeal, that District Court would be more
9 appropriate. That dismissal, however, is
10 contingent upon the District Court and Supreme
11 Court agreeing with the parties' assessment of the
12 law. If that turns out not to be the case, then
13 we'll see this matter again, but at this point the
14 parties have agreed to have the matter dismissed
15 before this body.

16 As to C(2), Mr. Myrstol --

17 MR. RUSSELL: Robin, so are we going to
18 take action on dismissing?

19 CHAIRMAN SHROPSHIRE: That was my
20 question.

21 MR. RUSSELL: We usually get an order.

22 MR. BEN REED: There is an order that
23 I've drafted and presented to the Chair. So that
24 order has been prepared.

25 CHAIRMAN SHROPSHIRE: So we would --

1 MR. RUSSELL: We need a motion to
2 authorize the Chair to sign it.

3 CHAIRMAN SHROPSHIRE: I understand. Why
4 don't we cover this item first, then go to Item 2
5 after we vote on this one. So any questions for
6 Ben on the Agenda Item C(1)?

7 MR. RUSSELL: I guess I have another
8 one, Robin. So the parties presume that District
9 Court will take it up, and if they don't, then it
10 is going to come back here?

11 MR. BEN REED: In a nutshell.

12 CHAIRMAN SHROPSHIRE: So we would still
13 dismiss it and then readmit it; is that how the
14 process --

15 MR. BEN REED: Exactly. The Board would
16 dismiss it without prejudice, which means the
17 Board still retains authority to rehear the case
18 should it come before the Board again. But my
19 understanding procedurally is that the Department
20 demonstrated to the other party's satisfaction
21 that the Board is not the appropriate venue for
22 this sort of an action.

23 MR. TWEETEN: Ben, which District Court
24 is this going to be filed in?

25 MR. BEN REED: I would presume it would

1 be filed in Missoula. The two choices are
2 Missoula, either the Fourth Judicial District in
3 Missoula or the First Judicial District here in
4 Lewis & Clark.

5 MR. TWEETEN: What happens if you file
6 it in Missoula County, and the Missoula County
7 District Court finds they don't have jurisdiction,
8 and it gets kicked back to us, and ultimately the
9 First Judicial District agrees with that and says
10 that BER doesn't have jurisdiction, and had to go
11 to District Court?

12 MR. BEN REED: With all the enthusiasm
13 that any attorney has for a hypothetical, I would
14 say that it would at that point go up to the
15 Supreme Court for some decision. I realize that
16 that's a nebulous enough answer that I could not
17 really be held to it, but --

18 MR. TWEETEN: I understand. I posed the
19 hypothetical just because I think that could
20 happen, and the question for the Board is whether
21 it's better for us to want to drive this thing
22 through the Board to a conclusion, and then let
23 somebody challenge the Board's action as being
24 beyond its jurisdiction.

25 CHAIRMAN SHROPSHIRE: Is that an option?

1 MR. TWEETEN: At this point. If we
2 reject the stipulation, I assume that's what's
3 going to happen. The matter will remain for
4 litigation in front of the Board, and the Board
5 will make a decision, and then somebody will go to
6 District Court and challenge our jurisdiction and
7 decide. Is that the way you see it, Ben, or have
8 you thought that through? Are the parties just
9 assuming we're going to rubber stamp this or --

10 MR. BEN REED: I think the parties are.
11 And the only concern that I have is that if the
12 parties withdraw their contested case from before
13 BER, it is not entirely clear to me that the Board
14 has the authority not to dismiss the matter. Does
15 that make sense grammatically?

16 MR. RUSSELL: I'm a simple guy. I've
17 got to go back. So let's say we don't do
18 anything, and the parties -- Do the parties still
19 have the ability to go and ask District Court if
20 they want to take this up? Let's say we don't --

21 CHAIRMAN SHROPSHIRE: Are we required to
22 dismiss this for them to take that step?

23 MR. RUSSELL: But that presumes that we
24 agree with somebody, that we've taken a position
25 that we agree with somebody. But the parties are

1 saying that this should be argued in District
2 Court. Why shouldn't we find out if District
3 Court takes it up before we dismiss it, and then
4 it comes back to us as a 41(a) or (b) or whatever,
5 because it is now out of our jurisdiction.

6 CHAIRMAN SHROPSHIRE: Is this something
7 that the Department has an opinion on?

8 MR. RUSSELL: Yes, they want us to
9 dismiss it. That's what they just said. They
10 want us to dismiss it, and see if the District
11 Court will take it up.

12 CHAIRMAN SHROPSHIRE: I see that it's in
13 front of us. I haven't heard them say that since
14 we've had this discussion.

15 MR. LIVERS: Madam Chair, I want to be
16 careful in terms of expressing the Department
17 opinion, and I think we'd allow Ben to do that.
18 We can weigh in procedurally if we have some
19 clarification to offer.

20 CHAIRMAN SHROPSHIRE: Do you have any
21 clarification to offer?

22 MR. NORTH: Madam Chair, Mr. Tweeten.
23 John North, Chief Legal Counsel with the
24 Department of Environmental Quality.

25 Given that the parties at this point are

1 not disputing the matter, I think I can safely
2 talk to you to say simply that the stipulation
3 does not require the Board to have dismissed prior
4 to them filing in District Court, nor in my
5 assessment of the law could it.

6 MR. RUSSELL: Robin, I'd go right back
7 to my point. Why would we do anything until the
8 District Court takes it up? It is not a
9 jurisdictional issue then.

10 CHAIRMAN SHROPSHIRE: I don't disagree.
11 I have an order to dismiss the appeal in front of
12 me, and I guess I would say: Do we need to vote
13 on it, or vote against it, or do we --

14 MR. RUSSELL: I think we just don't move
15 on it, unless our attorney -- Ben, you're our
16 attorney in this. Unless you feel otherwise, I
17 would say we don't do anything on it right now.

18 MR. BEN REED: It is not my belief that
19 the Board is required to move on this at this
20 time.

21 MR. TWEETEN: John, can I ask you a
22 question. What happens with respect to the matter
23 being litigated if the Board does not dismiss the
24 contested case appeal?

25 MR. NORTH: Madam Chair, Mr. Tweeten.

1 They can proceed in District Court. What I might
2 suggest would be that the Board sign an order that
3 basically says it is dismissed conditional upon a
4 District Court assuming jurisdiction to review the
5 matter.

6 MR. TWEETEN: I guess the concern that I
7 have is that the Court on its own motion can
8 consider the question of failure to exhaust,
9 because that's jurisdictional with the District
10 Court. The District Court can't take jurisdiction
11 unless administrative remedies have been
12 exhausted.

13 So if the administrative case is still
14 pending, a Court could, I suppose, say, "Look. I
15 don't want to be a ping pong ball here and let you
16 guys play me back and forth. Go finish the thing
17 in front of the agency," because that's what MAPA
18 contemplates is that you finish in front of the
19 agency before the District Court gets to take it
20 up. If the issue in front of the agency is -- the
21 issue in front of us is we don't have jurisdiction
22 over this, you can't stipulate as to whether we do
23 or not.

24 The law determines whether we have
25 jurisdiction or not, and you can't waive it, which

1 I think is kind of what's going on here. The
2 parties are asking the Board to approve an order
3 saying that we don't have jurisdiction. Well,
4 that position hasn't been litigated in front of us
5 yet, and I'm not convinced that we ought to be
6 signing an order saying we don't have jurisdiction
7 when that question hasn't been briefed and argued
8 in front of our Hearing Examiner.

9 So I guess I'm a little reluctant to
10 approve a motion authorizing the Chair to sign the
11 order. The fact that we waived our jurisdiction
12 isn't going to be persuasive to a District Court
13 as to whether we have jurisdiction or not. Nobody
14 can waive jurisdiction. Either you have it or you
15 don't as a matter of law.

16 So I don't think the District Court is
17 going to be impressed by our order dismissing this
18 without prejudice on the grounds that we don't
19 have jurisdiction. The District Court is going to
20 decide what it decides as to whether we have
21 jurisdiction, and if the Court thinks that we have
22 jurisdiction and it doesn't, it is going to
23 dismiss and send the case back to us, and then
24 we're going to have to decide what the effect of
25 this stipulated dismissal is.

1 CHAIRMAN SHROPSHIRE: Which was I guess
2 back to Joe's point, which I thought was a good
3 comment, that if we take action, we're voicing an
4 opinion. If we don't take action, we let the
5 process play out on its own.

6 MR. TWEETEN: If we don't approve this
7 order, we don't authorize the Chair to sign this
8 order, you can still go to District Court and ask
9 the District Judge to take jurisdiction and the
10 same process will go forward in the District
11 Court, only the case will remain open in front of
12 the BER, which will I think -- Well, maybe it will
13 help, maybe it won't. But at least the Court can
14 make its ruling at the outset as to whether it has
15 jurisdiction to hear the merits, and if it
16 doesn't, then our case is still open, because one
17 or the other of us has to have jurisdiction.
18 There has to be a remedy somewhere.

19 So I guess my recommendation, my
20 position -- I'm not acting as a lawyer. I guess
21 my vote is going to be -- I'm going to suggest
22 that nobody make a motion, and if somebody makes a
23 motion, I'm going to vote against it and let you
24 guys go figure this out in District Court, and
25 we'll keep our case open, and see where the chips

1 fall.

2 CHAIRMAN SHROPSHIRE: Ben, do you have
3 anything to add to that?

4 MR. BEN REED: I don't.

5 CHAIRMAN SHROPSHIRE: Well, I will
6 entertain a motion to authorize the Board Chair to
7 sign.

8 (No response)

9 CHAIRMAN SHROPSHIRE: Hearing none,
10 let's move on to the next agenda item. Is that
11 clean enough?

12 MR. TWEETEN: Just one comment. Ben, I
13 think you have the authority to stay your
14 proceedings if the parties do file in District
15 Court. As the Hearing Examiner, you control the
16 course of these proceedings, and there is no
17 reason why you have to be fighting this in two
18 jurisdictions at once. If they want to file in
19 District Court, you can just not do anything, and
20 let the District Court thing play out I think. So
21 there is no reason for the parties to be expending
22 their resources in both jurisdictions at the same
23 time.

24 MR. BEN REED: What I anticipate
25 probably before too many more turns of the

1 hourglass is that I'll have a conversation with
2 the attorneys from the parties, and we'll figure
3 out how to most economically go forward.

4 CHAIRMAN SHROPSHIRE: All right.
5 Thanks. The next item is Item C(2) related to
6 Montana BER 2014-04-AQ.

7 MR. BEN REED: And this one is
8 substantially more straight forward. Essentially
9 the Appellant wanted to appeal a fine that had
10 been levied upon him, and then decided he didn't
11 want to, and so he and the Enforcement Division
12 have come to a meeting of the minds, and therefore
13 he's withdrawing his appeal.

14 CHAIRMAN SHROPSHIRE: Thank you. Any
15 questions for Ben?

16 MR. TWEETEN: Does this require an
17 order?

18 CHAIRMAN SHROPSHIRE: I have in front of
19 me an order for dismissal for BER 2014-04-AQ.

20 MR. TWEETEN: Madam Chair, I move that
21 the Board authorize the Chair to sign the order in
22 this matter.

23 CHAIRMAN SHROPSHIRE: It's been moved by
24 Chris.

25 MS. CANTY: I'll second the motion.

1 CHAIRMAN SHROPSHIRE: Seconded by
2 Marietta. Any further discussion?

3 (No response)

4 CHAIRMAN SHROPSHIRE: All those in
5 favor, signify by saying aye.

6 (Response)

7 CHAIRMAN SHROPSHIRE: Opposed.

8 (No response)

9 CHAIRMAN SHROPSHIRE: Motion carries
10 unanimously.

11 We are to the last agenda item, general
12 public comment. Is there anyone in the audience
13 that would like to address the Board?

14 (No response)

15 CHAIRMAN SHROPSHIRE: All right. When
16 is our next meeting, Tom?

17 MR. LIVERS: I have to check. September
18 26th.

19 CHAIRMAN SHROPSHIRE: Any thoughts on if
20 that is going to be an in-person or a
21 teleconference?

22 MR. LIVERS: Madam Chair, at this point
23 I don't know. I'm not aware of a lot of
24 rulemakings, and obviously the ones we initiated
25 we probably won't be acting on at that meeting.

1 So I think there is a chance it will be a
2 telephone conference.

3 CHAIRMAN SHROPSHIRE: Do I need a motion
4 to adjourn?

5 MS. KAISER: So moved.

6 MR. TWEETEN: Second.

7 CHAIRMAN SHROPSHIRE: All those in
8 favor, signify by saying aye.

9 (Response)

10 CHAIRMAN SHROPSHIRE: We're adjourned.

11 (The proceedings were concluded
12 at 11:15 a.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 - 90 - 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 , 2014.

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires
March 12, 2016.