

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

3 * * * * *

4 CHAIRMAN RUSSELL: We're going to go
5 ahead and get started. I'm Joe Russell, and we're
6 going to get started here. Before we start, I
7 want to mention and introduce Larry Anderson as
8 our new Board member. This is our first in-person
9 meeting that Larry has been at. But welcome.

10 MR. ANDERSON: Thank you.

11 CHAIRMAN RUSSELL: You couldn't have
12 started at a better time. First it is 9:08,
13 and I'll call this meeting of the Board of
14 Environmental Review to order. The first item on
15 the agenda is the review and approval of the
16 October 2nd minutes of the meeting. Anyone have a
17 chance to review those?

18 MR. WHALEN: Mr. Chairman, I would move
19 to adopt the minutes from our last regular meeting
20 on October 2nd.

21 CHAIRMAN RUSSELL: It's been moved. Is
22 there a second?

23 MR. MILLER: Second.

24 CHAIRMAN RUSSELL: It's been seconded by
25 Marvin. Any further questions or changes?

1 (No response)

2 CHAIRMAN RUSSELL: Seeing none, all
3 those in favor, signify by saying aye.

4 (Response)

5 CHAIRMAN RUSSELL: Opposed.

6 (No response)

7 CHAIRMAN RUSSELL: The next items on the
8 agenda -- Because our Board attorney is not able
9 to be here today for medical reasons, we're going
10 to not go over those procedural items, and they'll
11 be rescheduled for the next meeting.

12 And so the next item on the agenda is to
13 set the meeting dates for 2010. Anyone have
14 chance to review those dates?

15 MR. MIRES: The only one that I had
16 problems with is July 30th. I'll be out of state.

17 CHAIRMAN RUSSELL: I actually, to carry
18 on with that same thing, March 26th is not going
19 to work for me. I'll also be out of state.

20 MR. ANDERSON: January 29th does not
21 work for me. I'm out of the country.

22 CHAIRMAN RUSSELL: So John, conflicts
23 with the 29th of January, the 26th of March, and
24 July meeting date. There is generally a little
25 wiggle room in reassigning those, at least a week

1 on either side.

2 MR. LIVERS: Mr. Chairman, we can move
3 any of those. You may want to just take them one
4 at time. On the January 29th, the only thing that
5 might be impacted if we move it later -- and we
6 can accommodate this -- we anticipate that the
7 Board will want to extend the public comment
8 period to extend the rulemaking on the Gallatin
9 Outstanding Resource Water issue.

10 We have a briefing on that. We
11 purposefully set a briefing today on that issue.
12 There are three Board members who really have not
13 had any exposure here to that issue, and I think
14 it would be a good review for everyone. So if
15 February proves to be a better option for that
16 first meeting, we could probably do a quick
17 telephone meeting sometime in January to extend
18 the ORW rulemaking. So I just wanted to point
19 that out on that one.

20 On March, I think it might be most
21 workable to move it earlier, maybe a week earlier,
22 if that is good for folks. And I think there is
23 nothing compelling that I'm aware of regarding the
24 July date to go either direction.

25 MR. ANDERSON: I just realized I've got

1 a trial date on May 21st. That week is set aside
2 for me. Move back that one week.

3 CHAIRMAN RUSSELL: Let's go through
4 them. So the January 29th meeting, can we move
5 that to the 22nd? I can't go into February. That
6 was one of the reasons why we set the 29th meeting
7 in the first place. So is the 22nd -- Larry is
8 giving me a thumbs up. How about everyone else?

9 (Response)

10 CHAIRMAN RUSSELL: Let's change the
11 January date to the 22nd. The March 26th meeting,
12 just another thumbs up, just does the 19th work
13 work?

14 (Response)

15 CHAIRMAN RUSSELL: 19th. The May
16 meeting. I'm usually day-to-day, so planning this
17 far out is not easy for me.

18 MS. SHROPSHIRE: It's easy for me to say
19 yes. I don't know if I'm going to get there. I
20 don't have any conflicts that I know of on any of
21 them.

22 MR. ANDERSON: I do have a conflict on
23 May 21st, if we can move it.

24 CHAIRMAN RUSSELL: Move it out a week?

25 MR. ANDERSON: You could move it out a

1 week, or move it back a week, either one of them.

2 Probably out a week is better.

3 CHAIRMAN RUSSELL: May 28th.

4 MR. MIRES: (Indicating)

5 CHAIRMAN RUSSELL: Larry is thumbs up.

6 Heidi?

7 MS. KAISER: What is Memorial Day?

8 MR. MIRES: Memorial day is on the 24th.

9 The holiday will be the 24th.

10 MR. LIVERS: Mr. Chairman, I think our
11 calendar has the holiday on the 31st.

12 MR. MIRES: You're right. It does.

13 MR. LIVERS: So the 28th would be the
14 Friday of Memorial Day weekend. That can be done.
15 It might be problematic for some Board members.

16 CHAIRMAN RUSSELL: Let's go the other
17 way then. The 14th?

18 MR. ANDERSON: That's fine.

19 MR. MILLER: Okay.

20 CHAIRMAN RUSSELL: John, does that work?

21 MR. NORTH: Yes, Mr. Chairman.

22 MR. LIVERS: That should be okay. May
23 14th.

24 MR. NORTH: March 19th, so there is
25 still that two month --

1 MR. LIVERS: Actually everything is
2 moving early, so the same intervals are more or
3 less being kept intact. That's good.

4 CHAIRMAN RUSSELL: Larry, we probably
5 should move forward on the July meeting then?
6 Will that work?

7 MR. MIRES: We'll make it work.

8 CHAIRMAN RUSSELL: That would be the
9 23rd.

10 MR. MIRES: We'll make it work.

11 MR. LIVERS: While we try to keep
12 Fridays, if a Thursday works better, too, that's
13 always an option.

14 CHAIRMAN RUSSELL: Let's try to stay on
15 the Fridays, and then if we have a major melt down
16 when you get back to your office, then we can go
17 back at it.

18 How about the last two? They're far
19 enough away that we probably don't need to worry
20 about them yet.

21 MR. MIRES: Good.

22 CHAIRMAN RUSSELL: October 1st and
23 December 3rd.

24 MR. MIRES: Both good.

25 CHAIRMAN RUSSELL: All right. Generally

1 we don't actually take action on this. Do we?

2 MR. LIVERS: We usually accept them.

3 CHAIRMAN RUSSELL: So I'll entertain a
4 motion to set the Board meeting dates for 2010 to
5 January 22nd, March 19th, May 14th, July 23rd,
6 October 1st, and December 3rd. Do I have a
7 motion?

8 MS. KAISER: So moved.

9 CHAIRMAN RUSSELL: It's been moved by
10 Heidi. Is there a second?

11 MR. MILLER: Second.

12 CHAIRMAN RUSSELL: It's been seconded by
13 Marvin. Any further discussion?

14 (No response)

15 CHAIRMAN RUSSELL: Joe, are those
16 working for you?

17 MR. WHALEN: I'll be all right. I'm
18 going to have to miss the Miles City Bucking Horse
19 Sale in May, but this is a commitment, so we'll do
20 that.

21 CHAIRMAN RUSSELL: That's gallant. We
22 might even be in Miles City by that date. You
23 never know. It's been moved and seconded. All
24 those in favor, signify by saying aye.

25 (Response)

1 CHAIRMAN RUSSELL: Opposed.

2 (No response)

3 CHAIRMAN RUSSELL: All right. The next
4 item on the agenda, as I mentioned, Katherine is
5 not here. The briefing items are where they are.
6 If you have any questions, we can put those on the
7 record, and have Katherine Orr's office respond to
8 them. So any questions related to the contested
9 case updates?

10 (No response)

11 CHAIRMAN RUSSELL: Cases in litigation?

12 (No response)

13 CHAIRMAN RUSSELL: Hearing none, we'll
14 move to other briefing items. And we're going to
15 do the Gallatin Outstanding Resource Water
16 presentation first, right?

17 MR. LIVERS: That's correct, Mr.
18 Chairman. Thank you. Mr. Chairman, members of
19 the Board, for the record Tom Livers, Deputy
20 Director of DEQ. As I mentioned briefly earlier,
21 we wanted to provide a briefing just so everybody
22 had the same background on the issue of the
23 Gallatin Outstanding Resource Water.

24 The Board initiated rulemaking, and has
25 extended this a few times, and we expect to extend

1 it, to ask the Board to extend it again. We'll do
2 that now at the January meeting. Basically the
3 parties are at the table trying to work things out
4 and discuss, so it's been productive, and it's
5 still moving forward. But we wanted to have a
6 briefing today so that folks had a chance to
7 digest information prior to that action. So with
8 that, I'll turn it over first to Bob Bukantis.

9 MR. BUKANTIS: Good morning, Mr.
10 Chairman, members of the Board. For the record,
11 my name is Bob Bukantis. I am the Water Quality
12 Standards Program Manager for DEQ. And so this
13 morning I'm going to start by talking to you about
14 the Gallatin ORW, providing a briefing, try to
15 bring everyone up to speed on the Gallatin ORW
16 situation.

17 So what I'm going to do is provide an
18 overview of ORW designation, how that fits into
19 Montana's water quality standards, and in
20 particular, the nondegradation piece of the
21 standards. I'm going to provide a brief history
22 and overview of the designation process, briefly
23 review the proposed rule to designate the Gallatin
24 ORW. And then I'm going to turn it over to Eric
25 Regensburger who will dive into a little bit on

1 how the Department would implement ORW
2 designation.

3 Water Quality Standards 101. Basically
4 when we're talking water quality standards, water
5 quality standards provide the basics for Clean
6 Water Act programs and Montana Water Quality Act
7 programs, such as permitting, TMDL, etc., and the
8 standard is made up of three basic components:
9 The use that is to be made of the water, for
10 example, aquatic life, drinking water, etc.,
11 standards which can be expressed as numbers; or
12 narrative statements in terms of how clean that
13 water needs to be to be able to support the use;
14 and a third component is a nondegradation policy.

15 And I'm going to dive in more depth in
16 nondegradation policy. I'll illustrate the stuff
17 a little bit with an example.

18 The State uses the standards and
19 implementation procedures in permitting TMDL's
20 assessment, etc., to protect state waters. So
21 just as an example, we'll look at a use, human
22 health. And in this case, we're talking about a
23 level that the Board has adopted as protective of
24 human health for chromium, and that's 100
25 micrograms per liter, so that would be numeric

1 standard per se.

2 One thing that you may have picked up on
3 a little bit is the language is a little bit
4 confusing. People tend to think of the number as
5 the standard, where as collectively there is the
6 three components to the standard. And
7 nondegradation, we'll talk a little bit about this
8 in more detail. Policy for chromium is to
9 classify this pollutant as a toxic.

10 As I mentioned before, the standards
11 provide basic decision criteria for when the
12 Department writes things like discharge permits.
13 For example, looking at chromium again, if Jenny's
14 crew were to write a discharge permit to meet the
15 standard, she needs to assure that that receiving
16 water, that that hundred micrograms per liter is
17 not exceeded as a result of the discharge in the
18 receiving water. Similarly our assessment crew
19 would use that 100 micrograms per liter to
20 determine whether a water would be impaired for
21 chromium or not, and then in turn, whether it
22 would be listed and scheduled for a TMDL.

23 Nondegradation policy gets a little bit
24 more complicated. We're going to dive into this
25 in a little more detail. Basically the

1 nondegradation policy is applied by the Department
2 to new and increased sources of pollutants,
3 basically regulated through permits.

4 Now backing off a little bit, and
5 getting a little more general on nondegradation
6 here -- Also I'd just like to say please feel free
7 to jump in with a question if you want some
8 clarification on any of this.

9 But when we look at our nondegradation
10 policy, the idea of the policy is that there is
11 three levels of protection specified under Montana
12 law. The minimum level of protection that is
13 applied to all waters is to protect all uses in
14 the waters, all existing uses.

15 The State also looks at determining
16 which waters are high quality waters. Under State
17 law, the waters that are considered high quality
18 waters are those waters that are not impaired --
19 the easiest way to think of it -- are those waters
20 that are not designated by this body, or already
21 are in State laws as Outstanding Resource Waters.
22 So it's those waters where the water is cleaner
23 than the standard for high quality waters.

24 Outstanding Resource Waters are special
25 waters. They're waters that are wholly within the

1 boundaries of our parks and wilderness areas, and
2 waters that would be designated by you through the
3 process that we're talking about today.

4 To try to illustrate this graphically,
5 again, thinking of our 100 micrograms per liter
6 chromium standard, if natural, or if, say,
7 chromium is above 100 micrograms per liter in the
8 water body, we would consider that an impaired
9 water, and that would receive the minimum
10 protection. The TMDL program would be working to
11 clean that up to the level of the standard.

12 Our waters that we consider high quality
13 waters -- which are most waters in the state --
14 for chromium, would be those waters where the
15 water is cleaner than the standard. It's this
16 area where most of the nondeg action occurs.

17 And if Jenny's folks were writing a
18 permit for water for chromium, and it was cleaner
19 than the standard, they'd be looking at protecting
20 that assimilative capacity, if you would, between
21 the standard and ambient. That's the place where
22 basically -- we just don't automatically allow
23 every discharger to discharge chromium, in this
24 example, all the way up to the standard. So it's
25 a policy on how that's protected.

1 In the case of an ORW water, Outstanding
2 Resource Water designation, we've got that little
3 arrow down there in ten. Let's assume that
4 ambient concentration for chromium is at ten.
5 Basically we're saying that if we designate it as
6 an Outstanding Resource Water, then we would not
7 allow a significant bump up there.

8 Under the high quality -- without
9 getting into all of the details -- under the high
10 quality water designation that, for example,
11 currently applies to the Gallatin, our permitting
12 process for this toxic might allow, say, an
13 increase up to 15 percent of the standard without
14 being considered a significant increase. So the
15 ORW designation really tightens up on the amount
16 of slippage in terms of how much pollutant can be
17 allowed in the stream.

18 This is a quote out of State law,
19 basically to highlight, that basically the
20 Legislature has said in State law that Outstanding
21 Resource Waters must be afforded the greatest
22 protection feasible under State law.

23 Now, the process laid out in State law
24 to go through this would be that someone would
25 petition the Board, and then the Board would make

1 an initial review to accept or reject the
2 petition, based on if there was sufficient
3 credible information to support that it's worthy,
4 that the water in question is worthy of
5 classification. So it's kind of a two step
6 process for the Board.

7 The initial petition review, once the
8 Board accepts the petition, then rulemaking would
9 be initiated to designate the water, and
10 ultimately the Board would have to make a finding
11 that the water is indeed an outstanding resource,
12 and that the classification is necessary because
13 this resource is at risk -- and this is an
14 important point -- there is no other effective
15 process to achieve the necessary protection. And
16 all this is done after an EIS is done to take a
17 detailed examination of impacts. And then
18 ultimately the Legislature is required to put this
19 ORW designation into effect.

20 So what's happened so far is this Board
21 was petitioned in 2001 to designate the Gallatin
22 as an Outstanding Resource Water. In March 2002,
23 this body accepted that petition, which triggered
24 the need for an EIS, which was completed in 2006;
25 and this body initiated rulemaking in 2006 to

1 designate the Gallatin as an ORW, held a public
2 hearing later that year, and then subsequently
3 extended the public comment period a number of
4 times.

5 So just a little bit more visual of
6 where we are in the process again. We're in this
7 third step of the process where the EIS is done,
8 and really what's going on right now is we have
9 local folks that are engaged in trying to put in
10 place an effective process to achieve necessary
11 protection, which would obviate the need of the
12 Outstanding Resource Water designation. So
13 meanwhile we've been asked to maintain the ORW
14 designation in process, if you would, just as an
15 incentive to try to keep all of the players at the
16 table.

17 So the proposed rule that we would be
18 asking you to extend presumably at the next Board
19 meeting is two parts. The first part is simply to
20 designate the Gallatin River as an ORW; and the
21 second part is to clarify that this prohibition
22 only applies to new or increased point sources in
23 the ORW, that is, it would grandfather existing
24 point sources; also clarify that the Department
25 has authority to regulate ground water, and look

1 at cumulative effects from development that would
2 impact groundwater connected to surface water.

3 So that was just a real quick overview
4 of ORW designation, and how it fits in the
5 standards. And I just wanted to highlight. This
6 is the highest level of protection we can put on
7 Montana's waters. And I'll pass this on to Eric
8 Regensburger, who will talk a little bit more in
9 detail about how the Department would implement
10 the designation.

11 I'd be happy to answer any questions you
12 might have specific to mine before I pass it on to
13 Eric's, if you'd like.

14 MS. SHROPSHIRE: For existing point
15 sources, I'm assuming like a permitted source that
16 exists in place now, is that if there would be a
17 permit modification or something along those
18 lines, would they still be grandfathered?

19 MR. BUKANTIS: Jenny is our Permitting
20 Manager. I guess I'd just as soon pass that one
21 to Jenny.

22 MS. CHAMBERS: Mr. Chairman, Ms.
23 Shropshire, Jenny Chambers, Bureau Chief of the
24 Water Protection Bureau, for the record.

25 Yes, it would be grandfathered in as

1 existing point source, so it wouldn't be
2 classified as a new or increased source based upon
3 a nondeg review, and then looking to see what tier
4 we would do on that nondeg review, which would be
5 the ORW designation, which would be Tier 3, so it
6 would be an existing source that wouldn't have to
7 follow the nondeg rules, and the modification
8 would also be grandfathered in.

9 If it was an increased source of the
10 modification, if they were trying to increase
11 capacity or something of that level, then we will
12 look at the increase from the grandfathered
13 capacity to the proposed or modified capacity, and
14 then do an analysis on that increase.

15 MS. SHROPSHIRE: On separate --

16 MS. CHAMBERS: Uh-huh.

17 MR. WHALEN: Mr. Chairman, a question
18 for Ms. Chambers, because I think she would
19 probably be the appropriate person to answer.

20 Ms. Chambers, on that stretch of the
21 Gallatin, all of those point sources that are
22 currently or being considered to be grandfathered
23 into the Gallatin ORW if it is approved, do they
24 meet the quality levels of the high quality water
25 standard that Bob had indicated earlier?

1 MS. CHAMBERS: Mr. Whalen, Chairman,
2 members of the Board. Yes, they currently do.
3 The one that falls within that stretch of that
4 Gallatin ORW designation would be the Big Sky
5 Water Sewer District. They have one outfall
6 permitted into that stretch of river, and they
7 currently do not even have that constructed. So
8 they're basically nondischarging surface water at
9 this point, so if they were to discharge, they're
10 required to meet the high quality designation
11 based upon the nondeg review, if indeed they were
12 to construct that and discharge at the level
13 they're authorized to discharge.

14 MR. WHALEN: And a follow up question.
15 Are there any nonpoint sources of water that would
16 be contributing to that stretch of the river --

17 MS. CHAMBERS: Yes.

18 MR. WHALEN: -- that do not meet --

19 MS. CHAMBERS: Yes, there are nonpoint
20 sources that contribute to pollutant sources on
21 that stretch of the river, no different than any
22 other receiving waters in the state have both
23 point source and nonpoint source contributions.

24 MR. WHALEN: Okay. Thank you.

25 CHAIRMAN RUSSELL: Any other questions?

1 MS. SHROPSHIRE: To follow up on the
2 nonpoint source. For, say, a storm water permit
3 or something like that, would there be more
4 stringent rules for storm water for an ORW than a
5 typical situation that wasn't?

6 MS. CHAMBERS: Chairman, members of the
7 Board. Basically for storm water discharges on
8 that area, we look at technology based effluent
9 limits. If they're maintaining permit coverage,
10 and utilizing technology based requirements --
11 which are mainly BMPs -- there would be not be any
12 more water quality standard designations we would
13 have to look at for pollutant sources from that
14 storm water.

15 So with permit coverage, maintaining and
16 doing the minimum -- or the requirements based
17 upon BMPs for that stretch of the river, they
18 would be protective of that designation on that
19 receiving water. If they violated one of those
20 provisions, there would be enforcement action, and
21 then there could be penalties assessed based upon
22 that failure to implement BMPs, Best Management
23 Practices, in accordance with a developed storm
24 water pollution prevention plan that's required
25 based upon that storm water construction activity.

1 CHAIRMAN RUSSELL: That's in place now.

2 MS. CHAMBERS: Correct.

3 CHAIRMAN RUSSELL: That has nothing to
4 do with ORW.

5 MS. CHAMBERS: Correct.

6 CHAIRMAN RUSSELL: So what's ORW do for
7 storm water discharge?

8 MS. CHAMBERS: Chairman, members of the
9 Board. There is -- ORW would not make a
10 difference based upon our current water quality
11 practices we're taking in place now to protect
12 water quality in Montana. Storm water
13 construction would still have the same
14 requirements on -- even post an ORW designation.

15 CHAIRMAN RUSSELL: I don't know where
16 Eric's going to talk, but I'm guessing he's going
17 to talk a little bit more about sources and
18 impacts to some extent. But in this case, is a
19 septic system a point source or a nonpoint source?

20 MS. CHAMBERS: Septic systems are
21 nonpoint sources, unless, Chairman, unless there
22 is, like Bob was mentioning, there was a direct
23 hydrologic connection between that groundwater to
24 surface water. Then it could be considered
25 possibly a point source.

1 CHAIRMAN RUSSELL: Thanks, Jenny.

2 MR. REGENSBURGER: Mr. Chairman, members
3 of the Board. My name is Eric Regensburger. I
4 work in the Public Water Subdivisions Bureau of
5 DEQ. And I'm going to continue on with what Bob
6 was talking about, a little more specifics on the
7 Gallatin ORW, and then also address Chairman
8 Russell's questions about the septic, and whether
9 septic are nonpoint or point sources.

10 I've got a real brief talk here today,
11 but I can probably talk a lot more on a lot of the
12 topics, so if you have any questions, go right
13 ahead. So I'm just going to give a brief summary
14 about the location, the criteria, and then get
15 into the point source issue -- that's the primary
16 topic of what I'm going to get into -- and then
17 talk about the groundwater connection to surface
18 water with regards what's classified as a point
19 source; then talk about the criteria used, the
20 area affected by that determination of what's a
21 point source, and then a real brief summary of the
22 impacts of ORW designation, very briefly.

23 So this map here shows the area of the
24 ORW. Down here this brown area is the edge of
25 Yellowstone National Park, and up here is Spanish

1 Creek, and the ORW extends from Spanish Creek up
2 to the boundary with the park. Once it's inside
3 the park, it's already by statute an ORW. And
4 this is about 44 miles long, this section, that's
5 being looked at for designation.

6 So under statute, the requirements for
7 an ORW is that if a stream is classified an ORW,
8 the Department cannot allow a new or increased
9 point source that would discharge that would
10 result in a permanent measurable change in the
11 water quality of an ORW. And notice I put
12 "measurable" in parentheses after permanent.
13 Measurable is not part of the rule or part of the
14 statute itself, but that's how we had to interpret
15 the term "permanent" as a measurable change. And
16 then we figure that the measurable change would be
17 equal to what's called a trigger value, which Bob
18 talked about previously.

19 And for the two major contaminants we're
20 concerned with in this area, due to septic
21 systems, that permanent change is for nitrogen, is
22 .01 milligrams per liter, and for phosphorus it's
23 .001 milligrams per liter. And then Bob talked
24 about what's new or increased as far as anything
25 existing or previously approved by the Department

1 would be grandfathered in.

2 So a source has to meet all three of
3 these criteria to be impacted by the OWR
4 designation, and I'm going to focus again on the
5 point sources regarding what's a point source for
6 this designation.

7 Well, the first one is easy, a direct
8 discharge into the river, a pipe into the river.
9 Like Jenny mentioned, the only one on this stretch
10 of river is the Big Sky Water and Sewer District
11 permit, and that actually has not been built yet,
12 like Jenny said.

13 The second one is the one that's a
14 little more complicated, and that's a groundwater
15 charge that is directly -- direct hydraulic
16 connection with the river, and primarily in this
17 area, that is septic systems. There really aren't
18 any or many other discharges that are affected by
19 this designation.

20 So the draft EIS came up with this
21 direct hydrologic connection footprint, we called
22 it, and basically it's pretty much based on what
23 we call a vulnerability assessment, looking at the
24 type of geology and other factors that would make
25 a discharge to one area more likely to impact the

1 river than if it discharged to another area.

2 And for this analysis, we looked at
3 travel time as the first cut, the most important
4 factor to what was considered in direct hydrologic
5 connection with the river, and there are three
6 major factors, criteria, used in that travel time,
7 and that's hydraulic gradient, which is the slope
8 of the groundwater table -- the steeper the slope,
9 the faster the groundwater will move; hydraulic
10 conductivity, which is a measure of the aquifer,
11 or the bedrock, or the soil to transmit water; and
12 then porosity, which is the amount of connected
13 pore spaces in that rock or soil.

14 And a common one year time of travel was
15 used as, again, the initial criteria. So based on
16 these factors up here, we calculated a one year
17 time of travel throughout the -- to the river
18 throughout that 44 mile stretch, and that was the
19 first cut of the footprint.

20 And then the footprint could be
21 shortened based on some other criteria, and those
22 were distance to depth of groundwater. If the
23 ground water more than 25 feet below the surface,
24 then you could shorten the footprint to that
25 location. Again, that was designed if you have

1 more unsaturated conditions, it took longer time
2 for the wastewater to get into the groundwater
3 than into the river.

4 Also if you had confined conditions of
5 the aquifer. Confined conditions is when the
6 groundwater -- Between the surface and the
7 groundwater, there's a low permeability geologic
8 unit that doesn't allow the discharge from the
9 septic system, or whatever system a discharger
10 might be using to get down into the aquifer very
11 quickly, and retards it for quite a long time. So
12 that was another condition that you could shorten
13 the footprint from the one year time of travel.

14 Then there is an aquifer down there
15 called the Madison Aquifer. It's a unique
16 geologic condition where you have large fractures
17 or large solution cavities in the rock, and that
18 was given additional criteria to move the
19 footprint back and forth based on that.

20 And then there was also another criteria
21 regarding -- which isn't listed here -- but
22 regarding if one of the higher permeability
23 geologic units pinched out along the edge of the
24 valley, as the valley starts going up into the
25 bedrock, that would also shorten the one year time

1 of travel footprint.

2 And then the last criteria was that the
3 minimum footprint, regardless -- if any of this
4 above was 300 feet. So if you had a minimum
5 footprint of 300 feet, as it turned out, once you
6 went through all this, the maximum width of the
7 footprint was approximately one half to
8 three-quarters of a mile in a few spots.

9 And this map shows the northern half of
10 the designated ORW section, and the red line that
11 surrounds -- that runs parallel to the main stem
12 of the Gallatin and some of the tributaries, is
13 the actual footprint. And you could see in some
14 areas it's wider. In some areas it's pretty
15 narrow, most likely because the canyon is quite
16 narrow in these cases. Then down here, this is
17 the Big Sky area. Here is the turn off, and the
18 Big Sky Ski Resort is up here, up the west fork.

19 Then as you head down further south, the
20 southern half of the designated area, again, the
21 footprint gets a little wider in spots down here.
22 And so that was the result of looking at those
23 hydrologic connections.

24 So in summary, any groundwater discharge
25 inside of the footprint would be considered a

1 direct point source to the river, and would be
2 regulated under the ORW designation.

3 Then lastly, the draft EIS talked about
4 impacts of implementing the ORW, and basically it
5 would reduce the amount, the number of discharges
6 originating inside the footprint, basically
7 effectively limiting the number of wastewater
8 systems that could go into the river.

9 Based on planning and zoning, there were
10 up to 652 single family equivalents, basically
11 single family homes, that through zoning could
12 have been built inside that footprint area, and if
13 those systems used conventional wastewater
14 systems, it reduced the number of allowable single
15 family equivalents down to 67. So it was a pretty
16 large reduction. And that would be for systems
17 that could be constructed inside that footprint.

18 Areas outside of the footprint would not
19 be affected, but they would still have to meet a
20 regular nondegradation review, which is not as
21 stringent as the ORW review. And that's it for me
22 unless there is any questions.

23 MS. KAISER: Eric, what was the basis
24 for the minimum width of 300 feet?

25 MR. REGENSBURGER: The 300 feet was

1 based on a study done by Bill Mosner over in
2 Missoula. He did a study over in, I think,
3 Frenchtown. It was a very similar high
4 conductivity, sand and gravel aquifer. And they
5 saw viruses and other things traveling at least
6 200 feet, possibly more, in that study fairly
7 rapidly. So it was kind of based on that
8 analysis.

9 MS. KAISER: Thanks.

10 MS. SHROPSHIRE: Did you do any sort of
11 sensitivity analysis with the one year, like
12 looking at, say, a ten year time frame versus one
13 year, and see how that impacted the width?

14 MR. REGENSBURGER: Madam Shropshire,
15 members of the Board, no, that was not done. It
16 probably wouldn't have done a whole lot, because I
17 think a lot of the one year time of travel,
18 particularly for the sand and gravels, pretty much
19 never -- you never got out to that one year time
20 of travel because the edge of the valley wouldn't
21 go out that far. The valley is so narrow, by the
22 time you got to the edge of the alluvial aquifer,
23 you would have less than one year time of travel.

24 So going out ten years probably wouldn't
25 have changed the footprint very much. But there

1 wasn't a sensitivity analysis done for maybe a six
2 month, or an eighteen month, or something like
3 that. No, they never did that. They used one
4 year time of travel because that's a very common
5 type of protection that's used by EPA, it's used
6 by DEQ in well head protection, so it's a fairly
7 common number to use.

8 CHAIRMAN RUSSELL: So just for those of
9 us in the slow group, anything in that boundary
10 has basically been deemed there is a hydrologic
11 connection between groundwater and surface water?

12 MR. REGENSBURGER: Yes, that's correct.

13 CHAIRMAN RUSSELL: If I wanted to get a
14 septic system within that boundary, is there any
15 -- and I think I heard you say that the permanent
16 change would be a change of .01. Is that just
17 total nitrogen, Eric?

18 MR. REGENSBURGER: That would be total
19 nitrogen, yes, .01. We're assuming all -- It's
20 actually nitrate, and we're assuming all the
21 nitrogen that's in the wastewater system would
22 convert to nitrate and get into the river, so it
23 is nitrate, but it's assumed all the nitrogen
24 converts to nitrate.

25 CHAIRMAN RUSSELL: I'm guessing that

1 you're looking at something higher level than what
2 we're doing right now in the wastewater, onsite
3 wastewater review, to determine the impacts on
4 groundwater and surface water?

5 MR. REGENSBURGER: Well, the type of
6 treatment that would be used would be up to the
7 developers in that area. The ORW would just say
8 you can only put this much more nitrogen into the
9 river, and kind of left it up to the developers to
10 see if they would coordinate and try to put in
11 better treatment systems, so that they could get
12 more systems in; although the other scenario could
13 happen where the developers who were ready to
14 develop first would just put in their systems
15 quickly, and get into that first 67 units, and not
16 worry about the rest of the developers. That was
17 one of the --

18 CHAIRMAN RUSSELL: So the 67 is
19 basically using conventional --

20 MR. REGENSBURGER: Conventional, and you
21 can increase that number by going to a higher --

22 CHAIRMAN RUSSELL: So if you go away
23 from conventional, and we use the same, you could
24 double the amount of homes in that area?

25 MR. REGENSBURGER: Yes, using Level 2,

1 you could double the nitrogen. Phosphorus is the
2 more difficult, and there is --

3 CHAIRMAN RUSSELL: But that's it.

4 MR. REGENSBURGER: There is waste
5 segregation. There are things like composting
6 toilets, incinerating toilets, or diverting the
7 waste water outside of the footprint. So there
8 are different methods, but at some point there was
9 going to be a limit on the number of discharges
10 that could occur inside that footprint.

11 CHAIRMAN RUSSELL: Okay. Any other
12 questions?

13 (No response)

14 CHAIRMAN RUSSELL: None. Thanks, Eric.
15 Any other questions for either Jenny or Bob
16 regarding this before we move on?

17 MR. WHALEN: No, Mr. Chairman.

18 CHAIRMAN RUSSELL: I appreciate it. The
19 next thing on the agenda is coal bed natural gas.

20 MR. LIVERS: Thank you, Mr. Chairman.
21 We're going to a few issues. This Board has
22 wrestled with that in the past. A couple things
23 are going on now. But basically we just have
24 committed to earlier boards to come back and give
25 periodic updates on the issue, and Bob Bukantis is

1 here to do that.

2 MR. BUKANTIS: Good morning again, Mr.
3 Chairman, members of the Board. For the record, I
4 remain Bob Bukantis, Water Quality Standards
5 Program Manager for the Department. I hope you
6 appreciate how hard it is now I'm over 30 to
7 switch gears like this.

8 I'm going to talk to you about coal bed
9 methane, an issue near and dear to the hearts of
10 many in Montana, and an issue of which this Board
11 has been quite involved in the past.

12 I'm going to really hit the highlights
13 on this. We could spend days and days talking
14 about this, and the Board has in the past, and so
15 I'm just going to try to hit real quick highlights
16 of what has been going on with coal bed methane to
17 try to bring everyone up to speed a little bit,
18 and give you an update on the latest developments.

19 So I'll try to focus a little bit on the
20 need to protect irrigated agriculture, why the
21 Board adopted standards for electric conductivity
22 and sodium adsorption ratio, just getting into it
23 a little bit, and hitting the highlights, basic
24 highlights on the technical issues, and a quick
25 overview of the history and current status, and

1 opening it up for questions. I apologize because
2 this will be a little remedial for some of you,
3 and perhaps not for others.

4 Basically the concerns centered from
5 coal bed methane, planned development, and ongoing
6 development in the Powder River Basin in Montana
7 and Wyoming. In the process of producing coal bed
8 methane, wells are drilled on approximately 80
9 acre centers in coal seams, and water is pumped on
10 off, which releases pressure in the coal seam, and
11 the gas is then collected and sold. Just kind of
12 as a rough average, for each thousand feet of gas
13 produced, there is about two barrels of water.

14 So far, there's been about 43,000 or so
15 wells permitted in Powder River Basin, and doing a
16 quick bit of math, a well might produce -- as kind
17 of a good round number. It's highly variable --
18 but about 400 barrels of water a day. And if you
19 look at the number of wells that are in operation
20 right now, which are probably 20,000 or so, that
21 produces perhaps several million barrels of water
22 a day to be produced, or to be disposed of and
23 handled.

24 And the issue centers around that the
25 water is high in salt, higher than average for the

1 surface waters in that basin. Just to get kind of
2 a real rough general sense, say, electric
3 conductivity, which is a measure of salt, of about
4 2,000 for a well. It's variable in these
5 qualities, but again, sodium adsorption ratio --
6 that I will talk about in a little bit more detail
7 -- of about 50, whereas if you look at the Tongue
8 River as an example of surface water, an average
9 conductivity might be 700 with an SAR of one.
10 We'll talk little bit more about what this might
11 mean to irrigated agriculture.

12 So again, really the concern has to do
13 with the volume of salt being produced potentially
14 getting into the water ways, and the nature of
15 that salt. So we're looking at it from two
16 different perspectives. One is the overall
17 salinity, which is typically measured as total
18 dissolved solids, or quite conveniently as
19 electric conductivity. And the total salt is
20 harmful to plants. Basically it makes it hard for
21 the plants to take water up from their roots, and
22 with subsequent reductions, if the water is too
23 salty, to crop production.

24 And with sodicity or SAR, we're talking
25 about having high relative proportions of sodium

1 relative to cations, particularly calcium and
2 magnesium, in the soil water and surface water,
3 and when the sodium gets way out of balance, it's
4 really hard on soils if it's used for irrigation.

5 The biggest obvious effect is usually
6 dispersal of clay complexes, which tends to cause
7 the soil water -- soil pore clogging, and in
8 extreme cases with really sensitive soils, the
9 soils can basically run when they're wet, and turn
10 to concrete when they're dry.

11 So just to hit the highlights on the
12 sort of things that the Board and many others
13 looked at in setting these criteria, or numeric
14 standards, basically went to a lot of trouble to
15 try to identify the crops in the area, looked at
16 the most sensitive crops, and the crops that were
17 chosen for setting the EC standard were field
18 beans in the Tongue, and alfalfa in the Powder
19 River, along the Powder River; looked at the soil
20 water threshold needs for those, because if the --
21 the plant seeds the soil water, not the water in
22 the river, and so you have to back calculate from
23 the soil water, and you don't want that water to
24 get too salty and cause a decline in production of
25 the crop.

1 An important feature that needs to be
2 looked at is the leaching fraction. It's kind of
3 like house plants. If you just water your house
4 plant all the time, and you never drain that water
5 off, that pot will get pretty salty. So you want
6 to run enough water through the soil profile to
7 leach the excess salts out, and maintain the
8 fertility in the soil, and not have the soil water
9 get too salty for the crop.

10 And then, of course, we have to look at
11 the amount of precipitation that in effect dilutes
12 the irrigation water, because precip water is
13 basically distilled water.

14 There's a little bit of a complex
15 relationship between the sodium adsorption rate
16 and salinity, but basically the threshold of harm
17 for SAR, that is harm to the soil, depends on the
18 salinity in the soil water. So the higher the
19 salt content in the soil water, the higher the SAR
20 can be without causing adverse dispersive effects
21 on the soil. Of course, you're kind of boxed in,
22 because you can't get that water get too salty or
23 you're going to kill your crop. So there is kind
24 of an interplay there that needs to be taken into
25 account when you're managing the watering, and

1 setting the standards.

2 A lot of these relationships are
3 published in various ag publications. But there
4 is also this rainfall effect, and basically
5 illustrate this one with a diagram. But what this
6 diagram shows, it's a widely used diagram for
7 irrigation management, and it's meant to
8 illustrate the relationship, on the horizontal
9 axis there, the conductivity or salt content of
10 the water relative to the sodium adsorption ratio,
11 and where you want to be ideally is to the left of
12 that first line.

13 So it just shows that the saltier the
14 water is, the higher the SAR soils can tolerate
15 without adverse effect. But then again, it's
16 limited by salinity that the crop can tolerate.
17 And the idea of the rainfall effect is, say for
18 example, with this soil there in the middle above
19 the word "precipitation," if you have got -- in
20 there you're in a slight to moderate hazard area,
21 but what tends to happen is if you get rainfall,
22 you're suddenly diluting the salt content of the
23 soil water, but you're not changing the balance of
24 salts in there.

25 So SAR tends to stay relatively

1 constant, and SAR tends to be high, and reduces at
2 a much slower rate than the concentrate of the
3 salt in the water, which moves you to the left in
4 that diagram and into a more high hazard
5 situation. So this was another consideration in
6 how collectively then really the Board set the
7 standards.

8 Without getting into the numbers in much
9 detail at all, no detail at all, I'll just give
10 you an idea what it looks like. Again, the use
11 that we're trying to protect is irrigated
12 agriculture, and in this case we set for the
13 Tongue River during the irrigation season a
14 monthly average EC of 1,000, and SAR a monthly
15 average of three.

16 We have a lot more detail in the
17 standards, and these standards were set
18 specifically for irrigation season, non-irrigation
19 season, looking at different numbers for the
20 Tongue River, Powder River, Tongue River
21 Reservoir, and Rosebud Creek, and then the
22 tributaries to all those waters. So there is
23 quite a few numbers when you get into detail on
24 the books.

25 So again, kind of moving right along

1 here, and just trying to hit the highlights, I'll
2 just try to give you a little bit of sense of the
3 history.

4 The Department started looking at the
5 need for standards back in the 1990s. And then by
6 2002, after a lot of work with stakeholders,
7 various agencies, and the Water Pollution Control
8 Advisory Council, this body initiated rulemaking
9 for the initial set of EC and SAR standards in
10 2002.

11 Prior to that point, the State relied on
12 a narrative standard, which is typical for --

13 I'll say a little bit about narrative
14 standards. When you don't have numeric standards,
15 there is always a fall back of narrative
16 descriptions that we need to protect water
17 quality. Having a numeric standard makes that job
18 of writing a permit, or making an assessment
19 decision, or whatever, simpler because you have a
20 number to apply. If you are trying to apply a
21 narrative standard, somehow you have to develop a
22 number to make that useful on a case-by-case
23 basis.

24 So at any rate, DEQ and the Board
25 completed an exhaustive review, and record, and

1 including many public meetings; the Board was out
2 looking at things on the ground; there was a
3 collaborative multi-agency,
4 industry/environmental/irrigator groups working on
5 this; and the Board hired a technical soils
6 expert, Dr. Don Oster.

7 And so in 2003, the Board adopted
8 numeric standards, and one interesting side note
9 that played out in more detail in 2003 is the
10 Board left the narrative standard in place for
11 anti-degradation significance threshold.

12 So just to get back to a little bit more
13 of an explanation of nondegradation again. Again,
14 where this threshold would play out would be in
15 the protection of high quality waters, that is,
16 where the waters are cleaner than the standard,
17 and then the nondegradation number would be used
18 to set the permit. That's a big issue,
19 particularly on the Tongue River, where there is a
20 lot of high quality water to protect, and high
21 value irrigation, agriculture that's being
22 irrigated with that water.

23 And just to give you a little bit more
24 detail on significance thresholds, basically the
25 Department uses four different levels of

1 significance thresholds. So the most relaxed
2 significance threshold is a significance threshold
3 for a narrative standard. So the position the
4 Board took in 2003 was that the narratives
5 treating the significance threshold for EC and SAR
6 was best done as if it was a narrative standard.

7 And how the Department looks at that is
8 in effect that significance threshold becomes a
9 standard because really what we have to do to say
10 that there is a change is we have to show a
11 measurable effect on use, or a measurable change
12 in aquatic life or ecological integrity. Since
13 the number is set to protect the use, then that
14 effectively becomes the significance threshold,
15 the standard. The standard is set to protect the
16 use. So I think a lot of people would agree that
17 this was probably done as a concession to industry
18 in the process, in the various groups coming
19 together to agree on something.

20 Now, the next level of protection is
21 designation of a pollutant as a harmful pollutant
22 rather than if the standard is narrative; and
23 basically in that point, when natural background
24 or the background level of the pollutant is less
25 than 40 percent of the standard, we say a

1 discharger can increase the concentration of the
2 pollutant in a river up to 10 percent without it
3 being considered to be significant degradation.
4 So that's a more relaxed designation.

5 And then more stringent designations are
6 treating a pollutant as a toxic, as the case I
7 mentioned earlier for chromium, where we can allow
8 the in-stream concentration to reach up to 15
9 percent of the standard without it considered
10 being a significant change of water quality. With
11 carcinogens, we allow no change.

12 Now the reason why I went through all
13 that is in 2005, the Board was petitioned to
14 establish a numeric anti-degradation threshold,
15 require reinjection of produced water, and change
16 some other things in detail. And so we went to
17 another rulemaking, and another road show, and
18 series of public meetings, etc.

19 And then in March of 2006, the Board
20 adopted the numeric approach to setting for
21 nonsignificance determination for EC and SAR to be
22 handled as harmful parameters rather than
23 numerics.

24 Subsequently Wyoming producers, CBM
25 producers, filed suits in State and Federal

1 District Court, challenging the Board and DEQ in
2 State Court on the use of adequate science for EC
3 and SAR standards in the nondegradation approach;
4 and in Federal Court filed suit challenging EPA's
5 approval of Montana's standards, because once we
6 establish the standards under State law, they are
7 submitted to EPA for their approval to be
8 effective under the Clean Water Act.

9 Some of the key arguments in the Federal
10 lawsuit were that EPA failed to consider the
11 entire administrative record from the State
12 rulemaking, and did not really articulate a solid
13 rationale for their approval, and that the
14 standards really weren't based on appropriate
15 technical and scientific data.

16 And then there was different people
17 intervened. The State of Wyoming intervened on
18 behalf of Wyoming producers; and Montana
19 intervened in Federal Court on behalf of EPA;
20 irrigators and some of the environment groups also
21 jumped in, etc.

22 The State case has played out. We won
23 in Judge Blair Jones' court in Columbus, and went
24 to the Montana Supreme Court, and the State of
25 Montana prevailed in State Court there.

1 Federal District Court in Wyoming, Judge
2 Clarence Brimmer heard the arguments this last
3 July in Cheyenne, and he on October 13th vacated
4 EPA's approval of both the 2003 and the 2006
5 rulemakings for purposes under the Clean Water
6 Act, and remanded those packages back to EPA, and
7 told EPA that EPA needs to consider the entire
8 record, and really be clear in its articulation of
9 its rationale for approving the standards, and
10 determine whether the standards are in fact based
11 on appropriate standard.

12 So that's where we sit right now, and
13 there has been some discussions between EPA and
14 DEQ and the Montana Department of Justice on the
15 next steps here. Right now the ball is in EPA's
16 Court, in that EPA, or really it's EPA and the
17 Department of Justice, the US has to decide on
18 whether they want to appeal Judge Brimmer's
19 decision, or whether we want to accept the remand.

20 Just to then just hit the highlights,
21 bring you up to date a little bit on development.
22 I think I mentioned earlier I think in Wyoming
23 they've so far permitted about 43,000 wells and
24 actually drilled about 20,000 wells, of which
25 about 15,000 are producing. A small percentage of

1 that water is treated. In Montana about 1200
2 wells have been drilled so far. We treat about
3 half our water. And I can tell you that things
4 are really slowing down with development because
5 of the economic situation.

6 And with that, I think I'll shut up and
7 let you ask questions. Thank you.

8 CHAIRMAN RUSSELL: Does the Board have
9 questions for Bob?

10 MR. MIRES: Why were there not
11 requirements for reinjections?

12 MR. BUKANTIS: You mean in terms of the
13 2006 rulemaking package?

14 MR. MIRES: Right.

15 MR. BUKANTIS: Well, the Board heard a
16 wide variety of testimony, and I don't want to
17 speak for the Board, but I think the Department's
18 position was it looked like it wasn't -- I'll step
19 back here a little bit.

20 Under the Clean Water Act -- this gets a
21 little bit more complicated. Basically under the
22 Clean Water Act, usually the approach for doing
23 permits relies on looking at either water quality
24 based permit limits, or technology based permit
25 limits; and in general, how the Department manages

1 discharges is to set those permit limits, and then
2 it's up to the industry to decide how to
3 appropriately dispose of or manage that water.

4 And so then the Department, when the
5 Department sets permit limits, it looks at
6 technology based limits -- which usually as a
7 result of looking at effluent limitation
8 guidelines which are set by EPA for an industry --
9 or on the other hand looking at water quality
10 based limits, where the Department looks at the
11 standards, and says okay, this is how clean that
12 water needs to be to protect the in-stream uses.

13 So with the standards, we felt like we
14 had the protection, the mechanism in place to
15 protect the water quality. It's kind of an
16 awkward position to be, under the Clean Water Act,
17 to be trying to tell people how to handle their
18 water, how to treat it, and the effluent
19 limitation guidelines were not in place, and so
20 the EPA is moving forward. I'm not sure if that's
21 the smoothest answer, but I think I got it. I'd
22 be happy to try to clarify for you.

23 MR. MIRES: I think I know where you're
24 going there.

25 CHAIRMAN RUSSELL: Any other questions?

1 MR. WHALEN: Mr. Chairman, this
2 shouldn't take long. Mr. Bukantis, in discussing
3 nondeg standards for high quality water resources,
4 you mentioned four levels of significance
5 thresholds. I was attempting to follow that
6 discussion, and I got, number one, most relaxed;
7 then you started to discuss pollutants. Could you
8 just kind of briefly outline those four different
9 significance thresholds, identify what those
10 thresholds are, with a succinct definition for
11 each.

12 MR. BUKANTIS: The succinct part, I'll
13 have to work on that. Basically narrative in
14 effect becomes the standard because you're trying
15 to look at harm to use. That's the most relaxed
16 anti-degradation significance threshold. And the
17 standard number is set to protect the use, so
18 that's basically where you're at with narrative.

19 Harmful allows a 10 percent change in
20 water quality to not be considered significant, as
21 long as your background level is not more than 40
22 percent of the standard.

23 And with the toxic level, which becomes
24 the next most stringent level, basically there is
25 a two step test there. The trigger value that

1 Eric mentioned earlier, the first step, there is a
2 trigger value that's part of numeric standards.
3 If the receiving water is going to change more
4 than the trigger value level, then you move on to
5 look to see if the discharge plus ambient is going
6 to exceed 15 percent of the standard. If that's
7 the case, it's deemed significant.

8 The most protective level is for
9 carcinogens where we don't allow any measurable
10 change. I don't know if I can get more succinct
11 than that. It's a little bit complicated. I hope
12 that helps.

13 MR. WHALEN: Mr. Chairman, just a quick
14 follow up. Thank you. That completes that
15 outline.

16 And with respect to toxicity, the
17 receipt of that toxicity takes place, I'm
18 assuming, to humans, or does it account for plant
19 life, soil fertility, biodiversity? Who is the
20 recipient of these various levels of
21 nondegradation?

22 MR. BUKANTIS: Board member Whalen, Mr.
23 Chairman. This goes back to the basic outline of
24 how standards are set. So the starting point for
25 standards are always the use you want to protect.

1 Now, the most salient way to get to the
2 most protective number is to determine what your
3 most sensitive use is for a particular pollutant.
4 Sometimes that's aquatic life -- that's fish and
5 bugs -- sometimes that's human health, depending
6 on the pollutant.

7 The position that we took with irrigated
8 agriculture was that for salts and SAR, for salts
9 it was the crops, and for the sodium adsorption
10 ratio it was the soils.

11 And so once you have a sense of what
12 your use is, then you set your number at the level
13 that's deemed necessary to protect that use. So
14 if you're looking at human health, for example,
15 you make a bunch of assumptions, and then choose
16 the number that minimizes cancer risk, for
17 example. If you're looking at toxics, you choose
18 a number that's conservative around what's called
19 a no-adverse effect level. Does that help?

20 MR. WHALEN: It does. Thank you very
21 much.

22 MR. MILLER: Bob, you had talked about
23 the standards that were set, the thousand for the
24 EC standard and three for SAR during the
25 irrigation season. Were there any standards set

1 for beyond that?

2 MR. BUKANTIS: Yes. The standards apply
3 year around, but they're seasonal standards, so
4 that there are more stringent standards typically
5 set during the irrigation season when folks are
6 going to be using the water for irrigation
7 standards. They're generally relaxed for the
8 non-irrigation season. And a couple
9 considerations there. One is protection of
10 riparian vegetation, etc..

11 And the other real interesting exception
12 is Tongue River Reservoir, where the State of
13 Montana DNRC is try to store water for use for the
14 irrigators, and that water may be stored during
15 the non-irrigation season to be used the next
16 year, so irrigation season standards effectively
17 apply year around in the Tongue River Reservoir to
18 account for that.

19 MR. MILLER: To follow up on that, so
20 then any waters received upstream from Tongue
21 River Reservoir will have the irrigation
22 standards, is what's proposed; is that correct?

23 MR. BUKANTIS: I'm going to punt on that
24 one because I don't have that handy. I can get
25 back to you on that. I don't remember that

1 detail. In fact, Joe, you were here.

2 CHAIRMAN RUSSELL: Let me just recite
3 them for you. No, there is different reaches that
4 were developed, different standards, and they were
5 developed based upon protection of crops. So in a
6 nutshell, we looked at each reach, and looked at
7 what was going on, and developed standards for
8 each of them the first time around; then we came
9 back in a couple years, and adopted
10 anti-degradation, which basically this is really
11 simple, but halve those standards.

12 MR. MILLER: One more follow up. What
13 was the sensitive crop for the Tongue River?

14 MR. BUKANTIS: Field beans.

15 MR. MILLER: Apparently they grow a
16 bunch down there.

17 MR. BUKANTIS: Yes. I don't know how
18 much.

19 MR. MILLER: I did not know that.

20 MR. BUKANTIS: Yes.

21 MS. SHROPSHIRE: To follow up on a
22 question that Joe Whalen had asked with regards to
23 the different levels, if you were to look at
24 carcinogens -- and I wasn't sure if arsenic would
25 be considered that -- and in terms of no

1 measurable change, if there were measurable
2 concentrations of arsenic in the river, and the
3 water that was being discharged had higher -- is
4 it that it can't discharged if it has higher, or
5 it can't be discharged if it's any measurable
6 change in the water?

7 MR. BUKANTIS: For carcinogen, it's no
8 measurable change. But there is a provision in
9 Montana State law and standards that says we can't
10 force people to treat purer than natural
11 background. So to quote a Federal attorney down
12 in Judge Brimmer's court, that when natural
13 background exceeds the standard in Montana, under
14 Montana State law, natural background in effect
15 becomes the standard.

16 MS. SHROPSHIRE: Even for carcinogens?

17 MR. BUKANTIS: I think that's the case.
18 And I don't know if I could defer to Jenny on how
19 to implement that. Jenny, did I nail it?

20 MS. CHAMBERS: Yes.

21 MS. SHROPSHIRE: Just to clarify, "no
22 measurable change" means that it has to be
23 measurable in the river, or you can't put it in
24 there if it's higher than the river?

25 MR. BUKANTIS: I think no measurable

1 change in the river. Basically yes.

2 CHAIRMAN RUSSELL: Anything else?

3 (No response)

4 CHAIRMAN RUSSELL: Thanks, Bob. Let's
5 take a break.

6 (Recess taken)

7 CHAIRMAN RUSSELL: We're going to get
8 going again. And we have some requests to
9 initiate rulemaking, and Item No. 1 is to amend
10 ARM 17.38.106 regarding engineering plan fees.
11 Tom.

12 MR. LIVERS: Mr. Gene Pizzini is here.

13 MR. PIZZINI: Good morning, Chairman
14 Russell, members of the Board. For the record, my
15 name is Eugene Pizzini, and I'm the rules expert
16 for the Public Water Supply Section here at DEQ.

17 As part of DEQ's Department primacy
18 agreement with USEPA for implementation of the
19 requirements of the Safe Drinking Water Act, the
20 Department is required to have a program in place
21 to assure that the design and construction of new
22 or substantially modified public water system
23 facilities will be capable of compliance with the
24 State primary drinking water regulations, 40 CFR
25 142.10.

1 Montana Code Annotated 75-6-103, 104,
2 and 112 set requirements for plan and
3 specification review for the BER, Department, and
4 the regulated public respectively. The
5 Legislature requires the Department to collect
6 fees commensurate with the cost of those reviews.
7 75-6-108(3) MCA states, "The Board shall by rule
8 prescribe fees to be assessed by the Department on
9 persons who submit plans and specifications for
10 construction, alteration, or extension of a public
11 water supply system or public sewage system. The
12 fees must be commensurate with the cost to the
13 Department in reviewing the plans and
14 specifications."

15 For whatever the initial reason, the
16 Department originally set the plan review fees at
17 roughly half of the actual cost, and supplemented
18 the cost with Federal grants and public water
19 connection fees. The fiscal year 99-00
20 legislative audit number 00-14 identifies that the
21 Department does not recover its costs for reviews
22 of public water supply system plans and
23 specifications as required by law. In fact, the
24 Department also did not recover its costs for
25 wastewater systems plans and specification reviews

1 as also required by 75-6-108(3).

2 The fiscal year 01-02 Legislative Audit
3 Division Audit No. 02-14 identified that the
4 Department does not recover its costs for review,
5 but indicated that the Department was initiating
6 rule revisions to address that issue. The
7 Department implemented an internal study of
8 engineering costs related to performing public
9 water supply plan reviews, and worked to refine
10 the actual time it takes to review individual
11 components of a drinking water system.

12 In December of 2005, the Board initiated
13 rule amendments to the engineering fees to address
14 the issues identified in the fiscal '99 and fiscal
15 year '01 legislative audits. Because of the
16 amount of the fee increase needed, the Department
17 decided to phase the increase over a few years.

18 Notice was sent to all public water
19 supply owners, operators, and consulting engineers
20 that had submitted plans and specifications to the
21 Department in the last five years. The Board
22 received two comments for specific line items in
23 the proposed fee schedule, and adjusted the
24 schedule to accommodate those comments.

25 In July of 2007, the Board again

1 initiated rulemaking to amend the engineering fee
2 rules. A notice of the public hearing was sent to
3 the owners and the operators of all public water
4 systems in the Department's data base, all county
5 sanitarians, all engineering/consulting firms, and
6 owners/developers that had submitted plans and
7 specifications for Department review within the
8 last three years.

9 No comments were received during the
10 public hearing. The Board did receive two written
11 comments. One comment suggested the Department go
12 to a straight hourly rate, and although the
13 Department considered that as an option, there are
14 inherent problems that have caused the Department
15 to dismiss that as a viable option. The second
16 comment was outside the scope of rule writing.

17 Shortly after the 2007 fee increase was
18 adopted, the program's cost significantly
19 increased. This increase compounded the fee
20 shortage for performing engineering reviews.

21 The Department is proposing to again
22 increase the engineering fees. Based on 2009
23 data, the program has calculated an approximate
24 \$250,000 shortage in collected fees versus the
25 actual costs of performing those reviews. Review

1 fees are being adjusted to reflect the actual time
2 it takes to perform the various reviews, and it
3 also incorporates a 40 percent increase for
4 indirect costs that have never been calculated
5 into the rates previously.

6 The projected revenue shortage is based
7 on the total program costs for 2009 of
8 approximately \$740,000, of which 75 percent or
9 approximately \$555,000 is the amount of time
10 engineers spend actually doing plan review. Total
11 program revenues from plan review fees amounted to
12 \$301,096, providing the difference of \$253,973.

13 The proposed fee increase was presented
14 to the public water supply focus group, a group
15 made up of municipal and private regulated
16 systems, consulting engineers, Montana Rural
17 Water, contract operators, and Department staff.
18 No significant negative comments were received
19 from the group at that time, and consulting
20 engineers present stated the rates were consistent
21 with their estimated costs for performing the type
22 of work involved.

23 The proposed fee increase will generate
24 approximately \$254,000 in revenue, and affect
25 approximately 2,100 public water and wastewater

1 systems and when submitting engineering plans and
2 specifications for review.

3 The Department recommends initiation of
4 rulemaking, and appointment of a Hearings Officer
5 for public hearing.

6 CHAIRMAN RUSSELL: Questions for
7 Department?

8 MR. MILLER: I was just wondering. It
9 looks like some of these were overhead, utilities,
10 rent. I guess a big part of this is -- It seemed
11 like when the Legislature meets each time -- I
12 don't know. I'm in the university system -- and
13 they just say, "Tough. You guys eat this stuff."
14 And I don't know. Are these really legitimate
15 costs to crank up here to pass on to everybody? I
16 don't know. It just seems like times are kind of
17 tough, and we're supposed to all kind of suck it
18 up here, and try to get by the best we can.
19 What's the comment here?

20 MR. PIZZINI: Chairman Russell, members
21 of the Board, I can take a shot at this, but I may
22 call up Mr. Dilliard since he happens to be in the
23 audience.

24 Probably the most important thing to
25 state here is that our engineering program now is

1 fee supported. We calculated in our study, I
2 think we figured that 75 percent of our engineers'
3 time is actually spent doing review, actually
4 sitting at a desk doing the engineering review.
5 25 percent of their time is spent on other things:
6 Training, annual leave, whatever figures into
7 that.

8 The requirement from the Legislature to
9 have costs, or to recover costs commensurate with
10 the cost of doing that review, that's what they
11 tell us we have to do. That time, the cost to
12 have the computer, the cost of the electricity,
13 the cost of the floor space, is all part of the
14 cost to have somebody sitting there and available
15 to do the review. We don't have another --
16 Realistically we don't have another pot of money
17 to tap into to cover those costs. It's coming
18 from the fees. Does that answer your question, or
19 would you like me to --

20 MR. MILLER: It just seems like
21 utilities, or rent, and things like that were
22 already in these buildings. And at least it never
23 seems to --

24 I know that we've presented this same
25 argument, and they say, "Tough. This is it." And

1 I guess I -- Just obviously, though, we don't have
2 an opportunity to go after fees and rulemaking
3 authority to set fees, but it just seems like then
4 everybody goes back, and we readjust the budget,
5 and we cut things, and we adjust to try to make it
6 go, and we have to. I guess that's kind of my
7 concern.

8 MR. PIZZINI: Chairman Russell, members
9 of the Board, one last thought on this. These
10 fees kick in only when plans and specifications
11 are submitted. These increases do not show up on
12 a reoccurring period on somebody's monthly or
13 annual tax bill, or -- If the system has to make a
14 change, or if the system decides to make a change,
15 and they submit plans and specifications to us,
16 then these fees are brought up. I'm assuming that
17 the systems at that point are going to be making
18 the decision as to whether the total costs of the
19 project is doable or not.

20 CHAIRMAN RUSSELL: Why don't we let Tom
21 put this all into context.

22 MR. LIVERS: Maybe to bail out Mr.
23 Pizzini a little bit, too. I agree with
24 everything he said.

25 Basically on the issue of our overhead

1 fees, we're directed to have a proprietary rate,
2 and that's an indirect charge that we have
3 universally throughout our programs, and
4 regardless of whether it's a Federal program, a
5 fee program, if we have a little bit of General
6 Fund in the agency; but on the State special, the
7 fee programs, RIT programs, and Federal programs,
8 we are required to collect indirects on those, and
9 that's the manner in which we equitably allocate
10 costs for all indirect activities throughout the
11 programs.

12 And recently for efficiencies, we've
13 tried to pull more costs into that indirect. For
14 example, we used to charge rent out to the
15 programs. That's a big piece that has been moved
16 in the last few years. There are some economies
17 of scale and some efficiencies in doing those
18 centrally. We're still quite a bit below honestly
19 the "U" system and some other places in terms of
20 those indirect costs, but basically that's the
21 only mechanism we've got to pay those costs.

22 We do look for efficiencies in those
23 programs, just as we look for efficiencies in our
24 permit, and remediation, and planning programs as
25 well. We look to -- In tough times, we take into

1 account the impacts on fee payers for these
2 things, and we initiated quite a few stakeholder
3 meetings, or started multiple meetings,
4 stakeholder meetings, to put some of these
5 discussions on the table.

6 But what happened with this program, as
7 Mr. Pizzini had indicated -- and I wasn't involved
8 -- but in looking at the record and talking to
9 some people around, I think this was a decision
10 back in probably the early 1990s when this was
11 still part of the Department of Health and
12 Environmental Sciences, that much of this activity
13 was a result of EPA actions and actions initiated
14 by the Feds.

15 So the predecessor, one of the
16 predecessors to this Board, the Board of Health,
17 had determined that they felt it was appropriate
18 that EPA pick up some portion of that cost, half
19 of the cost; and through those legislative audits,
20 we got direction from the Legislature years later
21 that that was not appropriate. The law says fees
22 have to cover these costs.

23 So we initiated a phase-in, because of
24 the rate shock when we made that all at once, we
25 initiated a phase-in over the last several years

1 to get to the point where the fees were covering
2 those costs, and this is another step in that
3 process.

4 CHAIRMAN RUSSELL: Just an editorial,
5 I'm sure that in the university system, your
6 program gets a bigger chunk taken out to go to
7 overall university support than is happening in
8 State government.

9 MR. MILLER: We may. I don't know. It
10 just doesn't seem like we have a secondary hammer,
11 and just so we typically -- They just say, "This
12 is it," and then you go back, and you readjust
13 everything, and --

14 CHAIRMAN RUSSELL: That's because
15 they're still taking their chunk to run their
16 campus, and you're the one that loses.

17 MR. MILLER: Yes.

18 CHAIRMAN RUSSELL: You can't make it up
19 in fees which are the cost of doing business.

20 MR. WHALEN: Mr. Chairman. I was pretty
21 impressed with the amount of public comment that
22 was to follow, or was introduced as part of the
23 water discharge rate fees adjustment that we're
24 going to be considering a little farther down the
25 list. And I think there may be some public

1 hearing that will engender to this subject as
2 well. So in lieu of that, I would move to
3 initiate rulemaking, appoint a Hearings Officer,
4 and schedule a hearing on this matter.

5 CHAIRMAN RUSSELL: I will get to public
6 comment, but is there a second? Now that we have
7 a motion, I'll take a second.

8 MS. SHROPSHIRE: Second.

9 CHAIRMAN RUSSELL: It's been seconded by
10 Robin. Discussion?

11 MS. SHROPSHIRE: I just did have a
12 couple more questions.

13 CHAIRMAN RUSSELL: We're in discussion.
14 Go ahead.

15 MS. SHROPSHIRE: A two part question.
16 Can these fees -- can you recover costs from a
17 past year when you lost money? And then the
18 second part is that if you find that the fees are
19 too high, and you're making a profit, how do you
20 deal with that situation?

21 MR. PIZZINI: Chairman Russell, members
22 of the Board, the second part of the question
23 would go "woo-hoo." Actually in 2005 and 2007
24 when we were initiating these changes, we weren't
25 exactly sure how the proposed changes in the fee

1 structure were going to affect our bottom line,
2 and that was actually what we told the Board at
3 that time was: This is our best guess as to how
4 we get to where we need to be, and if we find that
5 we're short, we're going to come back. If we find
6 that we're over, we're going to come back and
7 we'll reduce. What was the first part of the
8 question?

9 MS. SHROPSHIRE: Can you use these fee
10 increases to compensate for not having -- Are
11 these fees taking into account that you lost money
12 last year?

13 MR. PIZZINI: The poll from the audience
14 is no, we may not.

15 MS. SHROPSHIRE: Thank you.

16 MR. LIVERS: Mr. Chairman, Ms.
17 Shropshire, the other thing to take into account
18 is we will have a fund balance in a lot of our fee
19 programs, and we'll follow best accounting
20 practices to keep that at an appropriate level, so
21 it's not too low, it's not too high, and we'll
22 make adjustments on a yearly basis. What we're
23 dealing with here is projections into the future
24 in terms of what we anticipate when this account
25 will go negative, and trying to stave that off.

1 CHAIRMAN RUSSELL: I guess the only
2 other comment I'd make, just based on the fact
3 that these are fees, they're basically a fee for a
4 service. So if you're doing a nondeg review, it
5 has an actual amount of time associated with it,
6 and you've plugged that into your time versus what
7 you pay, your overhead established, but hopefully
8 there is not a lot of fluff in there. It's
9 basically your direct and indirect charges.

10 MR. PIZZINI: Mr. Chairman, that's
11 correct.

12 MR. LIVERS: The Legislature has given
13 us direction on this to say we're not to subsidize
14 this out of other revenue streams, Federal or
15 State revenue streams. These fees need to cover
16 the costs.

17 CHAIRMAN RUSSELL: Any other questions
18 for Mr. Pizzini?

19 MS. KAISER: I just noticed the
20 increases on some of the fees vary. Not all of
21 them were doubled. Some of them were drastically
22 increased. One went from \$50 to \$700. And I'm
23 just assuming that's to accommodate maybe an under
24 estimation earlier on of what it would take to do
25 that review.

1 MR. PIZZINI: Chairman Russell, members
2 of the Board, that is correct. In all of those
3 line items, the minimum you should see is that 40
4 percent increase that was for the indirects. The
5 other amounts that those line items went up by was
6 part of the review that we did in our funding to
7 figure out where we were at, and how much time the
8 engineers were actually spending doing the review.
9 The determination was made that we have line items
10 where we are not collecting near what it is
11 costing us in time to do the reviews.

12 Those ones that you see that have the
13 significant increases, those are ones where we may
14 have been charging basically what amounts to one
15 hour of an engineer's time, and it takes them a
16 week or more to do that review. And so that's the
17 majority of the changes that you see, is trying to
18 level out what the actual time requirements are
19 for our reviewers, and addressing that in an
20 average rate. So some of them are going to take
21 longer, and some of them are going to take less
22 time, and hopefully it all averages out.

23 CHAIRMAN RUSSELL: Further questions?

24 MR. ANDERSON: Can I just get a
25 clarification of the specific factors you use to

1 assess these fees. You have indirect costs.
2 Rent, salaries, are those indirect or direct
3 costs?

4 MR. LIVERS: Mr. Chairman and Board
5 member Anderson, on the last part of that, we'll
6 look at it. Direct costs include the specific
7 staff time required for reviewing the plans and
8 specifications. The indirect costs are just a --
9 we use a constant percentage across all programs
10 to recoup indirect costs, and indirects include
11 the rent, phone expenses, cost of central
12 services, computer systems, financial systems,
13 legal, human resources, that sort of thing. Does
14 that clarify?

15 MR. ANDERSON: Yes.

16 CHAIRMAN RUSSELL: Anything else?

17 (No response)

18 CHAIRMAN RUSSELL: Is there anyone out
19 in the audience that would like to speak to this
20 matter before the Board takes action?

21 (No response)

22 CHAIRMAN RUSSELL: Seeing no one jumping
23 to the podium, we have a motion on the floor. Any
24 further discussion?

25 (No response)

1 CHAIRMAN RUSSELL: Hearing none, all
2 those in favor, signify by saying aye.

3 (Response)

4 CHAIRMAN RUSSELL: Opposed.

5 (No response)

6 CHAIRMAN RUSSELL: Motion carries. The
7 next item on the agenda is the Department's
8 request to initiate rulemaking to amend the
9 administrative rule promulgated under Montana
10 Strip and Underground Mining Reclamation Act.

11 MR. NORTH: Mr. Chairman, members of the
12 Board, my name is John North. I'm Chief Legal
13 Counsel for the Department.

14 The Department regulates coal mining and
15 uranium mining under the Montana Strip and
16 Underground Mining Reclamation Act. One of the
17 requirements of that act is that a permittee post
18 a reclamation bond to guarantee that upon
19 completion of mining the land is reclaimed. There
20 are a number of acceptable mechanisms for
21 providing the surety, the most common being a
22 surety bond, but one that's not uncommon is the
23 providing of a letter of credit by the permittee
24 on a bank.

25 The Board has adopted this Rule 1109,

1 which sets criteria for what letters of credit the
2 Department can accept, and what we can't accept,
3 and there are essentially four criteria in these
4 rules. One of the criteria is called just the
5 general financial health criteria, and it requires
6 that the bank have a "B" plus rating in one of
7 three national bank rating services.

8 This has created a problem which came to
9 us last summer when one of our strip mine
10 permittees proposed to provide us with a letter of
11 credit on a state bank as opposed to a nationally
12 chartered bank. It turns out that these
13 accreditation services don't rate state banks, so
14 we could not accept that letter of credit.

15 The permittee and the bank asked us to
16 look into this, so we consulted with the Banking
17 and Financial Services Division over at the
18 Department of Administration, and they basically
19 told us that this rule, that particular
20 requirement is unnecessary, and it's also very
21 difficult to administer.

22 It has really three problems with it.
23 The first one is that the rating services that the
24 Securities and Exchange Commission consider to be
25 credible change over time. And this rule has

1 three rating services, and as I understand it, one
2 of them doesn't even rate banks anymore. The
3 second thing is that they don't all use an "A"
4 through "F" letter rating service, and this rule
5 says it has to have a "B" plus rating. And third,
6 they only rate national banks.

7 The Banking and Financial Services
8 Division assured us that the bank that our
9 regulated entity was proposing is a very healthy
10 bank, and their letter of credit would be as good
11 as any national bank that qualified under this
12 credit rating service.

13 So as a result of that, we're proposing
14 that that one criterion be deleted from the rule;
15 and we're also proposing another change that
16 conforms the language to accepted accounting
17 practice for banks.

18 I have one thing we are proposing that
19 is a little bit different from what you see on
20 your executive summary. The executive summary
21 asks that you appoint a Hearing Officer. We
22 anticipate that this is going to be very
23 noncontroversial, so we're asking the Board to
24 initiate without holding a public hearing.

25 CHAIRMAN RUSSELL: Thanks, John. Can we

1 put something in there that if they've done credit
2 default swaps we don't want them in our state?

3 MR. NORTH: We'll ask the Banking
4 Division about that.

5 CHAIRMAN RUSSELL: Any questions for
6 John? Robin.

7 MS. SHROPSHIRE: John, I'm trying to
8 remember on other rulemakings where it was
9 noncontroversial that we've ever waived the
10 hearing. Is that something we've done before?

11 MR. NORTH: It's not usual. The reason,
12 under both the Clean Air Act and the Water Quality
13 Act, we don't have the discretion to waive a
14 hearing. Any rulemaking, we have to hold a
15 hearing, noncontroversial or not. But the Strip
16 Mining Act doesn't have that same criteria.

17 MR. ANDERSON: Just a little background,
18 John. With respect to these letters of credit, my
19 general understanding is many state chartered
20 banks oftentimes end up being absorbed into
21 national chartered banks, and I'm wondering when
22 you have successor entities such as that, does the
23 letter of credit apply? Do you have rules that
24 assure that the letter of credit applies to the
25 successor entity?

1 MR. NORTH: Mr. Anderson, Mr. Chairman,
2 I'm going to think out loud here for a minute.
3 Our letters of credit go for a year, and they are
4 with the entity that provides it. So if they're
5 absorbed into a new entity, and no longer retain
6 that identity, they would have to meet the three
7 criteria that would remain in this rule, and if
8 they did not, then we would suspend the permit.

9 MR. ANDERSON: Okay. Thank you.

10 CHAIRMAN RUSSELL: John, this item No. 6
11 in the proposed MAR, if you do get some people
12 that are requesting a public hearing, do we have
13 to reinitiate or is it an automatic?

14 MR. NORTH: We would come back to the
15 Board, and we would request that the Board appoint
16 a Hearing Officer. Yes, we would come back to
17 you.

18 (Ms. Shropshire leaves meeting)

19 CHAIRMAN RUSSELL: Any other questions?

20 MR. WHALEN: Mr. Chairman, if I could
21 just ask Mr. North to assess the relative strength
22 of state chartered banks in his judgment to
23 nationally chartered banks currently. I know
24 there have been some write-ups in the Fed Gazette
25 with respect to this in our district. Mr. North,

1 I'm sure you probably have done some research.

2 Could you comment on that.

3 MR. NORTH: Mr. Whalen and Mr. Chairman,
4 I'm sorry to disappoint you, but I have not done
5 research on that. What I can tell you that I will
6 do is I will ask the banking division to submit a
7 comment for the record in this rulemaking that
8 provides that answer, though.

9 MR. WHALEN: Thank you.

10 CHAIRMAN RUSSELL: Any other questions?

11 (No response)

12 CHAIRMAN RUSSELL: Seeing none, I would
13 entertain a motion to -- Is there anyone out there
14 that would like to speak to this matter before the
15 Board takes action?

16 (No response)

17 CHAIRMAN RUSSELL: Seeing none, I'll
18 entertain a motion to initiate rulemaking.

19 MR. MILLER: So moved.

20 CHAIRMAN RUSSELL: Marvin. Is there a
21 second?

22 MR. ANDERSON: Second.

23 CHAIRMAN RUSSELL: It's been seconded by
24 Larry Anderson. Questions or comment?

25 MS. KAISER: I need to recuse myself.

1 CHAIRMAN RUSSELL: Four. I guess if
2 everything is affirmed, then we can initiate, or
3 we'll have to wait for Robin to come back. We'll
4 take a shot at it. Heidi has recused herself, and
5 is on the record of doing that. All those in
6 favor, signify by saying aye.

7 (Response)

8 CHAIRMAN RUSSELL: Opposed.

9 (No response)

10 CHAIRMAN RUSSELL: Motion carries. All
11 right. The agenda item that everyone has been
12 waiting for. The next item on the agenda is
13 initiation of rulemaking to adopt new rules and
14 make amendments to Title 17, Chapter 8,
15 Subchapters 5, 6, 7, 8, 9, and 12 to set minor and
16 major source permitting thresholds for greenhouse
17 gas emissions. Mr. Livers.

18 (Ms. Shropshire enters hearing)

19 MR. LIVERS: Mr. Chairman, members of
20 the Board, Vicki Walsh will be walking you through
21 this rulemaking. I've got a couple comments I
22 want to make prior to that. Some of those are
23 comments I'm sure Vicki is going to repeat and
24 probably provide a little more detail on in some
25 cases. I just wanted to highlight, I guess, a

1 couple of key issues surrounding this.

2 Like the previous rulemaking, we
3 anticipate this one will be noncontroversial, but
4 we'll probably end up with some hearings, I will
5 imagine.

6 Basically one of the things I guess I
7 want to emphasize first is the action we're
8 proposing the Board take today is not a decision
9 to regulate greenhouse gases. That decision is
10 being made by the Federal government. EPA has
11 three actions underway: Last week's endangerment
12 finding, and then two pending rulemakings that we
13 expect will be final sometime after the first of
14 the year. The rulemakings are the CAFE Clean Car
15 Emission standards, and what EPA is calling the
16 tailoring rule. Vicki will be covering those.
17 But those are the actions that ultimately will
18 result in a decision to regulate greenhouse gases.
19 We're anticipating those actions.

20 And the second point I guess I want to
21 cover is that once the first of those rules is
22 final, it will have an immediate effect on air
23 quality regulation of greenhouse gases in Montana.
24 Typically when the Federal government proposes and
25 has a new program or new rulemaking, they allow

1 adequate time for the State to conduct their own
2 rulemaking. In this case, it's a little different
3 situation.

4 What would happen is there is an
5 existing list of regulated pollutants, and once
6 one of those rules is final, the six greenhouse
7 gases in this rulemaking then come onto that list
8 of regulated pollutants, and are immediately
9 subject to action.

10 So when we were looking at this, we
11 considered various timing options. I think the
12 first thought that came into our head was: Should
13 we wait for the Feds to act, and then immediately
14 take action in the wake of that decision? The
15 problem with that is it leads us to limited
16 choices, none of which are very good.

17 One is it would immediately cause us to
18 be in the position of permitting thousands of new
19 actions all of the way down to, say, a replacement
20 of a home furnace. That seemed completely
21 unworkable, and not where any of us really wanted
22 to go.

23 We looked at the possibility of issuing
24 permits that were essentially illegal until the
25 State rulemaking took effect, and it would take

1 effect retroactively -- that's not a desirable
2 outcome either -- or we could look at putting
3 permitting on hold, at least the effective permits
4 on hold, until that rulemaking took effect. And
5 again, we're talking about a several month period
6 here, and none of those seemed like a good way to
7 proceed.

8 So we made the decision that the more
9 prudent course of action is to initiate now, and
10 be ready to act to final this rule when the Feds
11 are ready to move and final theirs. So in doing
12 that, we put some provisions into this rule that
13 basically says the State rule would not take
14 effect unless or until the Federal rule does, and
15 if for any reason that Federal rule were to be
16 delayed or go away, it would be null and void, the
17 State rule would follow that same pattern. That's
18 the way our proposed rule reads.

19 We also have a temporary provision in
20 this rule that sunsets the end of calendar 2011,
21 and the sense there is that that will give us all
22 time to figure out what it means to be regulating
23 these pollutants. And we know that the landscape
24 is changing, and we'll be able to see where the
25 Federal government is going, and have some sense

1 where the State needs to go with that as well.

2 The final point I guess I want to make
3 before I turn it over to Vicki is that what we're
4 proposing is to exactly mirror what the Feds are
5 doing. The tailoring rule gives them a threshold
6 below which this will not apply. We're proposing
7 to use the same threshold. So we're not looking
8 at anything more stringent or less stringent than
9 the Federal government.

10 So with that, I'd like to turn it over
11 to Vicki Walsh, please.

12 MS. WALSH: Mr. Chairman, members of the
13 Board, for the record, my name is Vicki Walsh.
14 I'm the Air Quality Permitting Supervisor with the
15 Department's Air Resources Management Bureau.

16 Before I get too far into reiterating
17 some of what Tom said today, I'd like to just note
18 that even in putting this presentation together, I
19 struggled with putting the word "greenhouse gas"
20 up there because it does create a reaction in most
21 people's minds. And I think that's a function of
22 many years of hearing a lot of information thrown
23 about in the media, as well as just recently in
24 the last week, all the information that we've been
25 bombarded with. So just a recognition of that.

1 And as Tom said, I'd like to make a
2 couple of notes about two things at least that
3 we're not doing with this request for rulemaking.
4 We're not creating a new greenhouse gas or new
5 regulation under this rulemaking, and we're also
6 not creating emission limits for greenhouse gases
7 or CO2. For the benefit of some of the new Board
8 members, I'd like to go over just some basic
9 terminology dealing with air quality permitting,
10 and most of which I'll use today.

11 We issue several permits within our
12 section dealing with air quality permitting. We
13 have a State program under which we issue permits
14 that are commonly termed "Montana air quality
15 permits," or MAQP's. We also implement and are
16 delegated to implement Federal programs, two of
17 which we'll be discussing today. One is the New
18 Source Review program, or NSR program, that we
19 commonly issue permits called PSD permits, or
20 Prevention of Significant Deterioration permits.
21 We also implement the Title 5 program, in which we
22 issue Title 5 or operating permits.

23 It's good to keep in mind that each of
24 these different types of permitting activities
25 have different thresholds of which you have to

1 meet before you're required to get that type of
2 permit.

3 Today's rulemaking, as Tom said, isn't a
4 creation of a new standard, but will be an
5 adjustment or a request to adjust the permitting
6 threshold for this new pollutant that we will
7 have, which is greenhouse gas emissions. Again,
8 the initiation is for those Federal programs that
9 we implement to mirror EPA's request, so for those
10 large sources, or those major sources, under the
11 Title 5 or New Source Review program, we'd be
12 requesting a threshold that would be equivalent to
13 EPA's. We're also requesting that identical
14 thresholds for our minor source program under
15 issuance of the Montana air quality permits.

16 So to get to why we're here today a
17 little bit, I think we need to take a step back,
18 and understand the general direction of where the
19 Federal government and EPA is going even as we
20 speak. Again, like Tom said, we really are here
21 as a result of actions being taken at the Federal
22 level, and what that means within Montana statute
23 after those actions occur.

24 EPA did move forward as recently as this
25 week in finalizing its greenhouse gas endangerment

1 finding. What that allows the Federal level to do
2 is to establish greenhouse gas emission standards
3 for different activities, that being either
4 permitting and/or mobile sources. So like Tom
5 said, we expect the light duty vehicle rule, or
6 commonly termed the clean cars rule, to go out
7 next spring final.

8 That rule is intended to -- One of the
9 things that rule is intended to do is to create
10 greenhouse gas emission standards for the 2012
11 fleet of vehicles that will go out. So really
12 what does that mean to EPA?

13 In terms of EPA, that will create
14 greenhouse gas as a regulated pollutant under
15 their statutes and their laws. So EPA is taking
16 an action as to what that means to air quality
17 permitting, and they've moved forward with this
18 proposal for what they termed a greenhouse gas
19 tailoring rule, which is essentially that same
20 thing we're requesting here, is an adjustment to
21 those permitting thresholds.

22 Hopefully this structure will kind of
23 lay it out a little bit more clearly. Again, EPA
24 is taking this endangerment finding, which allows
25 them to move forward with the final action on the

1 clean cars rule. So what that really means to us
2 in terms of permitting is at the time that that
3 action occurs, we are triggered as a regulated
4 pollutant. Under our current Montana statute,
5 greenhouse gas emissions will now be placed in
6 that list of pollutants that we regulate.

7 Normally, like Tom said, when a new
8 ambient standard or a new standard comes out, EPA
9 allows a period of time for the State to take a
10 look at that standard, look at the impacts in
11 different areas of that standard, develop a plan
12 by which they're going to control those emissions.
13 That process is not being given to us in this
14 rulemaking effort. When greenhouse gas is
15 triggered as a regulated pollutant, it will then
16 trigger our currently established permitting
17 thresholds for those sources under air quality
18 permitting.

19 EPA is making the move under the
20 tailoring rule to adjust its thresholds for air
21 quality permitting of stationary sources to handle
22 that. They have made a decision that they don't
23 feel that their current thresholds are appropriate
24 for the pollutant known as greenhouse gases, and
25 they are requesting or proposing to adjust that.

1 As a result of that, Montana has a State
2 program, and EPA can't fix our -- they don't have
3 the ability to fix our program, so we will be left
4 with permitting sources at our current levels upon
5 that final action, which like Tom said, really
6 does bring us down to levels as small as home
7 furnaces with the definition of greenhouse gas.

8 So again, action on EPA's part on either
9 the clean cars rule or the tailoring rule,
10 regardless of which one they take first, will
11 allow or will become a -- greenhouse gases will
12 become a regulated pollutant in the state of
13 Montana, and what does that mean again? Well, it
14 means that under our rules, we're required to
15 issue permits, air quality permits to sources at
16 established permitting thresholds.

17 So what are we here today to ask of you?
18 It sounds pretty straight forward if we're just
19 adjusting one threshold, but I realize you have a
20 15 page packet in front of you, so just to kind of
21 take a step back as to what that means.

22 We again are adjusting this permit
23 threshold. The request is to set the permit
24 threshold equivalent to what EPA is asking for,
25 and that's at a level of 25,000 tons per year of

1 greenhouse gas.

2 The other note to make within the
3 rulemaking is that under our Federal program, each
4 pollutant has a specific level -- it's termed a
5 significance level -- that if, for instance, a
6 large facility takes an action, and they're
7 already under that Federal permit program, if they
8 take an action, they're allowed so much pollution
9 before they have to go through what would be
10 termed a major modification under the permit
11 world.

12 Without an adjustment, or without
13 setting any type of significance level, by default
14 we're left with that level being zero. So what
15 that means to our sources is that if a source
16 decides to make a change without setting a level,
17 any amount of change in greenhouse gas emissions
18 will trigger that major modification process for
19 them. So it means additional analyses for them,
20 additional work in terms of looking at controls,
21 and so on and so forth.

22 So in line with asking for the
23 adjustment to the threshold, we're also asking for
24 a level to be set at the significance level. And
25 currently under your packet, that is set as a

1 range which is identical to what EPA is taking
2 comment on under their proposed action.

3 Also the packet is rather large because
4 we have to adjust this threshold under each of our
5 subchapters where we permit. So under Subchapter
6 6, we're adjusting it. Under Subchapter 6 is our
7 open burning rules. We're requesting adjustment
8 under our minor program source program rules,
9 which is under Subchapter 7; we're requesting
10 adjustment under the New Source Review program
11 rules, which are Subchapters 8 and 9; and then
12 we're also asking for that adjustment under
13 Subchapter 12, which is our Title 5 program.

14 One of the asides to the rules, we're
15 also asking for an adjustment or a change in the
16 fee under Subchapter 5 for some local entities,
17 being landfills and POTWs, that we believe will be
18 newly related sources under the air quality world
19 as a result of these actions, even setting them at
20 25,000 tons, and we want to make their fees more
21 in line of what sources would be paying.

22 As Tom stated, the rule also contains
23 some contingencies. The Department is not
24 requesting that the Board move forward ahead of
25 what the Federal EPA is doing. We're not asking

1 to create greenhouse gas as a pollutant if that's
2 not done at a Federal level. So we do have a
3 contingency within the rulemaking that the rule
4 will not become effective until the EPA rules
5 become effective.

6 Also we've seen in the last several
7 years a lot of court actions being taken on
8 vacatures of rules, so we have also a contingency
9 in there that if at such time the rules are
10 vacated, our rules will also automatically be
11 vacated. As Tom stated, we also have an
12 expiration date listed in the rule. For those
13 Board members that have been around for awhile,
14 under the air quality world, we normally work with
15 our stakeholders, and we find that process to be
16 very important to us. We acknowledge that we have
17 not had time. Based on the speed of EPA's
18 actions, and what we feel is necessary for us to
19 do under these rules, we have not had time to
20 undertake that stakeholder process, and so we
21 would like to position ourselves so that we can
22 react if final action is taken this spring at a
23 Federal level, but we'd also like the time to go
24 back and have that stakeholder process, and bring
25 another proposal to the Board with all of their

1 involvement.

2 So again, why are we here today? I
3 think that's been one of the biggest questions on
4 people's minds. It seems rather fast. So just to
5 kind of reiterate again, this is a little bit
6 different than other EPA or Federal actions where
7 we feel like we have time to determine what type
8 of program we can implement, and how that would be
9 implemented most appropriately.

10 We believe that initiating today will
11 provide us a position in the spring to take action
12 to continue to issue permits in a lawful manner,
13 to continue to issue permits within our statutory
14 time frames. Again, the temporary status is meant
15 and intended to be able to go back, and bring
16 those stakeholders into the process, and have
17 further discussions with them. And again, without
18 the rule, I think, as Tom said, we're left with
19 thousands of permit actions, and it doesn't seem
20 to be very palatable options without some type of
21 rulemaking.

22 In summary, I'd just like to say we are
23 requesting initiation of rulemaking, we're
24 requesting that the Board appoint a Hearing
25 Officer. And I'd also like to recognize -- I

1 think everybody should have a new or modified
2 version of the notice in front of them. Do you
3 have those? Joyce has got them right behind you.

4 We did make some adjustments based on
5 some commentary that we heard to ensure that this
6 effective status would play out the way we wanted
7 it to, so the changes you'll see are mainly listed
8 in the new rules. There has been some changes in
9 language to New Rules I, II, and III; V, VI, and
10 VII, IX, X and XI. I think you'll probably get
11 it. We skipped one in there.

12 So the new rules are intended to be
13 placed under each subchapter that is affected, so
14 one, two, and three are actually repeated under
15 five, six, and seven. You'll see they're repeated
16 as each set to go in the subchapters. Those
17 modifications again were changes to ensure that we
18 don't implement the rule prior to EPA setting its
19 effective date. EPA may have the ability to set
20 the effective date off in some time period, and we
21 didn't want to be issuing permits or required to
22 issue permits prior to that time.

23 So I am open for any questions that you
24 might have.

25 CHAIRMAN RUSSELL: Questions for the

1 Department?

2 MR. WHALEN: Mr. Chairman, if you would,
3 would you please note to Joyce. I haven't
4 received those new rules yet by email. If she
5 could send them to me, I'd be happy to review.

6 CHAIRMAN RUSSELL: Joyce doesn't have
7 them yet, so we'll get them as soon as possible.

8 MR. WHALEN: Thank you.

9 MS. WALSH: Mr. Chairman, Mr. Whalen, I
10 could probably -- Under New Rule I, the basic
11 change is to ensure that the effective date is
12 following the dates of when you would have to
13 comply with the light duty vehicle rule, so it's
14 essentially changing it to ensure that the State
15 rules would not have to comply or come into effect
16 until such time that we would have to comply with
17 any Federal action.

18 MR. WHALEN: Okay. Thank you.

19 CHAIRMAN RUSSELL: I just have some text
20 issues that maybe aren't issues for anyone but me.
21 In 17.8.743(1)(b), it seems like the only place
22 that you don't use the term "other." It says "15
23 tons of any air pollutant" instead of "any other
24 air pollutant." Am I missing something there?

25 MS. WALSH: Mr. Chairman, no, you're not

1 missing anything. We made the decision not to
2 make too many other corrections, but the 15 tons
3 there -- we could put it in there. There was no
4 reason that it doesn't say that.

5 CHAIRMAN RUSSELL: And before we take
6 action, I think it needs to be in there for
7 consistency.

8 The other thing is when you look at the
9 NSR and the PSD, the Feds are posting a range of
10 10,000 to 25,000.

11 MS. WALSH: Mr. Chairman, yes, for the
12 significance level, they're posting -- they're
13 accepting comments on a range. So they've set the
14 threshold level at 25,000, but they're accepting
15 comments on a significance level range of 10,000
16 to 25,000.

17 CHAIRMAN RUSSELL: Do these rules
18 reflect if they set the significance less than 25
19 that our rules will -- I was going to use the term
20 tailor, but I shouldn't -- that they'll fit what
21 the Feds will come up with if it's less than 25?

22 MS. WALSH: Mr. Chairman, do you mean
23 for the permitting threshold of 25,000 or the
24 significance threshold?

25 CHAIRMAN RUSSELL: Significance.

1 MS. WALSH: The significance threshold
2 it does allow us. There currently is a change, so
3 in the same spots that the Feds are requesting
4 comment on a range for the significance level of
5 10,000 to 25,000, we've placed that same range in
6 the notice.

7 CHAIRMAN RUSSELL: It's kind of hard to
8 -- I know you don't want to put a lot of text out
9 there for us to get confused with, but it's kind
10 of hard to follow what rule is being affected.

11 MS. WALSH: Right. It is.

12 MS. SHROPSHIRE: Could I follow up on
13 that question. Just to clarify, for the scope of
14 this rulemaking, is the scope a range of 10,000 to
15 25,000?

16 MS. WALSH: Mr. Chairman, Ms.
17 Shropshire, the notice is set for -- so the permit
18 threshold, a required source would be affected if
19 they meet a 25,000 ton threshold. That's how the
20 notice is set up.

21 If an existing source were to make a
22 change, we're accepting comments on that range of
23 10,000 to 25,000 for greenhouse gases, and that's
24 how PSD applies. If an existing source out there,
25 if you have a PSD source out there, they're

1 allowed to make certain changes up to certain
2 levels, and their significance levels are
3 different for individual pollutants, and this
4 would set a significance level for greenhouse
5 gases and accepting comment on that range.

6 CHAIRMAN RUSSELL: Because it's inverse.
7 From a PSD standpoint, if you set that lower, it's
8 actually more restrictive.

9 MS. WALSH: Uh-huh.

10 CHAIRMAN RUSSELL: Versus in permitting,
11 if you set it lower, it would be still be more
12 restrictive.

13 MS. WALSH: Yes.

14 MS. SHROPSHIRE: I've got a whole bunch
15 of questions, so I don't know if we should wait
16 until after public comment, or I should pursue
17 some of them now.

18 CHAIRMAN RUSSELL: I've been thinking
19 about that, too. I think that we could continue
20 to do this, and I think that there is a lot of
21 folks in the audience that would like to address
22 this, and it may be better to kind of group. I
23 just wanted to get my text issues out of the way.
24 It may be better to group our questions after we
25 hear from folks in the audience. I'd rather do

1 that.

2 Now, with that said, I wonder if instead
3 of just have things just kind of pinball all over
4 the place, I wonder if we shouldn't -- because I
5 know there is folks. Can I see a raise of hands
6 of who wants to speak to this?

7 (Response)

8 CHAIRMAN RUSSELL: I think I probably
9 want to use a format of proponents versus
10 opponents, and we can go with -- and I'm sure some
11 people don't want to take either side maybe. But
12 I think I'd rather take it in that fashion and
13 start with opponents. So we'll get started on
14 public comment then.

15 MR. GALT: Mr. Chairman, members of the
16 committee, for the record, my name is Dave Galt.
17 I'm the Executive Director of the Montana
18 Petroleum Association, and I'm pleased to have the
19 opportunity to make a few comments before you take
20 probably the most significant action on this
21 Board.

22 MPA is very concerned by the course of
23 action taken by US Environmental Protection Agency
24 with regard to greenhouse gas emissions, and the
25 fact this agency has taken steps to regulate

1 greenhouse gas prior to any congressional approval
2 of climate change legislation. Even EPA Director
3 Lisa Jackson, when announcing the endangerment
4 finding on Monday, said that the Federal
5 legislation was desirable, and was the desirable
6 way to regulate these emissions.

7 As we are just beginning to understand
8 the impact of the endangerment finding on affected
9 sources, we're now faced with an action commenced
10 by the Department of Environmental Quality without
11 necessary consultation. We think this rule is
12 premature.

13 MPA represents a wide range of members
14 from various small emission sources to some of the
15 largest in the state. We sympathize, but
16 respectfully disagree with Director Opper that the
17 promulgation of this tailoring rule is necessary
18 to protect the minor sources, those under 25,000
19 tons per year.

20 Embarking on this course of action
21 before Congress or EPA acts is risky. We
22 appreciate all of the contingencies that the
23 agency has sought to place in the rule to protect
24 Montana from variations in EPA actions that can't
25 be predicted yet. A major point here is that it

1 is critical that any contingency that you or the
2 agency place in administrative rule must not
3 trigger until the date EPA actually requires
4 specific permitting of CO2 sources as opposed to
5 mere adoption of a final rule by the EPA.

6 Even with that, MPA still has serious
7 concerns about this rule before you today. We
8 firmly believe that the EPA does not have the
9 legal authority to regulate greenhouse gas
10 emissions under the Federal Clean Air Act. It's
11 virtually a legal consensus that EPA's proposed
12 arbitrary cut-off of application for greenhouse
13 permitting to sources greater than 25,000 tons is
14 not authorized by the Clean Air Act, and will
15 ultimately be overturned. I believe everybody
16 thinks that. We do, the other side does, and the
17 states do.

18 This would place the State of Montana
19 clearly in the pole position with a State agency
20 regulating greenhouse gas. For the first time,
21 the Montana DEQ will be taking the position of
22 regulating greenhouse gas sources in excess of
23 25,000 tons per year without any enabling
24 statutory authority.

25 MPA is concerned that like EPA, DEQ does

1 not have the legal authority to defend the 25,000
2 ton per year limit for greenhouse gas. We fear
3 that the threshold will not withstand legal
4 challenge. If EPA's proposed tailoring rule is
5 struck down, it appears to us that Montana's rule
6 would still remain in effect, unless the EPA's
7 regulation of light vehicles was also struck down.
8 If that happens, then the requirements for
9 permitting will be lowered to levels for all other
10 regulated pollutants.

11 Just as damaging, if EPA's claimed
12 authority to establish arbitrary exceptions for
13 administrative convenience were actually to be
14 upheld, then the precedent would be that EPA could
15 increase or reduce those limits for large and
16 small facilities alike at their entire discretion,
17 or that third parties would sue to force this
18 result.

19 MPA is also concerned that if this rule
20 is passed, the EPA rules are not actually put into
21 effect, or are rejected, the Court at the Montana
22 DEQ will not be legally able to enforce the
23 contingencies in the rule, and that Montana will
24 become the first of fifty states to regulate
25 greenhouse gas for emissions of trivial size.

1 This would be the very result that EPA itself
2 called absurd and would be administratively
3 impossible, and it would be a death blow to any
4 business in this state. And if that situation in
5 fact happens, these rules will be in direct
6 violation of Montana's no more stringent rule.

7 In addition to the serious doubts about
8 the legality, the cost and feasibility once this
9 proposed rule is initiated, it certainly will
10 spark contentious litigation and drain resources
11 from DEQ and all parties, and yet nearly everyone
12 recognizes that ultimately Federal regulation of
13 greenhouse gas will likely occur in some form,
14 it's not likely to resemble the proposed rules,
15 thus making Montana a target for no purpose.

16 MPA is concerned that in this late hour
17 DEQ's request to the BER has not enabled the
18 public to analyze adequately the consequences of
19 moving forward with these rules. Further, this
20 rule has not had the review and comment by the
21 Clean Air Act Advisory Committee, which is unusual
22 and sets a dangerous precedent, particularly when
23 no emergency exists.

24 If these rules are subject to a
25 retroactive effective date, why can't this process

1 be postponed for another month, so that a more
2 orderly and thoughtful process can be completed.
3 The Montana Petroleum Association respectfully
4 requests that the Board reject the DEQ's request
5 and send the rule back to the agency to engage in
6 consultation with the Clean Air Act Advisory
7 Council and public. Then and only then would we
8 reconsider this rule. Thank you.

9 CHAIRMAN RUSSELL: Thanks, Dave. Next.

10 MR. PARKER: Chairman Russell, Board
11 members, my name is Jim Parker. I'm with PPL
12 Montana, Manager of Environmental Compliance
13 Services. As most of you know, PPL Montana is
14 part owner, and operates a fleet of merchant coal
15 fired and hydroelectric generating stations in
16 Montana. We have some serious concerns with the
17 proposed rule.

18 First of all, we understand that DEQ
19 faces a challenge if EPA passes vehicle tailpipe
20 emission rules, because some feel that stationary
21 sources then will be automatically subject to the
22 permitting requirements and threshold requirements
23 of Title 5 and PSD permitting programs; and
24 further we recognize that the rule is meant to
25 exempt smaller sources so that DEQ is not

1 inundated with permit applications.

2 However, we feel that right now the rule
3 actually creates more uncertainty than it
4 eliminates. There are some questions -- as Mr.
5 Galt alluded, and I'm sure others will allude to.
6 Is the rule legally defensible? What is the
7 statutory basis for this rule right now, given the
8 absence of any EPA rulemaking, particularly source
9 rulemaking? What happens if EPA ultimately passes
10 thresholds that don't match up with Montana's
11 rule? What happens then? Is the rule able then
12 to withstand a legal challenge, or will it be
13 overthrown?

14 So these are some of the questions that
15 we have, and we believe that they require serious
16 consideration before the rulemaking can be
17 initiated. We will be submitting written comments
18 which will expand on these points and possibly
19 others, but given the short notice, we didn't have
20 time to put the detail together here.

21 We also ask the Board to clarify the
22 requirements and time frame for submitting written
23 comments, because the MAR notice -- that I saw
24 anyway -- did not address that issue. It was
25 silent on that issue. So we'd appreciate some

1 clarification on that.

2 And finally, on behalf of PPL Montana
3 and the other owners of the facilities, I
4 appreciate the chance to share our views. Thank
5 you.

6 CHAIRMAN RUSSELL: Thanks, Jim. Just
7 since we're not actually rulemaking yet, that's
8 why some of this stuff isn't filled in.

9 MR. WHALEN: Mr. Chairman, the last name
10 that last speaker, please?

11 CHAIRMAN RUSSELL: Parker.

12 MR. ALLEN: Mr. Chairman, members of the
13 Board, I have two comments. I want to wear two
14 hats here just briefly. First of all, I want to
15 present a brief statement on behalf of the CHS
16 Refinery in Laurel. And Pat Kimmet, who is the
17 refinery manager, could not be here today, and
18 asked me to make this statement on their behalf.

19 Chairman Russell, members of the Board,
20 first of all, the refinery management wants me to
21 make it clear that they appreciate the good
22 working relationship they have with the DEQ Air
23 Resources staff, and that these comments are not
24 intended to be critical of them. However, there
25 is real concern with the process that was followed

1 that led to these greenhouse gas emission rules
2 being before you today for you to approve
3 initiating rulemaking.

4 There was no involvement by the Clean
5 Air Act Advisory Committee, and CAAAC has proven
6 to be a valuable forum for discussing various
7 issues involving air quality, including proposed
8 rules. The committee discussions always result in
9 a better understanding of everyone's concerns, and
10 ultimately in more workable rules. It would make
11 sense to gain input from CAAAC before going
12 forward with this rulemaking.

13 The second point: What is the rush?
14 The proposed rules surfaced very quickly. There
15 does not seem to be any compelling reason to
16 initiate rulemaking within a few days of when the
17 EPA made its finding. There are no EPA rules yet,
18 it hasn't been in the Federal Register, which
19 makes a request to initiate rulemaking premature,
20 and puts Montana out front with a lot of
21 unanswered questions as to how these rules will
22 interact with EPA rules.

23 Third point. Why does Montana want to
24 risk having a rule in place until it is absolutely
25 clear that EPA's planned rule stands up to the

1 challenges that it will face? If the State has
2 its own rule, it could be a problem to implement
3 it in the absence of a Federal rule.

4 CHS has other concerns with some of the
5 language in the proposed rule, but will address
6 them later if the Board moves forward with this
7 rulemaking.

8 The other hat I will put on just
9 briefly, just to follow up with Mr. Galt's
10 comments for a little bit. I serve as Executive
11 Director of the Western Environmental Trade
12 Association, WETA, and for those of you not
13 familiar with it, it is a coalition of companies,
14 associations, agriculture, other businesses, labor
15 unions, and individuals involved in natural
16 resources in the state.

17 And so to move forward with this kind of
18 a proposal at this point is of concern to a lot of
19 people. In fact, it will be something that will
20 play out one way or the other over the next
21 months, probably years -- I'm sure years -- that
22 is going to affect the lives of everybody involved
23 in the natural resource industry, plus everybody
24 else in the state.

25 But our members are those involved in

1 the kind of activities that really form the
2 economic backbone of this state, so it's important
3 when you take this kind of action of going forward
4 with this kind of a rulemaking, and that's why we
5 really think it's important to think about some of
6 the consequences that could occur, and some of
7 those outlined by Mr. Galt.

8 I remember when this Board was created,
9 and the Legislature gave the powers to the Board
10 to do certain things. I guess I would just
11 encourage the Board in this particular case to say
12 no. You can say no. The Department does a great
13 job in their own world of creating regulations
14 they bring before you, but you do represent
15 different segments of the economy, different
16 segments of expertise. That's why you're on the
17 Board.

18 And so I would just encourage you on
19 this one to back up a little bit, and say wait.
20 Go back and talk -- and even the Department this
21 morning talked in their presentation about the
22 fact that they want to come back and talk with the
23 stakeholders. Well, they usually do that. They
24 do a really good job with that. But all of a
25 sudden, this one just came forward, and we think

1 it's important for a rule like this, before it
2 goes forward, that that happen, that we have the
3 stakeholders involved. And the Clean Air Act
4 Advisory Committee, as I mentioned in the other
5 statement, has been very effective over the years
6 in exploring all of the ramifications that can
7 occur in looking at the different rules.

8 So there is nothing that says you have
9 to go forward, and there is so many unanswered
10 questions. A lot of our members are big concerns,
11 but there are a lot of smaller ones, and yet if
12 you go -- and I know the intent of the Department
13 is to give them the power to be able to protect
14 all of those people, the smaller entities, as well
15 as some of the larger ones, to have it all set out
16 here.

17 But if something goes wrong with this
18 whole process, and if there is anybody that can
19 tell me what's going to happen in Washington, D.C.
20 today, or tomorrow, or the next day, then they
21 could make a lot of money selling crystal balls.
22 So there is some real traps on this thing that I
23 hope that you recognize and will question the
24 Department on; but even more important, I think it
25 would be important for us to back up, have a

1 chance to get the stakeholders involved, and come
2 back with another rule.

3 So we hope that you will take that
4 approach, and I appreciate the opportunity to make
5 the comments.

6 CHAIRMAN RUSSELL: Thanks, Don. Ann,
7 did you have to leave? I'm going to let Ann
8 Hedges speak. I know I said the opponents first,
9 but I think Ann had asked to at least get out of
10 here by noon.

11 MR. WHALEN: Mr. Chairman, again, for
12 clarification, the name and association of that
13 last speaker?

14 CHAIRMAN RUSSELL: Don Allen, WETA.

15 MR. WHALEN: Thank you.

16 MS. HEDGES: Mr. Chairman, members of
17 the Board, thank you very much for accommodating
18 my schedule. I am Ann Hedges with the Montana
19 Environmental Information Center.

20 The same interests that are in this
21 today have been actively engaged at the Federal
22 level in these exact same discussions, and whether
23 anybody in this room agrees with them or not, the
24 EPA is going to be moving forward, and it is much
25 anticipated that EPA will finalize these other two

1 rules in the coming months, and it makes a lot of
2 sense for the State to have its rules mirror those
3 Federal regulations, and if not, I think we're
4 asking for trouble.

5 But there is no better back drop to this
6 discussion right now than what's going on with
7 world leaders in Copenhagen. What is occurring
8 worldwide is we are seeing oceans rise, we are
9 seeing glaciers melt, we are seeing impacts on
10 people all over the world.

11 Those impacts are also occurring in
12 Montana. They are occurring mainly in regard to
13 water availability. There are very serious
14 predictions about how water is going to be
15 impacted by carbon dioxide emissions and other
16 greenhouse gases. We know that when water dries
17 up, or when water comes at the wrong time of year,
18 or in the wrong form in Montana, it affects all of
19 the industries that are the backbone of the state
20 -- agriculture, timber, recreation -- and it will
21 affect our municipal water supplies.

22 These are very, very serious issues, and
23 we can no longer to afford to continue ignoring
24 them. EPA isn't, and the State can't afford to
25 ignore what EPA is doing. We will save Montana

1 resources by moving forward with this rule.

2 As the Chairman knows, MEIC has been
3 involved in a number of lawsuits against the State
4 for failing to regulate CO2. We can avoid
5 situations like occurred in Roundup, we can avoid
6 situations like occurred in the Highwood
7 Generation Station, by moving forward with this
8 rule, and not having a conflict between Federal
9 regulations and State regulations. That will
10 cause nothing but more headache and heartache for
11 the Board and every party involved. Much better
12 to have the rules be clear as we move forward,
13 both at the Federal level and at the State level.

14 Different jurisdictions have reached
15 different decisions than this Board on some of the
16 fundamental issues of whether CO2 is a regulated
17 pollutant under the Clean Air Act. Those
18 different jurisdictions, one of them just being
19 the Supreme Court of Utah in the last week, make a
20 regulatory framework that is even more difficult
21 for industry moving into the future, because if
22 one jurisdiction says CO2 is a regulated pollutant
23 under the Clean Air Act and another doesn't,
24 industry is wondering what's the bottom line.

25 So is the public, and this is an issue

1 that public cares deeply about. It's a much
2 better idea to have a consistent regulatory
3 framework for all involved.

4 Now, I think that Ms. Walsh pointed out
5 accurately that this is only going to apply to
6 existing sources that have significant
7 modifications in the future. They're not all
8 going to have to start complying immediately.
9 When they significantly modify their facility, at
10 that point those existing sources will have to
11 comply with this new rule. New sources will have
12 to comply with the new rule, but that's the way
13 it's always been.

14 And BACT is not disastrous. As many of
15 you know, who sat on this Board during the
16 Highwood case, the Roundup case, we learned a lot
17 about BACT in those processes, and Best Available
18 Control Technology permitting is really about
19 making sure that the State analyzes different
20 technologies to reduce pollution, and considers
21 economic factors, and environmental factors, and
22 weighs and balances the cost and benefits of those
23 factors, before it requires any particular
24 technology.

25 That is ultimately what is going to

1 occur as a result of this rulemaking, is when
2 facilities emit really large quantities of CO2 and
3 other greenhouse gases, there will just simply be
4 a balancing test to look at alternative
5 technologies to see if there is a better
6 technology out there to reduce CO2. That's the
7 bottom line of what we're talking about here, and
8 that is exactly the direction that this state
9 should be moving.

10 This right here today is not about
11 substantive changes that people want to make to
12 this rule. This rulemaking process should
13 proceed. There is a need for additional public
14 comment. Every interest here will participate in
15 that public comment period. Every member of the
16 public in Montana will be notified, through the
17 newspapers, through the website, and they will
18 also be allowed to participate.

19 Now, I would argue that taking this back
20 to the Clean Air Act Advisory Committee would be
21 an enormous mistake because that advisory
22 committee is really just made up of the same
23 industrial interests that are here today. I
24 occasionally go to these meetings, and who is in
25 those meetings? It's not members of the general

1 public. Those meetings are full of these
2 interests in the room today that represent their
3 industries, and DEQ.

4 The members of the public care deeply
5 about this issue. The only way you're going to
6 really gather the comment that is necessary from a
7 wider swath of Montanans who care about global
8 warming is to initiate the rulemaking process,
9 have one or a couple public hearings, gather all
10 of the comments on the substance of this rule as
11 you would in any rulemaking process, and then come
12 back to this Board, and make the decision about
13 whether what DEQ is proposing is appropriate.

14 But to stop now is to set ourselves up
15 to be on a different path than the Federal
16 government, and that will create nothing but
17 confusion down the road. And I would urge you to
18 avoid that. Thank you.

19 CHAIRMAN RUSSELL: Thanks, Ann.

20 MR. FORRESTER: Mr. Chairman, members of
21 the Board, I'm Gary Forrester here today
22 representing MDU Resources.

23 MDU Resources understands why the
24 Montana DEQ would attempt to propose their rule
25 timing it as close with the EPA's as they can. We

1 do not think it is appropriate for the Montana DEQ
2 to propose this now.

3 The outcome of the GHG vehicle rule and
4 tailoring rules are not final, and their legal
5 fate is uncertain. Even with the recently
6 finalized EPA CO2 endangerment finding, we believe
7 the Montana DEQ Quality is taking a risk, and
8 potentially wasting resources and time in
9 requesting the Board of Environmental Review to
10 issue regulations ahead of Federal rules that have
11 not been finalized.

12 There is no question whether the EPA can
13 arbitrarily establish higher thresholds for PSD
14 and NSR review under the Montana Clean Air Act.
15 MDU believes it would be more prudent for Montana
16 and the DEQ to wait until these rules and issues
17 are vetted through public comment and response to
18 the Federal process first. Thank you, Mr.
19 Chairman, members of the Board.

20 CHAIRMAN RUSSELL: Thanks.

21 MR. O'HAIRE: Mr. Chairman, members of
22 the Board, for the record, my name is Todd
23 O'Haire. I represent a company called Cloud Peak
24 Energy. It may be a name that most of you aren't
25 familiar with, and that's to be understood,

1 because as of about a month ago we didn't exist.
2 You may more be familiar with our previous name,
3 which was Rio Tinto Energy America.

4 Our parent company of Rio Tinto, on the
5 19th of November, they spun us off, our coal
6 assets, so that we are now a publicly traded
7 company on the New York Stock Exchange in the coal
8 mining business, exclusively in the coal mining
9 business, where we are operating exclusively in
10 the states of Montana and Wyoming. Here in
11 Montana, we own the state's largest coal mine,
12 which is the Spring Creek Mine located near
13 Decker, Montana, employing around 220 employees
14 down there.

15 I think it's important to note here real
16 briefly that Cloud Peak Energy, like our
17 predecessor, Rio Tinto Energy America,
18 acknowledges that climate change is real, and that
19 from a perception point as well, and that it's at
20 least in part caused by anthropogenic sources,
21 manmade sources. As such, Cloud Peak Energy
22 supports a national regulatory regime that would
23 manage carbon dioxide and greenhouse gas
24 emissions.

25 One thing that they have been consistent

1 about in our discussions on the national level
2 with regard to greenhouse gases, we think that any
3 regulations need to be technologically feasible;
4 timelines have got to be reasonable; and just as
5 importantly, we believe that the emissions -- or
6 the result needs to be in meaningful reductions in
7 emissions.

8 One of the things that we have been
9 consistently opposed to is any sort of a patchwork
10 of regulations, either by states or individual
11 regions, setting up their own various patchwork of
12 regulations.

13 When the reports of the Board and the
14 Department's intent on this rule first emerged,
15 our first concern was over the anti-business
16 message that this may send, and I expressed that
17 to Richard Opper when he called me and we visited
18 about that, about the intent on this.

19 However, having visited with Director
20 Opper, and visiting with Dave Klemp, who spent
21 some time visiting with me, and explaining how
22 this process was going to take place, and what the
23 intent was, I think I understand the strategy. I
24 think. And I'm not sure I agree with that
25 strategy, so I fit probably in that category

1 where Chairman Russell was talking about whether
2 or not I wanted to be an opponent or a proponent
3 of this rule because I'm not sure where we want to
4 be.

5 However, we're very concerned about
6 staking out on a one-in-the-nation sort of a
7 rulemaking process. In my conversation with Dave
8 Klemp, he expressed to me that he wasn't sure that
9 there was any other state at this time that was
10 embarking on such a rulemaking process. That may
11 be bad, that may be good. I don't know.

12 However, I will say that the mercury
13 rule -- As you know, this Board enacted rules on
14 the mercury rule -- is somewhat more strict than
15 what the Federal rule was going to embark upon.
16 And just this summer I completed a tour of the
17 Colstrip facilities, where I saw first hand that
18 they were putting the finishing touches on a \$20
19 million mercury control standard there; and since
20 we've seen the recomplete rejection of the
21 national mercury rule. So now Montana is left
22 with that mercury rule to the exclusion of the
23 state. So our big concern is that we're going to
24 be left with something that would be singular to
25 the state of Montana.

1 Mr. Livers kind of outlined some of the
2 ludicrously of not doing anything should the
3 Federal EPA rule come into effect. We could
4 actually see actual NEPA analysis be required for
5 the construction of a home, given the greenhouse
6 gas emissions that a home could emit.

7 So I guess my thought at this point is
8 our initial reaction is that perhaps the
9 Department and the Board shouldn't be so eager to
10 just go along with the Federal EPA. Perhaps this
11 should be an opportunity that the Board, and the
12 Department, and this Administration, should stand
13 up and vocally express their opposition to what's
14 going on on the national level.

15 I'm sure that there is other states that
16 are starting to realize the implications that the
17 national EPA rule could have on just things such
18 as implementing, building new homes, and those
19 sort of things. Perhaps the strategy should be
20 instead of eagerly trying to figure out a way to
21 comply with what EPA is doing, maybe you should
22 try to focus on how we can try to talk with
23 President Obama and the EPA, and get them steered
24 in the direction that would accommodate more of a
25 Federal legislation.

1 And I bring back to my beginning point,
2 where we support Federal legislation, and we think
3 that it's important that we embark upon Federal
4 legislations that we would have something that
5 would be meaningful and more workable on the state
6 level. Thank you.

7 CHAIRMAN RUSSELL: Thanks.

8 MR. WHALEN: Mr. Chairman, what was the
9 name of that speaker from Cloud Peak Energy?

10 CHAIRMAN RUSSELL: Todd O'Haire.

11 MR. WHALEN: Thank you.

12 MR. MAGRAW: Seeing no further
13 opponents, I'm Chuck Magraw, and I'm representing
14 the Natural Resources Defense Council.

15 I think this is a prudent way for the
16 Board and the agency to proceed. I don't think
17 it's that big a deal frankly as what you've been
18 hearing here today. In fact, other states are
19 wrestling with this issue. Some states, it's my
20 understanding, have these limits in statute, and
21 are looking at having to enact a legislative fix
22 with respect to this.

23 Of course, most of what you've heard
24 here has been an issue with what EPA is doing,
25 with what's happening in Washington, D.C., and

1 that's fine. But your job here and the agency's
2 job is to try to take a Federal regulatory
3 program, and mesh it with your own. As I said, I
4 think it's a reasonable way for you to go forward.
5 Thanks.

6 CHAIRMAN RUSSELL: Thanks, Chuck. Any
7 further?

8 (No response)

9 CHAIRMAN RUSSELL: All right. Questions
10 from the Board?

11 MS. SHROPSHIRE: This is probably a
12 question for the Department. One of the comments
13 was the Federal rule isn't final. Is our scope --
14 Would we be allowed to change this rule to
15 accommodate any Federal changes in their rule
16 based on how it's written?

17 MS. WALSH: Mr. Chairman, Ms.
18 Shropshire, for the record, again, my name is
19 Vicki Walsh with the Department.

20 The notice is somewhat prescriptive, in
21 that we do have a threshold set. We are taking
22 action on the range. In terms of whether or not
23 EPA finalizes action, that was some of the
24 modifications made to the language which was
25 dealing with the contingencies.

1 So the Department again is not
2 requesting that we move ahead and establish a
3 program without the Federal government finalizing
4 that program. And also in terms of effectiveness
5 or effective date, that dealt with the
6 modifications within the notice. If the rule goes
7 final, yet EPA has an allowance for making it
8 effective six months from that date, then we don't
9 want to move ahead with that either.

10 So in some respects, the notice is
11 somewhat prescriptive, but in some respects those
12 contingencies are being looked upon to take care
13 of some of those issues.

14 MS. SHROPSHIRE: Follow up. So just for
15 example, if EPA were to change the threshold to
16 50,000 tons, or if they were to add exemptions for
17 some reason, would we have to initiate a different
18 rulemaking, or could we continue on with this
19 rule?

20 MS. WALSH: Mr. Chairman, Ms.
21 Shropshire, right now it is prescriptive in that
22 the threshold is set, so if they set a different
23 threshold than the 25,000, I believe we would have
24 to come back and initiate for a different
25 threshold. We don't have that in a range right

1 now.

2 MS. SHROPSHIRE: Is there a way to
3 broaden the scope of this rulemaking contingent on
4 their final rule?

5 MS. WALSH: Mr. Chairman, Ms.
6 Shropshire, I think we could put in a range. I'm
7 not sure that we could put in a range stating that
8 it will be what EPA is effectively taking, but we
9 could put in a range up to 50,000 or whatever to
10 take comment on that range.

11 MS. SHROPSHIRE: I've got a few more
12 questions. Have you looked at the types of
13 sources that this would impact, say, for example,
14 how big of a wood burning facility would get
15 permitted, how many megawatts, how the 25,000 tons
16 transfers to a size of a facility in terms of
17 megawatts or something along those lines?

18 MS. WALSH: Mr. Chairman, Ms.
19 Shropshire, we have looked at it in terms of our
20 current threshold. We've done some checking. We
21 couldn't answer that across the board for every
22 single industry type, but we know the larger
23 sectors would be affected by that 25,000 threshold
24 level. A good majority of our current major
25 sources and Title 5 sources would be affected by

1 that threshold.

2 At least in the analysis that EPA has
3 put forth, and to some extent we agree with, the
4 scope of rulemaking with the 25,000 will affect
5 some new sources. There will be new categories of
6 sources that will be affected by this rulemaking,
7 but historically may not have held air quality
8 permits. You could look at, for example, some
9 larger hospitals' boilers may be over 25,000.
10 Some POTWs we expect; some landfills we expect may
11 be over 25,000 of tons of greenhouse gas
12 emissions.

13 MS. SHROPSHIRE: To continue on, what
14 about like slash piles or things like that? Would
15 those be considered?

16 MS. WALSH: Mr. Chairman, Ms.
17 Shropshire, we have not actually run numbers on
18 the open burning on emissions.

19 MS. SHROPSHIRE: But for example, if you
20 were to determine -- I guess that's one of the
21 questions is how you're going to measure that, or
22 the potential to emit, I guess, things like that
23 for those sorts of things.

24 MS. WALSH: Mr. Chairman, Ms.
25 Shropshire, we've looked at -- we have established

1 emission factors, so that's what you're going
2 after. We've found the difficulty in find them
3 for every industry sector. So historically in
4 terms of emission factors for the open burning
5 world, we worked with our major open burners to
6 establish those emission factors, so I would
7 foresee the same thing occurring with specifically
8 the open burners.

9 Some of the other industry sectors, they
10 bring forth some emission factors that they get
11 from manufacturers of different types of
12 equipment.

13 MS. SHROPSHIRE: And these may be just
14 sort of rough. I don't know. I'm kind of making
15 estimates. Because I know there is a lot of
16 discussion on utilizing the wood that we have from
17 the dying trees, and looking at some wood burning
18 facilities. And do you know -- For example, let's
19 say a small wood burning facility that would emit
20 in excess of 25,000 tons, they would be subject to
21 a Title 5 permit as well; is that correct?

22 MS. WALSH: Mr. Chairman, Ms.
23 Shropshire, if you're speaking in terms of like
24 biomass facilities?

25 MS. SHROPSHIRE: Yes.

1 MS. WALSH: We ran some numbers on our
2 current permitted source. We have one biomass
3 facility permitted at the University of Montana
4 Western down in Dillon. They would not hit the
5 25,000 threshold. We believe, at least
6 speculation on some of those sources that are
7 talking about potentially building, they're larger
8 than what would be at U of M Western, and so they
9 hold a strong possibility of being over that
10 25,000 mark. So therefore, yes, they would not
11 only be Title 5, but they would also be PSD
12 facilities.

13 MS. SHROPSHIRE: Looking at some of the
14 greenhouse gas legislation like in the east coast,
15 and then Western Climate Initiative, and some of
16 those discussions, one of the big questions that's
17 out there is whether or not biomass facilities
18 would be considered eligible. And you might not
19 have to include that, but in this case, anything
20 that emits CO2 equivalent would be eligible.
21 There is no exemption under this.

22 MS. WALSH: Mr. Chairman, Ms.
23 Shropshire, no. Under the current air permitting
24 structure under the Federal government rules,
25 there would be no exceptions to those types of

1 facilities.

2 MS. SHROPSHIRE: I have more, but I
3 maybe should back off for other questions.

4 CHAIRMAN RUSSELL: Other questions.

5 MR. LIVERS: Mr. Chairman, Tom Livers
6 for the Department. Maybe to add to Vicki's
7 comments, it seems the line of questioning is
8 directed to the concern that what if we get out of
9 sync with where EPA lands, and there is some
10 legitimate issue there.

11 I don't think we're in a position to be
12 able to anticipate every potential direction that
13 could go, but we do have the option of
14 supplemental rulemaking if something emerges in
15 the Federal rules that we don't anticipate. We
16 lose some of the timing advantage that we had
17 hoped for if that happens, but that is certainly a
18 tool available to us. If there is some left turn
19 that nobody saw coming in the Federal rulemaking,
20 we can accommodate that.

21 We looked at the possibility of a range
22 on the permitting threshold, but all our
23 indications are that that's a pretty certain
24 number, that 25,000 tons per year. We expect to
25 the best of our ability that's where that

1 rulemaking is going to land.

2 MS. KAISER: I don't know if Vicki or
3 Tom can answer that, but I guess I need
4 clarification or more convincing for what the down
5 side is for us to waiting until the EPA rule is
6 final or an EPA rule is final.

7 MS. WALSH: Mr. Chairman, Ms. Kaiser,
8 the way the Department is viewing this is that the
9 rule does put us in a position to react, and
10 again, it kind of relates to the way EPA would
11 normally react with a rule. So they would
12 normally give you three years to develop a plan as
13 to how you would implement a program.

14 In this scenario, the implementation or
15 the finalization of the Clean Car Rule will
16 establish greenhouse gas emission standards under
17 Title 1 of the Clean Air Act. By doing so, it
18 brings under our definition of regulated pollutant
19 greenhouse gas emissions.

20 So under the current structure we have,
21 what that would mean is we now have a new
22 pollutant under that list, it's just automatically
23 there, and so we would be required to issue
24 permits under our current permit thresholds for
25 every pollutant that's listed there, so greenhouse

1 gas emissions would then be --

2 Sources would be required to have a
3 permit if they have the potential to emit
4 greenhouse gas emissions at several different
5 levels under our current structure, and those
6 could be as low as 25 tons year, in comparison to
7 just what the Feds are requesting and adjustment
8 to 25,000 tons per year.

9 So the down side to waiting is that we
10 believe we could be placed in a position that EPA
11 takes final action, and we not only have thousands
12 of new sources out there that would hit that
13 trigger level because we haven't adjusted our
14 rules, and would need a permit; but we also have
15 sources in front of us that would have normally
16 gone through potentially our minor source program
17 that are now under the Federal program, and have
18 quite a bit additional analyses to undertake.

19 One of the other items is even our
20 registered sources, the oil and gas program, those
21 wells, if they were to make a change without this
22 rule, again, we would have a significance level;
23 we wouldn't have a separate threshold, so any
24 change in their emissions of greenhouse gases
25 would trigger them a major source; and so we see

1 significant numbers of permit actions, as well as
2 the additional analyses under those permitting
3 actions.

4 An example would be in a normal year, we
5 do two PSD actions a year. In this scenario,
6 without this rulemaking, almost entirely every
7 action that crosses our desk would be a PSD
8 action.

9 CHAIRMAN RUSSELL: Just to follow up on
10 that. I mentioned 17.8.743, which is air quality
11 permits when required. If you took out that, and
12 we're dealing with greenhouse gases as a
13 pollutant, then basically that would say if you
14 had 15 tons per year, you would be subject to a
15 permit.

16 Now, I think you know this. On a year,
17 what's a house with a natural gas furnace put out?

18 MS. WALSH: Mr. Chairman, you're right.
19 Under that specific scenario, under "B,"
20 specifically applies to asphalt plants, mineral
21 crushers, and screens; but under the scenario of
22 even 25, the average household that we've seen
23 runs at about 30 tons per year, and that's a
24 midsize house for their furnace.

25 CHAIRMAN RUSSELL: So like a four unit

1 apartment, certainly when you start to apply the
2 correct rules instead of the asphalt plant, might
3 be subject to permitting.

4 MS. WALSH: Right.

5 CHAIRMAN RUSSELL: Without this in
6 place.

7 MS. WALSH: Correct. I'm not sure if
8 that helps.

9 MS. KAISER: It did. Thank you.

10 MR. MILLER: What would be -- We've
11 heard comments here. Why doesn't the Department
12 kind of immediately implement -- What you usually
13 do is go out there, and let's solicit, meet with
14 the stakeholders, and engage the public, and do
15 your normal thing before we initiate all these
16 rules, and let's get a conversation going, and get
17 everybody involved, and immediately really go at
18 it aggressively.

19 Obviously I'm convinced we need to get
20 timely on it, but maybe not get so formal and get
21 regimented into rules and all of this, and then
22 come back and say, "Okay. We've talked to
23 everybody, and now --" Okay. Maybe we'd better
24 kind of have a buy-in from everybody, and all
25 sources, and then let's get at it.

1 MS. WALSH: Mr. Chairman, Mr. Miller, I
2 can try and answer that question. Again, like I
3 said, the Air Resources Management Bureau takes
4 that stakeholder process very seriously, and as
5 you've heard stated, we normally use that process,
6 and we haven't in this course of action.

7 That really is because of the immediate
8 application of this rule. We historically have
9 not seen the immediate application of a rule that
10 would so drastically affect the air permitting
11 world and what we're working on in a daily basis.
12 So we feel that we normally would have time to do
13 that.

14 That was part of the major discussions,
15 not only with the contingency, but with the
16 temporary status of the rule. We do want to make
17 that effort available over the next 18 months, but
18 we recognize that that is a work in progress.
19 That stakeholder process normally takes us a few
20 months on a simple topic, and then we're into a
21 three month to a five month time frame on getting
22 rules in place.

23 And so we really didn't feel, with the
24 speed that it seems that the Federal government is
25 taking actions, we really didn't feel like we had

1 that available to us in this scenario. And so
2 that was the purpose of the temporary status of
3 the rule, to allow us to actually go back and
4 actually work through that stakeholder process.

5 CHAIRMAN RUSSELL: Just to follow up on
6 that. Have you put enough side boards on this --
7 you've got regulations that we're going to look at
8 promulgating -- that if this thing fails to look
9 like this, it doesn't happen?

10 MS. WALSH: Mr. Chairman, yes, we
11 believe we do. We believe that that is the
12 intention of the contingencies. I know you heard
13 discussions of our mercury rule, and we believe
14 even in this context, we've looked at what will
15 happen -- If it doesn't become effective, how we
16 can retroactively apply it to actions that are
17 taking forth before us, and we don't have permits
18 out there that would have been in noncompliance
19 through the permitting issuance process.

20 And then also on the flip side, if some
21 actions occur where at a Federal level it goes
22 away again, the Department is not asking or
23 seeking to be out there alone issuing greenhouse
24 gas permits. We're asking that that be
25 automatically null and void and taken out of our

1 rules.

2 CHAIRMAN RUSSELL: And as we set the
3 schedule for this, if we do initiate today, it's
4 clear that based on a normal schedule that we'll
5 know what happened with EPA before we take final
6 action. Whether we should be debating this or
7 not, we'll be debating probably the final rule
8 anyway from EPA.

9 MS. WALSH: Mr. Chairman, the Department
10 believes that as well. We believe we'll see
11 continued action on behalf of EPA throughout our
12 rulemaking process.

13 CHAIRMAN RUSSELL: Just for the record,
14 I like our mercury rule, but I know there is
15 others that don't. But it's a good rule. We knew
16 we were getting outside what the Feds were doing
17 with the mercury rule. We were very clear about
18 that. But it's a good public health rule, and I
19 like it.

20 MR. LIVERS: Mr. Chairman, I'd like to
21 echo a couple of Vicki's comments. The
22 stakeholder process in air regulation is the gold
23 standard for the Department. We take it very
24 seriously, we've established good relationships,
25 and we've come out with a better rules as a result

1 of those discussions. I don't take it lightly
2 that we're having to move quickly here.

3 Similarly none of us likes surprising
4 the Board, or coming in quickly with things, and
5 forcing a real rapid pace, and that's one of the
6 reasons we tried to give at least an initial
7 conceptual heads up via email a couple weeks ago.

8 Our original plan, when we started
9 discussing this recently, was we would present a
10 briefing at this Board meeting, and look at
11 initiation at the first meeting in 2010.

12 When we sat down and really talked
13 through the schedule, and looked at the time frame
14 that EPA was on, and the time frame we would need
15 to conduct the state rulemaking, we decided that
16 was unworkable, and it would lead us into that
17 position of having no good solution once
18 greenhouse gases fell under the list of regulated
19 pollutants. We'd have to deal with that, and we
20 would not have rulemaking in place to have any
21 side boards.

22 So we chose to the move forward, and we
23 chose to have the side boards and the caveats that
24 you described. We recognize that we don't want to
25 get ahead of the Feds on this, we just need to be

1 ready when they move.

2 CHAIRMAN RUSSELL: Just a comment on the
3 stakeholders. This is bigger than CAAAC, too.
4 It's bigger. Now you have solid waste facilities,
5 you have POTW's, so it's more than just the normal
6 stakeholders in an air rulemaking. So I wonder if
7 it isn't the Board's -- if it isn't really a Board
8 level function to bring all of the stakeholders
9 in, since it really does have WPCAC and everyone
10 else. Is there a solid waste one, too? Rick?
11 There is a solid waste one out there, too.

12 So vetting it may be difficult in all of
13 those committees anyway. Once again, I know I'm
14 sounding like an advocate here.

15 MR. ANDERSON: What is a realistic time
16 frame for EPA's action on this complex of a
17 rulemaking process?

18 MS. WALSH: Mr. Chairman, Mr. Anderson,
19 I don't believe I can really speak for EPA. But
20 one of the considerations that we looked at when
21 we were looking at initiation is really this Clean
22 Cars Rule.

23 And our understanding is that it is
24 being established to set greenhouse gas emission
25 standards for the fleet of vehicles that will be

1 out in 2012; and our understanding from that is
2 that they have to meet a deadline for issuance of
3 that rule in March of this year to allow for that
4 to be effective in that fleet of vehicles. And so
5 at least it seems on the surface that EPA has to
6 meet the deadline for the Clean Cars Rule as of
7 March 31st, 2010.

8 So we feel fairly certain that that will
9 move. In recognition of that, the air permitting
10 staff in EPA are reacting to that with the
11 tailoring rule to help adjust their thresholds
12 dealing with air quality permitting, and so the
13 expectation is that the tailoring rule will at
14 least follow that rule. It's potentially possible
15 that they could do it before, although comments
16 aren't due on that rule until the end of December.
17 But we expect that that will kind of go along with
18 the Clean Cars Rule.

19 MS. SHROPSHIRE: Is part of this under
20 the fees, the municipal solid waste landfill and
21 POTWs, the fee for new sources \$500 and the fee
22 for other sources is \$15,000? I'm just concerned
23 that in light of probably the education that you
24 guys -- if this goes through -- that you're going
25 to have to do, you're going to have to spend, I

1 would think, a lot more time on some of these new
2 sources than you might even with old, and is that
3 a reasonable number?

4 MS. WALSH: Mr. Chairman, Ms.
5 Shropshire, really the effect of that is most of
6 the existing sources that are established in our
7 rules will have to go through rulemaking for -- At
8 the time they go through rulemaking for greenhouse
9 gases, it will be considered a modification, which
10 will result in a fee of \$500, if they go through
11 modification.

12 These types of sources within local
13 governments, the air quality rule will be new to
14 them. They don't even hold a permit with us. And
15 so yes, in light of time, an effort we may be
16 spending some time with them, but we did not feel
17 it was appropriate in terms of the activity for
18 permitting would be essentially the same for those
19 existing sources, and those local communities. We
20 felt like it was a pretty hard hit and surprise to
21 be hit with a new regulatory action at the cost of
22 \$15,000. So that was kind of what we were looking
23 at for those local entities.

24 MS. SHROPSHIRE: And in light of -- As I
25 understand it, in terms of the scope of these, if

1 we put a large number, we can always go less, but
2 we can't go higher. And I'm just wondering if it
3 makes sense to bump that number up, and we can
4 reduce it. But again, you guys are going to eat
5 that cost, and it's still DEQ's time. So I don't
6 know if there's -- That's one thing I would like
7 to consider is --

8 CHAIRMAN RUSSELL: Isn't this in the
9 same -- It is the air quality permit application
10 fee, and for these non-normal PSD permits, you're
11 reviewing for a suite of other things, and under
12 the POTW and solid waste, you're just looking at
13 greenhouse gas emissions.

14 MS. WALSH: Mr. Chairman, because they
15 would be pulled into the PSD world, we would have
16 to look at the other pollutants, although we don't
17 believe that those other pollutants would be as
18 big of an issue. So I think that would be a
19 correct statement, that in most cases you'd be
20 looking at greenhouse gases.

21 CHAIRMAN RUSSELL: Just before Robin
22 goes again, I don't understand under the -- In
23 that table, what is AS/ASM&B.

24 MS. WALSH: Mr. Chairman, the last fee
25 rulemaking that we went through established those

1 categories. One of the things that we did that
2 was finalized was to start to structure the
3 application fees somewhat in line with the size of
4 the source, and the amount of work that would go
5 into. So those categorizations were actually
6 finalized in the last rulemaking, so you don't see
7 those definitions, but we did define those.

8 And so "A" is your major source, it's a
9 Title 5 source; "S" and "SM" stand for synthetic
10 minor, so it's a source that has taken a
11 limitation within their permit to stay below the
12 Title 5 threshold level. They'll take a federally
13 enforceable limit. "B" are your common minor
14 sources, so they're our State source, like an
15 asphalt plant or crusher.

16 CHAIRMAN RUSSELL: I kept looking for
17 what those were.

18 MS. WALSH: Unfortunately they're not
19 out yet. They're not published. So it's still
20 under the last notice that was finalized, so you
21 don't see them.

22 MR. LIVERS: Mr. Chairman, Ms.
23 Shropshire, I just had some information from David
24 Rusoff, staff attorney on this issue. And with
25 respect to the question on fees, the 15,000 is

1 what is in the existing rule, so the 500 we're
2 proposing. Anything within the spectrum between
3 those two would be within the scope of the
4 rulemaking.

5 MS. SHROPSHIRE: All right. Great.

6 CHAIRMAN RUSSELL: Are you going to be
7 long?

8 MS. SHROPSHIRE: No, but I do have a
9 couple more questions.

10 CHAIRMAN RUSSELL: I'm just wondering if
11 -- I think there is going to be a lot of
12 deliberation. And just understand, because lunch
13 is here, and we could continue until 1:30, and
14 then all of a sudden we'd be back doing the same
15 thing. I'm just trying to find some logical break
16 in this. And just from a Board perspective, how
17 many more questions have you already formulated,
18 not knowing what's going to come up through just
19 general discussion?

20 MS. SHROPSHIRE: I just had one quick
21 question for now.

22 CHAIRMAN RUSSELL: Go ahead.

23 MS. SHROPSHIRE: Do you anticipate --
24 One of the questions is with regard to how people
25 are going to measure this, and it sounds like

1 you're going to be using emissions factors to
2 estimate these. But do you anticipate that you
3 will require monitoring equipment on any of these
4 sources, or will you be using emissions factors?
5 Can you give me any thoughts to that?

6 MS. WALSH: Mr. Chairman, Ms.
7 Shropshire, on the larger facilities, especially
8 the electrical generating facilities, many of them
9 already have CO2 monitors, so a lot of that
10 information is actual data that's coming in.

11 I don't see this any differently than
12 how we handle the rest of our sources. The
13 Federal government puts out information on
14 emission factors; we review that information along
15 with potential manufacturers data; a whole host of
16 information that's out there. So I don't see this
17 creating a whole new gamut of monitoring to
18 develop those emission factors. I think that will
19 move along within a State level, as well as a
20 national level, where we'll be able to see all
21 those. So I don't see that to be very different
22 than any of the other pollutants that we currently
23 do.

24 MS. SHROPSHIRE: What's the threshold
25 for requiring monitoring equipment?

1 MS. WALSH: Currently?

2 MS. SHROPSHIRE: Yes.

3 MS. WALSH: I believe -- and I don't
4 want to misspeak -- but I believe some of that
5 comes at the requirements of the acid rain
6 program, so I think they have some other
7 monitoring that they do, that they have continuous
8 emission monitors established for other regulatory
9 framework not dealing with greenhouse gases
10 currently.

11 MS. SHROPSHIRE: All right.

12 CHAIRMAN RUSSELL: I would propose that
13 we would break for lunch. I know that this is a
14 real thing for the folks that come. We're going
15 thirty minutes for lunch, we'll reconvene
16 hopefully at a quarter after one or so, and then
17 we'll just pick this up again, and go from there.

18 (Lunch recess taken)

19 CHAIRMAN RUSSELL: We're going to go
20 ahead and get started again. I'm certain that the
21 Board has some deliberating to do, but during the
22 break, it was mentioned to me that there is an
23 inherent range already that exists in this
24 rulemaking of starting at 25 tons per year to
25 25,000; and we've also discussed the fact that if

1 we do initiate rulemaking, we would like to
2 establish a range that is clear within the rule,
3 and maybe even a little more -- I'll use the term
4 "lenient" for no other better term -- than what's
5 been put in there, 25,000 tons. So I'll let Tom
6 take over from there.

7 MR. LIVERS: Sure. Thank you, Mr.
8 Chairman. Tom Livers for the Department. I had
9 heard from actually a few different Board members
10 during the break one facet of this discussion or
11 another, and the Chairman talked about an inherent
12 range, and what that comes from is the fact that
13 the existing threshold if we do nothing is 25
14 tons. That's where we're going to start
15 regulating if nothing happens, and if the Fed's
16 take the action we anticipate them taking.

17 So 25 tons is the threshold in existing
18 rule. Whatever number is proposed in this
19 initiation becomes the other end of that range.
20 So as currently written, the range would be
21 between 25 tons and 25,000 tons, and when the
22 Board is to take final action, it would be within
23 the scope of this rulemaking to arrive at any
24 number on that spectrum.

25 You have to base that number on the

1 record, on the information you've seen in here in
2 the rulemaking, but essentially what that means we
3 don't have to go out for supplemental rulemaking,
4 and we could land on any number. You could land
5 on any number in that range.

6 So that raises the question of: Would
7 it be prudent to extend the range to give the
8 Board additional latitude, and if the goal is
9 still, as the Department proposes, to look at what
10 the Feds are doing. And we don't anticipate EPA
11 to change its 25,000 ton number, but if it did,
12 really the highest we would envision EPA might go
13 is 50,000 tons.

14 And so if we change the number in this
15 rulemaking, and perhaps even explicitly stated a
16 range as well as maybe a target number, that just
17 gives the Board more latitude to go up as high as
18 50,000 tons, it gives us more latitude, and if the
19 Federal government were to change its number
20 higher, we can still follow that number if that
21 were the desire of the Board, without doing a
22 supplemental rulemaking. So it just gives more
23 discretion. There may be some value in that.

24 And one of the things we could do, maybe
25 in anticipation, I think our staff might be able

1 to characterize not necessarily a lot of examples
2 of each of those iterations, but maybe give some
3 examples of what kind of facilities might be
4 impacted at the different levels so you have a
5 sense what we're looking at. So throw a few
6 different things at you.

7 MR. MIRES: Would your bottom number
8 come up as well, or is it going to stay at 25
9 tons?

10 MR. LIVERS: Mr. Chairman, Mr. Mires, it
11 would stay at 25 tons because that is the existing
12 threshold. If we don't act, that's what's in the
13 existing rule. Anything over 25 tons. If the
14 Feds final their rule, greenhouse gases become
15 regulated pollutants. If we do nothing, then we
16 have to start permitting in excess of 25 tons. So
17 that's a set number.

18 The only way that would come up is if
19 you choose to put a different floor in, and have
20 an explicit range in the rule, but I don't know
21 that there is any value to doing that. I think
22 instead just letting that default number be in
23 there as existing probably makes more sense.

24 CHAIRMAN RUSSELL: Questions about that?
25 Comments?

1 (No response)

2 CHAIRMAN RUSSELL: So what would it look
3 like in the rule? Because whatever action we
4 take, if it's affirmative, then that language has
5 to be set before we leave today.

6 MR. LIVERS: There is a couple ways we
7 could accommodate that, Mr. Chairman. We could
8 just talk about the range explicitly saying 25
9 tons to 50,000 is the number you want, 50,000
10 tons; or we could say up to 50,000 tons.

11 You might also want -- I know there was
12 some discussion about keeping the 25,000 tons kind
13 of in the forefront of the discussion, so although
14 it's a little awkward, we could come up with
15 language that said permitting threshold of 25,000
16 tons or a number on a range up to 50,000 tons, or
17 between 25 tons and 50,000 tons. That might be
18 the most explicit. Again, it's a little bit
19 awkward wording, but if you want --

20 Part of the goal is to cause informed
21 public comment, to have people really know what
22 the Board is looking at. Then I think there might
23 be some value in saying 25,000 tons or a range
24 between the existing 25 tons and the maximum
25 50,000 tons, something to that effect.

1 CHAIRMAN RUSSELL: Robin.

2 MS. SHROPSHIRE: To put that in context,
3 it would be helpful for me if we knew what is
4 defined as a facility.

5 MR. LIVERS: What kind of facilities
6 would fall under different levels?

7 MS. SHROPSHIRE: Like would a city be a
8 considered a facility, or things like that in
9 terms of -- because that may impact that number as
10 well.

11 MR. LIVERS: Sure. Mr. Chairman, Ms.
12 Shropshire, I don't think that we've got an
13 extensive list, but I think our staff does have
14 maybe a few examples at least to help people get
15 their arms around what size of facilities we're
16 talking about in each case, so we can do that now
17 if you'd like. It wouldn't take long.

18 MR. MIRES: Please.

19 CHAIRMAN RUSSELL: To kind of get an
20 idea.

21 MR. MIRES: Yes.

22 MR. KLEMP: Mr. Chairman, members of the
23 Board, for the record, my name is David Klemp.
24 I'm the Bureau Chief for the Air Resources
25 Management Bureau. And Vicki would do a much

1 better job, however I'll do the best I can.

2 We have tried to quantify greenhouse gas
3 emissions from facilities. As Vicki was
4 mentioning to Ms. Shropshire earlier, it's very
5 difficult to obtain accurate emission factor data
6 for this stuff, but we do have some generalities.

7 She mentioned a roughly 60,000 Btu an
8 hour home, which is a midsized home size furnace,
9 is rough 31 tons per year. The U of M Western
10 facility boilers that she mentioned earlier, that
11 is in the neighborhood of 19 million Btu an hour.
12 I believe -- I'm not exactly sure the megawatt
13 size. It doesn't come to me. I was thinking it
14 was ten to twelve megawatts, but I might be
15 mistaken in that. That's roughly 20,000 tons per
16 year of greenhouse gas emissions.

17 Some of the other things like hospitals,
18 we looked at the St. James Hospital in Butte,
19 probably representative of the mid to large size
20 hospitals, with their heating system they would be
21 around 11,000 tons per year.

22 When you start getting above 25,000, you
23 start including things like asphalt plants. A
24 pretty small asphalt plant is about 35,000 tons
25 per year. A small lumber facility in the Seeley

1 area is roughly almost 60,000 tons per year of
2 greenhouse gas emissions. Some of the larger
3 heating plants, like at some of the university
4 systems, if we looked at MSU in Bozeman, you're
5 looking at roughly 160,000 tons of greenhouse gas
6 emissions.

7 Some of the larger facilities, some of
8 the coal fired utilities -- you've probably seen
9 some of these numbers -- 19 million is what we
10 have from like PPL, and that should be fairly
11 accurate with the continuous emission monitors
12 that are in place. Some of the smaller facilities
13 are around half a million, such as MDU Lewis &
14 Clark Station.

15 There are other facilities that it's a
16 little more difficult. Vicki talked about
17 landfills. The way the greenhouse gas definitions
18 work is that you look at the global warming
19 potential, and landfills have methane emissions,
20 and I think the methanes are stated to be, what,
21 25 times the global warming potential. So you
22 need one ton of methane emissions to trigger 25
23 ton permitting requirements under the existing
24 requirements.

25 And some of those facilities are

1 required to capture and use landfill gas
2 extraction systems, and maybe flare them, but not
3 all because of the size, or because maybe they
4 haven't changed. So we're probably looking at
5 many of those as most likely major sources, many
6 landfills.

7 So I hope that gives you just a
8 thumbnail overview of what might be impacted, and
9 I do have some other technical staff here if we
10 need to get further in the weeds. Thank you.

11 CHAIRMAN RUSSELL: Thanks, Dave. I
12 guess we can sit around and ponder all afternoon
13 about this, but first and foremost, we could do
14 this as nested, but I think I would ask for a
15 motion to adopt language that we will put a range
16 in these rules before we would consider taking
17 action on the rule.

18 MR. MIRES: So I would so move that, the
19 range.

20 CHAIRMAN RUSSELL: So the motion would
21 be to add a range that would identify the 25,000
22 tons per year, and create a range of 25 tons to
23 50,000 tons per year. So it would give us the
24 target that's in the EPA's reg, and then adopt the
25 range. Then it would notice a range from 25 tons

1 per year to --

2 MR. LIVERS: I may have heard wrong, Mr.
3 Chairman, but the range would be 25 tons to 50,000
4 tons.

5 CHAIRMAN RUSSELL: Right. I'm sure
6 David and John would be glad to get that language
7 worked up. So it's been moved. Is there a
8 second?

9 MS. SHROPSHIRE: Second.

10 CHAIRMAN RUSSELL: It's been seconded.
11 Further discussion?

12 MR. WHALEN: Mr. Chairman, just so I
13 understand. And this may be a remedial question.
14 But the Department is proposing to the Board that
15 we initiate rulemaking, but not finalize
16 rulemaking; is that correct? So that if this goes
17 to a Hearing Officer and a public hearing, that
18 the Board will have an option to take final action
19 at some later date?

20 CHAIRMAN RUSSELL: That's correct. All
21 we're doing today is considering initiation of
22 rulemaking.

23 MR. WHALEN: A second question, if I
24 may, and you could rule whether this is correct or
25 not, but I wanted to ask a question of Vicki

1 Walsh. Is she still in the room?

2 CHAIRMAN RUSSELL: Vicki had to leave,
3 but we certainly have able replacements.

4 MR. WHALEN: So I'll let you determine
5 who this should go to. But Mr. Galt of the
6 Montana Petroleum Association, as well as Mr.
7 O'Haire from Cloud Peak, and the gentleman from
8 MDU Resources, I think alluded this idea of final
9 action by the EPA, and how rulemaking by the EPA
10 may not in fact be final.

11 I'm wondering what additional steps
12 would be optional beyond rulemaking by EPA before
13 this becomes what we would consider to be, and
14 what the industry groups would consider to be,
15 final action.

16 CHAIRMAN RUSSELL: Joe, we should be
17 discussing the motion on the table, not generally
18 the rule in front of us.

19 MR. WHALEN: Okay.

20 CHAIRMAN RUSSELL: So we have a motion
21 on the table. Is there discussion regarding the
22 range that we'd like to put in there?

23 MR. LIVERS: Mr. Chairman, this is Tom
24 Livers. One point of clarification that's been
25 pointed out to me. The 25 tons is specific to a

1 specific pollutant, carbon dioxide, I would
2 assume, or --

3 MR. KLEMP: Generally.

4 MR. LIVERS: The way the wording would
5 probably read, rather than put the floor in there,
6 we'd put up to 50,000, but I think David would do
7 a better job explaining this.

8 MR. KLEMP: Mr. Chairman, members of the
9 Board, David Klemp again. Yes, in general our
10 permitting thresholds are 25 tons per year. It is
11 different, not necessarily -- there are some that
12 have pollutant specific thresholds, and some that
13 have other activity thresholds. Portable
14 facilities are 15 tons, incinerators are any
15 amount. And so I think Mr. Livers would be
16 correct it would be current thresholds up to
17 50,000.

18 CHAIRMAN RUSSELL: And that makes more
19 sense. So basically the range could be a range
20 from current thresholds up to 50,000 tons per
21 year.

22 MR. LIVERS: That's how we'll word it.

23 CHAIRMAN RUSSELL: Because there are
24 different thresholds in various parts of the
25 world. So Larry, do you take that amendment?

1 MR. MIRES: Yes, that's more clarifying.

2 CHAIRMAN RUSSELL: Okay. Robin, are you
3 okay with that also?

4 MS. SHROPSHIRE: We're essentially
5 changing the 25,000 value in the rule to 50,000?

6 MR. LIVERS: Mr. Chairman, Ms.
7 Shropshire, I think the way we would plan to word
8 that, just so there is a better understanding by
9 those people who might want to comment on this
10 during the rulemaking process, we'd probably be
11 more explicit than that. We would probably say
12 25,000 tons or a number on the range from current
13 thresholds up to 50,000 tons. And we'd put some
14 context to that in the information that went out,
15 so people were able to understand what that meant.

16 And the reason we would still explicitly
17 identify the 25,000 is that's still our best
18 understanding of where EPA intends to land, and
19 the Board certainly isn't -- EPA doesn't dictate
20 what number the Board arrives at, but there is
21 some logic to mirroring in this case what the
22 Federal government does. So while the wording
23 again is kind of awkward, we would work to make
24 sure that there is contextural information, so
25 it's not confusing. I think it's better to state

1 the 25,000, and then as an alternative the range.

2 MS. KAISER: So how does that come out?

3 MR. LIVERS: It's going to -- This may
4 not be verbatim, but I think what we would say is
5 instead of 25,000, we would simply add -- we would
6 keep the 25,000 tons per year, or then add "or a
7 number on a range from current thresholds up to
8 50,000 tons per year."

9 CHAIRMAN RUSSELL: This is certainly --
10 I agree with that. But why wouldn't we just
11 basically look at -- I'm looking at one here. It
12 says 25,000 tons per year or more of GHG, "or a
13 range from," and then plug that number in, because
14 this one is 100 tons. So for each specific rule,
15 why wouldn't we just plug in that specific number
16 and --

17 MR. LIVERS: For the floor? For the
18 lowest threshold?

19 CHAIRMAN RUSSELL: Right. So each one
20 of those, we will go into there -- because it
21 states "100 tons per year or more." We would use
22 that number for the bottom, and then we would cite
23 the range up to 50,000 tons per year.

24 MR. LIVERS: Mr. Chairman, we can do
25 that.

1 CHAIRMAN RUSSELL: I think it's --

2 MR. LIVERS: We will do that.

3 MS. SHROPSHIRE: For example on Page 6,
4 the range there is 10,000 to 25,000.

5 CHAIRMAN RUSSELL: That's PSD. That's
6 significance. That's not for permitting. That's
7 the point I was making earlier, to be very clear
8 that it's the significance that's 10,000 to 25,000
9 for permitting. Right now it's stated to be
10 25,000 tons per year. And we're creating a range
11 only for the permitting, not for the significance.

12 MS. SHROPSHIRE: Okay. Thank you for
13 that.

14 CHAIRMAN RUSSELL: So once again, Larry,
15 are you okay with that friendly amendment?

16 MR. MIRES: I think I'm understanding
17 the word exactly, so that we're safe on it.

18 MS. SHROPSHIRE: I don't know how it
19 will actually be worded, but I understand the
20 intent. I'm happy with the intent. So yes.

21 CHAIRMAN RUSSELL: So further
22 discussion?

23 MR. LIVERS: Mr. Chairman, not wanting
24 to get off the motion on the floor, but just maybe
25 for Mr. Whalen's clarification, we can have

1 discussions on timing for subsequent actions after
2 this vote.

3 CHAIRMAN RUSSELL: We're just
4 establishing the amended language for creating a
5 range specific to the notice.

6 MR. WHALEN: Mr. Chairman. Thank you,
7 Tom, for that clarification. Mr. Chairman, if I
8 understand the intent of the amendment, it's to
9 increase the minimum threshold of greenhouse gases
10 to 50,000 tons, and to provide greater certainty
11 throughout the rulemaking with respect to that
12 scale of emissions. Is that clear?

13 CHAIRMAN RUSSELL: Well, Joe, part of
14 this is each section of the regulation has
15 basically -- When you put the 25,000 tons per year
16 of greenhouse gas, the second part of that says
17 "or 100 tons of any other pollutant." If we were
18 to take the greenhouse gas out of there, you'd be
19 left with 100 tons of any pollutant, any air
20 pollutant. If greenhouse gas is considered a
21 pollutant, then that would be your floor for
22 regulation. So the floor is the start of the
23 range.

24 What we'd like to do is: There is a
25 potential, a slight potential, that the EPA could

1 land on 50,000 tons per year instead of 25,000, so
2 we would like to notice it in such a fashion that
3 we stay within -- that we don't have to back up in
4 every instance. We've done this several times in
5 the past, that we would basically notice a range
6 that would be what we would hear comments on, and
7 establish the range based on -- Whatever number we
8 land on has to be within that range that we
9 notice.

10 MR. WHALEN: I understand that. I guess
11 my question would be is if the interest is to
12 align State regs with Federal regs, and we
13 produced this draft rulemaking suggesting 25,000
14 tons, when did it become apparent that it will
15 probably or possibly land on 50,000 tons? What's
16 the basis for that?

17 CHAIRMAN RUSSELL: It's just based on a
18 little uncertainty, in the fact that if it does go
19 higher than 25,000 tons, then it's outside of the
20 scope of rulemaking.

21 MR. WHALEN: I would have to say I would
22 support greater certainty. Regulations in and of
23 themselves -- and maybe the industry people will
24 agree with me on this -- that's not where the risk
25 is. The risk is in uncertainty. So if we can

1 provide as much certainty in this process as
2 possible going forward, I think public comment
3 will reflect favorably upon that.

4 MR. LIVERS: Mr. Chairman, Mr. Whalen,
5 it's still the Department's belief that 25,000
6 tons per year is going to be the number that EPA
7 settles on. Everything we have heard indicates
8 that. We're simply giving ourselves some
9 flexibility if something unanticipated happens
10 there, and the highest threshold we could see them
11 moving to is 50,000.

12 We still think it's going to be 25,000.
13 And at some point we could go even go higher, but
14 then the range becomes maybe too much to grapple
15 with, and if there's something that's completely
16 unexpected happens, then we'd be into supplemental
17 rulemaking. But it's still our belief that 25,000
18 tons per year is going to be the permitting
19 threshold that EPA lands on.

20 MR. WHALEN: Okay. So we're going to
21 vote on the amendment first, and then if that
22 fails, we'll come back to an original motion to
23 initiate rulemaking without the amendment?

24 CHAIRMAN RUSSELL: That would be
25 correct.

1 MR. WHALEN: Okay. Thank you.

2 MS. SHROPSHIRE: We haven't made an
3 initial motion to initiate rulemaking.

4 CHAIRMAN RUSSELL: No. I made that
5 clear. Generally we would do this as a nested
6 motion, but we're farther away -- I think we have
7 a few additional questions before we initiate
8 rulemaking, or attempt to initiate rulemaking
9 through a motion. At least I'm going to challenge
10 the Department on a few questions before we
11 initiate overall rulemaking.

12 MR. ANDERSON: I just want to clarify.
13 The purpose of creating this range is so that if
14 we initiate this rulemaking, and start down the
15 rulemaking process, and the EPA changes its
16 threshold, we don't have to initiate a whole
17 another rulemaking process.

18 CHAIRMAN RUSSELL: As long as what they
19 changed is within the scope of what we changed.

20 MS. KAISER: Can I make a comment while
21 we're on the topic of uncertainty. It seems like
22 to eliminate uncertainty, that we wait until the
23 EPA finalizes the rule to initiate. I know you've
24 given a reason, Tom, and the Department has given
25 a reason not to do that; but it seems like we're

1 trying to get rid of the uncertainty by adding
2 different language, and it may not do that.

3 CHAIRMAN RUSSELL: Well, I guess I have
4 a comment on that. It wouldn't strike me as a
5 range. When you look at the rule the way it's
6 written, and you basically have a number, and it
7 says "or 100 tons per year of any other
8 pollutant;" but the Department's position on that
9 is that establishes a range from that lower number
10 to the 25,000.

11 Part of my intention in seeing a range
12 established is so it's very clear that there is a
13 more stringent layer down there, which is 100 tons
14 per year instead of 25,000. So the range just
15 makes it very clear to the public that there is a
16 lower limit, and it's already there in the rule.
17 If we don't do anything prior to it, then all of a
18 sudden there is a lower limit that may be in
19 effect for emitters.

20 MR. LIVERS: Mr. Chairman, I think there
21 are a couple of points at least on the table, and
22 I agree. I think as it's written, there is an
23 implicit range from the existing standard to the
24 higher. This raises the upper end of the range,
25 but it also makes it explicit for the purpose of

1 informing public comment.

2 And then the other point I think is Ms.
3 Kaiser's comment. I think they're legitimate. I
4 know there is uncertainty around this, and you're
5 right. If we were to wait, the Department's
6 convinced there are significant risks to waiting,
7 and we don't like any of the outcomes that we see
8 coming.

9 I guess not to get off point, but we
10 anticipate -- we can talk about this more after
11 this issue -- we would anticipate timing final
12 adoption probably immediately after, as soon as
13 possible after we see what the final Federal rule
14 looks like, so there would be some ability.

15 So what we've tried to do is propose a
16 rule that has caveats, off-ramps, all sorts of
17 side boards, that will keep us from getting
18 crosswise with whatever we see coming out of the
19 Feds. I think we've got one on the table now,
20 particularly with this range, that anticipates all
21 the most likely possibilities of what this Federal
22 rule is going to look like.

23 There could always be something
24 different, and if that happens, then we're in
25 supplemental. There is no two ways about it.

1 We're essentially doing a modified rulemaking, and
2 we're there. But we've got a broad rule that
3 gives us some discretion and some flexibility
4 within the scope of this rulemaking to react to
5 whatever finally comes from the Feds. And that's
6 what we've tried to do.

7 So you're right. There wouldn't be much
8 less uncertainty if we waited to see what came
9 out, but we really fully expect that there's
10 enough breadth and discretion in what we're
11 initiating that we can see what comes out, and
12 then respond to it in the final action.

13 MS. KAISER: Another quick question.
14 Once we initiate rulemaking, if we initiate
15 rulemaking, aren't we under a certain time
16 schedule to complete?

17 CHAIRMAN RUSSELL: Well, we have motion
18 on the floor, and these are some of the things
19 that I think are outside of the motion, that I
20 think they still very much need to be discussed.
21 But I think we ought to clear this motion off one
22 way or the other, and then talk about even the
23 merits of initiating rulemaking. Just because we
24 establish a range doesn't initiate rulemaking. It
25 just establishes a range, hopefully provides a

1 little clarity in this.

2 And once again, better we should have
3 initiated and done this as nested, but I thought
4 we should just try to get this off the table.

5 MR. WHALEN: Mr. Chairman, I'm prepared
6 for the question.

7 MR. ANDERSON: Let me get one more
8 clarification. I'm just taking, for example
9 17.8.743(e). And basically it says, "Any other
10 facility or emitting unit upon which construction
11 was commenced," etc. etc., "with the potential to
12 emit 25,000 tons per year or more of greenhouse
13 gases, or more than 25 tons per year of any
14 other," and "other" is underlined, "airborne
15 pollutant other than lead."

16 So shouldn't we be creating a range for
17 greenhouse gases, and also a range for any other
18 airborne pollutant?

19 CHAIRMAN RUSSELL: No. Other airborne
20 pollutants already have -- those are already
21 established. They're pollutants, and they're
22 established in rule.

23 MR. ANDERSON: All right.

24 CHAIRMAN RUSSELL: If we adopted the
25 language -- just since we're on that.

1 MR. ANDERSON: So we're just dealing
2 with greenhouse gases.

3 CHAIRMAN RUSSELL: Correct. And it
4 would basically state, "increase the potential to
5 emit by 25,000 tons per year or more of GHG, or a
6 range from 25 tons per year to 50,000 tons per
7 year." That would be the range that would be
8 right in that rule. That would be the amendment
9 that's on the table and we're discussing at this
10 time. That's how that language would look.

11 I am going to call for the question.
12 All those in favor of establishing a range as
13 specified, signify by saying aye.

14 (Response)

15 CHAIRMAN RUSSELL: Opposed.

16 (No response)

17 CHAIRMAN RUSSELL: Motion carries
18 unanimously. So we will have that in the MAR.

19 And then further discussion. I think
20 some of these other issues are important, and I
21 think the Department needs to address these. So
22 Heidi, start up again.

23 MS. KAISER: Once we initiate rulemaking
24 if we do, we ought to have a time frame for the
25 period that we have to finalize; is that correct?

1 CHAIRMAN RUSSELL: 180 days. Once we
2 start we have 180 days.

3 MS. KAISER: So that would mean --

4 MR. LIVERS: Mr. Chairman, Ms. Kaiser,
5 we could easily -- If the Federal rule were
6 delayed, we would have up until through the May
7 Board meeting, and actually until June 11th to
8 final this rule, although there is a provision for
9 extending, as we've seen with the Gallatin ORW.
10 The vehicle for doing that is to extend the public
11 comment period, so it would be reopened, and open
12 to further public comment. But that would
13 essentially provide for another 180 days.

14 So if there was some reason, such as the
15 Federal rulemaking was delayed -- and not that we
16 anticipate it -- but there is a time frame.

17 CHAIRMAN RUSSELL: But that's up to
18 another 180. It doesn't have to be --

19 MR. LIVERS: That's correct. Up to.
20 It's a range.

21 MR. MIRES: Could that be indefinitely
22 until there is a final decision made on EPA? In
23 other words, can you continue to extend that out?

24 MR. LIVERS: Mr. Chairman, Mr. Mires,
25 you can. It has to be done in good faith with

1 rationale, and not simply extended for
2 administrative convenience. And again, a good
3 example is the Gallatin Outstanding Resource
4 Water. That continues to be a situation where
5 there is a reason to extend.

6 So I think if our rationale continues to
7 be, and it should be, that we don't want to get
8 ahead of any Federal rulemaking, we really want to
9 try to be consistent, and have a valid rationale,
10 and continue with it. The Board at some point
11 should have a decision, and then whether it wanted
12 to simply stop that rulemaking, and consider
13 reinitiating, or continue to keep this one open.

14 MR. WHALEN: Mr. Chairman, I would move
15 that the Board initiate rulemaking, appoint a
16 Hearing Officer, and conduct a public hearing.

17 CHAIRMAN RUSSELL: Is there a second for
18 discussion?

19 MR. ANDERSON: I'll second.

20 CHAIRMAN RUSSELL: It's been seconded by
21 Larry. First, and certainly off line, it would be
22 my desire that we would hear this. If we move
23 forward with this, this is nothing -- no offense
24 to any Hearing Examiners out there in the whole
25 world -- but this is something that the Board of

1 Environmental Review should hear personally.

2 That's my intention with this.

3 MR. WHALEN: That's my intention with
4 the motion, Mr. Chairman.

5 CHAIRMAN RUSSELL: But you mentioned
6 appoint a Hearings Officer. We want to hear this.

7 MR. WHALEN: You're right. If I may
8 restate that motion.

9 CHAIRMAN RUSSELL: Sure.

10 MR. WHALEN: I would move that the Board
11 initiate rulemaking, that the Board of
12 Environmental Review hear a public hearing.

13 CHAIRMAN RUSSELL: Is that acceptable to
14 you?

15 MR. ANDERSON: That's acceptable.

16 CHAIRMAN RUSSELL: So there is a motion
17 on the floor. Further discussion?

18 MS. SHROPSHIRE: I had some questions
19 about -- One of the things that came up in our
20 discussion was who the stakeholders are, and the
21 process of communicating this to potential
22 stakeholders. And I guess the question is: Is
23 there a requirement to identify potential
24 stakeholders? And if so, what's the process for
25 communicating it to them? Because it's still

1 confusing to me who the stakeholders are.

2 MR. LIVERS: Mr. Chairman, thank you,
3 Ms. Shropshire. And let me take a stab. I may
4 ask Mr. North to elaborate or maybe even correct.
5 But basically at a minimum, we'll do widespread
6 public notice of this; we also will inform our
7 existing interested persons list -- that much is
8 required; and we will do that.

9 I think there is an acknowledgment,
10 particularly in some of the facilities discussion
11 here, that this is going to impact people beyond
12 kind of the normal stakeholders. Certain folks
13 who are used to having air quality permits
14 understand that this is happening, and will be
15 prepared to participate in that public comment
16 period. This will be a broader reach.

17 And I think it's my personal feeling,
18 and it's incumbent on the Department, to make sure
19 that we cast a good net on that. And so I guess I
20 would see an attempt not only to rely on our
21 traditional mechanisms, but maybe to be even a
22 little more aggressive in terms of letting folks
23 know this is out there, and giving an idea what
24 kind of facilities, what kind of interests might
25 be impacted, such as the landfills. That was one

1 we heard from Mr. Klemp, that they probably have
2 this on the radar anyway. But we want to make
3 sure that we do. And I don't know if any of our
4 staff would want to add on to that response at
5 all.

6 MR. KLEMP: Mr. Chairman, members of the
7 Board. That's a very good question, and I was
8 glad that the Chairman brought it up earlier.

9 This is not traditional stakeholders
10 that we have -- League of Cities and Towns,
11 Montana Association of Counties, hospital
12 associations, small business associations -- this
13 is very large, and so we would certainly envision
14 and be in support of something much broader than
15 the existing stakeholders. They may have separate
16 issues, and we may have to deal with that, but
17 there is a lot of folks with a dog in this fight,
18 so to speak.

19 MR. LIVERS: If I may add, Mr. Chairman.
20 Some of those groups are stakeholders under other
21 parts of the Department that don't deal with air
22 quality regulations, but certainly in our whole
23 total maximum daily load effort, some of the water
24 discharge issues. We have good ties with the
25 League of Cities and Towns, and the Association of

1 Counties, and we'll milk those for all they're
2 worth. We'll get the word out through those
3 conduits to make sure a broader spectrum is aware
4 of this, and has an opportunity to participate.

5 CHAIRMAN RUSSELL: Marv.

6 MR. MILLER: Tom, couldn't your
7 Department still initiate that without all this
8 broad group going, without the rulemaking?

9 MR. LIVERS: Mr. Chairman, we could. We
10 certainly could. It would probably have to be
11 broader, because then we'd be looking at 25 tons,
12 so we'd have to expand it even beyond. If we
13 don't have a rulemaking, a threshold, we'd
14 probably have to get it to the general public at
15 that point, and it would be a much wider group.

16 And if we had had a more normal time
17 frame on this without being driven by the Federal
18 urgency, we would have done more of our
19 traditional stakeholder work prior to this.
20 Again, when we started this discussion recently,
21 we had envisioned a briefing today, and initiation
22 in January, and then we realized that that was
23 going to put us in a bad position, that was going
24 to put the State in a bad position, so that's why
25 this is moving on this clock.

1 CHAIRMAN RUSSELL: Maybe just for this
2 whole concept of rulemaking in context of a time
3 period, maybe Tom or John, can you -- Let's say we
4 initiate rulemaking. When is it appropriate to
5 hold a public hearing? Because isn't there some
6 time limit between public hearing and --

7 MR. NORTH: Yes, Mr. Chairman. John
8 North. The first step is for the Department to
9 file the notice with the Secretary of State. The
10 next filing date is I think this coming Monday.
11 That would then mean that this notice would be
12 published in the Administrative Register, and the
13 public comment period would start on December
14 24th.

15 Under the Administrative Procedures Act,
16 we have to give at least 28 days for public
17 comment, and we can hold a hearing, or you can't
18 hold a hearing any sooner than 20 days after the
19 notice is published. So unless the Board decides
20 it wants to have a special meeting, to do it
21 sooner than the next Board meeting, really the
22 next Board hearing is just a little bit after the
23 20 day threshold. So I would anticipate then that
24 the comment period would then close maybe a week
25 after the Board meeting, unless the Board wanted

1 to have a longer period, but that would be the
2 traditional period.

3 CHAIRMAN RUSSELL: So that would be the
4 minimum time frames to work with.

5 MR. NORTH: That's right.

6 CHAIRMAN RUSSELL: The maximum time
7 frames would then be twenty -- After a public
8 hearing, is there a specified amount of time that
9 has to happen before a board can take action?

10 MR. NORTH: No, there is not. Simply
11 the comment period has to close.

12 CHAIRMAN RUSSELL: We can set that
13 comment period as long as it's greater than the 28
14 days from when the rule is actually posted.

15 MR. NORTH: You could set it 28 days or
16 longer.

17 MR. LIVERS: Mr. Chairman, just a couple
18 other timing considerations. On the minimum side,
19 we want adequate time for the Department to
20 respond. We expect extensive comments, and we
21 would want to do them justice, and that would be a
22 consideration. On the maximum side, we've got the
23 180 days, but the practical driver here again is
24 that early March time frame, which at this point
25 is when we expect the final action by EPA.

1 CHAIRMAN RUSSELL: So once again, I just
2 want to kind of look at the timing. We just set
3 our March meeting for the 19th. Let's say we hold
4 a public hearing on the 19th. We could -- no?

5 MR. LIVERS: A public hearing on the
6 19th of March?

7 CHAIRMAN RUSSELL: Yes.

8 MR. LIVERS: I think we were envisioning
9 a public hearing at the January meeting on the
10 22nd, so that again we would hope to be in a
11 position -- The Department's proposal is to be in
12 a position that we're ready to adopt final rule
13 very close to when EPA adopts, and we expect that
14 in March.

15 CHAIRMAN RUSSELL: All right. So you
16 would like to see a public hearing in January.

17 MR. LIVERS: Yes.

18 CHAIRMAN RUSSELL: If we initiate
19 rulemaking.

20 MR. LIVERS: Correct.

21 MS. KAISER: Considering the pretty
22 broad base of interested public, is that enough
23 time to -- I guess it would be -- the people would
24 be noticed -- allow the public to prepare the
25 comments by mid January. That's a concern, too.

1 CHAIRMAN RUSSELL: I wonder, somewhat in
2 a response to that, that we remember that this is
3 more procedural. I think this whole concept is
4 we're trying to set up a procedural regulation
5 that really just says you're going to have to go
6 through BACT. If everything happens, and you emit
7 over 25,000 tons per year, then we already have
8 that other process in place. We have BACT in
9 place. So we still have to remember this is
10 procedural. So what kind of comments would we get
11 based on procedure, other than the ones that we've
12 been receiving today?

13 MS. KAISER: I guess my thought is the
14 different people that will be -- this may affect,
15 may or may not affect. There is a broader group
16 of public works industries that will be affected,
17 and allowing them to become educated enough to
18 even comment on this proposed rule. That's my
19 concern. It may be --

20 MR. LIVERS: Mr. Chairman, Ms. Kaiser,
21 and I respect that, and while the Department
22 doesn't agree, there are people who see this
23 rulemaking as going down the path of regulating
24 greenhouse gases. We believe that the comments
25 really -- whether that should happen ought to be

1 directed at the Federal rulemaking, which is
2 really the entity making the decision to regulate
3 greenhouse gases.

4 As the Chairman has said, we see this
5 almost as a mechanical rule. This is a way to put
6 some kind of practical limitations that enable us
7 to deal with what we see coming down from the
8 Federal government. So in its substance, we
9 really do believe it is essentially mechanical.

10 Now, people won't necessarily perceive
11 it that way, and some disagree, some will
12 legitimately disagree with that perspective, so we
13 want to give adequate time to hear that out. I
14 guess my belief in the entire context of this
15 rulemaking there is adequate time.

16 MS. KAISER: I guess I'm actually more
17 concerned, too, about the Department responding to
18 comments. I think that to leave you more time for
19 the Department to do that is as critical, if not
20 more.

21 MR. LIVERS: Let's think that through.
22 If we were -- I'm kind of thinking through the
23 time frame. So I think what we're talking about
24 is a hearing in January 22nd, probably at least
25 another week or so. So let's say the public

1 comment period closes the end of January; a couple
2 of weeks to respond to comments, three weeks to
3 respond to comments. Dave, would you like
4 permission from Mr. Chairman?

5 MR. KLEMP: Yes. Mr. Chairman, Board,
6 Dave Klemp again. This whole issue of timing is
7 very difficult because we don't want to move so
8 quickly that we don't allow people to get educated
9 and submit some very appropriate comments, and we
10 also need some time to respond to comments. A
11 couple weeks to respond to comments, holy smokes.
12 I can envision a couple thousand comments. And
13 some of them may have to be done in a very general
14 fashion.

15 What we're trying to balance that with
16 is if EPA moves forward in March, the fact that
17 basically all of our permitting, and these permits
18 that people need for financing or to operate their
19 business, we either issue them unlawfully, or we
20 stick them in a box. And so we're very much
21 balancing the lesser of two evils, and we're going
22 to have to --

23 From our perspective, we can't move
24 forward unlawfully with permits, and we're going
25 to have to try to educate people as best and as

1 quickly as possible, and we're going to have to do
2 the best we can to respond in the time allotted.
3 We'll have to make that work in order to avoid
4 that very nasty consequence of either permitting
5 at lower threshold, or not issuing permits at all.

6 I hope that helps. Timing is very, very
7 difficult for us. Again, the expediency for the
8 initiation sets us up to be able to respond to
9 that.

10 MR. LIVERS: Just to add to that, if we
11 are not able to final State rulemaking immediately
12 in the wake of the Federal, then the impacted
13 parties have increased dramatically, and it gets
14 back to my response to Mr. Miller, that suddenly
15 it's not just hospitals, and cities, and those
16 folks. Then we're getting down to individuals
17 that will be impacted.

18 CHAIRMAN RUSSELL: Just a comment on
19 timing again. What about closing public comment
20 two weeks after the public hearing? Like on the
21 fifth?

22 MR. LIVERS: I'd like to defer to people
23 who will be responding to comments.

24 CHAIRMAN RUSSELL: Dave, what if two
25 weeks after the public hearing comment were to

1 close? Is that cutting it too close, February
2 5th? I'm guessing you're going to get a lot of
3 postcard comments.

4 MR. KLEMP: I am, too, and I think a
5 very general response would be very appropriate.
6 I think we would make it -- I'm getting nods from
7 Deb Wolfe and Chuck Homer, and they know better
8 than anybody if we can do this. So yes.

9 CHAIRMAN RUSSELL: Just to throw out a
10 date, we could close public comment on the 5th of
11 February.

12 MR. KLEMP: Yes.

13 CHAIRMAN RUSSELL: I think we're trying
14 to wrestle with this whole concept of giving
15 adequate time for the communities that are going
16 to be impacted to respond, but we want to also
17 make sure that you have enough time to do your
18 work, too.

19 MR. KLEMP: I appreciate that. Thank
20 you.

21 CHAIRMAN RUSSELL: You're giving me that
22 look like I just fell off the tree or something.

23 MR. LIVERS: No, Mr. Chairman. I don't
24 know if there is anything to add. Again, we would
25 try to present this, as we see it, as being a very

1 procedural rulemaking. This is not the decision
2 to regulate greenhouse gases. And we would try to
3 focus comment along those lines, so the comments
4 truly are germane to this rulemaking.

5 CHAIRMAN RUSSELL: And literally we're
6 just a week shy of two months if we initiate today
7 for a public hearing.

8 MS. SHROPSHIRE: Just some
9 clarification. I can appreciate the comment that
10 this is procedural, and I would agree that this
11 isn't the beginning of regulating, or it may be
12 the beginning, but this isn't regulating CO2, but
13 the impacts -- taking CO2 aside -- there may be
14 new sources that are now opened up to a Title 5
15 permit that are now going to be regulated for
16 particulate matter when they wouldn't have been
17 regulated for particulate matter otherwise.

18 So I think there is lots of impacts like
19 that where people will be subject to new
20 regulation because of this, even though we're not
21 regulating CO2. So I think that's part of the
22 thing I'm trying to get my head around, is those
23 sorts of concerns, if I'm understanding it
24 correctly.

25 MR. LIVERS: Mr. Chairman, Ms.

1 Shropshire, not to be argumentative, but I would
2 -- not because of this, not because of this
3 rulemaking. Because of actions taken by the
4 Federal government, they will now be covered. It
5 will not be regulated. What comment may come
6 along those lines, though, is: Where should the
7 line be drawn in terms of a permit threshold?
8 What's the right place to cut that off?

9 MS. SHROPSHIRE: Can I qualify? I
10 wasn't necessarily concerned, but I would argue
11 that this is going to be significantly more
12 complicated and not just procedural in terms of
13 its impact. So I agree that because of the
14 Federal rule, but I do think that in terms of the
15 stakeholders and potential additional entities
16 that will have permits, it's going to be broader
17 than carbon dioxide.

18 CHAIRMAN RUSSELL: I need clarification
19 because I don't see that. I see that we're
20 putting them in for greenhouse gas emissions, but
21 there is already limits on all other pollutants.
22 So I'm not sure how that's really going to impact.
23 Just because now you're a target -- let's say,
24 you're a landfill, and you've got greenhouse gas
25 emissions -- does that automatically open you up

1 to everything that's there? You're already -- The
2 way it's written, if you're emitting 100 tons per
3 year, you're subject to a Title 5 permit.

4 MR. KLEMP: Mr. Chairman, members of the
5 Board, to try to address this. Getting into the
6 reason, I will get as deep as you would like. But
7 this would not obligate -- should not obligate a
8 company to something they're not already obligated
9 to for purpose of the other pollutants.

10 Your initial question, Ms. Shropshire,
11 was: Now the people in are Title 5 because of
12 greenhouse gas emissions, they will be then
13 subject to particulate standards. And Title 5
14 doesn't create any new requirements that aren't
15 already there, and the threshold is just when a
16 permit is required; and specifically for Title 5,
17 it's a compilation of all applicable requirements.
18 Like I said, it does not establish new applicable
19 requirements, aside from record keeping,
20 monitoring, those types of things.

21 So yes, if a landfill already needs an
22 air quality permit because they have non-methane
23 organic compound emissions exceeding 25 per tons
24 per year, or they have an incinerator on site to
25 flare, they will have already have that air

1 quality permit.

2 What this does is raises that threshold
3 if it is only greenhouse gas that would then
4 trigger the permitting requirements. The big
5 issue with the PSD program, 250 tons a year of
6 greenhouse gases would make somebody a major
7 facility, and once you are a major facility, you
8 then look at all of the other pollutants and
9 potentially do BACT, but that wouldn't be the
10 driver for the permitting.

11 There's probably an exception to every
12 rule, and there is a bunch of different scenarios,
13 so I hope that was general enough, but yet
14 sufficient so I didn't generate more questions
15 than I answered.

16 MS. SHROPSHIRE: I'll leave it at that.
17 That's fine.

18 CHAIRMAN RUSSELL: Further questions?

19 (No response)

20 CHAIRMAN RUSSELL: All right. Just so
21 it's clear, you're anticipating EPA's final rule
22 in March.

23 MR. LIVERS: That's correct, Mr.
24 Chairman, on one of the two. On both of the two
25 actually. We're expecting both in March.

1 CHAIRMAN RUSSELL: But not at the same
2 time.

3 MR. LIVERS: It would be coincidence if
4 it were.

5 CHAIRMAN RUSSELL: Further questions for
6 the Department?

7 (No response)

8 CHAIRMAN RUSSELL: All right. I'm going
9 to call for the question. I'm going to do this
10 roll call. We'll just go down the line. Larry.

11 MR. MIRES: Yes.

12 CHAIRMAN RUSSELL: Robin.

13 MS. SHROPSHIRE: Yes.

14 CHAIRMAN RUSSELL: Marv.

15 MR. MILLER: I believe I'll go no.

16 CHAIRMAN RUSSELL: Heidi.

17 MS. KAISER: I'm opposed.

18 CHAIRMAN RUSSELL: Larry.

19 MR. ANDERSON: Yes.

20 CHAIRMAN RUSSELL: Joe.

21 MR. WHALEN: Aye.

22 CHAIRMAN RUSSELL: Joe Russell aye. We
23 will initiate rate rulemaking, and schedule a
24 public hearing for the 22nd. We will close public
25 comment on the 5th of February. All right. Let's

1 take a quick break.

2 (Recess taken)

3 CHAIRMAN RUSSELL: We're going to
4 proceed to the next item on the agenda, and that
5 would be executive summary for rulemaking. The
6 Department had asked and we initiated rulemaking
7 to adjust the discharge permit fee schedule for
8 application authorizations and annual permit fees.
9 Jenny.

10 MS. CHAMBERS: Thank you, Chairman,
11 members of the Board. My name is Jenny Chambers,
12 Chief of the Water Protection Bureau.

13 The Department requests the Board
14 finalize rules to amend ARM 17.30.201, the fees --
15 or the regulations that pertain to water discharge
16 permit fees. The Montana Water Quality Act
17 requires the Board to adopt rules that are
18 sufficient to recover the cost of issuing permits,
19 licenses, and authorizations issued by the
20 Department, as well as other administrative costs
21 on operating the program.

22 The program is currently operating under
23 a current fee schedule which became effective
24 February 15th, 2002. In preparing this fee rule
25 package, we used data specific to the permits we

1 currently have active and those we expect to
2 manage.

3 There has been a tremendous amount of
4 stakeholder involvement that has taken place on
5 this rule package, starting back in April of 2009.
6 Even prior to the Board initiation in July 24th,
7 2009, we also made changes to the rule package
8 prior to initiation of the rule package. In
9 addition, based upon the comments that we have
10 received during the public comment period, we have
11 reevaluated the fees, made adjustments, based on
12 the 2008 projections, but our actual data that we
13 have on the 2009 revenue projections that we're
14 looking into.

15 To give a sense of public participation
16 and involvement, we had three presentations to the
17 Water Pollution Advisory Council, five meetings
18 with stakeholder groups that represent the
19 petroleum, construction, transportation, and
20 industry, and over 1,300 notices were sent out
21 during the informal public comment period, plus we
22 posted during the public comment period in all the
23 major newspapers, and we ran three consecutive
24 Sundays to provide adequate public participation
25 in this process.

1 Of the over 1,300 notices, plus the
2 public hearing, plus the postings in the public
3 papers, the Department received eleven responses.
4 That is less than one percent comments received
5 based upon this rule package. Based upon the
6 comments we received, we made every attempt to
7 address the concerns.

8 The notice of the proposed amendment
9 that you have in front of you outlines the changes
10 and the response to comments. A summary of
11 changes include: We clarified in Section 1(c),
12 which is the storm water general permit section,
13 that that amount includes a first year annual
14 fees. So in the application package for a storm
15 water construction general permit, that would also
16 include the annual fees for that first initial
17 year of application.

18 We clarified the municipal separate
19 storm sewer systems general permit coverage that's
20 based on population to avoid any confusion that we
21 were trying to base it on population and on
22 outfalls. It is clarified to just be based on
23 population.

24 We reduced the annual fees for storm
25 water construction. We clarified that the

1 administrative processing fee will only be charged
2 for significant additional review on management
3 plans. Those would be if we had deficiencies
4 based upon an inspection, and we required a
5 permittee to submit a revised storm water
6 pollution prevention plan because of violations.
7 That would be significant additional review that
8 the Department would have to take.

9 Also on nutrient management plans on our
10 concentrated animal feeding operations, we may
11 also have significant reviews on nutrient
12 management plans that would require another
13 administrative processing fee. We have to post
14 nutrient management plans for public comment on
15 our website.

16 We reduced the minimal application fee
17 on 401 certifications, was reduced down to \$400.
18 And we added a clarification that the payment is
19 due after thirty days that is noticed, and that
20 penalties and interest will only be assessed after
21 90 days of failure to pay the fees.

22 Based on the changes in the proposed
23 rule package, the Water Pollution Control Advisory
24 Council is in support, and requests that the Board
25 give firm consideration to the rule package.

1 I do have a statement that I'll hand out
2 from the Water Pollution Control Advisory Council,
3 and also lists the members that are part of that
4 group that provided their support.

5 CHAIRMAN RUSSELL: Jenny, was that
6 actually part of the public comment since it's
7 a --

8 MS. CHAMBERS: Chairman, members of the
9 Board, I'm not sure what the question is.

10 CHAIRMAN RUSSELL: Is that statement
11 from them, was it part of the comments that were
12 made as part of the rulemaking process?

13 MS. CHAMBERS: No, it's just a
14 requirement for the Department to go to the
15 Advisory Council to get their support or guidance
16 in moving forward with rulemaking, based upon
17 going to them three times, one to just give a
18 briefing on the package, one to get permission to
19 go to initiate rulemaking to the Board, and then
20 this last one just to give them a recap on where
21 we are on the package, and that we're going to ask
22 the Board to final adoption.

23 At that meeting on November 16th, I
24 believe it was, they indicated that they -- based
25 upon the statement, that they would like the Board

1 to give firm consideration on the rule package to
2 ensure that the program has adequate resources to
3 maintain what we do in the program.

4 CHAIRMAN RUSSELL: Thanks.

5 MS. CHAMBERS: So based on the
6 projections and adjustments made to the rule
7 package, the Water Protection Bureau will bring in
8 approximately one point million in revenue, which
9 is projected to carry us to 2012. This will allow
10 us to operate and maintain status quo. There will
11 be no increase or decrease in personal service or
12 operating budget. Without this fee increase, we
13 will be struggling, and be precarious through
14 2010, and we will be in significant deficit in
15 2011.

16 And so we adjusted the fee package to be
17 -- to address the concerns from the commoners, and
18 original rule package would have brought in \$1.9
19 million, but we have increased that to carry us to
20 2012, knowing that we would possibly have to come
21 back to the Board in future years, and work with
22 stakeholders to move forward.

23 The Department respectfully requests the
24 Board adopt the final rules to amend ARM 17.30.201
25 as modified, and the Department is committed and

1 will continue to work with permittees and
2 stakeholders on future projects and revenue needs.
3 Thank you, and I'm available for any questions.

4 CHAIRMAN RUSSELL: Thanks. Questions?
5 I think, Larry, you had some stuff that needs --
6 Don doesn't know I read this stuff, but Don made a
7 comment about doing this annually.

8 MS. CHAMBERS: Correct, and what the
9 Department -- Chairman, members of the Board.
10 What I'm committed to is to meet with the
11 stakeholders annually to review our budget
12 projections, look at what revenue we're bringing
13 in, and figure out where we are at. If this
14 budget projection we've made based upon 2009
15 actuals, which is lower than what we had in 2008
16 when we initiated this process, come true, we
17 should be okay through 2012.

18 So in 2010, we would look at 2010
19 actuals, bring back and meet with the
20 stakeholders, see where we're at. If we have a
21 significant amount of money in the cash reserves
22 that we can carry forward without a fee increase,
23 we will utilize that money. If we have to look
24 and change budget projection either up or down
25 because of either too much money, which I'm really

1 doubting we're going to get, or that we need to
2 maintain the program and change things based upon
3 services we need to provide, then we would then
4 come back to the Board and ask to initiate
5 rulemaking.

6 So I guess we may not be coming to the
7 Board annually to request initiation of
8 rulemaking, but we will be committed to meeting
9 with the stakeholders to address our revenue
10 needs, and see where we're at based upon
11 projections.

12 MS. SHROPSHIRE: If you do inspections
13 at a site, do you -- How do you recover the cost
14 of inspections? Is that covered under the fee, or
15 is that a separate cost?

16 MS. CHAMBERS: That's covered under the
17 fee, so based upon the permittees, when they get
18 an application, and we get annual fees based upon
19 those that are currently active, that's the whole
20 program budget that we have to administer the
21 program. So that includes inspections,
22 enforcement, any kind of compliance assistance,
23 any kind of work that we do outside of just
24 issuing the permit, and collecting the annual fees
25 from that.

1 MS. SHROPSHIRE: If you had a problem
2 child that you were having to go back to, could
3 you charge them extra fees based on multiple
4 visits?

5 MS. CHAMBERS: No, we cannot. Ms.
6 Shropshire, Chairman, members of the Board. What
7 we would do then is we would take a good look at
8 the violations, and process them through formal
9 enforcement, and try to make it an even playing
10 field by using formal enforcement to address that
11 permittee, but not charge them a specific extra
12 fee for going out there more than once.

13 MS. SHROPSHIRE: I recently had had some
14 conversations with some city that will remain
15 unnamed, and they were talking about implementing
16 the MS4 permits, and costs to them, and I was a
17 little bit confused on that. I don't know if this
18 is within this at all, but -- and by the way, I
19 just -- Well, can you explain the MS4 permit, and
20 how the cities implement that, and the cost to the
21 cities? I don't know if that's a bigger question
22 that I intend it to be, but --

23 MS. CHAMBERS: Sure. Chairman, Ms.
24 Shropshire. In general, the MS4 is municipal
25 separate storm sewer systems. It came under the

1 Clean Water Act when Phase 2 storm water
2 regulations came in place. The Phase 1 came in
3 with large systems, and the large cities,
4 urbanized areas. Phase 2 brought in our basically
5 big seven in the state, and including Malmstrom
6 Air Force Base, some of the counties, some of the
7 University districts. The Missoula University
8 system is also part of an MS4.

9 They're working mainly under
10 co-permittee status under the general permit
11 requirements, and there are seven components under
12 MS4 requirements that the cities or the counties
13 have to implement, and they do have to implement
14 those, meaning it's a Clean Water Act requirement
15 that within urbanized area, any kind of storm
16 water runoff that they have, they have to inspect
17 them for listed discharges, anything beginning in
18 the storm sewer system that is not supposed to get
19 there; public education and outreach on over
20 fertilizing your lawn, or car washing, or things
21 of that nature; post construction activities,
22 meaning they can have more or stricter regulations
23 within their urbanized area to reduce sediment and
24 runoff into their storm sewer system.

25 So since the city, and the county, and

1 also the transportation -- MTD is also a
2 co-permittee in certain areas, the City of Helena
3 -- since they have the local jurisdiction over
4 that storm sewer system, they're basically
5 required to maintain seven elements to manage the
6 MS4 requirements.

7 A new requirement from us that came down
8 from EPA is that we have to audit and maintain
9 compliance inspections on those MS4s. We are just
10 starting to gear up and doing that now. Within
11 the next five years, we have a plan to address all
12 of the seven co-permittees under the municipal
13 separate storm sewer systems, to review their
14 annual reports, give them guidance, maintain
15 compliance inspections on what they're doing to
16 implement that program.

17 MS. SHROPSHIRE: So it would be like any
18 other industry that has a storm water system.
19 They would need to budget for that program within
20 their own budget.

21 MS. CHAMBERS: Chairman, members of the
22 Board, Robin Shropshire, you are correct. And one
23 of those cities, the City of Kalispell, has
24 allocated resources and has a storm water
25 coordinator to implement the MS4 program. Not all

1 the others are currently on there. We're actually
2 on the second round of issuing the general permit
3 for the MS4, and those questions are coming up as
4 far as resources on how they need to reimplement
5 that program.

6 MS. SHROPSHIRE: Thanks.

7 CHAIRMAN RUSSELL: Other questions?

8 MR. WHALEN: Mr. Chairman, a question
9 for Ms. Chambers. Ms. Chambers, this kind of goes
10 to the dollars and cents of the issue. What is
11 the projected revenue shortfall without these
12 adjustments?

13 MS. CHAMBERS: Chairman, Mr. Whalen.
14 I'm looking through my sheet right now. With no
15 fee increase, I indicated that we would have
16 enough money in the cash reserve at the current
17 revenue that we have bringing in to carry us
18 through 2010. In 2011, it is projected that we
19 will be in the negative \$217,000; and then 2012,
20 it goes up to 842, etc. So we would have to make
21 significant program cuts, including personal
22 services, which would be to lay off some of the
23 staff within Water Protection Bureau, in order to
24 offset that revenue shortage.

25 MR. WHALEN: I see. Just a follow up,

1 Mr. Chairman, if I may.

2 CHAIRMAN RUSSELL: Sure.

3 MR. WHALEN: Given the original language
4 that was proposed by the Department, and then the
5 revised language following public comment, what is
6 the projected impact of adopting the proposed
7 rules as amended by the public comment relative to
8 what was initially proposed?

9 MS. CHAMBERS: Chairman, Mr. Whalen,
10 members of the Board. The revenue that we were
11 having within the original fee package was going
12 to bring in 1.9 million. This package is going to
13 bring 1.5. It's an overall program increase of
14 about 25 percent, but that's kind of tough because
15 it's an overall program increase of 25 percent for
16 the program. The previous one was about 40
17 percent.

18 The impact to the program would be that
19 we have now taken a look and looked at the
20 applications that we have that come in as part of
21 the revenue needed to carry us forward to 2012.
22 Statutorily, it basically states to look at your
23 annual fees only, because it's hard to project
24 what kind of applications you're to going to have,
25 and how you maintain applications based versus

1 annual fees.

2 So with 1.5 revenues coming in from
3 annual fees, and about \$300,000 coming in from
4 applications, we're about 1.8, which would carry
5 us to about 2012. The original package would have
6 brought us in 1.9 in annual fees, which would have
7 been our statutory requirement to do that, plus we
8 would have had a little bit of extra for
9 applications if we got applications in about that
10 same range, 250 to 300,000.

11 So it's a shortfall of about \$500,000
12 that we're not going to be getting, based upon
13 taking this step, a slower approach, and coming
14 back and relooking at things a year from now.

15 MR. WHALEN: Thank you. And that
16 factors in projected growth and the number of
17 outfalls, as well as -- What are you using to
18 project those revenues, given the revised public
19 comment version?

20 MS. CHAMBERS: Mr. Chairman, Mr. Whalen.
21 What we look at is we look at the current actual
22 data that we have from permittees, which would
23 include flow data and the number of outfalls from
24 at least the major point sources. What we look to
25 project that is we look at just status quo, so

1 yes, there could be a shortfall a little bit based
2 upon flow where production goes down from those
3 permitted sites.

4 We have other factors in place that some
5 of them are fixed annual fees, and so the number
6 isn't going to change much, so that 1.5 is --
7 we're pretty solid that that's the lowest that
8 it's going to be that would be allowed to carry us
9 through to 2012. We may get higher than that,
10 that we may have a cash reserve that may allow us
11 to carry us through to 2012, a little bit further.

12 On the operating expenditure side, we
13 always estimate a small increase based upon costs
14 and requirements that go up, based upon travel or
15 budget projections on our operating expenses, so
16 we do factor in a slight increase in expenditures,
17 but maintain our revenue at status quo.

18 Some of the dollar numbers changed
19 slightly because our 2009 actuals were actually
20 lower than 2008's, so we're basically looking at
21 2009 actual data making those projections.

22 MR. WHALEN: Thank you, Ms. Chambers,
23 for being so prepared.

24 CHAIRMAN RUSSELL: Any other questions?

25 (No response)

1 CHAIRMAN RUSSELL: Seeing none, I will
2 entertain a motion to adopt the regulation as
3 amended, accept the Presiding Officer's report,
4 House Bill 521 and 311 analysis, and the
5 Department's responses to comments.

6 MS. SHROPSHIRE: So moved.

7 CHAIRMAN RUSSELL: It's been moved by
8 Robin. Is there a second?

9 MR. MILLER: Second.

10 CHAIRMAN RUSSELL: It's been seconded by
11 Marv. Further questions?

12 (No response)

13 CHAIRMAN RUSSELL: Is there anyone in
14 the audience here to speak to this matter?

15 MR. HEGREBERG: Mr. Chairman, members of
16 the Board, for the record, my name is Cary
17 Hegreberg. I'm the Executive Director of the
18 Montana Contractors Association. Our organization
19 represents the majority of highway and heavy
20 contractors that apply for and use these general
21 storm water permits for construction, and for sand
22 and gravel.

23 I want to start off by thanking Jenny
24 and her staff, Carrie, for being so open and
25 generous in their process, and involving

1 stakeholders like us. We had several
2 opportunities to offer comments, both informally
3 and formally. And to their credit, they did
4 accommodate and respond to most of our concerns in
5 a positive manner.

6 I want to just point out that when fee
7 increases like this are imposed on contractors --
8 and we agreed in the Montana Legislature several
9 months ago to substantial fee increases for open
10 cut mine permits. We understand there is a
11 proposal in the works to raise the air quality
12 fees on portable sources, which would be the hot
13 plants, gravel crushers, and so on -- that those
14 costs are always passed on to somebody; and in
15 many cases, contractors are passing those costs on
16 to the owner of the project, which in many cases
17 is another public entity, the Montana Department
18 of Transportation being the largest owner of
19 construction projects in Montana.

20 So the taxpayers are absorbing, in most
21 cases, these increases. And it's just something
22 to be cognizant of. It raises the cost of
23 construction, and you get less construction for
24 the money. We're not getting a lot more highway
25 dollars, we're not getting more money for public

1 infrastructure, we're just going to be absorbing
2 more of that available funding into fees paid to
3 other government entities.

4 I would mention on the sand and gravel
5 fee, that is one that continues to be a little
6 perplexing. The rate goes from \$450 to \$1,200,
7 and some of our members report, particularly in
8 eastern Montana, that most of these open cut mines
9 are on very dry sites -- they're not anywhere near
10 water. There is really no potential for
11 sedimentation -- and there ought to be some kind
12 of a mechanism for consolidating the actual risk
13 to water quality for the site.

14 By and large, we wanted to just say that
15 we were involved in this process. We appreciate
16 the fact that DEQ staff was so accommodating and
17 responsive to our concerns. But over the long
18 haul, we are definitely concerned about these
19 various fee increases. We know construction is
20 down significantly in 2009 from 2007 and 2008
21 levels. We're looking at continued reductions
22 through 2010. It's pretty safe to say there is
23 going to be fewer applications for storm water
24 permits, fewer compliance reviews, because there
25 is not going to be as much activity.

1 So we would just hope the Department's
2 costs would reflect what we're seeing on the
3 ground in terms of the level of activity. Thank
4 you.

5 CHAIRMAN RUSSELL: Thanks for your
6 comments.

7 MR. GALT: Mr. Chairman, members of the
8 Board, for the record, my name is Dave Galt. I'm
9 the Executive Director of the Montana Petroleum
10 Association. And I, too, want to express -- I'm
11 not here to support or oppose this. I just want
12 to make a few comments, and I want to talk --

13 When we saw the permit rule in the first
14 place, we were very concerned about that level of
15 the fee increase, and in fact the level of fee
16 increases going across the Department as a whole
17 have been somewhat of a concern to us, and it's an
18 interesting position that we're in. At the end of
19 the day, you factor in what you're going to get
20 for grants, and you factor in what kind of funding
21 the Legislature decides, and then you take a look
22 at your expenditures and your approach, and you
23 fill it in with some kind of fee; and by the time
24 this rule is on the table here at a point to be
25 able to fund the Department and not fund the

1 Department, we understand where that's at. I've
2 always kind of avoided that legislative process,
3 but it's something that we're going to have to pay
4 attention to.

5 Also in that rule hearing, we had a lot
6 of comments relative to terms, and how additional
7 things were going to be reviewed, and how
8 additional deposits could come, and terms like
9 significance review and reasonable. And I want to
10 thank the Department because they took our
11 comments to heart, and they came back with -- I
12 realize what I was asking for in the comments that
13 I made back on the first rule probably would be
14 things that you couldn't really put in a rule; but
15 they explained their position and their thought
16 process, and how were they going to operate in
17 responses to that on the record, and I appreciate
18 that, and I agree with that.

19 So the Montana Petroleum Association, we
20 have a lot of new construction permits. We're
21 affected storm water wise when you put in new
22 wells and stuff. We look forward to working with
23 the Department like we have in the past eighteen
24 months. It's been actually spectacular. We've
25 raised some issues both with the air folks, and

1 both with the water folks. Both bureaus worked
2 with our people, have offered training, and it's
3 been good. And we look forward to maybe working
4 with some other ideas.

5 At the end of the day, it's not only the
6 permit fee, it's the process; and in our book, the
7 process, the less time it takes and the easier
8 that process is to do, the more conducive that is
9 to do business. So we appreciate what the
10 Department has done. I think they've done an
11 outstanding job on public comment involving the
12 stakeholders, and I wanted you to hear that. We
13 look forward to working with the Department again.

14 And I guess the last thing I want to
15 tell you is I wish you all a happy holiday, and
16 I'll be back in February. Thank you.

17 MR. ALLEN: Mr. Chairman, members of the
18 Board, for the record, Don Allen with the Western
19 Environmental Trade Association.

20 Did I understand right you already
21 passed a motion to move forward with these before
22 you -- I might have had something important to say
23 before you make a motion.

24 CHAIRMAN RUSSELL: We haven't taken
25 action on it. I'm barely cognizant of the fact

1 that I have to ask for public comment. It's
2 fortunate that I caught it.

3 MR. ALLEN: I'm not here to oppose the
4 rules, and I'm not here to speak either way, other
5 than to say I did want to compliment the
6 Department as well, as other the two speakers
7 ahead of me.

8 They have worked real hard since these
9 rules were first published, and they came before
10 you in July. And if you'll recall, in the July,
11 at that time when they asked to go forward with
12 initiating rulemaking on these, I was one of those
13 that said they've got to involve the stakeholders
14 more, and we need to really talk about some of
15 these particular fees that are in there, and to
16 their credit, they have responded to that.

17 Of course now they're talking about a 25
18 percent increase instead of a 40 percent increase.
19 And the other big thing is they're going to take
20 it a year at a time, which was one of the things
21 we thought they should do, like the air quality
22 folks do, have a chance for conversation, input,
23 so forth, each year, and to take a look at their
24 budget, and we think this will work much better in
25 the Water Quality Division.

1 The only thing I'm not still real sure
2 on, and I know that Jenny has offered to try to
3 help me understand it better, but in terms of -- I
4 think as far as the 25 percent increase, the other
5 thing about that is it's not uniform across the
6 board. There are some, I know, where it's still
7 higher than that, and I'm not sure which ones
8 those are frankly. I hope we can have a better
9 understanding of that as we continue to dialogue
10 with them over the coming months.

11 So I guess overall, I think the problem
12 is they waited all this time, and if Jenny wasn't
13 there, they had other people, they've got a
14 backlog they've had to deal with, so a lot of
15 these issues in terms of timing, but they hadn't
16 had the increase since February of 2002, is my
17 understanding. So we think that's part of the
18 problem with this big increase, and as Mr. Galt
19 referred to, we're concerned about it across the
20 board in these economic times.

21 And you think well, maybe these big
22 companies -- which of some of our members, not all
23 of them -- but they could pay that, gee, it's no
24 big deal; but I tell you what, it does make a big
25 difference with some of them in terms of the

1 economic times we are all looking at right now.

2 So anyway, we just have to be careful,
3 and not keep piling on more and more fees across
4 the board, and this Board can play an important
5 role in trying to make sure we keep a handle on
6 all those fees as well.

7 So with that, Mr. Chairman, I just
8 wanted to make these general comments, and we'll
9 continue to work with the Department, and
10 hopefully can continue to improve the process so
11 that everybody understands exactly why they need
12 their fee increases, and what it's used for, and
13 that will be real helpful for all of the
14 stakeholders out there.

15 CHAIRMAN RUSSELL: Thanks for your
16 comments, Don.

17 MR. CAMDEN: Chairman Russell, members
18 of the Board, for the record, my name is John
19 Camden, and I work for the Montana Rural Water
20 Systems, and I am representing Dave Jones who is
21 president of the association. Montana Rural Water
22 would also like to thank Jenny and her staff for
23 the time that they allowed us to make comments.

24 Montana Rural Water would like to ask
25 the Board to make an amendment to this rule

1 package. On the renewal application, the fees are
2 being increased \$500, and for our members that are
3 very, very small -- and what I'm talking about is
4 to make a public system, it takes 15 service
5 connections or 25 people. So if you have 15
6 service connections or 25, that fee increase is
7 \$20 per service connection. If you had 50 service
8 connections, it goes to \$10. If you had 100, five
9 dollars; and if you had 500 service connections,
10 it's only one dollar. So that's a huge economic
11 impact on to very, very small systems.

12 As Don mentioned, we are in economic
13 conditions at this time. Very small systems, the
14 people that live there are on fixed incomes. They
15 have declining population, and it only takes -- if
16 one person dies out of -- or if the household
17 person dies, and they leave, that's an extra
18 burden on the utility. Also they're stressed with
19 other household costs.

20 So if the Board would consider an
21 amendment, and put the renewal application on a
22 sliding scale, we would appreciate that. Thank
23 you.

24 CHAIRMAN RUSSELL: I'd like the
25 Department to respond to that.

1 MS. CHAMBERS: Chairman, members of the
2 Board, again, my name is Jenny Chambers.

3 What John Camden with Montana Rural
4 Water Systems was referring to was the renewal
5 application fee on applying for an MPDES discharge
6 permit for the Montana discharge permit
7 elimination system. The permit is good for five
8 years, so the point of discharge there that has
9 that permit that's been issued to them for a five
10 year period. They only have to apply for renewal
11 of that \$1,500 fee, which is what we're proposing,
12 on a every five year basis.

13 Basically we've been in a backlog
14 situation. Some of the permittees have got past
15 that five year window, and they have been expired
16 for anywhere from two to five years past that five
17 years renewal. So without getting that five year
18 renewal application on a consistent five years
19 basis, that has affected our projections and what
20 revenue we currently bring in.

21 So by addressing the backlog, by getting
22 them on a time frame where they're good for five
23 years, we would only be asking the small
24 wastewater systems to apply for that renewal MPDES
25 permit prior to expiration date at a five-year

1 period.

2 CHAIRMAN RUSSELL: It's proposed to be
3 \$1,500 and it's now 1,000?

4 MS. CHAMBERS: It was \$1,000. It's
5 currently \$1,000, and it's proposing to be \$1,500.
6 And basically with the conversations you had
7 earlier today, there is nothing different as far
8 as the permit requirements that we have to do on a
9 small municipal wastewater system versus a large
10 municipal wastewater system.

11 All that information that we have seen
12 this morning as far as briefing requirements, we
13 have to evaluate the stream, the receiving water,
14 the pollutants that they're being discharged,
15 evaluate whether or not nondegradation applies,
16 what the quality of that water -- is it high
17 quality or is it not -- on a parameter by
18 parameter basis.

19 So the volume, or complexity, or the
20 size of the wastewater system from the permit end
21 doesn't vary -- it just changes based upon the
22 calculations due based upon the volume that
23 they're discharging -- but the level of work is
24 still the same.

25 CHAIRMAN RUSSELL: How many MPDES

1 permits have such a small number of users or
2 dischargers associated with the collection system
3 and discharge? I'm guessing there is not too many
4 that have 15 users on them that have an MPDES
5 permit.

6 MS. CHAMBERS: Chairman, members of the
7 Board, I don't have the exact number on how many
8 service connections they have based upon their
9 wastewater treatment systems. We classify them as
10 a major MPDES permit holder or a minor permit
11 holder, depending on the volume that they
12 discharge. A major POTW, which is a public owned
13 treatment works, would be one that disposes of
14 more than a million gallons per day. So ours is
15 based volume, not necessarily based upon service
16 connections.

17 With that, we currently have 24 major
18 public owned treatment works, and 50 minor public
19 owned treatment works, so you could roughly say
20 that there is a percentage of those 50 -- a small
21 percentages that may meet that criteria of having
22 a small amount of users to spread that fee base.

23 CHAIRMAN RUSSELL: Let's just -- For an
24 example, Bigfork is a minor.

25 MS. CHAMBERS: Yes, Bigfork is a minor.

1 CHAIRMAN RUSSELL: How many users are on
2 the Bigfork system, 300?

3 MS. CHAMBERS: How many people live in
4 Bigfork?

5 CHAIRMAN RUSSELL: It goes to the issue
6 -- You probably have 200 users in there. If you
7 increase it 500, that's two dollars per user plus
8 some change. It seems a little -- There is
9 probably not a lot -- John, correct me if I'm
10 wrong -- but there is probably not a lot of MPDES
11 permits out there with 15 users on them. There is
12 just no economy to have a system that you're going
13 to be able to discharge to surface water with. So
14 I think that most of them probably have 100 users
15 on them, don't they?

16 MS. CHAMBERS: Yes, based on the--

17 CHAIRMAN RUSSELL: Here is the logic.
18 It's a five year permit. Renewals, it's going up
19 five -- If you're discharging to surface water,
20 you have a plant of some sort, you don't have
21 straight pipes; you have an operator; you have
22 some actual costs. You're looking at very small
23 amount over a five-year period if you have 100
24 users on your system.

25 It's not like you've got MPDES permits

1 out there serving 15 users. If there is an
2 economy, you're going to have some sort of a
3 groundwater discharge system, and you don't have
4 an MPDES permit for those. So as much as I want
5 to be sympathetic to Rural Water, I just don't see
6 that that's the same logic I would apply to it,
7 but I'd love to be corrected. If there are small
8 users out there that have MPDES permits, I'd like
9 to know of them.

10 I don't see anybody jumping forward.
11 John was public comment. Are there any other
12 public comments?

13 (No response)

14 CHAIRMAN RUSSELL: Seeing none, we have
15 a motion on the floor. Is there any other
16 discussions by the Board?

17 MR. WHALEN: Mr. Chairman, I would like
18 to follow up on Mr. Camden's point, however, with
19 Department staff, if I may.

20 It's a little cumbersome at this point
21 to offer amendments, I think because we haven't
22 really prepared one yet. But has the Department
23 looked at setting up a sliding scale rate schedule
24 on any of these matters, where you're looking at
25 this pretty large gap in this state between some

1 of the smallest of the small communities to the
2 largest of the large communities that are based on
3 service connections, as opposed to some basically
4 flat and relatively arbitrary size connections?
5 Understanding that every connection has some fixed
6 costs involved in terms of planning, and
7 specification review, and such. But has the
8 Department looked at some of these service
9 connection based sliding scales?

10 MS. CHAMBERS: Chairman, Mr. Whalen,
11 members of the Board. Mr. Whalen, this is Jenny
12 Chambers, just so you're aware.

13 In the MPDES world, the Water Protection
14 Bureau, no, we have not, and that would mainly
15 only affect MPDES permitting part of our program.
16 We have several other types of activities that we
17 provide permit coverage for, like license and
18 authorizations.

19 I have spoken with John Camden and
20 Montana Rural Water in regards to this service
21 connection idea, and looking at the population
22 that they serve, basically based upon the
23 collections of wastewater they bring to their
24 treatment plant. It's very similar to what is
25 being done in the public drinking water sector as

1 far as how the Department charges fees based upon
2 service connections under public water supply
3 users or drinking water users.

4 So I am familiar with the process, and
5 looking into it, but we haven't broken it down
6 from total. It's a total revamp of our program,
7 and looking what we're doing.

8 Statutorily it states that we will
9 charge fees based upon the volume of pollutant
10 load that is being discharged into the receiving
11 water, so that really warrants itself to being a
12 volume concentration of the amount of gallons per
13 day that's being discharged to the receiving
14 water, so we would have to go legislative session
15 and revamp that whole process as far as how we
16 administer fees.

17 Plus it would be a change in our data
18 base and collection of materials, because the
19 Clean Water Act requires us to know volume of
20 discharge, not necessarily users that are
21 utilizing that system as far as service
22 connections. So we would have to collect a lot of
23 data, do a lot of review, make comparables to see
24 whether or not we would collect enough revenue to
25 maintain the program, and to also go to the

1 legislative session to make changes within that
2 program. But we have thought about it, and have
3 talked to Rural Water about it a little bit.

4 CHAIRMAN RUSSELL: On the top of Page
5 1343 there is a table. Is the issue that between
6 zero and 10,000 gallons per day, you get charged
7 \$1,300, and there should be more gradation in that
8 fee? Joe, is that your point? That's just one
9 place where -- There is a three tiered fee there.
10 Should it be more?

11 MR. WHALEN: I'm curious as to whether
12 that sort of alignment was considered by the
13 Department, either with respect to wastewater or
14 to water distribution. I think it's probably --
15 it merits looking at that -- Ms. Chambers has, I
16 think, pretty clearly addressed the subject. It's
17 something that would need to change in statute, so
18 it may fall to the Legislature in order to make
19 these adjustments first.

20 MS. SHROPSHIRE: I guess just to follow
21 up on what Chairman Russell said, I'm not sure I
22 agree. I think that if we just had it -- we could
23 still base it on volume, but have more gradations
24 within that volume, so that there is more fees for
25 different volumes. I think at this point it's not

1 in the scope of this rule, I guess I would argue,
2 but potentially it would improve water efficiency
3 if you were to -- if fees were less for less
4 volume, there might be an incentive to use less
5 volume, which would encourage people to use less
6 water. But I'm not sure that's within the scope
7 of this rulemaking.

8 I guess I would argue that it's within
9 statute if we were to still look at volumes, but
10 have there be more levels of volume, if that makes
11 sense.

12 MS. CHAMBERS: Chairman, members of the
13 Board. Yes, it makes sense to me. But keep in
14 mind that we are still allowing a percent
15 reduction on the annual fees that they maintain
16 compliance, so they will get a 25 percent
17 reduction in their annual fees, so we trying to
18 award permittees for maintaining compliance by
19 giving them a reduction on protecting better water
20 quality.

21 Along those same lines, we could look at
22 if they discharge less, what fees would they pay,
23 but keep in mind that all of the permitting
24 actions that we do, as far as issuing the permit,
25 maintain compliance on that permit, monitoring

1 that permit, and doing inspections on that permit,
2 remain the same, so we would still have to make
3 sure that the revenue we generate is based upon
4 the volume of projections, and trying to improve
5 water efficiency or wastewater discharges is in
6 effect our bottom line, based upon able to manage
7 our program, and manage it under the Water Quality
8 Act.

9 And there is also a big circle that you
10 could take there based upon water resources, and
11 would that impact water rights, and DNRC, and if
12 they discharge less, would there still be users
13 downstream that could utilize that water that they
14 were counting on that's no longer if they decrease
15 that.

16 So it's a pretty complicated picture,
17 but definitely something we'll continue to look
18 and talk to our stakeholders as we move forward,
19 and we are changing the way, the direction we're
20 moving here, based upon storm water construction,
21 looking at acreage of disturbance, trying to
22 protect water quality. The less acres you
23 disturb, the less amount of money have to pay on
24 annual fees. That approach could certainly be
25 taken in other permit realms as well.

1 CHAIRMAN RUSSELL: Any other questions,
2 comments?

3 MR. MILLER: Maybe I'll just make one.
4 The thing is they've worked awful hard to get this
5 going, and we've heard a lot of positive comments;
6 but maybe in the future, or the next go around, is
7 to try to maybe accommodate a little more sliding
8 scale here, to help out the little communities.
9 And so we certainly note that we maybe should look
10 at that in the future.

11 MS. CHAMBERS: Chairman, members of the
12 Board, Mr. Miller. Yes, definitely we will do
13 that. We tried to do that equitability across
14 other avenues on storm water construction,
15 groundwater discharge permits, trying to get that
16 sliding scale on those folks, so yes, we'll have
17 some work to do on the regular POTW's and MPDES
18 permit holders as well.

19 CHAIRMAN RUSSELL: Maybe we could just
20 throw it all out, and just take a percentage of
21 the users fees from the municipalities. Any other
22 comments?

23 (No response)

24 CHAIRMAN RUSSELL: Hearing none, there
25 is a motion, and it's been seconded. All those in

1 favor of adopting the rule as amended and all of
2 the appurtenant documents, signify by saying aye.

3 (Response)

4 CHAIRMAN RUSSELL: Opposed.

5 (No response)

6 CHAIRMAN RUSSELL: Motion carries.

7 MR. LIVERS: Mr. Chairman, given the
8 hour, I'm not going to talk long, but I do want to
9 make a comment on the last action. I appreciate
10 the comments of the folks who came in from the
11 various stakeholder groups. Certainly we value
12 the stakeholder relations.

13 There were some comments about fees
14 overall going up, and we're very mindful of that.
15 We're looking at our overall budget. We've got an
16 awful lot of flat and decreasing revenue sources
17 and fees, particularly those by the Board are one
18 area that we do want to look at. Sometimes we
19 have a statutory requirements to cover our costs
20 with those fees.

21 But nonetheless, I appreciate those
22 concerns being brought to the forefront. I think
23 it's a good thing. And I know a lot of times when
24 we talk about the whole board, we emphasize the
25 rulemaking, and we emphasize the contested case

1 appeals; but a function of that rulemaking is the
2 fees, and we appreciate the support of the Board,
3 but it is a rule that I think is going to take on
4 increasing importance, that the Board bring the
5 scrutiny it does to our fee proposals.

6 You'll have another major one, of
7 course, in the air quality fees, for those new
8 members who maybe haven't gone through that yet.
9 We've looked at our first numbers, and they're
10 beyond what we feel we can even propose, so we're
11 going back and making efforts to reduce those.

12 Just to give you a real quick context.
13 We're doing a lot of process improvement work
14 within the Department. Several of those programs,
15 particularly our fee permitting programs, have
16 undergone some streaming of some efficiency work
17 there. We're looking at downsizing our workload,
18 dropping several of our programs to reflect
19 marketing conditions, so part of an overall
20 effort.

21 And maybe we need to work a little bit,
22 too, at making sure we provide overview
23 information to the Board on the big picture of
24 fees, not just individual instances, and we'll
25 work at that. So I guess that's about all I had

1 to add.

2 CHAIRMAN RUSSELL: Thanks, Tom. The
3 next one is not a fee rule. So the next item on
4 the agenda is the amendment of 17.5403, 17.5.410.
5 Mr. North.

6 MR. NORTH: Mr. Chairman, members of the
7 Board, John North. This notice that you issued
8 last June came about because the Department is
9 proposing to do a comprehensive amendment of its
10 solid waste rules. And under the Solid Waste Act,
11 the Department adopts the substantive rules, but
12 the Board adopts the fee rules.

13 Unfortunately there are a couple of
14 cross references in the Board's fee rules to the
15 Department's rules, and we were in the process of
16 repealing those rules and adopting new ones, so we
17 needed to amend the cross-references.

18 Unfortunately, we haven't been able to
19 get that done. We had enough comments that we
20 needed to have a supplemental comment period. And
21 the six month deadline expires at the end of this
22 month for Board rulemaking, so we're proposing
23 that you let this die just by taking no action,
24 we'll come back to you once we've adopted the
25 rules, if we adopt the rules, and then we can

1 adjust the cross-references.

2 CHAIRMAN RUSSELL: So procedurally do we
3 actually just not take action?

4 MR. NORTH: You can decide to take
5 action and not adopt if you want, but if you don't
6 take action, it dies on December 24th anyway, and
7 that's what we would propose.

8 CHAIRMAN RUSSELL: So do we have to
9 formally not take action, or can we just go to the
10 next item?

11 MR. NORTH: You can just go to the next
12 item.

13 CHAIRMAN RUSSELL: The next item on the
14 agenda, the next items are repeals, amendments --
15 and that's new contested cases on appeal.
16 Procedurally we're going to try to go pretty fast.
17 John is out there. Just so you know, without a
18 Board attorney, without our attorney seated --
19 It's customary for her to present this to us.

20 Realize that the Department is a party
21 to these enforcement actions, and you have to be
22 really clear on that, as we ask questions of the
23 Department, that they shouldn't be leading to some
24 judgment that would affect the party that's not
25 here, hence ex parte communications. So keep that

1 in mind.

2 What we've decided to do, I believe --
3 John will nod -- I think I'm going to just read
4 these off, and if you have any questions related
5 to the case, we have John here to answer those.

6 MR. LIVERS: John Arrigo is the head of
7 our Enforcement Division.

8 CHAIRMAN RUSSELL: John Arrigo is in the
9 audience ready to answer any question that we can
10 pose of him that doesn't create an ex parte
11 communication.

12 New contested cases on appeal, in the
13 matter of the request for hearing regarding
14 revocation of certificate of approval ES No. 3493
15 C(1)(4) for the Fort Yellowstone Subdivision, Park
16 County, BER 2009-20 subdivision. "S-U-B" is for
17 subdivision.

18 The appeal was received on October 13th.
19 You have that. Katherine issued a first
20 prehearing order on the 29th, giving the parties
21 until November 13th to propose a schedule. On the
22 13th, the Department filed a request for
23 extension, and we're still in that extension
24 period. So at this point the Board can either
25 basically let this ride, or appoint Katherine or

1 her substitute as a permanent Hearings Examiner.

2 So if we don't want to hear this, we can --

3 MS. SHROPSHIRE: What's the first
4 option?

5 CHAIRMAN RUSSELL: We can doing nothing
6 at this point because there is an extension. We
7 can wait for further action by Katherine. We can
8 decide at this meeting to take this up as our
9 hearing, or we can appoint Katherine as permanent
10 Hearings Examiner. What's your wish? I can tell
11 you what my wish is.

12 MS. SHROPSHIRE: What's your wish?

13 MR. WHALEN: Mr. Chairman, I would move
14 that we appoint a permanent Hearings Examiner to
15 this case.

16 CHAIRMAN RUSSELL: Is there a second?

17 MS. SHROPSHIRE: Second.

18 CHAIRMAN RUSSELL: It's been moved and
19 seconded. Any further discussion?

20 (No response)

21 CHAIRMAN RUSSELL: Hearing none, all
22 those in favor, signify by saying aye.

23 (Response)

24 CHAIRMAN RUSSELL: Opposed.

25 (No response)

1 CHAIRMAN RUSSELL: The next item is in
2 the matter of the request for hearing by the City
3 Great Falls regarding the DEQ's notice of final
4 decision on their MPDES Permit No. MT0021920,
5 BER-2009-21WQ. And that last part is actually the
6 enforcement action number, it is not?

7 MR. ARRIGO: This is a permit appeal.

8 CHAIRMAN RUSSELL: Well, that's the
9 permit appeal number, correct?

10 MR. ARRIGO: (Nods head)

11 CHAIRMAN RUSSELL: The Board received
12 the appeal on the 29th; Katherine issued the first
13 prehearing order on the 12th of November, and
14 nothing else -- oh, a joint request for extension
15 to reply to the first prehearing order was filed
16 on November 30th, 2009. We basically have the
17 same options in front of us.

18 MS. SHROPSHIRE: It's been awhile, so
19 I'm a bit fuzzy. Can you remind me? There was,
20 it seems several months ago, some discussions of a
21 lot of the cities being opposed to their permits,
22 and at some point we were going to take on one of
23 these for the Board to hear themselves. Am I
24 thinking of the right thing, or was that a
25 different situation? Do you remember what I'm

1 talking about?

2 CHAIRMAN RUSSELL: No, I believe we did
3 discuss taking on hearing one of these from the
4 big -- I think, Larry, you remember that, too.

5 MR. MIRES: Right.

6 MS. SHROPSHIRE: I guess I would argue
7 that each of the cities are unique, and hearing
8 one of them doesn't represent hearing all of them,
9 but I just wanted to be clear that at some point
10 we had talked about that, and I --

11 MR. MIRES: It's to be considered.

12 MR. WHALEN: Mr. Chairman, I sort of
13 eye-balled this one as one that I would like to
14 hear, pretty much dovetailing on what Robin had to
15 say. A lot of people impacted by this decision,
16 hopefully some real educational value for those of
17 us that are new members that have not dealt with
18 this kind of an issue before the Board.

19 My question to you would be -- and maybe
20 Robin has already answered it -- but is it
21 customary for the Board to hear a challenge like
22 this to the Department in the event of a large
23 urban facility like Great Falls?

24 CHAIRMAN RUSSELL: Well, I don't know.
25 I'm really torn about this because some of us work

1 for the government that's sitting at the table.
2 Certainly I don't work for a city, but I do
3 actually -- you know, I'm a City-County Health
4 Department and Health Officer, so I somewhat have
5 some ties to Kalispell, which may or may not have
6 some of the same types of issues.

7 I don't think that -- From a personal
8 perspective, I don't think that makes me have to
9 recuse myself from the process, but it certainly
10 can make me a little uncomfortable.

11 MR. WHALEN: You raise an interesting
12 point. I would probably need to recuse myself as
13 well. I looked at the scale of this document,
14 went through it last night, 147 pages, and it just
15 seemed like a real load to put on a Hearing
16 Examiner.

17 CHAIRMAN RUSSELL: What about us?

18 MR. WHALEN: There is more of us, you
19 know.

20 CHAIRMAN RUSSELL: But we don't act like
21 an individual that lives in Helena.

22 MR. WHALEN: Okay. I'm going pull my
23 sights for this one.

24 CHAIRMAN RUSSELL: Any other comments?

25 MS. SHROPSHIRE: I won't be a City

1 Commissioner soon, so I won't have to recuse
2 myself. I would be interested in hearing one of
3 these, but I don't know which one.

4 MR. MIRES: I'm not sure this is the
5 one.

6 MR. ARRIGO: Mr. Chairman, members of
7 the Board, John Arrigo, DEQ Enforcement Division.
8 There may be some appeals of industrial wastewater
9 discharge permits that you might want to hear
10 rather than a municipality. It alleviates the
11 potential conflicts.

12 MR. MIRES: I agree.

13 MR. WHALEN: Mr. Chairman, is it the
14 opinion of Counsel that those of us that are
15 affiliated with cities, whether it would be
16 Helena, or Kalispell, or Miles City, that are
17 elected officials or employees, that we would need
18 to recuse ourselves from hearing a case like this?

19 CHAIRMAN RUSSELL: First of all, I don't
20 know if that -- and I'm not Counsel, but I'm as
21 close to Board Counsel as we have right now, and
22 certainly DEQ Counsel can weigh in on this.

23 But let me give you an example of one
24 where there was some very cohesive action between
25 -- The MS4 was one that became pretty much where

1 the League of Cities and Towns, and especially the
2 large cities, really got together and basically
3 challenged the permit the same way. John and Tom
4 remember this. They basically challenged their
5 permits in the same fashion. So Joe, there could
6 be some linkage between cities, and there may not
7 be. Only time would tell.

8 MR. WHALEN: But if it came to final
9 action before the BER, then would the matter of
10 recusal still surface when it came to final vote?

11 CHAIRMAN RUSSELL: Recusal, the clearest
12 recusal is when you are receiving remuneration and
13 the decision you make will affect that; is that
14 correct? So that is the clearest recusal that you
15 should make. So if you're being paid as the Mayor
16 of Miles City, it may be that you might want to
17 recuse yourself if the decision benefits your
18 community. And you still have to look at it in
19 the whole context of what you're doing, but that's
20 just some for instances that would come to mind.

21 MR. WHALEN: Thank you.

22 MS. SHROPSHIRE: And I just wanted to --
23 I don't think that as a Board, because one member
24 may have to recuse themselves, I don't think that
25 that should impact how we decide to hear that as a

1 Board.

2 CHAIRMAN RUSSELL: No. We've had things
3 in Flathead County that I've had to recuse myself
4 on. It doesn't mean the Board can't function,
5 even though sometimes I kind of wish it didn't in
6 that case, because it looked like we were going to
7 lose. But no.

8 MR. MILLER: I like John Arrigo's
9 comment. It seems like to me maybe the industrial
10 ones would be more the appropriate one to pursue.

11 CHAIRMAN RUSSELL: John is yanking us
12 off this hook.

13 MS. SHROPSHIRE: I think there may be
14 different -- In terms of the nutrient loading and
15 some of the things that I think are unique about
16 some of these permits, I think they may be unique
17 to the cities, so it wouldn't be the same
18 situation that an industrial permit would have.
19 So I would agree it would be -- but there may be
20 things about looking at some of these large cities
21 that we wouldn't see in an industrial permit.

22 MS. KAISER: I'm definitely interested
23 in hearing one of these. I'm not certain that
24 this is the right one.

25 MR. MIRES: Why don't we start with

1 Superior or something of that nature?

2 MS. SHROPSHIRE: Or Butte.

3 CHAIRMAN RUSSELL: Certainly I think we
4 should maybe take something like this up, but
5 maybe we shouldn't take this one up.

6 MS. SHROPSHIRE: So I'll move that we
7 appoint Katherine the permanent Hearings Examiner
8 for this particular item, and consider another one
9 at another time.

10 CHAIRMAN RUSSELL: Is there a second?

11 MR. WHALEN: I'll second that motion.

12 CHAIRMAN RUSSELL: It's been seconded by
13 Joe. Any further discussion?

14 (No response)

15 CHAIRMAN RUSSELL: Hearing none, all
16 those in favor, signify by saying aye.

17 (Response)

18 CHAIRMAN RUSSELL: Opposed.

19 (No response)

20 CHAIRMAN RUSSELL: Let's move on then.

21 MR. LIVERS: Mr. Chairman, I'm assuming
22 you don't want the Department to go out and create
23 another one for you to look at.

24 CHAIRMAN RUSSELL: No. I think you'll
25 do just fine in the normal course of work.

1 The next one is in the matter of the
2 request for hearing of John McInherney, Bob Haney,
3 and Marwin Hofer, regarding the revocation of
4 certificate of approval ES#34-93-C1-4, Fort
5 Yellowstone -- there is another one just like it?
6 These are the parties -- ES#34-93-C1 at Fort
7 Yellowstone Subdivision, Park County, BER 2009-22
8 Subdivision.

9 The Board received the appeal on
10 November 3rd; Katherine issued the first
11 prehearing orders on the 12th; and that's kind of
12 where it sits right now.

13 MR. WHALEN: Mr. Chairman, I would move
14 that we appoint a permanent Hearings Examiner, and
15 refer this case to her.

16 CHAIRMAN RUSSELL: Is there a second?

17 MR. MILLER: Second.

18 CHAIRMAN RUSSELL: It's been seconded by
19 Marv. Any further discussion?

20 (No response)

21 CHAIRMAN RUSSELL: Hearing none, all
22 those in favor, signify by saying aye.

23 (Response)

24 CHAIRMAN RUSSELL: Opposed.

25 (No response)

1 CHAIRMAN RUSSELL: The next item on the
2 agenda is in the matter of violations of the
3 Montana Strip and Underground Mining Reclamation
4 Act by Signal Peak Energy, LLC, at Bull Mountain
5 Mine No. 1, Roundup, Musselshell County, BER
6 2009-23SM, Strip Mine.

7 The Board received an appeal on November
8 4th; Hearing Examiner Katherine Orr issued
9 prehearing orders on the 12th; and it sits in the
10 same place it was on the 12th.

11 MR. WHALEN: Mr. Chairman, this is one I
12 would like for the Board to hear.

13 CHAIRMAN RUSSELL: All right.

14 MR. WHALEN: But rather than make a
15 motion to that effect right now, I'd be interested
16 to know if there are any other Board members that
17 were curious in hearing which violation applies
18 and what sorts of arguments might come as a
19 result.

20 CHAIRMAN RUSSELL: Because this has only
21 been a month since the last action -- where is
22 John -- I wonder if taking no action on this would
23 leave it open for us to do it. I think if we take
24 no action, we basically keep her in the interim
25 position, and then we may have some more

1 information to act on at the next one. I'm
2 certainly not opposed to taking one of these up.
3 This one is fine, too. I've dealt with things in
4 Roundup. Do you want to let this one ride?

5 MR. WHALEN: I'd be agreeable to that.

6 CHAIRMAN RUSSELL: We'll take it up at
7 the next meeting.

8 The next item on the agenda. These are
9 final actions on contested cases, and I might need
10 to -- hopefully I can keep up on these things --
11 in the matter of the appeal and request for
12 hearing by the Montana Environmental Information
13 Center, Citizens for Clean Energy, Sierra Club.

14 Do we need to take a quick break? Let's
15 take five.

16 (Recess taken)

17 CHAIRMAN RUSSELL: The first item is in
18 the matter of the appeal of the request for
19 hearing that was made by the Montana Environmental
20 Information Center, Citizens for Clean Energy,
21 Sierra Club, and the National Parks Conservation
22 Association, of the SME Highwood Generating
23 Station Air Quality Permit No. 3423-01-BER.

24 Apparently the parties have decided to
25 settle this matter, and I have an order to dismiss

1 in front of me. So I have an order, and I would
2 entertain a motion to authorize the Board Chair to
3 sign.

4 MR. MIRES: So moved.

5 MR. MILLER: Second.

6 CHAIRMAN RUSSELL: It's been moved and
7 seconded by Larry and Marv. Any further
8 discussion?

9 (No response)

10 CHAIRMAN RUSSELL: Hearing none, all
11 those in favor, signify by saying aye.

12 (Response)

13 CHAIRMAN RUSSELL: Opposed.

14 (No response)

15 CHAIRMAN RUSSELL: The next item on the
16 agenda is in the matter of violations of the
17 Montana Public Water Supply Laws by the Anaconda
18 Country Club, Anaconda, Deer Lodge County,
19 BER-2009-12. The parties have decided to settle,
20 actually a stipulation for dismissal filed under
21 Rule 41(a). And I have an order for dismissal in
22 front of me. I would entertain a motion to
23 authorize the Board Chair to sign the order of
24 dismissal.

25 MR. MILLER: So moved.

1 CHAIRMAN RUSSELL: It's been moved by
2 Marvin. Is there a second?

3 MS. SHROPSHIRE: Second.

4 CHAIRMAN RUSSELL: It's been seconded by
5 Robin.

6 MS. SHROPSHIRE: 41(a) clarification.

7 CHAIRMAN RUSSELL: We'll discuss
8 41(a) dismissals at the next Board meeting. Any
9 further discussion?

10 (No response)

11 CHAIRMAN RUSSELL: Hearing none, all
12 those in favor, signify by saying aye.

13 (Response)

14 CHAIRMAN RUSSELL: Opposed.

15 (No response)

16 CHAIRMAN RUSSELL: The next matter is
17 violations of the Montana Underground Storage Tank
18 Act by Stockton Oil Company at Soco Express No.
19 10, Yellowstone County, BER 2009-14 UST. The
20 parties have filed stipulations for dismissal
21 under Rule 41(a), and I'll bet you I have an order
22 for dismissal in front of me, and I would
23 entertain a motion to authorize the Board Chair to
24 sign said motion.

25 MS. KAISER: So moved.

1 CHAIRMAN RUSSELL: It's been moved by
2 Heidi. Second?

3 MR. MILLER: Second.

4 CHAIRMAN RUSSELL: It's been seconded by
5 Marv. Any further discussion?

6 (No response)

7 CHAIRMAN RUSSELL: Hearing none, all
8 those in favor, signify by saying aye.

9 (Response)

10 CHAIRMAN RUSSELL: Opposed.

11 (No response)

12 CHAIRMAN RUSSELL: Motion carries. The
13 next item is in the matter of violations of the
14 Montana Septage Disposal and Licensure Laws by
15 Craig Sundberg doing business as Sunny's Septic
16 Service and Excavating, Deer Lodge County,
17 BER-2009-15SDL.

18 The Board received stipulations for
19 dismissal under Rule 41(a) signed by the parties.
20 I have an order of dismissal in front of me. I
21 need authorization to sign it. Is there a motion?

22 MR. MILLER: So moved.

23 CHAIRMAN RUSSELL: It's been moved by
24 Marvin. Is there a second?

25 MS. KAISER: Second.

1 CHAIRMAN RUSSELL: It's been seconded by
2 Heidi. Any further questions?

3 (No response)

4 CHAIRMAN RUSSELL: Hearing none, all
5 those in favor, signify by saying aye.

6 (Response)

7 CHAIRMAN RUSSELL: Opposed.

8 (No response)

9 CHAIRMAN RUSSELL: Motion carries. In
10 the matter of violations of the Montana Public
11 Water Supply laws by Cottonwood Camp, a Montana
12 LLP, at Cottonwood Camp Fort Smith, PWSID Montana
13 0003301, Fort Smith, Big Horn County, BER
14 2009-19PWS.

15 The Board received motions to dismiss
16 the request for hearing and notice of appeal from
17 the Appellant. An order to dismiss the case is in
18 their packet. And I would entertain a motion to
19 authorize the Board Chair to sign said dismissal.

20 MR. MIRES: So moved.

21 CHAIRMAN RUSSELL: It's been moved by
22 Larry. Is there a second?

23 MS. SHROPSHIRE: Second.

24 CHAIRMAN RUSSELL: It's been seconded by
25 Robin. Further discussion?

1 (No response)

2 CHAIRMAN RUSSELL: Hearing none, all
3 those in favor, signify by saying aye.

4 (Response)

5 CHAIRMAN RUSSELL: Opposed.

6 (No response)

7 CHAIRMAN RUSSELL: The next item is in
8 the matter of violations of the Montana Metal Mine
9 Reclamation Act by Paradine Mining, Inc.,
10 Broadwater County, BER 2009-16MM.

11 The Board received an Administrative
12 Order on Consent and Dismissal, or stipulation to
13 dismiss, pursuant to Rule 41(a). I would
14 entertain a motion to authorize the Chair to sign
15 the order for dismissal.

16 MR. WHALEN: So moved.

17 CHAIRMAN RUSSELL: It's been moved by
18 Joe. Is there a second?

19 MR. MILLER: Second.

20 CHAIRMAN RUSSELL: It's been seconded by
21 Marv. Any further discussion?

22 (No response)

23 CHAIRMAN RUSSELL: Hearing none, all
24 those in favor, signify by saying aye.

25 (Response)

1 CHAIRMAN RUSSELL: Opposed.

2 (No response)

3 CHAIRMAN RUSSELL: The next item on the
4 agenda is in the matter of violations of the Metal
5 Mine Reclamation Act by Saturday Sunday, LLC, Deer
6 Lodge, BER 2009-2 MM. This will be deferred, Tom?

7 MR. LIVERS: This will be deferred to
8 the next meeting, Mr. Chairman.

9 CHAIRMAN RUSSELL: This will be on the
10 agenda for dismissal -- or for action at the next
11 Board meeting.

12 Well, we've worn everyone out. It's the
13 end of the meeting, and this is the time when we
14 accept general public comment. If there is anyone
15 in the audience that would like to speak to any
16 matters that pertain to the Board, would you come
17 to the podium, state your name, and state your
18 case.

19 (No response)

20 CHAIRMAN RUSSELL: Seeing none, I would
21 entertain a motion to adjourn.

22 MR. MIRES: So moved.

23 CHAIRMAN RUSSELL: It's been moved.

24 MR. MILLER: Second.

25 CHAIRMAN RUSSELL: It's been seconded by

1 Marv. All those in favor, signify by saying aye.

2 (Response)

3 CHAIRMAN RUSSELL: Good meeting, Board.

4 (The proceedings were concluded

5 at 4:07 p.m.)

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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 - 243 - 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 , 2009.

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