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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

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BOARD MEETING )  
September 30, 2016 )

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TRANSCRIPT OF PROCEEDINGS

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Heard at Room 111 of the Metcalf Building  
1520 East Sixth Avenue  
Helena, Montana  
September 30, 2016  
9:00 a.m.

BEFORE CHAIRMAN JOAN MILES,  
BOARD MEMBERS CHRIS TWEETEN, DR. ROBERT BYRON,  
ROY O'CONNOR; and ROBIN SHROPSHIRE,  
MARIETTA CANTY, and MICHELE REINHART-LEVINE

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

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

3                           \* \* \* \* \*

4           (Ms. Reinhart-Levine not present)

5           CHAIRMAN MILES: Good morning, everyone.  
6 We'll call the meeting to order. And I guess I'd  
7 ask Hillary to take roll.

8           MS. HOULE: Thank you, Madam Chair. In  
9 attendance we have Madam Chair Joan Miles. And I  
10 will go through and announce the Board members by  
11 name, and if you could just say "here" when I say  
12 your name, that would be great. Thank you. I'll  
13 start with Board Member Dr. Robert Byron.

14           DR. BYRON: Here.

15           MS. HOULE: Board member Marietta Canty.

16           MS. CANTY: Here.

17           MS. HOULE: Board member Roy O'Connor.

18           MR. O'CONNOR: Here.

19           MS. HOULE: Board member Michele  
20 Reinhart-Levine.

21           (No response)

22           MS. HOULE: And Board member Robin  
23 Shropshire.

24           MS. SHROPSHIRE: Here.

25           MS. HOULE: Board Member Tweeten.

1 MR. TWEETEN: Here.

2 CHAIRMAN MILES: I believe that Marietta  
3 was going to be on the phone, so we'll maybe hear  
4 her come in.

5 MS. CANTY: I answered here.

6 CHAIRMAN MILES: I'm sorry. I missed  
7 that. I mistook that. I thinking about Michele.  
8 So we may hear from her.

9 The first item of business is to review  
10 and approve the minutes from August 5th. And I  
11 apologize again that I wasn't here, and I do have  
12 one slight correction even without being here.

13 In the very first 1-A-1 review and  
14 approve minutes, it said Chairman Shropshire  
15 called for a motion to adopt the minutes as  
16 submitted. Mr. O'Connor and Ms. Reinhart-Levine  
17 seconded. So I think you forgot Mr. O'Connor  
18 moved.

19 Those of you were here for the meeting,  
20 are there any corrections or comments to the  
21 minutes?

22 (No response)

23 CHAIRMAN MILES: Okay. Is there a  
24 motion to approve?

25 MR. O'CONNOR: So moved.

1 CHAIRMAN MILES: Is there a second?

2 DR. BYRON: Second.

3 CHAIRMAN MILES: It's been moved and  
4 seconded. All in favor, please say aye.

5 (Response)

6 CHAIRMAN MILES: Anyone opposed?

7 (No response)

8 CHAIRMAN MILES: Motion carries  
9 unanimously. Thank you.

10 With that, we're going to move right  
11 into contested case updates and hear from Ben.

12 MR. REED: Thank you, Madam Chair. In  
13 the matter of the public water supply laws with  
14 Highlander Bar and Grill, the stipulation has been  
15 entered, and the Highlander Bar and Grill is,  
16 insofar as I know, complying with that  
17 stipulation.

18 For A(1)(b) and (c), the second proposed  
19 briefing contested case hearing schedule has been  
20 filed by the parties, and an order has been  
21 issued. Those orders are running in parallel and  
22 will continue at pace.

23 In (d), the matter of violations of  
24 Water Quality Act by Buscher Construction, the  
25 parties anticipate resolution through mediation,

1 so they anticipate that matter will be resolved  
2 one way or another by November 30th or they will  
3 so inform me.

4 Moving to non-enforcement cases, No. 2,  
5 in the matter of the Phillips 66's appeal of  
6 outfall 006 arsenic limits, that matter has been  
7 stayed to December 17th of this year.

8 With Columbia Falls Aluminum Company,  
9 again, at this point the matter proceeds at pace.  
10 The parties may be able to resolve, but they have  
11 both filed -- we're sort of moving towards a  
12 hearing at this point, so both parties have filed  
13 prehearing statements. I think we anticipate  
14 going to a hearing on that.

15 In the matter of Heart K Land and  
16 Cattle, I held a hearing on September 1st. The  
17 parties presented arguments in support of their  
18 motions for summary judgment, and I'm working on  
19 that. I anticipate having that wrapped up pretty  
20 quickly.

21 The second prehearing order in  
22 Westmoreland Resources simply sets a new schedule;  
23 as does (e), with the MPDES permit issued by DEQ  
24 for the Laurel Refinery.

25 In the matter of termination by DEQ of

1 the application by Payne Logging, exceptions and  
2 presentation of briefs and oral argument are being  
3 worked on by the parties, and that is proceeding  
4 according to schedule.

5 (Ms. Reinhart-Levine present)

6 CHAIRMAN MILES: Good morning, Michele.  
7 Thanks for joining. We're just going through.  
8 We're on the non-enforcement cases assigned to the  
9 Hearing Examiner, getting an update on that. And  
10 I think we have the whole Board in attendance  
11 either here in person or on the phone. So thank  
12 you.

13 MS. SHROPSHIRE: Joan, just to interrupt  
14 for just a minute. I'm travelling this morning,  
15 and at some point I may have to drop off to get on  
16 a plane, so I wanted to warn you ahead of time.

17 CHAIRMAN MILES: Thanks, Robin. And  
18 nice job last meeting, with a record pace on the  
19 Board meeting.

20 MS. SHROPSHIRE: You're welcome.

21 MR. REED: Under (g), in the matter of  
22 LT Trucking, the request for extension to file  
23 joint scheduling order was responded to. I  
24 confess that this was responded to a bit late. I  
25 just got the matter signed today. But the parties

1 are moving forward with that matter.

2 In the matter of the denial of the  
3 nondegradation review for Lakes at Heron  
4 Subdivision, the parties have filed a joint  
5 stipulation to dismiss without prejudice. I've  
6 prepared an order for your signature, Madam Chair.

7 And in the matter of the appeal of the  
8 violations of the Open Cut Mining Act by Big Rock,  
9 I've issued a first prehearing order asking the  
10 parties to set a schedule.

11 CHAIRMAN MILES: Before Ben moves to the  
12 next topic, any questions or procedural questions  
13 from the Board?

14 (No response)

15 CHAIRMAN MILES: Okay. Thank you.

16 MR. REED: And in the contested cases  
17 not assigned to a Hearing Examiner, in the matter  
18 of WECO regarding its MPDES permit, Mr. North,  
19 would you --

20 MR. NORTH: Madam Chair, members of the  
21 Board, John North. I'm sitting in for George  
22 Mathieus today. He is ill, and so I'm sitting in  
23 for him.

24 With regard to that, two things have  
25 happened recently. One is that the briefing on

1 the attorney fees issue between the Plaintiffs and  
2 the Department is ongoing. I think briefing  
3 should be done in early October, and then it will  
4 be ready for decision by the Judge on the issue of  
5 whether attorney fees are due and owing.

6 At the same time, Western Energy has  
7 filed an appeal of the substantive provisions of  
8 the case in the Montana Supreme Court, so it looks  
9 like that case will be in the Supreme Court for a  
10 decision.

11 CHAIRMAN MILES: John, can I ask you  
12 briefly. This case versus the WECO case down  
13 below, which is a permit for Area B, how do those  
14 differ? That's just a little confusing to me.

15 MR. NORTH: This case pertains to the  
16 discharge permit for the outfalls. The other case  
17 is under the Strip Mine Act.

18 CHAIRMAN MILES: Is it all the same  
19 expansion or is it --

20 MR. NORTH: I believe so. I think so.  
21 Excuse me. It is not. I wasn't sure on that. So  
22 it's a different expansion. I'm sorry.

23 CHAIRMAN MILES: So it is a different  
24 area of the mine, so they're very separate issues  
25 here.



1 MR. NORTH: They're separate, yes.

2 CHAIRMAN MILES: Thank you.

3 MR. O'CONNOR: Madam Chair, excuse me.  
4 I'm still not clear on where we are with respect  
5 to the Signal Peak/MEIC agreement or discussions  
6 that were going on. Has that been settled? If  
7 so, I may be missing out on something here, but I  
8 haven't gotten any letters on it or any  
9 information recently.

10 MR. NORTH: Madam Chair, I think Mr.  
11 Reed will be addressing the Board on that issue.

12 MR. REED: Absolutely. That's going to  
13 be under new contested cases, Mr. O'Connor.

14 MR. O'CONNOR: Okay. Thank you.

15 CHAIRMAN MILES: Something has happened  
16 apparently. Thank you. Any questions from anyone  
17 on the phone?

18 (No response)

19 CHAIRMAN MILES: Other briefing items.  
20 Thank you for your update. Air quality permit  
21 fees; is that where we are?

22 MR. REED: Yes, Madam Chair.

23 MR. NORTH: Madam Chair, Liz Ulrich will  
24 address the Board.

25 MS. ULRICH: Good morning, Madam Chair,

1 members of the Board. My name is Liz Ulrich, and  
2 I'm the Analysis and Planning Services Section  
3 Supervisor within the Air Quality Bureau.

4 The air quality rules, specifically ARM  
5 17.8.510, require the Department to report to the  
6 Board annually on air quality fees that are  
7 anticipated for the next calendar year. Last year  
8 Chuck Homer gave this report, and provided some  
9 history of the fee program, as well as discussion  
10 of fees for calendar year 2016. I don't plan to  
11 cover the same material that Chuck presented, but  
12 I am going to refer to some points he spoke about.

13 As a refresher, approximately 75 percent  
14 of the Air Quality Bureau is funded by fees  
15 collected from either permitted or registered  
16 sources or from applications we receive. The  
17 Legislature sets appropriation for air fees, and  
18 then you as the Board establish a fee schedule  
19 sufficient to collect enough revenue to support  
20 that appropriation.

21 The majority of the fees collected come  
22 from emissions from regulated facilities, or flat  
23 fees from registered oil and gas wells and  
24 portable facilities.

25 Last year Chuck mentioned that we

1 haven't raised the fee since 2009. Rather than  
2 increasing that rate, the Air Quality Bureau  
3 worked on reducing expenses, and we are still  
4 working on that. We are currently evaluating our  
5 program, and determining how we can make them  
6 operate more efficiently. We aren't yet 100  
7 percent sure what that looks like, but when we do,  
8 we will be sure to involve our stakeholders,  
9 especially the Clean Air Act Advisory Committee,  
10 in the process.

11 Between new regulations being  
12 promulgated by the EPA, and large sources of  
13 emissions in Montana shutting down, the air  
14 quality world is dynamic, and we anticipate being  
15 able to support the program through calendar year  
16 2017 without needing to request a fee change.

17 Therefore at this time we do not  
18 anticipate bringing a request for a fee change  
19 before the Board in the next year. In September  
20 2017 we will be back and present any anticipated  
21 fee changes for that year. Is there any  
22 questions?

23 CHAIRMAN MILES: Any questions?

24 (No response)

25 CHAIRMAN MILES: Thank you very much.

1 Now I think it goes back to you.

2 MR. REED: Yes, Madam Chair. Very  
3 briefly, Madam Chair, as the Board is aware, the  
4 Petitioners in the WECO Rosebud Strip Mine Area B  
5 case that's in BER 2016-03, the Petitioners have  
6 submitted a motion for summary judgment. The  
7 matter has been fully briefed by all the parties.

8 The matter has not been set for hearing  
9 because candidly I didn't believe that the Board  
10 was going to have enough time to thoroughly digest  
11 the materials. I assume the Board members have  
12 reviewed the materials. They're fairly copious,  
13 and they require quite a bit of review and  
14 rumination to address them.

15 That having been said, it would be  
16 possible for the Board to hear the matter today.  
17 However, absent sufficient amount of public  
18 notice, I think it's probably not appropriate.  
19 That having been said, there are a couple of  
20 issues that the parties have raised that I think  
21 are appropriate to address to the entire Board.

22 The matter has not been set for hearing  
23 by a Hearing Examiner. Therefore the Board needs  
24 to hear the matter. The matter can be heard at  
25 the December meeting of the Board. Having talked

1 with Mr. Mathieus, I believe that there is going  
2 to be ample time on the schedule for the Board to  
3 be able to hear the matter, and get a full and  
4 fair accounting of the parties' legal positions  
5 during the ordinary course of a one day meeting.

6 The parties have indicated, however,  
7 that they have a little bit of a concern about the  
8 fact that there are several Board members whose  
9 terms expire on the first of next year; and so in  
10 a perfect world, therefore, the parties would like  
11 to have the matter heard by the same Board members  
12 who ultimately would be making a decision.

13 So the parties have requested that the  
14 matter possibly be set for a hearing in October or  
15 November. That would be at the Board's  
16 convenience obviously, but the parties have  
17 indicated that they would be ready and able to  
18 move their schedules around.

19 I note that the parties are all in  
20 attendance today, and may wish to express their  
21 opinions on the matter to the Board, but that's  
22 sort of the lay of the land at current.

23 CHAIRMAN MILES: The next meeting is  
24 December 9th; is that correct?

25 MS. HOULE: That's correct, Madam Chair.

1                   CHAIRMAN MILES:   And I missed two  
2 meetings here.   So did we ever take up this issue  
3 of whether to assign this to a Hearing Examiner or  
4 not?

5                   MR. REED:   Madam Chair, when the matter  
6 was first appealed to the Board, the parties  
7 requested that the matter not be heard by a  
8 Hearings Examiner.   Candidly I think part of the  
9 reason was that they believed that the matter was  
10 going to need to be heard by the Board at some  
11 point.   Whichever way the Hearing Examiner decided  
12 on the matter, it would then be appealed by one of  
13 the parties to the Board, so they requested that  
14 the Board simply not assign it to a Hearings  
15 Examiner, that I would simply handle the  
16 administrative and scheduling matters prior to the  
17 Board hearing the matter.

18                  CHAIRMAN MILES:   So I guess my first  
19 question then procedurally is:   Is that what the  
20 Board wants to do, to hear the matter?   And I  
21 would just add my quick thought on it, not that I  
22 want to.   But I think I was of the mind originally  
23 that this could go to the Hearings Examiner,  
24 because I felt that we had made our position clear  
25 on the Cumulative Hydrologic Impact Assessment;

1 but after reading this, it seems to me that the  
2 alleged deficiencies are quite different. So it  
3 probably is appropriate for the Board to hear it,  
4 but that's just my thought. Anyone else have  
5 comments on that?

6 (No response)

7 CHAIRMAN MILES: Are we prepared to hear  
8 it? Not necessarily today, but are we prepared to  
9 take this under our jurisdiction?

10 MR. TWEETEN: Madam Chair, I would tend  
11 to defer to Counsel's judgment about this matter  
12 as well. And just having looked at the volume of  
13 materials that's in front of us, it occurs to me  
14 that rather than go through a hearing in front of  
15 the Hearing Examiner and then another hearing in  
16 front of the Board, it might be better just to cut  
17 to the chase and have the Board hear it sometime  
18 this fall.

19 DR. BYRON: Madam Chair, I agree with  
20 Mr. Tweeten, and your thoughts as well.

21 CHAIRMAN MILES: Anyone on the phone  
22 have a comment? It appears that the four of us  
23 here agree that since it is likely to come before  
24 the Board anyway, that we should schedule a  
25 hearing. Anyone on the phone?

1 MS. SHROPSHIRE: It's fine with me,  
2 Joan.

3 MS. REINHART-LEVINE: Michele. Same.

4 MS. CANTY: Marietta. It's fine with  
5 me, but I'll have to recuse myself because it  
6 involves coal, so for whatever that's worth.

7 CHAIRMAN MILES: Thanks. We understand  
8 that, Marietta. Thank you. Then I guess that  
9 being said, if the parties are here and want to  
10 comment about an appropriate time for a hearing,  
11 we'll take that, we'll listen to you. And I guess  
12 my concern is that would we be able to finish our  
13 work if we did this in December. So if it is ripe  
14 for hearing, we may need to schedule that within  
15 the next month or so. Who wants to -- Shiloh.

16 MR. HERNANDEZ: Madam Chair, members of  
17 the Board, Shiloh Hernandez with the Western  
18 Environmental Law Center, representing the  
19 Petitioners in this matter.

20 We share the concern that if this case  
21 is heard in December, that there won't be  
22 sufficient time for the Board as currently  
23 composed to issue a ruling on it by the end of the  
24 year. We understand that it is not always the  
25 case that Board members are removed immediately on



1 the first of January, that there is some time to  
2 choose all of that, but we think that it makes it  
3 the easiest for everyone, and avoids any potential  
4 change and potential for any political meddling in  
5 this. It's an issue that we just want to avoid  
6 altogether.

7 We are available in October and  
8 November. We really want to be aware and  
9 respectful of the Board's schedules, and that this  
10 isn't your full-time jobs. We think that it is  
11 most important that the Board be fully briefed on  
12 the matter before hearing it if that's possible;  
13 and if it works with your schedules, we think that  
14 the ideal time would be the latter two weeks of  
15 October or early November. And that's all I have  
16 to say. If you have any questions, I'm happy to  
17 respond.

18 CHAIRMAN MILES: Thank you. Is there  
19 anyone else representing any of the parties that  
20 wishes to comment?

21 MS. CONVERY: Madam Chair, members of  
22 the Board, my name is Becky Convery. I represent  
23 the Department in this matter.

24 We are not opposed to having a special  
25 hearing in late October/early November. Again, we

1 share the same concern that Mr. Hernandez does,  
2 and that is the Board have sufficient time to  
3 review the volume of materials that have been  
4 submitted in this case.

5           However, as an alternative, if a special  
6 hearing date cannot be agreed upon or Board  
7 members are not available in late October/early  
8 November, as a possible alternative, if all the  
9 materials have been reviewed and there is a  
10 hearing on the 9th, it may be possible to have a  
11 follow up telephonic conference for the Board to  
12 decide the matter prior to January 1st, if that's  
13 appropriate. So we just wanted to offer that as  
14 an alternative. Thank you, Madam Chair.

15           MR. MARTIN: Madam Chair, members of the  
16 Board, my name is John Martin, and I have the  
17 pleasure of representing Western Energy, its Union  
18 Local 400, the Cheyenne Miners Association, and  
19 Natural Resource Properties. We're the  
20 intervenors in this matter.

21           We are amenable, if the Board were to  
22 decide that it is appropriate to have a special  
23 session, we're certainly amenable and will  
24 accommodate. By the same token, I think Ms.  
25 Convery's suggestion is something that strikes us

1 as practical. More than anything else, we want to  
2 accommodate the Board. We recognize -- to put it  
3 in the vernacular -- that you have day jobs, and  
4 it is not that easy to pull everybody together,  
5 and we appreciate both the expense and the effort.  
6 So whatever the Board decides, we are amenable to  
7 it.

8 And we do think that the suggestion that  
9 was advanced by DEQ is something that strikes us  
10 as practical, and something that we'd be willing  
11 to join in and make that effort work.

12 Let me add -- just as an offer to  
13 perhaps facilitate what folks have suggested --  
14 that perhaps the parties could submit proposed  
15 findings of fact and conclusions of law in  
16 sufficient time to allow the Board to decide the  
17 matter, if it is necessary, before early January.  
18 Thank you.

19 CHAIRMAN MILES: Thank you. Anyone  
20 else?

21 (No response)

22 CHAIRMAN MILES: Board members.

23 MR. O'CONNOR: It seems to me like we  
24 usually have a pretty full schedule on the  
25 December meeting without trying to squeeze this

1 in. You have more experience than I do on this,  
2 Madam Chair, but just a comment here.

3 CHAIRMAN MILES: Chris, you mentioned  
4 that maybe a fall time period might be -- I would  
5 worry about December frankly. I appreciate the  
6 offer to kind of assist us through that, but  
7 that's a pretty busy time of year for everyone.  
8 And I would worry about whether we could finish  
9 our work. It just brings back shades of last  
10 year, because I think that we were doing that in  
11 December of last year, if I recall, and then  
12 meeting in January. So I would hesitate to think  
13 that we could actually finish it by the first of  
14 the year.

15 So I'm certainly willing to look at a  
16 date in October or November. I do have some time  
17 constraints. Maybe I'll just throw that out. I  
18 would be not be available after the 26th,  
19 Wednesday, but I would be available October 24th  
20 or 25th, and I am available that very first week  
21 in November. The 31st through the 3rd. I would  
22 be leaving town on the 4th. But that's just a  
23 couple of suggestions there. How do others'  
24 schedules look?

25 MR. TWEETEN: Madam Chair, my schedule

1 is quite flexible, but I am available on all of  
2 the dates that you have just identified. So any  
3 of those five, I guess, dates, five or six dates  
4 would be fine with me.

5 MR. O'CONNOR: Madam Chair, probably the  
6 1st, 2nd, 3rd of November would work fine for me,  
7 as well as the 31st which is Halloween, if that's  
8 an appropriate date.

9 CHAIRMAN MILES: Probably the 1st or 2nd  
10 would be preferable.

11 DR. BYRON: Madam Chair, those dates  
12 work for me, the 31st through the 3rd.

13 CHAIRMAN MILES: Marietta, I know you  
14 said you would have to recuse yourself. So Robin,  
15 are you still on the phone?

16 MS. SHROPSHIRE: Yes, I'm here.

17 CHAIRMAN MILES: I need to hear from  
18 Robin and Michele about the potential for meeting  
19 I think the 1st, 2nd, or 3rd of November.

20 MS. REINHART-LEVINE: This is Michele.  
21 Works for me.

22 CHAIRMAN MILES: Thank you, Michele.

23 MS. SHROPSHIRE: I need to check my  
24 calendar, and unfortunately I just have my phone  
25 with me. The 1st, 2nd, or 3rd is a Monday?

1           CHAIRMAN MILES: It is a Tuesday,  
2 Wednesday, Thursday. Monday is I think a  
3 potential, too. You can let us know.

4           MS. SHROPSHIRE: I think I can get back  
5 to you pretty quickly on that, but unfortunately I  
6 don't know right now.

7           CHAIRMAN MILES: I guess the next step  
8 would be -- Department, is that possible to have  
9 the support and the technical assistance we would  
10 need to set that up? Is there a preference on any  
11 one of those days, the 1st, 2nd, or 3rd?

12          MR. NORTH: I don't think we have a  
13 preference on those dates.

14          MR. REED: Madam Chair, if I might  
15 interject. What I can simply do is -- I know that  
16 this has perhaps caught the Board a bit on its  
17 back foot, and what I can simply do is have our  
18 office arrange for a date, and telephonically  
19 contact all the Board members, and make sure that  
20 that specific date and time works for them. We do  
21 that pretty routinely for these sorts of matters.

22          CHAIRMAN MILES: Does that sound good to  
23 the parties, workable to the parties? And I do  
24 appreciate, Mr. Martin, what you had talked about  
25 drafting some proposed findings of fact and

1 conclusions of law. I don't know if that's  
2 possible to do by November, but if it is, that is  
3 certainly helpful to the Board. We have the  
4 briefs, and we can be studying that. And it is  
5 rather a lot of material. I tried to get through  
6 it as best as I could, but certainly wasn't  
7 prepared to have a hearing on that today.

8 So I think that would give us an  
9 opportunity to work on the materials we have, and  
10 then if there would be a possibility of some  
11 drafts, FOF, if that's possible, we would  
12 appreciate that.

13 MR. HERNANDEZ: Absolutely.

14 MR. TWEETEN: Madam Chair, may I? A  
15 plea and then a question.

16 First of all, the last time we had one  
17 of these large summary judgment arguments, I  
18 requested that the parties try to get together and  
19 stipulate to as many of the facts as you can, and  
20 not just procedural facts, but substantive facts  
21 with respect to the matter as well. I know  
22 Western Energy at least has argued that there are  
23 material issues of fact that preclude summary  
24 judgment, but if we could get some sort of agreed  
25 statement of facts from the parties as to

1 everything that is possible for you to agree to,  
2 that would certainly make it easier for us to  
3 evaluate the appropriateness of this case for  
4 summary judgment.

5 Second question. How long do we  
6 anticipate this argument is going to take?  
7 Certainly not more than one day, I hope.

8 MR. HERNANDEZ: Madam Chair, Mr.  
9 Tweeten, we spoke with Mr. Reed about this  
10 previously. The parties all agree that we think  
11 that thirty minutes for each side to present our  
12 arguments should be sufficient, and then any  
13 additional time for questioning from the Board.

14 CHAIRMAN MILES: So I think this kind of  
15 schedule then would allow us, if we needed, to  
16 have an additional call in November or to complete  
17 our work at our December meeting. I guess I'll  
18 work with the Department on what that agenda is  
19 going to look like in December so we have  
20 sufficient time to complete this, if it is  
21 feasible.

22 MR. NORTH: Madam Chair, I think that  
23 given what we know about the December meeting  
24 right now, there should be time.

25 CHAIRMAN MILES: Okay. Well, here we



1 go.

2 MR. REED: So I think there will need to  
3 be a motion, Madam Chair, to set the matter, or  
4 are we --

5 CHAIRMAN MILES: We're going to hear  
6 from you about I think the most workable date  
7 between the 1st, 2nd, and 3rd, correct? So do we  
8 want a general motion that we do work with the  
9 Department and with Ben to set up a special  
10 meeting to hear this matter? Would that be an  
11 appropriate motion?

12 MR. REED: I think that would be  
13 sufficient, Madam Chair.

14 MR. TWEETEN: So moved.

15 DR. BYRON: Second.

16 CHAIRMAN MILES: It's moved by Mr.  
17 Tweeten, seconded by Rob Byron. Any further  
18 discussion?

19 (No response)

20 CHAIRMAN MILES: All in favor, please  
21 say aye.

22 (Response)

23 CHAIRMAN MILES: Opposed.

24 (No response)

25 CHAIRMAN MILES: Hearing none, this

1 matter on Western Energy Company Rosebud Strip  
2 Mine Area B will be scheduled for early November,  
3 date to be determined, and we will hear from Ben  
4 as soon as possible about that.

5 MR. REED: Yes, Madam Chair.

6 CHAIRMAN MILES: Thank you, everybody.  
7 Action items.

8 MR. REED: Madam Chair, Mr. O'Connor,  
9 yes. You'll note that Roman III(A)(1) looks  
10 suspiciously similar to an old case. It is and it  
11 is not. It has been styled as a new contested  
12 case. It's fundamentally the old Signal Peak with  
13 a couple of added twists that have to do both with  
14 the hydrologic issues that are covered or not  
15 covered by the CHIA, as well as the adequacy of  
16 the bonding.

17 The petition that's been filed by  
18 Western Environment Law Center through Counsel is  
19 pretty specific as to what they require. However,  
20 many of the issues are very much the same as were  
21 covered the last time this was before the Board.

22 CHAIRMAN MILES: So I guess again  
23 procedurally, the Department finished the revised  
24 CHIA; is that it?

25 MR. REED: Yes, Madam Chair.

1           CHAIRMAN MILES:   And then the permit had  
2 never been voided, so --

3           MR. REED:   I believe that to be the  
4 case.   Yes, Madam Chair.   The work at the site had  
5 continued, and there was an assumption that the  
6 parties would come to a meeting of the minds as to  
7 the effectiveness, general quality, and  
8 sufficiency of the CHIA as concerned the permit.

9           CHAIRMAN MILES:   So the issue for the  
10 Board right now is to decide whether to hear the  
11 matter or assign a permanent Hearing Examiner.

12          MR. TWEETEN:   Madam Chair, I guess given  
13 the amount of time that the Board has spent on  
14 this entire matter so far, it wouldn't make much  
15 sense to me to refer to a Hearing Examiner.   I  
16 think we've all done a lot of background work, all  
17 of us, so taking it straight to the Board would  
18 make the most sense to me.

19          CHAIRMAN MILES:   Others?

20                           (No response)

21          CHAIRMAN MILES:   I think we're in  
22 agreement with that.   I guess we will not assign a  
23 Hearing Examiner.   Is that the consensus of the  
24 Board?   Do we need a motion?   I don't think we  
25 need a motion to that effect.

1           MR. REED: I don't believe so, Madam  
2 Chair. I'll simply handle the logistical and  
3 scheduling matters.

4           And then No. 2 speaks for itself. It is  
5 a hydroelectric project where 401 certification  
6 has been appealed by Missouri Water Keepers.

7           CHAIRMAN MILES: Why does that say that  
8 we must assign a Hearing Examiner?

9           MR. NORTH: Madam Chair, members of the  
10 Board, John North. This contested case hearing is  
11 actually set up by Board rule as opposed to by  
12 statute, and the Board rule actually says that the  
13 Board shall appoint a Hearing Officer.

14          CHAIRMAN MILES: Thank you. Is there a  
15 motion then pursuant to ARM 17.30.109 to assign a  
16 Hearing Examiner to this case?

17          MR. TWEETEN: Madam Chair, if the  
18 regulation requires it, I don't think we need a  
19 motion, do we?

20          CHAIRMAN MILES: If we don't, that's  
21 fine.

22          MR. REED: I think the only question is  
23 who the Hearing Examiner is to be, and I have time  
24 available in my schedule.

25          CHAIRMAN MILES: Are you able to take

1 this on?

2 MR. REED: Yes, Madam Chair.

3 CHAIRMAN MILES: If we don't need a  
4 motion, we can proceed with that and proceed with  
5 Ben having to take it up. No. 3.

6 MR. REED: Then No. 3 is an appeal of  
7 the Open Cut Mining Act by Goran -- there is a  
8 minor typo -- in Stillwater County.

9 MS. HOULE: I'm sorry to interrupt, Mr.  
10 Reed. That typo was corrected this morning.  
11 Thank you for noting that. And it is on the  
12 updated agenda.

13 MR. TWEETEN: Corrected in one place and  
14 not in another.

15 MR. REED: I was working on these  
16 matters at about 10:00 last night, and feeling a  
17 little goofy, so I addressed an email to that  
18 effect to Ms. Houle.

19 CHAIRMAN MILES: Oh, Goran.

20 MR. REED: Yes, Madam Chair, although  
21 believe me, last night I sympathized very much  
22 with the inadvertent typographical error.

23 CHAIRMAN MILES: Apologies to Goran.  
24 What's the Board pleasure on this item? Are you  
25 able to take this as a Hearing Examiner? Will

1 your schedule allow you?

2 MR. REED: Madam Chair, I am and I will.

3 MR. O'CONNOR: I would move that we  
4 appoint a Hearing Examiner, specifically Ben to  
5 handle this.

6 MR. TWEETEN: I'll second.

7 CHAIRMAN MILES: Any discussion?

8 (No response)

9 CHAIRMAN MILES: All in favor, please  
10 say aye.

11 (Response)

12 CHAIRMAN MILES: Opposed.

13 (No response)

14 CHAIRMAN MILES: Thank you, Ben. If  
15 you'll take that matter up.

16 MR. REED: Yes, Madam Chair.

17 CHAIRMAN MILES: Initiation of  
18 rulemaking. The Department.

19 MR. NORTH: Yes, Madam Chair. With  
20 regard to the first one, the RTCR rule package,  
21 Tammy Filliator will make a presentation.

22 CHAIRMAN MILES: Thank you.

23 MS. FILLIATOR: Good morning. Madam  
24 Chair, members of the Board. My name is Tammy  
25 Filliator, and I represent the Public Water Supply

1 Program here at the Montana DEQ.

2 The 1989 Total Coliform Rule, a national  
3 primary drinking water regulation, became  
4 effective in 1990, and this rule was designed to  
5 protect public health by having every public water  
6 system in the United States test and meet maximum  
7 contaminant levels for coliform bacteria, a group  
8 of bacteria that could indicate the presence of  
9 pathogenic bacteria in the water supply. This  
10 rule was revised in 2013, and is now known as the  
11 Revised Total Coliform Rule or RTCR.

12 The RTCR became effective under Federal  
13 jurisdiction on April 1st of this year. DEQ  
14 implemented the rule under EPA authority. This  
15 means that while DEQ implemented and runs  
16 compliance for the rule, EPA has primary  
17 enforcement responsibility. In order to gain  
18 primary enforcement responsibility for the State,  
19 called primacy, the Department needs to propose  
20 and write rules to incorporate the RTCR into  
21 Montana's Administrative Rule.

22 While adopting the RTCR, the Department  
23 requests to adopt the 2015 Code of Federal  
24 Regulations and several housekeeping items. Last  
25 April we presented an overview of the RTCR to the

1 Board. Today we have a slightly more detailed  
2 overview of the rule package to share.

3 During the rule writing process, the  
4 Department worked with the Public Water Supply  
5 Focus Group. After we drafted the proposed rules,  
6 the Department sent a copy to the EPA. We heard  
7 back from them. We also sent postcards with  
8 information concerning the rule package to all  
9 public water supply certified operators,  
10 administrative contacts, and we also sent that  
11 rule package to the public water supply interested  
12 parties list.

13 Based on feedback from this outreach,  
14 the Department does not expect this rule package  
15 to be controversial. Basically we received two  
16 comments, informal comments. The Department  
17 recommends initiation of rulemaking and  
18 appointment of a Hearing Officer for a public  
19 hearing.

20 So I'd now like to go through a slightly  
21 more detailed overview of the rule package using  
22 the power point presentation.

23 CHAIRMAN MILES: Excuse me just one  
24 second. So we do have the full -- that was one of  
25 the items included, the full document to initiate



1 rulemaking in our packets?

2 MS. FILLIATOR: Yes, Madam Chair.

3 CHAIRMAN MILES: We'll move around so we  
4 can listen. I think we were given a summary of  
5 the changes here in this hand-out.

6 MS. FILLIATOR: Yes, Madam Chair. That  
7 I'll talk about at the end, if that's all right.

8 MS. HOULE: Madam Chair, members of the  
9 Board, those of you joining telephonically, there  
10 was an email sent out this morning. We do  
11 apologize for the short notice on that, but you  
12 should have received it via attachment in an  
13 email.

14 CHAIRMAN MILES: You did send out the  
15 power point a few days ago.

16 MS. HOULE: Madam Chair, that is  
17 correct. I sent out the power point, and then  
18 this morning the technical changes packet was sent  
19 out this morning. Just for those joining on the  
20 phone so you can access it. Thank you.

21 MS. FILLIATOR: So in terms of an  
22 outline of the talk, I'd like to go through the  
23 rule package. I'm going to start with the  
24 earliest ARM and work my way through. I'm going  
25 to emphasize the major changes, and I'm also going

1 to emphasize the 1989 Total Coliform Rule which we  
2 operated under through the beginning of this year,  
3 and then compare that to this new rule that was  
4 implemented April 1st.

5 So it was implemented under EPA  
6 authority in April 2016, and then at the end --  
7 you can interrupt me at any time for questions,  
8 but of course at the end we'll have time for  
9 questions, too.

10 So 17.38.104, this is one of the changes  
11 that is not related to the RTCR. In 17.38.104, we  
12 talk about something called significant  
13 deficiencies, and the key here is that a  
14 significant deficiency is a defect, a failure, or  
15 a malfunction of a public water supply system that  
16 can either cause introduction of contamination  
17 into a drinking water supply, or potentially can  
18 cause that contamination.

19 And what we would like to do with this  
20 rule package is clarify that when we look at  
21 isolating these sources of contamination or  
22 potential sources, that there are factors and  
23 conditions that can hinder that determination, and  
24 we need to make sure that we're not hindering the  
25 process.

1           And so specifically here includes a wide  
2 variety of things, but in the rule we've  
3 designated we need to have proper sampling  
4 locations, and proper sampling taps. That way if  
5 we're trying to determine the source of a  
6 contamination, we can do that more easily. And so  
7 this rule change would give the Department express  
8 authority to ensure that the necessary practices  
9 and conditions are in play so that we can track  
10 sources of contamination.

11           17.38.202. This is the ARM where we  
12 adopt Federal definitions, and in the RTCR, there  
13 are a total of five definitions that are included  
14 in the Federal rule package. We are suggesting we  
15 adopt four of those definitions. We're suggesting  
16 not to adopt the term "clean compliance history,"  
17 and that is because that particular term, when we  
18 look at the definition, it conflicts with one of  
19 our ARMs, specifically 17.38.215, that implies the  
20 use of that term. And so the terms are defined on  
21 the next slide.

22           Before we go to the next slide, there is  
23 a difference between Federal rule and Montana  
24 rule, and we have to be able to understand that to  
25 understand clean compliance history, and where it

1 kind of fits into this rule package.

2           So for the Federal rule, there are  
3 specific systems, and they're ground water systems  
4 that are non-community serving less than or equal  
5 to 1,000 people. Under Federal rule, those  
6 systems are starting on quarterly monitoring. If  
7 they're triggered, say they have an E. coli hit,  
8 they then go to monthly monitoring. They then  
9 have the ability through Federal rule to qualify  
10 for quarterly monitoring once again.

11           Montana rule, these very same systems  
12 start out on monthly monitoring, and I'll talk  
13 more about that here in a couple of slides. So  
14 slightly different than the Federal. We have  
15 these small systems. They're using ground water.  
16 They start on monthly monitoring. They go through  
17 a process with the Department to qualify for  
18 quarterly. And then just like the Federal rules,  
19 they can be triggered to return to monthly, for  
20 example E. coli positives. And then after they  
21 fix the problem, they can reapply and requalify  
22 for that quarterly monitoring.

23           So this next slide. So two things going  
24 on. First of all, in Montana, they're applying  
25 for quarterly monitoring, and then if they get

1 bumped off of quarterly, they can reapply later.

2 And so at the top of this slide, when a  
3 system applies for quarterly monitoring, they need  
4 to have satisfactory total coliform test results  
5 for 24 months, no MCL exceedences, monitoring  
6 violations, or treatment technique violations.

7 And that is the policy we have in place to  
8 originally apply for quarterly.

9 If we look at reapplying for quarterly  
10 monitoring -- and I pulled this verbiage from the  
11 Federal rule -- to reapply in the State of  
12 Montana, a record of no MCL violations, no  
13 monitoring violations, no coliform treatment  
14 technique triggers exceedences, or treatment  
15 technique violations.

16 And so to make it very clear that we  
17 have these two different steps in the process, and  
18 also that there is some overlap between the two,  
19 we're suggesting we do not adopt that definition.

20 CHAIRMAN MILES: The clean compliance  
21 history definition you're talking about?

22 MS. FILLIATOR: Yes, the clean  
23 compliance history definition, Madam Chair.

24 CHAIRMAN MILES: And that doesn't put us  
25 out of sync with what the Federal rule requires

1 because of what you're able to do here.

2 MS. FILLIATOR: So I did submit this  
3 proposed rule package to the EPA, and we received  
4 comments back. They were okay with this portion.

5 CHAIRMAN MILES: Thank you.

6 MS. FILLIATOR: So 17.38.211. I have a  
7 discretion sign in the corner because this is a  
8 point in the Federal rule package where the State  
9 of Montana can make choices. And so this  
10 particular choice deals with something called dual  
11 sampling, and if we look at the 1989 Total  
12 Coliform Rule, you could adopt dual sampling, and  
13 the State of Montana did do so. Specifically dual  
14 samples could be used by ground water systems  
15 serving 1,000 or fewer people.

16 With the Revised Total Coliform Rule,  
17 we're proposing to not adopt dual sampling. And  
18 when we look at the RTCR, only systems that have a  
19 single ground water well serving fewer than or  
20 equal to 1,000 people would even be eligible. So  
21 right off the bat, if we did adopt it, we have  
22 approximately a third of the systems that wouldn't  
23 qualify because they have two wells, two ground  
24 water wells.

25 And big picture-wise, I can go into as

1 much detail as you'd like, but if we look at the  
2 1989 TCR, these systems that we're dealing with  
3 here, 1989 TCR, if they collected a monthly  
4 sample, it came back positive, under the 1989 TCR,  
5 they would collect four additional samples the  
6 same month.

7           With the Revised Total Coliform Rule,  
8 even if we do not adopt this dual sampling due to  
9 changes in the rules, these systems still only  
10 collect four samples after a total coliform  
11 positive. And so the system is not spending  
12 additional money, even though we're not adopting  
13 dual sampling, but what it does do for the  
14 Department and the system is that it allows us to  
15 hopefully track down the source of contamination  
16 more quickly.

17           17.38.215 is probably the most complex  
18 portion of the rule package. I want to focus on  
19 three different line items here. The first I'll  
20 talk about are seasonal systems.

21           Under the 1989 Total Coliform Rule,  
22 there were no requirements for seasonal systems,  
23 and so this is actually a really big change.  
24 Under the RTCR, seasonal systems are required to  
25 perform and document a start-up procedure. And

1 this first portion of the slide is mandatory, and  
2 so performing the start-up procedure, documenting  
3 it, and then returning paperwork to the State is  
4 mandatory.

5 And as part of the procedure, the system  
6 -- So they've closed for the season; they've  
7 depressurized the system. Next year they're going  
8 to flush stagnant water from the pipes, inspect  
9 all their equipment, check their chemicals, make  
10 sure everything looks good before they open for  
11 the season.

12 The testing of a sample of water is at  
13 State discretion, and we would like to adopt that.  
14 And so after they've gone through their  
15 inspection, they've checked all their chemicals,  
16 the last step would be that they collect a sample,  
17 test it for total coliform. If that comes back,  
18 the test results are good, they're okay to open  
19 for the season.

20 The alternative would be that they do  
21 not test for total coliforms. They open for the  
22 season. Their first routine sample is a hit, and  
23 at that point, that can trigger additional  
24 activities that can cost money and take time later  
25 on in the process. So this is at State discretion



1     however.

2                   Now we look at coliform monitoring  
3     frequency. This slide I have the different system  
4     types. And the Federal rule has a routine  
5     coliform monitoring frequency, and that's in the  
6     middle column. And what I've done here is in the  
7     middle column is the Federal language, and then  
8     the column on the right is what Montana is doing.  
9     And so as we go down, you can see the word "no"  
10    there, and that's what I'd like to focus on.

11                   And so in 1993, we had a set of systems,  
12    ground water systems, non-community, transient  
13    systems serving fewer or equal to 1,000 people,  
14    and these systems were actually on quarterly  
15    monitoring. And the Department went through, and  
16    they switched from quarterly to monthly, and that  
17    went through the Board of Environmental Review at  
18    that time. And so these systems then were on  
19    monthly.

20                   In 1998, the Department decided to  
21    return to that quarterly because that's what the  
22    Federal regulations stated that they can do, and  
23    it was actually part of an official rule writing  
24    process; and county sanitarians, public health  
25    professionals, water professionals, they all came

1 together, and they made a series of comments  
2 during the official rule writing process, and  
3 said, "No, we'd rather not do this. We think it  
4 is better for these systems to stay on monthly  
5 monitoring, and if they have a clean -- and if  
6 they don't have any total coliform hits, and  
7 they're doing what they're supposed to be doing,  
8 then they can qualify for quarterly."

9 But as a result of that process, these  
10 systems went to the starting point of monthly  
11 monitoring, and so that's why I have a star here.  
12 And then I mentioned that it is MAR Notice 17-089,  
13 and it kind of details part of this process and  
14 the comments that were received, and it actually  
15 worked out well. The Board said that these  
16 individuals could sit down with the Department,  
17 and they could come up with a set of guidelines.  
18 So we start with monthly. Here is how you qualify  
19 for quarterly. So right now then, these systems  
20 are testing monthly.

21 Now, this table is also set up in the  
22 same way, and these are all at State discretion.  
23 And so under the EPA guidelines, we can reduce  
24 monitoring for the systems that are listed.  
25 However, in the State of Montana we're proposing

1 not to do that.

2           When the Federal rules were written they  
3 were written for all 50 states, and it is hard to  
4 take all of those states and stick them into one  
5 set of monitoring schedules and reduced monitoring  
6 frequency schedules. For the State of Montana,  
7 we're suggesting that we do not reduce the  
8 monitoring except for those ground water systems  
9 that are transient and non-seasonal. And then  
10 they were suggesting that they can qualify for  
11 quarterly monitoring.

12           And so here is a summary slide, and what  
13 I wanted to do is give you an idea of how things  
14 changed. And so once again, these rules have been  
15 implemented as of April 1st. And so we compare  
16 the 1989 TCR and the RTCR, the baseline for all  
17 systems prior to April monitoring monthly,  
18 currently monitor monthly.

19           The major change is with these seasonal  
20 systems. So I've divided -- if you'll look at the  
21 last two rows. I've separated seasonal transient  
22 systems from non-seasonal transient systems, and  
23 that's because when we look at those seasonal  
24 systems, they are no longer going to be able to  
25 qualify for quarterly monitoring. And so they're

1 only open a couple months of the season. Things  
2 can change quickly. We think it is a good idea  
3 that they monitor monthly.

4           However, if we go to the last row, our  
5 non-seasonal systems under the 1989 TCR, they  
6 could qualify for quarterly monitoring. Under the  
7 RTCR they still can. And if they're already on  
8 quarterly monitoring, they've stayed on quarterly  
9 monitoring, unless they were triggered due to an  
10 E. coli positive or something like that.

11           So when we look at the RTCR, there is a  
12 really big change in terms of what happens after a  
13 system collects a routine sample and it comes back  
14 positive. Under the 1989 Total Coliform Rule,  
15 small systems, if they got a hit, a positive  
16 coliform test result, they would collect five  
17 temporary routines the following month. So if  
18 they sample this month, they get a positive, next  
19 month they collect five temporary routines.

20           Under the RTCR, it is very forward  
21 thinking, and the idea is to concentrate on find  
22 and fix. So instead of just testing until your  
23 results come back negative, instead we trigger  
24 what's called Level 1 and Level 2 assessments. So  
25 there really is this emphasis on, "You have a

1 positive coliform sample. Let's find out why.  
2 And if we find out why, let's fix the problem so  
3 that it doesn't happen again." And so under the  
4 RTCR, if a system gets a hit, a total coliform  
5 positive sample, they trigger one of these  
6 assessments.

7           And the first type I'll talk about is a  
8 Level 1 assessment, and so the first way that you  
9 can trigger a Level 1 is that for a small system,  
10 they have two or more total coliform samples in  
11 the same month. For a large system, they have to  
12 hit the 5 percent mark, so 5 percent of their  
13 samples are total coliform positive. And then the  
14 other way that a Level 1 assessment is triggered  
15 is that a system has their routine sample, it  
16 comes back positive, they do not collect their  
17 repeat.

18           And so with this Level 1, the public  
19 water system itself will actually go through a  
20 check sheet that we have, and what they do is they  
21 star where they collected the sample that came  
22 back positive, and they'll look at their sampling  
23 techniques, they'll look at changes in the  
24 distribution system, they'll look at the source,  
25 they'll look at fire flow. Maybe there was a lot

1 of water flowing that day, and that changed the  
2 hydraulics in the system.

3 But the idea is to look at everything,  
4 from source, through treatment, distribution,  
5 storage, to try to figure out what caused that  
6 positive. And in some cases you don't know, but  
7 the system goes through, they make their best  
8 effort, they have a check sheet. And then this is  
9 mandatory with the Revised Total Coliform Rule.

10 The Level 2 is similar in that there are  
11 specific triggers. One trigger is that a system  
12 has E. coli hits in the system, and they have an  
13 MCL violation. Also if they have a second Level 1  
14 trigger within a rolling twelve month period, that  
15 triggers a Level 2.

16 And with this, the DEQ personnel field  
17 staff will go out onsite, and they'll go through  
18 the entire system, so very similar to what the  
19 system is doing during a Level 1. The big  
20 difference is that now that we either have E. coli  
21 in the system and we know it for sure, or we've  
22 got another Level 1, we have total coliform hits  
23 more than one time in a rolling twelve month  
24 period.

25 So we know something is going on. A DEQ

1 field staff person can go out, and a new set of  
2 eyes, look at the data, and once again, very  
3 extensive. We've started doing these, and  
4 sometimes it takes an hour or two for smaller  
5 systems. For a larger system, it can take half a  
6 day or a full day. But once again, the emphasis  
7 is on we're going to go out, try to find the  
8 problem, and then it needs to be fixed.

9 And so in terms of fixing it, it could  
10 be as easy as training an operator on how to  
11 correctly collect a sample. It could be that a  
12 storage tank needs to be flushed, and the public  
13 water system will need to go through that  
14 procedure.

15 And I have two signs here. Level 2's  
16 are mandatory when we look at the RTCR. The  
17 portion that's at State discretion is who  
18 completes it, and so we're proposing that the DEQ  
19 field staff personnel actually go out onsite and  
20 perform that Level 2. And it is free of charge to  
21 the system. We schedule it with them, and then go  
22 through everything from source, distribution,  
23 treatment, everything, trying to track down what's  
24 going on. And then they'll have a period of time  
25 where they can either fix what we find, or have a

1 schedule together to fix what we find.

2 So that leads me to the technical  
3 changes, and that is the sheet that was sent out  
4 this morning or yesterday, and the new public  
5 water supply attorney is going to address those.

6 MR. PETTIS: Madam Chair, members of the  
7 Board, Aaron Pettis. I'm an attorney here at DEQ.

8 We have gone through the rule notice,  
9 and have conducted a technical review of it to  
10 check the citations and things like that. We  
11 discovered a few citation errors, a couple typos,  
12 a couple quotations that needed to be fixed. So I  
13 have provided you with an excerpt of the rule  
14 notice that contains those changes. And then I  
15 went through and highlighted the changes that we  
16 made, crossing out the things that we omitted, and  
17 then showing the stuff that we've added in there.

18 These are just to clarify typos and to  
19 clarify citations to make sure that we correctly  
20 adopt the parts of the CFR that we intended to do  
21 all along.

22 I can go through these and explain why  
23 we did them if you want, or what the changes do.  
24 I think they're all pretty self-explanatory. We  
25 would ask that if you do initiate rulemaking, that



1 you do so with these approved changes.

2 CHAIRMAN MILES: Would those be  
3 incorporated into the rule notice that we were  
4 given?

5 MR. PETTIS: Yes.

6 CHAIRMAN MILES: I don't think we need  
7 to go through them if they're mostly technical.  
8 Thank you. Are there any questions from the Board  
9 members?

10 (No response)

11 CHAIRMAN MILES: Tammy, I had one  
12 question, before you get away. Actually I  
13 apologize. I don't think this really pertains to  
14 the changes you're proposing, which I think are  
15 great. I'm just curious.

16 Particularly for seasonal systems, how  
17 do they connect to -- not literally -- but  
18 disposal systems, septic systems? Which is often  
19 I think the case for seasonal systems. Before  
20 they're allowed to start operating, do you oversee  
21 that? Does the Department oversee that? How does  
22 that connect?

23 MS. FILLIATOR: Madam Chair, can John  
24 Dilliard come forward and answer this?

25 CHAIRMAN MILES: Sure. Absolutely.

1 MR. DILLIARD: Madam Chair, John  
2 Dilliard with the Public Water Supply Bureau.

3 Yes, we do. If they're a public water  
4 supply, then chances are they're also a public  
5 sewer system, public wastewater system, so we  
6 would have the authority to review the system,  
7 approve its design and its construction. So that  
8 would be kind of the monitoring that we would do  
9 on the front end of that.

10 We don't really have ongoing regulations  
11 for wastewater, small subsurface wastewater  
12 systems, but those are always something that we  
13 look at during an inspection just to make sure we  
14 don't see problems.

15 CHAIRMAN MILES: And if you see  
16 violations or if you see excessive coliform  
17 counts, do you take a look at the wastewater  
18 systems?

19 MR. DILLIARD: The wastewater system  
20 would always be something that we would keep in  
21 mind if we're seeing a problem with the water  
22 system. Sometimes it is just nearly impossible to  
23 make that link, but if we could find some way to  
24 specifically find or identify that the wastewater  
25 system is the problem, we could require that it be

1 moved, replaced, whatever would be needed to  
2 correct it.

3 CHAIRMAN MILES: Okay. Thank you. Any  
4 other questions?

5 MS. SHROPSHIRE: I'm just curious if any  
6 of the changes would require any budgetary changes  
7 for the Department, extra resources, or anything  
8 like that.

9 CHAIRMAN MILES: John Dilliard is coming  
10 back up. So thank you, Robin.

11 MR. DILLIARD: Madam Chair, Robin.  
12 Actually no, they won't. We are going to operate  
13 all of the new changes, the new RTCR rule, within  
14 our existing resources. So we won't need any  
15 additional at this time to implement any of this.  
16 Did that answer your question?

17 MS. SHROPSHIRE: Yes, it does. Great.  
18 Thank you.

19 CHAIRMAN MILES: Mr. Tweeten.

20 MR. TWEETEN: I should know the answer  
21 to this, but I don't, so I'm not sure which one of  
22 you can answer, but what's the definition of a  
23 seasonal system?

24 MS. FILLIATOR: If you give me just a  
25 moment, I can actually read the definition. But

1 in general, it is a system that is only open and  
2 operating part of the year. And what they'll do  
3 -- like a ski resort, a campground -- and so for  
4 part of the year, they'll actually depressurize  
5 the system, so all of the water will drain out,  
6 and then they'll start at the beginning of the  
7 next season.

8 MR. TWEETEN: So it wouldn't cover a  
9 situation where you've got ten connections, and  
10 one of them stays open during the winter for a  
11 caretaker cabin or something like that? That  
12 would not be a seasonal system?

13 MS. FILLIATOR: So with the definition,  
14 it's non-community, not operated as a public water  
15 supply system on a year around basis. And so if  
16 there is a connection that's active, it is not  
17 considered seasonal.

18 MR. TWEETEN: Thank you.

19 CHAIRMAN MILES: Any other questions?

20 (No response)

21 CHAIRMAN MILES: I think at this point  
22 we ask if there is any comments from the public in  
23 regard to initiation for rulemaking for this  
24 matter.

25 (No response)

1           CHAIRMAN MILES:   Seeing none, is there a  
2 motion from the Board to initiate rulemaking to  
3 adopt the new Federal Revised Total Coliform Rule,  
4 with the technical changes that were presented?

5           DR. BYRON:   Madam Chair, so moved.

6           MR. NORTH:   Madam Chair, and with the  
7 appointment of a Hearing Officer, too.

8           CHAIRMAN MILES:   With the appointment of  
9 a Hearing Officer.

10          MR. O'CONNOR:   I will second the motion.

11          CHAIRMAN MILES:   It's been moved and  
12 seconded.   Any discussion?

13                   (No response)

14          CHAIRMAN MILES:   All in favor, please  
15 say aye.

16                   (Response)

17          CHAIRMAN MILES:   Opposed.

18                   (No response)

19          CHAIRMAN MILES:   Thank you.   Motion  
20 passes.   Thank you very much for that thorough  
21 explanation of that, and good luck with that  
22 process.

23                   John, is the next one the Department?

24          MR. NORTH:   Yes, Madam Chair.   It is an  
25 incorporation by reference air quality, Federal

1 air quality rules, and Rebecca Harbage will make  
2 the presentation.

3 MS. HARBAGE: Madam Chair, members of  
4 the Board, for the record, Rebecca Harbage. I'm  
5 representing the Department's Air Quality Bureau  
6 this morning.

7 And I am here today just to ask that the  
8 Board adopt rulemaking to incorporate by reference  
9 up to date editions of Federal and State air  
10 quality statutes, rules, and regulations into the  
11 Administrative Rules of Montana. This is an  
12 annual rulemaking that the Bureau does to ensure  
13 that Montana's air quality rules are at least as  
14 stringent as Federal regulations, which allows  
15 Montana to continue to have administrative  
16 authority to implement and enforce Federal  
17 emission standards.

18 The Board initiated rulemaking on this  
19 on June 3rd of this year, and no comments were  
20 received during the public notice period. The  
21 Department requests today that the Board adopt the  
22 rules as proposed, along with the Department's  
23 stringency and takings analyses which are included  
24 in your packets. I'm available for any questions  
25 if you have them. Thank you.

1           CHAIRMAN MILES: So this is final  
2 adoption today? This has gone through the whole  
3 process?

4           MS. HARBAGE: Yes, Madam Chair, it has.

5           CHAIRMAN MILES: We have in our packets  
6 -- Do we have the stringency information in here?

7           MS. HARBAGE: I believe so.

8           CHAIRMAN MILES: I might just be looking  
9 at the wrong document. There were a lot of  
10 documents to download.

11          MS. HOULE: Madam Chair, it is my  
12 understanding that the stringency should have been  
13 included in the Adobe file. If you can connect to  
14 the website, the Board's website, it will be Item  
15 No. III(c)(1).

16          CHAIRMAN MILES: I have it here. I'm  
17 sorry. Yes. I've got it. Thank you. Is there  
18 any questions?

19                   (No response)

20          CHAIRMAN MILES: Any comments from the  
21 public?

22                   (No response)

23          CHAIRMAN MILES: Is there a motion from  
24 the Board to amend ARM 17.8.102 to incorporate by  
25 reference updated Federal and State statutes and

1 regulations, and to amend ARM 17.8.103 to update  
2 references stating where the documents may be  
3 obtained electronically? Is there a motion to  
4 that effect?

5 MR. O'CONNOR: I would so move.

6 CHAIRMAN MILES: Thank you. Is there a  
7 second?

8 DR. BYRON: Second.

9 CHAIRMAN MILES: Any further discussion?

10 (No response)

11 CHAIRMAN MILES: All in favor, please  
12 say aye.

13 (Response)

14 CHAIRMAN MILES: Thank you. Anyone  
15 opposed?

16 (No response)

17 CHAIRMAN MILES: Motion carries  
18 unanimously. Thank you. It is always nice to get  
19 that finally concluded.

20 Other action items? Anything from the  
21 Board or the Department?

22 MR. NORTH: None.

23 CHAIRMAN MILES: Any final action on  
24 contested cases? You have that one order that you  
25 talked about.



1 MR. REED: Yes, Madam Chair.

2 CHAIRMAN MILES: I'm not holding a  
3 hearing today.

4 General public comment. Are there any  
5 matters that anyone in the room would like to  
6 comment on?

7 (No response)

8 CHAIRMAN MILES: Hearing none, when does  
9 the Department work on putting together the 2017  
10 meeting schedule?

11 MR. NORTH: Normally, Madam Chair, that  
12 goes to the Board in December. That's what we  
13 intend to do is to propose a schedule.

14 CHAIRMAN MILES: Any other matters to  
15 discuss?

16 (No response)

17 MR. TWEETEN: Madam Chair, I move we  
18 adjourn.

19 CHAIRMAN MILES: Can I say one thing  
20 before you do that?

21 MR. TWEETEN: Withdraw my motion.

22 CHAIRMAN MILES: I did want to just  
23 re-emphasize what you said just to Ben about  
24 finding as much agreement as possible with the  
25 parties on the WECO case to stipulate to as many

1 facts as possible. I think that would really  
2 assist us. If you can work with the parties on  
3 that. I think that was a very important point.

4 MR. REED: Yes, Madam Chair. I'll issue  
5 an order, and get as much common ground prior to  
6 the hearing, and then post the hearing, as  
7 possible.

8 The one thing that Mr. Martin suggested  
9 with developing findings of fact and conclusions  
10 of law is something that I'm somewhat hesitant to  
11 engage in, simply because it ends up requiring a  
12 bit more from the Board, inasmuch as if findings  
13 of fact are advanced by a party but not adopted by  
14 the Board, then the Board may need to --

15 MR. TWEETEN: -- rule on each one.

16 MR. REED: Yes, although I'm not sure if  
17 that's absolutely true in a summary judgment  
18 hearing.

19 CHAIRMAN MILES: We had to deal with  
20 that last time.

21 MR. REED: I think that would only be  
22 the case if -- I have to stare at that a little  
23 bit harder, Madam Chair.

24 CHAIRMAN MILES: And then maybe the more  
25 important item is stipulating to the facts. And

1 so you could have those discussions with the  
2 parties, since they're not here. That may be a  
3 better approach than proposing draft findings of  
4 fact.

5 MR. REED: Yes, Madam Chair.

6 MR. TWEETEN: Madam Chair, I guess I'd  
7 go back to what I said the last time we faced this  
8 issue, which is that technically under Rule 56,  
9 the moving party is supposed to provide a list of  
10 uncontested facts along with their motion, and I  
11 don't see where the moving party has done that in  
12 this particular motion. It is summary judgment,  
13 so findings of facts is really anomalous anyway.  
14 We're not supposed to find facts. We are only  
15 supposed to determine whether there are  
16 uncontested facts or whether there is a material  
17 issue, a genuine issue of material fact under the  
18 rules.

19 So I don't think we need proposed  
20 findings of fact prehearing in order to do this,  
21 as long as the parties take seriously our request  
22 that they come up with an uncontested statement of  
23 facts.

24 MR. REED: Yes, Mr. Tweeten. I think  
25 that's exactly right.

1           CHAIRMAN MILES: Thank you. If you'd  
2 convey to the parties, because that's a little  
3 different from I think what I said during the  
4 meeting. I agree with that.

5           MR. REED: Yes, Madam Chair, I shall.

6           CHAIRMAN MILES: Anything else?

7           (No response)

8           MR. TWEETEN: Now I'll move we adjourn.

9           CHAIRMAN MILES: All in favor, please  
10 say aye.

11           (Response)

12           CHAIRMAN MILES: Meeting adjourned.

13 Thank you very much.

14           (The proceedings were concluded

15                           at 10:22 a.m. )

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C E R T I F I C A T E

STATE OF MONTANA )

: SS.

COUNTY OF LEWIS & CLARK )

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

That the proceedings were taken before me at  
the time and place herein named; that the  
proceedings were reported by me in shorthand and  
transcribed using computer-aided transcription,  
and that the foregoing - 60 - 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 \_\_\_\_\_, 2016.

\_\_\_\_\_  
LAURIE CRUTCHER, RPR  
Court Reporter - Notary Public  
My commission expires  
March 9, 2020.

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