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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
October 5, 2018)

TRANSCRIPT OF PROCEEDINGS

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
October 5, 2018
9:00 a.m.

BEFORE CHAIR CHRIS DEVENY,
BOARD MEMBERS JOHN DEARMENT,
DEXTER BUSBY, HILLARY HANSON, JOHN FELTON;
and CHRIS TWEETEN (by telephone)

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

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

3 * * * * *

4 (Mr. Tweeten not present)

5 CHAIR DEVENY: I'd like to call this
6 meeting to order. Chris Deveny, Chair, Board of
7 Environmental Review. And we'll go around and
8 we'll have a roll call first.

9 MS. BASS: Chris Deveny.

10 CHAIR DEVENY: Present.

11 MS. BASS: Chris Tweeten.

12 (No response)

13 MS. BASS: Dexter Busby.

14 MR. BUSBY: I'm here.

15 MS. BASS: Hillary Hanson.

16 MS. HANSON: Here.

17 MS. BASS: John Dearment.

18 MR. DEARMENT: Here.

19 MS. BASS: John Felton.

20 MR. FELTON: Here.

21 MS. BASS: Tim Warner.

22 (No response)

23 MS. BASS: We have five Board members.
24 We have a quorum.

25 CHAIR DEVENY: And let's have

1 introductions of other people in the room. We'll
2 start with George.

3 MR. MATHIEUS: George Mathieus, Board
4 liaison for the Department.

5 MR. HAYES: Ed Hayes, Acting Chief Legal
6 counsel for DEQ.

7 MS. BOWERS: Kirsten Bowers, Legal
8 Counsel for DEQ.

9 MR. MORGAN: John Morgan, supervising
10 attorney for the Waste Management Remediation
11 Division.

12 MR. LUCAS: Mark Lucas, DEQ Legal
13 Counsel.

14 MS. WEAVER: Christine Weaver, DEQ.

15 MS. SCHERER: Sandy Scherer, DEQ.

16 MS. CHRISTOPHERSON: Sarah
17 Christopherson, Legal Counsel for DEQ.

18 MR. PETTIS: Aaron Pettis, attorney for
19 DEQ.

20 MR. URBAN: Eric Urban, Water Quality
21 Planning Bureau at DEQ.

22 MS. KELLY: Myla Kelly, Water Quality
23 Standards.

24 MS. DEVANEY: Rainie Devany, Department
25 of Environmental Quality.

1 MS. McCARTHY: Minda McCarthy, DEQ.

2 MR. GARBER: Jason Garber, Water
3 Protection Bureau, DEQ.

4 MS. SIR: Haley Sir, DEQ.

5 MR. FLEMING: Derek Fleming, Water
6 Protection Bureau, DEQ.

7 MR. SLOAN: Dick Sloan, DEQ.

8 MS. BALLIEW: Caroline Balliew, DEQ.

9 MS. McLAUGHLIN: Joanne McLaughlin, DEQ.

10 MR. TIETZ: I'm John Tietz, Browning,
11 Kaleczyc, Berry, and Hoven on behalf of Columbia
12 Falls.

13 MR. WRIGHT: Steve Wright, Columbia
14 Falls Aluminum Company.

15 MS. LAUGHNER: Catherine Laughner,
16 Browning, Kaleczyc on behalf of CFAC.

17 MR. DAVIS: Tim Davis, Water Quality
18 Division, DEQ.

19 MS. HARBAGE: Rebecca Harbage, Air
20 Quality Bureau, DEQ.

21 MS. ULRICH: Liz Ulrich, Air Quality
22 Bureau, DEQ.

23 MS. MERKEL: Julie Merkel, Air Quality
24 Bureau at DEQ.

25 MS. GRIMM: Deb Grimm, Air Quality

1 Bureau, DEQ.

2 MR. KLEMP: David Klemp, Air Quality
3 Bureau, DEQ.

4 MR. WARNER: Ed Warner, Air Quality
5 Bureau, DEQ.

6 MR. JUERS: Shawn Juers, Air Quality,
7 DEQ.

8 MR. SIVERS: Eric Sivers, DEQ, Water
9 Protection Bureau.

10 MR. KENNING: Jon Kenning, Water
11 Protection Bureau, DEQ.

12 MS. CLERGET: I'm Sarah Clerget, Board
13 attorney from the AG's office.

14 CHAIR DEVENY: And I think --

15 MR. MOZER: Kurt Mozer, attorney, DEQ.

16 CHAIR DEVENY: And are there any
17 individuals on the phone who would like to
18 introduce themselves, let us know that you're on
19 the phone today? Would the gentleman speak his
20 name first?

21 MR. OLSON: Alan Olson, Montana
22 Petroleum Association.

23 CHAIR DEVENY: And the woman.

24 MS. TRANK: Peggy Trank, Treasure State
25 Resources Association.

1 CHAIR DEVENY: Thank you very much.

2 Anybody else on the phone?

3 (No response)

4 CHAIR DEVENY: Thank you everybody.

5 Before we get started, I'd just wanted to mention
6 there's just a slight change to the agenda today.
7 It was just under the action under contested
8 cases, there will be no public comment. That's
9 not something that is actually allowed. So that
10 will not be on the agenda.

11 So with that, let's move to -- Did you
12 have something, George?

13 MR. MATHIEUS: Sure. Thanks, Madam
14 Chair. Just that we just sort of updated our
15 technology today, so like this is the first time
16 we've used it. So we don't have a microphone, so
17 I think when people speak at the podium, kind of
18 making sure -- it shouldn't be a problem for -- I
19 just want to make sure it's not a problem for
20 people in this room, when you come to the podium,
21 but it's a small enough room, I think we can hear
22 each other.

23 But for people on the phone and stuff,
24 that microphone behind you is supposedly a super
25 microphone, and picking up stuff. So anyway it's

1 a new capability. We're trying to get in the ⁷
2 modern era. So hopefully it goes without any
3 hitch.

4 CHAIR DEVENY: So let's move to the
5 minutes. Does anybody have any comments about the
6 minutes from the last meeting?

7 (No response)

8 CHAIR DEVENY: Would anybody like to
9 entertain a motion to approve the minutes?

10 MR. DEXTER: So moved.

11 CHAIR DEVENY: It's been moved. Is
12 there a second?

13 MR. FELTON: Second.

14 CHAIR DEVENY: Any discussion?

15 (No response)

16 CHAIR DEVENY: All in favor of approving
17 the minutes of the June 8th meeting, please
18 signify by saying aye.

19 (Response)

20 CHAIR DEVENY: Any opposed?

21 (No response)

22 CHAIR DEVENY: The minutes have been
23 reviewed and approved. So let's move on to the
24 next agenda item, which is our briefing items, and
25 update on our cases. And I'll turn that over to

1 Sarah.

2 (Mr. Tweeten present)

3 MS. CLERGET: Sarah Clerget. Madam
4 Chair, we have, going through the agenda items, it
5 would be Section II(A)(1)(a). This is CMG
6 Construction. And just to reiterate what's on the
7 agenda, the parties have requested a stay of
8 proceeding due to settlement negotiations.

9 We issued an order granting the stay,
10 and they have to file status reports every thirty
11 days. They're essentially waiting for the
12 technology experts. They've met, and they're
13 working on the scope of work in regard to the
14 remediation. And once those technical details are
15 worked out, they should be giving us an
16 administrative order, and a notice of dismissal.
17 So that's moving along without our supervision at
18 this point, other than the status updates every
19 thirty days.

20 Copper Ridge. I issued the decision.
21 We just received the exceptions. Now we're
22 waiting for the responses to the exceptions, which
23 are due at the end of this month. So that will be
24 on your agenda for December for a decision.

25 In Fischer Land Development, I granted a

1 stay. They filed a joint status report asking
2 continue of the stay. They say they've come to an
3 agreement in principle, and they asked for an
4 additional extension. I gave them until the 4th.

5 And I apologize. They did give an
6 update yesterday, but I don't know what it is yet.
7 So I have wait for Aleshia to get back here,
8 because I was out of the office doing stuff all
9 day yesterday, so I haven't seen it yet. But they
10 have given me an update essentially explaining --
11 I asked them why they needed more time, and so
12 they have filed that update, I know, but I can't
13 tell you what it says right at this moment. So I
14 can give you an update on that a little bit later
15 in the meeting.

16 Wagoner Family. They have indicated
17 that they need a stay because they're close to
18 settling. I issued the stay. They filed a status
19 report, and their next one is due next week. So
20 they're continuing to update me on this, getting
21 their settlement details worked out.

22 Little Bear. There is a scheduling
23 order in place. They have filed a stipulated
24 extension for deadlines, which I granted. It was
25 just a few of the procedural deadlines, so overall

1 that scheduling order is in place, and they're
2 working towards it.

3 Moving on to Section (2)(a), first we
4 have the Absaloka Mine. This is MEIC and the
5 Sierra Club case that's in the Supreme Court that
6 we're waiting on an answer before that can
7 proceed. And I don't know if DEQ wants to note
8 where that is in the Supreme Court process now.
9 Ed, do you know?

10 MR. HAYES: Madam, Chair, Board members,
11 that matter is before the Montana Supreme Court
12 and is undergoing briefing, and will be heard in
13 due course there. I really don't have much of an
14 update in terms of expectations and timing.

15 MS. CLERGET: Next we have (2)(b) is
16 Signal Peak. I issued a scheduling order. There
17 is an ongoing proceeding regarding a motion to
18 quash a subpoena that's being litigated in
19 District Court, and the underlying case before the
20 Board is stayed while that occurs.

21 They filed summary judgment on that, and
22 that's in the middle of briefing, so I don't have
23 a timeline on that, but it is not going to be
24 immediate. That will continue for awhile.

25 And for Western Energy and Rosebud, this

1 one I did the hearing. They have now submitted
2 their exceptions and their responses, so this one
3 is due for a decision from me, and I'll get that
4 done as soon as I can, but that was a four day
5 hearing, so it's substantial.

6 CHAIR DEVENY: Is it possible we'll see
7 that in February?

8 MS. CLERGET: Possible. It will depend
9 on how fast I can get out the order, and then we
10 have to give them time for exceptions. So
11 possible. I don't want to say probable, but
12 possible.

13 And Montanore, we just did summary
14 judgment. I issued an order granting partial
15 summary judgment, and we had a scheduling
16 conference, put a scheduling order in place for
17 the remainder of the case, which is set for a two
18 day hearing on December 3rd and 4th. So after
19 that we'll have post hearing briefings, and then
20 we'll have the decision, and then there will be
21 exceptions, so that's going to be a bit before you
22 guys see it, but it is coming to a head.

23 So Laurel Refinery. We had a scheduling
24 conference about this case, because I needed the
25 parties to explain to me so that I can explain to

1 you why they need an additional stay, and they
2 explained to me that this appeal began with six
3 distinct issues. We're down to one.

4 And there is currently a modification
5 for the permit that is the subject of the appeal
6 out for a public comment right now, and so
7 depending on how that modification goes, it may
8 moot some of the issues in this case, and then
9 there is also some potential rulemaking that may
10 moot some of the issues in the case.

11 So the additional stay -- also the parts
12 of the permit that this case affects don't go into
13 effect until November of 2019, and if the
14 modification goes through, they wouldn't go into
15 effect until I think it's 2020. So we have time,
16 is the point, that a stay is not changing anything
17 substantive for this permit. So that's why there
18 is an additional stay which I granted, set for six
19 months.

20 Golden West Properties. This is the one
21 that we consolidated at the last meeting, and in
22 the intervening time, one of the parties moved for
23 dismissal, leaving only Mr. Weyer's appeal to
24 continue. He has gotten Counsel, and there is a
25 scheduling order in place at this point.

1 And then (3)(a) is for DEQ to update.

2 MS. BOWERS: Members of the Board, there
3 is not much of an update on -- I'm Kirsten Bowers,
4 attorney for DEQ. There is not much to update on
5 the Western Energy appeal that is currently before
6 the Supreme Court. We're briefing the case, and
7 the reply briefs are due October 25th.

8 So after that, the case will be fully
9 briefed, and then we'll wait to see if the Court
10 wants oral argument, and wait for our decision.

11 And then I just wanted to clarify the
12 non-enforcement case (2)(a), it's this case, this
13 Western Energy case, that Westmoreland, they
14 appealed their MPDES permit, and then that appeal
15 was stayed. They're waiting for the decision in
16 the Western Energy case because there are similar
17 issues. So as soon as we get the decision, we
18 will file a status report on the Westmoreland
19 Absaloka Mine case.

20 MS. CLERGET: I think that completes the
21 contested case update.

22 CHAIR DEVENY: Thank you. Do Board
23 members have any questions?

24 (No response)

25 CHAIR DEVENY: Next is our action items,

1 and we have some air quality rules to either
2 appeal, amend, or adopt, or reject. So if we
3 could have a presentation from someone from the
4 Air Quality Bureau.

5 MS. ULRICH: Good morning, Madam Chair,
6 members of the board. My name is Liz Ulrich, and
7 I'm the Supervisor of the Analysis and Planning
8 Section of the Department's Air Quality Bureau.

9 I'm here to request that the Board adopt
10 the proposed amendments to the air quality
11 operating fees as established in Section 17.8.505
12 of the Administrative Rules of Montana.

13 The Department requested the Board
14 initiate rulemaking at the June 8th Board of
15 Environmental Review meeting. At that meeting we
16 proposed that the Board initiate rulemaking to
17 increase the operation fee for facilities that
18 register in lieu of a permit from \$800 to \$900.

19 In addition for those facilities that
20 require Montana air quality or Title 5 operating
21 permits, the Department proposed the Board
22 increase the administrative fee from \$800 to \$900,
23 and the per ton fee from \$38.24 per ton up to an
24 amount not to exceed \$45.37 per ton of emissions.

25 During this meeting, we also committed

1 to the Board that we would continue to evaluate
2 our program's financial situation, and engage
3 stakeholders before proposing a final operation
4 fee for the Board's consideration.

5 So since that June 8th Board meeting,
6 State fiscal year 2018 concluded, we have a better
7 understanding of the amount of federal grant and
8 State General Fund currently available for air
9 quality activities. We completed our annual
10 emission inventory process, and we have continued
11 to engage stakeholders.

12 The Board held a public hearing on July
13 13th, 2018 to consider the proposed amendments of
14 the air quality operating fees. The Department
15 provided comments in support of the proposed rule,
16 with revised amounts for the oil and gas
17 registration fee of \$850, and the per ton
18 operation fee of \$44.35 for those facilities that
19 hold a Montana air quality or Title 5 operating
20 permit.

21 This increase would allow the
22 Department's Air Quality Bureau to collect
23 sufficient revenue to support the appropriate
24 implementation of the Air Quality Program.

25 In addition to the Department's comments

1 at the public hearing, the Board received two
2 comments that indicated while regulated entities
3 do not want to increase the operating fees, they
4 do understand sufficient fees are necessary to
5 enable the Department to continue implementing the
6 Air Quality Program. The regulated entities
7 appreciated the Department's engagement through
8 the stakeholder process, and wish to be included
9 in future fee discussions.

10 In response to these comments, we are
11 currently forming a work group that will work to
12 develop a fee structure that will be sustainable
13 into the future. If approved by the Board, these
14 amounts will be used to calculate the operation
15 fees assessed to facilities in November 2018.

16 We request that the Board adopt the
17 operating fees as proposed in the notice of
18 amendment. Thank you. Are there any questions?

19 CHAIR DEVENY: Do Board members have
20 questions?

21 MS. HANSON: I think just can you
22 clarify for a second. You said you're going to
23 develop a work committee, so you're asking for us
24 to adopt these as is, but a work committee is
25 going to be what looks at it just for the future

1 after this?

2 MS. ULRICH: Yes. We understand that as
3 a whole, a per ton fee may not be the best
4 sustainable into the future, so we have some
5 stakeholders that we've asked, and that have
6 volunteered to help us out, and we're still
7 recruiting, to look at what we could do in the
8 future through our Clean Air Act Advisory
9 Committee.

10 CHAIR DEVENY: Are there any other
11 questions by Board members?

12 (No response)

13 CHAIR DEVENY: Any public comments?

14 (No response)

15 CHAIR DEVENY: No comments from the
16 public. With that, would the Board like to
17 entertain a motion?

18 MS. HANSON: So moved.

19 CHAIR DEVENY: Motion to adopt the
20 amendments and the air quality operation fees as
21 proposed by DEQ. The motion has been made and
22 that's going to --

23 MR. DEARMENT: I'll second.

24 CHAIR DEVENY: There's a second. Any
25 further discussion?

1 (No response)

2 CHAIR DEVENY: All those in favor of the
3 motion before us, please signify by saying aye.

4 (Response)

5 CHAIR DEVENY: Any opposed?

6 (No response)

7 CHAIR DEVENY: Motion passes. Thank
8 you. And next on the agenda we have some more
9 information from DEQ on additional Air Quality
10 Bureau rules that will be coming before the Board,
11 so if we could have a brief presentation on that.

12 MS. HARBAGE: Good morning, Madam Chair,
13 Board members. For the record, my name is Rebecca
14 Harbage. I'm an Air Quality Planner with the
15 Department's Air Quality Bureau. I'm also the
16 project manager for the team of air quality
17 professionals, some of whom are in the room today,
18 who are working to develop a new registration
19 program for portable sources of emissions.

20 So as it says on the agenda, that would
21 be a transition from case-by-case permitting to
22 air quality registration program for those
23 sources.

24 So today I just want to provide you with
25 a really quick briefing on the upcoming rulemaking

1 that we will be bringing before the Board related
2 to that project. I don't have slides or anything,
3 but I do want to split this into three sections,
4 just to give it some structure.

5 So first I'm going to start out with
6 talking about why we're talking about developing a
7 registration program; second, what exactly are we
8 proposing that we do differently to change the way
9 we work; and then how to do we propose that we get
10 there.

11 First of all, because this is a
12 relatively big project for us, we're really
13 changing the way that we think about how we work.
14 We really want to get here before the Board today
15 in advance of going into the details of
16 rulemaking, so that we can give you some context
17 that hopefully will be helpful as this project
18 moves forward.

19 The first thing I want to start to tell
20 you about was why we're here today talking about a
21 registration program for portable sources. Over
22 the last few decades of permitting sources, a lot
23 has changed in the world of air quality. When
24 things change, it makes a lot of sense to adjust
25 the way that we do our work to adapt to those

1 changes.

2 One example of that is that when oil and
3 gas well development took off in eastern Montana,
4 the Legislature adjusted our idea of permitting as
5 usual for air quality sources by authorizing the
6 Board in 75-2-234, Montana Code Annotated, to
7 adopt a registration program in lieu of
8 case-by-case permitting.

9 That registration program for oil and
10 gas well facilities enabled the Department to
11 effectively deal with hundreds of very similar
12 permit applications that were coming in the door,
13 and it allowed us to do it in a way that was
14 administratively efficient, and still protected
15 air quality at the same level.

16 Today we're in a similar situation, and
17 you just heard from Liz who talked about how we
18 are evaluating the way we do our work, and trying
19 to work within our means. So although we do not
20 have hundreds of new applications coming in the
21 door, we are currently having to stretch our
22 resources in both staff time and funding to cover
23 the workload that we do have.

24 What we really need to do is figure out
25 a way to continue to do the work that we do

1 protecting air quality, but do it in a more
2 efficient manner. And so in other words, we need
3 to figure out how to use our limited resources
4 strategically to get the most environmental
5 benefit out of those resources.

6 You've probably heard a little bit in
7 the past at Board meetings about this registration
8 program. We've been thinking about it for awhile.
9 Over the last ten or fifteen years, the Air
10 Quality Bureau identified portable source
11 permitting as an area in which we could become
12 more efficient.

13 Really over the last couple years, this
14 has risen to the top of our priorities, and over
15 the last just about a year, we've been working
16 specifically on this program with stakeholders.

17 The bottom line is that we've been
18 permitting portable sources the same way for a
19 very long time, and so I just want to pause for a
20 minute. When I talk about portable sources, what
21 I'm really talking about are three specific source
22 categories that we consider portable because
23 they're able to move around the state.

24 They include crushing and screening
25 operations, concrete batch plants and asphalt

1 plants. Combined, these three source categories
2 make up more than half, 55 percent, of all of our
3 active Montana air quality permits. What that
4 means is it takes considerable staff time in the
5 Air Quality Bureau to process permit applications
6 for these sources, although really they're
7 relative minor compared to a lot of other source
8 categories.

9 Currently the Administrative Rules
10 adopted under the Clean Air Act of Montana require
11 the owners or operators of portable sources to
12 obtain a permit, an air quality permit, prior to
13 construction or operation. Similar to other
14 source categories, when a permit application comes
15 in, DEQ performs a case-by-case analysis of the
16 emissions, and the potential environmental impacts
17 that may result from operation of equipment at
18 that facility.

19 Based on that case-by-case analysis, the
20 permit may require certain emission limitations,
21 or the operation of appropriate control
22 technology. So specific examples for one of these
23 source categories, at a concrete batch plant, a
24 DEQ permit may require the operation of dust
25 suppression, so that might include a baghouse or

1 water spray bars for a concrete batch plant.

2 Over many years of permitting portable
3 sources in Montana, we've found that this
4 case-by-case analysis has resulted in almost
5 identical requirements and permit conditions that
6 vary very little from facility to facility within
7 these source categories.

8 In other words, we have permitting staff
9 who are spending a lot of time doing a
10 case-by-case analysis for portable sources, when
11 really the result of that analysis is very likely
12 to be identical for any crushing and screening
13 operation, any concrete batch plant, any asphalt
14 plant.

15 Not only are those control requirements
16 nearly identical within each source category, they
17 also haven't changed in the last few decades of
18 permitting. The result of that is that we
19 essentially know what the permit conditions will
20 be before we ever get an application in the door;
21 but the process of coming to that conclusion and
22 finalizing a permit can take up to three months.

23 So what can we do differently to get
24 more efficient in this process? As I mentioned
25 earlier, 75-2-234, MCA, allows the Board to adopt

1 a registration program in lieu of case-by-case
2 permitting. Registration in lieu of permitting is
3 proper for source categories where there are a
4 large number of very similar sources with
5 identical requirements, and for which there is no
6 substantial benefit from individual permitting.

7 As I mentioned earlier, oil and gas well
8 facilities were one such source category, and the
9 Board adopted a registration program for those
10 facilities in 2006. Portable sources like I'm
11 talking about today also fit into such source
12 categories.

13 A new registration program would allow
14 that the owners or operators of portable sources
15 could register their operations with the
16 Department instead of submitting a permit
17 application, having that process, and then getting
18 a permit.

19 The owner or operator of a portable
20 source, in order to register, would still be
21 required to submit the same type of information
22 that they currently submit in a permit
23 application.

24 They would also, once registered, still
25 be required to follow the same rules of operation

1 that are very similar to their current permit
2 conditions. Those rules of operation would
3 require things like emission limits, air pollution
4 control equipment installation and operation, and
5 other things like requirements for testing,
6 monitoring and reporting.

7 So essentially the control requirements
8 that are now included as permit conditions would
9 instead be adopted into Administrative Rules, that
10 would then apply to all portable sources across
11 the source category. By registering their
12 requirement with the Department, the owners or
13 operators of those sources would be certifying
14 that the operation of their equipment would comply
15 with the applicable rules and regulations.

16 What I really want to stress in this is
17 that transitioning from case-by-case permitting to
18 registration would not significantly change the
19 requirements that apply to these sources. What it
20 would change would be the process by which those
21 requirements are applied, so by rule rather than
22 permit.

23 The new registration program would
24 streamline that process, and it would reduce the
25 administrative burden and the time commitment for

1 both Air Quality Bureau staff and the owners and
2 operators of portable sources. This would allow
3 the Air Quality Bureau to refocus our time on
4 areas where we get more environmental benefit,
5 such as, for example, major sources, or spending
6 time providing education and compliance assistance
7 in the field.

8 So that's what we want to do, but how do
9 we get there, and who is involved in that process?
10 The Air Quality Bureau, our project team has been
11 working very closely with a variety of
12 stakeholders over the course of the last year.
13 We've been working with stakeholders within the
14 agency, as well as outside of State government, to
15 develop a registration program for these sources
16 that we believe is going to be appropriate and
17 effective in protecting air quality.

18 Over the last year, we've had
19 conversations with stakeholders, including our
20 Clean Air Act Advisory Committee, the Opencut
21 Section stakeholders, the Montana Contractors
22 Association, environmental groups, and the
23 Environmental Protection Agency.

24 Out of those conversations, we've formed
25 a technical working group comprised of

1 representatives from the industry who could help
2 us work through the details of how a portable
3 registration program might actually work for those
4 sources.

5 Internally we've coordinated with the
6 Opencut Section. There is a lot of crossover in
7 those sources, and how they are permitted in the
8 Department; as well as our own Oil and Gas
9 Services Section, because they have experience
10 with the registration program.

11 We have additional meetings with all of
12 these stakeholders planned over the next couple of
13 months. And I'm really here today because we feel
14 like we're just about ready to move this project
15 forward into a more formal process to propose the
16 new registration program.

17 As it says in the agenda, development of
18 this program will take the form of new
19 Administrative Rules. At the Board's December 7th
20 meeting, the Air Quality Bureau plans to ask the
21 Board to initiate rulemaking on new and revised
22 Administrative Rules to adopt a new registration
23 program for portable sources.

24 These rules would provide both the
25 process through which eligible portable sources

1 will be required to register, as well as the
2 control requirements that would apply to them once
3 they're registered.

4 As I said, we have additional
5 stakeholder meetings planned over the next couple
6 of months before we get to that December meeting.
7 We do have rules drafted at this time, but they're
8 currently being reviewed by our stakeholders, so
9 I'll be able to provide you with more detail on
10 the specifics of what goes in those rules in
11 December, but if you do have questions today, I'm
12 available to answer them as well. Thank you.

13 CHAIR DEVENY: Thank you. We'll be
14 hearing more. Do Board members have questions
15 right now?

16 MR. DEARMENT: Madam Chair, yes, one
17 quick question. Ms. Harbage, you make a very
18 compelling case for the registration program. I'm
19 just wondering if DEQ or your stakeholders groups
20 have come upon any down sides or major stumbling
21 blocks you have had to work through during the
22 process.

23 MS. HARBAGE: Madam Chair, Mr. Dearment.
24 That's a very good question. I would say we
25 haven't had any major stumbling blocks. The one

1 interesting part about this that we have
2 discovered and worked through is when we look at
3 portable sources, they're a little different than
4 stationary sources, in that they do move around
5 the state. So it has just been a really fun
6 challenge for us to try to figure out how to
7 appropriately register sources when they don't
8 stay in one place. But we've worked through it,
9 and we've had a lot of help from our stakeholders
10 addressing that.

11 MR. DEARMENT: Thank you.

12 CHAIR DEVENY: John.

13 MR. FELTON: Thank you, Madam Chair. It
14 strikes me that one of the things that
15 differentiates when you might need a more unique
16 permit versus a registration process is the amount
17 of variability in the process.

18 So with those three primary sources you
19 identified, do they basically do everything the
20 same way at all these sites?

21 MS. HARBAGE: Madam Chair, Mr. Felton.
22 Yes. So crushing and screening operations are
23 generally doing the same thing. When we look at
24 air pollution, the air pollution sources at those
25 facilities are generally almost identical. They

1 may have more crushers at one site and fewer
2 screens on another site, for example. The same
3 goes for asphalt plants and concrete batch plants.

4 We're pretty confident that the control
5 requirements that would apply to any crushing and
6 screening operation or the other two would be
7 appropriate for any of them.

8 MR. FELTON: Thank you.

9 CHAIR DEVENY: Any other questions?

10 Dexter.

11 MR. DEXTER: One real quick. Are you
12 talking about three registration programs for the
13 individual source, or one registration for all
14 three?

15 MS. HARBAGE: Madam Chair, Mr. Busby,
16 that's a good clarifying question. Currently we
17 have drafted rules that would basically set up one
18 registration program, but then there would be some
19 specific requirements that would apply to the
20 different source categories.

21 MR. BUSBY: Just one program?

22 MS. HARBAGE: Yes.

23 CHAIR DEVENY: Anything else?

24 (No response)

25 CHAIR DEVENY: Thank you. I think we

1 had a couple of new folks that came into the room
2 since we went around and introduced ourselves.
3 Would they care to state their name just so we
4 know who is all here.

5 MR. COLEMAN: Sure. I'm Ed Coleman, I'm
6 the Bureau Chief over at DEQ Coal and Opencut
7 Mining Bureau.

8 MR. ANDERSON: Chad Anderson,
9 Enforcement Program Manager.

10 CHAIR DEVENY: So I guess we should have
11 some public comment on that last presentation.
12 Was there anybody in the public that wanted to
13 comment on the presentation that we just heard?
14 Anybody on the phone?

15 (No response)

16 CHAIR DEVENY: Hearing none, we'll move
17 on. Welcome. Come on in. Would you state your
18 name, please, and who you represent.

19 MR. MEYER: My name is John Meyer. I'm
20 here for the ORW petition.

21 CHAIR DEVENY: Just in time. We're just
22 getting ready to get to that. So our next agenda
23 item is the petition for rulemaking that the Board
24 received from the Cottonwood Environmental Law
25 Center and the Gallatin Wildlife Association. And

1 I would refer you to the information in our packet
2 that our Board attorney prepared for us.

3 And with that, Sarah, would you like to
4 review your memo with the Board.

5 MS. CLERGET: Sure. First before we
6 start, I want to remind everybody of where we are
7 in the process, and I think if it is all right
8 with you, Madam Chair, we might like to have DEQ
9 and Cottonwood come up, so that they're ready to
10 talk about this. If you guys want to come and sit
11 at the tables.

12 So a reminder of where we are in this
13 process. At the last meeting, the Board indicated
14 that they moved past the initial phase to
15 determine whether there was sufficient information
16 in the application.

17 The next stage is to decide whether you
18 intend to adopt the petition. If you do, then it
19 needs to go out for -- we need to write a proposed
20 decision, which then goes out for public comment
21 through the regular public comment period,
22 published in the newspaper, all that sort of
23 thing. And then we respond to those comments that
24 we receive, and then issue a final decision on the
25 adoption of the petition.

1 If you choose to reject the petition,
2 then you have to issue a written decision stating
3 the reasons for your decision to reject.

4 At the last meeting you asked me to
5 provide you a memo with a recommendation. In
6 order to do that, I asked DEQ and Cottonwood both
7 to provide me with memos, and both of those memos
8 are in your packet, in addition to the
9 communication back and forth between me and
10 Cottonwood and DEQ.

11 The intention with that -- This is not a
12 contested case. This is an entirely different
13 thing under its own statutory regime. So the
14 purpose of that was so that you guys understand
15 what has gone on in the intervening time.

16 Also I thought the questions and email
17 correspondence were helpful in addition to what
18 was in the memos. So that's everything that was
19 in your packet.

20 Then you have a memo from me with a
21 recommendation that goes through the factors that
22 you have to consider in the statute, based on the
23 memos that have been given by both -- I'm going to
24 refer to them as parties out of habit, but by that
25 reference, I don't mean to indicate that this is a

1 contested case. It's just meant to indicate that
2 they are people who are here to talk about this.

3 And so I go through, based on their
4 memos, the factors in 75-5-316 that you have to
5 consider, one through three -- this is what I'm
6 looking at, Page 2 of my memo -- one through three
7 are things you must consider. They're conjunctive
8 so you have to consider all of those things.

9 So your ultimate decision can be based
10 on even just one factor that's contained in the
11 Section 4 analysis, we call it, which is the big
12 list of "A" through "F." So those are not
13 conjunctive, meaning that not all of those have to
14 be present.

15 So as I said in my memo, this standard
16 is a preponderance of the evidence standard, which
17 means that essentially you have to have 51
18 percent, you have to be 51 percent convinced by
19 the evidence.

20 So there has to be a preponderance of
21 the evidence that the section of the Gallatin that
22 Cottonwood has petitioned to be designated an
23 Outstanding Resource Water is an Outstanding
24 Resource Water, that's one; has a risk of having
25 one or more of the Section 4 criteria compromised

1 as a result of pollution; and that that class is
2 necessary because there is no effective process
3 that could otherwise address it.

4 Based on that, on my analysis, that that
5 preponderance has not been met. There is not a
6 preponderance of the evidence to indicate that
7 those three factors are met; and therefore, it's
8 my recommendation that you reject the petition.

9 If you choose to take my recommendation,
10 you can adopt some or all of this memo as your
11 written decision, or modify it as you see fit.

12 If you do not agree with that
13 recommendation, then you'll need to write, or
14 probably instruct me to write your own proposed
15 decision, and outline why it is that you believe
16 these factors have been met by a preponderance
17 standard.

18 So I think if you would like to hear
19 from the parties to answer questions. I'm happy
20 to answer any questions that there are about my
21 memo, but the parties are obviously here as well
22 to answer questions, since they I'm sure have
23 responses to my memo as well.

24 CHAIR DEVENY: Hopefully we've all read
25 the memo. So I think I'd like to hear from

1 Cottonwood at this point to see what they have to
2 say, and then we'll take questions of the Board,
3 both to Sarah and to Mr. Meyer. And then DEQ is
4 here as a resource as well.

5 MR. MEYER: Thank you, Madam Chair,
6 members of the Board. I haven't seen the memo, so
7 I'm not quite sure what we're referring to in
8 terms of any analysis that the attorney for the
9 Board may have done, so I really can't speak very
10 -- at all to that memo. So you guys obviously
11 know more than me. Do you have questions out of
12 the gate, maybe in terms of your decision, based
13 on the memo that was never provided?

14 CHAIR DEVENY: Sarah, do you have any
15 response in regards to the memo?

16 MS. CLERGET: I would just like to
17 indicate that, as you can see from the
18 communication, it was clear that this was
19 happening at the meeting today, and the memo was
20 included in the Board packet that was posted
21 publicly a week ago, and so it is available and
22 has been available.

23 CHAIR DEVENY: Okay. Maybe somebody can
24 provide --

25 (Document provided)

1 MR. MEYER: Thank you for providing
2 that.

3 So as you may know, we've already been
4 here before. In 2000, there was a group called
5 the American Wildlands that petitioned the Board
6 to designate the Gallatin River, this exact
7 section, as an Outstanding Resource Water.

8 The Board accepted the petition,
9 accepted public comment, and ultimately the
10 Montana Department of Environmental Quality
11 prepared an Environmental Impact Statement. And
12 before it accepted, before it issued a Record of
13 Decision that would have adopted or proposed the
14 Montana Legislature adopting this section as an
15 Outstanding Resource Water, a final decision was
16 never made.

17 So we've already been here before. The
18 only thing that's changed, there's two things that
19 have changed. One thing that is the Montana
20 Department of Environmental Quality has issued
21 numeric criteria for nutrients, which means that
22 -- do you guys understand what that means? It
23 basically says you can only discharge "X" number
24 of nitrogen and phosphorus or whatever -- and
25 before it was a narrative standard.

1 So the Montana Department of
2 Environmental Quality is now saying that standard
3 is more stringent, and that is going to protect
4 the river more. And what has changed is that not
5 only has the Montana DEQ issued a numeric
6 criteria, but it's also issued what's called a
7 Circular -- is it 12B?

8 MS. CLERGET: There is a 12A and 12B.

9 MR. MEYER: So the 12A is a numeric
10 criteria, and the 12B is the variances. And so my
11 understanding is that there are at least one
12 lawsuit, if not several, against Montana DEQ for
13 issuing variances to several potential pollutants.

14 And so the thought of this numeric
15 criteria somehow protecting the Gallatin River is
16 directly undermined by the fact that the DEQ has
17 been issuing variances to several potential
18 dischargers in the past.

19 The other issue that needs to be
20 considered is pharmaceuticals. The attorney for
21 the Montana Department of Environmental Quality
22 sent the Board attorney a memo or a handout from
23 the EPA expressing concern regarding
24 pharmaceuticals. Did you guys get that?

25 MS. CLERGET: It is in the materials,

1 yes.

2 MR. MEYER: What did you guys think
3 about that?

4 CHAIR DEVENY: You can continue with
5 your statement.

6 MR. MEYER: Well, there are several
7 people across the state of Montana that are
8 concerned that the Gallatin River is going to be
9 polluted with pharmaceuticals. There are no
10 numeric criteria to protect the Gallatin River
11 from pharmaceuticals; is that correct, attorney?

12 MS. CLERGET: This is your argument, so
13 I'm going to let you make your argument.

14 MR. MEYER: We're not arguing because
15 we're not parties contesting any issue.

16 MS. CLERGET: It is not my position to
17 advise you or your client, so I would prefer that
18 you make your statement, and unless there is a
19 question about the Board's obligation, I'll answer
20 that.

21 MR. MEYER: So the US Forest Service has
22 stated that the Gallatin River is an outstanding
23 scenic resource, so you meet the criteria right
24 there. The federal government said as much; is
25 that correct?

1 MS. CLERGET: It is true that under
2 Section 75-5-316(4)(c), it has been designated an
3 outstanding recreational fishery, if that's what
4 you're referring to. It has not been designated
5 wild and scenic.

6 MR. MEYER: A wild and scenic
7 designation protects the Gallatin River from dams.
8 It does not protect the Gallatin River from
9 pollution. Those are two separate things. There
10 is no proposal to dam the Gallatin River.

11 The Big Sky Water and Sewer District has
12 in its meeting minutes, and has evidently issued a
13 notice of request for qualifications from
14 engineering firms that would design and develop a
15 pipeline to discharge treated waste water into the
16 Gallatin River; is that correct?

17 MS. CLERGET: I am uncomfortable with
18 you putting me in the position of confirming your
19 facts. I have stated the position in the memo. I
20 think if you have additional argument, you need to
21 make it, and I'm not going to make it for you.

22 MR. MEYER: I'm not asking you to make
23 my argument. I'm asking you whether or not it is
24 true that the Big Sky Water and Sewer District has
25 issued a request for qualifications from

1 engineering firms to manufacture a pipeline to
2 discharge treated waste water into the Gallatin
3 River.

4 MS. CLERGET: The RFP or the equivalent
5 that has been put out by the Big Sky Water and
6 Sewer District was discussed in your memo and in
7 my memo.

8 MR. MEYER: So the US Forest Service has
9 said this is an Outstanding Resource Water.
10 People come here from all over the world to fish
11 this area. People come here from all over the
12 world, from all over the state of Montana, all
13 over the country to go whitewater rafting in this
14 area. I've not talked to a single person that
15 wants to swim in the Gallatin River, fish in the
16 Gallatin River, if there is treated waste water
17 being discharged into there.

18 The last time I was here someone said,
19 "Are you anti-development?" I'm clean water. I
20 want clean water. I think everyone here wants
21 clean water. If wanting clean water means I'm
22 anti-development, then I guess yes, that means I
23 am anti-development, because I'm clean water. If
24 you have no other questions, I'll sit down.

25 CHAIR DEVENY: We may have questions of

1 you for sure. Board members, questions of Sarah
2 in regards to her memo, or questions of Mr. Meyer?

3 MR. DEARMENT: I have one, Madam Chair.
4 Question for Ms. Clerget.

5 So if I understand correctly, we have
6 something of a precedent here, which a previous
7 Board moved forward with this, 2002 or whenever it
8 was. It seems to me that the situation now is
9 largely the same as it was then, as the river is
10 not listed as wild and scenic, there is no
11 endangered species, and so on.

12 The difference perhaps between now and
13 then is that the Circular 12A has come out, and we
14 have the numeric nutrient standards that we didn't
15 have then, and that's sort of the major difference
16 between now and the previous effort; is that a
17 reasonable summary?

18 MS. CLERGET: I think probably the
19 specific words that the Board used previously were
20 that they were concerned about nutrient loads,
21 which I think that not only the Circular 12A and
22 12B, but also the changes to the MPDES permitting
23 process that have occurred in the intervening time
24 would be an additional difference.

25 MR. DEARMENT: Okay. I guess what I'm

1 getting at is I appreciate your memo and generally
2 agree with it. I'm wondering, just procedurally,
3 given Cottonwood's concerns about pharmaceuticals
4 and the growing awareness of pharmaceuticals, our
5 options right now are we could just end this
6 essentially, or we can give notice of our intent
7 to accept, and have a public comment period.

8 I'm wondering, just as discussion for
9 the Board, if we think there is any value in
10 allowing that public process to proceed for
11 another month or so, and seeing if there is
12 anybody else out there who supports this idea, and
13 doing a more thorough job of vetting concerns from
14 other members of the community in the Big Sky
15 area.

16 I'm not necessarily advocating that we
17 do so, just more trying to -- I'm curious what my
18 other Board members think about continuing that
19 process for another month or so during this
20 comment period.

21 CHAIR DEVENY: I was kind of thinking
22 along those same lines, too. And to me the
23 significant difference between what the previous
24 Board approved, as Sarah described, was the
25 nutrient loading that at that time was numerical,

1 as was brought up, but now is a specific number.
2 And so that's probably not the big concern at this
3 point, at least from a point source type of
4 pollutant.

5 The concept of emerging chemicals,
6 emerging pharmaceuticals as an emerging pollutant,
7 pharmaceuticals and other personal care products,
8 is something that is kind of cutting edge right
9 now, and is becoming more and more -- we're
10 becoming more and more aware of the potential that
11 that could possibly have an aquatic life.

12 And while the science isn't really solid
13 on that yet, the memo from EPA makes it pretty
14 clear that there is a real need for more research
15 and work on that, and even in the RFQ that the
16 water and sewer district put out, they directed
17 their engineering firm to look at potential
18 treatment for that in the future, knowing that the
19 technology doesn't exist these days, but that
20 someday it may need to.

21 And so there is a recognition out there.
22 And I think if you look at the purpose of the
23 Outstanding Resource Water designation by the
24 Legislature, it is one of the few pieces of
25 legislation that is there to sort of preempt

1 anything from happening.

2 Most of the other legislation that's out
3 there is really sort of preventative in a way, but
4 if something happens, then there is ways to
5 correct. But this is sort of a preventative
6 precautionary measure.

7 And I think that the issue of
8 pharmaceuticals to me is enough to maybe move
9 along to that next step, to get some more input
10 from the public, to see where other people in the
11 Big Sky area in particular, what their thoughts
12 are on this. We really haven't heard much except
13 from the Petitioner. There hasn't been a lot of
14 public comment on our deliberations here.

15 So that's kind of where I was leaning,
16 too, John. And I don't know if other members have
17 thoughts.

18 MR. BUSBY: I would like to hear if DEQ
19 has any comments before we go any further.

20 MS. BOWERS: Madam Chair, members of the
21 Board, I'm Kirsten Bowers, DEQ attorney. And in
22 general, DEQ agrees with the Board attorney's
23 recommendation. The petitioned stretch of the
24 Gallatin River does meet the Outstanding Resource
25 Water criteria as an outstanding fishery, and it

1 meets the criteria with regard to other important
2 environmental and economic factors, including
3 recreational use of the river.

4 And I do think the difference between
5 the 2006 petition to the Board from American
6 Wildlands and this current petition is that DEQ
7 has numeric nutrient standards which would be
8 incorporated in an MPDES permit for a point
9 source. Those standards are designed to protect
10 the beneficial uses including the fishery, and
11 recreational use of the water.

12 And it would be unlikely that a new
13 point source discharger would be granted a
14 variance from those standards, because the
15 discharge is to high quality water, and existing
16 beneficial uses have to be protected.

17 So DEQ is also concerned about
18 pharmaceutical pollution, as those are emerging
19 issues of concern with regard to pharmaceuticals,
20 and also certain personal care products. And
21 you're correct there are no water quality
22 standards designed to protect beneficial uses from
23 those types of pollutants, and so there are no
24 standards that can be incorporated in a permit.

25 Most permits do have a reopener

1 provisions if in the future there are water
2 quality standards, and there is a reasonable
3 potential that a discharger could violate those
4 standards.

5 So I guess the bottom line for DEQ is
6 the petitioned section is an Outstanding Resource
7 Water. It is of high economic and environmental
8 value to the State of Montana. But there isn't
9 the required showing of necessity to protect the
10 waters beyond the available processes, which are
11 MPDES permitting and application of the State's
12 nondegradation policy.

13 CHAIR DEVENY: Does that answer your
14 question?

15 MR. DEXTER: It pretty much does
16 personalize. Can I make a couple of comments on
17 this myself?

18 CHAIR DEVENY: Sure.

19 MR. DEXTER: I tend to agree with DEQ on
20 this thing, that pharmaceuticals is going to be a
21 problem in the future. While it is there today,
22 we have no way of addressing it through regulation
23 until such criteria and methods of treatment have
24 been proven.

25 So I'm not sure we can address

1 pharmaceuticals, and I'm not sure what -- Big Sky
2 is sitting up there -- what they can do to address
3 pharmaceuticals. So are we getting the cart ahead
4 of the horse here? We can't protect the water, or
5 we can't protect Big Sky, because that economic
6 development is probably just as big as the
7 fishery. So are we going to damage one or the
8 other? I don't like those choices.

9 CHAIR DEVENY: Other comments by Board
10 members. John.

11 MR. FELTON: Thank you, Madam Chair.
12 This strikes me as a little bit like the
13 pharmaceutical concern, which I absolutely share,
14 is a little bit in my mind like the earlier
15 application when there were no nutrient standards.
16 Nutrients were identified as a concern, but there
17 were no standards. And so perhaps at that time
18 there was a different view of it.

19 I think it does evolve, and it makes me
20 -- I've been uncomfortable as well to essentially
21 kind of defacto set some rule when that hasn't
22 been done. It looks to me like the accept or
23 reject petition is really on the three factors
24 that were outlined in the memo, and I'm not sure
25 that we should be sort of creating new factors

1 outside those rule or statutory guidelines.

2 CHAIR DEVENY: Are there other comments
3 by the Board?

4 MR. DEARMENT: Madam Chair, perhaps a
5 question of Mr. Meyer, please. Madam Chair, Mr.
6 Meyer, we have a letter from American Rivers in
7 our packet signed by Scott Bosse, which pertains
8 to the previous attempt of this, where he says
9 groups that were -- the petition was withdrawn.

10 And he says, "Groups that were
11 previously at loggerheads over the ORW proposal --
12 conservation organizations, developers, local
13 property owners, and the Big Sky Water and Sewer
14 District -- join together to pursue a more
15 collaborative approach at protecting water quality
16 in the upper Gallatin River." That process
17 continues today, does it not?

18 MR. MEYER: My understanding is that the
19 Wastewater Solutions Forum has come to an end.
20 They could never agree on whether or not a
21 pipeline should be built into the Gallatin River
22 to discharge treated wastewater.

23 MR. DEARMENT: It's my understanding
24 that a new version of that had formed, and was
25 still trying to address that. But regardless, are

1 you in contact with some of these other groups?
2 Do you have any -- If we were to extend a comment
3 period on this, do you anticipate those groups
4 coming together to support this, or are they still
5 kind of trying this collaborative approach working
6 with Big Sky? Do you have any knowledge of that,
7 where we might end up?

8 MR. MEYER: I don't want to speculate.
9 I will add on a completely separate note that the
10 memo I believe says there are no endangered
11 species in the Gallatin River. MCA 75-5-316(3)(c)
12 (d), the presence of endangered or threatened
13 species in the water. It says no.

14 And there was a petition to list Arctic
15 Grayling as an endangered species. The US Fish
16 and Wildlife Service denied the petition to list
17 Arctic Grayling as an endangered species. They
18 went up to Court in the Ninth Circuit, and the
19 Ninth Circuit rejected US Fish and Wildlife
20 Service's decision not to list Arctic Grayling as
21 threatened or an endangered species.

22 So that means that Arctics are still a
23 proposed species for listing as being threatened
24 or endangered.

25 CHAIR DEVENY: Any other comments or

1 questions by Board members?

2 MS. HANSON: I think my questions fell
3 in line in terms of that Wastewater Solutions
4 Forum, and where that was. And it looks like it,
5 reading it, that there was even a study that was
6 put out. And so I feel like we're missing some
7 pieces of the puzzle on where this kind of broke
8 down, and where those groups are at right now.

9 MR. DEARMENT: I guess I was -- and
10 again, I'm not advocating for this at the moment,
11 just as part of a conversation -- thinking about a
12 comment period would give us a chance to hear from
13 them, if they would like to either support or
14 oppose this. And just wondering to give this sort
15 of the maximum benefit of the doubt while it is
16 before us, and give it as much of a chance as
17 possible.

18 Is there any value in giving notice of
19 an intent to adopt this, giving that comment
20 period a chance to play out, and then seeing where
21 we are and what we know at the end of it?

22 CHAIR DEVENY: I think there is some
23 merit in that. And the other thing we need to be
24 aware of is if we go ahead with the public comment
25 period, I believe -- and Sarah, correct me if I'm

1 wrong -- after that public comment period, we come
2 back and make a decision whether to continue or
3 not.

4 MS. CLERGET: Yes, that's correct.

5 CHAIR DEVENY: So there is that point.
6 And if we decide to continue at that point, then
7 there is the EIS, and there is a point after the
8 EIS where the Board has a decision to decide
9 whether to recommend. And then if that continues,
10 there is yet another process. It has to go
11 through the Legislature.

12 So any action we take today, if we take
13 action to further ahead, is not a definitive
14 commitment on the part of this Board that we're
15 necessarily in full agreement that the designation
16 should occur. It does merely kind of broaden the
17 opportunity for the public to weigh in on this,
18 and we would maybe find out what these other
19 groups are considering.

20 MS. HANSON: I'm not sure I fully
21 understand that. From the standpoint I guess of
22 today, would we then -- would you have to accept
23 it to move it to that, or could we just -- Is it
24 just saying we want one more month to allow more
25 people to speak on this topic?

1 MS. CLERGET: It is up to you. If you
2 want to put this out for a formal public comment
3 period, which is what is contemplated by the
4 statute, we have to issue a proposed written
5 decision.

6 So I need guidance from you guys about
7 what you want in the written decision, which I
8 will then do, and then that -- and practically
9 what we could do is I can write it, and give it to
10 the Board Chair for her to confirm that it does
11 reflect what you guys talked about today, and then
12 we can put it out for public comment, which means
13 newspaper notification, and sending it to
14 interested parties.

15 And then we could, if you would prefer,
16 set the public hearing for in front of the Board
17 at the next meeting, rather than me doing a public
18 hearing, as we would often with proposed
19 rulemaking separately. Then we'd need to get
20 comments, you would have to put a comment period
21 in, we have to get written comments, and those
22 written comments have to be responded to in
23 writing, and put together a proposed decision,
24 which then the Board would vote on.

25 MS. HANSON: In doing that today, I

1 think somebody used the language, and I may not be
2 totally correct on this, but used the language of
3 "intent to accept," but you could also do an
4 intent to decline, and open it up for a public
5 hearing.

6 MS. CLERGET: The statute doesn't
7 contemplate that, but I don't think it prevents
8 it. So if you wanted to do that, that's another
9 option as well.

10 Since the statute is not specific on
11 that, it sounds to me like what you're
12 contemplating is potentially just putting off a
13 decision on whether you intend to accept or deny
14 it until the next meeting to perhaps allow other
15 people to weigh in on that decision, without -- it
16 would essentially be adding a step to what the
17 statute contemplates, which is not going to harm
18 anybody's due process. It doesn't hurt anything
19 to add additional steps. So I don't think the
20 statute precludes that, if you wanted to.

21 CHAIR DEVENY: Another question, Sarah.
22 With regard to the hearing, does that have to come
23 before the Board, or could we assign you as the
24 Hearings Officer to run it, to run a hearing? Say
25 if it were held in Big Sky, for example.

1 MS. CLERGET: Yes, you can designate it
2 to me if you want to. The same way we would do
3 any other kind of rules hearing.

4 CHAIR DEVENY: That's an interesting
5 option you sort of raised.

6 MS. HANSON: I mean I guess kind of
7 jumping off of what John said earlier, in reading
8 the memo, I don't know that I stand on the side of
9 intent to accept when I don't think that it right
10 now meets, without more information and guidance
11 maybe, what is laid out that needs to be met to
12 accept it.

13 So I guess I tend more towards an intent
14 to decline with what's already been written in the
15 memo, and the thought process of saying, "If you
16 disagree with this, bring more information." But
17 that's my take.

18 MR. BUSBY: I have another comment
19 that's really triggered by that. We've only seen
20 one person, and this thing has been noticed
21 several times at our meetings, three at least. I
22 don't see any overwhelming support from the
23 community of Big Sky for this particular petition,
24 since it has been out there for several months,
25 potential of it. I'd have a hard time --

1 I support Sarah's thing. I'd have a
2 hard time saying we should spend any more time and
3 effort on it without a big showing from the
4 community, because we don't know what harm could
5 come to the community because of the wastewater
6 issue.

7 CHAIR DEVENY: I'm not sure that a lot
8 of people go online and read our agenda either.
9 That's another --

10 MR. MEYER: If I may.

11 CHAIR DEVENY: Excuse me. Hillary, you
12 had a --

13 MS. HANSON: I just have another
14 question. What does happen if we decide? If the
15 folks in Big Sky said, "Wait a second. We didn't
16 know about this. We wanted to know about it," can
17 they bring it forward again?

18 MS. CLERGET: They could bring their own
19 petition if they wanted to for sure, and it would
20 go through the same process as this did.

21 MS. HANSON: So it doesn't close the
22 door? That's what I was trying to ask.

23 CHAIR DEVENY: And so along those lines,
24 if we wanted to open up that -- did somebody on
25 the phone just say something?

1 MR. TWEETEN: Yes, Madam Chair, this is
2 Chris Tweeten. I wonder if you can hear me.

3 CHAIR DEVENY: Yes, we can now. Hi,
4 Chris. Welcome.

5 MR. TWEETEN: I've been listening and
6 biding my time here for the last hour or so, I
7 guess. I share the concern that's been expressed
8 that moving this process forward to public comment
9 and public hearing without adopting some sort of a
10 resolution of intention to accept the petition
11 seems to me to be contrary to the statute. And I
12 don't know that we can add a step.

13 We could carry it over to the next
14 meeting, and issue some sort of a notice inviting
15 members of the public to come and talk to us about
16 this before proceeding to the notion, to the idea
17 of intending to adopt.

18 But I'm persuaded by Sarah's memo that
19 it wouldn't be appropriate for us to state an
20 intention to adopt a petition at the current time
21 because those nutrients, or those pollutants that
22 the current EPA regulations control, it seems to
23 me, are addressed by the existing procedures for
24 the discharge permit that the Big Sky Water and
25 Sewer District may be pursuing.

1 And the pollutant that the petitioner
2 seems to be concerned about is not one that has
3 been identified in State law as being a pollutant
4 that's subject to control by regulation.

5 And so what essentially is being asked
6 of us is if we preempt all development in a
7 particular corridor of the Gallatin River until
8 such time as pharmaceuticals and other personal
9 care products are identified as a pollutant, and
10 some measure for controlling those pollutants
11 would exist under State law.

12 So it is kind of in the nature of a
13 preliminary injunction that would say Big Sky
14 can't proceed with its treatment plant proposal
15 because of the fact that we've identified this as
16 an Outstanding Resource Water, and I'm just not
17 comfortable doing that under the current showing
18 that's been made.

19 There is no conclusive evidence that has
20 been presented to us so far that some violation of
21 an existing water quality standard is going to
22 happen if the designation is not made. And that's
23 one of the criteria that we have to find in order
24 to adopt a resolution of the intention to accept
25 the petition.

1 So I think Sarah's point was better in
2 her memorandum than I just did, but I am persuaded
3 by Sarah's memorandum that it would be premature
4 for us to designate this in the current situation.

5 And then that's without prejudice. I
6 mean anybody can come back at some point in the
7 future when scientific knowledge has advanced and
8 circumstances have changed.

9 And in the meantime, the Petitioners, or
10 people who support them, can take it up with DEQ
11 in the permitting process. They could petition
12 DEQ for the adoption of regulations controlling
13 pharmaceuticals and personal care products if they
14 wanted to, if they thought they could make the
15 showing that's required that could bring that
16 within the definition of a pollutant under the
17 statute.

18 So it doesn't seem to me that you can
19 make the finding that is required by the statute
20 to go ahead with an intent to adopt, and without
21 that, I think the other option is not to intend to
22 adopt, and for the reasons Sarah's stated in her
23 memo. So I would be inclined to go in that
24 direction, rather than the other.

25 CHAIR DEVENY: Thank you, Chris. Are

1 there other comments from Board members?

2 (No response)

3 CHAIR DEVENY: Mr. Meyer, did you have
4 something you wanted to add?

5 MR. MEYER: Sure. Thank you. There is
6 several things that just came up in the last ten
7 minutes. When this first was heard in front of
8 the Board, there were several people here and on
9 the telephone that tried to comment, and the Board
10 closed public comment, even though people were
11 waiting on the telephone to provide public
12 comment.

13 Then I heard the Board talk about, well,
14 there hasn't been a strong showing from the public
15 in regards to whether or not they should go
16 forward, shouldn't go forward, and maybe we should
17 have some public comment on whether we should move
18 forward.

19 And so what I hear you saying is that
20 you want more public comment on whether there
21 should be public comment, because ultimately if
22 you accept the petition, you open this up for
23 thirty more days, and there is public comment,
24 that doesn't mean you have to move forward with
25 it. It ultimately means you allow the public to

1 comment. That's what accepting the petition at
2 this point does.

3 Board member Felton described the
4 previous petition as analogous to this one, that
5 there were no numeric criteria for pollutants such
6 as nitrogen and phosphorus. In this case there
7 are no numeric criteria for pollutants
8 pharmaceuticals, etc.

9 What I just heard Board member Tweeten
10 say is there are no water quality standards, that
11 maybe we should petition the Board for a standard
12 to protect the river. And that is not what is
13 contemplated under 75-5-316 No. 3. It says, "The
14 classification is necessary because there is no
15 other effective process to achieve the necessary
16 protection, including the nondegradation policy."

17 If we have to spend the next five years
18 asking the DEQ to make a rule and provide public
19 comment, by that time it is too late. The Big Sky
20 Water and Sewer District has already issued a
21 request for qualifications from engineering firms
22 to design and develop a pipeline to discharge
23 pharmaceuticals into the Gallatin River.

24 CHAIR DEVENY: Have you finished?

25 MR. MEYER: Yes.

1 CHAIR DEVENY: Further comments or
2 questions by Board members?

3 MR. DEARMENT: I guess I'd kind of
4 kicked this off and asked for the conversation.
5 Thank you, everybody. But I think it's helped
6 clarify my thinking a little bit, and I'm inclined
7 to agree with Sarah's memo, and what Chris has
8 said, that it doesn't meet the test that we need,
9 to me, to move forward; and others can bring this
10 forward again if they think it necessary, but I
11 think I'm inclined to adopt Sarah's
12 recommendation.

13 CHAIR DEVENY: Before we move forward,
14 I'd like to hear if there is any other public
15 comment right now on this particular issue by
16 people on the phone or in the audience.

17 (No response)

18 CHAIR DEVENY: I don't believe there is
19 anybody here. Are we ready to make a motion?

20 MR. BUSBY: I move that we decline the
21 petition for naming the Gallatin River as a
22 Outstanding Resource Water, and support Sarah's
23 document as our -- I don't know how you want to
24 word that but --

25 MS. CLERGET: Final written decision.

1 MR. DEXTER: -- as the final written
2 decision.

3 CHAIR DEVENY: It's been moved. Is
4 there a second?

5 MR. FELTON: Second.

6 CHAIR DEVENY: It's been moved and
7 seconded. Is there any further discussion?

8 (No response)

9 CHAIR DEVENY: All those in favor,
10 signify by saying aye.

11 (Response)

12 CHAIR DEVENY: Those opposed?

13 MR. TWEETEN: I'm a yes.

14 CHAIR DEVENY: Nay.

15 We'll go ahead and take a break.

16 (Recess taken at 10:20 a.m.)

17 * * * * *

18 (Oral argument on CFAC Appeal of
19 DEQ's modification of MPDES Permit
20 No. MT0030066 in separate transcript)

21 * * * * *

22 (Board meeting reconvened at 3:00 p.m.)

23 CHAIR DEVENY: We still have a couple
24 things on the agenda that should go fairly quickly
25 I believe. Board Counsel update.

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MS. CLERGET: I've got nothing.

CHAIR DEVENY: Anybody from the general public have any comments to make?

(No response)

CHAIR DEVENY: Hearing none, motion to adjourn.

MS. HANSON: So moved.

MR. FELTON: Second.

CHAIR DEVENY: All those in favor, signify by saying aye.

(Response)

CHAIR DEVENY: Meeting is adjourned. Thank you all very much.

(The proceedings were concluded

at 3:00 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 - 64 - 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 _____, 2018.

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

<p style="text-align: center;"><u> </u> \$ <u> </u></p> <p>\$38.24 - 14:23</p> <p>\$44.35 - 15:18</p> <p>\$45.37 - 14:24</p> <p>\$800 [2] 14:18, 14:22</p> <p>\$850 - 15:17</p> <p>\$900 [2] 14:18, 14:22</p> <p style="text-align: center;"><u> </u> 1 <u> </u></p> <p>10:20 - 63:16</p> <p>111 - 1:9</p> <p>12A [4] 38:8, 38:9, 42:13, 42:21</p> <p>12B [4] 38:7, 38:8, 38:10, 42:22</p> <p>13th - 15:13</p> <p>1520 - 1:10</p> <p>17.8.505 - 14:11</p> <p style="text-align: center;"><u> </u> 2 <u> </u></p> <p>2 - 34:6</p> <p>2)(a [2] 10:3, 13:12</p> <p>2)(b - 10:15</p> <p>2000 - 37:4</p> <p>2002 - 42:7</p> <p>2006 [2] 24:10, 46:5</p> <p>2018 [6] 1:5, 1:12, 15:6, 15:13, 16:15, 65:17</p> <p>2019 - 12:13</p> <p>2020 [2] 12:15, 65:22</p> <p>25th - 13:7</p> <p style="text-align: center;"><u> </u> 3 <u> </u></p> <p>3 - 61:13</p> <p>3)(a - 13:1</p> <p>3:00 [2] 63:22, 64:15</p> <p>3rd - 11:18</p> <p style="text-align: center;"><u> </u> 4 <u> </u></p> <p>4 [2] 34:11, 34:25</p>	<p>4th [2] 9:4, 11:18</p> <p style="text-align: center;"><u> </u> 5 <u> </u></p> <p>5 [4] 1:5, 1:12, 14:20, 15:19</p> <p>51 [2] 34:17, 34:18</p> <p>55 - 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