

PETROLEUM TANK RELEASE COMPENSATION BOARD
MINUTES
Teleconference Business Meeting
April 9, 2018
Lee Metcalf Building, Room 111, 1520 E 6th Avenue
Helena, MT

Board member in attendance via teleconference, as confirmed by roll call, was Jim Corson; Board Members in attendance in Room 111 of the Lee Metcalf Building were Jerry Breen, Mark Johnson, Ed Thamke, Heather Smith, Keith Schnider and Chuck Thompson. Also in attendance in Room 111 were Terry Wadsworth, Executive Director; Kyle Chenoweth, Attorney for the Board; and Ann Root and Garnet Pirre, Board staff.

Presiding Officer Jerry Breen called the meeting to order at 10:32 a.m.

Approval of Minutes – November 13, 2017

Mr. Johnson moved to suspend the rules and move the approval of minutes under the Discussion Items portion of the Agenda that pertain to minutes and record keeping. Mr. Thompson seconded. The motion was unanimously approved by roll call vote.

Board staff provided a transcript of Mr. Trombetta's address to the Board during the Petroleum Tank Cleanup Section report at the November 13, 2017 meeting. Mr. Johnson had asked for a review of that portion of the meeting, because he felt that there were significant statements made to the Board during Mr. Trombetta's comments.

Mr. Wadsworth noted that Mr. Trombetta had spoken about his history at DEQ, but it was during the Agenda item for Petroleum Tank Cleanup Section Reporting. According to the earlier training in this Board meeting that the Board received from Jane Rhodes of the State of Montana Professional Development Corporation the summation of minutes for things of substance is filtered by the relevance to the Agenda, as a point of business practice. Additionally, Mr. Trombetta did not refer to back to any other agenda item for the meeting during his comments, by specifically stating that he was speaking about any other topic on the agenda of the meeting. His speech was not relevant to the PTCS report and he did not say that his testimony was related to or in dispute of earlier statements.

Mr. Johnson asked if Mr. Trombetta would have had to be that specific.

Mr. Wadsworth indicated that under Robert's Rules of Order, if Mr. Trombetta was making a statement regarding other meeting agenda topics, he would need to have been that specific.

Mr. Johnson stated that what goes into the minutes seems to be discretionary. He said that Mr. Trombetta made statements that disputed earlier information that was given to the Board.

Mr. Johnson moved to approve the minutes as presented with the additional transcript pertaining to Mr. Trombetta's presentation to the Board during the PTCS Reporting section of the November 13, 2017 meeting. Mr. Johnson also moved to retain the recording from the November 13, 2017 meeting and the January 29, 2018 meeting until the Discussion Item on Minutes and Record Keeping took place at the subsequent meeting. Mr. Schnider seconded. The motion to approve the minutes as presented and to keep the audio recording of the November 13, 2017 meeting, until the Board discussed minutes and the keeping of audio recordings, was unanimously approved by roll call vote.

Approval of Minutes – January 29, 2018

Mr. Schnider moved to approve the minutes as presented. Ms. Smith seconded. The motion to approve the minutes as presented and keep the audio recording of the January 29, 2018 meeting, until the Board discussed minutes and the keeping of audio recordings, was unanimously approved by roll call vote.

Claim Adjustment Dispute, Town Pump, Fac #1510105, Rel #4155, Whitefish, MT

Mr. Wadsworth presented the Board with the appeal from Town Pump regarding utility costs contained in Claim #s 20170711G, 20170711H, 20170810G, 20171023D and 20180102D. Also, being appealed were the denial of costs associated with a scoping meeting contained in Claim #s 20170711G and 20170711H, and the denial of shipping charges contained in Claim #20160513E.

Mr. Wadsworth stated that the costs in question related to three categories of expenses: Utility costs, labor for a scoping meeting, and equipment shipping costs. All three of these costs are statutorily ineligible or are not reimbursable according to Board-promulgated rule. All six claims that were being appealed, were not part of either of the two Department (DEQ)-approved work plans (WP) for Release #4155.

Mr. Wadsworth cited §75-11-309 (3) (a) (ii), MCA that states:

Procedures for Reimbursement of Eligible Costs – Corrective Action Plans

(3) The board shall review each claim received under subsections (1) (h) and (1) (i), make the determination required in this subsection, inform the owner or operator of its determination, and, as appropriate, reimburse the owner or operator from the fund. Before approving a reimbursement, the board shall affirmatively determine that:

- (a) the expenses for which reimbursement is claimed;
- (i) are eligible costs; and
- (ii) were actually, necessarily and reasonably- incurred for the preparation or implementation of a corrective action plan approved by the department or for payments to a third party for bodily injury or property damage; and . . .

Mr. Wadsworth also cited ARM 17.58.342 (3) (d) in conjunction with the statute previously stated. For ease of reference the rule is stated here:

Other Charges Allowed or Disallowed

- (3) The following costs for implementing a corrective action plan are presumed to be reasonably incurred, only if approved by the board staff prior to claim submission:
- (d) shipping of samples and equipment.

Mr. Wadsworth indicated that, based on the criteria established in both Board law and Board rule, the costs that were submitted with each claim are not stated as items in the Department-approved corrective action plans or work plans (WP), and therefore could not lawfully be reimbursed by Board staff. When the Board hired staff to assist them in the review of submitted claims, they also directed the staff to follow the law, and make cost adjustments according to the legislatively established laws and Board promulgated rules. He stated this practice was upheld as these claims were submitted and processed.

Mr. Wadsworth described the business process that was developed to implement the requirements outlined in §75-11-309, MCA. The process begins with the notification of the release to DEQ, followed by an initial response. The findings are reported; DEQ reviews the findings; and, based on that review, DEQ decides whether or not additional action is necessary. If additional action is necessary, the owner/operator then prepares a WP. The WP is sent out for public comment and, after the public comment period, the WP gets approved. Mr. Wadsworth stated that those steps were required by law for the owner to receive reimbursement from the Fund. The same laws require the Board to review each claim and determine if the costs are actual, reasonable, and necessary for the implementation of an approved WP.

To be consistent with the law, investigation or cleanup activity must be conducted after a WP is approved by DEQ. The plan must be approved and in place before work is done, and claims for reimbursement are submitted after the work is done. The steps are: vetting what you are going to do within the public arena; getting state regulatory approval for that WP; and then public Funds can be disbursed for that activity.

Mr. Wadsworth stated that scoping meetings were never specifically called out in law and thus he felt that scoping meetings were not considered part of the expected cleanup process by the Legislature. The established business process, as described earlier, requires an invitation for review to the public and the opportunity for public participation. A scoping meeting conducted before the workplan is prepared does not provide that type of opportunity, and a scoping meeting has been conducted so infrequently that it makes up one tenth (1/10) of one (1) percent of all reviewed WPs since the inception of the fund. The scoping meetings are not considered by Board staff to be a reasonable or necessary cost of responding to a release. The scoping meetings have only occurred recently and only on a few cleanups. The Board staff questions the necessity of a meeting that happens only infrequently on a petroleum release cleanup.

Mr. Wadsworth stated that the release at Town Pump Whitefish site had been reimbursed \$910,479.93 to date. He stated that Town Pump was appearing before the Board to contest ineligible costs totaling \$4,300.00.

Mr. Wadsworth noted that the highest legal authority for denying costs is statute. The Board laws trump the Board rules and, in the case of these disputed claims, shipping charges are deniable both by statute and rule. In the Board staff's business process, the assessment of the terms eligible, actual, reasonable, and necessary are guided by statute first and then rule.

Mr. Wadsworth stated that the utility costs that were submitted were not part of an approved corrective action plan (CAP/WP). The utility charges for the approved WP had been exhausted, and the WP had been written to cover work through November of 2016. The Board staff granted the owner/consultant grace and paid the utility costs through March of 2017, at which point the full budgeted amount that had been approved for utilities was exhausted. The Board staff took into consideration how much it would have cost to shut the utilities off and balanced that against the charges that were submitted. That cost trade-off is part of a reasonableness assessment by Board staff. Saying it another way, if the owner had asked for the system to be shut off, the Board staff felt the costs would have been comparable to the submitted costs for the time period reimbursed through March 2017.

Mr. Wadsworth noted that the denial of labor costs associated with the scoping meeting was for costs not part of an approved WP. Additionally, the labor for a scoping meeting is incurred before a WP is in place. As noted prior, a consultant may not legally be reimbursed for labor that is not part of an approved WP. A scoping meeting takes place outside of that normal business practice, before the WP is prepared, and as such is not considered reasonable by Board staff.

Mr. Johnson asked if the Board is explicitly denied from approving costs that are part of preparing a WP, like scoping meetings. He said that the Board had always operated under the context that they do have some latitude.

Mr. Wadsworth indicated that the Board has some latitude on some laws and rules, but it's important to provide good justification for why they are allowing latitude. Additionally, if the matters that were in dispute were only issues of rule, and not law, the Board has a bit more flexibility in interpreting their own rules, because the Board promulgate the rules.

Mr. Johnson asked about the shipping costs that were being denied, and where they were required to be part of a Department approved WP.

Mr. Wadsworth cited §75-11-309 (3) (a) (ii), MCA, and stated that the owner is required to include all the costs they want to receive reimbursement for in the submittal of the WP that then receives DEQ approval.

Mr. Johnson asked if every cost had to be identified in that WP, as part of the law that was stated.

Mr. Wadsworth said that was the way he read that law.

Mr. Johnson stated that he didn't see anything that says all specific costs must be outlined specifically and explicitly in the WP. Mr. Johnson stated that under the Board rule it says that the costs are presumed to be reasonably incurred only if approved by the Board. That's the presumption. It doesn't mean that they are explicitly stated, it is a way for the Board staff to review the claim. He said that it is logical to have a piece of equipment that is part of a plan and, to get it to a site, it is implicit. He noted that in the past, he has interacted with Board staff wherein they noted that something had been missed on the WP, like an extra mobilization cost, and his office was able to add it to

the budget because of that communication. He thought that maybe the case with the shipping costs in dispute, that they had just been overlooked, and it seemed that the Board was getting overly bureaucratic and officious to say that the company could use the equipment they need, but the Board wouldn't pay for the shipment to get the equipment to the site.

Mr. Schnider asked if the Board could hear from Town Pump's representative.

Mr. Alan Stine, Olympus Technical Services, addressed the Board on behalf of Town Pump. He said that the Board staff had said the utility expenses should not be covered because they weren't part of a Department approved WP. He stated that while that was true, it didn't tell the whole story. The extenuating circumstances at this site have placed the cost burden on the responsible party. The site is complex and there has been a delayed selection of the path forward. He stated that the operation of the air sparging system that makes up part of the utility costs in dispute, was necessary and critical to the protection of human health and environment. The system could not be shut down and winterized.

Mr. Stine said that the last WP for this site expired in 2016 and that they have been without a WP since that time. Because of site complexity, a path forward was not determined until November 2017. At that time, some of the system operations will be discontinued until additional investigation is completed, which is what is currently planned. Mr. Stine said there were numerous discussions with DEQ regarding getting a WP request out during the period following the expiration of the last WP, but it didn't get done. Mr. Stine noted that the utility costs in dispute are included going forward and, therefore, those costs are necessary. There was just a gap when there was no WP to cover the costs being incurred.

Mr. Stine said that the contamination at the site is part of a regional aquifer that is bleeding out a few hundred feet and discharging into the Whitefish River at concentrations that exceed human health standards. The utility costs incurred were for the operation of the various remedial systems at the site. Those systems are a soil vapor extraction (SVE) and a peroxide injection system that were designed to treat the source area, and an additional air sparging (AS) system designed to treat the water coming from the seep and reduce the concentrations to below the human health standards before entering the Whitefish River. Town Pump didn't feel it was reasonable to discontinue the use of these remedial systems, even though a new WP hadn't been submitted and approved. Mr. Stine felt that DEQ would agree that it was necessary to continue the operations of these systems.

Mr. Stine noted that the remedial systems were not designed to be simply shut down and winterized. To do that would have added a lot of cost to the design and construction of this system. If the system is not left on, it will freeze and have pipe damage.

Mr. Stine said that the timing of the WP expiration coincided with major changes in the Board staff. He said that two long-time Board staff members, who had a good understanding of the processes and had worked closely with the consultants, left. These Board staff personnel had helped to resolve these types of issues, and when they left, the business process was changed to limit the flexibility, and it caught many of the consultants, Olympus included, unaware. He also noted that his firm had submitted Form 8 changes to DEQ that were approved, but fell in a black hole when it came to the Board staff, and said this was also part of the changes that happened with Board staff.

Mr. Stine said that even though the Owner and his firm tried to bring the issues forward and get a new WP requested and approved, they couldn't get any traction, and this dispute is one of the casualties of that.

Mr. Breen asked why it took so long to get another WP for this site.

Mr. Stine said that there was a change in case officers at DEQ, and the site is very complex. He said there was a lot of money spent at this site but there was also progress that has been made. He said a lot of the decisions were in DEQ's hands.

Mr. Schnider asked what the point of a scoping meeting was.

Mr. Stine stated that a scoping meeting is part of the requests for further action from DEQ.

Mr. Breen noted that the scoping meetings happen less than one-tenth of one percent of the time.

Mr. Stine stated that, in reality, some level of scoping meeting is common to every project. He said that he didn't know of a single project that he has done that didn't have some level of scoping meeting, such as phone calls between DEQ case officers, Owners, Board staff, and all those costs were grouped under project management. He stated that the reason the Board has not seen these costs in past projects is because they were not called scoping meetings, they were called project management.

Mr. Schnider asked if those costs were normally on a WP.

Mr. Stine said that they were on the WP under project management.

Mr. Johnson stated that scoping meetings were a newly requested component of preparing a WP that started happening in 2017. In his experience, they are used to identify critical factors and benchmarks to achieve the cleanup goals at a specific site.

Mr. Johnson asked Mr. Stine if DEQ had required the scoping meeting and Mr. Stine affirmed that DEQ had.

Mr. Johnson said that when looking at the language of actual, necessary, and required (sic) (reasonable), the scoping meeting would fall under required.

Mr. Stine agreed with Mr. Johnson, and stated that the scoping meeting was needed due to the complexity of the site and how long the work had been going on.

Jenny Chambers, Waste Management and Remediation Division Administrator, DEQ, addressed the Board regarding scoping meetings. She stated that for all projects, not only leaking underground storage tanks, but any of the remediation projects and all other cleanup activities, the Department always tries to increase preparation and that includes scoping meetings. The meetings help with communication and have shown in the Department's business process to gain efficiencies on the tail end. She stated that the scoping meetings will be something DEQ will continue to do with leaking underground storage tank sites, and it will help DEQ increase efficiencies, communication and identify the fastest way to cleanup and closure of sites to reduce backlog.

Mr. Breen asked who would be attending the scoping meetings.

Ms. Chambers stated that was dependent on the complexity of the site. She said that typically DEQ would like the owner/operator, the consultant, DEQ and Board staff to be involved in the preplanning of the project as well as any other entity that might have helpful information. She also stated that the meetings would be open to the public, if they chose to attend, but the meetings are not advertised and are most often held in Helena. The meetings could be held on location or via Skype, GoToMeeting or teleconference, if travel was an issue.

Mr. Breen asked if the Board should expect to see costs for scoping meetings on every site going forward.

Ms. Chambers said that she believed that would be the case, and that the Board has already seen them. The costs were classified under project management.

Mr. Wadsworth stated that he didn't know if tribal governments or city engineers/sanitaricians had been notified of the scoping meetings. He had concerns with regards to staying consistent with the public process of allowing those individuals to participate. Mr. Wadsworth also stated that he was the only Board staff member with background sufficient to contribute to a scoping meeting, and he does not have the time to be at every scoping meeting. He stated that if activities need to be vetted in the public and something is being proposed, it needs to follow the business process outlined in §75-11-309, MCA.

Mr. Breen stated that it would be fair to expect that scoping meetings will be more involved than just saying that it took place and sending a bill for it.

Mr. Johnson agreed and said that they would be more expensive as well.

Mr. Breen stated that it would cost the fund more money and asked who was supposed to be involved in the meetings.

Ms. Chambers clarified that statutory requirements for DEQ necessitate that when a final WP is submitted, it is sent out to the public or government entities, which are the county sanitarian, the tribal governments, if applicable. She stated that in the last twenty plus years, DEQ has received zero (0) comments from any of those entities based on WP's. The only entity that DEQ receives comments from is the Board staff. The up-front scoping meeting is a preparation planning tool and DEQ is not asking Board staff to be involved from a technical perspective. The Board staff would be involved for the fiduciary responsibility they have and the obligation of funds.

Ms. Chambers stated that there is a clear line between DEQ as a technical role and responsibility associated with WP's, and the Board and Board staff as a fiduciary role/responsibility. DEQ would be asking the Board staff to participate from an idea of alternative analysis, costs and tasks as referenced in the WP, things that may come up from an emergency standpoint but, only as they relate to finances, not technical aspects of a WP.

Mr. Breen agreed that technical aspects are for DEQ to resolve, but noted that the Legislature requires the Board and Board staff to look at reasonable and necessary when reviewing costs.

Ms. Chambers stated that the Board and Board staff's review is based on DEQ's required and requested actions. She said that if DEQ requests actions from a technical component, the costs associated with that request should be actual, necessary, and reasonable with the framework that's associated with some of the cost control issues.

Mr. Thamke stated that no one would disagree that more planning will make a project more efficient, and stated that the term scoping meeting is what is at issue. He said that scoping is really cleaved out of what has always been WP deliberation. He stated that at one point there was a consultant cost analysis work group, and he thought it would be valuable to have discussions on vernacular, definitions and other costs to find a way to move forward. He asked if the purpose of that group would have been to ameliorate many of the concerns that are coming in front of the Board asking for exceptions to Board determinations or Board staff recommendations.

Mr. Wadsworth stated that, based on his background as an environmental professional with experience in many states that he had never had a scoping meeting to identify the best option for his client. He stated that his company was able to provide the regulatory agency with a WP that was comprehensive, without a scoping meeting. The only meetings that he has seen in Montana that were considered a scoping meeting had to do with sites like Main Street Casino in Bozeman. There was a scoping meeting for the WP at this site and then the WP was proposed and publicly reviewed. During the public review the Board staff reviewed the recommendations for this site and had recommended changes to site activities. The scoping meeting that took place before the WP was proposed and reviewed turned out to be a waste of time, because the WP that was implemented at the site was not the same one that was a consequent of the scoping meeting. Mr. Wadsworth stated that the consultant should have the burden to look at the site, understand what is going on, and propose something that the State can approve.

The discussion shifted to the denied shipping costs. Mr. Stine addressed the shipping costs that were being disputed. He stated that the WP had a line item for miscellaneous materials, repairs, and supplies in the budget. The shipping costs that were denied were for the shipping of a replacement compressor that was needed because the site compressor was down and being repaired. The shipping of the compressor to the site was approved, but when the replacement was sent back, it was not approved. He stated that in the past, that type of item was included in the WP budget under miscellaneous, and it was assumed to cover shipping charges.

Mr. Johnson stated that the Board rule says that the shipping charges have to be approved by Board staff prior to the submittal of a claim, not before the actual work. He asked if, in a case like this, a Form 8 would have been sufficient to approve the shipping costs, if it was submitted before the claim that contained those costs. Mr. Johnson stated that he understood and appreciated that the Board staff must follow the Board rules and that anything in question would come before the Board.

Mr. Wadsworth agreed that staff must follow the rules, and stated that one of the problems with putting too many things under the task of miscellaneous materials and supplies is when the budget line item ends up being exceeded. That poses a problem when shipping charges are among the miscellaneous charges and the Board rule requires pre-approval for that.

Mr. Johnson clarified that the pre-approval is not before the work is done, but before the claim is submitted. He asked if the Form 8 would cover that situation.

Mr. Wadsworth stated that a Form 8 would be appropriate, and that written documentation is the preferred method of communication so that there is a record of what happened.

Ms. Amy Steinmetz, Petroleum Tank Cleanup Section Supervisor, addressed the Board. She stated that scoping meetings are not unique to DEQ or Montana. Other states and EPA use them, and they are a great way to build communication. She stated that scoping meetings can avoid having to circle back in communication if the time is taken at the beginning of a project to find the best way forward. She felt that the time and expense at the start of a project could save money for the Fund at the end.

Mr. Johnson moved to reject the staff recommendation and pay the costs in dispute. He also added that reasonable costs for a scoping meeting would also be considered as reimbursable by the Board. Mr. Schnider seconded.

The chairman asked for further discussion. Mr. Chenoweth stated he was looking through the laws and §75-11-307(2)(j), MCA, says, “An owner or operator may not be reimbursed from the fund for the following expenses: (j) costs that the board has determined are not actual, reasonable, and necessary costs of responding to the release and implementing the corrective action plan . . .” Mr. Chenoweth stated that the consultant had said the costs in dispute were not in the WP. He advised the Board that, although they could vote anyway they wanted, if they paid claims that were not part of an approved WP, they could be opening themselves up for litigation.

Mr. Johnson stated that the wording was “may”, rather than “shall” or “will”.

Mr. Chenoweth stated that the term was “may not” and “may not” doesn’t have any sort of permissiveness in it. The word “may” does, but “may not” does not. Mr. Chenoweth stated that he had looked up the words “may not”, and they are the constructive form of “shall not”.

Mr. Thamke stated that he needed clarification, because he had heard that the costs were incurred as part of the WP, and then that part of the costs were not in the original WP but in a subsequent one.

Mr. Chenoweth stated that the consultant stated the utility costs were not part of the WP and that the utility costs of the original WP had been exhausted.

Mr. Wadsworth confirmed that the budget had been exhausted, and the utility costs were paid through March.

Mr. Stine stated that the shipping costs were part of the approved WP, and that the other costs had been exhausted.

Mr. Thamke asked if a subsequent WP included the utility costs.

Mr. Stine stated that they are included moving forward, but the costs incurred while there was no approved WP in place can’t be claimed retroactively. The utilities are necessary and reasonable, and that is why they are part of the new WP. There was a delay in getting another WP requested, written and approved.

Mr. Thompson asked how you would cover costs of a scoping meeting since it would also take place before a WP and, as just discussed, costs outside of a WP are not eligible. He asked if you can bring previous costs into a WP you are getting approved or not.

Mr. Johnson asked the Board Attorney, Mr. Chenoweth, for clarification on reimbursable costs as they pertain to §75-11-307, MCA. He stated that the beginning of the rule states that, if an owner is in compliance with §75-11-307, MCA, they must be reimbursed. He asked if there is any explicit exclusionary language that states if the costs were not in the WP, it could not be reimbursed.

Mr. Chenoweth stated that §75-11-307, (2) (j) MCA, states that “An Owner or operator may not be reimbursed from the fund for the following expenses.”

Mr. Johnson stated that it doesn't seem explicit and the legislative intent would be more explicit to say those cost "shall not", "will not", "must not" be reimbursed, rather than "may not".

Mr. Chenoweth stated that "may not" is the verb form that Montana uses to express prohibition.

Mr. Schnider asked if there was any further discussion, and stated that he would like to move forward on the motion and second already on the table to reject the staff's recommendation. He stated that the legal issue could be clarified between Mr. Johnson and Mr. Chenoweth at another meeting, if necessary.

Mr. Johnson restated his original motion to reject the staff recommendation and pay for the disputed costs and to also authorize reimbursement for the reasonable costs of attending scoping meetings.

Mr. Wadsworth recommended that the motions be broken down by issue. He said that any issues going forward could be put on a subsequent Board meeting agenda to encourage public comment, and perhaps a legislator might want to render a position on the law.

Mr. Johnson withdrew his original motion. Mr. Schnider seconded.

Mr. Johnson moved to reject the staff recommendation to disallow utility costs for Claim #s 20170711G, 20170711H, 20170810G, 20171023D and 20180102D, and to recommend reimbursement for those costs. Mr. Schnider seconded. The motion failed by roll call vote of five against and two in favor.

Mr. Johnson moved to reject the staff recommendation to disallow scoping meeting costs and authorize reimbursement for scoping meetings for Claim #s 20170711G and 20170711H. Mr. Thamke seconded. The motion failed by roll call vote of four against and three in favor.

Mr. Johnson moved to reject the staff recommendation for shipping costs associated with Claim #20160513E and authorize payment. Mr. Schnider seconded. The motion passed unanimously by roll call vote.

Mr. Thompson stated that on this claim, the shipping costs could have been construed as miscellaneous costs and he felt they were therefore part of the WP.

Mr. Johnson moved to put a discussion item on the agenda of the next meeting to further identify scoping meetings and their reimbursement by the Board. Mr. Schnider seconded. The motion passed unanimously by roll call vote.

Mr. Thamke stated that, for the record, he didn't feel that Town Pump should be held responsible if they were trying to do the right thing environmentally by keeping the remediation systems going to prevent environmental contamination. He stated that it is wrong to be held in limbo between changes of policies that aren't documented, and an agency that is trying to hire the right staff. He said that when Counsel said a vote against this might be a violation of law, he was left with no choice. He wanted to commend Town Pump for keeping the systems running, even though they didn't know for sure that they would be reimbursed.

Third Party Review, WP #10682, Adam's Convenience Store (Packy's), Fac #3602359, Rel #4957, Malta

Mr. Wadsworth provided a summary to the Board regarding the concerns board staff had for the proposed work and the remedial alternatives analysis (RAA) for cleanup of this site.

At the January 29, 2018 Board meeting, Mr. Breen had requested a presentation on WP #10682 from DEQ to be given at the April 9, 2018 meeting. DEQ provided a memo to the Board, instead of a presentation at the meeting, because they wanted to resolve any outstanding issues before April, if possible. The proposed WP included a pilot test of in-situ chemical oxidation, and the most advantageous time for introduction into the environment would have been during seasonal low groundwater conditions, which are early spring. The memo stated that a previous remedial alternatives analysis was provided in 2015 pursuant to ARM 17.56.605 (3), and all the alternatives had been

evaluated according to the criteria contained therein. DEQ felt that further delay of obligation for funding the WP could potentially reduce the effectiveness of the selected alternative and increase the overall costs of the project.

The Board, through the Presiding Officer provided a written response. The response memo outlined the areas of concern that had been discussed at the January 29, 2018 meeting, and expressed an interest in DEQ, or the site consultant, addressing those concerns. The concerns included:

- the need for assessment of the impacts of excavation,
- why it is necessary to implement more than one of the listed alternatives at the site to get the site to closure,
- why another remedy is being implemented without first assessing the impacts of implementation of the originally selected remedy,
- identification of the risks to human health and the environment that remain at the site after the implementation of the remedy,
- the inability to evaluate possible costs, due to the lack of assessment of alternatives, and
- evaluation of a remedy that takes into consideration a petroleum mixing zone.

Mr. Wadsworth cited §75-11-312, MCA, that grants the Board the authority to implement a third-party review of a Corrective Action Plan (WP). For ease of use, the full citation is provided below:

75-11-312. Review of corrective action plans and claims.

1) To ensure that the fund provided for in [75-11-313](#) is being used in the most efficient manner, the board may implement a program of third-party review for corrective action plans and claims. The board may submit a corrective action plan or claim for review by a qualified third party of the board's choosing.

(2) If a third-party review suggests that a corrective action plan is inappropriate for the release, the board may remand the plan to the department for further review.

(3) If a third-party review suggests that submitted costs do not comply with the requirements of [75-11-309](#)(3)(a), the board may deny the costs, subject to [75-11-309](#)(4).

Ms. Steinmetz called on Mr. Kingsbury to speak on behalf of DEQ.

Mr. Brandon Kingsbury, Brownfields Coordinator and Project Manager, DEQ, addressed the Board. He stated that the site was discovered in 2013, and during investigation it was noted that there was free product in the wells within the source area. Mr. Kingsbury indicated free product was discovered on two separate occasions, once by him and, at another time by the consultant, Newfields.

Mr. Kingsbury stated that in the June 2015 groundwater monitoring report, provided by Newfields, nine (9) petroleum constituents exceeded DEQ7 human health standards and risk based screening levels (RBSLs) at six (6) of the nine (9) wells sampled.

Mr. Breen asked if the concentrations being reported were before the excavation took place.

Mr. Kingsbury said that it was. He stated that in June of 2017, Newfields provided a combined excavation and groundwater monitoring report, post-excavation. This report indicated exceedances of RBSLs in the northern portion of the excavation basin. Additional groundwater monitoring results obtained in 2017 indicate exceedances of human health standards in the wells that were sampled.

Mr. Kingsbury noted that the response memo provided to DEQ indicated that this site would clean up by the end of 2018. However, he said that all peer reviewed literature, and DEQ site observation, shows that degradation could not be ascertained at this point. It was unknown when the levels would be below RBSLs. The Newfields report of 2015 indicated that this site could go for as long as thirty (30) years to be cleaned up using monitored natural attenuation. He also cited the Environmental Protection Agency's guidance documents for assessing benzene degradation. EPA indicates that the half-life of benzene is close to one (1) year for sites undergoing active remediation, and is close to six (6) years for sites without active remediation. In looking at the benzene concentrations as they initially were, it would take five (5) to six (6) half-lives, which could push degradation at this site to thirty (30) years, just based on EPA's guidelines.

Mr. Kingsbury stated that this site has intermittent free product observed. The ground water levels at this site fluctuate between 22 to 27 feet, a five (5) foot fluctuation. This rising and falling of the groundwater explains why free product is only observed intermittently. Guidance documents suggest that sites with this level of groundwater fluctuation are highly susceptible to having adsorbent based free product that contribute to dissolved phase contamination. Thus, any analyses that conducted at this point is not useful because free product is still contributing to the dissolved phase contamination.

Mr. Kingsbury stated that the excavation was successful at removing 500 cubic yards of soil, the most highly contaminated soils were left in place due to engineering and safety concerns. The Oxygen Release Compound (ORC) that was to be provided by Regenesis was not provided in time and, therefore, the excavation did not have the added oxidants to polish and tackle the remaining free product in the ground, as well as what is in the vertical extent of smear areas on the soils. The hole from the excavation was 27 feet deep and in the middle of town. The choice was made to backfill the hole, so it would not be open over the weekend and be a potential fall hazard.

Mr. Kingsbury stated that this site is a Brownfields project and that the owner, David Adams, is leasing this to a floral business. The lessees, Tulips and Treasures, anticipate purchasing the property once it reaches cleanup standards and a No Further Corrective Action Letter has been issued by DEQ. In an effort to expedite the cleanup activity, Brownfields revolving grant and revolving loan funds have been provided by Bear Paw Development to assist in financing the excavation and proposed PersulfOx injections.

Mr. Kingsbury stated that Brownfields requires a remedial alternatives analysis (RAA), which was completed in 2015. That RAA included monitored natural attenuation, installation of a vapor mitigation system with in-situ injection of chemical oxidants, and soil removal with disposal. He said that EPA has approved the plan and approved the RAA that was completed.

He said the discussion of remedial alternatives identified that the site would take approximately 30 years to reach cleanup standards if monitored natural attenuation is the selected alternative, and that being one of many factors that led to why DEQ was approaching in situ chemical oxidation, and why they approved the plan going forward.

Mr. Thompson asked if having the ORC applied when it was originally planned would have reduced the need for the injection system currently being proposed.

Mr. Kingsbury stated that he believed it would have accelerated cleanup of the site.

Mr. Thompson asked what the delay was in getting the ORC.

Mr. Kingsbury stated that calls were placed to Regenesis, the maker of this ORC product, on a Wednesday, and the products still hadn't made its way to Montana by Friday, which meant there was an open hole that would have been left over the weekend.

Mr. Thompson stated that his business was doing a similar cleanup, and they had put a fence around the hole. He stated it was a cheap alternative compared to sixty plus thousand dollars.

Ms. Smith asked why the excavation was done, if the chemicals weren't available to remediate the soils.

Mr. Kingsbury stated that was between the supplier and consultant. He asked the consultant to explain.

Mr. Willie Welzenbach, Newfields, Inc, addressed the Board. He stated that the lack of ORC was an error in the field, and that the person who made that error was no longer with Newfields. He stated that error was on Newfields, not DEQ. He said that there was discussion with DEQ about the most cost effective way to get ORC into the ground, since it wasn't available at the time the excavation was open. At that point DEQ suggested pilot testing to see what would work best.

Mr. Johnson asked if there was a secondary infiltration system put in with a stand pipe and coarse material, and if that was left after backfill was completed, to be able to add ORC later.

Mr. Welzenbach said there was, but that DEQ didn't think that would be the most effective method.

Mr. Wadsworth noted that, although the piping was in place, it was not in direct contact with the area that could have had the ORC applied at the time the excavation was open.

Mr. Johnson stated that the coarse material would be permeable and that an application of ORC would infiltrate out and down gradient into the smear zone.

Mr. Welzenbach stated that it was very permeable, but that one of the problems with accessing massive soil by excavation is that the side slopes have to be flatter than normal, which leaves little area at the bottom of the excavation where the worst impacted soils exist. He indicated that they removed a lot of mass that would have continued to impact groundwater from above the water table, but had not remove a lot of mass from within the depth of the seasonal groundwater fluctuations.

Mr. Breen stated that he had received a lot of emails concerning this site, and he thought he had read that 96% of the source mass had been removed in the excavation.

Mr. Welzenbach stated that he did not generate that number and didn't know where it came from.

Mr. Wadsworth indicated 96% of the volume of soil planned to be excavated in the original WP was removed. Therefore, the contractor had gotten 96% of what they targeted for removal taken out. Since 96% of the planned volume was removed it was a successful excavation; there was just no ORC put in the ground as planned.

Mr. Johnson asked if, regardless of the anticipated volume, 96% of the contaminated soil on the site was actually removed.

Mr. Welzenbach said no to Mr. Johnson's question. He said that Mr. Wadsworth's statement had been correct. New Fields had dug where they planned to dig.

Mr. Breen asked if anyone assessed whether the amount excavation was a percentile of the source mass.

Mr. Welzenbach stated that the number had not been generated, but there had been assessment of the amount of soil remaining in the source area.

Mr. Breen asked if the amount of contaminated material was known before the dig started.

Mr. Welzenbach affirmed that it was known.

Mr. Kingsbury stated that the design build for excavation was based on four (4) or five (5) soil borings. He said it could cost a couple of hundred thousand dollars to find out the exact amount of contamination just by doing soil borings.

Mr. Breen indicate that with 96% of the planned soils being removed wouldn't it be necessary to know how well an excavation is expected to do before implementing another plan. He asked if determining the expected impact, before implementation, wasn't part of choosing a plan that is most cost effective to bring a site to closure. Mr. Breen asked if when considering an alternative from the alternatives analysis, and selecting what is supposed to be the most cost-effective approach to get the site to closure, if the technical folks have to know how successful the alternative is going to be before implementing the alternative. He asked if that was necessary in order to make the decision on whether you want to do one alternative or the other. The alternative that is being planned now could have been done at the beginning, without spending \$142,000 on the dig. He indicated that consideration of a third-party review is a reasonable option for a Board where most of the members don't actually have experience to make a technical decision. He stated that the Board members rely on the Board staff to decide what's most cost effective. He expressed concern that the fund has already spent \$142,000 and that there is talk about maybe spending as much as \$450,000 more.

Mr. Welzenbach stated that he didn't think \$450,000.00 would be an accurate number and said that the pilot test would help provide more information about costs going forward.

Mr. Breen asked how much the pilot test was going to cost.

Mr. Kingsbury stated that the pilot test was budgeted at \$140,000.00 and after board staff adjustments it would be \$121,000.00. He clarified that the \$121,000.00 were the costs associated with the WP that was being proposed and discussed for potential third-party review.

Mr. Breen asked how much Mr. Kingsbury would estimate the next phase of work would cost to get the site to closure.

Mr. Kingsbury stated that the pilot test had to be done first, and he wasn't going to guess at the amount. He stated that the pilot test might accomplish the goals of DEQ in speeding up the cleanup of the project.

Mr. Johnson asked if it may not be necessary to do further work after the pilot test.

Mr. Kingsbury said that was correct.

Mr. Welzenbach stated that the idea of a third-party review assumes that there is something wrong or missed. He stated that it was really clear where the mass is and they weren't able to dig enough to remove the mass. He also stated that it was clear that the concentrations of groundwater are heavily impacted by the mass. Therefore, the only way that Newfields and DEQ could think to remove the remaining mass was to treat it by injection. DEQ thought this was the best technical approach and he stated that a third-party review was second guessing DEQ.

Mr. Johnson asked if there were samples of the smear zone contamination and if they showed petroleum saturation level.

Mr. Welzenbach stated there was bore hole information.

Mr. Johnson asked if there were Photoionization Detector (PID) readings.

Mr. Welzenbach affirmed that there were also lab results that were in the tens of thousands of parts per million but that was in the soils, not the groundwater.

Mr. Johnson questioned the analysis that had been written in the PTRCB response memo to DEQ. He asked about the benzene degradation half-life being stated as 115 days and asked where Mr. Wadsworth had gotten that number. He also asked about the linear regression that was provided in the memo, and stated that it was presented without any support. He didn't think that the information could be used as a basis for a third-party review. He also asked if there was any consultation with DEQ in the first step of reviewing the WP, because there are many experts in DEQ just steps away from Board staff. He stated that the memo provided to DEQ was addressed as being from Mr. Breen but that he guessed that Mr. Wadsworth had done the regression analysis.

Mr. Wadsworth stated that the numbers he used were based on a published half-life estimate of unknown soil chemical properties and that only three data points were available in the reports for that sampling location.

Mr. Johnson stated that he came up with different numbers and that the lack of data points was laughable to use in creating a linear regression. He stated that using the data provided in the memo, his calculations show no decline in monitoring well two (2).

Mr. Wadsworth stated that the flaw in any assessment was, that the numbers available were before the dig, not after.

Mr. Johnson said that he used the same numbers Mr. Wadsworth had used. He said that after using EPA flow chart guidance document, there is a decision point that asks if free product has been recovered to the maximum extent practicable. He said that question can't be answered because there is not enough data to provide an evaluation.

Mr. Wadsworth agreed that natural attenuation may not be the solution but perhaps a petroleum mixing zone was. He indicated, given the limited information, that a third-party opinion would be valuable in assessing the site.

Mr. Johnson asked why it was more valuable than DEQ expertise.

Mr. Schnider agreed with Mr. Johnson that there was a lot of internal knowledge, and that the decision before the Board was to get another opinion or not.

Mr. Breen asked if the third-party review would be about \$3,000.00.

Mr. Wadsworth said it probably would.

Mr. Breen stated that since the completion of the soil removal, there has not been any real testing of the chemical concentrations at the site. He stated that spending another \$100,000.00, without knowing what the current conditions of contamination are, didn't make sense to him.

Mr. Kingsbury reminded the Board of the observed free product on the site and indicated that groundwater monitoring data from two (2) months following the excavation shows soils are still contaminated.

Mr. Johnson stated that, in his opinion, there was not enough information to base a third-party assessment on right now. He stated that there is a need to get more data before going forward, because it is a drastic action to question DEQ's judgement and the Board shouldn't put themselves in that position. He said that the Board could hold that card until later, after more data is obtained and then revisit the topic. It looked, to him, like there was maybe another well or two needed. The opportunity to do the ORC application for this year had already passed so maybe this time could be taken to obtain more data and then address the issue. DEQ could reassess the RAA and come back with a decision. Then the Board could decide if a third-party review was needed. Trying to select a consultant to do the review would be another issue and the need for third-party review seemed premature.

Ms. Steinmetz thanked the Board for providing the memo to DEQ. She appreciated the response and it was clear that time and effort had gone into its preparation. She stated that questions and concerns were raised at the January 29, 2018 Board meeting, and it was helpful to DEQ to have those in writing and be able to respond. Because the ORC is not able to get into the ground during low groundwater this year, DEQ proposed that a WP be submitted by the consultant to do two (2) groundwater monitoring events and develop a release closure plan. The release closure plans are fairly new at DEQ and they have been requested within the last couple of years. The RAA is part of the release closure plan.

Ms. Steinmetz stated that there is still free product at the site and DEQ still feels that chemical oxidation is probably the best path forward, but DEQ is willing to reassess that based on the information obtained from the groundwater monitoring events and updated RAA.

Mr. Thamke asked if there was groundwater monitoring that had taken place after the excavation and what the results were.

Mr. Kingsbury stated that there were and the down gradient wells that were investigated showed contamination.

Mr. Thamke asked if the excavation showed benefits like diminished free product.

Mr. Kingsbury said that he observed free product in place but there was no clear trend indicated from well sampling.

Mr. Johnson asked if the stand pipe in the excavation accessed groundwater and if free product could be detected.

Mr. Welzenbach stated that there was a small number of wells sampled after the excavation, so Newfields did not obtain a very broad picture. He stated that there is a substantial mass of contaminant remaining in inaccessible areas and that additional monitoring expense wouldn't be extremely useful, but it wouldn't hurt because an impasse had been reached.

Mr. Corson asked Ms. Steinmetz if DEQ didn't support the third-party review.

Mr. Steinmetz stated that it seemed like a duplicative effort considering the additional groundwater monitoring and the updated RAA.

Mr. Corson agreed that it was perhaps premature.

Mr. Wadsworth stated that the Board staff didn't have the ability to evaluate and determine what kind of an impact the lack of applying the ORC may have made to the cost of the ongoing cleanup at the site. That was one of the objectives for a third-party review.

Mr. Johnson asked if there was any reason why DEQ couldn't make that same assessment.

Mr. Wadsworth indicated that he felt the Board would benefit from an independent review of the material.

Mr. Welzenbach asked if the review would be of the WP or a lack of a past thing, and he wanted clarification.

Mr. Johnson also stated that he didn't understand and asked if Mr. Wadsworth was challenging DEQ's authority. He asked if Mr. Wadsworth was saying that there was an error.

Mr. Wadsworth stated that Mr. Welzenbach said that Newfields had made a mistake by not getting the ORC into the ground and subsequently a WP was being proposed with injection of a similar product to complete the cleanup. Mr. Wadsworth stated that the point he was trying to make to the Board, is that they should also consider an assessment, by a third party, on what impacts to long term cost may have resulted from ORC not being placed in the hole at the time of the excavation.

Mr. Johnson stated that it sounded like that could still happen since there are stand pipes that are in place.

Mr. Welzenbach stated that if the Board instituted a third-party review, he would like them to define the scope of the review. It seemed to him like there was a questioning of an RAA that was done multiple years ago. There was also a questioning of an activity that was maybe not done and might still be an option to deliver via the stand pipe. He also said that part of the questioning is the way the WP was written and whether it was a good WP. Additionally, the question of whether the pilot test might lead to large ongoing costs. He stated that the review seemed to be huge with no scope whatsoever and it was subject to personal opinions.

Mr. Chenoweth addressed the issue of second guessing DEQ and if it should be done. Mr. Chenoweth cited §75-11-302, MCA, and stated that this is the purpose of the third-party review. In the event the Board decides that they want a third-party review to see if the Fund is being used in the most efficient manner, then it can implement a program with a third-party review of the WP. He stated that it is the nature of the beast, that DEQ would be second guessed. He stated that in his opinion, there was a mandate from Legislature saying that yes, the Board can second guess the situation.

Mr. Welzenbach asked if the Board has to select when to do a third-party review and asked if this was a discussion item or an action item.

Mr. Schnider stated it would be action item.

Mr. Johnson asked how it could be an action item without having been discussed at a prior meeting and being requested by the Board. He said that all that was done at the last meeting was a request for more information, and that it seems inappropriate, based on the point of order discussions that had taken place at this meeting, for this to be an action item now.

Mr. Johnson stated that DEQ was acquiescing and willing to get more information and when he looked at the information provided, he didn't feel that there was enough evidence to support a third-party review. He said a third-party review would cost \$20,000.00 and would not provide any more information than is already in hand because of lack of data.

Mr. Johnson moved to accept DEQ's proposal to collect more information before any decision regarding a third-party review is made by the Board. Mr. Schnider seconded.

Mr. Breen asked if there was any discussion. Ms. Smith asked what the cost of the new plan would be.

Mr. Kingsbury estimated it would be \$25,000.00.

Mr. Schnider said that he assumed a third-party reviewer would need the same data from the new WP that is proposed to be gathered.

Mr. Kingsbury indicated that was correct.

Mr. Breen stated that a third-party review would only be to look at all the proposals and render an opinion on what should be happening on the site and would not be performing the actual work. He asked if that was correct. He also stated that the information would be coming mainly from DEQ. He indicated that from a Petroleum Marketer's background, he knows that the Legislature wants closure on sites, and without meaning any offense to Mr. Welzenbach, this WP looked like it had ballooned into a large scope of work that wasn't necessary. He wants the site closed in the best way possible.

Mr. Welzenbach stated that he thought the excavation was very cost effective and was the appropriate technical and cost-efficient way to approach the cleanup. He said that he disagreed with Mr. Breen and said that although the ORC application was missed there was still an opportunity to apply the reagent through the stand pipes in just as effective of a way. He further stated that the application was not going to treat much of the mass, but was going to influence the material that was made more bioavailable by the actual excavation. He said the application was going to control the short-term pulse of petroleum and groundwater caused by excavation. He thought that an accusation had been made based on limited awareness of the data.

Mr. Breen thanked him for his comments.

Mr. Johnson stated that the effectiveness of adding ORC during excavation doesn't hurt but it was never the final solution. He said that it is applied with recognition that there will be something else, going down the line, that will be necessary for remediation. He stated that talking about a third-party review didn't make sense, because he felt strongly that there was not enough data.

Mr. Breen asked for a restatement of the motion.

Ms. Pirre stated that Mr. Johnson had moved to accept DEQ's proposal to gather more information before any further action was taken by the Board regarding WP #10682 and that Mr. Schnider had seconded the motion.

Mr. Thompson asked if the motion needed to be more specific to state that the proposed information would come from groundwater monitoring.

Mr. Breen said yes.

Mr. Johnson's final motion was to accept DEQ's proposal to do two (2) groundwater monitoring events and provide an updated RAA and closure plan at the Adam's Convenience Store site, before any further action was taken by the Board regarding WP #10682. Mr. Schnider seconded.

The motion was unanimously approved through roll call vote.

Eligibility Ratification

Mr. Wadsworth presented the Board with the applications for eligibility that were tabulated in the Board packet (See, table below). There were two (2) applications, and both were recommended eligible by Board staff.

<i>Location</i>	<i>Site Name</i>	<i>Facility ID #</i>	<i>DEQ Reel # Release Year</i>	<i>Eligibility Determination – Staff Recommendation Date</i>
Big Timber	Former Sweetgrass Cenex	4906069	5252 October 2017	Recommended eligible. Reviewed 3/1/2018.
Black Eagle	Mountain View Coop	6015311	5242 Aug 2017	Recommended eligible. Reviewed 2/14/2018.

Mr. Thompson moved to approve the eligibility recommendations as provided. Ms. Smith seconded. The motion was unanimously approved by roll call vote.

Weekly Reimbursements and Denied Claims

Mr. Wadsworth presented the summary of weekly claim reimbursements for the weeks of January 17, 2018 through March 21, 2018, and recommended the Board ratify the reimbursement of the 132 claims, which totaled \$865,488.74 (See, table below).

WEEKLY CLAIM REIMBURSEMENTS April 9, 2018 BOARD MEETING		
Week of	Number of Claims	Funds Reimbursed
January 17, 2018	9	\$29,523.70
January 24, 2018	19	\$69,403.29
January 31, 2018	11	\$155,092.45
February 7, 2018	12	\$115,095.09
February 14, 2018	13	\$76,797.06
February 21, 2018	26	\$95,163.20
March 7, 2018	17	\$40,545.18
March 14, 2018	11	\$54,609.94
March 21, 2018	14	\$229,218.83
Total	132	\$865,448.74

Ms. Smith recused herself from voting on any claims associated with First Interstate Bank. Mr. Schnider recused himself from voting on any claims associated with Payne West Insurance. Mr. Thompson recused himself from voting on any claims associated with CHS, Inc. Mr. Johnson recused himself from voting on any claims associated with Resource Technologies, Inc. Mr. Corson recused himself from voting on any claims associated with First Interstate Bank.

Mr. Thompson moved to accept the weekly and denied claims as presented. Ms. Smith seconded. The motion was unanimously approved by roll call vote.

Board Claims – Claims over \$25,000

Mr. Wadsworth presented the Board with the six (6) claims for an amount greater than \$25,000 that had been reviewed by Board staff since the last Board meeting (See, table below).

Facility Name Location	Facility-Release ID#	Claim#	Claimed Amount	Adjustments	Penalty	Co-pay	**Estimated Reimbursement
Toners Tire Rama, Rudyard	2102475-3259	20171212A	\$42,150.66	\$182.13	-0-	\$8,753.33	\$33,215.20
Realty One, Glendive	1113942-3767	20171226Q	\$33,108.59	\$1,143.79	-0-	-0-	\$31,964.80
Village Pump Gas Station, Virginia City	2805399-5137	20171228A	\$32,468.43	\$66.00	-0-	-0-	\$32,402.43
Community Mutual Gas, Butte	4702577-116	20180129D	\$26,843.43	\$1.40	-0-	-0-	\$26,842.03
Minuteman Aviation Inc, Missoula	3202040-2139	20180201E	\$39,309.48	-0-	-0-	-0-	\$39,309.48
JW Roylance Construction, Laurel	6015309-5235	20180223A	\$29,287.70	-0-	-0-	\$14,643.85	\$14,643.85
Total			\$203,168.29				\$178,377.79

* In accordance with Board communication of delegation to the Executive Director signed on December 8, 2003, the Board staff will review the claims for the Board. If the dollar amount of the claim is above \$25,000.00, the claim must be approved and ratified by the Board at a regularly scheduled meeting before reimbursement can be made.

**If other non-Board claims are paid, between this Board meeting and payment of the claim listed above, the amount of co-payment remaining may differ from that projected at this time, which may change the estimated reimbursement.

Ms. Smith recused herself from voting on any claims associated with First Interstate Bank. Mr. Schnider recused himself from voting on any claims associated with Payne West Insurance. Mr. Johnson recused himself from voting on Claim #20180223A. Mr. Corson recused himself from voting on any claims associated with First Interstate Bank.

Mr. Schnider moved to accept the claims as presented. Mr. Thamke seconded. The motion was unanimously approved by roll call vote.

Discussion Item Record Keeping and Preservation of Minutes

Mr. Johnson stated that he would be willing to delay the discussion on Record Keeping and Preservation of Minutes to a subsequent meeting. He recognized that the meeting had already taken quite a bit of time without the addition of the discussion item. Mr. Johnson wanted to retain the meeting recordings until the discussion could take place.

Mr. Johnson moved to reschedule the discussion item on Record Keeping and Preservation of Minutes to the subsequent meeting with the understanding that the recordings for the meetings would be preserved until that discussion took place. Ms. Smith seconded. The motion was unanimously approved by roll call vote.

Board Attorney Report

Mr. Chenoweth provided an update to the Board on the Cascade County matter (See, table below). The Board Counsel is awaiting communication from Cascade County's Counsel on how they want to proceed for follow-up briefings.

Location	Facility	Facility # & Release #	Disputed/ Appointment Date	Status
Great Falls	Cascade County Shops	07-05708 Release 3051-C1,3051-C2,3051-C3 AND 3051-C4	Denial of applications	Lewis & Clark County District Court remanded the case back to the Board to make further factual findings. The parties have conferred with each other and are in the process of drafting a series of stipulated facts that will assist the Court in making a final decision.

He stated that Judge Menahan remanded the Cascade County case back to the Board to make further factual findings. Mr. Chenoweth stated that Cascade County's Attorney and the Board had decided to agree on stipulated facts, because those were the issues that needed to be clarified for the Court. Once both sides agree on stipulated facts, this case will be sent back before the Judge to see if there is enough information for the Court to render an opinion.

Mr. Chenoweth reported to the Board that the Keenan and Associates case had been sent before the Hearing Examiner (HE), Ann Brodsky, Esq. The decision to send this to the HE happened after the packet had been sent out, so it was not included in the original Board Attorney Report.

Mr. Thamke asked what remedy this action provided for Mr. Supola through Keenan and Associates.

Mr. Chenoweth stated that the Board has a question of law for which an opinion is being sought from the HE, and that issue affects the Board's ability to address the suspended claims that are Mr. Supola's concern. He said that the determination needs to be made about whether statute allows the Board to accept claims, when the facts from the information now in the Board's possession, indicate that the contamination the claims are being submitted for, may not be eligible for reimbursement.

Mr. Johnson asked if the issue was the Board's ability to hear the dispute about the claims, not the claims themselves.

Mr. Chenoweth stated that it was whether the Board has the legal ability to make a determination.

Mr. Johnson wanted the citations for the specific law in question. He said that the release was eligible, and that his understanding was that the Board had obligated funds for the WP. Then, without further discussion or knowledge of the Board, the claims associated with the WP had been suspended.

Mr. Chenoweth stated that the release was eligible, but the claims had been suspended so the Board could get a determination from the HE on the Board's legal ability to make a determination if those suspended claims should be reimbursed.

Mr. Johnson asked what the basis for the decision was and the point of law that was being applied.

Mr. Chenoweth stated that the contamination appears to be ineligible and therefore the claims would be also.

Mr. Johnson stated that there was definitive evidence that there was contamination from an eligible tank, that was the subject of the WP and that there wasn't groundwater contamination.

M. Chenoweth didn't want to get into details of facts because the case was going in front of a HE.

Mr. Johnson said that he had a problem with the decisions being made outside of the Board, and asked if there was further correspondence. He stated that the Board had all received packets of information from Mr. Supola.

Mr. Chenoweth said there had been further correspondence with Mr. Supola, and Keenan and Associates had been asked if there was information or evidence that the contamination would be eligible. Mr. Chenoweth had called Mr. Supola after the January 29, 2018 meeting and came to an impasse. That is why the case is going on to the HE.

Mr. Johnson stated that should be a Board decision, not a Board staff decision and asked why the case wasn't brought back to the Board for further discussion. He said it should have been a topic of Board discussion.

Mr. Chenoweth stated that the Board needed a legal determination in order to discuss the issues.

Mr. Johnson said that the Board should have been copied on this matter and there was no active participation by the Board to send the matter to the HE.

Mr. Wadsworth stated that Mr. Johnson was welcome to have all the files the Board staff has regarding the Keenan and Associates matter and the correspondence with Mr. Supola.

Mr. Johnson requested that information, and it was sent to him after the Board meeting.

Mr. Chenoweth stated that the order appointing the HE was signed by the Presiding Officer, and he had a copy of it for review, if needed.

Mr. Johnson asked what authority the Presiding Officer had to send the case to a HE without the Board making a decision.

Mr. Chenoweth stated that it was his understanding that the Presiding Officer could perform that action, independently of the Board.

Mr. Thamke stated that he couldn't give the citation, but said that the action taken did fall under the Presiding Officer's purview.

Mr. Johnson asked if it didn't have to be a discussion item.

Mr. Thamke said that for transparency, he felt it would be a good thing to bring to the Board, but the Board wouldn't have to ratify the decision. It would be presented as an information item.

Mr. Breen stated that the issue had come before the Board already and was denied, he asked if that was correct.

Mr. Johnson stated that the WP for the cleanup was approved unanimously by the Board and was obligated.

Mr. Breen stated that the approval was for the tanks that were eligible. He stated that in the information sent to the Board by Mr. Supola, the statement is made that the contamination appears to be coming from an upgradient source and is not from the eligible tank system. The contamination is from somewhere else.

Mr. Chenoweth stated that since the matter had been appointed to a HE, factual discussion should be avoided.

Mr. Johnson said that he felt the matter should have been handled at the Board level first because the Board had originally obligated money for this WP and the board staff unilaterally suspended the claims.

Mr. Thamke moved that after the HE renders their findings, those would be brought to the Board for discussion.

Mr. Wadsworth stated that is the normal business process for the Board. After the HE hears the case, the decision from the HE comes before the Board for their consideration.

Mr. Breen asked if Mr. Thamke wanted to rescind his motion and he stated that he did not.

Mr. Thamke moved that upon the HE's findings, those findings be presented to the Board for discussion for the Keenan and Associates site. Mr. Johnson seconded.

Mr. Thamke stated that he had made this motion because Mr. Johnson was justifiably concerned that a lot of stuff was happening, and this would enable the Board to better participate in discussing the findings.

Mr. Johnson asked if it was known if a hearing would take place, and if Keenan and Associates had responded.

Mr. Chenoweth stated that Keenan and Associates had not responded yet. They have been asked for their Attorney's name and once they hire an attorney, the Board will receive a scheduling order from the HE. At that time there will likely be a discovery period, a briefing period, and the hearing in front of the HE, just like a normal litigation.

Mr. Johnson asked if Board members could participate. There was no further discussion.

The motion was unanimously approved by roll call vote with Ms. Smith not in attendance.

Fiscal Report

Mr. Wadsworth presented the Fiscal Report through February 28, 2018.

Mr. Corson asked if the million dollars appropriated during the special Legislative session would be redeposited in the Fund. He also asked if the revenue and expenditures were in keeping with anticipated trends for this year.

Mr. Wadsworth stated that the million dollars in appropriated funds wouldn't likely be returned. He said that the Legislature could do the Fund a favor and raise the fee collected to a penny, which would return the million dollars within six (6) months.

Mr. Thamke noted that the Board would have to request the fee increase.

Mr. Wadsworth said that the expenses were close to what was expected, and the revenues were a little higher than expected.

Mr. Corson asked what the line item entitled "Contingent Contract Services" was.

Mr. Wadsworth stated that was the contingent lawsuits the Board has against several large oil companies. The lawyers involved have taken this matter on a contingency contract so there will not be expenses, unless they are able to recover costs against the companies involved in these cases.

Board Staff Report

Mr. Wadsworth presented the Board staff report.

Mr. Johnson asked if there were any potential or actual contested cases coming before the Board.

Mr. Wadsworth stated that he believed there were about three (3). He noted Muralts had two facilities that had issues due to violations, and Holiday Station store 272 was another potential contested matter.

Petroleum Tank Cleanup Section (PTCS) Report

Ms. Amy Steinmetz, Petroleum Tank Cleanup Section Supervisor, provided a report to the Board. She presented the summary of confirmed and resolved petroleum releases since January 10, 2018, and stated that there were seven (7) confirmed releases and ten (10) resolved. She stated that PTCS has been pushing to close as many sites as possible and the number of closures will increase at the next report, as there were thirty (30) currently being written. The summary of all petroleum release activity to March 26, 2018 showed 4,696 confirmed releases, and 3,652 total resolved releases. The number of total active and eligible sites is at 627 and the active ineligible sites are at 100 with the undetermined and pending sites totaling 240.

Mr. Corson asked if there was any site tied to the Stockton Oil properties in Billings because he noted they were removing tanks. Ms. Steinmetz offered to research the sites and get back to Mr. Corson.

Ms. Steinmetz briefed the Board on laser induced fluorescence (LIF), because each of the WP's being briefed included this type of technology. She stated that when investigations of petroleum release sites are performed, soil

borings are taken and samples from those borings are sent to the lab for analysis of petroleum constituents. The lab reports back to the consultant, who in turn reports to DEQ. DEQ, the consultant and owner then identify the next remedial step. One of the tools available in this process helps to cut down on the number of iterations WPs produced, and that is LIF. A soil sample is taken every two to three centimeters and a qualitative analysis of the soil and groundwater where the product or residual contamination is present, is reported. This tool won't identify dissolved contamination, like that found in groundwater. However, it provides real time data, without having to send samples to a laboratory for further analysis. The sampling is done using a grid and the contamination is identified in the field.

Cal's Eastside, Glasgow, Fac #53-02170, Rel #2899, WP #10710, Priority 1.4

Ms. Steinmetz stated that although this WP was under \$100,000.00, the consultant had asked for it to be briefed before the Board so there wouldn't be a delay when the LIF associated claims are submitted. The consultant anticipates those claims to be over \$25,000.00. This release was discovered in 1996 and has been investigated a couple of times to define the area of contamination. To define that, LIF was determined to be the technology of choice. This will report the area of contamination, risks to receptors and utilities. There will also be a groundwater sampling component for this WP. After this is completed, a release closure plan will be written.

Country Cafe, Glasgow, Fac #53-10475, Rel #3687, WP #10675, Priority 1.4

Ms. Steinmetz stated that this site is almost identical to Cal's Eastside. There have been a couple rounds of investigation and LIF has been determined as a great tool to use to further define the area of contamination. This will help determine if there are risks to receptors and a release closure plan will be submitted to DEQ with an RAA after LIF has been completed.

Mr. Breen asked if there was an estimate for how long it would take to bring these sites to closure.

Ms. Steinmetz stated that the project manager could give more information about that. She stated that this is helping to determine the route to closure, the alternative for cleanup that could be used, and how long it will take to clean up and close the site.

Mr. Thompson asked if the associated costs for LIF could be found in the task called soil borings on the WP budget.

Mr. Wadsworth stated that the costs labeled soil borings, field work and lab analysis with fee could all have related charges for LIF.

Town Pump 2, Whitefish, Fac #15-02459, Rel #192/4155, WP #10730/10734, Priority 1.2

Ms. Steinmetz stated that she agreed with Mr. Stine's previous testimony that the site was complex. She stated that a lot of money had already been spent, but the site needs to be fully investigated, and doing LIF in the upper zone will enable the contamination to be more exactly identified. She hopes that the location of the seeps that are coming from the upper layer of soil into the sandy layer below can be determined. This will enable the remediation to be targeted and will halt the contamination from continuing to go into the sandy layer.

Mr. Breen stated that \$900,000 plus had already been spent at this site and he questioned why the contamination was still unknown.

Ms. Steinmetz stated that much of the money had been spent to address the contamination going into the river and was more of an emergency response.

Mr. Stine, Olympus Technical Services, stated that he agreed it was a lot of money.

Mr. Breen stated that he understood there were two releases at the site which provides for \$2,000,000.00 in coverage from the Fund and wondered if that would run out.

Mr. Stine said that he didn't think the full amount would be used. He stated that a big part of the problem at the site was that the source area is under the large canopy of the facility. There had been much unknown until wells were

installed and free product was observed at the site, which hadn't been previously observed. That raised questions about the source of contamination and now they will be going back, using LIF, so that they can reach under the canopy for further analysis. He stated that it was difficult to cleanup because of all the permeabilities and the length of time the release has gone on. He said that probably the bulk of the contamination was not from recent releases, most likely the remaining contamination was from old releases.

Mr. Wadsworth noted that his only comment on the WP was regarding the amount of mobilizations and said that it is more cost effective to use consultants that are in the same part of the State as the release so that the MOB costs don't get so high.

Mr. Stine stated that Olympus has staff in Kalispell that do a lot of the remediation monitoring in that area.

Ms. Steinmetz noted that this WP does not call for a complete winterization of the injection system. This system needs to keep the water running, so utility costs will be incurred to do that. Additionally, this investigation will be followed up with a release closure plan and RAA after the LIF is completed.

Amoco Bulk Plant, Polson, Fac #60-15070, Rel #4542, WP #10722, Priority 1.2

Ms. Steinmetz stated that some soil has been removed from this site and it was discovered in January of 2006. LIF was determined to be the technology needed to help determine the area of contamination. Groundwater monitoring wells are also in place and those have helped identify the contamination. The RAA indicated that excavation would be the best way to cleanup this site and bring it to closure. In addition, it is estimated that fewer than three (3) years will be needed after excavation to close the site.

Public Forum

Full Transcript provided and attached

MR. BREEN: Thank you.

MS. STEINMETZ: Thank you.

MR. BREEN: Okay. Does that get us to public forum? I think. There are some people still in the audience, believe it or not. I'm sure somebody is going to speak. You've got to come to the podium.

MR. FRANKS: Why not? I just came here because Mark needed a ride home.

MR. JOHNSON: This is my ride home, so be gentle. I don't know what he's going to say.

MR. FRANKS: Dennis Franks with AJM, Incorporated in Bozeman, consultant. Just I have some observations today with regard to I guess the scoping meetings. I think they're a good idea. How you get them into a payment scheme, my initial thought is to just get them into an initial work plan, so they're cost basis for meeting with DEQ and the client either on site, or Skype, or something. So that's one way to handle the scoping meeting process.

But as you are aware, communication, and getting everything out early in the process is a good way to move forward.

I've just got to say Town Pump

apparently has used \$11 million for cleanup apparently, but my question then is: How much have they, due to their actions, have they put into the Petro Fund process throughout the years also? So they've probably put in a little bit more than that over the course of 25 years or 30 years.

As far as utility costs, I think it is important, as has already been brought up, it's important to keep those systems moving, and so they don't freeze up, as it was mentioned. Even though the cost was not put into the work plan, it is a real expense. You're saving the system from deteriorating and/or exploding due to frozen pipe.

So I think it should be discussed with the Petro Fund staff that this ongoing cost a Form 8 maybe should have done for this, but in the big picture of things, the cost to keep it active and viable versus the cost of the legal system and the amount of effort that Terry put into his presentation, and the amount of effort put into the presentation by Alan Stine, it just doesn't add up.

We're stepping over dollars to pick up pennies, and I really hope that the Board doesn't

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go down that path to step over that dollar to pick up the penny, because all us consultants are really trying our best. I love cleanup. I love seeing a site going from dirty to clean. And it happens.

Sometimes it takes a lot longer than anticipated because you don't know all of the actions that are happening, the geology, the chemistry, hydro activity. So there is a lot going on. But it is a very satisfying thing to see a project through from start to cleanup, and that's what we're all trying to get done here.

And nobody is retiring from working on these projects. I can guarantee you that. But we just all try and do our best. Okay. So that's what I have to say.

MR. BREEN: Could I just comment on something? A couple of things. The meetings -- what are they called -- the scoping meetings, I agree scoping meetings are great. The trouble I have with it -- and I'm only telling you this because we'd like the consultants to help out with figuring this out.

You don't need -- This thing Town Pump has got in Whitefish, Kalispell areas, that's

huge. That's a big deal. That's going to take a big scoping meeting. There's a lot of stuff that doesn't. The issue we're going to have is how do you value each one.

Right now, the cost of those scoping meetings is going in the job. You guys want to pull it out as a separate line and add it to it. I'm not saying that's right or wrong. That's just an issue that's there. So that's just my comment.

MR. FRANKS: My response would be I agree. When you first start on a site, you don't need a scoping meeting to first start out a site. You have to throw in six to ten wells maybe, but you're going collect information. You're going collect the information on soil type; you're going to collect information on the microbial activity; how bad the contamination is. There is lots of stuff to look at.

Once you get that information, and you really look at spending real money at a site for cleanup and systems, maybe that's at the point where you have, "Okay, let's have a scoping meeting now, and discuss what size project this is going to be, what road are we going to go down."

MR. BREEN: And that's fine. I don't

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want to discuss anything else today. I'm just
making a comment.

MR. FRANKS: And you don't want to have
one --

MR. JOHNSON: You get the last word.

MR. FRANKS: -- you don't want to have
one in every work plan. You don't need a scoping
meeting every time.

MR. BREEN: I agree, but we'll see it.

MR. JOHNSON: Under facility -- I think
it would be driven by DEQ's desire to need more
information. I don't think it is going to be on
every site or every release. It will be up to DEQ
to say, "We think it's complex enough that we need
to have this meeting" or not. There are so many
simple sites that we just don't need to do that,
and I think everybody would agree with that, but
there are some where you really benefit.

MR. BREEN: Thank you. I don't have
anything else. There must be somebody else out
there for public forum. Earl?

MR. GRIFFITH: Not unless we're talking
retirement. I just want to warn everybody that
I'm not going to retire even though I'm 73 in
thirty days. So I ain't quitting anytime soon.

MS. ROOT: Happy birthday.

MR. JOHNSON: In how many days?

MR. BREEN: Mr. Livers is in the back.

Did you want to speak?

MR. LIVERS: Thank you, Mr. Chairman.

Mr. Chairman, members of the Board, for the record, my name is Tom Livers. I'm the Director of the Department of Environmental Quality. I appreciate the opportunity. And I'll be 30 in 73 days. The years have been harder on me.

MR. JOHNSON: Backwards. Dog years.

MR. LIVER: First off, I do want to just start by saying thank you to all the Board members. I know the kind of time you guys put in wrestling with issues that most of you don't deal with on a daily basis. It is a time commitment. You are doing it for the right reasons. And maybe we don't agree on each issue. I know just watching that each of you is trying to do the right thing, what you believe is the right thing, so thank you for that.

I've been coming to the last two or three Board meetings just to kind of observe. I have heard some stuff from different parties, from my staff, and from some of the stakeholders. They

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were concerned with some of the processes, and so I just wanted to see some things first hand.

I think there is a lot of stuff that's going really well. I think there are some things that I've seen where I think some of these issues get more contentious than maybe they need to, almost combative at times. And I've got to tell you, our department is no stranger to controversial issues. We deal with contentious stuff all the time.

And I just think navigating through that is important. I'm not saying we do everything right, and like I said, Earl would back me up on that. But I know I served as the Board liaison to the other attached Board, the Board of Environmental Review, for about twelve years when I was the Deputy for this department.

They operate pretty differently. And the Staff/Board relationship is different. I don't want to come here and criticize, just offering some observations. But I would also like to be a resource to the extent that the Board's interested in that.

If there are some ways that we can talk about how the Board of Environmental Review

operates, maybe heads off some of the contention, and just some of the mechanics that seem to work productively to make good public policy decisions, we would certainly be happy to do that. We could come back with some ideas either at the next Board meeting, or at some point if anybody is interested in that.

But I guess I just wanted to kind of open the door for that if there is interest. So thank you, Mr. Chairman. I appreciate it.

MR. BREEN: You sat here pretty much most of the day just to say that. I appreciate that. Thank you.

MR. LIVERS: Thank you, sir.

MR. BREEN: Is there anything else?

MR. THAMKE: Did I miss an opportunity to suggest an agenda item for the next meeting? We've heard pretty consistently with the consultants and some agency folks that there's a bit of a disconnect with regard to understanding processes, such thing as scoping meeting definitions, and working more collaboratively.

I would like for discussion on the next meeting a resurrection of Board staff participation in a work group that talks about

cost effectiveness, or scoping, these things that we need to further define and understand.

You know, there seemed to be some momentum, and I don't know what happened to that momentum, but I think perhaps if the Board were to discuss it and direct staff to participate and provide feedback, maybe those would come to fruition. That would eliminate some of the questions that we've seen in the last couple of meetings.

So I would like to raise that as an agenda item. Garnet, more succinctly, Board staff participation in work group with consultants and DEQ. What's your pleasure, Mr. Chairman?

MR. BREEN: I'm not exactly sure what you just said. Are you talking to the Board?

MR. THAMKE: I want this as an agenda item, and since you control the agenda, I'm asking that that be put on the agenda.

MR. BREEN: For Board staff to attend --

MR. THAMKE: To participate in working groups with the environmental consultants and the agency to resolve some issues.

MR. JOHNSON: It's just that we'd have that as a discussion item, not as a directive at

this point.

MR. THAMKE: That's correct, as a discussion item.

MR. BREEN: At the next meeting.

MR. THAMKE: Correct.

MR. JOHNSON: If it is in the form of a motion, I'll second it.

MR. BREEN: It is not a motion yet. That's something you guys would like to see on the agenda?

MR. WADSWORTH: Motion and a second.

MR. BREEN: It's been motioned?

MR. WADSWORTH: Mr. Thamke is going to consider it a motion. I think from a business practice, Board practice standpoint, it is a good idea to motion to get it onto the agenda for a discussion item is not a bad idea.

MR. BREEN: It is just a discussion item is what we're talking about. It's not that big a deal. So go ahead if you want to make a motion.

MS. PIRRE: So you made the motion. You seconded?

MR. JOHNSON: Sure.

MR. BREEN: Would you read it to us.

MS. PIRRE: Can I just make up

something?

MR. JOHNSON: Sure.

MS. PIRRE: Ed moved to put on the agenda for discussion at the next meeting that the Board staff participate in work groups with consultants and DEQ.

MR. THAMKE: So we can define scoping during the discussion.

MR. BREEN: Is there any discussion?

MR. JOHNSON: Discuss having a discussion.

MR. BREEN: It's been moved and seconded to put a discussion item on the agenda. Would you please read the motion.

MS. PIRRE: Okay. The motion is that we're going to have a discussion item placed on the next agenda that is going to -- regarding the Board staff's participation in work groups with consultants and DEQ. That's what I got.

MR. BREEN: If there is no discussion on it, we'll have a vote.

MS. PIRRE: Keith Schnider.

MR. SCHNIDER: Aye.

MS. PIRRE: Jim Corson.

MR. CORSON: Aye.

MS. PIRRE: Jerry Breen.

MR. BREEN: Aye.

MS. PIRRE: Chuck Thompson.

MR. THOMPSON: Aye.

MS. PIRRE: Heather Smith is not here.

Sorry. Mark Johnson.

MR. JOHNSON: Aye.

MS. PIRRE: Ed Thamke.

MR. THAMKE: Aye.

MR. BREEN: Motion passes, one absent.

Is there anything else for public forum?

MR. CORSON: Yes. This is Mr. Corson on the phone. I have something that I would like to say or add. And I'm not sure if it came up today under my prior conversation, but I think our Chairman has had some real accomplishment in his family over the last like three or four months.

His daughter, who plays basketball here in Billings, she's been like recognized as an All-American player of the year for the conference. It's just been amazing to follow her. And I'm not sure if you other folks read about her in the local papers, but down here, she's just become a real life superstar. She has done outstanding things in basketball, and I just think

it is --

I would like to publicly congratulate Jerry for his family's accomplishments. It has been an outstanding run for her at the college down here, at like MSU-B, and I'm not sure if you all kind of recognize that. And he has gone to all her games in-state, out-of-state, national playoffs, NCAA championships. And I'm just really proud of him and his family. So I just wanted to add that on.

MR. BREEN: Thanks, Jim, and I'll pass that on to her. That's it, isn't it? We're done, Jim. Thank you. The meeting is adjourned.

(The proceedings were concluded)

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Presiding Officer