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BEFORE THE WATER POLLUTION CONTROL
ADVISORY COUNCIL (WPCAC)

TRANSCRIPT OF PROCEEDINGS

Heard at Room 111, Metcalf Building
1520 East Sixth Avenue
Helena, Montana
November 2, 2012
10:00 a.m.

CHAIRMAN TREVOR SELCH; MEMBERS
EARL SALLEY (By phone), KEITH SMITH, KAREN
BUCKLIN-SANCHEZ (By phone), KATHLEEN WILLIAMS, and
MICHAEL WENDLAND

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

3 * * * * *

4 CHAIRMAN SELCH: We're going to get
5 started. I think Mitchell might still be calling
6 in, but we do have our quorum, so I'll call the
7 meeting to order. Again, we'll go through our
8 agenda and minutes, and since they're
9 noncontroversial items, we'll just ask if anyone
10 has any additions to the agenda or changes.

11 MR. WENDLAND: Trevor, when we go to
12 deciding the next year's first meeting, I know
13 this year we did them on Fridays, and that was at
14 my request. We can discuss that change back if
15 anybody wants to address it, or we can continue
16 on.

17 CHAIRMAN SELCH: Sure. That was one of
18 the things I mentioned, too, is that we can
19 discuss that, if it works for everyone. We've
20 done them on Wednesdays before, and then moved to
21 Fridays. We'll bring that up at the end of our
22 briefing items as one of our last agenda items.

23 Anyone else have any additions?

24 (No response)

25 CHAIRMAN SELCH: Hearing none, we'll

1 approve the agenda for today.

2 Has everyone had a chance to look at the
3 minutes from our August 24th meeting?

4 MS. BUCKLIN-SANCHEZ: Yes.

5 MR. WENDLAND: Move we accept the
6 minutes as transcribed.

7 MR. SMITH: I'll second that.

8 CHAIRMAN SELCH: All in favor.

9 (Response)

10 CHAIRMAN SELCH: Motion carries. So we
11 have one substantial action item today, and that
12 is Tom Reid talking about the CAFO rule package,
13 so Tom is here to talk to us.

14 MR. REID: Good morning, members of the
15 Council. My name is Tom Reid. I'm with the
16 Permitting and Compliance, Water Protection
17 Bureau. And we're moving forward, hope to move
18 forward here on CAFO rules, so I thought I'd start
19 with few definitions and background on CAFO, just
20 to get everybody -- because we've been here -- the
21 last time we were here for CAFO rules was in 2006.

22 Start out with an animal feeding
23 operation is defined as a facility where animals
24 are confined and corralled for more than 45 days,
25 and is denuded of vegetation. CAFOs are then

1 animal feeding operations that meet the certain
2 size threshold, either medium or large CAFOs. So
3 these rules would apply either to medium or large
4 CAFOs.

5 And the thresholds are for medium CAFO
6 200 to 699 dairy cattle, or 300 to 999 other
7 cattle, any other cattle. And then large are 700
8 -- and I'm just giving you some examples. These
9 are all defined in the rule, so trying to give you
10 a sense that these regulations would affect both
11 medium and large concentrated animal feeding
12 operations, and not small CAFOs or AFOs.

13 In way of background, before we actually
14 go through the rule, this rule kind of has been in
15 the making for about ten years, since 2003. Under
16 the Federal Clean Water Act, CAFOs are defined as
17 point sources and require permits if they
18 discharge pollutants to State waters. That's been
19 in the Federal Clean Water Act since 1972.

20 In the mid-1970s, EPA promulgated CAFO
21 regulations, and those were in effect until
22 actually 2003. In 2003, EPA revised those CAFO
23 regulations, and as a result of that, there was a
24 first round of legal decisions that went through
25 the courts.

1 And in 2005, both those rules were
2 challenged both from the producer side and from
3 the environmental side, and they were consolidated
4 under Waterkeeper Alliance versus EPA, and the
5 result was the Second Circuit Court decision which
6 basically upheld the rule, but threw out certain
7 portions of the rule. That was 2005.

8 In 2008, EPA developed final regulations
9 implementing Waterkeeper versus EPA. And I might
10 say that we came before WPCAC and the Board in
11 2006 and adopted rules based on the 2003 rule as
12 determined by the 2005 Court decision.

13 When EPA promulgated the second set of
14 regulations in 2008, that again led to challenges
15 from both the environmental side and from the
16 producer side. That went through a number of --
17 Those cases were filed in a number of different
18 Federal Courts. And in 2011, the Fifth Circuit in
19 the National Pork Producers Council versus EPA
20 again threw out some of the CAFO rules, and upheld
21 other portions of the CAFO rules.

22 The significant issue there was duty to
23 apply, and EPA proposed -- duty to apply proposed
24 to discharge. And so EPA tried to define those in
25 rule, and the Court said you can't do that.

1 And so finally on July 30th, 2012,⁶ this
2 year, EPA promulgated final rules to implement the
3 2011 Fifth Circuit Court decision, and most of
4 these rules were written prior to that. We
5 started drafting this is over a year ago, and
6 working with stakeholders, and sent out an initial
7 package about a year ago.

8 So we've kind of amended those rules as
9 a result of the July 30th, 2012 Federal -- and I
10 believe that that's final. It is final. It was a
11 final action, and those rules, I'm not aware of
12 any challenges to them, because they didn't go
13 through the rulemaking process. They were just
14 promulgated as a result of the portions of the
15 original rules that were vacated by the Court.

16 If you have questions at any time,
17 please stop, and I'd be happy to answer those.

18 So at the State level, in 2005 the
19 Legislature amended the Water Quality Act to say
20 that we shall -- we the Board and the Department
21 -- shall adopt rules that by reference the Federal
22 rules. So that's what we're trying to do today is
23 adopt those Federal rules pretty much by reference
24 for the most part.

25 In 2006, like I said, we adopted those

1 rules. We also adopted a circular, DEQ9,⁷ that put
2 into rule in a circular a lot of what EPA had in
3 guidance; and in 2008, EPA put that guidance
4 material into the rule. So we had some conflicts
5 between DEQ9 and the Federal rule, which we're
6 adopting by reference. So part of what we're
7 doing today is we're retiring DEQ9 as a circular.

8 We authorize most discharges from CAFOs
9 under a general permit. That general permit is
10 set to expire in October 2013, which we will renew
11 that permit, and our goal is to have this rule
12 package adopted before that, so that these rules
13 would be the basis for that renewed permit.

14 MR. SMITH: Will that be a general
15 permit for the state?

16 MR. REID: Yes. Absolutely. We have
17 currently a general permit. We have a few
18 facilities authorized under an individual permit,
19 but we prefer and are actually directed by the
20 statute that a facility can be permitted under a
21 general permit -- it shall be permitted under a
22 general permit.

23 So these rules fall in three parts.
24 Even though there are several connected parts,
25 there are three major parts that I'll point out to

1 you.

2 And we have taken these rules, sent them
3 out to EPA again for another round of review, and
4 got comments back from them. We've worked with
5 NRCS. Our goal here is to work with existing
6 agencies that are heavily involved -- the MSU
7 Extension Service and NRCS. As a matter of fact,
8 we just set up a meeting down in Townsend to
9 discuss with the NRCS folks some outstanding
10 issues.

11 We've already received comments from
12 them. We've incorporated their comments. We're
13 still working with them.

14 The three major parts are: One is the
15 CAFO rule which begins on the first page, Rule
16 17.30.1330. And again, that is known as the CAFO
17 rule, and contains most of what EPA refers to, but
18 there are some other parts here that are also very
19 important.

20 On Page 2, I'd like to point out some
21 changes that we made in Subparagraph 2. That
22 would be 1332, on the second page about a third of
23 the way down the page. We had said that, "The
24 owner or operator of a CAFO must seek coverage
25 under an MPDES permit if the CAFO discharges or

1 proposed to discharge."

2 That was one of the contentious issues
3 in the Fifth Circuit Court decision, so we have
4 amended that based on recommendation from EPA to
5 put in verbatim the Federal rule, which was
6 promulgated on July 30th of this year. And when
7 this first was drafted, we didn't see how EPA was
8 going to address that.

9 So that rule or that subpart would now
10 read, "A CAFO must not discharge unless the
11 discharge is authorized under an MPDES permit. In
12 order to obtain authorization under an MPDES
13 permit, the CAFO owner or operator must either
14 apply for an individual permit, or submit a notice
15 of intent for coverage under a general permit."

16 So we have made that minor change. We
17 eliminated the language "proposed to discharge"
18 because it has connotations that we're trying to
19 find -- anybody can apply for a permit. If
20 they're building a facility, and they have not yet
21 had a discharge, but they want to be covered under
22 a permit, they can come in and submit an
23 application or an NOI, and be covered under a
24 permit before they discharge.

25 And that proposed discharge language is

1 ubiquitous through the MPDES rules, but it is ¹⁰
2 controversial when it comes to CAFO's.

3 The only other change that we made to
4 that rule was No. 10 on that same page. We struck
5 all of the language in the new No. 10, and put in,
6 "A CAFO must be covered by the permit at the time
7 that it discharges."

8 When the 2008 rule went into effect,
9 there were a lot of deadlines for existing CAFOs
10 and new CAFOs to come into compliance. Those
11 deadlines have all passed, so EPA eliminated that
12 section, and just said, "A CAFO must be covered by
13 the permit at the time it discharges." So you can
14 come in before that time. If you discharge
15 without a permit, it is still a violation of the
16 Clean Water Act. That's the CAFO rule in short.

17 Some of the more significant provisions
18 of this rule are found on Page 5. These other,
19 like 1341 on Page 4, that just amends the general
20 permit rule that says CAFOs can be covered under a
21 general permit. It is ancillary. It is not a
22 main provision of this rule.

23 What is significant is 17.30.1343, which
24 the title of that rule is, "Additional conditions
25 applicable to specific categories of MPDES

11
1 permits." In every permit we issue, we have
2 what's called standard conditions, and there is 15
3 or so standard conditions that apply to everybody.

4 In addition to those standard
5 conditions, certain facilities, like POTWs, have
6 additional language -- POTW is Publicly Owned
7 Treatment Works -- have language that is required
8 to be in every permit that we issue to a POTW.

9 This will add basically all of the stuff
10 that we had in DEQ9, and it puts it into rule, and
11 it says you must put that language in each and
12 every permit that you issue to a CAFO, whether
13 it's an individual or general permit.

14 And it contains -- I use the numbers
15 five, nine, and two. And they're on Page 5 in
16 general. At the bottom of the page, it starts out
17 with the five, what is contained in 40 CFR
18 122.42(e), and those are the five conditions.

19 One is that a CAFO must develop an
20 implement nutrient management plan. The second
21 one is recordkeeping and reporting requirements.
22 I'll move on to Page 6 now. And I might be off a
23 little bit from the page numbering in the earlier
24 one that we sent out two weeks ago, but it's
25 still in that same rule, 1343.

1 So on Page 6, record and reporting
2 requirements, and it goes on down the line.
3 Requirements relating to transfer of manure or
4 processed wastewater to other persons. So in
5 other words, a CAFO can transfer waste, sell it as
6 fertilizer, take it off site, and it is no longer
7 covered under the terms of that permit.

8 The requirement to include specific
9 terms in the nutrient management plan, and the
10 duty to comply with those terms -- which we'll
11 talk about in a minute -- that's the next piece.
12 And whenever there are changes in the nutrient
13 management plan, those must be submitted to the
14 Department and incorporated into the permit.

15 So that's 1343. It contains those five
16 conditions. It also defines the nine minimum
17 elements of what is considered a nutrient
18 management plan. And I'm not going to go through
19 those. Those are in the rule. Those are BMPs,
20 disposal of dead animals, those are the types of
21 things in the nine conditions.

22 Then it also establishes for the land
23 application of manure, litter, and processed
24 wastewater, two different procedures that a CAFO
25 can use. One is called a linear method, and one

1 is called a narrative approach, depending on how
2 they apply those waste products as fertilizers.

3 If they always plant in the same crop
4 rotation -- corn, soybeans, and fallow -- and they
5 do that every year, then they can submit -- they
6 can calculate how much waste they can put on every
7 year, based on the nutrient needs of those plants.
8 Those crops, I should say.

9 The other is narrative, which allows a
10 lot more flexibility, and it allows the CAFO to
11 say how they're going to determine from a year to
12 year basis what nutrients and how much of the
13 waste will be applied. Again, EPA has put out
14 guidance documents on this.

15 And NRCS, both at the national level and
16 state level, have worked for years. These are all
17 defined, and we incorporate by reference NRCS
18 Waste Management Standard 590. So those are all
19 -- You can go over to the NRCS website, and go
20 into their FOTG, their Field Office Technical
21 Guide, start clicking on maps, and get a lot of
22 the site specific information for your location.

23 So that's the second major component of
24 this rule, is adopting those standard conditions
25 that must go into each and every MPDES permit

1 issued to a CAFO. And then finally, the State
2 technical standard for application of manure,
3 litter, and processed wastewater to land surface,
4 so that any runoff from that is exempt from the
5 Clean Water Act, based on the agricultural
6 exemption under the Clean Water Act.

7 And that is a New Rule I, which is on
8 Page 9. New Rule I, Technical Standards for
9 Concentrated Animal Feeding Operations.

10 So these define and incorporate by
11 reference -- Actually there is two ways. You can
12 follow the guidance or the process in this rule,
13 and a lot of this rule was carried forward from
14 Department Circular DEQ9, so it is not new
15 material. It is pretty much what was in DEQ9. As
16 a matter of fact, these tables are right out of
17 DEQ9, but now we're putting them into the rule,
18 based on that 2008 CAFO rule which requires states
19 to do that.

20 We provide an alternative procedure,
21 which is to basically follow the NRCS procedures.
22 So if you go to NRCS, and they do a comprehensive
23 nutrient management plan for you as part of their
24 service, or technical service providers will do
25 that, we'll accept that. You just have to provide

1 that information for your permit.

2 In addition, the new rule sets up some
3 sampling requirements as required by the Federal
4 rule: Soil sampling, manure sampling. When EPA
5 reviewed DEQ9, they identified some deficiencies,
6 and we have tried to correct those deficiencies by
7 identifying the methods for chemical analysis of
8 nitrogen and phosphorus, and what methods are
9 acceptable to the Department for sampling, the
10 number of samples, positing of samples. It's all
11 different than what we normally do with water and
12 wastewater. So we've adopted basically NRCS
13 procedures for total nitrate and phosphorus, which
14 are the key ingredients in the nutrients.

15 So I guess that's a quick overview of
16 the rule. We're looking for input. I'd be happy
17 to answer any questions. We continue to work with
18 stakeholders as we wrap this up, and hopefully
19 take it to the Board at the December 7th meeting,
20 I believe.

21 CHAIRMAN SELCH: Thanks, Tom. Does
22 anyone have any questions for Tom?

23 MS. WILLIAMS: I'm not an expert on
24 this, but it sounds like the actual CAFO is the
25 denuded confined area, correct? And then there is

1 also application areas that you're talking about
2 being under the control of the CAFO, so --

3 MR. REID: Yes. That's correct. There
4 is the production area, which is basically where
5 the animals are confined, corralled; and then the
6 waste from that -- that's where the waste is
7 generated. Then the waste can be land applied
8 under -- It can be land applied on land under the
9 control or owned by the CAFO operation.

10 MS. WILLIAMS: Just a suggestion again,
11 being the public representative here. Like the
12 title of New Rule I on my Page 9 is "Technical
13 Standards for Concentrated Animal Feeding
14 Operations," but it is talking about the
15 application area, right? I don't know if it would
16 be helpful to differentiate between the actual
17 confined area and -- the confined area and the
18 application area, or if this is just all --

19 If everyone understands it the way that
20 it is, that's fine, but that kind of tripped me up
21 a little bit. In one place you talk about you
22 can't have discharges from a CAFO unless it is a
23 stormwater discharge; but then we're talking about
24 allowing discharges in the application area.

25 So it just might be easier to

1 understand. But if everybody knows what this all
2 means, that's fine. Just a thought.

3 MR. REID: Thank you.

4 CHAIRMAN SELCH: Anyone else have any
5 questions?

6 Anyone on the phone have any questions
7 for Tom?

8 MS. BUCKLIN-SANCHEZ: Thank you. Yes.
9 This is Karen Sanchez. My question is: Have any
10 producers provided input or comments to DEQ, and
11 what were those, if so?

12 MR. REID: Well, we sent it out to the
13 AFO/CAFO Work Group just this week after we
14 received comments from EPA and NRCS. We just set
15 up, like I said, a meeting with some of those
16 groups through that AFO/CAFO Stewardship Work
17 Group, I believe it is called. The Stock Growers,
18 Montana Farm Bureau, and other groups, are part of
19 that. So we haven't received comments from those
20 folks yet.

21 MS. BUCKLIN-SANCHEZ: Do you anticipate
22 a certain type of comments?

23 MR. REID: Do we anticipate comments? I
24 believe so. I mean I'm sure there'll be some
25 comments. We're actually hoping to get comments

1 so we can make any last minute revisions before we
2 go to the Board. And then it is a draft, so we'll
3 take comments, formal comments, during that
4 period.

5 A lot of what is in here is right out of
6 DEQ9 or the Federal rule. So all of the Federal
7 rule we're locked into. We can take comments on
8 those, and we can respond to those comments, but
9 it is based on incorporating Federal rule directly
10 by reference. New Rule I does have things that
11 folks certainly will be affected and can comment
12 on.

13 MR. SMITH: Is New Rule I, besides being
14 DEQ9 implemented in this, is it also based on the
15 Federal rules?

16 MR. REID: The Federal rule says that
17 states must adopt technical standards. That's
18 what the Federal rule says.

19 MR. SMITH: But they didn't stipulate,
20 so these are Montana standards, not Federal?

21 MR. REID: Yes.

22 MR. SMITH: You're just meeting the
23 stipulation to have them.

24 MR. REID: Right. Again, I think about
25 90 percent of the New Rule I is right out of DEQ9.

1 We just went for public comment, and we've cleared
2 up some things, like I said. Where EPA pointed to
3 deficiencies in DEQ9, we've tried to correct those
4 deficiencies.

5 MR. SMITH: But there is no Federal
6 specific standards in New Rule I?

7 MR. REID: No, not in the technical
8 standards. At the Federal level, the expectation
9 is that states will work with their extension,
10 University Extension Services through the land
11 grant universities, where that expertise is
12 housed. So that's what we've done. We worked
13 through MSU, the Extension Service, and Natural
14 Resources and Conservation. We're adopting those
15 by reference.

16 I believe David, our attorney --

17 MR. DENNIS: For the Council, I'm David
18 Dennis. I'm the Counsel for the water programs at
19 DEQ.

20 Tom, the question was asked, "Do you
21 expect comments on the rule?" And I guess my
22 thought is that that may have been directed at,
23 "Do you see this rule as being controversial in
24 any respect, where there are areas where you might
25 expect to have input by the public?"

1 MR. REID: Good question. I think CAFO,
2 the topic is in itself controversial, but I don't
3 think these rules are controversial because there
4 is not a lot of change, as evidenced by the fact
5 that every time EPA promulgated a rule, it has
6 spent two years and multiple challenges in court,
7 both from the environmental and the regulated
8 community, and most of the issues have been worked
9 out.

10 So by the time it gets down to Montana
11 adopting a rule, we come in kind of at the end of
12 the game. So I think we'll have comments. I
13 think most of those will be a matter of letting
14 folks know that this is basically DEQ9. We're
15 taking it and putting it in rule. And if there
16 are things we missed, we would welcome changes.

17 CHAIRMAN SELCH: Any more questions for
18 Tom?

19 (No response)

20 CHAIRMAN SELCH: Tom, I assume you're
21 looking for a motion to take forward this rule
22 package to the Board. In reading through what
23 Kathleen's comment was, both the application area,
24 and it does deal with a lot to do with that, I
25 kind of tend to agree with her that perhaps

1 referencing that in there would be valuable as
2 well.

3 MR. REID: We'll certainly take that
4 into consideration.

5 MR. SMITH: Does the motion need to
6 allow for any stipulation from this last review
7 that's going on? Since I'm still new to this
8 group.

9 CHAIRMAN SELCH: I guess you guys can
10 still -- This is just to bring the current package
11 to the Board, is basically what the motion would
12 do.

13 MR. REID: Yes, that's my understanding.

14 MR. SMITH: I'm just concerned if you
15 got any substantive comments from the Farm Bureau
16 or anybody else, whether it would come back to us
17 or not.

18 MR. REID: We anticipate -- That's a
19 good question. I guess I don't know about that.
20 We would hope, we would expect to make some
21 changes. Like I said, I pointed out two areas
22 where we've had changes. There have been some
23 other minor changes, in addition, and we're still
24 finding typos and those kind of grammatical
25 errors.

1 It is my understanding that we would not
2 bring that back to WPCAC unless we totally revised
3 the package. If we amended New Rule I, and then
4 did something different, we would probably start
5 over with the stakeholders.

6 MS. WILLIAMS: Do you have a reason for
7 the upcoming board meeting? I mean is there a
8 reason to have a deadline at this Board meeting,
9 or is there an opportunity for us to hear after
10 you've had comments?

11 MR. REID: We can certainly do that.
12 The deadline to go to the Board -- Well, these
13 have to be finalized basically two weeks before
14 the Board meeting so it can be sent out to the
15 Board. The driver is, as I said earlier, that
16 general permit expires in October of 2013.

17 And the rulemaking process is basically
18 a six month process, so these rules wouldn't be in
19 effect until May, and then -- because that's the
20 time frame that we have to start working. We have
21 to start working, we are working now on the
22 general permit, updating tables.

23 Basically it is a job of the permit to
24 take these rules and make them into something that
25 we can hand to somebody, to a CAFO, and that's the

1 next job. These rules really aren't something
2 that a grower can just implement. They're kind of
3 the rules that the Department will take, and EPA
4 will hopefully approve or not and comment on. And
5 so they would be the basis for our new general
6 permit, and any individual permits we issue after
7 that date.

8 So I guess given that the rulemaking
9 process before the Board is a six month process,
10 or has to be completed in six months, depending on
11 the meeting, so that was our goal to get it moving
12 in December.

13 MS. WILLIAMS: Okay.

14 MR. REID: I don't know when the Board
15 meeting is. Usually there is one in January or
16 February would be the next one.

17 CHAIRMAN SELCH: Does anyone want to
18 propose a motion for Tom?

19 MR. WENDLAND: So are we comfortable
20 making that motion to send this forward before we
21 see, like Kathleen said here and Keith both said,
22 without seeing if there is a lot of other changes?
23 I guess we can bring it back when -- as amended,
24 too, but --

25 MR. REID: I think we would -- and we do

1 come back and kind of as a briefing item update
2 that information, but if it is a vote to move
3 forward, then we would move forward, incorporate
4 any changes that we've worked out with
5 stakeholders between now and the cut-off date for
6 going to the Board.

7 And then again, it goes to the Board as
8 a draft, so the draft is -- The Board is taking
9 public comment, and may direct us to make changes
10 if we haven't addressed those stakeholder issues.

11 MR. SMITH: Would you all feel
12 comfortable if we sent it to the Board, and have
13 him come back with a summary of any comments from
14 those other groups? I don't think he's expecting
15 very many substantive changes. Mostly he's
16 adopting the first sections here. And the EPA
17 rules, we really have no choice on those anyway.
18 DEQ9, which has already been around for several
19 years.

20 I wouldn't mind him coming back, like
21 you said maybe with a briefing item, a summary of
22 the comments from these other organizations, and
23 if there is any substantive ones that come
24 forward.

25 MS. WILLIAMS: And our motion could be

1 to send it forward, given potential edits that may
2 occur from the stakeholder input or something, in
3 the interests of getting this going in time for
4 permits to be issued during the agricultural
5 season.

6 CHAIRMAN SELCH: I'm comfortable with
7 that. I had kind of -- along with a technical
8 advisory that if there are substantial comments,
9 we still have a chance to do that with the Board
10 members. Does anyone want to formally put that
11 out there?

12 MR. SMITH: I'll move to send this
13 forward to the Board, with the stipulation that
14 any substantive changes that come out of the last
15 reviews be presented back to this board for
16 consideration as a briefing item as a minimum, and
17 adopting those changes you made under 1330,
18 Subparagraph 2 and 10. What we've got written in
19 here is different than what you read. Does that
20 kind of cover it?

21 CHAIRMAN SELCH: I think so.

22 MR. WENDLAND: I'll second.

23 CHAIRMAN SELCH: Discussion?

24 (No response)

25 CHAIRMAN SELCH: Public comment?

1 (No response)

2 CHAIRMAN SELCH: Hearing none, vote.

3 All those in favor.

4 (Response)

5 CHAIRMAN SELCH: Opposed.

6 (No response)

7 CHAIRMAN SELCH: Motion carries.

8 Thanks, Tom.

9 Our next action item is our selection of
10 a date for the first meeting in 2013.

11 MS. STEINMETZ: The potential meeting
12 dates for the first BER meeting in 2013 are
13 January 25th and February 1st. Those are two
14 potential dates. Either one of those, filing the
15 Montana Administrative Register would be February
16 4th; publication date would be February 14th. You
17 guys need thirty days before publication to see an
18 issue about that publication date.

19 So the two dates that we have
20 potentially reserved for this room are January 4th
21 and January 11th. Both of those would give that
22 sufficient thirty day window. January 11th is
23 getting a little bit close to January 25th, if
24 that's the date they decide to go with. They're
25 both Fridays. We could potentially look to see if

1 we could get the room or another room for other
2 dates, but if one of those works, those would be
3 good dates. Does anybody have any other
4 suggestions?

5 MS. CRIDER: Keep in mind that with the
6 legislative session coming up, this room is going
7 to book up quickly. So keep that in mind.

8 CHAIRMAN SELCH: We've briefly talked
9 about dates, and it sounds like Friday still may
10 be the best date for everyone. Does that still
11 work for everyone here today and on the phone?

12 MR. SMITH: Fridays work for me.

13 MR. WENDLAND: Works for me.

14 MS. BUCKLIN-SANCHEZ: Yes. Thank you.
15 This is Karen.

16 MR. WENDLAND: For the first meeting,
17 I'd be in favor of the 11th. And that is a
18 Friday, you said?

19 MS. CRIDER: They're both Fridays.

20 MR. WENDLAND: I'm real flexible. I can
21 do either one.

22 MS. WILLIAMS: That week I will probably
23 be occupied, or I may be occupied, I should say.
24 I'll have to reenact my alternate. Well, I may
25 have to reenact my alternate, depending on the

1 outcome on Tuesday.

2 CHAIRMAN SELCH: That's a good time to
3 make note, too, that we're all serving at the
4 pleasure of the Governor, and obviously regardless
5 of what happens, we're going to have a new
6 Governor, and I guess I assume everyone just will
7 stay on the council until anyone hears otherwise,
8 and assuming that it may take them quite some time
9 to reappoint people if they want to do so. I'm
10 thinking at least on this January meeting,
11 everyone will still be here, unless we hear
12 differently.

13 So I've heard some talk for the 11th,
14 keep them on Fridays. The 4th was the other
15 option. Does anyone have any other conflicts or
16 suggestions for those two dates between the 4th
17 and the 11th for January?

18 (No response)

19 CHAIRMAN SELCH: Does the 11th work
20 better for you? Okay. Put down for the 11th
21 then.

22 MS. STEINMETZ: Do you want to make a
23 motion and vote on it?

24 CHAIRMAN SELCH: Put a motion for our
25 first meeting for 2013 for Friday, January 11th.

1 Does anyone second it?

2 MR. SMITH: I'll second.

3 CHAIRMAN SELCH: Discussion.

4 (No response)

5 CHAIRMAN SELCH: All in favor.

6 (Response)

7 CHAIRMAN SELCH: Opposed.

8 (No response)

9 CHAIRMAN SELCH: Motion carries. We'll
10 plan for January 11th.

11 We'll take a quick seven minute break.
12 We'll be back at 10:50 here, and finish up with
13 our briefing items.

14 (Recess taken)

15 CHAIRMAN SELCH: We'll get started with
16 our first briefing item, and we have Amy here to
17 give that to us, Silver Bow Creek water use
18 classification review.

19 MS. STEINMETZ: Rod is not be able to be
20 here today, but he has put a ton of work into
21 this, and helped with the slides, actually did the
22 slides. I just reordered them a little bit. So
23 I'm going to be giving this presentation. Amy
24 Steinmetz, Water Quality Standards Section in DEQ.

25 MS. BUCKLIN-SANCHEZ: Hello. This is

1 Karen on the phone. I can barely hear you. Is
2 there a way to --

3 MS. STEINMETZ: We'll move the
4 microphone over, the speaker over. Is that
5 better?

6 MS. BUCKLIN-SANCHEZ: Yes, ma'am.

7 MS. STEINMETZ: So I'm just going to
8 give you a briefing on our work regarding the
9 classification review of Silver Bow Creek.

10 Here is an overview of what I'm going
11 cover today. We're going to talk about what is
12 the water use class; how it's determined; tie that
13 into what we're doing at Silver Bow; how we came
14 to decide that we need to do this review; talk
15 about existing and attainable uses; where we are;
16 what our options are; and then a hopeful timeline
17 for completion of the process.

18 So what is a water use class? The
19 ground level of our water quality standards is the
20 foundation on which numeric and narrative
21 standards and nondeg are laid, and it sets the
22 minimum water quality at which the water body must
23 be maintained.

24 It is based on that water body's
25 designated uses. Designated uses are listed here.

1 We have drinking water, culinary and food
2 processing use after conventional treatment;
3 bathing, swimming, recreational use; growth and
4 propagation of salmonid fishes and associated
5 aquatic life; water fowl and fur bearers -- and
6 that's broken down into three levels that we're
7 going to talk about in just a little bit -- and
8 then agricultural and industrial water supply.

9 So like I mentioned, we're going to talk
10 about existing and attainable uses. The
11 designated uses that are considered for a use
12 class come from these existing and attainable
13 uses. Existing uses of a water body, we have to
14 designate those. Those are automatic. We
15 determine what those uses are, and we designate
16 those.

17 The attainable use is a little bit more
18 difficult. We have to take all of the data that
19 we have for a water body, go through that data,
20 look for trends, determine if a nonexisting use
21 may be supported in the next 20 years, and that 20
22 years comes from EPA guidance.

23 This table illustrates how the
24 designated uses fit together into different use
25 classes. You have a full page copy of this, if

1 you want to refer to it throughout. I think you
2 can read this one just fine, but if you want to
3 look at it as we're talking about Silver Bow.

4 The designated uses are listed on the
5 left, and then the use classes are listed across
6 the top. We can look first at the "I" class in
7 that far right column, and we see that each of
8 those designated uses are just listed as goals.
9 So they're just really loose goals. They're not
10 actually designated uses. "I" class has no
11 designated uses. It is the least protective class
12 that we have in our rules.

13 Then looking at a couple of those uses
14 that are listed there -- bathing, swimming,
15 recreational use, and then agriculture and
16 industrial water supply -- looking at the "B" and
17 "C" classes, those uses are considered for each of
18 those classes. The ones that are different
19 between classes are drinking and culinary use, and
20 then the aquatic life.

21 First drinking water in the "B" class,
22 those support or may support drinking water use;
23 "C" class, drinking water is not an existing or
24 attainable use.

25 Then as far as breaking it down into

1 one, two, and three, we look at the aquatic life,
2 and here is where we break it down into those
3 three levels. Full growth and propagation of
4 salmonid fish and associated aquatic life, water
5 fowl, fur bearers, that's going to be the B1 and
6 C1. Marginal growth and propagation of salmonid,
7 we're looking at B2 and C2; and then the warm
8 water fisheries, growth and propagation of
9 non-salmonid fish, we're looking at B3 and C3.

10 There are other classes in our rules.
11 We decided to put the "B," "C," and "I" classes in
12 this table because those are the ones that are
13 going to be looked at more carefully for Silver
14 Bow Creek.

15 So how do we determine the use class?
16 We will talk about the existing and attainable
17 uses. We looked at a lot of data; we do public
18 outreach. We look at chemistry data; we look at
19 biology data; we look at fish data. We look at
20 all of that, and we start asking some questions.

21 And this one you also have a page in
22 front of you that you can look through. These are
23 the questions that we start asking. We take all
24 of that data, and start asking questions. And you
25 can follow this. I'm not going to go through it.

1 But this is how we get to a determination of a use
2 class. And this one also includes the "A" class.

3 How does that tie into Silver Bow?

4 Before I get into Silver Bow any further, I want
5 to be very clear that we are looking at the main
6 stem of the Silver Bow from the confluence of
7 Blacktail Creek down to Warm Springs Creek.

8 There is some controversy in Butte right
9 now over the Metro Storm Drain, this little black
10 line there coming into Silver Bow. Some people in
11 Butte would like to see that called Silver Bow
12 Creek. It is a storm drain. DEQ does not
13 consider that a water of the state, so that is not
14 a part of our classification review.

15 We are simply looking at what is defined
16 in the Administrative Rules of Montana 17.30.607,
17 which states that the Silver Bow Creek main stem
18 goes from the confluence of Blacktail Creek to
19 Warm Springs Creek, the "I" class segment. We're
20 not looking at the Metro Storm Drain at all, just
21 Silver Bow from Blacktail to Warm Springs Creek.

22 MS. BUCKLIN-SANCHEZ: Does that go past
23 Deer Lodge, or is that before Deer Lodge where it
24 ends?

25 MS. STEINMETZ: Deer Lodge is after

1 Silver Bow Creek ends. So Silver Bow Creek flows
2 into the Clark Fork, and the Clark Fork goes by
3 Deer Lodge.

4 Just a little bit more about the "I"
5 classification. It was developed in December of
6 1957. There are only three water bodies in
7 Montana with this "I" classification. Like I
8 mentioned, it is the least protective, it doesn't
9 have designated uses at all, just loose goals.

10 DEQ would like to see the "I" class go
11 away. We're beginning that process by reviewing
12 the three water bodies that are currently "I"
13 class, determining whether or not it is
14 appropriate to reclassify them into a different
15 use class.

16 So the question that we have for Silver
17 Bow is: Do the substantial efforts in improving
18 water quality in Silver Bow Creek over the past
19 ten to twenty years warrant consideration of
20 reclassification to a more protective class now?
21 And the Department's view at this point is yes.

22 Trend analysis and metals data from
23 Silver Bow Creek has shown a clear trend of
24 improvement in the past seven to ten years, not
25 only metals data, but biology and fish data.

1 We're going to see some of that, and it really
2 shows clear trends towards improvement.

3 And beyond that, there is still a lot of
4 restoration work planned, and we expect to see
5 those improving trends continue. So we do feel
6 that the significant progress made to date
7 justifies the detailed analysis necessary to
8 reconsider reclassification.

9 And this illustrates that point really
10 well. This is the recoverable zinc in Silver Bow
11 Creek. It has SS-07, which is downstream all
12 point sources from Butte shows that declining
13 trend over time.

14 And it is also kind of a cool slide
15 because it shows the response in the water quality
16 to specific events. So we can see the removal of
17 the Colorado tailings; we see that first drop; LAO
18 groundwater, that lower area one; the Super Fund
19 area in Butte, beginning of treatment of that
20 water brings that trend down a little bit further;
21 construction of that Metro Storm Drain, and then
22 treatment of the water from the Metro Storm Drain.
23 And you can see that starting in 2006, the water
24 quality is below the zinc aquatic life standard.

25 MS. WILLIAMS: So those are January

1 measurements? Do you --

2 MS. STEINMETZ: It is just marked as
3 January. We probably should have that --

4 MS. WILLIAMS: So -- (inaudible) -- are
5 included in that?

6 MS. STEINMETZ: This is monthly
7 measurements, as much data as we had. It does not
8 show -- I'm going to talk about a little
9 stormwater events. So it has probably got a
10 little bit of some of the high water in there.

11 MS. WILLIAMS: So more than just
12 January.

13 MS. STEINMETZ: Right. We should have
14 just had the year on this. But nevertheless, it
15 shows that declining trend, and it shows a
16 response to important events, reclamation and
17 remediation events.

18 And that Colorado tailings, that first
19 drop that we see, this is pre-1996 Colorado
20 tailings area, and this is present time. So
21 removal of the Colorado tailings really
22 facilitated growth in that area.

23 We have a ton of data for Silver Bow
24 Creek, lots of data to wade through, so we're
25 going to -- we have identified existing uses, but

1 then the tougher piece is sorting through all of
2 that data, identifying trends in the data, and
3 then determining if there is the potential to meet
4 nonexisting uses in the near future.

5 And this just gives you a little bit of
6 an idea of the interest that there is in Silver
7 Bow Creek. This is just a partial list of
8 interested parties, stakeholders. And the groups
9 listed there in red, those are groups that have
10 collected data. So there is a lots of data, lots
11 of interest.

12 Let's look at existing uses. Public
13 outreach is a big part of determining existing
14 uses, and we have done a public meeting. Rod has
15 done a lot of outreach with different groups in
16 Butte. We've done a public meeting.

17 And that's important for disseminating
18 information, and letting the people in Butte and
19 along Silver Bow Creek know what we're doing, why
20 we're doing it, how we're doing it. That's
21 important. They need to know that. They're most
22 affected by whatever decision is going to be made.

23 But another way that we've done public
24 outreach is a public use survey, and we did this
25 to help with just another line of evidence for

1 those existing uses. So the public use, you can
2 see that area in yellow. That's the Silver Bow
3 Creek watershed. And what we did was obtain a
4 voter registration list from Silver Bow County and
5 Deer Lodge County.

6 And we've got some pretty amazing GIS
7 experts at DEQ, and we had one of them pull in the
8 residential data from that voter registration
9 list, overlaid it; they did an address match;
10 pulled it into a GIS map -- I don't even know if
11 I'm saying it right because I'm not a GIS expert
12 -- but he pulled in all of that information.

13 Then we threw out all of the addresses
14 that were outside of the watershed, and of the
15 remaining addresses, we randomly selected 550 to
16 be asked about existing use, and whether they
17 participate in these uses, or observe others
18 participating in these uses.

19 This is what we've seen. And I just
20 want to mention that we're looking at a sampling
21 error plus or minus 10 percent. We couldn't
22 justify the cost to send out thousands of surveys
23 to get at that smaller error, sampling error, when
24 it is just another line of evidence. We've got
25 other lines of evidence.

1 So for drinking water, you see that
2 there were people that responded that they drink
3 the water in Silver Bow Creek. That's not
4 statistically significant.

5 We had four responses out of 120 that
6 said that they have drunk or that they drink the
7 water, and I suspect that three of those are
8 either not understanding the question, or they're
9 trying to be funny. And one of them actually
10 qualified their yes by saying that they drank the
11 water to see if it would make them sick for one
12 week and it didn't. So it is a little bit of a
13 science experiment.

14 So we can say that drinking water is not
15 an existing use of Silver Bow Creek based on our
16 survey. However, the other uses -- agriculture
17 and industry, recreation and fishing -- from this
18 survey, those that answered that survey, over 10
19 percent for agriculture, industry, recreation;
20 over 30 percent for fishing.

21 So we could say from the survey that
22 those are existing uses. Like I said, we do have
23 other lines of evidence for that. Agriculture,
24 we've got water rights; for irrigation, for
25 industry, we have discharge permits for a couple

1 of industries; recreation, mostly word of mouth
2 that recreation is occurring.

3 And then fishing, we have a lot of data.
4 Fish data we're going to see in a little bit, and
5 pictures. And here is one of those pictures.
6 This is one of the first West Slope Cutthroat
7 Trout caught in lower area one.

8 Attainable uses. We have a lot of data.
9 I mentioned that already. We're looking through
10 all of that data. One thing I want to say about
11 metals is that we are going to be using some USGS
12 water quality trend data that we can't reference
13 yet because they are still in peer review. We
14 don't have that final data.

15 So I'm going to show four slides. And
16 the USGS data, they've done some really cool work
17 with flow adjusted data. They've got some really
18 good statistical tools that we don't have
19 available to us, and that's part of the reason
20 we're waiting for that data.

21 Again I want to show the zinc slide
22 because that really shows that downward trend.
23 Very similar to total recoverable copper. Same
24 sort of trend, but this one shows some spikes that
25 keep coming up above that aquatic life standard.

1 And copper, one thing that we see with
2 copper is that Butte has a really old stormwater
3 system; and when we get large storm events, they
4 see huge spikes in copper levels above standards,
5 way above standards. That's a big problem for
6 treatment. But the trend is a downward trend.
7 There is many of those big storm events where
8 they're seeing those large spikes in concentration
9 of copper.

10 And arsenic, this one has those -- and
11 both of those slides, copper and zinc, those are
12 both SS-07, that same point downstream of the
13 Butte point sources.

14 So the same thing here. The top line,
15 that navy, is SS-07. The SS-01 is sort of
16 background, I guess, reference. That's Blacktail
17 Creek. So fitted with trend lines, we can see
18 that the Blacktail Creek trend line is a constant,
19 and that's what we would expect to see. And then
20 the downward trend for the Silver Bow Creek below
21 the wastewater treatment plant, but also below all
22 of those sources outside of the mixing zone, so
23 water quality below Butte is a downward trend.

24 And then the next one is at Opportunity,
25 and I wanted to bring this slide to point out what

1 we've seen as reclamation has occurred upstream.
2 So starting in 1996, we start seeing some
3 reclamation upstream. We're seeing some effects
4 from that reclamation washing downstream. Those
5 levels start to rise at Opportunity, they're
6 coming back down below the drinking water standard
7 for arsenic.

8 And for the most part, those metals
9 trends that we've looked at from those four
10 slides, that's what we're seeing all along the
11 stream with the exception of Warm Springs. So
12 Warm Springs Pond comes back into Silver Bow
13 Creek. The water quality in Warm Springs Pond is
14 actually worse than Silver Bow Creek upstream, and
15 it is reintroducing some contamination. So we are
16 seeing some higher levels of contamination below
17 the ponds.

18 Just one slide for macroinvertebrates.
19 Taxa richness. Several points along the stream.
20 Blacktail is that navy line, and then the lower
21 area one. Rucker is a little bit downstream.
22 Opportunity, we saw the arsenic slide for
23 Opportunity. Then Warm Springs, the taxa richness
24 at Warm Springs climbed quite a lot, but we see
25 increasing trends in all of those.

1 MS. WILLIAMS: You have 2003 data for
2 that? You only have data up to 2003?

3 MS. STEINMETZ: The macroinvertebrate
4 and periphyton data is really spotty as far as
5 what we've seen and what we've been able to get
6 our hands on, so we only have that through -- It
7 is only displayed through 2003. I think we have
8 more macroinvertebrate data, but maybe not -- Taxa
9 richness might be another metric. But we are
10 seeing that the macroinvertebrates are increasing.

11 Now fish, I'm going to show the next ten
12 slides pretty quickly. Trevor provided these
13 slides, and they're very illustrative of what
14 we've seen for fish in the streams. So that's why
15 I will go through them quickly. They don't really
16 need a lot of explanation. They really speak for
17 themselves.

18 They use electro shocking to collect
19 these samples. This is Silver Bow Creek from
20 Butte to -- I believe that one is Opportunity,
21 right, right around Opportunity?

22 CHAIRMAN SELCH: Yes.

23 MS. STEINMETZ: So 2002, a couple of
24 sampling points found non-salmonid species in
25 Rocker, at Rocker, and that lower area --

1 CHAIRMAN SELCH: It was lower area one
2 at Rocker. Two sites. Yes.

3 MS. STEINMETZ: The lower area in
4 Rocker. I think you said fathead minnows --

5 CHAIRMAN SELCH: -- long nose suckers
6 and central mud minnows.

7 MS. STEINMETZ: Those are the species we
8 see there. 2003/2004, added a couple of sampling
9 locations. Nothing at those spots. Again at
10 Rocker, we see the same species as before. 2005,
11 added even more sampling in those locations.
12 Another -- fish in all sections. No trout along
13 Silver Bow. That Father Sheehan Section is
14 actually Blacktail.

15 2006, we see the first trout in the fall
16 sampling. And all of these samples are from the
17 fall. So first trout below German Gulch 2007.
18 First West Slope Cutthroat trout below German
19 Gulch. Now we see trout in the lower area one and
20 at Ramsey. Fish numbers are increasing.

21 2008, first West Slope Cutthroat Trout
22 at Ramsey. Also added that sampling section above
23 the highway. One at Opportunity. Numbers still
24 increasing. 2009, first West Slope Cutthroat
25 Trout in lower area one. 2010, now they're there

1 in all the sections -- That's you, right?

2 CHAIRMAN SELCH: Yes.

3 MS. STEINMETZ: That's you with the
4 first trout caught at Rocker. And here we are
5 2011.

6 MS. WILLIAMS: They always look bigger
7 when you hold them close to the camera.

8 CHAIRMAN SELCH: I didn't catch it with
9 my fly rod. I wasn't that proud of it.

10 MS. STEINMETZ: But still something to
11 be proud of. 2002 to 2011, that's a pretty
12 incredible increase in fish population.

13 This also demonstrates that increase in
14 numbers. West Slope Cutthroat Trout is a
15 sensitive species. And German Gulch is one of our
16 reference streams, so you can see that line there
17 at the top. High numbers of West Slope Cutthroat
18 trout that year from 2003 to 2011. However, these
19 other -- the Blacktail even starts a little bit
20 lower, and numbers climb that background.

21 Then SS-04 is after the confluence of
22 the Blacktail and the Metro Storm Drain coming
23 together to form Silver Bow Creek.

24 SS-07, the points below, or that
25 sampling point below Butte SS-17 at Opportunity

1 all starts with none, up until about 2005, and
2 then we start to see those numbers of West Slope
3 Cutthroat Trout, and now all three of those
4 stations are between 30 and 40 West Slope
5 Cutthroat Trout per mile.

6 This has been enough increase that Fish,
7 Wildlife and Parks have implemented a catch and
8 release for West Slope Cutthroat Trout throughout
9 the Silver Bow Creek segment, and there is a limit
10 on Brook Trout for 20 per day per section.

11 So where are we and what are our
12 options? We know we have existing uses. We have
13 recreation use, agriculture, industry. We know
14 that we have fishing use. What we don't know is
15 what the attainability of propagation is. Would
16 it be fully supported, would it be marginal? We
17 know right now that there is no propagation of
18 those salmonid species on Silver Bow, none that
19 we've seen evidence of. And will it support
20 drinking water use? Is that an attainable use?

21 So those are questions that we're asking
22 right now. We haven't come to any decisions yet.
23 We're looking at the data, trying to determine
24 which indicators to use for aquatic life.

25 So our options at this point: Leave "I"

1 classification. We know that we have existing
2 uses, so that's probably not a very good or
3 responsible option. Consider "C" class if we
4 determine that drinking water is not an attainable
5 use; consider "B" class if it is; and then
6 determine whether or not one or two under "C" or
7 "B" is more appropriate.

8 Three, we know it is not a warm water
9 fish. We have trout, so we know it's going to be
10 a one or a two. It is not a non-salmonid
11 population. And we also want to remember that
12 whatever decision we do come up with, water body
13 use classes are reviewed with each triennial
14 review. We can come back and revisit the
15 decision, and update if we need to.

16 But keep in mind it is much easier to
17 add uses than it is to remove them, so we don't
18 want to go in and say, "Oh, yes, we're going to
19 designate all uses." We want to be very
20 reasonable about it. We want to use science. We
21 want to decide on the best classification for this
22 stream.

23 Then timeline. Right now we're really
24 just waiting for that USGS data. We hope to have
25 that in the next couple of months, and we would

1 like to come back to you guys in that second
2 meeting probably of 2013 with an actual decision
3 and intent to move to the Board of Environmental
4 Review for rulemaking. So that's our hope.

5 Planning. So those two underlined
6 sections are kind of where we are in this process.
7 Right now we've consolidated all the raw data.
8 Rod has done a lot of work bringing that together.
9 And public outreach is huge. We've had internal
10 review, the perceived options. We looked at that.

11 Public meetings. We did a public
12 meeting in Butte last week, had good attendance,
13 really good response from the community that was
14 there.

15 Preparation of scientific review. We're
16 working on that right now. We need to wait for
17 that final data to come in from the USGS to
18 complete that. Then we'll probably have a
19 recommendation to bring to you guys, and hopefully
20 that will occur in the spring.

21 Do you have any questions? Did I miss
22 anything? Did I leave anything out?

23 CHAIRMAN SELCH: No.

24 MS. WILLIAMS: What are the other two
25 "I" classified water bodies?

1 MS. STEINMETZ: One is Muddy Creek.
2 That flows into the Sun, right? And then the
3 other one is the Prickley Pear in East Helena. So
4 those are the two other "I" classes. And we're
5 reviewing both of those, too. We're just not
6 quite as far as we are with Silver Bow, and
7 they're not going to be as complicated as Silver
8 Bow is.

9 For instance, Muddy Creek, there is a
10 drinking water intake, and we know that there are
11 trout. So it is going to be a lot easier with
12 those existing uses to determine the use class.

13 Silver Bow is a lot more complicated,
14 and there is so much interest from both sides,
15 People saying, "Why don't you just designate it
16 B1, most stringent," and then others saying, "It
17 is not ready for that. There will be too much
18 cost associated with a more stringent standard.
19 We need to look at the lower use classes." So
20 we're seeing both of those, and we're just waiting
21 for science to weigh what's going to be the best
22 option.

23 CHAIRMAN SELCH: Does anyone on the
24 phone have questions for Amy?

25 MS. BUCKLIN-SANCHEZ: No, thank you.

1 MR. SALLEY: No, I'm good.

2 MS. WILLIAMS: So didn't we just move
3 the sediment from the Clark Fork up to Opportunity
4 or -- is that right? The contaminated sediment
5 from the Milltown site. Right?

6 CHAIRMAN SELCH: Yes.

7 MS. WILLIAMS: Is that going to have any
8 effect?

9 CHAIRMAN SELCH: I'm not an expert on
10 that whole thing, but I know they've obviously
11 lined it, and they've capped it, and putting on
12 some -- I know there has been a lot of stuff in
13 the news about it, but I know there has been
14 issues about people saying, "Why are you bringing
15 it upstream?," but I'm assuming they know what
16 they're doing as far as it is not going to get
17 back into the drainage. But that's all I can say
18 on it, I guess. I think the one comment was "put
19 all the rats in one pile."

20 MS. WILLIAMS: Fill the pit. Good news.

21 MS. STEINMETZ: It's a step in the right
22 direction. It's a celebration of all of the hard
23 work that has happened in the area.

24 CHAIRMAN SELCH: Thanks, Amy. With
25 that, we will move on to our second briefing item.

1 And Kathleen, you had requested that we have a
2 discussion of the legal action on the Clean Water
3 Act guidance, and Eric is here to provide that to
4 us.

5 MR. URBAN: Mr. Selch, members of the
6 Council. My name is Eric Urban, and I'm the
7 Manager of the Quality Water Standards Section for
8 the Department.

9 I had originally planned to brief you on
10 this item as you requested, but as it turns out,
11 we have a much more qualified individual in the
12 Department we'll give a more formal introduction
13 to. David Dennis is our Legal Counsel for the
14 water program. He's relatively new to the
15 program, but is providing a lot of great insight
16 and has extensive knowledge on the subject that
17 you requested here, the EPA guidance, and the
18 Court findings with that. So with that, I will
19 turn it over to David.

20 MR. DENNIS: So we're back to
21 permitting, and the case that you requested
22 information on is a case that deals with the
23 relationship between the EPA and the states as it
24 relates to the NPDES permitting program.

25 And I don't want to give you information

1 that you may already know, but EPA is charged with
2 essentially doing permitting nationwide under the
3 Clean Water Act unless they delegate that
4 authority to the states under an approved state
5 program, and they have done that in I think all
6 but maybe five or six states around the country.
7 Montana is one of those. But for the most part,
8 the permitting programs are run by the individual
9 40 some odd states where they've delegated their
10 authority under the Clean Water Act to do
11 permitting.

12 The case that you requested some
13 information on is the National Mining Association
14 versus EPA. It was actually four cases that were
15 consolidated into one. And it relates to guidance
16 that was issued by EPA with respect to Region 3
17 and Region 4, which are heavy, sort of mountain
18 top mining areas, and the guidance had to do with
19 the parameter known as electrical conductivity.

20 And in the guidance that was issued, in
21 the guidance document that was issued by EPA, EPA
22 essentially stated that they presumed, or there
23 was a presumption that a discharge, any discharge,
24 would cause an exceedence of the electrical
25 conductivity standards for the individual states;

1 and given that there was that presumption, they
2 highly recommended that a reasonable potential
3 analysis for electrical conductivity be done
4 before any draft permits were issued.

5 That was challenged by four different
6 associations, mining associations, and essentially
7 what they claimed was that the EPA was
8 over-stepping its bounds because it had delegated
9 authority for permitting to the states, and that's
10 really the states' realm then to determine whether
11 or not a reasonable potential analysis is
12 necessary, and whether or not any discharge, any
13 particular discharge, is going to cause an
14 exceedence of a particular water quality standard
15 within the state, or within a particular stream
16 within the state.

17 The District Court agreed, stated that
18 the EPA had, by stating that there is a
19 presumption that the electrical conductivity
20 standard is going to be exceeded, that the EPA had
21 over-stepped its bounds in its guidance document
22 by essentially conducting rulemaking -- which they
23 can do, but not through guidance -- by conducting
24 rulemaking to be applied by the states without
25 going through the rulemaking process.

1 In essence they'd interfered with the
2 states' ability to monitor and regulate their own
3 permit process without any interference from EPA,
4 other than what the EPA's role is, which is to
5 review draft permits after they have been issued
6 by the state, and make whatever objections they
7 have to those draft permits.

8 So it is really an issue of what is the
9 relationship between the states' regulatory
10 program, and permit program, and the EPA, and how
11 far can they go as far as telling the states what
12 to do in the guidance document. And that's really
13 what the case is about.

14 I think that there was a statement on
15 the front of the case that it was related to --
16 when I printed it -- was related to -- I think the
17 title of an article that was written by somebody
18 with respect to the case, and it said something
19 like, "Federal District Court tells EPA 'No Means
20 No,'" for the second time, and I think that kind
21 of grabbed a lot of attention, and made it sound
22 like the District Court in this case was
23 particularly annoyed at EPA for what they had
24 done.

25 When you actually read through the case,

1 you see that that isn't quite accurate. The Court
2 at the end of the case said, "Look. We all
3 understand that it is important, especially in
4 these mountain top mining areas, that we protect
5 the environment, and also protect the interests of
6 industry, and it is the primary role there of the
7 states to do the permitting; and even though EPA
8 may be concerned about what's happening in those
9 areas, if they want to issue those sorts of
10 restrictions or mandates, they have to do that
11 through their rulemaking process."

12 And that's really what it comes down to.
13 So any questions?

14 MS. WILLIAMS: I must have requested
15 that awhile ago because I thought -- Well, that
16 was helpful, and I was brilliant to request that.
17 But could you also address the limbo that we're in
18 with what is considered State waters under the
19 Clean Water Act? Are we still in limbo as to what
20 is considered Waters of the US?

21 MR. DENNIS: No, I don't think we are.
22 The only place I can think of where we may be in
23 limbo is with respect to wetlands, in the Rapanos
24 decision and Swank decision that was issued a
25 dozen years ago.

1 There is some controversy. And
2 wetlands, for lack of a better term, it is kind of
3 a swampy arena, because wetlands can be dry,
4 wetlands can be wet, just on the ground level, or
5 they can contain water. So it has created a lot
6 of difficulty in really defining and determining,
7 "Gee. Is that a Water of the US that needs to be
8 regulated?"

9 And on the Federal level, it has created
10 a fair amount of uncertainty, or some uncertainty,
11 simply because the Supreme Court is struggling so
12 much with how to define when Waters of the US end,
13 or navigable waters, and where the wetlands start,
14 and where the two are the same.

15 And in Rapanos, the Court issued a
16 decision that really didn't help us much in
17 determining what would be considered wetlands. It
18 did give some, I guess, boundary to what would be
19 considered wetlands, because four of the nine
20 Justices agreed on what the standard essentially
21 should be in that case.

22 But again, even the standard as they
23 discussed it wasn't terribly clear. What they
24 said was there has to be a surface water
25 connection between the wetland and the water body;

1 typically it is a stream.

2 And again, there can be a question as to
3 what is the surface water connection. Does that
4 mean that if it is wet on top of the surface in
5 the wetland, is that -- and it is right next to
6 the water, what is considered the Water of the US
7 -- and again, it is primarily going to be streams
8 -- is that considered a continuous surface water
9 connection?

10 So I can see still some ambiguity there,
11 but definitely where there is a break between the
12 wetland area and the Water of the US, the wetland
13 area is not going to be considered a Water of the
14 US or navigable water. Now, sorry. I didn't mean
15 to -- go ahead.

16 MR. WENDLAND: I think that goes back to
17 -- So they have taken navigable out of the Waters
18 of US? Is that what you're saying?

19 MR. DENNIS: No. Navigable waters and
20 Waters of the US are the same thing. It is just
21 that waters of the -- "navigable waters" wasn't a
22 very good description of exactly what it was that
23 they were regulating, because a lot of these areas
24 aren't actually navigable. So they use in the
25 Federal regs navigable waters and Waters of the US

1 sort of interchangeably.

2 So a wetland is not going to be a Water
3 of the US if there is some intervening area that
4 isolates the wetland from what is considered the
5 Water of the US.

6 MS. WILLIAMS: Doesn't it apply to
7 intermittent streams, too? Isn't it a little bit
8 beyond wetlands that there is some confusion?

9 The bottom line I was interested in is
10 whether those two cases changed any of the
11 implementation here in Montana as to where we were
12 requiring discharge permits, especially whether it
13 be -- I don't know if we discharge -- or
14 intermittent streams, whether there was any
15 implication here.

16 MR. DENNIS: No. And really in the
17 Rapanos decision, there is no implication for
18 intermittent or ephemeral streams.

19 On the state side, the situation is a
20 little different, and it is actually even a little
21 bit more confusing with respect to wetlands,
22 because in probably most of the states, waters of
23 the state are not only considered surface waters,
24 but groundwater is included. Waters of the United
25 States don't include groundwater.

1 So you have areas in the state where you
2 have groundwater coming up and creating a wetland
3 area, or supporting vegetation that's generally
4 associated with a wetland area -- which is
5 typically how wetlands are defined by the type of
6 vegetation and the type of soil that they have.

7 So the question even becomes a little
8 bit more complicated within the state and in the
9 state of Montana because waters of the state are
10 groundwater and are surface water.

11 But with respect to whether or not
12 gullies, and ephemeral streams, and intermittent
13 streams, and even dry creek beds are considered
14 when determining whether or not a discharge is a
15 discharge to a water of the state, the Rapanos
16 decision and the Swank decision don't affect that,
17 and there has been no change within the state as
18 to how we view those types of discharges to the
19 those types of areas.

20 There may be some question and maybe
21 even a little bit more ambiguity with respect to
22 wetlands when it comes to a state. The position
23 that we've taken here is that if there is surface
24 water, then it is a water of the state. If there
25 is not surface water, then it isn't, recognizing

1 that at times there are going to be areas where
2 there is surface water at some times of the year
3 and not surface water other times of the year.
4 But that only applies to isolated wetland type
5 areas, not stream beds or ephemeral streams.

6 MS. WILLIAMS: Okay. I don't want to
7 belabor it.

8 MR. WENDLAND: I don't blame you for
9 wanting those answers, because it's the same
10 thing. Then stormwater runoff is also waters of
11 the state. The counties deal with their ditches,
12 there's water running down there, and it could be
13 water of the state.

14 MR. DENNIS: Well, stormwater would be
15 considered a discharge. At the time it enters a
16 water of the state, then it certainly becomes a
17 water of the state.

18 MS. WILLIAMS: For isolated wetlands,
19 the Fed's authority has been reduced, but the
20 state is maintaining --

21 MR. DENNIS: Yes.

22 MS. WILLIAMS: So there has been a
23 relative change, but the state is maintaining the
24 same programs that it had before Rapanos and
25 Swank. Okay. Thanks.

1 MR. DENNIS: If you have any questions,
2 my office is right there, so you can stop by.

3 CHAIRMAN SELCH: That brings us to the
4 public comment period, which we don't have any
5 members of the public, but we kind of do because
6 we have Bob here, who is kind of a public member,
7 but not anymore. He just wanted to say a few
8 words to the council.

9 MR. BUKANTIS: Well, for those of you
10 that are on the phone, and I haven't had a chance
11 to talk with yet, this is Bob Bukantis, and I'm
12 back working part-time for DEQ for at least few
13 months. And when I came in a month or two ago to
14 talk with Mark Bostrom, my former and now again
15 current boss, I kind of got a very pleasant
16 surprise.

17 Amy popped in and said, "Oh, good.
18 You're here. I have something for you," and she
19 handed me a very nice, very touching, very much
20 appreciated plaque that has a -- what's the word,
21 I'm looking for, Kathleen -- resolution on there
22 that the Council passed commending me for my work,
23 and the time and energy I've spent working with
24 you on water quality issues.

25 And I really appreciate that. Thank you

1 very much. I very much enjoyed working with this
2 council over the years. Keith, I'm sure I would
3 have enjoyed working with you had you been here.
4 I don't want to leave you out. But just wanted to
5 say thank you to the council for that. That was a
6 very kind gesture, and it will be a nice memento.
7 So thank you.

8 CHAIRMAN SELCH: Thanks, Bob. So that
9 brings us to our agenda items for the next
10 meeting, which we decided would be on January
11 11th. Does anyone have any items that they can
12 think of that they wanted to bring up? Or Amy, do
13 we have anything coming up?

14 MS. STEINMETZ: At that meeting we will
15 set the new calendar for the year. That will be
16 one agenda item. Also at the first meeting of the
17 year, we will determine whether the Chairperson
18 remains the same, or if there is interest from
19 someone else, so we'll do that at that meeting.
20 And those are actually the only agenda items that
21 I'm aware of for that meeting. We don't have
22 anything --

23 Nutrients will actually be later in the
24 year. You guys don't have anything coming up in
25 January, do you?

1 MR. REID: No. Updating CAFO.

2 MS. STEINMETZ: Update on CAFO briefing
3 item. That would be in January. So those are the
4 only other things, but I did want to mention that
5 this is going to be Stephanie's last WPCAC
6 meeting. She's taken another job with the Montana
7 Historical Society, so a little move for her, but
8 we'll miss her.

9 MS. WILLIAMS: This is your last one,
10 Stephanie?

11 MS. CRIDER: This one.

12 MS. WILLIAMS: I don't know if the group
13 would be interested, but obviously we'll have a
14 sense of what some of the legislative proposals
15 are going to be -- we already do -- but at that
16 point a lot of what legislative requests would
17 have been made. And things are still a little bit
18 quiet over there. And it is like last time.

19 So I don't know if John or others might
20 come and give the group a sense of what some of
21 the issues might be, if you guys are interested.
22 I'm just throwing it out.

23 MR. WENDLAND: Yes.

24 MR. SMITH: Yes.

25 CHAIRMAN SELCH: I'll backtrack and just

1 say that if anyone is interested in becoming the
2 Chair, I'm not going pull a Dude and wait until
3 the last minute, and then wish I had recruited
4 someone. I'm more than willing to keep going, but
5 if anyone is interested, make sure you let someone
6 know so that's they can --

7 MS. WILLIAMS: Have we heard from Roger
8 recently?

9 CHAIRMAN SELCH: We haven't, and we were
10 talking about that. I'm sure with the new
11 appointees we'll deal with that in the New Year
12 when the new Governor is in office. Anything
13 else?

14 (No response)

15 CHAIRMAN SELCH: With that, I think
16 we're adjourned.

17 (The proceedings were concluded

18 at 11:42 a.m.)

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C E R T I F I C A T E

STATE OF MONTANA)

: SS.

COUNTY OF LEWIS & CLARK)

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

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing - 65 - pages contain a true
record of the proceedings to the best of my
ability.

IN WITNESS WHEREOF, I have hereunto set my
hand and affixed my notarial seal
this _____ day of _____, 2012.

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

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