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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

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BOARD MEETING )  
APRIL 17, 2020 )

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TRANSCRIPT OF PROCEEDINGS VIA VIDEO CONFERENCE

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April 17, 2020  
9:00 a.m.

BEFORE CHAIR CHRIS DEVENY,  
BOARD MEMBERS JOHN DeARMENT, JEREMIAH LYNCH,  
CHRIS TWEETEN, DEXTER BUSBY,  
and DAVID LEHNHERR  
(All by Video)

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

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

3                           \* \* \* \* \*

4           CHAIR DEVENY: Let's go ahead and get  
5 started. I'd like to call to order this meeting  
6 of the Montana Board of Environmental Review. For  
7 the record, we are holding this meeting using Zoom  
8 remote technology due to the COVID-19 pandemic  
9 stay at home order from the Governor. We've done  
10 our best to ensure access and opportunity for all  
11 the parties and the public. I'd just ask for  
12 everybody's patience, and we'll continue on.

13           Before we take roll, I'd like to welcome  
14 our newest Board member, former US Magistrate  
15 Judge Jerry Lynch of Missoula. So welcome, Jerry.

16           BOARD MEMBER LYNCH: Thank you.

17           CHAIR DEVENY: And with that, we'll go  
18 ahead, and Lindsay, we'll have roll call, please.

19           MS. FORD: Good morning. Chris Deveny.

20           CHAIR DEVENY: Here.

21           MS. FORD: David Lehnherr.

22           BOARD MEMBER LEHNHERR: Here.

23           MS. FORD: Dexter Busby.

24           BOARD MEMBER BUSBY: I'm here.

25           MS. FORD: John DeArment.

1 BOARD MEMBER DEARMENT: Here.

2 MS. FORD: Chris Tweeten.

3 BOARD MEMBER TWEETEN: Here.

4 CHAIR DEVENY: Jerry Lynch.

5 BOARD MEMBER LYNCH: Here.

6 MS. FORD: Hillary Hanson.

7 (No response)

8 MS. FORD: Hillary is not present. We  
9 have six Board members present. We do have a  
10 quorum to continue.

11 CHAIR DEVENY: Great. Thank you  
12 everybody for making it today. I'd like to remind  
13 everybody that if they're not participating in the  
14 meeting, if you could please be sure to mute so  
15 that we're not getting a lot of background noise.  
16 And we are having this meeting recorded by our  
17 Court Reporter Laurie Crutcher, and we need to  
18 give her the courtesy of being quiet and speaking  
19 one at a time.

20 I'm going to try to ask, to see if this  
21 will work, when I ask for Board members to speak,  
22 or when they want to speak, if you could just wave  
23 your hand, and then I can acknowledge you, and  
24 that way we don't a lot of people speaking at  
25 once. So we're going to try that.

1           And then for the public comment period,  
2 we'll probably do that a little bit differently,  
3 but for Board members, that would be really  
4 helpful for me. I want to make sure that  
5 everybody has an opportunity to speak.

6           So we'll continue on with -- Let's do  
7 some introductions now, and just for ease of  
8 order, let's start with our Board staff. Sarah.

9           MS. CLERGET: Sarah Clerget, Board  
10 attorney.

11          CHAIR DEVENY: Then let's go to DEQ  
12 support and staff members.

13          MR. MATHIEUS: Good morning. George  
14 Mathieus, Deputy Director, DEQ, Board liaison.

15          CHAIR DEVENY: It looks like Lindsay  
16 stepped out. So Lindsay Ford is DEQ. There she  
17 is.

18          MS. FORD: Lindsay Ford, Board  
19 secretary.

20          CHAIR DEVENY: So those would normally  
21 be those of us that sit around the front table.  
22 Now let's go on to the rest of the DEQ staff that  
23 may be in attendance today, so we get a record of  
24 that.

25          MS. COLAMARIA: This is Angie Colamaria,

1 Chief Counsel, DEQ.

2 MS. SCHERER: Sandy Scherer, DEQ.

3 MR. DAVIS: Tim Davis, DEQ.

4 MS. BOWERS: Kirsten Bowers, DEQ  
5 attorney.

6 DR. SUPLEE: Mike Suplee, DEQ Water  
7 Quality Standards and Modeling.

8 MS. DeVANEY: Rainie DeVaney, MPDES  
9 Program, DEQ.

10 MR. VanOORT: Martin VanOort, DEQ Coal  
11 Section.

12 MS. WEAVER: Christine Weaver, MPDES  
13 permit writer.

14 MS. McLAUGHLIN: Joanna McLaughlin,  
15 MPDES permit writer.

16 MR. CRONIN: Chris Cronin.

17 MS. KELLY: Mila Kelly, Water Quality  
18 Standards and Modeling.

19 MR. KENNING: Jon Kenning, Water  
20 Protection Bureau.

21 MR. LUCAS: Mark Lucas, DEQ staff  
22 attorney.

23 MR. MOSER: Kurt Moser, DEQ attorney.

24 MS. CHRISTOPHERSON: Sarah  
25 Christopherson, DEQ attorney.

1 MR. BARTON: Daryl Barton, DEQ Water  
2 Quality Bureau.

3 MR. DORRINGTON: Matt Dorrington, DEQ  
4 Coal Section.

5 MR. CRONIN: Chris Cronin, Opencut  
6 Mining Section.

7 MS. SULLIVAN: Lauren Sullivan, Water  
8 Quality Standards and Modeling.

9 MS. STEFFENS: Galen Steffens, Water  
10 Quality Planning Bureau.

11 (Maya Rao present

12 but without microphone)

13 CHAIR DEVENY: It sounds like we may  
14 have gotten all the DEQ folks. If we could go  
15 ahead then to members of the public or parties who  
16 may have joined us, just for a check-in of  
17 introductions.

18 MS. FORD: Chris, before we go there,  
19 the folks that called in, I don't know if they're  
20 able to unmute themselves, so I will have to go in  
21 and manually unmute each caller because they don't  
22 have a way to unmute by just calling in. So I  
23 will go right now and unmute all of the people who  
24 have dialed in, and then if people can use -- if  
25 you called in, if you dialed in just by the phone,

1 if you can please use the chat -- Oh, no, you<sup>7</sup>  
2 can't do that. Never mind.

3 So I'm going to have to leave them all  
4 unmuted, because if they want to speak up, I won't  
5 know that if they're muted.

6 CHAIR DEVENY: Let's start with those  
7 that are on the Zoom video, and then we'll go to  
8 the ones that have called in.

9 MR. HERNANDEZ: Shiloh Hernandez, with  
10 the Western Environmental Law Center.

11 MR. MARTIN: John Martin, representing  
12 Westmoreland Rosebud Mining, and the International  
13 Union of Operating Engineers Local 400.

14 MS. CHRISTENSEN: Amy Christensen, I'm  
15 an attorney in Helena.

16 MS. TRANK: Peggy Trank, Treasure State  
17 Resources Association.

18 MR. OLSON: Alan Olson, Montana  
19 Petroleum Association.

20 MS. SOLEM: Aleisha Solem, Agency Legal  
21 Services.

22 MR. LaCASSE: Shane LaCasse, CHS.

23 MS. CANARIOS: Caroline Canarios,  
24 Northern Plains Resource Council.

25 MS. KERR-CARPENTER: Emma

1 Kerr-Carpenter, Northern Plains Resource Council  
2 -- (inaudible) --

3 MR. FINK: George Fink, CHS, Laurel.

4 CHAIR DEVENY: Are there other members  
5 on Zoom that would check in, or other people on  
6 Zoom that would check in from the public?

7 (No response)

8 CHAIR DEVENY: Let's go then, Lindsay,  
9 to those that have called in by the phone, and  
10 let's have a quick check-in by those. I guess  
11 you're just going to have to do a --

12 (Inaudible)

13 CHAIR DEVENY: Take it one at a time.

14 MS. MARQUIS: Hi. Good morning, this is  
15 Vicki Marquis with Holland and Hart, I'm here  
16 today representing the CHS Refinery.

17 MS. BORDALON: This is Sarah Bordalon  
18 with Holland and Hart. I'm representing  
19 Westmoreland and the Union.

20 MR. YEMINGTON: Sam Yemington, Holland  
21 and Hart, representing Westmoreland and the Union.

22 MR. CHEREN: Bobby Cheren with from  
23 Baker Hostetler.

24 (Inaudible)

25 CHAIR DEVENY: Could the last speaker

1 please --

2 UNKNOWN SPEAKER: Hello. Are you there?

3 CHAIR DEVENY: Yes.

4 UNKNOWN SPEAKER: I can't talk right  
5 now.

6 MS. FORD: I will go through each phone  
7 number and call people by the phone number that's  
8 listed, and have them present themselves. Do you  
9 want me to do that?

10 CHAIR DEVENY: This seems to be taking a  
11 lot of time. Is this something that we need to do  
12 now, or could it be done later?

13 MS. FORD: I mean it's up to you if you  
14 want them to mute themselves.

15 CHAIR DEVENY: Sarah, what's your  
16 thought on this?

17 MS. CLERGET: I think we should probably  
18 try to get a record of everybody who's there, but  
19 if they're not speaking up, then it's sort of up  
20 to them.

21 CHAIR DEVENY: Lindsay, do you have an  
22 idea of the number of people on the call?

23 MS. FORD: We have over fifty  
24 participants right now.

25 CHAIR DEVENY: That could take a long

1 time.

2 MS. FORD: I'm going to read the last  
3 four digits of your phone number. If that's you,  
4 please introduce yourself. 5086.

5 MR. HAYES: That's Ed Hayes with DEQ.

6 MS. FORD: 1517.

7 BOARD MEMBER BUSBY: This is Dexter.

8 MS. FORD: 6648.

9 MR. CHEREN: Bobby Cheren, Baker  
10 Hostetler.

11 MS. FORD: 1105.

12 MR. YEMINGTON: Sam Yemington, Holland  
13 and Hart.

14 MS. FORD: 5818.

15 MS. MARQUIS: Vicki Marquis from Holland  
16 and Hart.

17 MS. FORD: 5142.

18 MR. BARNES: Cory Barnes, Baker

19 Hostetler.

20 MS. FORD: 6648.

21 MR. CHEREN: This is Bobby again.

22 MS. FORD: Sorry. All the numbers just  
23 rearranged themselves on me. 6875.

24 MS. BORDALON: That's Sarah Bordalon  
25 from Holland and Hart.

1 MS. FORD: I think we got everyone. If  
2 there's anyone that I missed, please speak up at  
3 this time.

4 MS. CLERGET: I'm getting a lot of  
5 feedback from the phone lines, so my suggestion  
6 would be maybe to mute all of the phone lines  
7 except Dexter until we get to public comment.

8 CHAIR DEVENY: I agree with that. Go  
9 ahead, Lindsay, if you could mute everybody except  
10 for Dexter for now.

11 MS. FORD: Everyone is muted except for  
12 Dexter.

13 CHAIR DEVENY: Okay. Great.

14 MS. FORD: The feedback is coming from  
15 Dexter.

16 CHAIR DEVENY: Let's move on. Our next  
17 item is to review the minutes of our last two  
18 meetings. We have the January 24th meeting  
19 minutes which all you Board members should have  
20 seen. And does anybody have any additions or  
21 corrections to those January 24th minutes?

22 (No response)

23 CHAIR DEVENY: Hearing none, is there a  
24 motion to approve those minutes?

25 BOARD MEMBER LEHNHERR: This is David.

1 I move we approve those minutes.

2 CHAIR DEVENY: I'll second that. Is  
3 there any discussion?

4 (No response)

5 CHAIR DEVENY: Hearing no discussion, I  
6 guess we have to open up for public comment. Is  
7 there any public comment on the January 24th  
8 minutes?

9 (No response)

10 CHAIR DEVENY: Hearing none, all those  
11 in favor of approving the January 24th minutes,  
12 please signify by saying aye.

13 (Response)

14 CHAIR DEVENY: Any opposed, please  
15 signify by saying nay.

16 (No response)

17 CHAIR DEVENY: The minutes are approved.  
18 We also have the meeting minutes from February 7th  
19 that need to be reviewed. Are there any additions  
20 or corrections to those minutes?

21 (No response)

22 CHAIR DEVENY: I would move that the  
23 minutes of February 7th be approved.

24 BOARD MEMBER DEARMENT: This is John  
25 DeArment. I'll second that.

1 CHAIR DEVENY: It's been moved and  
2 seconded. Is there any public comment?

3 (No response)

4 CHAIR DEVENY: Hearing none, all those  
5 in favor of approving the February 7th minutes,  
6 please signify by saying aye.

7 (Response)

8 CHAIR DEVENY: Any opposed?

9 (No response)

10 CHAIR DEVENY: Hearing none, those  
11 minutes are approved. All right. Lindsay, do you  
12 know where that background noise is coming from?

13 MS. CLERGET: Dexter, are you on a  
14 speaker phone? That might be the problem.

15 BOARD MEMBER BUSBY: Not now. I had it  
16 earlier.

17 CHAIR DEVENY: Let's proceed, and our  
18 next is going to the briefing items, and with  
19 Sarah giving us an update on contested cases.

20 MS. CLERGET: Okay. So we're working on  
21 Agenda Item II(A)(1)(a). And you guys might have  
22 noticed these are a little longer. Judge Lynch, I  
23 wanted to give him a little bit of background  
24 because he hadn't been here for those, so that's  
25 why there is a little bit more information

1 included with some of these than you're probably  
2 used to.

3 So (1) (a) is Copper Ridge and  
4 Reflections. On February -- The big update to  
5 that is Copper Ridge and Reflections made a motion  
6 to sever the two cases in February, and I ordered  
7 that the cases proceed as combined. I denied that  
8 motion. And they're combined only for procedural  
9 purposes. Then they have a scheduling order.  
10 They're proceeding with that. Discovery closes at  
11 the end of April.

12 And an oral update from what's in your  
13 agenda, they have since filed motions in limine  
14 which are not yet fully briefed, so those are  
15 going to be pending as well.

16 The next one Item (b), Signal Peak  
17 Energy, this is -- we call it Signal Peak AO, or  
18 the penalty order.

19 On March 26th, the parties filed  
20 separate status reports both requesting extensions  
21 of the stay that's been in place for settlement  
22 discussions, but they requested different periods.  
23 So on April 1st I ordered that the stay continue;  
24 they either file a stipulated dismissal or a  
25 proposed litigation schedule by April 30th. So

1 they have to the end of the month essentially.

2 (2) is non-enforcement cases, (2) (a).  
3 Alpine Pacific Utilities, that has been stayed,  
4 but your agenda says that the parties are expected  
5 to file a proposed settlement. They have since  
6 done that. This is just an oral update from your  
7 packet.

8 They filed that on the 13th. They  
9 indicated that settlement discussions are ongoing,  
10 but they asked for a litigation schedule, which I  
11 then entered a scheduling order I think yesterday,  
12 or it may go out today, that set the proposed  
13 schedule with a hearing in late January of 2021.

14 (b) is the City of Great Falls. I  
15 issued a scheduling order back in October. They  
16 amended that in March. Calumet Refinery has made  
17 a motion to file an amicus brief, which has been  
18 fully briefed since March 2nd, so that is waiting  
19 for my decision.

20 (c) is Absaloka Mine. When I assumed  
21 jurisdiction of this, it had been stayed pending a  
22 Supreme Court decision which has since been  
23 issued, and it was issued in September.

24 The parties on November 22nd submitted a  
25 joint proposed schedule, which then I issued a

1 scheduling order in late November. The deadlines  
2 are for dispositive motions which will be fully  
3 briefed in December, so that one is proceeding.

4 Montanore Minerals. We had a contested  
5 case that made it all the way through the  
6 contested case process, as you may remember. Then  
7 in a separate case in District Court, that was  
8 ostensibly different, Judge Seeley issued an order  
9 that vacated the entire permit. So there is some  
10 question about how that has affected our case, the  
11 contested case.

12 And so they've appealed the District  
13 Court order to the Supreme Court, and the parties  
14 have cross appealed that. Originally in your  
15 agenda it says that they have until April 10th. I  
16 understand that they have now filed those briefs,  
17 responsive briefs, and then there is an extension  
18 for the reply. So that is continuing in front of  
19 the Supreme Court, and then once that decision is  
20 issued, we'll figure out how it affects us.

21 (e) is Talen. On January 17th --

22 BOARD MEMBER LYNCH: Christine, may I  
23 interrupt?

24 MS. CLERGET: Yes.

25 BOARD MEMBER LYNCH: I just want to for

1 the record note that I need to recuse myself on  
2 the Montanore Minerals Corporation, as I did  
3 settlements in those cases when they were pending  
4 in Federal Court. It's not directly related to  
5 this, but I think the appearance of impropriety  
6 necessitates I recuse myself. I just want that on  
7 the record, Christine.

8 CHAIR DEVENY: Okay. Thank you, Jerry.

9 MS. CLERGET: So (e) is Talen. On  
10 January 17th, Talen filed a motion requesting a  
11 continued stay, or in the alternative a return to  
12 active litigation. Westmoreland filed a motion to  
13 vacate, which is essentially they're requesting  
14 dismissal of the case. The motions are fully  
15 briefed now, and they are awaiting my decision.

16 While they were awaiting my decision,  
17 the parties filed a joint notice of executed coal  
18 supply agreement. I asked them for additional  
19 briefing telling me how that affected the case, if  
20 at all, and the bottom line is it doesn't affect  
21 it at all. They want to proceed on their motions.  
22 So those are also awaiting a decision from me.

23 You'll notice that there is a scrum at  
24 me at this point because I'm not working a full  
25 schedule with the kids. So I'm doing the best I

1 can, but you'll notice there's a lot of stuff  
2 that's pending for me right now.

3 (f) is Spring Creek Coal. There have  
4 been motions for extensions for settlement  
5 negotiations. I granted them until May 1st they  
6 have to file a settlement agreement or a proposed  
7 scheduling order.

8 CHS, we've had a number of status  
9 conferences in this case. As you will remember,  
10 you issued a final order back in December that  
11 disposed of almost all of this case, so there's  
12 only a little bit remaining, but it depends on the  
13 rulemaking that you guys are looking at today.

14 So we have stayed it until that happens,  
15 and then once that happens, we'll figure out how  
16 to proceed. So right now, we have a scheduling  
17 conference for April 24th, which obviously will be  
18 after your action.

19 The Laurel Refinery is the same as that.  
20 They are moving together. So that update is the  
21 same.

22 (i) is Signal Peak. And this is  
23 separate from the other Signal Peak. This is the  
24 permitting case. The first is a District Court  
25 case, which Amy Christensen's going to update on

1 that, I think.

2 CHAIR DEVENY: Yes. Amy, could you go  
3 ahead.

4 MS. CHRISTENSEN: Sure. So I think  
5 Sarah has a nice summary of the background of that  
6 case. It's currently at the Montana Supreme  
7 Court. It is fully briefed at this time, it's  
8 been submitted to a panel, so they're considering  
9 it. I would hope for a decision maybe by the next  
10 Board meeting; if not, hopefully by the one after  
11 that.

12 BER filed a notice of non-participation,  
13 and that one is essentially a discovery dispute.  
14 So that one is just now pending, and we should get  
15 a decision probably within the next 30 to 60 days,  
16 I would guess.

17 CHAIR DEVENY: So we may have an update  
18 in June possibly?

19 MS. CHRISTENSEN: Yes. So is your next  
20 meeting in June?

21 CHAIR DEVENY: Yes.

22 MS. CHRISTENSEN: So I would hope by  
23 June there would be an update on that one,  
24 possibly a decision.

25 CHAIR DEVENY: Great. Thank you, Amy.

1 MS. CHRISTENSEN: You're welcome.

2 MS. CLERGET: So Part 2 of that is the  
3 contested case, and we had a telephonic oral  
4 argument on March 30th on the pending motions in  
5 limine, which was a long and involved oral  
6 argument, telephonic, which was interesting.

7 And as part of that we had a hearing  
8 scheduled in April, and everyone has agreed, given  
9 the current pandemic, that we can't do that in  
10 April, so it has been rescheduled. In your packet  
11 it says possibly, but it has since been actually  
12 reset for August. And then the decision on the  
13 motion in limine is just waiting for me to issue,  
14 but it is fully briefed and argued.

15 (j) is Moudy Pit. These are actually 14  
16 separate cases, but we have combined them for  
17 procedural purposes. Since I think your last  
18 meeting, the Bloomquist firm has entered notices  
19 of appearance for all of the remaining residents  
20 and I think -- and the homeowners association, so  
21 they're now represented by Counsel.

22 And we have a scheduling order in place  
23 pursuant to that. They filed an amended statement  
24 of issues in February, and they're proceeding.  
25 Dispositive motions will be briefed in August, so

1 that's sort of the next big thing that will be in  
2 front of us.

3 And next one 3(a) is DEQ.

4 CHAIR DEVENY: DEQ, could you give us a  
5 quick update on that. Is Kirsten going to do  
6 that?

7 MS. BOWERS: Good morning, Chair Deveny,  
8 members of the Board. For the record, this is  
9 Kirsten Bowers, DEQ attorney.

10 And as you know, the Rosebud, MEIC  
11 versus DEQ/Western Energy case was remanded to the  
12 District Court on findings of material fact on  
13 certain issues. And as your packet indicates,  
14 MEIC did file a motion for a scheduling order in  
15 that case on April 7th.

16 And then just an oral update. Since  
17 then DEQ and Western Energy Company jointly filed  
18 a status report for the Court's consideration, to  
19 update the Court on facts related to the renewal  
20 of the MPDES permit that is at issue in that case.

21 And so we also requested a stay of the  
22 case until the renewed permit issues or for six  
23 months. And MEIC has indicated that they would  
24 oppose the stay. So at this point the parties are  
25 just awaiting an order for scheduling conference.

1 CHAIR DEVENY: Thank you, Ms. Bowers.

2 MS. CLERGET: That concludes the  
3 briefing update except for, of course, the cases  
4 that are in the action items for today.

5 CHAIR DEVENY: Let's move on then to the  
6 action items, and we are going to start with DEQ's  
7 request for rulemaking on New Rule I. So George,  
8 I'll let you take the lead on this.

9 MR. MATHIEUS: Thanks, Chris. I'm  
10 pretty sure we have a power point from Dr. Mike  
11 Suplee on this.

12 DR. SUPLEE: Good morning. Madam Chair,  
13 can you hear me okay?

14 CHAIR DEVENY: Yes.

15 DR. SUPLEE: Great. Thank you.  
16 Lindsay, I don't know how you want to do this, but  
17 if you want to just roll the slides, or whatever  
18 you think is easiest I think would be best.

19 MS. FORD: Yes. Let me share my screen  
20 here, and I can go ahead and present the slides.  
21 Just let me get it set.

22 DR. SUPLEE: Great. And there may be a  
23 lot of people on the phone that are not seeing  
24 this, but I know that this is part of the Board  
25 packet. And all the slides are numbered, and I'll

1 be very careful to make sure I indicate which  
2 slide number we're on as we go through, so you can  
3 view it yourself at home by slide number. Does  
4 that sound good?

5 MS. FORD: They're all muted.

6 DR. SUPLEE: So Lindsay, I think you'll  
7 just need to kick it into some kind of slide  
8 podium view.

9 MS. FORD: I thought I did.

10 DR. SUPLEE: We're seeing the whole  
11 group of slides right now.

12 MS. FORD: Okay. Well, I'm seeing just  
13 one, so -- Did that change?

14 DR. SUPLEE: We're still seeing all of  
15 them together. I think down in the bottom right,  
16 if you push the little thing that looks like a  
17 podium --

18 MS. FORD: I am doing that, and it's  
19 showing up on my screen, so I don't know why it's  
20 not on your guys'.

21 DR. SUPLEE: There we go. Okay.

22 CHAIR DEVENY: Do you know what you did?

23 MS. FORD: No.

24 CHAIR DEVENY: So you can do it again.

25 Thanks, Lindsay.

1 DR. SUPLEE: Madam Chair, I'll take my  
2 time, not hurry, make sure everybody knows which  
3 slide we're on. So is everybody with me? We're  
4 Slide No. 1, which is the introduction cover  
5 slide.

6 And today we're going to be, the  
7 Department is going to be talking to you about  
8 natural and nonanthropogenic water quality  
9 standards rulemaking, and this will include a  
10 demonstration of nonanthropogenic arsenic levels  
11 and derivation of arsenic standards for the  
12 Yellowstone River.

13 These were prepared, this work was  
14 prepared by the Department's Water Quality  
15 Standards and Modeling Section with assistance  
16 from the Water Protection Bureau. Again, my name  
17 is Dr. Michael Suplee.

18 With that, I think, Lindsay, we're ready  
19 to go to Slide 2. Okay. So far so good. So this  
20 is an overview of what we will be looking at  
21 today. I'll cover some of the regulatory  
22 background that stands behind the rulemaking.

23 And I just want to point out at this  
24 point that DEQ has been working on this for  
25 awhile. We started this project in 2015, around

1 the same time that Senate Bill 325 and what is now  
2 75-5-222 were initiated. About the same time as  
3 that, this project was begun.

4 We've worked over many meetings with the  
5 Senate Bill 325 Work Group. We've worked with  
6 EPA. We've had numerous conversations and  
7 discussions with various stakeholders. So there  
8 has been a lot of public input and stakeholder  
9 input into this so far.

10 Now, the rule covers more than just the  
11 Yellowstone River, but most of the presentation  
12 will be about the Yellowstone River, because that  
13 will be our first case where we will actually have  
14 a nonanthropogenic standard, and I'll be going  
15 over briefly how we covered that, and then how we  
16 derived the standards, and then how those  
17 standards are going to be implemented as the rule  
18 is written.

19 Just a little quick background. Arsenic  
20 is a Class A human carcinogen, meaning that it's  
21 been well demonstrated that it's a human  
22 carcinogen, and it typically causes at low  
23 concentrations -- like the one we're talking about  
24 here in the Yellowstone River, and etc. -- to the  
25 skin, bladder, and the lungs.

1           So I think with that we can now go to  
2 Slide 3. All right. So these are the principal  
3 State statutes that this rulemaking is basically  
4 operating under, one main one, 75-5-222, and  
5 that's the statute that says that the parameters  
6 for which the standards are more stringent than  
7 the nonanthropogenic condition, the standard is  
8 the nonanthropogenic condition. That's a key one.

9           Another fairly similarly related one is  
10 75-5-306. This is the statute that says it's not  
11 necessary that wastes be treated to a purer  
12 condition than the natural condition of the  
13 receiving stream, so long as minimum treatment  
14 requirements under the chapter are met.

15           And finally, the last one is just the  
16 Board's basic rulemaking authority to formulate  
17 and adopt water quality standards, giving  
18 considerations to the economics of waste treatment  
19 and prevention. I just wanted to put those up  
20 front.

21           So with that we can go to Slide 4.  
22 This, Madam Chair and members of the Board, will  
23 be the first implementation of 75-5-222, Part 1, the  
24 nonanthropogenic water quality standards. This  
25 will be the first one that we will have brought to

1 you under that.

2 Now, at this time only nonanthropogenic  
3 standards for the Yellowstone River are included,  
4 but we crafted the rule in a manner that it will  
5 incorporate future standards which fit under the  
6 natural definition as well, so in the future, if  
7 we develop or adopt either standards under  
8 nonanthropogenic or natural conditions, they'll  
9 both be able to go under this rule.

10 Natural is a little bit different than  
11 nonanthropogenic, in that it says in the way it's  
12 defined that includes human effects on the water  
13 quality, as long as those effects don't harm the  
14 beneficial uses. Then it gets into some somewhat  
15 circular definitions, but the most important part  
16 is that both natural and nonanthropogenic can be  
17 built into this rule. At this point we're only  
18 talking about nonanthropogenic rule for the  
19 Yellowstone.

20 I think with that, we can go to Slide 5.  
21 This is just going to give you -- we're going to  
22 move now more specifically to the Yellowstone.  
23 This is the stretch of the river that we're  
24 talking about. You can see it's a big watershed.  
25 Most of you, of course, are familiar with it.

1           And we're talking about the Yellowstone  
2 National Park boundary all the way up to the  
3 confluence of the Bighorn River. That is the  
4 segment of the river that the Department studied  
5 for the purposes of this project.

6           You'll see in our map that it's broken  
7 up into some segments that start and end at some  
8 major water bodies, like Mill Creek, the Boulder  
9 River, the Stillwater River, etc. The reason that  
10 those are laid out that way will become more clear  
11 as we move into the standards themselves.

12           So I think with that we can go to Slide  
13 6. Okay. So what do the concentrations in the  
14 Yellowstone River look like relative to our  
15 standards?

16           Well, first of all, I just want to  
17 quickly point out -- and you probably are aware of  
18 this -- but all water bodies have multiple  
19 beneficial uses -- they have drinking water,  
20 aquatic life, recreation, agriculture, etc., and  
21 associated water quality standards -- and they  
22 typically have certain water quality standards  
23 that are associated with certain uses.

24           In the case of the Yellowstone River,  
25 the human health standard is ten micrograms per

1 liter, and that's actually true for all water  
2 bodies in the state at this point in time.

3 Now, the aquatic life standard for  
4 arsenic is a much higher concentration. You can  
5 see there in the slide, around 340 micrograms per  
6 liter acute, or roughly half that for chronic.

7 When you look at the graph, and look at  
8 the concentrations that we typically see in the  
9 Yellowstone -- they start out highest up in the  
10 park, Corwin Springs is very near Gardiner, and  
11 downstream to Livingston, Big Timber, down to  
12 Billings -- you'll see that the concentrations are  
13 in the range of 30 down to something below ten.

14 So the concentrations we're talking  
15 about in the Yellowstone River are not impacting  
16 aquatic life because aquatic life is much more  
17 tolerant to arsenic. What we're talking about are  
18 impacts to the human health standard.

19 So all those numbers you can see, except  
20 way down by Billings, are frequently, during the  
21 high flow season, low flow season, or even  
22 annually, typically above ten micrograms per  
23 liter.

24 I think with that, we can go to Slide 7.  
25 So where is all this arsenic coming from? The

1 main source are geothermal features in Yellowstone  
2 National Park. For example, the Boiling River --  
3 there's a picture of it there -- has  
4 concentrations as high as 560 micrograms total  
5 arsenic per liter; and compare that to ten  
6 micrograms per liter, which is the human health  
7 standard. The Gardiner River, goes into the  
8 Yellowstone near Gardiner, Montana, is at 85  
9 micrograms per liter.

10 So essentially it's been known for some  
11 time that probably nearly all of this arsenic is  
12 from the Park, and it can clearly be defined as  
13 nonanthropogenic, and easy to define that way.

14 Let's go to Slide 8. Okay. So now  
15 we're going to move into the first part of this  
16 process, which was to demonstrate what the actual  
17 nonanthropogenic arsenic levels in the river were.

18 We can go to Slide 9. So I'm just going  
19 to briefly touch on some of major steps that we  
20 went through to get to where we are in terms of  
21 this process.

22 The first part was to define the  
23 watershed. That's pretty straight forward. We  
24 worked with the major watersheds, that you can see  
25 there, that the Yellowstone River is part of. All

1 those basins drain to the Yellowstone, and these  
2 were the ones that the Department examined for the  
3 various parameters that we're going to be talking  
4 about briefly going forward. And in those zones,  
5 we were identifying different types of sources,  
6 whether they be anthropogenic or nonanthropogenic.

7 Let's go to Slide 10. Okay. Now, as  
8 things are out there in the river right now, and  
9 broken up by those segments that I kind of touched  
10 on earlier, what we see is a median, or that's  
11 something like an average, annual concentration  
12 going downstream from the upper part of the river,  
13 around 29 micrograms per liter, and you can see  
14 that it decreases as you get down towards the  
15 Clarks Fork River in the Billings area down to  
16 about ten.

17 We identified these break points along  
18 the river because they're fairly uniform within  
19 the reach of the river, and they change fairly  
20 dramatically, about 20 percent change, where each  
21 of these major tributaries came in. And so these  
22 made for natural break points in which you could  
23 define different standards or criteria for each  
24 segment.

25 Let's move to the next Slide No. 11. So

1 I don't want to bog everybody down with a bunch of  
2 math, but I just want to very briefly touch on the  
3 very basics of how this is accounted for.

4 So the first thing we needed to do was  
5 figure out the total arsenic load in the river,  
6 and that basically is comprised of loads from the  
7 Park, which is most of it; point source loads  
8 along the river, we looked at those; and  
9 groundwater loads along the river, we also looked  
10 at those; nonpoint sources and tributary loads.

11 Once you know those things, you can then  
12 tease out the nonanthropogenic load simply by  
13 subtracting the total load from the anthropogenic  
14 point source loads, the anthropogenic groundwater  
15 loads, and the anthropogenic surface water runoff.  
16 That's essentially what we did in order to get at  
17 what is the nonanthropogenic concentration in the  
18 Yellowstone River.

19 We can go to Slide 12. Another thing we  
20 looked at is the influence of river seasonal  
21 patterns. Most of you are probably aware we have  
22 a pretty sharp runoff period in Montana. It's  
23 pretty consistent in terms of its manifestation in  
24 the Yellowstone River. We usually see a graph  
25 that looks something like this, no matter where

1 you are, in the segments we're discussing.

2           And these have an effect, in that when  
3 the water flow is the highest -- as you see there  
4 in the center -- which typically occurs between  
5 around May 1st through the end of July, that's  
6 also the time period when arsenic concentrations  
7 in the Yellowstone River are at their lowest  
8 because of the high dilution effect from the flow.

9           We can go to Slide 13. So we're kind of  
10 jumping to the end of the first part of our  
11 modeling work. We relied primarily on the LOADEST  
12 model, which is a USGS model that is specifically  
13 designed to work out these sorts of calculations.

14           And what we found was that -- and this  
15 was not really a surprise -- the vast majority of  
16 the arsenic in the river starting up there at Mill  
17 Creek, near Pray, to Corwin Springs, that first  
18 line, that first segment, is almost all  
19 nonanthropogenic, it's almost all from the Park,  
20 and that's still basically true even way down near  
21 the Bighorn. A very large proportion of the  
22 river's arsenic is still nonanthropogenic.

23           So most of what we're seeing in the  
24 river is from the nonanthropogenic source, and  
25 most of that is from the Park.

1           So let's go to Slide 14. An important  
2 question as we move forward with rulemaking is:  
3 Would it be necessary to change the beneficial use  
4 description? Do we need to change it to something  
5 like a use subcategory? That's a common action  
6 that one can take when dealing with a new  
7 criteria.

8           The Yellowstone River in the sections  
9 that we've been looking at is classified as B-1,  
10 B-2, and B-3 -- depending on where you are. B-3  
11 is further downstream. And what that says, among  
12 other things, is that it has drinking water use  
13 after conventional treatment.

14           So what's conventional treatment?  
15 Conventional treatment is coagulation,  
16 sedimentation, filtration, and disinfection, and  
17 that's all defined in our rules.

18           We concluded that we wouldn't need a use  
19 change in this case. We did some sampling along  
20 the river as part of this project, and we looked  
21 at two forms of arsenic. One is called arsenite.  
22 You can see it there. It's plus three. We didn't  
23 detect any of that.

24           Everything was in the form of arsenate.  
25 This is the oxidized arsenic form that is readily

1 removed by conventional treatment. The reason  
2 that's important is because if there was a lot of  
3 arsenite in the river, you have the plus three  
4 form, you would have to oxidize that first, and  
5 then do conventional treatment, so that would  
6 essentially be beyond conventional treatment.

7 But since that wasn't the case, since  
8 everything out in the river is in a form that is  
9 easily removed by conventional treatment, and  
10 conventional treatment can remove over 90 percent  
11 of the arsenate; we found, and after discussions  
12 as well with our drinking water engineers, that  
13 they can treat the levels that we're seeing out  
14 there in the river down to less than the current  
15 MCL of ten micrograms per liter; that a beneficial  
16 use change would not be necessary, just a criteria  
17 change.

18 So I just wanted to touch on that to let  
19 you know that we did consider that, and found that  
20 it wasn't necessary to alter that.

21 We can go to Slide 15. So now we're  
22 going to identify the nonanthropogenic standards  
23 themselves for the Yellowstone River.

24 We can go to Slide 16. Okay. Now, I  
25 would point out that this was probably one of the

1 more difficult aspects of the entire project, was  
2 to identify the most appropriate way to express  
3 these standards.

4 I mean once we identified the  
5 concentration ranges, and we had our model  
6 operating, we could have, in theory we could have  
7 developed almost daily standards if we chose to,  
8 which would represent how the river changes from  
9 day-to-day. That would never have been practical  
10 to implement.

11 So we did discuss briefly the idea of a  
12 monthly standard, which was probably the fairest  
13 minimum possible in terms of practicality for  
14 implementation.

15 More realistically, we discussed annual  
16 standards, and also seasonal standards. And we  
17 bounced around, and we got some more input from  
18 stakeholders on this, and ultimately we found a  
19 way to objectively look at this situation, and  
20 pick, or at least describe what would be one of  
21 the best ways to express the standards.

22 And our line of reasoning was as  
23 follows: If we are adopting nonanthropogenic  
24 arsenic standards in a particular way, while  
25 conforming with the statutes that we've already

1 looked at, and that can demonstrably decrease  
2 cancer risk for people using the Yellowstone River  
3 as a water supply, then that would be the best  
4 expression of the standards. So this was the  
5 objective approach we used to assess the different  
6 time units that we had to choose from, and this  
7 will become clearer as we go forward in the next  
8 slides.

9 Can we go to Slide 17. Okay. So what  
10 we did is we explored the effects on a drinking  
11 water beneficial use when the nonanthropogenic  
12 standards were expressed in different ways.

13 We looked at the two big candidates that  
14 we really have focused on, high flow and low flow  
15 seasonal standards, in other words two values, two  
16 different standards during the year for each  
17 segment; or just a single annual standard, one  
18 value for each segment throughout the year; and we  
19 asked ourselves which of these, the two seasonal  
20 or the one annual, would result in lower cancer  
21 risk to people drinking water from the Yellowstone  
22 River downstream from any permitted arsenic  
23 discharges.

24 In order for this to have meaning, you  
25 have to assume or show that arsenic in finished

1 drinking water, in a public water supply using the  
2 Yellowstone, varies with river arsenic  
3 concentrations, so we took a look at that.

4 We can go to Slide 18. What you're  
5 seeing here is a graph that shows the relationship  
6 between concentrations in the river as they vary,  
7 and their associated concentrations in finished  
8 drinking water in the Billings water supply, and  
9 what you see is that there's actually a pretty  
10 tight relationship. In other words, when  
11 concentrations in the river increase, arsenic in  
12 the drinking water increases, and also the  
13 reverse.

14 Now, I would point out that the Billings  
15 water supply is consistently meeting its maximum  
16 concentration limit of ten, so they're always  
17 below that; but below that in those concentration  
18 ranges that you see there, the levels in the  
19 drinking water do go up and down in accordance  
20 with changes in the river. So what that tells us  
21 is if you are to increase arsenic in the river, it  
22 will be ultimately reflected in the drinking  
23 water, even if ever so slightly.

24 We can move to Slide 19. Okay. This is  
25 a -- there's a fair amount going on here, but

1 there's a couple key points I want to point out.  
2 It's established by the EPA, and others who have  
3 looked at this stuff, that the human cancer risk  
4 from a carcinogen like arsenic is continuous from  
5 the origin. In other words, what does that mean?  
6 There is no safe lower concentration. It begins  
7 to cause issues right from zero, just like the  
8 graph shows there.

9           That is why, for example, the EPA health  
10 advisory, or if you look at drinking water  
11 supplies, the maximum contamination level goal --  
12 they're not usually at the goal -- but their goal  
13 for arsenic is zero. They would like to see zero  
14 in the drinking water supplies, if possible.

15           So what we did is we computed the cancer  
16 risk using standard EPA equations and risk  
17 factors, and assumptions that are already adopted  
18 in DEQ7, and then applied those to calculate what  
19 the cancer risk for any changes in the river would  
20 be.

21           So with that we can go to Slide 20. All  
22 right. There is a couple things here in the next  
23 part that we wanted to look at. So we asked  
24 ourselves, first of all, does the annual median --  
25 So if we just go with a single annual standard,

1 does that concentration ever occur during high  
2 flow?

3 Remember I mentioned earlier that during  
4 high flow, the river become much more diluted, and  
5 the arsenic concentrations drop. If we were to  
6 meet the basic intent of 75-5-222, then you would  
7 expect that, or you would intend that the  
8 concentrations of an annual median also occur even  
9 during that highly diluted period.

10 So we looked at that, and yes, it is in  
11 fact the case. So for example, in Segment 4 --  
12 that's the one down in the area of Laurel -- the  
13 annual median standard for that segment, based on  
14 the techniques we've showed you, would be 13, and  
15 the high flow maximum concentration is 13.7.

16 So that tells us that the standard is  
17 still within the nonanthropogenic condition; just  
18 barely, but it's within it. So our annual median  
19 is not a concentration beyond the nonanthropogenic  
20 conditions during high flow.

21 And that was the case for all the  
22 segments; all of them, an annual median fell  
23 within even the most diluted time period for each  
24 segment.

25 The next thing we did is we did a basic

1 mixing calculation where we looked at the river  
2 flow, plus discharges, but we manifested a  
3 standard as two seasonal standards, and then we  
4 compared those results to the river plus the  
5 discharges, if the standard were to be expressed  
6 as an annual standard; and then looked at the  
7 associated cancer risk with those two different  
8 ways of doing things.

9           So let's go to slide -- whatever the  
10 next slide is -- 21, and kind of jump to the punch  
11 line. What we have is a comparison of the cancer  
12 risk, and what we found was that a single annual  
13 standard actually caused, or results in, a lower  
14 cancer risk in the drinking water supply for all  
15 four segments from one through four.

16           So if you were to choose between the two  
17 seasonal standard and the one annual standard  
18 without any other consideration before you, the  
19 single annual standard would be the better choice,  
20 because the way it manifests in the river, it  
21 would result in slightly lower cancer risk for  
22 anybody using the drinking water downstream of any  
23 discharge.

24           In Segment 5 -- this is the segment that  
25 goes from the Clarks Fork of the Yellowstone all

1 the way down to the Bighorn -- we did not see any  
2 difference. And so really because the  
3 concentrations have dropped to the MCL out from  
4 dilution, there is really no difference between  
5 these two approaches.

6 We can go to Slide 22. If I were in  
7 your shoes, this is what would happen to me, I  
8 would be asking myself: Why does this work this  
9 way? Why would the annual standards be reduced  
10 cancer risk? I'm going to try to explain it to  
11 you as quickly as I can. Essentially the bottom  
12 line is it provides greater dilution when it  
13 matters most.

14 So what you're looking at there is a  
15 graph that shows the annual standard there on the  
16 orange line; and then the blue line shows the  
17 dilution power of the river.

18 Now, during the runoff period -- as  
19 we've kind of talked about, when there's a lot of  
20 water in the river, it has a huge dilution  
21 potential. And so it's such a high amount of  
22 volume that really it mutes almost any kind of  
23 discharge that you would put in the river, whether  
24 that discharge is above those concentrations, or  
25 below.

1           Now, in contrast, during the low flow  
2 period, you can see that the dilution strength  
3 really drops down. And if you look at the  
4 difference between the squiggly gray line -- which  
5 is the concentration in the river -- and the  
6 orange line, you can see there that there's a  
7 distance between them.

8           Lindsay, if you could hit the slide just  
9 once, it will bring up another one. Just click  
10 "enter" once. There you go. Now you'll see that  
11 -- if we can go back. Just click back one. There  
12 we go.

13           Okay. You'll see now if we did two  
14 seasonal standards, the low flow standard has a  
15 higher concentration, and provides less dilution  
16 during the time period when it matters most, which  
17 is during a low flow. So essentially the high  
18 flow standard is a slightly lower concentration  
19 overall, for this overall year around compared to  
20 the other one; and so it provides dilution, slight  
21 dilution in the river at the time that it really  
22 matters most, which is during low flow.

23           During high flow, there is such great  
24 dilution power from the river that it really  
25 doesn't matter either way. So this is why the

1 annual standard is providing this slight decrease  
2 in cancer risk compared to having two seasonal  
3 standards.

4 With that, we can go the next Slide 23.  
5 Okay. So we looked at this pattern to make sure  
6 it made sense to us, and yes, what we found was  
7 that the cancer risk from nonanthropogenic  
8 standards goes down incrementally as the standards  
9 are set to longer and longer time scales.

10 So up at the very top there, that's what  
11 a monthly standard would look like. It has a  
12 slightly higher cancer risk than if you were to do  
13 a two seasonal standard, which is in the middle;  
14 and that has a slightly higher cancer risk than  
15 the annual standard, which is at the bottom.

16 So if you look at this from the effect  
17 on the beneficial use, the best choice really is  
18 the one that's going to reduce cancer risk the  
19 most, and that turns out to be the annual  
20 expression of the standard.

21 With that we can go to Slide 24. An  
22 important point we looked at, permitted discharge  
23 volumes would have to be far, far, far in excess  
24 of the Yellowstone River's highest flows to change  
25 these conclusions. So what you're seeing would

1 not change if some of these permitted discharges  
2 increased a little bit. It will never ever come  
3 into a range that would change any of the findings  
4 or patterns that we just showed you, and we have  
5 looked at that.

6 We can go to Slide 25. So I'm getting  
7 close to the end here. So our conclusions on  
8 developing this standard was that, first,  
9 increases and decreases in the Yellowstone River's  
10 arsenic concentrations are reflected in the  
11 drinking water supplies. We looked at that, and  
12 we found that that was the case; all below the ten  
13 MCL that they need to be, but they do go up and  
14 down slightly, in accordance with the changes in  
15 the river.

16 Therefore, an annual nonanthropogenic  
17 standard is the better expression of the  
18 nonanthropogenic standard compared the two  
19 seasonal one, because it reduces very slightly  
20 cancer risk in Segments 1 through 4. In Segment 5  
21 it really doesn't matter which way we do it, and  
22 the Department is not proposing any changes in  
23 fact for Segment 5. It will just stay under DEQ7.

24 With that we can go to Slide 26. After  
25 looking at this from a couple of different points

1 of view, from the point of view of what does the  
2 statute require of us for the nonanthropogenic  
3 standards to be from the effect on the beneficial  
4 use, we've concluded that the annual standards are  
5 the best option.

6 They meet the intent of 75-5-222. Even  
7 when the river is at its most diluting of arsenic,  
8 the annual median concentrations that we're  
9 proposing are still within that nonanthropogenic  
10 condition. They're apparently more economical.

11 We've had a number of conversations with  
12 industry, and they had expressed the interest in  
13 having an annual standard. It works better for  
14 them in terms of treatment, consistency, etc. So  
15 that is apparently meeting the intent of that  
16 statute.

17 And also for 75-5-101, the annual median  
18 standards improve the quality and potability of  
19 water for public water supplies, so we feel that  
20 that's a good fit there, too. These standards as  
21 crafted are kind of a win-win for all of the major  
22 statutes that we see that they need to be  
23 operating under.

24 We can go to Slide 27. So here is the  
25 recommended standards that you see in your Board

1 packet. Segments 1 through 4 defined from,  
2 basically from point to point, tributary to  
3 tributary. The Yellowstone standards would start  
4 out at 28 -- remember currently they're ten -- and  
5 then decrease in a downstream direction with each  
6 segment.

7 Segment 5 which we studied, but are not  
8 recommending standards for, would remain under  
9 DEQ7. We see no need to change any uses on the  
10 Yellowstone River for the reasons I outlined.  
11 There would be no mixing zones. Essentially,  
12 because this is a long term average, the  
13 concentrations that would be applied and that a  
14 discharger would meet are basically the long term  
15 averages of the river.

16 The permits, a permit writer would  
17 basically set this up to be met as an average  
18 monthly limit; and also they would have a maximum  
19 daily limit, which in some cases can be almost  
20 twice the concentration shown there, so long as  
21 the average monthly limit is met at the end of the  
22 month.

23 Some of our other standards have a "no  
24 sample shall exceed" proviso associated with them;  
25 that would not apply in this case. They would use

1 the standard EPA TSD methods to calculate  
2 statistically compliance with the standards. So  
3 that would mean that if a single sample went to  
4 over 16 in Segment 3, that's not a violation.  
5 Again, it would be calculated statistically.

6 And I can discuss that more in detail  
7 later if we need to talk about that, or Jon  
8 Kenning can touch on that, too. He is with our  
9 permit program.

10 We have also -- and I don't want spend a  
11 lot of time on that -- but we spent quite a lot of  
12 time looking at mechanisms to measure the long  
13 term compliance of the river with the standard,  
14 and we have worked out a method to do that, too,  
15 so that going forward, we will be able to tell if  
16 the river beyond -- out in the ambient river, our  
17 Monitoring Section can see if the river is  
18 changing, is it going up, is it going down, is it  
19 complying with these standards or not. So we have  
20 that as well built into what will be used by our  
21 Monitoring and Assessment Section.

22 We can go to Slide 28. So again, just  
23 for folks that may be a little bit more spatially  
24 oriented, not just a table, here is again that map  
25 from the beginning of the presentation.

1           And what we're saying is that these  
2 different concentrations would apply. 28  
3 micrograms per liter would apply in that upstream  
4 segment down to Mill Creek, which is near Pray,  
5 Montana. The next one would be 22 micrograms per  
6 liter, and that would terminate at the Boulder  
7 River. The next segment would be 16 down to the  
8 Stillwater. From the Stillwater to the Clarks  
9 Fork of the Yellowstone, it would be 13.

10           And then finally the last segment we're  
11 not proposing any change, so basically from the  
12 Clarks Fork of the Yellowstone River all the way  
13 down to the border with North Dakota, essentially  
14 the standard would remain ten, as it is for the  
15 rest of the water bodies in the state.

16           Next Slide 29. Okay. That's all I  
17 have. I just wanted to remind the Board that  
18 we're here requesting initiation of rulemaking for  
19 these nonanthropogenic and natural based water  
20 quality standards. And of course, the first of  
21 those nonanthropogenic standards are for the first  
22 four segments of the Yellowstone River.

23           With that, I'd be happy, Madam Chair,  
24 and members of the Board, to answer your questions  
25 as best I can, and take it from there.

1           CHAIR DEVENY: Thank you, Dr. Suplee,  
2 for a very good presentation of this, and I'd like  
3 to open this up to questions of Dr. Suplee from  
4 Board members. Dr. Lehnherr.

5           BOARD MEMBER LEHNHERR: Thank you, Madam  
6 Chair.

7           Dr. Suplee, regarding Slide 27,  
8 Recommended Standards, the current standard is ten  
9 micrograms per liter. And even with the  
10 nonanthropogenic sources elevating the arsenic  
11 level in the river above that level, drinking  
12 water treatment techniques can keep the level in  
13 drinking water below ten micrograms per liter.

14           But I'm wondering. Let's say we go up  
15 to Segment 1, and we have a standard of 28  
16 micrograms per liter, and that can be treated  
17 below the ten micrograms per liter. But let's say  
18 there's a discharge allowed of, say worst case  
19 scenario, low flow, that's discharging, the  
20 standard would have to be below 28 micrograms per  
21 liter, but let's say it's discharging at 28  
22 micrograms per liter.

23           Does that raise the arsenic level  
24 concentration in the river to a significant  
25 degree, where it may affect the ability of water

1 treatment plants, or the ability for treatment for  
2 drinking water to reduce it below ten micrograms  
3 per liter, if that makes sense?

4 DR. SUPLEE: Yes. I think I understand  
5 your question. And it shouldn't. There are times  
6 up there in the upper segment where the river  
7 occasionally bounces up during the lowest flow  
8 periods -- not very often, not on average -- but  
9 periodically up to around 50 or 60 micrograms per  
10 liter, and that is also within the capability of  
11 water treatment plants to knock down below ten.

12 But the thing that's important to note  
13 is that when we talked about the various ways to  
14 express this standard, by having 28 during low  
15 flow -- which is an annual standard -- that's at a  
16 lower concentration than we would have proposed if  
17 we had done two seasonal standards. If we had  
18 done two seasonal standards, we should have said  
19 it should be 32 during the low flow season,  
20 because that's a typical concentration during low  
21 flow.

22 So by having it at 28, which is the long  
23 term annual average, there's that slight  
24 reduction, that slight dilution effect relative to  
25 the natural background concentrations in the

1 river, and that is what leads to -- as I was  
2 showing you -- a better expression of the  
3 standard.

4 BOARD MEMBER LEHNHERR: Thank you.

5 CHAIR DEVENY: Are there other  
6 questions? Jerry Lynch.

7 BOARD MEMBER LYNCH: Just so I'm clear,  
8 the proposed rule applies simply to this section  
9 of the Yellowstone River from the Yellowstone,  
10 Yellowstone down to Billings. Does it have an  
11 effect in making decisions by the DEQ in other  
12 water sources?

13 DR. SUPLEE: I had a little feedback,  
14 but I'm pretty sure I understood your question.  
15 I'll repeat what I thought I heard. Does this  
16 essentially just apply to the Yellowstone River,  
17 and does it affect other water bodies or other  
18 waters apply; is that basically it?

19 BOARD MEMBER LYNCH: Yes.

20 DR. SUPLEE: No, this is very specific  
21 to the main stem Yellowstone River. So a  
22 tributary coming into the Yellowstone River, for  
23 example, anywhere along those segments we looked  
24 at would still at this point continue to have ten  
25 micrograms per liter; and if we were to change

1 that, or propose to change that, that rule change  
2 would come to you first.

3 BOARD MEMBER LYNCH: All right. Thank  
4 you.

5 CHAIR DEVENY: Dr. Suplee, I have a  
6 question. When the Department was considering  
7 setting these standards, did you think about  
8 looking at, in the future, when drought conditions  
9 might be much worse than what they are right now,  
10 and how we could be proactive in dealing with  
11 these standards?

12 DR. SUPLEE: Sure. I'll tell you how we  
13 have set it up so that that can be addressed. So  
14 if drought, or if some of the climate change  
15 models are correct, we may see lower flows in the  
16 Yellowstone River in the future. I've worked on  
17 some data myself that suggests that we're already  
18 seeing that happen relative to maybe to 20 years  
19 ago.

20 The standards are built on the  
21 conditions that existed in the river from about  
22 2009 to 2017, so essentially they're present  
23 conditions standards.

24 However, we have built into the  
25 monitoring assessment sections component -- which

1 I just kind of glossed over that because it's kind  
2 of lengthy to get into -- but they will be  
3 examining in the future whether the standard is  
4 compliant or not by periodically going out and  
5 collecting a specified minimum data set, which  
6 they can then determine with a certain degree of  
7 statistical significance whether the river has  
8 actually increased in concentration, and perhaps  
9 even gone to a higher level than the standards  
10 were set at.

11 So that if, for example, in the future  
12 -- and I would point out that they have to collect  
13 a certain number of samples during the low flow  
14 season and a certain number of samples during the  
15 high flow season in order to get a balanced data  
16 set.

17 And what that will allow the DEQ to do  
18 going forward is if the standard were to be found  
19 to have been exceeded in the future, in the whole  
20 river or in some segment, two questions then  
21 arise. The first question is: Is there a very  
22 high likelihood that that has occurred because of  
23 humans, because of people? You know, has there  
24 been some violations of permit limits, or  
25 something that you could really look for?

1           If nothing like that is the case,  
2           everybody has been complying with their permits,  
3           it could very well be that it's an effect of  
4           either increasing arsenic concentrations coming  
5           from the Park, or lower water flows which provide  
6           less dilution, so the concentrations go up; in  
7           which case the Monitoring and Assessing Section  
8           would recommend to the Department Standards  
9           Section -- that's our group -- to revisit the  
10          standard and perhaps reset it to a different  
11          level.

12                 CHAIR DEVENY:   Just followup on that.  
13           Is there a trigger that would say it's time for  
14           those standards to be reviewed?  I'm just  
15           thinking, not wanting there to be a big lag  
16           between when you gather the data and when you come  
17           back to the Board for rule updating.

18                 DR. SUPLEE:   Right.  Yes.  We have our  
19           normal triennial review process where we revisit  
20           all standards.  We have not built into the  
21           Monitoring and Assessment Section's workload a  
22           triennial review visitation process.

23                 We have left that open to their  
24           discretion as to how often they revisit assessing  
25           the river.  But that is something that we could

1 potentially include with their work if the Board  
2 felt that that was an important part of the  
3 standards.

4 In general, we'll revisit them every  
5 three years, but if we don't have new data that's  
6 been collected to -- if the Monitoring Section  
7 hasn't provided us new data, then there's really  
8 not that much for us to sink our teeth into. Did  
9 I answer that well enough?

10 CHAIR DEVENY: I think so, yes. Thank  
11 you. Other questions from Board members? Chris  
12 Tweeten. Go ahead, Chris.

13 BOARD MEMBER TWEETEN: This is probably  
14 an ignorant question, but I want to make sure that  
15 I understand the practical effect of these  
16 standards.

17 The stretch of the river basically all  
18 the way down to Laurel, the natural condition of  
19 the river provides an arsenic level greater than  
20 ten, which is the drinking water standard.

21 Does that in practical effect mean that  
22 any application for a discharge permit that would  
23 involve any discharge of arsenic into the river  
24 would have to be denied or conditioned in some way  
25 to deal with that problem?

1 DR. SUPLEE: No, I don't believe that  
2 that's the case. Our understanding would be as  
3 follows: Existing permits that may have arsenic  
4 in them as a requirement would be required to meet  
5 the standards as you saw them essentially end of  
6 pipe, because there is no mixing zone. They  
7 basically just need to meet that concentration as  
8 an average monthly limit each month of the year.

9 A new source coming in would basically  
10 also have to meet those standards, because the  
11 standards being set -- this is the interesting  
12 thing about these nonanthropogenic standards.  
13 They're being set right at the long term  
14 nonanthropogenic condition of the river, so there  
15 is no more assimilative capacity, but they're  
16 right at the standard.

17 So our understanding is that then a  
18 source simply needs to meet those standards.  
19 They're simplified in that regard.

20 BOARD MEMBER TWEETEN: I'm still not  
21 sure I understand. Let's take a for instance.

22 Suppose I want to apply for a permit,  
23 for a discharge permit, and the use that I have in  
24 mind that would create the discharge produces a  
25 certain amount of arsenic that would be present in

1 the waters that would be discharged to the  
2 Yellowstone.

3 Is that use going to be permissible or  
4 not permissible, since it's going to put more  
5 arsenic in the river than what exists according to  
6 these nonanthropogenic standards?

7 DR. SUPLEE: So long as that discharge  
8 meets the nonanthropogenic concentration limit,  
9 then the concentration that you put out from this  
10 discharge into the river will match what's already  
11 in the river at an nonanthropogenic concentration.  
12 In other words, you would not have increased or  
13 decreased the concentration in the river.

14 BOARD MEMBER TWEETEN: So the burden on  
15 the permit applicant will be to show that -- let's  
16 take stretch one, for example, where I think the  
17 number was 28, if I remember right.

18 DR. SUPLEE: Yes.

19 BOARD MEMBER TWEETEN: So if I want to  
20 make a discharge in that stretch of the river,  
21 what I will prove in order to receive my permit is  
22 that whatever water I'm putting into the  
23 Yellowstone will not increase the concentration of  
24 arsenic above 28?

25 DR. SUPLEE: Right. And the way you

1 would do that is the concentration coming out of  
2 your discharge will need to be 28 as an average  
3 monthly limit.

4 BOARD MEMBER TWEETEN: Is that 28 in the  
5 pipe or 28 in the river?

6 DR. SUPLEE: 28 in the pipe. These  
7 standards have no mixing zones because essentially  
8 you just to put it out in the river at the  
9 concentration that the river is already at.

10 BOARD MEMBER TWEETEN: But won't that  
11 increase the concentration in the river?

12 DR. SUPLEE: No. If you mix two waters  
13 together with the same concentration, you'll have  
14 a larger volume of water with the same  
15 concentration.

16 BOARD MEMBER TWEETEN: Okay. There's  
17 math involved, so it's difficult for me, but I  
18 think I understand. Thanks.

19 DR. SUPLEE: Sure.

20 CHAIR DEVENY: Jerry Lynch.

21 BOARD MEMBER LYNCH: To follow up on  
22 Chris's question, if it's a new discharge, doesn't  
23 that depend on the volume of water coming from  
24 that discharge? In other words, if you're saying  
25 if it's 28 coming out of the end of the pipe, it's

1 going to remain 28 regardless of the flow from the  
2 pipe?

3 DR. SUPLEE: Correct. That's kind of  
4 like Concentration 101. Whenever you mix two  
5 waters, regardless of the volumes of either, if  
6 they both have the same concentration, the end  
7 volume will be larger, but the concentration will  
8 be identical.

9 BOARD MEMBER LYNCH: All right.

10 CHAIR DEVENY: John DeArment.

11 BOARD MEMBER DEARMENT: Following up on  
12 those questions, maybe it would be helpful to  
13 distinguish between concentration and load,  
14 because I think Chris and Jerry might be getting  
15 at the total load. The total amount of arsenic  
16 will go up.

17 DR. SUPLEE: Yes. I'll try, Madam Chair  
18 and Mr. DeArment, but sometimes this confuses the  
19 matter, but I'll give it a shot.

20 Concentration is mass per unit volume,  
21 how much stuff you have in a given volume of  
22 water. Load, in contrast, is mass per unit time.  
23 So that's like how many pounds are going by, how  
24 many pounds of arsenic are going by you in the  
25 river every day. And that has to do with the

1 volume of water in the river.

2 So yes, your discharging, your adding,  
3 it's going to very slightly increase the volume of  
4 the Yellowstone River by an MGD or a few liters,  
5 or whatever you're putting out; but so long as  
6 that discharge concentration matches what's in the  
7 river, the concentration in the river there will  
8 remain the same.

9 CHAIR DEVENY: Chris Tweeten.

10 BOARD MEMBER TWEETEN: Madam Chair, this  
11 is probably so simplified as to be completely  
12 stupid.

13 So if the river -- and these numbers are  
14 purely hypothetical. The river is flowing at ten  
15 CFS, and I discharge one CFS, and the river is at  
16 28, and my discharge is at 28, then you have the  
17 river flowing eleven CFS at 28, right?

18 DR. SUPLEE: That's exactly right.

19 BOARD MEMBER TWEETEN: Okay. I get  
20 that.

21 DR. SUPLEE: That's how it works. So  
22 it's really very simple. One of three things  
23 happen when a discharger discharges to the river:

24 They either put it out at the  
25 concentration that the river is at, in which case

1 the concentration doesn't change; they put it out  
2 at a concentration that's lower than what's in the  
3 river, in which case they're providing a slight  
4 dilution effect -- that's kind of what we're  
5 looking at with that annual versus two seasonal  
6 standards -- or they put it out in a concentration  
7 that's higher than what's in the river, in which  
8 case they bring up the concentration to some  
9 degree.

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

12 BOARD MEMBER BUSBY: This is Dexter.

13 CHAIR DEVENY: Hi, Dexter. I wasn't  
14 forgetting you. I was going to ask you next.

15 BOARD MEMBER BUSBY: I've just got a  
16 real easy, maybe a little bit legal question.

17 But if you set the standard at 28, does  
18 that meet the intent of the legislation in  
19 November as well as in June?

20 DR. SUPLEE: Yes.

21 BOARD MEMBER BUSBY: Because at various  
22 times, you're cleaning up the water, which really  
23 the legislation says you shouldn't have to do; and  
24 the other times you're putting in more than --  
25 concentration-wise, not poundage. We're talking

1 concentration.

2 DR. SUPLEE: Right. No, you're right.  
3 And we did cover that. Sometimes I do my best to  
4 explain these things in a slide show, but I went  
5 through it kind of fast.

6 So the short answer to your question is  
7 yes. We checked to make sure that even if we were  
8 to have these standards expressed as an annual  
9 standard, which we are promoting, that those  
10 concentrations fall within the intent of the  
11 75-5-222, which says that the standard has to be  
12 within the nonanthropogenic condition.

13 So even when the river is at its most  
14 dilute, these standards still fall within the  
15 range of concentrations that are observed in the  
16 river during that highly diluted period, so that  
17 satisfies that component of the standard.

18 BOARD MEMBER BUSBY: I'm more concerned  
19 about the other side of the point is when the  
20 river is the most concentrated because of low  
21 water.

22 DR. SUPLEE: That's the time where the  
23 annual standards provide two things that are  
24 beneficial: One, they provide a little tiny bit  
25 of dilution because of the way they are set, so

1 they'll actually very, very slightly bring down  
2 the concentration in the river relative to its  
3 natural state; and at the same time, they have  
4 been demonstrated to be, according to our  
5 conversations with industry, etc., to be the  
6 preferred, more economical option, which satisfies  
7 that other part of the statute, a different  
8 statute.

9           And that is why at least at earlier  
10 meetings we had with industry, they were happy to  
11 see that after looking at this more closely, that  
12 we were moving towards a single annual standard.

13           BOARD MEMBER BUSBY: And I understand  
14 the industry perspective. I was looking more  
15 closely at the language in the statute itself.  
16 And I was a little concerned that it says cleaning  
17 up -- in short, it says cleaning up the water  
18 better than what the receiving water is is not  
19 appropriate, I think is how it reads in short.

20           DR. SUPLEE: Sure. I think what we came  
21 to conclude as we worked on these, is you kind of  
22 have to keep all these statutes in front of you at  
23 the same time, and there's nothing that --  
24 including the idea that you want to protect the  
25 beneficial use to the best degree possible, if it

1 makes sense, and is within the statutes.

2 We feel that we have found a really nice  
3 balance point where all of the statutes are met,  
4 and the beneficial use is being protected at the  
5 best way that we -- you know, based on the cancer  
6 risk demonstration that I showed you. And  
7 apparently it's the better approach economically.

8 And yes, you are correct that we may be  
9 cleaning up the river a little better than  
10 necessary for 306, but at the same time, nobody is  
11 saying that that's something they don't want to do  
12 because it's actually easier to do, and makes more  
13 sense from a treatment perspective as well.

14 So again, I think -- I hope I'm  
15 answering this well, but I think you kind of have  
16 to look at all the statutes together to see how  
17 these fit.

18 BOARD MEMBER BUSBY: Okay. Thank you.

19 CHAIR DEVENY: Dr. Suplee, I was  
20 wondering. You used cancer as the type of health  
21 impact that you measured. Are there other  
22 impacts, health impacts from arsenic that start at  
23 lower concentrations that maybe you just weren't  
24 able to measure? Could you talk about why cancer  
25 was chosen, and what other health effects there

1     could be.

2             DR. SUPLEE:    Sure.    Starting with human  
3     health effects, arsenic is a very famous and  
4     ancient poison, so in high concentrations it will  
5     do you in very quickly, and many historical  
6     records of that.

7             At these low concentrations, like that  
8     one slide showed you, our aquatic life standard,  
9     so that's fish and aquatic life, that standard is  
10    around 150 to 300 micrograms per liter.  You don't  
11    see concentrations like that in the river, so it's  
12    really not at play here.  So they are not really  
13    being affected by the concentrations we see in the  
14    Yellowstone River.

15            Now, as you get into the lower  
16    concentrations moving down into the tens, and the  
17    thirties, and lower, that's where you're moving  
18    into the human health effects at a chronic low  
19    level, which include the skin, bladder, and lung  
20    cancer effects that can occur -- there's a lot of  
21    data on that -- and there really is no safe lowest  
22    concentration.

23            And that's why in an ideal world,  
24    drinking water supplies, if they could, would  
25    provide a maximum concentration limit goal of

1 zero, while that's really not very practical. But  
2 when setting up this standard, we certainly looked  
3 at the way and the effect, the use that was being  
4 affected, and cancer is really the issue again;  
5 and we have a mechanism to calculate that risk to  
6 see what would be the best expression of that  
7 standard to minimize the risk that's affecting  
8 people at the levels that we're seeing in the  
9 river.

10 CHAIR DEVENY: Okay. Thank you. And I  
11 had one other question. I'd like the record to  
12 reflect just a description of what your  
13 stakeholder inputs were when you were developing  
14 this rule.

15 DR. SUPLEE: Yes. Would you like me to  
16 go over that again?

17 CHAIR DEVENY: Just the stakeholders,  
18 yes.

19 DR. SUPLEE: Sure. We have consulted --  
20 and this goes back to around 2016. The project  
21 began in 2015, right around that time Senate Bill  
22 325 was passed, went through that Legislature.  
23 That's now 222. That's the nonanthropogenic  
24 standard or statute.

25 We began working with that SB325 Work

1 Group right around then. They actually requested  
2 at some point back then that we work specifically  
3 on arsenic standards for the Yellowstone River,  
4 because there were a couple of different  
5 nonanthropogenic standards we could have worked  
6 on. There's other ones out there that are  
7 pending. This is the one they specifically asked  
8 us to work on. We worked on that with them, met  
9 with them numerous times right up until as  
10 recently as -- our last meeting with that group  
11 was on January 6th.

12 We met with industry on a number of  
13 occasions. They gave us input at an earlier WPCAC  
14 meeting back in November, where we went back and  
15 really took a hard look at the different  
16 expressions of a nonanthropogenic standard, and  
17 came up with the approach you are seeing today,  
18 the annual average is the one to go with.

19 We have consulted with EPA on this  
20 standard, and nonanthropogenic standards are new  
21 to EPA, so that's always something that we'll be  
22 cautious about, but they have indicated to us that  
23 they have no disapproval issues that they have  
24 seen for the standards as we've crafted them.

25 CHAIR DEVENY: And how about input from

1 health departments, and counties, municipal  
2 governments around the state?

3 DR. SUPLEE: Unless they were part of  
4 the SB325 Work Group, we didn't really reach out  
5 to them specifically. There were some folks at  
6 the most recent WPCAC, representatives from some  
7 kind of interest group in the Billings area who  
8 came, and were very clear about they liked the  
9 standard, and they wanted to know more about it.

10 But I can't say that we reached out  
11 specifically to all of the county health  
12 departments along the river there where this  
13 standard would go in place. We have not done  
14 that.

15 CHAIR DEVENY: Okay. Thank you. Are  
16 there other questions of Dr. Suplee? Chris  
17 Tweeten. Go ahead, Chris.

18 BOARD MEMBER TWEETEN: This is a  
19 technical question, and I don't know if Dr. Suplee  
20 is the right person to answer this.

21 But in the agenda on Page 6, where we  
22 refer to this item, it talks about rulemaking for  
23 New Rule I. But if you look at the notice of  
24 rulemaking, notice of hearing that's in the  
25 packet, which is Page 21 I think of the packet, I

1 think it refers to New Rule II, if I'm reading it  
2 correctly. So which one is correct?

3 DR. SUPLEE: I don't have that in front  
4 of me, and I can try to bring it up. Maybe one of  
5 our legal staff, and maybe Kurt Moser could jump  
6 in and address that. But there is no New Rule II,  
7 so it should just be New Rule I, which is the  
8 Yellowstone River, and nonanthropogenic standard.

9 BOARD MEMBER TWEETEN: So if we  
10 authorized the issuance of this notice, that will  
11 have to be corrected in the notice before it goes  
12 out.

13 DR. SUPLEE: Okay. Thank you for that  
14 catch.

15 BOARD MEMBER TWEETEN: Okay. That's  
16 all, Madam Chair.

17 CHAIR DEVENY: Do other Board members  
18 have questions of Dr. Suplee?

19 BOARD MEMBER BUSBY: This is Dexter.  
20 I've got one that's relatively easy, I think.

21 I notice that the legislation is not  
22 specific to the Yellowstone, and I'm aware of  
23 other streams that have higher concentrations of  
24 not only arsenic, but other things that are not  
25 technically allowed in WQB7. So are you going to

1 be coming with other rulemaking, or is there a  
2 reason you just are selecting the Yellowstone and  
3 not generalizing your rulemaking?

4 DR. SUPLEE: That's a really good  
5 question, and I'm glad you asked that question.  
6 Madam Chair, members of the Board, we started with  
7 the Yellowstone because as complex as this  
8 standard was, it was actually the low hanging  
9 fruit. It was a relatively easy one, in the sense  
10 that the source of arsenic was Yellowstone  
11 National Park, and very, very easy to demonstrate  
12 that that is nonanthropogenic. There was like  
13 essentially no debate on that subject, and so that  
14 made for a very straight forward reading and  
15 interpretation of the standard.

16 You are correct that other water bodies  
17 have elevated arsenic. In some cases we believe  
18 those may be natural. We know that iron in some  
19 parts of the state may be naturally elevated  
20 across certain regions of the state. We have a  
21 whole host of other ones that we're working on or  
22 may work on at the state or regional scale that we  
23 may bring forward to the Board in the future.

24 I think it's also likely that you may  
25 see cases worked out on specific streams where

1 perhaps there is a particular interest in getting  
2 the nonanthropogenic part dialed in very  
3 accurately on that stream. You may see some  
4 others coming forward as well in the future.

5 CHAIR DEVENY: Does that answer your  
6 question, Dexter?

7 BOARD MEMBER BUSBY: Yes. You know,  
8 some of this is going to get really complex.  
9 That's why I was wondering if we're going to be  
10 hearing these come periodically, or whether they  
11 should be looking at a more generalized rule than  
12 a specific to each stream and each segment,  
13 because while they did a fabulous amount of work  
14 on this, I'm not sure how this work will apply to,  
15 let's say, the Madison River, or some other stream  
16 that I'm aware of, some other streams that I'm  
17 aware of.

18 I'm just not sure how it will impact any  
19 of those. So I'm just a little concerned that the  
20 State is setting themselves up for a huge amount  
21 of work, and I'm not sure that's -- what side of  
22 that I'd be on.

23 DR. SUPLEE: Sure. Madam Chair, members  
24 of the Board, I think the best way we can answer  
25 that is: I agree. I mean we've looked at this,

1 and we've had a lot of internal discussions about  
2 it, and we don't really see that this can be done  
3 too broad brush.

4 For example, we are looking at kind of a  
5 broad brush approach to maybe addressing elevated  
6 natural iron levels in some parts, primarily in  
7 eastern Montana. That might be done like at like  
8 the watershed scale or something like that.

9 But the problem that comes up is that it  
10 would be pretty hard to be too broad brush on any  
11 of this because each pollutant is different. How  
12 you figure out what nonanthropogenic or natural is  
13 a specific amount of work, and it has to be  
14 figured out and gone through.

15 And then you need to start to address  
16 the whole question of how does it affect the use,  
17 and how should that standard best be expressed.  
18 We've learned a lot on this process, so I think  
19 the next time we do it, we'll know a lot more. We  
20 do know a lot more about the questions that we  
21 need to ask, and how to get to the end point than  
22 the very first one, which took us a few tries.

23 But I can't argue with you that it could  
24 be -- It's probably going to be a fair amount of  
25 work. In some cases, some of the case specific

1 ones, some of the work may get carried out by  
2 permittees themselves if they feel that that's a  
3 more appropriate situation for their watershed and  
4 site.

5 CHAIR DEVENY: Thank you, Dr. Suplee. I  
6 know we have a lot of people online that want to  
7 speak to this issue, but I do think it's time to  
8 give our Court Reporter a break, and so I'd like  
9 to take a temporary break for ten minutes. Let's  
10 reconvene at 10:52.

11 (Recess taken)

12 CHAIR DEVENY: Let's get back at it.  
13 Lindsay, are you on?

14 MS. FORD: Yes.

15 CHAIR DEVENY: Could you take roll call,  
16 please.

17 MS. FORD: Chris Deveny.

18 CHAIR DEVENY: Here.

19 MS. FORD: David Lehnherr.

20 BOARD MEMBER LEHNHERR: Here.

21 MS. FORD: Dexter Busby.

22 (No response)

23 MS. FORD: John DeArment.

24 BOARD MEMBER DEARMENT: Here.

25 MS. FORD: Chris Tweeten.

1 BOARD MEMBER TWEETEN: Here.

2 MS. FORD: Jerry Lynch.

3 BOARD MEMBER LYNCH: Here.

4 MS. FORD: Dexter, are you back on?

5 (No response)

6 MS. FORD: It looks like we're still  
7 waiting on Dexter.

8 (Inaudible)

9 CHAIR DEVENY: I think we'll go ahead  
10 and get started. Before we open up to public  
11 comment, Sarah, did you have some questions of Dr.  
12 Suplee or DEQ?

13 MS. CLERGET: Yes, I do, if that's okay.

14 CHAIR DEVENY: Yes. Go ahead.

15 MS. CLERGET: The first one was: How  
16 many permits, current discharge permits do you  
17 think that is going to effect? In other words,  
18 how many are there in the segment of the  
19 Yellowstone that we're talking about?

20 DR. SUPLEE: I'm aware of at least one.  
21 That would be CHS's permit in Segment 4. There  
22 may be some permits further upstream. I would  
23 have to look into that to be certain. I think it  
24 there might be some way upstream, but I'm not sure  
25 if they have arsenic in their permit. So it might

1 be better to give you -- I don't have a correct, a  
2 full answer for you. I'm only aware of one.  
3 Permitting might have a better answer if they want  
4 to join in.

5 CHAIR DEVENY: Is there somebody here  
6 from Permitting that could answer that question?

7 MR. KENNING: Madam Chair, members of  
8 the Board, this is John Kenning. My last name is  
9 spelled K-E-N-N-I-N-G. I oversee the Permitting  
10 Program.

11 Most of the communities on the  
12 Yellowstone upstream have a discharge to the  
13 Yellowstone. That would be Gardiner, Livingston,  
14 Laurel, Columbus. So there are other communities,  
15 and as well as CHS upstream.

16 MS. CLERGET: And each of those have  
17 permits that would be affected by this?

18 MR. KENNING: Madam Chair, members of  
19 the Board, I would have to look at each permit  
20 specifically to see if arsenic is an issue. I'm  
21 aware arsenic is an issue with Gardiner because  
22 they receive wastewater from Mammoth Hot Springs,  
23 and have been recently litigating with Mammoth Hot  
24 Springs over the amount of arsenic that is coming  
25 in from the wastewater they take from the Park.

1 But I'd have to look at the other ones.

2 MS. CLERGET: And then my second  
3 question is followup to Dexter's conversation with  
4 Dr. Suplee that was about 222.

5 And it just concerns me that if the  
6 standard, if this standard is in fact lower at  
7 some points of the year -- which I think I heard  
8 you say -- than the naturally occurring water,  
9 then isn't this rule opening up permits or the  
10 rule itself for a challenge, based on the fact  
11 that 222 has to rule, because that's the statute,  
12 and the statute rules over the rule and over the  
13 permit. It seems to be setting us up for  
14 potential litigation or failure.

15 DR. SUPLEE: I'll give an answer as best  
16 I can, and maybe DEQ Legal may want to jump in on  
17 that one, but I'll take a start.

18 Again, we have enough data resolution  
19 that we could set a standard for every single day  
20 of the year if we chose to. That would be  
21 completely impractical to implement in permitting.

22 We could set it as at a monthly  
23 standard. That would track and mimic the  
24 conditions of the river very, very, closely, but  
25 that sets up a bunch of other difficulties, too,

1 which is it's very difficult for anybody who has  
2 to meet a permit limit like that to track a  
3 monthly changing concentration, especially during  
4 the low flow periods -- or the high flow periods  
5 in the summer when the concentrations get quite  
6 low, we're getting down into treatment levels that  
7 can be difficult for some of these dischargers to  
8 meet, so there's practical problems with it.

9           And so I'm not really sure that we're  
10 setting ourselves up for anything because when we  
11 looked at that, and then also took into context  
12 the protection of the use, it results that having  
13 a single standard all year around protects the use  
14 better, but also it's easier to implement, easier  
15 to permit, and is more cost effective.

16           So to me, I don't know if it's ever  
17 going to necessarily set us up for anything as you  
18 described. Beyond that, we're going to have to  
19 let our Legal staff give you their thoughts on  
20 that matter.

21           CHAIR DEVENY: Sarah, would you like to  
22 direct your question to anybody in Legal in DEQ?

23           MS. CLERGET: Sure. I don't know which  
24 of them is the one who wants to answer, but  
25 anybody at DEQ Legal want to jump in on that?

1           MR. MOSER: This is Kurt Moser, DEQ  
2 attorney. And I did have a legal review on some  
3 of it, on this package.

4           So I will say that the first thing we  
5 looked at is what is the nonanthropogenic  
6 condition. That's what science is going to have  
7 to tell us. Obviously the Legislature has  
8 directed us as agencies, both us and the Board, to  
9 accomplish this to at least a certain degree. And  
10 so we have to determine what the nonanthropogenic  
11 condition is before we can enforce that  
12 requirement.

13           But once we do that, and once we  
14 interpret that, we should have the afforded  
15 deference in the Courts as to how we interpret  
16 both the statute that we administer and the rules  
17 that come out of those. So I think that that  
18 would be the answer to that question.

19           And I think Dr. Suplee did go into that,  
20 how on a science based method we determined what  
21 the nonanthropogenic condition would be. So that  
22 would be the answer there.

23           MS. CLERGET: That's all I have, Chris.

24           CHAIR DEVENY: Okay. So last chance for  
25 Board members to ask Dr. Suplee questions before

1 we open up for public comment.

2 BOARD MEMBER LYNCH: I do have one,  
3 Madam Chair.

4 CHAIR DEVENY: Go ahead, Jerry.

5 BOARD MEMBER LYNCH: Doctor, you  
6 indicated that if there is a new discharge permit,  
7 and the discharge was lower than the 28 number  
8 that we see in some of these stretches, that it  
9 could in fact dilute; is that correct?

10 DR. SUPLEE: Yes. So if, for example, a  
11 discharge was going into the river at a lower  
12 concentration than, like you said, the 28, that's  
13 one of the segments then, there would be a slight  
14 dilution effect in the river. Yes.

15 BOARD MEMBER LYNCH: So the followup  
16 question is: Should we not be striving to dilute  
17 that 28 number, or is it your position that  
18 whatever the discharges may be would not be  
19 significant enough to dilute that 28, in other  
20 words, move it towards the ten acceptable level?

21 DR. SUPLEE: No, it's not our position  
22 that they should be per se. What we're saying is  
23 that per 222, the standard would be set at the  
24 nonanthropogenic condition, and that's what the  
25 dischargers should be targeting.

1           Now, it results that by setting it up as  
2   an annual standard, there is a certain larger and  
3   more extended dilution period throughout the year  
4   -- that is a fact -- and that has that slight  
5   reduction effect on cancer risk.

6           But again, at the same time, by setting  
7   up that standard, it's more easy for the  
8   permittees to meet, for the Department to  
9   administer, and everything.

10           BOARD MEMBER LYNCH: I understand that  
11   part. I go back to Dexter's question a bit  
12   earlier. There are going to be quite a number of  
13   other streams I suspect in the future that the  
14   Department will have to look at.

15           And what it seems to me we're saying  
16   here by adopting this rule is that we're going to  
17   adopt the nonanthropogenic standard for every body  
18   of water, when in fact there could be steps taken  
19   to reduce the amount of arsenic, or some other  
20   contaminant, through more stringent permitting  
21   requirements.

22           DR. SUPLEE: Well, I think what you're  
23   describing is a situation where we would be  
24   ignoring the Legislature, which said that where we  
25   can, or -- that we need to be looking at

1 nonanthropogenic conditions in water bodies.

2 We know for a fact that there are places  
3 around the state right now where more, where  
4 standards are probably set in place that are more  
5 stringent than the nonanthropogenic condition.  
6 The Yellowstone River was an easy one in that  
7 regard.

8 So our understanding from the  
9 Legislature is that where -- we need to be taking  
10 a look and trying to make sure that people are not  
11 being overly regulated by treating to a condition  
12 that's beyond the nonanthropogenic.

13 BOARD MEMBER LYNCH: That's how you  
14 interpret the statute that we've been talking  
15 about?

16 DR. SUPLEE: Yes.

17 BOARD MEMBER LYNCH: In other words, the  
18 DEQ, and the Board for that matter, should not be  
19 striving to reduce the overall concentration, if  
20 it can, through discharges that are more  
21 stringent?

22 DR. SUPLEE: I think --

23 BOARD MEMBER LYNCH: Requirements.  
24 Excuse me.

25 DR. SUPLEE: The way we interpret that

1 is if the nonanthropogenic condition of the water  
2 body -- in other words, man has had no control  
3 over it -- is at a certain level, and that certain  
4 level happens to be higher than the currently  
5 accepted standard, then it's an unfair or  
6 excessive amount of regulation in a sense to  
7 require people to treat to a higher level than  
8 that. That's the impetus behind this group of  
9 standards.

10 BOARD MEMBER LYNCH: In certain bodies,  
11 in certain streams for instance in the future,  
12 that would not necessarily be the DEQ's position,  
13 that depending on the circumstances in a  
14 particular stream, if in fact steps could be taken  
15 with a more stringent requirement in terms of a  
16 new discharge permit that would reduce the  
17 concentration, that's not what the DEQ should be  
18 looking at?

19 DR. SUPLEE: Again, I may not be  
20 tracking your question as well as I would like,  
21 but I think that our position --

22 BOARD MEMBER LYNCH: Let me repeat it  
23 just so I'm clear. If there is a situation in the  
24 future -- a new stream, not the Yellowstone --  
25 where the more stringent requirements on the

1 discharge could in fact reduce arsenic pollution  
2 or some other contaminant, is it the DEQ's  
3 position that we would just always stay with the  
4 nonanthropogenic concentration, if in fact new  
5 discharge permits could in fact reduce that  
6 concentration?

7 DR. SUPLEE: I'm not sure what our  
8 position is exactly on that. Let me see if  
9 anybody else in our Department has something to  
10 say on that specific situation.

11 MR. KENNING: Madam Chair, Mr. Lynch.  
12 This is Jon Kenning again.

13 CHAIR DEVENY: Go ahead, Jon.

14 MR. KENNING: The permitting rules would  
15 also have to take into account nondeg provisions,  
16 and a whole bunch of other processes when we look  
17 at new discharges. So it would not just be simply  
18 nonanthropogenic, but there are all other layers  
19 of protection involved.

20 BOARD MEMBER LYNCH: Let me just follow  
21 up then. I mean I understand we're talking about  
22 this stretch of the Yellowstone on the proposed  
23 rule. I just don't want some precedent being set  
24 that that's going be the standard on every stream  
25 that may come up in the future for discussion.

1 MS. CLERGET: Chris, this is Sarah. Can  
2 I jump in here?

3 CHAIR DEVENY: Go ahead, Sarah.

4 MS. CLERGET: Judge Lynch, I just want  
5 to clarify. I think the statute that Dexter and I  
6 were talking about was 222, and I think the  
7 statute that Dr. Suplee is talking about is  
8 75-5-306, which says it is not necessary that  
9 waste be treated to a purer condition than the  
10 natural condition of the receiving stream, as long  
11 as the minimum treatment requirements established  
12 under the chapter are met.

13 So now, how you want to interpret "it is  
14 not necessary" -- What I think I'm hearing Dr.  
15 Suplee say is that the Department has chosen to  
16 determine "it is not necessary" meaning that they  
17 can't, at least in this instance. And I think  
18 that might have been the Legislature's intent with  
19 306. But --

20 BOARD MEMBER LYNCH: So if I'm  
21 understanding correctly, Sarah, then the  
22 nonanthropogenic concentration is what controls?

23 MS. CLERGET: Yes. I mean according to  
24 75-5-306, the purer condition than a natural  
25 condition, I understand there is a little bit of a

1 difference between natural condition and  
2 nonanthropogenic; but for the most part, they're  
3 the same. Is that right, Dr. Suplee?

4 DR. SUPLEE: I think they are very, very  
5 similar, yes.

6 BOARD MEMBER LYNCH: All right. Thank  
7 you.

8 CHAIR DEVENY: Any other questions or  
9 comments by Board members before we open this up  
10 for public comments?

11 BOARD MEMBER LEHNHERR: Madam Chair, if  
12 I might ask a question.

13 CHAIR DEVENY: Yes. Dr. Lehnherr.

14 BOARD MEMBER LEHNHERR: This is David  
15 Lehnherr. Dr. Suplee, I'm looking at your Slide  
16 18, the arsenic in Billings finished drinking  
17 water. It would be interesting to see a similar  
18 graph for upstream communities.

19 Are you aware of any upstream  
20 communities, upstream to Billings, that are having  
21 any difficulty getting their drinking water  
22 arsenic concentration below ten micrograms per  
23 liter?

24 DR. SUPLEE: No. We looked into that.  
25 In fact, that was part of our examination of

1 whether we would actually, as part of this  
2 rulemaking -- since we would be setting a standard  
3 that's well above ten, especially up there --  
4 would we need to, for example, adopt a new  
5 sub-class, like arsenic impaired drinking water or  
6 something like that, in order for that to properly  
7 reflect the standard.

8 And our drinking water engineers who are  
9 familiar with the drinking water systems up there  
10 in the Gardiner area, etc., said that they are  
11 able to bring and are treating arsenic to below  
12 the current MCL of ten in their drinking water  
13 supplies for those communities. So that would --

14 BOARD MEMBER LEHNHERR: (Inaudible)

15 DR. SUPLEE: Okay.

16 CHAIR DEVENY: Any other questions or  
17 comments from Board members?

18 (No response)

19 CHAIR DEVENY: Hearing none, Sarah,  
20 could I get your direction on this. Should we  
21 just open it up for public comment now, or would  
22 it be better to have a motion before the Board?

23 MS. CLERGET: No, I think you need to  
24 open it up for public comment before you take  
25 action.

1           CHAIR DEVENY: At this point then we'll  
2 open it up for public comment, and I'm going to  
3 put my screen on gallery. If there are people on  
4 the screen that want to give comment, if you could  
5 raise your hand, put yourself on video. And we'll  
6 also take calls from the phone.

7           Let's go ahead and start with Shiloh  
8 Hernandez. I see his hand's up.

9           MR. HERNANDEZ: Thank you, Madam Chair,  
10 and thank you, Dr. Suplee. I real appreciate the  
11 presentation. It seems like a lot of good science  
12 has gone into this.

13           CHAIR DEVENY: Excuse me, Shiloh, and  
14 for every speaker, if you could give your name  
15 clearly for our Court Reporter, it will be real  
16 helpful for her. Thank you.

17           MR. HERNANDEZ: Absolutely. Shiloh  
18 Hernandez for the Western Environmental Law  
19 Center. I have a question for Dr. Suplee, and I  
20 just want to put it on the record and kind of  
21 build on some of the questions that came up from  
22 Board member Busby, Board member Lehnherr, and  
23 Board member Lynch.

24           And the effect of this is the  
25 discharger's limit for discharging to these waters

1 will increase from ten up to 28 or something  
2 around there, right?

3 DR. SUPLEE: That's correct, 28, ranging  
4 down to about 13 as you get close to Billings.

5 MR. HERNANDEZ: So in some cases it  
6 would more than double the amount of arsenic that  
7 a discharger could discharge into these waters.

8 And I understand the requirement of 306  
9 that waters not be treated to a cleaner condition  
10 than their natural receiving waters, and I  
11 understand that the Board and DEQ have to operate  
12 within the constraints established by the  
13 Legislature.

14 I wanted to just see if DEQ and the  
15 Board had considered the additional constraints  
16 from the Federal Clean Water Act, which is the  
17 provision that controls all of this, in particular  
18 Section 402(o), the anti-backsliding provisions of  
19 the Clean Water Act that say, in short, that a  
20 discharge permit that exists can't be reissued or  
21 modified to weaken the discharge concentrations.

22 So I understand that under these  
23 standards a new discharger would be able to  
24 discharge arsenic into the Yellowstone at a  
25 concentration of 28 micrograms per liter, but is

1 it the understanding of DEQ and the Board that  
2 pursuant to the Clean Water Act, the federal  
3 anti-backsliding provision, that existing  
4 dischargers would still be required to meet the  
5 existing ten micrograms per liter discharge limit?

6 DR. SUPLEE: Madam Chair, members of the  
7 Board, I'll kind of do this in two steps, so I'll  
8 answer part of the question, and then I'll bump  
9 the rest of it to Jon Kenning in the Permitting  
10 Program. He'll answer the second part, I think.

11 So regarding the idea that standards --  
12 standards do go up and down as the science  
13 changes. This is not unusual even for ones that  
14 are not based on nonanthropogenic.

15 So for example, ammonia standards have  
16 become less stringent than an earlier iteration of  
17 them, due to different changes in the science, and  
18 this has happened.

19 I will bump the rest of the answer to  
20 Jon Kenning to let him address the  
21 anti-backsliding part.

22 CHAIR DEVENY: Go ahead, Jon.

23 MR. KENNING: Madam Chair, members of  
24 the Board, yes, what Mr. Hernandez is talking  
25 about is called anti-backsliding, and it generally

1 says that when a permit limit has been  
2 established, we cannot weaken that limit. But it  
3 also has a number of exceptions, and we would be  
4 willing to look at those exceptions, and see if  
5 they apply in these cases.

6 CHAIR DEVENY: Mr. Hernandez, does that  
7 answer your question?

8 MR. HERNANDEZ: I just wanted to make  
9 sure it was part of the conversation. So thank  
10 you, Mr. Kenning, and thank you, Dr. Suplee.

11 CHAIR DEVENY: Did you have any other  
12 comments while you're on line?

13 MR. HERNANDEZ: Not with regard to this  
14 matter.

15 CHAIR DEVENY: Okay. Thank you.  
16 Anybody else want to weigh in?

17 (No response)

18 CHAIR DEVENY: I can't see any hand  
19 waving just based on --

20 MS. CLERGET: Vicki is waving her hand,  
21 Chris.

22 CHAIR DEVENY: I see Vicki now. Okay.  
23 There's so many people on I'm having to switch  
24 screens here. So I have Ms. Marquis. I can't  
25 hear you at this point. Are you on mute?

1 MS. CLERGET: We lost your video, too,  
2 Vicki.

3 MS. FORD: So I can see Vicki. I see  
4 you, but you don't have any sound. There is  
5 nothing even muted. There is just no sound. All  
6 there is is a video button. I don't know how to  
7 add --

8 DR. SUPLEE: -- microphone.

9 MS. FORD: There is no microphone.

10 MS. CLERGET: You've probably got to  
11 allow it to use your computer audio, is my guess.  
12 Maybe give her a minute and come back to somebody  
13 else.

14 CHAIR DEVENY: Vicki, we're going to let  
15 you get your technology working, and we'll come  
16 back to you, if that's okay. Thanks. Any other  
17 people want to speak at this point?

18 MS. FORD: Chris, I need to go in and  
19 unmute everyone on the phone, so let me go in and  
20 do that, and then there might be a few people.

21 MS. MARQUIS: Can you hear me now?

22 CHAIR DEVENY: Is that Vicki?

23 MS. MARQUIS: Yes. Can you hear me now?

24 CHAIR DEVENY: Yes. Go ahead.

25 MS. MARQUIS: Thanks so much for your

1 time. My name is Vicki Marquis, and I'm an  
2 attorney with Holland and Hart in the Billings  
3 office. I'm here today representing the CHS  
4 Refinery in Laurel, Montana, which is in that  
5 Segment 4 of the river that Dr. Suplee spoke about  
6 earlier.

7 CHS has been discussing this issue of  
8 arsenic regulation in the Yellowstone with the  
9 Department for at least six years, and we're  
10 really pleased that the Department's work on the  
11 issue has now culminated in proposed rulemaking.

12 And you heard Mike Suplee's  
13 presentation, but I think that's really the tip of  
14 the iceberg. The Department has done a ton of  
15 work on this, everything from data gathering and  
16 analysis, to modeling and research, meeting with  
17 stakeholders, and drafting a lot of complicated  
18 technical documents -- which I notice they're not  
19 in your Board packet, but they are available on  
20 DEQ's website, so you might want to check those  
21 out because they do have a lot of very good  
22 information in them.

23 So we wanted to thank the Department,  
24 first of all, for their work and their efforts on  
25 this. We met with the Department several times

1 and discussed concerns, and we were pleased to  
2 have those discussions, and pleased that the  
3 annual standard was one thing that they went back  
4 and looked at, and that's in the addendum  
5 document, which is really good.

6 I want to point out a couple things  
7 about the CHS discharge, first of all. And I  
8 think George Fink is on this presentation  
9 somewhere. He's got some slides to give you a  
10 better understanding of what the facility looks  
11 like, and the investments that they've made, and  
12 the work that they're doing. They continue to  
13 invest very heavily in all of their environmental  
14 protection programs, especially their wastewater  
15 treatment facility.

16 One thing I want to point out that's  
17 different about this refinery than a lot of other  
18 refineries across the nation is that the CHS  
19 Laurel Refinery doesn't have access to a municipal  
20 treatment system like many of the other refineries  
21 across the nation do, so they're on their own for  
22 water treatment.

23 And in terms of water treatment, there  
24 were some questions earlier about what the  
25 municipalities can treat for drinking water.

1           And I want to point out that, as Dr.  
2           Suplee talked about, there is a lot of confidence  
3           that a drinking water system can take in water at  
4           levels of up to 60 micrograms per liter, and treat  
5           it down below ten; but they're treating raw water,  
6           which is different than the industrial wastewater  
7           that CHS takes in. So that type of treatment is  
8           really not as easy in an industrial setting.

9           And what CHS has done is really  
10          significant and unprecedented. As far as we know,  
11          CHS is implementing state of the art technology  
12          that doesn't exist in another refinery in the  
13          nation, as far as we can tell. So this really is  
14          a significant undertaking for CHS and within the  
15          state here.

16          I do want to point out -- There was a  
17          discussion earlier about the difference between  
18          concentration and load. And just to give you some  
19          perspective, in the Department's determination of  
20          nonanthropogenic document that's on their website,  
21          at Appendix C-3, the Department provides the  
22          nonanthropogenic arsenic load in Segment 4 of the  
23          Yellowstone, which is where CHS discharges.

24          That nonanthropogenic or natural arsenic  
25          load varies between 2,000 kilograms a month, and

1 nearly 15,000 kilograms a month; so from a low of  
2 nearly 2,000 kilograms each month to a high of  
3 nearly 15,000 kilograms each month.

4 Now by comparison, CHS's discharge is  
5 estimated to add only four to five kilograms per  
6 month. That's four, just four to five kilograms  
7 per month in a system that's already carrying  
8 2,000 to 15,000 kilograms a month.

9 So we're not just diminishing the  
10 seriousness of arsenic that we're dealing with  
11 here, but it's important to know that what CHS  
12 adds to the river is less than 0.3 percent of what  
13 the river naturally carries at its lowest load  
14 point.

15 The same is true for flow. The  
16 Yellowstone River has a high flow of about 1,000  
17 CFS at -- I'm sorry -- that's at its low flow it's  
18 about 1,000 CFS. The CHS refinery's discharge  
19 only adds about three CFS. So again, we're right  
20 around 0.3 percent of the river's low flow.

21 CHS adds very little to the Yellowstone  
22 River, and in fact this is documented in the  
23 Department's determination of nonanthropogenic  
24 document. And they found that when they looked at  
25 all of the permitted discharges -- not just CHS,

1 but all of the permitted discharges -- they said  
2 they account for less than one percent of the  
3 total arsenic load. And they concluded that in  
4 total, the permitted sources do not contribute any  
5 arsenic load. That's in Section 4.0 on Page 33 of  
6 determination of nonanthropogenic document.

7 One other thing that's unique about the  
8 CHS discharge -- and Mr. Fink has some good  
9 pictures, and can describe this better -- but they  
10 recently installed a diffuser, which is a pretty  
11 complicated piece of equipment, and it provides  
12 immediate and thorough mixing within a really  
13 short section of the river, and that's better for  
14 the river, it's better for fish, it's better for  
15 everyone.

16 So when you consider the low amount of  
17 arsenic, the low flow of the discharge, and how  
18 it's mixed, and then if you also add in the  
19 accuracy with which arsenic can be measured, in  
20 reality you won't be able to measure any increase  
21 in arsenic just beyond the diffuser, at least not  
22 with any amount of certainty.

23 And this is a really important  
24 rulemaking. I know this is going a long time, but  
25 as you guys have already pointed out and

1 recognized, is that since this is the first  
2 nonanthropogenic based standard rulemaking, it  
3 really does set a precedent, and sets the tone for  
4 what can happen next.

5 And so we feel that it's important to  
6 get it right, and we ask you to make sure that it  
7 protects beneficial uses, and provides for  
8 reasonable and effective implementation.

9 One thing we would draw your attention  
10 to are the reasons for the draft rule.

11 CHAIR DEVENY: Ms. Marquis, could I ask  
12 you to just try and wrap up your comments in a  
13 couple minutes. I don't mean to interrupt, but I  
14 think we have a lot of people that want to weigh  
15 in today.

16 MS. MARQUIS: Sure. I will. On the new  
17 rule, I'll draw your attention specifically to  
18 Pages 2 and 3 of the MAR notice. The last  
19 sentence on Page 3 which carries over -- Page 2.  
20 I'm sorry -- which carries over to Page 3  
21 describes the standards as, quote, "From the human  
22 health perspective, they are the most protective  
23 expression of the nonanthropogenic arsenic  
24 standard."

25 And while we agree that that is the case

1 in this situation, we point out that unless that  
2 is limited to this particular case, it might  
3 create an expectation that the most protective  
4 standard for human health will always govern. But  
5 that might not be appropriate, because in other  
6 systems the most sensitive use might not be human  
7 health, it might be aquatic life, or something  
8 else. So that might not apply for future  
9 rulemaking.

10 And we would suggest editing the  
11 sentence simply to read, "The proposed  
12 nonanthropogenic arsenic standards for the  
13 Yellowstone River are protective of human health,  
14 which is the beneficial use in the Yellowstone  
15 River that is most sensitive to arsenic levels."

16 The sentence right after that, we'd also  
17 ask you to take a hard look at that. It implies  
18 that the nonanthropogenic standards preclude using  
19 any other standard to regulate dischargers, and in  
20 actuality it's the Water Quality Act and those two  
21 statutes that you guys have already talked about,  
22 75-5-222, and 75-5-306, that really preclude  
23 implementation of a more stringent standard.

24 We don't really know what would apply if  
25 this rule didn't apply, because what we know is

1 that the standard of ten cannot apply in  
2 accordance with those two statutes.

3 So we propose that language be changed  
4 to, "Because the proposed standards reflect the  
5 nonanthropogenic condition of the Yellowstone  
6 River, they protect beneficial uses, comply with  
7 the Water Quality Act, and enable regulation of  
8 point source discharges."

9 And the paragraph right after that talks  
10 about assimilative capacity and mixing zone, and  
11 we urge the Board to consider removing that  
12 paragraph, and also removing Subparagraph (c) from  
13 the proposed new rule.

14 And you know, I'll shorten this up a  
15 little bit. Our argument is essentially that  
16 assimilative capacity is another term for loading  
17 capacity, which is the term that is used in the  
18 permitting regulations.

19 And we have a robust set of permitting  
20 regulations. They're found in the rules at Title  
21 17, Chapter 30, Subchapters 12 and 13. There is a  
22 lot of regulation there, so there is really no  
23 need to put any limitations within this rule. The  
24 permitting rule should really govern.

25 And it's really inappropriate for a

1 water quality standard to also take the next step  
2 and go into permitting decisions, so we urge you  
3 to remove that Subparagraph (c), and let the  
4 permitting regulations stand on their own, so that  
5 you're not creating any unforeseen consequences or  
6 conflicts.

7 The rules as they stand now do allow the  
8 Department to determine that there is no loading  
9 capacity or no assimilative capacity, so that they  
10 can make the determination on mixing zones and the  
11 use of dilution. But we urge you to allow them to  
12 do that through the permitting regulations, and  
13 not create any confusion by putting different  
14 terms and different requirements in this water  
15 quality standard.

16 And we have some suggested language  
17 there, too. If you wanted to clarify what is  
18 going on here and what you would like to see, and  
19 if there is a concern about arsenic, the language  
20 could read:

21 "In accordance with 40 CFR 122.44  
22 Subparagraph (d)(1)(iii), and Title 17, Chapter  
23 30, Subchapter (5), dilution and mixing zones may  
24 be considered for discharges to the water bodies  
25 and for the parameters listed. However, for toxic

1 and carcinogenic parameters, dilution and mixing  
2 zones may only be considered for discharges with  
3 an average flow of less than one percent of a 7Q10  
4 low flow, and an annual load of less than one  
5 percent of the annual average load of the  
6 parameter."

7 That's our suggested language, if you  
8 wanted to replace Subparagraph (c), but again, we  
9 would prefer Subparagraph (c) not be in there at  
10 all.

11 My final point is on intake credits.  
12 Now, a lot of you raised concerns with -- and we  
13 recognize this, too -- is what happens if the  
14 river is running at a higher level than the  
15 standard is?

16 And this is a real concern for places  
17 like CHS, because they actually take river water  
18 in, and they take in groundwater that's influenced  
19 by river water. That's part of their process.  
20 For example, based on 2017 data, CHS took in an  
21 estimated average of 2.8 kilograms per month of  
22 arsenic; it took in another .55 kilograms per  
23 month from groundwater; and they added about 2.6  
24 kilograms per month.

25 Now, if you assume the limit that's been

1 proposed here applies to them at 13 micrograms per  
2 liter, that scenario would require CHS to treat  
3 3.9 kilograms per month, which is at least 1.3  
4 kilograms per month more than what they add to the  
5 discharge.

6 And while 1.3 kilograms doesn't sound  
7 like a lot, the cost to treat for that arsenic is  
8 at least another \$3 million to \$5 million in  
9 capital expenditures for arsenic polishing  
10 filters, and then there's an additional \$1 million  
11 to \$2 million per year in operational costs that  
12 go along with that.

13 Again, CHS isn't arguing they should  
14 have -- I mean they're agreeing they should have  
15 to treat the arsenic that they add to this system,  
16 but the concept of cleaning up what Mother Nature  
17 has put in the river is very expensive, and is  
18 something that we ask the Board to look at by  
19 providing an intake credit, because there is  
20 potential at all times to require the permittee to  
21 actually clean up more than what they're putting  
22 in, and clean up what's already in the river.

23 Some other states have already done  
24 that, and I can provide a list of them. There's  
25 the Great Lakes Water Quality Guidance which came

1 from EPA, Clean Water Act compliant regulations  
2 for the State of Washington, Oregon, Colorado,  
3 Minnesota, Ohio, Indiana, Michigan, Wisconsin,  
4 Illinois, Pennsylvania, New York, California, and  
5 Wyoming.

6 So we would like the Board to consider a  
7 provision in this rule that enables an intake  
8 credit. And we have suggested language for that  
9 as well.

10 To do that, we ask that the standards  
11 provided may be implemented as annual average  
12 standards, either in terms of load or  
13 concentration, and that an intake credit may be  
14 considered for permittees that take in surface  
15 water directly from and/or groundwater that  
16 originates or is influenced by the same water body  
17 to which the effluent discharges. That would  
18 allow consideration of an intake credit, which we  
19 feel is appropriate.

20 Our final point is one that Shiloh  
21 raised earlier. The anti-backsliding concern and  
22 other enforcement concerns are a real issue that  
23 can be really expensive for everybody. We  
24 recognize that there might be years when the  
25 arsenic level is really, really high.

1           And so in a case like CHS, where they  
2           are taking in high arsenic, maybe they won't be  
3           able to treat down to this standard, but maybe the  
4           reason for that is because the river that year was  
5           running really high, and so the standard, if you  
6           will, was artificially low. The river was high,  
7           all the water was high, but because of that, the  
8           treatment couldn't reach what the permit limit  
9           was.

10           Now, that creates a real risk for  
11           enforcement actions, citizen suits under the  
12           Federal Clean Water Act. And then if the  
13           Department does go in and change the standard to a  
14           higher number, there is the anti-backsliding  
15           claim. So we urge you to look at some language  
16           that would provide some clarity on enforcement,  
17           some clarity for those situations when there are  
18           high arsenic years, and to deal with the  
19           anti-backsliding concerns.

20           And finally, I just want to say that CHS  
21           is sensitive to the concerns with arsenic. I  
22           think Mr. Fink will be able to demonstrate to you  
23           the extent of their efforts to increase their  
24           wastewater treatment process to a level that's  
25           unprecedented in their industry. And they take

1 compliance very, very seriously.

2 So we hope that you will consider those  
3 comments, and if you have questions, or want to  
4 visit about this more, I'm happy to spend the time  
5 here today to do that. Thank you.

6 CHAIR DEVENY: Thank you, Ms. Marquis.  
7 I'm going to go on to somebody besides Mr. Fink  
8 for a bit, just to give another entity an  
9 opportunity to speak. So is there somebody else  
10 from the public that hasn't spoken that would like  
11 to speak?

12 MS. FORD: Chris, I need to go in and  
13 unmute the folks on the phone first.

14 CHAIR DEVENY: Let's go ahead and do  
15 that, Lindsay. Thank you.

16 MS. FORD: I think I've got everybody.

17 CHAIR DEVENY: I'm going to ask you to  
18 one by one, individuals who were interested in  
19 giving public comment on Rule I, to just kind of  
20 be polite and speak up one at a time.

21 I don't have any way of really checking  
22 on those of you who are calling in from the phone.  
23 So is there anybody interested in giving public  
24 comment that's on the phone right now?

25 (No response)

1 CHAIR DEVENY: Anybody on the phone that  
2 wants to give public comment?

3 (No response)

4 CHAIR DEVENY: Okay. I'm not hearing  
5 any, so --

6 MS. TRANK: Madam Chair, I'm sorry. I  
7 couldn't figure out how to unmute myself. Peggy  
8 Trank with the Treasure Resources Association.  
9 Just a couple of stray comments, if I might.

10 Our association represent a whole broad  
11 mix -- I'm going to have to drink some water  
12 because I'm going hoarse -- represents a broad mix  
13 of industry and businesses affected by water  
14 quality and discharges obviously.

15 And we have been involved in the  
16 stakeholder group since its inception dating back  
17 to 2015. And I just wanted to make some comments  
18 in support, and acknowledgment of the work that  
19 the Department has done on these rules to get them  
20 to this point. There has been a lot of  
21 stakeholder input, discussions with EPA as  
22 mentioned, and continue to refine the process.

23 And I think the science is pretty well  
24 vetted, as you've heard. And this bump in the  
25 road with permitting, and how to make it mesh with

1 the standards that we seem to have run into, and  
2 it is important, as a previous speaker said, to  
3 get it right at this time.

4 So whether the Board elects to go  
5 forward with rulemaking today or hold it back, or  
6 the Department needs to do some additional work,  
7 we leave that to your discretion, but we do hope  
8 you would give some guidance to the Department to  
9 continue to work with stakeholders to get this  
10 permitting piece right, because I think that is  
11 the key to making it successful, because this is  
12 intended to be a process that will be used for  
13 other parameters in other stream reaches.

14 I think when we started, we thought  
15 perhaps we could magically create this process  
16 that you just plugged anything into, and you  
17 create an outcome at the other end, and that is  
18 not true. It's very data dependent. That's why  
19 the Yellowstone was something that the industry  
20 asked them to look at first, and arsenic as well,  
21 so we could kind of use that as a model for this  
22 process.

23 So it is important to think we are on  
24 the right path of complying with Senate Bill 325,  
25 and if we can just fix this bump in the road with

1 how to mesh it with the permitting process. I  
2 think this has come a long way, and we encourage  
3 the Board's support for rulemaking, whether it is  
4 now, or whether some of these issues have been  
5 addressed, to move that forward. Thank you.

6 CHAIR DEVENY: Thank you, Ms. Trank.  
7 Are there other members of the public on the  
8 telephone that would like to give public comment  
9 on Rule No. I?

10 MS. CANARIOS: Hi, Madam Chair, Board  
11 members. My name is Caroline Canarios. That's  
12 C-A-N-A-R-I-O-S. I reside in Billings, Montana,  
13 and I'm speaking today on behalf of Western Plains  
14 Resource Association and our local affiliate  
15 Yellowstone Valley Citizens Council. We are a  
16 grassroots conservation group of over 500 members  
17 advocating for a healthy, inviting, sustainable  
18 community in the Yellowstone valley.

19 Our members reside along the Yellowstone  
20 River and in the Yellowstone Valley, using its  
21 water for drinking, recreation, business, and  
22 consider ourselves stewards of the water body.

23 Because arsenic is a known carcinogen,  
24 and given the DEQ's work -- and thank you, Dr.  
25 Suplee, for your work on this -- we are supportive

1 of the proposed nonanthropogenic standard for  
2 arsenic as DEQ has determined that are most  
3 protective for human health and the environment as  
4 written.

5 And additionally, we support DEQ's  
6 recommendation of no mixing zones or inclusion of  
7 intake credits as written; and overall support the  
8 Board of Environmental Review initiating  
9 rulemaking on the standards as proposed by the  
10 DEQ. Thank you for your time.

11 CHAIR DEVENY: Thank you, Ms. Canarios.  
12 Are there other members on the phone that would  
13 like to give public comment on Rule I? Please  
14 speak up if there are.

15 (No response)

16 CHAIR DEVENY: I'm not hearing any, so I  
17 think we'll go to Mr. Fink. And if you could keep  
18 your comments fairly brief, and as much as they  
19 apply to Rule I as possible.

20 BOARD MEMBER TWEETEN: Madam Chair, this  
21 is Chris. May I interpose a comment?

22 CHAIR DEVENY: Yes. Go ahead, Chris.

23 BOARD MEMBER TWEETEN: Well, two  
24 comments, I guess, that are related to each other.  
25 One, our agenda item for this rule indicates that

1 the action item would be to either initiate or not  
2 initiate rulemaking.

3 I don't think a member of the public  
4 reading that agenda item would expect that at this  
5 meeting we would be wordsmithing the rule. So I'm  
6 a little concerned about taking up suggestions as  
7 how to modify the text of the rule today when we  
8 haven't given notice to the public that that's our  
9 intention.

10 I guess my second observation is related  
11 to that, and this is in no way taking a position  
12 one way or another on the comments that Ms.  
13 Marquis made, which I think are obviously well  
14 considered and well thought out, and I think would  
15 be something that would be more properly taken up  
16 during the rulemaking process, where we have a  
17 public hearing, we have an opportunity for notice  
18 and comment, and the agency would then be required  
19 to consider all of those comments, both in favor  
20 of Ms. Marquis's position and those that might be  
21 critical of it, and to respond to those comments  
22 one by one in the final document that's returned  
23 to the Board before we decide whether to adopt the  
24 rule or not.

25 So I'm not sure it's a good use of our

1 time today to be considering suggestions as to how  
2 the text of the rule out to be modified. I think  
3 that it's premature to do that at this point under  
4 the statutory scheme that MAPA sets up, that those  
5 comments ought to be screened through the  
6 rulemaking process, and DEQ should then come back  
7 to us with their reaction to those comments, and  
8 we can consider all of that as a package in  
9 deciding whether to adopt a rule, and if so, what  
10 the rule should say.

11 CHAIR DEVENY: Thank you, Chris, for  
12 those comments, and I appreciate that. I'd also I  
13 guess like your recommendation to me as how do I  
14 as Chair, not knowing what people are going to say  
15 during the public comment process, but knowing  
16 that we have to have a public comment process.  
17 How would you suggest that I run this portion of  
18 the meeting to ensure that we don't get bogged  
19 down in that?

20 BOARD MEMBER TWEETEN: Well, Madam  
21 Chair, this is Chris again. As the Chair of the  
22 meeting, you have discretion as to what  
23 information ought to be received by the Board at  
24 this time and what shouldn't. And I don't know if  
25 you found my comment persuasive or not, but --

1 CHAIR DEVENY: I did as a matter of  
2 fact.

3 BOARD MEMBER TWEETEN: I don't want to  
4 -- I'm not trying to stonewall Mr. Fink, or Ms.  
5 Marquis, or anybody else at this point. I just am  
6 not sure, once all of those comments are spread in  
7 the record, that it's a matter that we would  
8 appropriately address at this meeting anyway, and  
9 whether it might not be a better use of  
10 everybody's time to defer those comments to be  
11 made through the rulemaking process.

12 So in your shoes, I guess, I would ask  
13 people who are offering comment to offer their  
14 comment as to the pros and cons of entering  
15 rulemaking at this point, as opposed to the merits  
16 of any particular language in the rule.

17 CHAIR DEVENY: Okay. I appreciate that  
18 advice. Sarah, I guess I'd like your input on  
19 that.

20 MS. CLERGET: I agree with Chris.

21 CHAIR DEVENY: Okay. Thank you. With  
22 that, we will ask then for future people that want  
23 to comment on this rule today to please limit your  
24 comments to the appropriateness of moving ahead  
25 with rulemaking on Rule I, the pros and cons. And

1 again, thank you, Chris, for that input.

2 So let's see. Back to Mr. Fink. Could  
3 you go ahead, and based on this discussion that  
4 we've just had, limit your comments to that  
5 outline.

6 MR. FINK: Yes, ma'am. Thank you, Madam  
7 Chair, and Board members. I guess specifically  
8 I'd like to take you on a little visual tour on  
9 why we think it is important to continue with this  
10 standards development. I'll just show you what  
11 we've been doing and working on since 2015, and a  
12 lot of what we do going forward hinges on having a  
13 nonanthropogenic standard in place.

14 CHAIR DEVENY: Again, is this  
15 appropriate -- Are you going to be talking about  
16 the rule that we're considering here today  
17 specifically?

18 MR. FINK: Yes, ma'am. It shows what  
19 we've done. And the DEQ Permitting staff has been  
20 exceptional in working with us to extend the time  
21 out, along with stays, to meet the existing ten  
22 part per billion standard, and that number in  
23 specific presents difficulties for us from a  
24 design and operational standpoint.

25 And so the nonanthropogenic standard

1 being in place before the permit goes into effect  
2 on the arsenic standard is important, because a  
3 lot of what we need to do is a long lead design  
4 and construction process.

5 So if you can take a few minutes, I can  
6 show you what we've done since 2015, just to give  
7 you an idea of the extent of the project, and why  
8 we just need to know going forward where this  
9 nonanthropogenic standard is going to land, and we  
10 were in --

11 CHAIR DEVENY: I'm not sure that this  
12 wouldn't be more appropriate for you to provide at  
13 the public hearing, rather than now.

14 MR. FINK: We can do that as well. But  
15 in general, we're in favor of moving forward with  
16 an annual standard. The seasonal standards did  
17 not basically -- and does not help us because we  
18 have to design and operate on the most stringent  
19 standard. So that's why we were proposing and in  
20 favor of going with an annual standard.

21 CHAIR DEVENY: Thank you, Mr. Fink. I  
22 appreciate that. Are there other comments from  
23 the public?

24 (No response)

25 CHAIR DEVENY: Other comments from the

1 public?

2 (No response)

3 CHAIR DEVENY: Hearing none, let's open  
4 this up to some Board discussion. Chris.

5 BOARD MEMBER TWEETEN: Yes, Madam Chair.  
6 A question for Mr. Fink, if I could. My question  
7 is: Is it your suggestion that we should decline  
8 to initiate the rulemaking at this point, and send  
9 you back to work with DEQ on further modification  
10 of the proposed rule, or are these concerns that  
11 you think can be taken up in discussion of  
12 amendments to the rule during the rulemaking  
13 process?

14 Maybe Ms. Marquis should be answering  
15 this question. I don't know.

16 MR. FINK: It may be best for Ms.  
17 Marquis to get into the details on it, but we  
18 would propose going forward with the rule. We  
19 believe a lot of the conditions we're bringing up  
20 would warrant the permit writers aspect of the  
21 process.

22 BOARD MEMBER TWEETEN: So even farther  
23 down the road than the rulemaking that these are  
24 considerations that ought to be taken up in  
25 dealing with your own individual permit between

1 you and DEQ.

2 MR. FINK: You could possibly let Mr.  
3 Kenning speak to that, because the rules kind of  
4 drive how the permit writers interpret things as  
5 well.

6 BOARD MEMBER TWEETEN: Right. Ms.  
7 Marquis, do you have anything to add to what Mr.  
8 Fink said in response to my question?

9 MS. MARQUIS: Certainly. Madam Chair,  
10 Board member Tweeten, thank you for listening to  
11 us. I know we've taken up a lot of your time  
12 today. I do approach you listening.

13 The reason we brought this full  
14 presentation is because one of the Board's options  
15 that they have today is to modify the notice and  
16 initiate the rulemaking.

17 And we feel that some of those  
18 sentences, particularly the two that I pointed out  
19 in the reasons for the New Rule, will set an  
20 expectation to the public and to everyone that all  
21 of these types of standards will be initiated at  
22 the most protective standard for human health, and  
23 that's not always going to be the case, so we'd  
24 like that clarified.

25 And the others are certainly changes

1 that could occur during the draft rulemaking, but  
2 the Department does have the option to modify the  
3 notice that goes out now. That's why we were  
4 here.

5 We don't want to put up a road block to  
6 this rulemaking process at this point. We just  
7 want to highlight that there is more work to be  
8 done, and to the extent that the initiation  
9 process can perhaps highlight that, or deal with  
10 that, or start people thinking about that, it  
11 would be helpful, because these are really, really  
12 complicated issues, and I know that the rulemaking  
13 initiation sort of sets up a six month time frame.

14 And especially now where we are with the  
15 COVID-19 restrictions, it's hard for people to get  
16 together and communicate about these things, and  
17 understand all of the issues. So we think it's  
18 really important to have a robust discussion at  
19 this point.

20 CHAIR DEVENY: Thank you, Ms. Marquis.  
21 Chris, did you have follow up on that?

22 BOARD MEMBER TWEETEN: Sure. As far as  
23 the language of the notice, I guess my view would  
24 be that as a result of public comment that's  
25 received at the hearing, DEQ could come back with

1 a different modified rationale for the rule if  
2 they chose to, so I'm not sure that there's  
3 anything in the notice language itself that's  
4 necessarily precedential for how the rule is going  
5 to turn out.

6 But I guess I'd like to hear perhaps  
7 from Mr. Moser with regard to what DEQ thinks  
8 about those proposed changes in the rationale for  
9 the rule, if they'd be acceptable to DEQ at this  
10 point.

11 I don't see any harm in incorporating  
12 them in the motion to initiate rulemaking, if  
13 that's appropriate. If DEQ wants to stick with  
14 the language that's in the notice, and consider  
15 these suggestions in the rulemaking process, I'd  
16 be fine with that as well.

17 But I'd like to hear from Mr. Moser as  
18 to just an off-the-cuff reaction from DEQ as to  
19 the proposed changes in the notice language as  
20 opposed to the language of the rule.

21 CHAIR DEVENY: Mr. Moser, could you  
22 answer Chris's question.

23 MR. MOSER: Yes. Madam Chair, members  
24 of the Board, again, this is Kurt Moser, DEQ  
25 attorney.

1           At this point I would say we would want  
2 to go forward with the -- would suggest you go  
3 forward with the language as proposed. I think  
4 while it may be difficult to go through all those  
5 individual changes, I think more importantly, even  
6 if we were to consider those on a case-by-case  
7 basis, I'm quite certain most of what Ms. Marquis  
8 suggested at this point is objectionable to DEQ.

9           However, I do think Board Member Tweeten  
10 is correct, that it shouldn't -- comments be made  
11 during the public comment period, the rule  
12 certainly could be changed, and the rationale for  
13 those changes would be expressed in the response  
14 to comments, thereby supplementing the record, and  
15 explaining the change of decision -- I mean change  
16 of course, if that is the case.

17           CHAIR DEVENY: Thank you for clarifying  
18 that. Do other Board members -- or Chris, did you  
19 have follow up to that?

20           BOARD MEMBER TWEETEN: Madam Chair, I  
21 don't. Thank you.

22           CHAIR DEVENY: Other Board members have  
23 questions, or comments, or further discussion, or  
24 recommendation for action? Dr. Lehnherr.

25           BOARD MEMBER LEHNHERR: Thank you, Madam

1 Chair. Regarding modifying language in the  
2 notice, there is some of the proposed language  
3 modifications that I don't think I would be  
4 comfortable with, but there is also the issue of  
5 the mechanism of how we, in this setting, change  
6 the language in a way that we all are very clear  
7 about what the changes in language are.

8 We've dealt with this before, where we  
9 did some sort of off-the-cuff language  
10 modifications, and there was some confusion about  
11 what the final result was. And so on that basis  
12 alone, I would be uncomfortable modifying the  
13 language at this point, unless we're set up to  
14 make the changes in a way that's very clear, and  
15 that puts everything in writing at this time in a  
16 way we all have easy access to.

17 And I'm not sure we're there today, so I  
18 would be inclined not to modify the notice.

19 CHAIR DEVENY: Thank you, David.

20 Dexter, were you trying to call in?

21 BOARD MEMBER BUSBY: No.

22 CHAIR DEVENY: Oh, okay. Jerry Lynch.

23 BOARD MEMBER LYNCH: I just didn't hear  
24 the Doctor's final comments about either  
25 proceeding forward or not proceeding forward.

1 CHAIR DEVENY: Go ahead, David.

2 BOARD MEMBER LEHNHERR: For a few  
3 different reasons, I am in opposition to modifying  
4 the notice. And I don't know if everyone heard my  
5 reasons, but that's the bottom line at this point  
6 for me.

7 BOARD MEMBER LYNCH: I agree with your  
8 comment. So your position is we should move  
9 forward with the notice?

10 BOARD MEMBER LEHNHERR: My inclination  
11 would be to go ahead and initiate rulemaking. And  
12 as Chris has pointed out, there will be  
13 opportunities for modifications down the road.

14 BOARD MEMBER LYNCH: I agree with that.  
15 Thank you.

16 CHAIR DEVENY: We're making some headway  
17 here, but I'm not hearing any motions.

18 BOARD MEMBER TWEETEN: Madam Chair.

19 CHAIR DEVENY: Yes, Chris.

20 BOARD MEMBER TWEETEN: I move that we  
21 initiate rulemaking as proposed by the Department,  
22 with the singular modification that it refer in  
23 the title, or in that section of the document to  
24 Rule I as opposed to Rule II.

25 CHAIR DEVENY: Could you point out where

1 that is, Chris? I'm not seeing that.

2 BOARD MEMBER TWEETEN: Let me see if I  
3 can get the packet back up here, because I had it,  
4 and now I don't. I'm going to pull up the packet  
5 on my cell phone here, so I can find the right  
6 spot, assuming that my cell phone will load the  
7 packet for me. It was in the notice, and right at  
8 the top of the language of the proposed rule,  
9 there is a reference there, and I think it says  
10 Roman Numeral II and not Roman Numeral I, if I  
11 read it correctly. Sarah, are you with me on  
12 this?

13 MS. CLERGET: Yes, I am, and I'm looking  
14 at Page 20 of the packet. And I'm wondering if  
15 you might be seeing the bracket. There's brackets  
16 around New Rule I that kind of makes New Rule I  
17 look like New Rule II.

18 BOARD MEMBER TWEETEN: I can tell you  
19 that as soon as my phone in its own leisurely way  
20 decides to load this page up for me.

21 CHAIR DEVENY: Yes, I kind of see where  
22 that is, too. It could be easily misread there.

23 BOARD MEMBER TWEETEN: If it says one,  
24 then I'm fine with it, and I'll withdraw that  
25 particular suggestion.

1 CHAIR DEVENY: So there's a motion, and  
2 I'm wondering, Chris, would you mind adding to  
3 your motion that we also designate a Hearing  
4 Officer?

5 BOARD MEMBER TWEETEN: Sure. So I would  
6 add to the motion that we appoint our Counsel  
7 Sarah Clerget to conduct the rulemaking hearing.

8 BOARD MEMBER LYNCH: I'll second Chris's  
9 motion.

10 CHAIR DEVENY: There is a motion before  
11 the Board.

12 BOARD MEMBER TWEETEN: I see. Okay.  
13 Yes, that's right. It is a bracket. Never mind.

14 CHAIR DEVENY: There is a motion before  
15 the Board to proceed with rulemaking and to  
16 appoint Sarah as the Hearings Officer, and there  
17 has been a second. Is there any further  
18 discussion?

19 (No response)

20 MS. FORD: Chris. I'm sorry. I missed  
21 who seconded that.

22 BOARD MEMBER LYNCH: I did. Jerry.

23 MS. FORD: Okay. Thank you.

24 CHAIR DEVENY: Any discussion?

25 (No response)

1 CHAIR DEVENY: Any public comment?

2 (No response)

3 CHAIR DEVENY: Hearing none and seeing  
4 none, all those in favor of the motion, signify by  
5 saying aye.

6 (Response)

7 CHAIR DEVENY: All those opposed.

8 (No response)

9 CHAIR DEVENY: Motion carries. Thank  
10 you, everybody. It's high noon. Do we want to  
11 continue on, or do we need to take a break?  
12 What's the Board's pleasure? I can go either way.  
13 Maybe we could get through the next rule.

14 MS. CLERGET: I think probably. It's my  
15 understanding it's a very brief segment.

16 CHAIR DEVENY: So moving on to the next  
17 rulemaking by the Department, and George Mathieus,  
18 if you could designate your spokesperson.

19 MR. MATHIEUS: Hey, Chris, it would be  
20 great. I think I lost the agenda. I'm trying to  
21 find it. Hold on a second here.

22 MS. CLERGET: It's initiate rulemaking  
23 for proposed amendments to the long list of rules  
24 starting with 1202 through 1372.

25 CHAIR DEVENY: Water Quality rules.

1 MR. MATHIEUS: I think it's the MPDES  
2 rules.

3 CHAIR DEVENY: MPDES rules.

4 MR. MATHIEUS: So I think Joanna is  
5 going to speak to that.

6 CHAIR DEVENY: Go ahead. And I'm not  
7 sure of your name, so if you could -- Joanna  
8 McLaughlin from DEQ. Joanna, please go ahead.

9 MS. McLAUGHLIN: Madam Chair, members of  
10 the Board, for the record, my name is Joanna  
11 McLaughlin, M-C-L-A-U-G-H-L-I-N. I'm a water  
12 quality permit writer for DEQ's MPDES Permit  
13 Program in the Water Quality Division.

14 The Board packet contains a proposed  
15 rule notice. It's very lengthy, so I won't detail  
16 each individual amendment. Instead I'd just like  
17 to highlight the purpose and relevancy, summarize  
18 feedback we received from the Water Pollution  
19 Control Advisory Council, and then discuss our  
20 stakeholder outreach. And finally I'd like to ask  
21 that the Board initiate this rulemaking.

22 So just a little bit of background.  
23 Montana DEQ is delegated to implement the National  
24 Pollutant Discharge Elimination System, which is  
25 the Federal permitting program regulated by EPA,

1 and we call that the NPDES program. Montana's  
2 permitting program is MPDES, which is implemented  
3 through DEQ.

4 In June of 2019, EPA finalized the  
5 revisions to the national permitting program  
6 regulations, and they also adopted new application  
7 forms for individual permittees. So to maintain  
8 consistency with our federal, the federal program,  
9 Montana has been allowed one year to make the  
10 programmatic and regulatory changes. So if the  
11 Board initiates the rulemaking process for these  
12 proposed amendments, Montana will be right on  
13 track with this timeline.

14 So that's a little bit of background, so  
15 the main purpose is to maintain consistency with  
16 the Federal regulations governing our State  
17 program, and then we're also seeking to implement  
18 some additional Montana specific editorial  
19 corrections, to provide clarity, and reduce  
20 redundancy. An example of an editorial correction  
21 would be updating DEQ's contact phone number and  
22 correcting references.

23 So DEQ conducted some stakeholder  
24 outreach, and sought recommendations from the  
25 Water Pollution Control Advisory Council, also

1 known as WPCAC. I'd like to just summarize the  
2 two topics they expressed interest in.

3 Both stakeholders and WPCAC asked how  
4 the proposed changes will affect rural areas  
5 relying on newspaper publications for public  
6 notice. And the proposed changes will not affect  
7 DEQ's responsibility to ensure that interested  
8 communities are informed.

9 Instead, the change allows flexibility  
10 to publish draft permit notifications on our web  
11 page, and choose, if appropriate, whether to  
12 publish notification in the newspapers. So DEQ  
13 still continues to remain responsible for choosing  
14 the most effective permitting method, which for  
15 rural communities is -- sorry -- effective  
16 communication method, which for rural communities  
17 is most likely newspaper publication.

18 The other topic that came up:  
19 Stakeholders had procedure related questions on  
20 transitioning to the new application forms. This  
21 is the most significant change in the proposed  
22 notice, as the MPDES program is required to adopt  
23 EPA's updated application forms.

24 So changes to the new forms are mainly  
25 modernizing formatting, adding clarifications to

1 instructions, so there's a few new requirements  
2 that are administrative in the rule in nature,  
3 such as requiring email addresses.

4 So since our current forms are in rules,  
5 DEQ can't adopt the new EPA forms until this rule  
6 change has been implemented to reflect the new  
7 requirements in the proposed rule notice, and  
8 actually that also explains why the proposed  
9 notice is so lengthy. Each type of discharger is  
10 required to submit a specific form, and each form  
11 reflects requirements outlined in our  
12 administrative rules.

13 So in closing, the Water Pollution  
14 Control Advisory Council voted to give its  
15 recommendation to move forward with this  
16 rulemaking, and the Department is not aware of any  
17 changes in this proposed package that would  
18 precipitate concerns among permittees or the  
19 public, and the Department could like to ask the  
20 Board to move forward with initiating rulemaking.  
21 Thank you. Do you have any questions?

22 CHAIR DEVENY: Thank you, Ms.  
23 McLaughlin. Do Board members have questions?

24 (No response)

25 CHAIR DEVENY: Any questions?

1 (No response)

2 CHAIR DEVENY: Any comments from the  
3 public on these rules? Again, please limit that  
4 to the topic at hand.

5 (No response)

6 CHAIR DEVENY: Anybody on Zoom, on the  
7 Zoom video that wishes to make comment?

8 (No response)

9 CHAIR DEVENY: So Lindsay, would you  
10 like to unmute everybody and see if we have  
11 anybody on the phone.

12 MS. FORD: Yes. Everyone is unmuted.

13 CHAIR DEVENY: Is there any public  
14 comment on the rules that were just discussed by  
15 Ms. McLaughlin?

16 (No response)

17 CHAIR DEVENY: Any comments?

18 (No response)

19 CHAIR DEVENY: Okay. Hearing none, is  
20 there any action that Board members would like to  
21 take? John, did I see a hand?

22 BOARD MEMBER DEARMENT: No, you didn't,  
23 but I guess while you're asking me, I'll go ahead  
24 and forward a motion that we initiate rulemaking  
25 as requested by the agency.

1 CHAIR DEVENY: Is there a second?

2 BOARD MEMBER TWEETEN: I'll second it.

3 CHAIR DEVENY: It's been moved and  
4 seconded. Is there any discussion?

5 BOARD MEMBER BUSBY: This is Dexter.  
6 I've got a really quick question for the  
7 Department.

8 CHAIR DEVENY: Go ahead, Dexter.

9 BOARD MEMBER BUSBY: You mentioned  
10 updating the forms and requiring email addresses;  
11 did I understand that correctly?

12 MS. McLAUGHLIN: That's one of the  
13 administrative changes in the forms, yes,  
14 requiring --

15 BOARD MEMBER BUSBY: I guess my question  
16 is: Does everybody who applies for a permit now  
17 have to have an email address?

18 MS. McLAUGHLIN: They would provide  
19 their email address. We may have some  
20 unrepresentative communities that have limited  
21 access to technology. But Rainie, maybe you can  
22 -- I'd like to refer that to Rainie. Those  
23 communities with limited access to technology, we  
24 already have an agreement with them, right?

25 MS. DeVANEY: This is Rainie. Madam

1 Chair, members of the Board.

2 CHAIR DEVENY: Rainie, please give your  
3 full name for our Court Reporter.

4 MS. DeVANEY: Of course. For the  
5 record, my name is Rainie, first name is  
6 R-A-I-N-I-E, my last name is DeVaney,  
7 D-E-V-A-N-E-Y.

8 CHAIR DEVENY: Go ahead, Rainie.

9 MS. DeVANEY: Thank you, Madam Chair.  
10 So it is correct that the new application forms  
11 will require an email address. However, the  
12 Department does maintain discretion in the event  
13 there are folks that do not have an active email  
14 address. We do maintain some discretion to waive  
15 that requirement on a case-by-case basis.

16 CHAIR DEVENY: Does that answer your  
17 question, Dexter?

18 BOARD MEMBER BUSBY: Yes. Thank you.

19 CHAIR DEVENY: Is there further  
20 discussion by the Board?

21 (No response)

22 CHAIR DEVENY: We have a motion that's  
23 been seconded before the Board that the Board  
24 initiates rulemaking for proposed amendments that  
25 are listed in the packet. I'm not going to read

1 them all. Is there any further discussion?

2 (No response)

3 CHAIR DEVENY: Is there any public  
4 comment on the motion?

5 (No response)

6 CHAIR DEVENY: Lindsay, are the phones  
7 unmuted?

8 MS. FORD: Yes.

9 CHAIR DEVENY: Hearing none, let's have  
10 a vote on the motion to initiate rulemaking for  
11 the proposed amendments. All those in favor,  
12 signify by saying aye.

13 (Response)

14 CHAIR DEVENY: All those opposed.

15 (No response)

16 CHAIR DEVENY: Hearing none, this motion  
17 passes. Okay. I think we should take a break for  
18 lunch. Do we need a full hour? It's 12:12.  
19 Let's reconvene at 12:45.

20 (Lunch recess taken)

21 CHAIR DEVENY: Lindsay, would you take  
22 roll call, please.

23 MS. FORD: Yes. Let me just make sure  
24 Dexter is unmuted here. So Chris Deveny.

25 CHAIR DEVENY: Here.

1 MS. FORD: David Lehnherr.

2 BOARD MEMBER LEHNHERR: Here.

3 MS. FORD: Dexter Busby.

4 BOARD MEMBER BUSBY: I'm here.

5 MS. FORD: John DeArment.

6 BOARD MEMBER DEARMENT: Here.

7 MS. FORD: Chris Tweeten.

8 BOARD MEMBER TWEETEN: Here.

9 MS. FORD: Jerry Lynch.

10 BOARD MEMBER LYNCH: Here.

11 MS. FORD: Okay. All six Board members  
12 are present.

13 CHAIR DEVENY: Okay. Great. Thanks,  
14 everybody. Let's move to action on contested  
15 cases, and we'll start with Sarah.

16 MS. CLERGET: Sure. The first order of  
17 business is Golden West, and in your packet, this  
18 starts at 71.

19 And just to kind of walk you through  
20 here, in your packet you'll see a proposed  
21 findings of fact and conclusions of law from me.  
22 And I apologize. I realized last night that I  
23 forgot the standard memo that I do for you guys  
24 with these.

25 But the FOFCOL is there. It is a FOFCOL

1 because it would dispose of the case entirely, if  
2 adopted. So that's why it has to be a FOFCOL  
3 instead of an order on motions for summary  
4 judgment. So you see that.

5 And then after that, you'll see an  
6 attachment to it, which was an order on motions  
7 that's Exhibit A to that, which was an order I  
8 issued earlier in the case that disposed of a  
9 bunch.

10 And the reason you have to have both of  
11 them is because if you choose to adopt the FOFCOL,  
12 you have to take care of -- anything that is  
13 dispositive of the case has to come in front of  
14 the Board, and that order on motions from August  
15 disposed of big parts of the case, and then the  
16 final FOFCOL disposed of the last piece.

17 So in order to understand or to make a  
18 decision on the whole case, you have to have all  
19 of those orders, and you'd have to adopt all of  
20 them.

21 And then at the end you'll see I did my  
22 standard order on exceptions. And then starting  
23 on Page 131 of your packet, there is a stipulation  
24 for dismissal of appeal, and that indicates that  
25 the parties stipulated for dismissal.

1           However, the stipulation doesn't state  
2 whether they -- it's a little unclear whether they  
3 want a dismissal pursuant to Rule 41, which means  
4 that you wouldn't have to rule on the proposed  
5 findings of fact and conclusions of law, or enter  
6 a final order; or in this document, the  
7 stipulation for dismissal, they ask for you to  
8 enter the order. And that you also can see on  
9 Page 135, that's their proposed order to you,  
10 which allows for the adoption. So that's the  
11 background information.

12           And then I'm looking at the list of  
13 people that we have on. And I see Sarah  
14 Christopherson and Mark Lucas -- I thought I saw.  
15 Yes, there he is -- Mark Lucas is on there. So  
16 they represent DEQ in this action, but I'm not  
17 seeing -- unless somebody is on the phone --  
18 representation from Mr. Kauffman or Ms. Akland,  
19 who are the other parties on this. If I'm wrong,  
20 please somebody speak up.

21           (No response)

22           MS. FORD: I'll unmute the phones just  
23 to make sure. Okay. The phones are unmuted.

24           MS. CLERGET: So I just wanted to be  
25 sure that I didn't misrepresent that there is

1 somebody on the phone who represents either Mr.  
2 Kauffman or Ms. Akland.

3 (No response)

4 CHAIR DEVENY: Sarah, who does Ms.  
5 Christopherson represent?

6 MS. CLERGET: DEQ.

7 MR. KAUFFMAN: This is Mr. Kauffman.

8 MS. CLERGET: Did I just hear Mr.  
9 Kauffman?

10 MR. KAUFFMAN: You did. I'm on mute.  
11 Just listening. Thank you.

12 MS. CLERGET: So we have Mr. Kauffman  
13 here, but not Ms. Akland. And to be honest, given  
14 the stipulation, that's not entirely unexpected to  
15 me. The stipulation indicates that they're not  
16 going to present exceptions, and as you can tell  
17 from the packet, they didn't present any  
18 exceptions.

19 So I don't know if you guys want to hear  
20 from the parties. You're obviously free to do  
21 that, or free to ask them any questions you want.  
22 And then your options are your standard options  
23 with regard to the FOFCOL.

24 CHAIR DEVENY: Sarah --

25 MR. LUCAS: Sarah, Mark Lucas here. If

1 I can just make a clarifying point. I'm not  
2 completely sure we can talk about this case with  
3 you without one of the parties here. We do have a  
4 stipulation, but it's the case that unless and  
5 until you do that, I'm concerned that any  
6 discussion with you about this case would be ex  
7 parte. Thank you.

8 MS. CLERGET: I did a little research  
9 into that, and obviously the Board members can  
10 feel free to disagree with me if they like, but I  
11 don't believe it's ex parte because this is a  
12 public proceeding, and they were noticed that it  
13 was occurring. It's essentially equivalent to us  
14 holding a court hearing for which they are not  
15 showing up.

16 So perhaps Judge Lynch would like to  
17 disagree with me or agree with me, but my  
18 understanding is that we can proceed, again, just  
19 as though this was a hearing where they didn't  
20 appear, and that's sort of on them.

21 BOARD MEMBER LYNCH: It's my view that  
22 with a stipulation for dismissal of the appeal  
23 signed by the attorneys for the parties involved,  
24 that the Board can go forward.

25 CHAIR DEVENY: That's how I'd like to

1 proceed. Any other Board members have objections  
2 to that?

3 (No response)

4 CHAIR DEVENY: We'll go ahead and go  
5 forward. Because there is a dismissal, is there a  
6 need to hear from the parties?

7 BOARD MEMBER LYNCH: This is Jerry.  
8 Madam Chair, I don't think so, although I don't  
9 know if there is something different in an  
10 administrative procedure. But anytime there's a  
11 stipulation of dismissal signed by the attorneys  
12 for both parties involved, that the judicial body  
13 can move forward, quasi-judicial in this case, and  
14 grant that.

15 MS. CLERGET: One clarification. The  
16 stipulation is signed by two of the three parties,  
17 so it's not signed by all of them. And the  
18 question --

19 BOARD MEMBER LYNCH: I'm sorry. I had  
20 to hang up the phone. But it's not signed by  
21 everyone?

22 MS. CLERGET: It's two out of the three.

23 BOARD MEMBER LYNCH: The third being?

24 MS. CLERGET: Being DEQ.

25 CHAIR DEVENY: Chris Tweeten, do you

1 have a comment?

2 BOARD MEMBER TWEETEN: I guess I do. I  
3 think it's odd to me that there is a stipulation  
4 to both enter a judgment and to dismiss with  
5 prejudice. That seems to be weird. If we agree  
6 to enter as our decision the proposed findings of  
7 fact and conclusions of law, then the result is  
8 basically a final judgment, not a judgment of  
9 dismissal. If we dismiss with prejudice, then the  
10 findings of fact and conclusions of law are moot.

11 So I think the stipulation strikes me as  
12 a bit strange in terms of the nomenclature of it.  
13 I don't have any problem with the idea of adopting  
14 the Hearing Examiner's proposed decision as our  
15 final decision.

16 As far as the stipulation goes, Sarah,  
17 am I correct in understanding then that we have a  
18 stipulation before us that's been signed by two of  
19 the parties? One of the Counsel that has signed  
20 the stipulation is not on the call, correct?

21 MS. CLERGET: That's correct.

22 BOARD MEMBER TWEETEN: Ms. Akland.

23 MS. CLERGET: Yes, and they were the  
24 ones who brought the appeal. Ms. Akland  
25 represents the individuals who brought the appeal.

1           BOARD MEMBER TWEETEN: Right. And the  
2 other party that is not on the stipulation is  
3 represented by Mr. Lucas; is that right?

4           MS. CLERGET: And Sarah Christopherson,  
5 I think; is that right, Mark?

6           MR. LUCAS: That's correct. And we're  
7 happy to stipulate on the record to join that  
8 stipulation, Board member Tweeten.

9           BOARD MEMBER TWEETEN: Okay. I guess  
10 Judge Lynch, I'd defer to you, but it seems to me  
11 that with that stipulation, or joinder of the  
12 stipulation on the record, then I think the  
13 interests of all the parties have been accounted  
14 for, and we can go ahead and rule on this.

15           BOARD MEMBER LYNCH: That's what I  
16 believe, Chris. I'd also point out that in --  
17 again, not being an administrative, that familiar  
18 with the administrative procedures -- that the  
19 stipulation itself was signed by both Ms. Akland  
20 on behalf of the residents, Kauffman on behalf of  
21 Golden West Properties, and they did represent  
22 that the Department of Environmental Quality does  
23 not oppose the relief requested in the proposed  
24 order.

25           So that coupled with -- I agree with you

1 that coupled with now a representation, that I  
2 think the Board can proceed forward.

3 CHAIR DEVENY: Okay. So we're  
4 comfortable proceeding forward, and now we need to  
5 talk about the fact that we have a dismissal and  
6 also a request for possibly adopting the FOFCOL  
7 and the orders.

8 BOARD MEMBER TWEETEN: Excuse me, Madam  
9 Chair. Jerry, while you were away from the screen  
10 handling your, dealing with your phone, you may  
11 not have heard my comment, but --

12 BOARD MEMBER LYNCH: I did not.

13 BOARD MEMBER TWEETEN: It's a little  
14 unusual to have a stipulation for dismissal with  
15 prejudice and a stipulation for entry of judgment  
16 in the same document.

17 BOARD MEMBER LYNCH: I agree.

18 BOARD MEMBER TWEETEN: So I think we  
19 ought to discard the stipulation for dismissal of  
20 the appeal with prejudice, and simply based on the  
21 stipulation that everybody has agreed to, adopt  
22 the Hearing Examiner's proposed decision as the  
23 Board's decision; would you agree with that?

24 BOARD MEMBER LYNCH: I agree with that,  
25 Chris.

1 CHAIR DEVENY: Any questions by Board  
2 members by what our esteemed legal members have  
3 been talking about?

4 UNKNOWN SPEAKER: I am sitting here  
5 listening to the Board of Environmental Review,  
6 and --

7 CHAIR DEVENY: I don't know who that  
8 was, but they muted. So David, John, Dexter, do  
9 any of you have questions about the procedural  
10 issues here?

11 BOARD MEMBER DEARMENT: No, thank you,  
12 Madam Chair. Not from me.

13 BOARD MEMBER LEHNHERR: None here.

14 BOARD MEMBER BUSBY: I don't have any.

15 CHAIR DEVENY: Okay. So Chris Tweeten,  
16 would you like to make that in the form of a  
17 motion then?

18 BOARD MEMBER TWEETEN: Certainly, Madam  
19 Chair. I would move that the Board adopt the  
20 Hearing Examiner's proposed decision as the  
21 Board's decision in this matter, and that the  
22 request for dismissal with prejudice be overruled.

23 CHAIR DEVENY: I'll second it. Is there  
24 discussion?

25 (No response)

1 CHAIR DEVENY: Is everybody clear on  
2 what we're voting on?

3 (No response)

4 CHAIR DEVENY: Is everybody clear?  
5 Okay. All those in favor of the motion, signify  
6 by saying aye.

7 (Response)

8 CHAIR DEVENY: Any opposed?

9 (No response)

10 CHAIR DEVENY: Any opposed?

11 (No response)

12 CHAIR DEVENY: Hearing none, the motion  
13 passes. Thank you. Okay.

14 MS. CLERGET: So No. 2 on the contested  
15 cases is -- actually not. Well, it is an appeal  
16 in new contested cases. That's Amy.

17 CHAIR DEVENY: I've asked Amy  
18 Christensen, who -- we've had to hire outside  
19 Counsel on this case, and I've asked her to give  
20 the Board an update, and there's possibly the  
21 decision making that we need to do. Go ahead,  
22 Amy.

23 MS. CHRISTENSEN: Thank you, Madam  
24 Chair, members of the Board. This case is  
25 currently pending before Judge Bidegaray on a

1 petition for judicial review that was filed by the  
2 conservation groups. They're challenging DEQ's  
3 decision to issue the permit, which BER approved  
4 after a contested case hearing.

5 And on judicial review BER was named as  
6 a party, so we moved to dismiss BER on the grounds  
7 that it's the deciding entity similar to a  
8 District Court Judge, and so it shouldn't be named  
9 as a party on judicial review, and have to  
10 essentially defend its own decision. So we  
11 thought it was appropriate for the other parties  
12 to argue about whether or not the decision was  
13 correct, and let the Court decide, but not have  
14 BER have to defend itself.

15 So we filed a motion to dismiss.  
16 Unfortunately we lost the motion, so now the case  
17 is moving forward. We have a scheduling order  
18 that's in place. The conservation groups filed  
19 their opening brief on April 10th, and response  
20 briefs are due on May 29th.

21 So we're now at a point in the case  
22 where we have to make a decision about how to go  
23 forward, and so we need to talk a little bit about  
24 strategy. And I believe that this discussion will  
25 proceed as part of the public session; is that

1 correct, Madam Chair?

2 CHAIR DEVENY: Yes.

3 MS. CHRISTENSEN: So as I see it, I  
4 think we've got three options to consider. One is  
5 request a writ of supervisory control, so that's  
6 an extraordinary remedy where we ask the Supreme  
7 Court to take a look at this issue and decide it  
8 now in the middle of the case, rather than waiting  
9 until the end.

10 Those types of remedies are not always  
11 granted, but if it's a purely legal issue, and if  
12 there is a risk that if it's not decided now,  
13 there's going to be -- essentially an injustice  
14 will occur to BER, then they will take it up. So  
15 that's one option, a writ of supervisory control.

16 The second option would be to just stay  
17 in the case, and participate at some level. We  
18 would have to file some type of a response brief.  
19 I wouldn't envision that that would be a very  
20 detailed, again a point-by-point defense of BER's  
21 decision, but some measure of involvement.

22 That particular option would preserve  
23 our right to appeal at the end of the case, so we  
24 would stay in the case, wait until the end, and  
25 then we could appeal to the Montana Supreme Court

1 about whether BER should have been in the case in  
2 the first place.

3 The third option would be to stay in the  
4 case and file a notice of non-participation, which  
5 is kind of what Judge Bidegaray suggested that we  
6 do. She's like, "Well, if you're unhappy being in  
7 this case, just don't participate," which doesn't  
8 really decide the issue, it doesn't really help  
9 us; and I also worry that it might impact our  
10 ability to appeal this decision later on.

11 So that's not my favorite option. One  
12 of the first two options I think would be better.

13 So I'd be interested in hearing the  
14 Board's thoughts about this, especially Chris and  
15 Judge Lynch, in terms of a writ of supervisory  
16 control, or just kind of modest participation  
17 followed by an appeal at the end.

18 CHAIR DEVENY: Go ahead, Chris Tweeten.  
19 Your hand was up first.

20 BOARD MEMBER TWEETEN: Thank you, Madam  
21 Chair. Is anybody present at the meeting today on  
22 behalf of MEIC and the Sierra Club in this case?

23 CHAIR DEVENY: Yes.

24 MS. CHRISTENSEN: Shiloh Hernandez is  
25 present. And I think Derf Johnson was present

1 also earlier. I'm not sure if he's still on.

2 BOARD MEMBER TWEETEN: Might I ask him a  
3 question? Because I think there's a fourth  
4 option.

5 MS. CHRISTENSEN: Okay.

6 BOARD MEMBER TWEETEN: The fourth option  
7 to be to try to procure some sort of agreement on  
8 behalf of the other parties that the Board can be  
9 released from participation as a party in this  
10 case.

11 And I guess I'm curious. My  
12 understanding was that there were discussions with  
13 you about the possibility of some sort of  
14 stipulation or agreement, and that the MEIC and  
15 Sierra Club declined to agree that the BER could  
16 be dismissed out of this case as a party.

17 I'm curious as to why MEIC and Sierra  
18 Club believe that they gain some advantage by  
19 having BER in this case as a party.

20 CHAIR DEVENY: Mr. Hernandez, if you'd  
21 like to respond to that, you're welcome to.

22 MR. HERNANDEZ: Thank you, Madam Chair.  
23 This is a matter really of an abundance of caution  
24 on our behalf. We didn't want to be in the case  
25 situation where our potential remedies would in

1 any way be limited for failure to join the Board  
2 of Environmental Review.

3 We've noticed that in multiple other  
4 cases decided by the Montana Supreme Court, BER  
5 has been named and joined as a defendant, and the  
6 Supreme Court has ruled on those cases. So  
7 following precedent, and wanting to be certain  
8 that we didn't limit our ability to seek any  
9 remedies that might present, we out of an  
10 abundance of caution named BER.

11 And with respect to non-participation, I  
12 would note that BER is actively -- is a number, in  
13 a number of other cases, as Sarah had noted, and  
14 just followed a notice of non-participation.  
15 That's the case with the discovery dispute that  
16 been appealed to the Montana Supreme Court for the  
17 Bull Mountain decision, and I'm not sure if  
18 there's another case, but there definitely is  
19 precedent that the Board is actively a party in  
20 other cases. So that's the motivation, that was  
21 the thinking behind it.

22 BOARD MEMBER TWEETEN: Madam Chair,  
23 followup, please.

24 CHAIR DEVENY: Okay, and then we'll go  
25 to Jerry Lynch.

1           BOARD MEMBER TWEETEN: I guess there are  
2 also -- as I'm sure you know -- numerous cases  
3 that have been taken to the Supreme Court  
4 following judicial review in a District Court of  
5 one of the Board's decisions where the Board has  
6 not been a party, and that --

7           And I'm just curious. I'm not aware  
8 that in any of those cases the Court has felt that  
9 its ability to afford proper relief on the appeal  
10 would be limited in some way because the Board  
11 wasn't present.

12           And I guess from the Board's  
13 perspective, having to continually go in and file  
14 things in these cases is a nuisance, it costs us  
15 money to have our Counsel, and in this case our  
16 outside Counsel, appear in these cases, and have  
17 to file notices of non-participation all the time;  
18 and I'm not aware of a single case that's gone to  
19 the Supreme Court in which the Board has decided  
20 to actively -- and I use the term "actively" --  
21 participate in the case by filing a brief on the  
22 merits, for example.

23           So that's what's driving the Board's  
24 concern here, is that I understand in an abundance  
25 of caution you may think the easiest thing to do

1 is just keep the Board in, and make the Board do  
2 what the Board wants to do; but from our  
3 perspective, it's not without cost, and we're not  
4 aware of any legal authority for the proposition  
5 that not having the decider in the administrative  
6 contested case present on the appeal has in any  
7 way affected the Court's ability to render  
8 complete relief among the parties.

9           So I guess I'd ask you again. Would you  
10 be willing to consider changing your stance, and  
11 agreeing that we can be let out of this case as a  
12 party? If not, then I guess I'm going to support  
13 Amy's suggestion that we file a petition for a  
14 writ, make you go to the Supreme Court, and make  
15 you explain to them why you think the Board needs  
16 to be a party in this case.

17           BOARD MEMBER LYNCH: I'd like to follow  
18 up, Madam Chair, on Chris's comments.

19           And Mr. Hernandez, although you say  
20 there have been cases in which the Board has been  
21 named a defendant, it's my understanding the  
22 Supreme Court has never made a ruling that in fact  
23 the Board is a proper defendant in a case such as  
24 this because the Board is a judicial, a  
25 quasi-judicial body that would be entitled to

1 quasi-judicial immunity.

2           You say it's out of caution, and this is  
3 -- don't take this wrong -- I think it's a bit  
4 careless. And I agree with Chris. From the  
5 Board's perspective, each time the Board is named  
6 as a defendant, it incurs unnecessarily legal fees  
7 to participate in these cases. And why you and  
8 your clients won't acknowledge that, that's your  
9 call, not mine.

10           But I would support the notion that the  
11 Board pursue a writ of supervisory control to have  
12 this issue decided, if that's what you folks  
13 choose to do, because -- if you can answer my  
14 question.

15           There is no relief that the Board can  
16 offer. The Board simply made a decision in  
17 review. It can't offer any relief that your  
18 client is asking. That's up to the DEQ upon a  
19 determination by the Court. The Board has no  
20 authority to grant any kind of relief, unless I'm  
21 missing something.

22           CHAIR DEVENY: Mr. Hernandez, would you  
23 like to respond? Go ahead, if you would.

24           MR. HERNANDEZ: Madam Chair, Members  
25 Lynch and Tweeten, I think that there is relief in

1 the case.

2 At bottom, one of our principal claims  
3 is that the Board has muddied the waters with  
4 respect to what evidence may or may not be  
5 presented to the Board on a petition for  
6 administrative review of a DEQ decision. That's  
7 kind of fundamental. Is DEQ limited to the record  
8 before DEQ at the time it made its decision, a'la  
9 Motor Vehicle Manufacturers versus State Farm, a  
10 federal standard; or is there some different  
11 standard?

12 So we view that some of the principal  
13 issues in the case are with respect to BER's  
14 ruling on how it conducts a contested case hearing  
15 under MAPA and MSUMRA; and we worry that someone  
16 could argue that's not DEQ's issue. DEQ doesn't  
17 decide the scope of MSUMRA review at BER. That's  
18 BER's decision.

19 And that's the big concern. This isn't  
20 a matter of spite, and it certainly isn't a matter  
21 of us wanting BER to assume for us. We don't. We  
22 want our cases to be resolved efficiently and  
23 justly just like everyone else.

24 So in light of those concerns, and I  
25 think that the situation where there's not case

1 law directly on point, I think it supports our  
2 position that we should be cautious, because I  
3 think there is a fair bit of ambiguity with  
4 respect to how judicial review of BER decisions  
5 under MAPA occurs. I think there's a lot of  
6 uncertainty in the judicial review provisions of  
7 MAPA.

8 And that's where we're at. And I think  
9 that a few points that maybe can address some of  
10 the concerns that are being raised here.

11 I think first, I'm of course not at  
12 liberty to make decisions to dismiss parties in  
13 cases without having consulted my clients, so  
14 that's just something that you, I'm sure the  
15 lawyers on the Board, recognize that's outside of  
16 my authority as a lawyer subject to the Rules of  
17 Professional Conduct to do right now.

18 But second, I think that we would be --  
19 my clients are reasonable clients, and they'd be  
20 happy to talk with Amy and the other parties to  
21 this case. If there was some -- Maybe there is a  
22 way that our concerns can be assuaged. There is  
23 -- Of course, there is some issues that parties  
24 can't agree. Even if we all agree to something,  
25 it doesn't change the law. But we're certainly

1 willing to talk, discuss that.

2           And third, I think that our clients want  
3 to make sure that we're being treated fairly. And  
4 I note that Signal Peak Energy named the Board of  
5 Environmental Review as a defendant in the Signal  
6 Peak versus MEIC case that's before the Montana  
7 Supreme Court. There BER, without any complaint,  
8 and without any pressure on Counsel, filed a  
9 petition of non-participation in District Court  
10 and at the Montana Supreme Court.

11           So I think that one requirement of our  
12 discussion that I think would have to be  
13 considered is that in that case also, BER should  
14 be dismissed, because I want to make sure that  
15 we're not being subject to a double standard.

16           So with that, off line, depending on  
17 what John, Mark, and Sarah Christopherson think,  
18 I'm happy to meet with them, and talk with Amy  
19 down the road or after this call, but we do have  
20 some limited concerns, I believe.

21           BOARD MEMBER LYNCH: Follow-up question,  
22 please, Madam Chair.

23           CHAIR DEVENY: Yes. Go ahead.

24           BOARD MEMBER LYNCH: For the benefit of  
25 the other Board members, Mr. Hernandez, what is

1 the standard of review at the District Court  
2 level?

3 MR. HERNANDEZ: The standard of review  
4 is set forth in MCA 2-4-704, I believe, and it's  
5 generally arbitrary and capricious review. But  
6 it's kind of the whole host of APA type standards  
7 of review.

8 CHAIR DEVENY: Chris Tweeten.

9 BOARD MEMBER TWEETEN: Well, I don't  
10 have any objection to Counsel getting together  
11 after this call and talking about a stipulation,  
12 but I would say that I would be opposed to the  
13 idea that in every one of these cases BER has to  
14 file something or sign something saying we agree  
15 to be bound by whatever the outcome of the Supreme  
16 Court's review of this case is.

17 We're bound by it anyway. As a matter  
18 of law under res judicata, the law of the case,  
19 whatever you want to call it, if the Supreme Court  
20 makes a decision and holds that we applied the  
21 wrong evidentiary standard in our contested case  
22 review, we don't have the discretion to disregard  
23 that decision.

24 So I'd be opposed to the idea that we  
25 have to go through that administrative hoop every

1 time of agreeing with Counsel for the parties that  
2 whatever the Supreme Court says we're going to  
3 follow it because we're going to follow it anyway.

4 So I guess what I would say is I think  
5 you all ought to get on the phone and talk this  
6 through, but I mean the idea that there's just  
7 some amorphous possibility out there that some  
8 weird thing may happen that doesn't afford you all  
9 of the relief that you think you're entitled to,  
10 and that that ought to be enough to require the  
11 Board to continue to go to the time and expense of  
12 filing these notices of non-participation every  
13 time somebody names us as a party, I'm not  
14 persuaded by that.

15 And as far as I'm concerned, I think  
16 we've sat by and filed notices of  
17 non-participation pretty consistently over the  
18 years, but I think frankly we're tired of it. We  
19 don't think it's required or appropriate, and it's  
20 time to get the Supreme Court to decide this issue  
21 one way or another as to whether we're necessary  
22 parties in these appeals.

23 So short of some agreement among Counsel  
24 to let us out of this case, I'm still going to  
25 support the idea that we ought to file the

1 petition and ask the Supreme Court to rule on it.

2 CHAIR DEVENY: Other comments or  
3 opinions?

4 BOARD MEMBER LYNCH: Just one other  
5 comment.

6 CHAIR DEVENY: Go ahead.

7 BOARD MEMBER LYNCH: I agree completely  
8 with what Chris has said. As far as another case  
9 in which -- Signal Energy, or whatever it was that  
10 you mentioned, Mr. Hernandez -- named the Board as  
11 a defendant, my position would be the same. It  
12 should never be a defendant.

13 And I agree that the time has come. I  
14 mean I'm new to the Board, but if the Board has  
15 been named -- which I understand over, over, and  
16 over again, both by the plaintiffs and the  
17 defendants -- it's time just to have it resolved.

18 So my suggestion would be Amy's first  
19 alternative to seek a writ of supervisory control.

20 CHAIR DEVENY: David, Dexter, John, any  
21 comments, questions?

22 BOARD MEMBER BUSBY: This is Dexter.  
23 Either one of our two folks on the Board that are  
24 lawyers, you're talking way above my legal  
25 understanding, so I'm going to have to ask you

1 guys what's the down side to doing that. You  
2 know, there's usually up sides and down sides. Is  
3 there a down side?

4 CHAIR DEVENY: Who want to answer that?  
5 Jerry. Thank you.

6 BOARD MEMBER LYNCH: I'll respond. The  
7 down side, I guess, if it is a down side, is the  
8 Court would say that the Board can in fact be  
9 named as a defendant, but that's happening all the  
10 time anyway, from what I understand.

11 The up side is that this notion that the  
12 Board should be named, and properly named, and go  
13 through this rigamarole, if the Court says no, the  
14 Board can't be named, it's entitled, in my view,  
15 to quasi-judicial immunity, that then the issue is  
16 resolved, so that each time one of these cases is  
17 filed, and then the Board is named, that the Board  
18 does not have to retain legal Counsel at  
19 considerable expense over and over to file a  
20 notice of non-participation. It makes no sense.

21 So I think that the statutes, to my  
22 knowledge, spell out what relief is available,  
23 what the standard of review is, and it's my  
24 understanding -- and Mr. Hernandez, you can  
25 correct me on this if I'm wrong -- but the appeal,

1 if you will, to the District Court and ultimately  
2 Supreme Court is based on the administrative  
3 record as developed, is it not, with perhaps some  
4 steps if there is a showing that something was  
5 deleted or whatever? Isn't it limited to the  
6 administrative record?

7 CHAIR DEVENY: Mr. Hernandez.

8 MR. HERNANDEZ: I think subject to the  
9 typical exceptions for supplementing or completing  
10 the administrative record, it is.

11 I think in this case, though, with  
12 respect to the administrative record, it has been  
13 quite helpful to have -- (inaudible) -- party to  
14 the case. There were multiple disputes about the  
15 content in the record; and Amy, to her credit I  
16 think very ably, resolved those concerns. I'm not  
17 sure if there was a different or easier way to do  
18 it.

19 But I think that, yes, Judge Lynch,  
20 you're right. It's the administrative record  
21 review subject to exceptions. But I think in this  
22 case, the facts show that the Board's presence in  
23 the case was salutary, and I think that Judge  
24 Bidegaray actually noted that in her ruling that  
25 she appreciated the presence of Ms. Christensen,

1 probably because of Amy's fine lawyering, but for  
2 what it's worth, the Court did say that she  
3 appreciated BER being present in the case.

4 BOARD MEMBER LYNCH: Well, that's  
5 admirable, I guess, but we're looking at the  
6 bigger picture, as Chris spelled out, that to do  
7 this over and over at considerable expense, there  
8 comes a time when the Board, in my view, has to  
9 say, "Let's get a final determination from the  
10 Supreme Court." And I think the Supreme Court --

11 I'm not giving anybody legal advice  
12 obviously. That's not my position. But I think  
13 the Supreme Court is going to say, subject to  
14 exceptions which you acknowledge, the  
15 administrative record controls the day, and  
16 basically the Board -- there's nothing the Board  
17 can do, and certainly not provide any relief  
18 that's not available as against the Department of  
19 Environmental Quality.

20 MR. HERNANDEZ: Your Honor, for what  
21 it's worth, we welcome certainty on this issue as  
22 well.

23 CHAIR DEVENY: I wanted to ask Amy a  
24 question. We're talking about a writ of  
25 supervisory control that -- I have no idea really

1 what that is, since I don't have a legal  
2 background. But I'm assuming this goes to the  
3 Supreme Court.

4           Could you talk about a timeline that we  
5 might be able to get an answer, something like  
6 that? Like we still need to be participating in  
7 the current case simultaneously, or would we get a  
8 fairly quick ruling from the Supreme Court, or is  
9 that totally out of your hands?

10           MS. CHRISTENSEN: The timing of the  
11 ruling would be out of our hands, but we can  
12 control the timing of the filing of the request.  
13 And I think right now, we would aim to file  
14 something before the response briefs are due, so  
15 that we could kind of get the Supreme Court  
16 involved immediately, so that we don't have to  
17 file a response brief if we don't have to, just to  
18 continue participating in the case to preserve our  
19 right to file an appeal later.

20           So sometime, I would say we make the  
21 request within the next probably 30 to 40 days,  
22 and then we would have to wait and see what the  
23 Court did.

24           CHAIR DEVENY: So is it possible that we  
25 would do that, but then also have to participate

1 with the case?

2 MS. CHRISTENSEN: I believe that, I  
3 think that -- and Shiloh, you can correct me if  
4 I'm wrong about this -- but I believe that once we  
5 file that petition, that everything else is going  
6 to -- they're going to hit the pause button on  
7 everything else, because the Court will have to  
8 decide whether or not to take that up.

9 MR. HERNANDEZ: Amy, I'm not certain  
10 about that, and to be honest, I haven't reviewed  
11 the law on that.

12 MR. LUCAS: Mark Lucas here, Amy. If I  
13 can weigh in on that. My understanding is that it  
14 does not automatically stay the case unless the  
15 parties seek that relief, or they so stipulate in  
16 the lower court.

17 So from our perspective, the best thing  
18 would be, instead of running up more legal bills,  
19 to discuss this with Mr. Hernandez, and see if he  
20 will, in an abundance of generosity and courtesy,  
21 allow the Board to be released from this case.  
22 Thank you.

23 MS. CHRISTENSEN: And Madam Chair, I am  
24 open to having those discussions again, with the  
25 hope that maybe we can reach some resolution this

1 time.

2 My only hesitation would be that I'm not  
3 sure that it resolves it conclusively going  
4 forward, but it would potentially resolve the  
5 pending case right now.

6 CHAIR DEVENY: Thank you. John, did you  
7 raise your hand or just scratch your head?

8 BOARD MEMBER DEARMENT: No, I was  
9 scratching at an inopportune moment. Sorry about  
10 that. But I think Jerry made a pretty compelling  
11 case for taking this to the Supreme Court. It  
12 sounds like in the end even Mr. Hernandez would  
13 welcome the clarity. So I can certainly support a  
14 decision to go there.

15 CHAIR DEVENY: David, Dr. David, you had  
16 your hand up.

17 BOARD MEMBER LEHNHERR: Yes. Thank you,  
18 Madam Chair. I'm just wondering. I don't know  
19 who could best answer this. But what would be a  
20 mechanism if we were going to delay action on this  
21 issue, and let the attorneys for the parties get  
22 together to discuss possibly letting the BER out  
23 of the case?

24 CHAIR DEVENY: Well, we still wouldn't  
25 resolve the overall issue, but I'll let Amy

1 respond to your question.

2 MS. CHRISTENSEN: Well, I think we can  
3 have that conversation with opposing Counsel  
4 pretty quickly, and figure out if we're able to  
5 reach some kind of resolution. We do have this  
6 kind of extended period of time before we have to  
7 file a response brief, so we have a little bit of  
8 time to work it out.

9 But if we're not able to work it out, I  
10 would need to know how the Board would like to  
11 proceed, because the Board won't meet again before  
12 the next response brief is due.

13 BOARD MEMBER LEHNHERR: Thank you.

14 BOARD MEMBER LYNCH: Go ahead, Chris.

15 BOARD MEMBER TWEETEN: Madam Chair, I'm  
16 prepared to make a motion at this point, unless  
17 there's further discussion among the members of  
18 the Board.

19 CHAIR DEVENY: -- (inaudible) --

20 BOARD MEMBER LYNCH: One followup  
21 question to Amy.

22 BOARD MEMBER TWEETEN: I'll be happy to  
23 wait.

24 BOARD MEMBER LYNCH: Amy, can you just  
25 briefly fill the Board in on Judge Bidegaray's

1 rationale, just a thumbnail.

2 MS. CHRISTENSEN: Yes. So we moved to  
3 dismiss on the grounds that BER is the deciding  
4 agency, they shouldn't have to defend their  
5 decision. It's really more to a District Court  
6 Judge, an appeal from a District Court decision up  
7 to the Montana Supreme Court.

8 We cited some case law that says that  
9 BER is not a required party in a case like this.  
10 There is a case out there that says that an  
11 administrative agency can be a party, so then the  
12 question was can they be a party, do they have to  
13 be a party.

14 And our option was, I mean we were  
15 trying to say to the Court, "You're creating a  
16 situation where you're making BER opt out,"  
17 whereas the case that she's relying on was really  
18 about an administrative agency that wanted in.

19 And so we thought the better approach  
20 would be, "You know what, if the administrative  
21 agency wants to opt in, let them opt in. We're  
22 saying we don't want to be in this case, so let us  
23 opt out. Don't force us to be in this case."

24 She didn't buy it. She thought it was  
25 fine for us to be brought in if some party had

1 requested that we be in the case. She didn't  
2 think that we had proven that MAPA provided all of  
3 the relief that was being requested, and we hadn't  
4 shown that -- I think she said something like  
5 beyond a reasonable doubt. So she said, "If you  
6 guys don't want to participate, file a notice of  
7 non-participation." So that's pretty much where  
8 she landed.

9 BOARD MEMBER LYNCH: Thank you.

10 CHAIR DEVENY: Any other discussion?  
11 Or Chris, do you want to go ahead with your  
12 motion.

13 BOARD MEMBER TWEETEN: Sure. I move  
14 that we direct Amy Christensen, our Counsel in  
15 this matter, to initiate promptly discussions with  
16 the attorneys for the other party in an attempt to  
17 secure a stipulation that the Board may be  
18 dismissed as a party in this case without  
19 prejudice to any of the issues that are being  
20 raised; and that in the event Amy is unsuccessful  
21 in securing that stipulation, she be authorized to  
22 file with the Montana Supreme Court a petition for  
23 a writ of supervisory control, asking the Court to  
24 rule that in all cases such as this, and absent  
25 some showing of extraordinary circumstances, it is

1 not necessary or appropriate to name the Board of  
2 Environmental Review as a party in matters arising  
3 from judicial review of the Board's decisions in  
4 the District Court, or appeals from those judicial  
5 review matters to the Montana Supreme Court.

6 CHAIR DEVENY: There is a motion before  
7 the Board. Is there a second?

8 BOARD MEMBER LEHNHERR: This is David.  
9 I'll second that.

10 CHAIR DEVENY: It's been moved and  
11 seconded. Is there further Board discussion?

12 BOARD MEMBER TWEETEN: Madam Chair, just  
13 a question for Amy. Does that provide you with  
14 sufficient guidance?

15 MS. CHRISTENSEN: It does. Thank you.

16 BOARD MEMBER BUSBY: This is Dexter.  
17 Just real quick. Chris, you didn't put a time  
18 element on that, and I'm not sure if there  
19 shouldn't have been a decision date in there, so  
20 Amy has the time to file.

21 BOARD MEMBER TWEETEN: Madam Chair, I'd  
22 respond to that and simply say that I did use the  
23 word "promptly," and absent some idea of what an  
24 appropriate date for that might be, I guess I  
25 would leave it to Amy's discretion to make the

1 determination as to whether, after promptly  
2 initiating those conversations, the conversations  
3 were in a position where they were not reasonably  
4 likely to be fruitful, in which point she would be  
5 authorized to go ahead with the petition.

6 CHAIR DEVENY: Are you comfortable with  
7 that, Dexter?

8 BOARD MEMBER BUSBY: I'm not  
9 uncomfortable with it, but I get concerned that  
10 "promptly" in legal terms is a very vague term.

11 BOARD MEMBER TWEETEN: I certainly agree  
12 to that, but Amy is an experienced lawyer, and I  
13 think she will have a good feel for when those  
14 discussions have hit the end of the road, and when  
15 it's time to go ahead. She can let her opposing  
16 Counsel know, or let the other Counsel know, that  
17 as far as she's concerned, this discussion is a  
18 dead end, and she intends to go forward with the  
19 petition. And at that point, you can lead a horse  
20 to water, but you can't make him drink. So you  
21 just go ahead and do what you have to do.

22 CHAIR DEVENY: Is there further Board  
23 discussion on the motion that's before us? John  
24 DeArment.

25 BOARD MEMBER DEARMENT: I just had a

1 quick question, in that it seems like even beyond  
2 this case, there's some interest in resolving this  
3 question one way or another once and for all.

4           Procedurally is there a way to do that?  
5 If Amy and Shiloh reach a resolution in the  
6 current matter, in the broader future could we  
7 still get an answer from the Court through some  
8 process as to this question for future cases?  
9 Thanks.

10           BOARD MEMBER LYNCH: Madam Chair, I'll  
11 respond.

12           CHAIR DEVENY: Jerry.

13           BOARD MEMBER LYNCH: If there is an  
14 agreement between Amy and Shiloh in this case,  
15 it's limited to this case. And that's the  
16 frustration, if you will, that I think both Chris  
17 and I alluded to, that if they reach an agreement  
18 here, it's not binding in the future on anybody,  
19 including Shiloh's current clients.

20           So the Board is going to ultimately have  
21 to make -- if they reach a resolution, fine. The  
22 Board can make a decision to say okay in this  
23 case, but leave that issue out there, or go  
24 forward with a writ of supervisory control, which  
25 I -- Chris will agree with me -- it's sometimes

1 difficult to get the Court to address those.

2 But because Amy will very convincingly  
3 -- I'm sure, Amy -- explain to the Court the  
4 perpetual nature of this problem that the Board  
5 faces. And so in answer to your question, it's  
6 only if the Court, the Supreme Court ultimately  
7 decides the issue, that there will be comfort  
8 moving into the future, or precedent moving into  
9 the future.

10 CHAIR DEVENY: So if I'm hearing this  
11 right, then the motion that's currently before us  
12 could potentially leave us kind of where we're at  
13 with the exception of this particular case.

14 BOARD MEMBER LYNCH: I think that's  
15 accurate. That is accurate.

16 BOARD MEMBER TWEETEN: I think it is,  
17 too. Madam Chair, if I might respond briefly.

18 Everything that Jerry said is correct  
19 obviously, and I don't dispute any of it. But on  
20 the other hand, the other way to look at it is  
21 that having had this discussion on the record,  
22 reflected in our minutes, that in the absence of  
23 cooperation from the parties to let the BER out,  
24 we're prepared to take this issue up, that might  
25 act to discourage parties from pursuing this route

1 in the future.

2 So it may never be necessary for us to  
3 be the party that does the lifting here to get the  
4 issue decided by the Supreme Court. Maybe  
5 somebody else will do it eventually.

6 And second, I guess, I would want to be  
7 able to represent to the Court, in the event the  
8 questions were raised, that we made every effort  
9 to keep this issue off the table, and were unable  
10 to do so. I think that might be a factor in  
11 moving their discretion to accept this case,  
12 because it is discretionary with them at this  
13 stage whether to decide this issue now or not.

14 So I'd like to take -- I think the  
15 better part of valor is to take one more stab at  
16 settling this question amicably in this case, and  
17 then if we're able to do that, then we can holster  
18 our guns and wait until the next time we have to  
19 fight this issue out before we actually ask the  
20 Court to decide it.

21 So my sense would be that it's better to  
22 try to resolve the issue by agreement at this  
23 point, if we can; and if not, then at least we can  
24 let the Court know that we made every effort to  
25 decide this issue, or resolve this issue without

1 asking their participation.

2 And we can certainly muster for the  
3 Court a significant number of prior matters in  
4 which we've been named as parties, just to let  
5 them know that this is not a once-in-a-lifetime  
6 issue, that it's a continuing issue that's come  
7 up, and that it's time for the Court to clarify  
8 MAPA, and make it clear that we're not appropriate  
9 parties in these cases.

10 So I would like to see Amy make one more  
11 stab at diplomacy here before we file the  
12 petition.

13 CHAIR DEVENY: Go ahead, Jerry.

14 BOARD MEMBER LYNCH: I was going to say  
15 well put, Chris, and I agree whole heartedly.

16 CHAIR DEVENY: I think we're ready for a  
17 vote on this issue, unless anybody has any other  
18 burning discussion points.

19 (No response)

20 CHAIR DEVENY: Hearing none, are people  
21 clear on what the motion is, or do we need to ask  
22 Laurie to somehow read it back to us?

23 BOARD MEMBER DEARMENT: I'm clear.

24 BOARD MEMBER LEHNHERR: I'm clear.

25 BOARD MEMBER BUSBY: I'm clear.

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

3 (Response)

4 CHAIR DEVENY: Any opposed?

5 (No response)

6 CHAIR DEVENY: Hearing none, motion  
7 passes. And thank you, Amy, and just keep me  
8 posted, and we'll take it from there.

9 MS. CHRISTENSEN: Thank you.

10 CHAIR DEVENY: Back to Sarah.

11 MS. CLERGET: So the next one is what we  
12 refer to as Western Energy Area F. So this is a  
13 different Western Energy case than the AM4 case  
14 that we were talking about.

15 And the issue here is that you've  
16 designated me as the Hearing Examiner for  
17 procedural purposes, and in your packet starting  
18 at Page 138 is the transcript from the meeting  
19 where you did that. And essentially you said that  
20 you wanted to hear back from me when summary  
21 judgment was filed to decide what you were going  
22 to do.

23 And summary judgment has now been filed.  
24 There is a notice of submittal starting at Page  
25 145 in your packet that was from DEQ. That

1 explains that the motion is fully briefed, and  
2 nobody has requested oral argument.

3 Before we realized that this was only  
4 set to me for procedural purposes, I actually went  
5 ahead and set oral argument, because I wanted it  
6 when I thought I was going to be deciding this,  
7 and then we realized that it was only for  
8 procedural purposes, so that's the other order  
9 that you'll see is me vacating the oral argument  
10 in front of me, and then giving the parties a  
11 notice based on their request that we weren't  
12 going to hear substantive argument today.

13 The only thing that's in front of you  
14 today is you need to decide whether you want to  
15 review the summary judgment motions that are  
16 pending, or whether you want to assign it to me  
17 for all purposes.

18 And just because I know somebody is  
19 going to ask, I can tell you the briefing on it is  
20 about a binder full, and because there's three  
21 parties, so you have three briefs. Everybody has  
22 cross moved for partial summary judgment, so you  
23 have three briefs, three responses, and three  
24 replies. And then there's about five or six  
25 binders of exhibits. So that's about how big

1 we're talking about. And this is obviously a big  
2 and important case.

3 So again, all that we're deciding today  
4 is procedural in nature, but I've told the  
5 parties, as you can see in that notice, that I  
6 wanted them here to discuss logistics or answer  
7 your questions if you had any going forward.

8 CHAIR DEVENY: Sarah, if we decided to  
9 take on this case, how would Board members get  
10 access to those binders given that we're social  
11 distancing and home bound?

12 MS. CLERGET: The same way I do. We can  
13 give you -- Everybody can have a file transferred  
14 that has them electronically, or we can produce  
15 them or have the parties produce them -- either  
16 way -- in hard copy, and then you guys could come  
17 and pick them up, if you want, or we can mail them  
18 to you. Either way.

19 But I would recommend what -- I have to  
20 do it in hard copy for me, because I write all  
21 over everything. So for those of you who wanted  
22 hard copies, we can make that happen individually.  
23 You know, everybody can have their own.

24 But then what happens is that you review  
25 it, and it's up to you whether you want to set

1 oral argument at a special meeting or at your June  
2 meeting; or if you don't want oral argument at  
3 all, if you just want to decide it on the briefs,  
4 and then I can help you, if you want me to, to  
5 write a decision, or you can write it yourself.  
6 You can elect somebody to write it and circulate  
7 it among yourselves, or whatever you want to do.

8 CHAIR DEVENY: Questions by Board  
9 members? Jerry.

10 BOARD MEMBER LYNCH: I would just  
11 recommend that -- I like the hard copy, too. I  
12 would recommend that any -- we require the parties  
13 to submit to Sarah, who can get them to us, for  
14 those Board members that want hard copies, rather  
15 than having the Board staff do that. I think  
16 they're quite capable of doing that. I would  
17 recommend that we require the parties to provide  
18 hard copies.

19 CHAIR DEVENY: Jerry, before we get  
20 there, we have to decide whether this Board is  
21 going to take on this case, or whether we're going  
22 to assign it to Sarah. So the nitty-gritty of  
23 this we can discuss later.

24 BOARD MEMBER LYNCH: All right. I  
25 misunderstood.

1 BOARD MEMBER TWEETEN: Madam Chair.

2 CHAIR DEVENY: Chris.

3 BOARD MEMBER TWEETEN: Looking at the  
4 transcript excerpt that Sarah provided us, this is  
5 probably my fault because I was the one --

6 MS. CLERGET: Yes, I agree.

7 BOARD MEMBER TWEETEN: -- the question  
8 when we first got this case many months ago, and  
9 it was my idea to simply assign it for procedural  
10 purposes at that time.

11 I don't relish the thought of -- and  
12 frankly I'm lazy this way. I don't relish the  
13 thought of taking this issue on as an original  
14 matter without the input from our Counsel as to  
15 her recommendations of what should happen here.

16 And as far as the record is concerned, I  
17 think I'm correct in saying that our practice has  
18 consistently been that after the Hearing  
19 Examiner's proposed decision comes to us, copies  
20 of the briefing will be provided in the Board  
21 packet. And we can certainly follow Jerry's  
22 suggestion and have the parties provide hard  
23 copies in whatever number the members of the Board  
24 decide is necessary. If you want hard copies, we  
25 could make the parties pay for it rather than do

1 it ourselves, and put poor Lindsay to the task of  
2 having to copy all that stuff.

3 But I am I think pretty firmly convinced  
4 that we should dump this in Sarah's lap, and have  
5 her do a proposed decision for us before we try to  
6 sort this out on our own. And I say that  
7 partially because it's pretty apparent a lot of  
8 water has gone under the bridge in this case  
9 already, and Sarah has already got a much better  
10 familiarity with what's gone on here than any of  
11 us have, and have to duplicate all that effort to  
12 get up to the point that she is now.

13 So for all those reasons, I would be  
14 prepared to support the idea of assigning Sarah  
15 the responsibility for writing a proposed  
16 decision.

17 CHAIR DEVENY: Sarah, did you have a  
18 followup?

19 MS. CLERGET: Just a clarification from  
20 what Chris said. Because these are all partial  
21 motions for summary judgment, this wouldn't come  
22 back to you until after a hearing, because  
23 generally the guidance I've gotten from you guys  
24 and the practice has been that unless it is  
25 dispositive on the summary judgment motions, it

1 doesn't come back to you until after the hearing.

2           And then when you get the packet for the  
3 hearing, or just an FYI when we do summary  
4 judgment, you get exceptions briefs. So you get  
5 the FOFCOL from me, and then exceptions briefs on  
6 the FOFCOL, but you can go look at the original  
7 briefs if you want to -- we always make everything  
8 in the record available to anybody who asks -- but  
9 I don't normally put the actual underlying  
10 briefing in the Board packet.

11           BOARD MEMBER TWEETEN: Madam Chair,  
12 that's all the more reason to support my motion to  
13 have Sarah do this.

14           CHAIR DEVENY: Was that a motion, Chris?

15           BOARD MEMBER TWEETEN: Sure. Madam  
16 Chair, I'm prepared to move that we assign all  
17 remaining issues in this matter to Sarah for her  
18 determination as the Hearing Examiner.

19           CHAIR DEVENY: There is a motion before  
20 us. Is there a second?

21           BOARD MEMBER BUSBY: This is Dexter.  
22 I'll second it.

23           CHAIR DEVENY: It's been moved and  
24 seconded. Is there further discussion by Board  
25 members?

1 BOARD MEMBER BUSBY: I have a question  
2 for Sarah.

3 CHAIR DEVENY: Go ahead, Dexter.

4 BOARD MEMBER BUSBY: With the situation  
5 the way it is, and your workload, are you able to  
6 handle this in a timely manner, or is it going to  
7 encumber you beyond your desired ability?

8 MS. CLERGET: Thank you for caring about  
9 that. I can handle it. Again, I always give the  
10 caveat that I use ALSB attorneys as necessary,  
11 although I will ultimately render the final  
12 decision. Sometimes I use them as a clerk to the  
13 clerk, as we refer to it sometimes. So in this  
14 and other decisions, assuming that continues to be  
15 all right with you, yes, I can handle it.

16 BOARD MEMBER BUSBY: Thank you.

17 CHAIR DEVENY: I can't speak for  
18 Hillary, but I suspect, as Health Officer in  
19 Flathead County, she's going to be quite taken up  
20 with the COVID-19 issue right now, and I question  
21 whether she would be available to spend a lot of  
22 time on it.

23 BOARD MEMBER TWEETEN: Madam Chair, I  
24 think that's correct. I see Hillary on the  
25 television about every other day giving advice to

1 the folks up in Kalispell about what they should  
2 be doing, so she's obviously very much engaged in  
3 that.

4 CHAIR DEVENY: John, Dr. Lehnherr, any  
5 comments? Preferences?

6 BOARD MEMBER DEARMENT: None.

7 BOARD MEMBER LEHNHERR: None here.

8 CHAIR DEVENY: Okay. Why don't we go  
9 ahead and vote on the motion then to assign the  
10 rest of this case in its entirety to Sarah  
11 Clerget, our Hearing Examiner. All those in favor  
12 of the motion, signify by saying aye.

13 (Response)

14 CHAIR DEVENY: All those opposed.

15 (No response)

16 CHAIR DEVENY: Sarah, you win again.

17 MS. CLERGET: Yay.

18 CHAIR DEVENY: We're going to keep Sarah  
19 on the hot spot here, and ask for Board Counsel  
20 update.

21 MS. CLERGET: There's only one thing on  
22 the Board Counsel update, and that is that the  
23 Board -- Chris and I wanted to make the Board  
24 aware of the fact that recent EPA action and  
25 litigation going on in Federal Court have raised

1 issues with the Board's rules on numeric water  
2 quality standards which are set by Board  
3 Administrative Rules; and then those rules that  
4 interact DEQ's rules on the variances.

5 We just wanted to let the Board know  
6 that this is a developing issue, and we'll be  
7 working with DEQ in the coming weeks to determine  
8 what it means and what the options are going  
9 forward.

10 This may mean that we need a special  
11 meeting, depending on what goes on with the  
12 discussions with DEQ and DEQ's discussions with  
13 the stakeholders, or it may be something we can  
14 take up in June. So we just wanted to give you  
15 guys an FYI that that was happening, and we're  
16 going to work on it as we can.

17 CHAIR DEVENY: Okay. Anything else for  
18 Board Counsel update?

19 MS. CLERGET: No. That's it. Oh,  
20 actually -- I'm sorry. I lied. Just the rules  
21 update. I'm still working on the procedural  
22 rules. I was supposed to have a round table, a  
23 second round table yesterday, but I cancelled that  
24 for probably obvious reasons. And so I will  
25 either reschedule that for later, or I may just

1 forego that, and do what I can by email. But I'll  
2 continue to work on it.

3 And then DEQ is continuing with their  
4 review of all of the BER rules, so that we can get  
5 a list from them of the totality of the BER rules,  
6 and where we stand in our two year review of  
7 statutory requirements. So that's the only other  
8 thing I had.

9 CHAIR DEVENY: Okay. Thank you. At  
10 this time, we'll open up the meeting for any  
11 general public comment that there may be out there  
12 on issues that are not associated with contested  
13 cases. So if there is anybody that has comments  
14 that they'd like to make, now is the time.

15 Lindsay, go ahead and unmute the phones  
16 if you haven't already.

17 MS. FORD: The phones are unmuted.

18 CHAIR DEVENY: Thank you. Is there any  
19 public comment at this time?

20 (No response)

21 CHAIR DEVENY: Any public comment?

22 (No response)

23 CHAIR DEVENY: Hearing none, it looks  
24 like we're ready to move to adjournment. I want  
25 to thank everybody today for participating, and

1 for patience, and this may be the forum we use for  
2 awhile yet. So it is nice to have faces, I have  
3 to admit. So with that, is there a motion to  
4 adjourn?

5 BOARD MEMBER TWEETEN: So moved.

6 BOARD MEMBER LYNCH: Second.

7 CHAIR DEVENY: It's been moved and  
8 seconded. All those in favor, signify by saying  
9 aye.

10 (Response)

11 CHAIR DEVENY: Any opposed?

12 (No response)

13 CHAIR DEVENY: Hearing none, this  
14 meeting is adjourned.

15 (The proceedings were concluded

16 at 1:54 p.m. )

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STATE OF MONTANA )  
: SS.  
COUNTY OF LEWIS & CLARK )

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

That the proceedings were taken before me at  
the time and place herein named; that the  
proceedings were reported by me in shorthand and  
transcribed using computer-aided transcription,  
and that the foregoing - 185 - 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 \_\_\_\_\_, 2020.

\_\_\_\_\_  
LAURIE CRUTCHER, RPR  
Court Reporter - Notary Public  
My commission expires  
March 9, 2024.

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