BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING
APRIL 17, 2020

TRANSCRIPT OF PROCEEDINGS VIA VIDEO CONFERENCE

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

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

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

BOARD MEMBER LYNCH: Thank you.

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

MS. FORD: Good morning. Chris Deveny.

CHAIR DEVENY: Here.

MS. FORD: David Lehnherr.

BOARD MEMBER LEHNHERR: Here.

MS. FORD: Dexter Busby.

BOARD MEMBER BUSBY: I'm here.

MS. FORD: John DeArment.
BOARD MEMBER DEARMENT: Here.

MS. FORD: Chris Tweeten.

BOARD MEMBER TWEETEN: Here.

CHAIR DEVENY: Jerry Lynch.

BOARD MEMBER LYNCH: Here.

MS. FORD: Hillary Hanson.

(No response)

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

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

I'm going to try to ask, to see if this will work, when I ask for Board members to speak, or when they want to speak, if you could just wave your hand, and then I can acknowledge you, and that way we don't a lot of people speaking at once. So we're going to try that.
And then for the public comment period, we'll probably do that a little bit differently, but for Board members, that would be really helpful for me. I want to make sure that everybody has an opportunity to speak.

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

MS. CLERGET: Sarah Clerget, Board attorney.

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

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

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

MS. FORD: Lindsay Ford, Board secretary.

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

MS. COLAMARIA: This is Angie Colamaria,
Chief Counsel, DEQ.

MS. SCHERER:  Sandy Scherer, DEQ.

MR. DAVIS:  Tim Davis, DEQ.

MS. BOWERS:  Kirsten Bowers, DEQ attorney.

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

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

MR. VanOORT:  Martin VanOort, DEQ Coal Section.

MS. WEAVER:  Christine Weaver, MPDES permit writer.

MS. McLAUGHLIN:  Joanna McLaughlin, MPDES permit writer.

MR. CRONIN:  Chris Cronin.

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

MR. KENNING:  Jon Kenning, Water Protection Bureau.

MR. LUCAS:  Mark Lucas, DEQ staff attorney.

MR. MOSER:  Kurt Moser, DEQ attorney.

MS. CHRISTOPHERSON:  Sarah Christopherson, DEQ attorney.
MR. BARTON: Daryl Barton, DEQ Water Quality Bureau.

MR. DORRINGTON: Matt Dorrington, DEQ Coal Section.

MR. CRONIN: Chris Cronin, Opencut Mining Section.

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

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

(Maya Rao present but without microphone)

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

MS. FORD: Chris, before we go there, the folks that called in, I don't know if they're able to unmute themselves, so I will have to go in and manually unmute each caller because they don't have a way to unmute by just calling in. So I will go right now and unmute all of the people who have dialed in, and then if people can use -- if you called in, if you dialed in just by the phone,
if you can please use the chat -- Oh, no, you can't do that. Never mind.

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

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

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

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

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

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

MR. OLSON: Alan Olson, Montana Petroleum Association.

MS. SOLEM: Aleisha Solem, Agency Legal Services.

MR. LaCASSE: Shane LaCasse, CHS.

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

MS. KERR-CARPENTER: Emma
Kerr-Carpenter, Northern Plains Resource Council
-- (inaudible) --

MR. FINK: George Fink, CHS, Laurel.

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

(No response)

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

(Inaudible)

CHAIR DEVENY: Take it one at a time.

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

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

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

MR. CHEREN: Bobby Cheren with from Baker Hostetler.

(Inaudible)

CHAIR DEVENY: Could the last speaker
UNKNOWN SPEAKER: Hello. Are you there?

CHAIR DEVENY: Yes.

UNKNOWN SPEAKER: I can't talk right now.

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

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

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

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

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

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

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

CHAIR DEVENY: That could take a long
MS. FORD: I'm going to read the last four digits of your phone number. If that's you, please introduce yourself. 5086.

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

MS. FORD: 1517.

BOARD MEMBER BUSBY: This is Dexter.

MS. FORD: 6648.

MR. CHEREN: Bobby Cheren, Baker Hostetler.

MS. FORD: 1105.

MR. YEMINGTON: Sam Yemington, Holland and Hart.

MS. FORD: 5818.

MS. MARQUIS: Vicki Marquis from Holland and Hart.

MS. FORD: 5142.

MR. BARNES: Cory Barnes, Baker Hostetler.

MS. FORD: 6648.

MR. CHEREN: This is Bobby again.

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

MS. BORDALON: That's Sarah Bordalon from Holland and Hart.
MS. FORD: I think we got everyone. If there's anyone that I missed, please speak up at this time.

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

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

MS. FORD: Everyone is muted except for Dexter.

CHAIR DEVENY: Okay. Great.

MS. FORD: The feedback is coming from Dexter.

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

(No response)

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

BOARD MEMBER LEHNHERR: This is David.
I move we approve those minutes.

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

(No response)

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

(No response)

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

(Response)

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

(No response)

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

(No response)

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

BOARD MEMBER DEARMENT: This is John DeArment. I'll second that.
CHAIR DEVENY: It's been moved and seconded. Is there any public comment?

(No response)

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

(Response)

CHAIR DEVENY: Any opposed?

(No response)

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

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

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

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

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

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

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

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

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

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

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

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

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

The parties on November 22nd submitted a joint proposed schedule, which then I issued a
scheduling order in late November. The deadlines are for dispositive motions which will be fully briefed in December, so that one is proceeding.

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

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

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

BOARD MEMBER LYNCH: Christine, may I interrupt?

MS. CLERGET: Yes.

BOARD MEMBER LYNCH: I just want to for
the record note that I need to recuse myself on
the Montanore Minerals Corporation, as I did
settlements in those cases when they were pending
in Federal Court. It's not directly related to
this, but I think the appearance of impropriety
necessitates I recuse myself. I just want that on
the record, Christine.

CHAIR DEVENY: Okay. Thank you, Jerry.

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

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

You'll notice that there is a scrum at
me at this point because I'm not working a full
schedule with the kids. So I'm doing the best I
can, but you'll notice there's a lot of stuff that's pending for me right now.

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

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

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

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

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

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

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

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

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

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

CHAIR DEVENY: Yes.

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

CHAIR DEVENY: Great. Thank you, Amy.
MS. CHRISTENSEN: You're welcome.

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

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

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

And we have a scheduling order in place pursuant to that. They filed an amended statement of issues in February, and they're proceeding. Dispositive motions will be briefed in August, so
that's sort of the next big thing that will be in
front of us.

And next one 3(a) is DEQ.

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

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

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

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

And so we also requested a stay of the
case until the renewed permit issues or for six
months. And MEIC has indicated that they would
oppose the stay. So at this point the parties are
just awaiting an order for scheduling conference.
CHAIR DEVENY: Thank you, Ms. Bowers.

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

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

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

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

CHAIR DEVENY: Yes.

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

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

DR. SUPLEE: Great. And there may be a lot of people on the phone that are not seeing this, but I know that this is part of the Board packet. And all the slides are numbered, and I'll
be very careful to make sure I indicate which slide number we're on as we go through, so you can view it yourself at home by slide number. Does that sound good?

MS. FORD: They're all muted.

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

MS. FORD: I thought I did.

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

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

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

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

DR. SUPLEE: There we go. Okay.

CHAIR DEVENY: Do you know what you did?

MS. FORD: No.

CHAIR DEVENY: So you can do it again.

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

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

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

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

And I just want to point out at this
point that DEQ has been working on this for
awhile. We started this project in 2015, around
the same time that Senate Bill 325 and what is now 75-5-222 were initiated. About the same time as that, this project was begun.

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

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

Just a little quick background. Arsenic is a Class A human carcinogen, meaning that it's been well demonstrated that it's a human carcinogen, and it typically causes at low concentrations -- like the one we're talking about here in the Yellowstone River, and etc. -- to the skin, bladder, and the lungs.
So I think with that we can now go to Slide 3. All right. So these are the principal State statutes that this rulemaking is basically operating under, one main one, 75-5-222, and that's the statute that says that the parameters for which the standards are more stringent than the nonanthropogenic condition, the standard is the nonanthropogenic condition. That's a key one.

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

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

So with that we can go to Slide 4. This, Madam Chair and members of the Board, will the first implementation of 75-5-222, Part 1, the nonanthropogenic water quality standards. This will be the first one that we will have brought to
Now, at this time only nonanthropogenic standards for the Yellowstone River are included, but we crafted the rule in a manner that it will incorporate future standards which fit under the natural definition as well, so in the future, if we develop or adopt either standards under nonanthropogenic or natural conditions, they'll both be able to go under this rule.

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

I think with that, we can go to Slide 5. This is just going to give you -- we're going to move now more specifically to the Yellowstone. This is the stretch of the river that we're talking about. You can see it's a big watershed. Most of you, of course, are familiar with it.
And we're talking about the Yellowstone National Park boundary all the way up to the confluence of the Bighorn River. That is the segment of the river that the Department studied for the purposes of this project.

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

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

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

In the case of the Yellowstone River, the human health standard is ten micrograms per
liter, and that's actually true for all water bodies in the state at this point in time.

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

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

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

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

    I think with that, we can go to Slide 7. So where is all this arsenic coming from? The
main source are geothermal features in Yellowstone National Park. For example, the Boiling River -- there's a picture of it there -- has concentrations as high as 560 micrograms total arsenic per liter; and compare that to ten micrograms per liter, which is the human health standard. The Gardiner River, goes into the Yellowstone near Gardiner, Montana, is at 85 micrograms per liter.

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

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

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

The first part was to define the watershed. That's pretty straight forward. We worked with the major watersheds, that you can see there, that the Yellowstone River is part of. All
those basins drain to the Yellowstone, and these were the ones that the Department examined for the various parameters that we're going to be talking about briefly going forward. And in those zones, we were identifying different types of sources, whether they be anthropogenic or nonanthropogenic.

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

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

Let's move to the next Slide No. 11. So
I don't want to bog everybody down with a bunch of math, but I just want to very briefly touch on the very basics of how this is accounted for.

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

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

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

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

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

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

So most of what we're seeing in the
river is from the nonanthropogenic source, and
most of that is from the Park.
So let's go to Slide 14. An important question as we move forward with rulemaking is: Would it be necessary to change the beneficial use description? Do we need to change it to something like a use subcategory? That's a common action that one can take when dealing with a new criteria.

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

So what's conventional treatment? Convention treatment is coagulation, sedimentation, filtration, and disinfection, and that's all defined in our rules.

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

Everything was in the form of arsenate. This is the oxidized arsenic form that is readily
removed by conventional treatment. The reason that's important is because if there was a lot of arsenite in the river, you have the plus three form, you would have to oxidize that first, and then do conventional treatment, so that would essentially be beyond conventional treatment.

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

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

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

We can go to Slide 16. Okay. Now, I would point out that this was probably one of the
more difficult aspects of the entire project, was
to identify the most appropriate way to express
these standards.

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

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

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

    And our line of reasoning was as
follows: If we are adopting nonanthropogenic
arsenic standards in a particular way, while
conforming with the statutes that we've already
looked at, and that can demonstrably decrease cancer risk for people using the Yellowstone River as a water supply, then that would be the best expression of the standards. So this was the objective approach we used to assess the different time units that we had to choose from, and this will become clearer as we go forward in the next slides.

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

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

In order for this to have meaning, you have to assume or show that arsenic in finished
drinking water, in a public water supply using the Yellowstone, varies with river arsenic concentrations, so we took a look at that.

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

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

We can move to Slide 19. Okay. This is a -- there's a fair amount going on here, but
there's a couple key points I want to point out. It's established by the EPA, and others who have looked at this stuff, that the human cancer risk from a carcinogen like arsenic is continuous from the origin. In other words, what does that mean? There is no safe lower concentration. It begins to cause issues right from zero, just like the graph shows there.

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

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

So with that we can go to Slide 20. All right. There is a couple things here in the next part that we wanted to look at. So we asked ourselves, first of all, does the annual median -- So if we just go with a single annual standard,
does that concentration ever occur during high flow?

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

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

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

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

The next thing we did is we did a basic
mixing calculation where we looked at the river flow, plus discharges, but we manifested a standard as two seasonal standards, and then we compared those results to the river plus the discharges, if the standard were to be expressed as an annual standard; and then looked at the associated cancer risk with those two different ways of doing things.

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

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

In Segment 5 -- this is the segment that goes from the Clarks Fork of the Yellowstone all
the way down to the Bighorn -- we did not see any
difference. And so really because the
concentrations have dropped to the MCL out from
dilution, there is really no difference between
these two approaches.

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

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

Now, during the runoff period -- as
we've kind of talked about, when there's a lot of
water in the river, it has a huge dilution
potential. And so it's such a high amount of
volume that really it mutes almost any kind of
discharge that you would put in the river, whether
that discharge is above those concentrations, or
below.
Now, in contrast, during the low flow period, you can see that the dilution strength really drops down. And if you look at the difference between the squiggly gray line -- which is the concentration in the river -- and the orange line, you can see there that there's a distance between them.

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

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

During high flow, there is such great dilution power from the river that it really doesn't matter either way. So this is why the
annual standard is providing this slight decrease in cancer risk compared to having two seasonal standards.

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

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

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

With that we can go to Slide 24. An important point we looked at, permitted discharge volumes would have to be far, far, far in excess of the Yellowstone River's highest flows to change these conclusions. So what you're seeing would
not change if some of these permitted discharges increased a little bit. It will never ever come into a range that would change any of the findings or patterns that we just showed you, and we have looked at that.

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

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

With that we can go to Slide 26. After looking at this from a couple of different points
of view, from the point of view of what does the statute require of us for the nonanthropogenic standards to be from the effect on the beneficial use, we've concluded that the annual standards are the best option.

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

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

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

We can go to Slide 27. So here is the recommended standards that you see in your Board
packet. Segments 1 through 4 defined from, basically from point to point, tributary to tributary. The Yellowstone standards would start out at 28 -- remember currently they're ten -- and then decrease in a downstream direction with each segment.

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

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

Some of our other standards have a "no sample shall exceed" proviso associated with them; that would not apply in this case. They would use
the standard EPA TSD methods to calculate statistically compliance with the standards. So that would mean that if a single sample went to over 16 in Segment 3, that's not a violation. Again, it would be calculated statistically.

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

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

We can go to Slide 28. So again, just for folks that may be a little bit more spatially oriented, not just a table, here is again that map from the beginning of the presentation.
And what we're saying is that these different concentrations would apply. 28 micrograms per liter would apply in that upstream segment down to Mill Creek, which is near Pray, Montana. The next one would be 22 micrograms per liter, and that would terminate at the Boulder River. The next segment would be 16 down to the Stillwater. From the Stillwater to the Clarks Fork of the Yellowstone, it would be 13.

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

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

With that, I'd be happy, Madam Chair, and members of the Board, to answer your questions as best I can, and take it from there.
CHAIR DEVENY: Thank you, Dr. Suplee, for a very good presentation of this, and I'd like to open this up to questions of Dr. Suplee from Board members. Dr. Lehnherr.

BOARD MEMBER LEHNHERR: Thank you, Madam Chair.

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

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

Does that raise the arsenic level concentration in the river to a significant degree, where it may affect the ability of water
treatment plants, or the ability for treatment for
drinking water to reduce it below ten micrograms
per liter, if that makes sense?

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

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

So by having it at 28, which is the long
term annual average, there's that slight
reduction, that slight dilution effect relative to
the natural background concentrations in the
river, and that is what leads to -- as I was showing you -- a better expression of the standard.

BOARD MEMBER LEHNHERR: Thank you.

CHAIR DEVENY: Are there other questions? Jerry Lynch.

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

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

BOARD MEMBER LYNCH: Yes.

DR. SUPLEE: No, this is very specific to the main stem Yellowstone River. So a tributary coming into the Yellowstone River, for example, anywhere along those segments we looked at would still at this point continue to have ten micrograms per liter; and if we were to change
that, or propose to change that, that rule change would come to you first.

BOARD MEMBER LYNCH: All right. Thank you.

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

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

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

However, we have built into the monitoring assessment sections component -- which
I just kind of glossed over that because it's kind of lengthy to get into -- but they will be examining in the future whether the standard is compliant or not by periodically going out and collecting a specified minimum data set, which they can then determine with a certain degree of statistical significance whether the river has actually increased in concentration, and perhaps even gone to a higher level than the standards were set at.

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

And what that will allow the DEQ to do going forward is if the standard were to be found to have been exceeded in the future, in the whole river or in some segment, two questions then arise. The first question is: Is there a very high likelihood that that has occurred because of humans, because of people? You know, has there been some violations of permit limits, or something that you could really look for?
If nothing like that is the case, everybody has been complying with their permits, it could very well be that it's an effect of either increasing arsenic concentrations coming from the Park, or lower water flows which provide less dilution, so the concentrations go up; in which case the Monitoring and Assessing Section would recommend to the Department Standards Section -- that's our group -- to revisit the standard and perhaps reset it to a different level.

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

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

We have left that open to their discretion as to how often they revisit assessing the river. But that is something that we could
potentially include with their work if the Board
felt that that was an important part of the
standards.

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

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

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

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

Does that in practical effect mean that
any application for a discharge permit that would
involve any discharge of arsenic into the river
would have to be denied or conditioned in some way
to deal with that problem?
DR. SUPLEE: No, I don't believe that that's the case. Our understanding would be as follows: Existing permits that may have arsenic in them as a requirement would be required to meet the standards as you saw them essentially end of pipe, because there is no mixing zone. They basically just need to meet that concentration as an average monthly limit each month of the year.

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

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

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

Suppose I want to apply for a permit, for a discharge permit, and the use that I have in mind that would create the discharge produces a certain amount of arsenic that would be present in
the waters that would be discharged to the Yellowstone.

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

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

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

DR. SUPLEE: Yes.

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

DR. SUPLEE: Right. And the way you
would do that is the concentration coming out of your discharge will need to be 28 as an average monthly limit.

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

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

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

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

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

DR. SUPLEE: Sure.

CHAIR DEVENY: Jerry Lynch.

BOARD MEMBER LYNCH: To follow up on Chris's question, if it's a new discharge, doesn't that depend on the volume of water coming from that discharge? In other words, if you're saying if it's 28 coming out of the end of the pipe, it's
going to remain 28 regardless of the flow from the pipe?

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

    BOARD MEMBER LYNCH: All right.

    CHAIR DEVENY: John DeArment.

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

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

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

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

CHAIR DEVENY: Chris Tweeten.

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

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

DR. SUPLEE: That's exactly right.

BOARD MEMBER TWEETEN: Okay. I get that.

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

They either put it out at the concentration that the river is at, in which case
the concentration doesn't change; they put it out at a concentration that's lower than what's in the river, in which case they're providing a slight dilution effect -- that's kind of what we're looking at with that annual versus two seasonal standards -- or they put it out in a concentration that's higher than what's in the river, in which case they bring up the concentration to some degree.

CHAIR DEVENY: Are there other questions from Board members?

BOARD MEMBER BUSBY: This is Dexter.

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

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

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

DR. SUPLEE: Yes.

BOARD MEMBER BUSBY: Because at various times, you're cleaning up the water, which really the legislation says you shouldn't have to do; and the other times you're putting in more than -- concentration-wise, not poundage. We're talking
DR. SUPLEE: Right. No, you're right. And we did cover that. Sometimes I do my best to explain these things in a slide show, but I went through it kind of fast.

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

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

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

DR. SUPLEE: That's the time where the annual standards provide two things that are beneficial: One, they provide a little tiny bit of dilution because of the way they are set, so
they'll actually very, very slightly bring down the concentration in the river relative to its natural state; and at the same time, they have been demonstrated to be, according to our conversations with industry, etc., to be the preferred, more economical option, which satisfies that other part of the statute, a different statute.

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

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

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

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

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

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

BOARD MEMBER BUSBY: Okay. Thank you.

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

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

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

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

And that's why in an ideal world, drinking water supplies, if they could, would provide a maximum concentration limit goal of
zero, while that's really not very practical. But when setting up this standard, we certainly looked at the way and the effect, the use that was being affected, and cancer is really the issue again; and we have a mechanism to calculate that risk to see what would be the best expression of that standard to minimize the risk that's affecting people at the levels that we're seeing in the river.

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

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

CHAIR DEVENY: Just the stakeholders, yes.

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

We began working with that SB325 Work
Group right around then. They actually requested at some point back then that we work specifically on arsenic standards for the Yellowstone River, because there were a couple of different nonanthropogenic standards we could have worked on. There's other ones out there that are pending. This is the one they specifically asked us to work on. We worked on that with them, met with them numerous times right up until as recently as -- our last meeting with that group was on January 6th.

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

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

CHAIR DEVENY: And how about input from
health departments, and counties, municipal
governments around the state?

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

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

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

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

But in the agenda on Page 6, where we
refer to this item, it talks about rulemaking for
New Rule I. But if you look at the notice of
rulemaking, notice of hearing that's in the
packet, which is Page 21 I think of the packet, I
think it refers to New Rule II, if I'm reading it correctly. So which one is correct?

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

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

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

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

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

BOARD MEMBER BUSBY: This is Dexter. I've got one that's relatively easy, I think. I notice that the legislation is not specific to the Yellowstone, and I'm aware of other streams that have higher concentrations of not only arsenic, but other things that are not technically allowed in WQB7. So are you going to
be coming with other rulemaking, or is there a
reason you just are selecting the Yellowstone and
not generalizing your rulemaking?

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

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

I think it's also likely that you may
see cases worked out on specific streams where
perhaps there is a particular interest in getting
the nonanthropogenic part dialed in very
accurately on that stream. You may see some
others coming forward as well in the future.

CHAIR DEVENY: Does that answer your
question, Dexter?

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

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

DR. SUPLEE: Sure. Madam Chair, members
of the Board, I think the best way we can answer
that is: I agree. I mean we've looked at this,
and we've had a lot of internal discussions about it, and we don't really see that this can be done too broad brush.

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

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

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

But I can't argue with you that it could be -- It's probably going to be a fair amount of work. In some cases, some of the case specific
ones, some of the work may get carried out by permittees themselves if they feel that that's a more appropriate situation for their watershed and site.

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

(Recess taken)

CHAIR DEVENY: Let's get back at it.

Lindsay, are you on?

MS. FORD: Yes.

CHAIR DEVENY: Could you take roll call, please.

MS. FORD: Chris Deveny.

CHAIR DEVENY: Here.

MS. FORD: David Lehnherr.

BOARD MEMBER LEHNHERR: Here.

MS. FORD: Dexter Busby.

(No response)

MS. FORD: John DeArment.

BOARD MEMBER DEARMEN: Here.

MS. FORD: Chris Tweeten.
BOARD MEMBER TWEETEN: Here.

MS. FORD: Jerry Lynch.

BOARD MEMBER LYNCH: Here.

MS. FORD: Dexter, are you back on?

(No response)

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

(Inaudible)

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

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

CHAIR DEVENY: Yes. Go ahead.

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

DR. SUPLEEE: I'm aware of at least one. That would be CHS's permit in Segment 4. There may be some permits further upstream. I would have to look into that to be certain. I think it there might be some way upstream, but I'm not sure if they have arsenic in their permit. So it might
be better to give you -- I don't have a correct, a full answer for you. I'm only aware of one. Permitting might have a better answer if they want to join in.

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

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

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

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

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

MS. CLERGET: And then my second

question is followup to Dexter's conversation with
Dr. Suplee that was about 222.

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

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

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

We could set it as at a monthly
standard. That would track and mimic the
conditions of the river very, very, closely, but
that sets up a bunch of other difficulties, too,
which is it's very difficult for anybody who has
to meet a permit limit like that to track a
monthly changing concentration, especially during
the low flow periods -- or the high flow periods
in the summer when the concentrations get quite
low, we're getting down into treatment levels that
can be difficult for some of these dischargers to
meet, so there's practical problems with it.

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

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

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

MS. CLERGET: Sure. I don't know which
of them is the one who wants to answer, but
anybody at DEQ Legal want to jump in on that?
MR. MOSER: This is Kurt Moser, DEQ attorney. And I did have a legal review on some of it, on this package.

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

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

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

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

CHAIR DEVENY: Okay. So last chance for Board members to ask Dr. Suplee questions before
we open up for public comment.

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

CHAIR DEVENY: Go ahead, Jerry.

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

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

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

DR. SUPLEE: No, it's not our position that they should be per se. What we're saying is that per 222, the standard would be set at the nonanthropogenic condition, and that's what the dischargers should be targeting.
Now, it results that by setting it up as an annual standard, there is a certain larger and more extended dilution period throughout the year -- that is a fact -- and that has that slight reduction effect on cancer risk.

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

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

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

DR. SUPLEE: Well, I think what you're describing is a situation where we would be ignoring the Legislature, which said that where we can, or -- that we need to be looking at
nonanthropogenic conditions in water bodies.

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

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

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

DR. SUPLEE: Yes.

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

DR. SUPLEE: I think --

BOARD MEMBER LYNCH: Requirements.

Excuse me.

DR. SUPLEE: The way we interpret that
is if the nonanthropogenic condition of the water
body -- in other words, man has had no control
over it -- is at a certain level, and that certain
level happens to be higher than the currently
accepted standard, then it's an unfair or
excessive amount of regulation in a sense to
require people to treat to a higher level than
that. That's the impetus behind this group of
standards.

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

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

BOARD MEMBER LYNCH: Let me repeat it
just so I'm clear. If there is a situation in the
future -- a new stream, not the Yellowstone --
where the more stringent requirements on the
discharge could in fact reduce arsenic pollution or some other contaminant, is it the DEQ's position that we would just always stay with the nonanthropogenic concentration, if in fact new discharge permits could in fact reduce that concentration?

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

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

CHAIR DEVENY: Go ahead, Jon.

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

BOARD MEMBER LYNCH: Let me just follow up then. I mean I understand we're talking about this stretch of the Yellowstone on the proposed rule. I just don't want some precedent being set that that's going be the standard on every stream that may come up in the future for discussion.
MS. CLERGET: Chris, this is Sarah. Can I jump in here?

CHAIR DEVENY: Go ahead, Sarah.

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

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

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

MS. CLERGET: Yes. I mean according to 75-5-306, the purer condition than a natural condition, I understand there is a little bit of a
difference between natural condition and nonanthropogenic; but for the most part, they're the same. Is that right, Dr. Suplee?

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

BOARD MEMBER LYNCH: All right. Thank you.

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

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

CHAIR DEVENY: Yes. Dr. Lehnherr.

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

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

DR. SUPLEE: No. We looked into that. In fact, that was part of our examination of
whether we would actually, as part of this rulemaking -- since we would be setting a standard that's well above ten, especially up there -- would we need to, for example, adopt a new sub-class, like arsenic impaired drinking water or something like that, in order for that to properly reflect the standard.

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

BOARD MEMBER LEHNHERR: (Inaudible)

DR. SUPLEE: Okay.

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

(No response)

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

MS. CLERGET: No, I think you need to open it up for public comment before you take action.
CHAIR DEVENY: At this point then we'll open it up for public comment, and I'm going to put my screen on gallery. If there are people on the screen that want to give comment, if you could raise your hand, put yourself on video. And we'll also take calls from the phone.

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

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

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

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

And the effect of this is the discharger's limit for discharging to these waters
will increase from ten up to 28 or something
around there, right?

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

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

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

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

So I understand that under these
standards a new discharger would be able to
discharge arsenic into the Yellowstone at a
concentration of 28 micrograms per liter, but is
it the understanding of DEQ and the Board that pursuant to the Clean Water Act, the federal anti-backsliding provision, that existing dischargers would still be required to meet the existing ten micrograms per liter discharge limit?

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

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

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

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

CHAIR DEVENY: Go ahead, Jon.

MR. KENNING: Madam Chair, members of the Board, yes, what Mr. Hernandez is talking about is called anti-backsliding, and it generally
serves that when a permit limit has been established, we cannot weaken that limit. But it also has a number of exceptions, and we would be willing to look at those exceptions, and see if they apply in these cases.

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

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

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

MR. HERNANDEZ: Not with regard to this matter.

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

(No response)

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

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

CHAIR DEVENY: I see Vicki now. Okay. There's so many people on I'm having to switch screens here. So I have Ms. Marquis. I can't hear you at this point. Are you on mute?
MS. CLERGET: We lost your video, too, Vicki.

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

DR. SUPLEE: -- microphone.

MS. FORD: There is no microphone.

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

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

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

MS. MARQUIS: Can you hear me now?

CHAIR DEVENY: Is that Vicki?

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

CHAIR DEVENY: Yes. Go ahead.

MS. MARQUIS: Thanks so much for your
time. My name is Vicki Marquis, and I'm an attorney with Holland and Hart in the Billings office. I'm here today representing the CHS Refinery in Laurel, Montana, which is in that Segment 4 of the river that Dr. Suplee spoke about earlier.

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

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

So we wanted to thank the Department, first of all, for their work and their efforts on this. We met with the Department several times
and discussed concerns, and we were pleased to have those discussions, and pleased that the annual standard was one thing that they went back and looked at, and that's in the addendum document, which is really good.

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

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

And in terms of water treatment, there were some questions earlier about what the municipalities can treat for drinking water.
And I want to point out that, as Dr. Suplee talked about, there is a lot of confidence that a drinking water system can take in water at levels of up to 60 micrograms per liter, and treat it down below ten; but they're treating raw water, which is different than the industrial wastewater that CHS takes in. So that type of treatment is really not as easy in an industrial setting.

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

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

That nonanthropogenic or natural arsenic load varies between 2,000 kilograms a month, and
nearly 15,000 kilograms a month; so from a low of nearly 2,000 kilograms each month to a high of nearly 15,000 kilograms each month.

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

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

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

CHS adds very little to the Yellowstone River, and in fact this is documented in the Department's determination of nonanthropogenic document. And they found that when they looked at all of the permitted discharges -- not just CHS,
but all of the permitted discharges -- they said they account for less than one percent of the total arsenic load. And they concluded that in total, the permitted sources do not contribute any arsenic load. That's in Section 4.0 on Page 33 of determination of nonanthropogenic document.

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

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

And this is a really important rulemaking. I know this is going a long time, but as you guys have already pointed out and
recognized, is that since this is the first nonanthropogenic based standard rulemaking, it really does set a precedent, and sets the tone for what can happen next.

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

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

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

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

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

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

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

We don't really know what would apply if
this rule didn't apply, because what we know is
that the standard of ten cannot apply in accordance with those two statutes.

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

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

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

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

And it's really inappropriate for a
water quality standard to also take the next step and go into permitting decisions, so we urge you to remove that Subparagraph (c), and let the permitting regulations stand on their own, so that you're not creating any unforeseen consequences or conflicts.

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

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

"In accordance with 40 CFR 122.44 Subparagraph (d)(1)(iii), and Title 17, Chapter 30, Subchapter (5), dilution and mixing zones may be considered for discharges to the water bodies and for the parameters listed. However, for toxic
and carcinogenic parameters, dilution and mixing zones may only be considered for discharges with an average flow of less than one percent of a 7Q10 low flow, and an annual load of less than one percent of the annual average load of the parameter.

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

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

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

Now, if you assume the limit that's been
proposed here applies to them at 13 micrograms per liter, that scenario would require CHS to treat 3.9 kilograms per month, which is at least 1.3 kilograms per month more than what they add to the discharge.

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

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

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

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

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

Our final point is one that Shiloh raised earlier. The anti-backsliding concern and other enforcement concerns are a real issue that can be really expensive for everybody. We recognize that there might be years when the arsenic level is really, really high.
And so in a case like CHS, where they are taking in high arsenic, maybe they won't be able to treat down to this standard, but maybe the reason for that is because the river that year was running really high, and so the standard, if you will, was artificially low. The river was high, all the water was high, but because of that, the treatment couldn't reach what the permit limit was.

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

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

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

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

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

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

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

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

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

    (No response)
CHAIR DEVENY: Anybody on the phone that wants to give public comment?

(No response)

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

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

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

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

And I think the science is pretty well vetted, as you've heard. And this bump in the road with permitting, and how to make it mesh with
the standards that we seem to have run into, and it is important, as a previous speaker said, to get it right at this time.

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

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

So it is important to think we are on the right path of complying with Senate Bill 325, and if we can just fix this bump in the road with
how to mesh it with the permitting process. I think this has come a long way, and we encourage the Board's support for rulemaking, whether it is now, or whether some of these issues have been addressed, to move that forward. Thank you.

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

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

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

Because arsenic is a known carcinogen, and given the DEQ's work -- and thank you, Dr. Suplee, for your work on this -- we are supportive
of the proposed nonanthropogenic standard for arsenic as DEQ has determined that are most protective for human health and the environment as written.

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

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

(No response)

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

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

CHAIR DEVENY: Yes. Go ahead, Chris.

BOARD MEMBER TWEETEN: Well, two comments, I guess, that are related to each other. One, our agenda item for this rule indicates that
the action item would be to either initiate or not initiate rulemaking.

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

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

So I'm not sure it's a good use of our
time today to be considering suggestions as to how
the text of the rule out to be modified. I think
that it's premature to do that at this point under
the statutory scheme that MAPA sets up, that those
comments ought to be screened through the
rulemaking process, and DEQ should then come back
to us with their reaction to those comments, and
we can consider all of that as a package in
deciding whether to adopt a rule, and if so, what
the rule should say.

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

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

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

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

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

MS. CLERGET: I agree with Chris.

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

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

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

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

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

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

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

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

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

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

(No response)

CHAIR DEVENY: Other comments from the
public?

(No response)

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

BOARD MEMBER TWEETEN: Yes, Madam Chair.

A question for Mr. Fink, if I could. My question is: Is it your suggestion that we should decline to initiate the rulemaking at this point, and send you back to work with DEQ on further modification of the proposed rule, or are these concerns that you think can be taken up in discussion of amendments to the rule during the rulemaking process?

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

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

BOARD MEMBER TWEETEN: So even farther down the road than the rulemaking that these are considerations that ought to be taken up in dealing with your own individual permit between
you and DEQ.

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

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

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

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

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

    And the others are certainly changes
that could occur during the draft rulemaking, but the Department does have the option to modify the notice that goes out now. That's why we were here.

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

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

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

BOARD MEMBER TWEETEN: Sure. As far as the language of the notice, I guess my view would be that as a result of public comment that's received at the hearing, DEQ could come back with
a different modified rationale for the rule if they chose to, so I'm not sure that there's anything in the notice language itself that's necessarily precedential for how the rule is going to turn out.

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

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

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

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

MR. MOSER: Yes. Madam Chair, members of the Board, again, this is Kurt Moser, DEQ attorney.
At this point I would say we would want to go forward with the -- would suggest you go forward with the language as proposed. I think while it may be difficult to go through all those individual changes, I think more importantly, even if we were to consider those on a case-by-case basis, I'm quite certain most of what Ms. Marquis suggested at this point is objectionable to DEQ.

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

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

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

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

BOARD MEMBER LEHNHERR: Thank you, Madam
Chair. Regarding modifying language in the notice, there is some of the proposed language modifications that I don't think I would be comfortable with, but there is also the issue of the mechanism of how we, in this setting, change the language in a way that we all are very clear about what the changes in language are.

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

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

CHAIR DEVENY: Thank you, David.

Dexter, were you trying to call in?

BOARD MEMBER BUSBY: No.


BOARD MEMBER LYNCH: I just didn't hear the Doctor's final comments about either proceeding forward or not proceeding forward.
CHAIR DEVENY: Go ahead, David.

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

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

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

BOARD MEMBER LYNCH: I agree with that.

Thank you.

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

BOARD MEMBER TWEETEN: Madam Chair.

CHAIR DEVENY: Yes, Chris.

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

CHAIR DEVENY: Could you point out where
that is, Chris? I'm not seeing that.

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

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

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

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

BOARD MEMBER TWEETEN: If it says one, then I'm fine with it, and I'll withdraw that particular suggestion.
CHAIR DEVENY: So there's a motion, and I'm wondering, Chris, would you mind adding to your motion that we also designate a Hearing Officer?

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

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

CHAIR DEVENY: There is a motion before the Board.

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

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

(No response)

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

BOARD MEMBER LYNCH: I did. Jerry.

MS. FORD: Okay. Thank you.

CHAIR DEVENY: Any discussion?

(No response)
CHAIR DEVENY: Any public comment?

(No response)

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

(Response)

CHAIR DEVENY: All those opposed.

(No response)

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

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

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

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

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

CHAIR DEVENY: Water Quality rules.
MR. MATHIEUS: I think it's the MPDES rules.

CHAIR DEVENY: MPDES rules.

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

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

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

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

So just a little bit of background. Montana DEQ is delegated to implement the National Pollutant Discharge Elimination System, which is the Federal permitting program regulated by EPA,
and we call that the NPDES program. Montana's permitting program is MPDES, which is implemented through DEQ.

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

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

So DEQ conducted some stakeholder outreach, and sought recommendations from the Water Pollution Control Advisory Council, also
known as WPCAC. I'd like to just summarize the
two topics they expressed interest in.

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

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

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

   So changes to the new forms are mainly
modernizing formatting, adding clarifications to
instructions, so there's a few new requirements that are administrative in the rule in nature, such as requiring email addresses.

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

So in closing, the Water Pollution Control Advisory Council voted to give its recommendation to move forward with this rulemaking, and the Department is not aware of any changes in this proposed package that would precipitate concerns among permittees or the public, and the Department could like to ask the Board to move forward with initiating rulemaking.

Thank you. Do you have any questions?

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

(No response)

CHAIR DEVENY: Any questions?
No response

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

No response

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

No response

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

MS. FORD: Yes. Everyone is unmuted.

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

No response

CHAIR DEVENY: Any comments?

No response

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

BOARD MEMBER DEARMENT: No, you didn't, but I guess while you're asking me, I'll go ahead and forward a motion that we initiate rulemaking as requested by the agency.
CHAIR DEVENY: Is there a second?

BOARD MEMBER TWEETEN: I'll second it.

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

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

CHAIR DEVENY: Go ahead, Dexter.

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

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

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

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

MS. DeVANEY: This is Rainie. Madam
Chair, members of the Board.

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

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

CHAIR DEVENY: Go ahead, Rainie.

MS. DeVaney: Thank you, Madam Chair.

So it is correct that the new application forms will require an email address. However, the Department does maintain discretion in the event there are folks that do not have an active email address. We do maintain some discretion to waive that requirement on a case-by-case basis.

CHAIR DEVENY: Does that answer your question, Dexter?

BOARD MEMBER BUSBY: Yes. Thank you.

CHAIR DEVENY: Is there further discussion by the Board?

(No response)

CHAIR DEVENY: We have a motion that's been seconded before the Board that the Board initiates rulemaking for proposed amendments that are listed in the packet. I'm not going to read
them all. Is there any further discussion?

(No response)

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

(No response)

CHAIR DEVENY: Lindsay, are the phones unmuted?

MS. FORD: Yes.

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

(Response)

CHAIR DEVENY: All those opposed.

(No response)

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

(Lunch recess taken)

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

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

CHAIR DEVENY: Here.
MS. FORD:  David Lehnherr.

BOARD MEMBER LEHNHERR:  Here.

MS. FORD:  Dexter Busby.

BOARD MEMBER BUSBY:  I'm here.

MS. FORD:  John DeArment.

BOARD MEMBER DEARMEN:  Here.

MS. FORD:  Chris Tweeten.

BOARD MEMBER TWEETEN:  Here.

MS. FORD:  Jerry Lynch.

BOARD MEMBER LYNCH:  Here.

MS. FORD:  Okay.  All six Board members

are present.

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

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

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

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

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

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

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

And then at the end you'll see I did my
standard order on exceptions. And then starting
on Page 131 of your packet, there is a stipulation
for dismissal of appeal, and that indicates that
the parties stipulated for dismissal.
However, the stipulation doesn't state whether they -- it's a little unclear whether they want a dismissal pursuant to Rule 41, which means that you wouldn't have to rule on the proposed findings of fact and conclusions of law, or enter a final order; or in this document, the stipulation for dismissal, they ask for you to enter the order. And that you also can see on Page 135, that's their proposed order to you, which allows for the adoption. So that's the background information.

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

(No response)

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

MS. CLERGET: So I just wanted to be sure that I didn't misrepresent that there is
somebody on the phone who represents either Mr. Kauffman or Ms. Akland.

(No response)

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

MS. CLERGET: DEQ.

MR. KAUFFMAN: This is Mr. Kauffman.

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

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

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

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

CHAIR DEVENY: Sarah --

MR. LUCAS: Sarah, Mark Lucas here. If
I can just make a clarifying point. I'm not completely sure we can talk about this case with you without one of the parties here. We do have a stipulation, but it's the case that unless and until you do that, I'm concerned that any discussion with you about this case would be ex parte. Thank you.

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

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

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

CHAIR DEVENY: That's how I'd like to
proceed. Any other Board members have objections to that?

(No response)

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

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

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

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

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

BOARD MEMBER LYNCH: The third being?

MS. CLERGET: Being DEQ.

CHAIR DEVENY: Chris Tweeten, do you
have a comment?

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

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

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

MS. CLERGET: That's correct.

BOARD MEMBER TWEETEN: Ms. Akland.

MS. CLERGET: Yes, and they were the ones who brought the appeal. Ms. Akland represents the individuals who brought the appeal.
BOARD MEMBER TWEETEN: Right. And the other party that is not on the stipulation is represented by Mr. Lucas; is that right?

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

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

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

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

So that coupled with -- I agree with you
that coupled with now a representation, that I think the Board can proceed forward.

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

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

BOARD MEMBER LYNCH: I did not.

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

BOARD MEMBER LYNCH: I agree.

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

BOARD MEMBER LYNCH: I agree with that, Chris.
CHAIR DEVENY: Any questions by Board members by what our esteemed legal members have been talking about?

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

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

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

BOARD MEMBER LEHNHERR: None here.

BOARD MEMBER BUSBY: I don't have any.

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

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

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

(No response)
CHAIR DEVENY: Is everybody clear on what we're voting on?
(No response)
CHAIR DEVENY: Is everybody clear?
Okay. All those in favor of the motion, signify by saying aye.
(Response)
CHAIR DEVENY: Any opposed?
(No response)
CHAIR DEVENY: Any opposed?
(No response)
CHAIR DEVENY: Hearing none, the motion passes. Thank you. Okay.
MS. CLERGET: So No. 2 on the contested cases is -- actually not. Well, it is an appeal in new contested cases. That's Amy.
CHAIR DEVENY: I've asked Amy Christensen, who -- we've had to hire outside Counsel on this case, and I've asked her to give the Board an update, and there's possibly the decision making that we need to do. Go ahead, Amy.
MS. CHRISTENSEN: Thank you, Madam Chair, members of the Board. This case is currently pending before Judge Bidegaray on a
petition for judicial review that was filed by the
conservation groups. They're challenging DEQ's
decision to issue the permit, which BER approved
after a contested case hearing.

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

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

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

CHAIR DEVENY: Yes.

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

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

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

That particular option would preserve our right to appeal at the end of the case, so we would stay in the case, wait until the end, and then we could appeal to the Montana Supreme Court
about whether BER should have been in the case in
the first place.

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

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

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

CHAIR DEVENY: Go ahead, Chris Tweeten.

Your hand was up first.

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

CHAIR DEVENY: Yes.

MS. CHRISTENSEN: Shiloh Hernandez is
present. And I think Derf Johnson was present
also earlier. I'm not sure if he's still on.

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

MS. CHRISTENSEN: Okay.

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

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

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

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

MR. HERNANDEZ: Thank you, Madam Chair. This is a matter really of an abundance of caution on our behalf. We didn't want to be in the case situation where our potential remedies would in
any way be limited for failure to join the Board of Environmental Review.

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

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

BOARD MEMBER TWEETEN: Madam Chair, followup, please.

CHAIR DEVENY: Okay, and then we'll go to Jerry Lynch.
BOARD MEMBER TWEETEN: I guess there are also as I'm sure you know -- numerous cases that have been taken to the Supreme Court following judicial review in a District Court of one of the Board's decisions where the Board has not been a party, and that --

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

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

So that's what's driving the Board's concern here, is that I understand in an abundance of caution you may think the easiest thing to do
is just keep the Board in, and make the Board do what the Board wants to do; but from our perspective, it's not without cost, and we're not aware of any legal authority for the proposition that not having the decider in the administrative contested case present on the appeal has in any way affected the Court's ability to render complete relief among the parties.

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

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

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

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

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

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

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

   MR. HERNANDEZ: Madam Chair, Members
Lynch and Tweeten, I think that there is relief in
At bottom, one of our principal claims is that the Board has muddied the waters with respect to what evidence may or may not be presented to the Board on a petition for administrative review of a DEQ decision. That's kind of fundamental. Is DEQ limited to the record before DEQ at the time it made its decision, a la Motor Vehicle Manufacturers versus State Farm, a federal standard; or is there some different standard?

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

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

So in light of those concerns, and I think that the situation where there's not case
law directly on point, I think it supports our
position that we should be cautious, because I
think there is a fair bit of ambiguity with
respect to how judicial review of BER decisions
under MAPA occurs. I think there's a lot of
uncertainty in the judicial review provisions of
MAPA.

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

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

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

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

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

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

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

CHAIR DEVENY: Yes. Go ahead.

BOARD MEMBER LYNCH: For the benefit of the other Board members, Mr. Hernandez, what is
the standard of review at the District Court level?

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

CHAIR DEVENY: Chris Tweeten.

BOARD MEMBER TWEETEN: Well, I don't have any objection to Counsel getting together after this call and talking about a stipulation, but I would say that I would be opposed to the idea that in every one of these cases BER has to file something or sign something saying we agree to be bound by whatever the outcome of the Supreme Court's review of this case is.

We're bound by it anyway. As a matter of law under res judicata, the law of the case, whatever you want to call it, if the Supreme Court makes a decision and holds that we applied the wrong evidentiary standard in our contested case review, we don't have the discretion to disregard that decision.

So I'd be opposed to the idea that we have to go through that administrative hoop every
time of agreeing with Counsel for the parties that whatever the Supreme Court says we're going to follow it because we're going to follow it anyway. So I guess what I would say is I think you all ought to get on the phone and talk this through, but I mean the idea that there's just some amorphous possibility out there that some weird thing may happen that doesn't afford you all of the relief that you think you're entitled to, and that that ought to be enough to require the Board to continue to go to the time and expense of filing these notices of non-participation every time somebody names us as a party, I'm not persuaded by that.

And as far as I'm concerned, I think we've sat by and filed notices of non-participation pretty consistently over the years, but I think frankly we're tired of it. We don't think it's required or appropriate, and it's time to get the Supreme Court to decide this issue one way or another as to whether we're necessary parties in these appeals.

So short of some agreement among Counsel to let us out of this case, I'm still going to support the idea that we ought to file the
petition and ask the Supreme Court to rule on it.

    CHAIR DEVENY: Other comments or opinions?

    BOARD MEMBER LYNCH: Just one other comment.

    CHAIR DEVENY: Go ahead.

    BOARD MEMBER LYNCH: I agree completely with what Chris has said. As far as another case in which -- Signal Energy, or whatever it was that you mentioned, Mr. Hernandez -- named the Board as a defendant, my position would be the same. It should never be a defendant.

And I agree that the time has come. I mean I'm new to the Board, but if the Board has been named -- which I understand over, over, and over again, both by the plaintiffs and the defendants -- it's time just to have it resolved.

    So my suggestion would be Amy's first alternative to seek a writ of supervisory control.

    CHAIR DEVENY: David, Dexter, John, any comments, questions?

    BOARD MEMBER BUSBY: This is Dexter. Either one of our two folks on the Board that are lawyers, you're talking way above my legal understanding, so I'm going to have to ask you
guys what's the down side to doing that. You know, there's usually up sides and down sides. Is there a down side?

CHAIR DEVENY: Who want to answer that?

Jerry. Thank you.

BOARD MEMBER LYNCH: I'll respond. The down side, I guess, if it is a down side, is the Court would say that the Board can in fact be named as a defendant, but that's happening all the time anyway, from what I understand.

The up side is that this notion that the Board should be named, and properly named, and go through this rigamarole, if the Court says no, the Board can't be named, it's entitled, in my view, to quasi-judicial immunity, that then the issue is resolved, so that each time one of these cases is filed, and then the Board is named, that the Board does not have to retain legal Counsel at considerable expense over and over to file a notice of non-participation. It makes no sense.

So I think that the statutes, to my knowledge, spell out what relief is available, what the standard of review is, and it's my understanding -- and Mr. Hernandez, you can correct me on this if I'm wrong -- but the appeal,
if you will, to the District Court and ultimately
Supreme Court is based on the administrative
record as developed, is it not, with perhaps some
steps if there is a showing that something was
deleted or whatever? Isn't it limited to the
administrative record?

CHAIR DEVENY: Mr. Hernandez.

MR. HERNANDEZ: I think subject to the
typical exceptions for supplementing or completing
the administrative record, it is.

I think in this case, though, with
respect to the administrative record, it has been
quite helpful to have -- (inaudible) -- party to
the case. There were multiple disputes about the
content in the record; and Amy, to her credit I
think very ably, resolved those concerns. I'm not
sure if there was a different or easier way to do
it.

But I think that, yes, Judge Lynch,
you're right. It's the administrative record
review subject to exceptions. But I think in this
case, the facts show that the Board's presence in
the case was salutary, and I think that Judge
Bidegaray actually noted that in her ruling that
she appreciated the presence of Ms. Christensen,
probably because of Amy's fine lawyering, but for what it's worth, the Court did say that she appreciated BER being present in the case.

BOARD MEMBER LYNCH: Well, that's admirable, I guess, but we're looking at the bigger picture, as Chris spelled out, that to do this over and over at considerable expense, there comes a time when the Board, in my view, has to say, "Let's get a final determination from the Supreme Court." And I think the Supreme Court -- I'm not giving anybody legal advice obviously. That's not my position. But I think the Supreme Court is going to say, subject to exceptions which you acknowledge, the administrative record controls the day, and basically the Board -- there's nothing the Board can do, and certainly not provide any relief that's not available as against the Department of Environmental Quality.

MR. HERNANDEZ: Your Honor, for what it's worth, we welcome certainty on this issue as well.

CHAIR DEVENY: I wanted to ask Amy a question. We're talking about a writ of supervisory control that -- I have no idea really
what that is, since I don't have a legal

background. But I'm assuming this goes to the

Supreme Court.

Could you talk about a timeline that we
might be able to get an answer, something like

that? Like we still need to be participating in

the current case simultaneously, or would we get a

fairly quick ruling from the Supreme Court, or is

that totally out of your hands?

MS. CHRISTENSEN: The timing of the
ruling would be out of our hands, but we can
control the timing of the filing of the request.
And I think right now, we would aim to file
something before the response briefs are due, so

that we could kind of get the Supreme Court

involved immediately, so that we don't have to

file a response brief if we don't have to, just to

continue participating in the case to preserve our

right to file an appeal later.

So sometime, I would say we make the

request within the next probably 30 to 40 days,

and then we would have to wait and see what the

Court did.

CHAIR DEVENY: So is it possible that we

would do that, but then also have to participate
with the case?

MS. CHRISTENSEN: I believe that, I think that -- and Shiloh, you can correct me if I'm wrong about this -- but I believe that once we file that petition, that everything else is going to -- they're going to hit the pause button on everything else, because the Court will have to decide whether or not to take that up.

MR. HERNANDEZ: Amy, I'm not certain about that, and to be honest, I haven't reviewed the law on that.

MR. LUCAS: Mark Lucas here, Amy. If I can weigh in on that. My understanding is that it does not automatically stay the case unless the parties seek that relief, or they so stipulate in the lower court.

So from our perspective, the best thing would be, instead of running up more legal bills, to discuss this with Mr. Hernandez, and see if he will, in an abundance of generosity and courtesy, allow the Board to be released from this case.

Thank you.

MS. CHRISTENSEN: And Madam Chair, I am open to having those discussions again, with the hope that maybe we can reach some resolution this
time.

My only hesitation would be that I'm not sure that it resolves it conclusively going forward, but it would potentially resolve the pending case right now.

CHAIR DEVENY: Thank you. John, did you raise your hand or just scratch your head?

BOARD MEMBER DEARMENT: No, I was scratching at an inopportune moment. Sorry about that. But I think Jerry made a pretty compelling case for taking this to the Supreme Court. It sounds like in the end even Mr. Hernandez would welcome the clarity. So I can certainly support a decision to go there.

CHAIR DEVENY: David, Dr. David, you had your hand up.

BOARD MEMBER LEHNHERR: Yes. Thank you, Madam Chair. I'm just wondering. I don't know who could best answer this. But what would be a mechanism if we were going to delay action on this issue, and let the attorneys for the parties get together to discuss possibly letting the BER out of the case?

CHAIR DEVENY: Well, we still wouldn't resolve the overall issue, but I'll let Amy
respond to your question.

MS. CHRISTENSEN: Well, I think we can have that conversation with opposing Counsel pretty quickly, and figure out if we're able to reach some kind of resolution. We do have this kind of extended period of time before we have to file a response brief, so we have a little bit of time to work it out.

But if we're not able to work it out, I would need to know how the Board would like to proceed, because the Board won't meet again before the next response brief is due.

BOARD MEMBER LEHNHERR: Thank you.

BOARD MEMBER LYNCH: Go ahead, Chris.

BOARD MEMBER TWEETEN: Madam Chair, I'm prepared to make a motion at this point, unless there's further discussion among the members of the Board.

CHAIR DEVENY: -- (inaudible) --

BOARD MEMBER LYNCH: One followup question to Amy.

BOARD MEMBER TWEETEN: I'll be happy to wait.

BOARD MEMBER LYNCH: Amy, can you just briefly fill the Board in on Judge Bidegaray's
rationale, just a thumbnail.

MS. CHRISTENSEN: Yes. So we moved to dismiss on the grounds that BER is the deciding agency, they shouldn't have to defend their decision. It's really more to a District Court Judge, an appeal from a District Court decision up to the Montana Supreme Court.

We cited some case law that says that BER is not a required party in a case like this. There is a case out there that says that an administrative agency can be a party, so then the question was can they be a party, do they have to be a party.

And our option was, I mean we were trying to say to the Court, "You're creating a situation where you're making BER opt out," whereas the case that she's relying on was really about an administrative agency that wanted in.

And so we thought the better approach would be, "You know what, if the administrative agency wants to opt in, let them opt in. We're saying we don't want to be in this case, so let us opt out. Don't force us to be in this case."

She didn't buy it. She thought it was fine for us to be brought in if some party had
requested that we be in the case. She didn't think that we had proven that MAPA provided all of the relief that was being requested, and we hadn't shown that -- I think she said something like beyond a reasonable doubt. So she said, "If you guys don't want to participate, file a notice of non-participation." So that's pretty much where she landed.

BOARD MEMBER LYNCH: Thank you.

CHAIR DEVENY: Any other discussion? Or Chris, do you want to go ahead with your motion.

BOARD MEMBER TWEETEN: Sure. I move that we direct Amy Christensen, our Counsel in this matter, to initiate promptly discussions with the attorneys for the other party in an attempt to secure a stipulation that the Board may be dismissed as a party in this case without prejudice to any of the issues that are being raised; and that in the event Amy is unsuccessful in securing that stipulation, she be authorized to file with the Montana Supreme Court a petition for a writ of supervisory control, asking the Court to rule that in all cases such as this, and absent some showing of extraordinary circumstances, it is
not necessary or appropriate to name the Board of Environmental Review as a party in matters arising from judicial review of the Board's decisions in the District Court, or appeals from those judicial review matters to the Montana Supreme Court.

CHAIR DEVENY: There is a motion before the Board. Is there a second?

BOARD MEMBER LEHNHERR: This is David. I'll second that.

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

BOARD MEMBER TWEETEN: Madam Chair, just a question for Amy. Does that provide you with sufficient guidance?

MS. CHRISTENSEN: It does. Thank you.

BOARD MEMBER BUSBY: This is Dexter. Just real quick. Chris, you didn't put a time element on that, and I'm not sure if there shouldn't have been a decision date in there, so Amy has the time to file.

BOARD MEMBER TWEETEN: Madam Chair, I'd respond to that and simply say that I did use the word "promptly," and absent some idea of what an appropriate date for that might be, I guess I would leave it to Amy's discretion to make the
determination as to whether, after promptly
initiating those conversations, the conversations
were in a position where they were not reasonably
likely to be fruitful, in which point she would be
authorized to go ahead with the petition.

CHAIR DEVENY: Are you comfortable with
that, Dexter?

BOARD MEMBER BUSBY: I'm not
uncomfortable with it, but I get concerned that
"promptly" in legal terms is a very vague term.

BOARD MEMBER TWEETEN: I certainly agree
to that, but Amy is an experienced lawyer, and I
think she will have a good feel for when those
discussions have hit the end of the road, and when
it's time to go ahead. She can let her opposing
Counsel know, or let the other Counsel know, that
as far as she's concerned, this discussion is a
dead end, and she intends to go forward with the
petition. And at that point, you can lead a horse
to water, but you can't make him drink. So you
just go ahead and do what you have to do.

CHAIR DEVENY: Is there further Board
discussion on the motion that's before us? John
DeArment.

BOARD MEMBER DEARMEN: I just had a
quick question, in that it seems like even beyond this case, there's some interest in resolving this question one way or another once and for all.

Procedurally is there a way to do that? If Amy and Shiloh reach a resolution in the current matter, in the broader future could we still get an answer from the Court through some process as to this question for future cases?

Thanks.

BOARD MEMBER LYNCH: Madam Chair, I'll respond.

CHAIR DEVENY: Jerry.

BOARD MEMBER LYNCH: If there is an agreement between Amy and Shiloh in this case, it's limited to this case. And that's the frustration, if you will, that I think both Chris and I alluded to, that if they reach an agreement here, it's not binding in the future on anybody, including Shiloh's current clients.

So the Board is going to ultimately have to make -- if they reach a resolution, fine. The Board can make a decision to say okay in this case, but leave that issue out there, or go forward with a writ of supervisory control, which I -- Chris will agree with me -- it's sometimes
difficult to get the Court to address those.

But because Amy will very convincingly -- I'm sure, Amy -- explain to the Court the perpetual nature of this problem that the Board faces. And so in answer to your question, it's only if the Court, the Supreme Court ultimately decides the issue, that there will be comfort moving into the future, or precedent moving into the future.

CHAIR DEVENY: So if I'm hearing this right, then the motion that's currently before us could potentially leave us kind of where we're at with the exception of this particular case.

BOARD MEMBER LYNCH: I think that's accurate. That is accurate.

BOARD MEMBER TWEETEN: I think it is, too. Madam Chair, if I might respond briefly.

Everything that Jerry said is correct obviously, and I don't dispute any of it. But on the other hand, the other way to look at it is that having had this discussion on the record, reflected in our minutes, that in the absence of cooperation from the parties to let the BER out, we're prepared to take this issue up, that might act to discourage parties from pursuing this route
in the future.

   So it may never be necessary for us to be the party that does the lifting here to get the issue decided by the Supreme Court. Maybe somebody else will do it eventually.

   And second, I guess, I would want to be able to represent to the Court, in the event the questions were raised, that we made every effort to keep this issue off the table, and were unable to do so. I think that might be a factor in moving their discretion to accept this case, because it is discretionary with them at this stage whether to decide this issue now or not.

   So I'd like to take -- I think the better part of valor is to take one more stab at settling this question amicably in this case, and then if we're able to do that, then we can holster our guns and wait until the next time we have to fight this issue out before we actually ask the Court to decide it.

   So my sense would be that it's better to try to resolve the issue by agreement at this point, if we can; and if not, then at least we can let the Court know that we made every effort to decide this issue, or resolve this issue without
asking their participation.

    And we can certainly muster for the Court a significant number of prior matters in which we've been named as parties, just to let them know that this is not a once-in-a-lifetime issue, that it's a continuing issue that's come up, and that it's time for the Court to clarify MAPA, and make it clear that we're not appropriate parties in these cases.

    So I would like to see Amy make one more stab at diplomacy here before we file the petition.

    CHAIR DEVENY: Go ahead, Jerry.

    BOARD MEMBER LYNCH: I was going to say well put, Chris, and I agree whole heartedly.

    CHAIR DEVENY: I think we're ready for a vote on this issue, unless anybody has any other burning discussion points.

    (No response)

    CHAIR DEVENY: Hearing none, are people clear on what the motion is, or do we need to ask Laurie to somehow read it back to us?

    BOARD MEMBER DEARMENT: I'm clear.

    BOARD MEMBER LEHNHERR: I'm clear.

    BOARD MEMBER BUSBY: I'm clear.
CHAIR DEVENY: All those in favor of the motion before us, please signify by saying aye.

(Response)

CHAIR DEVENY: Any opposed?

(No response)

CHAIR DEVENY: Hearing none, motion passes. And thank you, Amy, and just keep me posted, and we'll take it from there.

MS. CHRISTENSEN: Thank you.

CHAIR DEVENY: Back to Sarah.

MS. CLERGET: So the next one is what we refer to as Western Energy Area F. So this is a different Western Energy case than the AM4 case that we were talking about.

And the issue here is that you've designated me as the Hearing Examiner for procedural purposes, and in your packet starting at Page 138 is the transcript from the meeting where you did that. And essentially you said that you wanted to hear back from me when summary judgment was filed to decide what you were going to do.

And summary judgment has now been filed. There is a notice of submittal starting at Page 145 in your packet that was from DEQ. That
explains that the motion is fully briefed, and nobody has requested oral argument.

Before we realized that this was only set to me for procedural purposes, I actually went ahead and set oral argument, because I wanted it when I thought I was going to be deciding this, and then we realized that it was only for procedural purposes, so that's the other order that you'll see is me vacating the oral argument in front of me, and then giving the parties a notice based on their request that we weren't going to hear substantive argument today.

The only thing that's in front of you today is you need to decide whether you want to review the summary judgment motions that are pending, or whether you want to assign it to me for all purposes.

And just because I know somebody is going to ask, I can tell you the briefing on it is about a binder full, and because there's three parties, so you have three briefs. Everybody has cross moved for partial summary judgment, so you have three briefs, three responses, and three replies. And then there's about five or six binders of exhibits. So that's about how big
we're talking about. And this is obviously a big and important case.

So again, all that we're deciding today is procedural in nature, but I've told the parties, as you can see in that notice, that I wanted them here to discuss logistics or answer your questions if you had any going forward.

CHAIR DEVENY: Sarah, if we decided to take on this case, how would Board members get access to those binders given that we're social distancing and home bound?

MS. CLERGET: The same way I do. We can give you -- Everybody can have a file transferred that has them electronically, or we can produce them or have the parties produce them -- either way -- in hard copy, and then you guys could come and pick them up, if you want, or we can mail them to you. Either way.

But I would recommend what -- I have to do it in hard copy for me, because I write all over everything. So for those of you who wanted hard copies, we can make that happen individually. You know, everybody can have their own.

But then what happens is that you review it, and it's up to you whether you want to set
oral argument at a special meeting or at your June meeting; or if you don't want oral argument at all, if you just want to decide it on the briefs, and then I can help you, if you want me to, to write a decision, or you can write it yourself. You can elect somebody to write it and circulate it among yourselves, or whatever you want to do.

CHAIR DEVENY: Questions by Board members? Jerry.

BOARD MEMBER LYNCH: I would just recommend that -- I like the hard copy, too. I would recommend that any -- we require the parties to submit to Sarah, who can get them to us, for those Board members that want hard copies, rather than having the Board staff do that. I think they're quite capable of doing that. I would recommend that we require the parties to provide hard copies.

CHAIR DEVENY: Jerry, before we get there, we have to decide whether this Board is going to take on this case, or whether we're going to assign it to Sarah. So the nitty-gritty of this we can discuss later.

BOARD MEMBER LYNCH: All right. I misunderstood.
BOARD MEMBER TWEETEN: Madam Chair.

CHAIR DEVENY: Chris.

BOARD MEMBER TWEETEN: Looking at the transcript excerpt that Sarah provided us, this is probably my fault because I was the one --

MS. CLERGET: Yes, I agree.

BOARD MEMBER TWEETEN: -- the question when we first got this case many months ago, and it was my idea to simply assign it for procedural purposes at that time.

I don't relish the thought of -- and frankly I'm lazy this way. I don't relish the thought of taking this issue on as an original matter without the input from our Counsel as to her recommendations of what should happen here.

And as far as the record is concerned, I think I'm correct in saying that our practice has consistently been that after the Hearing Examiner's proposed decision comes to us, copies of the briefing will be provided in the Board packet. And we can certainly follow Jerry's suggestion and have the parties provide hard copies in whatever number the members of the Board decide is necessary. If you want hard copies, we could make the parties pay for it rather than do
But I am I think pretty firmly convinced that we should dump this in Sarah's lap, and have her do a proposed decision for us before we try to sort this out on our own. And I say that partially because it's pretty apparent a lot of water has gone under the bridge in this case already, and Sarah has already got a much better familiarity with what's gone on here than any of us have, and have to duplicate all that effort to get up to the point that she is now.

So for all those reasons, I would be prepared to support the idea of assigning Sarah the responsibility for writing a proposed decision.

CHAIR DEVENY: Sarah, did you have a followup?

MS. CLERGET: Just a clarification from what Chris said. Because these are all partial motions for summary judgment, this wouldn't come back to you until after a hearing, because generally the guidance I've gotten from you guys and the practice has been that unless it is dispositive on the summary judgment motions, it
doesn't come back to you until after the hearing.

And then when you get the packet for the hearing, or just an FYI when we do summary judgment, you get exceptions briefs. So you get the FOFCOL from me, and then exceptions briefs on the FOFCOL, but you can go look at the original briefs if you want to -- we always make everything in the record available to anybody who asks -- but I don't normally put the actual underlying briefing in the Board packet.

BOARD MEMBER TWEETEN: Madam Chair,
that's all the more reason to support my motion to have Sarah do this.

CHAIR DEVENY: Was that a motion, Chris?

BOARD MEMBER TWEETEN: Sure. Madam
Chair, I'm prepared to move that we assign all remaining issues in this matter to Sarah for her determination as the Hearing Examiner.

CHAIR DEVENY: There is a motion before us. Is there a second?

BOARD MEMBER BUSBY: This is Dexter.
I'll second it.

CHAIR DEVENY: It's been moved and seconded. Is there further discussion by Board members?
BOARD MEMBER BUSBY: I have a question for Sarah.

CHAIR DEVENY: Go ahead, Dexter.

BOARD MEMBER BUSBY: With the situation the way it is, and your workload, are you able to handle this in a timely manner, or is it going to encumber you beyond your desired ability?

MS. CLERGET: Thank you for caring about that. I can handle it. Again, I always give the caveat that I use ALSB attorneys as necessary, although I will ultimately render the final decision. Sometimes I use them as a clerk to the clerk, as we refer to it sometimes. So in this and other decisions, assuming that continues to be all right with you, yes, I can handle it.

BOARD MEMBER BUSBY: Thank you.

CHAIR DEVENY: I can't speak for Hillary, but I suspect, as Health Officer in Flathead County, she's going to be quite taken up with the COVID-19 issue right now, and I question whether she would be available to spend a lot of time on it.

BOARD MEMBER TWEETEN: Madam Chair, I think that's correct. I see Hillary on the television about every other day giving advice to
the folks up in Kalispell about what they should be doing, so she's obviously very much engaged in that.

CHAIR DEVENY: John, Dr. Lehnherr, any comments? Preferences?

BOARD MEMBER DEARMENT: None.

BOARD MEMBER LEHNHERR: None here.

CHAIR DEVENY: Okay. Why don't we go ahead and vote on the motion then to assign the rest of this case in its entirety to Sarah Clerget, our Hearing Examiner. All those in favor of the motion, signify by saying aye.

(Response)

CHAIR DEVENY: All those opposed.

(No response)

CHAIR DEVENY: Sarah, you win again.

MS. CLERGET: Yay.

CHAIR DEVENY: We're going to keep Sarah on the hot spot here, and ask for Board Counsel update.

MS. CLERGET: There's only one thing on the Board Counsel update, and that is that the Board -- Chris and I wanted to make the Board aware of the fact that recent EPA action and litigation going on in Federal Court have raised
issues with the Board's rules on numeric water quality standards which are set by Board Administrative Rules; and then those rules that interact DEQ's rules on the variances.

We just wanted to let the Board know that this is a developing issue, and we'll be working with DEQ in the coming weeks to determine what it means and what the options are going forward.

This may mean that we need a special meeting, depending on what goes on with the discussions with DEQ and DEQ's discussions with the stakeholders, or it may be something we can take up in June. So we just wanted to give you guys an FYI that that was happening, and we're going to work on it as we can.

CHAIR DEVENY: Okay. Anything else for Board Counsel update?

MS. CLERGET: No. That's it. Oh, actually -- I'm sorry. I lied. Just the rules update. I'm still working on the procedural rules. I was supposed to have a round table, a second round table yesterday, but I cancelled that for probably obvious reasons. And so I will either reschedule that for later, or I may just
forego that, and do what I can by email. But I'll continue to work on it.

And then DEQ is continuing with their review of all of the BER rules, so that we can get a list from them of the totality of the BER rules, and where we stand in our two year review of statutory requirements. So that's the only other thing I had.

CHAIR DEVENY: Okay. Thank you. At this time, we'll open up the meeting for any general public comment that there may be out there on issues that are not associated with contested cases. So if there is anybody that has comments that they'd like to make, now is the time.

Lindsay, go ahead and unmute the phones if you haven't already.

MS. FORD: The phones are unmuted.

CHAIR DEVENY: Thank you. Is there any public comment at this time?

(No response)

CHAIR DEVENY: Any public comment?

(No response)

CHAIR DEVENY: Hearing none, it looks like we're ready to move to adjournment. I want to thank everybody today for participating, and
for patience, and this may be the forum we use for
awhile yet. So it is nice to have faces, I have
to admit. So with that, is there a motion to
adjourn?

BOARD MEMBER TWEETEN: So moved.

BOARD MEMBER LYNCH: Second.

CHAIR DEVENY: It's been moved and
seconded. All those in favor, signify by saying
aye.

(Response)

CHAIR DEVENY: Any opposed?

(No response)

CHAIR DEVENY: Hearing none, this
meeting is adjourned.

(The proceedings were concluded
at 1:54 p.m.)

* * * * *
CERTIFICATE

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.