

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

3 * * * * *

4 (Ms. Kaiser not present)

5 CHAIRMAN RUSSELL: It is 9:10 and I will
6 call this regular meeting of the Board of
7 Environmental Review to order. It looks like all
8 of our members are present. Heidi is out fixing a
9 computer glitch, and so we'll get rolling without
10 her.

11 The first item on the agenda is the
12 review and approval of the October 8th, 2010
13 teleconference meeting.

14 MR. WHALEN: Mr. Chairman, I'll move to
15 approve those minutes.

16 CHAIRMAN RUSSELL: It's been moved. Is
17 there a second?

18 MR. MILLER: I second.

19 CHAIRMAN RUSSELL: Is there any
20 discussion?

21 (No response)

22 CHAIRMAN RUSSELL: Hearing none, all
23 those in favor, signify by saying aye.

24 (Response)

25 CHAIRMAN RUSSELL: Opposed.

1 (No response)

2 CHAIRMAN RUSSELL: Motion carried. The
3 next item on the agenda is the 2011 meeting
4 schedule.

5 MR. LIVERS: Mr. Chairman, members of
6 the Board, for the record, Tom Livers with the
7 Department. We have proposed dates scheduled
8 somewhat around the rule filing schedules, and
9 that sort of thing, but we do obviously have some
10 flexibility within there. So we try to get those
11 to you a little bit ahead of time so you could
12 check calendars to see if there were significant
13 conflicts.

14 Just to recap, we're looking at January
15 28th, March 25th, May 20th, July 22nd, September
16 23rd, and December 2nd for the 2011 meeting dates.

17 (Ms. Kaiser enters)

18 MR. WHALEN: Do we anticipate that the
19 May meeting is going to be a teleconference or a
20 personal meeting?

21 MR. LIVERS: Mr. Chairman, Mr. Whalen,
22 at this point it's probably too early to know for
23 sure. Typically it will depend on the size of the
24 agenda, and the amount of briefing, initiations,
25 and that sort of thing, but we also have some

1 control. Sometimes we have some discretion in
2 terms of, particularly on briefing items, when
3 they come forward to the Board. So if there is an
4 interest in making that a teleconference, I think
5 to some degree we'll have some flexibility on the
6 agenda to accommodate that, and it's certainly
7 something we could do.

8 CHAIRMAN RUSSELL: Would not some of
9 these initiations come up on that May meeting?

10 MR. LIVERS: Mr. Chairman, the
11 initiations we're making now for final action, the
12 bulk of them might happen by March, but certainly
13 it's possible.

14 MR. MIRES: What is the date that was
15 questioned?

16 MR. WHALEN: The third weekend in May.
17 It's kind of a big weekend in Miles City.

18 CHAIRMAN RUSSELL: Thanks.

19 MR. LIVERS: That was our oversight, Mr.
20 Chairman, Mr. Mayor.

21 MR. WHALEN: Is there an opportunity to
22 adjust that particular date?

23 CHAIRMAN RUSSELL: There certainly is.

24 MR. LIVERS: Mr. Chairman, Mr. Mayor, if
25 we were to -- I think I might suggest moving

1 forward on that date, because I believe we're
2 getting into Memorial Day Weekend if we make it
3 later. So we probably would want to look at the
4 13th potentially.

5 MR. WHALEN: That would be helpful.
6 Thank you.

7 MR. MIRES: We want to look at moving
8 that to May 13th, is what you're saying?

9 MR. WHALEN: I'd like to if possible.

10 MR. LIVERS: Mr. Chairman, we can
11 certainly accommodate that. I don't know that it
12 would take a motion as long as -- I mean it would
13 be part of the motion when you adopt the dates.

14 CHAIRMAN RUSSELL: Well, we'll just move
15 that up a week, and set this as our schedule. And
16 I don't think -- Do we take action on this
17 usually? It's really -- unless there is an issue.

18 MR. LIVERS: I don't think formal action
19 is necessary, Mr. Chairman. We'll go ahead and
20 work with these dates as proposed with the one
21 change. May 20th will become May 13th, and we'll
22 publish those.

23 CHAIRMAN RUSSELL: Perfect. All right.
24 Katherine.

25 MS. ORR: These cases "A" through "G"

1 are all in the stage of proceeding to hearing
2 except for Item (c). There was a stipulation to
3 dismiss that was submitted on December 1st of
4 2010, and that dismissal will be entertained by
5 the Board at the next Board meeting. Other than
6 that, there isn't very much to add.

7 As to Item (g), there was a request for
8 a third extension filed on November 23rd to
9 respond to the first prehearing order. That's all
10 I have there.

11 CHAIRMAN RUSSELL: Thanks, Katherine.
12 The next item on the agenda is rule initiation,
13 and the Department requests the Board to initiate
14 rulemaking to amend the air quality open burning
15 rules, and to change some procedural issues around
16 that based on some legislative changes. Tom.

17 MR. LIVERS: Thanks, Mr. Chairman. Deb
18 Wolfe from our Air Resource Management Bureau will
19 present this initiation.

20 MS. WOLFE: Good morning Chairman
21 Russell, members of the Board. My name is Debra
22 Wolfe, and I work in the Air Resources Management
23 Bureau, and I'm here today to represent the
24 Department regarding action on the proposed
25 revisions to the open burning rules.

1 I'll start with 17.8.604, which is open
2 burning, and the list of prohibited materials. By
3 way of background, I'll review the most recent
4 history of Board action for the rules that
5 prohibit the burning of certain materials.

6 In 2002, the Board amended 17.8.604 to
7 provide an exception to the general prohibition
8 that in order to allow wood waste generated in
9 areas where burning would be unwise, to be moved
10 to areas where burning could take place under
11 conditions applicable to other open burning.

12 The Board originally approved the rule
13 as a response to situations that occur when a city
14 experiences a heavy snowfall or a severe wind
15 storm, causing tree limbs to break and fall to the
16 ground. If other disposal methods are unavailable
17 or not feasible, it was felt that instituting open
18 burning would be unacceptable, and would
19 unacceptably increase particulate concentrations
20 in populated areas, and that it would be more
21 appropriate to move fallen tree limbs downwind
22 away from town before open burning.

23 The rule was submitted to EPA for
24 inclusion into the State Implementation Plan after
25 the Board approved it in 2003. In 2004, EPA

1 proposed to disapprove the amended provision. EPA
2 has not followed up to finalize the proposed
3 disapproval since that time, but has recently
4 indicated in discussion an inclination to approve
5 if the rule was changed in some way to condition
6 Department approval.

7 So the suggested revisions before you
8 are intended to provide appropriate conditions for
9 that approval. The revisions ensure that waste is
10 moved from the premises where it is generated, and
11 it's still prohibited material, and may not be
12 burned unless it is conducted pursuant to a
13 landfill or conditional open burning permit.
14 The revisions also ensure that movement and
15 burning is only an option for wood that is not
16 already described as prohibited. So if you'll
17 look at 604(1)(e), for instance. The proposed
18 revisions ensure other methods of disposal are
19 considered. Finally the proposal would require
20 the open burning to comply with BACT for open
21 burning.

22 The proposed revision to ARM 17-8-610(2)
23 merely corrects a grammatical error. The rest of
24 the revisions are made to make the rules
25 consistent with legislation removing the automatic

1 stay during the process for appealing air quality
2 permits pursuant to 75-2-211 in the Montana code.
3 That would be House Bill 700.

4 So the Department hereby requests that
5 the Board initiate rulemaking and conduct a public
6 hearing to consider the proposed amendments to
7 these rules. Thank you.

8 CHAIRMAN RUSSELL: Thanks, Deb. How
9 does this not automatic stay, how is that going to
10 work?

11 MS. WOLFE: Chairman Russell, members of
12 the Board, that is simply a change that makes it
13 consistent to the statutory rules, and so when you
14 say, "How does that work?," I guess that we could
15 review the legislation and find out what the
16 intent was, but it simply makes it consistent with
17 the legislation.

18 CHAIRMAN RUSSELL: But let's say I'm
19 sitting -- I have a home next to a permitted
20 process, and I know that because of my location
21 that I'm going to be adversely affected, and that
22 the only thing I want is some stricter conditions
23 put in the permit. So I file an appeal, and an
24 affidavit, and I submit it. What happens next?

25 MS. WOLFE: There is no automatic stay

1 at that point.

2 CHAIRMAN RUSSELL: So then you just keep
3 on burning? Are you getting my point?

4 MS. WOLFE: I am getting your point.

5 CHAIRMAN RUSSELL: That's literally why
6 the air pollution control regulations were written
7 and allowed, not just literally that -- You can't
8 just say, "I'm adversely affected." You file an
9 affidavit and it makes sense. Who at that point
10 considers if a stay is in the best interests of
11 public health or not?

12 MS. WOLFE: I'm actually going to let
13 Dave answer this one.

14 MR. KLEMP: Mr. Chairman, members of the
15 Board, for the record, Dave Klemp. I'm Bureau
16 Chief of the Air Resources Management Bureau,
17 former permitting supervisor in the Air Resources
18 Management Bureau.

19 And Chairman Russell, your question is a
20 very good one, and one we've been struggling with,
21 as you know, for many years now as a result of
22 appeals. And the open burning provisions would be
23 handled very similarly to those provisions under
24 the Montana Air Quality Permit provision, which is
25 basically our preconstruction permitting program,

1 and that if an appeal is filed, unless the stay is
2 granted, and the Board may consider granting a
3 stay if one is requested, that permit would go
4 final, and those activities would be allowed to
5 occur, much like a stay in a coal fired -- if
6 there was an appeal in a power plant or something
7 like that, they would be able to begin
8 construction. They would have the authorizations
9 necessary to proceed, again, without a stay
10 granted.

11 CHAIRMAN RUSSELL: If this was in an
12 area that wasn't a nonattainment area or something
13 like that, where you just applied BACT, I could be
14 adversely affected if I were the neighboring
15 property. Literally I could. You know that.

16 MR. KLEMP: Absolutely. I'm not sure
17 what recourse we have to, I guess, to be
18 inconsistent with the statute.

19 CHAIRMAN RUSSELL: All I'm doing is
20 bringing up some issues that could be of grave
21 public health concern if a stay isn't granted, and
22 there seems to be merit based on the affidavit.
23 It triggers -- I don't know if there are triggers
24 out there that could be used. I don't know what
25 the intent of the legislation was. I literally

1 don't. But I don't think the intent was to harm
2 public health.

3 MR. KLEMP: Mr. Chairman, the intent was
4 for projects to be able to move forward while the
5 appeal was being heard.

6 CHAIRMAN RUSSELL: And open burning is
7 different. It's more localized.

8 MR. KLEMP: Much shorter time frames.

9 CHAIRMAN RUSSELL: It's much shorter
10 time frames. Just keep that in mind moving
11 forward. I'm not going to be an obstructionist
12 here. I think that we need to be consistent with
13 what the statute says, but you have to also
14 consider the public health ramifications of not
15 granting a stay when it seems to be -- when there
16 seems to be merit.

17 MR. KLEMP: Absolutely. Thank you.

18 CHAIRMAN RUSSELL: Thanks for jumping up
19 there and taking command.

20 MS. SHROPSHIRE: I have a question. The
21 addition of the BACT analysis, and I guess the
22 question is: That's a new addition? Is that a
23 new addition?

24 MS. WOLFE: I don't know that it's
25 necessarily a new addition. There was certainly a

1 very good argument that regardless BACT would
2 apply when you conduct open burning. I suppose a
3 person previously could have argued -- little tiny
4 crack in the door -- that maybe this wouldn't
5 apply, that BACT wouldn't apply to this. This
6 absolutely ensures that BACT will apply.

7 MS. SHROPSHIRE: Just clarifying. Okay.
8 Thank you.

9 CHAIRMAN RUSSELL: Further questions for
10 Deb?

11 MR. WHALEN: Mr. Chairman, as someone
12 from a part of the state that doesn't seem to be
13 as adversely affected from open burning, this does
14 seem to be an issue that is fairly localized to
15 this part of the state and west. Some of my
16 questions have to do with the application of best
17 achievable control, or best available control
18 technology to this issue.

19 Did we go directly BACT as opposed to
20 kind of graduating up from lowest achievable
21 emission rates, or reasonably available control
22 technology? Was there any sort of graduation, or
23 did we just propose, or is the Department
24 proposing to go straight to BACT application in
25 this case?

1 MS. WOLFE: Chairman Russell, Mr.
2 Whalen, BACT is the control technology for open
3 burning in Montana. I don't know that there is a
4 graduated -- maybe I'm misunderstanding your
5 question.

6 MR. WHALEN: The question goes to a
7 little bit of research on the EPA site that
8 provides for a spectrum of controls depending on
9 upon the severity of the concern, beginning with
10 lowest achievable emission rate, and then moving
11 through describing reasonably available control
12 technology, then at the high end is best available
13 control technology.

14 So my concern is in an area where we
15 typically endure wildland fire smoke, are we
16 applying the highest and best technologies to a
17 problem that might be mitigated at a lower level?

18 MS. WOLFE: Mr. Chairman, Mr. Whalen,
19 what you're describing, these various type of
20 controls, are controls that depend on the type of
21 source, and the area, the status of the air
22 quality of the particular area. And I can
23 actually -- We don't do this in a vacuum, we have
24 a team, and so I do have an engineer that is
25 available to talk to you a little bit about those

1 various control strategies, and that may actually
2 answer your question.

3 CHAIRMAN RUSSELL: Before you jump up,
4 wildland open burning is not considered here at
5 all.

6 MR. WHALEN: I understand.

7 CHAIRMAN RUSSELL: And quite frankly, I
8 wanted to put cudros in. This Department does a
9 great job in applying BACT for wildland open
10 burning in the west. John Coefield is an
11 incredible meteorologist. He does a super job.
12 So this is really focused on those activities that
13 are less than that. Wildland open burning is one
14 of the best BACT applied programs that I've ever
15 witnessed out of DEQ.

16 But we need to stay to the focus. These
17 are more, as you mentioned, these are very
18 localized issues. Christmas tree burning,
19 conditional open burning permits, those are much
20 more localized than area wide issues around
21 wildland open burning.

22 MR. WHALEN: But we're still discussing
23 wood smoke, right?

24 MS. WOLFE: Yes.

25 CHAIRMAN RUSSELL: But you can't

1 commingle them. The problem is -- That's where
2 the Department does a great job with the major
3 open burning sources. They look at particulate
4 loading in the western valleys quite well before
5 they allow the majors to burn, and most of these
6 literally are just a small percentage of the
7 particulate that comes from wildland open burning.

8 Any further questions?

9 (No response)

10 CHAIRMAN RUSSELL: Hearing none, I would
11 entertain a motion to initiate rulemaking. And
12 Katherine, are you going to take this one on?

13 MS. ORR: Yes.

14 CHAIRMAN RUSSELL: Adopt the MAR, and
15 get this thing going.

16 MS. KAISER: So moved.

17 CHAIRMAN RUSSELL: It's been moved by
18 Heidi. Is there a second?

19 MR. MILLER: Second.

20 CHAIRMAN RUSSELL: It's been seconded by
21 Marv. Further discussion?

22 (No response)

23 CHAIRMAN RUSSELL: Hearing none, all
24 those in favor, signify by saying aye.

25 (Response)

1 CHAIRMAN RUSSELL: Opposed.

2 (No response)

3 CHAIRMAN RUSSELL: Motion carries
4 unanimously.

5 The next item on the agenda is another
6 rule initiation. The Department requests the
7 Board initiate rulemaking to streamline the
8 revocation permit, revocation permits for those
9 that are not operating.

10 MS. WOLFE: Good morning again.
11 Chairman Russell, members of the Board, again, for
12 the record, my name is Debra Wolfe, and I'm with
13 the Air Resources Management Bureau, and I'm here
14 to represent the Department regarding action on
15 this proposed revision to the Montana air quality
16 permit rules.

17 The proposed revision to ARM 17.8.763
18 would set forth a process for notice by
19 publication regarding the Department's intent to
20 revoke a permit for a source that's regulated
21 under Title 17, Chapter 8, Subchapter 7, the
22 Montana air quality permit.

23 The current rule fails to set forth a
24 method of alternative service in the event an
25 owner or operator cannot be found for regular mail

1 delivery. The Department feels including the
2 provision would help close the loop in situations
3 where the owner or operator is delinquent in its
4 fee payment, and the Department is obligated to
5 pursue them, even though the owner or operator
6 leaves no forwarding address or other information.
7 Chasing down a cold trail and maintaining an
8 administrative record for an inactive source takes
9 resources that the Department can ill afford.
10 The publication of an intent to revoke a permit
11 will provide any owner or operator sufficient time
12 to halt the process, and remedy the situation.

13 The Department requests the Board
14 initiate rulemaking, and conduct a public hearing
15 to consider the proposed amendments to these
16 rules. Thank you.

17 CHAIRMAN RUSSELL: Questions for the
18 Department, Deb?

19 MS. SHROPSHIRE: I have a question. Do
20 you ever call them, or is the phone number ever
21 part of the process where you leave a phone
22 message or anything like that to show added intent
23 to locate them? Is that --

24 MS. WOLFE: Chairman Russell, Ms.
25 Shropshire, I actually will have Dan Walsh, who is

1 our compliance supervisor, tell you a little bit
2 about how this rule is implemented and answer your
3 question.

4 MR. WALSH: Mr. Chairman, Ms.
5 Shropshire, for the record, my name is Dan Walsh.
6 I'm the air compliance supervisor for the
7 Department.

8 And in response your question, yes, we
9 make every effort we can to contact these sources
10 when this comes up. We have inspectors that are
11 assigned to individual facilities, and they try to
12 maintain a relationship where they're able to call
13 them. A lot of times when we're in this position,
14 the company will longer be in existence in a
15 general area, and all of the information we have
16 on file with them is no longer applicable, and we
17 have a real difficult time trying to track them
18 down in situations.

19 MS. SHROPSHIRE: So the point where
20 you're at where you're sending these certified
21 requests is way beyond the phone call sort of
22 stage? This is the last effort that is made to
23 get in contact with them, that's being verified, I
24 guess.

25 MR. WALSH: Mr. Chairman, Ms.

1 Shropshire, typically the process, there is a
2 number of steps, and we start out with --
3 particularly with this example we're talking about
4 with the billing -- we start out with sending them
5 a first notice that they owe us a bill; and then
6 we start with the second and third notices. And
7 during those times, we also have inspectors that
8 are trying to get a hold of them to try and
9 encourage them to stay up to speed with their air
10 fee payment that they owe.

11 As we get further down the process,
12 that's when we're talking about sending them the
13 certified mail, and also trying to do this public
14 notice to take care of that issue, and kind of
15 close the loop, as mentioned.

16 MS. SHROPSHIRE: Thank you.

17 MR. MIRES: How often does this occur?

18 MR. WALSH: Mr. Chairman, Mr. Mires, we
19 deal with this issue approximately, I would say,
20 anywhere from a half dozen to a dozen times a year
21 where we have sources that we're having a
22 difficult time identifying them. And then what
23 happens with those is that they stay on the books
24 until we find some way to notify them the way that
25 the rules are currently set up right now, and a

1 lot of these may stay on the books for years while
2 we're trying to figure out how to actually notify
3 them to close that loop and basically get rid of
4 the administrative process for them.

5 CHAIRMAN RUSSELL: So how many of these
6 are stationary sources?

7 MR. WALSH: Mr. Chairman, typically,
8 we're talking mainly about portable sources. It's
9 not something we deal with a lot with stationary
10 sources. It's portable asphalt plants and
11 crushers is typically what we're dealing with.

12 MR. LIVERS: Dan, I wonder if just for
13 context. You say half a dozen a year, but out of
14 what kind of a permit universe?

15 MR. WALSH: Our permit universe is
16 approximately 650 or 700 sources. Portable
17 sources is about half of that universe, so we're
18 talking about anywhere from six to twelve of that
19 350 per year is typically what we're talking
20 about.

21 CHAIRMAN RUSSELL: We get a lot of them
22 up in the Flathead.

23 MR. WHALEN: Mr. Walsh, I noticed in the
24 literature that this is run by the Attorney
25 General's Office as the methodology for contacting

1 these people, or these firms. To kind of follow
2 up on Ms. Shropshire's point earlier about -- It
3 just seems archaic that we're still publishing in
4 the newspapers these kind of notices. Did you
5 sense from the Attorney General's Office that
6 there was any sort of movement into some other
7 means of notifying people aside from publication
8 into newspapers?

9 MR. WALSH: Mr. Chairman, Mr. Whalen, if
10 I could have Deb Wolfe answer that.

11 MR. WHALEN: I should have directed that
12 question to you, Mr. Chairman.

13 MS. WOLFE: Chairman Russell, Mr.
14 Whalen. Maybe it is more appropriate for Joe.
15 The newspaper publication, I realize that a large
16 part of the population is seeing it as archaic.
17 It is used for other types of processes, such as
18 under the Rules of Civil Procedure, for instance.
19 It doesn't mean that we're locked into this
20 particular, but it is still somewhat acceptable.
21 Does that mean that in five years we won't be back
22 here looking for something that maybe is more
23 timely, or electronic, or something that's more
24 widely accepted? No. But right now that's what
25 we're dealing with.

1 CHAIRMAN RUSSELL: When we have to start
2 tweeting people. Actually there is a lot of Title
3 7s that requires publication. I don't know what
4 -- Title 7 is the county rules, but I don't know
5 what --

6 MR. WHALEN: The City as well.

7 CHAIRMAN RUSSELL: Most of that stuff
8 comes right out of there still. Times will
9 change.

10 MR. WHALEN: My understanding is that
11 posting those kinds of notices on the Department
12 website would serve as public notice as well.

13 CHAIRMAN RUSSELL: Possibly. We can't
14 post things publicly on our website. There still
15 has to be a paper that --

16 MR. WHALEN: That doesn't reach the
17 public notice criteria?

18 CHAIRMAN RUSSELL: Not for noticing
19 meetings. That will change. You're right. It's
20 not that far off that things will start to change
21 in the universe.

22 MR. WHALEN: Thank you, Mr. Chairman.

23 CHAIRMAN RUSSELL: So with that, I would
24 entertain a motion to initiate rulemaking, adopt
25 the notice, and appoint Katherine the Hearing

1 Examiner for this.

2 MR. WHALEN: So moved, Mr. Chairman.

3 CHAIRMAN RUSSELL: It's been moved by
4 Joe. Is there a second?

5 MR. MIRES: Second.

6 CHAIRMAN RUSSELL: Seconded by Mr.
7 Mires. Any further questions? Comments?

8 (No response)

9 CHAIRMAN RUSSELL: All those in favor,
10 signify by saying aye.

11 (Response)

12 CHAIRMAN RUSSELL: Opposed.

13 (No response)

14 CHAIRMAN RUSSELL: Thanks, Deb.

15 MR. LIVERS: Mr. Chairman, public
16 comment on --

17 CHAIRMAN RUSSELL: You know, I missed
18 two, haven't I? You let me blow the first one,
19 and you let me blow the second one. I will not
20 screw up again.

21 MR. LIVERS: I think you could still ask
22 for it.

23 CHAIRMAN RUSSELL: On the last two
24 initiations, is there anyone here that would like
25 to speak to these matters?

1 (No response)

2 CHAIRMAN RUSSELL: When we don't meet
3 that often in person, I tend to forget.

4 All right. The next item on the agenda
5 is the Department's request for initiation of
6 rulemaking around 17.30.1341, general permit
7 category for pesticide, and a few other little
8 things. Tom.

9 MR. LIVERS: Mr. Chairman. Thank you.
10 Jenny Chambers, head of our Water Protection
11 Bureau, will walk through this initiation.

12 MS. CHAMBERS: Thank you. Chairman,
13 members of the Board, my name is Jenny Chambers,
14 Chief of the Water Protection Bureau.

15 The Department requests the Board concur
16 in its recommendation to initiate rulemaking to
17 proceed with minor amendments to ARM 17.30.201,
18 the rules pertaining to the permit fees, and ARM
19 17.30.1341. The primary purpose of this
20 rulemaking is to provide an administrative
21 framework to allow the Department to proceed with
22 the development of a Montana pollutant discharge
23 elimination system general permit for pesticides,
24 and also to provide a fee schedule and necessary
25 information that's required under the Montana

1 Water Quality Act.

2 The Montana Water Quality Act requires
3 the Board to adopt rules that are sufficient to
4 recover the cost of issuing permits, licenses, and
5 other authorizations that are issued by the
6 Department, as well as the administrative cost of
7 operating the program.

8 For a little background information, in
9 2007, the United States Environmental Protection
10 Agency issued a rule exempting pesticide
11 application from discharge permit requirements
12 under the Clean Water Act. The rule concluded
13 that if pesticides were applied in accordance with
14 the Federal Insecticide, Fungicide, and
15 Rodenticide Act, or commonly referred to as FIFRA,
16 then it was exempt from Clean Water Act permit
17 requirements.

18 In January of 2009, the EPA rule was
19 vacated by the Federal Court of Appeals, and EPA
20 received a two year stay on the rule. By April
21 9th, 2011, application of pesticides to State
22 waters is no longer exempt, and must comply with
23 Clean Water Act requirements.

24 Therefore, this rulemaking is requested
25 to establish the administrative framework

1 necessary for the Department to comply with that
2 ruling, and also to provide the Department the
3 mechanism to develop a Montana pollutant discharge
4 elimination system for Montana pesticide
5 applicators.

6 The major proposed amendment to ARM
7 17.30.201 is to add a definition for pesticides.
8 Since this is a fairly new program for the
9 Department, we're working very closely with
10 stakeholders, and a work group, and also our
11 Montana Department of Agriculture, plus working
12 really close with our legal staff, and making sure
13 we're not being more stringent than the federal
14 EPA requirements.

15 I do have a new MAR notice to hand out
16 to you with a different definition for pesticide
17 definition. (Provides document) It is still
18 located in the same location. It's on the bottom
19 of Page 1, under 17.2, starts with Subpart (a).
20 Basically the definition is very similar. It just
21 provides some exemptions that we thought was
22 necessary to ensure that we weren't being more
23 stringent than the federal EPA.

24 Some additional amendments to ARM
25 17.30.201 remain the same. We're going to add the

1 definition for multi-county versus single county
2 coverage areas; we're going to correct the suction
3 dredge fee amounts to align with the statutory
4 amount in Title 75; and we're going to reduce the
5 fee amount for short term water quality standard
6 308 authorization, which is a Montana Water
7 Quality Act requirement for application of
8 pesticides that will exceed water quality
9 standards; and we're going to add some additional
10 clarification language.

11 The changes to ARM 17.30.1341 start on
12 Page 6 of the notice that I handed out. We are
13 requesting that we add a pesticide application to
14 the list of general permits to allow the
15 Department to issue the general permit, instead of
16 requiring us to issue all individual discharge
17 permits to applicators.

18 We're also going to add and change --
19 which is a change from the notice that you guys
20 received electronically -- in Part 4 to allow the
21 Department to issue Notice of Intent to process
22 the pesticide general permits. This change would
23 clarify that authorizations are not needed when a
24 Notice of Intent form is filed, and allows
25 coverage upon receipt of a complete NOI.

1 In turn, the Department will send out an
2 acknowledgment letter as opposed to reviewing an
3 application, determine the application complete,
4 and then sending approval under that application
5 process. The Notice of Intent allows the
6 Department to reduce our amount of expenses as far
7 as resource time, and then the permittees will
8 have coverage when they file a complete NOI, and
9 not wait for us to, 30 to 60 to 90 days, turn
10 around and give them an authorization letter.

11 MS. SHROPSHIRE: Question, Mr. Chairman.
12 Can you elaborate a little bit on the NOI, or
13 Notice of Intent, and what that is, just for
14 background.

15 MS. CHAMBERS: Certainly. Under the
16 MPDES program, surface waters discharge permit
17 program, you can either send out a standard
18 application form that's going to require more of a
19 Department review, and approval, and confirmation,
20 that indeed that that application is going to meet
21 the intent of that permit. We review all the
22 information, determine whether or not the
23 application is complete, whether or not we need to
24 send any deficiency letters out in order to get
25 additional information, so that we can actually

1 develop possibly an individual MPDES permit if
2 they meet the requirements of a more complex
3 possibly general permit.

4 A Notice of Intent is very similar to
5 what we do in the storm water construction
6 program, where there are short term quicker
7 projects that receive -- require immediate
8 coverage for the application of what they're
9 doing. You're either building a building, and
10 you're getting ready to start that project, you
11 need to have approval right away to have coverage;
12 or for pesticide applicators who are going to go
13 out and spray those fields because maybe there's
14 health impacts associated with that, and you need
15 to get on the ground and do that as soon as
16 possible.

17 They submit a Notice of Intent to the
18 Department. As long as all of the T's are
19 crossed, and the I's are dotted, and all of the
20 check boxes were filled out, and they had the
21 appropriate fee paid, they automatically have got
22 coverage, so we'll just turn around a quick
23 authorization letter to them, telling them that
24 they're good to go.

25 We could probably do Notice of Intent

1 within anywhere from two to ten days, versus an
2 application is normally at least a 30 day review
3 process with possible deficiencies later.

4 MS. SHROPSHIRE: Okay. Thank you.

5 MS. CHAMBERS: That basically concludes
6 a summary of the proposed revisions, and the
7 Department requests the Board concur with this
8 recommendation to initiate rulemaking of the
9 package, and appoint a Hearing Officer for a
10 public hearing. Thank you, and I'd be happy to
11 answer any questions.

12 CHAIRMAN RUSSELL: Questions?

13 MR. MILLER: Mr. Chairman, Jenny, you
14 mentioned you had talked to the Department of Ag.
15 How about, have they commented on this, or the
16 county weed groups, and so forth?

17 MS. CHAMBERS: Mr. Chairman, Mr. Miller,
18 yes. We've had huge stakeholder involvement, not
19 necessarily on us building this rule package to
20 allow us to have the administrative framework in
21 order to go with the MPDES general permit, and to
22 establish an actual fee setting for us to actually
23 implement this program when April rolls around.

24 But definitely as far as the
25 requirements of the general permit, what we're

1 doing to implement the program, trying to ensure
2 that we're not being more stringent than the
3 federal requirements, making sure we're not
4 duplicating efforts between the EPA efforts,
5 Montana DEQ efforts, and also Department of
6 Agriculture efforts. They still have to comply
7 with FIFRA. We want to make sure we're not
8 duplicating efforts.

9 Weed districts are involved with our
10 stakeholder group, with Montana Department of Ag.
11 In addition, we have done probably three or four
12 conferences, and trainings, and discussions
13 throughout the state, and will continue to do
14 that.

15 In addition, we have a website set up
16 that is specifically geared toward this pesticide
17 general permit development, and internal draft
18 review of a general permit is published on there
19 for internal comments prior to us going out for
20 formal public comment. We're taking it very
21 seriously as far as trying to get as much input as
22 we can to reduce the impacts on this particular
23 program.

24 MR. MILLER: Thank you.

25 MR. MIRES: Mr. Chairman, I have several

1 questions, and kind of follow up to Mr. Miller's.

2 I'm really interested in what the
3 Department of Agriculture has to say, and weeds,
4 in relationship to this rulemaking as it relates
5 to irrigation and the agricultural community. I
6 see some real concerns here that are going to be
7 developed, and justifiably so, and some hardships
8 that this is going to create. What is their
9 response or reply back?

10 MS. CHAMBERS: Mr. Chairman, Mr. Mires.
11 Basically this general permit is for application
12 of pesticide to state waters. If you're doing
13 irrigation, spraying as far as weed districts, or
14 if you're spraying your grain field, or you're
15 spraying other type of agricultural activities
16 that aren't directly sprayed on water, then you
17 will not need to have coverage under the general
18 permit. It's the application of pesticides to
19 state waters.

20 If you have over spray, or you're
21 spraying a forest canopy type of application, and
22 you're going to have an unavoidable impact to the
23 water, meaning it's going to drip down, or you're
24 going to have impact, yes, you would have to get
25 coverage, or have some kind of best management

1 practices in place.

2 The general permit is looking at
3 basically six pattern uses: Nuisance animals,
4 weeds and algae, forest canopy, mosquito and other
5 flying insects -- which are broken out into three
6 different categories: Larva chemical control,
7 chemical adulticide, and biological control -- and
8 then research and development. The general permit
9 cannot be more stringent than EPA currently is
10 proposing. We have threshold levels.

11 If it's a piscicide, which is
12 automatically sprayed on water, that the sole
13 purpose is to have fish kills, that's going to
14 have a zero threshold level, very similar to
15 research and development. When they are not sure
16 what they're doing when they're applying this to
17 the water, and they need to have some kind of
18 coverage, and they're not really sure what the
19 impacts are going to be, that's also going to have
20 a zero threshold.

21 So for weed and algae, like you
22 mentioned, that's a 64 acre threshold. So if
23 you're in an irrigation zone, and you're not going
24 to spray pesticides to exceed more than 64 acres,
25 you will not need to get coverage under this

1 general permit. However, if you're applying
2 directly to state waters, and you're below those
3 thresholds, and you're going to exceed the water
4 quality standard, you may still need a Section 308
5 authorization.

6 That's why we still have the 308 number
7 in this particular rule package, is because we may
8 still need to have some 308s or 4(a)s, drinking
9 water treatment plants, that apply copper sulphate
10 to their drinking water reservoir. They may still
11 need to have 308 coverage, but they're probably
12 going not to hit the threshold for this particular
13 permit.

14 So to answer your question in a quick
15 summary, basically, is that we're not seeing a lot
16 of impacts to the irrigation districts and/or weed
17 and algae control if they're just spraying on dry
18 land, and they're taking precautions, and they're
19 not doing it during a rain event, and following
20 their BMP's.

21 MR. MIREs: So how about an irrigation
22 district that maybe is using a pesticide in the
23 canals that covers a pretty broad area, it's their
24 main canal, that has the potential -- I guess all
25 of them would have a potential of that pesticide

1 at some point seeping back into state waters. How
2 is that going to affect --

3 MS. CHAMBERS: Mr. Chairman, Mr. Mires.
4 It is not overspray, and it is not runoff or storm
5 water runoff. It is direct application that you
6 unavoidably cannot avoid not spraying it into
7 state waters.

8 CHAIRMAN RUSSELL: If you were a
9 pesticide applicator, you'd know better than to
10 let that happen anyway.

11 MR. MIRES: I would hope so.

12 MS. CHAMBERS: Mr. Chairman, Mr. Mires,
13 that is a good point that Chairman Russell stated.
14 There is some pesticide applicators under the
15 FIFRA label that aren't allowed to be sprayed on
16 state waters. Therefore we are not going provide
17 a permittee -- allow them to do that if the FIFRA
18 label exempts them from applying it to state
19 waters. So we're going to have watch that between
20 the two agencies.

21 CHAIRMAN RUSSELL: Are you going to ever
22 finish? Go ahead.

23 MR. MIRES: No. And this one comes to
24 the fee structure. As I'm looking at this fee
25 structure -- and it may be that I'm totally

1 confused -- but I'm looking at suction dredge,
2 resident of Montana. You're going to increase
3 that permit fee for a new permit to \$50, and the
4 application or the renewal fee is \$25. I'm
5 looking at a concentrated animal feeding operation
6 where their annual fee is \$600, and new is \$12.
7 Fish farms, \$600.

8 And we come back into suction dredge.
9 Doesn't suction dredge create a heck of a lot more
10 pollution and problem issues than -- and I realize
11 all of the things that come out of an animal farm,
12 but let's get more closely into the suction
13 dredge, such as sand and gravel at \$900 as opposed
14 to suction dredge at \$25. I'm having a hard time
15 understanding that.

16 MS. CHAMBERS: Mr. Chairman, Mr. Mires,
17 that is an excellent question. We would agree
18 with you at the Department. Those two categories,
19 suction dredge and CAFO, are set in statute.
20 They're set in Title 75. I have no control to
21 change those unless I go back to the Legislature
22 to get those numbers changed.

23 The other program elements are, the ones
24 that we've evaluated at the Department, to
25 evaluate what the time and expenses it takes, and

1 amount of volume and concentration of the
2 pollution that those may impact in the State of
3 Montana. CAFOs would run us quite a bit higher
4 than what we could get as far as the cost to
5 manage that program, in addition to the suction
6 dredge category.

7 MR. MIRES: And that same concern would
8 come down to pesticides. I'm looking at single
9 county at \$450 and multi-county at \$1,400. I am
10 trying to get a handle on how you justify that.

11 MS. CHAMBERS: Mr. Chairman, Mr. Mires.
12 Yes, we looked at that long and hard, and again,
13 it's single counties, meaning they're going to get
14 coverage for their whole county, all of Rosebud
15 County, all of Lewis & Clark County, impacts for
16 that whole county area. We have very large
17 counties in the state. We looked at acreage, as
18 far as the smallest acreages to the large acreages
19 within counties. Or they could get that
20 multi-county, which is equivalent to the Montana
21 Department of Ag. district area, which could be up
22 to three to four different counties, you know,
23 where they're applying -- when they apply
24 pesticides.

25 We compared that specifically to storm

1 water construction and construction dewatering
2 authorizations for the single county annual fee;
3 and then for multi-county, since it's going to be
4 three or four acres, we three timesed the amount
5 as far as the fee associated with that for the
6 single county location. And again, it's depending
7 on the pattern use, and depending on the size of
8 acreage, they may or may not need to get the
9 general permit NOI coverage. So it's kind of
10 determined on the amount of volume that they grow.

11 For instance, forest canopy applying
12 possibly in western Montana, that's 640 acres for
13 them to apply currently under this general permit.
14 So a lot of application of pesticides. That's a
15 lot of impact to the state of Montana potentially.
16 Therefore the fee is commensurate with that
17 expense.

18 MR. MIRES: Thank you, sir. Your turn.

19 CHAIRMAN RUSSELL: You just mentioned
20 640 acres. Anything above that requires a permit?

21 MS. CHAMBERS: Mr. Chairman, again, the
22 threshold triggers and there's a cumulative
23 impact, so there's six different pattern uses. If
24 you're an applicator that sprays piscicides, but
25 you also spray in forest canopy, forest canopy is

1 640 acres, but piscicides is a zero threshold.

2 CHAIRMAN RUSSELL: What about larvicide?

3 MS. CHAMBERS: Larvicide for mosquitoes
4 is 74 acres. And these are again are just drafts.
5 We're trying to mimic and watch EPA's general
6 permits to ensure that we're not being more
7 stringent, and to allow justification on our fact
8 sheet of what makes sense for Montana, since we
9 are the fourth largest state, and population isn't
10 impacted, and we're trying to take some of those
11 factors into consideration.

12 CHAIRMAN RUSSELL: The definition that
13 you actually had in first MAR notice, I liked the
14 first part better than I like what you did in the
15 new one, and basically because Part (A), I know
16 the intent is for larva, but is a larva, a
17 mosquito larva, a pest?

18 MS. CHAMBERS: Mr. Chairman, this is new
19 as far as definitions, and pesticides, and these
20 terminologies that we're getting for these work
21 groups, and actually making a determination and
22 cutoff between what's a larvicide, what's a
23 nuisance animal control, what's a flying insect.
24 We're working closely with the Montana Department
25 of Ag on. Again, this definition is just to avoid

1 us having the impact be more stringent than the
2 federal EPA. This is a definition within FIFRA.

3 CHAIRMAN RUSSELL: The first one was a
4 definition in FIFRA.

5 MS. CHAMBERS: The first one was a
6 definition from the Montana Department of
7 Agriculture.

8 CHAIRMAN RUSSELL: Yes, and it's much
9 more clear when you're dealing with larva and pupa
10 in the stage of mosquito development because it
11 hits living organisms. One of the main things we
12 use is bacillus to kill larva, and we also use a
13 hormone.

14 So this is very explicit to where I
15 think a lot of the pesticide application of water
16 is, which is larviciding, and this isn't. The new
17 one isn't. So just a thought that you may want to
18 look at that as a very -- at least the one, the
19 first part of it, where you're talking about
20 everything up in the animal kingdom, and then you
21 can take off on the plants, weeds, and other
22 things, and take that out. But I would strongly
23 encourage you look at that, and I don't think even
24 if we adopted the new one, it wouldn't preclude
25 you from looking at that, and putting some of that

1 definition for clarification on what a larvicide
2 is.

3 MS. CHAMBERS: Mr. Chairman, we will
4 definitely clarify that definition in the fact
5 sheet as far as what our intent is as far as who
6 needs to be regulated under this general permit,
7 and also more explicitly in the permit. Again,
8 this was a legal review based upon not the
9 stringency within EPA.

10 I do have my legal Counsel here, Jim
11 Madden, if you want more specifics on why we chose
12 the FIFRA definition versus the Montana Department
13 of Ag. definition. And as far as legal review,
14 they felt that all of that information with the
15 Montana Department of Ag. was still covered within
16 the definition, but also provides those
17 exemptions, so we weren't going beyond our
18 statutory, and not being more stringent than the
19 EPA.

20 MS. SHROPSHIRE: Can I follow up on this
21 topic before we move on? That was one of my
22 questions, because the second definition, it
23 includes description of a critical or
24 semi-critical device, and I wasn't sure the
25 application of that. In terms of potentially

1 tidying up the definition, is that all within the
2 scope of the rulemaking? Can you change a
3 definition moving forward, or how do you word it
4 so that if a definition needs to change, that that
5 is not outside of the scope of the rulemaking?

6 MS. CHAMBERS: Mr. Chairman, Ms.
7 Shropshire, if we get significant comments on this
8 definition being consistent with EPA and using the
9 FIFRA definition, and we wanted to modify or
10 change that definition to provide more clarity,
11 and go back to the Montana Department of Ag.
12 definition, in addition we have to provide you in
13 the final rule adoption our review and analysis of
14 why we are requesting to be more stringent than
15 the federal EPA. And we'll have to weigh that
16 decision heavily on whether or not we want to go
17 that path or leave it consistent.

18 The critical devices I agree. It
19 doesn't really apply. But evidently there must be
20 some application of pesticides to be used in human
21 bodies or experimental programs to see whether or
22 not they solve some kind of medical disease or
23 implications.

24 There is one exemption that does help
25 with fish farms, the animal food exemption. This

1 definition would allow us not to regulate
2 application of pesticides at fish farms as a
3 duplicated application to state waters if we
4 already have a fish farm general permit. So there
5 are portions of this that have the pros and cons
6 on both sides of using the FIFRA definition.

7 MS. SHROPSHIRE: I can appreciate that
8 there may be pesticide application for humans, but
9 I wouldn't think that that would impact the Clean
10 Water Act. It just seems out of place, that part
11 of the definition. It didn't make sense to me.

12 MS. CHAMBERS: Mr. Chairman, Ms.
13 Shropshire. Yes, I'm not saying that it is or
14 isn't, but it's hard saying where they're going
15 with the Clean Water Act these days, and it's
16 better to have the definition to say those are
17 exempt just in case environmental or somebody
18 changes the regulation.

19 CHAIRMAN RUSSELL: Here is a case when
20 we're dealing with pharmaceuticals, and one of the
21 known pharmaceuticals does get into the water that
22 would actually go through a wastewater treatment
23 plant, or would be --

24 MS. SHROPSHIRE: Ibuprofen.

25 CHAIRMAN RUSSELL: -- or female

1 hormones, which could be considered on the other
2 side of something that could affect wildlife
3 differently. So my guess is that they're throwing
4 that in to catch some of the stuff that might go
5 through POTW's. It's just a thought. I wouldn't
6 know that for a fact, but I would think that if it
7 goes through a POTW, and they can't control it,
8 then it should be excluded. I don't know. Jim,
9 maybe you know more about that.

10 MR. MADDEN: I'm sorry, Mr. Chairman. I
11 didn't hear your question.

12 CHAIRMAN RUSSELL: My thought was
13 because there are human products that literally go
14 through a body intact, and are excreted, and go
15 through a POTW, that maybe they're trying to catch
16 these exclusions, so publicly owned treatment
17 works are going to be nailed for having human
18 hormones or human pharmaceuticals in the waste
19 stream. But it's a stretch.

20 MR. MADDEN: Mr. Chairman, I could offer
21 a comment. I think the definition in FIFRA was
22 never drafted with the intent that it would
23 address discharges to water necessarily. That has
24 been created by a Court decision that says FIFRA
25 pesticides now have to be looked at from that

1 perspective. So I wouldn't try to read the
2 definition with the idea that was drafted
3 intending to address discharges to water.

4 How well the definition works, I'm not
5 sure. What we're recommending today is that the
6 Board adopt the FIFRA definition because that is
7 the definition that the federal EPA is going to
8 use in their permit, their pesticide permit. We
9 want to just make it real clear at the front that
10 we are not using a definition that's any different
11 than theirs for the stringency review.

12 The Department of Ag., the Montana
13 Department of Agriculture definition, I looked at
14 that. I think it is more clear and easier to
15 understand. And I talked to the Agriculture
16 Department people, and they say they interpret
17 that definition to be completely consistent with
18 the FIFRA definition.

19 The problem is in the FIFRA definition,
20 I saw a couple of exclusions, one for this
21 critical device, I think, that's in the human
22 body, and another new animal products; and the
23 fact that there is exclusions in the definition
24 seems to make it narrower. So if we were to use
25 the State definition, it would appear to be

1 broader, and therefore we may be sweeping a
2 broader regulatory sweep, and that would be more
3 stringent. So just to avoid at the outside the
4 question of stringency, we elected to follow the
5 FIFRA definition. We'll clarify when we draft the
6 permit exactly how we're going to use that
7 definition to address the water discharges.

8 CHAIRMAN RUSSELL: If your permitting is
9 consistent with a larva being a pest, then I guess
10 that's okay. But I can assure you that from a
11 nuisance standpoint, a larva in the water is not a
12 human pest. It isn't. So I don't understand why
13 they would come up with a definition that wasn't a
14 little bit more clear, because our State
15 definition is much more clear about what a pest
16 is. And you just already said that, and I'm just
17 being redundant. I don't want to be redundant.
18 Thanks for your comments, Jim.

19 MR. ANDERSON: Let me ask a more general
20 question. My impression is that all of these
21 rules have been drafted to be consistent with the
22 EPA rules, and to not be more stringent than the
23 EPA rules. Does the EPA, does the statutory
24 framework of the EPA prohibit the State's rules
25 from being more stringent?

1 MR. MADDEN: Mr. Chairman, Mr. Anderson,
2 no. The federal laws and regulations don't
3 prohibit states from being more stringent in this
4 area. We have a State law that prohibits the
5 State agency, including the Board, from drafting a
6 rule that is more stringent than comparable
7 federal rules unless you make special findings.

8 So it doesn't outright prohibit you from
9 drafting a more stringent rule, but you have to
10 accompany that with findings that the rule is
11 needed to address environmental or health issues.
12 So routinely with a rulemaking here, we will look
13 at the stringency question, provide a memo for the
14 rulemaking record indicating whether or not there
15 is a stringency issue. If there is a stringency
16 question, we will try to put on the records any
17 testimony, or evidence, or scientific studies that
18 we have to show that the more stringent
19 requirement is justified.

20 In this case, the intent all along is to
21 be simply implementing the federal program as they
22 envision it has to be, so we wanted to avoid at
23 the outside any question of stringency, so we'll
24 just make our definition coincide with theirs
25 exactly.

1 MR. ANDERSON: Have you done any
2 analysis to determine whether Montana's particular
3 circumstances call for more stringent regulations
4 in this area?

5 MS. CHAMBERS: Mr. Chairman, Mr.
6 Anderson, in accordance with the Montana Water
7 Quality Act, we already have regulations in place
8 that provide more stringency than the federal EPA.
9 We have the Section 308 of the Montana Water
10 Quality Act that requires under that threshold
11 level, or even prior to the decision in January
12 2009, that require pesticide applicators to state
13 waters to get a 308 authorization.

14 So yes, there are circumstances based
15 upon this general permit that were already
16 providing that stringency level. What we're
17 trying not to do is to avoid the steps and
18 requirements of this general permit as far as
19 additional best management practices annual
20 reporting requirements, the development of pest
21 discharge management plan for all applications to
22 state waters, and only limit those to the ones
23 that exceed the threshold levels that would have
24 the potential to have a greater impact as far as a
25 volume of concentration of pesticides that they're

1 applying.

2 So Mr. Chairman, we do in Montana have
3 an impact for pesticides, and we do have a little
4 bit higher stringency with our Water Quality Act
5 requirements. We didn't want to necessarily go
6 there with the general permit MPDES Clean Water
7 Act requirement.

8 MR. WHALEN: Mr. Chairman, thank you.
9 A question for you, Jenny. First I'd like to
10 thank the Department for proposing this
11 rulemaking. I'm going to have no trouble in
12 supporting.

13 I do have a question that goes back to
14 Ms. Shropshire's question about Notice of Intent,
15 the difference between the online packet that we
16 have with respect to this proposal and what you
17 have handed out.

18 One of the key differences is in this
19 issue of Notice of Intent. Can you kind of walk
20 us again through the thinking of the Department to
21 provide for this fast track for permittees; and
22 then if you could, explain to us what provisions
23 that there are for public participation once a
24 Notice of Intent has been issued with the
25 Department.

1 MS. CHAMBERS: Mr. Chairman, Mr. Whalen,
2 yes, I can certainly do that. It's been our
3 process all along to look at general permits, and
4 all of our general permits we issue, and see if
5 there is a way that we can do Notices of Intent.

6 A general permit in itself allows for
7 public participation when we go out for public
8 comment on that general permit, and propose the
9 EA. It's a state wide general permit for certain
10 categories or areas of application that make it at
11 a higher volume of potential permittees, meaning
12 storm water construction, there's up to 1,500 to
13 2,000 permittees. We would not be able to manage
14 that as far as workloads and Department efforts if
15 we had to require all those individual permits.

16 The pesticides, we're looking at
17 anywhere from 200 to 400 or may or may not hit
18 this threshold, depending on what they're doing.
19 And again, to minimize resources at the
20 Department, which would ensure that we know who's
21 out there applying for these folks, and have them
22 file paperwork with the Notice of Intent process,
23 we know where they're at. We can do oversight and
24 compliance on them, but we don't have the up-front
25 paperwork to process and review all the forms, and

1 procedures, and documentation, and proposals for
2 public comment.

3 A Notice of Intent, when it comes into
4 the Department, we review the checked boxes, make
5 sure everything is filled out; we send back an
6 acknowledgement letter that says, "We have
7 received. You are compliant. You need to comply
8 with the provisions of the general permit," and we
9 give them a copy of the general permit. There is
10 no public participation at that particular time,
11 because the public participation was done at the
12 general permit stage for that five year term of
13 that general permit.

14 The public is available to contact us to
15 get copies of Notice of Intents, or know we have
16 Notice of Intents filed with, but there won't be a
17 public process as far as public Notices of Intent
18 within the state.

19 Mr. Chairman, Mr. Whalen, we were
20 planning on trying to go forward with this all
21 along. It was kind of an oversight that we had
22 exemption for the storm water construction in that
23 section of the rule that we thought since we were
24 already opening up 17.30.1341, that we would add
25 that category in there just to get that exemption

1 to allow us to look at Notices of Intent as a
2 process just to move forward with a general
3 permit.

4 MR. WHALEN: Follow-up, Mr. Chairman.
5 So is it fair to say that this is an attempt by
6 the Department to mitigate the economic impact of
7 the enforcement of these permits or the cost to
8 permittees in pursuing these activities?

9 MS. CHAMBERS: Mr. Chairman, Mr. Whalen,
10 I'm a little confused with that question. We're
11 not trying to mitigate or look at this for
12 economic purposes. We just really want to provide
13 the flexibility to the weed applicator districts,
14 mosquito control districts, so that if they get a
15 call from the county as far as an applicator, they
16 need to go spray in a certain area, that they can
17 just file a Notice Of Intent, and have coverage
18 the minute they file that complete Notice of
19 Intent with us, and go and do what they need to
20 do, and then get the acknowledgement letter, that
21 they know they need to comply with the conditions.

22 And then we will also be able to track
23 those as far as knowing where they're at, where
24 they're applying, and that the program is going to
25 require an annual report so that we can do any

1 kind of reviews after the fact, to kind of get a
2 trend on what pesticides are being applied in the
3 state, and require additional corrective action on
4 this part if there is adverse impact to
5 applicators; or if we get citizen complaints, then
6 we can follow up on those as they come up.

7 I don't know if I really answered your
8 question, but --

9 MR. WHALEN: Sure, you did. Thank you,
10 Jenny. Thank you, Mr. Chairman.

11 CHAIRMAN RUSSELL: Hopefully this will
12 be a quick question. Do you feel that the way
13 this was noticed, that removing the 25 percent
14 discount for those that aren't being good
15 permittees is properly noticed in here? Because
16 that applies to every general permit, right?

17 MS. CHAMBERS: Mr. Chairman, yes. That
18 -- You're on Page 4, I believe, subpart (e). That
19 was provided in the 2009 rulemaking package to
20 clarify that we don't provide a 25 percent
21 reduction for those that aren't maintaining
22 compliance as an incentive for those that -- a
23 bonus basically for those that do maintain
24 compliance, and for all of our permits within the
25 Water Protection Bureau, all of our MPDES

1 individual permits, all of our general permits,
2 all of our authorizations, and all of our
3 groundwater pollution control system permits.

4 The sentence that we added was just to
5 clarify that if you're under formal enforcement
6 for any time during that year period, you don't
7 get your 25 percent reduction because you're under
8 formal enforcement because there's violations that
9 are occurring, and we're trying to work with you
10 to address those violations.

11 We had some confusion on that from the
12 2009. There was some permittees that thought they
13 got a 25 percent reduction even though they were
14 under formal enforcement, so we just wanted to add
15 that sentence to clarify it.

16 CHAIRMAN RUSSELL: I wholeheartedly
17 agree with the concept. I just hope it was
18 noticed enough. Wouldn't it be nice to have some
19 of these guys like that come forward and say, "We
20 would still like our 75 percent discount"?

21 Thank you very much. Any further
22 questions before we take action, and I ask the
23 public if they want to comment?

24 (No response)

25 CHAIRMAN RUSSELL: Is there anyone

1 in the public that would like to comment on this?
2 I'm pretty sure the Board has pretty much covered
3 every base here. Rightfully so.

4 MR. LIVERS: Mr. Chairman, on your last
5 question regarding whether that provision was
6 called out adequately. We felt it was covered
7 under the general statement to provide
8 clarification. Obviously that's pretty broad.
9 And if there is interest on the Board's part, you
10 can certainly direct us to amend the notice to be
11 more specific.

12 CHAIRMAN RUSSELL: I don't have an
13 interest to do it, but I just thought I would --

14 MS. SHROPSHIRE: If you feel it's
15 properly covered, I don't think we need to, but I
16 think it's a good comment. I had a similar
17 question.

18 MR. LIVERS: Mr. Chairman, we feel that
19 legally we are covered there, but obviously it
20 will be called out during the public process of
21 the rulemaking.

22 CHAIRMAN RUSSELL: Anyone in the public
23 would like to speak to this?

24 (No response)

25 CHAIRMAN RUSSELL: Seeing none, I would

1 entertain a motion to initiate rulemaking, adopt
2 the new MAR that Jenny handed out, and appoint
3 Katherine the Hearing Officer for this.

4 MS. SHROPSHIRE: So moved.

5 CHAIRMAN RUSSELL: It's been moved by
6 Robin. Is there a second?

7 MR. ANDERSON: Second.

8 CHAIRMAN RUSSELL: It's been seconded by
9 Larry. Further comments, questions?

10 (No response)

11 CHAIRMAN RUSSELL: Hearing none, all
12 those in favor, signify by saying aye.

13 (Response)

14 CHAIRMAN RUSSELL: Opposed.

15 (No response)

16 CHAIRMAN RUSSELL: Motion carries
17 unanimously. We're going to take about a ten
18 minute break.

19 (Recess taken)

20 CHAIRMAN RUSSELL: The next item on the
21 agenda is proposed rulemaking to amend the rules
22 to designate a portion of the Gallatin River as an
23 Outstanding Resource Water. Tom.

24 MR. LIVERS: Mr. Chairman, I'll give
25 just a little bit of context before Todd Teegarden

1 gets up. This is obviously something that's come
2 before the Board repeatedly. I think even for new
3 Board members, it's getting to be an old issue.

4 But the Department is recommending -- we
5 received a request from one of the parties to
6 again extend the rulemaking, and the manner to do
7 that is by extending public comment, and we agree
8 with it. And this will probably come before you a
9 few more times for the same action because we're
10 only able to extend six months at a time.

11 There is a lot of good work going on. I
12 know about a year ago, when this came before the
13 Board, we suggested we dive in and make sure there
14 is still progress being made, that it hadn't just
15 gone to back burner, and perhaps we should
16 consider not extending. We've met with the
17 parties, with the group that's actively looking at
18 different approaches here, so we do believe there
19 is a lot of good discussion.

20 I think the concern or the position
21 expressed by American Rivers in their request to
22 extend stated that this has provided impetus to
23 get the parties to the table and keep them there.
24 There is a good group. They may have that
25 momentum without this, but it certainly does give

1 a context to keep those discussions going.

2 The Big Sky Water and Sewer District is
3 almost certainly -- well, it is pivotal to any
4 solution in the canyon, in the corridor, and they
5 are looking at the pilot snow making project. It
6 will not happen this year, but they are looking at
7 next year. And I think Todd is prepared to give a
8 little update on it, give a little more detail on
9 that.

10 CHAIRMAN RUSSELL: Okay.

11 MR. TEEGARDEN: Mr. Chairman, members of
12 the Board, for the record, I'm Todd Teegarden with
13 DEQ. I'm the Bureau Chief of the Technical
14 Financial Assistance Bureau. And I'm involved
15 with the pilot project because the bureau I work
16 with is involved with water, wastewater, and
17 source water issues.

18 We're going to be working closely with
19 Jenny Chambers in permitting on this pilot. And
20 in October we got a submittal from the wastewater
21 forum subgroup proposing a snow making site --
22 it's off site up in Yellowstone Club -- and they
23 basically want to pilot making snow out of
24 treated, highly treated wastewater, not on ski
25 slopes, on a timbered area that's got some slopes.

1 Long story short, Terry Campbell and I
2 took a site visit to meet with them, to look at
3 the site, and discuss monitoring parameters. And
4 when we got to the site, it was not a great site,
5 and they had proposed another site which is up by
6 their storage pond. They have a large storage
7 pond. They've got some big open land above it.

8 And so what was agreed to at that
9 meeting was this winter season is here. It's too
10 early to do it this year -- it's too late to do it
11 this year. So they're going to propose this new
12 site with the new submittal of plans and specs to
13 the Department for a pilot study next winter. And
14 so we have written them a letter back saying,
15 "Please resubmit." We want to work out the
16 details this winter on what the monitoring
17 requirements will be, so that we can make this a
18 go next winter. And that's kind of the update on
19 that part of the project.

20 MR. LIVERS: Mr. Chairman, I kind of
21 glossed over, too. I want to make sure everybody
22 understands the connection when I say that the Big
23 Sky treatment plant is pivotal.

24 And basically, one of the things we're
25 obviously looking at is the ability to bring more

1 systems, more onsite systems, septics, in the
2 corridor onto that system. There is a capacity
3 issue where Big Sky wants to make sure it has some
4 growth capability on the treatment plants, but the
5 capacity issue with how much can be brought on,
6 and that's most acute during the winter when they
7 are more limited in their land application. In
8 summer, they're land applying on golf courses down
9 there.

10 So I apologize. I just want to make
11 sure people understood how the Big Sky system fits
12 into the overall scheme.

13 CHAIRMAN RUSSELL: So I guess the Big
14 Sky system land applies in the summer, and just
15 stores in the winter right now?

16 MR. TEEGARDEN: That's correct, and they
17 do that at the Big Sky Water and Sewer District,
18 they do that up at the Yellowstone Club. They're
19 on dual systems. And again, this effort was
20 derived from that wastewater solutions forum that
21 is looking at the river corridor, the Gallatin
22 River ORW, and potentially sewerage some of those
23 onsite systems that are impacting the Gallatin.

24 CHAIRMAN RUSSELL: So the snow making
25 would just take care of new sources, or are they

1 going to try to take on some of the existing --

2 MR. TEEGARDEN: They want to take on
3 some of the existing as well as new. So if you
4 look at sewerage that corridor, they've got
5 developers that have vacant land that might hook
6 on, but also cleaning up and sewerage the existing
7 ones.

8 CHAIRMAN RUSSELL: So that's all well
9 and good up there at the top of the headwater on
10 this. What if you're 20 miles down river, and you
11 want to do something? You're not going to run a
12 sewer line twenty miles up there. Are they
13 proposing any offsets or --

14 MR. TEEGARDEN: That's a good question,
15 in that I don't know how far this corridor or this
16 planning effort looks at the whole reach that was
17 proposed designated as an Outstanding Resource
18 Water. But there is economics that drives what
19 can actually be hooked up.

20 CHAIRMAN RUSSELL: It would be a
21 challenge to run a sewer line that far back up.

22 MR. LIVERS: Mr. Chairman, I didn't mean
23 to suggest that the entire corridor would be
24 sewerage, but certainly there are pockets of
25 concentration in proximity to the Big Sky turnoff,

1 and there is likely to be some cost effectiveness
2 within some reasonable radius. I don't know what
3 that is going to prove to be. But certainly
4 taking some of that heavy concentration off of
5 septic in that area is going to help with the
6 problem.

7 CHAIRMAN RUSSELL: I wholeheartedly
8 agree. I'm just wondering about twenty miles down
9 that's still in the confines of the ORW and what's
10 going to happen there. The only reason I bring
11 that up is you can pull them on, but are you going
12 to allow offsets? For ones that you pull off, are
13 you going to allow something to go on?

14 And then the only other question I would
15 have is: Since we started this, and I had dark
16 hair, how much additional capacity has been put
17 into this ORW designated area since we started
18 this? And don't answer that now, but it's just
19 kind of an interesting question. How much growth
20 have we seen up there while we've tried to figure
21 this out? And we have an EIS that's getting
22 dated.

23 MR. MIRE: Coming back to the snow
24 making question. Maybe they have done some small
25 scale testing of this theory. Is there any chance

1 that they could do some more of that same testing,
2 or if they haven't done any, can they do some
3 testing this year, maybe on a smaller scale or
4 smaller area, rather than a larger area? And why
5 not use the ski slopes?

6 MR. TEEGARDEN: Mr. Chairman, Mr. Mires,
7 they want to limit the size and the potential for
8 runoff. If you have runoff from the site, which
9 you would have on a snow making site, you need to
10 get a permit from the Department, either
11 groundwater or surface water permit.

12 The goal of this pilot is to do
13 something on a detailed scale enough that we can
14 then look at that, and go to the larger scale
15 applications, maybe not again on ski hills, but in
16 forested areas, larger areas. But there haven't
17 been a lot of studies done, and the site they're
18 proposing that we went and looked at is about a
19 three acre site. So it's big, but it's not that
20 big, and it all would drain into their storage
21 pond. We would be able to catch all potential
22 runoff, and do a lot of testing to see what
23 quality comes out of there and what the runoff
24 water would look like.

25 MS. KAISER: You said it's highly

1 treated water that you're going to be testing snow
2 making, and it's treated to -- Actually you could
3 discharge that water in the river; is that
4 correct?

5 MR. TEEGARDEN: Mr. Chairman, Ms.
6 Kaiser, yes, again, if you had a permit.

7 MS. KAISER: From a quality standpoint.

8 MR. TEEGARDEN: From a quality
9 standpoint. Big Sky treats via mechanical plant
10 with filtration, chlorination, to meet our land
11 application standards for golf courses, because
12 that's what they irrigate is the golf courses up
13 there. So it is tertiary treated effluent that is
14 put in these storage ponds, held, and irrigated
15 during the winter, and it would be that same
16 treated water that would then be applied to this
17 site. We would certainly have a lot of
18 information on the effluent quality originally
19 when they apply it, and --

20 MS. KAISER: The current capacity of the
21 wastewater plant, is it sized such that you can
22 bring additional flow to it if you do add more
23 homes or facilities to it? If your snow making is
24 successful, you can go that route?

25 MR. TEEGARDEN: Mr. Chairman, Ms.

1 Kaiser, yes. There is capacity, but Big Sky has
2 legal commitments to what they built their plant
3 to. It's about a ten year old plant now. And
4 part of this study is Big Sky saying, "If we are
5 going to add capacity, we need to expand our
6 plant, what will that cost, and we need to find
7 new ways and new sites to do it," thus the snow
8 making is an idea, and a pilot that they want to
9 try to see, but they would have to expand their
10 plant if they have many new hook-ups.

11 CHAIRMAN RUSSELL: They wouldn't have to
12 expand their storage.

13 MR. TEEGARDEN: Right.

14 MS. SHROPSHIRE: The first -- this is
15 not really a question, but a comment. You can
16 comment if you disagree with me. But I guess
17 "highly treated" to me is a little bit misleading
18 because it's not treating for nitrates or
19 phosphates, as I understand it, and those are the
20 constituents that are of most concern with regards
21 to discharge to the river, so -- is that correct?

22 MR. TEEGARDEN: Mr. Chairman, Ms.
23 Shropshire, it is a nitrogen removal plant. They
24 really haven't optimized. It's a batch reactor
25 plant that is mechanical in nature, and can be

1 adjusted and operated to achieve quite good
2 nitrogen removal, not so much phosphorus.

3 Again, when they built this plant --
4 "they" being the Big Sky Water Sewer District --
5 they wanted to treat nitrogen down to a level that
6 allows them to apply on the golf courses a
7 non-discharging option. And phosphorus wasn't
8 accounted for because phosphorus is assumed to be
9 taken up in the soil.

10 Certainly if they were to discharge to
11 the river, then you'd have the nitrogen and
12 phosphorus issues.

13 MS. SHROPSHIRE: Just for my own
14 clarification, what's in front of us today is to
15 extend this rulemaking timeline, and what you're
16 discussing is an example of why we would want to
17 extend it. This doesn't necessarily apply to the
18 rulemaking. I just want to clarify the connection
19 between those.

20 MR. LIVERS: Mr. Chairman, Ms.
21 Shropshire, that's correct. You folks have heard
22 the overall rationale for extending in the past,
23 and I asked Todd to come today to basically bring
24 some additional detail on this aspect of the
25 overall picture. So it doesn't bear directly on

1 your decision whether to extend the rulemaking,
2 but it's such a key element of the overall
3 strategy, and the reason we think there is still
4 rationale for extending and extending through next
5 winter.

6 I just wanted you to have enough
7 background, and have an opportunity to learn a
8 little more about this piece of the puzzle, and
9 the overall -- It's an integral piece to the
10 solution, and I just think it gives you a little
11 background and context to making the decision to
12 continue to extend the rulemaking.

13 MS. SHROPSHIRE: I appreciate that.
14 Thank you.

15 CHAIRMAN RUSSELL: And it's one of the
16 only reasons why we would extend, if there is
17 something on the horizon.

18 MR. LIVERS: This is the light at the
19 end of the tunnel potentially. Yes, there is
20 something on the horizon.

21 CHAIRMAN RUSSELL: And just maybe a head
22 shake. They have ground water discharge permit
23 now, don't they, that --

24 MR. TEEGARDEN: They do not, Mr.
25 Chairman.

1 CHAIRMAN RUSSELL: They actually do
2 subsurface?

3 MR. TEEGARDEN: It's surface application
4 of treated effluent on the golf course, both at
5 Yellowstone Mountain Club and down at the Meadow
6 Village golf course.

7 CHAIRMAN RUSSELL: So they just do this
8 at night.

9 MR. TEEGARDEN: It's done at night.

10 CHAIRMAN RUSSELL: Because, you know,
11 just like the snow thing. I fall face first into
12 the snow, and I can't keep a golf ball out of the
13 rough, so you'd better be doing this at night.

14 MR. LIVERS: When there is no moon.

15 MR. WHALEN: Mr. Chairman, I have a
16 couple questions for Mr. Teegarden.

17 Mr. Teegarden, after doing a little
18 research on the web trying to find out who the
19 stakeholders are in the wastewater solutions
20 forum, I've come up blank. Can you identify for
21 me who those stakeholders are currently, and do
22 they include the original Petitioners for the
23 Outstanding Resource Water designation?

24 MR. TEEGARDEN: Mr. Chairman, Mr.
25 Whalen. Tom, do you have --

1 MR. LIVERS: I can certainly answer, Mr.
2 Chairman, Mr. Whalen. I can probably add some
3 insight on the second part of that question for
4 sure. The original petitioner -- I shouldn't have
5 said for sure. The original petitioner I think
6 was American Wildlands. It was an environmental
7 group. At one point, that group kind of ceded the
8 lead to the Greater Yellowstone Coalition; and now
9 American Rivers has chosen to take point on this.
10 It's probably, from a mission standpoint, the
11 right group.

12 Scott Bossee (phonetic) is the principal
13 with American Rivers on this issue, and he has had
14 historic involvement with this issue. I think he
15 may have been involved in the original petition.
16 That predates me. So part of it is that while the
17 lead organization on the petition has changed
18 hands, some of the original players are still
19 involved, the individuals. So I think that
20 answers the second part of your question.

21 And Todd, I can go from memory, if you'd
22 like, from what I know on the wastewater solutions
23 forum, and Bob Bukantis might also have a little
24 more direct. He's been maybe more directly
25 involved. Bob, would that be a fair thing? And

1 Mr. Chairman, with your permission.

2 MR. BUKANTIS: I haven't been involved
3 so much with the forum.

4 MR. LIVERS: The folks that we met with
5 on the solutions group last summer included Mr.
6 Bossee from American Rivers; it included
7 representatives from the Yellowstone Mountain
8 Club; Big Sky Water and Sewer District has been
9 involved, but were not able to attend the meeting
10 with Director Opper and me last summer.

11 There was a representative of an
12 organization called the Blue Water Task Force that
13 I think was -- that individual was based out of
14 the university, out of MSU. There was an employee
15 of HKM Engineering who I think was retained by the
16 water and sewer district. Anyone else that you
17 can think of?

18 MS. CHAMBERS: Spanish Peaks.

19 MR. LIVERS: Spanish Peaks.

20 MR. TEEGARDEN: Spanish Peaks
21 Development.

22 MR. LIVERS: Spanish Peaks Development,
23 and Moonlight Basin up there as well.

24 MR. TEEGARDEN: Yellowstone Coalition.

25 MR. LIVERS: Yellowstone Coalition was

1 present as well.

2 MR. WHALEN: A follow-up would be -- and
3 it relates directly to the idea of extension. If
4 we were to choose not to extend, would this issue
5 see the light of day in the current legislative
6 session? Because if we choose to extend, it
7 won't. It will be April before we're able to take
8 it up again.

9 MR. LIVERS: Mr. Chairman, Mr. Whalen,
10 it's an interesting question. I think there is a
11 couple of things that could happen if the Board
12 chose not to extend. Possibly you could let the
13 entire process die, in which case if there were to
14 be another Outstanding Resource Water petition, it
15 would have to come in. And there have been some
16 law changes since this time. This was
17 grandfathered in. So it's questionable as to
18 whether another petition would come in.

19 And from the standpoint of the working
20 group, there may be sufficient momentum that it
21 would continue anyway without this acting as the
22 sword of Damocles over them.

23 I think the other alternative is the
24 Board could choose, instead of extending, to grant
25 the ORW status based on the record, and in that

1 case, yes, the next step would be the ultimate
2 designation for ORW rests with the Legislature.
3 So it would come out of the Board of Environmental
4 Review. Depending on the outcome, depending on
5 the vote, if it were approved, if the Board were
6 to approve ORW status for the stretch of Gallatin,
7 the next step is it would go before the
8 Legislature. And I presume given the timing, it
9 would go before the 2011 session. That's the
10 factual --

11 CHAIRMAN RUSSELL: We couldn't take
12 action on it today.

13 MR. LIVERS: You have not noticed that
14 action today, so basically since we asked -- the
15 rulemaking would have exceeded six months before
16 the January meeting, so if we would ask it to be
17 brought today, you'd probably have to look at a
18 special meeting to consider if you wanted to move
19 on that.

20 MR. WHALEN: Thank you, Mr. Livers, Mr.
21 Chairman.

22 CHAIRMAN RUSSELL: It wouldn't be
23 prudent for us to take this up without some real
24 ability for people to actually comply.

25 MR. LIVERS: I would agree, Mr.

1 Chairman. And again, we are awfully encouraged by
2 the amount of discussion that's going on. We see
3 the snow making pilot and the results of that as
4 really key to how viable it's going to be to look
5 at bringing folks outside the district onto that
6 system. Right now that disposal, particularly the
7 winter disposal, is probably the key bottleneck
8 that has to be addressed if we're going to look at
9 the district agreeing to take on additional
10 connections outside its boundaries.

11 So we'd like to see this pilot have time
12 to run its course, get some good data on it, and
13 we're optimistic that it will be a potential
14 solution, but obviously want to kind of go through
15 the steps.

16 So from the Department standpoint, we
17 think the best course of action is to continue to
18 extend the rulemaking to allow this pilot to
19 happen over the course of next year, and then we'd
20 come back before you a year from spring, in spring
21 of 2012 ideally, with some information from the
22 pilot, and see -- ideally going forward with the
23 ability to look at some additional connections.

24 CHAIRMAN RUSSELL: Okay. Why don't we
25 see if there is anyone out in the audience who

1 would like to speak to this.

2 (No response)

3 CHAIRMAN RUSSELL: Seeing none, if there
4 is no further comment, I would entertain a motion
5 to adopt the initiation which would extend the
6 public comment period to April 29th.

7 MR. MIRES: So moved.

8 CHAIRMAN RUSSELL: It's been moved. Is
9 there a second?

10 MR. MILLER: I'll second.

11 CHAIRMAN RUSSELL: Seconded by Marv.
12 Any further comments?

13 (No response)

14 CHAIRMAN RUSSELL: Hearing none, all
15 those in favor, signify by saying aye.

16 (Response)

17 CHAIRMAN RUSSELL: Opposed.

18 (No response)

19 CHAIRMAN RUSSELL: Motion carries.

20 Thanks for your input on that because I was going
21 to vote no. I'm just kidding.

22 The next item on the agenda are the new
23 contested cases. Katherine, I'm going to let you
24 take over here.

25 MS. ORR: Mr. Chairman, members of the

1 Board, the first item is in the matter of
2 violations of the public water supply laws by
3 Gregory C. MacDonald at Highwood Mobile Home Park.
4 This is a case arising out of an alleged violation
5 in Great Falls, Montana. The mobile home park is
6 deemed to be a supplier of water, a community
7 water system, and to have a consecutive connection
8 to the City of Great Falls, and is subject to the
9 Public Water Supply Act.

10 And the violations that have been cited
11 are failure to monitor monthly for total coliform
12 bacteria; no report regarding the monitoring for
13 four months; and no public notice for monitoring,
14 for failing to monitor the violations. And the
15 penalty requested is \$1,024.

16 CHAIRMAN RUSSELL: Okay. Any procedural
17 questions for Katherine?

18 (No response)

19 CHAIRMAN RUSSELL: Katherine, are you
20 able to take this up?

21 MS. ORR: Yes, I am.

22 CHAIRMAN RUSSELL: I will entertain a
23 motion to appoint Katherine the permanent Hearings
24 Examiner on this matter.

25 MS. KAISER: So moved.

1 CHAIRMAN RUSSELL: It's been moved by
2 Heidi. Is there a second?

3 MR. ANDERSON: Second.

4 CHAIRMAN RUSSELL: It's been seconded by
5 Larry. Comments?

6 (No response)

7 CHAIRMAN RUSSELL: Hearing none, all
8 those in favor, signify by saying aye.

9 (Response)

10 CHAIRMAN RUSSELL: Opposed.

11 (No response)

12 CHAIRMAN RUSSELL: Motion carries
13 unanimously. Katherine.

14 MS. ORR: The next item on the agenda in
15 the matter of the appeal and request for hearing
16 by Ronald and Debbie Laubach regarding the DEQ's
17 final decision to amend the MATL certificate of
18 compliance.

19 Today, the decision point for the Board
20 is to determine whether to appoint me as a
21 permanent Hearings Examiner. This case has had
22 some developments, some procedural developments.
23 There is a pending request to have this case heard
24 today, and that pending request is opposed by
25 Counsel for MATL. There is also a motion to

1 intervene, and also there has been a prehearing
2 order issued that invites the parties to have a
3 hearing -- or excuse me -- to agree by December
4 6th to propose a hearing schedule.

5 And so those contested case matters are
6 pending, and I would expect that there would
7 possibly be a request for a hearing on the
8 outstanding request that exists in the file for an
9 expedited hearing, or the parties may agree to
10 having the hearing sooner, and then would indicate
11 that to me on or before December 6th.

12 There is also a motion to dismiss in
13 this case that will be addressed shortly.

14 So all by way of saying there are some
15 procedural matters that have been proceeding along
16 in the contested case, but that doesn't have
17 anything to do today with the Board's decision
18 point to decide whether to hear this itself or to
19 appoint me as Hearing Examiner.

20 CHAIRMAN RUSSELL: Thanks, Katherine.
21 And that is the question in front of us, only that
22 question. We're not going to argue this case
23 today. We're not prepared. We don't have
24 substantive background to do that from what was
25 sent to us. So really the matter in front of us

1 is if we're going to appoint Katherine, or we're
2 going to hear this ourselves, and allow Katherine
3 to finish up the procedural issues regarding a
4 hearing.

5 I would entertain a motion.

6 MR. MIRES: I would so move to appoint
7 Katherine permanent Hearings Examiner.

8 CHAIRMAN RUSSEL: Is there a second?

9 MR. MILLER: I second.

10 CHAIRMAN RUSSELL: It's been seconded by
11 Marv, moved by Larry. Is there further
12 discussion?

13 (No response)

14 CHAIRMAN RUSSELL: Heidi.

15 MS. KAISER: I would actually --

16 CHAIRMAN RUSSELL: I'm not going to hear
17 from you.

18 MR. LAUBACH: Can we do the public
19 comment now?

20 CHAIRMAN RUSSELL: I can't do that.
21 There is no public comment on matters of contested
22 cases.

23 MR. LAUBACH: Not on our case.

24 CHAIRMAN RUSSELL: There is a public
25 comment that is scheduled at the end of the

1 meeting, and you can certainly bring any matters
2 up in front of us at that point.

3 We have a question. Any further
4 comments or questions?

5 MS. KAISER: My comment is I would like
6 the Board to hear this.

7 MR. WHALEN: I would like to explore
8 that a little bit. Would there be some merit to
9 the Board hearing this case, do you think? If so,
10 what would those merits be?

11 MS. KAISER: From my point of view --
12 and maybe if we have some more information on the
13 whole issue, that would go away in my mind, but --
14 Actually if we had some more information regarding
15 this, if we can be supplied that, depending on how
16 this proceeds, that may clear up some questions I
17 have, and having the Board hear it may be a moot
18 point. Right now I've got some concerns.

19 MR. MIRES: I guess, Mr. Chairman, my
20 thought in making Katherine the Hearing Examiner
21 is since procedures have already gone at this
22 point, and she's been involved in this thing, it
23 just seems to me it would be more appropriate that
24 she finish up with where she's at, and possibly
25 there would be a resolve to it, rather than

1 dragging this on, making it harder for the
2 landowners, as well as for the company.

3 I think in my mind it is quicker and
4 more prudent to have Katherine finish up with
5 where she's at, and I don't know. If that's not
6 doable, then can it come back to the Board?

7 CHAIRMAN RUSSELL: Absolutely. It's
8 still our decision. And we can adopt Katherine's
9 position as our Hearing Examiner, or we can state
10 that it's not our position, and we can go back at
11 it. But from a position that this may expedite
12 the process, I agree that we should allow the
13 proceedings to continue.

14 MS. KAISER: I also agree.

15 CHAIRMAN RUSSELL: We will get the
16 record, and if we're doing our jobs, we at that
17 point will have the record, and we'll understand.

18 MS. SHROPSHIRE: For clarification,
19 during this process we have access to Katherine,
20 to discuss this with Katherine?

21 CHAIRMAN RUSSELL: She's our attorney.

22 MS. SHROPSHIRE: I just wanted to
23 clarify that. We don't have to wait until we're
24 voting on her recommendation. We can talk to her
25 before then.

1 CHAIRMAN RUSSELL: Absolutely. The
2 people we can't talk to are out there.

3 MS. SHROPSHIRE: So we can be involved
4 in the process with Katherine along the way.

5 CHAIRMAN RUSSELL: I'm sure Katherine
6 would relish that thought. Any comments,
7 Katherine?

8 MS. ORR: The decision is what you want
9 to delegate and when, and the way we've been doing
10 this in the absence of delegating fully to me, the
11 Board entrusts to me prehearing matters, and
12 always can take back the case, so to speak, if it
13 doesn't do anything explicit today. And maybe
14 that's the thing to do here.

15 Like I say, there are some procedural
16 motions before the Board, and you can go ahead and
17 decide to delegate to me all of the
18 responsibilities concerning this case, or
19 implicitly or impliedly to handle the procedural
20 motions. That's up to you.

21 If you were to delegate to me all of the
22 responsibilities up through hearing the contested
23 case, I think it would be kind of improper for me
24 to sort of spontaneously, or extemporaneously, or
25 ex parte hear a comment from a Board member,

1 because the parties wouldn't have the benefit of
2 hearing what that is. To me, that would be a
3 little odd.

4 CHAIRMAN RUSSELL: I was thinking more
5 along the lines that we would get the information,
6 that the information could be provided to us on
7 your rulings in a timely manner, so we can keep up
8 with what's going on.

9 MS. ORR: Right. Of course. Yes.

10 MS. SHROPSHIRE: Thank you for that
11 clarification.

12 CHAIRMAN RUSSELL: So we have a motion
13 on the floor. All those in favor, signify by
14 saying aye.

15 (Response)

16 CHAIRMAN RUSSELL: Opposed.

17 (No response)

18 CHAIRMAN RUSSELL: Motion carries. You
19 will have an opportunity at the end of the meeting
20 to discuss with the Board your position, but we
21 will not talk about the contested case.

22 Next item, Katherine.

23 MS. ORR: Mr. Chairman, members of the
24 Board, this is a very similar case. This is a
25 challenge by -- that you can see in the caption,

1 appeal and request for a hearing by Maurer Farms,
2 Inc., etc., and they are also challenging the
3 final decision of the Board to amend MATL's
4 certificate of compliance, which is an amendment
5 for construction activities in wetlands.

6 And again, there are procedural motions
7 pending, and those need to be ruled on. And
8 again, there has been a first prehearing order
9 which governs the progress of the case, prior to a
10 determination of the parties of what schedule they
11 want to hold the hearing on. So very similar.

12 MR. MIRES: Question. Would the outcome
13 of the previous one have an effect on this
14 outcome, whatever the outcome is of the previous
15 one?

16 MS. ORR: Mr. Chairman, members of the
17 Board, without delving too much into the waters of
18 the contested case, and me being bound not to
19 prejudge whatever is decided, I would say no.
20 These are fact intensive cases.

21 CHAIRMAN RUSSELL: But they're not --
22 the implication of each are not on the same
23 material. They're different, right?

24 MS. ORR: Yes.

25 CHAIRMAN RUSSELL: They're both

1 proposing that there's degradation associated in
2 different areas because of this?

3 MS. ORR: That's correct, Mr. Chairman.

4 CHAIRMAN RUSSELL: So that's not why
5 they're joined.

6 MR. MIRES: I was hoping they could
7 maybe resolve each other here, but I see the point
8 here.

9 CHAIRMAN RUSSELL: So any other
10 questions on this matter?

11 MS. SHROPSHIRE: Again, this is a
12 question for Katherine to proceed as the Hearing
13 Examiner?

14 CHAIRMAN RUSSELL: Correct. I will
15 entertain a motion to appoint her the permanent
16 Hearings Examiner on this matter.

17 MR. MILLER: So moved.

18 CHAIRMAN RUSSELL: Moved by Marv. Is
19 there a second?

20 MS. KAISER: Second.

21 CHAIRMAN RUSSELL: It's been seconded by
22 Heidi. Further discussion?

23 (No response)

24 CHAIRMAN RUSSELL: Hearing none, all
25 those in favor, signify by saying aye.

1 (Response)

2 CHAIRMAN RUSSELL: Opposed.

3 (No response)

4 CHAIRMAN RUSSELL: Motion carries. The
5 next item is Montana Strip and Underground Mine
6 Reclamation.

7 MS. ORR: The next item involves Bull
8 Mountain Mine in Roundup. And a Notice of
9 Violation was issued on September 22nd of this
10 year. The first alleged violation is a failure to
11 compact portions of the coal processing waste
12 disposal site to 90 percent of maximum dry density
13 to prevent spontaneous combustion, and to provide
14 strength required for stability of the coal
15 processing waste structure.

16 Also included in the recitation of
17 violations related to that is a failure to have
18 the structure inspected by a licensed engineer,
19 well, a qualified licensed professional engineer;
20 and the second violation is the failure to submit
21 certification that the sedimentation pond was
22 properly constructed.

23 The penalty requested in the first set
24 of alleged violations is \$3,500, and the penalty
25 requested in the second set is \$7,200.

1 CHAIRMAN RUSSELL: Any further comments
2 or questions for Katherine?

3 MS. KAISER: Mr. Chairman, I wish to
4 recuse myself from taking action on this matter.

5 CHAIRMAN RUSSELL: Heidi has recused
6 herself from further action on this. Questions?
7 Comments?

8 (No response)

9 CHAIRMAN RUSSELL: Hearing none, I would
10 entertain a motion to appoint Katherine the
11 permanent Hearings Examiner.

12 MR. WHALEN: So moved, Mr. Chairman.

13 CHAIRMAN RUSSELL: It's been moved by
14 Joe. Is there a second?

15 MR. ANDERSON: Second.

16 CHAIRMAN RUSSELL: Seconded by Larry.
17 Further discussion?

18 (No response)

19 CHAIRMAN RUSSELL: Hearing none, all
20 those in favor, signify by saying aye.

21 (Response)

22 CHAIRMAN RUSSELL: Opposed.

23 (No response)

24 CHAIRMAN RUSSELL: Next item.

25 MS. ORR: Mr. Chairman, members of the

1 Board, the next item involves a challenge by Meat
2 Production, Inc., otherwise known as Stampede
3 Packing Company. This is a challenge to decisions
4 made -- a challenge to the notice of final
5 decision for the groundwater pollution control
6 system permit issued by the Department. It takes
7 place in Kalispell.

8 There are numerous objections to various
9 parameters, pH, conductivity, total nitrogen, and
10 to the monitoring frequency of those parameters.

11 CHAIRMAN RUSSELL: And I just want to
12 mention that I do have a lot of history on this
13 site when they were discharging to the flood
14 plain, and we had a lot to do with that. And
15 after I left my office yesterday, I got a call
16 asking if I had a Stampede file in my room. So I
17 may have some records on this, but I don't believe
18 that I have any conflict at this point. But I
19 will certainly talk to our attorney about that.
20 Any other questions?

21 (No response)

22 CHAIRMAN RUSSELL: Hearing none, I would
23 entertain a motion to appoint Katherine the
24 permanent Hearings Examiner on this matter.

25 MS. SHROPSHIRE: So moved.

1 CHAIRMAN RUSSELL: It's been moved by
2 Robin. Is there a second?

3 MR. MILLER: Second.

4 CHAIRMAN RUSSELL: It's been seconded by
5 Marv. Further discussion?

6 (No response)

7 CHAIRMAN RUSSELL: Hearing none, all
8 those in favor, signify by saying aye.

9 (Response)

10 CHAIRMAN RUSSELL: Opposed.

11 (No response)

12 CHAIRMAN RUSSELL: Let's keep rolling
13 then.

14 MS. ORR: Mr. Chairman, members of the
15 Board, this is the segment of the meeting
16 concerning final action on contested cases. The
17 first one is in the matter of violations of the
18 Montana Underground Storage Tank Act by Hi-Noon
19 Petroleum. This is a case where Hi-Noon allegedly
20 failed to monitor its tank and piping releases
21 through a release detection system every three
22 days during the previous twelve months.

23 And the parties decided to enter into an
24 administrative order, and are asking for dismissal
25 under 41(a).

1 CHAIRMAN RUSSELL: Thank you. I have a
2 dismissal order for Case No. BER 2010-11 UST. I
3 would entertain a motion that would allow the
4 Board Chair to sign on behalf of the Board.

5 MS. KAISER: So moved.

6 CHAIRMAN RUSSELL: It's been moved by
7 Heidi. Is there a second?

8 MR. MIRES: Second.

9 CHAIRMAN RUSSELL: It's been moved and
10 seconded. Any further discussion?

11 (No response)

12 CHAIRMAN RUSSELL: Hearing none, all
13 those in favor, signify by saying aye.

14 (Response)

15 CHAIRMAN RUSSELL: Opposed.

16 (No response)

17 CHAIRMAN RUSSELL: Motion carries.
18 Next.

19 MS. ORR: The next item on the agenda is
20 in the matter of the request for hearing by the
21 City of Great Falls regarding the DEQ's notice of
22 final decision for MPDES Permit No. MT0021920.
23 The parties have filed a stipulation and request
24 for dismissal, having apparently agreed to the
25 terms of the permit, so that order of dismissal is

1 before the Board.

2 CHAIRMAN RUSSELL: All right. I have an
3 order of dismissal for Case No. BER 2009-21 WQ. I
4 would entertain a motion to have the Board Chair
5 sign on behalf of the Board.

6 MR. MILLER: So moved.

7 CHAIRMAN RUSSELL: It's been moved by
8 Marv. Is there a sec?

9 MS. SHROPSHIRE: Second.

10 CHAIRMAN RUSSELL: It's been seconded by
11 Robin. Further discussion?

12 (No response)

13 CHAIRMAN RUSSELL: Hearing none, all
14 those in favor, signify by saying aye.

15 (Response)

16 CHAIRMAN RUSSELL: Opposed.

17 (No response)

18 CHAIRMAN RUSSELL: Motion carries.

19 MS. ORR: Moving right along, this next
20 case is in the matter of violations of the Clean
21 Air Act of Montana by Sheep Mountain Properties,
22 has been through a lot of procedural, and I would
23 say substantive activity, and the parties have
24 gotten together happily, and have decided to enter
25 into an Administrative Order on Consent. There

1 was a reduction of the penalties from \$4,800 to
2 \$500.

3 The case involved an inspection by the
4 Department -- well, basically a report and then an
5 inspection by the Department, of slash piles that
6 were burning beyond the permitted time. That's
7 one of the alleged violations. And then the other
8 is a failure to obtain a ventilation forecast.

9 And the parties were able to work this
10 out, and present an Administrative Order on
11 Consent and a request for dismissal. This is a
12 good thing.

13 CHAIRMAN RUSSELL: Thanks, Katherine. I
14 do have a dismissal order for Case No. BER 2009-11
15 AQ, and would entertain a motion to authorize the
16 Board Chair to sign on behalf of the Board.

17 MR. WHALEN: So moved.

18 CHAIRMAN RUSSELL: It's been moved by
19 Joe. Is there a second?

20 MS. KAISER: Second.

21 CHAIRMAN RUSSELL: It's been seconded by
22 Heidi. Further discussion?

23 (No response)

24 CHAIRMAN RUSSELL: Hearing none, all
25 those in favor, signify by saying aye.

1 (Response)

2 CHAIRMAN RUSSELL: Opposed.

3 (No response)

4 CHAIRMAN RUSSELL: Saturday Sunday.

5 MS. ORR: Mr. Chairman, this case has
6 been before you. You may recall there were cross
7 motions for summary judgment that were filed, and
8 a proposed order was put before the Board in the
9 beginning part of this year, and the Board
10 approved the proposed order on summary judgment at
11 that time.

12 The underlying violation was a failure
13 of the mining entity to obtain an exploration
14 license prior to starting exploration activities.
15 The disposition on that summary judgment was to
16 enter an order on liability for that violation,
17 and then the next step in the case was to have a
18 hearing or disposition on the amount of penalties
19 that were assessed by the Department.

20 And the issue of penalties came to
21 hearing, was noticed and came to hearing on July
22 19th, 2010, and the appealing party did not appear
23 at that hearing; and the Department made a motion
24 for default, and that was granted, and I issued an
25 order assessing those penalties.

1 And as you know, though, that order is
2 merely a proposed order, and so I wrote a
3 clarifying order explaining those steps which you
4 have in your packet; and then you also have in
5 your packet an order for signature by the Board
6 approving the proposed order imposing penalties,
7 and that penalty amount is \$1,262.

8 CHAIRMAN RUSSELL: Thank you, Katherine.
9 In front of me I have an order of the Board
10 imposing penalties for Case No. BER 2009-02 MM. I
11 would entertain a motion to allow the Board Chair
12 to sign this order on behalf of the Board.

13 MR. ANDERSON: So moved.

14 CHAIRMAN RUSSELL: It's been moved by
15 Larry. Is there a second?

16 MR. MIRES: Second.

17 CHAIRMAN RUSSELL: Seconded by Larry.
18 Any further comments?

19 (No response)

20 CHAIRMAN RUSSELL: Hearing none, all
21 those in favor, signify by saying aye.

22 (Response)

23 CHAIRMAN RUSSELL: Opposed.

24 (No response)

25 CHAIRMAN RUSSELL: Motion carries.

1 We're going to take a break.

2 (Recess taken)

3 CHAIRMAN RUSSELL: Are we ready to roll?
4 The next item on the agenda is a matter regarding
5 the Gallatin local water quality district. And I
6 guess you'll tee this up, Tom.

7 MR. LIVERS: Thank you, Mr. Chairman,
8 members of the Board. These issues don't come
9 before the Board frequently, but part of the
10 Board's authority includes establishment and
11 amendments, major amendments, to the boundaries
12 for local water quality districts. So you have a
13 request before you for a boundary change. We
14 talked about this during the initiation of this
15 process.

16 But at this point I'm going to turn it
17 over again to Todd Teegarden from our Technical
18 and Financial Assistance Bureau.

19 MR. TEEGARDEN: Mr. Chairman, members of
20 the Board, again, I'm Todd Teegarden with
21 Technical and Financial Assistance Bureau.

22 One of our programs is source water
23 protection program, reviews and approves local
24 water quality districts, formations, work plans,
25 and amendments, and then we bring that to the

1 Board for your approval. And Alan English, who is
2 manager of the Gallatin local water quality
3 district, is here to describe briefly the
4 expansion, and what they're asking for approval
5 for. So with that, I guess I'd introduce Alan.

6 MR. ENGLISH: Thanks, Todd. I guess
7 it's still officially morning. Good morning, Mr.
8 Chairman, members of the Board. For the record,
9 my name is Alan English. And I wasn't exactly
10 sure what the format was here, so I don't have a
11 real formal presentation, but I think in your
12 packet you do have our five year strategic plan,
13 and in there is a map.

14 You can see in there basically what we
15 did is we've expanded the district boundary to the
16 north, to the west, and to the south; and the idea
17 of that was to pick up in the north the Logan
18 area; and a fair amount of growth on the north
19 side of the valley; over in the west the Churchill
20 and Amsterdam area; and we also pick up the Logan
21 Landfill; and then to the south obviously the Big
22 Sky area.

23 Over the years we've actually -- our
24 district boundary doesn't quite cover the Gallatin
25 Valley in terms of the watershed. We've always

1 had a philosophy that if somebody calls, and they
2 want something, and they're outside the district
3 boundary, it's tough luck, you're out of luck.

4 So we have over the years worked with a
5 lot of individuals in all these expansion areas.
6 We currently monitor wells in the western and
7 northern area in cooperation with the Bureau of
8 Mines and Geology, and we have from time to time
9 gotten requests for assistance, and so that was
10 sort of the impetus for changing the boundaries.
11 Specifically even going back to I believe 1999, we
12 actually got a letter from Big Sky Sewer and Water
13 District expressing interest in us expanding into
14 Big Sky.

15 For a little bit of review, the original
16 -- why we're really here today, the statute says
17 that we have to come back to the Board of
18 Environmental Review to request approval of any
19 modifications to our work plan, and you originally
20 approved that work plan in 1997. So in my mind,
21 that's when the district really got up and
22 running.

23 We are funded by a six dollar fee that's
24 assessed on -- the term is "fee assessed parcels,"
25 basically parcels with improvements. And it's one

1 thing that we're actually pretty proud of because
2 that was not a very significant fee. That's an
3 annual fee of six bucks. We've never increased
4 it. And we certainly may have to someday, but
5 that's not on the immediate horizon. To 1997 to
6 now, given everything that's happened, I think
7 we've been pretty frugal with our money on that.

8 I'm not sure if you're aware or not.
9 There are three other local water quality
10 districts in the state. There is one in Missoula,
11 Missoula Valley Water Quality District; and then
12 Lewis & Clark County, the Lewis & Clark County
13 Water Quality District focused over the Helena
14 valley; and then Butte-Silver Bow still has an
15 active local water quality district.

16 So of those, Butte, I'm not really sure
17 of. Butte hasn't been as active as the others.
18 But one thing that's unique about us is we're not
19 -- we've always from the beginning committed to
20 not being a regulatory department of the county,
21 so everything we do is generally on a cooperative
22 basis.

23 With that said, we do -- if a citizen
24 calls us, and they think they know some issue,
25 like they're picking up gasoline fumes in the

1 basement, we would certainly forward that to the
2 UST program, and make sure that they get to the
3 appropriate place. Our whole mission is to
4 protect and improve water quality, so we do pursue
5 compliance type issues, but not directly. We tend
6 to get people in contact with the proper
7 authorities.

8 As we went through this process, a
9 little bit of background, I will tell you that the
10 reason we did three different expansions rather
11 than one -- that may be a question the Board has
12 -- is that with the population at Big Sky, being
13 the primary population center if you look at the
14 three areas combined, we did get some comments
15 from some folks in the western part of the county
16 that said, "Well, even if we don't want it, and
17 all of the people down in Big Sky want it, we're
18 going to get drug into it."

19 We split those three areas out so
20 that each individual area had a little bit more
21 control over their own destiny, so to speak. And
22 we have worked very closely with the Gallatin
23 County Attorney's Office to make sure we follow
24 the statute and the process for changing the
25 boundaries, and we feel we followed it to a "T,"

1 if not going above and beyond.

2 I don't think you got it in your Board
3 packets, but I can certainly provide copies of the
4 final signed resolution that the Board passed, and
5 they include copies of the affidavits of public
6 notice. Postcards were sent out to all impacted
7 property owners with information on how to
8 protest.

9 And the long and short of it is that I
10 was somewhat surprised that we actually got a lot
11 less protest than I anticipated. In the western
12 part of the valley, which is primarily
13 agricultural, we have probably -- I don't have the
14 exact number, but I believe there was something in
15 the range of 600 parcels that would be impacted,
16 so potentially 600 protesters, and we had two
17 protesters certified, so less than one percent.

18 In the south area, the Big Sky area,
19 which is the biggest, about 2,300 parcels
20 impacted, and we also had two protests.

21 The northern area was a little
22 different. The first time around we proposed a
23 larger change to the north, and we did get some
24 public comment, and there was some valid points
25 made, and we adjusted that boundary. We shrunk it

1 down a little bit because some people were
2 claiming that we were going way out beyond where
3 there really was much development, and there
4 really wasn't much need for the district. We said
5 that was fair enough.

6 There was also a small area way up along
7 the north end of the Bridgers on the east side
8 where it drains into the Yellowstone drainage that
9 is a whole different watershed. People there
10 said, "We don't really have much to do with the
11 Gallatin watershed, so we don't have an interest,"
12 so we removed that area as well.

13 We still had one landowner in that area,
14 if not more, that were a little upset about the
15 idea, so we had somebody going around with a
16 letter with a protest form on the back, and
17 talking to folks. And we ended up, in that area
18 we ended up with 43 protests out of about 500 and
19 some, 8 percent protest rate, so a little higher.
20 But the statute say if it's less than 20, you can
21 proceed, so overall we were way less than that.

22 I think in general, I'm hoping that
23 that's because people don't really cause a lot of
24 problems, and maybe helping them. But that's
25 really not my place to say. So I don't have any

1 thing else specific. I'm happy to answer any
2 questions about our program, water quality
3 districts in general, and just here mainly asking
4 for the Board's approval of our revised work plan,
5 so we can actually implement the program in those
6 new areas.

7 CHAIRMAN RUSSELL: Alan, just a quick
8 question, and actually for more clarification. So
9 you used the Commissioners' resolution to create
10 these expanded boundaries?

11 MR. ENGLISH: No.

12 CHAIRMAN RUSSELL: You didn't do it by
13 public vote, did you?

14 MR. ENGLISH: We did not do it by public
15 vote, but the statute -- Let me grab it real quick
16 so I don't misstate it -- 7-13-4522 is changes in
17 district boundaries, and that's kind of the
18 statutory starting point for this. It says, "The
19 Board of Directors may by resolution change the
20 boundaries following the same procedures that the
21 Commission uses when they create the district."
22 So actually the Board of Directors of the water
23 quality district that held the hearings, and
24 passed the resolutions.

25 CHAIRMAN RUSSELL: I thought it still

1 had to go through the Commissioners. Questions
2 for Alan?

3 MR. MIRES: I have one question. How is
4 the expansion down in the Big Sky area going to
5 affect this Outstanding Resource Water issue?

6 MR. ENGLISH: Good question. I would
7 say in general, probably if there was any impact
8 at all, it would just be that we may end up being
9 one of the stakeholders and would weigh in on some
10 of the meetings. Again, we're not regulatory.
11 We've stayed out of that. Even I think some of
12 the designation actually extends into the current
13 water quality district, and we have made it a
14 point not to weigh in on it, because we feel we're
15 -- we support the idea, but you're looking at
16 potentially land use regulations and limitations,
17 and so we've stayed away from it.

18 But for example, if the sewer and water
19 district and other folks were looking at studying
20 the snow making as an option, and there is some
21 way we could help with that from a scientific
22 standpoint, we might get involved in that, but we
23 have intentionally not weighed in on the decision
24 to designate the river or not. That's a political
25 regulatory decision, so we've stayed away from it.

1 Does that answer your question?

2 MR. WHALEN: Mr. Chairman. Given the
3 expanded boundaries, how did the Board, the
4 current Board, address the issue of representation
5 from those areas that are being annexed into the
6 district?

7 MR. ENGLISH: According to the statute,
8 there is no change in our Board composition
9 because the only time you pull another Board
10 member is if you pull in an incorporated area, and
11 none of the areas that we added had any
12 incorporated areas in them. And so what we've got
13 in our work plan is to explore -- If folks in the
14 area are interested in participating to appoint
15 some sort of a Board liaison, it wouldn't be a
16 full blown voting Board member, but we would get
17 more representation.

18 And we've been doing that with -- For
19 example, now we have on our Board liaisons from
20 the Planning Department, and the Planning Board,
21 and Environmental Health, some of the other county
22 departments, so we get better communication. But
23 the Board make-up is set by statute, and it does
24 not include adding more Board members
25 specifically, unless there is a -- If Big Sky was

1 to incorporate, then we could have one.

2 MR. WHALEN: Thank you.

3 CHAIRMAN RUSSELL: Other questions?

4 (No response)

5 CHAIRMAN RUSSELL: We do this formally,
6 I guess. I haven't seen anything in here. I will
7 entertain a motion to adopt the new plan set forth
8 by the Gallatin Water Quality District, which
9 would incorporate new boundaries.

10 MS. SHROPSHIRE: Public comment?

11 CHAIRMAN RUSSELL: We could.

12 MR. LIVERS: We should.

13 CHAIRMAN RUSSELL: Public comment?

14 (No response)

15 CHAIRMAN RUSSELL: Thanks, Robin.

16 MR. WHALEN: I would support that
17 motion.

18 CHAIRMAN RUSSELL: So it's been moved by
19 Joe.

20 MR. MILLER: I'll second.

21 CHAIRMAN RUSSELL: It's been seconded by
22 Marv. Is there any further discussion?

23 MR. LIVERS: Mr. Chairman, Mr. North
24 just pointed out this is an approval function as
25 opposed to an adoption, so you might want to tweak

1 the motion.

2 CHAIRMAN RUSSELL: I would recommend, if
3 it's okay by the mover and seconder, that we would
4 change the language to "approve," not "adopt."

5 MR. WHALEN: No objection.

6 MR. MILLER: No objection.

7 CHAIRMAN RUSSELL: All right. Hearing
8 no objections, all those in favor, signify by
9 saying aye.

10 (Response)

11 CHAIRMAN RUSSELL: Opposed.

12 (No response)

13 CHAIRMAN RUSSELL: Thanks for coming up,
14 Alan.

15 MR. ENGLISH: Thank you very much.

16 CHAIRMAN RUSSELL: Nice job on this.
17 We've tried it and failed.

18 MR. ENGLISH: I've tried to help a few
19 times, but I'll come back if you want me.

20 CHAIRMAN RUSSELL: The next item on the
21 agenda is to consider comments made on pesticides
22 and the biotic ligand model during the 2010
23 triennial review.

24 MR. LIVERS: Mr. Chairman, the only
25 thing I would say before I turn it over to Mr.

1 Bukantis. Again, this is a continuation of the
2 triennial review process that began last spring,
3 and our action today is limited to just one aspect
4 of that, just those public comments we got as
5 listed here.

6 This is going to sound a little bit like
7 a briefing because we are not recommending action
8 on the Board's part, but we chose to put it as an
9 action item rather than a briefing item because we
10 didn't want to simply presume what the Board
11 wanted to do with it.

12 We wanted to preserve the Board's
13 ability to act if it chooses to. We're not
14 recommending action. It will be clearer, I think,
15 as Bob walks through this, but we did want to
16 close the loop, and bring back some information on
17 this aspect of the triennial review, lay out our
18 reasoning, and you'll see why we're not
19 recommending action. But again, it's here as an
20 action item so that we don't simply take away that
21 ability of the Board.

22 MR. BUKANTIS: Mr. Chairman, members of
23 the Board, for the record, my name is Bob
24 Bukantis, Water Quality Standards Manager for the
25 Department. And I seem to be experiencing

1 technical difficulties here. And actually it
2 looks like the calvary has arrived. So Allen, if
3 you could please get my presentation up on the
4 screen. And in deference to your time, and that
5 we're running a little late, maybe I'll just get
6 going and get started.

7 Tom has basically already offered you my
8 punchline, so to speak, and given you a little bit
9 of background, so I'll jump in right into some of
10 the specifics.

11 We received comments from a couple
12 commenters relative to DEQ7, and those comments we
13 view as they've been very constructive, and
14 they're consistent with a lot of the things that
15 we want to do to DEQ7 anyways, if you would, and
16 they fit right in with our plan of continual
17 maintenance and update.

18 So as Tom indicated, we're not going to
19 ask you to act at this time, and what we want to
20 propose is that we will just roll the comments,
21 and how we respond to these comments, into the
22 2011 version of DEQ7, and continue to look at the
23 biotic ligand model, and I'll get a little bit
24 more into some of the specifics.

25 Some of the specific comments we had

1 were specific to several pesticides, atrazine,
2 symizine, and metolachlor, basically talked about
3 their categorization as carcinogen or not,
4 presumably not being toxic; and a change in EPA's
5 basic number, health advisory number that we use
6 as the basis for metolachlor, and basically asked
7 that we not sum -- argued that we not sum
8 degradates of parent compounds with parent
9 compounds in the standards. Basically I'll just
10 explain those comments in a little bit more detail
11 and what we think we should do with them.

12 Basically the attribution of atrazine
13 and symizine is not a carcinogen. That requires a
14 little bit of background. How we decide whether a
15 compound is a carcinogen or not on DEQ7 depends on
16 how EPA categorizes that compound; and they have
17 just recently adopted a new system with how they
18 evaluate carcinicity. So the commenter I think
19 was basing their comment on EPA's new position on
20 how they evaluate those classes of carcinogens.

21 And so EPA, what they're doing as they
22 transition, if you would, from the old system to
23 the new system, they're not doing it all at once,
24 and they do it as they look at reregistering an
25 old compound and registering a new compound. And

1 so that's going to -- I think we're going to have
2 to do a couple things to adapt to that.

3 One is as EPA changes how they view
4 these compounds, we'll need to make those
5 modifications in DEQ7; and in addition, we'll have
6 to modify Footnote 2 in DEQ7 to adjust, to allow
7 us to use simultaneously both EPA classifications
8 systems, if you would. So that's how we plan to
9 address the carcinogen compound.

10 The piece I missed there, by the way, I
11 probably should mention, is these comments in
12 general were focused on specific compounds, but
13 they have more widespread impact on other similar
14 compounds within DEQ7; so rather than just do some
15 spot checks, we figure this is a good time for us
16 to do some more general clean-up.

17 So to try to speed through that, at this
18 point I'm not sure if it's -- maybe I should just
19 continue on the course I'm going.

20 We think that we should just do a
21 general clean-up adjustment update, if you would,
22 to DEQ7, rather than react specifically to these
23 specific comments.

24 Another example is the commenter telling
25 us that metolachlor had changed on the federal

1 level. That EPA number that we base our standard
2 on had been relaxed. But in the document that EPA
3 published to announce that, that came out during
4 the last -- when we were in process for the last
5 rulemaking for the 2010 DEQ7, and there is eleven
6 other compounds that we should probably similarly
7 make those types of adjustments to.

8 So to just try to get through that
9 quickly, basically we think the best way to
10 address this is with the next overall set of
11 changes to DEQ7. We have a bunch of other changes
12 that we're planning to make to DEQ7. Rather than
13 react to these comments, jump in, start a
14 rulemaking now, we think it's better to throw
15 these into the next set of general changes that we
16 plan to bring to you next year.

17 And there is a third question in there
18 with pesticides, and that has to do with how we
19 handle the degraded compounds. We think there is
20 a consistency issue there. We've identified
21 several places where we think we need to do a
22 little clean-up because this is a twenty year old
23 document. There has been various technical people
24 involved, and there is several places where we
25 want to do a little bit of homework, and make sure

1 we're consistent with how we handle degraded
2 compounds.

3 So with that, I think I'll move right on
4 to the copper biotic ligand model, give you
5 perhaps a whirlwind tour what that is about.

6 Basically in 2007, EPA came out with a
7 new water quality standard for aquatic life for
8 copper. It's called a copper biotic ligand model.
9 The current standard on the books for aquatic life
10 is based on a calculation of hardness. You just
11 put hardness in the equation. Based on ambient
12 hardness, it spits out a copper toxicity value.

13 Biotic ligand model has, in addition to
14 hardness, it also takes into account dissolved
15 organic carbon, pH, temperature, sulphate,
16 sulfides, sodium, potassium, and total alkalinity;
17 and it's basically a computer program that you
18 feed that information, it calculates out your end
19 result. And EPA has recommended to us that we
20 adopt that at least initially as an option to the
21 hardness based calculation.

22 And so what we've done, because I think
23 in all cases, especially when we're talking about
24 a new approach to how we do things, that we need
25 to be very sensitive to how the programs that

1 implement the standards, like Jenny's permit
2 program, for example, what is this going to do to
3 those programs, how is this going to influence
4 TMDL's permitting, etc. So we've had
5 conversations with remediation, those programs I
6 just mentioned, etc., and they have concerns about
7 how we would implement the copper BLM.

8 So basically the punchline I want to get
9 to on that, because of those concerns, we're not
10 sure what we want to -- we see this as probably
11 the way of the future for aquatic life standards,
12 for metals, at least the hardness based metals.
13 There is about six or seven of them, and this is
14 the first one. But we want to be real careful
15 about implementing this.

16 For example, EPA has recommended that we
17 put it out there as an option. Well, what do you
18 do when you have two different ways to calculate
19 the standards on the blocks? Are you going to
20 allow people to cherry pick the number they want
21 or what? So there is a lot of things for us to
22 look at. We need to carefully consider.

23 Perhaps telling on this item is that to
24 date, no other state in the country has adopted
25 the copper biotic ligand model, so we're reluctant

1 to want to be the first ones out there to try this
2 out, if you would.

3 So I kind of zoomed through this. There
4 is a lot of technical depth on all these issues,
5 if you would. But basically our recommendation to
6 you is that we take no action at this point. What
7 the Department plans to do is take the suggestions
8 and comments that we had seriously. We have
9 planned to address those on pesticides in the next
10 version of DEQ7 that we expect to bring to you
11 next year.

12 And the copper biotic ligand model I
13 think is going to -- I don't want to offer you a
14 timeline on that. I think we need to be careful
15 on how we move forward with that, but we are
16 working through some issues with that. For
17 example, we have a conference call with EPA next
18 week to talk about some issues about how we might
19 implement that.

20 So with that, I'll be happy to answer
21 any questions, and I have Rod McNeil here also,
22 who is much more familiar with a lot of the
23 technical stuff behind this.

24 CHAIRMAN RUSSELL: All right.
25 Questions?

1 MR. MIRES: How does this, or does it
2 tie in to A(3) that we looked at earlier on the
3 administrative rule 17.30.201 with pesticides?
4 The comments in here, does that reflect back to
5 earlier discussions?

6 MR. BUKANTIS: Mr. Chairman, Board
7 member Mires, only in the sense that these
8 pesticides would be some of the pesticides that
9 would be regulated under that rule. Currently I
10 think we have somewhere in the neighborhood of 100
11 pesticides on DEQ7.

12 CHAIRMAN RUSSELL: Other questions?

13 MR. WHALEN: Mr. Bukantis, so EPA has
14 relaxed for atrazine and symizine its standards
15 with respect to categorizing those as human
16 carcinogens; is that correct?

17 MR. BUKANTIS: I guess the way I would
18 characterize it -- and in your executive summary,
19 if you have that handy. The old categories are
20 under group categories, and they're "A" through
21 "E." Right now atrazine and symizine is
22 classified or categorized as a possible human
23 carcinogen. Under their new approach, they have
24 it categorized as "N," and that is "not likely to
25 be carcinogenic to humans." Presumably that is

1 based on newer data and information that support
2 that.

3 One of the things that I think we need
4 to think about as we're working through this is
5 Rod tells me that they were using a lower risk
6 level for causing cancer on that end than they
7 used in the older system.

8 MS. SHROPSHIRE: So they went from ten
9 to the minus five to ten to the minus six? That's
10 way it switched?

11 MR. BUKANTIS: I think it's ten to the
12 minus six to ten to the minus four on that one; is
13 that correct?

14 MR. WHALEN: But both of those elements
15 would still be considered carcinogenic for aquatic
16 life forms?

17 MR. BUKANTIS: No. This is for -- How
18 we apply this -- Mr. Chairman, Board member
19 Whalen. How we apply this is as a human
20 carcinogen. So right now, everything from "A" to
21 "C" we just lump as a carcinogen on DEQ7. We
22 don't break down all these different categories.
23 And Footnote 2 of DEQ7 says that we use this
24 system, and if it's "A" through "C," we call it a
25 carcinogen. Right now in our rules, we don't say

1 anything about the second category. Since EPA is
2 changing that, we're going to need to make that
3 modification.

4 And a lot of these things kind of
5 correspond, but we need to work through that, and
6 we'll need to basically make the decision on the
7 new categories what are we going to lump in as a
8 carcinogen. That's some of the homework we need
9 to do yet.

10 And we'll be working with stakeholders,
11 and Water Pollution Control Advisory Council,
12 etc., Department of Ag., and bring something back
13 to you on that.

14 MS. SHROPSHIRE: Does the State have
15 flexibility in choosing that ten to the minus six
16 versus ten to the minus four? Is there a range
17 that -- For example, if it remained ten to the
18 minus six, it may have changed that category. So
19 how does DEQ decide on which threshold to use?

20 MR. BUKANTIS: And I think I know what
21 you're getting at, Mr. Chairman, Board member
22 Shropshire. Basically in the Montana Water
23 Quality Act, part of the directive that we get in
24 how to set water quality standards is that when
25 we're setting a standard for a human carcinogen, I

1 think in all cases, we go to numbers that are
2 published by EPA, and they're published typically
3 at some -- if they decide it's a carcinogen -- at
4 some cancer, risk of excess cancers over a course
5 of a lifetime based on certain assumptions,
6 consumption rates of water, size of the person,
7 life span, etc. And then we move the decimal
8 point to, in Montana's case, to one in 100,000
9 excess lifetime cancer risks.

10 Unfortunately -- I don't know if I
11 should use that word -- but basically the
12 Legislature has put that in State law. So right
13 now that's set in State law. We're told to use
14 the most protective of the MCL, which is designed
15 for drinking water under the Safe Drinking Water
16 Act, or the cancer risk level. And so we use one
17 in 100,000 excess lifetime cancer risk to set
18 those numbers that are calculated that way, at
19 that risk level, as specified by State law in
20 statute.

21 MS. SHROPSHIRE: Do you have the ability
22 to look at cumulative? If you look at individual
23 pesticide versus both of them, and how it changes
24 that risk, or does it have to be only on the
25 individual one? For example, you might have two

1 things that impact your liver, and if you had both
2 of them, it exceeds that threshold.

3 MR. BUKANTIS: Mr. Chairman, Board
4 member Shropshire, we really don't. The standard
5 is set on a compound by compound basis, so those
6 synergistic effects are not taken into account, if
7 you would.

8 MS. SHROPSHIRE: And the DEQ doesn't
9 have that flexibility to include that in your
10 rule?

11 MR. BUKANTIS: No. That's laid out
12 pretty clearly in State law. I might offer a
13 little bit of history on that. A couple sessions
14 ago --

15 CHAIRMAN RUSSELL: What would your R&D
16 budget be if you had to do that?

17 MR. BUKANTIS: If we had to do that? It
18 would be a lot of money.

19 CHAIRMAN RUSSELL: That's university
20 level studies.

21 MS. SHROPSHIRE: But they're not
22 questions that -- in terms of Super Fund and
23 projects in Butte. They're questions that have
24 been asked many, many times, so it's not an
25 unusual question.

1 MR. BUKANTIS: Right. And that
2 basically raises an important point. A lot of
3 these things, it's very expensive to do all the
4 toxicology work behind this. So under Section
5 304(a) of the Clean Water Act, EPA does much of
6 science course, or in practice they borrow from
7 the toxicology that's been done in some of the
8 formerly rich states that have been shutting down
9 their offices under the economic crunch: New
10 Jersey, California, etc.

11 MS. SHROPSHIRE: One other question.
12 With regards to the copper, the biotic ligand
13 model for copper, have you assessed, for example,
14 if you were to apply that now in some of the Super
15 Fund sites in Butte, would it be stricter? Is
16 there any sort of bright line that you can say how
17 it's going to impact some of the copper
18 contaminated sites that we have in Montana?

19 MR. BUKANTIS: I would say there's two
20 sides to that question, one of which has to do
21 with difficulty in how we deal with it at this
22 point. That is, copper biotic ligand model, one
23 of the things that we need to work out on how we
24 would implement it is it's based on dissolved
25 metals, dissolved copper. Our standard is

1 currently totally recoverable, so it ignores that
2 suspended part, if you would.

3 And the other piece is it's very much
4 dependent on those other chemical ions. So the
5 root of exposure that the copper biotic ligand
6 model is looking at is solely the copper that
7 would go in through the gills of the aquatic
8 organisms, and nothing effectively goes in through
9 bugs that they ingest. And that's very much
10 influenced by things like total organic, dissolved
11 organic carbon, etc.

12 So it depends on the chemistry on a site
13 specific basis, so sometimes the number can be
14 higher than the old standard, sometimes lower.
15 And I don't know -- Rod, have you -- I know Rod
16 has done some comparisons. That's another problem
17 with the copper biotic ligand model is our legacy
18 data sets typically don't have all the necessary
19 supporting data to calculate the number. I don't
20 know if there is any generalizations we could make
21 based on what you've seen so far, Rod? Rod has
22 dug into this a little bit.

23 MR. McNEIL: Mr. Chairman, Ms.
24 Shropshire. We've been looking at specifically
25 the data from Silver Bow Creek, and there are a

1 series of sampling stations along the creek within
2 Butte; and if we were to apply that standard
3 throughout the run of the creek at existing
4 standard stations, and two of them, the biotic
5 ligand model would generate a lower standard; at
6 four of them, it would generate a higher standard;
7 and a considerably higher standard below the
8 wastewater treatment plant.

9 So we're talking about a factor of three
10 or four difference in terms of the level of
11 standard generated by the BLM versus the hardness
12 model.

13 CHAIRMAN RUSSELL: Any further
14 questions?

15 (No response)

16 CHAIRMAN RUSSELL: At this time, I think
17 at least by recommendation, we're going to wait to
18 see what comes up in the WQB7. So thanks for
19 coming up and talking to us, and we'll await your
20 next comments regarding this.

21 MS. SHROPSHIRE: It's not WQB7.

22 MR. BUKANTIS: DEQ7 now.

23 CHAIRMAN RUSSELL: Thanks, Bob. I
24 appreciate your presentation.

25 The last, almost the last matter is

1 violations of the Underground Storage Tank Act by
2 Juniper Hill Farms, LLC. Katherine, I'm going to
3 let you tee this up.

4 MS. ORR: Mr. Chairman, members of the
5 Board, we are at the juncture here where a
6 decision was issued regarding -- again, there was
7 a contested case hearing on the issue of the
8 proper penalty to be assessed, and that hearing
9 occurred on June 4th, and then on September 21st,
10 a proposed order on the penalty was issued by me.

11 And according to the Montana
12 Administrative Procedure Act, Section 2-4-621,
13 there is an opportunity for the party adversely
14 affected to file exceptions to the decision that
15 the Hearing Officer makes, and that has happened.
16 And in the proposed order, I invited the parties
17 to file exceptions, and response to exceptions,
18 and that has been done, and those are in your
19 packet.

20 And the decision point today basically
21 for the Board is whether upon argument there is a
22 necessity for the Board to change the findings of
23 fact. And I'll back up one step there. In order
24 to do that, the Board has to determine from a
25 review of the complete record that the findings of

1 fact are not supported by the record. And just to
2 kind of go further into this statute, the Board
3 can make decisions today, for example, regarding
4 whether there should be a change to the
5 conclusions of law.

6 That's easy. But that's not what's
7 before the Board. There are exceptions that have
8 been filed, and they delve into somewhat the
9 findings of fact that have been proposed; and also
10 the exceptions address admission of additional
11 evidence that wasn't part of the record, so that
12 raises a difficulty.

13 But what should happen right now is that
14 you hear oral argument, and decide for yourselves
15 whether or not the fact record that's been
16 established through the proposed findings of fact
17 should somehow be reopened, and so I would counsel
18 you to just hear these arguments, and you will
19 make that decision.

20 The one other small wrinkle is that the
21 Department filed a notice of clerical errors, and
22 I have reviewed those, and if you were
23 hypothetically to today move and decide to adopt
24 the proposed findings of fact, you could instruct
25 me to enter proposed, a final proposed findings of

1 fact that would take into account whatever those
2 proposed clerical errors are, if that makes sense.

3 So the first order of business is to
4 hear the parties on their exceptions. And it's
5 Mr. Morrison who is here representing Juniper Hill
6 who filed exceptions, and then the Department is
7 here represented by Ms. Jane Amdahl, and she filed
8 a response, and then Mr. Morrison filed sort of
9 supplemental exceptions. So I'm sure you'll hear
10 about that today.

11 MR. MORRISON: Mr. Chairman and members
12 of the Board, and Ms. Orr, Hearing Examiner Orr,
13 this process is foreign to me. I'm an attorney,
14 but I'm a tax lawyer who happened to unfortunately
15 use my sole -- I'm also in conflict because I own
16 Juniper Hill Farm, LLC, which bought the Lakeside
17 General Store Station. That's a small convenience
18 store out by Lakeside. I apologize to all of you
19 for having to take your time today, and I don't
20 want to take much of it. I know it's your lunch
21 hour, so I will make this very brief.

22 But I just want to give you a background
23 of what this is all about. I'm not Hi-Noon,
24 somebody that knows a lot about running filling
25 stations. I just happen to have a store because

1 it's next door to where I live. And when I first
2 bought the store, the owner that had the store had
3 a reputation for having problems with complying
4 with DEQ.

5 And I had some elderly ladies that ran
6 the store, and they were going to have to go out
7 dip big sticks in the ground to see what the fuel
8 levels were. I spent quite a bit of money
9 avoiding that problem when I bought the store
10 installing this expensive equipment to read the
11 fuel levels.

12 And one of the problems that I didn't
13 know was going to be a problem, after spending all
14 that money, was that apparently the equipment that
15 was installed wasn't capable of reading lower fuel
16 levels, and we -- very, very low fuel levels, and
17 with the cost of fuel, and the low amount of sales
18 that we had in the store, especially during the
19 winter, we didn't like to -- I don't want to have
20 10,000 gallons of gas that it took me ten months
21 to sell, so we kept fairly low levels of fuel in
22 these tanks.

23 I didn't realize it was a problem until,
24 as the record indicates, in November of 2008, I
25 got a notice that we weren't reporting to DEQ the

1 fuel levels that we should have been reporting.
2 And the best that I could establish from my own
3 memory was the facts, which is in the record, that
4 shows I indicated to DEQ I tried to get Northwest
5 Fuel -- I learned that there was a computer chip.
6 Too bad it wasn't installed in the first place
7 when they put this equipment in -- but I could buy
8 this for an extra \$1,000, buy this computer chip.
9 The Hearing Examiner, I think, at least her record
10 shows she does agree that it cost \$1,000 to put
11 this little clip in that would allow the fuel
12 tanks to read the right fuel levels.

13 And I thought that was taken care of
14 until the following April, I got a notice that we
15 were still not in compliance. The lady that ran
16 the store, she wasn't really experienced much in
17 running -- This is a small convenience store out
18 in the country here. So I don't know what all
19 happened. The records show all this, and I've
20 taken exceptions to the Hearing Examiner's -- some
21 of the things she said.

22 If the government had offered to settle
23 this for \$500 like that other case I heard this
24 morning, I wouldn't be here, and we wouldn't be
25 wasting your time. So I'm simply asking you to

1 use whatever authority you have to be a little bit
2 more understanding.

3 We have fiberglass tanks, fairly new
4 tanks in the store. It's a fairly new store. I'm
5 apologetic again that this even ever had to
6 happen. I would ask, if you have any authority,
7 to understand what I'm asking. I would certainly
8 appreciate if there is some way you could reduce
9 -- I don't want to ask you to totally eliminate
10 the fine that's involved here, but I would
11 certainly appreciate it if you could help me out
12 on that. Thank you.

13 CHAIRMAN RUSSELL: Jane, do you want to
14 respond?

15 MS. AMDAHL: I guess it's good afternoon
16 by now. Mr. Chairman, members of the Board, my
17 name is Jane Amdahl. I'm an attorney with the
18 Montana Department of Environmental Quality, and I
19 do represent the Department in this contested
20 case.

21 I do not want to repeat everything I set
22 forth in my brief in response to the exceptions
23 filed by Juniper Hill. I trust that the Board
24 members are certainly fully capable of reading
25 those arguments.

1 I would like to point out, however, as
2 Ms. Orr stated already, when a party files
3 exceptions to findings of fact, the Board may not
4 make any changes in the finding of fact unless
5 they review the record as a whole, and determines
6 that there is no competent substantial evidence to
7 support the finding. The Board may not merely
8 make its own credibility determination. That is
9 solely in the hands of the Hearing Examiner, which
10 in this case of course was Ms. Orr.

11 In this case, to my knowledge, no record
12 has been presented to the Board to review. That
13 is the obligation of the person or entity that is
14 raising the appeal or the challenge, and the last
15 time I checked with the Court Reporter, she told
16 me that no record had been ordered. So the Board
17 has no basis on which to do what is necessary in
18 order to make any changes to the findings of fact.

19 So I would suggest that on that basis
20 alone, that the Board should deny the exceptions
21 raised by Juniper Hill.

22 Secondly, one other issue that I believe
23 I pointed out in the hearing, I don't recall that
24 I pointed it out in my actual response to the
25 exceptions, and that is: The Board should keep in

1 mind that Juniper Hill property is not the same as
2 Mr. Thomas Morrison. He may own the company, but
3 the company includes its employees.

4 For instance, if General Motors, merely
5 because the COE is not aware of something that
6 happened in one of its offices or car dealerships,
7 does not mean that General Motors is still not
8 liable or responsible for the actions just because
9 the COE or the shareholders are not aware of it.

10 In this case the evidence is clear that
11 Juniper Hill was made aware, through its employee
12 who signed for a copy of the inspection report in
13 September 2008, that there were at least eight
14 violations of monitoring requirements from the
15 prior year.

16 Nothing was done until Mr. Morrison
17 received the warning letter, in which case he
18 stated at the hearing that he communicated with
19 Northwest Fuels to have a chip put in. There was
20 no follow up by Mr. Morrison; there was no follow
21 up by anybody else at Juniper Hill. It was not
22 done. Juniper Hill did not have it installed. It
23 was not until April of 2009 that any action
24 actually was taken to prevent future violations
25 because during that whole time, violations were

1 continuing to occur.

2 So I would simply ask the Board to
3 remember that Juniper Hill is a company. It is
4 not Mr. Morrison. You are to look at what Juniper
5 Hill knew, what Juniper Hill did, not what Mr.
6 Morrison personally may have known or done.

7 I would also remind the Board that the
8 initial penalty assessed for the 16 different
9 violations that were established in the prior one
10 year would have resulted, and the Department
11 calculation came to a penalty of \$6,720. The
12 Department determined that that was more money
13 than was truly necessary to act as a deterrent,
14 not only to Juniper Hill, but to other operators,
15 and unilaterally reduced that penalty to \$2,100.

16 Even if we take all of Mr. Morrison's
17 arguments into account, and take all penalty
18 factors in favor of Juniper Hill where there is
19 any discretion -- such as whether there was deemed
20 significant cooperation, good faith -- and do not
21 take any of the discretionary things against
22 Juniper Hill, some of the other factors, the
23 penalty still ultimately comes out to be a penalty
24 higher than the penalty that was assessed, \$2,100.

25 The Hearing Examiner stated that in her

1 proposed order. So even if some of the arguments
2 Juniper Hill made were true, ultimately that the
3 Department already reduced the penalty by well
4 over \$4,000, and a \$2,100 penalty was appropriate.
5 I would simply ask the Board members to review the
6 filings and make their determination based on
7 that. I'm open to any questions.

8 CHAIRMAN RUSSELL: I think we'll direct
9 our questions to Katherine.

10 MS. AMDAHL: Okay. Thank you very much.

11 CHAIRMAN RUSSELL: First of all,
12 Katherine, a question for you. When you acted on
13 behalf of the Board, you reviewed the Department's
14 record on how they calculated the penalties.

15 MS. ORR: Mr. Chairman, that is correct.
16 And we had an evidentiary hearing with testimony,
17 cross-examination, on the proper assessment of
18 penalties.

19 CHAIRMAN RUSSELL: And you didn't modify
20 those penalties because that wouldn't be a
21 position you should take if you take up the
22 findings as they were presented as accurate and
23 factual.

24 MS. ORR: Well, I think the
25 determination at that hearing was whether the

1 facts existed to support the conclusions -- Well,
2 let me put it another way -- whether the facts
3 existed such that the way the rule was applied was
4 correct.

5 CHAIRMAN RUSSELL: The only point I'm
6 trying to make is it was several years ago that we
7 had adopted a formal process to assess penalties,
8 and over the last four years that that's been in
9 effect, four plus -- I can't remember -- we've
10 allowed the Department to use a very specific
11 penalty assessment process. And I'm guessing that
12 the reduction of the initial penalty that was
13 higher was allowed in that process, but the
14 Department does not act arbitrarily in their
15 assessment of penalties. We made that when we
16 adopted the rule on how to assess those penalties,
17 as I recall, John, many years ago now.

18 So at least from my perspective -- and I
19 speak only for myself at this point -- over the
20 years that I've watched the Department bring
21 penalties to us, they've been based on -- those
22 conclusions based on the findings, and they've
23 been accurately assessed and fairly judged.

24 So that certainly is my opinion, and I
25 know that some of the older Board members can

1 agree or disagree with me, but that's been my
2 position over the years of watching these
3 penalties come, even to the fact that we would
4 have literally five, four or five in a row that
5 were assessed the exact same penalty because they
6 were literally the exact same violations that the
7 Department noted.

8 So that is my opinion. We can argue
9 this more, but I would certainly entertain a
10 motion to support the Hearing Examiner's position
11 and assess a \$2,100 penalty.

12 MS. KAISER: So moved.

13 CHAIRMAN RUSSELL: It's been moved by
14 Heidi. Second?

15 MR. WHALEN: Second.

16 CHAIRMAN RUSSELL: Seconded by Joe.
17 Further discussion? We certainly have more time
18 for discussion here.

19 MS. SHROPSHIRE: Mr. Chairman, I always
20 have trouble with some of these things in terms of
21 questions that are appropriate to the case, but is
22 it fair to ask if there was impact to the
23 environment in this case, or it was a failure to
24 monitor?

25 MS. ORR: Mr. Chairman, Ms. Shropshire,

1 I would say a little of both. In the penalty
2 calculation, the question was whether there was a
3 possible exposure to the environment of the
4 contaminants -- "potential" I guess is the word in
5 the rule -- and that's why the Department
6 suggested that it apply the gravity and extent
7 factors the way it did.

8 And yes, the underlying admitted
9 violation was a failure to monitor correctly.
10 There were monitoring results, but they were not
11 valid because of the testing method that was used.

12 MS. SHROPSHIRE: Follow up. Did the
13 tank leak?

14 MS. ORR: No, there was nothing in the
15 record that showed an actual leak.

16 CHAIRMAN RUSSELL: And I guess I'm going
17 to be very careful here, but I went through, when
18 the UST program literally got off its feet. If
19 you can't monitor, you don't know if you have a
20 leak. This is a prevention oriented program. If
21 you cannot monitor for the presence or absence of
22 a leak, then how do you know it's not leaking?
23 This could have been a grave environmental
24 disaster, and it would have never been picked up.

25 And the reason why monitoring became so

1 important in the 1990s, I think 1992 was a real
2 benchmark time, that you couldn't monitor before,
3 and a stick test isn't accurate. The stick test
4 changes with temperatures. So you really have to
5 -- I mean you buy this equipment, and you buy the
6 chip, so you can accurately monitor for the
7 presence or absence of a product in your tank
8 which would indicate a leak.

9 MS. SHROPSHIRE: I'm just -- I do --
10 Trust me, I appreciate that. Just in terms of how
11 the -- If the gravity is applied to -- what the
12 gravity is applied to. It's not applied to impact
13 to the environment, but potential impact to the
14 environment, so I'm just trying to make that
15 clarification.

16 CHAIRMAN RUSSELL: I think that's
17 probably why some of the \$4,600 of the initial
18 fine was reduced. Not seeing the calculations
19 right now, but --

20 Further comments? And we really should
21 be directing most of our comments to Katherine and
22 between ourselves. Since there's a motion, let's
23 direct them between ourselves or Katherine.

24 Further?

25 (No response)

1 CHAIRMAN RUSSELL: Hearing none, I'll
2 call for the question. All those in favor,
3 signify by saying aye.

4 (Response)

5 CHAIRMAN RUSSELL: Opposed.

6 (No response)

7 CHAIRMAN RUSSELL: Thank you for your
8 time. I believe we're done.

9 MS. ORR: Mr. Chairman, there is one
10 thing that I was addressing, if I may, and that
11 there is a proposal to change my order slightly,
12 and that was characterized as clerical orders by
13 the Department. And I have reviewed those, and if
14 you would allow me, I can change the wording of
15 the order to address and incorporate at least the
16 intent of those comments regarding the clerical
17 errors.

18 CHAIRMAN RUSSELL: Was this the "S" and
19 the "K"? Was that one of them?

20 MS. ORR: One is to say that there were
21 no -- there was no valid -- I plugged it in here
22 in the order. One is in Paragraph 8. The
23 Department determined that -- My finding of fact
24 is the Department determined that the number of
25 days of violation amounted to sixteen days, namely

1 eleven months for Tank No. 1, plus five months for
2 Tank No. 2, regarding which there were no monthly
3 leak detection records generated; and the
4 suggested change is valid leak detection records
5 generated, and I would agree with that. That's a
6 good change. So I would suggest putting that in
7 the order.

8 And then the second one is in finding of
9 fact -- well, the first one actually the way it
10 appeared in the request -- is as to finding of
11 fact No. 6, and the suggested language is to
12 clarify that the 70 percent -- or the .7 gravity
13 and extent factor did not result in a reduction to
14 70 percent of the -- she's saying that it seemed
15 like there was an implication that it was reduced
16 down to 30 percent, and that wasn't the intent.

17 So I guess what I would add is something
18 like, "The base penalty was determined by reducing
19 the maximum statutory penalty downward by applying
20 a factor of .7 for gravity and extent to yield a
21 base penalty of \$350, which is .7 times \$500." So
22 all by way of indicating that it wasn't reduced
23 down to 30 percent, it was reduced down to 70
24 percent, if I could do that.

25 CHAIRMAN RUSSELL: All right. Because

1 we can get this closed up if we do that, we'll
2 entertain a motion to allow Katherine to make
3 those changes to her order.

4 MR. MIRES: So moved.

5 CHAIRMAN RUSSELL: It's been moved by
6 Larry. Second?

7 MR. MILLER: Second.

8 CHAIRMAN RUSSELL: It's been seconded by
9 Marv. Any other comments?

10 (No response)

11 CHAIRMAN RUSSELL: Hearing none, all
12 those in favor, signify by saying aye.

13 (Response)

14 CHAIRMAN RUSSELL: Opposed.

15 (No response)

16 CHAIRMAN RUSSELL: Motion carries
17 unanimously. Thank you. That actually went
18 smoother than I thought it would.

19 We are at the time of the agenda that we
20 allow general public comment. This is the time
21 for the public to speak to matters that the Board
22 has jurisdiction over. I know that you've stuck
23 around to talk to us. Please be careful that we
24 do not start talking about a contested case,
25 because we are not here to hear your case. Okay?

1 MR. LAUBACH: My name is Ron Laubach.
2 My wife Debbie is there. We have three children,
3 healthful children. One goes to school in
4 Bozeman, one goes to school here, and one goes to
5 school -- he's a junior at Power, Montana. And I
6 farm, and I farm a piece of ground that my great
7 grandfather homesteaded 100 years ago this year,
8 and on that farm is a coulee that has great
9 hunting, antelope, deer, pheasants, sharp tail
10 grouse.

11 And why I'm here is to see if you guys
12 can get DEQ to reevaluate or adopt their policy
13 and statutes. In listening to you guys today, I
14 believe that you all are concerned and care about
15 a healthful environment. I'm just going to read
16 it, so I don't know how personal it will be that
17 way, but we'll get it through faster.

18 As a property owner, to prevent
19 hazardous type issues, I would like to see DEQ
20 adopt a policy or statute -- whatever it is -- to
21 send out certified letters to each property owner
22 that would be affected by DEQ's decisions; all
23 decisions by DEQ be made totally clear on any
24 proposals or decisions before certificates are
25 granted.

1 All maps should be accurate in their
2 depictions of the routes being taken by any
3 company that might affect the family issues,
4 farming practices, wildlife, etc.; and all route
5 issues on property must be clearly defined in all
6 information presented or discussed.

7 I'm going to be repeating a bunch of
8 stuff, too, but hopefully the main points come
9 out.

10 Once a problem has been realized, there
11 also should be a policy in place to correct the
12 problem without the threat of time issues,
13 especially when all parties, including DEQ, agree
14 and determine that there is a more viable
15 alternative route. Time is an issue that comes
16 up. DEQ employs a state that change could be done
17 in thirty days. DOE out of Washington state that
18 change could be done in thirty days.

19 DOE and NEPA also state -- and I have it
20 on my cell phone message -- that DEQ, that it's
21 their issue. They can change and make things
22 work. There is no one -- but yet no one wants to
23 take the initiative to make the change. All and
24 any certificates should not be granted unless all
25 issues have been addressed with each individual

1 landowner.

2 Money is an issue. Why should one
3 landowner accept \$800 an acre when another
4 landowner -- or land is selling for 1,200 bucks an
5 acre? Why should any property owner have to
6 absorb all of the costs of restoring and enhancing
7 wildlife, deer, antelope, pheasants, and so forth?
8 Why should any family have to accept to live under
9 either power lines or a train going through the
10 middle of your property, or behind your house,
11 when all these negatives can be avoided very
12 simply?

13 It is not a fact that DEQ policy is to
14 avoid -- Is it not a fact that DEQ's policy should
15 be avoiding tipi rings, keep a mile away from a
16 house, a residence? All studies on soils,
17 wildlife, should be done before certificates are
18 granted. Certified letters sent to all property
19 owners with a complete, and accurate, and clear
20 design of the project affecting the property
21 owners.

22 This would help to eliminate any
23 misunderstandings, devious behavior, and keep an
24 honest and straight forward relationship. With
25 all of the parties communicating, it would be a

1 better way to address the healthiest use. What
2 I'm trying to say is if all the parties would
3 communicate, you could address the health issues,
4 the wildlife, the wetlands, the farming practices,
5 the value of property loss, liability issues.

6 When a deal has been reached and signed,
7 then changed, then when you've got -- you know,
8 when you make a deal with somebody, and you sign
9 the paper, and you made an agreement, and then
10 somebody else changes it, and they don't let you
11 know, so you don't know where they're going, and
12 then you find out later they're going right
13 through your property?

14 I believe it would help if there was a
15 communication, if there was a way to make things
16 work with landowners, DEQ employees, companies,
17 then it would help to eliminate the process of
18 condemnation actions over your head; and if DEQ
19 employees are having a tailgate party, then send
20 an invitation to each individual landowner. How
21 many of you would go to a party that's just
22 advertised in the paper? It would be like
23 crashing the party, right?

24 I've got one last statement, but I want
25 you guys to kind of think of your own situation

1 where you live, your own house, your own kids, and
2 picture a train running -- taking over and running
3 right through your yard, or a power line right
4 over your house. Would any of you want to subject
5 your children to that? I'm 64 years old. I was
6 blessed with great kids. I want them -- and I'm a
7 healthy guy so far at my age, but I want them to
8 have that same opportunity.

9 Mr. Russell, I would like you to
10 entertain a motion for the Board to take some
11 action to make things right, to get DEQ to be more
12 flexible, to make a policy to let us know as
13 landowners, individually though. Don't expect --
14 There is so many issues in life. You can have a
15 parent that's either got Alzheimer's, dementia,
16 blind, can't hear, so we don't want to be
17 depending on newspaper, radio, TV; or, as I was
18 told, I think your policy is you put it into some
19 United States register thing. I don't exactly
20 remember what it was. And we're supposed to go
21 look that up.

22 So to try to simplify this, there was a
23 sign out there, too, on your desk, all of the
24 different things you guys handle, and one of them
25 said citizens complaint, so maybe this sounds like

1 a citizen complaint. Maybe this wasn't the way to
2 do it. I don't know. But I am looking for help.
3 I want to see the process changed. I want
4 individual farmers, landowners, to be recognized
5 individually, if that's the right word.

6 Thanks a lot. You guys earned your
7 money today. See you later.

8 CHAIRMAN RUSSELL: Thanks for your
9 comments. Any other comments?

10 MR. WILSON: Members of the Board, and
11 Mr. Chairman, for the record, my name is Kim
12 Wilson, and I was here today, and am here today
13 representing MATL, the power line that these
14 appeals are about. I won't go into those appeals.
15 I just want to very briefly respond to Mr.
16 Laubach's general comments, and just say a couple
17 of things.

18 One is we, too, think that support of
19 the healthful environment for the state and for
20 the residents of the state is a worthy cause, and
21 that's, of course, in line with MATL's promotion
22 of wind power as an alternative energy source.

23 It seems to me, though, that most of Mr.
24 Laubach's concerns deal with the original
25 certification of the line, and concerns about the

1 public comment and notice period that went with
2 that, and the environmental review that went with
3 that. There was a comprehensive environmental
4 review performed at that time, and we think that
5 those questions have been addressed at that time.

6 And so with that, we'll deal with this
7 appeal as a separate matter, but I did want to
8 just respond to that extent.

9 CHAIRMAN RUSSELL: All right. Thanks
10 for your comments. Any further comments from the
11 public?

12 (No response)

13 CHAIRMAN RUSSELL: Hearing none,
14 anything, Tom?

15 MR. LIVERS: No, Mr. Chairman. Thank
16 you.

17 MS. SHROPSHIRE: Mr. Chairman?

18 CHAIRMAN RUSSELL: But generally we take
19 public comment, and we will take anything up. You
20 can call me, if you want to take something up in
21 the rulemaking process, and I would be glad to
22 bring it to them. But this isn't a very good time
23 to make comments on public comments, so we should
24 be cognizant of that. This is not a good time to
25 do that, and there is a lot of good reasons. But

1 if you want to work on any rulemaking around this,
2 Robin, I'd be glad to talk to you about it.

3 MS. SHROPSHIRE: Point taken.

4 MR. LAUBACH: Mr. Russell, would it be
5 all right to just make one more comment?

6 CHAIRMAN RUSSELL: We're done. You've
7 verged on the line of stating your case, and we
8 allowed you to do that, and we're just not going
9 to allow it any longer. So with that, I'll
10 entertain a motion to adjourn.

11 MS. SHROPSHIRE: So moved.

12 CHAIRMAN RUSSELL: It's been moved. Is
13 there a second?

14 MS. KAISER: Second.

15 CHAIRMAN RUSSELL: All those in favor,
16 signify by saying aye.

17 (Response)

18 CHAIRMAN RUSSELL: Meeting is over.

19 (The proceedings were concluded

20 at 12:56 p.m.)

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C E R T I F I C A T E

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STATE OF MONTANA)
: SS.
COUNTY OF LEWIS & CLARK)

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

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing - 147 - 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 , 2010.

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires
March 9, 2012.