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MINUTES
MONTANA SAGE GROUSE OVERSIGHT TEAM

May 14, 2019 Meeting Summary
DNRC Headquarters, Montana Room

Note: Pursuant to Senate Bill 261 Section 1 (2015 Montana Legislature), meetings of the Montana Sage Grouse Oversight Team (MSGOT) are to be recorded electronically. The electronic recording is the official record. These summary minutes provide an abbreviated summary of the action taken and public comment. The time designations listed are approximate and may be used to locate the referenced discussion on the audio recording of this meeting. Access to the electronic copy of these minutes and the audio recording is provided from the Sage Grouse Habitat Conservation Program webpage hosted by the Montana Department of Natural Resources and Conservation at https://sagegrouse.mt.gov. The agenda, summary minutes, MSGOT meeting materials, and audio recordings are listed by meeting date on the MSGOT Meeting Archive webpage.

Members Present
John Tubbs, Montana Department of Natural Resources & Conservation, Director
Diane Ahlgren, Rangelands Resources Committee, by Phone
Senator Mike Lang, Malta, Montana by Proxy
Mike Tooley, Montana Department of Transportation, Director, by Proxy
Patrick Holmes, Montana Governor's Office
Martha Williams, Montana Department of Wildlife, Fish and Parks, Director, by Proxy
Rhonda Knudsen Representative HD 34
Jim Halvorson, Montana Board of Oil and Gas, Administrator, by Phone
Shaun McGrath, Department of Environmental Quality, Director

Staff Present
Ms. Carolyn Sime, Sage Grouse Habitat Conservation Program, Manager

Call to Order
00:00:01 Director Tubbs called the meeting to order.

Mud Springs Wind Project: Project Area Boundary Delineation and Mitigation [Handouts 1 and 2]

00:03:06 Ms. Sime. The documents before MSGOT were drafted by the project sponsors, and informed by conversations with the Program, over the past few months. The documents are different than ones presented at the prior MSGOT meeting. The project sponsor seeks an MSGOT decision on their proposed grandfathering boundary. The Program has provided a Technical Note [Handout 3] for consideration of other project information gathered over the years. MSGOT is asked to decide what, if any portion of the project, would be grandfathered, because the project was authorized but not implemented, prior to September 8, 2015. The decision will also be centered around voluntary mitigation offerings. There will be opportunity to discuss future development that would be subject to the Executive Order outside of the project boundary.

After the April 25 meeting, the record now shows the project boundary has changed since the project was first conceived. The reasons for the changes vary, based on developing landownership agreements and other wildlife concerns, such as eagles.

The Technical Note overview includes a timeline. Important to identify at what point a grandfathered boundary might have been determined. Core Areas were first delineated in 2008. Final designation of Core Areas occurred in January 2009. The Sage Grouse Advisory Council met between 2013 and 2014, with final recommendations advanced to Governor Bullock in January 2014. In April 2014, the Mud Springs project was submitted...
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to Department of Environmental Quality (DEQ) for a Stormwater Pollution Prevention Plan (SWPPP) which included a permit boundary. Executive Order 10-2014 was signed on September 9, 2014. This set forth the earliest framework for a sage grouse strategy. May 2015 the Stewardship Act signed. An update to Executive Order 10-2014 was signed Sept. 9, 2015 with a correction to the habitat map in December 2015. In January 2016, the Program was in early discussions with EverPower, an earlier project proponent. The Program provided a letter to the proponent, which sought to clarify they had a SWPPP and could be consider grandfathered. The letter contained additional language stating, should the project be modified, consultation may be required. In April 2016, Montana Department of Transportation issued a utility encroachment permit. In November 2017, a second letter was provided by the Program to Sunrise Wind Holdings LLC. (Sunrise), the new owner of the project. Sunrise was required to file a Notice of Intent for a new five-year SWPPP permit. At that time, development of a mitigation plan for sage grouse was ongoing. DEQ renewed the SWPPP to 2022 for the project boundary identified in the 2014 SWPPP. There may be renewed consultation requirements if the project changes. February 2019, Innogy and PacifiCorp notified the Program of their desire to finalize a mitigation plan and bring it before MSGOT. Senate Bill 299 was signed on May 2, 2019 [Handout 9]. The bill codifies portions of Executive Order 12-2015 and amends the Stewardship Act.

The Program worked with the project sponsor to identify the project boundary. The various boundaries through the years are shown on maps provided in MSGOT’s packet and show the 2014 SWPPP and 2017 SWPPP boundaries [Handout 3 and Handout 4].

Today, MSGOT is asked to first consider three different alternative boundaries and make a decision as to what boundary delineates a “grandfathered” area for purposes of an exemption from Montana’s Conservation Strategy stipulations and compensatory mitigation. The project sponsor identified a preference for a grandfathered area comprised of combination of all three areas including areas outside of the project boundary, according to land use agreements previously signed with private landowners in the area.

MSGOT’s second decision would be, how voluntary mitigation would be applied. There is ongoing dialogue that can be explored by MSGOT but is constrained to the grandfathered area. Impacts to sage grouse have been an area of considerable discussion with the Program.

Any project infrastructure outside of the “grandfathered” project boundary would be evaluated later. PacifiCorp has committed to voluntary mitigation [Handout 2]. Project infrastructure inside of grandfathered area will stay out of NSO’s. Vegetation removal would occur outside of nesting season. Committed to contribute up to $320,000 to the Stewardship Account, to offset impacts, inside and outside of the grandfathered area. If mitigation fees outside of the grandfathered area are more than $320,000, the project sponsor would make additional payments.

Ms. Sime suggested MSGOT discuss additional voluntary mitigation measures that do not appear in the mitigation document provided by the sponsor and clarify sponsors views around the contribution amount, including coordination of monitoring of leks with Montana Fish, Wildlife & Parks.

Third piece for MSGOT discussion might be, what mitigation would look like outside of the grandfathered area. Consider how MSGOT would approach mitigation both outside or within the grandfathered area.
The Mitigation commitment document offered by PacifiCorp speaks to several goals, listed on page 7 [Handout 2]. PacifiCorp committed to eliminate as many miles of transmission line as possible and construct all infrastructure outside of the NSO areas.

00:24:27 Tim Volk, Development Director, Innogy: No project is the same and there’s been a lot of changes over time. Innogy is the third company to own the project. Acquired it from another party who initiated all the land acquisitions. Real estate transactions took place in consideration of wind studies. In 2014, initial project boundaries and land agreements changed with changing technology. Turbines went from over 100 to 69 or 70. Innogy recognizes the best opportunity for the project to be successful is for PacifiCorp to buy the project.

00:26:59 Ken Clark, PacifiCorp: Discussed project area and basis for grandfathered area. State is considering the 2014 SWPPP boundary [Handout 4]. Request approval of boundary submitted by PacifiCorp on May 3 [Handout 1, Figure 1]. Boundary 1 is the 2014 SWPPP project boundary plus adds signed land owner agreements done prior to September 2015. Includes Bowler Flats and Crosby lands signed in January 2014. PacifiCorp was not the developer at the time so don’t know why these lands were not included in the 2014 boundary.

00:00:00 Sven VanEricksen, Legal Counsel for PacifiCorp. He looked at SB299 and feels it tracks those concepts and established existing land uses tied to a state action. There is a separate concept of what defines a project boundary. Examples in Executive Order 12-2015 reference adding Rights-of-Way or corridors, subdivisions, federal resource development plans. Language in statute says it is not tied to a state permit action but could include whatever might be in the scope for boundary for relevant land use action. The project easements were signed prior to the Executive Order effective date.

00:31:40 Director Tubbs: When you came to the state as the prior company, you came with a defined project boundary in the 2014 SWPPP. Asks why MSGOT should include lands with prior agreements when the company did not include them in the 2014 SWPPP.

00:32:28 Mr. VanEricksen: Doesn’t know if there is a legal answer. There is an area requested for SWPPP coverage. Question is if the SWPPP area is the only relevant point of reference or are there other areas when trying to figure out what is meant by “defined boundary.” PacifiCorp looks at is as land use references not tied to a state permit.

00:33:55 Mr. Clark: Presented two maps for MSGOT’s consideration. Innogy’s second boundary map identifies the 2017 boundary [Handout 1, Figure 2]. If the first option of adding land doesn’t work, it would be helpful to add the 2017 lands having landowner agreements to reap the most benefit of the development.

The third boundary map would maintain 2014 SWPPP boundary and PacifiCorp would try to focus development within the boundary [Handout 1, Figure 3]. Asks if wind turbines would be allowed outside of the grandfathered area. Mitigation would apply to the grandfathered area and any areas added outside the boundary. PacifiCorp will try to minimize transmission line as much as possible.

00:36:56 Director Tubbs: Asked for public comment.

00:36:59 Mr. Scott Blain, Commissioner for Carbon County: Read letter of support from Carbon County Commissioner Bill Bullock.
00:44:33 Mr. Richard Brown, Vice President of Resources Wyo-Ben and Joe Sylvester, Natural Resources Manager, Wyo-Ben.

00:52:05 Mr. Pitts Dearmon, Carbon County Commissioner, District 1.

00:56:30 Director Tubbs requests additional public comments. Hearing none, opened meeting for MSGOT discussion.

Discussion will be broken up into separate partitions. The first one being determination of what is the grandfathered area.

00:56:58 Director McGrath: Offered that it would be instructive to discuss the DEQ permit to understand the difference between the 2014 and 2017 permit. Generally, storm water permits require a five-year permit renewal. In this case, EverPower opted to renew the permit early (3 years) and add additional land to the permit. That is an important distinction. After talking to DEQ program staff and DEQ attorneys the conclusion is, had it been a simple renewal all of the 2017 would be grandfathered. In this case, there were new lands added and that happened after MSGOT was created by the Executive Order. Would be hard pressed to include those in the grandfathered area. The 2014 uses were allowed and permitted prior to the effective date of Executive Order, so he has no problem including those areas.

00:58:41 Director Tubbs: Asked if a wind energy field would require SWPPP throughout the entire area, not isolated areas. It looks like, in 2017 they went north and the only way to develop those new areas would be with a new SWPPP.

00:59:26 Director McGrath: The permit describes land that is covered by the permit.

00:59:42 Director Tubbs: If we were to ignore the sage grouse issue, they would need a new permit for the orange area in the map. But if they had a project underway and they wanted to expand into new areas, they would need to get a new permit.

01:00:00 Director McGrath: If the activity, through construction or otherwise would trigger the need for a storm water permit, they would need a new permit.

01:00:16 Director Tubbs: Those being access roads, and the site for the turbine itself.

01:00:32 Ms. Ahlgren: Feels like the project hasn’t been vetted well through the Program. She depends on that for recommendations. The process hasn’t been used well for this project. Having trouble deciding how to vote without this information. There are unanswered questions and the project has been in flux over the years. Couldn’t vote for anything other than the 2014 lands on the map. When they added lands, they needed to get permits and that is in statute. SB299 further defines anything that triggers new permits.

01:02:33 Director Tubbs: The reason for limited Program involvement is because of the grandfathering. There are no requirements to adhere to the Executive Order if the project is grandfathered. From beginning the Program was very aware of the Mud Springs wind project, even before the Executive Order was signed. The project was not a surprise to the Program. It was made clear a wind power project was being planned for this area and that it would be impacted by the Executive Order, if there wasn’t some consideration made by the Governor’s office for development of the project. Agrees that this will come up more in the mitigation segment. This is not an ordinary MSGOT approval. World
changed with SB299. We had a defined project boundary in 2014 with the SWPPP. The 2017 boundary would support eliminating the grandfathering entirely, because the 2017 permit came after the Executive Order went into effect. In 2017 Sunrise anticipated reducing the number of turbines substantially. Mitigation would go way up if we grandfathered it as opposed to 2014 having more turbines. Troubled by what MSGOT allows and how to mitigate if going with the 2017 proposal.

01:06:45 Director McGrath: Made a motion to accept 2014 Storm Water Permit Area and only that area as grandfathered. Seconded by Mr. Holmes.

01:07:06 Director Tubbs: Asked for additional MSGOT discussion.

01:07:35 Representative Knudsen: Asked how additional lands not included in the 2014 SWPPP fall under the definition in the Executive Order for easements or ROW.

01:08:16 Director Tubbs: They are referred to as county recorded agreements for wind development.

01:08:32 Mr. Clark: Easement agreements are attached to the documents for all of the ranch easements PacifiCorp holds. The agreements were signed before the Executive Order was in effect and why PacifiCorp consider these existing land uses as outlined in SB299.

01:09:43 Mr. Holmes: Stated a perspective of Section 1, sub part b, of SB299 that says existing land uses and activities that require a permit or other authorization from the state agency to be conducted within a defined project boundary. Defined project boundary includes types of things that may be included in sub part a, but at some level, must rely on what was submitted for the purpose of obtaining a state permit.

01:10:39 Director Tubbs: SB299 says “and”, as opposed to “or”, in sub part a.

01:10:46 Representative Knudsen: It does not say permits have been granted but does say, “and require a permit”.

01:11:17 Ms. Danna Jackson, DNRC Attorney assisting the Sage Grouse Program: Concurs with Mr. Holmes reading of the statute. There are two parts 2a and 2b. Useful to read the first sentence. “Existing land uses, and activities are recognized and respected, and those uses and activities, including those authorized by permit but not yet conducted, that existed as of September 8, 2015, may not be managed under the stipulations of the sage grouse conservation strategy adopted by the governor through executive order”. You need to read the bill as a whole. Reasonable interpretation to say the 2014 permit was authorized by permit but not yet conducted.

01:12:35 Director McGrath: Asked how SB299 speaks to other areas not included in the storm water permit but purchased before the 2015 date.

01:12:48 Ms. Jackson: The 2017 lands are separate lands from the lands included in the 2014 permit and would not be grandfathered.

01:13:10 Director McGrath: Asked how SB299 speaks to additional land under landowner agreement easements in 2014 but not included in the permit area of the 2014 SWPPP.
01:13:30 Ms. Jackson: If it precedes September 8, 2015 it could be grandfathered but the lands were not included in the 2014 SWPPP. The 2014 SWPPP permit defines the permit area.

01:13:57 Director Tubbs: Stated the 2017 boundary is off the table. This project sponsor made a case for the other lands, but the prior owners drew the line and gave us the 2014 SWPPP boundary. Should MSGOT start adding to it through agreements that were in place for a long time, then oil and gas speculation erodes the purpose of the Program. Asked for further discussion.

01:16:11 Ms. Ahlgren: Asked for someone to repeat motion.

01:16:20 Director Tubbs: The motion is to adopt the 2014 permit area under the DEQ, SWPPP permit, which is the black boundary outline on maps provided by project sponsor or the hatched area provided in the MSGOT packets [Handout 1 Figure 3 and Handout 10].

01:16:55 Director Tubbs: Called for a vote. Director Tubbs, Director McGrath, Mr. Holmes, Ms. Ahlgren and Administrator Halvorson voted aye. Director Williams and Director Tooley vote aye by proxy. Representative Knudsen voted no, and Senator Lang no by proxy.

01:17:17 Director Tubbs: Stated MSGOT would need to vote again to allow for public comment first. Called for additional public comment.

01:17:43 Ms. Sime: Pointed out the decision about project boundary is closely linked to discussion about mitigation.

01:17:53 Director Tubbs: Asked for additional comments from the project proponent.

01:18:20 Mr. Volk: Something not spoken to is what happens with decisions made today. There is no opportunity to run the HQT to know what the financial obligation will be. If not using the proposed boundary, the expectation is the project will result in significant cost. Key piece to PacifiCorp decision due to the thin economic status of the project.

01:19:12 Director Tubbs: Asked for additional comment. Hearing none, called for a vote.

Director Tubbs, Director McGrath, Mr. Holmes, Ms. Ahlgren and Administrator Halvorson voted aye. Director Williams and Director Tooley vote aye by proxy. Representative Knudsen voted no, and Senator Lang no by proxy. Motion passed.

01:19:41 Director Tubbs: The mitigation plan is voluntary and does not have to meet the Program requirements. Offered as a good will statement to conserve sage grouse.

01:20:55 Ms. Sime: Context for MSGOT’s second decision is based on the approved grandfathered project boundary for the 2014 SWPPP. MSGOT is asked to consider the voluntary commitments described in the commitments documents [Handout 2]. PacifiCorp would need to work with the permit agencies to update existing permits. PacifiCorp has offered some very explicit minimization measures. 1) Project infrastructure would not be built within the no surface occupancy buffer of a lek. 2) PacifiCorp agrees to refrain from removing vegetation during the nesting period. 3) A voluntary contribution to Stewardship Account was discussed however there is some ambiguity where the $320,000 fits. A few things were discussed that were not included in the final plan. Those are listed on page 6 of the Technical Note [Handout 3]. The Program recommends closer coordination with FWP for monitoring sage grouse.
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01:24:22  Mr. Clark: Mitigation plan proposed by Innogy and PacifiCorp was based on PacifiCorp’s project area 1 that includes additional lands to the north, outside the 2014 SWPPP boundary. With those additional acres, PacifiCorp had flexibility to place turbines in areas outside the NSO buffers and address other wildlife concerns by other agencies. Given the newly approved 2014 SWPPP grandfathered boundary PacifiCorp is not sure they can stick to the mitigation plan now.

01:25:25  Director Tubbs: Asked if the mitigation plan is essential in PacifiCorp’s decision for ownership of the project.

01:25:35  Mr. Clark: PacifiCorp would not need a mitigation plan to move forward.

01:25:42  Director Tubbs: Stated PacifiCorp could withdraw the mitigation plan offered. PacifiCorp would not need a mitigation plan to move forward within the grandfathered area. Called for a meeting break so PacifiCorp could consider their plan forward given the newly approved grandfather boundary and MSGOT could consider if a PacifiCorp wind project would be allowed outside the grandfathered area. A new mitigation plan would be considered for the area outside of the grandfathered boundary when PacifiCorp develops a plan.

BREAK

01:27:44  Director Tubbs: Reopened meeting. Questions pending are whether to move forward with the mitigation plan (the second decision pending) or what consideration would be made for mitigation of any project components sited outside of the 2014 SWPPP Permit boundary that was just decided as encompassing the grandfathered area. MSGOT would consider the contribution and mitigation measures that seek to avoid and minimize. The most meaningful mitigation would be elimination of the southern powerline to avoid the majority of leks.

01:30:09  Mr. Volk: Innogy and PacifiCorp stated they don’t know enough today to know what the final project layout will be relative to the 2014 SWPPP boundary but want confirmation from MSGOT that turbines can be outside the grandfather area given that Executive Order 12-2015 bars new wind development in Core Areas. PacifiCorp wants all land laid out today outside of the 2014 boundary (2017 boundary and lands with landowner agreements) to be available in the future. PacifiCorp will withdraw the voluntary mitigation agreement from consideration. PacifiCorp will discuss internally what the project will look like and where turbines might be located given the approved grandfathered boundary and, will evaluate eliminating the long transmission line to the south.

01:31:25  Director Tubbs: MSGOT will consider the grandfathered area as a reference point for the ultimate final project. Once the project sponsors decide on the final project layout, MSGOT will take into consideration changes made and efforts to avoid impacts.

MSGOT’s future decision will consider development outside the grandfathered area based on the grandfathered nature of the project. The lands outside of the grandfathered area, identified for development in the maps provided by PacifiCorp to MSGOT today, will be considered for future development, with consultation to the Program at that point in time including the HQT. There will be no motion on the proposed mitigation plan today because the project sponsors have withdrawn it. MSGOT will consider future development outside of the grandfather area when PacifiCorp finalizes a plan. The project would undergo a full Program analysis along with a mitigation plan. PacifiCorp
can then make a price point decision to proceed or not with development outside of the grandfathered area.

01:33:40 Mr. Clark: Asked if PacifiCorp needs coordination with the Program to get an updated DEQ SWPPP, if they stay within the project boundary for the grandfathered area.

01:33:10 Director Tubbs: MSGOT has adopted the 2014 SWPPP boundary as the grandfather area and the place where PacifiCorp is excluded from the Executive Order. The 2014 boundary reflects the development envelope.

01:34:40 Director McGrath: The envelope MSGOT approved is grandfathered and doesn’t fall under the Executive Order. Any permitting within the 2014 SWPPP envelope will be grandfathered for purposes of MSGOT.

01:35:04 Director Tubbs: That will also include any other state permits Pacific Corporation may need.

01:35:44 Ms. Sime: Written comments and maps from Wyo-Ben were provided to MSGOT for the record [Handout 14].

01:36:00 Director McGrath: Asks the proponent to consider the mitigation described on page 6 of the Technical Note. These seem minimal in cost and ask them to consider implementing them. Wanted to be clear what motivated his decision. Supports wind project development and a level playing field described by Wyo-Ben. MSGOT wants to protect sage grouse to the greatest extent they can.

01:37:36 Director Tubbs: Asked for additional comments; Hearing none. Asked for next MSGOT meeting dates.

01:38:08 Ms. Sime. MSGOT can arrange another meeting date, if necessary for the PacifiCorp project. Coming up for MSGOT, meetings will include SB299 discussion, and Program review and streamlining for fiber optic and MDT projects.

01:39:14 Director Tubbs: Reminded the project sponsors, there are other options than making a contribution to the Stewardship Account. One way to mitigate is independent conservation investments such as Denbury has done. Presumably, this was less than it would have cost them using the state’s credits. Sounds like there are ranchers within the area of the wind project that may be eligible.

01:41:22 Ms. Sime: Referred proponents to look to the Policy Guidance document.

01:41:57 Mr. Clark: Earlier this spring PacifiCorp tried to tie the $300,000 contribution to a credit amount, but the Program wouldn’t allow it. PacifiCorp wanted to tie it to a deescalated amount. Couldn’t figure out how it would apply and thought it is a difficult process but open to work out the details.

01:43:05 Director Tubbs: Generating credit for a voluntary donation, in a grandfathered area makes it more difficult. Now it will be contributions to a developing project so should be easier. It’s not a dollar question, it’s a functional acre question and what lands are being conserved.

01:44:20 Mr. Clark: PacifiCorp wants an HQT estimate on the PacifiCorp/Innogy layout they developed and provided to the Program in April 2019. Asks the Program to run the HQT
analysis on the proposed layout, excluding the area inside the 2014 SWPPP boundary. This way PacifiCorp can get an idea of what the mitigation costs would be. This will help PacifiCorp decide if they would develop outside of the grandfathered area or would need to stay within the grandfathered boundary.

01:44:58 Ms. Sime: The Program would want to confirm the spatial data for the project elements that would be sited outside the 2014 SWPPP boundary. One uncertainty is what is the project layout. The Program understands PacifiCorp still has decisions to make and will need to conduct analysis from a geotechnical point of view to determine where the final footprint will be. Until there is a final footprint, it’s challenging for the Program to provide meaningful feedback. The key decision orients around project placement relative to the stipulations in the Executive Order. For the area outside of the grandfathered area, stipulations and deviations from the Executive Order will require a series of decisions.

01:46:10 Director Tubbs: It sounds like PacifiCorp will change the layout again. For the intermediate time, if what PacifiCorp wants is for the Program to provide a snapshot of what was presented to MSGOT on May 14th the Program can do that, but it won’t be a final number.

01:46:56 Mr. Clark: That snapshot will determine how PacifiCorp will move forward with the layout. That snapshot is vital for planning.

01:47:12 Director Tubbs: It won’t be the final number since PacifiCorp is going to be moving things around. As long as the Program has the shapefiles, the HQT can be run to provide raw numbers, without stipulations. The HQT Raw Score numbers can go up or down based on policy.

01:47:48 Ms. Sime: The Raw Score results would be a minimum, for a project of this size and complexity. The Raw Score would include just the footprint, roads and proximity to leks. However, the final results are based on whether or not and how many deviations there are from the Executive Order.

01:48:23 Director Tubbs: The HQT will crank out numbers (but needs realistic data for accurate results). The Program will want to provide PacifiCorp with the most reliable information possible. Doesn’t want to give illusion that the HQT model knows something it doesn’t know or provides results that aren’t useful.

Asked for public comment. None.

Public Comment on Other Matters

01:49:00 Director Tubbs: Asked for public comment for other matters, in addition to Mud Springs project.

01:49:10 Mr. Richard Brown, Wyo-Ben: Asks MSGOT to consider the concept of developing a special management area for this Core Area. The Mud Springs project probably wasn’t anticipated in the Advisory Council’s recommendations to the Governor. There needs to be a way to allow the project to happen, including allowing other development activities as well. Asks for conversation to pull everything together in a logical fashion.

Adjournment

01:51:12 Meeting adjourned without a formal motion.
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Chair for this meeting:

/s/ Director John Tubbs