



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

3                           \* \* \* \* \*

4           CHAIRMAN RUSSELL: It's five after nine,  
5 and I'll call this regular meeting of the Board of  
6 Environmental Review to order.

7           MS. WITTENBERG: Chairman Russell, we  
8 have a visitor from EPA who would like to have a  
9 few words, please.

10           MR. WARDELL: If everyone can hear me,  
11 rather than standing at the microphone with folks  
12 behind me. I'm John Wardell. I'm the director of  
13 the EPA Region 8 Montana office. I'm here to give  
14 a long overdue award to Joe Russell.

15           EPA, for now some number of years, has  
16 recognized that there are folks who are external  
17 to the agency that have, from our perspective,  
18 done outstanding work, and we're pleased to be  
19 able to recognize Joe for that particular effort.

20           From our perspective, EPA is a  
21 relatively small agency, and for us to be able to  
22 do, or get done what we've been charged to do, we  
23 rely on state governments and other organizations  
24 in the regulated community to do the right thing,  
25 so that's why we've instituted these awards.

1           What I'd like to do is borrow from a  
2 part of the write-up to give you a background as  
3 to why the award is being made to recognize Joe's  
4 work with the Montana Board of Environmental  
5 Review.

6           First, as a member appointed in March of  
7 1999, and then beginning in January 2003 as the  
8 Board Chairman, and as such, Joe has artfully  
9 guided the Board through numerous complicated,  
10 contentious, and environmentally important issues.  
11 These issues typically are characterized by  
12 passionate, intense, and sometimes conscientious  
13 public participation.

14           I'd like to do is, one, present the  
15 citation, and then hand Joe the plaque. But the  
16 award is Friend of EPA, presented to Joseph W.  
17 Russell, to honor your service and commitment to  
18 Montana's environmental, public health, sound  
19 science, and public participation, signed by Carol  
20 Rushin, who is the Acting Regional Administrator.  
21 Joe, it's my pleasure.

22           CHAIRMAN RUSSELL: Thanks, John.

23           MR. WARDELL: We're also pleased to  
24 present this plaque. It's a weighty piece of  
25 glass. But it says on it, "Friend of EPA Award,

1 Montana Board of Environmental Review, Joseph W.  
2 Russell." The date on it is 2007. I would plead  
3 that maybe it was late in 2007, and it's early  
4 2009, so it's not as bad as it might seem. The  
5 other thing I would offer is that Montana is a big  
6 state, and Joe can be an elusive individual. So  
7 thank you very much.

8 CHAIRMAN RUSSELL: I do want to thank  
9 the EPA for recognizing this, but it doesn't come  
10 without lots of great Board members that I've  
11 worked with, and special thanks to the Department  
12 for nominating me.

13 With that done, we will review and  
14 approve the -- did we actually get those minutes,  
15 Joyce?

16 MS. WITTENBERG: Yes.

17 CHAIRMAN RUSSELL: We did -- review and  
18 approve the minutes of the December 5th, 2008  
19 regular Board meeting. Does anyone have any  
20 comments?

21 (No response)

22 CHAIRMAN RUSSELL: Hearing none, I'll  
23 entertain a motion to approve those minutes.

24 MS. KAISER: So moved.

25 CHAIRMAN RUSSELL: It's been moved. Is

1 there a second?

2 MR. SKUNKCAP: Second.

3 CHAIRMAN RUSSELL: It's been seconded.

4 All those in favor, signify by saying aye.

5 (Response)

6 CHAIRMAN RUSSELL: The next item on the  
7 agenda are the briefing items, contested case  
8 updates. Katherine.

9 MS. ORR: Mr. Chairman, members of the  
10 Board, you have in front of you the listing of  
11 cases, and I guess what I would propose to do is  
12 choose the cases for which there has been a  
13 development since we prepared the agenda.

14 Item II(A)(1)(c), in the matter of the  
15 appeal by the town of Superior, the parties have  
16 filed a request for an extension, and so that's  
17 pending.

18 In Item II(A)(1)(i), in the matter of  
19 violations of the Open Cut Mining Act by TMC, a  
20 stipulation to dismiss was filed today, I think.

21 And Item (l), a second request for  
22 extension was filed on January 22nd.

23 The MATL cases have been consolidated.  
24 I just thought I'd bring this to your attention.  
25 That's Item (o). And the parties have submitted

1 -- Well, not all of the parties, but the parties  
2 bringing the cases have submitted a more detailed  
3 statement of what their claims are. That happened  
4 on January 15th. And the parties are in discovery  
5 now and conducting depositions. That case is  
6 scheduled for hearing in May.

7 Item (p) is the most recent SME appeal,  
8 and the parties requested an extension of thirty  
9 days to submit a proposed prehearing schedule. So  
10 that is pending. And that's all I have there for  
11 that item.

12 CHAIRMAN RUSSELL: Do you want to move  
13 on to the next -- the cases in litigation.

14 MR. MIRES: Mr. Chairman, can we ask  
15 questions on these pending ones?

16 CHAIRMAN RUSSELL: Sure.

17 MR. MIRES: On (o), the one on the MATL  
18 case, you have a hearing scheduled in May. I  
19 guess with the importance of that in economic  
20 development in that region and the whole state,  
21 and the short construction time if this thing  
22 could move forward, is there any chance that  
23 hearing could be moved up or held sooner than  
24 that, or is that by agreement by both parties?

25 MS. ORR: No, that wasn't by agreement.

1 We had quite a lengthy hearing on December 3rd  
2 regarding matters concerning consolidation,  
3 intervention, and scheduling, and the Appellants  
4 requested that the hearing be done in August, and  
5 the Respondents requested that the hearing be done  
6 in March, and March was I thought really  
7 unrealistic, given the fact that the parties  
8 represented that there would be extensive  
9 discovery, and there would be experts.

10 At some point there is a due process  
11 requirement for parties to be able to  
12 appropriately prepare for their hearing, and May  
13 is pretty much in the middle. I would entertain a  
14 motion to move that hearing up if it comes before  
15 me.

16 MR. MIRES: I guess I would so  
17 respectfully request, because I know there are  
18 other companies that are trying to establish a  
19 business plan based upon the outcome of this, and  
20 it's kind of having a negative impact all the way  
21 along. So I would respectfully request that we,  
22 if possible, to move that hearing date up to an  
23 earlier date, if possible.

24 MS. ORR: What has to happen is I have  
25 to have a motion before me by one of the parties.

1 MR. MIRES: So in other words, somebody  
2 on that side needs to make that request.

3 MS. ORR: Right, and there would be a  
4 hearing again.

5 MR. MIRES: How is the proper way to get  
6 that done?

7 CHAIRMAN RUSSELL: Hopefully they're  
8 picking that up in this hearing. But in the form  
9 of a motion, just that we would like -- if it came  
10 in the form of a motion, then if the date came  
11 forward, you acting on our behalf could --

12 MS. ORR: I really can't, unless you  
13 want to withdraw part of your delegation to me to  
14 hear the matter, and reserve unto yourselves the  
15 specific issue, or the broad range of issues  
16 concerning procedurally how this would occur.

17 CHAIRMAN RUSSELL: I don't think we want  
18 to do that. I don't know if we would actually be  
19 expediting it if we were to take it on, so  
20 hopefully we'll just --

21 MS. ORR: But the most forceful thing  
22 would be for a party, or one or more parties, to  
23 move again for this hearing to be set earlier.

24 CHAIRMAN RUSSELL: Maybe they're hearing  
25 it.



1 MR. MIRES: Hopefully they heard that  
2 request, and hopefully this will move forward.

3 CHAIRMAN RUSSELL: Anything else?

4 MR. MIRES: Thank you.

5 CHAIRMAN RUSSELL: The next items are  
6 the -- maybe we could get a quick brief on the  
7 cases in litigation.

8 MS. ORR: This is fairly  
9 self-explanatory. The TRC case, there was an  
10 appeal of one of the specific issues, which was  
11 the denial of the motion to amend the affidavit,  
12 and that was taken to District Court, and the  
13 District Court upheld the decision of the Hearing  
14 Officer and the Board, so there aren't anymore  
15 pending issues in that case.

16 The Intervenors have filed a motion to  
17 dismiss that appeal, and the District Court also  
18 denied that motion. And where it says here, "A  
19 notice of entry of judgment was filed," that is  
20 put there -- that's significant because that  
21 starts the appeal period to the Montana Supreme  
22 Court.

23 MR. ROSSBACH: I don't know when it's  
24 appropriate to ask questions. It's a little hard  
25 to get a sense. Katherine, are you done with Item

1 (a)?

2 MS. ORR: Yes.

3 MR. ROSSBACH: On Item (b) -- and I  
4 apologize because of my not being at the last  
5 meeting. Can you tell us on Item (b) what the  
6 decision was in the Deseret power case that  
7 they're now filing supplemental briefs about?

8 MS. ORR: I have not read that. It's  
9 one of the things that is on my list. David  
10 Rusoff is here. He might be able to tell you more  
11 specifically.

12 MR. ROSSBACH: I just am reading that,  
13 "On December 12th, the parties filed supplemental  
14 briefs regarding the November 13th decision of the  
15 Appeals Board in the case of Deseret Power." So  
16 what was that decision?

17 CHAIRMAN RUSSELL: David is up.

18 MR. RUSOFF: Chairman Russell, members  
19 of the Board, this is David Rusoff, staff attorney  
20 for the Department of Environmental Quality.

21 Because this case could potentially come  
22 back to the Board -- Mr. Rossbach, you're  
23 referring to the District Court judicial review  
24 proceeding, I believe, in which the --

25 MR. ROSSBACH: Item (b) on the agenda.

1           MR. RUSOFF: I don't have the agenda in  
2 front of me, but I believe you're referring to the  
3 District Court appeal of the Petitioners in the  
4 SME case regarding the Board's granting summary  
5 judgment on the CO2 BACT issue.

6           MR. ROSSBACH: Yes.

7           MR. RUSOFF: As the item says, the US  
8 Environmental Appeals Board issued a decision, as  
9 you know, in the Deseret case, and it's also a  
10 matter of public record that the EPA has issued a  
11 response to that decision.

12           I'd prefer not to characterize either  
13 one of those, I guess for the main reason because  
14 it's always possible that the issue could come  
15 back to the Board either from the District Court  
16 or the Montana Supreme Court; but I would be glad  
17 to provide the decision to Katherine Orr for  
18 distribution to the Board. It's a matter of  
19 public record. I just want to avoid in an ex  
20 parte manner characterizing the decision.

21           I think that in the District Court  
22 proceeding, the parties have all briefed the case  
23 and described the decision differently.

24           MR. ROSSBACH: Okay.

25           MS. ORR: It addresses the issue of CO2

1 regulation, does it not?

2 MR. RUSOFF: It does.

3 MR. ROSSBACH: Does it say that they can  
4 or they can't? What does the decision say? Can  
5 you tell us that?

6 MR. RUSOFF: Again, I prefer not to  
7 characterize the decision. The EAB remanded the  
8 permit to EPA for further consideration of the  
9 issue; but again, beyond that, I'd prefer not to  
10 characterize it.

11 MR. ROSSBACH: That's fine. I would  
12 like to see the decision, and I would also like to  
13 see the EPA's interpretation of regulations that  
14 followed that. It would be very helpful to us in  
15 just understanding where the EPA is going on these  
16 issues.

17 MR. RUSOFF: Mr. Rossbach, I have both  
18 of those, and I can provide them to Katherine Orr  
19 for distribution to the Board. I'd be glad to do  
20 that.

21 MR. ROSSBACH: Thank you very much.

22 CHAIRMAN RUSSELL: Thanks, David. All  
23 right. Anything else on (b)?

24 MS. ORR: No, not that I have.

25 CHAIRMAN RUSSELL: We will move on to

1 some briefing items, and Tom Ellerhoff is sitting  
2 in for Tom Livers, who is over at the Capitol  
3 probably testifying on House Bill 2, I'm guessing.  
4 So Tom, do you want to kick this off.

5 MR. ELLERHOFF: Mr. Chairman, the first  
6 issue is the Upper Blackfoot Mining Complex, and  
7 David Bowers will represent the Department on this  
8 issue.

9 MR. BOWERS: Mr. Chairman, members of  
10 the Board, for the record, my name is David  
11 Bowers. I'm the State Super Fund project officer  
12 in DEQ's Remediation Division.

13 The purpose of my visit today is simple  
14 and straight forward. In December 2006, the Board  
15 voted to rescind the temporary water quality  
16 standards for the Upper Blackfoot Mining Complex  
17 that were petitioned for and acquired by ASARCO.  
18 I would like to take a few minutes of your time to  
19 provide you with an update of events that have  
20 transpired since that decision to rescind those  
21 standards.

22 And Mr. Ellerhoff has hand-outs, in case  
23 you don't have yours with you, that went out a  
24 little bit earlier in the week. I'll be using  
25 that as the template for my presentation of the

1 update and adding to that.

2           The first thing that happened after  
3 December 2006 when the temporary standards were  
4 rescinded was that the Department went to the  
5 Legislature, and they were able to obtain in 2007  
6 a \$2 million funding for a remedial investigation  
7 of the Upper Blackfoot. That began in earnest in  
8 October of 2007, the field events were completed  
9 in the summer of 2008, and we're in the process of  
10 finalizing that remedial investigation.

11           The risk assessment, we're hoping that  
12 the risk assessment and feasibility studies will  
13 follow and be completed by June 2010; hopefully  
14 the risk assessment by August, I'm thinking, or  
15 September of 2009; and then the feasibility study  
16 by 2010.

17           During that time, also in the summer of  
18 2007, the Department with the Forest Service  
19 worked very hard to provide input to the Forest  
20 Service on their environmental engineering cost  
21 effectiveness -- ECA -- analysis for segments of  
22 the Upper Blackfoot headwaters.

23           The action memorandum was issued in July  
24 of 2007 for total removal of the tailings  
25 impoundment and dam, total removal of the Mike

1 Horse Creek wastes that were off of ASARCO  
2 property, total removal of the Upper Blackfoot  
3 section that was in the EECA, and partial removal  
4 of the Beartrap, waste that was in the Beartrap a  
5 drainage below the dam.

6 Along with that, in 2007, the Forest  
7 Service also constructed a dam diversion to help  
8 secure the tenuous condition of the dam to make  
9 sure that flood waters could be managed in a  
10 responsible manner until the dam was removed.

11 In the early part of this year, in  
12 January, the Department also embarked on  
13 negotiations and providing comment for a water  
14 treatment plant that was to be constructed up  
15 where the old passive treatment system resided at  
16 the confluence of the Anaconda Creek and Beartrap  
17 Creek.

18 That water treatment plant has since  
19 been built. The design was started, the  
20 Department saw the first design documents in  
21 January of 2008, and we're sitting here now  
22 January of 2009, and the water treatment plant is  
23 scheduled to go on line February 1st.

24 So it's a pretty exciting day, as far as  
25 I'm concerned. It's state of the art, German

1 technology, ceramic microfiltration. It's part of  
2 about three or four technologies that are  
3 considered the next generation in water treatment.  
4 It has tremendous expandability. It's very  
5 compact. The days of the clarifiers and lime  
6 mixers and so forth are probably going to go by  
7 the wayside with this type of treatment.

8           One of the things we're very excited  
9 about is: Should we find other waters that need  
10 to be treated and so forth, the plant lends itself  
11 to expansion in a very small footprint. It has  
12 the capability right now. On average, it will be  
13 treating 91,000 gallons per day. It has the  
14 capacity at maximum flow to treat about 1.6  
15 million gallons a week, and that's with five  
16 filtration units that are canisters that are about  
17 this size, and about a meter tall.

18           When you think about -- any of you that  
19 are familiar with the old water treatment days --  
20 that's a pretty substantial step forward in the  
21 compactability of this treatment system.

22           Also along the lines of the update, in  
23 May of 2008, there was a settlement agreement that  
24 was reached with the State and its partners, the  
25 US Forest Service, the US Department of Justice,



1 with ASARCO and ARCO. That was a three part  
2 settlement.

3           The first part, which the State already  
4 has in its possession, was for \$16 million to  
5 remove the dam and tailings impoundment. There  
6 was also an additional \$21 million in unsecured  
7 claims, which with the current state of the  
8 economy are a bit tenuous at this time, but we're  
9 also somewhat optimistic -- because we have the  
10 other money -- that time is on our side. If  
11 copper prices can rebound over the next couple of  
12 years, we're confident that we're going to be in a  
13 much better situation than we are today with those  
14 unsecured claims.

15           The other portion of that settlement  
16 agreement was ASARCO's responsibility to construct  
17 the water treatment plant that is standing there  
18 today, and to take care of O&M for the next 100  
19 years on the water treatment plant, and address  
20 the repositories in the same manner up there. So  
21 it is ASARCO's responsibility above and beyond the  
22 settlement claim, and that's at a worth of about  
23 an additional \$13 million.

24           With that said, there is much more work  
25 to be done. We're actively moving into a response

1 action work plan that is the initial steps to  
2 planning removal of the dam and removal of the  
3 tailings impoundment, developing the  
4 infrastructure for that removal, designing the  
5 road system that will need to be up there, and  
6 also in embarking on the design of the repository  
7 that will be necessary for placing those wastes.

8 As you can see, numerous significant  
9 actions and events have unfolded since the Upper  
10 Blackfoot Mining Complex temporary standards were  
11 rescinded. For those of you who were around in  
12 the early years of those standards, you know that  
13 timely action was not always the rule of the day.

14 At times and for numerous reason, it  
15 seemed like the program at UBMC was moving at a  
16 glacial pace; but since the rescinding of the UBMC  
17 temporary standards, timely actions have become  
18 the norm.

19 How much impact did rescinding the  
20 standards have on the last two years? I think  
21 only time will tell us what significance this  
22 decision had on the actions and events that  
23 followed; but I personally believe that this one  
24 event signified the beginning of a new era at the  
25 Upper Blackfoot Mining Complex, and they are

1 committed to cleaning up the headwaters of the  
2 Upper Blackfoot Mining Complex.

3 For that, I would like to take this  
4 opportunity to say thank you. I would like to say  
5 thank you to Bob Bukantis and Chris Levine for  
6 their efforts and guidance that was instrumental  
7 in the preparation for DEQ's recommendation to the  
8 Board to rescind the temporary standards.

9 I would like to thank Paul Skubinna and  
10 Rebecca Ridenour for their countless hours and  
11 technical support regarding the old and new  
12 Montana pollutant discharge elimination system  
13 permits to treat the Mike Horse Adit and Anaconda  
14 Adit discharges. Without their dedication, and  
15 guidance, and tough mindedness, we would not have  
16 the new treatment system that is scheduled to  
17 commence operation on February 1st, 2009.

18 And finally, I would like to thank the  
19 Board for supporting DEQ's recommendation to  
20 rescind the UBMC temporary standards. Without  
21 your decision, I'm certain we would neither be on  
22 the threshold of activating a new state-of-the-art  
23 water treatment system, nor would we have made the  
24 progress in other areas that we have just  
25 completed in these short two years. Thank you

1 very much.

2 CHAIRMAN RUSSELL: Thanks, David. Any  
3 questions for David?

4 MS. KAISER: I've got one. The water  
5 treatment system sounds pretty interesting. What  
6 are your estimated operating costs per gallon or  
7 annually or --

8 MR. BOWERS: Board member Kaiser, the  
9 construction of the water treatment plant is  
10 coming in at \$3.7 million. For comparison  
11 purposes, I believe at the meeting the other day,  
12 ASARCO said their East Helena plant cost in the  
13 neighborhood of \$8 million, and it doesn't treat  
14 nearly as much water, it's not as adaptable to  
15 expansion and so forth; and then the operating  
16 costs are in the neighborhood of \$270,000  
17 annually, and looking at that potentially  
18 declining as we go down the years. It was  
19 mentioned that ASARCO believes that they can get  
20 it down in the neighborhood of \$120,000 a year in  
21 about ten years.

22 MS. KAISER: What's the greatest cost  
23 for operating? Is it electricity, or getting  
24 ridding of the waste, or regenerating --

25 MR. BOWERS: I would have to go back and

1 look at the numbers. Obviously electricity is one  
2 of the costs. That was one of the things that  
3 they didn't have up there before. The first thing  
4 that they had to do was to run three strand power  
5 up to the site, and phones up to the site. It  
6 will require a 24/7 operator. It's computerized  
7 linked to the operator's home, so that if any type  
8 of alarm system goes off, he or she will be able  
9 to address a certain amount of things at home  
10 before embarking to the plant.

11 Both caustic and acid treatment are  
12 involved in the process. The filters are  
13 expensive. This is a cross section of a ceramic  
14 microfilter. It works from the inside out. The  
15 little holes you see on the inside, they're .1  
16 microns. They stand about a meter long, and  
17 they're bundled.

18 I don't know how many of the filters are  
19 in each cylinder, but with the picture that you  
20 have there, you can see the cylinders that are on  
21 that skid on the front page. They're stainless  
22 steel. So they're bundled, and they work on, I  
23 believe it's a 90 second cycle, where water is  
24 pulsed through at high pressure, hits the filter,  
25 and then on about an 18 second cycle through the

1 filters that are active, it pulses back out, and  
2 drives the sludge to a collection tank, where then  
3 it's transferred to a sludge, filter sludge press.

4 So to me, it looks like something you  
5 make your pasta with, but it's pretty amazing.  
6 But they run, I believe each unit is in the  
7 neighborhood of about \$30,000.

8 MS. KAISER: Each unit --

9 MR. BOWERS: Each stainless steel unit,  
10 and there is five of them there. Four of them  
11 will operate -- they're designed either to run in  
12 series or individually, so that there is -- You  
13 can either be running -- it's designed for two of  
14 them to be running, and then it goes through an  
15 acid bath, and the other two kick on. It's  
16 computerized.

17 And under high flow conditions, they can  
18 have any sequence that they want, from three on up  
19 to five running at a time, to a total of -- it can  
20 handle about 330 gallons per minute, I believe,  
21 for short periods of time.

22 MS. KAISER: Thank you.

23 MR. SKUNKCAP: During the aquatic bug  
24 sampling, how often is that done? And then the  
25 fish consumption, is there a need for fish

1 consumption, a limit on that? And from the dumps  
2 and seeps -- I'm sorry. There is about three or  
3 four questions. From the dumps and seeps and  
4 vegetation, is that coming back around those?

5 MR. BOWERS: Board member Skunkcap, the  
6 sampling that we're doing right now is for the RI.  
7 We collected basically for a baseline up there,  
8 and we collected in October, and then again at  
9 high water in June. And what we're hoping to do  
10 with that, with that baseline, is to monitor the  
11 recovery.

12 One of the things that I didn't mention  
13 that is pretty exciting, that it's outside the  
14 norm of a remedial action in our Department, is  
15 that there is an extensive restoration action with  
16 our partners at the Natural Resource Damages, and  
17 the target is to reestablish the cutthroat trout  
18 population in the headwaters, and that's a pretty  
19 ambitious undertaking.

20 And anybody familiar with the  
21 Remediation Division knows that we're not in the  
22 restoration business, we're in the business of  
23 basically cleaning the palate so that other things  
24 can be done afterwards. So that's going to be  
25 used for monitoring, paraphytin will be used as

1 well as sediments and water column sampling for  
2 the metals.

3 Total removals will hopefully restore  
4 both vegetation and the flood channels to  
5 something that can sustain cutthroat trout  
6 populations in the headwaters. And there will be  
7 an extensive restoration monitoring plan to  
8 measure that effectiveness that EPA is actually  
9 sponsoring.

10 MR. SKUNKCAP: That was my next  
11 question, about helping out the natural resources  
12 on the fish. So you guys do help them restock it,  
13 put into their native fish -- and then on your  
14 baseline for the bugs, how many species of bugs  
15 were collected to create your base?

16 MR. BOWERS: I'd have to look at the  
17 numbers, but we sampled from 16 different stations  
18 all the way down, until we watched the -- our  
19 curves on our sediment contaminations, our water  
20 column contaminations, and our populations with  
21 our aquatic macroinvertebrates, to a point where  
22 we knew that there was no longer any impact from  
23 metals, and that was down to about Highway 279  
24 where Flesher Pass comes into -- About a mile  
25 upriver of there is about where it's looking



1 really good. Real close to Cadotte Creek where  
2 the huge wet --

3 MR. SKUNKCAP: How far were the  
4 stations? Were they varied -- the last one --

5 MR. BOWERS: There is a number of things  
6 that go into the design of an investigation like  
7 that. You generally want to have an upstream and  
8 a downstream sampling point for every tributary  
9 that comes in; and then if you hit something like  
10 the size of a wetland and Cadotte Creek, you want  
11 to have something upstream of that, something  
12 that's intermediate, and something downstream.

13 So it depends on topography, it depends  
14 on the number of tributaries, and so forth. And I  
15 believe, like I said, I think the most we sampled  
16 was 16 over about a two and a half mile stretch.

17 And again, what we're trying to do is  
18 see the progression of contamination, how it  
19 hopefully lessens as we head downstream, so we can  
20 identify the nature and extent of what we're  
21 dealing with.

22 MS. SHROPSHIRE: I have a couple  
23 questions. With the macroinvertebrate studies,  
24 are you looking at the population, or are you  
25 doing any whole body analyses to see if there is

1 any metals within the macroinvertebrates?

2 MR. BOWERS: Board member Shropshire,  
3 what we're looking at is we're looking at  
4 population and diversity counts, I believe it's  
5 call EPT counts; and then we were also doing  
6 metals, just the basic metals analysis, where you  
7 take the samples, and whole body samples, and  
8 blend them in, and see what the metals are.

9 The EPA study is going to go into  
10 smaller tissue analysis, similar to what they did  
11 on the Clark Fork, I believe, but that's still the  
12 plan. They're still in an infancy, but they've  
13 got the funding, and what they're targeting is for  
14 their sampling plan and collecting the remainder  
15 of what they need for their baseline to be  
16 completed by 2010 before we break ground.

17 MS. SHROPSHIRE: That's great. I have  
18 maybe a comment. But on the Clark Fork, there is  
19 the Clark Fork Watershed Education Program -- I'm  
20 not sure if I'm getting that right -- where  
21 they're bringing students in, and teaching them,  
22 you know, using the new science standards in  
23 Montana to learn about science on the Clark Fork,  
24 or the Clark Fork Basin.

25 Are there community outreach or

1 education programs that are being incorporated  
2 into this? It just seems like such a great  
3 opportunity for that in such a sort of world class  
4 project to teach kids science or things like that.  
5 I'm just curious what sort of outreach or  
6 educational things you guys are able to  
7 incorporate into that.

8 MR. BOWERS: Board member Shropshire,  
9 we're currently putting together with our  
10 partners, the Forest Service and Natural Resource  
11 Damages, our communication plan for this project;  
12 and that would be certainly something that's going  
13 to be considered, along with appropriate mailing  
14 lists, and websites, and how -- dissemination of  
15 information basically, because we anticipate a  
16 high degree of interest in this.

17 There has always been a historically  
18 high degree of interest in this site since the  
19 1975 breach of the dam, so that's something I  
20 think would be very worthy of consideration, and  
21 I'll take that back with me. Thank you.

22 CHAIRMAN RUSSELL: Any further questions  
23 for David?

24 (No response)

25 CHAIRMAN RUSSELL: Thank you very much.

1           MR. ROSSBACH: This is Bill. Could I  
2 just get a clarification on the finances of this  
3 settlement. I wasn't clear about it, David. Is  
4 ASARCO then, as a part of this, committing to long  
5 term payment of the expense of operating the water  
6 treatment plant? Is that what you said?

7           MR. BOWERS: That's correct. In the  
8 settlement agreement, they committed to signing on  
9 the dotted line to put a water treatment plant in  
10 place that will meet water quality standards as  
11 designed by our MPDES folks -- and Rebecca can  
12 correct me if I'm wrong -- that the effluent  
13 standards are to meet aquatic life standards,  
14 which are about as stringent as it gets. And  
15 along with that, they also have to provide for 100  
16 years of operation and maintenance of the plant.

17           MR. ROSSBACH: Is there any -- Given  
18 ASARCO's recent financial difficulties, I guess I  
19 wonder what kind of -- Is there any sort of  
20 bonding or anything for that long term commitment,  
21 or we just have to hope that copper prices stay  
22 up, and that whoever is operating ASARCO manages  
23 their resources enough that we get the money? I  
24 just wondered about that.

25           MR. BOWERS: That's a very good

1 question. We're in the process right now of  
2 negotiating where -- That money is obligated to  
3 us. It's already been signed for.

4 The Upper Blackfoot is in a unique  
5 situation compared to some of the other creditors  
6 that are after ASARCO's bankruptcy money. They've  
7 already signed and committed to this. We know how  
8 much it's going to cost, they know how much it's  
9 going to cost, and now the decision that's being  
10 negotiated by the State with ASARCO and its  
11 creditors is where is this money going to go. Is  
12 it going to go into a trust? Is it going to go --  
13 Are they going to keep it?

14 And right now the goal is to put it,  
15 along with some other ASARCO sites in Montana,  
16 into a Montana trust, so we would actually have  
17 the money to manage.

18 MR. ROSSBACH: I was going to say,  
19 relying on the long term financial stability of  
20 ASARCO might not be the best device.

21 MR. BOWERS: No. In fact, we're  
22 anticipating that ASARCO will be potentially a  
23 different company in one to two years.

24 MR. ROSSBACH: That's my assumption  
25 well. I have some other matters that I know about

1 ASARCO's difficulties.

2           So just one last question about this.  
3 Are you totally confident that long term active  
4 water quality treatment is really the only way  
5 that we can deal with the adit water, that it's  
6 just going to be there in perpetuity, that there  
7 is no other means of eliminating that in some  
8 passive fashion?

9           MR. BOWERS: Another very good question.  
10 What this does for us is it buys us time with a  
11 very good technology. There are a lot of other  
12 things that are potentially developing on the  
13 horizon.

14           For years, the mining industry has used  
15 grouting for securing and controlling water in  
16 their mine operations. However, to go in and do  
17 that kind of work in an old workings that has  
18 crumbled, where you'd have to essentially go back  
19 in and rework the whole thing, right now is in the  
20 area of cost prohibitiveness. However, in another  
21 20, 30 years, that may become more viable, or  
22 another technology may come along that may be more  
23 appropriate and more cost effective.

24           So what this does essentially, in our  
25 minds, is it buys us time, with a very good

1 technology that can be expanded, and easily  
2 maintained, until something better does come  
3 along.

4 MR. ROSSBACH: So if I understand you  
5 correctly, then the terms of the settlement are  
6 not that they are providing water quality  
7 treatment plant, but that they are going to  
8 provide whatever it takes to get us to the aquatic  
9 standards, and so at some point if --

10 I'm just wanting to make sure that there  
11 is an incentive for ASARCO, or whatever successor  
12 there is to ASARCO, to look into these other types  
13 of remedial technologies or whatever that come out  
14 of this, so that we're not stuck for the next  
15 millennia of dealing with this as an active  
16 problem. So there is an incentive to this, that  
17 there is a flexibility that will create an  
18 incentive to trying to keep developing additional  
19 technologies?

20 MR. BOWERS: The complexities of the  
21 settlement agreement -- and I'm not an attorney --  
22 but it's my understanding that for the most part,  
23 it's a bankruptcy settlement. It's a walk-away  
24 settlement for ASARCO and ARCO. That's the reason  
25 why the O&M has been factored, and it's

1 approximately a \$10 million lump sum that the  
2 State will be getting.

3 With proper investment and management  
4 over the years, that would be viewed as a pool.  
5 If we were to decide to go down a different path  
6 of treatment or different remedy, that would be  
7 the beginning of dealing -- that would be the pool  
8 of money that would begin to address that problem.

9 MR. ROSSBACH: So it's a walk-away. So  
10 that if there is money, that it's in the trust,  
11 then it will be the trust that has to determine,  
12 or whoever it is managing the trust, that they can  
13 do better long term by going to a different  
14 technology then; is that what you're saying?

15 MR. BOWERS: That's correct. That's my  
16 understanding.

17 MR. ROSSBACH: Do we have a notion of  
18 who is going to be in charge of running this  
19 trust? How does that work?

20 MR. BOWERS: I do know the State has  
21 been working on screening and establishing the  
22 members that will be operating that trust. So  
23 it's getting very close. It's sounding like  
24 ASARCO and its parent company are prepared to go  
25 in that direction as the State wishes. So the



1 State has gone that far in doing the initial  
2 interviews and so forth to establish that trust.

3 MR. ROSSBACH: So this will be somebody  
4 that is appointed by the State of Montana, the  
5 Governor, or the Legislature, or somebody like  
6 that; is that how it's being set up?

7 MR. BOWERS: That I can't answer. I do  
8 know who is working the front lines. We've got  
9 attorneys both from the Department of  
10 Environmental Quality and the Department of  
11 Justice working on this currently.

12 MR. ROSSBACH: Thank you.

13 CHAIRMAN RUSSELL: Thanks, Bill. Thanks  
14 David. Anything else? Robin.

15 MS. SHROPSHIRE: Can you give me a  
16 little leeway to make a semi-editorial comment on  
17 this project?

18 CHAIRMAN RUSSELL: If it's good.

19 MS. SHROPSHIRE: It goes along with the  
20 education comment. I think that it's not really a  
21 question at all, but a suggestion, if at all  
22 possible.

23 The work that you guys are doing I think  
24 on these projects is world class. And you look at  
25 the restoration on Silver Bow Creek, and the Clark

1 Fork River, and Milltown Dam, and all these  
2 projects, which are epic projects. In a different  
3 part of my life, I'm looking at the economics of  
4 restoration, and at first glance I'm doing an  
5 economic analysis of this, for "X" number of  
6 dollars that's put into these projects, they  
7 generate a lot of jobs. And in terms of this  
8 being an economy, I think it's something that we  
9 can be proud of, and the work that you guys are  
10 doing is fantastic.

11 One thing that I see missing in some of  
12 these projects is maybe the ability to make it  
13 more sustainable in terms of an economy, and  
14 incorporating more research, taking what you're  
15 learning, and including the University system, and  
16 making them better, and better, and better. And  
17 it seems that you're doing that with your water  
18 treatment plant, which I think is exciting.

19 And so, one, I just want to commend you  
20 on the great work. But in terms of this being I  
21 think a boost to the Montana economy, try to think  
22 about how incorporating the educational systems,  
23 or incorporating their University systems, so that  
24 that can multiply even more. So anyway, I just  
25 want to thank you.

1           MR. BOWERS: Board member Shropshire,  
2 it's interesting that you say that. I could wax  
3 on about this job, this project, on and on. But  
4 currently part of the EPA partnership to monitor  
5 the restoration efforts is -- The partner there is  
6 the University of Montana, and Johnny Moore and  
7 Andrew Wilcox; and then out of MSU, we also have a  
8 doctoral student that has been working very hard,  
9 and using DEQ data to generate flood plain maps  
10 and sediment transport issues through the wetlands  
11 and so forth.

12           We do have some education partners. But  
13 I was hoping to just hit on some of the  
14 highlights. I agree. I think that the  
15 educational factor is a great opportunity, and it  
16 would be a shame to see it go to waste. Thanks  
17 again.

18           CHAIRMAN RUSSELL: Anything else?

19           (No response)

20           CHAIRMAN RUSSELL: The next item on the  
21 agenda is a legislation brief. Tom.

22           MR. ELLERHOFF: Mr. Chairman, the  
23 legislative briefing will be done by our Chief  
24 Legal Counsel, John North, and he will provide the  
25 Department's proposed legislation, as well as talk

1 about some bills of interest.

2 MR. NORTH: Mr. Chairman, members of the  
3 Board, my name is John North, Chief Legal Counsel  
4 for the Department. You've previously been given  
5 a summary of the Department's bills, and what I'm  
6 passing around is other bills of interest to the  
7 Board. That wasn't passed out in advance because  
8 it includes bill draft requests, and recently  
9 adopted or recently introduced bills. So I waited  
10 until this morning to complete it.

11 I did send a copy of that yesterday to  
12 Bill and Don, with the caveat that it may be  
13 changed by this morning. And Bill and Don, it was  
14 changed slightly. You'll note when I go through  
15 that handout that three bills were tabled  
16 yesterday.

17 So I'll start with the DEQ proposed  
18 bills, and let me first say that there are really  
19 only three bills on this list that really would  
20 affect the Board or the Board's duty. So I'll  
21 very briefly describe the ones that won't, and  
22 then perhaps go into a little bit more detail on  
23 the ones that would. The ones that would are on  
24 the second page of your summary.

25 The first bill, House Bill 75, would

1 amend the provisions relating to an account called  
2 the Environmental Rehabilitation Response Account,  
3 which is available to the Department to fund  
4 cleanup actions.

5           Currently that legislation is not broad  
6 enough to cover removal of solid waste. It would  
7 only apply to hazardous substances, hazardous  
8 waste, those kinds of substances. And a lot of  
9 times, we are either in conjunction with a junk  
10 vehicle enforcement action, where we would have  
11 authority to do the junk vehicles, but oftentimes  
12 there is a lot of solid waste that's associated  
13 with those sites, and we really don't have a  
14 funding mechanism or the ability to require a  
15 cleanup. And this would extend that account so  
16 that we could use the fund in that situation. It  
17 would also allow us to cost recover against the  
18 viable party.

19           House Bill 98 just expands the authority  
20 of State agencies to implement what's known as  
21 energy performance contracts. Right now the  
22 energy performance contract legislation that's on  
23 the books only applies to local governments, and  
24 this would expand it to State agencies.

25           An energy performance contract is a

1 contract wherein the governmental entity contracts  
2 with somebody to install energy saving equipment  
3 in a building, and then the person is paid out of  
4 the energy savings itself over a period of years;  
5 and if energy savings don't develop, then the  
6 person isn't paid.

7           The next two, House Bill 153 and Senate  
8 Bill 71, deal with the State Super Fund Act, and  
9 makes some technical or site specific amendments.  
10 And unless Board members have questions about  
11 that, I think I'll just go on.

12           The next bill, Senate Bill 68, by  
13 looking at the summary, I think the most  
14 significant thing it does is creates a new noun in  
15 the English language called "road kill  
16 composting." It's exactly what it says. The  
17 Department of Transportation has road kill  
18 composting sites all over the state, and they're  
19 licensed by the Department pursuant to the Solid  
20 Waste Act.

21           The problem is there is also an obscure  
22 statute that you can't dispose an animal without  
23 burying it under two feet of soil within a mile of  
24 a residence, and so this would create an exception  
25 to that, so that these facilities could continue

1 to exist.

2 On the next page is the first bill that  
3 would really affect the Board, and that's Senate  
4 Bill 95, Temporary Nutrient Criteria. And this  
5 arises from the fact that the Department will soon  
6 be proposing numeric nutrient standards to the  
7 Board, and it's quite likely that those standards  
8 will be quite stringent, so stringent that it may  
9 not be possible, either from an economic or a  
10 technical standpoint, for communities along rivers  
11 to comply. There needs to be some mechanism to  
12 allow them what's been described as a variance  
13 from those until the technology is there to allow  
14 that to exist.

15 So what this bill would do would be to  
16 allow a variance, which is called a temporary  
17 nutrient criteria. How the bill would work would  
18 be that a community, after adoption of the  
19 nutrient standards, a community could come to the  
20 Department and apply for this variance; and if the  
21 Department chose to grant it, then the Department  
22 would come to the Board, and the Board would go  
23 through rulemaking to adopt the temporary nutrient  
24 criteria for that particular community.

25 And upon adoption of the rule by the

1 Board, then they would be given a set amount of  
2 time, which could be renewed in the future, until  
3 the technology is there, and the economics is  
4 there, to allow the communities to comply.

5 CHAIRMAN RUSSELL: John, before we move  
6 on, if this were -- thinking of the cart or horse,  
7 and TMDL driving the process -- is this the cart  
8 or the horse?

9 MR. NORTH: I'm not sure I understand.

10 CHAIRMAN RUSSELL: Is TMDL driving this  
11 need for the variance?

12 MR. NORTH: No. What's driving it is  
13 the fact that the EPA has been asking, and is now  
14 vehemently asking states to adopt nutrient  
15 standards, and so there will be these nutrient  
16 standards adopted. I wouldn't want to guess what  
17 the ultimate standards that the Board would adopt  
18 would be, but my understanding is that we will  
19 propose some fairly strict standards, and if those  
20 were adopted, then the communities would need that  
21 simply to not be in violation of the Water Quality  
22 Act itself.

23 CHAIRMAN RUSSELL: Similar to temporary  
24 water quality standards.

25 MR. NORTH: Right.



1           CHAIRMAN RUSSELL:  And the variance  
2 process will be -- will we be writing rule around  
3 how the variance process will be, or is it in  
4 Senate Bill 95?

5           MR. NORTH:  The process itself is in  
6 Senate Bill 95, so what involvement the Board will  
7 have will be -- once we determine what a variance  
8 should look like, it will come to the Board as a  
9 rule, and couldn't become effective until the  
10 Board adopts it as a rule.

11           CHAIRMAN RUSSELL:  But the process will  
12 be somewhat similar to the nondeg, not being able  
13 to comply with the nondeg standards, right?

14           MR. NORTH:  Somewhat, yes.

15           CHAIRMAN RUSSELL:  Somewhat similar?

16           MR. NORTH:  Yes.

17           CHAIRMAN RUSSELL:  Any other questions?  
18 This is a big bill.  This is really important  
19 stuff.

20           MR. MIRES:  If I understand it right,  
21 then every one of these variances would be on a  
22 community by community basis.

23           MR. NORTH:  Yes.

24           MS. KAISER:  So that would mean the  
25 Board would have to go through the rulemaking for

1 each one for temporary standards?

2 MR. NORTH: Yes. I'm sure that they  
3 could be grouped, but yes, there would be  
4 rulemaking for each one.

5 CHAIRMAN RUSSELL: Lumped.

6 MR. NORTH: Lumped. Yes.

7 Senate Bill 97 doesn't pertain at all to  
8 this Board, so I won't talk about that one.

9 The next one would amend the  
10 certification law for drinking water and  
11 wastewater treatment plants, and it would simply  
12 expand it to include persons who actually operate  
13 wastewater collection systems, and for communities  
14 serving over 3,300 people, would require that  
15 those persons be certified, and that the treatment  
16 plant not use somebody who is not certified.

17 And if this bill passes, we would then  
18 have to expand those rules, and that would come to  
19 the Board for rulemaking.

20 And the next bill --

21 MS. SHROPSHIRE: In any of these, is the  
22 Department weighing in on -- Are you supporting  
23 or --

24 MR. NORTH: These are our bills. They  
25 were introduced, and the title of it says, "By the

1 request of the Department of Environmental  
2 Quality." And yes, we're the prime proponents of  
3 the bills.

4 MS. SHROPSHIRE: With regards to the  
5 certification of the wastewater, right now I think  
6 the program in Havre is on moratorium for their  
7 wastewater certification program, and I would just  
8 encourage that the training of these operators --  
9 there needs to be some mechanism to make it easier  
10 for these operators to get trained, and I don't  
11 know how that would be incorporated or suggested  
12 in this, but right now it's my understanding it's  
13 a challenge for operators to get trained easily.

14 I know that the Water Center is doing a  
15 lot of work in trying to do that, but maybe to  
16 help facilitate them do the work they're already  
17 doing.

18 MR. NORTH: Okay. That's certainly  
19 something that can be considered when it comes to  
20 the Board for rulemaking, too.

21 The last one that really applies and  
22 would create some work for the Board is Senate  
23 Bill 102, and essentially this expands the  
24 rulemaking authority of the Board in the Public  
25 Water Supply Act.

1           Several years ago the EPA adopted what's  
2   called the Groundwater Rule, and it requires that  
3   public agencies that administer the act have the  
4   authority to require some changes in design of  
5   public water supplies if it creates either  
6   contamination of public water supplies, or the  
7   potential for contamination; and right now, it's  
8   been our determination that the rulemaking or the  
9   rulemaking authority that the Board has in the  
10  Public Water Supply Act is not that broad.

11           So this would expand to allow the Board  
12  to adopt rules that would comply with the EPA's  
13  groundwater rule, so if this passes, you will see  
14  rulemaking that would look very similar to the EPA  
15  groundwater rule.

16           And finally, the last bill is also a  
17  Super Fund bill. It makes technical revisions to  
18  the Super Fund law, so I won't go into that.

19           MS. SHROPSHIRE: I don't know if you can  
20  talk on WCI or the potential climate change  
21  legislation -- don't feel like you have to -- but  
22  I'm just curious.

23           MR. NORTH: I cannot, no. If you would  
24  like, I could try and get somebody from upstairs  
25  in Planning who might be able to talk about that

1 later in the meeting.

2 MS. SHROPSHIRE: That's okay.

3 MR. NORTH: And so then if you would go  
4 to the other handout, and these are basically  
5 bills that deal with the Administrative Procedures  
6 Act or the Board itself by name. And I have to  
7 tell you, there are a lot of bill drafts out  
8 there. For example, I think there is almost forty  
9 bill drafts that just deal with gravel mines this  
10 time. There are many bills that deal with  
11 environmental law, etc.

12 So in an attempt to narrow that down a  
13 little bit, what I've done is I've only included  
14 bills that have already been introduced, or bills  
15 that I can see on the bill drafting status system  
16 are moving. They're not on hold. There is  
17 somebody actually drafting the bill.

18 So with that in mind, the first one is  
19 Senate Bill 20. It creates a presumption that a  
20 rule is invalid if it's not adopted in  
21 accordance with the Montana Administrative  
22 Procedures Act.

23 Now you might think that that wouldn't  
24 be a change in existing law, but it actually would  
25 be. This is a response to a Montana Supreme Court

1 case, wherein an agency adopted a rule with a  
2 statement of reasonable necessity that was  
3 inadequate and I think in error.

4 And so the rule was challenged in  
5 District Court, and it went up to the Supreme  
6 Court, and Supreme Court looked at the APA, and  
7 the APA has a provision that says a rule is valid  
8 as long as it's adopted in substantial compliance  
9 with the purposes of the Act. So the Supreme  
10 Court ascertained that the purposes of the  
11 Administrative Procedures Act is to provide an  
12 opportunity for public notice and public comment,  
13 and that had been provided in this case. So the  
14 Supreme Court upheld the rule.

15 And so this is an attempt to correct  
16 that and say no, agencies actually have to comply  
17 with all of the APA in order for a rule to be  
18 valid.

19 Senate Bill 90 modifies the bill sponsor  
20 or notification requirements. Just briefly, the  
21 bill sponsor notification requirements is that  
22 anytime an agency adopts a rule to implement a  
23 bill or an amendment to a statute, a new statute  
24 or an amendment to the statute, the first time it  
25 does that, it has to notify the bill sponsor when

1 it's beginning to draft the rule, and then it has  
2 to notify the sponsor when it's actually proposing  
3 the rule by publication in the Secretary of State.

4           And this would amend that to say that we  
5 have to contact the sponsor. I'm assuming that  
6 means have a conversation with the sponsor. We  
7 have to tell them about our timelines for  
8 rulemaking, and we also have to advise them that  
9 if they don't like our rule or your rule, that  
10 they can go to the legislative committee that's  
11 assigned to review the agency's rulemaking, and  
12 petition that legislative committee to register an  
13 objection with the agency. Then it says that if  
14 the bill sponsor makes comments, the agency has to  
15 single those out if it adopts the rule, and say  
16 how it responded to the bill sponsor's comments.

17           And that bill was heard on the 16th of  
18 January, and as of this morning, no action has  
19 been taken.

20           Senate Bill 123 again deals with  
21 statements of reasonable necessity, and it says  
22 that if an agency amends a statement of reasonable  
23 necessity, that it has to give time, adequate  
24 time, to comment on that amendment.

25           And this again arises from a specific

1 situation. As I understand it, an agency issued a  
2 notice of proposed rulemaking without an adequate  
3 statement of reasonable necessity. It was pointed  
4 out to the agency that that was the case, so it  
5 published a modified statement of reasonable  
6 necessity, but the comment period was already done  
7 by then, so people didn't have an opportunity to  
8 comment on that.

9           So this would correct that situation,  
10 and I would say that while this would certainly  
11 apply to the Board from a legal standpoint, from a  
12 practical standpoint, I don't think it's a big  
13 deal for the Board. We try to make our statements  
14 of reasonable necessity fairly extensive and  
15 accurate; and we would always propose that if we  
16 had to change one of those, it should go up for  
17 public comment.

18           Now, the next three bills are where  
19 there has been a change. As of late yesterday  
20 afternoon, the next three bills were tabled in the  
21 House State Administration, so unless there is  
22 questions about that, I guess I probably won't go  
23 into those, because it's very unlikely that  
24 they'll become law.

25           Finally down at the bottom there is LC



1 891, and that one I think is ready for  
2 introduction, and it would provide that  
3 administrative rule can't take effect until the  
4 Legislature approves it by joint resolution.

5 Currently the law is that rule becomes  
6 effective, of course, when adopted and published,  
7 and the Legislature can always repeal it by a  
8 bill, so this would reverse that process.

9 CHAIRMAN RUSSELL: Where does the  
10 Department stand on this one?

11 MR. NORTH: Well, actually on all of  
12 these bills, it's the Administration that decides  
13 what they'll do on that, and then the agencies may  
14 be called upon to testify against them. In most  
15 of the previous bills, there were agencies that  
16 went in and testified against them; and I suspect  
17 that might be the case here, but I don't know, and  
18 I won't know until it's introduced.

19 CHAIRMAN RUSSELL: It sounds like 891  
20 would grind the process to a stop.

21 MR. NORTH: Yes, sir. And then LC 2055,  
22 this would essentially amend the House Bill 521.  
23 Right now the Board can go ahead and adopt a rule  
24 that's more stringent than federal rules if it  
25 makes certain findings. This would remove that

1 ability, and would simply say the Board's rules  
2 and the Department's rules can be no more  
3 stringent than federal rules if there is a  
4 comparable rule.

5 CHAIRMAN RUSSELL: Under the previous  
6 administration, that was probably important, but I  
7 would say that they can have at it now.

8 MR. NORTH: And finally -- I think it's  
9 on the back of yours -- there are five bill drafts  
10 that are moving. I've checked, and I think none  
11 of them at this point have language that is  
12 available, so it's very hard for me to tell what's  
13 exactly going to be in them.

14 But there is one to revise the laws  
15 governing the Board; there is one to generally  
16 revise the laws governing the Board; then there is  
17 one that would provide for a stay of permit  
18 obligations during litigation, and I would assume  
19 that would include contested cases, require the  
20 posting of a bond for people who ask for contested  
21 case hearings the second time around. They can  
22 challenge a permit once without posting a bond,  
23 but the second time around, they'd have to post a  
24 bond.

25 And then finally, and I'm not quite sure

1 what this one would -- what it's trying to do, but  
2 it would require dismissal of appeals that are not  
3 based on findings of fact or conclusions of law.

4 CHAIRMAN RUSSELL: You mentioned that  
5 you may not be versed in some of these LC's that  
6 are in front of us. What would they be posting a  
7 bond for?

8 MR. NORTH: I think it would be for any  
9 -- It would be similar to a bond that a Court can  
10 require, which is to provide that any lost income  
11 to workers at a particular facility or any lost  
12 profits by the company would be reimbursed if the  
13 company ultimately prevails.

14 CHAIRMAN RUSSELL: You're only aware of  
15 two things trying to change the laws governing the  
16 BER?

17 MR. NORTH: Right.

18 CHAIRMAN RUSSELL: Is there only two  
19 this time?

20 MR. NORTH: There are only two this  
21 time, and as I said, there is one in there, but  
22 it's on hold, to abolish the Board. And there are  
23 probably --

24 CHAIRMAN RUSSELL: Only one?

25 MR. NORTH: There are probably 80 or so

1 bill draft requests that just say "revise  
2 environmental law," and that could include  
3 generally revising the laws governing the Board,  
4 but these are the only two that mention the Board  
5 by name.

6 CHAIRMAN RUSSELL: Thanks, John.  
7 Anything else?

8 MR. SKUNKCAP: I had a question on the  
9 Bill 68, the road kill one. Do you know anything  
10 about that one?

11 MR. NORTH: Yes.

12 MR. SKUNKCAP: With the Montana  
13 Department of Transportation on these sites, do  
14 they coordinate with Chris Davine (phonetic) the  
15 grizzly bear coordinator, on these sites? Because  
16 that can have a huge impact throughout the NCBE,  
17 because a lot of times what they do is move  
18 grizzly bears that are habituated to a certain  
19 area on both sides of the Rocky Mountains, and  
20 what they're doing is just moving a problem bear  
21 to somebody else's area like that.

22 And I never read or hear anything about  
23 these. I didn't even know they had these sites.  
24 Is there any problems with them, or do they  
25 coordinate with the grizzly bear coordinator in

1 the NCBE? Can you answer that, or can you tell me  
2 who can?

3 MR. NORTH: Mr. Chairman, Mr. Skunkcap,  
4 I can't answer that question, but Rick Thompson,  
5 probably Rick Thompson from our Solid Waste  
6 Section can answer that, and I'll get that  
7 information for you before you leave today.

8 MR. SKUNKCAP: I appreciate that. Thank  
9 you. Because that has a big impact on Montana on  
10 both sides of the Rocky Mountains and the grizzly  
11 bear habitat.

12 MR. NORTH: I imagine.

13 MR. SKUNKCAP: Not so much as wolves,  
14 but grizzly bears do eat carcasses like that.  
15 Wolves will kill their stuff first.

16 CHAIRMAN RUSSELL: Just another follow  
17 up: Are they obligated to take these off the  
18 road, the MDT? I know you probably can't answer  
19 that, but when I call them, they say, "We don't  
20 have to do it." We must not have a composting  
21 facility in the Flathead area.

22 MR. NORTH: I don't know, but I think  
23 Rick Thompson can probably answer that, too

24 MR. SKUNKCAP: That would be the thing,  
25 too, if grizzly bears are getting hit on the road,

1 and that's what I was wondering, too. I just  
2 always thought they just got drug away by animals  
3 or what.

4 MR. NORTH: It's my understanding that  
5 they do take quite a few of these away.

6 CHAIRMAN RUSSELL: Thank. Because the  
7 next two are grouped, I'm going to take a break,  
8 and then we'll get back into the next two agenda  
9 items. Ten minutes.

10 (Recess taken)

11 CHAIRMAN RUSSELL: We are on to the last  
12 briefing item on the Gallatin ORW briefing, and  
13 that will roll right into our first action item.

14 MR. ELLERHOFF: Mr. Chairman, the  
15 Gallatin Outstanding Resource Water briefing,  
16 we're going to employ a tag team approach. Bob  
17 Bukantis is going to do the first part of the  
18 briefing, followed by Eric Regensburger.

19 MR. BUKANTIS: Mr. Chairman, members of  
20 the Board, for the record, my name is Bob  
21 Bukantis, and I'm the head of the Water Quality  
22 Standards Program here in the Department of  
23 Environmental Quality.

24 And this morning I'm going to start by  
25 giving you a brief overview of the Gallatin ORW,

1 and I'm going to start with just kind of a general  
2 explanation of how ORW designation is a component  
3 of water quality standards, and particularly the  
4 nondegradation piece of water quality standards;  
5 give you a little bit, a synopsis of the history;  
6 and tie it into the overview of the ORW  
7 designation process, just a reminder of exactly  
8 where we're at today in that process, briefly  
9 review the proposed rule, and hand it over to Eric  
10 Regensburger, who will then talk about how the  
11 Department would implement the ORW, with special  
12 emphasis on how we look at connection of surface  
13 water to groundwater.

14           Basically, basic water quality standards  
15 concepts. Water quality standards is really a  
16 combination of beneficial use that is intended to  
17 be protected, a criteria on how to protect that  
18 use, which in Montana is often referred to as the  
19 standards themselves, and nondegradation policy;  
20 and these things work in concert to provide basic  
21 protection in water quality programs to protect  
22 water quality.

23           I'll try to illustrate this a little bit  
24 with a specific example, an issue that's been  
25 before this Board a lot, coal bed methane and

1 EC/SAR standards. In this case, the beneficial  
2 use is irrigated agriculture that we want to  
3 protect, and an example of the criteria or  
4 standards themselves is that monthly average of  
5 three, and no sample may exceed four and a half  
6 for sodium adsorption ratio in the Tongue River  
7 during the irrigation season. And in 2006, we  
8 decided that for purposes of nondegradation,  
9 especially as applied to high quality waters, the  
10 SAR would be considered a harmful parameter.

11 So another basic concept is: The  
12 numeric standards or criteria themselves tend to  
13 be applied in permits for use in doing water  
14 impairment determination for 303D listing -- which  
15 targets the TMDL; also enforcement, use in  
16 enforcement investigations; sometimes for help to  
17 guide restoration activities, etc. -- whereas the  
18 nondegradation policy piece of the standards tends  
19 to only be applied in permits, specifically  
20 applied to new and increased sources.

21 So what is nondegradation basically?  
22 I'll just try to summarize the policy that's found  
23 in statute.

24 Basically there is really three main  
25 components of nondegradation. The basic thought



1 is, the idea is to maintain and protect Montana's  
2 water quality, not necessarily just give away  
3 clean water to the first person who comes along.

4 But to get back to the three basic  
5 components, the policy says that all of the waters  
6 in the state should at least receive the very  
7 basic protection of nondegradation, and that is  
8 that existing uses need to be protected and the  
9 water quality maintained to protect those uses,  
10 and that applies to all waters.

11 Then we have high quality water. High  
12 quality water is defined as any water that is  
13 cleaner than the standards. The Department  
14 usually looks at high quality water on a parameter  
15 by water body specific basis, and there is kind of  
16 a second level of protection that applies to  
17 Montana's high quality waters, and typically this  
18 is where most of the action is in nondegradation.

19 And the State policy says that that  
20 water must be maintained unless there is a good  
21 reason to degrade that water, and defines a  
22 process on how an alternative analysis would be  
23 done to support an authorization to degrade, and  
24 there is also a process where the State would look  
25 at what would be a significant impact to high

1 quality water.

2           And in practice, depending on the  
3 pollutant, there may be some incremental  
4 degradation of that water that's allowed, which  
5 feeds into part of the need for an ORW as an  
6 outstanding resource water. An outstanding  
7 resource water provides a third level of  
8 protection, and that's provided to a small subset  
9 of Montana's waters. So the ORW receives the  
10 designation -- ORW waters receive the highest  
11 level of protection under Montana's nondegradation  
12 policy.

13           So Mr. Skunkcap, did you have a  
14 question?

15           MR. SKUNKCAP: Mr. Chairman, can we ask  
16 questions during this?

17           CHAIRMAN RUSSELL: Go ahead.

18           MR. SKUNKCAP: You mentioned that the  
19 water quality all throughout the state. I know  
20 tribes have their different water quality issues,  
21 too. How are you working with the tribes on their  
22 water quality? Does the State have that  
23 jurisdiction to going to the Tribes? A lot of  
24 times they don't, and they state that, or  
25 something like this, just perceives that the State

1 has control over that, and that's not right.

2 MR. BUKANTIS: Mr. Chairman, Mr.  
3 Skunkcap, I agree with you. The State does not  
4 have control over waters on reservations. In some  
5 cases, the reservations have primacy over that; in  
6 other cases, EPA has that until the tribes have  
7 treatment and sustained status.

8 And we do work with the tribes on  
9 issues. In the past I've helped with some  
10 assessment, water quality assessments and  
11 training, and tend to testify and help with their  
12 standards, and also we work cooperatively on  
13 TMDL's, etc.

14 MR. SKUNKCAP: So does that need to be  
15 changed in this wherever it's stated? Because  
16 that has a big impact. If you move on, or we move  
17 on, that wording is in there forever. And does  
18 that need to be reworded something that omits the  
19 tribes?

20 MR. BUKANTIS: This wording right here  
21 currently is in Montana's statute, and the way --

22 MR. SKUNKCAP: What I'm saying is  
23 something that was worded like that, where the  
24 tribes didn't have that, made it to statute, and  
25 that's not right.

1           MR. BUKANTIS: I guess, Mr. Chairman,  
2 Mr. Skunkcap, the way I would address that is to  
3 say that when we work with the water quality laws  
4 and regulations, we recognize that we don't have  
5 authority over tribal waters, and --

6           MR. SKUNKCAP: But you're saying that,  
7 but it's not written on there. I guess what I'm  
8 asking is: Can that be written so when somebody  
9 is carrying a bill to that, or introducing new law  
10 like that, that's the way it goes in, and it makes  
11 it to -- I mean this is going back years and years  
12 how stuff have made it through, and Montana just  
13 perceives it like that.

14           I know the tribes have fought for years  
15 to change that, and just because it's been that  
16 way for so long, they just assume it's that way,  
17 and that's not how it was perceived.

18           MR. BUKANTIS: I guess, again, I'm not  
19 sure what more I could really say on that, other  
20 than I know that we recognize tribal sovereignty.

21           MR. SKUNKCAP: That's fine. I'll take  
22 that with me. Thank you, Mr. Chairman.

23           MR. BUKANTIS: So basically the  
24 Legislature is clear that outstanding resource  
25 waters need to be provided the highest level of

1 protection under State law.

2 So again, just summarizing the three  
3 levels of water quality protection that I talked  
4 briefly about a few minutes ago, all waters need  
5 to have existing uses protected; and then high  
6 quality waters -- which are most of the waters in  
7 the state. And I guess as a point of  
8 clarification, by state, we're referring to the  
9 political entity of the state of Montana as  
10 separate from the tribes.

11 MR. SKUNKCAP: That's good, because a  
12 lot of times when it's going to benefit Montana,  
13 but when there is a clean up, Montana don't want  
14 anything to do with the tribes, but when there is  
15 something, a quantity of water that the State  
16 wants, they'll go ahead and just pick and choose,  
17 and it just gets to me that the wording is out  
18 like that.

19 MR. BUKANTIS: And again, our  
20 outstanding resource waters. And earlier I had  
21 mentioned that it's really a small subset of the  
22 waters in the state, and the waters that now are  
23 designated as outstanding resources are those  
24 waters which are found in national parks and  
25 wilderness areas; and there is also an option for

1 this body, the Board of Environmental Review, to  
2 designate waters as an outstanding resource water.  
3 And that's what's happening with the Gallatin.

4           Again, just to visually summarize the  
5 basic concepts. If we consider our hypothetical  
6 pollutant to have a standard of 100, and that  
7 ambient background would be ten, impaired waters  
8 are those waters that have more pollutant than  
9 allowed by the standard; and the high quality  
10 waters are the waters that are cleaner than the  
11 standard, and those would also include ORW waters.

12           But the important distinction between  
13 ORW's and high quality waters is that our  
14 nondegradation policy for high quality waters in  
15 at least some cases would allow incremental  
16 slippage, if you would, towards the standard to  
17 accommodate some assimilative capacity, and we  
18 would not be allowed to give that away for water  
19 that's designated ORW water.

20           MS. SHROPSHIRE: At the beginning of  
21 your presentation, you had numeric and then  
22 narrative. I may expose myself. I should  
23 probably know the answer to this. Is nondeg  
24 considered a narrative standard?

25           MR. BUKANTIS: No. Mr. Chairman, Ms.

1 Shropshire, basically by narrative and numeric  
2 standards -- and this is one of those things I was  
3 saying -- maybe I should have left that simpler or  
4 explained it better. But that's a very good  
5 question.

6           The basic standards or criteria  
7 themselves that you tend to use as a test of  
8 whether you're protecting your uses are numeric or  
9 narrative. The nondeg criteria themselves for  
10 determining significance, whether a water is  
11 significant or not, is then applied against the  
12 standards.

13           So for example, you can have a numeric  
14 standard for nutrients; and to protect aquatic  
15 life, we're looking at developing standards -- as  
16 John discussed earlier -- that are very low, and  
17 those numbers are low because we believe those are  
18 the best numbers that are necessary to protect the  
19 resource.

20           And then you also have a narrative  
21 standard that is on the books that says that we  
22 cannot allow undesirable changes in aquatic life.  
23 So that becomes a narrative statement to say that  
24 if there is some activity that we're permitting,  
25 that we're not allowed to allow that activity to

1 go on if it's going to cause undesirable changes  
2 in aquatic life.

3 That's a narrative standard, whereas the  
4 numeric standard would be a specific number that  
5 says, "The best science says this is the number  
6 that's necessary for that water to be clean enough  
7 to support that use."

8 Once you have those in place, then you  
9 apply the nondegradation policy in permitting; and  
10 depending on the type of water you're looking at,  
11 you would then get more into specifics on how you  
12 would look at a fraction of that standard, for  
13 example.

14 MS. SHROPSHIRE: Can I follow up? If a  
15 standard doesn't exist, but you can measure some  
16 parameter, can you still have nondeg, or do you  
17 have to have a standard in order to impose nondeg?

18 MR. BUKANTIS: Generally the approach to  
19 a narrative standard with nondegradation is to say  
20 that the use needs to be protected, and that you  
21 allow no adverse change in ecological integrity  
22 since you don't have a number to partition out.

23 MS. SHROPSHIRE: So theoretically, let's  
24 say "X" parameter, and there is not a standard, a  
25 numeric standard, and you're seeing an increase in



1 that, you could argue that if it's not impairing  
2 or negatively impacting something, that that  
3 increase would be acceptable? Does that question  
4 make sense?

5 MR. BUKANTIS: Yes, and I'm afraid that  
6 I might start getting too speculative here  
7 without --

8 MS. SHROPSHIRE: But suffice it to say  
9 typically with nondeg, you have to have a  
10 standard?

11 MR. BUKANTIS: Yes. Nondeg basically is  
12 part of the standard in a collective sense, but we  
13 tend to think of the standards as those numbers  
14 that are set to protect the use, and then you  
15 adjust those numbers. Actually I have a slide  
16 buried in the back that I could get you if you  
17 want to try to --

18 MS. SHROPSHIRE: We can chat later, but  
19 thank you. That helps.

20 MR. BUKANTIS: Just a real quick summary  
21 of where we're at and what's happened with the  
22 Gallatin ORW. This has been going on for seven  
23 years now. And this Board was petitioned in  
24 December of 2001. In March of 2002, the Board  
25 accepted the petition, which triggered a need for

1 an EIS to do more in-depth analysis; and in fall  
2 2006, the Board initiated rulemaking to designate  
3 the Gallatin as an ORW.

4 And subsequently the public comment  
5 period has been extended three times, and I'll  
6 just talk a little bit more about that in terms of  
7 why. And actually associated with our first  
8 action item today, you did receive a copy of the  
9 letter from the Greater Yellowstone Coalition  
10 explaining a little bit about the progress that's  
11 been going on around the ORW in terms of local  
12 effects to address the issues that the ORW is  
13 intended to address.

14 So just briefly going over the  
15 designation process, earlier talking about what's  
16 happened so far, that has covered the first two  
17 steps, and puts us into the third step that I have  
18 up here on the slide, that is, the rule adoption  
19 to classify the Gallatin as an ORW based on the  
20 Board's and the Department's analysis of  
21 sufficient credible information to support that  
22 the ORW really is an outstanding resource, and  
23 that classification is necessary because that  
24 resource is at risk, and that there are not other  
25 effective processes to achieve the necessary

1 protection.

2           And this last point is really an  
3 important one because I think that's what is  
4 trying to happen now at the local level, is  
5 they're trying to address this through an  
6 alternative process.

7           Another important point here in terms of  
8 perspective on all this is unlike the rules that  
9 you typically deal with as a board under the  
10 Montana Water Quality Act, legislative approval is  
11 required on an ORW designation before the  
12 designation will take effect.

13           So I'll just real briefly refresh you on  
14 the proposed rule. There is really two parts of  
15 this rule. The first part simply says that the  
16 main stem of the Gallatin River would be  
17 designated as an ORW; the second part would  
18 clarify -- well, it really does two things: Kind  
19 of grandfathers in existing discharges, and  
20 clarifies that those are not subjected to the ORW,  
21 that this would affect new or increased sources.

22           It also clarifies the Department has the  
23 authority to address sources that may be connected  
24 by groundwater to the Gallatin ORW, as well as  
25 consider cumulative impacts of those and other

1 sources.

2 And just to summarize, really the ORW  
3 designation provides the highest level of nondeg  
4 protection allowed under Montana's water quality  
5 standards. And I'd be happy to answer any more  
6 questions, and if not, I'll pass it on to Eric  
7 Regensburger.

8 CHAIRMAN RUSSELL: Any questions for  
9 Bob?

10 (No response)

11 CHAIRMAN RUSSELL: Thanks, Bob.

12 MR. REGENSBURGER: Mr. Chairman, members  
13 of the Board, my name is Eric Regensburger, and I  
14 work with the Public Water and Subdivision Bureau  
15 here at DEQ, and like Bob said, I'm here to talk a  
16 little bit about a little more specifics about the  
17 ORW Gallatin River specifically with regards to  
18 point sources from groundwater discharges.

19 But Ms. Shropshire, Mr. Chairman, I may  
20 able to answer the question you had for Bob. When  
21 you asked that question, I was rifling through my  
22 rules real quick on nondeg. And at the end of the  
23 nondeg rules, there is kind of a catch-all  
24 statement that says even if you meet all these  
25 other narrative or numeric criteria that are

1 specifically in the nondeg rules, the Department  
2 can determine that something is degradation based  
3 on a set of criteria, based on new information  
4 that might be out regarding a specific parameter  
5 or something like that.

6 So there is kind of an all encompassing,  
7 if we miss anything, or if information changes  
8 over time regarding toxicity, or impacts on  
9 certain parameters, that we can address those,  
10 even if they aren't specifically addressed in the  
11 rest of the nondeg criteria. So I hope that helps  
12 you a little bit.

13 MS. SHROPSHIRE: It does. Thank you.

14 MR. REGENSBURGER: So although there is  
15 a lot of different bullet items on this next  
16 slide, it really won't take very long to go  
17 through this. I'm just going to go through  
18 location, the criteria, talk about point sources  
19 under ORW, and then specifically focus on how we  
20 determine connection between groundwater and  
21 surface water for the ORW designation, and then  
22 talk about the affected area, and real quickly on  
23 the impacts of ORW designation as we anticipated  
24 they might occur.

25 This slide is just an overview of the

1 area. The ORW area that was proposed extended  
2 from the boundary of the Yellowstone National Park  
3 on the south side of the Gallatin Valley, and then  
4 it continues all of the way up, 50 or 60 miles up  
5 to the confluence with Spanish Creek. So that's  
6 the area that we're looking at.

7 So for ORW, the requirements under ORW  
8 are that there are three criteria that you look  
9 at. One is that the sources that are being  
10 affected by ORW designation have to be new or  
11 increased; they have to be a point source to the  
12 affected river or surface water; and they have to  
13 result in a permanent -- and by "permanent," we've  
14 interpreted that as a measurable -- change in the  
15 water quality of an ORW.

16 And all three -- a source, any source  
17 has to meet all three of those criteria in order  
18 for it to be regulated under ORW designation, and  
19 the main point there is that there are some  
20 sources that are not point sources or not  
21 permanent that would not be regulated under ORW  
22 designation.

23 And like I said, I'm going to focus a  
24 little bit here on the point sources, and how we  
25 determine what is a point source for an ORW. It

1 may seem like a simple question or issue, but it  
2 gets quite complex.

3 First of all, the simple part is if you  
4 have a pipe that goes into the river with some  
5 type of pollutant, that's a direct discharge.  
6 That's a point source.

7 And then the second sources we were  
8 looking at under the ORW designation were  
9 groundwater, things that discharge to groundwater,  
10 but were in direct hydraulic connection with the  
11 river. And that phrase "direct hydraulic  
12 connection" took up quite a few pages in the EIS  
13 for the ORW. And I'm going to describe how that  
14 direct hydraulic connection was defined for this  
15 specific Gallatin ORW.

16 The main criteria that was used was the  
17 travel time from the discharge to the groundwater  
18 to the river, and there were three main things  
19 that control that: Hydraulic gradient, which is  
20 basically the slope of the groundwater table;  
21 hydraulic conductivity, which is the intrinsic  
22 property of soils and rocks that allow water to  
23 move through it at a certain rate; and then the  
24 porosity, which is basically the amount of buoy  
25 space in a soil or a rock.

1                   And based on the flow velocity through  
2 the different geologic units that exist in that  
3 valley, in that area of ORW designation, they came  
4 up with one year travel time as the initial  
5 criteria for a direct discharge or a direct  
6 hydraulic connection from a groundwater discharge  
7 to the river. The one year time of travel is used  
8 in other regulations, and well head protection,  
9 and other areas of environmental regulation, so  
10 it's a fairly common benchmark to use.

11                   So each one of these different hydraulic  
12 units, they determined how long it would take,  
13 what distance from the river would be required  
14 before that one year time of travel was exceeded,  
15 and that was the initial criteria used to define  
16 the distance from the river that a discharge would  
17 considered a direct hydraulic point source to the  
18 river.

19                   And then they had some other additional  
20 criteria after that first one year time of travel.  
21 The distance of the footprint or the distance from  
22 the river could be shortened based on primarily  
23 three things, and that was:

24                   If the ground water was more than 25  
25 feet below the surface, you could shorten the



1 length, the width of a footprint that way. If the  
2 aquifer was confined -- which meant that surface  
3 water would not get into the aquifer, or water  
4 discharge at the surface could not get into the  
5 aquifer -- then you could also shorten the  
6 footprint.

7           Then there was also a case where there  
8 was additional criteria applied to the Madison  
9 aquifer, which is a unique aquifer, has very large  
10 solutions in it, and has a whole different set of  
11 hydrologic headaches that are associated with it  
12 when you try to regulate it and predict the  
13 movement of contaminants through it.

14           And then in the end, the minimum width  
15 that the footprint could be was 300 feet, and that  
16 was based on some -- at least one study by a  
17 U of M professor that looked at how far pathogens  
18 from wastewater systems could travel in the  
19 subsurface.

20           So that's really the nuts and bolts  
21 summary of how the footprint was developed.

22           In the EIS, there was a lot of  
23 information on what impacts designating this  
24 footprint would have on the ground, and I've  
25 boiled it down to just these two very general

1 statements. Basically it would reduce the amount  
2 of discharges inside the footprint; it would limit  
3 the number of new wastewater systems that could be  
4 built inside that footprint area.

5 Areas outside the footprint would still  
6 have to go through the current nondegradation  
7 procedures, which would be basically no change  
8 from the current procedures.

9 And then basically this map just shows  
10 the north half of the ORW designation, and kind of  
11 just shows you the -- in the light red is the  
12 actual footprint area that would be affected. So  
13 any discharge inside that footprint point source  
14 discharge would be affected by the ORW  
15 designation.

16 And you can see in some areas it's very  
17 narrow, especially where the canyon is very  
18 narrow; and in other areas, it extends anywhere --  
19 I think the maximum is about a half mile to a  
20 three quarter distance from the river.

21 CHAIRMAN RUSSELL: Eric, how are you  
22 actually describing that if I were a property  
23 owner somewhere along here? Is it map detail,  
24 meets and bounds?

25 MR. REGENSBURGER: Yes. That's a good

1 question, because that came up in the comments  
2 when we first -- the comments to the draft EIS.  
3 And how we figured it, we had to develop a map  
4 because we had to determine impacts. We had to  
5 know what area was affected. These maps were set  
6 up as a first blush. This is the area we believe  
7 is impacted.

8           If someone came in to us with a proposal  
9 to develop something in or near this footprint, we  
10 would then use the criteria that were developed in  
11 the EIS, and determine if that specific property  
12 met those criteria to be inside the footprint.

13           So we would go to a site. If it was  
14 Location X, we would look at the geology there,  
15 determine the velocity, see if they were in the  
16 one year time of travel. If they were, then they  
17 would meet that criteria, and they would at that  
18 point be inside the footprint, and then go through  
19 those other criteria I just mentioned, and see if  
20 the footprint would change, and they'd be outside  
21 the footprint.

22           So it would be a site by site  
23 determination. The map was just a way to present  
24 people with what we think is going to be  
25 approximately the area that's impacted.

1           CHAIRMAN RUSSELL: The main pollutant or  
2 nutrients that you're looking at is phosphorus.

3           MR. REGENSBURGER: Nitrogen and  
4 phosphorus both.

5           CHAIRMAN RUSSELL: But nitrogen --  
6 groundwater connectivity -- I'm a septic system  
7 guy, you know, so everything equates back to that.  
8 But if you look at the breakthrough calculations  
9 between a regular subdivision -- something that  
10 would be outside of this, fifty years -- versus  
11 what's inside one year, there seems to -- it would  
12 be a challenge. A line on the map would not mean  
13 very much when you really look at the fate of that  
14 pollutant.

15           MR. REGENSBURGER: Well, yes. Because  
16 the line is based on time of travel, the longer  
17 the pollutant stays in the groundwater, the more  
18 time it has to get treated. So there is some  
19 connection between time of travel that pollutant  
20 has to what it actually discharges. A lot of it  
21 depends on the soil, too. There is a lot of  
22 factors we could have accounted for in this  
23 designation, but we kept it fairly simple with  
24 using time of travel.

25           As it turned out, phosphorus was the

1 limiting factor in the overall thing, like you  
2 said; but if you looked at both of them, and the  
3 50 year break through you're talking about is  
4 actually a different kind of calculation because  
5 it accounts for the amount of soil that absorbs  
6 the phosphorus, where this time of travel is  
7 basically just the velocity of the groundwater  
8 period.

9           So anything that's discharged from the  
10 drainfield today would -- that water at least  
11 would be at the river in one year. The phosphorus  
12 may be absorbed in that one year time, and never  
13 get to the river; but we made a conservative  
14 assumption that phosphorus would get through  
15 and --

16           CHAIRMAN RUSSELL: Take the soil out of  
17 it.

18           MR. REGENSBURGER: We took the soil out  
19 of the equation, so with the one year time of  
20 travel, the phosphorus might not actually get to  
21 the river for another 30, 40, 50 years, but the  
22 fact is it's going to get there, and under ORW, it  
23 doesn't matter how long it takes to get there,  
24 it's going to get there, so we couldn't allow it.

25           MS. SHROPSHIRE: I have some questions

1 basically along the same lines, and maybe I'm not  
2 understanding it. But let's say your septic  
3 system is -- from the time it's built, it takes  
4 two years to travel to the river. It's still  
5 hydraulically connected.

6 And my understanding of the chemistry is  
7 with something like nitrate, it has nothing to do  
8 with the amount of time that it takes to travel  
9 from the septic system to, let's say, the river.  
10 It has everything to do with the chemistry of the  
11 water.

12 So if you're in an oxidizing  
13 environment, nitrate is persistent, and it doesn't  
14 matter how long it is. And so you're going to be,  
15 in two years, contributing new sources to the  
16 river if you're, let's say, two years away. And  
17 so the one year limit in terms of defining  
18 hydraulic connectivity -- I don't know how else to  
19 say it, but to me, it doesn't make sense. It  
20 doesn't --

21 You're still hydraulically connected if  
22 it takes two years to get there, and if we were  
23 measuring this in time, in 2001, there would be a  
24 whole lot of septic systems that are contributing  
25 to the river.

1           And so I'm concerned that we're going to  
2 be missing -- if this is the way we're describing  
3 it -- a whole lot of sources that potentially  
4 could be contributing to the river. And I don't  
5 know how that can be addressed.

6           MR. REGENSBURGER: Ms. Shropshire, Mr.  
7 Chairman, you're correct. The soil and the  
8 physical environment has a lot to do with how  
9 nitrogen, specifically nitrogen gets removed from  
10 the environment.

11           The time of travel -- Statistically time  
12 of travel, there is a connection between how long  
13 it sits in there, because the longer it sits in  
14 the groundwater, the more chance it has to  
15 encounter sites that may not be oxic, and may be  
16 anaerobic, and may have the proper conditions. So  
17 statistically you can argue that there is some  
18 connection between time of travel and  
19 introduction.

20           But generally you're correct, is that it  
21 depends on the environment. You can get nitrogen  
22 reduction over a very short distance if you've got  
23 the right conditions, or you can have no nitrogen  
24 reduction over a very long distance of travel if  
25 you don't have the right conditions.

1           I guess it's very difficult to predict  
2 the nitrogen reduction in the environment. It's  
3 called denitrification. We looked at -- We've  
4 been looking for years to find studies where we  
5 could predict denitrification, and make better  
6 maps such as this that would have a better focus  
7 on what's actually happening in the subsurface.

8           But the science really is not there, so  
9 time of travel is kind of the next best thing to  
10 get at it. And everything is hydraulically  
11 connected, yes. I mean the Gallatin flows into  
12 the Missouri. You could argue that this is all  
13 connected to the Missouri, and look at it all down  
14 at the North Dakota border.

15           So you had to draw a line between  
16 hydraulic connection and direct hydraulic  
17 connection, and time of travel was the best thing  
18 we could come up with that didn't get so complex  
19 that it would require basically a thesis to study  
20 every site to determine what the chemical  
21 conditions were of the groundwater, whether  
22 denitrification would occur or not.

23           MS. SHROPSHIRE: I appreciate it is  
24 complicated. One thing that I think, at least  
25 from my experience, is that shallow groundwater



1 tends to not be reducing. So in general in  
2 shallow conditions, you won't see reductions.

3 So I don't know if that's something that  
4 could be incorporated at all in terms of an easier  
5 way to determine whether or not you're going to  
6 have reducing conditions or not, because from my  
7 experience in shallow groundwater, nitrate doesn't  
8 reduce because it's exposed to oxygen, so --

9 But I do appreciate that you can't do a  
10 whole research project on this, but it still -- I  
11 guess it concerns me a little bit that one year is  
12 not very long.

13 MR. REGENSBURGER: Ms. Shropshire, Mr.  
14 Chairman, again, I agree with your analysis. In  
15 the case of the Gallatin Valley, however, since it  
16 is so narrow, and there is not much room for  
17 development because most of the land is national  
18 forest land -- I haven't looked at all of the land  
19 ownerships versus the footprint, but I think the  
20 footprint covers a good portion of the areas that  
21 could actually be developed that are under private  
22 ownership.

23 So in this case it probably worked  
24 pretty good, because it covered most of the  
25 potentially developable areas. It may not work in

1 something as well in the Ravalli County,  
2 Bitterroot River, that's a much wider basin.

3 MS. SHROPSHIRE: Just one more follow up  
4 comment, and maybe a word of caution, that in  
5 terms of defining hydraulically connected, to me,  
6 that's not a solutransport term, it's more of a  
7 flow, which might be tested by looking at  
8 variations in wells. I mean if the well level  
9 goes up and down as the river level changes, it's  
10 a very good indication that they're hydraulically  
11 connected.

12 And so just putting a qualifier that I  
13 would be concerned that this is setting a  
14 precedence for other people to measure hydraulic  
15 connectivity, and I wouldn't necessarily want this  
16 to be used in other situations, if that makes  
17 sense.

18 MR. REGENSBURGER: Ms. Shropshire, Mr.  
19 Chairman, I know in the TMDL Section, they're  
20 struggling with this same issue on a more  
21 stabilized scale for TMDLs, and how to address  
22 impacts to septic systems and rivers.

23 I don't think they've yet come up with a  
24 good solution, but I think their solutions are  
25 going to incorporate more soil type situations and

1 impacts. And so I think they may be a little more  
2 complex than this, which may hopefully address  
3 some of the more scientific issues, complex  
4 issues, that come with nitrogen and phosphorous.

5 MS. SHROPSHIRE: Thanks.

6 MR. REGENSBURGER: And that was really  
7 the end of my presentation. So if there is any  
8 other questions.

9 CHAIRMAN RUSSELL: Any other questions  
10 for Eric?

11 MS. SHROPSHIRE: Is there an average  
12 distance?

13 MR. REGENSBURGER: Of the footprint?

14 MS. SHROPSHIRE: It makes perfect sense  
15 that it wouldn't be exactly the same, but I'm just  
16 sort of curious what --

17 MR. REGENSBURGER: Ms. Shropshire, Mr.  
18 Chairman, I don't think anyone has calculated  
19 that. Like I think the maximum width is about  
20 half a mile to three-quarters of a mile; and you  
21 can see on the southern part of this map, it gets  
22 pretty wide in some areas. The narrowest part is  
23 600 feet, because the minimum distance is 300  
24 feet, so both sides, 600 feet. So it ranges from  
25 600 to, say, 3,000 or 4,000 feet, but I don't know

1 what the average would be.

2 CHAIRMAN RUSSELL: I know Chuck would  
3 appreciate this, but those lines are probably 400  
4 feet wide, because we had that non-attainment area  
5 in Kalispell. Basically you draw a line, and  
6 there is about 400 feet that is in or out because  
7 of the line. So I like the logic about really you  
8 have to look at case by case, and area by area.  
9 Thanks, Eric.

10 I guess, Tom, we'll just move right into  
11 the first item, the action item on the agenda,  
12 initiation of rulemaking, appointment of Hearing  
13 Officer, in the matter of the amendment to ARM  
14 17.30.617, to designate the main stem of the  
15 Gallatin River. Do you want to go right back to  
16 Bob?

17 MR. ELLERHOFF: Mr. Chairman, yes, I do.  
18 Bob Bukantis will make the proposal.

19 MR. BUKANTIS: Mr. Chairman, members of  
20 the Board, for the record, again my name is Bob  
21 Bukantis, and I'm here just to really briefly say  
22 that the Department agrees with the position  
23 articulated by the Greater Yellowstone Coalition  
24 that we would like to see the public comment  
25 period extended, because we believe that they're

1 doing a good job on trying to resolve the issues  
2 that the ORW is intended to address, and would  
3 like to see -- continue this support that locally,  
4 those folks just locally addressing the  
5 development issues and protection of the Gallatin  
6 ORW.

7 So I'll just leave it at that in the  
8 spirit of brevity, and be happy to answer any  
9 questions.

10 CHAIRMAN RUSSELL: Before we take  
11 action, any questions by the Board?

12 (No response)

13 CHAIRMAN RUSSELL: Without prompting by  
14 any Tom, is there any member of the public that  
15 would like to speak to this matter before the  
16 Board takes action?

17 (No response)

18 CHAIRMAN RUSSELL: Seeing none, I'll  
19 entertain a motion to initiate rulemaking by  
20 publishing a supplemental notice, and appointing a  
21 Hearing Examiner.

22 MR. ROSSBACH: So moved.

23 CHAIRMAN RUSSELL: It's been moved by  
24 Bill. Is there a second?

25 MS. KAISER: Second.

1           CHAIRMAN RUSSELL:  It's been seconded by  
2 Heidi.  Any further questions?

3           (No response)

4           CHAIRMAN RUSSELL:  All those in favor,  
5 signify by saying aye.

6           (Response)

7           CHAIRMAN RUSSELL:  Opposed.

8           (No response)

9           CHAIRMAN RUSSELL:  Thank you, Bob and  
10 Eric, for your presentations.  The next item on  
11 the agenda, we're going to talk about some changes  
12 from the 2000 Legislature on model organizational  
13 rulemaking in contested case rules.  Tom, I'll  
14 give it to you.

15           MR. ELLERHOFF:  I think this would be  
16 good time for a pause.

17           MR. RUSOFF:  For the record, I'm David  
18 Rusoff, staff attorney for the Montana Department  
19 of Environmental Quality.

20           And the Department is proposing that the  
21 Department and the Board initiate joint rulemaking  
22 to adopt and incorporate by reference some  
23 revisions of model rules that occurred last year  
24 by the Secretary of State's office and the  
25 Department of Justice in response to House Bill 70

1 from the 2007 legislative session, which required  
2 some of the model rules that made more sense to be  
3 implemented by the Secretary of State's office, to  
4 be transferred from the Attorney General's Office  
5 to the Secretary of State. Those are rules  
6 regarding -- organizational rules adopted by  
7 agencies regarding their organizational structure,  
8 and model rules regarding rulemaking, which is  
9 overseen by the Secretary of State's Office.

10 So the Department and the Board have a  
11 Rule ARM 17.4.101 which adopts and incorporates by  
12 reference those model rules that I just mentioned,  
13 as well as contested case model rules that are  
14 still within the Department of Justice.

15 And last summer the Attorney General's  
16 Office and the Secretary of State's Office  
17 implemented the rule transfer, and in the process  
18 cleaned up some of their rules, made some minor  
19 editorial revisions that in my view don't change  
20 the substantive meaning of the rules. They both  
21 made some revisions to add some recent statutory  
22 requirements that weren't already in the rules,  
23 and made some revisions to clarify the rules.

24 So the Department is recommending that  
25 the Board, jointly with the Department, publish a

1 notice of intent to amend ARM 17.4.101 to reflect  
2 these changes in the Secretary of State's and  
3 Attorney General's model rules.

4 We're not proposing that a public  
5 hearing automatically be held, because both the  
6 Attorney General's Office and the Secretary of  
7 State's Office have both already held separate  
8 public hearings and received comments. We don't  
9 view this proposal today as a matter of  
10 significant interest to the public, and we think  
11 that it is unnecessary to hold a public hearing  
12 and incur the cost and time of doing that.

13 But in the notice that you have in front  
14 of you, there is a provision pursuant to the  
15 Montana Administrative Procedure Act that would  
16 allow or require the Department and the Board to  
17 hold a public hearing if requested by a certain  
18 minimum number of people.

19 And I think the notice that you have, I  
20 just noticed yesterday, has some blanks in it  
21 towards the end regarding that, and our proposal  
22 is that we, instead of trying to figure out how  
23 many people --

24 Backing up a little bit. MAPA requires  
25 that a public hearing be held if requested by a



1 certain percentage of the persons affected by the  
2 rule or 25 people, whichever is less, and we  
3 weren't able to determine -- I can't remember what  
4 the percentage is -- 10 percent or 25. We  
5 couldn't figure out a good way of determining what  
6 10 percent of all the people who could be affected  
7 by rulemaking rules and contested case rules would  
8 be, and so our proposal is to just use the more  
9 conservative approach, and schedule a public  
10 hearing if requested by 25 or more people, which  
11 would be fewer than 10 percent of all of the folks  
12 who could potentially be affected by the rules.

13 So I guess I should mention that we are  
14 proposing one minor change to 17.4.101. It is  
15 just a minor editorial change in subsection (4)  
16 that's not in the current rule. It's just a minor  
17 editorial change. We delete the word "MCA chapter  
18 implementing" in front of Article 2, Section 8 of  
19 the 1972 constitution, in that the wording is  
20 awkward and unnecessary, because the rules are in  
21 effect merely required by the constitution.

22 So other than that, we're just proposing  
23 that the current rule 17.4.101 just be amended to  
24 reflect the revisions made by the Secretary of  
25 State and the Attorney General's Office pursuant

1 to House Bill 70, and the Department recommends  
2 that the Board initiate rulemaking jointly with  
3 the Department as proposed. And I would be glad  
4 to answer any questions.

5 CHAIRMAN RUSSELL: Just procedurally,  
6 let's say 25 people decide that they want to chime  
7 in on this. If we didn't appoint a Hearings  
8 Examiner, would we have to come back and  
9 supplemental notice this?

10 MR. RUSOFF: Yes. Then in either event,  
11 it will come back to the Board to either publish a  
12 -- provide a proposed notice of amendment if a  
13 hearing has not been requested, or we'll come back  
14 to the Board with a notice of a public hearing.

15 And what I should also have mentioned is  
16 that at the top of the rule notice, there is a  
17 blank for the date on which the Board proposes to  
18 amend the above stated rule. That would be thirty  
19 days from the date of publication of this notice.  
20 MAPA requires thirty days notice prior to an  
21 agency rulemaking action, so thirty days would go  
22 in there.

23 If before the thirty days after  
24 publication expires we receive a request for a  
25 hearing by the minimum number of people, then a

1 notice of amendment would not be published, and we  
2 would publish -- we would come to the Board  
3 instead with a proposed notice of public hearing,  
4 and in that notice, the Board and the Department  
5 could appoint a Hearing Examiner.

6 CHAIRMAN RUSSELL: So I guess we can  
7 just initiate rulemaking and see what happens, and  
8 not appoint --

9 MR. RUSOFF: That's the Department's  
10 proposal. We don't expect anyone frankly to  
11 request a public hearing. As I mentioned, two  
12 public hearings have already been held, so there  
13 was plenty of opportunity to comment on the  
14 substance of the editorial revisions, and there  
15 are some other changes, like renumbering and  
16 reorganizing the rules. Both agencies took  
17 comment, and did make some revisions and response  
18 to those comments. I actually commented on them,  
19 and they made changes in response to my  
20 suggestions. So we don't expect this to be  
21 controversial at all.

22 MS. SHROPSHIRE: So just to clarify,  
23 that if you were to have a public hearing, people  
24 might be there because they felt obligated to be  
25 there, but if you didn't have one, no one would be

1 disappointed?

2 MR. RUSOFF: Well, it is something like  
3 that. I guess what I'm saying -- I don't know  
4 that anyone other than the Department and the  
5 Hearing Examiner and the Court Reporter would feel  
6 obligated to be there. But we would have to set  
7 aside the time, and there would be some expense in  
8 having the Board's hearing, and presumably  
9 Katherine Orr there, and the Court Reporter.

10 So this is not an uncommon practice.  
11 Generally the rule notices that are brought before  
12 the Board are matters of significant interest to  
13 the public, and so we just automatically propose  
14 that they be scheduled for public hearing; and in  
15 some situations, the particular act being  
16 implemented may require a public hearing for all  
17 rulemaking.

18 So it's unusual to bring something like  
19 this before the Board, but agencies do this all of  
20 the time when they amend rules like organizational  
21 rules and things that really aren't of much  
22 interest to the general public. Does that answer  
23 your question?

24 MS. SHROPSHIRE: I want to make sure  
25 we're following the rules.

1           MR. RUSOFF: I also suppose that there  
2 could be people who represent various groups who  
3 might feel that they should be there just to see  
4 what comments are made, so you're probably  
5 correct.

6           CHAIRMAN RUSSELL: With that, is there  
7 anyone in the audience who would like to speak to  
8 this before the Board takes any action?

9           (No response)

10          CHAIRMAN RUSSELL: With that, I'll  
11 entertain a motion to initiate rulemaking and  
12 publish the notice.

13          MR. MIRES: So moved.

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

16          MR. MARBLE: Second.

17          CHAIRMAN RUSSELL: It's been seconded by  
18 Don. All those in favor, signify by saying aye.

19          (Response)

20          CHAIRMAN RUSSELL: Opposed.

21          (No response)

22          CHAIRMAN RUSSELL: Motion carries. The  
23 next item on the agenda is the matter of  
24 amendments of ARM 17.8.308, 505, 744, 2505, and I  
25 see Deb is front of us.

1 MS. WOLFE: Good morning, Chairman  
2 Russell, members of the Board. My name is Debra  
3 Wolfe, and I'm a planner with the Air Resources  
4 Management Bureau, and I'm here today to represent  
5 the Department regarding the Board's consideration  
6 of the proposed rulemaking in the matter of the  
7 agricultural exemptions to regulation, and the  
8 removal of the requirement regarding the  
9 concurrent application process for Title 5 and  
10 Montana air quality permit applications.

11 The proposed revision of ARM 17.8.308  
12 and 17.8.744 clarifies the legislative directive  
13 to exempt certain commercial agricultural  
14 operations consistent with the statutory  
15 exemption. The revision of 17.8.1205 ensures a  
16 Montana air quality permit and a Title 5 permit  
17 may be processed in an order that preserves the  
18 respective timelines and therefore the validity of  
19 the final decision on each permit application.

20 The amendment of ARM  
21 17.8.504(2)(c) ensures that an applicant is  
22 appropriately charged for each permit application  
23 when applying for both a Montana air quality  
24 permit and a Title 5 permit for the same proposal.

25 Following the Board's initiation of

1 rulemaking last October in this matter, notice was  
2 published, comments solicited, Katherine Orr  
3 presided at a hearing held on November 25, 2008.  
4 No comments were received during the course of the  
5 comment period or during the course of the  
6 hearing.

7 The Department also prepared an analysis  
8 of stringency and takings which is included in  
9 your packet for this action. I'm available for  
10 any questions.

11 CHAIRMAN RUSSELL: All right. Any  
12 questions before we move along with this?

13 (No response)

14 CHAIRMAN RUSSELL: Seeing none, I will  
15 entertain a motion to amend the regulations as  
16 noticed, adopt the Hearing Officer's report, and  
17 the 521 and 311 analysis. Is there a motion?

18 MS. KAISER: So moved.

19 CHAIRMAN RUSSELL: Is there a second?

20 MR. MIRES: Second.

21 CHAIRMAN RUSSELL: Is there anyone out  
22 there -- before we take action. I think it's just  
23 your staff now. If you guys want to check out and  
24 come back as a member of the public, I'm willing  
25 to hear from you, but if not -- I just need to get

1 it on the record.

2 Seeing none, all those in favor, signify  
3 by saying aye.

4 (Response)

5 CHAIRMAN RUSSELL: Opposed.

6 (No response)

7 CHAIRMAN RUSSELL: Thank you. The next  
8 item on the agenda is new cases, new contested  
9 cases on appeal. The first one is the matter of  
10 violation of the Montana Water Quality Act by Jim  
11 Gilman Excavating, Inc.

12 MS. ORR: Mr. Chairman, members of the  
13 Board, this involved a precipitation event that  
14 happened in spring of 2008, and an excavating  
15 company that was hired by the Department of  
16 Transportation to excavate and install a new  
17 roadway up by Augusta. And they were discharging  
18 sediment to Elk Creek and Dry creek, and their  
19 BMP's failed in that period, in spring of 2008.

20 So this is an appeal from an NOV that  
21 was issued stating that Gilman Construction failed  
22 to install and maintain adequate BMP's, and that  
23 they're liable for unapproved discharges of  
24 sediment to State waters, significant sediment to  
25 State waters. The penalty requested is \$400,434.



1 CHAIRMAN RUSSELL: Question for  
2 Katherine. If the owner is the Department of  
3 Transportation, why aren't they part of this?

4 MS. ORR: That would be more for I  
5 suppose the Department. According to the NOV, the  
6 construction company was contracted by MDT.

7 CHAIRMAN RUSSELL: I will -- unless  
8 anyone wants to hear this, I would just as soon  
9 pass it off to our Hearing Examiner. Is there a  
10 motion?

11 MR. MIRES: So moved.

12 MR. MARBLE: So moved.

13 CHAIRMAN RUSSELL: It's been moved, and  
14 Don can second it. All those in favor, signify by  
15 saying aye.

16 (Response)

17 CHAIRMAN RUSSELL: Opposed.

18 (No response)

19 CHAIRMAN RUSSELL: In the matter of the  
20 appeal of the Forest Service Northern Region.  
21 Apparently they didn't want to pay all those fees  
22 they were supposed to. Anything you want to add  
23 to that?

24 MS. ORR: The interesting thing is that  
25 they are hot to trot apparently, because they

1 dismissed an appeal which is coming before the  
2 Board on an agenda item on final action that  
3 involved an appeal before there was a declaration  
4 that their permit -- or that the determination of  
5 the sufficiency of the application was deficient.

6 So they dismissed that apparently or  
7 agreed to the dismissal, and now they've turned  
8 around immediately after the Department determined  
9 that their application for the open burning permit  
10 was deficient, and they are appealing that now.  
11 So that's what this case is about.

12 CHAIRMAN RUSSELL: I will entertain a  
13 motion to appoint Katherine the permanent Hearing  
14 Examiner on this.

15 MS. SHROPSHIRE: So moved.

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

18 MR. SKUNKCAP: Second.

19 CHAIRMAN RUSSELL: Seconded by Gayle.  
20 Any further discussion?

21 (No response)

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

24 (Response)

25 CHAIRMAN RUSSELL: Opposed.

1 (No response)

2 CHAIRMAN RUSSELL: Now we're on to final  
3 action on contested cases. In the matter of the  
4 appeal of ExxonMobil regarding its air quality  
5 operating permit for the Billings refinery.  
6 Katherine.

7 MS. ORR: Mr. Chairman, members of the  
8 Board, you have before you a dismissal order that  
9 was submitted simultaneously with the stipulation  
10 by the parties to dismiss the proceeding. The  
11 dismissal order directs the Department to issue  
12 the Title 5 permit, and also that that will  
13 incorporate the terms of the technical review  
14 document for the permit with revisions.

15 CHAIRMAN RUSSELL: Okay.

16 MS. KAISER: Can I interject? I need to  
17 recuse myself.

18 CHAIRMAN RUSSELL: All right. So with  
19 that, and based on the fact there is a settlement  
20 between the Department and ExxonMobil, I have a  
21 stipulation for dismissal, and I need a motion to  
22 authorize the Chair to sign that.

23 MS. SHROPSHIRE: So moved.

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

1 MR. MIRES: Second.

2 CHAIRMAN RUSSELL: Seconded by Larry.

3 All those in favor, signify by saying aye.

4 (Response)

5 CHAIRMAN RUSSELL: One recusal.

6 The next item on the agenda is in the  
7 matter of violations of the Open Cut Mining Act by  
8 James Timis, Flathead County.

9 MS. ORR: So you may be familiar -- I  
10 don't know -- but this involves excavation in a  
11 subdivision that appeared at first glance to be an  
12 open cut mining activity, and the Department  
13 conducted an inspection, and confirmed that there  
14 were some 15,000 cubic yards removed.

15 And Mr. Timis was able to apparently  
16 convince the Department that this was not an open  
17 cut mining activity, it was more of a construction  
18 activity, and the parties have settled, the  
19 Department has waived penalties, and they seek to  
20 have this case dismissed with the order that you  
21 have before you.

22 CHAIRMAN RUSSELL: As stated, I have an  
23 order of dismissal, and I would entertain a motion  
24 to authorize the Board Chair to sign.

25 MS. KAISER: So moved.

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

3           MR. SKUNKCAP:  Second.

4           CHAIRMAN RUSSELL:  It's been seconded  
5  by Gayle.  All those in favor, signify by saying  
6  aye.

7           (Response)

8           CHAIRMAN RUSSELL:  Opposed.

9           (No response)

10          CHAIRMAN RUSSELL:  Motion carries  
11  unanimously.  The next item on the agenda is in  
12  the matter of violations of the Montana Septic  
13  Disposal and Licensure laws by Missoula Septic  
14  Service, Inc.  I have a real problem with not  
15  putting "system" with that, because septic system  
16  means a lot different than septic.  I don't  
17  understand why people do that.  I've got eight  
18  sanitarians that do the same thing.  It makes no  
19  sense.

20          MS. ORR:  Mr. Chairman, members of the  
21  Board, despite the name of the business, the  
22  issues are fairly simple in this case, or at least  
23  they didn't develop beyond simplicity, and that is  
24  that this business disposed of septage without a  
25  license.  They had a license and it expired.  They

1 got actually a renewal license, but during the  
2 time that it was expired, they disposed of septage  
3 against the requirements.

4 And so Missoula Septic has agreed to  
5 submit disposal records from July 1st, 2008  
6 through December 31st of 2008, and to pay the full  
7 penalty of \$14,400.

8 CHAIRMAN RUSSELL: With that, I have an  
9 order of dismissal in front of me dismissing Case  
10 No. BER 2008-17-SDL. I need a motion to authorize  
11 the Board Chair sign.

12 MS. SHROPSHIRE: So moved.

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

15 MR. MIRES: Second.

16 CHAIRMAN RUSSELL: Seconded by Larry.  
17 All those in favor, signify by saying aye.

18 (Response)

19 CHAIRMAN RUSSELL: Opposed.

20 (No response)

21 CHAIRMAN RUSSELL: Katherine, take your  
22 time on this next one.

23 MS. ORR: This is going to take at least  
24 a half an hour. I have already mentioned that the  
25 problem with this appeal was they jumped the gun

1 before there was a determination that the  
2 application was deficient. The USDA Forest  
3 Service got notification apparently of what the  
4 fee would be, and appealed immediately, and now  
5 they know they didn't need to appeal it at that  
6 juncture.

7 But the Department moved to dismiss on  
8 the basis that the Board was without jurisdiction  
9 at that point, and that's unopposed. So there is  
10 no opposition to the motion to dismiss, and the  
11 Department has submitted a dismissal order which  
12 properly takes care of the issue.

13 MR. MIRES: So it's hostile --

14 MS. ORR: Yes.

15 CHAIRMAN RUSSELL: With that, I will  
16 entertain a motion to authorize the Board Chair to  
17 sign the dismissal order on BER Case No.  
18 2008-22-AQ. Do I have a motion?

19 MS. SHROPSHIRE: So moved.

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

22 MS. KAISER: Second.

23 CHAIRMAN RUSSELL: It's been seconded by  
24 Heidi. All those in favor, signify by saying aye.

25 (Response)

1 CHAIRMAN RUSSELL: Opposed.

2 (No response)

3 CHAIRMAN RUSSELL: Motion carries  
4 unanimately. Unless I'm stopped, I am going to  
5 move to the general public comment section of our  
6 regs. This is the time that members of the public  
7 can address the Board on matters that impact the  
8 Board or the Board has jurisdiction upon. Is  
9 there anyone out in the audience that would like  
10 to speak to the Board?

11 MS. SHROPSHIRE: I have a question for  
12 Chuck.

13 CHAIRMAN RUSSELL: Do you want to do it  
14 on the record?

15 MS. SHROPSHIRE: Sure.

16 CHAIRMAN RUSSELL: I'm guessing we want  
17 to hear from you.

18 MR. HOMER: Mr. Chairman.

19 MS. SHROPSHIRE: I ran into some members  
20 representing PPL, and they said that they're  
21 making great improvements in their mercury  
22 reductions, which I guess is public. They've made  
23 it open to the public. And it sounds like they're  
24 moving -- based on our rule, have reduced their  
25 mercury emissions. So I don't know if you --



1           At some point I'd be curious, maybe at a  
2 future meeting, or -- I don't know if you can  
3 comment on that, or if you have any information.  
4 But I thought that was pretty exciting good news.

5           MR. HOMER: Ms. Chairman, Ms.  
6 shropshire, for the record, Charles Homer. I'm  
7 the Permitting Compliance Program Manager for the  
8 Air Quality.

9           Yes, we have gotten, I believe, all of  
10 the applications for the mercury control systems  
11 required by the rule the Board adopted. We're  
12 moving ahead with those. I don't have a lot of  
13 detail today, but certainly by the next meeting, I  
14 think we could give you some updates.

15           But we're very pleased in our  
16 discussions with the sources. It looks like they  
17 will be able to install equipment that will be  
18 able to comply with the standards that the Board  
19 adopted. So we're viewing that as a real success  
20 in terms of --

21           MS. SHROPSHIRE: I just wanted to thank  
22 you for the work you guys did on that.

23           MR. HOMER: We want to thank the Board  
24 for that process. That took quite a long time.  
25 And thank you for getting me on the record. I

1 would hate to miss a meeting.

2 MR. SKUNKCAP: Mr. Chairman, I was  
3 wondering about PPL, too. And also another one I  
4 was wondering about is the Highwood project. Can  
5 we get briefed on that at our next meeting?

6 CHAIRMAN RUSSELL: I don't know if we  
7 can very much because we're basically in  
8 litigation on it, so I think the only thing we  
9 would have is just probably maybe next time, if  
10 anything changes on the record on what's going on  
11 in litigation, we'll get something then.

12 MR. SKUNKCAP: Thank you, Mr. Chairman.

13 MS. ORR: Feel free to call me if you  
14 have any questions about the procedure of any of  
15 the cases.

16 CHAIRMAN RUSSELL: Just don't John or  
17 anyone in the public -- or in the audience, not in  
18 the public.

19 Seeing no more, I will entertain a  
20 motion to adjourn.

21 MR. SKUNKCAP: So moved.

22 CHAIRMAN RUSSELL: It's been moved by  
23 Gayle. Is there a second?

24 MS. KAISER: Second.

25 CHAIRMAN RUSSELL: Seconded by Heidi.

1 All those in favor, signify by saying aye.

2 (Response)

3 CHAIRMAN RUSSELL: Motion carries.

4 Meeting adjourned.

5 (The proceedings were concluded

6 at 12:02 p.m. )

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1 C E R T I F I C A T E

2 STATE OF MONTANA )

3 : SS.

4 COUNTY OF LEWIS & CLARK )

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

8 That the proceedings were taken before me at  
9 the time and place herein named; that the  
10 proceedings were reported by me in shorthand and  
11 transcribed using computer-aided transcription,  
12 and that the foregoing - 107 - pages contain a  
13 true record of the proceedings to the best of my  
14 ability.

15 IN WITNESS WHEREOF, I have hereunto set my  
16 hand and affixed my notarial seal  
17 this day of , 2009.

18  
19 LAURIE CRUTCHER, RPR  
20 Court Reporter - Notary Public  
21 My commission expires  
22 March 9, 2012.

23  
24  
25