

BEFORE THE MONTANA BOARD OF ENVIRONMENTAL REVIEW

BOARD MEETING )  
January 26, 2007 )  
)

TRANSCRIPT OF PROCEEDINGS

Heard at Room 111 of the Metcalf Building  
1520 East Sixth Avenue  
Helena, Montana  
January 26, 2007  
9:15 a.m.

BEFORE CHAIRMAN JOSEPH RUSSELL;  
BOARD MEMBERS LARRY MIRES, HEIDI KAISER, GAYLE  
SKUNKCAP, BILL ROSSBACH, ROBIN SHROPSHIRE,  
and DON MARBLE

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

3                               \* \* \* \* \*

4                               (Mr. Skunkcap not present)

5                               CHAIRMAN RUSSELL: It is, by the clock  
6 on the wall, it's 17 after nine. I call this  
7 regular Board of Environmental Review meeting of  
8 January 26th to order.

9                               I'm going to take something out of  
10 order, and I just want to welcome our new Board  
11 member Larry Mires to the table. And if you  
12 wouldn't mind just saying a few things about your  
13 background. I know you are our at-large member,  
14 and do you have anything else you want to add?

15                              MR. MIRES: I'm a fourth generation  
16 Montanan with interests that go from Superior  
17 clear to Glendive, and from the Highline clear  
18 down to Virginia City. There is some even kind of  
19 association or tie there.

20                              I taught in Glasgow for 31 years, and  
21 then left the public education system, and got  
22 into economic development; worked on getting the  
23 Fort Peck Museum established there in Glasgow; and  
24 worked as director on the Missouri River on water  
25 issue; and currently I'm the Executive Director

1 for the St. Mary Rehabilitation Working Group to  
2 keep the water on the highline flowing, so that we  
3 don't lose 10 percent of Montana's economy.

4 If you would like to see what the siphon  
5 looks like, there is a section of it sitting  
6 behind the Capitol on a trailer. It will be there  
7 until probably noon today, when it will head back  
8 north. Thank you, and I'm glad to be on the  
9 Board.

10 CHAIRMAN RUSSELL: Welcome aboard. And  
11 for those that don't know, I'm back, and I  
12 appreciate everyone's effort on getting me back on  
13 the Board, too. It meant a lot to me to get back.

14 MR. ROSSBACH: I would like to  
15 officially welcome Heidi back for reappointment.  
16 Heidi was reappointed as well.

17 CHAIRMAN RUSSELL: I'm glad you're back.  
18 With all that, and all of the gushy warm good  
19 feelings that we just had, let's get to order  
20 here.

21 The first item on the agenda is the  
22 review and approval of the minutes of the December  
23 2nd, 2006 meeting. It says December 2nd, and I've  
24 got December 1st on here. Was it the second?  
25 Does anyone have an old calendar?

1 MR. LIVERS: I think it was the first.

2 CHAIRMAN RUSSELL: Do I have motion to  
3 approve those minutes or their modifications?

4 MS. KAISER: So moved.

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

7 MR. MARBLE: Second.

8 CHAIRMAN RUSSELL: It's been seconded by  
9 Don. Any further comments?

10 (No response)

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

13 (Responses)

14 CHAIRMAN RUSSELL: Opposed.

15 (No response)

16 CHAIRMAN RUSSELL: The next item on the  
17 agenda is the contested case update. Katherine.

18 MS. ORR: Good morning, everyone. There  
19 is a long list, but I can cut to the chase on  
20 those. There are several of these in which I've  
21 issued a scheduling order. I don't know if you  
22 want me to go over those. I can do that if you  
23 would like.

24 But going to Item G, Items G, H, and J,  
25 all of those are either in settlement discussion,

1 or in the case of Item H, I have received a  
2 stipulation for dismissal. So that's good news.

3 Thompson River, we have also received a  
4 motion in limine, and I'm in the process of ruling  
5 on some of the pending motions there.

6 In three of the cases here, a hearing  
7 has been set. Those are Items K, L, and N. And  
8 all of those hearings will take place in July.

9 Roundup Power is another one where I'm  
10 in the process of ruling on cross motions for  
11 summary judgment.

12 MR. ROSSBACH: Is that "O"?

13 CHAIRMAN RUSSELL: There is two of them  
14 on there.

15 MS. ORR: There should be two of them.  
16 "O" is Butte-Silver Bow.

17 MR. ROSSBACH: "F" is Roundup Power.

18 MS. ORR: I have a different agenda  
19 here. It's probably an older one.

20 MR. MIRES: Mine corresponds with yours.

21 MS. ORR: We have a different agenda, I  
22 guess.

23 MS. WITTENBERG: You have the new one.  
24 When we moved the one item, I sent out a new  
25 agenda in the envelope with some other stuff.

1 MS. ORR: Anyway, Roundup Power, which  
2 is Item E, there are cross motions for summary --  
3 on the new agenda, there are cross motions for  
4 summary judgment which I'm in the process of  
5 ruling on. Any questions?

6 CHAIRMAN RUSSELL: Katherine, what is a  
7 Brief in Opposition to Petitioner's Motion for  
8 Leave? I've never heard the term "for leave." Is  
9 that a dismissal?

10 MS. ORR: Let me explain. When you  
11 amend, when you move to amend a complaint, for  
12 example, if it's beyond a certain time period, you  
13 have to get leave of the Court in order to do  
14 that, and I believe that's thirty days.

15 CHAIRMAN RUSSELL: Thank you. Are there  
16 any questions for Katherine?

17 MR. ROSSBACH: Can I just ask a brief  
18 question on "A." What's the status of Kendall  
19 then? "Until further notice" "upon initiative."

20 MS. ORR: That's pretty broad. I think  
21 the way that order reads -- and I have the file  
22 here -- one or more of the parties has to apply to  
23 the Hearing Examiner to have the hearing schedule  
24 reinstated.

25 MR. ROSSBACH: So right now the appeal

1 is not going forward; is that what it is saying?

2 MS. ORR: Right.

3 MR. ROSSBACH: Thank you.

4 CHAIRMAN RUSSELL: Don.

5 MR. MARBLE: I have a question. On the  
6 old schedule No. N, City of Bozeman, old "N," I  
7 wonder what is involved in that appeal? Who are  
8 the parties?

9 MS. ORR: That's the City of Bozeman.  
10 It's a water quality -- it's an appeal of an MPDES  
11 permit.

12 MR. MARBLE: Thank you.

13 MS. ORR: And the parties had until  
14 January 19th to file a proposed schedule, and I  
15 don't have that yet, but --

16 MR. ROSSBACH: January 19th.

17 MS. ORR: Right.

18 CHAIRMAN RUSSELL: Any other questions?

19 (No response)

20 CHAIRMAN RUSSELL: Cases in litigation.

21 MS. ORR: That is the big silent case.  
22 I haven't heard anything from the Court. I filed  
23 a motion on behalf of the Board to dismiss the  
24 Board as a party quite awhile ago, and haven't  
25 received a ruling on that. There is a new Judge.

1 I don't know who replaced Judge Buyske, but that's  
2 who it would be.

3 CHAIRMAN RUSSELL: Why would they not  
4 dismiss? Why would they oppose dismissing the  
5 Board from this case?

6 MS. ORR: I don't know. I don't  
7 understand it.

8 CHAIRMAN RUSSELL: It just seems  
9 nonsensical to keep the Board involved when it  
10 really is a matter of a permit.

11 MS. ORR: I understand there are  
12 informal discussions among the parties, not the  
13 Board, but the other parties are trying to resolve  
14 this business.

15 CHAIRMAN RUSSELL: Shouldn't we be  
16 involved until we're dismissed?

17 MS. ORR: Well, I'm saying that really  
18 in our briefing materials, that it's really not  
19 appropriate for the Board to deal with anything  
20 other than the record that's been established at  
21 this juncture.

22 CHAIRMAN RUSSELL: Anything else for  
23 Katherine at this time?

24 (No response)

25 CHAIRMAN RUSSELL: Let's move on then.

1 Tom, will you be giving us a briefing?

2 MR. LIVERS: Yes, Mr. Chairman. John  
3 North and I will be walking through the  
4 legislative briefing. For the record, Tom Livers  
5 with the Department of Environmental Quality.  
6 I've got a couple of hand-outs I'll pass around on  
7 some bills of interest, and also some guidance to  
8 advise new Board members from the Governor's  
9 Office.

10 It's pretty common each legislative  
11 session for questions to arise with respect to the  
12 role of board members in testifying on bills of  
13 interest to their boards, and the Governor's  
14 Office has put together some guidance to this  
15 effect.

16 Again, legislative testimony is not a  
17 primary function of this board. The functions are  
18 rulemaking, and contested case hearings. But  
19 there are some bills that would be of interest to  
20 the Board, either on the Board makeup or  
21 authority, or on topics that have been of interest  
22 to the Board, or subjects of rulemaking. And the  
23 guidance is pretty typical to guidance that we  
24 see, we've seen historically from the Governor's  
25 Office.

1           And basically obviously individuals are  
2 always free to testify at legislative hearings,  
3 but if you're to testify as a member of the Board,  
4 it requires a motion of the Board to request  
5 approval from the Governor's Office on this point  
6 for that person to go and testify. So I'll leave  
7 that with you, but if there are questions on it,  
8 I'll be glad to go over it.

9           Then I did pass around a sheet that has  
10 a couple of bills that deal with Board membership,  
11 and then some topical -- some bills that are of  
12 interest topically.

13           The first two up top there are House  
14 Bill 71 and Senate Bill 221. The House Bill was  
15 submitted by Representative McNutt, has not been  
16 heard yet, and making a slight revision to the  
17 membership: Keeps the Board at seven members;  
18 keeps the expertise in hydrology, local  
19 government, planning, and environmental sciences,  
20 a county health officer or M.D.; it adds a  
21 representative of the Office of Economic  
22 Development; and it adds a representative of an  
23 industry regulated by the Department of  
24 Environmental Quality.

25           Senate Bill 221 makes some similar

1 changes, except it specifies and adds several  
2 industry representatives, or people with expertise  
3 in oil and gas development, electric energy  
4 generation, or hard rock or coal mining; also adds  
5 someone with background in agriculture. It  
6 deletes the reference to local government  
7 planning. And one other overlay to consider is as  
8 a quasi-judicial board, at least one member of the  
9 Board must be an attorney.

10 So there could be overlap in these  
11 memberships if the attorney also has expertise in  
12 one of these areas; but in the case of Senate Bill  
13 221, there would have to be that just because of  
14 the limitation of seven board members, and  
15 specific expertise called out for each of the  
16 seven.

17 So far we're not seeing either of these  
18 bills getting a lot of attraction. It's a little  
19 early to tell. But they're out there, and I think  
20 they're probably at least partly in response to  
21 some of the controversial rulemakings that have  
22 gone on in the last couple of years.

23 The next two bills down there, Senate  
24 Bill 180 and House Bill 460, are metal mine bills.  
25 Senate Bill 180 is the bill that was brought at

1 the request of the Department. It's sponsored by  
2 Senator Harrington, had its hearing in Senate  
3 Natural Resources. We actually didn't anticipate  
4 much trouble getting it out of the Senate, and  
5 that's not what we're finding. So it is opposed  
6 by the petitioners, and that may keep it from  
7 coming out of the Senate.

8 MEIC and the Fort Belknap Indian  
9 community both oppose the bill. I think in a  
10 general sense, their positions come from the bill  
11 in their mind not going far enough.

12 That's the stated position of the Tribe.  
13 Basically they feel there is a need to stick to --  
14 given the damage they've been party to, they feel  
15 the need to stick to the basic provision that we  
16 found problematic in the rulemaking, and that is:  
17 We have to be able to guarantee that there will be  
18 not perpetual water treatment prior to issuing a  
19 permit.

20 With MEIC, their objections seem to be  
21 -- I assume that still perhaps they see it as not  
22 going far enough, but also they stated they feel  
23 that there are some provisions that really don't  
24 add much, and create an illusion that there is  
25 more movement than there is, and so that's part of

1 the grounds for their opposition.

2           There is a possibility -- it's doubtful  
3 that Senate Bill 180 will come out in its current  
4 form. If you remember from the last Board  
5 meeting, it deals with our ability to request  
6 additional information to adequately characterize  
7 the hydrology and geology of the area, and  
8 requires certain isolation of reactive materials.  
9 It deals with interim bonding; it has some MEPA  
10 exemptions for that interim bonding. And there is  
11 one other, a fourth provision I'm not remembering  
12 offhand.

13           But anyway, if it comes out, it looks  
14 like it may come out just with the interim  
15 bonding, and that is a big piece. There is no  
16 question that that's an important piece. But  
17 we'll see what happens with that. There is a  
18 chance there may be some executive action as early  
19 as this afternoon on that.

20           House Bill 460 is opposed by the mining  
21 industry, and we've taken an early look at it.  
22 There are a few things that we're recommending be  
23 changed. I don't know if that will happen or not,  
24 but that's just recently popped out of the  
25 Legislative Council.

1                   CHAIRMAN RUSSELL:  What's it trying to  
2 do?

3                   MR. LIVERS:  House Bill 460, it allows  
4 some additional authority to the Department in  
5 requesting information, requiring information  
6 prior to permitting.  It allows interim bonding,  
7 and sets up a third party review for setting the  
8 interim bonding, and a mutual contractor selection  
9 process between the Department and the affected  
10 industry or the company in that third party  
11 review.  Those are the main provisions of that.

12                   Then there are a couple of drafts that  
13 have not been introduced yet, but dealing with  
14 mercury.  There is also a couple of mercury  
15 disposal bills that I didn't put on there because  
16 they weren't directly relevant to the rulemaking  
17 that we've undergone, but there are some, a couple  
18 of mercury emission drafts.  Representative Windy  
19 Boy has one, and Senator Lind has another.  LC729,  
20 Representative Windy Boy's, basically calls for 90  
21 percent reduction in mercury emissions, so I think  
22 if they don't have a permit by the effective date  
23 of the law, they're trying to seek 90 percent  
24 reduction.  If they do have a permit, they have  
25 until 2010 to get 90 percent reduction.

1           Senator Lind's bill prohibits trading  
2 programs for mercury. And we haven't seen  
3 Representative Windy Boy's draft yet regarding air  
4 quality monitoring on coal plants.

5           CHAIRMAN RUSSELL: Would you like to add  
6 anything else?

7           MR. LIVERS: Yes. I put the link down  
8 at the bottom. I'll leave it at that. That's a  
9 link to the laws page for the current legislative  
10 sessions. It's a pretty useful page if you  
11 haven't already been on there. You can get  
12 information by bill or LC, which is Legislative  
13 Counsel draft number. You can also go in by  
14 sponsor, or committee, get information on the  
15 committees and the hearings. It's a good jumping  
16 off point for information.

17           Then John North, Chief Legal Counsel,  
18 also has several bills he's going to talk about  
19 that deal with rulemaking authority of boards and  
20 Administrative Rules.

21           CHAIRMAN RUSSELL: Tom, just briefly,  
22 your budget looks good?

23           MR. LIVERS: At the moment, no. We  
24 thought it looked good when we submitted it,  
25 but --

1                   CHAIRMAN RUSSELL: Not after they got  
2 done with it?

3                   MR. LIVERS: Yes. We did not fare well  
4 in our Joint Appropriations subcommittee, which is  
5 the first step of a long process. We've had our  
6 budget hearings over the course of the last couple  
7 weeks, and we were pretty unsuccessful with a  
8 couple of points. If we want to change things  
9 from the base budget, we have to put what are  
10 called decision packages, specific points that the  
11 Legislature has to weigh and act on.

12                   And we had a pretty cordial and, I  
13 thought, informative give and take in  
14 subcommittee, but we only -- I think we received  
15 approval on 38 percent of the decision packages  
16 that we proposed, which is low even in this  
17 session, given the dynamics of the session. So  
18 that's interesting. I think we're hopeful that in  
19 subsequent steps of this process we'll be able to  
20 reinstate a lot of that.

21                   We also have a little bit of a  
22 challenge, in that at present, we have not -- the  
23 subcommittee didn't restore funding that was  
24 unspent because of vacant FTE's, and that's going  
25 to present some challenges.

1           But the way it works -- if you're not  
2 familiar -- House Bill 2, the main budget bill,  
3 has a pretty thorough process. Each agency starts  
4 out in one of the joint appropriations  
5 subcommittees that has equal numbers of senators  
6 and representatives. It's balanced by party. But  
7 Senate Finance and House Appropriations both have  
8 members on those joint appropriations  
9 subcommittees, and that's where the real detailed  
10 work on the budget is done, the real detailed  
11 discussion.

12           From there the recommendations of the  
13 subcommittees goes to House Appropriations, then  
14 to the House floor; and ultimately House Bill 2  
15 then gets transmitted out in the House and over to  
16 the Senate, and we have another hearing in Senate  
17 Finance, and then it goes to the floor of Senate  
18 Finance.

19           House Bill 2 is always ultimately  
20 resolved in a preconference committee at the end,  
21 the last bill to fall in place. So there are a  
22 lot of steps in the process still, and our  
23 subcommittee has not closed on our budget at this  
24 point. They've got about half a dozen resource  
25 agencies that they deal with, and we expect the

1 wrap-up to take place early February. We're  
2 hoping to provide some additional information on  
3 some of the key points, key decision packages, and  
4 some of the base adjustments we're looking at, and  
5 so we are hopeful we may still get a couple of  
6 more things out in subcommittee.

7 CHAIRMAN RUSSELL: Then the mercury bill  
8 that you mentioned, your solid waste folks have  
9 looked at that, I'm guessing? There is some --

10 MR. LIVERS: Yes, and I don't remember  
11 that offhand. I don't know if there is anybody  
12 here that could speak to that.

13 CHAIRMAN RUSSELL: I looked through it,  
14 and I doubt it's going to get out of committee.  
15 It pretty much eliminates mercury in just about  
16 everything.

17 MR. LIVERS: I think they're only  
18 starting in the House, if I remember correctly.

19 CHAIRMAN RUSSELL: Which probably makes  
20 it even more unlikely to get out. But I think  
21 your solid waste people probably should be on  
22 that, at least a little bit.

23 And there was a real early bill on solid  
24 waste that -- I talked to some of your folks in  
25 your solid waste program, and they're very helpful

1 in keeping me focused on what the intent was.

2 (Mr. Skunkcap enters)

3 MR. LIVERS: Thank you. John would like  
4 to cover some of the Administrative Rule bills,  
5 some of which pertain to the Department, mostly  
6 which have an impact.

7 MR. NORTH: Mr. Chairman, members of the  
8 Board, John North, Chief Legal Counsel with the  
9 Department.

10 I've given you a chart here that has all  
11 of the bills and bill draft requests that are in  
12 pertaining to the rulemaking process and the  
13 Administrative Procedures Act. As you know, the  
14 Administrative Procedures Act is the act that  
15 regulates rulemaking by State agencies, and State  
16 boards and commissions, including the Department  
17 or the Board of Environmental Review.

18 It doesn't give the Board authority to  
19 adopt rules except for a few rules of practice,  
20 but rather regulates the procedures under which  
21 the Board and other agencies adopt rules, and also  
22 indicates that the Board has to have authority to  
23 adopt rules, and adopt rules without either  
24 express or implied authority.

25 With that little introduction, and also

1 I'll say that I won't cover every bill that's on  
2 this chart. I won't cover the unIntroduced ones;  
3 and the ones that I don't think will have any  
4 substantive effect on the Board, I won't cover as  
5 well. But I'll start by talking about the bills  
6 that deal with adoption authority by an  
7 administrative agency, and perhaps the most  
8 important of those bills is House Bill 209.

9 And by way of background for that bill,  
10 what the Administrative Procedures Act says is  
11 that not only does an agency have to have express  
12 or implied authority in the statute to adopt a  
13 rule, but also it has to, in the process of  
14 adopting the rule, find that the rule is  
15 reasonably necessary in order to implement the  
16 statute that's being implemented. And case law  
17 from around the country indicates that "reasonably  
18 necessary" doesn't mean absolutely necessary.  
19 What it means is that it promotes, is consistent  
20 with the purpose of the statute that's being  
21 implemented.

22 Well, House Bill 209 would remove  
23 "reasonably" everywhere it occurs before  
24 "necessary," so it would change the APA to say  
25 that a board or commission or an agency couldn't

1 adopt a rule unless it's necessary to implement  
2 the statute.

3 And the purpose there I think is to  
4 tighten up the standard, and to basically provide  
5 that it has to be absolutely necessary for the  
6 implementation of the statute before the board  
7 could adopt a rule.

8 Given that that would be a new standard  
9 in the country for rule adoption, I can see that  
10 leading to litigation over rules fairly soon, and  
11 I quite frankly couldn't predict what Courts would  
12 ultimately decide it meant if the bill becomes  
13 law.

14 The second one is House Bill 254. And  
15 I'm not quite sure exactly what that bill does, I  
16 have to say. I can tell you what changes it makes  
17 in the Administrative Procedures Act. It changes  
18 the definition of the term "rule." Right now, a  
19 rule is defined as a statement of general  
20 applicability that either implements a statute or  
21 proscribes law or policy. It removes the term  
22 "policy" from the definition of rule. And I think  
23 that the ultimate effect of that would be that an  
24 administrative agency could actually adopt a  
25 policy without going through the Administrative

1 Procedures Act, i.e., without public comment and  
2 public notice and public comment.

3 I suspect that's not what the intention  
4 is. I suspect the intention is to not allow  
5 agencies to adopt policies, and adopt rules that  
6 contain policies, but I don't think that would be  
7 the effect of that statute.

8 The third bill is directed only to the  
9 Board of Environmental Review, House Bill 276, and  
10 it pertains only to the petition process under  
11 which citizens can petition the Board to initiate  
12 rulemaking. And it provides that if there is a  
13 petition to the Board to initiate rulemaking, and  
14 the matter that's the subject of the petition was  
15 considered by the Legislature, the previous  
16 Legislature, then the Director of the Department  
17 of Environmental Quality is to certify to the  
18 Board that that is indeed the case, and then the  
19 Board cannot adopt a rule.

20 CHAIRMAN RUSSELL: Sounds like metal  
21 mine to me.

22 MR. NORTH: Mercury might be a closer  
23 fit actually.

24 So those are the ones on the authority  
25 of an agency to adopt rules.

1           There are two that pertain to the bill  
2 sponsor notification process, and you'll notice on  
3 all of your notices, the last paragraph says that  
4 the bill sponsor notification requirement does  
5 apply and have been complied with, or that they  
6 don't apply.

7           The bill sponsor notification statute  
8 basically says that when an agency is implementing  
9 a bill that -- a statute that was passed by the  
10 Legislature for the first time, that the agency  
11 has to notify the sponsor of the bill at two  
12 times: One when the agency starts to draft the  
13 bill or the rules initially -- so that's a sponsor  
14 notification that we, DEQ, have to do when we  
15 start drafting rules for submission to the Board  
16 -- then secondly, when it's noticed, when the  
17 proposed adoption is noticed, when the notice of  
18 hearing goes out; again, that the sponsor has to  
19 be notified.

20           Senate Bill 71 would modify that in  
21 several respects. One, it would say that it isn't  
22 just the first time that the agency implements the  
23 statute, it's basically anytime, so it would apply  
24 to amendments.

25           Secondly, it says that in the notice

1 where we indicate that the bill sponsor has been  
2 notified, we have to put the date and the manner  
3 of notification. And I think what happened there  
4 is that the Public Employees Retirement Board did  
5 some rulemaking, and indicated that they had  
6 notified the bill sponsor, and actually I don't  
7 think had done that. And the Veterans and Public  
8 Employees Retirement Legislative Subcommittee,  
9 Interim Committee, has a number of bills to  
10 correct some of the flaws that occurred in that  
11 process.

12 CHAIRMAN RUSSELL: Senate Bill 7 seems  
13 like it could be -- because it's been tabled, but  
14 that's the legislative veto of the administrative  
15 rules. That seems like it would be something we  
16 should be concerned about. Do you think it's  
17 dead?

18 MR. NORTH: I do, Mr. Chairman. I don't  
19 think there is any question but what that bill was  
20 unconstitutional, and the bill sponsor at the  
21 committee actually said he realized that his bill  
22 was unconstitutional, and was going to work with  
23 the Legislative Counsel to come up with some kind  
24 of a bill that would meet constitutional muster,  
25 and evidently that didn't occur because I see the

1 bill has now been tabled.

2 On the bill sponsor, on Senate Bill 71  
3 then, Senate Bill 71 then provides that if the  
4 agency doesn't comply with the specific  
5 notification requirement, then the rule is  
6 invalid, so it gives a way of invalidating.

7 CHAIRMAN RUSSELL: Who makes that  
8 decision?

9 MR. NORTH: Well, ultimately it would be  
10 made by a Court via a challenge to the rule.

11 CHAIRMAN RUSSELL: It wouldn't be like  
12 the EQC or something?

13 MR. NORTH: No.

14 Senate Bill 47 just makes a further  
15 modification of the bill sponsor notification  
16 requirement by providing that when a statute  
17 passes, and it is implemented in various acts, the  
18 bill sponsor is supposed to get notified for every  
19 act. So for example, if there was an amendment to  
20 our enforcement, and required amendments in the  
21 hazardous waste law, the solid waste law, and the  
22 air quality act, and we did three notices, we  
23 would have to notify them for each one.

24 And then finally, there is four or five  
25 bills that deal with review of an agency's

1 rulemaking. The most extensive one is House Bill  
2 97. It creates an office in the Legislature which  
3 is by via the fiscal note going to be a four  
4 person office, and it indicates that this office  
5 has to hire two attorneys. And the purpose of  
6 that is to review the agency's rules to make sure  
7 they're within the agency's authority, and it  
8 provides that 60 days before an agency issues a  
9 notice of proposed rulemaking, they have to submit  
10 this to this particular office, and then the  
11 office sends a notice to the agency and to the  
12 Rule Review Committee as to whether it believes  
13 that that rule is within the scope of the agency's  
14 rulemaking authority.

15 The other thing it does is it gives this  
16 office the ability to go back through all of the  
17 previously adopted rules that are on the books  
18 right now, and make the same determination; and  
19 then it gives that office I believe the authority  
20 to propose legislation. And the bill sunsets in  
21 2011, so I guess that this agency is being given  
22 four years to accomplish this task.

23 Senate Bill 340 provides that if an  
24 agency goes through a rulemaking process, and the  
25 Governor disagrees with it, that if the Governor

1 notifies the agency that it's to withdraw the  
2 notice of adoption prior to the time that the  
3 agency files the notice of adoption with the  
4 Secretary of State, then the agency must instead  
5 file a notice with the Secretary of State that the  
6 rulemaking has been withdrawn, and the agency  
7 cannot do anything similar to that for a period of  
8 at least one year.

9 CHAIRMAN RUSSELL: It sounds like  
10 they're giving the Governor veto authority over  
11 rulemaking.

12 MR. NORTH: Yes, that's what they're  
13 doing. Then Senate Bill 176 provides that if  
14 someone challenges a rule in court, and is  
15 successful, gets the rule stricken, they can  
16 submit a claim to the Department of Administration  
17 to get all their expenses for court costs, and  
18 attorneys fees, and so forth for having challenged  
19 the rule; and the Department of Administration is  
20 then supposed to grant this claim if it finds that  
21 agency intentionally violated the Administrative  
22 Procedures Act. And then if the Department of  
23 Administration grants this claim, then the agency  
24 that adopted the rule has to pay these expenses,  
25 and it further provides that the agency has to

1 take it out of its existing budget. It can't go  
2 in for an appropriation to get this money.

3 CHAIRMAN RUSSELL: The key word here is  
4 "intentionally"?

5 MR. NORTH: Intentionally. Yes, it says  
6 intentionally.

7 So Mr. Chairman, members, that's a  
8 summary of the bills so far, and none of them have  
9 passed. One has gotten I think out of the House  
10 and into the Senate, but that's the status of  
11 them.

12 CHAIRMAN RUSSELL: Thanks, John. I  
13 appreciate it.

14 MR. SKUNKCAP: Mr. Chairman, I have a  
15 question. Did they talk about the Zortman  
16 Landusky, or is this a good time for that?

17 CHAIRMAN RUSSELL: Actually Tom did  
18 brief on that, and can you give a quick --

19 MR. LIVERS: Mr. Chairman, Mr. Skunkcap,  
20 there is some additional information I can talk to  
21 you specifically on the Swift Gulch proposals if  
22 you would like. I did not cover those in any  
23 detail.

24 MR. SKUNKCAP: If I missed it, I could  
25 talk with him later.

1                   MR. LIVERS: We were talking about metal  
2 mine rules in general. But in terms of -- We have  
3 several funding proposals in to deal with water  
4 conditions in Swift Gulch. We've got two grant  
5 requests for a program within the Department of  
6 Natural Resources and Conservation, and those are  
7 \$300,000 each.

8                   One of them is to construct settling  
9 ponds and wetlands for treatment along there. The  
10 other grant is for research into  
11 source/groundwater connections, so we can do  
12 additional source control, and better understand  
13 the apparent connection between the Landusky pit  
14 and the seeps in Swift Gulch, so that ultimately  
15 we can do more targeted source control prior to  
16 getting into the creek.

17                   And then in addition to those \$300,000  
18 proposals in the grant program, we have an  
19 additional decision package in our budget in House  
20 Bill 2 for another \$500,000, and that is to  
21 augment the ponds and the wetlands with a  
22 semi-passive treatment system, most likely using  
23 limestone upstream, and that would be the first  
24 thing that would go in; and that would basically  
25 raise the pH of the water so that more iron can

1 precipitate out, and it will essentially make the  
2 downstream ponds and wetlands more effective, and  
3 increase the useful life on those as well.

4           We had a hearing on the two grant  
5 proposals on Monday that seemed to go pretty well,  
6 although the DNRC recommendation is to reduce one  
7 of the proposals to cut it in half because of  
8 funding constraints on that program. It's the  
9 wetlands and the ponds. It would effectively pull  
10 the wetlands out. But we argued for the full  
11 amount, as did the Fort Belknap Indian community.  
12 And then it seemed to be relatively well-received.  
13 It's too early to know where that's going exactly.

14           And then the request for the \$500,000 in  
15 our budget was not approved by our committee, but  
16 it's -- As I mentioned earlier, it's very, very  
17 early in that process, and we're pretty optimistic  
18 that we can get that back in. That was a very  
19 close vote. It was a three/three tie, which meant  
20 it didn't go forward, and thus it was not  
21 included.

22           But at least two of the members who  
23 voted against that particular motion expressed  
24 some concern with voting against it, and were  
25 generally supportive. They wanted to see some

1 additional information on ongoing maintenance  
2 costs, and how that would come down. And we had  
3 some subsequent discussions with the Fort Belknap  
4 council. And we were able to go back -- Actually  
5 we addressed our budget committee after -- We  
6 jointly addressed -- the representatives of Fort  
7 Belknap and ourselves addressed it after the  
8 hearings in the other committee on the grant  
9 proposals.

10 So we're pretty optimistic that that  
11 piece is not dead at this point, and will get  
12 reinstated.

13 MR. SKUNKCAP: Thanks, Mr. Chairman.

14 CHAIRMAN RUSSELL: Anything else?

15 (No response)

16 CHAIRMAN RUSSELL: We'll move on in the  
17 agenda then, move to action items, and the first  
18 item on the agenda actually was out of order, but  
19 it's III(A)(1) which is the proposed rulemaking  
20 designating a portion of the Gallatin River as an  
21 outstanding resource water. Tom.

22 MR. LIVERS: Thanks, Mr. Chairman. You  
23 recall initiating rulemaking at the Department's  
24 request earlier last year; and at this point,  
25 we're coming before the Board requesting that the

1 Board issue a notice of supplemental rulemaking  
2 extending the comment period.

3 Just to recap very briefly, this  
4 designation deals with a stretch of the Gallatin  
5 in the canyon from the park border down to the  
6 mouth of the canyon, to the confluence of Spanish  
7 Creek. If designated as an outstanding resource  
8 water, it would prohibit any new or increased  
9 point source discharges that would cause permanent  
10 change in the water quality in the river, in the  
11 main stem.

12 The Board initially accepted this  
13 petition back in the spring of 2002, and directed  
14 the Department to conduct an EIS. Because of  
15 funding constraints, we were only able to do that  
16 recently, and the final EIS has just recently been  
17 released on that.

18 The reason we're asking for extending  
19 the public comment period in issuing a  
20 supplemental notice is at the request of the  
21 several of the parties, particularly the  
22 Petitioners. As a result of the rulemaking  
23 effort, there have been some more aggressive  
24 discussions among the various interests in the  
25 Gallatin, and the people have come to the table,

1 they're trying to work on alternate solutions to  
2 come up with similar protection.

3 Folks are talking. We think that's a  
4 good thing, and the rulemaking has probably caused  
5 that to happen, or played a key role in that.

6 The parties are asking for more time to  
7 continue these discussions, and we agree with that  
8 approach. And so that for that reason, we're  
9 requesting that the Board extend the comment  
10 period and issue a supplemental notice.

11 CHAIRMAN RUSSELL: Thanks, Tom. Is  
12 there anyone who has any questions regarding this?  
13 If you don't, then we're going to entertain a  
14 motion.

15 MR. ROSSBACH: I move.

16 CHAIRMAN RUSSELL: You move to  
17 supplemental notice?

18 MR. LIVERS: There may be members of the  
19 public. I'm not sure.

20 CHAIRMAN RUSSELL: We'll get this out  
21 and then we'll do it before we take action.

22 MS. KAISER: I have a question.

23 CHAIRMAN RUSSELL: Do you want to second  
24 it before so we can talk about it?

25 MR. MARBLE: Second.

1                   CHAIRMAN RUSSELL: Heidi, what's your  
2 question?

3                   MS. KAISER: So the motion we're making  
4 here is to extend the comment period.

5                   CHAIRMAN RUSSELL: If we don't, then we  
6 would -- We have 180 days to take action on the  
7 rulemaking, and if we don't extend it, then it  
8 would die.

9                   MS. KAISER: Because we've gone past the  
10 180 days?

11                  CHAIRMAN RUSSELL: We will have gone  
12 past.

13                  MR. LIVERS: Mr. Chairman, the Board has  
14 three options, and they're outlined in the summary  
15 document, but one is publish the supplemental  
16 notice, extending the comment period; two, adopt  
17 the rule amendments as proposed or with  
18 modifications; or three, determine that you will  
19 not adopt the rule amendments either by making an  
20 affirmative vote to that effect, or by not voting,  
21 in which case, it would just extend beyond the  
22 period.

23                  CHAIRMAN RUSSELL: I'm wondering if we  
24 can even do Option 2 because I don't think we have  
25 all of the information it would require to adopt

1 it.

2 MR. LIVERS: That would probably take  
3 another meeting, and probably do it through a  
4 telephone meeting if needed.

5 CHAIRMAN RUSSELL: Because I don't think  
6 all of the Department's documents are in order at  
7 this time.

8 So Heidi, the reason we're doing this is  
9 if we don't take action at this meeting, the  
10 period of our ability to take action on this will  
11 have expired.

12 MS. KAISER: I'm guessing the  
13 Petitioners don't want to that happen.

14 CHAIRMAN RUSSELL: Actually I think the  
15 Petitioners do want this to happen. They're the  
16 ones that want to have it happen more than anyone  
17 else at this point. They want the extension.

18 MS. KAISER: Right. But they don't want  
19 the issue to die. They want an extension, so if  
20 need be rulemaking can proceed in the future?

21 CHAIRMAN RUSSELL: Well, would proceed  
22 within the supplemental notice guidance.

23 MR. LIVERS: Mr. Chairman, Ms. Kaiser,  
24 the indications we're getting are that the  
25 discussions are early on, but pretty fruitful, and

1 I think people are asking for some more time. I  
2 think you're right that the Petitioners don't want  
3 this off the table, but really feel that getting  
4 people to the table seems to be a positive step,  
5 and it's been expressed by both sides of the  
6 issue, the request for additional time.

7 CHAIRMAN RUSSELL: Any Board members  
8 comments?

9 (No response).

10 CHAIRMAN RUSSELL: Is there anyone out  
11 in the audience that would like to speak to this  
12 before we take any action?

13 (No response)

14 CHAIRMAN RUSSELL: The motion is to  
15 extend the supplemental notice, and extend the  
16 comment period to April 16th, 2007 at end of  
17 business day. Is there any further discussion?

18 (No response)

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

21 (Response)

22 CHAIRMAN RUSSELL: Opposed.

23 (No response)

24 CHAIRMAN RUSSELL: Motion carries  
25 unanimously. Thank you.

1 MR. LIVERS: Mr. Chairman, could you  
2 clarify the motion, please?

3 CHAIRMAN RUSSELL: To extend. To adopt  
4 the supplemental notice and extend the public  
5 comment period.

6 MR. LIVERS: And I was not sure on the  
7 date on that.

8 CHAIRMAN RUSSELL: I think it states on  
9 here, doesn't it? April 16, 2007. That would be  
10 the extension of the comment period that's in the  
11 notice. That's for -- John? July 2nd, 2007.

12 MR. NORTH: That's correct.

13 CHAIRMAN RUSSELL: Sorry. Any reference  
14 to the April date should be stricken, and it's  
15 actually July 2nd, that is the extension period.

16 We'll move on then. The next item on  
17 the agenda is rulemaking to amend 17.30.1303 and  
18 1330. Tom.

19 MR. LIVERS: Thank you, Mr. Chairman.  
20 This is a final adoption. We'll have just a very,  
21 very brief recap from our Water Quality Protection  
22 Bureau on what this does, and what we've seen in  
23 the comment period. With that, Carrie Smith from  
24 Water Quality Protection will address the Board.

25 MS. SMITH: Good morning, and thank you,

1 Chairman Russell, members of the Board. For the  
2 record, my name is Carrie Smith, and I'm the  
3 Section Supervisor for the Compliance and  
4 Technical Support Section of the Water Protection  
5 Bureau.

6 Based on your request during the  
7 previous board meeting, I have provided you a  
8 handout that contains a brief description of the  
9 definitions of a concentrated animal feed  
10 operation, known as a CAFO. A CAFO is an animal  
11 feeding operation, which means a lot or a facility  
12 where animals are confined and fed. The area is  
13 void of all vegetation, and the animals are held  
14 there for 45 days or more in a 12 month period of  
15 time. I would like to provide a brief summary and  
16 explanation of the proposed rules that you have  
17 before you.

18 In February of 2006, the Board adopted  
19 the EPA 2003 CAFO rules by reference, which  
20 provided consistency between the state and federal  
21 regulations regarding CAFOs. The proposed  
22 incorporation by reference will adopt several new  
23 CAFO deadlines that EPA promulgated on February  
24 10, 2006. MAR Notice 17-256 that you have been  
25 provided contains those provisions to the

1 administrative rules, and extends certain dates  
2 for compliance specified in that February 2006  
3 rule.

4 The amendments to 17.30.1303 are  
5 necessary to insure consistency between the state  
6 and federal CAFO rules, and are required by the  
7 Water Quality Act 75-5-802. The proposed rules  
8 would revise all references to the date by which  
9 the nutrient management plans must be developed  
10 and implemented in the 2003 CAFO rule.

11 This rule would not affect CAFOs that  
12 are currently permitted and existing, and have  
13 developed and implemented nutrient management  
14 plans. The amendment to 17.30.1330 eliminates a  
15 duplicative incorporation by reference that has  
16 already been incorporated in 17.30.1303.

17 The notice of proposed amendment gave  
18 interested parties until February 18th, 2007 to  
19 request a hearing or provide written comments.  
20 The Department did not receive any comments with  
21 regard to this notice of proposed amendments. The  
22 Department however did receive a few phone calls  
23 in which permit holders asked specific questions  
24 with regard to their facility, and how the  
25 proposed rule might affect their operations.

1 Based on our conversations, they did not submit  
2 formal written comment.

3 In closing, the Department requests the  
4 Board adopt the proposed rules as set forth in the  
5 original notice of proposed amendment with no  
6 changes to the revised CAFO rules, and to extend  
7 the deadlines and provide more time for compliance  
8 and consistency with the federal rules.

9 If you have any questions, I'd be happy  
10 to answer them.

11 MR. ROSSBACH: I think the record needs  
12 to be corrected. I think the comment period is  
13 January 18th, not February 18th, is what you said.  
14 I think you misstated.

15 MS. SMITH: That is correct.

16 CHAIRMAN RUSSELL: Any questions?

17 (No response)

18 CHAIRMAN RUSSELL: I guess I have a few.  
19 We're doing some rulemaking. There was no  
20 hearing.

21 MS. SMITH: That's correct, Mr.  
22 Chairman.

23 CHAIRMAN RUSSELL: So we don't need a  
24 Hearings Examiner report. But does that preclude  
25 the other requirements with 311 and 521?

1 MR. NORTH: (Shakes head)

2 CHAIRMAN RUSSELL: Do we have those  
3 documents?

4 MR. NORTH: (Nods head)

5 MS. WITTENBERG: It was on the table.

6 CHAIRMAN RUSSELL: There they are.

7 Okay. Any other questions?

8 (No response)

9 CHAIRMAN RUSSELL: Thank you. I will  
10 entertain a motion to adopt the amendments to  
11 17.30.1303 and 1330 pertaining to the  
12 incorporation by reference of the CAFO rules, and  
13 adopt the 521 and 311 analysis. Do I have a  
14 motion?

15 MR. MARBLE: So moved.

16 CHAIRMAN RUSSELL: It's been moved by  
17 Don.

18 MR. ROSSBACH: Second.

19 CHAIRMAN RUSSELL: It's been seconded by  
20 Bill. 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: Do you remember the  
3 first time this came to us, there was a packet  
4 about this thick -- (indicating) -- now we're down  
5 to about ten pages.

6 MS. SMITH: I'll be back.

7 CHAIRMAN RUSSELL: Let's take a break.

8 (Recess taken)

9 CHAIRMAN RUSSELL: Let's wrap this thing  
10 up. I have that we're on to final action on  
11 appeals, and the first one is in the matter of the  
12 request for hearing of Tom and Noel Gordon doing  
13 business as Creston Top Soil. Katherine, do you  
14 have anything you want to --

15 MS. ORR: This case involves a failure  
16 to file an annual progress report that is required  
17 if you have an open cut mining permit. And the  
18 parties agreed to pay the penalty requested by the  
19 Department of \$800, and that's what the  
20 Administrative Order on Consent shows.

21 CHAIRMAN RUSSELL: So we have an  
22 Administrative Order on Consent, and I have an  
23 order of dismissal with prejudice. Do I have a  
24 motion to authorize the Chair to sign?

25 MR. ROSSBACH: So moved.

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

3                   MR. MARBLE:  Second.

4                   CHAIRMAN RUSSELL:  It's been seconded by  
5  Don.  Any further discussion?

6                   (No response)

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

9                   (Response)

10                  CHAIRMAN RUSSELL:  Opposed.

11                  (No response)

12                  CHAIRMAN RUSSELL:  The next item is the  
13  Wesley Gillespie MPDES Permit No. MTG370275.  
14  Katherine.

15                  MS. ORR:  This is a case of a gentleman  
16  who appealed, I think it was an administrative  
17  order by the Department to pay a fee that he owed  
18  as a water quality permit holder, and he initially  
19  objected and then withdrew his appeal.

20                  CHAIRMAN RUSSELL:  I have an order to  
21  dismiss.  Do I have such a motion to authorize the  
22  Board Chair to sign?

23                  MR. ROSSBACH:  So moved.

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

1 MR. MIRES: Second.

2 CHAIRMAN RUSSELL: It's been seconded by  
3 Larry. All those in favor, signify by saying aye.

4 (Response)

5 CHAIRMAN RUSSELL: Opposed.

6 (No response)

7 CHAIRMAN RUSSELL: The last matter was  
8 Bruce Woods doing business as Big Sky Ready Mix.  
9 Katherine.

10 MS. ORR: Mr. Chairman, if you don't  
11 mind, I would like to go back to the Wesley  
12 Gillespie order, and that is after the Board has  
13 voted, I wanted to point out that we didn't get an  
14 indication from either party as to whether it  
15 should be dismissed with or without prejudice. So  
16 just maybe a word to the Department.

17 CHAIRMAN RUSSELL: That's why I did not  
18 say anything but dismissal, because usually I like  
19 to put that on there, but I didn't.

20 MS. ORR: I believe if it is just  
21 dismissed, it's implied that it's dismissed  
22 without prejudice.

23 The next case is a case where we went to  
24 hearing on November 14th, and Mr. Wood appeared.  
25 And it was the same issue as Creston Top Soil. He

1 was objecting to the imposition of a penalty for  
2 the failure to file an annual progress report two  
3 years running on a site here in the valley. And  
4 his defense was, "I didn't get notice from the  
5 Department that I was supposed to do that." And  
6 this proposed order and findings and conclusions  
7 of law say that that's not the Department's  
8 responsibility, and the fine should be imposed as  
9 the Department requested.

10 This fine is less than the one requested  
11 by the Department in Creston Top Soil, and I  
12 believe -- I'm guessing it's probably because Mr.  
13 Wood did file his annual progress reports. They  
14 were just filed really late. And so that's  
15 basically all that I have to say about that.

16 In the order, there is a blank here. It  
17 should say January 16th, in the first paragraph,  
18 2007. Also as the Board knows, pursuant to  
19 2-4-621, any party who has been adversely affected  
20 by an order has to have an opportunity to file  
21 exceptions, and none came in.

22 CHAIRMAN RUSSELL: Thank you. I have an  
23 order in front of me, and basically the Board  
24 finds that the penalty sought by the Department is  
25 appropriate and supported by the record, and we

1 reviewed and adopt the findings of fact,  
2 conclusions of law, and proposed order, and I need  
3 a motion to authorize the Board Chair to sign.

4 MR. ROSSBACH: So moved.

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

7 MS. KAISER: Second.

8 CHAIRMAN RUSSELL: It's been seconded by  
9 Heidi. And Katherine, for the record, I actually  
10 put the 16th in there and initialed it, so this  
11 record will indicate that. It's been moved and  
12 seconded. All those in favor, signify by saying  
13 aye.

14 (Response)

15 CHAIRMAN RUSSELL: Opposed.

16 (No response)

17 CHAIRMAN RUSSELL: New contested case on  
18 appeal.

19 MS. ORR: Mr. Chairman, this is a case  
20 that has come in. A first prehearing order was  
21 issued on January 16th asking the parties to file  
22 a proposed prehearing and hearing schedule.

23 CHAIRMAN RUSSELL: Basically all we need  
24 to do with this is appoint Katherine the permanent  
25 Hearings Examiner, or elect to hear this

1 ourselves.

2 MR. ROSSBACH: Mr. Chairman, on this  
3 matter, I've reviewed the substance of this, which  
4 appears to be a dispute regarding a power line  
5 that Western Energy has, which is allegedly in  
6 violation of the rules which are intended to  
7 protect wildlife. I am interested in hearing that  
8 matter, in that the power line is almost a third  
9 of a mile long, and I think it has some  
10 significance, and I'm interested in sort of issues  
11 involving the rules.

12 And so therefore, I will move that the  
13 Board hears the matter with all procedural matters  
14 -- the Board makes the substantive decision, but  
15 all procedural matters prior to the Board hearing  
16 be handled by Hearing Examiner Orr.

17 CHAIRMAN RUSSELL: You've done this  
18 before? Have you done one of these before where  
19 you actually act on our behalf while we aren't in  
20 session?

21 MS. ORR: I haven't.

22 CHAIRMAN RUSSELL: We've done this in  
23 the past, and basically what Bill is motioning is  
24 we will hear it. We would hear the case. The  
25 case would be heard in front of us, and any

1 prehearing -- anything that needs to be done,  
2 scheduling orders or anything, would be done by  
3 Katherine. We did one of these four years ago.

4 MR. ROSSBACH: We had another one that  
5 we were going to do that got settled. We were  
6 going to do that with Hardin, and it was --

7 CHAIRMAN RUSSELL: So basically the case  
8 would be in front of the Board, but anything that  
9 happens outside of the Board would be handled by  
10 you as our attorney.

11 MR. ROSSBACH: In other words, the Board  
12 will make the substantive final decision.

13 MS. ORR: Mr. Chairman, then what about  
14 a motion for summary judgment or a motion to  
15 dismiss? That's a substantive decision?

16 MR. ROSSBACH: Yes, that would be a  
17 substantive decision. That would be the intent of  
18 my motion.

19 MR. LIVERS: We have a motion on the  
20 floor that needs a second.

21 MR. MARBLE: Second.

22 CHAIRMAN RUSSELL: It's been seconded by  
23 Don.

24 MR. MARBLE: Is this line at the present  
25 time de-energized?

1 MR. NORTH: Mr. Chairman, Mr. Marble,  
2 John North. Yes.

3 MR. MARBLE: Thank you.

4 CHAIRMAN RUSSELL: Yes, it's not  
5 energized?

6 MR. NORTH: It's not energized. It's  
7 de-energized.

8 CHAIRMAN RUSSELL: So there is a motion  
9 and a second. Any further discussion?

10 MR. SKUNKCAP: I have a question, Mr.  
11 Chairman. I guess it's more of just a comment. I  
12 would like to hear more on this also, because we  
13 did a site inspection on Flathead at the Salish,  
14 and they had the same problem also with the  
15 companies not putting up visuals for the birds,  
16 and some of the swans running into the lines, and  
17 falling and breaking their neck, or not being able  
18 to navigate well. So I would really like to hear  
19 this.

20 CHAIRMAN RUSSELL: So you have a  
21 personal interest in this one also.

22 MR. SKUNKCAP: I do, because we went to  
23 the drill site, and it took them forever to get  
24 that in compliance.

25 CHAIRMAN RUSSELL: Any further

1 discussion?

2 (No response)

3 MR. MARBLE: Call for the question.

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

6 (Response)

7 CHAIRMAN RUSSELL: Opposed.

8 (No response)

9 CHAIRMAN RUSSELL: So anything we want  
10 to give Katherine before we move on?

11 MR. LIVERS: Mr. Chairman, we'll look at  
12 the timing on this issue is it as it unfolds.  
13 Just in quick discussions with John, we could  
14 probably have that happen in conjunction with the  
15 meeting here in Helena. I don't know that we'd  
16 have a geographic -- we'd have a venue issue  
17 there. I know you're looking for a road trip.  
18 We're pretty tied to Helena until the beginning of  
19 May, so it's not really an option to leave, but  
20 we'll see how it goes.

21 MR. ROSSBACH: I don't think we need to  
22 hear the contested case.

23 MR. MIRES: So you're looking at say  
24 March?

25 MR. LIVERS: We'll have to see when

1 that --

2 MR. ROSSBACH: It won't be March.

3 CHAIRMAN RUSSELL: Once they hear we  
4 want to hear it, they're probably going to settle  
5 it rapidly.

6 MR. LIVERS: It isn't likely this would  
7 happen at the March meeting, so we might be  
8 looking at -- I think we've got one in early June,  
9 so possibly.

10 CHAIRMAN RUSSELL: Now comes the time  
11 for general public comment. Is there anyone out  
12 there that would like to speak?

13 MR. ROSSBACH: Yes.

14 CHAIRMAN RUSSELL: Are you going to  
15 speak as the public?

16 MR. ROSSBACH: I'm going to speak as the  
17 public.

18 CHAIRMAN RUSSELL: Bill is speaking as  
19 the public.

20 MR. ROSSBACH: I would like -- and  
21 actually Lisa should be here, because although  
22 Lisa is extremely good about getting us clippings,  
23 on December 18th, 2006, the Missoulian had an  
24 editorial which I thought was quite remarkable for  
25 the Missoulian, and I would like to bring it to

1 our attention, and maybe have Lisa obtain it and  
2 circulate it.

3 Basically the Missoulain, I don't know  
4 whether you recall, but there was a study that was  
5 published in part by Mr. Kuypers and others who  
6 have testified before us on mining issues, in  
7 which they looked at, made a comparison of  
8 predicted and actual water quality at various hard  
9 rock mines, in which they looked at what was said  
10 during the course of the permitting process as to  
11 the mitigation measures, and how successful it  
12 would be, and what kind of pollution impacts there  
13 would be in advance of the permit; and then they  
14 went back and looked at what was the reality of  
15 it.

16 And the findings were fairly staggering  
17 as to how poorly predictive. At least 75 percent  
18 of the time, the predictions were wrong, and the  
19 predictions were wrong 90 percent of the time for  
20 high risk mines.

21 So I thought I would like to remind us  
22 all of this, and maybe remember that we -- I think  
23 we've made a commitment that we're going to be  
24 looking at hard rock issues again. We looked hard  
25 at that last spring, but I think it's time that --

1 I don't want to forget that this is a matter that  
2 the Department -- we've asked the Department to  
3 keep in mind, and maybe bring back to us, and I've  
4 been thinking of some other things.

5 But I'd like to read and put into the  
6 record the last paragraph:

7 "Mining's track record in the west is  
8 the best ammunition mining opponents have. If  
9 mining is going to endure as an industry, miners  
10 and those who regulate them need to do more than  
11 improve their performance. They need to create a  
12 whole new track record, one that the public can  
13 trust. Accurate pollution assessments, failsafe  
14 mitigation measures, and adequate bonds; these are  
15 the measures that will ensure a future for mining,  
16 as well as protection from the environment."

17 I think as the Board of Environmental  
18 Review, we have both responsibilities of ensuring  
19 a future for mining, as well as protection for the  
20 environment.

21 CHAIRMAN RUSSELL: Thanks, Bill. I  
22 totally concur.

23 MS. KAISER: I have a question for Bill.  
24 Did you say Kuypers did that study?

25 MR. ROSSBACH: Kuypers was one of the

1 authors, and they -- I think in a --

2 MS. KAISER: Does he reference the  
3 document?

4 MR. ROSSBACH: A geochemist was the  
5 other from the University of Colorado. And  
6 actually I would like to request that the  
7 Department maybe -- I would believe that the  
8 Department probably has access to that study, and  
9 that that study can be circulated to us, or an  
10 executive summary of that. I think that that  
11 would be helpful to us to have.

12 MR. MARBLE: Do you need a motion on  
13 that?

14 CHAIRMAN RUSSELL: I don't think so.

15 MR. LIVERS: We'll get that.

16 MR. ROSSBACH: Thank you. Then I move  
17 to adjourn.

18 CHAIRMAN RUSSELL: Is there a second.

19 MS. SHROPSHIRE: Second.

20 CHAIRMAN RUSSELL: It's been seconded by  
21 Robin. All those in favor, signify by saying aye.

22 (Response)

23 CHAIRMAN RUSSELL: Opposed.

24 (No response)

25 (The proceedings were concluded at 10:52 a.m.)

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C E R T I F I C A T E

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

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

That the proceedings were taken before me at  
the time and place herein named; that the  
proceedings were reported by me in shorthand and  
transcribed using computer-aided transcription,  
and that the foregoing -54- pages contain a true  
record of the proceedings to the best of my  
ability.

IN WITNESS WHEREOF, I have hereunto set my  
hand and affixed my notarial seal  
this                      day of                      , 2007.

LAURIE CRUTCHER, RPR  
Court Reporter - Notary Public  
My commission expires  
March 9, 2008.