

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
MARCH 22, 2013)

TRANSCRIPT OF PROCEEDINGS

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
March 22, 2013
9:00 a.m.

BEFORE CHAIRMAN JOSEPH RUSSELL,
BOARD MEMBERS LARRY MIRES, HEIDI KAISER,
ROBIN SHROPSHIRE, MARVIN MILLER;
and JOE WHALEN (By telephone)

PREPARED BY: LAURIE CRUTCHER, RPR
COURT REPORTER, NOTARY PUBLIC

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

3 * * * * *

4 CHAIRMAN RUSSELL: It is 9:02, and I
5 will call this regular meeting of the Board of
6 Environmental Review to order. The first item on
7 the agenda is the review and approval of the
8 minutes of the January 25th, 2013 Board meeting.
9 I'm sure everyone had a chance to review those.

10 MR. MIRES: I would so move to approve
11 the minutes.

12 MR. MILLER: I'll second.

13 CHAIRMAN RUSSELL: It's been moved by
14 Larry and seconded by Marv. Any further
15 discussion?

16 (No response)

17 CHAIRMAN RUSSELL: Hearing none, all
18 those in favor, signify by saying aye.

19 (Response)

20 CHAIRMAN RUSSELL: Opposed?

21 MR. WHALEN: Aye.

22 CHAIRMAN RUSSELL: Motion carries
23 unanimously, I believe. You were a little slow on
24 the "aye" there, Joe, but I think I got you as an
25 aye.

1 So the next item on the agenda are
2 briefing items, contested case updates.
3 Katherine.

4 MS. ORR: Mr. Chairman, members of the
5 Board, I don't have anything really to add to what
6 is on the agenda, and everything sort of speaks
7 for itself.

8 Adkins, the one down in Park County,
9 their oral argument is set for that petition for
10 judicial review I believe for April 10th, or April
11 11th, so perhaps in the next Board meeting, there
12 will be something before it.

13 And as far as for the cases that the
14 Board has reserved to itself, on Item II(A)(3)
15 Sub(c) and (d), Colstrip Steam Electric station
16 And JE Corette Steam Electric Station, those have
17 been set for hearing, and will occur before the
18 Board, Colstrip Steam before the Board on December
19 6th, and the second one before the Board in 2014
20 at its scheduled meeting in January, whenever that
21 is.

22 That's all I had to say.

23 CHAIRMAN RUSSELL: Okay. Thanks. Tom.

24 MR. LIVERS: Mr. Chairman, maybe a
25 question for Katherine. Would it be helpful in

1 scheduling if we were to try to nail down the date
2 for the January Board meeting in 2014 at this
3 point, or is that not necessary?

4 MS. ORR: No, I don't think it would be
5 -- The earlier the Board knows, the better, for
6 the purposes of the parties' preparation. It is
7 not critical, but it would be nice either this
8 meeting or the next meeting.

9 MR. LIVERS: Thank you. Maybe with that
10 in mind then, we don't have to act on that at this
11 meeting, but would ask that the Board members
12 consider their calendars for January. We can send
13 out a couple of options, and we'll just do that
14 via email.

15 CHAIRMAN RUSSELL: Just a thought, and
16 this is very selfish on my part, but the third
17 Friday in January would be my preference right
18 away.

19 MR. LIVERS: Okay. Mr. Chairman, that's
20 going to be early. That will be the 17th, I
21 think, so we can do that. But we'll send out an
22 email with some options on that and have folks
23 take a look.

24 CHAIRMAN RUSSELL: Is that following a
25 third Thursday?

1 MR. LIVERS: It is.

2 CHAIRMAN RUSSELL: Okay.

3 MR. LIVERS: The first is a Wednesday.

4 CHAIRMAN RUSSELL: Okay. That would be
5 my preference, so if anyone else has other
6 preferences, we need to get those in early.

7 Thanks, Katherine. And just from the
8 prehearing activity, will these be long hearings?

9 MS. ORR: Mr. Chairman, it is hard to
10 know. I would suspect so, though. I'm kind of
11 getting an idea that there will be motions for
12 summary judgment filed. That's going to happen in
13 October. I think they're going to have experts.
14 So depending on how the motion for summary
15 judgment goes, if it goes to hearing, I would
16 suspect yes.

17 CHAIRMAN RUSSELL: Which could be some
18 conflict based on the fact that I would not be
19 available on Thursday until the evening. If it
20 looks like it is going to be a day and a half, as
21 some other ones would, then there could be some
22 issue there.

23 MS. ORR: Okay. We'll watch out for
24 that.

25 MR. WHALEN: Mr. Chairman. Is it fair

1 to assume that these hearings will be in Helena?

2 CHAIRMAN RUSSELL: Well, I've had some
3 discussions with Tom about some budget matters,
4 and I guess I'll speak a little for the Department
5 now. They'd probably prefer to be in Helena just
6 to save some cost of traveling just us, instead of
7 traveling us all the way to eastern Montana, and
8 also traveling all of the Department folks that
9 might have to travel, too, but that could be
10 presumptuous on my part.

11 MR. LIVERS: Mr. Chairman, Mr. Whalen,
12 this is Tom, and I would echo that. We'll know
13 more at the end of the session where we stand with
14 the Board budget, but I think we may be looking at
15 some additional teleconference meetings, and that
16 sort of thing, and budget probably will be a
17 consideration.

18 Venue would be Helena, so I think we
19 would anticipate having those hearings in Helena,
20 but I'll probably be able to talk a little more at
21 the May meeting about what things look like for
22 the coming biennium with the Board budget.

23 CHAIRMAN RUSSELL: Anything further
24 before we move on?

25 (No response)

1 CHAIRMAN RUSSELL: All right, Tom. The
2 next thing is a briefing item, eastern Montana.

3 MR. LIVERS: Mr. Chairman, members of
4 the Board, I understand that at the December
5 meeting -- I wasn't at -- but there was a request
6 for just an update on DEQ's response to the
7 impacts in eastern Montana that we have purview
8 over.

9 And so I think some of you may recall
10 that last year we moved Steve Kilbreath into a
11 mobility, a temporary position that we were trying
12 out to focus on oil and gas impacts. And so Steve
13 will be here today and is going to give us an
14 update.

15 MR. KILBREATH: Mr. Chairman, members of
16 the Board, my name is Steve Kilbreath,
17 K-I-L-B-R-E-A-T-H. And as Tom mentioned, I work
18 in the Director's Office, and have been looking at
19 the impacts for oil development drilling
20 predominantly in eastern Montana, and I was going
21 to give you a briefing today to talk about that,
22 and I have a series of slides. I will try to be
23 brief because briefings are supposed to be brief.

24 So we'll start off with an overview.
25 This is a map that shows all of the oil and gas

1 wells in the state of Montana. And Montana has
2 produced oil and gas, and had exploration for a
3 long period of time. There are only four counties
4 in the state of Montana that do not have an oil or
5 gas production well and exploration well, and
6 those would be Mineral, Missoula, Ravalli, and
7 Butte-Silver Bow.

8 We have a cable glitch that we haven't
9 been able to figure out between my notebook and
10 that projector, and so every once in a while it
11 goes black for a second.

12 So we have drilled oil and gas wells in
13 Montana for a long time. The first wells were
14 drilled in the very early 1900s. There was seven
15 wells drilled in 1900 to 1910. We've gone through
16 a cycle where we drilled wells in the 1930s; we
17 had a big boom in the 1980s; and we're back with
18 another peak of drilling in Montana.

19 We're going to shift gears, and we're
20 only going to talk about horizontal drilling, and
21 this map shows the horizontal traces, the
22 completion traces of the horizontal wells in
23 Montana. We've color coded them by the geological
24 formation that they occur in. So the bright red
25 in the corner of the map is the Ordovician Red

1 River formation, and it's Ordovician age. Black
2 wells are Bakken.

3 And so you can see that we have focused
4 our primary drilling, horizontal drilling in
5 Montana in two areas. We've focused in the
6 Bakken, and we've focused in the Red River.

7 This shows you a histogram of
8 completions of horizontal wells by year. We have
9 been drilling horizontal wells for quite a period
10 of time. They're nothing new. The Red River/
11 Cedar Creek anticline in Fallon County has had
12 horizontal wells drilled in it since the 1980s.
13 The resurgence is dominantly in the Bakken
14 Formation. The lower histogram that just went
15 dark again --

16 MS. SHROPSHIRE: Can I ask a question.
17 Is there a regulatory definition of horizontal? I
18 mean is there some angle that has to exceed --

19 MR. KILBREATH: They record the vertical
20 wells, they record the slant wells, and then they
21 record the horizontal wells; and I haven't seen
22 one, Robin, in the Board of Oil and Gas rules.
23 They have descriptions of them, but I haven't seen
24 a description.

25 MS. SHROPSHIRE: So is that --

1 MR. KILBREATH: They call that a -- I
2 don't think they call that a horizontal well. I
3 think they have to turn and turn 90 degrees. But
4 there is not a clean definition that I've seen.

5 This shows a distribution of horizontal
6 wells by counties, and you can see in here, this
7 is Fallon County, this is the Cedar Creek area.
8 There has been horizontal drilling for years in
9 there. More recently Richland County, the Bakken,
10 has picked up, as has Roosevelt and has Sheridan
11 Counties in the Bakken in eastern Montana.

12 CHAIRMAN RUSSELL: So Steve, just to
13 stop you again then. The reason why we're
14 focusing on horizontal is because those are the
15 ones that are being hydrofractured --

16 MR. KILBREATH: We're focusing on
17 horizontal because that's where the bulk of the
18 production is coming from, and I'll show you that
19 in just a second. That's where almost all the
20 production --

21 CHAIRMAN RUSSELL: That's not an issue
22 of fracking --

23 MR. KILBREATH: Right now that's what's
24 in production, and that's what's dominating our
25 production, and we'll get into the fracking

1 component in a minute.

2 This is Elm Coulee. Elm Coulee was the
3 discovery of the Bakken outside of Sidney. Sidney
4 is down here in the corner, the little green dot,
5 and Elm Coulee is where the bulk of the production
6 in the Bakken formation and Richland County is.
7 The black dots are the surface locations of the
8 wells. The red lines are the horizontal trace of
9 the wells.

10 To give you an example of scale, a trace
11 like this is a two mile well. So the wells in the
12 Bakken are typically 10,000 feet deep, and then
13 they turn, and they drill from 5,000 to 10,000
14 more feet. So the typical Bakken well that's
15 going in today has a two mile horizontal lateral
16 that's underneath a two mile vertical hole. So
17 these are quite an interesting technology that's
18 going on out there in the drilling.

19 And so the Bakken is divided up into
20 spacing units. A spacing unit is two sections. A
21 company leases that, and they will drill out the
22 two sections with probably three or four
23 horizontal legs through that section that are two
24 miles in length.

25 Why we're focusing on horizontal

1 drilling is this is the total production from the
2 state of Montana, and Fallon County is down here,
3 and Richland and Roosevelt are here. This was
4 about 2000 when the discovery was done, was made
5 in Elm Coulee. Our oil production peaked about
6 2006. The price of oil tanked in about 2007, and
7 the number of drill rigs went away in Elm Coulee,
8 dropped down almost to nothing.

9 The price of oil came back up. Our
10 number of oil rigs has crept back up, and last
11 year we had about 20 rigs drilling in Montana.
12 And you start to see an upturn in production in
13 dominantly Roosevelt County, and a little upturn
14 in Richland County. Today there is a dozen rigs,
15 eleven or twelve, drilling in Montana.

16 So we're going to compare and contrast
17 Montana and North Dakota a touch. Robin.

18 MS. SHROPSHIRE: That was for oil. Do
19 you have a -- I'm curious what gas looks like.

20 MR. KILBREATH: I think it looks
21 similar. I didn't plot it, I didn't put it
22 together. We've almost stopped drilling for
23 natural gas completely, except that we're getting
24 gas as a byproduct out of the Bakken ones.

25 The Bakken wells have a typical decay

1 curve that is very steep, and you get the majority
2 of the production out of these wells in the first
3 few years. This is the typical North Dakota well,
4 and this well, the average Bakken well in North
5 Dakota, produces somewhere between 900 and 1,000
6 barrels a day, or 25,000 to 30,000 barrels a
7 month. It has a rapid decline, and then a life
8 span that will produce out over 20 or 30 years.

9 MS. SHROPSHIRE: I have a political
10 question. How much do you think that relates to
11 the tax holidays, the two years --

12 MR. KILBREATH: There is no tax holiday
13 in North Dakota, so this does not relate to a tax
14 holiday whatsoever.

15 MS. SHROPSHIRE: So --

16 MR. KILBREATH: It is the mechanics of
17 fracturing the shale, getting the oil out. You
18 get a high pulse of oil first, and then it decays
19 over time. And this has nothing to do with the
20 tax holiday.

21 In Montana -- and the Montana graph is
22 displayed a little bit differently -- the average
23 Bakken well in Montana produces a little bit less.
24 This is about 6,400, 6,500 barrels a month, so
25 about 220 barrels a day. The average Montana well

1 is much smaller than the average North Dakota
2 well, so it is much smaller production. The
3 average North Dakota well will produce 400,000 to
4 500,000 barrels over a ten year period. The
5 average Montana well will be about 200,000 to
6 250,000 gallons, so much lower production.

7 CHAIRMAN RUSSELL: And that's a function
8 of?

9 MR. KILBREATH: We'll get there. It's a
10 function of stratigraphy that carries --

11 CHAIRMAN RUSSELL: So how come you're
12 baiting us to ask questions?

13 MR. KILBREATH: I wanted to make sure
14 you didn't go to sleep when I turned the lights
15 off.

16 A picture is worth a thousand words.
17 This is the Montana Bakken with a little bit up in
18 northern Sheridan County. This is the North
19 Dakota Bakken. These are horizontal well traces.
20 Montana Bakken had first its major start of
21 drilling around 2000, major production around
22 2006. The first drilling in the Bakken in North
23 Dakota started 2004/2005, with their major
24 production starting about 2008. So they have
25 exploded in the amount of wells that they have

1 versus Montana.

2 The reason being is they've got a thick
3 pool in the Bakken. We've got a skinny pool. Elm
4 Coulee is a little basin in the Bakken that thins
5 out, and comes back, and starts thickening as you
6 go back to North Dakota. Elm Coulee is in here,
7 and the drilling that we're doing in the
8 Bainville/Froid/Culbertson area is coming into the
9 -- starting in towards thicker part of the basin
10 as you head towards North Dakota.

11 In North Dakota, the Bakken is 120, 150
12 feet thick, and the Three Forks underneath the
13 Bakken is another couple of hundred feet, 200 feet
14 of thickness that has production, good production.
15 We have very limited production in the Three Forks
16 on our side, a limited number of holes in it, and
17 a limited amount of production.

18 And so on the North Dakota side, they're
19 drilling those horizontal laterals in the Bakken,
20 and then off of the same pad they are putting
21 horizontal laterals into the Three Forks. And so
22 they will drill a pad that has multiple laterals
23 off of one pad. They've developed drilling
24 techniques that the rigs are articulated, and the
25 rigs move, and they walk across a pad, and drill

1 multiple holes.

2 One rig will drill 15 to 18 holes in
3 North Dakota in a year. Those holes are 20,000
4 feet in length. It is a mind boggling technology
5 to think about what they're doing with the
6 drilling and the moving of the rigs. It is just
7 incredible.

8 I can remember drilling a core hole in
9 Nevada in the 1970s, and it took like three months
10 to drill a 3,000 foot hole. This technology is
11 just incredible.

12 If you were to look at this in cross
13 section, a lot of these holes in North Dakota will
14 have laterals in the Bakken and laterals in the
15 Three Forks.

16 Overview of numbers. December
17 production for North Dakota was 23 and a half
18 million barrels of oil; December production for
19 Montana was 2.3 million barrels of oil; an order
20 of magnitude difference. Current rig count today
21 is 176 rigs operating in North Dakota; current rig
22 count in Montana is eleven. So lots more activity
23 across the border.

24 This is a graph that shows daily oil
25 production for North Dakota and daily oil

1 production for Montana. You can see that the
2 Montana peak was 2006; and in about 2008 the North
3 Dakota stuff started up, and hasn't looked back.
4 It is now up in about 750 million barrels a day.
5 750,000 barrels a day, 750 million barrels a year.

6 So it took off in 2008, and 2008 is an
7 important date to remember. So we'll skip the
8 overview of what's going on out there, and we'll
9 talk about what the DEQ is doing out there.

10 Dominantly our Permitting and Compliance
11 Division is what is impacted with eastern Montana.
12 We've seen an upswing in gravel permits, and we're
13 running 100 to 110 applications and permits a year
14 since the Bakken has been going. We can't graph
15 that data back through time to show when it took
16 off because we don't have a good data base
17 information past back about 2010, but we're
18 averaging 100 to 110 permits and applications per
19 year. Gravel mining is one of the most hotly
20 contested issues in eastern Montana.

21 We have an air registration program that
22 worked through the Legislature and worked through
23 industry, and created a registration versus a full
24 blown air permit. It was a classic success story
25 of everybody coming together and working at the

1 table. And it was 2003/2005 Legislature adopting
2 rules in 2007, and since that time we have 1,100
3 registered sites; at least 1,100, probably more
4 today.

5 And the registered sites are picking up.
6 Those sites that have the ability -- and Dave, if
7 I get this wrong, jump in -- to emit greater than
8 25 tons per year of air emissions, and you're
9 looking at combustion engines, emission from
10 combustion engines; you're looking at leaking of
11 VOC's from tanks; you're looking at leaking pipes,
12 the piping; you're looking at what they're
13 flaring.

14 MS. SHROPSHIRE: Does that include CO2?

15 MR. KILBREATH: Yes, I think it does.

16 Is Clint back there? You might ask him that
17 question.

18 CHAIRMAN RUSSELL: He's saying no.

19 MR. KILBREATH: He's saying no.

20 CHAIRMAN RUSSELL: We don't regulate
21 carbon.

22 MR. KILBREATH: So this was one of those
23 things where DEQ worked very closely with industry
24 and came up with a great program. And this
25 program is really streamlining, and doing a really

1 good job.

2 Think back to the graph that had 2008
3 highlighted. What I'm showing you here is impacts
4 to landfills in eastern Montana. And if you look
5 at here, you start seeing the Baker landfill
6 taking off, skyrocketing for tons per year going
7 into the landfill going out to 2008. You saw the
8 Sidney landfill going along increasing, and about
9 2008, 2010, start to go upward, steeply upward.

10 Public water and subdivision submittals.
11 So public water engineering and subdivision
12 applications, you look in here, and someplace in
13 about 2010, those start to take off and go up
14 through the roof.

15 MS. KAISER: What is the red line,
16 Steve, on the plotting --

17 MR. KILBREATH: It's Richland County.
18 So Richland County -- and that would be Sidney.
19 Sidney and Fairview is Richland County. Richland
20 County has just exploded with new growth in the
21 last few years.

22 MR. MIRES: I have a question on
23 landfills. Is the dumping just from residential
24 dumping, or is there oil rig dumping as well?

25 MR. KILBREATH: Predominantly right now

1 it is residential. We have exploration and
2 production waste, E&P waste, and we have a newly
3 permitted -- it just got its permit in the last
4 few years -- E&P landfill has been put in Dawson
5 County, and it's the Oaks Landfill, and that
6 landfill will probably be ready to take waste
7 mid-2013, so in three or four months.

8 We have an application for an E&P
9 landfill in Outlook. Outlook is either in
10 Sheridan or Daniels County. It's west of
11 Plentywood, and it is up there close. Then we
12 have a preapplication, we've had multiple
13 preapplication conferences for another E&P
14 landfill in Brockton in Roosevelt County.

15 MS. SHROPSHIRE: Do you know if they're
16 having to sample for the naturally occurring
17 radioactive materials in that?

18 MR. KILBREATH: Yes, they are. I've got
19 a slide on them. I'm going to talk about NORM and
20 TENORM.

21 Almost all of the oil that's coming out
22 of the Bakken has a large quantity of produced
23 water with it, and where you are in the Bakken,
24 that water ranges from half a barrel of water per
25 barrel of oil to four or five barrels of water per

1 barrel of oil.

2 Almost all of the water that's being
3 disposed of in the Bakken or produced from
4 formational water are going to Class 2 underground
5 injection sites. Class 2 sites are regulated by
6 the Board of Oil and Gas, which is a branch of the
7 Department of Natural Resources. They have
8 primacy for that program.

9 And one of the things that we see is we
10 see they'll take the water, and they'll run it
11 through filter socks, Robin, and the filter socks
12 are of a membrane that's just a progressively
13 smaller size that gets the suspended solids out.
14 The suspended solids have naturally occurring
15 radioactivity in them.

16 And the landfills, depending upon how
17 they're constructed, have different limits of NORM
18 or TENORM that they can take; and right now I
19 think the highest limit we have is probably Baker.
20 It can take 15 picocuries per gram of NORM or
21 TENORM, and we've seen some of the filters --

22 MS. SHROPSHIRE: What's TENORM?

23 MR. KILBREATH: NORM, naturally
24 occurring radioactive --

25 MS. SHROPSHIRE: What is TENORM?

1 MR. KILBREATH: TENORM is Technology
2 Enhanced. So if you take it and run it through a
3 filter sock and collect the particles, you're
4 enhancing it.

5 It has limits for landfills, and the new
6 landfills, the new exploration and production, new
7 E&P landfills that we have, are going to greatly
8 help this issue because they'll be able to take up
9 to 30 due to their construction. Currently
10 landfills in North Dakota won't take over five,
11 and so there's filter socks accumulating in
12 different places. If you don't have a home for
13 them, they've got to go to Colorado.

14 I suspect that once we build, once we
15 open the Oaks, we're going to see a lot of filter
16 socks.

17 This is interesting, the filter socks,
18 and that's a real interesting problem.

19 MS. KAISER: Could I ask one more
20 question about the produced water. What are the
21 other characteristics?

22 MR. KILBREATH: It's really high salt,
23 high chloride, high TDS, high chloride; 200,000 to
24 300,000 on the chlorides. It is just really
25 lovely stuff.

1 We have produced water permits in the
2 Water Protection Bureau. I think we have 20 or 22
3 general permits, and four individual permits for
4 produced water in other fields where the water
5 quality is of better standards; and the general
6 permits, Heidi, can be done if you can place that
7 water to a beneficial use. Like wildlife or stock
8 watering, then you can use a general permit. So
9 you have to have pretty good water quality, and
10 the produced water in Bakken is pretty rough. It
11 is almost all going into UIC sites.

12 So what I was going to say is temporary
13 work force housing is probably one of the biggest
14 impacts that's seen out there. RV parks, mobile
15 home parks, the closer you get to Sidney, the more
16 RV's you see. It's a cottage industry almost,
17 that mom and pop have five out behind the barn.
18 And the closer you get, you start seeing ten, and
19 then you start seeing twenty. RV parks for
20 temporary work force are a really -- it is a big
21 deal out there. There is a lot of it going on.

22 And in our world at DEQ, an RV park is a
23 subdivision. It falls under the regulation of
24 76-4, Title 76, Chapter 4, Subdivisions. If you
25 have two or more spaces for rent, we're going to

1 look at you.

2 Work camps. We're seeing a lot of work
3 camps. And you'll hear terms like "man camp" and
4 "work camp," and I use the word "work camp"
5 because work camp has a definition in the public
6 health statutes.

7 And a work camp is an employer/employee
8 provided housing, and we see work camps like this
9 one at Flat Lake that are dormitory style living;
10 and they'll have a central commissary where the
11 workers take their meals; they'll have laundry
12 facilities; and there'll be two beds per room, and
13 a bathroom; and you'll have a day shift worker and
14 a night shift worker sharing a room. You always
15 sleep alone in the room, but you've got a buddy.

16 And they build these in proximity to
17 work. And this one, you can see the drill rig
18 going in the background.

19 A work camp, in our eyes, is not a
20 subdivision because it does not have anything for
21 lease to the public or rent to the public, but we
22 look at them from the public water and public
23 wastewater perspective. So every work camp we're
24 seeing, we're reviewing under the Public Water
25 Supply Act.

1 And we're seeing some new things, like
2 truck parking facilities, where the trucking
3 companies don't have places for their folks to
4 live, so they get a flat spot, cover it with
5 gravel; and they build a building that's got
6 showers, and laundry, and toilets, and microwaves,
7 and a kitchen table, and they put up electrical
8 plugs.

9 And you get to drive your truck in
10 there. You drive your truck for twelve hours a
11 day, you park it, you take a shower, you do your
12 things, and then you sleep in your truck. So the
13 guys that are out there driving truck are in their
14 truck twenty hours a day.

15 We regulate truck parking facilities
16 under the Public Water Supply Act: 25 people, 60
17 days out of the year. We pick up the reviews for
18 water and sewer. So the work camps and the truck
19 parking facilities are something that's sprung up
20 that we haven't really dealt with in the past.

21 Septic pumpers. We regulate the septic
22 pumpers out there. And you probably recognize
23 that one.

24 CHAIRMAN RUSSELL: Why did you put that
25 picture?

1 MR. KILBREATH: Because I liked the
2 truck. I liked the truck picture.

3 And septage is a real interesting issue
4 in eastern Montana, because the majority of those
5 RV parks that spring up have hauled water and
6 hauled sewage.

7 CHAIRMAN RUSSELL: In the same tank.

8 MR. KILBREATH: In the same tank. And
9 they cut down on the hauled sewage because they
10 dump the gray water in the neighbor's field, and
11 just haul the black.

12 And the septage had been going to the
13 lagoons, the community lagoons. And the
14 communities out there are waking up on what
15 happens when you dump a whole bunch of hot loads
16 of really high strength waste into your lagoon.
17 We have had them just absolutely go dead.

18 One of the things that you get in the
19 holding tanks on RV's are that magic blue liquid
20 that keeps your food from smelling in there, and
21 so what happens is those are formaldehydes and
22 bactericide, so treatment plants don't like that
23 if there is a bunch of it in there. They upset
24 the balance.

25 Last year Sidney was taking 20,000 to

1 30,000 gallons a day of septage, and they had a
2 lagoon malfunction -- put that way -- where it
3 simply stopped for awhile. It has come back to
4 life, and it's back to working, but it stopped.
5 And most of the communities out there won't take
6 septage.

7 One of the pumpers has an application in
8 for us for a new land ap. site we've approved, and
9 one of the things he wants to go with is he wants
10 to put up a tank that he can store in, so that he
11 can store all winter, and then land apply all
12 summer. Adds a whole new concept to spring thaw
13 in Sidney, doesn't it?

14 And so right now, they're land applying
15 when the weather is nice, and in the winter they
16 were hauling to North Dakota.

17 One of the things we see that's real
18 intriguing and interesting to work with is
19 something we affectionately refer to as zombie
20 subdivisions, and these are the ones that we
21 approved in the 1980s that were started; and when
22 the oil downturn in the 1980s happened, all
23 the developers left town.

24 And we have a whole pile of things out
25 there that were started, construction was started;

1 the developer went bankrupt; the bank took back
2 the water and the sewer improvement; the counties
3 took back the lots for taxes; the banks sold the
4 infrastructure and improvements to the homeowners;
5 and the homeowners now are trying to deal with --
6 the counties have sold the lots because they can
7 make money on them today, and the water and
8 wastewater systems can't accommodate it.

9 And so it is making it an intriguing
10 legal environment. The lawyers are happy out
11 there. And there is probably eight, ten, twelve
12 of these things that we're dealing with in eastern
13 Montana.

14 Our enforcement group has been active
15 out there. We've taken complaints from local
16 government, sixty to seventy enforcement
17 complaints. Nine of them are coming to a head
18 with formal orders. And we may have seen an
19 upturn in our submittals with an increase in our
20 enforcement activity in eastern Montana. I think
21 there is a direct one-on-one relationship.

22 Water quality issues. We have been
23 looking at issues associated with fracking, and to
24 date we have not seen issues; the Board of Oil and
25 Gas has not seen issues.

1 And if you think about the drilling and
2 the fracking that's going on out there, fracking
3 is a relatively simple looking thing, simple
4 process. You take some water, you take some
5 chemicals, you take some additives, you put some
6 sand in them, and you pump them in the ground, and
7 you fracture; and the fracturing enhances your
8 production.

9 In reality on the surface, it looks a
10 little more complicated than it does in the
11 diagram. But the key to fracking and water
12 quality is bore hole construction and bore hole
13 integrity, casing integrity. These holes will
14 drill through and case, a surface casing, and then
15 they'll drill under the fresh water, set a casing,
16 grout, drill down to the kink point, the turn
17 point, set casing and grout. There's multiple
18 layers of casing, and multiple layers of grout,
19 and multiple layers of testing on the casing. And
20 so far we haven't seen issues associated with
21 fracking.

22 My mind tells me that we ought to be
23 more concerned about things that happen on the
24 surface -- trucks hauling chemicals, and spills at
25 the surface -- than we ought to be about the whole

1 process.

2 MS. SHROPSHIRE: Who is approving the
3 frack?

4 MR. KILBREATH: Board of Oil and Gas.
5 That's what's interesting, Robin, is the Board of
6 Oil and Gas has everything to do with exploration,
7 production, drilling, development, for oil and
8 gas; DEQ sits out here, and we have all the
9 peripheral things.

10 MR. MIRES: So do you have a common get
11 together, catch-all place, where all this
12 permitting is coordinated together, or is it you
13 guys need a DEQ permit, or you need another permit
14 here or there?

15 MR. KILBREATH: The drilling, the only
16 permit that DEQ has that an oil company needs is
17 when they put in production, they need an air
18 registration. That's the only one. All of the
19 other stuff is subsidiary impacts, or secondary
20 impacts related to that whole industry; and the
21 bulk of what we deal with are the impacts related
22 to the people associated with it -- the solid
23 waste, the public water, the wastewater, the
24 sewage pumpers, the lagoons that are having
25 problems, the community growth issues.

1 MR. MIRES: All of the responsibility
2 comes back down to basically our communities. Are
3 the oil companies getting involved with the
4 communities to solve this problem or --

5 MR. KILBREATH: Some are. The town of
6 Bainville, Bainville has gone through the funding
7 process, and got a brand new lagoon system in
8 2009, and it took them four or five years to get a
9 DER and get through that cycle. They built their
10 lagoon, and in 2009 when they built their lagoon,
11 they were over capacity for population with the
12 new lagoon they had built.

13 We have a company, Bain Construction,
14 that represents Procore and Sangel, are building a
15 siting and a work camp in town; and these guys are
16 building a lagoon for the town of Bainville. And
17 so Bainville will get a lagoon that will double
18 their town capacity, take care of the workers
19 associated with this, and then they're building
20 that at a cost of about million dollars to the
21 company coming in.

22 MR. MIRES: That's more the exception
23 than the norm, though.

24 MR. KILBREATH: Yes. Keystone XL,
25 they're doing improvements to the communities for

1 their work camps as they're going to come along.
2 We've been working with them on Baker, and we're
3 starting to work with them on the town of Fort
4 Peck right now.

5 MS. SHROPSHIRE: I'm involved with some
6 deep injection wells in a fracking project in
7 California, and there the EPA approves the
8 injection wells and they approve the fracking. I
9 guess I'm confused. Are they involved with any of
10 these injection wells or fracking?

11 MR. KILBREATH: EPA has given primacy to
12 the Montana Board of Oil and Gas for Class 2
13 wells, so EPA has overriding authority up here,
14 but the Board of Oil and Gas does all of the
15 regulation for the Class 2 wells. And the Board
16 of Oil and Gas has adopted rules for fracking, and
17 we do not have any EPA overriding authority on
18 fracking in Montana because we have our own rules.
19 It may change, but right now that's how it is.

20 So one of the things we've done is we've
21 taken a look at the public water supply systems in
22 Montana that are located within one mile of oil
23 and gas wells, and we've looked at them for all of
24 their monitoring history. And we've got -- I
25 don't know how many we've looked at that are

1 within a mile -- and we can see no issues with oil
2 and gas impacts, produced water impacts, etc., to
3 our public water supplies.

4 We've gone back and we've looked at
5 public water supplies within a mile of Class 2
6 injection wells, and we see the same results. We
7 see no correlated impact.

8 MS. SHROPSHIRE: What are you looking
9 for?

10 MR. KILBREATH: We're looking at mainly
11 the VOC's, because that's the data we have,
12 volatiles, mainly is BTEX is what we have.

13 MS. SHROPSHIRE: In the --

14 MR. KILBREATH: Public water supplies.
15 We're looking at the data, and there's about 104
16 things monitored for, Robin, in the inorganic
17 chemicals, organic chemicals, and the synthetics.
18 We've been looking through the data that we have,
19 and we haven't seen an impact.

20 We've looked at all public water
21 supplies that have BTEX -- Benzene, toluene,
22 ethylbenzene, and xylene. So the VOC's. And we
23 have about 105 public water supply systems in the
24 state that have had detectable BTEX. Seven of
25 them are within a mile of oil and gas; all seven

1 of those have leaking underground storage tanks on
2 or near the site, as do the other 95 or 97.

3 So from a BTEX point of view, it would
4 appear we're doing more to harm our shallow
5 aquifer by placing fuel in the tanks under them
6 than we are with drilling.

7 So where are we going to go with
8 drilling. Right now, the drilling has been
9 focused in Montana in Elm Coulee and in the
10 Bakken, in a triangle from Elm Coulee to the
11 Bakken/Froid fault, up into the North Dakota
12 border.

13 And right now -- this is a map of the
14 Board of Oil and Gas -- that is a bubble map that
15 shows the average daily production for the first
16 year of production of these wells; and you have to
17 be in between, someplace in between this small red
18 dot and this middle red dot, before a well is
19 economic.

20 What we're really seeing is an area --
21 Bainville is here, Culbertson is here, Froid is
22 here -- we're seeing another hot spot in the
23 Bakken that's developing. We will continue to
24 have infill drilling in the Bakken in Elm Coulee,
25 and we will have infill drilling in here; and how

1 much drilling we have out around the Bakken is
2 going to be depending on -- do we hit a sweet
3 spot? What's the price of oil? The economics of
4 a Bakken well at \$80 oil is very different than
5 \$120 oil.

6 And so right now, it appears -- this is
7 the map that we made -- it appears -- it has all
8 of the Bakken wells in those four counties shown.
9 It appears as if the only place that you have any
10 yellows and oranges, any significant quantity of
11 Bakken wells that are economic are in this
12 triangle.

13 There has been drilling for the Bakken
14 along the Rocky Mountain Front; there's been
15 drilling for the Heath in Central Montana; the
16 companies have been looking in other places. the
17 companies have been looking on the Rocky Mountain
18 Front. In this week's paper, Anchutz, which is
19 one of the big companies working up there,
20 completely pulled out of the Rocky Mountain Front.

21 There has been no happiness in the
22 drilling in the Bakken, Bakken equivalent rocks on
23 the Front range; and there has been very, very
24 limited success in the Heath in Central Montana.
25 I think it's probably three or four wells in the

1 Heath that are producing, and they're very
2 marginal. And there was an article in the
3 Billings paper about the Heath washing out in the
4 last week or so.

5 And so in reality what we're probably
6 going to see is we're going to see continued
7 exploration in the Bakken, but we'll see a very
8 limited area where we have continued development
9 drilling.

10 MS. SHROPSHIRE: Do you know what
11 percentage of the wells they're fracking?

12 MR. KILBREATH: I would suspect all, but
13 I don't know that. You can get to that
14 information through the Board of Oil and Gas. But
15 I think probably all of them. And the bulk of the
16 wells are being fracked on our side, I think in 20
17 or 30 stages of fracking. They frack in stages,
18 and a stage is just simply where you pack a
19 section of the hole and frack, and they frack in
20 multiple stages because they get more initial
21 production and more long term production out of
22 those wells.

23 Questions?

24 MS. SHROPSHIRE: Really interesting.

25 MR. MIRES: I do have some questions.

1 MR. KILBREATH: The take away, though,
2 that you guys I think need to take away is we're
3 getting impacts in Montana. We're getting a lot
4 of impacts in Montana from people, and the people
5 are from dominantly North Dakota development. I
6 think that's a real important take away.

7 MR. MIRES: Mr. Chairman, I do have some
8 questions. Steve, is there anything going on in
9 Montana that is going to start regulating,
10 seriously regulating TENORMs? What's on our
11 books? Anything?

12 MR. KILBREATH: I don't think so on our
13 books. We would regulate them through the
14 landfills. There's ongoing discussions with DEQ
15 and the people at DPHHS that regulate radioactive
16 stuff, Roy Kemp in that group. But right now, I
17 don't think so.

18 MR. MIRES: Is DEQ aware of a technology
19 called Ceramics Solution?

20 MR. KILBREATH: We have met with the
21 dyad. We have met with those folks. We are
22 waiting for them to give us a proposal. They seem
23 to be more willing to wander around and talk to
24 newspapers than they do to talk to us.

25 MR. MIRES: And communities.

1 MR. KILBREATH: And we have talked to
2 them, they've come here, and we've said, "Tell us
3 what you want to do, where you want to do it, and
4 give us a proposal," and we're waiting.

5 MR. MIRES: I did see their proposals
6 and their discussion. And their ceramic block
7 that they call ceramic is actually cement. And it
8 may be a high density cement. But their claim is
9 that their block only emits 2.7 picos. And
10 they're proposing that they would like to stick
11 some of these blocks in landfills, and virtually
12 any landfill would qualify to hold them. And I'm
13 wondering, do we have some kind of regulations, or
14 are we working at addressing this issue?

15 MR. KILBREATH: Our landfills can take
16 certain levels of NORM, depending upon how they're
17 constructed; and we would need to have them give
18 us a proposal that says, "We want to put this
19 filter sock shredding operation here, and we want
20 to make these cubes here."

21 We would say that is a solid waste
22 facility, and that facility needs regulation; and
23 then we would say, "Show us what your cubes have,
24 so we can make a determination on is it
25 appropriate to put them in a landfill." And we've

1 had sit down face-to-face meetings with them, but
2 we can't get a proposal from them, because I think
3 they're out there fishing for a spot.

4 MR. MIRES: I think their problem is
5 anytime you say the word "radiation," communities
6 come -- not realizing that there is a certain
7 amount of NORMs that are there. But they did put
8 on a presentation this last week in Glasgow, and
9 they put a proposal to the landfill to store a
10 significant tonnage, and it appears that this is
11 going to be a bigger problem looking into the
12 future than it is right now.

13 MR. KILBREATH: And think about the
14 filter socks in North Dakota that are happening if
15 the North Dakota landfills are not accepting them.
16 And the other alternative is to take them to
17 Colorado.

18 MR. MIRES: I'm told -- I have not seen
19 it -- but I'm told that some of those filter socks
20 are ending up in people's fields, in their
21 coulees, and that's not a good deal.

22 MR. KILBREATH: And we'd be really happy
23 to work with them, and we have said that to them,
24 but they need to say, "We want to put this
25 facility here, and it's going to do this, and then

1 we're going to put these cubes here," and then we
2 would deal with that submittal through our Solid
3 Waste Program. But I don't think they've found a
4 home yet that says, "Yeah, come on in." Maybe one
5 of these new E&P landfills is the answer.

6 MR. MIRES: The one at Oaks has some
7 good potentials. But the information provided --
8 and I don't know if it is 100 percent correct -- I
9 think the Glasgow landfill is a perfect site
10 because of its clay base, the clay structure
11 that's in the ground.

12 MR. KILBREATH: I may get a little bit
13 out here on my knowledge, but if you have a clay
14 liner constructed landfill, you can take only up
15 to a certain amount of NORMs. If you have a
16 membrane with a leachate collection system, and
17 all of the bells and whistles, they can take up to
18 30; and that's where the Oaks is going. Baker is
19 a clay lined. Nobody out there has the full bells
20 and whistle landfill that would help solve this
21 problem, but the new E&P landfills will be that.

22 MR. MIRES: Thank you.

23 CHAIRMAN RUSSELL: Anything else?

24 MS. SHROPSHIRE: I do have a question.
25 You were talking about the registries, and you had

1 a photograph, and there was like a flare pit.
2 Have you seen any issues with hydrocarbons,
3 reclamation of those sites, and hydrocarbons
4 ending up in the flare pits?

5 MR. KILBREATH: I don't know the answer
6 to that question. I know that in Montana, we are
7 capturing the vast majority of the gas we produce.
8 And the flare pits that you see associated with
9 that would be the excess gas that just gets off of
10 the tanks and the equipment, etc.

11 North Dakota, you can go on to their
12 website, the North Dakota Industrial Commission
13 Oil and Gas Division, and you can find out monthly
14 how much gas they produce, and how much gas gets
15 flared, and it is about 30 percent of their total
16 production is flared in North Dakota. You just
17 don't have the gathering and collection ability.

18 MS. SHROPSHIRE: I mean sort of --
19 sometimes you get liquid that comes out, and then
20 -- which is why they're bermed, but --

21 MR. KILBREATH: I don't think I know the
22 answer to that.

23 MS. SHROPSHIRE: It sounds like a
24 contaminant hydrogeologist's dream.

25 MR. KILBREATH: Yes.

1 CHAIRMAN RUSSELL: Anything else?

2 MR. KILBREATH: Thank you guys.

3 MR. WHALEN: Mr. Chairman, I do have
4 some questions for Steve, if he's not too far from
5 the podium.

6 MR. KILBREATH: I was hoping you weren't
7 awake.

8 MR. WHALEN: Steve, I would echo the
9 comment with respect to the quality of your
10 presentation. Even without the benefit of visual
11 aids, it was enjoyable on this end.

12 MR. KILBREATH: I will get it to you.

13 MR. WHALEN: Thank you. You addressed
14 the three issues that I have some questions about
15 that relate to the transport of gravel out of
16 Montana, the transport of produced water into
17 Montana from North Dakota, and the issue with
18 respect to landfill.

19 And my questions are: What sort of
20 regulatory regime does the Department have in
21 place to control the export of gravel resources
22 out of Montana into North Dakota, to control the
23 import of produced wastewater from North Dakota
24 into Montana, and the control of the transport of
25 the landfill material, intrastate landfill

1 material, from one landfill, say, in Richland
2 County to another landfill in Fallon, or Dawson,
3 or Custer County?

4 I'd be interested in your response to
5 those questions.

6 MR. KILBREATH: I think the short answer
7 to your question is none, none, and none. We
8 don't have any regulatory authority in our
9 programs of where the gravel goes. We regulate
10 the pits, and the construction, and the production
11 of the gravel; and if they want to sell that
12 gravel out of state, that's the decision of the
13 operator.

14 And I know in discussions with the Board
15 of Oil and Gas, there are a lot of Class 2 wells
16 along the border that are getting water from North
17 Dakota, and there is no regulations on the water
18 crossing the border coming our way. It is one of
19 those things. The border is there, but it doesn't
20 seem to have any major influence on those
21 commodities.

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

24 CHAIRMAN RUSSELL: Sure.

25 MR. MIRES: In regards to the gravel

1 pits, when they're permitted, are these pits going
2 to be required to be reclaimed and part of the
3 landscape --

4 MR. KILBREATH: Yes, the permitted pits
5 have reclamation requirements.

6 MR. MIRES: Thank you.

7 CHAIRMAN RUSSELL: Maybe at the break
8 I'll ask you what "subdivision stuff" is.

9 MR. KILBREATH: Okay.

10 CHAIRMAN RUSSELL: We're going to take a
11 quick break.

12 (Recess taken)

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1 CHAIRMAN RUSSELL: Let's go ahead and
2 get started. The next item on the agenda is the
3 Board will hold a public hearing on the
4 Butte-Silver Bow Air Pollution Control Program.
5 I'm not sure if that's called that. Ours is
6 called that. Paul, do you call it that?

7 MR. RILEY: (Nods head)

8 CHAIRMAN RUSSELL: One of the things is
9 that to adopt a local regulation, the Board of
10 Environmental Review must hold a public hearing on
11 the regulation and the process of adoption. And
12 literally it is statutory, and it is based on
13 75-2-301.

14 So as we move into a public hearing,
15 we'll do it as we would always. We will have
16 proponents, and opponents, and then if at any time
17 after that I'll close the public hearing, and we
18 may have some questions to the Department at that
19 point, but we would not be taking general comment
20 from the public at that point. I don't think
21 there is a lot of public people out there.

22 At this time we'll open the public
23 hearing, and we'll hear from the Department. I
24 guess we'll hear from Butte-Silver Bow.

25 MS. SHROPSHIRE: They're defined as the

1 Department --

2 CHAIRMAN RUSSELL: No. That's fine. No
3 they're not.

4 MR. RILEY: Mr. Chairman, members of the
5 Board, for the record, my name is Paul Riley from
6 Butte Silver Bow Environmental Health Department.
7 I'm here before you today about the changes we
8 have made in our air quality regulations in
9 Butte-Silver Bow County. These regulations were
10 passed by Butte Silver Bow County Commission on
11 April 18th, 2012. The Walkerville Town Council
12 also moved to develop the air quality regulations.

13 We have followed the procedures outlined
14 in 75-2-301, MCA. We issued public notice of the
15 intent to revise regulations as provided in Title
16 75 on February 12th through the 19th in the
17 Montana Standard; also newspaper articles,
18 television interviews, radio interviews took place
19 to keep the general public informed throughout the
20 process.

21 The public meeting was held by the Butte
22 Silver Bow County Commissioners on February 22,
23 2012. Public comment was taken and accepted at
24 that time. Per MCA 75-2-301, your packet includes
25 stringency analysis, including a list of

1 prohibited materials that may not be burned in a
2 solid fuel burning device.

3 Our revised regulations are also
4 included in your packet, but I would like to cover
5 a few of the items at this time.

6 Butte Silver Bow regulations were put in
7 place to address a PM10 nonattainment area. PM2.5
8 was not a regulated pollutant at that time. These
9 revised regulations are being put in place to help
10 Butte Silver Bow address ambient 2.5 issues in the
11 area.

12 Our revised rules include a public
13 notification process that defines air quality in
14 three categories based on the PM2.5 standard.
15 These categories are good, poor, and alert air
16 quality. Good air quality is defined as PM2.5
17 concentrations averaged over an eight hour period
18 that are less than or equal to 40 percent of the
19 most current 24 hour NAAQS. Poor air quality is
20 defined as concentrations averaged over an eight
21 hour period between 75 percent of the PM2.5 NAAQS
22 24 hour standard.

23 The Health Department may declare an air
24 pollution alert when ambient concentrations of
25 PM2.5 exceeds 75 percent of the NAAQS average over

1 any eight hour period, and when scientific
2 meteorological data indicates the average PM2.5
3 will remain above the NAAQS if an air pollution
4 alert is not called.

5 The revised rules also include two
6 different permitting options burning in Silver Bow
7 County: Class 1 permits for all EPA approved
8 stoves; and special needs permits for persons who
9 demonstrate an economic need. All permits are
10 free of charge. The regulations do allow
11 permitted persons to use wood stoves during air
12 pollution alerts.

13 The Health Department's intent is to
14 keep Butte Silver Bow from exceeding the 2006
15 PM2.5 24 hour national ambient air quality
16 standards of 35 micrograms per cubic meter. The
17 enforcement and permitting of these regulations
18 will be the responsibility of the Environmental
19 Health staff.

20 The penalty section was carefully
21 considered by the Council of Commissioners, and
22 involved consideration of public comment.
23 Citations can be issued under the penalty section,
24 but first steps in enforcement will entail
25 education information, including proper burning

1 techniques, oral and written warnings.

2 The Health Department and Council of
3 Commissioners went to great lengths to ensure that
4 all citizens' comments and concerns were addressed
5 through the public comment process. The air
6 quality ordinance will not place undue economic
7 burden on citizens that use wood products to help
8 or help heat their homes.

9 The permitting process is free of
10 charge. Information about clean burning
11 techniques is also provided free of charge by the
12 Health Department.

13 In closing, I would like to thank the
14 Board for their time, the State of Montana DEQ Air
15 Quality Division for their help and guidance in
16 this process. If you have any questions, I'd
17 gladly answer them.

18 CHAIRMAN RUSSELL: We'll probably call
19 you back up. Are there any other proponents?

20 (No response)

21 CHAIRMAN RUSSELL: Seeing no one jumping
22 up, are there any opponents?

23 (No response)

24 CHAIRMAN RUSSELL: Seeing none, this
25 public hearing is closed. We'll work in executive

1 session now.

2 I do have some questions for you, Paul.
3 Some of this is just -- I've been through this a
4 few times myself. Did your Public Works people
5 have any problem with your sanding material
6 ordinance?

7 MR. RILEY: Mr. Chairman, members of the
8 Board. No, we've had a pretty good relationship
9 with our Public Works Department in reference to
10 sanding materials, de-icing, and so forth.

11 CHAIRMAN RUSSELL: Maybe that's because
12 your old boss is the Public Works Director.

13 MR. RILEY: Dan Dennehy is now the
14 Public Works Director, who used to be the Health
15 Officer in Silver Bow County.

16 CHAIRMAN RUSSELL: And actually sat on
17 this Board for a couple years, too.

18 MR. RILEY: So Mr. Chairman, yes. We
19 worked directly with Dan and the road foreman as
20 far as getting a good cooperative and good
21 relationship with that Department to get an open
22 line of communication for the sanding materials.

23 CHAIRMAN RUSSELL: Having owned a house
24 in Butte for awhile, I know that your sanding
25 material two or three years ago did not meet this

1 spec that you put in here, just so you know.

2 MR. RILEY: I think the Public Works
3 Department has -- I think we've resolved that
4 problem.

5 CHAIRMAN RUSSELL: Good. And so your
6 permitting for solid fuel combustion devices, wood
7 stoves, how will you regulate that when you do
8 call an alert? Because you are going to allow, as
9 you stated, you will allow people of lower
10 economic means that haven't upgraded their stoves
11 to continue to burn.

12 MR. RILEY: Mr. Chairman, members of the
13 Board. Our permitting process is going to be --
14 we're actually working with the distributors of
15 wood stoves, as well as the individual process of
16 coming in on a voluntary basis to qualify for a
17 permit. We'll have a data base for those people
18 that are permitted with address information, so
19 when we do go out, and if we do have to take
20 enforcement action, it will basically be a
21 windshield survey, perusing the areas where we
22 know that stoves are, and if they are in
23 compliance, and they do have a permit, that would
24 be our process.

25 CHAIRMAN RUSSELL: Any questions?

1 MS. SHROPSHIRE: I do have a question.
2 It refers to outdoor stoves here, and I was
3 confused by that.

4 MR. RILEY: Ms. Shropshire, Chairman
5 Russell, members of the Board. We did address
6 hydronic wood boilers that weren't addressed in
7 our previous ordinance. So the outdoor hydronic
8 wood heaters that have become somewhat popular for
9 heating structures, they are addressed in our
10 ordinance.

11 MS. SHROPSHIRE: That is a new addition.

12 MR. RILEY: Correct.

13 MS. SHROPSHIRE: And it wasn't clear to
14 me that it addressed indoor wood burning stoves.
15 So it does --

16 CHAIRMAN RUSSELL: The solid fuel part
17 of it is wood stoves, and that would be the
18 indoor. And the State must have put something in
19 on outdoor combustion devices for heating
20 purposes, or did you guys just work with them to
21 make that part of it?

22 MR. RILEY: Mr. Chairman, members of the
23 Board. We worked with the State in going through
24 the process as far as addressing indoor basically
25 wood stoves, and the exterior hydronic heaters, so

1 to speak. Through the years, we've had, as these
2 hydronic heaters have become more popular, most of
3 them are in outlying areas, but we've had some
4 installed basically in localized neighborhoods
5 that were problematic for us, so we did address
6 those in the new ordinance.

7 CHAIRMAN RUSSELL: That's good. Other
8 questions? Marvin, you must have some. You live
9 down there.

10 MR. MILLER: Paul, just on a typical
11 year, how many days is Butte out of compliance?

12 MR. RILEY: Mr. Miller, Chairman
13 Russell, members of the Board. Usually we end up
14 somewhere in the categories -- are you referencing
15 air pollution alerts, or actually exceeding the
16 standard?

17 MR. MILLER: Well, exceeding the
18 standard.

19 MR. RILEY: It is probably on average
20 somewhere around five to seven days that we are
21 exceeding the 24 hour standard of 35 micrograms.

22 MR. MILLER: That's five to seven days
23 per year.

24 MR. RILEY: Per year, correct. And in
25 2013, we don't have all the qualified data back

1 yet, but the first 26 days of January this year,
2 we probably exceeded the standard five or six
3 times. So January was a bad month to start the
4 year.

5 MR. MILLER: Thank you.

6 CHAIRMAN RUSSELL: I can understand your
7 urgency then. Any other questions for Paul?

8 MR. MIRES: One. This is trivial, but
9 in here there was a comment or statement about
10 offensive odors. What constitutes an offensive
11 order? Who determines what an offensive odor is?
12 Is there State statutes that identify what is an
13 offensive odor?

14 MR. RILEY: Mr. Mires, Chairman Russell,
15 members of the Board. I guess as far as a State
16 statute as to what is an offensive odor, I can't
17 address that specifically. I could find out.

18 But we've had several instances where
19 people use unique materials in their wood burning
20 devices that create significant odors that we felt
21 needed to be addressed. In condensed
22 neighborhoods, especially in the uptown area where
23 houses are maybe six to eight feet apart, if
24 someone is burning potentially household waste,
25 plastics, or something that creates significant

1 odors, I guess that would be the explanation of
2 that.

3 MR. MIRES: Primarily it is going to be
4 things like plastic do have almost a toxic odor to
5 them; that would be the --

6 MR. RILEY: Correct.

7 MR. MIRES: Then in follow up, how
8 then --

9 CHAIRMAN RUSSELL: You'll know it when
10 you smell it.

11 MR. MIRES: But what's offensive to me
12 may not be offensive to somebody else.

13 CHAIRMAN RUSSELL: Especially if you're
14 the burner.

15 MR. MIRES: In looking at the map, it
16 appears that the boundary goes quite a ways
17 outside of Butte, and encompasses a good section
18 of the county proper. How does somebody living in
19 the county -- I'm assuming they're going to be
20 under the same ordinance and rules. If they're
21 outside of the city limits, and they're going to
22 be burning something that guys have said to not
23 burn, like colored papers, how are you going to
24 enforce it? Is this just a chance, by chance you
25 catch them?

1 MR. RILEY: Mr. Mires, Chairman Russell,
2 members of the Board. A lot of the time, most of
3 the complaints that we get are phone-in
4 complaints from neighbors. In reference to people
5 outside Butte Silver Bow proper, so to speak, we
6 have informational fliers and pamphlets that we
7 get out, talk to the media on a continual basis,
8 and providing the general public with information
9 what to burn.

10 Burnwise is a great tool from EPA that
11 lists proper burning techniques, as well as
12 materials that should be burned, and also that
13 should not be used in wood stoves.

14 But to directly answer your question, it
15 is somewhat of an honor system that we entrust
16 people to do the right thing; but if there is an
17 issue, we will go to the home and knock on the
18 door and say, "Is there something that you're
19 burning that is causing a significant odor, or
20 something that is a concern to your neighbors?,"
21 and pursue it in that manner.

22 MR. MIRES: Thank you.

23 CHAIRMAN RUSSELL: Anything else?

24 (No response)

25 CHAIRMAN RUSSELL: Nice job, Paul. All

1 right. At this point, unless there is anything
2 else that the Board would like to discuss, I have
3 an order that would approve the amended Title 8,
4 Chapter 16 of the Butte Silver Bow municipal code
5 as set forth in the Butte Silver Bow amended
6 regulations, and I will entertain a motion to
7 authorize the Board Chair to sign this order, and
8 complete our duties as related to local air
9 pollution control programs.

10 MS. KAISER: So moved.

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

13 MR. MIRES: I'll second.

14 CHAIRMAN RUSSELL: Seconded by Larry.
15 Further discussion.

16 (No response)

17 CHAIRMAN RUSSELL: Hearing none, all
18 those in favor, signify by saying aye.

19 (Response)

20 CHAIRMAN RUSSELL: Opposed.

21 (No response)

22 CHAIRMAN RUSSELL: Motion carries. All
23 right. Thanks. Good job.

24 ///

25 ///

1 CHAIRMAN RUSSELL: The next item on the
2 agenda is the CAFO rules. Tom.

3 MR. LIVERS: Mr. Chairman, we're
4 requesting final adoption of our CAFO rules, and
5 Tom Reid will address that.

6 MR. REID: Good morning. Mr. Chairman,
7 members of the Board, my name is Tom Reid,
8 R-E-I-D, and I work in the Water Protection Bureau
9 in the Permitting and Compliance Division.

10 The Board is taking action today on the
11 rules pertaining to Concentrated Animal Feeding
12 Operations or CAFOs. These rules are part of the
13 MPDES, or the Montana Pollution Discharge
14 Elimination System, in Subchapter 13, specifically
15 ARM 17.30.1330, 1341, 1343, 1361, 1362, and New
16 Rule 1.

17 1330 is what we call the CAFO rule.
18 That pertains to, defines CAFOs, and gives general
19 regulations for permitting CAFOs. 1341 is general
20 permits, rules pertaining to general permits.

21 Most -- and I think I can say all --
22 CAFOs in Montana are permitted under general
23 permits, and so that there are certain
24 requirements if those permits, those CAFOs are
25 being issued under general permit, including the

1 conditions to submit a nutrient management plan,
2 which is the substance of 1344. It spells out
3 what is in a nutrient management plan, which is a
4 required component of permitting a CAFO. And
5 we'll be talking about it in a little bit.

6 1361 and 1362 have to do with the
7 modification of permits, mainly if a CAFO modifies
8 its nutrient management plan during the course of
9 a permit. Some conditions are considered minor
10 amendments; and some conditions are major, and
11 have to go through review and approval by the
12 Department. Those rules were adopted pretty much
13 from the federal rules and incorporated by
14 reference.

15 New Rule 1 is the technical standard
16 that states are required to submit that define
17 what the state accepts in a nutrient management
18 plan, and we'll talk about that in a minute.

19 The primary reason for these amendments
20 is to update the State regulations in order to
21 maintain consistency with the federal regulations.
22 And in my introduction to these rules, I gave kind
23 of a description. In 2003, EPA promulgated new
24 CAFO rules. Those were challenged in court, both
25 from industry and from the environment side, in

1 what became known as Waterkeeper Decision.

2 As a result of that in 2008, EPA
3 promulgated new rules, which were again challenged
4 in Federal Court, and went through and were
5 decided under National Pork Producers versus EPA.

6 And then finally on July 30th, 2012, EPA
7 promulgated final rules in response to the
8 preceding litigation. So these rules reflect all
9 those changes, and all the litigation that's gone
10 over the last decade or so.

11 New Rule 1 is a technical standard which
12 states are required to adopt that addresses how
13 manure, litter, processed wastewater will be land
14 applied so that the nutrients in those wastes will
15 be utilized, and not run off into State surface
16 water. It is based on and will replace DEQ9 which
17 the Board adopted in 2006.

18 The Board initiated rulemaking on
19 December 7th, 2012; there was a hearing held on
20 January 11th, 2013; and the public comment period
21 closed on the 22nd of January. The Presiding
22 Officer's report and House Bill 521 and 311
23 analysis and the public comments are in the
24 Board's packet.

25 The Board received five comments from

1 three different commenters, including NRCS, MSU
2 Extension Service, and agricultural consultant.
3 All the comments were on New Rule 1. We didn't
4 receive any comments on the actual CAFO rules,
5 which is not surprising, because all those were
6 adopted by reference to the federal rule which has
7 been pretty well vetted by now.

8 And I would like to give a brief summary
9 of the comments and the proposed amendments, and
10 would be happy to answer any questions as we go
11 along.

12 The first comment has to do, and changes
13 will be made, have to do with field specific
14 assessment for determination of nitrogen and
15 phosphorus. The fundamentals of the nutrient
16 management plan is basically a site specific risk
17 assessment that determines the potential for
18 manure, litter, and processed wastewater that is
19 land applied to get into surface water. All CAFOs
20 are required to do that.

21 And in DEQ9 we allow two different
22 methods. One is a simple phosphorus soil test;
23 and the other is more extensive risk based
24 assessment, where you look at 16 different
25 factors, including the potential for sediment to

1 reach surface water, distance to surface water,
2 the erodability of the soils, the vegetative
3 cover, all those factors are considered.

4 When we proposed these rules, we went
5 strictly with a risk based phosphorus assessment.
6 That decision was based on the number of water
7 bodies in the state of Montana that are listed as
8 impaired for nutrients.

9 Based on that comment, we are proposing
10 to modify and allow the soil test in watersheds
11 that are not listed as impaired for nutrients.
12 That would allow the nutrient management plan and
13 the nitrogen base, or the phosphorus based risk
14 assessment, to be based on a simple phosphorus
15 soil test. That's the first comment, and proposed
16 amendment.

17 The second comment was a clarification
18 that nutrient management plans are required to be
19 updated every five years. That's in the federal
20 rule. That coincides with the term of MPDES
21 permits which are based on a five year cycle. The
22 general permits are issued for five years as well
23 as individual permits. So when you reapply, you
24 must submit an updated nutrient management plan.

25 The third topic comment had to do with

1 winter application of manure. I think everybody
2 -- NRCS, Extension Service, Department -- agree
3 that winter application of nutrients is not a good
4 thing. However, it happens generally because of
5 climatic conditions where there is a higher than
6 designed for precipitation, and impoundments fill
7 up, and you have to get rid of the waste.

8 So the rule as proposed did not allow
9 winter application. DEQ9 did not allow winter
10 application except for some requirements, some
11 provisions that were not clear. So as we proposed
12 the rule, we said no winter application.

13 Nutrients are supposed to be applied to
14 crops during the growing season, so in order to
15 qualify and to obtain a permit, the CAFO must
16 demonstrate that they have adequate storage for
17 all those wastes, at a minimum 180 days worth of
18 waste storage. But again, based on the comments
19 from NRCS -- and they deal a lot with these
20 producers -- we did amend the rule, proposed
21 amendment in the packet, that would allow winter
22 application under some limited conditions.

23 There is an additional set back from
24 surface water, a set back of 300 feet. What isn't
25 in the technical standard, but is in the rules we

1 adopted, is that there was a mandatory 100 foot
2 set back from surface water for all application.
3 This would extend it another 200 feet for winter
4 application.

5 There must be some permanent vegetation
6 in the field; and then depending on whether you're
7 applying liquid or solid waste, the slope of the
8 land surface has to be accounted for. Areas where
9 a CAFO has identified, meets these criteria, and
10 are eligible for a winter application, would have
11 to be identified in the nutrient management plan,
12 which is reviewed and approved by the Department
13 and goes out for public comment. So that's the
14 third comment.

15 The fourth had to do with nitrogen
16 fixation rates for the UNS (phonetic). As
17 proposed, the rule included Schedule I, which was
18 nitrogen fixation rates, in considerable detail
19 for a number of crops that are grown in Montana.

20 It was taken entirely from NRCS, and
21 NRCS is now saying they are no longer going to use
22 that level of specificity in their technical
23 standards, their technical standard 590
24 specifically. So they urged us to remove that
25 schedule, and to replace with it with some generic

1 rates. We thought that was a good idea. Because
2 NRCS is no longer going to support that either in
3 Montana or nationally, we'll go with what NRCS
4 recommends, and that's the ten pounds for annual
5 UNS and 35 pounds for perennial UNS with some
6 exceptions.

7 CHAIRMAN RUSSELL: So in the comment it
8 says -- this is a stupid chemistry joke -- but it
9 says it's going to be reduced by 35 to 50 pounds,
10 so you're going reduce that ammonia?

11 MR. REID: Yes. Those are all expressed
12 as credits, so that when you fill out your tables,
13 that's the credit that you actually -- it is a
14 debit because --

15 CHAIRMAN RUSSELL: Now you're getting
16 into the economy of scale.

17 MR. REID: Actually it's the reverse
18 from what you think about it.

19 So the last comment had to do with again
20 DEQ9, and the rule as proposed, we rely heavily on
21 EB-161, which is an Extension Service publication
22 that identifies nutrient demands for most of the
23 crops that are grown in Montana.

24 When we adopted DEQ9 in 2005, it was
25 EB-161, Extension Bulletin 161, was published in

1 2003. I guess the concern is that there are some
2 new crops coming on line, and producers may want
3 to use these crops in their rotation, and they're
4 not in EB-161. So there are other sources.

5 Montana does not recognize at this time
6 certified nutrient management planners. Other
7 states do that. It would be like a professional
8 engineer certification or a professional
9 geologist. We don't do that here, so that
10 recognition is not made in the State of Montana.

11 So we just, again since we have to
12 review and approve this, and go out for public
13 comment, we just allow other sources in addition
14 to EB-161 to be used as a basis for determining
15 the nutrient needs for the crops, and that could
16 be based on seed manufacturers recommendations,
17 other agricultural experts.

18 In the proposed rule we limited local
19 County Extension Service, realizing that they may
20 not be the only source of information on that.

21 So with that, I'd be happy to answer any
22 questions.

23 CHAIRMAN RUSSELL: Questions?

24 MS. KAISER: I have a couple. How did
25 the Department arrive at the 300 feet from surface

1 water for winter application?

2 MR. REID: Mr. Chairman, Ms. Kaiser.

3 That was based on the comment. NRCS suggested 300
4 feet. There isn't any hard and fast. The federal
5 rule requires 100 feet -- that's the standard --
6 unless you provide some alternatives. A
7 demonstration that is a 35 foot buffer is okay.

8 I don't know -- I believe the source of
9 that is from NRCS national standards, one of their
10 technical standards.

11 MS. KAISER: Does the Department do any
12 inspections prior to permitting winter application
13 on these areas?

14 MR. REID: Mr. Chairman, Ms. Kaiser. We
15 don't do any -- We do inspections on a routine
16 basis, but we don't go out -- If somebody has to
17 do a winter application, we don't necessarily go
18 out and look at that field. Like I said, they
19 would have to have identified that.

20 It is basically a preapproval. If they
21 have land that meets those criteria, and they feel
22 they may have a need for winter application, then
23 they would put that in their nutrient management
24 plan. We would review it and permit it. It would
25 be part of what is approved for that facility.

1 Site specific determination.

2 MS. KAISER: How many CAFO permits are
3 issued under -- how many have general discharge
4 permits or are permitted under a general permit?

5 MR. REID: The exact number changes, but
6 we have about 90 some, plus or minus ten to twenty
7 CAFOs, all under general permits at this point.
8 That's not always been the case. We had a few
9 under individual permits, but now they're under
10 general permits.

11 MS. KAISER: Thank you.

12 MS. SHROPSHIRE: Related to that, how do
13 you decide whether to go with a general permit or
14 an individual permit, or what caused the
15 transition from individual to --

16 MR. REID: Ms. Shropshire and Chairman
17 Russell. The Legislature amended the statute in
18 2005, and directed the Department to make
19 available a general permit unless there was a site
20 specific reason, water quality based reason, that
21 a CAFO should be permitted under a general permit.

22 Prior to that time, and I forget the
23 exact date, the CDC, Cattle Development Center,
24 basically the Court threw out our general permit
25 for reasons related to the Montana Environment

1 Policy Act. So we do comply with MEPA when we
2 issue the general permit, and we do an
3 environmental assessment at the time we issue an
4 authorization under the general permit.

5 Right now with these federal rules --
6 and again, a lot of these amendments to the rules
7 require that if a CAFO is permitted under a
8 general permit, it is held to the same standard
9 that an individual permit would be. So this is
10 rather unique, the general permit.

11 We have a nutrient management plan that
12 the Courts have said the public must have an
13 opportunity to comment on. So we public notice
14 every nutrient management plan, and we treat it in
15 that regard as an individual permit.

16 CHAIRMAN RUSSELL: Okay. Anything else?

17 (No response)

18 CHAIRMAN RUSSELL: Thank you, Tom.

19 MR. WHALEN: Mr. Chairman, I have a
20 question for Tom if he's not too far from the
21 podium. Tom, good presentation. Thank you very
22 much for taking the time to brief us.

23 If I understand your presentation
24 correctly, however, I'm having a little trouble
25 understanding the difference in terms of how these

1 discharge permits are monitored relative to
2 municipalities. Most municipalities, Class 2,
3 Class 1 cities, are held to some very rigid
4 testing standards with regard to wastewater
5 treatment.

6 If I understand your presentation
7 correctly, the CAFO's, they're complying with the
8 development of a nutrient management plan. Is
9 there any sort of monitoring that the Department
10 is doing to hold those operators to that nutrient
11 management plan over the five year permit?

12 MR. REID: Mr. Chairman, Mr. Whalen.
13 Yes. The rules prohibit any discharge from the
14 CAFO unless -- The only time a CAFO can discharge
15 is if the waste impoundment facility fills up and
16 overflows. And they have to be designed,
17 constructed, operated, and maintained to retain
18 the 25 year 24 hour storm event, in addition to at
19 a minimum 180 days worth of waste.

20 So basically a CAFO only discharges
21 periodically, during either chronic wet conditions
22 or catastrophic storm events that would cause the
23 waste impoundment to exceed its design capacity.
24 And we look at and approve those design
25 capacities, and look at each individual waste

1 impoundment structure.

2 But the waste has to go somewhere, so
3 the nutrient management plan is the structure that
4 the federal government and all this litigation has
5 looked at, so that these wastes are applied at
6 agronomic rates, so that any runoff from those
7 fields is considered agricultural runoff for the
8 purpose of the Federal Clean Water Act.

9 And yes, we do inspect both permitted
10 and unpermitted CAFOs, and we do that in
11 conjunction with EPA. So I think the CAFOs are
12 held actually to as high a standard as the
13 municipalities are.

14 CHAIRMAN RUSSELL: Anything else, Joe?

15 MR. WHALEN: I think I lost the
16 connection at the very end, but we'll let that
17 stand for now. Thank you, Tom.

18 CHAIRMAN RUSSELL: Before the Board
19 takes any action, are there any members of the
20 public that want to speak to this matter?

21 (No response)

22 CHAIRMAN RUSSELL: All right. With that
23 in mind, I will entertain a motion to adopt the
24 rule as amended, accept the Presiding Officer's
25 report, the 521 and 311 analysis, and the

1 Department's response to comments as our own.

2 MR. MILLER: I so move.

3 CHAIRMAN RUSSELL: It's been moved by

4 Marv. Is there a second?

5 MS. SHROPSHIRE: Second.

6 CHAIRMAN RUSSELL: Seconded by Robin.

7 Any further discussion?

8 (No response)

9 CHAIRMAN RUSSELL: Hearing none, all
10 those in favor, signify by saying aye.

11 (Response)

12 CHAIRMAN RUSSELL: Opposed.

13 (No response)

14 CHAIRMAN RUSSELL: Motion carries
15 unanimously. Thank you.

16 Let's take a stretch break. Five
17 minutes.

18 (Recess taken)

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1 CHAIRMAN RUSSELL: Let's go ahead and
2 get started.

3 The next item on the agenda is the
4 Board's final decision, maybe the final decision
5 on the Camas Prairie Gravel Pit, Sanders County.
6 So Katherine, I'll let you go ahead and kick start
7 this.

8 MS. ORR: Mr. Chairman, members of the
9 Board. You received suggested findings of fact,
10 and conclusions of law, and an order in this case.
11 And what I did was go through the transcript --
12 and also I think you've had access to the
13 transcript if you wanted to review it -- and pick
14 out the statutes, the elements of the statutes,
15 and then the factual record, to determine that
16 there was a violation, that Mr. Blakeman was an
17 operator, he was conducting opencut mining
18 operations on that extra lobe of .7 acres, as well
19 as conducting some opencut mining operations on
20 the permitted area with Sanders County. And he
21 seems to have conducted some cleanup, if you will,
22 on this Sanders County permitted mine.

23 And he really didn't present a defense
24 at the hearing, it didn't seem like, other than to
25 say that he wasn't aware of the boundary lines,

1 and he certainly wasn't aware of 10,000 aggregate
2 amount of removal of the overburden under 82-4-431
3 that would then require him to get a permit.

4 But as these suggested findings point
5 out, he was notified several times of the
6 responsibility that he had to get a permit, so
7 that seems like a contradiction, and that's
8 written in these findings.

9 And the Department presented testimony,
10 and they're also excerpted in these findings,
11 regarding the elements of the penalty, which is
12 \$3,600, and you have that set forth before you how
13 the Department determined what the penalty amount
14 should be. And Mr. Blakeman really didn't dispute
15 the derivation of that penalty, except to try to
16 say that his reclamation activities should in some
17 way defray his responsibility for the penalty.

18 Then in the December meeting, there was
19 discussion about, well, maybe there could be
20 another direction for these penalties. Especially
21 I think Board Member Anderson was concerned about
22 how vague 82-4-431 is insofar as the definition of
23 a site, and how do these individuals who are
24 subject to this statute know what the site is.

25 And impliedly I guess from your

1 discussions, maybe the Board wanted to look at
2 lowering the penalty on "Other matters as justice
3 may require" because of that vagueness.

4 Also a subtext here is Sanders County
5 may have been somewhat complicit in allowing
6 activities to occur on its permitted ground and
7 access to Mr. Blakeman to the lobe, and not doing
8 anything about it. So one question that I think
9 that the Board posed for the Department was can
10 you ask these players, Blakeman and Sanders
11 County, what happened here, and can you figure out
12 a way to make it a little more air tight, the
13 circumstance of anybody coming in and taking
14 gravel without a permit.

15 So before the Board today is the
16 question really of: Is there language you want to
17 change in this, given the transcript, and the way
18 you look at this, and what do you want to do with
19 penalties?

20 CHAIRMAN RUSSELL: And actually I
21 thought the same thing. I think the Board -- and
22 I realize the parties aren't both represented
23 here, so this is discussion with us and our
24 attorney.

25 But I thought that we'd look at the

1 findings and the order, and then I think we're
2 going to have a discussion again related to
3 penalty. So the first thing on --

4 MR. LIVERS: Mr. Chairman, on that
5 point, the Department does not have a statement
6 prepared. However, Mr. Blakeman was noticed, so
7 if there are questions to which the Board wants
8 the Department to respond, that is appropriate.

9 CHAIRMAN RUSSELL: Okay. So is there
10 anything in the order or findings that we need to
11 talk to Katherine about modifying?

12 MR. MILLER: Mr. Chairman, I just had a
13 couple of comments. On Page 3 Line 21, it says
14 "seeks an order of \$3,600," and I think that
15 should be \$3,300.

16 MS. ORR: Let me take a look. I think
17 it is -- let me just verify that.

18 CHAIRMAN RUSSELL: I think there was a
19 boost up. There was discussion of 33 --

20 MR. MILLER: There was a total to 33.

21 MR. MIRES: Wasn't there a reduction and
22 then it went back up to 36?

23 CHAIRMAN RUSSELL: There is discussion
24 on Page 2 around that, too.

25 MR. MILLER: Follow that discussion on

1 No. 6 there --

2 MS. ORR: It is 33. So that should be
3 changed.

4 MR. MILLER: And then on the very last
5 line, Page 6 Line 9, it says, "Reclamation shall
6 be completed no later than May 15th, 2013." Is
7 that reclamation on the .7 acres that are outside
8 the gravel pit? It is a little unclear there
9 exactly what he needs to reclaim, it seems to me.

10 MS. ORR: Mr. Chairman, members of the
11 Board, Mr. Miller. That is a good point, and I
12 think the record focused on, and the testimony, on
13 the need to reclaim for the rest of the debris,
14 and garbage, and batteries, and so forth on the
15 Sanders County permitted area. So that's what
16 that means.

17 CHAIRMAN RUSSELL: But isn't reclamation
18 at this point basically the slope? Isn't it to
19 reclaim the slope on the pit?

20 MR. MIRES: Outside of the permitted
21 area.

22 CHAIRMAN RUSSELL: Outside of the
23 permitted area. So couldn't you just basically
24 state "on the .7 acres"?

25 MS. ORR: You could as well, Mr.

1 Chairman, if you wanted to do that.

2 CHAIRMAN RUSSELL: And that's what you
3 were talking about?

4 MR. MILLER: Yes. That was the point,
5 because to reclaim the entire site, it seems like
6 the 40 acres is up to Sanders County to address.

7 MS. ORR: That's right.

8 MR. MILLER: And so Mr. Blakeman should
9 address just the .7, and clean that up. And I
10 think reclamation means reshaping, retopsoiling,
11 reseeding, all of those things.

12 And so then my next question is: Is a
13 month and a half in spring time the appropriate
14 time frame here to do all of this work? If it is
15 a wet snowy spring, we could have a bigger mess
16 out there than we've got right now, it seems like.
17 So I don't know.

18 CHAIRMAN RUSSELL: Hold your thought,
19 because all these are good. Can we individually,
20 or should we take Board action on directing this
21 order to be changed?

22 MS. ORR: Mr. Chairman, what I recommend
23 is that -- one suggestion is that you would adopt
24 the order with the suggested changes that have
25 been discussed. You could do that in two parts.

1 You could do that vis-a-vis this language that we
2 just talked about, and then the penalty part.

3 CHAIRMAN RUSSELL: And that's what I'm
4 thinking. I just don't know if the Board is
5 comfortable with just a head shake and a change on
6 both what Marv has just mentioned, that we would
7 strike 36 and add 33; and then add after
8 reclamation on the .7 acres in question, or
9 something like that.

10 MS. ORR: Mr. Chairman, now can I
11 interrupt, go back. I see that on the last page
12 of the penalty request, it is \$3,600. And I can
13 go over that amount for you really quickly of how
14 that came about. It is \$3,600, and that's
15 attached to the Administrative Order.

16 The adjusted base penalty was \$550; the
17 circumstances of his knowing that he had to get a
18 permit and not getting it bumped the adjusted base
19 penalty to \$110 per day, making that \$660 a day.
20 And five days of violation would be the \$3,300,
21 but it was bumped up because of the economic
22 benefit, the avoided cost for him of getting a
23 bond of \$300. So the total would be \$3,600. So
24 sorry about that.

25 MR. MILLER: Okay.

1 MS. ORR: So it is \$3,600.

2 MR. MILLER: Mr. Chairman, it just seems
3 like then in six there on Page 3, that other
4 statement should be in there, so it totals up to
5 36. When you go through and add the numbers
6 there, it only comes to 33.

7 MS. ORR: Okay.

8 MR. MILLER: Or maybe I missed it here.

9 CHAIRMAN RUSSELL: No. I'm doing the
10 math, too. Because you increased it to \$660, and
11 that is \$3,300.

12 MS. ORR: Mr. Chairman, if you go
13 through all of Item 6, it goes to \$660, and then
14 on the next page it bumps it up -- it talks about
15 the economic benefit of non-compliance of \$300.
16 And I say, "This was added," but maybe that line
17 is not very clear where it says, "This amount was
18 added to the penalty." It wasn't really added to
19 the penalty, it was an element that -- then the
20 amount that was the basis for the total penalty.
21 So I could change -- that's on Line 9.

22 MR. MILLER: I missed it. I'm sorry.

23 MS. ORR: So whatever is your -- if you
24 think it is -- Again, if you want me to correct
25 some of this language, I can.

1 CHAIRMAN RUSSELL: Probably for
2 clarification, let's do that.

3 MS. ORR: Okay. I will change this
4 language in Line 9 to say, "This amount was a
5 component of the penalty."

6 CHAIRMAN RUSSELL: And then we would
7 strike back to \$3,600.

8 MS. ORR: Right.

9 CHAIRMAN RUSSELL: In Line 21.

10 MS. ORR: Yes.

11 CHAIRMAN RUSSELL: Okay. Any other
12 questions or comments on the findings or
13 conclusions and order?

14 MS. KAISER: I guess can we go back to
15 what Marv talked about as far as the timeline for
16 reclamation? I have to agree with him. I think
17 by the time he receives this, that's a pretty
18 short time period.

19 CHAIRMAN RUSSELL: Well, just throw out
20 maybe a number. July 15th?

21 MR. MILLER: I would really think seven
22 tenths of an acre, if he does all of the things,
23 the reshaping and all of that, and potential
24 weather this spring, we probably ought to give him
25 like six months from the date of signing here.

1 MS. KAISER: I was going to suggest more
2 like September.

3 MR. MILLER: I don't know. I'm just
4 throwing it out. It just seems like a month and a
5 half, just if the weather is bad, he'll never make
6 it.

7 CHAIRMAN RUSSELL: I'm open to any
8 suggestions on the time frame.

9 MR. MIRES: I like Marv's idea, the six
10 month concept. It doesn't give any -- leaves no
11 room for him to say -- but in that same scenario,
12 we're going to claim this only on the seven tenths
13 of an acre. Do we address the rest of that pit
14 separately then? How do we address the rest of
15 the pit?

16 MR. MILLER: My thought is the rest of
17 the pit is all under, a permitted site under
18 Sanders County, and so that's their responsibility
19 to get after Mr. Blakeman or whoever.

20 MR. MIRES: So then is Sanders County
21 operating a landfill without a landfill permit,
22 since it has now become a garbage dump, or is the
23 landowner liable and responsible for that?
24 Because it looks to me like somebody has turned it
25 into a landfill, an unpermitted landfill.

1 CHAIRMAN RUSSELL: Well, I guess to me,
2 I think those are all really good points, and
3 maybe even more public health threat associated
4 with some of the stuff that's in there. I'm sure
5 that the Department is aware of that, and probably
6 should do a site visit soon, and talk to the
7 proper permitted -- because it didn't appear to be
8 anything on that .7 that would be landfill type
9 material.

10 MR. MIRES: No, just on the permitted
11 area.

12 CHAIRMAN RUSSELL: We need to stick to
13 the --

14 MR. MIRES: What I'm getting at is he is
15 claiming he should have reimbursement for the
16 reclaiming of the old batteries and stuff, he
17 should be given credit in the order here, but
18 that's not part of where the problem is.

19 CHAIRMAN RUSSELL: And do we have any
20 record that he actually reclaimed it?

21 MR. MIRES: No.

22 CHAIRMAN RUSSELL: He's just made a
23 statement that if he -- I mean those batteries are
24 worth some money. I'd take them and turn them in,
25 too.

1 MS. ORR: Mr. Chairman, if I could add
2 something here. One of the exhibits that was
3 submitted by Mr. Samdahl does indicate that there
4 was some improvement in the site. It was cleaned
5 up. That's Exhibit 9. And he said, "The site has
6 gone through years of use, and some good work has
7 been done here." And there were junk piles. And
8 then on Exhibit 13, he says, "The junk piles were
9 cleaned and hauled away except for the lead acid
10 batteries and the paint cans."

11 CHAIRMAN RUSSELL: So since you're on
12 that, does he know that Blakeman did that
13 clean-up?

14 MS. ORR: Good question. I don't know
15 if that's in the transcript.

16 MR. MIRES: Didn't Blakeman testify that
17 he did do the clean-up?

18 MS. ORR: Yes, he did. He testified
19 twice to that.

20 MR. MILLER: I think he did.

21 CHAIRMAN RUSSELL: Specifically on what
22 he did. I mean he did take a lot of material and
23 put it in a pile. I remember some pictures
24 showing that.

25 MS. ORR: Yes. The problem to me in

1 this transcript was you didn't know, when he said
2 he did something, clearly whether it was done on
3 the .7 acres, or whether it was done in the
4 permitted site.

5 And this is an example. It says, in
6 Exhibit 13, "Blakeman's equipment is still there.
7 There is one blue loader in the northeast corner,
8 and a yellow excavator with three out of the four
9 flat tires on the northwest corner." I'm assuming
10 that is the permitted area, but it is not quite
11 clear.

12 MR. WHALEN: Mr. Chairman, a question
13 for Katherine, if I may. Katherine, my question
14 goes to concern over liability with respect to
15 assigning any penalty to Mr. Blakeman. Are you
16 convinced that the Department is on sound footing
17 in its definition of Mr. Blakeman as the operator
18 of that pit which is permitted by Sanders County?

19 MS. ORR: Yes, Mr. Whalen, I am.

20 MR. WHALEN: Okay. Thank you.

21 MS. ORR: And I can tell you why. Mr.
22 Whalen, there is a portion of the definition of
23 operator in 82-4-403(8), and I break out a portion
24 of that definition, which is that he engaged in an
25 opencut operation. And the other portion of that

1 is that I think something like controlled or
2 managed, and he definitely engaged in it, so
3 therefore he's an operator.

4 And so the elements of an opencut
5 operation, you have to prove that there was
6 basically a commercial intent associated with the
7 activity, and then there is like a seven part
8 break out of all of the activities that could
9 consist of an opencut operation, and here he was
10 removing overburden for one. So that's how those
11 elements are met, as far as I would suggest.

12 CHAIRMAN RUSSELL: Anything else before
13 we talk about the penalty?

14 (No response)

15 CHAIRMAN RUSSELL: This is what I see so
16 far. We're turning on Page 3. There is no
17 change. It is \$3,600. On Page 4, Lines 9 and 10,
18 Katherine, you're going to make that more explicit
19 about that -- I mean it states it -- but that much
20 more clear that the \$3,600 did include a \$300
21 economic benefit penalty.

22 MS. ORR: Yes.

23 CHAIRMAN RUSSELL: Maybe that's the best
24 way to state it, is that. And there was
25 discussion on Line 9 on Page 6 that after

1 reclamation should state "on the .7 acres shall be
2 completed." And then I heard -- and I'm just
3 going to throw it out there -- no later than six
4 months after the order is signed.

5 MS. ORR: Okay.

6 MS. SHROPSHIRE: One more thing that
7 Marv mentioned was just the standard for
8 reclamation. Does that need clarification, or is
9 that clear how it will be reclaimed? Is that
10 clear?

11 CHAIRMAN RUSSELL: I think reclamation
12 in this part of the act is clear.

13 MR. MILLER: Isn't it defined by the
14 Department?

15 CHAIRMAN RUSSELL: That's what -- The
16 whole thing is based on how you reclaim a gravel
17 pit. And I'm sure that if you put garbage in
18 there, you're supposed to take it out. I'm
19 guessing they don't allow them to become solid
20 waste facilities.

21 But I think we need to realize that he
22 may have or may not have cleaned up stuff that was
23 in the permitted part of the pit, and he may or
24 may not have done that on good faith, or maybe
25 that local County Commissioner asked him to do it;

1 and also there was something else going on there,
2 but we don't know all of those details. So are we
3 good with no later than six months after signature
4 of the order?

5 (Affirmative response)

6 CHAIRMAN RUSSELL: Shall we take a vote
7 to this point?

8 MS. SHROPSHIRE: So it is clear that
9 reclamation is defined within that act? That's
10 clear?

11 CHAIRMAN RUSSELL: I think the whole act
12 is about reclamation.

13 MS. SHROPSHIRE: Okay. I thought it was
14 a good comment.

15 CHAIRMAN RUSSELL: I think it is, too.
16 I think that the concept of reclamation is pretty
17 clear. So --

18 MR. LIVERS: Mr. Chairman, the opencut
19 act is a reclamation based act.

20 CHAIRMAN RUSSELL: Okay. So far so
21 good. Those specific changes, direct Katherine to
22 make those, and do I have a motion to that effect?

23 MR. MILLER: So moved.

24 CHAIRMAN RUSSELL: It has been moved.
25 Is there a second?

1 MS. KAISER: I second.

2 CHAIRMAN RUSSELL: Further Board
3 discussion.

4 (No response)

5 CHAIRMAN RUSSELL: All those in favor of
6 those modifications, signify by saying aye.

7 (Response)

8 CHAIRMAN RUSSELL: Opposed.

9 MR. WHALEN: Nay.

10 CHAIRMAN RUSSELL: Is that for opposed
11 or for aye?

12 MR. WHALEN: That was opposition, Mr.
13 Chairman.

14 CHAIRMAN RUSSELL: You are opposed?

15 MR. WHALEN: I'm opposed. Thank you.

16 CHAIRMAN RUSSELL: Do note for the
17 record that Joe Whalen is opposed to those
18 changes.

19 Now let's talk about the penalty.
20 Katherine, I'll throw this out to you. This is a
21 big throw, and a big wide net. Do we have
22 discretion to modify the penalties based on the
23 rules that we adopted -- I don't remember when,
24 but I remember where. We weren't even in this
25 building.

1 MS. ORR: Mr. Chairman, I pulled the
2 notice of amendment of the penalty rules, and that
3 occurred in 2006. And I can't tell you what
4 building it was.

5 CHAIRMAN RUSSELL: It wasn't here, was
6 it? It was at the Capitol, as I recall.

7 Back to you, Katherine. We've really
8 digressed.

9 MS. ORR: So the comment section in that
10 notice of adoption is unavailing for us in
11 answering that question. The comment on "other
12 matters as justice may require" doesn't take us
13 where we want to know in answering that question.
14 It just says the list -- I can read it to you. It
15 says -- there was one -- Is this interesting for
16 you?

17 CHAIRMAN RUSSELL: I'm riveted.

18 MS. ORR: It is kind of a partial list
19 of other matters should be included. This is the
20 comment on this section, "Other matters as justice
21 may require."

22 "This is a very nebulous provision, and
23 it is hoped the Department will be very careful in
24 its application. The justice factor should
25 include a downward penalty adjustment when the

1 Department makes a mistake. Hopefully it will not
2 be necessary to use the rule very often because
3 all relevant factors have already been included in
4 the penalty calculation."

5 And the response of the Department was,
6 "The Department and Board expect that other
7 matters that may justify a penalty increase or
8 decrease will rarely occur. It is not feasible or
9 appropriate to speculate and list in the rules
10 what those other matters may constitute."

11 The one thing that I do think helps,
12 though, is the Purpose section of the penalty
13 calculation procedure. 17-4-308 says, "The
14 purpose of the penalty calculation process is to
15 calculate a penalty that is commensurate with the
16 severity of the violation, that provides an
17 adequate deterrent, and that captures the economic
18 benefit of non-compliance."

19 So those seem to be the stated factors
20 to consider, measured with the severity of the
21 violation, and provides an adequate deterrent.

22 CHAIRMAN RUSSELL: I'm going to make a
23 comment to the Board that probably will look like
24 I'm supporting the Department, but we've been
25 doing this for a long time, and the penalties

1 appear to be consistent. And I remember over a
2 year ago we were joking about a \$444 penalty that
3 came up three or four times, and its consistency.

4 I do have to believe that the Department
5 is very consistent in their application of this
6 rule. That's been my opinion all along. I
7 certainly don't see it as an area where they act
8 arbitrarily.

9 MS. ORR: I will point out, if I might,
10 that there is one statement in the record that the
11 extent of the deviation in looking at the harm is
12 minor. So that's in the penalty part of the
13 calculation of the penalty. However, we have this
14 guy being pinned down for whatever he did on the
15 .7 acres plus another 10,000 acres, and that
16 doesn't seem to me to be minor.

17 It is inconsistent in one way, to me
18 anyway, to say the extent is minor, and then to
19 also say, "Well, in the aggregate you removed over
20 10,000 cubic yards of overburden." I just point
21 that out.

22 MS. SHROPSHIRE: Is there anything that
23 relates to ability to pay?

24 MS. ORR: Good question. I don't know.
25 I don't think so.

1 MR. MIRES: Follow-up to that concept,
2 ability to pay. Who is ultimately responsible to
3 collect it? What if he doesn't pay? Then what?

4 CHAIRMAN RUSSELL: I had those thoughts
5 earlier today, and actually last night. And first
6 of all, because I am employed the Board, and we do
7 a lot of variances, one of the conditions -- none
8 of the conditions have anything to do with the
9 ability to pay.

10 If we're here to do environmental
11 regulation, and to hear cases related to that, I
12 think if we decide on a penalty, whether we decide
13 on what's put forth, or higher, or lower, it is up
14 to the Department to figure out how they're going
15 to get that money. We're not responsible to
16 collect that.

17 MS. SHROPSHIRE: I think those are two
18 separate questions.

19 CHAIRMAN RUSSELL: And possibly they
20 are. But I don't think you can -- Do I think this
21 guy is going to write a check tomorrow for any
22 figure? From what I saw in the hearing, I doubt
23 it. But is that our responsibility?

24 MS. SHROPSHIRE: And that's not the
25 question that I'm asking. But it's my

1 understanding as far as EPA enforcement, they do
2 have the ability to look at deep pockets, and I
3 don't know that the same applies here. So I was
4 curious.

5 CHAIRMAN RUSSELL: They could have taken
6 it out of our hands, and the Department could have
7 negotiated all that stuff, but he didn't. He
8 asked us to do it. The Department had some
9 latitude to -- In lieu of taking cash, they could
10 have done more work out there, supplemental
11 environmental activities. They could have done
12 that. He elected to ignore that part of his
13 ability, and went to an appeal to the Board.

14 And we don't have that flexibility.
15 We've argued that in the past, the concept of
16 dismissing cases, and wondering what in the heck
17 is going on. Well, the Department can do whatever
18 -- not whatever they damn well please -- but they
19 have the ability, the discretion to trade money
20 for activity. We don't.

21 MS. SHROPSHIRE: Supplemental
22 environmental projects.

23 CHAIRMAN RUSSELL: Yes.

24 MR. MIRES: To me, it seems like the big
25 issue here is reclaiming that land that was

1 disturbed. That looks like it is a bigger issue
2 than the dollars, but --

3 MR. MILLER: Mr. Chairman, as a
4 suggestion, why don't we put a little carrot on
5 there. If he reclaims the whole thing, and to the
6 Department's specifications in the six month time
7 period, it is a reduced fine. If he doesn't do
8 it, it is the full fine, and put the burden back
9 on him to get cracking.

10 CHAIRMAN RUSSELL: I would defer to our
11 attorney to see if we even have the latitude to do
12 that.

13 MS. ORR: Mr. Chairman, members of the
14 Board. I think you do. I think you could set
15 forth provisions where he has to present a plan to
16 the Department, get it approved, implement it, and
17 then the Department would be able to report to the
18 Board if that doesn't happen, and if the
19 Department is requesting imposition of full
20 penalties.

21 MS. SHROPSHIRE: Not a bad idea.

22 CHAIRMAN RUSSELL: I think I like the
23 idea, too. I just don't know how to figure out
24 the benefit of what it would take to knock off --

25 MR. MILLER: The comment, to reclaim

1 seven-tenths of an acre to all the reclamation
2 specifications, he's going to have to put out some
3 bucks, and time, equipment, cost, to bring back
4 the top soil that he ripped off, and so forth. So
5 I would say there is quite a little money there
6 that he will expend. But at least then we get the
7 problem solved, and there is an incentive on him
8 to get it done within that six months. We gave
9 him an extra four or five months here, so it seems
10 like we're giving him a possibility of an out
11 here, but we want some action.

12 MR. MIREs: I like that idea in the fact
13 it does give him an out, gives him an opportunity.
14 If he chooses not to take it, then the penalty
15 comes into to play. It's a financial thing plain
16 and simple. There is no more if's, and's, or
17 but's. The buck stops.

18 MR. WHALEN: Mr. Chairman, I would also
19 like to support Marv's idea, and recommend to the
20 Board. I would ask the Board to, first of all,
21 forgive me for my vote on that last motion. I was
22 unaware that we were considering the penalty phase
23 separate from the reclamation idea.

24 But I would also ask the Board to think
25 about the issue of indemnity as it relates to this

1 case versus, say, an electric shovel operator in a
2 coal mine who decides to go beyond that permitted
3 excavation, and profits to whatever degree, and
4 how that case might be different than this case.

5 I understand that the facts may be
6 different, but in that case the operator would
7 have some indemnity with -- that coal mine person
8 operator. In this case, perhaps this operator has
9 an indemnity, perhaps he doesn't. But to the
10 degree that the County was directing, or that
11 County agent was directing that activity, I think
12 it is important to be sensitive to that issue of
13 justice in terms of how we apply that penalty.

14 I'll reserve comment, or I'll avoid
15 comment from here out, and just vote my conscience
16 when it comes time for the question.

17 MS. ORR: Mr. Chairman, may I add one
18 thing? It says in the administrative order, too,
19 that "Within 45 days of service of this order,"
20 the NOV, "the Respondent shall submit to the
21 Department a complete opencut permit application,
22 including an adequate bond for reclaiming the .7
23 acres at the site, and the permit application and
24 bond must be submitted to the address listed in
25 Paragraph 23."

1 And I guess I'd suggest that that be
2 added as well.

3 CHAIRMAN RUSSELL: I have a question for
4 the Department. How long does it take -- We can't
5 order him to do this. He has to get a permit
6 before. How long does it take to get a permit?

7 MR. LIVERS: Mr. Chairman, I think we do
8 have a fairly tight statutory turn around on
9 opencut permits, and John North --

10 MR. NORTH: Mr. Chairman. It can vary
11 depending upon the complexity, but for this
12 operation, it would probably be 30 to 45 days.

13 MS. KAISER: After he submits an
14 application.

15 MR. NORTH: After he submits a complete
16 application.

17 MR. LIVERS: If I may, I think that's a
18 good point. I think while we have tight statutory
19 turn around times on opencut permits, it's really
20 contingent on the quality of the application we
21 receive. That's what typically slows down
22 issuance of an opencut permit.

23 CHAIRMAN RUSSELL: I'm thinking we're
24 not going to get a real quality application.

25 MS. SHROPSHIRE: From the time the

1 permit application is deemed complete.

2 CHAIRMAN RUSSELL: No, because that
3 could make him drag it out, because if he puts a
4 bad application out there, the Department is going
5 to have to come back and ask for additional
6 information.

7 I think all I wanted to know is if we
8 give him six months, are we comfortable with
9 taking 45 days away from it?

10 MS. KAISER: I have a question. So this
11 order, if we were approve it as it is, in order
12 for him to do that reclamation, he does need to
13 get a permit.

14 MS. SHROPSHIRE: Does that include a
15 reclamation plan as part of that?

16 CHAIRMAN RUSSELL: That's what it is.
17 That's what he's going to submit, his reclamation
18 plan.

19 MR. MIRES: So if we just simply fine
20 him \$3,600, and be done with it, and then when the
21 County goes in to reclaim that pit that they
22 didn't close up, is that going to get it reclaimed
23 faster, and more efficiently?

24 CHAIRMAN RUSSELL: If I were the County,
25 I'd say that that wasn't part of my permit. I'm

1 not going to reclaim it. That's part of the
2 issue.

3 MR. MIRES: That's what I'm wondering.

4 CHAIRMAN RUSSELL: If I were the County,
5 I'd say, "I didn't do that. It wasn't part of my
6 permit. I don't have to reclaim that." It
7 appears that a lot of that pit has been reclaimed,
8 those other lobes to the north.

9 MR. MILLER: That was all reclaimed
10 clear back in 2006. That's why I originally
11 suggested we ought to just close the whole thing
12 because nobody seems to be interested in it,
13 but --

14 CHAIRMAN RUSSELL: Except for Blakeman.

15 MR. MILLER: Yes, except for Blakeman.

16 CHAIRMAN RUSSELL: I think that we
17 should craft some language around this. We need
18 to consider what we feel is -- this is outside of
19 my realm. I don't know how many hours it is going
20 to take. I don't know how much material it is
21 going to take. If he took that much out, he
22 doesn't have to put that much back in. We can't
23 just basically go down saying, "Okay. Let's just
24 figure five bucks a yard." I don't know if we can
25 get that simple, but we have to keep it pretty

1 simple.

2 I really like the idea, Marv. I just
3 think we're going to have to come up with some
4 sort of figure that makes some sense, less than
5 \$3,600. Right?

6 MS. SHROPSHIRE: I have a question. Is
7 this approach that we're proposing consistent with
8 something that the Department would do? I just
9 want to make sure we're not setting a precedent
10 that would put them in a precarious situation on
11 another type of situation, or if I'm mixing apples
12 and oranges. Does that make sense?

13 CHAIRMAN RUSSELL: I think they do it
14 all the time. All I can tell you is I've been
15 through this with our air pollution control
16 program, with the State's program, and all of our
17 unpaved roads. We submitted it to getting out of
18 the appeal process by working hard with the
19 Department on specific things that we would do in
20 Flathead County to mitigate some of our problems
21 -- signage, paving, dust suppression. And when
22 you look at it in total, we spent way more money
23 than our fine was over the three years that we
24 were obligated.

25 So all I can tell you is the Department

1 does have some authority to ask for work instead
2 of fines.

3 MR. LIVERS: Mr. Chairman, Ms.
4 Shropshire, I guess maybe I'll answer it at a high
5 level, and that is that enforcement is our last
6 resort. Typically we spend considerable effort to
7 reach compliance. We want the laws followed. We
8 want folks to be in compliance with their permit.
9 We try to give ample opportunity for that.

10 So that's our goal, that is our primary
11 goal is to have permit conditions complied with.
12 If after repeated efforts we can't get that, then
13 we resort to enforcement. So maybe that sheds
14 some light on what you're asking.

15 MS. SHROPSHIRE: Back to your original
16 comment on deterrent. To me that's where the
17 ability to pay -- Is it a deterrent for him or a
18 deterrent broadly?

19 MS. ORR: May I comment?

20 CHAIRMAN RUSSELL: Sure.

21 MS. ORR: Address that? Ms. Shropshire,
22 Mr. Chairman, members of the Board. I think it
23 means deterrents for the violator. And I look at
24 this that it is a deterrent effect, even if he
25 doesn't pay, to know that he's got a fine that he

1 has to pay. It seems to me that he's not going to
2 do more activities out there illegally if he knows
3 he has this fine that's unpaid conceivably, and
4 this is a --

5 If I may comment, it seems to be a
6 violator who is very willing to point out that,
7 oh, he's not really responsible because all these
8 other employers, so to speak, are telling him to
9 do this, and the County is allowing him to do it.
10 The ownership of these actions seems minimal.

11 CHAIRMAN RUSSELL: Well, I don't want to
12 jump to any conclusions, but I think we can
13 probably throw any number in there, and he's going
14 to just ignore everything. We can act in good
15 faith, and we can go home and feel good about what
16 we're doing. We know he's going to be into it --

17 The permit he never got was \$300, and
18 the permit he's going to get is \$300, so we can go
19 to \$600 right now, and we can basically consider
20 excusing at least \$600, and go with the penalty
21 that the Department did, or anywhere in between
22 there. I think we're going to --

23 I think he's just going to ignore our
24 order anyway, but I think we have to complete our
25 job. I hate to be so cynical about it, but I just

1 don't think he's going to care anyway.

2 MS. KAISER: I like your idea to
3 increase it by \$600 somewhat justified.

4 CHAIRMAN RUSSELL: So let's craft some
5 language, Katherine, that we would fill in the
6 blanks on Page 6 and 4, \$3,600; and that before
7 the order is complete, that \$600 will be excused
8 if this is completed within the six month time
9 frame. But we also have a 45 day permit window.
10 Are we going increase that to seven, or are you
11 going to be comfortable with leaving it at six, so
12 he actually --

13 You know, we've got a building season
14 coming up, too, so --

15 MR. NORTH: Mr. Chairman, members of the
16 Board. I discussed this with Mr. Arrigo, and our
17 feeling, the Department's feeling, is that to
18 require him to apply for and obtain the permit and
19 submit a bond is probably not that necessary for a
20 .7 acre area; and also will present all kinds of
21 procedural hurdles that more than likely would
22 result in failure and noncompliance.

23 So what we would suggest would be that
24 he simply be required to submit a plan for the
25 reclamation to the Department, obtain the

1 Department's approval, and then implement the plan
2 within that time period.

3 CHAIRMAN RUSSELL: That sounds a little
4 like this isn't that important to the Department
5 when it comes to compliance with the rule and the
6 law, and it almost says, "We're going to allow you
7 to continue to violate the act" to me. Why
8 wouldn't we want him to fully comply with what we,
9 the Department, asked him to comply with in the
10 first place?

11 MR. NORTH: That's the way we do it most
12 times. Yes.

13 CHAIRMAN RUSSELL: Just to get it done
14 and make it right.

15 MR. NORTH: (Nods head)

16 CHAIRMAN RUSSELL: So there is
17 precedence out there not to require the permit.

18 MR. NORTH: We have on occasion required
19 violators simply to provide a plan, and reclaim
20 where the operation was complete, and there was
21 nothing but reclamation left. That's a minority
22 of the situations, but we have done that.

23 CHAIRMAN RUSSELL: So it doesn't put the
24 Department or us in the future into a bad
25 predicament.

1 MR. NORTH: No. It is a bridge we've
2 crossed.

3 MS. KAISER: It seems like a cleaner
4 process for this in particular. The damage is
5 done. Let's get it cleaned up and closed.

6 MS. SHROPSHIRE: That he's not
7 continuing to -- just that the mining, he's not
8 continuing to mine.

9 MR. MIRES: I can live with that.

10 CHAIRMAN RUSSELL: So let's throw out a
11 new number because it doesn't base anything on the
12 permit cost.

13 MR. MIRES: I guess I'm going to stay
14 where the Department has their numbers, a \$3,600
15 fine; but I think that fine could be forgiven if
16 that thing is reclaimed to the Department's
17 satisfaction, he ceases and desists, gets out of
18 everybody's lives.

19 I don't see him paying any money, and I
20 would much rather see him take the money that we
21 would get, and go back and reclaim it, rather than
22 the State having to go back and reclaim it. If he
23 would go and reclaim that, put it back where it is
24 supposed to be to the Department's satisfaction,
25 and agree he's never going to be back into that

1 pit at any point in his lifetime, I think we've
2 done the best we're ever going to get out of this
3 guy.

4 CHAIRMAN RUSSELL: The only thing I
5 would ask in consideration -- I'm okay with that,
6 too, but realize he derived personal economic
7 benefit from mining out of that pit.

8 MR. MIRES: I guess --

9 CHAIRMAN RUSSELL: If I needed three
10 truckloads of gravel, do you know how much I'm
11 going to go pay for it?

12 MR. MIRES: Yes, I have a good idea. I
13 guess, from what I can see, any finances he
14 derived from that gravel pit, that money is long
15 gone, from looking at what I could see here. But
16 if he doesn't agree to reclaim that pit to the
17 Department's satisfaction, then the \$3,600 fine is
18 imposed, and that's the way it stands, and the
19 hammer comes down, and we're done.

20 But it gives him an opportunity to get
21 out from underneath the penalty, fix the mistake
22 that was made, and leave or pay the fine. That
23 becomes his choice at that point.

24 MR. LIVERS: Mr. Chairman, if I could,
25 Mr. Mires. Just for my clarification, are you

1 proposing that if he completes the reclamation
2 satisfactorily, the fine be reduced or eliminated?

3 CHAIRMAN RUSSELL: It sounds like
4 eliminated.

5 MR. MIRES: I can go either way, if
6 there is a fair number in there. I would kind of
7 like to ask Joe Whalen what his thoughts are on
8 this concept. Do you eliminate the fine or reduce
9 the fine if he reclaims the property? Because I'm
10 seeing it's going to be tough to get any money out
11 of this turnip.

12 MR. WHALEN: I'm here. I'm giving that
13 suggestion some thought, Larry. At this point,
14 when we tabulate the hours that we have spent
15 discussing this matter, and the amount of staff
16 time that's been accumulated by the Department,
17 I'm willing to defer to the judgment of the Chair,
18 as well as to Katherine, with respect to the fine
19 amount.

20 I really like the reclamation idea, but
21 then again, the Department absorbs more costs in
22 going after him to make sure that that's enforced.
23 So I would like to see the fine reduced, not
24 eliminated. I would like to see it come down to
25 at least \$3,000, and then just be done with it.

1 CHAIRMAN RUSSELL: I think if we're
2 going to reduce it, and we're going to get him to
3 do this, it is going to take more than a \$600
4 reduction. I think we ought to reduce it by half
5 if we're going to do that.

6 MR. MIRES: I can live with that.

7 CHAIRMAN RUSSELL: With the full thought
8 that he's not going to do anything, but at least
9 we feel good about trying our darnedest to get
10 this thing cleaned up.

11 MR. MIRES: I could live with that as
12 well.

13 MS. SHROPSHIRE: I would prefer that to
14 eliminating it.

15 CHAIRMAN RUSSELL: Reduction of the fine
16 to \$1,800 if it is done within that time frame?

17 MR. MILLER: I can live with it.

18 MS. KAISER: I'm good with it.

19 CHAIRMAN RUSSELL: So I'm going to -- I
20 love the consensus building, but I think we need
21 to build --

22 MS. KAISER: Do we have to again amend
23 the wording in this order if we're going to
24 relieve him of getting a mining permit as directed
25 in the NOV?

1 MS. ORR: Mr. Chairman, Ms. Kaiser.
2 Yes, because it has to provide for the submitting
3 of the plan of reclamation to the Department,
4 getting the Department approval, and then
5 conducting the reclamation within "X" number of
6 days.

7 CHAIRMAN RUSSELL: I think you're
8 probably pretty comfortable with putting that
9 language together.

10 MS. ORR: Yes, I am.

11 CHAIRMAN RUSSELL: So this is what I
12 would suggest, that we vote on the \$1,800, six
13 month, Department approval, not requiring a
14 permit; that we vote on that, and we leave it up
15 to Katherine, and you will allow the Board Chair
16 to sign these findings and order as soon as
17 Katherine gets it to me; that you're comfortable
18 with the language change, you're comfortable with
19 this; and we're going to move forward as soon as
20 Katherine gets this, it is mailed to me, I will
21 sign it, and the order will be in effect on that
22 date. Are you good with that?

23 MR. MILLER: Sounds fine.

24 CHAIRMAN RUSSELL: So we've got two
25 things then. I want a motion on reduction to

1 \$1,800 if all things are complied with, all stuff
2 is complied with.

3 MR. MILLER: So moved.

4 MR. MIRES: I would second.

5 CHAIRMAN RUSSELL: It's been moved and
6 seconded. Any further discussion?

7 MS. SHROPSHIRE: You didn't literally
8 mean stuff? I think that's not part of the
9 motion.

10 CHAIRMAN RUSSELL: No.

11 MS. SHROPSHIRE: I just wanted to be
12 clear.

13 CHAIRMAN RUSSELL: Any further
14 discussion?

15 (No response)

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

18 (Response)

19 CHAIRMAN RUSSELL: Joe, are you out
20 there?

21 (No response)

22 CHAIRMAN RUSSELL: All those opposed,
23 signify by saying aye, the same.

24 (No response)

25 CHAIRMAN RUSSELL: Well, I guess we'll

1 just tally the votes that we have then, and that
2 was unanimous of those voting.

3 So the last thing I will entertain is a
4 motion to authorize the Chair to sign the
5 findings, conclusions of law, and order on
6 completion by Katherine.

7 MR. MIRES: So moved.

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

10 MR. MILLER: Second.

11 CHAIRMAN RUSSELL: Second by Marv. Any
12 further discussion?

13 (No response)

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

16 (Response)

17 CHAIRMAN RUSSELL: Opposed.

18 (No response)

19 CHAIRMAN RUSSELL: Motion carries
20 unanimously. Good deliberation, guys.

21 MS. SHROPSHIRE: When does it become
22 criminal instead?

23 CHAIRMAN RUSSELL: Instead of like a
24 civil violation?

25 MS. SHROPSHIRE: Yes.

1 CHAIRMAN RUSSELL: I don't know. John,
2 we have a question for you. There are things that
3 are in codes that are criminal acts and civil
4 acts. Can you describe the difference, and why
5 those came around?

6 MR. NORTH: Well, Mr. Chairman, Ms.
7 Shropshire, in some of the acts we have both civil
8 penalties and criminal penalties. They're
9 usually, but not always, for the more serious
10 violations. And what we find in those acts where
11 there are criminal penalties, that violations of
12 environmental laws are not always considered to be
13 high priorities for County Attorneys, and
14 consequently we usually go with civil matters.

15 Recently the Attorney General's Office
16 has designated, I think it is either a quarter or
17 a half a position for prosecution of criminal
18 violations of the environmental laws, and we have
19 indeed had about three I think criminal
20 prosecutions in the last two years.

21 I think most, if not all, of those were
22 for public water supply operators submitting false
23 monitoring data, water supply data. Those are the
24 kinds of violations that normally they're
25 considered fairly serious, and those are

1 prosecuted. I don't remember right off the top of
2 my head, but I do not think that the opencut act
3 has criminal penalties in it.

4 MS. SHROPSHIRE: Thank you.

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1 CHAIRMAN RUSSELL: So the last thing on
2 the agenda on contested cases is the public water
3 supply violations by the City of Ronan.

4 MS. ORR: Mr. Chairman, members of the
5 Board. I've given Joe a proposed order for the
6 Board's signature adopting the recommended order
7 on summary judgment which I drafted. And my
8 computer won't go on. I hope it is in the packet,
9 that recommended order on summary judgment, so
10 you've been able to look at it.

11 MR. LIVERS: It is.

12 MS. ORR: What happened here is the City
13 of Ronan, and they basically -- the NOV addressed
14 violation of the Administrative Rules of Montana
15 17-38-208 involving the failure to provide
16 filtration for a public water supply system; and
17 17-38-239, failure to provide public notice of the
18 failure to provide a filtration system.

19 And the Department sent out Request for
20 Admissions and other discovery requests, and got
21 nothing from the City Attorney from the City of
22 Ronan, and so after thirty days those are deemed
23 admitted. And so basically it is a good posture
24 for a motion for summary judgment, because there
25 is no dispute as to those material issues which

1 the Department put in its Request for Admissions.

2 And those address primarily the failure
3 to provide filtration, some of the introductory
4 definitional aspects of a public water supply
5 system, and the failure to provide an alternative
6 water supply. All of that was admitted by
7 default.

8 And therefore I'm recommending that the
9 Board adopt my order that addresses those things,
10 and find liability, award the Department its
11 requested relief, which is again a process as set
12 forth in the NOV in this case, of getting the City
13 of Ronan to submit a compliance plan, and provide
14 the requested filtration to provide notice.

15 I set that forth here in the proposed
16 order. It reads, "It is hereby ordered that the
17 Petitioners would take action specified in the NOV
18 in Paragraphs 14 through 21 pertaining to the
19 provision of Tier 2 public notice of the failure
20 to provide filtration treatment for the system,
21 complying with other notice and certification
22 requirements set forth in the NOV, submit to the
23 Department a compliance plan and schedule that
24 identifies a corrective action that will return
25 Petitioner to compliance with the surface water

1 treatment rule, or states that Respondent intends
2 to finalize and improve new water source as set
3 forth in the NOV."

4 And that "There would be review by the
5 Department of the plan and response to any
6 deficiencies within the time frame set forth, and
7 the time frames be triggered by the date of
8 execution of the Board's order."

9 That's basically the language in the
10 proposed order for the Board's approval.

11 CHAIRMAN RUSSELL: For discussion
12 purposes, I do have an order, and I would ask for
13 a motion for the Board Chair to sign that, Case
14 No. BER 2012-04 PWS.

15 MS. SHROPSHIRE: So moved.

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

18 MS. KAISER: I'll second.

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

21 (No response)

22 CHAIRMAN RUSSELL: I actually have some
23 discussion, but I want to get it closed so we can
24 talk to the Department a little bit. Any
25 discussion?

1 (No response)

2 CHAIRMAN RUSSELL: Hearing none, all
3 those in favor, signify by saying aye.

4 (Response)

5 CHAIRMAN RUSSELL: Opposed.

6 (No response)

7 CHAIRMAN RUSSELL: Motion carries
8 unanimously. All right.

9 This brand new surface water treatment
10 rule, does anyone want to describe to me how long
11 this thing has been in effect?

12 MR. PIZZINI: I don't.

13 CHAIRMAN RUSSELL: Come on up, Mr.
14 Pizzini. I didn't even know this rule was even
15 around.

16 MR. PIZZINI: Mr. Chairman, members of
17 the Board, for the record, my name is Eugene
18 Pizzini. I'm the Rules Manager for the Public
19 Water Supply Section. That's P-I-Z-Z-I-N-I.
20 Which surface water rules specifically are --

21 CHAIRMAN RUSSELL: I'm just wondering
22 why Ronan has a surface water, and they haven't
23 been filtering or treating it.

24 MR. PIZZINI: Mr. Chairman, members of
25 the Board. Public water supplies are required to

1 determine whether their sources are GWUDISW,
2 ground water directly under the influence of
3 surface water. It has taken our Department awhile
4 to work through all of these sources.

5 This source is one that was
6 questionable. The testing that came back -- Carol
7 may have more on this -- the testing showed that
8 it is under the influence of surface water.
9 That's where this process came from. They've had
10 a source that they've used for a long time. We've
11 just now made the determination that it's under
12 the influence of surface water.

13 CHAIRMAN RUSSELL: This rule has been
14 around for like 15 years, hasn't it? I'm not
15 chastising the Department.

16 MR. PIZZINI: Mr. Chairman, members of
17 the Board. When I started in 1997, I started
18 working on GWUDISW stuff. At that time, the
19 Department used the GWUDISW rule more as a way to
20 get systems to do things that we couldn't do
21 otherwise.

22 For example, there was a question if you
23 had a well that didn't have a well cap, whether
24 the Department could require to you put a well cap
25 on it. If you didn't voluntarily go out and put a

1 well cap on it, we said it's open to the
2 atmosphere, it may be surface water, you could
3 spend \$60 to put the cap on it, or you get to
4 treat for surface water.

5 MS. SHROPSHIRE: Can I ask. So you're
6 -- what I'm envisioning is a well that is in near
7 proximity to a river, and when the well is
8 pumping, you're drawing in surface water into the
9 well; is that the situation?

10 MR. PIZZINI: Potentially, or a spring
11 box that has a hole in the side that allows
12 surface water to run into it.

13 Basically if you have -- Mr. Chairman,
14 members of the Board. If you have a source that
15 has the potential for surface water getting into
16 it, you have the risks that all of those pathogens
17 that are available in surface water can be there,
18 whether it is being pulled through the soil, or
19 whether it is infiltrating through gravel, or
20 whether it is following a pathway along the
21 casing, whatever.

22 MS. SHROPSHIRE: That's correct.

23 CHAIRMAN RUSSELL: So is Ronan in
24 denial?

25 MR. PIZZINI: Mr. Chairman, members of

1 the Board. I would hate to have to guess as to
2 why Ronan has not responded.

3 CHAIRMAN RUSSELL: Have you had some
4 open discussion about this with their Public
5 Works?

6 OPERATOR: Now joining.

7 MR. WHALEN: Joe Whalen.

8 MR. PIZZINI: Mr. Chairman, members of
9 the Board. I'm not positive what all we have
10 done, but I know that our staff has spent a fair
11 amount of time with them in regards to this.

12 CHAIRMAN RUSSELL: I know if I were a
13 municipality, I would want to be in denial because
14 of what it would cost me to get into compliance
15 with this rule.

16 MR. PIZZINI: Chairman Russell, members
17 of the Board. The cost for doing surface water
18 treatment can be huge.

19 CHAIRMAN RUSSELL: Thanks. I appreciate
20 it. I didn't want to put you on the spot too
21 much. Anything else?

22 (No response)

23 CHAIRMAN RUSSELL: Before we adjourn, is
24 there any member of the public out there that
25 would like to address the Board on matters that

1 pertain to the Board?

2 (No response)

3 CHAIRMAN RUSSELL: Seeing none, I will
4 entertain a motion to adjourn.

5 MS. KAISER: So moved.

6 MR. MILLER: I'll second.

7 CHAIRMAN RUSSELL: Thanks for coming
8 back, Joe.

9 MR. WHALEN: Sorry for the delay.

10 CHAIRMAN RUSSELL: Just before we do
11 adjourn, I want to thank Marv for his time on the
12 Board, and your expertise and what you've added,
13 and I really appreciate it.

14 MR. MILLER: Well, it has been a
15 challenge, and I've learned a lot.

16 CHAIRMAN RUSSELL: Thanks, Marv. All
17 right. So all those in favor, signify by saying
18 aye.

19 (Response)

20 CHAIRMAN RUSSELL: Opposed.

21 (No response)

22 CHAIRMAN RUSSELL: Meeting is adjourned.

23 (The proceedings were concluded

24 at 12:09 p.m.)

25 * * * * *

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 - 122 - 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 , 2013.

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires
March 12, 2016.