

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
March 25, 2010)

TRANSCRIPT OF PROCEEDINGS

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
March 25, 2010
9:00 a.m.

BEFORE CHAIRMAN JOSEPH RUSSELL,
BOARD MEMBERS LARRY MIRES;
and LARRY ANDERSON, ROBIN SHROPSHIRE,
and JOE WHALEN, (By telephone)

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

3 * * * * *

4 CHAIRMAN RUSSELL: It's about 9:05, and
5 I will call this meeting of the Board of
6 Environmental Review to order. And Tom, do you
7 want go through the roll call since we have some
8 folks on the phone.

9 MR. LIVERS: Sure. Mr. Anderson.

10 MR. ANDERSON: Here.

11 MR. LIVERS: Ms. Shropshire.

12 MS. SHROPSHIRE: Here.

13 MR. LIVERS: Mr. Whalen.

14 MR. WHALEN: Here.

15 MR. LIVERS: Ms. Kaiser.

16 (No response)

17 MR. LIVERS: We know Mr. Miller is going
18 to be absent. Mr. Mires.

19 MR. MIRES: Here.

20 MR. LIVERS: Chairman Russell.

21 CHAIRMAN RUSSELL: Present. So we have
22 five.

23 MR. LIVERS: Yes.

24 CHAIRMAN RUSSELL: The first item on the
25 agenda is the review and approval of the minutes

1 from the January 28th, 2011 Board meeting.

2 Comments?

3 MR. MIRES: I would move we approve the
4 minutes.

5 CHAIRMAN RUSSELL: Is there a second?

6 MS. SHROPSHIRE: Second.

7 CHAIRMAN RUSSELL: It's been seconded by
8 Robin. Further discussion?

9 (No response)

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

12 (Response)

13 CHAIRMAN RUSSELL: Opposed.

14 (No response)

15 CHAIRMAN RUSSELL: Motion carries
16 unanimously. Next item on the agenda.

17 MR. LIVERS: Mr. Chairman, if I could,
18 Board members, due to a scheduling conflict here
19 at DEQ, we would like to move one item up early.
20 It is one in which you can take public comment.
21 It's an initiation of rulemaking. So what we'll
22 probably do, if you'd like, Mr. Chairman, is we
23 could have the presentation on this item, the
24 Board could ask questions, and if you wanted to
25 hold it open until its regular point in the agenda

1 just in case somebody were to show up for public
2 comment, you could do that.

3 CHAIRMAN RUSSELL: That would be great.

4 MR. LIVERS: So it's Item III(A)(2), on
5 additional criteria when hearing appeals of local
6 health board variance decisions. Steve Kilbreath
7 from the Department will present that.

8 CHAIRMAN RUSSELL: And Flathead County
9 is the poster child for these rules. Thanks,
10 Steve.

11 MR. KILBREATH: Mr. Chairman, members of
12 the Board, my name is Steve Kilbreath, and I'm
13 the Program Manager for the Public Water Supply
14 Engineering and Subdivision Program. And in my
15 tenure in the Subdivision Program, we have had
16 five local variance denial appeals to the
17 Department. In the prior fifteen or twenty years,
18 I think we'd had one, so recently we've had a rash
19 of these.

20 And in the statutes that control the
21 powers and duties of the local health officer,
22 Title 50, Chapter 2, Section 116, it gives the
23 authority for the local health officer to regulate
24 sewage from private buildings, and it also then
25 says that they have to adopt wastewater standards

1 that are no less stringent than the State
2 standards, and they must describe standards for
3 granting variances from the State minimum
4 standards, and the State minimum standards are the
5 wastewater rules that are in the Administrative
6 Rules of Montana 17.36.900 series rules.

7 Every county must adopt those rules, and
8 they can be more stringent if they go through the
9 stringency process. And then the regulations must
10 describe standards for granting variances from the
11 minimum requirements, and it goes on to say, "that
12 are identical to standards promulgated by the
13 Board of Environmental Review."

14 So the statute that gives the authority
15 for the local boards of health to do a variance
16 say that the standards they review the variance by
17 must be identical to those promulgated by this
18 body, and this body has put forth the section of
19 rules, Administrative Rules 17.36.922, which are
20 the ones we're asking to change.

21 And the Administrative Rules that we're
22 asking for a change from would be the variance
23 criteria where it says that in order to evaluate a
24 variance, you must look at and say that the
25 variance will not contaminate any actual or

1 potential drinking water supply, cause a public
2 health hazard by access to insects, rodents, or
3 other carriers of disease, cause or violate a
4 health hazard by being accessible to people or
5 animals, violate any law or regulation governing
6 water pollution or wastewater treatment, pollute
7 or contaminate State waters, degrade State waters,
8 and cause a nuisance due to odor.

9 So what we found in our precarious
10 position of being placed between an applicant and
11 a local board of health, making a decision on the
12 variance, was that the really bigger active
13 counties, the ones that had a lot of variances,
14 the basis for their rules are those seven sacred
15 items, but they've gone on, and almost every
16 county has additional items for their various
17 criteria.

18 And so we find ourselves in a position
19 where we're reviewing the denial of a variance;
20 the local government has used their additional
21 criteria to place and do their decision on the
22 variance; and we're reading this statute saying,
23 "Oops. You know, we've got a conflict here that
24 we've got local governments with different rules
25 applying to variances."

1 So what we did is we went out and talked
2 to the local government, we polled them all, and
3 we asked them if they had recommended changes to
4 this rule. And so we asked all 56 counties, and
5 we probably got comments back from ten, twelve,
6 the bigger active counties; and the comments that
7 came back are highlighted in this rule notice, and
8 they're asking for a change to the rule to say,
9 "Compliance with the requirement of the variance
10 would not place an undue hardship on an
11 applicant."

12 An undue hardship on an applicant, it
13 could be quite simple to do an engineered septic
14 system that costs \$100,000 to meet the criteria of
15 the basic rules. That might be an undue hardship.
16 The variance is necessary to address extraordinary
17 conditions that the applicant could not have
18 reasonably prevented.

19 Okay. We have a lot of parts of Montana
20 that the flood plain rules and the flood plains
21 are upgraded and amended. You have a property
22 that's setting out there, it's got a house and a
23 septic on it, and the flood plain gets painted
24 over the top of your house through a FEMA
25 amendment. You're now in a 100 year flood plain.

1 You want to replace your septic system, lo and
2 behold, you can't replace your septic system
3 because you're in the flood plain, so you ask for
4 a variance. So there is one of those
5 extraordinary conditions that are placed on you
6 that you have no control over.

7 No alternatives that comply with the
8 requirement are reasonably feasible. We get a lot
9 of requests for, "Well, I just don't want to do
10 this. It's cheaper for me to do this," but you
11 need to meet the basic requirements of the rule.
12 And if you can't, and you're asking for a
13 variance, you want to do just the minimum variance
14 that you can get by with; and then that the
15 variance requested is not more than is needed to
16 meet the minimum standards.

17 So you can't go way out and ask for
18 something really odd ball, like you've got a lot
19 with two feet to ground water. You can't ask for
20 a variance to put a trench into the ground water
21 when you could do something that would maximize
22 that separation to groundwater.

23 So these amendments to this rule will
24 make it easier for the local government to
25 administer variances and make decisions that will

1 untie their hands from these seven real simple
2 basic criteria. And if we are fortunate, it will
3 place us in the position of not being in between
4 the local government and an applicant in a
5 decision making process.

6 In my world, my strongest allies are the
7 local government. It's a very funny place to be
8 when you're stepping in between a board of health
9 and an applicant.

10 The other thing we've done in this is
11 we've changed and added a little bit more to the
12 appeal process. We've spelled out in 924 that you
13 must follow the contested case aspects of the
14 Montana Administrative Procedural Act.

15 And then we've beefed up a little bit
16 more language. One of the most important ones
17 we've beefed up -- and this will probably bring a
18 smile to Chairman Russell's lips -- we have said
19 the Department shall be bound by the local board's
20 interpretation of other local rules in effect at
21 the time of the board's decision, and that the
22 Department will not second guess the local
23 government in interpretation of their own rules,
24 is what this essentially says. And that's a real
25 interesting point for discussion.

1 So by adding these criteria to local
2 variance rules, and beefing up the administrative
3 appeal process part, we think we've made a really
4 good package, and the package has come to us
5 through local government. We would recommend that
6 you allow us to proceed with the rulemaking
7 process. Any questions?

8 CHAIRMAN RUSSELL: I do have a few
9 questions, and I do like what you've done, Steve.
10 Your criteria for granting variances sounds very
11 similar to the ones we've had in place for twenty
12 years, and they've worked fairly well for us, and
13 I think that -- not that you guys haven't and
14 other counties haven't had similar.

15 Lake County and Flathead County have --
16 this is an issue around stringency, and I think
17 you addressed it, but I think it can be clarified.
18 We require uniform pressure distribution on every
19 septic system that goes in in Flathead County.
20 We've had variances in the remote areas that have
21 said, "We don't want to do it," and our board
22 said, "Tough," because when you go through those
23 stringency requirements, or those requirements for
24 granting, they can't make a case for it, because
25 they can put a generator on or do something

1 different.

2 Because that's in the State rule, if
3 that variance was appealed to the DEQ, and you
4 don't require that, how are you going to handle
5 that? I think I heard how you're going to handle
6 it, but I want to --

7 MR. KILBREATH: How we would handle
8 that, Chairman Russell, would be we would say that
9 this is not a variance that's being asked for that
10 goes below the base minimum standard level on the
11 table, and so therefore we don't have an action in
12 that because they're not asking for a variance to
13 go beneath a minimum standard. They're asking for
14 a variance from a local rule that you've correctly
15 adopted and is more stringent than ours. We
16 probably would not get involved in that variance
17 decision because they're not asking to go beneath
18 the platform.

19 CHAIRMAN RUSSELL: But do you understand
20 that that's a variance to our minimum standard,
21 and you don't have a standard for that, so
22 literally they can still make the appeal to the
23 Department, and you're still going to have to make
24 a determination.

25 MR. KILBREATH: And on a case like that,

1 we would make the determination that we don't have
2 that as a standard that we're looking at. We're
3 not dropping below the State minimum -- not
4 dropping below the table.

5 CHAIRMAN RUSSELL: Okay. Thanks, Steve.
6 Any questions for the Department?

7 MR. ANDERSON: This is Larry Anderson.
8 I'm not sure I understand this, but I just want to
9 make sure, because we've got situations where
10 local governmental entities are going to have
11 pressure put on them by developers, the
12 developer's pressure is going to be such that
13 they're trying to evade minimum standards. And I
14 just don't want these variances used to swallow up
15 the basic minimum standards that we have had.

16 MR. KILBREATH: Mr. Chairman, these
17 variance standards would not apply to a new
18 subdivision. The subdivision rules would apply to
19 a new subdivision. These variance standards apply
20 only to those onsite wastewater systems that fall
21 outside the subdivision rules, and are permitted
22 by local government. They could not be used as an
23 evasion of subdivision standards.

24 MR. ANDERSON: Okay.

25 CHAIRMAN RUSSELL: I think three of the

1 five have dealt with flood plain issues in local
2 government, where the flood plain has changed, or
3 someone has done something bizarre in the flood
4 plain and wanted us to bail them out. Just from
5 history, Steve and I spent two full days in a
6 hearing up in Flathead County on a variance, and
7 these things can be very in depth.

8 MR. KILBREATH: To add to that, the
9 other thing that can be very costly, we had two
10 full days of staff time in the hearing, we had
11 travel, we had outside legal services that we had
12 to pay for in that one, we had days and days and
13 days of time in advance, and days and days of time
14 afterwards. We probably had thirty or forty days
15 of staff time wrapped up into that appeal. And
16 that particular appeal was pulled off of the table
17 through a District Court action. And it just
18 seems --

19 There was a place holder bill last
20 session, and there was a place holder bill this
21 session, to remove this whole appeal process of
22 local septic permits to DEQ, and place it in a
23 local court. It didn't get introduced this
24 session, didn't get introduced last session.
25 Maybe next time.

1 CHAIRMAN RUSSELL: There is just a lot
2 of small local health departments that just aren't
3 willing to try it in District Court.

4 MR. KILBREATH: But these just eat your
5 time. Every one of these, we have hours, and
6 hours, and hours, and hours.

7 And the one in Flathead County was a
8 flood plain issue; the one in Lake County was an
9 applicant who destroyed the only soil on his site
10 when he built his house; the one in Missoula
11 County is a flood plain issue; the one in Gallatin
12 County is a flood plain issue that they withdrew
13 their application; and the one in Park County that
14 we have scheduled for May is somebody who is
15 seventy feet from the public sewer, and doesn't
16 want to connect.

17 And so seventy feet from the public
18 sewer, and not wanting to connect, wanting to have
19 a holding tank instead of connecting to the public
20 sewer, that's going to waste a lot of time. It's
21 got attorneys involved; it's got a DEQ attorney,
22 private attorney, and a County Attorney. This
23 thing will waste days, and days, and days of time.

24 MR. WHALEN: Mr. Chairman, a question
25 for Steve. My question is: How is the term

1 "undue hardship" defined? Who determines what an
2 undue hardship would be, and what would be the
3 appeal process from the decision as to whether
4 something was or not was a undue hardship if these
5 rules go into effect?

6 MR. KILBREATH: That I believe is a
7 really good question. I don't think we have
8 defined "undue hardship." I think you'd attempt
9 to define it through the hearing process, and it
10 would probably be the Hearing Officers that would
11 make the final determination on the undue
12 hardship, because undue hardship for somebody
13 might be \$5,000, and for somebody else might be
14 \$100,000. I think it's kind of a subjective term.
15 And if a variance decision was made by the
16 Department on an undue hardship determination, I
17 believe that appeal would -- that could only be
18 appealed to District Court.

19 MR. WHALEN: Okay. Thank you.

20 CHAIRMAN RUSSELL: Any further
21 questions?

22 MS. SHROPSHIRE: This is Robin, and that
23 was similar to the question or comment I had. And
24 my concern is if somebody were to be able to
25 demonstrate undue hardship, what would be the next

1 step?

2 MR. KILBREATH: I believe we would -- if
3 you could clearly demonstrate undue hardship, we
4 would weigh that into our decision on the variance
5 appeal. The case in Lake County, we have an
6 onsite septic system that has slightly in excess
7 of \$100,000 price tag for installation as a result
8 of a variance appeal, and we overturned the local
9 decision on that particular case. And the
10 gentlemen were more than happy to spend \$100,00 on
11 the installation of the septic system because it
12 was a pittance in comparison to the price of the
13 home. With him, I'm not sure how you would have
14 got to an undue hardship in a particular case.

15 MS. SHROPSHIRE: Let's say that it was
16 clearly demonstrated that there was an undue
17 hardship, but there would be an impact to the
18 environment.

19 CHAIRMAN RUSSELL: You can't go below
20 the minimum standard.

21 MS. SHROPSHIRE: That's really I guess
22 what I wanted to be clear on. That was confusing
23 to me. So as long as you can't go below the
24 minimum standard, that was what I wanted to
25 confirm, and that's true.

1 CHAIRMAN RUSSELL: Robin, my point
2 earlier up the north fork, these people that
3 didn't want to pressurize their septic system
4 where everyone else in the county was, and our
5 board said, "You have a reasonable alternative.
6 Get yourself a generator, and power your pump with
7 that." They came in claiming an undue hardship,
8 but based on our own engineers saying, "For about
9 500 bucks, you can go out and get this thing
10 energized. It's not a big deal," over and above
11 what everyone else in the Flathead County was
12 paying.

13 MR. KILBREATH: To further add to that,
14 I think undue hardship will be an interesting
15 part. There would be very intriguing discussions
16 here and there.

17 CHAIRMAN RUSSELL: Any other questions
18 for Steve or the Department?

19 MS. SHROPSHIRE: I just wanted to ask
20 Steve if he had any recommendations for making the
21 undue hardship less subjective, any language that
22 could be -- to make -- or if he's okay with the
23 language as it is.

24 MR. KILBREATH: Mr. Chairman, I'm okay
25 with the language as it is, because the language

1 as it is came from the counties. I guess we could
2 look at that to see if we thought we could come up
3 with a definition of undue hardship, but as
4 everyone is pointing out, is such a subjective
5 thing. The undue hardship on the case in Lake
6 County might have been -- you said to the guy,
7 "\$500,000 is the price of septic," and he might
8 have said, "That's undue." He didn't bat an eye
9 at \$100,000, and yet we will see people who will
10 bat an eye at \$5,000.

11 So the burden, the first burden of undue
12 hardship is going to fall on the local boards of
13 health. The second determination of undue
14 hardship will fall on us after they've done that
15 determination.

16 CHAIRMAN RUSSELL: Anything else?

17 MS. SHROPSHIRE: No.

18 CHAIRMAN RUSSELL: All right. Thanks,
19 Steve.

20 MR. KILBREATH: Thank you.

21 CHAIRMAN RUSSELL: They do a nice job
22 keeping the -- especially the Subdivision Program
23 and Steve's program does a nice job in engaging
24 local health departments in the rulemaking, so I
25 really appreciate that. Even once in awhile

1 they'll call me and ask me a question.

2 MR. KILBREATH: When all else fails.

3 CHAIRMAN RUSSELL: Tom, what do you
4 think? Should we just kind of let this thing
5 linger?

6 MR. LIVERS: Mr. Chairman, I would
7 recommend that, yes. We're not anticipating any
8 public comment, we're not aware of any, but
9 nonetheless, just to keep it clean on the agenda,
10 you may want to just hold it until we reach that
11 point on the agenda, until later in the meeting.
12 Plus I think there was one item that our Chief
13 Legal Counsel wanted to check on with Steve before
14 he left, too. So I think that will give us a
15 chance to do that.

16 CHAIRMAN RUSSELL: We'll just keep
17 rolling then. Thanks, Steve.

18 The next item on the agenda is the
19 matter of contested case update. Katherine.

20 MS. ORR: Good morning, Mr. Chairman,
21 members of the Board. There has been quite a lot
22 of movement on these cases that you see digested
23 on the agenda, and let me fill in a little bit
24 more that's happened since we prepared the agenda.

25 On Item II(A)(1)(b) involving North Star

1 Aviation, we did get an appearance of Counsel to
2 represent North Star Aviation, which was a good
3 step; and then the parties have been asked to
4 submit a prehearing schedule, so hopefully we can
5 get that case back on track.

6 In Item II(A)(1)(g), in the matter of
7 the appeal and request for hearing by Ronald and
8 Debbie Laubach, I entered an order denying MATL's
9 motion to dismiss on March 16th of this month.
10 The bases for that motion were several fold, but
11 those included such things as he was representing
12 himself, and the statutory language for filing an
13 affidavit wasn't particularly clear on the point
14 of the consequence if an affidavit was not filed,
15 and I therefore held that it wasn't a service
16 requirement that would be jurisdictional. And I
17 can go into that if anyone wants me to.

18 The parties have requested then that the
19 hearing date that was originally set for March
20 29th be put off, and the new hearing date for that
21 case is April 21st.

22 Maurer Farms is a similar case. They
23 have submitted a motion for summary judgment.
24 That happened on March 16th. And there is a
25 hearing set for the motion on summary judgment in

1 April.

2 On Item II(A)(1)(k), in the matter of
3 violations of the Montana public water supply laws
4 by Belle Creek, a third order granting extension
5 was issued on March 22nd.

6 And that should bring you up to date on
7 what's happening on these cases.

8 CHAIRMAN RUSSELL: Thanks.

9 MS. ORR: Any questions?

10 CHAIRMAN RUSSELL: Questions for
11 Katherine?

12 (No response)

13 CHAIRMAN RUSSELL: And the last two are
14 in a holding pattern with us?

15 MS. ORR: They remain in a holding
16 pattern. I'm waiting for a proposed hearing order
17 on both of those.

18 CHAIRMAN RUSSELL: Thanks, Katherine.
19 Any questions before we move on?

20 (No response)

21 CHAIRMAN RUSSELL: All right. The next
22 item on the agenda is a briefing matter about a
23 letter from EPA that was received January 20,
24 2011.

25 MR. LIVERS: Mr. Chairman, going over

1 selected correspondence from the Board was an idea
2 that came out of the Board secretary, Joyce
3 Wittenberg. I agreed that I think on selected
4 submittals to the Board, there are some substance,
5 it made sense to possibly put aside some time on
6 the agenda.

7 So we're going to try this for a few
8 meetings and see how it works for the Board.
9 Sometimes we'll get something in, sometimes we
10 won't, but when there is something, it seems it
11 deserves just a little bit of attention on the
12 Board's part, we thought we'd try to do a quick
13 briefing rather than just have you folks get the
14 written correspondence and try to make sense of
15 what the substance or impact of it is, just give
16 you some context.

17 So with that, we're going to provide a
18 short briefing. Bob Bukantis is here to go over
19 this correspondence from EPA.

20 MR. BUKANTIS: Good morning, Mr.
21 Chairman, members of the Board. For the record,
22 my name is Bob Bukantis, and I am the Manager at
23 the Water Quality Standards Program, DEQ. And as
24 Tom indicated, I'll just give you just a brief
25 overview of this letter, put it in context.

1 Recall that last year we submitted a
2 standards package to EPA, went through rulemaking
3 process, and we did a major update on Department
4 Circular DEQ7, which is a compendium of Montana's
5 numeric water quality standards, and this is EPA's
6 approval of that action basically. Once we go
7 through the State process to adjust our water
8 quality standards, then we submit the standards to
9 EPA for their approval under the Clean Water Act.

10 Just to refresh your memory a little
11 bit, I'll just hit the highlights of what was in
12 that package. It was basically a very complete
13 rework of the format. We thoroughly rewrote the
14 introductory materials, and redid the tables of
15 standards, and the associated metadata, if you
16 would, to make that information much more user
17 friendly, and more accessible, both electronically
18 using computer search equipment, as well as just
19 easier to read and access all of the information.

20 At the same time, we added 18 new
21 pesticides that we are required to do under the
22 Montana Ag Chemical Ground Water Protection Act,
23 and in then added a bunch of new standards,
24 seventeen new health standards and six aquatic
25 life standards, that we did under the Montana

1 Water Quality Act/Clean Water Act authority, and
2 made some footnote changes.

3 Again, just real quick, hitting the
4 highlights, the letter in general compliments your
5 action and the Department's work to update and
6 maintain the currency of our standards.

7 And one thing I'll just also note.
8 There is a lot of detail there that is not worth
9 getting into, mostly just what EPA does is just
10 make clear the basis for their approval. And they
11 did note a few minor errors which ended up going
12 through on DEQ7, despite DEQ's and EPA's best
13 efforts on QA throughout the process. We'll
14 correct those errors on the next version of DEQ7,
15 which is currently in the works, by the way, and
16 we'll be bringing to you later this year.

17 So with that, I'd be happy to respond to
18 any questions you might have.

19 CHAIRMAN RUSSELL: Questions for Bob?

20 MR. MIRES: You may not be able to
21 answer this question, but are you familiar with
22 HR872 that's going through Congress right now? Is
23 anybody familiar with 872? That has come out of
24 House committee, and it deals with pesticides and
25 regulatory, and basically it turns back -- it's

1 called, "This act may be cited as the reducing
2 regulatory burden act of 2011," and it directly
3 points at I think affecting these eighteen new
4 pesticides that we added.

5 Can somebody research and find out how
6 this thing, if it passes Congress this year, how
7 it may affect this particular -- our rules that we
8 currently have? As I understand, it has gone
9 through the House.

10 MR. BUKANTIS: HR872?

11 MR. MIRES: HR872, yes.

12 MR. BUKANTIS: Mr. Chairman, Mr. Mires,
13 I'm not familiar with that bill. The one thing I
14 will offer relative to that is our pesticides are
15 done under State law, and are not approved by EPA
16 for groundwater because they don't have the
17 authority on that, and that's something -- maybe
18 this is relevant perspective. I'm not sure
19 without looking at that bill -- is that something
20 where the State is more progressive in being
21 protective of our citizens, if you would, than the
22 feds currently are.

23 MR. MIRES: Follow up. In Section 5,
24 Paragraph 5 of this thing, it says, "Use of a
25 registered pesticide except as provided in Section

1 402(s) of the Federal Water Pollution Control Act,
2 the Administrator for a state may not require a
3 permit under such act for discharge from a point
4 source of navigable water of a pesticide
5 registered under this act, or the residue of such
6 pesticide resulting from the application of such
7 pesticide."

8 And in other words, I don't know if
9 Congress is trying to overreach their bounds by
10 controlling what the state may or may not do.

11 MR. LIVERS: Mr. Chairman, for the
12 record, Tom Livers for the Department. The only
13 thing I caught in that quickly is a couple of
14 references to "under this act," and I assume it's
15 talking about under the federal act. So I don't
16 know if that -- it may be referring to -- it
17 sounds like that statement has to do with
18 authority coming from that federal act, so the
19 state authority would be maybe made through a
20 delegation there, and that might be different.
21 I'm offering you a non-legal interpretation, but
22 it may be a possibility.

23 MR. MIRES: That's why I'm asking.
24 Thank you.

25 MR. LIVERS: We can certainly look at

1 that.

2 CHAIRMAN RUSSELL: Any other questions
3 for Bob?

4 (No response)

5 MR. LIVERS: We'll try to have that by
6 the next Board meeting.

7 CHAIRMAN RUSSELL: Thanks, Tom. Thanks,
8 Bob.

9 The next item on the agenda is the
10 Department requests approval of amendments to the
11 Public Water Supply Rules, specifically ARM
12 17.38.101, 106, 502, 511, and 513. Mr. Pizzini.

13 MR. PIZZINI: Good morning, Chairman
14 Russell, members of the Board. For the record, my
15 name is Eugene Pizzini. I'm the Rules Manager for
16 the Public Water Supply Section of the Montana
17 Department of Environmental Quality.

18 The Department is requesting that the
19 Board initiate amendment to the Administrative
20 Rules of Montana dealing with the regulation of
21 public water supplies.

22 The first proposed amendment would
23 result in a reduction in certain engineering
24 review fees. Over the last eight years or so, we
25 have had to request fee increases to meet our

1 statutory requirement to collect fees commensurate
2 with the costs of our doing plan and spec review.
3 During the last hearing regarding proposed
4 engineering fee increases, the Department was
5 questioned as to its method of calculating line
6 item fees.

7 The concern was that we may collect more
8 in fees than required. We stated then if we found
9 we were collecting more in fees than were
10 required, we would be back to correct that issue.
11 We are proposing amendments to 17.38.101 in
12 accordance with that commitment. We have
13 identified a fairly unique situation where the
14 line item fee collects substantially more in fees
15 than it actually costs to do the review.

16 To resolve this issue, the Department
17 proposes to create a new definition and
18 corresponding line item fee. The issue arises in
19 the submission of plans and specifications for
20 large rural distribution systems. These systems
21 are generally fairly simple to review, but have
22 large submittals.

23 As a note, there is an error in the
24 reason statement in the package on the proposed
25 amendment that you received. Under the reason

1 statement, it refers to a rural water system and
2 multiple locations. The correct term should be
3 "rural distribution system." This error will be
4 corrected in the final notice.

5 The second proposed amendment is a
6 correction to ARM 17.38.101 sub (4)(j). As the
7 rule currently reads, a submitter can request a
8 deviation from the checklist process which was
9 created to expedite certain plan and specification
10 reviews. As systems are required to have plan and
11 spec review, the effect of this deviation from the
12 checklist would be to return to the standard
13 review process, making the entire process
14 nonsensical.

15 The last area of proposed amendment is
16 to ARM 17.38 Subchapter 5 dealing with water
17 hauled for cisterns. The proposed amendments do
18 not create any new requirement, but are intended
19 to clarify the water hauler rules, and to identify
20 those requirements in a single location.

21 There is also a numbering error in this
22 proposed section. ARM 17.38.513(1) refers to an
23 exception provided in three. Unfortunately three
24 does not exist as written. The Department
25 proposes to change the four to a three, and this

1 error will be corrected also in the final notice.

2 The Department recommends initiation of
3 rulemaking and appointment of a Hearings Officer
4 for a public hearing. Thank you.

5 CHAIRMAN RUSSELL: Thanks, Gene.

6 Questions for the Department?

7 (No response)

8 CHAIRMAN RUSSELL: The water hauler
9 stuff is probably the most substantial changes
10 that you're requesting. Why are you doing that?

11 MR. PIZZINI: Chairman Russell, members
12 of the Board, the water hauler rules haven't been
13 changed since the breakup of the DHES, and when
14 they broke up DHES and created the Department of
15 Public Health and Human Services and the
16 Department of Environmental Quality, we ended up
17 with water haulers because we do public water
18 supply stuff. There are some references in those
19 rules that go back to the prior breakup date
20 relating to DPHHS's authority to issue licenses
21 and stuff.

22 In addition, there is requirements in
23 there that aren't clear. Probably the best
24 example I can give you is we require water haulers
25 to ensure that the water that they put in their

1 tank, and that they haul in their tank, and that
2 they subsequently deliver to a cistern has a
3 minimum of .4 milligrams of per liter of chlorine.
4 That's to protect it. Every time you open that
5 tank, ever time you open a cistern and go to
6 inject water into somebody's cistern, you run the
7 risk that you're going to introduce a contaminant
8 into the tank.

9 Under 17.38.225 and 17.38.229, rules
10 that deal with disinfection of public water
11 supplies and reporting, any public water supply
12 that chlorinates is required to do daily chlorine
13 residual and to report that. If you look in 17.38
14 Subchapter 5, there is requirements for the
15 haulers to monitor chlorine residuals. There is
16 no specific requirement in that section that they
17 report those results to the Department. That
18 doesn't mean that they're not required to do it,
19 it's just in another section.

20 So the intent of these types of rules
21 are to make it easy for the water haulers to say,
22 "I'm required to do this," and to put it all in
23 one location.

24 CHAIRMAN RUSSELL: Because it's not in
25 here. Is the term "water hauler" fairly

1 comprehensively defined?

2 MR. PIZZINI: There is a definition for
3 water hauler, and it's being modified slightly as
4 a matter of fact. And I should start out with
5 Chairman Russell, members of the Board. And
6 Chairman Russell, members of the Board, we wanted
7 to make it clear that a water hauler is only
8 somebody who is hauling water through a non-piped
9 conveyance. You could not claim to be a water
10 hauler if you had a pipe running into your
11 facility.

12 And also from the break up of Department
13 of Health and Environmental Sciences, the
14 definition included ten families, which you see is
15 being struck, and also ten service connections.
16 The public water supply definition was changed a
17 long time ago. So this change is intended to
18 bring it into conformance with current statutory
19 definition of a public water supply.

20 CHAIRMAN RUSSELL: I was just trying to
21 maybe apply this to some real life scenarios, and
22 the one that comes to me -- and I think this is
23 why it wouldn't apply -- is fire camps.

24 MR. PIZZINI: Chairman Russell, members
25 of the Board, that's exactly correct. We do not

1 generally regulate fire camps because they are not
2 open in most cases for at least 60 days. We have
3 worked with the Department of Public Health and
4 Human Services. They have drafted standards that
5 they use to license, if you will, haulers that are
6 hauling to fire camps.

7 In some cases we have fire camps that go
8 over the 60 days, and we've allowed them to
9 continue to operate under Department of Public
10 Health and Human Services regulation. They're
11 basically the same as ours. And so it's just
12 taking one more step that isn't necessary in a bad
13 situation and removing it.

14 So yes, we may be required to regulate
15 some of them, but in all cases, they're going
16 through the county and DPHHS, and so we just kind
17 of back them up if we have to.

18 CHAIRMAN RUSSELL: These guys pull in
19 our parking lot and really create a mess.

20 MR. PIZZINI: Chairman Russell, members
21 of the Board, but they're not pulling in my
22 parking lot, so this is perfect.

23 MR. MIRES: Mr. Pizzini, I'm assuming
24 that this is applying to commercial water haulers
25 and not the private John Doe for his private home

1 dwelling?

2 MR. PIZZINI: Chairman Russell, members
3 of the Board, that is correct. Chairman Russell,
4 members of the Board, there is one more comment I
5 guess I would make, and that is just yesterday I
6 had a situation come up with a potential new water
7 hauler that showed me that there is another issue
8 with this, so I'm likely going to be coming back
9 to you here in the future, and I will briefly
10 explain what that issue is.

11 Right now, we treat water haulers as
12 water haulers. They're all exactly the same. And
13 the reason being is once you have that haul tank,
14 you may have gotten it to only supply water to
15 your business, but at any point you could say,
16 "You know what, I'm going to start selling water
17 to the houses next door."

18 And so the requirements have to change.
19 We have never split water haulers up into those
20 subgroups. After the conversation we had
21 yesterday, it may be important that we need to go
22 back and look at that, and consider something
23 along those lines. So you may hear more about
24 water haulers in the near future.

25 MR. MIRES: Follow up. Is that also

1 going to apply to these water haulers that are
2 hauling for fracking oil?

3 MR. PIZZINI: Chairman Russell, members
4 of the Board, our public water supply law and
5 rules only deal with water that is used for human
6 consumption. Any water hauling tank that was used
7 to haul for fracking or any other non-potable use
8 no longer is available to be used in hauling
9 potable water, whether they put anything separate
10 in it or not. If it was used to haul for other
11 than potable use, it's no longer approvable as a
12 water hauling tank.

13 CHAIRMAN RUSSELL: So because you say
14 "potable," and I do, and my own Board Chairman
15 corrects me and says "potable," what is correct,
16 Mister --

17 MR. PIZZINI: Chairman Russell, members
18 of the board, the correct term is "potable."

19 CHAIRMAN RUSSELL: Not potable.

20 MS. SHROPSHIRE: I have a question about
21 the chlorine residual. Is there a level which is
22 too high?

23 MR. PIZZINI: Chairman Russell, members
24 of the Board, under the groundwater rule, I
25 believe it set the maximum contaminant for

1 chlorine at four milligrams per liter. There has
2 always been one for surface water systems that was
3 four milligrams per liter, but until the
4 groundwater rule came out, there was no MCL for
5 groundwater systems for chlorine.

6 MS. SHROPSHIRE: I was just looking at
7 the part where it says that water haulers shall
8 for each load of water shall record," blah, blah,
9 blah, "but that only the lowest value needed to be
10 reported." And I was wondering what the reasoning
11 behind that was. Why wouldn't they report every
12 thing that they measure?

13 MR. PIZZINI: Chairman Russell, members
14 of the Board, I guess that is a "you pick your
15 battles and fight them as best you can," and the
16 ones -- You know, we could require, strictly
17 speaking, that every load is measured and
18 reported. We have some water haulers that haul
19 ten loads a day type thing.

20 That would create a significant pile of
21 information that we are required to review and
22 enter into our data base; it would require a
23 significant amount of work on the hauler's part;
24 and quite frankly from a public health point of
25 view, the important side of it is the minimum.

1 And so what we --

2 Let me back up and clarify. The hauler
3 is still required to do the testing and to record
4 those numbers. The only thing that they are
5 required to report to us is the lowest value each
6 day. Those records are still available, and when
7 we do our inspections, we are able to ask for
8 those records and review those records. It is
9 just not on a daily or a monthly time frame like
10 the minimum residuals would be.

11 MS. SHROPSHIRE: Okay. Would it help to
12 clarify this, or is it obvious that they have to
13 maintain those records? I think that answers my
14 question, as long as it's clear to them that they
15 have to maintain records.

16 MR. PIZZINI: Chairman Russell, members
17 of the Board, the records retention requirements
18 are in other sections, and so we don't get into
19 the actual rule retention requirements in each
20 section of rule. They are addressed in other
21 areas.

22 MS. SHROPSHIRE: Does it refer to their
23 record retention requirements?

24 MR. PIZZINI: Chairman Russell, members
25 of the Board, the federal rule has a specific

1 section, and I don't remember the number off the
2 top of my head, that deals with rule retention
3 requirements. It happens to be in 142, which is
4 the requirements for a state to have primacy, and
5 then the -- I don't remember who the state agency
6 is. It may be the Secretary of State that has
7 records retention requirements.

8 And Mr. North or somebody may be able to
9 help. Mr. North, which State agency is it that
10 has the records retention?

11 MR. LIVERS: Secretary of State.

12 MR. PIZZINI: The supplier has those
13 same requirements as well. We have requirements
14 for us to maintain the records; the supplier has
15 records retention requirements as well.

16 MS. SHROPSHIRE: I think you answered my
17 question, and my only comment was that if you can
18 make sure that this is clear so that it's helpful
19 to them in interpreting this -- that's always a
20 good thing -- so that there is no doubt about what
21 they're expected to do. So if you can insert that
22 in this or clarify it here, it keeps people from
23 having to go through another document and look it
24 up. So that would be a recommendation, if that's
25 your expectation.

1 MR. PIZZINI: Chairman Russell, members
2 of the Board, I'll work on that.

3 MS. SHROPSHIRE: Thank you.

4 CHAIRMAN RUSSELL: This is probably
5 technical and just more for my knowledge, but how
6 many water systems in Montana are actually using
7 chloramines for disinfection?

8 MR. PIZZINI: Chairman Russell, members
9 of the Board, from my recollection, the only one
10 is the City of Great Falls.

11 CHAIRMAN RUSSELL: So they're actually
12 using a chloramine for --

13 MR. PIZZINI: Chairman Russell, members
14 of the Board, they are actually adding ammonia to
15 as well as chlorine to the water, forming
16 chloramines, and that is their disinfectant, which
17 creates issues if somebody is going to come back
18 later and try and add more chlorine to the water,
19 the upper residual. That's exactly why we did the
20 exemption for it. We don't want certified
21 operators experimenting with ammonia and chlorine,
22 trying to figure out the chemistry in somebody's
23 cistern.

24 CHAIRMAN RUSSELL: There's probably not
25 a lot of chemists running around hauling water

1 right now, is there?

2 MR. PIZZINI: Could be.

3 CHAIRMAN RUSSELL: Maybe a few. Times
4 are tough. Thanks. Anything else before we
5 dismiss my friend from Great Falls?

6 MR. WHALEN: Mr. Chairman, I do need to
7 follow up on a point that was raised by Ms.
8 Shropshire.

9 I see in this proposed rulemaking the
10 minimum threshold for chlorine residuals in these
11 tanks, and we don't have a maximum level or
12 threshold residual of chlorine in these tanks. My
13 question is: In our public water system
14 throughout municipalities, do we have minimum and
15 maximum thresholds of chlorine residual in our
16 water distribution systems, or do we simply have
17 minimum thresholds in our water distribution
18 systems?

19 MR. PIZZINI: Chairman Russell, members
20 of the Board, I'll try and do this again. When
21 they did the original surface water treatment
22 rule, they created not only a minimum requirement
23 that disinfectant was required in the distribution
24 system, they also created a maximum. That applied
25 only to surface water systems.

1 Under those original rules, when the
2 State of Montana adopted its requirements, it
3 adopted the minimum chlorine requirements that
4 applied to surface waters of all systems in the
5 state that were supplying full-time disinfection.
6 Therefore, there was no maximum disinfectant
7 residual or maximum contaminant level in our
8 distribution system requirements.

9 When the Feds adopted the groundwater
10 rule in 2006, it included a maximum contaminant
11 level for chlorine for systems utilizing
12 groundwater. Therefore, all systems basically had
13 the four milligram per liter maximum contaminant
14 level for chlorine, that is, those are
15 distribution system MCL's. So a system could in
16 reality serve or treat with higher levels of
17 chlorine, as long as they did not exceed four
18 milligrams per liter at or before the first user.

19 MR. WHALEN: I see. To understand Mr.
20 Pizzini's point, the four milligrams per liter is
21 both the minimum and the maximum threshold of
22 chlorine residual in water systems?

23 MR. PIZZINI: Chairman Russell, members
24 of the Board, the explanation I just gave you was
25 based on the previous rules as they came out when

1 we adopted those rules initially, and the last --
2 actually I think it was two meetings ago that I
3 was here, we changed those numbers around some.

4 Right now surface water systems are
5 required to have water entering the distribution
6 system with a .2 milligrams per liter residual,
7 and then the chlorine must be detectable at all
8 points in the distribution system. So there is no
9 numeric value out in the distribution system.

10 Groundwater systems that are
11 disinfecting under the groundwater rule are
12 required to have water that enters the
13 distribution system at .2 milligram per liter, but
14 they are trying to achieve what is -- they're
15 trying to achieve a four log inactivation of
16 viruses. That requires that they have to have a
17 concentration for a specific period of time.

18 So in our engineering review, our
19 engineer says, "You must have, based on how long
20 this amount of water is going to flow through this
21 pipe or this structure, you must have this
22 concentration in order to get that four log."

23 Water haulers, as I said, because they
24 put the water -- or they subject the water to the
25 potential for contamination, their minimum

1 residual was increased from .2 to .4 to add an
2 extra barrier. I'm not sure if that answers your
3 question or not.

4 MR. WHALEN: Mr. Chairman, that's a very
5 useful explanation. Thank you, Mr. Pizzini.

6 CHAIRMAN RUSSELL: Thank you. Anything
7 else?

8 (No response)

9 CHAIRMAN RUSSELL: I think we're ready
10 to go. Katherine, you're good to go on this one?

11 MS. ORR: Yes.

12 CHAIRMAN RUSSELL: So I would entertain
13 a motion to initiate the rulemaking process,
14 assign this to Katherine, and make sure that the
15 amendments suggested or requested by Mr. Pizzini
16 are added specifically on the distribution -- I
17 can't remember exactly -- but something about
18 distribution dealing with 25 cents to three cents
19 per lineal foot. And there was one other one.

20 MR. PIZZINI: Chairman Russell, members
21 of the Board, the two errors in the notice that we
22 sent you, or the draft, the first was in
23 17.38.101, under the reason statement, where it
24 refers to a rural water system. We would like to
25 replace that, we need to replace that with "rural

1 distribution system." That is actually the term
2 that we intend to create and define.

3 The second error was in 17.38.513, and
4 under sub (1), it references an exemption
5 available under Section 3. Currently we're
6 numbered one, two, four. We wish to replace the
7 four and make it the three.

8 CHAIRMAN RUSSELL: All right. So that
9 would be the amendments to the notice. Do I have
10 a motion to initiate, and make the amendments to
11 the notice, and assign this to Katherine?

12 MS. SHROPSHIRE: So moved.

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

15 MR. MIRES: Second.

16 CHAIRMAN RUSSELL: It's been moved and
17 seconded. And before we move along, prompted by
18 my friend Tom, is there anyone out there in the
19 public that would like to speak to this matter
20 before the Board takes action?

21 (No response)

22 CHAIRMAN RUSSELL: Anyone out there in
23 telephone land that we don't know of?

24 (No response)

25 CHAIRMAN RUSSELL: Hearing none, all

1 those in favor, signify by saying aye.

2 MR. WHALEN: Mr. Chairman, with respect
3 to these teleconference meetings, I would a
4 request a roll call vote on these motions so that
5 we're clear as to who is voting for what.

6 CHAIRMAN RUSSELL: I will turn that over
7 to Tom to do the roll call, so all those in favor,
8 signify by saying aye.

9 MR. LIVERS: Ms. Shropshire.

10 MS. SHROPSHIRE: Aye.

11 MR. LIVERS: Mr. Whalen.

12 MR. WHALEN: Aye.

13 MR. LIVERS: Mr. Anderson.

14 (No response)

15 MR. LIVERS: Mr. Anderson.

16 (No response)

17 MR. LIVERS: Mr. Mires.

18 MR. MIRES: Aye.

19 MR. LIVERS: Chairman Russell.

20 CHAIRMAN RUSSELL: Aye.

21 All those opposed, signify by the same.

22 (No response)

23 MR. LIVERS: If I could, Mr. Chairman,
24 if the Board is interested, we do have a little
25 more information on the federal House resolution

1 that Mr. Mires brought up, HR872. Jenny Chambers,
2 the head of our Water Protection Bureau is here,
3 and can speak on that, if the Board would like at
4 this time.

5 CHAIRMAN RUSSELL: That would be great.
6 I'm sure Larry would love to know a little bit
7 more, Mr. water guy.

8 MR. MIRES: I would.

9 MS. CHAMBERS: Mr. Chairman, members of
10 the Board, for the record, my name is Jenny
11 Chambers. I'm the Bureau Chief of the Water
12 Protection Bureau. I don't have any of my notes
13 or handouts here, so it's kind of off the cuff,
14 but I hopefully can address some of the concerns
15 you have.

16 For my understanding when Bob got up and
17 talked about the EPA approval letter, there is a
18 couple of pesticides that have needed
19 clarification or errors in their water quality
20 standard packets that I know the standards program
21 is working forward to address.

22 MS. SHROPSHIRE: Jenny, just can you
23 slow down just a tiny bit? Because it's harder to
24 hear on the phone line.

25 MS. CHAMBERS: Mr. Chairman, Ms.

1 Shropshire, it will be the first, but I will
2 certainly try.

3 So that standards package had a couple
4 of pesticides that the standards program was going
5 to clarify. It is not related at all to the
6 resolution that's in front of Congress to clarify
7 or address the Sixth District Court ruling that
8 basically exempted the Clean Water Act, and
9 required point source pesticide sprayers to
10 receive permit coverage.

11 As you're aware, we came back several
12 months ago and proposed the pesticide rule package
13 so that we could set up that infrastructure for
14 that fee program to develop a general permit for
15 the pesticide applicators of that program. The
16 House resolution would basically reclarify that
17 Court's intent, and add language to basically
18 clean up and acknowledge that application of
19 pesticides to State waters would be maintained,
20 and managed, and regulated under FIFRA, the
21 Federal Insecticide, Rotenticide, Fungicide Act.
22 So we're watching that very closely.

23 Nothing has passed the House yet. There
24 has been about 80 I think representatives that
25 have signed that to move that forward. I don't

1 think our Montana Representative Rehberg has
2 signed that. I know the Department of Ag. is
3 working with the Governor's Office to see if there
4 is something they can do from a Montana stance.

5 But for us within DEQ and the
6 development of an MPDES general permit, we're
7 moving forward. We've had a tremendous amount of
8 stakeholder input and involvement. We went out
9 for a draft public comment period. We got a
10 significant amount of comments. We've had three
11 stakeholder meetings since we went out for public
12 comment.

13 And I'm planning on signing that permit
14 to issue it April 9th, but give a delayed
15 effective date until November 1. So then if
16 something at Congress happens, and that exemption
17 for FIFRA changes under the Clean Water Act,
18 Montana DEQ can gain back that general permit.

19 As well, we're also watching -- EPA has
20 an extension filed with the Court to extend their
21 deadline date from April 9th to October 31st, so
22 we're watching that time frame as well. EPA does
23 not plan on having a permit issued until
24 July/August time frame, and so there is question
25 about whether or not that's going to go forward,

1 and whether or not they're going to get their
2 extension or not.

3 But for our Montana applicators they'll
4 have liability coverage on April 9th, either under
5 our general permit or under our 308 Water Quality
6 Act program, and that will have time for the
7 summer season to provide education and outreach so
8 that when that permit is effective November 1, we
9 should be in pretty good shape. So we're watching
10 that very closely. I should be back to you guys
11 in May at the BER meeting to finalize our rule
12 package which we have changed quite a bit, based
13 on stakeholder input, and then if there's more
14 questions at that time in May, I'd be happy to
15 answer those.

16 CHAIRMAN RUSSELL: Thanks, Jenny.

17 MS. SHROPSHIRE: Jenny, that was
18 perfect. You can do it.

19 CHAIRMAN RUSSELL: Thanks. So the next
20 item on the agenda is actually the item that we
21 moved up, and I'm going to turn this over to Tom.
22 It's the 922 rule.

23 MR. LIVERS: Thank you, Mr. Chairman.
24 Members of the Board, this is the item that Steve
25 Kilbreath gave the presentation on at the

1 beginning of the meeting. And we did uncover a
2 couple of mechanical corrections that we'd just
3 like to speak to, and John North, our Chief Legal
4 Counsel, will address those real quickly. I think
5 they're going to be pretty easy to incorporate
6 into the notice. Thank you.

7 MR. NORTH: Mr. Chairman, members of the
8 Board, John North, Chief Legal Counsel for DEQ.
9 If you have the notice, if you turn to the third
10 page of the notice, which are the amendments to
11 17.36.924, and if you go down to Paragraph 6, New
12 Paragraph 6, you will see that it says, "In
13 evaluating the local board's variance decision,
14 the Department shall apply the various criteria in
15 Subsection (2)," which of course references
16 Subsection (2) of the same rule.

17 But those don't contain the various
18 criteria. They are actually in 17.36.922, which
19 we are also amending to add additional various
20 criteria, so in that Subsection 6, there should be
21 added before both of the two in parens 17.36.922.

22 That's it.

23 CHAIRMAN RUSSELL: All right. Thanks,
24 John. And Katherine, are you good to go on this
25 one?

1 MS. ORR: Yes.

2 CHAIRMAN RUSSELL: Before we take
3 action, is there anyone in the audience or on the
4 phone that would like to speak to this matter
5 before the Board takes action?

6 (No response)

7 CHAIRMAN RUSSELL: Seeing none, I would
8 entertain a motion to initiate rulemaking, adopt
9 the notice with the appropriate changes to 924
10 that John North had mentioned, appoint this to
11 Katherine, and get moving.

12 MR. WHALEN: Mr. Chairman, I would so
13 move that motion, and request a roll call vote.

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

16 MS. SHROPSHIRE: Second.

17 CHAIRMAN RUSSELL: It's been moved and
18 seconded. Further comment?

19 (No response)

20 CHAIRMAN RUSSELL: Hearing none, all
21 those in favor, signify by saying aye on roll call
22 by Tom Livers.

23 MR. LIVERS: Mr. Anderson.

24 (No response)

25 MR. LIVERS: Ms. Shropshire?

1 MS. SHROPSHIRE: Aye.

2 MR. LIVERS: Mr. Whalen?

3 MR. WHALEN: Aye.

4 MR. LIVERS: Mr. Mires.

5 MR. MIRES: Aye.

6 MR. LIVERS: Chairman Russell.

7 CHAIRMAN RUSSELL: Aye. Motion carries.

8 Apparently we lost Larry.

9 MS. SHROPSHIRE: Do we have just four
10 members present?

11 CHAIRMAN RUSSELL: Yes. I think we just
12 have a quorum, so stick around, okay?

13 MS. SHROPSHIRE: Well, all right. I'm
14 crossing the Canadian border in about an hour, so
15 as long as we're done by then, I'm good.

16 MR. LIVERS: We can have Jenny make the
17 rest of the presentations.

18 MS. SHROPSHIRE: I won't ask any more
19 questions.

20 CHAIRMAN RUSSELL: We'd better roll
21 then. The next item on the agenda is executive
22 summary for action on rule adoption on amending
23 the air quality open burning rules and other
24 related items.

25 MS. WOLFE: Good morning, Chairman

1 Russell, members of the Board. My name is Debra
2 Wolfe. I work in the Air Resources Management
3 Bureau. And I'm here today to represent the
4 Department regarding action on the proposed
5 revisions to the open burning rules. And if
6 you'll indulge me a minute, I'll review what we
7 proposed in the notice published on December 23rd,
8 2010.

9 ARM 17.8.604 is the list of materials
10 that one is prohibited from burning under the open
11 burning rules. As I stated previously, in 2002,
12 the Board amended 17.8.604 to provide an exception
13 to the general prohibition in order to allow wood
14 waste generated in areas where burning would be
15 unwise to be moved to areas where the burning
16 could take place under conditions applicable to
17 other open burning.

18 The Board originally approved the rule
19 as a response to situations that occur when a city
20 experiences a heavy snowfall or severe wind storm
21 causing tree limbs to break and fall onto the
22 ground. If other disposal methods are unavailable
23 or not feasible, it was felt that in situ open
24 burning would unacceptably increase particulate
25 concentrations in populated areas, and that it

1 would be more appropriate to move fallen tree
2 limbs downwind and away from town before open
3 burning.

4 The rule was submitted to EPA for
5 inclusion in the State Implementation Plan in
6 2003. In 2004, EPA proposed to disapprove the
7 amended provision. EPA has not followed up to
8 finalize the proposed disapproval since that time,
9 but has more recently indicated in discussions an
10 inclination to approve if the rule was changed in
11 some way that would condition that approval. So
12 the notice set forth a proposal to revise the rule
13 to provide conditions for approval into the SIP.

14 The revisions ensure that waste that is
15 moved from the premises where it is generated is
16 still prohibited material, and may not be burned
17 unless it is conducted pursuant to a landfill or
18 conditional open burning permit. The revisions
19 also ensure the movement and burning is only an
20 option for wood that is not already described as
21 prohibited in 17.8.604(1)(e). The proposed
22 revisions ensure other methods of disposal are
23 considered. Finally, the proposal would require
24 the open burning to comply with BACT for open
25 burning.

1 The proposed revision to ARM 17.8.610(2)
2 merely corrects grammatical error.

3 The notice also set forth revisions that
4 make the open burning rules consistent with
5 legislation removing the automatic stay during the
6 process to appealing opening burning permits
7 pursuant to 75-2-211, Montana Code Annotated.

8 The Board initiated rulemaking and held
9 a public hearing on January 13th, 2011 to consider
10 the proposed amendments to the above stated rules.
11 The Department supports the amendments as set
12 forth in the rulemaking notice published on
13 December 23rd, 2010. Thank you.

14 CHAIRMAN RUSSELL: Thanks, Deb.
15 Questions for the Department?

16 (No response)

17 CHAIRMAN RUSSELL: Katherine, do you
18 have anything to add? You were the Presiding
19 Officer on that.

20 MS. ORR: I don't, Mr. Chairman.

21 CHAIRMAN RUSSELL: Is there anyone in
22 the audience that would like to speak to this
23 matter before the Board takes action?

24 (No response)

25 CHAIRMAN RUSSELL: Seeing none, I would

1 entertain a motion to adopt the rule as presented,
2 accept the Presiding Officer's report, the House
3 Bill 521 and 311 analysis, and there were no
4 responses to comments.

5 MS. WOLFE: There were no comments, Mr.
6 Chairman.

7 CHAIRMAN RUSSELL: Do I have a motion?

8 MS. SHROPSHIRE: So moved.

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

11 MR. WHALEN: Second.

12 CHAIRMAN RUSSELL: Seconded by Joe
13 Whalen. Any further comments before we go?

14 (No response)

15 CHAIRMAN RUSSELL: We will roll call,
16 Tom. So all those in favor, signify by saying
17 aye.

18 MR. LIVERS: Mr. Anderson?

19 (No response)

20 MR. LIVERS: Ms. Shropshire?

21 MS. SHROPSHIRE: Aye.

22 MR. LIVERS: Mr. Whalen.

23 MR. WHALEN: Aye.

24 MR. LIVERS: Mr. Mires.

25 MR. MIRES: Aye.

1 MR. LIVERS: Chairman Russell.

2 CHAIRMAN RUSSELL: Aye. Thanks.

3 The next item on the agenda is
4 amendments to the air quality rules, specifically
5 17.8.763.

6 MS. WOLFE: Thank you. Again, I'll
7 reiterate for the record that my name is Debra
8 Wolfe, and I work in the Air Resources Management
9 Bureau, and I'm representing the Department today
10 regarding action on the proposed revisions to the
11 Montana air quality rules.

12 The proposed revision to ARM 17.8.763
13 would set forth a process for notice by
14 publication regarding the Department's intent to
15 revoke a permit for a source regulated under Title
16 17, Chapter 8, Subchapter 7.

17 The current rule fails to set forth a
18 method of alternative service in the event an
19 owner or operator cannot be found for regular mail
20 delivery. The Department feels including a
21 provision to help close the loop in a situation
22 where an owner or operator is delinquent in its
23 fee payment, and the Department is then obligated
24 to pursue them even though the owner or operator
25 leaves no forwarding address or other information.

1 Chasing down a cold trail and
2 maintaining administrative records for an inactive
3 source takes resources the Department can ill
4 afford. Publishing an intent to revoke a permit
5 would provide any owner or operator sufficient
6 time to halt the process and remedy the situation.

7 The Board initiated rulemaking and held
8 public hearing on January 13th, 2011 to consider
9 the proposed amendments in these rules. The
10 Department supports the amendments as set forth in
11 the rulemaking notice published on December 23rd,
12 2010. Thank you.

13 CHAIRMAN RUSSELL: Thank you. Questions
14 for the Department?

15 (No response)

16 CHAIRMAN RUSSELL: Katherine, anything
17 to add?

18 MS. ORR: No, Mr. Chairman.

19 CHAIRMAN RUSSELL: Is this just like a
20 record hearing, ten minutes?

21 MS. ORR: It is.

22 CHAIRMAN RUSSELL: All right. Anyone in
23 the audience or on the phone who would like to
24 speak to this matter before the Board takes
25 action?

1 (No response)

2 CHAIRMAN RUSSELL: Seeing and hearing
3 none, I would entertain a motion to adopt the rule
4 as presented, accept the Presiding Officer's
5 report and the Department's 521 and 311 analysis.

6 MR. MIRES: So moved.

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

9 MR. WHALEN: I'll second, Mr. Chairman.

10 CHAIRMAN RUSSELL: Seconded by Joe
11 Whalen. We'll roll call, Tom. All those in
12 favor, signify by saying aye.

13 MR. LIVERS: Mr. Anderson.

14 (No response)

15 MR. LIVERS: Ms. Shropshire.

16 MS. SHROPSHIRE: Aye.

17 MR. LIVERS: Mr. Whalen.

18 MR. WHALEN: Aye.

19 MR. LIVERS: Mr. Mires.

20 MR. MIRES: Aye.

21 MR. LIVERS: Chairman Russell.

22 CHAIRMAN RUSSELL: Aye. All right. We
23 should be on to final action on contested cases.
24 Katherine.

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

1 Board, this is a case involving a public water
2 supplier at a mobile home park in Cascade County,
3 and the allegation in the notice of violation was
4 a failure to monitor for total coliform bacteria
5 under the public water supply permit. \$1,024 was
6 asked for in penalties for failure to report the
7 coliform bacteria over four months. And the
8 parties were able to get together and agree, I
9 guess, that there was a misunderstanding as to the
10 responsibilities of this mobile home park owner,
11 and the notice of violation was vacated, and
12 penalties will not be imposed.

13 CHAIRMAN RUSSELL: So therefore I have
14 an order of dismissal for Case No. BER 2010-14PWS,
15 and I would entertain a motion to allow the Board
16 Chair to sign said order.

17 MS. SHROPSHIRE: So moved.

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

20 MR. MIRES: Second.

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

23 (No response)

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

1 MR. LIVERS: Mr. Anderson.

2 (No response)

3 MR. LIVERS: Ms. Shropshire.

4 MS. SHROPSHIRE: Aye.

5 MR. LIVERS: Mr. Whalen.

6 MR. WHALEN: Aye.

7 MR. LIVERS: Mr. Mires.

8 MR. MIRES: Aye.

9 MR. LIVERS: Chairman Russell.

10 CHAIRMAN RUSSELL: Aye. Nothing else,
11 Katherine?

12 MS. ORR: Nothing else on that case.

13 Then I can go to the next item on the agenda if
14 you would like.

15 CHAIRMAN RUSSELL: That would be great.

16 MS. ORR: Mr. Chairman, members of the
17 Board, this is a new contested case matter
18 involving an open cut mining act violation of
19 failure to obtain an open cut mining permit before
20 disturbing 14.7 acres of land without a permit,
21 and the penalty sought is \$27,600.

22 CHAIRMAN RUSSELL: This is the Deer
23 Lodge Asphalt, Inc.?

24 MS. ORR: Yes.

25 CHAIRMAN RUSSELL: Well, I would

1 entertain a motion to appoint Katherine the
2 permanent Hearings Officer on this.

3 MR. WHALEN: So moved, Mr. Chairman.
4 This is Joe.

5 CHAIRMAN RUSSELL: Is there a second?

6 MR. MIRES: Second.

7 CHAIRMAN RUSSELL: It's been seconded by
8 Larry. Further discussion by the Board?

9 (No response)

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

12 MR. LIVERS: Mr. Anderson.

13 (No response)

14 MR. LIVERS: Ms. Shropshire.

15 MS. SHROPSHIRE: Aye.

16 MR. LIVERS: Mr. Whalen.

17 MR. WHALEN: Aye.

18 MR. LIVERS: Mr. Mires.

19 MR. MIRES: Aye.

20 MR. LIVERS: Chairman Russell.

21 CHAIRMAN RUSSELL: Aye. Katherine.

22 MS. ORR: Mr. Chairman, members of the
23 Board, you have before you a request for rehearing
24 that was filed by Juniper Hill Farms, LLC,
25 Lakeside General Store here in Lewis & Clark

1 County. This request for rehearing comes after
2 the Board signed an order on December 15th
3 imposing penalties, and in that order, the Board
4 adopted the proposed findings of fact and
5 conclusions of law which I entered. And I have
6 with me a proposed order either granting the
7 request for rehearing or denying the request for
8 rehearing, depending on what your vote is.

9 I'd be glad to explain I guess my
10 perspective on this if that's what you would like.

11 CHAIRMAN RUSSELL: I would like that.

12 MS. ORR: I would say that in order --
13 First of all, under the Montana Administrative
14 Procedure Act, and specifically under Montana Code
15 Annotated 2-4-621, which is the section which is
16 the closest to addressing this situation of a
17 request for a rehearing whereby the Board is in a
18 position to issue a final order, there is no
19 provision in MAPA which addresses this step.

20 And I would also say that the movant in
21 this case, Juniper Hill Farms, whether
22 inadvertently or not, has not really addressed a
23 reason why to go further now, and why the Board
24 should change its order which it signed, voted on,
25 and approved in December.

1 There perhaps could be unusual
2 circumstances to reopen a decision, and it does
3 not appear that Juniper Hill Farms has gone into
4 any detail or made any showing about unusual
5 circumstances or new facts which would convince
6 the Board, I would think, to change its order from
7 December.

8 But even if that were the case, and
9 looking at the individual points that Juniper Hill
10 Farms made in its motion, in its request for
11 rehearing, basically what it's asking the Board to
12 do is reanalyze the application of Administrative
13 Rule 17.4.308, which is a rule which allows a
14 decision maker to alter an analysis of penalties
15 if justice may require.

16 And in essence, Juniper Hill Farms is
17 asking the Board now to look behind the curtain,
18 so to speak, and look at and reconsider factual
19 items of fact; and I would suggest that this is
20 not the time to do that. The time to analyze
21 whether or not to determine whether issues of fact
22 should be considered by the Board was in December.

23 Sort of the final point to be made, and
24 it may be the most important of all, is that in
25 the December hearing, the Board looked at the

1 Hearing Examiner's proposed findings of fact and
2 conclusions of law, and in that proposed order,
3 there is an entry whereby 17.4.308 was taken into
4 consideration.

5 So in effect, the basis for
6 reconsideration, even if you were to reconsider
7 upon this motion, it has already been taken into
8 account by the Hearing Examiner, and by
9 implication the Board, because the Board adopted
10 the Hearing Examiner's findings of fact and
11 conclusions of law.

12 And I'd be glad to answer any other
13 questions that you might have.

14 CHAIRMAN RUSSELL: I certainly don't
15 have any. Does the Board have any other questions
16 for Katherine?

17 MR. WHALEN: Mr. Chairman, this is Joe.
18 I'd like to ask Katherine who the legal entity is
19 who is requesting the rehearing. Is it Juniper
20 Hill Farms, LLC, or Tom C. Morrison?

21 MS. ORR: Well, he represents Juniper
22 Hill Farms, so I would say Juniper Hill Farms.

23 MR. WHALEN: Okay. Thank you.

24 MS. ORR: In that there is almost an
25 identity of entities there, I can see where it

1 might be confusing.

2 CHAIRMAN RUSSELL: Any other questions?

3 (No response)

4 CHAIRMAN RUSSELL: Well, I think from my
5 perspective, it's pretty clear that we followed
6 our processes quite well when we last rendered a
7 decision on this based on our Hearing Examiner,
8 and I would entertain a motion that we don't take
9 this matter up again.

10 MS. SHROPSHIRE: So moved.

11 CHAIRMAN RUSSELL: Is there a second?

12 MR. MIRES: Second.

13 CHAIRMAN RUSSELL: It's been moved and
14 seconded. Is there any other questions the Board
15 may have of Katherine?

16 (No response)

17 MS. ORR: Mr. Chairman, may I add one
18 thing, and that is the way I drafted this proposed
19 order denying the request for hearing, the
20 language at the end of it would read, "The Board
21 hereby denies the request for rehearing because
22 there is no demonstrated basis or rationale to
23 grant a rereview of findings of fact or
24 conclusions of law once the Board has adopted a
25 final agency order, as occurred here on December

1 15th, 2010, pursuant to 2-4-621." And I hope that
2 that would be sufficient here.

3 MR. WHALEN: Mr. Chairman, I would
4 suggest that we use that language in the motion as
5 opposed to stating the motion in the negative.

6 CHAIRMAN RUSSELL: I actually have both
7 motions in front of me, and I would suggest we use
8 the order denying request for rehearing which has
9 that specific language in it.

10 MR. WHALEN: Excellent. Thank you.

11 CHAIRMAN RUSSELL: And since I do --

12 MS. SHROPSHIRE: Do I need to repeat my
13 motion, or are we good?

14 CHAIRMAN RUSSELL: I don't believe so.
15 It's all here.

16 MS. SHROPSHIRE: Okay. Good.

17 CHAIRMAN RUSSELL: It's been moved and
18 seconded and clarified. All those in favor of
19 denying the request for rehearing, signify by
20 saying aye.

21 MR. LIVERS: Mr. Anderson.

22 (No response)

23 MR. LIVERS: Ms. Shropshire.

24 MS. SHROPSHIRE: Aye.

25 MR. LIVERS: Mr. whalen.

1 MR. WHALEN: Aye.

2 MR. LIVERS: Mr. Mires.

3 MR. MIRES: Aye.

4 MR. LIVERS: Chairman Russell.

5 CHAIRMAN RUSSELL: Aye. All right. So
6 we are almost done, and at this point in the Board
7 meeting, I would accept public comment from anyone
8 out there that is actually public, if they have
9 anything that they'd like to take up with the
10 Board of Environmental Review that actually the
11 Board of Environmental Review has authority to do.

12 (No response)

13 CHAIRMAN RUSSELL: Seeing none, Tom.

14 MR. LIVERS: Two quick administrative
15 items, Mr. Chairman, members of the Board. Just a
16 reminder the next meeting is May 13th. We don't
17 know yet what the agenda looks like to tell you
18 whether we anticipate a telephone or in person
19 meeting.

20 And then just wanted to make sure
21 everyone was aware that we did receive notice from
22 the Governor's Office of the reappointment of all
23 three pending Board members, Ms. Kaiser, Mr.
24 Mires, Chairman Russell; and then there are four,
25 those three plus Mr. Anderson, who are subject to

1 Senate confirmation. Mr. Anderson was appointed
2 after the last legislative session.

3 We had hoped at one point that the
4 Senate might schedule those confirmation hearings
5 today, but that hasn't happened, so I'm not sure
6 of the calendar on that, particularly since things
7 seem to be moving fairly quickly, or at least the
8 adjournment or recess seems to be coming up. But
9 I did want to point that out.

10 And then again May 13th for the next
11 meeting.

12 CHAIRMAN RUSSELL: Okay. Thanks, Tom.
13 Anything else?

14 (No response)

15 CHAIRMAN RUSSELL: Nice work. I would
16 entertain a motion to adjourn.

17 MR. MIRES: So moved.

18 CHAIRMAN RUSSELL: Second anyone?

19 MR. WHALEN: I'll second.

20 MS. SHROPSHIRE: Second.

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

24 (Response)

25 CHAIRMAN RUSSELL: Motion carries.

1 We're adjourned.

2 (The proceedings were concluded

3 at 10:36 a.m.)

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

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

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing - 70 - 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 , 2011.

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