

Page 1

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

3

4

5

6 MARCH 27, 2009

7

8

9

TRANSCRIPT OF PROCEEDINGS

10 Heard at Room 111 of the Metcalf Building

11 1512 East Sixth Avenue

12 Helena, Montana

13 March 27, 2009

14 9:18 a.m.

15

16 BEFORE CHAIRMAN JOSEPH RUSSELL,
17 BOARD MEMBERS LARRY MIRES, HEIDI KAISER,
18 BILL ROSSBACH, JOE WHALEN, and MARVIN MILLER

21 PREPARED BY: LAURIE CRUTCHER, RPR

23 P.O. BOX 1192, HELENA, MT 59624

24 (406) 442-8262

25

1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 CHAIRMAN RUSSELL: The time is 9:18. 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 23, 2009 meeting.

9 MR. MIRES: I would so move.

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

12 MR. ROSSBACH: Second.

13 CHAIRMAN RUSSELL: It's been seconded by
14 Bill. Is there any discussion?

15 (No response)

16 CHAIRMAN RUSSELL: Seeing none, all
17 those in favor, signify by saying aye.

18 (Response)

19 CHAIRMAN RUSSELL: Opposed.

20 (No response)

21 CHAIRMAN RUSSELL: The next item on the
22 agenda is to welcome our new Board members, and
23 I'll ask Marvin to start, introduce yourself, and
24 maybe tell us a little bit about your background.
25 And Tom, if you can -- maybe we can go around, and

1 who we represent by the statute, maybe everyone
2 should kind of understand, too. So we'll start
3 with Marvin.

4 MR. MILLER: My name is Marvin Miller.
5 For the past 40 years I've been with the Montana
6 Bureau of Mines and Geology in Butte. We're a
7 nonregulatory service and research organization.
8 And the bureau was created back in 1919 to really
9 look at geology, mineral, and water resources in
10 the state.

11 And I originally grew up around Big
12 Timber, Montana, and graduated from high school
13 there, and got my degree in geology from Montana;
14 and I was lucky enough to get a fellowship, a
15 three year fellowship to do graduate work at
16 Indiana, University of Illinois. And fortunately
17 there was a job back in Montana here at Montana
18 Tech when I finished that up, and so that started
19 my career at the bureau.

20 I've worked on a whole host of various
21 projects throughout Montana. Maybe the most
22 notable is working with, in the agricultural
23 community, on dry land salinity saline seep type
24 research in North Central Montana. In that
25 process, I've worked with a lot of local groups,

1 and farm organizations, and so forth, to reduce
2 the salinity. And I'm happy to say that we've in
3 many cases put land that was totally out of
4 production right back into production, and to
5 almost 100 percent production in that area.

6 In that period, I've answered thousands
7 of requests related to Montana's water resources,
8 particularly groundwater quality concerns, and I
9 guess I was appointed on the Board to really look
10 at hydrology and the environmental aspects in that
11 area.

12 So I've certainly got a lot to learn
13 because I haven't been involved with the
14 regulatory or legal aspects, and so I'm really
15 happy that many of you people are familiar with
16 that. So I know I've got a lot to learn, but I'll
17 do my best to provide some science and background
18 on some water issues in the state. Thanks.

19 CHAIRMAN RUSSELL: And why don't we just
20 go around and introduce ourselves.

21 MS. KAISER: I'm Heidi Kaiser. I'm also
22 a geologist, and I live in Park City. Do I need
23 to say more than that? That's a hard act to
24 follow.

25 CHAIRMAN RUSSELL: Well, then I'm just

1 Joe. I'm Joe Russell. I'm a health officer at
2 the Flathead City/County Health Department. I
3 represent that component on the Board, health
4 officer and medical officer. I've been here a
5 long time.

6 MR. MIRES: I'm Larry Mires, I'm from
7 Glasgow, and I represent primarily the citizen
8 advocacy of the Board. Common sense.

9 MR. WHALEN: Good morning. My name is
10 Joe Whalen. I'm the Mayor of Miles City. I think
11 I was appointed to confuse all of you, because my
12 middle name is Russell, and the Chair's last name
13 is Russell, so you've got two Joseph Russells
14 here.

15 Statutorily I represent the appointments
16 needed to represent geography as well other
17 concerns. The geography that I represent would be
18 southeastern Montana, the zone of concern would be
19 local government planning, and in that appointment
20 would replace Don Marble.

21 I'm originally from northeastern
22 California, a little town called Cedarville, which
23 is in Modoc County, about five miles west of
24 Nevada, 20 miles south of Oregon. It's very rural
25 there; dominated primarily by beef cattle, small

1 grains, alfalfa, and some timber interests. So I
2 feel right at home in Miles City. My background
3 would be in animal science, agricultural
4 education.

5 I have meandered, kind of like the
6 Yellowstone River, in terms of my career choices.
7 One of the most interesting places that I worked
8 at before landing in North Dakota, before moving
9 to Miles City, was at Smith and Hawkin. For those
10 of you that are not familiar with that
11 organization, it was founded by Paul Hawkin, who
12 is a well known author and writer in the area of
13 small business, ecology, and commerce, and now in
14 the area of environmental and social justice.

15 I managed all of the freight shipments
16 for Smith and Hawkin. At that time it was a \$50
17 million a year company. We were selling outdoor
18 garden furniture that was sourced in Java, and we
19 had set up the first certified teak program for
20 sustainable harvest in the rain forests.

21 From California I moved to North Dakota,
22 primarily as a security decision, and I ended up
23 being the general manager and part owner of Dakota
24 Internet Access, essentially brought the internet
25 to northWestern North Dakota, and I managed that

1 organization for five years. We sold and signed
2 the ink on 9/11/2001 actually to a local telephone
3 cooperative, and I moved to Miles City basically
4 to start another internet organization at that
5 time.

6 But in the business planning, the
7 writing was on the wall pretty much with Worldcom.
8 I would have had to have contracted with them for
9 three years, and decided that that wasn't a
10 company that I was interested in doing business
11 with.

12 So without any business planning at all,
13 we opened a book store on Main Street in Miles
14 City. Within a year and a half of moving to a
15 community where I knew no one, I had more friends
16 and acquaintances of anyplace that I had ever
17 lived as an adult, and I was elected Mayor three
18 years after moving to Miles City, and have been a
19 Mayor there for three years next month.

20 MR. ROSSBACH: I'm Bill Rossbach. Most
21 everybody else out here knows me, but I'll
22 introduce myself to the new members of the Board.

23 I'm a lawyer in Missoula. I've
24 practiced there for 30 years. My practice has
25 been a lot in the field of environmental law, and

1 about 95 percent of everything I do has some
2 science component. So my work is focused
3 primarily on analyzing scientific issues,
4 analyzing scientific evidence, trying to reach
5 some sort of consensus of science or medicine or
6 engineering of a particular issue, and trying to
7 then convince people of what I've concluded.

8 So I am an at large member, but I come
9 with a lot of background in science, and law,
10 particularly administrative law. That's my intro,
11 I guess.

12 And if you come to my house, you'll see
13 an awful lot of Smith and Hawkin products,
14 including a teak bench that I've had for probably
15 30 years, 25 years.

16 CHAIRMAN RUSSELL: Bill also served as
17 the Chair of the Missoula City-County --

18 MR. ROSSBACH: Yes, I was also for
19 twelve years the Chair of the Missoula City-County
20 Health Board, which is sort of not exactly
21 affiliated -- sometimes at odds with the BER --
22 but nonetheless, does a lot of the same work on a
23 local level in terms of sanitation, and
24 subdivision, air quality, water quality. Many of
25 the same issues that we deal with here, we dealt

1 with there on a local level.

2 CHAIRMAN RUSSELL: Thank you for
3 introducing yourselves, and welcome. You'll have
4 a lot of fun.

5 The next part of this is some
6 orientation. John, are you going to do that?

7 MR. LIVERS: Mr. Chairman, for the
8 record, I'm Tom Livers. I'm the Deputy Director
9 of the Department of Environmental Quality. My
10 principal job during the meetings is just to
11 remind you to speak into the microphone, and
12 loudly enough for Laurie Crutcher, our Court
13 Reporter.

14 But the orientation will be done jointly
15 between our Chief Legal Counsel for the
16 Department, John North, and the Board Attorney
17 Katherine Orr.

18 MR. NORTH: Mr. Chairman, members of the
19 Board, my name is John North. I'm the Chief Legal
20 Counsel for DEQ. And what I'm going to talk about
21 is in your blue green packet there entitled "New
22 Member Orientation," at least that's what should
23 be on top.

24 I'm going to first of all talk about the
25 general statutes pertaining to the Board, and then

1 what the Board duties are, which are mainly the
2 deciding of contested cases and the adoption of
3 rules; and then I'll go into a little bit more
4 detail on rulemaking procedures; then I'll cover
5 the State Code of Ethics which is applicable to
6 Board members. They're considered to be State
7 officers or employees under the State Code of
8 Ethics.

9 I'll do a little briefing on the open
10 meeting and public participation laws, which of
11 course are also applicable to the Board. And then
12 the last item on the agenda is the law of
13 contested cases. Of course, contested cases are
14 adjudicatory matters, and they're matters where
15 the Department is not serving the Board as its
16 staff in that situation.

17 With regard to rulemaking and other
18 administrative matters, the Department is staff to
19 the Board, but we change hats when it comes to
20 contested cases because we're always parties
21 before the Board. And so in those situations, you
22 are in the role of Judge, and we are in the role
23 of one of the parties before the Board. And so
24 that briefing needs to come from Katherine Orr,
25 your attorney, and she will do that segment of it.

1 So starting out really basic, on the
2 first handout there, you'll see your Board of
3 Environmental Review authorizing or creating
4 statute 2-15-3502, which sets out the
5 qualifications that the Board members must have.
6 And from your introductions, I think you all know
7 quite well what your role is.

8 The only thing I would say is that the
9 statute does say that there is supposed to be a
10 person with background in hydrology, and I know
11 several of you have that that are here today. But
12 that person that's officially designated as the
13 hydrologist on the Board is Robin Shropshire, who
14 isn't here today.

15 I would point out to you to the last two
16 provisions of that statute. The first one says
17 the Board is designated as a quasi-judicial board
18 for purposes of 2-15-124. Of course,
19 quasi-judicial means it decides contested cases,
20 and acts in somewhat of a judicial capacity.

21 And then No. 5 says that the Board is
22 attached to the DEQ for administrative purposes
23 only.

24 So if you'll turn to the second page
25 there, you have the statute on quasi-judicial

1 boards, so that's the statute that governs the
2 Board. And I won't go through all of it -- you
3 can review it at your leisure -- but I will call
4 to your attention three or four portions of it.

5 In Subsection (1), you will see that it
6 says that every quasi-judicial board has to have
7 an attorney as a member, and so that's the role
8 that Bill Rossbach fills on this, as well as being
9 a public member under the previous statute.

10 Subsection 5 says the Governor shall
11 designate the presiding officer. The Governor has
12 designated Joe Russell to be the presiding
13 officer. And the presiding officer may make and
14 second motions and vote on a quasi-judicial board.

15 Six says that members don't serve at the
16 pleasure of the Governor. They can only be
17 removed for cause. Seven talks about your
18 compensation, \$50 a day. And then eight is a
19 little bit more of a constitution, I guess, for
20 the Board.

21 The Board has to have a quorum to do
22 business, and a majority of the membership
23 constitutes a quorum, so four members of the Board
24 can conduct business; but a motion can only pass
25 upon the affirmative vote of a majority of all

1 members of the Board. So if you have a quorum of
2 four, in order to pass something, all four members
3 present would have to vote for it.

4 And then turning to the next statute,
5 this is the one on allocation for administrative
6 purposes, and again, the Board is allocated to the
7 Department for administrative purposes. What does
8 that mean? 1(a), it exercises its quasi-judicial,
9 quasi-legislative, and you do have
10 quasi-legislative functions because you adopt
11 rules. All of your functions, you exercise them
12 independent of the Department, and without the
13 Department's control or approval.

14 Now, in Subsection (2), it lists what
15 the Department does for the Board, and you'll see
16 in "A," we direct and supervise the budgeting, and
17 recordkeeping, and that sort of thing. So the
18 Board's budget is contained within the DEQ budget.
19 The records are kept by the Director's
20 administrative staff.

21 And you'll see in "D," it says, "provide
22 staff for the agency." So we do provide staff in
23 a lot of ways, both just setting up the travel and
24 that sort of thing, and then also providing the
25 Board with documents and whatever it needs. And

1 again, the only situation where we don't provide
2 that, anything along a substantive nature, is when
3 it gets to contested cases, which are judicial.

4 So the next packet talks a little bit
5 about the Board's duties, and as I said, the Board
6 has two main duties: Adoption of rules and
7 deciding contested cases. So I've listed the
8 areas where the Board does have rulemaking
9 authority, and I'll go over those briefly.

10 No. 1, it has the authority to make its
11 own rules of conduct, and along those lines, the
12 Board has adopted the Attorney General's Model
13 Rules for Contested Cases and Rulemaking. Those
14 are now the Secretary of State's Model Rules for
15 Rulemaking. But the Board has adopted those as
16 its governing rules. You have authority to adopt
17 rules under the Water Quality Act, the Air Quality
18 Act, the Public Water Supply Act; and then the
19 Solid Waste Act, but only as it pertains to the
20 fees.

21 The Department is the rulemaking
22 authority for all of the other portions of the
23 act. And generally speaking, all of the statutes
24 in Title 75, the Department has the authority to
25 adopt rules for the ones that pertain to waste, so

1 hazardous waste, underground storage tank, Super
2 Fund laws, that sort of thing. That's not Board
3 rulemaking, that's Department rulemaking.

4 Mega landfill siting, you do have
5 authority to adopt rules under that, but that
6 statute is being repealed by the current
7 Legislature, and so you won't have that for very
8 long.

9 You have authority under the Major
10 Facilities Siting Act, the Montana Agricultural
11 Chemical Groundwater Act; and then the last four
12 are the four reclamation statutes that are
13 contained in Title 82. You're the rulemaking
14 authority under all of those. So that's coal
15 mining, uranium mining, all hard rock mining, sand
16 and gravel, bentonite type mines.

17 Then there are two things that are
18 particular to the Board when it adopts rules that
19 other agencies that don't -- Well, there is one
20 thing that doesn't apply to other agencies, and
21 there is another particular statute that deals
22 with all agencies as well.

23 The first one is what we call House Bill
24 521, and that's a statute that the Legislature put
25 into most of the statutes that are in Title 75, so

1 your EPA type statutes, air, water, waste, those
2 kinds of statutes; and it basically says that the
3 Board can't adopt a rule that's more stringent
4 than a comparable federal standard or rule unless
5 it makes certain findings based on peer reviewed
6 evidence that is put into the record.

7 And if you will look a couple of pages
8 further back, I think you will see a memo from Jim
9 Madden, and it's called a House Bill 521 finding.
10 Every rulemaking that you go through, the
11 Department submits a memo along those lines to say
12 whether or not there is a comparable federal
13 regulation, and whether or not the rulemaking
14 would be more stringent than the comparable
15 federal regulation. When the Board adopts the
16 rule, the Board then adopts the 521 finding.
17 That's contained in that memo as well.

18 There have been probably, in the twelve
19 or thirteen years of the Board's existence, there
20 may have been five or six times where the Board
21 was adopting something that had been determined to
22 be more stringent than the comparable federal
23 standard, and had some peer reviewed science that
24 was placed in the record; but normally what you'll
25 find is either that there is no comparable federal

1 standard, or that it's not more stringent than.

2 Secondly, the Legislature probably
3 twenty years ago passed House Bill 311, the
4 Private Property Assessment Act, and it says that
5 if an agency is adopting a rule that has takings
6 implications under the Constitution, in other
7 words, might be determined to be a taking under
8 the Fifth Amendment to the Constitution, then the
9 agency has to submit, prepare a takings
10 assessment.

11 Now, in order to make the determination
12 for each rulemaking, the Attorney General's Office
13 has provided a checklist that you can go down and
14 check the answers to the various questions, and
15 determine whether or not a rulemaking has takings
16 implications. And I think you'll see at the back
17 of this packet a takings checklist that's been
18 made out as well, so you'll see one of those in
19 every rulemaking packet as well.

20 Rulemaking is generally, I would say 97
21 percent of the time, is proposed to the Board by
22 the Department, but it can happen -- the Board can
23 propose rulemaking in two other ways as well. The
24 Board can decide that it wants to adopt a rule on
25 a particular matter, and then the Board would

1 direct the Department to prepare a rule for its
2 consideration, and we would do that.

3 And the other way is that the Montana
4 Administrative Procedures Act provides for citizen
5 petitions, so a citizen can petition the Board for
6 adoption of the rule. They submit a petition, it
7 contains reasons why the Board should adopt the
8 rule, and is supposed to contain the proposed rule
9 as well as the language in the proposed rule. And
10 I think when that happens, the Board has 60 days
11 to act on that, and either decide to initiate
12 rulemaking or not; and if the Board decides not
13 to, it has to give its reasons in writing.

14 The next Section C of this handout is
15 the contested case hearings portion of it, and
16 there I've just listed the statutes where the
17 Board does have authority to hear contested case
18 appeals. Those are normally appeals either of the
19 Department's decision to grant or deny a permit,
20 or an appeal of a Department order, either an
21 order to take corrective action or an order to pay
22 a penalty, administrative penalty.

23 The Department in most of its statutes
24 has the authority either to impose an
25 administrative penalty by order, or to go to court

1 to get a judicial penalty; and in the vast
2 majority of the enforcement cases, we will go the
3 administrative penalty route, and so the Board
4 hears quite a few of those as well.

5 That's all I'll say about the contested
6 cases. You'll see that the list is longer of the
7 statutes that you have contested case authority.
8 That's because virtually every contested case that
9 is in any of the statutes that the Department
10 administers comes to the Board; whereas
11 rulemaking, the Board doesn't always have that
12 rulemaking authority.

13 Then I should point out that these three
14 volumes are the Department's rules. Our rules are
15 contained -- The Department's and the Board's
16 rules, they're contained in Title 17 of the
17 Administrative Rules of Montana. So there is
18 essentially three volumes of them.

19 And the next handout then basically is
20 one that I actually prepared for legislators when
21 I was asked to go over and describe administrative
22 rulemaking to legislators, but I think it's pretty
23 applicable here, too.

24 A rule is a standard or a statement that
25 implements, interprets, or prescribes law or

1 policy, and most agency rules do have the force
2 and effect of law.

3 The question sometimes comes up: What's
4 the difference between statutes and administrative
5 law? That's really a misnomer. It's really
6 what's the difference between statutes and rules.

7 And of course, statutes are the laws
8 that are passed by the Legislature. Rules are
9 rules that are passed by administrative bodies.
10 They're not law, but if they're properly adopted
11 in accordance with the Montana Administrative
12 Procedures Act, and if they're within the agency's
13 delegation of rulemaking authority delegated by
14 the Legislature, then they have the force and
15 effect of law.

16 Where are the rules located? They're
17 over there right now. And the purpose of the
18 rules is to fill in the gaps left by legislation,
19 because legislation can't be all that detailed,
20 and rules tend to be based more on scientific
21 knowledge and that sort of thing. So that's why
22 there is a board that consists of people of your
23 qualifications to adopt these rules.

24 And the other function of the rulemaking
25 process is to allow the public to have input,

1 because before a rule can be adopted, the public
2 does have to have been given notice, and has to
3 have an opportunity to comment.

4 The Administrative Procedures Act was
5 passed in 1971. I think it was one of Forrest
6 Anderson's initiatives for modernizing government.
7 Some of the stories that I've heard about agency
8 rulemaking back before the APA was passed are
9 really interesting. Some of the boards would --
10 they wouldn't announce their meetings. They would
11 adopt rules. They might have the rules in a
12 drawer, and the public really didn't even know
13 about them. If they were thinking about adopting
14 something pretty controversial, they might convene
15 in Sidney or Glasgow, and nobody in Helena would
16 really know much about it.

17 So the Administrative Procedures Act was
18 designed to provide transparency and an
19 opportunity for people to have input in the
20 process, and it does it pretty well.

21 Generally when the agency commences a
22 rulemaking, the Board meets; we have prepared a
23 proposed notice of proposed rulemaking; and the
24 Board votes on that, and votes to go forward; at
25 which point we, on behalf of the Board, file the

1 notice with the Secretary of State, who publishes
2 it in the Montana Administrative Register. This
3 is the Register, and it is published every two
4 weeks essentially.

5 Once this is published, the public
6 comment period starts. The public comment period
7 has to be no less than 28 days long. And the
8 Montana Administrative Procedures Act doesn't
9 necessarily require there to be a hearing, but
10 many of our statutes do. The Water Quality Act
11 does; the Air Quality Act. So it's pretty common
12 for the Board to decide to hold a hearing. In
13 fact, there is very few of the rulemakings that we
14 do where the Board doesn't hold a hearing.

15 The Board has the option of holding the
16 hearing itself or appointing a presiding officer
17 to conduct the hearing. And some of the major
18 rulemakings -- like with the coal bed methane
19 rulemaking. The Board had a big hard rock mining
20 rulemaking a few years ago -- the Board actually
21 hears the hearings itself, and in those instances
22 traveled around the state to different places,
23 including Miles City, to take public testimony.

24 Then once the comment period closes, the
25 Department analyzes the comments, and prepares a

1 recommendation for the Board, and we come back to
2 the Board with that recommendation. And the
3 comments have to be summarized, and then the
4 Department will prepare proposed responses,
5 and any proposed amendments that the Department
6 feels are appropriate.

7 We'll submit that to you in your Board
8 packet, and then you have the option of either
9 going along with that, adopting the rule and
10 adopting the responses to comments, as we've
11 proposed, or changing the responses to comments,
12 adopting the rule in a different form or deciding
13 not to adopt the rule.

14 Normally Katherine Orr is your Hearing
15 Officer. She will normally submit to you a
16 Hearing Officer report which describes the hearing
17 and that sort of thing. So you would have her
18 report, you will have the 521 memo, you'll have
19 the 311 checklist, and then you will have the
20 Department's proposed notice of adoption for your
21 consideration when you finally act on the
22 rulemaking.

23 Rulemaking has to be completed within
24 six months, so on the date that this is published,
25 the Board then has six months to make a final

1 decision and publish the notice of adoption of the
2 rulemaking, which is also published in the Montana
3 Administrative Register.

4 Now, the Board can get more time by
5 publishing a supplemental notice allowing
6 additional comment, and then the six months starts
7 over again, but we are under that six months
8 deadline normally.

9 And the Board meetings are scheduled
10 such that there is the meeting where there is the
11 initiation, and then there is an interim meeting
12 while the public comment period is going on and so
13 forth; and then on the next meeting, two meetings
14 after the initiation, we try to bring it back to
15 the Board, because that allows us to get that done
16 within that six month window.

17 Just a few of the substantive things
18 about the substantive requirements for rulemaking.
19 The agency has to have statutory authority to
20 adopt the rule, either in general -- A lot of the
21 statutes say the Board has the authority to adopt
22 rules to implement this statute. So then
23 essentially you can adopt procedural rules, and
24 you can adopt substantive rules that add to, that
25 fill in the gaps for that statute.

1 Sometimes the Board's grant of authority
2 is specific, and then you don't have the general
3 rulemaking authority, but rather you only have it
4 within certain areas.

5 In order to ensure that those
6 requirements are met -- that you have the
7 authority, and that it's within the scope of your
8 rulemaking authority to do -- the Legislature has
9 inserted a requirement in the Administrative
10 Procedures Act that there be a rule reviewer, and
11 the rule reviewer is supposed to make sure that
12 the Board has the authority, and that it's within
13 the scope of the Board's authority, and actually
14 signs off on the notice.

15 And the rule reviewers for the Board are
16 -- There is three attorneys, Department attorneys.
17 Jim Madden does water quality, subdivisions,
18 public water supply type. He's the rule reviewer
19 for those rules. David Rusoff, who is my air
20 quality attorney, does air quality rulemaking, and
21 waste type rulemaking. And then I do the general
22 rulemaking, and the mining statutes. So you'll
23 see three different rule reviewer names on there
24 depending on the subject matter.

25 And then the rule, according to the APA,

1 has to be consistent with -- and these are the
2 magic words -- consistent with, and not in
3 conflict with the standards set by the statute,
4 and if the rule doesn't meet that requirement,
5 then it can be challenged and held to be invalid.

6 And the Montana Supreme Court has
7 interpreted that provision to mean that a rule
8 cannot contain requirements that were not within
9 the contemplation of the Legislature when it
10 adopted the statute. So that's the standard that
11 the Montana -- either it has to be expressly
12 within the delegation, or it has to have been
13 arguably within the fair contemplation of the
14 Legislature when it adopted the statute.

15 The next packet is an ethics packet, and
16 I'd just suggest -- That one is fairly detailed,
17 and probably takes a few times to read it, so I
18 wouldn't presume to go over this with you today.
19 I'll just point out that, first of all, it's a
20 summary, and it's by subject matter, so I think
21 it's more understandable than the Code of Ethics
22 itself, but I have attached the Code of Ethics
23 after it, so that you do have a copy of the actual
24 code that you could refer to.

25 And I would just call your attention to

1 the big categories, which I think is the first
2 one, acceptance of gifts. You can't accept a
3 gift of substantial value that would tend to
4 improperly influence you in the conduct of your
5 duties, and that's a gift of \$50 or more.

6 Then under financial interests, No. 1,
7 you can't acquire an interest in a business or
8 undertaking that you have reason to believe may be
9 directly and substantially affected to its
10 economic benefit by your official action.

11 The second one there, the coal mining,
12 the federal coal mining statute, and Montana's
13 statute in order to implement the federal statute,
14 require that no person can have an interest in a
15 coal mining operation and perform a function under
16 the coal mining statutes. There are forms that
17 need to be filled out, and I'll be coming to you
18 Board members individually and giving you the
19 forms so you can fill that out. That's a
20 requirement of federal law and the state law.

21 And then No. 3, you can't engage in a
22 substantial transaction for your private business
23 purposes with a person whom you inspect or
24 supervise, and I would point out there that
25 "inspect or supervise," it's a sort of term of

1 art, but the Attorney General has issued an
2 opinion indicating that it's a lot broader than it
3 sounds. It means to view closely or critically,
4 to ascertain quality or state, detect errors, to
5 view and examine officially.

6 So I think basically the parties that
7 come before you in contested cases you are
8 inspecting or supervising; and with rulemaking, I
9 think it would be a case-by-case determination
10 there.

11 And then finally official action, you
12 can't perform an official act directly and
13 substantially affecting to its economic benefit a
14 business or other undertaking in which you have a
15 substantial financial interest. So Board members
16 tend occasionally to recuse themselves if they do
17 have some kind of an interest, and that's what
18 would need to be done. You wouldn't participate
19 in the discussion or in the vote.

20 There is an exception. If you have to
21 absolutely do it, you can disclose by filing a
22 disclosure statement with the Secretary of State,
23 and then you can vote on a particular matter.
24 I've never seen any ruling, administrative or
25 judicial ruling, as to what that means, but it

1 would probably mean if there is only four people
2 here, and action needs to be taken, that would be
3 a situation where you'd have to vote for sure.

4 And then the last one that I'd point
5 out, just because we have a couple members who
6 have other public jobs, under employment
7 contracting, duplicate compensation, a public
8 employee can't receive salaries from two separate
9 public employment positions for overlapping hours.
10 So that would mean that people who are public
11 employees here couldn't be also being paid for
12 their work in the other position and get the per
13 diem for this as well.

14 Then the last thing I'll talk about is
15 public meetings, and I've given you an outline
16 there. The public meeting law says that a meeting
17 is the convening of a quorum, of the Board in this
18 case, either in person or electronically -- so
19 electronic meetings are public meetings as well --
20 to hear, discuss, or act upon any matter over
21 which you have jurisdiction.

22 So if four of you get together to talk,
23 and you talk about business, anything that the
24 Board has authority over, that's a public meeting.
25 So that means then --

1 Well, what does it mean? First of all,
2 it means that it has to be noticed, and it has to
3 be a public notice, has to be given somewhere
4 between 48 to 72 hours before the meeting. The
5 notice has to contain an agenda; and the agenda
6 has to list the matters that are going to be
7 discussed and acted on, or acted on; and it then
8 also has to contain a section inviting people to
9 come and comment on any matter that they want to
10 comment on that's within the Board's authority.

11 So the first thing is if you're going to
12 hold a meeting, it has to be noticed with an
13 agenda. So then once you hold the meeting, the
14 requirements are it has to be open to the public.
15 The public has to be allowed to comment on each
16 agenda item as it's being conducted, except for
17 contested cases because those are judicial type
18 matters.

19 The Board substantively can't discuss
20 matters that aren't on the agenda. And then the
21 Board has to allow comments again, general public
22 comment, which this Board does generally at the
23 end of each meeting. And then the Board must keep
24 minutes.

25 Now, having said all that, there are a

1 couple situations I would just like to talk to you
2 about a little bit because it might not come to
3 mind, so it's things you would need to look out
4 for.

5 During a break or whatever, it wouldn't
6 be a good idea for four members to be down the
7 hall discussing a matter because that would be a
8 public meeting that wouldn't be open to the
9 public. Three members could discuss things, two
10 members could discuss things, but not four. When
11 we travel with the Board, we try to not have any
12 more than three Board members in one van for that
13 very reason. And sometimes it creates some
14 logistical problems, but it's necessary to keep
15 from violating the open meetings law. There are
16 exemptions, but the Board never runs into those
17 really.

18 And then finally what is a penalty.
19 Well, first of all, any action that's taken can be
20 voided by a District Judge, and the District Judge
21 can then order the Board to pay attorneys fees.

22 And the second thing that I have to
23 point out, I guess, that knowingly conducting a
24 meeting in violation of the open meeting law is
25 official misconduct under the Montana criminal

1 code, and that is a misdemeanor.

2 So on that cheery note, if people have
3 any questions, I'd be happy to answer them. If
4 not, I'll just turn it over to Katherine for
5 contested case.

6 CHAIRMAN RUSSELL: Just so you know,
7 John has some things that he'll do if he thinks
8 you're getting close to violating, and that would
9 mostly be this beard rubbing that starts to go
10 faster and faster. So if he starts to rub his
11 beard and then doesn't stop, you're probably right
12 on the edge of doing something improper or
13 illegal. I've seen it several times.

14 MS. ORR: Members of the Board, I'm
15 Katherine Orr. I'm an Assistant Attorney General.
16 And I've had the pleasure of working with this
17 Board now for -- I think we're coming on three
18 years this summer. I've been asked to talk about
19 contested cases, and what I did -- I have no
20 prepared written materials, and I would be glad to
21 have what I say today transcribed. Basically what
22 I did was I went through the Montana
23 Administrative Procedure Act, and picked out some
24 of the provisions that are the more prominent
25 ones.

1 John has talked to you about the
2 derivation of the Board, and the fact that the
3 Board has quasi-judicial functions. That's a
4 matter of Montana Code Annotated 2-15-121(a). And
5 with that authority, the Board may hear contested
6 cases.

7 Contested cases are defined under the
8 Montana Administrative Procedure Act at Montana
9 Code Annotated 2-4-1024(2)(b), a proceeding before
10 an agency -- and the Board is an agency -- in
11 which a determination of legal rights, duties, or
12 privileges of a party is required by law to be
13 made after an opportunity for a hearing.

14 And these hearings, contested case
15 hearings, are to be distinguished from rulemaking
16 hearings. Rulemaking hearings are intended for
17 promulgation of a rule with general applicability
18 to all persons, and in which interested members of
19 the public may provide testimony in support of or
20 against a rule.

21 A contested case, however, involves an
22 agency determination applicable to specifically
23 named parties. These are parties that by statute
24 may be admitted as parties.

25 For the purposes of the Board, there are

1 statutes in Title 75, and other titles that John
2 has already kindly listed for you, that establish
3 the Board's authority to hear contested cases, and
4 this authority is specifically conferred by
5 Montana statute; and outside of any sort of
6 specifically written statute established by the
7 Legislature, the Board may not hear or act in
8 those areas.

9 And as John pointed out, these contested
10 cases tend to sort of split between appeals of the
11 denial or issuance of permits by permittees or
12 concerned citizens, and appeals of orders to take
13 corrective action; and these orders generally have
14 as a component notices of violation, for example
15 violation of rules, statutes, or permit
16 conditions.

17 Typically there is established in
18 statute a time period for filing of an appeal. In
19 the air quality area that's fifteen days. In
20 other areas that's thirty days. If that period
21 passes and there is no appeal, and a party wishes
22 to appeal and file something beyond that time
23 period, the appeal won't be accepted.

24 And likewise these orders to take
25 corrective actions are final within thirty days

1 unless there is an appeal to the Board, in which
2 case the Board schedules a hearing. The authority
3 of the Board in these contested case hearings is
4 generally specific to the requested relief, and
5 must be available under the authority of the
6 applicable rule or statute.

7 The Board applies Montana law. The
8 procedural rules that the Board applies in these
9 contested case hearings may be those Model Rules
10 that John talked about that the Attorney General
11 has adopted, and may be specific rules that are
12 set forth in the various environmental statutes.
13 Also occasionally there are procedural rules that
14 may have been adopted by reference that are
15 federal rules that might apply.

16 And the Model Rules reference
17 application of various Rules of Civil Procedure
18 that are in Title 25, and primarily those have to
19 do with rules of discovery; although the case law
20 has expanded in this area, and throughout the
21 years, other Rules of Civil Procedure have been
22 applied by hearing officers, and so that case law
23 and rulings by the Montana Supreme Court have been
24 applied in this administrative context when
25 interpreting those Rules of Civil Procedure.

1 As a substantive matter, when the Board
2 evaluates the evidence and is issuing its findings
3 of fact and conclusions of law, it applies the
4 substantive environmental rules and statutes,
5 which can also be federal rules on occasion that
6 have, for example, been incorporated by reference.

7 In contested cases, the Board can
8 appoint a Hearing Examiner for the conduct of the
9 hearing. For many of the contested cases on the
10 agenda, you probably have noticed that the Board
11 has designated Board Counsel as a Hearing Examiner
12 through a vote on a motion of at least four of the
13 Board members. For some contested cases, the
14 Board deems it more appropriate not to delegate a
15 contested case to a Hearing Officer, and the Board
16 hears that contested case itself.

17 And as the Board attorney, I am
18 available to assist the Board on matters
19 concerning rulings on questions of evidence,
20 objections, and that sort of thing, and I'm also
21 available to assist in the drafting of the
22 decision.

23 And it has happened in various of our
24 more complicated cases that the Board has
25 delegated to me the prehearing kinds of matters

1 with the parties, such as scheduling of prehearing
2 motions, oversight of discovery; and then it's
3 understood that when it comes to a hearing on the
4 merits, then the full Board then hears those
5 matters.

6 Contested cases are somewhat similar to
7 trials in District Court, although I think
8 contested cases are generally a little more
9 informal. But Board members or the appointed
10 Hearing Examiner may administer oaths; issue
11 subpoenas; provide for oversight of discovery;
12 regulate the course of hearings, including
13 requested continuances; fixing the times for
14 filing briefs or other documents; and the Board or
15 Hearing Examiner may direct parties to confer to
16 consider simplification of issues and formation of
17 a prehearing order. Most of these provisions are
18 set forth right in the Administrative Procedures
19 Act.

20 Opportunity may be afforded parties to
21 respond and present evidence and argument. The
22 agency or the Hearing Officer is bound by common
23 law and statutory Rules of Evidence. Objections
24 to evidence may be made and ruled upon. All
25 testimony is given under oath. Evidence can be

1 testamentary or documentary. A party has a right
2 to conduct cross-examination required for a full
3 and true disclosure of facts, including the right
4 to cross-examine the author of any document.

5 The Board and Board Counsel in a
6 contested case may not communicate with any party
7 or party's representative in connection with any
8 issue of fact except upon notice and opportunity
9 for all parties to participate. And I do often
10 get that, where a party may be unrepresented by
11 Counsel, and calls my office and wants to discuss
12 the case; and I stop them immediately, and say, "I
13 cannot discuss this. If you have a matter that
14 you maybe could resolve with Department Counsel,
15 please do so."

16 The record in a contested case
17 proceeding consists of the stenographic record,
18 all motions, briefs, and rulings on these motions,
19 all evidence received, and the proposed findings
20 and conclusions of law.

21 When a Hearing Examiner has been given
22 the responsibility to hear a case, he or she -- me
23 in most cases -- recommends a decision to the full
24 Board with findings of fact and conclusions of law
25 based on a preponderance of the evidence. And the

1 full Board then issues its final decision, and
2 that is a separate decision. Sometimes it
3 incorporates by reference the Hearing Examiner's
4 decision; sometimes it doesn't.

5 And there is a specific provision in the
6 Montana Administrative Procedure Act that
7 addresses the situation where the Hearing Examiner
8 has heard the evidence, is making a recommendation
9 regarding the findings, and the Board itself has
10 not heard the case on the merits.

11 And in that case, if the decision is
12 adverse to a party, the decision may not be made
13 until the proposed decision, proposed by for
14 example the Hearing Examiner, is served upon the
15 parties, and there is an opportunity for each
16 party adversely affected to file exceptions,
17 present briefs and oral argument to the Board, and
18 you will see that on occasion.

19 The Board may adopt the proposed
20 decision of a Hearing Examiner as its final order,
21 or it may reject conclusions of law and
22 interpretation of administrative rules in the
23 proposal for decision, but it may not reject or
24 modify the findings of fact unless it reviews the
25 entire transcribed record, and states with

1 particularity that the findings of fact were not
2 based upon competent substantial evidence, or the
3 proceedings did not comply with law.

4 And you can imagine some of these
5 hearings are three and four days long, and we
6 don't want to get into the situation where every
7 Board member is having to evaluate volumes and
8 volumes of testimony.

9 The Board may accept or reduce the
10 recommended penalty in a proposal for decision,
11 but may not increase it without a review of the
12 entire record.

13 A person aggrieved by a final written
14 decision may obtain review by a District Court.
15 In this case -- and you have several of these on
16 the agenda -- the appellant may file a petition in
17 District Court where the appellant lives, or in
18 Lewis & Clark County where the Board is located,
19 within thirty days after service of the final
20 written decision of the Board.

21 And just as an aside, the Board is
22 obligated under the provisions of the Montana
23 Administrative Procedure Act to issue a decision
24 ninety days from the time that the matter has been
25 deemed submitted, that all of the briefing is in.

1 The Court reviews the written record,
2 and in most cases is confined to the written
3 record. The Court may affirm or remand for
4 further proceedings, and the Court may reverse or
5 modify the findings.

6 If the findings are -- and I thought
7 you'd be interested in knowing the standards for
8 reversal of a Board decision, reversal or
9 modification.

10 One, if they're in violation of
11 statutory or constitutional provisions; if they're
12 in excessive statutory authority of the agency; if
13 they're made upon unlawful procedure; and if
14 they're affected by another error of law; if
15 they're clearly erroneous in light of the
16 evidence; if they're arbitrary, or capricious, or
17 characterized by an abuse of discretion; or
18 finally, if the findings of fact essential to the
19 decision were not made, although were requested.

20 Having presented this brief outline of
21 contested case proceedings, in many cases, the
22 parties after an appeal to the Board determine
23 that they can settle a case. And you can see on
24 the agenda we have many of those today. The
25 parties can present in that instance, in the

1 instance of a settlement, a proposal for
2 dismissal, and an administrative order on consent,
3 and a stipulation for dismissal, and a proposed
4 order.

5 Those are provided to the Board in the
6 packet, so that the Board can see how the matters
7 have been resolved vis-a-vis the requested
8 corrective action and requested penalty. Or
9 sometimes the parties may reach a joint agreement
10 to withdraw from the jurisdiction of the Board,
11 and that's allowable under Rule 41 of the Rules of
12 Civil Procedure.

13 And in either case, the Board is given a
14 draft of a dismissal order in their packet, and
15 then can vote after generally I give a short
16 presentation of what the case has involved and
17 what the settlement terms are. And then the Board
18 typically votes by motion to approve of the
19 dismissal.

20 So that's a very kind of brief overview
21 of contested cases, and if you have any questions,
22 let me know.

23 CHAIRMAN RUSSELL: Thank you, Katherine.
24 Any questions? Bill.

25 MR. ROSSBACH: I don't have a question.

1 I have a comment that may be helpful to the new
2 members a little bit. Just very simple.

3 The difference between the rulemaking
4 that John talks about and the contested cases that
5 Katherine talks about is -- The way I think about
6 it is just think about if we're rulemaking, we're
7 acting like a legislature, or a city council, or a
8 county commission; and in that sense, we have
9 hearings, and we listen to evidence, but we can
10 also be lobbied. People can talk to us. People
11 can give us information. We eventually have to
12 put that all in the record as to what we're doing,
13 but we're not prohibited from talking to people.

14 Isn't that true?

15 MR. NORTH: (Nods head)

16 MR. ROSSBACH: Basically we're a
17 legislature. When we're doing rulemaking, we're
18 acting just like the people across the street are
19 doing. We're talking to people, we're listening
20 to all kinds of stuff, we have hearings, just like
21 a committee in the Legislature would have
22 hearings, but we're not precluded from kind of
23 trying to find out what's going on. And then we
24 depend upon John, and staff, all of those people,
25 to be helping us make these decisions.

1 When it's a contested case, because the
2 Department is always on the other side, the
3 Department is always one of the parties of the
4 contested cases, we are like a panel of judges,
5 and so it's the difference between what's called
6 quasi-legislative -- that is kind of like a
7 legislature -- and quasi-judicial.

8 And so I just think about, okay, it's a
9 contested case. That means we're judges, which
10 means we can't decide anything based upon anything
11 that we hear or know, other than what comes
12 through in a transcript, in testimony, in like a
13 courtroom setting. And that's a very formal
14 setting.

15 We can't talk to anybody, we can't go
16 call Charles and say, "Gee, Charles, really what's
17 going on here?" We can't talk to John North.
18 Really the only -- we can't even really talk to
19 Tom Livers. The only person we can talk to is
20 Katherine, our lawyer, or maybe talk to one or the
21 other of any of us individually, but not more than
22 three.

23 And that's the difference between
24 judges. If we were judges, we could probably talk
25 to each other secretly, and kind of -- and that's

1 the way judges decide things. But we have to
2 basically keep completely separate from everybody
3 else in this room except basically Katherine Orr,
4 because then we are judges, and we are held to a
5 very different standard of independence from the
6 Department.

7 And if you just think about that, and
8 you say, "Oh, this is a contested case. That
9 means I can't talk to anybody that's on the other
10 side of this table;" and if it's a rulemaking,
11 okay. Then it doesn't really matter where we get
12 all of the stuff. We still have to put on the
13 record why we're making the decision, what the
14 bases for the decision is, but we're not held to
15 the same very strict separation.

16 And I think if you just think about it
17 that way. There is rules and procedures on how
18 each one works, but Katherine and John can kind of
19 make sure that all happens properly. You don't
20 have to get too lost in that stuff.

21 It's just the basic principle of: Are
22 we in a contested case situation, or are we in a
23 rulemaking situation? And if you remember
24 legislator or judge, then it kind of makes it
25 easier to make sense, and that is kind of the way

1 I have to look at it, and that's the way I think
2 makes the most sense, sort of how do you draw the
3 line. Is that fair, John?

4 MR. NORTH: Yes.

5 MR. ROSSBACH: I haven't seen your hand
6 anywhere near your beard.

7 MR. LIVERS: Mr. Chairman, Mr. Rossbach,
8 we had a side bar earlier, because that was a
9 point John didn't want to get back up and make, is
10 that ex parte doesn't apply there, and I think
11 that's a good distinction that you've -- it
12 doesn't apply to rulemaking, and I think you
13 explained that well. And I think the distinction
14 in between the two functions of the Board, the two
15 primary functions, were pretty well laid out
16 there.

17 MR. NORTH: I would like to add one
18 thing. Mr. Chairman, Board members, I agree with
19 everything Bill said, and I just want to add one
20 point.

21 Oftentimes you will get a contested case
22 appeal. It will come to the Board for the initial
23 decision, which is: Does the Board want to hear
24 it or assign a Hearing Officer? And at those
25 times, sometimes there are questions about what

1 the violation is, what the person did, that sort
2 of thing.

3 In most of those situations, the Counsel
4 for the person that we are saying violated the law
5 or the person challenging the permit is not here.
6 And sometimes there can be questions, and we feel
7 a whole lot better if those questions are directed
8 to Katherine than if they're directed to us,
9 because we really aren't supposed to be answering
10 those. Even at that level, we can't discuss any
11 matter of the case with the Board.

12 And so to the degree that you can direct
13 those questions to Katherine, and she can either
14 answer them or set in process a motion to get them
15 answered, we would appreciate that, too.

16 CHAIRMAN RUSSELL: I guess the last
17 thing -- and I'll try to be diplomatic about this
18 -- but there will come times when this is
19 contentious, and although I know the formality of
20 working through the Chair is bothersome at times
21 to me, it isn't to the people out there, and the
22 side bars and everything else that go on can be
23 incredibly difficult for our Court Reporter, and
24 everything else.

25 So if you will work through the Chair,

1 the meetings will run relatively smooth. And it
2 just helps certainly our reporting, and it also
3 helps our deliberation and matters. So the
4 Department staff, Tom and the staff that we work
5 with, will always work through the Chair, and if
6 we work through the Chair, then things will run
7 smoothly.

8 With that said, I will get on with the
9 next matter on the agenda, which is we need to set
10 the December meeting date, either the 4th or the
11 11th.

12 MR. LIVERS: Mr. Chairman, I don't
13 really have anything to add to that. We've set
14 the rest of the calendar, and particularly if the
15 new Board members or anyone needs another copy of
16 that, we can get that to you, and we can have that
17 before you at least today. That is usually set --

18 The coming year's schedule is usually
19 set at the December meeting. At the December
20 meeting of the previous year, we set everything
21 except this coming December. So we have two
22 choices based on kind of the frequency of the
23 meeting schedule, and on the Secretary of State's
24 rule reporting deadlines, and two candidates are
25 the 4th and the 11th.

1 Obviously if there is a subsequent
2 conflict that arises, we can always change it down
3 the road, but just to help all of us and you with
4 your planning, if you would like to settle on one
5 of those, that would probably be a good thing to
6 do.

7 CHAIRMAN RUSSELL: Do I have anyone who
8 wants to jump up?

9 MR. MIRES: I'd go for the 11th.

10 MS. KAISER: I was going to go for the
11 4th.

12 MR. ROSSBACH: I have a trial that
13 starts November 30th. I'm not sure how likely it
14 is to go, but it would certainly go through the
15 4th if it does. I would prefer the 4th, but I
16 have that potential conflict.

17 CHAIRMAN RUSSELL: Shall we set it for
18 the 11th just in case, and then --

19 MR. ROSSBACH: I'm just telling you
20 that's the potential conflict that I have. Trials
21 often settle, but I know just yesterday the Judge
22 set the trial for November 30th. That will go at
23 least -- I think that's the Monday of that week,
24 and it's supposed to go through the Tuesday of the
25 next week.

1 MR. MIRES: I would look at the 11th
2 then. That's your basic --

3 CHAIRMAN RUSSELL: Is the 11th okay?
4 Why don't we start with the 11th.

5 MR. ROSSBACH: If it changes, and people
6 want to move it back, obviously that date will be
7 open for me then.

8 CHAIRMAN RUSSELL: Let's go for the
9 11th. Do I have a motion to set that for the
10 11th?

11 MS. KAISER: So moved.

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

14 MR. MIRES: Second.

15 CHAIRMAN RUSSELL: It's been seconded by
16 Larry. Any further discussion?

17 (No response)

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

20 (Response)

21 CHAIRMAN RUSSELL: Opposed.

22 (No response)

23 MR. ROSSBACH: Could I have one request?
24 Could you just then kind of send us out an email
25 confirming all of the dates then, so we've got

1 them all in place. I would really appreciate
2 that.

3 MR. LIVERS: You bet.

4 CHAIRMAN RUSSELL: And you can go a step
5 further, and actually send them out through
6 Outlook and populate my calendar so I don't have
7 to do it myself. That would be great, because how
8 many times a year do I ask for those meeting
9 dates? At least twice.

10 MR. LIVERS: On that, Mr. Chairman, how
11 many people would just as soon get an Outlook
12 meeting notice? We can do both, if you want. If
13 people use Outlook, we'll be glad to do it.

14 CHAIRMAN RUSSELL: I would certainly
15 like that.

16 MR. ROSSBACH: I don't know how to use
17 it, but that's fine.

18 MR. LIVERS: We'll make sure we send
19 those out. That way you've got them both in email
20 and meeting notice, if that works with your
21 system.

22 CHAIRMAN RUSSELL: That's great. The
23 next item on the agenda are the contested case
24 updates. All cases that we have are assigned to
25 Katherine.

1 MS. ORR: Mr. Chairman, members of the
2 Board, the first two items have been stayed for
3 quite a long period. They're some of our older
4 cases. The first one is stayed pending the
5 completion of an EIS. The second one is the
6 subject also of a bankruptcy proceeding.

7 Item (c) involves an appeal by SME
8 Highwood of a provision -- a reference test method
9 for condensable particulate matter. This arose as
10 the result of the issuance of a permit by the
11 Department. That was in 2007, I believe. This
12 has also been stayed, and the parties will be
13 asked to update the status of this for the Hearing
14 Examiner.

15 The next item is also a case where there
16 have been several extensions, and the parties are
17 attempting to settle the case.

18 Item (e) here is a matter where the
19 Board has retained jurisdiction to hear the case
20 on the merits, and I'm handling the prehearing
21 matters. And the parties have been attempting to
22 settle this, but it looks like they haven't been
23 successful in that, and they'll be submitting a
24 prehearing and hearing schedule, and this will
25 perhaps come before the Board.

1 The next Item (f) is also one where the
2 Board has retained jurisdiction, and the parties
3 have been requesting extensions to attempt to
4 settle the case, and we don't know yet where
5 that's going.

6 That's true also of the next item, Item
7 (g).

8 Item (h) is a case in which SME
9 Highwood, a permit that was issued last fall, has
10 been appealed again by the appellants, MEIC,
11 Citizens for Clean Energy, the Sierra Club, and
12 the National Parks Conservation Association. The
13 parties -- actually SME Highwood requested a stay
14 of proceeding until June 17th of this year that I
15 granted.

16 The next item is one where --

17 MR. ROSSBACH: Can I ask for a
18 clarification on that? I see that the appellants
19 filed some sort of a -- they contested the stay;
20 is that correct?

21 MS. ORR: Yes, they did, and --

22 MR. ROSSBACH: What was the basis for
23 the stay, and then the motion to stay, and then
24 what was the basis for the contest of the stay?

25 MS. ORR: The case has been complicated

1 by the intentions of SME Highwood to convert to a
2 gas fired plant as opposed to a coal fired plant.
3 And SME Highwood was proposing that it would be
4 complicated and expensive for them to, in essence,
5 defend against the old permitting provisions, and
6 pursue its new permit under the gas fired
7 scenario, and therefore wanted a stay of
8 proceedings.

9 And the appellants wanted a firm
10 commitment that the coal fired method of
11 generating energy would be permanently terminated
12 or abandoned, and SME Highwood was unable to give
13 that firm commitment. So --

14 MR. ROSSBACH: So the question of the
15 permit is not moot then by the change, because
16 it's not a --

17 MS. ORR: Correct.

18 MR. ROSSBACH: That's what I was trying
19 to understand.

20 MS. ORR: So I determined that a stay
21 would be appropriate at least until June 17th, and
22 then hopefully matters will have been somewhat
23 more clarified as to the route that SME Highwood
24 would be pursuing.

25 And the next case, a water quality case,

1 this is a fairly recently filed case, and the
2 parties will be filing a prehearing and hearing
3 schedule. And I have the file here. They
4 probably already have and I haven't updated the
5 agenda.

6 In the last matter, Item (j), the
7 parties have been requested to file a proposed
8 prehearing and hearing schedule, and they're
9 having a little bit of trouble getting together on
10 what that should be; and it will probably fall to
11 me to help them decide, actually to issue a
12 decision regarding what the prehearing and hearing
13 schedule should be.

14 The next two items are items that have
15 been appealed from a Board decision. The first
16 item involves the Thompson River CoGen Plant.

17 The Board heard the matter by way of
18 deciding on a proposed decision of mine after a
19 four day hearing, and everything was pretty much
20 resolved except for a prehearing, a motion and
21 decision of the Board of me at the first level,
22 and of the Board after that, regarding a motion
23 for leave to file an amended affidavit, which in
24 the air quality context must always be filed to
25 support an appeal.

1 And in this case, the issue was whether
2 an amended affidavit could be filed several months
3 after the initiation of the proceeding. And I
4 ruled, and the Board upheld the decision, not to
5 allow that to happen, because so much of the
6 contested case had already unfolded, and it would
7 have prejudiced the parties.

8 This went to the District Court level.
9 The District Court affirmed the Board's decision,
10 and the appellants decided to appeal to the
11 Montana Supreme Court, and that's where it sits
12 right now on that specific issue.

13 Also on the first permit that was issued
14 to SME Highwood, and following from the decision
15 of the Board that a BACT analysis was not required
16 for CO₂ emissions, that decision of the Board was
17 appealed to District Court, and has gone through
18 many machinations of which I have not been a part.

19 But you have this in front of you, and
20 the very latest procedural matter that I know of
21 is that SME Highwood has also asked for a stay of
22 proceedings until June of this year, I believe.

23 MR. REICH: Ms. Orr, members of the
24 Board, this is Kenneth Reich. I called in just in
25 case there was a need to supplement the

1 explanation. I can give you the up to date status
2 of that matter, if you'd like.

3 CHAIRMAN RUSSELL: Go ahead.

4 MR. REICH: SME did file a motion to
5 stay similar to the one that it filed with respect
6 to the BER appeal. The appellants opposed that
7 motion. There has been some back and forth
8 briefing, and SME's last brief was filed
9 yesterday. To my knowledge, the Court hasn't
10 ruled on the motion to extend the date for oral
11 argument, but as in the other case, we asked for
12 an extension to June 17th or later.

13 CHAIRMAN RUSSELL: Is that it?

14 MR. REICH: That's the status.

15 CHAIRMAN RUSSELL: Well, thank you.
16 Katherine.

17 MS. ORR: And that completes the ongoing
18 contested case summaries. And I see there is
19 legislative briefing. If there is a question, I'd
20 be glad to answer that.

21 MR. MILLER: Katherine, just for my own
22 ignorance here. On a number of these, like No. C,
23 it was in place until March 19th, which is past;
24 and in No. C, it was parties until February 9th,
25 which is past. And a couple of these others, the

1 dates are -- what does that mean?

2 MS. ORR: Well, that can mean one of two
3 things, either that the matter actually hasn't
4 been addressed explicitly with me, the Hearing
5 Examiner; and if it hasn't, and if the time period
6 has expired, I generally urge, try to urge
7 informally the parties to take care of the matter,
8 or I issue a subsequent order ordering them to do
9 something by that deadline.

10 And not in this section of the agenda,
11 but further down, there have been some
12 developments since the time of the writing of the
13 agenda. The agenda is usually written about three
14 weeks to two weeks before a Board meeting, and
15 then, by virtue of the notice provisions of MAPA,
16 has to go out at least seven days before a Board
17 meeting. But there are always ongoing activities
18 that may occur, and it could be that something has
19 happened in the file that is not on the agenda,
20 and it's up to me to keep you up to date on those
21 matters.

22 MR. MILLER: Thank you. I was just
23 trying to see what does it mean if they don't meet
24 the date. Thank you.

25 CHAIRMAN RUSSELL: The next item on the

1 agenda is the legislative briefing. Tom.

2 MR. LIVERS: Thank you, Mr. Chairman,
3 members of the Board. John North and I -- mostly
4 John -- have some information on a couple of bills
5 still alive, some affecting the Administrative
6 Procedures Act, and a couple others impacting the
7 business of the Board or actions taken by the
8 Board. So John can start off with the procedures
9 briefing.

10 MR. NORTH: At your January meeting,
11 there were about seven or eight bills dealing with
12 the Administrative Procedures Act, and they're
13 down to three now.

14 So the first one is Senate Bill No. 20.
15 It amends the Montana Administrative Procedures
16 Act. There is a provision in MAPA that says a
17 rule is valid if it it's adopted in substantial
18 compliance with the purposes of MAPA. MAPA has,
19 of course, a number of procedural requirements.
20 And an agency adopted a rule, and didn't comply
21 with all of the procedural requirements, I think
22 didn't put in the rulemaking notice a very
23 adequate statement of reasonable necessity.

24 One of the requirements -- and you'll
25 see it in our proposed rulemaking notices -- is

1 not only do we set out the rule that's supposed to
2 be adopted, but we also have to give a statement
3 of reasonable necessity, which is basically the
4 reasons why the rule is being proposed.

5 And I think of all of the agencies in
6 State government, we're probably about the best at
7 preparing thorough statements of reasonable
8 necessity. Some agencies do a very good job. And
9 one of the boards I think over at the licensing
10 department didn't do much of a statement of
11 reasonable necessity, and I think maybe what they
12 did do was wrong.

13 So what they did is after the comment
14 period closed, and they had gotten all kinds of
15 comments on that, they simply amended the
16 statement of reasonable necessity, and didn't put
17 it back out for public comments.

18 So that led to a couple of bills.
19 Senate Bill 20 is one, and it basically says that
20 substantial -- and the Supreme Court upheld the
21 rule, and saying substantial compliance, the
22 purpose of MAPA is to give public notice of what
23 was proposed, and allow comment. That happened
24 here. That's good enough. That's substantial
25 compliance.

1 So Senate Bill 20 changes that, and says
2 that substantial compliance means you comply with
3 all of the provisions in MAPA.

4 The third bill, Senate Bill 123, is also
5 a reaction to that, and it basically says if
6 you're going to change the statement of reasonable
7 necessity, you've got to put it out for public
8 comment again.

9 And then finally the middle one, Senate
10 Bill 90, modifies the bill sponsor notification
11 provision. The bill sponsor notification
12 provision in MAPA says that if an agency is
13 implementing a statute or an amendment to a
14 statute for the first time after the statute or
15 amendment is adopted by the Legislature, the
16 agency has to notify the sponsor of the bill when
17 it starts to do the rulemaking by drafting.

18 So with board rules, we have to notify
19 the sponsor that we're starting to develop a draft
20 rule for presentation to the Board, and we have to
21 give them time to submit any comments that they
22 want. And then once we've got the proposed rule
23 ready to go, and we submit it to the Board, we
24 also have to send it back to the sponsor again.

25 And we've done that faithfully, but the

1 legislators want a bit more. So in our sponsor
2 notifications, we're going to have to tell them
3 the schedule; we have to advise them of the fact
4 that if they don't like the rule, they can go to
5 the legislative committee that's the oversight
6 committee for that particular agency -- so for DEQ
7 and the Board, that's the Environmental Quality
8 Council -- and also has to specifically tell them
9 that they can submit comments; and then if they do
10 submit comments, and we and you don't go along
11 with their comments, then we specifically have to
12 set out that the bill sponsor made these comments
13 and why we rejected them.

14 And I think probably all three of these
15 bills are likely to pass. The first two are on
16 the Governor's desk for signature right now.

17 And then finally, House Bill 483, you've
18 probably heard quite a bit about this in the
19 newspaper. This is Representative Lou Jones' bill
20 dealing with contested case reviews of energy
21 projects. And basically it amends the Water
22 Quality Act, the Air Quality Act, and the Major
23 Facilities Siting Act, mainly the Air Quality Act.

24 And it makes a number of changes in the
25 permitting statutes, and says, first of all, that

1 for a person to appeal, they must have submitted
2 comments during the Department's public comment
3 period on the permit; they have to confine their
4 appeal to the issues that they raise to the
5 Department; and if it's a person challenging a
6 permit, the permittee has the election to have the
7 appeal heard either by the Board of Environmental
8 Review, or can elect to have it heard at the
9 District Court level out in the county where the
10 facility is located.

11 If it remains with the Board, the Board
12 is required to complete -- make the final decision
13 within 150 days of the time it receives the
14 contested case; and then it also requires the
15 petitioner to post a bond unless the Board or the
16 Court finds that the appeal is being filed --
17 excuse me -- if the Board finds that it's being
18 filed for an improper purpose, such as to harass
19 or cause delays.

20 Then it narrows in on BACT appeals, best
21 available control technology appeals, and it says
22 that the Board has to apply the law at the time
23 the application was filed, and give deference to
24 the Department's decision. And then there is a
25 couple additional provisions that basically say

1 while the appeal is pending, the requirement to
2 commence construction within 18 or 36 months is
3 tolled, and it also provides for waivers of the
4 due diligence requirement that's in the Air
5 Quality Act once construction has commenced.

6 That bill passed the House, and it's in
7 the Senate for second reading this afternoon. So
8 they'll be hearing that bill, and then I guess
9 going into some confirmation hearings, some of
10 that will -- so that's it.

11 CHAIRMAN RUSSELL: Thanks, John.

12 MR. LIVERS: Mr. Chairman, just a couple
13 things real quickly, and primarily maybe for new
14 Board members. There will be, of course, a lot of
15 terms and acronyms, such as "best available
16 control technology," that the existing Board has
17 had a chance to become familiar with. Stop us and
18 we'll try to make sure we're covering those and
19 give you some background.

20 At some point when there aren't pending
21 cases surrounding BACT determinations, we will
22 likely do a briefing for the Board for discussion
23 to go in a little more detail. We're a little
24 constrained on that at the moment, but I think
25 that's an issue that would be useful when the time

1 comes. And we can certainly give some basic
2 factual objective background on some of these as
3 well for the new Board members.

4 CHAIRMAN RUSSELL: That would be
5 extremely comprehensive, probably front to BACT.

6 MR. LIVERS: Top to bottom. Mr.
7 Chairman, members of the Board. One other bill,
8 just as kind of a general heads up for action
9 that's likely to come before the Board in the
10 intermediate future -- not real quickly -- that's
11 Senate Bill 95. That's brought by Senator
12 Brueggeman at the request of the Department, and
13 it allows the Department to use temporary nutrient
14 standards, water quality standards, for point
15 source discharges.

16 That's in anticipation of the Board
17 establishing numeric nutrient discharges --
18 numeric nutrient water quality standards for
19 primarily nitrogen and phosphorus discharges. So
20 that would be something the Board is likely to be
21 looking at in the near intermediate future, and
22 this just gives the Department authority to use
23 temporary standards for point source discharges
24 when there are economic concerns or limitations of
25 technology concerns.

1 CHAIRMAN RUSSELL: And just to add on to
2 that from a local perspective, at first blush you
3 might not think this is good idea. It's a really
4 good idea. It's important that we could get this
5 thing through.

6 MR. LIVERS: Senate Bill 95 was amended
7 in the House, it passed the Senate and was
8 transmitted to the House, and was admitted there.
9 And so we'll watch those amendments. And that's
10 had an interesting road. It looks like it's
11 coming thorough.

12 CHAIRMAN RUSSELL: All right. Thanks,
13 Tom.

14 John, the next item on the agenda is
15 actually an adoption process for final rule. In
16 the matter of the amendment of ARM 17.40.118 and
17 the adoption of New Rule 1 pertaining to state
18 revolving fund and public water and sewer projects
19 eligible for categorical exclusions from MEPA
20 review.

21 MR. LIVERS: Mr. Chairman, we'll hear
22 from Todd Teegarden. Todd is the Bureau Chief of
23 our Technical and Financial Assistance Bureau.
24 He's also serving as the Acting Division
25 Administrator for the Planning Division following

1 Art Compton's retirement.

2 MR. TEEGARDEN: Mr. Chairman, members of
3 the Board, as Tom said, my name is Todd Teegarden,
4 and I'm Bureau Chief of the Technical Financial
5 Assistance Bureau and the Planning Division here
6 at DEQ. I manage the drinking water state
7 revolving water fund, and water pollution control
8 state revolving fund programs, which provide
9 funding and technical assistance to public water
10 and wastewater facilities in Montana.

11 The issue I'm going to address today is
12 regarding our environmental reviews for water and
13 wastewater projects. Currently with MEPA and
14 NEPA, there is three levels of review that the
15 Department can take.

16 The first one is projects that are
17 eligible for categorical exclusion, which I'll
18 define a little bit further here. The second is
19 the Department would do an Environmental
20 Assessment, and make a finding or a decision on
21 that -- typically it's a finding of no significant
22 impact. And thirdly, if there is significant
23 impact, an EIS is prepared.

24 So what I'm talking about today is the
25 categorical exclusions or these parameters that

1 would allow us basically to call it a minor
2 improvement, and therefore we don't have to go to
3 the EA or the EIS level.

4 As the Department representative, we're
5 asking for approval of amendments to the public
6 water supply and wastewater system rules. And the
7 first one is to amend our existing rules to make
8 them consistent with federal categorical exclusion
9 rules regarding these categorical exemptions from
10 environmental reviews in the water pollution
11 control SRF program and related projects.

12 We are adopting the exact language of
13 the federal categorical exclusion law that was
14 changed in 2007. So since the early 1990s, we've
15 had a categorical exclusion rule for this water
16 pollution control SRF program that mirrored NEPA,
17 or the federal categorical exclusion criteria. In
18 2007, they amended those, and so this change is
19 just to exactly change our rules to match the
20 federal categorical exclusion criteria.

21 Secondly, we want to adopt a new rule to
22 allow categorical exclusions from environmental
23 review for eligible drinking water state revolving
24 fund programs, and non-SRF public drinking water
25 and public wastewater projects. This language

1 will again be exactly the same as the federal
2 categorical exclusion.

3 This rule affects owners of public water
4 supply and public sewage systems. Examples of
5 these systems are cities, towns, water and sewer
6 districts, subdivisions, mobile home parks,
7 businesses, and schools. These amendments will
8 provide consistency and efficiencies with the
9 Department on our MEPA reviews that meet the
10 federal definition of categorical exclusions.

11 Some project examples are water and
12 sewer main extensions within community boundaries
13 and existing right-of-ways, and in previously
14 disturbed area; water and sewer replacement
15 projects; rehab type of projects; and minor unit
16 process improvements at community water and
17 wastewater treatment facilities.

18 An example might be -- they're in the
19 process of disinfection, either a water plant or a
20 sewer plant. It's within the existing confines of
21 the community. It's just a change in technology,
22 say, from chlorination to UV type of disinfection.
23 That would allow us, rather than have to do an
24 environmental assessment and/or an EIS, it would
25 be a minor change, and thus would meet that

1 definition.

2 Public input, we did a mass mailing to
3 DEQ's interested parties list, and those possibly
4 affected by this rule change. A public hearing
5 was held on February 24th, 2009, in which no one
6 attended. DEQ did not receive any public comments
7 during the 30 day comment period.

8 If you would like additional
9 information, I'm available to discuss and answer
10 questions. Thank you.

11 CHAIRMAN RUSSELL: Thanks, Todd. Any
12 questions for the Department?

13 (No response)

14 MR. LIVERS: The only other context I
15 would offer for the new Board members is
16 initiation of this rulemaking took place at a
17 previous board meeting probably two meetings ago,
18 and then we went through the process Todd outlined
19 here, and then this action today is the final
20 action on those rules.

21 CHAIRMAN RUSSELL: Which you do have the
22 record, and certainly can vote on.

23 MR. ROSSBACH: Just to sort of clarify,
24 if you look at the documents that are attached to
25 this, you can see that there is the notice --

1 which is what John was talking about -- where it's
2 published in the administrative record, and signed
3 by Joe, and signed by Richard Opper, sets out,
4 "This is what we're going to do;" and then there
5 was a hearing that was held in February, and the
6 Hearing Examiner was Katherine for that; and she
7 heard apparently very little testimony.

8 MS. ORR: None, except the Department.

9 MR. ROSSBACH: And there is a document
10 there that shows what happened at that hearing,
11 and then Katherine comments on that. So that kind
12 shows how the process of rulemaking -- when we're
13 not actually doing it, when we're not conducting
14 the hearing ourselves -- but it sort of shows how
15 the steps in the process. So now it comes back to
16 us for making a final decision.

17 CHAIRMAN RUSSELL: With that said, I'll
18 entertain a motion to adopt the proposed
19 amendments and the new rule, adopt the 521 and 311
20 analysis and the Hearing Examiner's report.

21 MR. ROSSBACH: So moved.

22 MR. MILLER: Second.

23 CHAIRMAN RUSSELL: Before we take
24 action, is there anyone in the public that would
25 like to speak to this matter?

1 (No response)

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

4 (Response)

5 CHAIRMAN RUSSELL: Opposed.

6 (No response)

7 CHAIRMAN RUSSELL: Motion carries. The
8 next item on the agenda is addition to
9 Administrative Rule 17, Chapter 8, Subchapter (1)
10 to exempt from incorporation by reference an
11 emissions standard for mercury which has been
12 vacated by the courts. Tom.

13 MR. LIVERS: Mr. Chairman, thank you.

14 And this is another final adoption. It's gone
15 through the process similar to what we just took.
16 So we've had initiation by the Board a couple
17 meetings ago, the public process, and now the
18 final action. And Debra Wolfe from our Air
19 Quality Air Resources Management Bureau will be
20 presenting today.

21 MS. WOLFE: Good morning, Mr. Chair, and
22 members of the Board. And I, too, would like to
23 join this assembly in welcoming the new members of
24 the Board.

For the record, my name is Debra Wolfe.

1 and I'm a planner with the Air Resources
2 Management Bureau, which is a bureau of the
3 Permitting and Compliance Division. I'm here
4 today to represent the Department regarding the
5 adoption of the rule proposed in the matter of the
6 amendment of ARM 17.8.102(2) to exempt 40 CFR part
7 60 Subpart (4)(h) from incorporation by reference
8 into state law.

9 In order that the new members of the
10 Board might have some background regarding this
11 matter, I'll ask the indulgence of the existing
12 members that were present when this rule was
13 initiated in January, and I'll sketch out where
14 we've been.

15 Each year, the Board conducts an annual
16 rulemaking to incorporate by reference federal
17 statutes and regulations and other State
18 Administrative Rules, including whole chapters of
19 the most current edition of the Code of Federal
20 Regulations. However, not every regulation is
21 appropriate for this incorporation, and sometimes
22 the Board finds it necessary to specifically
23 exempt certain of these rules. Some of more
24 recent exemptions include rules that were reviewed
25 and vacated by the Courts, including the DC

1 circuit.

2 The rule proposed for your consideration
3 today would exempt from incorporation by reference
4 40 CFR Part 60 Subpart HHHH which establishes a
5 scheme for regulating atmospheric emissions of
6 mercury under a national cap and trade program.
7 The US Court of Appeals for the Circuit Court for
8 the District of Columbia vacated Subpart HHHH on
9 February 8, 2008.

10 Failure to exempt Subpart HHHH
11 jeopardizes the appropriate implementation of
12 Montana's own state mercury control program by
13 imposing dates for certain activities that will
14 conflict with deadlines in Montana's air quality
15 permit program.

16 Existing mercury emitting sources
17 required to file an application for a Montana air
18 quality permit to comply with Montana's mercury
19 emission regulations would face a requirement
20 under the now vacated Subpart HHHH to install,
21 certify, and operate mercury monitoring equipment
22 by January 1, 2009, which as you will note has
23 already passed. That's before their Montana air
24 quality permit would impose Montana's deadlines
25 and guidelines for the same requirement.

1 The Board appointed Katherine Orr as the
2 Hearing Officer, and conducted a public hearing on
3 February 4, 2009. The Board received one comment
4 in support of the proposed rule amendment.
5 Requirements for rulemaking procedure were
6 conducted pursuant to the Montana Administrative
7 Procedures Act.

8 The Department submitted an analysis of
9 the effects of the proposed rule for purposes of
10 the statutes, and found that no implications would
11 arise pursuant to 521 and 311 for the consequence
12 of adopting the proposed rule.

13 The Department prepared for the Board's
14 consideration a draft notice of final adoption,
15 including a draft response to that comment that we
16 received that supported the Board's adoption of
17 the proposed rule. The Department recommends that
18 the Board adopt the rule as proposed.

19 CHAIRMAN RUSSELL: Any questions for the
20 Department?

21 (No response)

22 CHAIRMAN RUSSELL: Is there anyone in
23 the audience that would like to speak to this
24 matter?

25 (No response)

1 CHAIRMAN RUSSELL: Seeing none --

2 MR. WHALEN: Mr. Chairman, I move that
3 we adopt the amendments as proposed.

4 CHAIRMAN RUSSELL: And as part of that,
5 we need to adopt the 521 and 311 analysis and the
6 Hearing Examiner's report. Will you add that your
7 motion?

8 MR. WHALEN: I'll be happy to modify the
9 motion to adopt the new amendments as proposed,
10 the 521 and 311, and the presiding officer's
11 report.

12 CHAIRMAN RUSSELL: Is there a second?

13 MR. MIRES: Second.

14 CHAIRMAN RUSSELL: It's been seconded by
15 Larry. Further discussion?

16 (No response)

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

19 (Response)

20 CHAIRMAN RUSSELL: Opposed.

21 (No response)

22 CHAIRMAN RUSSELL: Motion carries.
23 Thank you. The next item on the agenda is new
24 contested cases on appeal. In the matter of the
25 violations of the Metal Mine Reclamation Act by

1 Saturday Sunday.

2 MS. ORR: Mr. Chairman, members of the
3 Board, this has to do with a mine over by Deer
4 Lodge. It involves exploration beneath the
5 surface of the land that has resulted in material
6 disturbance of the surface. And the formal
7 allegation in the notice of violation from which
8 there is an appeal states that there was
9 exploration without an exploration license.

10 There was a site visit by a Department
11 official, and they found a 20 foot deep
12 excavation, which was clearly, in their view, an
13 exploration activity, and Saturday Sunday Mine had
14 no license. And the penalty that the Department
15 is seeking is \$1,262.

16 CHAIRMAN RUSSELL: Any further questions
17 for Katherine?

18 (No response)

19 CHAIRMAN RUSSELL: Seeing none, I will
20 entertain a motion to appoint Katherine the
21 permanent Hearings Examiner for this matter.

22 MR. MIRES: So moved.

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

25 MR. ROSSBACH: Second.

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

3 (Response)

4 CHAIRMAN RUSSELL: Opposed.

5 (No response)

6 CHAIRMAN RUSSELL: The next one is in
7 the matter of violations of the Open Cut Mining
8 Act by Daniels County.

9 MS. ORR: Mr. Chairman, members of the
10 Board, this is a case up in Scobey in which an NOV
11 and administrative penalty order was issued. It's
12 an open cut mining case. Daniels County was given
13 a mining land reclamation permit.

14 And under that permit, there were
15 certain conditions concerning the operation and
16 the boundaries of that operation, and those in the
17 Department's view were not honored. And the
18 formal allegations in the Notice of Violation are
19 that there is an open cut operation in an
20 unpermitted area, and there was failure to comply
21 with the permit requirement that set forth a plan
22 of operation. And the penalty in that case that
23 the Department is seeking is \$1,140.

24 CHAIRMAN RUSSELL: Any further questions
25 for Katherine?

1 (No response)

2 CHAIRMAN RUSSELL: Seeing none, I'll
3 entertain a motion to appoint Katherine permanent
4 Hearing Examiner on this.

5 MS. KAISER: So moved.

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

8 MR. WHALEN: Second.

9 CHAIRMAN RUSSELL: It's been second by
10 Joe. All those in favor, signify by saying aye.

11 (Response)

12 CHAIRMAN RUSSELL: Opposed.

13 (No response)

14 CHAIRMAN RUSSELL: The next one is in
15 matter of violations of the Montana Public Water
16 Supply Laws by Hugh Black, St. Mary Enterprises.
17 Is that right next door to our former Board
18 Chair's place?

19 MR. MIRES: It most certainly is.

20 MS. ORR: Mr. Chairman, members of the
21 Board, this is at the St. Mary's Lodge and Resort,
22 and it involves the characterization of this
23 business as a public water supply system. There
24 was a Notice of Violation, administrative
25 compliance and penalty order issued.

1 In that, the Department has made four
2 formal allegations: Operation of an approved
3 public water and wastewater system; there were
4 extensions to the public water and wastewater
5 systems that were not approved; there was no
6 certification letter that construction was
7 completed as approved prior to the operation of
8 the public water system; there was a failure to
9 monitor for coliform bacteria in two quarters in
10 2007 and 2008; failure to provide public
11 notification of the failure to monitor for
12 coliform bacteria; and a failure to report
13 monitoring violations to the Department. And the
14 penalty requested is \$23,008.

15 CHAIRMAN RUSSELL: Any questions for
16 Katherine?

17 MR. ROSSBACH: Is John Arrigo here to
18 explain that particular calculation?

19 CHAIRMAN RUSSELL: He is out there.
20 Well, we know that this process works, so we're
21 not going to question it for one minute.

22 Do I hear a motion to assign Katherine
23 the permanent Hearings Examiner on this?

24 MR. WHALEN: So moved.

25 CHAIRMAN RUSSELL: It's been moved by

1 Joe. Is there a second?

2 MR. MILLER: Second.

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

5 (Response)

6 CHAIRMAN RUSSELL: Opposed.

7 (No response)

8 CHAIRMAN RUSSELL: In the matter of the
9 appeal of the River Rock County Water and Sewer
10 District regarding the MDEQ permit for wastewater
11 treatment.

12 MS. ORR: Mr. Chairman, members of the
13 Board, this is a case in Gallatin Valley, in which
14 the River Rock County Water and Sewer District is
15 appealing various provisions of the MPDES permit.
16 And that appeal I believe is in your packet.
17 There are seven items listed for the appeal. I
18 can go through those if you'd like, but basically
19 this is a challenge to an MPDES permit.

20 CHAIRMAN RUSSELL: Questions?

21 MR. ROSSBACH: Who is challenging?

22 MS. ORR: The River Rock County Water
23 and Sewer District.

24 MR. ROSSBACH: The district is
25 challenging their permit that was issued.

1 MS. ORR: Right.

2 CHAIRMAN RUSSELL: Larry.

3 MR. MIRES: In reading this, it sounds a
4 little interesting to kind of hear this, as it may
5 apply in the same neighborhood of the outstanding
6 water resource in that same neighborhood. There
7 seems to be somewhat of a tie, even though they're
8 not directly connected, but they're darn close, in
9 the same neighborhood. It has some appeal to it.

10 CHAIRMAN RUSSELL: Any further comments
11 around that?

12 MR. ROSSBACH: Well, why don't we
13 continue that as Katherine doing it for now, and
14 then keep a status, and as it goes forward, we'll
15 consult with Katherine about whether we should
16 take over at some later point.

17 MR. MIRES: I think that's a good idea.

18 CHAIRMAN RUSSELL: With that in mind,
19 we'll just let this one continue to ride. We will
20 not assign this to Katherine.

21 The next item on the agenda, and the
22 last of these, is in the matter of violations of
23 the Montana Underground Storage Tank Act by Flying
24 J, Inc.

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

1 Board, this is an appeal by Flying J Travel Plaza
2 outside of Butte regarding underground storage
3 tanks. The appeal is from a Notice of Violation,
4 and administrative compliance and penalty order.

5 There were two 20,000 gallon UST's and
6 three 12,000 gallon UST's at the Travel Plaza, and
7 the Department has made four formal allegations:
8 Failure to correct compliance inspection
9 violations within ninety days; failure to conduct
10 mechanical line leak detection monitoring records;
11 failure to anchor sheer valves at the dispenser;
12 and failure to obtain annual testing of
13 operability. And the penalty requested is \$2,461.

14 CHAIRMAN RUSSELL: Thank you. Any
15 questions regarding this?

16 MR. WHALEN: Ms. Orr, is this an
17 abandoned underground storage tank site?

18 MS. ORR: No, it is not.

19 MR. WHALEN: It's active?

20 MS. ORR: Yes.

21 MR. ROSSBACH: There's no allegations of
22 any leaks at this point, it is just violations of
23 basically monitoring and reporting?

24 MS. ORR: Yes.

25 CHAIRMAN RUSSELL: I'll entertain a

1 motion to appoint Katherine the permanent Hearings
2 Examiner on this matter.

3 MS. KAISER: So moved.

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

6 MR. ROSSBACH: Second.

7 CHAIRMAN RUSSELL: It's been seconded by
8 Bill. All those in favor, signify by saying aye.

9 (Response)

10 CHAIRMAN RUSSELL: Opposed.

11 (No response)

12 CHAIRMAN RUSSELL: Final action on
13 contested cases. In the matter of the appeal of
14 the Town of Superior regarding the final MPDES
15 permit. Katherine.

16 MS. ORR: Mr. Chairman, members of the
17 Board, this was an appeal of the provisions of an
18 MPDES permit, and the parties have decided jointly
19 to move, or to file a stipulation for dismissal
20 under Rule 41(a); and in that circumstance, the
21 parties are in essence asking to withdraw from the
22 jurisdiction of the Board, and therefore the Board
23 is not in a position of reviewing the terms of the
24 dismissal, but rather to simply grant the
25 dismissal.

1 The appeal I see involved a discharge
2 permit which the Town of Superior was saying
3 involved quite a lot of expense and compliance
4 monitoring imposed in the new permit conditions.

5 CHAIRMAN RUSSELL: Thanks. I have an
6 order of dismissal in front of me, and you
7 probably have one also. I'll entertain a motion
8 to authorize the Board Chair to sign said
9 dismissal.

10 MR. MIRES: So moved.

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

13 MR. MILLER: Second.

14 CHAIRMAN RUSSELL: It's been seconded by
15 Marv. Any 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. The
23 next matter is violations of the Water Quality Act
24 by Park County.

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

1 Board, this is the same sort of situation where
2 the parties have jointly filed a stipulation for
3 dismissal under Rule 41(a), and are withdrawing
4 from the jurisdiction of the Board. The
5 underlying allegation involved a discharge of
6 sewage to the Yellowstone River, and apparently
7 the parties have decided a method to resolve this
8 matter without the necessity of the Board
9 adjudicating it.

10 CHAIRMAN RUSSELL: Thank you. With that
11 said, I have an order of dismissal, and I need a
12 motion to authorize the Chair to sign.

13 MS. KAISER: So moved.

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

16 MR. Mires: Second.

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

19 (Response)

20 CHAIRMAN RUSSELL: Opposed.

21 (No response)

22 CHAIRMAN RUSSELL: Motion carries. In
23 the matter of violations of the Open Cut Mining
24 Act by TMC., Inc. at the Nuss Pit, Gallatin
25 County. Katherine.

1 MS. ORR: Mr. Chairman, members of the
2 Board, I did want to say that regarding these
3 41(a) dismissals, as opposed to the type of
4 dismissal that involves this TMC open cut case,
5 the parties in a 41(a) dismissal choose not to
6 have the Board review the provisions of the
7 Administrative Order on Consent, and retain
8 jurisdiction to make sure that it's followed.

9 That is sort of one of the essential
10 differences, is that the parties in the case of a
11 41(a) dismissal then wouldn't have recourse to the
12 Board to make sure that the AOC is implemented.

13 With TMC, Inc., Gallatin County, there
14 was a Notice of Violation issued, and in that,
15 there were allegations that there was an amended
16 plan of operation without a permit; there was an
17 open cut made without a permit; there was a
18 failure to operate within approved hours of
19 operation; and there was no submission of ground
20 water elevation levels. The original penalty
21 sought was \$5,000, and now the parties have
22 settled it for \$2,970.

23 CHAIRMAN RUSSELL: Based on that, I have
24 an order of dismissal, and I need a motion to
25 authorize the Chair to sign.

1 MS. KAISER: So moved.

2 CHAIRMAN RUSSELL: It's been moved by
3 Heidi. Is there second?

4 MR. ROSSBACH: Second.

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

7 (Response)

8 CHAIRMAN RUSSELL: Opposed.

9 (No response)

10 CHAIRMAN RUSSELL: Motion carries.

11 MS. ORR: The next item is the Loyal
12 Order of the Moose. That's the Moose Lodge here
13 in Lewis & Clark County. There was a Notice of
14 Violation issued alleging failure to monitor
15 coliform bacteria. And this is a case where there
16 has been a stipulation to dismiss under Rule
17 41(a).

18 CHAIRMAN RUSSELL: I do have an order of
19 dismissal, and I will entertain a motion to
20 authorize the Board Chair to sign.

21 MR. MILLER: So moved.

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

24 MR. MIRES: Second.

25 CHAIRMAN RUSSELL: It's been seconded by

Page 89

1 Larry. All those in favor, signify by saying aye.

2 (Response)

3 CHAIRMAN RUSSELL: Opposed.

4 (No response)

5 CHAIRMAN RUSSELL: The next one is UST
6 Dutton School.

7 MS. ORR: Mr. Chairman, members of the
8 Board, this is obviously in Dutton, Montana. A
9 Notice of Violation and administrative compliance
10 and penalty order was issued. It involved one
11 UST, a 10,000 gallon tank, and the allegation of
12 the Board was that there were no tank leak
13 detection monitoring records for nine out of
14 twelve months.

15 The initial penalty sought was \$1,445
16 for four days of violation. And Dutton apparently
17 put in an automatic tank gauging system and
18 release detection monitoring system, and there is
19 going to be a reinspection under the AOC, and the
20 penalty has been dropped to \$395.

21 CHAIRMAN RUSSELL: With all that said, I
22 have an order of dismissal, and I need an
23 authorization to sign that said order.

24 MR. WHALEN: Mr. Chairman, I move to
25 adopt the order dismissing.

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

3 MS. KAISER: Second.

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

7 (Response)

8 CHAIRMAN RUSSELL: Opposed.

9 (No response)

10 MS. ORR: The next case on the agenda is
11 Swan Lake Stage Stop. It involves two 6,000
12 gallon UST's that were permitted, and then the
13 permit expired. The formal allegations under the
14 NOV was that there was a failure to conduct
15 release detection monitoring, failure to provide
16 corrosion protection, failure to obtain compliance
17 inspection, operating a UST without a valid
18 operating permit and operating tags.

19 The initial penalty was \$4,573, and now
20 under the proposed AOC, that would be a penalty of
21 \$1,730.

22 CHAIRMAN RUSSELL: With all that said, I
23 have an order of dismissal, and I need a motion to
24 authorize the Chair to sign it.

25 MR. MIRES: So moved.

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

3 MR. ROSSBACH: Second.

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

6 (Response)

7 CHAIRMAN RUSSELL: Opposed.

8 (No response)

9 CHAIRMAN RUSSELL: Motion carries. Last
10 one.

11 MS. ORR: And finally, last but not
12 least, is Helena Sand and Gravel here in Lewis &
13 Clark County. This involved allegations of open
14 cut mining violations. The permit that was issued
15 authorized 111.5 acres for open cut operation; and
16 under the plan of operation, it specifically laid
17 out a temporary access road, and that road was not
18 used for just temporary access, and for the
19 purpose specified in the plan of operation, it was
20 used for other matters as well.

21 And the initial penalty was \$1,980, and
22 the parties have agreed on a penalty of \$960.

23 CHAIRMAN RUSSELL: I have an order of
24 dismissal in front of me, and I need a motion to
25 authorize the Chair to sign.

1 MS. KAISER: So moved.

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

4 MR. MILLER: I second.

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

7 (Response)

8 CHAIRMAN RUSSELL: Opposed.

9 (No response)

10 CHAIRMAN RUSSELL: So ends the final
11 action on contested cases. Now comes the time for
12 general public comment. Is there anyone who is
13 not employed by the Department and would like to
14 speak to the Board on matters pertaining to the
15 Board?

16 (No response)

17 CHAIRMAN RUSSELL: Seeing none, I will
18 entertain a motion to adjourn.

19 MS. KAISER: I have a point of comment
20 first, for the benefit of the new Board members.
21 The Chairman generally does allow a break before
22 11:30.

23 MR. WHALEN: I have a quick question.
24 On these dismissals, orders to dismiss, is
25 discussion typically allowed on those motions

1 after the motions are made so that we can --

2 CHAIRMAN RUSSELL: Generally we can.

3 And if you do, you're going to stop me, because I
4 usually -- but no offense intended, but oftentimes
5 we don't have a lot of the background. We have
6 certainly the Department's filings and such, and
7 often if you have read those, you get everything
8 you can see, and sometimes it's still not enough,
9 and it's up to you guys to slow me down.

10 MR. ROSSBACH: That brings up one of my
11 bones of perpetual contention, which is that it's
12 frustrating sometimes, and it has been frustrating
13 that we hear about these violations, we hear the
14 stories of the violations, we make a decision --

15 Sometimes I think there may have even
16 been one or two in here at different times that we
17 wanted to hear ourselves. I kind of think the
18 Moose Lodge was one at one point we were thinking,
19 because of some of our members may have actually
20 consumed the water at the Moose Lodge that had
21 coliform in it.

22 But be that as it may, sometimes it's a
23 concern of mine and it's frustrating, is that we
24 -- when the DEQ and the parties decide to
25 stipulate to dismiss, we can't say anything about

1 it. And so we hear of these violations, and they
2 reach a penalty, and make a decision about it, and
3 they take the jurisdiction away from us.

4 And sometimes there have been cases
5 where we have wondered and questioned whether it
6 was an adequate penalty, whether adequate
7 alterations of behavior had been taken, had been
8 done. And so it's sometimes frustrating, and it's
9 been -- Sometimes I feel like we don't have enough
10 information about the background of the dismissals
11 to feel comfortable in making that decision to
12 dismiss. Nonetheless we really don't have any
13 rights to get any more information, is what I am
14 told.

15 But it's still frustrating sometimes,
16 that you see these things, and a penalty is
17 reduced from \$5,000 to \$1,000, and you go, "Why is
18 that?" We heard about these horrible violations
19 in the initial Notice of Violation, and then
20 they're contested, and then the next thing we
21 know, they're being dismissed.

22 Sometimes as a Board, you want to feel
23 like are we -- do we have adequate supervisory
24 sort of oversight, that sometimes I think we don't
25 get -- So that's why -- You see these things and

1 we run through them, and sometimes I wonder, "Gee,
2 is that enough penalty, or is that too much
3 penalty?" on the other side. Why were these
4 decisions made? And it's sometimes hard to know.
5 It's frustrating.

6 MR. MIRES: I question whether we don't
7 give up some of that when we assign it to
8 Katherine to solve it or get it resolved, so we
9 don't drag it out forever. We could hold on to
10 them, but I wonder if we would actually be doing
11 these people any justice, or if we would be
12 creating a greater injustice and a disservice to
13 them.

14 I guess I have to operate under the
15 assumption -- and I realize you're not supposed to
16 operate under assumptions -- but I'm going to
17 assume that the Department and Katherine work in
18 the very best interests of our interests, as well
19 as the Board's or the public's interest, to find a
20 peaceful and amicable resolve, but would be where
21 I would hope --

22 MR. ROSSBACH: I think that's true, and
23 I agree with that assumption generally. But
24 Katherine really doesn't have any input into that
25 either. These are decisions made between the

1 parties, and Katherine is essentially our
2 representative, and just like we don't have any
3 input into it, Katherine doesn't have either.

4 So even if we were to hold the case, and
5 not designate it to Katherine, they could still
6 reach a settlement and not include us if they
7 don't want to.

8 MR. ARRIGO: Mr. Chairman, members of
9 the Board, my name is John Arrigo. I'm the
10 Administrator of the Enforcement Division, and
11 these comments have not been cleared by Legal or
12 management. But I would just say that I share
13 your frustration. And we try to do enforcement in
14 a manner that is fair and reasonable, that upholds
15 the integrity of the programs, yet doesn't stymie
16 business, so to speak.

17 Certain violations need penalties, and
18 when we calculate these penalties, we do it
19 according to the rules passed by the Board. We
20 calculate the penalties based upon our
21 understanding of the facts as we know them at the
22 time, and in a manner that's fair and reasonable.

23 We do not want to hammer people, and
24 seek unjust penalties. There is always a question
25 the equitability and consistency, and we try to

1 have to live within those confines. Most of the
2 time that is a subjective judgment call on our
3 behalf, but we try to do a good job.

4 You do not get to see most of the cases
5 because only 10 percent of them are appealed, and
6 a lot of those appeals are submitted just to
7 protect the individual's right to appeal.

8 And we always tell people, "You may
9 appeal, but at the same time we can have informal
10 settlement discussions during that process," and
11 that's how most of these are resolved. We'll come
12 to an agreement, we'll learn more information,
13 we'll adjust the penalty, and sign an Order on
14 Consent, and they agree to dismiss it.

15 We also have to think of our approach,
16 in that we recognize that appeals take a lot of
17 time on the Board's and Katherine's part, on our
18 part, our attorneys' part, and we don't have the
19 time or the resources to fight all of these in
20 appeals. So we make judgment calls. We have to
21 make a judgment, "Do we want to go to court and
22 avoid the administrative process?" We make that
23 decision up front.

24 Most of our cases, over 95 percent, are
25 administrative, though. In some of the larger

1 cases, such as air, the penalties we seek are
2 hundreds of thousands of dollars, and we know
3 those orders will be appealed.

4 So what we do in that and in some other
5 laws, like water quality, we send what we call a
6 demand letter, and we will send the letter to the
7 parties saying, "We believe these violations have
8 occurred. We've calculated this proposed penalty.
9 If you agree to pay the penalty, we'll settle for
10 an Administrative Order on Consent, rather than
11 filing a complaint in court and having a consent
12 decree."

13 And usually the parties -- these are the
14 larger businesses -- they don't want to go to
15 court. They'd rather settle administratively.
16 And those demand letters are not appealable. They
17 initiate a settlement process, and then we will
18 begin sometimes months of settlement discussions.
19 But we'll agree on large penalties, and you don't
20 even see those.

21 All I can offer to calm your frustration
22 is that if you would like on occasion, I would be
23 happy to provide a report to the Board summarizing
24 any particular case. After the case is settled, I
25 can talk to you informally about it, or give you

1 summary information on penalties on average open
2 cut penalties, or individually list the initial
3 penalties, the settlement penalties, and just give
4 you some information, and possibly comfort that we
5 are trying to do a good job, and we don't just
6 calculate large penalties and then settle for a
7 quarter just to make it go away.

8 MR. ROSSBACH: That's great, John. I
9 appreciate that, and I kind of want to maybe
10 follow up a little bit. I would like to take you
11 up on -- The one thing that -- It's not the
12 penalties that frustrate me at all.

13 Sometimes I would like to know -- okay.
14 Once you investigated this, and you decided to
15 reach this penalty, what other remedial actions
16 did they take, or what did you find out in the
17 investigation that led you to believe that maybe
18 the penalty wasn't so high.

19 Those are the kind of things that
20 sometimes I would like just a short summary, so
21 that they reached a consent, and this is what it
22 is, the penalty was this, the party took these
23 remedial actions, you know, like a two sentence
24 summary of what you did to improve the
25 circumstances that caused the violation in the

1 first place. They have now got a new monitoring
2 system, or their underground storage tank --
3 Like one we heard, now they've got an electronic
4 monitoring system.

5 Some of those things would -- just a
6 sentence or two of what happened would sometimes
7 -- would help me just feel more comfortable about
8 their dismissals. That's all.

9 MR. ARRIGO: Mr. Chairman, Mr. Rossbach,
10 that would be easy to do. I'm just not sure of
11 process where in the dismissal that occurs. And
12 I'd be happy to work with Mr. North and Mr.
13 Livers. And if the other party is willing to
14 accept the Department's characterization of the
15 case, I'd be happy to do that.

16 MR. ROSSBACH: If we could just -- It
17 doesn't have to be an awful lot, but sometimes I
18 wish that somebody was here to tell us, "Yes, we
19 got it done, and this is why we feel better about
20 this."

21 MR. ARRIGO: Possibly if these are on
22 the agenda for dismissal, I could be prepared to
23 do that for each case after you dismiss it, and
24 give you some details.

25 MR. LIVERS: Mr. Chairman, Bill, why

1 don't you give us a chance to look at this. I
2 also want to be mindful of the legal side boards
3 here in terms of the Board not somehow directing
4 the Department in its settlement actions.

5 And I think we hear your concern, and we
6 can follow up, and try to come up with what's an
7 appropriate summary that doesn't cross those
8 lines. And we may reach some points where we
9 disagree on the Board role here, and look at it,
10 and see if we can come up with something to help
11 meet those concerns.

12 MR. ROSSBACH: Anything like that would
13 be helpful. I'm not trying to push you to do
14 something beyond what you feel comfortable with,
15 but I know John would probably be able to tell us
16 what happened exactly, and why they did this. And
17 I'm not trying to get that for every one, but
18 sometimes it just seems like these were big issues
19 when they came to us, and then they go away.
20 That's fine. I'm happy that they go away.

21 But just for the sake of knowledge of
22 how the DEQ was making these decisions would
23 sometimes be helpful to us.

24 MR. ARRIGO: Mr. Chairman, Mr. Rossbach,
25 I hear you. I just want to point out that the

1 appeals are a small percentage of all of the
2 cases, and it might give you a taste for how we do
3 stuff.

4 MR. ROSSBACH: That's kind of what I'm
5 thinking about, is what happened. You get these
6 things, they come to us, sometimes they sound
7 really awful, and then all of a sudden they're
8 gone; and sometimes even ones that we retain
9 jurisdiction on, they go away. And it would just
10 be nice for -- just to kind of get, as you say,
11 get a flavor of how these things get resolved
12 without trying to burden you guys with that.

13 I don't want to add any burden, because
14 obviously it's nice to get through these things in
15 five minutes, rather than --

16 MR. ARRIGO: I could do that with
17 summary reports for a case specific, whichever --

18 MR. LIVERS: We'll look at that.

19 CHAIRMAN RUSSELL: We'll certainly --

20 MR. WHALEN: Mr. Chairman, the last part
21 of the conversation has been illuminating. Thank
22 you for your indulgence. We'd better move to
23 adjourn the meeting.

24 CHAIRMAN RUSSELL: Is there a second?

25 MS. KAISER: Second.

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

3 (Response)

4 (The proceedings were concluded
5 at 11:48 a.m.)

6 * * * * *

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Page 104

C E R T I F I C A T E

2 STATE OF MONTANA)

3 : SS.

4 COUNTY OF LEWIS & CLARK)

5 I, LAURIE CRUTCHER, RPR, Court Reporter,

6 Notary Public in and for the County of Lewis &

7 Clark, State of Montana, do hereby certify:

8 That the proceedings were taken before me at
9 the time and place herein named; that the
10 proceedings were reported by me in shorthand and
11 transcribed using computer-aided transcription,
12 and that the foregoing - 103 - pages contain a
13 true record of the proceedings to the best of my
14 ability.

15 IN WITNESS WHEREOF, I have hereunto set my

16 hand and affixed my notarial seal

17 this day of , 2009.

18

19 LAURIE CRUTCHER, RPR

20 Court Reporter - Nota

21 My commission expires

22 March 9, 2012.

23