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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

BOARD MEETING )  
MAY 30, 2008 )

TRANSCRIPT OF PROCEEDINGS

Heard at the Metcalf Building  
520 East Sixth Avenue  
Helena, Montana  
May 30, 2008  
9:10 a.m.

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

PREPARED BY: LAURIE CRUTCHER, RPR  
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1           WHEREUPON, the following proceedings were  
2 had and testimony taken, to-wit:

3                           \* \* \* \* \*

4                   (Mr. Skunkcap not present)

5                   CHAIRMAN RUSSELL: It is about eleven  
6 minutes after the hour, and I will call this  
7 regular meeting of the Board of Environmental  
8 Review to order. The first item on the agenda is  
9 the review and approval of the minutes of the  
10 April 21st, 2008 regular meeting. I'm sure all of  
11 the Board members have had a chance to read  
12 through those.

13                   MR. MIRES: I didn't see anything that  
14 had --

15                   CHAIRMAN RUSSELL: Would you like to  
16 make a motion?

17                   MR. MIRES: I move to approve and adopt  
18 the minutes.

19                   CHAIRMAN RUSSELL: It's been moved. Is  
20 there a second?

21                   MR. ROSSBACH: Second.

22                   CHAIRMAN RUSSELL: It's been seconded by  
23 Bill. Any further questions, comments about them?

24                   (No response)

25                   CHAIRMAN RUSSELL: All those in favor,

1 signify by saying aye.

2 (Response)

3 CHAIRMAN RUSSELL: Opposed.

4 (No response)

5 CHAIRMAN RUSSELL: Just so the audience  
6 knows, Don and Heidi are on the phone, as well as  
7 Ken Reich, and one of his colleagues, I believe.

8 MS. BREWER: Richard Sugarman.

9 MR. ADAMS: Excuse me. I'm on the  
10 phone, too, Steve Adams with White Sand Investment  
11 Partners.

12 CHAIRMAN RUSSELL: Welcome, Steve.

13 MS. DILLEN: Abigail Dillen is on the  
14 phone as well.

15 CHAIRMAN RUSSELL: Anyone else?

16 (No response)

17 CHAIRMAN RUSSELL: The next item on the  
18 agenda is the contested case updates. Katherine.

19 (Mr. Skunkcap enters)

20 MS. ORR: Mr. Chairman, members of the  
21 Board, I really don't have anything to report  
22 beyond what's contained in the agenda. I guess  
23 maybe one thing to add is that in Item I(A)(C),  
24 the parties have reached an agreement and have  
25 reduced that agreement to writing, but we don't

1 have it in front of us yet. In Item I(E) also,  
2 the parties have indicated that they're reducing  
3 that matter to writing in the way of a settlement.

4 And that's all I have to report there.

5 CHAIRMAN RUSSELL: Thank you, Katherine.

6 The next item on the agenda is the initiation of  
7 rulemaking, appointment of Hearings Officer.

8 First is to amend 17.8.505 and 17.8.514 for the  
9 annual adjustment of the air quality operating and  
10 open burning permit fees. Mr. Livers.

11 MR. LIVERS: Mr. Chairman, these are  
12 fairly routine updates. I think all of the Board  
13 members have seen them before. But Eric Merchant  
14 will walk through these for us. Eric has recently  
15 changed positions, and is supervisor of --

16 MR. MERCHANT: -- the Air Policy and  
17 Planning Section.

18 CHAIRMAN RUSSELL: Nice to have you  
19 here, except we're going to kind of miss Chuck not  
20 coming up.

21 MR. MERCHANT: I appreciate that. Thank  
22 you.

23 For the record, my name is Eric  
24 Merchant. I'm the Air Quality Policy and Planning  
25 Section Manager for the ARMB. And as stated

1 previously, I'm up in front of you today to  
2 request that the Board initiate rulemaking to  
3 amend the air quality operating and open burning  
4 fees under ARM 17.8.505 and 17.8.514.

5           Just a short summary of changes,  
6 proposed changes to ARM 17.8.505. For the  
7 operating fees, the annual stationary source  
8 administrative fee will increase from \$500 to  
9 \$600, and this would be consistent with portable  
10 source and registration program administrative  
11 fees. And then the primary change here is a  
12 change in the annual operating fee from \$29.96 per  
13 ton to \$31.29 per ton. This is primarily due to  
14 an increased appropriation, and a decrease in  
15 carry over from the last fiscal year.

16           A summary of proposed changes to the  
17 Administrative Rules under 17.8.514 for open  
18 burning, there is a reduction this year in the  
19 major open burning permit fees from last year's  
20 rate of \$21.07 for PM, per ton of PM; \$5.27 per  
21 ton of NOx; and \$5.27 cents per ton of VOC's; to  
22 \$17.40, \$4.35, and \$4.35 respectively.

23           That's what we're requesting.

24           CHAIRMAN RUSSELL: Does the Board have  
25 any questions for Eric?

1 MS. SHROPSHIRE: Why are you reducing  
2 the fees?

3 MR. MERCHANT: For open burning?  
4 Essentially what's happened is the emissions went  
5 up. We did have an increase in costs associated  
6 with personal services and things like that for  
7 the program. However, because the emissions went  
8 up last year, we are not requiring as much this  
9 year to cover our costs.

10 CHAIRMAN RUSSELL: Eric, has the  
11 Department ever looked at -- especially with open  
12 burning of forest waste, logging waste -- possibly  
13 bringing it up, and then looking at some  
14 discounting for alternatives -- chipping, giving  
15 them to some of these biofuel school sources?

16 MR. MERCHANT: Mr. Chairman, members of  
17 the Board, I'm not aware that we've looked at that  
18 issue. I don't know if that would be an issue  
19 that we have looked at in the past. I'm not sure.

20 CHAIRMAN RUSSELL: Just a thought.  
21 There is alternatives -- Western Washington is not  
22 burning nearly as much as they produce, chipping  
23 it, and leaving it, which is just fire safe, and  
24 we've got three schools in western Montana now  
25 that have biofuel boilers.

1           MR. MERCHANT: I believe there are more  
2 than that actually. It's my understanding there  
3 may be seven at this time.

4           CHAIRMAN RUSSELL: Three that I know of.  
5 So maybe there is an alternative there to keep the  
6 cost down for schools, too. Just a thought.

7           MR. MERCHANT: Okay.

8           MR. LIVERS: For the record, Tom Livers,  
9 Deputy Director of DEQ. The Department has been  
10 active in the Fuels for Schools Program. We've  
11 shared some financing of the U of M Western  
12 boiler. It's an area that we're interested in.  
13 So in terms of taking suggestions to consider  
14 whether we ought to consider aligning the fee  
15 structures to incent that, that's certainly  
16 something we can look at in the future.

17           CHAIRMAN RUSSELL: Especially with PM2.5  
18 and open burning linkages, we're getting pushed  
19 pretty hard at the local level with that, and that  
20 might be another way to offset some of those  
21 emissions. Thanks, Eric.

22           MR. MERCHANT: I think I'm coming back  
23 up, so I may just want to stay here for a minute.

24           CHAIRMAN RUSSELL: Katherine, will you  
25 preside over this?

1 MS. ORR: Yes.

2 CHAIRMAN RUSSELL: I will entertain a  
3 motion to initiate rulemaking and appoint  
4 Katherine the Hearings Officer.

5 MR. ROSSBACH: So moved.

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

8 MS. SHROPSHIRE: Second.

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

11 (Response)

12 CHAIRMAN RUSSELL: Opposed.

13 (No response)

14 CHAIRMAN RUSSELL: The next item on the  
15 agenda is update of air quality incorporation by  
16 reference rules, and I won't cite them all. Eric.

17 MR. MERCHANT: The Department is  
18 requesting that the Board initiate rulemaking to  
19 amend the annual air quality incorporation by  
20 reference, and essentially this is an annual  
21 change to bring the current federal and state  
22 regulations into play.

23 Just a short summary of proposed  
24 changes. We would obviously be adopting the  
25 current editions of federal statutes and



1 regulations, and the State Administrative Rules.

2 This year we would be providing for specific

3 exclusions to vacated requirements in the 2007

4 Code of Federal Regulations; and then again,

5 another proposal this year would be to add a rule

6 which would automatically render future vacated

7 federal requirements null without the need for

8 rulemaking. So those are the two changes

9 primarily this year, under this year's rulemaking

10 effort.

11 CHAIRMAN RUSSELL: Does the Board have

12 any questions for Eric?

13 MR. MARBLE: This is Don. I have a

14 question. Looking at the first Page 1 of the

15 rules -- I think I'm on the right page -- it says,

16 "If a Court or Federal Court of Competent

17 Jurisdiction vacates."

18 Just for my own information, like these

19 Circuit Courts back east, are they a Court of

20 Competent Jurisdiction, or does that mean just our

21 own circuit? I do want to know that.

22 MR. MERCHANT: Mr. Marble, members of

23 the Board, my assumption is yes, that that would

24 be a competent --

25 MR. LIVERS: I think that's correct.

1           CHAIRMAN RUSSELL: I think it's  
2 relative.

3           MR. ROSSBACH: In terms of competence?

4           MR. MARBLE: Relevant or competent, I  
5 guess.

6           And then I was looking further down the  
7 rule, "The following subparts are excluded," and I  
8 wonder if someone could just give me a plain  
9 language explanation of what we are excluding  
10 there.

11           CHAIRMAN RUSSELL: David, do you want to  
12 handle the first one first?

13           MR. RUSOFF: I can if you'd like. For  
14 the record, David Rusoff, attorney for the Montana  
15 Department of Environmental Quality.

16           The DC Circuit has jurisdiction over  
17 challenges to Environmental Protection Agency  
18 rulemaking, so that any challenge would be brought  
19 in that circuit. And so the US District Court for  
20 the DC area and the DC Circuit Court of Appeals  
21 would be the Courts of Competent Jurisdiction in  
22 this particular case.

23           MR. MARBLE: This is Don again. I was  
24 wondering if that Court decision that came down  
25 recently by a circuit -- I don't remember which

1 one, though -- about the carbon emissions, was  
2 that the DC circuit, or was that a different one?

3 MR. RUSOFF: Mr. Marble, I'm not sure  
4 which decision you're referring to.

5 MR. MARBLE: The Circuit Court said that  
6 it would be all right for states to -- or EPA to  
7 regulate carbon emissions from vehicles.

8 MR. RUSOFF: Mr. Marble, I believe  
9 you're referring to the US Supreme Court decision  
10 in reviewing a decision of -- I believe it was the  
11 circuit for DC -- or the Court of Appeals for the  
12 DC Circuit. I believe that's where that case  
13 originated. But the ultimate decision in the  
14 Massachusetts versus EPA case -- which is the case  
15 I believe you're referring to -- was made by the  
16 United States Supreme Court, and certainly we  
17 would consider that to be a Court of Competent  
18 Jurisdiction for purposes of the intent of this  
19 proposed rule.

20 MR. MARBLE: Thank you.

21 CHAIRMAN RUSSELL: I think Don had  
22 another question that you would field, Eric.

23 MR. MERCHANT: Mr. Marble, members of  
24 the Board, Mr. Chairman, members of the Board, I  
25 guess I could go through each specifically vacated

1 requirement and try to give you an understanding  
2 of what they are, but I guess the general  
3 statement would be that these are MACT  
4 requirements that were vacated for one -- the  
5 Court found that there was one problem or another,  
6 and so they have simply been no longer applied.  
7 And so we are taking them out of our incorporation  
8 by reference because there is no federal  
9 requirement.

10 CHAIRMAN RUSSELL: Don, is that --

11 MR. MARBLE: I just wonder what that  
12 3(A) is specifically referring to. Is it the  
13 commercial and industrial solid waste incineration  
14 units? Does that apply in anything, in any  
15 litigation or any permits requested before the  
16 Board, or anything that we're considering now?

17 MR. MERCHANT: Mr. Marble, Mr. Chairman,  
18 members of the Board, we are specifically  
19 excluding these requirements from our  
20 incorporation reference, so that they would not be  
21 automatically applicable to a source that might  
22 fall into one of these categories covered by  
23 these.

24 MR. MARBLE: It's not an issue?

25 MR. MERCHANT: That's correct.

1 MR. MARBLE: Okay.

2 CHAIRMAN RUSSELL: Anything else?

3 MR. MARBLE: I had question on four.

4 Maybe it's an obvious answer to it. It says, "The  
5 following subparts are excluded from incorporation  
6 by reference." So I guess it's "C." Are any of  
7 those involved with issues like SME or issues  
8 before the Board?

9 MR. MERCHANT: Mr. Marble, Mr. Chairman,  
10 members of the Board, what specific item are you  
11 referencing?

12 MR. MARBLE: I was looking at like 4(C).

13 MR. MERCHANT: In the notice here, I  
14 have only 4(A).

15 MR. MARBLE: Are you on Page 2?

16 MR. MERCHANT: Yes.

17 MR. MARBLE: I have a 4(A), (B), (C),  
18 (D).

19 MR. MERCHANT: I believe the document  
20 that I have in front of me is 3(C). Are you  
21 referring to 40 CFR 63 subpart D, D, D, D, D?

22 MR. MARBLE: Oh, okay. D, D, D is the  
23 same as what I have on mine as "C."

24 MR. MERCHANT: Okay.

25 MR. MARBLE: So that's going to exclude

1 changes EPA made as far as regulating boilers; is  
2 that right?

3 MR. MERCHANT: Under the MACT  
4 requirements, that's correct. And so at this  
5 point, the Department's position is that those  
6 specific requirements were vacated. Those would  
7 have -- The SME project would have been subject to  
8 those requirements. Now they're subject to a  
9 case-by-case MACT determination.

10 MR. MARBLE: Okay. I just kind of  
11 wanted to know what we were talking about here. I  
12 think that's all of the questions I had on that  
13 part.

14 CHAIRMAN RUSSELL: Anything else?

15 (No response)

16 CHAIRMAN RUSSELL: Katherine, are you  
17 going to handle this one also?

18 MS. ORR: I'd be glad to.

19 CHAIRMAN RUSSELL: I would entertain a  
20 motion to initiate rulemaking, and appoint  
21 Katherine as the presiding officer.

22 MR. MIRES: So moved.

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

25 MR. SKUNKCAP: Second.

1                   CHAIRMAN RUSSELL:  It's been seconded by  
2   Gayle.  Any further discussion?

3                   (No response)

4                   CHAIRMAN RUSSELL:  Is there anyone in  
5   the audience that would like to discuss this  
6   matter with the Board before the Board renders a  
7   decision?

8                   (No response)

9                   CHAIRMAN RUSSELL:  All those in favor,  
10  signify by saying aye.

11                   (Response)

12                   CHAIRMAN RUSSELL:  Opposed.

13                   (No response)

14                   CHAIRMAN RUSSELL:  Motion carries.  I  
15  did notice we will do the temporary water quality  
16  standards next, so the next item on the agenda is  
17  the three year review of the temporary water  
18  quality standards for Daisy Creek and Fisher  
19  Creek.

20                   MR. KOERTH:  Good morning.  My name is  
21  Jon Koerth.  I'm with the Department of  
22  Environmental Quality's Remediation Division.  For  
23  the past nine years, I've been the coordinator  
24  with the DEQ's participation in the New World  
25  Cleanup Project.  The United States Forest Service

1 has been doing work for the past nine years in the  
2 New World Mining District. Part of this work  
3 involved establishing temporary water quality  
4 standards on Daisy Creek, Fisher Creek, and the  
5 upper portion of the Stillwater River.

6           These standards were established in 1999  
7 for a period of not to exceed 15 years, so they  
8 would expire in 2014. This is a statutory  
9 requirement that they be reviewed by the Board  
10 every three years, so we're in our third triennial  
11 review, and if the standards are in place until  
12 2014, there would be two more of these reviews  
13 before they would expire.

14           During the last nine years, the United  
15 States Forest Service has completed much work.  
16 There are some work items remaining, but we are  
17 currently in a phase of monitoring and observing  
18 the response to the work that's been done to more  
19 clearly identify and define what work remains.

20           Mary Beth Marks from the United States  
21 Forest Service will provide some information, and  
22 a statement; and Kris, I believe, has some  
23 hand-outs for you that Mary Beth would like you to  
24 have on this.

25           If there are questions, I'd be glad to



1 answer them in regard to this project; and if  
2 there are not, I would like to introduce Mary Beth  
3 Marks. So we'll see if there is questions I guess  
4 first.

5 CHAIRMAN RUSSELL: Does the Board have  
6 any questions for Jon?

7 (No response)

8 MR. KOERTH: I'll remain available for  
9 questions if you have some afterwards. With that,  
10 Mary Beth.

11 MS. MARKS: Mr. Chairman, members of the  
12 Board, for the record, my name is Mary Beth Marks.  
13 I'm employed by the USDA Forest Service on the  
14 Gallatin National Forest, and I am the on scene  
15 coordinator for the New World Mining District  
16 Response and Restoration Project. It is my  
17 pleasure to come before you today to update the  
18 Board with the progress we have made on the New  
19 World Response and Restoration Project. For this  
20 briefing, I've provided you with a handout which  
21 contains figures of the location of the New World  
22 Mining District, and graphs summarizing the  
23 improvements to water quality in the headwater  
24 areas of Fisher Creek, Daisy Creek, and the  
25 Stillwater River.

1           Improvements in water quality in these  
2 drainages are a direct result of the US Forest  
3 Service's reclamation efforts that I will describe  
4 in a moment. This information that I've provided  
5 to you is also available in the progress report  
6 that was provided to you previously in April as  
7 part of our statutory obligation in adhering to  
8 these temporary water quality standards for  
9 portions of Fisher Creek, Daisy Creek, and the  
10 headwaters of the Stillwater.

11           As you know, these streams do not  
12 support their designated uses due in part to  
13 impacts attributable to historic mining. The  
14 temporary standards allow the US Forest Service to  
15 proceed with cleanup of these historic wastes and  
16 move incrementally towards water quality  
17 improvements in support of the designated uses for  
18 these streams.

19           First I would like to review some of the  
20 major reclamation activities completed at New  
21 World since the end of the last three year review  
22 cycle in 2005.

23           In 2003, we reopened 1900 feet of the  
24 Glengarry Adit and the Como Raise to backfill and  
25 install water type plugs in these mine workings in

1 2004 and 2005. This essentially eliminated the  
2 contaminated adit discharge into Fisher Creek.

3 In 2005 and 2006, an impermeable cap and  
4 lime amended soil cover was placed on 5.5 acres of  
5 mineralized and disturbed soils in the Como Basin  
6 at the headwaters of Fisher Creek. From 2005  
7 through 2007, the remaining adit and drain  
8 discharges on district property have been  
9 evaluated to address possible source control  
10 treatment of the contaminated water.

11 Sites that have undergone waste removal  
12 and capping have been reclaimed and revegetated,  
13 and as a result, a total of about 22 acres have  
14 been revegetated. Other reclamation activities  
15 include regrading and revegetation of road  
16 corridors; stabilization and placing barriers to  
17 off road vehicle use in select areas; placement of  
18 runoff controls and stabilization of stream  
19 channels below Como Basin and the McClaren Pit  
20 areas.

21 No reclamation activities were conducted  
22 in 2007. Surface and ground water monitoring  
23 continued through 2007 as in previous years.  
24 While we still have decisions to make on some  
25 remaining sources of mining related contaminants

1 on district property, all major sources have been  
2 addressed.

3 Anticipated activities in 2008 and 2009  
4 include stabilization of the incised Fisher Creek  
5 stream channel passing through the Glengarry Mine  
6 site, evaluation and implementation of response  
7 alternatives for point source adit and under drain  
8 discharges in the district, and restoration/  
9 stabilization of road cuts and drainage control on  
10 roads throughout the district.

11 With these recent reclamation activities  
12 in mind, I would like to review water quality  
13 trends over time in Fisher Creek, Daisy Creek, and  
14 the Stillwater drainage. During this discussion,  
15 I will be referring to your handout that contains  
16 the various maps and graphs.

17 Figure 1 is a general location map of  
18 the New World Mine District; and Figure 2 shows  
19 the three principal drainages being regulated  
20 under the temporary water quality standards and  
21 surface water sampling sites along those  
22 drainages.

23 With the elimination of the Glengarry  
24 Adit discharge in 2005, substantial improvements  
25 to water quality occurred in Upper Fisher Creek.

1 On the third page of your handout is a bar graph,  
2 Figure 3, demonstrating the reduction in metals  
3 concentration in Upper Fisher Creek at surface  
4 water station SW3 several hundred yards down  
5 stream from the Glengarry Mine. As you can see,  
6 there has been a significant reduction in metals  
7 concentration at both the high and the low flow,  
8 and overall metal concentrations have decreased an  
9 average of 45 percent. We expect to see  
10 additional decreases in metal concentrations  
11 reflected in future data collected from SW3 as a  
12 result of the construction of the Como Basin cap.

13 The next two graphs, Figures 4 and 5,  
14 are graphs that illustrate changes in copper  
15 concentration over time at the surface water  
16 stations on Fisher Creek. At station SW3 located  
17 on the Upper Fisher Creek, we can see that since  
18 2004, we have seen some of the lowest  
19 concentrations of the copper in both the high flow  
20 and the low flow range that have been reported  
21 over almost twenty years of the history of data  
22 collection.

23 Station CFY2, Figure 5, is located on  
24 lower Fisher Creek near its confluence with the  
25 Clark Fork of the Yellowstone. Data presented on

1 this figure suggests that there have been no  
2 significant changes with regard to copper  
3 concentrations at this station.

4           Moving over to Daisy Creek, at Station  
5 DC2, the most dramatic changes have been measured  
6 during high flow conditions with the large volume  
7 of snow that collects on the capped area, and  
8 which had historically been contaminated as it  
9 infiltrated through the mine wastes, and now it  
10 runs off as essentially clean water. This runoff  
11 has the additional positive impact of diluting  
12 metal contamination and acidity derived from other  
13 natural sources in Upper Daisy Creek.

14           The results measured during low flow  
15 conditions are not as dramatic, but decreases in  
16 metals concentration are realized for all of the  
17 metals monitored except for zinc.

18           Figure 6 is the bar graph that  
19 represents the decrease in the metal  
20 concentrations at DC2.

21           In the Stillwater River at Station SW7,  
22 water quality has also improved as a result of  
23 capping the McClaren Pit, and now meets aquatic  
24 standards during all low flow monitoring events.

25           On the fifth of page of the handout,

1 Figure 8 shows the trend similar to other  
2 drainages discussed above in copper concentration  
3 measured at the station over time. During high  
4 flow events, a considerable amount of suspended  
5 sediment is scoured and transported in surface  
6 water, and these suspended sediments likely  
7 account for high flow exceedences of aquatic life  
8 standards. This conclusion is supported by the  
9 observation that for the fourth year in a row,  
10 there were no exceedences of aquatic life  
11 standards at this station based on dissolved  
12 metals concentration.

13 No temporary water quality or narrative  
14 standards were exceeded in 2007 on Fisher Creek,  
15 Daisy Creek, or the Stillwater drainages. Since  
16 the second three year review cycle between 2005  
17 and 2007, there has been only one exceedence to  
18 the temporary standards. This was an exceedence  
19 to the zinc standard at Station CFY2 on lower  
20 Fisher Creek during September of 2006.

21 The rule adopting temporary standards in  
22 portions of Fisher Creek, Daisy Creek, and the  
23 Stillwater has allowed this project to proceed  
24 with cleanup actions on an established schedule  
25 that has resulted in significant water quality

1 improvements in the New World Mining District. We  
2 continue to believe that the reclamation  
3 activities completed and planned for the future  
4 will result in additional successive and  
5 incremental improvements in water quality for  
6 these drainages.

7           Studies of natural background surface  
8 water quality conditions and a regional study of  
9 back water groundwater quality have recently been  
10 initiated as a means of determining realistic,  
11 technically supportive and attainable long term  
12 water quality goals for the closure of the New  
13 World Mining District.

14           The USDA Forest Service is recommending  
15 that there be no adjustment in the temporary  
16 standards at this time, as these standards are a  
17 necessary and important tool in allowing our  
18 cleanup of historic mining waste in the New World  
19 District to proceed.

20           This completes my update to you. I  
21 thank you for your attention, and would be glad to  
22 answer any questions you may have.

23           CHAIRMAN RUSSELL: Any questions?

24           MS. SHROPSHIRE: It seems like the  
25 biggest improvements have been in the high flow



1 range, is that -- compared to the low flows?

2 MS. MARKS: Yes.

3 MS. SHROPSHIRE: And if I'm remembering  
4 from last time, that was -- the trends that we saw  
5 before that were still at low flows. You're not  
6 seeing much --

7 MS. MARKS: We're still seeing an  
8 improvement, and actually considerable  
9 improvement. It's just not as high as the  
10 improvement during high flow. And in particular,  
11 if you look at Figure 3 compared to Figure 6, the  
12 difference between low flow and high flow is more  
13 dramatic at the McClaren Pit, where we have the  
14 impermeable cover that allows for all of the snow  
15 melt to run off as clean water, and so you have --  
16 That is the major improvement at that site. But  
17 we still do see, from that capping of that area,  
18 we see an improvement during low flow as well.

19 MS. SHROPSHIRE: And I'm looking at the  
20 progress report graphs. But can you tell me what  
21 you guys are doing to address the groundwater?

22 MS. MARKS: At this point, I guess what  
23 I can say is that all of our reclamation has  
24 addressed groundwater in those specific areas  
25 through closures; and in many cases, the goal of

1 the reclamation is to restore it to where surface  
2 water is where it historically was, and  
3 groundwater is historically where it was, such as  
4 that impermeable cap to keep the surface water in  
5 the surface.

6           What we're doing to address groundwater  
7 from here forward is gathering our existing data,  
8 and looking at what background groundwater quality  
9 is throughout the entire district, and then  
10 presenting that information to the State, and  
11 working together to see what the strategy might be  
12 for the close-out of this project.

13           MS. SHROPSHIRE: Do you have background  
14 numbers yet?

15           MS. MARKS: We do. We have wells  
16 throughout the district with lots of data.

17           MS. SHROPSHIRE: How are they comparing  
18 to these numbers?

19           MS. MARKS: It's a very mineralized  
20 area, and so for instance, the iron and the copper  
21 values and some of the other metals are high  
22 throughout the district, even when they're not in  
23 conjunction with mining. But that's part of the  
24 data. The analysis of that data is really pretty  
25 preliminary, and we're pulling that together.

1 That's a lot of the work we're looking at doing  
2 with the State in the next year or two.

3 MS. SHROPSHIRE: When you look at the  
4 chronic and acute standards, these numbers are  
5 still significantly above that, and it seems to me  
6 that that is in large part due to the groundwater  
7 contribution that's contaminated.

8 And so do you see long term -- Just for  
9 sake of discussion, if the background in areas  
10 outside of the area are lower, and there seems to  
11 be a groundwater issue here, have you thought  
12 about how you guys might address that?

13 MS. MARKS: I guess how I can respond is  
14 to say that we're addressing the man caused mining  
15 impacts, and we do recognize that there are a lot  
16 of groundwater sources into these streams that are  
17 natural, that are high in metals, and we're not  
18 planning to address those sources. So we're  
19 focusing on the mining caused impacts.

20 MS. SHROPSHIRE: And that's what I mean.  
21 The ones that are mining impacted that are  
22 contaminating the groundwater, it seems to me that  
23 that's really where the problem still lies.

24 MS. MARKS: We could address all of  
25 those. We're attempting to address every mining

1       caused impact we can, and do as much improvement  
2       on it as we can. Even if we improved all of those  
3       impacts to drinking water standards, the streams  
4       would still not meet standards because of the  
5       natural sources from groundwater, just the  
6       mineralized area and the natural sources into the  
7       streams.

8               MS. SHROPSHIRE: I would be interested  
9       to see numbers in the future that reflect natural  
10      concentrations and how similar they are to this  
11      area. I think that would be helpful.

12              MS. MARKS: Again, we're pulling that  
13      information into a succinct report. All of our  
14      data is available on the website today. But we  
15      will be pulling that information together, and  
16      working with the groups within MDEQ to work  
17      through that data.

18              MS. SHROPSHIRE: Thank you.

19              MR. ROSSBACH: Just one quick question.  
20      What is your -- I see only references to 2009.  
21      What's the calendar schedule for the future work  
22      on this? How many years more are you going to be  
23      working out there?

24              MS. MARKS: The schedule for the project  
25      is that we have a certain amount of work scheduled

1 for this year, and then we have an outstanding  
2 analysis report that's called an engineering -- or  
3 evaluation cost analysis, and we're looking at  
4 remaining adits at the site that have discharge  
5 coming out of it that don't meet standard, and  
6 we're analyzing those sites to determine what  
7 future actions we need to do at these sites.

8           Once that decision is made and that work  
9 is completed, the majority of our reclamation work  
10 will be done. Additional work that we will do to  
11 finish up the project is road drainage, erosion  
12 control and road drainage, to make sure that we  
13 leave the entire area in a stable condition once  
14 we're finished with our work.

15           So this last decision on these draining  
16 adits, hopefully we'll work with the State, make  
17 those decisions this year, next winter, and then  
18 get those actions implemented. So I would say our  
19 construction up there will last another additional  
20 one or two years.

21           MR. ROSSBACH: That's all?

22           MS. MARKS: Yes. We have completed the  
23 majority of our work at the site.

24           MS. SHROPSHIRE: How deep are these  
25 wells, or how deep is the groundwater

1       contamination? Do you know in general? Is it --

2                   MS. MARKS: I'm going to turn and --

3       Allen Kirk with Tetratech is here. Can you answer  
4       the depth of the wells, the groundwater wells?

5                   MR. KIRK: So my name is Allen Kirk, and  
6       I'm a consultant with Tetratech. And we've been  
7       working on the New World Project for a number of  
8       years now.

9                   I would estimate that we have something  
10       like 50 or 60 monitoring wells throughout the  
11       District that have been monitored since -- some of  
12       them since 1989, and they range in depth. They're  
13       quite variable. A lot of them are completed in  
14       alluvial materials, and so unconsolidated  
15       materials; and a number of them completely in  
16       bedrock.

17                   The deepest bedrock wells are underneath  
18       the most highly mineralized part of the district,  
19       and they're as deep as 600 or 700 feet, and still  
20       showing pretty high levels of contamination. Most  
21       of the alluvial wells in the stream valleys, the  
22       water quality is quite variable, depending on how  
23       close you are and how proximal you are to  
24       groundwater discharges, or historically active  
25       mine sites.

1 MS. SHROPSHIRE: And the reason I'm  
2 asking is, as I alluded to before, it's difficult  
3 to clean up these sites under the ground once  
4 they're contaminated, and do you -- especially  
5 when they're that deep. And so I wasn't sure if  
6 there was any shallow contamination that could  
7 maybe be addressed, because capping something  
8 doesn't necessarily fix the groundwater.

9 MR. KIRK: No, it doesn't. I guess if I  
10 were to summarize the groundwater, the  
11 distribution of contaminated groundwater in the  
12 district, it's very localized with most metals  
13 except for iron and manganese, which seems to be  
14 distributed over a much, much larger area up there  
15 in the groundwater. But the areas that are  
16 contaminated with the base metals -- like copper,  
17 lead, zinc, and that sort of thing -- are very,  
18 very localized. We're talking about a couple  
19 square miles, three square miles, right over the  
20 core heart of the mineralized part of district.

21 As you move away from that, that  
22 mineralized core, the groundwater quality gets  
23 much better much quicker. But there is a regional  
24 halo of elevated iron and manganese.

25 MS. SHROPSHIRE: Thank you very much.

1                   CHAIRMAN RUSSELL: Thank you. Any other  
2 questions?

3                   MR. SKUNKCAP: Is that in the bedrock as  
4 you move away like that, and it gets better in  
5 the --

6                   MS. MARKS: Well, what it is is you have  
7 an ore deposit out there, so there is an ore  
8 deposit of high sulfide material rich in gold that  
9 was never mined, and that is the concentration  
10 with the wells in that area into the bedrock are  
11 the highly -- have a lot of the minerals.

12                  MR. SKUNKCAP: The alluvial is better?

13                  MS. MARKS: Then as you move away from  
14 that even in the bedrock, you have iron and the  
15 manganese everywhere.

16                  MR. SKUNKCAP: I didn't hear how deep  
17 the alluvial wells were.

18                  MS. MARKS: I would say they're 50 to  
19 150 feet.

20                  MR. SKUNKCAP: And the bedrock is --

21                  MS. MARKS: Five to seven hundred feet.

22                  MR. KIRK: And these are the deepest  
23 wells. Many of them are shallower than that.

24                  CHAIRMAN RUSSELL: Any other questions?

25                  (No response)



1                   CHAIRMAN RUSSELL: Thank you very much  
2 for coming up and addressing us. Is there anyone  
3 in the audience that would like to speak to this  
4 before we move on?

5                   (No response)

6                   CHAIRMAN RUSSELL: Seeing none, we will  
7 keep moving.

8                   MR. LIVERS: Mr. Chairman, on this item,  
9 I think the Board does need to take action just to  
10 reaffirm whether any changes need to be made, any  
11 modifications. So it's more than a briefing item.

12                  CHAIRMAN RUSSELL: Is there anyone on  
13 the Board that would like to make a motion?

14                  MR. ROSSBACH: I would move that the  
15 temporary standards be continued as currently in  
16 place.

17                  CHAIRMAN RUSSELL: Is there a second?

18                  MS. SHROPSHIRE: Second.

19                  CHAIRMAN RUSSELL: It's been moved and  
20 seconded. Is there further discussion?

21                  MS. SHROPSHIRE: Can we request that the  
22 additional information on the background  
23 concentrations, can we get an update on that  
24 sooner than three years?

25                  MR. LIVERS: Sure. Mr. Chairman, Ms.

1 Shropshire, yes, we can put a request in that when  
2 that information is available -- I think what I  
3 heard from the Forest Service is it's out there,  
4 but they're compiling it into a report that will  
5 stand alone, and have that information pulled  
6 together. So I think we could certainly provide  
7 that when it's available.

8 CHAIRMAN RUSSELL: Any further  
9 discussion?

10 (No response)

11 CHAIRMAN RUSSELL: All those in favor,  
12 signify by saying aye.

13 (Response)

14 CHAIRMAN RUSSELL: Opposed.

15 (No response)

16 CHAIRMAN RUSSELL: Thanks again. The  
17 next item on the agenda is a new contested case on  
18 appeal, and it's actually a Flathead County issue,  
19 Schellenger Construction and Tudvedt Family  
20 Partnership.

21 I have a question for the Department on  
22 this. Is that going to be all right?

23 MS. ORR: Sure.

24 CHAIRMAN RUSSELL: We have a new  
25 contested case on appeal, as I said. There was an

1 appeal received by the Board on April 8th  
2 regarding this matter, and before we move forward,  
3 I did have a question for Neal.

4 Neal, I read through this because it's  
5 in Flathead County -- not that I don't read  
6 through everything. When a Zoning Administrator  
7 removes a conditional use permit, why are they  
8 appealing this decision to the Department?

9 MR. HARRINGTON: Mr. Russell, members of  
10 the Board. Why is Schellenger Construction  
11 appealing it? Is that your question?

12 CHAIRMAN RUSSELL: So the Department,  
13 when you basically revoke their permit based on  
14 the fact they don't have a conditional use permit  
15 from another governing body.

16 MR. HARRINGTON: Well, I'm speculating  
17 or -- this may not be speculation -- but I think  
18 Schellenger Construction wants to be able to move  
19 all of the gravel that they have processed, that  
20 they have stockpiled at the mine site, and so they  
21 want to expedite being able to move that material.  
22 I assume that's their motive for appealing the  
23 letter that I wrote in March that indicated that  
24 they were not -- they could not operate without a  
25 conditional use permit from the County.

1           CHAIRMAN RUSSELL: I guess I'll ask my  
2 question again then. What position is the  
3 Department or the Board in to basically supersede  
4 a local government's decision not to allow it?

5           MS. ORR: Do you mind if I interrupt?

6           CHAIRMAN RUSSELL: That would be fine.

7           MS. ORR: Mr. Chairman, members of the  
8 Board, this case came in, and there are pending  
9 motions. There is a motion to dismiss from the  
10 Department, and an opposing brief, and there is a  
11 clear question about jurisdiction of the Board.

12           CHAIRMAN RUSSELL: I'll let you take  
13 care of that then. We'll appoint you. But it  
14 just seemed odd that we were asked to do something  
15 that is in direct opposition to the local  
16 governing body.

17           I would entertain a motion to appoint  
18 Katherine the permanent Hearings Examiner on this,  
19 and hopefully a decision will be coming rapidly.

20           MS. SHROPSHIRE: So moved.

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

23           MR. ROSSBACH: Second.

24           CHAIRMAN RUSSELL: It's been moved and  
25 seconded. Any further discussion?

1 (No response)

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

4 (Response)

5 CHAIRMAN RUSSELL: Opposed.

6 (No response)

7 CHAIRMAN RUSSELL: Now we will move on  
8 to the final action on contested cases, and we'll  
9 probably handle the first few when we get down to  
10 -- we'll handle the first one, and then I'm going  
11 to take a break.

12 The first one is the matter of the  
13 petition for review of hazardous waste final  
14 permit for Flying J, which seems to have been  
15 around for at least like ten or twenty years,  
16 hasn't it?

17 MS. ORR: Mr. Chairman, members of the  
18 Board, this case has been around for a very long  
19 time, and it involves a post closure hazardous  
20 waste permit. And as you recall, there was an  
21 issue about the jurisdiction of the Department in  
22 determining that a permit would be required for  
23 part of post closure action.

24 Other issues in that permit were also  
25 raised by the Petitioners, and the parties have

1 now reached resolution about those other issues,  
2 and have submitted a stipulation for dismissal  
3 with prejudice. We don't have the administrative  
4 order that I know of, but maybe -- If you have  
5 questions, that's fine, about that; but otherwise  
6 I think the case is in a good posture to be  
7 dismissed with prejudice.

8 CHAIRMAN RUSSELL: With that in mind,  
9 I do have an order, and I would entertain a motion  
10 to have the Chair sign this order for dismissal  
11 with prejudice.

12 MR. MIRES: So moved.

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

15 MR. ROSSBACH: Second.

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

18 (Response)

19 CHAIRMAN RUSSELL: That may be the  
20 longest case on the docket in the history of the  
21 BER. The next item, we are going to hear from the  
22 parties on this next one, so with that in mind,  
23 let's take a quick break.

24 (Recess taken)

25 (TRC matter heard)

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(Reconvened at 12:20 p.m.)

(Mr. Marble and Ms. Kaiser

not present)

CHAIRMAN RUSSELL: The next item -- I just -- this is not a warning at all, but we went through this, and I know Bill has some commitments back at home. We're going to try very hard to be out of here before 2:00, very, very hard, because I have some commitments.

MS. ORR: Joe, you're going to need Heidi and Don.

CHAIRMAN RUSSELL: Correct. We are going to have to. Can we get the last two?

MS. ORR: Oh, sure.

CHAIRMAN RUSSELL: Let's go ahead and take care of the last two since we do have a quorum sitting here. We'll take those somewhat out of order. Ken, you're still on the line, right?

MR. REICH: I'm still on the line patiently waiting.

CHAIRMAN RUSSELL: Item No. 4 in the matter of appeal of the City of Whitefish regarding MPDES permit. Katherine, do you want to

1 get us on board on this.

2 MS. ORR: Mr. Chairman, members of the  
3 Board, this is an MPDES permit that the parties  
4 have reached agreement on the terms of the permit  
5 and are appealing under Rule 41, which is asking  
6 the Board that it remove its jurisdiction from the  
7 matter, and the dismissal is without prejudice.

8 CHAIRMAN RUSSELL: Thank you. I have an  
9 order authorizing the Board Chair to dismiss this  
10 matter without prejudice. Do I have a motion?

11 MR. MIRES: So moved.

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

14 MR. ROSSBACH: Second.

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

17 (No response)

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

20 (Response)

21 CHAIRMAN RUSSELL: Opposed.

22 (No response)

23 CHAIRMAN RUSSELL: All right. The  
24 motion carries by quorum.

25 In the matter of violations of the



1 Montana public water supply laws of the City of  
2 Helena, BER 2008-05 PWS. Katherine.

3 MS. ORR: Mr. Chairman, members of the  
4 Board, this is a case that was very recently  
5 appealed I believe on the 13th of May, and it's a  
6 public water supply issue involving the City of  
7 Helena, and that was operation of an unapproved  
8 public water and wastewater main extension and  
9 lift station.

10 And the parties have reached an  
11 agreement to dismiss the appeal, and that's what I  
12 have for you.

13 CHAIRMAN RUSSELL: I have an order in  
14 front of me to dismiss this case with prejudice.  
15 Do I have a motion to authorize the Board Chair to  
16 sign?

17 MR. ROSSBACH: So moved.

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

20 MS. SHROPSHIRE: Second.

21 CHAIRMAN RUSSELL: Seconded by Robin.  
22 Any further discussion?

23 (No response)

24 CHAIRMAN RUSSELL: All those in favor,  
25 signify by saying aye.

1 (Response)

2 CHAIRMAN RUSSELL: Opposed.

3 (No response)

4 CHAIRMAN RUSSELL: Motion carries by  
5 quorum.

6 Don, are you on?

7 MS. BREWER: I told him to call back in.

8 CHAIRMAN RUSSELL: We'll take public  
9 comment also. If there is general public comment  
10 that does not involve -- first of all, does not  
11 involve the contested cases or anything that has  
12 been previously addressed on the agenda.  
13 Anything?

14 (No response)

15 CHAIRMAN RUSSELL: I don't see any  
16 general public out there. Don, do you have  
17 anything to you want to say?

18 MR. ALLEN: Not today, Mr. Chairman.  
19 Thank you.

20 CHAIRMAN RUSSELL: We're going to have  
21 to wait.

22 (Mr. Marble present)

23 MR. MARBLE: My problem is I'm in a  
24 different time zone.

25 (Recessed at 12:15 p.m. for SME matter)

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

2 STATE OF MONTANA )

3 : SS.

4 COUNTY OF LEWIS &amp; 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 -42- pages contain a true  
13 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 \_\_\_\_\_, 2008.

18

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

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