

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
JULY 22, 2011)

TRANSCRIPT OF PROCEEDINGS

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
July 22, 2011
9:00 a.m.

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

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

LAURIE CRUTCHER, RPR
406-442-8262

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

3 * * * * *

4 CHAIRMAN RUSSELL: It is about 9:04, and
5 I will call this regular meeting of the BER to
6 order. Tom, I'll turn it over to you.

7 MR. LIVERS: All right. Thank you, Mr.
8 Chairman, members of the Board. For those in the
9 audience who don't remember, I'm Tom Livers, I'm
10 the Deputy Director of the Department of
11 Environmental Quality. Let me do a quick roll
12 call. Mr. Anderson.

13 MR. ANDERSON: Present.

14 MR. LIVERS: Mr. Mires.

15 MR. MIRES: Present.

16 MR. LIVERS: Mayor Whalen.

17 MR. WHALEN: Present.

18 MR. LIVERS: Ms. Shropshire.

19 MS. SHROPSHIRE: Here.

20 MR. LIVERS: And Ms. Kaiser.

21 MS. KAISER: I'm here.

22 MR. LIVERS: And Chairman Russell.

23 CHAIRMAN RUSSELL: Present.

24 MR. LIVERS: Thank you. With that, Mr.
25 Chairman, if you'd like to go ahead and walk us

1 through the agenda, that would be great.

2 CHAIRMAN RUSSELL: The first item on the
3 agenda is the review and approval of the minutes
4 of the May 13, 2011 regular meeting. Any comments
5 before we take action?

6 (No response)

7 CHAIRMAN RUSSELL: So hearing none, I
8 would entertain a motion to approve the minutes of
9 the May 13, 2011 meeting.

10 MR. MIRES: So moved.

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

13 MS. KAISER: Second. This is Heidi.

14 CHAIRMAN RUSSELL: Is there any further
15 discussion?

16 (No response)

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

19 (Response)

20 CHAIRMAN RUSSELL: Opposed.

21 (No response)

22 CHAIRMAN RUSSELL: Motion carries
23 unanimously. The next item on the agenda is those
24 contested cases assigned solely to Katherine Orr.

25 MS. ORR: Good morning, everybody. Can

1 you all hear me? I've been very busy this last
2 interim. As you can see, there are sort of an
3 even mixture almost of cases set for hearing,
4 cases in which summary judgment motions have been
5 filed, and decisions are due.

6 We did have a contested case hearing on
7 April 21st involving MATL and Ronald and Debbie
8 Laubach, and that decision is going to come out
9 fairly shortly.

10 And there was a decision in the Maurer
11 Farms denying the motions for summary judgment,
12 and so the next step on that will be setting a
13 hearing. That's Item II(A)(2)(d).

14 But basically we're moving right along
15 on these cases, and as you can see, we've got
16 hearings set in September, October, and December.

17 CHAIRMAN RUSSELL: Any questions for
18 Katherine?

19 (No response)

20 CHAIRMAN RUSSELL: Thank you. The next
21 item on the agenda is general Board
22 correspondence. Tom.

23 MR. LIVERS: Okay, Mr. Chairman. Thank
24 you for that. We have Tom Ring of our
25 Environmental Management Bureau to present

1 information, briefing information on that.

2 MR. RING: Good morning, Mr. Chairman.
3 My name is Tom Ring, and I'm with the Facility
4 Siting Program in the Environmental Management
5 Bureau.

6 You received a copy in the mail, and
7 through the email, of the executive summary of
8 what's referred to as the 12-D report, and
9 evidently there was very little context for you to
10 understand what was going on there, so I hope to
11 provide a little background and clarification.

12 Colstrip Generating Units 1 through 4
13 are situated just east of the town of Colstrip in
14 Rosebud County. The Board of Natural Resources
15 and Conservation approved a certificate of
16 environmental compatibility and public need for
17 Colstrip Units 3 and 4 under the Major Facility
18 Siting Act of 1976. Unit 3 has been operating
19 since 1983. Unit 4 went on line in 1986.

20 Throughout the Colstrip 3 and 4
21 permitting process and design process, many people
22 raised concerns over seepage control from the
23 effluent holding pond, and possible degradation of
24 water quality that could result from a leaking
25 pond. The effluent holding pond is used to

1 dispose of bottom ash, fly ash, and scrubber waste
2 from the generating plants.

3 If you look at Figure 1 that was emailed
4 to you this morning, it gives you an idea where
5 the plants are relative to the effluent holding
6 pond, and you'll note in the figure that there are
7 also a number of monitoring wells. These are
8 operated by PPL, and I'll be speaking both of PPL
9 monitoring wells and monitoring wells covered by
10 the 12-D report which are downstream.

11 PPL's wells kind of end and align on the
12 east side of that figure, and further to the east,
13 it's private land owned by other ranchers. And
14 the 12-D report looks at private land in the Cow
15 Creek, South Fork Cow Creek, and Pony Creek
16 drainages.

17 At the fly ash pond, they receive fly
18 ash and scrubber wastes that are transported by a
19 pipeline and a slurry. In the pond, the solids
20 settle from the slurry in the upper cells and,
21 quote unquote, "clear water" has been collected at
22 the lowest cell, the clear well, and returned for
23 the plant for reuse. The cycle goes around and
24 around.

25 In more recent years, PPL has installed

1 a paste system that removes much of the free water
2 from the ash, holds it in the line cell, and then
3 recycles it back to the plant. In the ash
4 disposal process, water used in the slurry
5 dissolves minerals in the ash and scrubber waste.
6 Dissolved minerals are further concentrated by
7 evaporation.

8 The Board of Natural Resources and
9 Conservation made a number of findings and legal
10 conclusions when it issued the certificate
11 regarding seepage. Conclusion 12-D states as
12 follows: "The sludge pond or ponds shall be
13 completely sealed. Conventional means such as a
14 compaction and bentonite application do not seal
15 the ponds. As indicated by monitoring wells, the
16 applicants shall install and operate, and in
17 extreme measures even up to complete sealing by a
18 plastic membrane shall be taken.

19 At the time the Board made the findings,
20 this finding, they made a number of other findings
21 that anticipated some seepage.

22 In subsequent Court litigation, the
23 Court determined that the clear meaning of 12-D
24 taken in the context of the Board's findings was
25 that some leakage is expected, and the pond may

1 leak in small amounts, but if leakage is detected
2 by the monitoring wells, the owner would have to
3 resort to more stringent measures, including the
4 liner, and they also had to recover the leaking
5 water and pump it back up to the ponds.

6 In 1984, there was some additional
7 follow-up work to resolve another lawsuit that
8 resulted in the 12-D stipulation. Under the 12-D
9 stipulation, the monitoring described in the
10 stipulation satisfies the monitoring requirements
11 of the certificate in part. In general, this
12 monitoring under the 12-D stipulation is annually
13 conducted along the Cow Creek drainage on land
14 downstream of Colstrip Units 3 and 4, as well as
15 the Pony Creek drainage further north.

16 If monitoring along Cow Creek does not
17 show an abrupt increase in specific electrical
18 conductivity or boron derived from bedrock strata
19 underlying the alluvium as measured by any of a
20 series of monitoring wells between the property
21 line and the Stinking Spring, Montana Power -- now
22 PPL Montana -- agreed to manage the groundwater
23 flow in the Cow Creek alluvial system.

24 If monitoring were to show an abrupt
25 increase, Montana Power agreed to intercept the

1 bad quality water at the Stinking Spring or
2 another point, or an adequate intersection system
3 could be constructed. PPL Montana assumed these
4 responsibilities when the certificate was
5 transferred to PPL from Montana Power.

6 A series of monitoring wells continue to
7 be operated by PPL Montana near the effluent
8 holding pond -- you see those on Figure 1 -- and
9 then the second figure shows the monitoring system
10 required in the 12-D stipulation.

11 Portions of the PPL monitoring system in
12 the Cow and South Cow Creek drainage have detected
13 seepage from the effluent holding pond.

14 Additional monitoring wells are operated in the
15 tributaries to Cow Creek affected by past spills
16 from the pipelines between effluent holding pond
17 and the plants, and we've had a couple of spills
18 from the pipeline as well.

19 Detection of leakage in these PPL
20 monitoring wells necessitated construction and
21 operation of a series of intersection wells and
22 trenches near the effluent holding pond upstream
23 of the property line. Based on PPL's 2010
24 monitoring report, these interception measures
25 have been able to capture most seepage, and

1 prevent it from reaching monitoring sites just
2 above the property line on the south fork of Cow
3 Creek.

4 At one of the PPL monitoring wells near
5 the property line on Cow Creek, there has been a
6 very, very slight, gradual but steady increase in
7 dissolved constituents from about 2000, but an
8 abrupt increase has not been detected in the
9 monitoring wells on private land between the
10 property lines and Stinking Spring.

11 In order to implement the monitoring
12 portion of the 12-D stipulation, a contractor was
13 chosen by one of the litigants, Genie Land
14 Company, the landowners downstream, and approved
15 by all of the 12-D signatories. Batelle Northwest
16 Labs is the contractor, and it in turn subcontracts
17 with Reclamation Research Group, a spin-off of the
18 reclamation unit down at Montana State University,
19 to collect samples from springs, wells, and
20 surface water sites on the Genie Land Company
21 property.

22 Samples this year were analyzed by
23 General Engineering Labs. Batelle analyzes the
24 results and prepares the 12-D report each year.
25 From the specific electrical conductivity and

1 boron results contained in Batelle's 2010 report,
2 the Department concludes that there are currently
3 not abrupt increase in electrical conductivity or
4 boron in wells derived from bedrock underlying the
5 alluvium between the property line and the
6 Stinking Spring.

7 While there is no need for additional
8 interception, an additional interception system
9 near the Stinking Spring based on the 2010
10 monitoring, we have been working with PPL Montana
11 to have them conduct additional investigations
12 again this year to identify and capture the
13 effluent holding pond water that has been detected
14 near the property line in the Cow Creek drainage,
15 and we will continue to watch this area, and work
16 with PPL in the future.

17 I hope that gives you a very brief
18 summary of what happened many years ago and the
19 monitoring that continues to this day, and the
20 Department continues to watch this area carefully
21 and work with PPL to try to prevent water from
22 moving off their property.

23 CHAIRMAN RUSSELL: Thanks, Tom. I don't
24 know where this can go. This is certainly
25 something that would have been really nice for you

1 to be able to point to a map and help guide us
2 along, but thanks for your dissertation.

3 MR. RING: One other note. The Stinking
4 Spring on the second figure is indicated as GSP2,
5 which is a ways downstream on the main Cow Creek
6 drainage.

7 CHAIRMAN RUSSELL: Thanks. Questions
8 for Tom from the Board?

9 MR. WHALEN: Mr. Chairman, this is Joe.
10 Tom, I'm assuming that there are levies that are
11 surrounding the holding ponds above Cow Creek; is
12 that right?

13 MR. RING: In the Cow Creek drainage,
14 the pond straddles the divide between Cow Creek
15 and the south fork of Cow Creek. Around that,
16 they damned a small tributary stream. There is a
17 main dam on that small tributary to Cow Creek,
18 creating a basin to receive the ash. There was a
19 low lying ridge as well along the east side, and
20 they created a saddle dam there.

21 Around the whole perimeter, there is a
22 slurry cut-off wall made of concrete that goes
23 down to some relatively impermeable layers. It
24 was an attempt to contain seepage when the pond
25 was initially built.

1 MR. WHALEN: Have there been any
2 incidents of topping of that wall in significant
3 rain events in the past that you're aware of?

4 MR. RING: Not directly from rain
5 events, but we have had two fairly large leaks
6 from the pond. One appeared to be where the
7 slurry cut-off wall intersects the bottom of the
8 saddle dam. There was a fair amount of leakage
9 occurring when water levels in the cell nearest
10 that were brought up for the first time.

11 Since then the water levels were drained
12 down, and the paste plant went into place. The
13 paste itself is relatively impermeable, and that
14 section of the wall was coated with paste in the
15 last couple of years.

16 There was another event. I can't tell
17 you -- I don't think anybody knows if it was over
18 topping or a fault in maybe one of the joints in
19 the concrete panels to the south of the effluent
20 holding pond. The spring emerged south of the
21 railroad tracks there, and that's why you see all
22 of the interception systems along the south fork
23 of Cow Creek.

24 MR. WHALEN: So there would be -- my
25 final question. The opinion of the Department is

1 that the current location of those monitoring
2 wells would account for any environmental damage
3 that would occur in the event of a topping as well
4 as just normal drainage; is that correct?

5 MR. RING: I'm not quite sure how to
6 answer that. The initial monitoring system, I
7 guess in my opinion, was a little bit sparse; and
8 given the geology of the area, we've got some
9 partial berms creating clinker deposits, and
10 occasionally over the last ten years we've seen a
11 few surprises where we didn't expect water to go.

12 When leakage is detected, the Department
13 has directed PPL or their predecessor to find the
14 edge of the leakage, and begin recovery
15 operations.

16 MR. WHALEN: Thank you, sir. Thank you,
17 Mr. Chairman.

18 CHAIRMAN RUSSELL: Hence those all those
19 recovery wells.

20 MR. RING: Yes, and it wouldn't surprise
21 me if we'll see a few more go in this year.

22 CHAIRMAN RUSSELL: When you look at
23 those maps, you can almost be overwhelmed. Are
24 every recovery well monitored just like the
25 monitoring wells are?

1 MR. RING: Most all of them are, sir.

2 CHAIRMAN RUSSELL: I guess when you're
3 on site, it doesn't look nearly as cumbersome.

4 MR. RING: It's a large -- We're only
5 showing you a fraction of the monitoring wells.
6 There is another ash disposal north of the town
7 site as well.

8 CHAIRMAN RUSSELL: Just from the map,
9 those ponds must be extremely large in acres.

10 MR. RING: I'm going to say, off the top
11 my head, about 300. I could get you an exact
12 number.

13 CHAIRMAN RUSSELL: That's all right. I
14 was just overwhelmed with looking at the map. Any
15 other questions for Tom and Tom?

16 (No response)

17 CHAIRMAN RUSSELL: Thank you very much
18 for the briefing.

19 All right. The next item on the agenda
20 is Action Item III(A)(1), which is in the matter
21 of the amendment of 17.38.101 to correct reference
22 error and create a new system type for the purpose
23 of engineering review and fee collection. I could
24 continue to read, but I'm not going to. Tom.

25 MR. LIVERS: You bet. Mr. Chairman,

1 members of the Board, to present today, we have
2 the always dapper Mr. Gene Pizzini, one of the
3 three neck ties in the room.

4 MR. PIZZINI: Good morning, Chairman
5 Russell, members of the Board. For the record, my
6 name is Gene Pizzini. I'm the rules manager for
7 the Public Water Supply Section of Montana DEQ.

8 At its March 25, 2011 Board hearing, the
9 Board initiated rulemaking to amend administrative
10 the rules of Montana dealing with regulation of
11 public water supplies by creating a new definition
12 and line item fee for purposes of engineering
13 review, updating and clarifying the water hauler
14 rules, and correcting a clerical error related to
15 the deviation.

16 In addition, the Board requested
17 clarification on whether the correct pronunciation
18 of the word potable was potable or potabile, and I
19 responded that correct pronunciation was potabile.
20 I wish to note for the record I've researched this
21 question, and have been unable to locate a
22 reference that gives the option of pronouncing the
23 term potable as potabile. For reference, the term
24 potabile means suitable to drink, and comes from
25 the Latin "poter" meaning "to drink."

1 On May 11, 2011, the Board held a public
2 hearing regarding the proposed amendments. A
3 notice of the public hearing was sent to the
4 owners and operators of all public water supply
5 systems in the Department's data base, all county
6 sanitarians, and all engineering consulting firms
7 and owners and developers that had submitted plans
8 and specifications for Department review within
9 the last three years. Four comments were received
10 through the comment period.

11 The proposed amendment to ARM 17.38.101
12 proposes to add a new definition and associated
13 line item fee for rural distribution systems. The
14 proposed amendment is intended to recover
15 commensurate costs associated with conducting
16 engineering reviews.

17 One comment was received regarding this
18 proposed amendment. The commenter suggested the
19 proposed definition be expanded from one service
20 connection per mile to fewer than four service
21 connections per mile. The Department agrees, and
22 has proposed language to incorporate this comment.

23 The proposed amendments to 17.38.502
24 were intended to clarify the water hauler
25 definition. The Board received two comments

1 associated with the proposed amendment. The first
2 comment asked for clarification regarding whether
3 only haulers hauling to a public system are water
4 haulers for purposes of these rules. The
5 Department agrees that the proposed language
6 incorrectly limited the definition of water
7 hauler, and proposes language to correct that
8 issue.

9 The second comment questioned whether
10 the definition intended to only cover haulers that
11 were hauling to cisterns or other reservoirs.
12 Although this was existing language, the
13 Department agrees that this language is in
14 conflict with the statutory definition of a public
15 water supply, and has proposed language to correct
16 this conflict.

17 The proposed amendments to 17.38.513
18 were intended to clarify the requirement for
19 chemical treatment and monitoring of hauled water.
20 The Board received one comment regarding the
21 record retention requirement for chlorine residual
22 monitoring. For further clarification, the
23 Department proposes to add language clarifying the
24 record retention requirements.

25 These proposed amendments do not add any

1 significant requirements to the regulated public,
2 and in fact reduce those requirements in some
3 cases, and removes potential areas of confusion
4 that lead to compliance.

5 Therefore, the Department recommends
6 adoption of the proposed amendments set forth in
7 the notice of public hearing on proposed
8 amendments and as amended in the notice of
9 amendments. Thank you.

10 CHAIRMAN RUSSELL: Thanks, Gene. Thanks
11 for clarification on potable versus potable.

12 MR. PIZZINI: I had to do that.

13 CHAIRMAN RUSSELL: For the record, I do
14 not have a tie on today.

15 I do have a question as we try to filter
16 through all these semantic and pronunciations. Is
17 ultraviolet one or two words?

18 MR. LIVERS: Mr. Chairman, this is Tom.
19 I've seen it as one word. I think the real
20 question whether "anal retentive" is hyphenated.

21 CHAIRMAN RUSSELL: I think it's one
22 word. Just as a point, in DEQ terms, is
23 groundwater one word or two words?

24 MR. LIVERS: I think, Mr. Chairman --
25 this is Tom Livers. I think we tend to use it as

1 one word, but interestingly it's abbreviated as
2 GW.

3 CHAIRMAN RUSSELL: In the schedule it is
4 ultraviolet, two words, so is groundwater. But
5 it's a little late to get involved in the minutia
6 of that type of activity.

7 With all that said, are there any
8 questions the Board has for the Department?

9 (No response)

10 CHAIRMAN RUSSELL: Judging from the
11 silence, I'm guessing that is a no. With that
12 said, though, I would entertain a motion to adopt
13 the rule as amended, as Gene has mentioned; the
14 presiding officer's report, House Bill 521 and
15 311, the comments and the responses to comments.
16 Is there a motion?

17 MR. ANDERSON: I'll move.

18 CHAIRMAN RUSSELL: That's Larry. Is
19 there a second?

20 MS. KAISER: Second.

21 CHAIRMAN RUSSELL: It's been seconded by
22 Heidi. Is there any further discussion?

23 MR. LIVERS: Mr. Chairman, although --

24 CHAIRMAN RUSSELL: Don't even say
25 another word. Is there anyone on line or in the

1 room at the DEQ that wants to make a comment on
2 this matter?

3 (No response)

4 MR. LIVERS: No one here in the room at
5 DEQ, and I'm not aware of anyone on the line.

6 CHAIRMAN RUSSELL: Thanks, Tom. Any
7 further discussion by the Board?

8 (No response)

9 CHAIRMAN RUSSELL: Hearing none, I'll
10 call for the question. All those in favor,
11 signify by saying aye.

12 (Response)

13 CHAIRMAN RUSSELL: Opposed.

14 (No response)

15 CHAIRMAN RUSSELL: Motion carried
16 unanimously. Thanks, Gene.

17 The next item on the agenda is in the
18 matter of amendments to ARM 17.36.922, and ARM
19 17.36.924 on variance appeals.

20 MR. LIVERS: Mr. Chairman, Jim Madden is
21 here to present this.

22 MR. MADDEN: Good morning, Mr. Chairman,
23 members of the Board. I'm not wearing a neck tie.

24 This is the amendment to the Board's
25 minimum standard rules that are issued for the

1 benefit of counties when they permit septic
2 systems. Pursuant to the authority of the Water
3 Quality Act, the Board is directed to set minimum
4 standards for counties, and also to set criteria
5 for reviewing variances from minimum standards.

6 At its March meeting, the Board
7 initiated rulemaking to amend the variance
8 criteria portion of these minimum standards. This
9 was based on a legal determination that the
10 variance criteria that the Board promulgates are
11 stand alone, that is, counties cannot add to them.
12 The current set of rules contemplated that
13 counties could add to the variance criteria.

14 We subsequently determined that was
15 contrary to the statute. The intent of the
16 rulemaking was to add additional variance criteria
17 to make a complete set in the State rules, and
18 that set then is required to be used by counties
19 and by the Department when it reviews on appeal a
20 request for variance decision made by local
21 counties.

22 The rulemaking was initiated in March,
23 and went to a public hearing. We had three
24 commenters. They're all county health
25 departments. The Gallatin County and Lewis &

1 Clark County comments simply said, "We support
2 these rules," and Missoula County said the same
3 thing. They had a couple of questions for
4 clarification, and a couple of suggestions for
5 adding additional criteria.

6 Our proposed response to comments -- I
7 won't go through it -- indicates what the requests
8 for clarification were, and we declined to adopt
9 the clarifications. We're basically recommending
10 that the Board adopt the rules as proposed,
11 together with the House Bill 521 analysis and
12 takings analysis, and I'm available for questions.

13 CHAIRMAN RUSSELL: Questions for the
14 Department?

15 (No response)

16 CHAIRMAN RUSSELL: I just have an over
17 arching comment, and I think we've discussed this
18 in the past on different things, different types
19 when rules at the Department come into effect.

20 When local health departments don't --
21 when this rule becomes -- I'm not trying to be
22 over presumptuous -- but when this rule is
23 adopted, there has never been a deadline for local
24 health departments to go in and amend their
25 regulations in the past, and I don't believe there

1 is one here. I don't think you can actually write
2 a rule to require that.

3 Is it just logical, when you made your
4 amendments, that you'll add this, you'll use this
5 variance criteria at that point?

6 MR. MADDEN: Mr. Chairman, I'm not sure
7 I understand the question. I recognize the
8 situation where the counties don't necessarily
9 adopt updates to the minimum standards rules, and
10 there is no mechanism to do that in a timely way.

11 CHAIRMAN RUSSELL: That's part of what
12 -- I think you just answered most of my question.
13 Let's say Flathead County has a variance, and we
14 apply the variance criteria that's in our
15 regulations now. When a variance gets to you, the
16 Department, you're going to apply these variance
17 criteria?

18 MR. MADDEN: That's correct. We're by
19 statute required to use the State Board's variance
20 criteria when we review a local variance decision.

21 CHAIRMAN RUSSELL: So there is a little
22 bit of conflict, but certainly we know that when
23 it does hit the Department, what you're going to
24 use for variance criteria.

25 MR. MADDEN: Right. That should be

1 clear.

2 CHAIRMAN RUSSELL: That was just a point
3 I wanted to make.

4 MR. ANDERSON: This is Larry Anderson.
5 I'm wondering what the reasoning of the Department
6 was with respect to the Missoula County's
7 proposals.

8 MR. MADDEN: Mr. Anderson, and Chairman
9 Russell, the Missoula County approach in our
10 comment response document -- I'm looking for it so
11 you can see them --

12 Comment No. 3 is from Missoula. They
13 requested we insert a clause requiring special
14 circumstances before a variance would be granted,
15 and our response was we already in substance had
16 that, but the proposed criteria require that the
17 variance be necessary to address extraordinary
18 conditions, and we thought "extraordinary
19 condition" was close to enough to "special
20 circumstances," that you didn't need Missoula's
21 criteria.

22 Their other request was comment No. 4.
23 They wanted a stipulation that the variance could
24 not be the result of an illegal action on the part
25 of the Applicant, and our response was to decline

1 to put that in there. We were not trying to send
2 a message that illegal actions are okay. We're
3 trying to allow local boards the flexibility to
4 grant a variance, even though there may be some
5 illegal action.

6 The example that we used in our response
7 to comments was confusion about the flood plain,
8 where the applicant had constructed something in
9 the flood plain either on erroneous information
10 from the flood plain office, or a
11 misunderstanding; and the applicant then comes
12 with this illegal construction to the health board
13 looking for a variance to install some kind of a
14 septic system. And we wanted to leave the health
15 board the flexibility to grant the variance, and
16 not necessarily be tied to denial automatically
17 because of illegal action.

18 I guess another example on that case
19 would be a situation where the applicant for the
20 variance has already built the system, the sewage
21 system, that needs a variance, has already been
22 constructed without a variance, so it's an illegal
23 system, so the applicant comes to the board to ask
24 for forgiveness instead of permission, and there
25 may be situations where the board may want to

1 grant forgiveness in those situations.

2 CHAIRMAN RUSSELL: Jim, you know how
3 many variances. I've told you. We'll do half a
4 dozen variances a year in Flathead County, and I
5 think your rationale for excluding what Missoula
6 County wanted is very appropriate, because
7 oftentimes they'll build based on a permit we've
8 issued, and then they'll have some construction
9 standard that they couldn't meet, and they will
10 come back; and someone might construe that as an
11 illegal act.

12 So I think it's really appropriate that
13 you didn't include that, although the first thing
14 they do -- that's part of our variance, the
15 special circumstances issue is one of our six
16 criteria for variance granting. But we can live
17 with that.

18 MR. ANDERSON: This is Larry Anderson.
19 What about Comment 5?

20 MR. MADDEN: This is from Missoula
21 County again. This is their long stated legal
22 position that they believe they do have the
23 authority to write variance regulations, variance
24 criteria that are more stringent or that are in
25 addition to the State criteria.

1 They don't agree with our original legal
2 interpretation that the local boards are required
3 to use the State Board variance criteria and only
4 those. So in their comments, they restated their
5 position that they think they should be allowed to
6 have additional variance criteria to those of the
7 State Board, and they objected to our deleting the
8 provision in the current rules that -- well, it
9 used to authorize local boards to have additional
10 variance criteria. We think --

11 CHAIRMAN RUSSELL: Don't you have to
12 have some public health benefit to have more
13 restrictive standards? It would be hard to apply
14 that to a variance process.

15 MR. MADDEN: That's a question, I know.
16 If counties are adopting rules more stringent than
17 the State rules, they have to go through a showing
18 sometimes of justifying the increase in
19 stringencies. I'm not sure whether that applies
20 to variance criteria since they're not substantive
21 environmental standards.

22 CHAIRMAN RUSSELL: If it's not a
23 standard, how could you do that?

24 MR. MADDEN: But to be clear, the
25 counties do have authority under the Water Quality

1 Act and other acts to adopt substantive standards
2 for sewage that are more stringent than the
3 Board's minimum standards, and that's clear; but
4 what they don't have is authority to write
5 additional variance criteria.

6 Basically the Legislature wanted the
7 State Board to write the minimum standards, and
8 they wanted the State to be in control of
9 variances from the minimum standards. So they
10 don't want counties writing criteria that would
11 allow variances from minimum standards except the
12 State's criteria.

13 So there is confusion about that, and
14 that only recently in the last year or so did the
15 Department realize the distinction was there
16 between the county's authority to write more
17 stringent standards for substantive standards, but
18 not for variance criteria.

19 MR. ANDERSON: Thank you very much.

20 MR. WHALEN: Mr. Chairman, I also was
21 very interested in the comments submitted by the
22 Missoula City-County Health Department, and the
23 Department's take on those comments or responses,
24 to have the Department -- Just in terms of going
25 forward in general principle, my question has to

1 do with the fact that these comments originated
2 out of Missoula, but more specifically, they
3 originated out of Missoula City-County Health
4 Department.

5 I can understand the Department's
6 position and its response with respect to county
7 health departments. However, the City of Missoula
8 operates under self-governing charter powers as
9 opposed to general governing powers, which does
10 provide them the ability to adopt standards and
11 ordinances that are more stringent than what the
12 State allows.

13 And so just as a general philosophy or a
14 legal stand on the part of the Department, when
15 you have a city-county board such as this is, and
16 you have one portion of that board, namely the
17 county, operating under general governing power,
18 and another portion of the board that is operating
19 under self-governing power, which gives the City
20 of Missoula much more flexibility in terms of
21 standards that it adopts and the ordinances it
22 continues to pass.

23 Has the Attorney General looked at that
24 relationship, and come down as to how it would
25 apply to these issues of variances?

1 MR. MADDEN: Mr. Chairman, to my
2 knowledge, no, that hasn't been looked at by the
3 State Attorney General. The self-governing powers
4 of the city have not been cited by the city,
5 either as a basis for their being able to be more
6 stringent than the state.

7 So it's a question that I haven't looked
8 at, and I don't think the Attorney General has
9 either, and I don't know enough about the
10 self-governing powers to even start to speculate
11 what the answer might be.

12 CHAIRMAN RUSSELL: And I do agree with
13 Joe about home rule, and Missoula is a home rule
14 city -- but most of the septic system activity is
15 outside of the jurisdictional boundary of the
16 city. So from a practical standpoint, it wouldn't
17 come up very often. Very seldom will you find a
18 septic system being installed in western Montana
19 within the city limits because the city is just
20 not going to allow it.

21 MR. WHALEN: That's a good point, Joe.
22 It should also be acknowledged that the city has
23 no control over the health department other than
24 the appointment of its members, so that may kind
25 of factor in. But this is an interesting issue,

1 and maybe the issue isn't hot enough to bring to
2 head before the Attorney General. I just found
3 the whole situation here to be of interest. Thank
4 you.

5 CHAIRMAN RUSSELL: Any further questions
6 for the Department?

7 (No response)

8 CHAIRMAN RUSSELL: Hearing none, I would
9 entertain a motion to adopt the regulation, and
10 the presiding officer's report, analysis of House
11 Bill 521 and 311 -- using House Bill 521 and 311,
12 how many years ago was taking and stringency put
13 into place? Fourteen years ago now?

14 MR. NORTH: 1995.

15 CHAIRMAN RUSSELL: It's nice to use
16 those -- the public comments and the Department's
17 responses to comments. Do I have a motion?

18 MR. WHALEN: Mr. Chairman, so moved.

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

21 MR. MIRES: I'll second.

22 CHAIRMAN RUSSELL: It has been moved and
23 seconded. Further comments by the Board?

24 (No response)

25 CHAIRMAN RUSSELL: Hearing none, all

1 those in favor, signify by saying aye.

2 MR. LIVERS: Mr. Chairman.

3 CHAIRMAN RUSSELL: Even though you told
4 me there was no public, I still have to get it on
5 the record.

6 MR. LIVERS: Afraid so. Thank you.

7 CHAIRMAN RUSSELL: Is there anyone of
8 the public that wishes to comment on this matter
9 before the Board takes action?

10 (No response)

11 CHAIRMAN RUSSELL: No one? All right.
12 With that in mind, all those in favor, signify by
13 saying aye.

14 (Response)

15 CHAIRMAN RUSSELL: Opposed.

16 (No response)

17 CHAIRMAN RUSSELL: Motion carries
18 unanimously.

19 MR. LIVERS: If there is interest, our
20 Chief Legal Counsel did indicate he did have some
21 additional information on the self-governing
22 question.

23 CHAIRMAN RUSSELL: Oh, well, that would
24 be Mr. North.

25 MR. NORTH: Mr. Chairman, members of the

1 Board, John North, Chief Legal Counsel for the
2 Department.

3 Yes. What I would have to add, first of
4 all, shouldn't be construed as a definitive final
5 opinion on the question that Mr. Whalen raised,
6 but I will add that my understanding of the
7 difference between home rule counties and local
8 governments and non-home rule is that the non-home
9 rule have to have a statute that somehow or
10 another authorizes their particular actions in a
11 particular area, whereas home rule inherently has
12 that authority, but can be limited by the
13 Legislature.

14 And I believe that the statute here that
15 talks about the State criteria having to be --
16 excuse me -- the local criteria having to be
17 identical to the State criteria would be a statute
18 that could serve as a limitation on home rule
19 powers.

20 CHAIRMAN RUSSELL: Good point, John.
21 All right. We are to the point of our meeting
22 that we are to discuss final action on contested
23 cases. Turn this over to Katherine.

24 MS. ORR: Mr. Chairman, members of the
25 Board. The first matter is in the matter of the

1 appeal and request for hearing by Holcim,
2 Incorporated regarding DEQ's notice of final
3 decision for MPDES Permit Number -- and there is a
4 number.

5 This involved a challenge to an MPDES
6 discharge permit. It was for discharge from a
7 wastewater treatment facility in Gallatin County
8 to the Missouri River. The appeal was filed on
9 July 20, 2010, appealing the total nitrogen
10 effluent limit in the permit renewal, and the
11 parties have reached resolution, and are seeking
12 dismissal under 41(a).

13 CHAIRMAN RUSSELL: Thank you. Any
14 questions for Katherine?

15 (No response)

16 CHAIRMAN RUSSELL: Hearing none, I have
17 an order granting notice of dismissal for Case No.
18 BER 2010-13-WQ, and I would entertain a motion to
19 authorize the Board Chair to sign.

20 MR. MIRES: So moved.

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

23 MR. ANDERSON: Second.

24 CHAIRMAN RUSSELL: Seconded by Larry.
25 Any further discussion?

1 (No response)

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

4 (Response)

5 CHAIRMAN RUSSELL: Opposed.

6 (No response)

7 CHAIRMAN RUSSELL: Motion carries
8 unanimously. Okay. The next item on the agenda.

9 MS. ORR: The next item is in the matter
10 of violations of the Montana Public Water Supply
11 Laws by Bellecreek, LLC, at Belle Creek Dental --
12 this is in Butte -- and a notice of violation and
13 administrative compliance and penalty order was
14 issued on November 24th of 2010.

15 This dental office was deemed to be a
16 supplier of water and a transient non-community
17 public water supply system, and the violations
18 alleged were failure to monitor for total coliform
19 bacteria, and failure to report the results, and
20 failure to give public notice of the results; and
21 the initial penalty requested was \$768, and the
22 parties have reached an agreement, and wish the
23 Board to adopt their motion to dismiss under Rule
24 41(a). It looks like all but \$256 of the penalty
25 were suspended.

1 CHAIRMAN RUSSELL: All right. Thanks,
2 Katherine. I don't know if I've ever seen this
3 before, but I don't think I've ever seen an AOC
4 interlined and underlined provided to the Board,
5 corrected for some reason. Maybe I don't look at
6 them very closely. All right.

7 I do have an order of dismissal on the
8 matter of water supply laws by Bellecreek, LLC,
9 Case No. BER 2010-20-WS. I would entertain a
10 motion to authorize the Board Chair to sign that
11 order.

12 MR. ANDERSON: So moved.

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

15 MS. SHROPSHIRE: Second.

16 CHAIRMAN RUSSELL: It's been seconded by
17 Robin. Further discussion to Katherine?

18 (No response)

19 CHAIRMAN RUSSELL: Katherine.

20 MS. ORR: The next item --

21 CHAIRMAN RUSSELL: I haven't actually
22 called for the question yet. All those in favor,
23 signify by saying aye.

24 (Response)

25 CHAIRMAN RUSSELL: Opposed.

1 (No response)

2 CHAIRMAN RUSSELL: Motion carries.

3 Katherine.

4 MS. ORR: The next item three is in the
5 matter of violations of the Montana Strip and
6 Underground Mine Reclamation Act by Signal Peak
7 Energy, LLC, at Bull Mountain Mine No. 1, Roundup,
8 Musselshell County, BER 2010-19-SM.

9 This was a case involving a violation of
10 82-4-23, which requires in part that top soil must
11 be removed in a separate layer, and afterward
12 returned as the top layer after the operation has
13 been backfilled and upgraded. And the penalty
14 sought were \$3,000, and they have been now reduced
15 to \$2,400.

16 And there is a kind of a joint NOV and
17 AOC, Administrative Order on Consent, that has
18 been drafted for Items 3 and 4, but the portion
19 that you're interested in for the purposes of
20 three is the portion of the AOC that addresses the
21 penalties for \$2,400.

22 CHAIRMAN RUSSELL: All right, and with
23 that in mind, I do have a dismissal order for Case
24 No. BER-2010-19-SM. I would entertain a motion to
25 authorize the Board Chair to sign.

1 MR. MIRES: So moved.

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

4 MR. WHALEN: I'll second.

5 CHAIRMAN RUSSELL: It's been seconded by
6 Joe. Further discussion?

7 MS. KAISER: This is Heidi.

8 CHAIRMAN RUSSELL: You want to recuse
9 yourself?

10 MS. KAISER: I do from this item, from
11 this item, and four.

12 CHAIRMAN RUSSELL: Duly noted. Any
13 other comments or questions?

14 (No response)

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

17 (Response)

18 CHAIRMAN RUSSELL: Opposed.

19 (No response)

20 CHAIRMAN RUSSELL: Motion carries. Five
21 votes yea. Okay, Katherine.

22 MS. ORR: The last one here. This is in
23 the matter of violations of the Montana Strip and
24 Underground Mine Reclamation Act by Signal Peak,
25 Roundup, Bull Mountain Mine.

1 The violation here that was alleged in
2 the NOV issued on September 22, 2010 was a
3 violation of Montana Code Annotated 82-4-231,
4 involving a failure to achieve 90 percent
5 compaction of maximum dry density coal processing
6 waste material, and failure to have the coal
7 processing waste structure inspected by a
8 qualified licensed professional engineer, failure
9 to submit in a timely fashion certification that
10 the sedimentation pond was properly constructed.

11 The penalty originally assessed was
12 \$12,350, and I think the parties reached an
13 agreement whereby Signal Peak would pay \$10,800.
14 And that's also in the AOC before the Board.

15 CHAIRMAN RUSSELL: And being dismissed
16 pursuant to Rule 41(a).

17 MS. ORR: Yes.

18 CHAIRMAN RUSSELL: I have a dismissal
19 order for Case No. BER 2010-17, and would
20 entertain a motion to authorize the Board Chair to
21 sign.

22 MR. WHALEN: I would so move, with the
23 commendation to the Hearing Examiner for her work
24 on this issue.

25 CHAIRMAN RUSSELL: Thanks. That's nice

1 that you pass that on. Is there a second?

2 MR. MIRES: Second.

3 CHAIRMAN RUSSELL: It's been moved and
4 seconded. Further discussion to Katherine or the
5 Department, with caution?

6 (No response)

7 MS. ORR: No discussion.

8 CHAIRMAN RUSSELL: So hearing none, all
9 those in favor, signify by saying aye.

10 (Response)

11 CHAIRMAN RUSSELL: Opposed.

12 (No response)

13 CHAIRMAN RUSSELL: Motion carries.

14 The next item on the agenda are new
15 contested cases. Katherine.

16 MS. ORR: Mr. Chairman, members of the
17 Board. The first item is in the matter of
18 violations of the Water Quality Act by Circle B,
19 LLC, at Circle B Feed Yard, Hysham, Treasure
20 County.

21 This is a case involving failure to
22 comply with permit conditions, for example,
23 discharge to State waters outside of the
24 production area, and exceedence of effluent
25 limitation for nitrogen. The penalty sought is

1 \$8,400. And the parties have already submitted a
2 stipulation to dismiss, but I think that it's
3 still necessary to appoint a Hearing Officer, and
4 then the stipulation for dismissal will be
5 presented at the meeting on September 23rd.

6 CHAIRMAN RUSSELL: Thanks, Katherine.

7 Do you have any questions for Katherine?

8 (No response)

9 CHAIRMAN RUSSELL: I would entertain a
10 motion to assign Katherine the permanent Hearing
11 Examiner or officer on this matter.

12 MS. KAISER: So moved.

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

15 MR. ANDERSON: Second.

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

18 (No response)

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

21 (Response)

22 CHAIRMAN RUSSELL: Opposed.

23 (No response)

24 CHAIRMAN RUSSELL: Motion carries. Just
25 for the record, Heidi is back.

1 The next item is appeal and request for
2 hearing by the City of Helena.

3 MS. ORR: Mr. Chairman, members of the
4 Board, you can see this is captioned "In the
5 Matter of the Appeal and Request for Hearing by
6 the City of Helena regarding DEQ's Notice of Final
7 Decision for Montana Pollutant Discharge
8 Elimination System," and then there is a permit
9 number.

10 This appeal was filed on June 16th, and
11 there has been a first prehearing order issued. I
12 can't tell you too much about objections to the
13 domestic wastewater treatment permit that's been
14 issued because that isn't in the file yet, but
15 basically it's a challenge by the City of Helena
16 to the final decision on that MPDES permit.

17 CHAIRMAN RUSSELL: All right. Any
18 questions for Katherine?

19 (No response)

20 CHAIRMAN RUSSELL: I guess a general
21 question to the Department. Do they see many of
22 these coming down the pike? I know that's a
23 loaded question.

24 MR. LIVERS: This is Tom. I'm not sure,
25 Mr. Chairman. I don't think it's going to be an

1 isolated instance. I don't have a good feel yet
2 for just how widespread this is going to be.

3 CHAIRMAN RUSSELL: I just remember back
4 to the storm water stuff, and we just seemed to
5 have a barrage of them as these permits came up.

6 MR. LIVERS: Mr. Chairman, there has
7 been a lot more discussion here than I'm aware of
8 in other municipalities.

9 CHAIRMAN RUSSELL: Okay. It probably
10 wasn't fair to ask you that at this point, but I
11 did anyway.

12 Comments or questions by the Board
13 before we take any action on this?

14 MS. KAISER: I will recuse myself from
15 taking action on this matter also.

16 CHAIRMAN RUSSELL: Okay. Any other
17 comments or questions?

18 (No response)

19 CHAIRMAN RUSSELL: Hearing none, I would
20 entertain a motion to assign this matter to
21 Katherine as the permanent Hearings Officer.

22 MR. MIRES: So moved.

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

25 MS. SHROPSHIRE: Second. This is Robin.

1 CHAIRMAN RUSSELL: Any further
2 discussion?

3 (No response)

4 CHAIRMAN RUSSELL: Hearing none, all
5 those in favor, signify by saying aye.

6 (Response)

7 CHAIRMAN RUSSELL: Opposed.

8 (No response)

9 CHAIRMAN RUSSELL: Motion carries
10 unanimously minus Heidi as a voter.

11 Last one. In the matter of the
12 violation of Public Water Supply laws by Olson's
13 Lolo Hot Springs, Missoula County.

14 MS. ORR: Mr. Chairman, members of the
15 Board, Lolo Hot Springs is a supplier of water,
16 and they're subject to the surface water treatment
17 rule, and the requirement to provide filtration
18 treatment, to find and approve new source, and to
19 correct the system's construction issues or meet
20 filtration avoidance criteria.

21 And the NOV that was issued on May 31st,
22 2011 seeks to have Lolo Hot Springs submit a
23 compliance plan and schedule with an
24 identification of the corrective action to comply
25 with the surface water treatment rule.

1 CHAIRMAN RUSSELL: Questions for
2 Katherine?

3 (No response)

4 CHAIRMAN RUSSELL: Katherine, are you
5 okay with all these getting assigned?

6 MS. ORR: So far, so good.

7 CHAIRMAN RUSSELL: This Helena one could
8 be big. It could be huge. But we'll see. So
9 far, so good. So we'll entertain a motion to
10 assign this to Katherine.

11 MR. MIRES: So moved.

12 CHAIRMAN RUSSELL: So moved by Larry.
13 Is there a second?

14 MR. ANDERSON: Seconded by Larry.

15 CHAIRMAN RUSSELL: So all those in
16 favor, signify by saying aye.

17 (Response)

18 CHAIRMAN RUSSELL: Opposed.

19 (No response)

20 CHAIRMAN RUSSELL: Motion carries
21 unanimously.

22 Is there anything else that we need to
23 do before I take general public comment, even
24 though there isn't any general public out there?

25 MR. LIVERS: Mr. Chairman, this is Tom.

1 I'm not aware of anything. And the only other
2 reminder is the next meeting will be September
3 23rd.

4 CHAIRMAN RUSSELL: And I'm guessing if
5 you have Outlook, that's already been scheduled
6 for you.

7 MR. LIVERS: Yes.

8 CHAIRMAN RUSSELL: All right. So I will
9 ask for general public comment because I need to
10 go on the record formally.

11 MR. LIVERS: None here in Helena, Mr.
12 Chairman.

13 CHAIRMAN RUSSELL: I don't see anyone
14 jumping through the phone. All right. With all
15 that said, I would entertain a motion to adjourn.

16 MR. WHALEN: So moved.

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

19 MS. KAISER: I'll second.

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

22 (Response)

23 CHAIRMAN RUSSELL: Opposed.

24 (No response)

25 CHAIRMAN RUSSELL: All right. Once

1 again, I commend the Department, and as Joe
2 mentioned, Katherine. Way to go. You've been at
3 this for a long time, and we really appreciate
4 your work.

5 MS. ORR: Thank you very much.

6 CHAIRMAN RUSSELL: Thanks, Tom, for
7 being the IC for the State down in Billings.

8 MR. LIVERS: You're welcome, Mr.
9 Chairman. Thank you.

10 CHAIRMAN RUSSELL: Everyone have a great
11 day and a weekend.

12 (The proceedings were concluded

13 at 10:05 a.m.)

14 * * * * *

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

STATE OF MONTANA)

: SS.

COUNTY OF LEWIS & CLARK)

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

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing - 48 - pages contain a true
record of the proceedings to the best of my
ability.

IN WITNESS WHEREOF, I have hereunto set my
hand and affixed my notarial seal
this day of , 2011.

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