

BEFORE THE MONTANA BOARD OF ENVIRONMENTAL REVIEW

BOARD MEETING)
July 27, 2007)
)

TRANSCRIPT OF PROCEEDINGS

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
July 27, 2007
9:11 a.m.

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

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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: Since we have a
6 quorum, we'll start this meeting. It's 9:11, and
7 I'll call this regular meeting of the Board of
8 Environmental Review to order. The first item on
9 the agenda is the review and approval of minutes
10 of the June 1, 2007 regular meeting. Any comments
11 on the minutes?

12 (No response)

13 CHAIRMAN RUSSELL: Do I have a motion to
14 approve?

15 MS. KAISER: So moved.

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

18 MR. ROSSBACH: Second.

19 CHAIRMAN RUSSELL: It's been seconded by
20 Bill. Any further discussion?

21 (No response)

22 CHAIRMAN RUSSELL: Seeing none, all
23 those in favor, signify by saying aye.

24 (Response)

25 CHAIRMAN RUSSELL: Opposed?

1 (No response)

2 CHAIRMAN RUSSELL: So the next item on
3 the agenda is the briefing items, contested case
4 updates, cases assigned to Hearing Officer
5 Katherine Orr.

6 MS. ORR: Good morning, Mr. Chairman,
7 members of the Board. What I thought I would do
8 is just go through any changes from what you've
9 been mailed.

10 On Item 1(d), which is the Roundup Power
11 Project case, I have issued an order saying that
12 exceptions could be filed by the parties by
13 September 12th, and I will probably issue an order
14 also saying that responses to those exceptions
15 will be due on September 18th.

16 In the Kountry Korner Enterprises, a
17 public water supply case, a new hearing schedule
18 is -- the parties are working on that.

19 Going to the next page on Item
20 II.A.1(h), the Marty and Cindy Puryer case will be
21 set for the middle of September when that will go
22 to hearing.

23 The Missoula Public County Works
24 Department Case, Item (n), the parties have
25 prepared a stipulation, and it was just a little

1 bit late to get it before this Board now.

2 And so most of those are percolating
3 along. Do you want me to go on to cases in
4 litigation?

5 CHAIRMAN RUSSELL: Please. That would
6 be great.

7 MS. ORR: We did an order. I don't know
8 if everyone has had a chance to read that. The
9 Judge did not grant the Board's motion to dismiss
10 because I guess she thought that there might be
11 some factual matters that would defeat a motion to
12 dismiss. And there is a briefing schedule that
13 she set out for the parties. The Petitioner has
14 to file their brief -- that's Flying J -- on
15 August 10, 2007; and the Respondents, the Board
16 and the Department, have until September 21 to
17 file their responsive briefs to that. So that's
18 happening as well.

19 CHAIRMAN RUSSELL: Katherine, I do have
20 a question. In this order denying the motion to
21 dismiss, there was a statement made, "Assertion
22 that the Board considered the testimony of the
23 Hearings Examiner who was functioning as an
24 advocate for MTDEQ"?

25 MS. ORR: I have thought about that in

1 my spare moments, and I happen to believe that
2 MAPA has a provision that is squarely on point,
3 that that was contemplated by the Legislature,
4 that the Hearing Examiner be consulted by the
5 Board. So the Judge will just have to decide
6 that.

7 CHAIRMAN RUSSELL: That's a pretty bold
8 statement.

9 MS. ORR: It is. I'd be glad to give
10 you that cite in MAPA, too.

11 CHAIRMAN RUSSELL: I think you need it
12 more than I do right now. But I still think it's
13 a pretty bold statement to be making, someone
14 following MAPA.

15 MS. ORR: So anyway, that's that. And
16 so you may want to proceed to the initiation of
17 rulemaking.

18 CHAIRMAN RUSSELL: All right. With that
19 in mind, we will move to action Item III(A)(1),
20 and that is a request from the Department to amend
21 ARM 17.38.101 and 106, Public Water Supply Rules.
22 Tom.

23 MR. LIVERS: Thanks, Mr. Chairman. Mr.
24 Pizzini will present for the Department.

25 MR. PIZZINI: Chairman Russell, members

1 of the Board, today the Department is requesting
2 to initiate rulemaking to adopt our engineering
3 review fee structure. The Legislature intends for
4 the Department to collect fees that are
5 commensurate with the cost of doing their
6 engineering reviews, and the legislative audits
7 have shown that we are not doing that.

8 In 2005, we made a fee change to try to
9 correct that, and it helped, but we are still not
10 recovering fees for various reasons commensurate
11 with our cost. So the Department is proposing
12 some changes to that. Included in those changes
13 are increases in line item fees, some new line
14 item fees; removal of the maximum hourly flat fee;
15 and for rereview of previously denied plans and
16 specifications.

17 The Department is also proposing to
18 adopt new expedited checklists for community wells
19 and non-community wells. These expedited
20 checklists will add some additional time to the
21 engineers doing the submission, but in reaction to
22 that -- I guess is the way to say it -- the
23 Department will guarantee a 15 day turn around on
24 those reviews, which will make them happy.

25 Other proposed amendments include

1 clarification of existing rules; receipt of final
2 clarification of definitions to conform with MCA
3 definitions; the deletion of a duplicate
4 reference; and housekeeping changes to conform
5 with formatting standards of the Secretary of
6 State.

7 If you have any questions, I will be
8 more than happy to try to answer them. The
9 Department recommends that you initiate
10 rulemaking, appoint a Hearing Officer, and conduct
11 a public hearing.

12 CHAIRMAN RUSSELL: Any questions for Mr.
13 Pizzini?

14 (No response)

15 CHAIRMAN RUSSELL: Thank you. Actually
16 I caught something last night. There were like
17 500 submittals.

18 MR. PIZZINI: 420, I believe.

19 CHAIRMAN RUSSELL: And you've got to
20 make up 150,000 annually, or is that biannually?

21 MR. PIZZINI: No. That was annual. The
22 shortage was annually, over those 420
23 applications. There was various reasons or --

24 MR. LIVERS: Mr. Chairman, I can add a
25 little bit, too. For years, I think in the early

1 1990s, the Board -- then the Board of Health --
2 had given direction that because of the number of
3 EPA requirements and mandates associated with
4 these rules, it was the Board's position that EPA
5 funds ought to cost share this, and that the
6 entire cost shouldn't be put on the fee payers.

7 And then over, I think it was about five
8 years ago, the Legislature initiated a pretty good
9 full cost push, full cost audit push. The law is
10 pretty clear here that the fees need to be
11 commensurate with the cost of doing business, so
12 we started at that point pretty radically phasing
13 out the EPA funding, and moving towards strictly a
14 fee based approach, so we made a big movement to
15 get there. I think this is kind of the second in
16 that series, and we didn't quite make it all on
17 the first push.

18 CHAIRMAN RUSSELL: And that's not much,
19 300 and change per submittal average.

20 MR. PIZZINI: The problem with making
21 those is you don't know exactly what type of
22 submission is going to come in, so they may be all
23 main extensions next year as opposed to large
24 subdivisions, but probably not.

25 CHAIRMAN RUSSELL: We'll keep you busy

1 in the Flathead.

2 MR. PIZZINI: Thank you.

3 CHAIRMAN RUSSELL: We appreciate the
4 reimbursement also. Do we have a motion to --

5 MR. MARBLE: I move we initiate
6 rulemaking.

7 CHAIRMAN RUSSELL: And appoint
8 Katherine. Katherine, are you okay to do this
9 one?

10 MS. ORR: Yes.

11 CHAIRMAN RUSSELL: And appoint.

12 MR. ROSSBACH: Second.

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

15 MR. LIVERS: Before the vote, Mr.
16 Chairman, you may want to see if there is anyone
17 in the public --

18 CHAIRMAN RUSSELL: Is there anyone from
19 the public that would like to speak to this
20 matter?

21 (No response)

22 CHAIRMAN RUSSELL: Seeing none, we'll
23 continue. All those in favor, signify by saying
24 aye.

25 (Response)

1 CHAIRMAN RUSSELL: Opposed.

2 (No response)

3 CHAIRMAN RUSSELL: Motion carries.

4 We'll move on with this.

5 The next matter is the matter of the
6 Amendment to 17.30.617 to designate the main stem
7 of the Gallatin River ORW. Tom, do you want to
8 kick this off?

9 MR. LIVERS: Mr. Chairman, basically we
10 know there are discussions underway, we've had
11 some requests to us, and we support that there be
12 a supplemental rulemaking to extend the comment
13 period. Bob, do you want to add anything to this?

14 MR. BUKANTIS: No.

15 MR. LIVERS: I think there are people
16 from the audience that would like to comment on
17 this.

18 CHAIRMAN RUSSELL: Since there probably
19 are people in the audience that would like to
20 comment on this --

21 MR. REGNERUS: Chairman Russell, members
22 of the Board, I'm Shawn Regnerus (phonetic). I'm
23 with American Wildlife, and we're the Petitioner
24 on this rulemaking, and basically to just give you
25 a little bit of background.

1 During the last six months since we
2 asked for the initial comment, essentially we've
3 made a significant amount of progress. This next
4 Tuesday, we're meeting. We have a working group
5 of about 19 members composed of people from the
6 Big Sky community. We're meeting on Tuesday to
7 actually look at bid proposals from different
8 engineering firms to conduct a technical report on
9 the feasibility of the project that we're
10 contemplating on this. It's going to cost us
11 about \$60,000. We've raised \$45,000 to date, and
12 we have commitments to raise the remaining
13 \$15,000.

14 So I'm pretty confident with the amount
15 of progress that we're making. I'd like it to be
16 a little bit quicker, but right now, it looks like
17 by the time this six month extension comes due, we
18 will have that technical report out, and we'll
19 have a lot better idea about what the actual
20 feasibility of the proposal is.

21 Basically in that technical report,
22 we're looking at how feasible it is going to be to
23 expand the Big Sky Water and Sewer District, so
24 that we can include a lot more of the area in the
25 centralized water and sewer treatment, and reduce

1 the number of individual septic tanks that are
2 actually contributing nutrients into the Gallatin.

3 And so I am confident in both the
4 progress that we're making on that technical
5 report, and then also more importantly on the
6 support we're building in the community to
7 actually implement that technical report when it's
8 completed. Thank you.

9 CHAIRMAN RUSSELL: Anyone else?

10 (No response)

11 CHAIRMAN RUSSELL: I just want to make a
12 comment. When this first started, I never thought
13 you'd get this far, and I applaud you for what
14 you've done. Department, you've done a great job
15 keeping this thing moving forward. I really
16 didn't think that this would ever have gotten this
17 far, and it looks like you are going to get this
18 designation, and I just think this is great. From
19 the public hearing, and prior to that in talking
20 with the Department, I'm just almost floored that
21 this thing has gotten to the point where it is.
22 So good job.

23 So what we need to do is we need to
24 actually make a motion to extend the comment
25 period on the proposed amendment to --

1 (Mr. Skunkcap enters)

2 CHAIRMAN RUSSELL: I didn't actually
3 find the comment date. Tom, do you know what it
4 is? John, do you know what it is?

5 MR. NORTH: January 4th.

6 CHAIRMAN RUSSELL: January 4th, 2008.
7 Do I have a motion to that extent?

8 MS. SHROPSHIRE: I move we extend the
9 date.

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

12 MS. KAISER: Second.

13 CHAIRMAN RUSSELL: It's been seconded by
14 Heidi. Any further discussion?

15 MR. MARBLE: There is two amendments on
16 the table, and we're just moving to extend the
17 comment period on those two amendments; is that
18 right? That's the way I'm reading this.

19 CHAIRMAN RUSSELL: There is --

20 MR. MARBLE: There is an amendment
21 designating the Gallatin, and another one to amend
22 about discharges to ground water.

23 CHAIRMAN RUSSELL: We're just extending
24 the comment period. That will actually be a rule
25 when this is all said and done.

1 MR. LIVERS: Those amendments were
2 proposed in the initial rulemaking.

3 CHAIRMAN RUSSELL: Right. All we're
4 doing is extending comment at this point. Any
5 other discussion or comments?

6 (No response)

7 CHAIRMAN RUSSELL: All those in favor,
8 signify by saying aye.

9 (Response)

10 CHAIRMAN RUSSELL: Opposed.

11 (No response)

12 CHAIRMAN RUSSELL: The next item on the
13 agenda is new contested cases. Katherine.

14 MS. ORR: Mr. Chairman, members of the
15 Board, there is quite a long list here, and so I
16 guess I recommend we go through each one of these
17 and --

18 CHAIRMAN RUSSELL: Take your time.

19 MS. ORR: --- see who you want to
20 appoint as Hearing Officer. The first one is Town
21 of Superior, it's an MPDES permit challenge. And
22 the parties have been asked to file a proposed
23 schedule, and I'm sure that's coming soon. And
24 it's going to be important for you to either
25 appoint me the Hearing Examiner or to decide to

1 hear it yourselves.

2 CHAIRMAN RUSSELL: Comments by the
3 Board? Bill.

4 MR. ROSSBACH: What's the time frame of
5 this then for a hearing? When would the hearing
6 be in this case?

7 MS. ORR: That hasn't been set.

8 MR. ROSSBACH: What is your expectation
9 in terms of how it's proceeding?

10 MS. ORR: I think they've been running
11 about six months out.

12 MR. ROSSBACH: Are there particular
13 factual discovery that's going to be going on in
14 this case, legal briefing? What is your
15 expectation of what's going to be required?

16 MS. ORR: It's hard to say.

17 MR. ROSSBACH: Who is Counsel for the --

18 MS. ORR: Let me take a look at the
19 file. I also put the Town of Superior -- they
20 don't have Counsel yet. They're authorized to
21 discharge from their wastewater treatment facility
22 to the Clark Fork River, and they say the basis
23 for their appeal is that their responses on the
24 draft permit were not fully considered, and that
25 the expense of compliance monitoring imposed in

1 the new permit, such as the mixing zone study,
2 cannot be scientifically justified. So it looks
3 like a monitoring challenge.

4 MR. ROSSBACH: Tom, do you have any
5 comments on this one, in terms of the
6 appropriateness of the Board or the Hearing
7 Examiner? Any thoughts on that?

8 MR. LIVERS: Mr. Chairman --

9 MS. SHROPSHIRE: At the last meeting,
10 didn't we discuss --

11 MR. ROSSBACH: We did.

12 CHAIRMAN RUSSELL: Maybe we should
13 probably pull this back to some order. There was
14 discussion at the last meeting that we should hear
15 it, because there was a lot of these MPDES permits
16 coming up, and that there might be a model if we
17 were to hear one. I think in discussions with
18 Tom, and I think email to you, that every one of
19 these are distinct, and that there would be very
20 little reason to use the Board in a model sense to
21 try to set some course of action into the future.

22 So since they're all distinct, we're
23 going to hear them on the merits of the case, or
24 we're going to assign them to our Hearings
25 Examiner and let Katherine bring us back the

1 record. So we just need to realize there is no
2 model that we can establish here.

3 MR. ROSSBACH: I understand that. I
4 guess what I'm interested is in terms of the
5 particular monitoring issue that's being raised in
6 this case. What is Tom's impression of this?

7 MR. LIVERS: Mr. Chairman, Mr. Rossbach,
8 if the interest of the Board is on monitoring and
9 the appropriateness of the monitoring plan,
10 Superior is one of two I think currently where
11 that's a particular issue. I think there is a new
12 one. And John, do you recall?

13 MR. NORTH: Exxon case.

14 MR. LIVERS: Exxon would be another
15 where monitoring is a salient issue in the case.
16 The parties are -- and this would be more
17 appropriate for Katherine to talk about. The
18 parties are continuing in the Superior case to at
19 least discuss settlement possibilities. But I
20 guess if the Board were to -- Again, I'd probably
21 ask you to defer to Counsel -- but if the Board
22 were particularly interested in the monitoring
23 aspects, the Superior case or the Exxon case are
24 two where those are relevant pieces.

25 CHAIRMAN RUSSELL: Anyone else?

1 MR. ROSSBACH: I guess what I would like
2 to -- Can we do something where we continue
3 Katherine to do the preliminaries, and still have
4 an opportunity to hear it later, or not?

5 CHAIRMAN RUSSELL: I think we can keep
6 Katherine as the interim.

7 MR. ROSSBACH: If it's six months before
8 -- and see how the issues unfold in this case.
9 That's kind of what I would like to do.

10 MS. ORR: My opinion about that, Mr.
11 Chairman, members of the Board, is the Board can
12 delegate the responsibility to me to hear a case
13 and can also withdraw that delegation. As a
14 matter of compliance with MAPA, I don't think it
15 is a good idea after the hearing has been held for
16 obvious reasons. So anytime up to that point, I
17 think you could do it. So we could have me handle
18 sort of the prehearing issues concerning this
19 case.

20 MR. ROSSBACH: We have another meeting
21 in between now and any final hearing on this, so
22 we can see whether there is a settlement, or
23 whether there is -- how the issues are -- maybe
24 you could report on how much of it is going to be
25 factually based versus legal based at our next

1 meeting as that case unfolds. I would like to
2 have Katherine continue doing the prehearing stuff
3 on the basis that she has, and report on it next
4 time whether --

5 CHAIRMAN RUSSELL: Because by process,
6 anything that comes before the Board, Katherine is
7 the interim Hearings Examiner without any action
8 by the Board. I think we take no action.

9 MR. ROSSBACH: That's what I'm saying.
10 We take no action.

11 CHAIRMAN RUSSELL: Because I wouldn't
12 want anyone to think that we're making a motion
13 today that says we're going to hear it and then
14 rescind that, or let's just let it ride.

15 MR. ROSSBACH: That's what I'm saying.
16 I'm comfortable with Katherine, and having her
17 report back on what the status of that is, and how
18 it looks like in terms of what kind of hearing
19 it's going to be.

20 CHAIRMAN RUSSELL: So moving on. It's a
21 little case.

22 MS. ORR: Items C(2) and C(3) are
23 companion cases, challenges to the SME permit.
24 And the parties have gotten together in both of
25 those cases, and proposed consolidation of at

1 least the prehearing matters, and you have on the
2 table here before you a proposed schedule. And
3 I'm understanding that the Board wants to hear
4 both of these cases.

5 CHAIRMAN RUSSELL: There is members of
6 the Board that would certainly like to.

7 MS. ORR: That's the first question.
8 And then the second one would be how you want to
9 handle your scheduling, if you resolve it that the
10 Board will handle it.

11 CHAIRMAN RUSSELL: Well, since we've
12 kind of done this before, we could have a little
13 discussion on if the Board wants to hear this
14 case. If there is any -- I would entertain a
15 motion to hear both of these cases hopefully as
16 consolidated.

17 MR. ROSSBACH: So moved.

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

20 MR. MARBLE: Second.

21 CHAIRMAN RUSSELL: Is there any further
22 discussion?

23 (No response)

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

1 (Response)

2 CHAIRMAN RUSSELL: The next thing we do
3 is we do have some issues around scheduling, and
4 the fact that anytime we hear a case -- and I know
5 we have actually taken action and voted on this --
6 but when we're not in meeting, Katherine does all
7 of our work, and during the hearing, she will also
8 rule on evidence and other matters that might come
9 up, and so those are things that Katherine would
10 do.

11 And John, do you recall? Did we take
12 action to appoint that -- I don't know even what
13 we called it in the Roundup case when we did this
14 before, that things that would happen outside of
15 the Board's meeting times, that Katherine has all
16 rights and responsibilities to carry those out,
17 and that you would actually be the rulings
18 examiner during the hearing. That just happens.

19 MR. NORTH: Mr. Chairman, John North,
20 Chief Legal Counsel for the Department. I don't
21 remember. We could go back and check.

22 CHAIRMAN RUSSELL: I don't think we have
23 to worry about it now because Katherine, you do
24 act for the Board during times when we don't meet,
25 so I think we're good to go at this point.

1 The other thing is that Bill has looked
2 at the schedule. It seems a little bit aggressive
3 if the Board is going to hear this. And so a
4 little discussion maybe by Bill about that
5 schedule.

6 MR. ROSSBACH: I guess my question to
7 Tom: Do we have any proposed meeting schedule for
8 2008 yet? We haven't set our meetings for 2008,
9 have we?

10 MR. LIVERS: No, we have not yet. We
11 would likely follow roughly the same schedule.

12 MR. ROSSBACH: End of January.

13 MR. LIVERS: End of January/early
14 February; late March/early April.

15 MR. ROSSBACH: Well, I guess I'm
16 interested in any representatives of the parties
17 telling me about experts and discovery, what is
18 anticipated taking place in this case. With the
19 kind of expert potential issues here, it seems
20 unrealistic as a lawyer myself to --

21 CHAIRMAN RUSSELL: Is SME represented
22 here?

23 MR. McCARTER: (Indicating)

24 CHAIRMAN RUSSELL: I just wanted to make
25 sure, if we're going to start discussing things,

1 that SME is here, because I know David is here.

2 MR. ROSSBACH: We're talking about all
3 written discovery already having been done,
4 according to this, or submitted.

5 CHAIRMAN RUSSELL: Hold on one more
6 second, Bill. Is MEIC and CCE represented also?

7 MS. DILLON: (indicating)

8 CHAIRMAN RUSSELL: I just want to make
9 sure everyone is at the table now.

10 MR. ROSSBACH: I knew Abigail is there.

11 MS. DILLON: I can address that, Mr.
12 Chairman, members of the Board.

13 CHAIRMAN RUSSELL: Are you all ready to
14 address that issue?

15 MR. RUSOFF: Sure.

16 MS. DILLON: Mr. Chairman, members of
17 the Board, Abigail Dillon. I'm representing MEIC
18 and CCE in this matter.

19 The parties had agreed on a fairly
20 aggressive discovery schedule because we believe
21 that the issues are quite cabined. Our position
22 is that the issues turn on legal determinations as
23 opposed to factual issues, although we do
24 anticipate continued discovery and witness --
25 presentation of witnesses.

1 Counsel from SME is here today, but they
2 represented to me they don't believe they'll call
3 more than two or three witnesses, and we are on
4 the same track. If that were to change, I'm sure
5 that we would represent to Ms. Orr or to the Board
6 that the schedule was -- that we would need to
7 extend it; but at this time, we believe we could
8 at least complete discovery on the time frame that
9 we had proposed, and we have submitted written
10 Interrogatories and Requests for Production to
11 each other, and responses are due on August 6th.

12 But of course, we would understand that
13 the Board is going to have to juggle to schedule a
14 hearing, and that, of course, we haven't tried to
15 schedule.

16 MR. ROSSBACH: When you say you're on
17 the same track, you mean that -- Are you having
18 two or three experts yourself?

19 MS. DILLON: Yes.

20 MR. ROSSBACH: Is that what you're
21 saying?

22 MS. DILLON: Yes.

23 MR. ROSSBACH: So we're looking at
24 possibly six experts probably from the two private
25 parties?

1 MS. DILLON: Possibly.

2 MR. ROSSBACH: And then how many
3 witnesses --

4 MS. DILLON: I believe I would have to
5 have Mr. Rusoff speak as to how many witnesses he
6 intends to call. But we do anticipate a least a
7 two day hearing.

8 MR. MARBLE: Where will this hearing be
9 held? I would like to see it in Great Falls.

10 CHAIRMAN RUSSELL: Likely it's either
11 going to be here or Great Falls. I think we could
12 have it either here or Great Falls. Remember,
13 though, this is not a rulemaking process. This is
14 a contested case. So to take it to Great Falls to
15 just have some free for all I'm not exactly sure
16 is a prudent thing to do, but --

17 MR. MARBLE: Except the public could at
18 least sit in on the matter, and they can hear for
19 themselves what's going on, hear the experts and
20 all that.

21 CHAIRMAN RUSSELL: That's fine. They've
22 been hearing the experts all along.

23 MR. ROSSBACH: Is a "free for all" a
24 proper legal term?

25 CHAIRMAN RUSSELL: I'm not sure. "Free

1 for all" could be a legal term. And that could go
2 on the record because I don't care. I've already
3 been to Great Falls in these matters.

4 Anyone else want to address the Board
5 regarding the schedule or anything else that's
6 pertinent to the case, since all the parties are
7 represented?

8 MR. McCARTER: Mr. Chairman, members of
9 the Board, I'm Mike McCarter, and I'm one of the
10 attorneys representing Southern Montana Electric.
11 And I agree with Ms. Dillon. I would guess we'd
12 probably end up with four experts, and it appears
13 that the parties are cooperating, and that we're
14 moving right along in the case, and I think we can
15 get it ready to go to hearing by the time frame
16 we've got set out in the order.

17 CHAIRMAN RUSSELL: Thank you. Any
18 questions?

19 MR. ROSSBACH: When you say four,
20 meaning two for you and two for them? Am I
21 correct?

22 MR. McCARTER: Mr. Chairman, Mr.
23 Rossbach, that's correct, although I don't know.
24 Again, the Department might have an expert. I
25 defer to Mr. Rusoff on that.

1 MR. ROSSBACH: And that's fine. Mr.
2 Rusoff, do you have any comment?

3 MR. RUSOFF: For the record, I'm David
4 Rusoff, attorney for the Montana Department of
5 Environmental Quality.

6 At this point, I would anticipate the
7 Department probably not calling any outside expert
8 witnesses. Of course, I consider all of our
9 employees to be experts. But within the meaning
10 of the Rules of Evidence, I don't think we would
11 present any expert testimony. I would anticipate
12 calling two or three Department employees,
13 depending upon what the issues are at that point.
14 And I concur with everything that Abigail and Mike
15 have said.

16 CHAIRMAN RUSSELL: Thanks, David.

17 MR. ROSSBACH: I guess since the parties
18 have agreed to this schedule, and we get to decide
19 when the hearing is, I think we should hold them
20 to the schedule, and force them to comply with the
21 deadlines they've agreed to, and then see if they
22 can in fact complete that; and then so that we'll
23 have plenty of time to look at briefs, and to look
24 at any deposition transcripts, or anything that's
25 submitted, exhibits, so that we have adequate time

1 to do that; and then consider scheduling something
2 maybe in January or something as a hearing date,
3 so that we have plenty of time to digest obviously
4 a lot of material.

5 CHAIRMAN RUSSELL: We'll shoot for the
6 two days that would have been our first regular
7 meeting in 2008.

8 MR. LIVERS: So Mr. Chairman, obviously
9 this schedule contemplates a hearing in December.
10 You want to move that to January? Okay.

11 MR. ROSSBACH: But that's our decision,
12 and I think if they've agreed to the rest of the
13 things, let's hold them to that, and then we can
14 decide when to hear it, where we make sure that we
15 have adequate preparations, and we have fully
16 prepared, to digest all of the materials that
17 clearly are going to be presented to us.

18 MR. LIVERS: So Mr. Chairman, with that
19 in mind, when we're laying out the schedule -- and
20 we may try to do it earlier. Typically we agree
21 on the schedule at the last meeting of the
22 calendar year. That may still be the case -- but
23 we'll certainly contemplate that first meeting in
24 2008, which is likely to come toward the end of
25 January, we'll plan on a day hearing in

1 conjunction with that. And just to accommodate
2 the Board's schedule, maybe we'll try to set that
3 up a little earlier this year, and possibly even
4 act on it at the next meeting.

5 MR. ROSSBACH: John and Tom, as you look
6 forward in terms of other deadlines that we have
7 to comply with in terms of rulemaking or other
8 things, is there anything that you know that is
9 going to be dropped on us as a must-do at that
10 January meeting? Is there anything coming up
11 where within the six month rules, or the 180 day
12 rules, or any of that, so we could keep our
13 agenda?

14 CHAIRMAN RUSSELL: I don't think we've
15 actually initiated anything of substance.

16 MR. ROSSBACH: Sometimes these guys know
17 about things that are coming down the line, and I
18 just want to make sure that we have a fairly low
19 key agenda otherwise, that we're not coming and
20 trying to do two big things at once in January.

21 Do you see anything coming down the line
22 that's going to be a problem with that?

23 MR. LIVERS: Mr. Chairman, Mr. Rossbach,
24 the only thing we're aware of at this point in
25 January is with the extension of the ORW

1 rulemaking. That is going to come due at that
2 time. It sounds like the parties aren't
3 anticipating another extension on that, based on
4 what we heard from Mr. Regnerus this morning. So
5 that would be one consideration. Other than that,
6 I think we can for the most part schedule
7 Department rulemakings, so that things don't hit
8 at the same time. I know the Chairman earlier was
9 promoting a lack of controversy of this meeting,
10 and so we're trying to get some things going
11 around again. But we can certainly work around
12 that.

13 CHAIRMAN RUSSELL: So we've already
14 taken all of the action we need on this, and just
15 kind of plan on that we'll be proceeding to a
16 early 2008 hearing. And it would be nice to keep
17 all of the other prehearing schedules somewhat
18 intact, because we don't want to push those back
19 any time at all, so we'll have more time to look
20 at the records.

21 UNKNOWN SPEAKER: We lost Larry.

22 CHAIRMAN RUSSELL: I'm guessing we could
23 probably put him back on.

24 (Mr. Mires present again by telephone)

25 CHAIRMAN RUSSELL: It must have been

1 your fault, Larry.

2 MR. MIRES: It must have been, or else
3 this place is like everything else down here.
4 They have everything timed.

5 MR. LIVERS: Do you want to recap
6 quickly for Larry?

7 CHAIRMAN RUSSELL: Larry, I don't know
8 when you cut out.

9 MR. MIRES: We were setting a date.

10 CHAIRMAN RUSSELL: Actually we're just
11 looking at possibly the first regular meeting of
12 the BER in 2008 in early February, late January.
13 All of the other prehearing schedule will most
14 likely remain the same.

15 MR. MIRES: Okay.

16 CHAIRMAN RUSSELL: And that takes care
17 of those. The next item on the agenda, I am going
18 to recuse myself. It's a matter of North Valley
19 Hospital and Swank Enterprises, but Swank is not
20 labeled. But I have a working relationship with
21 both entities, so Bill, would you mind taking
22 over.

23 MR. ROSSBACH: That is Item No. 4. Does
24 anybody have any comment on this? Katherine, do
25 you want to fill us in in terms of the questions

1 about scheduling and the issues.

2 MS. ORR: The issues are for the North
3 Valley Hospital case, there was a need for an
4 MPDES permit, there is a discharge of storm water
5 without a permit, and it went into the Whitefish
6 River. That's basically the main thrust of the
7 case.

8 MR. ROSSBACH: So is there any comment
9 on whether this is a matter that the Board would
10 like to hear, or that we would appoint Katherine
11 as a permanent Hearing Examiner?

12 MR. MARBLE: I move we appoint Katherine
13 as Hearings Examiner.

14 MS. KAISER: Second.

15 MR. ROSSBACH: It's been moved and
16 seconded. Any other further questions or
17 discussion on this matter?

18 (No response)

19 MR. ROSSBACH: Hearing none, I'll call
20 for a vote. All those in favor, signify by saying
21 aye.

22 (Response)

23 MR. ROSSBACH: Opposed.

24 (No response)

25 MR. ROSSBACH: Motion is carried, and

1 Katherine is appointed permanent Hearings
2 Examiner.

3 CHAIRMAN RUSSELL: Thanks, Bill. The
4 next matter is violations of the Montana Public
5 Water Supply Laws by Gallatin National Forest at
6 Soda Butte Campground. Katherine.

7 MS. ORR: Mr. Chairman, members of the
8 Board, this is actually a public water supply
9 case. And the notice of violation states that
10 there is a failure of the Soda Butte Campground
11 concession to sample for nitrate, and to give
12 notice of monitoring violations. Those are public
13 water supply action violations, and we're asking
14 for a penalty.

15 CHAIRMAN RUSSELL: Thanks. Who wrote
16 the public notice? Does anyone know who wrote the
17 public notice?

18 MS. ORR: The notice for --

19 CHAIRMAN RUSSELL: That was posted the
20 6th of June.

21 MS. ORR: Let me look that up for you.

22 CHAIRMAN RUSSELL: I'm hoping it's not
23 the Department, Frank. I was just going to tell
24 you "campground" doesn't have two O's together in
25 it.

1 MR. GESSAMAN: We did it right. The
2 Department provided the sample.

3 CHAIRMAN RUSSELL: They must not have
4 done very well on it. Any questions or comments
5 regarding this?

6 (No response)

7 CHAIRMAN RUSSELL: Hearing none, I would
8 seek a motion to appoint Katherine as permanent
9 Hearings Examiner on this.

10 MR. ROSSBACH: So moved.

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

13 MR. MIRES: Second.

14 CHAIRMAN RUSSELL: Seconded by Larry.
15 Further comments?

16 (No response)

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

19 (Response)

20 CHAIRMAN RUSSELL: Opposed.

21 (No response)

22 CHAIRMAN RUSSELL: Moving on, the next
23 matter is the violation of Montana public water
24 supply laws by Malsam Water Conditioning doing
25 business as Culligan of Great Falls. Do you have

1 that one next? Katherine.

2 MS. ORR: Mr. Chairman, members of the
3 Board, this is also a public water supply case,
4 and there was operation of a public water supply
5 prior to approval as a public water supply source,
6 and it's a penalty case.

7 CHAIRMAN RUSSELL: Any questions?

8 (No response)

9 CHAIRMAN RUSSELL: Seeing none, I'll
10 entertain a motion to appoint Katherine permanent
11 Hearings Examiner.

12 MR. ROSSBACH: So moved.

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

15 MR. SKUNKCAP: Second.

16 CHAIRMAN RUSSELL: Seconded by Gayle.
17 Any comments?

18 (No response)

19 CHAIRMAN RUSSELL: All those in favor,
20 signify by saying aye.

21 (Response)

22 CHAIRMAN RUSSELL: Opposed.

23 (No response)

24 CHAIRMAN RUSSELL: Moving on, in the
25 matter of violation of the Open Cut Mining Act by

1 Big Rock, LLC, at the Wheeler Gravel Pit, Missoula
2 County.

3 MS. ORR: Mr. Chairman, members of the
4 Board, this is a case involving several interests
5 that are kind of interrelated. Big Rock is one of
6 them. And there was mining outside of the
7 permitted area, and there is a small penalty
8 that's being sought for that.

9 CHAIRMAN RUSSELL: Any comments?

10 (No response)

11 CHAIRMAN RUSSELL: I'll entertain a
12 motion to appoint Katherine permanent Hearings
13 Examiner.

14 MR. MARBLE: So moved.

15 MS. KAISER: Second.

16 CHAIRMAN RUSSELL: It's been moved by
17 Don and seconded by Heidi. Any further comments?

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: The next matter is --
25 and certainly don't think of last week when they

1 posted their quarterly profits when we start to
2 discuss this matter -- but it's in the matter of
3 the appeal of Exxon Mobile regarding its final
4 MPDES permit. Katherine.

5 MS. ORR: Mr. Chairman, members of the
6 Board, I'm simplifying greatly here, but this is a
7 challenge to the discharge point and the
8 designation of an outfall as a discharge point,
9 and also monitoring requirements at the outfall.

10 CHAIRMAN RUSSELL: Does anyone want to
11 start this one off? There is no one representing
12 them out there.

13 MR. ROSSBACH: Is anyone representing
14 anyone in this matter here?

15 CHAIRMAN RUSSELL: Mr. Madden is
16 representing the Department.

17 MR. MADDEN: Well, I'm not Counsel on
18 this case actually.

19 MR. ROSSBACH: I'm sorry. I apologize.
20 Going through this, I don't recall exactly more
21 substantively what the monitoring issue was in
22 this case.

23 MS. ORR: There is a very succinct
24 description of the objections in the letter that
25 actually is in your packet, but it's written by

1 somebody from Holland and Hart, and also I should
2 add for the Board there is a dispute as to the
3 required turbidity limit, nephelometric turbidity
4 in Item 3 in that letter. It talks about the
5 monitoring point for effluents.

6 MR. ROSSBACH: When do you think this
7 one will be heard? What's your schedule? Did you
8 issue a scheduling order on this?

9 MS. ORR: Well, I asked for that to be
10 submitted, and they have until next Monday to
11 submit that.

12 MR. ROSSBACH: What would you be
13 anticipating would be -- is that scheduled only
14 for a hearing in six months?

15 MS. ORR: I would think if they can't
16 settle it.

17 MR. ROSSBACH: Let's sit on this one,
18 too. Let's let Katherine continue and see how it
19 plays out. My opinion about this one is we should
20 let Katherine continue on it, and see how it
21 evolves, like we did with the Superior one, and
22 see what kind of factual disputes there might be
23 arising out of this one that we might want to take
24 a look at at some point, since it doesn't look
25 like it's going to go to a hearing on this before

1 our next meeting.

2 MR. MARBLE: Second.

3 CHAIRMAN RUSSELL: We're just not going
4 to take any action.

5 MR. ROSSBACH: We'll just sit on that.

6 CHAIRMAN RUSSELL: All right, Katherine.
7 You've got your marching orders on that one.

8 The next matter is a violation of the
9 Open Cut Mining Act by John Schlecht doing
10 business as John Schlecht Excavating.

11 MS. ORR: And the violation in this case
12 is mining without a permit, and it's a penalty
13 case.

14 CHAIRMAN RUSSELL: All right. Motion to
15 appoint Katherine the permanent Hearings Examiner.

16 MS. KAISER: So moved.

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

19 MR. SKUNKCAP: Second.

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

22 (Response)

23 CHAIRMAN RUSSELL: Opposed.

24 (No response)

25 CHAIRMAN RUSSELL: The next matter is

1 the matter of violation of the Montana Public
2 Water Supply Laws by Broadway Flying J, Belgrade.

3 MS. ORR: Mr. Chairman, members of the
4 Board, this is, as you can see, a public water
5 supply case. In this case, there is a failure to
6 monitor total coliform bacteria, nitrates, and a
7 failure to provide public notice of the
8 violations.

9 CHAIRMAN RUSSELL: Any further comments
10 or questions of Katherine?

11 (No response)

12 CHAIRMAN RUSSELL: Seeing none, I'll
13 take a motion to appoint Katherine the permanent
14 Hearings Examiner.

15 MR. ROSSBACH: So moved.

16 CHAIRMAN RUSSELL: Is there a second?

17 MS. SHROPSHIRE: Second.

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

20 (Response)

21 CHAIRMAN RUSSELL: The next matter is
22 the Water Quality Act violations by Jack Mountain
23 Estates Subdivision, Jefferson County, BER 2007-15
24 WQ.

25 MS. ORR: This is a failure to use best

1 management practices, and that's about all I have
2 written down for my notes. I can look in the case
3 and see if there is more in the notice of
4 violation.

5 CHAIRMAN RUSSELL: Actually it looks
6 like another storm water discharge problem.

7 MS. ORR: Yes.

8 CHAIRMAN RUSSELL: It looks like a
9 pretty big storm water discharge problem based on
10 the fine. I'll entertain a motion to appoint
11 Katherine permanent Hearings Examiner.

12 MR. MIRES: So moved.

13 CHAIRMAN RUSSELL: It's been moved by
14 Larry. Second.

15 MR. SKUNKCAP: Second.

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

18 (Response)

19 CHAIRMAN RUSSELL: Opposed.

20 (No response)

21 CHAIRMAN RUSSELL: The last action item
22 on the agenda is the Westmoreland Resources case.
23 Katherine.

24 MS. ORR: Mr. Chairman, this is a case
25 that the Board reserved to itself, and you have in

1 your packet an Administrative Order on Consent and
2 a proposed order for dismissal, and you might want
3 to hear from the Department concerning the thought
4 process behind the Administrative Order on
5 Consent.

6 MR. LIVERS: Mr. Chairman, we'll turn it
7 over to our attorney on this matter, Ed Hayes.

8 MR. HAYES: Mr. Chairman, members of the
9 Board, for the record, I'm Ed Hayes representing
10 the Department in this matter.

11 The case involves specifically a line of
12 17 poles at the Western Energy mining site that
13 the Department determined to be out of compliance.
14 It initially came to the attention of the
15 Department early in the spring of 2006, and it was
16 placed as an action item on some of the inspection
17 reports, and discussions were held in terms of
18 determining whether it was actually a violation.

19 We determined, the program determined it
20 was a violation because the power poles did not
21 have adequate separation between energized
22 components on the power line. That was done, I
23 believe, some time in September when it was
24 determined it was actually in violation.

25 Within a month, Western Energy had

1 abated the specific power line by deenergizing it
2 and actually placing it underground. They then
3 hired an expert that was recommended to them by
4 the Fish & Wildlife Service, Richard Harness, and
5 he did an extensive survey of the remaining power
6 lines that Western Energy had control over on its
7 mine site, and reconfigured -- He prioritized the
8 poles that needed to be retrofitted or brought
9 into compliance with the suggested practices.

10 And by February of 2007, those poles
11 that were prioritized one and two were
12 retrofitted, and by retrofitting, there was a mix
13 of two components: One, anti-perching devices
14 were actually placed on the poles to prevent the
15 raptors from perching on them; and secondly, there
16 is a series of four or five different varieties of
17 insulating the energized components on the power
18 poles to protect them from raptors coming in
19 contact with them, each referring to the specific
20 component on the power line.

21 And then there is a commitment for
22 Priority 3 poles by Western Energy to retrofit,
23 and those were the ones located in less favorable
24 habitat for raptors, and where the power lines
25 were conformed such that they didn't present a

1 high or medium risk to raptors. And Western
2 Energy is committed to retrofitting those, most of
3 those within five years.

4 Initially I believe the Department
5 issued a notice of violation for two days of
6 violation, which total in excess of \$6,000.
7 Subsequent to issuing that notice of violation, we
8 got additional information in regard to the risk
9 presented by this powerline that specifically was
10 out of compliance; and on that, we reduced in the
11 context of settlement the gravity of the
12 violation.

13 Also subsequent to issuance of the
14 notice of violation, we became aware of the
15 efforts that Western Energy made in addressing the
16 problem, and I should add they also addressed some
17 power poles that weren't even covered by the
18 suggested practices. And based on that additional
19 information, then credit was given to Western
20 Energy for good faith and for amounts voluntarily
21 expended; and the amount of the penalty was
22 reduced, keeping the two days violation, for a
23 total of \$4,000.

24 And so with the abatement of the
25 situation, and a penalty that the Enforcement

1 Division believes is sufficient for a deterrent
2 effect, the case was settled, and the
3 Administrative Order on Consent executed.

4 CHAIRMAN RUSSELL: Thanks, Ed. Any
5 comments?

6 MR. MARBLE: I have some questions.
7 Were there any dead birds found underneath this
8 wire?

9 MR. HAYES: Extensive surveys were done,
10 and there have been no dead raptors found either
11 subsequent to that, to the beginning of the
12 enforcement. The short answer is no.

13 MR. SKUNKCAP: Mr. Chairman, I have a
14 question. On the anti-perching deals, docking
15 devices that you had, did you guys have spacers on
16 those lines, too, or visuals, too, for the raptors
17 to see upon landing or taking off? You mentioned
18 the docking devices, anti-docking devices on the
19 poles itself; but on the lines, did you guys have
20 the spacers, or the buoy visuals for the raptors
21 when they're coming down or taking off? Because a
22 lot of swans coming down, there is not enough time
23 to go back up, and then they end up falling down
24 and breaking their necks.

25 MR. HAYES: You're talking about in the

1 lines between the poles?

2 MR. SKUNKCAP: Right.

3 MR. HAYES: That never was raised as an
4 issue, so I don't believe those are present. I
5 don't know the requirements regarding those under
6 the Suggested Practices, but those were not
7 included in the retrofitting.

8 MR. MARBLE: Well, up where I live on
9 the prairie, this is a big problem. These power
10 lines aren't appropriate, and if an eagle is
11 killed, then they come out and fix it, but they
12 really should be upgrading them all.

13 I think we need to send a stronger
14 message to the people that put up these power
15 lines. We shouldn't have to wait until there is
16 those violations. They should be out fixing these
17 things. I think the penalty is too small by many
18 times. I think Westmoreland is a big company, and
19 I think they should get whacked with a pretty good
20 penalty on this, and give a message to all these
21 people that they've got to pay more attention to
22 these lines.

23 There is a lot of lines that in my
24 opinion aren't properly grounded. And like Gayle
25 says, that have these things on them, and the

1 spacing isn't right, and the ground, the ground
2 wires aren't insulated, so that if they hit the
3 ground and the hot wire, they're dead.

4 And so I just feel like the penalty is
5 way too small.

6 MS. KAISER: Aren't there wildlife
7 surveys done prior to installation of any new
8 lines? I can't speak for existing lines, ones
9 that have been there.

10 CHAIRMAN RUSSELL: No.

11 MS. KAISER: Maybe if there is suitable
12 habitat generally --

13 CHAIRMAN RUSSELL: This is a long
14 process, siting lines.

15 MR. HAYES: I will say in looking
16 through the permit files, there have been surveys
17 of the Western Energy mine site with a fairly
18 detailed inventory of the raptors that live in
19 that area, and none actually nested within the
20 mine site, but there were some I think red tailed
21 hawks nearby.

22 MR. SKUNKCAP: I didn't see the
23 environmental -- well, the assessment done on this
24 for wildlife. Is that something they overlooked,
25 or just a case -- It seemed like they would have

1 been more up to par on that, on a habitat area
2 like that where they notice problems.

3 MR. HAYES: I don't think that this
4 specific line was in existence that long prior to
5 the Department noticing or questioning whether it
6 was in compliance or not.

7 MR. MARBLE: I guess the problem that
8 the wires were only -- instead of being the
9 recommended 60 inches, they were -- I forget how
10 far --

11 MR. HAYES: I think they were 30 or 32
12 inches.

13 MR. MARBLE: I just can't believe that
14 somebody would build a line like that. And I
15 think letting them off with a dinky little penalty
16 is just giving them message that, well, if you
17 don't get caught, it's okay. And I feel we need
18 to send a stronger message to people, "Go out and
19 check your wires."

20 Within a few miles of my house, we've
21 lost three golden eagles over the past eight
22 years, and each time they come out, "Oh, yes.
23 This isn't right," and they fix it up. I'm
24 getting kind of tired of that kind of approach.
25 I'd like to see them get the message that if

1 you're not out checking your wires and making sure
2 they're adequate, you're going to get whacked with
3 a good penalty. That's all I have to say.

4 MR. HAYES: Chairman Russell, members of
5 the Board, I will indicate that the amount of the
6 penalty, the base penalty was calculated pursuant
7 to our Administrative Rules. We have a \$5,000
8 maximum daily penalty, and then there are tables
9 and etc. to determine what percentage of that
10 should be levied in accordance with the severity
11 of the fine, and then the daily penalties are
12 under the discretion of the Department, and based
13 on that, that's the penalty we came up with.

14 MS. SHROPSHIRE: How many days were they
15 out of compliance?

16 MR. HAYES: Well, the power line existed
17 since the spring of 2006 and into October, I
18 believe, of 2006. But as I indicated, there was
19 some discussion. I believe it was centered on
20 whether the separation pertaining to the wires
21 themselves or the components on the pole, and it
22 wasn't decided specifically until September that
23 it was a violation, and then Western Energy acted
24 fairly quickly after that to de-energize the pole
25 and bury the power line.

1 MS. SHROPSHIRE: How was the two days
2 time frame determined?

3 MR. HAYES: The Department does not have
4 a lot of guidance in determining that. It seems
5 to me that we make a decision to issue daily
6 penalties for the days that it's out of
7 compliance, and then if that is deemed excessive,
8 the Department can reduce that amount. And the
9 Enforcement Division believed that daily penalties
10 for the entire period of time that they were out
11 of compliance would have resulted in an excessive
12 penalty, and reducing that, determined that we
13 believed \$4,000 was a sufficient penalty,
14 especially in light of the additional funds that
15 Western Energy spent dealing with the problem.

16 MR. SKUNKCAP: So they knew about the 60
17 inches that was specified for Suggested Practices
18 for raptors, and they just knowingly went against
19 that and did it 32 inches?

20 MR. HAYES: Well, they should have
21 known. In their permit, it indicates that they
22 have to construct the lines in accordance with the
23 Suggested Practices, which in the Suggested
24 Practices is 60 inches. I can't say for sure that
25 they were aware of that, and in light of that,

1 still went out and constructed --

2 CHAIRMAN RUSSELL: Ed, is there a
3 minimum standard? It's a suggested practice to
4 keep them 60 inches apart. Is there a minimum
5 standard?

6 MR. HAYES: It is considered a minimum
7 standard. The document that it resides in is
8 called the Suggested Practices. By Administrative
9 Rule, they're required to build them in accordance
10 with the Suggested Practices. So that is the
11 minimum standard.

12 CHAIRMAN RUSSELL: So there is a rule
13 stating that there is to be 60 inches?

14 MR. HAYES: There is a rule that states
15 it has to be constructed in Suggested Practice,
16 and in the Suggested Practices, it is 60 inches.

17 CHAIRMAN RUSSELL: There ought to be a
18 rule.

19 MR. ROSSBACH: You said something
20 earlier, though, that is now confusing to me. You
21 said there was a dispute as to whether it was the
22 items on the pole that were 60 inches apart versus
23 the lines being 60 inches apart. Is that what
24 their defense to this was, that they
25 misinterpreted the Suggested Practices? Is that

1 what you're saying?

2 MR. HAYES: No, that was not raised as a
3 defense.

4 MR. ROSSBACH: So I guess you said there
5 was some confusion as to whether it was a
6 violation or not. What was that confusion about?

7 MR. HAYES: I don't know if Chris is
8 more involved in that. Do you want come talk to
9 that?

10 MR. WIDE: Chairman Russell, members of
11 the Board, I'm Chris Wide (phonetic). I'm the
12 Permitting Supervisor in the Goal Program, and was
13 kind of on the sideline watching this as this
14 happened.

15 We permitted this power line through a
16 minor revision, and once it was permitted, I
17 notified a couple of the inspectors, "Watch it.
18 When it's put up, make sure it's in compliance."
19 That led to the inspection of the power line, and
20 the inspector that looked at it did not determine
21 at the time when he was out there what the
22 distances were. He said, "It doesn't look 60
23 inches," and then it took about three or four
24 months for the Department to really get somebody
25 out in the field, do the measurements, and

1 determine what the spacing was, and it was not
2 adequate spacing.

3 At that time, we notified Western Energy
4 that we would be issuing a violation, the power
5 line was de-energized, and they replaced it with
6 an above ground -- or on the ground power cable to
7 run the -- Well, this was a spur line that was put
8 in to run a water well for livestock. They put in
9 a supplemental source, retrofitted the poles, and
10 then reactivated it.

11 CHAIRMAN RUSSELL: Question for Ed. So
12 the two days was probably taking into
13 consideration their response time to the violation
14 or the existence of a violation.

15 MR. HAYES: Yes, to the extent that the
16 Department didn't feel comfortable imposing daily
17 penalties to the length of time it took for us to
18 determine it was a violation. We didn't want to.

19 MR. MARBLE: How many days was it
20 energized totally?

21 MR. HAYES: I believe it was constructed
22 in the spring of 2006, March or so, and then
23 through September when we notified them it was in
24 violation, by the end of October.

25 MR. MARBLE: It seems to me that the two

1 days penalty is totally inadequate.

2 CHAIRMAN RUSSELL: I disagree completely
3 because the Department -- it's the responsibility
4 of the permitter to tell them they're in
5 violation, and when they did it, Westmoreland
6 de-energized the pole.

7 MR. MARBLE: They hire engineers, and
8 they go build these things. They should do it
9 right the first time. They've got a permit to
10 build it according to the rules, and they didn't.

11 CHAIRMAN RUSSELL: Don, you've been
12 around a long time. That's why we have government
13 regulators.

14 MR. MARBLE: A little slap on the hand
15 is inadequate. I move we reject the proposed
16 penalty, and send it back to the Department to
17 take another look at it.

18 CHAIRMAN RUSSELL: There is a motion.
19 Is anyone going to second that?

20 MR. SKUNKCAP: Mr. Chairman, before the
21 motion, I have a question.

22 CHAIRMAN RUSSELL: Before we do that, is
23 there a second on the floor?

24 MS. SHROPSHIRE: Second.

25 CHAIRMAN RUSSELL: It's been seconded by

1 Robin. Now you can -- Your comment is -- or
2 question, Gayle.

3 MR. SKUNKCAP: On the best available
4 information, was that overlooked? During
5 something like this, there is biologists that look
6 at these areas, and the federal flyway comes into
7 effect on some of these, and then if the raptors
8 are in that specific area a lot, the biologists
9 should have pointed that out. Was that brought up
10 anywhere?

11 MR. HAYES: We had both wildlife experts
12 from the Department and also from the Fish &
13 Wildlife Service present and participating
14 throughout the enforcement process and the
15 evaluation process that led up to it, and acted as
16 expediently as we could to ascertain that it was
17 out of compliance, and then initiated the
18 enforcement.

19 Part of it is that our inspections are
20 only monthly, so when it's followed through as an
21 action item, it's going to be another month before
22 we have an inspection, and go out and get
23 additional information.

24 MR. SKUNKCAP: Thanks, Mr. Chairman.

25 CHAIRMAN RUSSELL: Any further comments?

1 MS. SHROPSHIRE: My comment is just that
2 there are standards in place, and the standards
3 weren't met, and then a violation is issued. And
4 I guess it's troubling to me that after somebody
5 is caught, and then they fix it, that it seems as
6 if they're doing a good thing, that they're going
7 out of their way to be good stewards. And I agree
8 with Don that if the regulation wasn't paid
9 attention to in the first place, that it is good
10 that they're fixing it, but that's not
11 stewardship, and when they're not understanding
12 the regulations to begin with.

13 And that's where I sort of am troubled.
14 They're coming across as being the good guy when
15 they're not paying attention to the rules.

16 MR. ROSSBACH: I guess, Chris, this is a
17 question for Chris. Was the DEQ inspector at the
18 scene before it was energized or shortly after it
19 was energized?

20 MR. WIDE: It would have been shortly
21 after it was energized. It was constructed -- I'm
22 going to say it was probably within a month of
23 being energized, based on when it was energized,
24 when the inspection took place.

25 MR. ROSSBACH: So there is no

1 during-construction inspections of these?

2 MR. WIDE: We don't have the people to
3 get out and do that. With all of the action going
4 on on all of the coal mines, and the level of
5 staff we have, we can't get out on all of the
6 construction things.

7 The individual that did inspect it was a
8 wildlife biologist. He worked for the Department
9 for a couple years. He's worked -- probably 25
10 years experience. He also worked at Western
11 Energy, and was familiar with the lines there.
12 And we have no reported raptor electrocutions at
13 Western Energy, and Bruce was the biologist out
14 there. He was very cognizant of these types of
15 things, and looked at the power lines.

16 We would look at them periodically
17 during inspections. We never found any signs of
18 electrocutions. It was not a real high priority
19 issue. But on this new construction, "Let's check
20 it and make sure we're in compliance," it was not
21 constructed in compliance, and then the subsequent
22 actions took place.

23 MS. KAISER: Is it maybe because the
24 biologists at DEQ didn't consider this raptor
25 habitat in the area? Would that be a possibility?

1 MR. WIDE: We look at all of the coal
2 mine area as raptor habitat. There are red tailed
3 hawks nesting on almost of the coal mines and
4 adjacent to it; there are wintering bald eagles
5 and golden eagles. Our winter populations are
6 probably -- Bald eagles is definitely important
7 across all of the coal mines. We do see a few
8 golden eagles.

9 And so we're cognizant of those type of
10 issues, and as a matter of fact, we have one mine,
11 the Spring Creek Mine, that for some reason
12 periodically gets an electrocution, and they have
13 surveyed their lines, they're surveying them again
14 now. They had three raptors electrocuted this
15 spring. And the one, two raptors were
16 electrocuted at the same time. It appears that
17 the two raptors actually joined hands to reach
18 across, and because it was two birds, they could
19 reach across, and the electrocution occurred. It
20 was a very sad incident, but everything was
21 constructed as per the standards.

22 And they've now hired a consultant to
23 come in and relook at all their lines again to
24 make sure they don't have problems.

25 MR. MARBLE: We probably see more

1 problems with grounding wires than with the space.
2 If your ground wire runs by the hot, and it's not
3 insulated, then it's really a very dangerous
4 situation.

5 MR. WIDE: I agree.

6 CHAIRMAN RUSSELL: Any further
7 discussion?

8 (No response)

9 CHAIRMAN RUSSELL: We have a motion on
10 the floor.

11 MR. ROSSBACH: Can you reread the
12 motion?

13 CHAIRMAN RUSSELL: I think the motion is
14 to --

15 MR. ROSSBACH: -- reconsider the
16 penalty.

17 CHAIRMAN RUSSELL: -- have the
18 Department reconsider the penalty. I'm not
19 exactly sure if that is something we can do, but I
20 guess we can see how the motion goes, and if the
21 Department doesn't believe they can reconsider the
22 penalty because we based this on the rule --

23 MR. MARBLE: Could we hear from Tom?

24 MR. LIVERS: Mr. Chairman, I think
25 procedurally probably the action that would need

1 to be taken is to reject the order, and then we
2 would from that take the Board's direction from
3 this discussion, if that motion were -- If the
4 rejection occurred, we'd take that, and the
5 contested case would still be in effect, and we
6 would resume settlement negotiations.

7 CHAIRMAN RUSSELL: But your contested
8 case is based on the administrative, the penalties
9 that you seek. Now we're asking you to seek
10 greater penalties.

11 MR. LIVERS: Mr. Chairman, that's
12 understood from the discussion. I guess I'm just
13 thinking procedurally that what's been filed is a
14 stipulation to dismiss, and I assume you would
15 reject that document.

16 MR. ROSSBACH: It sounds like the
17 appropriate order is basically a motion that says,
18 "We do not accept the stipulation to dismiss."

19 MR. LIVERS: I guess I would also ask
20 the Board's attorney to weigh in.

21 CHAIRMAN RUSSELL: I don't believe the
22 stipulation to dismiss is our document.

23 MR. ROSSBACH: No, but we would not
24 approve the order of dismissal.

25 CHAIRMAN RUSSELL: We have an order, and

1 that's all we have.

2 MR. ROSSBACH: That's what we're saying.
3 We're not approving the stipulation.

4 CHAIRMAN RUSSELL: But the stipulation
5 was --

6 MR. ROSSBACH: -- to issue an order, for
7 us to grant an order.

8 CHAIRMAN RUSSELL: The stipulation was
9 to settle the case based on the penalty.

10 MR. MARBLE: Subject to our approval.

11 CHAIRMAN RUSSELL: No. The stipulation
12 is between the parties. Our job is to dismiss the
13 case.

14 MR. ROSSBACH: Basically what Don is
15 saying is that the motion then would be that we
16 would not approve the order of dismissal.

17 CHAIRMAN RUSSELL: All right. So --
18 Robin.

19 MS. SHROPSHIRE: I just want to rephrase
20 my concerns. What I would be interested in seeing
21 -- and I don't know if that's a possibility -- is
22 just the timeline of events in terms of when it
23 was inspected, when it was energized, when the
24 notice of violation was received, when it was
25 de-energized. And the other thing that I'm

1 interested in is what are the regulations, and how
2 clear are they, so that energy companies, when
3 they're building these lines, know that it's --
4 you know, how clear is the regulation or the rule
5 that they're looking at.

6 MR. ROSSBACH: The other issue for me --
7 the timeline is important also in terms of -- what
8 I would like to know is: Does Department see
9 plans? Do we see a set of drawings at any point
10 that says 32 inches or 60 inches? How does the
11 process work? I guess I'm interested in learning
12 more about that in terms of the timeline, because
13 I think there is some problem with our inspector
14 going out and seeing this, and our not getting on
15 it sooner. But how did it get that far --

16 I guess the question I think that Robin
17 is raising, and maybe Don and Gayle, is how did it
18 get to that point without -- was there no
19 during-construction inspections, or inspection of
20 plans, or approval of plans, how that process
21 works that it got this far.

22 Because clearly on the other hand,
23 clearly Western Energy did the right thing,
24 probably went the extra yard once it was
25 determined that it was a violation. But how did

1 we as a matter of process get to that point that
2 we let this go so far? Is there something that we
3 could change to do that? And where does the
4 responsibility lie before we start deciding there
5 is penalties, I guess?

6 MR. MARBLE: I would add to that:
7 Before they build this line, do they submit plans
8 to DEQ?

9 MR. WIDE: All they submit to us is a
10 basic map of where the line is going to be. Each
11 of the mining permits has a piece that addresses
12 power line construction, and one of the
13 Administrative Rules is that all powerline
14 construction will meet -- I'm paraphrasing -- will
15 meet the raptor protection guidelines.

16 And those guidelines continue to be
17 updated. Right now our rules say 1996. That was
18 the last time we updated the rules. That was the
19 one that was in place. There is now a 2006, and
20 some of the companies are actually taking on the
21 2006 and saying, "This is going to be our
22 standard," because there were some updates.

23 But we don't look at the actual
24 powerline configuration. We could, and that may
25 be something we need to look at down the road,

1 that all powerlines, we actually look at the
2 configuration, and make sure it conforms, and then
3 make sure it's built as per that. That may
4 resolve some of these issues. But to date, we
5 have not done that.

6 MR. ROSSBACH: Maybe this is for Ed.
7 What does Andy Forsyth say about what happened
8 here? What's the company's explanation for how
9 they built this out of compliance? Do they have
10 an excuse for 32 inches versus 60 inches, or has
11 that not even come up?

12 MR. HAYES: That really didn't come up.
13 Western Energy acknowledged that it was out of
14 compliance, and really offered no explanation in
15 terms of how it came to be.

16 MR. ROSSBACH: I'm somewhat
17 uncomfortable not having Andy to answer these
18 questions.

19 MR. MARBLE: It seemed to me they were
20 given -- they asked for a permit, they were given
21 a permit; they said they would build it according
22 to the appropriate standard, and they didn't, and
23 I don't know why you ignore the days in violation
24 until the time they were caught. I think that's
25 giving them too much leeway.

1 MS. KAISER: Given the information we
2 have today and the timeline that we have that it
3 sounds like the inspector was out there, four
4 months prior to the issue of violation, I can't
5 support the motion that's on the table based on
6 that information.

7 MR. SKUNKCAP: After that all
8 discussion, I want to hear what the Board attorney
9 has to say.

10 MS. ORR: Mr. Chairman, members of the
11 Board, now that it appears as though this case
12 hasn't been settled, in other words, the
13 settlement agreement hasn't been approved by the
14 Board, and the Board won't sign the order of
15 dismissal, we're at the point of needing to hear
16 the case on its merits, and it will be up to the
17 parties to determine whether they can isolate for
18 the Board the penalty phase of the case, or the
19 liability phase, or both.

20 And I think that a penalty determination
21 with all of these factors of good faith and timing
22 are very fact intensive, and as Bill Rossbach is
23 referring to it, I think it's incumbent on the
24 Board to hear from both sides here.

25 CHAIRMAN RUSSELL: I think the first

1 thing we need to do is since we had a motion on
2 the floor, and we've discussed that motion, and
3 it's not appropriate, what we have to do is direct
4 the Chair not to sign the order of dismissal and
5 then probably hear the case. So will you rescind
6 your motion? Do you concur?

7 MR. MARBLE: (Nods head)

8 MS. SHROPSHIRE: (Nods head)

9 CHAIRMAN RUSSELL: I will take a motion
10 to the effect of directing the Chair not to sign
11 the order of dismissal, and we'll probably hear
12 this case.

13 MS. SHROPSHIRE: Can I comment in a
14 general sense?

15 CHAIRMAN RUSSELL: If I have a second,
16 you can comment.

17 MR. ROSSBACH: Did you make a motion?

18 CHAIRMAN RUSSELL: I asked for a motion.

19 MR. MARBLE: I'll make the motion.

20 MS. SHROPSHIRE: Second.

21 CHAIRMAN RUSSELL: Now you can go at it.

22 MS. SHROPSHIRE: Well, I think it brings
23 up a bigger issue just in terms of how the number
24 of days -- how is the penalty assessed, and how
25 many days were applied to that, which I think can

1 be kind of arbitrary at times, and so that's one
2 of the things that concerns me about this, is how
3 you choose the numbers of days. I think that's
4 probably a difficult thing, but it's not just
5 this, but it's in other cases as well in a lot of
6 these permit violations that we see.

7 CHAIRMAN RUSSELL: And the only comment
8 I would like to make to that is it's not been that
9 long, but almost all of this Board adopted those
10 new rules on setting penalty, and allowing the
11 Department to assess penalties in a new fashion.

12 MS. SHROPSHIRE: That was the monetary.

13 CHAIRMAN RUSSELL: But that's the issue
14 here is that we're not penalizing these folks
15 enough.

16 MR. ROSSBACH: But as I read those, the
17 Board's utilization of those rules in this case,
18 there is a tremendous amount of discretion
19 employed in it, basing it on the facts as they are
20 presented to the Department in making those
21 decisions. And I think what I hear Don and Robin
22 saying is they're not criticizing, but just
23 concerned about how the application of those rules
24 were used in this case, given some uncertainty
25 about the facts.

1 MR. MARBLE: The message I'd like to see
2 go out is if you get a permit to a build a line,
3 you say you're going to build it according to
4 standards and you don't, you're going to be at
5 risk for penalties from the day you energize the
6 line. And if the message we're going to send out
7 as proposed is if you do all that, you are not
8 going to be in any trouble until somebody comes
9 out and says, "Oh, you didn't do it right," I
10 think that's not the right message. The right
11 message is: Build it right or you're at risk from
12 day one of the -- I think that's within the rules.

13 CHAIRMAN RUSSELL: Well, since we have
14 this discussion going on, I'm just going to make a
15 comment that I hope you take the same feelings
16 toward the violations of the public water supply
17 law, because I'm a public health professional, and
18 oftentimes I believe those violation penalties are
19 too low, and I keep my opinions to myself about
20 those because the Department acts within their
21 rule in trying to assess prudent and proper
22 penalties on the public water supply violations.
23 So we just need to be consistent in our
24 application of this process.

25 MR. ROSSBACH: Absolutely.

1 CHAIRMAN RUSSELL: That's all I have to
2 say.

3 MS. SHROPSHIRE: I'll just add I
4 couldn't agree with you more, and that's where I'm
5 cautious with this, is that -- I have mixed
6 emotions because I agree with everything that you
7 just said. That's where I'm troubled with this.

8 MR. SKUNKCAP: I'm confused now, because
9 why are you put on the Board with your expertise
10 and your -- I don't know. That's my comment.

11 CHAIRMAN RUSSELL: Any last comments
12 before we take action on the motion?

13 MR. ROSSBACH: My only comment is that
14 I'm uncomfortable with an absence of facts upon
15 which the discretion of the Department was used in
16 applying the rules to this particular case, and
17 that's my original concern about the case. I
18 don't have the same overriding concerns that maybe
19 Don and Gayle have, but I'm uncomfortable with the
20 lack of the factual basis for the determination of
21 penalties, and I would like to hear more
22 information about that.

23 MS. KAISER: One more comment. I guess
24 the one fact that was brought up is there were no
25 raptor kills, that this problem was fixed before

1 there was an environmental situation.

2 MR. HAYES: That is correct.

3 MR. SKUNKCAP: Mr. Chairman, I would
4 like to rephrase my question. I guess my
5 confusion was on -- You're appointed to the Board
6 because of your field of expertise. And this is
7 not my personal opinion, Mr. Chairman. I guess
8 this is something I have experience in, too. And
9 I decline or accept that this is my personal
10 opinion on that. That's something in my field of
11 wildlife. Each member was put on this Board,
12 appointed by the Governor of what they do in their
13 field. And I decline that. This is personal.

14 CHAIRMAN RUSSELL: It's professional to
15 you also, Gayle. And don't get me wrong. I
16 appreciate all of the comments that are made.
17 Just there is procedural issues here that we've
18 abided by, and that I think that they're important
19 in weighing in on this vote.

20 MR. SKUNKCAP: I just wanted to make
21 that clear this isn't personal, but we're here to
22 give our opinion, and this is a Board, and we
23 don't all have to agree, but we are here to give
24 our opinion on that out of our respective fields,
25 just for the record.

1 MS. SHROPSHIRE: This just reminded me
2 of -- I don't remember if it was the Supreme Court
3 that said it -- but you don't have to wait for the
4 fish to be floating dead in the river before we do
5 something. So even though raptors weren't
6 necessarily killed, there was a violation.

7 CHAIRMAN RUSSELL: Certainly, as you
8 stated, this is in the rule, right? 60 inches is
9 the rule?

10 MR. HAYES: It references the Suggested
11 Practices.

12 CHAIRMAN RUSSELL: I can go back to the
13 same issues when we dealt with Roundup, when we
14 talked about the five step process that I continue
15 to think should be put in rule. What's that
16 called, Tom?

17 MR. LIVERS: Top down BACT.

18 CHAIRMAN RUSSELL: Top down BACT is a
19 recommendation. It's not in the rule. So that's
20 why I continue to come back. Is this a rule?

21 MR. ROSSBACH: The rule is that you have
22 to comply with these standards, so it is in the
23 rule.

24 CHAIRMAN RUSSELL: Okay.

25 MR. ROSSBACH: You have to comply with

1 the suggestions.

2 CHAIRMAN RUSSELL: Have you seen the
3 wording in that?

4 MR. ROSSBACH: That's what he said.

5 CHAIRMAN RUSSELL: I just want to state
6 that the Department has a lot of rules, and
7 oftentimes sometimes we cite them by reference,
8 which is pretty clear, but if they're a CFR, there
9 is no doubt, but when they're a guideline or
10 Suggested Practices, it gets a little muddy.

11 MR. ROSSBACH: As I understand it, we
12 have incorporated the Suggested Practices into our
13 rules; is that correct?

14 MR. HAYES: That is correct.

15 MR. ROSSBACH: So that makes them a
16 rule.

17 CHAIRMAN RUSSELL: That's your opinion.
18 This has been a great discussion, and I hope no
19 one feels that they've been left out. If anyone
20 feels they've been left out, this is the time
21 before we take action that you should probably
22 chime in again. Larry.

23 MR. MIRES: It's a bit of a challenge
24 listening to all of it. I see both sides of the
25 issue here. I see that we have a rule that is in

1 place as a recommendation, a 60 inch standard that
2 was not followed or adhered to by the company when
3 they put in the line, so I tend to agree with Don
4 with what he said. On the other side of the coin,
5 we have a policy that has been established in the
6 Department, or maybe it's a rule, that determines
7 what the assessment or the fee will be for the
8 penalty.

9 I think if we're going to adjust the
10 penalty that the Department has set, I think then
11 you need to go back and readjust the guidelines of
12 which Department sets the penalty; and since this
13 was in existence when the company did this to
14 start with, I think we're somewhat obligated to
15 stay with it and not be changing rules when we're
16 down into the session. I think you have to make
17 those rule changes prior to the company doing
18 their construction, so that they know up front
19 what it is, not after the fact. Does that make
20 sense?

21 MR. MARBLE: I have a question.

22 CHAIRMAN RUSSELL: Thanks, Larry.

23 MR. MARBLE: Is it Department policy
24 that penalties don't start until after they've
25 been inspected and found to be in violation? Is

1 that what your rules are?

2 MR. HAYES: No, that isn't the policy.
3 Really there is a broad discretion given to the
4 Department in the Administrative Rule, and we do
5 not base days of violation starting from the date
6 the notice of violation was issued.

7 MR. MARBLE: Is it the precedent of the
8 Department that you don't start violations until
9 the day they're inspected and found in violation,
10 or is every incident on its own standard?

11 MR. HAYES: It's a case-by-case basis.

12 MR. MARBLE: I think we should vote.

13 CHAIRMAN RUSSELL: Any further last
14 comments? I'm going to do this by roll call, too.
15 The motion is to direct the Chair not to sign the
16 order, and commence a hearing of the Board to
17 establish their own penalty, not using the
18 Department's --

19 MR. ROSSBACH: No, that's not what the
20 -- The motion is to reject the order. It is not
21 to have a hearing. It's to reject the order.
22 There could be further settlement discussions.
23 It's not to hear the case. As I understand, the
24 vote we're voting on is to reject the order, and
25 that's nothing more, nothing less.

1 MR. MARBLE: That's my motion.

2 CHAIRMAN RUSSELL: Basically make the
3 parties realize that we're not going to accept
4 that penalty, and --

5 MR. ROSSBACH: Well, they could --

6 MS. KAISER: What's the path forward?

7 MR. ROSSBACH: The path forward is to go
8 forward in the process as it was outlined and
9 scheduled, and if there is a settlement or further
10 discussions, that is all within the realm of the
11 Department and the parties.

12 MR. LIVERS: Mr. Chairman, we would
13 agree with Mr. Rossbach's interpretation that the
14 motion should really be just to direct the Chair
15 not to sign the dismissal order. Then the default
16 path is a typical contested case lead up to --
17 with the discussions that we'd be having before
18 that.

19 CHAIRMAN RUSSELL: All those in favor,
20 signify by saying aye. I'll do this by roll call.
21 Don.

22 MR. MARBLE: Aye.

23 CHAIRMAN RUSSELL: Gayle.

24 MR. SKUNKCAP: Aye.

25 CHAIRMAN RUSSELL: Larry.

1 MR. MIRES: Aye.

2 CHAIRMAN RUSSELL: Robin.

3 MS. SHROPSHIRE: Aye.

4 CHAIRMAN RUSSELL: Bill.

5 MR. ROSSBACH: Aye.

6 CHAIRMAN RUSSELL: Heidi.

7 MS. KAISER: Opposed.

8 CHAIRMAN RUSSELL: Joe, opposed. The
9 motion carries.

10 The next item on the agenda is the
11 matter of general public comments. Does anyone in
12 the audience want to address the Board on any
13 Board related matters not discussed today as a
14 contested case, or anything else that would be
15 hearings related?

16 MR. MARBLE: I have one after the public
17 things. We're past --

18 CHAIRMAN RUSSELL: I think the public is
19 done, so --

20 MR. MARBLE: As I recall, some time ago
21 one of our Board members asked the Department to
22 give us a report on what is appropriate for
23 lignite mercury controls, and I don't know if
24 that's been done, but I'd like to see the
25 Department go ahead, and do a little study, and

1 tell us what you can expect in the control of
2 mercury when you're burning lignite, because I
3 think --

4 Well, the other thing is I would like to
5 see -- I noticed our BACT for mercury doesn't
6 include a requirement for ACI, but I think as the
7 years are going on rapidly, the technology is
8 advancing, and I would like to get some
9 information from the Department on how many plants
10 are being built that are using ACI, what kind of
11 mercury reductions are they experiencing, and are
12 we getting close to the fact when ACI should be
13 included as a mercury BACT strategy. So --

14 CHAIRMAN RUSSELL: Are you coupling that
15 with some alternative combustion, IGCC versus CFE?

16 MR. MARBLE: I would like to see other
17 IGCC. If we could, we could go on and say I'm
18 interested in that. But I guess I'll just limit
19 it to those two things.

20 CHAIRMAN RUSSELL: Just use of activated
21 carbon?

22 MR. MARBLE: ACI, and also what is
23 patented lignite controls. So I'm just
24 interested, throw out that to the Board and see if
25 anybody else has any thoughts on that.

1 CHAIRMAN RUSSELL: Are you getting that,
2 Tom?

3 MR. LIVERS: Yes.

4 MS. SHROPSHIRE: I have a question, too.
5 I had heard -- is it CCAC -- is that the right
6 acronym -- the Climate Change Advisory Committee
7 or -- had recommended that DEQ -- recommended that
8 we initiate rulemaking on a carbon standard. Is
9 that true? Do you have any comments on that?

10 MR. LIVERS: Mr. Chairman, Ms.
11 Shropshire, I have not been directly involved in
12 that Climate Change Committee, but I know those
13 recommendations are at least out there. I don't
14 know if they're final or not. I'm not sure of
15 the status of that. I know there is some
16 discussion of whether it would be appropriate to
17 move forward with carbon rulemaking at this point,
18 or whether it would be premature.

19 So that's on the table. I can't tell
20 you. I'm sure I can ask Richard to come in and
21 speak a little more directly on that. But there
22 is a real interest in carbon, and that could
23 potentially be on the table. I think there are
24 also discussions as to whether that's premature,
25 or whether that's more of a legislative issue

1 prior to being a Board rulemaking issue. So
2 that's probably the best I can do.

3 CHAIRMAN RUSSELL: Coupled with that,
4 are there any states moving forward with any
5 carbon rules, do we know?

6 MR. LIVERS: I don't know, but I assume
7 that the committee has looked at that.

8 MR. MARBLE: There are back east more.

9 CHAIRMAN RUSSELL: Maybe we can get a
10 list of those, if it's not too much trouble. Any
11 further comments?

12 (No response)

13 CHAIRMAN RUSSELL: Seeing none, I'll
14 entertain a motion to adjourn.

15 MR. MARBLE: Move we adjourn.

16 CHAIRMAN RUSSELL: Second.

17 MR. SKUNKCAP: Second.

18 CHAIRMAN RUSSELL: All those in favor,
19 signify by saying aye.

20 (Response)

21 CHAIRMAN RUSSELL: We're adjourned.

22 (The proceedings were concluded
23 at 10:52 a.m.)

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C E R T I F I C A T E

STATE OF MONTANA)
: SS.
COUNTY OF CASCADE)

I, LAURIE CRUTCHER, RPR, Court Reporter,
Notary Public in and for the County of Cascade,
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 -79- 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 , 2007.

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires
March 9, 2008.