

1 BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
2 OF THE STATE OF MONTANA

3

4 BOARD MEETING)

5 AUGUST 8, 2008)

6

7 TRANSCRIPT OF PROCEEDINGS

8

9 Heard at the Metcalf Building

10 1520 East Sixth Avenue Avenue, Room 111

11 Helena, Montana

12 August 8, 2008

13 9:00 a.m.

14

15 BEFORE CHAIRMAN JOSEPH RUSSELL,

16 BOARD MEMBERS LARRY MIRES, HEIDI KAISER,

17 BILL ROSSBACH, ROBIN SHROPSHIRE, and DON MARBLE

18 (All by telephone)

19

20

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

3 * * * * *

4 (Ms. Shropshire not present)

5 CHAIRMAN RUSSELL: It is 9:07, and I
6 will call this regular meeting of the Board of
7 Environmental Review to order. The first item on
8 the agenda is the review and approval of the
9 minutes of the May 30, 2008 regularly scheduled
10 meeting. Are there any corrections to the
11 minutes?

12 (No response)

13 CHAIRMAN RUSSELL: Hearing none, is
14 there someone who would like to motion to approve
15 these?

16 MR. ROSSBACH: So moved.

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

19 MR. MARBLE: Seconded by Don.

20 CHAIRMAN RUSSELL: Any further
21 discussion?

22 (No response)

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

25 (Response)

1 CHAIRMAN RUSSELL: Opposed.

2 (No response)

3 CHAIRMAN RUSSELL: Motion carries. The
4 next item on the agenda is a briefing item, the
5 EQC letter regarding PM2.5 rulemaking. Tom.

6 MR. LIVERS: Mr. Chairman, members of
7 the Board, for the record, I'm Tom Livers with the
8 Department. I just wanted to kind of follow up.
9 I think we had briefed the Board the last time
10 that there had been a couple of meetings with the
11 Agency Oversight Subcommittee of the Environmental
12 Quality Council regarding the Board action on the
13 Highwood Generating Station permit, and
14 specifically the PM-10/PM2.5 issue.

15 The Agency Oversight Subcommittee met
16 again recently immediately prior to the Council
17 itself, and then requested that the Council send a
18 letter to the Board. There was discussion on
19 whether the Board, in the opinion of the EQC, had
20 the regulatory framework to support the decision
21 that was made. The Chairman of the subcommittee
22 made it clear repeatedly that this was not in any
23 way them weighing in on either the project or even
24 the decision itself other than the regulatory
25 underpinnings. They also recognized that they had

1 very little, essentially no standing in the
2 contested case decision and the Board's appellate
3 role.

4 EQC does serve as the rulemaking
5 oversight body for DEQ and for BER, so on
6 rulemaking they do have a role, but they were
7 mindful and fully understood that they were not in
8 any way part of the appellate chain for this
9 decision; but they felt that in their role as the
10 rulemaking oversight body, they wanted to weigh in
11 by what they saw as that lack of support.

12 And Chairman Russell and Dave Klemp and
13 I appeared several times, or a few times before
14 this subcommittee, discussing, trying to lay out
15 the framework. I'm not sure that we ever fully
16 convinced the subcommittee of where the authority
17 came from in this case.

18 The subcommittee kept looking for one
19 rule specifically that said there is a requirement
20 to directly control and directly analyze 2.5, and
21 we tried to lay out the fact that it is a
22 pollutant, it has a standard, it's subject to BACT
23 analysis, and there is a host of regulatory --
24 there is plenty of regulatory underpinning for
25 that, and it's really just the fact that EPA had

1 put forth policy guidance on using the surrogate
2 that really gave the Board the authority.

3 I think finally the EQC focused in on
4 what they felt was a policy call on the Board's
5 part to disallow use of the surrogate, and to say
6 that action specifically didn't have sufficient
7 regulatory underpinning, and that was thus the
8 thrust of this letter.

9 So I think the whole issue of whether
10 the decision was fully backed up sufficiently in
11 rule was part of the EQC's concern, and I think
12 also just the sense that maybe the perceived rules
13 of the game changed for SME throughout this
14 process. That was also expressed, that the
15 understanding was that this analysis would be done
16 with the surrogate, that's how they applied, and
17 then late in the game that was changed. So there
18 was some general concern there, too. So that led
19 the EQC to suggesting in this letter that the
20 Board undertake rulemaking to solidify this.

21 CHAIRMAN RUSSELL: Thanks, Tom. Any
22 questions of the Board to Tom or myself?

23 (No response)

24 CHAIRMAN RUSSELL: Hearing none, we'll
25 be moving on. I just want to make a final

1 comment.

2 MR. ROSSBACH: I don't have a question,
3 but I'd like to make a request.

4 CHAIRMAN RUSSELL: Sure.

5 MR. ROSSBACH: I think given the request
6 by the EQC, I think -- Can we put on the agenda
7 for a future meeting some more detailed discussion
8 about what rulemaking would look like to comply
9 with the EQC request?

10 CHAIRMAN RUSSELL: I think that's a good
11 idea. I don't know if we want to wait for very
12 long, though.

13 MR. ROSSBACH: I agree. I'm just saying
14 let's put it on the next agenda.

15 CHAIRMAN RUSSELL: Tom, would you have
16 enough time to do a briefing at the next regular
17 meeting? If so --

18 MR. ROSSBACH: That's all I'm asking.
19 I'm leaving that up to Tom as when he can do it,
20 and what everybody thinks is the best time to do
21 it.

22 MR. LIVERS: Mr. Chairman, Mr. Rossbach,
23 that sounds good. I appreciate that. And I think
24 we could be ready at the next meeting. We did
25 suggest -- and I wasn't trying to speak for the

1 Board -- but in these latest discussions, when
2 they zeroed in on rulemaking to formally embed in
3 rule this decision of disallowing the surrogate, I
4 did weigh in that the Board had, in its
5 discussions on this decision, tried to really
6 direct that it had to do with this particular
7 action, and it was not necessarily yet going to be
8 a seat change in how this analysis is done.

9 We're wrestling with that here because
10 we think it's probably going to have wider
11 implications, but basically saying it was my
12 impression that the Board wanted to see this play
13 out, and get a sense of the pro and cons -- first
14 off, was it possible; and then assuming it was,
15 what were the trade offs, what were the strengths
16 and weaknesses of this particular approach.

17 So I thought it was potential -- that it
18 might be a little premature for the Board to
19 actually move forward right now with rulemaking on
20 this, and it might make more sense to let this
21 whole issue play out just a little bit longer.
22 And I think that still would be the Department's
23 recommendation, that we're still real early in
24 seeing the effects of this decision and this
25 change.

1 And so I think if the Board were to ask
2 our opinion right now, we certainly could have a
3 briefing, but we might suggest that it's just a
4 little early, in watching all this play out, to go
5 forward with rulemaking; and maybe several months
6 down the road, it might be a little more timely.
7 Maybe six months or better down the road would
8 make a little more sense.

9 And we don't have to make that decision
10 now, and if you would like a briefing on this
11 where we can talk about that and go in a little
12 more depth on the pros and cons of that, we can do
13 that.

14 MR. ROSSBACH: This is Bill again.
15 That's essentially what I'm asking, Tom. I know
16 this is not an agenda item today, and I don't
17 expect you to have a detailed analysis of this,
18 but I'd be interested in the issues that you are
19 wrestling with and some proposals. That's all.
20 And if you think the timing is not right in two
21 months when we have our next meeting, that's fine.
22 I would just like to kind of get a little more
23 detail on what you guys are thinking now.

24 MR. LIVERS: Mr. Chairman, Mr. Rossbach,
25 that sounds good, and we could be ready with that

1 for the October meeting. We'll plan on that
2 unless we hit a snag. We'll put a more detailed
3 briefing on the October agenda, and then we can
4 discuss at that time exactly where we are, and
5 maybe the pros and cons of moving forward now
6 versus later.

7 CHAIRMAN RUSSELL: Thank you. And just
8 a final comment. I actually participated in these
9 EQC meetings, and I felt that they were very
10 civil, especially from the Environmental Quality
11 Council's Subcommittee's perspective. I thought
12 they were very respectful of the Board, and what
13 they do, and how they do work. And for them to
14 take up a matter like this was certainly not
15 something they did internally. They had a lot of
16 pressure to do this. So I thought it was a very
17 civil proceeding, and I certainly have no
18 objection to the outcome of their proceedings.

19 And so unless anyone else has anything
20 further, we'll move on.

21 (No response)

22 CHAIRMAN RUSSELL: The next item on the
23 agenda are the contested case updates. Katherine.

24 MS. ORR: Good morning, everyone. You
25 have before you a list, and what I thought I would

1 do is just address the ones to which there is an
2 addition since the agenda went out.

3 In Item B(1)(e), which is the CHS, Inc.
4 Title V operating permit challenge, a stipulation
5 for dismissal has been signed, and we'll be
6 presenting a motion to dismiss and order for the
7 Board in October.

8 And other than that, I don't have any
9 changes over this. The Board should know that
10 both the SME case and the TRC case have been
11 appealed in part. The MEIC has appealed the issue
12 of CO2 regulation, and brought in the Department
13 as a Respondent in that appeal; and TRC filed an
14 appeal on I think July 7th, naming only the Board
15 as the Respondent.

16 There was a wrinkle in the service of
17 that. Neither the Department, nor the Board, nor
18 the Permittee received the actual appeal until
19 July 30th.

20 TRC is appealing the two motions that
21 the Board heard on May 30th regarding the leave to
22 amend the affidavit to have TRC considered a major
23 stationary source, and the failure of the Board to
24 consider TRC's bad actor status. And I have a
25 response due in that coming up in about three

1 weeks. So that's happening there.

2 I should note that Item II(b) --

3 OPERATOR: Robin Shropshire is joining
4 the meeting.

5 MS. ORR: II(B)(d), if you remember,
6 there were two SME cases. One was a challenge by
7 the citizens groups, and another was a challenge
8 by SME regarding a particulate matter standard;
9 and that is still on the books, but I am
10 communicating with the attorneys, and they are, I
11 imagine, communicating among themselves about what
12 they want to do as far as the disposition of that.

13 And that's all I had for those items.

14 CHAIRMAN RUSSELL: Thanks, Katherine.
15 We'll be back to you pretty soon, I'm sure.

16 MS. ORR: Yes.

17 CHAIRMAN RUSSELL: The next item on the
18 agenda is initiation of rulemaking, appointment of
19 Hearing Officer. The Department is proposing
20 amendments to Administrative Rules of Montana
21 Title 17, Chapter 38, Subchapters 1 and 2 updating
22 the existing rules regarding the public water
23 supplies. Tom.

24 MR. LIVERS: Thanks, Mr. Chairman. And
25 to just give the Board some background on this

1 rulemaking, we've got Eugene Pizzini from our
2 Public Water Supply Section.

3 MR. PIZZINI: Chairman Russell, members
4 of the Board, for the record, my name is Eugene
5 Pizzini, and I'm the Rules Manager for the Public
6 Water Supply Section.

7 The Department is requesting initiation
8 of rulemaking concerning the amendments to the
9 Administrative Rules of Montana Title 17, Chapter
10 38, Subchapters 1 and 2, Public Water and Sewage
11 System Requirements. The proposed amendments are
12 necessary to update the adoption by reference of
13 federal rules and for clarification.

14 As a condition of primacy with the
15 United States Environmental Protection Agency,
16 Montana is required to have rules no less
17 stringent than the applicable federal rules. The
18 policy of the Montana Legislature has been for
19 State agencies to retain primacy over environment
20 and public health programs.

21 A major portion of the proposed
22 amendments center around the adoption of the 2007
23 edition of the Code of Federal Regulations. The
24 rules currently adopt the 2003 edition of the CFR.
25 As it stands, all public water supplies are

1 required to meet the 2003 requirements under State
2 authority, as well as any changes made in the
3 latest edition of the CFR under federal
4 authorities.

5 The Department generally tries to adopt
6 the newer edition every other year in order to
7 minimize the number of versions of the rules
8 published, to avoid rule writing during the
9 legislative session, and to allow for the
10 publication of the CFRs in hard copy prior to the
11 adoption.

12 The adoption of the 2007 CFRs will
13 include portions of two new rules: Long Term 2,
14 Enhanced Surface Water Treatment rule, otherwise
15 known as LT2, and the Stage 2 Disinfection
16 Byproducts Rule, also known as Stage 2. These
17 rules are now in effect and are being implemented
18 by EPA in Montana.

19 Montana has received two year extensions
20 to its requirement to submit a primacy application
21 for these rules. In addition, the new groundwater
22 rule has an effective date of December 2009.
23 Montana is working to complete a two year
24 extension application for this rule as well.

25 The Department is proposing to adopt

1 portions of these rules when it converts to the
2 2007 CFRs in order to minimize confusion for the
3 regulated public. In order to adopt the 2000 CFRs
4 without adopting these new requirements, the
5 Department would be forced to adopt the federal
6 rules line by line, which may lead systems to
7 believe their requirements don't apply.

8 In addition, the Department is proposing
9 to adopt the new lead and copper rule short term
10 revisions. Because those changes were promulgated
11 on October 10th, 2007, after the July 1, 2007
12 deadline for inclusion in the 2000 CFRs, the
13 actual language the Department proposes to adopt
14 will not appear in the 2007 CFRs. In order to
15 avoid adopting multiple versions of the CFR, the
16 Department proposes to adopt the 2007 requirements
17 as modified by 72 Federal Register Page 57,782 on
18 October 10th, 2007.

19 Other notable changes include amendments
20 to the Department's Circular PWS5; groundwater
21 under the direct influence of surface water
22 determinations; clarification to the service
23 connection and main definitions, with the addition
24 of a new definition for accessory building;
25 clarification of the chlorine residual monitoring

1 requirements for consecutive systems; and proposed
2 New Rule 1 to clarify and codify consecutive
3 system requirements.

4 New Rule 1 also proposes to adopt 40 CFR
5 141.3 with additional requirements which exclude
6 some public water systems from the requirements of
7 40 CFR Part 141. The additional requirements
8 ensure that the users of those consecutive systems
9 receive the same public notices as the users of
10 the wholesale system.

11 The Department recommends initiation of
12 rulemaking, and the appointment of a Hearing
13 Officer for the public hearing.

14 CHAIRMAN RUSSELL: Thanks, Gene. I have
15 one question before I open this up. I get the
16 first question.

17 One thing that struck me as I was
18 reading through this is trying to clarify the
19 accessory building status, and the main and such.
20 That will not affect the definition of what a
21 public water supply is; is that correct?

22 MR. PIZZINI: Chairman Russell, members
23 of the Board, that is correct.

24 CHAIRMAN RUSSELL: For some reason,
25 because it's an accessory building, and it isn't

1 counted as a connection, we may have some things
2 falling off of what are public water supplies
3 right now.

4 MR. PIZZINI: Chairman Russell, members
5 of the Board, the reason we decided or needed to
6 put that in there is the last time we were doing
7 rule writing, we had a member of the public who
8 wanted clarification as to whether if he had -- if
9 he constructed an unattached garage on his
10 property, and puts water and sewer in that garage,
11 whether that line would now become a service line,
12 and because it's a community requiring an
13 engineer, plans and specifications and the whole
14 nine yards. So the intent of the accessory
15 building is to allow people to make those kinds
16 modifications on their property without triggering
17 them into the engineering requirement.

18 CHAIRMAN RUSSELL: But it will not
19 preclude like fifteen or more connections serve --
20 use "X" number of days a year?

21 MR. PIZZINI: Chairman Russell, members
22 of the Board, that is correct.

23 CHAIRMAN RUSSELL: Thank you. Anything
24 else from the Board?

25 (No response)

1 CHAIRMAN RUSSELL: Hearing none, I will
2 entertain a motion to initiate rulemaking. And
3 Katherine, you're good to go on this?

4 MS. ORR: Yes.

5 MR. LIVERS: Mr. Chairman, let me just
6 remind you. We do have a couple members of the
7 public here, so on this item and the next item,
8 you'll want to ask whether there is any public
9 comment on this prior to your vote.

10 CHAIRMAN RUSSELL: Thanks, Tom. If
11 there is any member of the public that would like
12 to speak to this matter before the Board takes
13 action, this is your time to do so.

14 Anyone jumping up, Tom?

15 MR. LIVERS: Doesn't look like it.

16 CHAIRMAN RUSSELL: Okay. Then I will
17 entertain a motion to initiate rulemaking, and
18 appoint Katherine Hearings Officer on this matter.

19 MR. ROSSBACH: So moved.

20 CHAIRMAN RUSSELL: Second?

21 MS. SHROPSHIRE: Second.

22 CHAIRMAN RUSSELL: Seconded by Robin.
23 It's been moved and seconded. Further comments?

24 (No response)

25 CHAIRMAN RUSSELL: Hearing none, all

1 those in favor, signify by saying aye.

2 (Response)

3 CHAIRMAN RUSSELL: Opposed.

4 (No response)

5 CHAIRMAN RUSSELL: Motion carries
6 unanimately. The next item on the agenda is the
7 adoption of final rules, amendments to ARM
8 17.30.617, designating the mainstream of the
9 Gallatin River from Yellowstone National Park
10 boundary to the confluence of Spanish Creek as an
11 ORW. Tom, do you want to take this?

12 MR. LIVERS: Sure, Mr. Chairman. We've
13 had a request to extend the comment period in this
14 extended rulemaking from the Greater Yellowstone
15 Coalition, which is the group that's taken over
16 from American Wildlands, the group that brought
17 the original petition.

18 There has been progress on this issue.
19 They were able to raise money for the feasibility
20 study, and is going to talk to the Department
21 about that later on this month, as I understand.
22 So I don't want to presume too much out of this,
23 but it seems from our perspective that there
24 continues to be productive discussion and progress
25 on this issue, and providing some additional time

1 for these discussions and this work to play out
2 makes sense.

3 So with that, I guess I open it up to
4 Board questions and public comment.

5 CHAIRMAN RUSSELL: Are there any Board
6 members that have any questions regarding this
7 matter?

8 I believe what we're being asked is to
9 extend the public comment period to January 2nd,
10 2009.

11 MR. LIVERS: That's correct, Mr.
12 Chairman. Thank you for catching that error in
13 the summary. It's not until July 18th of 2008,
14 it's January 2nd, 2009.

15 CHAIRMAN RUSSELL: Any further --

16 MS. SHROPSHIRE: I have a question. And
17 it relates to this, and I think it actually
18 relates to the rulemaking with regards to -- What
19 is the direct hydrologic connection? With regards
20 to that, is there a definition of how we actually
21 measure whether or not something has a direct
22 hydrologic connection?

23 CHAIRMAN RUSSELL: I think that's the
24 kind of issue at hand, isn't it? I think many of
25 those that have elected not to want to see that

1 designation wonder if there is a hydrologic
2 connection -- and I'm sure there is a lot more to
3 it -- but how you set your boundaries, your
4 distance from your river reach, your river bank.

5 MR. LIVERS: Mr. Chairman, this is Tom.
6 I don't know that we've got staff present at this
7 meeting to go in depth, but if you recall from
8 some of the initial analysis, there was some kind
9 of general assumptions made in trying to arrive at
10 that, and kind of define sort of the zone of
11 influence. And yes, that is really a key to the
12 whole question.

13 But if we want to revisit some of that
14 at a future meeting, we can certainly have some of
15 the folks from the Department who worked on the
16 original analysis present for that discussion.

17 CHAIRMAN RUSSELL: That brings up an
18 interesting question. If we did that, in what
19 format would we have to do it? It wouldn't be
20 just like a Board briefing, would it? There has
21 been public hearings --

22 MR. LIVERS: Maybe the most productive
23 thing is if some or all Board members wanted a
24 little background on this, and for example, I
25 think we've had some turnover since the Board

1 really had an in-depth discussion. We could
2 perhaps just provide some background information
3 on that, and we can do it in any form. We could
4 do it by sending you some information, some
5 summary information from the initial analysis, or
6 certainly could present a briefing.

7 I don't think there is anything in the
8 process of the fact you're in rulemaking that
9 would preclude us from revisiting some of the
10 early briefing, and even talking in more depth
11 about some of the discussions since that time. We
12 can do that as early as the October meeting if you
13 wanted to.

14 MS. SHROPSHIRE: With regards to how --
15 Does it involve the PWS5? The ground water under
16 the direct influence of surface water
17 determinations, are those linked in any way?

18 CHAIRMAN RUSSELL: Only if you have a
19 public water supply. Most of this is the other
20 way. This is septic system and other man made
21 influences on that resource water.

22 MS. SHROPSHIRE: Again, we can talk
23 about it at another meeting, like Tom was saying.
24 That's my only question.

25 MR. LIVERS: Is there an interest at

1 this point in putting it on the next meeting, or
2 do we want to have just some off line discussions
3 about that and decide from there?

4 CHAIRMAN RUSSELL: I know that Larry
5 didn't participate in the original --

6 MR. MIRES: And I would really like to
7 have more information on it.

8 CHAIRMAN RUSSELL: I forget who else
9 wasn't involved, but I know Larry wasn't, and
10 maybe Heidi.

11 MR. LIVERS: Mr. Chairman, why won't we
12 go ahead and schedule, probably for the October
13 meeting, a more detailed briefing on this,
14 although I guess I'd still urge the Board to take
15 its action today on the supplemental rulemaking,
16 extension of the comment period. But nonetheless,
17 we'll plan to be back in October with a more
18 detailed discussion.

19 CHAIRMAN RUSSELL: All right. That
20 sounds good. With all that in mind, is there
21 anyone in the audience that would like to speak to
22 this matter before the Board takes it up?

23 Anyone jumping up, Tom?

24 MR. LIVERS: No, sir.

25 CHAIRMAN RUSSELL: All right. Seeing

1 none, do I have a motion to basically amend the
2 notice extending the comment period to January
3 2nd, 2009?

4 MR. MIRES: This is Larry. So moved.

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

7 MS. KAISER: I'll second. This is
8 Heidi.

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

11 (Response)

12 CHAIRMAN RUSSELL: Opposed.

13 (No response)

14 CHAIRMAN RUSSELL: Okay. Thank you.

15 The next items on the agenda are new contested
16 cases on appeal. Item No. 1 is the matter of
17 violations of the appeal by Plum Creek
18 Manufacturing of its Montana groundwater pollution
19 control system permit. Katherine.

20 MS. ORR: Mr. Chairman, members of the
21 Board, this is a challenge to a groundwater
22 monitoring permit system, and it involves the
23 permitting for processed wastewater to be
24 discharged to groundwater from Plum Creek's
25 facility in Columbia Falls. That's basically it.

1 CHAIRMAN RUSSELL: Thanks. Question.

2 And maybe we can't get into this. But it seems
3 like their major issue is with the definition of
4 process water; and when looking through this, I
5 guess I didn't see what their objection to the
6 definition of process water was. It just seems
7 like how it was applied.

8 MS. ORR: They're very scant in their
9 description of their appeal.

10 CHAIRMAN RUSSELL: You saw that, too.

11 MS. ORR: I have the letter from Dale
12 Cockrell. That's all I have.

13 CHAIRMAN RUSSELL: It just seems like
14 there could have been a little bit more meat put
15 on the bones about what their objection was.

16 MR. ROSSBACH: Could I make a
17 suggestion? Because this is Plum Creek and it
18 involves a major permit, I'm interested in
19 learning a lot more about what the issues here
20 are.

21 And I would sort of like to suggest that
22 instead of making a decision about a permanent
23 Hearing Examiner, we do like we've done in other
24 cases, appoint Katherine as kind of interim
25 Hearing Examiner to get some more information,

1 discovery, motions, whatever is going to take
2 place, move the thing along to see where this is
3 going in terms of factual issues, factual
4 disputes, legal disputes, so that at some future
5 meeting, we can make a decision whether to hear it
6 ourselves or have her have a hearing.

7 MR. MIRES: This is Larry. I have to
8 agree with Bill on that.

9 MR. ROSSBACH: And I would so move. You
10 can draft the language appropriately, but I would
11 like to have Katherine as interim Hearing
12 Examiner, and we'll make an ultimate decision
13 based upon Katherine's judgment of when it's
14 appropriate to do so.

15 CHAIRMAN RUSSELL: So basically we'll
16 ask Katherine to do all of the prehearing stuff,
17 and maybe take this up ourselves.

18 MR. ROSSBACH: At the time, when the
19 time comes to schedule an actual final hearing on
20 it, then we will make the decision as to who hears
21 it.

22 CHAIRMAN RUSSELL: I think basically all
23 we have to do is appoint -- I don't think we have
24 to do anything then because Katherine is our
25 interim Hearings Examiner, so I think we just take

1 no action on this. That would be the simplest,
2 unless -- Katherine, do you need a little bit more
3 definition than that?

4 MS. ORR: I don't think so.

5 CHAIRMAN RUSSELL: Well, then let's just
6 move on to the next item.

7 MS. ORR: There are two cases involving
8 this particular item. If you look at Item C(3),
9 C(2), and III(C)(4), both of the Respondents for
10 this notice of violation have appealed. Three W's
11 involves the issuance of a notice of violation for
12 placement of hazardous waste in a landfill up in
13 Cascade County. There were, it looks like, many
14 yards of waste soil disposed of in the landfill.

15 And the Department is looking for a
16 clean-up plan, registration and ID with the
17 Department as a hazardous waste discharge, and
18 dates of removal. It looks like no penalties are
19 sought. And in this particular one, Three W's --
20 which is one of the landfill operators I guess --
21 is appealing.

22 CHAIRMAN RUSSELL: Thanks. We have to
23 keep these separate, right? We can't force them
24 to join together on this?

25 MS. ORR: I can ask the parties about

1 that.

2 CHAIRMAN RUSSELL: But it seems like
3 they could put them together.

4 MS. ORR: Yes.

5 CHAIRMAN RUSSELL: But I guess we need
6 to take action individually.

7 MS. ORR: Right.

8 CHAIRMAN RUSSELL: On this matter -- and
9 this is -- Basically the first one is the
10 attorneys for Montana Waste Systems, so this is
11 Montana Waste Systems appeal. Do I have a motion
12 to appoint Katherine the Hearings Examiner?

13 MR. ROSSBACH: I would like to -- If we
14 can do sort of the same on these as in the last
15 one, and see if they can -- Again, I feel a little
16 bit like I don't know enough. I'd like to have
17 Katherine see if she can get them to merge these
18 two, and see where it goes before we decide what
19 to do. This is a big issue.

20 MS. SHROPSHIRE: I agree.

21 CHAIRMAN RUSSELL: Let's just, for our
22 purposes -- since we're not going to take action
23 -- on Items 2 and 4, we're not going to take
24 action, so we'll move to Item 3. In the matter of
25 the appeal of the Eastgate Water and Sewer

1 Association of the Helena Sand Gravel, Inc.'s open
2 cut mining permit HGS-017. Katherine.

3 MS. ORR: Mr. Chairman, members of the
4 Board, this is a case involving a challenge by the
5 adjoining landowners to Helena Sand and Gravel to
6 the issuance of a permit by the Department on the
7 basis of MEPA and the Open Cut Mining Act.

8 CHAIRMAN RUSSELL: Comments by the
9 Board.

10 MS. SHROPSHIRE: I think this is again
11 one that's a pretty big deal.

12 CHAIRMAN RUSSELL: Haven't we already
13 dealt with Helena Sand and Gravel? Is this the
14 same Helena Sand and Gravel that we just closed a
15 case on?

16 MS. ORR: I don't think so. But Robin
17 is right. This mining operation has been in our
18 papers.

19 CHAIRMAN RUSSELL: Maybe that's what it
20 was.

21 MS. ORR: And the Department has been
22 handling the permitting of this via an action in
23 the District Court here.

24 MR. ROSSBACH: I hate to keep pumping
25 these, but I think we ought to do the same thing,

1 and let them -- wouldn't change anything to let
2 Katherine continue as an interim Hearing Examiner
3 to see how these things play out, and make a final
4 decision at a later point, on the first four of
5 these.

6 MS. SHROPSHIRE: I agree with that. I'm
7 not ready to let this one go yet.

8 MR. MIRES: I agree also.

9 CHAIRMAN RUSSELL: It sounds like you
10 guys are trying to find work. The last one is
11 another appeal. I've already opened up the
12 letter, so Katherine, go ahead and take this one
13 on.

14 MS. ORR: Mr. Chairman, members of the
15 Board, this has to do with an open cut operation
16 without a permit, failure to operate within the
17 approved hours of operation, and no submission of
18 groundwater elevation levels in Gallatin County.
19 And there is a challenge to a notice of violation
20 in which \$5,000 in penalties are requested by the
21 Department.

22 CHAIRMAN RUSSELL: And they seem to have
23 some mitigating circumstances that made them
24 operate outside of their permit limits.

25 MS. ORR: That's what they want --

1 MR. ROSSBACH: I'm going to punt on this
2 one. I move that Katherine be appointed permanent
3 Hearing Examiner on this one.

4 CHAIRMAN RUSSELL: That's a motion by
5 Bill. Is there a second?

6 MS. SHROPSHIRE: I'll second.

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

9 (Response)

10 CHAIRMAN RUSSELL: The next item on the
11 agenda are final actions on contested cases. The
12 first one is the matter of appeal of the
13 Butte-Silver Bow Public Works Department regarding
14 the final MPDES permit. Katherine, we have a
15 stipulation for dismissal.

16 MS. ORR: Right. And Mr. Chairman,
17 members of the Board, this is a simple motion and
18 proposed order of dismissal pursuant to Rule 41 of
19 the Montana Rules of Civil Procedure, and this is
20 a situation where the parties have agreed and are
21 moving the Board to remove its jurisdiction.

22 CHAIRMAN RUSSELL: With that in mind, I
23 do have an order of dismissal to dismiss this case
24 with prejudice. Do I have a motion to authorize
25 the Board Chair to sign?

1 MR. MIRES: So moved.

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

4 MR. ROSSBACH: Second.

5 CHAIRMAN RUSSELL: Seconded by Bill.
6 Any further discussion?

7 (No response)

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

10 (Response)

11 CHAIRMAN RUSSELL: Opposed.

12 (No response)

13 CHAIRMAN RUSSELL: Next, matter of
14 violations of Open Cut Mining Act by Big Rock, LLC
15 at the Wheeler Gravel Pit, Missoula County.
16 Katherine, I have a stipulation to dismiss?

17 MS. ORR: Yes, you do, Mr. Chairman,
18 members of the Board. This involves a site where
19 mining activities were conducted outside the
20 permitted area of the pit, and the Department
21 asked for a surety bond in the amount of \$40,000
22 and some, and wanted Big Rock to apply for an
23 amended permit.

24 And the Department was asking for an
25 administrative penalty initially of \$5,000

1 roughly, and according to the stipulation, Big
2 Rock will pay an administrative penalty of
3 \$4,488.50 with all but \$3,596 suspended, and the
4 remaining suspended amount will have to be paid if
5 Big Rock doesn't comply with the requirement that
6 they submit an application to amend their permit.

7 CHAIRMAN RUSSELL: Thank you. I do have
8 an order in front of me. I need a motion to
9 authorize the Board Chair to sign. Is there a
10 motion?

11 MR. ROSSBACH: So moved.

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

14 MS. KAISER: I'll second. This is
15 Heidi.

16 CHAIRMAN RUSSELL: It's been seconded by
17 Heidi. 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: All right. The next
25 item is in the matter of violations of the Montana

1 Water Quality Act by 48 North, Pc. at Spring Creek
2 Estates Subdivision, Kalispell. There is a
3 stipulation to dismiss.

4 MS. ORR: Yes, Mr. Chairman, members of
5 the Board. This is a Rule 41(a) motion and
6 proposed order, in which the parties have gotten
7 together, and decided upon the best course of
8 action, and are asking the Board to remove its
9 jurisdiction basically.

10 CHAIRMAN RUSSELL: I noticed -- I know
11 this is pretty picayune, but the attorney from
12 Kalispell didn't date the letter. Is that okay?

13 MS. ORR: I think it's okay.

14 CHAIRMAN RUSSELL: I have an order in
15 front of me. I need a motion to authorize the
16 Board Chair to sign.

17 MR. MIRES: So moved.

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

20 MR. ROSSBACH: Second.

21 CHAIRMAN RUSSELL: Seconded by Bill.

22 All those in favor, signify by saying aye.

23 (Response)

24 CHAIRMAN RUSSELL: Opposed.

25 (No response)

1 CHAIRMAN RUSSELL: All right. Motion
2 carries. Next one, UST Act by CStore in Superior.
3 Katherine.

4 MS. ORR: Mr. Chairman, members of the
5 Board, you have before you a stipulation to
6 dismiss and a proposed dismissal order with an
7 administrative order on consent. This is a case,
8 an underground storage tank case, in which the
9 Department was seeking penalties for a set of
10 violations, failure to provide corrosion
11 protection, failure to have spill prevention
12 equipment, and failure to conduct release
13 detection monitoring, failure to timely correct
14 violations.

15 An initial penalty of \$9,050 was sought,
16 and the agreement that the administrative order on
17 consent puts in place compliance with the observed
18 violations and corrective action in the original
19 notice, and seeks penalties of \$3,020.

20 CHAIRMAN RUSSELL: I do have an order of
21 dismissal in front of me. Do I have a motion to
22 authorize the Board Chair to sign?

23 MS. KAISER: So moved.

24 CHAIRMAN RUSSELL: It's been moved by
25 Heidi.

1 MS. SHROPSHIRE: Second.

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

4 (Response)

5 CHAIRMAN RUSSELL: Opposed.

6 (No response)

7 CHAIRMAN RUSSELL: The last matter of
8 appeal, a letter by Schellenger Construction, Inc.
9 and Tutvedt Family Partnership, Flathead County,
10 Kalispell. Order dismissing. Katherine.

11 MS. ORR: Mr. Chairman, members of the
12 Board, this involves an appeal of an issuance of a
13 letter from the Department to the representative
14 of Schellenger Construction Company and Tutvedt
15 Family Partnership. The appellants were arguing
16 that the issuance of the letter by the Department
17 saying that if certain activities weren't
18 undertaken that there would no longer be allowed
19 any mining activities was itself an appealable
20 action; and the Department filed a motion to
21 dismiss the appeal, saying that in fact the letter
22 of the Department advising the permit holder of
23 required actions was not a final appealable
24 action.

25 And I agreed with that, and wrote an

1 order dismissing the appeal on those grounds. And
2 hopefully you've had a chance to look that over,
3 and I'm asking the Board to adopt my findings and
4 enter an order of dismissal.

5 CHAIRMAN RUSSELL: I thought this was
6 really unique. I've never seen anything like
7 this. I thought it was an interesting read. I'm
8 not kidding. They basically were appealing a
9 what-if, "If you don't do this, this is what will
10 happen," or an if-what.

11 So with that in mind, I would entertain
12 a motion for the Board to adopt Katherine's
13 findings, and authorize the Board Chair to sign a
14 motion to dismiss.

15 MS. SHROPSHIRE: So moved.

16 MR. MIRES: Second.

17 CHAIRMAN RUSSELL: Moved by Robin and
18 seconded by Larry. All those in favor, signify by
19 saying aye.

20 (Response)

21 CHAIRMAN RUSSELL: Opposed.

22 (No response)

23 CHAIRMAN RUSSELL: That is all for that
24 section. We are on to general public comment. Is
25 there anyone in the audience or on the phone that

1 would like to speak to the Board on matters that
2 the Board has jurisdiction on?

3 (No response)

4 CHAIRMAN RUSSELL: Anyone jumping up,
5 Tom?

6 MR. LIVERS: No one here in Helena.

7 Before we go, maybe just a couple of
8 quick logistical notes, if I could, Mr. Chairman.
9 First off, thanks for participating in the
10 conference call. Given such a quick agenda, it
11 sure seemed to make sense -- mostly for the sake
12 of all of the time on the Board Members' part, but
13 also just from expense, fuel, all that -- to go
14 with the teleconference. So I appreciate that
15 Chris tee'd up that option, and made it happen.
16 So when we have something that looks like it will
17 be as light as this agenda, we'll keep that as an
18 option.

19 And then one other thing. We've had
20 some interest in maybe trying to broadcast or
21 somehow convey these meetings out wider across the
22 state, and Chris has had some discussions with
23 Helena Civic Television, which has the capability
24 now to air here in Helena, I think Billings,
25 Bozeman, and Missoula as well; and then in 2009,

1 they'll be able to have wider statewide reach.
2 And they are interested in televising these
3 meetings. We think there is some value to that as
4 well.

5 To facilitate that, we're looking at
6 moving the meetings from the Metcalf Building into
7 the Capitol, and that would happen for probably
8 all of the meetings except during legislative
9 session. So it's possible that as early as the
10 October 3rd meeting we may be changing the venue,
11 and holding these meetings in the Capitol
12 Building, and broadcasting them over the Helena
13 Civic Television network.

14 CHAIRMAN RUSSELL: That sounds great.
15 I'm really excited.

16 MR. LIVERS: Good.

17 CHAIRMAN RUSSELL: Anything else, Tom?

18 MR. LIVERS: That's it, Mr. Chairman.
19 Thank you.

20 CHAIRMAN RUSSELL: Is there anything
21 that any Board member wants to bring up before we
22 adjourn?

23 (No response)

24 CHAIRMAN RUSSELL: Hearing none, I will
25 entertain a motion to adjourn.

1 MR. ROSSBACH: So moved.

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

4 MS. SHROPSHIRE: Second.

5 CHAIRMAN RUSSELL: Seconded by Robin.
6 All those in favor, signify by saying aye.

7 (Response)

8 CHAIRMAN RUSSELL: All right. Nice
9 meeting, and we'll see you in October.

10 (The proceedings were concluded

11 at 9:57 a.m.)

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

2 STATE OF MONTANA)

3 : SS.

4 COUNTY OF LEWIS & CLARK)

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

8 That the proceedings were taken before me at
9 the time and place herein named; that the
10 proceedings were reported by me in shorthand and
11 transcribed using computer-aided transcription,
12 and that the foregoing - 39 - pages contain a true
13 record of the proceedings to the best of my
14 ability.

15 IN WITNESS WHEREOF, I have hereunto set my
16 hand and affixed my notarial seal
17 this _____ day of _____, 2008.

18

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

23

24

25