BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING )
SEPTEMBER 23, 2011 )

TRANSCRIPT OF PROCEEDINGS

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
September 23, 2011
9:00 a.m.

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

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

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CHAIRMAN RUSSELL: It is 9:03 a.m., and
I will call --

OPERATOR: Karl Knuchel is joining the
meeting.

CHAIRMAN RUSSELL: I'll call this
regular meeting of the Board of Environmental
Review to order. Tom, do you want to take a roll
call.

MR. ELLERHOFF: Yes, Mr. Chairman.
Would the members identify themselves, please.

MR. MILLER: Marvin Miller.

MR. ANDERSON: Larry Anderson.

MR. MIRES: Larry Mires.

MS. KAISER: Heidi Kaiser.

MS. SHROPSHIRE: Robin Shropshire.

MR. WHALEN: Joe Whalen.

CHAIRMAN RUSSELL: We're all here then.
All right. With that, the first item on the
agenda is the review and approval of the minutes
from the July 22nd meeting. Any comments before
we take action?

(No response)
CHAIRMAN RUSSELL: Hearing none, I will entertain a motion to approve those minutes as submitted.

MR. MIRES: Larry Mires so moves.

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

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

CHAIRMAN RUSSELL: It's been seconded by Heidi. Further comment?

(No response)

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

(Response)

CHAIRMAN RUSSELL: Opposed.

(No response)

CHAIRMAN RUSSELL: Motion carries unanimously. All right. The next item on the agenda are briefing items, contested case updates. Katherine.

MS. ORR: Good morning, everyone. Mr. Chairman, members of the Board. There has been quite a lot of activity on these cases, and I'll just kind of go through the highlights of these activities.
For briefing item II(A)(1)(a), in the matter of the notice of violations of the Montana Water Quality Act by North Star Aviation, Inc., a contested case hearing was held two days ago, September 21st, and post hearing briefs are due on October 18th.

The next item, "B," in the matter of the request for hearing regarding the revocation of certificate of approval, there was a recommended order on summary judgment that was issued, and this item will be moved to the final action portion of the agenda at the end of that section.

The parties have filed, I would say minor exceptions to the recommended order on summary judgment, so the idea will be that for today, the Board will look at my proposed drafted order to adopt my recommended order on summary judgment, which takes into account the interchange that occurred regarding those exceptions, but we'll get to that on the final action portion of the agenda.

The next item II(A)(1)(c), in the matter of the violations of the Open Cut Mining Act by Deer Lodge Asphalt, a contested case hearing was held on September 19th, and post hearing briefs
are due in that case on October 11th.

Then going down through Items (d) through (g), there has not been any action that differs from what you see here on the agenda.

On Item (g), Lolo Hot Springs, there has been a proposed hearing schedule, and today I'm issuing an order that adopts that hearing schedule.

Regarding other cases assigned to the Hearing Examiner, if you go down to briefing Items II, Roman Numeral II(A)(2)(a) or (b) in the matter of the appeal and request for hearing by Roseburg Forest Products, an order vacating in the dates in the third scheduling order and setting up a telephone conference for October 3rd was issued.

Item (c), in the matter of the appeal and request for hearing by Maurer Farms, Inc., there has been quite a lot of activity in this case. One of the Appellants filed a withdrawal of appeal, Mr. Salois. Also, I have issued an order on a motion to dismiss denying that motion, and also an order on cross motions for summary judgment denying those motions because there are material issues of fact, and also questions of law that need to be resolved.
MATL has filed a motion to reconsider the ruling on the dismissal and summary judgment that was filed on October 24th. Maurer Farms just recently filed a response, so I'll be ruling on that. If that goes to hearing, that is set for hearing on October 19th.

Going to Item (d) in this subsection, Meat Production, Inc., the hearing date was vacated, and a request for dismissal is being contemplated by the parties, and we expect that to be submitted shortly.

City of Helena regarding DEQ's notice of final decision for Montana Pollutant Discharge Elimination System Permit, that's Item (e) in this subsection, a second order granting extension was issued on September 14th, so the parties have yet to either arrive at a settlement or file a proposed schedule, looking like they may be able to settle that case.

And then No. 3, Cases Not Assigned to the Hearing Examiner, in the matter of the violations of the Montana Strip and Underground Mine Reclamation Act by Carbon County Holdings, a stipulation to dismiss was filed recently.

OPERATOR: Now joining Todd Shea.
MS. ORR: A stipulation to dismiss was filed on September 21st, 2011, so that was going to go to the regularly scheduled meeting in December, and now the Board will just have only to entertain that motion to dismiss, so that's great.

And now we're at the other briefing items.

CHAIRMAN RUSSELL: Thanks, Katherine.

Tom, do you want to tee this one up.

MR. ELLERHOFF: Yes, Mr. Chairman. Bob Habeck of the Air Resources Management Bureau will address this issue for the Department.

MR. HABECK: Thank you, Mr. Ellerhoff.

Mr. Chairman, members of the Board. My name is Bob Habeck. I'm an Air Program Manager with the Air Resources Management Bureau. I'm here to brief the Board on the status of the annual air quality permit fee rule.

The State Clean Air Act allows the Department to charge an annual air quality operation fee and an air quality and open burning permit fee application fee sufficient to cover the Department's costs of developing and administering the permitting requirements of the State Clean Air Act.
Typically there is a need to revise these permit fees. The Department requests the Board to initiate rulemaking to propose new fees. However, this year, much the same as I brought to you last year, the Department is not requesting the Board to initiate rulemaking. Rather the Department calculated that it can maintain existing services using the existing fee structure for fiscal year 2012. So therefore the formal rulemaking action is not being requested, and therefore this action is on your agenda only as a briefing item.

The Department discussed this decision not to request rulemaking with the members of our stakeholders, the Clean Air Act Advisory Council, and members of the major open burning community, and received no adverse comments regarding this decision.

Also it was understood from these stakeholders that the current financial situation is dynamic and ongoing, such that next year the Department may, if necessary, come before the Board and request rulemaking depending on the financial situation.

MR. HABECK: So to round off my presentation, the current air quality permit fee charges will remain the same at $38.24 a ton as currently published in the rules, and the application administrative fees will also remain the same as currently published in our rules.

So that concludes my briefing to the Board. I stand by for any questions.

CHAIRMAN RUSSELL: Any questions for Bob?

(No response)

CHAIRMAN RUSSELL: It's hard to have questions if nothing is going to change.

Questions for the Department?

(No response)

CHAIRMAN RUSSELL: Thanks, Bob. All right. The next item on the agenda is Item III(A)(1), Executive Summary for Rulemaking, and this is in MPDES program ARM 17.30 Subchapter 12.

MR. ELLERHOFF: Mr. Chairman, Tom Reid of the Water Protection Bureau will discuss this issue for the Department.

MR. REID: Good morning, Mr. Chairman, members of the Board. My name is Tom Reid. I'm with the Department's Water Protection Bureau,
Permitting Compliance Division.

This amendment to Subchapter 12 clarifies and updates the minimum treatment requirements for point source dischargers, and is necessary in order to maintain consistency with the Federal NPDES regulations and program requirements. Subchapter 12 addresses effluent standards, and along with Subchapters 11, 13, and 14 form the basis for State issued MPDES permits.

I'll give you a little bit of history here. These rules went before WPCAC on April of this year. The Board initiated rulemaking on May 13th. There was a public hearing here in Helena on July 7th. The public comment period closed the next day. We had one commenter, MDU, Montana Dakota Utilities, and if it's all right, I'll summarize those comments briefly.

CHAIRMAN RUSSELL: Please.

MR. REID: There were actually six different comments. The first one had to do with adoption of Federal rules versus State rules, and adoption by reference versus by adoption in rule. It's always kind of a balance between how much you adopt by reference, and currently we adopt about 80 percent of the NPDES rules by reference.
What we're trying to do is clarify in these updates, these rules, especially Subchapter 12, what minimum elements are for an MPDES permit, and there has been some confusion in the past having to refer back and forth between the Federal rules and the State rules. So we believe --

Specifically the comment was on Rule 1203, which are minimum treatment requirements. These are the basis for MPDES permits for the treatment based requirements. So there is no change recommended there.

Comment No. 2, I think there was a little bit of confusion. EPA -- There is Phase 1 and Phase 2 of these 316(b) rules, which 316(b) has to do with cooling water intake structures. We're adopting rules for Phase 1, which were promulgated by EPA in 2000, and have been challenged in court and upheld, so we feel comfortable in proposing those.

EPA reinitiated Phase 2 rules. Phase 2 rules address existing facilities, and those rules were promulgated in the Federal Register on April 20th of this year by EPA.

I believe the comments confused the two sets, Phase 1 and Phase 2, and they recommended
that we delay adopting this rule package until EPA
took final action. Final action on Phase rules
was back in 2001, so again, I think we're
comfortable with that.

The next three questions have to do with
the cost benefit, wholly proportionate, and the
cost tests that are used to cost out these various
treatment options for cooling water intake
structures. The comment requested that we change
the -- was not comfortable with the fact that as
they read the rules, we would be comparing for
costs for a new facility, one that has not got a
permit, yet with 1999 --

CHAIRMAN RUSSELL: This is Joe Russell.

You're cutting out, Tom.

MR. REID: Maybe that's better. The
comment was relative to the cost of a new facility
relative to the cost analysis that was done by EPA
in 1999. For a new facility, we wouldn't compare
it to the 1999 cost. That's not what the wholly
disproportionate test is about. It compares the
technology. EPA evaluated three different
technologies, one through technology,
recirculating technology, and dry cooling, and
they said if the cost for a new facility was
equivalent to the dry cooling -- which is roughly ten times the cost of recirculating -- then it would be wholly disproportionate to the cost benefit of installing that equipment.

The next comment had to do with extending the wholly disproportionate test to New Rule V. New Rule V is applicable to Phase 2 facilities, and therefore Phase 2 facilities under the current federal rule are subject to best professional judgment, and EPA has not adopted these tests to apply to existing facilities.

Existing facilities are the subject of the new rule that is out for public comment -- well, actually the public comment period closed in August, but has not been adopted by EPA.

And then last, they had requested extension of the public comment period, and after we talked to them, and cleared up the confusion relative to Phase 1 and Phase 2, they withdrew that request, so they didn't have an issue with extending the public comment period.

So I'd be happy to answer any questions in more detail, but with that, the Department recommends that the Board adopt these regulations as proposed.
CHAIRMAN RUSSELL: All right. Thanks, Tom. I'm not sure if there's something wrong with that mike. When you did get close to it, then it started to echo a little bit. But I think, unless the Board disagrees, I think we caught most of what you were saying, and it is in the record.

Any questions or comments for the Department?

(No response)

CHAIRMAN RUSSELL: All right. Before we move into this, is there anyone in the audience, member of the public, that would like to speak to this matter before we take action?

(No response)

CHAIRMAN RUSSELL: Anyone jumping up there, Tom?

MR. ELLERHOFF: Mr. Chairman, I see nobody moving forward.

CHAIRMAN RUSSELL: We do have people on the phone that I don't recognize their names. Anyone on the phone that would like to speak to this matter?

(No response)

CHAIRMAN RUSSELL: Hearing none, I will entertain a motion to adopt the proposed
amendments as submitted, accept the Presiding Officer's report, the House Bill 521 and 311 analysis, and the Department's responses to comments.

MR. MILLER: This is Miller. So moved.

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

MR. WHALEN: Mr. Chairman, this is Joe.

CHAIRMAN RUSSELL: Is this for the second, Joe?

MR. WHALEN: Yes.

CHAIRMAN RUSSELL: All right. It's been moved and seconded. Is there further comment?

(No response)

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

(Response)

CHAIRMAN RUSSELL: Opposed.

(No response)

CHAIRMAN RUSSELL: Motion carries unanimously. Thank you for your presentation, Tom.

All right. The next item on the agenda is executive summary for action on rule adoption on Rule 17.8.801, 804, 818, 820, 822, 825, 901,
Mr. Chairman, Debra Wolfe of the Air Resources Management Bureau will address this rule for the Department.

MR. ELLERHOFF: Mr. Chairman, Debra Wolfe of the Air Resources Management Bureau will address this rule for the Department.

MS. WOLFE: Thank you. Thank you, Mr. Chairman, members of the Board. For the record, my name is Debra Wolfe, and I work in the Air Resources Management Bureau. I'm here today to represent the Department regarding the Board's proposed amendment of air quality rules. The Board is today taking action on a proposal to amend air quality rule provisions in Title 17, Chapter 8, Subchapters 8, 9, and 10, to update requirements for PM-2.5 for sources that are subject to major source permitting rules.

As I described in the presentation to request initiation of this rulemaking, certain changes to federal requirements for major sources necessitated revisions to Montana's Major Source Permitting Program to make it consistent with those changes. The Board held a hearing on July 7th, 2011, and provided opportunity for public comment. No written or oral public comment was received.

The Board has in its packet a draft
notice and an executive summary of this item. The
Department supports the Board's proposed
amendments to the rules, and requests that the
Board adopt the amendments as proposed in the
notice published May 26th, 2011. Thank you.

CHAIRMAN RUSSELL: Comments for Deb or the Department, or of the Department?

MR. MIRES: Mr. Chairman, this is Larry Mires. I have a question, and it's not necessarily substance as much as clarification of it.

If you look in 17.8.801, the Department has struck out names like, say, particulate matter and went to PM-10, scratched out sulphur dioxide and went to SO2, and throughout all of 801, that seems to be the case where we've taken from writing out the name topic, even hydrogen dioxide, to NO2; and then when we get down into 17.8.901 and throughout the rest of the rule, everything is written back out again.

Is there a reason why we're not writing out the words "particulate matter," "sulphur dioxide," or "hydrogen dioxide" in 801, and then we leave them as they are in the rest of them? It just looks a little odd to me.
MS. WOLFE: Mr. Chairman, members of the Board. I think this is actually just a matter of probably some inconsistency in style. I have to say that these were modeled after what the Federal rules have in them, and so if it referred to an acronym NO2 instead of nitrogen dioxide, it probably carried that over to the State rules.

If there is a preference for having it be consistent all the way through for whatever concern, that can certainly change in a housekeeping rulemaking later on. I can take note of that.

MR. MIRES: I think it would look better if it was consistent throughout instead of bouncing back and forth. That's just my personal opinion. Thank you.

CHAIRMAN RUSSELL: Thanks, Larry. Any other comments or questions?

MR. ANDERSON: This is Larry Anderson. I would agree with Larry on that. It seems to me that we ought to make this consistent throughout the rule.

CHAIRMAN RUSSELL: I'm sure the Department will take note of that, so the next time we see anything like this, we can make sure
that there is some consistency in nomenclature.

Any other comments?

(No response)

CHAIRMAN RUSSELL: Anyone in the audience that would like to address this before the Board takes action?

(No response)

MR. ELLERHOFF: Mr. Chairman, I see nobody raising their hand.

CHAIRMAN RUSSELL: Or running to the podium?

MR. ELLERHOFF: Correct.

CHAIRMAN RUSSELL: Okay. I will take that as no one wants to make any comments. Okay. I'll entertain a motion to adopt the proposed amendments, accept the Presiding Officer's report, the Department's 521 and 311 analysis, and there were no comments so we don't have to adopt any Department's responses. Do I have a motion?

MR. MIRES: Larry Mires. So moved.

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

MR. MILLER: This is Miller. I'll second.

CHAIRMAN RUSSELL: Seconded by Marv.
Further comments?

MR. WHALEN: Mr. Chairman, in lieu of the comments by Mr. Mires and Mr. Miller, I would move to amend the motion by stipulating that any references to chemicals be spelled out in the rule.

CHAIRMAN RUSSELL: Now, would that -- I'm sure that would be a friendly amendment. I'm guessing -- I'll defer to Katherine. Are you talking about in future revisions, or would you like to see this revised?

MR. WHALEN: Well, I think that the point of the comments was to see that this rule is revised, as well as any references to elements or chemical molecular combinations in future rulemaking. So we can't control -- I can't control that for future rules, only with an amendment to this. We can stipulate that that's the case with this particular amendment.

CHAIRMAN RUSSELL: I guess I would ask John or Katherine. These are non-substantive amendments. Could we not direct the Department in our motion to clean this up right now?

MS. ORR: Mr. Chairman, my feeling about it is you could. These are non-substantive. And
John wants to comment as well.

MR. ANDERSON: This is Larry Anderson.

I didn't hear Katherine's comments there.

MS. ORR: I'm sorry, Larry. The issue is whether before this notice of adoption goes out there can be a change that wasn't technically noticed to the public that would contain the full spelling of the chemical compounds as opposed to an abbreviation. And it seems to me that that would be acceptable. John North wants to speak to that as well right now.

MR. NORTH: Mr. Chairman, members of the Board, John North, Chief Legal Counsel for the Department. I agree with Katherine that that could be done. However, what I would want to do is to take a look at the rules in the remainder of this subchapter that are not being amended to see how that would work with them.

I'm not familiar with why this is being done at the present time, and it could be that the terms are used by the abbreviations in the rest of that particular subchapter, at which point, I would say that it shouldn't be done in this rulemaking, but should be done in a rulemaking that covers the entire subchapter. If the Board
wanted to defer consideration of this until later
in the meeting, I could look at that, and brief
you on it before you adjourn.

CHAIRMAN RUSSELL: How does the Board
feel? If John could look at the subsequent
sections and see about consistency, maybe we could
add that in. It isn't substantive. We just heard
from our Counsels that it isn't.

MR. ANDERSON: I would suggest if we're
going to -- and I would second Joe's motion, but I
would suggest additionally what we do is when we
designate a chemical by its name, like "carbon
monoxide," we then put in parenthesis its
abbreviation.

CHAIRMAN RUSSELL: That would certainly
add -- except in the case of particulate matter
which is defined at different levels of particle
size.

MR. ANDERSON: Sure.

MR. WHALEN: Mr. Chairman, I would
withdraw my amendment to the rule if Mr. North
would come back and provide some sort of a remedy
for the consistency that is being suggested by Mr.
Mires and Mr. Miller. I agree with both of them,
as well as the comment made by Mr. Anderson.
However as Chairman you would like to arrange that, that would be fine with me.

CHAIRMAN RUSSELL: I would suggest that we just don't -- John, do you need like 20 minutes or so?

MR. NORTH: I think that would be fine, yes.

CHAIRMAN RUSSELL: Let's just defer, and let's just defer action for about 20 minutes. We can bring this up later in the agenda.

MR. MIRES: Agreed.

CHAIRMAN RUSSELL: With that in mind, let's move on. And so Katherine, since we want to give John 20 minutes, let's make sure that we don't outpace ourselves in the next sections here.

The next item, action item for final actions on contested cases.

MS. ORR: Mr. Chairman, members of the Board, the first item is in the matter of the appeal and request for hearing by Ronald and Debbie Laubach regarding the DEQ final decision to amend the MATL certificate of compliance, BER 2010-15 MFS.

The Board has before it a proposed order of dismissal under 41(a), and this is unusual in
that this case went to a full contested case hearing. But anyway, it sounds like the parties were able to reach an agreement, and that was before the recommended decision on the contested case findings was to be issued.

It is an interesting case. It was involving Montana Alberta Tie, Limited, which got its original certificate of compliance on October 22nd, 2008 regarding a line, a power line, wind power line, from Great Falls to near Lethbridge, about 130 miles long. And MATL applied for an amended certificate.

And this is what Mr. and Mrs. Laubach were objecting to. They filed their appeal on October 5th, 2008, and were objecting to the proximity of the line to their wetlands. And that is in very general terms what the subject of the contested case hearing was.

Mr. Laubach appeared pro se, and on his own behalf, but now we have an order of dismissal asking for dismissal with prejudice under 41(a), and that is appropriate under the Rules of Civil Procedure.

CHAIRMAN RUSSELL: Thanks, Katherine.

Any questions for Katherine before we --
MR. MIRES: Mr. Chairman, this is Larry Mires, and I do have a question, and I'm not sure if I'm in the right order, or if I'm out of order on this one. If the dismissal of this case, how does that -- Under the new cases, I think it's under C(9), how does that fact play in the public's case, or does it, or is that disassociated?

MS. ORR: Well, it is interesting. Where the line is placed is going to affect conceivably neighbors if there is an agreement, say, with respect to Mr. Laubach.

And as far as Item 9 in the new contested case section, that actually -- there is a kind of a punt mechanism that exists under the statutes where a party can ask to go to District Court, and that's what happened, so the Board won't be hearing that case. It's like a judicial review of the Department's decision, not the Board's decision. So factually I don't know what the interrelationship is. There could be one, but it's a moot question for the Board.

MR. MIRES: Thank you very much.

MS. ORR: Does that answer your --

MR. MIRES: Thank you.
CHAIRMAN RUSSELL: All right. Still cutting out. Did you say it's a moot question for the Board?

MS. ORR: Right, because Item 9 is now under the jurisdiction of the District Court.

CHAIRMAN RUSSELL: Okay. All right.

With all that in mind, I have an order of dismissal for 2010-15 MFS. I would entertain a motion to authorize the Board Chair to sign that order of dismissal.

MR. MILLER: I so move. This is Miller.

CHAIRMAN RUSSELL: Moved by Marv. Is there a second?

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

CHAIRMAN RUSSELL: Seconded by Heidi.

Further questions?

(No response)

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

(Response)

CHAIRMAN RUSSELL: Opposed.

(No response)

CHAIRMAN RUSSELL: Motion carries unanimously. All right. The next one is BER
MR. WHALEN: Mr. Chairman, I don't know if this happened to the rest of you, but I lost about half of what Katherine was saying in her narrative on that last issue. Is there another microphone that Katherine might be able to use?

CHAIRMAN RUSSELL: I don't know if you guys are sharing a mike, but even the one that the Department is using cuts out.

MS. ORR: Okay. We just placed another microphone near me. Does that work any better?

MR. WHALEN: It's better.

CHAIRMAN RUSSELL: The next item, Circle B.

MS. ORR: Mr. Chairman, members of the Board, this is a case involving the unauthorized discharge of wastewater to State waters. It involves a CAFO operation, concentrated animal feeding operation, and there was a failure to comply with permit conditions. There was a requested penalty of $8,400. We don't know what resulted ultimately, but you have before you a motion to dismiss.

CHAIRMAN RUSSELL: All right. And I do have an order of dismissal for BER 2011-07 WQ, and
would entertain a motion to authorize the Board Chair to sign.

MR. WHALEN: Mr. Chairman, this is Joe.

I would so move that.

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

MR. MILLER: I'll second it. Miller.

CHAIRMAN RUSSELL: Seconded by Marv. Is there any further discussion?

(No response)

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

(No response)

CHAIRMAN RUSSELL: Opposed.

(No response)

CHAIRMAN RUSSELL: Motion carries unanimously. Okay. Next item.

MS. ORR: Mr. Chairman, members of the Board, this is in the matter of the request for hearing by Western Energy Company regarding DEQ's notice of noncompliance and abatement order. This involves the Strip Mine and Underground Reclamation Act.

There was a notice of noncompliance and an order of abatement that was issued on the basis
that there were field conditions that varied from
the approved worst case design parameters for the
sizing of a pond, and reclamation upon inspection
had not progressed as was represented. There was
an order to abate and a request for hearing. Then
on August 1st, 2011, there was a withdrawal of the
request for hearing, so you have before you a
proposed order of dismissal.

CHAIRMAN RUSSELL: Apparently they are
just going to take their --

MS. ORR: Apparently so.

CHAIRMAN RUSSELL: All right. I do have
an order of dismissal for Case No. BER 2011-10 SM,
and would entertain a motion to authorize the
Board Chair to sign.

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

CHAIRMAN RUSSELL: Moved by Larry. Is
there a second?

MS. SHROPSHIRE: Second. This is Robin.

CHAIRMAN RUSSELL: It's been moved and
seconded by Robin. Any further discussion?

(No response)

CHAIRMAN RUSSELL: Hearing none, all
those in favor, signify by saying aye.
MS. ORR: The next item. This is a case involving four underground storage tanks out at Fort Peck at the Fort Peck Station -- that's the name of the gas station -- and there was a motion for summary judgment that was filed by the Department, and that was fully briefed. And upon consideration of the briefing, I drafted a recommended order on the motion for summary judgment.

The underground storage tank owner bought the station in 1994. None of the tanks had adequate overfill, spill, or corrosion protection. And I can hear there is a terrible echo.

CHAIRMAN RUSSELL: We can hear you, though.

MS. ORR: Can you? Okay. Anyway, the tank owner was obligated to institute proper overfill, spill, corrosion protection, and/or close the tanks timely by 1998, and didn't do that. And the issue that the owner brought up
was, "How can you prove that I own these tanks
since you can't prove the location of the tanks?"

And as a matter of proper proof under
the rules regarding motions for summary judgment,
the Department came forward with adequate proof of
ownership by way of business records of the
Department that included a form filed by this
Appellant where she said she owned the tanks at
the station, and the owner in the summary judgment
briefing did not file anything sufficient to
refute that.

So I decided that she was therefore
liable, was the owner, and that the recommended
corrective action should be instituted. And you
have the order, the recommended order, and then a
recommended order granting the motion for summary
judgment. No exceptions were filed by the
Appellant.

CHAIRMAN RUSSELL: All right. Thanks,
Katherine. I do have an order, motion for summary
judgment on Case No. BER 2010-08, and would
entertain a motion to authorize the Board Chair to
sign on behalf of the Board.

MS. ORR: Could I interject? On Page 2
of the order that I prepared for the Board's
signature, there is a little bit of a discrepancy between my recommended order and this one concerning the date of institution of the corrective action plan.

On the order for the Board, I say, and you would say, "Within 60 days from receipt of this order, Ms. Hlavka shall complete all actions," and it should say "within 60 days from execution of this order," and I'd like to change that language and have you sign the corrected order as I provide it to you.

CHAIRMAN RUSSELL: Katherine, thanks.
So I will -- since nothing happened on this -- I will entertain a motion to authorize the Board Chair to sign an order as amended on my -- (inaudible) -- so from receipt to execution.

MS. ORR: So there will be a change in the Board's order from receipt to execution of this order on Page 2, correct?

MS. ORR: Yes.

CHAIRMAN RUSSELL: Okay. Do I have a motion?

MR. MILLER: This is Miller. I so move.

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

(Inaudible)

CHAIRMAN RUSSELL: Anyone want to second this?

MR. ANDERSON: Larry Anderson, second.

CHAIRMAN RUSSELL: It's been moved and seconded by Larry. Further discussion?

(No response)

CHAIRMAN RUSSELL: Just a clarification. When will I get this to sign and return to the Department? Because that will be -- my signature will be execution, right?

MS. ORR: Yes, it will. And what will happen is I'll give Joyce a corrected copy today, and she'll send that to you.

CHAIRMAN RUSSELL: Okay. All right. With that clarification, all those in favor, signify by saying aye.

(Response)

CHAIRMAN RUSSELL: Motion carries unanimously. Before we move on, John, are you ready?

MR. ELLERHOFF: Mr. Chairman, John is not back.

CHAIRMAN RUSSELL: All right. We still
have some work here. New contested cases. The first one is in the matter of violations of the Open Cut Mining Act by -- what is that, Ell Dirt Works?

MS. ORR: Mr. Chairman, before we get to that item, we have as a final action item the disposition of the Fort Yellowstone Subdivision case.

CHAIRMAN RUSSELL: And we received that in the mail.

MS. ORR: Right. And I think there were two parties on the phone, Mr. Knuchel and Mr. Shea -- parties' Counsel, I should say. Are you still on the phone?

MR. KNUCHEL: Karl Knuchel. I'm here.

MS. ORR: Mr. Shea?

I'm not sure if he's still on. Anyway, this case involves a recommended -- well, a recommended order on a motion for summary judgment that I drafted. And we had oral argument on these. There were cross motions for summary judgment concerning a subdivision in Park County very near Gardiner.

And the Department seeks to revoke the subdivision approval because there is a deviation
from the plan as it was originally issued. What happened was a water main under the plan was installed, and then that was disconnected by the water district, and resituated. And the deviation as to the Fort Yellowstone Subdivision plan was not approved by the Department, and therefore the Department was seeking revocation.

And at oral argument, there actually was no dispute as to that fact, so this really is a situation that is ripe for summary judgment. Mr. Shea, on behalf of the water district -- and that's in the materials that you have, and I apologize for the late date of those materials.

OPERATOR: Now joining Todd Shea.

MS. ORR: There is Mr. Shea right there.

This is very timely because I'm now describing your exceptions, Mr. Shea. He filed exceptions that in my view kind of contain a minor suggestion for change. He was concerned about there being the appearance of the water district reconnecting that water main without approval of the Department. And the Department weighed in on this. And then I've drafted in this suggested order for the Board the language that would go into the final order of the Board which --
OPERATOR: Now joining Signe Laren.

MS. ORR: Hi, Signe. We're on this item right now. This is Katherine, and the Board is all here. I hope that's okay for me to do that, Mr. Chairman, with the parties' Counsel. Signe Laren represents the parties, some of the parties here as well.

But anyway, you have before you a proposed order that incorporates the minor suggested language change that would be adopted into the final order on summary judgment that I issued, and since this is a MAPA proceeding right now, the parties have the opportunity to weigh in on their exceptions by way of oral argument. So I don't know if any party wishes to say anything in addition to what's being submitted to the Board.

MR. SHEA: This is Todd Shea speaking. I don't mean to interrupt anybody, but there no one was speaking.

We incorporate on behalf of the water district the arguments that we previously made, and I would respectfully request that the order as drafted from this morning not be implemented because I still think it is missing the point that Gardiner Park is trying to make.
Simply Gardiner Park is making the argument that -- and I think it's undisputed -- that the disconnection of the water main was with the Department DEQ approval. And so I would request again that the language be to the effect that the disconnection of the water main was with Department approval, and I think that's where the District keeps on coming back.

The statement that it was done without Department approval I think is incorrect, and begins confusing things. So again, I would just request that it be stated that the disconnection of the water line was with Department approval because I think we all agree that it was done with Department approval.

MS. ORR: Mr. Chairman, do you mind if I call on the individual parties' Counsel?

CHAIRMAN RUSSELL: No, not at all.

MS. ORR: Mr. Knuchel?

MR. KNUCHEL: Yes.

MS. ORR: Did you have any --

MR. KNUCHEL: What I would agree with was what Jim Madden proposed was his comments, and Shea's exceptions. I think that what Mr. Madden has proposed, you as the Hearings Officer has
MR. SHEA: If I could just say one thing. After I filed the exceptions on Gardiner Park's behalf this week, the -- (inaudible) -- through Karl Knuchel agreed with the exceptions I filed. So I would just like the record to reflect that.

CHAIRMAN RUSSELL: It is in the record. It's been submitted to us.

MR. SHEA: Right, but my point is I made the exceptions early in the week, and the Plaintiff -- excuse me -- (inaudible) -- through your office had no objections to the exceptions that we were submitting.

CHAIRMAN RUSSELL: You know, I guess I'm just being a little naive, but it seems a little bit like word wrangling right now. Maybe I'm -- I think we're all getting to the same place, are we not?

MR. SHEA: I think it may be word wrangling, but I think there is -- I know there is another civil claim that's pending, and I'm concerned with a misconstruing of the language to benefit parties in the civil action I think is
1 frankly unfair.

2 CHAIRMAN RUSSELL: I probably should
3 have assumed that there was a real reason for what
4 seems to be very minor action in front of the
5 Board of Environmental Review.

6 MR. SHEA: Again, the key issue is the
7 disconnection with the DEQ approval.

8 CHAIRMAN RUSSELL: And it sounds like at
9 least Mr. Knuchel in a response didn't have a
10 problem with that.

11 MR. KNUCHEL: Mr. Chairman, this is Karl
12 Knuchel. Just to clarify the record, I would
13 amend my exception to adopt what Mr. Madden has
14 filed. We had like about 24 hours to respond to
15 Mr. Shea's exceptions, and I'm in a very busy time
16 in my schedule. So in fairness, I would just say
17 that to make it very clear on this record, that
18 the exception proposed by -- the comments on the
19 exceptions proposed by Madden for DEQ we would
20 adopt.

21 MR. SHEA: If I could just add one thing
22 for the record. I think Ms. Orr was very clear in
23 her correspondence with the parties that if in
24 fact the parties, including Mr. Karl Knuchel, did
25 not have time to respond to the exceptions, that
we were going to extend the time for exceptions, and extend the hearing until a later date. Mr. Knuchel's office apparently didn't have a problem in responding to the exceptions, and simply agreed to them.

CHAIRMAN RUSSELL: Are we moving too fast on this, Katherine?

MS. ORR: In my view, it's up to the parties whether they want to go through another iteration of language and comment. I understand, I think it was Mr. Knuchel, who has said along the way that it would be very advantageous to have this addressed in a timely fashion today, as opposed to waiting until the next Board meeting.

CHAIRMAN RUSSELL: In early December.

MS. ORR: Right.

CHAIRMAN RUSSELL: Well, I guess it's up to the parties, because all we can do is take action on what the parties recommend at this point.

MR. SHEA: This is Todd. I thought there was a possibility of convening the Board at another possible date before December, and perhaps that would be middle ground if in fact everyone agrees to that.
MS. ORR: Yes. I've told the parties' Counsel that we have done that, we've had meetings between the regularly scheduled meetings. I didn't know if we wanted, if the Board wanted to go to that trouble since we're at this point, and it seems like we're very close to the appropriate language.

CHAIRMAN RUSSELL: Katherine, here is what I would suggest. Working with the Department to schedule a very quick meeting to give us a nice, clean, all parties agreed to order, and it would take us five minutes to approve it. Board, unless you weigh in, I think we could have a quick meeting, lunch time sometime, just get it done.

I'll review the form.

MR. MIRES: Larry Mires agrees.

CHAIRMAN RUSSELL: Let's move on, Katherine, and this seems like it's just not ripe.

MS. ORR: Okay.

MR. SHEA: Are you moving on to the next matter?

CHAIRMAN RUSSELL: We're going to move on to the next matter, and leave this up to you, the parties, and Katherine, and give us a nice order that takes us five minutes to approve.
MS. ORR: While you're all together, do you have a preference for a date?

CHAIRMAN RUSSELL: No. A week, two, three, December 2nd. That's up to the parties.

MS. ORR: Okay. We'll get back to you then.

CHAIRMAN RUSSELL: Perfect. Thanks.

MS. ORR: Mr. North is ready with the discussion of what the rest of the rules provide.

MR. SHEA: Katherine, I will now get off the call. This is Todd Shea. I will convene with you next week as to a rescheduled date for this. Thank you.

CHAIRMAN RUSSELL: Thanks for joining us today.

MS. LAREN: Katherine, this is Signe. I'll get off as well, so we'll just talk next week.

CHAIRMAN RUSSELL: John.

MR. NORTH: Mr. Chairman, members of the Board, John North, Chief Legal Counsel for DEQ. I've gone through Subchapters 8 and 9 of Chapter 8, so that would include the first three or four rules here, and determined that these rules are indeed the only places where those terms are used...
within those subchapters. So in order to implement to the maximum extent that it appears possible at this point the suggestions of the Board members, what I would suggest is that within --

CHAIRMAN RUSSELL: We're not picking anything up here, John.

MR. NORTH: I'm sorry, Mr. Chairman. I've gone through Subchapters 8 and 9. Can you hear me now?

CHAIRMAN RUSSELL: Yes.

MR. NORTH: I've gone through Subchapters 8 and 9, determined that these rules are the only places where those terms are used within Subchapters 8 and 9. In order then to implement what the Board members have requested, I would suggest that two changes be made.

One is that within those subchapters, wherever the term "sulphur dioxide" is used, that it be written out; and then the acronym or whatever it is, SO2, follow that in parens; and then the same would occur with regard to nitrogen dioxide. Those seem to be the two terms where that change could be made, and where those terms appear.
With regard to PM-10, PM-2.5, and particulate matter, it appears to me that those changes couldn't be made. Those could have some substantive effect, and it would need a lot more consideration before we looked at changing those terms.

CHAIRMAN RUSSELL: All right. Thanks, John. I think I picked up enough to probably kind of restate a motion if the Board would indulge me. First of all, who made the original motion to proceed with adoption?

MR. MIRES: Larry Mires.

CHAIRMAN RUSSELL: Larry, would you mind rescinding your motion?

MR. MIRES: I would rescind my motion and correct it as we need to.

CHAIRMAN RUSSELL: Is that okay with the person that seconded that?

MR. MILLER: Yes, it is. Miller.

CHAIRMAN RUSSELL: So here is what I would state. I would entertain a motion to adopt the proposed amendments with modifications in these sections that sulphur containing compounds would be described in writing and by their chemical nomenclature, and also nitrogen dioxide
by handwriting and by its chemical nomenclature;
and all references to particulate matter, those
being particulate matter PM-10 and PM-2.5, remain
as they're stated in the proposed amendments; and
that we would adopt the Presiding Officer's
report, House Bill 521 and 311 analysis. And
there were no comments. So do I have a motion?

MR. ELLERHOFF: Mr. Chairman, this is
Tom. John is raising his hand.

CHAIRMAN RUSSELL: All right. Thought I
missed something.

MR. NORTH: Mr. Chairman, I think to say
"sulphur containing compounds" would be too broad.
What I was specifically saying was SO2 or sulphur
dioxide.

CHAIRMAN RUSSELL: All right. So it
would be nitrogen -- but it doesn't describe it as
oxides of nitrogen, right? Because sometimes it
would state that in an air pollution control rule.

MR. NORTH: Mr. Chairman --

CHAIRMAN RUSSELL: Sulphur dioxide and

nitrogen --

MR. NORTH: -- dioxide.

CHAIRMAN RUSSELL: -- dioxide. If

that's the way it is, then would everyone accept
that?
MS. SHROPSHIRE: Well, I guess I'm wondering if not -- I don't know if that's correct or not. There may be minor -- NOx isn't always NO2. It may be some form of like, you know, like nitrogen or some other thing like that. I'm not saying what I'm trying to say very well. But I don't know that that's correct. It may -- (inaudible) -- NO2.

CHAIRMAN RUSSELL: It's the oxides of nitrogen, NOx.
MS. SHROPSHIRE: I think that's better than NO2.
CHAIRMAN RUSSELL: But I think this is describing just NO2 as nitrogen dioxide in this part of the -- in this section; is that correct? Is Deb still out there?
MS. WOLFE: Mr. Chairman, nitrogen dioxide is going to be very different from oxides of nitrogen. Oxides of nitrogen are going to be precursors to creating particulate pollution, and so they do have to be kept separate. NO2 is, for lack of a better term, sort of an ambient designation, and oxides of nitrogen come from emissions, and they contribute to particulate
matter pollution. So they are separate.

CHAIRMAN RUSSELL: Okay. I'll take your word for it.

MR. WHALEN: Mr. Chairman, this is Joe. May I just first thank you for your patience during this very difficult teleconference.

Secondly, with respect to the use of this nomenclature, there is a standard formatting for the abbreviations of acronyms and spelling out, and the whole objective I think of this process is just to establish some consistency in -- Maybe Mr. North can agree that there is a standard formatting that's used where you initially spell out the term, whether it's a molecular combination or some other elaboration of an acronym, and then you in parentheses follow up with the parenthesized symbol, and then throughout the rest of the document the symbol is used as opposed to the spelling out.

I would just kind of put that out there as a suggestion. It's something I'm sure the Department has used in countless other documents ahead of this. Thank you.

MR. ELLERHOFF: Mr. Chairman, this is Tom. That's correct.
CHAIRMAN RUSSELL: I agree with you, Joe, but I'm not sure where that actually leaves us, because in further sections of what we're -- (inaudible) -- continues to use and has been written out. So I guess I would defer back to the Department if they can add some consistency. I don't think we're wrong. I don't think it's substantive. I think it's good editing, but I don't think it's substantive to allow the Department to clean this up -- nitrogen dioxide, sulphur dioxide, SO2, and NO2 -- irrespectively since I used them in the wrong order -- and we can let them clean this up. It's not substantive. Just give it a go.

MR. WHALEN: I'm all for that, Mr. Chairman.

CHAIRMAN RUSSELL: I think with that, my motion wouldn't really need amendment. John?

MR. NORTH: Mr. Chairman, John North. No, I don't think it is. Just to restate, I believe what the motion is is that wherever sulphur dioxide or nitrogen dioxide appears, that it appear both as written out and then with the parens after it, and we can do that.
CHAIRMAN RUSSELL: Okay. All right. Hearing that, is there anyone in the audience that would object to what we've done? Tom, is that right?

MR. ELLERHOFF: Mr. Chairman, I see no hands going up, so --

CHAIRMAN RUSSELL: I am going to call for the question. All those in favor, signify by saying aye.

(Response)

MR. MIRES: Do you need somebody to make a motion for it and a second first?

CHAIRMAN RUSSELL: Didn't we get one of those? Oh, I guess we didn't. How about a motion?

MR. MIRES: I would again so move.

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

MR. MILLER: I'll second it. Miller.

CHAIRMAN RUSSELL: Seconded by Marv. Are there any questions, comments?

MR. WHALEN: Mr. Chairman, I just have an informal request, that given the nature of the teleconference so far, that all of vote counts be by roll call vote so that we can make sure that
we've got everybody accounted for properly.

CHAIRMAN RUSSELL: That's fine. So call for the question. All those in favor, signify by saying aye. And Tom, would you roll call this, please, or Joyce.

MS. WITTENBERG: Larry Anderson.

MR. ANDERSON: Aye.

MS. WITTENBERG: Larry Mires.

MR. MIRES: Aye.

MS. WITTENBERG: Heidi Kaiser.

MS. KAISER: Aye.

MS. WITTENBERG: Robin.

MS. SHROPSHIRE: Aye.

MS. WITTENBERG: Joe Whalen.

MR. WHALEN: Aye.

MS. WITTENBERG: Marv Miller.

MR. MILLER: Aye.

MS. WITTENBERG: Chairman Russell.

CHAIRMAN RUSSELL: Aye. Let's go back to where we were. I believe we're still on -- Are we on C(1), new contested cases on appeal, Ell Dirt Works?

MS. ORR: Mr. Chairman, members of the Board, this is a case in Richland County involving an alleged violation of the Open Cut Mining Act,
violation of Section 82-4-431. There were in the
Notice of Violation an administrative compliance
and penalty order issued on June 28th, 2011 by the
Department, recitations of open cut operations
without a Department issued permit at the Gene
Foss pit No. 1 site, and there was a disturbance
of 10.2 acres without a permit, and the Department
is seeking $14,000 in penalties.

CHAIRMAN RUSSELL: Thanks, Katherine.

We can assign this to Katherine unless she
verbally states she can't handle the work, or we
can hear these ourselves. So what I will do is I
will make motions to defer these or assign these
to Katherine. And then do you still want to do a
roll call on these, Joe?

MR. WHALEN: Yes, please.

CHAIRMAN RUSSELL: All right. So on the
matter of Ell Dirt Works, I would entertain a
motion to assign Katherine the permanent Hearings
Examiner. All those in favor, signify by saying
aye. We're going to roll call it.

MS. WITTENBERG: Larry Mires.

MR. MIRES: Aye.

MS. WITTENBERG: Larry Anderson.

MR. ANDERSON: Aye.
MS. WITTENBERG: Heidi.

MS. KAISER: Aye.

MS. WITTENBERG: Robin.

MS. SHROPSHIRE: Aye.

MS. WITTENBERG: Marvin.

MR. MILLER: Aye.

MS. WITTENBERG: Joe Whalen.

MR. WHALEN: Aye.

MS. WITTENBERG: Chairman Russell.

CHAIRMAN RUSSELL: Aye. Okay. The next item on the agenda is open cut, Plum Creek, Lincoln County.

MS. ORR: Mr. Chairman, members of the Board, what I would recommend is we look at Items 2 through 8 together as far as my description, because these appear to be cases that are very, very similar in content. And at some point, I'm also recommending that there be a consideration of consolidation along some sort of rational line that has to do with identity of fact situations. So as to Items 2 through 8, I'll just go ahead and describe those all together, if that's all right with you.

CHAIRMAN RUSSELL: That's great.

MS. ORR: The issue in these cases seems
to be that there are a considerable number of landowners who are alleging -- Well, they've filed an appeal because they're alleging that they weren't included in a public hearing concerning the issuance of an amendment to an open cut permit, and the determination of that will be affected by a statute which says that landowners within one half mile of the permitted boundary, and those, or at least 30 percent of all persons owning surface land within the one half mile radius or ten, whichever is larger, can address themselves to the amended permit. And there might be some question as to which landowners fall within that characterization so as to be able to participate in a hearing on the permit.

The Department has filed a motion to dismiss and/or a summary judgment, and there has been a response to that by some of the landowners. Also I, as interim Hearing Officer, went ahead and asked that the parties decide upon a prehearing schedule, and that is in process as we speak. So that's my best summary of the situation.

CHAIRMAN RUSSELL: All right. Well, well summarized and always good. With that in mind, with these Items 2 through 8, I would
certainly ask the Board to speak after we get a
motion on the floor. I would entertain a motion
to appoint Katherine the Hearing Examiner in this
case. Motion?

MR. MILLER: This is Miller. I so move.

CHAIRMAN RUSSELL: Moved by Marv. Is
there a second?

MS. SHROPSHIRE: Second. This is Robin.

CHAIRMAN RUSSELL: Seconded by Robin.

Is there further discussion before the Board takes
action?

MR. WHALEN: Mr. Chairman, this is Joe.

Would it be in order to ask if there are any
irregularities with respect to the public noticing
of the amendment to this hearing?

CHAIRMAN RUSSELL: Whatever Katherine
knows I guess would be fine.

MS. ORR: Well, I think it would be
improper to address that because that's basically
one of the main issues in this case.

MR. WHALEN: Okay. Thank you.

MS. ORR: So that's the subject of the
contested case hearing. That's one of the
subjects that will be determined through a fact
finding.
CHAIRMAN RUSSELL: Okay. Anything else directed to Katherine?

MR. ANDERSON: This is Larry Anderson. I'm looking at the landowners' point here. They're saying that Plum Creek Timberlands has a permit to remove 142,000 cubic yards of top soil and gravel material during the spring and summer months until the year 2030, 19 years. This suggests to me that this may be a pretty major issue, so maybe the Board should take this on as opposed to deferring it to Katherine.

CHAIRMAN RUSSELL: It's certainly up to the -- anyone else? You can --

MR. ANDERSON: I guess that's a question. I don't know in the sphere of things how big an issue this is. It seems pretty big to me.

CHAIRMAN RUSSELL: It appears to be big because it's taking up a lot of paper. I hate to sound so smug about it, but I'm not sure it is as big as the amount of paper it's taking up. It's certainly up to the Board if they want to, and I would entertain a motion if they feel that they want to hear it.

MR. MIRES: This is Larry Mires. It
appears to me that this basically comes down to a
point where the landowners felt that they weren't
given the opportunity to speak out at a public
hearing, and if I understood Katherine correctly,
that you may be close to some kind of -- coming to
a resolve on this, or did I mishear what was being
said in the cutting out on the call conference.

MS. ORR: Mr. Chairman, I think Larry is
correct in that, but I don't know for sure. This
looks like it might be ripe for summary judgment.

MR. WHALEN: Mr. Chairman, just so you
know why I will vote the way that I do, because I
know sometimes when you vote in the negative there
is some questions about it. But the Constitution
requires, as well as statute, that public
participation be liberally construed, and so if we
go ahead and issue an order for summary judgment
in this case, or at least if that's the direction
that the Hearing Examiner is moving, I'm a little
concerned that we're fending that part of the
Constitution and statute, and therefore I'm going
to vote negative with respect to the appointment
of this matter to the Hearing Examiner; and should
the motion come up to hear the matter by the
Board, I'll support that. Thank you.
CHAIRMAN RUSSELL: All right. I guess I would just state that we don't know how Katherine would have -- (inaudible) -- on this. She might have moved the -- (inaudible) -- for public participation. But with that said, I'm up for a motion. I don't have to spring every motion. The folks on the Board can do the same.

MR. WHALEN: We do currently have a motion on the floor, don't we, Mr. Chairman?

CHAIRMAN RUSSELL: I don't believe so.

MR. MILLER: Yes, we do.

MR. ELLERHOFF: Mr. Chairman, this is Tom. That's correct.

CHAIRMAN RUSSELL: And it's been seconded?

MR. ELLERHOFF: Yes, it has, Mr. Chairman.

CHAIRMAN RUSSELL: Okay. With that -- And that would be to appoint Katherine? That was the motion, right? I'm easily distracted.

MR. ELLERHOFF: Mr. Chairman, that's correct.

CHAIRMAN RUSSELL: All right. Well, we'll just take a vote and see how it goes then.

All those in favor -- and this will be a roll call
vote. All in favor of appointing Katherine the
Hearing Examiner, signify by saying aye.

MS. WITTENBERG: Larry Mires.

MR. MIRES: Aye.

MS. WITTENBERG: Larry Anderson.

MR. ANDERSON: No.

MS. WITTENBERG: Heidi.

MS. KAISER: Aye.

MS. WITTENBERG: Robin.

MS. SHROPSHIRE: Aye.

MS. WITTENBERG: Marvin.

MR. MILLER: Aye.

MS. WITTENBERG: Joe Whalen.

MR. WHALEN: Nay.

MS. WITTENBERG: Chairman Russell.

CHAIRMAN RUSSELL: You missed someone.

MR. ELLERHOFF: No.

MS. WITTENBERG: No. I got two nays and
four ayes.

CHAIRMAN RUSSELL: Really?

MS. WITTENBERG: Yes, and then yours.

CHAIRMAN RUSSELL: I counted three ayes.

Well, I vote aye. All right. So the motion
carries by a five to two vote, and we'll move on.

Appeal by Jerry McRae.
MS. ORR: Mr. Chairman, members of the Board, this is a case that is similar to the Laubach case, in that a landowner was objecting to the DEQ's decision to amend a certificate of approval of compliance. And under the statute, there is an ability of either the permittee or the appellant to proceed to District Court, and basically I would call it a judicial review proceeding of the Department's decision in its issuance of the amendment to the certificate of compliance.

And that's the posture we're at right now, and so it's out of the jurisdiction of the Board, and I don't think there is any order that's necessary. I guess also there is no action that's required by the Board.

CHAIRMAN RUSSELL: I guess I'm a little confused, because how can it be taken from the Board's jurisdiction without the Board requiring that to occur?

MS. ORR: Without what?

CHAIRMAN RUSSELL: Never mind. The parties -- Have the parties agreed to move from the Board's --

MS. ORR: Either party can do that, and
they have.

CHAIRMAN RUSSELL: One party -- We're getting civics lessons.

MS. ORR: Pardon?

CHAIRMAN RUSSELL: Never mind. I thought the parties had to -- (inaudible) -- not a party.

MS. ORR: Either MATL, the permittee, could do it, or the Appellant could do it. And the Appellant decided to go ahead and do that here.

CHAIRMAN RUSSELL: All right. So I guess all I can say is thanks for your comments on this, and we move on.

MS. ORR: Right. There is no action to be taken by the Board at this point.

CHAIRMAN RUSSELL: Okay. Let's move on to the last one.

MS. ORR: The last one is in the matter of violations of the Water Quality Act by SK Construction, Inc., on US Highway 2 near Bainville, Roosevelt County. This is a case involving the discharge of significant sediment amounts to the Little Muddy Creek and Red Bank Creek, State waters, in violation of the general
1 permit and ARM 17.30.1342.
2 The Department issued a Notice of
3 Violation, administrative compliance and penalty
4 order under the Water Quality Act, and it is
5 seeking $16,800.
6
7 CHAIRMAN RUSSELL: All right. So with
8 that in mind, questions for Katherine?
9 (No response)
10 CHAIRMAN RUSSELL: Hearing none, I would
11 entertain a motion to assign Katherine the
12 permanent Hearing Examiner on this matter.
13 MR. MILLER: I so move. This is Miller.
14 CHAIRMAN RUSSELL: It's been moved. Is
15 there a second?
16 MS. KAISER: This is Heidi. I second.
17 CHAIRMAN RUSSELL: It's been moved and
18 seconded. Roll call this. All those in favor,
19 signify by saying aye.
20 MS. WITTENBERG: Larry Mires.
21 MR. MIRES: Aye.
22 MS. WITTENBERG: Larry Anderson.
23 MR. ANDERSON: Aye.
24 MS. WITTENBERG: Heidi.
25 MS. KAISER: Aye.
26 MS. WITTENBERG: Robin.
We are on to the last big substantive matter in front of the Board today. I haven't done one of these in awhile, and I haven't really reviewed the law. This is regarding adoption of amendments to the Lewis & Clark County Air Pollution Control Regulations, or I guess they call them the Outdoor Air Quality Regulations. John or Katherine, are we actually conducting a public hearing today?

CHAIRMAN RUSSELL: All right. I have not worked up any public hearing language, so I'm just going to have to wing it, if that's all right. Hopefully I catch everything I need to.

CHAIRMAN RUSSELL: The Board of Environmental Review will now hold a public
hearing on the request by the Lewis & Clark City County Health Department to amend their Outdoor Air Quality Regulations. We are going to hold a public hearing, and we will listen to the audience. We will first hear from any proponents of the regulations, and then we will hear from opponents, and if everything is clear to the Board, we will take action today on this matter.

So we are in public hearing right now, and as such, Katherine, since you're there, I'm guessing that we have at least someone from the County Health Department there.

MS. ORR: That's correct, Mr. Chairman.

CHAIRMAN RUSSELL: All right. Well, we'll probably start it off with them since they're probably the proponents of it.

MS. ORR: Okay. I guess I'd suggest we hear from the Lewis & Clark County representative. If you would state your name, that would be very helpful.

MS. MOORE: Thank you. If you can't hear me --

CHAIRMAN RUSSELL: We don't want you to read what you've given to us. We want you to summarize it, tell us what you've changed, why
you've done it, and that should be plenty unless the Board has questions.

MS. MOORE: Mr. Chairman, members of the Board, thank you very much. If you have problems hearing me, please let me know.

For the record, my name is Kathy Moore, Environmental Services Administrator for the Lewis & Clark City County Health Department. I'm before you today to introduce and present the changes that we've made to the air quality regulations in Lewis & Clark County, the regulations which the Lewis & Clark County Board of County Commissioners approved on September 1st of this year.

We have followed the procedures outlined in 75-2-301 of the Montana Code Annotated. We issued a notice of intent to change our regulations as provided in Title 75 on July 16th, 2011. We posted that notice on our website, and released it to the media on the 16th of July of this year. The notice of intent was also distributed at public meetings which were held August 2nd, 4th, and 11th. During the period from July 19th through August 30th, we also had newspaper articles, two television interviews, and one radio talk show.
Our public meetings were held before the East Helena City Council, and the Lewis & Clark City County Commission, and the Helena City Commission. We had a total of five public meetings at which we accepted public comment. We have provided a stringency analysis, and have only one item that we believe is more stringent than State standards, and that is our prohibition on the use of coal. We took public comment, accumulated that comment, and summarized it, and we have responded to the public comment, and posted our responses on our website. We have also responded personally to numerous emails.

Upon your decision to approve or deny this modification to our regulations, we will notify all of the interested parties of the decision that is made today.

I'd like to now briefly go over the changes to the regulation. You have some of those changes before you, but I would like to highlight a couple of those changes.

Our old regulation was based on particulate matter the size of ten microns. We are now changing that from the PM-10 standard to the PM-2.5 to bring us in line with EPA's health
based standard. Our definitions, in our previous regulation, we had definitions of good, watch, and poor ratings, which we used to enforce our air regulation. We are basing them now on an eight hour standard as opposed to a 24 hour standard which was in our old regulation.

We used two criteria, that is the PM standard, the micrograms that we're at, the micrograms per meter cubed, and meteorological conditions. We used those two criteria to determine whether we are at a good, which we are now calling 21 micrograms per cubic meter for an eight hour period; a watch, which is 21 micrograms per cubic meter to 28 micrograms per cubic meter. Anything over 28 micrograms we are calling a poor. There is no change from our previous regulations. When we hit a poor, we require people to discontinue burning.

Our new regulation will allow exemptions to that, however. We will allow persons to burn stoves which do not emit more than is 7.5 grams per hour of PM-2.5, that is EPA certified stoves, and that is a change from our old regulation.

Another change from our old regulation to the new one is that burning devices may not
exceed 20 percent opacity during a poor stage. We've included that provision because we do not wish malfunctioning or poorly functioning stoves to be burned during a poor stage.

Our intent in making these modifications is to prevent us from moving into an exceedence of EPA's standard of 35 micrograms.

We've included a contingency standard that allows us to address other suspected PM sources if we have a poor air quality episode that exceeds a 48 hour period. We are prohibiting the burning of coal, the single area in which we are more stringent than State standards.

We have expanded our enforcement and penalty section, as well as our appeal process section, based on public comment that we received. Our enforcement and penalties are essentially taken from State rules and from the Missoula air quality ordinance. We've included this expanded enforcement and penalty section, so that people do not need to refer to the State rules to find out what penalties and enforcement are.

Finally, we've added a repealer in Chapter 8 of our regulations.

Those are the key changes that we have
made to our regulation. I am available for any
questions that you might have.

CHAIRMAN RUSSELL: Thank you, and thank
you for keeping it brief. Questions for Lewis &
Clark County Health Department?

MR. WHALEN: Mr. Chairman, a couple
questions with respect to the enforcement of the
new regulations should they be adopted.

Which department is going to be charged
with enforcing the particulars of the new
regulations that are being proposed, and has there
been a change in the budgeting for that department
as a result of this action by Lewis & Clark
County?

MS. MOORE: Mr. Chairman, the
enforcement of the air quality regulation will
occur within the City County Health Department.
While we've had no budgeting change for that
enforcement, we will continue to perform
enforcement in the same way that we have in the
past. Registered sanitarians in our department
will be pulled off other work to do enforcement
during poor episodes.

MR. WHALEN: Okay. Thank you.

CHAIRMAN RUSSELL: That's a question. I
I know that the language has changed by the EPA.
You've never been non-attainment for particulate pollution; is that correct?

MS. MOORE: Mr. Chairman, that's correct. We've never exceeded the EPA 24 hour standard or the EPA annual standard for particulate.

CHAIRMAN RUSSELL: But your annual averages are creeping -- I guess I have some inside information from my colleague, Melanie Reynolds. You are creeping very close to 2.5, aren't you, on annual average?

MS. MOORE: We're currently at 34.4, I believe, micrograms. We are dangerously close to the EPA standard.

CHAIRMAN RUSSELL: This is an urgent matter. Questions?

MR. MIRES: Mr. Chairman, this is Larry Mires. One other question. What did you say you had a prohibition on at your beginning? That cut out. I couldn't hear.

CHAIRMAN RUSSELL: I think it was coal, coal burning.

MS. MOORE: That's correct.

MR. MIRES: Thank you. A follow up
question on that. Is the purpose on the coal because it can't be burned sufficiently to get it down to 2.5? Is that the purpose behind it?

MS. MOORE: The Board of Health requested that we prohibit the burning of coal because in addition to particulate matter, it contains so many other hazardous air pollutants, including heavy metals.

MR. MIRES: Follow up question. Are there many people in the city of Helena or any jurisdiction area that burn coal right now as their main heat source, for example?

MS. MOORE: It's our understanding that it is not used as a main heat source for anyone. However, we believe there are about 20 people that do burn coal as supplemental heating.

MR. MIRES: Thank you.

MS. SHROPSHIRE: Mr. Chairman, a question along the same lines. Do you look at the contaminants that other solid fuels produce in comparison to coal?

MS. MOORE: The fuels that we have looked at include wood, oil, and coal, as well as natural gas and propane. Those are the only fuels that we've looked at. Other fuels aren't used to
our knowledge for heating.

CHAIRMAN RUSSELL: And most of them are prohibited by the State, too, like chicken manure, just to throw one out.

MS. SHROPSHIRE: Okay. Thank you.

CHAIRMAN RUSSELL: Any other questions?

(No response)

CHAIRMAN RUSSELL: Has the Department done a record of decision on this?

MR. ELLERHOFF: Mr. Chairman, this is Tom. Jim Madden is approaching the lectern.

MR. MADDEN: Good morning, Mr. Chairman, members of the Board. Can you all hear me?

CHAIRMAN RUSSELL: I can.

MR. MADDEN: I'm, for the record, the attorney that worked on this project. Dave Rusoff, our air expert, has retired, so my knowledge is a mile wide and an inch deep.

But no, there has been no requirement for a Department Record of Decision on this. I think we have Bob Habeck, who is ready to weigh in with some testimony about the compatibility of these local regulations with the State program. But other than that, it's a Board decision to approve the program.
CHAIRMAN RUSSELL: Well, Bob, will this be incorporated into the State SIP?

MR. HABECK: Mr. Russell, members of the Board, Bob Habeck, Air Program Manager for the Department.

My testimony today is to speak affirmatively to Lewis & Clark County's procedural processes. They are in conformance with the State Clean Air Act. And also in consultation with Jim Madden, we found that the program meets the stringency requirements.

As you noted before, Mr. Chairman, Lewis & Clark County is not previously a non-attainment area for particulate matter, and as such, these rules have not been incorporated into the SIP and are not proposed today.

CHAIRMAN RUSSELL: Okay. But the first part -- and I've seen this, and this is -- I mean the law is pretty clear -- if both cities, the Board of Health, and the County Commissioners have adopted the amendments.

MR. HABECK: Mr. Chairman, this is Bob Habeck again. The Department has found that the Lewis & Clark County has fulfilled all of the legal processes, as city and county public
processes with the affirmative.

CHAIRMAN RUSSELL: Thanks, Bob. We've had one of these come that didn't get a city's approval in front of us. Okay. This has been kind of a whacked out public hearing. Are there any other proponents?

MR. ELLERHOFF: Mr. Chairman, this is Tom. I see nobody here in the Metcalf Building conference room.

CHAIRMAN RUSSELL: So that would mean there are no proponents in the room, or opponents in the room?

MR. ELLERHOFF: That's correct.

CHAIRMAN RUSSELL: How about on the phone?

(No response)

CHAIRMAN RUSSELL: All right. With that, I will close the public hearing, and the Board will be in executive action, take executive action on this matter.

The only thing I will mention on the regulation, on the last -- or on Page 16, it says "Reviewed and approved by the Montana Board of Environmental Review by memorandum and order dated November" blank "2011." Whomever's copy this is,
it will have to reflect that it's not November yet. And I believe we'll take action on this there -- (inaudible) -- should be September 23rd. Get back to this.

I will, just to kick this thing off, I have in front of me a memorandum of order and order, and I would entertain a motion for the Board Chair to sign this order and complete the process of amending the Lewis & Clark County air quality regulations.

MR. MILLER: I so move. This is Miller.
CHAIRMAN RUSSELL: Marvin, thank you.

Is there a second?

MR. MIRES: Mires. Second.

CHAIRMAN RUSSELL: It's been moved and seconded by Larry. Other comments?

MR. WHALEN: Mr. Chairman, this is Joe. I understand that DEQ would be a back stop to the County with respect to compliance with State regulations if, for some reason, the County isn't able to step in and enforce adequately. Have there been any other cases that the Board could consider where this sort of order has been in place, and the control and monitoring of air quality has been shifted to the county as opposed
to the state, and what sort of success record has
there been in that event?

CHAIRMAN RUSSELL: Well, since I'm kind
of a living whatever about this, just to mention,
there is a part of Title 75 that allows for the
establishment of local air pollution control
districts, and those jurisdictions, generally
public health departments -- except Billings used
to be run by a separate organization -- we are
required to adopt regulations, generally not on
major air polluters. Generally we're doing
non-point source polluters.

The law is very specific. We have to
have our rules, we have to have those approved by
all governing bodies within the jurisdiction to be
regulated. I believe Missoula, Flathead, Lewis &
Clark, Yellowstone -- I believe -- I'm not sure if
Gallatin does or not. I think Gallatin. Libby is
a long standing program where their local public
health department regulates nonpoint source and
wood stoves, even though they are kind of a point
source. They're not like point source in --
(inaudible) --

So there are a lot of examples of this.
Generally the local health departments have to --
you know, do all of those activities. Very seldom, and I don't believe at all, has the State ever jumped in to regulate in addition in these areas that are defined within a map and have regulation. Bob would know. Bob and I have worked on these for a gazillion years.

MR. WHALEN: Thank you, Mr. Chairman.

CHAIRMAN RUSSELL: Any other questions?

(No response)

CHAIRMAN RUSSELL: Hearing none, we'll roll call this. All those in favor of the Board Chair signing the order, signify by saying eye.

MS. WITTENBERG: Larry Mires.

MR. MIRES: Aye.

MS. WITTENBERG: Larry Anderson.

MR. ANDERSON: Aye.

MS. WITTENBERG: Heidi.

MS. KAISER: Aye.

MS. WITTENBERG: Robin.

MS. SHROPSHIRE: Aye.

MS. WITTENBERG: Marvin.

MR. MILLER: Aye.

MS. WITTENBERG: Joe Whalen.

MR. WHALEN: Aye.

MS. WITTENBERG: Chairman Russell.
CHAIRMAN RUSSELL: Aye. All right.

Thank you to Lewis & Clark for keeping it brief, and for a good discussion.

The last -- Katherine, we're done, right? Everything that you had is over?

MS. ORR: That's right, Mr. Chairman.

CHAIRMAN RUSSELL: All right. So we are on to the last item. Is there anyone that would like to address the Board on matters within the jurisdictional confines of the Board of Environmental Review?

(No response)

CHAIRMAN RUSSELL: No one is jumping up there, Tom?

MR. ELLERHOFF: Mr. Chairman, nobody here.

CHAIRMAN RUSSELL: Okay. The last thing I would mention. This is -- We've been at it for almost two hours, and granted, it wouldn't have been worth it to drive to Helena for two hours, and I know we have these rule revision constraints, but this was a very difficult meeting, as Joe mentioned.

I don't know what's going on with your sound system, but it cut out the whole time. It
was very difficult to pick up some of the comments that were made. And I don't know if that's a function of the sound system, or the way the stars aligned today, but it was a difficult meeting. And we might want to look into maybe a better bridge or something.

MR. ELLERHOFF: Mr. Chairman, this is Tom. We'll look into the sound system.

CHAIRMAN RUSSELL: I appreciate it.

Well, with all that said, I would entertain a motion to adjourn.

MS. KAISER: Heidi. So moved. I have one more question before we adjourn. There was -- (inaudible) -- the next meeting possibly being a two day meeting. Am I premature in asking if that's been resolved or --

CHAIRMAN RUSSELL: I don't know.

MS. ORR: Mr. Chairman, I think I can address that. Since the Carbon County case has been settled, there won't be a contested case in conjunction with the December 2nd meeting, so it looks like it will be one day, not a whole day even. I don't know what's on the agenda yet, but it's pretty full, Joyce tells me.

CHAIRMAN RUSSELL: Okay. We can hear
you, Joyce. So probably a one day meeting, and as
my calendar looks at it, it looks like December
2nd. So back on it. Is there a motion to
adjourn?

MS. KAISER: So moved. This is Heidi.

CHAIRMAN RUSSELL: Heidi moved. Is
there a second?

MR. MILLER: Miller. I second.

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

(Response)

CHAIRMAN RUSSELL: Opposed.

(No response)

CHAIRMAN RUSSELL: Motion carries.

Meeting adjourned. We'll see you in early
December.

(The proceedings were concluded
at 10:56 a.m.)

* * * * *
CERTIFICATE

STATE OF MONTANA  )

: SS.

COUNTY OF LEWIS & CLARK  )

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

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing - 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 , 2011.

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