

BEFORE THE MONTANA BOARD OF ENVIRONMENTAL REVIEW

BOARD MEETING)
September 28th, 2007)
)

TRANSCRIPT OF PROCEEDINGS

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
September 28, 2007
9:00 a.m.

BEFORE CHAIRMAN JOSEPH RUSSELL;
BOARD MEMBERS HEIDI KAISER, GAYLE
SKUNKCAP, ROBIN SHROPSHIRE, LARRY MIRES,
and DON MARBLE

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

3 * * * * *

4 (Ms. Kaiser and Mr. Skunkcap not present)

5 CHAIRMAN RUSSELL: Since we have a
6 quorum and it's a little after nine, we'll go
7 ahead and get started, because we're going to lose
8 Robin at ten. There is a good possibility we
9 could be pretty much done with this meeting by
10 ten.

11 We're going to go ahead and get started.
12 It is 9:03, and I will call this regular meeting
13 of the Board of Environmental Review to order.
14 The first item on the agenda is the minutes -- are
15 the minutes? Is the minutes? Tom.

16 MR. LIVERS: Is the minutes.

17 CHAIRMAN RUSSELL: -- of the July 27,
18 2007 meeting. Any comments on that before we take
19 some action?

20 (No response)

21 CHAIRMAN RUSSELL: Seeing none, I will
22 entertain a motion to approve the minutes as
23 mailed.

24 MR. MARBLE: I move to approve the
25 minutes.

1 MR. MILES: Second.

2 CHAIRMAN RUSSELL: It's been moved by
3 Don, and it's been seconded by Larry. Any further
4 discussion?

5 (No response)

6 CHAIRMAN RUSSELL: Seeing none, all
7 those in favor, signify by saying aye.

8 (Response)

9 CHAIRMAN RUSSELL: Opposed.

10 (No response)

11 CHAIRMAN RUSSELL: So the next item on
12 the agenda is to set the 2008 meeting schedule.
13 Tom.

14 MR. LIVERS: Mr. Chairman, and probably
15 that's a bit of a misnomer. We're not looking at
16 setting the schedule today.

17 Typically we'll do that at the last
18 meeting of the calendar year, set the dates for
19 next year, but we thought it would be useful,
20 maybe a little more helpful to you if we tossed
21 out some proposed meeting dates now, and let you
22 take them home, and look at your schedule, and see
23 what works, and then come prepared at the November
24 30th meeting to actually set those.

25 So John has pulled together some options

1 coinciding with the Secretary of State's
2 rulemaking deadline and the whole bit, and that's
3 the short sheet of paper you've got in front of
4 you.

5 The only thing to keep in mind, what
6 historically is a difficult meeting to set is the
7 March/April meeting, just given different spring
8 break schedules, and other considerations around
9 that time. But we'll just leave this with you,
10 encourage everyone to take that home, check your
11 calendars, and come back prepared on the 30th to
12 have a discussion and set the schedule.

13 CHAIRMAN RUSSELL: The only one I would
14 suggest you could -- Well, it's going to be a
15 conflict with me probably -- is March 21st.

16 MR. MILES: Just cross it off?

17 CHAIRMAN RUSSELL: I would, unless you
18 don't want me here.

19 MR. LIVERS: We'll just take that off
20 now.

21 CHAIRMAN RUSSELL: Thank you, Tom.

22 MR. MILES: January 21st is a federal
23 holiday.

24 CHAIRMAN RUSSELL: Really? What is it?

25 MR. MILES: Martin Luther King Day.

1 MR. MARBLE: The 25th of January is the
2 last Friday.

3 MR. MILES: Mine shows Monday the 21st.

4 CHAIRMAN RUSSELL: It is always on a
5 Monday, isn't it? So it would be the 21st.

6 MR. LIVERS: Actually looking at it, if
7 you assume February 1st is a Friday, then January
8 28th wouldn't be, so --

9 MR. MARBLE: The 25th is a Friday.

10 MR. LIVERS: Why don't we just cross out
11 the 21st and 28th, and suggest January 25th. This
12 is why we decided to do it ahead of time.

13 MR. MILES: February 1st is a Friday.

14 MR. MARBLE: Was that going to be a two
15 day hearing maybe? Is that SME?

16 MR. LIVERS: That is a possibility.
17 Thank you, Don. Okay. So we should probably make
18 a note on here that that January/February meeting
19 could be a two day meeting.

20 Mr. Chairman, Mr. Marble, just maybe a
21 notation that there is a chance that that January
22 or February meeting could be a two day meeting.
23 That's all I've got.

24 CHAIRMAN RUSSELL: Thanks, Tom. The
25 next item on the agenda are the briefing items,

1 all cases assigned to Hearing Officer Katherine
2 Orr.

3 (Mr. Skunkcap enters)

4 (Ms. Kaiser enters)

5 MS. ORR: Good morning, everybody, Mr.
6 Chairman, members of the Board. A lot of cases
7 pending, and I don't have anything additional to
8 report here really over and above what is written.

9 I would bring your attention on the
10 Flying J matter in District Court. The Department
11 and the Board filed their response briefs on
12 September 21st, and that's will go to oral
13 argument on October 17th. That should be
14 interesting. That's actually Item II-B in the
15 matter of the petition for review of hazardous
16 waste final permit, cases in litigation. If you
17 go clear to the end of the pending cases.

18 MR. MARBLE: Okay.

19 MS. ORR: So I've done some work on
20 that. And I haven't in my files heard anything
21 regarding the SME case, but the case -- I think it
22 would be likely to hear or entertain motions for
23 summary judgment on that case, but I'm not sure.
24 And that I think is now set for November, but
25 we'll see how that proceeds.

1 So other than that, I don't have
2 anything really to report.

3 CHAIRMAN RUSSELL: Do you have any
4 questions for Katherine?

5 MR. MARBLE: I have a question on the
6 SME. It says oral argument prefiled. Are the
7 oral motions on SME before the Board or just
8 before the attorney?

9 MS. ORR: They're before the Board.
10 Like I say, I haven't heard anything or received
11 anything, so the parties might be in the process
12 of discovery at this point. So that's all I have
13 to report there.

14 CHAIRMAN RUSSELL: Thank you. The next
15 item on the agenda is -- did you cover case in
16 litigation?

17 MS. ORR: Yes. That's the one that's
18 going to oral argument in October.

19 MR. MILES: Which one was that,
20 Katherine?

21 MS. ORR: That's Item II-B, cases in
22 litigation, and that involves the review authority
23 of the Board or the lack thereof regarding
24 post-closure permits.

25 CHAIRMAN RUSSELL: Thank you. The next

1 item on the agenda are action items, and we are
2 going to probably adopt some rules here. The
3 first one on the agenda is affecting ARM 17.8.501,
4 17.8.505, and 17.8.514, air quality. Mr. Homer.

5 MR. HOMER: Mr. Chairman, members of the
6 Board, my name is Charles Homer, of the Air
7 Resource Management Bureau. On August 1st, the
8 Board's Hearing Officer held a hearing regarding
9 the annual update of the air quality fees. There
10 were no members of the public attended the
11 hearing.

12 We received one written comment from
13 WETA during the hearing period. Basically the
14 comment was regarding the use of fees, and just
15 making the point that fees had gone up
16 substantially.

17 This is an annual adoption of the fee
18 level. Without taking too much time, we added
19 fees for registered oil and gas facilities; we
20 proposed raising the minimum fee for all
21 facilities from \$470 to \$500; and established a
22 flat fee of \$600 for oil and gas facilities. The
23 dollar per ton fee rose significantly this year,
24 based on three things: An increase in
25 appropriation, a decrease in carry over from the

1 previous fiscal year, and a slight decrease in
2 total emissions. So the dollar per ton fee goes
3 from \$22.30 to \$29.96.

4 CHAIRMAN RUSSELL: Chuck, I find it
5 interesting. Your budgets are that tight where
6 you have to talk about \$150 conference room fee
7 being taken out of your -- Do you have any
8 contingencies? What happens if you have to stay
9 over an extra night while someone in your program
10 is out doing some permit review?

11 MR. HOMER: The fees are basically
12 adjusted for the appropriation. In the specific
13 instance of the Smoke Management Program, we tried
14 to, for that one portion of the regulated
15 community, establish a budget that is commensurate
16 with the activities for that part of the program.
17 They don't receive the same fee as all of the
18 other regulated industries. The reason for that
19 is that the fees for smoke management actually
20 predated the fees for everyone else.

21 We do have plenty of money, and we can
22 -- for that part of the program, and we can
23 backfill from other fees. It's not statutorily
24 required that we do that level of detail, so
25 that's just to basically inform both the Board and

1 the public as to the kind of things that has
2 changed. But you're right. It is a very small
3 matter.

4 CHAIRMAN RUSSELL: Any questions for Mr.
5 Charles Homer?

6 (No response)

7 CHAIRMAN RUSSELL: Thanks, Chuck. I
8 appreciate it. Katherine.

9 MS. ORR: Mr. Chairman, I notice there
10 is an improper date in the Presiding Officer
11 report.

12 CHAIRMAN RUSSELL: Would that be your
13 report?

14 MS. ORR: That would be mine. In the
15 first line, it says it's August 2nd. It's really
16 August 1st that that hearing occurred.

17 CHAIRMAN RUSSELL: Thank you. Any
18 further questions before we move to amend these
19 rules?

20 (No response)

21 CHAIRMAN RUSSELL: Is there anyone in
22 the general public that would like to speak to
23 this matter before the Board takes action?

24 (No response)

25 CHAIRMAN RUSSELL: Thanks for your

1 prompt, Tom. Seeing none, I will entertain a
2 motion to adopt the amendments, the 521 and 311
3 analysis, the Department's responses to comments,
4 and the Presiding Officer's report with the
5 amendment to the date in the first line. Would
6 anyone like to make that motion?

7 MS. KAISER: So moved.

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

10 MR. SKUNKCAP: Second.

11 CHAIRMAN RUSSELL: Seconded by Gayle.
12 Any further discussion?

13 (No response)

14 CHAIRMAN RUSSELL: Seeing none, all
15 those in favor, signify by saying aye.

16 (Response)

17 CHAIRMAN RUSSELL: Opposed.

18 (No response)

19 CHAIRMAN RUSSELL: Once again, I have a
20 question. When John comes back in, I need to ask
21 him a question about something. Just remind me
22 maybe.

23 The next item on the agenda is another
24 executive summary on rule revision, and it is Air
25 Quality 17.8.102, 103 -- I'm not going to read

1 them all -- and ending with 17.8.1509. And these
2 are the adoption, primarily an adoption by
3 reference.

4 MR. HOMER: Mr. Chairman, members of the
5 Board, Charles Homer again. The Department has
6 adopted several federal programs, and the way we
7 get our delegation to incorporate them is through
8 incorporation by reference. Annually we have to
9 update our incorporation by reference to adopt any
10 changes in federal requirements over the last
11 year. This is that annual adoption.

12 The Board's Hearing Officer held a
13 hearing on August 2nd on this. There were no
14 attendees at the hearing, and there were no
15 comments.

16 CHAIRMAN RUSSELL: Thank you. Any
17 questions for Chuck?

18 (No response)

19 CHAIRMAN RUSSELL: Thank you. Is there
20 anyone in the public who would like to speak to
21 this before the Board takes action?

22 (No response)

23 CHAIRMAN RUSSELL: Seeing none, I will
24 entertain a motion to amend the rules as
25 presented, adopt the Department's 521 and 311

1 analysis and the Hearing Examiner report. There
2 were no responses to comments, so I guess we don't
3 have to adopt those. Is there a motion?

4 MR. MARBLE: I had a question on the --
5 said one of the proposals to remove the compound
6 methyl ethyl ketone. Is that a significant --
7 science based people have anything to say about
8 that?

9 MR. HOMER: Mr. Chairman, Mr. Marble,
10 the EPA has certain criteria that various
11 compounds must need to be classified in specific
12 areas as VOC's, etc. The public, the regulated
13 community can apply to have those removed. They
14 go through certain tests and analyses, based on
15 volatility, etc., and they can get those removed
16 from this list.

17 So when EPA changes their list, we then
18 therefore have to change our list to adopt that
19 change. We're merely adopting the federal
20 definition of that compound.

21 MR. SKUNKCAP: Mr. Chairman, I have a
22 question. I don't know if it would be for him, or
23 at this time. But on all of the forest fire
24 smoke, did that compound any of that discharge on
25 anything? Did you guys get any levels on that?

1 MR. HOMER: Mr. Chairman, Mr. Skunkcap,
2 that really doesn't impact this rulemaking. But
3 yes, as everyone probably knows, we experienced a
4 very bad fire season this year, and had
5 significant levels of wild firesmoke in western
6 and eastern Montana.

7 The Department does track that. In
8 fact, we have a website on the DEQ website called
9 Today's Air. In those cities where we have
10 monitors, we post as much real time readings as we
11 can; we have health advisories; we work with local
12 Health Departments and the State Health Department
13 to get that information out. At this time, we
14 have a limited ability to monitor, so basically
15 we've only had real time monitors in western
16 Montana and in major population areas.

17 We have other methods on there that
18 individuals can use outside of those areas to make
19 determinations about levels of pollution and their
20 impact. So if you look at that web site, you'll
21 find advisories basically on how to use
22 visibility, figuring out what the visibility is --
23 if it's five miles or ten miles -- what that would
24 correspond to in pollution levels, and some of the
25 actions you may want to take to protect your

1 health, or health of kids, or sensitive groups
2 during that time.

3 We certainly do try to address that.

4 MR. SKUNKCAP: Thank you. Thank you,
5 Mr. Chairman. I wasn't sure.

6 MR. LIVERS: Mr. Chairman, maybe just to
7 add on to that, Mr. Skunkcap. The other thing,
8 the Department also regulates open burning, major
9 open burning. We issue permits for that. And we
10 did, in light of the severity of the fire season
11 in, I think it was early September, maybe late
12 August, early September time frame, we restricted
13 the ability of those holding open burning permits
14 to conduct discretionary burns, so as not to
15 aggravate the problem, including Forest Service
16 use of wildland fire use, their prescribed burns.

17 So given all of the serious background
18 that was there because of the bad fire season, we
19 did restrict any discretionary open burns.

20 CHAIRMAN RUSSELL: Back to the motion.
21 I'll entertain a motion to amend the rule as
22 presented.

23 MR. MARBLE: Did the public --

24 CHAIRMAN RUSSELL: Yes, I asked. No one
25 jumped up -- adopt the presiding Hearing

1 Examiner's report, 521 and 311 analysis, and there
2 were no responses. Do I have a motion?

3 MR. MILES: So moved.

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

6 MS. SHROPSHIRE: Second.

7 CHAIRMAN RUSSELL: It's been seconded by
8 Robin. Any further discussion?

9 (No response)

10 CHAIRMAN RUSSELL: Seeing none, all
11 those in favor, signify by saying aye.

12 (Response)

13 CHAIRMAN RUSSELL: Opposed?

14 (No response)

15 CHAIRMAN RUSSELL: John, I have a
16 question for you. On the responses to comments,
17 in the first set, it talks about the Board's
18 responses to comments. Aren't those actually the
19 Department's responses to comments that we're
20 adopting?

21 MR. NORTH: Mr. Chairman, John North,
22 Chief Legal Counsel, DEQ. Those are the
23 Department's proposed responses to the Board, but
24 by adopting them, they become the Board's
25 responses to comments.

1 CHAIRMAN RUSSELL: So they should be
2 worded, "The Board's response is"?

3 MR. NORTH: Yes.

4 CHAIRMAN RUSSELL: Thanks. The next
5 item on the agenda is the amendments to executive
6 summary for rule adoption amendments to ARM
7 17.38.101, and 17.38.106, water quality. Mr.
8 Pizzini.

9 MR. PIZZINI: Chairman Russell, members
10 of the Board, my name is Eugene Pizzini. I'm with
11 the Public Water Supply Section. Because of
12 legislative audits that have determined that the
13 Department is not recovering costs commensurate
14 with the cost of doing engineering review, plan
15 and spec review, we proposed modification to our
16 rules. At the July 27, 2007 meeting, the Board of
17 Environmental Review initiated rulemaking to ARM
18 17.38.101 and 106.

19 A public hearing was held on August
20 30th, 2007. Katherine Orr was the presiding
21 officer. And public notice of that hearing was
22 sent to every public water supply in the
23 Department's data base.

24 We further sent a copy of that to all
25 consulting engineers and all consultants that have

1 submitted plans and specs to the Department within
2 the last three years. We submitted, or we sent a
3 copy of that notice to all sanitarians, as well as
4 all owners and developers that submitted plans and
5 specs in the last three years.

6 As detailed in the Presiding Officer's
7 report, no comments were received during the
8 public hearing. The Board did receive two written
9 comments. The Department's proposed response to
10 those comments is attached to your executive
11 summary.

12 In short, one comment suggested that we
13 do away with the line item fees and go to a
14 straight hourly rate. The Department considered
15 that option, and has done away with it because
16 there are some inherent problems with that, such
17 as review time between individual engineers.

18 The second comment questioned the
19 requirement for the submission of plans and
20 specifications for water vending units. These are
21 the type units you'll find in like a WalMart. The
22 commenter didn't believe that those systems should
23 be reviewed as public water supplies because
24 they're taking water from an approved public water
25 supply.

1 The response to that is basically that
2 water vending -- or excuse me -- water dispensers
3 are listed specifically in the definition of a
4 public water supply in the law, and therefore, it
5 would be a statutory change to remove those, and
6 they're beyond the scope of this rulemaking.

7 Based on the comments received in the
8 proposed responses to those comments, the
9 Department recommends adoption of the proposed
10 amendments as set forth in the notice of public
11 hearing and proposed amendments.

12 CHAIRMAN RUSSELL: Thanks. Is there any
13 questions for Gene?

14 MR. MARBLE: I was reading the letter
15 from Sparkling Pure. That's the one you're
16 talking about?

17 MR. PIZZINI: Yes, sir.

18 MR. MARBLE: So what are we actually
19 talking about? Like in WalMart, do they sell
20 bottled water, or do they have a fountain where
21 people drink the water, or they fill up jugs, or
22 what?

23 MR. PIZZINI: Chairman Russell, Mr.
24 Marble, yes, those are the vending units that they
25 attach --- they have generally some sort of a

1 treatment like granulated activated carbon to
2 remove chlorine. People either bring their own
3 jugs, or they purchase their jugs and they put
4 them in the unit, hit the button, fill their jug,
5 and take it home. So they're basically bottling
6 their own water.

7 MR. MARBLE: So what this man said is
8 before you have levels, you have to have these
9 outfits engineered, designed lay out, and
10 everything?

11 MR. PIZZINI: Chairman Russell, Mr.
12 Marble, that is correct. Because they are
13 specifically spelled out as a public water supply,
14 they fall in under our engineer requirements. We
15 have a process in place that makes it easier for
16 those systems.

17 Those systems can submit a general
18 engineering review right up front that says, "This
19 is the unit we use," get that reviewed and
20 approved, and basically that approval lasts for
21 the next three years. The only thing they have to
22 do each time they go to install that unit in a
23 different location is show us where it's going to
24 go, what system it's going to connect to, and that
25 there is proper back flow prevention, and that

1 they're not going to cause a problem in that
2 system.

3 So the statement may have been slightly
4 misinformed in that he was -- they would in
5 reality have to submit each time, but the total
6 review is going to be much less because they can
7 do a general one up front, and then just apply
8 that later.

9 MR. MARBLE: It seems like the concept
10 is good, because the amount of plastic being
11 generated in bottled water is incredible, and
12 turning up all over the place in trash, and so --
13 But it's out of your hands, is basically what
14 you're saying.

15 MR. PIZZINI: Mr. Chairman, Mr. Marble,
16 currently that is correct.

17 MR. MARBLE: Thank you.

18 CHAIRMAN RUSSELL: Gene, are we
19 inconsistent with other states in how we look at
20 this rule?

21 MR. PIZZINI: Chairman Russell, members
22 of the Board, Montana is one of three states in
23 the country that regulates dispensers and water
24 bottlers to the same Safe Drinking Water Act
25 standard. Everybody else looks at water bottlers

1 as a food product, and therefore, they fall under
2 the FDA.

3 CHAIRMAN RUSSELL: But they're being
4 inspected at some point? There is a lot of
5 potential for cross contamination --

6 MR. PIZZINI: Mr. Chairman, members of
7 the Board, that is correct. I have spoken with
8 many states that wish that they regulated water
9 bottlers. But yes, we do.

10 CHAIRMAN RUSSELL: I remember several
11 years ago we had a water bottler in a milk plant
12 in Kalispell. And this isn't a point of use. But
13 they had a tremendous amount of over growth of
14 bacteria in this bottled water. And there was an
15 article not that long ago that just talked about
16 bottled water, and how unregulated -- how much we
17 believe it's a regulated industry, and it doesn't
18 really get as much regulation as possibly drinking
19 water from a tap in Helena, Montana.

20 MR. PIZZINI: Correct.

21 CHAIRMAN RUSSELL: Thanks for your
22 comments. Anything else before we take some
23 action?

24 MR. MARBLE: I think the article you
25 were referring to said that water from the tap is

1 safer than most bottled water.

2 CHAIRMAN RUSSELL: Yes. Oh, it is. I
3 firmly believe that. It's probably more regulated
4 than the amount of water we drink out of a plastic
5 container. And no one thinks it's safe, do they?
6 That's why they all drink that bottled water.

7 With all that, I will entertain a motion
8 to amend the rule as presented, adopt the
9 Presiding Officer's report, the Department's 521
10 and 311 analysis, and our potential responses to
11 comments.

12 MR. MARBLE: I so move.

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

15 MR. SKUNKCAP: Second.

16 CHAIRMAN RUSSELL: I was supposed to ask
17 if anyone would like to speak to us before I take
18 action on this. Anyone?

19 (No response)

20 CHAIRMAN RUSSELL: Is there a second?

21 MR. SKUNKCAP: Second.

22 CHAIRMAN RUSSELL: It's been seconded by
23 Gayle. Any further comments?

24 (No response)

25 CHAIRMAN RUSSELL: Anyone want to step

1 up on the soap box again, and give a shot at how
2 good our public water supply system is in Montana?
3 Hearing none, all those in favor, signify by
4 saying aye.

5 (Response)

6 CHAIRMAN RUSSELL: Opposed.

7 (No response)

8 CHAIRMAN RUSSELL: Thank you. New
9 contested cases on appeal. Katherine.

10 MS. ORR: Did you want to take these
11 individually?

12 CHAIRMAN RUSSELL: I think we're good.
13 We can take them individually. And I think Robin,
14 we got through everything that's real -- I know
15 what you want to hear about. Why don't we go
16 fast.

17 MS. ORR: The Board members have in
18 front of them the notices of violation, and the
19 first one is a metal mine case, and that's mining
20 without a permit, and there has been a penalty
21 imposed. So whatever the Board's wishes are
22 there.

23 CHAIRMAN RUSSELL: I would entertain a
24 motion to -- Are you able to put this one on your
25 very full docket?

1 MS. ORR: I am.

2 CHAIRMAN RUSSELL: Since you are, I will
3 entertain a motion to appoint Katherine the
4 permanent Hearings Examiner for this case.

5 MR. MIRES: So moved.

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

8 MS. KAISER: Second.

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

11 (Response)

12 CHAIRMAN RUSSELL: Opposed?

13 (No response)

14 CHAIRMAN RUSSELL: Next.

15 MS. ORR: The next one is a water
16 quality case and permit violations with a penalty
17 imposed. If the Board would like to determine who
18 they want to hear that.

19 MR. MARBLE: I move we appoint our
20 attorney Katherine as the Hearing Examiner.

21 CHAIRMAN RUSSELL: Is there a second?

22 MS. SHROPSHIRE: Second.

23 CHAIRMAN RUSSELL: It's been seconded by
24 Robin. Before we take action, why is only one
25 party appealing this? Are they appealing for both

1 the parties?

2 MS. ORR: Good question. I think that
3 needs to be clarified.

4 CHAIRMAN RUSSELL: But we can take this
5 action and let you handle it, but I thought it was
6 kind of interesting that only one party is
7 appealing. It's been moved and seconded. All
8 those in favor, signify by saying aye.

9 (Response)

10 CHAIRMAN RUSSELL: Opposed.

11 (No response)

12 CHAIRMAN RUSSELL: Next.

13 MS. ORR: The next one is an open cut
14 case, a sand and gravel case with penalties.
15 Basically that's it. Failure to submit an annual
16 progress report.

17 CHAIRMAN RUSSELL: And when you look at
18 their appeal, you wonder why. No wonder they
19 don't.

20 MR. MARBLE: I move we appoint Katherine
21 as the permanent Hearing Examiner.

22 CHAIRMAN RUSSELL: Is there a second?

23 MS. KAISER: Second.

24 CHAIRMAN RUSSELL: It's been moved and
25 seconded. All those in favor, signify by saying

1 aye.

2 (Response)

3 CHAIRMAN RUSSELL: Next.

4 MS. ORR: The next one is an open cut
5 case, a similar situation with brevity of the
6 appeal request. An administrative penalty be
7 imposed for a violation of failure to submit an
8 annual progress report.

9 CHAIRMAN RUSSELL: Okay. Katherine, are
10 you up for another one?

11 MS. ORR: Yes.

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

15 MS. SHROPSHIRE: So moved.

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

18 MR. MILES: Second.

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

21 (Response)

22 CHAIRMAN RUSSELL: Opposed.

23 (No response)

24 CHAIRMAN RUSSELL: Have we had him
25 before us before?

1 MS. ORR: Yes.

2 CHAIRMAN RUSSELL: That is that part.
3 Final action on contested cases. The first one is
4 the Roundup, Bull Mountain.

5 MS. ORR: Mr. Chairman, members of the
6 Board, I don't know if you've had the opportunity
7 to read the request for dismissal of Bull
8 Mountain, which is the Roundup Power Project.
9 They are relinquishing their permit. And within
10 that ambit of the permit labeled 318200, there is
11 really no break down in the relinquishment of the
12 permit and the amendment. However, we believe
13 that Bull Mountain/Roundup Power intended to
14 address both of those in their request for the
15 dismissal.

16 And the reason why that's important to
17 point out specifically is that the petition
18 addresses the validity of the amendment as well as
19 the underlying permit, so the dismissal order
20 specifically designates dismissal of the issues
21 regarding the underlying permit and the amended
22 permit. So that's the reason why the wording in
23 the dismissal order is the way it is.

24 And there is no specific reference in
25 the proposed dismissal order to the issue of

1 mootness. It just seemed like that would have
2 been a substantive decision to make that what had
3 been submitted by the parties may not support. So
4 that's why the order is worded the way it is. And
5 the other parties have agreed to the dismissal.
6 So that's what you have before you.

7 CHAIRMAN RUSSELL: So why are we
8 dismissing with prejudice then?

9 MS. ORR: That means that it can't be
10 brought again, the same claims can't be brought.
11 So now we're on to a new chapter apparently where
12 they will submit a new permit, and ask for
13 conditions peculiar to that permit, and none of
14 the issues in this case can be relitigated.
15 That's what a dismissal with prejudice means.

16 CHAIRMAN RUSSELL: It seems to be a
17 little cloudy. But that's all right.

18 MS. ORR: It's a dismissal with
19 prejudice without prejudice. How is that?

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

23 MR. MARBLE: I see someone from MEIC
24 that's here.

25 CHAIRMAN RUSSELL: Don't matter. They

1 can't touch this one. That's one thing I know.
2 It's a contested case. So I'll entertain a motion
3 to authorize the Board Chair to sign.

4 MR. MARBLE: So moved.

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

7 MS. SHROPSHIRE: Second.

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

10 (Response)

11 CHAIRMAN RUSSELL: Opposed.

12 (No response)

13 CHAIRMAN RUSSELL: Next. Brady.

14 MS. ORR: Brady is a case up near Great
15 Falls, and this is a water quality and public
16 water supply case where there were multiple
17 violations of a permit, violations, failure to
18 monitor, discharges from one cell to another in
19 the treatment plant. This is rife with problems,
20 the operation of this wastewater treatment
21 facility.

22 And the Department entered into an
23 agreement in which I think they're paying some
24 \$4,000 in penalty; and under the consent order,
25 they've agreed to comply with the Board's

1 regulations and permit conditions.

2 CHAIRMAN RUSSELL: Did you say ripe with
3 problems?

4 MS. ORR: Rife and ripe.

5 CHAIRMAN RUSSELL: Thank you, Katherine.
6 I do have an order of dismissal in front of me,
7 and I would entertain a motion to authorize the
8 Board Chair to sign it.

9 MS. KAISER: So moved.

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

12 MR. SKUNKCAP: Second.

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

15 (Response)

16 CHAIRMAN RUSSELL: Opposed.

17 (No response)

18 CHAIRMAN RUSSELL: Next. Missoula
19 County Public Works.

20 MS. ORR: Mr. Chairman, members of the
21 Board, Missoula County. That case was a challenge
22 regarding an MPDES permit granted to the County
23 for the Lolo Wastewater Treatment Facility. And
24 the County issued its request for appeal citing
25 various disagreements with the testing frequency,

1 and limits for total nitrogen and total
2 phosphorus, and other issues regarding total
3 nitrogen and total phosphorus.

4 And those matters were apparently
5 resolved to their satisfaction informally, and the
6 County is withdrawing from its appeal, and there
7 was a stipulation for dismissal.

8 CHAIRMAN RUSSELL: Thank you, Katherine.
9 In front of me I have an order of dismissal. I
10 will entertain a motion to authorize the Board
11 Chair to sign it.

12 MR. MIRES: So moved.

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

15 MS. SHROPSHIRE: Second.

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

18 (Response)

19 CHAIRMAN RUSSELL: Opposed.

20 (No response)

21 CHAIRMAN RUSSELL: Last one.

22 MS. ORR: The last one is Flying J in
23 Belgrade. It was a case involving some public
24 water supply violations, and nitrate monitoring
25 problems, failure to provide public notice and

1 certification to the Department of violations
2 regarding sampling and nitrate test results. And
3 they agreed to pay the requested penalty, and
4 bring themselves into compliance.

5 CHAIRMAN RUSSELL: Thank you, Katherine.
6 With that, I have an order of dismissal for Case
7 No. BER 2007-14-PWS. Do I have a motion to
8 authorize the Board Chair to sign?

9 MS. KAISER: So moved.

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

12 MS. SHROPSHIRE: Second.

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

15 (Response)

16 CHAIRMAN RUSSELL: That ends the agenda
17 except for the general public comment, and
18 something that was placed in our today packet.
19 And I think I will, since I saw someone come in
20 that probably wants to make comments to the Board,
21 is there anyone in the general public that would
22 like to make comments that have jurisdiction to
23 the Board at this time before we adjourn the
24 meeting?

25 MS. LINDLIEF-HALL: Good morning,

1 Chairman Russell, members of the Board. My name
2 is Brenda Lindlief-Hall. I'm here on behalf of
3 the Tongue River Water Users Association. I know
4 I've seen a lot of you over the last few years
5 regarding the Tongue and Powder Rivers and the
6 tributaries, and the standards that this Board
7 established to help protect those rivers for
8 irrigation primarily.

9 And as I'm sure you all know, the State
10 of Montana, primarily through the Department of
11 Environmental Quality as I understand it, has been
12 engaged in negotiations with the State of Wyoming
13 and the Environmental Protection Agency, along
14 with the Northern Cheyenne Tribe, to try to
15 resolve a couple of lawsuits that were brought by
16 the State of Wyoming -- well, one lawsuit brought
17 by the State of Wyoming, a number of other
18 lawsuits that were brought in Federal Court in
19 Wyoming by the coal bed methane industry. When I
20 say industry, I'm talking about probably seven or
21 eight different coal bed methane and oil and gas
22 companies.

23 The subject matter of those lawsuits is
24 the water quality standards that were promulgated
25 by this Board, which as you know, we all worked

1 really hard for years to get up to speed on the
2 science, and really understand those water bodies,
3 and the natural conditions, and other conditions
4 that were contributing to the salinity and
5 sodicity of those rivers.

6 While I think that the Tongue River
7 Water Users Association applauds efforts to try
8 resolve those lawsuits, they certainly don't want
9 to sacrifice their water quality, and they
10 certainly don't want to see this Board's authority
11 undermined in its rulemaking authority as well.

12 So we have a couple of concerns about
13 this draft agreement that would -- it looks to me
14 from a somewhat cursory view of this draft
15 agreement between Montana and Wyoming, it looks
16 like it would undermine the water quality
17 standards that were promulgated by this Board.
18 There are some very good things about this
19 proposed agreement, but I think there are some
20 things that are troubling.

21 First and foremost, I think this
22 agreement needs to be vetted publicly. I think
23 that interested parties all need an opportunity to
24 look at it, and be able to comment before it's
25 signed. And I also, on behalf of my clients

1 Tongue River Water Users Association, we would
2 really like to know why at this point in time what
3 is being described as ambient water quality
4 includes coal bed methane discharges. Ambient
5 water quality in the periods of record include all
6 of the years where coal bed methane water has been
7 discharged in Wyoming, and as well as in Montana.

8 We believe that those numbers should be
9 backed out, that we should be looking at a true --
10 as close as we can get -- a true baseline for
11 water quality excluding coal bed methane
12 discharges in those years where coal bed methane
13 discharges have been going on. So I think that is
14 kind of the crux of things.

15 If Wyoming -- I just think that any
16 standards that are set really need to be
17 established looking at a true baseline, pre-coal
18 bed methane development on all of the rivers. And
19 I think that that will bring us then to whether
20 the Tier 1 or Tier 2 water quality standards and
21 nondeg would apply.

22 So I hope that we can get some public
23 comment on it. I don't know exactly the interplay
24 between the Board's authority and the executive
25 branch's ability to enter into essentially what

1 perhaps is a treaty. I don't really understand
2 the interplay of all of that law, but I do think
3 it's something that we all need to look at and be
4 aware of.

5 So with that, thank you. If anyone has
6 any questions.

7 (Ms. Shropshire leaves)

8 MR. MARBLE: I have a question. So what
9 is the status right now in the Federal Court?

10 MS. LINDLIEF-HALL: Chairman Russell,
11 Mr. Marble, as my understanding, the Tongue River
12 Water Users Association has intervened in those
13 federal lawsuits. Well, we intervened in one, and
14 then they all got consolidated, so I guess we're
15 intervenors essentially in all of them.

16 The Federal Court cases which are
17 pending in front of Judge Brimmer, who is the
18 Senior Judge in Wyoming, those lawsuits currently
19 have been stayed pending these negotiations. And
20 Judge Brimmer made it very clear that he was very
21 concerned that all of the parties, and in
22 particular the coal bed methane companies, had an
23 opportunity to comment on these negotiations. He
24 didn't say much about my clients' opportunity to
25 comment, but he was very concerned that the coal

1 bed methane companies that were involved would
2 have an opportunity to comment.

3 I'm assuming that they have been working
4 closely with the State of Wyoming on these
5 negotiations, and so I imagine that they've had
6 their opportunity to comment. Currently those
7 lawsuits are stayed pending the outcome.

8 MR. MARBLE: Does the proposed agreement
9 override the standards that have been established
10 in Montana, in Montana rivers, or is it strictly a
11 Wyoming issue?

12 MS. LINDLIEF-HALL: No, they would apply
13 to -- Well, I don't know. That is a legal
14 question that I have not looked at. I don't know
15 how, again, the Board's authority and how that
16 interplays with the executive authority to enter
17 into an agreement with the State of Wyoming.
18 That's a question I haven't looked into yet.

19 MR. MARBLE: But do you think it is
20 going to adversely affect standards that this
21 Board or DEQ has done?

22 MS. LINDLIEF-HALL: Yes. Have you seen
23 a copy of the draft agreement?

24 MR. MARBLE: Have we seen a copy? I've
25 never seen one.

1 MR. LIVERS: Mr. Chairman, a copy of the
2 draft agreement has been distributed to the
3 parties. It is a public document, and can be made
4 more widely available.

5 Maybe just a little bit of background,
6 if I may. And I'm not trying to steal the podium
7 here from Ms. Hall. But Art Compton also had
8 prepared -- if you'd like to get some additional
9 background information on this matter. We got
10 this request too late to add it to the agenda and
11 still give public notice. It would have shown up
12 as a briefing item, because I don't believe the
13 Board has any authority at this point over this
14 matter.

15 But it's certainly an issue of interest
16 and related to the rulemaking, and it's a timely
17 discussion, so it seemed appropriate for this
18 public comment hearing. But when the Board is
19 ready, I think Mr. Compton can also add some
20 information from the Department's perspective.

21 CHAIRMAN RUSSELL: I think that would be
22 good.

23 MS. LINDLIEF-HALL: Again, thank you.

24 CHAIRMAN RUSSELL: You bet. Thank you.

25 Art.

1 MR. COMPTON: Mr. Chairman and members,
2 I'm Art Compton from the Planning Division here at
3 DEQ. That's where we do water quality standards,
4 and TMDL's, and other fun stuff.

5 When you look at this negotiated
6 process, settlement negotiations are a little bit
7 different than most of the things we do. This was
8 EPA's mediated effort. It wasn't ours. It was
9 held in a series, and is being held in a series of
10 meetings in Denver, out of state.

11 And I think we're sympathetic to our
12 constituents, look at this as something different
13 than the dialogue with the Department that they
14 usually have, because again, litigation settlement
15 negotiations are a little bit different, and it's
16 not our show. It's EPA's.

17 Brenda and Art Hayes came in and sat
18 down with Richard and I a couple of weeks ago to
19 go over the provision of the settlement. We have
20 been verbally briefing some members of the NPRC
21 and their attorney, and in fact I just got off the
22 phone with Jack Tuholske, the NPRC attorney,
23 before I came down here.

24 We are upbeat about the agreement. We
25 believe that the provisions of the agreement

1 uphold the Board's 2003 and 2006 rulemaking.
2 Naturally there are some implementation issues
3 that we have to work out with Wyoming following,
4 if this agreement is put in place, and we avoid
5 our court date in Cheyenne.

6 The agreement is fairly general, but the
7 provisions of the agreement I would characterize
8 as upholding, not undermining, the Board's work in
9 2003 and 2006. And essentially that is that on
10 the Tongue River, that the anti-degradation, the
11 numeric anti-degradation thresholds that the Board
12 adopted in 2006 would apply at the border on the
13 Tongue.

14 At the Wyoming border on the Powder, it
15 would be the water quality standards that apply,
16 based on the fact that the Powder River is not
17 high quality water. It already exceeds those
18 anti-deg thresholds. So the standards themselves,
19 which are exceeded sometimes as well, would be the
20 performance criteria at the border on the Powder.

21 And then on a couple of tributaries of
22 interest, and they are generally Hanging Woman
23 Creek and Badger Creek, the performance criteria
24 is ambient water quality at the mouth.

25 And the reason it's ambient water

1 quality at the mouth rather than the numeric
2 standard of an EC of 500 that the Board adopted in
3 2003, is that we would hold Wyoming dischargers to
4 the same criteria that we hold Montana dischargers
5 to, and that is, I believe it's Section 308 of the
6 Montana Water Quality Act specifies that a
7 discharger need not treat water to a condition
8 purer than natural.

9 So in other words, ambient water quality
10 at the mouth of Hanging Woman Creek, we have good
11 data on that, something like 668 samples. It
12 varies from the low 2000 in EC up to about the mid
13 2000s. That's what the ambient water quality is
14 now.

15 The standard we recommended the Board
16 adopt, and that the Board adopted in 2003, is 500.
17 And if you remember, that was drawn, that was
18 derived from the same mathematical algorithm we
19 used to calculate all of the standards. And the
20 reason it came out so low on the tribs, in other
21 words, 500 as opposed to 1,000 on the Tongue and
22 2,000 on the Powder, is leaching rain. The more
23 water that leaches through the root zones, the
24 higher salinity water can be used for irrigation.

25 The Tongue, we used a leaching rate of

1 15 percent, based on the fact that it's largely
2 mechanical irrigation, fairly efficient irrigation
3 measures being used. On the Powder, we assumed --
4 and again, this is on the advice of our expert Dr.
5 Oster -- assumed a leaching rate of 30 percent,
6 which was based on the fact that it's mostly flood
7 irrigation on the Powder, and that was largely
8 responsible for the number coming out higher in
9 the Powder than it did on the Tongue.

10 On the tributaries, if you recall, the
11 leaching rate was zero, and that's based on the
12 fact that a typical alfalfa crop in Montana can
13 use 24 inches of water a year, and only gets about
14 14 from the kind of spreader dike systems that a
15 tributary like Hanging Woman Creek would deliver.

16 So these irrigated alfalfa crops on the
17 tributaries are marginal operations at best. They
18 don't get as much water as they need. The
19 leaching rate is zero, and that drives that number
20 on the tributary down very low, only about a
21 quarter of what that ambient water quality is.

22 So again, we're going on Section 308 of
23 the Montana Water Quality Act. And I'm going into
24 this detail because that's one of the, I believe,
25 our constituents' main issues is what happened to

1 the 500 on the tribes.

2 And the fact is the Montana Water
3 Quality Act provides ambient water quality as our
4 guidance, and we brought the resources of our
5 Tetrattech EPA model that we've got about two
6 years, and about three-quarters of a million
7 dollars in on, to define ambient water quality on
8 Hanging Woman Creek, and that's the number that is
9 in the agreement.

10 Finally, I think that some of this
11 misunderstanding -- it came to light on the phone
12 call with the NPRC attorney this morning -- was
13 nothing more than some nomenclature on two of the
14 tables that accompany the agreement. The earlier
15 draft of the tables included eighty some odd
16 values for ambient water quality.

17 The facilitator, EPA, Wyoming, we all
18 agreed that the ambient water quality didn't need
19 to be in there, rather just the criteria, the
20 standard and the anti-deg threshold, and so we
21 took out the ambient water quality, but under the
22 title of the table, we left the title period of
23 record 1985 to 2007.

24 So when some of our constitutents saw
25 the period of record -- And of course, the first

1 version of this they saw was the final version --
2 so they saw the period of record under the table
3 heading, and didn't understand what the numbers
4 meant. We're taking that period of record off of
5 the tables, because at least several of the tables
6 only include what the criteria are, the standard
7 or the anti-deg threshold, and that caused some
8 confusion.

9 I can tell you that after hanging up
10 with Jack Tuholske this morning, he is satisfied
11 the agreement is in the best interests of his
12 constituents, and he's going to have some further
13 conversations with them about that, and that
14 Richard and I plan to go to Billings in a couple
15 weeks, and sit down with those constituents, and
16 have some good face-to-face on the provisions in
17 the agreement.

18 And like I said, the Department is
19 upbeat on the agreement. We believe we're getting
20 what we would ultimately -- we would hope to
21 ultimately get out of the court system, if not the
22 original decision in Wyoming Federal District
23 Court, certainly what we'd get on appeal to the
24 Tenth Circuit in Denver, and we think the
25 agreement is in our best interests.

1 CHAIRMAN RUSSELL: Questions for Art.

2 MS. KAISER: Art, so this agreement will
3 be adopted by the State, and would supersede any
4 rules that have been --

5 MR. COMPTON: Mr. Chairman, Ms. Kaiser,
6 that's correct. The signatories would be Wyoming,
7 Montana, EPA, and we've invited the Northern
8 Cheyenne Tribe to sign it as well. The Northern
9 Cheyenne has been in all of our negotiation
10 sessions in Denver, and they're working with their
11 tribal government on whether or not they choose to
12 be signatory to the agreement.

13 But it would be binding on certainly the
14 two sovereign states, and although the Northern
15 Cheyenne would not have any action to take under
16 it, we certainly feel it's appropriate for them to
17 even to be signatories if they so choose.

18 EPA is the ultimate arbiter of issues
19 between the two states. As I said, this agreement
20 is fairly general, and there is some
21 implementation work to do, and we'll be working
22 diligently with Wyoming to implement it over the
23 coming year or so if the agreement is signed. I
24 hope that answers your question.

25 MS. KAISER: Thank you.

1 CHAIRMAN RUSSELL: That brings up a
2 question. You mentioned rule superseding. It
3 might supersede a rule in Wyoming, they might have
4 to change some standards down there, but it's not
5 going to change our standards.

6 MR. COMPTON: Mr. Chairman, that's
7 correct. Again, I think it embodies your rules,
8 it doesn't undermine them. And I went into all
9 that detail on the tribs so that you would
10 understand why we're going with ambient water
11 quality on the tribs, and now the EC of 500 that
12 the Board adopted, and the reason why. But
13 again --

14 CHAIRMAN RUSSELL: I think it's the same
15 point that Brenda brings up about the background,
16 and it's like when I went out, and we talked about
17 not the Tongue so much, but the Powder. EC and
18 SAR are pretty high out there, and what we set is
19 violated quite a bit. So it's going to be --

20 The Tongue, it may be easier to
21 determine some background through some
22 arbitration, but the Powder is going to be -- it
23 appears is going to be much more difficult.

24 MR. COMPTON: Mr. Chairman, I think
25 that's right. I think the more marginal water

1 quality is for irrigation, the more often it
2 exceeds the standard or the anti-deg threshold
3 that the Board adopted, and provides more working
4 implementation.

5 But again, we look at the Board's work
6 as having said, "These are the numbers that we
7 need to protect beneficial uses." The fact is the
8 Powder, sometimes we have them, sometimes we
9 don't.

10 On the Tongue, the anti-deg threshold
11 that the Board adopted is there to protect that
12 increment of high quality water between ambient
13 and the standard. Those are critical issues, and
14 they formed kind of our no-negotiation floor with
15 respect to our discussions with Wyoming over the
16 last year. Those were never on the table.

17 I know the very first session almost
18 ended as quickly as is it started when Wyoming
19 thought that our Governors had set us to the task
20 of looking at the numbers again, when we made it
21 clear that that was not going to happen, that the
22 numbers were not on the table. Like I said,
23 things were almost over before they started, but
24 we somehow got past some of those first crucial
25 moments, and went on from there, and the numbers

1 are still intact.

2 CHAIRMAN RUSSELL: And are non-deg?

3 MR. COMPTON: Absolutely.

4 CHAIRMAN RUSSELL: Which is probably the
5 most critical.

6 MR. MARBLE: How would you respond to
7 Ms. Hall's comments about the way they're
8 measuring and including Wyoming coal bed methane
9 water as measuring ambient? Is that -- I don't
10 understand all this very well.

11 MR. COMPTON: You bet. Mr. Chairman,
12 Mr. Marble, I think the issue is with the flow
13 that we're seeing today, what is natural and
14 what's human caused. And that's not an issue on
15 the Tongue and Powder. It's not an issue on any
16 water body with respect to Wyoming's ultimate
17 compliance criteria under the agreement, because
18 it is the standard, the anti-deg threshold, and
19 then ambient water quality on the tribs.

20 Where it will become an issue is
21 ultimately when we're haggling over a set of
22 permits in Wyoming, and that's where the rubber is
23 going to meet the road on implementation of this
24 agreement, is we watch those permits -- it used to
25 be 200 a month, now it's 30 or 40 a month -- that

1 Wyoming issues, and we look at every one, and
2 decide whether or not we believe they're going to
3 cause us issues at the border.

4 When we hit our first group of permits
5 under this agreement that we believe -- draft
6 permits that we believe are going to cause a
7 problem, we will be challenging Wyoming's ability
8 to issue those; and at that point, the question of
9 is this produced water that's causing an issue, or
10 has got us bumping up against the standard, or is
11 it natural salinity, say, in the Powder which
12 exceeds the standards now.

13 That's where that understanding will
14 come in, and although that is not addressed in the
15 agreement, I think all of the parties understand
16 that one of the first tasks that we have to set
17 ourselves to is a strict definition of natural
18 water quality on the two main stems.

19 We've already done that on Hanging Woman
20 Creek. We believe the ambient water quality is
21 natural on Hanging Woman, because there have not
22 been any CBM discharges to the upper reach
23 channels of Hanging Woman yet. But certainly that
24 definition of ambient is important, and again,
25 it's one of the first technical tasks that will

1 fall to the states upon execution of the agreement
2 if it's agreed upon.

3 CHAIRMAN RUSSELL: How is this mechanism
4 going to work? Because a state -- You can't
5 challenge their permit, other than a party in a
6 contested case, or asking the EPA to intervene on
7 the fact that they're not protecting water
8 quality.

9 MR. COMPTON: Well, Mr. Chairman, under
10 the agreement, if we identified a permit or set of
11 permits published as draft permits in a particular
12 month in Wyoming -- and they have a new list every
13 month -- the agreement kind of defines the
14 procedures we'd use to challenge Wyoming on that,
15 to provide them data, and we will use that
16 Tetrtech EMI model I mentioned to identify when
17 we have an issue.

18 CHAIRMAN RUSSELL: But right now we
19 don't do it. We can't do anything, right?

20 MR. COMPTON: Actually, Mr. Chairman,
21 right now we can object to a permit. If Wyoming
22 does not accept the principles of our objection,
23 they have to put those reasons in writing, they
24 have to copy Region 8 EPA in Denver as to why
25 they're not accepting the premises of our

1 objection, and making permit modifications based
2 on that. And that puts EPA in the drivers seat as
3 the ultimate arbiter.

4 So really things are not much different
5 under the agreement. What the agreement does,
6 though, I guess what we feel we're getting from
7 the agreement is two major things: One is that
8 Wyoming is agreeing. Of course, they sued us over
9 the 2003 rulemaking and the 2006 rulemaking.
10 They're backing off and accepting those numbers
11 that the Board established in both rulemaking
12 efforts, the standards on the Powder, and the
13 anti-deg thresholds on the Tongue.

14 They are also agreeing with EPA's edict.
15 And again, this facilitated process was EPA's
16 process, and EPA had to come in and define how
17 they would react to certain situations. EPA has
18 essentially stated in the agreement that they will
19 not consider any authorization to degrade on the
20 Tongue, or any standards exceedences on the
21 Powder. Rather they will require application of
22 best available treatment technologies in Wyoming
23 to avoid such numbers exceedences at the border.

24 And EPA has put both states on
25 notice that that's going to be their technical

1 approach in overseeing implementation of this
2 agreement. We think that's huge. It's saying
3 essentially that when you look at waivers to an
4 authorization, or an authorization to degrade, or
5 an anti-deg waiver we call it, there is a complex
6 social and economic sort of optimization exercise
7 that goes into that.

8 EPA thought about, "How are we going to
9 balance benefits to producers, and therefore
10 revenue in Wyoming with costs, i.e., impacts to
11 beneficial uses in Montana? How are we ever going
12 to --" which is what the non-deg waiver process is
13 intended to do. "How are we ever going to balance
14 those two across the state lines?"

15 And they decided, "We're not going to go
16 there. We're going to avoid that scenario by
17 telling Wyoming, 'When you reach the anti-deg
18 criteria, any further discharges are going to have
19 to include best availability treatment
20 technologies,'" so they don't degrade the river
21 beyond anti-deg criteria. And again, outside of
22 an ORW, that is the strictest water quality
23 compliance criteria there is, is the anti-deg
24 threshold.

25 CHAIRMAN RUSSELL: Does Wyoming have EC

1 and SAR standards on the Tongue and Powder?

2 MR. COMPTON: Mr. Chairman, they use
3 narrative standards for salinity and sodium.

4 CHAIRMAN RUSSELL: That really worked
5 well for us. Are they thinking about this,
6 through this process, of adopting some rules that
7 would adopt numeric standards?

8 MR. COMPTON: Mr. Chairman, I don't
9 believe they are contemplating embarking on a type
10 of a numeric standard rulemaking that this Board
11 embarked upon and completed, but they are -- EPA
12 is in fact next month in the middle of the month
13 kicking off a nationwide effort to look at
14 effluent limit guidelines. If you remember,
15 that's what the last petition asked us to do, and
16 we decided it wasn't a good idea, recommended to
17 the Board that it was not a good idea.

18 One of the things we were hoping, in
19 fact, is that EPA would embark on a nationwide
20 effort, which is how effluent limit guidelines are
21 established. They're established for a particular
22 industry on a nationwide basis. EPA is kicking
23 that process off next month with a meeting on the
24 afternoon of the 18th in Billings, and they're
25 going to be down in Wyoming the day before that.

1 And so we think that's huge. We think,
2 of course, technology based water quality
3 standards, if you recall, can be more stringent
4 than the water quality based standards that the
5 Board adopted, and it's based on what's the
6 available technology out there, and what does it
7 cost; therefore, when and how intensively is it
8 appropriate to apply it.

9 And again, that process starts next
10 month, that federal process. That's the good
11 news. The bad news is it's going to take probably
12 five or six years to play out.

13 CHAIRMAN RUSSELL: Good thing we have
14 numeric standards.

15 MR. COMPTON: Right.

16 MR. MARBLE: I seem to remember during
17 our hearing on the coal bed methane that we had
18 earlier -- When we had the hearing on the coal bed
19 methane earlier, I think the testimony was
20 something like on a good day, we have -- in our
21 Department here in coal bed methane permitting, we
22 have maybe five people, and I remember Wyoming
23 said they have about 40 and growing.

24 And so I'm wondering if they're issuing
25 30 permits a month, are we going to have staff to

1 really review those? What do you think about
2 that?

3 MR. COMPTON: Mr. Chairman, Mr. Marble,
4 the 30 or 40 permits now that Wyoming is doing, we
5 have several standards folks go over those. And
6 again, that's simply reviewing them to see are
7 there any that are low enough in the drainages, or
8 close enough to perennial flow, or some of this
9 water might reach the main stem. And if there is,
10 then we enter into it.

11 There has only been a few of those so
12 far, and the reason for that is that Wyoming is
13 holding off waiting to see how, first of all, our
14 standard and anti-deg threshold setting played
15 out, and then now since they're suing us, how that
16 litigation plays out.

17 And so of course, our work on this side
18 of the board, we've only got three permits, as
19 compared to a couple thousand in Wyoming. We've
20 only got three permits -- two of them are for
21 treated discharge, one is for untreated discharge
22 -- and virtually all the rest of our permits in
23 the future will be for treated discharges. We
24 don't anticipate there is going to be any more
25 untreated discharges.

1 Permitting Division is hiring a
2 full-time FTE for Miles City, who will work solely
3 on CBM issues, and will be located out in that
4 area to make monitoring, and site inspection, and
5 that kind of thing, easier and cheaper to do. But
6 we have not seen the permit load here. So I think
7 you're referring to the 30 or 40 permits a month
8 that Wyoming puts out, and again, there's only a
9 small percentage of those that aren't on some
10 third order ephemeral tributary way aways from any
11 perennial flow.

12 And we expect this agreement is going to
13 perhaps ramp up permitting in Wyoming a little bit
14 once they know what the rules are, but we're
15 satisfied that ultimately the rules are protective
16 of beneficial uses, and again, uphold the Board's
17 numbers.

18 CHAIRMAN RUSSELL: Any other questions
19 for General Compton?

20 MR. COMPTON: Thank you, Mr. Chairman.

21 CHAIRMAN RUSSELL: Anything else?

22 (No response)

23 CHAIRMAN RUSSELL: Seeing no others,
24 thank you for coming in, Brenda, and talking to
25 us. And I will entertain a motion to adjourn this

1 regular meeting of the BER.

2 MR. SKUNKCAP: No way. I've got one.
3 It's not on the agenda. Well, a question for --
4 just a brief one, a yes or no answer. The
5 Northern Cheyenne, they're in all those
6 negotiations so far? Is that what you said?

7 MR. COMPTON: Was it: Are the Northern
8 Cheyenne part of the negotiations?

9 MR. SKUNKCAP: They are in all of them?
10 You mentioned they were in the ones in Denver.

11 MR. COMPTON: Mr. Chairman, Mr.
12 Skunkcap, they are. They've been at every single
13 session we held in Denver.

14 MR. SKUNKCAP: Is it Joe Walks Along?

15 MR. COMPTON: It's actually William and
16 Joe have both been there.

17 MR. SKUNKCAP: That's all. And the
18 another subject, Mr. Chairman, a different
19 subject. On the Zortman Landusky, how is that
20 going? Can anybody update us on that?

21 CHAIRMAN RUSSELL: Should we put it on
22 for next agenda?

23 MR. SKUNKCAP: That would be fine.

24 MR. LIVERS: That might be the best way,
25 Mr. Chairman, Mr. Skunkcap. We'll get Wayne

1 Jepson up here, and he can give a pretty
2 comprehensive update on where that is, and we can
3 talk about all aspects of it, Swift Gulch, as well
4 as some of the other issues, too.

5 CHAIRMAN RUSSELL: Including budget.
6 I'd like an update on -- I know there was some
7 issues around budgeting.

8 MR. LIVERS: There is always that
9 concern about shortfall and operating costs.

10 CHAIRMAN RUSSELL: That would be great.
11 We'll expect that at the next meeting, since we'll
12 probably have a little room, right?

13 Now I'll entertain a motion to adjourn.

14 MS. KAISER: So moved.

15 CHAIRMAN RUSSELL: It's been moved by
16 Heidi. Second?

17 MR. MILES: Second.

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

20 (Response)

21 CHAIRMAN RUSSELL: Good meeting.

22 (The proceedings were concluded

23 at 10:19 a.m.)

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C E R T I F I C A T E

STATE OF MONTANA)
: SS.
COUNTY OF LEWIS & CLARK)

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

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing -59- pages contain a true
record of the proceedings to the best of my
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IN WITNESS WHEREOF, I have hereunto set my
hand and affixed my notarial seal
this day of , 2007.

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