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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Page 2 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 б 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.

Page 3 1 Second. MR. MILES: 2 CHAIRMAN RUSSELL: It's been moved by 3 Don, and it's been seconded by Larry. Any further 4 discussion? 5 (No response) б CHAIRMAN RUSSELL: Seeing none, all 7 those in favor, signify by saying aye. 8 (Response) 9 CHAIRMAN RUSSELL: Opposed. 10 (No response) 11 So the next item on CHAIRMAN RUSSELL: 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

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

CHAIRMAN RUSSELL: Thank you, Tom.
 MR. MILES: January 21st is a federal
 holiday.
 CHAIRMAN RUSSELL: Really? What is it?
 MR. MILES: Martin Luther King Day.

Page 5 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. б 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 That is a possibility. MR. LIVERS: 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,

Page 6 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. б 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 So I've done some work on MS. ORR: 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.

Page 7 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 б 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 That's Item II-B, cases in MS. ORR: 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. Chairman, members of the MR. HOMER: б 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

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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 The fees are basically MR. HOMER: 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.

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

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Page 10 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? б (No response) 7 CHAIRMAN RUSSELL: Thanks, Chuck. Ι 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

Page 11 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

Page 12 them all -- and ending with 17.8.1509. And these are the adoption, primarily an adoption by reference.

4 Mr. Chairman, members of the MR. HOMER: 5 Board, Charles Homer again. The Department has б 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 This is that annual adoption. year.

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)

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

(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

Page 13 1 analysis and the Hearing Examiner report. There 2 were no responses to comments, so I quess 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 б methyl ethyl ketone. Is that a significant --7 science based people have anything to say about 8 that? 9 Mr. Chairman, Mr. Marble, MR. HOMER: 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?

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

7 The Department does track that. In 8 fact, we have a website on the DEO 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

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Page 15 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. б 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 Yes, I asked. CHAIRMAN RUSSELL: No one 25 jumped up -- adopt the presiding Hearing

Page 16 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 Is there a second? Larry. б MS. SHROPSHIRE: Second. 7 CHAIRMAN RUSSELL: It's been seconded by 8 Robin. Any further discussion? 9 (No response) 10 Seeing none, all CHAIRMAN RUSSELL: 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.

Page 17 1 So they should be CHAIRMAN RUSSELL: 2 worded, "The Board's response is"? 3 MR. NORTH: Yes. 4 The next CHAIRMAN RUSSELL: Thanks. 5 item on the agenda is the amendments to executive б summary for rule adoption amendments to ARM 7 17.38.101, and 17.38.106, water quality. Mr. 8 Pizzini. 9 Chairman Russell, members MR. PIZZINI: 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 Environmental Review initiated rulemaking to ARM 17 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.

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

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Page 19 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 б 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 I was reading the letter MR. MARBLE: 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

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Page 21 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

Page 22 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 -б 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 I remember several CHAIRMAN RUSSELL: 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 Anything else before we take some comments. 23 action? 24 MR. MARBLE: I think the article you 25 were referring to said that water from the tap is

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Oh, it is.

1 safer than most bottled water. 2 CHAIRMAN RUSSELL: Yes. 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? б 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.

> MR. MARBLE: I so move.

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

15 MR. SKUNKCAP: Second.

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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)

CHAIRMAN RUSSELL: Anyone want to step

Page 24 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 Did you want to take these MS. ORR: 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?

Page 25 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. б 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 Is there a second? CHAIRMAN RUSSELL: 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

Page 26 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 б 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 The next one is an open cut MS. ORR: 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

Page 27 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 б 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?

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MS. ORR: Yes.

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

5 MS. ORR: Mr. Chairman, members of the б 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

Page 29 1 It just seemed like that would have mootness. 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. б 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 It's a dismissal with MS. ORR: 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

Page 30 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 б Don. Is there a second? 7 Second. MS. SHROPSHIRE: 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

Page 31 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. б 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 It's been moved by CHAIRMAN RUSSELL: 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,

Page 32 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 б County is withdrawing from its appeal, and there 7 was a stipulation for dismissal. 8 Thank you, Katherine. CHAIRMAN RUSSELL: 9 In front of me I have an order of dismissal. Ι 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 Is there a second? Larry. 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

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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.
б	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 б 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.

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

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really hard for years to get up to speed on the science, and really understand those water bodies, and the natural conditions, and other conditions that were contributing to the salinity and 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.

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

Page 36 Tongue River Water Users Association, we would 1 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 б 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

Page 37 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 б any questions. 7 (Ms. Shropshire leaves) 8 I have a question. MR. MARBLE: 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

Page 38 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 б 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 But do you think it is MR. MARBLE: 20 going to adversely affect standards that this 21 Board or DEO has done? 22 MS. LINDLIEF-HALL: Yes. Have you seen 23 a copy of the draft agreement? 24 I've MR. MARBLE: Have we seen a copy? 25 never seen one.

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

5 Maybe just a little bit of background, б 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 I think that would be CHAIRMAN RUSSELL: 22 qood. 23 MS. LINDLIEF-HALL: Again, thank you. 24 CHAIRMAN RUSSELL: You bet. Thank you. 25 Art.

Page 40 1 MR. COMPTON: Mr. Chairman and members, 2 I'm Art Compton from the Planning Division here at 3 DEO. That's where we do water quality standards, 4 and TMDL's, and other fun stuff. 5 When you look at this negotiated б 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

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

б 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

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quality at the mouth rather than the numeric 1 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 б 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 algorhythm 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

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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, б 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 Tonque.

On the tributaries, if you recall, the leaching rate was zero, and that's based on the fact that a typical alfalfa crop in Montana can use 24 inches of water a year, and only gets about 14 14 from the kind of spreader dike systems that a 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

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

¹ the 500 on the tribs.

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	Tetratech EPA model that we've got about two
б	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

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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 б 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 constitutents, 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.

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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, б 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. Ι 24 hope that answers your question. 25 MS. KAISER: Thank you.

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

б MR. COMPTON: Mr. Chairman, that's 7 Again, I think it embodies your rules, correct. 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. Chairman, I think MR. COMPTON: 25 that's right. I think the more marginal water

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

On the Tongue, the anti-deg threshold that the Board adopted is there to protect that increment of high quality water between ambient and the standard. Those are critical issues, and they formed kind of our no-negotiation floor with respect to our discussions with Wyoming over the 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

Page 49 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. б 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 You bet. MR. COMPTON: 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 б 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.

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

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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 guality.

9 Well, Mr. Chairman, under MR. COMPTON: 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 Tetratech 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

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

1

2

3

4 So really things are not much different 5 under the agreement. What the agreement does, б 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 Rather they will require application of Powder. 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

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

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Page 54 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, б 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.

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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

really review those? What do you think about 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 б 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.

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

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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 б 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 Anything else? CHAIRMAN RUSSELL: 22 (No response) 23 CHAIRMAN RUSSELL: Seeing no others, 24 thank you for coming in, Brenda, and talking to 25 And I will entertain a motion to adjourn this us.

¹ regular meeting of the BER.

2 MR. SKUNKCAP: No way. I've got one. 3 It's not on the agenda. Well, a guestion for --4 just a brief one, a yes or no answer. The 5 Northern Cheyenne, they're in all those б 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 Should we put it on CHAIRMAN RUSSELL: 22 for next agenda? 23 MR. SKUNKCAP: That would be fine. 24 That might be the best way, MR. LIVERS: 25 Mr. Chairman, Mr. Skunkcap. We'll get Wayne

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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.
б	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.)
24	* * * * *
25	

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1	CERTIFICATE
2	STATE OF MONTANA)
3	: SS.
4	COUNTY OF LEWIS & CLARK)
5	I, LAURIE CRUTCHER, RPR, Court Reporter,
6	Notary Public in and for the County of Lewis &
7	Clark, State of Montana, do hereby certify:
8	That the proceedings were taken before me at
9	the time and place herein named; that the
10	proceedings were reported by me in shorthand and
11	transcribed using computer-aided transcription,
12	and that the foregoing -59- pages contain a true
13	record of the proceedings to the best of my
14	ability.
15	IN WITNESS WHEREOF, I have hereunto set my
16	hand and affixed my notarial seal
17	this day of , 2007.
18	
19	LAURIE CRUTCHER, RPR
20	Court Reporter - Notary Public
21	My commission expires
22	March 9, 2008.
23	
24	
25	