

Page 2

1 WHEREUPON, the following proceedings were
2 had and testimony taken, to-wit:
3 * * * * *

4 CHAIRMAN RUSSELL: It is about two after
5 nine, and I will call this regular meeting of the
6 Board of Environmental Review to order. Tom.
7 MR. LIVERS: Mr. Chairman, members of
8 the Board, for the record, I'm Tom Livers, I'm the
9 Deputy Director of the Department of Environmental
10 Quality. And I will start with a quick roll call.
11 Larry Anderson.
12 MR. ANDERSON: Here.
13 MR. LIVERS: Heidi Kaiser.
14 MS. KAISER: Here.
15 MR. LIVERS: Marvin Miller.
16 MR. MILLER: Here.
17 MR. LIVERS: Larry Mires.
18 MR. MIRES: Here.
19 MR. LIVERS: Robin Shropshire.
20 MS. SHROPSHIRE: Here.
21 MR. LIVERS: Joe Whalen.
22 MR. WHALEN: Here.
23 MR. LIVERS: Chairman Russell.
24 CHAIRMAN RUSSELL: I'm present.
25 MR. LIVERS: I think we're there.

Page 3

1 CHAIRMAN RUSSELL: The first item on the
2 agenda is the review and approval of the July
3 24th, 2009 minutes.
4 MR. MIRES: This is Mires. I had one
5 question. There is an area that's highlighted.
6 Is there a particular reason for that?
7 THE CLERK: No. It just didn't get
8 removed, but it will be removed from the final.
9 MR. LIVERS: This is Tom. I think there
10 was an artifact. We were going to try to
11 potentially expand on that a little bit, and so we
12 will take care of it in the final, as Joyce said.
13 MR. MIRES: With that, I would so move
14 to approve the minutes.
15 CHAIRMAN RUSSELL: It's been moved by
16 Larry Mires. Is there a second?
17 MR. MILLER: Miller. I second it.
18 CHAIRMAN RUSSELL: It's been moved and
19 seconded. Any further discussion?
20 (No response)
21 CHAIRMAN RUSSELL: Hearing none, all
22 those in favor, signify by saying aye.
23 (Response)
24 CHAIRMAN RUSSELL: Any opposed? We
25 probably don't need to do --

Page 4

1 MR. LIVERS: I don't think we need a
2 roll call on that one. Thanks.
3 CHAIRMAN RUSSELL: I'm going to have to
4 go back and forth here. There may be long pauses.
5 But the next item on the agenda are the briefing
6 items, contested case updates. Katherine.
7 MS. ORR: Good morning, all. I'll just
8 kind of go through the ones that need highlighting
9 for the Board.
10 Item II(A)(1)(c) is the appeal by the
11 Citizens for Clean Energy, Sierra Club, MEIC,
12 National Parks Conservation Association, of the
13 second permit that was issued to Southern Montana
14 Electric Generation and Transmission, SME
15 Highwood.
16 Pending is a motion to dismiss and an
17 agreement that this case should be dismissed by
18 the Appellants, although the parties disagree as
19 to the grounds for the dismissal, whether it
20 should be with prejudice or not. And I'm
21 currently evaluating that, and should be able to
22 issue an order regarding that in next week.
23 The next Item (d) in the matter of the
24 violations of the Metal Mine Reclamation Act by
25 Saturday Sunday, you all can see that there were

Page 5

1 cross motions for summary judgment, and I issued a
2 proposed order granting the Department's motion
3 for summary judgment.
4 And under MAPA, we are required to send
5 out notice to the party against whom the motion
6 was issued that they may file exceptions, and I'll
7 be issuing an order stating that, and they will
8 have the opportunity to file exceptions, and that
9 will be, if they do file exceptions, before the
10 Board in the next meeting.
11 And I've also advised the parties that
12 since there is a penalty component, and that is
13 going to necessitate a factual hearing, that the
14 parties advise me when we can have that hearing;
15 and hopefully simultaneously with the hearing on
16 the exceptions, if there are any, we can present
17 the result of that meeting on the penalties to the
18 Board, so that would be for December.
19 In Item (g), there is a motion to compel
20 and for sanctions pending, which I'll be ruling on
21 shortly. That's in the matter of the violations
22 of the Clean Air Act of Montana by Sheep Mountain
23 Properties.
24 And those are the only ones that --
25 Well, actually (h), I wanted to tell the Board

Page 6

1 that it looks like that will be dismissed in the
2 next meeting as well.
3 And then the cases in litigation, Item
4 (a), I have not researched frankly where it is in
5 the Supreme Court. I don't think it's changed
6 from the indication here of where it is.
7 The next item is the appeal by SME to
8 District Court regarding the CO2 conclusions of
9 the Board, and I have heard that that is going to
10 be dismissed.
11 And that's all for that section.
12 CHAIRMAN RUSSELL: The next item on the
13 agenda are the repeal, amendments, and adoption of
14 final rules. Tom.
15 MR. WHALEN: Mr. Chairman, this is
16 Whalen. A question for Ms. Orr.
17 Katherine, with respect to the SME case,
18 the contested case above -- it would be I think
19 2(c), where you had mentioned that there was a
20 dismissal, and then there was some question as to
21 whether that would be dismissal with or without
22 prejudice.
23 MS. ORR: Yes.
24 MR. WHALEN: Which of those two parties
25 is arguing for dismissal with prejudice?

Page 7

1 MS. ORR: SME is.
2 MR. WHALEN: Thank you, Mr. Chairman.
3 CHAIRMAN RUSSELL: The next item, Item
4 III(A)(1), in the matter of the proposed adoption
5 of amendments of ARM 17.8.501, 17.8.504, 17.8.505,
6 17.8.514, the annual adjustment of the air quality
7 operation and open burning fees.
8 MR. LIVERS: Mr. Chairman, this is Tom
9 of the Department. Deb Wolfe from our Air
10 Resources Management Bureau will present this
11 information. Actually the first two rulemakings.
12 MS. WOLFE: Good morning. For the
13 record, my name is Debra Wolfe, and I'm a planner
14 with the Air Resources Management bureau, and I'm
15 here today to represent the Department regarding
16 action on the proposed incorporation by reference
17 rulemaking. We can start with IBR or fees.
18 MS. ORR: Fees.
19 MS. WOLFE: In the notice of the
20 proposal that you have in your packets regarding
21 ARM 17.8.501, 17.8.504, 17.8.505, and 17.8.514 was
22 published on June 25, 2009, and the Board's
23 Hearing Officer Katherine Orr presided over a
24 public hearing on July 27th, 2009 to take comment
25 on the proposed amendments.

Page 8

1 The proposed notice set out a range
2 between \$36 and \$41 a ton for an operating fee to
3 be determined by the Board based on the hearing
4 record. The Department completed its fiscal year
5 2010 budget evaluation, and provided testimony at
6 hearing to support the Board's assessment of
7 operation fees at \$38.24 per ton, which is within
8 the range set forth in the Board's rule proposal.
9 The Department also announced the per
10 ton figure at a meeting of Clean Air Act Advisory
11 Council, which is a representative consortium of
12 industry and environmental interests, on June
13 30th, 2009.
14 The Department has prepared for the
15 Board's consideration a draft notice of rule
16 amendment in this matter, and the Department
17 recommends that the Board adopt the rule as set
18 forth in the notice of rule amendment. I'd be
19 happy to take any questions.
20 CHAIRMAN RUSSELL: Thank you. Board
21 members, do you have any --
22 (No response)
23 CHAIRMAN RUSSELL: Hearing none, Tom,
24 the MAR that we have does, it still have the range
25 in it?

Page 9

1 MR. LIVERS: We're checking on that, Mr.
2 Chairman. Thank you.
3 CHAIRMAN RUSSELL: I'm guessing it
4 probably should. I'm racing through it. I can't
5 find it.
6 MR. LIVERS: Mr. Chairman, let me see if
7 I can get the page number here quickly. It's near
8 the beginning. The top page number is 959 about
9 not quite halfway down. That's the first
10 reference, for example, and it talks about an
11 amount within the range of \$36 to \$41 to be
12 determined by the Board based on the hearing
13 record.
14 CHAIRMAN RUSSELL: And so 38 -- what was
15 the --
16 MR. LIVERS: 959. That's the first. I
17 manage there are a couple others, too. I'm just
18 checking real quickly. It's Page 959 on the top
19 number.
20 CHAIRMAN RUSSELL: I actually see the
21 bracketed. So we actually need to make sure that
22 it reflects the \$38 and --
23 MR. LIVERS: It will need to -- The
24 final order will have the exact amount in once the
25 Board takes action on that.

Page 10

1 CHAIRMAN RUSSELL: I just want to make
2 sure we take the action that's that per ton fee.
3 MR. LIVERS: Correct.
4 CHAIRMAN RUSSELL: What was it, 38 what?
5 MS. WOLFE: \$38.24, and it is reflected
6 in the executive summary.
7 CHAIRMAN RUSSELL: So we don't take
8 action on the summary.
9 MS. WOLFE: Right.
10 CHAIRMAN RUSSELL: So \$38.24. Board
11 members, do you have any questions for the
12 Department?
13 MR. WHALEN: Mr. Chairman, this is
14 Whalen. Ms. Wolfe, are we to understand that
15 there was no public comment in opposition to the
16 rulemaking?
17 MS. WOLFE: Yes. That's true. No
18 public comment was received.
19 CHAIRMAN RUSSELL: I heard there was
20 some grousing, though.
21 MR. LIVERS: Mr. Chairman, maybe just to
22 elaborate on one point that Ms. Wolfe made. This
23 is Tom. We do have an active stakeholder group.
24 She mentioned the Clean Air Act Advisory Council.
25 And we have a good working relationship. It is

Page 11

1 made up of a cross section of fee payers, and we
2 work every year closely with that group in
3 discussing our proposals, proposed fee levels,
4 uses, activities. So there has been a
5 considerable amount of vetting with the affected
6 parties.
7 CHAIRMAN RUSSELL: Okay.
8 MR. WHALEN: Mr. Chairman, Whalen. I
9 move to adopt the rules as proposed by DEQ.
10 CHAIRMAN RUSSELL: Maybe a couple
11 friendly insertions there. With the per ton
12 amount of \$38.24 to replace the sliding fees that
13 were part of the Hearing Officer's report and the
14 House Bill 521 and 311 analysis.
15 MR. WHALEN: Correct. As I understand
16 it -- this is Whalen again -- As I understand it,
17 that \$38.24 figure per ton is in the proposed
18 rulemaking, so that would be the figure that I
19 would recommend in the motion.
20 CHAIRMAN RUSSELL: All right. Just as a
21 matter of course, oftentimes we just will
22 basically adopt verbatim what was in the notice,
23 and we can't adopt that notice without making that
24 modification.
25 MR. WHALEN: I see. Thank you.

Page 12

1 CHAIRMAN RUSSELL: So I have a motion to
2 adopt the rule with the amendments, accept the
3 Hearing Officer's report, and House Bill 521 and
4 311 analysis prepared by the Department. Is there
5 a second?
6 MR. MILLER: This is Miller. I'll
7 second it.
8 CHAIRMAN RUSSELL: It's been moved and
9 seconded. Any further discussion? I know I have
10 to ask for public comment, Tom. Did you smile?
11 MR. LIVERS: I did, Mr. Chairman. Thank
12 you. There doesn't appear to be any public
13 comment here, and I'm not aware of anyone who's
14 phoned in other than the Board members themselves.
15 CHAIRMAN RUSSELL: Okay. Any further
16 discussion?
17 MR. LIVERS: Mr. Chairman, when we're
18 ready, I'll probably do a roll call on this.
19 CHAIRMAN RUSSELL: I think we're ready.
20 All those in favor, signify by saying aye. Tom
21 will do a roll.
22 MR. LIVERS: Mr. Anderson.
23 MR. ANDERSON: Aye.
24 MR. LIVERS: Ms. Kaiser.
25 MS. KAISER: Aye.

Page 13

1 MR. LIVERS: Mr. Miller.
2 MR. MILLER: Aye.
3 MR. LIVERS: Mr. Mires.
4 MR. MIRES: Aye.
5 MR. LIVERS: Ms. Shropshire.
6 MS. SHROPSHIRE: Aye.
7 MR. LIVERS: I'm not sure if that came
8 through. Was that an aye or a no?
9 MS. SHROPSHIRE: Aye.
10 MR. LIVERS: Thank you. I apologize for
11 that. Mr. Whalen.
12 MR. WHALEN: Aye.
13 MR. LIVERS: Mr. Russell.
14 CHAIRMAN RUSSELL: Aye.
15 MR. LIVERS: Thank you. Passed
16 unanimously.
17 The next item, again, Ms. Wolfe will run
18 us through that. III(A)(2).
19 MS. WOLFE: Again, for the record, my
20 name is Debra Wolfe, and I'm here today to
21 represent the Department regarding action on the
22 proposed incorporation by reference rulemaking.
23 Notice of this proposal was published
24 June 25th, 2009, and the Board's Hearing Officer
25 Katherine Orr presided over a public hearing on

Page 14

1 July 27th, 2009. The Department recommends that
2 the Board adopt the amendment as proposed in the
3 proposed MAR notice published on June 25th, 2009,
4 and the Department supports the submission of
5 these amendments to EPA for inclusion into the
6 State Implementation Plan.
7 CHAIRMAN RUSSELL: Is that it?
8 MS. WOLFE: Yes.
9 CHAIRMAN RUSSELL: Deb, you are so good.
10 Brevity is great. No offense to anyone else in
11 the Department.
12 MS. WOLFE: Thank you, Mr. Chairman.
13 CHAIRMAN RUSSELL: Do the Board members
14 have any questions for the Department?
15 (No response)
16 CHAIRMAN RUSSELL: Hearing none, is
17 there anyone in the audience, the public, that
18 would like to speak to this?
19 (No response)
20 MR. LIVERS: None here in Helena, Mr.
21 Chairman.
22 CHAIRMAN RUSSELL: All right.
23 MR. LIVERS: I think we're ready for a
24 motion, and then when you're ready, a roll call
25 vote.

Page 15

1 CHAIRMAN RUSSELL: Once again, there are
2 no submitted testimony, comments?
3 MS. WOLFE: Mr. Chairman, members of the
4 Board, no comments were received.
5 CHAIRMAN RUSSELL: With that in mind, I
6 will entertain a motion to amend as presented ARM
7 17.8.102, 17.8.302, 17.8.767, 17.8.802, 17.8.822,
8 17.8.902, 17.8.1002, pertaining to the
9 incorporation by reference of the current CFR's
10 and other materials into the air quality rules.
11 Do I have a motion -- and to accept the Hearing
12 Officer's report and the House Bill 521 and 311
13 analysis.
14 MR. MIRES: Mires. So moved.
15 CHAIRMAN RUSSELL: It's been moved by
16 Larry. Is there a second?
17 MS. SHROPSHIRE: This is Robin. Second.
18 CHAIRMAN RUSSELL: It's been moved and
19 seconded. Any further discussion?
20 (No response)
21 CHAIRMAN RUSSELL: Hearing none, all
22 those in favor, signify by saying aye. Tom.
23 MR. LIVERS: Mr. Chairman, we'll go
24 inverse alphabetically this time, shake things up
25 a little bit. Mr. Whalen.

Page 16

1 MR. WHALEN: Aye.
2 MR. LIVERS: Ms. Shropshire.
3 MS. SHROPSHIRE: Aye.
4 MR. LIVERS: Mr. Mires.
5 MR. MIRES: Aye.
6 MR. LIVERS: Mr. Miller.
7 MR. MILLER: Aye.
8 MR. LIVERS: Ms. Kaiser.
9 MS. KAISER: Aye.
10 MR. LIVERS: Mr. Anderson.
11 MR. ANDERSON: Aye.
12 MR. LIVERS: Chairman Russell.
13 CHAIRMAN RUSSELL: Aye.
14 MR. LIVERS: Thank you.
15 CHAIRMAN RUSSELL: And the next matter
16 in front of the Board is the modifications,
17 proposed adoption of amendments to Title 17.38
18 Subchapters 1 and 2. Tom.
19 MR. LIVERS: Mr. Chairman, thank you.
20 Presenting for the Department will be Mr. Eugene
21 Pizzini, and your comments on brevity were heard
22 by all here.
23 CHAIRMAN RUSSELL: I'm just hoping Gene
24 can pull it off.
25 MR. PIZZINI: Mr. Chairman, members of

Page 17

1 the Board, for the record, my name is Eugene
2 Pizzini, and I'm the rules expert writer for the
3 Public Water Supply Program.
4 On July 24th, 2009, the Board initiated
5 rulemaking to amend the Public Water Supply rules.
6 On September 3, 2009, Katherine Orr conducted
7 A public hearing on the proposed amendments.
8 The Presiding Officer's report documents
9 comments received both verbal and written with one
10 exception. Kathy Moore with Lewis & Clark City
11 County Health Department submitted a written
12 comment that was not noted in the Presiding
13 Officer's report, and that was probably my fault
14 as I did not specifically forward that on to
15 Katherine. The comment was noted and responded to
16 in the response to comments and the notice of
17 amendment, adoption, and repeal. These Board
18 minutes will be attached to the Presiding
19 Officer's report, and placed in the permanent rule
20 file.
21 At the time of the hearing, an
22 individual on behalf of two regional water
23 authorities offered both verbal and written
24 comments, one municipal system and one county
25 health department submitted separate written

Page 18

1 comments, one individual submitted a comment on
2 behalf of Montana Rural Water Systems, and a
3 separate individual asked questions that were
4 outside the scope of this rulemaking. Those
5 questions were addressed after the Presiding
6 Officer closed the public hearing.
7 Proposed amendments based on comments
8 received include replacing the term "chlorine"
9 with the term "disinfectant" for the purpose of
10 residual monitoring, clarifying the need for
11 surface water systems to collect and report two
12 daily residual disinfectant samples, and
13 clarification for residual monitoring and
14 reporting for groundwater systems.
15 In addition, supplemental testimony was
16 offered by the Department as part of its House
17 Bill 521 analysis. In preparing the House Bill
18 521 analysis, it was determined that a portion of
19 an existing rule would still be more stringent
20 than its comparable federal rule. The
21 supplemental testimony is intended to justify
22 maintaining that more stringent requirement.
23 The Department believes that the
24 proposed response to the comments received
25 adequately addresses those comments, and

Page 19

1 recommends that the Board adopt the proposed
2 changes as amended during the comment period.
3 And I'm available for any questions you
4 may have.
5 CHAIRMAN RUSSELL: Thanks, Gene. Very
6 nice. Questions from the Board to the Department?
7 MR. MIRES: This is Mires. One question
8 in regards to the comments from Mr. Wade on the
9 rural water system. Was he satisfied with the
10 reply on that, do you know, or can we find that
11 out?
12 MR. PIZZINI: Chairman Russell, members
13 of the Board, I have not heard back from Mr. Wade
14 or anyone with the regional water authority since
15 the responses came out. Do you have a particular
16 question? Was there one specific question that
17 has your interest?
18 MR. MIRES: Well, only in the fact that
19 rural projects are odd characters in themselves,
20 especially in this end of the state where they are
21 so huge that in the construction phases, 72 months
22 may seem like a reasonable period of time, but
23 when dealing with Congress and trying to get
24 funding, some of the projects have been in the
25 works for ten and fifteen years. And sometimes

Page 20

1 rural water projects don't fit within the scope of
2 our good intention on the rules.
3 I'm just wondering if that has been
4 taken into consideration when we have to deal with
5 these large rural type water projects.
6 MR. PIZZINI: Chairman Russell, members
7 of the Board, I can probably try to address that
8 somewhat at this point. In general, Mr. Wade made
9 a few different comments regarding the regional
10 water system authorities. The first was dealing
11 with deviation requests and the various time
12 limits imposed on those, that they're good for a
13 maximum of 72 months; and the other was that they
14 wanted to propose the Department did the review
15 and either approved or denied those deviation
16 requests quicker than the forty-twenty.
17 The Department adopted by reference the
18 new statutory language that dealt with those
19 issues, and so we are bound to stick with the
20 statutory language. The Board cannot adopt a rule
21 that says the deviation request is good for twenty
22 years, as an example.
23 One of the other questions that they
24 brought forward was that they suggested we replace
25 the term "chlorine" and "chlorine residual" with

Page 21

1 "disinfectant" because regional water systems and
2 some other systems are required, in order to carry
3 a residual through the system, to use a secondary
4 disinfectant such as chloramines, which have a
5 longer life. And we agreed with that, and we made
6 the change, or proposed to make the change.
7 The third issue that the regional
8 authority brought forward or requested information
9 on is the one that we had to mark as being outside
10 of the scope, and that is where they asked whether
11 they are a consecutive connection or a public
12 water supply. That is not a function of this rule
13 writing, and that is why we said it's beyond the
14 scope of this rule writing.
15 We have had multiple discussions with
16 the regional authorities and EPA. I don't think
17 the question has been answered, at least to their
18 satisfaction. I'm sure we're going to continue to
19 have discussions regarding that issue. But for
20 the function of this rule writing process, that
21 question is beyond the scope of the rule writing.
22 Does that answer questions the Board may
23 have?
24 MR. MIRES: This is Mires. Yes, it
25 does, and I commend the Department for the

Page 22

1 responses that they gave to Mr. Wade, and I was
2 just curious whether he had ever responded back
3 with whether he was satisfied. I thought the
4 Department did a nice job on it.
5 CHAIRMAN RUSSELL: Any further?
6 (No response)
7 CHAIRMAN RUSSELL: I read it once.
8 Gene, did you respond to -- is your response to
9 Lewis & Clark County actually part of the record?
10 MR. PIZZINI: Chairman Russell, members
11 of the Board, yes, it is.
12 CHAIRMAN RUSSELL: Okay.
13 MR. PIZZINI: Chairman Russell, members
14 of the Board, what happened was the comment came
15 to me personally, and I forwarded it to the
16 Director's Office, and there was miscommunication
17 as to whether I forwarded it to Katherine Orr or
18 whether somebody there had. But we accepted the
19 comment, we mentioned it in our response, and we
20 responded to it. So that portion of it is there.
21 It just didn't show up in the Presiding Officer's
22 report.
23 CHAIRMAN RUSSELL: All right. Got it.
24 MR. WHALEN: Mr. Chairman, this is
25 Whalen. My question is: Just for clarification

Page 23

1 on this and future matters, when we come up
2 against an issue where we have a deviation request
3 issue, where we're up against statute with respect
4 to that time limit of 72 months, is it accurate to
5 say --
6 Is there a statute on the books that any
7 rules that are passed by this Board within its
8 rulemaking authority, that we are unable to adjust
9 something like time frames, or fee schedules, or
10 anything like that? Is that a pretty clear
11 question?
12 CHAIRMAN RUSSELL: I can take a shot,
13 and then maybe Tom would also. But I don't think
14 -- What we do has to fit within what the
15 Legislature desires us to do. So if they set a
16 time limit, and it's a hard and fast one, it can't
17 be waived.
18 MR. LIVERS: That's essentially correct,
19 Mr. Chairman. This is Tom. Basically all our
20 rulemaking has to be consistent with statutory
21 parameters, statutory guidance; and where statute
22 has specific references, in this case on time
23 frames, then it is pretty clear -- it is very
24 clear cut, and we'll have to be consistent with
25 anything there.

Page 24

1 MR. WHALEN: That will be very helpful.
2 Thank you.
3 CHAIRMAN RUSSELL: Generally from my
4 regulatory perspective, waivers or variances can
5 be granted to regulation; but if there is a
6 statute that supports it, you're pretty much stuck
7 with it. And the Department does grant waivers to
8 some parts of their regulations.
9 MR. LIVERS: And this is Tom again. And
10 typically what we'll do -- in fact, we had some
11 legislation in the last session where we wanted to
12 come up with a waiver process under a certain
13 provision. We asked for that statutory authority
14 in law to -- statutory authority to allow the
15 Department to develop a waiver system, and
16 criteria under which we'd grant waivers.
17 So again, since the Board's rulemaking
18 ultimately derives from Montana law, we'll look to
19 that; but there are cases where the statute does
20 give certain discretion to the Department and to
21 the Board in its rulemaking.
22 MR. WHALEN: That's clear. Thank you
23 very much.
24 CHAIRMAN RUSSELL: All right. Okay.
25 Any further questions for the Department? Mr.

Page 25

1 Pizzini, you did a great job.
2 MR. PIZZINI: Thank you, sir.
3 CHAIRMAN RUSSELL: I'll craft a motion
4 unless someone else wants to, but --
5 OPERATOR: Ryan Purdy is joining the
6 meeting.
7 CHAIRMAN RUSSELL: Before I craft a
8 motion or have someone send one out, is there
9 anyone in the audience -- Tom, is there someone
10 out there now?
11 MR. LIVERS: It sounds like we may have
12 had a member of the public join. And just for
13 orientation, we're on agenda Item No. Roman
14 Numeral III(A)(3), and that's public water supply
15 rules. The Board is about to take action.
16 And for the record, if I could ask who
17 joined just now on the phone, and if there is any
18 particular affiliation that we would put in the
19 minutes.
20 MR. PURDY: Yes. My name is Ryan Purdy,
21 I'm with Morrison and Frampton, on behalf of Lomax
22 Development.
23 MR. LIVERS: Thank you very much, Mr.
24 Purdy.
25 CHAIRMAN RUSSELL: I will entertain a

Page 26

1 motion to adopt the rule as submitted which would
2 modify 17.38.101, 17.38.208, 17.38.225, 17.38.229,
3 and others as listed, and adopt New Rule I, New
4 Rule II, New Rule III, New Rule IV, which will be
5 codified in the final publication; accept the
6 Hearing Officer's report, the House Bill 521 and
7 311 analysis, and the Department's responses to
8 comments. Do I have a motion?
9 MS. SHROPSHIRE: So moved. This is
10 Robin.
11 CHAIRMAN RUSSELL: It's been moved by
12 Robin. Is there second?
13 MR. WHALEN: Mr. Chairman, Whalen. I'll
14 second.
15 CHAIRMAN RUSSELL: It's been moved and
16 seconded. Any further discussion?
17 (No response)
18 CHAIRMAN RUSSELL: Hearing none, all
19 those in favor, signify by saying aye.
20 MR. LIVERS: We'll take a roll call, Mr.
21 Chairman. Thank you. Mr. Anderson.
22 MR. ANDERSON: Aye.
23 MR. LIVERS: Ms. Kaiser.
24 MS. KAISER: Aye.
25 MR. LIVERS: Mr. Miller.

Page 27

1 MR. MILLER: Aye.
2 MR. LIVERS: Mr. Mires.
3 MR. MIRES: Aye.
4 MR. LIVERS: Ms. Shropshire.
5 MS. SHROPSHIRE: Aye.
6 MR. LIVERS: Mr. Whalen.
7 MR. WHALEN: Aye.
8 MR. LIVERS: Chairman Russell.
9 CHAIRMAN RUSSELL: Aye.
10 MR. LIVERS: Unanimous. Thank you.
11 CHAIRMAN RUSSELL: The last amendment to
12 the Administrative Rules is -- for brevity on my
13 part, I will just call it the Gray Water Rule.
14 MR. LIVERS: Mr. Chairman, I realize the
15 bar has been set high by the Department
16 representative, but I think Mr. Steve Kilbreath is
17 prepared to meet that.
18 MR. KILBREATH: Mr. Chairman, good
19 morning to you also. Members of the Board, my
20 name is Steve Kilbreath, K-I-L-B-R-E-A-T-H. I am
21 the section supervisor for the DEQ Subdivision
22 Section, and it was our charge to create gray
23 water rules and carry them forward. We filed a
24 rule notice in June. We held a meeting with the
25 BER in July.

Page 28

1 The gray water rules have been
2 relatively uncontroversial. There has been a very
3 low amount of people attending any meetings and a
4 low number of public comments. We sent out 400
5 notices to interested parties, and I think we
6 received less than two dozen comments back. We
7 have modified rules based on -- our proposed rules
8 based on those comments.
9 The clarifications that we added to the
10 rules involved review of existing gray water
11 systems if we find them. We modified setbacks to
12 wells in our initial rule package. We had a 50
13 foot setback to other wells besides drinking water
14 wells. The comments from the local government
15 asked for 100 foot setbacks, so we modified rules
16 for that setback.
17 We've clarified the use of kitchen sink
18 gray water, which has a higher bacterial content,
19 and the only time kitchen sink gray water may be
20 used in a gray water system is if it has a waste
21 segregation system. Otherwise it goes into the
22 sanitary system that's associated with the house,
23 goes into the septic system or the sewer.
24 We clarified the word "subsurface," and
25 put a six inch burial depth on that; essentially

Page 29

1 clarified some maintenance issues about salt
2 buildups and possible changes in pH to soils,
3 brought forth by Mr. Whalen. A very minor set of
4 modifications, very noncontroversial set of rules,
5 and I would request that the BER move to adopt
6 these rules. Thank you.
7 CHAIRMAN RUSSELL: Well, Steve, good
8 job. I was looking at some of the comments by --
9 Were those actually comments?
10 MR. KILBREATH: We did not receive a lot
11 of written comments. We received some verbal
12 ones, and we did go ahead and address the verbal
13 ones that came out of the BER meeting. Those were
14 the water right comments, the UIC injection well
15 comments, and the salts and pH comments. There
16 was more public comment from members of the BER
17 than there was from members of the public.
18 CHAIRMAN RUSSELL: All right. Do
19 members of the Board have any questions for Steve?
20 (No response)
21 CHAIRMAN RUSSELL: Hearing none, thank
22 you, Steve. I will then entertain a motion to
23 adopt the gray water rules as published, accept
24 the Hearings Officer's report, the House Bill 521
25 and 311 analysis, and the Department's responses

Page 30

1 to comments. Do I have a motion?
2 MS. KAISER: So moved.
3 CHAIRMAN RUSSELL: It's been moved by
4 Heidi. Is there a second?
5 MR. MILLER: Miller. I second it.
6 CHAIRMAN RUSSELL: It's been moved and
7 second. Any further discussion?
8 (No response)
9 CHAIRMAN RUSSELL: Anyone in the
10 audience like to speak to this?
11 (No response)
12 MR. LIVERS: None here in Helena, Mr.
13 Chairman.
14 CHAIRMAN RUSSELL: Let me see if I can
15 dig someone up outside my office.
16 MR. WHALEN: Mr. Chairman, I wanted to
17 wait until we had a motion on the floor before
18 offering comment. I guess my comment would be
19 that I'm impressed by the diligence of the
20 Department in addressing many of the comments that
21 have come to it, not just from the public, but
22 from the Board as well.
23 I do know that relative to the other
24 issues that we're handling today, there are a few
25 more comments that have been generated by this

Page 31

1 issue than others, and that Ms. Orr responded to
2 each of those comments does tell me that initially
3 rulemaking -- because we don't have a great deal
4 of federal guidance from the EPA with respect to
5 this, there were a lot of surprises that came up
6 as a result of these comments, which tells me that
7 this may not be ready for prime time.
8 And with respect to the comments that
9 have been registered by the Department, there are
10 two that I don't feel that have been completely
11 addressed. One has to do with the kitchen waste,
12 the maintenance of those storage tanks, given the
13 fact that the size of those storage tanks is set
14 at 50 gallons, mainly to draw attention to that,
15 the required maintenance of those pathogens that
16 can grow within 24 hours in a storage tank.
17 Then No. 2, the issue of high sodium or
18 alkaline deposits being made on top soils was
19 recognized, but I don't know that it has been
20 fully addressed, understanding that the gray water
21 is going to be a higher sodium water.
22 So my concern is that what we're doing,
23 we have a great deal of public support for water
24 conservation, and I think that's extremely
25 admirable, from the two groups particularly that

Page 32

1 stepped up this rulemaking; but my concern is that
2 we're trading one principle of conservation, which
3 is water conservation, and sacrificing soil
4 fertility as a result, among other things.
5 So I'm going to vote no on this issue,
6 and I just wanted to explain my reasons for that.
7 I think it's something that merits closer
8 examination, and I think we're getting closer, but
9 I don't know that we're there yet, and I'm just
10 not real comfortable with passing this issue
11 today. Thank you.
12 CHAIRMAN RUSSELL: All right.
13 MR. ANDERSON: This Larry Anderson. I
14 have a question on proposed Rule 17.36.103 sub(a),
15 sub(i). It requires a description of the soils
16 within 25 feet of the proposed gray water
17 irrigation areas, and I'm just trying to figure
18 out what the basis for the 25 feet area is.
19 CHAIRMAN RUSSELL: Steve, can you handle
20 that?
21 MR. KILBREATH: Mr. Chairman, the basis
22 for that comes straight out of our DEQ subdivision
23 regulations, where we require a soil site analysis
24 within 25 feet of any proposed drainfield site.
25 It's based on the fact that we think that the

Page 33

1 soils would be consistent, and a 25 foot distance
2 would be representative of the drainfield area.
3 MR. ANDERSON: My question is more
4 focused on how did you arrive -- and maybe the 25
5 feet is a historical number. I'm just trying to
6 figure out how did you arrive at the 25 foot area.
7 CHAIRMAN RUSSELL: Where is Abe when you
8 need him?
9 MR. KILBREATH: Mr. Chairman, that 25
10 foot distance away from drainfields has been in
11 the rules for probably two dozen years. I
12 couldn't tell you specifically where it came from
13 to start with, but based upon looking at thousands
14 of test pits myself, based upon observing soil
15 conditions in the field -- and again, now these
16 soil conditions are physical characteristics of
17 the soil, looking at structure, looking at clay
18 content, permeability, etc. -- in most sites, a 25
19 foot set back is adequate for characterization of
20 the soils in a drainfield area.
21 In those sites that it is not
22 appropriate, if you have a test hole that doesn't
23 have proper permeability, or doesn't match with
24 the other test pits within the subdivision, when
25 we're reviewing those sites, we ask for additional

Page 34

1 test pits.
2 So it's something that's been in the
3 rules historically, but it's something we evaluate
4 on each evaluation or on each site that we see.
5 And then within the 900 series rules or the state
6 minimum standards, the soil conditions at each
7 gray water site is something that the local county
8 sanitarian would also evaluate.
9 CHAIRMAN RUSSELL: I can say this from a
10 non-technical standpoint. The rule is that you
11 will know the soils within a specific distance of
12 the site that you're going to treat. This is like
13 -- From another standpoint, if someone turned in
14 test pit evaluations that were 200 feet away from
15 the proposed drainfield site, that would be
16 unacceptable.
17 The 25 feet says that your soils aren't
18 going to change much within that area, and as such
19 it would be representative of the soils underneath
20 the drainfield.
21 MR. ANDERSON: Okay. I'm just trying to
22 get my bearings on that. I appreciate those
23 responses.
24 CHAIRMAN RUSSELL: Steve, was that a
25 good characterization?

Page 35

1 MR. KILBREATH: Yes, it was. We process
2 waivers for subdivisions for not having test pits,
3 but we really put a lot of thorough evaluation on
4 those waivers, and we put a lot of emphasis on
5 consistency in the soils before we grant a waiver
6 for a reduced number of test pits.
7 CHAIRMAN RUSSELL: Any other
8 clarifications? Certainly, Joe, I respect what
9 you said, and make no comment about that; but I
10 will mention that the folks that are regulating
11 this have been participating in this rulemaking;
12 my own staff has participated; Steve and I
13 testified on the House Bill that put this all into
14 motion three years ago or two plus years ago.
15 I personally like the rule because it's
16 more restrictive than I thought we were going to
17 get, and I feel that this is a very protective
18 regulation. I think it meets the -- Certainly I
19 haven't heard anything from the bill sponsor that
20 we didn't meet her objectives, and we also have a
21 rule that's protective of public health.
22 And there certainly are other countries
23 that do nothing. There are other states that take
24 a very liberal look at gray water, and I am just
25 glad that we didn't.

Page 36

1 MR. WHALEN: Thank you, Mr. Chairman.
2 If I may ask a question before we go forward.
3 This will be my final question.
4 You brought up the issue of regulation,
5 and that brings to mind my question. In reading
6 through the material, it appears that it will be
7 DEQ who will be charged with regulating those gray
8 water sites. Maybe I should direct that question
9 to Mr. Kilbreath.
10 CHAIRMAN RUSSELL: Let me take a shot at
11 it and see, because I've been doing this for a
12 long time.
13 What we've done is we've established a
14 gray water rule at the State level. It will be
15 used in the review of subdivisions because the
16 Sanitation and Subdivisions Act is a State rule.
17 It will be incorporated into local
18 regulations when local regulators modify their
19 regulation. There is a process at the local
20 level. We can't just adopt these without going
21 through the local public hearing process, and
22 basically following the same process that the
23 State did to adopt the gray water rules. So right
24 now, it will be incorporated and used in the
25 Sanitation Act, but it needs to be incorporated

Page 37

1 into local regulation at some point by all local
2 health departments.
3 MR. KILBREATH: Mr. Chairman, that's a
4 correct comment, and the other comment I'd like to
5 add to this is we found this set of rules
6 particularly challenging to make them usable. It
7 was easy to make them too difficult to see gray
8 water reuse. It was difficult to make them easy
9 enough to allow it. Thank you.
10 CHAIRMAN RUSSELL: So any further
11 comments or questions?
12 (No response)
13 CHAIRMAN RUSSELL: That's probably a
14 long enough pause. With that, I will entertain a
15 motion to adopt the regulations as proposed,
16 accept the Hearings Officer's report, the House
17 Bill 521 and 311 analysis, and the Department's
18 responses to comments, which will become the
19 Board's responses to comments.
20 MR. WHALEN: Mr. Chairman, do we not
21 have a motion on the floor?
22 CHAIRMAN RUSSELL: Do we? I guess we
23 do. So I will call for the question then. All
24 those in favor, signify by saying aye.
25 MR. LIVERS: Mr. Anderson.

Page 38

1 MR. ANDERSON: Aye.
2 MR. LIVERS: Ms. Kaiser.
3 MS. KAISER: Aye.
4 MR. LIVERS: Mr. Miller.
5 MR. MILLER: Aye.
6 MR. LIVERS: Mr. Mires.
7 MR. MIRES: Aye.
8 MR. LIVERS: Ms. Shropshire.
9 MS. SHROPSHIRE: Aye.
10 MR. LIVERS: Mr. Whalen.
11 MR. WHALEN: No.
12 MR. LIVERS: Chairman Russell.
13 CHAIRMAN RUSSELL: Aye.
14 MR. LIVERS: Six to one. Thank you very
15 much. I guess on behalf of the Department, I
16 appreciate the Board's comments on this matter and
17 the perspectives expressed; and given the amount
18 of Board participation, I do want to make sure
19 that one comment of Mr. Kilbreath's properly
20 transmitted over the phone lines. He said there
21 are a low number of people participating as
22 opposed to a number of low people. I want to make
23 sure that the record --
24 CHAIRMAN RUSSELL: All right. I thank
25 the Department for all of this, and making sure we

Page 39

1 got through all those four that fast.
2 MS. SHROPSHIRE: Mr. Chairman, this is
3 Robin. In about a couple minutes before the top
4 of the hour, I have to step away for about 30
5 minutes, so I apologize, and hopefully you guys
6 will still be at it when I come back; but if not,
7 if you hear me hang up, I have to leave for about
8 30 minutes, and I apologize.
9 CHAIRMAN RUSSELL: I'm guessing we'll be
10 done, but if not, please call back.
11 MR. LIVERS: Ms. Shropshire, is there
12 anything you wanted -- were there any cases of
13 particular interest that you might want us to take
14 out of order, or are you okay if we just proceed
15 on through the agenda?
16 MS. SHROPSHIRE: Thanks, Tom, for
17 asking. No, I think just to keep on as you are is
18 fine with me.
19 MR. LIVERS: That sounds good. Thank
20 you.
21 CHAIRMAN RUSSELL: The next item on the
22 agenda is new contested case appeals. Katherine.
23 MS. ORR: Mr. Chairman, members of the
24 Board, the first one is in the matter of
25 violations of the Montana Underground Storage Tank

Page 40

1 Act by Stockton Oil Company at Soco Express No.
2 10. This is in Yellowstone County, Billings. And
3 the violations that are alleged are failure to
4 properly anchor a shear valve at the dispensers --
5 that's at seven dispensers -- and failure to
6 correct compliance inspection violations within
7 the 90 days of issuance of the inspection, and the
8 penalty requested is \$805.
9 CHAIRMAN RUSSELL: Questions to
10 Katherine?
11 (No response)
12 CHAIRMAN RUSSELL: Hearing none, I will
13 entertain a motion to appoint Katherine the
14 permanent Hearings Examiner.
15 MR. MIRES: This is Mires. So moved.
16 CHAIRMAN RUSSELL: It's been moved by
17 Larry. Is there a second?
18 MR. MILLER: Miller. Second.
19 CHAIRMAN RUSSELL: It's been moved and
20 seconded. Is there any further comment?
21 (No response)
22 CHAIRMAN RUSSELL: Hearing none, all
23 those in favor, signify by saying aye. We don't
24 need a roll call on these, I hope.
25 MR. LIVERS: Mr. Chairman, I'd recommend

Page 41

1 we just do a non-roll call vote on these, and then
2 if there's any questions, we can certainly go
3 back.
4 CHAIRMAN RUSSELL: I think that's great.
5 So all those in favor, signify by saying aye.
6 (Response)
7 CHAIRMAN RUSSELL: Opposed.
8 (No response)
9 MR. LIVERS: It carries unanimously.
10 CHAIRMAN RUSSELL: The next item is
11 septage disposal licensure laws by Craig Sunberg.
12 MS. ORR: Mr. Chairman, members of the
13 Board, this you can see is out of Anaconda, and
14 the violation is essentially operating without a
15 license to dispose of septage from the time period
16 of January 1st, 2009 to April 22nd, 2009, and the
17 penalty is \$3,000.
18 CHAIRMAN RUSSELL: That's a great letter
19 for appeal. Did they hand deliver it?
20 MS. ORR: Good question. It says it was
21 filed.
22 CHAIRMAN RUSSELL: It says something
23 like, "Delivered to the Board 8/20/09."
24 MS. ORR: It does say that, doesn't it?
25 CHAIRMAN RUSSELL: Who touched it first?

Page 42

1 I'm sorry. I digress.
2 Do I have a motion to appoint Katherine
3 the permanent Hearings Examiner?
4 MR. WHALEN: So moved, Mr. Chairman.
5 Whalen.
6 CHAIRMAN RUSSELL: It's been moved by
7 Joe. Is there a second?
8 MR. MILLER: Miller. Second.
9 CHAIRMAN RUSSELL: It's been moved and
10 seconded. All those in favor, signify by saying
11 aye.
12 (Response)
13 CHAIRMAN RUSSELL: Opposed.
14 (No response)
15 CHAIRMAN RUSSELL: The next one, the
16 matter of violations of the Metal Mine Reclamation
17 Act by Paradine Mining.
18 MS. ORR: Mr. Chairman, on the item
19 before, I'm sorry to disappoint you, but that was
20 faxed.
21 CHAIRMAN RUSSELL: Oh, it was faxed.
22 MS. ORR: Anyway, on Paradine Mining,
23 this is out of Broadwater County near Winston, and
24 the violation that's been alleged is exploration
25 without an exploration license. The penalty

Page 43

1 sought is \$1,500, and the Department also seeks
2 injunctive relief.
3 CHAIRMAN RUSSELL: All right. Any
4 questions for Katherine?
5 MR. MILLER: I thought it was \$1,800.
6 MS. ORR: Let me take a look here and
7 I'll verify what it was. Yes, you're right. I
8 stand corrected.
9 CHAIRMAN RUSSELL: Any further comments
10 from the Board?
11 (No response)
12 CHAIRMAN RUSSELL: Hearing none, I'll
13 take a motion to appoint Katherine the permanent
14 Hearings Examiner on this matter.
15 MS. SHROPSHIRE: So moved. This is
16 Robin.
17 CHAIRMAN RUSSELL: It's been moved by
18 Robin. Is there a second?
19 MR. WHALEN: Second, Mr. Chairman.
20 Whalen.
21 CHAIRMAN RUSSELL: Seconded by Joe.
22 Further discussion?
23 (No response)
24 CHAIRMAN RUSSELL: Hearing none, all
25 those in favor, signify by saying aye.

Page 44

1 (Response)
2 CHAIRMAN RUSSELL: Opposed.
3 (No response)
4 CHAIRMAN RUSSELL: Motion carries. The
5 next item is another -- The septage program has
6 been kind of busy -- septage disposal and
7 licensure laws by Steven Kunkel doing business as
8 Montana Septic Service in Great Falls.
9 MS. ORR: Mr. Chairman, members of the
10 Board, this involves disposal of septage and car
11 wash sump waste at the Great Falls waste water
12 treatment plant from January 1st, 2009 to April
13 30th, 2009, and this was done without renewal of
14 the septage license that's required, and the
15 penalty that the Department is requesting is
16 \$8,700.
17 CHAIRMAN RUSSELL: Any questions for
18 Katherine?
19 MR. WHALEN: Mr. Chairman, this is
20 Whalen. Mr. Chairman and Ms. Orr, when these
21 notices go out to these operators that they are in
22 violation and that they need to correct that
23 situation by a certain time frame, is there any
24 indication to these operators what sort of fines
25 potentially they may be looking at if they fail to

Page 45

1 comply on that initial contact?
2 MS. ORR: That I don't know.
3 MR. LIVERS: Mr. Chairman, this is Tom
4 Livers, and I think John Arrigo of our Enforcement
5 Division could address that question.
6 MR. ARRIGO: Mr. Chairman, members of
7 the Board, this is John Arrigo with the DEQ
8 Enforcement Division. And as you'll see from the
9 agenda, we have a couple of these septic violation
10 cases before us.
11 The normal procedure for the program is
12 to send an advisory to the licensed pumper that
13 their permit expires on December 31st, and they
14 usually send that out prior to November --
15 sometimes they'll send one out in October, another
16 one in November -- and it tells them that they
17 must have their license renewed by January 1st,
18 and it says that they may not pump without a
19 renewed license. If they do not get a renewal --
20 (Ms. Shropshire leaves the meeting)
21 MR. ARRIGO: If they do not get a
22 renewal application, the program would send out
23 another advisory letter in January or February
24 saying that, "You need to have your license
25 renewed before you can pump." Those notice

Page 46

1 letters typically do not state the amount of the
2 penalty, but they do say that if you pump without
3 a license, the violations may be referred to
4 Enforcement for a penalty.
5 The other thing that's kind of hanging
6 over pumpers' head is that if they do not renew
7 their license by April 1st, they have to pay a
8 late fee of approximately \$150, \$300, so that we
9 view as an incentive for them to hurry up and get
10 relicensed before they pump.
11 But the Department kind of has a
12 practice that in its violation letters that we
13 send to all permitted entities to notify them that
14 we believe a violation is occurring, we typically
15 do not threaten penalty amounts. We say that the
16 violation may be referred to Enforcement, but we
17 try to take friendly notification, just let them
18 know that it will go to Enforcement, and we don't
19 threaten that, "If you violate, you're subject to
20 a \$10,000 or a \$500 fine." We try to keep those
21 numbers out of those letters.
22 CHAIRMAN RUSSELL: Thanks, John.
23 MR. WHALEN: Thank you, Mr. Arrigo.
24 Thank you, Mr. Chairman.
25 CHAIRMAN RUSSELL: Thanks, Joe. And

Page 47

1 Tom, I think we -- and if you get this, I'll be
2 very impressed -- but I think we're getting a
3 little glandular at this, but you'll have to look
4 at the letter from the pumper to figure it out.
5 Tom, call me when you get it.
6 MR. ANDERSON: This is Larry Anderson,
7 and I just need a little background here. Mr.
8 Kunkel's basic appeal -- I guess for lack of a
9 better term -- is dated 8/28/09, and he simply
10 says, "Dear Enforcement Division: I, Steve
11 Kunkel, owner of Montana Septic, am requesting a
12 meeting with you regarding the penalties against
13 me and my business." That's the extent of his
14 appeal?
15 CHAIRMAN RUSSELL: Can I do this one,
16 too? Because I've been around awhile. In one
17 certain program you basically have to provide more
18 justification, and that's in the Air Quality
19 Program; but this is generally enough to appeal a
20 matter that comes to the Enforcement Division and
21 then to us as the Board. There is one program
22 that actually requires an affidavit which puts a
23 little more meat on the request for appeal, but
24 the Air Quality Program is the only one.
25 MR. LIVERS: So I think maybe in further

Page 48

1 comment on Mr. Anderson's question, I think we do
2 try to keep the ability to appeal pretty straight
3 forward, particularly when we're dealing with
4 small businesses in the case of this program. So
5 it's a relatively easy thing for someone to file
6 an appeal, particularly in this particular
7 program.
8 A lot of times the Board will see
9 appeals of decisions. A lot of them are done just
10 so that those people preserve their ability to
11 argue their case. That's one of the reasons
12 you'll see an awful lot of settlements in Board
13 cases as well.
14 MR. ANDERSON: Thank you.
15 MS. ORR: Mr. Chairman, I was just
16 speaking with the Board secretary, and also on
17 these letters that are of questionable appeal
18 intent, the Board secretary checks with that
19 individual, and she did in this case, and he
20 indicated that this was an appeal, and that's done
21 routinely where there is a question.
22 CHAIRMAN RUSSELL: I hope he gets his
23 fees figured out. I would entertain a motion to
24 move this to Katherine, and appoint her as the
25 permanent Hearings Examiner.

Page 49

1 MR. WHALEN: So moved, Mr. Chairman.
2 Whalen.
3 CHAIRMAN RUSSELL: It's been moved by
4 Joe. Is there a second?
5 MR. MIRES: Mires. Second.
6 CHAIRMAN RUSSELL: Seconded by Larry.
7 All those in favor, signify by saying aye.
8 (Response)
9 CHAIRMAN RUSSELL: Opposed.
10 (No response)
11 CHAIRMAN RUSSELL: All right. Last one,
12 Katherine.
13 MS. ORR: Mr. Chairman, members of the
14 Board, this is a UST case outside of Helena here
15 at the Lakeside General Store, and it involves two
16 UST's, and the failure of the owner to conduct
17 release detection monitoring, and to maintain
18 records concerning that release detection, and the
19 penalty sought is \$2,100, in addition to
20 injunctive relief.
21 CHAIRMAN RUSSELL: Questions for
22 Katherine?
23 (No response)
24 CHAIRMAN RUSSELL: None. All right.
25 I'll entertain a motion to appoint Katherine the

Page 50

1 permanent Hearings Examiner.
2 MR. MIREs: Mires. So moved.
3 CHAIRMAN RUSSELL: It's been moved by
4 Larry. Is there a second?
5 MR. MILLER: Miller. Second.
6 CHAIRMAN RUSSELL: It's been moved and
7 seconded. All those in favor, signify by saying
8 aye.
9 (Response)
10 CHAIRMAN RUSSELL: Opposed.
11 (No response)
12 CHAIRMAN RUSSELL: All right. We are
13 down to final action on contested cases. The
14 first one in front of us is the appeal by Eastgate
15 Water and Sewer Association of Helena Sand and
16 Gravel's open cut permit. Katherine.
17 MS. ORR: Mr. Chairman, members of the
18 Board, this case has been around for awhile. It
19 involved the challenge by a citizens' group
20 regarding the issuance of an open cut mining
21 permit to Helena Sand and Gravel.
22 There was an intervenor, Helena Sand and
23 Gravel, and there were a couple of motions filed,
24 a motion to dismiss, and that was a dismissal of a
25 claim that was granted by me regarding whether the

Page 51

1 citizens' association could challenge the action
2 of the Department under MEPA, and I issued an
3 order saying that no, that was not possible.
4 Then there was a motion by the
5 Department for a more definite statement, and that
6 more definite statement was filed, so there has
7 been action in this case. But finally the parties
8 all filed a motion to stay, and I guess got down
9 to the business of settling it, and you have
10 before you a 41(a) dismissal.
11 CHAIRMAN RUSSELL: Any other questions
12 for Katherine?
13 (No response)
14 CHAIRMAN RUSSELL: Hearing none, I will
15 entertain a motion to authorize the Board Chair to
16 sign the order of dismissal, Case No.
17 BER-2008-08-OC.
18 MR. MILLER: So moved. This is Miller.
19 CHAIRMAN RUSSELL: Is there a second?
20 MS. KAISER: I'll second. This is
21 Heidi.
22 CHAIRMAN RUSSELL: It's been moved and
23 seconded. Is there any further discussion?
24 (No response)
25 CHAIRMAN RUSSELL: Hearing none, all

Page 52

1 those in favor, signify by saying aye.
2 (Response)
3 CHAIRMAN RUSSELL: Opposed.
4 (No response)
5 CHAIRMAN RUSSELL: Motion carries. No.
6 2, in the matter of the violation of the Montana
7 Underground Storage Tank Act by Flying J, Inc.
8 MS. ORR: Mr. Chairman, members of the
9 Board, this is a case in Silver Bow County on
10 Brown's Gulch Road, involved two 20,000 gallon
11 UST's, and three 12,000 gallon UST's. There were
12 violations asserted regarding failure to correct
13 compliance inspection violations within 90 days,
14 and a failure to conduct mechanical line leak
15 detection monitoring, and failure to obtain test
16 of operability of the leak detection system. And
17 you have before you a 41(a) dismissal request.
18 CHAIRMAN RUSSELL: All right. Any
19 further comments or questions by the Board to
20 Katherine?
21 MR. WHALEN: Mr. Chairman, question for
22 the Hearing Examiner. Ms. Orr, why was this issue
23 dismissed with prejudice?
24 MS. ORR: That is a good question. I
25 guess the parties believed that the violator

Page 53

1 sufficiently addressed the violations such that
2 there shouldn't be a revisitation of the case, and
3 Ms. Amdahl is here to address that even further.
4 MS. AMDAHL: Mr. Chairman, members of
5 the Board, I'm Jane Amdahl, staff attorney with
6 the Department of Environmental Quality, and the
7 attorney assigned to this particular contested
8 case.
9 It was dismissed with prejudice because
10 Flying J had corrected the violations. And as for
11 the penalty, because Flying J is in bankruptcy, we
12 have to actually collect the penalty through the
13 bankruptcy proceeding rather than through this
14 Board proceeding. This was merely to set the
15 amount of the penalty, which was done in this
16 case, so there was nothing else that would need to
17 be done to satisfy this particular case, and
18 that's why it would be dismissed with prejudice.
19 Any other questions?
20 CHAIRMAN RUSSELL: Just a general one.
21 I think it's a good question by Joe. 95 percent
22 our cases seem to be dismissed with prejudice.
23 MS. AMDAHL: That would be a standard
24 situation where either an Administrative Order on
25 Consent is entered into to settle a case, or where

Page 54

1 everything has been taken care of, the penalty has
2 been paid, and so on. And "with prejudice" simply
3 means we will not relitigate the same issue, and
4 when the matter has been fully resolved, there is
5 no reason to relitigate.

6 MR. WHALEN: Mr. Chairman, follow up
7 question for Ms. Amdahl. Ms. Amdahl, I understand
8 that Flying J may be in bankruptcy. Is this a
9 Chapter 11, or a Chapter 13 bankruptcy to simply
10 reorganize and come back? That would be the first
11 part of my question. The second question is:
12 Does this operator have a history of this type of
13 violation in this or other facilities throughout
14 the state, and was that considered in determining
15 whether this would be dismissed with or without
16 prejudice?

17 MS. AMDAHL: Mr. Chairman, members of
18 the Board, Flying J is in a Chapter 11
19 reorganization. Chapter 13 is limited to
20 individuals. Chapter 11 is reorganization for
21 corporations and other business enterprises. So
22 in this case, it is a reorganization.

23 I don't believe we have a particular
24 history of this type of violation, certainly not
25 at this particular site. I have been working with

Page 55

1 the Underground Storage Tank program for five
2 years approximately, and if there have been any
3 other Flying J cases, I honestly don't remember
4 them, so there can't have been too many.

5 Does that answer your question? I'm not
6 sure I got all of it.

7 MR. WHALEN: You did, Ms. Amdahl. Thank
8 you very much. Thank you, Mr. Chairman.

9 CHAIRMAN RUSSELL: Any other questions?
10 (No response)

11 CHAIRMAN RUSSELL: Hearing none, I will
12 entertain a motion to authorize the Board Chair to
13 sign the order of dismissal for Case No.
14 BER-2008-06-UST. Do I have a motion?

15 MR. MILLER: This is Miller. So moved.

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

18 MR. MIRES: Mires. Second.

19 CHAIRMAN RUSSELL: Further discussion?
20 (No response)

21 CHAIRMAN RUSSELL: Hearing none, all
22 those in favor, signify by saying aye.
23 (Response)

24 CHAIRMAN RUSSELL: Opposed.
25 (No response)

Page 56

1 CHAIRMAN RUSSELL: Motion carries.
2 No. 3, Sandy Rose.

3 MS. ORR: Mr. Chairman, members of the
4 Board, this is a public water supply case out at
5 Canyon Ferry Mansion next to Townsend. The
6 allegations were failure to monitor for coliform
7 bacteria, failure to provide public notification;
8 and the parties apparently settled to the
9 satisfaction of both the Department and Canyon
10 Ferry, and are asking again for a 41(a) dismissal
11 with prejudice.

12 CHAIRMAN RUSSELL: Okay. And that was a
13 supplemental mailing I just found. So any
14 questions for Katherine?
15 (No response)

16 CHAIRMAN RUSSELL: I will entertain a
17 motion to authorize the Board Chair to sign the
18 order of dismissal, Case No. BER 2009-08-PWS.

19 MS. KAISER: So moved. This is Heidi.

20 CHAIRMAN RUSSELL: It's been moved by
21 Heidi. Is there a second?
22 MR. MILLER: Second by Miller.

23 CHAIRMAN RUSSELL: Second by Marvin.
24 All those in favor, signify by saying aye.
25 (Response)

Page 57

1 CHAIRMAN RUSSELL: Motion carries
2 unanimously.

3 MR. WHALEN: Mr. Chairman, this is
4 Whalen. You did not call for a nay vote.

5 CHAIRMAN RUSSELL: Well, then I'll back
6 up and call for a nay vote. Any dissenters?
7 MR. WHALEN: No.

8 CHAIRMAN RUSSELL: All right. Hold on.
9 I need to really back up then. So you voted no?
10 MR. WHALEN: I'm voting no on the
11 motion.

12 CHAIRMAN RUSSELL: All right.

13 MR. ANDERSON: Can we reopen this a bit?
14 As a matter of background in these dismissals,
15 could we as a matter of course attach the
16 settlement agreement to our files?
17 MR. LIVERS: Mr. Chairman, Mr. Anderson,
18 yes, we can do that.

19 MR. ANDERSON: What were the terms of
20 the settlement in this particular case?
21 MR. LIVERS: Mr. Anderson, let me check
22 to see. I think we've got a staff attorney who is
23 coming up to address that.

24 MS. SCHMIDT: Mr. Chairman, members of
25 the Board, my name is Carol Schmidt, and I'm a

Page 58

1 staff attorney with DEQ. And my recollection of
2 this case is simply that Sandy Rose did comply
3 with our agreement to monitor, and also that she
4 did pay the penalty, I think at the full request
5 that we requested, if I recall. But she did go on
6 a payment schedule. So that was our negotiations
7 and settlement with her. Are there any other
8 questions on that one?
9 MR. ANDERSON: Thank you.
10 MS. SCHMIDT: You're welcome.
11 CHAIRMAN RUSSELL: Anything else?
12 (No response)
13 CHAIRMAN RUSSELL: Just for the record,
14 note that Joe voted no to that, authorizing the
15 Board Chair to sign to dismiss that case.
16 The next thing on the agenda is in the
17 matter of the appeal of River Rock County Water
18 and Sewer District. Katherine.
19 MS. ORR: Mr. Chairman, members of the
20 Board, this is a case out of Bozeman involving
21 River Rock County Water and Sewer District. There
22 was a Montana groundwater pollution control system
23 permit issued on March 1st, 2009, and the
24 conditions of the permit were appealed in part,
25 and the Department apparently and the Appellant

Page 59

1 got together, and decided upon mutually agreeable
2 conditions. And this is a request to dismiss the
3 case under Rule 41(a).
4 CHAIRMAN RUSSELL: Questions for
5 Katherine?
6 MR. WHALEN: Mr. Chairman. Ms. Orr, I
7 noticed this dismissal is stipulated without
8 prejudice. Can you explain, or is there a staff
9 attorney there that can explain why this
10 particular issue was dismissed without prejudice?
11 MS. ORR: Let me see if there is a staff
12 attorney here who can address this. John North is
13 here, and he would like to address this point.
14 MR. NORTH: Mr. Chairman, Mr. Whalen,
15 members of the Board, John North, Chief Legal
16 Counsel with the Department.
17 As Ms. Orr said, this was an appeal of
18 certain conditions on a permit by some surrounding
19 landowners; and while I am not familiar with the
20 exact details of the grounds for the appeal or the
21 settlement, what I can tell you is that the
22 resolution of the issues involve some ongoing
23 monitoring that would be performed by the
24 permittee.
25 And I believe that the people who had

Page 60

1 appealed this would not agree to its dismissal
2 with prejudice, because if in the future it
3 appears as if there would be continuing problems,
4 they did not want to forfeit their right to file
5 another appeal.
6 CHAIRMAN RUSSELL: Thanks, John.
7 MR. ANDERSON: This is Anderson. I
8 would think if we have a situation where the
9 settlement calls for future performance, that is
10 ongoing type performance like this contemplates,
11 the Department would not want to dismiss with
12 prejudice either.
13 MR. NORTH: Mr. Chairman and Mr.
14 Anderson, I really can't address that in any more
15 detail simply because of my lack of knowledge of
16 the actual details. But it was the Department's
17 permit that was being appealed here, so the
18 Department would not have had a problem with
19 dismissal with prejudice, because the Department's
20 action initially was what was being appealed, and
21 the Department, of course, had taken that action,
22 and therefore was happy with it.
23 MR. ANDERSON: Okay. I appreciate that
24 clarification. Thank you.
25 CHAIRMAN RUSSELL: Any further

Page 61

1 questions?
2 (No response)
3 CHAIRMAN RUSSELL: Hearing none, I have
4 an order of dismissal in front of me, Case No.
5 BER-2009-05-WQ. Do I have motion to authorize the
6 Board Chair to sign?
7 MR. MIRES: Mires. So moved.
8 CHAIRMAN RUSSELL: It's been moved by
9 Larry. Is there a second?
10 MR. WHALEN: Second. Whalen.
11 CHAIRMAN RUSSELL: Seconded by Joe.
12 Further discussion?
13 (No response)
14 CHAIRMAN RUSSELL: Hearing none, all
15 those in favor, signify by saying aye.
16 (Response)
17 CHAIRMAN RUSSELL: Opposed.
18 (No response)
19 CHAIRMAN RUSSELL: Motion carries
20 unanimously. The next item is the matter of
21 Public Water Supply laws by Headwaters Livestock
22 Auction, LLC.
23 MS. ORR: Mr. Chairman, members of the
24 Board, this is a case out of Three Forks, Montana,
25 and it's a public water supply system that was

Page 62

1 alleged to have altered its public water supply
2 system without Department approval of the plans
3 and specs. The alteration was installation of a
4 reverse osmosis system. And the initial fine
5 requested was \$7,518, and you have before you
6 again a 41(a) request for dismissal with
7 prejudice.
8 CHAIRMAN RUSSELL: Thanks, Katherine.
9 Any questions for Katherine?
10 MR. ANDERSON: This is Anderson again.
11 I'm just curious about the terms of the settlement
12 agreement.
13 MS. ORR: We'll have a staff attorney
14 who can explain that.
15 MR. LIVERS: Mr. Chairman, Mr. Anderson,
16 this is Tom again, and Ms. Schmidt is on her way
17 back up.
18 MS. SCHMIDT: Mr. Chairman, members of
19 the Board, this is Carol Schmidt. I'm again legal
20 staff at DEQ. And again, unfortunately, I don't
21 have my papers right in front of me, but I do
22 recall that Headwaters have agreed and have their
23 engineers submitting all that we requested for
24 that action, for what they did in their plans; and
25 then also, I think they came back with an offer

Page 63

1 that was a reduced offer for the penalty, and the
2 Department did accept it.
3 I can get you those exact numbers at my
4 office when I go back there, but I don't have them
5 in front of me at this point.
6 MR. ANDERSON: Thank you.
7 CHAIRMAN RUSSELL: Any further questions
8 regarding this matter?
9 (No response)
10 CHAIRMAN RUSSELL: Just a comment -- and
11 this is to you, Tom -- that I guess when we put
12 the packets together, we need to take all of the
13 stuff on the original, the contested case, and
14 reattach it to the -- so we have all of the
15 documents, especially now that we're electronic,
16 and it shouldn't be a big issue.
17 MR. LIVERS: Mr. Chairman, I think
18 that's a good suggestion. I understand the
19 Board's concern to see this, and I think we will
20 provide more detail. We probably will -- I think
21 John and I will be meeting with Katherine to again
22 talk about those cases that are settled under the
23 41(a) rule, but nonetheless, we will provide
24 additional information. Thank you.
25 CHAIRMAN RUSSELL: And maybe as well

Page 64

1 maybe another briefing on what a settlement under
2 41(a) actually does to the Board. And I do not
3 want to talk about that now.
4 MR. LIVERS: No, we won't, but we'll
5 talk about it internally, and I will discuss with
6 you offline whether we want to cover that. But
7 nonetheless, I think providing additional
8 information is certainly something we'll do.
9 CHAIRMAN RUSSELL: Thanks, Tom. I do
10 have an order of dismissal in front of me for Case
11 No. BER 2009-13-PWS, and I will entertain a motion
12 to authorize the Board Chair to sign this
13 dismissal. Do I have a motion?
14 MR. MILLER: This is Miller. So moved.
15 CHAIRMAN RUSSELL: It's been moved by
16 Marvin. Is there a second?
17 MS. KAISER: I'll second. This is
18 Heidi.
19 CHAIRMAN RUSSELL: It's been moved and
20 seconded. Further discussion?
21 (No response)
22 CHAIRMAN RUSSELL: All those in favor,
23 signify by saying aye.
24 (Response)
25 CHAIRMAN RUSSELL: Opposed.

Page 65

1 (No response)
2 CHAIRMAN RUSSELL: Hearing none, we'll
3 say that's a unanimous vote. Last one, Katherine.
4 SME.
5 MS. ORR: Mr. Chairman, members of the
6 Board, you will remember that in the case of the
7 Highwood Generation Plant near Great Falls that
8 Highwood SME itself appealed the original permit
9 on the basis that the permit set a limit for total
10 particulate matter, but didn't specify the
11 measurement test methods for measuring condensible
12 particulates, and therefore appealed that
13 provision in the permit; and now Highwood SME is
14 requesting a 41(a) dismissal.
15 CHAIRMAN RUSSELL: Thanks, Katherine.
16 Questions for Katherine?
17 MR. ANDERSON: This is Anderson. Does
18 that mean that SME accepts the heightened
19 standards that DEQ has adopted?
20 MS. ORR: I'm going to refer that
21 question to Department Counsel David Rusoff.
22 MR. RUSOFF: For the record, this is
23 David Rusoff. I'm a staff attorney for the
24 Department of Environmental Quality.
25 The particular contested case here is

Page 66

1 Southern Montana's request for a contested case to
2 challenge a condensable particulate limit in its
3 air quality permit. That permit has since been
4 revoked, and so the issues in that case are moot.
5 There isn't any basis to continue the contested
6 case. And so I think Southern Montana's notice of
7 voluntary dismissal merely reflects the fact that
8 there aren't any remaining issues.
9 MR. ANDERSON: Okay. Thank you.
10 MR. RUSOFF: You're welcome.
11 CHAIRMAN RUSSELL: Any further questions
12 for Katherine or the Department?
13 (No response)
14 CHAIRMAN RUSSELL: Hearing none, I do
15 have an order of dismissal in front of me for Case
16 No. BER 2007-06-AQ, and seek a motion to authorize
17 the Board Chair to sign such dismissal. Do I have
18 a motion?
19 MR. WHALEN: So moved, Mr. Chairman.
20 Whalen.
21 CHAIRMAN RUSSELL: It's been moved by
22 Joe. Is there a second?
23 MR. MILLER: I second it. Miller.
24 CHAIRMAN RUSSELL: It's been seconded by
25 Marv. Any further discussion?

Page 67

1 (No response)
2 CHAIRMAN RUSSELL: Hearing none, all
3 those in favor, signify by saying aye.
4 (Response)
5 CHAIRMAN RUSSELL: Opposed.
6 (No response)
7 CHAIRMAN RUSSELL: Motion carries.
8 Last, other action on contested cases. Violations
9 of the Water Quality Act by the Wilderness Club,
10 LLC, Montana. Katherine.
11 MS. ORR: Mr. Chairman, members of the
12 Board, this case involves -- it's a water quality
13 case, and the parties -- Wilderness Club filed a
14 motion for summary judgment, and I issued a
15 proposed order denying the motion for summary
16 judgment on September 2nd, and so this will go to
17 hearing.
18 I just wanted to have the Board members
19 have the opportunity to look at this proposed
20 order, and I'll be issuing a final order setting
21 the case for hearing when I hear from the parties
22 regarding their availability for a hearing date,
23 and have not received a motion for reconsideration
24 on this, so we're going to go forward with
25 deciding when the hearing is.

Page 68

1 CHAIRMAN RUSSELL: Questions of
2 Katherine?
3 MR. PURDY: Yes. This is Ryan Purdy,
4 Counsel for Wilderness Development. Can you hear
5 me?
6 CHAIRMAN RUSSELL: Yes.
7 MR. PURDY: I'm sorry. Forgive me.
8 This is my first time in this mode of
9 communication, so I do apologize, I'm not sure. I
10 would like to just be on the record in raising
11 objection to the proposed order, and whatever
12 action you guys take here today. My client
13 objects to the proposed order because, one, it
14 does not completely address the issues raised by
15 my client; and two, to the extent it does, we
16 disagree with the order. We just want to reserve
17 all rights of appeal to this order.
18 And I notice that the young woman who
19 spoke before me -- I'm afraid I forgot her name.
20 I think it's Katherine -- she did state that you
21 guys have not received a motion for
22 reconsideration. Katherine, is that appropriate
23 in this meeting? If so, we can have one drafted
24 and out to you early next week.
25 We just don't feel that the equitable

Page 69

1 considerations raised in our motion for summary
2 judgment were addressed in this order, and whether
3 we need to more fully expand those so that you can
4 more clearly address them, or whether you can just
5 reconsider and rereview the specific facts alleged
6 in the motion, I'm not sure.
7 CHAIRMAN RUSSELL: First of all, this is
8 a little dangerous, because unless the Board has
9 the record, we have assigned this to Katherine to
10 undertake our duties; and I think it's fine that
11 you have expressed your concern, but this is not
12 going to be argued in front of the Board unless
13 the Board wants to reconsider our position with
14 Katherine hearing this.
15 And Board, I hope you heard what I just
16 said. We assigned this to Katherine. Unless you
17 want to take it back and get the record, this
18 should not be being argued in front of us because
19 we don't have the record.
20 MR. WHALEN: I endorse your position,
21 Mr. Chairman. Whalen.
22 MS. ORR: Mr. Chairman, members of the
23 Board, actually this is a case where the Board
24 retained jurisdiction to hear the contested case
25 itself, and so this is then in essence a kind of a

Page 70

1 partial delegation, I guess, and the Board can
2 entertain a motion to change this order if Counsel
3 for Wilderness Club would like to do so, and then
4 the procedure that I would recommend is that the
5 Board have me review that for your approval.
6 CHAIRMAN RUSSELL: Katherine, I don't
7 think we have received -- we didn't receive the
8 record, and we did receive some additional
9 information, but it wasn't that long ago.
10 MS. ORR: Okay.
11 CHAIRMAN RUSSELL: It just concerns me
12 that, first of all, that I haven't had much
13 opportunity to review any of this. And I don't
14 know how the rest of the Board feels, but you
15 still have the record.
16 MS. ORR: Mr. Chairman, members of the
17 Board, I think that what I need to do with the
18 Department is to sit down and make sure that the
19 electronic record that is forwarded to the Board
20 for each one of these meetings is a little more
21 all inclusive, and I will do that. And I agree.
22 That notwithstanding, what I would
23 recommend is that this go forward as it would,
24 which is that if Counsel wants to file a motion
25 for reconsideration, Counsel can do that; or the

Page 71

1 Board can delay action on the proposed order until
2 December, whatever is your druthers about that.
3 CHAIRMAN RUSSELL: Here is what I'm
4 thinking. I don't mind doing something, be it
5 telephoning again; but I guess literally I haven't
6 reviewed the supplemental documents, Katherine,
7 and I don't know where everyone else is, but I've
8 been a little busy with flu stuff up here, and
9 literally I have not had this part of the record
10 that long. So I don't mind doing this, and
11 Katherine, I certainly trust your judgment on
12 things, but I would still like a pretty good
13 opportunity to review the entire record.
14 MS. ORR: And I think that's obviously
15 within your right to say so and do so, and maybe
16 the thing to do for the Board would be to set a
17 telephonic hearing on adoption of the proposed
18 order or entertainment at that same juncture of a
19 request to reconsider from Counsel.
20 CHAIRMAN RUSSELL: That would be fine.
21 MS. ORR: Maybe you would want to get a
22 feeling from the Board about when that would be
23 convenient.
24 CHAIRMAN RUSSELL: That's fine. You
25 were tracking, Board members?

Page 72

1 MR. WHALEN: Mr. Chairman, Whalen. Just
2 as a matter of process, we've had a motion for
3 summary judgment, we've had a denial order on the
4 motion for summary judgment. Wouldn't the next
5 step be for the Appellant to then appeal to the
6 Board formally?
7 MS. ORR: Mr. Chairman, members of the
8 Board, this is an appeal before the Board already.
9 And Mr. Chairman, Mr. Whalen, I think you're
10 several steps ahead of yourself, and the first
11 thing that needs to happen is the Board needs to
12 adopt this proposed order or not.
13 CHAIRMAN RUSSELL: What we have is the
14 issue of summary judgment was basically trying to
15 streamline their case. And Katherine, you didn't
16 believe that their case was just based on the
17 material fact.
18 MS. ORR: Mr. Chairman, members of the
19 Board, in this proposed order, the determination
20 is that there was not a set of disputed material
21 facts; and as a matter of law, given the
22 definition of owner/operator under the applicable
23 rule and the permit itself, there was no basis to
24 dismiss Wilderness Club as a responsible entity
25 under the permit, and the rules, and the statute,

Page 73

1 which was what Wilderness Club was requesting.
2 MR. PURDY: This is Ryan Purdy. Forgive
3 me for interrupting. I think in the proposed
4 motion for summary judgment, that was only
5 partially the question before the Board. Our
6 second argument was related to the equitable
7 development or apportionment of the fees, and that
8 was the second issue raised in the motion for
9 summary judgment, which was not identified in the
10 order, and I guess that's what we would be asking
11 for reconsideration on.
12 I agree with Katherine that there is
13 most likely no material facts in question here,
14 that we are going under not only statute, but also
15 the equitable doctrine. In this case, I think
16 that for the most part this can be done via
17 pleadings.
18 So I just would raise the question that
19 whether we file a motion for reconsideration and
20 then have the questions more fully briefed, or ask
21 for a more fully briefed response, I'm not sure.
22 But I guess I just would like to raise that as a
23 possible option.
24 CHAIRMAN RUSSELL: Katherine.
25 MS. ORR: Mr. Chairman, members of the

Page 74

1 Board, I'm looking in the language of the order,
2 and I'm not finding it right now, but this
3 administrative board doesn't adjudicate equitable
4 issues, so that's partly the basis for not
5 addressing those issues. Now, if Counsel feels
6 that maybe there is some authority to the
7 contrary, then Counsel can present that to the
8 Board in the form of a motion for reconsideration.
9 MR. ANDERSON: This is Anderson. Can I
10 try to clarify this? The issue was whether or not
11 Wilderness was a permittee and therefore liable
12 for the violations of the permit?
13 MS. ORR: Yes.
14 MR. ANDERSON: And Wilderness's argument
15 essentially is, "We had some joint venture or
16 something with somebody else, who we contend was
17 responsible for the violations of the permit, and
18 therefore we should not be liable at least in
19 whole for the violations of the permit."
20 MS. ORR: That's basically -- Is it okay
21 if I answer that, Mr. Chairman?
22 CHAIRMAN RUSSELL: Yes, that's fine.
23 MS. ORR: That's basically correct,
24 although the relationship of Wilderness Club and
25 Schwartz Construction is not a joint venture

Page 75

1 relationship.
2 MR. ANDERSON: I was using that very
3 loosely.
4 MS. ORR: Okay.
5 MR. ANDERSON: But --
6 MS. ORR: So that is correct.
7 MR. PURDY: This is Ryan. And I don't
8 know when it's proper for me to speak, so forgive
9 me. But just to clarify this action, Wilderness
10 Development is the owner of the real property;
11 they entered into a property contract with
12 Schwartz Construction, who was in charge of all
13 construction activity, including the Swit
14 (phonetic) and notice of interest here, and I
15 guess the application in this matter.
16 And that is the question before this
17 panel, is that entity, Schwartz Construction, was
18 in charge of all construction activity; they had
19 oversight and control of everything on site at the
20 time in question.
21 MR. ANDERSON: But the fundamental
22 question is who was the permittee? Was it
23 Schwartz or was it Wilderness? If it was
24 Wilderness, Wilderness is the one over whom the
25 Department had jurisdiction, and --

Page 76

1 MR. PURDY: Actually the Applicant was
2 Schwartz Construction, at least that is my
3 understanding.
4 CHAIRMAN RUSSELL: Well, once again, I
5 get a little concerned here.
6 MS. ORR: Mr. Chairman, I think the best
7 thing would be if Counsel is interested in filing
8 a motion for reconsideration, that the Board could
9 entertain that.
10 CHAIRMAN RUSSELL: I think that's wise.
11 We'll get the record, and we'll get the permit,
12 and we'll get everything else in front of us, and
13 we'll get this figured out.
14 MR. PURDY: And so is it my
15 understanding that we would file a notice of
16 reconsideration, or motion for reconsideration, if
17 you will, and we would then have another telephone
18 conference?
19 CHAIRMAN RUSSELL: Most likely, unless
20 it's agreed to by the parties that we can hear
21 this at our next regularly scheduled Board
22 meeting, and at that time we could hear it in
23 person. If you want it expedited, we could
24 possibly do it earlier, but we generally meet
25 every other month, so --

Page 77

1 MR. PURDY: I would raise the question
2 of trying to get it done sooner than later -- just
3 because we are in the process of a trial schedule
4 -- not this coming month, but the next.
5 CHAIRMAN RUSSELL: Then I guess you need
6 to get that filed, and get some basis behind it in
7 the file.
8 MR. PURDY: Would we request a date, or
9 would we just provide several dates that would
10 work for us?
11 CHAIRMAN RUSSELL: Because of
12 Katherine's duties to the Board -- and I don't
13 mean that in a subordinate sense certainly,
14 Katherine -- but that would be Katherine and the
15 Department to try to determine a date. The
16 Department would be just facilitating that on
17 behalf of the Board, the date.
18 MR. PURDY: So just work with Katherine
19 on the date?
20 CHAIRMAN RUSSELL: That would be my
21 suggestion.
22 MR. WHALEN: Mr. Chairman, Whalen. I
23 agree with you in your concern that we're walking
24 into dangerous territory here, but not necessarily
25 for the same reasons. I think we need to

Page 78

1 formalize this process with a motion, if that's
2 going to be the will of the Board. I would be
3 opposed to the Board considering what Mr. Purdy
4 just proposed.
5 Essentially this is going to boil down
6 to an issue of contract law. I'm not an attorney,
7 and I don't think all of the Board members are
8 attorneys, though I appreciate that Mr. Anderson
9 is. And we do have staff attorneys, and we have
10 appointed Ms. Orr as our Hearings Examiner. This
11 is basically an issue of indemnity, I think. And
12 if we're going to go forward with this action, I
13 really think we need to do it in the form of a
14 motion.
15 CHAIRMAN RUSSELL: I'm not exactly sure
16 what a motion would look like, but if someone
17 would like to try one.
18 MR. ANDERSON: This is Anderson again.
19 Can we clarify the present status of the
20 situation? As I understand it, Ms. Orr, on behalf
21 of the Board, has proposed an order which we have
22 before us, a proposed order denying motion for
23 summary judgment. We're being asked to either
24 accept or reject that proposed order.
25 Counsel for Wilderness Club has -- I

Page 79

1 think he should characterize this as simply an
2 objection to the proposed order, as opposed to a
3 motion for reconsideration, because the order
4 hasn't been adopted in the first instance, so
5 there is nothing for the Board to, quote,
6 "reconsider."
7 CHAIRMAN RUSSELL: Larry, this is Joe.
8 I do agree with that, except for the fact that it
9 wasn't noticed that the Board was going to take up
10 this from an adjudication side. And I'm grateful
11 that Katherine reminded me that we didn't just
12 turn it over wholeheartedly, that Katherine, while
13 we don't meet by proper posting of an agenda that
14 clearly specifies what the Board is going to do on
15 each matter, that Katherine acts for us.
16 So Katherine basically denied the motion
17 for summary judgment on our behalf, and unless we
18 change our position, and it's properly noticed in
19 the agenda that goes out to Montana, that we're
20 really not in a position to do anything but allow
21 Katherine to accept the reconsideration, and then
22 we can take it up as an agenda item, whether it be
23 within a month or at the next regular Board
24 meeting.
25 MR. ANDERSON: So then the question I

Page 80

1 have -- and I'm not discreetly familiar
2 specifically with these discrete provisions of the
3 Administrative Procedure Act. Is there a
4 provision in the Administrative Procedure Act for,
5 quote, "reconsideration," unquote, by the Board?
6 MS. ORR: Mr. Chairman, Mr. Anderson, in
7 these administrative contested case hearings, the
8 Rules of Civil Procedure are impliedly adopted,
9 and that would be the basis.
10 MR. ANDERSON: That is my understanding
11 as well. And if that is correct, then there is no
12 provision under the Rules of Civil Procedure for
13 "reconsideration" other than provisions under Rule
14 59 and 60. So the Wilderness Club would have to
15 focus its motion under Rule 59 or 60.
16 MS. ORR: And Mr. Chairman, actually Mr.
17 Madden would like to address this issue as well.
18 MR. MADDEN: Mr. Chairman, members of
19 the Board, for the record, my name is Jim Madden.
20 I'm an attorney with the Department of
21 Environmental Quality. I'm the Department's
22 attorney that's representing the Department in
23 this contested case.
24 Just a thought on process here. The way
25 I understand what's before the Board now is I

Page 81

1 understood this to be a meeting at which the Board
2 would be asked to adopt the proposed order denying
3 summary judgment as its own action, rather than
4 treating it as an interim order by the Hearings
5 Examiner to which the parties file exceptions.
6 The Board would just directly immediately act on
7 the motions.
8 But I hear that the Board may be
9 reluctant to do that, given that they haven't
10 reviewed the whole record. So one suggestion I
11 would offer is to switch this back into the
12 typical process that occurs in many of these cases
13 where the Board's Hearings Officer would issue a
14 proposed order, and the parties would have an
15 opportunity to file exceptions to it to the full
16 Board; and at that time, at the next meeting
17 probably, the parties would be able to argue their
18 exceptions, and the Board would have the
19 opportunity at that time to either adopt the order
20 in its entirety -- it will have before it the
21 exceptions from the parties -- or the Board can
22 modify the order at that point.
23 Rather than going into a process of
24 motions for reconsideration, which is unusual for
25 the Board proceedings, we could accomplish the

1 same end by converting this to a proposal for a
2 decision with the parties given an opportunity to
3 file written exceptions, and present oral argument
4 at the next meeting. Just a thought.

5 CHAIRMAN RUSSELL: I think that's a
6 great thought, and maybe I've been leading me and
7 the Board. It does say "proposed order," but
8 there is no order for the Board in the packet, is
9 there? And did I miss it?

10 MS. ORR: No, there isn't, Mr. Chairman.
11 And I have a comment, if that would be appropriate
12 at this time. I think a couple of issues. One is
13 the instance where the Board reserves jurisdiction
14 sometimes complicates the situation, because it's
15 not clear the extent of the delegation to the
16 Hearings Officer.

17 And in some of our previous cases -- SME
18 Highwood was a good example -- there was a motion
19 for summary judgment filed, and the Board
20 definitely wanted to rule on those motions; and
21 then there have been other cases where, again, the
22 Board has retained jurisdiction, but not to the
23 extent of ruling on a motion for summary judgment.

24 So that's why I think we're sort of in
25 this never-never land, and if it is the sense of

1 whatever we're calling it at this point, my client
2 may be just willing to stipulate to the current
3 order, preserving their right to appeal, and then
4 possibly ask a District Court, or appeal this
5 matter to the District Court, so that it can
6 decide the equitable matters in the case. That
7 may be a more appropriate venue for the question
8 that Wilderness is raising.

9 So I think at least what I would propose
10 is that whatever we're doing here be subject to
11 our motion for reconsideration, so that if in fact
12 we fail to file, or if in fact we contact Mr.
13 Madden and work out a deal where we agree not to
14 file this motion for reconsideration, that
15 whatever action be taken today is your guys'
16 action.

17 MR. WHALEN: Mr. Chairman, Whalen. I
18 think we need to set this in motion, and the
19 proper way to do it, given what I've heard so far,
20 is for one of us -- and I will do that -- to move
21 to adopt the proposed order denying the motion for
22 summary judgment.

23 CHAIRMAN RUSSELL: Is there a second?

24 MR. MIRES: To move this forward -- this
25 is Larry -- I'll second. Mires.

1 the Board that it wants to rule -- or not rule,
2 but approve, or alter, or put its own imprimatur
3 on this proposed order, that's certainly within
4 the Board's ability to do that. And that might be
5 what we want to do, and that's what Mr. Madden was
6 addressing himself to.

7 The second thing is the Montana
8 Administrative Procedure Act addresses filing
9 exceptions when there is a final order disposing
10 of a case, which is not this situation, because a
11 denial of the motion for summary judgment results
12 in then going to a hearing on the merits. But I
13 think it would be acceptable, and take care of
14 everything, including the concept of the Board
15 issuing the final order on the motion for summary
16 judgment if the parties were invited to file
17 objections, and then the Board could hear that at
18 an interim meeting.

19 MR. PURDY: This is Ryan Purdy. I think
20 I agree with that position. And I'm not sure if
21 it's appropriate for me to suggest this, but I
22 would like to speak with my client.

23 And so any motion you guys make, if we
24 could make it subject to our objection, or motion
25 for reconsideration, or -- I don't know --

1 CHAIRMAN RUSSELL: It's been moved and
2 seconded. Discussion?

3 MR. MIRES: This is Mires, and I need a
4 little guidance on this. Can we actually act on
5 an order when we don't necessarily have an order
6 in the packet? That would be the question. And I
7 guess -- or does the fact that since this is on
8 the agenda, and at the end of -- what do we call
9 this -- at the end of the proposed order denying
10 the motion, there is a paragraph there that says,
11 "Order. Board denies the motion." Does that in
12 fact give us the ability, and clear publicly, that
13 we can act on Joe's and my motion? Does that make
14 sense?

15 MS. ORR: Mr. Chairman, may I address
16 that question?

17 CHAIRMAN RUSSELL: Yes.

18 MS. ORR: I think you raise a very good
19 point, Larry, and my suggestion would be simply
20 that the motion would be to accept the proposed
21 order, and that you would instruct me to issue an
22 order for the Board signature, saying that the
23 Board adopts the proposed order as a final order.

24 CHAIRMAN RUSSELL: And do you feel that
25 would put everything else in motion for a

Page 86

1 reconsideration of the order?
2 MS. ORR: Well, then after --
3 CHAIRMAN RUSSELL: Or an appeal?
4 MS. ORR: Yes. After that's done, then
5 I think the next step would be for this case to go
6 to a contested case hearing, which has to be
7 before the Board.
8 CHAIRMAN RUSSELL: Does the party want
9 to reserve their rights to -- I heard "District
10 Court" thrown at us, which I'm not sure can be
11 done until we actually settle the entire case.
12 MS. ORR: Mr. Chairman, members of the
13 Board, I think it's implied under the provisions
14 of the Montana Administrative Procedure Act that
15 the case can be appealed after a disposition on
16 the merits.
17 MR. WHALEN: Mr. Chairman, Whalen. Just
18 to sort of answer Larry's concern and to highlight
19 what Ms. Orr has just suggested, what this motion
20 does is, whether it is passed or whether it fails,
21 it creates a process whereby a formalized appeal
22 can be made by Wilderness, and this issue can come
23 before the Board for full hearing, if that is the
24 wish, as long as they go through the process.
25 And Larry, I do have the order in front

Page 87

1 of me in my packet. I don't know if you have it
2 in yours.
3 MR. MIRES: No.
4 CHAIRMAN RUSSELL: Now I need some
5 clarification. I think my brain just slipped out
6 the door. Would we not just argue the motion for
7 summary judgment at that point? Would we not?
8 MR. WHALEN: Correct.
9 CHAIRMAN RUSSELL: That's all we would
10 be doing. We wouldn't be arguing the --
11 MR. MIRES: Right.
12 CHAIRMAN RUSSELL: So all we would do is
13 take up the motion for summary judgment, not the
14 case as -- then if we dismiss the motion, then we
15 would continue on to hear the case.
16 MR. PURDY: This is Ryan Purdy. My
17 concern with that is that the equitable
18 considerations can't be addressed by the Board.
19 Maybe they can, but in my reading of the statute,
20 it's my understanding that they can't. So that is
21 Wilderness's concern.
22 CHAIRMAN RUSSELL: That's not the entire
23 case, is it?
24 MR. PURDY: No, that is not the entire
25 case.

Page 88

1 CHAIRMAN RUSSELL: So you're just going
2 to split it up possibly.
3 MR. PURDY: It's possible.
4 CHAIRMAN RUSSELL: Well, unless you have
5 any real reason for us not to take this motion up,
6 then I think we should call for the question.
7 MS. ORR: Mr. Chairman, I would agree
8 with that.
9 MR. MIRES: This is Mires, and I have
10 one clarification. Do we need to have the
11 comments that Katherine provided us on my question
12 added into the amendment -- or into the motion?
13 And I just need to have a point of clarification.
14 I don't know. Do we need to clarify that in
15 there?
16 MS. ORR: I think you can if you like.
17 So the motion would be something like, "The Board
18 votes to adopt the proposed order, and that the
19 Board instructs the Hearings Examiner to write an
20 order for the Chairman's signature that says that
21 the proposed order is final."
22 MR. MIRES: This is Mires. Joe Whalen,
23 are you happy with that?
24 MR. WHALEN: I am, yes.
25 MR. MIRES: So am I.

Page 89

1 CHAIRMAN RUSSELL: So the motion will be
2 amended friendly and reflect that language. Any
3 further discussion?
4 (No response)
5 CHAIRMAN RUSSELL: Hearing none, all
6 those in favor, signify by saying aye.
7 (Response)
8 CHAIRMAN RUSSELL: Opposed.
9 (No response)
10 CHAIRMAN RUSSELL: Motion carries.
11 Thanks for all your input.
12 I believe the last item on the agenda is
13 general public comment. Is there anyone
14 anywhere --
15 (Mr. Purdy leaves the meeting)
16 CHAIRMAN RUSSELL: -- that would like to
17 speak to the Board on matters pertaining to the
18 Board's jurisdiction?
19 MR. LIVERS: Just checking it out here,
20 Mr. Chairman. It looks like there is no one here
21 that wants to offer general public comment.
22 CHAIRMAN RUSSELL: With that in mind, I
23 will entertain a motion to adjourn.
24 MS. KAISER: Joe, this is Heidi. Can I
25 be the general public for a minute?

Page 90

1 CHAIRMAN RUSSELL: I'm not sure, but
2 we'll certainly take Board comments.
3 MS. KAISER: I just have a question for
4 Katherine, if it's appropriate, if there is an
5 update or progress on the changes to ARM
6 17.30.201, the permit fee rate changes for water
7 discharges. I know there was a hearing earlier
8 before in September.
9 MS. ORR: Mr. Chairman, Heidi, that's a
10 rule set that was heard, and I think the
11 Department is intending to rereview some of the
12 provisions of the rule.
13 MS. KAISER: Okay. Were there quite a
14 few comments given at the hearing or --
15 MS. ORR: There were quite a few, yes.
16 MS. KAISER: Okay. That's all I needed.
17 Thanks.
18 MR. WHALEN: Mr. Chairman, Whalen. If I
19 may just direct a question to Ms. Orr. I think
20 the Board could use some general clarification,
21 because this issue will come up over and over
22 again with respect to the difference between "with
23 prejudice" and "without prejudice" when it comes
24 to these dismissal cases, and what those terms
25 mean, because they tend to be contrary to general

Page 91

1 understanding of that phrase, for those phrases.
2 MS. ORR: Mr. Chairman, I'd be glad to
3 put something together for the Board on that for
4 the next meeting.
5 MR. WHALEN: That would be appreciated.
6 Thank you, Katherine.
7 CHAIRMAN RUSSELL: For years -- Joe, I
8 totally concur. For years in my little Outlook
9 where I could write just a little note to myself,
10 I actually have the definition of what "with
11 prejudice" means, just so I could refer to it when
12 I saw it.
13 MR. LIVERS: Mr. Chairman, this is Tom.
14 Members of the Board. I think at the next
15 meeting, which is scheduled for December 4th, I
16 believe it is, Friday December 4th, we'll have
17 that information prior to the meeting and
18 available for discussion. We'll also look at the
19 Rule 41(a) and civil procedures, and just have
20 some briefing material there.
21 Whether we have a face to face or a
22 telephone meeting is yet to be determined. We'll
23 take a look at what's on the agenda, and it may be
24 impacted whether we have an interim meeting to
25 deal with this last contested case, or whether

Page 92

1 that shows up at the next meeting as well.
2 CHAIRMAN RUSSELL: Just a comment on the
3 interim meeting in November. November is really
4 looking bad for me.
5 MR. MIRES: Same here.
6 CHAIRMAN RUSSELL: I have a couple out
7 of state meetings to attend, and we lose a whole
8 week with Thanksgiving generally. So just keep
9 that in mind when we're doing this, Katherine and
10 Tom, that November really does not look good for
11 me.
12 MR. MIRES: Mr. Chairman, this is Mires.
13 A question on Tom's last comment. You stated
14 December 4. Is it the fourth or is it actually
15 December 11th for our next meeting?
16 MR. LIVERS: Apparently I got that
17 wrong, Mr. Chairman. It is the 11th.
18 MR. MIRES: Thank you.
19 CHAIRMAN RUSSELL: I have the same
20 thing. I have a BER question mark on the fourth.
21 So it's not on the fourth?
22 MR. LIVERS: Mr. Chairman, let me
23 verify. We've got a couple different reports
24 here. I've got it on my Outlook as the fourth,
25 but let me verify, and we'll get something out to

Page 93

1 the Board via email later today.
2 CHAIRMAN RUSSELL: Joyce did send
3 something out to be incorporated in Outlook
4 calendars for the 11th.
5 MR. MIRES: Correct.
6 CHAIRMAN RUSSELL: I have it on both,
7 but the 11th sounds better to me.
8 MR. LIVERS: It may be that I have it on
9 both. I apologize for that confusion.
10 CHAIRMAN RUSSELL: That's the same
11 confusion I have. Anything else, Board?
12 (No response)
13 CHAIRMAN RUSSELL: These are difficult
14 meetings when we're not in person, and I
15 appreciate everyone moving through these rapidly,
16 and speaking in order. It really does -- and
17 everyone that's been around will contest -- it
18 makes these things smooth. And for some tough
19 agenda items, we did pretty well today. So we
20 will probably see each other in December, and I
21 will entertain a motion to adjourn.
22 MR. MIRES: So moved. Mires.
23 CHAIRMAN RUSSELL: It's been moved by
24 Larry. Is there a second?
25 MR. MILLER: Second. Miller.

1 CHAIRMAN RUSSELL: It's been seconded by
 2 Marv. All those in favor, signify by saying aye.
 3 (Response)
 4 CHAIRMAN RUSSELL: Opposed.
 5 (No response)
 6 CHAIRMAN RUSSELL: Happy trails.
 7 (The proceedings were concluded
 8 at 11:10 a.m.)
 9 * * * * *

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 C E R T I F I C A T E
 2 STATE OF MONTANA)
 3 : SS.
 4 COUNTY OF LEWIS & CLARK)
 5 I, LAURIE CRUTCHER, RPR, Court Reporter,
 6 Notary Public in and for the County of Lewis &
 7 Clark, State of Montana, do hereby certify:
 8 That the proceedings were taken before me at
 9 the time and place herein named; that the
 10 proceedings were reported by me in shorthand and
 11 transcribed using computer-aided transcription,
 12 and that the foregoing - 94 - 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 , 2009.
 18
 19 LAURIE CRUTCHER, RPR
 20 Court Reporter - Notary Public
 21 My commission expires
 22 March 9, 2012.
 23
 24
 25