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1	BEFORE THE BOARD OF ENVIRONMENTAL REVIEW	Page
2	OF THE STATE OF MONTANA	
3		
4	BOARD MEETING)	
5	OCTOBER 2, 2009)	
6		
7	TRANSCRIPT OF PROCEEDINGS	
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9		
10	Heard at Room 152 of the Capitol Building	
11	Helena, Montana	
12	October 2, 2009	
13	9:00 a.m.	
14		
15	BEFORE CHAIRMAN JOSEPH RUSSELL,	
16	BOARD MEMBERS LARRY MIRES, HEIDI KAISER,	
17	LARRY ANDERSON, ROBIN SHROPSHIRE,	
18	JOE WHALEN, and MARVIN MILLER	
19	(All by telephone)	
20		
21	PREPARED BY: LAURIE CRUTCHER, RPR	
22	COURT REPORTER, NOTARY PUBLIC	
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24	(406) 442-8262	
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Page 2	
-	Page 4
1 WHEREUPON, the following proceedings were 1 MR. LIV	'ERS: I don't think we need a
2 had and testimony taken, to-wit: 2 roll call on that	one. Thanks.
3 * * * * * 3 CHAIRM	IAN RUSSELL: I'm going to have to
	rth here. There may be long pauses.
8	em on the agenda are the briefing
	ed case updates. Katherine.
	R: Good morning, all. I'll just
·	e
, i i i i i i i i i i i i i i i i i i i	ugh the ones that need highlighting
9 Deputy Director of the Department of Environmental 9 for the Board.	
	(A)(1)(c) is the appeal by the
	an Energy, Sierra Club, MEIC,
	Conservation Association, of the
13MR. LIVERS: Heidi Kaiser.13second permit	that was issued to Southern Montana
14 MS. KAISER: Here. 14 Electric Genera	ition and Transmission, SME
15 MR. LIVERS: Marvin Miller. 15 Highwood.	
5	is a motion to dismiss and an
· · · · · · · · · · · · · · · · · · ·	t this case should be dismissed by
5 5 5	although the parties disagree as
	v . v
	for the dismissal, whether it
	prejudice or not. And I'm
	ating that, and should be able to
	regarding that in next week.
23 MR. LIVERS: Chairman Russell. 23 The nex	t Item (d) in the matter of the
24 CHAIRMAN RUSSELL: I'm present. 24 violations of th	e Metal Mine Reclamation Act by
25 MR. LIVERS: I think we're there. 25 Saturday Sund	ay, you all can see that there were
Page 3	Page 5
5	for summary judgment, and I issued a
	granting the Department's motion
3 24th, 2009 minutes.	
	der MAPA, we are required to send
	he party against whom the motion
	t they may file exceptions, and I'll
	rder stating that, and they will
	tunity to file exceptions, and that
9 MR. LIVERS: This is Tom. I think there 9 will be, if they	do file exceptions, before the
10 was an artifact. We were going to try to 10 Board in the ne	ext meeting.
8 8 9	e also advised the parties that
	penalty component, and that is
	sitate a factual hearing, that the
	me when we can have that hearing;
	simultaneously with the hearing on
5 1 5	
	if there are any, we can present
17 MR. MILLER: Miller. I second it. 17 the result of the	at meeting on the penalties to the
17MR. MILLER: Miller. I second it.17the result of the18CHAIRMAN RUSSELL: It's been moved and18Board, so that	would be for December.
17MR. MILLER: Miller. I second it.17the result of the18CHAIRMAN RUSSELL: It's been moved and18Board, so that19seconded. Any further discussion?19In Item	would be for December. (g), there is a motion to compel
17MR. MILLER: Miller. I second it.17the result of th.18CHAIRMAN RUSSELL: It's been moved and18Board, so that19seconded. Any further discussion?19In Item20(No response)20and for sanctio	would be for December. (g), there is a motion to compel ns pending, which I'll be ruling on
17MR. MILLER: Miller. I second it.17the result of th.18CHAIRMAN RUSSELL: It's been moved and18Board, so that19seconded. Any further discussion?19In Item20(No response)20and for sanctio	would be for December. (g), there is a motion to compel
17MR. MILLER: Miller. I second it.17the result of the18CHAIRMAN RUSSELL: It's been moved and18Board, so that19seconded. Any further discussion?19In Item20(No response)20and for sanctio21CHAIRMAN RUSSELL: Hearing none, all21shortly. That's	would be for December. (g), there is a motion to compel ns pending, which I'll be ruling on in the matter of the violations
17MR. MILLER: Miller. I second it.17the result of the18CHAIRMAN RUSSELL: It's been moved and18Board, so that19seconded. Any further discussion?19In Item20(No response)20and for sanctio21CHAIRMAN RUSSELL: Hearing none, all21shortly. That's22those in favor, signify by saying aye.22of the Clean Air	would be for December. (g), there is a motion to compel ns pending, which I'll be ruling on
17MR. MILLER: Miller. I second it.17the result of the18CHAIRMAN RUSSELL: It's been moved and18Board, so that19seconded. Any further discussion?19In Item20(No response)20and for sanctio21CHAIRMAN RUSSELL: Hearing none, all21shortly. That's22those in favor, signify by saying aye.23of the Clean Air23(Response)23Properties.	would be for December. (g), there is a motion to compel ns pending, which I'll be ruling on in the matter of the violations r Act of Montana by Sheep Mountain
17MR. MILLER: Miller. I second it.17the result of the18CHAIRMAN RUSSELL: It's been moved and18Board, so that19seconded. Any further discussion?19In Item20(No response)20and for sanctio21CHAIRMAN RUSSELL: Hearing none, all21shortly. That's22those in favor, signify by saying aye.22of the Clean Air23(Response)23Properties.24CHAIRMAN RUSSELL: Any opposed? We24And tho	would be for December. (g), there is a motion to compel ns pending, which I'll be ruling on in the matter of the violations

1 that it looks like that will be dismissed in the 2 next meeting as well. 1 The proposed notice set out a range between \$36 and \$41 a ton for an operating fee to 5 2 hard then the cases in litigation, Item 4 1 The proposed notice set out a range 5 4 (a), I have not researched frankly where it is in 5 1 The proposed notice set out a range 5 4 (a), I have not researched frankly where it is in 5 1 The proposed notice set out a range 5 7 The next item is the appeal by SME to 5 1 2010 budget evaluation, and provided testimony at 5 7 The next item is the appeal by SME to 5 6 1 1 The Department tase announced the per 5 10 To final rules. Tom. 1 The Department tas an anounced the per 10 10 14 Grand are the repeal, amendments, and adoption 15 13 30th, 2009. 11 14 The Department tas prepared for the 16 14 The Department has prepared for the 17 16 Whalen. A question for Ms. Orr. 14 16 The Department tas prepared for the 16 17 Katherine, with respect to the SME case, 16 20 CHAIRMAN RUSSELL: Thank		Page 6		Page 8
2 next meeting as well. 2 between \$35 and \$41 a ton for an operating fee to be determined by the Board based on the hearing to be determined by the Board based on the hearing to be determined by the Board based on the hearing to budget evaluation, and provided testimony at the support the Board's assessment of operation fees at \$38.24 per ton, which is within the faring to support the Board's assessment of operation fees at \$38.24 per ton, which is within the faring to support the Board's assessment of operation fees at \$38.24 per ton, which is within the faring to support the Board's assessment of operation fees at \$38.24 per ton, which is within the faring to support the Board's assessment of operation fees at \$38.24 per ton, which is within the faring to support the Board's assessment of operation fees at \$38.24 per ton, which is within the faring to support the Board's null proport the partment as propared for the proposel. 10 be dismissed. 10 The Department as nonucned the per ton figure at a meeting of Clean Air Act Advisory to figure at a meeting of Clean Air Act Advisory to figure at a meeting of Clean Air Act Advisory to figure at a meeting of Clean Air Act Advisory to figure at a meeting of Clean Air Act Advisory to figure at a meeting of the propation and adopt the rule as set forth in the begartment has prepared for the Board's consideration a draft notice of rule as set forth in the notice of rule amendment. I'd be happy to take any questions. 11 MS. ORR: Yes. 10 MR. WHALEN: Which of those two parties is arguing for dismissal with prejudice? 200 221 MS. ORR: SME is. Page 7 MR. LIVERS: We're checking on that, Mr. 2 MR. WHALEN: Wh	1	-	1	
3 And then the cases in litigation, Item 3 be determined by the Board based on the hearing 4 (a), I have not researched frankly where it is in 5 5 the Supreme Court. I don't think it's changed 7 6 from the indication here of where it is. 7 7 The next item is the appeal by SME to 8 8 District Court regarding the CO2 conclusions of 9 9 the Board, and I have heard that that is going to 16 10 be dismissed. 7 11 And that's all for that section. 7 12 CHAIRMAN RUSSELL: The next item on the 10 13 anendment. 10 14 final rules. Tom. 13 30th, 2009. 15 MR. WHALEN: Mr. Chairman, this is 16 16 Whalen. A question for Ms. Orr. 16 17 Katherine, with respect to the SME case, 17 18 the contested case aboveit would be 1 think 18 19 of amendment in this matter, and the Department 10 whether that would be dismissal with or without 20 21 MS				
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5 the Supreme Court. I don't think it's changed 5 2010 budget evaluation, and provided testimony at hearing to support the Board's assessment of operation fees at \$38.24 per ton, which is within is within is within support the Board's assessment of operation fees at \$38.24 per ton, which is within is within is within an anounced the per ton be dismissed. 1 And that's all for that section. 1 1 MR. WHALEN: Mr. Chairman, this is 1 1 MR. WHALEN: Mr. Chairman, this is 1 1 MS ORR: Yes. 2 2 MS. ORR: Yes. 2 2 MR. WHALEN: Thank you, Mr. Chairman, and provided testimony at the array set forth in the Board's consideration a draft notice of rule 2 members, do you have any 2 2 MS. ORR: Yes. 2 2 MR. WHALEN: Thank you, Mr. Chairman, the air quality operation an draft Mt the prospesed to the proposed adoption of amendme				
6 from the indication here of where it is. 6 hearing to support the Board's assessment of operation fees at \$38.24 per ton, which is within 7 The next item is the appeal by SME to 7 operation fees at \$38.24 per ton, which is within 8 District Court regarding the CO2 conclusions of 7 The Department also announced the per 10 be dismissed. 7 The Department also announced the per 11 And that's all for that section. 7 The Department also announced the per 13 agenda are the repeal, amendments, and adoption of 11 11 14 final rules. Tom. 13 30th, 2009. 15 MR. WHALEN: Mr. Chairman, this is 10 The Department has prepared for the 16 Whalen. A question for Ms. Orr. 11 16 amendment. I'd be 17 Katherine, with respect to the SME case, 14 The network and the Department 18 the contested case above it would be 1 think 16 operation fees at SWE to May operations. 12 mk. WHALEN: Which of those two parties 15 is arguing for dismissal with prejudice? 23 MS. ORR: SME is. 2 MR. WHALEN: Thank you, Mr. Chairman. <td></td> <td></td> <td></td> <td></td>				
7 The next item is the appeal by SME to 7 operation fees at 388.24 per ton, which is within 8 District Court regarding the CO2 conclusions of 1 operation fees at 388.24 per ton, which is within 9 The beard, and I have heard that it is going to 0 The Department also announced the per 10 be dismissed 1 And that's all for that section. 1 11 And that's all for that section. 1 Council, which is a representative consortium of 11 agenda are the repeal, amendments, and adoption of 1 final rules. Tom. 1 16 MR. WHALEN: Mr. Chairman, this is 10 Board's consideration a draft notice of rule 16 Whalen. A question for Ms. Orr. 1 Te commends that the Department 1 16 17 Katherine, with respect to the SME case, 1 Te conscileration a draft notice of rule amendment. In this matter, and the Department 18 the contested case above it would be 1 think 20 CHAIRMAN RUSSELL: Thank you. Board 19 prejudice. CHAIRMAN RUSSELL: Thank you. Board CHAIRMAN RUSSELL: Thank you. Board 23 MS. ORR: SME is. 21 MR. WHALEN: Which of those two parties				
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9 the Board, and Thave heard that that is going to be dismissed. 9 The Department also announced the per ton figure at a meeting of Clean Air Act Advisory 11 And that's all for that section. 10 ton figure at a meeting of Clean Air Act Advisory 12 CHAIRMAN RUSSELL: The next item on the agenda are the repeal, amendments, and adoption of final rules. Tom. 10 ton figure at a meeting of Clean Air Act Advisory 13 agenda are the repeal, amendments, and adoption of final rules. Tom. 10 ton figure at a meeting of Clean Air Act Advisory 14 The Department has prepared for the Board's consideration a draft notice of rule amendment in this matter, and the Clean Air Act Advisory 16 Whalen. A question for Ms. Orr. 11 The Department has prepared for the Board's consideration a draft notice of rule amendment in this matter, and the Clean Air Act Advisory 16 Whalen. A question for Ms. Orr. 11 The Department has prepared for the Board's consideration a draft notice of rule amendment in this matter, and the Clean Air Act Advisory 12 (c), where you had mentioned that there was a 20 10 The Department has prepared for the 10 10 the would be dismissal with or without 22 10 The Department has prepared for the 23 MS. ORR: Yes. 23 MS. ORR: SME is. 24 MR. WHALEN: Thank you, Mr. Chairman. 25			-	
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11 And that's all for that section. 11 Council, which is a representative consortium of industry and environmental interests, on June 12 industry and environmental interests, on June 14 final rules. Tom. 30th, 2009. 15 MR. WHALEN: Mr. Chairman, this is 16 16 Whalen. A question for Ms. Orr. 17 17 Katherine, with respect to the SME case, 18 18 the contested case above it would be I think 19 19 2(c), where you had mentioned that there was a 10 20 whether that would be dismissal with or without 17 21 ms. ORR: Yes. 20 23 MS. ORR: Yes. 23 24 MR. WHALEN: Thank you, Mr. Chairman. 20 25 is arguing for dismissal with prejudice? 23 26 MR. WHALEN: Thank you, Mr. Chairman. 2 26 MR. WHALEN: Thank you, Mr. Chairman. 2 26 MR. WHALEN: Thank you, Mr. Chairman. 2 27 MS. ORR: SME is. 2 28 MR. LIVERS: Wr. Chairman, this is Tom 3 31 of amendments of APM 1				
12 CHAIRMAN RUSSELL: The next item on the agenda are the repeal, amendments, and adoption of final rules. Tom. 12 industry and environmental interests, on June 14 final rules. Tom. 30th, 2009. 15 MR. WHALEN: Mr. Chairman, this is The Department has prepared for the Board's consideration a draft notice of rule amendment in this matter, and the Department 16 Whalen. A question for Ms. Orr. 14 17 Katherine, with respect to the SME case, 15 18 the contested case above it would be 1 think 19 2(c), where you had mentioned that there was a 10 20 dismissal, and then there was some question as to 10 21 members, Yes. 20 23 MS. ORR: Yes. 20 24 MR. WHALEN: Which of those two parties 23 25 is arguing for dismissal with prejudice? 23 26 MR. WHALEN: Thank you, Mr. Chairman, 2 36 CHAIRMAN RUSSELL: The next item, Item 1 4 III(A)(1), in the matter of the proposed adoption of amendments of ARM 17.8.501, 17.				a b b c c c c c c c c c c
13 agenda are the repeal, amendments, and adoption of 13 30th, 2009. 14 final rules. Tom. The Department has prepared for the 15 MR. WHALEN: Mr. Chairman, this is 14 Board's consideration a draft notice of rule 16 Whalen. A question for Ms. Orr. 14 Board's consideration a draft notice of rule 17 Katherine, with respect to the SME case, 16 amendment in this matter, and the Department 18 the contested case above it would be I think 12 forth in the notice of rule amendment. I'd be 18 the contested case above it would be I think 12 forth in the notice of rule amendment. I'd be 19 page 7 forth in the notice of rule amendment. I'd be the page numbers. do you have any 20 MS. ORR: Yes. 22 (No response) 23 23 MS. ORR: SME is. 1 MR. LIVERS: We're checking on that, Mr. 24 MR. WHALEN: Thank you, Mr. Chairman, this is Tom 1 MR. LIVERS: Mr. Chairman, this is Tom 3 of amendments of ARM 17.8.501, 17.8.504				-
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15MR. WHALEN: Mr. Chairman, this is15Board's consideration a draft notice of rule16Whalen. A question for Ms. Orr.amendment in this matter, and the Department17Katherine, with respect to the SME case,it information. Actually the first two rulemakings.18the contested case above it would be 1 thinkit information. Actually the first two rulemakings.20(Joperation and open burning fees.21MR. WHALEN: Which of those two parties23MS. ORR: Yes.24MR. WHALEN: Which of those two parties25is arguing for dismissal with prejudice?24MR. WHALEN: Thank you, Mr. Chairman.25CHAIRMAN RUSSELL: Hearing none, Tom,24MR. WHALEN: Thank you, Mr. Chairman.3CHAIRMAN RUSSELL: The next item, Item4III(A)(1), in the matter of the proposed adoption5of amendments of ARM 17.8.501, 17.8.504, 17.8.505,617.8.514, the annual adjustment of the air qualityoperation and open burning fees.8MR. LIVERS: Mr. Chairman, this is Tom9of the Department. Deb Wolfe from our Air10Resources Management Bureau will present this11information. Actually the first two rulemakings.12MS. WOLFE: Good morning. For the13record, my name is Debra Wolfe, and I'm a planner14with the Air Resources Management bureau, and I'm15here today to represent the Department regarding16action on the proposed incorporation by reference16action	13	agenda are the repeal, amendments, and adoption of	13	30th, 2009.
16Whalen. A question for Ms. Orr. Katherine, with respect to the SME case, the contested case above it would be 1 think 2(c), where you had mentioned that there was a dismissal, and then there was some question as to whether that would be dismissal with or without prejudice.16amendment in this matter, and the Department recommends that the Board adopt the rule as set forth in the notice of rule amendment. I'd be happy to take any questions.20dismissal, and then there was some question as to whether that would be dismissal with or without prejudice.16amendment in this matter, and the Department recommends that the Board adopt the rule as set forth in the notice of rule amendment. I'd be happy to take any questions.23MS. ORR: Yes. MR. WHALEN: Which of those two parties is arguing for dismissal with prejudice?20CHAIRMAN RUSSELL: Hearing none, Tom, 2424MS. ORR: SME is. CHAIRMAN RUSSELL: Then kyou, Mr. Chairman, of amendments of ARM 17.8.501, 17.8.504, 17.8.505, of the Department. Deb Wolfe from our Air 101MR. LIVERS: Mr. Chairman, this is Tom of athe page number here quickly. It's near the beginning. The top page number is 959 about not quite halfway down. That's the first 1011MR. LIVERS: Mr. Chairman, this is Tom of the Department. Deb Wolfe, and I'm a planner 13111111CHAIRMAN RUSSELL: And so 38 what was the today to represent the Department regarding 1415here today to represent the Department regarding 161111CHAIRMAN RUSSELL: And so 38 what was	14	final rules. Tom.	14	The Department has prepared for the
17Katherine, with respect to the SME case, the contested case above it would be I think17recommends that the Board adopt the rule as set18the contested case above it would be I think19forth in the notice of rule amendment. I'd be192(c), where you had mentioned that there was a dismissal, and then there was some question as to prejudice.18forth in the notice of rule amendment. I'd be21whether that would be dismissal with or without prejudice.19happy to take any questions.23MS. ORR: Yes.20CHAIRMAN RUSSELL: Thank you. Board24MR. WHALEN: Which of those two parties is arguing for dismissal with prejudice?23CHAIRMAN RUSSELL: Hearing none, Tom, the MAR that we have does, it still have the range to in it?25is arguing for dismissal with prejudice?Page 71MR. LIVERS: We're checking on that, Mr.2MR. WHALEN: Thank you, Mr. Chairman, of amendments of ARM 17.8.501, 17.8.5	15	MR. WHALEN: Mr. Chairman, this is	15	Board's consideration a draft notice of rule
17Katherine, with respect to the SME case, the contested case above it would be I think17recommends that the Board adopt the rule as set18the contested case above it would be I think19forth in the notice of rule amendment. I'd be192(c), where you had mentioned that there was a dismissal, and then there was some question as to prejudice.18forth in the notice of rule amendment. I'd be21whether that would be dismissal with or without prejudice.19happy to take any questions.23MS. ORR: Yes.20CHAIRMAN RUSSELL: Thank you. Board24MR. WHALEN: Which of those two parties is arguing for dismissal with prejudice?23CHAIRMAN RUSSELL: Hearing none, Tom, the MAR that we have does, it still have the range to in it?25is arguing for dismissal with prejudice?Page 71MR. LIVERS: We're checking on that, Mr.2MR. WHALEN: Thank you, Mr. Chairman, of amendments of ARM 17.8.501, 17.8.5	16	Whalen. A question for Ms. Orr.	16	amendment in this matter, and the Department
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192(c), where you had mentioned that there was a dismissal, and then there was some question as to whether that would be dismissal with or without prejudice.19happy to take any questions. CHAIRMAN RUSSELL: Thank you. Board members, do you have any 2223MS. ORR: Yes. MR. WHALEN: Which of those two parties is arguing for dismissal with prejudice?20(No response) 2324MR. WHALEN: Which of those two parties is arguing for dismissal with prejudice?23CHAIRMAN RUSSELL: Hearing none, Tom, 2425is arguing for dismissal with prejudice?23CHAIRMAN RUSSELL: Hearing none, Tom, 242MS. ORR: SME is. 223CHAIRMAN RUSSELL: Hearing none, Tom, 243CHAIRMAN RUSSELL: The next item, Item 4111(A)(1), in the matter of the proposed adoption 5 of amendments of ARM 17.8.501, 17.8.504, 17.8.505, 617.8.514, the annual adjustment of the air quality 7 operation and open burning fees. 81Resources Management Bureau will present this 11 information. Actually the first two rulemakings. 12NS. WOLFE: Good morning. For the 131Ite halfway down. That's the first 141013record, my name is Debra Wolfe, and I'm 1516CHAIRMAN RUSSELL: And so 38 what was 151414with the Air Resources Management bureau, and I'm 1514CHAIRMAN RUSSELL: And so 38 what was 1614with the Air Resources Management bureau, and I'm 1514CHAIRMAN RUSSELL: And so 38 what was 16	18	•		•
20dismissal, and then there was some question as to whether that would be dismissal with or without prejudice.20CHAIRMAN RUSSELL: Thank you. Board members, do you have any (No response)23MS. ORR: Yes.22(No response)24MR. WHALEN: Which of those two parties is arguing for dismissal with prejudice?23CHAIRMAN RUSSELL: Hearing none, Tom, 2425is arguing for dismissal with prejudice?24CHAIRMAN RUSSELL: Hearing none, Tom, 2527MR. WHALEN: Which of those two parties is arguing for dismissal with prejudice?23CHAIRMAN RUSSELL: Hearing none, Tom, 2426MR. WHALEN: Thank you, Mr. Chairman. 3CHAIRMAN RUSSELL: The next item, Item 31MR. LIVERS: We're checking on that, Mr.2MR. WHALEN: Thank you, Mr. Chairman. 3CHAIRMAN RUSSELL: I'm guessing it 413MR. UNSELL: The next item, Item 5617.8.514, the annual adjustment of the air quality 734MR. LIVERS: Mr. Chairman, this is Tom 961Can get the page number here quickly. It's near 88MR. LIVERS: Mr. Chairman, this is Tom 961can get the page number here quickly. It's near 811information. Actually the first two rulemakings. 12MS. WOLFE: Good morning. For the 131amount within the range of \$36 to \$41 to be 1312MS. WOLFE: Good morning. For the 1413CHAIRMAN RUSSELL: And so 38 what was 1415here today to represent the Department regarding 1614CHAIRMAN RUSSELL: And so 38 what wa				
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	17	rulemaking. We can start with IBR or fees.	17	manage there are a couple others, too. I'm just
18 MS. ORR: Fees. 18 checking real quickly. It's Page 959 on the top 10 MS. WOLEE: In the notice of the 10 number				
19 MS. WOLFE: In the notice of the 20 proposal that you have in your packets regarding				
20 proposal that you have in your packets regarding 20 CHAIRMAN RUSSELL: I actually see the				
ARM 17.8.501, 17.8.504, 17.8.505, and 17.8.514 was 21 bracketed. So we actually need to make sure that				5
22 published on June 25, 2009, and the Board's 22 it reflects the \$38 and		•		
23 Hearing Officer Katherine Orr presided over a 23 MR. LIVERS: It will need to The	1 72	Heating Utticer Katherine Urr presided over a	23	INK. LIVERS: It will need to The
			A 4	for all and an example a set of the set of t
25 on the proposed amendments. 25 Board takes action on that.	24	public hearing on July 27th, 2009 to take comment	24	final order will have the exact amount in once the

	Page 10		Page 12
1	CHAIRMAN RUSSELL: I just want to make	1	CHAIRMAN RUSSELL: So I have a motion to
2	sure we take the action that's that per ton fee.	2	adopt the rule with the amendments, accept the
3	MR. LIVERS: Correct.	3	Hearing Officer's report, and House Bill 521 and
4	CHAIRMAN RUSSELL: What was it, 38 what?	4	311 analysis prepared by the Department. Is there
5	MS. WOLFE: \$38.24, and it is reflected	5	a second?
6	in the executive summary.	6	MR. MILLER: This is Miller. I'll
7	CHAIRMAN RUSSELL: So we don't take	7	second it.
8	action on the summary.	8	CHAIRMAN RUSSELL: It's been moved and
9	MS. WOLFE: Right.	9	seconded. Any further discussion? I know I have
10	CHAIRMAN RUSSELL: So \$38.24. Board	10	to ask for public comment, Tom. Did you smile?
11	members, do you have any questions for the	11	MR. LIVERS: I did, Mr. Chairman. Thank
12	Department?	12	you. There doesn't appear to be any public
13	MR. WHALEN: Mr. Chairman, this is	13	comment here, and I'm not aware of anyone who's
14		14	phoned in other than the Board members themselves.
	Whalen. Ms. Wolfe, are we to understand that		•
15	there was no public comment in opposition to the	15	CHAIRMAN RUSSELL: Okay. Any further
16	rulemaking?	16	discussion?
17	MS. WOLFE: Yes. That's true. No	17	MR. LIVERS: Mr. Chairman, when we're
18	public comment was received.	18	ready, I'll probably do a roll call on this.
19	CHAIRMAN RUSSELL: I heard there was	19	CHAIRMAN RUSSELL: I think we're ready.
20	some grousing, though.	20	All those in favor, signify by saying aye. Tom
21	MR. LIVERS: Mr. Chairman, maybe just to	21	will do a roll.
22	elaborate on one point that Ms. Wolfe made. This	22	MR. LIVERS: Mr. Anderson.
23	is Tom. We do have an active stakeholder group.	23	MR. ANDERSON: Aye.
24	She mentioned the Clean Air Act Advisory Council.	24	MR. LIVERS: Ms. Kaiser.
25	And we have a good working relationship. It is	25	MS. KAISER: Aye.
	D 11		
	Page 11		Page 13
1	made up of a cross section of fee payers, and we	1	Page 13 MR. LIVERS: Mr. Miller.
1 2	5	1 2	-
	made up of a cross section of fee payers, and we		MR. LIVERS: Mr. Miller.
2	made up of a cross section of fee payers, and we work every year closely with that group in	2	MR. LIVERS: Mr. Miller. MR. MILLER: Aye.
2 3	made up of a cross section of fee payers, and we work every year closely with that group in discussing our proposals, proposed fee levels,	2 3	MR. LIVERS: Mr. Miller. MR. MILLER: Aye. MR. LIVERS: Mr. Mires.
2 3 4	made up of a cross section of fee payers, and we work every year closely with that group in discussing our proposals, proposed fee levels, uses, activities. So there has been a	2 3 4	MR. LIVERS: Mr. Miller. MR. MILLER: Aye. MR. LIVERS: Mr. Mires. MR. MIRES: Aye.
2 3 4 5	made up of a cross section of fee payers, and we work every year closely with that group in discussing our proposals, proposed fee levels, uses, activities. So there has been a considerable amount of vetting with the affected parties.	2 3 4 5	MR. LIVERS: Mr. Miller. MR. MILLER: Aye. MR. LIVERS: Mr. Mires. MR. MIRES: Aye. MR. LIVERS: Ms. Shropshire.
2 3 4 5 6 7	made up of a cross section of fee payers, and we work every year closely with that group in discussing our proposals, proposed fee levels, uses, activities. So there has been a considerable amount of vetting with the affected	2 3 4 5 6	MR. LIVERS: Mr. Miller. MR. MILLER: Aye. MR. LIVERS: Mr. Mires. MR. MIRES: Aye. MR. LIVERS: Ms. Shropshire. MS. SHROPSHIRE: Aye. MR. LIVERS: I'm not sure if that came
2 3 4 5 6 7 8	made up of a cross section of fee payers, and we work every year closely with that group in discussing our proposals, proposed fee levels, uses, activities. So there has been a considerable amount of vetting with the affected parties. CHAIRMAN RUSSELL: Okay. MR. WHALEN: Mr. Chairman, Whalen. I	2 3 4 5 6 7	MR. LIVERS: Mr. Miller. MR. MILLER: Aye. MR. LIVERS: Mr. Mires. MR. MIRES: Aye. MR. LIVERS: Ms. Shropshire. MS. SHROPSHIRE: Aye. MR. LIVERS: I'm not sure if that came through. Was that an aye or a no?
2 3 4 5 6 7	made up of a cross section of fee payers, and we work every year closely with that group in discussing our proposals, proposed fee levels, uses, activities. So there has been a considerable amount of vetting with the affected parties. CHAIRMAN RUSSELL: Okay. MR. WHALEN: Mr. Chairman, Whalen. I move to adopt the rules as proposed by DEQ.	2 3 4 5 6 7 8	MR. LIVERS: Mr. Miller. MR. MILLER: Aye. MR. LIVERS: Mr. Mires. MR. MIRES: Aye. MR. LIVERS: Ms. Shropshire. MS. SHROPSHIRE: Aye. MR. LIVERS: I'm not sure if that came through. Was that an aye or a no? MS. SHROPSHIRE: Aye.
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4 (Pages 10 to 13)

	Page 14		Page 16
1	July 27th, 2009. The Department recommends that	1	MR. WHALEN: Aye.
2	the Board adopt the amendment as proposed in the	2	MR. LIVERS: Ms. Shropshire.
3	proposed MAR notice published on June 25th, 2009,	3	MS. SHROPSHIRE: Aye.
4	and the Department supports the submission of	4	MR. LIVERS: Mr. Mires.
5	these amendments to EPA for inclusion into the	5	MR. MIRES: Aye.
6	State Implementation Plan.	6	MR. LIVERS: Mr. Miller.
7	CHAIRMAN RUSSELL: Is that it?	7	MR. MILLER: Aye.
8	MS. WOLFE: Yes.	8	MR. LIVERS: Ms. Kaiser.
9	CHAIRMAN RUSSELL: Deb, you are so good.	9	MS. KAISER: Aye.
10	Brevity is great. No offense to anyone else in	10	MR. LIVERS: Mr. Anderson.
11	the Department.	11	MR. ANDERSON: Aye.
12	MS. WOLFE: Thank you, Mr. Chairman.	12	MR. LIVERS: Chairman Russell.
13	CHAIRMAN RUSSELL: Do the Board members	12	
14		14	CHAIRMAN RUSSELL: Aye.
14	have any questions for the Department?	14	MR. LIVERS: Thank you. CHAIRMAN RUSSELL: And the next matter
16	(No response)		
	CHAIRMAN RUSSELL: Hearing none, is	16	in front of the Board is the modifications,
17 18	there anyone in the audience, the public, that would like to speak to this?	17 10	proposed adoption of amendments to Title 17.38
19	•	18 19	Subchapters 1 and 2. Tom.
20	(No response)		MR. LIVERS: Mr. Chairman, thank you.
20	MR. LIVERS: None here in Helena, Mr.	20	Presenting for the Department will be Mr. Eugene
	Chairman.	21	Pizzini, and your comments on brevity were heard
22	CHAIRMAN RUSSELL: All right.	22	by all here.
23	MR. LIVERS: I think we're ready for a	23	CHAIRMAN RUSSELL: I'm just hoping Gene
24 25	motion, and then when you're ready, a roll call	24 25	can pull it off. MR. PIZZINI: Mr. Chairman, members of
20	vote.	20	
	Page 15		Page 17
1	Page 15 CHAIRMAN RUSSELL: Once again, there are	1	Page 17 the Board, for the record, my name is Eugene
1 2	-	1 2	_
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2	CHAIRMAN RUSSELL: Once again, there are no submitted testimony, comments?	2	the Board, for the record, my name is Eugene Pizzini, and I'm the rules expert writer for the
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		1	
	Page 18		Page 20
1	comments, one individual submitted a comment on	1	rural water projects don't fit within the scope of
2	behalf of Montana Rural Water Systems, and a	2	our good intention on the rules.
3	separate individual asked questions that were	3	I'm just wondering if that has been
4	outside the scope of this rulemaking. Those	4	taken into consideration when we have to deal with
5	questions were addressed after the Presiding	5	these large rural type water projects.
6	Officer closed the public hearing.	6	MR. PIZZINI: Chairman Russell, members
7	Proposed amendments based on comments	7	of the Board, I can probably try to address that
8	received include replacing the term "chlorine"	8	somewhat at this point. In general, Mr. Wade made
9	with the term "disinfectant" for the purpose of	9	a few different comments regarding the regional
10	residual monitoring, clarifying the need for	10	water system authorities. The first was dealing
11	surface water systems to collect and report two	11	with deviation requests and the various time
12	daily residual disinfectant samples, and	12	limits imposed on those, that they're good for a
13	clarification for residual monitoring and	13	maximum of 72 months; and the other was that they
14	reporting for groundwater systems.	14	wanted to propose the Department did the review
15	In addition, supplemental testimony was	15	and either approved or denied those deviation
16	offered by the Department as part of its House	16	requests quicker than the forty-twenty.
17	Bill 521 analysis. In preparing the House Bill	17	The Department adopted by reference the
18	521 analysis, it was determined that a portion of	18	new statutory language that dealt with those
19	an existing rule would still be more stringent	19	issues, and so we are bound to stick with the
20	than its comparable federal rule. The	20	statutory language. The Board cannot adopt a rule
20	supplemental testimony is intended to justify	20	that says the deviation request is good for twenty
22	maintaining that more stringent requirement.	22	years, as an example.
23	The Department believes that the	23	One of the other questions that they
23	proposed response to the comments received	23	brought forward was that they suggested we replace
24	adequately addresses those comments, and	24 25	the term "chlorine" and "chlorine residual" with
25	adequately addresses those comments, and	25	the term chionne and chionne residual with
	Page 10		Page 21
1	Page 19	1	Page 21 "disinfectant" because regional water systems and
1	recommends that the Board adopt the proposed	1	"disinfectant" because regional water systems and
2	recommends that the Board adopt the proposed changes as amended during the comment period.	2	"disinfectant" because regional water systems and some other systems are required, in order to carry
2 3	recommends that the Board adopt the proposed changes as amended during the comment period. And I'm available for any questions you	2 3	"disinfectant" because regional water systems and some other systems are required, in order to carry a residual through the system, to use a secondary
2 3 4	recommends that the Board adopt the proposed changes as amended during the comment period. And I'm available for any questions you may have.	2 3 4	"disinfectant" because regional water systems and some other systems are required, in order to carry a residual through the system, to use a secondary disinfectant such as chloramines, which have a
2 3 4 5	recommends that the Board adopt the proposed changes as amended during the comment period. And I'm available for any questions you may have. CHAIRMAN RUSSELL: Thanks, Gene. Very	2 3 4 5	"disinfectant" because regional water systems and some other systems are required, in order to carry a residual through the system, to use a secondary disinfectant such as chloramines, which have a longer life. And we agreed with that, and we made
2 3 4 5 6	recommends that the Board adopt the proposed changes as amended during the comment period. And I'm available for any questions you may have. CHAIRMAN RUSSELL: Thanks, Gene. Very nice. Questions from the Board to the Department?	2 3 4 5 6	"disinfectant" because regional water systems and some other systems are required, in order to carry a residual through the system, to use a secondary disinfectant such as chloramines, which have a longer life. And we agreed with that, and we made the change, or proposed to make the change.
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	Page 22		Page 24
1	responses that they gave to Mr. Wade, and I was	1	MR. WHALEN: That will be very helpful.
2	just curious whether he had ever responded back	2	Thank you.
3	with whether he was satisfied. I thought the	3	CHAIRMAN RUSSELL: Generally from my
4	Department did a nice job on it.	4	regulatory perspective, waivers or variances can
5	CHAIRMAN RUSSELL: Any further?	5	be granted to regulation; but if there is a
			5 5
6	(No response)	6	statute that supports it, you're pretty much stuck
7	CHAIRMAN RUSSELL: I read it once.	7	with it. And the Department does grant waivers to
8	Gene, did you respond to is your response to	8	some parts of their regulations.
9	Lewis & Clark County actually part of the record?	9	MR. LIVERS: And this is Tom again. And
10	MR. PIZZINI: Chairman Russell, members	10	typically what we'll do in fact, we had some
11	of the Board, yes, it is.	11	legislation in the last session where we wanted to
12	CHAIRMAN RUSSELL: Okay.	12	come up with a waiver process under a certain
13	MR. PIZZINI: Chairman Russell, members	13	provision. We asked for that statutory authority
14			· · · · · · · · · · · · · · · · · · ·
	of the Board, what happened was the comment came	14	in law to statutory authority to allow the
15	to me personally, and I forwarded it to the	15	Department to develop a waiver system, and
16	Director's Office, and there was miscommunication	16	criteria under which we'd grant waivers.
17	as to whether I forwarded it to Katherine Orr or	17	So again, since the Board's rulemaking
18	whether somebody there had. But we accepted the	18	ultimately derives from Montana law, we'll look to
19	comment, we mentioned it in our response, and we	19	that; but there are cases where the statute does
20	responded to it. So that portion of it is there.	20	give certain discretion to the Department and to
21	It just didn't show up in the Presiding Officer's	21	the Board in its rulemaking.
22	report.	22	MR. WHALEN: That's clear. Thank you
23	CHAIRMAN RUSSELL: All right. Got it.	23	very much.
	•		5
24	MR. WHALEN: Mr. Chairman, this is	24	CHAIRMAN RUSSELL: All right. Okay.
25	Whalen. My question is: Just for clarification	25	Any further questions for the Department? Mr.
	Page 23		Page 25
1	on this and future matters, when we come up	1	Pizzini, you did a great job.
2	against an issue where we have a deviation request	2	MR. PIZZINI: Thank you, sir.
3	issue, where we're up against statute with respect	3	
		-	CHAIRMAN RUSSELL: I'll craft a motion
4	to that time limit of 12 months. Is it accurate to	4	CHAIRMAN RUSSELL: I'll craft a motion
4	to that time limit of 72 months, is it accurate to	4 5	unless someone else wants to, but
5	say	5	unless someone else wants to, but OPERATOR: Ryan Purdy is joining the
5 6	say Is there a statute on the books that any	5 6	unless someone else wants to, but OPERATOR: Ryan Purdy is joining the meeting.
5 6 7	say Is there a statute on the books that any rules that are passed by this Board within its	5 6 7	unless someone else wants to, but OPERATOR: Ryan Purdy is joining the meeting. CHAIRMAN RUSSELL: Before I craft a
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		I	
	Page 26		Page 28
1	motion to adopt the rule as submitted which would	1	The gray water rules have been
2	modify 17.38.101, 17.38.208, 17.38.225, 17.38.229,	2	relatively uncontroversial. There has been a very
3	and others as listed, and adopt New Rule I, New	3	low amount of people attending any meetings and a
4	Rule II, New Rule III, New Rule IV, which will be	4	low number of public comments. We sent out 400
5	codified in the final publication; accept the	5	notices to interested parties, and I think we
	• •		received less than two dozen comments back. We
6	Hearing Officer's report, the House Bill 521 and	6	
7	311 analysis, and the Department's responses to	7	have modified rules based on our proposed rules
8	comments. Do I have a motion?	8	based on those comments.
9	MS. SHROPSHIRE: So moved. This is	9	The clarifications that we added to the
10	Robin.	10	rules involved review of existing gray water
11	CHAIRMAN RUSSELL: It's been moved by	11	systems if we find them. We modified setbacks to
12	Robin. Is there second?	12	wells in our initial rule package. We had a 50
13	MR. WHALEN: Mr. Chairman, Whalen. I'll	13	foot setback to other wells besides drinking water
14	second.	14	wells. The comments from the local government
15	CHAIRMAN RUSSELL: It's been moved and	15	asked for 100 foot setbacks, so we modified rules
16	seconded. Any further discussion?	16	for that setback.
17	(No response)	17	We've clarified the use of kitchen sink
18	CHAIRMAN RUSSELL: Hearing none, all	18	gray water, which has a higher bacterial content,
19	those in favor, signify by saying aye.	19	and the only time kitchen sink gray water may be
20	MR. LIVERS: We'll take a roll call, Mr.	20	used in a gray water system is if it has a waste
21	Chairman. Thank you. Mr. Anderson.	21	segregation system. Otherwise it goes into the
22	MR. ANDERSON: Aye.	22	sanitary system that's associated with the house,
23	MR. LIVERS: Ms. Kaiser.	23	goes into the septic system or the sewer.
24	MS. KAISER: Aye.	24	We clarified the word "subsurface," and
25	MR. LIVERS: Mr. Miller.	25	put a six inch burial depth on that; essentially
			· · · · · · · · · · · · · · · · · · ·
	Page 27		Page 29
1	Page 27 MR. MILLER: Ave.	1	Page 29 clarified some maintenance issues about salt
1	MR. MILLER: Aye.		clarified some maintenance issues about salt
2	MR. MILLER: Aye. MR. LIVERS: Mr. Mires.	2	clarified some maintenance issues about salt buildups and possible changes in pH to soils,
2 3	MR. MILLER: Aye. MR. LIVERS: Mr. Mires. MR. MIRES: Aye.	2 3	clarified some maintenance issues about salt buildups and possible changes in pH to soils, brought forth by Mr. Whalen. A very minor set of
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1			
	Page 30		Page 32
1	to comments. Do I have a motion?	1	stepped up this rulemaking; but my concern is that
2	MS. KAISER: So moved.	2	we're trading one principle of conservation, which
3	CHAIRMAN RUSSELL: It's been moved by	3	is water conservation, and sacrificing soil
4	Heidi. Is there a second?	4	fertility as a result, among other things.
5	MR. MILLER: Miller. I second it.	5	So I'm going to vote no on this issue,
6	CHAIRMAN RUSSELL: It's been moved and	6	and I just wanted to explain my reasons for that.
7	second. Any further discussion?	7	I think it's something that merits closer
8	(No response)	8	examination, and I think we're getting closer, but
9	CHAIRMAN RUSSELL: Anyone in the	9	I don't know that we're there yet, and I'm just
10	audience like to speak to this?	10	not real comfortable with passing this issue
11	(No response)	11	today. Thank you.
12	MR. LIVERS: None here in Helena, Mr.	12	CHAIRMAN RUSSELL: All right.
		12	
13	Chairman.		MR. ANDERSON: This Larry Anderson. I
14	CHAIRMAN RUSSELL: Let me see if I can	14	have a question on proposed Rule 17.36.103 sub(a),
15	dig someone up outside my office.	15	sub(i). It requires a description of the soils
16	MR. WHALEN: Mr. Chairman, I wanted to	16	within 25 feet of the proposed gray water
17	wait until we had a motion on the floor before	17	irrigation areas, and I'm just trying to figure
18	offering comment. I guess my comment would be	18	out what the basis for the 25 feet area is.
19	that I'm impressed by the diligence of the	19	CHAIRMAN RUSSELL: Steve, can you handle
20	Department in addressing many of the comments that	20	that?
21	have come to it, not just from the public, but	21	MR. KILBREATH: Mr. Chairman, the basis
22	from the Board as well.	22	for that comes straight out of our DEQ subdivision
23	I do know that relative to the other	23	regulations, where we require a soil site analysis
24	issues that we're handling today, there are a few	24	within 25 feet of any proposed drainfield site.
25	more comments that have been generated by this	25	It's based on the fact that we think that the
	5 5		
	Page 31		Page 33
1	issue than others, and that Ms. Orr responded to	1	soils would be consistent, and a 25 foot distance
2	each of those comments does tell me that initially	2	would be representative of the drainfield area.
3	rulemaking because we don't have a great deal	3	MR. ANDERSON: My question is more
4	of federal guidance from the EPA with respect to	4	focused on how did you arrive and maybe the 25
5	this, there were a lot of surprises that came up	5	feet is a historical number. I'm just trying to
	as a result of these comments, which tells me that		, , , ,
6		6	figure out how did you arrive at the 25 foot area.
7	this may not be ready for prime time.	7	CHAIRMAN RUSSELL: Where is Abe when you
8	And with respect to the comments that	- ×	
9	have been registered by the Department they	8	need him?
1 1 0	have been registered by the Department, there are	9	MR. KILBREATH: Mr. Chairman, that 25
10	two that I don't feel that have been completely	9 10	MR. KILBREATH: Mr. Chairman, that 25 foot distance away from drainfields has been in
11	two that I don't feel that have been completely addressed. One has to do with the kitchen waste,	9 10 11	MR. KILBREATH: Mr. Chairman, that 25 foot distance away from drainfields has been in the rules for probably two dozen years.
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	Page 34		Page 36
1	test pits.	1	MR. WHALEN: Thank you, Mr. Chairman.
2	So it's something that's been in the	2	If I may ask a question before we go forward.
3	rules historically, but it's something we evaluate	3	This will be my final question.
4	on each evaluation or on each site that we see.	4	You brought up the issue of regulation,
5	And then within the 900 series rules or the state	5	and that brings to mind my question. In reading
6	minimum standards, the soil conditions at each	6	through the material, it appears that it will be
7	gray water site is something that the local county	7	DEQ who will be charged with regulating those gray
8	sanitarian would also evaluate.	8	water sites. Maybe I should direct that question
9	CHAIRMAN RUSSELL: I can say this from a	9	to Mr. Kilbreath.
10	non-technical standpoint. The rule is that you	10	CHAIRMAN RUSSELL: Let me take a shot at
11	will know the soils within a specific distance of	11	it and see, because I've been doing this for a
12	the site that you're going to treat. This is like	12	
	, , , ,		long time.
13	From another standpoint, if someone turned in	13	What we've done is we've established a
14	test pit evaluations that were 200 feet away from	14	gray water rule at the State level. It will be
15	the proposed drainfield site, that would be	15	used in the review of subdivisions because the
16	unacceptable.	16	Sanitation and Subdivisions Act is a State rule.
17	The 25 feet says that your soils aren't	17	It will be incorporated into local
18	going to change much within that area, and as such	18	regulations when local regulators modify their
19	it would be representative of the soils underneath	19	regulation. There is a process at the local
20	the drainfield.	20	level. We can't just adopt these without going
21	MR. ANDERSON: Okay. I'm just trying to	21	through the local public hearing process, and
22	get my bearings on that. I appreciate those	22	basically following the same process that the
23	responses.	23	State did to adopt the gray water rules. So right
24	CHAIRMAN RUSSELL: Steve, was that a	24	now, it will be incorporated and used in the
25	good characterization?	25	Sanitation Act, but it needs to be incorporated
	Page 35		Page 37
1	_	1	_
	MR. KILBREATH: Yes, it was. We process		into local regulation at some point by all local
2	MR. KILBREATH: Yes, it was. We process waivers for subdivisions for not having test pits,	2	into local regulation at some point by all local health departments.
2 3	MR. KILBREATH: Yes, it was. We process waivers for subdivisions for not having test pits, but we really put a lot of thorough evaluation on	2 3	into local regulation at some point by all local health departments. MR. KILBREATH: Mr. Chairman, that's a
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1	Page 38	1	Page 40
1	MR. ANDERSON: Aye.	1	Act by Stockton Oil Company at Soco Express No.
2	MR. LIVERS: Ms. Kaiser.	2	10. This is in Yellowstone County, Billings. And
3	MS. KAISER: Aye.	3	the violations that are alleged are failure to
4	MR. LIVERS: Mr. Miller.	4	properly anchor a shear valve at the dispensers
5	MR. MILLER: Aye.	5	that's at seven dispensers and failure to
6	MR. LIVERS: Mr. Mires.	6	correct compliance inspection violations within
7	MR. MIRES: Aye.	7	the 90 days of issuance of the inspection, and the
8	MR. LIVERS: Ms. Shropshire.	8	penalty requested is \$805.
9	MS. SHROPSHIRE: Aye.	9	CHAIRMAN RUSSELL: Questions to
10	MR. LIVERS: Mr. Whalen.	10	Katherine?
11	MR. WHALEN: No.	11	(No response)
12	MR. LIVERS: Chairman Russell.	12	CHAIRMAN RUSSELL: Hearing none, I will
13	CHAIRMAN RUSSELL: Aye.	13	entertain a motion to appoint Katherine the
14	MR. LIVERS: Six to one. Thank you very	14	permanent Hearings Examiner.
15	much. I guess on behalf of the Department, I	15	MR. MIRES: This is Mires. So moved.
16	appreciate the Board's comments on this matter and	16	CHAIRMAN RUSSELL: It's been moved by
17	the perspectives expressed; and given the amount	17	Larry. Is there a second?
18	of Board participation, I do want to make sure	18	MR. MILLER: Miller. Second.
19	that one comment of Mr. Kilbreath's properly	19	CHAIRMAN RUSSELL: It's been moved and
20	transmitted over the phone lines. He said there	20	seconded. Is there any further comment?
21	are a low number of people participating as	21	(No response)
22	opposed to a number of low people. I want to make	22	CHAIRMAN RUSSELL: Hearing none, all
23	sure that the record	23	those in favor, signify by saying aye. We don't
24	CHAIRMAN RUSSELL: All right. I thank	24	need a roll call on these, I hope.
25	the Department for all of this, and making sure we	25	MR. LIVERS: Mr. Chairman, I'd recommend
	1 5		
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	Page 39		Page 41
1	Page 39 got through all those four that fast.	1	Page 41 we just do a non-roll call vote on these, and then
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1	I'm sorry. I digress.	1	(Response)
2	Do I have a motion to appoint Katherine	2	CHAIRMAN RUSSELL: Opposed.
3	the permanent Hearings Examiner?	3	(No response)
4	MR. WHALEN: So moved, Mr. Chairman.	4	CHAIRMAN RUSSELL: Motion carries. The
5	Whalen.	5	next item is another The septage program has
6	CHAIRMAN RUSSELL: It's been moved by	6	been kind of busy septage disposal and
7	Joe. Is there a second?	7	licensure laws by Steven Kunkel doing business as
8	MR. MILLER: Miller. Second.	8	Montana Septic Service in Great Falls.
9	CHAIRMAN RUSSELL: It's been moved and	9	MS. ORR: Mr. Chairman, members of the
10	seconded. All those in favor, signify by saying	10	Board, this involves disposal of septage and car
11	aye.	11	wash sump waste at the Great Falls waste water
12	(Response)	12	treatment plant from January 1st, 2009 to April
13	CHAIRMAN RUSSELL: Opposed.	13	30th, 2009, and this was done without renewal of
14	(No response)	14	the septage license that's required, and the
15	CHAIRMAN RUSSELL: The next one, the	15	penalty that the Department is requesting is
16	matter of violations of the Metal Mine Reclamation	16	\$8,700.
17	Act by Paradine Mining.	17	CHAIRMAN RUSSELL: Any questions for
18	MS. ORR: Mr. Chairman, on the item	18	Katherine?
19	before, I'm sorry to disappoint you, but that was	19	MR. WHALEN: Mr. Chairman, this is
20	faxed.	20	Whalen. Mr. Chairman and Ms. Orr, when these
21	CHAIRMAN RUSSELL: Oh, it was faxed.	21	notices go out to these operators that they are in
22	MS. ORR: Anyway, on Paradine Mining,	22	violation and that they need to correct that
23	this is out of Broadwater County near Winston, and	23	situation by a certain time frame, is there any
24	the violation that's been alleged is exploration	24	indication to these operators what sort of fines
25	without an exploration license. The penalty	25	potentially they may be looking at if they fail to
20	without all exploration neerse. The penalty	20	
	Page 43		Page 45
1	sought is \$1,500, and the Department also seeks	1	comply on that initial contact?
2	sought is \$1,500, and the Department also seeks injunctive relief.	2	comply on that initial contact? MS. ORR: That I don't know.
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LAURIE CRUTCHER, RPR 406-442-8262

12 (Pages 42 to 45)

	Page 46		Page 48
1	letters typically do not state the amount of the	1	comment on Mr. Anderson's question, I think we do
2	penalty, but they do say that if you pump without	2	try to keep the ability to appeal pretty straight
3	a license, the violations may be referred to	3	forward, particularly when we're dealing with
4	Enforcement for a penalty.	4	small businesses in the case of this program. So
5	The other thing that's kind of hanging	5	it's a relatively easy thing for someone to file
6	over pumpers' head is that if they do not renew	6	an appeal, particularly in this particular
7	their license by April 1st, they have to pay a	7	program.
8	late fee of approximately \$150, \$300, so that we	8	A lot of times the Board will see
9	view as an incentive for them to hurry up and get	9	appeals of decisions. A lot of them are done just
10	relicensed before they pump.	10	so that those people preserve their ability to
11	But the Department kind of has a	11	argue their case. That's one of the reasons
12	practice that in its violation letters that we	12	you'll see an awful lot of settlements in Board
13	send to all permitted entities to notify them that	13	cases as well.
14	we believe a violation is occurring, we typically	14	MR. ANDERSON: Thank you.
15	do not threaten penalty amounts. We say that the	15	MS. ORR: Mr. Chairman, I was just
16	violation may be referred to Enforcement, but we	16	speaking with the Board secretary, and also on
17	try to take friendly notification, just let them	17	these letters that are of questionable appeal
18	know that it will go to Enforcement, and we don't	18	intent, the Board secretary checks with that
19	threaten that, "If you violate, you're subject to	19	individual, and she did in this case, and he
20	a \$10,000 or a \$500 fine." We try to keep those	20	
20	numbers out of those letters.	20	indicated that this was an appeal, and that's done
			routinely where there is a question.
22	CHAIRMAN RUSSELL: Thanks, John.	22	CHAIRMAN RUSSELL: I hope he gets his
23	MR. WHALEN: Thank you, Mr. Arrigo.	23	fees figured out. I would entertain a motion to
24	Thank you, Mr. Chairman.	24	move this to Katherine, and appoint her as the
25	CHAIRMAN RUSSELL: Thanks, Joe. And	25	permanent Hearings Examiner.
	Page 47		Page 49
1	Tom, I think we and if you get this, I'll be	1	MR. WHALEN: So moved, Mr. Chairman.
2	very impressed but I think we're getting a	2	Whalen.
3	little glandular at this, but you'll have to look	3	CHAIRMAN RUSSELL: It's been moved by
4	at the letter from the pumper to figure it out.	4	Joe. Is there a second?
5	Tom, call me when you get it.	5	MR. MIRES: Mires. Second.
6	MR. ANDERSON: This is Larry Anderson,	6	CHAIRMAN RUSSELL: Seconded by Larry.
7	and I just need a little background here. Mr.	7	All those in favor, signify by saying aye.
8	Kunkel's basic appeal I guess for lack of a	8	(Response)
9	better term is dated 8/28/09, and he simply	9	CHAIRMAN RUSSELL: Opposed.
10	says, "Dear Enforcement Division: I, Steve	10	(No response)
11	Kunkel, owner of Montana Septic, am requesting a	11	CHAIRMAN RUSSELL: All right. Last one,
12	meeting with you regarding the penalties against	12	Katherine.
13	me and my business." That's the extent of his	13	MS. ORR: Mr. Chairman, members of the
	5		
14	appeal?	14	Board, this is a UST case outside of Helena here
15	CHAIRMAN RUSSELL: Can I do this one,	15	at the Lakeside General Store, and it involves two
16	too? Because I've been around awhile. In one	16	UST's, and the failure of the owner to conduct
17			
18	certain program you basically have to provide more	17	release detection monitoring, and to maintain
	certain program you basically have to provide more justification, and that's in the Air Quality	17 18	records concerning that release detection, and the
19	certain program you basically have to provide more justification, and that's in the Air Quality Program; but this is generally enough to appeal a	17 18 19	records concerning that release detection, and the penalty sought is \$2,100, in addition to
19 20	certain program you basically have to provide more justification, and that's in the Air Quality	17 18 19 20	records concerning that release detection, and the
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19 20	certain program you basically have to provide more justification, and that's in the Air Quality Program; but this is generally enough to appeal a matter that comes to the Enforcement Division and	17 18 19 20	records concerning that release detection, and the penalty sought is \$2,100, in addition to injunctive relief.
19 20 21	certain program you basically have to provide more justification, and that's in the Air Quality Program; but this is generally enough to appeal a matter that comes to the Enforcement Division and then to us as the Board. There is one program	17 18 19 20 21	records concerning that release detection, and the penalty sought is \$2,100, in addition to injunctive relief. CHAIRMAN RUSSELL: Questions for
19 20 21 22	certain program you basically have to provide more justification, and that's in the Air Quality Program; but this is generally enough to appeal a matter that comes to the Enforcement Division and then to us as the Board. There is one program that actually requires an affidavit which puts a	17 18 19 20 21 22	records concerning that release detection, and the penalty sought is \$2,100, in addition to injunctive relief. CHAIRMAN RUSSELL: Questions for Katherine?
19 20 21 22 23	certain program you basically have to provide more justification, and that's in the Air Quality Program; but this is generally enough to appeal a matter that comes to the Enforcement Division and then to us as the Board. There is one program that actually requires an affidavit which puts a little more meat on the request for appeal, but	17 18 19 20 21 22 23	records concerning that release detection, and the penalty sought is \$2,100, in addition to injunctive relief. CHAIRMAN RUSSELL: Questions for Katherine? (No response)

13 (Pages 46 to 49)

	Page 50		Page 52
1	permanent Hearings Examiner.	1	those in favor, signify by saying aye.
2	MR. MIRES: Mires. So moved.	2	(Response)
3	CHAIRMAN RUSSELL: It's been moved by	3	CHAIRMAN RUSSELL: Opposed.
4	Larry. Is there a second?	4	(No response)
5	MR. MILLER: Miller. Second.	5	CHAIRMAN RUSSELL: Motion carries. No.
6	CHAIRMAN RUSSELL: It's been moved and	6	2, in the matter of the violation of the Montana
7	seconded. All those in favor, signify by saying	7	Underground Storage Tank Act by Flying J, Inc.
8	aye.	8	MS. ORR: Mr. Chairman, members of the
9	(Response)	9	Board, this is a case in Silver Bow County on
10	CHAIRMAN RUSSELL: Opposed.	10	Brown's Gulch Road, involved two 20,000 gallon
11	(No response)	11	UST's, and three 12,000 gallon UST's. There were
12	CHAIRMAN RUSSELL: All right. We are	12	violations asserted regarding failure to correct
13	down to final action on contested cases. The	13	compliance inspection violations within 90 days,
14	first one in front of us is the appeal by Eastgate	14	and a failure to conduct mechanical line leak
15	Water and Sewer Association of Helena Sand and	15	detection monitoring, and failure to obtain test
16	Gravel's open cut permit. Katherine.	16	of operability of the leak detection system. And
17	MS. ORR: Mr. Chairman, members of the	17	you have before you a 41(a) dismissal request.
18	Board, this case has been around for awhile. It	18	CHAIRMAN RUSSELL: All right. Any
19	involved the challenge by a citizens' group	19	further comments or questions by the Board to
20	regarding the issuance of an open cut mining	20	Katherine?
21	permit to Helena Sand and Gravel.	21	MR. WHALEN: Mr. Chairman, question for
22	There was an intervenor, Helena Sand and	22	the Hearing Examiner. Ms. Orr, why was this issue
23	Gravel, and there were a couple of motions filed,	23	dismissed with prejudice?
24	a motion to dismiss, and that was a dismissal of a	24	MS. ORR: That is a good question. I
25	claim that was granted by me regarding whether the	25	guess the parties believed that the violator
	Page 51		Page 53
1	Page 51 citizens' association could challenge the action	1	Page 53 sufficiently addressed the violations such that
1 2	_	1 2	-
	citizens' association could challenge the action		sufficiently addressed the violations such that there shouldn't be a revisitation of the case, and Ms. Amdahl is here to address that even further.
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	Page 54		Page 56
1	everything has been taken care of, the penalty has	1	CHAIRMAN RUSSELL: Motion carries.
2	been paid, and so on. And "with prejudice" simply	2	No. 3, Sandy Rose.
3	means we will not relitigate the same issue, and	3	MS. ORR: Mr. Chairman, members of the
4	when the matter has been fully resolved, there is	4	Board, this is a public water supply case out at
5	no reason to relitigate.	5	Canyon Ferry Mansion next to Townsend. The
6	MR. WHALEN: Mr. Chairman, follow up	6	allegations were failure to monitor for coliform
7	question for Ms. Amdahl. Ms. Amdahl, I understand	7	bacteria, failure to provide public notification;
8	that Flying J may be in bankruptcy. Is this a	8	and the parties apparently settled to the
9	Chapter 11, or a Chapter 13 bankruptcy to simply	9	satisfaction of both the Department and Canyon
10	reorganize and come back? That would be the first	10	Ferry, and are asking again for a 41(a) dismissal
11	part of my question. The second question is:	11	with prejudice.
12	Does this operator have a history of this type of	12	CHAIRMAN RUSSELL: Okay. And that was a
13	violation in this or other facilities throughout	13	supplemental mailing I just found. So any
14	the state, and was that considered in determining	14	questions for Katherine?
15	whether this would be dismissed with or without	15	(No response)
16	prejudice?	16	CHAIRMAN RUSSELL: I will entertain a
17	MS. AMDAHL: Mr. Chairman, members of	17	motion to authorize the Board Chair to sign the
			Ŭ l
18	the Board, Flying J is in a Chapter 11	18	order of dismissal, Case No. BER 2009-08-PWS.
19	reorganization. Chapter 13 is limited to	19	MS. KAISER: So moved. This is Heidi.
20	individuals. Chapter 11 is reorganization for	20	CHAIRMAN RUSSELL: It's been moved by
21	corporations and other business enterprises. So	21	Heidi. Is there a second?
22	in this case, it is a reorganization.	22	MR. MILLER: Second by Miller.
23	I don't believe we have a particular	23	CHAIRMAN RUSSELL: Second by Marvin.
24	history of this type of violation, certainly not	24	All those in favor, signify by saying aye.
25	at this particular site. I have been working with	25	(Response)
	Page 55		Page 57
1	Page 55 the Underground Storage Tank program for five	1	Page 57 CHAIRMAN RUSSELL · Motion carries
1	the Underground Storage Tank program for five	1	CHAIRMAN RUSSELL: Motion carries
2	the Underground Storage Tank program for five years approximately, and if there have been any	2	CHAIRMAN RUSSELL: Motion carries unanimously.
2 3	the Underground Storage Tank program for five years approximately, and if there have been any other Flying J cases, I honestly don't remember	2 3	CHAIRMAN RUSSELL: Motion carries unanimously. MR. WHALEN: Mr. Chairman, this is
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15 (Pages 54 to 57)

		1	
	Page 58		Page 60
1	staff attorney with DEQ. And my recollection of	1	appealed this would not agree to its dismissal
2	this case is simply that Sandy Rose did comply	2	with prejudice, because if in the future it
3	with our agreement to monitor, and also that she	3	appears as if there would be continuing problems,
4	did pay the penalty, I think at the full request	4	they did not want to forfeit their right to file
5	that we requested, if I recall. But she did go on	5	another appeal.
6	a payment schedule. So that was our negotiations	6	CHAIRMAN RUSSELL: Thanks, John.
7	and settlement with her. Are there any other	7	MR. ANDERSON: This is Anderson. I
8	questions on that one?	8	would think if we have a situation where the
9	MR. ANDERSON: Thank you.	9	settlement calls for future performance, that is
10	MS. SCHMIDT: You're welcome.	10	•
			ongoing type performance like this contemplates,
11	CHAIRMAN RUSSELL: Anything else?	11	the Department would not want to dismiss with
12	(No response)	12	prejudice either.
13	CHAIRMAN RUSSELL: Just for the record,	13	MR. NORTH: Mr. Chairman and Mr.
14	note that Joe voted no to that, authorizing the	14	Anderson, I really can't address that in any more
15	Board Chair to sign to dismiss that case.	15	detail simply because of my lack of knowledge of
16	The next thing on the agenda is in the	16	the actual details. But it was the Department's
17	matter of the appeal of River Rock County Water	17	permit that was being appealed here, so the
18	and Sewer District. Katherine.	18	Department would not have had a problem with
19	MS. ORR: Mr. Chairman, members of the	19	dismissal with prejudice, because the Department's
20	Board, this is a case out of Bozeman involving	20	action initially was what was being appealed, and
21	River Rock County Water and Sewer District. There	21	the Department, of course, had taken that action,
22	was a Montana groundwater pollution control system	22	and therefore was happy with it.
23	permit issued on March 1st, 2009, and the	23	MR. ANDERSON: Okay. I appreciate that
24	conditions of the permit were appealed in part,	24	clarification. Thank you.
25	and the Department apparently and the Appellant	25	CHAIRMAN RUSSELL: Any further
	Page 59		Page 61
1	5	1	Page 61 questions?
	got together, and decided upon mutually agreeable		questions?
2	got together, and decided upon mutually agreeable conditions. And this is a request to dismiss the	2	questions? (No response)
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16 (Pages 58 to 61)

		I	
	Page 62		Page 64
1	alleged to have altered its public water supply	1	maybe another briefing on what a settlement under
2	system without Department approval of the plans	2	41(a) actually does to the Board. And I do not
3	and specs. The alteration was installation of a	3	want to talk about that now.
4	reverse osmosis system. And the initial fine	4	MR. LIVERS: No, we won't, but we'll
5	requested was \$7,518, and you have before you	5	talk about it internally, and I will discuss with
6	again a 41(a) request for dismissal with	6	you offline whether we want to cover that. But
7	prejudice.	7	nonetheless, I think providing additional
8	CHAIRMAN RUSSELL: Thanks, Katherine.	8	information is certainly something we'll do.
9	Any questions for Katherine?	9	CHAIRMAN RUSSELL: Thanks, Tom. I do
10	MR. ANDERSON: This is Anderson again.	10	have an order of dismissal in front of me for Case
11	I'm just curious about the terms of the settlement	11	No. BER 2009-13-PWS, and I will entertain a motion
12	agreement.	12	to authorize the Board Chair to sign this
13	MS. ORR: We'll have a staff attorney	13	dismissal. Do I have a motion?
14	who can explain that.	14	MR. MILLER: This is Miller. So moved.
15	MR. LIVERS: Mr. Chairman, Mr. Anderson,	15	CHAIRMAN RUSSELL: It's been moved by
16	this is Tom again, and Ms. Schmidt is on her way	16	Marvin. Is there a second?
17	back up.	17	MS. KAISER: I'll second. This is
18	MS. SCHMIDT: Mr. Chairman, members of	18	Heidi.
19	the Board, this is Carol Schmidt. I'm again legal	19	CHAIRMAN RUSSELL: It's been moved and
20	staff at DEQ. And again, unfortunately, I don't	20	seconded. Further discussion?
21	have my papers right in front of me, but I do	21	(No response)
22	recall that Headwaters have agreed and have their	22	CHAIRMAN RUSSELL: All those in favor,
23	engineers submitting all that we requested for	23	signify by saying aye.
23	that action, for what they did in their plans; and	23 24	
	ş .		(Response)
25	then also, I think they came back with an offer	25	CHAIRMAN RUSSELL: Opposed.
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1	Page 63	1	Page 65
1	that was a reduced offer for the penalty, and the	1	(No response)
2	that was a reduced offer for the penalty, and the Department did accept it.	2	(No response) CHAIRMAN RUSSELL: Hearing none, we'll
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17 (Pages 62 to 65)

	Page 66		Page 68
1	Southern Montana's request for a contested case to	1	CHAIRMAN RUSSELL: Questions of
2	challenge a condensible particulate limit in its	2	Katherine?
3	air quality permit. That permit has since been	3	MR. PURDY: Yes. This is Ryan Purdy,
4	revoked, and so the issues in that case are moot.	4	Counsel for Wilderness Development. Can you hear
5	There isn't any basis to continue the contested	5	me?
	5		
6	case. And so I think Southern Montana's notice of	6	CHAIRMAN RUSSELL: Yes.
7	voluntary dismissal merely reflects the fact that	7	MR. PURDY: I'm sorry. Forgive me.
8	there aren't any remaining issues.	8	This is my first time in this mode of
9	MR. ANDERSON: Okay. Thank you.	9	communication, so I do apologize, I'm not sure. I
10	MR. RUSOFF: You're welcome.	10	would like to just be on the record in raising
11	CHAIRMAN RUSSELL: Any further questions	11	objection to the proposed order, and whatever
12	for Katherine or the Department?	12	action you guys take here today. My client
13	(No response)	13	objects to the proposed order because, one, it
14	CHAIRMAN RUSSELL: Hearing none, I do	14	does not completely address the issues raised by
15	have an order of dismissal in front of me for Case	15	my client; and two, to the extent it does, we
			5
16	No. BER 2007-06-AQ, and seek a motion to authorize	16	disagree with the order. We just want to reserve
17	the Board Chair to sign such dismissal. Do I have	17	all rights of appeal to this order.
18	a motion?	18	And I notice that the young woman who
19	MR. WHALEN: So moved, Mr. Chairman.	19	spoke before me I'm afraid I forgot her name.
20	Whalen.	20	I think it's Katherine she did state that you
21	CHAIRMAN RUSSELL: It's been moved by	21	guys have not received a motion for
22	Joe. Is there a second?	22	reconsideration. Katherine, is that appropriate
23	MR. MILLER: I second it. Miller.	23	in this meeting? If so, we can have one drafted
24	CHAIRMAN RUSSELL: It's been seconded by	24	and out to you early next week.
25	Marv. Any further discussion?	25	We just don't feel that the equitable
	-		· ·
	Page 67		Page 69
1	Page 67	1	Page 69 considerations raised in our motion for summary
1	(No response)	1	considerations raised in our motion for summary
2	(No response) CHAIRMAN RUSSELL: Hearing none, all	2	considerations raised in our motion for summary judgment were addressed in this order, and whether
2 3	(No response) CHAIRMAN RUSSELL: Hearing none, all those in favor, signify by saying aye.	2 3	considerations raised in our motion for summary judgment were addressed in this order, and whether we need to more fully expand those so that you can
2 3 4	(No response) CHAIRMAN RUSSELL: Hearing none, all those in favor, signify by saying aye. (Response)	2 3 4	considerations raised in our motion for summary judgment were addressed in this order, and whether we need to more fully expand those so that you can more clearly address them, or whether you can just
2 3 4 5	(No response) CHAIRMAN RUSSELL: Hearing none, all those in favor, signify by saying aye. (Response) CHAIRMAN RUSSELL: Opposed.	2 3 4 5	considerations raised in our motion for summary judgment were addressed in this order, and whether we need to more fully expand those so that you can more clearly address them, or whether you can just reconsider and rereview the specific facts alleged
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18 (Pages 66 to 69)

	Page 70		Page 72
1	partial delegation, I guess, and the Board can	1	MR. WHALEN: Mr. Chairman, Whalen. Just
2	entertain a motion to change this order if Counsel	2	as a matter of process, we've had a motion for
3	for Wilderness Club would like to do so, and then	3	summary judgment, we've had a denial order on the
4	the procedure that I would recommend is that the	4	motion for summary judgment. Wouldn't the next
5	Board have me review that for your approval.	5	step be for the Appellant to then appeal to the
6	CHAIRMAN RUSSELL: Katherine, I don't	6	Board formally?
7	think we have received we didn't receive the	7	MS. ORR: Mr. Chairman, members of the
8	record, and we did receive some additional	8	Board, this is an appeal before the Board already.
9	information, but it wasn't that long ago.	9	And Mr. Chairman, Mr. Whalen, I think you're
10	MS. ORR: Okay.	10	several steps ahead of yourself, and the first
11	CHAIRMAN RUSSELL: It just concerns me	11	thing that needs to happen is the Board needs to
12	that, first of all, that I haven't had much	12	adopt this proposed order or not.
13	opportunity to review any of this. And I don't	13	CHAIRMAN RUSSELL: What we have is the
14	know how the rest of the Board feels, but you	14	issue of summary judgment was basically trying to
15	still have the record.	15	streamline their case. And Katherine, you didn't
16	MS. ORR: Mr. Chairman, members of the	16	believe that their case was just based on the
17	Board, I think that what I need to do with the	17	material fact.
18	Department is to sit down and make sure that the	18	MS. ORR: Mr. Chairman, members of the
19	electronic record that is forwarded to the Board	19	Board, in this proposed order, the determination
20	for each one of these meetings is a little more	20	is that there was not a set of disputed material
21	all inclusive, and I will do that. And I agree.	21	facts; and as a matter of law, given the
22	That notwithstanding, what I would	22	definition of owner/operator under the applicable
23	recommend is that this go forward as it would,	23	rule and the permit itself, there was no basis to
24 25	which is that if Counsel wants to file a motion for reconsideration, Counsel can do that; or the	24 25	dismiss Wilderness Club as a responsible entity
20		20	under the permit, and the rules, and the statute,
	Page 71		Page 73
1	Board can delay action on the proposed order until	1	which was what Wilderness Club was requesting.
2	December, whatever is your druthers about that.	2	MR. PURDY: This is Ryan Purdy. Forgive
3	CHAIRMAN RUSSELL: Here is what I'm	3	me for interrupting. I think in the proposed
4	thinking. I don't mind doing something, be it	4	motion for summary judgment, that was only
5	telephoning again; but I guess literally I haven't	5	partially the question before the Board. Our
6	reviewed the supplemental documents, Katherine,	6	second argument was related to the equitable
7			
	and I don't know where everyone else is, but I've	7	0
8	and I don't know where everyone else is, but I've been a little busy with flu stuff up here, and	-	development or apportionment of the fees, and that
8 9	been a little busy with flu stuff up here, and	7 8 9	development or apportionment of the fees, and that was the second issue raised in the motion for
9	been a little busy with flu stuff up here, and literally I have not had this part of the record	8	development or apportionment of the fees, and that was the second issue raised in the motion for summary judgment, which was not identified in the
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9 10	been a little busy with flu stuff up here, and literally I have not had this part of the record that long. So I don't mind doing this, and	8 9 10	development or apportionment of the fees, and that was the second issue raised in the motion for summary judgment, which was not identified in the order, and I guess that's what we would be asking
9 10 11	been a little busy with flu stuff up here, and literally I have not had this part of the record that long. So I don't mind doing this, and Katherine, I certainly trust your judgment on	8 9 10 11	development or apportionment of the fees, and that was the second issue raised in the motion for summary judgment, which was not identified in the order, and I guess that's what we would be asking for reconsideration on.
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19 (Pages 70 to 73)

	Page 74		Page 76
1	Board, I'm looking in the language of the order,	1	MR. PURDY: Actually the Applicant was
2	and I'm not finding it right now, but this	2	Schwartz Construction, at least that is my
3	administrative board doesn't adjudicate equitable	3	understanding.
4	issues, so that's partly the basis for not	4	CHAIRMAN RUSSELL: Well, once again, I
5	addressing those issues. Now, if Counsel feels	5	get a little concerned here.
6	that maybe there is some authority to the	6	MS. ORR: Mr. Chairman, I think the best
7	contrary, then Counsel can present that to the	7	thing would be if Counsel is interested in filing
8	Board in the form of a motion for reconsideration.	8	a motion for reconsideration, that the Board could
9	MR. ANDERSON: This is Anderson. Can I	9	entertain that.
10	try to clarify this? The issue was whether or not	10	CHAIRMAN RUSSELL: I think that's wise.
11	Wilderness was a permittee and therefore liable	11	We'll get the record, and we'll get the permit,
12	for the violations of the permit?	12	and we'll get everything else in front of us, and
13	MS. ORR: Yes.	13	we'll get this figured out.
14	MR. ANDERSON: And Wilderness's argument	14	MR. PURDY: And so is it my
15	essentially is, "We had some joint venture or	15	
			understanding that we would file a notice of
16	something with somebody else, who we contend was	16	reconsideration, or motion for reconsideration, if
17	responsible for the violations of the permit, and	17	you will, and we would then have another telephone
18	therefore we should not be liable at least in	18	conference?
19	whole for the violations of the permit."	19	CHAIRMAN RUSSELL: Most likely, unless
20	MS. ORR: That's basically Is it okay	20	it's agreed to by the parties that we can hear
21	if I answer that, Mr. Chairman?	21	this at our next regularly scheduled Board
22	CHAIRMAN RUSSELL: Yes, that's fine.	22	meeting, and at that time we could hear it in
23	MS. ORR: That's basically correct,	23	person. If you want it expedited, we could
24	although the relationship of Wilderness Club and	24	possibly do it earlier, but we generally meet
25	Schwartz Construction is not a joint venture	25	every other month, so
-			
1			
	Page 75	-	Page 77
1	relationship.	1	MR. PURDY: I would raise the question
2	relationship. MR. ANDERSON: I was using that very	2	MR. PURDY: I would raise the question of trying to get it done sooner than later just
2 3	relationship. MR. ANDERSON: I was using that very loosely.	2 3	MR. PURDY: I would raise the question of trying to get it done sooner than later just because we are in the process of a trial schedule
2 3 4	relationship. MR. ANDERSON: I was using that very loosely. MS. ORR: Okay.	2 3 4	MR. PURDY: I would raise the question of trying to get it done sooner than later just because we are in the process of a trial schedule not this coming month, but the next.
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	Page 78		Page 80
1	formalize this process with a motion, if that's	1	have and I'm not discreetly familiar
2	going to be the will of the Board. I would be	2	specifically with these discrete provisions of the
2	opposed to the Board considering what Mr. Purdy	3	Administrative Procedure Act. Is there a
		4	provision in the Administrative Procedure Act for,
4	just proposed.	4 5	•
5	Essentially this is going to boil down		quote, "reconsideration," unquote, by the Board?
6	to an issue of contract law. I'm not an attorney,	6	MS. ORR: Mr. Chairman, Mr. Anderson, in
7	and I don't think all of the Board members are	7	these administrative contested case hearings, the
8	attorneys, though I appreciate that Mr. Anderson	8	Rules of Civil Procedure are impliedly adopted,
9	is. And we do have staff attorneys, and we have	9	and that would be the basis.
10	appointed Ms. Orr as our Hearings Examiner. This	10	MR. ANDERSON: That is my understanding
11	is basically an issue of indemnity, I think. And	11	as well. And if that is correct, then there is no
12	if we're going to go forward with this action, I	12	provision under the Rules of Civil Procedure for
13	really think we need to do it in the form of a	13	"reconsideration" other than provisions under Rule
14	motion.	14	59 and 60. So the Wilderness Club would have to
15	CHAIRMAN RUSSELL: I'm not exactly sure	15	focus its motion under Rule 59 or 60.
16	what a motion would look like, but if someone	16	MS. ORR: And Mr. Chairman, actually Mr.
17	would like to try one.	17	Madden would like to address this issue as well.
18	MR. ANDERSON: This is Anderson again.	18	MR. MADDEN: Mr. Chairman, members of
19	Can we clarify the present status of the	19	the Board, for the record, my name is Jim Madden.
20	situation? As I understand it, Ms. Orr, on behalf	20	I'm an attorney with the Department of
21	of the Board, has proposed an order which we have	21	Environmental Quality. I'm the Department's
22	before us, a proposed order denying motion for	22	attorney that's representing the Department in
23	summary judgment. We're being asked to either	23	this contested case.
24	accept or reject that proposed order.	24	Just a thought on process here. The way
25	Counsel for Wilderness Club has I	25	I understand what's before the Board now is I
	Page 79		Page 81
1	think he should characterize this as simply an	11	understend this to be a mosting at which the Reard
			understood this to be a meeting at which the Board
2	objection to the proposed order, as opposed to a	2	would be asked to adopt the proposed order denying
3	motion for reconsideration, because the order	2 3	would be asked to adopt the proposed order denying summary judgment as its own action, rather than
3 4	motion for reconsideration, because the order hasn't been adopted in the first instance, so	2 3 4	would be asked to adopt the proposed order denying summary judgment as its own action, rather than treating it as an interim order by the Hearings
3 4 5	motion for reconsideration, because the order hasn't been adopted in the first instance, so there is nothing for the Board to, quote,	2 3 4 5	would be asked to adopt the proposed order denying summary judgment as its own action, rather than treating it as an interim order by the Hearings Examiner to which the parties file exceptions.
3 4 5 6	motion for reconsideration, because the order hasn't been adopted in the first instance, so there is nothing for the Board to, quote, "reconsider."	2 3 4 5 6	would be asked to adopt the proposed order denying summary judgment as its own action, rather than treating it as an interim order by the Hearings Examiner to which the parties file exceptions. The Board would just directly immediately act on
3 4 5 6 7	motion for reconsideration, because the order hasn't been adopted in the first instance, so there is nothing for the Board to, quote, "reconsider." CHAIRMAN RUSSELL: Larry, this is Joe.	2 3 4 5 6 7	would be asked to adopt the proposed order denying summary judgment as its own action, rather than treating it as an interim order by the Hearings Examiner to which the parties file exceptions. The Board would just directly immediately act on the motions.
3 4 5 6 7 8	motion for reconsideration, because the order hasn't been adopted in the first instance, so there is nothing for the Board to, quote, "reconsider." CHAIRMAN RUSSELL: Larry, this is Joe. I do agree with that, except for the fact that it	2 3 4 5 6	would be asked to adopt the proposed order denying summary judgment as its own action, rather than treating it as an interim order by the Hearings Examiner to which the parties file exceptions. The Board would just directly immediately act on the motions. But I hear that the Board may be
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21 (Pages 78 to 81)

1	Page 82		Page 84
1	same end by converting this to a proposal for a	1	whatever we're calling it at this point, my client
2	decision with the parties given an opportunity to	2	may be just willing to stipulate to the current
3	file written exceptions, and present oral argument	3	order, preserving their right to appeal, and then
4	at the next meeting. Just a thought.	4	possibly ask a District Court, or appeal this
5	CHAIRMAN RUSSELL: I think that's a	5	matter to the District Court, so that it can
6	great thought, and maybe I've been leading me and	6	decide the equitable matters in the case. That
7	the Board. It does say "proposed order," but	7	may be a more appropriate venue for the question
8	there is no order for the Board in the packet, is	8	that Wilderness is raising.
9	there? And did I miss it?	9	So I think at least what I would propose
10	MS. ORR: No, there isn't, Mr. Chairman.	10	is that whatever we're doing here be subject to
11	And I have a comment, if that would be appropriate	11	our motion for reconsideration, so that if in fact
12	at this time. I think a couple of issues. One is	12	we fail to file, or if in fact we contact Mr.
13	the instance where the Board reserves jurisdiction	13	Madden and work out a deal where we agree not to
14	sometimes complicates the situation, because it's	14	file this motion for reconsideration, that
15	not clear the extent of the delegation to the	15	whatever action be taken today is your guys'
16	Hearings Officer.	16	action.
17	And in some of our previous cases SME	17	MR. WHALEN: Mr. Chairman, Whalen. I
18	Highwood was a good example there was a motion	18	think we need to set this in motion, and the
19	5 I		
	for summary judgment filed, and the Board	19	proper way to do it, given what I've heard so far,
20	definitely wanted to rule on those motions; and	20	is for one of us and I will do that to move
21	then there have been other cases where, again, the	21	to adopt the proposed order denying the motion for
22	Board has retained jurisdiction, but not to the	22	summary judgment.
23	extent of ruling on a motion for summary judgment.	23	CHAIRMAN RUSSELL: Is there a second?
24	So that's why I think we're sort of in	24	MR. MIRES: To move this forward this
25	this never-never land, and if it is the sense of	25	is Larry I'll second. Mires.
	Page 83		Page 85
1	-	1	Page 85 CHAIRMAN RUSSELL: It's been moved and
1	the Board that it wants to rule or not rule,		CHAIRMAN RUSSELL: It's been moved and
2	the Board that it wants to rule or not rule, but approve, or alter, or put its own imprimatur	2	CHAIRMAN RUSSELL: It's been moved and seconded. Discussion?
2 3	the Board that it wants to rule or not rule, but approve, or alter, or put its own imprimatur on this proposed order, that's certainly within	2 3	CHAIRMAN RUSSELL: It's been moved and seconded. Discussion? MR. MIRES: This is Mires, and I need a
2 3 4	the Board that it wants to rule or not rule, but approve, or alter, or put its own imprimatur on this proposed order, that's certainly within the Board's ability to do that. And that might be	2 3 4	CHAIRMAN RUSSELL: It's been moved and seconded. Discussion? MR. MIRES: This is Mires, and I need a little guidance on this. Can we actually act on
2 3 4 5	the Board that it wants to rule or not rule, but approve, or alter, or put its own imprimatur on this proposed order, that's certainly within the Board's ability to do that. And that might be what we want to do, and that's what Mr. Madden was	2 3 4 5	CHAIRMAN RUSSELL: It's been moved and seconded. Discussion? MR. MIRES: This is Mires, and I need a little guidance on this. Can we actually act on an order when we don't necessarily have an order
2 3 4 5 6	the Board that it wants to rule or not rule, but approve, or alter, or put its own imprimatur on this proposed order, that's certainly within the Board's ability to do that. And that might be what we want to do, and that's what Mr. Madden was addressing himself to.	2 3 4 5 6	CHAIRMAN RUSSELL: It's been moved and seconded. Discussion? MR. MIRES: This is Mires, and I need a little guidance on this. Can we actually act on an order when we don't necessarily have an order in the packet? That would be the question. And I
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22 (Pages 82 to 85)

Page 80 Page 80 1 reconsideration of the order? CHAIRMAN RUSSELL: So you're just going 2 MS. ORR: Well, then after So Watter State (1) 4 MS. ORR: Yes. After that's done, then MR. PURDY: It's possible. 5 Linkin the next step would be for this case to go any real reason for us not to take this motion up, 6 to a contested case hearing, which has to be then I think we should call for the question. 7 Defore the Board. MR. MIRES: This is Mires, and I have 9 CAHIRMAN RUSSELL: Does the party want MR. MIRES: This is Mires, and I have 10 Court thrown at us, which I'm not sure can be one clarification. Do we need to have the 11 one to name and brightight 14 I don't know. Do we need to clarity that in 15 there? 14 I don't know. Do we need to clarity that in 16 the appealed after a disposition on 15 16 the reprosed or and the appealed after a disposition on 16 16 the appealed ofter a disposition on the merits. 16 17 So the motion would be something like. "The Board 14 20 <				
2 MS. ORR: Well, then after 3 2 to split it up possibly. 3 CHAIRMAN RUSSELL: on appeal? 3 MR. PURDY: This possible. 4 MS. ORR: Yes. After that's done, then 5 1 Think the next step would be for this case to go to a contested case hearing, which has to be before the Board. 5 1 Think the mets motion up, then I think we should call for the question. 7 CARAIRMAN RUSSELL: Does the party want 6 10 then I think we should call for the question. 8 Caruft thrown at us, which I'm not sure can be 10 one cartification. Do we need to have the 11 10 8 Deard, I think it's implied under the provisions 14 of the Montana Administrative Procedure Act that 15 14 14 of the Montana Administrative Procedure Act that 16 14 I dom't know. Do we need to have the 10 16 the rests. MR. WHALEN: Mr. Chairman, Whalen. Just 11 14 I dom't know. Jou can if you like. 17 MR. WHALEN: Mr. Chairman, Whalen. Just 11 14 I dom't know. Jou can if you like. 18 to sort of answer Larry's concern and to highlight what Ms. as long as they go through the process. MR. MIRES: No. 21 of me in my packet. I don't know if you have 1 10	1.	-		-
3 CHAIEMAN RUSSELL: Or an appeal? 3 MR. PURDY_11's possible. 4 MS, ORR: Yes. After that's done, then 3 MR.PURDY_11's possible. 5 I think the next step would be for this case to go 4 CHAIEMAN RUSSELL: Well, unless you have 5 before the Board. CHAIEMAN RUSSELL: Does the party want 7 MS. ORR: MC. Chairman, I would agree 8 CHAIEMAN RUSSELL: Does the party want 7 MR. MIRES: This is Mircs, and I have 10 Court" thrown at us, which I'm not sure can be 10 one clarification. Do we need to have the 11 done until we actually settle the entire case. 3 And I just need to have a paint of clarification. 12 board, I think I's implied under the provisions 14 14 Idont know. Do we need to larify that in 15 the case can be appealed after a disposition on 15 MR. WALEN: Mr. Chairman, Whalen. Just 16 mmerits. MS. ORR: I think you can if you like. 17 MR. WALEN: Mr. Chairman, Whalen. Just 16 MS. ORR: I think you can if you like. 18 to sta a process whereby a formalized appeal 16 MR. MIRES: This is Mirres. Joe Whalen.			-	
4 MS, ORR: Yes. After that's done, then Fage 87 5 I think the next step would be for this case to go to a contested case hearing, which has to be 5 any rare reason for us not to take this motion up, then I think we should call for the question. 7 before the Board. 5 any rare reason for us not to take this motion up, then I think we should call for the question. 8 CHAIRMAN RUSSELL: Does the party want MS. ORR: Mr. Chairman, Ivould agree 9 MR. MIRES: This is Mires, and I have 10 Court firrow 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 the merits. 14 of the Montana Administrative Procedure Act that to sort of answer Larry's concern and to highlight 19 beard for full hearing, if that is the wish, as long as they go through the process. 21 and ber wideness, and this issue can come ande by Wideness, and this would a contil the any that it the proposed order is final." 14 treates a process whereby a formalized appeal can be made by Wideness, and this the process. 25 And Larry, I do have the order in front				
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23 (Pages 86 to 89)

	Page 90		Page 92
1	CHAIRMAN RUSSELL: I'm not sure, but	1	that shows up at the next meeting as well.
2	we'll certainly take Board comments.	2	CHAIRMAN RUSSELL: Just a comment on the
3	MS. KAISER: I just have a question for	3	interim meeting in November. November is really
4	Katherine, if it's appropriate, if there is an	4	looking bad for me.
5	update or progress on the changes to ARM	5	MR. MIRES: Same here.
6	17.30.201, the permit fee rate changes for water	6	CHAIRMAN RUSSELL: I have a couple out
7	discharges. I know there was a hearing earlier	7	of state meetings to attend, and we lose a whole
8	before in September.	8	week with Thanksgiving generally. So just keep
9		9	
	MS. ORR: Mr. Chairman, Heidi, that's a	-	that in mind when we're doing this, Katherine and
10	rule set that was heard, and I think the	10	Tom, that November really does not look good for
11	Department is intending to rereview some of the	11	me.
12	provisions of the rule.	12	MR. MIRES: Mr. Chairman, this is Mires.
13	MS. KAISER: Okay. Were there quite a	13	A question on Tom's last comment. You stated
14	few comments given at the hearing or	14	December 4. Is it the fourth or is it actually
15	MS. ORR: There were quite a few, yes.	15	December 11th for our next meeting?
16	MS. KAISER: Okay. That's all I needed.	16	MR. LIVERS: Apparently I got that
17	Thanks.	17	wrong, Mr. Chairman. It is the 11th.
18	MR. WHALEN: Mr. Chairman, Whalen. If I	18	MR. MIRES: Thank you.
19	may just direct a question to Ms. Orr. I think	19	CHAIRMAN RUSSELL: I have the same
20	the Board could use some general clarification,	20	thing. I have a BER question mark on the fourth.
21	because this issue will come up over and over	21	So it's not on the fourth?
22	again with respect to the difference between "with	22	MR. LIVERS: Mr. Chairman, let me
23	prejudice" and "without prejudice" when it comes	23	verify. We've got a couple different reports
23		23 24	
	to these dismissal cases, and what those terms		here. I've got it on my Outlook as the fourth,
25	mean, because they tend to be contrary to general	25	but let me verify, and we'll get something out to
	Dago 01		Dogo 02
1	Page 91	1	Page 93
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2	understanding of that phrase, for those phrases. MS. ORR: Mr. Chairman, I'd be glad to	2	the Board via email later today. CHAIRMAN RUSSELL: Joyce did send
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6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	Notary Public in and for the County of Lewis & Clark, State of Montana, do hereby certify: That the proceedings were taken before me at the time and place herein named; that the proceedings were reported by me in shorthand and transcribed using computer-aided transcription, and that the foregoing - 94 - pages contain a true record of the proceedings to the best of my ability. IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this day of , 2009. LAURIE CRUTCHER, RPR Court Reporter - Notary Public My commission expires	
21 22 23 24 25	My commission expires March 9, 2012.	