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1 BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
2 OF THE STATE OF MONTANA

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5 BOARD MEETING)
6 DECEMBER 6, 2013)

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9 TRANSCRIPT OF PROCEEDINGS

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12 Heard at Room 111 of the Metcalf Building
13 1520 East Sixth Avenue
14 Helena, Montana
15 December 6, 2013
16 9:00 a.m.

17

18 BEFORE CHAIRMAN ROBIN SHROPSHIRE,
19 BOARD MEMBERS LARRY MIRES,
20 JOSEPH RUSSELL, CHRIS TWEETEN, and HEIDI KAISER
21 (by telephone); and JOAN MILES

22
23

24 PREPARED BY: LAURIE CRUTCHER, RPR
25 COURT REPORTER, NOTARY PUBLIC

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

3 * * * * *

4 (Mr. Tweeten not present)

5 CHAIRMAN SHROPSHIRE: We should go ahead
6 and get started. I'll call this Board of
7 Environmental Review meeting to order. But since
8 this is a teleconference call, can we go ahead and
9 do a roll call. Would you mind doing that?

10 MR. LIVERS: For the record, this is Tom
11 Livers, Deputy Director of the Department of
12 Environmental Quality. I'll go ahead and do roll
13 call on this and on votes this morning. Ms.
14 Canty.

15 (No response)

16 MR. LIVERS: Ms. Kaiser.

17 MS. KAISER: I'm here.

18 MR. LIVERS: Ms. Miles.

19 MS. MILES: Here.

20 MR. LIVERS: Mr. Mires.

21 MR. MIRES: Here.

22 MR. LIVERS: Mr. Russell.

23 MR. RUSSELL: Here.

24 MR. LIVERS: Mr. Tweeten.

25 (No response)

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1 MR. LIVERS: Chair Shropshire.
2 CHAIRMAN SHROPSHIRE: Here.
3 MR. MIRES: Madam Chairman, this is
4 Larry Mires. If I might make one comment, that
5 when you're talking, you seem to be cutting out on
6 this end anyway, so I'm wondering if you're close
7 enough to the speaker.
8 CHAIRMAN SHROPSHIRE: Are you saying I'm
9 cutting out or that Tom is cutting out?
10 MR. MIRES: You're cutting out.
11 MR. RUSSELL: I get it, too, Robin.
12 You're cutting out.
13 CHAIRMAN SHROPSHIRE: Is this better?
14 MR. LIVERS: Yes.
15 MR. RUSSELL: Those three words are
16 better.
17 CHAIRMAN SHROPSHIRE: I had it on
18 speaker phone, so I'll just take it off the
19 speaker phone, if that works, if you can hear me
20 better now. Is that better?
21 MS. MILES: That's good.
22 CHAIRMAN SHROPSHIRE: Great. Thanks for
23 the feedback. All right. So let's go ahead and
24 get started. The first thing on the agenda is the
25 review and approval of the minutes of the October

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1 4th, 2013 meeting. Are there any questions about
2 the minutes?
3 (No response)
4 CHAIRMAN SHROPSHIRE: Hearing none, is
5 there a motion to approve?
6 MR. MIRES: Larry Mires would move to
7 approve.
8 CHAIRMAN SHROPSHIRE: It's been moved by
9 Larry. Is there a second?
10 MR. RUSSELL: Russell.
11 CHAIRMAN SHROPSHIRE: Seconded by Joe.
12 Any further discussion?
13 (No response)
14 CHAIRMAN SHROPSHIRE: All right.
15 Hearing none, all those in favor, signify by
16 saying aye.
17 (Response)
18 CHAIRMAN SHROPSHIRE: Opposed.
19 (No response)
20 CHAIRMAN SHROPSHIRE: All right. The
21 motion carries unanimously. The next item on the
22 agenda is the review and approval of the minutes
23 of the October 29th, 2013 meeting. Anybody have
24 questions about those minutes?
25 (No response)

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1 CHAIRMAN SHROPSHIRE: All right.
2 Hearing none, is there a motion to approve?

3 MS. MILES: I move approval. Joan.
4 CHAIRMAN SHROPSHIRE: It's been moved by
5 Joan. Is there a second?
6 MR. MIRES: Larry will second it.
7 CHAIRMAN SHROPSHIRE: Seconded by Larry.
8 Any further discussion?

9 (No response)
10 CHAIRMAN SHROPSHIRE: All right, hearing
11 none, all those in favor, signify by saying aye.

12 (Response)
13 CHAIRMAN SHROPSHIRE: Opposed.
14 (No response)

15 CHAIRMAN SHROPSHIRE: All right. The
16 motion carries unanimously. The next item on the
17 agenda are other administrative items, which I
18 think is setting the 2014 meeting schedule. So
19 Tom, will you go over that.

20 MR. LIVERS: Sure. Members of the
21 Board, Madam Chair, you've got in your packet the
22 proposed meeting dates. They are set primarily
23 around rule adoption schedules, and we've found a
24 pretty good alignment of potential recommended
25 dates there. Just for a reminder, I think you've

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1 got it in front of you, but we're recommending
2 January 21st, March 21st, May 30th, July 25th,
3 September 26th, and December 5th.

4 And the only thing I would point out --
5 and I'll talk more about this at the end of the
6 meeting -- is the January schedule, given the
7 contested case hearings, that January 21st is a
8 Tuesday. The rest are Fridays.

9 So the Department would recommend the
10 Board adopt this meeting schedule. We had asked
11 to give a heads up at the last meeting that the
12 Board have the Board members take a look at their
13 calendars and see if those work.

14 CHAIRMAN SHROPSHIRE: Any questions or
15 comments from the Board?

16 (No response)

17 CHAIRMAN SHROPSHIRE: So Tom, is this
18 something that we need to approve then?

19 MR. LIVERS: Yes. Madam Chair, I think
20 a quick motion, and I don't think it calls for a
21 roll call vote, but a vote would be in order.

22 CHAIRMAN SHROPSHIRE: Okay. Is there a
23 motion to approve the calendar as discussed by
24 Tom?

25 MR. MIRES: Larry would go ahead and

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1 move.

2 CHAIRMAN SHROPSHIRE: It's been moved by
3 Larry. Is there a second?

4 MS. KAISER: I'll second.

5 CHAIRMAN SHROPSHIRE: Seconded by Heidi.

6 Any further discussion?

7 (No response)

8 CHAIRMAN SHROPSHIRE: All right.

9 Hearing none, all those in favor, signify by

10 saying aye.

11 (Response)

12 CHAIRMAN SHROPSHIRE: Opposed.

13 (No response)

14 CHAIRMAN SHROPSHIRE: Motion carries.

15 Thanks, Tom. The next item on the agenda is

16 briefing items and contested case updates.

17 Katherine, can I turn that over to you, please.

18 MS. ORR: Yes. Thank you. Good morning

19 everyone.

20 Just going down the list here, there is

21 not too much to say about II(A)(1), which is BER

22 2012-11, Public Water Supply, Trailer Terrace

23 Mobile Park.

24 The next one involving Western Energy

25 Company. Also the parties are proceeding through

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1 their prehearing preparation; and as the agenda

2 reads there is going to be a teleconference on

3 April 14th or maybe perhaps sooner if the parties

4 request that, to then kind of see what the status

5 is. This is a hearing that comes before the

6 Board, so we'll be able to be a little bit more

7 specific, I think, the parties and I, with

8 scheduling it finally before the Board, and we'll

9 check back with you.

10 The next two items involving Colstrip

11 Steam and JE Corette, those are the ones that are

12 coming to hearing the third week of January, and

13 so I have been attempting to finish disposition of

14 the motions on those cases. I have ruled on all

15 of the motions that were pending on Colstrip

16 Steam. That's an order on a Motion for Leave to

17 Amend and Order on Appellant's Motion for Partial

18 Summary Judgment, and Order on Motion for Leave to

19 Supplement Briefs with Appellant's Discovery

20 Responses and Order on Motions in Limine.

21 And I've given an oral ruling on

22 Colstrip's and the Department's motion for summary

23 judgment, and am going to follow up with a written

24 order on that next week; and hopefully by the end

25 of next week, I'll have rulings on all of those

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1 similar types of motions that are pending for JE

2 Corette. And if any Board member wants to ask me

3 what the disposition of those rulings are, I'd be

4 glad to tell you.

5 CHAIRMAN SHROPSHIRE: Any questions?

6 (No response)

7 MS. ORR: And then I can move on to the
8 new contested cases if you'd like, if there are no
9 questions.

10 CHAIRMAN SHROPSHIRE: If there aren't
11 any questions from the Board, I would recommend
12 that we move on to new contested case cases.

13 MS. ORR: Okay. The first new contested
14 case In the Matter of the Violations of the
15 Sanitation and Subdivisions Act and Public Water
16 Supply Laws by Roger Emery at the Sunrise Motel.
17 That's in Richland County.

18 And this is a situation, we've had
19 similar situations, where it is a Subdivision Act
20 violation, and a Notice of Violation and
21 Administrative Compliance and Penalty Order was
22 issued by the Department on September 26th. There
23 was a hearing request by Sunrise Motel on October
24 24th challenging the issuance of the penalties,
25 the determination for the order designation of the
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1 penalties, which the combined penalties are
2 \$21,500.

3 What happened here was there was a
4 certificate of subdivision approval and a
5 certificate of trailer court approval; and as you
6 can imagine, there was a much greater expansion
7 from what those approvals gave by the owner, and
8 the deviation is contained in the order, the
9 Notice of Violation.

10 There was an addition of eight mobile
11 homes and 35 RV's without the Department's review
12 and approval; there was a connection of eight
13 mobile homes and 35 RV's, which raised the
14 population and the property served to 200 people,
15 which is about double the population authorized by
16 the Certificate of Subdivision approval, and in
17 excess of the units allowed by the Certificate of
18 Trailer Court Approval; and two public water
19 supply wells have been constructed and connected
20 to the public water supply without the
21 Department's approval.

22 MR. RUSSELL: Can I just butt in there
23 for a minute?

24 MS. ORR: Yes.

25 MR. RUSSELL: I'm not keeping up on the
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1 record, but what you just said, that public water
2 supply wells were connected, that's a presumption
3 that they meet the Public Water Supply Act. I
4 think it would be better to say two wells were
5 connected.

6 MS. ORR: Okay.

7 MR. RUSSELL: That may be semantics to
8 some, but maybe not to others.

9 MS. ORR: That's what I was reading from
10 the notice. It says, "Two public water supply
11 wells have been constructed and connected to the
12 public water supply system without the
13 Department's approval in violation of 75.6.112."

14 MR. RUSSELL: All right. I guess it is
15 however you define a public water supply well.

16 MS. MILES: It's a well being used for
17 public water supply which has not been approved
18 yet.

19 MR. LIVERS: Madam Chair, Mr. Russell, I
20 assume the reference there is based on the
21 population served meeting the definition. That's
22 probably where that reference comes from. I
23 understand your point.

24 MR. RUSSELL: It could be just being
25 picky, but --

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1 MS. ORR: No, it is good to be picky.
2 So that's basically that case. There is a
3 corrective action that was requested in the Notice
4 of Violation which may be instituted if there is a
5 ruling in favor of the Department. I don't know.
6 An odd thing about this case is there seems to
7 only be a challenge of the penalty imposition, so
8 that will play out during the course of the case,
9 but that's basically the case.

10 MR. MIREs: Madam Chair, can I set a
11 comment in here by chance?

12 CHAIRMAN SHROPSHIRE: Please.
13 Absolutely.

14 MR. MIREs: Tom, you're going to have to
15 correct me, please, because I'm not sure this is
16 -- right at this point in time, it says from the
17 review of it. But if I'm looking at this penalty,
18 it looks like the total penalty came up to be
19 \$31,500; but as I also review what these people
20 are doing down there in eastern Montana in
21 general, I'm not sure \$31,000 is sufficient.

22 And I'm basing that on the fact that a
23 lot of these people are springing these things up
24 and charging exorbitant prices for rent. Some of
25 them are up to \$1,000 a month per trailer, and a

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1 room is going for \$2,100 to \$2,500 a month for
2 just simply a room. So I see the locals are
3 taking advantage of a situation, and there is some
4 serious price gouging going on; but at the same
5 time, I also understand the influx of people
6 coming in and what's been through in the past.

7 I guess I would recommend that when this
8 goes to hearing and everything, I think the fine
9 ought to be maybe in proportion to what they've
10 been charging under an illegal permit for rent

11 space. And I don't know. I realize we're stuck
12 with the statute on what we can legitimately fine,
13 but --

14 CHAIRMAN SHROPSHIRE: Katherine, maybe
15 you could help us out here. As I understand it,
16 the question we have in front of us right now is
17 whether or not you will be the Hearing Examiner or
18 if the Board is going to hear this. I don't know
19 if there is any opportunity to change the scope of
20 what is coming in front of either you or us. Can
21 you help me out there?

22 MS. ORR: Madam Chair, first of all, I
23 apologize for not adding up the penalties
24 correctly. But I think the Board has discretion
25 to determine what the penalties are.

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1 CHAIRMAN SHROPSHIRE: When would be the
2 appropriate time to weigh in on that?

3 MS. ORR: Well, depending on what you
4 do. If you designate me as the Hearing Officer,
5 then conceivably it would go to a contested case
6 hearing, and then the result would be brought to
7 the Board for its approval based on the record; or
8 the Board could hear the matter itself and
9 determine itself what penalties it thought were
10 appropriate.

11 As you know, there is a fairly strict
12 set of guidelines for determination of the
13 penalty, and that's based on the rule language as
14 well as what the factual underpinning is. So
15 that's going to dictate what the penalties are.
16 There is some catch-all language such as, "as
17 justice may require," so that may affect the
18 penalty determination.

19 CHAIRMAN SHROPSHIRE: I guess I'll open
20 this up for discussion among the Board in terms of
21 thoughts on assigning this to Katherine, or if
22 there is any -- I mean I guess my preference is to
23 assign it to Katherine, but are there those on the
24 Board that are interested in hearing this?

25 MR. MIRES: This is Larry, Madam Chair.

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1 Also I agree assigning to Katherine for expediting
2 the issue as quickly as possible, because there
3 does need to be resolve in this area quickly on
4 those type of issues; but I would also throw out
5 as recommendation that in setting penalty that
6 maybe we ought to be thinking about considering --
7 are they gouging people in setting these things up
8 to make lucrative incomes, and not following the
9 rules and regulations, and attaching public water
10 system and public wastewater systems.

11 Somebody is going to pick up the tab on
12 this, and right now I'm not sure it is going in

13 right direction. But I really think to expedite
14 it, it would be best if Katherine could take the
15 case and get a resolve to it. Just my thoughts.

16 CHAIRMAN SHROPSHIRE: Thank you. Any
17 other discussions?

18 MS. MILES: Robin, this is Joan. Are
19 they still out of compliance, or are they working
20 with the Department to come into compliance?

21 MS. ORR: Madam Chair, Ms. Miles, I
22 don't know. I can't answer that.

23 MR. LIVERS: Madam Chair, Ms. Miles.
24 They are working with the Department to come into
25 compliance.

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1 CHAIRMAN SHROPSHIRE: Okay. Thank you,
2 Tom.

3 MR. RUSSELL: But I'm not sure that
4 answered -- Did that answer the question? Have
5 they stopped performing this illegal practice?

6 MR. LIVERS: Madam Chair --

7 CHAIRMAN SHROPSHIRE: Katherine, I don't
8 know. Can we discuss this?

9 MR. LIVERS: I think we're probably
10 about where we should be. We really can't get
11 into this at this point. I'm sorry.

12 CHAIRMAN SHROPSHIRE: Thanks, Tom. Any
13 other questions for Katherine from the Board?

14 (No response)

15 CHAIRMAN SHROPSHIRE: All right. I
16 guess I've asked this question before, but I'll --
17 just to help clarify this again for me. I'm
18 assuming we're going to assign this to Katherine,
19 but if this is assigned to Katherine, is it
20 appropriate for the Board to talk to Katherine in
21 the interim about this, or do we have to wait for
22 her ruling to weigh in on it?

23 MR. RUSSELL: Robin, this is Joe. My
24 understanding, and based on past practices, I
25 would assign it, and then we're going to get

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1 Katherine's record and order, and we could modify
2 it at that point. But I think Katherine should be
3 clear that -- I mean Larry makes a good point.
4 The economic benefit in this market place could be
5 severely under-estimated.

6 CHAIRMAN SHROPSHIRE: Thanks, Joe. I
7 don't think that changes the motion, but I'll
8 entertain a motion to appoint Katherine the
9 permanent Hearing Examiner.

10 MR. RUSSELL: I'll make that motion.
11 This is Joe.

12 CHAIRMAN SHROPSHIRE: It has been moved
13 by Joe. Is there a second?

14 MS. MILES: Second.

15 MR. MIRES: This is Larry. I'll second.
16 CHAIRMAN SHROPSHIRE: I heard Heidi
17 first. Seconded by Heidi. Any further
18 discussion?
19 MS. MILES: It wasn't Heidi, it was
20 Joan. And I'd be happy to have Larry second it.
21 MR. MIRES: Joan can have credit on this
22 one.
23 CHAIRMAN SHROPSHIRE: I'm sorry, Joan.
24 Seconded by Joan. Any further discussion?
25 (No response)

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1 CHAIRMAN SHROPSHIRE: All right.
2 Hearing none, all those in favor, signify by
3 saying aye.
4 (Response)
5 CHAIRMAN SHROPSHIRE: Opposed.
6 (No response)
7 CHAIRMAN SHROPSHIRE: Motion carries
8 unanimously. Tom, I did sort of a blanket
9 approval there. Do we need to do roll call when
10 it's unanimous?
11 MR. LIVERS: Madam Chair, I don't think
12 so. Not at all. And I'll try to anticipate as
13 well with you when it sounds like something is
14 potentially not going to go unanimously.
15 The other thing I'd just remind the
16 Board, and while I'm not advocating the Board hear
17 this case itself, but in the past when it has
18 wanted to keep its options open -- You haven't
19 precluded that at this time. I recognize the
20 Board is less interested maybe in hearing it
21 directly, and more interested in making sure its
22 interests are heard by Katherine; but just
23 remember, that even when the Board chooses to hear
24 cases itself, typically Katherine will do all of
25 the prehearing motions, and so you really haven't

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1 precluded that if at the next juncture you choose
2 to hear it yourself.
3 CHAIRMAN SHROPSHIRE: Okay. So are we
4 okay with the motion as it stands, Tom?
5 MR. LIVERS: Yes, we are.
6 CHAIRMAN SHROPSHIRE: Okay. Great.
7 Thanks for that. Good discussion. Katherine, can
8 you discuss the next new contested case, please.
9 MS. ORR: Yes. Madam Chair, members of
10 the Board. This next case is captioned In the
11 Matter of the Notice of Appeal and Request for
12 Hearing by Montana Environmental Information
13 Center regarding DEQ's approval of Coal Mine
14 Permit No. C1993017, issued to Signal Peak Energy,
15 LLC, for Bull Mountain Mine No. 1 in Roundup.
16 Basically this involves the issuance of

17 an amended permit to increase the number of
18 acreage -- the increase is 7,161 acres for mining.
19 And in order to issue this amendment, the
20 Department completed a preparation of its written
21 findings, including a cumulative hydrologic impact
22 assessment, which is not in the materials; but
23 they did that. And MEIC filed an Appeal and
24 Request for Hearing under 82-4-206, and the
25 grounds for the appeal are assessment of whether

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1 there was material --
2 Basically MEIC is challenging the
3 Department's assessment of damage to the
4 hydrologic balance outside the permit area, and
5 they're saying that the Department employed the
6 incorrect legal standard -- and then I'll just use
7 the language that MEIC used in their request or
8 their appeal -- that "The Department's
9 determination was not in accordance with the law
10 because the permit application did not demonstrate
11 that the proposed mine expansion was designed to
12 prevent material damage to the hydrologic
13 balance."

14 The parties and I have been discussing
15 one aspect of these types of hearings, which is
16 that the hearing must be held within thirty days
17 of the request for hearing. Also pending is a
18 motion to intervene by Signal Peak Energy, and I
19 am preparing an order basically granting the
20 motion for intervention as we speak, so to speak;
21 and the parties thankfully have entered into a
22 joint stipulation to waive the time frames for the
23 hearing. So this is what's been happening already
24 in this case, and I just wanted to inform you.

25 If you wanted me to go into more detail

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1 about the waiver, I certainly can, or maybe I'll
2 just add a few things. One is the thirty day time
3 frame has been waived by agreement of all of the
4 parties, and the parties are anticipating and
5 mention in their waiver that there will be
6 briefing around a summary judgment motion; and if
7 it turns out that there has to be development of
8 the factual record in this case by virtue of a
9 denial of the Motion for Summary Judgment, then
10 that could come at a later time.

11 CHAIRMAN SHROPSHIRE: Thanks, Katherine.
12 Any questions? I'll open it up for discussion to
13 the Board. Any comments, questions for Katherine?

14 (No response)

15 CHAIRMAN SHROPSHIRE: Katherine, are you
16 available to continue working on this if we
17 appoint this to you?

18 MS. ORR: Yes.

19 CHAIRMAN SHROPSHIRE: Okay. I would
20 entertain a motion to appoint Katherine as the
21 permanent Hearing Examiner on this.

22 MR. RUSSELL: This is Joe. I'll make
23 that motion for further discussion purposes.

24 CHAIRMAN SHROPSHIRE: Okay. Is there a
25 second?

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1 MR. MIRES: Larry will second.

2 CHAIRMAN SHROPSHIRE: Seconded by Larry.
3 So let's open it up for discussion then.

4 MR. RUSSELL: Now that Robin --

5 OPERATOR: Now joining name not
6 reported.

7 MR. LIVERS: For the record, would the
8 person who came on line please identify.

9 MS. KAISER: Actually it's Heidi. I
10 accidentally pressed "end" instead of "mute." So
11 I'm back.

12 MR. LIVERS: Great. Thank you.

13 MR. RUSSELL: So Robin, not to put you
14 too much on the spot, because I always kind of
15 pushed these --

16 CHAIRMAN SHROPSHIRE: No, it's good.
17 I've had a steep learning curve, so correct me
18 anytime, Joe.

19 MR. RUSSELL: Not for that reason, but
20 that we're so quick to push this one to Katherine.

21 CHAIRMAN SHROPSHIRE: That's why I
22 wanted to open it up to discussion, so let's talk
23 about it.

24 MR. RUSSELL: I would actually rather
25 see it stay in its own status right now to see how

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1 this starts to move, and then maybe -- because
2 some time frames have been pushed out, maybe just
3 keep it in the status it is in, and just kind of
4 see how it rolls along for awhile.

5 CHAIRMAN SHROPSHIRE: I'd certainly
6 support that. Any other comments?

7 MR. MIRES: Madam Chair, this is Larry.
8 I guess my question to Tom and Katherine is: Can
9 we do it that way, and not turn it over Katherine
10 at this time, and just let it roll as it is?

11 MR. LIVERS: Madam Chair, Mr. Mires,
12 yes, you can. If you take no action at this
13 point, Katherine will continue to do the initial
14 work, the prehearing work, and you clearly reserve
15 that decision for later.

16 MS. ORR: That's right.

17 MR. LIVERS: So if the motion were
18 withdrawn or were to fail, that would be the same
19 effect.

20 CHAIRMAN SHROPSHIRE: What's the more

21 proper avenue? Do we vote on it? Do we oppose it
22 if we want it to fail, or how do we remove the
23 motion?

24 MR. LIVERS: I think I would suggest you
25 withdraw the motion.

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1 MR. MIRES: I would withdraw my second.

2 This is Larry.

3 MR. RUSSELL: I'll withdraw my motion.

4 CHAIRMAN SHROPSHIRE: So there is no
5 motion on the table, and we'll take no action on
6 this, and let Katherine continue to act as the
7 interim Hearing Examiner; is that a fair
8 statement?

9 MR. LIVERS: That's correct, and that's
10 what the minutes will reflect.

11 CHAIRMAN SHROPSHIRE: Okay. Great.
12 Joe, thanks for that. Any other discussion on
13 this matter?

14 (No response)

15 CHAIRMAN SHROPSHIRE: And Heidi, you
16 dropped off, you came back on, but I don't think
17 anybody else has joined; is that correct?

18 MR. LIVERS: That's correct, I think.

19 CHAIRMAN SHROPSHIRE: Okay. Great.

20 MR. RUSSELL: Robin, was this one of
21 these in the past, Heidi, that you recused
22 yourself from?

23 MS. KAISER: Yes, and I was just about
24 to do that; but since we're not taking action,
25 when it comes before us again, I will be asking to

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1 be recused.

2 CHAIRMAN SHROPSHIRE: Okay.

3 MR. RUSSELL: Latent memory. Sorry.

4 MS. KAISER: A good latent memory.

5 CHAIRMAN SHROPSHIRE: So moving on to
6 the final action on contested cases, I may need
7 some help with this in terms of framing our
8 motion. But Katherine, can I turn this over to
9 you to describe what's going on here.

10 MS. ORR: Yes. Members of the Board,
11 what we're about to discuss is In the Matter of
12 Request for Hearing by Hawthorne Springs Property
13 Owners Association, H Lazy Heart, LLC, Patchy,
14 Inc., and other residents regarding the open cut
15 mining permit No. 2258 issued to Farwest Products,
16 Missoula County, BER 2012-09-OC. And I just refer
17 to the full title because it tells you all of the
18 parties.

19 But MAPA does not specifically require
20 that dispositions of motions to dismiss and
21 motions for summary judgment be approved by the
22 Board, but I think it is a good idea. Generally

23 under the language in MAPA, or let me say
24 specifically, it is required if a case goes to a
25 hearing on the merits, then the Board absolutely
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1 must approve the findings of fact and conclusions
2 of law.

3 In this situation, we had the Department
4 and the Respondents file -- in the case of the
5 Respondents a motion to dismiss; and in the case
6 of the Department a motion to dismiss, or in the
7 alternative a motion for summary judgment; and I
8 granted those motions in part, and I'll explain
9 that more specifically. But I gave the Appellants
10 here, the Petitioners, the opportunity to file
11 exceptions, and for the Board to review those
12 exceptions, and then decide what it wants to do.
13 And I'm just explaining that isn't necessarily a
14 step that we have to take, but I think it is a
15 good idea.

16 And so exceptions were filed by the
17 Appellants, the Petitioners or requesting parties,
18 and the Department and Farwest Rock Products filed
19 responses to those exceptions, and then I
20 circulated to the Board a proposed draft order for
21 its signature, and you have that. It is called
22 Order Adopting -- Recommended Order Dismissing
23 Requesting Parties, and Awarding Summary Judgment
24 to the Department Against the Remaining Requesting
25 Parties. This is all rather confusing, so I hope
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1 I can unscramble it for you.

2 But you have this. It is in its final
3 form, but you guys can do whatever you want
4 concerning what you believe should be the
5 disposition of this case. I put it before you
6 because it does encapsulate what the procedure has
7 been, and sort of what your findings would be.

8 This is a case that centers around a
9 couple of provisions in the Open Cut Act. One of
10 them is 82-4-427, which is the provision that
11 addresses who can ask for a hearing when the
12 Department determines to issue an open cut mining
13 permit; and another one, 82-4-432, which is
14 lengthy, and somewhat unclear, shall we say, that
15 is the provision which determines the process by
16 which the Department parses through the
17 information given by applicant, which is the open
18 cut mining company; and it is the process by which
19 the Department determines which of the surrounding
20 landowners may be involved in the evaluation
21 process of the application.

22 And 82-4-432 I think Sub (9) is very
23 clear that it is only those surrounding owners who
24 own land one half mile from the proposed mine site

25 who can weigh in, who can request a hearing, and
0028

1 then at this hearing give their analysis of
2 whether or not the application should be granted
3 based upon the elements of the statute.

4 And sometimes it is kind of confusing,
5 because when you ask for a public hearing, it is
6 not a public hearing under the open meeting law,
7 it is a public hearing, because this is a
8 contested case hearing, but it is a public
9 meeting, a public meeting I should say under this
10 82-4-432.

11 And the way that reads is if 30 percent
12 or ten of those surrounding landowners request a
13 public meeting, that must be held. Well, in this
14 case, that public meeting wasn't held by the
15 Department because not enough of those landowners
16 in proximity under the statutory language to the
17 mine site requested a hearing. There were
18 landowners a little bit further away who requested
19 a hearing and could have met that quota, if you
20 will, but there weren't enough requests from the
21 landowners in closer proximity under the statutory
22 language.

23 So under 82-4-427, that's the provision
24 that allows parties to request a hearing. It
25 says, "Subject to subsections 1(b) and 1(c), a
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1 person whose interests are or may be adversely
2 affected by a final decision of the Department to
3 approve or disapprove a permit application and
4 accompanying material or a permit amendment
5 application are entitled to a hearing before the
6 Board," and this is the provision that the
7 requesting parties proceeded under.

8 And the subject of the motion to dismiss
9 is: Do all of the requesting parties have a right
10 to a hearing under this provision? And the ruling
11 that I'm recommending is that by virtue of the
12 specificity of 82-4-432 and 82-4-427, what the
13 statute contemplates is that it is only those
14 landowners who possess land within one half mile
15 of the mine boundary that are entitled to that
16 have right to a hearing.

17 And the reason for that is that the
18 language is very specific about stating that it is
19 "persons whose interests are or may be adversely
20 affected by a final decision of the Department --"
21 and then this is the operative language -- "to
22 approve or disapprove a permit application and
23 accompanying material," and that is what 82-4-432
24 allows the public to comment on, is the
25 application and accompanying material; and you

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1 can't comment on those unless you're landowners
2 within the one half mile proximity to the mine
3 site.

4 So that is sort of the main basis for
5 saying that those requesting parties who don't
6 have ownership of land within that geographic
7 requirement would be dismissed. There is a
8 requesting party, though, there is one, and that's
9 H Lazy Heart, LLC, which does have land ownership
10 within the statutory requirement.

11 So then the analysis shifts to, as the
12 Department put forward, whether there should be
13 disposition on the basis of a summary judgment, on
14 basis of summary judgment, in favor of the
15 Department or not; then in other substantive
16 issues, such as whether the Department complied
17 with 82-4-432 in developing or approving of a plan
18 of operation appropriately under this statute.

19 And I ruled that some of the issues that
20 were brought up by remaining requesting party
21 H Lazy Heart, LLC are outside of the coverage of
22 this statute; and those that are within it were
23 handled appropriately by the Department. And I
24 was able to determine that by looking at the sworn
25 affidavit submitted by the Department.

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1 One feature of summary judgment motions
2 -- and they're not granted lightly, because after
3 all, they're a disposition. They're a summary
4 disposition. The parties don't get to go to
5 hearing. But one of the features in the rule, in
6 Rule 56, is that if parties are coming forward on
7 a summary judgment motion or in opposition to a
8 summary judgment motion, they must come forward
9 with sworn evidence.

10 And one of the things that happened in
11 this case is that the Petitioners, the remaining
12 requesting party, did not present any sworn
13 affidavits in opposing the Department's motion for
14 summary judgment, and therefore they didn't meet
15 their burden to show that there was a material
16 issue of fact to then prevent disposition on
17 summary judgment. And the remaining requesting
18 party through Counsel was arguing in their
19 exceptions that no, 82-4-427 doesn't require that
20 you do that, that you come forward with evidence
21 on a summary judgment disposition.

22 And sort of the step that has to be
23 brought into this analysis is there are a number
24 of cases now which allow in an administrative
25 setting use of the state rules and state juris

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1 prudence through the Courts regarding summary
2 judgment motions to dispose of cases on summary

3 judgment, i.e., the Rules of Civil Procedure can
4 be used as guidance in these administrative
5 hearings. So the Rules of Civil Procedure and
6 applicable juris prudence do apply, and you have
7 to apply then the principle that you have to come
8 forward with sworn evidence, and the remaining
9 requesting party did not do that.

10 And therefore, I would submit that
11 disposition of summary judgment is appropriate in
12 this case; and basically if you read the
13 exceptions, the response to exceptions of the
14 Department and Farwest, they emphasize these
15 points as well.

16 So if anyone has any questions after
17 that long and turgid explanation, I'd be glad to
18 answer them.

19 CHAIRMAN SHROPSHIRE: I'm hoping we have
20 some discussion on this. Does anybody have any
21 questions for Katherine? Or just open it up for
22 discussion.

23 MR. RUSSELL: This is Joe. Actually,
24 Katherine, I thought you summarized it pretty
25 clearly. If they didn't meet the burden of the
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1 law, why would we allow them to continue in the
2 process?

3 MS. ORR: Is that a question?

4 MR. RUSSELL: No, it is a comment. I
5 think your points are well taken. I think we
6 should move on your action, or on your
7 recommendation.

8 CHAIRMAN SHROPSHIRE: Any other
9 questions?

10 MS. MILES: This is Joan. I just have
11 more of a -- not on the legal proceedings, but a
12 question about how those geographic distances are
13 determined. And maybe it goes to more of a
14 question about how the permit is granted. Are
15 those open cut mines developed over a period of
16 time, but an entire area has been permitted, so
17 the distance for property owners would be anyplace
18 within that area?

19 MS. ORR: Madam Chair, Board Member
20 Miles, you have put your finger on another aspect
21 of this case that I didn't address and I should.

22 MS. MILES: I did see something.

23 MS. ORR: Yes. It is very interesting.
24 One of the things that the requesting parties fear
25 is that under the language in the statute which
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1 allows expansion of an open cut mine site, that
2 the ones who become more in proximity within this
3 one half mile determination because of the
4 expansion won't have the opportunity to then

5 comment. And the statute does say that there has
6 to be a 50 percent expansion before it gets sort
7 of opened up to comment by the adjoining
8 landowners. That is a real concern. And the
9 statute only addresses itself to a 50 percent
10 expansion. So if there is a 25 percent expansion,
11 they may be out of luck. It is a concern.

12 The problem is I don't think it is an
13 issue that's ripe for determination at this point.
14 There is a doctrine in the law that in order for
15 an issue to be adjudicated, it has to be, quote,
16 "ripe," or else it is not a case or controversy.
17 And that is something that I think I mentioned in
18 the recommended order, that there is no ripeness
19 at this point.

20 But addressing your comment
21 specifically, what happened was, as far as I can
22 tell, there is this geographic area for the mine
23 site. Farwest determined to place their mine site
24 in one location, then they determined to place it
25 elsewhere, and the effect of that was to exclude

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1 some of the surrounding landowners because they
2 were further than the one half mile land ownership
3 from the boundary of the mine site. That's what
4 happened.

5 MS. MILES: How bound are they to that
6 particular mine site? Could they go back -- I'm
7 just concerned about that language that said "the
8 property owners whose interests are or may be
9 affected," and how do you limit that? How do you
10 determine that? Could they go back to the
11 original site? What would be the process? Would
12 they have to go through another permitting
13 process?

14 MS. ORR: Board Member Miles, Madam
15 Chair. I think it would be determined again by
16 this very specific and somewhat difficult
17 statutory language which addresses itself to
18 whether there is a 50 percent expansion. If there
19 were a 35 or 25 percent expansion, there wouldn't
20 be a process anew for a public meeting. Let me
21 say it wouldn't be required. Maybe the Department
22 would want to hold one anyway.

23 And there are other interests, if I may
24 add something. There are other interests that the
25 Petitioners, the requesting parties are asserting

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1 that bother them: Impact to their property
2 values, noise, dust. These are all very real, and
3 there may be other avenues, such as nuisance
4 claims or other claims under other statutes that
5 they could proceed under. So I don't know. That
6 was going a little bit beyond your question.

7 CHAIRMAN SHROPSHIRE: Joan, do you have
8 any follow up questions or --

9 MS. MILES: Well, I guess it is a bit
10 troubling to me that it looks like an intentional
11 effort to try to exclude parties, and that there
12 may be a loophole to go back in and impact their
13 interests without an opportunity to comment based
14 on that 50 percent rule.

15 However, I would also move to the issue
16 that Joe commented about, that if the Petitioners
17 have not met the -- irrespective of the number of
18 landowners involved, if they have not met their
19 legal burden, then --

20 OPERATOR: Now joining.

21 MR. TWEETEN: Chris Tweeten.

22 (Mr. Tweeten present)

23 MS. MILES: -- I think we have to be
24 bound by that. But it is a troubling case for me.

25 MR. RUSSELL: This is Joe. Robin, this
0037

1 is specifically to Joan. It is always troubling
2 to me that you have an arbitrary half mile
3 decision matrix, because that doesn't mean
4 anything either. It is sad. I think Joan
5 probably dealt with these as a local Health
6 Officer. I have. There may be some people in the
7 DEQ audience that have dealt with these also. But
8 they do impact other people's property, and a half
9 mile is nothing more than an arbitrary line. And
10 that's clearly just a comment.

11 CHAIRMAN SHROPSHIRE: Right. I'm not
12 suggesting we do this, but like I said, in terms
13 of my learning curve, I have just a process
14 question.

15 If there were a situation where the
16 Board needed more time to review something, can
17 you, Tom or Katherine, help me understand the
18 process for -- Again, I'm not saying we do this
19 for this, but it does raise some of those
20 questions in this case. If we need more time to
21 review something, what is the process for doing
22 that?

23 MS. ORR: Madam Chair, I think in this
24 case, for example, you could defer a decision
25 until your next meeting, or depending on the
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1 exigency of the circumstances, until a special
2 meeting by conference call.

3 MR. RUSSELL: Robin, this is Joe again.
4 Not to belabor the point, but we have an order in
5 front of us that Katherine feels comfortable
6 enough to write.

7 CHAIRMAN SHROPSHIRE: Understood.

8 MR. RUSSELL: And so this isn't one that

9 we're just -- We have something that -- and as
10 Katherine said, the summary judgment isn't taken
11 lightly. I mean it is literally only based on
12 material fact, and there just doesn't seem to be
13 -- (inaudible) -- the fact that they didn't meet
14 the burden of the law.

15 CHAIRMAN SHROPSHIRE: And again, just to
16 clarify, Joe, I'm not suggesting that we do that.
17 I just wanted to understand if that was an option.
18 And so I want to share with you my understanding.
19 So in terms of what we're proposed with, it is a
20 Recommended Order Dismissing Requesting Parties
21 and Awarding Summary Judgment to the Department
22 against the Remaining Requesting Party; did I say
23 that correctly?

24 MS. ORR: Madam Chair, yes. And I can
25 explain it if you want.

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1 CHAIRMAN SHROPSHIRE: Yes, please.

2 MS. ORR: The disposition really
3 benefits the Department and the Respondent, but I
4 can explain it sort of in two parts. One is there
5 were certain requesting parties, for example,
6 Hawthorne Springs Property Owners, Patchy, Inc.,
7 and other residents who weren't named, who were
8 those who petitioned for a public meeting, but
9 whose ownership circumstances put them outside of
10 the one half mile coverage of the statute, so they
11 were dismissed as parties. And that is the motion
12 that Farwest Rock Products put forward, a motion
13 to dismiss, so that was granted in part, as to
14 Hawthorne Springs Property Owners Association, and
15 Patchy, Inc., and the other residents.

16 It was not granted, though, as to H Lazy
17 Heart, LLC, so that's the first part of that
18 order. So it is a recommended order dismissing
19 requesting parties, certain ones of those, and
20 then awarding summary judgment to the Department
21 against the remaining requesting party, which is
22 H Lazy Heart, LLC.

23 So it is not usual that we have to go
24 into the explanation of the title of a recommended
25 order, but this is extremely confusing.

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1 CHAIRMAN SHROPSHIRE: That's why I just
2 wanted to make sure that the order was clear. Any
3 other questions or discussion from the Board?

4 (No response)

5 CHAIRMAN SHROPSHIRE: We have an order
6 in front of us. Is there a motion to authorize
7 the Board Chair to sign?

8 MR. RUSSELL: This is Joe. I would make
9 a motion to authorize the Board Chair to sign the
10 notice in front of us.

11 CHAIRMAN SHROPSHIRE: Thanks, Joe. It
12 has been moved by Joe. Is there a second?

13 MR. MIRES: Larry will second.

14 CHAIRMAN SHROPSHIRE: It has been
15 seconded by Larry. Any further discussion?

16 MS. MILES: This is Joan. The order is
17 what we received this morning. Had I received
18 this earlier?

19 MS. ORR: You received it this morning.

20 CHAIRMAN SHROPSHIRE: That's the order
21 that I'm referring to, is the one that we received
22 this morning. Correct.

23 MS. ORR: And Madam Chair, may I make a
24 comment on that? Typically these orders aren't
25 very complicated, so the actual order and so the

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1 language that you review is given to you the day
2 of the Board hearing; but this should have been
3 given to you earlier.

4 CHAIRMAN SHROPSHIRE: That's why, I
5 guess to add comment to that, I wanted to make
6 sure that everyone is comfortable with moving
7 forward today, and it sounds like -- I'm not
8 hearing opposition that we are. So any other
9 discussion on that?

10 (No response)

11 CHAIRMAN SHROPSHIRE: Okay. Hearing
12 none, all those -- shall we do a roll call for
13 this, Tom?

14 MR. LIVERS: Sure. Ms. Kaiser.

15 MS. KAISER: In favor.

16 MR. LIVERS: In favor of the motion.

17 Ms. Miles.

18 MS. MILES: Yes.

19 MR. LIVERS: Mr. Mires.

20 MR. MIRES: Yes.

21 MR. LIVERS: Mr. Russell.

22 MR. RUSSELL: Aye.

23 MR. LIVERS: Mr. Tweeten.

24 MR. TWEETEN: (No response)

25 MR. LIVERS: Chairman Shropshire.

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1 CHAIRMAN SHROPSHIRE: Aye. Opposed?

2 (No response)

3 MR. LIVERS: None heard.

4 CHAIRMAN SHROPSHIRE: Okay. I'm not
5 sure if Mr. Tweeten voted, but I guess --

6 MR. LIVERS: Ms. Shropshire, I would
7 assume --

8 MR. TWEETEN: Robin, this is Chris.

9 MR. LIVERS: I'm assuming since he
10 wasn't here for the start of the discussion, he
11 felt it best to stay out of the vote.

12 CHAIRMAN SHROPSHIRE: (Inaudible)

13 MR. TWEETEN: That's correct. I didn't
14 vote because I just got on a few minutes ago. I
15 had it in my mind that this call was at one
16 instead of nine. (Inaudible)

17 CHAIRMAN SHROPSHIRE: That makes sense,
18 and I just wanted to make sure that -- I don't
19 know if that is -- so those that voted, it was
20 unanimous, and Mr. Tweeten did not vote. So I
21 just wanted to clarify that for the record. Is
22 that clear enough?

23 MR. LIVERS: Yes. And the minutes will
24 reflect that.

25 CHAIRMAN SHROPSHIRE: Okay.

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1 MR. LIVERS: Just a quick update.
2 Obviously Mr. Tweeten joined us during this
3 discussion. We did receive an email from Ms.
4 Canty that she's ill today, so she won't be
5 joining us.

6 I think, Madam Chair, I might request
7 just a short break for the Court Reporter. Five,
8 ten minutes ought to do it, and then we could
9 resume.

10 CHAIRMAN SHROPSHIRE: That sounds great.
11 If we start back at 10:15, is that enough time?

12 MR. LIVERS: Sounds good.

13 MR. RUSSELL: Do you want us to --

14 CHAIRMAN SHROPSHIRE: I'm just going to
15 stay on the phone, and we'll reconvene in about
16 ten minutes.

17 (Recess taken)

18 CHAIRMAN SHROPSHIRE: Why don't we go
19 ahead and get started. So the next item on the
20 agenda under Final Actions on Contested Cases is
21 In the Matter of the Request for Hearing by
22 William E. Smith on behalf of Mike Adkins
23 regarding the Park County denial to validate
24 Adkins Class III Waste Tire Monofill License.
25 Katherine. Do you have any comments on that?

0044

1 MS. ORR: And Madam Chair, members of
2 the Board. Before the Board is an order
3 dismissing this case with prejudice. Basically
4 the parties got together and had decided that --
5 Well, let me just say the parties have agreed that
6 dismissal is appropriate. I can refresh the
7 Board's memory. Maybe some of the Board members
8 would like to know a little bit about this case
9 because they weren't in authority, I should say,
10 when the case came to fruition.

11 But this is a case involving a Class III
12 waste tire monofill license that was requested to
13 be issued by the Adkins, who wanted to put in this
14 Class III waste tire monofill waste site in the

15 Paradise Valley. And Dr. Wadle from Park County
16 refused to validate the license, and that's part
17 of the statutory process. The Department had
18 validated the license, but then it goes to the
19 local Health Officer under 75.10.225, and the
20 local Health Officer refused to validate it.

21 This was then appealed to the Board, and
22 there were intervenors, Protecting Paradise, who
23 entered into the case. And the case, I would say
24 a majority of the questions had to do with the
25 adequacy of the EA that was done, and whether an
0045

1 EIS should have been done to determine the
2 collateral impacts of installation of this waste
3 site. And the parties, some parties appealed to
4 the District Court in Park County.

5 And then this case was stayed for a long
6 while, and then the District Court issued an
7 opinion that an EIS had to be done. And so the
8 parties, the intervenors, the appellants, the
9 Adkins, Park County, and the Department,
10 determined that the District Court's decision
11 rendered further disposition at this
12 administrative level moot. And therefore, there
13 is a request to dismiss this case with prejudice
14 by agreement of the parties.

15 And I have written an order for the
16 Board Chair's signature. And Robin, I don't know
17 if you got that. Did she? This was written and
18 filed with you, Joyce, a long time ago, but it is
19 a short order. And I can read it.

20 MS. MILES: I don't think I've seen it.

21 CHAIRMAN SHROPSHIRE: Would you mind
22 reading that, please, Katherine, just for
23 everyone's --

24 MS. ORR: Sure. It's Order Dismissing
25 Case with Prejudice, and it is signed by Robin
0046

1 Shropshire, Chair. It says, "On September 23rd,
2 2013 --" and I'll read this quickly because we'll
3 just get through it. "On September 23, 2013, the
4 Appellants, Mr. William E. Smith, CEM Consulting
5 Engineer for Octagon Consulting Engineers, LLC, on
6 behalf of Mike Adkins, filed an unopposed motion
7 to dismiss with prejudice the above captioned
8 case.

9 "The Montana Department of Environmental
10 Quality and the Adkins have not chosen to not
11 appeal Judge Gilbert's decision in the District
12 Court case, Protecting Paradise, Inc. versus DEQ,
13 Sixth Judicial District Court, Park County.
14 Therefore the Adkins' appeal of DEQ's approval of
15 an application for license of the Adkins Class III
16 waste tire monofill, and assigned License No. 51,

17 and Dr. Douglas Wadle's May 18th, 2012 decision on
18 behalf of Park County not to validate the license
19 is moot. The proceeding is moot since the DEQ is
20 reevaluating the license pursuant to Judge
21 Gilbert's decision.

22 "For good cause appearing, and there
23 being no objection from the other parties,
24 Protecting Paradise, Inc., the DEQ, and Park
25 County, it is hereby ordered that this matter is

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1 dismissed with prejudice." That's how it reads.

2 CHAIRMAN SHROPSHIRE: Thank you,
3 Katherine. Any questions or comments from the
4 Board?

5 (No response)

6 CHAIRMAN SHROPSHIRE: So as Katherine
7 has read, I have an order to dismiss the case with
8 prejudice. Is there a motion to authorize the
9 Board Chair to sign?

10 MS. MILES: I would so move. This is
11 Joan.

12 CHAIRMAN SHROPSHIRE: It has been moved
13 by Joan. Is there a second?

14 MR. MIREs: Larry would second.

15 CHAIRMAN SHROPSHIRE: Seconded by Larry.
16 Any further discussion?

17 (No response)

18 CHAIRMAN SHROPSHIRE: Hearing none, all
19 those in favor, signify by saying aye.

20 (Response)

21 CHAIRMAN SHROPSHIRE: Opposed.

22 (No response)

23 CHAIRMAN SHROPSHIRE: Okay. Motion
24 carries. Getting close to the end here.

25 We're moving on to the initiation of

0048

1 rulemaking, and Tom, are you going to discuss this
2 next item on the agenda?

3 MR. LIVERS: Madam Chair, members of the
4 Board. This next initiation of rulemaking will be
5 presented by Bob Smith of our Industrial Energy
6 Minerals Bureau.

7 MR. SMITH: Thanks. Chairman
8 Shropshire, members of the Board. My name is Bob
9 Smith, and I'm the permit coordinator for the
10 Department's Coal and Uranium Program. Today I'm
11 requesting the initiation of rulemaking to amend
12 the rules that implement the Montana Strip and
13 Underground Mine Reclamation Act.

14 As proposed, the rulemaking will include
15 a change to ARM Title 17, Chapter 24, Subchapter
16 9, which are the rules under which the Montana
17 Department of Environmental Quality regulates
18 underground, coal, and uranium mining. The

19 proposed rule is to change the in situ coal
20 gasification rules to be as stringent as the
21 federal counterpart contained in 30 CFR 828, and
22 enforced by the Office of Surface Mining.

23 Senate Bill 292 passed by the 2011
24 Legislature required in part that the Board of
25 Environmental Review adopt rules by October 1st,
0049

1 2012. These were necessary to regulate
2 underground mining using in situ coal
3 gasification. This was accomplished July 27th,
4 2012. As approved, ARM 17.24.905(1)(b) indicated
5 which rules in Chapter 24 did not apply to in situ
6 coal gasification.

7 Currently ARM 17.24.905(1)(b) indicates
8 that ARM 17.24.220, Plans for Disposal of Excess
9 Spoil, is not applicable to in situ coal
10 gasification. However, a review by the Office of
11 Surface Mining determined that by including ARM
12 17.24.320 in the list of rules that are secluded
13 from in situ coal gasification, Montana's rules
14 were not as stringent as the federal counterpart,
15 as the federal rules do not eliminate the
16 requirement for a plan to dispose of excessive
17 spoil.

18 Therefore, to satisfy the requirements
19 that the state rules be as stringent as federal
20 rules, it is necessary to eliminate
21 17.24.905(1)(b) from the rule. The amended rule
22 would require applicants for a permit for in situ
23 coal gasification operations to address whether
24 the operation contemplated disposal of excess
25 spoil, and if it did, to propose a plan for

0050
1 disposal.

2 Basically it is a very simple rule
3 change. So thank you for your time, and I'm
4 available for any questions.

5 CHAIRMAN SHROPSHIRE: Great. Thank you.
6 Any questions from the Board?

7 MS. KAISER: I just have one comment,
8 Robin.

9 CHAIRMAN SHROPSHIRE: Is that Heidi?

10 MS. KAISER: This is Heidi. I wish to
11 recuse myself from taking action on this matter.

12 CHAIRMAN SHROPSHIRE: Okay. Thanks,
13 Heidi.

14 MR. RUSSELL: This is Joe. Robin, since
15 when is the Department an affected party? Have I
16 missed that all along? I don't think I've ever
17 seen the Department listed as an affected party.

18 CHAIRMAN SHROPSHIRE: Tom, do you want
19 address that?

20 MR. LIVERS: Madam Chair, no. Madam

21 Chair, Mr. Russell, I assume you're looking at the
22 executive summary, and I assume we're following
23 the typical template.

24 MR. RUSSELL: I know that's really
25 picky. I should just withdraw my question.

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1 MR. LIVERS: I think I would suggest
2 that we think about that for future summaries to
3 see if there is a better term. Probably not hold
4 up initiation on these two, but I would take the
5 spirit of the comment, and we'll consider whether
6 that's the most appropriate term in future
7 rulemakings.

8 CHAIRMAN SHROPSHIRE: Okay. It is not
9 going to change the scope of this at all. If we
10 look at that moving forward, that's not going to
11 change anything we do today, is it, Tom?

12 MR. LIVERS: Madam Chair, I don't
13 believe so. It is just terminology we've used in
14 our templates for initiating rulemaking, and I
15 think it doesn't change the substance of the
16 rulemaking. So if it looks like there is a better
17 term, we'll put some thought into that and
18 consider changing it in the future. But no, I
19 don't see that it changes the substance of the
20 initiation that we're asking.

21 CHAIRMAN SHROPSHIRE: Okay. Does that
22 work for you, Joe?

23 MR. RUSSELL: Oh, yes. I totally agree.

24 CHAIRMAN SHROPSHIRE: So I'll entertain
25 a motion to initiate rulemaking. Help me out

0052

1 here. Do we need to appoint Katherine to this?
2 Is that the process?

3 MR. RUSSELL: If we want to. I'll make
4 the motion.

5 CHAIRMAN SHROPSHIRE: Do we want to --
6 go ahead, Joe.

7 MR. RUSSELL: I would make that motion
8 to appoint --

9 MR. LIVERS: Excuse me. Before we make
10 that motion, John just pointed out to me this is
11 -- we're requesting with no public hearing
12 contemplated. So at this point I don't know that
13 we need to -- it would not even be appropriate to
14 appoint a Hearing Examiner.

15 MR. RUSSELL: I would retract that
16 second part, and I'll await to see if there is any
17 public that wants to comment.

18 MR. LIVERS: This is Tom again, Madam
19 Chair. Just to elaborate, we see as a pretty
20 relatively insignificant cleanup action that
21 really is just the result of the Office of Surface
22 Mining's comment, and because of that, we just

23 don't anticipate it is going to be controversial
24 or engender much public comment.

25 MS. MILES: May I ask a question?

0053

1 CHAIRMAN SHROPSHIRE: Go ahead.

2 MS. MILES: You might have the same

3 question. It still allows public comments, it is

4 just not a public hearing on the rule?

5 MR. LIVERS: Correct.

6 MS. MILES: Okay. Thank you.

7 CHAIRMAN SHROPSHIRE: Great. Thank you.

8 That was the question I had. Okay. So do you

9 want to restate your motion, Joe?

10 MR. RUSSELL: I would move to initiate

11 the rulemaking process.

12 CHAIRMAN SHROPSHIRE: Is there a second?

13 MS. MILES: Second. This is Joan.

14 CHAIRMAN SHROPSHIRE: Seconded by Joan.

15 Any further discussion?

16 MR. LIVERS: Before we vote, I would

17 remind the Chair to call for public comment.

18 CHAIRMAN SHROPSHIRE: All right. Thank

19 you. Any public comment?

20 (No response)

21 MR. LIVERS: None here in Helena.

22 CHAIRMAN SHROPSHIRE: Thanks, Tom.

23 MR. LIVERS: I don't know. We had one

24 member of the public on the phone earlier. Ann?

25 MS. HEDGES: I'm still here, but I don't

0054

1 have a comment. Thanks, Tom.

2 CHAIRMAN SHROPSHIRE: Hearing none, all

3 those in favor, signify by saying aye.

4 (Response)

5 CHAIRMAN SHROPSHIRE: Opposed.

6 (No response)

7 CHAIRMAN SHROPSHIRE: Motion carries.

8 Is there an update on the second item here, Tom?

9 MR. LIVERS: Sure. Thank you, Madam

10 Chair.

11 CHAIRMAN SHROPSHIRE: Do you want to

12 introduce that, please.

13 MR. LIVERS: You bet. Thanks, Madam

14 Chair. The initiation for rulemaking on Open Cut

15 operations will be presented by Christopher Cronin

16 from the Industrial and Energy Minerals Bureau and

17 the Open Cut Program.

18 MR. CRONIN: Madam Chair, members of the

19 Board. My name is Chris Cronin, and I'm the

20 supervisor of the Department's Open Cut Mining

21 Program. Today I'm requesting the initiation of

22 rulemaking to adopt a proposed new rule pertaining

23 to the administrative requirements for limited

24 open cut operations.

25 This proposed rulemaking will add a new
0055

1 rule to ARM Title 17, Chapter 24, Subchapter 2,
2 which are the rules under which the Department
3 regulates the open cut mining of sand, gravel,
4 scoria, soil, clay, bentonite and peat. The
5 proposed new rule will implement legislative
6 changes.

7 Specifically, the proposed rule provides
8 administrative requirements and procedures that
9 are necessary to implement the provisions for
10 limited open cut operations as contained in
11 Section 5 of Senate Bill 332, which was approved
12 during the 2013 legislative session, and is now
13 codified as 82-4-431 Subsection (2), MCA.

14 Under the 2013 act revisions, an
15 operator who holds an open cut mining permit may
16 conduct a limited open cut operation without
17 obtaining an additional permit or amending an
18 existing permit if the criteria in 82-4-431
19 Subsection (2) MCA are met. To do so, the
20 operator must submit appropriate site and
21 operation information on a form provided by the
22 Department.

23 Proposed New Rule 1 would clarify the
24 procedure for submitting the site and operation
25 information to the Department, the time limits for
0056

1 reclamation of a limited open cut site, and the
2 time limit for submittal of an application to
3 continue or expand a limited open cut operation.

4 Finally, New Rule 1 provides that the
5 10,000 cubic yard limitation for a limited open
6 cut operation does not include the volume of soil
7 and overburden that is stripped and stockpiled on
8 the site for reclamation purposes. This
9 clarification is needed to uphold the intent of a
10 limited open cut operation, which is to allow
11 operators to conduct smaller, short term projects,
12 without having to complete the full open cut
13 permitting process.

14 Proposed New Rule 1 will set forth
15 administrative procedures necessary to implement
16 Section 5 of Senate Bill 332, and the Department
17 believes it directly supports the intent of the
18 2013 act revisions. Thank you for considering
19 this request. I am available for any questions
20 you may have.

21 CHAIRMAN SHROPSHIRE: Thanks, Chris.
22 Any questions from the Board?

23 MR. RUSSELL: Robin, this is Joe.
24 There is this regulatory threshold of 10,000 cubic
25 yards, and so we don't have to worry about -- and
0057

1 I know this is legislation, and we have to do it.
2 I should said got to do it. That's more
3 appropriate. So do you have any idea what impact
4 this has on how much can actually be mined? It is
5 just a little bit of the top footprint that's
6 being taken off, right?

7 MR. CRONIN: Madam Chair, Board Member
8 Russell, essentially the top soil and the
9 overburden material, the non-product that's taken
10 off and put to the side, is excluded; and the
11 intent is that the person who is conducting the
12 limited operation actually would have 10,000 yards
13 of material that they could use for their project.
14 And the --

15 MR. RUSSELL: So Chris, that actually
16 could be a significant amount of material being
17 moved, and if I have a pit, and all I want to do
18 is take sand out of it, I know you can't do
19 anything about it, but I guess when it is not just
20 the top soil, it could be a significant amount of
21 mining.

22 MS. MILES: This is Joan. I guess
23 that's my question as well. Is the exclusion of
24 that top soil, was that what was directed in the
25 Senate Bill that was passed? Is that specified?

0058

1 MR. CRONIN: Madam Chair, Board Members,
2 my understanding is that the intent during the
3 legislative session was that the 10,000 yards of
4 material would be available for the operator to
5 use for their project.

6 And the fact that at this point the rule
7 is seeking to clarify that the soil and overburden
8 would be put aside and not counted is also with
9 the understanding that there is a finite and
10 limited duration under which this can occur. So
11 the material has to be put back within a year
12 unless they ask for an extension, but it is within
13 a year and a half or two years in total. So it is
14 the short duration of a limited open cut
15 operation. I think that is consistent with
16 allowing the 10,000 yards to actually be used.

17 MR. RUSSELL: This is Joe again. So if
18 I have a pit, and I only want to take two inch
19 minus -- (inaudible) -- out of it, so I could
20 actually -- so if I claim to the Department in
21 this pit I'm just going to mine out the two inch
22 gravel, but I'm going to leave -- and minus, and
23 I'm going to leave anything above two inches, I'm
24 going to consider that overburden, and I'm going
25 to get it out of the way; is that how it works?

0059

1 CHAIRMAN SHROPSHIRE: Go ahead, please.

2 MR. CRONIN: Madam Chair, members of the

3 Board. I think it is important -- One thing I
4 guess I would also like to bring forward is the
5 fact that the limited open cut operation also has
6 a geographic limitation of five acres, so it has a
7 time limitation and a geographic limitation, and
8 cannot exceed five acres.

9 With respect to the 10,000 yards -- if I
10 may -- the top soil is defined in the act and
11 already in the rules as material that will support
12 plant growth. Overburden is the material that is
13 above the target. So an operator has to define
14 basically a geologic layer, a stratum that's their
15 product. So they don't get to sift through it,
16 and go for just a certain particular size
17 gradient.

18 The intent is that the soil and the
19 overburden material that they strip away, they
20 have no use for. They have no need for it. It is
21 everything else that they pick up that is in that
22 10,000 yards. That doesn't include if they sift
23 it out and things like that. So the intent is
24 that the size limitation, acreage limitation of
25 five, the duration limitation, and the intent of
0060

1 allowing that material to be used, that's where
2 the 10,000 yards is coming from.

3 MR. LIVERS: Madam Chair, members of the
4 Board, this is Tom. And I'd like to throw in what
5 I think may be some context that might help frame
6 the discussion, and I'm relying on memory from a
7 session I've tried to put out of my head. So if I
8 get some things a little wrong, I might ask Chris
9 to set me straight, but I just want to make sure
10 that you understand the context.

11 The purpose of the Senate Bill 332 was
12 to expand the terms under which certain limited
13 open cut operations could act, could function, and
14 allowing some mining to happen without going
15 through the entire permitting process until a
16 certain threshold is met.

17 Our concern with that at the time was
18 that if you don't take actions to salvage
19 reclamation material, that's one of those things
20 that has to be done immediately from the get-go,
21 and that's what the focus of the top soil
22 provisions are, to make sure that even while the
23 provisions of limited mining is taking place, the
24 operator must be salvaging top soil for
25 reclamation purposes, regardless of whether the
0061

1 threshold is met.

2 And I think either Mr. Cronin or Mr.
3 Coleman may add some context as well.

4 MR. COLEMAN: Madam Chair, Mr. Russell,

5 for the record, my name is Ed Coleman. I'm the
6 Bureau Chief over the Open Cut Program.

7 And the main reason we wanted to exclude
8 the top soil and the overburden was pretty much at
9 the counties' request. They're looking to use
10 these things for small pits to do a quick road
11 project, some quick maintenance, and get in and
12 get out, and that was the overall goal of
13 excluding that. If we include the top soil and
14 overburden, that might not actually cut it, and
15 that might defeat the purpose of what they were
16 looking for.

17 MR. RUSSELL: Well, I keep trying to
18 picture where overburden would be insignificant.
19 I think about an alluvial system maybe in Flathead
20 County, and maybe you want to go get a better
21 gravel. You could be -- (inaudible) --

22 CHAIRMAN SHROPSHIRE: The way I have
23 thought of overburden -- and maybe this is an
24 over-simplification -- is anything that's not
25 bedrock. So Joe's point -- it could be a lot of

0062

1 material. It sounds like the definition in this
2 scope is different that it's material above the
3 target zone. Are we sure that that definition is
4 clear?

5 MR. COLEMAN: Madam Chair, if you could
6 just give me one second. I'd just like to look up
7 the definition of materials.

8 What we're really talking about is for
9 any materials that are mined, and materials mean
10 bentonite, clay, scoria, peat, sand, gravel, soil,
11 or mixtures of those substances that's defined in
12 statute. And so when we go out and regulate these
13 things, we're going to have to have some
14 discretion out there. If people are cherry
15 picking the best parts, and moving outside the
16 law, then certainly we'd look for clarification.

17 But the idea behind this was to just
18 give the counties the ability to get in and just
19 fix a road if they need to, because they were
20 upset about having to go through the whole
21 permitting process for just fixing a big hole in
22 the road.

23 MR. RUSSELL: I see the -- (inaudible)
24 -- much closer. I know you're doing the right
25 thing. I'm just trying to get my hands around

0063

1 what this could look like.

2 CHAIRMAN SHROPSHIRE: And is the scope
3 of it now sufficient that we can continue to have
4 these discussions in the rulemaking? I don't know
5 who that question would be addressed to. Could
6 somebody address that?

7 MR. LIVERS: I'm sorry, Madam Chair.

8 Could you restate the question, please?

9 CHAIRMAN SHROPSHIRE: I just want to
10 make sure that in the rulemaking process, that the
11 scope is consistent with allowing us to address
12 these questions that we're having right now.

13 MR. LIVERS: Madam Chair, members of the
14 Board, this is Tom. And that's probably more of a
15 legal question, but my gut would say yes, in that
16 the focus of the rulemaking seems to be where some
17 of the concern is over the appropriateness of
18 excluding overburden and top soil from the total.
19 So my sense is that if that's the focus of the
20 Board's concern, that's consistent with the focus,
21 a focus of the rulemaking, so I don't think we
22 have any scope concerns.

23 I think, yes, the answer to your
24 question, Madam Chair, is yes, the scope is
25 appropriate, sufficient to be able to look at the

0064

1 questions the Board is raising. I think they are
2 right within the scope of the rulemaking, proposed
3 rulemaking.

4 CHAIRMAN SHROPSHIRE: All right.

5 Thanks.

6 MR. RUSSELL: I have just one more
7 question.

8 CHAIRMAN SHROPSHIRE: Please go ahead,
9 Joe.

10 MR. RUSSELL: I thought I saw somewhere
11 one place where the site, the distribution is
12 limited to one mile; but isn't there another one
13 that's five miles? For some reason, I thought
14 that's where the overburden could be removed to.
15 I'm trying to catch up in the law here, but now
16 I'm not --

17 MR. COLEMAN: Madam Chair, Mr. Russell,
18 this is Ed Coleman again. As far as limited open
19 cut operations, what we tried to do in the 2013
20 legislation -- and please understand, this was a
21 compromise bill -- was that we tried to get it so
22 an operator could have only one limited open cut
23 operation within a mile to the next one, so that
24 people couldn't put these on top of each other,
25 and stack them, and build a much bigger footprint.

0065

1 So the idea behind the one mile of
2 separation is you get one limited open cut
3 operation, then you have to go at least a mile
4 away before you can have the other one; and that
5 also served the needs of the county because if
6 they wanted to do a given stretch one year and a
7 given stretch in another year, they could just
8 kind of hop on down the road.

9 MR. RUSSELL: That makes sense. Was
10 there a five mile issue in here -- (inaudible) --

11 MR. COLEMAN: Madam Chair, Mr. Russell,
12 I don't believe so.

13 MR. RUSSELL: I guess I'll have another
14 opportunity to read this in more depth.

15 MS. MILES: Madam Chair, this is Joan.
16 I have a question.

17 CHAIRMAN SHROPSHIRE: Please go ahead.

18 MS. MILES: This is more of a procedural
19 question, and I don't mean to overburden the
20 Department, but when do you -- I notice that the
21 proposal in front of us is to initiate rulemaking
22 without a public hearing. And when do you
23 typically have public hearings on rules or not?
24 This one feels to me a little bit more than a
25 ministerial change than the first one did. And

0066

1 would there be benefit in having a public hearing
2 so this can be further fleshed out?

3 MR. LIVERS: Madam Chair, Ms. Miles. We
4 make the decision as to whether a public hearing
5 is going to be appropriate. We typically do take
6 into account our assessment of the degree of
7 interest, controversy, complexity. So I
8 understand what you're saying, and it would
9 certainly be within the Board's purview to -- I
10 don't know if it would require an amendment of
11 initiation, but perhaps just the act of appointing
12 a Hearing Officer would make it clear that the
13 Board is interested, or if the Board directs us to
14 conduct a hearing in this case.

15 Since this is a Board rulemaking, I
16 think if the motion to initiate included
17 appointment of a Hearing Officer and direction for
18 the Department to conduct a public hearing, we
19 would follow that.

20 MS. MILES: It says the Board options
21 are that we can initiate it and issue the attached
22 notice of proposed adoption, no public hearing.
23 We can modify the notice and initiate rulemaking,
24 which I think is what you're saying; or determine
25 that it is not appropriate, deny the request to

0067

1 initiate rulemaking.

2 Madam Chair, I guess just given the
3 controversial nature of this and the earlier
4 discussion we had today, I just wonder if there
5 wouldn't be some benefit in having a public
6 hearing along with this.

7 CHAIRMAN SHROPSHIRE: Joan, I had the
8 exact same thought, so I appreciate you bringing
9 that up. I guess that would be my recommendation,
10 too, is to appoint Katherine as the Hearing

11 Examiner if we initiate rulemaking for this.

12 MR. LIVERS: Madam Chair, I think Mr.
13 Coleman has a comment as well.

14 MR. COLEMAN: Madam Chair, Ms. Miles.
15 We're open to have a public hearing. The reason
16 why we did not go down the path was this was
17 discussed at length in the 2013 session. I also
18 sent out an email to our stakeholders group that
19 consists of the regulated community, conservation
20 groups, citizens, whoever has identified
21 themselves as an interested party, and they didn't
22 have any comments.

23 Well, actually their comments were that
24 we need to clarify that top soil and overburden
25 was not part of the 10,000 cubic yards as

0068

1 discussed. And so that came from the counties.

2 And so we have vetted this to our
3 stakeholders group, but if you feel a hearing is
4 necessary, we'll gladly go forward with that.

5 CHAIRMAN SHROPSHIRE: I guess my thought
6 is that, just based on the conversation today to
7 avoid any absence of doubt, it may be that no one
8 shows up for the hearing, and people just provide
9 public comment, but I would like to have the
10 option for a public hearing. Any additional
11 discussion on that?

12 MR. RUSSELL: This is Joe, Robin. I can
13 only hear what I'm hearing through the phone, but
14 my feeling that I'm getting from the Department
15 is, first of all, this was a contested bill, and
16 there were compromises, and that the proposed rule
17 in front of us mirrors the Montana code for this,
18 and there is probably very little latitude that we
19 may be given based on that, because -- and Robin,
20 you know the process there is out there that is
21 going to make sure that the rule meets the law.
22 So I don't know if the Department wants to hang
23 out there any further than I just did.

24 CHAIRMAN SHROPSHIRE: No. I hear what
25 you're saying, Joe, and I just want to make sure

0069

1 that there is no doubt that the public has the
2 opportunity to comment, and so that could be
3 through the public comment process, but I just
4 want to -- Joan's point to the process for
5 deciding if there's a public hearing or not, I
6 don't want there to be any doubt about making sure
7 that we include the public.

8 MR. LIVERS: Madam Chair, this is Tom.
9 The comment I would make on the last two points --
10 I'm not advocating for or against a hearing. I
11 think in addition to the amount of interest, and
12 controversy, or the amount of controversy is the

13 amount of interest.

14 I think the point that Mr. Coleman
15 brought out if -- Mr. Russell was correct that we
16 don't have a lot of latitude in crafting the
17 rules. They mirror the statute from a compromise
18 bill that came out of the session. That probably
19 by itself wouldn't be enough to say we would avoid
20 a public hearing.

21 I think that the other added piece to it
22 is the fact that there was quite a bit of
23 discussion during the session; we have attempted
24 to get this word out, vet it, give the
25 opportunity, and have had very little response.

0070

1 So I think you put those two together, and that
2 probably forms the basis for our initial decision
3 to not include the public hearing.

4 CHAIRMAN SHROPSHIRE: Any other
5 discussion?

6 MR. RUSSELL: I did find the five miles.
7 It was actually -- and what was confusing is it is
8 in the MCA. It is the disposition of surplus rock
9 and gravel, not the overburden. It can be sold to
10 anyone within five miles of the operation.

11 CHAIRMAN SHROPSHIRE: Joan, do you want
12 to follow up? Does that change your position, or
13 what are your thoughts on the hearing?

14 MS. MILES: Well, I'm not as clear --
15 but that's only because I'm not that familiar with
16 that statute -- that what is being proposed is
17 exactly what the legislation said. I didn't see
18 that distinction in what was in front of me about
19 overburden, particular volume of soil or
20 overburden being excluded. And that may be just
21 my unfamiliarity with that.

22 And that was where I was going in the
23 beginning. If this is a pretty ministerial change
24 to match exactly what was in the statute, then I
25 certainly wouldn't propose going that extra step.

0071

1 I'm not that familiar with it to be confident that
2 that's exactly -- I don't know if there is some
3 discretionary language in the proposed rule that
4 perhaps was not in the statute.

5 MR. RUSSELL: Robin and Joan, to follow
6 that up, for 82-4-40 -- (inaudible) -- the
7 definition of affected land, it actually strikes
8 from that the overburden.

9 MS. MILES: In the --

10 MR. RUSSELL: In the Senate Bill --
11 (inaudible) --

12 CHAIRMAN SHROPSHIRE: Well, I guess
13 based on that, I would entertain a motion to
14 initiate rulemaking, and I don't know if we

15 decided on whether or not to have a public
16 hearing, but I'll entertain a motion on this, if
17 somebody would like to take a stab at that.

18 MR. MIRES: This is Larry, and I would
19 make a motion that we initiate rulemaking as
20 proposed by the Department.

21 CHAIRMAN SHROPSHIRE: And just to be
22 clear, that's to not have a public hearing?

23 MR. MIRES: Not have a public hearing,
24 because as I read this law -- Can I comment after
25 my motion or wait?

0072

1 CHAIRMAN SHROPSHIRE: Why don't we -- I
2 just wanted to clarify the motion. Why don't we
3 get a second, and we can discuss that. Does that
4 make sense?

5 MR. MIRES: That's fine.

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

8 CHAIRMAN SHROPSHIRE: Seconded by Heidi.
9 Is there further discussion?

10 MS. MILES: This is Joan. I'm okay with
11 that, given that the interested parties and
12 stakeholders have already been involved and
13 provided input before you put the rule together.

14 CHAIRMAN SHROPSHIRE: Any other
15 discussion?

16 I'm sorry. I forgot to ask for public
17 comment. Is there public comment?

18 MR. LIVERS: None here at DEQ. Ann?

19 MS. HEDGES: None here.

20 MR. LIVERS: And I think, Madam Chair, I
21 think Mr. Mires may have had another question or
22 comment that he wanted to bring up after his
23 motion.

24 CHAIRMAN SHROPSHIRE: Larry.

25 MR. MIRES: This is Larry, and my

0073

1 comment is as I'm reading the law, 322, it appears
2 that this rulemaking is simply in line with what
3 the Legislature passed, and I think it is -- with
4 everything that went on during the Legislature, I
5 really don't think a public hearing is going to be
6 a necessity at this particular point and juncture
7 in the game. I think it has been aired really
8 well already personally, and it looks like it's
9 just clarification of the existing law.

10 CHAIRMAN SHROPSHIRE: Thank you for
11 that. And I think this is good discussion,
12 because I was a little bit with Joan, and didn't
13 quite understand that, so I think that that
14 clarifies that. So any other discussion?

15 (No response)

16 CHAIRMAN SHROPSHIRE: Okay. Hearing

17 none, all those in favor, signify by saying aye.
18 (Response)
19 CHAIRMAN SHROPSHIRE: Opposed.
20 (No response)
21 CHAIRMAN SHROPSHIRE: Okay. Motion
22 carries. Thanks for that discussion on that. I
23 think that was valuable.
24 All right. So now we're at the part of
25 the agenda that's designated for general public

0074

1 comment. Is there anyone that would like to
2 address the Board on proceedings?
3 MR. LIVERS: Nobody here at the DEQ in
4 Helena. Anyone on the phone?
5 (No response)
6 MR. LIVERS: None, Madam Chair. I
7 might, before we adjourn then, just talk a little
8 bit about the January meeting.
9 CHAIRMAN SHROPSHIRE: Okay. Please do.

10 MR. LIVERS: As I mentioned earlier,
11 this will be atypical, in that the Board meeting
12 will be on a Tuesday rather than a Friday. So the
13 Board meeting will be scheduled for Tuesday,
14 January 21st, starting at 9:00. We'll hope to get
15 through the agenda expeditiously. I don't know
16 that we'll make it by noon.

17 We've got a couple of big items. We'll
18 be initiating rulemaking on the numeric nutrient
19 water quality standards presentation that Dr.
20 Suplee and others from the Department to present
21 for background to the Board. We've got revisions
22 to a couple of our water quality circulars, I
23 think one and thirteen. And then you'll also have
24 a relatively pro forma incorporation by reference
25 of some federal changes in air quality rules.

0075

1 And then the Board is due to act on its
2 triennial review of the temporary water quality
3 standards at the New World Mine. It's not a
4 particularly complicated action, but we have a
5 large number of Board members who have not seen
6 this issue before. So we'll have some background
7 there.

8 So what I would imagine is this meeting
9 will probably run into early afternoon; we'll
10 probably take a break; and then we'll begin the
11 hearings on the Colstrip and Corette permit
12 appeals. So they would likely start Tuesday
13 afternoon early enough that we would have enough
14 time available to make some ground before we broke
15 for the night. We've got the next two days
16 scheduled for that. And I don't know if Katherine
17 would want to comment whether she thinks there's a
18 chance it might spill into Friday as well.

19 I think we had originally urged the
20 Board members to try to clear that week to the
21 extent they could.

22 MS. ORR: And Madam Chair, it would
23 surprise me if it didn't spill into Friday. And
24 just while I'm talking, one of the things that I'm
25 entertaining in my mind for a recommendation to
0076

1 the Board is two things, and actually Laurie
2 helped me think about this, or at least one of the
3 items.

4 Depending on what you think, it may
5 expedite the process to have the parties -- and if
6 they agree, of course -- to have the parties
7 prefile the testimony of their experts, and then
8 there would be cross-examination at the hearing.
9 I guess this is done at the PSC. This would have
10 to be at the parties' agreement.

11 And the second thing in another board
12 that I represent, I ask the parties, once they've
13 determined what the exhibits are -- this is before
14 the hearing -- to determine a subset of those, or
15 the whole set if appropriate, that can be
16 presubmitted to the Board, and that way the Board
17 has an opportunity to review what those say.

18 Is that something the Board would be
19 interested in, both of those things? Assuming
20 that the parties can do that. The time is getting
21 a little bit short, but would the Board be
22 interested in that? I guess I'd ask.

23 MR. MILES: This is Larry, and I
24 certainly would be.

25 MR. RUSSELL: It's a lot more reading,
0077

1 but I think it will shorten the hearing. That
2 would be good.

3 MS. ORR: So with your permission, I'll
4 ask the parties if they're in a position to be
5 able to do that. If they are, I could pursue it.

6 CHAIRMAN SHROPSHIRE: Is there anyone
7 opposed to that?

8 (No response)

9 CHAIRMAN SHROPSHIRE: Katherine, if you
10 could check with them, that would be great.

11 MS. MILES: That would be helpful to
12 know what we're getting into.

13 MS. ORR: Just thinking aloud, because
14 of the holidays and the timing of all of this, I
15 guess what I'd ask them is to have that be
16 submitted a week before the hearing. So you're
17 not going to have a lot of time to look at that,
18 but you're going to have some. So that's what I
19 would propose to do. I understand your direction
20 is to see if that's a possibility, and I would do

21 that.

22 CHAIRMAN SHROPSHIRE: Okay. Thanks,
23 Katherine.

24 MR. LIVERS: That's all I've got.

25 CHAIRMAN SHROPSHIRE: Any other --
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1 Thanks, Tom. Anyway, good meeting today,
2 everybody. Any other comments?

3 MR. MIRES: Madam Chairman, I do have a
4 comment. This is Larry. I would like to thank
5 John Arrigo for the update on the Blakeman
6 situation. I'm a little disappointed in Mr.
7 Blakeman that he has not seen fit to appreciate
8 what the Board did for him, and I'm disappointed
9 that he hasn't gone in to address this problem.

10 But the other question I have -- and
11 maybe Tom can give me an answer on this one.
12 Since that site was initially permitted to the
13 County, isn't the County somewhat responsible for
14 helping close that thing back up, and put it back
15 to its original state, and terminate that permit?
16 Is there any way that we can get help from them at
17 the same time?

18 MR. LIVERS: Madam Chair, Mr. Mires.
19 I'm going to ask John for some help here. But the
20 County was responsive to some of our questions
21 early on, so I think John is going to talk to
22 that.

23 MR. ARRIGO: Madam Chair, members of the
24 Board. My name is John Arrigo, Administrator of
25 the Enforcement Division.

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1 And Mr. Mires, to answer your question,
2 I just checked with Chris Cronin from the Open Cut
3 Program, and Sanders County was issued an
4 amendment to their permit to include all of the
5 area that was disturbed, and I assume some future
6 areas to be disturbed. Mr. Blakeman worked within
7 that area that's now permitted. He also disturbed
8 without a permit .7 acres adjacent to the Sanders
9 County site. So Sanders County does not have a
10 responsibility to reclaim that disturbance outside
11 their permit boundary.

12 However, trying to get the letter I
13 referred to in my memo served on Mr. Blakeman. We
14 have not heard from the Sheriff's Department on
15 whether or not service has been completed. He's
16 been hard to get a hold of, and I doubt he's going
17 to do anything.

18 So it is up to us to figure out how to
19 get that .7 acres reclaimed, and certainly one of
20 our options is to talk with Sanders County, and
21 see what they might be able to do. And so those
22 discussions have not begun. We're waiting to see

23 if Mr. Blakeman will respond to the letter.
24 MR. MIRES: Thank you very much.
25 CHAIRMAN SHROPSHIRE: Thanks, John. Any
0080
1 other comments?
2 (No response)
3 CHAIRMAN SHROPSHIRE: All right. So I
4 would entertain a motion to adjourn.
5 MS. MILES: So moved.
6 CHAIRMAN SHROPSHIRE: It's been moved by
7 Joan. Is there a second?
8 MR. MIRES: Larry will second.
9 CHAIRMAN SHROPSHIRE: Seconded by Larry.
10 All those in favor, signify by saying aye.
11 (Response)
12 CHAIRMAN SHROPSHIRE: Opposed.
13 (No response)
14 CHAIRMAN SHROPSHIRE: Okay. We're
15 adjourned.
16 (The proceedings were concluded
17 at 11:12 a.m.)
18 * * * * *

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1 C E R T I F I C A T E
2 STATE OF MONTANA)
3 : SS.
4 COUNTY OF LEWIS & CLARK)
5 I, LAURIE CRUTCHER, RPR, Court Reporter,
6 Notary Public in and for the County of Lewis &
7 Clark, State of Montana, do hereby certify:
8 That the proceedings were taken before me at
9 the time and place herein named; that the
10 proceedings were reported by me in shorthand and
11 transcribed using computer-aided transcription,
12 and that the foregoing - 80 - pages contain a true
13 record of the proceedings to the best of my
14 ability.
15 IN WITNESS WHEREOF, I have hereunto set my
16 hand and affixed my notarial seal
17 this day of , 2013.
18
19 LAURIE CRUTCHER, RPR
20 Court Reporter - Notary Public
21 My commission expires
22 March 12, 2016.
23
24

