

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
MAY 19, 2012)

TRANSCRIPT OF PROCEEDINGS

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
May 19, 2012
9:00 a.m.

BEFORE CHAIRMAN JOSEPH RUSSELL,
BOARD MEMBERS LARRY ANDERSON, ROBIN SHROPSHIRE,
JOE WHALEN, and MARVIN MILLER

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

LAURIE CRUTCHER, RPR
406-442-8262

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

3 * * * * *

4 CHAIRMAN RUSSELL: It is a little after
5 9:00, and I'll call this Board of Environmental
6 Review meeting to order. The first thing on the
7 agenda is the review and approval of minutes of
8 the March 23rd, 2012 meeting. Questions about the
9 minutes?

10 (No response)

11 CHAIRMAN RUSSELL: Hearing none, is
12 there a motion to approve?

13 MR. MILLER: I so move.

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

16 MS. SHROPSHIRE: Second.

17 CHAIRMAN RUSSELL: It's been seconded by
18 Robin. Any further discussion?

19 (No response)

20 CHAIRMAN RUSSELL: Hearing none, all
21 those in favor, signify by saying aye.

22 (Response)

23 CHAIRMAN RUSSELL: Opposed.

24 (No response)

25 CHAIRMAN RUSSELL: Motion carries. The

1 next item on the agenda are briefing items, and
2 all contested cases are assigned to Katherine. So
3 Katherine, take it away.

4 MS. ORR: Mr. Chairman, members of the
5 Board, good morning. I'll just go through these
6 items quickly to update you over the time that the
7 agenda was prepared.

8 On II(A)(1)(a), involving Any Time
9 Septic, there is a stay in effect until July 18th
10 of this year.

11 In the next case, Olson's Lolo Hot
12 Springs, an anticipated settlement date per the
13 parties is July 1st.

14 On (d), SK Construction, a scheduling
15 order was issued on May 11th, 2012, and a hearing
16 is set for September 19th, 2012.

17 Anything I don't refer to here it
18 remains the same. There has been no update since
19 the agenda was put together.

20 On (f), Absaloka Mine, Big Horn County,
21 a hearing is set for August 29th.

22 CR Kendall Corporation, good news on
23 that. A status report was filed on May 3rd, and a
24 stipulation for dismissal will be submitted in the
25 near future.

1 On Roseburg Forest Products, a
2 telephonic status conference is being held on June
3 19th.

4 On (c), City of Helena, an unopposed
5 motion to modify the second scheduling order was
6 filed on May 16th, and that will be ruled upon
7 shortly.

8 And on Brad Blakeman, Camas Prairie
9 Gravel Pit, this is a case that was not assigned
10 to the Hearing Examiner for the hearing portion,
11 and that's been set for hearing before the Board
12 on September 28th. And the one activity in that
13 case was there was a notice and consent to
14 withdrawal of Counsel filed on April 17th, 2012.

15 CHAIRMAN RUSSELL: All right. Thanks,
16 Katherine. Any questions that the Board has for
17 Katherine?

18 (No response)

19 CHAIRMAN RUSSELL: We'll keep going now.
20 We will start into the action items, and the first
21 Item III(A)(a) is to amend 17.30.617 to designate
22 the main stem of the Gallatin River from the
23 Yellowstone National Park boundary to the
24 confluence of Spanish Creek as an ORW. Who dares
25 to come in front of us and talk about this?

1 MR. LIVERS: No one, so I'm going to
2 cover it. Mr. Chairman, members of the Board, for
3 the record, Tom Livers with the Department.

4 This is an extension, and we will
5 probably have at least one more as this runs its
6 course, provided the Board agrees to extend. The
7 pilot project that we've been waiting on is
8 underway currently. It is the snow effluent
9 disposal during the winter for capacity at Big Sky
10 water treatment plant, wastewater treatment plant.

11 We're getting runoff data in June. It's
12 a fairly late runoff up there, and that should be
13 the last of the data collection necessary to
14 evaluate this pilot project. They're planning on
15 a report to us, to the Department, by August, so
16 ideally by fall we'll have some sense of the
17 viability of snow effluent as a treatment option
18 to get through the capacity problems over the
19 winter when they can't land apply otherwise.

20 So the water and sewer district is still
21 very open, provided this is feasible, is very open
22 to the idea of taking on additional capacity from
23 the corridor within the canyon, which is a key
24 piece of the alternative to ORW designation to
25 providing adequate protection to the Gallatin.

1 So it has been a long haul, but things
2 are moving. And we knew going in, even when we
3 were able to get the pilot project up and running,
4 we knew there would be a couple more extensions,
5 given the fact that the only tool we have to keep
6 this rulemaking active is to extend it within six
7 month intervals.

8 So the idea is we'll continue to have
9 more information. I don't know what's going to be
10 in the report, or how universally accepted it's
11 going to be. It might not all come together this
12 fall. It depends on what that looks like, and
13 where people are. But we're very optimistic, as
14 are most of the parties involved in this, that
15 it's going to look feasible, and the alternative
16 of taking on sewage capacity from the Gallatin
17 corridor in the district and the treatment plant
18 will be an option.

19 CHAIRMAN RUSSELL: So not to belabor the
20 point, first of all, I think it's a great idea. I
21 really do. I think logistically that -- How far,
22 have we looked at how far they're willing to go
23 down the Gallatin to collect sewage?

24 MR. LIVERS: Mr. Chairman, I'll respond
25 with what I know. I don't know, Todd, if you have

1 any more specific information on that. But there
2 is a fairly relatively dense concentration up and
3 downstream from the intersection, and I would
4 assume that the denseness development, which would
5 take a fair amount of the load, would be included
6 then. I don't know what the marginal points are
7 when the density drops off and the distance takes
8 over.

9 CHAIRMAN RUSSELL: That's good enough.
10 It's going to cost a lot of money to get sewage
11 back up to Big Sky, depending on how far you have
12 to capture to make this work. So is there anyone
13 on the Board that wants to address this matter
14 directly to Tom?

15 MR. MILLER: I guess I was going to
16 comment that, my gosh, after eleven years, it
17 seems like this has really languished a long time,
18 and I guess I was kind of wondering why do we come
19 back every time. Why don't we just wait until it
20 gets squared away, and then we'll consider it?
21 But I guess it really doesn't take that much time
22 every six months to go through it, so --

23 CHAIRMAN RUSSELL: Marv, it is actually
24 tied to an EIS, so if we stopped the rulemaking, I
25 think we'd be in trouble with the EIS that was

1 done for this project, that was paid for through
2 the Legislature, wasn't it?

3 MR. LIVERS: Mr. Chairman, the EIS was
4 paid for with some carry-over funds that we had
5 one year, and we were able to cover that. One of
6 the problems with the early stage delays on this
7 was the Board acted, an EIS was required, and we
8 did not have any funding for it. And we went
9 several times before the Legislature requesting
10 funding for this and weren't successful. And then
11 finally in the 2005 session, there were some bills
12 to direct us to conduct the EIS, and some funding.

13 That funding was later amended out, but
14 the direction remained, so we felt that at that
15 point that the clear legislative intent, while
16 there was a lot of disagreement within the
17 Legislature, the only legislative intent that
18 really clear on the record was we had a direction
19 to conduct the EIS. We didn't have a clear
20 funding source, and we were able to find a way to
21 do that, but that took several years, several
22 biennia really to go through that before we could
23 even start the EIS process.

24 Then a moderate amount of time. The EIS
25 really wasn't an inordinately lengthy process. It

1 was mostly getting to the start of it. Then
2 getting the timing to be able to start this pilot
3 project when that option came forward as an
4 alternative has been a little bit of delay in
5 addition.

6 But the fact that rulemaking time frames
7 only allow a six month period without an
8 extension, you guys see this slightly more than
9 twice a year, so it has come back.

10 It has taken a long time, but we are
11 really close to at least having information.
12 Whether that all comes together remains to be
13 seen, but I do think with the commitment and
14 investment that we've had to date, it really is
15 time to see this through at this point. That's my
16 recommendation.

17 MR. MILLER: Thank you.

18 CHAIRMAN RUSSELL: And I wholeheartedly
19 agree. We're just too darn close to quit now, and
20 (h) is nine, right? The MAR notice is 17-276(h).
21 That would be nine or ten? Is that how I get
22 that?

23 MR. LIVERS: I think so.

24 CHAIRMAN RUSSELL: Nod from John. With
25 all that said, we'll entertain a motion to extend

1 the rulemaking and public comment period to
2 November 2nd, 2012. Is there a motion?

3 MR. WHALEN: So moved, Mr. Chairman.

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

6 MR. MILLER: Second.

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

9 (No response)

10 CHAIRMAN RUSSELL: Before we take
11 action, is there anyone in the audience that would
12 like to speak to this matter?

13 (No response)

14 CHAIRMAN RUSSELL: Hearing no more
15 inquiries on this, all those in favor, signify by
16 saying aye.

17 (Response)

18 CHAIRMAN RUSSELL: Opposed.

19 (No response)

20 CHAIRMAN RUSSELL: Motion carries
21 unanimously.

22 The next action item on the agenda is
23 the Department's request to amend 17.8.801 and
24 17.8.818 for the major source permitting regarding
25 emissions of NOx as a precursor of ozone, and

1 other minor amendments.

2 MR. LIVERS: Mr. Chairman, Deb Wolfe
3 will be presenting.

4 MS. WOLFE: Good morning. Mr. Chairman,
5 members of the Board, my name for the record is
6 Debra Wolfe, and I'm here to represent the
7 Department regarding the amendment of air quality
8 rules.

9 The Department today is requesting the
10 Board to initiate rulemaking that would amend air
11 quality provisions in Title 17, Chapter 8,
12 Subchapter 8 to update requirements for ozone for
13 sources subject to major source permitting rules.
14 So I'll go through a little bit of background
15 about ozone very briefly.

16 Ozone is a pollutant for which EPA has
17 established a national ambient air quality
18 standard pursuant to the Federal Clean Air Act.
19 The NAAQS for ozone were revised in 1997. You may
20 have also seen in the news that they were revised
21 for 2008 as well, so I want to separate those for
22 you, that this is concerning the 1997 ozone
23 standard.

24 It is an eight hour standard, and it is
25 considered to be met if the fourth highest

1 measured eight hour ozone concentration if
2 averaged over three years is less than or equal to
3 .8 parts per million. We are in attainment for
4 ozone. That means that we still need to revise
5 rules pertaining to our major sources, but our
6 state -- just to reassure people -- doesn't really
7 have an ozone problem.

8 Ozone is not directly emitted from a
9 source, but is formed as result of a photochemical
10 reaction involving sunlight between volatile
11 organic compounds and nitrogen oxides. So VOC's,
12 which are volatile organic chemicals, and NOx,
13 nitrogen oxide, are ozone precursor pollutants,
14 and those are what are emitted from sources.

15 Ozone is particularly an urban problem
16 -- and Joe knows all about this already -- and NOx
17 is emitted primarily from sources in vehicles, and
18 in Montana, that would be major sources.

19 So we're asking the Board initiate
20 rulemaking that would add NOx and ozone at
21 particular levels to control for the ambient
22 levels of ozone. If you have any questions, I'd
23 be happy to answer them.

24 CHAIRMAN RUSSELL: Questions for Deb?

25 (No response)

1 CHAIRMAN RUSSELL: This is necessary?

2 It needs to be done?

3 MS. WOLFE: Yes.

4 CHAIRMAN RUSSELL: For many good
5 reasons. When you apply this rule to Montana,
6 what do you see?

7 MS. WOLFE: I'm sorry. When you apply
8 this rule --

9 CHAIRMAN RUSSELL: NOx. Just generally
10 looking at NOx emitters in Montana.

11 MS. WOLFE: Those are very good
12 questions. You're talking about implementation.
13 We've got a very talented engineer that heads up
14 our Permitting Section that would be happy to
15 answer those questions. How about that? Vicki
16 Walsh.

17 MS. WALSH: Mr. Chairman, members of the
18 Board, for the record, my name is Vicki Walsh, and
19 I'm the Air Permitting Supervisor for the Air
20 Resources Management Bureau with the Department.

21 And your question is a good one. What
22 it really means is for these folks it is major
23 sources. We don't have but a handful of major
24 sources in the state of Montana. So if they make
25 a change regarding NOx, and they make a

1 significant change in NOx, it will not only
2 trigger the PSD requirement or review for NOx, it
3 would also trigger it for ozone. It is almost
4 like using NOx as a surrogate to get there.

5 So overarching, I don't see a huge
6 change. They will have to include that in their
7 analyses and look at ozone, but that's probably
8 about as far as it will go in actual
9 implementation.

10 CHAIRMAN RUSSELL: You can only measure
11 ozone as a surrogate to precursors. You can't
12 actually measure ozone emissions.

13 MS. WALSH: You can do ambient level
14 ozone monitoring, but no, not at the source. We
15 would be looking at NOx specifically as that
16 numbering, looking at controlling NOx, so that you
17 don't have that impact or creation of ozone.

18 CHAIRMAN RUSSELL: Questions for --

19 MS. SHROPSHIRE: Do you know of any
20 sources that would be made a major source by this
21 change that weren't previously?

22 MS. WALSH: Mr. Chairman, Ms.
23 Shropshire, a source won't be created as a major
24 source only because the trigger is the same for
25 NOx as it would be for ozone. So you would become

1 a major source of NOx, and go through that
2 application of the analyses, not ozone by itself.

3 So if you trigger for NOx, you're going
4 through that analysis, but we're saying now you've
5 got to pull in and review the implication of
6 creating ozone as well. You've got to have that
7 as part of your discussion.

8 CHAIRMAN RUSSELL: Other questions?

9 (No response)

10 CHAIRMAN RUSSELL: All right. Thank
11 you. Well, with all that, I think before we get
12 started, is there anyone in the audience that
13 would like to speak to this that's a member of the
14 public or wants to act like a member of the
15 public, like maybe someone in the Water Section?

16 (No response)

17 CHAIRMAN RUSSELL: All right. Seeing
18 none, I will entertain a motion to initiate
19 rulemaking on this matter, and assign it to
20 Katherine.

21 MS. ORR: Sounds good.

22 CHAIRMAN RUSSELL: All right. Do I have
23 a motion?

24 MR. MILLER: I so move.

25 CHAIRMAN RUSSELL: It's been moved by

1 Marv. Is there a second?

2 MR. ANDERSON: I'll second.

3 CHAIRMAN RUSSELL: Larry seconded. Any
4 further discussion?

5 (No response)

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

8 (Response)

9 CHAIRMAN RUSSELL: Opposed.

10 (No response)

11 CHAIRMAN RUSSELL: Motion carries
12 unanimously. Thank you.

13 The next item on the agenda is just a
14 little item, revising Circular DEQ2. Tom.

15 MR. LIVERS: Mr. Chairman, this is
16 following up on some of the briefings we had at
17 the last meeting. We've got some fairly complex
18 rulemakings coming down with respect to nutrients
19 and related issues, so we wanted to provide a
20 pretty in-depth briefing before we get into the
21 actual initiation, so we can get a sense of the
22 Board interest, areas of concerns and questions.
23 This is the first in a series of initiations that
24 are going to stem from those related issues, so
25 stretching this out slightly further. Paul

1 LaVigne from the Planning Division is going to
2 walk us through this.

3 MR. LaVIGNE: Good morning, Mr.
4 Chairman, members of the Board. For the record,
5 my name is Paul LaVigne, and I work in the
6 Municipal Wastewater Section, formerly known as
7 the Water Pollution Control State Revolving Fund.
8 I'm here today, as Tom said, we're requesting
9 initiation for rulemaking authority for changes
10 we're making in design Circular DEQ2 and reuse
11 standards.

12 I kind of briefed the Board last time.
13 Not everyone was here, so I thought what I'd do is
14 just kind of quickly go through what we're
15 envisioning here.

16 So DEQ2 is a fairly good sized document.
17 We posted it on the web last time, and as you can
18 see, this is kind of it right here. So it is
19 fairly technical.

20 So it is design standards for larger
21 municipal systems. It includes collection system
22 stuff, whether it is gravity or pressure systems
23 with lift stations. Various treatment
24 technologies, everything from lagoons to advanced
25 biological nutrient removal systems. And it would

1 apply to just service water discharging systems or
2 groundwater discharging systems, in some cases
3 even total attainment systems.

4 So it is essentially a tool box for
5 consulting engineers and our review engineers here
6 at DEQ to provide consistency on the reviews.

7 It is based on what's called Ten State
8 Standards, which were developed decades ago by a
9 group of ten states in the midwest. It's fairly
10 conservative in its approach, in terms of
11 redundancy, and just capacity, and that sort of
12 thing. Ten States has been around a long time,
13 and a lot of other states use it as a basis for
14 design. They have one for water and one for
15 wastewater.

16 So the proposed changes generally are a
17 lot of cleanup throughout the document. It has
18 been probably thirteen years or so since we
19 updated it. But there are also some significant
20 modifications, primarily with regard to land
21 application, spray irrigation. I'll talk about
22 that in a second. Then we have some new sections
23 on membranes, and other treatment technologies,
24 including biological nutrient removal systems.

25 Then probably the biggest addition would

1 be the reuse standards, and I'll go into those for
2 a second in a minute, and they cover treatment
3 standards to be met prior to reuse, and then
4 classifications and allowable uses.

5 So the land application, these systems
6 have been around for quite awhile in Montana, and
7 these are generally at agronomic rates. So what's
8 in there now in Chapter 120 includes just
9 applying, spraying on the surface for
10 agricultural, or even recreational purposes like
11 golf courses, at agronomic rates.

12 It's been used in Montana for thirty
13 years or so. We've had design standards in DEQ
14 since 1994. We had guidance before that. And by
15 rule they're exempt from a groundwater discharge
16 permit if they're applied at agronomic rates.

17 We felt we did a pretty good job of
18 addressing the design part of it way back when in
19 1994, but we felt that we were probably a little
20 weak on the operation side of it. So once the
21 system was approved, we needed some sort of
22 controls there so they weren't impacting
23 groundwater or even surface water in some cases.

24 So we beefed up that a lot, and added
25 sampling, monitoring, and recordkeeping

1 requirements. Essentially what we want them to do
2 is to continually demonstrate they aren't
3 impacting State waters.

4 The new technologies are membrane
5 bioreactors, so that's essentially a physical
6 barrier in place of clarifiers now, which is
7 essentially a gravimetric way of separating the
8 good stuff from the bad stuff before it goes out.
9 So now you have essentially a physical barrier in
10 the way of a membrane. We have one now that just
11 went into operation in Bigfork. We've got another
12 one proposed in River Rock outside of Belgrade.
13 Then Butte is proposing one also.

14 SBR's, there are several versions of
15 those. Generally all of these are aimed at
16 nutrient removal. And so BNR, we have a section
17 BNR, biological nutrient removal, that would cover
18 the biological part of these processes. And as
19 you know, the proposed numeric water quality
20 standard, which will be coming up, are very local.
21 In fact, we probably can't get there in terms of
22 nitrogen limits. We're probably on an order of
23 magnitude higher than that. But it will require
24 all of these tools to get to the limits of
25 technology.

1 MR. LIVERS: Paul, just for my
2 reference, sequencing batch reactors, is that SBR?

3 MR. LaVIGNE: Yes, sequencing batch
4 reactors. That takes various forms. It is just
5 kind of a different twist on the conventional
6 activated sludge plants you might see around.
7 It's more of a draw and fill sort of thing with
8 certain types of -- creating certain types of
9 atmospheres for various bugs to do their thing
10 basically.

11 CHAIRMAN RUSSELL: They're usually
12 tankage, too, right? Mostly in tankage versus --

13 MR. LaVIGNE: Right. So instead of
14 numerous tanks, a lot of times there is one tank
15 in a sequencing biological reactor.

16 In terms of reuse, we've added that to
17 DEQ2 as well. And the history there is there was
18 House Bill 52 in the last legislative session.
19 They gave the Board authority to adopt rules and
20 standards for reuse. Essentially that bill, in
21 addition to giving authority, just defined
22 reclaimed wastewater, and then requires DNRC
23 approval for the water rights part of it before
24 reuse can be proceeded with, and before we can
25 approve it.

1 As far as the rules associated with
2 reuse, they fall under two acts, the Water Quality
3 Act, and then the Public Water Supply Act.
4 Essentially under the Water Quality Act, it
5 defines reclaimed water and unrestricted reclaimed
6 water -- so I'm going to talk about that in a
7 second. It adopts by reference DEQ2. DEQ2 has
8 always been adopted by reference in the Public
9 Water Supply Act, but not in the Water Quality
10 Act.

11 It clarifies that existing permit
12 exclusion I talked about, about spray irrigation,
13 and what it does is it defines it as it must be
14 applied at agronomic rates, so Department approved
15 at agronomic rates, and that agronomic rates
16 wasn't in there before.

17 And then we have this new exclusion for
18 unrestricted reclaimed wastewater, exclusion from
19 a groundwater permit with monitoring and reporting
20 requirements. Now, some states are doing this,
21 and some aren't. There is a lot of states that do
22 it for spray irrigation, but we're kind of opening
23 the door a little wider than that.

24 Because essentially what will have to
25 happen is that the effluent has to be treated,

1 filtered, disinfected, all this stuff, and has
2 total nitrogen of less than five milligrams per
3 liter. So this is very highly treated wastewater,
4 and it would meet nondeg right off the bat, not
5 just at the end of the pipe.

6 And then under the Public Water Supply
7 rules, just minor cleanup. And then it would
8 require DEQ approval to be based on compliance
9 with the treatment standards, monitoring,
10 reporting, and recordkeeping, and then also
11 includes the water rights.

12 On that note, DEQ has worked out a
13 Memorandum of Understanding between DNRC and the
14 Department to deal with these water rights during
15 the review process; and then some prohibitions
16 that you have to use it properly to reclaimed
17 water, and it has to have proper treatment.

18 I kind of already mentioned basically
19 these issues. There are a couple tables that are
20 key in DEQ2, and those are tables B-1 and B-2. So
21 B-1 has the classes, the various classes of
22 reclaimed wastewater; and B-2 has the uses of
23 reclaimed wastewater; and then the monitoring and
24 reporting requirements, and O&M practices.

25 So the public involvement we've had so

1 far are: Just in general, it has been kind of
2 mentioned in various EQC meetings, and the Interim
3 Policy, and Interim Water Policy Committee; and
4 then WPCAC, we've briefed them three or four
5 times, I think. Then we've had detailed technical
6 review from some national engineering firms and
7 the larger state level engineering firms.

8 So in essence that's it. If you guys
9 want to look at anything in detail, we've got DEQ2
10 here loaded. We can look at anything you might
11 want to look at. It's a fairly technical
12 document, as you guys have seen. And I have with
13 me a couple of experts that have worked for a long
14 time on this stuff, and can probably answer any of
15 your questions.

16 CHAIRMAN RUSSELL: Questions for Paul or
17 anyone else?

18 MR. WHALEN: Mr. Chairman, I wanted to
19 get the Department to answer a question that's
20 been puzzling me a little bit since I was
21 reviewing the material. It relates to Rule
22 17.38.103, which involves category exclusion to
23 MEPA.

24 MR. LaVIGNE: What was the rule number
25 again?

1 MR. WHALEN: 17.38.103.

2 MR. LaVIGNE: Mr. Whalen, is that one of
3 the rules we were amending?

4 MR. WHALEN: Yes. Let me make sure.

5 MR. LIVERS: It looks like it was just
6 changing "sewer" to "sewage."

7 MR. WHALEN: So that's not a new section
8 that was introduced?

9 MR. LIVERS: Correct.

10 MS. SHROPSHIRE: The whole title is
11 underlined, so it appears as if it's a new
12 section, but it was just "sewer" to "sewage."

13 MR. LIVERS: I think that's what's
14 happening there. I'd probably defer it to Paul,
15 but --

16 MR. LaVIGNE: I'm probably going to have
17 to defer to Claudia if she's here.

18 MR. WHALEN: That was my impression,
19 that it was a new section. Even if it is not, I
20 guess I'm curious how it is legal for the
21 Department to grant category exclusion to MEPA.

22 MR. LaVIGNE: Mr. Whalen, in some cases
23 we can if it is just a change to a uniprocessor
24 modification, without changing capacity, or
25 effluent quality, or something like that.

1 So for example, if a community came in
2 and wanted to, let's say, change the configuration
3 of the clarifier, or some other component like
4 that, we could do that review without going out
5 for public comment.

6 If they were to downsize a clarifier,
7 take one off, even add one that would involve
8 other land or something like that, we certainly
9 would do MEPA review. So it is a MEPA review,
10 too. We have criteria for categorical exclusions,
11 and those are pretty well defined, pretty
12 innocuous, in my opinion. We've thought of this
13 quite a bit. I don't know if that answers your
14 question enough.

15 MR. WHALEN: Well, I just had a quick
16 follow up if I may, Mr. Chairman. Since we're
17 addressing public wastewater supply systems here,
18 a lot of those projects are going to be financed
19 through the Revolving State Drinking Water Fund,
20 which as I understand it does require MEPA review.
21 So how do you get around the conflict of
22 categorical exclusion on portions of a project
23 that is likely to be funded through that DNRC
24 program that does require MEPA review? I'm seeing
25 a little bit of a conflict, and I'd kind of like

1 an answer.

2 MR. LaVIGNE: Actually the Water
3 Pollution Control State Revolving Fund -- and I'm
4 the manager of that program -- has the categorical
5 exclusion criteria, and I think it is in our
6 rules, too. We revised those not too long ago, a
7 couple years ago, I think.

8 But it's kind of the same as what I was
9 saying. If it is a project where nothing is
10 really going to change, it is just an upgrade, or
11 not even an upgrade, a replacement, for example,
12 or lining of sewers or something like that, then
13 we would do a categorical exclusion. Those are
14 still noted in the paper and all that. They can
15 be overturned at any time prior to the project
16 getting started.

17 MR. WHALEN: So the Legislature made
18 provision for those work-arounds?

19 MR. LaVIGNE: I'm not sure exactly where
20 that originated, but in my tenure here in the last
21 twenty years, which goes back almost to the
22 beginning of SRF, we have had provision to allow
23 for category exclusions, and that's in line, I
24 guess parallel with the NEPA requirements that we
25 worked under under the construction grants program

1 from which this program evolved. So we're
2 required by EPA to have a NEPA-like review in the
3 SRF program, so it is very consistent with federal
4 law.

5 MR. LIVERS: Mr. Chairman, Paul has
6 given a good answer, and I think if you want, John
7 can maybe supply a little more on just the legal
8 framework of categorical exclusions.

9 MR. NORTH: Mr. Chairman, Mr. Whalen,
10 the concept of categorical exclusion first arose
11 in the rules implementing the National
12 Environmental Policy Act, and those rules provide
13 that an agency can create a categorical exclusion;
14 and when we upgraded, revised the MEPA rules
15 either in 1980 or 1989 -- I can't remember which
16 revision it was -- that was a concept in the
17 federal rules that we adopted.

18 So it is in the uniform MEPA rules,
19 which have been adopted by every agency, and it
20 provides that an agency can create a categorical
21 exclusion for certain actions that would have
22 minor environmental impact, either by adoption of
23 a rule, or by preparation of a programmatic
24 environmental assessment; and it provides that the
25 agency can do that where the impacts would be

1 minor, and the categorical exclusion has to
2 include criteria that basically would assure that
3 the impacts would be minor.

4 And then also if there happens to be a
5 project that might meet those criteria, but would
6 nevertheless be major, basically it indicates then
7 that a categorical exclusion doesn't apply.

8 MR. WHALEN: Thank you.

9 CHAIRMAN RUSSELL: Further questions?

10 MS. SHROPSHIRE: Just a minor question.
11 Curious the reasoning behind changing wastewater
12 to public sewage.

13 MR. LaVIGNE: I don't think wastewater
14 was defined, and public sewage is defined in the
15 law, and I think that's why they did it. And
16 these rules would apply to just public systems.
17 So we just wanted to make that clear. So that was
18 just kind of a side effect. I guess when we
19 started looking at the law to change reuse, the
20 rules for reuse, we found that, hey, this may be
21 not defined, so --

22 CHAIRMAN RUSSELL: Paul, isn't it really
23 because we can't figure out if it is one or two
24 words?

25 MR. LaVIGNE: You got me.

1 MR. MILLER: Kind of like "groundwater."

2 CHAIRMAN RUSSELL: "Groundwater" is one
3 word. It is not the same if it's two words.

4 I do have a few questions specific to --
5 Is A-1 being met for the snow making for the ORW?

6 MR. CAMPBELL: Mr. Chairman, members of
7 the Board, for the record, my name is Terry
8 Campbell, and I've been working with Todd on the
9 snow pollutant operation at Big Sky. And no, A-1
10 is not being met at the Big Sky Sewer District at
11 this point in time.

12 It is being met, I guess, from the
13 standpoint of filtration is provided, the
14 disinfection levels are provided, but the nutrient
15 levels are not being met at this current time.
16 They're close. The nutrient conditions in that
17 effluent that they're achieving right now are
18 about eight milligrams per liter total nitrogen;
19 but that's pretty much the level of treatment they
20 can achieve with the sequencing batch reactor
21 technology they have.

22 So in order for them to use that snow
23 effluent operation in an unrestricted fashion,
24 they would have to take it to a more advance level
25 than where they're at currently.

1 CHAIRMAN RUSSELL: They know that?

2 MR. CAMPBELL: And they know that.

3 CHAIRMAN RUSSELL: Do you know of any
4 reuses for toilet and urinal in Montana?

5 MR. CAMPBELL: We do not have anybody
6 that I'm aware of currently that has reuse for
7 flushing of toilets and urinals. It's pretty
8 popular in the states of Washington, California,
9 and Florida, in commercial facilities; but not
10 here so far.

11 CHAIRMAN RUSSELL: There is plants that
12 actually will -- So there are plants that will
13 actually meet that "B" standard?

14 MR. CAMPBELL: There are. Yes. It is
15 difficult. It is a level of technology, but there
16 are plants, including membrane bioreactor
17 facilities, that can achieve the types of
18 standards that we have set as conditions.

19 CHAIRMAN RUSSELL: All right. That's
20 all for reuse. I want to talk about septage. Do
21 you feel that DEQ2 is going to more appropriately
22 address septage receiving into publicly owned
23 treatment works?

24 MR. LaVIGNE: Mr. Chairman, we do have
25 some provisions in there for dealing with septage.

1 I can't remember what the appendix is. We've
2 always allowed it, or had a standard for it for
3 quite awhile, and it's certainly up to the
4 communities to decide whether or not they want to
5 accept septage, because it can have a significant
6 impact on facilities. It is a fairly concentrated
7 load, and it will depend on when it's introduced
8 and where it is introduced into the plant.

9 CHAIRMAN RUSSELL: Do you feel that you
10 need to take a consultative regulatory approach to
11 some publicly owned treatment works to help them
12 manage that, or are they capable of doing it
13 themselves?

14 MR. LaVIGNE: Generally, Mr. Chairman, I
15 think that the communities that are large enough
16 -- Well, I guess, yes and no. The communities
17 that actually have septage receiving stations
18 would be generally your larger mechanical
19 facilities, and they're generally run well enough,
20 and people are knowledgeable enough, to make the
21 right decisions there about bleeding in septage,
22 and sampling, and that sort of thing.

23 But on the other hand, there certainly
24 are lagoon systems where we don't encourage
25 septage to be disposed of in any lagoons as a

1 Department. But it is up to the communities. And
2 they're are some problems. In fact, just this
3 week, Sidney had some real problems. They've been
4 accepting a lot of septage from man camp waste and
5 stuff like that back in eastern Montana, and their
6 lagoons -- they had to just cut everybody off on
7 outside dumping just this week.

8 CHAIRMAN RUSSELL: We're talking a waste
9 thirty to forty times stronger than domestic waste
10 going into those, and we'd love to get out of the
11 land application business. Rick is not here, and
12 he hasn't heard my tirade for awhile. But it is a
13 double edged sword, and from a regulatory
14 standpoint, it should be encouraged based on good,
15 solid engineering.

16 And reading through here, getting it off
17 the head works and some of the things that are in
18 here I think are good; but the application of the
19 strength of the waste to the technology, I hope
20 you're out there helping these plants, these sewer
21 plants, get to that point where maybe we can do
22 it.

23 MR. LaVIGNE: And like I said, it is up
24 to communities. We don't want to push them to
25 accept septage. Some systems will say, "Yes, we

1 will do it," and some will say, "We absolutely
2 won't." We always felt that that was their call.
3 I understand the complexity. If you say no, it's
4 going to go somewhere else.

5 CHAIRMAN RUSSELL: Probably hopefully
6 the last question. When you deal with the lagoons
7 and spray irrigation, it's probably case-by-case
8 on how you monitor to determine if there is a
9 discharge to groundwater that now makes -- of
10 enough sufficient nutrient that would make this
11 needed groundwater discharge permit.

12 It seems like it is an open loop, and
13 I'm a little concerned that there is this thought
14 that, "Oh, I have a lagoon system and spray
15 irrigation. I'm exempt from regulation." I hear
16 that, and we have one. And I think that's an
17 inappropriate approach to -- I almost said
18 wastewater but I didn't want to go back into the
19 one or two word -- to sewage treatment, and
20 because they are a sewage treatment plant, and
21 they accept the same sewage treatment that a
22 biological treatment plant would in Kalispell, but
23 they get this approach, "Well, it is not an issue
24 with us. We're literally exempt from a lot of
25 regulation."

1 MR. LaVIGNE: Exactly, and Mr. Chairman,
2 that's why we beefed up that Chapter 120, because
3 the operations side of things was weak.

4 And we started a few years ago really
5 looking at this, and while we were trying to get
6 DEQ2 moving here, we essentially developed a
7 couple form letters that we sent out, with each
8 time we visit a community saying, "Here is what
9 you need to do to do sampling, and you need to
10 continually demonstrate that you're not impacting
11 groundwater at all." So those would include
12 monitoring flow, precipitation, nitrogen content,
13 fecal coliform essentially.

14 CHAIRMAN RUSSELL: Thanks, Paul. Great
15 document. I read it word for word. Not really.
16 I trust that it is a good document, and I commend
17 the Department on a good start.

18 MS. SHROPSHIRE: I just want to follow
19 up on my previous questioning if you're done. I'm
20 still trying to understand the replacement of
21 "wastewater" with "public sewage," because I don't
22 know what the definition of public sewage is.

23 And just while you're looking for that
24 to explain, there may be some sources that go to a
25 treatment system that are not sewage that may have

1 nutrients. And I don't know if by putting "public
2 sewage" in there, that that excludes them if
3 they're not public sewage, if -- Maybe I'm
4 misunderstanding this, but I just want to make
5 sure that "public sewage" isn't excluding things
6 that aren't public sewage, that may have nutrients
7 that contribute to the system. Does that make
8 sense?

9 MR. LaVIGNE: I'm not totally clear.
10 Can I just -- Here is what I think my definition
11 is, why they changed that. There is a definition
12 for a public sewage system, and that is it serves
13 25 or more people. And I don't think that was
14 very clear in the way the rules were written
15 before. It just said "wastewater," so it could
16 include industrial wastewater and other sources.

17 So this is under the Public Water Supply
18 Act, so it is just dealing with municipal type
19 domestic public sewage, sewage for systems that
20 meet the definition of a public sewage system.

21 CHAIRMAN RUSSELL: I would have probably
22 asked you to define it based on the key word being
23 "public" not "sewage," because I think it really
24 does fall back to the issue of being public and
25 non-public, or multi-family versus single family,

1 and what comes under the regulation as a public
2 sewage treatment system. You recognize public in
3 the same way, don't you?

4 MR. LaVIGNE: Claudia, do you want to
5 add anything there?

6 MS. MASSMAN: Mr. Chairman, members of
7 the Board, for the record, my name is Claudia
8 Massman. I think Chairman Russell hit it. These
9 rules are being adopted under the Public Water
10 Supply Act, and that applies only to public sewage
11 systems as it is defined in that act. And I don't
12 have the definition right in front of me, but it's
13 something like 25 -- the system has to serve a
14 certain amount of people for more than 60 days,
15 and that's the only thing that we regulate under
16 these rules.

17 CHAIRMAN RUSSELL: I think generally
18 applied, it is 25 or more people, or 15 or more
19 connections, 60 days out of the year. Thanks,
20 Claudia. Further discussion?

21 (No response)

22 CHAIRMAN RUSSELL: All right. Hearing
23 none -- and we are initiating rulemaking on this.
24 I would entertain a motion to initiate rulemaking,
25 and Katherine, you're going to hear this, or --

1 MS. ORR: I'm available.

2 CHAIRMAN RUSSELL: I would leave it up
3 to the Board if they want to hear this one. It's
4 been a long time since we've done a rulemaking,
5 and this is going to be a big one. I don't know
6 how that affects anyone. None of us work for
7 cities anymore, right, Joe?

8 MR. WHALEN: Right.

9 CHAIRMAN RUSSELL: There will be some
10 issues that come up from the municipalities on
11 this. Do you agree?

12 MR. LaVIGNE: I agree, yes.

13 CHAIRMAN RUSSELL: So it is your liking.
14 We can entertain a motion either way, but
15 Katherine is available. Are you guys okay with
16 that? I want to make sure we're not throwing a
17 wrench into the whole BER process by hearing it
18 ourselves.

19 MR. LIVERS: It is your option, Mr.
20 Chairman. It is the Board's option.

21 MR. WHALEN: Mr. Chairman, I think Robin
22 raised a pretty interesting question with respect
23 to this definition issue that is going to get to
24 the heart of the acceptance of the circular. I
25 would support the Board hearing this matter. I

1 think it is going to be a pretty important
2 interest to municipalities in particular, as there
3 is more pressure to dispose of industrial
4 wastewater through municipal public wastewater
5 systems. So that would be my preference, just as
6 an observation.

7 CHAIRMAN RUSSELL: As a motion?

8 MR. WHALEN: Yes. You have a really
9 good way of crafting intentions into motions, so
10 do you have some wording that you'd like to use?

11 CHAIRMAN RUSSELL: I'd probably have to
12 catch up with your -- So I would entertain a
13 motion to initiate rulemaking, and have the Board
14 hear this within the six month time frame. That's
15 the only thing I'm wondering about, because this
16 is probably going to be a fairly lengthy public
17 hearing.

18 MR. LIVERS: Mr. Chairman, just offhand,
19 I think we'd probably look at trying to hold it in
20 conjunction with the next Board meeting, which I
21 don't know yet if it was planned for a phone
22 meeting or an in-person meeting. I'm not sure the
23 load on that meeting. What we would probably do
24 is try to anticipate the duration of the hearing,
25 most likely bring you in Thursday, sometime

1 Thursday for the hearing, and try to schedule
2 things appropriately over that Thursday/Friday
3 time frame.

4 CHAIRMAN RUSSELL: It is probably going
5 to take a little time to get through.

6 MR. LIVERS: I assume that would be
7 preferable to the Board members, rather than
8 scheduling a separate stand-alone hearing.

9 CHAIRMAN RUSSELL: And the challenge is
10 keeping our hearing within the notice, because the
11 next meeting is only two months out, right?

12 MR. LIVERS: It will be in July. I'll
13 pull up the date. Probably roughly around the
14 third week in July, I'm guessing.

15 MR. NORTH: Mr. Chairman, John North,
16 Chief Legal Counsel for the Department. That
17 won't be a problem because we won't file the
18 notice on Monday. We'll wait until the filing
19 date. That would mean that it came out just 20
20 days before the Board meeting.

21 CHAIRMAN RUSSELL: So that's not going
22 to be an issue.

23 MR. NORTH: No.

24 CHAIRMAN RUSSELL: All right. So do I
25 have a motion to move forward with the Board

1 hearing this?

2 MR. WHALEN: So moved.

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

5 MS. SHROPSHIRE: Second.

6 CHAIRMAN RUSSELL: Seconded by Robin.
7 Further discussion, including members that might
8 be in the public or on the phone if anyone snuck
9 in?

10 (No response)

11 CHAIRMAN RUSSELL: Hearing none, all
12 those in favor, signify by saying aye.

13 (Response)

14 CHAIRMAN RUSSELL: Opposed.

15 (No response)

16 CHAIRMAN RUSSELL: Motion carries
17 unanimously. Thank you. That was good. And all
18 I would say is when we do this hearing, we just
19 want to -- we don't want to get into a two day
20 fiasco because we just set ourselves up for it.

21 The next item on the agenda is establish
22 new and revised water quality standards in
23 Circular DEQ7.

24 MR. LIVERS: Mr. Chairman, Rod McNeil is
25 here for this.

1 MR. McNEIL: Mr. Chairman, members of
2 the Board, my name is Rod McNeil, and I'm with the
3 Water Quality Standards Section of the DEQ. We
4 gave you a pretty picture to look at until I get
5 through the early parts of this talk.

6 DEQ7 is something that keeps coming
7 back. You never quite get rid of it. And we
8 undertook the triennial review in 2010 and 2011.
9 The update this time is to clean up some further
10 issues that were not addressed in the triennial
11 review, as well as a major undertaking to add
12 Required Reporting Values to a large number of the
13 constituents in DEQ7.

14 I would say that our public outreach in
15 this round on DEQ7 has been significantly greater
16 than previous versions. We actually posted a
17 draft version of this online in July of 2011, took
18 informal public comment at that time, made some
19 further revisions. We've been to WPCAC three
20 times discussing those changes, and talking about
21 the general intent of the more mundane changes
22 that we wanted to make.

23 And then in October of 2011, we put the
24 second draft out for comment; took further
25 comment, particularly from the laboratories which

1 are affected by the Required Reporting Values; and
2 then again put it out for public comment, and it
3 is posted on the web to receive informal public
4 comment again.

5 So we've tried to, I would say very hard
6 this time, to do the public outreach in a very
7 significant way. Individual copies of the
8 revision drafts have been submitted to the NGO's
9 and parties of interest in advance, on two
10 occasions, two cycles so to speak, so hopefully
11 everybody feels informed on this.

12 I'm going to talk about some of the, I
13 guess I'll call it easier changes to understand
14 first. First under the Montana Agricultural
15 Chemical Groundwater Protection Act, we're
16 required to develop interim standards if the
17 federal government does not have standards for
18 groundwater protection.

19 In 2010 and 2011, the Montana Department
20 of Agriculture detected five new pesticides in
21 groundwater supplies around the state, and I've
22 listed them here for you. These compounds are all
23 pesticides of one form or another, and we've
24 developed standards in conjunction with the EPA
25 regional toxicologist.

1 We also undertook a review of other
2 health advisories for other pesticides that have
3 been established in the past, and we reviewed all
4 of those that have been posted in DEQ7 for more
5 than ten years, and reviewed all of those, went
6 back through the EPA to confirm our findings, and
7 modified the standards for the twelve pesticides
8 that you see listed here. So those two areas all
9 relate to the Agricultural Chemical Groundwater
10 Protection Act, and those have all been -- the
11 numeric values are all posted in your copies of
12 DEQ7.

13 We've also adopted two new aquatic life
14 standards. One is a chronic aquatic life standard
15 for Acrolein. And then we're modifying the acute
16 aquatic life standard for Endrin, because what we
17 posted was specific to salt water, not fresh
18 water. We're a little short on salt water here,
19 so we decided to correct that.

20 We've also got nine new or revised human
21 health standards. Under the Safe Water Drinking
22 Act, we had five new compounds. Many of these are
23 related to chemical treatment at domestic drinking
24 water plants, and these compounds had no prior
25 federal standards.

1 We were reviewing two human health
2 standards based on MCL's under the Safe Water
3 Drinking Act. Those are Alpha emitters and
4 Metolachlor, which is a pesticide. And then we
5 adopted one new nonpriority pollutant from the
6 304(a) criteria list, which is
7 Hexachlorocyclohexane. We also revised an error
8 in the Aldicarb Sulphone standard from three to
9 two micrograms per liter.

10 So this has been sort of a mix of
11 current making corrections and incorporating new
12 materials.

13 Revising the categorization of 12
14 standards, we undertook a review of all the
15 standards in DEQ7, and found that their status
16 under the Integrated Risk Information System used
17 by the EPA had been modified for 12 of these
18 compounds.

19 Basically here are the three things that
20 can happen. It could be changed from carcinogenic
21 to toxic, toxic to carcinogenic, or from harmful
22 to toxic. Harmful is not a category that the EPA
23 recognizes, but these two compounds that were now
24 classified as toxic had no prior federal
25 standards.

1 Now, there are existing toxic reports
2 for these, and they are listed in IRIS, so the
3 categorization is important in terms of how these
4 compounds are interpreted, particularly
5 nondegradation, so having appropriate and accurate
6 categorizations is important.

7 Compounds that have been changed from
8 carcinogenic and toxic, basically all of those
9 compounds would have an allowance under
10 nondegradation. Those compounds that go from
11 toxic to carcinogenic would have a zero tolerance
12 for change under nondegradation.

13 We also corrected sources of
14 information. EPA doesn't review this. We changed
15 the numeric values to reflect the correct values
16 in the 2010 triennial review, but we did not
17 correct all of the source material to indicate
18 where those numbers came from. So there are 28
19 compounds whose sources were updated and changed.

20 And this is fairly routine. So for
21 instance, let's say there is a pesticide that we
22 developed under a health advisory for an interim
23 standard. Then later on it becomes a nonpriority
24 pollutant. And so it goes on the 304(a) list, or
25 is adopted under the Safe Water Drinking Act and

1 has a specific standard.

2 We want to reflect the most current
3 source of information, and the most current source
4 -- or most current accurate technical information
5 for criteria. So this is constantly updated.
6 These 28 cases, the numbers were updated, but
7 sources were not.

8 In the footnotes, we had to make a
9 number of revisions to appropriately reflect
10 changes. One of the most important is in Footnote
11 8, which is being modified to indicate the
12 development of a draft numeric nutrient standard
13 which will be included under a separate circular,
14 DEQ12.

15 The inorganic nitrogen and inorganic
16 phosphorus have been removed from DEQ12, so the
17 change in Footnote 8 reflects that, and refers to
18 DEQ12 in its draft form to describe the standards
19 for those compounds.

20 We're also repealing reference to the
21 narrative water quality standards for nutrients
22 and removing inorganics. I've already said that.
23 But anyway, the reference to the narrative water
24 quality standards is not necessary because it is
25 covered under separate statutes.

1 We've included three new footnotes to
2 address the issue of parent compounds, and whether
3 they're quantified with their daughter products.
4 So particularly pesticides as they enter the
5 environment, or complex organic compounds, they
6 break down in the environment, and we end up with
7 daughter products, which we want to quantify with
8 the parent compounds in order to provide a safe
9 limit which includes the daughter products, which
10 may or may not have similar toxicity.

11 We're also making revisions to the
12 introduction just to clarify some of our
13 definitions, and clear up some of the commonly
14 used terms that we use throughout DEQ7.

15 We're proposing to remove the secondary
16 maximum contaminant levels for both iron and
17 manganese because SMCL's refer only to esthetics,
18 things like stains your toilet bowl, or it smells
19 bad, etc.; and the different departments have
20 interpreted SMCL's differently, and as such we're
21 proposing to drop them to prevent this confusion.

22 Iron does have an aquatic life standard,
23 and we propose to retain that; but manganese has
24 neither a human health or a current aquatic life
25 standard, so we're proposing to drop that entirely

1 from DEQ7.

2 However, we do see manganese as having a
3 significant potential for human health issues,
4 particularly in young children, and there is
5 current research ongoing in that area, and we're
6 watching them very closely, and we'll bring that
7 back to the Board when a solid number is developed
8 for a standard.

9 The final area that I want to address on
10 DEQ7 is RRV's. We need to do some definitions
11 here to get started. Required Reporting Value is
12 the laboratory reporting limit that's sufficiently
13 sensitive to meet the most stringent numeric water
14 quality standard for that parameter, and we are
15 proposing 213 new or revised RRV's.

16 This involved interacting with seven
17 different laboratories, and getting from them
18 their minimum detection limits for every reporting
19 technique that they use for every compound that
20 appears in DEQ7. This was a huge undertaking, and
21 I'd like to thank my co-worker Amy Steinmetz for
22 helping to a great extent with this work.

23 The MDL is the minimum concentration of
24 a substance that can be measured and reported with
25 99 percent confidence, as different from -- the

1 analyte concentration being different.

2 So we have all these MDL values for all
3 these different tests from all of the different
4 labs. What we do to calculate the Required
5 Reporting Value is that we use the 75 percentile
6 of all the MDL's from all the labs for a given
7 methodology, and multiply it by 3.18, to come up
8 with a statistical reference that allows hopefully
9 a reproduceable standard between laboratories,
10 independent of the location and submission of the
11 sample.

12 We've selected RRV's that are closest to
13 the 10 percent of the most restrictive standard.
14 So if a standard -- if the RRV -- or the method
15 has a standard of one, we're going to select a
16 level of .1 for the RRV. That's the
17 recommendation guidance from the EPA as to the
18 method selection for use.

19 The example we give here is
20 dichlorobenzene. The standard is 75 micrograms,
21 and two labs reported MDL's of compounds under
22 method 625. The MDL's were 1.23 and 1.6. The
23 calculated RRV would be five micrograms. RRV's
24 calculated through the EPA method would be
25 five-twenty-four-two and 624 for the same compound

1 were .7 and .9 micrograms per liter respectively.

2 Since 10 percent of the standard is
3 seven and a half micrograms, we selected the
4 highest of these three, and the five microgram
5 level that was calculated from the RRV's -- or
6 from the MDL's was selected as the standard for
7 the RRV.

8 There are some exceptions to this
9 because it seems like everything in science has
10 exceptions, but in this case, we were able to
11 minimize the number of exceptions that we felt
12 were appropriate.

13 If all calculated RRV's exceed the most
14 restrictive standard, the laboratory minimum
15 reporting value, or the MRL, may be selected as
16 the RRV if it is closer to 10 percent of the
17 standard. If no MRL's were reported, the RRV
18 closest to the standard will still be selected.

19 The example we gave here is Crysene.
20 Human standard is .038 micrograms; 10 percent of
21 that would be .0038 micrograms. The calculated
22 RRV for the Crysene was 13 micrograms, well in
23 excess of the human health standard; but there was
24 a minimum reporting limit of five micrograms from
25 some of the labs. Since the five micrograms was

1 closer to 10 percent of the standard, then 13
2 micrograms, we selected the five microgram limit
3 for the RRV.

4 If all of the calculated RRV's are below
5 10 percent of the most restrictive standard, an
6 MRL may be selected as the RRV if it's closer to
7 10 percent of the standard. For this one, we used
8 Propham as the example. Human health standard is
9 100 micrograms. Only one lab submitted minimum
10 detection limits, and that calculated RRV was .08
11 micrograms per liter. Laboratory MRL was .5
12 micrograms per liter.

13 It was excessively restrictive to have
14 them -- or for us to select the RRV of .08, when
15 .5 is still well below the 10 percent limit for
16 human health standard. So the chosen value of 10
17 percent was selected as the RRV, and we use the
18 MRL of .5.

19 And for a very few compounds, no MDL's
20 were reported. None of the seven labs questioned
21 had minimum detection limits set for some
22 compounds.

23 The compound we selected for the
24 demonstration here is Chloramine (phonetic). The
25 human health standard is .08 micrograms, and since

1 no one reported it, we set an RRV so that the labs
2 knew what levels of sensitivity they had to
3 develop and the methodology to be utilized, and
4 then it was set at .008, or 10 percent of the
5 human health standard.

6 I realize that this is a lot to digest
7 at once, and we went through this with the labs
8 three times to try and get everything squared away
9 in a manner that minimized the number of labs that
10 were excluded from being able to do these
11 analyses.

12 But by the same token, we had -- I guess
13 I'll say -- a requirement to be able to measure
14 down to the standard or below it. Otherwise we
15 don't know where we are. So having people report
16 values that are above the standards doesn't tell
17 us much. Mr. Chairman.

18 CHAIRMAN RUSSELL: I have an issue with
19 this, because at some point they determined --
20 someone was able to determine the standard based
21 on that concentration or they wouldn't have set
22 it.

23 MR. McNEIL: Correct.

24 CHAIRMAN RUSSELL: So some lab can do
25 it.

1 MR. McNEIL: Yes, that's correct. Just
2 to give you kind of the difference with, say, a
3 pesticide. The Montana Department of Agriculture
4 has what's called a dual sector LCMSMS -- big
5 fancy piece of equipment -- that costs \$750,000,
6 and it's capable of measuring those limits for
7 pesticides down to the limits of the analytical
8 equipment. Other labs have not invested in that
9 type of equipment.

10 I guess I'll call it a philosophic
11 question. Is it appropriate to ask a lab to
12 quantify a substance for which they have
13 insufficient sensitivity for us to determine
14 whether they're meeting the standard?

15 CHAIRMAN RUSSELL: You have to realize
16 I'm a public health professional. I think it is
17 inappropriate to set some sort of standard out
18 there for human health risk, and then apply a
19 different one because no one wants to buy the
20 equipment to do that. If the equipment is
21 available, it should be being used.

22 MR. McNEIL: We are not proposing to
23 change the standards. We're setting the required
24 reporting values that the labs --

25 CHAIRMAN RUSSELL: Isn't that the same

1 thing?

2 MR. McNEIL: No.

3 CHAIRMAN RUSSELL: So if I can only
4 report to ten, and the human health risk is one,
5 then what do I know?

6 MR. McNEIL: You know nothing. I guess
7 that's my point. If the level is one, you can
8 only report to ten --

9 CHAIRMAN RUSSELL: I don't know how
10 risky it is.

11 MR. McNEIL: You have some feel for how
12 risky it is, but all we can do is report based on
13 the numbers that the lab has submitted.

14 CHAIRMAN RUSSELL: That's the difference
15 between environmental health standards and public
16 health standards.

17 MS. STEINMETZ: Mr. Chairman, members of
18 the Board, for the record, my name is Amy
19 Steinmetz. I work with Rod in the Water Quality
20 Standards Section. And I would like to address
21 that concern.

22 Not necessarily all of our standards can
23 be met by current laboratory technology. So in
24 some cases, yes, one method may be able to get
25 down to that very low level. In that case, if

1 that's the only method that can, we might have to
2 choose just one laboratory that we're able to send
3 samples to. Some of the pesticides that's
4 definitely the case.

5 But in other cases, that standard wasn't
6 set necessarily by a level that we found. It was
7 set by toxicology studies. So there are some
8 cases where the technology is not yet able to get
9 down to those standards, and so the RRV is set at
10 the lowest level that those laboratories could
11 possibly see, sometimes even a little bit lower.

12 There are going to be some compounds
13 that even our RRV's can't be met, but we want
14 those laboratories to try to get down to those
15 levels, and so we're keeping those RRV's as low as
16 they possibly can be.

17 CHAIRMAN RUSSELL: I appreciate that,
18 and I understand my argument, is that just because
19 they can't --

20 MS. STEINMETZ: -- doesn't mean they
21 shouldn't try? Absolutely, and that's why we're
22 trying to get them to get down as low as we can,
23 or as low as they can. But in some cases even the
24 technology, and some of the polynuclear aromatic
25 hydrocarbons, they just can't get that low. So

1 whatever they can see, they need to report that's
2 an exceedence. So that's --

3 CHAIRMAN RUSSELL: I appreciate that.
4 It is bothersome at times.

5 MS. STEINMETZ: Absolutely. It is.

6 MR. MILLER: A question. You mentioned
7 you had seven labs that you used, and then you
8 mentioned there was one in Montana over at
9 Bozeman. Is there any others in Montana?

10 MR. McNEIL: Oh, yes.

11 MS. STEINMETZ: We had -- I believe four
12 of the laboratories have locations in Montana,
13 four or five of them actually. Two of them were
14 out of state. But yes, we did. Most of our labs
15 were local.

16 MR. MILLER: Thank you.

17 MS. SHROPSHIRE: Maybe they should apply
18 top down BACT.

19 CHAIRMAN RUSSELL: Don't even go there.
20 Did you have some more to go through?

21 MR. McNEIL: I still have Subchapter (6)
22 to go through, but Mr. Chairman, I wonder whether
23 it would be appropriate to discuss DEQ 7 first,
24 and then move on to Subchapter (6), or how would
25 you like to handle this?

1 CHAIRMAN RUSSELL: I guess I just have a
2 quick question on the removal of nitrogen and
3 phosphorus, the inorganics in there. The organic
4 nitrogen stuff is still in there.

5 MR. McNEIL: Correct.

6 CHAIRMAN RUSSELL: Nitrate is now --
7 There is no MCL, but is that a national priority
8 pollutant?

9 MR. McNEIL: Nonpriority pollutant.
10 Those will remain in DEQ7 as numeric values.
11 Inorganic nitrogen phosphorus were moved to DEQ12.

12 CHAIRMAN RUSSELL: Let's take a break
13 and we'll get on with Subchapter (6).

14 (Recess taken)

15 CHAIRMAN RUSSELL: Shall we get started
16 again? Here we go.

17 MR. McNEIL: Mr. Chairman, members of
18 the Board, I also have corrections and
19 modifications to Subchapter (6) that I wanted to
20 address. I'm just going to sort of reel through
21 the list here, and if you have any questions
22 afterwards, we'll go through it.

23 17.30.602 is being modified to drop two
24 definitions -- acutely toxic conditions and
25 chronic toxicity -- because they are no longer

1 used in Subchapter (6), and we're modifying the
2 definition of mixing zone and pollutants to avoid
3 a conflict of definition between this and other
4 sections in the rule.

5 17.30.616 relates to water bodies
6 classified as G-1. This is a water body
7 classification that we have not used. It relates
8 to water bodies that are containment facilities
9 for water generated by coal bed methane
10 activities.

11 There was a Ninth Court ruling that
12 decided that water generated from coal bed methane
13 activities was a pollutant, and as such,
14 structures constructed to retain that are not
15 waters of the state, hence we don't need the water
16 body classifications. So we're eliminating the
17 G-1 classification.

18 17.30.619 is being altered to eliminate
19 reference to specific federal regulations which
20 are cited elsewhere, in 17.30 Subchapter (12), and
21 the reference to 40 CFR 136 is being updated to
22 reflect new federal guidance.

23 17.30.629 Subsection (1) is being
24 modified to eliminate language that implies that
25 degradation only occurs when beneficial use is

1 impacted. This is related to the C-3 water body
2 classification. It was an oversight. We made
3 that correction to all the other water body
4 classifications, and for whatever reason at the
5 time it was not corrected on C-3, so we're making
6 that correction now.

7 And 17.30.635 is being modified to
8 eliminate duplication and inconsistencies between
9 ARM -- with that and 17.30 Subchapter (12).

10 17.30.637 is being modified to eliminate
11 requirements from Section 3, as these are
12 addressed under other regulatory programs
13 administered by the Department, 17.30 Subchapters
14 (12) and (13).

15 In addition, Section 4, the prohibition
16 against dumping snow from parking lots into State
17 surface waters is being eliminated. And Sections
18 (5) and (6) with reference to 17.30.635, the
19 authority to impose minimum treatment is being
20 eliminated, and 17.30.1203 is being substituted.

21 And finally, 17.30.658 addresses water
22 quality standards for G-1 classification, and
23 since we're eliminating the classification, we
24 don't really need to worry about the water quality
25 criteria for the classification.

1 Those are the list of affected rules in
2 Subchapter (6). Does the Board have any questions
3 regarding this?

4 CHAIRMAN RUSSELL: Just one. Did you
5 mention that you're going to exclude snow being
6 dumped into surface water from parking lots?
7 Is that what I heard?

8 MS. SHROPSHIRE: That's what I heard.

9 MR. McNEIL: Let me check that. The
10 Board is proposing to eliminate the prohibition
11 against dumping snow from parking lots into State
12 surface waters. If I misstated that, I apologize.

13 CHAIRMAN RUSSELL: That's why I think I
14 just asked you the question. So the answer would
15 be yes.

16 MR. McNEIL: Yes.

17 MS. SHROPSHIRE: So if I understand, it
18 is okay to dump snow from parking lots into State
19 waters?

20 MR. McNEIL: Yes.

21 MS. SHROPSHIRE: Why is that okay?

22 MR. McNEIL: The quantity of pollutants
23 that could be introduced was felt to be minimal,
24 and unlikely to affect water quality of the state.

25 MS. SHROPSHIRE: What's the driver

1 behind that?

2 MR. McNEIL: It was felt that the issue
3 was adequately addressed by the Board rules
4 establishing requirements for municipal separate
5 storm sewer systems. And I think if that doesn't
6 adequately answer the question, I have to defer to
7 possibly Jenny.

8 MS. CHAMBERS: Chairman Russell, members
9 of the Board, my name is Jenny Chambers. I'm
10 Chief of the Water Protection Bureau.

11 Just to provide some clarity to that
12 particular question, no, it is not okay to dump
13 snow from an urbanized area into State waters. We
14 felt that this was kind of a redundant section
15 within Subchapter 6 because the general
16 prohibition kind of occurs anyway because you
17 can't provide a placement of a waste into State
18 waters without a proper permit.

19 So basically for those that have
20 urbanized municipal separate storm sewer systems
21 and have a discharge permit from the Department,
22 that's a requirement for good housekeeping for
23 best management practice so that they're not
24 allowed to manage their storm water and/or snow
25 melt, snow runoff, be a piece from disposal of

1 snow in that, so we thought that was a kind of
2 duplication of efforts, so we didn't have to
3 provide a general prohibition to state that fact,
4 but it would be a violation of the Montana Water
5 Quality Act if they were to do that, and it caused
6 degradation of the environment.

7 CHAIRMAN RUSSELL: So the answer is it's
8 covered elsewhere?

9 MS. CHAMBERS: Yes. Short answer.

10 MS. SHROPSHIRE: For clarification,
11 would it help to make that clarification in that
12 amendment?

13 CHAIRMAN RUSSELL: Maybe just as
14 Department response, so it is part of the record.

15 MR. McNEIL: Okay. We can certainly do
16 that, Mr. Chairman.

17 CHAIRMAN RUSSELL: It is not an issue of
18 rule. It is an issue of response that it's
19 covered elsewhere.

20 MS. SHROPSHIRE: Mr. Chairman, can I ask
21 a question about DEQ7?

22 CHAIRMAN RUSSELL: Yes.

23 MS. SHROPSHIRE: I'm looking at nitrate,
24 and for the -- I guess it is the Required
25 Reporting Value, and it has a value of 20, and I

1 was curious if that was actually 20,000, or if
2 that was 20 parts per billion. I just wanted to
3 confirm that --

4 MR. McNEIL: This is --

5 MS. SHROPSHIRE: Nitrate as nitrogen.

6 MR. McNEIL: Nitrate as nitrogen is
7 reported in micrograms, so the human health
8 standard is 10,000 micrograms or ten milligrams
9 per liter.

10 MS. SHROPSHIRE: And the reporting value
11 is 20 micrograms?

12 MR. McNEIL: 20 micrograms.

13 MS. SHROPSHIRE: So 20 parts per
14 billion?

15 MR. McNEIL: Yes.

16 MS. SHROPSHIRE: Okay. Thank you.

17 MR. McNEIL: I hope without exception
18 all of DEQ7 is now in micrograms. We converted
19 the footnote sections as well to reflect that.

20 MS. SHROPSHIRE: Okay. Thank you. It
21 seems like a low number to be able to measure.

22 CHAIRMAN RUSSELL: This must be the lab
23 link.

24 MS. STEINMETZ: Mr. Chairman, members of
25 the Board, again, Amy Steinmetz, Water Quality

1 Standards.

2 And we have 20 parts per billion in
3 there to be consistent with what we're doing in
4 DEQ12, so our Required Reporting Values will be
5 consistent between the two documents, the two
6 regulations. So we have the lower aquatic life
7 standard in DEQ12. That's such a low number
8 compared to that standard.

9 CHAIRMAN RUSSELL: Thanks, Amy.

10 Questions? Joe.

11 MR. WHALEN: I have a couple of
12 questions, one for Subsection (6) and one
13 regarding Circular DEQ7. Which would you like to
14 take first?

15 MR. McNEIL: Since I have DEQ7 open
16 first, we'll take that first.

17 MR. WHALEN: Let's go there. Could you
18 kind of walk through the Department's position
19 once again on Section (8) repealing references to
20 the narrative water quality standard for nutrients
21 in surface waters, and why the Department feels
22 it's necessary to do that. There is mention of
23 some conflict in here, and I want to get in my own
24 head what's going on.

25 MR. McNEIL: Secondary -- Well, let's

1 see. The SMCL values, the Secondary Maximum
2 Contaminant Levels, I think maybe we're talking
3 two different subjects here.

4 MR. WHALEN: We could be.

5 MR. McNEIL: You're talking in Footnote
6 A or --

7 MR. WHALEN: Yes. And here is the
8 motive for the question. The way that I
9 understand it, based upon my own reading, is that
10 we're abandoning narrative water quality standards
11 for nutrients that at least at present are not
12 recognized as creating or exceeding human health
13 standards. So what that means, as I understand
14 it, is that we no longer have active narrative
15 water quality standards for aquatic life because
16 they don't rise to the threshold of human health
17 standards. Is that an accurate understanding of
18 it?

19 MR. McNEIL: No, that is not correct.
20 We are not abandoning narrative standards.
21 17.30.367, that would remain in force and can
22 still be utilized. The numeric water quality
23 standards that will be captured by DEQ12 will
24 offer a numeric standard for interpretation for
25 nutrients.

1 MR. WHALEN: So we have an interim
2 period between adoption of Circular DEQ7 and
3 Circular DEQ12 where there may be --

4 MR. McNEIL: There is a possibility
5 there is a lag phase, if you will. But they are
6 in 17.30.637. Narrative standards still remain in
7 place, so that there isn't a lapse there with
8 that.

9 MR. WHALEN: That addresses that
10 question, thank you. Mr. Chairman, may I ask
11 another on Subsection (6)?

12 CHAIRMAN RUSSELL: Certainly.

13 MR. WHALEN: First, again to kind of
14 re-emphasize the point that was made with Circular
15 DEQ2, obviously exhaustive work, and I think
16 pretty well prepared documents. I would like to
17 thank the Department for that.

18 With respect to Subsection (6), one of
19 the objectives of the revisions, as I understand
20 it, is to provide additional clarity as guidance,
21 and there was one -- this is just a comment, and
22 it may not merit a response from you -- but there
23 was a revision by reference to MCA 75-5-108 or 103
24 on the definition of a mixing zone.

25 And that caught my eye because in

1 reading the current definition of a mixing zone,
2 it was pretty clear as to what a mixing zone is.
3 By accepting the revision, we're referring to the
4 code, which is real nebulous in terms of its
5 definition. And I can illustrate -- I've got the
6 language in front of me, and I can illustrate that
7 for you if you would like.

8 But you had mentioned that there was a
9 conflict in the definition of a mixing zone, which
10 was the driver to adopting by reference to Montana
11 Code Annotated.

12 MR. McNEIL: That's correct.

13 MR. WHALEN: Can you outline what that
14 conflict was of the definition, and why that was
15 necessary.

16 MR. McNEIL: It was more of an expansion
17 off the definition which is included in 75-5-103.
18 The expansion involved, "Mixing zone also means a
19 limited area of a surface water body or portion of
20 aquifer for initial dilution of a discharge takes
21 place where water quality changes may occur or
22 certain water quality standards may be exceeded."

23 So it is an attempt to expand the
24 definition to make clear that the water quality
25 standards may not be met inside the mixing zone.

1 MR. WHALEN: That helps. Thanks a lot.

2 CHAIRMAN RUSSELL: Any other questions?

3 (No response)

4 CHAIRMAN RUSSELL: You're off the hook,

5 Rod. All right. With all of that, is there

6 anyone in the public that would like to speak to

7 this matter before the Board takes action?

8 (No response)

9 CHAIRMAN RUSSELL: Seeing none, I would

10 entertain a motion to commence the rulemaking

11 process, and appoint this to Katherine.

12 MR. MILLER: I so move.

13 CHAIRMAN RUSSELL: It's been moved by

14 Marv. Is there a second?

15 MR. WHALEN: I'll second, Mr. Chairman.

16 CHAIRMAN RUSSELL: Seconded by Joe. And

17 as Joe has mentioned, nice work on this. This is

18 not easy work. It is not like you can just draw

19 up one document, and figure out how to move

20 forward with it.

21 So it has been moved and seconded. Any

22 other comments by the Board?

23 (No response)

24 CHAIRMAN RUSSELL: Hearing none, all

25 those in favor, signify by saying aye.

1 (Response)

2 CHAIRMAN RUSSELL: Opposed.

3 (No response)

4 CHAIRMAN RUSSELL: Motion carries
5 unanimately.

6 This is the moment we've all been
7 waiting for. We are looking at repeal, amendment,
8 and adoption of final rule 17.38 Subchapter (3),
9 cross-connections in drinking water supplies.
10 Gene.

11 MR. PIZZINI: Good morning, Chairman
12 Russell, members of the Board. For the record, my
13 name is Eugene Pizzini. I'm the rules expert for
14 the Public Water Supply Section.

15 On January 27th, 2002, the Board
16 initiated rulemaking to amend the public water
17 supply rules. On March 2nd, Katherine Orr
18 conducted a public hearing on the proposed
19 amendments. The Presiding Officer's report
20 documents written comments received.

21 The comments received were from one
22 municipal system, and they included comments
23 related to specific proposed amendments, as well
24 as those that were outside the scope of the
25 rulemaking. In drafting responses, the Department

1 not only drafted responses to those that were for
2 specific proposed amendments, but also to try and
3 clarify questions for those comments that were
4 outside.

5 The Department believes that the
6 proposed responses adequately address those
7 comments, and does not propose amendments based on
8 the comments received. Therefore the Department
9 recommends adoption of the proposed amendments as
10 set forth in the Notice of Public Hearing on
11 proposed amendments. If the Board has questions
12 or comments, I am more than willing to answer.

13 CHAIRMAN RUSSELL: Questions for the
14 Department?

15 (No response)

16 CHAIRMAN RUSSELL: All right. Since the
17 Board has no comments or questions for you, I
18 would entertain a motion to amend the rule 17.38
19 Subchapter (3), accept the Presiding Officer's
20 report, the 311 analysis, and the Department's
21 response to comments. So I would entertain that
22 motion.

23 And 521, I guess it's in there, but it's
24 always been perplexing to me that it doesn't
25 apply, but should we adopt it because it doesn't

1 apply, or because it doesn't apply should we leave
2 it out of the motion? Katherine?

3 MS. ORR: Well, I think you have to
4 refer to whether it applies or not.

5 CHAIRMAN RUSSELL: So I would include
6 521 and 311 analysis then. Is there a motion?

7 MR. MILLER: So moved.

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

10 MS. SHROPSHIRE: Second.

11 CHAIRMAN RUSSELL: It's been seconded by
12 Robin. Any further comments?

13 (No response)

14 CHAIRMAN RUSSELL: All those in favor,
15 signify by saying aye.

16 (Response)

17 CHAIRMAN RUSSELL: Opposed.

18 (No response)

19 CHAIRMAN RUSSELL: Motion carries
20 unanimously.

21 MS. SHROPSHIRE: Did you ask for public
22 comment?

23 CHAIRMAN RUSSELL: I did. I'm pretty
24 sure I did. I thought I did. Did I forget?

25 MR. PIZZINI: You forgot. Do you want

1 to reopen it and try it again?

2 CHAIRMAN RUSSELL: No. No one was here.

3 All right. We are going to get into the
4 final part of the meeting, final action on
5 contested cases.

6 The first one is in the matter of
7 violations of the Public Water Supply Laws by Jore
8 Corporation, Lake County. Katherine.

9 MS. ORR: Mr. Chairman, members of the
10 Board, this is a case up by Ronan, a public water
11 supply case, where the public water supply failed
12 to retain a licensed professional to design and
13 submit plans and specs to the Department, and to
14 develop a funding plan to implement the corrective
15 action. And you have before a Rule 41(a)
16 dismissal. The parties apparently reached
17 agreement on this.

18 CHAIRMAN RUSSELL: All right. I have in
19 front of me an order of dismissal for Case No. BER
20 2011-05 PWS. I would entertain a motion to
21 authorize the Board Chair to sign said order.

22 MR. ANDERSON: So moved.

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

25 MR. MILLER: I'll second.

1 CHAIRMAN RUSSELL: It's been seconded by
2 Marv. Further discussion?

3 (No response)

4 CHAIRMAN RUSSELL: All those in favor,
5 signify by saying aye.

6 (Response)

7 CHAIRMAN RUSSELL: Opposed.

8 (No response)

9 CHAIRMAN RUSSELL: Motion carries
10 unanimously. Katherine, the next one, in the
11 matter of request for hearing by Nancy Scott, Dale
12 Whitten, et al., of Plum Creek Timberlands for
13 Dorr Skeels.

14 MS. ORR: Mr. Chairman, members of the
15 Board, there is a proposed order for the Board to
16 adopt the Hearing Examiner's, my proposed order
17 granting a motion for summary judgment.

18 This is a case that has had a fairly
19 circuitous route, as you can tell from the record,
20 and it involves an open cut mine permit expansion
21 in Lincoln called the Dorr Skeels site.

22 And Plum Creek Timberlands applied for
23 the expansion on this permit last June, and there
24 was an appeal -- and this applies to numbers three
25 and four also on your agenda. There was an appeal

1 by various local residents of the decision of the
2 Board to issue the permit on the expansion without
3 a public hearing, and so the process has been
4 winding its way through my files.

5 The Department -- and this is referenced
6 in the order before the Board -- filed a motion to
7 dismiss, or in the alternative for a summary
8 judgment, on August 29th, 2011, and there in
9 essence was no response to that by Petitioners who
10 were unrepresented by Counsel.

11 And on December 13th, I issued an order
12 denying the motion to dismiss, and giving the
13 parties an opportunity to address the motion for
14 summary judgment by the Department, which
15 basically removed any issues of fact regarding
16 whether the Department correctly followed the
17 statutory guidelines for providing notice to
18 surrounding landowners.

19 And I basically just wanted to err on
20 the side of giving these Petitioners as much
21 latitude as I could regarding notice about what
22 would be required for them to defeat this summary
23 judgment motion, and to give them a deadline.

24 And what they came across with was, in
25 the case of the Nancy Scott case, I call it, six

1 affidavits which didn't advance the record any
2 further than what already existed, which was that
3 there were four landowners, who out of the sixteen
4 that were surrounding the mine, the mine expansion
5 proposal, who asked for an order -- or excuse me
6 -- for a public hearing.

7 What is required under the statute
8 82-4-432 is basically a threshold amount of
9 surrounding landowners within one half mile of the
10 mine expansion site who would request a hearing.

11 And I'm convinced that what happened
12 here was all Petitioners were confusing this
13 process -- which is a contested case process --
14 with a kind of a public petition process.

15 And so when asked to follow the
16 contested case procedures of responding to a
17 motion for summary judgment -- which would have
18 required some sort of affidavit exchange, not only
19 involving proof of surrounding ownership, but
20 proof that back when the Department was looking at
21 this, that there would have been a sufficient
22 number of people requesting a hearing -- none of
23 that happened.

24 And then I also decided to give even
25 more latitude by saying that they may choose to

1 file exceptions before the Board, and I gave them
2 a date for that in April, and no one filed
3 exceptions.

4 So I think the Petitioners have sort of
5 withdrawn in trying to go forward with their
6 appeal in essence.

7 So what you have before you is my
8 proposed order on summary judgment granting the
9 motion for summary judgment, affirming that the
10 Department did follow all the necessary steps for
11 granting the permit expansion, and then an order
12 for you to incorporate by reference my proposed
13 order, and to basically find -- after having said
14 all of that -- that the Department's actions were
15 correct.

16 And there is a little bit of difference
17 in each one of these cases. In the Nancy Scott
18 case, there were six affidavits filed; but in the
19 proposed order granting the motion for summary
20 judgment, I walked through why that didn't change
21 the record.

22 In the Steve Endicott matter, which is
23 matter No. 3, there were no affidavits filed
24 whatsoever. And in the Glenn Miller case, there
25 were two affidavits filed, but they were filed by

1 surrounding landowners who had already gotten
2 notice.

3 So I hope that is not clear as mud. I
4 hope it is clear.

5 CHAIRMAN RUSSELL: And that's why we
6 have several orders in front of us, and you have
7 combined the ones that were --

8 MS. ORR: That's right. Mr. Chairman,
9 there were many more cases, but I consolidated
10 them around Petitioners with identical claims
11 basically.

12 CHAIRMAN RUSSELL: So you grouped them,
13 and it was the date that you did your -- Was it
14 specifically around dates then that you combined
15 your orders?

16 MS. ORR: No, it was around
17 characterization of their ownership basically.
18 Some of them did live within one half mile of the
19 mine.

20 CHAIRMAN RUSSELL: All right. So I
21 think it's probably appropriate to take each of
22 these four as separate orders then, and I'll just
23 cite the case numbers, and then we'll take action
24 on those.

25 MS. ORR: Yes. And Mr. Chairman, there

1 are three of them. There is III(C)(2) which is
2 Nancy Scott; III(C)(3) which is Steve -- so you
3 have that.

4 CHAIRMAN RUSSELL: I've got them. And
5 so the first action is on the order of the Board
6 adopting the proposed order granting motion for
7 summary judgment on Case Nos. BER 2011-15, 17, 13,
8 12, all open cut. I would entertain a motion to
9 authorize the Board Chair to sign.

10 MR. MILLER: I so move.

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

13 MR. ANDERSON: Second.

14 CHAIRMAN RUSSELL: It's been seconded by
15 Larry. Further discussion by the Board?

16 MR. WHALEN: Mr. Chairman. Katherine,
17 are there any other parallel processes underway
18 that -- Given the number of Petitioners in total,
19 given everything you've told us, is there anything
20 else out there that you think could come back on
21 the Board if we were to go ahead and issue these
22 orders of dismissal at this point? Are there
23 other actions that are related to this matter that
24 seem to be brewing in the background that we want
25 to consider?

1 MS. ORR: Mr. Chairman, members of the
2 Board, I don't think there are any, but maybe John
3 could answer that. I don't know of any parallel
4 proceedings.

5 MR. NORTH: Mr. Chairman, Mr. Whalen,
6 John North, Chief Legal Counsel. I'm not aware of
7 any, no. There is always potential that this
8 could occur again because we do have a statute
9 which basically says there has to be ten
10 surrounding landowners in order for somebody to
11 request a public hearing, or for the Department to
12 have to hold a public hearing; but I'm not aware
13 of any brewing at this very moment, no.

14 MR. WHALEN: Thank you, Mr. Chairman.
15 Call for the question.

16 CHAIRMAN RUSSELL: All those in favor,
17 signify by saying aye.

18 (Response)

19 CHAIRMAN RUSSELL: Opposed.

20 (No response)

21 CHAIRMAN RUSSELL: Motion carries
22 unanimously.

23 The next matter is order of the Board
24 adopting proposed order granting motion for
25 summary judgment on Case No. BER 2011-16-OC. Do I

1 have a motion to authorize the Board Chair to
2 sign?

3 MS. SHROPSHIRE: So moved.

4 MR. MILLER: I'll second it.

5 CHAIRMAN RUSSELL: Robin moved and Marv
6 seconded. Any further discussion?

7 (No response)

8 CHAIRMAN RUSSELL: Hearing none, all
9 those in favor, signify by saying aye.

10 (Response)

11 CHAIRMAN RUSSELL: Opposed.

12 (No response)

13 CHAIRMAN RUSSELL: Motion carries.

14 I have in front of me an order of the
15 Board adopting proposed order granting motion for
16 summary judgment on Case No. BER 2011-14-OC and
17 Case No. BER 2011-18-OC, and I would entertain a
18 motion to authorize the Board Chair to sign.

19 MR. WHALEN: So moved, Mr. Chairman.

20 CHAIRMAN RUSSELL: It's been moved by
21 Joe. Is there a second?

22 MR. ANDERSON: Second.

23 CHAIRMAN RUSSELL: It's been seconded by
24 Larry. Any further discussion?

25 (No response)

1 CHAIRMAN RUSSELL: Hearing none, all
2 those in favor, signify by saying aye.

3 (Response)

4 CHAIRMAN RUSSELL: Opposed.

5 (No response)

6 CHAIRMAN RUSSELL: Motion carries
7 unanimously. Katherine.

8 MS. ORR: Mr. Chairman, members of the
9 Board, the next case involves Noble Excavating,
10 Nickleback Rock Quarry in Lincoln County. And
11 there was a small miner's exclusion statement
12 submitted on May 3rd, 2010. The Department of
13 Environmental Quality on May 10th of 2010 warned
14 the excavating company that there would be a
15 larger acreage potentially, and that they would
16 need to get a permit.

17 A warning letter went out, then a Notice
18 of Violation on August 23rd, 2011 that there were
19 seven acres disturbed. That's two acres over the
20 five acre limit for small miners. Then it was
21 expanded to fourteen acres. And the violation is
22 that Noble Excavating was engaging in mining
23 without obtaining an open mining permit from the
24 Department, and the penalty that was requested was
25 \$10,000.

1 And you have before a stipulation to
2 dismiss. It doesn't have a designation about
3 41(a), but I assume that's what -- Oh, here in the
4 Order of Dismissal, it specifies that it is under
5 41(a), so I assume the Department reached an
6 agreement that is satisfactory to it.

7 CHAIRMAN RUSSELL: I see John back there
8 shaking his head.

9 I do have an order of dismissal for Case
10 No. BER 2011-24-MM, and would entertain a motion
11 to authorize the Board Chair to sign.

12 MR. ANDERSON: So moved.

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

15 MR. MILLER: I'll second it.

16 CHAIRMAN RUSSELL: It's been seconded by
17 Marv. Any further discussion?

18 (No response)

19 CHAIRMAN RUSSELL: Hearing none, all
20 those in favor, signify by saying aye.

21 (Response)

22 CHAIRMAN RUSSELL: Opposed.

23 (No response)

24 CHAIRMAN RUSSELL: Motion carries
25 unanimously. We have one new contested case.

1 Katherine.

2 MS. ORR: Mr. Chairman, members of the
3 Board, this case involves a Strip and Underground
4 Mine Reclamation Act violation by Westmoreland
5 Resources at the Absaloka Mine in Big Horn County
6 near Hardin, and the violation cited is a failure
7 to timely publish a blasting schedule and to
8 submit it to the Department. The penalties
9 requested are \$2,500.

10 CHAIRMAN RUSSELL: Any questions?

11 MS. SHROPSHIRE: I have a question.
12 Does the State have a self-audit policy where you
13 can be granted some sort of immunity if you
14 self-report, similar to EPA's audit policy?

15 MR. NORTH: Mr. Chairman, Ms.
16 Shropshire, no. Sometime in the 1990s, late
17 1990s, the Legislature did adopt a voluntary audit
18 act, but it had a sunset date on it, and it went
19 out of effect probably six or eight years ago, and
20 was not renewed by the Legislature. And so now
21 basically in our penalty calculations, if somebody
22 self-reports, and also takes immediate action to
23 correct the violation, we take that into account
24 in the penalty phase.

25 MS. SHROPSHIRE: Thank you.

1 MR. WHALEN: Mr. Chairman, I don't know
2 if the Appellant would be interested in directly
3 coming before the Board, but this is one I think
4 the Board would like to hear.

5 CHAIRMAN RUSSELL: How does the
6 Department feel about that? We'll wait until they
7 confer because Westmoreland has a pretty solid
8 relationship with the Department over the years.

9 MR. LIVERS: Mr. Chairman, just off the
10 top of my head, I would certainly -- It is the
11 Board's right to hear any of these cases it wants
12 to. My only question is if this would rise to the
13 level of significance that you would want to do
14 that. It certainly could be accommodated in the
15 schedule that we're anticipating for the hearing
16 the next meeting, if that fits the time frame.

17 CHAIRMAN RUSSELL: It is up to the
18 Board. This is basically an issue that they
19 didn't tell the public when they were going to
20 blast, correct?

21 MR. ARRIGO: (Nods head)

22 MS. ORR: Mr. Chairman, it appears to
23 be --

24 MR. MILLER: They missed the deadline by
25 55 days, so it seems like to me it is pretty

1 clear. And they've been in operation for 30, 40
2 years. It just seems like that should be a pretty
3 routine type thing to me.

4 CHAIRMAN RUSSELL: I'm sure there was a
5 lot of coffins built when those first blasts went
6 up, and they didn't know they were coming. It is
7 up to the Board. We could accommodate something
8 this quick in the next Board meeting, I'm
9 guessing.

10 MR. LIVERS: I would think so. It's
11 probably a question for Katherine.

12 MS. ORR: Mr. Chairman, what ordinarily
13 happens under my direction is the parties submit a
14 proposed schedule that they're comfortable with,
15 accommodating matters such as discovery and
16 joinder. So I suppose it would be the Board
17 meeting in September that would probably be a
18 better solution.

19 CHAIRMAN RUSSELL: What we do is we just
20 don't assign this to you, and we let it ride and
21 see what goes on over the next month or two, and
22 at the next meeting if it is going to be that far
23 out, then we can take it on, because this one
24 seems like it might get resolved. I think we just
25 take no action, and we just let it keep going.

1 We're just not going to assign you. We can take
2 that as action that we're not going to assign you,
3 or we can just take no action.

4 MS. ORR: Right, and Mr. Chairman, then
5 implied in that is that I would handle the
6 prehearing matters.

7 CHAIRMAN RUSSELL: Especially if we take
8 no action.

9 MS. ORR: Yes.

10 CHAIRMAN RUSSELL: So without taking
11 action, I say we take no action. Next. Is
12 that --

13 MR. WHALEN: That accomplishes the same
14 objective. Thank you.

15 CHAIRMAN RUSSELL: We are now to kind of
16 a modified general public thing. John.

17 MR. NORTH: Mr. Chairman, members of the
18 Board, I have an announcement, and it is dealing
19 with Claudia Massman, who was hired back in 1992
20 probably by you, Katherine.

21 MS. ORR: That's right.

22 MR. NORTH: When Katherine was Chief
23 Legal Counsel of the Health Department. She's
24 been doing water quality ever since, and she and
25 Abe Horpstad probably wrote most of the water

1 quality rules that we have now. And Claudia is
2 retiring on June 30th, so this was her last Board
3 meeting. So I wanted you to know that.

4 CHAIRMAN RUSSELL: Claudia, thanks for
5 all your assistance to the Board over the years.
6 It is greatly appreciated.

7 MR. NORTH: Mr. Chairman, I have one
8 other announcement. I have hired Claudia's
9 replacement, who is David Dennis who is seated
10 right here, and he will assume the job June 1st,
11 and so you'll be seeing a lot of David, I think.

12 CHAIRMAN RUSSELL: I actually have
13 another attorney --

14 MR. NORTH: Yes, Dana David. He hasn't
15 had an opportunity to come before the Board yet,
16 but he will be the Mining and Solid Waste
17 Attorney, and I'll introduce him when he has
18 something before the Board for you.

19 CHAIRMAN RUSSELL: All right. Great.

20 MS. SHROPSHIRE: When we review the
21 temporary water quality standards.

22 MR. LIVERS: Mr. Chairman, just a
23 reminder then. The next Board meeting is
24 scheduled for Friday, July 27th, and I assume
25 we'll spill into Thursday, July 26th as well, and

1 we'll try to anticipate the time you needed for
2 the rule hearing.

3 CHAIRMAN RUSSELL: Okay.

4 MR. LIVERS: And it will be an in-person
5 meeting, I'm sure.

6 CHAIRMAN RUSSELL: All right. Anything
7 else? Is there any other public comment on
8 matters that pertain to the Board?

9 (No response)

10 CHAIRMAN RUSSELL: Hearing none, great
11 meeting. Very well -- Department, you did a great
12 job getting this accomplished. So thank you very
13 much. I would entertain a motion to adjourn.

14 MR. WHALEN: Move to adjourn, Mr.
15 Chairman.

16 CHAIRMAN RUSSELL: Do I have a second?

17 MR. MILLER: I'll second.

18 CHAIRMAN RUSSELL: It's been moved and
19 seconded. All those in favor, signify by saying
20 aye.

21 (Response)

22 CHAIRMAN RUSSELL: Opposed.

23 (No response)

24 CHAIRMAN RUSSELL: We're adjourned.

25 (The proceedings were concluded at 11:18 a.m.)

C E R T I F I C A T E

STATE OF MONTANA)

: SS.

COUNTY OF LEWIS & CLARK)

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

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing - 89 - 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 , 2012.

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires
March 12, 2016.