

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
JANUARY 22ND, 2010)

TRANSCRIPT OF PROCEEDINGS

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
January 22, 2010
9:00 a.m.

BEFORE CHAIRMAN JOSEPH RUSSELL,
BOARD MEMBERS LARRY MIRES, HEIDI KAISER,
ROBIN SHROPSHIRE, JOE WHALEN, and MARVIN MILLER
(all by telephone); and LARRY ANDERSON

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1 WHEREUPON, the following proceedings were
2 had and testimony taken, to-wit:
3 * * * * *
4 CHAIRMAN RUSSELL: It is approximately
5 9:02, and I'll call this regular meeting of the
6 Board of Environmental Review to order, and hand
7 the com to Tom. Go ahead, Tom.
8 MR. LIVERS: Mr. Chairman, members of
9 the Board, for the record, Tom Livers with
10 Department. I'll just go ahead and go down a roll
11 call. Mr. Anderson.
12 MR. ANDERSON: Here.
13 MR. LIVERS: Mr. Mires.
14 MR. MIREs: Here.
15 MR. LIVERS: Ms. Shropshire.
16 MS. SHROPSHIRE: Here.
17 MR. LIVERS: Ms. Kaiser.
18 MS. KAISER: Here.
19 MR. LIVERS: Mr. Miller.
20 MR. MILLER: Here.
21 MR. LIVERS: Mr. Whalen.
22 MR. WHALEN: Here.
23 MR. LIVERS: Chairman Russell.
24 CHAIRMAN RUSSELL: Here.
25 MR. LIVERS: We're here in Helena.

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1 We've got several members of DEQ staff, Board
2 secretary Joyce Wittenberg, and Court Reporter
3 Laurie Crutcher here. We have a couple members of
4 the public, Don Allen from WETA, and Jim Parker
5 from PPL. I don't think I've missed anybody. And
6 it sounded like we might have someone else joining
7 us by phone -- I don't think he's on yet -- but
8 Joseph Kukowski (phonetic), he's the President of
9 Montana Rivers, but I don't believe he's on yet.
10 CHAIRMAN RUSSELL: We were at 9:00 a.m.
11 immediately to hold a hearing. Since that Board
12 action was nullified on a previous Board meeting
13 and Board action, we'll move towards the
14 administrative items, and the review and approval
15 of the minutes from December 11th. Anything on
16 the minutes that need to be modified? If not, I
17 would entertain a motion to approve.
18 MS. KAISER: This is Heidi. I will make
19 the motion.
20 CHAIRMAN RUSSELL: It's been moved by
21 Heidi. Is there a second?
22 MR. MIREs: Larry Mires will second.
23 CHAIRMAN RUSSELL: It's been seconded by
24 Larry. Further discussion?
25 (No response)

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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. The
7 next item on the agenda are the procedural items,
8 Board's authority when a case is being dismissed
9 under Rule 41(a). Tom.
10 MR. LIVERS: Mr. Chairman, I think Ms.
11 Orr will lead us through that discussion.
12 MS. ORR: Mr. Chairman, members of the
13 Board, good morning. I was asked to give a little
14 explanation of 41(a), and the concepts of
15 dismissal with and without prejudice.
16 The 41(a) discussion arises in the
17 context of stipulations that are presented to the
18 Board fairly routinely by both parties, the
19 appellant and the Department usually, in these
20 appeals before the Board; and the question is what
21 is 41(a), and what is its meaning.
22 41(a) is a Rule of Civil Procedure --
23 and excuse me, Larry, if this is too 101 -- that
24 provides for the ability of parties to get
25 together and jointly request a dismissal, and

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1 that's in 41(a)(1)(ii); and also a plaintiff, an
2 appellant in these cases, could request a
3 dismissal under 41(i) unilaterally if there had
4 been no other action in the case; but generally we
5 get a proposed stipulation by both parties.
6 And what that does is it requests that
7 the Board divest itself of jurisdiction of the
8 case. And I have looked in Montana law to see if
9 that Rule of Civil Procedure has been applied in
10 the administrative law context, and haven't really
11 found anything, but it has in other jurisdictions.
12 The Board has adopted model rules, and
13 in those model rules, which are adopted as you
14 recall partially by the Attorney General and
15 partially by the Secretary of State, the agency
16 incorporates by reference rules of discovery, but
17 not necessarily the Rules of Civil Procedure, so
18 therein lies the rub.
19 As I say, other jurisdictions, though,
20 have directly applied the Rule of Civil Procedure
21 41(a) in the administrative context; and also
22 there are lots of cases in Montana where an
23 administrative agency has applied other Rules of
24 Civil Procedure not expressly adopted under the
25 model rules.

1 So I would say that that section does
2 apply in the cases that are brought before the
3 Board, and it means basically that the Board,
4 after it grants the 41(a) dismissal, has no
5 authority either to enforce a consent decree that
6 may have been arrived at in the course of that
7 agreement between the parties, and it really means
8 that the Board doesn't have the authority to
9 review the terms of the consent decree that may be
10 before the Board, although as I understand it, the
11 Department is very willing to let the Board see
12 the individual consent decrees that are arrived
13 at.

14 One last thing to say about 41(a), this
15 portion of 41(a), where the parties jointly
16 provide a stipulation, is that they may request
17 the Board to continue jurisdiction for the purpose
18 of enforcing the consent decree. So that is an
19 option for the Department. If the Department
20 doesn't do that, in my opinion, it also has the
21 ability to go in to District Court to enforce the
22 consent decree. So those are its two options
23 beyond the dismissal that the Board may grant.

24 Has anyone fallen asleep?

25 CHAIRMAN RUSSELL: This is Joe. The

1 issue that would come up with a mutual agreement
2 between the parties to dismiss a 41(a), you
3 mentioned right near the end of your discussion
4 about that, that there may be a time where they
5 just ask the Board to not do anything, and take it
6 up again. Let's say things aren't done the way
7 they were stipulated.

8 MS. ORR: Right.

9 CHAIRMAN RUSSELL: So when we see those,
10 it kind of rolls into the next one that those
11 would be dismissed without prejudice or not?

12 MS. ORR: I'm not sure exactly. You're
13 sort of asking two things, as I understand it.
14 One is the situation where possibly the Board is
15 asked to exercise its continuing jurisdiction to
16 enforce the consent decree. That hasn't come up.
17 The Department usually has decided to have the
18 Board divest itself of jurisdiction. So the
19 Board, in most of the cases where we get a 41(a)
20 stipulation, is not asked to exercise its
21 continuing jurisdiction.

22 The question of whether a case is
23 dismissed with or without prejudice under 41(a) is
24 a separate question. Unless otherwise specified,
25 a 41(a) dismissal is without prejudice, and the

1 parties generally are asking, though, for the
2 dismissal to be with prejudice under 41(a), which
3 that could lead me to the next discussion of what
4 is the difference.

5 A dismissal without prejudice is as if
6 the rights of the parties had not been adjudicated
7 or resolved. It's as if there is a clean slate,
8 and the parties can go back, and for instance, a
9 party could file an appeal if a new identical
10 permit were issued, and that party wanted to
11 challenge that permit, as in the SME case. So
12 that is the impact of without prejudice.

13 If something has been dismissed with
14 prejudice, it means that -- there is a term -- res
15 judicata as to the rights of the parties, which
16 means that the rights have been deemed to have
17 been substantively resolved, and there may not be
18 a filing of those same claims.

19 CHAIRMAN RUSSELL: Katherine, the reason
20 I bring that up is because actually Flathead
21 County has been through one of these dismissals,
22 which I have tried very, very hard to stay as far
23 away as I could, but my bosses kept -- the
24 Commissioners kept dragging me closer to it.

25 But if we have a stipulated dismissal,

1 and it's between Flathead County -- just to keep
2 this example -- and the Department, if Flathead
3 County, even though that case was dismissed with
4 prejudice, if Flathead County doesn't do anything,
5 doesn't do anything to correct why the case was
6 brought forward in the first place, then what
7 happens if it was dismissed?

8 MS. ORR: Well, then that's -- and not
9 knowing a whole lot about the situation -- but
10 then it was an error to have dismissed the case
11 with prejudice.

12 CHAIRMAN RUSSELL: That was my point I
13 was trying to bring up, that from a Board's
14 perspective, we've been basically dismissed from
15 any further action. And I guess it really doesn't
16 matter because it's not like we're liable for some
17 party not complying with the conditions of
18 dismissal. I mean we were the Court, right?

19 MS. ORR: In which case?

20 CHAIRMAN RUSSELL: Any case that's
21 brought in front of the Board that's dismissed.

22 MS. ORR: That's right.

23 CHAIRMAN RUSSELL: So at some point we
24 basically were asked to give up our jurisdiction.

25 MS. ORR: Right.

1 CHAIRMAN RUSSELL: So what happens if
2 then a party fails to comply with the conditions
3 of dismissal, and we basically said we're out of
4 it?

5 MS. ORR: Well, we, as the adjudicatory
6 body, don't then go forward with some further
7 action on that failure to implement the terms of
8 the dismissal. That's up to the parties.

9 And for instance -- if this is
10 responsive to your question -- let's say a case is
11 dismissed under 41(a)(1)(ii), which is generally
12 the type of dismissal that happens before the
13 Board, and there is a consent decree, and a party
14 doesn't pay penalties, or the sufficient amount,
15 or doesn't undertake the corrective action that's
16 anticipated, then the Department would have the
17 ability under a couple of its statutes to go to
18 District Court to enforce that agreement.

19 CHAIRMAN RUSSELL: But they wouldn't
20 come back to us.

21 MS. ORR: Not unless that's specified in
22 the dismissal, which I was interested to see in my
23 research that they can ask the Board to have
24 continuing jurisdiction to enforce the terms of
25 the agreement.

1 MR. LIVERS: Mr. Chairman, this is Tom.
2 I might offer a few thoughts maybe from the
3 Department's perspective on this, based on the
4 discussion we've had.

5 We have a lot of cases that come on the
6 Board's agenda and then settle out, and I think a
7 lot of times that's because the appellants, they
8 want to preserve their ability to appeal, and so
9 they will file, and then we'll begin entering
10 settlement discussions; and a large percentage of
11 these typically involve payment of fees or
12 penalties.

13 So it's fairly common that when a case
14 settles out, we'll have received a payment in
15 question, or an agreed upon amount, or at least
16 have entered into a formal payment plan. I think
17 in those cases, we would then bring forward our
18 recommendation to dismiss with a lot of assurance
19 that our terms have been met.

20 It sounds to me that for those cases
21 that might be more involved, where the resolution
22 isn't quite so straight forward, we might want to
23 consider requesting that the Board retain
24 jurisdiction. I think that will be a relatively
25 small amount of those cases, at least certainly

1 not the majority, but that's an option we might
2 want to consider. But I think for a lot of the
3 simple appeals of penalties and fees, we typically
4 wouldn't see that. And that does make up a fairly
5 large amount of the caseload.

6 CHAIRMAN RUSSELL: And once again, I
7 have my own example, and basically the consent
8 decree or the stipulations that we agreed to
9 actually had a couple years of activities that
10 we've said we would do to basically dismiss the
11 case. So what happens if we don't file an annual
12 report the next year?

13 MR. LIVERS: We know where you live.

14 CHAIRMAN RUSSELL: I only say that
15 because we just did -- "we," the royal "we." I
16 had nothing to do with it, but I do have a copy of
17 it. But you know, at some point, what if the
18 commissioners decide, "Screw it. We're not going
19 to comply," and it's a couple years worth of
20 compliance activity that we've agreed to? That's
21 to your point, Tom, is maybe it would be better
22 not to just fully take the Board out of those
23 actions.

24 MR. LIVERS: That's my thought off the
25 top of my head. I think John Arrigo may have some

1 thoughts on this as well, Mr. Chairman.

2 MR. ARRIGO: Mr. Chairman, members of
3 the Board, this is John Arrigo, Administrator of
4 the Enforcement Division, and I'd like just to
5 give you a non-legal management view.

6 We issue compliance and penalty orders
7 for violations of permits, law, and rule. If
8 they're dismissed with an order on consent with
9 prejudice, the Board divests itself of authority
10 in the case; and if it's with prejudice, the
11 original violations have been adjudicated. Is
12 that correct, Katherine? She's nodding her head.

13 MS. ORR: That's right.

14 MR. ARRIGO: So that's my legal
15 terminology. Under most of these orders on
16 consent, we agree to a settlement penalty or some
17 sort of corrective action.

18 And in the Flathead County case, in lieu
19 of paying a penalty, the County agreed to do a
20 broad, extensive, multi-year dust mitigation
21 program. If they fail to comply with the terms of
22 the Order on Consent, those would be new
23 violations, and would not be considered
24 adjudicated.

25 And if we have a party that violates an

1 Order on Consent, we conclude that further
2 enforcement in the administrative venue would not
3 be successful, and so we typically go to District
4 Court, and seek penalties or injunctive relief for
5 violations of the order. Those are my comments.

6 CHAIRMAN RUSSELL: Thanks, John. We're
7 fully compliant up here, John. I got a little --
8 my gut started to turn a little bit with the way
9 you described that, but I think we're okay, John,
10 really.

11 MR. LIVERS: The hypothetical was
12 useful, Mr. Chairman.

13 CHAIRMAN RUSSELL: It became
14 unhypothetical when John cited our case.

15 MR. ANDERSON: Let me just finish that
16 up a little bit. It seems to me that it's really
17 better to have the Department go straight to
18 District Court in those situations where the
19 entity that's violating the consent decree, is
20 violating the consent decree, because if the
21 Department goes back to the Board, then the entity
22 that's violating the consent decree then probably
23 has appellate rights from a Board decision to the
24 District Court. And so it's more efficient for
25 the Department to enforce the consent decree via a

1 just so the Board knows. And that's all.

2 CHAIRMAN RUSSELL: Another way of
3 putting that is you're acting on our behalf.

4 MS. ORR: Right.

5 MR. LIVERS: And if I could underscore
6 one of Katherine's points from earlier, Mr.
7 Chairman, I think we were interested in seeing
8 this discussion, since there was a request to put
9 the settlement documents, to share that with the
10 Board members, which we have absolutely no problem
11 doing. I just wanted to make sure there was a
12 clear understanding of expectations in terms of
13 the Board's role in these settlements.

14 CHAIRMAN RUSSELL: Or lack of role.

15 MR. LIVERS: Correct.

16 MS. ORR: I have been in Federal
17 District Court when I was Chief Counsel over here
18 at the Department in the Butte water case, and we
19 actually spent years negotiating the terms of that
20 consent decree, and wanted the same entity that
21 approved of the consent decree to then have
22 enforcement responsibility for it. So I just
23 throw that out. That's a situation where you
24 might have the same body reviewing the terms of
25 the consent decree.

1 breach of contract claim or whatever in District
2 Court.

3 MR. LIVERS: Mr. Chairman, I think that
4 the Department generally agrees with Mr.
5 Anderson's statement. I think that's a good way
6 to go.

7 CHAIRMAN RUSSELL: It sounds logical,
8 too.

9 MR. WHALEN: Mr. Chairman, I didn't
10 understand during the roll call if we have a
11 recorder who is going to be putting together some
12 transcripts of this meeting. I'm assuming that
13 there is; is that correct?

14 CHAIRMAN RUSSELL: I think Laurie is
15 reporting.

16 MR. LIVERS: That's correct.

17 MR. WHALEN: Thank you, Tom. Thanks,
18 Mr. Chairman.

19 CHAIRMAN RUSSELL: All right.
20 Katherine, do you have anything else to add?

21 MS. ORR: One thing that I should add, I
22 think, is the discussion about 41(a) is the very
23 same in the case that an administrative case is
24 referred to a Hearing Officer, me, or if the Board
25 reserves unto itself its adjudication of a case,

1 CHAIRMAN RUSSELL: Okay. All right.
2 Board members, do you have any other questions
3 regarding these two procedural items?

4 (No response)

5 CHAIRMAN RUSSELL: Hearing none, the
6 next item on the agenda are the briefing items.
7 Katherine.

8 MS. ORR: I'll try to be brief with
9 these briefing items. The ASARCO case in A(1)(b),
10 you can see the date, that it was stayed in 2006.
11 The last sort of act that needs to be done to get
12 this off of our plate, so to speak, is there needs
13 to be a trustee for -- I guess now it's not even
14 ASARCO. It's another company that will sign off
15 on the dismissal. And that's what's happening
16 there, is the companies and the Department are
17 trying to see who that would be.

18 And in Item (c), the Department and the
19 Appellant have proposed another schedule for
20 hearing, and I'll be reviewing that.

21 In Item (e), this is a case where there
22 is some non-responsiveness on the part of the
23 Appellant, and the Department filed a motion for
24 sanctions, and I issued an order granting motions
25 for sanctions.

1 And this is interesting to me because it
2 gets into what sanctions are available to an
3 administrative body such as the Board, and now
4 we're going to be waiting for Sheep Mountain to
5 comply with some of the discovery components of
6 the case, and a term of an order, which was a
7 scheduling order that was issued earlier.

8 Also some of these cases raise the issue
9 of what happens when a party is not represented by
10 Counsel, when a company is not represented by
11 Counsel, and that issue is raised in that case.

12 In Item (f), there was a motion recently
13 filed by the Department for a more definite
14 statement, and that is another issue that has been
15 surfacing, as you know, which is sometimes these
16 appeals are so scant that you can't tell what the
17 claims are really.

18 On Item (g), there is a request, a
19 recent request to alter some of the dates in the
20 scheduling order.

21 In Item (h) and (j), this is a case
22 involving Fort Yellowstone Subdivision. There has
23 been a request to consolidate those cases. And
24 that's all that I have to report on those.

25 Cases in litigation, the Thompson River

1 Co-Gen case, the status hasn't changed in the
2 Supreme Court.

3 And now we're at the rulemaking section.

4 CHAIRMAN RUSSELL: All right. You made
5 a comment back on the Item (f). In some parts of
6 the rules, it's very specific what needs to
7 accompany a request for a contested case, right?

8 MS. ORR: That's right.

9 CHAIRMAN RUSSELL: And in some others
10 like -- this is probably water quality -- there
11 isn't.

12 MS. ORR: That's right. Like the State
13 statute enforcing the Clean Air Act is very
14 specific about filing an affidavit and detailing
15 the parameters of an appeal, and this one is not
16 so specific. So it's a problem.

17 CHAIRMAN RUSSELL: It is a problem.
18 There ought to be a way to stop it being a
19 problem.

20 MR. ANDERSON: Does this problem -- Is
21 some of the source of this problem the fact that
22 the Department allows inanimate entities to be
23 represented by non-lawyers?

24 MS. ORR: Mr. Chairman, Mr. Anderson, we
25 do not.

1 MR. ANDERSON: That's good.

2 MS. ORR: It would constitute the
3 unauthorized practice of law.

4 MR. ANDERSON: Right.

5 CHAIRMAN RUSSELL: Good response,
6 Katherine.

7 MS. ORR: And that language has filtered
8 into some of the orders that the Board has issued.

9 CHAIRMAN RUSSELL: All right. Any
10 questions for Katherine before we move on?

11 MR. WHALEN: Mr. Chairman, question for
12 Katherine. Katherine, you referred to Items (h)
13 and (j) as there was a request to consolidate
14 those two. Did that request come from the
15 Appellants or did it come from the Department?

16 MS. ORR: Mr. Chairman, Mr. Whalen, that
17 was a joint request.

18 MR. WHALEN: Okay. Thank you.

19 CHAIRMAN RUSSELL: All right. Thank
20 you, Katherine. The next item on the agenda is
21 initiation of rulemaking and appointment of a
22 Hearing Officer possibly. Item (1), amend ARM
23 17.30.617, to designate the mainstream of the
24 Gallatin River from the Yellowstone National Park
25 boundary to the confluence of Spanish Creek as an

1 ORW, and to amend 17.30.338, and add a new
2 subsection clarifying the discharges to
3 groundwater with the direct hydrologic connection
4 to an ORW are within statutory mandates. I won't
5 read the rest. Tom.

6 MR. LIVERS: Mr. Chairman, this is a
7 request to issue a notice of supplemental
8 rulemaking, to extend the comment period, and Bob
9 Bukantis will speak to this.

10 MR. BUKANTIS: Mr. Chairman, members of
11 the Board, for the record, my name is Bob
12 Bukantis, and I head the Water Quality Standards
13 Section for the Department of Environmental
14 Quality. And I plan to be very brief this
15 morning, especially given that we provided you a
16 more in-depth briefing on this item in your recent
17 December 11th meeting.

18 But first I'll start with just bringing
19 your attention to the materials in preparation for
20 this item, executive summary, the draft
21 supplemental administrative register that Tom just
22 spoke to briefly, and comment letter received from
23 Greater Yellowstone Coalition requesting this
24 extension. And I'll just really hit the
25 highlights on this just to refresh everyone's

1 memory.

2 Basically the ORW designation is done as
3 part of Montana water quality standards to provide
4 the greatest protection to a water body feasible
5 under State law. And this issue first came to
6 this body brought by a petition from American
7 Wildlands in December of 2001. This has since
8 been more recently handed off to the Greater
9 Yellowstone Coalition as environmental group or
10 petition lead.

11 And as a result of the petition, the
12 Board and the Department took a series of actions
13 including an EIS, public hearing in Gallatin
14 Gateway, and the Department drafted the rule which
15 identified this segment of the Gallatin as an ORW.

16 The intent of the rule is to also
17 clarify that the Department has authority to
18 regulate all new and increased sources of
19 pollution with direct hydrologic connection to the
20 Gallatin River, and clarified that new
21 restrictions would not apply to prior issued
22 permits by DEQ or local governments.

23 The initial public comment period closed
24 in November of 2006, and at that point, we
25 received quite a bit of comment that objected to

1 the ORW designation because it would render some
2 of the Big Sky area properties undevelopable.

3 Since that time, Petitioners and members
4 of the development community have banded together
5 to develop a wastewater solutions forum, and have
6 been working towards alternatives to Outstanding
7 Resource Water designation that they feel would be
8 more effective in protecting the Gallatin, while
9 trying to eliminate having properties become
10 undevelopable under their plan. So they're
11 seeking kind of a win-win solution, where they
12 expect to provide protection that would be
13 equivalent or better than ORW designation.

14 So what you've seen has been a series of
15 extensions to the public comment period to try to
16 allow time to work this out, which is consistent
17 with the direction we have under State law on ORW
18 designation; which just to refresh your memory on
19 that point, is that one of the stipulations is
20 that there is not a more effective process to
21 achieve the necessary protection, and that seems
22 to be what the locals are trying to do.

23 So in this regard, the Department
24 recommends that the Board extend the public
25 comment period to continue to allow for some time

1 for the local process to work out. And I'll end
2 it there, and be happy to respond to any questions
3 you might have.

4 CHAIRMAN RUSSELL: Thanks, Bob.

5 Questions for Bob?

6 MR. MILLER: Mr. Chairman, a question
7 for Bob. This is Miller. How long is the
8 extension for?

9 MR. BUKANTIS: This extension would be
10 until April 23rd, I believe -- yes, April 23rd,
11 later this year.

12 MR. MILLER: Thank you.

13 CHAIRMAN RUSSELL: Actually how long
14 does that extend the process?

15 MR. BUKANTIS: About six months.

16 CHAIRMAN RUSSELL: How many times have
17 we actually extended this process? Does anyone
18 know?

19 MR. BUKANTIS: I have this summarized
20 here someplace. Well, I'm going to tell you off
21 the top of my head. I think it's been about six
22 times.

23 CHAIRMAN RUSSELL: -- Board members
24 didn't hear the initial public hearing.

25 MR. BUKANTIS: Correct.

1 CHAIRMAN RUSSELL: All but one.

2 MR. BUKANTIS: You and Robin, I think.

3 CHAIRMAN RUSSELL: Robin, did you hear
4 the initial public hearing?

5 MS. SHROPSHIRE: Yes.

6 CHAIRMAN RUSSELL: At Gallatin Gateway?

7 MS. SHROPSHIRE: Yes.

8 MS. KAISER: I also did, I believe.
9 This is Heidi.

10 MR. LIVERS: Mr. Chairman, that's
11 correct. Heidi was there as well.

12 CHAIRMAN RUSSELL: Questions for Bob?
13 (No response)

14 MR. WHALEN: Mr. Chairman. For review
15 and clarification, Mr. Bukantis, it seems counter
16 intuitive to developing properties in Big Sky
17 would contribute to the water quality of the
18 Gallatin. And in your previous presentation, it
19 seems that the argument that both groups were
20 making was that by centralizing wastewater
21 treatment as opposed to having individual lots
22 draining into the river, that water quality is
23 improved. Is that basically the logic behind
24 extending the comment period and trying to arrive
25 at consensus between the Greater Yellowstone

1 Coalition and the development community?

2 MR. BUKANTIS: I guess I'm not sure if I
3 could give you a clear yes or no on that, Mr.
4 Whalen. I think part of the logic is they're
5 looking for -- What I'm going to do is I'm going
6 to pass this one to Eric Regensburger who is here,
7 and a little bit more conversant with the details
8 of this piece.

9 MR. REGENSBURGER: Mr. Chairman, members
10 of the Board, my name is Eric Regensburger, I work
11 with the Subdivision Program at DEQ, and I'll try
12 to respond to your question.

13 The developers and the Petitioners for
14 ORW are trying to work out a system where they
15 could take the wastewater from down along the main
16 stem of the Gallatin, and possibly pitch it up to
17 the Big Sky Village area, where they have a
18 treatment system, and they also discharge their
19 wastewater via land application.

20 Between the elevated amount of treatment
21 that occurs in centralized wastewater system for
22 Big Sky and discharge in the summer months during
23 the growing season to the golf courses and such,
24 the amount of nutrients and other contaminants
25 that would get into the Gallatin would be greatly

1 reduced over any kind of discharge through a
2 septic system that occurred down closer to the
3 Gallatin River.

4 So the thought is that by going through
5 a centralized system, and either discharging to
6 the golf course, or possibly they were talking
7 about doing what's called snow effluent, where
8 they would discharge as snow in the winter, and
9 treat it that way, the thought was that that would
10 be as good or better a solution to protecting the
11 Gallatin as compared to the recommendations in the
12 ORW document.

13 MR. WHALEN: Thanks, Mr. Regensburger.
14 I appreciate the explanation.

15 CHAIRMAN RUSSELL: Eric, I've got one
16 for you. I have a one acre lot I'm going to get
17 to develop on the Gallatin. You're going to make
18 me pump my wastewater out of the ORW designated
19 area, but I'm going to put a half an acre of lawn
20 in, and I'm going to irrigate it 25 minutes per
21 zone per day. What is putting more water into the
22 zone than either a septic system waste, or that
23 type of irrigation? And I'd like to put a lot of
24 fertilizer on my yard.

25 MR. REGENSBURGER: Mr. Chairman, members

1 of the Board. As far as the quantity issue of how
2 much water is going, I think the septic system
3 takes the water out of the same aquifer that it
4 discharges to, so there is no net gain/loss there.
5 Irrigation obviously has some uptake to the plants
6 and rapid transpiration, so there is some use of
7 water quantity there.

8 As far as the quality of irrigation and
9 fertilizer use, yes, you're correct. The more
10 fertilizer you use, the potential for more of it
11 to actually get through, and percolate down, and
12 get into the river. However, that's a nonpoint
13 source of contaminants, the irrigation and the
14 fertilizer use, so that type of discharge activity
15 would not be regulated under ORW because ORW is
16 only for point source discharges. Does that
17 answer your question, Mr. Chairman?

18 CHAIRMAN RUSSELL: Did you answer my
19 question?

20 MR. REGENSBURGER: Well, if --

21 CHAIRMAN RUSSELL: There is numerous
22 studies on the nutrients that come off of golf
23 courses near surface water. It's a tremendous
24 amount. And I know that in the -- and Eric, I
25 know you know this, because in the subdivision

1 activity, basically around some lakes, especially
2 in northwest Montana, you try to put a no -- just
3 try to keep a primitive -- your setbacks to
4 surface water, you try to leave primitive, so
5 you're not developing golf course like lawns. And
6 I know you may not be able to regulate it, but it
7 can be a great issue when you're trying to protect
8 surface water.

9 MR. REGENSBURGER: Mr. Chairman, members
10 of the Board. You are correct as far as lawn
11 irrigation for an individual home like the one
12 acre lot like you were talking about. That's a
13 nonpoint source, and is not regulated under ORW.
14 With regards to the golf course irrigation, that
15 is currently regulated under the permit that Big
16 Sky Water and Sewer District has with the
17 Department.

18 And if it's done correctly, you avoid
19 irrigating close to streams, you avoid runoff, and
20 therefore the fertilizer should sink down into the
21 ground, be taken up better than running off into
22 the creek. But correct. There is probably going
23 to be some amount of fertilizer that is going to
24 leak through just because you can't be always be
25 perfect with your application to be exactly right

1 on with the water needs of the soil. So there is
2 some issue there.

3 However, if the wastewater is treated
4 better by the Big Sky Water and Sewer District
5 system than what is discharged down below through
6 a septic system, you have some reduction up front
7 there before you discharge to the golf course or
8 to a lawn.

9 CHAIRMAN RUSSELL: I'm just being
10 argumentative.

11 MR. REGENSBURGER: I appreciate that.

12 CHAIRMAN RUSSELL: I certainly don't
13 disagree with what you're trying to do, Eric. It
14 is just there are other sources that you just
15 can't get to.

16 MR. REGENSBURGER: Mr. Chairman, members
17 of the Board. I think the parties that are
18 working on the agreement were looking at that snow
19 effluent process I mentioned earlier as a way to
20 do even better than the golf course irrigation,
21 but that snow effluent process has some issues
22 with the spring runoff time.

23 CHAIRMAN RUSSELL: Thanks, Eric. Any
24 further questions for the Department?

25 (No response)

1 CHAIRMAN RUSSELL: Just so everyone
2 knows, we never on this -- unless I forgot -- but
3 actually the Board is hearing this, so we wouldn't
4 be appointing a Hearings Officer on this. Correct
5 me if I'm wrong, but I don't think we ever gave it
6 to Hearing Examiner.

7 MR. LIVERS: That's correct, Mr.
8 Chairman. And Mr. Chairman, and you'll call for
9 public comment?

10 CHAIRMAN RUSSELL: Yes. Is there anyone
11 in the audience or on the phone that would like to
12 speak to this matter?

13 (No response)

14 MR. LIVERS: Doesn't appear so, Mr.
15 Chairman.

16 CHAIRMAN RUSSELL: Thanks, Tom. Hearing
17 that, I will entertain a motion to accept the
18 Department's recommendation to extend the public
19 comment period to April 23rd, 2010, which also
20 extends this process approximately six months.

21 MR. MILLER: This is Miller. I so move.

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

24 MR. MIREs: I'll second.

25 CHAIRMAN RUSSELL: It's been seconded by

1 Larry. Further discussion?

2 (No response)

3 CHAIRMAN RUSSELL: Hearing none, all
4 those in favor, signify by saying aye.

5 (Response)

6 CHAIRMAN RUSSELL: Opposed.

7 (No response)

8 CHAIRMAN RUSSELL: Motion carries. The
9 next item on the agenda is actually Item 2, and it
10 is --

11 MR. LIVERS: Mr. Chairman, I can speak
12 to this item if you want.

13 CHAIRMAN RUSSELL: I would love that.

14 MR. LIVERS: Sure. And I want to
15 apologize to the Board for some kind of last
16 minute changes here. The Department is
17 withdrawing this rulemaking request at this time,
18 and it came up fairly late, so I do apologize for
19 any time that you might have spent reviewing this
20 background material on this.

21 The rulemaking would have done three
22 things. It would have changed the manner in which
23 we charge fees to certain entities that don't bill
24 directly for delivering water; it would have
25 extended the waiting period on operator

1 certification testing; and it would require
2 transient systems treating water to have a
3 certified operator.

4 What has proven problematic is the fee
5 piece of this, and essentially we had chosen to go
6 forward with this rulemaking some time ago. I
7 think in the interim, there has been a lot more
8 concern, certainly an interest on the part of this
9 Administration, in holding the line on unnecessary
10 fees. And we've looked at this, and we've
11 determined that this is one we can live without at
12 this point in time. It's in the spirit of State
13 government trying to look at cost cutting and cost
14 containment measures, so we are withdrawing the
15 fee request.

16 The other two parts of the rule, one
17 part of those, the extension of the waiting
18 period, is actually a Departmental rule, and the
19 Board doesn't need to act on that; and the third
20 piece is a relatively minor piece that we don't
21 feel justifies rulemaking on its own. So we would
22 consider coming back with that at some point in
23 time when there is reason to bring other rules
24 before the Board.

25 CHAIRMAN RUSSELL: Thanks, Tom. Since

1 the Department is rescinding that request, we will
 2 move on to the next item, and that is the
 3 amendment of ARM 17.8.745. Tom.
 4 MR. LIVERS: Mr. Chairman, thank you.
 5 Our de minimus rule, and Mr. Homer will be here to
 6 discuss this.

7 MR. HOMER: Thank you, Mr. Chairman,
 8 members of the Board. My name is Chuck Homer.
 9 I'm the Manager of the Air Permitting Compliance
 10 Program in the Air Resources Management Bureau of
 11 DEQ.

12 The Department is requesting that the
 13 Board change the threshold at which de minimus
 14 changes may be made at permitted facilities
 15 without having to get a change in the permit. In
 16 the 1995 legislative session House Joint
 17 Resolution 22 was passed, stating that there
 18 should be a level at which permitted facilities
 19 can make changes without having to change air
 20 quality permits. In 1996, the Board adopted the
 21 original de minimus rule.

22 Without going into too much depth here,
 23 I will give a quick summary of the SIP process for
 24 newer Board members.

25 Montana, as part of the requirements of

1 these issues.

2 This was one of our outstanding issues
 3 that we thought we could address in a manner that
 4 would make it approvable by EPA. What we've
 5 determined through review of this and through
 6 discussions with the EPA is that a level of five
 7 tons per year -- and that would be a change at a
 8 facility, that would have a change in the
 9 facility's potential to emit, not necessarily
 10 actual emissions, but changes in their potential
 11 to emit of five tons per year -- would be a small
 12 enough change that EPA would be able to approve
 13 that as a de minimus action that wouldn't need to
 14 be addressed in the permit.

15 Since the Board initially adopted the
 16 rule, we have been implementing a process that
 17 allowed these changes up to 15 ton per year level.
 18 While this is a change that will require some more
 19 permitting actions, we don't believe that it is
 20 critical. We still believe we'll be able to
 21 handle these permitting issues. We believe that
 22 facilities will be able to still make necessary
 23 changes on a timely manner, because most of the
 24 de minimus changes we've had -- and as I said,
 25 we've been implementing this for 13 years -- are

1 the Federal Clean Air Act, has a State
 2 Implementation Program, and that implementation
 3 program is meant to encompass the air quality
 4 requirements that are necessary to protect ambient
 5 air quality standards, so many of the rules that
 6 the Board has adopted are submitted to EPA, EPA
 7 then publishes them in the Federal Register, and
 8 makes them federally enforceable.

9 Our Montana Air Quality Permit Program
 10 is part of that. It is contained in the State
 11 Implementation Plan. So when changes are made to
 12 the Air Quality Permitting Program, after the
 13 Board adopts them, they must be submitted to EPA
 14 for them to approve them as changes to the SIP.
 15 These changes were submitted in 1996, and the
 16 Board has made a couple of adjustments to that
 17 over the years, and those changes have also been
 18 submitted.

19 EPA has never acted on any of those SIP
 20 changes, so there is an inconsistency between what
 21 EPA has published as Montana's air permitting
 22 rules and the rules that the Board has adopted.
 23 EPA is now acting to address many of these SIP
 24 quality issues -- this isn't the only one -- and
 25 the State DEQ is working with the EPA to address

1 at or below the five ton level.

2 One of the things we discussed with EPA
 3 was the ability to get this addressed immediately,
 4 so one benefit to the industry would be now they
 5 will have, if the Board should choose to adopt
 6 this and EPA approves it, a consistent situation
 7 out there. The way it exists now, with the
 8 inconsistency between the SIP and permitting,
 9 creates a level of uncertainty for regulated
 10 facilities that is certainly not helpful to them.

11 We have discussed this in front of
 12 CAAAC. Based on our timing and trying to get this
 13 done in a quick manner, we didn't give it as much
 14 discussion with CAAAC as we may have liked. We
 15 did talk to them. We got some feedback. There
 16 was some concern that this will require additional
 17 permitting requirements; we acknowledge that. We
 18 don't think it's significant. But there was no
 19 significant opposition to this change.

20 So that's what we're proposing here,
 21 that the Board authorize initiation of rulemaking,
 22 appoint a Hearing Officer. We have had some
 23 discussions with Katherine about a potential
 24 hearing date, so if the Board should choose to do
 25 that, we would have a date for a hearing. But it

1 would be to change the de minimus threshold, the
2 threshold beneath which a facility didn't have to
3 get a permit to change from the current 15 tons
4 per year down to five tons per year.

5 CHAIRMAN RUSSELL: Thanks, Chuck. So
6 apparently our de minimus rule wasn't de minimus
7 enough.

8 MR. HOMER: Yes, Mr. Chairman, that's
9 correct, according to the EPA.

10 CHAIRMAN RUSSELL: I could have boiled
11 that right down for you. All right. So Board
12 members, do you have questions for the Department?

13 MR. WHALEN: Mr. Chairman, this is Joe.
14 I really appreciated that explanation. It was a
15 really confusing issue to try to digest in written
16 form. It was nice to have it boiled down. Thank
17 you, Mr. Homer.

18 Secondly, Mr. Homer, if you would, could
19 you outline for us some examples of those kind of
20 facilities that would be generating roughly five
21 tons per year.

22 MR. HOMER: Mr. Chairman, Mr. Whalen. A
23 lot of these changes that would fall below that
24 would be valve replacements, small changes,
25 putting in little pieces of a facility. Some

1 major impact. These are all very small changes.
2 And we've really had no issues with facilities
3 being able to slip something through in the 13
4 years we've been administering it at 15 tons, and
5 we wouldn't expect that at the lower level either.

6 MR. WHALEN: Okay. Thank you, Mr.
7 Chairman.

8 MR. ANDERSON: This is Larry Anderson.
9 I know over the last 30 years I've thought that
10 gaining two pounds a year is de minimus, but it
11 adds up. And so I'm wondering with respect to
12 these facilities, have you noticed that they take
13 advantage? One way or other, do they take
14 advantage of the de minimus rule that you have?

15 MR. HOMER: Mr. Chairman, Mr. Anderson.
16 This theoretical seems a little too real for me
17 personally, the two pound issue. But we have had
18 instances where rarely facilities have proposed
19 something as de minimus that was not covered under
20 the rule, and obviously not what the Board had
21 intended or how the Department implements that.
22 It's been a rare occurrence. We've been able to
23 adequately deal with that.

24 Almost entirely our regulated community
25 are reasonable people trying to comply with these

1 facilities are very complex, like a petroleum
2 refinery; some pieces of power plants, putting in
3 a new small piece of equipment, valve changes. I
4 could bring an engineer up here, and get a lot
5 more in depth if you'd like more beyond that
6 simple explanation.

7 MR. WHALEN: Mr. Chairman, just a follow
8 up. So basically what we're talking about would
9 be some modifications to existing large facility
10 sites. Five tons per year doesn't necessarily
11 migrate over to small asphalt, hot mix asphalt
12 recyclers, or some infield agricultural type
13 facilities. These are typically geared toward
14 large facility modifications.

15 MR. HOMER: Mr. Chairman, Mr. Whalen.
16 It would apply to any permit we have, but
17 agricultural entities are for the most part exempt
18 from Montana air quality permitting requirements.
19 They're subject to federal major source rules if
20 they're that large. But a small change at a small
21 facility would still be covered, as well as small
22 changes at large facilities.

23 It certainly wouldn't allow new
24 facilities without permits; it wouldn't allow
25 significant addition of emitting units; no real

1 rules, and that's one reason I think the de
2 minimus is valuable. If we create a system of
3 regulation that can be complied with and meet our
4 mission of protecting public health and the
5 environment, that gives us the best result.
6 Occasionally there will always be somebody who
7 will try to push the envelope, but we're certainly
8 capable of implementing this rule in a reasonable
9 way.

10 MR. ANDERSON: Thank you.

11 CHAIRMAN RUSSELL: Any further
12 questions?

13 MS. SHROPSHIRE: This is Robin. Could I
14 get a little bit more clarification as well. I'm
15 trying to visualize, let's just say, a plant, and
16 they -- of regulated pollutants. And I'm trying
17 to think of an example of something that might
18 fall between the five and 15 ton that would reopen
19 their permit. Can you give an example of that.

20 MR. HOMER: Mr. Chairman, Ms.
21 Shropshire. I'm going to bring up Jenny O'Mara,
22 one of our permitting engineers, and she will give
23 some examples of de minimus changes, changes that
24 are de minimus and sum that up.

25 MS. O'MARA: Mr. Chairman, members of

1 the Board. My name is Jenny O'Mara, and I'm an
2 engineer with the Air Resources Management Bureau.

3 And we did do some preliminary
4 calculations to try and figure out what common
5 actions would still fall under the de minimus
6 threshold of five tons per year, and a couple of
7 them that we came up with were like an existing
8 facility where they wanted to add a new crusher,
9 would be a crusher that operated up to 950 tons
10 per hour; another example would be for a facility
11 to add a screen up to 515 tons per hour; an engine
12 that is less than 35 horsepower, or a small boiler
13 that is less than eleven million Btu's per hour.
14 And then as Chuck said, also various valves, pump
15 seals, flanges, and fittings, just to name a few.

16 CHAIRMAN RUSSELL: Any other questions?
17 (No response)

18 CHAIRMAN RUSSELL: Thank you for that.

19 MS. SHROPSHIRE: Thank you.

20 CHAIRMAN RUSSELL: Anything else?

21 (No response)

22 CHAIRMAN RUSSELL: All right. Is there
23 anyone in the audience that would like to speak to
24 this matter before the Board takes action?

25 (No response)

1 MR. LIVERS: Apparently not, Mr.
2 Chairman.

3 CHAIRMAN RUSSELL: I just have a
4 question on the MAR Notice No. 4. The comment
5 period seems pretty short. Did you --

6 MR. LIVERS: De minimus?

7 CHAIRMAN RUSSELL: Yes, it seems
8 de minimus. February 4th, 2010 is not very far
9 away from here.

10 MR. HOMER: Mr. Chairman, that's
11 correct. The notice that you have before you does
12 not have the date of a hearing in it. We were
13 just discussing that yesterday, and I believe that
14 the actual comment -- The hearing date, the
15 potential hearing date that we've discussed with
16 Katherine would be March 11th, and we would be
17 keeping the comment period, as we usually do, one
18 week after that. So I believe the actual end of
19 the comment period would be March 18th.

20 CHAIRMAN RUSSELL: That would be
21 reflected in the notice?

22 MR. HOMER: Yes.

23 CHAIRMAN RUSSELL: So any motion should
24 make sure that that's reflected. Since I kind of
25 told -- maybe the next step would be a motion. I

1 would entertain a motion to initiate rulemaking on
2 this matter, and appoint Katherine the permanent
3 Hearings Examiner, and modify the proposed notice
4 to reflect a March 18th date for submitting
5 written views, arguments, or data. Do I have a
6 motion?

7 MR. WHALEN: Mr. Chairman, this is Joe.
8 I'll make that motion.

9 CHAIRMAN RUSSELL: It's been moved by
10 Joe Whalen. Is there a second?

11 MR. MILLER: This is Miller. I'll
12 second it.

13 CHAIRMAN RUSSELL: It's been seconded by
14 Marv. Any further discussion?

15 MR. WHALEN: Mr. Chairman, does the
16 Department anticipate that if we pass this
17 rulemaking, or we initiate rulemaking on this
18 matter, that it will be scolded by the
19 Environmental Quality Council and overruled, so
20 that we'll need to withdraw it at some point?

21 MR. LIVERS: Mr. Chairman. We don't
22 anticipate that, Mr. Whalen. Thank you.

23 MR. WHALEN: Thank you, Mr. Livers.

24 CHAIRMAN RUSSELL: All right. Hearing
25 nothing further by the Board, all those in favor,

1 signify by saying aye.

2 (Response)

3 CHAIRMAN RUSSELL: Opposed.

4 (No response)

5 CHAIRMAN RUSSELL: Motion carries. All
6 right. Thanks to the staff for their
7 presentation.

8 The next item on the agenda are new
9 contested cases on appeal. In the matter of the
10 appeal and request for hearing by Fidelity
11 Exploration and Production Company. Katherine.
12 MS. ORR: Yes, Mr. Chairman, members of
13 the Board. Fidelity Exploration was issued a
14 permit, an MPDES permit, and they're requesting
15 that it be modified to eliminate the outfall, and
16 to include a mixing zone for acute toxicity, and
17 for other matters that are referenced in the
18 appeal.

19 CHAIRMAN RUSSELL: Do I have a motion to
20 appoint Katherine permanent -- Katherine, unless
21 you speak up, I'm just going to ask for you to be
22 appointed.

23 MS. ORR: Okay. That's fine.

24 CHAIRMAN RUSSELL: Do I have a motion to
25 appoint Katherine permanent Hearings Examiner on

1 this matter?
 2 MR. MILLER: This is Miller. I so move.
 3 CHAIRMAN RUSSELL: It's been moved by
 4 Marv. Is there a second?
 5 MR. MIRES: Second.
 6 CHAIRMAN RUSSELL: It's been seconded by
 7 Larry. Further discussion?
 8 MS. KAISER: Mr. Chairman, this is
 9 Heidi. I would like to recuse myself from taking
 10 action on this matter.
 11 CHAIRMAN RUSSELL: All right. Joe.
 12 MR. WHALEN: Mr. Chairman, this is Joe.
 13 Given that this is a matter of significant public
 14 interest, particularly with respect to discharge
 15 into the Tongue River, I really feel like the
 16 Board ought to hear this matter. I'm just going
 17 to state that up front, and I'll probably vote in
 18 the negative, and that's why.
 19 CHAIRMAN RUSSELL: Any further
 20 discussion?
 21 (No response)
 22 CHAIRMAN RUSSELL: Since we have kind of
 23 been given an idea of how the vote and the recusal
 24 will go, Tom, I'm going to roll call this.
 25 MR. LIVERS: Okay. Mr. Anderson.

1 MR. ANDERSON: I'll vote no.
 2 MR. LIVERS: Mr. Mires.
 3 MR. MIRES: Yes.
 4 MR. LIVERS: Ms. Shropshire.
 5 MS. SHROPSHIRE: Can you clarify the
 6 motion again? I apologize.
 7 CHAIRMAN RUSSELL: The motion that I
 8 requested, and it was moved and seconded, was to
 9 move this to Katherine to be the permanent
 10 Hearings Examiner. Joe raised the issue around
 11 discharge to the Tongue, and mentioned that he
 12 would vote no on appointing a Hearings Examiner,
 13 and would like the Board to hear this.
 14 MR. LIVERS: So if this motion were to
 15 fail, I assume there would be a motion for the
 16 Board to hear this directly.
 17 CHAIRMAN RUSSELL: Yes, we would have to
 18 do that change to course now.
 19 MS. SHROPSHIRE: I guess I could go
 20 either way, so I'll vote no.
 21 MR. LIVERS: Mr. Miller.
 22 MR. MILLER: Yes.
 23 CHAIRMAN RUSSELL: Mr. Whalen.
 24 MR. WHALEN: No.
 25 MR. LIVERS: Chairman Russell.

1 CHAIRMAN RUSSELL: I'm going to vote
 2 yes, but that's makes it three to three. I'm
 3 going to need a new motion.
 4 MR. WHALEN: Mr. Chairman, I would move
 5 that the Board hear this appeal and request by
 6 Fidelity Exploration and Production.
 7 CHAIRMAN RUSSELL: Is there a second?
 8 MR. ANDERSON: I'll second.
 9 CHAIRMAN RUSSELL: It's been moved and
 10 seconded to have the Board hear this matter
 11 directly. Let's roll call this one again.
 12 MR. LIVERS: Mr. Anderson.
 13 MR. ANDERSON: Yes.
 14 MR. LIVERS: Mr. Mires.
 15 MR. MIRES: Yes.
 16 MR. LIVERS: Ms. Shropshire.
 17 MS. SHROPSHIRE: Yes.
 18 MR. LIVERS: Mr. Miller.
 19 MR. MILLER: Yes.
 20 MR. LIVERS: Mr. Whalen.
 21 MR. WHALEN: Yes.
 22 MR. LIVERS: Chairman Russell.
 23 CHAIRMAN RUSSELL: Yes. We have all
 24 this time. Katherine, I'm very sorry you're not
 25 going to have to take this up on your own.

1 MS. ORR: I'd be glad to help in
 2 whatever way I can.
 3 CHAIRMAN RUSSELL: As the Board should
 4 know, even though we take this up, this is a
 5 contested case, and Katherine will act on our
 6 behalf, continue to act on our behalf. Basically
 7 we'll expect you to do prehearing issues that you
 8 feel that are within your scope, just as you have
 9 in the past, Katherine.
 10 MS. ORR: Yes.
 11 CHAIRMAN RUSSELL: So we can't do this
 12 without you. You know that.
 13 MS. ORR: Thank you.
 14 CHAIRMAN RUSSELL: So the next item on
 15 the agenda is --
 16 MR. LIVERS: Before we move on, I
 17 wonder, Mr. Chairman, is there any value, or is it
 18 premature to talk about kind of a general time
 19 frame, whether we might be able to consolidate the
 20 Board hearing with a regular meeting? If it's too
 21 early to make that, we can certainly just work on
 22 that in the interim, and do that behind the
 23 scenes.
 24 CHAIRMAN RUSSELL: That would be great.
 25 And I know we all block out those regular meetings

1 dates, and working around them would certainly be
2 of benefit to me. I would just leave that up to
3 you and Katherine, or the Department and Katherine
4 and Fidelity to keep that in mind as we move
5 forward.

6 MR. LIVERS: Okay. We'll do that, Mr.
7 Chairman.

8 CHAIRMAN RUSSELL: Thanks, Tom. Good
9 point.

10 Item No. 2, in the matter of violations
11 of the Montana Public Water Supply Law by Jason
12 Ellsworth. Katherine.

13 MS. ORR: Mr. Chairman, members of the
14 Board, this is a public water supply case out of
15 Hamilton, Montana. The owner Jason Ellsworth at
16 SFE Unapproved -- I'm not sure what that means --
17 is the owner of a public water supply system, and
18 a public sewage system, and the violations are as
19 follows: Operation of a public water supply and
20 public sewage system without prior Department
21 approval; failure to retain a certified operator;
22 failure to monitor for lead and copper; failure to
23 monitor for total coliform bacteria; and failure
24 to report monitoring violations; and the requested
25 penalty is \$9,598.

1 CHAIRMAN RUSSELL: All right. Thanks.
2 Does the Board have any other questions for
3 Katherine before we take action?

4 MR. WHALEN: Mr. Chairman. Ms. Orr,
5 what was Department's estimate of the benefit to
6 Mr. Ellsworth for noncompliance, economic benefit?

7 MS. ORR: For which violation were you
8 speaking?

9 MR. WHALEN: All totaled.

10 MS. ORR: That's broken out for each
11 violation, and I think you have that in your
12 packet.

13 CHAIRMAN RUSSELL: One of them is \$824.

14 MR. MILLER: On Page 11 of 11.

15 MS. ORR: Yes. The economic benefit was
16 \$1,273.

17 MR. WHALEN: Okay. I thought I saw
18 something quite a bit higher, but I could be
19 wrong. Thank you. I understand it's kind of
20 laborious to put this together right now.

21 MS. ORR: No. That's fine.

22 CHAIRMAN RUSSELL: Further questions for
23 Katherine?

24 (No response)

25 CHAIRMAN RUSSELL: Hearing none, I would

1 entertain a motion to appoint Katherine permanent
2 Hearings Examiner on this matter.

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

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

6 MR. MILLER: This is Miller. I'll
7 second it.

8 CHAIRMAN RUSSELL: It's been seconded by
9 Marv. Any further questions?

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. The
17 next item on the agenda is in the matter of
18 violations of the public water supply law. I
19 can't help myself. The attorney, what an
20 appropriate name for an attorney to do the last
21 case.

22 In the matter of violations of the
23 Public Water Supply Laws by High Spirits
24 Entertainment, LLC, as High Spirits Club and
25 Casino, Florence, Ravalli County. Katherine.

1 MS. ORR: Yes. Mr. Chairman, members of
2 the Board. The Department issued a notice of
3 violation and administrative compliance order on
4 October 30th, 2009, and the violations are:
5 Exceedence of the non-acute MCL for total coliform
6 bacteria; failure to report non-acute MCL total
7 coliform bacteria; failure to provide public
8 notification; and order to take corrective action.
9 And no asserted number for penalty, but there may
10 be penalties for failure to implement the order to
11 take corrective action, is the way I understand
12 it.

13 CHAIRMAN RUSSELL: Further questions for
14 Katherine?

15 MR. MILLER: Mr. Chairman, this is
16 Miller. Katherine, or maybe somebody there in the
17 Department, why isn't there a penalty violation
18 worksheet made up for this?

19 MR. LIVERS: Mr. Chairman, hang on just
20 a second, please.

21 MR. ARRIGO: Mr. Chairman, Mr. Miller,
22 this is John Arrigo again. In all of our penalty
23 orders, we do a penalty calculation worksheet, and
24 it is attached to the order, it just didn't get
25 transferred to the Board packets somehow, and we'd

1 be happy to get that to you.
 2 MR. MILLER: About how much are we
 3 talking, John? Follow up.
 4 CHAIRMAN RUSSELL: That's fine.
 5 MR. ARRIGO: I'm sorry, I don't have the
 6 order in front of me. Mr. Madden might have it.
 7 Hold on a second. The order -- Maybe there is not
 8 a penalty in this one. We're just ordering them
 9 to comply with the total coliform MCL, and what
 10 the order requires them to do is to submit a plan
 11 to correct the MCL, and they have a couple options
 12 to do that.
 13 If you look at Paragraph 20 of the
 14 order, Page 4, it says, "Within 45 days submit a
 15 plan, and it shall include one of the following
 16 corrective actions, identification, and abatement
 17 of the contamination source, development of a new
 18 water source, or the installation of a full-time
 19 disinfection."
 20 I apologize. In these MCL kind of
 21 cases, we figure that the owner doesn't have a lot
 22 of control over the quality of the water that
 23 comes out of a well, but they do have a
 24 responsibility for treating it, if necessary. So
 25 we typically don't seek penalties in these types

1 of orders, but we do require them to address the
 2 MCL. So this is not a penalty order.
 3 MR. MILLER: Thank you very much, John.
 4 It seemed different than the others, and I was
 5 just asking.
 6 CHAIRMAN RUSSELL: How long has this
 7 been going on John, violations of the MCL?
 8 MR. ARRIGO: Mr. Chairman, again, I'm
 9 not sure I can accurately respond. I have to look
 10 in the order. If a public water supply has a
 11 positive result for a total coliform bacteria
 12 test, they have to collect repeat samples; and
 13 then depending upon the results of those, if those
 14 four or five repeat samples are good, then the MCL
 15 goes away. If they are present, then they have
 16 what's called a non-acute MCL.
 17 And this says that they collected one
 18 sample on July 3rd, 2009, it was positive for
 19 coliform. They were required to collect four
 20 repeats within 24 hours. On July 6th, they
 21 collected four repeats, which all tested positive.
 22 On August 3rd, they collected five repeats, which
 23 were all positive. So we are alleging that they
 24 exceeded the non-acute total coliform MCL in July,
 25 August, and September of 2009. That's how far

1 back our data goes to document the violation.
 2 CHAIRMAN RUSSELL: I apologize. I'm
 3 trying to put you on the spot, but they're the
 4 ones that are appealing your order, so -- They
 5 don't agree with you, John. With that in mind,
 6 would anyone like to move to have Katherine the
 7 permanent Hearings Examiner in this case?
 8 MR. MILLER: This is Miller. I so move.
 9 CHAIRMAN RUSSELL: It's been moved. Is
 10 there a second?
 11 MR. WHALEN: This is Joe. I'll second.
 12 CHAIRMAN RUSSELL: It's been seconded by
 13 Joe Whalen. Further discussion?
 14 (No response)
 15 CHAIRMAN RUSSELL: Hearing none, all
 16 those in favor, signify by saying aye.
 17 (Response)
 18 CHAIRMAN RUSSELL: Opposed.
 19 (No response)
 20 CHAIRMAN RUSSELL: Motion carries. The
 21 last one of these, in the matter of the request
 22 for hearing by AquaFlo, LLC. Katherine.
 23 MS. ORR: Mr. Chairman, members of the
 24 Board. AquaFlo is a company that operates here in
 25 the valley, and there was a groundwater pollution

1 permit issued, and they are requesting review and
 2 modification of the permit, for example, regarding
 3 the total nitrogen permitted, sampling and
 4 reporting frequency for escherichia, E. coli, and
 5 other sampling and reporting frequency
 6 requirements. And that's a simplification, but
 7 that is sort of the introduction to this.
 8 CHAIRMAN RUSSELL: Not too many people
 9 try to actually say escherichia. Thanks for
 10 giving it a shot, Katherine.
 11 MS. ORR: And I didn't say it correctly,
 12 did I?
 13 CHAIRMAN RUSSELL: Well, I didn't
 14 actually want to put you on the spot, but pretty
 15 darn close. Pretty good for lawyer.
 16 MS. ORR: I'm going to be able to say it
 17 better.
 18 CHAIRMAN RUSSELL: I would entertain a
 19 motion to appoint Katherine permanent Hearings
 20 Examiner on this matter.
 21 MS. SHROPSHIRE: So moved. Robin.
 22 CHAIRMAN RUSSELL: It's been moved by
 23 Robin. Is there a second?
 24 MR. LIVERS: I think Ms. Kaiser
 25 seconded.

1 MS. KAISER: Second.
 2 CHAIRMAN RUSSELL: Any further
 3 discussion?
 4 MR. WHALEN: Mr. Chairman, I notice that
 5 the attorney in this appeal uses the term
 6 "arbitrary and capricious" seven different times
 7 in his letter to the -- I'm wondering if --
 8 CHAIRMAN RUSSELL: Some attorneys like
 9 to throw those two terms around a little bit.
 10 MR. WHALEN: Yes. I just wonder if
 11 Katherine is willing to take on that sort of
 12 character assassination if she's appointed as our
 13 Board Examiner, or whether she would prefer that
 14 the Board take that heat.
 15 CHAIRMAN RUSSELL: Being through a few
 16 of these, that's the general term for people that
 17 don't like the Department's decisions.
 18 MR. WHALEN: I've never seen it used
 19 seven times in one letter. I was quite impressed.
 20 CHAIRMAN RUSSELL: We'll have to
 21 congratulate Mr. Gallagher on getting it in there
 22 that many times.
 23 I do have a motion on the floor. All
 24 those in favor of appointing Katherine permanent
 25 Hearings Examiner, signify by saying aye.

1 (Response)
 2 CHAIRMAN RUSSELL: Opposed.
 3 (No response)
 4 CHAIRMAN RUSSELL: Motion carries.
 5 Okay. Last group. Action on contested cases. In
 6 the matter of violations of the Water Quality Act
 7 by Wilderness Club, LLC. Katherine.
 8 MS. ORR: Mr. Chairman, members of the
 9 Board. This is a case that the Board retained
 10 jurisdiction on, at least for the non-preliminary
 11 stages and for the final outcome. This was out of
 12 Eureka in Lincoln County, and the Wilderness Club
 13 was the owner or developer of this club, a golf
 14 course and residential development, located near
 15 Eureka.
 16 There was a notice of violation issued
 17 on August 12th, 2008, and there were various
 18 violations cited for discharging sediment to State
 19 waters contrary to the MPDES permit for discharges
 20 associated with construction activities. There
 21 was significant sediment that entered Grob Lake,
 22 and failure to maintain erosion and sediment
 23 control measures, etc.
 24 The initial penalty requested was
 25 \$42,580. There was a motion for summary judgment

1 filed on May 14th, 2009, and that was denied by
 2 me. The parties have reached an agreement to
 3 dismiss this case under 41(a), and the
 4 Administrative Order on Consent is in the packet.
 5 So if anyone has any questions.
 6 CHAIRMAN RUSSELL: I'm not exactly sure,
 7 but I don't have an attachment, or the link
 8 doesn't work. Does everyone else have that
 9 attachment?
 10 MR. MILLER: This is Miller. I don't.
 11 CHAIRMAN RUSSELL: I wonder if we either
 12 didn't get it, or for some reason the link isn't
 13 working.
 14 MR. LIVERS: Mr. Chairman, it's working
 15 down here, so I apologize for that.
 16 CHAIRMAN RUSSELL: I don't want to fret
 17 over that. So can you read -- Since I don't have
 18 it, Katherine, would you mind reading -- I hope
 19 the order is short. If you could just read the
 20 order, I can call for a vote on it.
 21 MS. ORR: You've got the stipulation for
 22 dismissal? Is that what you're --
 23 CHAIRMAN RUSSELL: I don't have
 24 anything.
 25 MS. ORR: Is that what you're referring

1 to?
 2 CHAIRMAN RUSSELL: I generally have an
 3 order to dismiss in front of me, and I usually
 4 make my motion off of that, but I don't have it.
 5 MS. ORR: Let me pull that up. It says,
 6 "The Parties hereby stipulate pursuant to 41(a),
 7 Montana Rules of Civil Procedure, to the dismissal
 8 of this appeal. The parties have reached a
 9 resolution in the matters at issue, and the
 10 Appellant withdraws its appeal and request for
 11 hearing."
 12 CHAIRMAN RUSSELL: And that would be
 13 something you signed, right?
 14 MS. ORR: Well, this actually was a case
 15 that the Board reserved to itself, so the order
 16 should be signed by the Board.
 17 CHAIRMAN RUSSELL: So I don't have that
 18 order, so all I'm going to do is ask the Board to
 19 authorize the Chair to sign said order when I do
 20 receive it.
 21 MR. MIRES: This is Larry Mires, and I
 22 would so move.
 23 CHAIRMAN RUSSELL: Is there a second?
 24 MR. MILLER: This is Miller. I'll
 25 second.

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

3 (No response)

4 CHAIRMAN RUSSELL: I'm guessing it will
5 be with prejudice, most likely.

6 MS. ORR: It does say request -- the
7 order of dismissal that was proposed says
8 "dismissal with prejudice."

9 CHAIRMAN RUSSELL: Okay. Thanks for
10 clarification. All those in favor, signify by
11 saying aye.

12 (Response)

13 CHAIRMAN RUSSELL: Opposed.

14 (No response)

15 CHAIRMAN RUSSELL: Motion carries.

16 Other actions on contested cases. In the matter
17 of violations of the Montana Strip and Underground
18 Mine Reclamation Act by Signal Peak Energy, LLC,
19 at Bull Mountain Mine. Katherine.

20 MS. ORR: Mr. Chairman, members of the
21 Board. This is a case out of Roundup. An NOV and
22 administrative penalty order dated October 9th,
23 2009 was issued.

24 And Signal Peak operates Bull Mountain
25 Mine under a permit. The violations concern

1 construction of a road not identified in the
2 approved facility plan area, i.e., the permitted
3 area; failure to use temporary sediment control
4 measures during access road construction; failure
5 to salvage and handle soil materials in
6 construction of the road; improper handling of top
7 soil and subsurface -- and I'm now paraphrasing --
8 failure to protect the undisturbed soils, and to
9 minimize degradation of the biological properties
10 of the soil; failure to salvage all of the
11 available top soil, and using top soil as fill
12 material at the base of the coal conveyor.

13 And there is a substantial amount of
14 penalties requested. The combined amount is
15 \$378,000. One of those violations involves 78
16 days of violation, and that's part of the reason
17 why that number is so high.

18 CHAIRMAN RUSSELL: Once again, I don't
19 have the attachments, or I don't have the proper
20 link to open them. We're basically at that -- The
21 last time we talked about this, we didn't take any
22 action to appoint you the permanent Hearings
23 Examiner, and we're basically at that same place.

24 MS. ORR: Right.

25 CHAIRMAN RUSSELL: Katherine, are they

1 getting close to -- Are we getting -- How close
2 are we to a hearing?

3 MS. ORR: Well, there was a first
4 prehearing order issued, and a notice of
5 appearance of Counsel was filed on December 4th --
6 that's Stephen Wade of the Browning Kaleczyk firm
7 -- and there has not been a scheduling order
8 issued in that, I don't believe.

9 CHAIRMAN RUSSELL: So what's your
10 feeling? Does any one party want to get this
11 thing expedited? I literally don't have anything
12 in front of me to look at, and I still feel that
13 we can either appoint you, or we can continue to
14 let this ride. If we let it ride, then at some
15 point you're going to be -- the parties may be a
16 little bit miffed that you won't be able to take
17 action on something substantive.

18 MS. ORR: Mr. Chairman, members of the
19 Board. You could again reserve unto yourselves
20 the undertaking of the hearing the merits of this
21 case, and delegating to me, if you want, the
22 prehearing matters.

23 CHAIRMAN RUSSELL: And I guess my
24 question still would remain: Are we getting close
25 to the end of the prehearing matters?

1 MS. ORR: No, it's just beginning.

2 CHAIRMAN RUSSELL: Then I would suggest
3 to the Board that we continue to leave this as is,
4 and if there is a lot of head nodding, I don't
5 think we need to do anything but move on to the
6 next item. And I won't see any head nodding
7 either. Tom, are you seeing anything out of
8 Larry?

9 MR. ANDERSON: Larry's head nodding in
10 the affirmative.

11 CHAIRMAN RUSSELL: Let's just move on,
12 unless I hear an objection immediately.

13 (No response)

14 CHAIRMAN RUSSELL: In the matter of
15 violations of the Metal Mine Reclamation Act by
16 Saturday Sunday, LLC, Deer Lodge County, BER
17 2009-02-MM. Katherine.

18 MS. ORR: Mr. Chairman, members of the
19 Board. This is a case out of Deer Lodge County.
20 There were cross motions for summary judgment
21 filed, and I propose that the Department's motion
22 for summary judgment be granted, which would in
23 effect end the portion of this case that involves
24 the violation for failure to get an exploration
25 permit, and would constitute a ruling that there

<p style="text-align: right;">Page 66</p> <p>1 was a failure to do that, and what is remaining is 2 an evidentiary hearing on penalties. 3 So there were no exceptions filed on the 4 portion of the case that involves liability for 5 failure to get an exploration permit, and I'm not 6 sure the Board really needs to do anything. I 7 guess the Board could vote that that portion of 8 the case, liability for getting an exploration 9 permit, is now a permanent disposition. And 10 actually there is an order before the Board. Do 11 you have that as well? 12 CHAIRMAN RUSSELL: I don't have any -- 13 The last three items, I have no attachments for. 14 But basically what the agenda says is that no one 15 contested your ruling on summary judgment, and 16 that we could -- there is probably an order 17 somewhere down there that would allow some of this 18 case to be resolved, based on my signature on an 19 order, partial dismissal of the appeal. 20 MS. ORR: Right. That's exactly right. 21 And the Board decided in October to adopt that 22 part of the proposed -- well, that proposed order 23 that I wrote, and then Saturday Sunday, sort of 24 erring on the side of caution, was given the 25 ability to file exceptions to that determination,</p>	<p style="text-align: right;">Page 68</p> <p>1 Any further discussion? 2 MR. WHALEN: Mr. Chairman, question for 3 Katherine. What is the likely impact of this 4 partial order of dismissal on the resolution of 5 this case, in your judgment? 6 MS. ORR: Well, Mr. Chairman, Mr. 7 Whalen, it whittles down the issues considerably, 8 and now the case is basically a determination on 9 the facts presented of what the proper penalty is. 10 MR. WHALEN: I see. Thank you. 11 CHAIRMAN RUSSELL: Any further 12 questions? 13 (No response) 14 CHAIRMAN RUSSELL: Hearing none, all 15 those in favor, signify by saying aye. 16 (Response) 17 CHAIRMAN RUSSELL: Opposed. 18 (No response) 19 CHAIRMAN RUSSELL: Motion carries. 20 Thank you, Katherine. The last item on the 21 agenda. Is there anyone in the audience that 22 would like to address the Board on matters that 23 pertain to the Board of Environmental Review? 24 (No response) 25 CHAIRMAN RUSSELL: No one is jumping up</p>
<p style="text-align: right;">Page 67</p> <p>1 and to do that by December, and they did not. And 2 therefore this order dismisses that portion of 3 this case. 4 And the order portion that I wrote -- I 5 can read to you -- it says, "The Hearing 6 Examiner's proposed order on cross motions for 7 summary judgment has been adopted by the Board. 8 The Board hereby rules that the Appellant violated 9 Montana Code Annotated Section 82-4-331 to obtain 10 an exploration license prior to starting 11 exploration activities at its site located in Deer 12 Lodge County, and is liable for penalties to be 13 correctly determined at an evidentiary hearing to 14 resolve factual issues regarding the proper amount 15 of penalties owing." 16 CHAIRMAN RUSSELL: And that's an order 17 to be signed by me. 18 MS. ORR: Yes. 19 CHAIRMAN RUSSELL: Do I have a motion to 20 authorize the Board Chair to sign that order? 21 MR. MIREs: Larry Mires. So moved. 22 CHAIRMAN RUSSELL: It's been moved by 23 Larry. Is there a second? 24 MS. SHROPSHIRE: Second. 25 CHAIRMAN RUSSELL: Robin seconded it.</p>	<p style="text-align: right;">Page 69</p> <p>1 to the podium, Tom? 2 MR. LIVERS: Apparently not, Mr. 3 Chairman. 4 CHAIRMAN RUSSELL: With that, I would 5 entertain a motion to adjourn. 6 MS. KAISER: So moved. 7 CHAIRMAN RUSSELL: It's been moved. Is 8 there a second? 9 MR. MILLER: This is Miller. Second it. 10 CHAIRMAN RUSSELL: All those in favor, 11 signify by saying aye. 12 (Response) 13 CHAIRMAN RUSSELL: Opposed. 14 (No response) 15 CHAIRMAN RUSSELL: Meeting adjourned. 16 (The proceedings were concluded 17 at 10:41 a.m.) 18 * * * * * 19 20 21 22 23 24 25</p>

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 - 69 - 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 , 2010.

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires
March 9, 2012.