

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

BOARD MEETING )  
MAY 14, 2010 )  
)

## TRANSCRIPT OF PROCEEDINGS

Heard at Room 111 of the Metcalf Building  
1520 East Sixth Avenue  
Helena, Montana  
May 14, 2010  
9:00 a.m.

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

PREPARED BY: LAURIE CRUTCHER, RPR  
COURT REPORTER, NOTARY PUBLIC  
P.O. BOX 1192, HELENA, MT 59624  
(406) 442-8262

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

4 CHAIRMAN RUSSELL: This is Joe Russell,  
 5 and it is 9:03, and I'll call this meeting of the  
 6 Board of Environmental Review to order. Tom.  
 7 MR. LIVERS: Thank you, Mr. Chairman.  
 8 This is Tom Livers with the Department. I'm here  
 9 in Helena. We also have with us Board Member  
 10 Larry Mires here in Helena, and Board Attorney  
 11 Katherine Orr; Laurie Crutcher is our Court  
 12 Reporter; and Board Secretary Joyce Wittenberg and  
 13 Misty Gable (phonetic) are here; and then we have  
 14 some members of the Department in the audience.  
 15 We're expecting to be joined by the Missoula  
 16 City-County Health Department later in the meeting  
 17 here in Helena, or possibly by phone for that late  
 18 action item.  
 19 CHAIRMAN RUSSELL: If they're going to  
 20 be there in person, they'd be better be hurrying.  
 21 MR. LIVERS: I think they're aware of  
 22 that, I hope. So Mr. Chairman, I'll go ahead and  
 23 do a roll call of those that we know are on the  
 24 line just for the record. Ms. Kaiser.  
 25 MS. KAISER: Here.

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1 MR. LIVERS: Mr. Miller.  
 2 MR. MILLER: Here.  
 3 MR. LIVERS: Mr. Mires.  
 4 MR. MIRES: Here.  
 5 MR. LIVERS: Mr. Whalen.  
 6 MR. WHALEN: Here.  
 7 MR. LIVERS: Chairman Russell.  
 8 CHAIRMAN RUSSELL: Here.  
 9 MR. LIVERS: Okay.  
 10 CHAIRMAN RUSSELL: All right. The first  
 11 item on the agenda is review and approve the  
 12 minutes of the March 19th meeting.  
 13 MR. WHALEN: Mr. Chairman, Joe Whalen.  
 14 I move to approve the minutes of our March 19th  
 15 meeting.  
 16 CHAIRMAN RUSSELL: It's been moved by  
 17 Joe. You might speak up if you can. It's kind of  
 18 hard to hear from my end. It's been moved by Joe  
 19 Whalen. Is there a second?  
 20 MR. MILLER: I'll second it. Miller.  
 21 CHAIRMAN RUSSELL: Seconded by Marv.  
 22 Any further discussion?  
 23 (No response)  
 24 CHAIRMAN RUSSELL: Hearing none, all  
 25 those in favor, signify by saying aye.

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1 (Response)  
 2 CHAIRMAN RUSSELL: Opposed.  
 3 (No response)  
 4 CHAIRMAN RUSSELL: Motion carries. The  
 5 next item on the agenda is there are some  
 6 conflicts with the October schedule, and we need  
 7 to talk about it. You guys are good. You  
 8 remembered I called on that?  
 9 MR. LIVERS: We did, Mr. Chairman.  
 10 CHAIRMAN RUSSELL: That's very nice of  
 11 you. In full disclosure, I'm the one that has a  
 12 conflict, so if we can move it to where it  
 13 continues to work around that date, I would  
 14 appreciate it.  
 15 MR. LIVERS: We made conflicts plural on  
 16 the agenda to make it sound a little more  
 17 widespread.  
 18 CHAIRMAN RUSSELL: Thanks, Tom. Let's  
 19 just realize it is me.  
 20 MR. MIRES: So what day is open for you,  
 21 Mr. Chairman?  
 22 CHAIRMAN RUSSELL: I'm actually in  
 23 Louisiana all that week, and I wouldn't be back,  
 24 so I would be available the 8th, or I would be  
 25 available on the 24th.

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1 MR. MIRES: The 24th sounds good.  
 2 MS. KAISER: Of October?  
 3 MR. MIRES: Of September, the week  
 4 before.  
 5 CHAIRMAN RUSSELL: I'm pretty sure that  
 6 that's correct. Yes. I am gone all that. So the  
 7 24th would work for me, although you might cut  
 8 into possibly an LSU football game with Tennessee  
 9 if I can't get out on the 24th, but don't let that  
 10 dissuade you.  
 11 MR. LIVERS: Mr. Chairman, there's a  
 12 chance I won't be available on the 24th, but we'll  
 13 easily find another option, so I wouldn't  
 14 recommend trying to schedule around that.  
 15 CHAIRMAN RUSSELL: All right. Well, the  
 16 24th, is that where we want to go?  
 17 MS. KAISER: Good with me.  
 18 MR. MILLER: It's okay with me.  
 19 CHAIRMAN RUSSELL: Joe?  
 20 MR. WHALEN: No objection.  
 21 CHAIRMAN RUSSELL: With that in mind,  
 22 let's move that BER meeting to the 24th of  
 23 September.  
 24 MR. MIRES: And just as a backup, in  
 25 case we run into a smurf, what does the 8th look

1 like?

2 CHAIRMAN RUSSELL: The 8th of October?

3 MR. MIRES: Correct.

4 CHAIRMAN RUSSELL: Fine with me.

5 September is a terribly busy meeting month for me,  
6 like out of the state meeting month. I would  
7 prefer going the other way if it's possible.

8 MR. MILLER: I thought, though, the 8th,  
9 we're talking about the 8th of October.

10 CHAIRMAN RUSSELL: Correct.

11 MS. KAISER: If that's better for you,  
12 why don't we go that way, Joe.

13 CHAIRMAN RUSSELL: If the 8th works for  
14 everyone, that would be a much more preferable  
15 date for me.

16 MR. MIRES: I have a question on the  
17 8th, but I don't have the answer for it yet, but I  
18 may have a conflict there. But if that works  
19 better for everybody, go with that, and we'll  
20 modify something.

21 CHAIRMAN RUSSELL: All right. Let's go  
22 for the 8th then, because Tom, you're available on  
23 the 8th?

24 MR. LIVERS: Yes, Mr. Chairman.

25 CHAIRMAN RUSSELL: All right. Let's go

1 for the 8th.

2 MR. LIVERS: We'll move that to the 8th,  
3 Mr. Chairman. I don't think we need a vote on  
4 that issue. We got clear consensus from the  
5 discussions.

6 CHAIRMAN RUSSELL: Let's get back on --  
7 The next item on the agenda are the briefing  
8 items, contested case updates, by Katherine Orr.

9 MS. ORR: Mr. Chairman, members of the  
10 Board, good morning. There was a minor earthquake  
11 over Item II-A(1)(b), and that is that case is  
12 being dismissed. We have a stipulation to  
13 dismiss. As you know, that was filed in 2005, so  
14 that was a good development. It's not before the  
15 Board right now because we received it after the  
16 packet went out, but that will be before the Board  
17 in the next meeting.

18 Thompson River CoGen is set for hearing  
19 on October 20th.

20 Moving right along, Saturday Sunday, the  
21 Metal Mine Reclamation Act, Item (d), if you  
22 recall, the Board issued a partial order on  
23 summary judgment, or ratified an order that was  
24 written, and now the remaining issue is  
25 calculation of the penalty, and that is

1 anticipated to go to hearing.

2 Hugh Black, the next item is set for  
3 hearing on June 14th.

4 North Star Aviation, the next item, that  
5 is set for hearing on September 16th.

6 And Item (g), the parties are still  
7 perhaps negotiating.

8 In the next item, this is in the matter  
9 of Montana Septage Disposal and Licensure laws by  
10 Steven Kunkel, the issue in that case really  
11 that's remaining is penalties, and the parties are  
12 trying to complete the discovery stage with a  
13 little bit of assistance from me. There has been  
14 a little bit of resistance in providing the  
15 materials that were requested in discovery by the  
16 Department.

17 Juniper Hill Farm, another case --

18 CHAIRMAN RUSSELL: Katherine, are they  
19 having trouble getting that stuff in a bottle or  
20 what?

21 MS. ORR: What do you mean by that?

22 CHAIRMAN RUSSELL: The septage disposal  
23 stuff. It's early. I'll be good.

24 MS. ORR: It's an individual who is  
25 representing himself, and is unable to produce tax

1 records, so he's having to sort of recreate what  
2 his assets, income, and expenses are. So that's  
3 being done hopefully, and those responses are due  
4 today as a matter of fact.

5 On Juniper Hill, I'm in the process of  
6 ruling on a motion for summary judgment, and the  
7 hearing on that case is set for June 4th.

8 Fort Yellowstone, the parties are still  
9 attempting to -- That's a consolidated case, if  
10 you remember. The parties are attempting to reach  
11 settlement.

12 The same with Item (k), which is an  
13 MPDES permit challenge.

14 There is also in this Public Water  
15 Supply case, Jason Ellsworth in Hamilton, the  
16 parties are discussing settlement.

17 The same with Item (m), which is a  
18 discharge permit that's also being challenged, and  
19 as I understand, there is another extension  
20 request in the works.

21 Fidelity Exploration, this is in a  
22 posture of the parties trying to determine whether  
23 they can settle it.

24 And the next item, Bull Mountain, as I  
25 understand it, the parties have reached a

1 settlement in principle.

2 So that's that for the contested cases,  
3 for that portion of the agenda.

4 CHAIRMAN RUSSELL: Great. Thank you,  
5 Katherine. Does the Board have any questions  
6 before we move on, on procedural stuff that's  
7 going on with those?

8 (No response)

9 CHAIRMAN RUSSELL: All right. Let's  
10 move on. The next item is in the matter of --  
11 We're actually moving into the Action Items,  
12 Repeal, Amendment, or Adoption of Final Rules. In  
13 the matter of the amendment of ARM 17.8.745 to  
14 reduce the per ton thresholds, exempting de  
15 minimis changes from the requirement to obtain  
16 Montana air quality permits. Tom.

17 MR. LIVERS: Mr. Chairman, I do want to  
18 let you know that we've picked up a couple of  
19 members of the public here in Helena, so you'll  
20 want to make sure just to offer public input prior  
21 to action on these next couple of items. And at  
22 this point, I'm pleased to welcome back to the  
23 Board on his reunion tour Mr. Charles Homer.  
24 He'll be walking us through this rulemaking.

25 MR. HOMER: Mr. Chairman, members of the

1 five tons.

2 The Board held a hearing on March 11th.  
3 There was a couple of commenters expressing what I  
4 would term tepid approval. I believe that they  
5 didn't really see the need to do this, they didn't  
6 really agree with EPA's objections, but in the  
7 interests of getting a rule that is in effect and  
8 that is consistent with the State Implementation  
9 Plan, they expressed some support for getting this  
10 done.

11 So the Department is then proposing that  
12 the Board take final action on this, and approve  
13 the rule notice as proposed. And I'm open for any  
14 questions that the Board may have.

15 CHAIRMAN RUSSELL: Thanks, Chuck. This  
16 is just for clarification. When we talk about  
17 changes, we're talking about general operational  
18 changes that don't exceed five tons per year would  
19 be excluded.

20 MR. HOMER: Yes, Mr. Chairman,  
21 operational physical changes at the facility that  
22 would have the potential -- that would increase  
23 potential emissions. It's not necessarily actual  
24 emissions, but would increase potential emissions  
25 at the facility up to the threshold.

1 Board, thank you. For the record, my name is  
2 Charles Homer. I'm the Manager of the Air Quality  
3 Permitting Compliance Program at DEQ. We've kind  
4 of gone over this several times, so I'll try to  
5 make my summary quick.

6 This rule 17.8.745 allows facilities to  
7 make small changes in their equipment that have a  
8 minimal impact on emissions without coming in for  
9 modification of their air quality permit. This  
10 rule was adopted I believe initially in 1996.  
11 Changes were made. Ultimately a change to the  
12 State Implementation Plan was submitted to EPA in  
13 2002. This is one of those rules that was part of  
14 the backlog of SIP approvals that EPA has been  
15 sitting on for quite awhile, and is now taking  
16 action on.

17 In discussions with EPA, the Department  
18 believed that we could come to a resolution on  
19 their concerns over this rule that would allow  
20 them to accept, to approve the SIP change, and  
21 provide certainty to the regulated community in a  
22 manner that wouldn't significantly decrease the  
23 value of this rule. And so this rule was to  
24 change the threshold at which a facility had to  
25 get a permit from the current fifteen tons down to

1 CHAIRMAN RUSSELL: Which is now five  
2 instead of fifteen.

3 MR. HOMER: Which is proposed to be  
4 five, yes.

5 CHAIRMAN RUSSELL: Pretty simple to me.  
6 All right. Do any members of the Board have  
7 questions for the Department?

8 (No response)

9 CHAIRMAN RUSSELL: Before I craft a  
10 motion here or someone does that for us, is there  
11 anyone in the audience that would like to speak to  
12 the matter before we take action?

13 (No response)

14 MR. LIVERS: Apparently not, Mr.  
15 Chairman.

16 CHAIRMAN RUSSELL: With that in mind, I  
17 would entertain a motion to approve the proposed  
18 amendments, accept House Bill 521 and 311  
19 analysis, adopt the Hearing Officer's report, and  
20 the Department's response to comments.

21 MR. WHALEN: Mr. Chairman, Joe Whalen.  
22 So moved.

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

25 MR. MIREs: Second.

1 CHAIRMAN RUSSELL: It's been seconded by  
 2 Larry. Further discussion.  
 3 (No response)  
 4 CHAIRMAN RUSSELL: Hearing none, all  
 5 those in favor, signify by saying aye.  
 6 (Response)  
 7 CHAIRMAN RUSSELL: Opposed.  
 8 (No response)  
 9 CHAIRMAN RUSSELL: Motion carries  
 10 unanimously. In the second -- I guess we are  
 11 going to deal with ORW today. Tom.  
 12 MR. LIVERS: Mr. Chairman, thank you.  
 13 The Department is asking again that the Board  
 14 extend the public comment period, thus extending  
 15 the rulemaking. I know all Board members have  
 16 been involved in previous extensions here, and  
 17 we've had briefings on this in terms of just  
 18 what's going on with the ORW, what's the  
 19 significance.  
 20 We had some discussions here in the  
 21 Department, just to make sure there was still  
 22 value to this extension since it has been going on  
 23 for a few years. It's our belief there is still  
 24 value, and I'll just kind of run through a little  
 25 bit of the discussion we had on that.

1 When the Board did initiate rulemaking  
 2 on designating this stretch of the Gallatin an  
 3 Outstanding Resource Water, it provided an impetus  
 4 for parties on both sides of this issue to sit  
 5 down, talk through concerns, look at solutions,  
 6 look at different alternatives, and there was some  
 7 pretty productive discussion that was taking place  
 8 initially after this initiation.  
 9 What we've seen, with the downturn in  
 10 the economy, there has been a drop off in  
 11 development pressure, and I think neither side in  
 12 the discussion is feeling the same urgency at this  
 13 point to have these discussions.  
 14 The concern we've got is that it's our  
 15 belief that this is really the best time for those  
 16 parties to be talking. It's going to be a more  
 17 productive discussion than when the wolf is at the  
 18 door, when everybody is under pressure to try to  
 19 resolve things quickly. I know that will up the  
 20 ante, and that will certainly increase the  
 21 interest; but we would encourage that the  
 22 discussion continue now while there is time to  
 23 really work through these things and talk about  
 24 them without kind of the immediate deadlines and  
 25 immediate pressures that would be faced if there

1 were more development proposed at the moment.  
 2 So I guess for that reasoning, it's the  
 3 Department's belief that there is still value to  
 4 keeping this rulemaking out there. It does  
 5 provide some sort of impetus for these discussions  
 6 to take place. We have and will continue to  
 7 encourage parties to kind of reconvene, and step  
 8 back up their discussions. But that's our  
 9 rationale for the recommendation, Mr. Chairman,  
 10 members.  
 11 CHAIRMAN RUSSELL: Comments for the  
 12 Department? Questions?  
 13 MR. WHALEN: Mr. Chairman, Joe Whalen.  
 14 In the meantime, if these discussions continue,  
 15 our role essentially is to protect the  
 16 environment. Has new development been suspended  
 17 at least in terms of outfalls on the Gallatin  
 18 River while these discussions carry forward?  
 19 MR. LIVERS: Mr. Chairman, Mr. Whalen,  
 20 there hasn't been a formal suspension, but nor has  
 21 there been to my knowledge -- I'm looking at also  
 22 Bob Bukantis and Eric Regensburger -- I don't  
 23 think there has been additional proposals for  
 24 discharge into the Gallatin during this time. We  
 25 can find that answer definitively, but I'm

1 certainly not aware of anything.  
 2 MR. WHALEN: Thank you. One more  
 3 followup, Mr. Chairman. In terms of an extension,  
 4 how long are we looking at realistically before  
 5 this matter comes back to the Board for a  
 6 decision, do you think, Tom?  
 7 MR. LIVERS: Mr. Chairman, Mr. Whalen,  
 8 the law allows extensions of up to six months at a  
 9 time. I don't know -- This would essentially kick  
 10 that can down the road, extend it for another six  
 11 months. I don't know that we would be back with a  
 12 resolution within the six month time frame.  
 13 Our best guess is that once there is  
 14 renewed interest in development, it becomes a  
 15 little more immediate. If they haven't resumed  
 16 talks productively by then, I'm sure I would  
 17 expect that at that point there would be a strong  
 18 reason to. So I don't have a good prediction for  
 19 you, Mr. Whalen. I would be surprised if we had a  
 20 resolution within this extension that we're  
 21 considering here. I would expect we would  
 22 probably be talking about more like the 12 to 18  
 23 month time frame at least. It could be longer.  
 24 That's my best guess.  
 25 MR. WHALEN: Thank you, Mr. Chairman.

1 Thank you, Tom.

2 CHAIRMAN RUSSELL: I guess I would ask  
3 the question: Is the Department so vested in this  
4 that -- is there still political will on their  
5 parts to get this resolved? I'm sorry if that  
6 sounds a little harsh or critical, but --

7 MR. LIVERS: That's fine, Mr. Chairman.  
8 I don't mind the question at all. The Department  
9 hasn't been a key player in these discussions.  
10 We've maybe helped in some of the initial framing,  
11 but really we have not taken a position or played  
12 an active part in the discussions. It's been  
13 essentially between environmental interests and  
14 the development community in the Gallatin.

15 So I think the best we can do is to  
16 continue to encourage, and we can do that more  
17 strongly, stronger than we have recently, maybe  
18 really encourage folks to get to the table. I  
19 don't know that we have any kind of -- We  
20 certainly don't have any position of authority to  
21 do that, and I'm not sure if we necessarily bring  
22 much clout, but I think we can certainly convey  
23 the interest that these discussions continue.

24 Other than that, I think it's fair to  
25 say we're not overly vested. We still believe

1 these discussions are productive and the right to  
2 way to proceed with this issue; but if the parties  
3 aren't going to take the initiative themselves to  
4 continue them, there is only so much we can do to  
5 encourage them.

6 CHAIRMAN RUSSELL: I just wonder if we  
7 lose that much if we -- And I'm just literally,  
8 I'm probably thinking out loud, and should have  
9 kept it to myself. But what if we just said no,  
10 and we basically asked them to come back with  
11 another rulemaking. All the Department --  
12 Everything the Department has done up to this  
13 point from a scientific basis still stands. And I  
14 am the only one that heard the first public  
15 hearing, am I not?

16 MR. LIVERS: No. Ms. Kaiser was at the  
17 meeting as well.

18 CHAIRMAN RUSSELL: Okay. Two of the  
19 seven of us. I just wonder, literally I wonder if  
20 we're doing the right thing by just keep dragging  
21 this out, if there is not a lot of will on their  
22 part; or if there is at some point in the next 12  
23 to 18 months, as you mentioned, from the time  
24 frame, then why don't they just bring it back to  
25 us? What's lost?

1 MR. LIVERS: Let me make sure I  
2 understand your question, Mr. Chairman. Are you  
3 suggesting that by saying no, that we would just  
4 not continue the rulemaking, and allow it to  
5 expire; and if there is interest in designation at  
6 some point in the future, that a petition could be  
7 brought back to the Board to start that process  
8 again?

9 CHAIRMAN RUSSELL: Correct.

10 MR. LIVERS: Okay.

11 CHAIRMAN RUSSELL: And I know, I bet  
12 there is people squirming in their seats right  
13 now, going, "Do you know how much more work that  
14 is if we have to reinitiate this thing?" I  
15 understand that, but at some point we've got to  
16 kick them into doing something. Maybe a letter  
17 that says, "You know what, this is the last time  
18 we're going to extend this rulemaking."

19 MR. LIVERS: Mr. Chairman, let me just  
20 close out that previous thought. It can certainly  
21 be done if we need to reinitiate. I think the EIS  
22 that was conducted would essentially still be  
23 deemed current. We would have to look to see if  
24 there is any circumstances that have changed that  
25 would call for any supplemental analysis.

1 There has been a law change since this  
2 was grandfathered in, and that law now puts the  
3 cost of any environmental analysis on the  
4 Petitioners. And I'm not saying that for any kind  
5 of editorial comment, just so folks are aware of  
6 different circumstances that potentially might  
7 limit further petitions if there is a sense that  
8 there is a need for supplemental analysis. So  
9 that could be a factor. But other than that,  
10 certainly what you propose is an option.

11 CHAIRMAN RUSSELL: Well, and the last  
12 thing I want to do -- and certainly don't have a  
13 problem going on the record with this -- I don't  
14 want to allow industry to walk away from  
15 negotiating, and then put the onus on the  
16 Petitioners that wasn't there when they initiated  
17 this, i.e., a lot of extra cost especially -- that  
18 is not my intent. The only intent I had is to get  
19 this thing moving, because I fully agree with you.  
20 This is the perfect time to do this when we don't  
21 have a lot of development activity going on up  
22 there.

23 MR. LIVERS: I appreciate your comments,  
24 Mr. Chairman, and I didn't mean to characterize  
25 that the lack of interest was one sided. It's my

1 understanding that neither party is feeling  
2 particularly compelled at the moment to put these  
3 on the front burner. So I don't want to  
4 characterize that it is just the development  
5 community that's lacking interest. I think there  
6 is a general sense -- There is just not a sense of  
7 urgency, I guess, on either side at this point.

8 CHAIRMAN RUSSELL: Okay. Well, that's  
9 fair. I hope I didn't put anyone on the spot.

10 MR. MIREs: Mr. Chairman, this is Larry  
11 Mires. I agree with what you're saying on this,  
12 and I really think it's time to put some pressure  
13 on both parties to bring this to a head. And I  
14 think -- and I'm saying that from both sides. The  
15 individuals that filed it initially, if they don't  
16 want to have to pick up some expenses, they'd  
17 better get to the table and start doing some  
18 talking, and the same thing with business. I  
19 agree with where you're at, and your comments, but  
20 I think this thing has to come to a head sooner  
21 than it does later, because we've been pushing  
22 this as long as I've been here.

23 CHAIRMAN RUSSELL: I used to have dark  
24 hair when this started.

25 MR. MIREs: I would highly recommend, if

1 there is any way that the Department can encourage  
2 both sides to get to the table and come back with  
3 a conclusion, that would be very, very beneficial  
4 and helpful to all of us, because I'm kind of in a  
5 mind of saying six months is fine, but I'm not  
6 sure I want to go much further than that.

7 CHAIRMAN RUSSELL: I think we ought to  
8 remember this conversation when we're asked to  
9 extend this again.

10 MR. LIVERS: A couple thoughts, Mr.  
11 Chairman. Certainly we can put more emphasis than  
12 we have on those discussions with both parties.  
13 There may be some value in perhaps having us draft  
14 a letter for the Board to send, just explaining  
15 the Board's interest, and expressing the sentiment  
16 that's been reflected in the meeting today. We  
17 can certainly do that if there is interest in  
18 that.

19 CHAIRMAN RUSSELL: I think that's a good  
20 start.

21 MR. MILLER: This is Miller. I think  
22 so, too.

23 MR. LIVERS: All right. I'll take that  
24 -- We'll draft a letter, and circulate that draft  
25 to all Board members for a chance to weigh in, and

1 get that done certainly between now and the next  
2 Board meeting.

3 CHAIRMAN RUSSELL: Great. Okay. Any  
4 more jabs for the Department while we're at it?  
5 (No response)

6 MR. LIVERS: Jobs or jabs?

7 CHAIRMAN RUSSELL: Jobs first, you know.  
8 Anything else?

9 (No response)

10 CHAIRMAN RUSSELL: All right. Hearing  
11 none, I would entertain a motion to initiate  
12 rulemaking for the purpose of extending this  
13 process another six months or so, as it is posted  
14 in the proposed MAR notice.

15 MR. MIREs: This is Mires. So moved.

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

18 MR. MILLER: Miller. I'll second.

19 CHAIRMAN RUSSELL: Seconded by Marv.  
20 Any further discussion? I know, Tom. I'll catch  
21 them.

22 (No response)

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

1 (No response)

2 MR. LIVERS: None, Mr. Chairman.

3 CHAIRMAN RUSSELL: All right. Since  
4 we've dotted all the I's and crossed all the T's,  
5 all those in favor, signify by saying aye.

6 (Response)

7 CHAIRMAN RUSSELL: Opposed.

8 (No response)

9 CHAIRMAN RUSSELL: Motion carries  
10 unanimously.

11 MR. LIVERS: Mr. Chairman, we will  
12 follow up with that draft letter, and get it out  
13 for the Board review.

14 CHAIRMAN RUSSELL: Perfect. Thank you,  
15 Tom. I hope Eric and Bob weren't fidgeting too  
16 much when I said we should reinstate.

17 MR. LIVERS: I'll check with Eric when  
18 he comes to.

19 CHAIRMAN RUSSELL: All right. The next  
20 item on the agenda are new contested case appeals.  
21 The first one is in the matter of the public water  
22 supply laws of Red Cliff Estates Homeowners  
23 Association, Jefferson County, BER 2010-05 PWS.  
24 Katherine.

25 MS. ORR: Mr. Chairman, members of the

1 Board, this case actually has evolved all by  
2 itself to a point of the parties submitting a  
3 stipulation for dismissal. But in case you were  
4 wondering about it, it's a case out of Clancy, and  
5 involves a failure to monitor and report  
6 analytical results for lead and copper for the  
7 first six months of 2009, and failure to report  
8 monitoring violations; and the amended notice of  
9 violation had the penalties at \$357, with all of  
10 that suspended except for \$179.

11 So the parties have reached settlement  
12 on that already, and will be submitting a  
13 stipulation for dismissal under 41(a). They  
14 already have as a matter of fact, and that will  
15 come before the Board at its next meeting.

16 CHAIRMAN RUSSELL: Well, just so we can  
17 let you really button this thing up, do I have a  
18 motion to appoint Katherine the permanent Hearings  
19 Examiner on this one?

20 MR. MIREs: So moved.

21 MR. MILLER: I second it. Miller.

22 CHAIRMAN RUSSELL: It's been moved by  
23 Larry, seconded by Marv. Comments?

24 (No response)

25 CHAIRMAN RUSSELL: I paused long enough.

1 All those in favor, signify by saying aye.

2 (Response)

3 CHAIRMAN RUSSELL: Opposed.

4 (No response)

5 CHAIRMAN RUSSELL: They should all be  
6 this easy, Katherine.

7 MS. ORR: They should, shouldn't they?

8 MR. MILLER: Thanks for all the hard  
9 work, Katherine.

10 MS. ORR: You're welcome. It was hard  
11 work.

12 CHAIRMAN RUSSELL: Go ahead. Belgrade.

13 MS. ORR: The next one is, as you can  
14 see, involving a challenge of a wastewater  
15 discharge permit, and I couldn't tell from the  
16 appeal what exactly is being challenged, so I  
17 don't know if I can comment on that. I know I  
18 can't. But it was challenged, and so that's the  
19 most that I know about it.

20 CHAIRMAN RUSSELL: How long has Belgrade  
21 had a public sewer?

22 MS. ORR: That I can't comment on.

23 CHAIRMAN RUSSELL: A lot of Belgrade is  
24 still on on-sites.

25 MR. LIVERS: Mr. Chairman, this is Tom.

1 I think the city itself has had it for quite  
2 awhile, and public water.

3 CHAIRMAN RUSSELL: Across the highway,  
4 that stuff that was incorporated, or was that ever  
5 incorporated over there?

6 MR. LIVERS: I'm not sure on the status  
7 of the incorporation, but in terms of the main  
8 core of the city, they've had public utilities. I  
9 think what you're commenting is the amount of  
10 development outside the city core that's on site,  
11 and there is lots certainly.

12 CHAIRMAN RUSSELL: From what I'm seeing  
13 -- Is there anyone in there that knows what type  
14 of treatment they have before we take any action  
15 on this thing?

16 MR. LIVERS: Mr. Chairman, not here,  
17 although we can certainly get somebody down here  
18 if you'd like that.

19 CHAIRMAN RUSSELL: No, I think we don't  
20 need to slow this process down. We're moving so  
21 well.

22 MR. LIVERS: We can still follow up  
23 afterward with just an informational email to the  
24 Board.

25 CHAIRMAN RUSSELL: That would be great.

1 Any Board comments before we take any action on  
2 this?

3 MR. WHALEN: Mr. Chairman, would there  
4 be any strong objection by the Board if we were to  
5 hear this matter?

6 CHAIRMAN RUSSELL: I'll let the Board  
7 speak to that.

8 MS. KAISER: This is Heidi. Mr.  
9 Chairman, I don't object. In fact, I would like  
10 to hear it.

11 CHAIRMAN RUSSELL: There is two. How  
12 about you, Marvin, Larry?

13 MR. MILLER: I don't care.

14 CHAIRMAN RUSSELL: Let's do this. So  
15 then I would ask Katherine or the Department: How  
16 long before this thing starts to gel up?

17 MS. ORR: Mr. Chairman, that does vary.  
18 Most of these permit challenges have resolved on  
19 their own. But if the Board has a preference for  
20 having this move right along, that can certainly  
21 be reflected in rulings on motions for extension  
22 and that sort of thing.

23 CHAIRMAN RUSSELL: Well, the reason I  
24 ask, if it looks like we're out, and we could  
25 actually schedule the hearing for one of our



1 regular Board meetings, then I would say we don't  
2 take any action to appoint you permanent. We'll  
3 let you just continue to ride this and keep us  
4 apprised of when we actually need to schedule  
5 this, since the matter is in front of the Board  
6 until we give it to you, right?

7 MS. ORR: Right.

8 CHAIRMAN RUSSELL: Is that all right  
9 with the rest of the Board?

10 MR. MIRES: Mr. Chairman, I have one  
11 question. By our accepting this, and our doing it  
12 at this point in time with some of the unknowns  
13 that I've heard so far, what does that do to the  
14 city of Belgrade as far as addressing this issue  
15 in a speedy and timely manner, so that it's up and  
16 running properly?

17 CHAIRMAN RUSSELL: Well, I think that  
18 there is good reason for them to basically go and  
19 resolve this between the parties, and not let us  
20 get involved in it.

21 MR. MIRES: I guess that's what my  
22 concern here is, is that if we step in the middle  
23 of this right now, if there is a way that  
24 Katherine can resolve this in a speedy and  
25 efficient manner, I think we're doing justice to

1 the City of Belgrade by not hearing it as a Board  
2 if it can be resolved between now and the time we  
3 meet again.

4 CHAIRMAN RUSSELL: Conversely, if we  
5 don't do anything, Katherine will continue to do  
6 our bidding, and it may be the City of Belgrade  
7 will say, "Well, oh, crap. Now we've got to go in  
8 front of the Board," or the maybe even the  
9 Department might say that, and just say, "Well,  
10 let's get this thing resolved."

11 MR. MIRES: It won't impede anything  
12 then?

13 CHAIRMAN RUSSELL: I don't think so. I  
14 think it might actually help it be expedited.

15 MR. MIRES: Then that's fine.

16 CHAIRMAN RUSSELL: Anyone else feel  
17 differently?

18 MR. WHALEN: Mr. Chairman, by that  
19 suggestion -- and I think Larry has really raised  
20 this point here -- to Katherine's comment about  
21 things basically resolving themselves over time,  
22 and they're kind of in the mix here, if I may  
23 direct a question to Katherine.

24 Katherine, does that really depend upon  
25 or does it matter whether an issue is appointed to

1 a permanent Hearing Examiner or if the Board  
2 decides to hear it? Does that process still work  
3 at roughly the same pace in terms of the  
4 resolution of matters before they kind of come  
5 before the Board or before a decision is  
6 ultimately made by you?

7 MS. ORR: I think yes.

8 MR. WHALEN: Okay. Thank you.

9 CHAIRMAN RUSSELL: What did you actually  
10 say yes to?

11 MS. ORR: Whether or not the Board is  
12 the ultimate decision maker, I think these cases  
13 tend to proceed at the same pace.

14 CHAIRMAN RUSSELL: I agree. It looks  
15 like this is just a groundwater discharge permit.  
16 They must do -- I'm guessing they do aeration  
17 lagoons and spray irrigation out there somewhere  
18 down there. That would be my guess.

19 MR. LIVERS: I'm not sure about the  
20 spray irrigation, Mr. Chairman.

21 CHAIRMAN RUSSELL: They might do  
22 subsurface.

23 MR. LIVERS: I'm not sure. We can get  
24 that information.

25 MS. ORR: The only thing that -- I'm

1 sure you all noticed, too, in the file -- is there  
2 was a comment period, and the Department decided  
3 to change eight or so aspects of the permit before  
4 it was issued, ranging from all different kinds of  
5 topics for the permit. Did everyone see that?

6 MR. WHALEN: Yes.

7 MR. MILLER: This is Miller. Yes, I  
8 did.

9 MS. ORR: Okay. So who knows whether  
10 those were sort of the focus of contention. I  
11 can't tell yet.

12 MR. LIVERS: Mr. Chairman, one  
13 clarification. Since there is the possibility the  
14 Board will hear this, at this point, we won't  
15 respond with additional informational emails. I  
16 don't want to risk any ex parte communication.

17 CHAIRMAN RUSSELL: That's fine. We'll  
18 just have to kind of figure it out ourselves, Tom.

19 MR. WHALEN: Mr. Chairman, do you need a  
20 formal motion for the Board to hear this matter?

21 CHAIRMAN RUSSELL: Actually I think we  
22 need no motion. We can just move on. We can make  
23 a motion, but as long as we don't, it's ours, it's  
24 in our jurisdiction, and Katherine will continue  
25 to do all prehearing matters for us.

<p style="text-align: right;">Page 34</p> <p>1 MR. WHALEN: Thank you.  2 CHAIRMAN RUSSELL: Okay. Let's move on  3 then.  4 MS. ORR: Mr. Chairman, members of the  5 Board, the next case involves a business called  6 Aces Wild, LLC, at Aces and Eights Casino in  7 Glasgow, and this is a public water supply case  8 involving the failure to monitor for total  9 coliform bacteria, and the requested penalty is  10 \$510.  11 CHAIRMAN RUSSELL: So we're kind of  12 rolling along on this one, too, probably.  13 MR. MIRES: Mr. Chairman, this is Larry.  14 I have to recuse myself from this one.  15 MR. MILLER: Mr. Chairman, this is  16 Miller. Katherine, I thought it was \$1,017.  17 MS. ORR: Let me get a look at it again.  18 I don't know why I have that if that's the case.  19 MR. LIVERS: Mr. Chairman, this is Tom.  20 On Page 3, the Department did calculate a penalty  21 in the amount of \$1,017.  22 MS. ORR: I stand corrected on that.  23 That's right. I see that, Item 13.  24 MR. LIVERS: Yes. But if you go down to  25 Item 17, the Department -- Respondent shall pay</p>	<p style="text-align: right;">Page 36</p> <p>1 signify by saying aye.  2 (Response)  3 CHAIRMAN RUSSELL: Opposed.  4 (No response)  5 CHAIRMAN RUSSELL: Motion carries. Last  6 one.  7 MS. ORR: Then the next case, this is  8 the Fort Peck Station, and it involves four  9 underground storage tanks. There was a failure to  10 close a substandard UST system, and they needed to  11 be taken out of service if they didn't meet the  12 corrosion protection requirements, and the order  13 says that this business must remove the tanks and  14 piping within thirty days or experience a penalty,  15 and I think the penalty is \$10,000. Well, \$10,000  16 per violation. I'm not sure it's been calculated  17 yet.  18 CHAIRMAN RUSSELL: It doesn't appear to  19 be.  20 MS. ORR: And a first prehearing order  21 was issued on this on May 7th.  22 CHAIRMAN RUSSELL: Any further questions  23 for Katherine?  24 MR. MILLER: Mr. Chairman, this is  25 Miller. There was a letter attached here to this</p>
<p style="text-align: right;">Page 35</p> <p>1 \$510 to resolve the violations, so I'm assuming  2 the situation is that our calculated penalty is  3 \$1,017, and we're agreeing to accept \$510 to  4 resolve it.  5 MS. ORR: Part of it will be suspended.  6 CHAIRMAN RUSSELL: If they pay.  7 MS. ORR: Yes.  8 CHAIRMAN RUSSELL: Well, that's  9 wonderful. You guys are so nice down there.  10 All right. Any further questions for  11 Katherine on this one?  12 (No response)  13 CHAIRMAN RUSSELL: Hearing none, I would  14 entertain a motion to appoint Katherine the  15 permanent Hearing Examiner, and get this matter  16 resolved.  17 MR. MILLER: So moved. This is Miller.  18 CHAIRMAN RUSSELL: It's been moved by  19 Marv. Is there a second?  20 MS. KAISER: I'll second. This is  21 Heidi.  22 CHAIRMAN RUSSELL: It's been seconded by  23 Heidi. Further discussion.  24 (No response)  25 CHAIRMAN RUSSELL: All those in favor,</p>	<p style="text-align: right;">Page 37</p> <p>1 written by Jenny here, I guess, and she really  2 brought up quite a number of points, seems to be  3 conflicting statements. Is there someone there to  4 comment? Are these comments, the statements that  5 she made, are they somewhat valid or not?  6 CHAIRMAN RUSSELL: Probably treading  7 into areas where we may not be able to go.  8 MR. MILLER: That could be.  9 MR. LIVERS: Mr. Chairman, I would agree  10 with your characterization there. Really as a  11 party in this case, we should not respond at this  12 point.  13 MR. MILLER: Okay.  14 CHAIRMAN RUSSELL: The only question I  15 would have to Katherine is I'd like to make sure  16 it was licensing their tanks every year. Just  17 from my background knowledge about this program,  18 she brings up some -- (inaudible) -- stuff. But  19 Katherine, that was from me to you.  20 MS. ORR: Okay.  21 CHAIRMAN RUSSELL: Okay. Any other  22 questions for Katherine?  23 (No response)  24 CHAIRMAN RUSSELL: Hearing none, I would  25 entertain a motion to appoint Katherine the</p>

10 (Pages 34 to 37)

1 permanent Hearings Examiner for this matter.  
 2 MR. MILLER: I'll so move. Miller.  
 3 CHAIRMAN RUSSELL: Is there a second?  
 4 MS. KAISER: I'll second.  
 5 CHAIRMAN RUSSELL: It's been seconded by  
 6 Heidi. Is there 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 MR. WHALEN: (Inaudible)  
 13 CHAIRMAN RUSSELL: Joe, did you oppose?  
 14 MR. WHALEN: I did.  
 15 CHAIRMAN RUSSELL: So the motion carries  
 16 four to one. Did you get that?  
 17 MR. LIVERS: We've got that, Mr.  
 18 Chairman.  
 19 CHAIRMAN RUSSELL: All right. The final  
 20 actions on contested cases. In the matter of the  
 21 appeal of the Seventh Day Adventist Church  
 22 Christian School in Hamilton. Katherine.  
 23 MS. ORR: Mr. Chairman, members of the  
 24 Board, this is a case that is before you on the  
 25 posture of requesting dismissal under Rule 41(a).

1 This was a public water supply system in Hamilton,  
 2 and the violations asserted were failure to  
 3 monitor coliform bacteria, failure to report  
 4 monitoring violations, a total coliform MCL  
 5 violation, failure to report non-acute MCL total  
 6 coliform violations, and failure to provide public  
 7 notification; and the requested penalty was \$658.  
 8 I don't know what finally resulted in this case.  
 9 CHAIRMAN RUSSELL: It looks like it got  
 10 resolved.  
 11 MS. ORR: Yes.  
 12 CHAIRMAN RUSSELL: We can take some  
 13 discussion with you, but to get that started, I'll  
 14 entertain a motion to authorize the Chair to sign  
 15 the order of dismissal for BER 2010-04 PWS.  
 16 MR. WHALEN: So moved, Mr. Chairman.  
 17 CHAIRMAN RUSSELL: Moved by Joe. Is  
 18 there a second?  
 19 MR. MILLER: I'll second it. Miller.  
 20 CHAIRMAN RUSSELL: Seconded by Marv. Is  
 21 there any discussion on this?  
 22 (No response)  
 23 CHAIRMAN RUSSELL: Hearing none, all  
 24 those in favor, signify by saying aye.  
 25 (Response)

1 CHAIRMAN RUSSELL: Opposed.  
 2 (No response)  
 3 CHAIRMAN RUSSELL: Motion carries  
 4 unanimously. The last one, Katherine, in the  
 5 Matter of the PWS for High Spirits Club and  
 6 Casino, Florence.  
 7 MS. ORR: Yes. Mr. Chairman, members of  
 8 the Board, this is a similar case with similar  
 9 violations: Exceedence of the non-acute MCL for  
 10 total coliform bacteria, failure to report  
 11 non-acute MCL total coliform bacteria violations,  
 12 failure to provide public notification; and  
 13 basically the Department was looking for  
 14 corrective action rather than penalties.  
 15 CHAIRMAN RUSSELL: Okay. Thanks,  
 16 Katherine. I would entertain a motion to  
 17 authorize the Board Chair to sign the order of  
 18 dismissal of BER 2010-02 PWS.  
 19 MR. MIREs: So moved. Mires.  
 20 CHAIRMAN RUSSELL: It's been moved by  
 21 Larry. Is there a second?  
 22 MR. MILLER: I second it. Miller.  
 23 CHAIRMAN RUSSELL: Seconded by Marv. Is  
 24 there any further discussion?  
 25 MR. WHALEN: Mr. Chairman, question to

1 Katherine. Katherine, the Department's motivation  
 2 for corrective action versus penalties in this  
 3 case was based upon what?  
 4 MS. ORR: I guess maybe it would be  
 5 better for the Department to address that.  
 6 MR. WHALEN: As opposed to corrective  
 7 action and penalties.  
 8 MS. ORR: Mr. Arrigo is coming up to  
 9 address that question.  
 10 MR. ARRIGO: Mr. Chairman, members of  
 11 the Board, this is John Arrigo, Administrator of  
 12 the DEQ Enforcement Division. And in these public  
 13 water supply cases, we have two sort of classes of  
 14 violations. One is the failure to monitor for a  
 15 parameter, and other is for exceeding an MCL.  
 16 And from our perspective, the way we  
 17 approach these is that the failure to monitor is a  
 18 choice that the public water supply operator  
 19 makes, and so we feel those bad choices deserve a  
 20 penalty, so that we can convince them to monitor  
 21 properly in the future.  
 22 In regards to an MCL where they detect  
 23 bacteria or exceed a drinking water limit for  
 24 something such as nitrates, they don't really have  
 25 a choice in that matter, and it's dependent upon

<p style="text-align: right;">Page 42</p> <p>1 the quality of the groundwater or whatever that 2 they dispense to their customers. 3 So these orders, we will fine people for 4 monitoring violations; but for MCL violations, we 5 order them to take corrective action to fix the 6 MCL. 7 MR. WHALEN: Thank you, Mr. Arrigo. 8 That explains the Department position. 9 CHAIRMAN RUSSELL: John, let's suppose 10 that there is an MCL violation, and it's 11 non-fecal. What would generally be some 12 corrective measures, just in general, that the 13 Department would require someone who has MCL 14 violations of coliform? 15 MR. ARRIGO: Mr. Chairman, I don't know 16 if -- Can I talk about this specific case? 17 MS. ORR: Just in general. You can -- 18 if you'd like -- 19 CHAIRMAN RUSSELL: Why don't we just 20 find this thing, and I'm going to ask John a 21 question after we're done? Then I can, can't I, 22 Katherine? I don't want to prejudice the outcome 23 if -- 24 MR. ARRIGO: I can talk in general terms 25 not specific to this case.</p>	<p style="text-align: right;">Page 44</p> <p>1 under the federal rules, we can't dictate the 2 corrective action; and in particular to bacteria 3 problems, we order them to submit a corrective 4 action plan which may include one of three 5 options. One is to eliminate the source of the 6 bacteria, for example, if there is a septic system 7 nearby; the other option is to obtain a new source 8 of water, such as drilling a new well in a 9 different location; or third is to install 10 disinfection. 11 In this case, there were problems with 12 surface water from the parking lot draining into 13 the area around the well casing, and the High 14 Spirits folks didn't think they had the money to 15 take any corrective action. That's why they 16 appealed. As it turns out, they were able to do 17 some regrading, and slope the area away from the 18 well to eliminate surface water infiltrating in 19 and around the casing, and we hope that that is an 20 effective corrective action. 21 If it is not, and if they have 22 additional bacteria detections, they have agreed 23 in the stipulation to do additional corrective 24 action, primarily disinfection. 25 CHAIRMAN RUSSELL: All right. And it</p>
<p style="text-align: right;">Page 43</p> <p>1 MS. ORR: And if you dismiss the case 2 then -- 3 CHAIRMAN RUSSELL: Let's dismiss it, and 4 then we can talk specifics on this one. Would 5 that be all right with everyone? 6 MR. WHALEN: Sure. 7 MR. MILLER: Fine. 8 MS. KAISER: Fine. 9 CHAIRMAN RUSSELL: So I would entertain 10 a motion to authorize the Board Chair to sign an 11 order of dismissal for -- I already did that. 12 I've already done all that. I'll just call for 13 the question. All those in favor, signify by 14 saying aye. 15 (Response) 16 CHAIRMAN RUSSELL: Opposed. 17 (No response) 18 CHAIRMAN RUSSELL: All right. Motion 19 carries unanimously. 20 John, Mr. Arrigo, in these types of 21 cases where they're monitoring but they do have 22 some MCL violations, and you take action to 23 correct those, in this specific case, what type of 24 actions did you require? 25 MR. ARRIGO: First of all, Mr. Chairman,</p>	<p style="text-align: right;">Page 45</p> <p>1 kind of brings -- I was glad to hear that because 2 it does bring up something. You said earlier they 3 can't control the bacteria in the aquifer, but 4 generally our deeper aquifers do not have a lot of 5 bacteria unless we're putting it there, which 6 oftentimes is poor well construction, which this 7 sounds like a prime example of a poorly 8 constructed well. 9 And I have another question later on 10 that's not an enforcement issue, but it sounds 11 like a poorly constructed well. I've seen these 12 in our county where they're not grouted properly, 13 where they'll go in and put their pitless adapter 14 in, and they won't back in and grout the annulus 15 correctly. 16 These are some of the challenges that we 17 have with public water supplies and our well 18 drilling laws that are really soft, instead of 19 regulatory, in a lot of these approaches. I am 20 absolutely making some of my opinions known right 21 now, but this is a problem, and I see it quite a 22 bit in these smaller public water supplies. 23 MR. ARRIGO: Mr. Chairman, I would just 24 say that I believe you are correct. Most sources 25 of coliform bacteria are near surface, and they</p>

1 wouldn't get into a deeper aquifer unless the well  
2 has some defects. But one thing I can tell you is  
3 that for all public water supply wells, they have  
4 to meet construction and design standards that are  
5 more stringent than the Board of Water Well  
6 Construction Standards.

7 So for new wells, our engineers review  
8 those, and try to make sure that it's a safe,  
9 reliable supply. When we come across these MCL  
10 problems, and they propose to modify the physical  
11 design of the well or the distribution system,  
12 that has to go through public water supply  
13 engineer review, and we bring them up to  
14 standards.

15 CHAIRMAN RUSSELL: And I agree, John.  
16 The regulations on the public water supply side  
17 are totally adequate, but there is no teeth on the  
18 well drillers when they do it improperly. You can  
19 go after the owners, you can go after the  
20 developers, but I still believe that the well  
21 drillers rules are not strong enough to make the  
22 system even better.

23 But that's an opinion of mine. It  
24 doesn't have to be taken any more than what I just  
25 put on the record.

1 All right. We'll go ahead and move on  
2 then. Tom, did anyone from Missoula show up?

3 MR. LIVERS: Yes, Mr. Chairman. We have  
4 two representative from Missoula City-County here,  
5 Jim Carlson and Ben Schmidt, and I guess moving  
6 into this item, I'd just give a very quick set up,  
7 and then turn it over to Missoula.

8 Basically the Clean Air Act of Montana  
9 provides that local governments, cities and  
10 county, may establish and administer local air  
11 pollution control programs, provided those  
12 programs are consistent with the Clean Air Act of  
13 Montana, and approved by the Board of  
14 Environmental Review.

15 So Missoula City-County has been  
16 operating a strong program for many years, and  
17 they've recently made changes, and are seeking an  
18 order approving these revisions, seeking approval  
19 from the Board of Environmental Review. So with  
20 that, I'll turn it over to Missoula City-County  
21 Health Department.

22 CHAIRMAN RUSSELL: And as I'm guessing  
23 Jim comes up, Jim, we read through --

24 MR. LIVERS: It's Ben Schmidt, Mr.  
25 Chairman.

1 CHAIRMAN RUSSELL: We've read through  
2 the packet, and we really want to focus on some of  
3 the statutory requirements that allow us to  
4 approve this, basically your record of decision.  
5 We do not need to go through the air pollution  
6 control regulation amendments put forward.

7 MR. SCHMIDT: Mr. Chairman, members of  
8 the Board, thank you for your time. I am Ben  
9 Schmidt with the Missoula City-County Health  
10 Department. I will try to "X" out what I was  
11 going to explain what we've done to each of the  
12 chapters as you requested.

13 Going on to the process we did -- By the  
14 way, I just want to mention for the record that we  
15 did do changes to Chapters 2, 4, 6, 9, and 14.  
16 The rest of our rules were not touched.

17 And to reiterate that, one of the  
18 reasons we're proposing this change is because in  
19 2006 or 2008, our PM2.5 three year running average  
20 was 35.2 micrograms per cubic meters. Due to  
21 rounding conventions, Missoula County avoided  
22 becoming a nonattainment area by just .3  
23 micrograms per cubic meter, and these proposed  
24 rules will help keep Missoula from becoming a  
25 PM2.5 nonattainment area, which is basically the

1 goal of the Health Department, is to stay in  
2 attainment for PM2.5.

3 As part of the rulemaking process, a lot  
4 of actions were done. In May and June of 2009, we  
5 held five open houses in Seeley Lake, Clinton,  
6 Missoula, Frenchtown, and Lolo, where the proposed  
7 rule changes were explained and public comment was  
8 collected. On May 4th, 2009, 13,400 brochures of  
9 the proposed rule changes were sent to county  
10 residents. They were also given our contact  
11 information on these brochures if they wished to  
12 make comments or questions. We did receive many  
13 questions and comments throughout this process.

14 The Missoula Air Pollution Control Board  
15 held public meetings on the proposed rules on June  
16 18th, August 20th, and September 17th, 2009.  
17 Notification for all three public hearings were  
18 posted in the Missoulian newspaper. Notifications  
19 for the September 17th Board hearing were posted  
20 September 6th and 13th in the Missoulian, and  
21 September 3rd and 10th in the Missoula independent  
22 newspapers.

23 With these open houses, mailings, public  
24 notification in the local newspapers, three Board  
25 hearings, approval of the Air Board, approval of

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1 the City of Missoula, and approval of Missoula  
2 County County Commissioners, the requirements of  
3 Montana Code Annotated 75.2.301(1) through (3)  
4 were met.  
5 Throughout this process, in response to  
6 public comment, several drafts and changes were  
7 made to our rule. This was definitely a process  
8 that went on for several months as the comments  
9 came in. And the materials sent earlier to the  
10 Board, justification for those rules more  
11 stringent than State were supplied. This would  
12 meet the requirement of MCA 75.2.301(3) and (4).  
13 So we're going to ask the Board to  
14 approve these rule changes. And I guess since you  
15 do not wish for me to summarize what those changes  
16 were to those chapters at this point, I've just  
17 got to say thank you, Chairman, and members of the  
18 Board. Jim Carlson and I are both here for  
19 comments or any questions you may have. Thank  
20 you.  
21 CHAIRMAN RUSSELL: Thanks. And that  
22 doesn't alleviate the fact that our Board might  
23 ask questions of some of the modifications you  
24 made to your Air Pollution Control Program.  
25 MR. SCHMIDT: Yes.

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1 CHAIRMAN RUSSELL: I actually have one.  
2 On Page 8, the amendment, I think "within" is one  
3 word and not two. Item 4 down there.  
4 MR. SCHMIDT: Okay. "Within" is two  
5 words.  
6 CHAIRMAN RUSSELL: I think that's one  
7 word.  
8 MR. SCHMIDT: One word. Excuse me.  
9 CHAIRMAN RUSSELL: I was reading it. I  
10 just didn't need you to tell me again.  
11 MR. LIVERS: Mr. Chairman, that's likely  
12 the Department's error. We'll certainly make sure  
13 that's corrected.  
14 CHAIRMAN RUSSELL: All right. Board, do  
15 you have any comments?  
16 (No response)  
17 CHAIRMAN RUSSELL: Just because I've  
18 been through this a few times and actually on the  
19 local level, I have reviewed the record of  
20 decision as well as you have, and I know that  
21 they've met that with the meetings, who they've  
22 met with, with the elected officials that they've  
23 met with. So you guys did a great job on putting  
24 this out to the public, probably went way over  
25 what you needed to do statutorily.

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1 MR. WHALEN: Mr. Chairman, just one  
2 question for Missoula. Is the City of Missoula a  
3 chartered form of government?  
4 MR. SCHMIDT: Yes, it is.  
5 CHAIRMAN RUSSELL: Thank you. Good  
6 work.  
7 MR. SCHMIDT: Thank you.  
8 CHAIRMAN RUSSELL: Any further questions  
9 for the Department or Missoula County?  
10 (No response)  
11 CHAIRMAN RUSSELL: Hearing none, I would  
12 entertain a motion to accept the amendments as put  
13 forward, with any slight editorial changes that  
14 may need to occur to codify this document.  
15 MS. KAISER: So moved.  
16 MR. WHALEN: Second.  
17 CHAIRMAN RUSSELL: It's been moved by  
18 Heidi and seconded by Joe. Any further  
19 discussion?  
20 (No response)  
21 CHAIRMAN RUSSELL: I don't know where  
22 this falls in the whole thing. It's not a  
23 contested case. Is there anyone else in the  
24 audience that would like to speak to this matter  
25 before the Board takes action?

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1 MR. LIVERS: None, Mr. Chairman.  
2 CHAIRMAN RUSSELL: So the next step on  
3 this is putting it into the SIP, right? Most  
4 likely.  
5 MR. CARLSON: Mr. Chairman, members of  
6 the Board, I'm Jim Carlson, Director of  
7 Environmental Health. These are rule changes to  
8 the program. This is not a SIP amendment, because  
9 at this point in time, we're still in compliance  
10 with the PM2.5 regulations, and therefore there is  
11 no requirement for a SIP amendment.  
12 CHAIRMAN RUSSELL: Oh, I thought you  
13 guys were over the limit, so you were doing  
14 this --  
15 MR. CARLSON: The federal law says 35  
16 three year running average not to be exceeded, and  
17 because of the federal rounding standard, even  
18 though we were over 35 by two tenths of a micron  
19 averaged over three years, the rounding is to 35.  
20 Therefore you're technically not violating the  
21 federal standard, and not subject to a SIP call as  
22 a result.  
23 CHAIRMAN RUSSELL: All right. That's  
24 good for your community. All right. So with all  
25 that, any further discussion by the Board?

1 (No response)  
 2 CHAIRMAN RUSSELL: Once again, Missoula,  
 3 you guys did a great job on your amendments. I  
 4 will call for the question. 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. Before we go to general public  
 11 comment, I do have a comment myself for the Board,  
 12 and it relates to two things.  
 13 The contesting by municipalities of  
 14 their MPDES permits, which seems to be coming more  
 15 and more frequent, and I don't know if at some  
 16 further Board meeting we could have a discussion  
 17 around that, and what seems to be driving that.  
 18 Several years ago, as you guys will  
 19 recall, we had some problems around warm water for  
 20 the larger municipalities, and now we seem to have  
 21 several of these municipalities -- not always the  
 22 same -- but that are contesting their MPDES permit  
 23 revisions. So maybe there is an agenda item  
 24 there, Tom. Maybe there is something driving that  
 25 that we might want to hear about.

1 MR. LIVERS: Mr. Chairman, let us  
 2 explore that. I think obviously we would handle  
 3 that generically, so that we didn't get into any  
 4 specific contested cases. But it seems to me that  
 5 we can probably provide some context through a  
 6 briefing item, and we'll look to putting that on  
 7 the next agenda, assuming we don't see any snags,  
 8 if we're able to do that, and that would allow us  
 9 to give some background information on what we  
 10 think is happening there, and give the Board some  
 11 time to fire some questions at us.  
 12 CHAIRMAN RUSSELL: Then the second thing  
 13 -- and I don't know -- I certainly wouldn't want  
 14 the Department to take a lot of time doing this.  
 15 But in reviewing some of these PWS violations that  
 16 involve monitoring, part of me would like to know  
 17 if this is something that they are willingly not  
 18 doing, they're basically deciding that it's not --  
 19 that they're not going to monitor, or if there are  
 20 some of these that, looking through the record,  
 21 that they basically just didn't understand that  
 22 they had these monitoring requirements.  
 23 I don't want to put anyone on the spot,  
 24 but if they're not monitoring, we don't know the  
 25 status of these public water supplies. And from

1 John's perspective, if they are, and we're seeing  
 2 these MCL violations, that's not good for public  
 3 health either.  
 4 But the one that was brought up this  
 5 time that elected not to monitor for, I think it  
 6 was lead and copper, which are pH issues, those  
 7 aren't very expensive tests to run. So I just --  
 8 I don't want to spend a lot of time on this, but  
 9 I'd like to know if some of these folks are just  
 10 saying, "You know what, we're just not going to do  
 11 the monitoring that is required," or if they  
 12 basically didn't understand that some of this  
 13 stuff was necessary to monitor.  
 14 If this never comes back up again, I'll  
 15 probably have forgot about it, but it does seem to  
 16 be right now an issue that I'd like to have  
 17 explored.  
 18 MR. LIVERS: Mr. Chairman, we'll do  
 19 that. We don't really have the right people here,  
 20 nor are we in a position to respond today, but I  
 21 know what you're asking. We can take it back, and  
 22 get some additional information, and then maybe  
 23 decide whether it merits a briefing item or just  
 24 some communication with the Board prior to the  
 25 next meeting. We'll see what that looks like, and

1 we can respond appropriately.  
 2 CHAIRMAN RUSSELL: All right. I'd  
 3 appreciate it.  
 4 The other thing -- I don't think Ed is  
 5 there -- but we are having a pharmaceutical take  
 6 back day on June 6th. If he's interested, maybe  
 7 have him give me a call.  
 8 MR. LIVERS: Will do.  
 9 CHAIRMAN RUSSELL: All right. Now comes  
 10 the time -- Before we go to general public  
 11 comment, is there anything else that the Board  
 12 would like to bring up?  
 13 (No response)  
 14 CHAIRMAN RUSSELL: Hearing none, this is  
 15 the time of the meeting that we've set aside for  
 16 general public comment. If anyone in the audience  
 17 or on the phone would like to speak to the Board  
 18 on matters within their jurisdiction, this is the  
 19 time to do so.  
 20 (No response)  
 21 MR. LIVERS: None, Mr. Chairman.  
 22 CHAIRMAN RUSSELL: With that, I would  
 23 entertain a motion to adjourn.  
 24 MR. MILLER: I so move. This is Miller.  
 25 CHAIRMAN RUSSELL: Second.

1 MS. KAISER: I'll second.  
 2 CHAIRMAN RUSSELL: It's been seconded by  
 3 Heidi. Any further discussion?  
 4 (No response)  
 5 CHAIRMAN RUSSELL: Hearing none, all  
 6 those in favor, signify by saying aye.  
 7 (Response)  
 8 CHAIRMAN RUSSELL: Meeting is adjourned.  
 9 MR. LIVERS: July 23rd for the next  
 10 meeting.  
 11 (The proceedings were concluded  
 12 at 10:18 a.m. )  
 13 \* \* \* \* \*

1 C E R T I F I C A T E  
 2 STATE OF MONTANA )  
 3 : SS.  
 4 COUNTY OF LEWIS & CLARK )  
 5 I, LAURIE CRUTCHER, RPR, Court Reporter,  
 6 Notary Public in and for the County of Lewis &  
 7 Clark, State of Montana, do hereby certify:  
 8 That the proceedings were taken before me at  
 9 the time and place herein named; that the  
 10 proceedings were reported by me in shorthand and  
 11 transcribed using computer-aided transcription,  
 12 and that the foregoing - 58 - pages contain a true  
 13 record of the proceedings to the best of my  
 14 ability.  
 15 IN WITNESS WHEREOF, I have hereunto set my  
 16 hand and affixed my notarial seal  
 17 this day of , 2010.  
 18  
 19 LAURIE CRUTCHER, RPR  
 20 Court Reporter - Notary Public  
 21 My commission expires  
 22 March 9, 2012.  
 23  
 24  
 25



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