

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

3

4 BOARD MEETING                                )  
5    )  
6 JULY 23, 2010                                 )

7

8                                   TRANSCRIPT OF PROCEEDINGS

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10           Heard at Room 111 of the Metcalf Building  
11                               1520 East Sixth Avenue  
12                               Helena, Montana  
13                               July 23, 2010  
14                               9:00 a.m.

15

16                               BEFORE CHAIRMAN JOSEPH RUSSELL,  
17                               BOARD MEMBERS LARRY MIRES, HEIDI KAISER,  
18                               LARRY ANDERSON, JOE WHALEN, MARVIN MILLER;  
19                               AND ROBIN SHROPSHIRE (BY TELEPHONE)

20

21 PREPARED BY: LAURIE CRUTCHER, RPR  
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1           WHEREUPON, the following proceedings were  
2 had and testimony taken, to-wit:

3                           \* \* \* \* \*

4           CHAIRMAN RUSSELL: It's 9:01, and I will  
5 call this regular Board of Environmental Review  
6 meeting to order. The first item on the agenda is  
7 the review and approval of the May 14th, 2010  
8 Board teleconference meeting.

9           MR. MIRES: So moved.

10          MR. MILLER: Second.

11          CHAIRMAN RUSSELL: It's been moved by  
12 Larry and seconded by Marv to approve those  
13 minutes. Discussion?

14          (No response)

15          CHAIRMAN RUSSELL: Seeing 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 minutes are approved.

22                 The next item on the agenda is the  
23 review and approval of the May 28th teleconference  
24 minutes.

25          MR. MILLER: I so move.

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

3           MS. KAISER:  Second.

4           CHAIRMAN RUSSELL:  It's been seconded by  
5  Heidi.  Any discussion?

6           (No response)

7           CHAIRMAN RUSSELL:  Seeing none, all  
8  those in favor, signify by saying aye.

9           (Response)

10          CHAIRMAN RUSSELL:  Opposed.

11          (No response)

12          CHAIRMAN RUSSELL:  Motion carries.  The  
13  next item on the agenda are the briefing items,  
14  contested case updates.  Katherine.

15          MS. ORR:  Mr. Chairman, members of the  
16  Board, good morning.  Good to see everybody.  
17  There have been some activities since we prepared  
18  the agenda, and let me just go over those really  
19  quickly.  On the second item A(1) --

20          CHAIRMAN RUSSELL:  Katherine, can I butt  
21  in for a minute.  Before the meeting, I was  
22  supposed to read some emergency procedures on  
23  evacuating this room in case there is a fire, or  
24  earthquake, or other natural or unnatural  
25  disaster.

1           Therefore, in case of evacuation, you  
2 will be notified of an evacuation either through a  
3 fire alarm or directly from trained emergency  
4 personnel, people in orange vests. That would be  
5 Misty. If you are informed of an emergency,  
6 immediately proceed to the north stairwell, go  
7 down and out the building. The north stairwell is  
8 east of us. Has everyone got that? This is the  
9 north side of the building, that is the east  
10 stairwell. Are you following along? All right.

11           Proceed to the main door and exit the  
12 building. Proceed to the grassy knoll north of  
13 the building out this way, across the parking  
14 lots. If this area is unsafe for any reason,  
15 proceed to the grassy area across Sixth Avenue  
16 east of the State Library -- (indicating) -- that  
17 way. But we will go out that way, and around, and  
18 go up. Okay, John? We still evacuate this side,  
19 and we'll circuitously go around and end up up  
20 here. Check in with the meeting facilitator for  
21 an accounting of personnel. I will inform you  
22 right now that Misty will be our meeting  
23 facilitator.

24           Do not leave the assembly area until  
25 instructed that it is safe to do so. If at any

1 time you are unsure of what to do, follow the  
2 directions of emergency personnel. Any questions?

3 (No response)

4 CHAIRMAN RUSSELL: I am really sorry I  
5 butted in, but Katherine, it's yours now.

6 MS. SHROPSHIRE: Katherine, can you get  
7 a little closer to the mike, please?

8 MS. ORR: Is that better?

9 MS. SHROPSHIRE: I think so, yes.

10 MS. ORR: On Item II(A)1(b), which is in  
11 the matter of violations of the Metal Mine  
12 Reclamation Act by Saturday Sunday, there was a  
13 hearing held on July 19th, and Counsel for  
14 Saturday Sunday did not appear, and there was a  
15 motion for a default, and the default was granted,  
16 and an order was issued for default, and ordering  
17 Saturday Sunday to pay the penalties, and that  
18 will come before the Board in the next Board  
19 meeting.

20 On Item (d), Sheep Mountain, there is a  
21 pending motion to consolidate with one of the new  
22 cases that we have. It's in the matter of  
23 violations of the Clean Air Act of Montana by Todd  
24 Michael Mihalko. And we haven't heard a response  
25 on that yet from the other side, but a ruling will

1 be imminent on that.

2           On Item (e), this is Great Falls. This  
3 is a permit challenge case. There was a motion to  
4 vacate and dismiss pending before the Hearing  
5 Examiner -- actually I misstated. This is a  
6 challenge of a septic service business, and there  
7 has been actually an agreement in that case, and a  
8 motion to vacate and dismiss is pending before the  
9 Hearing Examiner.

10           In Juniper Hill, there was a hearing  
11 held on June 4th, and a decision is forthcoming on  
12 that.

13           On Item (h), City of Great Falls, that's  
14 the one I was thinking about. This is a permit  
15 challenge. An agreement in principle has been  
16 reached in this case.

17           And in Item (j), there was a motion for  
18 a stay of proceedings pending an application for  
19 eligibility, and that was denied -- eligibility  
20 before the Petroleum Board -- and that was denied  
21 on July 20th.

22           And then moving right along to the cases  
23 that the Board retained unto itself, on Item (a),  
24 which is Signal Peak Energy, just yesterday I  
25 received a settlement, a stipulation for

1 settlement, and a proposed order of dismissal.

2 And City of Belgrade, a second order  
3 granting extension of time was issued on July 15,  
4 2010.

5 CHAIRMAN RUSSELL: Thank you, Katherine.  
6 The next item on the agenda are some briefing  
7 items, and we will hear initially from John on the  
8 triennial review of Montana Water Quality  
9 Standards. You can turn it over to anyone you  
10 want.

11 MR. NORTH: Mr. Chairman, Bob Bukantis  
12 from the Department will make that presentation.

13 MR. BUKANTIS: Mr. Chairman, members of  
14 the Board, good morning. For the record, my name  
15 is Bob Bukantis, and I'm the Water Quality  
16 Standards Program Manager for the State of  
17 Montana, DEQ. And what I'm going to do is give  
18 you a real brief update on the triennial review  
19 portion of our triennial review, meaning that  
20 you'll notice there is basically two items on the  
21 agenda, and this is going to be an overview of the  
22 general comment that we received outside of the  
23 scope of our proposed changes to the standards.

24 And Rod McNeil, during the action items,  
25 will bring you an action item on the changes that

1 we propose to make directly to the standards as  
2 part of this triennial review.

3           So I'm just going to basically give you  
4 a real quick overview on what we received for  
5 comments, more focusing on what we plan to do to  
6 wrap these up, and summarize, and report back to  
7 you with recommendations.

8           So just to reorient you a little bit, we  
9 opened up the 45 day public comment period on tax  
10 day, April 15th, and planned to run that to June  
11 16th. We did get a request from the Montana  
12 Petroleum Association to extend the public comment  
13 period based on a recent Supreme Court ruling  
14 related to the permitting of EC and SAR, so we  
15 granted that request and extended that public  
16 comment period for 15 days.

17           So we closed the comment period roughly  
18 a month ago, and what we received was three  
19 categories of comment basically. We had a comment  
20 from Syngenta Corporation regarding how we handle  
21 carcinogenicity with some of the pesticides that  
22 we have listed in our standards. And that also  
23 shows up in the action item, by the way, because  
24 they directed their comment towards our changes,  
25 but we really didn't propose any changes on any of



1 the pesticides that they talked about. So we're  
2 wrapping it up as part of the more general comment  
3 review, if you would.

4 And we also received a comment from  
5 American Chemet, which is proposing adoption of  
6 EPA's 2007 Aquatic Life National Recommended Water  
7 Quality Criterion for the copper biotic ligand  
8 model as a copper standard.

9 And then the other major category of  
10 comments that we received, of course, was on EC  
11 and SAR, and we got about two pounds of comments  
12 on EC and SAR. And it's not quite as bad as it  
13 sounds. It's actually about 700 pages. But most  
14 of the bulk of that was additional comments that  
15 were appended, if you would, additional documents  
16 that were appended, if you would, to the, say, one  
17 to six page cover letters.

18 And of those, we started to summarize  
19 that information, we've got about 50 different  
20 comment categories; and we got comments from  
21 Northern Plains Resource Council, Marathon Oil,  
22 Tongue River Water Users, Fidelity, Devon,  
23 Williams, Wyoming DEQ, and Wyoming Attorney  
24 General's Office.

25 So what we're planning to do with all

1 this stuff is to prepare a report, bring it back  
2 to you in October. What we'd like to do is put  
3 these comments in context, in the case of the EC  
4 and SAR ones -- which are really the complicated  
5 ones to pull together -- basically around, say, a  
6 structure of explaining the basis for the  
7 standards that we have on the books now; also  
8 weave into that the additional 33 documents that  
9 we identified as new science, if you would, since  
10 the 2003 rulemaking; and also additional documents  
11 and comments that we received during the public  
12 comment period.

13 So we're going to try to organize this  
14 stuff, kind of digest it for you, and then provide  
15 you with our recommendations on where to go from  
16 here, and we're planning to bring that back in  
17 October, and of course support it with our  
18 rationale for what we think. And I guess with  
19 that, I'd be happy to answer any questions.

20 CHAIRMAN RUSSELL: Bob, on the new body  
21 of knowledge around EC and SAR, is there something  
22 drastically different about how we should approach  
23 it?

24 MR. BUKANTIS: I guess I'd say my first  
25 take on this -- I don't want to take a firm

1 position on this because I think it's important  
2 that we objectively kind of pull this together and  
3 digest it -- but nothing jumped out at me -- I  
4 guess I'll go that far -- to say we're off base.  
5 And my sense is I think we're pretty good, but  
6 it's premature to take that as any kind of firm  
7 position.

8 CHAIRMAN RUSSELL: Any questions for  
9 Bob?

10 MR. WHALEN: Mr. Bukantis, as someone  
11 who is new to the Board, relatively new, is it  
12 typical for the Department to take comment on  
13 items that are outside of the scope of the changes  
14 that are proposed?

15 MR. BUKANTIS: Historically we haven't  
16 been very aggressive that way, if you would say.  
17 We often do get comment that way, and that's  
18 something that EPA has been pushing us to do more,  
19 and independent of the whole EC and SAR thing.  
20 And we're thinking that we like this model. We  
21 think it's good public policy. And I think it  
22 might be a good way, when we get this kind of  
23 information, then digest it, and come back to you  
24 in a formal way; and then, if you would, and  
25 document what those comments are, and then make

1 recommendations.

2           So we're thinking that this is likely  
3 the wave of the future, if you would.

4           MR. WHALEN: Thank you, Mr. Bukantis.

5           MR. NORTH: Mr. Chairman, I'd add to  
6 that that is a requirement of the EPA rules under  
7 the Federal Clean Water Act, and there is also a  
8 statutory provision in the Montana Water Quality  
9 Act that says that the Board is to review the  
10 water quality standards every three years -- hence  
11 the term "triennial review" -- to determine if  
12 changes or additions need to be made.

13           CHAIRMAN RUSSELL: It's a little  
14 different rulemaking process than we're generally  
15 accustomed to. Someone else is forcing the review  
16 of this rulemaking process. Not forcing. At what  
17 point do you feel that -- At least one of us has  
18 been through this in depth, and I wonder at what  
19 point the Board needs an EC and SAR 401 course. I  
20 didn't say 101.

21           MR. BUKANTIS: Art Compton is the one  
22 that started to pull this document together for  
23 us, and he and I have talked about that some. We  
24 have recognized that not all of you have been  
25 through the CBM wringer on this, if you would, and

1 through all of the details, so we think we need to  
2 write it fairly general so that folks will have a  
3 good basic understanding of what's going on here  
4 and what's being proposed. I don't know if that  
5 answers your question, Mr. Chairman.

6 CHAIRMAN RUSSELL: It does. Just wanted  
7 to tee it up. Thanks, Bob. Any other questions?

8 (No response)

9 CHAIRMAN RUSSELL: Thank you. The next  
10 item on the agenda is we are going to get a little  
11 briefing on individual waste water discharge  
12 permit appeal activity. John.

13 MR. NORTH: Mr. Chairman, the Board  
14 indicated at the last meeting that it would like  
15 to have this information. Jenny Chambers will  
16 provide it to you.

17 MS. CHAMBERS: Good morning, Chairman,  
18 members of the Board. My name is Jenny Chambers,  
19 Chief of the Water Protection Bureau here at DEQ.  
20 As a briefing item on the agenda, I will provide  
21 an overview of the waste water discharge permit,  
22 and summarize recent activity in relation to  
23 permit appeals.

24 In general, under the Montana Water  
25 Quality Act, 75-5-605, Montana Code Annotated, it

1 is unlawful to cause pollution of any State  
2 waters, or place a waste where it will cause  
3 pollution of any state waters, unless it's  
4 authorized under a discharge permit.

5           The Montana Water Quality Act regulates  
6 discharge of pollutants into State waters through  
7 the adoption of water quality standards and permit  
8 application processes. Subsequent administrative  
9 rules are established to provide a framework and  
10 establish a common system of issuing these  
11 permits. There are two main types of discharge  
12 permits, either discharge to surface water or a  
13 discharge to groundwater. Both of these are  
14 protective of State waters in Montana.

15           For surface water discharges, Montana  
16 DEQ has been delegated primacy from EPA to issue  
17 what's called a Montana pollutant discharge  
18 elimination system permit. Those are surface  
19 water discharge permits, and they're pursuant to  
20 402, Section 402 of the Clean Water Act, and are  
21 identified in our administrative rules.

22           MPDES permits are issued either as  
23 individual permits or authorization to discharge  
24 under general permits. General permits are used  
25 for categories of discharge that after an

1 evaluation of technology based effluent limits, or  
2 an evaluation of water quality based effluent  
3 limits, that these requirements are similar in  
4 nature that we can provide permit coverage for a  
5 full universe of permit types, and then separate  
6 authorizations are granted under those general  
7 permit authorizations.

8           Some general permit examples include  
9 storm water construction; storm water industrial;  
10 storm water mining, oil and gas; small municipal  
11 separate storm sewers systems; CAFOs --  
12 Concentrated Animal Feeding Operations --  
13 construction dewatering; produced water; suction  
14 dredges; and disinfected water.

15           There are other types of discharges that  
16 discharge to groundwater. These permits are  
17 issued under what's called a groundwater pollution  
18 control system permit, and we have separate  
19 Administrative Rules of Montana to regulate our  
20 groundwater discharges. The main groundwater  
21 discharges are either sanitary and domestic waste  
22 -- from subdivisions, from homeowners  
23 associations, things of that nature -- that have a  
24 design capacity of more than 5,000 gallons per  
25 day; and then any amount of industrial wastewater

1 discharged into the groundwater also needs to have  
2 a groundwater pollution control system permit.

3           These regulations are found in the  
4 Administrative Rules of Montana 17.30.102(2). The  
5 handout that was provided in your packets that's  
6 entitled Water Protection Bureau Permit Appeals  
7 provides a comparison of the number of individual  
8 permits issued in relation to the number of  
9 permits -- number of permits issued in relation to  
10 the number of permit appeals.

11           The table does not take into account  
12 additional workload or other activities we have  
13 within the bureau, such as a general permit  
14 authorization, or any permit modifications that we  
15 may have based upon an individual permit that we  
16 have already issued.

17           So I just want to go through a little  
18 bit that actual table, kind of just to walk you  
19 through that as far as what I gathered for you.

20           It's broken out by Federal fiscal year.  
21 Water Protection Bureau, since it's a delegated  
22 program from EPA, we track based upon the federal  
23 fiscal year as far as bean counting numbers. We  
24 have two different types of MPDES surface water,  
25 as I indicated, and the groundwater pollution



1 control numbers. And federal fiscal year 2010, as  
2 of July 9, 2010 when this document was developed,  
3 we issued 27 MPDES permits, we issued 20  
4 groundwater permits, the number of appealed MPDES  
5 permits were zero, and the number of groundwater  
6 appeals were three.

7 So the total permits issued was 47,  
8 total appealed was four, and that provides a  
9 percentage ratio of 9 percent. So as you track  
10 those down the table, it's kind of an increased  
11 possibility of permit appeals if you increase the  
12 number of permits that you issue.

13 I just wanted to note also that there is  
14 currently ten more MPDES permits out for public  
15 notice, so that number 27 theoretically could go  
16 up to 37 between now and September 30th. So after  
17 you track all this information, and you kind of  
18 look at total permit appeals for the last five  
19 years, the average is only about 7 percent.

20 So you guys are looking at the Board  
21 document, and it comes through, and you see all  
22 these water quality permit appeals. The last  
23 couple years they've been groundwater permit  
24 appeals. We haven't had too many surface water  
25 permit appeals. And so that kind of provides you

1 the number and some kind of relationship table to  
2 look at a little clearer.

3           So after looking at this, I really did  
4 think that there would be a more increased number  
5 because we've started issuing more permits in the  
6 last couple years, but really there's not been any  
7 particular trend in permit appeals. I looked to  
8 see what exactly we're getting permit appeals on  
9 to see if there is some certain regulation, or  
10 certain policy or procedure that we could change  
11 or modify based upon the permit appeals. Nothing  
12 is really striking or sticking out as far as  
13 something we could modify in the future to reduce  
14 those, but we will definitely keep track of those  
15 and looking at those as we move forward.

16           One initiative that the Water Protection  
17 Bureau is taking that we underwent in 2009 was a  
18 Kaison Gynon (phonetic) review process to evaluate  
19 our whole permitting process to see where we can  
20 streamline and make efficiencies in the program.

21           With that, we're going to implement in  
22 Federal fiscal year 2011 a preapplication process,  
23 and a prepermitting process that will increase the  
24 communication with the permittees up front during  
25 the process, so when they get a permit issued, it

1 may not be as shocking or surprise to them. And  
2 it may reduce the number of appeals, or at least  
3 provide a better framework of where we're headed  
4 moving forward.

5 I also wanted to indicate and let the  
6 Board know that if any changes in permits during a  
7 negotiation process or a discussion, as we're  
8 asking for extensions, any changes in the permits  
9 do go out again for public comment, so the public  
10 does get an opportunity to provide us comment if  
11 we do make any changes to the permits that we've  
12 already issued that are now appealed.

13 And then I wanted to provide a list of  
14 the type of permits that we have issued in the  
15 last two years as far as reissuance or renewal,  
16 and that's the last part of that table, MPDES  
17 permits and groundwater permits. So you can see  
18 there's like a wide range of permits, from ASARCO,  
19 to Sidney Sugars, to the Town of Dillon, to the  
20 City of Belgrade, to River Rock, to Utility  
21 Solutions, and Gallatin County as far as  
22 groundwater permits go, so you can kind of get a  
23 sense of who our permittees are in the state, who  
24 we've been working with in the last couple years.

25 With that, I'll be happy to take any

1 questions.

2 CHAIRMAN RUSSELL: Questions?

3 MS. KAISER: I have one. It is in  
4 regards to the table of the list of permits. If  
5 you mentioned this, and I missed it, I apologize.  
6 Some are labeled MPDES priority.

7 MS. CHAMBERS: Right. Currently all of  
8 the permits that we're currently issuing are  
9 what's referred to as MPDES priority permits.  
10 Those are the permits from EPA that are expired  
11 more than two years. It doesn't mean that they  
12 haven't had permit coverage, just their previous  
13 permit was administratively extended. They have  
14 to maintain permit compliance under that existing  
15 permit, but they have applied for renewal of that  
16 permit, and the permit is only good for five  
17 years, and we just have a backlog of permits, and  
18 so those are priority permits that we're trying to  
19 get out that are expired more than two years.

20 In Federal fiscal year 2011, we're  
21 actually taking a different approach with EPA as  
22 far as a backlog reduction plan to issue the  
23 permits and keep the permits current, and then  
24 slowly pick away at the backlog as a way to not  
25 have a backlog in 2015, is the planned proposal as

1 far as the workload and resources that we have  
2 available.

3 So they're all priority permits, in my  
4 mind, as far as the State of Montana goes; but in  
5 EPA's eyes, it's a priority permit if it's expired  
6 more than two years.

7 MS. KAISER: So are these most -- but  
8 these have all been issued?

9 MS. CHAMBERS: All of these on the list  
10 have been issued. Those are the ones we've had  
11 completed. I get the bean count for EPA that says  
12 I have issued those priority permits in the last  
13 Federal fiscal year.

14 MS. KAISER: Do you have a backlog now  
15 of --

16 MS. CHAMBERS: Yes, and the backlog --  
17 Sorry. Chairman, Ms. Kaiser. The backlog is  
18 expired to -- or estimated to last until 2015 as  
19 far as our goal into reaching the actual no --  
20 zero backlog of discharge permits under surface  
21 water.

22 MS. KAISER: Thank you.

23 MR. ANDERSON: What's the percentage of  
24 these appeals that are permittee type appeals  
25 versus public appeals?

1 MS. CHAMBERS: Mr. Chairman, Mr.  
2 Anderson, excellent question. Within the Water  
3 Quality Act and the Administrative Rules of  
4 Montana for establishing our discharge permits,  
5 the only person that can appeal our permits are  
6 the permittees. It's different than the air  
7 quality program where the public can appeal the  
8 permits. On MPDES permits or groundwater permits,  
9 only the permittee can appeal their permit. If  
10 the public was in question or had any issues with  
11 the actual permit, they'd have to file a complaint  
12 in court.

13 MR. ANDERSON: Do you have a lot of  
14 participation by the public in this permitting  
15 process?

16 MS. CHAMBERS: Mr. Chairman, Mr.  
17 Anderson, it varies based upon the type of permit  
18 that we're issuing. Most of the municipalities,  
19 we get little comments from the public on --  
20 mainly just from the permittee. On some of the  
21 larger facilities, such as the coal mines, power  
22 plants, industrial facilities, it's a wide range.  
23 We get comments from the public as well. I don't  
24 even want to talk about coal bed methane. We get  
25 comments from even out of state participants on

1 that process.

2 MR. ANDERSON: Thank you.

3 CHAIRMAN RUSSELL: I have just a couple.  
4 Yesterday in our local Board of Health meeting,  
5 the City Manager of Kalispell came in and made a  
6 comment to our Board about how drastically DEQ  
7 reduced the nutrient discharges of the Helena  
8 treatment plant, but looking on here -- and I  
9 don't even see Helena on here. Is that a factual  
10 statement?

11 MS. CHAMBERS: Mr. Chairman, members of  
12 the Board, we are currently working with the City  
13 of Helena through that preapplication process that  
14 I had explained to try to test that out to see how  
15 we could work better with permittees up front. We  
16 have a draft City of Helena permit that we've  
17 completed, and we've had meetings with them to  
18 discuss that permit prior to going out for public  
19 notice.

20 Yes, there are changes drastically in  
21 their City of Helena permit to address the total  
22 maximum daily load of the Lake Helena TMDL  
23 document. We're looking at opportunities for them  
24 to hook up septic as far as a trading opportunity  
25 within the City of Helena permit, and we're just

1 trying to address all of the concerns right now to  
2 the best of our ability that is still within the  
3 constraints of rules and regulations, and we  
4 should be going out for public comment in August  
5 on that permit, receive and evaluate what comments  
6 we receive during public comment, and then issue a  
7 permit, and then proceed.

8 CHAIRMAN RUSSELL: You mentioned  
9 something that I just can't let go. You are  
10 actually going to give them credit for connecting  
11 the septic systems?

12 MS. CHAMBERS: We are evaluating that  
13 under our proposed trading policy, and just  
14 looking at whether or not that's a possibility.  
15 It's not necessarily a trade or offset because  
16 that TMDL is kind of a phased document, that  
17 indicates that there will be no increase or phased  
18 approached as they look on increasing their  
19 treatment and operation expenses, so we're just --  
20 There is not definitive right now how we're going  
21 to offset that, or even evaluate within the  
22 permit. We're just exploring all the options that  
23 the City of Helena has proposed to us, and then  
24 we'll make a final decision before we go out  
25 public comment.



1           CHAIRMAN RUSSELL: I'm very interested  
2 in this trading, because you've got groundwater  
3 discharge versus surface water discharge. When  
4 you figure out how to trade, I want to know.

5           MS. CHAMBERS: Mr. Chairman, members of  
6 the Board, it's not just my decision necessarily.  
7 We're working together as a whole interim group,  
8 working with John and legal staff as far as what  
9 our trading policy. Maybe that's something that  
10 as we get more formalized we'll be able to brief  
11 the Board on what that trading policy looks like,  
12 and give you an opportunity to review it and look  
13 at it.

14           CHAIRMAN RUSSELL: It's just a major  
15 dilemma of TMDL. What you set a TMDL for a  
16 surface water body and what you allow in  
17 groundwater is so different. When you look at  
18 nutrients and how they look as a discharge are  
19 very different. And so I'm very interested in  
20 this whole concept.

21           MS. CHAMBERS: Yes.

22           CHAIRMAN RUSSELL: Any further  
23 questions?

24           (No response)

25           CHAIRMAN RUSSELL: Thanks, Jenny. I

1 appreciate it.

2 The next item is the Gallatin ORW.

3 John.

4 MR. NORTH: Mr. Chairman, assuming that  
5 Tom is not driving through Wyoming like last  
6 meeting, and he is stationary, Tom Livers will  
7 provide the briefing on this issue.

8 CHAIRMAN RUSSELL: Tom, are you there?

9 MR. LIVERS: Mr. Chairman, I'm here.  
10 Can you hear me okay?

11 CHAIRMAN RUSSELL: Very well. Thanks.

12 MR. LIVERS: I'm here, I am stationary.  
13 Mr. Chairman, members of the Board, for the  
14 record, I'm Tom Livers, Deputy Director of the  
15 Department. And before we move into this, let me  
16 just make, if I could, one quick comment on the  
17 backlog of MPDES permits.

18 This has been a long term issue with the  
19 Department, long term concern on EPA's part as  
20 well. It dates back many years, in part due to  
21 heavier reliance on the water quality based  
22 permitting approach that's more labor intensive,  
23 but there have been a number of factors  
24 contributing to it. Staffing levels is one, but a  
25 lot of process issues as well. And I feel that

1 the Department has finally made just excellent  
2 progress on sending out a work plan for backlog  
3 reduction and actually making progress against  
4 that reduction.

5           So although we're still several years  
6 away from completely eliminating the backlog, I  
7 think the work that Jenny and her staff have done  
8 is really productive, and finally, on a very long  
9 term situation, we're starting to see the light at  
10 the end of the tunnel in terms of making real  
11 progress and eliminating that backlog.

12           So with that, let me move into the  
13 update on the Gallatin River Outstanding Resource  
14 Water designation. At the last regular Board  
15 meeting, the Board approved again an extension of  
16 the rulemaking on this designation, and partly in  
17 response to Department comments, the Board asked  
18 the Department, directed the Department to  
19 communicate with the parties involved in some of  
20 the discussions around this to make sure that  
21 indeed things were progressing, and not stalled  
22 out, and that's what I want to get here.

23           I guess I'll give you a little bit of  
24 background on the rulemaking first, but the short  
25 answer is that we're real encouraged by the work

1 that is going on there, and I can tell you that  
2 the parties have not shelved this effort. It's  
3 very much on the front burner, and it's still  
4 moving forward.

5           So a brief history on the rulemaking,  
6 and this dates back several years. But the past  
7 few years, upon completion of the Environmental  
8 Impact Statement on this issue, the Board  
9 resurrected rulemaking and had pending designation  
10 of Outstanding Resource Water designation. We  
11 talked about this quite a bit. The most  
12 protective designation available in our hierarchy  
13 of water quality standards.

14           That action served as an impetus to  
15 bring disparate interests together in the  
16 Gallatin, development and environmental community  
17 both, and others that are maybe not closely  
18 aligned with either side, to try to find good  
19 alternatives to this designation, and they formed  
20 what was known as the Wastewater Solutions Group.  
21 That is a group that's been looking at different  
22 approaches to protecting the Gallatin, and they  
23 have come to the Board several times asking for an  
24 extension of rulemaking as they continue to  
25 explore their alternatives.

1           Any scheme for protecting water quality  
2   in the canyon is going to have to rely to some  
3   degree on the only wastewater treatment system in  
4   the canyon, and that is the one at Big Sky, Big  
5   Sky Water and Sewer District. There is a sense  
6   that if more of the corridor can be brought on  
7   line with that system, it will have significant  
8   impacts on protection and reducing potential  
9   groundwater/surface water interference.

10           Obviously the big concentration of  
11   population is on the west fork in the Big Sky and  
12   above area, but there is also relatively more  
13   dense development above and immediately below that  
14   area. So there is potential that if there can be  
15   greater utilization of the treatment system, that  
16   could really have a positive impact on protection  
17   of the Gallatin, but there are challenges to that,  
18   the biggest being capacity.

19           The treatment system has two capacity  
20   concerns. One is a winter storage concern. They  
21   have limited ability for land application, really  
22   none currently in the winter. They do their land  
23   application in the summer on the three golf  
24   courses in the area. They do have a discharge  
25   permit, but no one is hoping to have to use that.

1           So to counter these capacity issues, the  
2 group has been looking at an increased use of snow  
3 making for treated effluent. There was some early  
4 work, maybe ten years ago, in looking at this kind  
5 of controlled non-discharging areas; but several  
6 states, including ski areas, do actual slope  
7 application, both on timbered slopes, and in some  
8 cases on ski slopes. So there is an interest in  
9 doing that because it would solve the winter  
10 storage capacity issues, or at least not really  
11 solve them, but have significant impact on that.

12           The other capacity issue with respect to  
13 the district is they do want to reserve a certain  
14 amount of growth capacity for that area, so they  
15 have to some degree a disincentive on bringing  
16 some of the corridor in as well.

17           The group has been working together to  
18 look at a snow making pilot, slope application,  
19 and they've got to move forward. They've got a  
20 clock ticking on that money. I think they have to  
21 have some progress this calendar year on that.

22           One of the challenges with that is going  
23 to be permitting issues, some of the monitoring  
24 required even for a pilot project; and the concern  
25 with the group is they're willing to meet all the

1 permit conditions on a permanent basis, but some  
2 of the conditions may not be cost effective for a  
3 pilot scale approach, and so we're working with  
4 them to see where we might have some ability to  
5 help facilitate that effort, without compromising  
6 our requirements.

7           So that's where that issue is right now,  
8 and I guess just as a personal comment, there were  
9 three of us from the Department in the meeting.  
10 John North was there, Director Opper was there,  
11 and I was there. I was really struck by, I guess,  
12 the mutual concern, the mutual trust that that  
13 group has engendered from working together.

14           I think everyone, including the  
15 environmental representatives, feel that some of  
16 the approaches they're looking at would be a  
17 better alternative than designation as an  
18 Outstanding Resource Water, better protection of  
19 the Gallatin in the long run. I don't think  
20 anybody is trying to shut down development, but  
21 rather find ways to do so in a way that still  
22 preserves the water quality in the canyon.

23           So I was pretty impressed by those  
24 efforts, and by the individuals, and the group  
25 dynamic. So there is no action pending before the

1 Board in the near future. Having just extended  
2 the rulemaking, I would expect that as the six  
3 month time frame comes up on that, we might have  
4 some more progress to report, but we would  
5 probably entertain a request from that group to  
6 extend again.

7 But I guess the bottom line for me, and  
8 I hope for the Board, is: There is concern that  
9 maybe with the down turn in development, this has  
10 one to the back burner, and things weren't  
11 progressing. There are certainly plenty of  
12 challenges, but there is a real sincere effort  
13 down there and a lot of activity to move forward  
14 on this issue.

15 That's it, Mr. Chairman.

16 CHAIRMAN RUSSELL: Thanks, Tom. Any  
17 questions for Tom?

18 (No response)

19 CHAIRMAN RUSSELL: Thanks, Tom. The  
20 next item on the agenda is proposed legislation  
21 for the 2011 legislative session. John.

22 MR. NORTH: Mr. Chairman, Mr. Tom Livers  
23 will provide that as well.

24 MR. LIVERS: Okay. Thank you, Mr.  
25 Chairman, members of the Board. Again, Tom



1 Livers.

2           We had an attachment in your packet of  
3 the five proposed bills that we are requesting  
4 this legislative session. We never go in with a  
5 real heavy agenda, but this is a little light on  
6 our end. We really have boiled it down to just  
7 those areas that we really want to focus on.

8           I just want to point out that only one  
9 of these is going to directly impact the Board.  
10 The rest we just wanted to provide. Typically the  
11 Department will give the Board, just for  
12 information, some of the other items we're going  
13 to go forward with legislatively, as a courtesy or  
14 as context.

15           But the first one will have a direct  
16 impact, and that's the wastewater reuse  
17 authorization. Basically this would expand -- if  
18 passed, this legislation would allow for some  
19 expanded use of treated municipal wastewater  
20 effluent. There is already some use -- obviously  
21 we just talked about it in the Gallatin in terms  
22 of land application on the golf courses -- but  
23 this would really expand those potentials in not  
24 only landscape irrigation, but firefighting in  
25 certain cases, and construction water, some

1 industrial applications. There is discussion of  
2 the impact on closed basin, how this might go.  
3 But what would happen if this passes.

4           The Legislature then would authorize the  
5 Board of Environmental Review to establish rules  
6 for these systems, and standards for reuse options  
7 that are not currently available, and then those  
8 rules would be permissive. Individual municipal  
9 systems could determine whether they wanted to  
10 implement these rules.

11           So the entire approach at this stage is  
12 permissive. The Board would be authorized to  
13 adopt these rules, and individual municipal  
14 systems could choose to implement them. What we  
15 would anticipate is we'll come back after the  
16 legislative session, give the Board a briefing,  
17 probably a progress briefing during the session as  
18 well, but afterward on what's passed, what hasn't,  
19 what effect it's going to have to the Board, and  
20 assuming this would go -- and I'm sure there would  
21 be some controversy around it -- but I think there  
22 is a pretty good chance that this will come out,  
23 and people will start to see the potential  
24 resource value of treated effluent. I expect this  
25 will come forward, and we'll be back to you next

1 spring with a game plan for rulemaking.

2 So I can take questions one at a time on  
3 these, Mr. Chairman, whatever you prefer.

4 CHAIRMAN RUSSELL: Why don't we  
5 entertain questions. If you've read through.

6 MR. WHALEN: Mr. Chairman. Tom, are  
7 there any models that are currently being used by  
8 the Department with respect to the development of  
9 this wastewater reuse authorization legislation  
10 from other states, other cities, in particular?

11 MR. LIVERS: Mr. Chairman, Mr. Whalen, I  
12 don't know that specifically, and John, perhaps  
13 Todd Teegarden would could answer that more  
14 directly. I know we're certainly looking at other  
15 states being much more aggressive on wastewater  
16 reuse. In terms of -- I expect that when it comes  
17 time to developing some of the actual rules, we'll  
18 probably look pretty heavily to those states, at  
19 least those that have maybe similar water and land  
20 interests to Montana. I expect once we begin  
21 drafting the legislation itself, we probably will  
22 look to what other states have done.

23 And just as a footnote, just yesterday,  
24 the Environmental Quality Council, the  
25 quasi-legislative body that among other things has

1 authority to approve our proposed legislation for  
2 predrafting -- they approved all five of these, so  
3 now we are moving into the bill drafting stage  
4 along with the legislative staff. So we'll be  
5 doing that in the next couple months, and I expect  
6 as we draft these bills, we'll be looking at what  
7 other states have done for guidance.

8 MR. WHALEN: Thank you, Mr. Chairman.  
9 Thanks, Tom.

10 MR. MIRES: Tom, this is Larry Mires.  
11 Is this something that then would be used in the  
12 Gallatin Outstanding Resource Water for their  
13 issue down there? Could this help them with their  
14 concern, like, say, snow making with wastewater in  
15 the winter time?

16 MR. LIVERS: Mr. Chairman, Mr. Mires, I  
17 think that's certainly possible. I think as we're  
18 -- Again, assuming that this is passed, and we're  
19 developing rules -- Well, also in the legislative  
20 stage -- I think we'll certainly make sure that  
21 appropriate snow making applications are allowed  
22 under this. So yes, I do think -- it may be -- I  
23 don't know for sure. It may be that we might have  
24 some authority already to do some of this work,  
25 but I think nonetheless, we'll make sure that as

1 long as appropriate treatment and safeguards are  
2 in place, that, yes, snow making would be an  
3 option allowed under this.

4 CHAIRMAN RUSSELL: Tom, then I would  
5 guess that you'd want to expand this outside of  
6 just municipal, because that would be a POTW, and  
7 it wouldn't be municipal then.

8 MR. NORTH: Mr. Chairman, I can talk  
9 about that a little bit. We had a discussion  
10 about this before the EQC meeting yesterday, which  
11 Tom wasn't here for, but the program has indicated  
12 that they would like to do that, and when the  
13 Director presented that to the EQC yesterday, that  
14 was the recommendation that came out. So we're  
15 anticipating it would be drafted to apply to all  
16 public sewage systems, not just municipal.

17 CHAIRMAN RUSSELL: That's great. There  
18 is a tremendous potential for even subdivisions  
19 that become districts to irrigate green belts  
20 twelve months out of the year. We do everything  
21 in a box, and we never think about how we could  
22 really expand this, and I think this is great  
23 legislation.

24 MR. LIVERS: Thanks, Mr. Chairman, and  
25 John, thanks for that update. That's great news.

1 So I'm assuming no other questions on this,  
2 although we can always pull back, of course. The  
3 piece of legislation, while it's not directly  
4 under the purview of the Board, obviously a lot of  
5 the rulemakings, and maybe even contested cases  
6 the Board gets involved with, interact with the  
7 TMDL process, the total maximum daily load  
8 process.

9           And just to make sure everyone is  
10 generally familiar, very quickly, TMDL, total  
11 maximum daily loads, are essentially watershed  
12 plans that are developed to restore water quality.  
13 We have a long history with this. This is another  
14 area where I think it took the Department and most  
15 states a long time really to come up to speed and  
16 develop effective programs for creating these  
17 TMDL's.

18           Montana was no exception, and faced a  
19 lawsuit several years ago that was pushing a Court  
20 deadline for preparing TMDL's. That Court ruling  
21 was based on our 2006 impaired waters list, the  
22 202(3)(d) list, and gave us a 15 year deadline  
23 that will come due in 2012.

24           What we have been doing for the past  
25 several years is we've really gotten this program

1 working effectively. We have shifted from an  
2 approach that deals with developing TMDL's in  
3 isolated stream segments and other water bodies,  
4 to more of a cohesive watershed approach. I think  
5 intuitively you can probably see the benefits of  
6 that kind of approach. There is both efficiency  
7 and quality gains in moving that direction.

8           A lot of the monitoring, a lot of the  
9 resource analysis, and a lot of the interested  
10 parties interaction comes with a watershed, and  
11 being able to deal with all water bodies in that  
12 watershed at one time, as opposed to grabbing a  
13 stream segment here, maybe two there, and going  
14 over to another watershed. This is just a lot  
15 better product, much more efficient, much more  
16 effective, the engagement of the parties and  
17 analysis of the situation.

18           So we have shifted that approach, and  
19 the only hitch in doing so is that both the  
20 current Federal Court settlement on the lawsuit I  
21 mentioned, and then State statute, driven by us  
22 completing the analysis of the roughly 430  
23 impaired reaches on our 2006 impaired waters list,  
24 which has frankly since been updated. So we can't  
25 do both. We can't both satisfy the conditions of

1 that lawsuit, and meet current State law, and  
2 shift to what is a longer term, much better, and  
3 more efficient approach.

4           So we're running two concurrent tracks  
5 to address this issue, and to try to make sure the  
6 Department is able to fully shift over to the  
7 watershed based approach. You'll also hear the  
8 term "list neutral," and that's meaning it's not  
9 driven by any one iteration of this list, and  
10 specifically the 2006 iteration.

11           So we've had extensive discussion with  
12 the Plaintiffs to petition Judge Molloy to  
13 re-examine this, and generally we're finding a lot  
14 of support. I think there is still interest that  
15 the Department is held to producing a similar  
16 quantity of analysis, but really for the most  
17 part, folks just wanted to see progress being  
18 made, and significant progress has been made  
19 recently. And I think the Plaintiffs in the  
20 lawsuit also recognize the value of this list  
21 neutral watershed based approach.

22           So we're optimistic that we'll be able  
23 to have that reconsidered, and it's obviously  
24 going to depend -- that piece is going to depend  
25 on Judge Molloy. But if we're to shift over, we



1 also have to address the statutory piece in this,  
2 and there is nothing in statute that prevents the  
3 watershed based approach, but again, we're held to  
4 delivering on the impaired waters on the 2006  
5 list.

6 So we're trying to make a shift there  
7 that would authorize the same quantity of work,  
8 but allow the 2006 list into the watershed based  
9 approach. So that's very briefly a description of  
10 what that would accomplish.

11 MR. MIRES: Tom, this is Larry Mires.  
12 In dealing with TMDL and the watersheds, is the  
13 Department working closely with DNRC? And the  
14 second part of it: Are the watershed councils  
15 involved in any of this discussion, so that we  
16 have legislation that everybody can work with?

17 MR. LIVERS: Mr. Chairman, Mr. Mires,  
18 I'll give a real brief response, but I think  
19 probably a lot more detail could come from one of  
20 the program representatives, maybe George  
21 Mathieus, Mark Bostrom, or someone else from that  
22 shop.

23 But essentially there has been a lot of  
24 communication on this whole TMDL program with  
25 local watershed groups throughout the process. I

1 think that's one of the reasons it was a little  
2 bit slow to get started, and by that, I'm not  
3 blaming the local groups, I'm just saying that  
4 kind of consensus building takes a lot of time.

5 I don't know specifically how much  
6 discussion there has been on the legislation  
7 itself, and I might defer that to someone else  
8 from the Department.

9 CHAIRMAN RUSSELL: George.

10 MR. MATHIEUS: Mr. Chairman, members of  
11 the Board, for the record, my name is George  
12 Mathieus, Administrator of the Planning Division  
13 of DEQ.

14 I don't have much to add to what Tom  
15 said, other than the whole point of the watershed  
16 approach was to engage stakeholders and other  
17 agencies. I think the key piece of it is really  
18 the implementation. We wanted to develop a  
19 program that just didn't become a book report that  
20 sat on a shelf, and integration of everything from  
21 a permitting program in this Department to the  
22 local watershed groups actually can make  
23 restoration occur on the ground was the whole  
24 premise behind the program.

25 As far as specifically needing that in

1 the legislation, that ability already exists under  
2 current statute, to my knowledge. Would you  
3 agree, John?

4 MR. NORTH: Ability for --

5 MR. MATHIEUS: To implement TMDLs.

6 MR. NORTH: To implement the TMDLs does,  
7 yes, on a watershed basis, it's just that we'd  
8 have to have all of the 1996 list done by 2012.

9 MR. MATHIEUS: That's the key point is  
10 that, as Tom alluded to, we're bound by a number  
11 based on a specific list, the 1996 list. The  
12 reality is we could jump all across the state and  
13 pick up these beans -- as we like to call them  
14 internally -- and really not get that more  
15 watershed approach implementation effect that we  
16 were trying to get. So subsequently we're picking  
17 up a watershed approach, maybe streams that were  
18 listed in 1996, 1998, 2000, 2002, maybe 2008, and  
19 doing a more holistic approach, and that's the  
20 benefit.

21 And we've spent a lot of time with the  
22 stakeholders, with other agencies. There is an  
23 advisory group called the State TMDL Advisory  
24 Group that we keep apprised of this.

25 So I think it's just been a great

1 success story, and we have that support. Does  
2 that answer the question?

3 CHAIRMAN RUSSELL: Thanks, George.  
4 Moving on. Tom.

5 MR. LIVERS: The next one on your sheet  
6 is updated fiscal requirements, and basically that  
7 deals with our State Super Fund Program, the CECRA  
8 program, and that's for cleanup of sites that  
9 merit cleanup, but don't fit the national priority  
10 list status to be included under Federal Super  
11 Fund cleanup activities. Really this is kind of a  
12 mechanical cash management queue, although some  
13 parties may not see it that way, and there may be  
14 some controversy associated with this.

15 But it's in part by a legislative  
16 performance audit received on the program about a  
17 year or two ago, I guess, and it is just -- we've  
18 been working to improve our cash management of  
19 this program. Essentially we receive a portion of  
20 resource indemnity tax funds to front end some of  
21 these cleanups, and then we do cost recovery with  
22 responsible parties, so that ultimately those  
23 responsible for either the pollution or at least  
24 the current landowners do end up footing the bill  
25 or the bulk of the bill.

1           We have been billing on a variable  
2 basis, variable time basis, and as part of our  
3 push to have tighter cost recovery controls and be  
4 able to develop more money through and get more  
5 cleanup quicker, we're asking for some teeth to  
6 require thirty day reimbursement when it makes  
7 sense. It just lets us get more done faster, and  
8 that was one of the recommendations of the  
9 performance audit.

10           Any questions on that one, Mr. Chairman?

11           CHAIRMAN RUSSELL: Questions?

12           (No response)

13           CHAIRMAN RUSSELL: None.

14           MR. LIVERS: Thank you. The information  
15 program revisions, this also is prompted by the  
16 legislative performance audit. Our Department has  
17 been involved in overseeing and financing cost  
18 effective energy and water use retrofits to State  
19 buildings for years. We were involved in it when  
20 that function was still part of DNRC, and then  
21 when DEQ was formed in the mid 1990s, that  
22 function came over to DEQ along with some other  
23 energy programs, and we've done a variety of  
24 mechanisms for financing that.

25           But essentially this is really again

1 kind of a mechanical change that would make sure  
2 that what we're doing lines up with law, or  
3 actually in this case the law lines up with what  
4 we're doing, and it has to do with how we account  
5 for savings in terms of repayment.

6           The original program language  
7 legislation was ambiguous on whether we were  
8 supposed to continue to recover costs of the  
9 useful life of the improvements, or until the  
10 amount of the original investment was repaid; and  
11 this is going to specify that it's the latter,  
12 that we will cost recover from those projects  
13 until the original investment is repaid, and that  
14 aligns it with the current approach in this  
15 program, lends some of the older existing projects  
16 with that approach.

17           So that's all on that. I can certainly  
18 answer questions on either that legislation or  
19 that --

20           CHAIRMAN RUSSELL: Any questions?

21           (No response)

22           CHAIRMAN RUSSELL: Why don't we move on  
23 to the last one, Tom.

24           MR. LIVERS: Okay. Thank you, Mr.  
25 Chairman. Post mining revegetation period for

1 strip and underground mine reclamation. There was  
2 some changes made by the Montana Legislature in  
3 the last session to the Montana Strip and  
4 Underground Mine Reclamation Act. Basically the  
5 act requires -- and it's aligned with Federal law  
6 -- it requires essentially kind of a ten year test  
7 period before you can ensure that certain  
8 reclamation activities are successful and then can  
9 be considered completed.

10 House Bill 278 from the last session,  
11 the 2009 Legislature, exempted certain things from  
12 that -- pond diversions, stock piles, access  
13 roads, some of those things -- and I think there  
14 were good reasons for doing that.

15 However, the way that program was set  
16 up, it's delegated to the State from the Office of  
17 Surface Mining within the Department of the  
18 Interior. They're the ones who regulate the  
19 Federal Act, the Federal Surface Mining Control  
20 and Reclamation Act, and they are charged with  
21 ensuring that State programs are consistent with  
22 and no less stringent than the Federal  
23 requirements.

24 When the OSM, the Office of Surface  
25 Mining, reviewed the changes made during the last

1 session, they concluded that a couple of the  
2 provisions that were changed are less stringent  
3 than the Federal act, and we've had ongoing  
4 negotiations with them. We've narrowed their  
5 concerns, and ultimately agreement with OSM that  
6 if we can amend our law to revert those changes,  
7 just those couple of changes they consider less  
8 stringent than the remaining ones that were  
9 changed last session will stay in place, and will  
10 be consistent, and receive Federal approval.

11 So in our mind, it's a cleanup piece of  
12 legislation. There might be some controversy by  
13 some legislators looking at State authority versus  
14 Federal authority, but that's essentially what's  
15 happening there.

16 And we have checked. The Board does  
17 adopt coal regulations. This will not impact any  
18 of the Board's rulemaking. And that's it, Mr.  
19 Chairman.

20 CHAIRMAN RUSSELL: Questions for Tom?

21 MR. WHALEN: Mr. Chairman. Tom, when  
22 this legislation was initially proposed by whoever  
23 sponsored the bill, did that legislator come to  
24 the Department and verify that it would meet  
25 approval with OSM prior to introduction into the



1 Legislature?

2 MR. LIVERS: Mr. Chairman, Mr. Whalen.  
3 I don't know the answer to that question, and I  
4 can look it up real quickly. I want to say it was  
5 Representative McChesney, but I don't know for  
6 sure, so I probably shouldn't have said that. But  
7 I don't know.

8 John, do you have any background on this  
9 one?

10 MR. NORTH: Yes. Mr. Chairman, Mr.  
11 Whalen. They did come to the Department, and it  
12 appeared to us that the Office of Surface Mining  
13 had approved very similar language in the South  
14 Dakota program, and it was on that basis that we  
15 concluded that it would be okay.

16 And it turns out since that time we have  
17 determined that OSM adopted a policy back in 1983,  
18 and the policy laid out what could and couldn't be  
19 exempted, and I'm not sure whether they did not  
20 apply it to the South Dakota program, or whether  
21 unbeknownst to us for some of the nuances in their  
22 language the South Dakota program did comply.

23 But at the time it was the impression of  
24 everyone involved that House Bill 278, everything  
25 in it would pass muster, and it was only after it

1 was passed, and the Legislature went home, and we  
2 submitted this to OSM for approval that probably  
3 they got their lawyers working on it, and they  
4 determined that part of it wouldn't.

5 MR. WHALEN: Thank you.

6 CHAIRMAN RUSSELL: Any other questions?

7 MR. ANDERSON: One, Joe. This is Larry  
8 Anderson. Are you all monitoring the interim  
9 committees for bill requests, and things such as  
10 that, to deal with issues that come up in that  
11 context?

12 MR. LIVERS: Mr. Chairman, Mr. Anderson.  
13 Yes, we are. Occasionally something might come  
14 out of a committee that we don't normally work  
15 with, but certainly on the Resource Interim  
16 Committees, we have a pretty strong presence  
17 there. We're involved with the Water Policy  
18 Interim Committee very closely; Energy,  
19 Telecommunications. Occasionally something might  
20 come out of, say, local government that we don't  
21 see coming. And I can't say that we've always  
22 caught 100 percent of them, but we really have a  
23 pretty good sense of what's coming in, and try to  
24 weigh in when we're given the opportunity.

25 MR. ANDERSON: Thank you.

1 CHAIRMAN RUSSELL: Any other questions?

2 (No response)

3 CHAIRMAN RUSSELL: Seeing none, let's  
4 move on to the next item on the agenda. And we  
5 are in the process of rule adoption for amending  
6 ARM 17.50.410 Section 7. Is that right? All  
7 right. So, John.

8 MR. NORTH: Mr. Chairman, Rick Thompson  
9 from the Solid Waste Program will make a  
10 presentation on this.

11 MR. THOMPSON: Chairman Russell, members  
12 of the committee or the Board, good morning. My  
13 name is Rick Thompson, and I'm the Section  
14 Supervisor of the Solid Waste Management Section  
15 in the Waste and Underground Tank Management  
16 Bureau. I'm here to represent the Department  
17 regarding action on the solid waste rulemaking  
18 concerning Administrative Rules Title 17 Chapter  
19 50 Subchapters 403 and 410. These are in the  
20 solid waste fee rules.

21 On April 15, 2010, the Secretary of  
22 State published MAR Notice 17-305 pertaining to  
23 the proposed amendment of ARM 17.50.403 and 410.  
24 The Department recently revised and adopted solid  
25 waste rules ARM 17.50 Subchapter 5, which included

1 the repeal of 17.50.503. ARM 17.50.403 and 410  
2 contained cross-references to the repealed  
3 17.50.503. That's an awful lot of numbers there,  
4 so I hope we're straight on those.

5 The proposed amendments would correct  
6 outdated citations to the hazardous waste rules,  
7 language concerning the suspension of quarterly  
8 solid waste management system fees after a  
9 facility is placed in interim closure status, and  
10 would make minor editorial changes that will not  
11 really have any impact on the new rules. So the  
12 Montana Code Annotated Title 75 Chapter 10 Part  
13 106 Subpart 2 provides that the Board shall amend  
14 solid waste fee rules, which would include Title  
15 17, ARM 17.50.403 and 410.

16 Because these proposed amendments are  
17 basically clerical in nature, and no public  
18 comments have been received to date, we're asking  
19 that the Board adopt the amendments as proposed,  
20 and as are proposed in the MAR notice published on  
21 April 15, 2010.

22 CHAIRMAN RUSSELL: Thanks, Rick.

23 Questions for Rick?

24 (No response)

25 CHAIRMAN RUSSELL: All right. Before we

1 take action, is there anyone in the audience that  
2 would like to speak to this matter before the  
3 Board takes action?

4 MR. LIVERS: Thank you, Mr. Chairman.

5 CHAIRMAN RUSSELL: I don't see anyone  
6 jumping up. Therefore, I would entertain a motion  
7 to adopt the rule as proposed, and also adopt the  
8 521 and 311 analysis.

9 MR. WHALEN: So moved.

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

12 MR. MILLER: I'll second.

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

15 (No response)

16 CHAIRMAN RUSSELL: Seeing none, all  
17 those in favor, signify by saying aye.

18 (Response)

19 CHAIRMAN RUSSELL: Opposed.

20 (No response)

21 CHAIRMAN RUSSELL: Thank you. Motion  
22 carries unanimously. We'll go to the next one  
23 then.

24 The Board is being requested to adopt  
25 amendments to ARM Title 17.38 subchapter two. Mr.

1 Pizzini.

2 MR. PIZZINI: Good morning, Chairman  
3 Russell, members of the Board. For the record,  
4 Eugene Pizzini, and I'm the Rules Expert in the  
5 Public Water Supply Section.

6 On March 19, 2010, this Board proposed  
7 or initiated an amendment to the Public Water  
8 Supply rules, basically dealing with changing the  
9 adoption by reference to reference the newer  
10 version of the Code of Federal Regulations,  
11 bringing the Department requirements into  
12 conformance with Federal requirements, and  
13 removing confusing language in our existing rules.

14 On May 11, 2010, Katherine Orr conducted  
15 a public hearing. Notice was sent to all public  
16 water supply owners, operators, and county  
17 sanitarians. No comments were received.

18 These proposed amendments do not add any  
19 new significant requirements, and in fact reduce  
20 some of the requirements that are in place today.  
21 In addition, they remove potential areas of  
22 confusion for the regulated public, and therefore  
23 should reduce the number of violations that we  
24 have.

25 Therefore, the Department recommends

1 adoption of the proposed amendments as set forth  
2 in the notice of public hearing on the proposed  
3 amendments, and I can answer any questions you may  
4 have.

5 CHAIRMAN RUSSELL: Thanks, Gene.

6 Questions for Gene?

7 (No response)

8 CHAIRMAN RUSSELL: Seeing none, is there  
9 anyone in the audience that would like to speak to  
10 this matter before the Board takes action?

11 (No response)

12 CHAIRMAN RUSSELL: Seeing none, I will  
13 entertain a motion to adopt the amendments as  
14 submitted, and approve the Presiding Officer's  
15 report, as well as the 521 and 311 analysis.

16 MS. KAISER: So moved.

17 CHAIRMAN RUSSELL: It's been moved by  
18 Heidi.

19 MR. MIRES: I second.

20 CHAIRMAN RUSSELL: It's been seconded by  
21 Larry. Any further discussion?

22 MR. NORTH: Larry Mires.

23 CHAIRMAN RUSSELL: Larry Mires. Any  
24 further discussion?

25 (No response)

1           CHAIRMAN RUSSELL: Seeing 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 last item in this area is a request to adopt  
8 proposed amendments to the Department's Circular  
9 DEQ-7, and incorporate the updated water quality  
10 standards into the Circular by amending 17.30  
11 subchapters 5, 6, 7, and 10, and there is some  
12 more, but I'm not going to read any further.

13           MR. NORTH: Rod McNeil will make a  
14 presentation for the Department.

15           MR. McNEIL: Mr. Chairman, members of  
16 the Board, my name is Rod McNeil. I'm with the  
17 Water Quality Standards section as an aquatic  
18 ecologist.

19           We have submitted these proposed rule  
20 modifications to you in April, and we submitted  
21 these proposals to you in March, and the public  
22 comment period opened on April 15th. It was to be  
23 closed on June 1st, and was extended by 15 days as  
24 we were running the comment period on the proposed  
25 rule changes contemporaneous with the triennial



1 review. The extension extended through the 16th  
2 of June.

3 We received no comments relative to the  
4 proposed rule changes, proposed for DEQ-7. The  
5 primary goal of these changes was to increase or  
6 to add certain water quality standards for DEQ-7,  
7 and incorporate DEQ-7 changes into the rule cited  
8 in the package that was submitted to you. Changes  
9 include adoption of new rules, amending existing  
10 rules, and clarifying existing language.

11 We received one letter of support from  
12 the EPA recommending that the Board adopt the  
13 proposed changes to DEQ-7 on the 7th of May, and  
14 are now requesting that the Board adopt the  
15 proposed changes, and the Department supports the  
16 rules as recommended.

17 CHAIRMAN RUSSELL: All right. Thank  
18 you. Questions for Rod?

19 MR. MIRES: Mr. McNeil, does EPA  
20 currently have standards that these rules would be  
21 equal to, or are these rules more stringent than  
22 current standards that EPA currently has?

23 MR. McNEIL: Mr. Chairman, Mr. Mires.  
24 These rules are no more stringent than the  
25 existing standards that EPA has. Some of the

1 proposed changes involve the development of health  
2 advisories for human health for pesticides where  
3 there are no existing standards within the EPA  
4 rules. Those standards are developed in  
5 conjunction with working with the toxicologists at  
6 the EPA in creating those advisories.

7 MR. MIRES: I guess my concern comes in  
8 the fact that June 4th, some of the water  
9 irrigators around have expressed concerns over  
10 EPA's ruling on aquatic life, rulings that are  
11 coming out, and I notice that the Idaho delegation  
12 has taken up very strong opposition to what EPA is  
13 requiring because some of the rules are going to  
14 very negatively impact the irrigation or the  
15 agricultural community. And primarily they're  
16 addressing aquatic herbicides in the irrigation  
17 districts.

18 How is our rulemaking here going to line  
19 up with that?

20 MR. McNEIL: Our proposed rulemaking  
21 would coincide with the EPA recommendations. As  
22 far as aquatic life criteria goes, we have the EPA  
23 304(a) criteria on acrilene, and we are following  
24 their recommendation exactly in terms of what we  
25 are proposing as a standard for acrilene. There

1 are also a series of six other aquatic life  
2 standards that we are modifying. They already  
3 existed in our State regulations, but we are  
4 modifying it to more closely follow the EPA 304(a)  
5 criteria guidance on aquatic life.

6 MR. MIRES: So if the EPA rules are not  
7 enacted, or if they're stopped, that they're  
8 currently proposing, can we enact this rulemaking  
9 now? We would then in essence have more stringent  
10 rules than EPA currently has.

11 MR. McNEIL: No, sir, I don't think --  
12 perhaps I was unclear. We are adopting already  
13 existing criteria from the EPA. These are not  
14 proposed standards from the EPA. These are  
15 existing criteria that have already been approved,  
16 and are existing in Federal law. We're simply  
17 adopting those same standards.

18 MR. NORTH: Mr. Chairman, Mr. Mires. I  
19 think perhaps your question touches more on  
20 permitting than it does on standards, so with the  
21 Board's permission, I think Jenny Chambers could  
22 shed some light on this issue.

23 MS. CHAMBERS: Mr. Chairman, Mr. Mires.  
24 Again, Jenny Chambers, Chief of the Water  
25 Protection Bureau.

1           I believe some of the concerns you're  
2 hearing in regards to the agricultural industry  
3 and irrigation ditch of application of pesticides,  
4 especially in Idaho directly, is that there has  
5 been a District Court ruling by the District Court  
6 on requirements to have Montana pollutant  
7 discharge elimination systems for application of  
8 pesticides on or near water.

9           Idaho isn't a delegated MPDES program.  
10 Therefore, they're going to meet the requirements  
11 strictly imposed by them by the general permit  
12 provisions by EPA.

13           The rulemaking that Rod proposed to you  
14 as a Board to apply water quality standards won't  
15 be impacted by the general permit. Currently the  
16 way EPA has drafted that general permit, it's a  
17 technology based general permit provisions to  
18 establish and maintain best management practices  
19 from applicators on applying the pesticides on the  
20 water or near the waters.

21           We're working closely right now with the  
22 Department of Agriculture to move forward in  
23 development of our general permit on pesticide  
24 applicators to make sure that we're not imposing  
25 more restrictive measures than necessary to meet

1 the Federal requirements, or impose regulations as  
2 far as water quality standards or increased  
3 monitoring that's different than what they're  
4 currently doing under FIFRA, the Federal  
5 Insecticide Rodenticide Act that's administrated  
6 by the Department of Agriculture.

7           So I will be before you later probably  
8 within the next couple months, maybe the December  
9 session, to address maybe our fee rule process as  
10 we move forward with this general permit on  
11 pesticide applicators, but currently there won't  
12 be any water quality monitoring or impact as it's  
13 proposed by EPA now, based upon what Rod proposed  
14 to you.

15           MR. MIRES: That's better.

16           CHAIRMAN RUSSELL: Are you better now?

17           MR. MIRES: A little bit.

18           MR. WHALEN: Mr. Chairman, I have a  
19 couple questions for Mr. McNeil. Mr. McNeil, do I  
20 understand correctly that the Department is  
21 proposing that the Board adopt changes to all  
22 State waters?

23           MR. McNEIL: Mr. Chairman, Mr. Whalen.  
24 Yes, that is correct. This would apply to all  
25 State waters.

1           MR. WHALEN: Thank you. The second  
2 question is: There is a movement here, it looks  
3 like, to exempt endosulfan sulfate from aquatic  
4 life standards criteria because of what Mr. Mires  
5 had referred to with respect to more stringent  
6 application of standards in the state of Montana  
7 versus what EPA is currently enforcing. Can you  
8 speak to this issue of endosulfan sulfate a little  
9 bit?

10           MR. McNEIL: Yes, Mr. Chairman, Mr.  
11 Whalen. Endosulfan and sulfate are two of the  
12 pesticides that were under consideration in the  
13 rule changes. The issue is that these are health  
14 advisories that are developed in compliance with  
15 the Montana Groundwater Protection Act --  
16 Agricultural Groundwater Protection Act. I'm  
17 sorry. These compounds have been detected in  
18 groundwater supplies, and therefore we are  
19 required to develop a standard for that compound.

20           The standard is developed by researching  
21 the literature on endosulfan and sulfate, and then  
22 working with EPA's toxicologists to develop a  
23 human health advisory specific to those compounds.  
24 So there is a requirement under state law to  
25 develop those standards. They are not more

1 stringent than the Federal standards because there  
2 are no Federal standards. It is developed as a  
3 health advisory in conjunction with EPA.

4 MR. WHALEN: Just a quick followup.  
5 With respect to the standards issue and health  
6 advisories, you are an aquatic life specialist,  
7 correct?

8 MR. McNEIL: Yes.

9 MR. WHALEN: These health advisories are  
10 human health advisories.

11 MR. McNEIL: That's correct.

12 MR. WHALEN: As opposed to aquatic life  
13 health advisories.

14 MR. McNEIL: That's correct.

15 MR. WHALEN: That answers my question.

16 CHAIRMAN RUSSELL: Further questions?

17 (No response)

18 CHAIRMAN RUSSELL: Thank you. Is there  
19 anyone in the audience that wants to speak to this  
20 matter before the Board takes action?

21 (No response)

22 CHAIRMAN RUSSELL: With that, I will  
23 entertain a motion to adopt the amendments as  
24 proposed, accept the Presiding Officer's report,  
25 the 521 and 311 analysis, and the Department's

1 responses to comments.

2 MR. WHALEN: Just for clarification, are  
3 you entertaining a motion to adopt application to  
4 all State waters, standards to all State waters,  
5 groundwater and surface waters?

6 CHAIRMAN RUSSELL: As they apply. As  
7 DEQ-7 applies to State waters.

8 MR. WHALEN: I'll make that motion.

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

11 MS. KAISER: Second.

12 CHAIRMAN RUSSELL: It's been seconded by  
13 Heidi. Further discussion?

14 (No response)

15 CHAIRMAN RUSSELL: Seeing none, all  
16 those in favor, signify by saying aye.

17 (Response)

18 CHAIRMAN RUSSELL: Opposed.

19 (No response)

20 CHAIRMAN RUSSELL: Motion carries  
21 unanimously. We're going to take a quick break.

22 (Recess taken)

23 CHAIRMAN RUSSELL: Let's go ahead and  
24 get started. The next item on the agenda is new  
25 contested cases on appeal. The first one is in



1 the matter of appeal and request for hearing by  
2 Roseburg Forest Products. Katherine.

3 MS. ORR: Mr. Chairman, members of the  
4 Board, this is a case involving Roseburg Forest  
5 Products Company, a particle board mill in  
6 Missoula. It is an appeal of a groundwater  
7 pollution control permit. And you saw some of the  
8 challenges in the file: No testing for oil and  
9 grease, no continuous flow monitor, quarterly  
10 testing for pH and TDS. Most of these permit  
11 challenges seem to challenge some of the  
12 constituent levels and the monitoring frequency,  
13 and this is no different.

14 CHAIRMAN RUSSELL: Thank you. With  
15 that, we can entertain a motion to have Katherine  
16 be appointed as the permanent Hearings Examiner  
17 for this, or we can hear it ourselves. I'll  
18 entertain a motion either way.

19 MR. WHALEN: I would move the former.

20 CHAIRMAN RUSSELL: That would be to  
21 appoint Katherine the Hearings Examiner. Is there  
22 a second?

23 MR. MILLER: I'll second.

24 CHAIRMAN RUSSELL: That was moved by  
25 Joe, and seconded by Marv. Any further

1 discussion?

2 (No response)

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

5 (Response)

6 CHAIRMAN RUSSELL: Opposed.

7 (No response)

8 MS. ORR: Mr. Chairman, the next case is  
9 in the matter of violations of the Clean Air Act  
10 of Montana by Todd Michael Mihalko, Jefferson  
11 County, a case nearby. This involves an open burn  
12 in one day with no ventilation forecast, or  
13 completion of the burning within one day, and it  
14 happened in closed winter time open burning  
15 season. The penalty requested is \$4,800.

16 CHAIRMAN RUSSELL: It must have been a  
17 pretty good burn. So when did it occur? Just  
18 during those closed winter months, December,  
19 January, February?

20 MS. ORR: Right, and I think the notice  
21 of violation mentions finding piles of burn  
22 several days thereafter.

23 CHAIRMAN RUSSELL: All right. Once  
24 again, since Katherine knows so much about this, I  
25 will entertain a motion to appoint Katherine the

1 permanent Hearings Examiner.

2 MR. MIRES: So moved.

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

5 MR. MILLER: I'll second.

6 CHAIRMAN RUSSELL: It's been seconded by  
7 Marv. All those in favor, signify by saying aye.

8 (Response)

9 CHAIRMAN RUSSELL: All right.

10 MS. ORR: And the final action, there  
11 are a number of cases. This is the stack right  
12 here. You can see visual evidence of progress.

13 The first case involved a notice of  
14 violation that was filed in 2005, and it involved  
15 the Paymaster Mine Adit here in Lewis and Clark  
16 County. And there was a request -- or the  
17 violation cited was a failure to pay permit fees,  
18 and then there were permit fees running with  
19 interest. There was an order staying proceedings  
20 because of the ASARCO bankruptcy in January of  
21 2006, and finally there has been a stipulation to  
22 dismiss under 41(a), and that's what's before you  
23 right now.

24 CHAIRMAN RUSSELL: Any other questions  
25 before we move on this?

1 (No response)

2 CHAIRMAN RUSSELL: Seeing none, I will  
3 entertain a motion to authorize the Board Chair to  
4 sign the order of dismissal regarding this matter.

5 MS. SHROPSHIRE: So moved.

6 CHAIRMAN RUSSELL: It's been moved by  
7 Robin. Is there a second?

8 MR. MILLER: I'll second.

9 CHAIRMAN RUSSELL: It's been seconded by  
10 Marv. Further discussion?

11 MR. ANDERSON: Let me ask a question  
12 more generally, Katherine. I'm sitting here  
13 reflecting on the Massey Minerals problem, and  
14 that occurred in West Virginia. And I've read  
15 quite a bit about one of the tactics of major  
16 industrial polluters of appealing citations to a  
17 point where they exhaust administrative agencies.  
18 Is that an issue here? Do you see that at all?

19 MS. ORR: Mr. Chairman, Mr. Anderson.  
20 It would be hard to discern this. You mean the  
21 delay here?

22 MR. ANDERSON: Right.

23 MS. ORR: It seems like the delay was --  
24 This case was eclipsed by the bankruptcy  
25 proceeding for years and years.

1 MR. ANDERSON: So a stay?

2 MS. ORR: Yes.

3 MR. ANDERSON: But otherwise do you see  
4 that?

5 MS. ORR: That's hard for me to answer.  
6 I can't tell from the elements of the file.

7 MR. ANDERSON: Okay. No further  
8 questions.

9 CHAIRMAN RUSSELL: Any other questions?

10 (No response)

11 CHAIRMAN RUSSELL: We do have a motion  
12 and a second. All those in favor, signify by  
13 saying aye.

14 (Response)

15 CHAIRMAN RUSSELL: Opposed.

16 (No response)

17 CHAIRMAN RUSSELL: Motion carries. Next  
18 is the St. Mary's Enterprise, Inc.

19 MS. ORR: Mr. Chairman, members of the  
20 Board. This involves a public water supply  
21 system, a supplier of water, a transient  
22 non-community water system; and the violations  
23 cited in the Notice of Violation were failure to  
24 monitor for total coliform bacteria, failure to  
25 provide public notification of the monitoring

1 violations, failure to report the monitoring  
2 violations. The penalty initially requested was  
3 \$23,000, and this is also a 41(a)(1) dismissal.

4 CHAIRMAN RUSSELL: Questions before we  
5 go?

6 (No response)

7 CHAIRMAN RUSSELL: Seeing none, I will  
8 entertain a motion to authorize the Board Chair to  
9 sign the order of dismissal for Case No. BER  
10 2009-04-PWS.

11 MR. MIRES: So moved.

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

14 MS. KAISER: I'll second.

15 CHAIRMAN RUSSELL: It's been seconded by  
16 Heidi. Discussion?

17 (No response)

18 CHAIRMAN RUSSELL: Seeing none, all  
19 those in favor, signify by saying aye.

20 (Response)

21 CHAIRMAN RUSSELL: Opposed.

22 (No response)

23 CHAIRMAN RUSSELL: Motion carries. The  
24 next item is another water quality, Fidelity.  
25 Katherine.

1 MS. ORR: Mr. Chairman, members of the  
2 Board. This involved the Department's denial of a  
3 request for modification to Fidelity's MPDES  
4 permit, and there was an appeal from the  
5 Department's decision on November 16th, 2009, and  
6 the parties apparently settled what differences  
7 they had, and have brought a 41(a) dismissal in  
8 front of the Board.

9 CHAIRMAN RUSSELL: I have the  
10 stipulation for dismissal, but I don't have an  
11 order, so there must be one prepared but not in  
12 our packet.

13 MS. ORR: Okay. I'll get with Misty and  
14 make sure you have that.

15 CHAIRMAN RUSSELL: So even though I  
16 don't have an order, I would ask for a motion to  
17 authorize the Board Chair to sign that order when  
18 it is in front of me.

19 MR. ANDERSON: So moved.

20 CHAIRMAN RUSSELL: It's been moved by  
21 Larry Anderson.

22 MR. MILLER: Second.

23 CHAIRMAN RUSSELL: It's been seconded by  
24 Marv. Further discussion?

25 (No response)

1           CHAIRMAN RUSSELL: Seeing 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 one, AquaFlo.

8           MS. ORR: AquaFlo, Mr. Chairman, members  
9 of the Board, is a case involving a challenge to a  
10 Department MPDES or groundwater pollution control  
11 system permit that was issued on December 14th,  
12 2009. Some of the challenges were total nitrogen,  
13 total nitrogen load, reduction, components  
14 regarding nondegradation, and monthly compliance  
15 and reporting requirements. And the parties  
16 apparently reached agreement, and there is a 41(a)  
17 dismissal before the Board again.

18           CHAIRMAN RUSSELL: I have a stipulation.  
19 I don't have the order, but I may have. I will  
20 get one, I'm sure.

21           MS. ORR: Yes.

22           CHAIRMAN RUSSELL: So when I have an  
23 order in front of me, I will need an authorization  
24 for the Chair to sign that said order on BER  
25 2010-03-WQ.



1 MR. MILLER: I so move.

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

4 MR. WHALEN: Second.

5 CHAIRMAN RUSSELL: It's been seconded by  
6 Joe. Further discussion?

7 (No response)

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

10 (Response)

11 CHAIRMAN RUSSELL: Opposed.

12 (No response)

13 CHAIRMAN RUSSELL: The next item on the  
14 agenda is in the matter of violations of the  
15 public water supply laws by Red Cliff Estates  
16 Homeowners Association.

17 MS. ORR: Mr. Chairman, members of the  
18 Board, this is a public water supply case where  
19 the allegations were failure to monitor for lead  
20 and copper during the monitoring period; failure  
21 to notify the Department of monitoring violations.  
22 There was a notice of violation issued on February  
23 11th of this year, and then an amendment to that  
24 on February 25th of this year, and the remaining  
25 penalty from the suspended penalties is \$179. And

1 you have a stipulation for dismissal before you.

2 CHAIRMAN RUSSELL: I also have an order  
3 for dismissal. With that, any questions for  
4 Katherine before we move on this?

5 (No response)

6 CHAIRMAN RUSSELL: Seeing no questions,  
7 I will entertain a motion to authorize the Board  
8 Chair to sign the order of dismissal for Case No.  
9 BER 2010-05-PWS.

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

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

13 MR. ANDERSON: Second.

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

16 (No response)

17 CHAIRMAN RUSSELL: Seeing and hearing  
18 none, all those in favor, signify by saying aye.

19 (Response)

20 CHAIRMAN RUSSELL: Opposed.

21 (No response)

22 CHAIRMAN RUSSELL: Motion carries. The  
23 next one is Citizens Awareness Network, Women's  
24 Voices of the Earth, Thompson River CO-Gen.

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

1 Board. You will recall this case. It was  
2 appealed to District Court, and then the Montana  
3 Supreme Court, on the issue of the Hearing  
4 Examiner's denial of a motion to amend, and it was  
5 remanded to the District Court, and ultimately  
6 through the Board to the Hearing Officer. And the  
7 parties have reached an agreement, and you have a  
8 dismissal before you. I have that order that I  
9 wrote for you, and I will give that to you.

10 CHAIRMAN RUSSELL: All right. A little  
11 different process here. Any questions on that?

12 (No response)

13 CHAIRMAN RUSSELL: Seeing none, I will  
14 entertain a motion to have the Chairman sign the  
15 order of dismissal for BER Case 2006-18-AQ.

16 MR. MIRES: So moved.

17 CHAIRMAN RUSSELL: It's been moved by  
18 Larry Mires.

19 MR. MILLER: Second.

20 CHAIRMAN RUSSELL: It's been seconded by  
21 Marv. Further discussion?

22 (No response)

23 CHAIRMAN RUSSELL: Seeing none, all  
24 those in favor, signify by saying aye.

25 (Response)

1 CHAIRMAN RUSSELL: Opposed.

2 (No response)

3 CHAIRMAN RUSSELL: The last one is in  
4 the matter of violations of public water supply  
5 laws by Jason Ellsworth in Ravalli County.

6 MS. ORR: Mr. Chairman, members of the  
7 Board. This involves a public water supply  
8 system, a supplier of water, non-transient,  
9 non-community water system, and the allegations in  
10 the administrative order were operation of a  
11 public water supply system without Department  
12 approval, no plans and specs submitted before  
13 operation, failure to retain a certified operator,  
14 failure to monitor for copper and lead, total  
15 coliform bacteria, and failure to report  
16 violations. The penalty initially requested was  
17 \$9,598, and there were a significant list of  
18 corrective actions requested.

19 CHAIRMAN RUSSELL: Was the fee actually  
20 modified? Was that the fee that was finally  
21 imposed on them?

22 MS. ORR: I don't know.

23 CHAIRMAN RUSSELL: I can't ask any more  
24 because it's a 41(a). Any other questions for  
25 Katherine?

1 (No response)

2 CHAIRMAN RUSSELL: Seeing none, I will  
3 entertain a motion for the Board Chair to sign the  
4 order of dismissal for Case No. BER 2010-01-PWS.

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

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

8 MR. ANDERSON: Second.

9 CHAIRMAN RUSSELL: It's been seconded by  
10 Larry Anderson. Further discussion?

11 (No response)

12 CHAIRMAN RUSSELL: Seeing none, all  
13 those in favor, signify by saying aye.

14 (Response)

15 CHAIRMAN RUSSELL: Opposed.

16 (No response)

17 CHAIRMAN RUSSELL: Motion carries. The  
18 next item, I've got -- Tom is still on, but I know  
19 we're going to take this up, but we're not going  
20 to take any action on the Gallatin.

21 MR. NORTH: Mr. Chairman, if I might,  
22 the statutes that govern local governments and the  
23 Montana Water Quality Act contain provisions that  
24 allow for creation of local water quality  
25 districts, and the Water Quality Act provides that

1 before one can be created, the Board has to hold a  
2 hearing and approve it; and then a statute further  
3 provides that if there is any modification  
4 extension of the district, that has to come back  
5 to the Board for approval.

6           And the Gallatin Local Water Quality  
7 District is proposing to extend its boundaries  
8 quite significantly, so they intended to come to  
9 the Board for approval at this meeting. However,  
10 earlier this week, we got a call from the District  
11 indicating that they had not completed their work  
12 plan yet for this expansion, and they therefore  
13 asked that the Board defer this until probably the  
14 October meeting. So there is no one here from the  
15 Board.

16           We are prepared, if the Board is  
17 interested, to give you a general overview of the  
18 water quality district laws and the Board's role;  
19 or if the Board would prefer, we can wait until  
20 October and do that in conjunction with the  
21 petition to approve it. That's your discretion.  
22 Todd Teegarden is here and is available.

23           CHAIRMAN RUSSELL: I know, and maybe  
24 some others know a little bit about them, but it  
25 would be better to brief now. Everyone will still

1 be seated unless they decide not to be. So why  
2 don't we go ahead and do that. Todd.

3 MS. SHROPSHIRE: Chairman Russell, I  
4 didn't want to interrupt the presentation, but  
5 I'll probably hang up midway through. But thanks.

6 CHAIRMAN RUSSELL: Thanks, Robin.  
7 Thanks for participating.

8 MR. TEEGARDEN: Mr. Chairman, members of  
9 the Board, for the record, Todd Teegarden. I'm  
10 Bureau Chief of the Technical Financial Assistance  
11 Division here at DEQ. And one of the sections in  
12 our bureau is the Source Water Protection Section  
13 which does source water protection plans, looks at  
14 groundwater issues, public health issues, and also  
15 is involved with oversight of these local water  
16 quality districts.

17 And as John mentioned, DEQ is required  
18 by statute 75-5-311 to monitor the implementation  
19 of local water quality district programs, and to  
20 ensure that they are adequate to protect surface  
21 and groundwater and local programs consistent with  
22 Title 75 Chapter 5.

23 Local water quality districts range from  
24 regulatory type of districts, of which Missoula  
25 County was organized; and there are four local

1 water quality districts in the State of Montana  
2 currently. Again, as I mentioned, Missoula County  
3 is regulatory; then there is also water quality  
4 districts that are formed more for data  
5 collection, monitoring, public education programs,  
6 and those type of outreach efforts. There's been  
7 three of those formed in Lewis & Clark County,  
8 Silver Bow County, and Gallatin County.

9           As John mentioned, Gallatin County has  
10 received some -- Well, they were established in  
11 1997 by the Board's approval through the County  
12 Commissioners, and it includes the communities of  
13 Bozeman, Belgrade, and Manhattan. Since then,  
14 they've had numerous requests, with the growth in  
15 the area from the Big Sky area out towards  
16 Amsterdam and towards Logan, to potentially expand  
17 the district. So as you'll hear from the  
18 District's Board next meeting, they are looking to  
19 basically expand the district in three directions  
20 in those growth areas.

21           Again, I want to emphasize that Gallatin  
22 County is not regulatory in nature. They're more  
23 monitoring, public education, and dissemination of  
24 information, water quality data.

25           With that, again, the Department is



1 involved with the oversight of the local water  
2 quality districts. Once a year they submit a work  
3 plan and an annual report on what activities have  
4 happened in those districts. We're involved with  
5 some counties that are interested in potentially  
6 forming districts. There is a few of those  
7 counties out there -- which, Joe, you're aware of  
8 -- Lake County and Flathead County have had this  
9 discussion over the years.

10 So we're involved as needed for septic  
11 education workshops in areas that aren't local  
12 water quality districts, but counties that are  
13 interested and have sanitary programs or public  
14 health programs that want DEQ's assistance in  
15 those efforts.

16 So with that, that's what I had to  
17 present, and I'm open for questions.

18 CHAIRMAN RUSSELL: Questions for Todd?

19 OPERATOR: Ms. Shropshire is leaving the  
20 meeting.

21 MR. WHALEN: Mr. Chairman. Mr.  
22 Teegarden, the district would indicate this is  
23 essentially a government entity, so this action or  
24 proposal before the Board, when it comes in  
25 October, does it require the petition of those

1 residents or businesses that are living outside of  
2 the current district at the local level prior to  
3 coming to the Board, or is it coming to the Board  
4 after the fact, is number one. I guess we can  
5 just start and leave there.

6 MR. TEEGARDEN: Sure. Because Gallatin  
7 County specifically is not a regulatory program,  
8 their activities are determined by the County  
9 Commissioners. The County Commissioners have had  
10 a hearing on this, they have had a public  
11 notification on who might be and who's out there.  
12 There has been a few protests, but in general very  
13 high support for this expansion, and the  
14 Commissioners have okayed it, as well as the  
15 Board. Then the final step is to come to get  
16 approval by the BER.

17 CHAIRMAN RUSSELL: I'll explain that  
18 because I've been through this and have been  
19 soundly kicked around for trying to do one in  
20 Flathead County.

21 There is two ways you can adopt these.  
22 You can adopt them by resolution, which means the  
23 County Commissioners, if it is a county wide, the  
24 County Commissioners would resolve to adopt the  
25 district, and then it would be up to a petition --

1 I think it's 35 percent.

2 MR. TEEGARDEN: 30 percent.

3 CHAIRMAN RUSSELL: -- 30 percent of the  
4 property owners can come back and petition that it  
5 not occur; or you can just go to a public vote and  
6 simple majority. So it really does take that --  
7 It's no different than any district you set up.  
8 It's a taxing district. So those people that will  
9 come into the district have the right to vote it  
10 out or vote it in, and there is two ways the law  
11 will allow it.

12 MR. WHALEN: Board approval is required  
13 for that -- if I can use the term -- annexation of  
14 those outer areas into that district before it  
15 occurs; is that correct?

16 MR. TEEGARDEN: That's correct.

17 CHAIRMAN RUSSELL: Board of  
18 Commissioners.

19 MR. WHALEN: Not the Board of  
20 Environmental Review.

21 CHAIRMAN RUSSELL: We approve the plan.  
22 We don't approve the public process. That's not  
23 part of us.

24 MR. TEEGARDEN: And they will be  
25 submitting the plan, they said, in mid August, so

1 you will get to see that in advance of the next  
2 meeting, their presentation on it.

3 CHAIRMAN RUSSELL: Todd has worked a lot  
4 on these districts, and Joe Meeks has, and so the  
5 Department is lock step with these districts. So  
6 there isn't any conflict what Title 75 does or  
7 anything of that nature.

8 MR. WHALEN: Thank you, Mr. Teegarden.

9 CHAIRMAN RUSSELL: Sorry to steal your  
10 thunder.

11 MR. TEEGARDEN: No. Thanks for the  
12 input.

13 CHAIRMAN RUSSELL: I've been literally  
14 beat down trying to establish a water quality  
15 district in Flathead County. You can laugh.  
16 Yours is funded by the mining industry, and didn't  
17 have even have to go to a --

18 MR. TEEGARDEN: One point that I might  
19 add, if you're interested in the Board. The Board  
20 by statute must require the County Commissioners  
21 on the Board, representatives of the cities or  
22 towns that are in the district, in this case  
23 Bozeman, Manhattan, and Belgrade, and I think Big  
24 Sky, if they're added, would have a  
25 representative. It has to be a minimum of five

1 people.

2           If there is large landowners, they can  
3 ask to be a member of this. The board is  
4 representative of the communities, county, private  
5 individuals, and there is also a member of the  
6 Public Health Department, County Health  
7 Department.

8           CHAIRMAN RUSSELL: Thanks, Todd. I  
9 really appreciate it.

10           Anything else on that?

11           (No response)

12           CHAIRMAN RUSSELL: We'll see that in  
13 October. Well, as we wind down towards the close,  
14 this is the time of the meeting where anyone in  
15 the audience that's actually public can address  
16 the Board on matters that relate to the Board's  
17 actions. If there is anyone out there that would  
18 like to speak, come on up.

19           MS. LINDLIEF-HALL: Mr. Chairman,  
20 members of the Board, my name is Brenda  
21 Lindlief-Hall. I am here on behalf of the Tongue  
22 River Water Users Association. I'm their  
23 attorney. I've represented them since about  
24 January of 2000. I am here to address the issue  
25 of the Fidelity contested case matter regarding

1 its Whole Effluent Toxicity tests. I hope you'll  
2 bear with me because this is going to be a little  
3 bit of a rant. I'll try and keep it short.

4 But first of all, I just want to commend  
5 the Department of Environmental Quality for not  
6 amending Fidelity's permit with regard to the  
7 whole effluent toxicity tests. However, I do want  
8 to express my clients' extreme displeasure over  
9 the Department's decision to not assess any  
10 penalties or to waive any penalties, the \$40,425  
11 penalty as provided in the administrative order on  
12 consent.

13 That brings me into kind of another  
14 issue. We don't agree that those penalties should  
15 have been dismissed. There was recently a  
16 decision issued by the Montana Supreme Court. It  
17 was a decision by the full seven justice panel, a  
18 unanimous decision in a case called Northern  
19 Cheyenne Tribe versus the Montana Department of  
20 Environmental Quality. My client, the Tongue  
21 River Water Users Association, intervened in that  
22 case, as did Northern Plains Resource Council.

23 In that case, the Montana Supreme Court  
24 voided the permit, the same permit that is at  
25 issue, with regard to the Whole Effluent Toxicity

1 test called WET tests. Those WET tests, as you  
2 probably know by now, are regarding aquatic life,  
3 and they're tests that are required by EPA to  
4 ensure that aquatic life are not endangered by  
5 discharges of this effluent.

6 So Fidelity doesn't have to pay any sort  
7 of fine. The permit has now been voided. If you  
8 read that Northern Cheyenne decision, you will see  
9 the whole history of this permit laid out very  
10 nicely by Justice Morris. The Department first  
11 issued Fidelity that permit, or first allowed  
12 Fidelity to discharge without any permit starting  
13 in 1998, coal bed methane produced water  
14 discharges directly into the Tongue River starting  
15 in 1998.

16 Finally in 2000, the DEQ issued a permit  
17 to discharge. Chairman Russell knows a lot of  
18 this history because there were two petitions to  
19 establish water quality standards, one where the  
20 Board finally promulgated standards in 2003,  
21 numeric water quality standards for electrical  
22 conductivity and sodium adsorption ratio. Another  
23 petition was brought in 2005. In March of 2006,  
24 the Board again promulgated or amended that rule,  
25 and determined that EC and SAR are harmful

1 parameters, and that therefore nondegradation  
2 review would be required.

3 The Board at that time also declined to  
4 impose any kind of treatment requirements, but did  
5 direct the Department of Environmental Quality to  
6 come back in September of 2006 with a treatment  
7 option. That never happened.

8 So the Northern Cheyenne Tribe brought  
9 the case challenging Fidelity's permit in 2006.  
10 The Tongue River Water Users Association, as I  
11 already said, intervened, as did Northern Plains  
12 Resource Council.

13 Ultimately the Montana Supreme Court  
14 voided that permit because the Department did not  
15 exercise its best professional judgment and  
16 require treatment technology based effluent  
17 limitations. That permit is now void.

18 The DEQ has recently issued that permit.  
19 Comments are due on August 3rd. They're calling  
20 it a reissuance of a permit, even though the  
21 permit has been voided by the Montana Supreme  
22 Court.

23 And if you look at the public notice and  
24 you look at the statement of basis for the  
25 Fidelity permits, you will see that even though



1 the Board of Environmental Review required  
2 nondegradation review in its amended rule in March  
3 of 2006, the Department of Environmental Quality  
4 is still attempting to allow Fidelity to have a  
5 permit without undergoing the rigorous  
6 nondegradation review.

7           Granted, the Supreme Court in that  
8 Northern Cheyenne case issued on May 18th of this  
9 year did not address the issue of nondegradation  
10 review, but it clearly voided the permit. So the  
11 DEQ can't just reissue the permit without  
12 requiring nondegradation review, and that is what  
13 it appears to be.

14           Additionally, in that Supreme Court  
15 order, the Montana Supreme Court remanded to the  
16 DEQ for reissuance of the permit in compliance  
17 with the law within ninety days. Fidelity  
18 Exploration and Production Company comes back in,  
19 they file a motion. Even though the remand was  
20 not to Fidelity, Fidelity files a motion seeking  
21 additional time to comply.

22           In reviewing, the Department said,  
23 "Well, we're going to try and comply with the  
24 Court's initial ninety day time frame." In that  
25 order on Fidelity's motion, the Montana Supreme

1 Court said -- and that was issued on June 29th, I  
2 believe, of this year. The Montana Supreme Court  
3 says, "As noted by Appellants, Fidelity has  
4 enjoyed the benefits derived from its now void  
5 permit for several years."

6 Several years is a vast understatement.  
7 Of course, the Supreme Court didn't know all of  
8 the underlying background, but it did note that  
9 Fidelity has been discharging without treatment  
10 since 1998, and it's 2010.

11 And so the reason that I bring this up  
12 at this point in time is because I don't think  
13 that you've seen the last of the Fidelity permit  
14 issues, unfortunately. And I would encourage you  
15 all to read the opinion of the Montana Supreme  
16 Court. It's the Northern Cheyenne Tribe, Tongue  
17 River Water Users Association, Northern Plains  
18 Resource Council, versus the Montana Department of  
19 Environmental Quality and Fidelity Exploration and  
20 Production Company. Again, that was issued on May  
21 18th of 2010.

22 I would also encourage you to go to the  
23 DEQ's website, read the statements of basis, read  
24 those permits. The Department of Environmental  
25 Quality is proposing to allow Fidelity a year from

1 the date the permits are issued to comply, so  
2 they're going to get another year before they're  
3 required to treat the water because of the  
4 economics.

5 So they don't have to pay any penalty  
6 for the WET Test failures, which by the way have  
7 been documented since the permit was issued in  
8 2006. If you'll look at that Administrative Order  
9 on Consent, the discharge monitoring reports first  
10 show that Fidelity was not meeting the  
11 requirements of the WET Test. They were violating  
12 the permits beginning in April of 2006. It's  
13 constantly been in violation of its permit. It  
14 doesn't have to pay any money.

15 My clients, ranchers, have to pay to  
16 litigate these issues. They have paid a lot of  
17 money now. Since 2000, they have been litigating  
18 these issues.

19 I would ask you please to look at those  
20 permits, and make comments if you feel they are  
21 appropriate, because I guarantee you, you will  
22 more than likely be seeing the issue of the  
23 Fidelity permits again. Thank you.

24 CHAIRMAN RUSSELL: Any questions?

25 MR. WHALEN: Mr. Chairman, that kind of

1 raises an earlier question that I had to you  
2 regarding the settlement of these issues that the  
3 Board chooses to hear. We chose to hear this  
4 Fidelity Exploration violation, and then we show  
5 up at this meeting, and learn that the issue was  
6 settled. Was it settled under a 41(a)  
7 arrangement, Katherine?

8 MS. ORR: Mr. Chairman, it was.

9 MR. WHALEN: Does that essentially  
10 preclude us from hearing the terms of the  
11 settlement? Because this is really interesting  
12 testimony, and it was news to me that this was  
13 part of the settlement agreement. Does that mean  
14 -- If it is settled under 41(a), we therefore have  
15 no interest in learning about the settlement, or  
16 authority to learn about the settlement; is that  
17 accurate?

18 MS. ORR: I would say after it's  
19 dismissed, I think you can hear about it if you  
20 want; and I think the Department can voluntarily,  
21 if it wants, provide the terms of the settlement.

22 MR. WHALEN: Voluntarily? We can't  
23 order the Department to come and testify before  
24 the Board, and identify what the terms were?

25 MS. ORR: Well, I think after it's been

1 dismissed, you can. But what I'm talking about is  
2 it seems to me that in other meetings that we've  
3 had -- and I'm now losing track in my mind -- that  
4 the Department was going to provide the terms of  
5 this stipulation or the Administrative Order on  
6 Consent with the settlements. I don't know if you  
7 remember that, John, but --

8 MR. NORTH: Yes, I think there was some  
9 discussion along those lines, and we can certainly  
10 do that. And I think the distinction here is that  
11 when it's a 41(a) settlement, the parties have  
12 settled the matter, and there is not a contested  
13 case before the Board anymore, so the case has  
14 gone away. But in terms of discussing or being  
15 notified of the terms of the settlement, that's  
16 something we can and will do in the future.

17 MR. LIVERS: Mr. Chairman, this is Tom  
18 Livers. I would agree with John's assessment  
19 there, and with Katherine's statement. And this  
20 may be our oversight, because as I recall, when we  
21 did provide an explanation, a briefing for the  
22 Board on its authority or lack of authority under  
23 41(a), it was in the context that the Board had  
24 interest in seeing the terms of the settlements.

25 So we were certainly willing to do that,

1 but wanted the Board to understand that in those  
2 cases, it really didn't have authority to impact  
3 those terms. But I think it was in that context,  
4 so I think it was our oversight for not supplying  
5 settlement terms, and that's something we  
6 certainly have agreed to do in the past, and can  
7 do.

8 CHAIRMAN RUSSELL: I guess I have a  
9 question to the bookend attorneys here then. Does  
10 Montana's FOIA laws preclude any of this prior to  
11 it being settled by the Board? There is  
12 exclusions in the Federal act that would say these  
13 types of proceedings wouldn't be releasable until  
14 they be settled.

15 MR. NORTH: Well, I'll take the first  
16 shot, Katherine. I think that there is no similar  
17 provisions in Montana's laws, find an exclusion  
18 for that, and it certainly would be public  
19 information.

20 MS. ORR: And Mr. Chairman, this has  
21 come up in my career anyway where there has been a  
22 pending case, and there has been an information  
23 request under our Constitution, and --

24 MR. LIVERS: Mr. Chairman, could I ask  
25 Katherine to speak closer to the microphone,

1 please?

2 MS. ORR: Okay. This can come up where  
3 there might be a public information request during  
4 the course of a proceeding, and I would say that  
5 as long as the request has not been advanced by a  
6 party, or an adjudicating body, that that request  
7 can be entertained.

8 CHAIRMAN RUSSELL: Wouldn't we be the  
9 adjudicating body?

10 MS. ORR: We would be.

11 CHAIRMAN RUSSELL: I've just been doing  
12 some research around FOIA, and I know that there  
13 is Federal exclusions to providing information  
14 during a case that's still pending.

15 MR. NORTH: And Mr. Chairman, I'm  
16 talking about a case where there hasn't been a  
17 stipulated settlement, so there is really no  
18 longer a conflict.

19 MS. ORR: The significance of 41(a) is  
20 that the parties themselves have decided to  
21 withdraw from the jurisdiction of the Board, and  
22 so that having been done, the Board doesn't any  
23 longer have any jurisdiction to probe the terms of  
24 this settlement.

25 MR. WHALEN: Mr. Chairman, if the Board

1 orders a hearing, doesn't that remove this issue  
2 from that process?

3 MS. ORR: Well, I think the parties at  
4 any time can say, "You, adjudicating body, we  
5 don't need you anymore." Now, there is one sort  
6 of exception to that that I see, which is when the  
7 parties withdraw from jurisdiction of the Board,  
8 they can no longer use the Board to enforce the  
9 terms of their settlement.

10 MR. NORTH: Mr. Chairman, I would add I  
11 agree totally with what Katherine Orr said, and  
12 just point out to the Board that when you act on  
13 contested cases, you're acting in a quasi-judicial  
14 capacity, so you essentially derive or have the  
15 same powers with regard to that case as a Court  
16 has. And 41(a) is a Court rule, and the same rule  
17 applies to District Courts. Once the parties have  
18 resolved the issue, the Court is deprived of  
19 jurisdiction.

20 And Mr. Chairman, I would also add one  
21 other thing, if I might, and that is I think with  
22 regard to the particular contested case that we're  
23 talking about here, there may be some confusion as  
24 to whether or not that was a penalty case or  
25 whether it was a permit appeal, and I think that



1 the attorney whose handling that, Claudia Massman,  
2 could provide some clarification on that, too.

3 CHAIRMAN RUSSELL: You didn't sit here  
4 for two-and-a-half hours not to say something,  
5 Claudia.

6 MS. MASSMAN: Mr. Chairman, members of  
7 the Board, for the record, my name is Claudia  
8 Massman, and I was the attorney that was  
9 representing the Department on Fidelity's appeal.  
10 But the appeal is not of an enforcement order, it  
11 was an appeal of a denial to modify their permit.

12 And as Brenda explained, the permit has  
13 been declared -- both permits. Fidelity has two  
14 permits -- both permits were declared void by the  
15 Montana Supreme Court, in which case Fidelity came  
16 in, and stipulated to dismiss its appeal of a  
17 permit modification because it no longer had a  
18 permit.

19 And the Department was in the process of  
20 complying with the Supreme Court's order to redo  
21 both permits, and to look at treatment as  
22 something that needed to be considered in those  
23 permits. So the Department has done that. The  
24 draft permits are now out, and this had nothing to  
25 do -- there is no settlement agreement. It was

1 just a decision by Fidelity that they no longer  
2 needed to appeal the permit modification denial.

3 The enforcement case -- and if you have  
4 questions on that, Mr. Arrigo is here -- but that  
5 was an Administrative Order on Consent, so that  
6 never was something that the Board was involved  
7 in, and that did address the WET violations.

8 MR. WHALEN: Okay.

9 CHAIRMAN RUSSELL: Thank you. Any other  
10 questions for -- John.

11 MR. NORTH: Mr. Chairman, I guess I  
12 would bring up one other thing, and also look at  
13 Katherine at the same time. You've been urged to  
14 look at the current permit, and make comments on  
15 that permit. Keep in mind that if that permit  
16 becomes appealed by Fidelity, that appeal will  
17 come to you, and if you are on record as having  
18 made comments during that comment period, I would  
19 suggest that at that point you would need to  
20 recuse yourself.

21 CHAIRMAN RUSSELL: The whole Board?

22 MR. NORTH: No, whichever person made  
23 the comment.

24 CHAIRMAN RUSSELL: I want to recuse  
25 myself right now. I really don't mean that,

1 Brenda. Why would I want to quit now? I have  
2 been through the whole bloody mess.

3 MR. ANDERSON: What is the status of the  
4 enforcement action right now?

5 MR. ARRIGO: Mr. Chairman, Mr. Anderson.  
6 My name is John Arrigo. I'm the Administrator of  
7 the Enforcement Division.

8 And the permit program identified  
9 violations of the Fidelity permit. They detected  
10 acute toxicity in their discharge based upon the  
11 WET Test. There is no numerical limit for whole  
12 effluent toxicity. There is a prohibition in the  
13 permit that says there shall be no acute toxicity.  
14 Failing the test means they have acute toxicity in  
15 the discharge.

16 We notified Fidelity that we thought  
17 these were violations, and we offered them an  
18 Order on Consent to resolve them. We calculated  
19 and assessed a penalty in the neighborhood of  
20 \$42,000 for the violations, but we suspended the  
21 penalty pending their performance of certain  
22 activities. The national guidance requires that  
23 if you have WET failures, you're supposed to try  
24 and identify the constituent in the discharge that  
25 is causing the toxicity, and then develop a plan

1 to correct those problems.

2           We suspended the penalty on the  
3 condition that they perform those studies. They  
4 had performed some studies in the past in response  
5 to the violations, but we didn't think they were  
6 definitive enough, so the Order on Consent  
7 required them to do it again. In fact, we made  
8 them do it a third time.

9           The issue is that Fidelity believes that  
10 total dissolved solids is causing the toxicity in  
11 the discharge. They're probably right, but we  
12 were trying to have them find out -- Total  
13 dissolved solids is a bunch of constituents --  
14 which, if any of those, individual constituents  
15 that make up TDS are the toxic parameter. They  
16 did a variety of studies, and we couldn't really  
17 determine exactly what it was. There is some  
18 suspicion that it might be bicarbonate, but we  
19 don't know for sure.

20           So they've completed those studies, and  
21 then they proposed a plan on how to address the  
22 TDS concentration. They are treating part of  
23 their discharge, but they blend it with some  
24 untreated wastewater, and they wanted to modify  
25 that blending to meet a concentration of TDS that

1 would not cause any WET failures.

2 They applied for a permit amendment to  
3 incorporate that change in the treatment and  
4 blending into their permit. The Department denied  
5 that permit modification. They appealed that.  
6 They've since withdrawn that appeal.

7 After the Supreme Court decision, and  
8 after they completed all of their studies, we  
9 decided that they had complied with the  
10 requirements of the Order on Consent, and had  
11 fulfilled all of those requirements, so we have  
12 closed that order. So the enforcement action and  
13 penalty are done.

14 CHAIRMAN RUSSELL: Questions for John?

15 (No response)

16 CHAIRMAN RUSSELL: Thanks, John. Any  
17 further questions?

18 (No response)

19 CHAIRMAN RUSSELL: Any other member of  
20 the audience that would like to speak to us before  
21 we adjourn?

22 MS. LINDLIEF-HALL: Mr. Chairman,  
23 members of the Board, if I may. I would just like  
24 to redact that statement that I made about making  
25 comments, cueing off John North's comment. Please

1 don't comment. But I do ask that you go and read  
2 those draft permits. Thanks.

3 CHAIRMAN RUSSELL: Thanks, Brenda. All  
4 right. Seeing no other member of the audience  
5 that would like to speak to us, I will entertain a  
6 motion to adjourn.

7 MR. MILLER: So moved.

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

10 MR. WHALEN: Second.

11 CHAIRMAN RUSSELL: It's been seconded by  
12 Joe. Comments before -- Seeing none, all those in  
13 favor, signify by saying aye.

14 (Response)

15 CHAIRMAN RUSSELL: Opposed.

16 (No response)

17 CHAIRMAN RUSSELL: All right. We are  
18 adjourned.

19 (The proceedings were concluded

20 at 11:30 a.m. )

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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 - 102 - 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.