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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
JULY 24, 2009)

TRANSCRIPT OF PROCEEDINGS

Heard at Room 111 of the Metcalf Building
1512 East Sixth Avenue
Helena, Montana
July 24, 2009
9:32 a.m.

BEFORE CHAIRMAN JOSEPH RUSSELL,
BOARD MEMBERS LARRY MIRES, HEIDI KAISER,
JOE WHALEN, and MARVIN MILLER

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

3 * * * * *

4 CHAIRMAN RUSSELL: We'll start our
5 regular meeting now, and the first item on the
6 agenda is the review and approval of the May 29,
7 2009 Board meeting minutes, which were sent
8 separate, right?

9 MS. WITTENBERG: Yes.

10 CHAIRMAN RUSSELL: Any comments on those
11 minutes?

12 (No response)

13 CHAIRMAN RUSSELL: Seeing none, I'll
14 entertain a motion to adopt the minutes as
15 submitted.

16 MR. MILLER: So moved.

17 CHAIRMAN RUSSELL: Who wants to second
18 it?

19 MR. MIRES: I'll second.

20 CHAIRMAN RUSSELL: It's been seconded by
21 Larry. Any 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: Motion carries.

4 MR. LIVERS: Mr. Chairman, before we
5 leave administrative matters -- For the record,
6 Tom Livers for the Department. Just for the
7 record, we do have a new appointment to the Board.
8 I think most Board members are aware of that.
9 Larry Andersen, he's an attorney in private
10 practice in Great Falls for several years, will be
11 filling the seat. This is a quasi-judicial board,
12 there is a requirement for an attorney, and he
13 will fill that role.

14 Mr. Andersen, I spoke with him after his
15 appointment. He had a prior commitment that
16 prevented him from participating today. He was
17 not able to change that. But he's looking forward
18 to his term on the Board. So he will be joining
19 us at the next opportunity.

20 And then also for the record, Ms.
21 Shropshire, Robin Shropshire called this morning.
22 She is at home sick, and not able to come in, but
23 she did ask that if we had any concerns over a
24 quorum, she would be able call in, and that didn't
25 look like that was going to be the case.

1 CHAIRMAN RUSSELL: Thanks, Tom. The
2 next item on the agenda are briefing items,
3 contested case updates. Katherine.

4 MS. ORR: Mr. Chairman, members of the
5 Board, I think the way I'll proceed here is if
6 there is a development that needs some sort of
7 amendment to what's stated on the agenda, I'll go
8 over those.

9 The first one would be Item (d), which
10 is in the matter of the appeal by Eastgate Water
11 and Sewer Association of Helena Sand and Gravel,
12 Inc. open cut permit. A hearing was scheduled for
13 the next Board meeting of September 2nd, and
14 that's being dismissed, and the Board will have a
15 dismissal order before it for that meeting.

16 And in the next Item (e), III-A(1)(e),
17 in the matter of the violations of the Montana
18 Water Quality Act by Wilderness Club, LLC, and
19 Wilderness Club Eureka, Lincoln County. There is
20 pending before the Board -- and this is one of
21 those cases where the Board retained jurisdiction
22 -- summary judgment. A summary judgment motion
23 was filed by the Wilderness Club, and this has
24 been fully briefed at this point. The parties
25 have waived oral argument.

1 And I would suggest as a matter of
2 procedure, unless you feel differently, that I
3 review it, write a proposed decision for you to
4 adopt, and that would be on September 2nd. And
5 unless you want to do it a different way, I would
6 suggest that. So it's not something that we need
7 to vote on, but I just -- is that okay?

8 CHAIRMAN RUSSELL: Sounds good to me.

9 MR. MILLER: Sounds good.

10 MS. ORR: And then the next matter, (f),
11 why we don't we come back to that, because in this
12 matter, there have been continuing requests for a
13 stay, and this issue of whether or not to continue
14 this stay that's been requested is before me
15 because you've delegated prehearing matters, but I
16 thought the Board would want to hear from the
17 parties what their reasoning is pro and con
18 issuance of a stay. And I'll hear that as well
19 today. So we'll come back to that on the agenda.

20 On Item (g), this is one that is before
21 me, been delegated to me, and the Department filed
22 a motion for summary judgment, and this has also
23 been briefed, and there is a ruling to be made on
24 that, and I'll have that ready for the September
25 meeting.

1 On Item (i), the parties are asking for
2 a fourth extension. That just came in.

3 And Item (l) in the matter of the notice
4 of violations of the Montana Water Quality Act by
5 North Star Aviation, the parties have proposed a
6 schedule for the hearing, which I'll then issue a
7 scheduling order.

8 And those are the additions to those
9 cases that I wish to make, but let's go back to
10 Item (f).

11 CHAIRMAN RUSSELL: Before we go on, just
12 because I don't recall the details of this River
13 Rock County Water Sewer District, there must not
14 be any imminent hazard there for this extension?
15 Things are in order?

16 MS. ORR: Well, that's a good question.

17 CHAIRMAN RUSSELL: If we're just
18 prolonging something that may not be functioning
19 properly, I guess I would have some opposition to
20 continuing at this stage.

21 MS. ORR: I would look into that. We
22 could ask: Is there a representative from SME
23 today?

24 MR. ZADICK: Yes. Mr. Chairman, members
25 of the board, I'm Gary Zadick. I'm the attorney

1 for SME. I'll give you a brief status of the
2 permitting.

3 The notice asks the parties to give a
4 status of construction and permitting affecting
5 the coal plant. The coal plant, the owners of the
6 land where the site has applied for rezoning. It
7 seems like many years ago. Ultimately the Cascade
8 County Board of Commissioners granted the
9 rezoning. It was upheld by the District Court,
10 and MEIC and the neighboring landowners have
11 appealed to the Supreme Court. Notice was issued
12 yesterday or the day before. Their appellant's
13 brief is due in thirty days. So rezoning is still
14 being litigated.

15 The air permit issue by DEQ and the CO2
16 part of it approved by the Board is on appeal to
17 the District Court, Cascade County. The Judge
18 from Lewistown is presiding over it. That process
19 was stayed, and a similar request to stay it until
20 November 2nd is pending before the Court, and has
21 been briefed, waiting a decision from the Judge on
22 whether to grant our request to stay further
23 proceedings until November 2.

24 A similar request is before the BER on
25 the PM2.5 determination by DEQ, and is being

1 appealed by MEIC. We've requested a stay until
2 November 2, 2009.

3 Southern Montana has filed an
4 application for a gas plant air permit at the same
5 site. That's in process with DEQ. That's the
6 reasoning behind this request for a stay.

7 Southern Montana is not in the position
8 today to decide whether to abandon the coal permit
9 or not. We need further processing of the gas
10 permit before we can make those decisions. It
11 affects financing, investment today by the owners,
12 who are 40,000 or 50,000 Montanans who have a
13 substantial investment in construction to date,
14 and in the deposit to have a first queue on the
15 transmission network. And so that's all tied into
16 that. Those investments don't want to be lost --
17 we don't want to lose those investments, and
18 affect the owners.

19 The construction onsite is not ongoing
20 today because of these appeals and their impact on
21 long term financing. Interim financing was
22 obtained to build what was done to commence
23 construction to that point, although there is
24 still work ongoing under the Section 106 permit
25 through the US Army Corps of Engineers. That work

1 is ongoing, because that affects water supply. It
2 doesn't involve hard construction right now, but
3 it's a review process under Section 106 of the
4 water source, the facilities that might have to
5 cross the river, transmission line, gas line.

6 So that's the status of construction.
7 And that's the purpose behind the request for a
8 stay. It doesn't make sense to invest money, and
9 experts, and gear up this hearing, until we know
10 what's going to happen with the gas permit, and
11 that's underway. Thank you.

12 CHAIRMAN RUSSELL: Questions for SME?

13 (No response)

14 CHAIRMAN RUSSELL: Thank you, Gary.

15 MS. HARBINE: Mr. Chairman, members of
16 the Board, Jenny Harbine representing the
17 Appellants in this matter.

18 SME has sought and obtained a temporary
19 stay of the appeal proceedings in this matter, and
20 is seeking further stay until November 2009 of the
21 appeal proceedings, and MEIC requested the status
22 conference to get clarity regarding the status of
23 the Highwood Coal Plant that is the subject of
24 this permit appeal, and also to address a
25 fundamental inequity in SME's request for a

1 continued stay.

2 While initial press reports indicated
3 that SME was abandoning its coal plant altogether
4 in favor of building a gas plant, nothing that SME
5 has said formally to this Board, to the two
6 District Courts before which related matters are
7 pending, or to DEQ, indicates that SME has given
8 up its plans to build a coal plant.

9 In fact, SME's most recent submissions
10 to DEQ with respect to its air quality permit
11 application for a gas plant indicate that SME has
12 not abandoned those plans.

13 The gas plant permit application is
14 actually styled as a modification to the coal
15 plant permit, and the gas plant is described as
16 additive to the coal plant facility, not a
17 substitute for the coal plant facility. Indeed,
18 in that application, SME has modeled cumulative
19 emissions from both the gas plant and the coal
20 plant, contemplating that they might both be
21 constructed at the same site.

22 So there is a real lack of clarity here
23 regarding -- and confusion created by SME
24 regarding the status of the coal plant and SME's
25 intentions with respect to that plant. And unless

1 and until SME relinquishes its coal plant permit,
2 or DEQ or this Board revokes that permit, MEIC's
3 appeal of the Highwood Coal Plant permit is very
4 much a live issue.

5 SME has already undertaken significant
6 construction activities on the coal plant. Much
7 of this construction was done even after SME
8 announced that it would shift its focus from
9 building a coal fired power plant to a natural gas
10 plant, and much of that activity indeed took place
11 after the Hearing Examiner first granted SME's
12 request for a stay of these appeal proceedings.

13 While SME apparently is not engaged in
14 construction activities at this moment, any
15 suspension of work was done voluntarily by SME,
16 and SME may begin construction again at any time.
17 All this construction is happening pursuant to a
18 permit that MEIC contends is unlawful.

19 In the meantime, if these appeal
20 proceedings are stayed, construction may continue
21 while MEIC is unable to pursue its legal claims
22 before this Board.

23 And there are three ways that the Board
24 can address this inequity. It may revoke SME's
25 air quality permit for the coal plant, or direct

1 DEQ to consider such a revocation; it may prohibit
2 construction of the coal plant while the stay of
3 appeal proceedings is in effect; or the Board can
4 simply deny SME's motion for a stay, and allow
5 MEIC to pursue this appeal.

6 I'll advocate for revocation of the
7 permit, and there are several reasons for that.
8 If SME does not intend to build this coal plant,
9 then there is no reason for SME to hang on to this
10 permit. Revocation, or SME voluntarily
11 relinquishing this permit, would obviate the need
12 for these appeal proceedings, and also not to
13 mention the other cases pending before the
14 District Courts in Helena and in Cascade County.

15 If SME does not intend to build a coal
16 plant, there is no good reason for it to hang on
17 to its permit, and there are policy reasons for
18 that, too.

19 Allowing SME to retain its permit
20 effectively allows it to squat on its allocation
21 of the PSD increment for pollutants in the state.
22 While SME retains the permit, whether or not the
23 coal plant is actually constructed, SME retains
24 that allocation of the PSD increment for
25 particulate matter, nitrogen oxide, and sulphur

1 oxide, and meanwhile no other development projects
2 may make use of that allocation.

3 If SME is still clinging to the hope
4 that it might someday be able to build this coal
5 plant, or wishes to retain this permit for
6 transfer or sale at some later date, it would be
7 skirting the purposes of the Clean Air Act to
8 allow SME to retain this permit.

9 Whether SME retains the permit or has to
10 undergo a new permitting process, it will need to
11 update its Best Available Control Technology
12 analysis in order to ensure that the maximum
13 achievable emissions reductions are employed for
14 this plant. If that's the case, under the
15 existing permit, that would be the case if SME
16 were to apply for a new permit.

17 The BACT analysis in the current permit
18 is already stale, but at whatever point in the
19 future that SME might find this project again
20 feasible, that BACT analysis would be very
21 outdated. So under either scenario, whether SME
22 does intend to construct this coal plant, or
23 retain the hope of constructing this coal plant,
24 or whether it doesn't intend to construct this
25 coal plant, there is no good reason for SME to

1 retain this air quality permit.

2 If the Board is inclined to grant SME's
3 stay through November, then we would respectfully
4 request that the Board also require SME to cease
5 all construction activities at the site in order
6 to prevent the inequity of MEIC's appeal not going
7 forward while construction continues.

8 I'll answer any questions.

9 CHAIRMAN RUSSELL: Thank you. Any
10 questions?

11 (No response)

12 CHAIRMAN RUSSELL: I have one for our
13 attorney. Of the three options, there is only one
14 the Board has authority to do. We can't revoke a
15 permit.

16 MS. ORR: Right.

17 CHAIRMAN RUSSELL: There is two options
18 that were basically to revoke a permit. That's
19 not our job. I think David --

20 MS. ORR: It's not before us at this
21 point.

22 MR. RUSOFF: For the record, I'm David
23 Rusoff, attorney for the Department of
24 Environmental Quality, and I just wanted to
25 address the agenda item which is the status of

1 SME's request for another stay of the contested
2 case hearing, and the status of construction.

3 When SME contacted the parties prior to
4 filing its most recent request for a stay, SME
5 contacted the Department, and the Department's
6 position was that it does not object to the
7 requested stay. And I believe SME indicated that
8 in its brief to Ms. Orr, and that is still the
9 Department's position. We don't have any
10 objection to continuing the stay.

11 CHAIRMAN RUSSELL: Thanks, David.

12 MS. HARBINE: If I may? Mr. Chairman,
13 members of the Board, I wanted to address the
14 Chairman's concern regarding the Board's authority
15 to revoke a permit.

16 The Board does have authority to revoke
17 a permit under ARM 17.8.763. You may revoke a
18 permit or any portion of a permit at the written
19 request of a permittee, or for violation of any
20 requirement of the Clean Air Act of Montana, rules
21 adopted under the act, the Federal Clean Air Act
22 and rules promulgated under that act, or any
23 applicable requirement in the Montana SIP.

24 There is precedent in the Board of
25 Environmental Review which I'm happy to -- I'm

1 sorry -- the Environment Appeals Board of the
2 Environmental Protection Agency, which I'm happy
3 to provide to this Board, for denying permits
4 under exactly this circumstance: Where there is a
5 very remote possibility that a project will ever
6 be constructed, a BACT analysis is in danger of
7 growing stale, the project proponent is not
8 diligently pursuing construction, and a PSD
9 increment has been allotted to that project that's
10 unavailable for other projects.

11 I would submit that under these
12 circumstances revocation is appropriate, and the
13 Department and the Board should consider that.

14 CHAIRMAN RUSSELL: Thanks.

15 MR. ZADICK: Mr. Chairman, may I respond
16 to a couple of things? I have the press release
17 here, and nowhere in it did Southern Montana say
18 it was not building the coal plant. This is the
19 only press release there has been. I'm happy to
20 share it with the Board.

21 The amount of money invested to date in
22 the coal project is about \$40 million, funded by
23 Montanans. These multiple appeals have all been
24 done without a request for a stay by the
25 opponents, nor posting any security. That's an

1 issue probably for the next legislative session,
2 what it does to a project. But there are no
3 projects in Montana.

4 If you're worried about CFC's, there is
5 none on the drawing board. The stay in November
6 won't affect anything, and there is still room
7 anyway, so that allotment isn't used up.

8 We've asked for a stay until November
9 10, and that's a reasonable request in light of
10 the fact we've done double time to submit the air
11 permit application on the gas plant. So I think
12 our request is reasonable. Thank you.

13 CHAIRMAN RUSSELL: Board?

14 MR. LIVERS: Mr. Chairman, maybe before
15 you get into questions, I guess I would just
16 reiterate Katherine's opening that this decision
17 has been delegated to her. It's been noticed not
18 as an action item today, but a briefing item, so
19 any discussion or certainly any direction would at
20 best be informal.

21 CHAIRMAN RUSSELL: Good point.

22 MR. WHALEN: I have a quick question.
23 Madam, I'm sorry, I didn't get your name when you
24 came to testify.

25 MS. HARBINE: Jenny Harbine.

1 MR. WHALEN: Jenny, you indicated there
2 was a precedent set for permit revocation under
3 circumstances very similar to this. What is that
4 precedent?

5 MS. HARBINE: I have actually copies of
6 two decisions here of the EPA Administrator,
7 Environmental Appeals Board, which the
8 Administrator has delegated authority. (Provides
9 document) And I apologize. I don't have copies
10 for all Board members. I have a few, and may
11 submit copies at a later date.

12 MR. WHALEN: Okay.

13 MS. HARBINE: Although this arises in
14 slightly different procedural circumstances, it's
15 a situation -- both of these are situations, one
16 in 1983 and one in 1999, in which a project, after
17 a permit has issued, became infeasible. There
18 were changed circumstances, either problems with
19 property ownership for the project site, or
20 permitting approval issues aside from the air
21 quality permit.

22 And in both of these cases, the
23 Administrator, or the Environmental Appeals Board,
24 looked at the policy considerations underlying the
25 availability of the PSD increment, and looked at

1 the requirement that projects be diligently
2 constructed. In the case of federal law, projects
3 must be constructed, or construction must commence
4 within 18 months after a permit is issued, and
5 must be diligently pursued thereafter. That's the
6 same as the permit condition that SME operates
7 under here.

8 And they looked -- before there was any
9 violation of that condition of federal law, the
10 Administrator looked at the circumstances, said
11 "There is no possible way that these projects are
12 going to be able to comply with that requirement.
13 We're just going to revoke the permit or deny the
14 permit now." Does that answer your question?

15 MR. WHALEN: Thank you.

16 MR. ZADICK: May I respond?

17 CHAIRMAN RUSSELL: That's fine.

18 MR. ZADICK: The first decision here, In
19 the Matter of the New York Power Authority, they
20 failed to commence construction. We've commenced
21 construction. Completely different circumstances.
22 They're contesting that we commenced construction.
23 That's another one of these appeals. But DEQ has
24 determined we commenced construction.

25 The second one, the applicant sold the

1 property, and so they were asked to show cause why
2 their permit shouldn't be revoked. We haven't
3 sold the property. We've invested \$40 million in
4 the project. We still own the property. Active
5 construction, concrete, steel, isn't ongoing, but
6 the Corps of Engineers permitting Section 106 that
7 affects the water supply is ongoing. And so those
8 activities are still ongoing and active.

9 If you don't secure your water source,
10 that may be a problem, but we believe we've
11 succeed in that, and all of these steps have to be
12 taken in sequence. Thank you.

13 CHAIRMAN RUSSELL: I don't even play a
14 lawyer after I stayed at a Holiday Inn Express,
15 but both of these were remanded back to
16 Administrators to make decisions, so I don't see
17 that -- I think it's a stretch that we would have
18 any authority to revoke a permit. And it says
19 it's remanded to the Administrator, and back here
20 it basically says the same thing. We're not the
21 Administrator. DEQ is the Administrator.

22 MR. RUSOFF: Could I also respond
23 briefly, Chairman Russell? Again, David Rusoff
24 for the Department. I guess I just wanted to
25 confirm your statement that the Board's

1 Administrative Rules provide the Department with
2 authority to revoke an air quality permit under
3 certain circumstances; and if the Department makes
4 that determination, the permittee has the ability
5 to request a contested case hearing before the
6 Board, and the parties would have the opportunity
7 to file briefs on the applicable case law, and the
8 facts related to particular situation. And that
9 case might or might not be assigned to a Hearing
10 Examiner, and then the Board would have to make a
11 decision.

12 So I would caution the Board not to
13 develop any preconceived ideas about a revocation
14 of this particular permit, or what the law might
15 be applicable to revocation of a permit prior to
16 the issue actually coming before the Board. Thank
17 you.

18 CHAIRMAN RUSSELL: Thanks. I've
19 probably muddled the water enough, so I'm not
20 going to say anything else. And this is a matter
21 really of Katherine's. Is there anything else
22 that the Board would like to informally pronounce?
23 Formally and informally pronounce?

24 (No response)

25 CHAIRMAN RUSSELL: Seeing none, thanks

1 for your time today. We'll see what Katherine
2 comes up with.

3 Katherine, back on the agenda.

4 MS. ORR: We are on item III(A)(2),
5 which is cases in litigation. And I think the
6 summaries here sort of speak for themselves.

7 In the first matter, which is the
8 Thompson River CoGen appeal, a reply brief was
9 filed with the Supreme Court on July 13, 2009.

10 In the second matter, which involves the
11 appeal of the Board's ruling on CO2, I don't have
12 anything to add other than what's been placed on
13 the agenda.

14 CHAIRMAN RUSSELL: Thank you. Why don't
15 we take a quick break.

16 (Recess taken)

17 CHAIRMAN RUSSELL: We're going to go
18 ahead and get started. The first item is the
19 proposed rulemaking to the Gallatin River
20 Outstanding Resource Water. Tom, are you going to
21 take this one?

22 MR. LIVERS: Mr. Chairman, Bob Bukantis
23 is going to make a presentation for the Board, but
24 maybe just a quick little bit of history. There
25 is quite a bit of history associated with this.

1 The Board is being asked by the
2 Department to extend the public comment period,
3 and that's a means to essentially extend the
4 rulemaking so that the discussions can continue.
5 We've got obviously a couple new Board members for
6 whom this is a new issue, and actually we'll have
7 three, so likely at one of the next meetings,
8 we'll do a little more background.

9 I know a couple of the Board members
10 have heard some background on this issue, but
11 we'll probably be looking at another extension,
12 just given the timing of the rules, as early as
13 the December meeting; and by that time, prior to
14 that action, we'll spend a little more time giving
15 a briefing on the issue, how it came to be, what
16 the key points are, where we're heading with that.

17 CHAIRMAN RUSSELL: And the concept of
18 extension is not to let this thing just fester.
19 It's actually moving forward from the parties,
20 right?

21 MR. LIVERS: It is, and it's at the
22 request of the parties. And Bob can probably talk
23 in a little bit more detail about that. But
24 essentially it's had good consequences, and the
25 discussions are ongoing. They've got a process in

1 place, and this just keeps the rulemaking alive
2 while that happens, but it also gives the time for
3 that to run its course.

4 CHAIRMAN RUSSELL: Thanks. Bob.

5 MR. BUKANTIS: Mr. Chairman, members of
6 the Board, my name is Bob Bukantis, and I
7 supervise the Water Quality Standards Section for
8 the Department of Environmental Quality. And as
9 Tom indicated, I'm here just to really briefly go
10 over the Gallatin ORW, extension of the public
11 comment period that's before you.

12 So in your packets, in addition to the
13 executive summary, you've got a draft
14 Administrative Register notice to extend the
15 public comment period to the 20th of November, and
16 also a copy of the comment letter submitted by the
17 Greater Yellowstone Coalition requesting extension
18 of the public comment on this rulemaking.

19 Just very briefly, I'll summarize the
20 background and context of this, especially given,
21 as Tom indicated, we're thinking that we will be
22 coming back to you, and explaining this in more
23 detail in December, assuming you agree with us to
24 extend the public comment period.

25 But basically what ORW designation means

1 is it's a designation to provide the highest level
2 of water quality protection available under
3 Montana's law to a water, in this case the
4 Gallatin River between the Park and Spanish Creek.

5 And again, this issue first came to the
6 Board through a petition from American Wildlands
7 in December of 2001, so this has been going on for
8 quite awhile, and that petition precipitated a
9 series of Board and Department actions, which
10 included an EIS, a public hearing by this Board in
11 Gallatin Gateway, and a draft rule, which just to
12 summarize the draft rule, the rule would identify
13 the Gallatin as an ORW, Outstanding Resource
14 Water; and it would also clarify the Department
15 has authority to regulate all new or increased
16 sources of pollution with direct hydrologic
17 connection to the Gallatin River, as well as
18 clarify that any new restrictions would not apply
19 to any permits that had been issued prior to the
20 rule going into effect.

21 The initial public comment period closed
22 on November 2nd, 2006. We received quite a bit of
23 comment, and there was quite a bit of opposition
24 to the ORW because it would render some Big Sky
25 properties undevelopable in the eyes of many.

1 And so there was a move to develop a
2 collaborative group which became known as the
3 Wastewater Solutions Forum, which has been moving
4 forward with trying to seek alternatives that
5 would provide the Gallatin with water quality
6 protection that would be as good or better as
7 would be envisioned from the ORW.

8 So the Department has agreed to support
9 that collaborative moving forward. There was a
10 meeting, I think, within -- well, I know within
11 the last couple of weeks, where some of the
12 Department members were involved. I think things
13 have slowed down a little bit because of the
14 economic situation, but things continue to move
15 forward, and you do have that letter from GYC
16 asking to extend rulemaking, which we support.

17 So with that, I'll leave you with just
18 saying that the Department supports extending this
19 rulemaking until the 20th of November, and this
20 item would be then back before you in the December
21 meeting. I'd be happy to answer any questions if
22 you have any, and there is also a couple folks
23 here in the Department that have been involved
24 with various aspects for back up if necessary.

25 CHAIRMAN RUSSELL: Thanks, Bob. We will

1 at some future meeting, before this is all closed,
2 the Department will put a nice briefing matter
3 together, some nice maps, understanding what the
4 rules are trying to do?

5 MR. LIVERS: Mr. Chairman, we have done
6 that periodically, as you know, but I think what
7 we're envisioning at this point is maybe the
8 December meeting, since the six month extension
9 will be up prior to the January meeting.

10 We'll probably need to take action. We
11 anticipate action, again, to extend in December,
12 and we would have a briefing prior to the action
13 item where we go into more detail, more depth, a
14 little more on the history; but also we've done a
15 Power Point before that shows the footprint for
16 the hydrologic connection, and I think that's what
17 we've got in mind.

18 CHAIRMAN RUSSELL: Great. So are there
19 any procedural questions that the Board would
20 have, so we don't really run into this water
21 quality issue, and the matters, and the
22 boundaries, and all those things?

23 (No response)

24 CHAIRMAN RUSSELL: Thanks, Bob.
25 Questions before we proceed with this?

1 (No response)

2 CHAIRMAN RUSSELL: If none, I will

3 entertain a motion --

4 MR. LIVERS: Do you want to take public

5 comment?

6 CHAIRMAN RUSSELL: Is there anyone out

7 in the audience that is actually not a DEQ person

8 that would like to extend a comment on this

9 matter?

10 (No response)

11 CHAIRMAN RUSSELL: Seeing none, I will

12 entertain a motion to actually to adopt a new

13 notice, and extend the comment period to November.

14 MS. KAISER: So moved.

15 CHAIRMAN RUSSELL: It's been moved by

16 Heidi. Is there second?

17 MR. MILLER: I'll second.

18 CHAIRMAN RUSSELL: Seconded by Marvin.

19 Is there any comment?

20 (No response)

21 CHAIRMAN RUSSELL: Questions? All those

22 in favor, signify by saying aye.

23 (Response)

24 CHAIRMAN RUSSELL: Opposed.

25 (No response)

1 CHAIRMAN RUSSELL: Thank you. The next
2 item on the agenda is the potential amendment to
3 Administrative Rules of Montana 17.38 Chapters 1
4 and 2, Public Water Supplies. It must be Gene.
5 Our new Charles Homer.

6 MR. PIZZINI: Good afternoon, ladies and
7 gentlemen, Chairman Russell, members of the Board.
8 For the record, my name is Eugene Pizzini, and I'm
9 the Rules Coordinator for the Public Water Supply
10 Section.

11 The Department has proposed amendments
12 to the Administrative Rules of Montana Title 17,
13 Chapter 38, Subchapters 1 and 2, Public Water and
14 Sewage System Requirements. The proposed
15 amendments are necessary to amend existing rules
16 to incorporate new statutory requirements related
17 to regional water systems, adopt new rules to
18 incorporate new federal requirements related to
19 groundwater sources, disinfection byproducts, and
20 surface water sources; amend existing rules to
21 reduce requirements that are more stringent than
22 existing federal requirement related to treating
23 groundwater, sanitary surveys, and residual
24 disinfectants; and to amend existing rules to
25 repeal sections that are not authorized by

1 statute.

2 As a condition of primacy with the
3 United States Environmental Protection Agency,
4 Montana is required to have rules no less
5 stringent than the applicable federal rules. The
6 policy of the Montana Legislature has been for
7 State agencies to retain primacy over
8 environmental and public health programs.

9 The proposed amendments to Title 17,
10 Chapter 38, Subchapter 1 are necessary to
11 incorporate new statutory requirements for the
12 review of regional water supply systems, Section
13 1, Chapter 449, laws of 2009. This actually came
14 in under House Bill 556.

15 The new provisions will apply to
16 regional water supply systems for which a final
17 engineering report has been approved by United
18 States Bureau of Reclamation. For these projects,
19 the statute requires a shorter time for Department
20 review of plans and specifications, a longer life
21 for plan approvals after approvals are issued by
22 the Department, and a project life approval for
23 project documents other than design plans and
24 specifications. All other requirements in the
25 subchapter apply to these projects except as

1 specifically modified by these amendments.

2 The proposed amendments to Title 17,
3 Chapter 38, Subchapter 2 include the proposed
4 adoption of four new federal rules. The new
5 federal requirements include the groundwater rule,
6 the initial distribution system evaluation rule,
7 the Stage 2 disinfection byproducts requirements
8 rule, and the enhanced treatment for
9 criptosporidium rule. All applicable public water
10 supply systems are subject to the new federal
11 requirements under federal rule.

12 The Department proposes to adopt these
13 new requirements by reference with no changes.
14 The proposed new rules are necessary to allow the
15 Department to enforce public water supply laws and
16 to retain primacy for the enforcement of the Safe
17 Drinking Water Act.

18 Proposed changes to the existing rules
19 or to accommodate the new federal requirements and
20 Department resource issues. The groundwater rule
21 requires systems with susceptible sources to
22 provide treatment that achieves inactivation or
23 removal of 4-logs of viruses. The existing rules
24 only allow for inactivation. The existing rule
25 requires systems that chlorinate to maintain a

1 minimum .2 milligram per liter residual at all
2 points in the distribution system.

3 As these systems are subject to the
4 disinfection byproducts requirements, there is a
5 potential for systems to create compliance issues
6 with the federal rules while complying with
7 Montana's more stringent rules.

8 The Department is also proposing to
9 reduce existing sanitary survey frequencies to
10 more closely match that of the federal
11 requirements.

12 The Department proposes to repeal rules
13 that it does not have specific statutory authority
14 to enforce. These rules were carried over from
15 the break-up of the Department of Health and
16 Environmental Sciences. Those portions of these
17 rules that the Department does regulate are
18 codified under other rules.

19 The other revisions are necessary to
20 provide consistency and clarity in the
21 implementation and enforcement of existing rules
22 with existing statutory requirements.

23 The Department recommends appointment of
24 a Hearings Officer and initiation of rulemaking.
25 I am more than willing to answer any questions.

1 CHAIRMAN RUSSELL: Thanks. I have one,
2 but I'll wait. Any questions for the Department,
3 Gene?

4 (No response)

5 CHAIRMAN RUSSELL: When I read through
6 this, you talk about the two parts per million
7 residual, and then in the other area, I couldn't
8 find -- you talk about disinfecting agents. Is
9 there somewhere in there that shows the
10 equivalency between chlorine and other agents that
11 are listed? And we all know there are standards
12 for those. Why aren't they done by potential
13 instead of by chemical?

14 MR. PIZZINI: Mr. Chairman, members of
15 the Board, I guess the easiest way to answer that
16 is in reality, the way our current rule is set up,
17 we require systems to have a minimum .2 milligrams
18 per liter when they use a chlorine form
19 disinfectant. If you have been on the Board long
20 enough, once upon a time, that section of our
21 rules was the chlorination rule. Well, in order
22 to allow systems to use another form of
23 disinfectant such as UV, we had to make it the
24 disinfection rule.

25 So in reality, I think your question is

1 taking two of the components that we're doing and
2 try and push them into one, and I'll try to
3 explain that.

4 We have the .2 chlorine residual
5 requirement existing under the current rule. The
6 groundwater rule, which is the new federal rule
7 requirement that's coming in, may require a
8 groundwater source to disinfect its source and
9 achieve 4-log virus inactivation prior to the
10 first user. It has no subsequent language or
11 residual out into the distribution system.

12 Montana was actually proactive years ago
13 when they created this disinfection rule, and
14 allowed the Department to require some groundwater
15 systems to install chlorination and then
16 disinfection. We did not have the 4-log
17 component. So our answer to that was we said,
18 "You have to have a minimum residual out in the
19 distribution system. That way we know that
20 everybody has water that's being disinfected."

21 The problem with that is the first user
22 on the system may not have water that's been in
23 contact long enough with the chlorine to achieve
24 the 4-log virus inactivation.

25 So to resolve the stringency between our

1 rules and the new federal rule, we're doing away
2 with the .2. A groundwater system that's
3 triggered into disinfection under the groundwater
4 rule will not have to maintain a residual out in
5 the distribution system.

6 Part of what we're removing with the .2
7 is Montana was also more stringent than the
8 federal rule for surface water systems. The
9 surface water rule says that a system basically
10 must have a detectable level out in all points of
11 their distribution system. Montana used .2 as a
12 qualitative number as opposed to having -- or
13 excuse me -- quantitative as opposed to just
14 saying detectable, because it was so wide open.

15 One of the concerns with requiring that
16 level is that in order for a large system, or a
17 system with large distribution, to push it out to
18 the farthest points, they're going to have a lot
19 initially. That large quantity initially has the
20 potential to cause disinfection byproducts issues.
21 And so in an effort to try to make it easier for
22 systems to comply with that, we're proposing to do
23 away with the .2.

24 The .2 will remain under some
25 circumstances. A groundwater system that's

1 required to supply full-time disinfection, and for
2 some reason if the Department determines that
3 there is a distribution system issue -- such as
4 multiple leaks, loss of water through the system,
5 the system is unable to maintain pressure, the
6 system has a recurring problem out in the
7 distribution system -- then we will require them
8 to maintain a residual, and that residual will be
9 the .2.

10 CHAIRMAN RUSSELL: So the last question
11 I would have is New Rule IV on criptosporidium.
12 What I know of criptosporidium, it takes a lot of
13 disinfection agent to inactivate it, and if you're
14 filtering it, you have basically have to filter it
15 through something like a concrete slab. How is
16 that going to buck up against the disinfection
17 byproduct rule?

18 MR. PIZZINI: Chairman Russell, members
19 of the Board, the enhanced treatment for
20 criptosporidium is otherwise known LT-2, long term
21 two.

22 When EPA wrote their rules to implement
23 the Safe Drinking Water Act back years ago, they
24 wrote the surface water treatment rule. That rule
25 is mainly designed to deal with Giardia and

1 criptosporidium, which for the reasons you stated,
2 difficulty of inactivation through a chemical
3 treatment, is why the surface water treatment rule
4 requires mechanical, as well as chemical
5 treatment. You use filters to take as much of it
6 out as you can; you use chlorine as a disinfectant
7 on the other end to try and catch the remainder.
8 The surface water treatment rule requires 3-log
9 inactivation/removal of cripto.

10 The LT-2 is the next step, and what it's
11 doing is the general intent is to improve the
12 ability, or to raise the bar on what the systems
13 have to do to ensure that they're removing cripto.
14 They do that by monitoring and doing some
15 treatment changes. So yes, cripto is extremely
16 difficult to inactivate with chlorine under the
17 wrong water -- wrong being right in this case.
18 Water quality parameters, you could be talking 30
19 minutes to get an inactivation.

20 So that's why they have the filtration
21 requirement. This is just the next step in their
22 progression on how they're going to deal with
23 these things.

24 CHAIRMAN RUSSELL: Just a quick
25 question. Are there any large public supplies

1 that are pretreating before they filter at this
2 time, prechemical treatment? Sometimes that will
3 help with disinfection byproducts. I was
4 wondering.

5 MR. PIZZINI: Chairman Russell, members
6 of the Board, the disinfection byproducts is
7 mainly going to be dealt with under Stage 2.
8 Surface water systems that optimize their surface
9 water quality facilities, depending on the type of
10 plant they have, have the ability to remove some
11 of the precursors, the organic carbon that's in
12 the water, that type of stuff.

13 LT-2 -- or excuse me -- Stage 2 is
14 dealing with -- Stage 1, when it came out, dealt
15 with the larger systems. Stage 2 is now applying
16 those disinfection byproduct removal requirements
17 and monitoring down to the smaller systems.

18 So yes, a change in some treatment
19 plants -- And there is a whole array of various
20 treatments that you can use, whether it's direct,
21 indirect, and so they can change the way they're
22 doing things. I don't know what we have for
23 systems currently that are doing pretreatment. I
24 can find out if you --

25 CHAIRMAN RUSSELL: Just to --

1 MR. PIZZINI: Just to harass me.

2 CHAIRMAN RUSSELL: Just a little

3 harassment. Are there any questions for Gene

4 before we release him?

5 (No response)

6 CHAIRMAN RUSSELL: Thank you.

7 Any other questions?

8 (No response)

9 CHAIRMAN RUSSELL: Seeing none, I would

10 entertain a motion to initiate rulemaking and

11 appoint Katherine --

12 MS. ORR: That would be fine.

13 CHAIRMAN RUSSELL: -- as the Hearing

14 Examiner. Do I have a motion for that?

15 MR. WHALEN: Mr. Chairman, I move to

16 initiate rulemaking, and appoint Katherine Orr as

17 our Hearings Officer.

18 CHAIRMAN RUSSELL: Is there a second?

19 MR. MIRES: Second.

20 CHAIRMAN RUSSELL: Seconded by Larry.

21 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: Motion carries. We
4 have another Department request to initiate
5 rulemaking on ARM 17.30.201.

6 MS. CHAMBERS: Thank you, Mr. Chairman,
7 members of the Board. Thanks for giving me the
8 opportunity to follow Geno. My name is Jennie
9 Chambers, and I am Chief of the Water Protection
10 Bureau.

11 The Department requests the Board concur
12 with the recommendation to initiate rulemaking to
13 amend ARM 17.30.201. These are rules that are
14 pertaining to the permit fees associated with
15 water quality discharges.

16 The Montana Water Quality Act requires
17 the Board to adopt rules that are sufficient to
18 recover the cost of issuing permits, licenses, or
19 other authorizations issued by the Department, as
20 well as any costs that are used to administer the
21 operating program of the budget.

22 The program is operating -- our current
23 fee schedule, which became effective February 15,
24 2002, so we haven't had a fee increase since the
25 2002 time frame. In preparing these fee rule

1 packages, we used specific data on permits that we
2 currently issue or expect to manage in the future,
3 and this was consistent with our statutory
4 requirements under MCA 75-5-516.

5 I just want to give you a quick
6 overview, I guess, of the Water Protection Bureau,
7 and why we're going forward with the fee increase,
8 and ask the Board to initiate rulemaking.

9 The Water Protection Bureau currently
10 has 26 FTEs that are covered under this fund
11 source. Personal services just to cover staff is
12 1.8. We have very limited operating cost, and
13 have reduced it drastically just to maintain our
14 budget where it current is. Our operating budget
15 is only \$460,000. Our current revenue from fees
16 brings in 1.7. It's not even enough to cover our
17 staff, let alone any kind of operating expenses.

18 Our total budget remains at status quo
19 2.4. We haven't changed -- basically gone to the
20 legislative session and asked for additional
21 funding to try to raise our spending authority,
22 basically 2.4 just to maintain our current budget.

23 We do get additional revenue, but it's
24 very limited. We get a PPG grant, which is from
25 EPA, just to administer the program. Based upon

1 our primacy package, that's a little over
2 \$300,000, \$324,000.

3 We get some cooperation and some money
4 from Planning Division, which is another division
5 within the Department of Environmental Quality,
6 \$97,000. That is basically to fund one FTE for
7 nonpoint source work associated with water quality
8 discharges; coordinate with Army Corps of
9 Engineers, Fish, Wildlife and Parks, and be the
10 liaison with the Department in those activities.

11 And then we get very limited General
12 Fund, \$60,000 currently. However at this last
13 legislative session, basically we're sitting on
14 the side of the table wondering whether or not we
15 were going to maintain that \$60,000 or not. So in
16 this budget projection, we basically didn't
17 account for General Fund because it's not
18 something that we can count on going forward in
19 the future.

20 So we needed to make up the difference
21 somehow in our fee structure. There has been no
22 increase in fee. If we have no increase in fee to
23 move forward in 2010, we would have basically
24 \$70,000 to carry forward on our fees. So \$70,000
25 plus the 1.7 we bring in would not be enough to

1 cover the program. In 2011, we would have
2 \$560,000 in the red, so we'd be in a deficit
3 \$560,000.

4 Basically to get this package, based
5 upon hard economic times, we knew that this fee
6 increase might impact our stakeholders. We have
7 done an informal review and stakeholder
8 involvement with informal comments during the
9 drafting process. We will continue to work with
10 those folks, get responses back to them during the
11 informal process, which is not mandatory, but it's
12 definitely something we want to move forward with.

13 In addition, two presentations to the
14 Water Pollution Control Advisory Council who
15 agreed with the Department's initiative to move
16 forward; also gave some recommendation as to
17 whether or not we'd go for a large increase at
18 this time, which is looking about a 30 and 40
19 overall program increase, or do incremental
20 changes and come back to the Board each year.

21 So with this particular package, if we
22 move forward, it's about a 30 to 40 percent
23 increase, and then we probably shouldn't have to
24 be back in front of the Board until 2013, so it
25 will carry us forward at least during the next

1 biennium.

2 The four major proposed amendments are
3 increasing both application and annual fees for
4 permits and authorizations, establishing fees
5 based on volume discharges for groundwater
6 discharges to make it more equitable for
7 groundwater discharges compared to surface water
8 discharges. We also establish fees for
9 administrating the process of permit related
10 submittals.

11 One example on No. 3 here is if we get
12 application from a permittee for authorization to
13 degrade, which is a very complex process, we
14 currently do not have a fee associated with that.
15 If somebody came into the Department, a mine or a
16 new industry or something, that knew they weren't
17 going to have a similar capacity to discharge in
18 that receiving water, and needed to apply for
19 authorization to degrade, I'd have to allocate
20 staff and resource in our operating budget to
21 supply or to review that request. We thought it
22 would be prudent to have a fee associated with
23 that to try to recover, recoup some of those
24 costs.

25 In No. 4, we just added text in the

1 rules to clarify how the fees are assessed under
2 the fee schedule. As you see from the package
3 that was provided, the rule package, these fee
4 packages are fairly complex, so we want to add
5 additional language to try to clarify things.

6 The MAR notice that you have been
7 provided for the proposed revisions. The
8 Department requests the Board concur with this
9 recommendation to initiate rulemaking, and to
10 appoint a Hearings Officer for the public hearing.
11 I'd be happy to answer any questions.

12 CHAIRMAN RUSSELL: I have one question.
13 Under the storm water permit area, it's still a
14 per outfall, even though --

15 In a lot of cities, Kalispell being one,
16 they're basically not -- there are a lot of storm
17 water systems for parking lots that are not being
18 tied into the existing storm water system
19 collection. Are those things going to be subject
20 to this rule?

21 MS. CHAMBERS: Mr. Chairman, members of
22 the Board, I'm a little confused on your question.
23 Are you referring to the storm water section under
24 MS-4, and this is little separate storm sewer
25 systems, and that those are based upon outfalls,

1 and those are for small MS-4s within Montana,
2 which we only have a handful, about nine of them,
3 which is more than a handful unless you have nine
4 fingers. But about nine of them.

5 So basically the city is required, based
6 upon MS-4, by having a plan to cover, to be
7 compliant with general permits with MS-4s, to set
8 up their own local ordinance based on how they do
9 storm water in a particular area, or urban area of
10 development.

11 So it would be our recommendation from
12 the Department to have the City of Kalispell set
13 up ordinances within their local area to ensure
14 that those storm water drainage systems either
15 comply with the city requirements, hook up to city
16 sewer systems, or maintain their storm water
17 runoff from the particular area or site.

18 CHAIRMAN RUSSELL: So what would be a
19 definition of an outfall then?

20 MS. CHAMBERS: An outfall is defined as
21 point source or area of disturbance where runoff
22 all maintains. Under storm water, it's a little
23 bit different, because it's not a point source
24 activity. However, under the EPA Clean Water Act,
25 storm water is considered a point source.

1 We define outfalls -- and I think the
2 definition is in the packet, but it could just be
3 referenced on additional, another rule source. We
4 define an outfall as a receiving water, state
5 receiving water, so if --

6 CHAIRMAN RUSSELL: Nothing short of
7 that?

8 MS. CHAMBERS: Right.

9 CHAIRMAN RUSSELL: Groundwater would be
10 considered a state receiving water? I'm just
11 trying to get to -- Some of our systems in Montana
12 use dry wells. Is that an outfall?

13 MS. CHAMBERS: That's an outfall under
14 the groundwater, requirements of the groundwater
15 pollution control system, so that indeed maybe
16 would need a groundwater pollution control system
17 permit, or a permit coverage in the UIC program
18 that was brought up earlier. But as far as storm
19 water, it's surface water runoff that would
20 potentially impact or cause harm on surface water,
21 receiving waters.

22 CHAIRMAN RUSSELL: That helps. Thanks.

23 MR. WHALEN: Mr. Chairman. Ms.
24 Chambers. My question would be: Are there new
25 categories that have been inserted into the fee

1 schedule as a result of this review?

2 MS. CHAMBERS: Mr. Whalen, members of
3 the Board, we have clarified some areas that have
4 added some new categories. Some areas that we
5 have changed is groundwater is now set up by
6 volume or flow.

7 That used to be just an industrial or
8 domestic, but we tried to break those out to be
9 more representative of populations of groundwater
10 discharges, which are some large subdivisions or
11 even the City of Belgrade, that would pay an
12 equitable amount of rate compared to like a
13 surface water discharge, like the City of Deer
14 Lodge.

15 Plus we added some additional
16 categories, for instance, the authorization to
17 degrade is a new category. We looked at adding --
18 we have another category for others, just in case
19 some new general permit gets developed that we
20 didn't have a category associated with that, that
21 we have a place holder for those.

22 In addition, we added another category
23 for resubmittal of application fees, and then
24 maybe an administrative processing fee. We do
25 have some permittees that will submit an

1 application; we have staff review those, look at
2 them for completeness; call them deficient;
3 continue to work with the permittee to try to get
4 the application complete; then a year or two years
5 later, they'll submit a whole brand new
6 application, and call it under their existing
7 permit. However, everything that we reviewed has
8 totally changed.

9 So we would probably charge those folks
10 a resubmittal application fee, just to allocate
11 the time that it's going to take to rereview a
12 totally new application, in our eyes, but a
13 concurrent application in the permittee's eyes.

14 MR. WHALEN: I have a follow-up. In
15 setting up this rate increase schedule, I'm
16 noticing some discrepancies between point versus
17 nonpoint sources. There is a couple of cases
18 where point sources have not risen, but nonpoint
19 sources have. What was the thinking in terms of
20 changes to the way that these fees were structured
21 relative to point versus nonpoint?

22 MS. CHAMBERS: Well, in the eyes of the
23 Clean Water Act, anything that we regulate within
24 the Water Protection Bureau is considered a point
25 source, so I just want to clarify that. So in the

1 Clean Water Act, stormwater is a point source type
2 of activity. We also look at the volume and
3 concentration and the potential for the pollutants
4 that they're to going to discharge.

5 In stormwater construction, for
6 instance, that would be turbidity, how much volume
7 of the site contributed to the impact of the
8 receiving waters. We looked at a little bit of
9 that.

10 However, the big hurdle, I guess, that
11 we had was on the point sources, which would be
12 the individual MPDES permit holders. We were
13 reaching our statutory cap. Under the MCA
14 requirements, we have a statutory cap of five
15 thousand, so we don't have much wiggle room as far
16 as going any higher to make it more equitable on
17 there as far as the increase. We only had the
18 other activities that we weren't at that cap to
19 kind of play with.

20 MR. WHALEN: Thank you. One more follow
21 up. I guess I understand the bind that the
22 Department or the Bureau is in with respect to
23 trying to catch up on revenues in order to justify
24 operations.

25 But speaking for myself, I would say

1 don't feel bashful about coming to the Board with
2 much more nominal fee increases on an annual basis
3 as opposed to a big lump sum fee increase of 30,
4 40 percent system-wide. Politically it's a lot
5 easier to digest those small increases. At least
6 at the local level, if we're going to raise our
7 water rates, if we've got to raise them 50 to 60
8 percent, we've got a real issue with ratepayers;
9 but if we come in on an annual basis, and do a 2
10 or 3 percent increase in order to maintain
11 operations, that makes everything a lot more
12 palatable.

13 And I'm kind of interested to hear if
14 you've heard from municipal water users relative
15 to this new fee structure.

16 MS. CHAMBERS: Mr. Whalen, members of
17 the Board, yes, we had sent these draft rules to
18 the League of Cities and Towns, actually did a
19 presentation in front of those. There is some
20 smaller municipalities that are represented on
21 WPCAC, so they also heard the presentation.

22 I would agree with you and echo that,
23 that it's not good program management as far as
24 waiting seven years to come in for a fee increase.
25 So even though these rules may carry us to 2013,

1 it wouldn't be prudent to wait until that time
2 frame when we're in dire straits in order to get a
3 fee increase.

4 So to get in the cycle of when we go to
5 the legislative session, get our spending
6 authority to get us covered for the next two year
7 biennium, I would propose that my bureau would
8 also go forward with the fee increase, evaluate
9 our budget at that time, and go on an every two
10 year cycle to also be able to communicate that to
11 the municipalities on our regulated community as
12 far as our permittees.

13 MR. WHALEN: Thank you, Mr. Chairman.

14 CHAIRMAN RUSSELL: I have a couple. You
15 try to establish your fees based on what it takes
16 to do the work, with the exception of suction
17 dredging, as it appears. It's really nice that
18 you're basically going to nail nonresidents of
19 Montana with a higher fee. I like that. I guess
20 I'm on the record as saying that.

21 Somewhere in your narrative, you also
22 mentioned that there is \$400,000 that you're not
23 sure you're going to have in your program. What
24 was that all about?

25 MS. CHAMBERS: Mr. Chairman, I'm not

1 sure where the \$400,000 reference is coming from.

2 CHAIRMAN RUSSELL: I don't either. I
3 couldn't find it. Maybe it was another rule, but
4 there is only the fee rule in front of us, isn't
5 it?

6 MS. CHAMBERS: That's correct. Mr.
7 Chairman, members of the Board, I guess I'd like
8 provide a little bit of clarification. Yes, the
9 cost of managing the program, the fees are
10 supposed to be assessed in order for us to manage
11 our program. Suction dredge -- and it wasn't my
12 idea to charge residents more than nonresidents.
13 That was put in the statute up in the legislative
14 session years ago, and so we would have to go back
15 to them in order to get that changed.

16 Plus CAFOs is also other area that is
17 locked in statute, and that we were working with
18 the stock growers and some of our group in order
19 to evaluate that particular fee. That is not
20 commensurate based upon what it takes to review a
21 CAFO application, or do compliance on a CAFO
22 particular site.

23 The \$400,000 section, I'm not --

24 CHAIRMAN RUSSELL: That's all right.

25 MS. CHAMBERS: -- totally clear. But it

1 could be that we are seeing a decrease in
2 applications. From 2008 to 2009, we have seen a
3 20 percent decrease in applications, and so we did
4 look a little bit at what we currently have and
5 what we expect to manage in the future. With the
6 economic downturn, even the Department sees
7 reductions on stormwater applications. That
8 trickles down to our bureau because we don't get
9 the storm water construction applications in
10 either.

11 So we are looking at loss of revenue
12 potentially in the future with the downturn in the
13 economy.

14 CHAIRMAN RUSSELL: Any other questions?

15 MR. LIVERS: Mr. Chairman, just looking
16 at the summary on this rulemaking, I think we
17 might be mixing a couple of numbers. I think
18 there is a reference to, "Currently unknown is a
19 \$60,000 State General Fund appropriation would be
20 available in the future," and then there is, "In
21 addition to approximately \$2 million permit fee
22 revenues, there is another approximately \$400,000
23 between some State special revenue funds and
24 federal grants."

25 CHAIRMAN RUSSELL: I was just reading

1 too fast. Thanks for clarifying that for me.

2 MR. LIVERS: I think Mr. Mires might

3 have caught that as well.

4 CHAIRMAN RUSSELL: Any further

5 questions?

6 (No response)

7 CHAIRMAN RUSSELL: Thank you. Seeing

8 none, Katherine, are you up for this one, too?

9 MS. ORR: Yes, that would be fine.

10 CHAIRMAN RUSSELL: I would entertain a

11 motion to initiate rulemaking, and appoint

12 Katherine as the Hearing Officer.

13 MR. MIRES: So moved.

14 CHAIRMAN RUSSELL: It's been moved by

15 Larry. Is there a second?

16 MS. KAISER: Second.

17 CHAIRMAN RUSSELL: It's been seconded by

18 Heidi. Further discussion?

19 (No response)

20 CHAIRMAN RUSSELL: Seeing none, all

21 those in favor, signify by saying aye.

22 (Response)

23 CHAIRMAN RUSSELL: Opposed.

24 (No response)

25 CHAIRMAN RUSSELL: Thank you. Next on

1 the Agenda are new contested cases on appeal.

2 MS. ORR: Mr. Chairman, members of the
3 Board, coincidentally the violations for both of
4 these cases are the same, and the first one has to
5 do with the Anaconda Country Club. These are
6 public water supply cases.

7 In that case, you probably saw the
8 administrative order that recites the violation
9 and the request for the penalty. There was an
10 alteration of a public water supply system without
11 prior Department approval, and specifically they
12 installed a new groundwater well and abandoned an
13 existing well without plans, and specs, and
14 approval by the Department. And they also
15 operated the public water supply without
16 Department approval. And the Department is
17 seeking \$5,420 in fines.

18 CHAIRMAN RUSSELL: Any questions for
19 Katherine?

20 (No response)

21 CHAIRMAN RUSSELL: Seeing none, I would
22 entertain a motion to appoint Katherine the
23 permanent Hearings Examiner on this matter.

24 MS. KAISER: So moved.

25 CHAIRMAN RUSSELL: It's been moved by

1 Heidi. Is there a second?

2 MR. MILLER: Second.

3 CHAIRMAN RUSSELL: Seconded by Marvin.

4 Further discussion?

5 (No response)

6 CHAIRMAN RUSSELL: All those in favor,
7 signify by saying aye.

8 (Response).

9 CHAIRMAN RUSSELL: Opposed.

10 (No response)

11 CHAIRMAN RUSSELL: Motion carries
12 unanimously.

13 MS. ORR: Mr. Chairman, members of the
14 Board, this is a case out of Three Forks involving
15 Headwaters Livestock Auction, which is also a
16 public water supply source. The same allegations,
17 alteration of a public water supply without
18 Department approval. In this case, it was
19 installation of a reverse osmosis system. And no
20 plans and specs had been generated by an engineer,
21 and then when that was done, there were
22 deficiencies in the plans and specs.

23 And then the second alleged violation is
24 operation of the public water supply system
25 without Department approval, and the fine there

1 that's requested is \$7,518.

2 CHAIRMAN RUSSELL: I have a question.
3 You read the appeal letter, did you not?

4 MS. ORR: Yes.

5 CHAIRMAN RUSSELL: The first, "After
6 having met with a number of Board members in the
7 violations department of this past week," who are
8 they talking about?

9 MS. ORR: I guess their own board, is
10 the way I read that.

11 CHAIRMAN RUSSELL: It says, "In the
12 violations department this past week, I find it
13 necessary to ask for an appeal."

14 MS. ORR: Maybe they have a very special
15 committee that anticipates violations.

16 CHAIRMAN RUSSELL: Well, I guess they're
17 in the business.

18 MS. ORR: It was unclear.

19 CHAIRMAN RUSSELL: That is a weird
20 statement. I guess it doesn't really need
21 clarification. They asked for -- they've appealed
22 the decision of the Department. It almost sounds
23 like there is someone in the Department who says,
24 "Why don't you just appeal and see how far you can
25 get." I'm sure that didn't happen, John.

1 MR. LIVERS: Mr. Chairman, I'd speculate
2 that's all it is, that they had some discussions
3 with the Department staff, which they may be
4 referring to as Board members, and maybe they
5 weren't satisfied, and it looks like --

6 CHAIRMAN RUSSELL: I'm sure it wasn't ex
7 parte.

8 MR. ARRIGO: Mr. Chairman, members of
9 the Board, just for clarification. I'm John
10 Arrigo with the Enforcement Division. I believe
11 the appeal letter came from a gentleman who is a
12 manager of the operation, and he had to consult
13 with his Board of Directors to make the decision
14 whether or not to appeal.

15 CHAIRMAN RUSSELL: He wasn't very clear.
16 I want to just go on the record that he didn't
17 talk to me.

18 MR. WHALEN: Mr. Chairman, I'm just
19 wondering if there may be some merit in splitting
20 the difference with Ms. Orr on these new appeals
21 and maybe hear this one.

22 CHAIRMAN RUSSELL: It would be up to the
23 Board. Is that a motion?

24 MR. WHALEN: It's not a motion. It's
25 just a thought I would put out there to consider

1 before we would go to motion, for a couple
2 reasons. One is the workload that we're putting
3 on the Hearings Officer.

4 And then secondly, between these two, if
5 they are similar in nature in terms of violations,
6 and this one happens to be a higher fine, and we
7 have the incident of this letter in the memo and
8 the confusion that it's generated, it might be
9 worth giving this some hearing. I don't know what
10 sort of -- because I'm new, I'm not certain what
11 sort of difficulties it might create for the
12 Department, but as a new Board member, this is
13 something that I guess I would be interested in
14 listening to.

15 CHAIRMAN RUSSELL: With that in mind, in
16 the past we've basically just not appointed a
17 Hearing Examiner permanently, and we would allow
18 Katherine to continue to do pre-hearing work for
19 us, and just move forward in that fashion.

20 MR. MIREs: Basically just like Joe was
21 saying, just retain the option of looking at it in
22 the future if need be.

23 CHAIRMAN RUSSELL: Right.

24 MR. MIREs: Like most cases, this will
25 resolve itself.

1 CHAIRMAN RUSSELL: It may resolve itself
2 with some parties' actions on this. So we can
3 just take no action on it. We'll just keep
4 moving. Is that all right? We'll just keep
5 moving then.

6 The last item -- and this is very odd
7 that we only have one -- is final actions on
8 contested case. This would be in the matter of
9 violations of the Montana Water Quality Act by Jim
10 Gilman Excavation at Augusta-South, Lewis & Clark
11 County.

12 MS. ORR: Mr. Chairman, members of the
13 Board, this is a case in which the parties resolve
14 to file a motion for dismissal under Rule 41(a),
15 and that means that they're mutually withdrawing
16 from the jurisdiction of the Board, and the Board
17 really doesn't have much more to do other than to
18 sign the dismissal order. I can give you details
19 about the case, but whatever is your druthers
20 there.

21 CHAIRMAN RUSSELL: Is there a motion --

22 MR. MIRES: So moved.

23 CHAIRMAN RUSSELL: -- and authorize the
24 Board Chair to sign the order --

25 MR. WHALEN: Second.

1 CHAIRMAN RUSSELL: Seconded by Joe. All
2 those in favor, signify by saying aye.

3 (Response)

4 CHAIRMAN RUSSELL: Opposed.

5 (No response)

6 CHAIRMAN RUSSELL: Motion carries.

7 Katherine, we're done with you, right?

8 MS. ORR: Yes, for now.

9 CHAIRMAN RUSSELL: This is the time of
10 the meeting that the Board would accept general
11 public comment on matters pertaining to the Board.
12 Is there anyone out there that would be a member
13 of the public that would like to speak to the
14 Board at this time?

15 MR. ALLEN: Mr. Chairman, members of the
16 Board, for the record, Don Allen with WETA,
17 Western Environmental Trade Association, and I
18 might just comment on a couple things. I know you
19 gave me an opportunity to get up earlier, but I
20 don't want to disappoint you.

21 So the ones on the ORW, I will just
22 quickly say that we think it's on the right path
23 going forward. We had a lot of misgivings about
24 that whole adoption of that rule to begin with,
25 but then the groups came along and put together a

1 collaborative effort trying to resolve that, and
2 I'm hopeful that it will be okay when they get
3 done.

4 The other thing I might just say about
5 the fees. As you know, in the air quality fees,
6 when those were proposed for initiating
7 rulemaking, one of our people was here to talk
8 about the overall concern about the increase in
9 fees coming pretty heavy on things. It was a big
10 increase on the air, and it's a big increase on
11 the water. And so there is some concern about
12 that.

13 But then let me quickly say that we've
14 been meeting with Jennie, and her people, and the
15 Department, and I might just mention that one of
16 the things we've urged them to do -- and I know
17 Director Oppen, and Judy Hanson, and also Jennie
18 are all supportive of that -- I've been urging
19 them for awhile to set up a water CAC.

20 As you know, we have the Clean Air Act
21 Advisory Committee, which has done a really
22 excellent job over the years of getting ahead of
23 the curve on air quality matters, including fees.
24 They're working on some ways not to try to
25 mitigate that. And so the last time I suggested

1 the other day at a meeting, somebody said, "Yes,
2 we could call it CWAAC. That would work real
3 good," and I said, "I'm not sure about that
4 name."

5 But I just want to throw that out
6 because it's up to the Department, of course, and
7 up to the Department, and I'm hopeful they'll go
8 ahead and do that, and that they will help us do a
9 lot of good communicating that needs to happen.

10 So that's my concern is that -- these
11 cumulative effect of the fees that is a concern to
12 a lot of people. Some of our folks are having a
13 tough time right now, and so it's not -- we've
14 gone into the Legislature, and they can tell you
15 that last session we supported, and we've always
16 supported, enough fees appropriation of the
17 Legislature to do the job right in terms of
18 permitting, saying, "Hey, if you need more money
19 to do the permitting, to get it done, we'll come
20 and support that." We've lived up to that.

21 But I just throw that out just as a
22 cautionary thing, because these things come along,
23 and hopefully we can continue to work with the
24 Department. And as I say, the air quality folks
25 have been great in trying to address this in terms

1 of next time, and so hopefully we can do that as
2 far as the water quality, too.

3 But anyway, I appreciate the chance to
4 comment. I'm sorry. I told you I was supposed to
5 be on vacation today, but it didn't work that way,
6 so I wound up having to come up. So I apologize
7 for not having a tie on.

8 CHAIRMAN RUSSELL: You bring up some
9 nice points, and from the regulatory standpoint --
10 which I've done for most of my professional career
11 -- establishing environmental fees takes a
12 philosophy. How much general obligation does the
13 public have to support a program versus how much
14 does the industry have to support the program?

15 And you can go out there, and you can
16 find a lot of literature on how much, is it
17 totally fee supported, should there be some
18 general obligations for complaints and public
19 health protection. So these points are good, and
20 I'm sure that every time that you look at a fee,
21 you look at -- whether you do it specifically or
22 not, you look at those types of issues.

23 MR. LIVERS: Mr. Chairman, we do, and I
24 wanted to express appreciation for those points
25 being raised as well. There is certainly a subset

1 of the Legislature that has pretty strong feelings
2 that fee supported programs are essentially not
3 general obligations, or that the fulcrum is pretty
4 far over, so that they're primarily to be
5 supported by the fee payers.

6 I also think -- and Don may agree with
7 me on this -- that that tends to flex over time,
8 and sometimes the condition of the General Fund is
9 the driver, that we go through a session like
10 we've just had where there wasn't a surplus of
11 General Fund, and it becomes less of a decision
12 based on the kind of philosophy you're talking
13 about, and maybe a little more based on fiscal
14 reality.

15 So I think sometimes that tends to play
16 maybe too big a role, but certainly those are the
17 kind of considerations we take. When we believe
18 there is an argument that there is a general
19 obligation out there, we do try to raise that with
20 the Legislature, and it manifests in a lot of
21 parts of our budget discussions.

22 Also taken to heart are Don's comments
23 on the Clean Air Advisory Council or committee,
24 and trying to replicate that. We see that as a
25 real successful model, and we are moving that

1 direction.

2 So I guess I just want you to know we're
3 listening to that, as well as Mr. Whalen's
4 comments about large increases versus smaller
5 incremental increases. So it's all taken to
6 heart, and all of those are kind of reflective of
7 the direction we're trying to head in the
8 Department.

9 CHAIRMAN RUSSELL: That's good. Thanks
10 for your comments.

11 MR. ALLEN: Thanks, Mr. Chairman,
12 members of the Board.

13 CHAIRMAN RUSSELL: Any general Board
14 comments before we adjourn?

15 (No response)

16 CHAIRMAN RUSSELL: Good meeting. I
17 would entertain a motion to adjourn.

18 MR. WHALEN: So moved.

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

21 MR. MILLER: Second.

22 CHAIRMAN RUSSELL: It's been seconded by
23 Marvin. All those in favor, signify by saying
24 aye.

25 (Response)

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CHAIRMAN RUSSELL: Meeting adjourned.

(The proceedings were concluded

at 11:15 a.m.)

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C E R T I F I C A T E

STATE OF MONTANA)
: SS.
COUNTY OF LEWIS & CLARK)

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

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing - 68 - 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 _____, 2009.

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

<p>\$</p> <p>\$2 54:21 \$300,000 42:2 \$324,000 42:2 \$40 16:22, 20:3 \$400,000 52:22, 53:1, 53:23, 54:22 \$460,000 41:15 \$5,420 56:17 \$560,000 43:2, 43:3 \$60,000 42:12, 42:15, 54:19 \$7,518 58:1 \$70,000 42:24, 42:24 \$97,000 42:6</p> <p>1</p> <p>1 29:3, 29:13, 30:10, 30:13, 38:14 1.7 41:16, 42:25 1.8 41:12 10 17:9 106 8:24, 9:3, 20:6 111 1:10 1192 1:23 11:15 68:3 13 22:9 15 40:23 1512 1:11 17 29:12, 30:9, 31:2 17.30.201 40:5, 40:13 17.38 29:3 17.8.763 15:17 18 39:4 1983 18:16 1999 18:16</p> <p>2</p> <p>2 7:23, 8:2, 29:4, 29:13, 31:3, 31:7, 32:1, 33:17, 34:4, 35:2, 35:6, 35:11, 35:23, 35:24, 36:9, 38:7, 38:13, 38:15, 51:9 2.4 41:19, 41:22 20 54:3 2001 25:7 2002 40:24, 40:25 2006 25:22 2008 54:2 2009 1:5, 1:13, 2:7, 8:2, 9:20, 22:9, 30:13, 54:2, 69:17 2010 42:23 2011 43:1 2012 69:22 2013 43:24, 51:25 20th 24:15, 26:19 24 1:5, 1:13 26 41:10 29 2:6 2nd 4:13, 5:4, 7:20, 25:22</p> <p>3</p> <p>3 44:11, 51:10 3-log 37:8 30 37:18, 43:18, 43:22, 51:3 38 29:13, 30:10, 31:3</p> <p>4</p> <p>4 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