



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

3                           \* \* \* \* \*

4           CHAIRMAN RUSSELL: It is 9:03 a.m., and  
5 I will call --

6           OPERATOR: Karl Knuchel is joining the  
7 meeting.

8           CHAIRMAN RUSSELL: I'll call this  
9 regular meeting of the Board of Environmental  
10 Review to order. Tom, do you want to take a roll  
11 call.

12           MR. ELLERHOFF: Yes, Mr. Chairman.  
13 Would the members identify themselves, please.

14           MR. MILLER: Marvin Miller.

15           MR. ANDERSON: Larry Anderson.

16           MR. MIRES: Larry Mires.

17           MS. KAISER: Heidi Kaiser.

18           MS. SHROPSHIRE: Robin Shropshire.

19           MR. WHALEN: Joe Whalen.

20           CHAIRMAN RUSSELL: We're all here then.  
21 All right. With that, the first item on the  
22 agenda is the review and approval of the minutes  
23 from the July 22nd meeting. Any comments before  
24 we take action?

25                           (No response)

1           CHAIRMAN RUSSELL: Hearing none, I will  
2 entertain a motion to approve those minutes as  
3 submitted.

4           MR. MIRES: Larry Mires so moves.

5           CHAIRMAN RUSSELL: It's been moved. Is  
6 there a second?

7           MS. KAISER: I'll second. This is  
8 Heidi.

9           CHAIRMAN RUSSELL: It's been seconded by  
10 Heidi. Further comment?

11           (No response)

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

14           (Response)

15           CHAIRMAN RUSSELL: Opposed.

16           (No response)

17           CHAIRMAN RUSSELL: Motion carries  
18 unanimously. All right. The next item on the  
19 agenda are briefing items, contested case updates.  
20 Katherine.

21           MS. ORR: Good morning, everyone. Mr.  
22 Chairman, members of the Board. There has been  
23 quite a lot of activity on these cases, and I'll  
24 just kind of go through the highlights of these  
25 activities.

1           For briefing item II(A)(1)(a), in the  
2 matter of the notice of violations of the Montana  
3 Water Quality Act by North Star Aviation, Inc., a  
4 contested case hearing was held two days ago,  
5 September 21st, and post hearing briefs are due on  
6 October 18th.

7           The next item, "B," in the matter of the  
8 request for hearing regarding the revocation of  
9 certificate of approval, there was a recommended  
10 order on summary judgment that was issued, and  
11 this item will be moved to the final action  
12 portion of the agenda at the end of that section.

13           The parties have filed, I would say  
14 minor exceptions to the recommended order on  
15 summary judgment, so the idea will be that for  
16 today, the Board will look at my proposed drafted  
17 order to adopt my recommended order on summary  
18 judgment, which takes into account the interchange  
19 that occurred regarding those exceptions, but  
20 we'll get to that on the final action portion of  
21 the agenda.

22           The next item II(A)(1)(c), in the matter  
23 of the violations of the Open Cut Mining Act by  
24 Deer Lodge Asphalt, a contested case hearing was  
25 held on September 19th, and post hearing briefs

1 are due in that case on October 11th.

2 Then going down through Items (d)  
3 through (g), there has not been any action that  
4 differs from what you see here on the agenda.

5 On Item (g), Lolo Hot Springs, there has  
6 been a proposed hearing schedule, and today I'm  
7 issuing an order that adopts that hearing  
8 schedule.

9 Regarding other cases assigned to the  
10 Hearing Examiner, if you go down to briefing Items  
11 II, Roman Numeral II(A)(2)(a) or (b) in the matter  
12 of the appeal and request for hearing by Roseburg  
13 Forest Products, an order vacating in the dates in  
14 the third scheduling order and setting up a  
15 telephone conference for October 3rd was issued.

16 Item (c), in the matter of the appeal  
17 and request for hearing by Maurer Farms, Inc.,  
18 there has been quite a lot of activity in this  
19 case. One of the Appellants filed a withdrawal of  
20 appeal, Mr. Salois. Also, I have issued an order  
21 on a motion to dismiss denying that motion, and  
22 also an order on cross motions for summary  
23 judgment denying those motions because there are  
24 material issues of fact, and also questions of law  
25 that need to be resolved.

1           MATL has filed a motion to reconsider  
2 the ruling on the dismissal and summary judgment  
3 that was filed on October 24th. Maurer Farms just  
4 recently filed a response, so I'll be ruling on  
5 that. If that goes to hearing, that is set for  
6 hearing on October 19th.

7           Going to Item (d) in this subsection,  
8 Meat Production, Inc., the hearing date was  
9 vacated, and a request for dismissal is being  
10 contemplated by the parties, and we expect that to  
11 be submitted shortly.

12           City of Helena regarding DEQ's notice of  
13 final decision for Montana Pollutant Discharge  
14 Elimination System Permit, that's Item (e) in this  
15 subsection, a second order granting extension was  
16 issued on September 14th, so the parties have yet  
17 to either arrive at a settlement or file a  
18 proposed schedule, looking like they may be able  
19 to settle that case.

20           And then No. 3, Cases Not Assigned to  
21 the Hearing Examiner, in the matter of the  
22 violations of the Montana Strip and Underground  
23 Mine Reclamation Act by Carbon County Holdings, a  
24 stipulation to dismiss was filed recently.

25           OPERATOR: Now joining Todd Shea.

1 MS. ORR: A stipulation to dismiss was  
2 filed on September 21st, 2011, so that was going  
3 to go to the regularly scheduled meeting in  
4 December, and now the Board will just have only to  
5 entertain that motion to dismiss, so that's great.

6 And now we're at the other briefing  
7 items.

8 CHAIRMAN RUSSELL: Thanks, Katherine.  
9 Tom, do you want to tee this one up.

10 MR. ELLERHOFF: Yes, Mr. Chairman. Bob  
11 Habeck of the Air Resources Management Bureau will  
12 address this issue for the Department.

13 MR. HABECK: Thank you, Mr. Ellerhoff.  
14 Mr. Chairman, members of the Board. My name is  
15 Bob Habeck. I'm an Air Program Manager with the  
16 Air Resources Management Bureau. I'm here to  
17 brief the Board on the status of the annual air  
18 quality permit fee rule.

19 The State Clean Air Act allows the  
20 Department to charge an annual air quality  
21 operation fee and an air quality and open burning  
22 permit fee application fee sufficient to cover the  
23 Department's costs of developing and administering  
24 the permitting requirements of the State Clean Air  
25 Act.

1           Typically there is a need to revise  
2 these permit fees. The Department requests the  
3 Board to initiate rulemaking to propose new fees.  
4 However, this year, much the same as I brought to  
5 you last year, the Department is not requesting  
6 the Board to initiate rulemaking. Rather the  
7 Department calculated that it can maintain  
8 existing services using the existing fee structure  
9 for fiscal year 2012. So therefore the formal  
10 rulemaking action is not being requested, and  
11 therefore this action is on your agenda only as a  
12 briefing item.

13           The Department discussed this decision  
14 not to request rulemaking with the members of our  
15 stakeholders, the Clean Air Act Advisory Council,  
16 and members of the major open burning community,  
17 and received no adverse comments regarding this  
18 decision.

19           Also it was understood from these  
20 stakeholders that the current financial situation  
21 is dynamic and ongoing, such that next year the  
22 Department may, if necessary, come before the  
23 Board and request rulemaking depending on the  
24 financial situation.

25           OPERATOR: Now joining. Joe.



1 MR. HABECK: So to round off my  
2 presentation, the current air quality permit fee  
3 charges will remain the same at \$38.24 a ton as  
4 currently published in the rules, and the  
5 application administrative fees will also remain  
6 the same as currently published in our rules.

7 So that concludes my briefing to the  
8 Board. I stand by for any questions.

9 CHAIRMAN RUSSELL: Any questions for  
10 Bob?

11 (No response)

12 CHAIRMAN RUSSELL: It's hard to have  
13 questions if nothing is going to change.  
14 Questions for the Department?

15 (No response)

16 CHAIRMAN RUSSELL: Thanks, Bob. All  
17 right. The next item on the agenda is Item  
18 III(A)(1), Executive Summary for Rulemaking, and  
19 this is in MPDES program ARM 17.30 Subchapter 12.

20 MR. ELLERHOFF: Mr. Chairman, Tom Reid  
21 of the Water Protection Bureau will discuss this  
22 issue for the Department.

23 MR. REID: Good morning, Mr. Chairman,  
24 members of the Board. My name is Tom Reid. I'm  
25 with the Department's Water Protection Bureau,

1 Permitting Compliance Division.

2           This amendment to Subchapter 12  
3 clarifies and updates the minimum treatment  
4 requirements for point source dischargers, and is  
5 necessary in order to maintain consistency with  
6 the Federal NPDES regulations and program  
7 requirements. Subchapter 12 addresses effluent  
8 standards, and along with Subchapters 11, 13, and  
9 14 form the basis for State issued NPDES permits.

10           I'll give you a little bit of history  
11 here. These rules went before WPCAC on April of  
12 this year. The Board initiated rulemaking on May  
13 13th. There was a public hearing here in Helena  
14 on July 7th. The public comment period closed the  
15 next day. We had one commenter, MDU, Montana  
16 Dakota Utilities, and if it's all right, I'll  
17 summarize those comments briefly.

18           CHAIRMAN RUSSELL: Please.

19           MR. REID: There were actually six  
20 different comments. The first one had to do with  
21 adoption of Federal rules versus State rules, and  
22 adoption by reference versus by adoption in rule.  
23 It's always kind of a balance between how much you  
24 adopt by reference, and currently we adopt about  
25 80 percent of the NPDES rules by reference.

1           What we're trying to do is clarify in  
2 these updates, these rules, especially Subchapter  
3 12, what minimum elements are for an MPDES permit,  
4 and there has been some confusion in the past  
5 having to refer back and forth between the Federal  
6 rules and the State rules. So we believe --

7           Specifically the comment was on Rule  
8 1203, which are minimum treatment requirements.  
9 These are the basis for MPDES permits for the  
10 treatment based requirements. So there is no  
11 change recommended there.

12           Comment No. 2, I think there was a  
13 little bit of confusion. EPA -- There is Phase 1  
14 and Phase 2 of these 316(b) rules, which 316(b)  
15 has to do with cooling water intake structures.  
16 We're adopting rules for Phase 1, which were  
17 promulgated by EPA in 2000, and have been  
18 challenged in court and upheld, so we feel  
19 comfortable in proposing those.

20           EPA reinitiated Phase 2 rules. Phase 2  
21 rules address existing facilities, and those rules  
22 were promulgated in the Federal Register on April  
23 20th of this year by EPA.

24           I believe the comments confused the two  
25 sets, Phase 1 and Phase 2, and they recommended

1 that we delay adopting this rule package until EPA  
2 took final action. Final action on Phase rules  
3 was back in 2001, so again, I think we're  
4 comfortable with that.

5 The next three questions have to do with  
6 the cost benefit, wholly proportionate, and the  
7 cost tests that are used to cost out these various  
8 treatment options for cooling water intake  
9 structures. The comment requested that we change  
10 the -- was not comfortable with the fact that as  
11 they read the rules, we would be comparing for  
12 costs for a new facility, one that has not got a  
13 permit, yet with 1999 --

14 CHAIRMAN RUSSELL: This is Joe Russell.  
15 You're cutting out, Tom.

16 MR. REID: Maybe that's better. The  
17 comment was relative to the cost of a new facility  
18 relative to the cost analysis that was done by EPA  
19 in 1999. For a new facility, we wouldn't compare  
20 it to the 1999 cost. That's not what the wholly  
21 disproportionate test is about. It compares the  
22 technology. EPA evaluated three different  
23 technologies, one through technology,  
24 recirculating technology, and dry cooling, and  
25 they said if the cost for a new facility was

1 equivalent to the dry cooling -- which is roughly  
2 ten times the cost of recirculating -- then it  
3 would be wholly disproportionate to the cost  
4 benefit of installing that equipment.

5           The next comment had to do with  
6 extending the wholly disproportionate test to New  
7 Rule V. New Rule V is applicable to Phase 2  
8 facilities, and therefore Phase 2 facilities under  
9 the current federal rule are subject to best  
10 professional judgment, and EPA has not adopted  
11 these tests to apply to existing facilities.

12           Existing facilities are the subject of  
13 the new rule that is out for public comment --  
14 well, actually the public comment period closed in  
15 August, but has not been adopted by EPA.

16           And then last, they had requested  
17 extension of the public comment period, and after  
18 we talked to them, and cleared up the confusion  
19 relative to Phase 1 and Phase 2, they withdrew  
20 that request, so they didn't have an issue with  
21 extending the public comment period.

22           So I'd be happy to answer any questions  
23 in more detail, but with that, the Department  
24 recommends that the Board adopt these regulations  
25 as proposed.

1           CHAIRMAN RUSSELL: All right. Thanks,  
2 Tom. I'm not sure if there's something wrong with  
3 that mike. When you did get close to it, then it  
4 started to echo a little bit. But I think, unless  
5 the Board disagrees, I think we caught most of  
6 what you were saying, and it is in the record.

7           Any questions or comments for the  
8 Department?

9           (No response)

10          CHAIRMAN RUSSELL: All right. Before we  
11 move into this, is there anyone in the audience,  
12 member of the public, that would like to speak to  
13 this matter before we take action?

14          (No response)

15          CHAIRMAN RUSSELL: Anyone jumping up  
16 there, Tom?

17          MR. ELLERHOFF: Mr. Chairman, I see  
18 nobody moving forward.

19          CHAIRMAN RUSSELL: We do have people on  
20 the phone that I don't recognize their names.  
21 Anyone on the phone that would like to speak to  
22 this matter?

23          (No response)

24          CHAIRMAN RUSSELL: Hearing none, I will  
25 entertain a motion to adopt the proposed

1 amendments as submitted, accept the Presiding  
2 Officer's report, the House Bill 521 and 311  
3 analysis, and the Department's responses to  
4 comments.

5 MR. MILLER: This is Miller. So moved.

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

8 MR. WHALEN: Mr. Chairman, this is Joe.

9 CHAIRMAN RUSSELL: Is this for the  
10 second, Joe?

11 MR. WHALEN: Yes.

12 CHAIRMAN RUSSELL: All right. It's been  
13 moved and seconded. Is there further comment?

14 (No response)

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

17 (Response)

18 CHAIRMAN RUSSELL: Opposed.

19 (No response)

20 CHAIRMAN RUSSELL: Motion carries  
21 unanimously. Thank you for your presentation,  
22 Tom.

23 All right. The next item on the agenda  
24 is executive summary for action on rule adoption  
25 on Rule 17.8.801, 804, 818, 820, 822, 825, 901,

1 904, and 1007. Tom.

2 MR. ELLERHOFF: Mr. Chairman, Debra  
3 Wolfe of the Air Resources Management Bureau will  
4 address this rule for the Department.

5 MS. WOLFE: Thank you. Thank you, Mr.  
6 Chairman, members of the Board. For the record,  
7 my name is Debra Wolfe, and I work in the Air  
8 Resources Management Bureau. I'm here today to  
9 represent the Department regarding the Board's  
10 proposed amendment of air quality rules. The  
11 Board is today taking action on a proposal to  
12 amend air quality rule provisions in Title 17,  
13 Chapter 8, Subchapters 8, 9, and 10, to update  
14 requirements for PM-2.5 for sources that are  
15 subject to major source permitting rules.

16 As I described in the presentation to  
17 request initiation of this rulemaking, certain  
18 changes to federal requirements for major sources  
19 necessitated revisions to Montana's Major Source  
20 Permitting Program to make it consistent with  
21 those changes. The Board held a hearing on July  
22 7th, 2011, and provided opportunity for public  
23 comment. No written or oral public comment was  
24 received.

25 The Board has in its packet a draft



1 notice and an executive summary of this item. The  
2 Department supports the Board's proposed  
3 amendments to the rules, and requests that the  
4 Board adopt the amendments as proposed in the  
5 notice published May 26th, 2011. Thank you.

6 CHAIRMAN RUSSELL: Comments for Deb or  
7 the Department, or of the Department?

8 MR. MIRES: Mr. Chairman, this is Larry  
9 Mires. I have a question, and it's not  
10 necessarily substance as much as clarification of  
11 it.

12 If you look in 17.8.801, the Department  
13 has struck out names like, say, particulate matter  
14 and went to PM-10, scratched out sulphur dioxide  
15 and went to SO<sub>2</sub>, and throughout all of 801, that  
16 seems to be the case where we've taken from  
17 writing out the name topic, even hydrogen dioxide,  
18 to NO<sub>2</sub>; and then when we get down into 17.8.901  
19 and throughout the rest of the rule, everything is  
20 written back out again.

21 Is there a reason why we're not writing  
22 out the words "particulate matter," "sulphur  
23 dioxide," or "hydrogen dioxide" in 801, and then  
24 we leave them as they are in the rest of them? It  
25 just looks a little odd to me.

1 MS. WOLFE: Mr. Chairman, members of the  
2 Board. I think this is actually just a matter of  
3 probably some inconsistency in style. I have to  
4 say that these were modeled after what the Federal  
5 rules have in them, and so if it referred to an  
6 acronym NO2 instead of nitrogen dioxide, it  
7 probably carried that over to the State rules.

8 If there is a preference for having it  
9 be consistent all the way through for whatever  
10 concern, that can certainly change in a  
11 housekeeping rulemaking later on. I can take note  
12 of that.

13 MR. MIRES: I think it would look better  
14 if it was consistent throughout instead of  
15 bouncing back and forth. That's just my personal  
16 opinion. Thank you.

17 CHAIRMAN RUSSELL: Thanks, Larry. Any  
18 other comments or questions?

19 MR. ANDERSON: This is Larry Anderson.  
20 I would agree with Larry on that. It seems to me  
21 that we ought to make this consistent throughout  
22 the rule.

23 CHAIRMAN RUSSELL: I'm sure the  
24 Department will take note of that, so the next  
25 time we see anything like this, we can make sure

1 that there is some consistency in nomenclature.

2 Any other comments?

3 (No response)

4 CHAIRMAN RUSSELL: Anyone in the  
5 audience that would like to address this before  
6 the Board takes action?

7 (No response)

8 MR. ELLERHOFF: Mr. Chairman, I see  
9 nobody raising their hand.

10 CHAIRMAN RUSSELL: Or running to the  
11 podium?

12 MR. ELLERHOFF: Correct.

13 CHAIRMAN RUSSELL: Okay. I will take  
14 that as no one wants to make any comments. Okay.  
15 I'll entertain a motion to adopt the proposed  
16 amendments, accept the Presiding Officer's report,  
17 the Department's 521 and 311 analysis, and there  
18 were no comments so we don't have to adopt any  
19 Department's responses. Do I have a motion?

20 MR. MIRES: Larry Mires. So moved.

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

23 MR. MILLER: This is Miller. I'll  
24 second.

25 CHAIRMAN RUSSELL: Seconded by Marv.

1 Further comments?

2 MR. WHALEN: Mr. Chairman, in lieu of  
3 the comments by Mr. Mires and Mr. Miller, I would  
4 move to amend the motion by stipulating that any  
5 references to chemicals be spelled out in the  
6 rule.

7 CHAIRMAN RUSSELL: Now, would that --  
8 I'm sure that would be a friendly amendment. I'm  
9 guessing -- I'll defer to Katherine. Are you  
10 talking about in future revisions, or would you  
11 like to see this revised?

12 MR. WHALEN: Well, I think that the  
13 point of the comments was to see that this rule is  
14 revised, as well as any references to elements or  
15 chemical molecular combinations in future  
16 rulemaking. So we can't control -- I can't  
17 control that for future rules, only with an  
18 amendment to this. We can stipulate that that's  
19 the case with this particular amendment.

20 CHAIRMAN RUSSELL: I guess I would ask  
21 John or Katherine. These are non-substantive  
22 amendments. Could we not direct the Department in  
23 our motion to clean this up right now?

24 MS. ORR: Mr. Chairman, my feeling about  
25 it is you could. These are non-substantive. And

1 John wants to comment as well.

2 MR. ANDERSON: This is Larry Anderson.

3 I didn't hear Katherine's comments there.

4 MS. ORR: I'm sorry, Larry. The issue  
5 is whether before this notice of adoption goes out  
6 there can be a change that wasn't technically  
7 noticed to the public that would contain the full  
8 spelling of the chemical compounds as opposed to  
9 an abbreviation. And it seems to me that that  
10 would be acceptable. John North wants to speak to  
11 that as well right now.

12 MR. NORTH: Mr. Chairman, members of the  
13 Board, John North, Chief Legal Counsel for the  
14 Department. I agree with Katherine that that  
15 could be done. However, what I would want to do  
16 is to take a look at the rules in the remainder of  
17 this subchapter that are not being amended to see  
18 how that would work with them.

19 I'm not familiar with why this is being  
20 done at the present time, and it could be that the  
21 terms are used by the abbreviations in the rest of  
22 that particular subchapter, at which point, I  
23 would say that it shouldn't be done in this  
24 rulemaking, but should be done in a rulemaking  
25 that covers the entire subchapter. If the Board

1 wanted to defer consideration of this until later  
2 in the meeting, I could look at that, and brief  
3 you on it before you adjourn.

4 CHAIRMAN RUSSELL: How does the Board  
5 feel? If John could look at the subsequent  
6 sections and see about consistency, maybe we could  
7 add that in. It isn't substantive. We just heard  
8 from our Counsels that it isn't.

9 MR. ANDERSON: I would suggest if we're  
10 going to -- and I would second Joe's motion, but I  
11 would suggest additionally what we do is when we  
12 designate a chemical by its name, like "carbon  
13 monoxide," we then put in parenthesis its  
14 abbreviation.

15 CHAIRMAN RUSSELL: That would certainly  
16 add -- except in the case of particulate matter  
17 which is defined at different levels of particle  
18 size.

19 MR. ANDERSON: Sure.

20 MR. WHALEN: Mr. Chairman, I would  
21 withdraw my amendment to the rule if Mr. North  
22 would come back and provide some sort of a remedy  
23 for the consistency that is being suggested by Mr.  
24 Mires and Mr. Miller. I agree with both of them,  
25 as well as the comment made by Mr. Anderson.

1     However as Chairman you would like to arrange  
2     that, that would be fine with me.

3             CHAIRMAN RUSSELL: I would suggest that  
4     we just don't -- John, do you need like 20 minutes  
5     or so?

6             MR. NORTH: I think that would be fine,  
7     yes.

8             CHAIRMAN RUSSELL: Let's just defer, and  
9     let's just defer action for about 20 minutes. We  
10    can bring this up later in the agenda.

11            MR. MIRES: Agreed.

12            CHAIRMAN RUSSELL: With that in mind,  
13    let's move on. And so Katherine, since we want to  
14    give John 20 minutes, let's make sure that we  
15    don't outpace ourselves in the next sections here.

16            The next item, action item for final  
17    actions on contested cases.

18            MS. ORR: Mr. Chairman, members of the  
19    Board, the first item is in the matter of the  
20    appeal and request for hearing by Ronald and  
21    Debbie Laubach regarding the DEQ final decision to  
22    amend the MATL certificate of compliance, BER  
23    2010-15 MFS.

24            The Board has before it a proposed order  
25    of dismissal under 41(a), and this is unusual in

1 that this case went to a full contested case  
2 hearing. But anyway, it sounds like the parties  
3 were able to reach an agreement, and that was  
4 before the recommended decision on the contested  
5 case findings was to be issued.

6 It is an interesting case. It was  
7 involving Montana Alberta Tie, Limited, which got  
8 its original certificate of compliance on October  
9 22nd, 2008 regarding a line, a power line, wind  
10 power line, from Great Falls to near Lethbridge,  
11 about 130 miles long. And MATL applied for an  
12 amended certificate.

13 And this is what Mr. and Mrs. Laubach  
14 were objecting to. They filed their appeal on  
15 October 5th, 2008, and were objecting to the  
16 proximity of the line to their wetlands. And that  
17 is in very general terms what the subject of the  
18 contested case hearing was.

19 Mr. Laubach appeared pro se, and on his  
20 own behalf, but now we have an order of dismissal  
21 asking for dismissal with prejudice under 41(a),  
22 and that is appropriate under the Rules of Civil  
23 Procedure.

24 CHAIRMAN RUSSELL: Thanks, Katherine.  
25 Any questions for Katherine before we --



1           MR. MIRES: Mr. Chairman, this is Larry  
2 Mires, and I do have a question, and I'm not sure  
3 if I'm in the right order, or if I'm out of order  
4 on this one. If the dismissal of this case, how  
5 does that -- Under the new cases, I think it's  
6 under C(9), how does that fact play in the  
7 public's case, or does it, or is that  
8 disassociated?

9           MS. ORR: Well, it is interesting.  
10 Where the line is placed is going to affect  
11 conceivably neighbors if there is an agreement,  
12 say, with respect to Mr. Laubach.

13           And as far as Item 9 in the new  
14 contested case section, that actually -- there is  
15 a kind of a punt mechanism that exists under the  
16 statutes where a party can ask to go to District  
17 Court, and that's what happened, so the Board  
18 won't be hearing that case. It's like a judicial  
19 review of the Department's decision, not the  
20 Board's decision. So factually I don't know what  
21 the interrelationship is. There could be one, but  
22 it's a moot question for the Board.

23           MR. MIRES: Thank you very much.

24           MS. ORR: Does that answer your --

25           MR. MIRES: Thank you.

1           CHAIRMAN RUSSELL: All right. Still  
2 cutting out. Did you say it's a moot question for  
3 the Board?

4           MS. ORR: Right, because Item 9 is now  
5 under the jurisdiction of the District Court.

6           CHAIRMAN RUSSELL: Okay. All right.  
7 With all that in mind, I have an order of  
8 dismissal for 2010-15 MFS. I would entertain a  
9 motion to authorize the Board Chair to sign that  
10 order of dismissal.

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

12          CHAIRMAN RUSSELL: Moved by Marv. Is  
13 there a second?

14          MS. KAISER: This is Heidi. I'll  
15 second.

16          CHAIRMAN RUSSELL: Seconded by Heidi.  
17 Further questions?

18          (No response)

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

21          (Response)

22          CHAIRMAN RUSSELL: Opposed.

23          (No response)

24          CHAIRMAN RUSSELL: Motion carries  
25 unanimously. All right. The next one is BER

1 2011-07 WQ.

2 MR. WHALEN: Mr. Chairman, I don't know  
3 if this happened to the rest of you, but I lost  
4 about half of what Katherine was saying in her  
5 narrative on that last issue. Is there another  
6 microphone that Katherine might be able to use?

7 CHAIRMAN RUSSELL: I don't know if you  
8 guys are sharing a mike, but even the one that the  
9 Department is using cuts out.

10 MS. ORR: Okay. We just placed another  
11 microphone near me. Does that work any better?

12 MR. WHALEN: It's better.

13 CHAIRMAN RUSSELL: The next item,  
14 Circle B.

15 MS. ORR: Mr. Chairman, members of the  
16 Board, this is a case involving the unauthorized  
17 discharge of wastewater to State waters. It  
18 involves a CAFO operation, concentrated animal  
19 feeding operation, and there was a failure to  
20 comply with permit conditions. There was a  
21 requested penalty of \$8,400. We don't know what  
22 resulted ultimately, but you have before you a  
23 motion to dismiss.

24 CHAIRMAN RUSSELL: All right. And I do  
25 have an order of dismissal for BER 2011-07 WQ, and

1 would entertain a motion to authorize the Board  
2 Chair to sign.

3 MR. WHALEN: Mr. Chairman, this is Joe.  
4 I would so move that.

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

7 MR. MILLER: I'll second it. Miller.

8 CHAIRMAN RUSSELL: Seconded by Marv. Is  
9 there any further discussion?

10 (No response)

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

13 (Response)

14 CHAIRMAN RUSSELL: Opposed.

15 (No response)

16 CHAIRMAN RUSSELL: Motion carries  
17 unanimously. Okay. Next item.

18 MS. ORR: Mr. Chairman, members of the  
19 Board, this is in the matter of the request for  
20 hearing by Western Energy Company regarding DEQ's  
21 notice of noncompliance and abatement order. This  
22 involves the Strip Mine and Underground  
23 Reclamation Act.

24 There was a notice of noncompliance and  
25 an order of abatement that was issued on the basis

1 that there were field conditions that varied from  
2 the approved worst case design parameters for the  
3 sizing of a pond, and reclamation upon inspection  
4 had not progressed as was represented. There was  
5 an order to abate and a request for hearing. Then  
6 on August 1st, 2011, there was a withdrawal of the  
7 request for hearing, so you have before you a  
8 proposed order of dismissal.

9 CHAIRMAN RUSSELL: Apparently they are  
10 just going to take their --

11 MS. ORR: Apparently so.

12 CHAIRMAN RUSSELL: All right. I do have  
13 an order of dismissal for Case No. BER 2011-10 SM,  
14 and would entertain a motion to authorize the  
15 Board Chair to sign.

16 MR. MIRES: This is Larry Mires. So  
17 moved.

18 CHAIRMAN RUSSELL: Moved by Larry. Is  
19 there a second?

20 MS. SHROPSHIRE: Second. This is Robin.

21 CHAIRMAN RUSSELL: It's been moved and  
22 seconded by Robin. Any further discussion?

23 (No response)

24 CHAIRMAN RUSSELL: Hearing none, all  
25 those in favor, signify by saying aye.

1 (Response)

2 CHAIRMAN RUSSELL: Opposed.

3 (No response)

4 CHAIRMAN RUSSELL: Motion carries  
5 unanimously. J.R. Enterprises.

6 MS. ORR: The next item. This is a case  
7 involving four underground storage tanks out at  
8 Fort Peck at the Fort Peck Station -- that's the  
9 name of the gas station -- and there was a motion  
10 for summary judgment that was filed by the  
11 Department, and that was fully briefed. And upon  
12 consideration of the briefing, I drafted a  
13 recommended order on the motion for summary  
14 judgment.

15 The underground storage tank owner  
16 bought the station in 1994. None of the tanks had  
17 adequate overfill, spill, or corrosion protection.  
18 And I can hear there is a terrible echo.

19 CHAIRMAN RUSSELL: We can hear you,  
20 though.

21 MS. ORR: Can you? Okay. Anyway, the  
22 tank owner was obligated to institute proper  
23 overfill, spill, corrosion protection, and/or  
24 close the tanks timely by 1998, and didn't do  
25 that. And the issue that the owner brought up

1 was, "How can you prove that I own these tanks  
2 since you can't prove the location of the tanks?"

3 And as a matter of proper proof under  
4 the rules regarding motions for summary judgment,  
5 the Department came forward with adequate proof of  
6 ownership by way of business records of the  
7 Department that included a form filed by this  
8 Appellant where she said she owned the tanks at  
9 the station, and the owner in the summary judgment  
10 briefing did not file anything sufficient to  
11 refute that.

12 So I decided that she was therefore  
13 liable, was the owner, and that the recommended  
14 corrective action should be instituted. And you  
15 have the order, the recommended order, and then a  
16 recommended order granting the motion for summary  
17 judgment. No exceptions were filed by the  
18 Appellant.

19 CHAIRMAN RUSSELL: All right. Thanks,  
20 Katherine. I do have an order, motion for summary  
21 judgment on Case No. BER 2010-08, and would  
22 entertain a motion to authorize the Board Chair to  
23 sign on behalf of the Board.

24 MS. ORR: Could I interject? On Page 2  
25 of the order that I prepared for the Board's

1 signature, there is a little bit of a discrepancy  
2 between my recommended order and this one  
3 concerning the date of institution of the  
4 corrective action plan.

5 On the order for the Board, I say, and  
6 you would say, "Within 60 days from receipt of  
7 this order, Ms. Hlavka shall complete all  
8 actions," and it should say "within 60 days from  
9 execution of this order," and I'd like to change  
10 that language and have you sign the corrected  
11 order as I provide it to you.

12 CHAIRMAN RUSSELL: Katherine, thanks.  
13 So I will -- since nothing happened on this -- I  
14 will entertain a motion to authorize the Board  
15 Chair to sign an order as amended on my --  
16 (inaudible) -- so from receipt to execution.

17 MS. ORR: So there will be a change in  
18 the Board's order from receipt to execution of  
19 this order on Page 2, correct?

20 CHAIRMAN RUSSELL: Yes, Page 2, Line 14.

21 MS. ORR: Yes.

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

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

25 CHAIRMAN RUSSELL: It's been moved by



1 Marv. Is there is a second?

2 (Inaudible)

3 CHAIRMAN RUSSELL: Anyone want to second  
4 this?

5 MR. ANDERSON: Larry Anderson, second.

6 CHAIRMAN RUSSELL: It's been moved and  
7 seconded by Larry. Further discussion?

8 (No response)

9 CHAIRMAN RUSSELL: Just a clarification.  
10 When will I get this to sign and return to the  
11 Department? Because that will be -- my signature  
12 will be execution, right?

13 MS. ORR: Yes, it will. And what will  
14 happen is I'll give Joyce a corrected copy today,  
15 and she'll send that to you.

16 CHAIRMAN RUSSELL: Okay. All right.  
17 With that clarification, all those in favor,  
18 signify by saying aye.

19 (Response)

20 CHAIRMAN RUSSELL: Motion carries  
21 unanimously. Before we move on, John, are you  
22 ready?

23 MR. ELLERHOFF: Mr. Chairman, John is  
24 not back.

25 CHAIRMAN RUSSELL: All right. We still

1 have some work here. New contested cases. The  
2 first one is in the matter of violations of the  
3 Open Cut Mining Act by -- what is that, Ell Dirt  
4 Works?

5 MS. ORR: Mr. Chairman, before we get to  
6 that item, we have as a final action item the  
7 disposition of the Fort Yellowstone Subdivision  
8 case.

9 CHAIRMAN RUSSELL: And we received that  
10 in the mail.

11 MS. ORR: Right. And I think there were  
12 two parties on the phone, Mr. Knuchel and Mr. Shea  
13 -- parties' Counsel, I should say. Are you still  
14 on the phone?

15 MR. KNUCHEL: Karl Knuchel. I'm here.

16 MS. ORR: Mr. Shea?

17 I'm not sure if he's still on. Anyway,  
18 this case involves a recommended -- well, a  
19 recommended order on a motion for summary judgment  
20 that I drafted. And we had oral argument on  
21 these. There were cross motions for summary  
22 judgment concerning a subdivision in Park County  
23 very near Gardiner.

24 And the Department seeks to revoke the  
25 subdivision approval because there is a deviation

1 from the plan as it was originally issued. What  
2 happened was a water main under the plan was  
3 installed, and then that was disconnected by the  
4 water district, and resituated. And the deviation  
5 as to the Fort Yellowstone Subdivision plan was  
6 not approved by the Department, and therefore the  
7 Department was seeking revocation.

8 And at oral argument, there actually was  
9 no dispute as to that fact, so this really is a  
10 situation that is ripe for summary judgment. Mr.  
11 Shea, on behalf of the water district -- and  
12 that's in the materials that you have, and I  
13 apologize for the late date of those materials.

14 OPERATOR: Now joining Todd Shea.

15 MS. ORR: There is Mr. Shea right there.  
16 This is very timely because I'm now describing  
17 your exceptions, Mr. Shea. He filed exceptions  
18 that in my view kind of contain a minor suggestion  
19 for change. He was concerned about there being  
20 the appearance of the water district reconnecting  
21 that water main without approval of the  
22 Department. And the Department weighed in on  
23 this. And then I've drafted in this suggested  
24 order for the Board the language that would go  
25 into the final order of the Board which --

1 OPERATOR: Now joining Signe Laren.

2 MS. ORR: Hi, Signe. We're on this item  
3 right now. This is Katherine, and the Board is  
4 all here. I hope that's okay for me to do that,  
5 Mr. Chairman, with the parties' Counsel. Signe  
6 Laren represents the parties, some of the parties  
7 here as well.

8 But anyway, you have before you a  
9 proposed order that incorporates the minor  
10 suggested language change that would be adopted  
11 into the final order on summary judgment that I  
12 issued, and since this is a MAPA proceeding right  
13 now, the parties have the opportunity to weigh in  
14 on their exceptions by way of oral argument. So I  
15 don't know if any party wishes to say anything in  
16 addition to what's being submitted to the Board.

17 MR. SHEA: This is Todd Shea speaking.  
18 I don't mean to interrupt anybody, but there no  
19 one was speaking.

20 We incorporate on behalf of the water  
21 district the arguments that we previously made,  
22 and I would respectfully request that the order as  
23 drafted from this morning not be implemented  
24 because I still think it is missing the point that  
25 Gardiner Park is trying to make.

1           Simply Gardiner Park is making the  
2 argument that -- and I think it's undisputed --  
3 that the disconnection of the water main was with  
4 the Department DEQ approval. And so I would  
5 request again that the language be to the effect  
6 that the disconnection of the water main was with  
7 Department approval, and I think that's where the  
8 District keeps on coming back.

9           The statement that it was done without  
10 Department approval I think is incorrect, and  
11 begins confusing things. So again, I would just  
12 request that it be stated that the disconnection  
13 of the water line was with Department approval  
14 because I think we all agree that it was done with  
15 Department approval.

16           MS. ORR: Mr. Chairman, do you mind if I  
17 call on the individual parties' Counsel?

18           CHAIRMAN RUSSELL: No, not at all.

19           MS. ORR: Mr. Knuchel?

20           MR. KNUCHEL: Yes.

21           MS. ORR: Did you have any --

22           MR. KNUCHEL: What I would agree with  
23 was what Jim Madden proposed was his comments, and  
24 Shea's exceptions. I think that what Mr. Madden  
25 has proposed, you as the Hearings Officer has

1 proposed, is an accurate reflection of the record  
2 in this case.

3 MR. SHEA: If I could just say one  
4 thing. After I filed the exceptions on Gardiner  
5 Park's behalf this week, the -- (inaudible) --  
6 through Karl Knuchel agreed with the exceptions I  
7 filed. So I would just like the record to reflect  
8 that.

9 CHAIRMAN RUSSELL: It is in the record.  
10 It's been submitted to us.

11 MR. SHEA: Right, but my point is I made  
12 the exceptions early in the week, and the  
13 Plaintiff -- excuse me -- (inaudible) -- through  
14 your office had no objections to the exceptions  
15 that we were submitting.

16 CHAIRMAN RUSSELL: You know, I guess I'm  
17 just being a little naive, but it seems a little  
18 bit like word wrangling right now. Maybe I'm -- I  
19 think we're all getting to the same place, are we  
20 not?

21 MR. SHEA: I think it may be word  
22 wrangling, but I think there is -- I know there is  
23 another civil claim that's pending, and I'm  
24 concerned with a misconstruing of the language to  
25 benefit parties in the civil action I think is

1 frankly unfair.

2 CHAIRMAN RUSSELL: I probably should  
3 have assumed that there was a real reason for what  
4 seems to be very minor action in front of the  
5 Board of Environmental Review.

6 MR. SHEA: Again, the key issue is the  
7 disconnection with the DEQ approval.

8 CHAIRMAN RUSSELL: And it sounds like at  
9 least Mr. Knuchel in a response didn't have a  
10 problem with that.

11 MR. KNUCHEL: Mr. Chairman, this is Karl  
12 Knuchel. Just to clarify the record, I would  
13 amend my exception to adopt what Mr. Madden has  
14 filed. We had like about 24 hours to respond to  
15 Mr. Shea's exceptions, and I'm in a very busy time  
16 in my schedule. So in fairness, I would just say  
17 that to make it very clear on this record, that  
18 the exception proposed by -- the comments on the  
19 exceptions proposed by Madden for DEQ we would  
20 adopt.

21 MR. SHEA: If I could just add one thing  
22 for the record. I think Ms. Orr was very clear in  
23 her correspondence with the parties that if in  
24 fact the parties, including Mr. Karl Knuchel, did  
25 not have time to respond to the exceptions, that

1 we were going to extend the time for exceptions,  
2 and extend the hearing until a later date. Mr.  
3 Knuchel's office apparently didn't have a problem  
4 in responding to the exceptions, and simply agreed  
5 to them.

6 CHAIRMAN RUSSELL: Are we moving too  
7 fast on this, Katherine?

8 MS. ORR: In my view, it's up to the  
9 parties whether they want to go through another  
10 iteration of language and comment. I understand,  
11 I think it was Mr. Knuchel, who has said along the  
12 way that it would be very advantageous to have  
13 this addressed in a timely fashion today, as  
14 opposed to waiting until the next Board meeting.

15 CHAIRMAN RUSSELL: In early December.

16 MS. ORR: Right.

17 CHAIRMAN RUSSELL: Well, I guess it's up  
18 to the parties, because all we can do is take  
19 action on what the parties recommend at this  
20 point.

21 MR. SHEA: This is Todd. I thought  
22 there was a possibility of convening the Board at  
23 another possible date before December, and perhaps  
24 that would be middle ground if in fact everyone  
25 agrees to that.



1 MS. ORR: Yes. I've told the parties'  
2 Counsel that we have done that, we've had meetings  
3 between the regularly scheduled meetings. I  
4 didn't know if we wanted, if the Board wanted to  
5 go to that trouble since we're at this point, and  
6 it seems like we're very close to the appropriate  
7 language.

8 CHAIRMAN RUSSELL: Katherine, here is  
9 what I would suggest. Working with the Department  
10 to schedule a very quick meeting to give us a  
11 nice, clean, all parties agreed to order, and it  
12 would take us five minutes to approve it. Board,  
13 unless you weigh in, I think we could have a quick  
14 meeting, lunch time sometime, just get it done.  
15 I'll review the form.

16 MR. MIRES: Larry Mires agrees.

17 CHAIRMAN RUSSELL: Let's move on,  
18 Katherine, and this seems like it's just not ripe.

19 MS. ORR: Okay.

20 MR. SHEA: Are you moving on to the next  
21 matter?

22 CHAIRMAN RUSSELL: We're going to move  
23 on to the next matter, and leave this up to you,  
24 the parties, and Katherine, and give us a nice  
25 order that takes us five minutes to approve.

1 MS. ORR: While you're all together, do  
2 you have a preference for a date?

3 CHAIRMAN RUSSELL: No. A week, two,  
4 three, December 2nd. That's up to the parties.

5 MS. ORR: Okay. We'll get back to you  
6 then.

7 CHAIRMAN RUSSELL: Perfect. Thanks.

8 MS. ORR: Mr. North is ready with the  
9 discussion of what the rest of the rules provide.

10 MR. SHEA: Katherine, I will now get off  
11 the call. This is Todd Shea. I will convene with  
12 you next week as to a rescheduled date for this.  
13 Thank you.

14 CHAIRMAN RUSSELL: Thanks for joining us  
15 today.

16 MS. LAREN: Katherine, this is Signe.  
17 I'll get off as well, so we'll just talk next  
18 week.

19 CHAIRMAN RUSSELL: John.

20 MR. NORTH: Mr. Chairman, members of the  
21 Board, John North, Chief Legal Counsel for DEQ.  
22 I've gone through Subchapters 8 and 9 of Chapter  
23 8, so that would include the first three or four  
24 rules here, and determined that these rules are  
25 indeed the only places where those terms are used

1 within those subchapters. So in order to  
2 implement to the maximum extent that it appears  
3 possible at this point the suggestions of the  
4 Board members, what I would suggest is that  
5 within --

6 CHAIRMAN RUSSELL: We're not picking  
7 anything up here, John.

8 MR. NORTH: I'm sorry, Mr. Chairman.  
9 I've gone through Subchapters 8 and 9. Can you  
10 hear me now?

11 CHAIRMAN RUSSELL: Yes.

12 MR. NORTH: I've gone through  
13 Subchapters 8 and 9, determined that these rules  
14 are the only places where those terms are used  
15 within Subchapters 8 and 9. In order then to  
16 implement what the Board members have requested, I  
17 would suggest that two changes be made.

18 One is that within those subchapters,  
19 wherever the term "sulphur dioxide" is used, that  
20 it be written out; and then the acronym or  
21 whatever it is, SO<sub>2</sub>, follow that in parens; and  
22 then the same would occur with regard to nitrogen  
23 dioxide. Those seem to be the two terms where  
24 that change could be made, and where those terms  
25 appear.

1           With regard to PM-10, PM-2.5, and  
2 particulate matter, it appears to me that those  
3 changes couldn't be made. Those could have some  
4 substantive effect, and it would need a lot more  
5 consideration before we looked at changing those  
6 terms.

7           CHAIRMAN RUSSELL: All right. Thanks,  
8 John. I think I picked up enough to probably kind  
9 of restate a motion if the Board would indulge me.  
10 First of all, who made the original motion to  
11 proceed with adoption?

12           MR. MIRES: Larry Mires.

13           CHAIRMAN RUSSELL: Larry, would you mind  
14 rescinding your motion?

15           MR. MIRES: I would rescind my motion  
16 and correct it as we need to.

17           CHAIRMAN RUSSELL: Is that okay with the  
18 person that seconded that?

19           MR. MILLER: Yes, it is. Miller.

20           CHAIRMAN RUSSELL: So here is what I  
21 would state. I would entertain a motion to adopt  
22 the proposed amendments with modifications in  
23 these sections that sulphur containing compounds  
24 would be described in writing and by their  
25 chemical nomenclature, and also nitrogen dioxide

1 by handwriting and by its chemical nomenclature;  
2 and all references to particulate matter, those  
3 being particulate matter PM-10 and PM-2.5, remain  
4 as they're stated in the proposed amendments; and  
5 that we would adopt the Presiding Officer's  
6 report, House Bill 521 and 311 analysis. And  
7 there were no comments. So do I have a motion?

8 MR. ELLERHOFF: Mr. Chairman, this is  
9 Tom. John is raising his hand.

10 CHAIRMAN RUSSELL: All right. Thought I  
11 missed something.

12 MR. NORTH: Mr. Chairman, I think to say  
13 "sulphur containing compounds" would be too broad.  
14 What I was specifically saying was SO<sub>2</sub> or sulphur  
15 dioxide.

16 CHAIRMAN RUSSELL: All right. So it  
17 would be nitrogen -- but it doesn't describe it as  
18 oxides of nitrogen, right? Because sometimes it  
19 would state that in an air pollution control rule.

20 MR. NORTH: Mr. Chairman --

21 CHAIRMAN RUSSELL: Sulphur dioxide and  
22 nitrogen --

23 MR. NORTH: -- dioxide.

24 CHAIRMAN RUSSELL: -- dioxide. If  
25 that's the way it is, then would everyone accept

1 that?

2 MS. SHROPSHIRE: Well, I guess I'm  
3 wondering if not -- I don't know if that's correct  
4 or not. There may be minor -- NOx isn't always  
5 NO2. It may be some form of like, you know, like  
6 nitrogen or some other thing like that. I'm not  
7 saying what I'm trying to say very well. But I  
8 don't know that that's correct. It may --  
9 (inaudible) -- NO2.

10 CHAIRMAN RUSSELL: It's the oxides of  
11 nitrogen, NOx.

12 MS. SHROPSHIRE: I think that's better  
13 than NO2.

14 CHAIRMAN RUSSELL: But I think this is  
15 describing just NO2 as nitrogen dioxide in this  
16 part of the -- in this section; is that correct?  
17 Is Deb still out there?

18 MS. WOLFE: Mr. Chairman, nitrogen  
19 dioxide is going to be very different from oxides  
20 of nitrogen. Oxides of nitrogen are going to be  
21 precursors to creating particulate pollution, and  
22 so they do have to be kept separate. NO2 is, for  
23 lack of a better term, sort of an ambient  
24 designation, and oxides of nitrogen come from  
25 emissions, and they contribute to particulate

1 matter pollution. So they are separate.

2 CHAIRMAN RUSSELL: Okay. I'll take your  
3 word for it.

4 MR. WHALEN: Mr. Chairman, this is Joe.  
5 May I just first thank you for your patience  
6 during this very difficult teleconference.

7 Secondly, with respect to the use of  
8 this nomenclature, there is a standard formatting  
9 for the abbreviations of acronyms and spelling  
10 out, and the whole objective I think of this  
11 process is just to establish some consistency in  
12 -- Maybe Mr. North can agree that there is a  
13 standard formatting that's used where you  
14 initially spell out the term, whether it's a  
15 molecular combination or some other elaboration of  
16 an acronym, and then you in parentheses follow up  
17 with the parenthesized symbol, and then throughout  
18 the rest of the document the symbol is used as  
19 opposed to the spelling out.

20 I would just kind of put that out there  
21 as a suggestion. It's something I'm sure the  
22 Department has used in countless other documents  
23 ahead of this. Thank you.

24 MR. ELLERHOFF: Mr. Chairman, this is  
25 Tom. That's correct.

1           CHAIRMAN RUSSELL: I agree with you,  
2 Joe, but I'm not sure where that actually leaves  
3 us, because in further sections of what we're --  
4 (inaudible) -- continues to use and has been  
5 written out. So I guess I would defer back to the  
6 Department if they can add some consistency.

7           I don't think we're wrong. I don't  
8 think it's substantive. I think it's good  
9 editing, but I don't think it's substantive to  
10 allow the Department to clean this up -- nitrogen  
11 dioxide, sulphur dioxide, SO<sub>2</sub>, and NO<sub>2</sub> --  
12 irrespectively since I used them in the wrong  
13 order -- and we can let them clean this up. It's  
14 not substantive. Just give it a go.

15           MR. WHALEN: I'm all for that, Mr.  
16 Chairman.

17           CHAIRMAN RUSSELL: I think with that, my  
18 motion wouldn't really need amendment. John?  
19 Katherine?

20           MR. NORTH: Mr. Chairman, John North.  
21 No, I don't think it is. Just to restate, I  
22 believe what the motion is is that wherever  
23 sulphur dioxide or nitrogen dioxide appears, that  
24 it appear both as written out and then with the  
25 parens after it, and we can do that.



1           CHAIRMAN RUSSELL: Okay. All right.  
2   Hearing that, is there anyone in the audience that  
3   would object to what we've done? Tom, is that  
4   right?

5           MR. ELLERHOFF: Mr. Chairman, I see no  
6   hands going up, so --

7           CHAIRMAN RUSSELL: I am going to call  
8   for the question. All those in favor, signify by  
9   saying aye.

10           (Response)

11           MR. MIRES: Do you need somebody to make  
12   a motion for it and a second first?

13           CHAIRMAN RUSSELL: Didn't we get one of  
14   those? Oh, I guess we didn't. How about a  
15   motion?

16           MR. MIRES: I would again so move.

17           CHAIRMAN RUSSELL: So moved by Larry.  
18   Is there a second?

19           MR. MILLER: I'll second it. Miller.

20           CHAIRMAN RUSSELL: Seconded by Marv.  
21   Are there any questions, comments?

22           MR. WHALEN: Mr. Chairman, I just have  
23   an informal request, that given the nature of the  
24   teleconference so far, that all of vote counts be  
25   by roll call vote so that we can make sure that

1 we've got everybody accounted for properly.

2 CHAIRMAN RUSSELL: That's fine. So call  
3 for the question. All those in favor, signify by  
4 saying aye. And Tom, would you roll call this,  
5 please, or Joyce.

6 MS. WITTENBERG: Larry Anderson.

7 MR. ANDERSON: Aye.

8 MS. WITTENBERG: Larry Mires.

9 MR. MIRES: Aye.

10 MS. WITTENBERG: Heidi Kaiser.

11 MS. KAISER: Aye.

12 MS. WITTENBERG: Robin.

13 MS. SHROPSHIRE: Aye.

14 MS. WITTENBERG: Joe Whalen.

15 MR. WHALEN: Aye.

16 MS. WITTENBERG: Marv Miller.

17 MR. MILLER: Aye.

18 MS. WITTENBERG: Chairman Russell.

19 CHAIRMAN RUSSELL: Aye. Let's go back  
20 to where we were. I believe we're still on -- Are  
21 we on C(1), new contested cases on appeal, Ell  
22 Dirt Works?

23 MS. ORR: Mr. Chairman, members of the  
24 Board, this is a case in Richland County involving  
25 an alleged violation of the Open Cut Mining Act,

1 violation of Section 82-4-431. There were in the  
2 Notice of Violation an administrative compliance  
3 and penalty order issued on June 28th, 2011 by the  
4 Department, recitations of open cut operations  
5 without a Department issued permit at the Gene  
6 Foss pit No. 1 site, and there was a disturbance  
7 of 10.2 acres without a permit, and the Department  
8 is seeking \$14,000 in penalties.

9 CHAIRMAN RUSSELL: Thanks, Katherine.  
10 We can assign this to Katherine unless she  
11 verbally states she can't handle the work, or we  
12 can hear these ourselves. So what I will do is I  
13 will make motions to defer these or assign these  
14 to Katherine. And then do you still want to do a  
15 roll call on these, Joe?

16 MR. WHALEN: Yes, please.

17 CHAIRMAN RUSSELL: All right. So on the  
18 matter of Ell Dirt Works, I would entertain a  
19 motion to assign Katherine the permanent Hearings  
20 Examiner. All those in favor, signify by saying  
21 aye. We're going to roll call it.

22 MS. WITTENBERG: Larry Mires.

23 MR. MIRES: Aye.

24 MS. WITTENBERG: Larry Anderson.

25 MR. ANDERSON: Aye.

1 MS. WITTENBERG: Heidi.

2 MS. KAISER: Aye.

3 MS. WITTENBERG: Robin.

4 MS. SHROPSHIRE: Aye.

5 MS. WITTENBERG: Marvin.

6 MR. MILLER: Aye.

7 MS. WITTENBERG: Joe Whalen.

8 MR. WHALEN: Aye.

9 MS. WITTENBERG: Chairman Russell.

10 CHAIRMAN RUSSELL: Aye. Okay. The next

11 item on the agenda is open cut, Plum Creek,

12 Lincoln County.

13 MS. ORR: Mr. Chairman, members of the  
14 Board, what I would recommend is we look at Items  
15 2 through 8 together as far as my description,  
16 because these appear to be cases that are very,  
17 very similar in content. And at some point, I'm  
18 also recommending that there be a consideration of  
19 consolidation along some sort of rational line  
20 that has to do with identity of fact situations.  
21 So as to Items 2 through 8, I'll just go ahead and  
22 describe those all together, if that's all right  
23 with you.

24 CHAIRMAN RUSSELL: That's great.

25 MS. ORR: The issue in these cases seems

1 to be that there are a considerable number of  
2 landowners who are alleging -- Well, they've filed  
3 an appeal because they're alleging that they  
4 weren't included in a public hearing concerning  
5 the issuance of an amendment to an open cut  
6 permit, and the determination of that will be  
7 affected by a statute which says that landowners  
8 within one half mile of the permitted boundary,  
9 and those, or at least 30 percent of all persons  
10 owning surface land within the one half mile  
11 radius or ten, whichever is larger, can address  
12 themselves to the amended permit. And there might  
13 be some question as to which landowners fall  
14 within that characterization so as to be able to  
15 participate in a hearing on the permit.

16 The Department has filed a motion to  
17 dismiss and/or a summary judgment, and there has  
18 been a response to that by some of the landowners.  
19 Also I, as interim Hearing Officer, went ahead and  
20 asked that the parties decide upon a prehearing  
21 schedule, and that is in process as we speak. So  
22 that's my best summary of the situation.

23 CHAIRMAN RUSSELL: All right. Well,  
24 well summarized and always good. With that in  
25 mind, with these Items 2 through 8, I would

1 certainly ask the Board to speak after we get a  
2 motion on the floor. I would entertain a motion  
3 to appoint Katherine the Hearing Examiner in this  
4 case. Motion?

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

6 CHAIRMAN RUSSELL: Moved by Marv. Is  
7 there a second?

8 MS. SHROPSHIRE: Second. This is Robin.

9 CHAIRMAN RUSSELL: Seconded by Robin.  
10 Is there further discussion before the Board takes  
11 action?

12 MR. WHALEN: Mr. Chairman, this is Joe.  
13 Would it be in order to ask if there are any  
14 irregularities with respect to the public noticing  
15 of the amendment to this hearing?

16 CHAIRMAN RUSSELL: Whatever Katherine  
17 knows I guess would be fine.

18 MS. ORR: Well, I think it would be  
19 improper to address that because that's basically  
20 one of the main issues in this case.

21 MR. WHALEN: Okay. Thank you.

22 MS. ORR: So that's the subject of the  
23 contested case hearing. That's one of the  
24 subjects that will be determined through a fact  
25 finding.

1           CHAIRMAN RUSSELL: Okay. Anything else  
2 directed to Katherine?

3           MR. ANDERSON: This is Larry Anderson.  
4 I'm looking at the landowners' point here.  
5 They're saying that Plum Creek Timberlands has a  
6 permit to remove 142,000 cubic yards of top soil  
7 and gravel material during the spring and summer  
8 months until the year 2030, 19 years. This  
9 suggests to me that this may be a pretty major  
10 issue, so maybe the Board should take this on as  
11 opposed to deferring it to Katherine.

12           CHAIRMAN RUSSELL: It's certainly up to  
13 the -- anyone else? You can --

14           MR. ANDERSON: I guess that's a  
15 question. I don't know in the sphere of things  
16 how big an issue this is. It seems pretty big to  
17 me.

18           CHAIRMAN RUSSELL: It appears to be big  
19 because it's taking up a lot of paper. I hate to  
20 sound so smug about it, but I'm not sure it is as  
21 big as the amount of paper it's taking up. It's  
22 certainly up to the Board if they want to, and I  
23 would entertain a motion if they feel that they  
24 want to hear it.

25           MR. MIRES: This is Larry Mires. It

1 appears to me that this basically comes down to a  
2 point where the landowners felt that they weren't  
3 given the opportunity to speak out at a public  
4 hearing, and if I understood Katherine correctly,  
5 that you may be close to some kind of -- coming to  
6 a resolve on this, or did I mishear what was being  
7 said in the cutting out on the call conference.

8 MS. ORR: Mr. Chairman, I think Larry is  
9 correct in that, but I don't know for sure. This  
10 looks like it might be ripe for summary judgment.

11 MR. WHALEN: Mr. Chairman, just so you  
12 know why I will vote the way that I do, because I  
13 know sometimes when you vote in the negative there  
14 is some questions about it. But the Constitution  
15 requires, as well as statute, that public  
16 participation be liberally construed, and so if we  
17 go ahead and issue an order for summary judgment  
18 in this case, or at least if that's the direction  
19 that the Hearing Examiner is moving, I'm a little  
20 concerned that we're fending that part of the  
21 Constitution and statute, and therefore I'm going  
22 to vote negative with respect to the appointment  
23 of this matter to the Hearing Examiner; and should  
24 the motion come up to hear the matter by the  
25 Board, I'll support that. Thank you.



1           CHAIRMAN RUSSELL: All right. I guess I  
2 would just state that we don't know how Katherine  
3 would have -- (inaudible) -- on this. She might  
4 have moved the -- (inaudible) -- for public  
5 participation. But with that said, I'm up for a  
6 motion. I don't have to spring every motion. The  
7 folks on the Board can do the same.

8           MR. WHALEN: We do currently have a  
9 motion on the floor, don't we, Mr. Chairman?

10          CHAIRMAN RUSSELL: I don't believe so.

11          MR. MILLER: Yes, we do.

12          MR. ELLERHOFF: Mr. Chairman, this is  
13 Tom. That's correct.

14          CHAIRMAN RUSSELL: And it's been  
15 seconded?

16          MR. ELLERHOFF: Yes, it has, Mr.  
17 Chairman.

18          CHAIRMAN RUSSELL: Okay. With that --  
19 And that would be to appoint Katherine? That was  
20 the motion, right? I'm easily distracted.

21          MR. ELLERHOFF: Mr. Chairman, that's  
22 correct.

23          CHAIRMAN RUSSELL: All right. Well,  
24 we'll just take a vote and see how it goes then.  
25 All those in favor -- and this will be a roll call

1 vote. All in favor of appointing Katherine the  
2 Hearing Examiner, signify by saying aye.

3 MS. WITTENBERG: Larry Mires.

4 MR. MIRES: Aye.

5 MS. WITTENBERG: Larry Anderson.

6 MR. ANDERSON: No.

7 MS. WITTENBERG: Heidi.

8 MS. KAISER: Aye.

9 MS. WITTENBERG: Robin.

10 MS. SHROPSHIRE: Aye.

11 MS. WITTENBERG: Marvin.

12 MR. MILLER: Aye.

13 MS. WITTENBERG: Joe Whalen.

14 MR. WHALEN: Nay.

15 MS. WITTENBERG: Chairman Russell.

16 CHAIRMAN RUSSELL: You missed someone.

17 MR. ELLERHOFF: No.

18 MS. WITTENBERG: No. I got two nays and  
19 four ayes.

20 CHAIRMAN RUSSELL: Really?

21 MS. WITTENBERG: Yes, and then yours.

22 CHAIRMAN RUSSELL: I counted three ayes.

23 Well, I vote aye. All right. So the motion  
24 carries by a five to two vote, and we'll move on.  
25 Appeal by Jerry McRae.

1 MS. ORR: Mr. Chairman, members of the  
2 Board, this is a case that is similar to the  
3 Laubach case, in that a landowner was objecting to  
4 the DEQ's decision to amend a certificate of  
5 approval of compliance. And under the statute,  
6 there is an ability of either the permittee or the  
7 appellant to proceed to District Court, and  
8 basically I would call it a judicial review  
9 proceeding of the Department's decision in its  
10 issuance of the amendment to the certificate of  
11 compliance.

12 And that's the posture we're at right  
13 now, and so it's out of the jurisdiction of the  
14 Board, and I don't think there is any order that's  
15 necessary. I guess also there is no action that's  
16 required by the Board.

17 CHAIRMAN RUSSELL: I guess I'm a little  
18 confused, because how can it be taken from the  
19 Board's jurisdiction without the Board requiring  
20 that to occur?

21 MS. ORR: Without what?

22 CHAIRMAN RUSSELL: Never mind. The  
23 parties -- Have the parties agreed to move from  
24 the Board's --

25 MS. ORR: Either party can do that, and

1 they have.

2 CHAIRMAN RUSSELL: One party -- We're  
3 getting civics lessons.

4 MS. ORR: Pardon?

5 CHAIRMAN RUSSELL: Never mind. I  
6 thought the parties had to -- (inaudible) -- not a  
7 party.

8 MS. ORR: Either MATL, the permittee,  
9 could do it, or the Appellant could do it. And  
10 the Appellant decided to go ahead and do that  
11 here.

12 CHAIRMAN RUSSELL: All right. So I  
13 guess all I can say is thanks for your comments on  
14 this, and we move on.

15 MS. ORR: Right. There is no action to  
16 be taken by the Board at this point.

17 CHAIRMAN RUSSELL: Okay. Let's move on  
18 to the last one.

19 MS. ORR: The last one is in the matter  
20 of violations of the Water Quality Act by SK  
21 Construction, Inc., on US Highway 2 near  
22 Bainville, Roosevelt County. This is a case  
23 involving the discharge of significant sediment  
24 amounts to the Little Muddy Creek and Red Bank  
25 Creek, State waters, in violation of the general

1 permit and ARM 17.30.1342.

2 The Department issued a Notice of  
3 Violation, administrative compliance and penalty  
4 order under the Water Quality Act, and it is  
5 seeking \$16,800.

6 CHAIRMAN RUSSELL: All right. So with  
7 that in mind, questions for Katherine?

8 (No response)

9 CHAIRMAN RUSSELL: Hearing none, I would  
10 entertain a motion to assign Katherine the  
11 permanent Hearing Examiner on this matter.

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

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

15 MS. KAISER: This is Heidi. I second.

16 CHAIRMAN RUSSELL: It's been moved and  
17 seconded. Roll call this. All those in favor,  
18 signify by saying aye.

19 MS. WITTENBERG: Larry Mires.

20 MR. MIRES: Aye.

21 MS. WITTENBERG: Larry Anderson.

22 MR. ANDERSON: Aye.

23 MS. WITTENBERG: Heidi.

24 MS. KAISER: Aye.

25 MS. WITTENBERG: Robin.

1 MS. SHROPSHIRE: Aye.

2 MS. WITTENBERG: Marvin.

3 MR. MILLER: Aye.

4 MS. WITTENBERG: Joe Whalen.

5 MR. WHALEN: Aye.

6 MS. WITTENBERG: Chairman Russell.

7 CHAIRMAN RUSSELL: Aye. Okay. Motion  
8 carries unanimously.

9 We are on to the last big substantive  
10 matter in front of the Board today. I haven't  
11 done one of these in awhile, and I haven't really  
12 reviewed the law. This is regarding adoption of  
13 amendments to the Lewis & Clark County Air  
14 Pollution Control Regulations, or I guess they  
15 call them the Outdoor Air Quality Regulations.  
16 John or Katherine, are we actually conducting a  
17 public hearing today?

18 MS. ORR: Yes.

19 CHAIRMAN RUSSELL: All right. I have  
20 not worked up any public hearing language, so I'm  
21 just going to have to wing it, if that's all  
22 right. Hopefully I catch everything I need to.

23 MS. ORR: Okay.

24 CHAIRMAN RUSSELL: The Board of  
25 Environmental Review will now hold a public

1 hearing on the request by the Lewis & Clark City  
2 County Health Department to amend their Outdoor  
3 Air Quality Regulations. We are going to hold a  
4 public hearing, and we will listen to the  
5 audience. We will first hear from any proponents  
6 of the regulations, and then we will hear from  
7 opponents, and if everything is clear to the  
8 Board, we will take action today on this matter.

9 So we are in public hearing right now,  
10 and as such, Katherine, since you're there, I'm  
11 guessing that we have at least someone from the  
12 County Health Department there.

13 MS. ORR: That's correct, Mr. Chairman.

14 CHAIRMAN RUSSELL: All right. Well,  
15 we'll probably start it off with them since  
16 they're probably the proponents of it.

17 MS. ORR: Okay. I guess I'd suggest we  
18 hear from the Lewis & Clark County representative.  
19 If you would state your name, that would be very  
20 helpful.

21 MS. MOORE: Thank you. If you can't  
22 hear me --

23 CHAIRMAN RUSSELL: We don't want you to  
24 read what you've given to us. We want you to  
25 summarize it, tell us what you've changed, why

1 you've done it, and that should be plenty unless  
2 the Board has questions.

3 MS. MOORE: Mr. Chairman, members of the  
4 Board, thank you very much. If you have problems  
5 hearing me, please let me know.

6 For the record, my name is Kathy Moore,  
7 Environmental Services Administrator for the Lewis  
8 & Clark City County Health Department. I'm before  
9 you today to introduce and present the changes  
10 that we've made to the air quality regulations in  
11 Lewis & Clark County, the regulations which the  
12 Lewis & Clark County Board of County Commissioners  
13 approved on September 1st of this year.

14 We have followed the procedures outlined  
15 in 75-2-301 of the Montana Code Annotated. We  
16 issued a notice of intent to change our  
17 regulations as provided in Title 75 on July 16th,  
18 2011. We posted that notice on our website, and  
19 released it to the media on the 16th of July of  
20 this year. The notice of intent was also  
21 distributed at public meetings which were held  
22 August 2nd, 4th, and 11th. During the period from  
23 July 19th through August 30th, we also had  
24 newspaper articles, two television interviews, and  
25 one radio talk show.



1           Our public meetings were held before the  
2 East Helena City Council, and the Lewis & Clark  
3 City County Commission, and the Helena City  
4 Commission. We had a total of five public  
5 meetings at which we accepted public comment.

6           We have provided a stringency analysis,  
7 and have only one item that we believe is more  
8 stringent than State standards, and that is our  
9 prohibition on the use of coal. We took public  
10 comment, accumulated that comment, and summarized  
11 it, and we have responded to the public comment,  
12 and posted our responses on our website. We have  
13 also responded personally to numerous emails.

14           Upon your decision to approve or deny  
15 this modification to our regulations, we will  
16 notify all of the interested parties of the  
17 decision that is made today.

18           I'd like to now briefly go over the  
19 changes to the regulation. You have some of those  
20 changes before you, but I would like to highlight  
21 a couple of those changes.

22           Our old regulation was based on  
23 particulate matter the size of ten microns. We  
24 are now changing that from the PM-10 standard to  
25 the PM-2.5 to bring us in line with EPA's health

1 based standard. Our definitions, in our previous  
2 regulation, we had definitions of good, watch, and  
3 poor ratings, which we used to enforce our air  
4 regulation. We are basing them now on an eight  
5 hour standard as opposed to a 24 hour standard  
6 which was in our old regulation.

7           We used two criteria, that is the PM  
8 standard, the micrograms that we're at, the  
9 micrograms per meter cubed, and meteorological  
10 conditions. We used those two criteria to  
11 determine whether we are at a good, which we are  
12 now calling 21 micrograms per cubic meter for an  
13 eight hour period; a watch, which is 21 micrograms  
14 per cubic meter to 28 micrograms per cubic meter.  
15 Anything over 28 micrograms we are calling a poor.  
16 There is no change from our previous regulations.  
17 When we hit a poor, we require people to  
18 discontinue burning.

19           Our new regulation will allow exemptions  
20 to that, however. We will allow persons to burn  
21 stoves which do not emit more than is 7.5 grams  
22 per hour of PM-2.5, that is EPA certified stoves,  
23 and that is a change from our old regulation.

24           Another change from our old regulation  
25 to the new one is that burning devices may not

1 exceed 20 percent opacity during a poor stage.  
2 We've included that provision because we do not  
3 wish malfunctioning or poorly functioning stoves  
4 to be burned during a poor stage.

5 Our intent in making these modifications  
6 is to prevent us from moving into an exceedence of  
7 EPA's standard of 35 micrograms.

8 We've included a contingency standard  
9 that allows us to address other suspected PM  
10 sources if we have a poor air quality episode that  
11 exceeds a 48 hour period. We are prohibiting the  
12 burning of coal, the single area in which we are  
13 more stringent than State standards.

14 We have expanded our enforcement and  
15 penalty section, as well as our appeal process  
16 section, based on public comment that we received.  
17 Our enforcement and penalties are essentially  
18 taken from State rules and from the Missoula air  
19 quality ordinance. We've included this expanded  
20 enforcement and penalty section, so that people do  
21 not need to refer to the State rules to find out  
22 what penalties and enforcement are.

23 Finally, we've added a repealer in  
24 Chapter 8 of our regulations.

25 Those are the key changes that we have

1 made to our regulation. I am available for any  
2 questions that you might have.

3 CHAIRMAN RUSSELL: Thank you, and thank  
4 you for keeping it brief. Questions for Lewis &  
5 Clark County Health Department?

6 MR. WHALEN: Mr. Chairman, a couple  
7 questions with respect to the enforcement of the  
8 new regulations should they be adopted.

9 Which department is going to be charged  
10 with enforcing the particulars of the new  
11 regulations that are being proposed, and has there  
12 been a change in the budgeting for that department  
13 as a result of this action by Lewis & Clark  
14 County?

15 MS. MOORE: Mr. Chairman, the  
16 enforcement of the air quality regulation will  
17 occur within the City County Health Department.  
18 While we've had no budgeting change for that  
19 enforcement, we will continue to perform  
20 enforcement in the same way that we have in the  
21 past. Registered sanitarians in our department  
22 will be pulled off other work to do enforcement  
23 during poor episodes.

24 MR. WHALEN: Okay. Thank you.

25 CHAIRMAN RUSSELL: That's a question. I

1 know that the language has changed by the EPA.  
2 You've never been non-attainment for particulate  
3 pollution; is that correct?

4 MS. MOORE: Mr. Chairman, that's  
5 correct. We've never exceeded the EPA 24 hour  
6 standard or the EPA annual standard for  
7 particulate.

8 CHAIRMAN RUSSELL: But your annual  
9 averages are creeping -- I guess I have some  
10 inside information from my colleague, Melanie  
11 Reynolds. You are creeping very close to 2.5,  
12 aren't you, on annual average?

13 MS. MOORE: We're currently at 34.4, I  
14 believe, micrograms. We are dangerously close to  
15 the EPA standard.

16 CHAIRMAN RUSSELL: This is an urgent  
17 matter. Questions?

18 MR. MIRES: Mr. Chairman, this is Larry  
19 Mires. One other question. What did you say you  
20 had a prohibition on at your beginning? That cut  
21 out. I couldn't hear.

22 CHAIRMAN RUSSELL: I think it was coal,  
23 coal burning.

24 MS. MOORE: That's correct.

25 MR. MIRES: Thank you. A follow up

1 question on that. Is the purpose on the coal  
2 because it can't be burned sufficiently to get it  
3 down to 2.5? Is that the purpose behind it?

4 MS. MOORE: The Board of Health  
5 requested that we prohibit the burning of coal  
6 because in addition to particulate matter, it  
7 contains so many other hazardous air pollutants,  
8 including heavy metals.

9 MR. MIRES: Follow up question. Are  
10 there many people in the city of Helena or any  
11 jurisdiction area that burn coal right now as  
12 their main heat source, for example?

13 MS. MOORE: It's our understanding that  
14 it is not used as a main heat source for anyone.  
15 However, we believe there are about 20 people that  
16 do burn coal as supplemental heating.

17 MR. MIRES: Thank you.

18 MS. SHROPSHIRE: Mr. Chairman, a  
19 question along the same lines. Do you look at the  
20 contaminants that other solid fuels produce in  
21 comparison to coal?

22 MS. MOORE: The fuels that we have  
23 looked at include wood, oil, and coal, as well as  
24 natural gas and propane. Those are the only fuels  
25 that we've looked at. Other fuels aren't used to

1 our knowledge for heating.

2 CHAIRMAN RUSSELL: And most of them are  
3 prohibited by the State, too, like chicken manure,  
4 just to throw one out.

5 MS. SHROPSHIRE: Okay. Thank you.

6 CHAIRMAN RUSSELL: Any other questions?

7 (No response)

8 CHAIRMAN RUSSELL: Has the Department  
9 done a record of decision on this?

10 MR. ELLERHOFF: Mr. Chairman, this is  
11 Tom. Jim Madden is approaching the lectern.

12 MR. MADDEN: Good morning, Mr. Chairman,  
13 members of the Board. Can you all hear me?

14 CHAIRMAN RUSSELL: I can.

15 MR. MADDEN: I'm, for the record, the  
16 attorney that worked on this project. Dave  
17 Rusoff, our air expert, has retired, so my  
18 knowledge is a mile wide and an inch deep.

19 But no, there has been no requirement  
20 for a Department Record of Decision on this. I  
21 think we have Bob Habeck, who is ready to weigh in  
22 with some testimony about the compatibility of  
23 these local regulations with the State program.  
24 But other than that, it's a Board decision to  
25 approve the program.

1           CHAIRMAN RUSSELL: Well, Bob, will this  
2 be incorporated into the State SIP?

3           MR. HABECK: Mr. Russell, members of the  
4 Board, Bob Habeck, Air Program Manager for the  
5 Department.

6           My testimony today is to speak  
7 affirmatively to Lewis & Clark County's procedural  
8 processes. They are in conformance with the State  
9 Clean Air Act. And also in consultation with Jim  
10 Madden, we found that the program meets the  
11 stringency requirements.

12           As you noted before, Mr. Chairman, Lewis  
13 & Clark County is not previously a non-attainment  
14 area for particulate matter, and as such, these  
15 rules have not been incorporated into the SIP and  
16 are not proposed today.

17           CHAIRMAN RUSSELL: Okay. But the first  
18 part -- and I've seen this, and this is -- I mean  
19 the law is pretty clear -- if both cities, the  
20 Board of Health, and the County Commissioners have  
21 adopted the amendments.

22           MR. HABECK: Mr. Chairman, this is Bob  
23 Habeck again. The Department has found that the  
24 Lewis & Clark County has fulfilled all of the  
25 legal processes, as city and county public



1 processes with the affirmative.

2 CHAIRMAN RUSSELL: Thanks, Bob. We've  
3 had one of these come that didn't get a city's  
4 approval in front of us. Okay. This has been  
5 kind of a whacked out public hearing. Are there  
6 any other proponents?

7 MR. ELLERHOFF: Mr. Chairman, this is  
8 Tom. I see nobody here in the Metcalf Building  
9 conference room.

10 CHAIRMAN RUSSELL: So that would mean  
11 there are no proponents in the room, or opponents  
12 in the room?

13 MR. ELLERHOFF: That's correct.

14 CHAIRMAN RUSSELL: How about on the  
15 phone?

16 (No response)

17 CHAIRMAN RUSSELL: All right. With  
18 that, I will close the public hearing, and the  
19 Board will be in executive action, take executive  
20 action on this matter.

21 The only thing I will mention on the  
22 regulation, on the last -- or on Page 16, it says  
23 "Reviewed and approved by the Montana Board of  
24 Environmental Review by memorandum and order dated  
25 November" blank "2011." Whomever's copy this is,

1 it will have to reflect that it's not November  
2 yet. And I believe we'll take action on this  
3 there -- (inaudible) -- should be September 23rd.  
4 Get back to this.

5 I will, just to kick this thing off, I  
6 have in front of me a memorandum of order and  
7 order, and I would entertain a motion for the  
8 Board Chair to sign this order and complete the  
9 process of amending the Lewis & Clark County air  
10 quality regulations.

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

12 CHAIRMAN RUSSELL: Marvin, thank you.  
13 Is there a second?

14 MR. MIRES: Mires. Second.

15 CHAIRMAN RUSSELL: It's been moved and  
16 seconded by Larry. Other comments?

17 MR. WHALEN: Mr. Chairman, this is Joe.  
18 I understand that DEQ would be a back stop to the  
19 County with respect to compliance with State  
20 regulations if, for some reason, the County isn't  
21 able to step in and enforce adequately. Have  
22 there been any other cases that the Board could  
23 consider where this sort of order has been in  
24 place, and the control and monitoring of air  
25 quality has been shifted to the county as opposed

1 to the state, and what sort of success record has  
2 there been in that event?

3           CHAIRMAN RUSSELL: Well, since I'm kind  
4 of a living whatever about this, just to mention,  
5 there is a part of Title 75 that allows for the  
6 establishment of local air pollution control  
7 districts, and those jurisdictions, generally  
8 public health departments -- except Billings used  
9 to be run by a separate organization -- we are  
10 required to adopt regulations, generally not on  
11 major air polluters. Generally we're doing  
12 non-point source polluters.

13           The law is very specific. We have to  
14 have our rules, we have to have those approved by  
15 all governing bodies within the jurisdiction to be  
16 regulated. I believe Missoula, Flathead, Lewis &  
17 Clark, Yellowstone -- I believe -- I'm not sure if  
18 Gallatin does or not. I think Gallatin. Libby is  
19 a long standing program where their local public  
20 health department regulates nonpoint source and  
21 wood stoves, even though they are kind of a point  
22 source. They're not like point source in --  
23 (inaudible) --

24           So there are a lot of examples of this.  
25 Generally the local health departments have to --

1 you know, do all of those activities. Very  
2 seldom, and I don't believe at all, has the State  
3 ever jumped in to regulate in addition in these  
4 areas that are defined within a map and have  
5 regulation. Bob would know. Bob and I have  
6 worked on these for a gazillion years.

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

8 CHAIRMAN RUSSELL: Any other questions?

9 (No response)

10 CHAIRMAN RUSSELL: Hearing none, we'll  
11 roll call this. All those in favor of the Board  
12 Chair signing the order, signify by saying eye.

13 MS. WITTENBERG: Larry Mires.

14 MR. MIRES: Aye.

15 MS. WITTENBERG: Larry Anderson.

16 MR. ANDERSON: Aye.

17 MS. WITTENBERG: Heidi.

18 MS. KAISER: Aye.

19 MS. WITTENBERG: Robin.

20 MS. SHROPSHIRE: Aye.

21 MS. WITTENBERG: Marvin.

22 MR. MILLER: Aye.

23 MS. WITTENBERG: Joe Whalen.

24 MR. WHALEN: Aye.

25 MS. WITTENBERG: Chairman Russell.

1           CHAIRMAN RUSSELL: Aye. All right.

2 Thank you to Lewis & Clark for keeping it brief,  
3 and for a good discussion.

4           The last -- Katherine, we're done,  
5 right? Everything that you had is over?

6           MS. ORR: That's right, Mr. Chairman.

7           CHAIRMAN RUSSELL: All right. So we are  
8 on to the last item. Is there anyone that would  
9 like to address the Board on matters within the  
10 jurisdictional confines of the Board of  
11 Environmental Review?

12           (No response)

13           CHAIRMAN RUSSELL: No one is jumping up  
14 there, Tom?

15           MR. ELLERHOFF: Mr. Chairman, nobody  
16 here.

17           CHAIRMAN RUSSELL: Okay. The last thing  
18 I would mention. This is -- We've been at it for  
19 almost two hours, and granted, it wouldn't have  
20 been worth it to drive to Helena for two hours,  
21 and I know we have these rule revision  
22 constraints, but this was a very difficult  
23 meeting, as Joe mentioned.

24           I don't know what's going on with your  
25 sound system, but it cut out the whole time. It

1 was very difficult to pick up some of the comments  
2 that were made. And I don't know if that's a  
3 function of the sound system, or the way the stars  
4 aligned today, but it was a difficult meeting.  
5 And we might want to look into maybe a better  
6 bridge or something.

7 MR. ELLERHOFF: Mr. Chairman, this is  
8 Tom. We'll look into the sound system.

9 CHAIRMAN RUSSELL: I appreciate it.  
10 Well, with all that said, I would entertain a  
11 motion to adjourn.

12 MS. KAISER: Heidi. So moved. I have  
13 one more question before we adjourn. There was --  
14 (inaudible) -- the next meeting possibly being a  
15 two day meeting. Am I premature in asking if  
16 that's been resolved or --

17 CHAIRMAN RUSSELL: I don't know.

18 MS. ORR: Mr. Chairman, I think I can  
19 address that. Since the Carbon County case has  
20 been settled, there won't be a contested case in  
21 conjunction with the December 2nd meeting, so it  
22 looks like it will be one day, not a whole day  
23 even. I don't know what's on the agenda yet, but  
24 it's pretty full, Joyce tells me.

25 CHAIRMAN RUSSELL: Okay. We can hear

1 you, Joyce. So probably a one day meeting, and as  
2 my calendar looks at it, it looks like December  
3 2nd. So back on it. Is there a motion to  
4 adjourn?

5 MS. KAISER: So moved. This is Heidi.

6 CHAIRMAN RUSSELL: Heidi moved. Is  
7 there a second?

8 MR. MILLER: Miller. I second.

9 CHAIRMAN RUSSELL: Marv. All those in  
10 favor, signify by saying aye.

11 (Response)

12 CHAIRMAN RUSSELL: Opposed.

13 (No response)

14 CHAIRMAN RUSSELL: Motion carries.

15 Meeting adjourned. We'll see you in early  
16 December.

17 (The proceedings were concluded  
18 at 10:56 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 - 79 - 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                      , 2011.

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