

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
OCTOBER 3, 2008)

TRANSCRIPT OF PROCEEDINGS

Heard at the State Capitol Building
1301 Sixth Avenue, Room 152
Helena, Montana
October 3, 2008
9:00 a.m.

BEFORE CHAIRMAN JOSEPH RUSSELL,
BOARD MEMBERS LARRY MIRES, HEIDI KAISER,
BILL ROSSBACH; ROBIN SHROPSHIRE,
and DON MARBLE (All by telephone)

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

3 * * * * *

4 CHAIRMAN RUSSELL: It is 9:05, and I
5 will call this Board of Environmental Review
6 meeting to order. The first item on the agenda is
7 the review and approval of the August minutes.

8 MR. MIRES: This is Larry, and I so move
9 we approve.

10 CHAIRMAN RUSSELL: It's been moved that
11 we approve. Is there a second?

12 MR. ROSSBACH: Second. Bill.

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

15 (No response)

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

18 (Response)

19 CHAIRMAN RUSSELL: Opposed.

20 (No response)

21 CHAIRMAN RUSSELL: Motion carries
22 unanimously. The next item on the agenda are the
23 briefing items, contested case updates, cases
24 assigned to Katherine Orr. Katherine.

25 MS. ORR: Good morning, Mr. Chairman,

1 members of the Board. I can just go through this
2 quickly. There are some additions here to brief
3 the Board about.

4 On the first item, this is regarding CR
5 Kendall. This is under II(A)(1)(a). The
6 Department has reported that they're still waiting
7 for some water quality data, and then an EIS and
8 closure plan will probably be completed about a
9 year from now, November 2009.

10 ASARCO, I asked for an update on that,
11 and that is still in bankruptcy. Apparently the
12 Department has put in a request for payment in
13 full of the penalties. There has been no
14 objection to that, but it still remains in
15 bankruptcy.

16 As to Item D, this is in the matter of
17 the appeal by Southern Montana Electric. If the
18 Board recalls, there were two contested case
19 hearings: One was a challenge to a permit
20 condition by SME; and another one involved the CO2
21 and the PM10/PM2.5 issues.

22 This one has to do with SME appealing a
23 permit condition which involved clarification of a
24 test method for condensible particulate matter,
25 and SME has requested a stay of that for six

1 months pending EPA clarification of that test
2 method.

3 The next item that I have something to
4 add, that would be Item G involving the Open Cut
5 Mining Act and James Timis. I just wanted to tell
6 the Board that's been set for hearing on April 6th
7 of 2009.

8 Plum Creek Manufacturing, Item H, this
9 and the next three items were ones that the Board
10 has retained jurisdiction except for prehearing
11 matters. In this case, Plum Creek withdrew its
12 notice of appeal on September 19, 2008, so there
13 will be a dismissal before the Board in December.

14 On Item J, Eastgate Water and Sewer
15 Association of Helena Sand and Gravel, this is the
16 challenge that has been mounted by a citizens
17 group. The Board has jurisdiction over this.
18 Helena Sand and Gravel intervened on August 28th,
19 and I entered an order granting that Intervenor
20 status on September 16 of 2008.

21 On Item L, that is TMC, a hearing has
22 been scheduled March 5th, 2009.

23 I can go into the cases in litigation if
24 you'd like.

25 CHAIRMAN RUSSELL: That would be fine.

1 MS. ORR: These are the two cases that
2 now are in District Court. The one involving TRC
3 is the first one, or now it's TRP. This started
4 as an appeal against just the Board, and the
5 Department and TRP have both filed motions to
6 intervene, and the Court has granted the
7 Department's motion to intervene. That happened
8 on September 23, 2008. No word yet on the motion
9 to intervene by TRP, but there wasn't any
10 opposition to that, so one would think that the
11 Court would grant that.

12 On Item B, this is the SME case. As you
13 know, there is an appeal of the CO2 issue. And
14 this actually contains an error in the agenda.
15 It's SME that filed its intent to file. It
16 requested to intervene, rather than the Department
17 here. The Department already was a party. That
18 motion was granted on September 19th, 2008, and
19 Judge McKittrick has assumed jurisdiction of that
20 case.

21 CHAIRMAN RUSSELL: Thanks, Katherine.
22 The next item on the agenda is initiation of
23 rulemaking, appointment of Hearing Examiner, to
24 amend 17.8.308, 17.8.504, 17.8.744, and 7.8.1205.
25 Tom.

1 MR. LIVERS: Mr. Chairman, members of
2 the Board, for the record, this is Tom Livers,
3 Deputy Director of DEQ, and Deb Wolfe from our Air
4 Resource Management Bureau will walk us through
5 this rulemaking. Deb.

6 MS. WOLFE: Good morning, Chairman
7 Russell, members of the Board. My name is Debra
8 Wolfe, and I'm a Planner with the Air Resources
9 Management Bureau. I'm here today to represent
10 the Department regarding the initiation of
11 rulemaking in the matter of agricultural
12 exemptions to regulation, and the removal of the
13 requirement regarding the concurrent application
14 process for Title 5 and Montana Air Quality permit
15 applications.

16 With regard firstly to the amendments to
17 exempt agricultural activities, in 2007, the
18 Montana Legislature amended Montana Code Annotated
19 75-2-111 to limit the regulation of certain
20 agricultural activities for air quality purposes.
21 The reference as to agricultural exemptions in the
22 current rules are not sufficiently broad to
23 encompass the activities the Legislature defined
24 as exempt in Montana Code Annotated 75-2-111(1)(a)
25 and (b).

1 The current rules do not exempt
2 commercial agricultural operations. The statute
3 is more conditional. It does not exempt
4 commercial agricultural operations that remain in
5 a single location for twelve months, and are
6 subject to federal permitting requirements. The
7 rules will be revised to be identical to the
8 statutory exemptions.

9 Secondly, with regard to the changing
10 requirements for Title 5 permit application, the
11 Department proposes amending the language to
12 ensure a Montana air quality permit and a Title 5
13 permit may be processed in an order that preserves
14 the integrity of the timelines, and therefore the
15 validity of the final decision on each
16 application.

17 The amendment of ARM 17.8.504(2)(c)
18 ensures an applicant is appropriately charged for
19 each permit application when applying for both a
20 Montana air quality permit and a Title 5 permit
21 for the same proposal.

22 Title 5 permits must include all
23 requirements applicable to the facility, so it is
24 impractical to issue a Title 5 permit prior to
25 issuing a final Montana air quality permit when

1 the Montana air quality permit is also required.
2 Upon receipt of a complete application of a Title
3 5 permit, the Department is required pursuant to
4 ARM 17.8.1222 to take final action regarding the
5 application within eighteen months.

6 However, the two processes address
7 different requirements and have different time
8 frames. The processing of one permit application
9 may have little to do with the requirements for
10 processing the other.

11 To correct this situation, the
12 Department proposes that the Board amend ARM
13 17.8.1205(2)(c) to require submission of an
14 application for a Title 5 permit within twelve
15 months after commencing operation, or if an
16 existing permit would prohibit the proposed
17 construction or other change before commencing
18 operation.

19 The current rule also contains
20 provisions regarding the processing of initial
21 applications that occurred several years ago.
22 These provisions are no longer necessary and are
23 proposed for repeal.

24 Additionally, the rule contains a
25 provision at ARM 17.8.1205(3)(c) which is

1 redundant of ARM 17.8.1221, and is therefore
2 unnecessary.

3 The proposed amendments are also
4 intended to correct a number of grammatical and
5 syntax errors. The Department has prepared for
6 the Board's consideration a draft notice of
7 proposed amendment. The Department recommends
8 that the Board initiate rulemaking, schedule a
9 date for hearing, and appoint a presiding officer
10 to conduct the hearing as described in the
11 proposed MAR notice.

12 CHAIRMAN RUSSELL: I have a question.
13 Regarding the first part of this exemption of ag
14 activities, which seems to be a great thing to do
15 as least from someone's perspective, yesterday in
16 the Flathead we had at least three burns in the
17 valley that were ag associated. Will what you are
18 doing now put us in a predicament against the
19 State rule and the rulemaking for limiting that
20 burning during times when we've called for closing
21 burning in the valley?

22 MS. WOLFE: Chairman Russell, members of
23 the Board, the agricultural exemption that the
24 Legislature created did not affect opening burning
25 provisions.

1 CHAIRMAN RUSSELL: Okay. Any further
2 questions?

3 MR. MIRES: This is Larry. Is that an
4 intention, is that primarily aimed at like summer
5 fallowing and planting in the fall when it creates
6 a lot of dust? Is that what it's all about?

7 MS. WOLFE: Chairman Russell and members
8 of the Board, that was not the intent of the
9 legislation. If you'd like more details regarding
10 the types of air emissions that the legislation
11 was intended to exempt, I could let you talk to a
12 program specialist. Carson Coate would be pleased
13 to answer your questions.

14 CHAIRMAN RUSSELL: Larry, do you want
15 that?

16 MR. MIRES: I'm not sure it's 100
17 percent necessary, but I would be kind of curious
18 to know what was the intent. What are they
19 targeting here under this change?

20 CHAIRMAN RUSSELL: Why don't we hear
21 from the Department.

22 MR. COATE: Mr. Chairman, members of the
23 Board, for the record, my name is Carson Coate.
24 I'm in the Air Compliance Section with the Air
25 Resources Management Bureau.

1 This exemption was primarily for hay
2 grinders. What it did is we had one or two
3 sources that would come in and locate at different
4 farms and grind hay for the process of producing
5 feed and things like that.

6 Because they were considered commercial,
7 they had no exemption under our current rules, so
8 we amended the statute to include these facilities
9 provided they don't stay in location longer than
10 twelve months, and provided that they aren't
11 affected by PSD, which is under 42 USC 7475, New
12 Resource Review under 42 USC 7503, and Title 5
13 operating permits under 42 USC 7661.

14 And so what we lose is kind of the
15 regulations of visible emissions, the dust, the
16 particulate matter coming off these facilities.
17 They still will be required to comply with
18 Subchapter 6 and all of the ag open burning
19 regulations however.

20 MR. MIRES: Thank you.

21 CHAIRMAN RUSSELL: Any other questions?

22 (No response)

23 CHAIRMAN RUSSELL: Hearing none, I would
24 entertain a motion to initiate rulemaking -- and
25 Katherine, are you available?

1 MS. ORR: Yes, I am, Mr. Chairman.

2 CHAIRMAN RUSSELL: -- and appoint
3 Katherine our Hearings Examiner.

4 MR. MIRES: So moved. This is Larry.

5 MR. MARBLE: I'll second it.

6 CHAIRMAN RUSSELL: Before we vote, did
7 anyone show up from the public?

8 MR. LIVERS: Mr. Chairman, we have a
9 couple members of the public here, so you probably
10 do want to ask for public comment on these items.

11 CHAIRMAN RUSSELL: Is there anyone in
12 the audience that would like to speak to this
13 before the Board takes action?

14 MR. LIVERS: It doesn't look like it,
15 Mr. Chairman.

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

18 (Response)

19 CHAIRMAN RUSSELL: Opposed.

20 (No response)

21 CHAIRMAN RUSSELL: Thank you. The next
22 item on the agenda is adoption of final rules,
23 amendment of ARM 17.8.505, 17.8.514. And I
24 believe we have -- is this what we need
25 supplemental open?

1 MS. WOLFE: Yes, it is. We had a
2 supplemental hearing, notice and comment and
3 hearing on the fee matter and on the IBR.

4 CHAIRMAN RUSSELL: Actually, Tom, why
5 don't you take over then.

6 MR. LIVERS: Mr. Chairman, I'm going to
7 pass this off again to Debra Wolfe.

8 MS. WOLFE: Again, for the record, my
9 name is Debra Wolfe, and I'm a Planner with the
10 Air Resources Management Bureau, and I'm here
11 today to represent the Department regarding action
12 on the proposed rulemaking to set air quality
13 operation and open burning fees.

14 Pursuant to 75.2.220, the Department
15 assesses air quality permit application fees,
16 annual air quality operation fees, and open
17 burning fees. In the aggregate, these fees must
18 be sufficient to cover the Department's costs of
19 developing and administering the permitting
20 requirements for the Clean Air Act of Montana.

21 Annual air quality operation fees are
22 required for all facilities that hold an air
23 quality permit or those facilities that are
24 registered oil and gas well facilities.

25 For facilities other than portable

1 facilities and registered oil and gas well
2 facilities for which a flat administrative fee is
3 assessed, the air quality operation fee has been
4 based on the actual or estimated actual amount of
5 air pollutants emitted during the previous
6 calendar year, and includes an administrative fee
7 plus a per ton fee for tons of PM-10, sulphur
8 dioxide, lead, oxides of nitrogen, and volatile
9 organic compounds emitted.

10 The amount of money the Department needs
11 to generate through the collection of air quality
12 fees depends on the legislative appropriation, the
13 amount of fee carry over from the previous fiscal
14 year, and the projected application fees.

15 For fiscal year 2009, the Board is
16 proposing to increase the administrative portion
17 of the annual operating fee for stationary sources
18 from \$500 to \$600. This change would provide
19 consistency with the current fee charged for the
20 administration of the portable source and
21 registration programs for which the Department
22 provides similar administrative services.

23 This change in fee would result in an
24 increase in Department revenue of approximately
25 \$30,000 a year, and a corresponding decreased cost

1 per ton operating fee for stationary sources. The
2 emission component of the operation fee is also
3 revised to account for the change in the total
4 amount of pollutants emitted in the state in the
5 previous calendar year.

6 The appropriation for fiscal year 2009
7 is \$3,966,080, an increase of \$105,852 from fiscal
8 year 2008. The projected carry over from fiscal
9 year 2008 is zero. The total amount of pollutants
10 reported for 2008 fees is 98,661 tons.

11 Based upon the appropriation, the
12 estimated carry over, the projected permit
13 application fees, and the emission inventory from
14 sources, in order to cover the Department's costs
15 of developing and administering the Air Quality
16 Permitting Program, it is necessary for the Board
17 to increase the per ton charge to \$31.29.

18 Therefore, the Board is proposing to
19 amend 17.8.505(7) by replacing the per ton charge
20 of \$29.96 with \$31.29. Last calendar year, the
21 total amount of fees assessed was \$3,541,368. The
22 amount of fees that would be assessed in 2008 to
23 meet the fiscal year 2009 budget would be
24 \$3,832,302, for an increase of \$290,934. In
25 calendar 2008, the fees are assessed for 1,243

1 facilities.

2 For opening burning activity, the
3 proposal includes amendments to ARM 17.8.514 to
4 revise the fee required for major open burning
5 permit applications for fiscal year 2009.

6 Each year, following consultation with
7 the Montana Airshed Group, which includes the
8 major open burners in the state, the Department
9 develops a budget reflecting the costs that the
10 Department will incur for that fiscal year to
11 operate the Smoke Management Program for major
12 open burners.

13 Fees assessed to individual burners are
14 based upon the budget and the burners' actual, or
15 estimated or actual emissions from the previous
16 calendar year in which the burner conducted open
17 burning pursuant to an air quality major open
18 burning permit; that is, tons of emissions
19 generated in 2007 are used to calculate fees
20 assessed in 2008 for the 2009 fiscal year.

21 For calendar year 2007, the major open
22 burners reported 8,787 tons of emissions, compared
23 to 4,826 tons for calendar year 2006, for an
24 increase of 3,961 tons.

25 The operating budget for the twelve

1 major open burners in fiscal year 2009 is \$77,278
2 compared to a budget of \$46,159 for fiscal year
3 2008. The increase of \$31,119 in major open
4 burning funding is due to increases of \$29,267 in
5 personnel costs as a result of the increased use
6 of staff, staff time in the Smoke Management
7 Program, particularly with regard to forecasting
8 the dispersion conditions for prescribed burning.

9 The increase in the need for additional
10 staff time also reflects an increase in workload
11 for permitting functions and planning and advisory
12 activities relating to smoke management and
13 coordination activities with the Idaho/Montana
14 Airshed Group. The increases are partially offset
15 by decreases in other costs. The budget also
16 includes an increase of indirect costs as a result
17 of the increases in personnel and operating costs.

18 The Board is proposing to decrease the
19 permit fees from \$21.07 per ton of particulate,
20 \$5.27 per ton of oxides of nitrogen, and \$5.27 per
21 ton of volatile organic compounds emitted, to
22 \$17.40, \$4.35, and \$4.35 respectively. The
23 cumulative amount of the fees would equal the
24 budget of \$77,502. This amount would be
25 distributed among the twelve major open burners.

1 The Department provided notice, held a
2 hearing, and received comment on the proposed rule
3 amendments and additions. No comments were
4 received, and the Department recommends the Board
5 adopt the amendments as proposed.

6 CHAIRMAN RUSSELL: Thanks, Deb.
7 Questions for the Department?

8 (No response)

9 CHAIRMAN RUSSELL: Hearing none -- I
10 guess Katherine, just before I kind of botch this
11 up, we need to adopt the original notice and the
12 supplemental, the takings, and the stringency, and
13 the Hearings Examiner report. Can we do those all
14 together?

15 MS. ORR: That is done, Mr. Chairman, in
16 the notice of amendment.

17 CHAIRMAN RUSSELL: So basically we just
18 have to adopt the notice of amendment?

19 MS. ORR: Right.

20 CHAIRMAN RUSSELL: As well as the
21 stringency and takings?

22 MS. ORR: That doesn't have to be
23 adopted by rule, but there is on the record
24 indication -- Well, the actual takings and the 521
25 review are in the record here, and I've reviewed

1 those, and those are appropriate, and don't
2 constitute a barrier to adopting the notice of
3 amendment.

4 CHAIRMAN RUSSELL: Okay. So I will
5 entertain a motion to adopt the notice of
6 amendment and the Hearings Examiner report. Is
7 there a motion?

8 MR. ROSSBACH: So moved. Bill.

9 CHAIRMAN RUSSELL: Is there a second?

10 MS. SHROPSHIRE: I'll second it. This
11 is Robin.

12 CHAIRMAN RUSSELL: Any further
13 discussion?

14 (No response)

15 CHAIRMAN RUSSELL: Is there any member
16 of the public out there, Tom, who wants to speak
17 to this?

18 MR. LIVERS: No, Mr. Chairman.

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

21 (Response)

22 CHAIRMAN RUSSELL: Opposed.

23 (No response)

24 CHAIRMAN RUSSELL: Motion carries. The
25 next item on the agenda is the update of the air

1 quality incorporation by reference rules, and I'm
2 not going to read them all, Tom.

3 MR. LIVERS: Mr. Chairman, again, Debra
4 Wolfe is going to walk us through the rulemaking.

5 MS. WOLFE: Good morning again, members
6 of the Board, Chairman Russell. My name is Debra
7 Wolfe, and I'm a Planner with the Air Resources
8 Management Bureau, and I'm here again today to
9 represent the Department regarding action on the
10 proposed incorporation by reference rulemaking.

11 As you know, the Board annually adopts
12 by reference the most recent version of the Code
13 of Federal Regulations. As a state with authority
14 and delegation for the administration of various
15 federal air quality programs, Montana maintains
16 primacy in part by adopting these provisions.

17 Recently the Courts have vacated a
18 number of standards for maximum achievable control
19 technology that has been adopted by EPA, and which
20 were subsequently incorporated by the Board into
21 State law.

22 The Federal Courts' action canceling
23 these standards did not cancel them at the state
24 level. You'll note the standards the Court has
25 vacated to date are specifically excluded from

1 this incorporation action; but if more standards
2 are vacated between now and the next incorporation
3 action, the State will be in the position of
4 implementing standards on the books that do not
5 reflect what is happening at the federal level.

6 The proposed Subsection 17.8.102(2) was
7 the Department's attempt to solve the problem of
8 the current regulatory interval between Court
9 decisions and the adoption of the most current
10 CFR. The Department provided notice, held a
11 hearing, and received comment on the proposed rule
12 amendments and additions. One comment was
13 received, and the draft notice of amendment
14 reflects the response to that comment.

15 I should note that that is the revised
16 draft notice of amendment.

17 The Department has concluded that many
18 issues remain to be examined before a satisfactory
19 solution to this problem may be proposed. As a
20 result, we now recommend that the Board adopt the
21 amendments as proposed, but that the Board not act
22 to adopt ARM 17.8.102(2). Thank you.

23 CHAIRMAN RUSSELL: Thanks, Deb. Any
24 comment or questions for the Department from the
25 Board?

1 (No response)

2 CHAIRMAN RUSSELL: Hearing none, I would
3 entertain a motion to amend the regulation and
4 adopt by reference except with the proposed
5 addition of 17.8.102.

6 MR. MIRES: So moved. Larry.

7 CHAIRMAN RUSSELL: That would include
8 the Hearings Examiner report.

9 MR. MIRES: Correct.

10 CHAIRMAN RUSSELL: It's been moved by
11 Larry.

12 MS. KAISER: I'll second. This is
13 Heidi.

14 CHAIRMAN RUSSELL: It's been seconded by
15 Heidi. Any further comments?

16 (No response)

17 CHAIRMAN RUSSELL: Any member of the
18 public wishing to speak to this, Tom?

19 MR. LIVERS: No, Mr. Chairman.

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

22 (Response)

23 CHAIRMAN RUSSELL: Opposed.

24 (No response)

25 MS. SHROPSHIRE: Aye.

1 CHAIRMAN RUSSELL: That must have been
2 Robin; is that correct?

3 MS. SHROPSHIRE: I turned my phone from
4 mute to back on, so I said aye.

5 CHAIRMAN RUSSELL: You said aye as in
6 nay or aye as in --

7 MS. SHROPSHIRE: I'm sorry. I think I
8 just turned it on too late. I'm not opposed to
9 it.

10 CHAIRMAN RUSSELL: So the motion carries
11 unanimously.

12 So we are on to the new contested case
13 appeals. Katherine. Number one is Sand and
14 Gravel.

15 MS. ORR: Yes, Mr. Chairman, members of
16 the Board. Helena Sand and Gravel received a
17 notice of violation and administrative penalty
18 order in which the Department is stating that
19 Helena Sand and Gravel violated the Open Cut
20 Mining Act by using a different point of access
21 than was permitted for two different purposes; and
22 the Department is seeking \$1,000 in penalty.

23 CHAIRMAN RUSSELL: Any questions for
24 Katherine?

25 (No response)

1 CHAIRMAN RUSSELL: Hearing no questions,
2 I would entertain a motion to appoint Katherine
3 the permanent Hearings Examiner unless I hear an
4 objection from Katherine.

5 MS. ORR: No objection.

6 CHAIRMAN RUSSELL: Is there a motion?

7 MR. MIRES: Larry. So moved.

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

10 MR. ROSSBACH: Bill. Second.

11 CHAIRMAN RUSSELL: Any further
12 discussion?

13 (No response)

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

16 (Response)

17 CHAIRMAN RUSSELL: Opposed.

18 (No response)

19 CHAIRMAN RUSSELL: The next item on the
20 agenda.

21 MS. ORR: That is a water quality case
22 involving the Wilderness Club, which is in Eureka,
23 and it involves the unapproved discharge of
24 sediments to State waters, and the failure to
25 maintain erosion sediment controls, and to have a

1 permit on site, and the penalties sought are
2 \$42,500.

3 CHAIRMAN RUSSELL: It must have been a
4 lot of sediment.

5 MS. ORR: Yes. There are other
6 allegations, but those are the main ones.

7 CHAIRMAN RUSSELL: Any further questions
8 for Katherine?

9 MR. ROSSBACH: This is Bill. As I
10 understand it, the only issue is the amount of the
11 penalty; is that correct?

12 MS. ORR: Mr. Chairman, Mr. Rossbach,
13 no. I think all of the assertions in the
14 Department's notice of violation are at issue.

15 MR. ROSSBACH: Because I thought I had
16 read the appeal as suggesting they were only
17 appealing the amount.

18 CHAIRMAN RUSSELL: It does kind of state
19 that, doesn't it?

20 MS. ORR: That maybe I should reread it.
21 "My clients are appealing the penalty," yes, so
22 that -- I don't necessarily know that to be a
23 limitation of the challenges, but that will
24 probably get clarified as this progresses. It's
25 the Morrison Frampton firm in Kalispell that's

1 handling this.

2 The scheduling order was issued on
3 October 2nd, and the hearing has been set for May
4 27th, for the Board's information.

5 CHAIRMAN RUSSELL: Katherine, you'd be
6 available?

7 MS. ORR: Yes.

8 CHAIRMAN RUSSELL: I would then
9 entertain a motion to appoint Katherine the
10 permanent Hearings Examiner on this.

11 MR. ROSSBACH: This is Bill. I'd like
12 to pose an alternate motion. I'm concerned about
13 this case. The penalty issue has still kind of
14 been something that has been controversial. And
15 I've reviewed what the calculation was, and it
16 seemed appropriate to me.

17 But I would propose an alternate motion
18 here on this one, that we appoint Katherine as
19 interim Hearing Examiner to let this proceed on a
20 pretrial basis, and have her report back how the
21 issues are becoming crystalized as the case goes
22 forward, and we can make a decision about whether
23 we'll have her as the permanent Hearing Examiner
24 or have the Board hear it.

25 CHAIRMAN RUSSELL: So do we actually

1 just not take action? Because that's where we are
2 now.

3 MR. ROSSBACH: Is that how that would be
4 done?

5 CHAIRMAN RUSSELL: I think we've done
6 that in the past. I think the three that are kind
7 of rambling on earlier, I think we just didn't
8 take action. Is that correct, Katherine?

9 MS. ORR: Yes, it is.

10 MR. ROSSBACH: That would be my
11 position.

12 CHAIRMAN RUSSELL: So we're just not
13 going to take action. We're going to move
14 forward.

15 The next item on the agenda.

16 MS. ORR: Mr. Chairman, members of the
17 Board, do you want me to go ahead and address
18 that?

19 CHAIRMAN RUSSELL: Yes.

20 MS. ORR: That's the appeal of CHS,
21 Inc., to a Title 5 operating permit. CHS and the
22 Department have arrived at a stipulation for
23 dismissal, and you have the order in front of you.
24 The stipulation tweaks certain aspects of the
25 permit that are agreeable to both parties.

1 CHAIRMAN RUSSELL: I do have an order,
2 but it's actually not finished. I do have a
3 dismissal order in front of me, it just doesn't
4 have a signature line on it. I'm guessing this is
5 for my signature.

6 MS. ORR: I guess we do have a corrected
7 order here which we can fax to you.

8 CHAIRMAN RUSSELL: Okay. Well, or send
9 it in the mail. That's what we've been doing
10 since we haven't been meeting in person. I do
11 have an order. I need a motion to authorize the
12 Board Chair to sign the order.

13 MR. ROSSBACH: So moved.

14 CHAIRMAN RUSSELL: It's been moved by
15 Bill. Is there a second?

16 MR. MIRES: Second.

17 CHAIRMAN RUSSELL: Seconded by Larry.

18 MR. LIVERS: Mr. Chairman, I believe the
19 individual that had phoned in, Dave Veeder, is
20 relevant to this case.

21 CHAIRMAN RUSSELL: Mr. Veeder, do you
22 have anything you want to add?

23 MR. VEEDER: No. Fed Ex, CHS, is in
24 favor of the dismissal, and has entered into the
25 stipulation, and would recommend to the Board that

1 it enter the order.

2 CHAIRMAN RUSSELL: Thanks for your
3 comments and patience. Anything further before we
4 take action?

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: Next, Katherine.

12 MS. ORR: Mr. Chairman, we have a
13 question, and that is who made the last motion?

14 CHAIRMAN RUSSELL: Bill and Larry.

15 MS. ORR: Thank you. The next dismissal
16 involves Dale's Dairy, and that was a public water
17 supply case, and the parties have moved to dismiss
18 based on Rule 41(a), so they have in essence
19 mutually withdrawn from the jurisdiction of the
20 Board, and that's the basis for the dismissal.

21 CHAIRMAN RUSSELL: I do have an order of
22 dismissal for Case No. BER 2008-11-PWS. Is there
23 a motion to authorize the Board Chair to sign?

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

25 CHAIRMAN RUSSELL: It's been moved by

1 Heidi. Is there a second?

2 MS. SHROPSHIRE: Second.

3 CHAIRMAN RUSSELL: It's been seconded by
4 Robin. Further discussion by the Board?

5 (No response)

6 CHAIRMAN RUSSELL: Hearing none, all
7 those in favor, signify by saying aye.

8 (Response)

9 CHAIRMAN RUSSELL: Opposed.

10 (No response)

11 CHAIRMAN RUSSELL: Tom, anything before
12 we go into public comment?

13 MR. LIVERS: Maybe just a couple of
14 quick administrative items, Mr. Chairman. As I
15 mentioned maybe before the official start of the
16 meeting, we do anticipate at our December 5th
17 meeting we'll likely have a face-to-face meeting
18 in Helena. From the Department perspective, in
19 addition to some rulemaking, we'll have a couple
20 of briefing items that will probably work better
21 with folks in person.

22 Again, if it turns out that we have a
23 light agenda like this one, we'll keep open the
24 option of teleconference; but at this point, we
25 would anticipate an in-person meeting.

1 And then we will be sending a draft
2 meeting schedule to the Board prior to the next
3 meeting, a draft meeting schedule for calendar
4 year 2009, and we'll ask the Board to act on that
5 at the December 5th meeting. So we'll get that to
6 you ahead of time so you can have a chance to take
7 a look at schedules, and we'll try to have
8 everyone prepared to act on those dates at the
9 next meeting. It would look similar to what we've
10 had for the last couple years.

11 CHAIRMAN RUSSELL: There must be some
12 Board members that are up for reappointment this
13 go around, right? Bill and --

14 MR. LIVERS: There are four, Mr.
15 Chairman, yes.

16 CHAIRMAN RUSSELL: I'm sure they'll all
17 be putting in for reappointment.

18 Is there anyone in the public that would
19 like to comment at this time? This is their
20 opportunity.

21 (No response)

22 MR. LIVERS: No, there aren't, Mr.
23 Chairman.

24 CHAIRMAN RUSSELL: I'll entertain a
25 motion to adjourn.

1 MR. ROSSBACH: So moved.
2 CHAIRMAN RUSSELL: It's been moved by
3 Bill.
4 MR. MARBLE: Don will second.
5 CHAIRMAN RUSSELL: Seconded by Don. All
6 those in favor, signify by saying aye.
7 (Response)
8 CHAIRMAN RUSSELL: Opposed.
9 (No response)
10 CHAIRMAN RUSSELL: All right.
11 (The proceedings were concluded
12 at 9:45 a.m.)
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