

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)

DECEMBER 7, 2012)

TRANSCRIPT OF PROCEEDINGS

Heard at Room 111 of the Metcalf Building

1520 East Sixth Avenue

Helena, Montana

December 7, 2012

9:00 a.m.

BEFORE CHAIRMAN JOSEPH RUSSELL,
BOARD MEMBERS LARRY MIRES, LARRY ANDERSON,
ROBIN SHROPSHIRE, MARVIN MILLER;
and JOE WHALEN (By telephone)

PREPARED BY: LAURIE CRUTCHER, RPR

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

3 * * * * *

4 CHAIRMAN RUSSELL: It's 9:00. We're
5 going to get this meeting started. So I do call
6 this regular meeting the Board of Environmental
7 Review to order.

8 The first order of business is review
9 and approval of the minutes of the September 27th,
10 2012 meeting.

11 MR. MIRES: So moved.

12 MR. MILLER: Second.

13 CHAIRMAN RUSSELL: Further discussion.

14 (No response)

15 CHAIRMAN RUSSELL: Hearing none, all
16 those in favor of adopting the minutes, signify by
17 saying aye.

18 (Response)

19 CHAIRMAN RUSSELL: Opposed.

20 (No response)

21 CHAIRMAN RUSSELL: Motion carries
22 unanimously. The second item is to set the 2013
23 meeting schedule. Has everyone reviewed that?

24 MR. NORTH: Mr. Chairman, John North. I
25 think one thing that we do need to do is establish

1 the members present, either through roll call or
2 indication of who is present and who is not.

3 CHAIRMAN RUSSELL: Do you want to roll
4 call?

5 MS. WITTENBERG: Sure. Robin.

6 MS. SHROPSHIRE: Here.

7 MS. WITTENBERG: Larry Anderson.

8 MR. ANDERSON: Here.

9 MS. WITTENBERG: Chairman Russell.

10 CHAIRMAN RUSSELL: Here.

11 MS. WITTENBERG: Larry Mires.

12 MR. MIRES: Here.

13 MS. WITTENBERG: Marvin Miller.

14 MR. MILLER: Here.

15 MS. WITTENBERG: Joe Whalen on the
16 phone.

17 MR. WHALEN: Here.

18 MS. WITTENBERG: Heidi Kaiser is not
19 present.

20 CHAIRMAN RUSSELL: Thanks, John. Just
21 for the Board, Tom is actually presenting in New
22 Mexico, presenting something, or he would be here.
23 He said if it wasn't that important, he would be
24 here.

25 So if you'd look at the dates for the

1 meetings. Are there any that you know that are
2 just going to be problematic?

3 MR. MIRES: January and March could be,
4 but I could do it by telephone at that point, if
5 that's okay.

6 CHAIRMAN RUSSELL: All right. So John,
7 process-wise, let's say we adopt this schedule,
8 and we have a real conflict. We still have -- if
9 we're at least a meeting out, we still have the
10 opportunity to move it within the MAR notice
11 necessities, right?

12 MR. NORTH: Yes, Mr. Chairman, you
13 would.

14 CHAIRMAN RUSSELL: So we're going to
15 just set this as our meeting schedule. We really
16 have never taken action on it. And put those in
17 your calendar, and if there is some big issue,
18 then I would say contact Joyce, and John or Tom
19 will work with Joyce, and try to find an
20 alternative date.

21 So let's keep moving. The next item on
22 the agenda are the briefing items. Katherine.

23 MS. ORR: Mr. Chairman, members of the
24 Board. I don't think there is anything to add
25 other than what's been written here.

1 On the first item, James Vaughn, Any
2 Time Septic, there was a prehearing conference in
3 November. The parties upon my invitation provided
4 oral argument on the pending motion for summary
5 judgment. And I notified the parties that I
6 decided to grant the motion for summary judgment,
7 and I'm just in the process of writing that up,
8 and had to do it in sort of a truncated fashion
9 like this because the case was due to go to
10 hearing in November.

11 That proposed decision is going to be
12 before the Board in January. And it's really a
13 motion for partial summary judgment because the
14 issue of penalties will still be something that
15 will have to go to hearing because that's a fact
16 determination, as you all found out in the last
17 contested case hearing before the Board.

18 And on these others it is pretty
19 self-explanatory. Adkins, as you know, has been
20 suspended, if you will, pending the decision by
21 the Sixth Judicial District, Livingston, on the
22 petition for judicial review.

23 And this EarthJustice Sierra Club matter
24 which the Board has reserved to itself, there was
25 a document filed under 75-20-223 to remove this to

1 District Court as a matter of an automatic right,
2 but no motion has been filed to do that. I'm
3 going to invite the parties to do that, so there
4 will probably be a dismissal order coming up for
5 the Board in January on that.

6 So that's all I had there.

7 CHAIRMAN RUSSELL: Okay. Thank you. So
8 John, the next item on the agenda is a Department
9 briefing on the air quality permit fees.

10 MR. NORTH: Mr. Chairman, Bob Habeck
11 will make that presentation.

12 MR. HABECK: Mr. Chairman, members of
13 the Board, my name is Bob Habeck. I'm a program
14 manager with the air program, and I'm here to give
15 you the 2012 update to air quality fees. As in
16 years past, the Department does not intend to come
17 before the Board to request to initiate
18 rulemaking. Therefore the fees as previously on
19 the books will remain the same. That includes our
20 operations fees, our administration fees, our
21 application fees, and our open burning fees.

22 A little history in review. The purpose
23 of leaving the fees constant was in response to
24 the slow economic down-turn, and the need to make
25 sure that fee payers have some financial

1 certainty, while still providing basic services.

2 So in the past and into the present, the
3 Department still continues to manage our priority
4 projects. Our deferred list continues to grow as
5 we try to provide those basic services. We are
6 balancing our revenue that comes in with
7 expenditures that go out.

8 It is important to note going into the
9 future, looking at the basic services and where we
10 get our money, we have two primary sources where
11 we get our money. Some come from these fees,
12 these fee rules that we generate money; it comes
13 from federal grants as well.

14 And as you read in the papers, there are
15 sources that are closing -- Stone Container
16 Missoula, sources in Billings are signaling they
17 may mothball, and Columbia Falls Aluminum is
18 cutting way back. Less emissions means less
19 revenue.

20 So moving into the future, we're really
21 going to double down and look at diversifying our
22 revenue portfolio, and working with stakeholders
23 in a real transparent communicative fashion, we're
24 going to look at diversifying.

25 Mr. Chuck Homer from the Department, who

1 is very well versed in finances and looking at
2 these things, is going to lead an ad hoc work
3 group with our sources to look at diversifying.

4 Also the Department is trying to align
5 its revenues that we take in with our legislative
6 appropriation. We have a decision package going
7 before the Legislature to reduce our
8 appropriation, to better align those revenues with
9 our expenditures.

10 And then lastly, we're going to continue
11 to manage our money, provide those basic services,
12 and moving forward quarter by quarter, year by
13 year. I may be before you next year in response
14 to basic services needs, to look at the fee rule
15 change. In 2012 as in years past, we do not
16 intend to initiate rulemaking, request initiate
17 rulemaking. So that concludes my briefing. Any
18 questions of me?

19 CHAIRMAN RUSSELL: Questions for Bob.

20 (No response)

21 CHAIRMAN RUSSELL: So you haven't seen a
22 down-turn in open burning permit fees or revenue?

23 MR. HABECK: Mr. Chairman, open burning
24 and the emissions that are generated are seasonal
25 based on weather, available resources. And what

1 those sources tend to do, they're up and down
2 literally. We started to look for trends.
3 They're up and down. So the revenue that we're
4 generating from open burners we're finding is
5 enough to cover the note to provide them with the
6 service and still do our business. But it
7 certainly is up and down, depending on weather and
8 availability of their resources.

9 CHAIRMAN RUSSELL: So not to get into
10 the weeds too far, but when you look at open
11 burning, and the fact that if you don't open burn
12 you have no emissions, how much of the fees cover
13 the program cost?

14 MR. HABECK: Mr. Chairman, open burning
15 is an application. Year to year they pay an
16 application fee based on the emissions that they
17 do.

18 We have a target amount of money we try
19 to generate, because it is based on staff time and
20 the services we provide; whereas we're not
21 collecting all to the amount that we think we're
22 running. It's getting there every year.

23 So even though we may be on the low
24 emissions, 2012 had a lot of wild fires. A lot of
25 the time they didn't go out and do prescribed

1 burning in the fall, so the emissions were down,
2 but we're collecting enough to cover the note. It
3 is one of those things we work with our
4 stakeholders, those major open burners who pay
5 fees. And we're constantly frugal with our money,
6 too. They keep us in check. They ask what are we
7 doing with that money.

8 So I think, Mr. Chairman, we are
9 collecting revenue enough to provide the services
10 we need. Hopefully going down to county programs,
11 we're giving the county programs the services they
12 want, too.

13 CHAIRMAN RUSSELL: Especially with your
14 meteorologist. She's doing a great job. Thanks,
15 Bob.

16 All right. We will keep rolling then.
17 The next item on the agenda is executive summary
18 for rulemaking, a request by the Department to
19 initiate rulemaking on MPDES relating to CAFOs.
20 John.

21 MR. NORTH: Mr. Chairman, Tom Reid will
22 make the presentation for the Department.

23 MR. REID: Mr. Chairman, members of the
24 Board, good morning. My name is Tom Reid, and I'm
25 in the Water Protection Bureau, Permitting and

1 Compliance Division.

2 Today we are requesting that the Board
3 initiate rulemaking to amend Title 13, Chapter 30,
4 Subchapter 13, and adopt New Rule I. These rules
5 govern the terms and conditions that must be
6 included in discharge permits issued to
7 concentrated animal feeding operations or CAFOs
8 under the Montana Pollutant Discharge Elimination
9 System. New Rule I replaces the current
10 Department Circular DEQ9 that was adopted in 2005.

11 The primary reason for this rulemaking
12 is to update and maintain consistency with federal
13 regulations governing CAFOs, and to adopt state
14 technical standards as required by Federal
15 regulations for delegated MPDES states. I propose
16 to give a brief background, and will be happy to
17 answer any questions as we go along.

18 I think probably at the Federal level
19 CAFO regulations have had a rather rocky road. In
20 2003, EPA promulgated CAFO regulations to update
21 the existing regulations that have been in place
22 since the 1970s. As soon as those rules were
23 promulgated, they were challenged in several
24 different Federal Courts and consolidated in the
25 Second Circuit Court under Waterkeeper Alliance

1 versus EPA.

2 In 2008, the Second Circuit Court,
3 Waterkeeper, vacated some of the Federal rules,
4 remanded some of the rules back to EPA. And so in
5 2008, EPA adopted final rules implementing the
6 Waterkeeper decision.

7 That immediately launched a second round
8 of challenges in court, which were consolidated in
9 the Fifth Circuit Court, and were known as
10 National Pork Producers Council versus EPA. EPA
11 just promulgated final rules implementing the
12 National Pork decision on July 30th, 2012. So
13 this process has been going on for over a decade.

14 As part of the 2008 rule, states were
15 given two years to adopt state technical
16 standards. We did that through DEQ9, and in 2011
17 EPA reviewed our state technical standards, and
18 did not approve them. They found some
19 deficiencies in those standards. So in today's
20 adoption of New Rule I, we are addressing those
21 deficiencies that EPA identified in our 2011
22 Circular DEQ9.

23 In addition, in 2005, the Legislature
24 passed Part 8 of the Montana Water Quality Act
25 dealing with Concentrated Animal Feeding

1 Operations, and directed the Department to adopt
2 the Federal rules by reference. So a large part
3 what we're doing today is adopting those Federal
4 rules by reference. While there is not a lot of
5 content in the state rule, there is considerable
6 amount in the Federal rule that we're adopting by
7 reference.

8 The basic rule package comes in three
9 parts, which is amendments to 1330 which begin on
10 Page 1 and 2, and that's basically what's called
11 the CAFO rule. And in that rule, we are again
12 updating it to be equivalent to the Federal rules,
13 and eliminating any language that tries to define
14 what "propose to discharge" means to a CAFO,
15 because that was the subject of the National Pork
16 Producers litigation, that we only regulate the
17 discharge from a facility, and not the
18 construction of the facility or the potential for
19 discharge.

20 The next major part of this rule package
21 is 1343, and these are the requirements that
22 actually go into any permit that is issued to a
23 CAFO, and these contain requirements that the CAFO
24 must develop a nutrient management plan; they must
25 take care of the manure, litter, and process

1 wastewater that is generated on the facility; and
2 if those are land applied, and those are land
3 applied at agricultural utilization rates, then
4 any runoff from that field is considered exempt
5 under the Clean Water Act under the agricultural
6 exemption.

7 And EPA directed each and every state to
8 adopt technical standards, and these technical
9 standards are in New Rule I, things like soil
10 sample, soil types, precipitation, are all state
11 specific.

12 In addition, a lot of what was in DEQ9
13 is now in the Federal rule. That includes
14 requirements for recordkeeping, manure and soil
15 sampling, the requirement to submit annual
16 reports, and that the terms of the nutrient
17 management plan must be available for public
18 comment, and the Department has to respond to
19 those comments; and those terms then become
20 enforceable provisions of the permit as effluent
21 limits. And then there is also a requirement that
22 the facility develop and implement best management
23 practices.

24 The nutrient management plan gives the
25 producer some flexibility. There is two different

1 approaches, a narrative approach and a linear
2 approach, which I'd be happy to discuss if there
3 is questions as to what those mean.

4 And then finally, the last piece of this
5 rulemaking is the technical standard which is in
6 New Rule I. This technical standard borrows
7 heavily from DEQ9, so we basically took from DEQ9
8 Chapters 5 and 6, which were technical standards
9 and sampling procedures, so that is basically what
10 constitutes a technical standard under EPA's
11 definition.

12 So again, there is not a lot of new
13 material, but it is kind of repackaged here.

14 So in closing, the Department has worked
15 with both agencies and industry stakeholders. We
16 provided early copies of this rulemaking to EPA
17 and got comments back from them. They have not
18 reviewed the technical standard. They will do
19 that down the road. But they did provide comments
20 on the rule.

21 We worked a lot with NRCS, and have
22 adopted by reference a lot of material that is put
23 out by NRCS, and also MSU extension service.

24 After incorporating these changes, we
25 went ahead and sent it out to the Montana AFO/CAFO

1 Stewardship Group, which is an organization of
2 producers, the Cattlemen's Association, Cattle
3 Feeders, Pork Producers, and other industry and
4 agricultural interests. So it has been circulated
5 around.

6 And we went before the Water Pollution
7 Control Advisory Council on November 2nd, and they
8 concurred with the rulemaking.

9 So with that, I would be happy to answer
10 any questions.

11 CHAIRMAN RUSSELL: Thanks, Tom.
12 Questions for Tom?

13 MR. MIREs: My question, Tom, may be
14 answered in 17-30-1361, it is revocation. The
15 changes in the new rules, would it apply to
16 existing permits? Would they have to go back and
17 upgrade their permits so that they are in
18 compliance with what the existing new rules are,
19 or would their old permit stay the way they are
20 until such time as it was reissued? I'm a little
21 fuzzy on that.

22 MR. REID: Mr. Chairman, Mr. Mires, good
23 question. All permits are renewed on a five year
24 basis, and part of the 2005 amendments to the
25 State Water Quality Act direct the Department to

1 issue -- provide coverage under the general
2 permit. So most -- I used to say most. Now I
3 think I can say all of the facilities in the state
4 of Montana are covered under general permit.

5 That general permit expires in 2013. So
6 since most facilities that are covered under that
7 general permit, when we issued that permit back in
8 2006, or it would be 2008, were required to comply
9 with DEQ9, and we're basically transferring those
10 over. So I think it will be rather neutral, and
11 there won't any new requirements applied to CAFOs
12 that are covered under an existing permit. So
13 does that answer your question?

14 MR. MIREs: It does. Thank you.

15 CHAIRMAN RUSSELL: Not too far off
16 track, but do you know the -- When the Class 5
17 injection well people come into the state, do they
18 contact you guys to do -- when they come in and do
19 their inspection activities?

20 MR. REID: Mr. Chairman, Class 5 is
21 administered by EPA in the state of Montana. And
22 do they contact us? I don't know if they contact
23 us in the Permitting Division, in the Water
24 Protection Bureau. When we issue permits or when
25 they issue permits, we copy them, and they're

1 aware of our permitting activities, and a lot of
2 times they'll follow up on a facility that we
3 issue a permit to.

4 CHAIRMAN RUSSELL: Just to make sure
5 there is not an injection well?

6 MR. REID: Yes.

7 CHAIRMAN RUSSELL: What if there is an
8 injection well as part of this?

9 MR. REID: A lot of the community
10 subdivisions that we permit that are 5,000 gallons
11 or more per day are also UIC, so they usually just
12 register with UIC program. Those require
13 registration.

14 Industrial dischargers are a different
15 issue. I don't think any of the CAFOs would
16 qualify as UIC, but in general, the UIC program
17 kind of parallels our groundwater permit program.
18 So we coordinate a lot with EPA, but I don't know
19 about inspections.

20 CHAIRMAN RUSSELL: We just had an animal
21 feed operation -- not a concentrated one -- that
22 was visited by the Class 5 program, injection well
23 program.

24 MR. REID: That's interesting.

25 CHAIRMAN RUSSELL: It was interesting

1 because it caught me way off guard, because they
2 asked me for help.

3 MR. MIRES: What would they do on
4 injections?

5 CHAIRMAN RUSSELL: Well, if it was an
6 injection well, like if it was being discharged to
7 a drainfield -- You may remember the Stampede case
8 that we had that. Basically they were making sure
9 that there weren't industrial discharges going
10 into a septic system, which would be considered an
11 injection well. So it's kind of -- you've got to
12 watch that, and oftentimes those guys have to get
13 into waste segregation.

14 MR. REID: Mr. Chairman, a lot of times
15 if there is other -- in addition to the CAFO
16 operations, if there's like slaughter facilities
17 onsite, and those are injected into a well or a
18 drainfield, then that would involve both UIC and
19 probably a groundwater discharge permit.

20 CHAIRMAN RUSSELL: Well, thank you for
21 your presentation. Is there any other questions
22 you have on this?

23 (No response)

24 CHAIRMAN RUSSELL: I'm sure you're
25 getting anxious to get this behind you.

1 MR. REID: Yes. It is about time.

2 CHAIRMAN RUSSELL: I agree. All right.
3 Before we move to take any action, is there anyone
4 in the audience that would like to speak to this
5 matter? Is there anyone in the audience that's
6 not a DEQ staff person?

7 MS. HEDGES: Me.

8 CHAIRMAN RUSSELL: So I would entertain
9 a motion to -- Katherine, you're going to handle
10 this?

11 MS. ORR: Yes.

12 CHAIRMAN RUSSELL: I'd entertain a
13 motion to initiate rulemaking, and appoint
14 Katherine the Hearing Examiner.

15 MR. MILLER: I so move.

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

18 MS. SHROPSHIRE: Second.

19 CHAIRMAN RUSSELL: It's been seconded by
20 Robin. Further discussion.

21 (No response)

22 CHAIRMAN RUSSELL: Hearing none, all
23 those in favor, signify by saying aye.

24 (Response)

25 CHAIRMAN RUSSELL: Opposed.

1 (No response)

2 CHAIRMAN RUSSELL: Motion carries
3 unaniously. Thank you. The next item on the
4 agenda is DEQ4. John.

5 MR. NORTH: Mr. Chairman, Barb Kingery
6 from the Department will make this presentation.

7 MS. KINGERY: Mr. Chairman, members of
8 the Board. Good morning. My name is Barb
9 Kingery, and I'm the Section Supervisor of the
10 Subdivision Section here at DEQ.

11 And today we are before you asking the
12 Board to initiate rulemaking regarding changes to
13 Circular DEQ4. The title of that is Montana
14 Standards for Subsurface Wastewater Treatment
15 Systems. So I want to give you a little bit of
16 background.

17 DEQ4 was updated substantially in 2004,
18 and then with an additional chapter added in 2009,
19 but no major changes had occurred since that 2004
20 update back then, so it was really overdue, even
21 today. It has really been something that we
22 really should be addressing. The Subdivision
23 Section has been tasked with updating it, so let
24 me give you a little bit of background of what
25 DEQ4 is.

1 To start with, we need to sort of look
2 at the framework of where it lies within the rules
3 and the statutes. We have a set of overlying
4 statutes which give us guidelines, and sort of a
5 skeleton for what we need to do here at DEQ. From
6 those statutes, we implement rules to help make
7 the guidelines -- to make these statutes work. We
8 have these rules that are in place, and they sort
9 of provide the specifics.

10 Below the rules are the circulars; and
11 the circulars, and this one particular, deal
12 strictly with the design and construction of
13 drainfields. It doesn't get into the rules that
14 have to do with pathogen transport; it doesn't get
15 into the rules of where you place it, or those
16 kinds of things, strictly with design and
17 construction of subsurface treatment systems.

18 So like I said, Subdivisions has been
19 tasked with sort of updating and keeping records
20 of this particular circular.

21 And so back in 2009, we started a
22 process. We saw it had been awhile since it had
23 been updated. We started a process here. And we
24 began with a group of sanitarians from the
25 counties, consultants from private industry, and

1 DEQ members; and we put together a small task
2 force.

3 And what we did is we assigned a single
4 chapter from DEQ4 to a small group, and on that
5 group was a consultant from private, a sanitarian
6 from the Health Departments around the state, and
7 a DEQ member; and each of those groups of three
8 worked on specific chapters within the document to
9 try and update them, and they worked together.
10 And then they came back, and then we as a
11 collective group looked at the changes that they
12 recommended, and we accepted some, and got rid of
13 others, and sort of made changes.

14 So then we had sort of this document
15 that we had produced from this small group, and we
16 took it on the road, and we put it out to the
17 public. And in late 2009 we went to Polson and
18 invited anybody who was interested in commenting
19 on it; and then we had a meeting here in Helena;
20 and in the start of 2010, we had a meeting in
21 Billings.

22 And those open forums were incredibly
23 helpful and incredibly productive. Out of those
24 open forums we heard that, "We like this," and "We
25 didn't like that."

1 One of the things that came out of that
2 specifically, for an example, was our chapter on
3 septic tanks. And we had a group of people who
4 said "Hey, I want some more input of what you're
5 requiring for your septic tanks."

6 And so as part of that we developed
7 another small group of just septic tank
8 manufacturers in the state, and we asked them to
9 come to Helena, and they worked specifically on
10 that chapter, looking at ASTM's that we were
11 requiring, and some of the changes that we were
12 recommending, and they helped us develop that
13 chapter.

14 Another comment that we received as part
15 of that open forum was a comment from the
16 engineering and the consultant community that was
17 saying that, "We find DEQ4 difficult to deal with,
18 because sometimes we are in DEQ4 for our designs,
19 and sometimes we are in DEQ2." DEQ2 deals with
20 larger systems and the distribution that's
21 associated with those large systems.

22 So if you have a large community system
23 with big distribution pipes and those kinds of
24 things that go in, and pump stations that then
25 feed into a drainfield, these consultants were

1 dealing with DEQ2 on the distribution side and
2 DEQ4 on the drainfield construction side.

3 So in response to that comment we said,
4 "Okay. We'll bring those sections of DEQ2 that
5 might relate to subsurface wastewater treatment
6 systems into DEQ4." So in the end we had this big
7 document that we hope is a one stop place for the
8 design community in Montana to go to when they are
9 looking at constructing a subsurface treatment
10 system, whether it be a single individual house or
11 a large community.

12 So after that, we got together then just
13 at DEQ, the staff here, and said, "Okay. These
14 are all changes. Are we okay with this?" We
15 talked to Legal staff. Legal helped us to make
16 sure that our document was in true step with the
17 statutes and the rules that sort of over-lie it;
18 and we made a few changes there.

19 We opened up a blog to bring in comments
20 from people who were not able to email me, or felt
21 more comfortable in that sort of a forum. The
22 blog was interesting, in that maybe there were a
23 few people that had a lot of great discussion back
24 and forth, and we took some comment from there.

25 And we came up with I think a pretty

1 good document through that process. We came
2 before you guys December of 2011, last December,
3 and there was some additional comment from you,
4 the Board, and so we decided, "Okay. We have one
5 more group we need to reach out to." So we did
6 that.

7 And truly we have, after this whole long
8 approach of trying to include everybody, I truly
9 believe we have a much better product that we're
10 presenting before you now. So I know in your
11 packets you got a copy of the revised DEQ4, and I
12 know you kind of got a list of what we are
13 proposing to change in it, but just to sort of
14 give you a brief overview.

15 We have some new chapters that bring in
16 emerging technology that is new around the state.
17 We have some definitions that have changed, like I
18 said, in response to helping them line up better
19 with our current rules and statutes. We added
20 pictures back into DEQ4. There has never been
21 pictures in that document. And I'm a picture
22 person, so I do better if I can see what it
23 supposed to look at.

24 We went before WPCAC. They gave us a
25 nod. And so now we're back before you guys again

1 asking to initiate rulemaking. That's sort of
2 just a real brief overview of what we've done.

3 I'd be open for any questions if you
4 have any at this time.

5 CHAIRMAN RUSSELL: Questions for Barb?

6 (No response)

7 CHAIRMAN RUSSELL: Do you have all your
8 questions answered, Robin?

9 MS. SHROPSHIRE: Yes. Barb and I spent
10 some time going through it, and I just wanted to
11 comment that I was given the opportunity prior to
12 this to spend some significant time with Barb and
13 the Department to incorporate my comments, and so
14 I've spent considerable time looking at this, and
15 all my questions have been resolved.

16 There are a few things that I had
17 commented on; and if they couldn't be
18 incorporated, the reasons behind that make sense
19 to me. I'm pleased with the document, and
20 appreciated the opportunity to have been heard on
21 some of my feedback. So thanks.

22 MS. KINGERY: Chairman Russell, Ms.
23 Shropshire. Like I said, we have a much better
24 document, but I don't want to sort of lie to you
25 and tell you that it is perfect at this point. I

1 see it as a work in progress. And you know, to
2 have waited from 2004 to 2013 essentially to
3 update it is little long, and I'm hopeful that the
4 next time period won't be nearly that lengthy. So
5 we understand as a group and as a Department that
6 it is something that is fluid and not necessarily
7 rigid in nature.

8 CHAIRMAN RUSSELL: Well, I have a few
9 comments, and they're not substantive. But you
10 probably need to look at your indents throughout
11 the whole document because they're all over the
12 place, and your hanging indent -- I know this
13 sounds really anal and picayune -- If you're going
14 to put the document out there, line up all of your
15 paragraphs.

16 And if you want, I can show you several
17 instances where you indent on some paragraphs and
18 you don't on others. And you just need to format
19 it. And I know you've had a lot of people in it,
20 and a lot of stuff going on, but it would be a
21 good time to just make sure your formatting is
22 good. I know that sounds pretty anal.

23 The only other thing is in 2242, you say
24 you can't use fill to overcome a vertical
25 separation, but that's why you do fill. So you

1 may not want to look at that in context.

2 And the rest of the document, you've
3 done -- I'm sure there is little minor things like
4 that, as you said. It is a huge document. From a
5 local public health perspective, we're not looking
6 forward to adopting something like this. But I
7 appreciate all of your work on this.

8 Steve knows -- It is going to be
9 monumental for a lot of local departments to do
10 anything with this other than adopt it by
11 reference. But we can't just adopt it by
12 reference because we still have to have our
13 regulatory document in front of it. But it is
14 good. It is well done. It is probably a lot more
15 than we need at the local level, but it certainly
16 is when you look at subdivision activity.

17 So other questions or comments?

18 (No response)

19 CHAIRMAN RUSSELL: All right. With that
20 in mind, is there anyone in the audience that
21 would like to speak to this matter?

22 (No response)

23 CHAIRMAN RUSSELL: Seeing none, and
24 hearing no one coming racing from the halls, I
25 would entertain a motion to initiate rulemaking on

1 DEQ4 and whatever else needs to be in that title,
2 and appoint this to Katherine. This is probably
3 going to go pretty fast since it has had so much
4 work on the front end. So I would entertain that
5 motion.

6 MS. SHROPSHIRE: So moved.

7 CHAIRMAN RUSSELL: It's been moved by
8 Robin.

9 MR. MILLER: I'll second.

10 CHAIRMAN RUSSELL: Seconded by Marv.
11 Further discussion.

12 MR. WHALEN: Mr. Chairman, I would just
13 like to issue a statement in support for Barb and
14 the Department with respect to the construction of
15 this document and process that was used, and I
16 think that's the right way to do things. I really
17 think they managed this whole process in a very
18 constructive way that was very well received by
19 the regulated community, as well as the regulators
20 themselves. So thank you to all.

21 CHAIRMAN RUSSELL: Nice comment, Joe.
22 Further comments.

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 unanimately.

6 The next item on the agenda is adoption
7 of rule amending ARM 17.8.102, incorporating air
8 quality rules adopted in 2010 CFR.

9 MR. NORTH: Mr. Chairman, Deb Wolfe will
10 address this matter.

11 MS. WOLFE: Thank you. Good morning,
12 Mr. Chairman, members of the Board. For the
13 record, my name is Deb Wolfe, and I'm here to
14 represent the Department regarding the amendment
15 of air quality rules, and we are at the point
16 where we are considering adoption.

17 The Department does request the Board at
18 this time to adopt rulemaking to amend 17.8.102 to
19 accept the current editions of the Federal and
20 state statutes and rules that are incorporated by
21 reference in the Administrative Rules of Montana.

22 A hearing was held. Katherine presided
23 over a hearing on September 7th. And I believe
24 there is a draft notice of adoption in your
25 packet. We've received no comments.

1 CHAIRMAN RUSSELL: Anything for Deb?

2 (No response)

3 CHAIRMAN RUSSELL: Nothing. So with
4 that in mind, is there anyone in the audience that
5 wants to speak to this matter before the Board
6 takes it up?

7 (No response)

8 CHAIRMAN RUSSELL: Seeing none, I would
9 entertain a motion to adopt the rule as presented,
10 adopt the Presiding Officer's report, and the 521
11 and 311 analysis.

12 MR. ANDERSON: So moved.

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

15 MR. MIRES: Second.

16 CHAIRMAN RUSSELL: Seconded by the other
17 Larry. Further discussion.

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. Thanks.

1 The next item on the agenda is executive
2 summary for rule adoption on DEQ13, which is the
3 Nutrient Trading Policy. John.

4 MR. NORTH: Mr. Chairman, Todd Teegarden
5 will address that.

6 MR. TEEGARDEN: Mr. Chairman, members of
7 the Board, for the record, I'm Todd Teegarden,
8 Bureau Chief of the Technical and Financial
9 Assistance Bureau in the Planning Division.

10 We held a public meeting on November 13,
11 2012 regarding the Nutrient Trading Policy. One
12 member of the public commented and handed in
13 written comments. We did receive two other sets
14 of written comments. Many of those comments we
15 had addressed previously, and so responding to
16 comments was relatively simple. We did make a few
17 minor changes to the document, but they weren't
18 substantial.

19 Again, we remind the Board that this
20 trade policy is strictly voluntary. And with that
21 the Department is requesting the Board adopt the
22 rule that incorporates the policy. Thank you.

23 CHAIRMAN RUSSELL: Questions?

24 (No response)

25 CHAIRMAN RUSSELL: It appears you had a

1 lot of public comment.

2 MR. TEEGARDEN: Well, there was a couple
3 of pages of comments, and again I would say that I
4 think in our previous unofficial scoping we did
5 with public interest groups, we probably had
6 answered all those comments. Two thirds to three
7 quarters of them we had commented previously, so
8 it was kind of just pulling up our old comments.
9 But yes, we had two consultants comment, and then
10 Clark Fork.

11 CHAIRMAN RUSSELL: You know, there is
12 some people out in the state that are portraying
13 this policy as some miraculous means of overcoming
14 TMDL. How do you feel about it? Within the
15 Department's scope of what they can say about it.

16 MR. TEEGARDEN: Mr. Chairman, I wouldn't
17 take it that far. I do think it is a very
18 valuable tool that as TMDLs are written, or we
19 just look at water quality improvements in basins,
20 I think it is a valuable tool that nationally has
21 grown to be a viable option to reduce nutrients at
22 a less cost. And so I don't think it is the
23 answer for sure, but it is a tool that
24 specifically permittees I think can use.

25 CHAIRMAN RUSSELL: Okay. I agree. So

1 any other questions for the Department,
2 specifically Todd or anyone else that we would
3 like to throw under the bus here?

4 MR. WHALEN: Mr. Chairman, again, just a
5 statement of support to the policy that's been
6 developed, and thanks to Todd and his
7 administration for his part in putting this
8 package together. I really want to issue a strong
9 statement of support for it and to vote for it.
10 Thank you.

11 CHAIRMAN RUSSELL: All right. Great.
12 Any other comments?

13 (No response)

14 CHAIRMAN RUSSELL: Anyone out there want
15 to comment?

16 (No response)

17 CHAIRMAN RUSSELL: Let's get rolling on
18 this thing. So I would entertain a motion to
19 adopt the rule, specifically DEQ13, the House Bill
20 521 and 311 analysis, the Department's responses
21 to public comment, Hearing Officer's report, and
22 the notice of adoption.

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

24 CHAIRMAN RUSSELL: It's been moved by
25 Joe Whalen.

1 MR. MILLER: I'll second it.

2 CHAIRMAN RUSSELL: It's been seconded by
3 Marv. Any further discussion?

4 (No response)

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

7 (Response)

8 CHAIRMAN RUSSELL: Opposed.

9 (No response)

10 CHAIRMAN RUSSELL: Motion carries
11 unanimously.

12 The next item on the agenda is final
13 adoption rule amendment for 17.30.1305, 1310,
14 1322, and 1303. John.

15 MR. NORTH: Mr. Chairman, Tom Reid will
16 address it.

17 MR. REID: Mr. Chairman, members of the
18 Board, good morning again. My name is Tom Reid,
19 and I work in the Water Protection Bureau in the
20 Permitting and Compliance Division. And today we
21 are requesting that the Board adopt the proposed
22 amendments to Title 13, Chapter 30, Subchapter 13
23 of the Montana Pollutant Discharge Elimination
24 System.

25 These rules fall into four categories.

1 1304 is definitions that are used throughout the
2 chapter, technical definitions. 1310, we are
3 proposing to exclude water transfers from permit
4 coverage under the MPDES program, which was done
5 by EPA at the Federal level several years ago.

6 The bulk of this rule package was to
7 1322, which are the application requirements for
8 permit and permit variances issued under the MPDES
9 program, and application requirements for new
10 cooling water intake structures.

11 And finally, the repeal of 1310, which
12 was an unnecessary table of cross references
13 between State and Federal rules. In the new
14 format that most rules follow, the rules are
15 actually adopted, or the incorporations by
16 reference are actually made in the rule.

17 So in summary, the Board voted to
18 initiate rulemaking on the 27th. There was a
19 hearing on the 5th of September, and the public
20 comment period closed on the 12th, and no comments
21 were received. Copies of the notice of the House
22 Bill 521 and 311 analysis and Hearings Officer
23 reports are in your packet. With that, I'd be
24 happy to answer any questions.

25 MS. SHROPSHIRE: Mr. Chairman, kind of

1 in line with your formatting comment, this is a
2 pretty nitpicky comment. But most places where
3 I've seen storm water it is one word, and here you
4 have it as two words. Is there a reason why you
5 have two and EPA uses it as one word?

6 MR. REID: I believe EPA uses two words.

7 CHAIRMAN RUSSELL: I think they do, too.

8 MR. REID: They actually published a
9 federal register notice on that issue. When they
10 initiated Phase 1 in the storm water rules, they
11 had received that comment.

12 MS. SHROPSHIRE: I'm looking at their
13 website right now, and it's one word. You might
14 just check that.

15 MR. REID: Yes, we will check that. We
16 have consistently --

17 MS. SHROPSHIRE: I know Spellcheck likes
18 to make it two words, but I've seen EPA use just
19 one. So anyway that's my, like I said, a nitpicky
20 comment.

21 CHAIRMAN RUSSELL: So how come no
22 comments on this? Just well vetted, or --

23 MR. REID: I think, again, we follow the
24 -- Mr. Chairman, members of the Board, we follow
25 the NPDES, the Federal regulations, and we're

1 basically going through a process now that we're
2 going to be updating the entire Subchapter 13. We
3 went through Subchapter 12. The Federal Clean
4 Water Act was amended in 1987. We're still trying
5 to pick up some of those changes.

6 EPA has published new regulations, and
7 like the CAFO rule, they usually fight it out at
8 the Federal level, and by the time we adopt them,
9 most of the issues are relatively straight
10 forward.

11 So I think these amendments, especially
12 the application requirements, do incorporate a lot
13 of Federal rules, especially updating storm water
14 into the MPDES for industrial storm water
15 requirements.

16 CHAIRMAN RUSSELL: Other questions?

17 (No response)

18 CHAIRMAN RUSSELL: At the break I'd like
19 to talk to you about something, so if you'd hang
20 around.

21 MR. REID: I will.

22 CHAIRMAN RUSSELL: All right. Any
23 further questions for the Department?

24 MR. NORTH: Mr. Chairman, I did look at
25 the Water Quality Act, and the statute uses it as

1 two words, so --

2 CHAIRMAN RUSSELL: That was our statute?

3 MR. NORTH: Yes, Montana Code Annotated.

4 CHAIRMAN RUSSELL: I've seen this, too.

5 It's the same as groundwater, wastewater. They're

6 all over the place. We need to be consistent.

7 Let's get this thing done then. I would

8 entertain a motion to adopt the rule as presented,

9 and the Hearings Officer's report, and the 521 and

10 311 analysis.

11 Did I ask anyone if there's anyone in

12 the audience that would like to speak to this?

13 Well, I meant to. So is there anyone out there

14 that would like to speak to this before we

15 actually get a motion on the floor?

16 (No response)

17 CHAIRMAN RUSSELL: So I would entertain

18 that motion.

19 MR. MILLER: So moved.

20 CHAIRMAN RUSSELL: It's been moved by

21 Marv. Is there a second?

22 MR. ANDERSON: Second.

23 CHAIRMAN RUSSELL: Seconded by Larry

24 Anderson. Is there anything else that we need to

25 discuss?

1 (No response)

2 CHAIRMAN RUSSELL: All those in favor,
3 signify by saying aye.

4 (Response)

5 CHAIRMAN RUSSELL: Opposed.

6 (No response)

7 CHAIRMAN RUSSELL: Motion carries
8 unanimously. Let's take a quick break. We'll try
9 to get back at 10:05 or so.

10 (Recess taken)

11 CHAIRMAN RUSSELL: Let's go ahead and
12 get started again. And I believe we are on the
13 last rule matter, and that would be to amend
14 17.30.617 to designate the main stem of the
15 Gallatin River as an ORW. Mr. North.

16 MR. NORTH: Mr. Chairman, I will address
17 this matter with help from Todd Teegarden and Eric
18 Urban, if there are specific questions. This is a
19 matter that started I believe in 2001.

20 CHAIRMAN RUSSELL: I was on the Board at
21 that time.

22 MR. NORTH: And by the filing of a
23 petition to designate the Gallatin as an
24 Outstanding Resource Water. And the process is
25 that if a petition is complete, it is accepted by

1 the Board, and then the Board requires the
2 preparation of an EIS; and upon completion of the
3 EIS, the Board can either initiate rulemaking or
4 deny the petition. And the Board chose to accept
5 the petition, direct the preparation of an EIS.
6 That took awhile due to lack of funding, but the
7 EIS was finally completed in 2007.

8 The Board held a comment period, and
9 held a hearing in Gallatin Gateway in October
10 2006. And upon completion of the hearing, the
11 parties that were involved, the stakeholders --
12 being the property owners and also the petitioner,
13 which was a public interest group -- recommended
14 that the Board extend the comment period and not
15 take action for the reason that they had decided
16 to get together and see if there was some better
17 way of protecting the river without adopting an
18 ORW.

19 And as you know, that process drug on a
20 lot longer than anybody ever thought it would,
21 primarily due to the economic slow-down that
22 occurred shortly after the close of the first
23 comment period.

24 So the idea was that they could sewer
25 the corridor along the Gallatin, which would

1 prevent then the nutrients from entering the
2 Gallatin, and protect the river to perhaps even a
3 better extent than a designation as an ORW would
4 do; but the problem was that required a way to
5 treat the wastewater, and the sewage treatment
6 plant on the Gallatin was at capacity, so they
7 needed to find a way of disposing of the treated
8 water.

9 That involved the conduct of a test, a
10 pilot test, to see whether there was a way of
11 doing that using snow making. That test was
12 conducted last winter, and monitoring occurred
13 throughout the spring and summer; and all while
14 that occurred, the Board extended the comment
15 period, the idea being that one of the criteria
16 for adoption of an ORW is whether or not there is
17 another effective process available. And the
18 determination was that we needed to have the
19 results of that test study done in order to
20 determine whether or not that is the case.

21 The pilot test has now been done, and it
22 indicates that snow making is a feasible option,
23 so we now know that there is another feasible
24 option for protecting the water. However, whether
25 or not it will be implemented will be -- to

1 implement it would be a process that would last
2 two to three years.

3 There is really no reason for the Board
4 to keep extending the comment period during that
5 time because there will be nothing really to
6 comment on.

7 If the Board does not extend the comment
8 period, then by operation of law, this particular
9 rulemaking proceeding will terminate because the
10 Administrative Procedures Act indicates that a
11 rulemaking can be done only if the notice of
12 adoption occurs within six months of the last
13 notice of proposed rulemaking. So that's why
14 every six months the Board had extended the
15 comment period.

16 The Department met with the stakeholders
17 now at Big Sky last week, and Todd Teegarden and
18 Eric Urban were the people that went down and met
19 with them; and all of the stakeholders, including
20 a representative of the public interest group,
21 expressed approval for this course of action, that
22 is, not to extend the comment period.

23 They also indicated that they intend to
24 continue working on this matter, and they've
25 actually scheduled a meeting amongst themselves

1 for January, after Christmas, so as to determine
2 what the next step is and to proceed along those
3 lines.

4 So the Department is then recommending
5 that the Board take no action here, which would
6 then mean that this particular proceeding would
7 die; and part of our recommendation is on the
8 basis that the Board could at a future date
9 reinstitute rulemaking for the adoption of the ORW
10 status.

11 If the Board were to do that, we would
12 probably need to supplement the EIS to determine
13 that there were no changed conditions, or to
14 analyze any changed conditions that occurred out
15 there. I think we're probably at that stage now
16 anyway. So whether the Board were to take action
17 today to adopt this as ORW or decide to take that
18 action, I guess in the near future or not we
19 probably would need to supplement the EIS.

20 So on that basis the Department is then
21 recommending that the Board take no action, which
22 again is not a denial of the petition, but simply
23 leaving that essentially in limbo, and with the
24 idea that should the parties decide in the future
25 that they're not going to proceed along these

1 lines, it is available to the Board to reinstitute
2 the process.

3 CHAIRMAN RUSSELL: All right. Questions
4 for John?

5 MR. MIRES: If the Board were to, say,
6 terminate the ORW now, if we were to take that
7 action, could it still be petitioned to be
8 reinitiated at a later date? Does that make sense
9 what I'm asking?

10 MR. NORTH: Yes. Mr. Chairman, Mr.
11 Mires, yes, that could happen as well. There is
12 an existing ORW statute, and the parties, any
13 party could submit a petition under the ORW
14 statute as it currently exists.

15 This particular proceeding is under a
16 previous version of the statute, but there is
17 still a process for doing that. It requires the
18 preparation of an EIS. It requires the party
19 petitioning to pay for the EIS, but again in the
20 future, if this were to occur in the next few
21 years, we have the previous EIS, and all that
22 would be necessary would be to supplement it to
23 review existing conditions out there, and then
24 that could be published as the EIS, and the Board
25 would then take comment both on the rulemaking and

1 on the EIS.

2 MR. MIRES: Who then would pick up the
3 cost of the supplement of the EIS? Would that
4 come back to the Department to pick that up or the
5 person requesting that it be reinitiated?

6 MR. NORTH: Mr. Chairman, Mr. Mires, it
7 would be the responsibility of the petitioner.

8 MR. MIRES: Okay. Thank you.

9 CHAIRMAN RUSSELL: All right. So John,
10 I never knew this day would ever come. But how
11 many miles of the Gallatin was this ORW going to
12 impact? More than ten?

13 MR. NORTH: Oh, yes, Mr. Chairman.

14 CHAIRMAN RUSSELL: Less than fifty?

15 MR. TEEGARDEN: Yes.

16 CHAIRMAN RUSSELL: It was always
17 interesting to me that we were going to see all of
18 the potential additional sewerage along the
19 Gallatin get pulled all the way back up and
20 utilized, and the ORW was a mechanism to hopefully
21 reduce nutrients within that defined corridor.

22 So I hope that the sewer plant at Big
23 Sky actually gets going, and it happens, but I
24 just wonder how much collection was really going
25 to happen out of that. And I also would wonder

1 how much development has happened over the last
2 eleven years that this thing has been in place.
3 Eric, do you have that answer, or Todd?

4 MR. TEEGARDEN: Mr. Chairman, members of
5 the Board. Todd Teegarden with the Technical and
6 Financial Assistance Bureau. Part of the impetus
7 for this ORW designation was the high growth rate
8 in the 1980s and 1990s and early 2000s. Certainly
9 the last ten years the growth has decreased
10 significantly, and thus the pressure that was
11 driving this whole process kind of has eased.

12 I would just reiterate that the meeting
13 that Eric Urban and I went to this weekend, there
14 still is interest, and very -- there is
15 considerable interest because of the economy
16 potentially turning around to continue to meet,
17 look at snow making as an available option,
18 potentially even do a larger pilot snow making
19 project in the next couple years; but then also
20 looking at zoning in that corridor you talked
21 about.

22 That area I believe was roughly about 40
23 to 47 miles that they looked at for sewerage.
24 Certainly, though, the majority of the load and
25 development is just below Big Sky, right there at

1 the mouth of the canyon. And so I think in
2 reality, if you look at sewerage that, it would be
3 a lot shorter sewerage project to catch the
4 majority of the existing load and even the
5 potential for growth in that area.

6 CHAIRMAN RUSSELL: Okay. Questions?

7 (No response)

8 CHAIRMAN RUSSELL: Well, this is how
9 we're going to do it. Unless someone speaks up
10 right now and has a motion to keep this rulemaking
11 alive, we're going to move on to the next item.

12 (No response)

13 CHAIRMAN RUSSELL: I could count to
14 five.

15 (No response)

16 CHAIRMAN RUSSELL: All right. Let's go
17 on to the next item. And as you know, if we don't
18 do anything, it literally just in six months or so
19 dies, and this rulemaking just dies, and we don't
20 have to --

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

22 I do have a question. Maybe direct me to John.

23 If we adopt these amendments today, the initial

24 objections that basically have postponed moving on

25 this matter for last eleven years have essentially

1 been met as a result of this pilot study, which
2 confirms that snow making is an alternative to
3 wastewater disposal.

4 If we adopt these amendments, does that
5 not start to turn the wheels in terms of
6 rulemaking, so that this wastewater is handled in
7 a way that the pilot study concerns is a
8 constructive way to manage the wastewater, that
9 doesn't deteriorate the river?

10 If we're going to pursue some sort of a
11 resolution eventually, whether the economy picks
12 up and development continues or not, wouldn't it
13 make sense to go ahead and adopt these amendments
14 to trigger that mechanism as opposed to deny
15 adoption of the amendments, and then revisit it,
16 involving the development of another EIS, another
17 petition, another ten years of development, before
18 we actually can secure the environmental quality
19 of that river? Do you want me to make that more
20 concise?

21 MR. NORTH: Mr. Chairman, Mr. Whalen,
22 no, I think I understand the question. I think I
23 would point out two things in response to that.

24 Adoption of the rule amendments at this
25 point would not necessarily do that, from the

1 standpoint that under the statute, an Outstanding
2 Resource Water rule cannot become effective until
3 it's approved by the Legislature. And so it
4 certainly couldn't become effective until it went
5 to the 2013 Legislature, and the Legislature took
6 action to approve it.

7 The other thing that I would point out
8 is that there seems to be consensus among both the
9 public interest group representatives that
10 petitioned the Board and amongst the people, the
11 development community there in Big Sky, that they
12 would prefer to try and address this outside of
13 the context of an ORW.

14 I think there is some concerns that the
15 ORW might have some consequences, unintended
16 consequences perhaps is the best way of phrasing
17 it. So we're not recommending going forward at
18 this point because of that, because of what seems
19 to be the interest of all parties that are
20 involved.

21 And secondly, the Board needs to make a
22 finding in order to go ahead and adopt that there
23 is no other process that is available to provide
24 equivalent protection, and it is the Department's
25 feeling at this point that, given the fact that

1 this study has been done, and we've waited on it
2 this long, and the study turned out positively,
3 we're not sure the Board could make that finding
4 at this point.

5 MR. WHALEN: Mr. Chairman, one follow-up
6 with Mr. North. Mr. North, can you outline what
7 those unintended consequences were determined to
8 be by the stakeholders?

9 MR. NORTH: I'm not sure that I can
10 right now, no. I just know that they've met,
11 discussed it, and they would prefer to proceed
12 without the ORW. I would just look at Todd or
13 Eric to see if they have anything to add to that
14 at this point.

15 MR. REGENSBERGER: Mr. Chairman, members
16 of the Board, Eric Regensberger Department of
17 Environmental Quality.

18 One of the major unintended consequences
19 of the ORW was that there would be a certain
20 number of new septic systems that could be put
21 into the Gallatin Valley after the designation was
22 complete; and the thought was that developers
23 would take up those eight or so new septic
24 systems, and then that would cut off any
25 development by people who had bought land, had

1 family land in the Gallatin Valley for years, and
2 then could not develop their land. They would
3 lose all value or much of the value of the
4 property.

5 So it was basically trying to protect
6 small individual, long time landowners in the
7 valley from being shut out from developing their
8 land, is what I remember one of the major
9 unintended consequences.

10 MR. WHALEN: And that would be addressed
11 in a finding of fact, correct?

12 CHAIRMAN RUSSELL: If we were to adopt a
13 rule. Outside of that, there is no findings
14 necessary.

15 MR. WHALEN: Mr. Chairman, there are no
16 members from the public present to object to not
17 carrying out this amendment?

18 CHAIRMAN RUSSELL: We do have a member
19 of the public here now.

20 MS. HEDGES: No, I don't have an
21 interest in this.

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

23 CHAIRMAN RUSSELL: All right. Countdown
24 is on.

25 (No response)

1 CHAIRMAN RUSSELL: Well, it has been a
2 real pleasure to have this ORW on the calendar
3 every half a year, and I'm really sorry that we
4 won't see it again.

5 Let's go ahead and move on then.
6 Katherine.

7 MS. ORR: Mr. Chairman, members of the
8 Board, the next matter is final action in the
9 matter of violations of the Montana Strip and
10 Underground Mine Reclamation Act by Signal Peak
11 Energy, LLC, at Bull Mountain Mine No. 1, Roundup.

12 This is a case where there was a Notice
13 of Violation issued for construction of roads,
14 drill pads, drill bore holes, without following
15 the permit conditions. The original penalty asked
16 by the Department was \$47,925, and you have before
17 you a Rule 41(a) motion to dismiss and a proposed
18 order.

19 CHAIRMAN RUSSELL: All right. I do have
20 an order to dismiss case No. BER 2012-08 SM, and I
21 would entertain a motion to authorize the Board
22 Chair to sign said order to dismiss.

23 MR. MIRES: So moved.

24 CHAIRMAN RUSSELL: It's been moved by
25 Larry. Is there second?

1 MR. MILLER: Second.

2 CHAIRMAN RUSSELL: It's been seconded.

3 Any further discussion?

4 (No response).

5 CHAIRMAN RUSSELL: Hearing none, all

6 those in favor, signify by saying aye

7 (Response)

8 CHAIRMAN RUSSELL: Opposed.

9 (No response)

10 CHAIRMAN RUSSELL: Motion carries

11 unanimously.

12 MS. ORR: Mr. Chairman, members of the
13 Board, the next matter is in the matter of
14 violations of Montana Underground Storage Tank Act
15 by Jeanny Hlavka, individually and doing business
16 as J. R. Enterprises.

17 This is kind of an unusual situation,
18 but in the original action, as I call it, there
19 was a notice of appeal filed in this case on April
20 29th, 2010, and a motion for summary judgment
21 filed by the Department in January 2011. That was
22 recommended by me to be granted in August of 2011.
23 The Board endorsed that in its following meeting.

24 Then the case was appealed to District
25 Court. Judge McKeon, on judicial review, issued

1 an order remanding the case for further
2 proceedings.

3 The issues that he dealt with -- other
4 than the procedural issue of whether this summary
5 judgment should be granted or not, and he said no,
6 and then remanded it -- were as follows: One,
7 whether there would be any other potential
8 landowner other than J. R. Enterprises that could
9 be responsible for removing the tanks, and he
10 found yes, and remanded for further proceedings on
11 that, and ordered that the town of Fort Peck be
12 brought in as a party.

13 And Judge McKeon also ordered as a
14 matter of law that Ms. Hlavka's argument that the
15 Department had no jurisdiction was wrong, and
16 that's under a certain statute 75-10-504 that she
17 was arguing that there was limiting language in
18 that statute which prevented the Department from
19 taking jurisdiction over the issue of removal of
20 tanks, and he specifically said no, the Department
21 does have jurisdiction. That language may be
22 interpreted as being limited, but there is lots of
23 other language throughout the act that gives the
24 Department the authority to require removal of
25 these tanks.

1 After that remand, then the Department
2 filed a second motion for summary judgment, and
3 there was a response, and the response basically
4 was the same argument as before that had been made
5 as to this issue of jurisdiction.

6 That argument was no, under 75-11, I
7 think it is, 75-11-504, the Department doesn't
8 have jurisdiction -- the same argument -- but the
9 problem is the District Court Judge had said, "I'm
10 remanding this subject to my order, and my order
11 says the Department does have jurisdiction to
12 require removal of these tanks." So I issued an
13 order recommending that the summary judgment
14 motion be granted.

15 And exceptions were filed. The
16 Department argues in the exceptions -- and I would
17 recommend that the Board agree -- that the
18 District Court's decision is the law of the case,
19 and must be followed, not to mention the fact that
20 as an independent matter, I think the Department
21 does have jurisdiction in this case to order the
22 removal of those tanks.

23 And then the other issue, the reason why
24 the Department was recommending summary judgment
25 otherwise, was that the other issue of potential

1 involvement of the town of Fort Peck had been
2 taken care of because the town of Fort Peck agreed
3 to be brought in as a party, and they also agreed
4 under an AOC to be involved in the payment for
5 removal of the tanks if it were to be shown that
6 any of the tanks were on its property.

7 So that can be boiled down to a
8 conclusion that there are no remaining issues of
9 fact; and as a matter of law under the District
10 Court's decision and under the statute itself, the
11 Department does have jurisdiction to require the
12 removal of the tanks, and that's what I'm
13 recommending. And you have an order before you
14 adopting my recommended order on summary judgment.

15 CHAIRMAN RUSSELL: And the parties
16 concur?

17 MS. ORR: And you've got exceptions
18 before you that still J. R. Enterprises is
19 arguing, "No, under that statute, the Department
20 cannot come in and exercise its authority," and so
21 they may appeal this again. I don't know.

22 CHAIRMAN RUSSELL: But if we take action
23 and decide, then they can appeal to somewhere
24 else?

25 MS. ORR: Yes. Correct.

1 MR. ANDERSON: Was the expectation today
2 that they would present their arguments in
3 opposition to your recommendation?

4 MS. ORR: No. They were given an
5 opportunity to indicate that they would come for
6 oral argument, and we have not heard from them on
7 that. There was kind of a tortured interaction of
8 emails, I would say, where there was a request of
9 my office of whether they'd be waiving rights by
10 not coming and presenting today, and I responded
11 that that's a legal question, and I can't give
12 legal advice on that, so --

13 MR. NORTH: Mr. Chairman, John North. I
14 of course can't comment on any issue of fact or
15 law in this matter. I can tell you that I
16 contacted Katie Knierim, Counsel for Hlavka this
17 morning, to determine whether she did intend to
18 come by telephone to present oral argument, and
19 she indicated that she is waiving oral argument,
20 and of course the Department is, too.

21 CHAIRMAN RUSSELL: Well, with all that
22 said, I do have an order granting second motion
23 for summary judgment for Case No. BER 2010-08 UST,
24 and would entertain a motion to authorize the
25 Board Chair to sign.

1 MR. ANDERSON: So moved.

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

4 MR. MILLER: I'll second it.

5 CHAIRMAN RUSSELL: It's been seconded by
6 Marv. Further discussion by the Board?

7 (No response)

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

10 (Response)

11 CHAIRMAN RUSSELL: Opposed.

12 (No response)

13 CHAIRMAN RUSSELL: Motion carries
14 unanimously.

15 MS. ORR: Mr. Chairman, members of the
16 Board, we're in the new contested cases section of
17 the agenda.

18 The first one is In the Matter of
19 Violations of the Public Water Supply Laws by
20 Trailer Terrace Mobile Park. This involves a
21 Notice of Violation and Administrative Compliance
22 and Penalty Order basically reciting violations of
23 public water supply laws and rules.

24 There were three itemized violations:
25 Failure to monitor systems for arsenic during the

1 first quarter of 2012; failure to collect
2 groundwater source samples from wells following
3 collection of total coliform samples; and failure
4 to hire a certified operator. And the penalties
5 requested are \$1,011.

6 CHAIRMAN RUSSELL: I just picked up that
7 one of the Appellants is a Kalispell guy. Any
8 questions for Katherine on this matter?

9 (No response)

10 CHAIRMAN RUSSELL: Well, hearing none, I
11 would entertain a motion to assign this
12 permanently to Katherine, if that's okay with you,
13 Katherine.

14 MS. ORR: Yes, that's fine.

15 MS. SHROPSHIRE: So moved.

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

18 MR. MIRES: Second.

19 CHAIRMAN RUSSELL: It's been seconded by
20 Larry Mires. Is there any further discussion?

21 (No response)

22 CHAIRMAN RUSSELL: Hearing none, all
23 those in favor of assignment to Katherine, signify
24 by saying aye.

25 (Response)

1 CHAIRMAN RUSSELL: Opposed.

2 (No response)

3 CHAIRMAN RUSSELL: Motion carries
4 unanimously.

5 MS. ORR: Mr. Chairman, members of the
6 Board, the next item is In the Matter of the
7 Notice of Appeal and Request for Hearing by
8 Western Energy Company regarding its MPDES permit
9 number.

10 There were various aspects about the
11 challenge to the MPDES permit that was issued, and
12 I can itemize those for you if you'd like. But
13 anyway a first prehearing order was issued, and
14 the parties have filed a proposed scheduling
15 order, and I am ready to look at the proposed
16 schedule, and issue an order regarding what the
17 hearing schedule will be.

18 CHAIRMAN RUSSELL: Questions for
19 Katherine?

20 (No response)

21 MS. ORR: If you'd like, I can go
22 through what the points of appeal are.

23 CHAIRMAN RUSSELL: Maybe we should.

24 MS. SHROPSHIRE: I would appreciate
25 that, Mr. Chairman.

1 MS. ORR: Okay. Western Energy states
2 that the grounds for the appeal include, but are
3 not limited to, the following: "The permit
4 imposes effluent limit levels that are far below
5 background concentrations for the receiving waters
6 in the vicinity of the Rosebud Mine. The permit
7 imposes water quality based effluent limitations
8 and beneficial use classification on a
9 classification of stream (ephemeral) for which
10 they're not intended.

11 "MTDEQ has not sufficiently addressed
12 concerns and comments submitted by Western Energy
13 dated June 13, 2012 during the public comment
14 period, and the permit renders Western Energy's
15 Rosebud Mine a zero discharge facility due to the
16 inappropriate and inapplicable water quality
17 limitations."

18 CHAIRMAN RUSSELL: But they have
19 outfalls already, right?

20 MS. ORR: How do you mean?

21 CHAIRMAN RUSSELL: I'm just looking at
22 some of the data.

23 MS. SHROPSHIRE: I think the argument is
24 that they couldn't meet the water quality, and
25 therefore it would be zero discharge. They

1 couldn't discharge based on the limits in the
2 permit, so they'd have to do something else with
3 it; is that --

4 MS. ORR: That sounds logical to me,
5 yes.

6 CHAIRMAN RUSSELL: Other questions for
7 Katherine?

8 (No response)

9 CHAIRMAN RUSSELL: All right. Hearing
10 none, I would entertain a motion to assign
11 Katherine permanent Hearings Examiner for this
12 matter.

13 MR. MILLER: I so move.

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

16 MR. MIRES: I would second.

17 CHAIRMAN RUSSELL: Seconded by Larry
18 Mires. Any further discussion?

19 MR. WHALEN: Mr. Chairman, given the
20 addition of Western Energy, I'm wondering what
21 sort of resolution could be driven by appointing
22 this to a Hearings Examiner, and I think they have
23 a lot to say. For my own purposes, I'm interested
24 in hearing the case. I understand that the
25 majority of the Board may not be. But when I vote

1 no, I would like the Board to understand that
2 that's my reasoning. Thank you.

3 CHAIRMAN RUSSELL: I kind of figured you
4 might, Joe, and certainly not in any derogative
5 sense.

6 MS. ORR: Not taken.

7 MR. ANDERSON: I'd like to hear this as
8 well.

9 CHAIRMAN RUSSELL: Since we have a
10 motion on the floor, remember, if you vote in the
11 affirmative we are assigning it. All those in
12 favor of the motion, signify by saying aye.
13 Let's just roll call in one step, okay? Vote aye
14 or no. Marv.

15 MR. MILLER: Aye.

16 CHAIRMAN RUSSELL: Larry.

17 MR. MIRES: Aye.

18 CHAIRMAN RUSSELL: To assign it?

19 MR. MIRES: Yes. With Marvin. That's
20 what you --

21 MS. SHROPSHIRE: We're voting to give it
22 to Katherine.

23 CHAIRMAN RUSSELL: Yes, so if you vote
24 aye, it's going to Katherine; if you vote no, it
25 is going to the Board most likely.

1 MR. MIRES: I'll vote aye with Marvin.

2 CHAIRMAN RUSSELL: Larry.

3 MR. ANDERSON: No.

4 CHAIRMAN RUSSELL: Robin.

5 MS. SHROPSHIRE: No.

6 CHAIRMAN RUSSELL: Joe.

7 MR. WHALEN: No.

8 CHAIRMAN RUSSELL: Chairman Russell, no.

9 All right. So we probably need to take another
10 motion. I wasn't going to lock this thing up for
11 the three, so I needed to do something. So we
12 need another motion to -- Well, we don't need
13 another motion. What we need is to understand
14 that in the interim, I would expect that Katherine
15 would continue to do your work as an interim
16 Hearings Examiner, keep us apprised of any
17 activities of the parties, and we'll see what
18 happens with scheduling.

19 MS. SHROPSHIRE: Mr. Chairman, I have a
20 question with regards to the information here. It
21 included the permit, but not the permit
22 application. Is that part of the record, or
23 something that would be included at some point?

24 MS. ORR: Mr. Chairman, Ms. Shropshire,
25 I think that that's up to the parties whether they

1 want to introduce the application as part of the
2 proceeding as an exhibit.

3 CHAIRMAN RUSSELL: There was a permit
4 issued.

5 MS. SHROPSHIRE: A permit was issued,
6 but to me the application is relevant.

7 CHAIRMAN RUSSELL: Then you're going to
8 probably see it. I hope it is long. All right.
9 We are going to move along.

10 The last one we have, Katherine, Montana
11 Solid Waste Management Act.

12 MS. ORR: Yes. This case is, as you can
13 see, In the Matter of Violations of the Montana
14 Solid Waste Management Act by Asphalt Plus, LLC, a
15 corporation, etc.

16 This case involves the issuance of a
17 Notice of Violation, Administrative Order by the
18 Department where the allegation is that Asphalt
19 Plus was operating a solid waste management system
20 without a license. And the remedy is a request
21 for a corrective action. There was a lot of waste
22 asphalt disposed without a license.

23 CHAIRMAN RUSSELL: Other questions for
24 Katherine?

25 (No response)

1 CHAIRMAN RUSSELL: Hearing none, I would
2 entertain a motion to assign this case to
3 Katherine.

4 MR. MIRES: I would so move.

5 CHAIRMAN RUSSELL: Larry Mires moves.
6 Anyone like to second this?

7 MR. MILLER: I'll second.

8 CHAIRMAN RUSSELL: Seconded by Marv.
9 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.

18 Katherine, we have something on just an
19 update on the Blakeman Camas Prairie Gravel Pit
20 case.

21 MS. ORR: Mr. Chairman, members of the
22 Board. As you recall, there was a contested case
23 proceeding before the Board on September 28th,
24 2012, and the Board voted that the Appellant's
25 position was not well taken, there was some

1 liability of the Appellant; and there were
2 penalties asked by the Department, according to
3 the exhibit that sets forth the violation, and the
4 derivation of the penalties, and the testimony of
5 Mr. Arrigo that they were looking for \$3,600 in
6 penalties.

7 And the Board tasked me to look at
8 whether that could be altered. And I have looked
9 at that, I've looked at the record, as well as
10 some of the background information that was
11 generated in the rulemaking process for the rule
12 17.30.308, I think it is, that is the rule that
13 addresses "other matters as justice may require."

14 And basically I think there were members
15 of the Board who were looking at this case and
16 looking at the blurred distinctions in the statute
17 82-4-331, the 10,000 cubic yards issue.

18 And Board Member Anderson brought this
19 up several times, that it really wasn't clear how
20 that statute operated as to Mr. Blakeman, whether
21 the 10,000 cubic yards applied to him alone with
22 respect to his removal of -- or open cut
23 operations on the unpermitted area, or whether the
24 10,000 cubic yards in the aggregate could be
25 considered and applied to Mr. Blakeman because he

1 was conducting an open cut operation, both with
2 respect to his lobe that was apart from Sanders
3 County's permit and together with that permit.
4 And the boundary lines, as Mr. Blakeman said, were
5 blurred. And I would submit that the statute and
6 the boundaries lines are also blurred.

7 So I think that's why basically the
8 Board was in a quandary about what to do with
9 these administrative penalties. And you were
10 looking at whether the gravity portion of the
11 penalties could somehow be changed from what the
12 Department concluded.

13 The Department concluded, referencing
14 language in the penalty rule itself, that there
15 was operation without a permit, and that
16 automatically creates a major gravity. But then
17 one of the Board members astutely brought up,
18 well, there may have been operation within the
19 County's permit.

20 Another comment by the Board was: Isn't
21 the County responsible here, Sanders County, for
22 first the ten acres and then the 40 acres that
23 they were permitted for, and it is not clear
24 whether -- or what portion of the 40 permitted
25 acres Mr. Blakeman was operating on.

1 So all that by way of back drop. So
2 today maybe you would want to discuss and vote on
3 what you think the penalty should be. I just
4 laying out the background for you on the gravity
5 aspect. And this other rule 17.4.308, "other
6 matters as justice may require," you asked me to
7 evaluate whether there were other matters as
8 justice may require to move off of the penalty
9 requested of \$3,600.

10 That rule does address itself to the
11 Department recommending that there might be other
12 matters as justice may require, instead of the
13 Board, but I don't think that that's a limitation
14 here. I think the Board itself can evaluate that.

15 And I looked back in the rulemaking for
16 17.4.308, and found that what that means simply,
17 in the rationale that was submitted by the
18 Department at the time, is if construction of the
19 previous rules as to gravity, harm, economic
20 benefit of non-compliance, don't address the
21 situation totally. So I think the Board can alter
22 the penalty if it wants.

23 And I thought about the issue of whether
24 the statute, whether the statute 82-4-431
25 represents a due process problem, and therefore

1 could be factored into this lowering of the
2 penalty.

3 The law 82-4-431 is very poorly worded.
4 It is very misleading. It doesn't define site, as
5 Board Member Anderson and I think Mr. Miller
6 pointed out. It is unclear where the 10,000 cubic
7 yard cutoff is, especially in this situation where
8 you've got and in grafting on to the existing
9 permit of the County, and then activity off to the
10 side that isn't associated with that county.

11 So who knows if Mr. Blakeman ever met
12 the 10,000 cubic yard cutoff that would require
13 him to get a permit. He was told to get a permit,
14 and he was told that the County had a permit; but
15 as he says, he never knew where the lines were
16 regarding the permit boundary.

17 So it is a very poorly worded statute.
18 Maybe rules would be in order to help out in
19 interpretation of that. And so I would say that
20 there is a due process problem here in that
21 statute.

22 CHAIRMAN RUSSELL: Questions for
23 Katherine? And remember that we are discussing
24 this matter amongst ourselves.

25 MS. ORR: Yes. And I just wanted to say

1 for the Board that I haven't written this up for
2 two reasons -- one, I just haven't had time, the
3 liability aspect of this; and then secondly, I
4 thought I could write it up all in one fell swoop
5 for approval by the Board in its next meeting.

6 CHAIRMAN RUSSELL: I don't have the
7 original documents with me, and I agree with you
8 that this is an issue that really comes back down
9 to gravity and the assignment of some factor,
10 because I don't think we can do anything outside
11 of that. Larry.

12 MR. MIRES: I have a question. I don't
13 know if it's relevant to this or not. So assume
14 that you assess a fee or a fine, a penalty to Mr.
15 Blakeman. And from what I could see, I really
16 questioned what he's going to pay to anybody as to
17 how much money he has to pay. But what if he
18 doesn't pay? Then what are the actions? How do
19 you collect these penalties?

20 MS. ORR: Well, that may be a factor of
21 how hard the Department wants to pursue it. There
22 are collection methods, but sometimes you can't
23 get blood out of a turnip either, and the cost of
24 collection exceeds what the collection is itself,
25 so --

1 MR. MIRES: I have another question, and
2 I'm really reluctant, but since we're talking
3 amongst ourselves. Essentially this property
4 appears to be totally within the Salish Kootenai's
5 Tribe's exterior boundaries, and we're talking
6 about a mineral right issue here, where does the
7 Tribe enter into this scenario?

8 MS. ORR: Mr. Chairman. Do you think
9 that this is a jurisdiction issue in your
10 question?

11 MR. MIRES: I really wonder if there
12 isn't a jurisdiction issue at stake here. From
13 dealings that I've had, personal dealings in that
14 neighborhood, dealing with land and minerals,
15 anything dealing with minerals was jurisdiction by
16 the Tribe first. I'm surprised that the Tribe
17 isn't here making comments. I'm really shocked.

18 MS. ORR: Mr. Chairman, Mr. Mires. I
19 think the Department has jurisdiction vis-a-vis
20 this open cut violation issue, and there hasn't
21 been an assertion of jurisdiction by any other
22 entity vis-a-vis this question. If there are
23 mineral rights involved, there might be at some
24 other point.

25 MR. MIRES: If you have an open cut mine

1 and you're taking gravel, isn't that considered a
2 mineral?

3 MS. ORR: I don't have the expertise to
4 answer that.

5 MR. MILLER: I don't think it is in
6 Montana, but --

7 MR. MIRES: It seems to be in northeast
8 Montana, so I would suspect it is in western
9 Montana.

10 MR. MILLER: Then it might be.

11 CHAIRMAN RUSSELL: But the reservation
12 is a checkerboard, and so my guess is based on
13 what we know of this property, it is on private
14 property, not owned by the Tribe.

15 MR. MIRES: Correct. And I had property
16 that was not owned by the tribe, and the same
17 reservation, and we were not allowed to extract
18 minerals because it was inside the interior
19 boundaries of the tribal reservation, and
20 therefore all minerals inside are tribal
21 jurisdiction. I guess that kind of makes a
22 muddier mess out of this scenario, and that's
23 going to lead to another follow-up question, if I
24 may.

25 CHAIRMAN RUSSELL: Sure. Larry.

1 MR. MIRES: When you have open cut
2 mining like on these gravel pits, what obligation
3 is the permittee required to come in and reclaim
4 the property, even if it is on private land, so
5 that that pit and that permit is closed if they're
6 no longer utilizing it?

7 In other words, what is the obligation
8 to the county to close the candy store so people
9 don't go in and help themselves? Even though I
10 agree that this guy was openly violating it, but
11 there is an open candy store. Where is the
12 obligation to the county to prevent that on all --
13 and they're all over the state, all over, no
14 matter where you look. So what is the obligation
15 to the permittee to reclaim it like required on
16 Colstrip?

17 MS. ORR: Mr. Chairman, Mr. Mires. I'd
18 have to read the permit, but I would assume that
19 the permittee has an obligation to reclaim when it
20 is finished, when it is no longer going to want to
21 be permitted.

22 MR. MILLER: Well, I don't know. Maybe
23 I'm just muddying the water. But it seems like to
24 me in listening and reading all this
25 documentation, that literally the parties really

1 -- I think we ought to recommend they close the
2 pit.

3 We had a 2002 letter from Sanders County
4 that essentially indicated that they didn't know
5 what was happening, but they hadn't used it since
6 2002, and the land owner even sounded surprised
7 that there was any activity or that much activity
8 in the pit, and he couldn't even be bothered to
9 show up for the hearing.

10 So it seems like to me that we ought to
11 just have the County add the seven-tenths of an
12 acre to their site so it is all one site, and
13 recommend that we close the pit, and follow up
14 with the reclamation in that.

15 And then I guess my other thought is
16 that since Mr. Blakeman was documented to at least
17 move 3,000 or cubic yards, that he should be maybe
18 a major player in assisting Sanders County to
19 reclaim the pit, and that would involve removing
20 all the waste material, regrading, reshaping,
21 re-top-soiling, reseeding the area, because he was
22 the major benefactor of this period.

23 And it just seems like -- I might throw
24 out one other thing that was brought out in the
25 hearing by Mr. Samdahl, was the giant ripple marks

1 that were there as part of glacial Lake Missoula,
2 and I might mention that, to add a little to that,
3 is there is no place on the planet that they have
4 ripple marks of that magnitude.

5 It provides the most convincing and
6 compelling evidence of the whole glacial Lake
7 Missoula story, and these ripple marks are -- it
8 is up to 60 feet crest to crest, and an amplitude
9 of up to 30 feet, and those major ripple marks are
10 right there. So I think it really is a very
11 critical and important geological area, and so as
12 a minor part, it seems like to me, there again, we
13 shouldn't be really ripping into all this.

14 So I'm kind of wondering if -- it seems
15 like it is inappropriate to find Mr. Blakeman on
16 this, but he certainly could help with the
17 clean-up of the pit.

18 CHAIRMAN RUSSELL: Well, I guess a few
19 things that I would interject. We can't do an
20 AOC, so we can't -- we don't have the latitude to
21 wash this away and say, "Go fix your problem."
22 That's something the Department could do or a
23 District Court could do, but we're left with what
24 we have in front of us.

25 So we've already found Blakeman guilty

1 -- I hate to use the term so severely -- but of
2 doing something wrong. He's done something
3 inappropriate, and we've said he has done
4 something inappropriate. What we left to
5 Katherine was the fact that we were a little
6 queasy -- that's not a legal term -- but with the
7 amount of the penalty.

8 I don't think -- none of us felt that he
9 wasn't wrong. He extracted gravel without a
10 permit. Sanders County closed the -- basically
11 made a notation that they have no responsibility
12 for any activity after such date. We recognized
13 that. It is all part of the record. That's where
14 we found him guilty of extracting without a
15 permit, and hence we left Katherine with this task
16 of looking at the penalty.

17 As we started this -- and we don't have
18 -- Marv, as much as we just want to clean it up
19 and move along, we don't have that luxury. At
20 least I don't believe we do, Katherine. I think
21 we have the case, and the case has been presented,
22 so I think we have to just move along, and I
23 think --

24 We can't remand this back. He appealed
25 it to us, right? If we could remand it back to

1 the Department, but the Department has their
2 position. They've already stated their position.
3 This guy did wrong. And we agreed with the
4 Department, so now we're left with the penalty.
5 And I think we're left with one portion of the
6 penalty, I believe, is the gravity of the amount.
7 So I think that's what we're left with, but
8 Katherine, do you want to interject?

9 MS. ORR: Mr. Chairman, the way I look
10 at this is: Who were the parties before the
11 Board? And unfortunately you don't have Sanders
12 County before you to in order to apply relief or
13 remedy.

14 But I think it is very imaginative, the
15 prospect of having Mr. Blakeman do some
16 reclamation. You do have jurisdiction over him.
17 And there is a portion of the penalty policy
18 called the Supplemental Environmental Program
19 where you can require a violator to do clean-up
20 efforts or do whatever the parties agree in lieu
21 of penalties or in addition to penalties. So I
22 think that would be a very unique add-on to this,
23 and it might be constructive.

24 CHAIRMAN RUSSELL: But he has been --
25 The site has been reclaimed all along. And did he

1 not admit that he was reclaiming?

2 MS. ORR: That was another thing. He
3 said he was, quote, "reclaiming," but at the same
4 time he was also conducting an open cut operation.
5 He was, as Ms. Amdahl pointed out, reclaiming the
6 affected land and transporting materials. Both of
7 those activities constitute an open cut operation.
8 So I think he was violating. Who knows what the
9 extent of what he was doing was reclamation.

10 CHAIRMAN RUSSELL: So where does that
11 leave us? Do we have a party that we can -- How
12 do we know that he's going to reclaim it now to
13 our level of --

14 MS. ORR: You know, Mr. Chairman, this
15 is a unique situation, but what you could do is
16 have the Department and Mr. Blakeman get together
17 and propose a supplemental environment project to
18 the Board, and have that be in addition to or in
19 lieu of penalties.

20 CHAIRMAN RUSSELL: Would that take the
21 Department concurring? Which we could not get
22 today because --

23 MS. ORR: Right. It would.

24 CHAIRMAN RUSSELL: I'm intrigued by
25 this.

1 MS. ORR: It is intriguing.

2 CHAIRMAN RUSSELL: But we are not the
3 agent that would go out there and determine if it
4 was okay, just like a District Court wouldn't be.
5 They'd just say, "Work with the parties," and --

6 MS. ORR: Mr. Chairman, what would
7 happen, I think, is that the Board would oversee
8 the implementation of this.

9 CHAIRMAN RUSSELL: Who lives closest to
10 that?

11 MR. MIRES: Is there travel expense
12 involved here?

13 CHAIRMAN RUSSELL: I don't know.

14 MS. ORR: And so I just throw that out.
15 I think you could do that.

16 CHAIRMAN RUSSELL: Well, I guess I don't
17 have an objection to asking the parties if they'd
18 be willing to do that.

19 MS. ORR: Mr. Chairman, what you could
20 do is ask the parties to make a presentation at
21 the next meeting about what they recommended, if
22 they can have a meeting of the minds about what
23 should be done, if anything, and defer the penalty
24 determination.

25 CHAIRMAN RUSSELL: Chime in, Board. I

1 think this is just --

2 MR. ANDERSON: I'd so move on that.

3 MR. MIRES: I'd second that.

4 CHAIRMAN RUSSELL: So what are we
5 moving?

6 MR. ANDERSON: We're moving to have the
7 parties confer among themselves to see if they can
8 come to a reclamation plan that the offender would
9 implement, and the Department would approve and
10 monitor.

11 CHAIRMAN RUSSELL: In deferment of some
12 penalty.

13 MR. ANDERSON: We make a decision after
14 that as to whether or not that would be in
15 addition to the penalty, defer the penalty in
16 exchange for that reclamation plan.

17 MS. SHROPSHIRE: Mr. Chairman, I just
18 want to understand that. When you say reclamation
19 plan, do you mean a Supplemental Environment
20 Project, or are you talking about reclamation?

21 MR. ANDERSON: I guess I wasn't thinking
22 in terms of words of art.

23 MS. SHROPSHIRE: Because when I think of
24 reclamation plan, it is a plan that would reclaim
25 the site; where a Supplemental Environmental

1 Project would be a project that would not
2 necessarily include reclamation, but could include
3 -- would be broader, and that might be something
4 that would benefit the public, or something else
5 that's separate from reclamation. Does that make
6 sense?

7 MR. ANDERSON: Yes.

8 MS. SHROPSHIRE: I just wanted to
9 understand that you're discussing the idea of
10 having him --

11 MR. MILLER: Site closure plan.

12 MS. SHROPSHIRE: -- present a
13 Supplemental Environmental Project proposal. And
14 then I guess the next question is: Is that in
15 lieu of the fine, or is that yet to be determined?
16 And then the last part is: Who approves of the
17 project?

18 MR. ANDERSON: You know, as I sit here
19 and think about it, obviously there is another
20 party involved here that has not chosen to
21 participate, and that's Sanders County. So that
22 layer is a complicating factor on top of this that
23 maybe we can't address without having Sanders
24 County involved.

25 CHAIRMAN RUSSELL: Maybe just to throw

1 -- I'm not trying to be obnoxious here, but I'm
2 going to be. They're not the permittee. So would
3 we have to -- would the Department have to issue a
4 permit so they could do the reclamation? I mean
5 Sanders County is the permit holder, right? And
6 they've basically washed their hands of it.

7 So I just want to make sure we need to
8 make -- I'm not trying to be obstructionist, but
9 all this stuff keeps popping up into my head.
10 They don't have the closure requirements; Sanders
11 County does. So does Sanders County have to be
12 part of this? Just a thought.

13 MR. ANDERSON: And that's why we need to
14 have an evaluation of the Sanders County permit to
15 determine what their obligations for reclamation
16 were, and what time period they had to conduct
17 that reclamation.

18 MR. MIRES: It seems to me there was
19 testimony by the Department regarding Sanders
20 County, and even on the letter. So I'm going to
21 agree with what the Chairman says here, that I
22 think the Department, as they're working this out,
23 go back to the original permittee, and working
24 with them in conjunction with them and Mr.
25 Blakeman, find a reasonable way to close this pit

1 up, and close out that permit, and permanently
2 reclaim it so that it is not a open store.

3 And I'm wondering if that latitude can't
4 be allowed to the Department with the original
5 permittee, even though they are not part of the
6 case that we decided on. They held the permit,
7 and as I understood it from the testimony, they
8 still had the permit because they never officially
9 closed it out, unless I misunderstood that.

10 MS. ORR: Mr. Chairman, Mr. Mires, I
11 would have -- As Mr. Anderson recommends, I would
12 have the Department report on that. What leverage
13 do they have through the permit to make this
14 happen?

15 MR. MIRES: Yes, because I certainly
16 don't know.

17 MS. SHROPSHIRE: I don't think that --
18 Well, the Department has a procedure on
19 Supplemental Environment Projects that --

20 MS. ORR: Are you asking, Ms.
21 Shropshire --

22 MS. SHROPSHIRE: No. That was a
23 declarative statement. They do. And so to me it
24 makes sense that we understand that before we make
25 recommendations, make sure it is consistent with

1 what we intended.

2 CHAIRMAN RUSSELL: So let's try to craft
3 this up. Larry, kind of restate what your motion
4 was then.

5 MR. ANDERSON: I would move that the
6 Board request the Department and the offender to
7 meet and confer for the purpose of developing a
8 plan of -- and I'm using the term -- reclamation
9 of this site, and we would determine after the
10 plan is presented to us whether the offender's
11 execution of this plan would be in lieu of the
12 fine or in addition to the fine.

13 CHAIRMAN RUSSELL: Is there a second to
14 that?

15 MR. MILLER: I'll second it.

16 CHAIRMAN RUSSELL: Discussion.

17 MS. SHROPSHIRE: I just have a question
18 for Katherine. I wasn't present for the previous
19 discussion, so I think that I should stay out of
20 this vote. But I guess I'm looking at Katherine
21 for guidance on that.

22 CHAIRMAN RUSSELL: Well, first of all,
23 do you have the record?

24 MS. SHROPSHIRE: I can review the
25 record, but that's what I'm asking for, is based

1 on review of the record, is that adequate, or do I
2 need to be present at the meeting in order to
3 participate now?

4 MS. ORR: Mr. Chairman. My thought
5 would be no, you don't have to have been present.

6 MS. SHROPSHIRE: Okay. Thank you.

7 CHAIRMAN RUSSELL: As long as you catch
8 up on the record.

9 MS. SHROPSHIRE: All right.

10 CHAIRMAN RUSSELL: Well, any further
11 discussion on this?

12 (No response)

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

16 (Response)

17 CHAIRMAN RUSSELL: Opposed.

18 (No response)

19 CHAIRMAN RUSSELL: Aye. Motion carries,
20 and we'll move forward on this matter as it has
21 been recommended by the Board.

22 So with that, there comes the time that
23 we can take comments from the audience on matters
24 pertaining to the Board.

25 (No response)

1 CHAIRMAN RUSSELL: Seeing none, I do
2 have a thought, and this was in discussion with
3 Steve Kilbreath on -- Steve has taken a temporary
4 position working for the Department on matters
5 that pertain to the Bakken development in eastern
6 Montana, and I know this has been an issue with
7 Larry over time, and a very big concern.

8 And if you would like, we would ask the
9 Department at our next meeting -- if we have an
10 in-person meeting -- to give us an update on the
11 impacts in eastern Montana relating to the
12 developments in the Bakken. And I think Steve
13 would be excited to show us some of the things
14 that he's run into out there.

15 And it would be a good idea, because
16 I've been in contact with a sanitarian out there
17 myself, and it's a sky is falling type activities
18 for a lot of these guys, just in the environmental
19 regulatory realm. I'm sure John has heard a lot
20 of the horror stories already, a lot of public
21 water supply violations. Lots.

22 MS. SHROPSHIRE: You're not suggesting a
23 field trip, though?

24 CHAIRMAN RUSSELL: Not in the winter,
25 but you know what, before we leave this Board, we

1 have to do one more field trip. We have a race to
2 settle. So John, if you would keep that in mind.

3 MR. NORTH: Yes, we'll do that, Mr.
4 Chairman.

5 THE COURT: Any other discussion before
6 we adjourn?

7 (No response)

8 CHAIRMAN RUSSELL: Seeing none, I would
9 entertain a motion to adjourn.

10 MR. MIRES: So moved.

11 MR. MILLER: Second.

12 CHAIRMAN RUSSELL: All those in favor,
13 signify by saying aye

14 (Response)

15 CHAIRMAN RUSSELL: So we're adjourned.

16 (The proceedings were concluded
17 at 11:28 a.m.)

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C E R T I F I C A T E

STATE OF MONTANA)

: SS.

COUNTY OF LEWIS & CLARK)

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

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing - 90 - 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 , 2012.

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires
March 12, 2016.