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BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY  
OF THE STATE OF MONTANA

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TRANSCRIPT OF PROCEEDINGS

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Heard at Room 111, Metcalf Building  
1520 East Sixth Avenue  
Helena, Montana  
September 27, 2012  
2:30 P.M.

CHAIRMAN JOE RUSSELL

MEMBERS: LARRY MIRES, HEIDI KAISER, LARRY ANDERSON, JOE  
WHALEN, MARVIN MILLER. BOARD LIAISON: TOM LIVERS.  
BOARD ATTORNEY: KATHERINE ORR.

PREPARED BY: SUSAN JOHNSON, RPR

COURT REPORTER, NOTARY PUBLIC

P.O. BOX 1192

HELENA, MONTANA 59624

(406) 442-8262

1 WHEREUPON, the following proceedings were had:

2 CHAIRMAN RUSSELL: I will call this regular  
3 meeting of the Board of Environmental Review to order.

4 The first item on the agenda is the review  
5 and approval of the minutes for the July 27th, 2012  
6 board meeting.

7 MR. MIRES: So moved.

8 MR. MILLER: Seconded.

9 CHAIRMAN RUSSELL: Moved by Larry and  
10 seconded by Marv. Any discussions, corrections? I  
11 always want to applaud Joyce for doing a nice job on  
12 those transcripts. All those in favor signify by saying  
13 aye.

14 (Response)

15 CHAIRMAN RUSSELL: Opposed.

16 (No response)

17 CHAIRMAN RUSSELL: Motion carried  
18 unanimously.

19 The next item on the agenda is the contested  
20 case update. Katherine.

21 MS. ORR: Mr. Chairman, Members of the Board,  
22 the first item, II A, 1a, in the matter of Violations of  
23 the Montana Seepage Disposal and Licensure Laws by James  
24 Vaughn, doing business as Any Time Septic and  
25 Porta-Potty is ripe for ruling on a motion for a renewed

1 motion for summary judgment. The answer to that was  
2 filed on September 20th, 2012. So that's what is  
3 happening on that. And a hearing is scheduled in  
4 January for the following two cases.

5 Then on II A, 2, the Brad Blakeman, Camas  
6 Prairie Gravel Pit case. As you all know, that is going  
7 to go to a contested case hearing tomorrow. And we  
8 think that Mr. Blakeman will appear.

9 The next item b there, the board is very  
10 familiar with, there was a telephonic hearing on  
11 September 11th, 2012 where the board heard oral argument  
12 on pending motions and ruled on those. And Chairman  
13 Russell has an order in his possession for signature to  
14 confirm what was done by the board.

15 The next item II A, 3 a involving Jeanny  
16 Hlavka, doing business as J.R. Enterprise, is also ripe  
17 for an order on summary judgment. The hearing is set  
18 for October 25th. There was an order vacating the  
19 second scheduling order so as to clear the way for  
20 ruling on the summary judgment. So that should be  
21 coming out soon.

22 CHAIRMAN RUSSELL: Thank you. Any questions  
23 for Katherine before we proceed to the next?

24 (No response)

25 CHAIRMAN RUSSELL: All right. None.

1           The next item on the agenda is initiation of  
2 rulemaking to amend ARM 17, Chapter 38, Subchapter 1.  
3 That's why Gene is here.

4           MR. PIZZINI: Chairman Russell, Members of  
5 the Board, for the record, my name is Eugene Pizzini. I  
6 am the public supply rules expert manager.

7           The department is proposing two minor changes  
8 to the existing engineering feed rules that would result  
9 in a reduction of cost to systems submitting plans under  
10 those amendments, and New Rule 1, related to the  
11 identification and repair of significant deficiencies.  
12 The legislature requires the department to collect fees  
13 commensurate with the cost of reviewing plans and  
14 specifications. MCA 75.610.8(3) states the board shall,  
15 by rule, prescribe fees to be assessed by the department  
16 on persons who submit plans and specifications for  
17 construction, alteration or extension of a public water  
18 supply system or public sewage system. The fees must be  
19 commensurate with the cost of the department for  
20 reviewing the plans and specifications.

21           Past legislative audits identify the  
22 department was not recovering its costs for conducting  
23 engineering review. Based on those findings, the BER  
24 adopted increased engineering fees. During testimony,  
25 the department stated that if a fee rate was found to be

1 excessive, it would returned to the BER with the request  
2 to correct that issue. The proposed engineering review  
3 change acted on that pledge. The department proposes to  
4 add a new line item for slip lining in both the water  
5 and waste water fee schedule.

6 Slip lining is a process where a new line is  
7 pulled through an existing line to replace the existing  
8 line. Currently, the department charges 25 cents a foot  
9 to conduct engineering review of water or waste water  
10 main placement. The department has determined that a  
11 fee of 15 cents per foot would be more in line to  
12 recover commensurate costs for review of slip line  
13 projects. The proposed New Rule I is intended to  
14 implement new authority authorized in the 2009  
15 Legislature. The Legislature authorized the BER to  
16 adopt rules requiring identification and repair of  
17 significant deficiencies that have the potential to  
18 contaminate drinking water.

19 Prior to the 2009 amendment, the Water  
20 Supplies Distribution and Treatment Act required  
21 proposed public water waste water system to submit plans  
22 and specifications for department review and approval  
23 prior to construction and to construct according to  
24 those approved plans and specifications. The act did  
25 not specifically require that an operating system

1 maintain the condition of the system after construction.

2 In addition, systems in operation prior to the adoption

3 of plan and specification review requirements have

4 historically been grandfathered, as construction

5 standards may not have applied. The existing federal

6 surface treatment rule, the lead and copper rule and the

7 ground water rule contain requirements for existing

8 systems to repair significant deficiencies. The

9 proposed New Rule 1 clarifies the department's authority

10 to require repair of significant deficiencies under the

11 existing statutes and rules. The department does not

12 propose to require every existing system to meet all new

13 construction standards, as they evolve, only those

14 identified by the department as being significant with

15 the potential to adversely affect public health or the

16 environment.

17 Because a designation of a significant

18 deficiency requires a system to resolve that

19 deficiency within a mandated timeframe, it is important

20 that only those situations which have a high potential

21 for adversely affecting public health or the environment

22 be classified as significant. For this reason, the

23 department has developed a significant deficiency

24 committee to make determinations as to whether a

25 deficiency is significant or not. This committee is

1 modeled after the department's deviation committee for  
2 engineering review. The department recommends  
3 initiation of rulemaking and appointment of a hearings  
4 officer for a public hearing.

5 And I can take any questions.

6 CHAIRMAN RUSSELL: So how significant is this  
7 committee you're looking to make up? Is it all DEQ  
8 people?

9 MR. PIZZINI: It is.

10 CHAIRMAN RUSSELL: Does that mean it's always  
11 that significant?

12 MR. PIZZINI: Chairman Russell, Members of  
13 the Board, we tried to cover on that significant  
14 deficiency committee, I believe we have one PE, one  
15 field services person and one of our compliance section  
16 folks.

17 CHAIRMAN RUSSELL: So they could be DEQ  
18 people, but they may not be in Helena?

19 MR. PIZZINI: Chairman Russell, that is  
20 correct. Chairman Russell, one of the members on the  
21 committee now is actually in the Kalispell office.

22 CHAIRMAN RUSSELL: It's a good office.

23 MR. PIZZINI: We would agree.

24 CHAIRMAN RUSSELL: Questions?

25 MR. MIRES: Curiosity, on establishing the

1 fees, I notice on like filtration, we have a \$150 charge  
2 for filtration, and standard clarification is like \$700.  
3 Is there that much difference in work, is that how that  
4 fee is established?

5 MR. PIZZINI: Chairman Russell, Member Mires,  
6 may I refer that to one of our design engineers?  
7 Denver.

8 MR. FRASIER: My name is Denver Frasier, I am  
9 a review engineer for Public Water Supply. And with  
10 regard to that question, I guess the best answer I can  
11 come up with is sometimes. For instance, right now I'm  
12 looking at standard clarification for one project that  
13 is 120 plan sheets long, so it's significantly more  
14 difficult than a \$700 fee cover. Oftentimes with  
15 filtration, there is enough differential with the  
16 specifications and the plans and just the overall  
17 hydraulics that, yes, it's typically going to, in my  
18 opinion, probably require more time to do the plan  
19 review.

20 Thank you.

21 MR. MIRES: Then am I to conclude, then, that  
22 that applies also to sludge handling for 2240 and  
23 biological treatment for 3360?

24 MR. PIZZINI: Chairman Russell, Member Mires,  
25 I don't have the specifics on how we came to those.



1 What I can tell you is that when we went through and did  
2 the last fee increase, we looked at all the projects  
3 that had been submitted to the department over a period  
4 of time. And as a matter of fact, I believe that we  
5 postponed our fee increase hearing in an attempt to go  
6 for a period of time where we were specifically  
7 gathering information on how long it took engineers to  
8 do review.

9 The downside of this is, and this is actually  
10 why we're here doing this review fee change, which is  
11 the reduction, is we have to guess. You know, we don't  
12 know what is going to come in tomorrow. All we can do  
13 is look at what happened yesterday and say, this is what  
14 we've got, here is what we need, here is what the  
15 average is. That's, to my understanding, how these  
16 numbers came up.

17 MR. MIRES: So, then, let's say you're doing  
18 a sludge review, sludge handling review, and you find  
19 out it doesn't take you as long as you anticipated.  
20 Would the fee be reduced or is it going to be a standard  
21 2240?

22 MR. PIZZINI: Chairman Russell, Mr. Mires, to  
23 my knowledge it stays where it is because when we set  
24 that fee, it was here is the number of projects, here is  
25 the number of hours, here is what it cost. So, yes, one

1 may take 10 hours to review and the next may take you 20  
2 hours to review. Somebody's going to get a deal,  
3 somebody's going to pay the difference.

4 CHAIRMAN RUSSELL: I'll just add to that,  
5 that there are some reviewers, and I speak from a local  
6 perspective, some reviewers that take longer than  
7 others. So to do a time and materials is really  
8 dangerous to the consumer, it's way better to set a fee  
9 and either make a little money or lose a little money.  
10 It's way more responsive to the community than doing  
11 time and materials.

12 MR. MIRES: That answered my question.

13 MR. PIZZINI: One follow-up to that is that  
14 is exactly why we're here for this engineering fee  
15 reduction. When somebody submits slip lining to us,  
16 literally it's a process where you're dragging pipe  
17 through an existing pipe, so you're not looking at  
18 crossings, you're not looking at utilities, all that  
19 type of stuff.

20 In reality, the cost of us to sit down and  
21 look at those plans isn't the same as if we were  
22 reviewing plans and specs for a new main or a  
23 replacement main where you're actually digging. That  
24 was the trigger for this, is this doesn't make sense and  
25 this is the only option or the best option we could come

1 up with to resolve that.

2 MR. MIRES: Thank you.

3 MR. WHALEN: Just a quick question for the  
4 department. What do you anticipate the hit is going to  
5 be in terms of revenues for DEQ as a result of these  
6 lower review fees? If I'm not mistaken, slip lining is  
7 on the increase, just in terms of trending in public  
8 water supplies, supply systems across the state. Is  
9 that accurate?

10 MR. PIZZINI: Chairman Russell, Mr. Whalen, I  
11 am not sure if that is accurate. But if you are  
12 suggesting that we should modify our fees to fund  
13 additional processes in the program, we would probably  
14 be more than willing to do that. The statute tells us  
15 that we need to collect fees that are commensurate with  
16 the cost, so that's why we're here to reduce this. We  
17 are actually, for this review, collecting more than what  
18 it is costing us to do that. If you were to spread that  
19 over the whole program, meaning that if we were going to  
20 increase the cost on this one to fund another portion  
21 that isn't covering its costs, that might be  
22 justifiable.

23 But for this particular issue, we are  
24 charging more than what it is costing us to do the  
25 review. Since that is what we're trying to do is

1 collect commensurate costs on specific line item fees,  
2 this one was collecting too much. My guess is that the  
3 program would do whatever it could to take extra money,  
4 but this isn't going to be one of them at this point.

5 MR. WHALEN: Thank you.

6 MR. ANDERSON: In the assessment of the fee,  
7 how many projects go into the assessment and how many  
8 years of projects go into the assessment?

9 MR. PIZZINI: Chairman Russell, I'd like to  
10 let my boss answer this.

11 MR. DILLIARD: Mr. Chairman, Members of the  
12 Board, my name is Jon Dilliard. I'm Bureau Chief of the  
13 Public Water Supply and Subdivisions Bureau.

14 Slip lining is actually something that has  
15 just started to pick up in Montana, we're just starting  
16 to see more. The engineer may correct me, but I think  
17 we've only had maybe three of these projects in the last  
18 year and a half.

19 MR. FRASIER: There has actually been  
20 probably closer to 30. We get anywhere from 100 to 150  
21 just main extensions per year and about, now, about 20  
22 percent of those, I guess, are going to be slip line  
23 projects, and generally in the larger communities.

24 MR. DILLIARD: That's increased a lot more  
25 than the last time I had heard about what we were

1 receiving, so about a third of them.

2 In the review of this case, the engineers and  
3 the engineer manager looked at what the history was and  
4 what the anticipated time that the engineers were using  
5 to do this, and that is where the fee was set.

6 MR. ANDERSON: Is there a national standard  
7 for this review process that you work off of or is it  
8 just internal projects?

9 MR. DILLIARD: Mr. Chairman, Mr. Anderson, I  
10 may be a little confused. There are standards that we  
11 use as far as the technical standards that are looked  
12 at. Primarily, what we use in Montana is called the Ten  
13 State Standards, and those are relatively nationally  
14 accepted as being engineering standards for water and  
15 sewer systems.

16 MR. ANDERSON: I didn't make my question very  
17 clear. What I'm trying to do is figure out is there a  
18 standard, like if you go to a mechanic and you want an  
19 oil change, there is a national standard that it takes  
20 20 minutes or whatever to do an oil change. I'm just  
21 wondering if there is some sort of standards like that  
22 in the assessment of the slip line process, for example,  
23 reviewing the slip line process.

24 MR. DILLIARD: Mr. Chairman, Mr. Anderson, I  
25 am not aware of one. I do know that, as far as

1 assessing fees, virtually every state does it in a  
2 different manner. Some programs in other states are  
3 fully funded with general fund. Other ones charge no  
4 fee because they're getting their fees from another  
5 source. But nobody seems to be the same in the way  
6 they're assessing fees and doing the reviews.

7 MR. ANDERSON: Thanks.

8 CHAIRMAN RUSSELL: Any other questions from  
9 the department?

10 (No response)

11 CHAIRMAN RUSSELL: Hearing none, is there  
12 anyone in the audience that would like to speak to this  
13 matter before the board takes it up?

14 (No response)

15 CHAIRMAN RUSSELL: I would entertain a motion  
16 to initiate rulemaking. And, Katherine, you're  
17 available?

18 MS. ORR: Yes.

19 CHAIRMAN RUSSELL: I appoint Katherine the  
20 hearings examiner for that.

21 MR. MILLER: I so move.

22 CHAIRMAN RUSSELL: Is there a second?

23 MS. KAISER: Second.

24 CHAIRMAN RUSSELL: Seconded by Heidi.

25 Is there any further discussion?

1 (No response)

2 CHAIRMAN RUSSELL: Hearing none, all those in  
3 favor signify by saying aye.

4 (Response)

5 CHAIRMAN RUSSELL: Opposed.

6 (No response)

7 CHAIRMAN RUSSELL: The motion is carried  
8 unanimously. Thank you.

9 The next item on the agenda is final adoption  
10 of the revision of Circular DEQ-2.

11 MR. LEVINE: Mr. Chairman and Members of the  
12 Board, my name is Paul Levine, and I am the manager of  
13 the Water Pollution Control Fund. And just to refresh  
14 your memory on this, do you want the seven-minute  
15 version or do you want the one-minute version?

16 CHAIRMAN RUSSELL: Take all the time you  
17 want, Paul.

18 MR. LEVINE: Just as a refresher to everyone,  
19 well, first we briefed the boards in March on this  
20 issue. We requested rulemaking authority in May at the  
21 May meeting. Then we had a public hearing that no one  
22 turned out for at the July meeting. So House Bill 52,  
23 for the last session, gives the board authority to adopt  
24 the rules for re-use for public sewage systems. So as  
25 part of this adoption that we'll be requesting here

1     shortly, we have the re-use rules and then revisions to  
2     Circular DEQ design circulars for larger waste water  
3     systems.

4             So the re-use rule essentially includes  
5     definitions for reclaimed waste water and other  
6     unrestricted claimed waste water, incorporates reference  
7     to the water quality rules. There are some minor  
8     terminology corrections in the term public sewer system.  
9     There are exemptions from ag discharge permits, one just  
10    clarifies that agricultural land applications exemption  
11    but be in economic rates. And then the proposed rule  
12    changes add an exemption for classes A-1 and B-1,  
13    reclaimed waste water approved by DEQ. There is a  
14    requirement for monitoring, recordkeeping, recording for  
15    re-use and a requirement for DNRC approval regarding  
16    water rights for re-use. Circular DEQ-2, as I  
17    mentioned, is kind of the bigger design standards for  
18    larger communities, it kind of looks like this, it's a  
19    pretty good size document. It covers collection  
20    systems, lift stations and treatment systems. And this  
21    is used a lot, obviously, by consultants and it helps  
22    DEQ-2 reviewers to provide consistent reviews. The  
23    proposed changes are very comprehensive. They include a  
24    lot of minor tweaking.

25             There are some major changes, mainly with



1 regard to spray irrigation and with an additional focus  
2 on operations for spray irrigation facilities. There  
3 are some major additions to the document, as well, they  
4 include new technologies for sequencing batch reactors,  
5 membrane bioreactors and biological turbo systems, and  
6 then, of course, re-use. The re-use portion includes  
7 standards for treatment and effluent quality related to  
8 specific beneficial uses and pretty much lines out what  
9 those uses can be.

10 As far as public input and public comment,  
11 over the last couple years, I think we've been working  
12 on this since 2008, but we've sent this out to larger  
13 firms, national firms and larger firms in Montana for  
14 review, and we've incorporated a lot of those comments  
15 in the past. We had a public hearing, as you well know,  
16 at the last meeting. No one attended, and we've  
17 received no public comments, no comments during the  
18 public comment period. So I think at this time, the  
19 department would now respectfully request adoption of  
20 the re-use standards and the updated changes to the  
21 DEQ-2.

22 CHAIRMAN RUSSELL: Thank you.

23 Is it because you've been at this since 2008  
24 that no one really has any comments?

25 MR. LEVINE: They're probably tired of it,

1 Mr. Chairman, you know, we've preached this at several  
2 conferences over the years, specifically re-use and  
3 spray irrigation and the new standards, so no one is  
4 really surprised, I think. And frankly, I think people  
5 welcome the addition of some of the design standards for  
6 the new technologies. Even Ten States doesn't address  
7 them yet.

8 CHAIRMAN RUSSELL: That would be the next  
9 question is, there have been some changes in technology,  
10 and you feel that you're pretty much cutting edge about  
11 what is being proposed in Montana?

12 MR. LEVINE: Yes, I believe so, Mr. Chairman.  
13 But I think that it's really changing right now, new  
14 trends are driving a lot of new ideas. And so although  
15 we -- I think what we're trying to capture is really  
16 proven technology so far in a major way, the sequencing  
17 batch reactors and MBRs, obviously, and some other  
18 stuff. But I think that two years from now we'll see  
19 more we'll have standards for, certainly. I think the  
20 basic principles in biological bacteria removal will  
21 kind of stay the same, just different versions and  
22 variations.

23 CHAIRMAN RUSSELL: I don't think the bacteria  
24 will change enough that it will change the technology on  
25 it. It's interesting to me, I know White Fish is just

1 starting a new process of looking at their plan, and  
2 hopefully we'll make substantial changes to it. I  
3 disagree with you that the technology is driving it. I  
4 think driving nutrient removal, I think the regulation  
5 is going to drive the nutrient removal to extremely low  
6 limits.

7 MR. LEVINE: That is kind of what I meant to  
8 say.

9 CHAIRMAN RUSSELL: Yeah, I kind of figured  
10 you did. It will be interesting to see what happens  
11 because there are some areas of the state, certainly,  
12 that need to do a better job.

13 MR. LEVINE: It's a big challenge for  
14 everyone, it really is.

15 CHAIRMAN RUSSELL: It's a big challenge  
16 keeping up with it. Just in general, how many big  
17 reviews do you have going on for POTWS right now?

18 MR. LEVINE: Mr. Chairman, Great Falls is  
19 upgraded and Butte is well underway. And, of course,  
20 Big Fork just upgraded. Glendive. Those are the big  
21 three that I can think of.

22 CHAIRMAN RUSSELL: And White Fish soon.

23 MR. LEVINE: Yes.

24 CHAIRMAN RUSSELL: All right. Questions,  
25 other questions?

1 (No response)

2 CHAIRMAN RUSSELL: All right. Well, nice  
3 work on this. Does anyone in the audience want to speak  
4 to this before we take this up? This is just a  
5 recording that goes through my head, that Tom and Jon  
6 dumped in there several years. So thank you.

7 With all that, I would entertain a motion to  
8 adopt the rule, the 52.1.311 analysis and the hearings  
9 officer's support. I think that's all we have, right,  
10 no comments. Is there a motion?

11 MR. WHALEN: I move.

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

14 MR. MILLER: Second.

15 CHAIRMAN RUSSELL: It's been seconded by  
16 Marv. Further discussion?

17 Hearing none, all those in favor signify by  
18 saying aye.

19 (Response)

20 CHAIRMAN RUSSELL: Opposed.

21 (No response)

22 CHAIRMAN RUSSELL: The motion carries  
23 unanimously.

24 The next item on the agenda is ARM 17,  
25 Chapter 30, Subchapters 5, 6, 7 and 10. Right. All the

1 water guys left. So all the water guys left.

2 MR. LIVERS: Mr. Chairman, that's going to be  
3 Rod McNeil. So maybe if you're okay going out of order,  
4 we can go ahead with the air rule, and I'll go round up  
5 the water folks.

6 CHAIRMAN RUSSELL: That's fine. That would  
7 be great. We are going to move along and double back on  
8 this. So you are going to talk about ARM 17.8.801 and  
9 818.

10 MS. WOLFE: Thank you, Mr. Chair and Members  
11 of the Board. For the record, my name is Debra Wolfe,  
12 and I work in the Air Resources Management Bureau, the  
13 Montana Department of Environmental Quality. And I'm  
14 here today to represent the department regarding the  
15 board's proposed amendment of air quality rules. The  
16 board today is taking action on a proposal to amend Air  
17 Quality Provision 17.8.801, 17.8.818 to update  
18 requirements for ozone for sources subject to major  
19 source permitting rules. As I described in the previous  
20 presentation to request initiation of this rulemaking,  
21 there have been certain changes to federal requirements  
22 for major sources which necessitated revisions to  
23 Montana's major source permitting program in order to  
24 make it consistent with the federal changes. The board  
25 held a hearing on July 7th, 2011 and provided an

1 opportunity for public comments. No written or oral  
2 public comment was received and the board has in its  
3 packet a hearings officer report, a draft notice and an  
4 executive summary of this item.

5 We do, as a department, support the board's  
6 proposed amendments to the rules and we request the  
7 board adopt what is proposed in the notice published May  
8 26th, 2012.

9 Thank you.

10 CHAIRMAN RUSSELL: Thanks.

11 Questions?

12 (No response)

13 CHAIRMAN RUSSELL: No. All right. There  
14 were no comments. Is there anyone in the audience that  
15 would like to speak to this matter before the board  
16 takes it up?

17 I don't see anyone, Tom. All right. I would  
18 entertain a motion to adopt the rule, accept the  
19 presiding hearing examiner's report and stringency in  
20 taking these requirements.

21 MS. KAISER: I so move.

22 CHAIRMAN RUSSELL: Moved by Heidi. Is there  
23 a second?

24 MR. MIRES: Second.

25 CHAIRMAN RUSSELL: It's been moved, and

1 seconded by Larry. Further discussion?

2 (No response)

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

5 (Response)

6 CHAIRMAN RUSSELL: Opposed.

7 (No response)

8 CHAIRMAN RUSSELL: Motion carries  
9 unanimately. Shall we take a break?

10 MR. LIVERS: Mr. Chairman, for the record,  
11 Tom Livers from the department. We had some confusion.  
12 I think the folks weren't aware of the switch to  
13 Thursday for the meeting. They're on their way and  
14 they'll be ready to go.

15 (Thereupon, a short break was taken.)

16 CHAIRMAN RUSSELL: The next item on the  
17 agenda is, doubling back here, I'm going to talk about  
18 amendments to the water quality standards rules.

19 MR. MCNEIL: Mr. Chairman, Members of the  
20 Board, my name is Rod McNeil. I'm with the Montana DEQ  
21 water quality standard section. At the request of the  
22 board, we held a public hearing on July -- I'm sorry,  
23 no. May. The comment period ended on July 12th. Based  
24 on those comments, we did make further changes to DEQ7,  
25 as you received it in May. Those changes included

1 leaving cadmium as a toxic compound rather than changing  
2 it to carcinogenic status, based on the information  
3 provided by the EPA. Also, we left tetrachlorethylene as  
4 carcinogenic as opposed to changing it to toxic, as  
5 proposed. This was due to the change in the IRIS  
6 classification provided by the EPA, the integrated risk  
7 information system changed the status of  
8 tetrachloroethylene twice in the last four years. It  
9 was a question of timing when we did the change to  
10 intercept the current status.

11 The other area of comment that we received  
12 where we felt the change was appropriate was deleting  
13 reference to DEQ12, the numeric nitrogen standard, as it  
14 was too early, we felt a number of the commenters felt  
15 it was too early to even make reference to DEQ12 until  
16 the board had approved the standards and had a chance  
17 for public comments regarding those standards.

18 That is the extent of the changes. If you  
19 have any questions regarding the DEQ7 or anything  
20 relevant to Subchapter 6, I'd be happy to address it.

21 CHAIRMAN RUSSELL: Thanks.

22 I guess this comes up once in a while where  
23 public comment will, because of the public comment,  
24 you'll modify the rule that was noticed. And just for  
25 the board and always for me, what is within the scope of



1 allowable and where we don't have to go back out there  
2 and redo it, where, you know, there has to be some side  
3 boards on what you can do within the notice?

4 MR. MCNEIL: I defer to John to answer that.

5 MR. NORTH: Mr. Chairman, Members of the  
6 Board, John North, chief legal counsel for the  
7 department.

8 The way the department interprets the scope  
9 of a rulemaking is that if we're proposing, say, a  
10 matter of a standard, of changing a standard by making  
11 it more stringent, then the scope of the rulemaking is  
12 between what the standard is now and what is proposed.  
13 Similarly, if we're making it less stringent within the  
14 same range. For other matters, it's a question of  
15 whether or not it was addressed in the rulemaking and  
16 whether or not it's fairly in response to a comment.

17 CHAIRMAN RUSSELL: So there would be -- so if  
18 you propose something to be less stringent, and for some  
19 reason it's becoming more stringent above what it was in  
20 the existing rule, that could be a conflict?

21 MR. NORTH: That's not something we would  
22 propose that the board do on adoption. We would instead  
23 propose a new rule making to do that or a supplemental  
24 notice.

25 CHAIRMAN RUSSELL: I guess the DEQ12 stuff,

1 was that really necessary to hold off on the nitrogen  
2 stuff?

3 MR. NORTH: David or Rod, could you address  
4 that?

5 MR. MCNEIL: Certainly. As the board is  
6 aware, Mike Suplee has been working for years in the  
7 development of these standards, and we felt, rather than  
8 raise it as a public issue, it was simpler to just  
9 incorporate the change to DEQ7 at the time DEQ12 is  
10 adopted, so do it as an entire package, make it a little  
11 more streamlined and obviate the concerns that the  
12 public had regarding the adoption of the nutrient  
13 standards at this time.

14 CHAIRMAN RUSSELL: Other questions?

15 MR. WHALEN: Mr. Chairman, just so that I'm  
16 clear, Rod, the department's position is that cadmium is  
17 not carcinogenic if it's ingested within water?

18 MR. MCNEIL: Yes.

19 MR. WHALEN: Water vapor, however, if it's in  
20 water vapor --

21 MR. MCNEIL: In water vapor, it does have a  
22 carcinogenic pathway and there is a cancer slope index  
23 associated with inhalation of water vapor. It's a  
24 question of what organ is being exposed to the toxicant.  
25 So the lungs, because of their surface area, apparently

1 are more susceptible to the carcinogenic development on  
2 the cadmium exposure than our other organs.

3 MR. WHALEN: Where would you routinely find  
4 cadmium, where would it routinely be used?

5 MR. MCNEIL: Basically, in mining operations  
6 and in a few milling operations where they work with  
7 high chromium steels, would be the only places where  
8 you'd find them. Chromium and cadmium are used as  
9 modifiers in steels to give them specific tensile  
10 strength properties, so cadmium would only typically be  
11 found in mining operations or milling operations.

12 MR. WHALEN: Thanks, Mr. Chairman. Thank  
13 you, Rod.

14 CHAIRMAN RUSSELL: Any other questions?  
15 Anyone in the audience like to discuss this matter with  
16 the board before we take any action on it?

17 (No response)

18 CHAIRMAN RUSSELL: Seeing none, I would  
19 entertain a motion to amend the rule, amend the rule  
20 with the amendments suggested through the comment  
21 process, adopt the 521 and 311 analyses, the hearings  
22 officer's report and the department's responses to  
23 comments, adopt DEQ7.

24 MR. ANDERSON: Could you discuss the removal  
25 of the manganese standard on footnote 24 a little bit

1 more?

2 MR. MCNEIL: Yes, sir. Manganese was  
3 regulated as a guidance in DEQ7 against a secondary  
4 standard for drinking water. There is what is called a  
5 problem at several levels with that. First of all, it's  
6 not a numeric standard, it's a guidance, it's a  
7 secondary value from the water, not numeric values that  
8 are proposed by the government.

9 Secondly, the numbers are not believed to be  
10 protective at this time. There is a great deal of  
11 research taking place right now. I'm a member of a  
12 federal group, federal state toxicology risk assessment  
13 committee, Fast Track. We're currently considering a  
14 human health advisory for manganese, it's probably two  
15 years away from being completed. But the intent is,  
16 long term, to adopt a human health standard for  
17 manganese.

18 MR. ANDERSON: I don't understand, if we at  
19 least have a reference point, footnote 24, how we are  
20 protecting the health and safety of the public by taking  
21 that out?

22 MR. MCNEIL: The value appears as a footnote  
23 within DEQ7. The issue is that it was developed as a  
24 standard for organoleptic criteria, which is taste and  
25 odor, not human health protection. So we feel that,

1 number one, because it's not a true standard, it's a  
2 secondary proposed standard, it's not appropriate for  
3 DEQ7.

4 And secondly, the more stringent, more  
5 rigorous evaluation of it from the human culture  
6 perspective is taking place and will generate a health  
7 advisory, which will be proposed to the board for  
8 adoption sometime in the next two years.

9 MR. ANDERSON: Okay.

10 CHAIRMAN RUSSELL: I will entertain a motion  
11 to amend the rule with proper amendments to DEQ7, adopt  
12 the presiding officer's report, the House Bill 521 and  
13 311 analyses and the department's responses to comments.

14 MR. MILLER: I so move.

15 CHAIRMAN RUSSELL: Moved by Marv. Is there a  
16 second?

17 MR. MIRES: I'll go ahead and second it.

18 CHAIRMAN RUSSELL: It's been moved and  
19 seconded. Any further discussion?

20 (No response)

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

23 (Response)

24 CHAIRMAN RUSSELL: Opposed.

25 (No response)

1                   CHAIRMAN RUSSELL: The motion carries  
2 unanimously.

3                   I think we're on to Katherine's stuff.

4                   MS. ORR: Mr. Chairman, Members of the Board,  
5 the first item in III C 1 involves the appeal and  
6 request for hearing by Roseburg Forest Products Company.  
7 This is a particle board mill located in Missoula,  
8 Montana. And the department approved of a Montana  
9 ground water pollution control system permit on July  
10 1st, 2010, and Roseburg Forest Products appealed from  
11 that on July 14th, 2010. And the parties have  
12 apparently reached an agreement on the terms of the  
13 permit and have submitted a stipulation for dismissal  
14 and have presented an order for the board to sign  
15 dismissing the case.

16                   CHAIRMAN RUSSELL: Questions for Katherine.

17                   (No response)

18                   CHAIRMAN RUSSELL: Hearing none, I do have an  
19 order of dismissal for the case No. BER 2010-09 WQ. I  
20 would entertain a motion to authorize the board chair to  
21 sign it.

22                   MS. KAISER: I so move.

23                   CHAIRMAN RUSSELL: It's been moved by Heidi.  
24 Is there a second?

25                   MR. WHALEN: Second.

1                   CHAIRMAN RUSSELL:   Seconded by Joe.   Further  
2   discussion?

3                   (No response)

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

6                   (Response)

7                   CHAIRMAN RUSSELL:   Opposed.

8                   (No response)

9                   CHAIRMAN RUSSELL:   The motion carries  
10   unanimously.   Next, Lolo.

11                   MS. ORR:   This is item 2, Lolo Hot Springs,  
12   Lolo, Montana.   A notice of violation and administrative  
13   compliance order was issued on May 31st of 2011.   A  
14   violation letter had gone out on May 22nd from the  
15   department of 2009, stating that this supplier of water  
16   had failed to provide filtration treatment.   And they  
17   failed to do that, so there was a notice of violation  
18   and administrative compliance order filed by the  
19   department.

20                   And the order in the notice of violation  
21   required that there be a compliance plan submitted, a  
22   compliance by a date specified in the plan, and that if  
23   there were a failure to comply with that, there would be  
24   running penalties.   The appeal was filed on June 28th of  
25   2011, and the parties have apparently reached an

1 agreement on compliance with the compliance plan, I  
2 guess. And so they're asking for an order of dismissal  
3 based on their stipulation for dismissal.

4 CHAIRMAN RUSSELL: Thanks.

5 So I'm looking at page 7 of the AOC, which is  
6 the signature page. And Brent Olson apparently signed  
7 this in 2011, which I know is not true. Does that ever  
8 raise any stir when someone doesn't actually put the  
9 correct date on it? I mean, there wouldn't have been 13  
10 months passed on an AOC; right, John? I'm guessing that  
11 is just a mistake by the owner.

12 MR. ARRIGO: Chairman of the Board, my name  
13 is John Arrigo, administrator of the enforcement  
14 division. I cannot comment on an ongoing contested  
15 case. But I can tell you that these AOCs are not  
16 effective until signed by the department. So if there  
17 is a mistake, I guess it doesn't matter if they signed  
18 it and then the department signs it.

19 CHAIRMAN RUSSELL: It just seemed odd that he  
20 put the signature as July 10, 2011, and you guys signed  
21 it August 15th, 2012. I wonder if that is a mistake.

22 MR. ARRIGO: Probably.

23 CHAIRMAN RUSSELL: It wouldn't have been  
24 sitting on somebody's desk for 13 months?

25 MR. ARRIGO: I know I didn't sign the wrong



1 date.

2 CHAIRMAN RUSSELL: With that, I do have an  
3 order of dismissal for case No. BER 2011-09 PWS. And I  
4 would entertain a motion to authorize the board chair to  
5 sign it.

6 MR. ANDERSON: Can I ask a question first?  
7 Has Lolo Hot Springs complied with all of the terms?

8 CHAIRMAN RUSSELL: I wonder if I should just  
9 answer that because I've been through an AOC. You know,  
10 when they basically go to an AOC, they're dumping this  
11 out of the case load, but it still may be ongoing at  
12 their level. So I don't know, John, I don't know how  
13 you feel, John or John.

14 MR. ARRIGO: Mr. Chairman, Mr. Anderson,  
15 after the board dismisses the appeal, I can talk about  
16 the status of the order and whether or not they've  
17 complied. And I'd be happy to do that, get the file  
18 upstairs.

19 MR. ANDERSON: That puts us in a Catch 22.

20 CHAIRMAN RUSSELL: This is the same thing on  
21 the rule 41 that we've dealt with in the past. We  
22 basically have been taken out of the case.

23 MR. ANDERSON: I understand conceptually.

24 MR. NORTH: Mr. Chairman, Mr. Anderson, my  
25 client doesn't know the answer right now. I think we

1 have allotted more latitude by virtue of the fact that  
2 this has been a settled matter. Perhaps we can answer  
3 the question when he knows the answer.

4 CHAIRMAN RUSSELL: Do we want to finish our  
5 part of this, Larry?

6 MR. ANDERSON: Okay.

7 CHAIRMAN RUSSELL: I'll entertain a motion to  
8 authorize the board chairman to sign.

9 MR. ANDERSON: So moved.

10 MR. WHALEN: Second.

11 CHAIRMAN RUSSELL: Moved by Larry and  
12 seconded by Joe. Any further discussion?

13 (No response)

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

16 (Response)

17 CHAIRMAN RUSSELL: Opposed.

18 (No response)

19 CHAIRMAN RUSSELL: The motion carries  
20 unanimously.

21 MR. LIVERS: Mr. Chairman, Members of the  
22 Board, I think Mr. Arrigo has gone to try to get that  
23 information, so he should have it for the board by the  
24 end of the meeting.

25 CHAIRMAN RUSSELL: All right.

1 Katherine.

2 MS. ORR: Mr. Chairman, Members of the Board,  
3 the next matter is in the matter of violation of the  
4 Opencut Mining Act by Ell Dirt Works. And this is a  
5 case involving Ell Dirt Works in Richland County near  
6 Williston. There was a notice of violation in  
7 administrative compliance and penalty order issued on  
8 June 28th, 2011, an appeal was requested on July 28th,  
9 2011.

10 The NOV alleged that the respondent operator  
11 was basically conducting an opencut operation without a  
12 permit. There were 10.2 acres disturbed, and the  
13 administrative compliance portion of the NOV ordered the  
14 operation to cease opencut operations. The penalty  
15 requested by the department was \$14,000, and the penalty  
16 obtained in the AOC is \$13,658.

17 CHAIRMAN RUSSELL: Questions for Katherine?

18 (No response)

19 CHAIRMAN RUSSELL: I have a dismissal order  
20 for case No. BER 2011-11 OC, Ell Dirt Works. So I would  
21 entertain a motion to authorize the board chair to sign  
22 that dismissal order.

23 MR. MILLER: I so move.

24 CHAIRMAN RUSSELL: Is there a second?

25 MS. KAISER: I'll second.

1 CHAIRMAN RUSSELL: Seconded by Heidi.

2 Further discussion?

3 MR. WHALEN: Question, Mr. Chairman. And a  
4 question of Katherine, maybe. So in this case, this is  
5 another administrative order we're stipulating dismissal  
6 of?

7 MS. ORR: Right.

8 MR. WHALEN: We were privy to the outcome in  
9 terms of the fine that was part of the settlement before  
10 passing the stipulation to dismissal, and that's okay?

11 MS. ORR: If I'm understanding your question,  
12 the department is essentially submitting the AOC as a  
13 courtesy. But it's really not necessary. If you're  
14 submitting to the board, it's a joint stipulation for  
15 dismissal, and that should be enough for the board to  
16 determine that it doesn't have jurisdiction. Is that  
17 responsive to your question?

18 MR. WHALEN: I may just be a little slow  
19 today. I'm trying to get the side bars for  
20 administrative order of consents in terms of what, since  
21 the board has removed itself from consideration in the  
22 matter by essentially delegating a hearing, what  
23 information are we entitled to in terms of the process  
24 and outcome prior to the order to dismiss?

25 MS. ORR: Well, Mr. Chairman and Mr. Whalen,

1 as I said, you really, it can be a fairly blind process  
2 where if the parties are saying we got together and we  
3 agree that there should be a dismissal, then the  
4 jurisdiction of the board goes away.

5 And it's interesting to me that this has  
6 never happened, but I think the department could ask for  
7 the continuing jurisdiction of the board to make sure  
8 that the compliance order was complied with, but they've  
9 never done that. They've always asked for dismissal and  
10 then, in essence, relegated compliance with the  
11 administrative order on consent exclusively to  
12 themselves. And I suppose, if there were a violation of  
13 it, they would, I think they would go to district court  
14 in that instance.

15 CHAIRMAN RUSSELL: When you were starting to  
16 say that, that is exactly what I thought, I said that we  
17 have no jurisdiction, it would never come back to us  
18 unless they put us back in. But they couldn't, the DEQ  
19 couldn't put us in. The appeal is made to the board.

20 MS. ORR: Mr. Chairman, in this case, there  
21 is an appeal from the department order, administrative  
22 order to the board, and now the parties are enough in  
23 agreement so that there is an infrastructure of activity  
24 that the department and the petitioner agree they can do  
25 and believe that there is the necessary jurisdiction of

1 another forum like a board or a district court.

2 CHAIRMAN RUSSELL: We get thrown into them  
3 because their only appeal maker is to the board.

4 MS. ORR: Right.

5 CHAIRMAN RUSSELL: So that's why we always  
6 become involved. But that also prompts to try  
7 resolution by the party.

8 MS. ORR: Mr. Chairman, we haven't gotten to  
9 SK Construction yet, but I do have their administrative  
10 order on consent, if you want me to pass that out.

11 MR. ANDERSON: I mean, I'm just sort of  
12 assuming, I guess I've assumed all along in this  
13 process, based on the department's experience enforcing  
14 these regulations and dealing with the parties that  
15 they're dealing with, that they're not going to enter  
16 into a consent and a dismissal unless the offending  
17 party has complied with the terms of the consent. That  
18 just makes sense to me. I don't know if it makes sense  
19 to the department, but I've just assumed that's how they  
20 operate. Is that right, John?

21 MR. NORTH: I'm sorry. Again, excuse me,  
22 Mr. Chairman. Mr. Anderson, the question is?

23 MR. ANDERSON: I've been operating on the  
24 basic assumption, when we are provided with an order of  
25 dismissal from an appeal of a decision, a violation that

1 you all have issued, that when there is a resolution  
2 that calls for some performance on behalf of the  
3 offending party, that performance has been executed, or  
4 you have some very specific assurances that will be  
5 before you -- before this comes to us.

6 MR. NORTH: Mr. Chairman, Mr. Anderson, yes.  
7 And commonly, what it is and, again, with the case of  
8 the Lolo Hot Springs dismissal, you've seen the  
9 administrative order on consent, so we have an order  
10 that's effective that they've agreed to. And if they  
11 violate it, then we go forward with a new action that  
12 basically alleges the violation of failing to comply  
13 with the administrative order and consent. And we could  
14 do it, as Katherine said, by going to district court, or  
15 we could come back to the board. Well, we would issue a  
16 penalty order, and that might come back to the board if  
17 they choose to appeal that penalty order.

18 And as a matter of fact, in the Lolo case, it  
19 actually specifically provides that if they fail to  
20 comply with the administrative order, we would seek  
21 penalties in accordance with the section in the Water  
22 Quality Act that provides for administrative penalties.  
23 And by the way, the administrative order on consent in  
24 that case says that they have to upgrade and have their  
25 well in place and operating in accordance with the specs

1 by December 15th. So the time for performance isn't up  
2 yet, and we've not received anything from them to yet  
3 indicate that they do have it in place, but they still  
4 have some months to do that.

5 CHAIRMAN RUSSELL: Having gone through the  
6 other side of this, I know it pretty well. And we did  
7 such a wonderful job. John is back there smiling.

8 We do have a motion and a second to this  
9 dismissal order. Any further discussion?

10 (No response)

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

13 (Response)

14 CHAIRMAN RUSSELL: Opposed.

15 (No response)

16 CHAIRMAN RUSSELL: Motion carries  
17 unanimously. That is for BER 2011-11.

18 Katherine.

19 MS. ORR: Mr. Chairman, Members of the Board,  
20 the next item 4 involves violations of the Water Quality  
21 Act by SK Construction. And I do have the  
22 administrative order on consent, if you all want to see  
23 that. Right here. This is a case out of Roosevelt  
24 County. There is a notice of violation in  
25 administrative compliance and penalty order dated August



1 1st of 2011 that was issued by the department. In that,  
2 the department alleged that the respondent violated the  
3 permit that was issued, this is a water quality permit,  
4 a general discharge storm water permit for storm water  
5 discharges associated with construction activities.

6 And the violation was the failure to use best  
7 management practices to minimize or prevent a discharge  
8 of significant sediment to state waters. And there was  
9 allegedly a significant discharge of sediment to Little  
10 Muddy Creek and Red Bank Creek. The penalty requested  
11 was \$16,800, and the penalty agreed to was \$15,400, and  
12 then there is some compliance matters that are taken  
13 care of in this AOC.

14 CHAIRMAN RUSSELL: Thank you. I do have an  
15 order of dismissal for Case No. BER 2011-20 WQ. I would  
16 entertain a motion to authorize the board chair to sign  
17 it.

18 MR. MIRES: So moved.

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

21 MS. KAISER: I'll second.

22 CHAIRMAN RUSSELL: Seconded by Heidi.  
23 Further discussion?

24 MR. WHALEN: Would you mind passing one of  
25 those AOCs?

1 CHAIRMAN RUSSELL: Do you want us to wait?

2 MR. WHALEN: No.

3 CHAIRMAN RUSSELL: It's been moved and  
4 seconded. All those in favor, signify by saying aye.

5 (Response)

6 CHAIRMAN RUSSELL: Opposed.

7 (No response)

8 CHAIRMAN RUSSELL: Motion carries  
9 unanimately.

10 Katherine.

11 MS. ORR: Mr. Chairman, Members of the Board,  
12 the next item 5 is entitled, in the matter of violation  
13 of the Opencut Mining Act by the City of Ronan at Ronan,  
14 Lake County. This is a case where an NOV and  
15 administrative compliance and penalty order was issued  
16 on October 28th of 2011. It was appealed on  
17 November 25th of 2011. The underlying allegation was  
18 that no annual progress report or severance fees for  
19 calendar year 2010 were done, and there was a penalty  
20 requested of \$480. And the stipulation says that all of  
21 the provisions of the administrative compliance and  
22 penalty order were fully satisfied. So you have before  
23 you a 41 A dismissal request.

24 CHAIRMAN RUSSELL: I have a dismissal order  
25 for Case No. BER 2011-23 OC. And I would entertain a

1 motion to authorize the board chair to sign it.

2 MR. WHALEN: So moved.

3 CHAIRMAN RUSSELL: It's been moved by Joe.

4 Is there a second?

5 MR. ANDERSON: Second.

6 CHAIRMAN RUSSELL: It's been moved and

7 seconded. Any further discussion?

8 (No response)

9 CHAIRMAN RUSSELL: All right, hearing none,  
10 all those in favor, signify by saying aye.

11 (Response)

12 CHAIRMAN RUSSELL: Motion carries.

13 MS. ORR: Go on to the next one, which is in  
14 the matter of violation of the Opencut Mining Act by  
15 Russell Olsen at PaveCo Pit, Flathead County. This is a  
16 case where a notice of violation and administrative  
17 order was issued to Mr. Olsen on January 3rd of 2012.  
18 He appealed it on July 1st of 2012.

19 The allegations in the NOV and administrative  
20 order say that he was an operator and in possession of  
21 an Opencut Mining Act permit, but he failed to provide a  
22 progress report or severance fees for calendar year  
23 2010. And the administrative order portion of the NOV  
24 orders Mr. Olsen to submit an annual progress report and  
25 the severance fee and pay a penalty of \$480. And this

1 is a case where the department moved to dismiss this  
2 appeal on the basis that the appeal was not timely. And  
3 I issued a recommended order of dismissal, and before  
4 you today is an order dismissing the case. And,  
5 interestingly, it goes into this process that we were  
6 just talking about, which is what happens when you  
7 dismiss a case.

8           And the recommended order for the board's  
9 signature goes into that specifically. It says the case  
10 is dismissed and, therefore, Mr. Olsen is ordered to  
11 comply with the administrative order portion of the NOV  
12 and the administrative order. So that is what happens.  
13 Whatever existed before the appeal, then, is the  
14 document that dictates what the compliance should be.  
15 And in this case, it's an order to submit an annual  
16 progress report and severance fees and to pay the  
17 penalty. And there are time lines in that  
18 administrative order, and so in this order of dismissal,  
19 it states that the time lines start running as of the  
20 date of execution of the chairman on behalf of the  
21 board.

22           And it's also worth it to note that Mr. Olsen  
23 didn't participate at any stage, he didn't submit a  
24 response to the motion to dismiss. He was also, in the  
25 proposed order of dismissal that I wrote, just to err on

1 the side of caution, given the ability to file  
2 exceptions and to argue those exceptions to the board  
3 today. And he didn't do that.

4 CHAIRMAN RUSSELL: So he elected not to be a  
5 party to this action, so you're going to dismiss it.  
6 And the order is going to say you still owe \$480?

7 MS. ORR: Right.

8 CHAIRMAN RUSSELL: And you have some stuff to  
9 do, but, guess what, BER is not going to be involved any  
10 further, so then DEQ has to take this matter up  
11 somewhere else.

12 MS. ORR: Right. It's kind of interesting  
13 that the period under the statute to file an appeal is  
14 30 days from service of the order. And Mr. Olsen signed  
15 the post office slip where you acknowledge receipt right  
16 away after that was issued. So the 30-day clock was  
17 running, started running in January, but he appealed in  
18 July.

19 CHAIRMAN RUSSELL: So your order and the  
20 board's order will be delivered to him.

21 MS. ORR: Yes.

22 CHAIRMAN RUSSELL: Does he get a little note  
23 on the front of it that says, you've got to get this  
24 resolved? Apparently, he doesn't think it's that  
25 important. Any other questions?

1 MS. ORR: You know, it does trigger the  
2 question of, and I did not put this in the board's  
3 order, his right to take this to district court. So it  
4 might be good to submit a cover letter with it when I do  
5 send it out.

6 CHAIRMAN RUSSELL: Because if the  
7 department's going to want to rectify the situation,  
8 this is not a matter, if we dismiss it, based on your  
9 order and then our order dismissing the case, then the  
10 department's own next step is district court.

11 MS. ORR: Or his.

12 CHAIRMAN RUSSELL: Or his.

13 MS. ORR: If he doesn't comply, the  
14 department can go to district court to apply the terms  
15 of this order, or he can appeal it.

16 CHAIRMAN RUSSELL: File a complaint, I've  
17 accepted it. If he doesn't show, he's in contempt.

18 MR. ANDERSON: The district court is bound by  
19 the findings of the department and his own remedy as a  
20 question of law, and this is pretty objective in terms  
21 of the question of law, he really doesn't have a case in  
22 district court.

23 MS. ORR: No.

24 CHAIRMAN RUSSELL: It doesn't unless he  
25 resolves it on his own, based on the orders or the

1 department's going to have to file. In a few more  
2 minutes, I won't have to worry about it.

3 MS. ORR: It can be written, Mr. Chairman, so  
4 that the board has continuing jurisdiction.

5 CHAIRMAN RUSSELL: I don't think that that's  
6 necessary. You know, year after year we have issues  
7 around not holding up to the 30 days that you have to  
8 appeal. I think it's fine, unless the board feels that  
9 they want to maintain jurisdiction and doesn't want to  
10 sign it. I would recommend not doing that.

11 MR. WHALEN: I think we have enough  
12 redundance built into this process as it is.

13 CHAIRMAN RUSSELL: That's a good discussion.  
14 We've had some really good discussions around contested  
15 cases today. I do have a final order on motion to  
16 dismiss for Case No. BER 2012-07 OC. And we'll  
17 entertain a motion to authorize the board chair to sign.

18 MS. KAISER: I move.

19 CHAIRMAN RUSSELL: Heidi is accepting the  
20 challenge. Is there a second?

21 MR. MILLER: I'll second.

22 CHAIRMAN RUSSELL: Seconded by Marv. Any  
23 further discussion?

24 (No response)

25 CHAIRMAN RUSSELL: Hearing none, all those in

1 favor, signify by saying aye.

2 (Response)

3 CHAIRMAN RUSSELL: Opposed.

4 (No response)

5 CHAIRMAN RUSSELL: Motion carries  
6 unanimately.

7 MR. LIVERS: Mr. Chairman, I might try to  
8 offer a little context for the board members in terms of  
9 dismissal. If I'm legally imprecise, I would ask for  
10 Katherine or perhaps John's help in clarifying. But  
11 with respect to information on dismissal of cases, there  
12 was quite a discussion on this a few years back before  
13 the current makeup of the board. And we looked at Rule  
14 41 A of the Rules of Civil Procedure, and essentially,  
15 as we stated today, if the case is dismissed under that,  
16 it's really not the business of the board anymore, the  
17 jurisdiction.

18 There was quite a bit of discussion that  
19 prompted that in terms of some of the terms of  
20 settlement at the time. What the department does, as a  
21 courtesy to the board, is provide the terms of the  
22 settlement so the board is aware of those, that  
23 information. And I think we have maybe some  
24 juxtaposition today of, say, Lolo and Ell Works where,  
25 in the latter, there was a specific penalty associated



1 with the action and carried through to the settlement.  
2 In the case of Lolo, there was not a penalty, it was  
3 just more action that needed to be taken. So it might  
4 appear that there is differing amounts of information  
5 provided in the question of why there might be more  
6 information on one and less on another, but really it's  
7 just the nature of the terms of the consent order, the  
8 settlement differed in those cases.

9           And although, under that, under Rule 41 A,  
10 the board doesn't have that jurisdiction to weigh the  
11 terms of the settlement, we will continue to provide  
12 them to the board as a courtesy so you can see how these  
13 things are settling out. And I think it does help the  
14 board get a sense of where these are going and maybe  
15 some sense of whether it feels the department is  
16 appropriate to settle.

17           I guess I would ask Katherine if there is  
18 anything that either needs further clarification, I  
19 think that I got that essentially correct, but if there  
20 is anything legally precise you want to comment on.

21           MS. ORR: I don't have anything to add.

22           CHAIRMAN RUSSELL: John Arrigo.

23           MR. ARRIGO: Mr. Chairman, Members of the  
24 Board, just to help answer Mr. Anderson's question a  
25 little more, these orders on consent are to resolve the

1 appeal. They often contain compliance schedules that  
2 may run years for construction or whatever of certain  
3 things. So after it leaves the board's jurisdiction, we  
4 still maintain that compliance with them.

5 Thank you.

6 CHAIRMAN RUSSELL: Good discussions on this  
7 stuff today.

8 So we have some new contested cases.  
9 Katherine.

10 MS. ORR: Mr. Chairman, Members of the Board,  
11 in III D 1, a new case in the matter of violation of the  
12 Montana Strip and Underground Mine Reclamation Act by  
13 Signal Peak Energy, LLC at Bull Mountain Mine No. 1,  
14 Roundup, in Musselshell County. Signal Peak Energy is  
15 operating an underground coal mine, which is called Bull  
16 Mountain Mine No. 1 and is therefore an operator.

17 And the violations that are listed in the  
18 Notice of Violation are to the effect that Signal Peak  
19 constructed bore holes 37 and 43 without receiving prior  
20 department approval, in other words, approval under the  
21 compliance plan and the permit. Signal Peak violated  
22 permit conditions and ARM 17.24.213. There is a failure  
23 to construct in accordance with permit conditions as far  
24 as installation of a fuel tank that was not in  
25 accordance with the permit, and there is an unapproved

1 road and drill pad construction and specifically roads  
2 constructed in the bottom of dry coolies. Penalty  
3 sought is \$47,925. What I didn't tell you is the date  
4 of the NOV, which I can. Do you want me to tell you  
5 that? I didn't write that down.

6 CHAIRMAN RUSSELL: It goes from 48 to  
7 \$47,000, what is the big deal?

8 MR. WHALEN: If I may ask you, what is the  
9 date of the NOV?

10 MS. ORR: Let me look that up. I can tell  
11 you in just a second. It is June 21st, 2012.

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

14 CHAIRMAN RUSSELL: Let's decide what we'll do  
15 with this for discussion. I would entertain a motion to  
16 assign Katherine as hearings examiner on this case.

17 MR. MIRES: So moved.

18 CHAIRMAN RUSSELL: Is there a second?

19 MR. MILLER: I'll second it.

20 CHAIRMAN RUSSELL: Further discussion?

21 MS. KAISER: I would just like to recuse  
22 myself from taking part in that.

23 MR. WHALEN: I guess I've got to have a  
24 comment, I'll try not to get out of line. Just let me  
25 know, Katherine, if I do. It seems as though we seem to

1 be revisiting violations by this organization on a  
2 repeated basis. We refer the matter to the hearings  
3 examiner, yet we get more violations. And I'm wondering  
4 if maybe it's time to bring this before the board to  
5 listen to them and to bring them before the board to  
6 answer for the violations. Because at this point, they  
7 haven't done that except through our hearings examiner.

8 CHAIRMAN RUSSELL: Larry.

9 MR. MIRES: Are you referencing the Signal  
10 group in particular?

11 MR. WHALEN: Signal Peak.

12 MR. MIRES: Signal Peak. Good point.

13 MS. ORR: I have a question, if I may. Were  
14 you referring, Mr. Whalen, to doing that outside of this  
15 contested case process or within it?

16 MR. WHALEN: Within.

17 MS. ORR: Understood, then.

18 MR. WHALEN: I'm basically arguing for a  
19 hearing, a public hearing.

20 MS. ORR: A contested case hearing?

21 MR. WHALEN: Yes.

22 MR. MIRES: Would that help reduce their  
23 violations that we see on them, do you think?

24 MR. WHALEN: I think, to be fair, it's a  
25 possibility. We could continue to hear these violations

1 and to delegate these matters to the hearings examiner  
2 or we can invite this organization before the board to  
3 answer on their appeal to the board.

4 MR. MIREs: Just a comment here. I doubt, my  
5 opinion, seriously, regardless of what route you travel  
6 with these individuals, that it will make any difference  
7 at all. I think it would still stay the same number of  
8 violations that they will continue to do. It's just  
9 historic with them. That's just my experience. Just a  
10 thought. But that's not to say that it may not have a  
11 positive effect.

12 MR. WHALEN: I have the same sense that you  
13 do. I'm not privy to what the previous settlements have  
14 been with them on their violations. And whether that's  
15 a matter of public record, once it's assigned, or not, I  
16 think that's a matter that may bear on future behavior  
17 by the organization, too, these repeated violations.

18 Katherine, am I out of line there? Have we  
19 been made aware of the settlements once we have referred  
20 these cases to you?

21 MS. ORR: Mr. Chairman, Board Member Whalen,  
22 I can find those for you from the previous cases. The  
23 AOCs, for example, or the disposition.

24 MR. WHALEN: I should probably direct this  
25 question to Mr. Chairman: Are we made aware of what

1 these compliance settlements are once we have delegated  
2 them to the hearings examiner in the past?

3 CHAIRMAN RUSSELL: Anything that Katherine  
4 generates is record, and I believe we get a pretty good  
5 record of this. If we don't, we can certainly request  
6 it.

7 MS. ORR: May I respond?

8 CHAIRMAN RUSSELL: Sure.

9 MS. ORR: By law under MAPA, I can only make  
10 recommendations. It's the board that makes the final  
11 decision. And if there were a recommended decision on a  
12 penalty, for example, by me, there would be an  
13 opportunity for Signal Peak to file exceptions and argue  
14 it before the board, or they would not, and the board  
15 would review the determination, the recommended order on  
16 that, assuming they are liable for penalties and make  
17 its independent decision. That's the way MAPA is  
18 designed.

19 MR. WHALEN: You've refreshed me. Typically  
20 what we get in a case like this is a stipulation for  
21 dismissal, and that doesn't include the terms or hasn't  
22 historically included the terms of the agreement.

23 CHAIRMAN RUSSELL: Well, if it went to  
24 completion through our hearings examiner. I think that  
25 where we don't is when the parties get together and say,

1     okay, let's get the board out and we're going to  
2     stipulate it.  If Katherine takes it through to the end  
3     and the parties literally argue it to the end and expect  
4     that the board will literally execute some order upon  
5     them, then we would have a full record from Katherine.  
6     But when Katherine only represents the board, then all  
7     of a sudden we get dumped out, and that's why there is  
8     such discrepancy in what appears to be the record.  I'm  
9     not making any qualification on good or bad, it's just  
10    how it happens.

11                 So it really is, if we have a full record,  
12    it's because Katherine has brought the record  
13    recommended.  She may have executed some orders before  
14    that, but there will be an order by the board in the  
15    finalizing the hearing.

16                 MR. WHALEN:  That answers my question.

17                 MS. ORR:  That's right.

18                 CHAIRMAN RUSSELL:  So we still have a  
19    question.

20                 MR. MILLER:  I was just going to make a  
21    comment.  I think, Joe, to your comment, too, is under  
22    this penalty calculation summary, they have a Section 5  
23    that is the history, and they've got nailed an  
24    additional 15 percent because of previous violations.  
25    So it seems like, to me, there is some action there that

1 is getting a little more severe each time. Maybe it's  
2 not severe enough. But they did take that into account.

3 CHAIRMAN RUSSELL: We have to be careful if  
4 we step out because one of the parties isn't being  
5 represented right now. The department, the one party is  
6 here. And one of the things I would ask Katherine,  
7 because I can't ask the parties, is generally something  
8 like this is going to take some time.

9 MS. ORR: That's correct.

10 CHAIRMAN RUSSELL: Maybe a year or plus.

11 MS. ORR: That's possible, Mr. Chairman. You  
12 know, it's a case where there's a larger number of  
13 requested penalties, so there might be discovery on how  
14 the penalties were derived or whatever.

15 CHAIRMAN RUSSELL: And the only concern I  
16 have, because this intrigues me to hear this in person,  
17 is the logistical nightmare of a case like this. The  
18 ones that we've been doing aren't really that difficult.  
19 This one could be, there would be a lot, which has  
20 already been said, there could be a lot of material  
21 introduced --

22 MS. ORR: That's right.

23 CHAIRMAN RUSSELL: -- in support of the  
24 parties on this, which may make it very difficult for us  
25 to do anything, unless we do it this way, that we



1 literally just don't assign. That leaves you in that  
2 interim position, see how it progresses, and then maybe  
3 take it up in a little while. We've done that in the  
4 past. That leaves the door open for us to take it or  
5 not give it, we would keep it. That would allow  
6 Katherine the latitude to work outside of our  
7 limitations, meetings, and it would progress.

8 I just feel that I don't want to be in the  
9 department's way, and specifically, maybe I shouldn't  
10 make this statement, in the department's way of  
11 expediting a conclusion to this case. Because they're  
12 the ones that want this thing rectified. The other  
13 party, maybe not so much. And so maybe we just don't  
14 take any action, we leave you in the interim slot. That  
15 gives you all powers to continue to act on behalf of the  
16 board. Are you good with that?

17 MR. WHALEN: We have a motion on the floor to  
18 go ahead and assign.

19 CHAIRMAN RUSSELL: Right. No, we won't  
20 assign a permanent hearings officer and we can actually  
21 take action on the motion on the floor, but we don't  
22 want to take an affirmative on it. So we do have a  
23 motion. All those in favor signify by saying aye.

24 (Response)

25 CHAIRMAN RUSSELL: Opposed.

1 (No response)

2 CHAIRMAN RUSSELL: So, Katherine, you'll just  
3 keep doing your job and we'll keep moving ahead.

4 MS. ORR: Yes.

5 MR. LIVERS: Mr. Chairman, just one  
6 consideration on the board on hearings, I don't know the  
7 schedule on which this would proceed. It would prove  
8 some challenges for the department if the board ends up  
9 hearing this during the legislative session, that's a  
10 difficult time for us to schedule. I just wanted to  
11 make that point. Thank you.

12 CHAIRMAN RUSSELL: I'm very sympathetic to  
13 the department's position on that, I don't mind saying  
14 that. No offense to those who recuse themselves.

15 The last one -- no, we have two left.  
16 Request for hearing by Hawthorne Springs Property Owners  
17 Association.

18 MS. ORR: Mr. Chairman, Members of the Board,  
19 I won't go through the title of this. This is item 2 in  
20 II D, and this regards an opencut mining permit  
21 application taking place in Missoula County for Farwest  
22 Rock Products and Hawthorne Springs residential  
23 subdivision and property owners who were adjacent to the  
24 proposed mining operation and are objecting to it. And  
25 they're objecting to the way that the plan of operation

1 says, and their concern that Farwest may relocate or  
2 expand, and then the plan of operation would be  
3 insufficient. And that's what this case involves.

4 And I did look up in the statute, and this  
5 does appear to be a process afforded by the statute  
6 unless a party argues convincingly otherwise.

7 CHAIRMAN RUSSELL: So Hawthorne Springs  
8 property owners are concerned about the operation  
9 itself, hours, times, stuff.

10 MS. ORR: What they're alleging is the  
11 opencut mining mine was going to be a half a mile from  
12 the subdivision. Then it was moved further away, and  
13 there is a plan of operation issued. And the new  
14 location, then, disallowed the surrounding landowners  
15 from participating in the public hearing where they  
16 could comment on the plan of operation.

17 And the petitioners are concerned that the  
18 plan of operation doesn't prohibit moving back within  
19 the half mile and operations to begin when the adjoining  
20 subdivision owners then wouldn't have any say at all in  
21 the conduct of this opencut mining.

22 CHAIRMAN RUSSELL: It's interesting that  
23 different rules use different ways of determining  
24 distance, some are the property line, like with sewers,  
25 if you need a public sewer or put a septic system. So

1 this one is actually a half mile from the operation  
2 itself?

3 MS. ORR: Initially it was allegedly under  
4 the new placement of the mine. It's further than a half  
5 a mile.

6 CHAIRMAN RUSSELL: So they don't have to  
7 comment?

8 MS. ORR: Right, they wouldn't be allowed to.

9 CHAIRMAN RUSSELL: They wouldn't be allowed  
10 to comment.

11 MS. ORR: Right.

12 CHAIRMAN RUSSELL: But why would they  
13 allegedly be able to move back within a half a mile when  
14 the law is supposed to protect the property owners?

15 MS. ORR: That is something to look at.

16 MR. WHALEN: Mr. Chairman, I have a question  
17 for Katherine. There must be some sort of land use plan  
18 or regulation in the County of Missoula that the  
19 property owners could address in this case, wouldn't  
20 there be, that concern of this plan of operation sort of  
21 morphing into a much larger and relocated plant? I  
22 guess my question is wouldn't these property owners have  
23 a more local recourse such that the board doesn't need  
24 to get involved with it?

25 MS. ORR: Mr. Chairman, Mr. Whalen, what I

1 would say, they have invoked the jurisdiction of the  
2 board to help sort it out.

3 MR. WHALEN: Okay.

4 CHAIRMAN RUSSELL: It appears the property is  
5 unzoned.

6 MR. MILLER: I think I saw that somewhere in  
7 this verbiage. I'm trying to find it.

8 CHAIRMAN RUSSELL: So, Katherine, are you  
9 chomping at the bit to have this one?

10 MS. ORR: Sure.

11 CHAIRMAN RUSSELL: Can't wait, can you?

12 I would entertain a motion to appoint  
13 Katherine the permanent hearings examiner on this.

14 MR. ANDERSON: So moved.

15 CHAIRMAN RUSSELL: Moved by Larry Anderson.  
16 Is there a second?

17 MS. KAISER: Second.

18 CHAIRMAN RUSSELL: Heidi seconded. Any  
19 further discussion?

20 (No response)

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

23 (Response)

24 CHAIRMAN RUSSELL: Opposed.

25 (No response)

1                   CHAIRMAN RUSSELL: Question for the  
2 department: How many opencut mining specialists do you  
3 have right now? It used to be you had two, one in the  
4 west and one in the east.

5                   MR. LIVERS: I'm not sure, Mr. Chairman, that  
6 I can answer exactly. It's more than that. We still  
7 have one based in our Kalispell office, one or two in  
8 our Billings office and at least a couple here. We did  
9 broker an agreement with several parties. Opencut  
10 legislation is typically pretty controversial. And we  
11 were able to -- well, there were several parties that  
12 worked during the 2009 session, I think, that the  
13 industry was willing to have a volume fee imposed on  
14 itself. In exchange, those fee revenues would be used  
15 for additional staffing for the program. It was one of  
16 the few industries that didn't have any kind of fee  
17 mechanism to support regulation of the industry. And so  
18 we were able to add a couple of permit specialists at  
19 that time. I think we're still feeling the crunch a  
20 little bit. We were able to substantially, as a result  
21 of that, reduce backlog. At the time, we had 300  
22 applications backlogged. It's now down to single digits  
23 and probably would be eliminated if it were not for the  
24 increased demand for eastern Montana. We do have some  
25 additional staffing there, which is still a little bit

1 of a stretch there with the new activity with all the  
2 gravel required for drilling pads and access roads and  
3 plus construction in general.

4 CHAIRMAN RUSSELL: I remember back in the day  
5 when there was two. It was crazy. Okay.

6 Katherine, anything else?

7 MS. ORR: Not on that item.

8 CHAIRMAN RUSSELL: Before we go to general  
9 public comments --

10 MS. ORR: There is one other case.

11 CHAIRMAN RUSSELL: Sorry about that.

12 MS. ORR: This will go quickly, I believe.

13 This is in the matter of the request for hearing by  
14 Earth Justice, Montana Environmental Information Center,  
15 Sierra Club, and the National Wildlife Federation. It's  
16 an appeal on the provision of an administrative order on  
17 consent.

18 CHAIRMAN RUSSELL: Katherine, I don't think  
19 we actually took up the last item.

20 MS. ORR: I think you did, actually.

21 CHAIRMAN RUSSELL: Did we?

22 MS. ORR: Yes.

23 CHAIRMAN RUSSELL: Okay. Keep going, then.

24 MS. ORR: Anyway, this is an appeal from an  
25 administrative order on consent that the department

1 entered into at Coal Strip with PP and L. They're  
2 objecting to many things, and I can go through some of  
3 those, if you want. But under 75.10.223, I have been  
4 informed that it looks like there has been a request by  
5 PP and L, Montana, to proceed to district court. And  
6 75.22.223 does allow that under certain circumstances,  
7 and the jurisdiction of the board then is removed  
8 automatically.

9 And this is the first I've seen this today,  
10 the election of PP and L to proceed to district court.  
11 I'm just telling you that this may be a lengthy  
12 proceeding, if somehow, if there is an effective  
13 objection to this request, or it could be a very short  
14 proceeding, if in fact this procedure has been followed  
15 correctly and there is no objection and that sort of  
16 thing. So what you might want to do is just not do  
17 anything right now and see what happens.

18 CHAIRMAN RUSSELL: So would both parties have  
19 to concur? Because it sounded like just PP and L could  
20 petition for it.

21 MS. ORR: To be honest, I have to review the  
22 statute to see how it works again. This happened in the  
23 Mattel case, I don't know if you remember. And in that  
24 case, there was an affirmative motion to take it out of  
25 the jurisdiction of the board, and hopefully that will



1 happen here.

2 MR. LIVERS: Mr. Chairman, one party may, you  
3 don't need the concurrence of both.

4 CHAIRMAN RUSSELL: Just one party.

5 MS. ORR: It does put venue in the county  
6 where the company is. So that's one of the effects of  
7 this.

8 MR. WHALEN: Mr. Chairman, question for  
9 Katherine. In the event that PP and L hadn't petitioned  
10 district court to hear this matter, is this something  
11 that could lawfully come before the board for  
12 consideration, a thirt party appealing an administrative  
13 order on consent?

14 MS. ORR: You know, I think it's better not  
15 to answer that. That's a legal question yet to be  
16 resolved or challenged.

17 MR. WHALEN: Okay. Thank you.

18 CHAIRMAN RUSSELL: So do we just kind of let  
19 this die on the vine, or should we take an action?

20 MS. ORR: What I would recommend is we do  
21 what we did before with the Signal Peak case. Not  
22 assign it, but see what happens.

23 CHAIRMAN RUSSELL: All right. So I'll  
24 entertain a motion not to assign this, leave it under  
25 the jurisdiction of the board.

1 MR. ANDERSON: So moved.

2 MR. MIRES: Second.

3 CHAIRMAN RUSSELL: That would be an  
4 affirmative vote to there.

5 MS. KAISER: I need to recuse myself from not  
6 taking actions.

7 CHAIRMAN RUSSELL: Duly noted.

8 All those in favor of having the board  
9 maintain jurisdiction at this time, signify by saying  
10 aye.

11 (Response)

12 CHAIRMAN RUSSELL: Opposed.

13 (No response)

14 CHAIRMAN RUSSELL: Motion carried  
15 unanimously.

16 MS. ORR: Mr. Chairman, I'm just asking, is  
17 this, on this latest procedural act where there is a  
18 notice to the board that the jurisdiction is now being  
19 changed to the jurisdiction of the district court, I  
20 assume there is going to be a bit of a motion's practice  
21 on that, although I don't know.

22 CHAIRMAN RUSSELL: Most to practice, you  
23 mean?

24 MS. ORR: A motion to practice. In other  
25 words, there might be a response to this by Earth

1 Justice and these other parties, I don't know, or a  
2 motion from the department, who knows. But would you  
3 want me to call a telephonic meeting like we did on that  
4 or do you want me to rule on it?

5 CHAIRMAN RUSSELL: First of all, question for  
6 you, if a party, because the law allows a party to move  
7 this to district court, can that decision be appealed  
8 and who does it, I mean, is it appealed at the district  
9 court level?

10 MS. ORR: The decision to change the  
11 jurisdiction?

12 CHAIRMAN RUSSELL: Change venue.

13 MS. ORR: Well, I think it can't be appealed  
14 right away, but it might be a matter on appeal -- you  
15 mean to the Montana Supreme Court?

16 CHAIRMAN RUSSELL: No. A decision to move  
17 this to a new venue to a district court, not out of  
18 ours. Can that motion be appealed?

19 MS. ORR: It can be challenged at this forum.

20 CHAIRMAN RUSSELL: Challenged.

21 MS. ORR: Perhaps. The statute might be so  
22 crystal clear that no one is going to challenge it.

23 CHAIRMAN RUSSELL: So if one party says,  
24 because of the type of case this is --

25 MS. ORR: And the wording in the statute, it

1 may be that it will automatically go to the district  
2 court. If I were in charge of this, I would say to the  
3 parties, okay, I need an affirmative motion dismissing  
4 this action at this stage, at this forum.

5 CHAIRMAN RUSSELL: Since you're still acting  
6 on our behalf while we aren't in meetings, I think you  
7 would -- and if you need to brief us before, if you feel  
8 a decision should be made by the entire board, I'm sure  
9 you'll let us know.

10 MS. ORR: I will err on the side of doing  
11 that.

12 CHAIRMAN RUSSELL: Makes sense? Okay. Nice  
13 job.

14 Now comes the time of the meeting that we  
15 will accept general public comment on those items that  
16 have jurisdiction of the Board of Environmental Review.

17 (No response)

18 CHAIRMAN RUSSELL: We'll keep moving, then.  
19 Anything else for the board?

20 (No response)

21 CHAIRMAN RUSSELL: Anything that you feel we  
22 need to know for tomorrow morning?

23 MS. ORR: That's a good question.

24 CHAIRMAN RUSSELL: Just as a matter of the  
25 board hearing a contested case in person.

1 MS. ORR: I can't go into too much because we  
2 have a party here. But like I was saying earlier, it  
3 does appear that the petitioner is going to appear.  
4 There has been no discovery of him, so it's going to be  
5 interesting.

6 CHAIRMAN RUSSELL: We'll just let him stand  
7 up there and give us his side of the story.

8 MS. ORR: I guess.

9 CHAIRMAN RUSSELL: I get that every day at my  
10 office. Anything else?

11 (No response)

12 CHAIRMAN RUSSELL: So just so we know,  
13 tomorrow morning we start at 9:00.

14 I entertain a motion to adjourn.

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

16 CHAIRMAN RUSSELL: Moved by Joe. Is there a  
17 second?

18 MR. MILLER: Second.

19 CHAIRMAN RUSSELL: Seconded by Marv. All  
20 those in favor, signify by saying aye.

21 (Response)

22 CHAIRMAN RUSSELL: Opposed.

23 (No response)

24 CHAIRMAN RUSSELL: We are adjourned.

25 (Whereupon, the taking of the hearing was concluded at

1 4:30 PM.)

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C E R T I F I C A T E

I, Susan Johnson, Registered Professional  
Reporter, do hereby certify:

That the foregoing hearing was taken before me  
at the time and place herein named, that the hearing was  
reported by me and that the foregoing \_\_\_\_\_ pages  
contain a true record of the testimony of the witness to  
the best of my ability.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

\_\_\_\_\_

SUSAN JOHNSON