

## OFFICIAL RECORD OF PROCEEDINGS

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Missoula City-County Board of Health  
August 20, 2009

**Board Members Present:** Dr. Garon Smith (Chair), Jean Curtiss, Dr. Alan Gabster, Renee Mitchell, and Eileen Sansom

**Board Members Excused:** Dr. Sandy Kuntz (Vice Chair) and Ross Miller

**Staff Members Present:** Health Administration: Julie Mohr; Environmental Health: Jim Carlson, Erik Englebert (Items 1 and 2), Mary Lou Gilman (Item 1), and Shannon Therriault (Items 1 and 2); Health Promotion: Greg Oliver (Items 4 - 6); and Health Services: Julie Serstad (Item 1)

**Legal Counsel Present:** Marnie McClain (Chief Civil Deputy County Attorney)

**Others Present:** Item 1 only—Colleen Dowdall, Dr. Dana Headapohl, Julie Lake, Dr. Lawrence (Larry) Martin, Fred Stewart, and John Tabaracci; for multiple items—Ruth Licitra, Michael Moore, Bob Reid, Ron Scholl, and Daniel Westberg

### MEETING CALLED TO ORDER

Dr. Garon Smith called the meeting to order at 2:47 p.m.

### ITEM 1 HEARING: APPEAL OF NOTICE OF VIOLATION AND ORDER TO TAKE CORRECTIVE ACTION ISSUED TO DR. HEADAPOHL AND DR. MARTIN

- **Attachment A**, Missoula City-County Health Department, *Headapohl Request for Health Board Review of Amended Order: Staff Report and Recommendation*, August 12, 2009. Missoula, MT.
- **Attachment B**, Missoula City-County Health Department, *Headapohl Appeal: Appendix D*, 2009. Missoula, MT.
- **Attachment C**, Dana Headapohl, *Letter to Board of Health*, August 20, 2009. Missoula, MT.
- **Attachment D**, Sullivan, Tabaracci, & Rhoades, *Letter to Marnie McClain, Missoula County Attorney's Office*, June 6, 2009. Missoula, MT.
- **Attachment E**, Worden Thane P.C., *Letter to Marnie McClain, Missoula County Attorney's Office*, August 13, 2009. Missoula, MT.
- **Attachment F**, Martin-Lake & Associates, Inc., *Certified Transcript: Board of Health Hearing for the Headapohl/Martin Appeal*, August 20, 2009, Missoula, MT.

**Official Transcript:** These minutes provide an abbreviated summary of the hearing; for the detailed record of the hearing, refer to **Attachment F**, a certified transcript of the hearing prepared by Julie M. Lake, Martin-Lake & Associates, Inc. Members of the public may view the transcript at the health department but are instructed to contact Martin-Lake & Associates if interested in obtaining copies.

**Abbreviated Summary (See Attachment F for the detailed record):**

- **Hearing Convened:** Dr. Smith opened the hearing for the appeal of the Notice of Violation and Order to Take Corrective Action issued by the health department to Dr. Dana Headapohl and Dr. Lawrence Martin.
- **Staff Report:**
  - Environmental Health Specialist Mary Lou Gilman provided background information (See **Attachment A**) indicating the parcel is in the floodplain: septic use for a three bedroom home is grandfathered since the septic system was permitted and installed prior to 1988 when the flood plain was re-designated. The addition of two structures that may be used as bedrooms without obtaining review and approval by the health department and a septic permit violated the Health Code. The department issued a Notice of Violation (NOV) and Administrative Order to Take Corrective Action on May 12, 2009 to Dana Headapohl and Lawrence Martin for violating Health Code, Regulation 1, Section III, Permits (A) and Section XIII, Increased Use, Changes of Use and Enlargement of Structures (A). The order required the removal of the two new structures.
  - Jim Carlson, Director of Environmental Health, indicated that Drs. Headapohl and Martin subsequently requested an administrative review as allowed by the Health Code, at which he served as the hearing officer on June 1, 2009, for the purpose of reviewing the appropriateness of the order.
    - Following the administrative hearing, an Amended Order was issued. (See pages 2 and 9 through 13 of **Attachment A**.)
    - Drs. Headapohl and Martin requested today's review of the Amended Order before the Board of Health.
- **Staff Recommendation:** Mr. Carlson provided details regarding the department's findings and actions (see **Attachments A** and **B**) and gave the staff recommendation that the Board of Health affirm the Amended Order (Appendix C in **Attachment A**) including the Findings of Fact, Conclusions of Law, Notice of Violation, and Amended Order. The department is willing to extend the required date of compliance to allow Dr. Headapohl and Dr. Martin to apply for a variance and go through that process.
- **Review of Board's Scope of Authority:** Marnie McClain, Chief Civil Deputy County Attorney, reviewed with board members their scope of authority under the Health Code, which was to affirm, modify, or revoke the NOV. She indicated she did not believe the Health Code gives the board authority to decide the constitutionality of a regulation, explained an applicant can make whatever argument they choose and must come before the board first if they intend to seek judicial review and must make their arguments at their first opportunity. She explained the hearing was an adjudicatory process that required looking at the specific facts before the board: they were not acting in a rule-making capacity. Review of hypothetical questions posed in letters received would be too broad for the board's activities in the hearing: they were not looking at what rules might be written to cover all possible contingencies.
- **Testimony by Dr. Dana Headapohl and Dr. Lawrence (Larry) Martin:**
  - Dr. Headapohl provided **Attachment C**:
    - She recounted the history of acquiring the two buildings in question, the function and use of the buildings, and interactions with the department including issuance of the NOV and Order, the administrative hearing, and her request for the hearing before the board. She identified questions and

- concerns she has as a citizen regarding the intent and interpretation of the Health Code and described the additional issue of the incinoleet.
- She said the Health Code has not been violated: the buildings are not used in a manner that increases the load on the septic system.
  - She asked to receive a fair and independent hearing from the board.
- Dr. Lawrence Martin indicated the two buildings in no way create additional effluent on the property or in the system and outlined the basis for his reasoning.
- **Testimony by Attorneys:**
    - John Tabaracci (Sullivan, Tabaracci, & Rhoades) provided **Attachment D** and noted that violations identified in the NOV are keyed to increased use. He said inclusion and use of the two buildings does not meet the Health Code’s definition of increased use and detailed his reasoning. He indicated acquisition of the incinoleet without a permit was not a violation of the requirement to permit installation of a wastewater treatment and disposal system because the incinoleet does not fall under the definition for such systems.
    - Colleen Dowdall (Worden Thane P.C.) provided **Attachment E** and said the intent of her letter was not to ask the board to make a decision based on the Constitution. The question for the board was whether there was a violation of the Code. She asked the Board of Health to dismiss the NOV on the basis that the definitions of “bedroom” and “increased use” in the Health Code are vague and do not apply to the two buildings. A reasonable person would not know the addition of the buildings could be determined to be bedrooms. They are not being used as bedrooms and their use has not increased use of the septic system. She outlined her reasoning.
  - **Testimony of Fred Stewart:** Mr. Stewart, a neighbor on whose property the buildings were formerly located, described the history and poor condition of the two buildings when he acquired his property—including decades of prior use as sheds full of objects and debris that prevented their use for other purposes—and described how Drs. Headapohl and Martin acquired the buildings. He outlined his and the neighborhood’s concerns to protect the ground water and said the health department’s credibility may be questioned in the community by action such as was currently under discussion.
  - **Board Discussion:** Dr. Smith closed the testimony portion of the hearing and opened it to board discussion, which included questions posed to and comments received from staff members (including Shannon Therriault, a supervisor in Environmental Health), Marnie McClain, Dana Headapohl, Larry Martin, John Tabaracci, and Colleen Dowdall. Refer to **Attachment F** for the record of this discussion.
  - **Motion by Jean Curtiss:** Ms. Curtiss made a motion for the Board of Health to amend the Administrative Order to Take Corrective Action to say that by May 15, 2010 Lawrence Martin and Dana Headapohl must do one of the following:
    1. Remove the buildings, including the un-permitted waterless toilet, from the property, or:
    2. Secure a parcel to which you have legal, permanent access, that is located 100 feet out of the floodplain and meets all of the requirements of the Health Code and which is of adequate size for a drainfield and replacement for six bedrooms. Additionally you must apply for and obtain a permit for the system and install and connect it to the existing structure(s).

Ms. Mitchell indicated she could not support the motion, knowing there is no stated intention to use the buildings as bedrooms.

**Motion: *The motion carried: Ayes – 4 (Smith, Curtiss, Gabster, and Sansom); Nays - 1 (Mitchell); Absences - 2 (Kuntz and Miller)***

- Dr. Headapohl asked if she needed to apply for a permit for the incinolet. Mr. Carlson indicated from the department's perspective the incinolet cannot be made legal without making the buildings legal. Dr. Smith said he did not see how they are coupled but asked if an incinolet must be permitted in other instances since it does not deliver anything to the ground. Mr. Carlson said the department and public sewer systems regulate where waste goes. Dr. Smith said he thought what is codified does not lead to that conclusion.
- Dr. Smith concluded the hearing. Off the record, the board briefly discussed Renee Mitchell's question as to when fines could be imposed in the matter of an Amended NOV and Amended Order to Take Corrective Action issued to another party represented by Ms. Dowdall and upheld by the board.

**ITEM 2 SET HEARING ON PROPOSED CHANGES TO WASTEWATER REGULATIONS**

- **Attachment G**, Missoula City-County Health Department, *Memo from Erik Englebert to the Board of Health: Draft Changes to Health Code, Regulation 1 and Proposed Regulation 5*, August 12, 2009, Missoula, MT.
- **Attachment H**, Missoula City-County Health Department, *Health Code – Administrative and Enforcement Section: Draft Proposed Changes*, August 19, 2009, Missoula, MT.
- **Attachment I**, Missoula City-County Health Department, *Health Code – Regulation 1, Wastewater Treatment and Disposal Systems: Draft Proposed Changes*, August 20, 2009, Missoula, MT.
- **Attachment K**, Missoula City-County Health Department, *Updates to Regulation 1 & Proposed Regulation 5* (PowerPoint presentation, August 20, 2009, Missoula, MT.)

**Staff Recommendation:** Shannon Therriault and Erik Englebert, Environmental Health, asked the board to set a public hearing for September 17, 2009 to consider proposed changes to the Health Codes administrative and enforcement language, changes to Regulation 1 pertaining to wastewater, and to consider the addition of Regulation 5 to require permits to site wells.

Proposed changes to the administrative and enforcement sections of the Health Code (**Attachment G**) will:

- Allow anyone receiving a Notice of Violation (NOV) from the department to have an opportunity to request an administrative review.
- Update the variance criteria for wastewater variances so that they will match the state's minimum standards. Currently there are criteria in the regulations that specify what must be met in order for the board to grant a variance. The language is from the early 1990s and will be replaced with language the state changed in 2003.

Mr. Englebert indicated the last update to Regulation 1 was in 2007. To start the process to revise the regulations, staff members drafted changes, reviewed them with management, made further revisions and then consulted with experts before seeking public comments. Little

feedback was received from installers but well drillers gave good comments on the proposed addition of Regulation 5. The Water Quality Advisory Council reviewed the proposed changes 3 times.

- Small changes to Regulation 1 clarify certain points, make certain practices more explicit, and make minor technical adjustments. As recommended by Ms. Curtiss, the definition of “bedroom” will be adjusted to clarify the building in question does not have to be attached to the main house.
- Major changes to Regulation 1 are as follows:
  - Easements are no longer allowed for individual systems on newly created lots because of installation and maintenance problems that have occurred, which can lead to increased public health risk. Examples of problems in Pattee Canyon and Hawthorne Springs were cited. Problems that can occur with systems stacked on common-use lots were also described.
  - A Circumvention clause is being added similar to what is found in state rule and air regulations. Ms. Therriault described a scenario in which a party did not have to go through OPG and by following the advice of a consultant was able to avoid meeting a requirement for a multi-family system.
  - The Maximum Land Application section will be modified. The language will be left at 700 gallons per acre per day. The requirement to determine contiguous ownership when there are existing small lots will be adjusted.
  - The Linda Vista Special Management Area will be removed since it is built out.
  - The Wye/O’Keefe Creek drainage will be added as a Special Management Area in order to deal with the nitrates in the area.

All proposed changes are posted at Environmental Health’s website.

- Regulation 5 is being proposed in order to deal with proper locating and siting of wells to ensure they are installed according to the Montana Department of Environmental Quality (DEQ) approved site plan or else meet all Department of Natural Resources (DNRC) setbacks.
  - This is proposed for all properties—not just subdivisions.
  - It deals with location only—it does not cover potability, quantity, or construction.
  - There will be a fee, which Environmental Health will keep as low as possible.

An example was given at Big Sky Lake to illustrate why easements create problems with individual septic systems and how wells often are drilled in locations other than where they should be placed. State law was violated because the well was drilled in a mixing zone, the plat approval was violated because it was not drilled as stipulated, and subdivision regulations were violated because the well was drilled too close to surface water. The siting permitting process should help people avoid costly issues arising from incorrect siting of wells. A permit must be obtained before construction. A site layout must be available or DNRC setbacks must be met.

**Board Questions:** Ms. Curtiss asked if the department and well drillers discussed instances when water is not available where expected. Mr. Englebert said consultants raised the issue as it pertains to drawing lot layouts, asking if a new permit will be required and if the process will have to start over. Staff members believe if a site is abandoned, the party should not have to completely re-permit. There may be a small modification fee because the department will have to make adjustments to paperwork. Ms. Curtiss noted that drawing a well location on a plan does

not guarantee water will be available. Ms. Therriault said this type of scenario can create a problem because the need to drill a well in a location other than originally planned can then affect proper location of septic systems. When this occurs in subdivisions, the permit will require that parties clear this up by going through a subdivision site modification process to address it up front. It will involve more time and will require a fee but will ensure that what needs to be done will take place. Ms. Curtiss said it might encourage more use of public water systems.

**Motion:** Mr. Englebert reiterated the request for the board to set a public hearing on the proposed changes to the Health Code at the September 17, 2009 meeting. Dr. Gabster made the motion.

*The motion carried unanimously: Ayes – 5 (Smith, Curtiss, Gabster, Mitchell, and Sansom); Nays - 0; Absences - 2 (Kuntz and Miller).*

**ITEM 3 APPROVE JUNE 18 AND JULY 20, 2009 MINUTES**

Minutes for the June 18, 2009 meeting will be reviewed in September. Minutes for July 20, 2009 were approved as submitted.

**ITEM 4 JOURNAL REPORT**

- **Attachment I**, Raloff, Janet. July 18, 2009. Bad Breath. Science News: 26-29.

Dr. Smith indicated the article provides summaries of new health impact studies on particulate exposure. Scientists are now looking at “ultrafine” particulates that are no more than 0.1 micrometers in diameter. They can pass through cell membranes. There are discrepancies between different forms of measuring particulates: some equipment counts the number of particles; other equipment counts the mass of the particles. It appears the number of particles, rather than the mass, is the more important factor. Regulations may change from mass-based particulates to number-based particulates.

**ITEM 5 SEPTEMBER JOURNAL REPORT**

Eileen Sansom will provide the report.

**ITEM 6 PANFLU VACCINATION: REVIEW CONCEPT OF OPERATIONS AND DRAFT EMERGENCY DECLARATION**

- **Attachment M**, Missoula City-County Health Department. *Draft Pandemic Influenza Immunization Plan: Concept of Operations*, August 15, 2009. Missoula, MT.
- **Attachment N**, Missoula City-County Health Department. *Draft H1N1 Emergency Proclamation*, August 11, 2009. Missoula, MT.

Due to the lateness of the hour, staff members were not available who were going to present the concept of operations. The topic was deferred to a later date. Marnie McClain presented **Attachment N** on behalf of Director Leahy, who was out of town. She said Director Leahy described the current situation with pandemic influenza as being similar to having a hot dry summer with little fires popping up and thunderstorms forecasted. Precipitating events are known to be underway. The situation is not yet an emergency but preparations need to escalate.

The law provides for either doing ordinary business or for having an emergency. In order to step into the procedures to follow in an emergency, it would first be necessary to declare an

emergency by way of a resolution signed by the Board of County Commissioners. The draft proclamation proposes to involve the mayor as well. It identifies the conditions and circumstances in which the commissioners and mayor would be asked to declare that an emergency condition exists in order to initiate some of the means of doing business allowed by the emergency statutes. Activating the emergency disaster plan sets up the potential to reclaim some of the costs associated with certain activities already underway. In the event of an emergency, Montana Code Annotated 50-2-116 and 50-2-118 enable the Board of Health to act to carry out the purposes of the public health system. Meanwhile the health department, the board, and the health officer are taking action as permitted at this time.

Greg Oliver, Director of Health Promotion, said staff members who could not rejoin the meeting were going to report on the planning underway to assign distribution of the H1N1 vaccine based on guidelines for risk groups, expected unpredictable arrival dates, and expected limited availability. It is likely that the health department will not receive as much vaccine as wanted and will not be able to follow a normal distribution system. Mr. Oliver described the risk tiers for school-age children up to age 24 and said vaccination clinics might be held, for instance, at each school. For other populations there may be other kinds of clinics. The department's efforts during a shortage of seasonal flu vaccine to provide a clinic at Big Sky High School involved weeks of planning and hundreds of hours worked. The implications of H1N1 suggest the possibility of multiplying the effort required then by 20 or 30 times. It is likely that planning with schools and other entities must be ready for implementation in October or November. The board's authority may not extend to addressing the expenses that will arise, which is one reason why the proposed emergency proclamation may become an important tool.

Bob Reid, Director of Disaster and Emergency Services for Missoula County, indicated no action was being requested at that time. The intent was to provide the board with a status report. Mr. Oliver said approval of the declaration language could become a future action item.

**ITEM 7 VOTE ON NATIONAL ASSOCIATION OF LOCAL BOARDS OF HEALTH (NALBOH) BALLOT; DETERMINE HOW TO HANDLE FUTURE NALBOH BUSINESS**

- **Attachment O**, National Association of Local Boards of Health, 2009 Official Election Ballot – Western Region, August 2009, Bowling Green, OH.

The board is an institutional member of NALBOH and could cast a single ballot to vote for the unopposed candidates for four positions listed on the 2009 election ballot for the western region. Dr. Smith recommended voting to show the Board of Health is active.

**Motion:** Dr. Gabster made a motion for the board to vote affirmatively for each candidate on the 2009 election ballot.

***The motion carried unanimously: Ayes – 5 (Smith, Curtiss, Gabster, Mitchell, and Sansom); Nays – 0; Absences – 2 (Kuntz and Miller).***

NALBOH sends informational letters and e-mail versions of newsletters to the board via Ms. Mohr and forwarded to the board as they come in—and to staff members if deemed useful. She asked on Director Leahy's behalf whether a board member would like to serve as a NALBOH liaison to periodically report on and make recommendations about the availability of various

tools, webinars, activities, and conferences. Dr. Smith asked for a volunteer. The opportunity was deferred for future consideration.

**ITEM 8 PUBLIC COMMENTS ON ITEMS NOT ON THE AGENDA**

No comments were given.

**ITEM 9 BOARD AND STAFF COMMENTS ON ITEMS NOT ON THE AGENDA**

Staff members who were not able to stay and report on the panflu concept of operations could not do so because they are meeting about several confirmed cases of E. coli 0157. It appears the cases are confined but staff members are working to notify physicians to be on the watch. Although onsets are grouped closely, the cases appear to be unrelated.

**Adjournment:** Dr. Smith adjourned the meeting at 4:44 p.m.

Respectfully submitted,

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Ellen Leahy  
Health Officer

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Garon Smith  
Chair