BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: COLUMBIA FALLS ALUMINUM COMPANY'S (CFAC) APPEAL OF DEQ'S MODIFICATIONS OF MONTANA POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT NO. MT0030066, COLUMBIA FALLS, FLATHEAD COUNTY, MT.	**CASE NO. BER 2014-06 WQ**

PROPOSED ORDER

At the September 29, 2017 meeting of the Board of Environmental Review (BER or Board), the Board instructed the undersigned convene a conference with the parties to discuss the status of the case, and discuss with the parties "any thoughts that [the parties] might have to assist the Board in proceeding with this case in the absence of any proposed findings and conclusions from Mr. Reed." BER then moved consideration of the matter to its December meeting. This proposed order constitutes the undersigned's recommendation to the Board based on the filings and conferences that have occurred since the September Board meeting.

A. Procedural History

On November 16-18, and 21, 2016, a hearing in this case was held in Helena, Montana. Hearing Examiner Ben Reed presided over the hearing. On December 2, 2016, Hearing Examiner Reed issued an Order directing parties to file supplemental briefs. On December 9, 2016, Columbia Falls Aluminum Company (CFAC), filed an unopposed motion to extend the deadline to file post-hearing briefs. Hearing Examiner Reed issued an Order granting the extension the same day.

On December 12, 2016, both parties filed post-hearing briefs. On December 23, 2016, the parties filed simultaneous response briefs. On February 3, 2017, the parties filed proposed findings of fact and conclusions of law.

On December 30, 2016, Hearing Examiner Reed terminated his employment with the State. Before leaving, Mr. Reed indicated to the parties and BER that he would issue a proposed decision in this case. Mr. Reed then left the country and moved to Kosovo.

On March 1, 2017, former Board Attorney Andres Haladay issued a *Notice to Parties* indicating that he intended to include the matter of Mr. Reed being found unavailable under Mont. Code Ann. § 2-4-622, as an action item on the agenda of the Board's March 31, 2017 meeting. In the Notice, Mr. Haladay proposed options to the parties if Hearing Examiner Reed were to be found unavailable. Mr. Haladay also included a memo indicating he would recommend that BER find Mr. Reed unavailable and re-assign the case in order to "ensure a timely proposed order."

On March 13, 2017, DEQ and CFAC filed responses to the Notice. DEQ objected to the transfer as premature since DEQ "has no knowledge that Mr. Reed has withdrawn or refused to follow through on his commitment to issue a proposed decision. CFAC requested additional information and more detail as to why Mr. Reed was unavailable and an explanation of why the hearing was conducted by Mr. Reed if he was leaving.

At the March 31, 2017 meeting, the Board voted to appoint Mr. Haladay as the Hearing Examiner for procedural matters and tabled any action on the question of Mr. Reed's unavailability. Tr. 28:3-31:13 (Mar. 31, 2017). Mr. Haladay left state employment on September 8, 2017, and the undersigned became BER's attorney.

On September 29, 2017, BER held a Board meeting; the agenda included the matter of CFAC's appeal of DEQ's modification of permit no. MT0030066, BER 2014-06 WQ. (*See* http://deq.mt.gov/DEQAdmin/ber/agendasmeetings). BER was informed by the undersigned that Mr. Reed had not issued a proposed decision on this matter. Tr. 52:14-16 (Sept. 29, 2017). BER discussed its options and moved to reassign the

procedural aspects of the case to the undersigned as hearing examiner and then requested the undersigned convene a status conference with the parties.

During the September 29, 2017 meeting, it was discovered that the Board members' meeting packets included a copy of DEQ's proposed findings of fact and conclusions of law (FOF/COL), which was submitted to Mr. Reed by DEQ on February 3, 2017. Board members were directed by the undersigned to disregard the material and to not read it if they had not already. Tr. at 56:21-57:2.

On October 17, 2017, the undersigned issued a *Notice of Telephonic Status Conference*, and on October 18, 2017, held a status conference with the parties. At the status conference, the parties discussed (1) BER inadvertently receiving DEQ's proposed FOF/COL; (2) whether additional briefing or action regarding the inadvertent disclosure of DEQ's proposed FOF/COL was required; (3) Hearing Examiner Reed being declared unavailable at BER's December 8, 2017, board meeting; and (4) the parties' options should Mr. Reed be declared unavailable, pursuant to Mont. Code Ann. § 2-4-622.

The parties also discussed the questions raised in CFAC's response to the March 1, 2017 Notice to the parties. DEQ indicated it would be willing to waive the demeanor of witnesses for the purpose of Mont. Code Ann. § 2-4-622 if BER declared Mr. Reed unavailable. CFAC was not prepared to take a position on that issue. The parties requested additional time to explore their options before committing to a procedural plan going forward and agreed to discuss the matter at a subsequent status conference.

On October 27, 2017, the undersigned emailed Mr. Reed at his last known email address. A copy of that email is attached to this order. The undersigned requested that Mr. Reed respond by November 5, 2017, and indicated that if no response were received, the undersigned would assume that Mr. Reed no longer intended to provide a proposed decision in this case. To date, the undersigned has received no response from Mr. Reed.

On November 6, 2017, the undersigned issued an Order to the parties, based on the discussion during the October 17, 2017 status conference. In that Order, the undersigned declared CFAC's response to the Notice to Parties moot because

> "an explanation of why the prior members of BER appointed Mr. Reed as Hearing Examiner or why Mr. Reed was not forthcoming with his decision are neither knowable or relevant to the current decision facing the parties and the BER in this case. That is, how the parties want to proceed pursuant to Mont. Code. Ann. § 2-4-622 if the BER finds at its December 8, 2017 meeting that Mr. Reed is unavailable."

The undersigned also set out a detailed procedural history of this case and provided a copy of the email to Mr. Reed (attached hereto). The undersigned then set another status conference and ordered the parties to be prepared to discuss: (1) the status of this case; (2) whether or not each party will decide to waive the [demeanor] of witnesses pursuant to Mont. Code Ann. § 2-4-622 if the BER finds Mr. Reed unavailable at its December 8, 2017 meeting; (3) a proposed schedule for either a new hearing or a review of the existing record based on that decision; and (4) what relief, if any, is appropriate regarding the inadvertent disclosure to BER of DEQ's proposed FOF/COL and the authority upon which such relief is requested.

On November 20, 2017, the undersigned held a second status conference. Approximately two hours prior to the scheduled meeting time, CFAC filed *a Response Prior to November 20, 2017 Scheduled Telephone Conference*. In its filing, and at the status conference, CFAC indicated it felt ex parte communications had occurred regarding the inadvertent disclosure of DEQ's proposed FOF/COL and that a disinterested party should investigate whether this proceeding could "fairly continue." CFAC argued that it believed BER might be prejudiced by the disclosure of the FOF/COL and questioned the inadvertence of the disclosure. CFAC stated it could not respond to the undersigned's questions regarding whether or not it would waive the demeanor of witnesses pursuant to Mont. Code Ann. § 2-4-622 until: (1) the BER actually declared Mr. Reed unavailable, and (2) it was determined that the BER should continue to hear the case after the disclosure of DEQ's proposed FOF/COL. DEQ maintained that is was willing to waive the demeanor of witnesses if BER declared Mr. Reed unavailable. The issues raised by CFAC's filing were also discussed during the

conference, in addition to the items listed in the undersigned's November 6, 2017 Order. CFAC indicated it would like an opportunity to discuss its proposed remedy to the FOF/COL disclosure with counsel for DEQ outside the presence of the undersigned, which it had not done prior to the conference. The undersigned adjourned the conference and set a third status conference for the following day, November 21, 2017.

When the parties reconvened the following day, the parties reported that they had discussed CFAC's proposed remedy for the FOF/COL disclosure. The parties indicated they intended to call Betsy Brandborg, an attorney at the State Bar of Montana, to discuss the disclosure but did not anticipate having her conduct any investigation, speak to the undersigned, or speak to anyone at BER. DEQ further stated that it did not believe any ex parte contact had occurred. DEQ again stated that it would waive the demeanor of witnesses if Mr. Reed is declared unavailable. CFAC again stated it could not indicate whether or not it would make such a waiver until it was determined whether the BER could hear the case at all after the disclosure of DEQ's proposed FOF/COL. At the conclusion of the status conference the undersigned stated she would propose the four decisions to the Board that are set out infra at section "D. Conclusion," and that the parties would have the opportunity to address the Board regarding all of the procedural issues discussed during the three status conferences at the Board's next meeting on December 8, 2017.

B. Unavailability

Generally, a proposal for decision must be prepared by the person who conducted the hearing on the matter, pursuant to Mont. Code Ann. §§ 2-4-621 and 622. However, there is an exception if the hearing examiner becomes unavailable:

> **When hearings officer unavailable for decision.**
> (1) If the person who conducted the hearing becomes unavailable to the agency, proposed findings of fact may be prepared by a person who has read the record only if the demeanor of witnesses is considered immaterial by all parties.
> (2) The parties may waive compliance with 2-4-621 and this section by written stipulation.

Stated another way, in the event the person who conducted the hearing becomes unavailable, *if all the parties agree* to waive the demeanor of witnesses, then proposed findings of fact may be prepared for the Board by another hearing examiner who reviews the evidentiary record. *If all the parties do not agree* to waive the demeanor of witnesses, then the Board must order that a new hearing be conducted. This hearing can be conducted by the Board itself, or the Board can assign the case to another hearing examiner to conduct the new hearing and issue a proposed order. Mont. Code Ann. §§ 2-4-621 and 622.

There is no definition in statute or case law of what constitutes "unavailable" for the purpose of the Montana Administrative Procedure Act (MAPA). In the absence of a legal definition, a common understanding of the meaning of the term "unavailable" will suffice. Mr. Reed has now been gone from state-employment, and indeed from the country, for 12 months with no proposed decision forthcoming. Various attempts by various people to contact Mr. Reed and inquire as to the status of a proposed decision, have been unsuccessful. He has no continuing contract with BER, DEQ, or the Agency Legal Services Bureau to conduct or complete any legal work. It is therefore reasonable for BER to conclude that Mr. Reed is now "unavailable." The undersigned therefore recommends that the Board, through a seconded motion at its December 8, 2017 meeting, declare Mr. Reed "unavailable" for the purpose of Mont. Code Ann. § 2-4-622.

If the Board declares Mr. Reed unavailable, the Board must then decide whether to review the existing record or hold a new hearing. The existing record consists of the parties' exhibits and an audio and stenographic recording of the original hearing, including witness testimony and arguments of the parties. Under MAPA, the Board can only choose to review the existing record (or order a new hearing examiner to review it), if both DEQ and CFAC agree that the "demeanor of witnesses is considered immaterial." Mont. Code Ann. § 2-4-622. DEQ has stated that it will agree to waive the demeanor of witnesses pursuant to this statute, if Mr. Reed is found unavailable. However, the undersigned has been unable to discern from the three status conferences whether or not

CFAC will be willing to waive the demeanor of witnesses. In the absence of an express waiver from CFAC, the Board must assume that all the parties *do not agree* that the "demeanor of witnesses is considered immaterial." *Id.* Since the demeanor of witnesses is not considered immaterial by all parties, the undersigned recommends that the Board order a new hearing be conducted in the above-captioned case. Pursuant to Mont. Code Ann. § 2-4-622.

C. Disclosure of DEQ's Proposed Findings and Conclusions

As noted above, it was discovered at the last meeting that the Board received, as part of its September meeting packet, a copy of DEQ's proposed FOF/COL. This packet was posted publicly online approximately one month before the Board's September meeting. It is the understanding of the undersigned that the document was inadvertently included in the Board's packet based on a miscommunication and/or misunderstanding between staff members and that no one (including the undersigned) noticed the mistake until the September meeting had already begun. The Board is free to ask its staff and the undersigned, during the December meeting, in public and on the record, any questions it may have about the facts leading to the disclosure. Counsel for DEQ was present at the September meeting but did not appear or comment before the Board. CFAC was not present at the September meeting.

In its written submission and in the discussion during the status conferences, CFAC has argued that the disclosure of DEQ's proposed FOF/COL constituted ex parte contact and that such ex parte contact has "tainted the BER", CFAC has also questioned the inadvertence of the disclosure.[1] As a remedy, CFAC argued that the BER should follow Montana's Code of Judicial Conduct in this matter and allow an "[i]nvestigation by a disinterested party…" and that after receiving advice from this third party, should have an opportunity to object as the model code provides.

[1] CFAC has stated on the record that it does not believe counsel for DEQ was involved in the disclosure, but rather questions whether someone else at DEQ or BER, or the undersigned, was involved.

It appears, however, based on the third status conference, that CFAC may now have abandoned this suggestion, and will instead discuss the matter with Ms. Brandborg, at the Montana State Bar, but without the intention that Ms. Brandborg will conduct any sort of investigation, speak to anyone from BER, or propose anything to the Board. As the parties are certainly free to consult with anyone they wish at any time, and as Ms. Brandborg will apparently have no direct knowledge of the facts of the disclosure (not having spoken to any BER or DEQ staff or the undersigned), any conclusions she may have as a result of this conversation would appear to be of minimal value to the Board. However, the undersigned has confirmed to the parties that they are free to discuss this conversation, or bring forth any other argument they may have with the Board regarding this issue at the meeting on December 8, 2017.

As CFAC correctly noted, in its filing, the Montana Code of Judicial Conduct does not apply to persons appointed to perform quasi-judicial functions. MAPA is the only relevant law that applies to the Board, and MAPA's only statement on ex parte contact appears in Mont. Code Ann. § 2-4-613.[2] As such, the Code of Judicial Conduct may be, at best, a point of reference and it is not binding in any way. Further, there is no precedent for such a measure within the knowledge of the undersigned and the parties have provided none. Finally, in the context of a multi-member, quasi-judicial board for which there is no available replacement (as there is with a District Court Judge), as a practical matter the suggestion is unworkable.

More importantly, the disclosure does not constitute ex parte contact. Ex parte is defined as, "on or from one party only, usually without notice to or argument from the adverse party." Blacks Law Dictionary 268 (3rd Ed. 1996). In other words, ex parte contact must involve contact between the judge (or here, the Board) and one party

[2] That statute reads:

> **2-4-613. Ex parte consultations.** Unless required for disposition of ex parte matters authorized by law, the person or persons who are charged with the duty of rendering a decision or to make findings of fact and conclusions of law in a contested case, after issuance of notice of hearing, may not communicate with any party or a party's representative in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate.

without notice to the other party. In this instance, the disclosure was done by BER staff to the Board—not by a party to the Board. The Board cannot have ex parte contact with itself. Additionally, the disclosure was done in public and on the record—the packet, including the document, was posted to BER's website and available for both parties and the public to view and the discussion about it was conducted at an appropriately noticed public meeting, on the record, where both parties had the opportunity to appear and argue if they chose. Thus, although the disclosure was of one party's document, it was not done by the party and it was not done without notice to the other party. The disclosure therefore does not constitute ex-party contact.

The undersigned has already instructed any Board members who reviewed the document to disregard its contents. Board members (who are vested with the ability to hear contested case hearings where, for example, offers of proof are made), are capable of disregarding evidence that should not form the basis of a final decision. Further, Board members are capable of basing their final decision on only the appropriate evidence presented to them—either during a hearing or in a final proposed decision from a hearing examiner—for decision. In jury trials, an instruction from the judge to disregard or not consider improper evidence or argument is routine practice often upheld on appeal. In bench trials judges (or Boards) must be the arbiters of admissibility, at times hearing evidence they may ultimately conclude should be rejected. While the disclosure was unfortunate, it has not "tainted" the Board in any way that cannot, or has not already, been remedied by an instruction to disregard DEQ's proposed FOF/COL and base the final decision in this matter only on the record finally presented for decision.

For all these reasons, the undersigned recommends that the Board decline CFAC's invitation (if presented) to have an independent investigator examine the circumstances of the disclosure. The Board should disregard DEQ's proposed FOF/COL and the arguments therein and it should form no basis for the Board's final decision in this matter. The Board must decide this case based solely on the record before the Board for decision pursuant to MAPA.

D. Conclusion

For the reasons stated above, the undersigned recommends the Board enter the following **PROPOSED ORDER**:

1. Mr. Reed is "unavailable" as a hearing examiner pursuant to Mont. Code Ann. § 2-4-622;

2. A new hearing be conducted in CASE NO. BER 2014-06 WQ;

3. Jurisdiction of this case is, either:

   a. retained by BER to conduct the hearing and issue a final decision as a Board. The matter is assigned to [*a hearing examiner*] for the purpose of resolving any prehearing procedural issues only. The hearing will be held on [*date*].

      OR

   b. assigned to [*a hearing examiner*] to set and conduct a new hearing, resolve any prehearing procedural issues, and present a proposed FOF/COL to the Board.

4. The disclosure of DEQ's proposed FOF/COL prior to the September meeting was inadvertent and did not constitute ex parte contact. Board members who reviewed the document will disregard it. The final decision will be based solely on the record before the Board for decision pursuant to MAPA.

DATED this 5th day of December, 2017.

/s/ Sarah Clerget
SARAH CLERGET
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Proposed Order to be mailed to:

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DATED: 12/5/17 /s/ Aleisha Solem

Clerget, Sarah

From: Clerget, Sarah
Sent: Friday, October 27, 2017 10:34 AM
To: Ben Reed (reed.ben@gmail.com)
Subject: Columbia Falls Aluminum Co. Proposed Decision

Hello Ben,
This is Sarah, from ALSB. I have taken over from Andres Haladay as the Hearing Examiner in the Columbia Falls Aluminum Co. matter, BER No. 2014-06, and as counsel for the Board of Environmental Review. I understand from the record (transcripts of prior BER meetings and the parties' filings) that you intended to render the proposed decision on this case after you left employment with ALSB/BER. It is my understanding, however, that there was never a contract set up with you (by BER, ALSB, or DEQ) to complete this work, and that you have not provided the proposed decision to anyone at BER, DEQ, CFAC, or ALSB. If this is not correct, please let me know. As it has now been almost a year since the hearing, at the next BER meeting on December 8, 2017, the Board is planning to declare you, as the prior Hearings Examiner, unavailable for the purpose of MCA 2-4-622. Before I advise the Board to do that, I wanted to attempt to contact you directly to confirm that you will not be providing that proposed decision. If you **do** intend to provide the proposed decision before the December 8th Board meeting, please let me know as soon as possible. **If I do not hear from you by one week from today, November 5, 2017, I will assume that you are unavailable and do not intend to render a proposed decision in the Columbia Falls Aluminum Co. case.**
Thank you,

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