

0001

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
DECEMBER 4, 2015)

TRANSCRIPT OF PROCEEDINGS

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
December 4, 2015
9:00 a.m.

BEFORE CHAIRMAN JOAN MILES,
BOARD MEMBERS CHRIS TWEETEN, DR. ROBERT BYRON,
ROY SAYLES O'CONNOR, MICHELE REINHART LEVINE;
And ROBIN SHROPSHIRE (By telephone)

PREPARED BY: LAURIE CRUTCHER, RPR
COURT REPORTER, NOTARY PUBLIC

0002

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

* * * * *

(Mr. Tweeten not present)

CHAIRMAN MILES: Good morning, everyone.
I'll call the meeting to order. It is the
December 4th Board of Environmental Review
meeting. Do you take attendance, Hillary, of
Board members?

MS. HOULE: Yes, please.

CHAIRMAN MILES: We'll do that first,
and then we'll identify who is on the phone. So
do you want to take attendance?

MS. HOULE: If you just want to state
your name, here, and that should be --

MR. SAYLES O'CONNOR: Roy O' Connor.

DR. BYRON: Robert Byron.

CHAIRMAN MILES: Joan Miles.

MS. REINHART-LEVINE: Michele
Reinhart-Levine.

MR. REED: Ben Reed, attorney for the
Board.

MR. MATHIEUS: George Mathieus.

CHAIRMAN MILES: Before we get started,
I know those of you who are on the telephone gave

0003

your names, but if you would go through that again
once more so we have that for the record, please.
Just shout it out.

MS. SHROPSHIRE: Robin Shropshire on the
phone.

CHAIRMAN MILES: Robin is a Board
member, and I believe everyone else is a member of
the public. So if you'd proceed. Thank you.

MR. EDWARD BYRON: Edward Byron.
(phonetic)

11 MR. MUNOZ: Daniel Munoz. (phonetic)
 12 MR. WISE: Chris Wise. (phonetic)
 13 CHAIRMAN MILES: Anyone else?
 14 (No response)
 15 CHAIRMAN MILES: Thank you. I think
 16 we'll have some more people phone in later, but
 17 they'll announce their names when they come on.
 18 I think we can get through our business
 19 today in fairly good order. We have obviously
 20 work to finish up on the MEIC Signal Peak case.
 21 That's at the end of the agenda. The other action
 22 points we have, Board members, are two requests to
 23 initiate rulemaking, and two new contested cases
 24 that we need to decide whether they come to the
 25 Board, or if we assign them to a Hearing Examiner.

0004

1 So I think all of that will move along fairly
 2 well, and then we'll take a break probably,
 3 because I know some people want to get on the
 4 phone for the Signal Peak case. I think all of
 5 this will go through in fairly good order.
 6 So with that, we'll take up the first
 7 item of business.
 8 MR. GERSTEN: Now joining Allen Gersten
 9 (phonetic), Libby, Montana.
 10 CHAIRMAN MILES: We'll now take up the
 11 minutes, and the Board has to adopt the October
 12 16th, 2015 meeting minutes. And before I ask for
 13 a motion on that, I want to just point out a
 14 mistake that was in here. On Page 5 of the
 15 minutes, under III.B.3, it says, "Mr. Mathieus
 16 informed the Board that the Department would like
 17 to postpone until the December 9 meeting," that
 18 should be today; and then the next sentence,
 19 "Chair Miles agreed to hear the issue on December
 20 9." It should be December 4. So if you would
 21 correct those. Are there any other comments or
 22 corrections to the minutes?
 23 (No response)
 24 CHAIRMAN MILES: Is there a motion to
 25 approve the minutes?

0005

1 MR. SAYLES O'CONNOR: So moved.
 2 CHAIRMAN MILES: Is there a second?
 3 DR. BYRON: Second.
 4 CHAIRMAN MILES: Any further discussion?
 5 (No response)
 6 CHAIRMAN MILES: All in favor, please
 7 say aye.
 8 (Response)
 9 CHAIRMAN MILES: Opposed.
 10 (No response)
 11 CHAIRMAN MILES: Hearing none, the
 12 minutes are approved, thank you, with those
 13 corrections.
 14 Board members, it was in your packets
 15 and posted on the website the schedule for 2016.
 16 We had selected these dates at our last meeting,
 17 but we needed to post them to the public, and then
 18 we can approve those proposed dates today. I hope
 19 everyone had a chance to look at that, and I would
 20 take a motion to approve the meeting schedule for
 21 2016.

22 DR. BYRON: So moved.
 23 MS. REINHART-LEVINE: Second.
 24 CHAIRMAN MILES: It's been moved and
 25 seconded. Any discussion?

0006

1 (No response)
 2 CHAIRMAN MILES: All in favor, please say
 3 aye.

4 (Response)
 5 CHAIRMAN MILES: Opposed.
 6 (No response)
 7 CHAIRMAN MILES: The meeting schedule
 8 has been adopted and can be posted on the
 9 Department's website.

10 Contested case update, and I'm going to
 11 turn that over to Ben.

12 MR. REED: Thank you very much, Madam
 13 Chair. With respect to Highlander Bar and Grill,
 14 an updated or amended scheduling order was issued
 15 on 16 November of this year.

16 For "B" and "C," the two Copper Ridge
 17 cases, status updates were due November 30th. I
 18 haven't received those, but it is relatively close
 19 in time, so I anticipate receiving those in the
 20 very near future.

21 In "D," I've issued a scheduling order,
 22 and that is all for the enforcement cases.

23 CHAIRMAN MILES: Are there any questions
 24 of Ben on any of these?

25 (No response)

0007

1 CHAIRMAN MILES: Okay. Thank you.

2 MR. REED: In non-enforcement cases,
 3 YELP is still stayed until February 1.

4 In the matter of Phillips 66, the
 5 parties are, as far as I know, complying with the
 6 terms of the stipulation.

7 In the matter of Columbia Falls Aluminum
 8 Company, I issued an amended scheduling order, and
 9 have received a copious stack of motions from the
 10 parties, and so I'm looking forward to diving into
 11 those.

12 In "D," I think that this is slightly --
 13 the notation here, the last sentence should be
 14 crossed out. The Board did assign me as permanent
 15 Hearing Examiner. After conferring with Mr.
 16 Mullen, the attorney for the Department of
 17 Environmental Quality, I have an order prepared
 18 that hasn't gone out over my signature.

19 Briefly, Mr. Pozzi, who is the COO of
 20 the corporations that initially had their permits
 21 lapse, contacted myself and the attorney for DEQ,
 22 and indicated that he was planning on simply
 23 letting the permits lapse. He signed a document
 24 to that effect with respect to one of the permits,
 25 but not the other two. I'm going to be issuing a

0008

1 scheduling order for the remaining two that
 2 indicates that unless we hear something from Mr.
 3 Pozzi, that the appeal is simply going to be
 4 denied.

5 There are two concerns: One is
 6 obviously that Mr. Pozzi has disappeared; and

7 other is that Mr. Pozzi is not an attorney, and
8 purported to be representing the two corporate
9 entities, which is obviously problematic under
10 Montana law. So more detailed than I suspect the
11 Board required, but that having been said.

12 Heart K Land & Cattle, the scheduling
13 order and an order allowing Heart K Lands'
14 attorney to practice in the state of Montana Pro
15 Hac Vice have gone out, the latter in a somewhat
16 delayed fashion I'm afraid, but it is out.

17 In the matter of Westmoreland Resources,
18 a prehearing order is going to be issued today.
19 And that brings us to the end of non-enforcement
20 cases assigned to me.

21 As far as the No. 3(a), I would refer
22 that matter to Mr. North.

23 MR. NORTH: Madam Chair, members of the
24 Board, John North, Chief Legal Counsel for the
25 Department.

0009

1 The status on that hasn't changed since
2 the last meeting. The judicial review action has
3 been submitted to the Judge under summary judgment
4 motion; oral argument has been held; it has been
5 deemed submitted; and we're just waiting for the
6 Judge's decision.

7 CHAIRMAN MILES: Thank you. Any
8 questions of Ben on any of these items? I know we
9 can't get into a lot of discussion, but if you
10 have any timing questions.

11 (No response)

12 CHAIRMAN MILES: Hearing none, the
13 Department will move to other briefing items, and
14 the Department will provide the Board with a
15 report regarding the air quality permit fees that
16 are in motion.

17 MR. MATHIEUS: Madam Chair, we have
18 Chuck Homer today.

19 MR. HOMER: Madam Chair, members of the
20 Board, my name is Chuck Homer. I'm with the Air
21 Quality Bureau.

22 The air quality rules require us to
23 report to the Board annually on air quality fees,
24 and for today, since many members of the Board
25 have not been involved in air quality fee

0010

1 rulemaking, I'm going to take a little time -- a
2 little time I promise, George -- to sort of go
3 over the background of the fees, and where we are,
4 to give the newer members kind of a basis in where
5 we are.

6 (Mr. Tweeten present)

7 MR. HOMER: All regulated facilities
8 either permitted or registered under air quality
9 rules are required to submit an annual fee. That
10 fee is intended to support the actions of the
11 permitting, and wider permitting and registration
12 programs. Approximately 75 percent of the entire
13 Air Quality Program is funded by these fees.

14 The general path that this takes is that
15 the Legislature sets an appropriation for air fees
16 in the Department for the biennium. The BER then
17 establishes a fee schedule sufficient to collect

18 enough revenue to support that appropriation.
 19 The current structure in the air quality
 20 rules collects most of the fees based on emissions
 21 from a facility with a minimum administrative fee
 22 for all regulated facilities. There are a couple
 23 of types of entities that pay a flat fee not based
 24 on emissions, and those include registered oil and
 25 gas wells, and portable facilities.

0011

1 Historically from the beginning of the
 2 fees -- and the fees were established around the
 3 same time we established the Title V permitting
 4 program. Fees apply to all regulated facilities,
 5 not just Title V permitted facilities -- the
 6 Department would go to the Board, calculate the
 7 necessary revenue, and that would be the approp
 8 (phonetic), minus what we expected in application
 9 fees, and then minus what we had left over in the
 10 air fee fund. So for many years we essentially
 11 zeroed out the fee fund at the end of the year
 12 when we established the new fee rate.

13 That would generally happen early in the
 14 year. Since the fees are based on emissions in
 15 the prior year, we would do an emission inventory,
 16 come to the Board usually around May with a
 17 proposal for a new fee rate, hold the hearing over
 18 the summer, and final action would be in September
 19 or October.

20 2009 was the last year that the
 21 Department proposed a change in the fee rate based
 22 on revenue collection. A couple things happened
 23 at that time. There was a significant raise in
 24 the fee rate based on the legislative
 25 appropriation, and at the same time was the

0012

1 beginning of the recession. And so the following
 2 year the Department decided that we would adjust
 3 to the fee rate. Instead of raising the fee rate,
 4 we would reduce expenses. We've continued that
 5 pattern subsequently.

6 Last year we came before the Board and
 7 proposed some small changes in application fees,
 8 but that didn't have a significant effect on
 9 revenue. And during that time, and today, and
 10 continuing for at least the next few years, the
 11 Department believes it can fund the appropriation
 12 based on the fee collections at the current rate,
 13 supplemented by the existing balance in the fee
 14 fund.

15 So during those years starting in 2009
 16 when the Department reduced expenses -- and that
 17 was mainly through vacancies and through reduced
 18 travel -- we have established a sufficient fund
 19 approximately half of an annual appropriation. We
 20 are getting sufficient revenue that with that fund
 21 we can survive, fund the entire appropriation.
 22 That stands for the current fiscal year 2016.

23 We don't propose to come to the Board
 24 next spring with anything. Things could change.
 25 We could come, but at this point we don't think we

0013

1 need to. And we're looking at probably being able
 2 to support the program through 2019 without any

3 kind of request for a revenue based fee change.

4 At the moment, and continuing at least
5 for the next biennium, we see a lot of changes in
6 the program. New programs, such as the clean
7 power plant, are becoming a much larger piece of
8 the Air Quality Program. We're seeing significant
9 changes in regulations in other parts. We're
10 seeing the closure of some significant sources,
11 like the PPL Talon Plant, Corette plant in
12 Billings. There may be additional closures in the
13 future.

14 So we're under a real time of change now
15 in the Air Quality Program, both in terms of the
16 regulated community, the program, and
17 organizationally potentially how we're going to
18 react to that, so it is becoming increasingly hard
19 to project when and what we might need for revenue
20 in the forthcoming bienniums. So given that
21 uncertainty, we still think at this moment we
22 don't plan to come to the Board anytime before
23 2019 with any kind of revenue change.

24 That's all I had to say, if you have any
25 questions.

0014

1 CHAIRMAN MILES: Chuck, I have a
2 question. I've been on the Board for I think over
3 two years, and I thought you about came in about a
4 year ago, and you were proposing to work on some
5 fees. Is that the same fees you're talking about?

6 MR. HOMER: Yes.

7 CHAIRMAN MILES: You have decided that
8 you don't need to adjust them.

9 MR. HOMER: With that change in
10 application fees, I think we're fine.

11 CHAIRMAN MILES: Any other questions?

12 MR. SAYLES O'CONNOR: Do you think your
13 monitoring and enforcement are staying at the same
14 level if you had to lose anything on that end, or
15 are you confident that you're covering all the
16 bases?

17 MR. HOMER: If you're talking about
18 monitoring in terms of ambient monitoring, things
19 are changing, pollutants are changing. At the
20 moment we're fine, but again, that could change.

21 In terms of compliance, we're in the
22 midst I think of a significant relook at the types
23 of compliance we do and how we do compliance. At
24 the moment, I don't think we'd say we're doing any
25 less compliance work than we've done in the past.

0015

1 We're starting to figure out how to do it
2 differently.

3 MR. SAYLES O'CONNOR: Thank you.

4 CHAIRMAN MILES: Any other questions?

5 (No response)

6 CHAIRMAN MILES: Thank you. The next
7 item on the agenda are new contested cases, and
8 I'm going to turn it back over to Ben.

9 MR. REED: Madam Chair, there has been a
10 notice of appeal of the final DES permit issued
11 for the Laurel refinery, and I've drafted a
12 scheduling order. It requires assignment of a
13 permanent Hearing Examiner, should the Board so

14 choose.

15 CHAIRMAN MILES: Thank you. Any
16 discussion on this item from Board members? This
17 does deal with, as has been mentioned, an appeal
18 to a permit, and I think particularly focusing on
19 some of the monitoring requirements, and some of
20 the actual requirements that are in the permit.
21 Does the Board wish to take this up directly or
22 assign to a permanent Hearing Examiner? Any
23 comments?

24 (No response)

25 CHAIRMAN MILES: I'll accept a motion to

0016

1 assign this to a permanent Hearing Examiner unless
2 somebody wishes to do otherwise.

3 MR. TWEETEN: So moved.

4 MR. SAYLES O'CONNOR: Second.

5 CHAIRMAN MILES: It's been moved and
6 seconded. Any further discussion?

7 (No response)

8 CHAIRMAN MILES: All in favor, please
9 say aye.

10 (Response)

11 CHAIRMAN MILES: Robin, are you on the
12 phone?

13 MS. SHROPSHIRE: I'm here. Aye.

14 CHAIRMAN MILES: Anyone opposed?

15 (No response)

16 CHAIRMAN MILES: Hearing none, this will
17 be assigned to Ben. Thank you. Assuming you can
18 take these on.

19 MR. REED: Yes, Madam Chair. In the
20 matter of the termination by DEQ of Payne
21 Logging's application requesting to move its
22 boundaries in Libby, the Board has received the
23 appeal, I've drafted an initial prehearing order,
24 and this requires only that a permanent Hearing
25 Examiner be assigned if the Board so chooses. I

0017

1 am able to take this case.

2 CHAIRMAN MILES: Any discussion on this
3 matter?

4 (No response)

5 CHAIRMAN MILES: Is there a motion to
6 assign to a Hearing Examiner?

7 MR. SAYLES O'CONNOR: I would move we
8 assign a permanent Hearing Examiner.

9 CHAIRMAN MILES: Is there a second?

10 MS. REINHART-LEVINE: Second.

11 CHAIRMAN MILES: Thank you. It's been
12 moved and seconded. Any further discussion?

13 (No response)

14 CHAIRMAN MILES: All in favor, please
15 say aye.

16 (Response)

17 CHAIRMAN MILES: Opposed.

18 (No response)

19 CHAIRMAN MILES: Hearing none, we have
20 assigned that to Ben as well. Thank you for
21 taking those on.

22 The next item is initiation of
23 rulemaking. George.

24 MR. MATHIEUS: Thank you, Madam Chair.

25 The first item is updates for DEQ Circular 2

0018

1 having to do with our wastewater operator
2 certification program, and Tammy Filiator will be
3 presenting today on behalf of the Department.

4 CHAIRMAN MILES: Just for the Board,
5 it's on Page 50 of your agenda packet is where
6 this starts.

7 MS. FILLIATOR: Madam Chair, members of
8 the Board, my name is Tammy Filiator, and I'm the
9 rule coordinator for the Public Water and
10 Subdivision Bureau of the Montana DEQ.

11 Montana Code Annotated 37-42-104 and
12 37-42-202 give the Department the authority to
13 adopt rules concerning the operator certification
14 program. Using this authority, in October of
15 2015, the Department proposed a series of changes
16 to operator certification rules. These rule
17 changes were supported by both the Operator
18 Certification Advisory Committee and the Public
19 Water Supply Focus Group.

20 A public hearing was held on November
21 4th, and the official comment period ended on
22 November 16th. No formal comments were submitted
23 pertaining to this rule package. The rule
24 adoption notice was submitted to the Secretary of
25 State on the 30th of November. Therefore the

0019

1 proposed rules will be adopted this month and in
2 effect next Friday, December 11th.

3 As part of the above mentioned operator
4 certification rule package, wastewater treatment
5 classes and corresponding certifications will
6 change. Currently we have four classes. Once the
7 proposed rules are adopted, we will have four
8 classes for operators certified prior to January
9 1st of 2016, and two classes for operators
10 certified on or after January 1st of 2016.

11 I stand before the Board because the
12 details of the current four wastewater classes and
13 corresponding certifications are included in
14 Circular DEQ2. Montana Code Annotated 75-6-103
15 gives the Board the authority to edit DEQ2 and
16 adopt by reference the updated version.

17 The Department is proposing to open DEQ2
18 and to make a minor change in the material, that
19 is remove the wording for the four wastewater
20 classes we have now, and add wording to put an
21 interested party to Montana ARM 17.40.202, which
22 contains the most current wastewater treatment
23 system classification information. Then we
24 propose adopting the new version for water
25 quality, subdivisions, public water, and solid

0020

1 waste.

2 The Department considered inserting
3 explanations of the new classifications in the
4 DEQ2. However, by directing an interested party
5 to the appropriate ARM, stating current
6 classification rules, we will not have to reopen
7 this document in the event additional changes are
8 made. The Department does not expect this rule
9 package to be controversial. The Department

10 recommends initiation of rulemaking, and
 11 appointment of a Hearing Officer for a public
 12 hearing. Thank you, and are there questions?

13 CHAIRMAN MILES: Thank you. That was
 14 very clear. Any questions from the Board?

15 (No response)

16 CHAIRMAN MILES: I think we do need to
 17 open it up for public comment, unless anyone has
 18 questions here of you.

19 (No response)

20 CHAIRMAN MILES: Is there any comment
 21 from the public on this proposal?

22 (No response).

23 CHAIRMAN MILES: Seeing none, is there a
 24 motion from the Board to initiate rulemaking to
 25 update Circular DEQ2?

0021

1 MS. SHROPSHIRE: So moved from Robi n.

2 CHAIRMAN MILES: Thank you, Robi n. Is
 3 there a second?

4 MR. SAYLES O'CONNOR: Second.

5 CHAIRMAN MILES: Roy O' Connor. Any
 6 further discussion?

7 (No response)

8 CHAIRMAN MILES: Hearing none, all in
 9 favor of the motion, please say aye.

10 (Response)

11 CHAIRMAN MILES: Robi n.

12 MS. SHROPSHIRE: Aye. I said aye.

13 CHAIRMAN MILES: Thank you. Opposed.

14 (No response)

15 CHAIRMAN MILES: Hearing none, the
 16 motion passes, and your recommendation of
 17 initiating rulemaking and assigning to a Hearing
 18 Examiner.

19 MS. FILLIATOR: Thank you, Madam Chair.

20 CHAIRMAN MILES: Item No. 2, which is
 21 that whole laundry list of regulations that the
 22 Department has determined are duplicative of
 23 statute or rule or are otherwise unnecessary. Who
 24 is going to take this?

25 MR. MATHIEUS: Thank you, Madam Chair.

0022

1 We have two individuals today. First we'll have
 2 Ms. Carrie Smith, and then followed by Mr. John
 3 Arri go.

4 MS. SMITH: Good morning, Chairman
 5 Miles, members of the Board. My name is Carrie
 6 Smith, and I'm the policy advisor in our Planning
 7 Division.

8 Over the last several months, the
 9 Department has taken on the task to review our
 10 Administrative Rules, and identify those that are
 11 duplicative, unnecessary, or simply outdated. The
 12 rule package before you contains such rules, and
 13 will not affect any of our regulated sources. On
 14 November 6th, John Arri go and I presented this
 15 rule package to our Water Pollution Control
 16 Advisory Council, who recommended that we move
 17 forward and present these rules to you for your
 18 consideration. I would like to provide a brief
 19 overview of those rules that are not directly
 20 related to enforcement, and ask Mr. Arri go to

21 present the rules related to penalties and
22 enforcement.

23 As a reference, the proposed rules
24 before you are all contained in Environmental
25 Quality Title 17. First, in Chapter 4, which is a

0023
1 procedural rule, 201, it is a water pollution rule
2 that required the Department to work through
3 WPCAC, Water Pollution Control Advisory Council.
4 This rule merely repeats the statute and is
5 unnecessary.

6 Contained in Chapter 30, which is water
7 quality, Subchapter 6, which is specific to
8 surface water quality standards and procedures,
9 Item 635, radiological criteria, it prohibits the
10 violation of radiological criteria. However, a
11 violation of any provision of our water quality
12 standards DEQ7 is pollution, and causing pollution
13 is prohibited by statute. Therefore this rule is
14 unnecessary.

15 Contained in Subchapter 13, which is the
16 Montana Pollutant Discharge Elimination System
17 permit rule, Rule 1386. This rule was adopted in
18 1989, and requires the Department to coordinate
19 and report to EPA. However, this rule was adopted
20 long before the annual performance partnership
21 agreement between the Department and EPA, as well
22 as electronic web based data base reporting
23 systems, online meetings, and email. Reporting
24 requirements to EPA have been modified and
25 contained in all of our annual agreements.

0024
1 Therefore this rule is outdated and unnecessary.

2 Subchapter 14 is pretreatment. This
3 entire subchapter was adopted in 1989 in
4 anticipation of receiving delegation from EPA for
5 the pretreatment program. However, due to the
6 lack of funding, the Department opted not to seek
7 authority for the program, and it continues as
8 today operated and administered by EPA. Due to
9 the age of these rules, if in the future the
10 Department wanted to seek delegation, it would be
11 better to adopt the current rules as they are at
12 the time, rather than to try to modify these 1989
13 versions.

14 And finally, Subchapter 16 is water
15 quality administrative procedure rule. In 1602,
16 it is an emergency procedure rule which repeats
17 the statute, and since it is repeating the
18 statute, and the statute is self-implementing, the
19 rule is unnecessary.

20 I would be happy to answer any questions
21 you may have about any one of those rules or any
22 portion of the package.

23 CHAIRMAN MILES: Any questions?

24 (No response)

25 CHAIRMAN MILES: I have a question, and

0025
1 it is truly a question, not a criticism or
2 anything, but I struggled with this actually
3 during my time at DPHHS as well.
4 With so many rules or provisions
5 scattered throughout the statutes, and then some

6 provisions contained in rule, how is a regulated
7 entity supposed to have one comprehensive guide to
8 what they need to do to comply with whatever it is
9 they're trying to do? I just worry about that, if
10 things are in different places in bits and pieces.

11 MS. SMITH: Chairman Miles, I think
12 that's an excellent question and observation, and
13 I think from my perspective, part of this is an
14 effort on behalf of the Department to recognize
15 that when their staff becomes confused with the
16 pieces and parts and the disjointed, it is time to
17 take a look at these things in a comprehensive,
18 which is why you look at some veteran employees,
19 and they jump into these projects, and take it on
20 as a task.

21 This is only the beginning. I
22 anticipate that as an agency we will continue to
23 look at this, so that we do have one comprehensive
24 area, so that our regulated community can
25 understand what their expectations are.

0026
1 CHAIRMAN MILES: Thank you. Any further
2 questions?

3 (No response)

4 CHAIRMAN MILES: If not, I think we'll
5 go to John Arrigo. Thank you very much.

6 MR. ARRIGO: Madam Chair, members of the
7 Board, my name is John Arrigo. And just to add to
8 Ms. Smith's answer to your question, Chairperson,
9 the Environment Quality Council publishes a
10 booklet biannually which lists all the applicable
11 environmental statutes and regulations, so that's
12 kind of a guide book there.

13 I'm here to discuss the repeal of
14 17.30.2001 and 2003, and those are old Water
15 Quality Act penalty calculation rules; and then
16 16.38.601, 602, 603, and 607, and those are old
17 public water supply penalty calculation rules.
18 And I asked Ms. Houle to put into your packet a
19 copy of these rules, and it starts on Page 72.

20 You'll note that some of the rules are
21 in kind of an Arial font. Those are the ones that
22 we're requesting to be repealed. The other ones
23 that are in more of the Times Roman font, those
24 have already been repealed.

25 To give you a little bit of background

0027
1 and help you understand, in 1995, the Board of
2 Health and Environmental Sciences, your
3 predecessor, promulgated the Public Water Supply
4 Penalty Calculation Rules. In 1998, the BER
5 promulgated Water Quality Act Penalty Calculation
6 Rules. The Department and the Enforcement
7 Division were created in 1996. In the Enforcement
8 Division's earlier years, we used a combination of
9 rules, and policies, and guidance, etc., to
10 calculate penalties under the various statutes.

11 Recognizing that this was kind of
12 inconsistent, the Department worked with the
13 Legislature in 2005, and we had a bill passed that
14 standardized the factors you consider in penalty
15 calculations for all of the laws that DEQ
16 administers. In 2006, the Board promulgated

17 standard penalty calculation rules which we use
18 today.

19 Also when those new rules were
20 promulgated, we repealed parts of the water
21 quality and public water supply penalty
22 calculation rules that dealt with the actual
23 calculation. However, we did not repeal the
24 definitions sections, and some of the procedural
25 sections, thinking that they would help guide us

0028

1 in our implementation of the new penalty
2 calculation rules. Now after almost ten years of
3 implementing the standard penalty calculation
4 rules, the old rules are out of date and not used,
5 so they're ripe for repeal.

6 I can give you some general comments on
7 the reasons for these requests for repeal, and one
8 is that there is definitions of classes of
9 violations; those are outdated and are not
10 comprehensive. There is also definitions of other
11 terms that are commonly understood, so those don't
12 need to be in rule. Some sections of the rules
13 unnecessarily repeat statutory language. And then
14 some of the procedures actually conflict with
15 existing statute or unnecessarily limit the
16 Department's discretion on enforcement.

17 If you would like me to go through the
18 specific rules, I'd be happy to, or answer any
19 questions.

20 CHAIRMAN MILES: Any questions?

21 (No response)

22 CHAIRMAN MILES: Explain again where --
23 So you've taken all this out, but where is it in
24 the new rules?

25 MR. ARRIGO: Madam Chair, members of the

0029

1 Board, we have a new set of penalty calculation
2 rules that are in 17.4.300, and they implement the
3 standard penalty factors that are in statute, and
4 they're used to calculate penalties under each
5 law.

6 CHAIRMAN MILES: So that's already in
7 existence?

8 MR. ARRIGO: Yes, it has been since
9 2006, the Board rules.

10 MR. SAYLES O'CONNOR: Madam Chair. Are
11 you simplifying these rules? All these rule
12 changes, is this for simplifying them, or for
13 clarification, or both? Do you have a word that
14 you can describe these measures?

15 MR. ARRIGO: Madam Chair, Mr. O'Connor,
16 these repeals are to get rid of rules that are not
17 used and not necessary because we have a new set
18 that works fine.

19 CHAIRMAN MILES: Any further questions?
20 (No response)

21 CHAIRMAN MILES: Thank you.

22 MR. ARRIGO: Madam Chair, with that, I'd
23 like to request the Board initiate rulemaking to
24 repeal these rules, and we need a hearing, and
25 appoint a Hearing Officer. Thank you.

0030

1 CHAIRMAN MILES: Is your request

2 including everything that's on this list in Item
3 No. 2?

4 MR. ARRIGO: Yes, ma'am.

5 CHAIRMAN MILES: The one that Ms. Smith
6 talked about? Thank you. Any comment from
7 members of public? Anyone wish to comment on
8 these rules?

9 (No response)

10 CHAIRMAN MILES: Seeing and hearing
11 none, is there a motion from the Board to initiate
12 rulemaking as described in Item No. III(b)(2)?

13 MS. REINHART-LEVINE: Madam Chair, so
14 moved.

15 MR. SAYLES O'CONNOR: Second.

16 CHAIRMAN MILES: Second by Roy O' Connor.
17 Any further discussion?

18 (No response)

19 CHAIRMAN MILES: Hearing none, all in
20 favor of initiating rulemaking and appointing a
21 Hearing Examiner, please say aye.

22 (Response)

23 MS. SHROPSHIRE: Aye.

24 CHAIRMAN MILES: Opposed.

25 (No response)

0031

1 CHAIRMAN MILES: Hearing none, the
2 motion passes, and both of those rulemaking
3 procedures will go forward.

4 I do have a quick question of George,
5 just an FYI clarification. Does DEQ need to
6 submit their proposed rules before any Legislative
7 committees?

8 MR. MATHIEUS: Madam Chair, in the past
9 we had to submit -- what I'm not clear on, and
10 pardon me, I'll ask for clarification from Mr.
11 North. It used to be EQC, but I believe in the
12 last session, those authorities got transferred to
13 the Water Policy Interim Committee; is that
14 correct?

15 MR. NORTH: Only the water quality
16 rules.

17 MR. MATHIEUS: Only on the water quality
18 side then. EQC would still cover waste, and air,
19 and things of that nature.

20 CHAIRMAN MILES: So you'll still go
21 through a legislative committee. Where does that
22 take place in the process?

23 MR. MATHIEUS: How about if I just refer
24 this to Chief Legal? Thank you.

25 CHAIRMAN MILES: I'm just very familiar

0032

1 with this from the Health Department, and I
2 wondered what you did here.

3 MR. NORTH: Madam Chair, members of the
4 Board, John North. The rules, once the Board
5 decides to initiate rulemaking, we send the
6 proposed notices to the Environment Quality
7 Council, for all rules other than water quality
8 and for water quality, to the Water Policy
9 Committee; and then they do their review, it's on
10 their next agenda, and they decide whether or not
11 they want to call the agency in, whether or not
12 they want to object to the rules, delay the

13 rul emaki ng, whatever.

14 CHAIRMAN MILES: Thank you.

15 MR. TWEETEN: Madam Chair. John, could
16 I ask a question? John, all of these rules that
17 are deemed to be either duplicative or superseded
18 or otherwise unnecessary, I'm assuming that your
19 shop has looked through these, and concurs in the
20 decision that these are actually either redundant
21 or obsolete or so forth as reported by staff?

22 MR. NORTH: Madam Chair, Mr. Tweeten.
23 Absolutely. That's correct.

24 CHAIRMAN MILES: That takes us to Item
25 III(c), which is the final action on Montana

0033

1 Environmental Information Center and the Signal
2 Peak Energy case. And are we waiting for anybody?

3 MS. HOULE: I think we should give it a
4 few minutes for people to call in if they were
5 planning to during the Signal Peak, and then we
6 can clarify if anyone has called in.

7 CHAIRMAN MILES: So let's just break for
8 ten minutes.

9 (Recessed at 9:46 a.m.)

* * * * *

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

0034

C E R T I F I C A T E

2 STATE OF MONTANA)
3 : SS.

4 COUNTY OF LEWIS & CLARK)

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

8 That the proceedings were taken before me at
9 the time and place herein named; that the
10 proceedings were reported by me in shorthand and
11 transcribed using computer-aided transcription,
12 and that the foregoing - 33 - pages contain a true
13 record of the proceedings to the best of my
14 ability.

15 IN WITNESS WHEREOF, I have hereunto set my
16 hand and affixed my notarial seal
17 this day of , 2015.

18
19 LAURIE CRUTCHER, RPR
20 Court Reporter - Notary Public
21 My commission expires
22 March 12, 2016.
23

24
25

120415