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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

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BOARD MEETING )  
FEBRUARY 9, 2018 )

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TRANSCRIPT OF PROCEEDINGS

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Heard at Room 111 of the Metcalf Building  
1520 East Sixth Avenue  
Helena, Montana  
February 9, 2018  
9:00 a.m.

BEFORE CHAIR CHRIS DEVENY,  
BOARD MEMBERS JOHN DEARMENT, DEXTER BUSBY,  
HILLARY HANSON;  
and CHRIS TWEETEN and TIM WARNER (By telephone)

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

1           WHEREUPON, the following proceedings were  
2 had:

3                           \* \* \* \* \*

4           CHAIR DEVENY: Good morning, everybody.  
5 I'm Chris Deveny, Chair of the Board of  
6 Environmental Review, and I'd like to call this  
7 meeting to order. Lindsay, would you please take  
8 the roll call.

9           MS. FORD: Chris Deveny.

10          CHAIR DEVENY: Present.

11          MS. FORD: Dexter Busby.

12          MR. BUSBY: I'm here.

13          MS. FORD: Hillary Hanson.

14          MS. HANSON: Here.

15          MS. FORD: John Dearment.

16          MR. DEARMENT: Here.

17          MS. FORD: Tim Warner.

18          MR. WARNER: I'm here.

19          MS. FORD: Chris Tweeten.

20          MR. TWEETEN: Present.

21          MS. FORD: John Felton.

22                   (No response)

23          MS. FORD: John did say he would not be  
24 attending, so he's not present.

25          CHAIR DEVENY: So we have a quorum.

1 Great. At this time I'd like to ask people in the  
2 room to identify themselves, and also then we'll  
3 be asking people who might have called in  
4 telephonically to also identify themselves. So if  
5 we could start with John.

6 MR. NORTH: John North, Chief Counsel  
7 for the DEQ.

8 MR. CRONIN: Chris Cronin, Section  
9 Supervisor for the Opencut Program.

10 MR. MOSER: Kurt Moser, attorney with  
11 DEQ.

12 MR. LUCAS: Mark Lucas, attorney with  
13 DEQ.

14 MR. HAYES: Ed Hayes, attorney for DEQ.

15 MS. SHERER: Sandy Scherer, legal  
16 secretary DEQ.

17 MR. PETTIS: Aaron Pettis, attorney for  
18 DEQ.

19 MR. GARBER: Jason Garber, Water  
20 Protection Bureau, DEQ.

21 MS. ULRICH: Liz Ulrich, Air Quality  
22 Planning.

23 MS. MERKEL: Julie Merkel, Air Quality  
24 Permitting.

25 MS. ACKERLUND: Julie Ackerlund, Air

1 Quality Planning.

2 MR. CHRISTENSEN: Brady Christensen, DEQ  
3 Solid Waste.

4 MR. KENNING: Jon Kenning, Water  
5 Protection Bureau Chief.

6 MR. JONES: Brad Jones, DEQ attorney.

7 MR. BROWN: Jim Brown, attorney for  
8 Payne Logging.

9 CHAIR DEVENY: Thank you. And could I  
10 ask anybody else who is on the phone to identify  
11 themselves, anybody that might have called in,  
12 besides our two Board members.

13 (No response)

14 CHAIR DEVENY: Hearing none, we'll go on  
15 and review the minutes. First we have two meeting  
16 minutes to review. The December 8th meeting  
17 minutes, are there any additions or corrections to  
18 these minutes from the Board or from staff?

19 (No response)

20 CHAIR DEVENY: Hearing none, are there  
21 any comments on the minutes from members of the  
22 public?

23 (No response)

24 CHAIR DEVENY: Hearing or seeing none,  
25 is there a motion to approve the minutes from the

1 December 8th meeting?

2 MS. HANSON: So moved.

3 MR. BUSBY: Second.

4 CHAIR DEVENY: It's been moved and  
5 seconded. Any discussion?

6 (No response)

7 CHAIR DEVENY: None. All in favor, say  
8 aye.

9 (Response)

10 CHAIR DEVENY: Any opposed?

11 (No response)

12 CHAIR DEVENY: Motion carries. The  
13 minutes from December 8th have been approved.

14 Let's look at the January 5th meeting  
15 minutes that you've all reviewed by now. Are  
16 there any additions or corrections to these  
17 minutes from Board members, or DEQ?

18 (No response)

19 CHAIR DEVENY: Hearing or seeing none,  
20 are there any from the public?

21 (No response)

22 CHAIR DEVENY: Hearing or seeing none,  
23 do I have a motion to approve the minutes?

24 MR. BUSBY: So moved.

25 CHAIR DEVENY: It's been moved.

1 MR. DEARMENT: Second.

2 CHAIR DEVENY: It's been moved and  
3 seconded. All in favor, say aye.

4 (Response)

5 CHAIR DEVENY: Any opposed?

6 (No response)

7 CHAIR DEVENY: None. Okay. The meeting  
8 minutes from January 5th have been approved.

9 And next we'll turn this over to DEQ to  
10 talk about the potential 2018 Board rulemaking.

11 MR. MATHEIUS: Madam Chair, thank you.  
12 I'm going to hand this out to the Board. It would  
13 be easier.

14 So this is just the same potential  
15 rulemaking schedule that we handed out the last  
16 Board meeting, and I would just note that there  
17 has been a couple of just quick changes, and  
18 they're just date changes.

19 The one today, for example, it is on the  
20 agenda for today, already proposed initiation, so  
21 today would be potential adoption. And then the  
22 one near the end, I think we were originally  
23 shooting for December on proposed initiation, and  
24 we moved that back to October.

25 I apologize for being late. I was

1 frantically looking for someone in Water Quality  
2 to come and talk about the two DEQ Water Quality  
3 related rulemakings. I was unsuccessful, but I  
4 could probably talk about it generally. But there  
5 are folks from Air Quality here that can talk  
6 about the air ones, and Jon Dilliard is here, and  
7 he could talk about the public water supply one.

8 So I guess the first one, so we'll skip  
9 the nitrate sampling requirements, and just jump  
10 to public water supplies, modifying requirements  
11 regarding materials and fixtures containing lead.  
12 Jon will offer some thoughts on what that's going  
13 to entail.

14 MR. DILLIARD: Thank you, George. Madam  
15 Chair, members of the Board, my name is Jon  
16 Dilliard. I am with the Public Water Supply  
17 Bureau, and I'm the Bureau Chief, and I'd like to  
18 talk to you just a moment about our proposed  
19 rulemaking.

20 First of all, I would like to apologize  
21 that the title of the rulemaking is not very  
22 descriptive of what we're actually doing. What  
23 we're proposing in our rules is to put together  
24 some requirements for a public water supply to use  
25 when they are doing water main replacement that

1 involves lead service lines.

2           When activity like that occurs, what  
3 we've found out in many cases -- and Flint is a  
4 good indication of it -- is when water main work  
5 occurs, there is a release of lead from lead  
6 service lines that goes into the homes. So we  
7 have to take special care, and we want communities  
8 to take special care of those people when they're  
9 doing that kind of work.

10           So we're coming up with some  
11 requirements for the system to follow, such as  
12 prior notification to the owners, offering them  
13 with either bottled or filtered water of some  
14 sort, periodic monitoring during the construction  
15 and after the construction for awhile to make sure  
16 their lead levels don't spike on them.

17           And that's just in a nutshell what we're  
18 proposing in these rules. It is just something  
19 for the communities to follow when they have to  
20 work in those situations involving lead service  
21 lines.

22           CHAIR DEVENY: Thank you, Jon. It looks  
23 like we'll be looking at those in April.

24           MR. DILLIARD: Thank you. I guess I'm  
25 going to move on to the next one for Public Water



1 Supply. Once again, I'm Jon Dilliard, Public  
2 Water Supply Bureau.

3 The next one that we're proposing is to  
4 modify our Circular PWS5, which is actually the  
5 Groundwater Under the Influence of Surface Water  
6 Circular that we use to determine if a system that  
7 is supposedly groundwater has surface water  
8 influence.

9 And what we're doing on that is  
10 primarily housekeeping. One of the things we were  
11 doing is one of the rules that is contained or  
12 surrounded that is the total coliform rule. EPA  
13 has recently changed that, and we have recently  
14 adopted those changes, and now it's called the  
15 Revised Total Coliform Rule.

16 So we're going in, we're going to make  
17 those changes, we're updating some of the forms,  
18 some of the language to make it easier to read,  
19 easier to follow, and easier to fill out the forms  
20 that we have. So it is pretty much all  
21 housekeeping effort.

22 CHAIR DEVENY: All right.

23 MR. DILLIARD: Any questions?

24 CHAIR DEVENY: I think we don't need a  
25 lot of detail right now because we'll be hearing

1 those. Thank you.

2 MR. MATHEIUS: So Madam Chair, it looks  
3 like we have about three of them from Air Quality  
4 Bureau, so I think Liz will probably talk about  
5 those. Do you have the list, Liz?

6 MS. ULRICH: I do.

7 CHAIR DEVENY: And this could just be  
8 really brief.

9 MS. ULRICH: Good morning, Madam Chair,  
10 members of the Board. My name is Liz Ulrich,  
11 U-L-R-I-C-H, and I'm the supervisor of the  
12 Analysis and Planning Services Section in the Air  
13 Quality Bureau at DEQ.

14 The first thing that's going to be  
15 happening today, we are going to be requesting  
16 adoption of our 2016 IBR package. So you've  
17 already approved initiation of that one. And then  
18 the next item is hopefully we can initiate in  
19 August. That will be the 2017 version of our IBR  
20 and QAPP update, which is the Quality Assurance  
21 Project Plan.

22 Those two things are a yearly update.  
23 We incorporate the federal regulations into our  
24 rules to kind of keep the authority in DEQ's hands  
25 rather than Federal oversight.

1           Is there any questions about the IBR or  
2 the QAPP update?

3           CHAIR DEVENY: No.

4           MS. ULRICH: That one is a pretty  
5 standard thing.

6           And then lastly we have, we moved our  
7 initiation up hopefully to October. That might be  
8 a little ambitious of us, but we would like to get  
9 that done hopefully before -- initiate before the  
10 end of the year, so we're kind of trying to get it  
11 in fall rather than December. And that's the  
12 registration program for portable sources.

13           This is something we currently have a  
14 registration program for oil and gas well  
15 facilities, and it just is a -- we're looking to  
16 do it for portable sources, initially crushers and  
17 screens. And I have Julie Merkel here, the  
18 Permitting Supervisor. If you have further  
19 questions about this, she can speak to it.

20           But having them follow one set of rules,  
21 rather than having permits for each of those  
22 sources, they would just be able to follow one set  
23 of rules, register their source. It's really just  
24 a more efficient way for us to permit for the  
25 sources and for us.

1           But we are also hoping to have a  
2 briefing before we bring that rulemaking to you.  
3 So hopefully a meeting or two before that, we'll  
4 brief you on what that's going to look like.

5           CHAIR DEVENY: That's great. And I had  
6 asked DEQ to put this together so the Board  
7 members would have an idea of what rules are  
8 coming down the next meetings and months for this  
9 calendar year, so that's really helpful. Thank  
10 you.

11           MR. MATHEIUS: Madam Chair, we are just  
12 going to have two more that we could briefly --  
13 Jon Kenning could probably, at least one for sure  
14 I know he can discuss.

15           MR. KENNING: Madam Chair, members of  
16 the Board, my name is Jon Kenning. I am the  
17 Bureau Chief of the Water Protection Bureau.

18           Coming up in June, we hope to have a  
19 rule package on the 401 program. The 401 is part  
20 of the Clean Water Act that deals with basically  
21 certifying federal projects in water ways, such as  
22 Army Corps projects, or hydroelectric dams. When  
23 they put those projects in, the State has the  
24 right to condition those projects to make sure  
25 they're protecting Water Quality.

1           Currently, our rules, the timelines in  
2           our rules do not line up with the Federal rules,  
3           so we have to make a decision before we even know  
4           what the project is. And so we hope to come to  
5           you with a rule package to rectify that.

6           CHAIR DEVENY: Thank you, Jon. Is that  
7           it, George?

8           MR. MATHEIUS: Yes.

9           CHAIR DEVENY: Do any Board members have  
10          any questions about this, or can we move on to the  
11          actual rulemaking?

12          (No response)

13          CHAIR DEVENY: I don't hear any, so  
14          let's go ahead then, and move on to the rule  
15          adoption for the Montana Ambient Air Monitoring  
16          Program.

17          MS. CLERGET: No, I think you're on the  
18          briefing items. You're getting ahead of yourself.

19          CHAIR DEVENY: Yes, I am. We have to go  
20          to the briefing items first. I'll turn it over to  
21          Sarah to talk about contested case updates.

22          MS. CLERGET: A few updates I have  
23          orally for you that are a little different than  
24          what's on the agenda, so I'm going to try and go  
25          through these relatively quickly.

1 Columbia Falls, you know where we are in  
2 that. I'm reviewing the hearing, so that's going  
3 to take a little bit, and then we have to do an  
4 order and exceptions. So it's probably going to  
5 be a few meetings before that's done.

6 In Copper Ridge, which is the (b) and  
7 (c), under "A," those are two cases that are being  
8 handled together. They're scheduled for hearing  
9 at the end of this month.

10 Then (d), the matter of Goran has  
11 actually been dismissed since we did this agenda,  
12 so that's going to fall off your agenda. You  
13 won't hear that anymore.

14 (e), this is on the second page, Oil  
15 Field Rock and Logistics, I should be issuing an  
16 order on that relatively soon. Then we have  
17 exceptions, so hopefully that one will be before  
18 you at the next meeting.

19 (f), Dickinson, that one has actually  
20 been dismissed since we did this agenda as well,  
21 so that one will fall off the agenda. You won't  
22 see it anymore.

23 Under Section 2, Non-Enforcement Cases,  
24 Westmoreland, we have a status update coming from  
25 the parties on this one, because there is some

1 question about whether we need to put in a  
2 scheduling order or whether we need to continue  
3 with a stay. So I'm monitoring this one, and  
4 hopefully I'll have a better update for you at the  
5 next meeting.

6 Signal Peak. I've asked for a status  
7 update, or a proposed prehearing order which was  
8 supposed to come in yesterday. I don't know if  
9 that actually did or not. But the point is we're  
10 monitoring that one. It is in a stay, but we're  
11 watching it pretty closely.

12 In Western Energy, that's scheduled for  
13 a hearing. It is going to be a big hearing, five  
14 days in March. So they're working on prehearing  
15 briefs right now.

16 Montanore, the scheduling order is in  
17 place, and they're proceeding based on the  
18 scheduling order. So they're in the discovery  
19 stage right now.

20 Laurel Refinery. We have stayed this,  
21 but only until February 16th. So they're going to  
22 file a status update. We're monitoring that one  
23 pretty carefully.

24 And JR Civil, which is (f) on Page 3, I  
25 issued a scheduling order. They asked for a two

1 week delay while they work on some settlement  
2 discussions, which I granted, but it shouldn't  
3 mess with the scheduling overall, so they're still  
4 proceeding until I hear otherwise, based on the  
5 scheduling order.

6 In Section 3, this is a new case that  
7 you need to assign, and if you want to assign it,  
8 I'll remind you that your options are you can keep  
9 it; you can keep it for substantive decisions and  
10 give it to a Hearing Examiner for procedural  
11 matters; or you can hand it over to the Hearing  
12 Examiner for procedural and substantive matters.

13 So that should be in your packet pages  
14 -- I'm sorry. I'm getting ahead of myself. No,  
15 this is DEQ's update. It's a new contested case,  
16 so it's not until later. Sorry. I'm turning it  
17 over to John North for an update on this one.

18 MR. NORTH: Madam Chair, members of the  
19 Board, John North, Chief Legal Counsel at DEQ.

20 Actually there has been something  
21 occurred since this was given, was prepared two  
22 weeks ago, and that is the parties did reach  
23 settlement on the attorneys fees, and the Court  
24 has entered judgment in accordance with the  
25 settlement.



1           So I suspect that perhaps next week a  
2 notice of entry of judgment will be entered, and  
3 then the case, I suspect, will be appealed to the  
4 Montana Supreme Court. So I would expect by next  
5 Board meeting, the report will be that it's in the  
6 Supreme Court and in the briefing phase.

7           CHAIR DEVENY: Thank you, John.

8           MS. CLERGET: That's all for me at this  
9 point. I apologize. The new contested case comes  
10 under Action Items later.

11          CHAIR DEVENY: Thank you, Sarah. Any  
12 questions from Board members about Sarah's update?

13          (No response)

14          CHAIR DEVENY: Or John's update.

15          (No response)

16          CHAIR DEVENY: Hearing none, we will  
17 move on now to the Montana Ambient Air Monitoring  
18 Program Rules.

19          MR. MATHEIUS: Yes, Madam Chair.

20          MS. ACKERLUND: Madam Chair, members of  
21 the Board, my name is Julie Ackerlund. I'm with  
22 the Department's Air Quality Bureau. Ackerlund is  
23 spelled A-C-K-E-R-L-U-N-D.

24                 And I'm here today to ask the Board to  
25 adopt rulemaking to incorporate by reference up to

1 date editions of the Federal Air Quality  
2 Regulations and Contact Information that we have  
3 in the Administrative Rules of Montana, and to  
4 adopt the rulemaking to incorporate the 2017  
5 Montana Ambient Air Monitoring Program, Quality  
6 Assurance Project Plan, also affectionately known  
7 as QAPP.

8           Annually the Department requests  
9 rulemaking to ensure that Montana's air quality  
10 rules are at least as stringent as the Federal  
11 regulations, which allows Montana to continue to  
12 have administrative authority to implement and  
13 enforce Federal emission standards.

14           The Board initiated rulemaking on  
15 September 29th of 2017. We received no public  
16 comments, and the Department did submit supporting  
17 comments. The Department requests that the Board  
18 adopt the rules as proposed, and that they adopt  
19 the stringency and takings analysis that's in your  
20 Board packet. Thank you.

21           CHAIR DEVENY: Thank you, Julie. Are  
22 there questions from Board members of Ms.  
23 Ackerlund or other DEQ representatives about these  
24 proposed rules? We did have a presentation on  
25 this I believe at the September meeting.

1 (No response)

2 CHAIR DEVENY: Hearing none, before I  
3 proceed, there have been some additional folks  
4 that came into the room since we had people  
5 identify themselves, so if people could do that  
6 for the record, it would be very helpful. We'll  
7 start on this side of the room. Ed, do you want  
8 to start. We're just identifying new people.

9 MR. THAMKE: Good morning, everybody.  
10 My name is Ed Thamke. I'm the Waste and  
11 Underground Tank Management Bureau Chief for the  
12 Department.

13 MR. COLEMAN: And I'm Ed Coleman. I'm  
14 the Bureau Chief over the Coal and Opencut Mining  
15 Bureau.

16 MS. BAWDEN: Susan Bawden, DEQ  
17 Enforcement.

18 MR. MULLEN: Norm Mullen. I'm the Air  
19 Quality and Energy attorney for DEQ.

20 CHAIR DEVENY: Are there other folks  
21 that came in since we last asked?

22 (No response)

23 CHAIR DEVENY: Okay. Thank you. So  
24 we've had no questions from the Board members.  
25 Are there any comments from the public on the

1 proposed air quality rules?

2 (No response)

3 CHAIR DEVENY: Hearing and seeing none,  
4 I guess I would like the Board to entertain a  
5 motion, if there is.

6 MR. DEARMENT: I move that we adopt the  
7 rules.

8 CHAIR DEVENY: I would second that  
9 motion. Is there discussion about the motion?

10 (No response)

11 CHAIR DEVENY: Hearing none, we'll take  
12 a vote. All those in favor of adopting these  
13 rules, please signify by saying aye.

14 (Response)

15 CHAIR DEVENY: Any opposed?

16 (No response)

17 CHAIR DEVENY: Hearing none, the motion  
18 passes, and the air quality rules have been  
19 adopted. Thank you. So now, Sarah, we'll move on  
20 to the new contested case that we have before us.

21 MS. CLERGET: Yes. So under Action  
22 Items Section III.B(1), you have a new contested  
23 case that needs to be assigned. And the materials  
24 on this case are in your packet, so it should be  
25 pages -- they're not numbered, but the second sort

1 of pink section in your binder, the Matter of  
2 Notice of Appeal and Request for Hearing by CMG  
3 Construction.

4 CHAIR DEVENY: Give everybody a few  
5 seconds to find that, if we could.

6 MS. CLERGET: Sure.

7 CHAIR DEVENY: Go ahead.

8 MS. CLERGET: So I'll remind you your  
9 options are the three I discussed before, and you  
10 just need to do whichever of those options by a  
11 seconded motion.

12 CHAIR DEVENY: Is there discussion by  
13 Board members on this new contested case?

14 (No response)

15 CHAIR DEVENY: I would like to move that  
16 we assign this case to Sarah, our Board attorney.

17 MS. CLERGET: For substantive and  
18 procedural purposes?

19 CHAIR DEVENY: Yes, for both procedural  
20 and substantive.

21 MS. HANSON: Second.

22 CHAIR DEVENY: It's been moved and  
23 seconded. Is there any discussion on this motion?

24 (No response)

25 CHAIR DEVENY: Hearing none, we'll take

1 a vote. All those in favor, say aye.

2 (Response)

3 CHAIR DEVENY: Any opposed?

4 (No response)

5 CHAIR DEVENY: Motion passes.

6 MS. CLERGET: Just another note. There  
7 is a new contested case that came in, but it came  
8 in after this agenda had closed, so you'll be  
9 hearing about it at your next meeting. But just  
10 an FYI that it's coming. I think that's all for  
11 new cases.

12 (9:26 a.m.)

13 (Board heard oral arguments  
14 in BER 2015-08JV, Payne Logging  
15 and BER 2017-02OC, Wagoner Family Partnership  
16 and reconvened at 11:14 a.m.)

17 \* \* \* \* \*

18 CHAIR DEVENY: Okay. Moving on to our  
19 next agenda item, we have Board Counsel update  
20 from Sarah.

21 MS. CLERGET: The main thing in this  
22 section is the policy that we've put before you  
23 guys. This is a draft policy. It's entirely  
24 meant to be something that you guys can consider,  
25 and change as you see fit.

1           I put in the materials there is the --  
2           there should be the old policy as well as the new  
3           one, so you kind of see a difference. We did red  
4           line changes, but then the number of red line  
5           changes actually broke words, so I decided not to  
6           give you the red line version because it was  
7           incomprehensible. So you have just the two  
8           versions you can kind of compare in general.

9           The biggest difference with this policy  
10          is the timeline of submitting things to the Board  
11          before a meeting. Right now, the policy is that  
12          it is five weeks before a meeting everything has  
13          to be submitted; and this pushes it back for the  
14          public to two weeks before; and then materials are  
15          posted on the website at least a week before the  
16          meetings.

17          Chris and I have had some discussion and  
18          disagreement about how long you guys need with  
19          materials. This meeting was a good indication of  
20          the heft that some of your materials can have. As  
21          you can tell from the amount that we end up  
22          modifying stuff, even orally as it comes to you,  
23          is sort of a moving target all the time.

24          So at some point, I'm going to want more  
25          time always because I'm going to want you to have

1 the most up to date information, and we just sort  
2 of cut it off. So I would like to push that you  
3 don't get the materials before a week before the  
4 meeting, because with my experience with the  
5 Board, usually people don't look at it until a  
6 couple days before the meeting.

7 Chris is very certain that everybody is  
8 going to read the materials two weeks in advance,  
9 so she wants them two weeks in advance. And I can  
10 understand why, given -- you can see how big they  
11 can get. So it is sort of your pleasure.

12 In this policy there is not a deadline  
13 on purpose for your Hearing Examiner to put stuff  
14 in, or for the Board secretary to put stuff in the  
15 materials. So this policy would allow us to  
16 update materials right up to the meeting if we  
17 needed to, and only sets a deadline for the  
18 public.

19 So all of that is to say that if you  
20 want to put a deadline for us in the policy, you  
21 can. If you want to just give us some direction  
22 about what you would like orally, that will work,  
23 too. I'm trying to just go into the policy with  
24 your eyes wide open about what I have and have not  
25 put in there.



1           For the purpose of the public, though,  
2           it does put a two week deadline in, that anything  
3           that doesn't get to the Board within two weeks  
4           before a meeting, the Board has the discretion to  
5           not consider because it is untimely. And that is  
6           very clearly a "may." You certainly can consider  
7           something that comes in within two weeks of a  
8           meeting if you want to, even based on this policy,  
9           but it gives you a ground to refuse something if  
10          it is too big or for whatever reason.

11           MS. HANSON: When the public submits  
12          something, is it just automatically added to the  
13          Board materials, or does staff review it, and go  
14          through it, and maybe have to respond to it also?

15           MS. CLERGET: It depends. Currently the  
16          way it works is usually it is submitted to  
17          Lindsay, and then Lindsay gives a heads up to me,  
18          John, George, anybody else who might need to look  
19          at it, but we've sort of been doing it on a  
20          case-by-case basis.

21           This would in my mind formalize that  
22          process a little bit, so that everything  
23          absolutely comes to Lindsay, and then she can  
24          triage it from there. My concern is that right  
25          now I don't want people submitting things directly

1 to Board members, which is a potential without  
2 this policy, is my concern.

3 MS. HANSON: Which I agree with. I  
4 guess my question was more related to if they turn  
5 it in two weeks in advance, and you guys are --  
6 let's say we decide a week in advance things are  
7 posted. Is that enough time for you guys to do  
8 the components you may need to do for it before it  
9 is posted to the Board?

10 MS. CLERGET: I think so, but I'd ask  
11 Lindsay if she has any other feelings.

12 MS. FORD: Yes, that's more than enough  
13 time for me.

14 MS. CLERGET: I speak for Aleisha also.

15 MS. HANSON: That's fine. I just know  
16 sometimes people can turn stuff in that requires a  
17 lot of work, and want to make sure it is not  
18 putting a burden on you guys if that time period  
19 has been shortened.

20 MS. CLERGET: I think two weeks gives us  
21 enough time from the public.

22 MS. HANSON: I can only speak for  
23 myself, Chris, but I read the materials last  
24 night.

25 MR. BUSBY: I had trouble downloading it

1 in 40 pages. I've had trouble at home. I can't  
2 handle -- my stuff can't handle big things. You  
3 know, the small stuff, two or three pages that  
4 come out, I can get that, but the big ones I  
5 can't.

6 CHAIR DEVENY: Dexter, you can request  
7 that they be sent to you via mail, and I think  
8 it's perfectly fine to do, and that is another  
9 reason why you need a little bit more time.

10 MR. BUSBY: Lindsay is very helpful, so  
11 that's that --

12 CHAIR DEVENY: Sarah, just a question.  
13 You and I and Aleisha sat down and talked about  
14 this a couple weeks ago, and at the time we were  
15 going to take out the informally and formally  
16 submitting information. You left that in here.  
17 Is there a --

18 MS. CLERGET: That was just a mistake.

19 CHAIR DEVENY: So I would suggest that  
20 we take that out, because you either submit  
21 information or you don't.

22 MS. CLERGET: Right. Just an oversight.  
23 Sorry.

24 CHAIR DEVENY: Chris, I'm curious.  
25 You've been on the Board before. None of the rest

1 of us have. What do you feel about having this, I  
2 guess, much more strategic policy in place versus  
3 what was done by previous Hearing Officers, Board  
4 attorneys, and Hearing Officers, and Board members  
5 before?

6 MR. TWEETEN: Madam Chair, first of all,  
7 I'm inclined in matters of procedure to -- I guess  
8 my default is to defer to the staff, and Madam  
9 Chair, and our Counsel, with respect to what works  
10 best for them. So unless I saw some serious flaw  
11 in it, I would be inclined to want to accept your  
12 proposals.

13 As has been discussed, I think it is  
14 very much an individual thing as to how individual  
15 members of the Board process these materials, and  
16 what amount of time they're going to need to  
17 prepare for the meetings. I'm a natural  
18 procrastinator, so a week would be fine for me,  
19 but other Board members might feel differently  
20 about it.

21 I guess at this point I'm inclined to  
22 vote to adopt the proposal, but I would certainly  
23 defer to other -- I mean if it's going to cause a  
24 burden on other members of the Board to change  
25 this timeline, then I would suggest we leave it

1 the same.

2 But I guess I haven't heard that.

3 Dexter, I don't know whether receiving these  
4 materials by mail a week before would be  
5 satisfactory for you or not.

6 So I'd like just to hear from the rest  
7 of the Board as to what their preferences are.

8 MR. BUSBY: Chris, I think a week in  
9 advance of the Board meeting would actually be  
10 better. Then I wouldn't forget about getting  
11 through them.

12 CHAIR DEVENY: John, what are your  
13 thoughts, Dearment?

14 MR. DEARMENT: A week is fine for me.

15 CHAIR DEVENY: Tim, are you still with  
16 us? How about you?

17 MR. WARNER: I'm fine with the proposal.

18 CHAIR DEVENY: So looking at No. 7 on  
19 Page 2, this is where the difference is, right?  
20 Before was there a five week period?

21 MS. CLERGET: For the public, yes.

22 CHAIR DEVENY: And now it would just be  
23 one week?

24 MS. CLERGET: It would be two weeks for  
25 the public, not in this policy. As a matter of

1 procedure for you guys, it would be a week for us,  
2 for the Board secretary and the Hearing Examiner,  
3 to get you your materials a week in advance. But  
4 that week in advance deadline is not in this  
5 policy. The only deadline that's in this policy  
6 is two weeks for the public. So it just more of a  
7 working deadline for us.

8 CHAIR DEVENY: So it is possible you  
9 might have them early?

10 MS. CLERGET: Anything is possible.

11 CHAIR DEVENY: But it would never be  
12 later.

13 MS. CLERGET: And I do want to make one  
14 point that I should have made at the beginning.  
15 There is some difficulty with having this as a  
16 policy that I want to just make you guys aware of.

17 MAPA and the case law surrounding MAPA  
18 is very clear that things that affect a party's  
19 rights need to be done by rulemaking, not by  
20 policy. So ultimately I think this is something  
21 that you may want to consider moving into  
22 rulemaking and not having as a policy.

23 But at this point I'm comfortable  
24 defending it as a policy because we need to see if  
25 it works for a little while before we go through

1 the whole process of rulemaking, and allowing that  
2 to happen is I think appropriate and reasonable.

3 And I also think that there is an  
4 argument that because everything in here is sort  
5 of permissive, it is a "may" deadline, it is not a  
6 "must," that there is an argument to be made that  
7 it doesn't necessarily affect anybody's  
8 substantial rights.

9 So just want to flag for you that I'm  
10 comfortable having this as a policy for awhile. I  
11 don't think it can sit as a policy forever. And I  
12 just want to be clear that if you want it as a  
13 policy, there is some danger that it could come  
14 back to you as a problem.

15 CHAIR DEVENY: That said, Sarah, I would  
16 like to move then that we adopt this proposed  
17 policy, or proposed -- we adopt this policy as a  
18 proposed rule, and try it out for the next two  
19 Board meetings, and then at our October meeting we  
20 come back and decide if we want to put it into  
21 formal rule.

22 MS. CLERGET: So just to clarify your  
23 language a little bit. You want to adopt it as a  
24 policy until October?

25 CHAIR DEVENY: That's right, and then a

1 rule. What do Board members think about it?

2 Would somebody second that?

3 MR. BUSBY: I'll second that.

4 CHAIR DEVENY: Discussion?

5 MR. TWEETEN: Madam Chair, this is  
6 Chris. Would you accept an amendment to your  
7 motion?

8 CHAIR DEVENY: Yes.

9 MR. TWEETEN: That would remove the  
10 suggestion that we adopt it as a policy today.  
11 That adoption will expire at the October meeting.

12 CHAIR DEVENY: Yes, I would.

13 MR. TWEETEN: The reason I say that is  
14 that if we decide in October that we want to make  
15 it rule, it is going to take us 60 days to  
16 probably to go through the rulemaking process, and  
17 if it expires in October, then we have nothing in  
18 place until we get the rule done. So I would  
19 suggest we adopt it as a policy, and then decide  
20 in October whether we want to pursue rulemaking to  
21 convert into Administrative Rule.

22 CHAIR DEVENY: I would welcome that  
23 amendment to my motion. Is there a second to that  
24 amendment?

25 MR. BUSBY: Yes, I'll second it, just as



1 an amendment.

2 CHAIR DEVENY: Discussion on the  
3 amendment?

4 (No response)

5 CHAIR DEVENY: Let's vote on the  
6 amendment. All those in favor.

7 (Response)

8 CHAIR DEVENY: None opposed?

9 (No response)

10 MS. CLERGET: You need public comment  
11 before the motion.

12 CHAIR DEVENY: Before we take a vote --

13 MS. CLERGET: That's okay. You may have  
14 to revote if you need to.

15 CHAIR DEVENY: Is there any public  
16 comment on the motion that is before us that we  
17 just approved the amendment on?

18 (No response)

19 CHAIR DEVENY: Hearing none, we will  
20 proceed. Is there any discussion now on the  
21 motion that's been amended?

22 MR. BUSBY: I need to ask Sarah a  
23 question. If we decide to take this to  
24 rulemaking, does the permissives go away, and it  
25 becomes "shall"?

1 MS. CLERGET: Probably not. We can  
2 probably write the rules so that it's permissive.  
3 It is going to take a little crafting, but I think  
4 that's possible.

5 CHAIR DEVENY: Further discussion on the  
6 motion?

7 (No response)

8 CHAIR DEVENY: Let's take a vote. All  
9 those in favor of the amended motion before us,  
10 signify by saying aye.

11 (Response)

12 CHAIR DEVENY: Any opposed?

13 (No response)

14 CHAIR DEVENY: Motion carries.

15 MS. CLERGET: The only other item on the  
16 Board Counsel update is just an FYI for the Board  
17 that there was a petition for rulemaking that came  
18 in again after the materials were ready, and the  
19 agenda was done for this meeting. So just a heads  
20 up that at your next meeting you're going to get a  
21 petition for rulemaking that came in from the  
22 public. So I just wanted to let you know that  
23 that was happening.

24 With that, I'll conclude my Counsel  
25 update.

1           MR. BUSBY: Do we have the subject  
2 matter for the petition?

3           MS. CLERGET: It is from the Cottonwood  
4 Council, and it involves a classification of an  
5 outstanding resource water. And George is coming  
6 back, so he can clarify that for me.

7           MR. MATHEIUS: Madam Chair, that is  
8 correct. It is outstanding water resource. It is  
9 a classification, it is a unique classification  
10 for a water body. It is on the Gallatin.

11          CHAIR DEVENY: We'll look for that at  
12 our next meeting then. So Hillary.

13          MS. HANSON: This is probably not the  
14 time, but as we are talking about materials, one  
15 thing I guess doesn't need to be a policy  
16 obviously, but it would be nice if the whole Board  
17 packet could be like one link that you could  
18 download the whole thing, instead of everything  
19 individually. If there was a way to add that  
20 somewhere on the website, that would be super  
21 helpful.

22          MS. CLERGET: We also just talked about  
23 getting it Bates stamped first. We'll work on  
24 that.

25          CHAIR DEVENY: Chris, did you say

1 something?

2 MR. TWEETEN: No, I'm just musing to  
3 myself.

4 CHAIR DEVENY: All right. At this time,  
5 let's open up our meeting to -- unless Board  
6 members had anything else to bring up.

7 (No response)

8 CHAIR DEVENY: Let's open up the meeting  
9 for public comment at this time, if anybody would  
10 like to comment on any issues not related to  
11 contested cases.

12 (No response)

13 CHAIR DEVENY: Seeing none, we will move  
14 on toward adjournment. Is there a motion to  
15 adjourn?

16 MS. HANSON: So moved.

17 CHAIR DEVENY: It has been moved.

18 MR. DEARMENT: Second.

19 CHAIR DEVENY: It's been seconded. And  
20 we'll have a vote. All those in favor, signify by  
21 saying aye.

22 (Response)

23 CHAIR DEVENY: All those opposed.

24 (No response)

25 CHAIR DEVENY: Meeting adjourned.

(The proceedings were concluded  
at 11:32 a.m. )

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STATE OF MONTANA )

: SS.

COUNTY OF LEWIS & CLARK )

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

That the proceedings were taken before me at  
the time and place herein named; that the  
proceedings were reported by me in shorthand and  
transcribed using computer-aided transcription,  
and that the foregoing - 37 - pages contain a true  
record of the proceedings to the best of my  
ability.

IN WITNESS WHEREOF, I have hereunto set my  
hand and affixed my notarial seal  
this \_\_\_\_\_ day of \_\_\_\_\_, 2018.

\_\_\_\_\_  
LAURIE CRUTCHER, RPR  
Court Reporter - Notary Public  
My commission expires  
March 9, 2020.

<p style="text-align: center;"><b>1</b></p> <p>111 - 1:10 11:14 - 22:16 11:32 - 37:2 1520 - 1:11 16th - 15:21</p>	<p>9:00 - 1:14 9:26 - 22:12</p>	<p>29:9, 30:3, 30:4</p>	<p>10:17, 33:17 April - 8:23 argument [2] 31:4, 31:6</p>	<p>31:23 Board [53] 1:1, 1:5, 1:18, 2:5, 4:12, 4:18, 5:17, 6:10, 6:12, 6:16, 7:15, 10:10, 12:6, 12:16, 13:9, 16:19, 17:5, 17:12, 17:21, 17:24, 18:14, 18:17, 18:20, 18:22, 19:24, 20:4, 21:13, 21:16, 22:13, 22:19, 23:10, 24:5, 24:14, 25:3, 25:4, 25:13, 26:1, 26:9, 27:25, 28:3, 28:4, 28:15, 28:19, 28:24, 29:7, 29:9, 30:2, 31:19, 32:1, 34:16, 34:16, 35:16, 36:5</p>	<p>5:24, 26:25, 27:10, 29:8, 32:3, 32:25, 33:22, 35:1</p>
<p style="text-align: center;"><b>2</b></p> <p>2 [2] 14:23, 29:19 2015-08JV - 22:14 2016 - 10:16 2017 [3] 10:19, 18:4, 18:15 2017-02OC - 22:15 2018 [4] 1:6, 1:13, 6:10, 38:17 2020 - 38:22 29th - 18:15</p>	<p style="text-align: center;"><b>A</b></p> <p>A-C-K-E-R-L-U-N - 17:23 a.m [4] 1:14, 22:12, 22:16, 37:2 Aaron - 3:17 ability - 38:14 able - 11:22 absolutely - 25:23 accept [2] 28:11, 32:6 accordance - 16:24 Ackerlund [6] 3:25, 3:25, 17:20, 17:21, 17:22, 18:23 Act - 12:20 Action [2] 17:10, 20:21 activity - 8:2 actual - 13:11 add - 35:19 added - 25:12 additional - 19:3 additions [2] 4:17, 5:16 adjourn - 36:15 adjourned - 36:25 adjournment - 36:14 administrative [3] 18:3, 18:12, 32:21 adopt [11] 17:25, 18:4, 18:18, 18:18, 20:6, 28:22, 31:16, 31:17, 31:23, 32:10, 32:19 adopted [2] 9:14, 20:19 adopting - 20:12 adoption [4] 6:21, 10:16, 13:15, 32:11 advance [7] 24:8, 24:9, 26:5, 26:6,</p>	<p>effect [2] 30:18, 31:7 affectionately N18:6 affixed - 38:16 agenda [9] 6:20, 13:24, 14:11, 14:12, 14:20, 14:21, 22:8, 22:19, 34:19 agree - 26:3 ahead [4] 13:14, 13:18, 16:14, 21:7 Aleisha [2] 26:14, 27:13 allow - 24:15 allowing - 31:1 allows - 18:11 already [2] 6:20, 10:17 Ambient [3] 13:15, 17:17, 18:5 ambitious - 11:8 amended [2] 33:21, 34:9 amendment [7] 32:6, 32:23, 32:24, 33:1, 33:3, 33:6, 33:17 amount [2] 23:21, 28:16 analysis [2] 10:12, 18:19 Annually - 18:8 anybody's - 31:7 anymore [2] 14:13, 14:22 apologize [3] 6:25, 7:20, 17:9 Appeal - 21:2 appealed - 17:3 appropriate - 31:2 approve [2] 4:25, 5:23 approved [4] 5:13, 6:8,</p>	<p>29:9, 30:3, 30:4 affect [2] 30:18, 31:7 affectionately N18:6 affixed - 38:16 agenda [9] 6:20, 13:24, 14:11, 14:12, 14:20, 14:21, 22:8, 22:19, 34:19 agree - 26:3 ahead [4] 13:14, 13:18, 16:14, 21:7 Aleisha [2] 26:14, 27:13 allow - 24:15 allowing - 31:1 allows - 18:11 already [2] 6:20, 10:17 Ambient [3] 13:15, 17:17, 18:5 ambitious - 11:8 amended [2] 33:21, 34:9 amendment [7] 32:6, 32:23, 32:24, 33:1, 33:3, 33:6, 33:17 amount [2] 23:21, 28:16 analysis [2] 10:12, 18:19 Annually - 18:8 anybody's - 31:7 anymore [2] 14:13, 14:22 apologize [3] 6:25, 7:20, 17:9 Appeal - 21:2 appealed - 17:3 appropriate - 31:2 approve [2] 4:25, 5:23 approved [4] 5:13, 6:8, 10:17, 33:17 April - 8:23 argument [2] 31:4, 31:6 arguments - 22:13 Army - 12:22 asking - 3:3 assign [3] 16:7, 16:7, 21:16 assigned - 20:23 Assurance [2] 10:20, 18:6 attending - 2:24 attorney [8] 3:10, 3:12, 3:14, 3:17, 4:6, 4:7, 19:19, 21:16 attorneys [2] 16:23, 28:4 August - 10:19 authority [2] 10:24, 18:12 automatically - 25:12 Avenue - 1:11 awhile [2] 8:15, 31:10 aye [6] 5:8, 6:3, 20:13, 22:1, 34:10, 36:21</p>	<p>31:23 Board [53] 1:1, 1:5, 1:18, 2:5, 4:12, 4:18, 5:17, 6:10, 6:12, 6:16, 7:15, 10:10, 12:6, 12:16, 13:9, 16:19, 17:5, 17:12, 17:21, 17:24, 18:14, 18:17, 18:20, 18:22, 19:24, 20:4, 21:13, 21:16, 22:13, 22:19, 23:10, 24:5, 24:14, 25:3, 25:4, 25:13, 26:1, 26:9, 27:25, 28:3, 28:4, 28:15, 28:19, 28:24, 29:7, 29:9, 30:2, 31:19, 32:1, 34:16, 34:16, 35:16, 36:5 body - 35:10 bottled - 8:13 Brad - 4:6 Brady - 4:2 brief [2] 10:8, 12:4 briefing [4] 12:2, 13:18, 13:20, 17:6 briefly - 12:12 briefs - 15:15 bring [2] 12:2, 36:6 broke - 23:5 Brown [2] 4:7, 4:7 Building - 1:10 burden [2] 26:18, 28:24 Bureau [13] 3:20, 4:5, 7:17, 7:17, 9:2, 10:4, 10:13, 12:17, 12:17, 17:22, 19:11, 19:14, 19:15 Busby [12] 1:18, 2:11, 2:12, 5:3,</p>	<p style="text-align: center;"><b>C</b></p> <p>calendar - 12:9 can't [3] 27:1, 27:2, 27:5 care [2] 8:7, 8:8 carefully - 15:23 carries [2] 5:12, 34:14 case [12] 13:21, 16:6, 16:15, 17:3, 17:9, 20:20, 20:23, 20:24, 21:13, 21:16, 22:7, 30:17 case-by-case - 25:20 cases [5] 8:3, 14:7, 14:23, 22:11, 36:11 cause - 28:23 certain - 24:7 certainly [2] 25:6, 28:22 certify - 38:7 certifying - 12:21 Chair [100] 1:17, 2:4, 2:5, 2:10, 2:25, 4:9, 4:14, 4:20, 4:24, 5:4, 5:7, 5:10, 5:12, 5:19, 5:22, 5:25, 6:2, 6:5, 6:7, 6:11, 7:15, 8:22, 9:22, 9:24, 10:2, 10:7, 10:9, 11:3, 12:5, 12:11, 12:15, 13:6, 13:9, 13:13, 13:19, 16:18, 17:7, 17:11, 17:14, 17:16, 17:19, 17:20, 18:21, 19:2, 19:20, 19:23, 20:3,</p>
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