

A P P E A R A N C E S

1
2 ATTORNEY APPEARING ON BEHALF OF THE BOARD OF
3 ENVIRONMENTAL REVIEW:

4 MS. SARAH CLERGET, ESQ.
5 Special Assistant Attorney General
6 Agency Legal Services Bureau
7 1712 Ninth Avenue
8 Helena, MT 59620-1440

9 ATTORNEYS APPEARING ON BEHALF OF THE APPELLANT:

10 MS. CATHERINE LAUGHNER, ESQ.
11 MR. W. JOHN TIETZ, ESQ.
12 Attorney at Law
13 Browning, Kaleczyc, Berry & Hoven, PC
14 800 N. Last Chance Gulch, Suite 101
15 Helena, MT 59601

16 ATTORNEY APPEARING ON BEHALF OF THE DEPARTMENT:

17 MR. KURT R. MOSER, ESQ.
18 Special Assistant Attorney General
19 Department of Environmental Quality
20 P.O. Box 200901
21 Helena, MT 59620
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E X H I B I T S

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1
2 WHEREUPON, the following proceedings
3 were had:

4 * * * * *

5 (Board member John Dearment present)

6 CHAIR DEVENY: We'll go ahead and get
7 started. Meranda, would you please take roll call
8 again, and we'd like to find out, if Chris Tweeten
9 is still on, when he joined the meeting.

10 MS. BASS: Chris Deveny.

11 CHAIR DEVENY: Here.

12 MS. BASS: Chris Tweeten.

13 BOARD MEMBER TWEETEN: Madam Chair, I'm
14 still on.

15 CHAIR DEVENY: Chris, do you remember
16 what time you joined the meeting? We'd like to
17 get that in our record.

18 BOARD MEMBER TWEETEN: I think it was
19 seven minutes after the hour. Shortly after you
20 started.

21 MS. BASS: Dexter Busby.

22 BOARD MEMBER BUSBY: I'm here.

23 MS. BASS: Hillary Hanson.

24 BOARD MEMBER HANSON: Here.

25 MS. BASS: John Dearment.

1 BOARD MEMBER DEARMENT: Here.

2 MS. BASS: John Felton.

3 BOARD MEMBER FELTON: Here.

4 MS. BASS: Tim Warner.

5 (No response)

6 CHAIR DEVENY: Our next agenda item is
7 to hear oral arguments on the Columbia Falls
8 Aluminum Company's appeal of DEQ's permit, and
9 then to make consideration on the findings of
10 facts, conclusions, and order. And so with that,
11 I'd like Sarah to maybe just give an introduction
12 to the process today.

13 MS. HANSON: Start with --

14 MS. CLERGET: This is Sarah Clerget for
15 the record. And before the meeting today, Hillary
16 Hanson brought to my attention that she may have a
17 potential conflict, and I wanted to bring it to
18 the attention of the parties. Now that Chris is
19 on the phone, it is less of an issue because we
20 would have a quorum even without her. But she's
21 indicated that she is on the --

22 BOARD MEMBER HANSON: CFAC Community
23 Liaison Panel.

24 MS. CLERGET: She has indicated she
25 hasn't heard anything about this particular issue,

1 and doesn't feel that it would affect her
2 decision, but we think it's important to raise it
3 for the parties, and find out if they have any
4 cause determination that she should recuse
5 herself.

6 And in the absence of that, are the
7 parties willing to waive -- I don't think there is
8 a conflict to waive, but if you feel there is a
9 conflict, are you willing to waive it?

10 MS. LAUGHNER: Cathy Laughner for
11 record, representing CFAC. No objection, no
12 comment, and I will waive it.

13 MR. MOSER: DEQ has no objection to
14 having Board member Hanson hear this matter.

15 MS. CLERGET: Thank you. So that dealt
16 with, we can have Hillary participate and issue a
17 decision with other Board members.

18 MR. DEARMENT: Madam Chair, may I
19 interrupt, if this is a good time to say this. I
20 am going to recuse myself.

21 MS. CLERGET: Yes. Thank you. We've
22 talked about that in previous meetings. So with
23 that settled, I want to bring your attention to
24 the proposed decision in the packet, which I'm
25 sure you've all seen, from me. And I want to

1 clarify quickly my position for the Board.

2 Although I was the Hearing Examiner,
3 which in this case involved reviewing the record
4 rather than holding the hearing myself, I want to
5 clarify that I am in my capacity here today here
6 as your Board Counsel, so whatever the Hearing
7 Examiner may have done, I don't want anybody to
8 feel like they can't openly -- I have no ego in
9 this.

10 And the only thing for me is that any
11 decision that the Board makes is as insulated as
12 possible against future challenges at the District
13 Court or Supreme Court level.

14 So I want to be clear that I'm here to
15 answer questions about the law or the process, and
16 to the extent that it is helpful, I can answer
17 some questions about the decision, although I'm
18 going to be very careful not to advocate for any
19 position. I want the parties to do any advocacy.

20 But I do think it is helpful to have the
21 Hearing Examiner here to clarify any points of law
22 or points of fact, to the extent that you're
23 wondering where a fact came from in the record or
24 something like that.

25 And the last point of housekeeping is

1 that Aleisha is here, and as you've seen, we have
2 this big screen behind you. So we brought the
3 entire record with us, so if there is any portion
4 of the record, anything that you guys want to see
5 that is cited, or that you want to look at, we can
6 project it up on the screen for you as part of
7 this discussion.

8 So you have my proposed decision, which
9 is to remand back to the DEQ for the purposes of
10 Outfall 006. You've seen the exceptions briefed
11 by both DEQ and CFAC. They're here to oral argue
12 today. I just remind you of your options which
13 are in the memo that accompanies the entire
14 packet, which are that:

15 You can modify the findings of fact. If
16 you choose to modify the findings of fact, for the
17 purposes of today, what that will mean is that you
18 have to put off a decision until the next meeting
19 while every single person reviews the entire
20 record. There cannot be any modification of facts
21 unless every person on the Board reviews the
22 record in its entirety, at which point then you
23 can modify the fact.

24 That can only happen if you determine
25 today that the facts presented in the proposed

1 order are not supported by substantial evidence in
2 the record. You can look at whatever you need to
3 to make that determination as part of the record.
4 You don't have to review the entire record in
5 order to decide that it is not based on
6 substantial evidence, but you do have to review
7 the entire record before you modify any finding of
8 fact.

9 BOARD MEMBER TWEETEN: Madam Chair, can
10 I interrupt for just a second? Because I think
11 maybe we can cut through some of the material
12 that's in the parties' exceptions.

13 CHAIR DEVENY: Chris, I think we're
14 planning to do that, so if you could just let
15 Sarah continue. We'll see if we handle what I
16 think you're going to say, and then if not, please
17 bring it up at that time.

18 BOARD MEMBER TWEETEN: Well, Madam
19 Chair, my comment goes directly to the point that
20 Sarah just made regarding the reviewing of the
21 entire record and so forth.

22 CHAIR DEVENY: Go ahead.

23 BOARD MEMBER TWEETEN: Thank you.
24 Sarah, sorry to interrupt you. Both parties have
25 taken exception to a number of Sarah's findings

1 based on the fact that Sarah's findings express
2 particular numeric values in micrograms -- or in
3 milligrams rather than micrograms because she
4 didn't use the appropriate Greek letter or
5 character to express those particular numeric
6 values.

7 CHAIR DEVENY: Excuse me, Chris.

8 BOARD MEMBER TWEETEN: I believe that
9 those are technical errors that can be corrected
10 without being considered rejection of those
11 findings of fact. And so at the appropriate
12 moment down the road, I'm going to suggest that we
13 would -- and hopefully both parties will consent
14 to this -- that we simply consider Sarah's
15 proposed decision modified to insert the
16 appropriate Greek letter designation in place of
17 the letter "M," which means milligrams, as opposed
18 to micrograms.

19 MS. CLERGET: We're aware of that.

20 BOARD MEMBER TWEETEN: So hopefully the
21 parties wouldn't spend much time on those.

22 CHAIR DEVENY: Okay, Chris. Thank you.
23 Sarah, would you please continue.

24 MS. CLERGET: I think Chris is correct,
25 and I have a list of those findings of fact that

1 have incorrect typos, and then there are also some
2 citations that are incorrect, which as Chris just
3 outlined I believe are essentially typographical
4 errors or errors that don't affect the substance.

5 And so if you were to -- whatever your
6 decision is, this list is available for you if you
7 would like to include it in a modification of the
8 facts that's non-substantive. So you don't have
9 to, as Chris said, review the record in order to
10 do that.

11 The proposed conclusions of law however
12 are essentially yours to do with as you will. You
13 don't have to review the entire record in order to
14 modify conclusions of law, particularly any
15 interpretation of the Administrative Rules or
16 application of the Administrative Rules to the
17 facts.

18 You can modify those at will, and the
19 only thing is that any modification that you do
20 obviously needs to be done in writing, so we have
21 to put them forth with enough particularity that I
22 can articulate in a written decision later.

23 So I think that covers all of the
24 housekeeping, and unless you have any further
25 questions, we can turn it over to the parties.

1 CHAIR DEVENY: I think that's fine. So
2 at this point we'll start the oral argument. Do
3 either of you have a preference who goes first?

4 MS. LAUGHNER: I think we go first.

5 MR. MOSER: Yes, I think CFAC goes
6 first.

7 CHAIR DEVENY: I'm not going to put a
8 time limit on you because we didn't allow you an
9 extension as you requested, but I ask you to be as
10 concise as possible, and if I feel like we're
11 running way over time, I may ask you to cut things
12 off.

13 MS. LAUGHNER: For the record, my name
14 is Catherine Laughner with Browning, Kaleczyc
15 representing Columbia Falls Aluminum Company.
16 Thank you for the opportunity to provide argument,
17 and I want to make a point of thanking Sarah,
18 because we think she worked really hard in reading
19 a lot of material, and wading through it, and
20 really working to understand it.

21 We appealed the permit in 2014 because
22 CFAC wants to be in compliance, and since 2014,
23 there has been a lot of activity at the site. And
24 Steve Wright, the Environmental Manager, is here,
25 and if you guys have questions maybe at the end,

1 he can tell you what the current status is if
2 you're curious. He's available here and willing
3 to come down here, and answer your questions.

4 CFAC wants to be in compliance, and
5 would really like to consolidate all of the
6 activity up there, and move forward with
7 consistent oversight.

8 So with that, John Tietz is going to
9 give you oral argument.

10 MR. TIETZ: Good morning, Madam Chair,
11 members of the Board. My name is John Tietz with
12 Browning, Kaleczyc, Berry and Hoven, here on
13 behalf of Columbia Falls Aluminum.

14 I'm presuming that everybody has read
15 through -- hopefully not the copious amounts of
16 materials that are there -- but at least the
17 background that was provided in the Hearing
18 Examiner order, which pretty well sets forth the
19 procedural background and the historical
20 permitting background for CFAC.

21 And so I'm not going to go into great
22 deal with respect to the background, but I want to
23 make sure, for the point of my argument, the
24 playing field of what has happened at CFAC over
25 time.

1 And so in 1984, CFAC was issued a
2 groundwater discharge permit for discharges to the
3 groundwater. That was then replaced in 1994 by
4 the surface water, the first MPDES permit, the
5 surface water discharge permit, and that remained
6 in place through a repermitting process in 1999,
7 when that permit was reissued, but was actually
8 substantively different than the 1994 permit.

9 And then in 2003, when the 1999 permit
10 was at its expiration date, CFAC made application
11 to renew that permit, requested for the
12 continuation of the mixing zones, both the
13 groundwater mixing zone and the surface water
14 mixing zone.

15 That permitting application was not
16 considered by DEQ at that time. It was
17 administratively continued, and remained continued
18 until 2013, when the Department picked that
19 application back up, made some requests of CFAC
20 with respect to additional information. That was
21 provided to the Department.

22 And then in 2014, a permit, a draft
23 permit was issued, went through the comment
24 process, and then a final permit was issued. And
25 so it's that 2014 final permit that changed the

1 1999 permit substantively and fairly
2 significantly, that bred the current appeal.

3 And so that by way of very brief
4 overview of the permit is to where we got to
5 today.

6 And my presentation is not going to be
7 lengthy, but CFAC does not object to the proposed
8 order by the Hearing Examiner remanding to DEQ the
9 rewrite for the 006 outfall. We agree that the
10 permit needs to be rewritten so that CFAC can
11 maintain compliance. That is foremost in CFAC's
12 intent is to become compliant, remain in
13 compliance with the permit, and to comply with the
14 Water Quality Act and the Clean Water Act.

15 So we believe that the remand back with
16 respect to all of the elements expressed by the
17 Hearing Examiner in the order with respect to
18 Outfall 006, that that needs to be as described in
19 her order.

20 The order, however, fails to address the
21 treatment by the pond system, and we included that
22 in our exceptions. So the pond system
23 historically received discharges from Outfalls 007
24 and 009. And we appealed the permit because
25 previously, in the previous permit, in the 1999

1 permit, the treatment effects of percolation of
2 water from those ponds into the groundwater was
3 recognized in the permit for being in compliance
4 with those discharges.

5 In the new permit, that percolation
6 treatment was not recognized, and the permit set
7 forth numeric limits end of pipe going into the
8 pond, and those limits are frankly -- CFAC cannot
9 right now meet those numeric limits.

10 DEQ did not provide a compliance
11 schedule, even though this was a significant
12 departure from the prior permit, the 1999 permit,
13 that recognized that percolation treatment. And
14 so CFAC gets put in a position where they can't
15 maintain compliance with the permit. They're
16 immediately out of compliance when that would go
17 into effect, because that end of pipe numeric
18 standard they can't meet.

19 And so we would request that the Hearing
20 Examiner's order be amended to include a rewrite,
21 or at least a reconsideration of the pond
22 treatment, either to provide for a compliance
23 schedule so that CFAC can maintain compliance and
24 have a period to bring those numeric standards
25 into effect; or to reconsider the treatment

1 effects of the percolation from the ponds.

2 And so that would be really the only
3 issue with the Hearing Examiner's order that we
4 would ask that the Board change, would be that
5 remand to consider those issues. The ponds, there
6 were findings of fact with respect to ponds, but
7 there were never any conclusions in the order, so
8 really that's the sole aspect there.

9 Now I have I guess a procedural
10 question. Part of this also is my presentation is
11 addressing DEQ's objections, or their exceptions
12 and their briefing with respect to violations of
13 17.30.1311 and 17.30.1376 that the Hearings
14 Examiner found in her order. Do you want me to
15 make my presentation with respect to those now, or
16 should I wait until after DEQ presumably argues
17 its position on those matters? I'm not sure how
18 you want to handle that.

19 MS. CLERGET: I think rebuttal might
20 make more sense to the Board members, but if
21 anybody disagrees.

22 CHAIR DEVENY: Let's go with rebuttal
23 then.

24 MR. TIETZ: Okay. Then I will end my
25 presentation there, and let Mr. Moser go.

1 MR. MOSER: Good morning, Madam Chair
2 and members of the Board. My name is Kurt Moser,
3 and I represent DEQ in this permit appeal case.

4 As Mr. Tietz explained in his opening
5 statement here today, the case before you today
6 concerns the appeal of an MPDES permit that DEQ
7 issued related to CFAC's industrial production of
8 aluminum, and we issued that permit in 2014.

9 When DEQ issued the permit, it acted
10 under the premise that CFAC could restart its
11 aluminum production operations at any time.
12 Because CFAC continued to represent that to DEQ,
13 DEQ processed and issued the 2014 permit with that
14 understanding.

15 Now, since the time that the MPDES
16 permit was issued, many things have changed at the
17 site. CFAC has now permanently closed and
18 dismantled its aluminum production facility, and
19 is engaging in remedial activities related to the
20 site's designation as a federal Superfund site.
21 That designation occurred in September of 2016,
22 about two months before we had the contested case
23 hearing in November of 2016.

24 The Hearing Examiner's proposed decision
25 remands the permit to DEQ with instructions to

1 re-examine and rewrite the permit for Outfall 006.
2 That's the outfall that's designated in the permit
3 that discharges to the Flathead River.

4 While DEQ is not taking exception to the
5 general concept of remand, particularly in light
6 of the changed circumstances at the site, it does
7 take exception to two central legal conclusions in
8 the proposed decision.

9 First, the proposed decision's
10 application of ARM 17.30.1311 sub (1), finding
11 that DEQ cannot issue a permit that requires a
12 permittee to immediately comply with effluent
13 limits when it has information -- as we have here
14 -- that the permittee will not be able to meet
15 those limits immediately.

16 Secondly, the proposed decision's
17 finding that DEQ did not provide required notice
18 under ARM 17.30.1376 concerning DEQ's addition of
19 Figure 2 to the 2014 permit. That figure, it's a
20 diagram showing the final surface water mixing
21 zones that were contained in the permit.

22 ARM 17.30.1311 is a permitting
23 regulation that is entitled "Prohibitions," and it
24 contains various subsections that prohibits the
25 issuance of a discharge permit in different

1 situations.

2 But the proposed decision specifically
3 bases some of its conclusions upon Subsection (1),
4 which states, "No permit may be issued when the
5 conditions of the permit do not provide for
6 compliance with the applicable requirements of the
7 Act," which is the Montana Water Quality Act, "or
8 rules adopted under the Act."

9 The proposed decision concludes that
10 CFAC's past monitoring data shows that it will be
11 immediately in non-compliance with the permit's
12 effluent limits for cyanide, and basically saying
13 that therefore DEQ violated this provision and
14 issued an unlawful permit because it has failed to
15 provide for compliance.

16 DEQ disagrees with this interpretation.
17 DEQ's interpretation of this rule is that it is
18 prohibited from issuing a permit that does not
19 have conditions that comply with the Montana Water
20 Quality Act and its rules. Those rules require
21 DEQ to impose water quality based effluent limits
22 for cyanide when there is reasonable potential to
23 cause or contribute to a violation of water
24 quality standards.

25 Here the record is clear there is not

1 only reasonable potential to violate, but that
2 CFAC's known discharges consistently exceed
3 applicable cyanide standards by a significant
4 amount.

5 Upon remand, this interpretation of this
6 rule could potentially not allow DEQ to impose
7 necessary effluent limits, and that would be in
8 conflict with both State and Federal law.

9 This interpretation confuses DEQ's
10 responsibilities when issuing discharge permits
11 with those of CFAC. CFAC must comply with water
12 quality standards. DEQ provides for compliance
13 with the Montana Water Quality Act and its rules
14 by writing a permit that contains limits that will
15 protect water quality. If DEQ fails to include
16 those limits in a permit, that is precisely how it
17 violates ARM 17.30.1311 sub (1).

18 We are prohibited under that rule from
19 issuing a permit that does not contain water
20 quality based effluent limits when reasonable
21 potential exists, irrespective of a discharger's
22 ability to comply.

23 Now, it is unlawful under Montana
24 statute and the Clean Water Act to discharge
25 industrial waste into any State waters without a

1 permit. Discharging pollutants into waters of the
2 state is not a right, it is an exception to the
3 general rule that no discharges of pollutants are
4 allowed. This decision seems to make it right, at
5 least the interpretation of ARM 17.30.1311 sub
6 (1).

7 Now, because this Board's decision
8 effectively becomes the Agency's decision when it
9 becomes final, it is also important to consider I
10 think this point, and that is an Agency's
11 interpretation of a rule is incorrect if it is
12 plainly inconsistent with the spirit of the rule.

13 Interpreting a rule that is designed to
14 protect water quality in a manner that first
15 defers to the discharger's inability to meet water
16 quality standards clearly violates the spirit of
17 that rule.

18 Now, the proposed decision also suggests
19 that DEQ must consider a compliance schedule as a
20 result of its violation of ARM 17.30.1311, but
21 this is also incorrect. As DEQ stated in its
22 exceptions that it filed last Friday, ARM
23 17.30.1350 is the compliance schedule rule, and
24 DEQ is not required to issue a compliance schedule
25 in a permit simply because a discharger cannot

1 meet its legal obligations.

2 It is discretionary. DEQ -- that is a
3 consideration if they can't meet it, that is
4 perhaps the factor No. 1; but there are other
5 considerations that are inherent when granting a
6 compliance schedule.

7 Now, a compliance schedule is defined in
8 rule as a schedule of remedial measures included
9 in permit, including an enforceable sequence of
10 interim requirements, for example, actions,
11 operations, or milestone events leading to
12 compliance with the Montana Water Quality Act and
13 requirements thereunder.

14 Therefore, before DEQ can even consider
15 a compliance schedule for a particular pollutant,
16 it would have to make a reasonable finding that an
17 enforceable sequence of interim requirements will
18 lead to compliance with all necessary effluent
19 limits.

20 As the record shows, CFAC never
21 requested a compliance schedule here, and never
22 proposed any interim measures it would take to
23 meet the final effluent limits for cyanide.
24 That's because CFAC wanted to continue the terms
25 of the 1999 permit, which did not contain any

1 effluent limits for cyanide at all. CFAC did not
2 propose to control these discharges. They wanted
3 to continue them essentially without limitation.

4 Under those circumstances it was not
5 reasonable for DEQ to establish any compliance
6 schedule because there was no plan or future date
7 for compliance.

8 When you establish a compliance schedule
9 in a permit, you have to put a date certain that
10 those limits will be met. It can't be
11 speculative, it has to be definite, and you need
12 to have those remedial -- you need to have those
13 interim measures established that will get you to
14 that effluent limit, which again, those effluent
15 limits have to be in permits to comply with
16 Federal and State law.

17 Even assuming upon remand that CFAC is
18 now willing to work towards compliance with final
19 effluent limitations and to establish a compliance
20 schedule, DEQ believes that the Board's basis for
21 a remand would center more upon ARM 17.30.1350,
22 which is the compliance schedule rule, and not ARM
23 17.30.1311 as stated in the proposed decision.

24 Again, DEQ is prohibited under ARM
25 17.30.1311 from issuing a permit that does not

1 contain required effluent limits. A permit must
2 contain such limits irrespective of a discharger's
3 ability to meet those limits. Discharging
4 pollutants into State waters is an exception, it
5 is not the rule, and dischargers have no
6 continuing right to discharge pollutants in
7 perpetuity because they are unable to meet those
8 standards.

9 So DEQ would ask that the Board reject
10 the proposed decision's reliance upon 17.30.1311
11 sub (1). We believe it's misplaced.

12 The second area that DEQ takes, general
13 area that DEQ takes exception with is ARM
14 17.30.1376. The proposed decision also faulted
15 DEQ because it added a diagram to the final
16 permit. That diagram was entitled Figure 2, and
17 it shows that the established surface water mixing
18 zones contained in the final version of the 2014
19 permit, even though it was not included with the
20 draft permit.

21 As DEQ explained in its exceptions, ARM
22 17.30.1376 provides DEQ discretion to renotice a
23 permit if it receives public comments that raise
24 substantial new questions. The mixing zones shown
25 in Figure 2 were already authorized through the

1 draft permit.

2 And even if those narrative descriptions
3 that were contained in that permit did not provide
4 a great level of clarity, the public comment
5 process specifically contemplates that changes may
6 be made to a final permit, provided such changes
7 are explained in the required responses to
8 comments.

9 Figure 2 did not provide any substantial
10 changes from the mixing zones that had been
11 described in the draft permit, and it was created
12 based upon the comments received from CFAC. We
13 explained those changes in the response to
14 comments that's in the record. And so DEQ could
15 ask that the proposed decision's reliance upon
16 17.30.1376 as a basis for the remand would be
17 rejected by the Board.

18 Now, I'm also at the same place that Mr.
19 Tietz was at, and that is this hearing is also not
20 just an oral argument hearing on our exceptions,
21 but the opportunity to provide a response to the
22 exceptions, objections or exceptions of the other
23 party. So in order to make a record, I can go
24 through a rather laborious process right now of
25 reading these. I don't know --

1 We were told that this is what we needed
2 to do, that I can provide that in writing instead.
3 I don't know what CFAC thinks about doing that.
4 Otherwise, I would just provide my specific
5 responses, and this is basically just to create a
6 record, so --

7 MS. CLERGET: I think you could hear a
8 response from CFAC on that proposal.

9 MR. TIETZ: So just so that I'm clear,
10 Kurt, you're proposing just going through your
11 response to our comments now or our exceptions?

12 MR. MOSER: Yes, just to basically make
13 a record.

14 MS. CLERGET: How long is it?

15 MR. MOSER: Maybe ten minutes, maybe
16 fifteen minutes.

17 MS. CLERGET: Unless the Board feels
18 otherwise, I think it would probably be best to
19 put in the record, unless the Board or CFAC agrees
20 that submitting it written and attaching it to the
21 record would be preferable. I think probably to
22 be safe, we should probably just read it into the
23 record, if everybody is amenable to that.

24 MR. TIETZ: That's fine.

25 MR. MOSER: So these are DEQ's response

1 to CFAQ objections.

2 MS. CLERGET: Actually, Kurt, I'm sorry.
3 I'm going to stop you. It might make more sense,
4 since we told CFAC to wait for rebuttal, to let
5 CFAC make their argument, and then read that in
6 during rebuttal. Does that make sense?

7 MR. MOSER: Sure.

8 MS. CLERGET: Is that okay with
9 everybody?

10 CHAIR DEVENY: It seems to make sense to
11 me.

12 MS. CLERGET: I'm sorry to jump in
13 quickly.

14 MR. TIETZ: I guess a point of
15 clarification. Are you planning on responding to
16 CFAC's exceptions? Is that what you're reading
17 in?

18 MR. MOSER: Yes.

19 MR. TIETZ: I'll start then with my
20 rebuttal of DEQ's arguments with respect to the
21 violation of 17.30.1311 and 17.30.1376.

22 Oddly enough, with respect to DEQ's
23 arguments about 17.30.1311 sub (1) and the finding
24 of the Hearings Examiner that they violated that
25 in not providing a permit that CFAC could comply

1 with, we actually agree with most of what Mr.
2 Moser just explained.

3 However, DEQ makes the assertion that
4 they have to write a permit that complies with the
5 Water Quality Act; that's absolutely true. They
6 have to provide effluent limits; that's absolutely
7 true. But they say "irrespective of the
8 discharger's ability to comply."

9 And that's a statement that DEQ is
10 bringing into the statute or the rule that is
11 simply not there. There is no basis for and no
12 citation that DEQ makes for that addition to the
13 rule. So the rule states that no permit may be
14 issued when the conditions of the permit do not
15 provide for compliance with the applicable
16 requirements of the Act, the rules adopted under
17 the Act.

18 So the DEQ's position is they have to
19 set effluent limits in the permit, and as I say,
20 that is true. And in their briefing, DEQ cites to
21 the federal rule on that requirement which is
22 found at 40 CFR 122.44(d) sub (ii), which says
23 that effluent limits must be provided in the
24 permit.

25 However, DEQ then is essentially saying

1 that effluent limits are numeric limits, numeric
2 effluent limits, at the point of discharge, and
3 that's not the case. 40 CFR 122.2 defines
4 effluent limitation as, "Any restriction imposed
5 by the director on quantities, discharge rates,
6 and concentrations of pollutants which are
7 discharged from point sources into waters of the
8 United States."

9 That is also reiterated in DEQ's own
10 rules at 17.30.1202 sub (13), which states that,
11 "Effluent limitation means any restriction or
12 prohibition imposed by the Department on
13 quantities, discharge rates, and concentrations of
14 chemical, physical, biological, and other
15 constituents, that are discharged from point
16 sources other than new sources into State waters,
17 including schedules of compliance."

18 So while it is true that DEQ has to
19 include effluent limits, it is not true that they
20 have to be numeric effluent limits at the point of
21 discharge. There are other mechanisms that DEQ
22 can use to set those effluent limits that a
23 discharger can comply with.

24 And the fact that it is not a numeric
25 standard is set forth or supported within the

1 federal regulation that was cited by DEQ at 40 CFR
2 122.44(k), which provides for best management
3 practices. And what that regulation states is
4 that, "Best management practices may be instituted
5 to control or abate the discharge of pollutants
6 when," sub (3), "numeric effluent limitations are
7 infeasible."

8 And so in situations such as Outfall
9 006, where you have groundwater expressing to
10 surface water, that gives you the ability to use
11 BMP, best management practices, to regulate those
12 effluents, to constitute an effluent limit to
13 remain in compliance with the Clean Water Act.

14 So the other aspect is that because they
15 have other opportunities -- one, mixing zones.
16 Mixing zones allow for essentially a discharge, a
17 numeric discharge into waters that exceed the
18 limits, but they meet the limit by a certain,
19 after a certain dilution period. There is also
20 the ability, as Mr. Moser was talking about,
21 compliance schedules.

22 So DEQ has at its disposal a tool box of
23 alternatives that it could put into a permit that
24 would provide for compliance, that would give a
25 discharger the ability to comply with the permit,

1 while still meeting the Water Quality Act, the
2 Clean Water Act, and the requirements that DEQ has
3 to meet.

4 DEQ is treating it as an either/or.
5 Either we comply with the Clean Water Act and the
6 Water Quality Act, or we have to let them just
7 discharge willy-nilly, and that's not the case.
8 There are certainly mechanisms to provide for
9 compliance, to provide a discharger with the
10 ability to comply with the permit that's issued by
11 DEQ, that complies with all the requirements in
12 the Water Quality Act and the Clean Water Act, and
13 still give them the ability to meet that
14 compliance.

15 And DEQ has not made a substantive
16 argument as to why they shouldn't have to create a
17 permit that a discharger has to -- that they can
18 comply with. That's the point of the Water
19 Quality Act, it's the point of the Clean Water
20 Act, is to bring dischargers into compliance with
21 the Act; and provide --

22 Specifically when DEQ knows that a
23 discharger is going to be in violation the moment
24 that permit goes into effect, I think they have an
25 obligation under the rule to provide for a

1 mechanism for that discharger to be able to come
2 into compliance, not just immediately be out of
3 compliance. And that's what the rule means.

4 And so I don't think the Department gets
5 a pass on the rule just because they have to meet
6 the Water Quality Act. They do. They have to
7 meet the Water Quality Act, but they also have to
8 provide the discharger with the ability to meet
9 the Water Quality Act as well.

10 With respect to 17.30.1376, the Hearing
11 Examiner found that DEQ violated that rule because
12 the Department didn't provide an opportunity for
13 the public and CFAC to comment on a figure that
14 was in the final permit. And the statute requires
15 that if the Department makes basically a
16 substantive change to an aspect of the permit,
17 that public comment is then either reopened or
18 they have to modify the permit, and DEQ didn't do
19 that in this circumstance.

20 DEQ argues that the public comment
21 wasn't necessary in this case because it was
22 merely an illustration of the mixing zones that
23 were described in the 2014 fact sheet. And Mr.
24 Moser pointed out that they did respond to,
25 discussed in response to comments, which were

1 issued with a final permit that they addressed
2 that.

3 However, the actual response to comment
4 -- and I don't have the exhibit number for the
5 response to comments, if you wanted to put it up,
6 but I can read it in, and I will do so.

7 The comment had to do with the mixing
8 zones, and the fact that mixing zones were not
9 included in the permit. So DEQ's response here is
10 that, "There are two independent aspects related
11 to granting of a mixing zone which are discussed
12 in Part 4(d) of the fact sheet."

13 One, "Delineation of the mixing zone,
14 including relevant considerations for groundwater
15 and/or surface water boundaries regulated by ARM
16 17.30 subchapter 5;" and two, "Setting of
17 available dilution flow on a parameter specific
18 basis to be used in determining reasonable
19 potential to exceed standards and, if necessary,
20 develop effluent limits at the end of pipe."

21 The comment then goes on to say, "As
22 part of this permit renewal, the groundwater
23 mixing zone characteristics were summarized in
24 Table 22 Page 30 of the fact sheet. This data was
25 the basis for the allowable dilution flow used for

1 calculating effluent limits in Part 4(e)," which
2 was the second part of the two aspects.

3 It goes on to state, "However, DEQ did
4 not provide a delineation of the mixing zones in
5 the draft. Through this response to comments, DEQ
6 is adding a groundwater mixing zone delineation
7 for the three outfalls. A new figure was added to
8 the final permit, which shows the groundwater
9 mixing zones delineation for the three outfalls."

10 "DEQ developed a mixing zone delineation
11 using groundwater flow direction based on the 1998
12 mixing zone study potentiometric map, and newly
13 released EPA potentiometric contour map dated
14 February 17th, 2014. The western boundary of the
15 Outfall 007 groundwater mixing zone was limited to
16 the previous southwestern boundary extent for the
17 groundwater mixing zone presented in the 1998
18 mixing zone study."

19 At any rate, so their own comment
20 indicates that there was something substantive to
21 that delineation. It wasn't just a depiction of
22 what was articulated narratively in the fact sheet
23 with the draft permit. There actually was a
24 substantive change. They did something in this
25 response to comments that they didn't do in the

1 fact sheet, that they didn't do in the permit.

2 And so CFAC didn't get the opportunity
3 to comment on that, and the public didn't have an
4 opportunity to comment. And the question I think
5 at this point is: How do you rectify that? Well,
6 I think we're going back to remand to the
7 Department, and there is going to be a rewrite,
8 and that figure can be included in the public
9 comment that's going to come off the rewrite, and
10 so we would be offered the opportunity to comment
11 on that at that time.

12 But I think the Hearings Examiner's
13 conclusion that there was a violation of the rule
14 is correct.

15 With respect to DEQ's exceptions, I
16 think I've addressed the two primary concerns CFAC
17 has for their exceptions in their brief. So I'll
18 just quickly go through the other exceptions that
19 they filed.

20 Finding of Fact No. 26. This is what
21 was discussed with the units, that the order
22 included a concentration in milligrams per liter
23 rather than micrograms per liter, so we agree with
24 DEQ's exception for Finding of Fact No. 26. Same
25 for Finding of Fact No. 29. Same for Finding of

1 Fact No. 30. Same for Finding of Fact No. 31.

2 Finding of Fact No. 60 goes to the issue
3 of Exhibit 2 depicting the surface water mixing
4 zone. That's what I just discussed, so we're on
5 the record there.

6 Actually I believe these are the two
7 that the reference in the Hearing Examiner's order
8 to the exhibit numbers was incorrect, and so we
9 agree that those need to be corrected.

10 Finding of Fact No. 64, again, that's a
11 units issue. We agree with that.

12 Finding of Fact No. 118, I don't think
13 we have any argument with respect to the purposes
14 that DEQ included Exhibits 1 and 2 from the prior
15 1990 permit, though I think it created confusion.

16 Finding of Fact No. 120 is the issue
17 with respect to the public's ability to comment on
18 Figure 2, and that's been addressed.

19 Finding of Fact No. 125, again, that's a
20 concentration issue for milligrams versus
21 micrograms, and we would agree with that.

22 And then with respect to the DEQ's
23 objections to the conclusions of law is what I've
24 already discussed in our oral argument, so that
25 would be it for me.

1 MR. MOSER: Just to quickly respond, to
2 rebut from some of the argument from Mr. Tietz.

3 Mr. Tietz is correct that you can't put
4 narrative effluent limits or something called Best
5 Management Practices in place instead of numeric
6 effluent limits in certain circumstances. There
7 must be a finding that numeric effluent limits are
8 infeasible.

9 But one of the most important findings
10 you must make if you decide to do any effluent
11 limit, whether it's a BMP type effluent limit or a
12 numeric effluent limit, is that the water quality
13 standards are met in the waterway. And what we
14 have here is significant evidence that they're not
15 being met, and at least the criteria for cyanide
16 are being exceeded by a significant degree.

17 And in this case, we have numeric
18 limits, and it was not infeasible to apply numeric
19 effluent limits in this case.

20 So specific to the exceptions, I would
21 also say that to the extent CFAC's objections and
22 DEQ's, I think we have I believe identified the
23 same issues with the citations to the incorrect
24 units of concentration. In most cases this was a
25 micrograms per liter versus milligrams per liter

1 issue. I won't go through those specifically, but
2 we agree that those could be changed. It was just
3 an oversight.

4 There was also a comment concerning
5 Finding of Fact 60 that Mr. Tietz raised. This
6 issue does not specifically address the Exhibit 2
7 issue from the 2014 permit that we discussed about
8 public notice. This one specifically, it just
9 reverses the two, reverses these two exhibits that
10 were part of the 1999 permit simply, and that's
11 the issue there, so --

12 And as far as CFAC's specific, the ones
13 we will address, first of all, CFAC's general
14 objection. CFAC made a general objection that the
15 order must rule on each proposed Finding of Fact
16 based upon Montana Code Annotated 2-4-623 sub (4).
17 The Montana Supreme Court has ruled on this issue
18 and has disagreed in State ex rel. Montana
19 Wilderness Association versus the Board of Natural
20 Resources and Conservation, that's 2000 Montana 11
21 1982.

22 The Court found that that provision of
23 MAPA does not require a separate and express
24 ruling on each -- requiring finding as long as the
25 Agency's decision is clear.

1 And that case also cited an earlier
2 case, the Montana Consumer Counsel versus Public
3 Service Commission, 168 Montana 180 from 1975,
4 basically saying that if the proposed decision
5 clearly adopts one fact, it doesn't adopt the
6 other fact, it clearly is rejecting that other
7 fact, and therefore the proposed decision doesn't
8 have to explicitly address every proposed finding
9 in an order.

10 Here the proposed decision adopts
11 certain facts and clearly omits others, so there
12 is no error in that regard.

13 In CFAC's introduction of its
14 objections, it states that through special
15 conditions, DEQ required CFAC to investigate site
16 hydrology and institute best management practices.
17 It then cites its own application to establish
18 this.

19 It is important to remember that CFAC's
20 application for a permit is not a regulatory
21 document, cannot be relied upon to establish
22 permit conditions. The MPDES permits that are
23 contained within the record are the ones that, are
24 the regulatory documents that establish any
25 conditions, and they also contain the best

1 evidence of their content and meaning.

2 CFAC's citations to American Wildlands
3 versus Browner are really irrelevant in this
4 context. There are rules, we clearly have rules
5 that allow mixing zones under the appropriate
6 circumstances in Montana. DEQ is certainly not
7 disputing that mixing zones are afforded certain
8 dischargers in certain situations.

9 CFAC's objection to the Finding of Fact
10 No. 34, the groundwater permit did not allow
11 discharges to surface water. It was a groundwater
12 permit. That's referring to the 1984 groundwater
13 permit. If it allowed discharges to surface
14 water, an MPDES permit would have been required;
15 that's a surface water discharge permit, and
16 groundwater discharge permit is not an MPDES
17 permit. That 1984 groundwater permit is in the
18 record, and it speaks for itself.

19 CFAC's objection to Finding of Fact No.
20 35. "There was no mixing zone granted in the 1984
21 groundwater permit." The permit is in the record
22 and it speaks for itself.

23 DEQ also briefed this issue in its post
24 hearing legal issue brief that was filed, and
25 that's contained in the record, and is dated

1 December 12th, 2016.

2 CFAC's objection to Finding of Fact No.
3 41, "The proposed decision correctly concluded
4 that the 1994 permit did not contain any
5 designated mixing zones, surface or groundwater,
6 acute or chronic." The permits speak for
7 themselves.

8 The proposed decision also correctly
9 concluded that neither DEQ nor the Montana
10 Department of Health and Environmental Sciences
11 issued a surface water discharge permit to CFAC or
12 ARCO. This is supported by the hearing record,
13 the permits, and is further supported by DEQ's
14 post hearing legal issue brief. Again, that's the
15 -- there was no surface water -- did not issue a
16 surface water discharge permit when it issued the
17 groundwater discharge permit.

18 CFAC's objection to Finding of Fact No.
19 51, the March 31st, 1997 letter that CFAC
20 references speaks for itself. It is contained in
21 the record, and it is the best evidence of its
22 content and meaning.

23 CFAC's objection to Finding of Fact No.
24 62. Finding of Fact No. 62 is not incomplete. It
25 describes a mixing zone, does not describe a

1 synthetic cap. Furthermore, the 1999 MPDES permit
2 speaks for itself, and provides the best evidence
3 of its content and meaning.

4 CFAC's objections to Finding of Fact No.
5 63. Finding of Fact No. 63 describes mixing zone
6 considerations made in the development of the 1999
7 permit, and is not incomplete. The statement of
8 basis for the 1999 permit speaks for itself, and
9 contains the best evidence of its content and
10 meaning.

11 CFAC's objections to Finding of Fact No.
12 66. This finding of fact describes conditions
13 from the fact sheet that describe the rationale of
14 conditions contained in the 1999 MPDES permit
15 considering mixing zones. The EA is not a
16 regulatory document. The Environmental Assessment
17 document is not a regulatory document for purposes
18 of regulating the discharges of pollutants to
19 surface water. It is developed for purposes of
20 compliance with the Montana Environmental Policy
21 Act.

22 Furthermore, CFAC's additional
23 conclusions concerning the Environmental
24 Assessment should be disregarded because that EA
25 speaks for itself, and contains the best evidence

1 of its content and meaning.

2 CFAC's objections to Finding of Fact No.
3 68. The finding does not misstate the conclusions
4 contained within the statement of basis for the
5 1999 permit. The statement of basis is contained
6 within the record, and contains the best evidence
7 of its content and meaning.

8 Furthermore, CFAC's citations to the
9 1994 groundwater permit and the 1994 MPDES permit
10 are incorrect because they do not establish any
11 mixing zones, and CFAC's citation to a tentative
12 draft permit from 1997 creates no binding
13 requirements.

14 CFAC's objections to Finding of Fact No.
15 69. CFAC's objections to this finding is not
16 supported by the 1984 groundwater permit or the
17 1994 MPDES permit. Furthermore, the 1997
18 tentative draft CFAC cites to creates no binding
19 conditions, and should be disregarded.

20 CFAC's objections to Finding of Fact No.
21 108. This Finding of Fact correctly summarizes
22 the cited material in DEQ's responses to comments.
23 CFAC's attempt to add legal conclusions here to a
24 finding of fact are erroneous and should be
25 disregarded.

1 CFAC furthermore cites to a prohibition
2 regulation, ARM 17.30.1311 Sub(7), for new sources
3 and new dischargers. This reference is
4 unsupported by the record, and does not apply
5 here.

6 CFAC's objections to Finding of Fact No.
7 112 should be disregarded. Finding of Fact No.
8 112 accurately represents the cited record.
9 In-stream monitoring is not compliance monitoring
10 for effluent discharges.

11 CFAC's objections to Finding of Fact No.
12 116 should be disregarded. Finding of Fact No.
13 116 accurately represents the cited record.

14 CFAC's objection to Finding of Fact No.
15 117 should be disregarded. Finding of Fact No.
16 117 accurately represents the cited record.

17 CFAC's objections to Conclusion of Law
18 No. 4. The proposed decision's conclusions
19 concerning Outfall 007 and 009 are correct, and
20 CFAC's objections here should be disregarded.

21 Furthermore, CFAC's conclusions
22 concerning mixing zones should be disregarded,
23 based upon the hearing record, the various
24 discharge permits, and DEQ's post hearing legal
25 issue brief dated December 12th, 2016.

1 CFAC's objection to Conclusion of Law
2 No. 7. CFAC's conclusions concerning mixing zones
3 should be disregarded based upon the hearing
4 record, the various discharge permits, and DEQ's
5 post hearing legal issue brief dated December
6 12th, 2016.

7 CFAC's Conclusion of Law No. 8. CFAC's
8 objections should be disregarded. Conclusion of
9 Law No. 8 contains a reasoned opinion and cites
10 authority.

11 CFAC's objection to Conclusion of Law
12 No. 17 should be disregarded. Conclusion of Law
13 No. 17 is correct. Cyanide is a toxic chemical
14 under DEQ's Circular 7.

15 CFAC's objection to Conclusion of Law
16 No. 27 should be disregarded. Conclusion of Law
17 No. 27 accurately summarizes the cited rules.

18 CFAC's objection to Conclusion of Law
19 No. 28. CFAC's objection should be disregarded.
20 Conclusion of Law No. 28 accurately summarizes the
21 cited rules. See also DEQ's brief in opposition
22 to CFAC's motion for partial summary judgment
23 dated January 4th, 2016, which was successful.

24 CFAC's objection to Conclusion of Law
25 No. 29 should be disregarded. Conclusion of Law

1 No. 29 is supported by the hearing record, the
2 permits themselves, which are the binding
3 regulatory documents, and is further supported by
4 DEQ's post hearing legal issue brief dated
5 December 12th, 2016.

6 CFAC's objection to Conclusion of Law
7 No. 30 should be disregarded. Conclusion of Law
8 No. 30 accurately summarizes the cited materials,
9 and is supported by the cited authority and
10 reasoning contained therein.

11 CFAC's objection to Conclusion of Law
12 No. 35 should be disregarded. Conclusion of Law
13 No. 35 accurately summarizes the rules cited in
14 the text of the paragraph.

15 CFAC's objection to Conclusion of Law
16 No. 36 should be disregarded. Conclusion of Law
17 No. 36 accurately summarizes the cited rule. See
18 also DEQ's post hearing legal issue brief dated
19 December 12th, 2016.

20 CFAC's objection to Conclusions of Law
21 No. 37 should be disregarded. Conclusion of Law
22 No. 37 accurately summarizes the cited rules. See
23 also DEQ's post hearing legal issue brief dated
24 December 12th, 2016.

25 CFAC's objection to Conclusion of Law

1 No. 41 should be disregarded. Regardless of its
2 composition as a conclusion of fact or law, the
3 conclusion is accurately based upon the record.

4 CFAC's objection to Conclusion of Law
5 No. 42 should be disregarded. The conclusion is
6 accurately based upon the entire record.

7 CFAC's objection to Conclusion of Law
8 No. 51 should be disregarded. The conclusion is
9 accurately based upon the entire record.

10 CFAC's objection to Conclusion of Law
11 No. 55 should be disregarded. Regardless of its
12 composition as a conclusion of fact or law, the
13 conclusion is accurately based upon the entire
14 record.

15 CFAC's remaining objections to the
16 proposed order should be disregarded. The
17 proposed order properly found DEQ complied with
18 all requirements in its regulation of Outfalls 007
19 and 009. See also DEQ's exceptions to proposed
20 findings of fact, conclusions of law and order for
21 arguments concerning ARM 17.30.1311 sub(1) and our
22 oral argument here today.

23 Again, for purposes of this hearing, DEQ
24 asks the Board to find that DEQ did not violate
25 17.30.1311 sub (1) by requiring CFAC to

1 immediately comply with necessary water quality
2 standards. If there is a mechanism whereby that
3 matter can be resolved, it potentially could be
4 resolved through the issuance of a compliance
5 schedule, but the facts in the record did not
6 support the issuance of a compliance schedule.

7 DEQ further asks the Board to find that
8 it did not violate ARM 17.30.1376 by adding Figure
9 2 to the final version of the MPDES permit.

10 CHAIR DEVENY: Well, it might be a good
11 time to take a break. Why don't we reconvene at
12 12:30.

13 MS. CLERGET: I just want to be clear
14 that nobody is going to talk about this off the
15 record, right?

16 CHAIR DEVENY: Okay.

17 MS. CLERGET: We may check with Chris
18 that he can get back on.

19 CHAIR DEVENY: Chris, are you still on?

20 BOARD MEMBER TWEETEN: Yes, Madam Chair.
21 I'm having a little trouble hearing you. Are you
22 about to break for lunch? Is that what I
23 understood?

24 CHAIR DEVENY: That's what we're
25 thinking of, and we're just debating --

1 BOARD MEMBER TWEETEN: Could I make a
2 request of the parties. I guess there is a
3 blizzard of objections to the finding of facts
4 from both parties, and understanding that if we
5 sustain any of those objections, then -- leaving
6 aside the technical ones that I talked about
7 before -- but any substantive changes that the
8 parties are suggesting to the findings of fact
9 require all of the non-recused members of the
10 Board to review the entire record, all the
11 transcripts, all of the exhibits.

12 And it doesn't seem to me that many of
13 those findings of fact objections are pertinent to
14 the rather limited legal issues that have been
15 presented by the parties with respect to this
16 proposed decision.

17 I'd like to ask the parties during the
18 lunch break to look at their objections to
19 findings of fact, and identify those that are in
20 fact material to the legal arguments that they're
21 making regarding the proposed decision; and then
22 come back and identify those for us.

23 And by implication that would mean that
24 anything that they don't come back and identify
25 can be considered to be immaterial with respect to

1 the legal issues, and not something that the Board
2 would have to review the entire record in order to
3 correct.

4 Am I making sense? Because I just think
5 that many of these issues with respect to the
6 finding of facts have not been connected by the
7 parties to the particular legal issues that they
8 raise with respect to the Hearing Examiner's
9 proposed decision. They're just sort of out there
10 in the abstract as things that the parties are
11 suggesting that the Hearing Examiner has either
12 misstated or stated mistakenly, or have omitted
13 perhaps.

14 And I think the parties have to
15 understand the burden that they're placing on the
16 Board, if they expect us to go back and make all
17 of those corrections. And I would like to put the
18 burden back on the parties to come back after
19 lunch, and tell us which of those objections to
20 the findings of fact are really material things
21 that we need to consider in order to decide the
22 legal issues that are presented.

23 And my intention would be to suggest
24 that the Board in fact disregard any of those
25 objections to the findings of fact that aren't

1 material with respect to the issues that are
2 raised here.

3 Otherwise it seems to me we're all going
4 to have to go back and spend many, many hours
5 reading transcripts, and looking at exhibits, and
6 so on and so forth, in trying to sort this mess
7 out. And I don't want to do that unless we
8 absolutely have to in order to dispose of this
9 matter.

10 CHAIR DEVENY: Thank you for that,
11 Chris. I'm going to ask Sarah for her opinion on
12 that for the Board to consider.

13 MS. CLERGET: I think that sounds like a
14 good question for the parties, but they're
15 indicating that they may have a comment which may
16 be helpful at this point.

17 CHAIR DEVENY: Mr. Moser.

18 MR. MOSER: Madam Chair, members of the
19 Board, Mr. Tietz and I just had a conversation,
20 and we were wondering if we could potentially have
21 a discussion with Sarah I guess off the record for
22 about five minutes or so, or ten minutes, just to
23 kind of discuss some of the things that Mr.
24 Tweeten just raised, in hopes of maybe
25 facilitating this.

1 MS. CLERGET: I think if that would
2 facilitate this, I think that's possible, and we
3 will come back and report to the Board what we
4 discussed so that the Board is aware. So I think
5 we can do that during the lunch break and then
6 come back with either, as Chris suggests, a
7 statement from the parties, or perhaps a statement
8 from me, if we can resolve it in our conference.

9 CHAIR DEVENY: Okay. That sounds good.
10 Chris, are you able to join us this afternoon?

11 BOARD MEMBER TWEETEN: I think so, sure,
12 for a period of time. I have an obligation
13 tonight that starts at 5:00 Central time, which is
14 4:00 your time. So hopefully we'll be finished
15 with this by then.

16 CHAIR DEVENY: I think we're all in
17 agreement for that. Let's go ahead and reconvene
18 at 12:30 here today. That will give the folks to
19 have time to talk, and for us to have lunch and
20 digest. And remember, no talking to one another
21 about these issues. With that, Chris, did you
22 have something to add? Are you okay?

23 BOARD MEMBER TWEETEN: (No response)

24 CHAIR DEVENY: We'll have lunch now and
25 reconvene.

1 (Lunch recess taken)

2 CHAIR DEVENY: I'd like to reconvene
3 this meeting. Would you just check for Chris.
4 And you could show for the record that everybody
5 else is here.

6 MS. BASS: I believe he's on the phone.
7 Do you want me to call his name?

8 CHAIR DEVENY: Chris, are you on?

9 BOARD MEMBER TWEETEN: I am.

10 CHAIR DEVENY: I think we're all back
11 then. We can go ahead, and get started. Sarah,
12 do you want to report on --

13 MS. CLERGET: Yes. So I met with the
14 parties over the lunch break, and we have a list
15 of the corrections. So what we're going to
16 propose to do is I, as the Hearing Examiner, am
17 going to withdraw the proposed order that I gave
18 you in the packet, and correct it in the following
19 ways that are on a list that we're going to put up
20 on the Board here. And Chris, we'll read through
21 that list for you on the phone.

22 But essentially Points 1 through 12 on
23 the list are corrections to the units being
24 incorrect, and the exhibits being incorrectly
25 cited.

1 And then No. 13 on the list is a
2 modification of my proposed fact No. 68. I'm
3 taking out four words, so that proposed Finding of
4 Fact No. 68 will now read, "The 1999 permit thus
5 allowed CFAC discharges of cyanide in exceedence
6 of the water quality standards within the mixing
7 zone, which included basically the entire plant
8 for the groundwater, and the back water and main
9 channels of Flathead River for surface water, with
10 the justification that CFAC could not control the
11 discharges, and there was no anticipated impact."

12 And then I am changing my proposed fact
13 No. 118 to read, "The February --" I'm taking out
14 three words so that it reads, "The February 2014
15 fact sheet distributed for public comment included
16 Exhibit 1 and 2, the figures of the groundwater
17 and surface water mixing zones from the 1999
18 permit."

19 So I am, as the Hearing Examiner,
20 resubmitting those findings of fact and my
21 proposed order to you with those changes, and I
22 would therefore ask -- and the parties and I have
23 discussed this, and the parties have stipulated to
24 these changes in my proposed order.

25 And my understanding from the parties is

1 that with these changes, they do not believe that
2 -- they believe that the findings of fact are
3 based on competent substantial evidence.

4 So the standard for whether the Board
5 can modify findings of fact, according to 2-4-621,
6 Montana Code Annotated, is that, "The Board may
7 not reject or modify the findings of fact unless
8 the Agency first determines from a review of the
9 complete record, and states with particularity in
10 the order, that the findings of fact were not
11 based on competent substantial evidence."

12 So it is my understanding from the
13 parties, which they can reiterate on the record,
14 that they are not arguing that the findings of
15 fact as presented in my current proposed order are
16 not based on competent substantial evidence. And
17 I would ask that the parties make a record about
18 that, please.

19 MR. TIETZ: This is John Tietz for CFAC.
20 That's correct.

21 MR. MOSER: This is Kurt Moser for DEQ.
22 That's correct, what the Hearing Examiner stated.

23 MS. CLERGET: And the corrections are on
24 the list in front of you, as I described to you,
25 Chris.

1 So Chris, I believe that that answers
2 your question. The parties are not advocating
3 that the Board review the record in its entirety.
4 They have disagreements with the findings of fact,
5 but do not believe that those rise to the level of
6 undermining the substantial credible evidence that
7 the facts are based on. Does that make sense to
8 everybody?

9 Chris, does that answer your question?

10 BOARD MEMBER TWEETEN: Madam Chair, this
11 is Chris. Yes, Sarah. I want to thank you and
12 the Counsel for the parties for your diligent work
13 in this area. I think you relieved the Board of a
14 substantial potential burden here, and I for one
15 am very grateful, and I think other Board members
16 probably share my feelings with respect to that,
17 so thanks very much for your good work.

18 MS. CLERGET: That leaves us with the
19 conclusions of law. So --

20 CHAIR DEVENY: I think maybe for
21 purposes of just getting through these findings of
22 facts, I think I'd like to just have a motion that
23 gets us to where we are with the findings of fact,
24 and deal with the conclusions of law separately.

25 MS. CLERGET: That makes sense.

1 CHAIR DEVENY: So I would like to move
2 that the Board accepts the Hearing Examiner's
3 proposed findings of fact, with the modifications
4 that have been outlined orally, and that are on
5 the board and the fact sheet.

6 MS. CLERGET: Which we will attach to
7 the record. Do you want to mark it? We'll attach
8 it to the record as Exhibit A to this hearing
9 transcript.

10 CHAIR DEVENY: Is there a second to my
11 motion?

12 BOARD MEMBER HANSON: Second.

13 CHAIR DEVENY: All those in favor,
14 signify by saying aye.

15 (Response)

16 CHAIR DEVENY: Any opposed?

17 (No response)

18 CHAIR DEVENY: Motion passes, so the
19 findings of fact have been approved. So let's
20 move on then to the conclusions of law. And the
21 Board members have an opportunity now to ask any
22 questions they might have of either of the
23 parties.

24 (Whereupon, Exhibit A
25 was marked for identification)

1 BOARD MEMBER TWEETEN: Madam Chair, this
2 is Chris again.

3 CHAIR DEVENY: Go ahead.

4 BOARD MEMBER TWEETEN: May I ask Counsel
5 for both sides, the Department and CFAC, just
6 picking the low hanging fruit first here.

7 Can you identify for me anything that's
8 shown in the exhibit, I think it is the photograph
9 of the mixing zones, the aerial photograph, the
10 drone photograph, or whatever it is, whatever is
11 depicted in there that is not found in the recital
12 that was in the proposed findings of fact that was
13 available for the public to comment on?

14 What's the difference between the
15 exhibit and the narrative findings with respect to
16 the description of the mixing zone?

17 MR. MOSER: This is Kurt Moser with DEQ.
18 The physical pictures were not, the physical
19 pictures themselves were not in the draft permit
20 that went out for public notice. They were added
21 in response to comment, and they are narratively
22 described within the permit itself, and there were
23 exhibits that were cited in our brief from the
24 record that explain that.

25 If one were to look at the 2014 permit

1 itself, it does explain mixing zone. It does have
2 reference to the mixing zones, but it is also
3 contained within the fact sheet for the 2014
4 permit which was issued in February, because we
5 issue fact sheets with draft permits now. And we
6 don't modify the fact sheets later. They are
7 modified by the responses to comments.

8 So the administrative record sort of in
9 a tighter sense of this permit is the draft
10 permit, the fact sheet, and the public comments
11 which modifies the fact sheet to the extent any
12 changes are made. So it is explained in those
13 references that are in our brief.

14 CHAIR DEVENY: Is it possible to show
15 this up on the board for the Board members?

16 MS. CLERGET: Yes. (Complies) So this
17 is -- I think it is 22. The final fact sheet, was
18 it 22?

19 MR. MOSER: This should be D-12 at 29 to
20 31. So that's Department's Exhibit 12.

21 MS. CLERGET: So this is exhibit Figure
22 2 attached to the 2014 permit; do the parties
23 agree?

24 MR. MOSER: Yes.

25 MR. TIETZ: Yes.

1 MR. MOSER: And if you want it in color.
2 Did you get it in color? You can get it on --
3 that's Exhibit 30, DEQ's Exhibit 30. But this is
4 what was attached to the final permit. It was not
5 attached to the draft.

6 MR. TIETZ: Could we put up the actual
7 fact sheet, too?

8 MS. CLERGET: Sure.

9 MR. TIETZ: That would be Page 30 of the
10 fact sheet.

11 MR. MOSER: I think if you look at what
12 we cited in our exceptions briefs was Pages 29 to
13 31 on the fact sheet, which is D-12.

14 MS. CLERGET: Where in D-12 is it
15 narratively described?

16 MR. TIETZ: Page 30, I believe.

17 MR. MOSER: On Pages 29 to 31. That was
18 the citation that's in the brief.

19 So starting on Page 29 of the fact
20 sheet, it explains, I guess, the history of the
21 mixing zones, what DEQ intended on doing, changes,
22 general changes that it was going to be making to
23 the mixing zones.

24 Then it talks about surface water mixing
25 zones starting on Page 30. And then it talks

1 about acute mixing zones and chronic mixing zones.

2 MS. CLERGET: Here you go, guys. The
3 fact sheet is on the left on the board. For the
4 purposes of the record, this is DEQ-12 at Pages 29
5 to 31, or 29 to 30. And on the right is exhibits
6 that were attached to the final permit, which
7 is --

8 MS. SOLEM: DEQ Exhibit 30.

9 MS. CLERGET: Chris, I apologize that
10 you can't see these. But what is on the right is
11 a color photo with some delineations on it and
12 some text, and then on the left is the narrative
13 fact sheet that was put out for public comment.

14 BOARD MEMBER TWEETEN: I guess my
15 question is -- understanding that a picture is
16 worth a thousand words. If the photograph
17 actually has something on it that is substantially
18 in addition to or different from the material that
19 was put out for public comment, that would be one
20 thing.

21 If the photograph is largely cumulative
22 of the narrative that was put out for public
23 comment, I don't see why this is a problem. So
24 that's really why I'm asking the question; and not
25 having it up in front of me, I'm not in a position

1 to really say much about that, other than to say
2 that that's why I raised the question.

3 I understand the importance of the right
4 of public participation and so forth, but on the
5 other hand, the simple fact that there is a
6 photograph that was not available for public
7 comment by itself doesn't really tell me much. So
8 that's the reason why I asked the question, and
9 maybe you can enlighten me a little bit about why
10 this is an important issue.

11 MR. MOSER: This is Kurt again, and I'm
12 sure Mr. Tietz would like to have an opportunity
13 to talk about this as well. But just to -- if we
14 want to go through the references that we're
15 referencing in the brief, the exceptions, this is,
16 now you see this is where we're talking about the
17 surface water mixing zones on Page 30, some
18 conclusions about acute and chronic life
19 standards.

20 Then going to Page 31, we're talking
21 about the acute mixing zone, the chronic mixing
22 zone, and there are two other documents where we
23 were discussing this as well.

24 Obviously the permit itself, the draft
25 permit on Pages 3 to 4 -- that's D-15 if you want

1 to show that. That's Pages 3 and 4. You can see
2 related, these mixing zones are related to
3 specific outfalls, and so you can see here there
4 is additional description here based upon the
5 outfalls.

6 So you can see, you know, it says mixing
7 zones granting chronic dilution of 10 percent. No
8 acute dilution. You can see with the various
9 outfalls, there is listed descriptions, and it
10 continues on to the bottom of Page 4.

11 And then the other important part that
12 we've argued, that DEQ has argued is an important
13 part of the process of following our rules is the
14 responses to comments. And in this case we cited
15 responses to comment at Pages 3 and 4, and this
16 would be D-18.

17 MS. CLERGET: I don't think it is 18.

18 MR. MOSER: D-18.

19 MS. CLERGET: The responses to comments?

20 MR. MOSER: Yes, it is the proposed
21 responses to comments. It is like DEQ --

22 MS. SOLEM: 19?

23 MR. MOSER: I guess that cite is wrong.

24 MS. SOLEM: Three and four.

25 MR. MOSER: Pages 3 and 4, not Comments

1 3 and 4. So starting -- if we go -- keep going
2 down a little bit.

3 MS. CLERGET: Comment No. 28, is that
4 what you're looking for?

5 MR. MOSER: I was looking for 28. It is
6 where we discussed -- I apologize. That citation
7 is incorrect. It is D-19 above. I guess I got it
8 right in the earlier reference to it, D-19 and 13
9 up above in my brief talking about Comment No. 28.

10 This is where we're explaining why we
11 did what we did, why we added the diagrams, and
12 explains that we had gotten this comment. This
13 comment was from CFAC. So we had added it to
14 provide more information.

15 And I guess in addition, whether or not
16 it is substantially changing just -- and I'll let
17 Mr. Tietz talk after this, I think, but -- What
18 we've concluded and what we've argued is that it
19 wasn't substantial, it wasn't a substantial change
20 such that it would necessitate going back out for
21 public notice.

22 And so we don't think a substantial
23 change occurred from what we did in the draft
24 materials to what ultimately happened. And we
25 also think DEQ is afforded the ability to make

1 changes, and that's important, because there are
2 some changes that can be made as a result of
3 receiving comments.

4 If things aren't quite as clear as
5 someone would like them to be, we can make -- we
6 do things like that. So it is not simply a matter
7 of making a change that's a clerical error or
8 something like that. We can make changes that are
9 important changes.

10 It is just we decide if they're very
11 substantial or not, and based upon the way the
12 rules are written, we do have a fair amount of
13 discretion to make those changes, and it is an
14 important amount of discretion to have, and that's
15 why we raised this issue, because the Agency does
16 need that kind of discretion, because going
17 through the administrative process, it is
18 important to have that ability.

19 So I'll conclude then and I'll let Mr.
20 Tietz talk.

21 CHAIR DEVENY: Mr. Tietz, would you like
22 to comment on --

23 MR. TIETZ: Yes, please. Could we go
24 back to the fact sheet at Page 30.

25 So essentially what happened was that

1 the draft permit came out with a fact sheet, and
2 it included the depictions of the mixing zones
3 from the 1999 permit. And those appeared to be,
4 to at least these reviewers, that that was what
5 the mixing zone was going to be in the new permit.
6 And then once the final permit came out you have
7 Figure 2, which was obviously significantly
8 different than the exhibits that were there.

9 The issue here is that Figure 2 was a
10 depiction of the actual delineation of the
11 parameters of the mixing zone. And you have to
12 read 29, 30, 31 in the draft, or in the fact
13 sheet, but nowhere in there does it describe
14 narratively the delineation of the mixing zone.

15 It talks about the flow; it talks about
16 the amount of water; you've got your hydrogeology;
17 about what your transmissivity is, and the other
18 aspects of groundwater flow through the area. And
19 that's one component of delineating the mixing
20 zone, as setting the available dilution flow on a
21 parameter specific basis.

22 But the other aspect is that you have to
23 delineate the boundaries of the mixing zone, and
24 nowhere in that, in either the 29, 30, 31
25 discussion of the mixing zones, nor in the

1 description of the individual outfalls, is there
2 actually a narrative description of the
3 delineation of the mixing zone. The only
4 delineation comes out in this drawing after the
5 permit has been issued.

6 And so what the methodology for actually
7 drawing these lines on the map, to depict where
8 the mixing zone is, where the edges are, where
9 your compliance points are, the first point that
10 that information was conveyed to the public or to
11 CFAC was when Figure 2 was issued as part of the
12 final permit.

13 So I mean there is a lot of description
14 of mixing zone, but there is no narrative
15 description of what those delineated boundaries
16 are of that mixing zone except for Figure 2. And
17 CFAC and the public never had the opportunity to
18 comment on the appropriateness or how these
19 delineations were made because it wasn't put in
20 the permit until the final.

21 CHAIR DEVENY: Questions from the Board.

22 BOARD MEMBER HANSON: I have a question
23 just to make sure I'm following this correctly.

24 So there was a figure that was provided
25 with the fact sheet that showed mixing zones that

1 were different?

2 MR. TIETZ: Yes, and those actually came
3 up earlier.

4 MS. CLERGET: We can show them to you if
5 you want.

6 BOARD MEMBER TWEETEN: Madam Chair, this
7 is Chris again. So Mr. Tietz, what areas of
8 concern or controversy did the public find out
9 about for the first time when the photograph came
10 out that are at all significant or material with
11 respect to this decision?

12 MR. TIETZ: Well, it has to do with the
13 fact of being able to look at that, the
14 determination of the boundaries, and look at that
15 in the context of the mixing zone and what was
16 being proposed. I can't specifically discuss what
17 the technical aspects of that are. I'm afraid I
18 can't. Steve may be able to lend some insight to
19 that.

20 But the reality is that the delineation
21 was never available for comment, and I think that
22 that aspect alone violates the statute that they
23 should have that ability. Sorry.

24 So the depiction on the left is what was
25 included in the fact sheet, and that was a

1 depiction of the mixing zones from the 1999
2 permit. And so the depiction of the mixing zone
3 for the surface water, and there is a similar
4 depiction of the groundwater mixing zone, that
5 one, that were included in the fact sheet.

6 And that was one of the issues we
7 discussed with the Findings of Fact, and what the
8 purpose of those was, and that was an issue that
9 DEQ was trying to demonstrate in that fact sheet.

10 But those were the drawings that were
11 included in the fact sheet as compared to the
12 figure that was included in the permit.

13 BOARD MEMBER TWEETEN: What did CFAC
14 find out for the first time when it saw the
15 photograph?

16 MR. TIETZ: Where the boundaries of the
17 mixing zone were, so where in the river the mixing
18 zone was included, where in -- well, there wasn't
19 a groundwater mixing zone. So it was where in the
20 river the boundaries of that mixing zone were, how
21 far down it went, what sections of the river were
22 included within the mixing zone, so where the
23 compliance points were for the mixing zone.

24 BOARD MEMBER TWEETEN: And is that all?

25 CHAIR DEVENY: John, you had a question

1 while we're waiting.

2 BOARD MEMBER TWEETEN: Excuse me, Madam
3 Chair. I'm not -- I have another question for Mr.
4 Tietz. Was that all?

5 MR. TIETZ: Just a moment.

6 BOARD MEMBER TWEETEN: The
7 identification of the boundaries of the mixing
8 zone, is that the only thing that was new about
9 the photograph that you didn't know before?

10 MR. TIETZ: Correct.

11 BOARD MEMBER TWEETEN: How does that
12 relate to the arguments that you're making with
13 respect to your exceptions to this order?

14 MR. TIETZ: The exception to the order
15 is that the Hearings Examiner found that DEQ
16 violated the rule with respect to not providing
17 public comment and the opportunity to comment
18 before the permit went final on what the
19 delineation of the mixing zone was.

20 And so we're supporting the Hearing
21 Examiner's finding that the failure to allow for
22 public comment and CFAC's comment as to the
23 respective -- the delineation of the mixing zone
24 prior to the permit going final was they weren't
25 provided with that ability to comment, and so that

1 was a violation of 17.30.1376, because we believe
2 that's a substantive change that warranted public
3 comment.

4 BOARD MEMBER TWEETEN: Why does CFAC
5 have standing to make that argument?

6 MS. CLERGET: Chris, sorry. This is
7 Sarah. I'm just going to jump in here. DEQ is
8 making that argument, not CFAC. DEQ is making the
9 argument that the Hearing Examiner's conclusion of
10 law is incorrect.

11 BOARD MEMBER TWEETEN: We're being told
12 that the public was denied its right to
13 participate, but nobody from the public is here
14 making that argument.

15 MR. TIETZ: CFAC was also --

16 BOARD MEMBER TWEETEN: I don't know why
17 either DEQ or CFAC has standing to make that
18 argument on behalf of the public. If somebody
19 from the public was upset because they didn't have
20 a right to comment, why aren't they here? Why
21 haven't they filed a lawsuit in District Court?

22 And hasn't the time for making arguments
23 under the right of public participation passed?
24 As I recall it, the period of limitation for
25 making those arguments is relatively short. Why

1 are we bothered by this argument now if nobody
2 from the public has even felt aggrieved enough to
3 show up?

4 MS. CLERGET: Chris, this is Sarah. I
5 guess I want to be clear. I made a conclusion of
6 law that the permit as issued violated the ARMs
7 that required DEQ to put the permit before the
8 public and allow them to comment on it, the public
9 and CFAC.

10 So DEQ has taken issue with my
11 conclusion of law, which was part of my remand
12 decision, that these exhibits, by not being
13 included until the final draft -- or the final
14 permit, were violative of that ARM. So DEQ has
15 taken exception with that conclusion of law.
16 CFAC --

17 BOARD MEMBER TWEETEN: I understand that
18 now, but my question is still the same. The right
19 that you're arguing about is a right that belongs
20 to the public.

21 MR. TIETZ: May I? So --

22 BOARD MEMBER TWEETEN: Nobody from the
23 public is here, and I've tried to find out from
24 CFAC how the failure to include this photograph
25 has affected their rights, and I guess I still

1 haven't heard much that I find very persuasive
2 that CFAC was severely prejudiced by the fact that
3 they didn't see this photograph until later.

4 So why does the Board have to deal with
5 this argument at this point, when it doesn't sound
6 like a member of the public isn't here, and it
7 doesn't sound to me like CFAC has been prejudiced?

8 CHAIR DEVENY: Mr. Tietz, did you have a
9 comment?

10 MR. TIETZ: I would just say that the
11 rule says that the comment period, if there is a
12 substantive change, the comment period can be
13 reopened to give interested persons an opportunity
14 to comment of the information argument submitted.

15 So obviously clearly CFAC is an
16 interested person. This doesn't just run to the
17 public, it runs to CFAC as well. And the question
18 is whether or not the change is a substantive
19 change that warranted CFAC's ability to comment on
20 it at the time, and I don't believe that what our
21 post hoc rationalization of what our potential
22 impact was now is relevant. The question is what
23 was done at the time, and whether that was a
24 substantive change that warranted opening up,
25 reopening of public comment.

1 BOARD MEMBER TWEETEN: But I don't think
2 the Board has the authority, and I think that MAPA
3 is fairly clear on this point, that administrative
4 action shouldn't be set aside without a showing of
5 prejudice on the part of somebody. Like I said, I
6 haven't heard that from anybody.

7 Let's assume that you're right, and
8 let's assume that the Department technically
9 violated the rule. Why isn't that harmless error?
10 Why should we set aside the rule, or set aside the
11 Department's decision in the permit, based on an
12 allegation of a violation that doesn't seem to
13 have been prejudicial to anybody? At least nobody
14 is in front of the Board right now.

15 CHAIR DEVENY: I don't think we have an
16 answer to your question, Chris, so perhaps --
17 Sarah, did you have a comment?

18 MS. CLERGET: No.

19 CHAIR DEVENY: John Felton has on this
20 related --

21 BOARD MEMBER TWEETEN: I guess Madam
22 Chair --

23 CHAIR DEVENY: Just a second.

24 BOARD MEMBER TWEETEN: When we get to
25 the point of taking up this particular exception,

1 I'm going to suggest that it be rejected on the
2 grounds that the mistake, if made, was immaterial.

3 CHAIR DEVENY: Okay. Thank you, Chris.
4 John.

5 BOARD MEMBER FELTON: Thank you. I'm
6 trying to figure out what I think might be the
7 materiality piece of this. So first of all, I
8 have to get a little --

9 The mixing zone picture with the outline
10 of the actual mixing zone, I presume that at the
11 downstream end of that is where compliance must be
12 met; is true or false?

13 MR. TIETZ: That's correct.

14 BOARD MEMBER FELTON: On the 19 --

15 CHAIR DEVENY: DEQ is saying that's
16 false.

17 MR. MOSER: We can wait. I mean if you
18 want to hear me talk about it, I mean Mr. Tietz is
19 up there, so --

20 MR. TIETZ: So the mixing zone, the
21 intention of the mixing zone is it allows for
22 dilution of a parameter. So a parameter can go
23 into the water body above the standard, and it
24 needs to meet the standard at the end of the
25 mixing zone.

1 BOARD MEMBER FELTON: That was my
2 question. So when we look at Outfall 006 chronic
3 mixing zone outlined in yellow, presumably at the
4 downstream end of that, then compliance needs to
5 be met; is that true?

6 MR. TIETZ: That is my understanding of
7 the mixing zone, yes.

8 BOARD MEMBER FELTON: Does DEQ think
9 that's true or is that not true?

10 MR. MOSER: This was actually an issue
11 that came up in these proceedings, because the way
12 that it was treated in 1999, it was different than
13 the way it is treated today.

14 More importantly, you monitor at the
15 outfall location, and the concentration that
16 you're allowed essentially creates the allowable
17 size of the mixing zone, but the compliance point
18 is the end of the pipe. That's where you monitor.

19 Now, yes, there is a mixing zone that's
20 allowed, but that is not where we -- we don't take
21 compliance measurements at the end of the mixing
22 zone.

23 Now, in the 1999 permit, it was
24 different. But in the way DEQ operates in the
25 more modern era, the effluent limits are set based

1 -- sort of you back calculate to the effluent
2 limits.

3 And so the important thing -- and this
4 didn't change from the draft to the final -- is
5 the effluent limits that were coming out of the
6 end of the pipe. So that's the part that matters.
7 From our perspective, that's what we consider the
8 actual compliance point for effluent limits.

9 Now, there is a delineation, and I
10 believe CFAC wanted a delineation, because as
11 stated in -- or wanted more certainty on that
12 based on the public comment.

13 BOARD MEMBER FELTON: So if the point of
14 compliance is at the end of the pipe, what becomes
15 magical about the end line of the mixing zone?
16 Can you move the mixing zone? This is obviously
17 30 miles downstream from where it is here.

18 MR. MOSER: Hopefully not, but here's an
19 issue, though. If we monitor -- The reason we
20 don't do it like that anymore is that if we
21 monitored at the end of the mixing zone, there is
22 nothing to enforce, because we can't prove that
23 the chemical came from that pipe. We can only
24 prove that there's an exceedence of water quality
25 standards. So enforcement is extremely difficult.

1 MR. TIETZ: Can I clarify?

2 BOARD MEMBER FELTON: I'm trying to
3 understand what the end of the mixing zone means.

4 MR. TIETZ: I think I can --

5 BOARD MEMBER TWEETEN: But Madam Chair,
6 that's all well and good, but the time for
7 delineating that argument in CFAC's exceptions and
8 briefing has long passed, and I don't remember
9 seeing that argument explained in any of the
10 papers that were filed in front of the Hearing
11 Examiner with respect to prejudice, and the
12 Hearing Examiner certainly didn't make any sort of
13 finding with respect to prejudice.

14 I don't think -- I think it's way too
15 late for CFAC to come in and decide what their
16 prejudice is at this point during the hearing. I
17 mean they're having an argument with DEQ now about
18 a point that DEQ has never heard before today, as
19 far as I can tell from the papers, at least the
20 papers that I reviewed.

21 So I guess that doesn't solve my problem
22 with respect to this allegation. And I think that
23 CFAC had its opportunity to identify prejudice and
24 give DEQ an opportunity to argue it in the papers
25 before this hearing started, and they didn't take

1 advantage of that opportunity, as far as I can
2 tell, unless I'm missing something in the papers
3 that we've seen up until today.

4 So I think it is too late to come in
5 front of us during the hearing, and suddenly
6 decide that this is the reason why this is
7 material. DEQ and CFAC should have been arguing
8 this in their paperwork, and they didn't. So as
9 far as I can tell, there is no issue here for us
10 to review at this point.

11 CHAIR DEVENY: Sarah, did you have a
12 comment?

13 MS. CLERGET: I guess I want to clarify.
14 Chris, this was a point that was argued at the
15 hearing. There was evidence presented about the
16 facts that this was not -- that the exhibit not
17 being included until the 2014 final permit, there
18 was evidence presented by CFAC about how that
19 affected them, and there was evidence presented by
20 DEQ about the same arguments that you've heard
21 here today about that it was included enough that
22 they should have been on notice.

23 So it was an issue at the hearing. I
24 made a finding of fact that the exhibit was not
25 included, and I did not make findings of fact or

1 conclusions of law about prejudice specifically,
2 although the conclusion of law stating that the
3 inclusion of Exhibit 2 in the 2014 final permit is
4 violative of the ARM requiring that the public be
5 allowed and CFAC be allowed to comment on this
6 exhibit.

7 I mean the fact that I found that as a
8 conclusions of law indicates what I thought about
9 the fact that I found that it was not included,
10 and how that materially affected the rights of
11 CFAC and the public.

12 CHAIR DEVENY: John, did you have any --
13 I don't think we want to belabor the technical
14 issues of the diagrams because they were discussed
15 during the hearing, but I do want to make sure
16 you're clear on --

17 BOARD MEMBER FELTON: I am. Thank you.

18 CHAIR DEVENY: I'm wondering if we could
19 keep this conversation about this particular
20 matter in mind, and move on to maybe discuss a
21 couple of the other points. Chris, are you
22 comfortable with that, or would you rather hammer
23 this out a little longer?

24 BOARD MEMBER TWEETEN: I think we've
25 pretty much said all there needs to be said about

1 this.

2 CHAIR DEVENY: I would like to go to the
3 conclusions of law and look at under 4(a), where
4 the conclusions of law said that the permit does
5 not provide for compliance as required by the ARM.

6 And DEQ, in my opinion, gave some
7 compelling evidence as to why they are not
8 required to in their permit provide for
9 compliance. And I'd like to hear from Mr. Tietz a
10 little bit of response to that, and then again
11 further from Mr. Moser.

12 MR. TIETZ: So I guess I'm not clear
13 exactly what your question is.

14 CHAIR DEVENY: Did you agree that the
15 permit does not provide for compliance as required
16 by the ARM, the finding of -- the conclusion of
17 law?

18 MR. TIETZ: I do.

19 CHAIR DEVENY: And what do you base that
20 on?

21 MR. TIETZ: So as I described in my
22 prior argument, I think that the permit obviously
23 has to comply with the Water Quality Act. There
24 is no question about that. The permit has to set
25 effluent limits. That's correct.

1 The issue is whether or not the permit
2 issued by DEQ has to provide for compliance,
3 provide a mechanism for the discharger to be in
4 compliance. Can DEQ issue a permit that under
5 known circumstances put the discharger into
6 immediate non-compliance? The discharger has no
7 ability to comply with the permit the moment it
8 becomes effective.

9 And we believe that the rule requires
10 DEQ to draft a permit that complies with the Water
11 Quality Act, that provides for effluent limits,
12 but also creates a situation where a discharger
13 can be in compliance; and whether that means
14 provide for a compliance schedule --

15 Which DEQ has the ability to do,
16 although DEQ has argued that CFAC didn't ask for
17 it. They gave us a compliance schedule for
18 ammonia discharges that we didn't ask for, but
19 they included that.

20 So our position is that the permit that
21 is issued has to provide a road to compliance. It
22 can't just shut the gate off and say, "Here's your
23 permit. You're out of compliance, and now you're
24 getting fined for being out of compliance." I
25 think it has to give the permittee a road to

1 compliance.

2 CHAIR DEVENY: Does that mean then that
3 DEQ would be required to issue all permits with
4 giving whoever applies for that permit the ability
5 to comply?

6 MR. TIETZ: I would think that would be
7 implicit in the regulations that they have the
8 ability to comply, particularly in this situation
9 where it is a long standing situation. There have
10 been multiple permits. The 1999 permit had
11 certain parameters, it had certain elements to it,
12 that significantly changed in the 2014 permit.

13 DEQ knew that CFAC couldn't comply with
14 those new elements to the permit, and yet it
15 didn't provide any mechanism for CFAC to be able
16 to achieve compliance, whether that would be a
17 compliance schedule, or BMP's, or other types of
18 situations.

19 And so we believe that the rule requires
20 DEQ to provide a permit that a discharger can
21 comply with, without violating the Water Quality
22 Act. I mean in no circumstances are we saying
23 that DEQ should violate the Water Quality Act. It
24 can't. The permit must comply with the Water
25 Quality Act.

1 But there can be mechanisms that DEQ has
2 the authority and the latitude to draft a permit
3 in a way that gets the permittee to be able to
4 achieve compliance, that it is a possibility.
5 Giving a permit that's impossible to comply with
6 from the very get-go seemed to be in violation of
7 what the rule states.

8 CHAIR DEVENY: And if I recall
9 correctly, there was a lot of material to review,
10 but CFAC asked to have a mixing zone, but didn't
11 ask for -- but didn't suggest doing anything else
12 to come into compliance, and didn't ask for a
13 compliance schedule.

14 MR. TIETZ: Correct, that CFAC did not
15 ask for a compliance schedule with respect to the
16 mixing zone.

17 I'm going to take this back to another
18 issue that has been kind of underlying this entire
19 case, which has to do with whether or not DEQ has
20 to request information for the mixing zone, and
21 admit information to evaluate the mixing zone.
22 This was part of the summary judgment brief or
23 motion that we submitted and that was denied.

24 But the 1999 permit included the mixing
25 zone, the surface water mixing zone for cyanide,

1 and that was requested to continue in the 2003
2 application, it was included in the 2013
3 information reapplication, and there was never any
4 request from DEQ, no indication from DEQ that the
5 mixing zone was at risk.

6 CFAC had provided a full blown mixing
7 zone study in 1998 that the 1999 permit was based
8 upon, and CFAC was under the impression that that
9 mixing zone had been established by DEQ as a
10 proper mixing zone in the river.

11 And when we went through the whole new
12 permitting process, there was never any
13 indication, there was never any request from DEQ
14 that CFAC needed to provide anything more to
15 demonstrate that the mixing zone was still
16 appropriate, or that it was correct, until we got
17 the permit, or the draft permit that indicated no
18 mixing zone was going to be issued.

19 And so we never had the opportunity,
20 quite frankly, to understand that it was going to
21 change, that we could have requested a compliance
22 schedule. It was just that the mixing zone was
23 now inappropriate, and that was part of the
24 comments that CFAC made was with respect to the
25 that mixing zone, and what information was -- that

1 no information was requested.

2 So the short answer is no, CFAC never
3 requested a compliance schedule for the mixing
4 zone.

5 CHAIR DEVENY: Mr. Moser, would you like
6 to respond to Mr. Tietz's statements.

7 MR. MOSER: Yes, Madam Chair. So here
8 we're talking about an issue of how to interpret a
9 specific rule, and obviously DEQ disagrees with
10 the interpretation that's contained within the
11 proposed decision, because we believe that the
12 permit limits themselves are how you get
13 compliance with the Act. And so that is how we
14 read it. In other words, we can't issue a permit
15 that doesn't have those limits in it.

16 Now, if a compliance schedule was put
17 into a permit, you still would have those final
18 effluent limits in the permit. You may have
19 interim effluent limits that you are moving
20 towards getting those final effluent limits, but
21 nonetheless, they would be in the permit. They
22 wouldn't be effective until the date that that
23 occurs.

24 If the Board decides that that's
25 something that DEQ has to look at on remand, there

1 are definitely different things that are occurring
2 because of the changed circumstances when this
3 gets remanded.

4 But the conclusion that we must in all
5 circumstances issue a permit that basically
6 whitewashes what's going on, and say, "This is
7 what we're going to do. We're just going to allow
8 you to comply," we can't do that. I mean that
9 specifically violates 17.30.1311 sub (1).

10 I guess that's the point that we've
11 made, and I think we also argued it in our brief
12 as well.

13 CHAIR DEVENY: In your exceptions brief,
14 I think you did. What about the allegation that
15 you never informed CFAC about the change between
16 the 1999 permit and the 2014 requirements that
17 were going to go into the permit?

18 MR. MOSER: I don't think that the
19 findings of fact that are in the order before the
20 Board indicate that. I do think the record
21 indicates and the transcript indicates that we did
22 have discussions with CFAC about a lot of issues,
23 that things were going to change this time around
24 when we issued the permit.

25 We had discussions about

1 recharacterizing the nature of Outfall 006, and so
2 many of their issues relate to that. Mr. Tietz
3 noted that, made a comment that we weren't going
4 to provide a mixing zone. Obviously we provided
5 many mixing zones, but the mixing zone we didn't
6 provide was an acute mixing zone for cyanide,
7 because the agency determined that that was not in
8 the interests of protecting the river.

9 And as the findings show, EPA actually
10 recommends that you do not give an acute mixing
11 zone for toxic substances. Again, this is a toxic
12 substance, and it's cyanide. And there was a lot
13 of testimony on the record about cyanide. We had
14 experts on both sides that discussed that, and to
15 the extent that that's been recapped, I mean it is
16 in the order. So --

17 CHAIR DEVENY: Do Board members have any
18 questions? I'd like to stick to the issue of the
19 permit does not provide for compliance.

20 BOARD MEMBER BUSBY: I've got a couple
21 of things I'd like to clear up in my own mind
22 related to that. And I don't care which one of
23 you answers. Was CFAC in compliance with the
24 permit that they had previously, and totally in
25 compliance, or completely in compliance, or

1 substantially in compliance? I don't care what
2 term you use.

3 MR. MOSER: I think the proposed order
4 makes certain findings on that, and so I feel I
5 guess a little hesitant to say it. I think that
6 they were substantially in compliance with the
7 previous permit. There weren't any --

8 BOARD MEMBER BUSBY: And that was --

9 MR. MOSER: But remember there weren't
10 any limits, so I mean there were no limits on
11 cyanide in the previous permit. So --

12 BOARD MEMBER BUSBY: I understand that,
13 but as far as the permit is concerned, they were
14 substantially in compliance. Okay.

15 MR. MOSER: I believe that's the case.

16 MR. DEXTER: In the new permit, which
17 was issued in 2014, if I understand this
18 correctly --

19 MR. MOSER: Yes.

20 BOARD MEMBER BUSBY: -- you changed the
21 location of the compliance point. And the
22 previous one was at the -- where? At the end of
23 the mixing zone? Just tell me if I'm all wet on
24 what I think I understand.

25 MR. MOSER: That's accurate.

1 BOARD MEMBER BUSBY: So what you do with
2 the permit is you went from black over here to
3 white with no in between; is that correct? In
4 other words, you went from compliance here to --

5 MR. MOSER: I would agree there was
6 significant differences between the two permits,
7 yes. I don't know if I'd quite characterize it
8 like that, but yes, there was significant
9 differences.

10 BOARD MEMBER BUSBY: There is
11 significant differences, but there was no
12 compliance -- and I think Mr. Tietz answered this
13 for me -- there was no compliance schedule to go
14 from Point A to Point B on the permit itself?

15 MR. MOSER: Well, there are. I mean
16 there are in some cases, yes, and some no. But
17 what we're talking about I think primarily is the
18 discharge --

19 BOARD MEMBER BUSBY: So I'm trying to
20 get from Point A, the 1999 permit that was
21 effective to 2014, and the Point B is the 2014
22 forward. In DEQ's mind, there was a black and
23 white cut date on that; and this point you had to
24 have your compliance at this point, and 2009 -- or
25 the 1999 permit, the cut point was different, or

1 that compliance point, however you want to put it,
2 was different. But this change made a tremendous
3 difference as far as CFAC was concerned in the
4 limitations they're allowed.

5 MR. MOSER: Yes, it did.

6 BOARD MEMBER BUSBY: Was DEQ aware that
7 there was no way they could meet the new permit
8 limits?

9 MR. MOSER: In the development of this
10 permit, DEQ asked CFAC to try to characterize the
11 nature of their discharges, particularly from the
12 old landfills that are located on the site, which
13 has been identified as one of the primary sources
14 of the cyanide fluoride. Now, it is not the only
15 source, so -- and this is where some of this gets
16 somewhat confusing.

17 But the difference that was in this
18 permit was that DEQ no longer included that as a
19 point source or as a source for the discharge,
20 because that is upgradient. It is basically those
21 are -- I don't want to get this -- it's either the
22 side or above where the location of the plant is.

23 That was no longer included as a source,
24 but DEQ attempted to have them characterize this,
25 in other words, or pump and treat it, to get a

1 leachate collection system, pump and treat that to
2 a wastewater treatment plant.

3 These discussions were being had. CFAC
4 just said, "We don't want to do that. We want
5 1999." That's basically where we are. So that's
6 sort of been a common theme throughout this, the
7 proceedings, was that they very much wanted what
8 they had in 1999, and we were going to make a
9 change.

10 So it wasn't a surprise, I think. We
11 had a long process of talking about this, at least
12 when we began to actively pick up the permit again
13 in 2013, that there was a time to think about
14 this.

15 CHAIR DEVENY: One follow-up.

16 BOARD MEMBER BUSBY: And just a real
17 quick follow-up. When they made application in
18 2013 or whenever you started this, they said the
19 plant was going to restart; is that correct? They
20 thought it would?

21 MR. MOSER: They said that they wanted
22 to basically treat it like it could restart. I
23 mean they weren't saying that they definitely
24 would restart. They never said that. But
25 basically, it could begin again, and so that's how

1 we processed the application.

2 BOARD MEMBER BUSBY: As an operating
3 facility.

4 MR. MOSER: Right. And I mean that's
5 not uncommon. We have to do that. I mean
6 sometimes people have to get permits before they
7 even discharge anything, and so then they have
8 their permits in order before they start their
9 discharge.

10 BOARD MEMBER BUSBY: Thank you.

11 BOARD MEMBER HANSON: I just want to
12 make sure I understand, and I may be like super
13 understating your point, but I guess I want to
14 make sure I'm understanding it.

15 So when you talk, you know, when
16 17.30.1311 specifically calls to provide for
17 compliance, from your interpretation, what you're
18 saying is, "We allowed them to provide for
19 compliance by giving them a number that they
20 needed to comply with"?

21 MR. MOSER: No.

22 BOARD MEMBER HANSON: Why not?

23 MR. MOSER: We have to -- I'm sorry. So
24 what we're saying is that the conditions of the
25 permit must provide for compliance with the Act.

1 So we have to -- Those conditions that are in the
2 permit, those limits, must comply with the Act.

3 So in this case, with something like
4 cyanide, we have a rule that's adopted in State
5 law, 40 CFR 122.4(d), which says that there's
6 reasonable potential to cause or contribute to a
7 violation of a water quality standard or criteria,
8 we must have limits for that in the permit. So we
9 have to do that.

10 And we interpret this to say we are
11 prohibited from issuing a permit that doesn't have
12 those limits in there.

13 CHAIR DEVENY: I have a question while
14 we're kind of on this. If CFAC had requested a
15 compliance order after they saw the draft permit
16 application in 2013, would you have been
17 compelled, or would you have had the discretion to
18 work with them to develop a compliance schedule
19 for the cyanide?

20 MR. MOSER: I certainly think we would
21 have considered it. I mean I can't go back in
22 time for sure, but I mean like that, but certainly
23 if somebody says, "We want to do this." But then
24 again, as I said in my opening statement, we would
25 have to be able to say, "You can get to that limit

1 in so long," and then we'd have to have these
2 interim steps that we could ensure that they're
3 making that progress to get there.

4 Because we were sort of on opposite ends
5 of the spectrum with this permit, I mean under the
6 facts here, that that's not reasonable. But if
7 during the permit development we had said, "Okay,
8 we're going to do this," or "We're going to --"
9 because I mean we're talking there's a feasibility
10 issue here. There is a feasibility issue.

11 And if there simply isn't any way that
12 -- I mean without doing more. And again, we
13 talked to them about doing more, collecting the
14 water that's coming out of the landfills, pumping
15 and treating that. That was an example of that.
16 There is other things that they could do.
17 Everything, though, obviously involves a lot of
18 money, so --

19 But certainly we would have looked at
20 those things, and had they desired that, and also
21 if they had provided information that we could
22 actually get to the number eventually.

23 CHAIR DEVENY: I kind of feel like we've
24 discussed this third point -- first point, No. A,
25 quite a bit. Are people comfortable maybe moving

1 on?

2 MR. TIETZ: Can I just respond to just a
3 couple things?

4 CHAIR DEVENY: Sure. Go ahead.

5 MR. TIETZ: One, I think that Mr. Moser
6 was talking about the characterization of Outfall
7 006, and the opportunities CFAC had to respond to
8 that. I think there were many conversations that
9 went on there.

10 I think that Mr. Moser maybe slightly
11 mischaracterized how that interactive went on.
12 Steve Wright is here. If the Board wants to hear
13 from him, he could describe what those discussions
14 were.

15 But there were many discussions about
16 Outfall 006, and there was a lot of discussion
17 about that with respect to Outfall 006. I wasn't
18 privy to a lot of those, so I can't give you much
19 detail there, but I know there was a lot of
20 discussion about that.

21 Mr. Moser continues to talk about the
22 requirement to set effluent limits in the permit,
23 and I don't disagree with that. And he also just
24 said that the permit has to have effluent limits
25 that mirror the Water Quality Act. I've said this

1 numerous times. We absolutely agree with that.
2 That's without question true.

3 But effluent limits don't mean numeric
4 standards at the end of the pipe. They can mean
5 other things. He was just talking about leachate
6 collection, he was talking about pump and treat.
7 Those are best management practices. Those were
8 available to the Department. They could have
9 provided for those in the permit, and they didn't.

10 And so there is no requirement -- I mean
11 it is DEQ policy to set a numeric effluent limit
12 at the end of the pipe. That's not a requirement
13 under the rule. They could set the permit -- or
14 the limit at the end of the mixing zone as it was
15 in the prior permit.

16 So I don't have the specific -- but
17 there was a finding of fact with respect to the
18 mixing zone. And as the process went through, the
19 DEQ permit writer had made a determination that
20 the mixing zone should have continued. And
21 throughout the process, if you look at the
22 evolution of the draft permit, and how the permit
23 writer viewed the mixing zone, until the very,
24 very end of the process, she had a mixing zone in
25 there for cyanide as it had been in the 1999

1 permit.

2 MS. LAUGHNER: No. 126.

3 MR. TIETZ: So Finding of Fact No. 126.

4 And so it wasn't until the very end, right before
5 the draft permit was issued, and for unknown
6 reasons, it suddenly switched and the mixing zone
7 was gone. I never have received much of an
8 explanation about why that happened, but
9 throughout that process, the permit writer had
10 felt that the mixing zone was appropriate, and
11 that it should have continued, and then it was no
12 longer in the permit.

13 CHAIR DEVENY: Further questions on this
14 topic? Chris, are you still with us?

15 BOARD MEMBER TWEETEN: Yes, I am.

16 CHAIR DEVENY: Okay. I'd like to talk
17 about No. B, "The permit describes Outfall 006 as
18 a single location, which did not comport with the
19 reality that there are many discrete and diffuse
20 seeps in the area of the back water channel along
21 the river bank."

22 And this is an item why our Hearings
23 Officer found that DEQ was -- why CFAC met the
24 burden that DEQ did not have preponderance of the
25 evidence; is that correct?

1 MS. CLERGET: That the permit violated
2 the law, I think.

3 CHAIR DEVENY: That the permit violated
4 the law. Excuse me. So there was a lot of
5 information in here about Outfall 006, and I would
6 really like somebody to sort of clarify the
7 description of that.

8 And I understand that the permit has a
9 single latitude longitude description, but that
10 CFAC also had told DEQ that the description was
11 incorrect. And I guess I'd like DEQ to kind of
12 speak to this particular item.

13 MR. MOSER: Thank you, Madam Chair. DEQ
14 has not found an exception to that holding in this
15 ruling. We have not filed an exception. So that
16 is why I believe that the matter will be remanded
17 for further recharacterization of that outfall.
18 So --

19 CHAIR DEVENY: Now I think we're getting
20 somewhere. So based on what I'm hearing, in terms
21 of the conclusion of law, I'm thinking that based
22 on what DEQ has said regarding "A," and based on
23 what has been said about "C," not in my mind being
24 a huge substantial issue, that I think I would
25 disagree with those two conclusions of law, but I

1 do think I would agree with No. B. And --

2 MS. CLERGET: I just want to be clear.
3 You're talking about conclusion of law 4(a) and
4 (b) and (c)?

5 CHAIR DEVENY: Yes. So remind us again,
6 Sarah, of what we do with the conclusions of law.
7 We either approve them or change them?

8 MS. CLERGET: Yes, you can reject,
9 modify, or adopt them. And if you are going to
10 modify or reject them, you need to make a written
11 finding, so you can either do it yourself, or you
12 can order me to do it; and if you order me to do
13 it, then I need some direction.

14 So if you're forming a motion, then
15 those are -- but those are your options.

16 CHAIR DEVENY: I would like to put a
17 motion before this Board that we accept the
18 conclusion of law letter No. B, "The permit
19 describes Outfall 006 as a single location which
20 does not comport with the reality that there are
21 many discrete and diffuse seeps in the area of the
22 back water channel along the river bank."

23 And along with that motion, that we
24 reject letters "A" and "C," with the rationale
25 that I don't think that I don't believe that "C"

1 was really substantial. And No. A I believe does
2 not provide for compliance. It is sort of taken
3 out of context to what the ARM states, and I don't
4 feel comfortable with saying that they were out of
5 compliance for that -- or that the permit did not
6 provide for compliance as a reason for DEQ to be
7 out of -- what word am I looking for?

8 MS. CLERGET: That the permit violates
9 the law.

10 CHAIR DEVENY: That the permit violates
11 the law. So if that's not too muddled. Anybody
12 care to discuss that, or have a second? We need a
13 second before we can discuss it.

14 BOARD MEMBER BUSBY: Can I make just a
15 comment on that?

16 CHAIR DEVENY: I think we need a second
17 before we can comment.

18 BOARD MEMBER BUSBY: Probably do.

19 CHAIR DEVENY: It hasn't been seconded.

20 BOARD MEMBER FELTON: I'll second, just
21 so we can --

22 BOARD MEMBER TWEETEN: Madam Chair, this
23 is Chris. I'll second.

24 CHAIR DEVENY: Okay. Thank you. Now
25 we'll have discussion.

1 BOARD MEMBER BUSBY: I'm not sure it
2 violates the law, but it certainly isn't the
3 letter of the law either. I think DEQ, when they
4 make a substantial change to a permit, I think
5 they have to provide a method to -- not a specific
6 method, but an opportunity for compliance.

7 When you issue a permit, that
8 automatically puts the permittee in noncompliance.
9 I'm not sure that doesn't violate the law in
10 itself. So I'm not sure it is in violation of the
11 law, but I think issuing the permit without
12 recognizing that they're purposely putting the
13 permittee in non-compliance, I'm not sure that
14 part isn't in violation.

15 CHAIR DEVENY: John.

16 BOARD MEMBER FELTON: Thank you. So
17 first, I was willing to second it. I'm a little
18 confused. Is the only -- This is more for Sarah.
19 I'm not sure. Is the only conclusion of law Item
20 4?

21 MS. CLERGET: No. They're all
22 conclusions of law.

23 BOARD MEMBER FELTON: They're all
24 conclusions of law. So are we going to have to
25 then, based on this motion, go through and do

1 every single -- do we have to address them all and
2 not hold one out?

3 MS. CLERGET: You can address this one,
4 and then address the rest of them if you want.
5 But ultimately you have to address all of them,
6 yes.

7 BOARD MEMBER FELTON: So then my other
8 question was: Early on when Mr. Moser was making
9 his discussion, way back last century whenever we
10 started this discussion, there was a lot of
11 discussion about -- My impression was that DEQ was
12 really questioning more that this ARM is an
13 incorrect citation, that it really should be 1350.

14 So I wasn't entirely clear, based on
15 DEQ's presentation, if they're contesting that the
16 permit is incorrect because it doesn't provide for
17 compliance, or if they're contesting that the
18 citation is wrong, or that you're saying it is
19 entirely okay. I'm a little confused as to really
20 what it is that you were saying earlier on.

21 CHAIR DEVENY: Thank you, John.

22 MR. MOSER: Madam Chair, Board member
23 Felton. The point we were making there, and we
24 did -- it would be incorrect to say you have to
25 have a compliance schedule every time you know

1 they're going to be out of compliance, but that
2 doesn't mean that you can't look at it further
3 with more information.

4 If the Agency has more information, I
5 believe you could have the Agency take that into
6 consideration upon the remand, and see if we can
7 work with a compliance schedule.

8 The danger in saying that just because
9 you're out of compliance you have to get a
10 compliance schedule, it neglects the fact that
11 there are many other factors that come into play
12 when you grant a compliance schedule, like will
13 they ever be able to meet it. Is there a series
14 of actions that we can put in a permit that will
15 get them to that limit? Those things are --
16 that's important, too.

17 So it is not just -- I'm not arguing
18 that DEQ didn't follow 17.30.1350, the compliance
19 schedule rule. Based upon the facts in the
20 record, we don't think that there was evidence to
21 even do a compliance schedule, based upon what we
22 had, but --

23 But yes. Our central, more of a central
24 focus is certainly on the interpretation of
25 17.30.1311 sub (1), because we think that that has

1 pretty big repercussions if that's something
2 that's held and is interpreted that way.

3 BOARD MEMBER FELTON: Can I follow up on
4 this?

5 CHAIR DEVENY: Yes.

6 BOARD MEMBER FELTON: So is there a
7 difference from DEQ's perspective if I am an
8 existing permittee, and the conditions of the
9 permit are going to change, or I'm a brand new
10 applicant for a permit, which I think is --

11 So if we're going to set from a DEQ
12 perspective, "You must comply with this standard,"
13 does it matter if I've previously been permitted
14 or if I'm brand new?

15 MR. MOSER: Well, it can in the issuance
16 of a compliance schedule. I mean it can't for the
17 issuance of -- of effluent levels, you still have
18 to put the effluent limits. But it is a
19 consideration, depending on if the limit changes,
20 it is a consideration for a compliance schedule.
21 So it is one of the criteria.

22 But again, you still have to have an end
23 date, and you still have to have a series of
24 events to get there. So yes, I mean it's a
25 consideration. It would be different, yes, for

1 those circumstances.

2 BOARD MEMBER FELTON: Was it considered
3 in this case? Did DEQ consider -- "We have an
4 existing permitted entity. We're going to change
5 things a bit. Should we --" Was there
6 consideration of a compliance schedule, or was it
7 like, "When this permit ends, you're at this
8 level, and when this starts the next day, you must
9 be somewhere else"?

10 MR. MOSER: I think based upon the facts
11 in this record, there wasn't enough evidence to
12 say we were going to get there. And there wasn't
13 anything that we were going to -- a series of
14 actions that we could get to get that final
15 compliance date, where they would meet the
16 effluent limits, because --

17 So the answer is no, but the reason is
18 because it is such a different -- it is a very
19 different -- it is like the way it was treated in
20 1999 was very different than the way it was
21 treated in 2014, that's true. I mean there is no
22 doubt about that.

23 But because the applicant wanted it to
24 be like 1999, it didn't really provide us the
25 opportunity to investigate the compliance

1 schedule.

2 BOARD MEMBER FELTON: So my last
3 question then is: Was the 2014 permit infeasible?
4 Was it DEQ's belief that CFAC could not comply
5 with that permit?

6 MR. MOSER: Well, that's, No. 1,
7 feasibility is not supposed to be considered when
8 putting in water quality based effluent limits.
9 There is a case that I cited in my brief on that
10 issue.

11 Feasibility does come into play with
12 technology based effluent limits, but that's not
13 what we're talking about there. We're talking
14 about water quality based, I mean that protects
15 fish and aquatic life uses, something that
16 protects human health, that's in the river. So
17 what's your question again?

18 BOARD MEMBER FELTON: I'm just trying to
19 understand if it was possible for CFAC to be
20 compliant with the 2014 permit.

21 MR. MOSER: As I explained, we did have
22 discussions with CFAC about pumping and treating.
23 Mr. Tietz said it was a BMP. It really isn't a
24 BMP. If you collect the effluent on the bottom of
25 a landfill that's seeping cyanide, you would pump

1 it to a waste water treatment plant, you would
2 treat that. You'd have to treat it before it went
3 out.

4 They didn't want to do that. I mean the
5 1999 permit was good for that, I mean for them. I
6 don't think it was very good for the river, but it
7 was good for them, and they liked that. And I can
8 see why. So that's what they -- they didn't want
9 to make those changes. And if we would have --

10 And I guess another comment to what he
11 said. If we would have mandated that they do that
12 like he suggested, but they refused to do it, they
13 would have been in immediate non-compliance again.
14 I mean we can't mandate certain activities. We
15 regulate the discharge of pollutants. So that's
16 kind of where we are.

17 BOARD MEMBER FELTON: Thank you.

18 CHAIR DEVENY: There is a motion before
19 the Board. Is there any further discussion or
20 clarification that needs to be made?

21 (No response)

22 BOARD MEMBER BUSBY: Would you read back
23 the motion?

24 CHAIR DEVENY: You're going to make me
25 read back the motion? Basically what I'm moving

1 is that we're looking at Conclusion of Law No. 4.
2 And I'm saying that we reject "A" and "C," and
3 that we agree with the conclusion of law 4(b).

4 We still have all of these other
5 conclusions to go through, and I don't know that
6 we -- I don't think we have to go through those
7 individually, but I thought this one, maybe it was
8 something we might want to separate out.

9 BOARD MEMBER FELTON: One last question.
10 If this motion passes, then we need to revisit the
11 proposed order, right? Because it takes away a
12 significant amount of what's in the content of the
13 order. Is that --

14 MS. CLERGET: Yes.

15 BOARD MEMBER FELTON: Okay. Just so I
16 understand what we're doing.

17 BOARD MEMBER BUSBY: Could I take one
18 jump before we consider this?

19 CHAIR DEVENY: Absolutely.

20 BOARD MEMBER BUSBY: I'd like to make a
21 motion. Because CFAC is no longer an operating
22 entity, there is no chance of being an operating
23 entity, that we remand the entire permit back to
24 be rewritten under that scenario.

25 MS. CLERGET: Do the parties want to

1 comment on that?

2 MR. TIETZ: We would need a moment to
3 talk.

4 BOARD MEMBER BUSBY: We need a second
5 before --

6 CHAIR DEVENY: So we have motion on the
7 table. I don't think we can move to another
8 topic.

9 BOARD MEMBER BUSBY: That's what I was
10 wondering.

11 MS. CLERGET: You've got to deal with
12 the first one.

13 BOARD MEMBER BUSBY: That's why I asked.

14 CHAIR DEVENY: Let's take a vote on my
15 motion. All those in favor of the motion, signify
16 by saying aye.

17 (Response)

18 CHAIR DEVENY: Aye.

19 BOARD MEMBER TWEETEN: Aye.

20 CHAIR DEVENY: All those opposed.

21 BOARD MEMBER HANSON: Aye.

22 BOARD MEMBER BUSBY: Aye.

23 BOARD MEMBER FELTON: Aye.

24 CHAIR DEVENY: I think there was two for
25 and three against. So the motion fails. So let's

1 continue on with discussion or --

2 BOARD MEMBER BUSBY: I was going to make
3 a substitute motion or a different motion, that
4 let's remand, because of the conditions have
5 completely changed that the permit was written
6 under, and just remand the whole thing back to DEQ
7 to rewrite a permit based on the new conditions,
8 that CFAC is no longer an operating entity or no
9 longer plans to be an operating entity.

10 BOARD MEMBER HANSON: I'll second it.

11 CHAIR DEVENY: Second for discussion.

12 MS. CLERGET: Do you want to hear --

13 CHAIR DEVENY: Dexter, do you want to
14 continue with --

15 BOARD MEMBER BUSBY: I was going to ask
16 Sarah to give us her thoughts on that.

17 MS. CLERGET: I think you should
18 probably hear from the parties, as that wasn't a
19 conclusion, that wasn't a conclusion of law that I
20 proposed. So I think you need to hear from the
21 parties about what they think about that.

22 BOARD MEMBER BUSBY: I'd like to hear
23 from DEQ first, if possible, because that puts the
24 burden on them, is the reason I'd like to hear.

25 MR. MOSER: Madam Chair, members of the

1 Board, it is hard to think about this on the fly,
2 but I'm not sure that there are supporting facts
3 in the record for that, like a wholesale remand.
4 There are certainly a lot of conclusions that are
5 in the order, and some of those are favorable to
6 DEQ, some of them are favorable to CFAC.

7 We did not dispute the second
8 conclusion, so it is going to be remanded to
9 reconfigure Outfall 006. I believe the cyanide
10 limits in question are coming out of that outfall.
11 So that concern is really going to be something
12 that we're going to be looking at.

13 I don't think that if you rule the way
14 that DEQ is suggesting you rule, that that means
15 they will immediately have to comply with what
16 you're concerned with. So it is going to be
17 remanded, I believe, based upon that second of the
18 two major legal findings.

19 BOARD MEMBER BUSBY: I'm concerned about
20 the immediate compliance issue, plus Outfall 006.
21 I think they're both extremely important issues to
22 both parties.

23 MR. TIETZ: CFAC would not object to
24 taking the whole permit back to the Department to
25 rewrite based on the current conditions.

1 I don't know whether the Board can hear
2 -- Steve Wright can give you an update on what the
3 current condition of the CFAC facility is right
4 now, if that would help the Board understand what
5 that would mean, if that is appropriate.

6 MR. MOSER: DEQ will object to that. We
7 don't think that would be procedurally appropriate
8 to hear that kind of testimony at this hearing
9 that's scheduled for exceptions. If there is some
10 other format that the Board thinks that would be
11 more appropriate to remand back, or have an
12 additional fact finding, that's another
13 possibility; but in this format, I think that that
14 would be inappropriate.

15 BOARD MEMBER BUSBY: I think that would
16 be inappropriate. That's --

17 CHAIR DEVENY: It sounds like it would
18 be introducing new information that wasn't in the
19 hearing record. Sarah, I would defer to you.

20 MS. CLERGET: Yes, I think new evidence
21 at this stage is not appropriate.

22 I will note that in the findings of fact
23 that you've decided on, Finding of Fact 20 states
24 that, "CFAC has now been designated a federal
25 Superfund site." No. 21 discusses remedial

1 investigation and feasibility. No. 17 states that
2 they've ceased aluminum production; and No. 18
3 states that they have announced a permanent
4 closure. So those facts are in the record.

5 MR. TIETZ: I would just say that, at
6 least for consideration, that the testimony of Mr.
7 Wright would not be with respect to the decision
8 of the findings of fact and conclusions of law.
9 It would be in answer to Mr. Busby's direct
10 motion. So it would be for a different purpose.

11 CHAIR DEVENY: Hillary.

12 BOARD MEMBER HANSON: So can I ask a
13 question maybe of DEQ. If in the proposed order
14 we remanded this anyway, does it not in and of
15 itself kind of go towards this motion? Because
16 wouldn't you take into consideration the fact that
17 they're now closed?

18 MR. MOSER: Again, I think as the
19 Hearing Examiner -- Madam Chair, Board member
20 Hanson -- indicated, the Hearing Examiner
21 indicated, there is evidence in the record that
22 you already know that this is the case. So it is
23 closed, it is permanently closed, it is a
24 Superfund site, there is remedial activities going
25 on, all those. And additional things on remand

1 would be taken into consideration. They'd have to
2 be.

3 BOARD MEMBER HANSON: That's all I'm
4 asking.

5 MR. MOSER: But the decision before you
6 now is you're remanding for us to go through
7 Outfall 006, DEQ's exceptions to the ruling
8 centered upon legal conclusions it does not want
9 to have hanging over its head on that remand. But
10 if the parties sit down and talk about a
11 compliance schedule, they can sit down and talk
12 about a compliance schedule.

13 If they think about -- and they're going
14 to sit down and talk about how to reconfigure this
15 thing, because it is going to be different. But
16 we don't know exactly how that's going to be. We
17 have to sit down and go through that, so --

18 BOARD MEMBER BUSBY: Question for Sarah.
19 How would we reword my motion to make it
20 compatible with what Mr. Moser just said?

21 BOARD MEMBER HANSON: If I'm hearing
22 correctly, he still wants a decision on the
23 conclusions of law, so that there is -- DEQ has --
24 that's what I'm hearing.

25 BOARD MEMBER BUSBY: I am, too.

1 BOARD MEMBER HANSON: Which takes away
2 -- ditches the whole thing.

3 BOARD MEMBER BUSBY: I'm not sure we
4 want to ditch the whole thing, but remand the
5 permit back for review, but I'm not sure how that
6 should be worded.

7 CHAIR DEVENY: Well, I think we need to
8 go through the conclusions of law before we start
9 talking about a --

10 BOARD MEMBER BUSBY: We can do it under
11 a motion if you want.

12 CHAIR DEVENY: I believe that we have to
13 go through the conclusions of law and make a
14 decision about them before we make a decision on
15 the order. John.

16 BOARD MEMBER FELTON: Thank you.

17 BOARD MEMBER TWEETEN: Madam Chair, this
18 is Chris. Can I --

19 CHAIR DEVENY: John Felton had a comment
20 first. Just a second, Chris. You're up next.

21 BOARD MEMBER TWEETEN: Okay.

22 BOARD MEMBER FELTON: So I understand
23 that we need to get through the conclusions of law
24 first, but this really relates directly to what I
25 think is a DEQ concern, which is reading that part

1 of that Conclusion 4, which I think DEQ's concern
2 is does that mandate that every single permit must
3 incorporate the idea of a compliance schedule.
4 They'd have to consider that.

5 But when we look at the order, it talks
6 about remanding to DEQ to re-examine or rewrite
7 the permit, such that it provides for compliance
8 either immediately or with a compliance schedule.
9 I don't think that finding or conclusions of law,
10 whatever that term is, necessarily is dictating
11 that DEQ must build a compliance schedule into
12 every permit, because within the order itself it
13 says that's an option.

14 So I think, I feel like -- that's part
15 of the reason I voted against the previous motion,
16 is I don't think it has that implication.

17 But my other question, and this is a
18 procedural question, sort of follow-up to that, is
19 if this proceeds to the decision to remand to the
20 Department for reconsideration and rewriting of
21 the permit, does that come back to this Board at
22 all, or would it have to be on another appeal and
23 come back to the Board? Just procedural.

24 MS. CLERGET: It would have to be back
25 on another appeal.

1 BOARD MEMBER FELTON: Thank you. That's
2 all I have.

3 CHAIR DEVENY: Chris Tweeten, you had a
4 comment or question.

5 BOARD MEMBER TWEETEN: Yes, Madam Chair,
6 a couple of observations. One, even though CFAC
7 did not announce its intention to permanently
8 cease operations until the year after the 2014
9 permit, it was not in fact in operation when the
10 2014 permit was approved by DEQ, and the actual
11 physical conditions at that time haven't changed,
12 I don't think.

13 It seems to me, looking through the
14 findings of fact and conclusions of law, that the
15 cyanide releases that are troublesome in this case
16 are the result of the historic, as I understand
17 the facts, the result of the historic landfilling
18 of these potliners over the years that have ceased
19 before 2014, and aren't going to happen anymore
20 now that they're out of business, but they weren't
21 happening in 2014 either. This was a discharge
22 from historic waste that had been landfilled some
23 years prior.

24 And so I'm not sure that the permanent
25 cessation of operations at CFAC makes much

1 difference with respect to the actual discharges
2 that we're talking about here. That's my first
3 observation.

4 My second observation is that if we're
5 going to remand anyway, then Specification C in
6 Sarah's conclusions of law regarding the unnoticed
7 exhibit is moot, because to the extent that it is
8 going to be included in the new order or the new
9 permit that issues, if there will be one, will be
10 available for public comment in fact, and it's out
11 in the open now anyway.

12 But if there is going to be remand
13 anyway then under Specification B, then "C"
14 doesn't make any difference then. So just a
15 couple of thoughts there.

16 I'd like to hear from some people that
17 know more about this than I do, what their
18 thoughts are about whether the cessation, the
19 permanent cessation of business by CFAC really
20 makes much of a difference in terms of the
21 conditions on the ground that were the subject of
22 the permit that was already issued.

23 CHAIR DEVENY: Could DEQ comment on
24 that.

25 MR. MOSER: Madam Chair, Board member

1 Tweeten, could you please repeat that question?

2 BOARD MEMBER TWEETEN: Sure. Let me try
3 again. I think it is common ground here that in
4 2014 when the permit was issued, CFAC wasn't
5 making aluminum at that point. They'd stopped
6 some years before. That's right, isn't it?

7 MR. MOSER: I believe that the
8 information on the record suggests that they
9 stopped or halted production in 2009, but I could
10 be wrong about that.

11 BOARD MEMBER TWEETEN: Right, but it
12 doesn't matter exactly when, but they hadn't been
13 producing for awhile in --

14 MR. MOSER: I would say this, Board
15 member Tweeten. So because these discharges go
16 through the ground, sometimes they take longer to
17 get out, to express themselves out into the river.
18 So that's a little bit different scenario here as
19 well. So that's something to consider.

20 BOARD MEMBER TWEETEN: But I guess my
21 question is that the simple making permanent of
22 the situation that was thought to be potentially
23 temporary in 2014, I mean the possibility of
24 reopening in 2014 was still out there, but a year
25 later they had made the situation permanent.

1 It doesn't seem to me to be that big of
2 a difference of change in circumstances with
3 respect to the data that was actually used as the
4 basis for issuing the permit. It wasn't based on
5 -- the permit wasn't based on the active
6 production of aluminum by CFAC, it was based on
7 the discharges that were resulting from the
8 historic landfill and the potliners that were
9 associated with active production in the past,
10 right?

11 MR. MOSER: Madam Chair, Board member
12 Tweeten. Actually the 2014 permit was not based
13 upon the landfills, the historic landfills. That
14 was no longer included as a source because the
15 Agency asked CFAC to properly characterize it.

16 The Agency argued that that should not
17 have been considered a point source as it was
18 currently configured because there was no discrete
19 conveyance to the surface water. Therefore it
20 didn't fit the definition of a point source.

21 So the permit actually did specifically
22 -- was specifically written for industrial
23 operations, and the other related activities
24 connected to the active production of aluminum.
25 So it was written that way.

1 The fact is, though, that there are the
2 seeps from the landfills flow underneath the
3 plant, and mix, and presumably mix with the other
4 discharge points in the groundwater before it all
5 gets to the river. And so you're right that those
6 contaminants are still likely moving towards the
7 river, but the permit itself was based upon an
8 active industrial operation.

9 BOARD MEMBER TWEETEN: Okay. Thank you.

10 CHAIR DEVENY: So we have a motion
11 that's been seconded before us. Is there further
12 discussion on the motion?

13 BOARD MEMBER BUSBY: I guess my only
14 comment is is the wording satisfactory? Do we
15 need to adjust the wording slightly?

16 MS. CLERGET: If you leave the wording
17 the way it is, you're going to still have to
18 address the other conclusions of law, I think.

19 BOARD MEMBER BUSY: How would we avoid
20 that?

21 MS. CLERGET: I guess can you -- you
22 might have to read back the motion. I guess I'll
23 need to rehear it.

24 BOARD MEMBER BUSBY: I just said based
25 on the information and your recommendation that we

1 remand the permit back to DEQ --

2 MS. CLERGET: It is completely the
3 pleasure of the Board what your conclusions of law
4 are, so that would --- As the motion is made, it
5 would mean that the Board did not address what is
6 currently contained in Conclusion of Law 4(a) or
7 (c), and it would create essentially a new
8 conclusion of law and reason for remand based on
9 the findings of fact that I've cited regarding the
10 current state of CFAC.

11 So I would then rewrite the conclusions
12 of law based on your direction to reflect that.
13 So if that is what you intend to do, if that's
14 what you want to do, that is completely within
15 your purview.

16 And then you're essentially not reaching
17 all of the conclusions that I reached, and so
18 you're rejecting those that you're not reaching,
19 and then you're adding a conclusion of law based
20 on the findings of fact. Does that make sense?

21 BOARD MEMBER BUSBY: Not completely.

22 CHAIR DEVENY: John.

23 BOARD MEMBER FELTON: So the motion
24 really relates to sort of saying pretty much
25 everything is moot because the plant is closed.

1 But if we get to the order, and we actually remand
2 this thing, isn't that a relevant factor? I mean
3 whatever is going on will have to somehow play
4 into where we -- how the new permit gets written.

5 So my inclination is to not go that
6 route simply because then we have to go through
7 and figure out which of these findings of law, or
8 conclusions of law matter and which don't. So
9 that would be my feeling.

10 I think it is going to as a practical
11 matter, if we get to the point of remand, it's
12 going to somehow play in.

13 CHAIR DEVENY: I think so, too.

14 BOARD MEMBER BUSBY: I'll withdraw it if
15 she'll withdraw the second.

16 BOARD MEMBER HANSON: Yes.

17 CHAIR DEVENY: The motion and the second
18 have been withdrawn, so we'll move on to the
19 conclusions of law. Let's take a break and come
20 back at 2:30.

21 (Recess taken)

22 CHAIR DEVENY: Chris, are you with us?

23 BOARD MEMBER TWEETEN: Yes, I am.

24 CHAIR DEVENY: We're back and ready to
25 start again, and Sarah is going to give us a

1 description of what transpired over the break.

2 MS. CLERGET: So my understanding from
3 the parties is that they are going to request a
4 stay from the Board on their decision on the
5 proposed order, and the reasons for that, and what
6 the parties have agreed to Ms. Laughner is going
7 to explain.

8 CHAIR DEVENY: Can you tell us exactly
9 what the stay would entail?

10 MS. CLERGET: The stay would mean that
11 you make no decision on the conclusions of law --
12 or the proposed order. You make no decision on
13 the proposed order today, based on what Ms.
14 Laughner is going to describe the agreement of the
15 parties is. And then as she'll describe, the case
16 will resolve itself.

17 MS. LAUGHNER: So the parties have, CFAC
18 and DEQ have reached a settlement that would
19 involve Columbia Falls Aluminum Company submitting
20 a new application based on current site conditions
21 or reassessing whether a permit is needed, and
22 that would be until February, the end of February
23 2019 that we would do that.

24 And another important point would be
25 that the plant and the conditions remain as status

1 quo, so CFAC would continue to be in compliance.

2 And so we'll have discussions and work
3 out what kind of permit, the new permit needs to
4 look like, or if we need a permit, and we would
5 accomplish that by the end of February 2019.

6 MR. MOSER: Madam Chair, members of the
7 Board, that's correct. We did reach a settlement
8 with those parameters.

9 MS. CLERGET: It would be my
10 recommendation to the Board, based on that, that
11 the Board stay their decision until February of
12 2019. Essentially this is a motion to stay by the
13 parties, based on the settlement, and so the Board
14 can grant that motion to stay until February of
15 2019, at which point the parties will -- the case
16 will resolve.

17 CHAIR DEVENY: Board members have any
18 questions?

19 BOARD MEMBER BUSBY: Do we need a
20 motion?

21 CHAIR DEVENY: We will need a motion.

22 BOARD MEMBER BUSBY: So moved.

23 CHAIR DEVENY: It's been moved.

24 BOARD MEMBER FELTON: Second.

25 CHAIR DEVENY: Any further discussion?

1 (No response)

2 CHAIR DEVENY: All those in favor,
3 signify by saying aye.

4 BOARD MEMBER TWEETEN: Madam Chair, hang
5 on just a second. This is Chris. Sarah, will we
6 be receiving a status report on this matter at the
7 December meeting?

8 MS. CLERGET: Parties, what do you
9 think?

10 MS. LAUGHNER: I'm agreeable to that.

11 MR. MOSER: DEQ is agreeable to that.

12 MS. CLERGET: Yes, Chris.

13 BOARD MEMBER TWEETEN: I think that
14 would be useful. Based on my experience, parties
15 can enter into discussions with every intention of
16 settling, and at the end of the day not be able to
17 do so because of some unforeseen circumstance. So
18 it would be nice for us to keep on top of this I
19 think a little bit, so a status report at our next
20 meeting would be good to have.

21 MS. LAUGHNER: Just so I can be clear,
22 we have settled. We're not going to go back and
23 write something up, but we can give you a status
24 report of how our discussions are going in
25 December.

1 BOARD MEMBER TWEETEN: So the contested
2 case is going to be dismissed; is that my
3 understanding?

4 MS. LAUGHNER: That's our goal.

5 CHAIR DEVENY: But at this point we just
6 stay.

7 MS. CLERGET: Yes, the idea being that
8 there will be a Rule 41 dismissal forthcoming from
9 the parties once the February 2019 deadline comes.

10 BOARD MEMBER TWEETEN: Not to dice words
11 with you, but I think you have an agreement in
12 principle. I don't think you have a settlement
13 yet. So we'll be looking forward to hearing, at
14 least I'll be looking forward to hearing about
15 your progress as the next meeting unfolds.

16 CHAIR DEVENY: There is a motion and a
17 second before us. All in favor, please signify by
18 saying aye.

19 (Response)

20 CHAIR DEVENY: Any opposed?

21 (No response)

22 CHAIR DEVENY: Motion carries. The stay
23 is granted.

24 MS. LAUGHNER: Thank you very much.

25 MR. MOSER: Thank you.

1 MS. CLERGET: Thank you guys for working
2 so well together.

3 (The proceedings were concluded
4 at 3:00 p.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 - 130 - 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.

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