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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
February 7, 2020)

TRANSCRIPT OF PROCEEDINGS

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
February 7, 2020
9:00 a.m.

BEFORE CHAIR CHRIS DEVENY, DEXTER BUSBY;
and BOARD MEMBERS CHRIS TWEETEN,
HILLARY HANSON, and DAVID LEHNHERR
(By telephone)

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

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

3 * * * * *

4 CHAIR DEVENY: We're going to go ahead
5 and get started. Good morning, and welcome to the
6 February Board of Environmental Review meeting.
7 I'll call it to order, and ask Sara Nelsen to take
8 roll call.

9 MS. NELSEN: Good morning. Chris
10 Deveny.

11 CHAIR DEVENY: Here.

12 MS. NELSEN: Dexter Busby.

13 MR. BUSBY: I'm here.

14 MS. NELSEN: Hillary Hanson.

15 MS. HANSON: Here.

16 MS. NELSEN: John Dearment.

17 (No response)

18 MS. NELSEN: John Dearment.

19 (No response)

20 MS. NELSEN: Chris Tweeten.

21 MR. TWEETEN: Here.

22 MS. NELSEN: David Lehnherr.

23 (No response)

24 MS. NELSEN: David Lehnherr.

25 MR. LEHNHERR: Here. I'm having a hard

1 time hearing the audio.

2 MS. NELSEN: Okay. Sorry about that,
3 David. So we do have five of six members for a
4 quorum.

5 CHAIR DEVENY: Okay. Thank you, Sara.
6 We'll go around and have introductions here in the
7 room, and David, Chris, and those of you on the
8 phone, let us know if you're having audio problems
9 and we'll try to fix it. So go ahead, let's start
10 with --

11 MS. BOWERS: Kirsten Bowers, DEQ Legal.

12 MR. MOSER: Kurt Moser, DEQ Legal.

13 MR. HAYES: Ed Hayes, Deputy Chief
14 Legal.

15 MR. GEORGE: William George, Water
16 Quality Standards.

17 MS. STEFFENS: Galen Steffens, Water
18 Quality Planning, DEQ.

19 MS. COLAMARIA: Angie Colamaria, Chief
20 Legal, DEQ.

21 MS. CHRISTOPHERSON: Sarah
22 Christopherson, DEQ Legal.

23 MR. COLEMAN: I'm Ed Coleman. I'm the
24 Bureau Chief over DEQ's Coal and Opencut Mining
25 Bureau.

1 MS. SCHERER: Sandy Scherer, DEQ Legal.

2 MR. FLEMING: Derek Fleming, DEQ Water
3 Protection Bureau.

4 MS. MARQUIS: Vicki Marquis with Holland
5 and Hart.

6 DR. SUPLEE: Mike Suplee, Water Quality
7 Standards and Modeling Section, DEQ.

8 MR. KENNING: Jon Kenning, DEQ Water
9 Protection Bureau.

10 MS. McLAUGHLIN: Joanna McLaughlin, DEQ
11 Water Protection Bureau.

12 MS. HORNE: Melinda Horne, DEQ Water
13 Protection Bureau.

14 MR. BARTON: Darryl Barton, DEQ Water
15 Protection Bureau.

16 CHAIR DEVENY: Thank you. Did we get
17 everybody in the room?

18 MS. NELSEN: Sara Nelsen, interim Board
19 secretary. And it looks like we have another late
20 arrival.

21 MS. DEVANEY: Rainey Devaney, Water
22 Protection Bureau.

23 MR. MATHIEUS: George Mathieus, Board
24 liaison.

25 MS. CLERGET: Sarah Clerget, Board

1 attorney.

2 CHAIR DEVENY: I think we've got
3 everybody in the room. Is there anybody on the
4 phone today other than the Board members? Are
5 there any members of the public?

6 (No response)

7 CHAIR DEVENY: It doesn't sound like
8 there is anybody else. We'll go ahead and move
9 forward. Board members, are you able to hear me?

10 (No response)

11 CHAIR DEVENY: Is there anybody out
12 there?

13 MS. HANSON: We can hear you fine.

14 CHAIR DEVENY: Thanks, Hillary. Anybody
15 else? Chris, David?

16 MR. TWEETEN: I can hear you just fine.
17 Apparently you don't hear me very well. This is
18 the third time I've answered, so --

19 CHAIR DEVENY: I just heard this last
20 time. Thanks. How about you, David?

21 MR. LEHNHERR: I can hear you, Chris.
22 I'm having a hard time hearing some of the other
23 people in the room.

24 CHAIR DEVENY: That's because they
25 weren't miked. And you just came through now, so

1 it sounds like we're still all aboard. So we'll
2 go ahead and get started.

3 You have in your packet the December
4 13th, 2019 minutes. Is there any discussion,
5 corrections, or additions to the minutes by the
6 BER members?

7 (No response)

8 CHAIR DEVENY: Hearing none, are there
9 any discussions, or comments, additions,
10 corrections by members of the DEQ or the public?

11 (No response)

12 CHAIR DEVENY: Hearing none, I would
13 move to approve the minutes of the December 13th
14 BER meeting. Is there a second?

15 MR. BUSBY: I'll second that.

16 CHAIR DEVENY: Dexter seconded it. It's
17 been moved and seconded. Is there any discussion?

18 (No response)

19 CHAIR DEVENY: Hearing none, all those
20 in favor of approving the minutes from the
21 December 13th meeting, please signify by saying
22 aye.

23 (Response)

24 CHAIR DEVENY: Any opposed?

25 (No response)

1 CHAIR DEVENY: Hearing none, the meeting
2 minutes are approved.

3 We'll move on to the briefing items now
4 with the contested case update by our Board
5 attorney, Sarah Clerget.

6 MS. CLERGET: Hi, everybody. So
7 starting with II(A)(1)(a), we've got CMG. This is
8 just an update to you that this case is dismissed.
9 They filed a stipulation, and although they didn't
10 file a Rule 41 dismissal, DEQ filed it, and I
11 granted it, so it is now dismissed.

12 Next 1(b) is Copper Ridge and
13 Reflections. This one, they have a fully briefed
14 motion to sever the cases, which means to separate
15 Copper Ridge from Reflections, which were two
16 cases that were originally joined for procedural
17 purposes. That motion is fully briefed and in
18 front of me for decision.

19 Otherwise they have discovery closing I
20 think in April, and then dispositive motions in
21 June, and we don't have a hearing set beyond that.
22 So that one is proceeding according to the
23 scheduling order and has pending motions.

24 2(a) Alpine Pacific Utilities. This one
25 has a scheduling order in place. Discovery closes

1 June of 2020, so they're proceeding according to
2 that.

3 City of Great Falls. They've got a
4 scheduling order. Dispositive motions are fully
5 briefed in September of 2020, so they're
6 continuing with their scheduling order.

7 Absaloka Mine, Westmoreland. We've got
8 a scheduling order in place. Dispositive motions
9 are fully briefed December 2020, so again, that
10 one is a ways out, and they're proceeding.

11 Montanore Minerals. This one is stayed
12 pending the outcome of any Supreme Court appeal
13 that was of -- they're appealing Judge Seeley's
14 order in the District Court, which the way it was
15 written affects our case, and so the appeal to the
16 Supreme Court will affect whether our case
17 continues or not, and they filed their opening
18 brief in the Supreme Court. So that is
19 continuing, they'll keep me updated, and we'll
20 proceed depending on what the Supreme Court does.

21 (e) is Golden West. I just issued an
22 order on summary judgment in this case, which
23 granted summary judgment. The parties have a
24 schedule for doing their exceptions briefs, and
25 you will see this at the April meeting. They'll

1 be in front of you for oral argument.

2 CHAIR DEVENY: So just to interrupt. So
3 April sounds like a good time to plan on being
4 here physically if at all possible.

5 MS. CLERGET: Yes, please. That's
6 another one that has three parties. And there is
7 a prior summary judgment order, and then the
8 summary judgment order that fully resolved the
9 case. So it's not as complicated as some of you
10 have had before, but it is a complicated one, and
11 three parties make it a lot. So it would really
12 be awesome.

13 And there is no way that that one is not
14 going. They've already confirmed that they're
15 doing exceptions briefing, and asked for an
16 extension on that, so that I know they're briefing
17 it, and I know there'll be oral argument, so
18 definitely happening in April.

19 Talen. They have partially briefed
20 motions to stay and vacate the case essentially.
21 The parties are briefing what they want to do with
22 the remainder of this case that hasn't been
23 resolved. Those I think are fully briefed, I want
24 to say the 14th, sometime the middle of February.
25 So once I get those, I'll issue a decision on

1 that, and depending on what that decision is, it
2 may or may not be in front of you, or it may
3 continue. It's hard to know at this point.

4 Spring Creek Coal. The parties have
5 until February 28th to file a settlement agreement
6 or ask for a scheduling order. Essentially they
7 needed more time. We originally thought that I
8 had an answer on this by now, but they asked for
9 an extension to keep working out the details of
10 the settlement agreement. So February 28th is
11 their deadline for that.

12 Western Energy. This is (h). I'm
13 referring to it as Western Energy Area F, so as
14 not to confuse it with the District Court cases
15 going on right now. The Area F, they have
16 partially briefed partial motions for summary
17 judgment in front of me right now. I think those
18 are fully briefed the middle, end of February.

19 So once I have those, I will be working
20 on a decision for that. Because they're partial
21 summary judgment, they may or may not come in
22 front of you. That will again be up to the
23 parties, depending on what happens. But probably
24 if it did come in front of you, it probably
25 wouldn't be until the June meeting, given when

1 they're going to be fully briefed.

2 And then CHS. This case is stayed right
3 now. I had a good meeting with the parties to
4 talk about -- it has been stayed for awhile, but
5 if you'll remember at the last meeting, you did
6 final decision on most of the case.

7 There is only two issues left. One of
8 them, they're working hard to resolve, and the
9 last one is an issue about arsenic, and that issue
10 on arsenic is dependent on rulemaking which DEQ is
11 going to talk about more today, and then hopefully
12 will be in front of you at the next meeting.

13 So it makes the most sense for everybody
14 to stay in this case pending that rulemaking,
15 because otherwise it's going to be sort of a waste
16 of everybody's time and energy to do it maybe
17 twice. And I'm told from the parties that there
18 is nothing changing on the ground by staying it,
19 because the permit provisions that are left and
20 that would take effect wouldn't take effect until
21 either 2021 or 2022. I can't remember.

22 So the point is we have time. We're not
23 changing anything by taking the time to wait until
24 this rulemaking is done. So that one is continued
25 to be stayed. We're going to meet, after this

1 meeting we're going to meet in March to talk about
2 the non-arsenic issue -- hopefully they can get
3 that resolved -- and then to talk about what we
4 need to do for schedule based on the rulemaking
5 from DEQ.

6 (j), Laurel Refinery, this is the same
7 as CHS.

8 (k). You've got Signal Peak. There is
9 the District Court case. Now it's a Supreme Court
10 case. That is assigned to outside Counsel.

11 CHAIR DEVENY: I can give an update on
12 that. I've been in touch with our outside
13 Counsel, and Amy Christensen has given me an
14 update. I'll just read it to you, just to remind
15 you what the background is on this a little bit,
16 and then what's currently happening.

17 Signal Peak Energy appealed the District
18 Court order denying its request to obtain
19 discovery from two landowners, who are also
20 members of MEIC. In the District Court matter,
21 BER filed a notice of non-participation, and we
22 filed a similar notice in the appeal pending
23 before the Montana Supreme Court.

24 Signal Peak has filed its opening brief
25 on the appeal, and the Respondents filed their

1 response brief on December 20th, 2019. Signal
2 Peak's reply brief was due on February 3rd, but
3 they requested and were granted an extension until
4 February 28th. If the oral argument is not
5 ordered by the Court, the case will be submitted
6 for decision after the reply brief is filed. So
7 this is ongoing.

8 MS. CLERGET: Then the contested case
9 piece of it that is left in front of me, we've got
10 scheduled for a hearing April of 2020. They just
11 submitted their pretrial filings, their exhibits,
12 and things like that. Now they have some time to
13 work on motions in limine, if they want them, and
14 then we'll proceed to hearing. And I can't
15 remember if it's a three day hearing or four day
16 hearing that we've got it scheduled for, but it's
17 a longer one.

18 Then we've got Moudy Pit. This one, if
19 you'll remember, there were 14 separate cases that
20 we combined for procedural purposes. I filed an
21 order asking everybody in the case.

22 First we needed some clarification,
23 because there was a Rippling Woods Homeowners
24 Association had filed a case, but an individual
25 had appeared. We needed some clarification

1 because individuals can't represent entities in
2 front of a lawyer like me, so we filed something
3 informing them of that; and then telling the
4 parties that they needed to file either a pro se
5 appearance, which listed their address and how
6 they wanted things to be filed, or whether they
7 were going to have a lawyer.

8 A bunch of the Appellants, including the
9 Homeowners Association, are now represented by a
10 lawyer, so they filed an appearance. The
11 Appellants who are listed here did not file the
12 appearance as I ordered. I then issued an order
13 to show cause saying essentially, "I'm going to
14 dismiss your case if you don't appear and tell me
15 where you are, and how you want things served on
16 you," and they failed to respond to that order as
17 well.

18 So those listed parties have now been
19 dismissed. Their appeals have been dismissed.
20 We're left only with the parties who are
21 represented by the lawyer, which includes the
22 Homeowners Association and a number of listed
23 individual parties. And we have a scheduling
24 order in place, and they're going to proceed
25 according to that.

1 3(a) is not assigned to me.

2 CHAIR DEVENY: Okay. Western Energy.

3 Ms. Bowers.

4 MS. BOWERS: Good morning, Madam Chair,
5 Members of the Board. Just briefly, as I stated
6 in my written update, this case has been remanded
7 to the First Judicial District Court after the
8 Montana Supreme Court's order.

9 And the most recent development are the
10 mining company filed a motion to substitute the
11 District Court Judge Seeley, and Judge Seeley
12 invited Judge Reynolds to assume jurisdiction of
13 the case, and Judge Reynolds did assume
14 jurisdiction on December 18th. There has been no
15 further development since then.

16 CHAIR DEVENY: Thank you, Ms. Bowers.
17 And then the next one is also a case that we have
18 outside Counsel for because the BER was named as a
19 defendant in the petition. An update from Amy.
20 This is the Western Energy one as well.

21 The update from Amy states that the
22 motion has been fully briefed and now waiting a
23 decision. And the Court did issue an amended
24 scheduling order this week, and it's ongoing with
25 documents not required to be submitted until

1 sometime in May. So this, too, is ongoing, and we
2 will continue to have Amy keep us updated.

3 So unless Board members have any
4 questions on these contested cases regarding
5 status, we'll turn this over to George to talk
6 about some DEQ proposed rulemaking.

7 MR. MATHIEUS: Thank you, Madam Chair.
8 Thankfully it is not me talking to you, but it is
9 just an opportunity for the Department to continue
10 to keep the Board updated on this arsenic standard
11 issue that we're planning on proposing rulemaking
12 before you guys, maybe in the upcoming months. So
13 Dr. Mike Suplee is going to be presenting to you
14 today.

15 DR. SUPLEE: Madam Chair, members of the
16 Board, good morning. My name is Dr. Michael
17 Suplee, that's S-U-P-L-E-E, and I'm in the Water
18 Quality Standards and Modeling Section here at the
19 Department of Environmental Quality.

20 Today I'd like to give the Board a brief
21 update on the status of nonanthropogenic arsenic
22 standards for parts of the Yellowstone River. We
23 intend to come to you at your April 17th meeting
24 to request initiation of rulemaking for these
25 standards.

1 The Department last updated you on the
2 standards in June of 2018. Here some key facts
3 and aspects of these standards.

4 Arsenic concentrations in the main stem
5 Yellowstone River from Yellowstone National Park
6 to around Billings are elevated above the human
7 health standard, which is ten micrograms per
8 liter. Upstream near Gardiner, Montana, average
9 annual concentrations are around 30 micrograms per
10 liter, and decrease in a downstream direction.

11 The arsenic in the river is mainly from
12 natural geothermal sources in Yellowstone National
13 Park. 97 percent of the river's arsenic load
14 measured downstream of Billings, we have found
15 through our work, is from Yellowstone National
16 Park sources.

17 The river's concentrations are much
18 lower than the aquatic life arsenic standard,
19 which is 150 micrograms per liter. Therefore, the
20 aquatic life beneficial use is not really in
21 question here.

22 The Department has identified
23 nonanthropogenic arsenic concentrations and
24 developed standards for the river. The work is
25 documented and through reports on the Department's

1 website. At our last briefing, the exact means by
2 which the new standards would be implemented was
3 still being worked out. Since then, those details
4 have been addressed.

5 We said in June 2018, the last time we
6 were here on the subject, that we would come to
7 the Board with a rule package in the fall of that
8 year. Due to a key staff departure, however,
9 there were delays, and the Department did not
10 finalize the technical work until the fall of
11 2019.

12 Additional technical work, which aided
13 the Department in finalizing the standards, was
14 completed just last month in January 2020.

15 Going back to 2015, Senate Bill 325,
16 which is now 75-5-222, MCA, was passed, and
17 required the Department to implement
18 nonanthropogenic conditions as the water quality
19 standards when those conditions exceed the
20 otherwise applicable standards.

21 Via the Senate Bill 325 Work Group,
22 which is an advisory group, the Department has
23 worked from the start with diverse stakeholders on
24 implementation of the Yellowstone River arsenic
25 standards. The Department will be recommending a

1 single annual standard, the annual median
2 nonanthropogenic concentration, for each of four
3 river segments.

4 Among several possible ways of
5 expressing the nonanthropogenic standards, the
6 Department found that the single annual standards
7 are the best option to protect human health and
8 the drinking water beneficial use. The standards
9 will also preclude unnecessarily stringent permit
10 limits for dischargers along the Yellowstone River
11 who have arsenic in their MPDES permits. There's
12 strong support for the new rule and Yellowstone
13 River arsenic standards among members of the
14 Senate Bill 325 Work Group.

15 The Water Pollution Control Advisory
16 Council was briefed on the rule and standards at
17 their January 10th meeting, and they recommended
18 the rule be brought to you, the Board.

19 Again, we intend to come to you at your
20 April 17th meeting to request initiation of
21 rulemaking on that rule. Thank you, and if you
22 have any questions, I'd be happy to answer them
23 now.

24 CHAIR DEVENY: Thank you, Dr. Suplee.
25 Do members of the Board have questions?

1 (No response)

2 CHAIR DEVENY: I'm not hearing any. I
3 did hear a little beep. Did somebody try to call
4 in or speak up?

5 MR. LEHNHERR: Yes. Chris, this is
6 David Lehnherr. Was this item provided in our
7 Board packet? I didn't see anything about this in
8 our Board packet I received.

9 CHAIR DEVENY: David, it's under "Other
10 Briefing Items," where it's just listed that DEQ
11 would be giving us an update on the proposed
12 rulemaking. There were no details in the packet.

13 MR. LEHNHERR: Okay. I'm sure before
14 April we'll be getting more information on all of
15 this. Thank you.

16 CHAIR DEVENY: Could you tell Mr.
17 Lehnherr where he can find documents that are
18 going to be, that might be available between now
19 and the April meeting.

20 DR. SUPLEE: Yes, Madam Chair, Members
21 of the Board. Right now we have three technical
22 reports out on the DEQ website under our Water
23 Quality Standards page, and they have executive
24 summaries, or you can wade through all of the guts
25 of it if you want to, and they basically outline

1 all of the technical materials that have led to
2 the standards that we have, including an
3 explanation in the last document from just last
4 month about the specific water quality standards,
5 and the way we're expressing those standards, is
6 all detailed in those documents.

7 CHAIR DEVENY: Then I'm sure at the
8 April meeting you will be giving us a fairly
9 detailed summary of what you're proposing.

10 DR. SUPLEE: Madam Chair, correct. Yes.

11 CHAIR DEVENY: Does that help answer
12 your question, David?

13 MR. LEHNHERR: Yes. Thank you very
14 much.

15 CHAIR DEVENY: Any other questions or
16 comments from Board members on the phone?

17 (No response)

18 CHAIR DEVENY: Hearing none, thank you
19 very much for the presentation. We'll look
20 forward to hearing from you in April.

21 DR. SUPLEE: Thank you.

22 CHAIR DEVENY: Moving on to Action
23 Items, we have another Department discussion about
24 water quality standards. George.

25 MR. MATHIEUS: Yes. Thank you, Madam

1 Chair. Galen is going to present to you this
2 morning.

3 MS. STEFFENS: Good morning, Madam Chair
4 and members of the Board. Thank you for having
5 me. My name is Galen Steffens, and I'm the Water
6 Quality Planning Bureau Chief here at Montana DEQ.

7 And we are requesting opening the water
8 quality standards to public comment for triennial
9 review. The last triennial review was completed
10 in May of 2017. The triennial review is
11 consistent with state and federal regulations,
12 specifically Montana Code Annotated 75-5-301 for
13 classification and standards for State waters,
14 which states: "The Board shall review from time
15 to time at intervals of no more than three years
16 and to the extent permitted by this chapter
17 revise, establish classification --"

18 MR. TWEETEN: Madam Chair, excuse me.
19 This is Chris.

20 CHAIR DEVENY: Yes, Chris.

21 MR. TWEETEN: I can't hear what the
22 person is saying.

23 CHAIR DEVENY: Thanks for speaking up,
24 Chris.

25 MS. STEFFENS: So I'm going to start

1 over so that the members on the phone can hear me.

2 CHAIR DEVENY: Is this better, Chris,
3 and others?

4 MR. TWEETEN: Much better. Thank you.

5 MR. LEHNHERR: Yes.

6 CHAIR DEVENY: I think you might want to
7 start over.

8 MS. STEFFENS: Yes, I will, Madam Chair.
9 Thank you. So again, my name is Galen Steffens,
10 and I am the Water Quality Planning Bureau Chief
11 here at Montana DEQ.

12 And we are requesting opening water
13 quality standards to public comment for triennial
14 review. The last time the triennial review was
15 completed was May of 2017. The triennial review
16 is consistent with state and federal regulations,
17 specifically Montana Code Annotated 75-5-301, for
18 classification and standards for State waters,
19 which states:

20 "The Board shall review from time to
21 time at intervals not more than three years, and
22 to the extent permitted by this chapter, revise
23 established classifications of waters and adopted
24 standards of water quality."

25 Beyond the statutory requirement, this

1 provides an opportunity for solicitation of public
2 input, and allows for congruency with current
3 research and data on aspects pertaining to water
4 quality standards.

5 So real quick, what comprises the water
6 quality standards? We have beneficial uses for
7 surface waters, such as aquatic life, recreation,
8 drinking water, etc.; and groundwater, which is
9 also drinking water, irrigation, livestock
10 watering, etc.

11 We have criteria standards; we have
12 numeric criteria; and narrative criteria, as well
13 as nondegradation standards, which are implemented
14 in discharge permits for new and increased
15 sources, and protects existing uses of all State
16 waters, and limits or prohibits changes in water
17 quality in high quality and outstanding resource
18 waters respectively.

19 We also have mixing zones, which is
20 implemented in discharge permits when applicable,
21 and included in water quality standards because
22 it's a requirement of Montana Code Annotated
23 75-5-301, which is the section in State law on
24 classification and standards of State waters.

25 So to recap, I know that when we

1 reference administrative rule sections it gets a
2 little abstract, but the standards that would be
3 open to comment include surface water, designated
4 uses, and water quality criteria which are found
5 in ARM 17.30 Subchapter (6); groundwater rules
6 found in ARM 17.30 Subchapter (10); and numeric
7 water quality criteria included in Departmental
8 Circulars DEQ7 and DEQ12; nondegradation rules in
9 ARM 17.30 Subchapter (7); compliance schedule
10 authorizing provision of ARM 17.30.1350; and
11 mixing zone rules in ARM 17.30 Subchapter (5).

12 So moving from what standards would be
13 open to public comment into the process for the
14 triennial review, staff brought this request to
15 the Water Pollution Control Advisory Committee,
16 WPCAC, at the January 10th meeting, and they
17 recommended proceeding to the BER with a request
18 to open water quality standards to public comment.

19 If the BER approves, the water quality
20 standards will be open for recommended 60 day
21 public comment period and associated public
22 hearing; and outreach would include publishing
23 notice in newspapers across the state, mailing
24 information to our invested parties list, email
25 our invested party list serves, updating the

1 standards website, having internal discussion
2 within the Department and other agencies, as well
3 as having EPA involvement.

4 Then once that period is completed, the
5 Department would consider all internal and
6 external comments and feedback that we received.
7 Where appropriate, the Department will then
8 propose changes and updates to water quality
9 standards.

10 This is followed by staff conducting
11 stakeholder meetings on any proposed changes, and
12 we would then come back to WPCAC and the Board
13 with any proposed changes, and would request
14 initiating rulemaking. The timeline for that, if
15 this moves forward, would be summer of this year.

16 And that would trigger formal public
17 process on any proposed changes, and we would come
18 back to the Board for adoption.

19 So in closing, we just would like to
20 state that we're now requesting opening the
21 triennial review period by scheduling a public
22 hearing, and soliciting public comments on
23 Montana's water quality standards. And I'm
24 available for questions and so is staff if you
25 have any questions. Thank you.

1 CHAIR DEVENY: Thank you. Do members of
2 the Board have questions of Ms. Steffens?

3 (No response)

4 CHAIR DEVENY: I have a question. Does
5 the public hearing process involve needing to use
6 a Hearings Officer?

7 MS. STEFFENS: Yes, it does, Madam
8 Chair.

9 CHAIR DEVENY: So are we at the point
10 where we need to have action where we would
11 potentially assign this to Ms. Clerget?

12 MS. CLERGET: (Nods head)

13 MS. STEFFENS: Yes, Madam Chair.

14 CHAIR DEVENY: Thank you for clarifying
15 that. Board members, any comments, questions of
16 Ms. Steffens?

17 MR. BUSBY: You were a little bit
18 unclear about your scheduling, the starting point
19 I guess of your scheduling. Is that in April, did
20 you say, or March, or --

21 MS. STEFFENS: So this is a very valid
22 question, and I was running through with staff to
23 make sure I was clear on it. This is the first
24 time I'm going through this.

25 And the 60 day period would start once

1 we provide that notice to our stakeholders through
2 a letter, as well as in the newspapers, and start
3 that period. Then we'd have the public hearing,
4 and that would be scheduled prior to when we're
5 sending the notice, so everybody can know when the
6 hearing was.

7 So that would be as soon as the next
8 couple of weeks that we would open this, if the
9 Board decides to do that.

10 CHAIR DEVENY: Thank you, Dexter. Any
11 other questions from Board members for Ms.
12 Steffens?

13 (No response)

14 CHAIR DEVENY: It sounds like we
15 probably need to have a motion to either -- I'm
16 assuming that the Board is in favor of proceeding
17 with the rulemaking, which is based on the fact
18 that it's required that we do a triennial review.

19 I lost my mike. I'm back on again. So
20 let me again ask if any Board members have any
21 further questions of Ms. Steffens.

22 (No response)

23 CHAIR DEVENY: Hearing none, I'm going
24 to move that we direct the Department to solicit
25 comments from interested parties on the water

1 quality standards found in ARM Title 17 Chapter
2 30, initiate a public comment process, and assign
3 this to our Hearings Officer Sarah Clerget.
4 Sarah, does that cover everything that we need to
5 have in a motion?

6 MS. CLERGET: Yes, I think so.

7 CHAIR DEVENY: Is there a second to my
8 motion?

9 MR. TWEETEN: Madam Chair, this is
10 Chris. I'll second.

11 CHAIR DEVENY: It's been moved and
12 seconded. Is there any further discussion by
13 Board members?

14 (No response)

15 CHAIR DEVENY: Hearing none, we will
16 have some public comment on this item before we
17 vote. Is there any members of the public that
18 would like to comment on this particular action
19 item?

20 (No response)

21 CHAIR DEVENY: Hearing none, we'll have
22 a vote on the motion to have DEQ proceed with the
23 rulemaking, and assign Ms. Clerget as the Hearings
24 Officer.

25 MS. STEFFENS: Thank you, Madam Chair,

1 members of the Board.

2 CHAIR DEVENY: All those in favor of the
3 motion, please signify by saying aye.

4 (Response)

5 CHAIR DEVENY: Any opposed?

6 (No response)

7 CHAIR DEVENY: Hearing none, the motion
8 carries. Thank you.

9 We have a new contested case I'd like
10 Sarah Clerget to describe to us.

11 MS. CLERGET: There was a little more in
12 your packet this time with this new contested case
13 because a little more was filed with the initial
14 request for a hearing.

15 And as you could tell if you looked at
16 the motion, there was a motion that came in before
17 the Board meeting that Chris ruled on, since I
18 wasn't assigned, so I can't rule on anything until
19 I get assigned.

20 So she granted that motion to stay the
21 proceedings pending some settlement discussions
22 that they're having. So right now, there is
23 nothing going on in the case and it's stayed.

24 However, I do think it should still be
25 assigned because unless you guys want to -- If

1 you're going to keep it, that's fine, but then if
2 not, then we need to go ahead and assign it so
3 that I can babysit what's going on with the
4 settlement discussions, and make any appropriate
5 orders; or if you're going to keep the
6 jurisdiction, that we know that, and then we can
7 set up a schedule that works with the Board's
8 schedule.

9 So that's why even though it's stayed,
10 it's in front of you to decide about assigning it
11 or not.

12 CHAIR DEVENY: So our options today are
13 to keep the case, to assign it to Sarah for
14 procedural purposes, or to assign it to Sarah for
15 all purposes.

16 MS. CLERGET: It's like you've done this
17 before. We're getting it down.

18 CHAIR DEVENY: We'll see what happens
19 next time. Do members of the Board have any
20 questions?

21 (No response)

22 CHAIR DEVENY: Would anybody like to
23 make a motion regarding this particular case?

24 MR. BUSBY: I'll make a motion that we
25 assign it to Sarah for the complete package, not

1 just part of it. All purposes.

2 CHAIR DEVENY: It's been moved to assign
3 it to Sarah for all purposes. Is there a second?

4 MR. LEHNHERR: I'll second it.

5 CHAIR DEVENY: Was it David that did the
6 second? It's been moved and seconded. Any
7 further discussion?

8 (No response)

9 CHAIR DEVENY: Hearing none, all those
10 in favor of assigning the new contested case to
11 Sarah Clerget for all purposes, please signify by
12 saying aye.

13 (Response)

14 CHAIR DEVENY: Any opposed?

15 (No response)

16 CHAIR DEVENY: Hearing none, it's been
17 assigned to Sarah. Thank you. And then we'll
18 turn it over to Sarah for a Board Counsel update.

19 MS. CLERGET: The first thing I have on
20 here is just I wanted to let you know we're
21 continuing to work with DEQ on doing a general
22 review of the rules that we need to do every two
23 years. It has been assigned from our discussions
24 to their Chief Legal for some review and work with
25 the Department on that, so we're continuing to

1 work with them. I don't know if you have anything
2 else you want to say about that, George. He's
3 shaking his head for those of you who can't see.

4 The other thing on the rules. I did a
5 round table yesterday that was really pretty
6 productive, and we had a bunch of our sort of
7 regular stakeholders in the contested case come,
8 and from all sides, which was really, really
9 helpful. And we had a really good discussion
10 about ways to make the contested case process
11 better.

12 The big take-aways from that were that
13 we need some specific rules, especially rules
14 talking about which Rules of Civil Procedure
15 apply, which model rules apply, particularly
16 updated model rules apply. The overwhelming
17 consensus was that we need specifically rules that
18 will make the process better.

19 Another general consensus I think was
20 that the process is long and arduous, and anything
21 we can do to make that better, to make discovery
22 work better. We had some specific ideas about
23 ways to make initial disclosures potentially
24 different and better that are sort of a tailored
25 rule to the BER process that might help.

1 And then we talked about potentially
2 different ways to make some of these cases -- we
3 called it a fast track option, sort of an opt-in,
4 which is similar to some things that some of the
5 District Courts are doing.

6 And so those were some general ideas we
7 had that I think we're going to start to sort of
8 translate into some specific rule outlines --
9 we're not ready to call them rules yet -- but I'll
10 start putting those ideas to paper, and see what
11 we can work out.

12 And then the other big point of
13 discussion that I wanted to raise for you guys is
14 that a lot of the stakeholders on all sides said
15 that it would be very helpful, and they think it's
16 very important to get the BER final decisions out
17 into the public in some way, and on the website
18 particularly.

19 Right now in order to get any BER
20 decision, somebody from the public has to make a
21 public records request, and either come to DEQ and
22 look through them, or have somebody at DEQ look
23 through them. And really you can only find
24 something if you know it exists. There is no way
25 to search prior decisions or to find prior

1 decisions.

2 And under 2-4-623 Montana Code
3 Annotated, it says, "Each agency shall index and
4 make available for public inspection all final
5 decisions and orders." And while they I think are
6 at least arguably publicly available right now,
7 and indexed, it is not in a particularly useful
8 way to anybody. And so the access is somewhat
9 dependent on how easily you can access Helena or
10 DEQ, and how much -- and that puts a burden on DEQ
11 staff as well.

12 So before the meeting, I anticipated
13 this was going to be an issue, and I kind of
14 looked around at what other agencies do. I looked
15 at the PSC, the Tax Board, Commission on Political
16 Practice, Workers Comp, other agencies that have
17 contested case decisions, and how their final
18 decisions are presented.

19 So there is a bunch of different
20 options, you know, sort of Cadillac versions, all
21 the way down to the sort of, "Let's just get what
22 we can up as soon as possible."

23 And so with your permission, I'd like to
24 start some discussions with IT, both at DOJ and at
25 DEQ, to see what might be available, what the cost

1 options are, and then start talking to the
2 stakeholders again about --

3 The overall main consensus was we need
4 at least the decisions out, but ideally I think
5 everybody would like to have the dockets available
6 much like the PSC does, so that those who are
7 participating in contested cases can see what has
8 been filed in their case, and everything is
9 following along.

10 If, for example, we miss something, we
11 miss something that should be docketed, the
12 parties can tell us that, and it's not at the end
13 when we're getting ready to transfer to District
14 Court that we learn that there is something
15 missing from the docket, or that the docket is
16 mis-ordered, or something like that.

17 So that was sort of the deluxe end of
18 what the stakeholders would like, I think, but the
19 agreement was at the very least we need to get the
20 decisions up there in some way. And again, there
21 is lots of options to do that.

22 Some of the agencies, for example COPP
23 and the PSC, have searchable decisions, where you
24 can search the decisions by keyword. Some others,
25 like Workers Comp and the Tax Board, have them

1 indexed by sort of type or general subject matter.
2 So that requires somebody to go through the
3 decisions and tag them for what they relate to.

4 Again, all of that takes time and money,
5 but I'd like to at least start the discussion to
6 find out what time or money it might take, and
7 what might be possible for very little input of
8 either, but I wanted to run that by you guys and
9 see if you wanted me to pursue that as a
10 possibility with this.

11 The reason to do it now is because the
12 availability of that may change the procedural
13 rules, so whether or not we have the ability to
14 put up the old decisions at least, or to put up
15 the docket if we're going to go that direction,
16 may change what we want to do with the procedural
17 rules a little bit.

18 So it was just an idea for further
19 exploration at this point if you would like that.

20 CHAIR DEVENY: Do any Board members have
21 any questions or comments to make regarding
22 Sarah's presentation on the rule-updating round
23 tables that she held?

24 MR. TWEETEN: Madam Chair, this is
25 Chris.

1 CHAIR DEVENY: Go ahead.

2 MR. TWEETEN: Can everybody hear me?

3 CHAIR DEVENY: Yes.

4 MR. TWEETEN: I think Sarah raises a
5 really good point. In my experience, this rule
6 requiring that the agency decisions be made
7 available to the public and indexed is not
8 followed by a lot of agencies in State government,
9 especially the smaller agencies.

10 And the indexing requirement I think is
11 designed exactly for the purpose that Sarah
12 mentioned, which is to help members of the public
13 -- agency decisions might be pertinent to a
14 particular problem that they're having, and don't
15 have to read every single decision in order to
16 conduct research into what the Board has done.

17 There's a myriad of different ways that
18 this can be addressed. I think having her
19 initiate the process of examining this question,
20 soliciting input from stakeholders and others, is
21 a really good idea, and I would strongly support
22 having Sarah do that. Do we need a motion to that
23 effect, or can we just make that assignment?

24 CHAIR DEVENY: I don't think we need a
25 motion. I concur with you, Chris. I did listen

1 in on the round tables yesterday, and found to be
2 some really good input from all the parties that
3 were in attendance, and some really positive and
4 some really great suggestions.

5 And I am in agreement that I think the
6 IT issue may need to be looked at first or in
7 conjunction as Sarah continues to do the round
8 tables, and get feedback from the parties. And so
9 I also agree that we should have Sarah continue to
10 do this work. I think our procedural rules
11 eventually really are a little outdated, and need
12 to be modernized, and this is I think a good
13 start. Other comments from any Board members?
14 Anybody feeling differently? Dexter.

15 MR. BUSBY: No. I think Chris is right
16 on, both Chris and Sarah are right on. This needs
17 to be done. And I heard some feedback yesterday
18 also from that meeting that this would be a good
19 step forward.

20 CHAIR DEVENY: Hillary, David, any
21 comments?

22 MS. HANSON: I agree. It sounds like a
23 great idea.

24 MR. LEHNHERR: Yes. This is David. I
25 concur.

1 CHAIR DEVENY: It sounds like you've got
2 a unanimous go ahead, Sarah. So thank you for
3 your work, and we'll look forward to hearing an
4 update as this proceeds.

5 MS. CLERGET: I think that's all I've
6 got for my Board Counsel update.

7 CHAIR DEVENY: So with that, we're down
8 to opening this meeting up to general public
9 comment, if there is any, from anybody that wants
10 to speak on any issue other than contested cases,
11 which we don't speak about.

12 (No response)

13 CHAIR DEVENY: Hearing none, I would
14 entertain a motion to adjourn.

15 MR. BUSBY: So moved.

16 CHAIR DEVENY: I'll second it. Any
17 discussion?

18 (No response)

19 CHAIR DEVENY: Hearing none, all those
20 in favor of adjourning, please signify by saying
21 aye.

22 (Response)

23 CHAIR DEVENY: Any opposed?

24 (No response)

25 CHAIR DEVENY: Chris, I'm assuming that

1 was to adjourn, and not an opposition vote. ⁴¹ I'm
2 going to assume that. Meeting is adjourned.
3 Thanks, everybody. We'll see you all in April
4 hopefully.

5 (The proceedings were concluded

6 at 9:51 a.m.)

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C E R T I F I C A T E

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 - 41 - 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 17th day of
February, 2020.

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

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