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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
June 12, 2020)

TRANSCRIPT OF PROCEEDINGS VIA ZOOM

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
June 12, 2020
9:00 a.m.

BEFORE CHAIR CHRIS DEVENY,
BOARD MEMBERS JOHN DEARMENT,
CHRIS TWEETEN, DEXTER BUSBY,
HILLARY HANSON, JEREMIAH LYNCH,
and DAVID LEHNHERR

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: I believe it's 9:00, so I
5 think we'll go ahead and get started. I'm Chris
6 Deveny, and for the record, I'm Chair of the Board
7 of Environmental Review, and today we're hosting
8 this meeting of the Board via Zoom because of the
9 COVID-19. So that's the technology we're using.

10 Before we do roll call, Deb Sutliff is
11 our interim Board secretary, and she has a few
12 housekeeping rules she wants to tell everybody.
13 She'll be running the technology today. Go ahead,
14 Deb.

15 MS. SUTLIFF: Well, at this point we're
16 just -- I'm at a loss for words. We've got a lot
17 of people connecting today, so please keep your
18 microphones muted, and we will call on you as the
19 topics come up. We'll have everybody introduce
20 themselves once we've done roll call, so that we
21 have kind of an idea who is on the phone, as well
22 as connected to the Zoom.

23 CHAIR DEVENY: So Deb, I was told that
24 you were going to ask people to enter their names
25 into Chat, so you could kind of do that, make that

1 an easier way to do attendance of various people
2 from the phone and on Zoom.

3 MS. SUTLIFF: Absolutely. Yes. Thank
4 you. If you could, please chat your name, let me
5 know who you are on the phone, send me a quick
6 chat. That would be great. I can see who is
7 connected. We've got a lot of staff, DEQ staff as
8 well. But yes, please send me a chat so we can
9 get you introduced. If you have any questions or
10 concerns, please send it through the chat, and
11 we'll address your questions upon the appropriate
12 time.

13 MR. MATHIEUS: Chris, this is George.
14 I'd just add that since we are assuming that some
15 people are on a cell phone and are not on Zoom via
16 computer, if you're on the computer, send your
17 name and we will read those off.

18 If you're only on a cell phone, we'll
19 call on you, and we'll mention -- I think usually
20 what it shows is like the last three or four
21 digits of your cell phone number. I don't know if
22 there are people today who are on a cell phone
23 group only. If there are, that's how we'll get
24 through the roll call.

25 MS. CLERGET: There are, George.

1 MR. MATHIEUS: Clear as mud?

2 CHAIR DEVENY: Okay. Let's go ahead and
3 have the roll call then, Deb, please.

4 MS. SUTLIFF: All right. Chris Deveny.

5 CHAIR DEVENY: Here.

6 MS. SUTLIFF: David Lehnherr.

7 MR. LEHNHERR: Here.

8 MS. SUTLIFF: Dexter Busby.

9 MR. BUSBY: I'm here.

10 MS. SUTLIFF: John DeArment.

11 MR. DEARMENT: Here.

12 MS. SUTLIFF: Chris Tweeten.

13 MR. TWEETEN: Here.

14 MS. SUTLIFF: Jerry Lynch.

15 (No response)

16 CHAIR DEVENY: Jerry, we didn't hear
17 you. I see your face there. Can you check in?

18 (No response)

19 MS. SUTLIFF: Jerry, I see your camera.

20 I'm not seeing a connection as far as audio.

21 There we go. We do see Jerry. I don't hear him,
22 but I do see him. Let's continue on with Hillary
23 Hanson.

24 MS. HANSON: Here.

25 CHAIR DEVENY: Welcome Board members.

1 Jerry, have you figured out your audio yet?

2 (No response)

3 CHAIR DEVENY: Well, hopefully Jerry
4 will get that figured out. In the meantime let's
5 go ahead then, and have introductions of our legal
6 folks, and then DEQ.

7 MS. CLERGET: This is Sarah Clerget, and
8 I'm Board attorney working for the AG's office.

9 CHAIR DEVENY: Is Aleisha on?

10 MS. SOLEM: This is Aleisha Solem, I'm
11 paralegal with the DOJ Agency Legal Services
12 Bureau.

13 CHAIR DEVENY: Let's go to DEQ. George,
14 go ahead and start.

15 MR. MATHIEUS: Good morning. My name is
16 George Mathieus. I'm the Deputy Director for DEQ,
17 and the Board liaison for the Department.

18 MR. DAVIS: Good morning. This is Tim
19 Davis. I'm the Water Quality Division
20 Administrator at DEQ.

21 MS. COLAMARIA: This is Angie Colamaria,
22 Chief Counsel, DEQ.

23 MS. KELLY: This is Myla Kelly with the
24 Water Quality Standards and Modeling Section.

25 MR. ANDERSON: This is Chad Anderson

1 with the Enforcement Program.

2 MR. MOSER: This is Kurt Moser with DEQ
3 Legal.

4 MS. CHRISTOPHERSON: Sarah
5 Christopherson with DEQ Legal.

6 MS. BOWERS: Kirsten Bowers, DEQ Legal.

7 MR. SUPLEE: Mike Suplee, Water Quality
8 Standards and Modeling Section, DEQ.

9 MS. SULLIVAN: Lauren Sullivan, Water
10 Quality Standards Section, DEQ.

11 MS. FORTMAN: Kristy Fortman, Watershed
12 Protection Section, DEQ.

13 MR. KENNING: Jon Kenning, Water
14 Protection Bureau, DEQ.

15 MR. LARGE: This is Keith Large with
16 Federal Superfund and Construction --

17 CHAIR DEVENY: Keith, I don't think we
18 got your title. Could you speak up again.

19 MR. LARGE: Sorry about that. I'm
20 State Project Officer with the Federal Superfund
21 and Construction Bureau.

22 CHAIR DEVENY: Thank you. Any other DEQ
23 people?

24 MR. MATHIEUS: Madam Chair, this is
25 George. I see that Galen Steffens is on. It

1 looks like she's maybe struggling to connect to
2 audio.

3 CHAIR DEVENY: Okay.

4 MR. MATHIEUS: She's the Water Quality
5 Bureau Chief in the Water Quality Division.

6 CHAIR DEVENY: Any other DEQ staff?

7 MS. HINZ: This is Emily Hinz from the
8 Coal Section, DEQ.

9 CHAIR DEVENY: Are there any members of
10 the general public on Zoom that would check in
11 with their name?

12 MS. CHRISTENSEN: This is Amy
13 Christensen, I'm an attorney with Christensen and
14 Prezeau, and I represent the Board.

15 CHAIR DEVENY: Thank you, Amy. Sorry I
16 forgot you.

17 MR. RYAN-AYLWARD: This is Michele
18 Ryan-Aylward. I'm with BC Ministry of
19 Environment, British Columbia.

20 CHAIR DEVENY: Thank you. Any other
21 members of the public or anybody we may have
22 missed that's on Zoom?

23 MS. JOHNSON: Tammy Johnson with the
24 Montana Mining Association is on the phone.

25 MS. JACOBSEN: This is Nancy Jacobsen,

1 I'm with the Big Creek Coalition, the Moudy Pit
2 No. 2949 Appellant.

3 MS. TRANK: Peggy Trank with Treasure
4 State Resources Association.

5 CHAIR DEVENY: Anybody else?

6 (No response)

7 CHAIR DEVENY: Okay. Thank you. So
8 with that, we'll move on. Jerry, did you get your
9 audio to work?

10 (No response)

11 MS. CLERGET: I don't see him on.

12 CHAIR DEVENY: He's on. His video is
13 on. Jerry, could you raise your hand if you can
14 hear us? Deb, maybe you could give Jerry a call,
15 and we can get him just to call in on his cell
16 phone.

17 MR. LYNCH: I just did that. I just got
18 on. I had technical difficulties, so I used the
19 phone. Can you hear me?

20 CHAIR DEVENY: Good to have you on. All
21 right.

22 MR. LYNCH: Thank you.

23 CHAIR DEVENY: So Deb, is there a way
24 you can set it up so that just the Board members
25 are visible, at least to me, and maybe George and

1 Sarah for sure. I'd also to like remind people,
2 because we are recording this, and we have a Court
3 Reporter as well, that it's very helpful for
4 everybody if people state their name before they
5 speak. Okay.

6 So Board members, you have received the
7 minutes of the April 17th meeting. Are there any
8 additions or corrections to those minutes?

9 (No response)

10 CHAIR DEVENY: Any additions or
11 corrections? If not, I'll move that we approve
12 the minutes of the April 17th Board meeting.

13 MR. DEARMENT: This is John DeArment.
14 I'll second.

15 CHAIR DEVENY: Thank you, John. Is
16 there any discussion?

17 (No response)

18 CHAIR DEVENY: Hearing none, all those
19 in favor of approving the minutes, please signify
20 by saying aye.

21 (Response)

22 CHAIR DEVENY: Any Board members that
23 are opposed?

24 (No response)

25 CHAIR DEVENY: Hearing none, the motion

1 passes to approve the minutes. At this point, I
2 guess if there's any public comment on the
3 minutes, I should open that up as well.

4 (No response)

5 CHAIR DEVENY: Hearing none, we'll move
6 on. Sarah, could you please give us an update on
7 our cases. And just for your information, there's
8 three cases where I will be calling on our outside
9 Counsel Amy Christensen for updates, so Amy is on
10 standby ready for that. So Sarah, go ahead.

11 MS. CLERGET: So briefing items, it
12 looks like A(1)(a) first is Copper Ridge. As you
13 guys know, this has been remanded three times now
14 back to me. This update requires a split between
15 me and Amy, so I'm only updating on the contested
16 case portion of it.

17 So as you can see from your agenda,
18 there was a motion filed on February -- I ruled on
19 a motion to sever the cases on February 21st.
20 That motion to sever cases is now something Amy
21 will talk to you about.

22 After that, on April 23rd I issued an
23 order requesting that the parties indicate whether
24 they wanted a stay based on the appeal of that
25 order denying the sever. The parties indicated

1 that they did not want a stay pending the District
2 Court action, so we are proceeding with the
3 contested case simultaneous to the District Court
4 action.

5 The Copper Ridge/Reflections filed a
6 motion in limine and a motion for summary
7 judgment. An update from your agenda, I have now
8 ruled on the motion in limine and denied it. The
9 motion for summary judgment is not yet fully
10 briefed. I've given them an amended scheduling
11 order on May 27th -- or sorry -- DEQ moved for an
12 amended scheduling order on May 27th. I denied
13 that motion, so we are proceeding with summary
14 judgment, which will be fully briefed shortly, and
15 then I have to issue a decision on that.

16 Amy, you're up.

17 MS. CHRISTENSEN: Thank you. So we
18 found out about this petition for judicial review
19 right after the last Board meeting, and it
20 presents many of the same issues as another case
21 that I'm working on, the one involving the Rosebud
22 Mine.

23 And in that case there's -- and I'll
24 talk about this later -- but the main issue that
25 I'm dealing with is this question of whether or

1 not the Board should be a party to that case.

2 This petition presents that same issue,
3 and so rather than going ahead and filing a motion
4 to dismiss like we did in the other case to get
5 the Board out, we have gotten an extension in
6 order give the Montana Supreme Court some time to
7 rule on that issue. So right now our responsive
8 pleading is due on July 31st, so we're hoping that
9 we'll get some guidance from the Supreme Court
10 before that.

11 In the meantime we have some issues
12 involving the administrative record that we're
13 working through some disagreement about what
14 should be included in that. It has been
15 transmitted to the District Court. We're working
16 through those issues with Counsel in the case.
17 Aleisha has been awesome in helping us with that,
18 and I'm cautiously optimistic we'll get those
19 issues resolved.

20 So for now, the case from the District
21 Court side of it is kind of on hold until the
22 Supreme Court rules.

23 CHAIR DEVENY: Thank you, Amy.

24 MS. CLERGET: Moving on down my list,
25 (b), you've got the Signal Peak Energy notice of

1 violations. There's two Signal Peak Energy cases.
2 We call this one Signal Peak AO.

3 On April 30th, the parties filed a joint
4 status report, and I issued a scheduling order on
5 May 7th. Discovery closes in September 2020 so
6 they're proceeding along that scheduling order.

7 An update from your agenda. DEQ has a
8 pending motion to dismiss filed early on in this
9 case, which has been sort of pushed down the road,
10 and I just granted Signal Peak an extension to
11 respond to that, which will be fully briefed on
12 June 23rd. So that will be a motion for my
13 decision, once it's fully briefed.

14 No. 2 in the nonenforcement cases, we
15 have (a), Alpine Pacific Utilities. I issued an
16 amended scheduling order on April 20th. The
17 parties are proceeding with expert disclosures due
18 at the end of June.

19 (b) is the City of Great Falls. I
20 issued an amended scheduling order on March 20th.

21 Then Calumet Montana Refining, LLC,
22 filed a motion to file, for permission to file a
23 brief amicus curiae, which means "a friend of the
24 Court," and I issued an order -- that was opposed.
25 I issued an order partially already granting their

1 request to file an amicus brief on May 18th.
2 Other than that, they're proceeding according to
3 the scheduling order, and they're in discovery
4 right now.

5 (c) is Westmoreland Absaloka Mine. This
6 has been under a motion to stay for awhile. They
7 will have to file an update on June 24th, so I
8 will get more information at that point.

9 (d) is Montanore Minerals. As you guys
10 probably remember, this has been stayed pending --
11 The District Court ruled in a separate action that
12 affected our case. That's gone up to the Supreme
13 Court, and so the contested case is stayed pending
14 that decision from the Supreme Court, which is now
15 fully briefed and just awaiting decision.

16 (e) is Talen, Major Facilities Siting
17 Act. This one there was a motion to stay or a
18 motion for a scheduling order, and then also a
19 motion to vacate that were pending. I issued an
20 order on all of those, denying the motion to
21 vacate which was essentially a motion to dismiss.
22 And then I also granted and denied in part the
23 motion for scheduling order.

24 And we had a scheduling conference on
25 May 15th. Well, they could have asked for a

1 scheduling conference on May 15th. Instead they
2 filed an agreement that they had reached to go
3 forward with the case, so saying that they didn't
4 need a schedule, litigation schedule.

5 They have a status report due July 1st.
6 They are going to indicate at that point whether
7 they've reached a final settlement. Absent a
8 final settlement, Talen will inform me that they
9 relinquish the certificate amendment that they
10 challenged in this proceeding, and then they'll
11 complete the relinquishment by August 31st, or the
12 parties will move to dismiss the proceeding on or
13 before December 30th. So that was their agreement
14 based on my order.

15 CHAIR DEVENY: Sarah, do you mean
16 September? I think you said December.

17 MS. CLERGET: Oh, sorry. Yes,
18 September.

19 CHAIR DEVENY: Okay. Thank you.

20 MS. CLERGET: So Spring Creek Coal is
21 the next case. On May 8th, the parties filed a
22 joint motion to substitute Spring Creek Coal for
23 the Navaho Transitional Energy Company, based on a
24 purchase of Spring Creek Coal. And they also
25 jointly moved to replace Spring Creek Coal as the

1 permit holder and the party of interest in that
2 case. I granted that motion on May 13th, and
3 entered an amended scheduling order.

4 Since then, an update to your agenda,
5 MEIC has filed an unopposed motion to amend the
6 notice of appeal, which I granted on June 9th, so
7 we're proceeding through discovery which ends
8 January of 2021 with that amended notice of appeal
9 filed by MEIC.

10 (g) is CHS. This is the case that
11 requires the rulemaking on arsenic to be completed
12 before we can continue, so we had a status
13 conference on April 24th, and I issued an order
14 continuing the stay of this case until September
15 4th of 2020, pending the rulemaking on the
16 arsenic.

17 (h) is Laurel Refinery. We consolidated
18 this case with CHS, so its update is the same.

19 (i) is Signal Peak Energy. This is not
20 the AO case, but the MPDES permit case. First,
21 Amy has an update on the District Court case.

22 MS. CHRISTENSEN: So that District Court
23 case is now up on appeal to the Montana Supreme
24 Court. The Board has filed a notice of
25 nonparticipation in that case, so we have just

1 been monitoring it. It has been fully briefed and
2 now just it's awaiting a decision, which I would
3 expect anytime.

4 MS. CLERGET: Then the contested case
5 continued while the District, and now also Supreme
6 Court case was appealed. They filed a motion in
7 limine in February of 2020. Oral argument was
8 held on that in March of 2020. It is fully
9 briefed and awaiting my decision. The hearing was
10 rescheduled for August of 2020, I think it's a
11 three day hearing that's scheduled.

12 Today we have Rippling Woods Homeowners
13 Association for the Moudy Pit site in Ravalli
14 County. On May 26th, DEQ filed a motion to
15 dismiss, which is not yet fully briefed, so that
16 will be pending my decision once it is.

17 (k) is Western Energy. We call this
18 Western Energy Area F to distinguish from the
19 other Western Energy cases. The parties have
20 cross-moved for partial summary judgment, and the
21 motions are fully briefed and awaiting my
22 decision.

23 (l) is Amy.

24 MS. CHRISTENSEN: Thank you. This is a
25 case that we talked about pretty extensively at

1 the last Board meeting. It involves the Rosebud
2 Mine. And we had previously filed a motion to
3 dismiss in front of the District Court arguing
4 that BER should not have been a party to that
5 case. We lost the motion, and so at the last
6 meeting we talked about what we were going to do
7 next.

8 And a decision was made to see if the
9 Conservation Groups were willing to let us out of
10 the case before we took the issue to the Supreme
11 Court, and if they were not willing to do so, to
12 file a petition for writ of supervisory control to
13 the Montana Supreme Court to address the issue.

14 We did have some conversations with the
15 Conservation Groups. We weren't successful in
16 convincing them to let us out, so we did file a
17 motion for a writ of supervisory control. We
18 filed that on May 22nd.

19 And a writ of supervisory control is
20 considered an extraordinary remedy. They're not
21 automatically granted. It's not like a regular
22 appeal where you ask the Court to consider an
23 issue and they just do. This they have to be
24 convinced to consider the case, really to consider
25 the issue at this point in the case. And they can

1 just dismiss it and say, "We don't think this is
2 an appropriate issue to be considered on
3 supervisory control."

4 We did overcome that hurdle. The Court
5 has accepted the case, and they have ordered a
6 summary response from the Conservation Groups and
7 the District Court.

8 The District Courts typically don't
9 respond in these types of situations. The
10 Conservation Groups have thirty days to respond,
11 so their response is due June 29th, so end of this
12 month. And then I don't know how long it will
13 take to get a response from the Supreme Court.

14 We likely won't have an opportunity to
15 file a reply brief. It would be unusual if we
16 were granted oral argument. So probably once the
17 Conservation Groups submit their response, it will
18 be submitted for decision.

19 CHAIR DEVENY: Thank you for the update,
20 Amy.

21 MS. CLERGET: The next one 3(a) is DEQ.

22 CHAIR DEVENY: DEQ, I didn't see
23 anything in writing in our Board summary. Do you
24 have an oral update on the Western Energy case?

25 MS. BOWERS: Madam Chair, members of the

1 Board, that case has been remanded to the District
2 Court by the Montana Supreme Court on certain
3 questions of material fact, and the parties are
4 just proceeding under Judge Reynolds' scheduling
5 order. So there's really nothing beyond that.
6 I'll just keep you updated as milestones occur.

7 CHAIR DEVENY: Okay. Thank you, Ms.
8 Bowers. Let's go on to some DEQ briefing items
9 now. George Mathieus.

10 MR. MATHIEUS: So thank you, Madam
11 Chair. We have two briefing items today. One is
12 the conversations we've had at the last Board
13 meeting about our numeric nutrient criteria, so
14 Tim Davis is going to provide an update on that;
15 and then Myla Kelly is providing an update on Lake
16 Kookanusa.

17 MR. DAVIS: Madam Chair, members of the
18 Council, would like me to just jump in?

19 CHAIR DEVENY: Yes. Go ahead, Tim.

20 MR. DAVIS: Thank you. Again, members
21 of the Council, Madam Chair, my name is Tim Davis.
22 I'm the Water Quality Division Administrator at
23 DEQ. As George indicated, I'm going to give you
24 an update on both the numeric nutrient criteria
25 status in Montana, as well as our nutrient

1 variance rules.

2 As I think the Board may be aware,
3 Montana's nutrient variance rules have been
4 challenged in court, so EPA's approval of those
5 rules -- Variances are water quality standards and
6 must be approved by EPA.

7 So EPA's approval of those Montana
8 variance rules has been tied up in court for the
9 last several years, and Judge Morris is the
10 presiding Judge in Federal District Court on that
11 case.

12 As a result of his decisions, DEQ
13 adopted revised variance rules in the fall as
14 directed by the Court. EPA disapproved those
15 rules in February of this year, and that
16 disapproval was at least largely based on some
17 Court decisions that occurred after we adopted our
18 rules.

19 And EPA's disapproval triggered
20 nonseverability provisions that were in the
21 numeric nutrient criteria when a prior BER adopted
22 those numeric nutrient criteria, that effectively
23 said if the general variance was disapproved, then
24 the numeric nutrient criteria go away.

25 So DEQ has concluded, as well as the

1 plaintiffs, the Upper Missouri Waterkeepers, in a
2 filing that they filed before Judge Morris, has
3 concluded that the nonseverability provisions in
4 the numeric nutrient criteria are self-executing,
5 that they have been triggered, and so the numeric
6 nutrient criteria are no longer in effect in
7 Montana.

8 That means that the Department now
9 reverts back to what's known as a narrative
10 standard, so a narrative nutrient standard. And
11 in order to continue to make progress on
12 nutrients, DEQ is working on a variety of short
13 term, medium term, and long term options.

14 We pulled together the Nutrient Work
15 Group for a meeting on May 21st. That work group
16 was established, and it's really been guiding us
17 through all of our work on nutrients for much of
18 the last ten years. There was around 70
19 participants in that Nutrient Work Group meeting,
20 so there's a lot of interest in how we're going to
21 proceed.

22 We got a lot of feedback and questions
23 during that work group meeting, and we're working
24 on responding to that feedback and those questions
25 at this time. And we plan to set up a series of

1 Nutrient Work Group meetings going forward.

2 So at this point, the last thing I would
3 say, Madam Chair, members of the Council, is that
4 there has been a challenge. EPA in their
5 disapproval of our variance rules in February,
6 they also adopted the nonseverability provisions
7 and approved them from a prior rulemaking when the
8 numeric nutrient criteria were adopted.

9 So the Upper Missouri Waterkeepers has
10 challenged EPA's approval of the adoption of those
11 nonseverability provisions, again in front of
12 Judge Morris. DEQ has intervened, has asked to
13 intervene in that case as well.

14 But at this point, we're planning to
15 engage the stakeholders, continue to make progress
16 on nutrients, work with them in a fairly robust
17 process going forward to address their concerns,
18 and not backslide on protecting Montana's waters
19 from nutrients. So I'm happy to answer any
20 questions.

21 CHAIR DEVENY: Questions from Board
22 members of Tim Davis?

23 MR. LEHNHERR: This is --

24 MR. LYNCH: This is Jerry. Go ahead.
25 I'm sorry.

1 CHAIR DEVENY: I don't know who was
2 there first.

3 MR. LYNCH: I don't know. I'll go
4 first, I guess.

5 CHAIR DEVENY: Go ahead.

6 MR. LYNCH: This is Jerry Lynch. Could
7 you explain to me, Mr. Davis, the difference
8 between the numeric nutrient standard and the
9 fallback, I guess as you called it, standard that
10 existed before.

11 MR. DAVIS: Madam Chair, I didn't catch
12 which Board member that was, but --

13 CHAIR DEVENY: Jerry Lynch.

14 MR. DAVIS: Okay. The numeric nutrient
15 criteria, so when the Department does not have a
16 numeric criteria based on the science, there is a
17 narrative process that we can go through, and we
18 had a narrative process in place prior to -- a
19 narrative standard prior to the adoption of the
20 numeric nutrient criteria that we applied, that
21 is applied during the permitting process.

22 So if someone has a reasonable potential
23 to violate a narrative nutrient standard, then in
24 the permitting process we would apply a permit
25 limit, or narrative permit condition for

1 nutrients, that's not going to fall back on a
2 statewide numeric number. It's going to be based
3 on more site-specific narrative provisions.

4 MR. LYNCH: Followup question for my own
5 edification. I obviously understand numeric
6 standards. I don't understand narrative
7 standards. What does that mean?

8 MR. DAVIS: Madam Chair. So I'll give
9 you an example. We're still working through how
10 the narrative standard will be applied in permits
11 at this point. That's part of the conversations
12 that we're having with the Nutrient Work Group.

13 How we applied the narrative standard
14 previously was if there was an impairment for
15 nutrients in a stream that a discharger was
16 discharging into, then we would put on their
17 permit limits that they could not -- that they had
18 to hold at current performance, or they had to
19 take steps to improve performance of their
20 discharge of nutrients into that source.

21 So that's an example of if under a TMDL,
22 a total maximum daily load, identified that there
23 was an impairment on a stream, then we would apply
24 a narrative standard at that point.

25 That's not necessarily how we will be

1 applying it at this point, because there's a lot
2 more science that's been developed since then, so
3 we're still working through exactly what that
4 means. And so I'd be happy to report back as
5 we're moving through, as we're coming up with more
6 specific answers on how it applies to individual
7 permits.

8 MR. LYNCH: Again, sorry. Just one last
9 question, and then I'll leave you alone. But you
10 say impairment. Is the impairment, when you
11 decide there's an impairment, that's based upon
12 some -- isn't that based upon some standard?

13 MR. DAVIS: The impairment is based on a
14 standard, and we used the narrative standard
15 previously. We had been using the numeric
16 nutrient standard for TMDL's since we adopted it.
17 We're looking at how we would identify new
18 impairments going forward.

19 We're not necessarily going to be
20 falling back on the -- that's where I was
21 indicating. We're not looking at falling back on
22 the same process, where we would rely upon
23 impairments for nutrients in order to apply a
24 narrative nutrients condition on the permit.

25 CHAIR DEVENY: George, do you have

1 something to add to that?

2 MR. MATHIEUS: Yes, Madam Chair. I
3 might just add a couple of things.

4 One is we have many narrative standards,
5 and the whole point of doing a numeric standard,
6 it's site specific, so all the science and data
7 analysis that went into setting those standards
8 was virtually site specific.

9 And the main reason for that, or one of
10 the reasons, one of the good reasons for that is
11 regulatory certainty. The narrative side is very
12 similar, in that we use a translator mechanism.

13 So I think the simplest way to put this
14 is that what will likely happen is as we move
15 forward, and we would, let's say, look at a
16 particular stream, and try to figure out what the
17 standard for that stream should be, we're going to
18 use the same science that we've been developing
19 for the last twenty years that developed our
20 numeric standards.

21 So I don't see there being a large
22 deviation from what we did before. It just
23 frankly becomes more process. Once we did all
24 that work, and created a numeric standard, we
25 virtually had those set in stone.

1 This is just going to require us to
2 develop a translator that says, "Okay. Now that
3 we're operating with a narrative, here's how we're
4 going to translate to a number for purposes of
5 permitting," and fortunately we already have
6 twenty years of data to help us do that.

7 CHAIR DEVENY: David Lehnherr, you had a
8 question.

9 MR. LEHNHERR: Yes. Just a brief
10 comment. I agree that the word "narrative" is a
11 bit confusing in this context.

12 But I have a question for Mr. Davis,
13 just wondering about the Nutrient Work Group, and
14 I'm wondering if you could give us just a real
15 rough idea of the variety of individuals and
16 groups represented in the working group.

17 MR. DAVIS: Madam Chair, Board Member
18 Lehnherr, I'd be happy to. So the working group
19 is really a very diverse representation of
20 membership, and includes Conservation Groups, it
21 includes cities and towns, it includes industrial
22 associations, it includes individual consulting
23 engineers, and so basically everyone across the
24 spectrum is represented.

25 Those are also noticed, so we don't have

1 70 members of the work group, but those meetings
2 have been open for anyone to participate in as
3 well.

4 MR. LEHNHERR: Thank you.

5 CHAIR DEVENY: Any other questions from
6 Board members?

7 (No response)

8 CHAIR DEVENY: Tim, one of the questions
9 that I have is: In your medium to long term
10 solutions that you're talking about with the work
11 group, are you talking about the possibility of
12 the BER -- since these are our rules -- putting
13 out new rules that would meet EPA's requirements,
14 and put something a little more solid in the air?

15 MR. DAVIS: Madam Chair, members of the
16 Council, we are not currently contemplating
17 bringing back and proposing the numeric nutrient
18 criteria again as they were constituted.

19 And the variance rules themselves were
20 Department rulemaking, and so that was the
21 difference, was the criteria were adopted by BER
22 with the nonseverability clause. The variance was
23 adopted by rule through the DEQ, through the
24 Department process.

25 We're not at this point intending to

1 bring those back, but that doesn't mean that we
2 won't come back to the Board with potential
3 rulemaking in the future. We're simply at this
4 point working through those variety of options,
5 short term, medium term, and long term.

6 CHAIR DEVENY: And then just one other
7 question. How is this all affecting enforcement
8 of water quality violations that might be
9 occurring?

10 MR. DAVIS: Madam Chair, members of the
11 Council, all the permits and all the limits that
12 are currently in permits stay in effect. All of
13 the variances stay in effect as well. If someone
14 is violating their permit limits, their current
15 permit limits, then we will be working to bring
16 them back to compliance, and if that was not
17 effective, that's where enforcement would come
18 into play.

19 CHAIR DEVENY: Any other questions from
20 Board members?

21 (No response)

22 CHAIR DEVENY: Any comments or questions
23 from the public?

24 (No response)

25 CHAIR DEVENY: Thank you, Tim.

1 MR. DAVIS: Thank you.

2 CHAIR DEVENY: And with that, I believe
3 Myla Kelly has some information on Lake Kookanusa
4 for us.

5 MS. KELLY: Madam Chair, members of the
6 Board. My name is Myla Kelly. I'm the manager of
7 the Water Quality Standards and Modeling Section
8 here at Montana DEQ. Thanks for your time this
9 morning. I would just like to take a few minutes
10 to brief the Board on an upcoming rulemaking that
11 we are anticipating for the early fall.

12 The proposed rulemaking will be specific
13 to a geographical location, that is Lake Kookanusa
14 in the Kootenai River, and specific to one
15 pollutant, and that is selenium.

16 So if you aren't familiar, Lake
17 Kookanusa is located in northwestern Montana. It
18 crosses the US/Canadian boarder, and it's formed
19 by Libby Dam. The Lake Kookanusa drains to the
20 Kootenai River, which flows through Montana, then
21 it crosses the border into Idaho, and then it
22 takes a sharp right turn north back into Canada,
23 if you can kind of picture a very large U-shaped
24 watershed.

25 Draining into Lake Kookanusa in Canada

1 is the Elk Valley, within which lies substantial
2 metallurgical coal reserves, and multiple large
3 scale metallurgical coal mines, so over 26 million
4 tons of metallurgical coal was produced in the Elk
5 Valley just in 2018.

6 And the overburden from these operations
7 creates large waste piles, which are high in some
8 contaminants, including selenium. Selenium is a
9 naturally occurring element that is present in
10 sedimentary rocks, in shales, coals, and phosphate
11 deposits.

12 And selenium is a micronutrient, which
13 means it's essential for biological processes to
14 occur in humans and animals, but at high levels it
15 can be toxic.

16 So Montana DEQ is concerned about those
17 rising levels of selenium in Lake Kookanusa and
18 the Kootenai River, and what those subsequent
19 effects are on aquatic life; and as a result, we
20 listed the lake, Lake Kookanusa, as threatened for
21 selenium in 2012. And since then, we've begun the
22 process of establishing a site specific water
23 quality standard for selenium that protects our
24 aquatic life. So 95 percent of the selenium that
25 enters Lake Kookanusa comes from the Elk Valley.

1 So we talked a little bit about
2 standards already today, and interestingly we've
3 talked about site specific standards, and site
4 specific standards might not be a term that you
5 have heard us use often before this morning.

6 For the most part, Montana adopts EPA
7 national recommended water quality standards for
8 the protection of our beneficial uses, like
9 aquatic life or human health. So EPA does the
10 science behind what a protective standard is, it
11 recommends that standard, and the Board chooses
12 whether to adopt that standard for Montana. We
13 have many examples of that -- cadmium, chloride,
14 copper, zinc, etc., and so on.

15 So with the case of selenium, when EPA
16 finalized their recommended criteria in 2016, one
17 of their strong recommendations was that because
18 of the way selenium bioaccumulates and moves up
19 through the food chain, and because that is very
20 dependent on site specific conditions, if the data
21 can be collected and the ecosystem modeling
22 completed for a specific water body or region,
23 then that is the most protective and accurate
24 standard.

25 So for the past six years we have been

1 working in collaboration with British Columbia,
2 with Federal agencies on both sides of the border,
3 with our Tribal and indigenous communities, with
4 the mining industry, tech, coal, with selenium
5 experts from across the continent, and countless
6 stakeholders, to collect that necessary data, and
7 to complete the science to establish a joint
8 British Columbia/Montana site specific selenium
9 criteria.

10 So we are, happy to say, in the
11 finishing stages of that collaborative work, and
12 we're going to be coming in you in the near term
13 to share those results, and request initiation of
14 rulemaking for that criteria.

15 In conjunction with the site specific
16 criteria for Lake Kookanus, we will also be
17 requesting initiation of rulemaking to adopt EPA's
18 2016 national recommended selenium criteria for
19 the Kootenai River.

20 So for the Kootenai River, at this time
21 we do not have data that's needed to develop a
22 site specific criteria. So in lieu of that, the
23 best protective criteria for the river is to
24 update our existing criteria which we have on the
25 books with EPA's recommended 2016 recommendation,

1 so it will be an update to the criteria using
2 EPA's national recommended standard.

3 So there'll be two parts to that
4 rulemaking: Lake Kookanusa site specific
5 criteria, and the Kootenai River criteria as well.

6 So that concludes my update. I know it
7 was brief, but I just wanted to alert you that
8 that was going to be coming in the near future,
9 and would like to take any questions that you
10 might have at this time.

11 CHAIR DEVENY: Thank you, Myla. Do
12 Board members have questions of Ms. Kelly?

13 MR. LYNCH: This is Jerry Lynch. I do
14 have one, just again for my own education.

15 Myla, what is the EPA recommended
16 standard compared to, if you know, current levels
17 of selenium in Lake Kookanusa and/or the river?

18 MS. KELLY: Yes. So thank you. Madam
19 Chair, members of the Board.

20 The existing criteria that we currently
21 have established for Lake Kookanusa is five
22 micrograms per liter, so that's what we currently
23 have in our Circular DEQ7. And that applies to
24 all water bodies in the Montana.

25 In 2016, when EPA provided their

1 recommended national water quality criteria, they
2 recommended a couple of different elements to the
3 criteria. So they recommended an egg ovary, a
4 fish egg ovary element, a fish whole body muscle
5 element, and a water column element, one for
6 lentic systems and one for lotic systems.

7 So the values that they recommended are
8 with -- So we are proposing to not adopt those
9 criteria for Lake Kookanusa, but our own unique
10 site specific criteria that will be established,
11 or that we'll be determining through this modeling
12 effort.

13 So the levels of selenium currently in
14 Lake Kookanusa are between one and two micrograms
15 per liter, and it varies depending on the location
16 within the reservoir. And we anticipate it's
17 likely that the site specific criteria will be
18 within that same range, but we don't know those
19 results yet.

20 MR. LYNCH: A followup question. What
21 is the EPA recommended standard?

22 MS. KELLY: The EPA recommended standard
23 for lakes, so for lentic system is 1.5 micrograms
24 per liter.

25 MR. LYNCH: Okay. Thank you.

1 CHAIR DEVENY: Any other questions from
2 the Board?

3 (No response)

4 CHAIR DEVENY: This sounds like a real
5 important issue. I'm glad that DEQ is moving
6 forward on it. It looks like David Lehnherr, do
7 you have a question?

8 MR. LEHNHERR: Yes. I may have
9 misunderstood, but is there going to be -- there
10 are going to be different standards for the lake
11 and the river; is that correct?

12 MS. KELLY: Yes, Madam Chair, members of
13 the Board.

14 MR. LEHNHERR: Why is that?

15 MS. KELLY: The national recommended
16 criteria establishes a different criteria for
17 lentic versus lotic systems because of the way the
18 selenium bioaccumulates up the food chain. And so
19 that's one of the reasons.

20 So for example, for lentic is -- for
21 flowing systems, lotic systems, rivers, the
22 national recommended criteria is three; whereas in
23 lentic systems in lakes and reservoirs, their
24 national recommended criteria is 1.5.

25 MR. LEHNHERR: Thank you.

1 CHAIR DEVENY: Any other questions from
2 Board members?

3 (No response)

4 CHAIR DEVENY: Dexter, are you still
5 with us on the phone?

6 MR. BUSBY: Yes, I am.

7 CHAIR DEVENY: Okay. Good. Just wanted
8 to check in.

9 MR. TWEETEN: Madam Chair.

10 CHAIR DEVENY: Go ahead.

11 MR. TWEETEN: Madam Chair, this is
12 Chris.

13 CHAIR DEVENY: Chris Tweeten, go ahead.

14 MR. TWEETEN: I observe that we have a
15 representative from the British Columbia
16 Environmental Ministry in attendance
17 electronically. I wonder if this might be an
18 appropriate time to see if our neighbors in Canada
19 have any comments on this issue.

20 CHAIR DEVENY: Yes. I was planning to
21 do that. Thank you. Mr. Large, if you're
22 interested in making any comments, you'd be
23 welcome to at this time.

24 MS. KELLY: Madam Chair, members of the
25 Board, I believe the representative from British

1 Columbia Environmental is Michele Ryan-Aylward.

2 CHAIR DEVENY: I'm sorry.

3 MR. RYAN-AYLWARD: Thanks Myla, and
4 Madam Chair. Sorry. I don't know the proper
5 introductory remarks. I'm just here to observe.
6 No comments from me. Thank you for the
7 opportunity.

8 CHAIR DEVENY: You're welcome. Any
9 other comments from members of the public?

10 (No response)

11 CHAIR DEVENY: Hearing none, thank you
12 very much, Myla.

13 Moving right along, we have no action on
14 contested cases today, so with that, I'll turn it
15 back to Sarah to give us a Board Counsel update.
16 Sarah Clerget.

17 MS. CLERGET: The only thing I have is
18 that we had had some rulemaking on the procedural
19 rules that you guys had initiated, and that has
20 sort of been put on hold with COVID and me not
21 working full-time. So I just wanted to tell you
22 guys the status of that hasn't moved forward at
23 all.

24 We are working on a few policies on
25 docketing, based on the -- drafting some of those

1 policies and/or rules, based upon some of the
2 docketing issues that we've had in cases going up
3 to District Court, so hopefully by the next
4 meeting we're going to have something to bring to
5 you, whether it's a policy or a proposed rule that
6 we can get some standardization in our docketing,
7 so if I get hit by a bus, or Aleisha gets hit by a
8 bus, the next person's docket will look the same
9 as ours, and we can have some consistency through
10 that. So we are working on that.

11 So the other thing was we had talked
12 about a system for filing for contested cases --
13 I'd told you guys about different IT systems that
14 folks had used -- to get our prior BER decisions
15 up in a more accessible public format.

16 And I have continued working with both
17 DOJ IT and Department of Administration IT. I
18 know the tech people are talking to each other
19 about the PSC system, and my understanding at very
20 high levels is that there is a possibility that
21 because D of A designed the PSC docketing system
22 that it is something that we could adapt for
23 relatively little money.

24 We'd still have to pay D of A because of
25 how -- they're like ALS. They're self-funded, so

1 that's how they support their budget. We would
2 have to pay them a little bit to adapt that
3 system.

4 I don't have an estimate yet -- they're
5 going to work on what the estimate would be for
6 that -- but I understand it to be a relatively
7 small amount of money, because most of the work is
8 all done. All we'd have to do is just translate
9 it a little bit to fit with our website and our
10 specific needs. There are pieces of it that we
11 did not need.

12 So that project is continuing as well,
13 although more slowly than otherwise, because
14 frankly I'm at capacity with the contested cases.

15 Also I did want to tell you I have
16 another attorney from ALS helping me with at least
17 the summary judgment decisions that are pending,
18 so that's essentially a law clerk to the law
19 clerk, to assist in work flow to try and get these
20 decisions moving a little bit more quickly,
21 because like I said, I'm only at about three
22 quarter time right now with child care issues and
23 stuff.

24 So hopefully that will move a little
25 more quickly, and I think that's all I've got,

1 unless anybody has questions for me.

2 CHAIR DEVENY: Any questions of Sarah?

3 (No response)

4 CHAIR DEVENY: Hearing none, we'll move
5 on. At this point, I'd like to open up the
6 meeting for any general public comment that there
7 may be, not on any contested cases, but on any
8 other matter.

9 (No response)

10 CHAIR DEVENY: Hearing none, would
11 somebody like to move to adjourn?

12 MR. TWEETEN: Madam Chair, this is
13 Chris. So moved.

14 CHAIR DEVENY: I believe Chris Tweeten
15 moved to adjourn. I'll second it. Is there any
16 other discussion?

17 (No response)

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

21 (Response)

22 CHAIR DEVENY: Any opposed?

23 (No response)

24 CHAIR DEVENY: Hearing none, this
25 meeting is adjourned. Thanks, everybody, and I

1 hope you all stay well. We'll see you in a couple
2 months.

3 (The proceedings were concluded
4 at 9:57 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 - 43 - 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
June, 2020.

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires
March 9, 2024.

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