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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
August 7, 2020)

TRANSCRIPT OF PROCEEDINGS VIA ZOOM

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

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

1 The following proceedings were had:

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4 CHAIR DEVENY: I will go ahead and call
5 this meeting of the Board of Environmental
6 Review to order. I'm Chris Deveny, Chair. I
7 just wanted to mention for the record that we
8 are holding this meeting using the Zoom virtual
9 technology because of the COVID-19 pandemic.
10 And it sounds like we have a dog in agreement
11 there.

12 Anyway, so the meeting is called to order
13 and, Deb, if you would go ahead and take roll
14 call of board members and then do a preview of
15 the people who signed in to today's meeting.

16 MS. SUTLIFF: All right. Chair Chris
17 Deveny.

18 CHAIR DEVENY: Deveny. Here.

19 MS. SUTLIFF: Dexter Busby.

20 MR. BUSBY: I'm here.

21 MS. SUTLIFF: Hillary Hanson? (No
22 response.) Hillary Hanson?

23 John DeArment.

24 MR. DEARMENT: Here.

25 MS. SUTLIFF: Chris Tweeten. (No

1 response.)

2 David Lehnherr.

3 MR. LEHNHERR: Here.

4 MS. SUTLIFF: And Judge Jerry Lynch.

5 MR. LYNCH: Present.

6 MS. SUTLIFF: We have Sarah Clerget.

7 MS. CLERGET: Present but I'm not a board
8 member. Board attorney.

9 MS. SUTLIFF: Thank you. I'm sorry.

10 CHAIR DEVENY: We have five board members
11 present so we do have a quorum today. So then,
12 Deb, if you want to do the other introductions
13 starting with our board attorney Sarah, that
14 would be good.

15 MS. CLERGET: Sarah Clerget, I'm here.

16 MS. SUTLIFF: Thanks, Sarah.

17 All right. Moving on, then we have Lisa
18 Lesofski. I'm sorry, Lisa, if I'm
19 mispronouncing your name. Lisa is our clerk
20 and recorder today for the board meeting.

21 We also online have Ed Hayes with DEQ
22 legal. George Mathieus, DEQ deputy director.
23 We have Dave Klemp. Troy Burrows. We have Tim
24 Davis with DEQ. We have Sandy Scherer with the
25 legal department here at DEQ. I apologize,

1 it's going really last. We have Amy
2 Christensen. Also with DEQ we have Shawn
3 Juers, Eric Campbell, Lisa Sullivan, Liz
4 Ulrich, Ed Warner, Myla Kelly, Christine
5 Weaver, Katie Alexander, Kurt Moser, Jon
6 Staldine. I apologize if I'm mispronouncing
7 names this morning. My tongue is all twisted
8 up.

9 We have Norm Mullen, DEQ legal. We have
10 Katy Callon with air quality. We have Mike
11 Suplee, Ed Coleman, Rainey DeVaney, Eric
12 Sivers. Caroline -- oh, Caroline, I'm so
13 sorry, Canarios. Kirsten Bowers with DEQ
14 legal. We have Eric Schmidt, Hannah New. We
15 have Peggy Trenk, Darryl Barton. Caroline, I
16 do apologize for your last name. Julie Merkel.
17 Jon Kenning, Maya Rao.

18 On the phone we have a Galen Steffens,
19 Joanna McLaughlin. Rich Jost attending as
20 well. I do hope I've captured everyone. I
21 apologize if I haven't. If I haven't gotten to
22 you, it looks like we've got everybody.

23 CHAIR DEVENY: Okay. Thank you, Deb.

24 MS. SUTLIFF: You're welcome.

25 CHAIR DEVENY: Is there anybody that Deb

1 missed? Okay, thank you.

2 Moving on, we'll review the minutes of the
3 last board meeting, which was on June 12th.

4 Are there any additions or corrections to the
5 minutes by board members? Any public comment
6 on the minutes? Hearing none, I would move
7 that we approve the minutes of the June 12th
8 meeting. Is there a second?

9 MR. LYNCH: This is board member Lynch.
10 I'll second.

11 CHAIR DEVENY: It's been moved and
12 seconded. Any further discussion? Hearing
13 none, all those board members in favor of
14 approving the minutes of the June 12th meeting
15 please signify by saying aye. (Response)
16 Opposed? (No response.) Any opposed? Hearing
17 none, the minutes are approved.

18 So let's move on to the briefing items
19 with Sarah Clerget, our legal guru.

20 MS. CLERGET: Good morning, everybody.
21 Moving through these on the agenda, 2A, water
22 enforcement cases, we've got Copper Ridge and
23 Reflections. This is the one that's on its
24 third remand. It came back to me and I am
25 continuing with the contested case while it's

1 also going in district court, and Amy will
2 update you on the district court piece.

3 I had a motion in limine in front of me
4 that I ruled on denying the Copper Ridge and
5 Reflections motion in limine. There is a
6 motion for summary judgment fully briefed and
7 pending in front of me, so that's waiting for a
8 decision by me.

9 And then, Amy, do you want to do the
10 district court case?

11 CHAIR DEVENY: So Amy Christensen is our
12 outside counsel that we've hired to assist the
13 board. So go ahead. Thank you, Amy.

14 MS. CHRISTENSEN: Thanks, Chris. So the
15 petition for judicial review in district court
16 is really still in its infancy. DEQ has
17 answered that. We had a little bit more time
18 to file an amended brief because we were
19 waiting to see what the Supreme Court was going
20 to do in a separate case.

21 We are filing our answer brief -- we filed
22 our motion to dismiss in this case last week on
23 the same grounds as we filed in the Rosebud
24 Mine case, which is we don't feel like the
25 board should be a part of it when we're dealing

1 with judicial review of one of the board's
2 decisions. So the answer brief to that will be
3 due in another week and then it will be fully
4 briefed and we'll wait for a decision from
5 Judge Harada on that.

6 CHAIR DEVENY: So in about a week then?

7 MS. CHRISTENSEN: In about a week it will
8 be fully briefed. We filed our motion to
9 dismiss. Response brief is due in a week.
10 We'll have a chance to file a reply brief and
11 it will be briefed.

12 CHAIR DEVENY: Thank you. Somebody is not
13 muted. If everybody could please check and see
14 if the Zooms and phones are muted. We're
15 getting a lot of interference here.

16 Thank you, Amy. And I've noticed that
17 Chris Tweeten has joined us as board member, so
18 please let the minutes reflect that he's joined
19 the meeting.

20 Okay, Sarah. Why don't you go ahead and
21 continue.

22 MS. CLERGET: All right. And then
23 under -- there should have been an additional
24 entry under enforcement cases and I apologize,
25 this was my fault. It was left off. So there

1 should have been a 1B and that is the Signal
2 Peak enforcement case, which is what has been
3 dismissed and that's why I forgot to put it on
4 there. So that was on your previous agendas
5 but it has now -- the parties have settled and
6 dismissed it, so that's why it is gone.

7 Two is nonenforcement cases. The first
8 one is Alpine Pacific Utilities. On April 20th
9 I issued an amended scheduling order and
10 discovery is closing the end of August, so
11 they're proceeding with that one.

12 Then in the City of Great Falls, which is
13 B, I issued an order partially granting
14 Calumet's request to file an amicus brief.
15 That was on May 18th. Discovery is closing the
16 beginning of August. Actually, I just received
17 a motion for extension on that, so that date
18 will move but not by much. I want to say it's
19 to September. But they're generally
20 proceeding.

21 Then Absaloka Mine, they're working
22 towards a settlement. They asked for a
23 continued stay, which I granted on July 29th.
24 They have until September 9th at which they're
25 either going to be dismissed because they've

1 stayed or they're going to ask for a schedule
2 order.

3 Montanore Minerals. This is the one
4 that's up in front of the Supreme Court on a
5 parallel district court action that wasn't
6 supposed to have anything to do with us but the
7 decision in district court affected us. So
8 it's fully briefed in front of the Supreme
9 Court right now and awaiting decision. They're
10 going to file a status with me within 30 days
11 of the decision so that's stayed until we get
12 that decision from the Supreme Court.

13 Talen. On July 1st Talen gave a notice.
14 I'm just going to read this. "That the parties
15 have not reached a settlement resolving this
16 contested case hearing and that Talen will
17 relinquish the certificate amendments
18 challenged in this proceeding." So that's --
19 they've agreed that they're going to
20 essentially -- well, that they're going to
21 relinquish the certificate. They're going to
22 complete that relinquishment by August 31st and
23 then move to dismiss by September 30th. So
24 hopefully by our next meeting that one will be
25 gone too.

1 Spring Creek Coal. This one has been
2 actually renamed Navajo Transitional Energy
3 Company after a transition of the certificate.
4 I gave them an amended scheduling order on May
5 12th. Discovery closes January 2021. So
6 they're proceeding per the schedule.

7 CHS. This one is stayed pending actually
8 the rulemaking that's in front of you today on
9 the arsenic. So I've had a couple of
10 scheduling conferences and we're continuing the
11 stay until a conference on September 4th based
12 on what happens today.

13 H is Laurel Refinery. That is the same
14 update as above.

15 Signal Peak, this one Amy is going to give
16 you the district court update, but the
17 contested case proceeds in front of me.
18 They've done all of their prehearing briefing.
19 There was a motion in limine that I issued an
20 order on on July 29. We have a prehearing
21 conference set for August 11, and the hearing
22 in this matter will go August 18th. I just
23 talked to the parties the day before yesterday
24 and we've decided -- everybody has agreed that
25 we're going to do that hearing remotely. So it

1 will probably take two to three days but it's
2 going to be a little bit new territory for
3 everybody to do the trial remotely, so we'll
4 see how that goes.

5 Moudy Pit. This update is actually the
6 end of it is wrong and I needed to correct it.
7 I had said that there were no dispositive
8 motions filed by the deadline and that I would
9 schedule a conference. But I was looking at a
10 previous scheduling order so, in fact, they
11 have another month to file dispositive motions.
12 So discovery closes on August 5th and then we
13 may or may not get dispositive motions on that
14 case.

15 Western Energy Area F. The parties have
16 cross-moved for partial summary judgment and
17 the motions are fully pending in front of me.
18 So that one is waiting for a decision by me,
19 but it's a big one so it takes some time.

20 We've got -- oh, I'm sorry, Amy. I
21 forgot.

22 CHAIR DEVENY: Let's go back and have Amy
23 give us the update on the Signal Peak.

24 MS. CLERGET: Sorry.

25 CHAIR DEVENY: That's okay.

1 MS. CHRISTENSEN: I didn't want to
2 interrupt Sarah because she was on a roll. So
3 I thought we'd circle back.

4 CHAIR DEVENY: She was on a roll.

5 MS. CHRISTENSEN: So in the Signal Peak
6 case, which is I, we did get a ruling from the
7 Montana Supreme Court in that. The parties had
8 taken a decision from the district court on
9 some subpoena dispute up to the Montana Supreme
10 Court. The Montana Supreme Court issued a
11 ruling June 23rd. They felt that we did not
12 have enough rulings from the board in order for
13 the upper courts to make a decision on that, so
14 they have remanded the matter back to the board
15 to address some discovery issues and make some
16 rulings before they can address the
17 constitutional issues. So this one is coming
18 back and it will -- there will be some
19 additional rulings required before it going
20 anywhere else.

21 And then I can move on to the Western
22 Energy Rosebud Mine case, which is subparagraph
23 L. This is one that we talked about quite a
24 bit in the last meeting or two because the
25 issue in that case is whether or not the board

1 should be made a party on judicial review of
2 one of its own decisions and because that issue
3 was resurfacing in many cases, it was decided
4 to file a motion to dismiss before the district
5 court to see if we could get the board out of
6 the case. That motion to dismiss was denied.

7 We filed a petition for writ of
8 supervisory control with the Supreme Court,
9 which is a kind of immediate appeal to see if
10 the Court would jump in and make a decision
11 before the district court action was complete.
12 It's an extraordinary remedy and,
13 unfortunately, the Supreme Court decided that
14 we had not established sufficient urgency and
15 need for that type of extraordinary remedy,
16 that immediate appeal, and so they denied the
17 writ, which means the district court judicial
18 review had been stayed while the Supreme Court
19 was considering the petition. So the district
20 court is back on track now.

21 We're filing an answer brief in that case
22 today, which will be a very simple sort of
23 statement that we believe that it's more
24 appropriate for the parties to the case to
25 present their positions rather than for the

1 board to advocate in defense of its own
2 decision.

3 So essentially at some point we'll get a
4 decision on the merits of the petition for
5 judicial review from the district court and at
6 that point we'll be in a position to appeal the
7 issue of whether the board should be a party to
8 the Supreme Court and at that point we could
9 present the issue on its merits and the Court
10 could consider it. So they essentially denied
11 our petition for a writ of supervisory control
12 more on a technical issue, not on the merits of
13 the argument that we were making.

14 So unfortunately we're back in district
15 court. We're going to have to ride this one
16 out. There is probably going to be oral
17 argument scheduled at some point. There is a
18 little bit more briefing to do, but that case
19 is kind of rolling along at this point.

20 CHAIR DEVENY: Thank you, Amy. Go ahead,
21 Sarah.

22 MS. CLERGET: I'm done. The next one is
23 DEQ.

24 CHAIR DEVENY: You're right. DEQ, do you
25 want to give an update, Ms. Bowers? Kirsten?

1 MS. BOWERS: Good morning, Madam Chair,
2 members of the board. The next case is the
3 Western Energy permit appeal that has been
4 stayed on your agenda pending judicial review
5 and that's associated with a case, MEIC and
6 Sierra Club versus DEQ and Western Energy
7 Company, that went to the Supreme Court. The
8 Supreme Court, the Montana Supreme Court issued
9 its opinion back in September of 2019 and
10 remanded the case back to district court on
11 certain questions of fact. And we're still
12 proceeding on remand before the district court
13 in accordance with the district court
14 scheduling order. The parties are conducting
15 discovery. So I'll just keep you posted on
16 that.

17 CHAIR DEVENY: Thank you, Ms. Bowers.

18 Before we move on to the action items, I'd
19 like to ask if there have been any other
20 members of the public or staff members that
21 have joined the Zoom meeting this morning?

22 MS. MARQUIS: Good morning. This is Vicki
23 Marquis with Holland & Hart. I joined a little
24 late. I'm sorry about that.

25 CHAIR DEVENY: Any others on phone or on

1 Zoom? It doesn't look like it.

2 Let's go ahead with the action items and,
3 George, if you would like to do an introduction
4 on the new rule or turn that over to someone?

5 MR. MATHIEUS: Thank you, Madam Chair,
6 members of the board. Back in April the
7 Department requested initiation of rulemaking
8 for arsenic standards. I think Myla Kelly is
9 going to make a presentation to you guys this
10 morning.

11 CHAIR DEVENY: Okay. And Sarah held the
12 hearing on that. There was a public comment
13 period on that and so we're proceeding now and
14 being asked to consider adoption of the new
15 rule. So, Myla, if you'd like to give your
16 presentation.

17 MR. DAVIS: Madam Chair, if I may. This
18 is Tim Davis, water quality division
19 administrator. Actually Mike Suplee, Dr. Mike
20 Suplee was going to give the presentation.

21 CHAIR DEVENY: All right, Dr. Suplee.

22 DR. SUPLEE: Good morning, Madam Chair,
23 members of the board. Again, my name is Mike
24 Suplee. That's spelled S-u-p-l-e-e, and I'm in
25 the water quality standards and modeling

1 section of the Montana DEQ.

2 I'm here today to request that the board
3 adopt New Rule I as it was proposed. New Rule
4 I, as you recall, pertains to natural and
5 nonanthropogenic standards, including
6 nonanthropogenic arsenic standards for four
7 segments of the upper and middle Yellowstone
8 River.

9 Since rulemaking was initiated by this
10 body in April, there has been the requisite
11 public comment period in a hearing. A number
12 of comments were received. All were addressed
13 and there were two major themes prevailing
14 those comments. First, there was generally
15 broad but not universal support for natural and
16 nonanthropogenic standards and in particular
17 the Yellowstone's nonanthropogenic arsenic
18 standards. Further, there was phrase for the
19 technical work the Department carried out to
20 identify the Yellowstone's arsenic standards.

21 Second, there were requests for
22 alterations to the rule to allow for certain
23 permitting flexibilities be made available,
24 specifically intake credits and mixing zones.

25 Careful consideration was given to the

1 permitting flexibilities that were requested.

2 In the end, however, it was concluded that the
3 rule should be adopted as proposed without
4 allowance for intake credits or mixing zones.

5 Regarding intake credits, I want to
6 emphasize that when nonanthropogenic standards
7 are developed in the way they were for arsenic
8 on the Yellowstone River, the new standards
9 already give dischargers credit for the
10 naturally occurring concentrations above the
11 current standard. As a result, any need for a
12 water quality standards based intake credit is
13 precluded by the nonanthropogenic standards
14 themselves.

15 I have a figure I would like to present
16 that would help illustrate this point, if Deb
17 could pass screen share to me for just a quick
18 moment.

19 MS. SUTLIFF: Mike, try your screen share
20 at this point.

21 DR. SUPLEE: It says you've disabled it.

22 MS. SUTLIFF: It's not allowing me to
23 enable it. I apologize.

24 DR. SUPLEE: We could either skip it or --
25 I did provide that PowerPoint slide to you

1 yesterday. Is there any way you can bring that
2 up?

3 MS. SUTLIFF: Let's see if I can do that.
4 We'll give it a try.

5 DR. SUPLEE: Thank you.

6 MS. SUTLIFF: I have it up on my screen.
7 I'm not able to share that for some reason. I
8 apologize. I'm having some technical
9 difficulties with this presentation.

10 DR. SUPLEE: That's okay. It was just an
11 illustration to help kind of make the point a
12 little clearer regarding this issue. We'll
13 probably be able to talk our way through it as
14 we go forward.

15 So, anyway, that was that subject. And
16 moving on to mixing zones, which was the other
17 major permitting flexibility that was
18 requested.

19 The Department also recommends that
20 they're only appropriate when the background
21 condition of the receding water is below the
22 applicable water quality standard. Since
23 nonanthropogenic standards, like the
24 Yellowstone River's arsenic standards are
25 established right at the central tendency of

1 the water body's nonanthropogenic
2 concentration, the human-caused increase in the
3 concentration will move the concentration away
4 from its central tendency and away from the
5 nonanthropogenic condition. Stated another
6 way, mixing zones are not appropriate for
7 nonanthropogenic standards because the water
8 body has no submittal capacity above the
9 nonanthropogenic standard.

10 The Department and I would like to thank
11 the board for considering New Rule I and again
12 request that the board adopt it as proposed. I
13 would be happy to answer any questions you may
14 have. Thanks.

15 CHAIR DEVENY: Thank you, Dr. Suplee.
16 We're going to have public comment on these
17 rules, proposed rules and I'd like to get an
18 idea of the number of people that we have on
19 today that are interested in commenting so
20 that -- I may need to set some time limits. Is
21 there a way to, for people to kind of indicate?
22 Maybe we can do it verbally, people that are on
23 the Zoom or by phone.

24 Nobody is planning to give public comment?

25 (Audio issue.)

1 CHAIR DEVENY: Was that Eric Schmidt
2 because if it was, we didn't hear what you
3 said. You didn't come through.

4 MS. MARQUIS: Madam Chair?

5 CHAIR DEVENY: Yes.

6 MS. MARQUIS: I represent the CHS Laurel
7 Refinery. We have previously submitted public
8 comments both orally and at the last board
9 meeting, at the public hearing, and in writing
10 and beyond those comments, we just stand behind
11 those comments and would reiterate those. And
12 we have nothing further.

13 CHAIR DEVENY: Thank you, Ms. Marquis.

14 All right. Well, it doesn't appear that
15 we have a lot of people chomping at the bit to
16 comment on this because I think the Department
17 has provided a lot of opportunity to give
18 public input on this and there was also the
19 hearing. But I will open it to public comment
20 and I'm going to ask anybody that does have
21 comment on it to please limit their comments to
22 the language of the proposed rule. And I'm
23 going to limit anybody that does wish to speak
24 to no more than ten minutes.

25 At that point is there anybody that wishes

1 to comment on Proposed Rule I? Is there
2 anybody that wishes to comment?

3 MR. SCHMIDT: This is Eric Schmidt again.
4 Can you hear me better now?

5 CHAIR DEVENY: We can, Eric. Thank you.
6 Please go ahead. If you could limit your
7 comments to the rule language and no longer
8 than ten minutes.

9 MR. SCHMIDT: Thank you, Madam Chair and
10 members of the board. My apologies. I seem to
11 have an issue with my web cam and Zoom
12 particularly. It turns me into Alvin and the
13 Chipmunks.

14 My name is Eric Schmidt and I am a
15 resident of Billings and I serve as the chair
16 of the Yellowstone Valley Citizens Council,
17 which is an affiliate of the Northern Plains
18 Resource Council, and I'm here today to speak
19 on behalf of the Yellowstone Valley Citizens
20 Council.

21 We are a grassroots conservation group of
22 over 500 members advocating for a healthy,
23 inviting, and sustainable community in the
24 Yellowstone Valley. Our members reside along
25 the Yellowstone River, drink its waters,

1 recreate in its waters, irrigate from its
2 channels, and consider ourselves stewards of
3 this water body.

4 Arsenic is a known carcinogen that
5 accumulates over the life course and while the
6 limit for drinking water is ten micrograms per
7 liter, we also know that there is no safe level
8 of arsenic and that our drinking water
9 treatment facilities strive for zero micrograms
10 per liter. Given this information and our
11 interest in protecting the water body for our
12 county's residents and water users, we are
13 supportive of the nonanthropogenic standard
14 that is the most protective for human health
15 and the environment.

16 Additionally, we support DEQ's New Rule I
17 as proposed specifically in not allowing mixing
18 zones. We would also request the same
19 explicative and prohibitive language on intake
20 credits. By nature of a nonanthropogenic
21 standard, there is no assimilative capacity
22 rendering mixing zones and intake credits not
23 applicable. Mixing zones or intake credits
24 increases the potential to raise the arsenic
25 concentration of the river from human causes as

1 described in New Rule I.

2 We believe that such provisions are meant
3 to circumvent environmental protections put in
4 place through rulemaking.

5 We thank you for the opportunity to
6 comment in favor of the adoption of New Rule I
7 as proposed. Thank you again.

8 CHAIR DEVENY: Thank you, Mr. Schmidt.
9 Are there any other members of the public that
10 wish to comment on proposed New Rule I?

11 With that I'm going to close the public
12 comment period for the proposed Rule I rule
13 adoption and I would like to ask the members of
14 the Board of Environmental Review if any of you
15 have any questions or comments, questions of
16 DEQ or just have any discussion, comments to
17 bring up?

18 Dr. Lehnherr? Davis?

19 MR. LEHNHERR: Yes. Thanks. I just had a
20 couple of questions for a couple of concepts
21 that I'm wondering if Dr. Suplee could comment
22 on briefly. I want to make sure I understand
23 the concept of intake credits and mixing zones
24 and I'm wondering if it's possible to put, to
25 describe those two ideas in a nutshell, if

1 possible.

2 DR. SUPLEE: Yes, I think I can summarize
3 those. So the idea behind intake credits is
4 that there are places where it is known that a
5 pollutant -- and that can be a naturally
6 occurring pollutant too, so it could be
7 man-caused or natural -- is above a water
8 quality standard in an area and under certain
9 circumstances a discharger or a user of the
10 water is using that water without actually
11 altering that particular pollutant
12 concentration in any way. Rather than having
13 to treat that pollutant down to the water
14 quality standards applicable in their area,
15 they can get a credit for the fact that it
16 arrived at them in a high concentration and
17 then they didn't change it.

18 If you look into the regulations and
19 places where this is applied, there is
20 basically five conditions that they ask that
21 you meet and basically you can't really change
22 the concentration of that pollutant or alter
23 its chemical composition in any way, et cetera,
24 et cetera. But all of those apply in cases
25 where there is, as there is today on the

1 Yellowstone River, a water quality standard
2 that is more stringent than in our case a
3 naturally occurring pollutant condition, where
4 you are going to be addressing that directly in
5 this rulemaking by adopting a nonanthropogenic
6 standard.

7 In the cases of mixing zones, because we
8 looked at what the statute required of us, the
9 statute essentially said that we have to -- if
10 the standard is more stringent than the
11 nonanthropogenic condition, we have to
12 establish a standard at the nonanthropogenic
13 condition.

14 So then the question becomes well, what do
15 you use? The concentration in the river
16 varies, of course, through times. And so after
17 a great deal of consideration and discussion
18 among many levels of people at DEQ, we
19 basically concluded that the central tendency
20 or some measure of central tendency of the
21 water body is the best measure and so,
22 therefore, you're setting the standard right at
23 the middle point of what the river is like most
24 of the time as an average, or in this case a
25 median. At that point once you've established

1 that standard, essentially there is no
2 assimilative capacity for more pollution or
3 more of the pollutant that you're discussing
4 because it will move you away from the central
5 tendency, which is, as we've defined it and
6 understand it, to be the best description of
7 the nonanthropogenic condition.

8 So that's why mixing zones really don't
9 have a place in here because the river is right
10 at that edge, right at that tipping point
11 between -- right at the very concentration that
12 is the standard itself. Does that help?

13 MR. LEHNHERR: Yes. Thank you.

14 MR. LYNCH: This is board member Lynch,
15 Doctor. I do have one question for my own
16 edification, and that is when we talk about
17 this credit, can you explain that in layman's
18 terms, I guess? How does that work?

19 DR. SUPLEE: Madam Chair, members of the
20 board. Basically my understanding of how it
21 works would be, again, if a concentration of a
22 standard is -- let's just take the current
23 condition we have on the Yellowstone River. We
24 have a standard of ten and we know that the
25 natural background concentration of the river

1 in some locations is as high as 28, as we've
2 described it. What they would do is they would
3 basically discount that amount, so that the
4 discharger would not have to treat the
5 discharge down to the standard.

6 MR. LYNCH: Okay. And that's essentially
7 a constant in this regard that the Department
8 knows what these various discharge
9 concentrations would be and they know which
10 discharge it would be entitled to as so-called
11 credit?

12 DR. SUPLEE: Yes, that's the case.

13 MR. LYNCH: All right. Thank you.

14 CHAIR DEVENY: Are there other questions
15 from board members?

16 MR. BUSBY: Yeah, this is Dexter.

17 CHAIR DEVENY: Go ahead, Dexter.

18 MR. BUSBY: Just a question for the
19 Department, probably one of the Department
20 lawyers that I think any of them could answer
21 this.

22 Since this is supposed to be implementing
23 75-5-222, if you look at the very first line of
24 75-5-222 it says, "The Department may not apply
25 a standard to a water body for water quality

1 that is more stringent than the
2 nonanthropogenic condition of the water body."

3 If you set a standard at 28 and a water
4 body goes to whatever you model was about 60 at
5 a maximum, how do you say this is not in
6 conflict with the statute?

7 CHAIR DEVENY: Mr. Moser, would you like
8 to go ahead and address that?

9 MR. MOSER: Yes. Madam Chair, members of
10 the board. I think what's important to
11 remember is what the Department is actually
12 doing is it's establishing what the
13 nonanthropogenic condition is and this is what
14 the board is essentially doing with all the
15 Department's research. And so that's -- the
16 nonanthropogenic condition is basically
17 calculated -- and perhaps Dr. Suplee could talk
18 about this in a little bit more detail. But
19 we're establishing what the nonanthropogenic
20 condition is. And so a single reading in the
21 river is not the nonanthropogenic condition.
22 We did develop the nonanthropogenic condition.
23 I mean, the legislature said you have to base
24 it on the nonanthropogenic condition and so
25 that -- and that is something that we

1 established through research. And so it
2 wouldn't conflict because we're not just
3 talking about one reading in the river. So
4 that would be the answer I think and, Mike, if
5 you -- Dr. Suplee, if you want to elaborate on
6 that perhaps.

7 DR. SUPLEE: Madam Chair, members of the
8 board, I think Kurt basically explained it
9 correctly. All I would say is when you look at
10 a concentration in a water body like the
11 Yellowstone or in most cases, it's not a single
12 number all the time, obviously. It changes.
13 It changes with season, weather, snow melt,
14 et cetera. So you have a range of numbers and
15 what you went up with is -- and especially in
16 the case of the Yellowstone River, I'm sure
17 you've heard of the classic bell-shaped curve
18 of a population of data and right in the middle
19 of that bell curve is what we have concluded is
20 basically the best description of the
21 nonanthropogenic condition, its central
22 tendency. It's where most of the data, most of
23 the concentrations are most of the time in the
24 river.

25 MR. BUSBY: I would like to ask Chris the

1 same question, since he's our legal mind.

2 CHAIR DEVENY: Chris, would you like to
3 respond?

4 MR. TWEETEN: Not really. It's a
5 technical question and I would tend to defer to
6 the expertise of the agency on that particular
7 point. I don't see an inherent conflict with
8 the statute and I guess I would -- I have no
9 grounds on which to think that the agency's
10 interpretation of the statute and the
11 application of the data was wrong. So I think
12 I'd -- that's about all I would have to say
13 about that.

14 MR. DAVIS: Madam Chair, this is Tim
15 Davis, Water Quality Division.

16 CHAIR DEVENY: Go ahead, Tim. And then,
17 Sarah, you had a point to make.

18 MR. DAVIS: Can I break this down? I'm
19 going to -- I am less technical than Dr. Suplee
20 so let me put this into and see if I can answer
21 Dexter's question in kind of a layman's terms.

22 We looked at several years of data that
23 showed both the high and the lows that you see
24 of arsenic in the river. That takes into
25 account the periods when arsenic is above the

1 proposed standard and below the proposed
2 standard. And so we looked at also potentially
3 a seasonal standard that would have had
4 different numbers based on the season.

5 After working with stakeholders, we agreed
6 that having a single annual average would both
7 be protective and that average, that standard,
8 is within that average fluctuation between the
9 high and the low. So it takes into account the
10 protective and in the end it does address the
11 economics of treating down lower than the
12 seasonal standard would have proposed.

13 So it takes into account that natural
14 variation and that's why we proposed a standard
15 and worked with the stakeholders to do so.

16 CHAIR DEVENY: Dexter, has your question
17 been answered?

18 MR. BUSBY: Not completely, because I can
19 think of a really easy scenario where you've
20 got a very high river standard and an ultralow
21 water condition and -- not a standard but a
22 content -- and you've got it set at, say, 28,
23 which is your high setting, that you would be
24 in conflict at that moment in time and probably
25 not be able to enforce. If you did, you'd

1 probably get it thrown out.

2 I'm not sure we should adopt a rule that
3 doesn't at all times reflect the exact language
4 of the statute.

5 CHAIR DEVENY: Sarah, did you have a
6 comment?

7 MS. CLERGET: Just maybe a follow-up
8 question, clarification that Kurt could do.

9 So the statute says -- and Dexter had it
10 right the first sentence. The second sentence
11 says, "For the parameter for which the
12 applicable standards are more stringent than
13 the nonanthropogenic condition, the standard is
14 the nonanthropogenic condition of the parameter
15 in the water body. The Department shall
16 implement the standard in a manner that
17 provides for the water quality standards for
18 downstream waters to be attained and
19 maintained."

20 So, Kurt, I think the follow-up question
21 from Dexter is you talked about you've
22 determined through the research what the
23 nonanthropogenic condition is, and Dr. Suplee
24 and Tim just explained to us that the
25 nonanthropogenic condition varies in the river

1 on the bell curve, and you've picked
2 essentially a single point in that bell curve.

3 And so the correlation question that I
4 have is between the statutes language for the
5 nonanthropogenic condition and the rules
6 language for the standard because the rule sets
7 a standard that doesn't vary and the statute
8 seems to contemplate that wherever the
9 nonanthropogenic condition is is where the
10 standard is.

11 So I just wanted you to explain how you
12 got the one standard from the varying condition
13 again.

14 MR. MOSER: Okay. Madam Chair and members
15 of the board, I didn't catch all that. That
16 was a little broken up but I think I got the
17 gist of it.

18 Again, the statute talks about what the
19 nonanthropogenic condition is. The
20 nonanthropogenic condition is not going up to a
21 point in time and taking a water sample. A
22 nonanthropogenic condition has to be developed.

23 As the expert agency here, the Department
24 has to figure out what that is and use a lot of
25 science to do that. And that's why I do not

1 believe that establishing this as a single
2 standard the way that the agency has done so
3 somehow would create an instance of a violation
4 or noncompliance with the directives of the
5 legislature.

6 The nonanthropogenic condition is not --
7 or the agency is not looking at it as one
8 single sample and I do not believe that is what
9 the statute would require. Okay?

10 So I guess that -- that's about as clear
11 as I can get on that. I mean, it's not one
12 sample. The nonanthropogenic condition has
13 been developed using the methodology that the
14 agency did. That accounts for highs and lows.
15 Every water quality standard, every numeric
16 water quality standard -- and, again, Dr. Mike
17 can talk about this more -- is some form of
18 averaging that's occurring, and that's how you
19 develop those numbers.

20 So I don't have anything further on that.

21 MR. DAVIS: Madam Chair, it's Tim Davis
22 again. If I can provide one other detail that
23 might help the board member understand.

24 The other piece of this is you have to
25 keep in mind that treatment -- that dischargers

1 need to build treatment plants to be able to
2 meet a standard and if they had to fluctuate
3 daily all the way down to the low and all the
4 way to the high, it would not be possible for
5 them to match that day to day and they would
6 have to build a treatment plant to treat all
7 the way down to the lowest concentration.

8 And in this case when we proposed a
9 seasonal standard, the main discharger, CHS,
10 requested that we look at an annual average
11 instead of two so that they knew what they were
12 designing for. So, otherwise, you'd have to --
13 it's not possible from an implementation and
14 enforcement and a discharger's perspective to
15 have a standard that fluctuates every single
16 day and treat it at different levels every
17 single day.

18 CHAIR DEVENY: I'm going to ask people to
19 check and make sure that their phones and their
20 Zooms are muted. We're getting a little
21 feedback from somebody. Thank you.

22 Other board member questions or comments?
23 Hearing none, is there a motion by any of the
24 board members to take action on this new rule?
25 We have some options. One would be no action,

1 another would be to adopt the new rule as set
2 forth, as well as adopting the House Bill 521
3 and 311 analysis, or a third option would be to
4 make some modifications that we thought were
5 appropriate and consistent with the hearing.

6 MR. TWEETEN: Madam Chair, this is Chris.
7 I would move the second option.

8 CHAIR DEVENY: I would second that and
9 I'll read it. It would be to adopt New Rule I
10 as set forth in the notice of adoption and the
11 House Bill 521 and 311 analysis, and this is
12 pertaining to the natural and nonanthropogenic
13 water quality standards.

14 It's been moved and seconded. Is there
15 further discussion or any discussion on the
16 motion?

17 MR. BUSBY: Yeah, this is Dexter. I
18 personally don't think we should adopt a rule
19 that has potential conflict with the statute
20 it's trying to implement. So I would not
21 support this.

22 CHAIR DEVENY: Okay. Any other
23 discussion?

24 I would like to commend the Department for
25 their outreach to stakeholders on this

1 particular issue and for really delving into
2 the science and basing their work on the
3 science, and I'm going to be in support of this
4 rule.

5 Any other comments or discussion from
6 board members before we vote? Hearing none,
7 all those in favor of the motion before the
8 board to approve New Rule I and House Bill 521
9 and 311 analysis, please signify by saying aye.

10 (Response) Any opposed?

11 MR. BUSBY: Aye.

12 CHAIR DEVENY: So we have four in favor
13 and one opposed. Motion carries. Rule I is
14 passed. Thank you, everybody.

15 And moving right along, we have air
16 quality fees rules. So, George.

17 MR. MATHIEUS: Thank you, Madam Chair,
18 members of the board. Just so there is not
19 confusion on the agenda, the title indicates
20 adoption but then the verbiage below indicates
21 that this is a proposal to initiate rulemaking.
22 I just wanted to make that clear. And Liz
23 Ulrich from the water (inaudible) will be
24 presenting.

25 CHAIR DEVENY: I didn't catch that. Who

1 is going to be presenting?

2 MR. MATHIEUS: Liz Ulrich.

3 CHAIR DEVENY: Okay. Good. Welcome,
4 Ms. Ulrich.

5 MS. ULRICH: Thanks. Good morning, Madam
6 Chair, members of the board. My name is Liz
7 Ulrich, that's U-l-r-i-c-h. And I'm the
8 supervisor of the analysis and planning section
9 in the Department's Air Quality Bureau.

10 On April 12th, 2019 the board adopted a
11 new subchapter of rules in ARM Title 17,
12 Chapter 8, Subchapter 18.

13 CHAIR DEVENY: I'm sorry. I'm going to
14 interrupt you. If everybody could please mute
15 their phone or their Zoom, it would be
16 appreciated. We're getting a lot of feedback.

17 Go ahead, Ms. Ulrich.

18 MS. ULRICH: So April 12th, 2019, the
19 board adopted a new subchapter of rules in ARM
20 Title 17, Chapter 8, Subchapter 18. These
21 rules allowed the Air Quality Bureau to
22 implement a registration program for sand and
23 gravel, asphalt, and concrete facilities. At
24 that time the Department said it would continue
25 to engage stakeholders and develop a fee

1 structure to support the adopted registration
2 program.

3 The Department has done this and today is
4 asking the board to initiate rulemaking to
5 amend ARM 17-8-501, 504, 505, and 510
6 pertaining to air quality operating fees for
7 registered sand and gravel, asphalt, and
8 concrete facilities.

9 The transition from a permitting program
10 to a registration program requires a new fee
11 structure. The fee structure is outlined in
12 the rule notice in your packet on page 109.

13 Under the previous permitting program, the
14 facilities paid an annual operating cost of
15 \$800 per year per permit and an application fee
16 of \$500 when a permit application was
17 submitted.

18 Without this new rule, there would be no
19 fees collected, as permits are no longer issued
20 for these affected facilities. The new fee
21 rule is designed to be revenue neutral, that
22 is, to generate relatively the same amount of
23 funding from the new registration program as
24 was generated from the collection of the annual
25 operating fee from the previous permitting

1 program.

2 As is the case with other fee assessments,
3 the Air Quality Bureau will annually evaluate
4 whether the fee rates for this registration
5 program are adequate to fund the required work,
6 will actively engage stakeholders in the
7 process, and will return to the board if
8 necessary to adjust the fees to cover the costs
9 of the program.

10 This new fee structure will also result in
11 a more equitable system for fee payers. Under
12 the previous fee structure, the smaller
13 operators paid more than their fair share while
14 the large operators may have paid less. Under
15 the proposed fee structure, most of the
16 facilities will pay the same or less fees to
17 the Department, while a smaller number of
18 facilities may be paying more fees to the
19 Department depending on their production
20 levels.

21 In anticipation of this rulemaking, air
22 quality staff engaged in many discussions with
23 owners and operators of registration eligible
24 facilities, the Montana Contractors
25 Association, the opencut mining stakeholders,

1 and the Clean Air Act Advisory Committee,
2 CAAAC. The CAAAC is made up of members of the
3 regulated community, trade groups, and
4 environment groups. Based on these
5 conversations, the Department believes that the
6 proposed structure represents the best option
7 to fund the portable facility registration
8 program.

9 Madam Chair, the Department recommends
10 that the board initiate rulemaking, issue a
11 notice of public hearing on the proposed
12 amends, appoint a hearing examiner, schedule a
13 hearing as described in the draft notice.

14 Thank you.

15 CHAIR DEVENY: Thank you, Ms. Ulrich.

16 Are there questions of DEQ from board
17 members about the proposal to initiate
18 rulemaking?

19 Hearing none, is there any public comment
20 about whether or not the Department should
21 initiate rulemaking on this issue?

22 Hearing none, is there interest on any of
23 the board members' parts of having a motion to
24 initiate the rule and assigning it to our
25 hearings officer, Sarah Clerget, as the hearing

1 officer to hold the hearing on the rulemaking?

2 MR. BUSBY: I'll move that.

3 CHAIR DEVENY: It's been so moved. Do I
4 hear a second?

5 MR. TWEETEN: Madam Chair, it's Chris.
6 I'll second.

7 CHAIR DEVENY: It's been moved and
8 seconded. Any further discussion?

9 With that, we'll go ahead and take a vote.
10 All those in favor of the initiating rulemaking
11 and assigning the case to, the rule for the
12 hearing to Sarah Clerget, please signify by
13 saying aye. (Response) Any opposed? (No
14 response) Hearing none, the motion carries.

15 Thank you.

16 MS. ULRICH: Thanks.

17 CHAIR DEVENY: Okay. Let's see. I
18 believe we're heading toward the end. We do
19 have -- George wanted to talk about a
20 supplemental board meeting that might be
21 needed.

22 MR. MATHIEUS: Yeah, Madam Chair, members
23 of the board, Tim Davis is going to present to
24 the board on this matter. Thank you.

25 CHAIR DEVENY: Thank you, George. Tim, go

1 ahead.

2 MR. DAVIS: Madam Chair, members of the
3 board. Again, Tim Davis, Water Quality
4 Division administrator. We would like to
5 request the board to hold a special session to
6 initiate rulemaking on the Lake Koochanusa
7 site-specific selenium standard. As you've had
8 in other presentations, this has been years in
9 the making and we're requesting that the board
10 consider holding a special session to initiate
11 rulemaking on either September 23rd or
12 September 24th. That will allow us to -- the
13 special session will allow us to move through
14 the rulemaking process this year in a timely
15 fashion.

16 We're required to -- we'll be having a
17 45-day public comment period and it will allow
18 us to ideally be able to match the
19 December 11th, or shoot for the December 11th
20 board meeting to consider adoption.

21 CHAIR DEVENY: Are there any other dates
22 that we could hold that meeting and still be
23 meeting the deadline requirements?

24 MR. DAVIS: Madam Chair, members of the
25 board, it would have to be -- given all the

1 alignment of getting the standard ready,
2 noticing, having a hearing in front of CAAAC
3 and then going through the public comment
4 period, it would probably -- it would have to
5 be around that date or sooner than that date,
6 so slightly sooner than that date.

7 If we are not able to hold a special
8 session around that, if it waited until the
9 October scheduled board meeting, we would not
10 be able to meet the December 11th hearing.

11 CHAIR DEVENY: I'm just thinking we're
12 going to have to probably throw out some
13 possible dates for board members and I'm
14 wondering if it could be earlier in September
15 or would there be a problem with holding, you
16 know, maybe giving the board an option of maybe
17 five days or something or are those two dates
18 pretty important based on your scheduling?

19 MR. DAVIS: Madam Chair, members of the
20 board, it's probably -- that week is probably
21 the week it would have to be based on the
22 scheduling lining up finalizing the rule draft.

23 CHAIR DEVENY: Okay. So what I think I'll
24 suggest is that, because most of us might not
25 know what our plans are for those dates, is for

1 Deb to poll the board members and find out
2 which -- throw out some date options starting
3 with the 23rd and the 24th and see if we can
4 get a quorum together on that date and, if not,
5 we may have to look at a couple days earlier or
6 whatever. I don't have a calendar in front of
7 me right now.

8 So, Deb, could you within the next say
9 couple weeks could you poll the board members?
10 Maybe next week even?

11 MS. SUTLIFF: Absolutely. Yes.

12 CHAIR DEVENY: Will that work, Tim, and
13 letting you know then?

14 MR. DAVIS: Madam Chair, that would be
15 terrific. I'll work with Deb and work with
16 Sarah and you to make sure we can find a date
17 that works for the board and works for the time
18 lines.

19 CHAIR DEVENY: Great.

20 MR. DAVIS: Thank you.

21 MR. TWEETEN: Madam Chair, this is Chris.

22 CHAIR DEVENY: Yeah, Chris.

23 MR. TWEETEN: Would it be advisable to
24 adopt a motion at this point committing to
25 having the special meeting on a date to be

1 determined at the convenience of all the
2 parties of the Department and the board
3 members, I guess? I wouldn't say all of the
4 parties but just the Department and the board
5 members.

6 CHAIR DEVENY: I don't think there is
7 anything wrong with having a motion to do that,
8 if you'd like to make one.

9 MR. TWEETEN: I'd so move.

10 MR. LYNCH: I'll second. This is board
11 member Lynch.

12 CHAIR DEVENY: It's been moved and
13 seconded to hold a meeting to consider the
14 adoption, to consider the initiation of
15 rulemaking for the Lake Kooconusa and Kootenai
16 River; is that correct?

17 MR. DAVIS: Correct.

18 CHAIR DEVENY: It's been moved and
19 seconded. All those in favor signify by -- or
20 is there any discussion?

21 MR. BUSBY: Yeah, this is Dexter. I have
22 a question for Tim, a real quick and easy one.

23 If this has been going on for years, how
24 come we're being pushed into a real tight time
25 frame on this?

1 MR. DAVIS: Madam Chair, members of the
2 board, the goal is to wrap this up with this
3 administration, not because we're concerned
4 about the next administration, just because of
5 all the time bringing all the parties on board,
6 bringing them up to speed.

7 MR. BUSBY: Okay.

8 CHAIR DEVENY: Is there any public
9 comment? Hearing none, is there further board
10 discussion? All those in favor of the motion
11 please signify by saying aye. (Response) All
12 those opposed? (No response.) Motion carries.
13 Thank you.

14 Next we have an item on the agenda that we
15 need to discuss and that's --

16 MS. CLERGET: We still have the new
17 contested case.

18 CHAIR DEVENY: I'm sorry. Well, let's do
19 the new contested case then. Sarah, would you
20 go ahead with that?

21 MS. CLERGET: Sure. So this is the notice
22 of appeal that's in your packet by Mr. Duane
23 Murry, numbered BER 2020-01, and we received a
24 request for a hearing from him. And you guys
25 just need to decide whether you want to keep

1 it, assign it, keep it for substantive purposes
2 and assign it for procedural purposes. Those
3 are your standard menu of options.

4 CHAIR DEVENY: Do any of the board members
5 have pleasure with this?

6 MR. BUSBY: Yeah, what's this all about,
7 Sarah?

8 MS. CLERGET: I don't really know, to be
9 honest.

10 MR. BUSBY: Okay.

11 MS. CLERGET: All I have is the letter, so
12 you have what I have.

13 MR. BUSBY: Okay.

14 MR. LYNCH: Sarah, could you run over our
15 options again, please?

16 MS. CLERGET: Sure. You can keep the case
17 yourself and act on all procedural and
18 substantive matters yourself. You can assign
19 it to a hearing examiner, me or somebody else
20 for all purposes, meaning substantive and
21 procedural, in which case it only comes back to
22 you when there is a final proposed decision
23 from me that is dispositive of the whole thing,
24 or you can assign it to a hearing examiner, me
25 or anybody else, for procedural purposes,

1 meaning I set the schedules and all that kind
2 of stuff but you keep the substantive
3 decisions. So if, for example, there is a
4 motion for summary judgment, that comes
5 directly to you before it goes to me, you do
6 the hearing yourselves. So those are the three
7 options.

8 MR. LYNCH: I'd move for option number
9 two.

10 CHAIR DEVENY: So there is a motion to
11 assign the case to Sarah for all procedural and
12 for all matters; is that correct?

13 MS. CLERGET: Yes.

14 MR. TWEETEN: I'll second that.

15 CHAIR DEVENY: It's been seconded to
16 assign the case to Sarah for all matters. Is
17 there any discussion?

18 MS. CLERGET: Just a clarification, Chris,
19 that you're assigning it to me, me being ALSB,
20 so if I was hit by a bus it can be somebody
21 else from ALSB.

22 CHAIR DEVENY: Thank you. All those in
23 favor signify by saying aye. (Response) Any
24 opposed? (No response) Hearing none, okay,
25 Sarah, add it to your docket.

1 MS. CLERGET: Okay.

2 CHAIR DEVENY: I have jumped ahead and now
3 we'll go back.

4 We've been utilizing Amy Christensen, and
5 I think she's done a nice job as outside
6 counsel. There is concern about the added
7 expense that the board has when we hire outside
8 counsel and I guess I'd like us to discuss as a
9 board where we want to proceed, if we want to
10 change any of our thoughts on having outside
11 counsel, and what our options might be. And
12 I'm going to lean heavily on Jerry and Chris
13 because you guys know the system. And those of
14 us who aren't attorneys are, at least I speak
15 for myself, a little bit at a loss here about
16 what to do.

17 MR. LYNCH: I think we have -- everybody
18 has to mute again. I can't hear much.

19 CHAIR DEVENY: Could everybody please mute
20 if you're not speaking, especially phones?
21 Thank you.

22 Jerry, did you hear what I said?

23 MR. LYNCH: I got the gist of it.
24 Obviously if the board is named, the board has
25 to have an attorney to represent the board in

1 the proceeding; otherwise, there could be
2 potentially some sort of default against the
3 board and/or its members.

4 The question I have in terms of options
5 is, not that Amy hasn't done a fantastic job,
6 are there state agency lawyers that could
7 undertake the same task? And, Chris, you're
8 certainly more versed than I am on that. But
9 not that I want to deprive Amy of a payday
10 because, again, she's done a marvelous job but
11 is there an option with the board being named
12 as a party obviously that an agency lawyer
13 could address?

14 MR. TWEETEN: Madam Chair, this is Chris.
15 Can I respond to that?

16 CHAIR DEVENY: Yes, please do.

17 MR. TWEETEN: Okay. The idea of hiring
18 outside counsel I think developed in
19 discussions I was having with Sarah about what
20 to do in these particular cases. And I think
21 maybe, Sarah, you may have a better memory of
22 this than I do -- I certainly hope you do -- of
23 what the considerations were that led us to
24 conclude that we should recommend to the board
25 the hiring of outside counsel. But Sarah being

1 the attorney in the underlying matter as the
2 hearing examiner representing the board in most
3 of these cases, I think it was felt that having
4 Sarah as our board counsel appear as an
5 attorney in the appeal would basically present
6 the -- or let me think about how to say this.

7 That the idea of our objection to these
8 cases, to being named in these cases, that the
9 board as decider is not an appropriate party I
10 think applies to the board, I think it also
11 applies to the board's hearing examiner, who
12 was Sarah. So I think Sarah -- and, Sarah,
13 please jump in and correct me if I've got this
14 wrong -- I think we decided that the best
15 course for the board was to hire independent
16 outside counsel. There might, it seems to me,
17 be some sort of implicit admission, I guess
18 that -- well, maybe not. I'll strike that.

19 But certainly if we object to having the
20 board as a party in these matters, that would
21 certainly cover or extend to an objection that
22 our counsel should be representing us in that
23 matter. So we turn to the idea of outside
24 counsel.

25 Agency Legal Services Bureau, of which

1 Sarah is a member, is the Attorney General's
2 agency that provides counsel to state agencies
3 in situations like this. If an agency counsel
4 has a conflict of interest or if there is too
5 much work for that particular agency counsel
6 and they can't add this to their pile of work
7 and still stay ahead of what they need to get
8 done, those agencies have the option of turning
9 to the Attorney General's office and asking to
10 hire a lawyer out of Sarah's unit to represent
11 the agency in a particular matter. That's how
12 Agency Legal Services Bureau works. It's like
13 an outside counsel firm except it's located
14 inside state government. It's significantly
15 more economical than hiring outside counsel,
16 because I think Sarah's agency charges
17 something like 106 bucks an hour as opposed
18 to -- the average in Helena is probably over
19 200 bucks an hour for outside counsel right
20 now. So there is a savings there.

21 The problem in this case, of course, is
22 that Sarah relying on her colleagues at Agency
23 Legal Services Bureau as she does, to the
24 extent there is a consideration for not using
25 Sarah as the counsel on these judicial review

1 communications, that would apply to the
2 entirety of the ALSB as well.

3 The other option that we probably ought to
4 look at is counsel from DEQ. I think
5 ordinarily under the Administrative Procedure
6 Act the default is unless an agency attach for
7 administrative purposes, like we are to DEQ,
8 unless they have their own lawyer, the
9 Department is responsible for providing counsel
10 for the attached agency. That's not
11 appropriate in this case because the Department
12 is a party to the appeal in almost all these
13 cases. So that's not an option either.

14 So it seems to me that the only acceptable
15 approach to this is to hire outside counsel.
16 And we don't do it very often and I know that
17 Amy has faced a flurry of these cases recently
18 and the expenses are such that it's costing us
19 money every time somebody does one of these.
20 It's one of the reasons why we asked the Court
21 to step in and disallow this practice, frankly,
22 is that not only does it waste the agency's
23 time but it also costs the agency money every
24 time we have to do this.

25 Sarah, do you have anything to add or

1 change in what I just said?

2 MS. CLERGET: I agree with everything you
3 said about ALS. I believe -- and this is a
4 question for Chris. When we got Amy on board,
5 I think she agreed to do it for the ALS rate,
6 if I remember. So it's not -- I don't think
7 it's actually costing you any more per hour
8 than --

9 MR. TWEETEN: Okay.

10 CHAIR DEVENY: I'm not sure of that,
11 Sarah. And I didn't have anything to do with
12 the budget on that.

13 MR. TWEETEN: We're going to have to pull
14 the contract with Amy and see what the rate is,
15 which I've never seen and I don't know what the
16 rate is but if that's -- if that's the case.

17 MR. LYNCH: I'll just follow up to Chris,
18 if I could. Chris, I think when you very well
19 articulated the options, you mentioned that at
20 some point in time an option would be to have
21 it land in the Attorney General's lap. Is that
22 accurate?

23 And the reason I say that is this. We're
24 dealing with this naming board members of this
25 entity, our board, but that could happen across

1 all boards in the state if someone chose to do
2 that. So it seems to me -- if you agree, it
3 seems to me the Attorney General ought to take
4 a step to put an end to this, if that's an
5 option.

6 MR. TWEETEN: Sure. Having been next door
7 to the Attorney General for a long time, I've
8 never talked to General Fox about this, I don't
9 know what his attitude would be. The only
10 options that he would have would be ALSB, which
11 we've already talked about it being not an
12 attractive option, or assigning somebody from
13 his civil bureau to take this issue on and step
14 up and represent boards every time they want to
15 assert the defense that we're asserting. And
16 that's a possibility. I think it's probably
17 been done, although I can't remember a specific
18 instance during the time that I was there. But
19 it's certainly an option that the Attorney
20 General could entertain. He'd have to be
21 convinced, I think, that this was basically
22 what we failed to convince the Supreme Court of
23 that this is a significant and urgent problem
24 that he would have to step in on rather than
25 letting the appeals in these cases run their

1 course and get to the Supreme Court in the
2 ordinary course of business.

3 I mean, it wouldn't be out of line to
4 approach the Attorney General about this. My
5 guess is you probably would talk to Chief
6 Deputy Bennion about it first before it got on
7 to General Fox's desk.

8 But that's certainly an option that could
9 be looked at. I wouldn't be optimistic that he
10 would want to do it but, on the other hand, I
11 wouldn't rule it out. I don't know what his
12 thoughts are about questions like this so I
13 can't really say.

14 MR. LYNCH: This is Jerry again. I think
15 we're probably all of the same mind that at
16 present we allow Amy to complete her job on the
17 case and perhaps get a favorable decision from
18 the Supreme Court, which would negate any need
19 to go to the Attorney General. In it doesn't
20 turn out -- well, that will end the inquiry, I
21 guess. It's either favorable or not favorable
22 in terms of allowing board members or the board
23 to be named.

24 At that point in time then the cost I
25 think should fall upon the -- if the Supreme

1 Court disagrees with Amy's analysis, I doubt
2 that it will but I'm not a prognosticator, then
3 the cost I think should be absorbed by the
4 Attorney General's office. But that's
5 something to be dealt with in the future, I
6 suspect.

7 MR. TWEETEN: All I would say in response
8 to that, Madam Chair, is that in my experience
9 the Attorney General and Department of Justice
10 have never been anxious to absorb costs that
11 they don't absolutely have to absorb, and they
12 have a tight budget just like every state
13 agency does. So that's all I guess I'd say
14 about that.

15 MR. LYNCH: Thank you.

16 CHAIR DEVENY: Any further discussion or
17 thoughts on this from board members?

18 MR. BUSBY: After listening to our legal
19 minds talk about this, maybe we should
20 encourage the Department to put a chunk of
21 money in their budget to cover these costs.

22 MR. MATHIEUS: Can I respond to that,
23 Madam Chair? From my perspective kind of what
24 is driving this discussion, frankly, is me and
25 my concerns and this is -- they're this simple.

1 In the last two years we've seen a significant
2 increase in the board's budget. It is what it
3 is.

4 At the same time I'm seeing a significant
5 decline in revenues of the agency. So what I'm
6 charged with is getting bills that I can't plan
7 for. So this is just part of the dialogue.

8 I'd like a way to work with the board to the
9 best of our abilities to actually plan and
10 predict costs and build a real budget. I mean,
11 that's just responsible government. And we're
12 not there today. And I'm not an attorney
13 obviously, and I don't understand all of the
14 nuances and ins and outs of just even this
15 specific example we're talking about. It's my
16 understanding that there are options. We've --
17 the board has been in I'll just say similar
18 situations before and different paths have been
19 taken.

20 So what I'm really asking, and some of the
21 conversations I've had with the Chair, are just
22 a way to predict and build a real budget and
23 not just me getting bills and trying to come up
24 with a way to pay for them, because I don't do
25 it anymore. And right now we're building our

1 budget for the upcoming biennium so the timing
2 is perfect. And to the best of our ability --
3 and I know we can't predict everything but, I
4 mean, that's how we set budgets. So if there
5 is a way moving forward that we can do that,
6 I'll sleep a lot better.

7 MR. TWEETEN: Madam Chair, can I respond
8 to that or maybe have a dialogue with George
9 about that?

10 CHAIR DEVENY: Yes, please.

11 MR. TWEETEN: I don't think this has
12 changed since I left state government but,
13 George, in building your agency budget, don't
14 you start with the '21-'22 biennium and the
15 expenditures that are made in the '21-'22
16 biennium and use that as a starting place for
17 what the board's budget would be for the
18 upcoming two years?

19 MR. MATHIEUS: Madam Chair, member
20 Tweeten, yes, some of that is accurate. I
21 guess the point that I'm making is I've seen a
22 significant increase in the board's budget and
23 it's becoming less predictable.

24 MR. TWEETEN: Madam Chair, George, I
25 understand that. But I guess I'm -- what I'm

1 suggesting is that the expenditures that we've
2 made in the past year to retain Amy and use her
3 services are going to show up in our base
4 budget for the next biennium, are they not?

5 MR. MATHIEUS: Correct.

6 MR. TWEETEN: So unless we expect those
7 expenditures to increase and with the caveat
8 that budgeting is a crapshoot and, you know,
9 during the budget process in the legislature I
10 have seen things deleted from agency budgets
11 with no apparent reason whatsoever other than
12 that they're looking for numbers to cut out.
13 So you never know what the budget is going to
14 do -- excuse me, what the legislature is going
15 to do.

16 But at least going into the legislative
17 session when you go into the budget
18 subcommittees, I would expect that these
19 expenditures that we're going to make this year
20 are going to be part of the base budget that
21 the subcommittee will look at and subcommittees
22 sometimes go on budget-cutting rampages and
23 stuff gets thrown to the floor just because
24 they need to cut. And that's always a risk and
25 that's a fight you have to make with the

1 legislature all the way through the session
2 sometimes.

3 But as a starting point I think these
4 expenditures are going to be in the budget goes
5 to the legislature unless the DEQ decides at
6 some point to trim them from their budget
7 request.

8 MR. MATHIEUS: Madam Chair, my response is
9 it's not that black and white. I mean, we
10 haven't asked in the past for a specific
11 appropriation from the board and it's typically
12 down at a level within the budget that isn't
13 specifically talked about or articulated in our
14 budget subcommittee and that process. It's
15 down several layers.

16 And the way it's worked in the past is
17 it's a combination of setting aside money in
18 the director's office budget to pay for the
19 general workings of the board, you know, even
20 simple things like you guys' per diem and those
21 things. Primarily the programs pay for, say,
22 for example, we're working -- you guys are
23 working on a coal case, right? And so we bill
24 the coal program.

25 Where we're at right now is that we're

1 having -- in order to pay the bills, we're
2 having to take it from other places and so it's
3 not necessarily in that neat of a package. I'm
4 taking it from anywhere I can within the
5 agency.

6 MR. TWEETEN: George, thanks for reminding
7 me of that. I had forgotten that you're
8 largely a fee-based budget, you don't get as
9 much general general fund as some of the other
10 agencies do. You're obligated to charge for
11 your services. So that does complicate
12 matters. I see what you're saying.

13 I don't know what the answer is but if you
14 want to go into the idea of a line item budget
15 for BER and then you're in a situation where if
16 you overspend that you're going to try to be a
17 part of the supplemental bill and this will be
18 a very small part of the supplemental bill I
19 would think because some of those expenditures
20 are huge that go into that bill.

21 But that's an idea that I think we should
22 talk about, certainly, if that would help
23 address the problem from DEQ's perspective. I
24 mean, I'm not personally that excited about it
25 because, as you know, last session the BER was

1 a target and we came within the Governor's veto
2 of being disincorporated as a board. So
3 putting the board out there as an individual
4 target in the budget subcommittee I guess is
5 not ideal from the board's perspective. This
6 is exactly contrary to the Department's
7 interest because, you know, we like to wear
8 beige and stay small if we can and the
9 Department on the other hand is interested in
10 finding a budget that it can tap for the board
11 that doesn't require them to raid the budgets
12 of all of your constituent agencies. I mean, I
13 get the point. I get the problem.

14 So I guess it's not a suggestion that I
15 make with a great deal of enthusiasm but I
16 think we should certainly explore it.

17 MR. LYNCH: Madam Chair, if I may.

18 CHAIR DEVENY: Go ahead. Jerry.

19 MR. LYNCH: George, a quick question. I
20 think you've already answered it, but the
21 escalating budget of the board is mainly
22 attributable to these additional legal costs or
23 are there other areas?

24 MR. MATHIEUS: Madam Chair, member Lynch,
25 I would say no. I mean, I think I did say

1 earlier I think it's just one piece of the
2 puzzle. I mean, the costs have gone up and
3 some of it's just more cases, more appeals,
4 more whatever. Some of it's just the nature of
5 the game.

6 But I'm just generally seeing a pretty
7 significant increase and while this is one
8 piece of it, the other, some other things that
9 we've done or that the board has done with some
10 of your rules and that, you know, just for me
11 being able to say what does that mean, what
12 generally do we think we're going to spend by
13 making this decision and then I can plan for
14 it.

15 So that's all it really is. I know some
16 of it is out of our control because we can't
17 predict, but it's not just the outside counsel.

18 MR. LYNCH: Okay. Thank you.

19 MR. MATHIEUS: You bet.

20 CHAIR DEVENY: Any further discussion?

21 Just a second, Chris. I'd like to hear from
22 Sarah, if we could.

23 MS. CLERGET: I was just going to offer.

24 One of the tools that we've done for -- because
25 I think the ALS is a cost, it's not just Amy.

1 ALS costs have certainly gone up. And one of
2 the things that we have offered that I've done
3 for agencies in the past is we can pull all
4 sorts of different billing numbers because
5 obviously I bill by the .1 and we break it out,
6 as George said, I bill to the BER general and
7 then I also bill per case so if it's a coal
8 case, it goes to the coal. And we have very
9 specific billing, you can track this is what it
10 takes to get to a motion for summary judgment,
11 this is what it takes to go through a hearing,
12 and this is the number of cases that I hold on
13 a very regular basis.

14 So those are all -- a billing analysis is
15 something I've done for clients before where I
16 come to you with essentially a presentation and
17 say look, this is the average of what it costs
18 in the life of a case, your sort of big cases
19 and then your small cases, this is what a case
20 costs, and this is how many cases I carry on
21 average and so, therefore, this is the amount
22 of time that you could expect that I will be
23 spending. Obviously that's going to change if
24 cases suddenly balloon or drop.

25 But we've got at least three years of data

1 now from me and then we do have some data
2 previously from the prior hearing examiners. I
3 think obviously with each hearing examiner or
4 board counsel those numbers change a little
5 bit, but for me you have at least three years
6 of data we can build a basic projection off of
7 if you want me to do that.

8 MR. MATHIEUS: Are you going to charge me?

9 MS. CLERGET: As I don't work if work
10 doesn't tell me, then I can't bill. I have to
11 bill everything. I mean, you can talk to John,
12 who is my supervisor. ALS does occasionally do
13 no charge things but they've been very angry at
14 me recently for no charging stuff. So I have
15 specifically been told that I'm not allowed to
16 no charge anything anymore because I was doing
17 it too much. But that's a conversation that
18 you can maybe have with John.

19 If this is in order to get ALS more
20 revenue ultimately, then I think ALS spending a
21 little bit of money or incorporating, absorbing
22 a little bit of money in order to get that
23 covered is not unreasonable to ask.

24 MR. TWEETEN: Madam Chair, just for the
25 record, ALSB is a fee-based agency as well.

1 They pay their staff out of the revenues that
2 they generate by billing the agencies that they
3 work for. So many of the same pressures that
4 George was talking about that fall on DEQ are
5 even more apparent with ALSB because it's a
6 much smaller agency. I don't know how many FTE
7 it has now but it's probably less than 20 I
8 would guess when you count the support staff
9 and paralegals and the attorneys. So there is
10 a much smaller margin of error for ALSB when
11 their revenues don't cover their costs. So
12 that's why Sarah is under pressure to make sure
13 that her billing is comprehensive because they
14 can't really afford to do a lot of charity work
15 or else their budget is not going to balance
16 and then they will have to borrow money out of
17 the Department of Justice budget, which won't
18 please the Attorney General very much or his
19 Central Services division, more to the point.
20 So they're under the same pressure as the DEQ
21 and that's why Sarah is obligated to bill all
22 of this.

23 CHAIR DEVENY: Okay. Thanks for this
24 discussion. And I don't mean to bring it to an
25 end specifically but we are at 10:30 and we

1 probably -- if we don't move on, we're going to
2 need to take a break to give our court reporter
3 a break. So --

4 MR. TWEETEN: Madam Chair, can I just ask
5 you a question?

6 CHAIR DEVENY: Yes.

7 MR. TWEETEN: Are you open to the idea of
8 having discussions with George about alternate
9 methods of trying to budget for BER's
10 expenditures? As we've discussed, you know, I
11 don't -- as I said, I'm not enthusiastic about
12 the idea of being an individual line item on
13 DEQ's budget but there may be other
14 opportunities to be more specific in the way
15 our expenditures are accounted for in their
16 budget.

17 CHAIR DEVENY: Certainly I'm open to
18 discussions and I think a lot of it has to
19 occur with the board, although as volunteer
20 board members we don't really have a lot to
21 say, but I think there is a lot of coordination
22 that can be done through Sarah and George. And
23 I'm happy to be part of those conversations and
24 would welcome any other board members that
25 would join in on that as well.

1 MR. TWEETEN: I volunteer to help out in
2 that discussion as well.

3 CHAIR DEVENY: George, if you have some
4 ideas to bring to the -- maybe we just have a
5 little subcommittee of Chris and I and, Jerry,
6 would you be interested in joining that?

7 MR. LYNCH: I'd be happy to do it.

8 CHAIR DEVENY: And Sarah as well?

9 MS. CLERGET: Yes.

10 MR. TWEETEN: Sarah will have to bill him
11 for it.

12 MS. CLERGET: Or I'll get fired. Sorry.
13 They account for -- I mean every .1 of my day
14 has to be accounted for.

15 CHAIR DEVENY: I think in the meantime we
16 need to allow Amy to continue doing the work.
17 Maybe we'll get a Supreme Court decision in
18 that area but maybe the -- I guess it would be
19 five of us to get together sometime and do a
20 Zoom or a phone meeting and have some
21 discussion of options that, George, you might
22 have, be able to put out there after you've
23 been given a chance to give it a little more
24 thought and run it by some of your department
25 folks.

1 MR. MATHIEUS: Thank you, Madam Chair, but
2 not to oversimplify, but I've already got folks
3 working on trends analysis on sort of what
4 Sarah was talking about. And I think just
5 simply, for example, the Department saying here
6 is the next ten rulemakings we're anticipating,
7 you know, and then how do we put a predictive
8 cost to that, for example.

9 One of the things I mentioned earlier was
10 the two-year rule review thing that the board
11 picked up. I didn't anticipate that, so those
12 types of things that may be coming down the
13 pike that aren't necessarily just appeals that
14 I think we could discuss and we could predict.
15 And we don't need to do it in this forum and
16 the board. So it's just a coming together and
17 trying to figure out what our future looks like
18 and how we can be more efficient at it.

19 CHAIR DEVENY: If you can put out some
20 suggested dates for a phone call or a Zoom
21 meeting and then with the five of us we can do
22 that.

23 All right. Well, this has been a good
24 discussion and I think we'll move on now.

25 Sarah, did you have any other board

1 counsel updates to give?

2 MS. CLERGET: No.

3 CHAIR DEVENY: And this is now an
4 opportunity for the public to comment about
5 anything that we've discussed today except for
6 any of the contested cases. Is there anybody
7 from the public that would like to discuss
8 anything or bring up anything, make comments on
9 anything? Hearing none, I would ask for a
10 motion to adjourn.

11 MR. TWEETEN: So moved.

12 CHAIR DEVENY: It's been moved. I'll
13 second it. Public comment on the adjournment?
14 Hearing none, all those in favor of adjourning
15 please signify by saying aye. (Response) Any
16 opposed? (No response.) The meeting is
17 adjourned.

18 (The meeting was adjourned at
19 10:36 a.m.)

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C E R T I F I C A T E

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I, LISA R. LESOFSKI, Registered
Professional Reporter do hereby certify:

That the proceedings were taken before me
at the time and place herein named, that the
proceedings were reported by me and that the
foregoing pages contain a true record of the
proceedings to the best of my ability.

Dated this 27th day of August, 2020.

/s/

Lisa R. Lesofski
Notary Public for the State
of Montana
Residing at Helena
My Commission Expires 3-31-2024