BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING
June 8, 2018

TRANSCRIPT OF PROCEEDINGS

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
June 8, 2018
9:00 a.m.

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

PREPARED BY: LAURIE CRUTCHER, RPR
COURT REPORTER, NOTARY PUBLIC
WHEREUPON, the following proceedings were had and testimony taken, to-wit:

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CHAIR DEVENY: Good morning, everybody, and welcome to the Board of Environmental Review. I'm Chris Deveny, Chair of the Board. We'll go ahead, and Lindsay will have a roll call, please.

MS. FORD: Chris Deveny.

CHAIR DEVENY: Present.

MS. FORD: John Felton.

MR. FELTON: Present.

MS. FORD: Dexter Busby.

MR. BUSBY: I'm here.

MS. FORD: Hillary Hanson.

MS. HANSON: Here.

MS. FORD: Tim Warner.

(No response)

MS. FORD: Tim Warner.

(No response)

MS. FORD: John Dearment.

MR. DEARMENT: Here.

MS. FORD: Chris Tweeten.

MR. TWEETEN: Here.

MS. FORD: We do have a quorum.

CHAIR DEVENY: Okay. Thank you. Let's
go around and identify others in the room that are
at the meeting. If you want start over there.

MS. SCHERER: Sandy Scherer, legal
secretary, DEQ.

MR. LUCAS: Mark Lucas, DEQ staff
attorney, Air Energy and Mining Division.

MR. KLEMP: David Klemp, Air Quality
Bureau Chief.

MS. HARBAGE: Rebecca Harbage, Air
Quality planner.

MR. RASH: I'm Hoby Rash, Field Services
Section Supervisor, Air Quality.

MR. MOSER: Kurt Moser, DEQ Water
Quality Attorney.

MS. TRUEBLOOD: Carla Trueblood,
Financial Specialist, Air Energy and Mining
Division.

MS. ULRICH: Liz Ulrich, DEQ, Analysis
and Planning Section, Air Quality Bureau.

MR. OLSON: Alan Olson, Montana
Petroleum Association.

MS. TRENK: I'm Peggy Trenk, Treasure
State Resources Association.

MR. CRISWELL: Gordon Criswell, Talen
Montana.
MR. DAVIS: Tim Davis, I'm Water Quality Division Administrator.


CHAIR DEVENY: Thank you. Are there any other members or people from the public that are on the phone line today? If there are, could they speak up and identify themselves.

(No response)

CHAIR DEVENY: Okay. So Lindsay, it is just John Felton is the only one that's on the phone?

MS. FORD: Correct.

CHAIR DEVENY: Okay. Great. Thank you. Welcome, John. All right. Well, with that, let's move on to our administrative items then. You have the minutes before you. Does anybody, any Board members have additions or corrections to the minutes?

(No response)

CHAIR DEVENY: Or any from DEQ staff? I know George was just going to be a little late today. Any staff members know of any -- George, any corrections or additions to the minutes that you --
MR. MATHIEUS:  (Shakes head)

MR. TWEETEN:  Move adoption.

CHAIR DEVENY:  Chris Tweeten has moved the adoption of the minutes.  Is there a second?

MR. BUSBY:  Second.

CHAIR DEVENY:  Seconded by Dexter.  All in favor, please say aye.

(Response)

CHAIR DEVENY:  Any opposed?

(No response)

CHAIR DEVENY:  All right.  With that, let's move on to our next order of business which is briefing items, and we'll start with contested cases, and I'll turn it over to Sarah Clerget, our Board attorney.

MS. CLERGET:  Good morning, everybody. I'll just go through these on the agenda. First we have under briefing items II(A)(1)(a), CMG Construction, this is just proceeding through a scheduling order. No updates there.

Columbia Falls. I apologize for not having the decision to you for this meeting. I hope to have it for the next meeting. But you all know the status of that case very well.

Copper Ridge Subdivision is Items (c)
and (d) together. We were hoping that the parties were going to stipulate to a schedule that would allow it to be on this case, but they wanted more time for their exceptions briefs, so that will be on the agenda for the next meeting for a decision from you guys.

Item (e), Fischer Land Development, the scheduling order is in place and they're proceeding.

Item (f), Wagoner Family, we're in the penalty phase, and just put a scheduling order in place for that.

Little Bear is Item (g). And we issued a scheduling order and had a scheduling conference, so that is proceeding according to that.

No. 2 is the non-enforcement cases. 2(a) is Westmoreland. There's a stay on that pending a decision from the Montana Supreme Court, so no update there.

Item (b), we have a little bit more to talk about, and I'm going to wait. Lindsay is going to need to pass you out something here. But the big news here is this case is proceeding on a scheduling order, but one of the parties, the
mine, has issued two subpoenas which the Montana Environmental Center has moved to quash, and the way that they moved to quash was based on constitutional grounds and for separation of powers issue. As an Executive Branch board, we can't rule on constitutional issues. That's the purview of the Court. 

So after an oral argument and a bit of discussion on the issue, all the parties decided to go to District Court, and they filed an action there regarding the subpoenas, so the District Court can decide whether or not the subpoenas will be quashed.

In that process, BER was named as one of the parties in the District Court suit, so I wanted to let you guys know that BER has been named in the suit, but my intention -- if you believe that you can assign it to me, and I don't see any reason why you couldn't -- my intention would be to just file a notice of appearance in the case so we get any information that's filed, and then file what's called essentially a notice of non-participation. So you just say, "Court, we're here, but we don't take a position one way or the other," and let them sort it out.
And then the underlying case has been stayed while they sort that out in District Court. And then once they come back with an answer from the District Court, the underlying case will proceed.

So I wanted Lindsay to pass out to you the Notice and Complaint, just so you had it, to you know you have been sued, but there is really nothing that you need to be concerned about, or nothing that you need to do as long as you agree with me that we're not going to participate in any -- take any position or participate in any meaningful way.

MR. FELTON: Sarah, excuse me. This is John Felton. Can that be emailed to me, please?

MS. FORD: Yes.

CHAIR DEVENY: So is that something we need to take action on now?

MS. CLERGET: I think the only thing that you would need to take action on would be to decide whether or not you're comfortable with me representing you in the District Court action as both the Hearing Examiner and the Board attorney.

If there were any kind of meaningful reaction, if we were going to have to do any kind
of argument or briefing, I would encourage you to have another attorney; but because it is essentially just filing a notice of appearance and this notice of non-participation, I think I can handle it without you guys having to bring somebody else into it.

So that I think is what takes a seconded motion is if you just wanted me to represent you in this and follow that.

CHAIR DEVENY: Let's have a Board discussion on this while we're here on the agenda item. Do any of the Board members feel that we need to have anybody other than Sarah work on this issue?

MR. TWEETEN: Madam Chair. I don't necessarily, but I have a question, I guess. Just looking at the Complaint really quickly, it looks like it only demands declaratory injunctive relief, correct?

MS. CLERGET: Yes, I think so.

MR. TWEETEN: It does demand a declaration with respect to the jurisdiction of the Board and the Hearing Examiner to resolve constitutional claims raised by certain parties. Is that an issue on which you think the Board
might want to take a position one way or other?

MS. CLERGET: I don't think so because it is pretty straightforward. I mean Jarussi is a Supreme Court case on point, and it says that executive branch boards don't have jurisdiction over constitutional issues, so it's pretty straightforward.

And that was what I brought up to the parties, in that they filed a motion to quash in the underlying case, and it was on the First Amendment grounds, and I said, "I can't rule, based on Jarussi, I can't rule on First Amendment grounds. What do you want to do? Do you want to withdraw that as a ground for this motion to quash, or do you want to proceed and get an answer from the District Court?," and so they decided they wanted to go to District Court.

MR. TWEETEN: So when those kinds of issues are raised in front of the Board, we rely on the presumption of constitutionality in statutes, and presumption of regularity, and just reject those claims out of hand and let them raise them on judicial review; is that the way it works?

MS. CLERGET: Yes, but I think they need a practical answer on this motion to quash on
whether they can depose these two witnesses, so we
couldn't put it off until the end of the case.

MR. TWEETEN: No, I understand that. I
guess I'm just trying to clarify in my own mind
whether there might be some benefit to the Board
appearing and filing arguments on that question,
but I agree with you. I think the issue of law
doesn't seem to be all that unclear right now, and
I don't think we want to be deciding the
constitutionality of statutes and things like that
anyway.

MS. CLERGET: No. And I think on the
grounds of this, it is a constitutional issue that
they're talking about jurisdiction on is the First
Amendment, essentially whether it is going to
chill their First Amendment rights, the issuance
of the subpoena is going to chill their First
Amendment rights, association particularly. So I
don't think that's ever something that we would
want to be ruling on.

MR. TWEETEN: No, but who will be --
Will the Department be appearing and opposing on
this?

MS. CLERGET: The Department is not
named, so I don't know. My expectation is that it
would probably be MEIC. I know in the underlying action, Ms. Pfister and Mr. Charter both have Counsel to represent them in addition to MEIC, so they've appeared in the underlying action, so my guess is they would probably appear to represent them here as well.

MR. TWEETEN: Is MEIC's position running parallel with that of the Board here?

MS. CLERGET: No. The Board hasn't taken a position one way or the other.

MR. TWEETEN: Thank you.

CHAIR DEVENY: Chris, are you comfortable with Sarah's recommendation to us then?

MR. TWEETEN: Yes, Madam Chair, I think I am.

CHAIR DEVENY: Is there a motion then from the Board members to continue to have Sarah represent us on this case and before the District Court?

MS. HANSON: So moved.

MR. BUSBY: I'll second that.

CHAIR DEVENY: It's been moved and seconded. Is there any further discussion?

(No response)
CHAIR DEVENY: All those in favor, say aye.

(Response)

CHAIR DEVENY: Any opposed?

(No response)

CHAIR DEVENY: Motion carries.

MS. CLERGET: So moving on to 2(c) is Western Energy, and the parties are still working on their post hearing briefing. They haven't submitted it to me yet. So they asked for an extension on that, which I granted. This was a big hearing, so the proposed findings of fact and conclusions of law are big. And so that will probably be coming before me for a decision relatively soon. I can't remember the deadline that I gave them on that. Then I'll get to issuing a decision.

Montinore Minerals is (d), and we just yesterday actually -- Summary judgment is pending in this case, and the parties asked for oral argument, and they couldn't get themselves scheduled for oral argument until the 9th of July. So we had a scheduling conference yesterday and vacated the hearing that's set for August 20th, and they're going to wait until they
get a decision on summary judgment before we set a
new schedule if necessary, because depending on
what happens with summary judgment, we may not
need a new schedule.

(e) Laurel Refinery is stayed until
August 24th, and that's hopefully because they're
going to settle.

(f) JR Civil is stayed. They're filing
a joint status report every I think it's 30 days
or 60 days -- I can't remember -- so the next one
is due next week, and they're continuing to work
on their settlement.

(g) is Motor Vehicle Wrecking Facility
No. 0376. And we have stayed it until June 1.
And I haven't heard -- I apologize because I
haven't updated this since this happened -- but
the bottom line is Mr. Payne has tried to appear.
His Counsel has withdrawn, and he's trying to
appear on his own behalf, but he's appearing as a
corporation. Payne Logging is a corporation. So
he can't appear.

When you have a corporation, you have to
have a lawyer. And so we've issued an order
telling him that, and he had until June 1st to
show cause or get a lawyer, and that hasn't
happened. He's called several people several
times to try and get legal advice, but obviously
that has not happened.

And so I think he's struggling a little
bit, and I would probably have to issue another
order here shortly because it doesn't seem like
he's gotten Counsel in that case. So we can't
move forward without him having Counsel.

No. 3, contested cases not assigned to a
Hearing Examiner, Western Energy.

CHAIR DEVENY: Do we want to have DEQ --
MS. CLERGET: Yes, I think probably.
CHAIR DEVENY: Norm, I think you were
going to cover this for us.

MR. MULLEN: Norm Mullen, Department
staff attorney, and I'm acting as Chief Counsel
today.

The situation, as I understand it, as is
stated in the item in the agenda, the last
sentence. There is an appeal to District Court,
and opening briefs are due on June 13th, next
week.

Because this is an appeal of a matter
that is before the Board, we have to be very
careful about talking about matters that are in a
contested case outside of a formal proceeding with Counsel for the other sides present.

    CHAIR DEVENY: Yes. Okay. Thank you.
    MR. MULLEN: Thank you.
    MS. CLERGET: No. 4 Oilfield. I just wanted to let you guys know that that has been appealed. That was a decision that you rendered at your last meeting. That's been appealed up to District Court. So Lindsay filed a certified record of our proceeding, and that is going forward, and I will keep you updated on the status. Hopefully it doesn't come back.

    I think that concludes the contested case update.

    CHAIR DEVENY: Thank you, Sarah. We'll move over to DEQ then, George, for other briefing items. I think we have some briefing on some revised water quality standards.

    MR. MATHIEUS: Yes, Madam Chair. I believe Eric Urban is presenting before the Board on that.

    MR. URBAN: Madam Chair, members of the Board, for the record, my name is Eric Urban. I'm the Bureau Chief for the Water Quality Planning Bureau here at the Department, and that
responsibility, one of my roles is overseeing our Water Quality Standards Program.

Today I'm here to speak largely to two different topics. One will be setting site specific criteria for arsenic on the Yellowstone River, and the other will be speaking to frequency and duration for human health criteria. I'll try and make that little less jargony when we get there.

So starting with the Yellowstone arsenic, I guess before I get too far, I do want to point out that we have others in the audience working for the Department that are integral in this topic. One is Melissa Schaar. She is our lead technical expert, and has been on this topic for several years now, and has done some I guess nationally cutting edge type work on setting criteria for natural.

And other would be Ms. Myla Kelly, our Standards Section Supervisor. So I wanted to make sure I pointed that out.

So arsenic in Montana has been a topic that is well known for at least the last 30, 40, 50 years. We've known that it's high in concentration in our surface waters and
groundwater throughout much of Montana. The highest concentrations originate off of Yellowstone National Park and geologic formations therein.

Over the past several years we've collected additional data on both the Madison River side and the Yellowstone River side in an attempt to understand what those concentrations are, and largely how much of it is truly natural.

In addition to the science side of this, we've worked with work groups and stakeholders for several years now in an attempt to understand how to set natural criteria or standards to protect natural.

Through the course of that, we feel very confident that we know what the natural concentrations are for the Yellowstone River, to the levels of -- very little of the arsenic do we not know where it comes from, and the majority of it, some 95 percent or more, is coming from natural sources.

Less than 2 percent or around 2 percent of that arsenic can be attributed to humans, that being either point source or nonpoint source, and then there is a little uncertainty where our
The technique isn't that sharp, but for the purposes of setting criteria and managing surface waters, we're very confident in our knowledge of arsenic.

So that gives us a concentration. We know that arsenic in Montana ranges, and Yellowstone, ranges from high 30 micrograms per liter down to, well, zero in some situations. But coming out of Yellowstone, it is high 30s, pushing 40 micrograms per liter arsenic.

For scale, the human health criteria or MCL for arsenic is ten, and that is the current standard that's set for the Yellowstone River. And you can see the conundrum we're in when it comes to applying standards where naturally they're exceeded constantly, if not frequently.

So we've got this range. I guess I should also point out the aquatic life criteria in arsenic is much higher than the human health one. It is 150 micrograms. So this effort will not be changing aquatic life criteria for the Yellowstone River.

So now we've got the science done, and we're very confident of arsenic levels. The next question is: How do you pick a number out of a range? How do you consistently choose a number
when it's constantly variable, daily, monthly, annually, flow based, etc.? And that's where Ms. Schaar has provided that technical expertise, and provided the consistent documentation on how to do that.

In the fall of this year, we'll be coming to the Board presenting a rule package that shows multiple numbers from the Yellowstone through to the mouth of the Clark Fork River somewhere near Laurel.

And this rulemaking will be calling out a different approach than what exists today. Today the arsenic number is to protect human health. The arsenic number going forward will be driven to protect natural. Because it is higher than the human health numbers, we want to be very transparent in what that number is meant to protect, so we'll be calling out a different use there.

The rule package will have a table that specifies those uses it will protect. We'll also be bringing rules to discuss mixing zones, the implementation on how it will work within permits. Then also we'll be bringing rules to describe how to use it with nondeg regulations. So again,
implementation tools.

So in large, that's the package that you'll be seeing this fall. It's one that we've been working on for several years now, and it is a concern or a natural issue that's been present, well, forever really in Montana; and this is our well, long planned out attempt at satisfying the conditions for no purer than natural in our surface water quality standards.

So I guess with that, I'll turn it to the Board for questions on arsenic before I get to the next topic.

CHAIR DEVENY: Questions from any Board members?

MR. BUSBY: The only question I have is is this salable to the EPA?

MR. URBAN: Madam Chair, Mr. Busby, we've worked closely with the EPA all along as we, too, had that concern from the very beginning. Nationally, I'm not aware of any other large scale water bodies that have arsenic at these concentrations.

The EPA's requirement is to have a criteria that protects the use. So in this case, we'll be developing criteria to protect natural,
and as such, we do not anticipate concerns with EPA. And they have been a close partner all along.

CHAIR DEVENY: I had a question in regards to the arsenic work. These standards apply to surface water, but I'm assuming that your scientific research included groundwater and the relationship between surface water. Is that accurate? And along that line, are you anticipating changing any groundwater standards with arsenic?

MR. URBAN: Madam Chair, members of the Board, that's a very astute question. So this rulemaking effort will speak specifically to segments of the Yellowstone River, and it will be not only limited to surface water, but it will be limited to those segments very targeted to our understanding.

Groundwater standards are a little bit different beast. One thing that we will be looking at in the near future is rewriting some of our groundwater standards. I'll go into that at some other point. But largely this effort will not be speaking to arsenic in groundwater.

We did look at it as part of those
interactions in this effort. We have learned a considerable amount, and that has been one of the big benefits of this project is our knowledge of arsenic.

And I can tell you with all of our outreach we speak to the standards we're talking about, but then while it is not specific to our work, we're bringing in the groundwater mapping, because there is a lack of public awareness of the arsenic concentrations in Montana. And that speaks directly to private well owners.

For example, the entire Madison Valley is largely higher than the MCL, and they're at a higher risk of cancer for consuming that groundwater. So it has been part of all of our stakeholder outreach. Even though it is a little bit outside of our direct authority, we feel very important to continue that outreach.

CHAIR DEVENY: All right. Thank you.

MR. URBAN: So the next item I'll talk about is frequency and duration for human health criteria.

So when we hear the word "standard," we think of it as a number. That number really is required to have three pieces to it. One is the
number itself, and then we talked to is magnitude. The other pieces are frequency, so how often does it occur, or can it occur; and then duration, how long can it occur when it does. So water quality criteria really has those three parts -- magnitude, frequency, and duration.

Our current regulations within DEQ Footnote 16 have this phrase included in them, specific to human health criteria. It says, "Surface or groundwater concentrations may not exceed these values." That's been interpreted that no sample, no single sample may exceed the human health magnitude.

So what that has done is it creates a very high level of conservatism with not only our monitoring and assessment work, but also with our permitting programs. So when we look at it from a technicals perspective, human health, what is a human need with respect to arsenic for protection or respect to any of the human health parameters, all those are calculated on much longer exposure periods.

So our criteria to protect humans with drinking water use a 70 kilogram human drinking two liters of water per day every day, plus 17 and
a half grams of fish consumption on average, plus
a 70 year exposure. So it is a very long
exposure. It is very constant and consistent with
those numbers.

When we apply a "no single sample shall
exceed" type approach, we're quite, quite,
conservative, and much more stringent than any of
the Federal regulations or guidance on this topic.

So we've done the technical side of it
now. We fully understand what a human needs with
respect to human health protection, frequency, and
duration. What we'll be proposing now will be in
direct line with Federal guidance, and the
scientific nature of all of those pollutants.

So rule package pieces that we'll be
bringing to the Board will include a revised
Footnote 16, and it will speak to largely
carcinogens separate, then toxic parameters --
that will be evident in our rule package -- with
different frequency and duration for either, one
that's technically appropriate for that topic.

We'll also be revising our low flow
designs for mixing zones and permit development in
order to accurately again implement those criteria
as needed.
So I guess there is a lot of jargon in that. I would open it to the Board if there is any technical questions.

MR. DEARMENT: Madam Chair, Mr. Urban. I understand there is a great deal of conservatism rolled into that, but it seems like your process for a long time --

I'm just curious what's motivating this, given that the system you have now I assume is working reasonably well, that that conservatism that's rolled into it is actually a good thing when you're talking about human health and carcinogens.

MR. URBAN: Madam Chair, Mr. Dearment. What's working now, so when you have a level of "no sample shall exceed," there is several layers of conservatism that happen. One of those unintended consequences has been the listing of impaired water bodies.

So as written, we look back for the past ten years of data, so we look at a ten year data set. We may have, for example, 100 samples in that data set of that receiving water.

As current, a single sample in the past ten years considers that water body impaired
creates another process -- developing restoration plans, or TMDL's -- when in fact we really have no technical driver for that to occur that we, one, largely there isn't a problem in that water body; and two, it is not a problem for human health consumption at that point.

So what's happened is we've created a paperwork end loop that's really unnecessary for the water body, and it is a resource drain on the Department, and a bit of a distraction from real human health concerns. And we have those coming up this fall, too.

So if that answers your question.

MR. DEARMENT: Yes, thank you.

CHAIR DEVENY: Any other questions from Board members?

(No response)

CHAIR DEVENY: Have you put together a stakeholders group for this? Do you have plans to?

MR. URBAN: Madam Chair, members of the Board, one of the reasons you're not seeing a proposal to initiate rules at this point is for that exact reason. We feel there is more stakeholders outreach on this topic to occur over
the summer. And I guess that's part of the reason.

CHAIR DEVENY: All right. Any other questions?

(No response)

CHAIR DEVENY: All right. Thank you very much.

MR. TWEETEN: Madam Chair. So does that mean you will be putting together a group?

MR. URBAN: Madam Chair, Mr. Tweeten. I think I wouldn't recommend us to put a group together, but we'll certainly be doing a road show and traveling and reaching out to multiple stakeholders and individuals throughout the state. I do not anticipate a work group.

MR. TWEETEN: Okay. Thank you.

CHAIR DEVENY: Okay. Let's move into Board action items then, and let's refer to Page 11 of our packet, and where DEQ is going to talk to us about initiating rulemaking on air quality operation fees.

MS. ULRICH: Good morning, Madam Chair, members of the Board. My name is Liz Ulrich, and I'm the supervisor of the Analysis and Planning Services Section for the Department's Air Quality
Bureau.

So as promised at the last Board meeting, today the Department is asking the Board to initiate rulemaking to amend air quality operation fees as established in Section 17.8.505 of the Administrative Rules of Montana.

I'm going to keep this initiation testimony at a higher level, but the Department will certainly provide additional details at the public hearing should the Board approve our request to initiate rulemaking. And of course I'm available to answer any questions that you have throughout this meeting.

Under Section 75-2-220 of the Montana Code Annotated, the Department assesses fees that are sufficient to cover the reasonable costs, direct and indirect, of developing and administering the permitting or registration requirements of the Clean Air Act of Montana.

Montana's existing air quality permitting and registration programs are primarily supported by fees paid by businesses regulated under this program.

There are two main types of air permit and registration fees. The first are permit
application or registration fees paid by those businesses that are either obtaining a new permit or registration, or modifying an existing air quality permit; and the second being annual operation fees paid by all companies that are required to hold an air quality permit or registration.

The Board approved an increase in the application fees in 2014, but the operation fees haven't been increased since 2009.

In this action, the Department is asking the Board to consider revising those annual air quality operation fees which are required for all facilities that hold an air quality permit, either those that have been issued a Montana air quality permit, an air quality operating permit, or those that have registered in lieu of obtaining a Montana air quality permit, such as oil and gas well facilities.

The air quality operation fee for facilities other than portable facilities and registered oil and gas well facilities consists of a flat administrative fee, plus a fee based on the actual or estimated actual tonnage of air pollutants emitted by the facility during the
previous calendar year.

This per ton fee is assessed for the amounts of PM-10, sulphur dioxide, lead, oxides of nitrogen, and volatile organic compounds emitted. Portable facilities and oil and gas well facilities are assessed a flat fee only.

So more specifically, the Department is asking the Board to initiate rulemaking that will propose to increase the operation fee for facilities that registered in lieu of a permit from $800 to $900. For certain facilities that require air quality permits, the request is to increase the administrative fee from $800 to $900, and the per ton fee from $38.24 per ton up to an amount not to exceed $45.37 per ton of emissions.

As I mentioned earlier, the last time the Board raised air quality operating fees was in 2009. For that year, the reported emissions were more than 90,000 tons. In 2017, roughly 49,000 tons of pollutants were emitted.

The proposed fee increase would allow the Department’s Air Quality Bureau to collect sufficient revenue to support the appropriate implementation of the air quality program.

In anticipation of this rulemaking, Air
Quality Bureau staff have been engaged in discussions with the Clean Air Act Advisory Council or CAAAC over the last several months. CAAAC is made up of members of the regulated community, trade groups, and environmental groups.

We have discussed why we are requesting a fee increase, how we are improving our internal processes to ensure we are spending their fee money wisely, and how our current fee structure is set up, and how it might look in the future.

We understand fee increases aren’t easy, but through these conversations, the Department anticipates minimal opposition regarding this proposed rulemaking. At the public hearing, the Department intends to request a specific per ton amount that will not exceed $45.37 per ton. In the meantime, the Department will continue engaging stakeholders.

So this is the tricky part. If adopted, these amended fees will be billed in November of 2018 to fund the Department's activities in fiscal year 2019, based on emissions reported for calendar year 2017.

So to reiterate, Madam Chair, the Department recommends that the Board initiate
rulemaking to reflect an increase from $800 to $900 for the operation fee for oil and gas well facilities that register in lieu of obtaining a permit; increase the administrative fee from $800 to $900 for facilities other than portable facilities or registered oil and gas well facilities that require permits; and increase the per ton fee from $38.24 up to an amount not to exceed $45.37 per ton of emissions for facilities other than portable facilities or registered oil and gas well facilities that require a permit.

We also request that the Board issue a Notice of Public Hearing on the proposed amendment, appoint a Hearings Examiner, and schedule a hearing as described in the draft notice. So are there any questions?

CHAIR DEVENY: Hillary.

MS. HANSON: I'm confused by the "not to exceed $45."

MS. ULRICH: Right. So that was something we talked with the stakeholders about, and we just wanted to give ourselves enough time to make sure that we knew everything that we needed to know to set that amount. There are some things, such as possibly Federal budget, that are
question marks for us, so we're unsure about, and
we want to give ourselves enough time, look at all
of our options, talk to stakeholders some more,
before we actually set that definite amount, and
put it into rule.

MS. HANSON: So at the time the rule is
adopted, do you anticipate that amount would be
specifically stated?

MS. ULRICH: Yes. That final adoption
notice will have a definite amount in there.

CHAIR DEVENY: Would you need to have
that specific amount ready for the hearings to
take place?

MS. ULRICH: So Madam Chair, I am not
sure. I think the goal is that we will have that
-- I think the public hearing is the place where
we would listen to public comment, to be engaging
with our stakeholders still, and then have it at
the adoption how that final amount prepared. And
I will look back to my Bureau Chief Dave Klemp
just to make sure that's correct.

MR. MULLEN: Madam Chair, members of the
Board, I am not Dave Klemp. I'm Norm Mullen. I'm
the attorney for the Air Program also.

The idea is, as I understand it, that
the amount not to exceed the $45 plus is a presumptive amount under Federal law for a reasonable amount for operating permit fees.

MR. KLEMP: Madam Chair, members of the Board. I am Dave Klemp, and I would like to clarify. There is a Federal presumptive amount. It is not $45.37 per ton, it is $49.85 per ton, and that is the amount the Federal government presumes that it takes to run an effective air quality program.

The reason we have asked for up to $45.37 per ton not to exceed is that we do -- there are constantly changes to not only the State General Fund, the Federal grant. Budgets have been finalized at the Federal level. Money has not yet been sent completely to all of the states.

We want to make sure that if we adjust that number down that we didn't run into a scope of notice issue.

So we wanted to be very clear, and we've been very clear with stakeholders. We do not intend to go above the $45.37 per ton, but it may come down at the hearing. We do expect to come in with a specific dollar amount, but we also understand that nothing is final until the Board
adopts it, which will hopefully be in October, so that bills can go out in November. Thank you.

MR. TWEETEN: Mr. Klemp, before you leave. So you're anticipating final adoption in October, and the fiscal year for which you'll be collecting these increased fees begins July 1st, correct?

MR. KLEMP: (Nods head)

MR. TWEETEN: So will you be billing the new rate for tons that were emitted prior to the effective date of the rule?

MR. KLEMP: Madam Chair, Mr. Tweeten. The short answer is yes. As Liz described -- and let me back up for a second.

The Air Quality Bureau used to come annually in front of the Board of Environmental Review. We have not been in front of the Board since 2009, so this is fairly new. Some folks are more familiar with it, sitting on the Board, than others. The time frames are pretty short. It takes three Board meetings, if you will, for us to finalize a fee. There's initiation, there's a hearing, and there's final action.

We completed our emission inventories in March of 2018 for this year. That is for calendar
year 2017 emissions. That is the tonnage that we will use to collect the fees and fund our appropriation, our State air quality fee appropriations.

So yes, we will be billing folks three months into the fiscal year to cover the remaining nine months of that fiscal year, and on emissions that are based on a year. So there is a year lag in there.

MR. TWEETEN: Okay. Thank you.

MR. KLEMP: If that makes sense. Thank you.

CHAIR DEVENY: I had a question on how the emissions are reported or collected to DEQ. Could somebody describe how that occurs?

MR. RASH: Madam Chair, members of the Board, my name is Hoby Rash, and once again, I'm the supervisor of our Field Services Section in Air Quality.

So the process -- in response to your question -- that we entertain to collect this information is, first of all, we send out a notice towards the end of the year that, "Hey, this is coming up. Please prepare your emission inventory information. Be ready for that."
And then based on typically requirements in the permits for each of these individual facilities, then facilities can then respond to us and supply their collected information for that previous year.

Typically that happens through an electronic online system. So we offer that. There is a grid there for people that list each of their emitting units, and then they can say, "For this emitting unit --" maybe it's a particular boiler or particular heater or something of that nature -- "we operated it this amount for this year, for the past calendar year, and that then resulted in an emission of 'X' many pounds, tons of each individual pollutant."

So at a very high level, that's how that comes about. We then take all the collected information from the various facilities, we add that up and say, "Here is what the total emissions were --" as Liz communicated to you earlier -- "for that calendar year for the entire state of Montana."

So we can go deeper if you want to.

That's kind of a high level --

CHAIR DEVENY: I just wanted to know if
it was self-reported or if DEQ collects the information.

MR. RASH: Self-reported. Yes.

CHAIR DEVENY: And just a followup question. I don't know if you're the one to answer it.

But the significant reduction in emissions since 2009, is that because of some facilities that were shut down, or improvements in technology, or do you track that? Do you know why the emissions have dropped?

MR. RASH: Madam Chair, I'm going to defer that to our Bureau Chief. I think your question is very perceptive. Once again, I think both of those are true, but I'll defer that to Dave Klemp.

MR. KLEMP: Yes, Madam Chair, members of the Board. Once again I'm David Klemp.

And the question is all of the above. There are facilities in this last year certainly that are no longer with us today. There have been facilities in the last ten years that are no longer with us today. There is also new facilities that come in. There's also been reduction in emissions. There is new Federal and
sometimes State regulations that apply that reduce emissions.

So it is a variety of factors. The economy is also a factor. It is based on how much somebody actually emits. And generally their production is tied to emissions in some loose sense. So combination of a bunch.

CHAIR DEVENY: Thank you. Do other Board members have questions for DEQ?

(No response)

CHAIR DEVENY: There is a request before us -- Actually maybe we'll have some public comment first. Would that be appropriate?

MS. CLERGET: Yes.

CHAIR DEVENY: Is there anybody here from the public that would like to speak on this issue before the Board?

MR. OLSON: Madam Chair, members of the Board. For the record, my name is Alan Olson. I'm the Executive Director of the Montana Petroleum Association.

And I'm going to start off by complimenting Liz Ulrich and Dave Klemp for the time that they've taken to come to Billings on a couple of occasions, and explain this fee increase
to our members. And I just can't tell you how much we appreciate their professionalism.

     We do have issues. You know, anything that's going to get into our hip pocket kind of gives us a little concern. And when we're looking at the oil and gas program, and I'm going to -- this particular piece is the production side -- we've got some people that are going to take a hit of $25,000, $30,000. That's a big hit.

     We've got concerns, and I've brought this up with Mr. Klemp on numerous occasions. And the people in this program are good people. But why do we run the oil and gas regulatory program out of Butte, 400 miles away from the action? That costs money. That costs money that our people have to pay.

     Some of the other producers that I've talked to, they're going to go in and take a look at all of their facilities, and there are a number of facilities that will be coming off line. So at the end of the day, the way we're kind of looking at it is the last man standing is going to pick up the tab.

     It is a good program. We appreciate the program. We have problems with the cost. We
would much rather DEQ run this program than the EPA. Their response time is fantastic. But there again, it is the cost. Any cost savings that I think the Department can come up with would be greatly appreciated and greatly supported.

So I think that's some of the things that I hope the Board keeps in mind, and the Department keeps in mind. So with that, Madam Chair, thank you.

CHAIR DEVENY: Thank you, Mr. Olson. Are there any other members of the public that would like to comment? I appreciate you keeping your comments fairly brief.

MS. TRENK: Madam Chair, members of the Board, my name is Peggy Trenk, and I'm here on behalf of the Treasure State Resources Association. And I kind of echo what Mr. Olson said about how much we appreciate the Department's outreach. They participated with our members in Billings not once, but twice. I'm sure they didn't come just for the doughnuts. I actually think that they wanted to get some input and they did.

They've done a great job of floating this out early, and coming back with the CAAAC
members. So we can't acknowledge that enough.

So just looking at the list of folks who are emitters, if you want to say that, and of the top 17, 14 of those are our members.

So we certainly are interested and concerned when you look at fee increases, but we do understand that it's important to run a robust program. And we appreciate the fact that the Department has kind of laid out where they're spending money, and what they're doing about trying to run an efficient program, and I'm sure that conversation is going to continue. We appreciate that.

So at this point, we support having this rulemaking effort go forward. I'm sure there will be continued conversations. But we do appreciate all of the work that's been done to date. Thank you.

CHAIR DEVENY: Thank you. Any other members of the public that wish to comment?

(No response)

CHAIR DEVENY: Board members, we have a request before us. Chris.

MR. TWEETEN: Madam Chair, just a comment I guess first. And I appreciate the
perspectives of the two members of the public who just spoke.

It is really important that to the extent those perspectives affect the wording of the regulation that's being proposed, that all of those concerns be laid on the record either in written form or as part of the testimony at the rulemaking hearing, because in the forming of the final rule, if the information isn't in the rulemaking record, it is very difficult for the agency to take it into consideration.

So I urge you to continue your level of participation in the process, and again, to the extent that they affect the content of the rule itself as opposed to decisions that the Department or the Legislature might have to make, that those matters be spread on the record.

So with that, Madam Chair, I'll move initiation of rulemaking.

CHAIR DEVENY: It has been moved. Is there a second?

MR. DEARMENT: I'll second.

CHAIR DEVENY: It's been moved and seconded. Further Board discussion. Dexter.

MR. BUSBY: Yes. I just want to make a
quick comment really to the Department. I think they've done a very admirable job of keeping their costs under control. I was actually involved in this process for quite a large number of years, from the beginning of the collection actually, and they've done a very good job of keeping their costs under control. I don't know if it had to do with the permit, or all the noise we made every time they raised the fees.

But I want to just compliment the Department on that. They've done an excellent job. I think they have challenges that they need to look at in the future. One of them is that you ratchet down your emissions. And they are going down. People go away, and technology improves. They may have to look at a different format, and that would call -- be required under legislation because this is a legislated thing.

So I think they need to look at not either a new funding source, but a different method of calculating their fees. So anyway, I think they've done a good job, and I would suggest we move forward.

CHAIR DEVENY: Any other Board comments?

MR. FELTON: Madam Chair, just a quick
comment. The DEQ recommendation also includes appointing a Hearing Officer, so I think that should be probably be part of the motion if we can.

CHAIR DEVENY: Yes, you're right. Let's include that. Chris, are you willing to include that in your motion?

MR. TWEETEN: Certainly. I accept the appointment of the Board's attorney as our Hearing Officer for purposes of conducting a rulemaking hearing as a friendly amendment.

CHAIR DEVENY: Is there a second to the friendly amendment?

MR. DEARMENT: I'll second that.

CHAIR DEVENY: So it's been moved and seconded that we have DEQ initiate rulemaking on the air quality fees, and that Sarah Clerget, our Board attorney, be assigned as the Hearings Examiner on this for this case. Any further discussion?

(No response)

CHAIR DEVENY: If not, all those in favor of the motion, signify by saying aye.

(Response)

CHAIR DEVENY: Those opposed.
(No response)

CHAIR DEVENY: Motion carries. Thank you. Why don't we take a ten minute break. We'll come back at ten after ten.

(Recess taken)

CHAIR DEVENY: Lindsay, do you want to check in with Board members.

MS. FORD: Chris Deveny.

CHAIR DEVENY: Here.

MS. FORD: John Felton.

MR. FELTON: Here.

MS. FORD: Dexter Busby.

MR. BUSBY: Here.

MS. FORD: Hillary Hanson.

MS. HANSON: Here.

MS. FORD: John Dearment.

MR. DEARMENT: Here.

MS. FORD: Chris Tweeten.

MR. TWEETEN: Here.

MS. FORD: Tim Warner.

(No response)

MS. FORD: We still have a quorum.

CHAIR DEVENY: So our next action item is the petition for rulemaking that was made by the Cottonwood Environmental Law Center and the
Gallatin Wildlife Association. And we had the request last meeting, and we postponed making a decision making, and asked DEQ to put together some information, and for Sarah to do some research.

So I'll turn it over to Sarah right now and she can kind of fill us in, and we'll decide what's next. And just for purposes, if you look at her flow sheet, it is on Page 16 of our Board packet.

MS. CLERGET: And I don't want to reiterate too much what I said in the memo and in the flow chart. I'm a visual learner, and so that's why you're going to see flow charts from me a lot. It's Page 20.

So the initial question for you today I think is just in those top four things on the flow chart, and No. 1 on the memo, which is the question of sufficient credible information. So if anybody has any questions about that, the memo or the flow chart, to answer, I'm happy to answer those.

CHAIR DEVENY: Why don't you go ahead and just describe the memo in case people haven't read it.
MS. CLERGET: Sure. Essentially there is three -- there's one big statute on this, and so my memo goes through and kind of tracks the different sections of the statute. Essentially there is three steps to this process: An initial review to determine whether the petition contains sufficient information; and then if it does, you go forward to step two. If it doesn't, you issue a written finding.

The second step is a decision to adopt or reject the petition, and there is a number of steps if you decide to adopt it, sort of you indicate that you're going to adopt it, and then go through a bunch of steps, and then actually adopt it.

And then the step three is the MAPA rulemaking process, which you guys are all familiar with.

So step two is kind of the complicated one, and that's a little bit different than the normal process; but I don't think you need to worry about that yet until you make the decision about whether or not there is sufficient credible information contained in the petition.

CHAIR DEVENY: Then at our last meeting,
I think we felt that the proposal, the petition proposers were maybe not aware that the EIS was required to be paid for by them, and so we asked DEQ to just give an estimate of what that might be. And Tim, do you want to talk to that?

MR. DAVIS: Sure. Madam Chair, members of the Board, Tim Davis, Water Quality Division Administrator.

So we consulted, at the Board's request, we consulted with the MEPA program within the Department, and they gave us an estimate based on comparable EIS's as to what they thought it would cost. The estimated cost is $250,000 to complete the EIS.

And I'll put that a little bit in perspective. A recent coal EIS cost $1.8 million. So when you think of that as a high estimate, that was taking into account using some of the work that was already done, but is over eleven years old. So they gave us that estimate.

You also directed us to attempt to meet with the petitioners prior to this meeting to discuss it with them. They were unable to meet prior to this meeting. We tried to meet with them this week, and they indicated were not going be
able to be here today.

But that's the estimate. And if you remember, in the statute, they are responsible for paying the estimated amount. If the amount exceeds, the actual amount exceeds the amount of the estimate, they're responsible for paying that. However if the actual amount is less than the estimate, then we would refund that.

So that's what we came up with. We did provide this to the petitioners as well.

CHAIR DEVENY: Okay. Thank you. And I understand the petitioners are not here today.

MR. TWEETEN: Madam Chair, I have a question for Mr. Davis, please. Can you take us through a little bit what happened with the 2007 petition. I know it was accepted by the Board and went through the EIS process. And the EIS process, I have to confess I didn't read it word for word, but I did look at the executive summary, and scanned it, and it looked like the preferred alternative from the EIS was for a designation. And I'm not aware of what happened after that.

Can you fill me in a little bit on what happened?

MR. DAVIS: Madam Chair, Mr. Tweeten.
essentially the Board postponed any adoption over
time, and it was really at the request -- it is my
understanding. I wasn't here at the time -- but
at the request of the petitioners themselves to
give them and other stakeholders the opportunity
to work together to come with up with alternatives
to the adoption of the ORW, which they have done.

And eventually the Board rescinded and
got rid of the petition itself. But the
stakeholders worked pretty hard since the original
petition to come up with proposals, and they just
this last year came out with the report and
suggestions for how to deal with wastewater in the
system up in Big Sky.

MR. TWEETEN: Okay. Thanks.

CHAIR DEVENY: Hillary has a question.

MS. HANSON: I guess I'm a little
unclear on the adoption or non-adoption of the
petition. Is that a separate issue from whether
or not they can pay for the EIS?

MS. CLERGET: I think the way that we
talked about it at last meeting when Cottonwood
was here was if they're not going to be able to
fund this, would they like to withdraw their
petition, because practically it would seem like
it would not make sense for the Board to adopt a petition if they can't carry through. And it is certainly their burden.

So without them here, I don't know if they are willing to do that, or if their lack of presence indicates anything about that. But I would say the Board might be able to consider it.

Given what they heard last time, what the Board heard last time about the ability to pay, and the cost that you've heard now, it might be that there isn't sufficient information in the petition to make the Board believe that it is in fact possible to take the petition forward, so you might be able to consider it in that context.

But statutorily the decision that the Board has to make is whether or not there is sufficient information in the petition.

MS. HANSON: Do we have to make the decision at this meeting, or could we also say we would like to have the petitioners present before making that to get an answer from them on whether or not they would like to withdraw the petition?

MS. CLERGET: I think that's within your purview to decide.

MR. DEARMENT: I was thinking the same
MR. TWEETEN: So there is no time limit between the filing of the petition and the time at which the Board decides to go forward.

MS. CLERGET: No. And we discussed this a little bit at the last meeting, or it might have been the meeting before. In MAPA generally there is a timeline, but this statute has such a different process that I think it takes it out of the normal MAPA rulemaking process, and there isn't the timeline in the statute. So I think we're okay.

CHAIR DEVENY: John, did you have a comment?

MR. DEARMENT: Yes, Madam Chair. I was just going to second what Hillary said, and I'm kind of interested in giving Cottonwood some more time to see if they would like to give us their thoughts on their ability to pay for the EIS, and if they'd like to continue or withdraw the petition.

CHAIR DEVENY: I think that seems kind of reasonable, but at the same time, I just want to caution the Board that that cannot be a reason for us to deny the petition, I don't believe, once
we decide to proceed or not proceed with that.

MR. TWEETEN: Madam Chair, may I?

CHAIR DEVENY: Chris.

MR. TWEETEN: I think that's correct.

And I would say that having read the petition, I think it marshals strong arguments in favor of the Gallatin River.

But I think there is this question as to whether we'll just be spinning our wheels and wasting time if we go forward with it substantively, and the decision is ultimately made that they cannot pay for the EIS. We don't have authority to waive that provision in the statute. The Legislature has said that has to be done, and if they can't do it, then the EIS can't proceed and the statute is stymied at that point.

So I'm prepared to move that we carry this agenda item over to the next meeting, and that we ask DEQ to continue to seek dialogue with the petitioners to find out whether, in light of the estimate for the EIS, they intend to proceed with this petition or not.

CHAIR DEVENY: I would second that motion. I think that's a good one. And I would like to ask DEQ if they would agree to make a very
concerted effort to get in contact with them, and get information from the petitioners, and then ask them to appear at the next meeting if it is possible.

MR. DAVIS: Madam Chair, we will do so.

CHAIR DEVENY: Is there any other discussion, Board members, on the motion?

(No response)

CHAIR DEVENY: I guess before we vote, are there any public comments on this particular issue?

(No response)

CHAIR DEVENY: Hearing none, there is a motion before the Board, and it has been seconded. All those in favor, signify by saying aye.

(Response)

CHAIR DEVENY: Any opposed?

(No response)

CHAIR DEVENY: None. Okay. Motion carries. We'll delay this until the next meeting.

Moving right along, Board Counsel update. Sarah.

MS. CLERGET: I don't have anything.

CHAIR DEVENY: Surely you jest.

MS. CLERGET: Questions I can answer,
but other than that, I don't have anything.

CHAIR DEVENY: Does anybody have any questions of Board Counsel?

(No response)

CHAIR DEVENY: Hearing none, we'll move on. We will now open this meeting up to any members of the public who might wish to comment on any issue that hasn't been before us today. No contested cases comment is allowed. Any interested people from the public that want to comment?

(No response)

CHAIR DEVENY: Hearing none, are there any other issues that the Board would like to discuss at this time? Hillary.

MS. HANSON: It is not really another issue. I was just going to request Lindsay, for the Board packet next month, if we're having this petition back on, do you mind re-including the petition in this? I did not save it, and so haven't read it since over a month ago.

MS. FORD: Yes, I can do that.

CHAIR DEVENY: Anything else?

(No response)

CHAIR DEVENY: I will entertain a motion
to adjourn if anybody is interested in that.

MR. TWEETEN: So moved.

MS. HANSON: Second.

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

(Response)

CHAIR DEVENY: Any opposed?

(No response)

CHAIR DEVENY: Thank you very much for a very good meeting.

(The proceedings were concluded at 10:20 a.m.)

* * * * *
CERTIFICATE

STATE OF MONTANA

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 - 58 - pages contain a true record of the proceedings to the best of my ability.

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

________________________________________

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