BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING
February 8, 2019

TRANSCRIPT OF PROCEEDINGS

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
February 8, 2019
9:00 a.m.

BEFORE CHAIR CHRIS DEVENY,
BOARD MEMBERS JOHN DEARMENT,
CHRIS TWEETEN, DEXTER BUSBY,
and HILLARY HANSON

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

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(Ms. Hanson not present)

CHAIR DEVENY: Welcome everybody to the Board of Environmental Review. I'm Chris Deveny, and I'm the Chair, and I'll call the meeting to order. And Lindsay, would you please take roll call.

MS. FORD: Chris Deveny.

CHAIR DEVENY: Here.

MS. FORD: Dexter Busby.

MR. BUSBY: I'm here.

MS. FORD: John Dearment.

MR. DEARMENT: Here.

MS. FORD: Chris Tweeten.

MR. TWEETEN: Here.

MS. FORD: Hillary Hanson.

(No response)

MS. FORD: Hillary is on her way. Roads have not been ideal, so she will be here. Tim Warner.

(No response)

MS. FORD: So we have four members present. We do have a quorum.
CHAIR DEVENY: Let's go around and have introductions to see who else might be here. We'll start with George.

MR. MATHIEUS: George Mathieus, Department liaison.

MS. BOWERS: Kirsten Bowers, DEQ attorney.

MS. BOWDEN: Susan Bowden, DEQ Enforcement.

MS. McCARTHY: Mindy McCarthy, DEQ.

MR. HAYES: Ed Hayes, Acting Chief Legal Counsel.

MR. MOSER: Kurt Moser, DEQ attorney.

MS. CHRISTOFFERSON: Sarah Christopherson, DEQ attorney.

MS. SCHERER: Sandy Scherer, DEQ.

MR. YDE: Chris Yde, DEQ.

MR. WHITTAKER: Nick Whittaker, DEQ attorney.

MR. PETTIS: Aaron Pettis, DEQ attorney.

MR. LONGCAKE: Brad Longcake, Montana Petroleum Marketers and Convenience Stores.

MS. KELLEY: Myla Kelly, DEQ.

MS. DEVANEY: Ranie Devaney, DEQ.

MS. TRENK: Peggy Trenk, Treasure State
Resources Association.

MR. TIEZ: John Tietz, Browning, Kaleczyc, Berry and Hoven.

MS. LAUGHNER: Cathy Laughner, Browning, Kaleczyc.

MS. MARQUIS: Vicki Marquis with Holland and Hart.

MR. LEAP: Landy Leap with Copper Ridge and Reflections at Copper Ridge.

MS. REYNOLDS: Aimee Reynolds, DEQ.

MR. URBAN: Eric Urban, DEQ.

MR. DAVIS: Tim Davis, DEQ.

MR. KENNING: Jon Kenning, DEQ.

MS. McLAUGHLIN: Joanne McLaughlin, DEQ.

MR. FLEMING: Derek Fleming, DEQ.

MS. CLERGET: Sarah Clerget, I'm with the AG's office, Counsel for the Board.

CHAIR DEVENY: Thank you. Are there any members of the public on the telephone that would like to identify themselves?

(No response)

CHAIR DEVENY: Hearing none, I think we probably have everybody here. We'll move on to the minutes. Are there any additions or corrections to the minutes that Board members
would have?

(No response)

CHAIR DEVENY: Any public comment on the minutes or suggestions for changes by the public?

(No response)

CHAIR DEVENY: Hearing none, would someone entertain a motion.

MR. DEARMENT: So moved.

MR. BUSBY: Second.

CHAIR DEVENY: It's been moved and seconded to approve the minutes. All those in favor, signify by saying aye.

(Response)

CHAIR DEVENY: Any opposed?

(No response)

CHAIR DEVENY: Motion passes. The minutes are approved. Let's see. The next order of business then will be update on our contested cases, and we'll turn that over to Sarah.

MS. CLERGET: So going through the briefing items, A(1)(a) is CMG. There is a scheduling order in this case, and the parties are proceeding according to that scheduling order.

Fischer Land Development, they have come to an agreement in principle. The status
conference is set for February 11th. I tried to
have it done for you before this meeting but they
needed a little more time. So hopefully that one
will be settled shortly.

Wagoner Family settlement was dismissed
with prejudice, which means that it's done. They
can't come back.

Little Bear, they were supposed to issue
me a status report yesterday, but that did not
happen, so I will be following up with them.
Hopefully it will be settled shortly.

Continuing on to two non-enforcement
cases, Absaloka Mine is still stayed. We're
waiting for the decision in MEIC and Sierra Club
v. DEQ and Western Energy.

Signal Peak, they have submitted the
first summary judgment motions. That's not fully
briefed yet, but it will be in front of me for
summary judgment in about a month.

Western Energy, I have the proposed
FOFCOLs, and that's ready for my decision. It
will be in front of you guys at the April meeting,
so I just want to put a plug in for everybody
being here in person because that's a three party
case, and there is going to be a lot of moving
pieces. So having everybody here in person would be easiest.

    MR. TWEETEN: When was that?

    MS. CLERGET: The April meeting.

Montanore, their proposed FOFCOLs are due to me, and we have a hearing set on them. Essentially their closing arguments are set for March 22nd, so that will be in front of me for decision shortly.

Laurel Refinery I want to talk about in combination with the new contested case that we have, CHS, but I'll wait until we get to the new contested case to talk about that.

    (Ms. Hanson present)

    MS. CLERGET: But essentially this is a continuation. There is one of the six appealed issues in the Laurel Refinery case remains on the original permit in this case.

    My understanding is that we have new Counsel as well in this case, that Vicki Marquis is taking over this case, so we'll discuss that when we get to CHS.

    Golden West Properties, there's a scheduling order in place, and they're proceeding.

    Columbia Falls Aluminum Company, I asked
the parties to be here today because I wanted them
to update you on the status. So I'd ask -- I
don't know if it's going to be Cathy or John --
and Kurt to tell the Board the status, current
status of that case.

CHAIR DEVENY: While we're waiting, I
would just note that we've been joined by Hillary
Hanson, Board member. Welcome.

MS. HANSON: Thank you.

MR. MOSER: Madam Chair, members of the
Board, I'm Kurt Moser. I represent DEQ in this
Columbia Falls matter.

If you recall, several meetings ago this
matter was stayed by the Board until the end of
February, in the transcript. That's what the
transcript indicated.

The parties have engaged in discussions
about the site, I believe in October, possibly
November -- Let's see. Yes, in October, members
of DEQ staff visited the site, walked over the
property with the representatives of CFAC.

As a result of that site visit, the
agency determined that it would no longer need to
have a discharge permit at the site; and because
of that, the agency filed a notice of intent to
terminate the permit on January 28th. That is currently out for public notice, and the public notice period for that closes on February 27th.

It is the agency's opinion that --
Again, this is the agency's opinion -- that if that matter goes forward, and the permit ultimately is terminated, then that would moot out this case; but obviously that's the agency's opinion. And I guess that's the update on the case at this point.

MS. LAUGHNER: Good morning, Cathy Laughner for Columbia Falls Aluminum Company. I don't really have anything to add. We'll wait until the public comment period closes. Thank you.

MS. CLERGET: So that's your status update on Columbia Falls. That completes my updates. The next case is an update for DEQ to make.

MS. BOWERS: Madam Chair, members of the Board, I'm Kirsten Bowers, DEQ attorney. And I'll give you an update on the MEIC versus DEQ and Western Energy case that's appealed to the Montana Supreme Court.

That matter is fully briefed before the
Supreme Court at this point. We just received an order for oral argument, and that is set for March 13th at 9:30 a.m. So that's where we're at now. Thank you.

CHAIR DEVENY: Thank you.

MS. CLERGET: That completes the contested case update.

CHAIR DEVENY: Okay. Let's move on then to the rule that the Department wants us to extend comment period for 45 days on. So if we could have a brief presentation by the Department.

MR. URBAN: Madam Chair, members of the Board, for the record, my name is Eric Urban, that's U-R-B-A-N, Bureau Chief here with the Water Quality Planning Bureau, DEQ.

As you recall, at the December Board meeting, the Board elected to initiate rulemaking for six parameters in groundwater water quality standards. That comment period is open and completes today. Given the interest that we received on this comment period, we are requesting the Board extend that comment period by 45 days.

One thing of note is the Board packet does not include an additional hearing. We would like the Board to also include the second hearing
on this matter. So I guess in summary, we're requesting an additional 45 days and a second hearing to accommodate the interest that we've received, and given that many of the stakeholders are quite busy with the session. So if you have any questions, I'll be available.

CHAIR DEVENY: We'll have questions from the Board, then we'll have public comment, and we'll discuss a motion.

MR. TWEETEN: Yes. MAPA has certain deadlines in it in the rulemaking process with respect to when the final adoption has to take place relative to the publication of the notice and intent to engage in rulemaking.

How does the extension fit together with those deadlines? Are those deadlines automatically extended if the Board votes to extend the comment period, and hold another hearing?

MR. URBAN: Yes. Madam Chair, Mr. Tweeten, I'm going to look over my shoulder after I answer. But the MAPA process requires us to have six months generally, and either way with this extension, we'll still be within that six months, and that looks right.
MR. TWEETEN: Thank you.

CHAIR DEVENY: Any other questions from Board members?

(No response)

CHAIR DEVENY: Are there any members of the public who wish to speak on this matter? I'd like you to limit it to the extension and the hearing.

MS. MARQUIS: Certainly. Madam Chair, members of the Board, my name is Vicki Marquis. I'm an attorney with Holland and Hart. We represent Talen Montana, who is a part owner and operator of the steam electric generation facility in Colstrip, Montana.

And groundwater remediation is of utmost importance to Talen Montana. Since 2000, they've spent about $300 million on environmental protection. About half of that has gone towards groundwater remediation. So they take their commitment to groundwater remediation very seriously.

They also take their commitment to public health very, very seriously, because most of the more than 3,000 jobs at the facility support our local jobs. So public health means
they're talking about impacts to their neighbors, and their friends, and their families.

Talen Montana supports and is very thankful for the Department's proposal for the 45 day extension and a second hearing. We appreciate the additional time. We feel that it will help us go through the information, and provide more thoughtful comments to the Board.

We also request additional information. Going through the rulemaking package, we had some questions, and some more information would be more helpful to us in considering the rulemaking and providing good comments to this Board, specifically just in four areas.

Briefly those are consideration of the economics of waste treatment. As required by Montana Code Annotated 75-5-301 subparagraph (2), there needs to be consideration of the economics of waste treatment and prevention when enacting new water quality standards, and we didn't see mention of that in the rulemaking package, so we would like some more information on that, if possible.

We also have questions about the Department's analysis of the more stringen...
Federal requirement, and specifically how these rules meet the requirements for becoming water quality standards in the statute, and this is at 75-5-203 subparagraph 2(a) and (b). There is a requirement to show that the standards will protect public health, and that they will mitigate the harm to public health.

And it is Talen Montana's understanding, at least in the Colstrip area, the naturally occurring background levels are higher than the standard proposal, and so the standard proposal does nothing to fix the naturally high background levels. So our question is: How does it mitigate harm to the public health?

The third area we have questions on is what effect does this have on groundwater classification. Groundwater is classified numerically one through four, and at least the first three classifications, one through three, include some designation of use for drinking water. And so if these standards go into place, for example Class 1 groundwater must be maintained suitable for private and public drinking water with little or no treatment.

Again, it's our understanding that
background levels are higher than the standard, so our question is how does that affect the classification, because now treatment would be required for that water to meet the standard.

And then our fourth and final question is: How does this coincide with regulation that this Board has authority to enact under public water supplies? That's found at 75-6-103 Paragraph (2)(a).

And it is our understanding from the Department's rulemaking package that the impetus is from exposure through drinking water only, and so the question is how does this dovetail with public water supply regulations, and would that be a more appropriate place to start.

Again, if we can have that information at the beginning of an extended comment period, that would be more helpful to us to review the information, and provide thoughtful responses to the Board. Thank you.

CHAIR DEVENY: Thank you. So the issue before us today we need to -- I'm sorry. Ms. Trenk.

MS. TRENK: I'll be quick. Madam Chair, members of the Board. I'm Peggy Trenk, T-R-E-N-K,
here on behalf of the Treasure State Resources Association. I've also been asked to extend the support of the Montana League of Cities and Towns and the Montana Association of Realtors for the requested extension. We would appreciate the additional time. Thank you.

CHAIR DEVENY: Thank you.

MR. OLSON: Good morning, 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 we, too, are here to support the Department's recommendation or wish to extend the rulemaking by an additional 45 days. Thank you, Madam Chair.

CHAIR DEVENY: Are there other --

MR. LONGCAKE: Hello, Madam Chair, members of the committee. My name is Brad Longcake, L-O-N-G-C-A-K-E. I'm the Executive Director for the Montana Petroleum Marketers and Convenience Store Association.

We want to thank the Department for allowing us the opportunity to testify today in support of the extension of 45 days. It will just give us another opportunity to consult with our consultants, and see what we can do to help make
this a better, more efficient process. So again,
thank you for consideration. We support the
amendment. Thank you.

CHAIR DEVENY: Are there any other
members of the public that wish to comment?

(No response)

CHAIR DEVENY: Any questions of the
Board?

MR. TWEETEN: Madam Chair, just an
observation, I guess, with respect to Talen's
request for information.

At least three ways that that can be
advanced. I guess one would be communicating
directly with the Department, and requesting that
information; another would be providing verbal
comments at the rulemaking hearing, which the
Department and the Board would then be required to
respond to in writing under MAPA; and the third
would be to provide those comments and requests
for information in writing as part of the public
comment on the proposed rule.

And again, if that was done, the Board
and the Department would be required to respond to
those requests in writing. I understand the
timeliness concern that you have, but pose those
questions to the Department, and if the
information isn't forthcoming, they have other
available remedies available to them to make sure
that the record reflects responses to those
questions.

CHAIR DEVENY: Thank you, Chris. I
would like to entertain a motion then that we
approve the request of the Department to extend
the comment period on the Administrative Rules of
Montana pertaining to groundwater standards
incorporated by reference in the Department's
Circular DEQ7; and also hold a second hearing for
this, and the comment period would be extended 45
days.

MR. TWEETEN: Madam Chair, one other
question, I guess. Is there a date certain that
the Department has in mind for a second hearing?
Because ordinarily the notice of rulemaking
includes the date of the public hearing, so that
all of the deadlines that line up in MAPA are
clearly set forth, so everybody understands. So
we should include that in the order if we grant
the request.

MR. URBAN: Madam Chair, Board Member
Tweeten, the proposed hearing would be March 19th
at 2:00 p.m.

CHAIR DEVENY: We'll include that date in the motion then.

MR. TWEETEN: I'll move for the extension and the additional hearing on the date stated by the Department.

MR. BUSBY: I'll second.

CHAIR DEVENY: Probably we need to assign this to the Hearing Officer then, too. Can we amend that motion then to add that we're also going to assign the hearing to our Hearing Officer?

MR. TWEETEN: Sure. Certainly.

CHAIR DEVENY: I would propose that as an amendment to the motion.

MR. BUSBY: I'll second.

CHAIR DEVENY: All those in favor then -- is everybody clear what we're voting on? All those in favor of the motion, please signify by saying aye.

(Response)

CHAIR DEVENY: Opposed.

(No response)

CHAIR DEVENY: Motion carries. I would like to thank DEQ for recognizing that you needed
to do the extension, and try to get things sorted out before we go further on this. I'm going back to Sarah now to talk about the new contested case.

MS. CLERGET: Yes. So this new contested case, if you look at the permit number under this new contested case and the permit number under Item (2)(e) in the briefing item of my update, you'll notice that the permit number is the same; and so the obvious question is what the relationship is between these two cases, and why there needs to be two cases, or whether they can be combined.

And I have put those questions to the parties, and asked them to be here today to answer them for you, so that you can decide whether you're going to keep it, whether you're going to assign it to a Hearing Examiner, and if they're going to assign it to a Hearing Examiner, whether it's for all purposes, or just procedural purposes.

In making those decisions, I wanted you to know whether or not it will be combined with (2)(e), either substantively or for procedural purposes. So with that, I'm going to turn it over to the parties, if they wouldn't mind answering
those questions.

    CHAIR DEVENY: Go ahead.

    MR. MOSER: Madam Chair, members of the Board, my name's Kurt Moser, and I represent the agency and DEQ in the CHS matter, both the older case and then the newer case.

    Just for I guess summary purposes, the original case was the appeal of the renewal of an MPDES permit, so it was basically the Department's action to renew the entire permit, and CHS had appealed six elements of that renewal to this Board; and the parties basically settled on five of those.

    This Board approved those changes, and then modified the permit to account for those five, so those stipulations between the parties essentially in the form of consent decrees. The Board issued an order in that case doing that, and that remained --

    There was one matter that remained, and that matter is stayed until I believe February 25th. I think it is in the order with the agenda.

    During that period of time, though, last I believe -- I can't remember exactly when we issued it, but it was sometime last fall, I think
we issued -- or late last fall, we issued a
modification to that permit, and then CHS appealed
portions of that modification to the permit, so
that's where we stand right now.

And Counsel for -- as the Hearing
Examiner, Board attorney noted -- the Counsel has
changed on that case as well, and Counsel for CHS
is present here, Vicki Marquis. So I guess I'm
open for any questions that you have at this
point.

CHAIR DEVENY: Let's hear from Ms.
Marquis, and then maybe we'll have questions.
Thank you.

MS. MARQUIS: Good morning, Madam Chair,
members of the Board. I'm Vicki Marquis here
representing Cenex Harvest States regarding both
the older appeal and the newer appeal that Mr.
Moser just spoke about.

We did file a notice of substitution of
Counsel -- I believe that was filed yesterday --
transferring the older matter to my representation
of Cenex Harvest States.

Mr. Moser described the situation
accurately. There were the six items. The one
that was stayed and was not resolved in the first
appeal concerned arsenic limits, and that issue has also been appealed on the newly issued permit. We do want to keep both of those appeals going at this time. Just to be clear, that there has been no break in the stay of those arsenic limits. That's very important for the refinery. We don't have a problem, however, with consolidating these appeals for procedural matters. And I'm open for any questions if you have them.

CHAIR DEVENY: Any questions from the Board?

(No response)

CHAIR DEVENY: Sarah, could we get your take on how that consolidation for procedural matters will work.

MS. CLERGET: Yes. I think it is exactly that. You just say we're -- you can assign the case however you want to assign it or keep it, but that the cases will be combined for procedural purposes.

CHAIR DEVENY: Does that make it more straight forward for the work that you do and for the Board?

MS. CLERGET: I think so, yes, because
there will be overlapping evidentiary issues that are -- obviously Counsel is the same -- so to just put it all in one place will I think be easier for everybody to handle. Just to be clear, there's still two cases, we're just dealing with them together.

CHAIR DEVENY: Right. And does DEQ have any issues with this?

MR. MOSER: Madam Chair, members of the Board, DEQ doesn't have any issues with it. I guess just as a point of clarification, there is an issue, and the new case is really the appeal of a major modification of a permit.

I guess the important part of that is more of something that probably will get fleshed out more through the Hearing Examiner, possibly through the motion practice in the case, simply because whenever there is a major modification of a permit, the scope of the appeal is limited to the major modification, and it is not like sort of the entire piece of the permit.

But I believe that procedurally, I think what the Board is contemplating here is acceptable to the agency.

CHAIR DEVENY: Okay. Thank you. Board
questions, discussion, or suggestions for a motion?

MR. DEARMENT: I would move we assign it to Sarah as the Hearings Examiner, and combine them as suggested.

CHAIR DEVENY: For procedural matters?

MR. DEARMENT: For procedural.

MS. CLERGET: You're assigning it to me for its entirety, or just for procedural purposes?

MR. DEARMENT: In its entirety.

CHAIR DEVENY: I'll second that. Any discussion?

(No response)

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

(Response)

CHAIR DEVENY: Opposed.

(No response)

CHAIR DEVENY: Motion carries.

MS. CLERGET: We're now ready for Copper Ridge, so if we need to take a five minute break to let everybody set up.

CHAIR DEVENY: Sounds good. Let's take a five minute break, and we'll take another break in a little while.
(Recess taken at 9:31 a.m.)

* * * * *

(Case BER 2015-01 WQ Reflections at Copper Ridge and BER 2015-02 WQ Copper Ridge Development Corporation in separate transcript and reconvened at 1:50 p.m.)

MS. CLERGET: I don't have anything for your Counsel update.

CHAIR DEVENY: Does anybody from the public wish to comment on anything other than the contested cases we talked about today?

(No response)

CHAIR DEVENY: Seeing none, are Board members ready to adjourn?

BOARD MEMBER TWEETEN: Move we adjourn.

BOARD MEMBER HANSON: Second.

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

(Response)

CHAIR DEVENY: Opposed.

(No response)

CHAIR DEVENY: Thank you everybody for your patience.

(The proceedings were concluded at 1:52 p.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 - 26 - 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 ________, 2019.

____________________________________

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public

My commission expires

March 9, 2020.
grant - 18:22
guys - 6:22

half - 12:18
handle - 24:4
Hanson [7] 1:19, 2:4, 2:18, 7:14, 8:8, 8:9, 26:17
happen - 6:10
having - 7:1
hear - 22:11
Heard - 1:10
Hearings - 25:4
Helena - 1:12
Hello - 16:16
hereby - 27:7
herein - 27:9
hereunto - 27:9

January - 9:1
Joanne - 4:14
John [4] 1:17, 2:14, 4:2, 8:3
Join - 8:7
Jon - 4:13

K
Kaledycz [2] 4:3, 4:5
KELLEY - 3:23
Kelly - 3:23

L
L-O-N-G-C-A-K - 16:18
Landy - 4:8
League - 16:3
Lap [2] 4:8, 4:8
least [3] 14:9, 14:18, 17:12
Legal - 3:11
levels [3] 14:10, 14:13, 15:1
liason - 3:5
limit - 12:7
limited - 24:19
January - 9:1
Joanne - 4:14
John [4] 1:17, 2:14, 4:2, 8:3
Join - 8:7
Jon - 4:13

M
maintained - 14:22
making - 20:21
maybe - 22:12
McCarron [2] 3:10, 3:10
meet [2] 12:15, 14:21
meeting [6] 1:5, 2:7, 6:2, 6:22,
7:4, 10:17
meetings - 8:13
member [4] 8:8, 18:24, 26:16, 26:17
mention - 13:21
Metcalf - 1:10
Mind - 3:10
Mine - 6:13
modified - 21:15
Montana [16] 1:2, 1:12, 3:21, 9:23, 12:12, 12:14,
Montana's - 14:8
Montanore - 7:5
month - 6:19
most - 7:29
Moser [9] 3:13, 3:13,
motions - 6:17
moved [3] 5:8, 5:10, 26:19
moving - 6:25
MPDES - 21:9
Myla - 3:23

N
name's - 21:4
named - 27:9
naturally [2] 14:9, 14:12
neighbors - 13:1
newly - 23:2
Nick - 3:18
not enforcement - 6:12
notarial - 27:16
noted - 22:6
nothing - 14:12
November - 8:19
numerically - 14:18