BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING
MAY 31, 2019

TRANSCRIPT OF PROCEEDINGS

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
May 31, 2019
9:00 a.m.

BEFORE CHAIR CHRIS DEVENY,
BOARD MEMBERS JOHN DEARMENT,
CHRIS TWEETEN, DEXTER BUSBY,
MELISSA HORNBEIN, DAVID LEHNHERR;
and HILLARY HANSON (By phone)

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: Welcome to the Board of Environmental Review. I will call this meeting to order. Lindsay, could you do a roll call, please.

MS. FORD: Chris Deveny.

CHAIR DEVENY: Here.

MS. FORD: Dexter Busby.

MR. BUSBY: Here.

MS. FORD: Hillary Hanson.

(No response)

MS. FORD: Hillary Hanson.

MS. HANSON: Here.

MS. FORD: John Dearment.

MR. DEARMENT: Here.

MS. FORD: Chris Tweeten.

MR. TWEETEN: Here.

MS. FORD: Melissa Hornbein.

MS. HORNBEIN: Here.

MS. FORD: David Lehnherr.

MR. LEHNHERR: Here.

MS. FORD: We have seven Board members present. We do have a quorum.

CHAIR DEVENY: I think that might be a
record. Let's go around and introduce other folks that are in the room. Maybe Aleisha, we'll start with you and go around the room.

MS. SOLEM: Aleisha Solem, Agency Legal Services.

MS. CLERGET: Sarah Clerget, Agency Legal Services, Board Attorney.

MR. MATHIEUS: George Mathieus, Department Deputy Director, Board liaison.

MS. FORD: Lindsay Ford, Board secretary.

MS. SCHERER: Sandy Scherer, DEQ.

MS. BOWERS: Kirsten Bowers, DEQ Legal.

MR. MULLAN: Norm Mullan, DEQ Legal.

MR. MOSER: Kurt Moser, DEQ Legal.

MR. MARTIN: John Martin, Holland and Hart for Western.

MR. YEMINGTON: Samuel Yemington, Holland and Hart for Western.

MR. STEERE: Wade Steere with Western Energy Company.

MS. CHRISTOPHERSON: Sarah Christopherson, DEQ Legal.

MS. MAVENCAMP: Terry Mavencamp, DEQ Remediation.
MR. MORGAN: Jon Morgan, DEQ Legal.

MS. BOWDEN: Susan Bowden, DEQ Enforcement.

MR. VANOORT: Martin VanOort, DEQ Coal.

MS. HINZ: Emily Hinz, DEQ Coal.

MS. TRANK: Peggy Trank, Treasure State Resources Association.

MR. OLSON: Alan Olson, Montana Petroleum Association.

MR. KLEMP: David Klemp, DEQ.

MR. YDE: Chris Yde, DEQ.

MS. ULRICH: Liz Ulrich, DEQ.

MS. MERKEL: Julie Merkel, DEQ.

MR. LUCAS: Mark Lucas, DEQ Legal.

MR. PETTIS: Aaron Pettis, DEQ Legal.

MR. REGENSBURGER: Eric Regensburger, DEQ Water Quality Standards.

MR. FERGUSON: Cody Ferguson, Northern Plains Resource Council.

DR. SUPLEE: Mike Suplee, Water Quality Standards, DEQ.

MR. KENNING: Jon Kenning, DEQ Water Quality.

MS. McLAUGHLIN: Joanna McLaughlin, DEQ.

MR. FLEMING: Derek Fleming, DEQ.
MR. DAVIS: Tim Davis, Water Quality Division, DEQ.

MS. SULLIVAN: Lauren Sullivan, DEQ Water Quality Standards.

MS. KELLY: Mila Kelly, DEQ Water Quality Planning Bureau.

MR. HERNANDEZ: Shiloh Hernandez, Western Environmental Law Center, for the Sierra Club and MEIC.

MR. JOHNSON: Derf Johnson, MEIC.

MS. HARBAGE: Rebecca Harbage, DEQ.

CHAIR DEVENY: Thank you. Are there any members of the public on the phone that would like to give their names?

(Inaudible)

MR. ROSS: This is Travis Ross with --

CHAIR DEVENY: We had two people speaking at once. Could the woman who spoke first, please go ahead.

MS. MARQUIS: This is Vicki Marquis with Holland and Hart.

CHAIR DEVENY: Gentleman.

MR. ROSS: Travis Ross, Missoula County Health Department.

CHAIR DEVENY: Are there other members
on the phone that would like to speak up and let
us know that you're there?

(No response)

CHAIR DEVENY: Hearing none, there is a
gentleman just coming in the door. We were just
in the process of identifying ourselves. Would
you mind doing that, please.

MR. KROGSTAD: Kevin Krogstad, DEQ Coal
Section.

CHAIR DEVENY: I'd like to remind people
on the phone to please mute their phones, and to
also indicate who they are when you speak. Thank
you very much.

With that, we'll move on to the minutes
of the last meeting. Do any of the Board members
or DEQ or other staff have any corrections or
additions to the minutes?

(No response)

CHAIR DEVENY: Hearing none, is there
any public comment on the minutes?

(No response)

CHAIR DEVENY: Hearing none, could I
have a motion to either approve or deny them?

MR. TWEETEN: Move to approve.

MR. BUSBY: I'll second.
CHAIR DEVENY: It's been moved and seconded to approve the minutes of the last Board meeting. Would all the Board members in favor of the motion signify by saying aye.

(Response)

CHAIR DEVENY: Any opposed?

(No response)

CHAIR DEVENY: Motion carries. The minutes are passed. Okay. Next we'll move on to the briefing items, and I'll turn it over to the Board's attorney, Sarah Clerget.

MS. CLERGET: Hi, everybody. So this is going through your briefing items that are on your agenda, and just an update to the cases that we currently have open.

First under A(1)(a), these are enforcement cases. CMG Construction. We held a scheduling conference on this one on April 2nd, 2019, and parties agreed to a schedule for discovery. I issued a scheduling order, and they are proceeding accordingly.

"B," Copper Ridge, we had a final prehearing schedule. Remember, you remanded the case back to me. I decided that there needed to be additional factual hearing. We had a
prehearing conference on Thursday of last week, and oral arguments on motions in limine about that. It's set for hearing Wednesday of next week, and it's a one day hearing, so that is proceeding.

2(a), Non-Enforcement Cases. The first is the Major Facility Siting Act certificate by Talen, and this is the one that we had the emergency meeting on, so you guys generously assigned it to me.

And so after that meeting where you assigned it to me, the parties and I stayed, and we had a hearing that lasted a couple of hours on the issue of whether the fifteen day deadline for all of the evidence applied; and then after the end of that hearing, or during that hearing, Talen moved to intervene as a party, which I granted. So we now have three parties on that case.

And then they asked for additional time to respond, which I granted them until midnight Thursday night; and then on Friday, I issued an order on that, essentially ruling that the fifteen day deadline doesn't apply, and we're going to the regular MAPA route.

The parties have until Monday to elect
whether or not to go directly to District Court, and so we will know at that point whether or not they elected to do that, or whether we're going to proceed down the contested case road in front of the BER.

"B," this is Spring Creek Coal, which was a new case at the last meeting. I issued a prescheduling order on this, which is an update from what's on the agenda. I issued a pre-scheduling order on 5/29, and so we'll get a schedule in place for that.

CHS, which is Item (c), we consolidated that case with 2015-07WQ, and I've issued a scheduling order. The parties entered a stipulation regarding some of the appealed permit provisions, and then amended notice of appeal, but they're proceeding according to the original scheduling order.

I'm going to go off agenda here for a minute about CFAC, which should be in here, Columbia Falls Aluminum Company, which you guys may remember you've heard arguments on a few meetings ago. We just received last night and granted a motion to dismiss in that case, so it is now dismissed and gone. So that's resolved.
"D" is the Absaloka Mine, which has been stayed since March 28th of 2018 pending the resolution of the Supreme Court Case Sierra Club v. DEQ.

"E" is Montanore. The matter is ripe for me to make a decision. We had a hearing, they submitted the post hearing briefing, and it's now before me for a decision.

However, DEQ Counsel cannot be at the August meeting, so we're going to push that oral argument off until October when he can attend. So you will be hearing that case for decision in October, at your October meeting.

Moving on to "F," this is the Laurel Refinery case. You consolidated this case with 2019-01, and there is a scheduling order in place, and they're proceeding.

"G" is Golden West Properties. They filed cross motions for summary judgment, which are ripe in front of me now, so I will issue a decision on that; and then depending on what that decision is, and what the parties decide, you may or may not have that decision in front of you, or it may wait until a hearing occurs, depending on what happens. So that one may or may not be
coming in front of you quickly, but it is ripe for a decision in front of me on summary judgment. No. 3(a) is not mine, so that's a DEQ update.

CHAIR DEVENY: DEQ, could I ask for an update on the Western Energy permit.

MS. BOWERS: Yes, Madam Chair, members of the Board. Kirsten Bowers with DEQ. And as summarized in your packet, the Montana Supreme Court requested additional briefing on that case, and the briefs are due simultaneously on June 17th.

We're to provide additional information on the three issues I outlined, and two of which pertain to the DEQ's representative monitoring protocol, and the third, the Court wanted more information on the modifications to that permit in 2014, and to address Western Energy's argument that the District Court shouldn't have considered the case until these modifications were complete. So we'll just keep you posted on that.

CHAIR DEVENY: Thank you, Ms. Bowers.

MS. CLERGET: That completes the briefing item update.

CHAIR DEVENY: Next we'll move on to
action items. We've got some rules to consider. The first one pertains to the groundwater standard incorporated in DEQ Circular 7, and George, if you could have your staff come up and give us information on this.

MR. MATHIEUS: Sure, Madam Chair. I believe Dr. Mike Suplee is presenting on the first item.

DR. SUPLEE: Good morning, everyone. Madam Chair, Members of the Board, my name is Dr. Mike Suplee, and I'm the Acting Section Supervisor of the Water Quality Standards and Modeling Section here at DEQ, and I'm here to speak on the adoption of proposed groundwater standards per MAR Notice No. 17-403.

Today the Board and the Department are proposing four groundwater criteria for adoption of standards into Department Circular DEQ7. These are diallate; dioxane 1,4; perfluorooctane sulfonate or PFOS, and perfluorooctinoic acid, PFOA.

At the start of this rulemaking in December of 2019, manganese and iron criteria were also included on this list, but these are not being proposed for adoption today for reasons I
will outline shortly.

I would like to point out that diallate; dioxane 1,4; PFOS and PFOA are all manmade compounds, and therefore their natural background concentrations are zero.

In contrast, iron and manganese are naturally occurring elements, and in some locations in Montana, natural background concentrations can equal or exceed the criteria that were proposed.

Most of the comments we received pertained to the manganese and iron criteria, often touching on how the Department would address cases where elevated natural background concentrations occurred. Several Department programs implement groundwater standards, for example, remediation, hard rock mining and coal, and each has its own specific rules and practices governing how implementation occurs, including how to characterize natural background concentrations.

This fact bears directly on the implementation of the manganese and iron criteria. To create a more consistent implementation process across the Department, the Department is working towards identifying and synchronizing these
programs' implementation methods. However, this work is not complete.

Some Department programs might need to update implementation policies, or possibly undertake rulemaking of their own, and it is better that this work be completed before instead of after manganese and iron are adopted as groundwater standards.

Through this work, the Department also expects that specific technologies for removing manganese and iron will be identified, along with the associated costs.

Returning to the four criteria under consideration today, we received a comment of general support, as well as a comment of general discontent regarding more regulation. We received one comment pertaining to diallate and dioxane 1,4, and several pertaining to PFOS and PFOA, regarding the Board's and Department's authority to regulate these compounds.

In our responses, we clarified that the adoption of these compounds as groundwater standards falls clearly within the Board and Department authority.

To recap, today the Department and the
Board are proposing that four groundwater criteria be adopted as standards into Department's Circular DEQ7. Again, these are diallate, dioxane 1,4, PFOS, and PFOA.

Thank you, and I or others from the Department can answer any questions you may have.

CHAIR DEVENY: Thank you. You might as well stay up here in case people have questions. Do Board members have questions of DEQ regarding this? I know we've talked about it before.

MR. DEARMENT: Madam Chair, I have just a quick question. Dr. Suplee, you're not giving up on manganese and iron, you're just delaying that, if I understand correctly; is that true?

DR. SUPLEE: Madam Chair, Mr. Dearment, yes, that's correct. The main issue that we ran into as we went into this was the complexity of the different techniques, the different branches that our Department use to implement the standards, especially with the high natural background, were really leading to complexities that we needed to get figured out, so that when we came back with the standard in the future, we could more readily explain how it would be implemented, what the ramifications of that were,
etc., etc.

MR. DEARMENT: Madam Chair. Do you have a sense of the time frame you're looking at before those tasks will be accomplished, and you might come back to the Board to propose those standards again?

DR. SUPLEE: I don't have an immediate answer for that. I think it was an ongoing project. We've had some -- One of the main key players who was kind of shepherding that coordination identification project for us left the Department, so that kind of sets everything back. But I know that it remains a priority for us.

So I can't give you an exact answer, but it will become a priority again once things kind of settle down.

MR. DEARMENT: Thank you.

CHAIR DEVENY: Do other Board members have questions of Dr. Suplee?

(No response)

CHAIR DEVENY: Hearing none, is there any public comment today on the proposed regulations?

(No response)
CHAIR DEVENY: You could go ahead and sit down.

DR. SUPLEE: Thank you.

MR. ROSS: My name is Travis Ross. I'm with Missoula City-County Health Department. And we -- for the initial proposal for change of DEQ7, we would prefer not to see these proposed standards bifurcated, but understand DEQ's position on it.

We do want to urge diligent work to not delay establishing protective standards for iron and manganese. Newer research indicates that there is higher absorption rates in children and infants and have neurological issues. So from a public health standpoint, it's important to recognize there is risk, and work diligenty to develop those protective standards.

In Missoula, we do not see naturally high concentration of manganese in the alluvial aquifer. We can associate it with contaminated sites.

So the other part of this is these standards can have underground impacts for clean-up, State and Federal clean-up, where there's -- it could be considered an applicable
and relevant standard. So we would be interested
in working with the Department on the next steps,
but do want to see it move sooner than later. So
thank you.

CHAIR DEVENY: Thank you, Mr. Ross.

Your comments will be entered into the record, and
will be considered. Thank you. Are there any
other public comments?

(No response)

CHAIR DEVENY: Hearing none, does the
Board wish to take action on this item?

MR. TWEETEN: Madam Chair, I'd move
adoption of the rules as proposed.

CHAIR DEVENY: There has been a move to
adopt the rules as proposed by DEQ.

MR. BUSBY: I'll second that.

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

MS. HORNBEIN: Madam Chair. Is there
any way that we can request a follow-up on the
iron and manganese issue at our next meeting to
get a report from the Department?

CHAIR DEVENY: We certainly can, and the
hearing record will reflect that request of DEQ.
Thank you. Other comments on the motion before
the Board?

(No response)

CHAIR DEVENY: Hearing none, could we have a vote. All those in favor of the motion, signify by saying aye.

(Response)

CHAIR DEVENY: Any opposed?

(No response)

CHAIR DEVENY: None. The motion carries. Thank you, DEQ, for your efforts on this.

And next we have another rule to consider. And DEQ, if you could go ahead and give a presentation on the Administrative Rules for Circulars DEQ1, 2, and 3.

MR. MATHIEUS: Madam Chair, Eric Regensburger is going to give you that presentation.

MR. REGENSBURGER: Good morning. Madam Chair, Members of the Board, my name is Eric Regensburger. I'm a hydrologist with the Department's Water Quality Standards and Modeling Section. I'm here to speak on the adoption of proposed setback rules between sewage lagoons and wells for MAR Notice 17-404.
For the members of the Board that are new and weren't present when I presented the details of the rule previously, I'll provide a quick summary.

Prior to 2017, there was a statutory setback of 500 feet between sewage lagoons and water wells. In 2017, the Legislature removed that statutory setback, and directed the Department to adopt new rules. New Rule I, which we're reviewing today, was written to comply with that legislative directive.

To ensure that the setback applies evenly across various programs in the Department that are administered by the Department, we are asking that the Board adopt New Rule I by reference into the Board rules and circulars for public water and wastewater systems, and for concentrated animal feeding operations.

The basic components of New Rule I are a maximum default setback of 1,000 feet which is designed to protect wells from pathogens. The default setback can be reduced up to a minimum or down to a minimum setback of 100 feet using science based methods, and estimate pathogen reduction and vulnerability. Water or sewage
The Department coordinated with the DNRC well construction rules to provide consistency between DEQ and DNRC rules which did not exist under the previous statute.

The Board and Department held a public hearing on January 17th, 2019. The public submitted oral written comments which have been addressed in the proposed Notice of Adoption. The Department has modified New Rule I in response to some of these comments to correct some formulas parameters, and to make the rule easier to understand.

The proposed Notice of Adoption also updates the citation of authority and implementation for ARM 17.30.1334.

The Department requests that the Board amend ARM 17.30.1001 and 17.38.101 as proposed, amend ARM 17.30.1334, and update the citation of authority and implementation to adopt the provided HB 521 and 311 analysis. Thank you, and I or others in the Department answer any questions that you might have.

CHAIR DEVENY: Thank you, Mr.
Regensburger. Do members of the Board have questions of DEQ on this issue? Mr. Tweeten.

MR. TWEETEN: Just for the record, the proposed setback is different from the one that existed by statute prior to 2017. Is there legislative history or something to indicate that by removing the statutory setback, the Legislature was suggesting that a greater default setback should be established by the Department, or is that something that the Department arrived at independently through its research before engaging in the rulemaking?

MR. REGENSBURGER: Madam Chair, Mr. Tweeten. The setback and the discussion with the Legislature was that the new setback should be based on a science based method rather than a somewhat arbitrary 500 foot or 100 foot, or whatever number you want to pick. So the 1,000 feet was based on analysis of pathogen migration and such to protect wells from a typical, not a worst case scenario, but a typical scenario that can occur in Montana in certain aquifers.

CHAIR DEVENY: Mr. Lehnherr, David, did you have a question?

MR. LEHNHERR: Yes. Eric, you mentioned
that there could be exceptions to the 1,000 foot
setback rule. Can you go over those once again,
and maybe say a little something about how easy or
difficult the process to obtain an exception is.

MR. REGENSBURGER: Madam Chair, Mr.
Lehnherr. Sure. The different exceptions are
designed to account for site specific conditions.
The main way that you can reduce that setback from
1,000 feet are if the aquifer that the well is
completed in is in a different aquifer than where
the wastewater is discharged to; or if the
groundwater flow direction prohibits the movement
of wastewater towards the well, just a physical
impossibility of the wastewater to get to the
well.

The other method requires some
calculations and data collection. It's designed
to look at a four log or 99.99 percent removal of
pathogens between discharge in the wastewater
lagoon to the well.

And the rule has several different
methods for calculating some of the parameters.
There are hydrogeologic parameters that govern how
pathogens will move through the water into a well.

We specifically included several methods
in the rule, some being very quick and easy --
just reading a number off a table -- to more
complicated, but more accurate methods. The
simple, cheap methods are conservative in nature,
so that by using a simple method, we're not going
to endanger a well.

So we have accounted for that cost issue
in this rule, knowing that it can cost some money
to reduce the setback. We also have provisions
for treatment. If a well has disinfection, for a
public well, the setback can reduce 200 feet; and
if the sewage lagoon is disinfected per
requirements in the rule, that setback can also be
reduced 100 feet so there's a lessened chance of
pathogens getting to the well.

So there are several methods to reduce
the setback, and cost could be minimal, cost could
be a little bit higher in some cases where the
hydrogeology is a more complex and requires more
data collection.

MR. LEHNHERR: One other question. How
often do you think there would be exceptions
sought by parties? Say a percentage roughly.

MR. REGENSBURGER: That would want to go
less than 1,000 feet? That's a hard one to figure
out, but probably half, I guess. In some cases it
may not be an issue to drill a well 1,000 feet,
but in many cases logistics might dictate that
they want to go a shorter distance.

So I think it would be at least probably
half the cases where putting in a new lagoon for
wells is going to be a lot less, because most
wells aren't within 1,000 feet of a lagoon. Most
wells will go in without having to even worry
about this rule, but a new lagoon is going to have
to look most likely at this issue.

MR. LEHNHERR: Thank you.

CHAIR DEVENY: Do any other Board
members have questions of DEQ?

MS. HORNBEIN: Madam Chair, I have a
question. Under the previous version of this
statute, the setback was 500 feet; is that
correct?

MR. REGENSBURGER: Madam Chair, Ms.
Hornbein, yes.

MS. HORNBEIN: Was there any provision
under the previous statutory language for reducing
a setback?

MR. REGENSBURGER: No.

MS. HORNBEIN: So just to make sure that
I have it correct. Under the new statutory provisions in the rule proposed by the agency, the default would be 1,000 feet, no analysis would be done to incorporate setback unless a request was made by a petitioning party?

MR. REGENSBURGER: Correct.

MS. HORNBEIN: Thank you.

CHAIR DEVENY: Any other questions?

(No response)

CHAIR DEVENY: Hearing none, would the Board like to entertain a motion?

MS. HORNBEIN: I will move to adopt the rule as proposed by DEQ.

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

(No response)

CHAIR DEVENY: Hearing none, all those in favor of the motion, please signify by saying aye.

(Response)

CHAIR DEVENY: Any opposed?

(No response)

CHAIR DEVENY: Motion carries. Thank you, Mr. Regensburger.

That concludes our work on rulemaking
today. Next is new contested cases, and we'll go back to Sarah for this.

MS. CLERGET: So in looking at your updated agenda -- we apologize for that, but that's the one that went out, I can't remember if it was yesterday or the day before -- that should have two contested cases, new contested cases on it.

One of them is the appeal for Western Energy Company regarding Permit No. DEQ-01103F, which I'm going to refer to as the Western Energy Area F case, so as to not confuse it with the current Western Energy case that's in front of us right now. That notice of appeal came in from Western Energy.

Then the second appeal is the same permit, appealing the same permit, and so I would ask that you probably combine those appeals for procedural purposes, since they're essentially cross appeals of the same permit, the one is by Western and one is by MEIC.

And I'll reiterate your options you have. You can keep one or both; you can assign them for procedural purposes, and keep the substantive decisions like summary judgment or
hearing; or you can assign it to me for all purposes.

CHAIR DEVENY: I have a question of you. Would there be any reason to keep them separate?

MS. CLERGET: I think as they were filed separately, and given separate case numbers, we should keep them separate, but combine them for procedural purposes.

CHAIR DEVENY: Any questions of Sarah on this procedure? Chris.

MR. TWEETEN: Just a practical one. Do you have time to take these on as the Hearing Examiner at this point, if we were to combine them for procedural purposes?

MS. CLERGET: I think so. That raises another question, which is just for the assignment purposes, I wanted to clarify with you guys that if I need help, there are other attorneys in my office who can help, and so when you assign a case to me, my assumption is that you assign it to me, and then I can delegate as necessary for work flow if needed. But ultimately I will be the one who will be presenting it to you, but I may need help from some other attorneys as these cases get larger and more. So can somebody just make sure,
orally make sure that that's okay?

MR. TWEETEN: I think that's understood, unless anybody has a different understanding.

CHAIR DEVENY: That's quite clear.

MS. CLERGET: So with that caveat, yes, I can take it.

MR. TWEETEN: Madam Chair, I would move to assign these, to consolidate these cases for prehearing purposes, and assign them to our Hearing Examiner, our Counsel to serve as Hearing Examiner.

CHAIR DEVENY: That assignment is in totality or for procedural purposes?

MR. TWEETEN: I think we start with procedural purposes, and then I think down the road we can make a determination if it appears that the case is susceptible to summary judgment, perhaps we could make a determination to expand the scope of the assignment to handle that, or to assign a hearing on the merits if it comes to that.

I think initially we ought to just get through the procedural matters, and then Sarah can report back to us, as she does at every meeting, and we can make a determination as to whether we
want to expand the scope or reference that point.

CHAIR DEVENY: Any other discussion on this?

(No response)

MR. TWEETEN: I think I made that in the form of a motion.

MR. BUSBY: I'll second.

CHAIR DEVENY: It's been moved and seconded. Further discussion on the motion to consolidate the cases and to assign to Sarah for procedural purposes?

(No response)

CHAIR DEVENY: Hearing none, all in favor of the motion, signify by saying aye.

(Response)

CHAIR DEVENY: Any opposed?

(No response)

CHAIR DEVENY: Hearing none, the motion passes.

MS. CLERGET: I think that concludes the new cases.

CHAIR DEVENY: Then next we have some action on contested cases, and the Signal Peak. Sarah, would you provide --

MS. CLERGET: We don't have the table
set up for this, but for the purposes of expedition, if the parties need to be heard, they can come up to the podium.

   But the main issue for the Board is the Signal Peak case, there's two issues. I'll take the easier one first.

   The easier one is that there was an underlying subpoena issue that was taken up to District Court, that has been decided by the District Court, and has now been appealed up to the Montana Supreme Court.

   I filed something called a Notice of Non-Participation that essentially told the Court that I'm a party, but I don't intend to practically participate.

   I anticipate that the same thing can be done in the Supreme Court, which in my opinion would allow me to continue to represent the Board. If that becomes from the filings not what needs to happen, that something more substantive needs to happen, then I would probably suggest that we get another attorney in to represent the Board, so I'm not both the Hearing Examiner and making substantive arguments in front of the Supreme Court.
So I just wanted to clear that procedure
with you guys on the Supreme Court appeal for
Signal Peak.

MR. TWEETEN: I have a question.

CHAIR DEVENY: Chris, go ahead.

MR. TWEETEN: Would you anticipate
another attorney from Agency Legal Services taking
that on, or would it have to be outside Counsel?

MS. CLERGET: I think we could probably
have somebody from ALSB do it, but if you guys
don't feel that way, then we can get outside
Counsel.

CHAIR DEVENY: I can see you have some
concerns there, Chris.

MR. TWEETEN: Well, I guess I understand
the reasoning behind separating the representation
function from the Hearing Examiner function. I
guess I'm not sure that those concerns are fully
allayed if one of your colleagues from Agency
Legal Services is arguing the merits in front of
you as a Hearing Examiner. It seems to me there
is at least a question as to --

MS. CLERGET: They wouldn't be in front
of me. They'd be in front of the Supreme Court.

MR. TWEETEN: Oh, right. Okay.
MS. CLERGET: So it would be we'd build a wall, and then they can go in front of the Supreme Court and do whatever they're going to do.

MR. TWEETEN: But you don't anticipate that there would be a situation in which they'd be arguing in front of you as the Hearing Examiner?

MS. CLERGET: No.

CHAIR DEVENY: I'm not sure this is anything that needs a motion on this discussion.

MS. CLERGET: I don't think so.

CHAIR DEVENY: Are we comfortable having Sarah represent us in front of the Supreme Court unless we otherwise need another attorney to do so?

(No response)

CHAIR DEVENY: I think that's fine.

MS. CLERGET: Then the harder piece of that is there is a large summary judgment motion that is pending right now in this case, and originally I had thought that was in front of me, but the parties, MEIC pointed out that in fact in 2016, which was two Hearing Examiners before me, the case was only assigned to the Hearing Examiner for procedural purposes, which meant that the Board retained the substantive decision on summary
judgment.

So you guys have a choice now about whether you want to continue that, and you want to hear the summary judgment in front of you, which means essentially that I will take all of the briefing on summary judgment, and give it to you, and then you hear oral arguments on the summary judgment briefing, and then you make your decision; as opposed to me reviewing the summary judgment materials, making a proposed decision, and then you guys hearing oral arguments on the proposed decision with exceptions briefs.

So those are sort of the two options that are available to you, and you need to decide what you want to do about that.

CHAIR DEVENY: Chris, I'm going to put you on the spot, because I believe you were on the Board then. Do you remember or recall, was the Board at that time planning to take on this case?

MR. TWEETEN: Well, the answer is I don't recall whether any specific discussion was had at that time about the question of referring the decision to the Hearing Examiner, or keeping it before the Board itself.

I think our experience generally is that
using our Hearing Examiner to make proposed
decisions is an efficient way to handle these
matters, because if the Board were to hear the
matter on its own, the question would come up as
to who would preside over the hearing, for one
thing, but who would prepare the initial decision
on behalf of the Board, which I suppose we could
refer to our Counsel to take care of.

But if that's going to be the approach
that we take, why wouldn't we just refer the
decision for a preliminary proposed decision to
our Counsel as Hearing Examiner? It seems to me
to make more sense to do it that way than to
retain jurisdiction, hear the oral arguments, and
then ask our Counsel to prepare a proposed
decision.

I value the input of Counsel with
respect to how these arguments ought to be
analyzed, as I think important advice for the
Board in how to proceed. We don't always accept
our Counsel's advice in these matters, but I
certainly find it helpful.

So I guess I would propose that we refer
the summary judgment motions to our Counsel to act
as Hearing Examiner, make a proposed decision as
provided in MAPA, and then the Board can take it up on the record with the written advice of our Council in form of a proposed decision.

CHAIR DEVENY: Is that a motion?

MR. TWEETEN: Yes. Did that make sense, or should I rephrase that?

MS. CLERGET: I think the parties might want to be heard. I did tell them that at your discretion, you guys you might allow them to be heard on that issue, so at your discretion.

CHAIR DEVENY: There is a motion before us.

MR. TWEETEN: I don't have any objection.

CHAIR DEVENY: I have no objection. I have a question of Sarah before we proceed, and I will allow the parties to speak on this.

Sarah, if the Board did retain this case, and under our jurisdiction, what's the hearing record look like on that now that we would be required to review?

MS. CLERGET: It's about six or seven binders, I would say, of motions, and attachments, and exhibits.

CHAIR DEVENY: How big are those
binders?

      MS. CLERGET: Three inch binders. It's not as big as Western.

      CHAIR DEVENY: Are both parties here for both Signal Peak and --

      MR. HERNANDEZ: We are, yes.

      MR. MARTIN: We are.

      CHAIR DEVENY: You decide who's going to speak first.

      MS. CLERGET: Chris, I think you need a second to your motion to get to discussion.

      CHAIR DEVENY: Okay. I'm sorry. Is there a second to Chris's motion?

      MR. DEARMENT: I'll second it.

      CHAIR DEVENY: It's been seconded, and we'll have discussion. Are there further questions of Board members before we hear from the parties?

      MR. LEHNHERR: Could we have the motion restated?

      MR. TWEETEN: Madam Chair, I move that the Board refer to our Counsel, acting as Hearing Examiner, the pending summary judgment motions in the matter of Signal Peak Energy, Bull Mountain Coal Mine No. 1, for the preparation of a proposed
decision in accordance with MAPA, which then would be brought back to the Board for further proceedings.

CHAIR DEVENY: That was the motion. Did you have further questions? And before we hear from the parties, Sarah, could you just go through what that procedure would be if we retained, the Board retained.

MS. CLERGET: Sure. It's a lot like -- because these are only motions, all you get is you get a file, the file, and then you go through it, and then at whatever meeting you decide, you have oral arguments on the motions from the parties, much like the oral arguments that you have on the proposed decision. You just don't have a proposed decision from me. You only have the briefing from the parties.

And then you have your discussion and decide what you want to do, and then however you want to do it, one of you can write it, or you can ask me to write something that reflects the decisions that you've made, and then that decision becomes the final agency action.

So the step that you skip is the proposed decision from me, and the briefing, the
exceptions briefs from the parties.

CHAIR DEVENY: Do Board members need any further clarification on that before we hear from the parties?

MS. HORNBEIN: I just have an additional procedural question for Counsel.

So in the case where the Board retains -- or no. In the case where we pass it off to you, when you provide us with your proposed decision, and then we have the exceptions briefs from the parties, do we also have access to the summary judgment briefing from the parties that you reviewed in putting your decision together?

MS. CLERGET: Yes, just as in these decisions. You can go look at anything you want to in the record.

CHAIR DEVENY: Further questions from Board members?

(No response)

CHAIR DEVENY: If not, let's hear from the parties. I'll let you decide who goes first.

MR. HERNANDEZ: Madam Chair, members of the Board, Shiloh Hernandez for MEIC and Sierra Club.

I think I'd like to start out with my
proposal, which is that the Board retain jurisdiction of this. It was a decision made after some consideration in 2016. I was here. I've reviewed the transcript for that, and the Board provided two reasons for its decision in 2016 to retain jurisdiction.

First, the Board said that this case, unlike the Western case, raises -- it's just not a replay of prior cases, it's new issues, questions about how the reclamation provisions in MSUMRA, the Montana Strip and Underground Mining Reclamation Act -- and you'll hear that acronym repeatedly today, MSUMRA -- and how they apply.

The Board hasn't yet addressed it. It's a question of law, so it's appropriate for the Board to address it in the first instance. That was the reasoning of then Chair Miles for not assigning the merits to the then Hearing Examiner Benjamin Reed.

The second basis was a matter of efficiency, and this was raised by Mr. Tweeten. In fact what happens, as Ms. Clerget just explained, if this is assigned to Ms. Clerget, and her docket has space, then she'll review the nine briefs that have been filed on
summary judgment, make cross motions, we have nine briefs; she'll issue a proposed ruling, and then the parties will then write six more briefs objecting to the proposed ruling, and then briefs responding to those objections.

So then the issue comes to you, the Board, with fifteen briefs and a proposed ruling, instead of the current nine briefs and no proposed ruling.

And having written three of the current nine briefs, I'm not anxious, enthusiastic, to write two additional briefs. I don't think it helps the Board in any material manner to have six more briefs and a proposed ruling.

So the Board has already addressed this issue. I think the reasons that the Board offered in 2016 for retaining jurisdiction of the merits and not assigning the merits to a Hearing Examiner remain. They still have force today for everyone involved.

The Board, as Ms. Hornbein said, you guys can either read nine briefs, or you can read sixteen briefs. You don't have any efficiency gained by having an additional intermediary step here.
The other important point that I would like to add, the reasoning that the Board offered in 2016 is that the parties in this have filed cross motions for summary judgment. It's not one party arguing that we need to get a hearing, and the other party arguing there are no disputed facts. The parties, all three of them, argue that there are no disputed facts, and that the resolution of the case turns on questions of law.

Questions of law are reviewed de novo, after Ms. Clerget would issue a proposed order. So there is no change. The Board has to make a ruling as a question of law, either on nine briefs or on fifteen briefs.

And more importantly, questions of law are -- that is the province of the Board. The Board interprets these laws. That's assigned to the Board in particular.

And on that point, since this is just a summary judgment matter and not a hearing, it's not a matter where the sides are going to come up here, and present experts, and have evidentiary objections, and you go through the whole trial type proceeding of a contested case. It will just be oral arguments.
So it wouldn't be a situation where the Board would be trying to juggle ruling on and addressing objections and evidentiary matters. That's in some cases much easier for a Hearing Examiner, although different boards do it differently. For example, the PSC, the Board rules on evidentiary matters in hearings.

But that wouldn't be the case here. It would just be an oral argument, just like you're going to hear later this afternoon in the Western case. The parties will come up, first you'll receive the briefs, you'll review them, the parties will present their argument of the briefs, and Board will review it and resolve the questions of law that are presented to the Board.

I mention in our briefing in the Western case the principle of mercy. All of you have day jobs. We'll all busy attorneys. Ms. Clerget has a very busy docket. Adding a supplemental two months of briefing and a proposed ruling, it's just not what we need in this case.

The last thing that I'll say is that this case was filed in 2016. It's now 2019, and we haven't had a summary judgment ruling.

Part of that owes to the fact that
Signal Peak Energy filed a motion to subpoena non-parties to this case that then went to the District Court in Billings. The Judge there ruled that the subpoena had no merit, it was filed for improper purposes. That's what the District Court in Billings said.

The result is this case has been delayed for at least a year on account of Signal Peak Energy's maneuvering, and now they're bring that to the Supreme Court.

We, the petitioners in this case, think that the case should be moved forward, and the most expeditious way to do that now is to just have the Board hear the summary judgment motions. And with that, I'll step down.

CHAIR DEVENY: Maybe some Board members have questions, Mr. Hernandez, so if you'd stay.

MR. TWEETEN: I do. A couple of questions. One, I think we have been around before with your client about the issue of both parties agreeing that there are no genuine issues of material fact. Those agreements are not binding on the Board, are they?

MR. HERNANDEZ: They're not, but that's what happened in the prior iteration of Signal
Both parties said there are no disputed issues of fact, the Board agreed, and moreover the Board made a very important statement. They said this case will be resolved based on information in the four corners of the CHIA, and the record available to the agency, and beyond that, nothing matters.

And the contents of the CHIA and the information before the Board, that administrative record that the Board recognized in the prior case, it's not going to change. So they're really following the Board's prior ruling. There is not really space for summary judgment.

In fact, Board Member Tweeten, I'm glad that you mentioned that, because really it does show that this case should be resolved on summary judgment based on the record that's in existence, which as I mentioned is precisely the province of the Board to make that legal analysis.

MR. TWEETEN: Well, as I said in a prior case, you've come before the Board having agreed with your opposing Counsel that there are no genuine issues of material fact, and we've disagreed with that, and referred the matter back to our Hearing Examiner to conduct an evidentiary
hearing. In fact, it may be the Western Energy case that we're hearing this afternoon.

I guess my point is a tribunal considering a summary judgment motion has two burdens. One is to ensure that there are no genuine issues of material fact. And then once the tribunal has satisfied itself of that point, then going on and deciding the merits.

And the fact that you've stipulated that there are no issues of material fact doesn't relieve us of the obligation to make that decision independently for ourselves.

I guess my second observation is that I understand the question regarding nine briefs versus fifteen, or sixteen, or however many you've calculated, but you're certainly free to incorporate by reference briefing that you've done before. You don't have to restate matters that you've already argued in full in your exceptions.

And I guess my second point is that it's I think less burdensome on the Board to -- Well, I won't say it that way. I think the parties need to be reminded that they should exercise economy in their drafting of their briefs, and that fifty page briefs aren't necessarily helpful for the
Board, although they are very burdensome for the Board members to wade through.

I'm reminded of what Benjamin Franklin wrote to one of his correspondents apologizing for the length of the letter, and saying that, "If I'd had more time, I would have made it shorter."

I would urge the parties, all parties, to take that to heart, and edit down your briefs, so that we don't necessarily receive fifty page briefs on the merits of every point, because I do think those are somewhat burdensome for the members of the Board to deal with, and I do think that with some effort, I think Counsel can pare those briefs down to a much more manageable size.

And now an observation, Madam Chair, if I might. I continue to go back to the point that I made before, which I think it's useful for the Board members to have the viewpoint of our Counsel with respect to how contested matters ought to be resolved, and to receive that in the form of a proposed decision, is most consistent with the statutes in MAPA that deal with receiving advice from a Hearing Examiner.

And you as the parties would have an opportunity to comment on the proposed decision.
If we simply heard your argument, and then assigned our Counsel to draft a proposed order for our consideration, you would not have the opportunity to except to that under MAPA.

So I think it's actually beneficial for you as parties, by giving you an opportunity to state your objections to our Counsel's proposed decision as provided in MAPA, rather than going the other route, which is to hear the arguments ourselves, and then ask our Counsel to draft up a proposed order.

Even if we take a vote on which way the proposed order should go, I would think from your perspective, you'd want to have the opportunity to provide your comments on that before we decide whether to adopt the order or not.

And of course, MAPA doesn't require us to have a second hearing on a memorandum, a proposed decision that our Counsel drafts for us, as opposed to what MAPA provides with respect to the proposed decision by a Hearing Examiner.

So I guess my mind is not changed at this point on my thoughts on this.

MR. HERNANDEZ: Board Member Tweeten, Madam Chair, if I may briefly just respond to your
points.

Your second point about over-length briefs, I would agree with Benjamin Franklin. If I would have had more time, I would have written a shorter brief. I appreciate your indulgence. It was a long brief that we filled in the Western case.

With respect to summary judgment and disputed facts, you referred to the Western case, and I wanted to point out a really important distinction between the Bull Mountain case, the first one, Bull Mountains, and the Western case, which is that in the Bull Mountains case, which the Board resolved on summary judgment, they had cross motions where the parties agreed there were no disputed facts; whereas in the Western case, there were not cross motions, and there was a dispute of facts. DEQ filed a 100 page statement of disputed facts, and so that's a critical distinction here.

So even though, yes, the Board does have an obligation to determine whether or not there are disputed facts, In Re: Bull Mountains the parties had no disputed facts, the Board agreed. Western, the parties said disputed facts, the
Board agreed.

And finally on the point of what is useful to the Board and the parties. I won't belabor the point. I feel that nine briefs and oral argument is adequate for us to present our positions, and that we don't need -- As a party, and you suggested that, in the parties' best interests, I don't think an additional round briefing and additional hearing isn't necessary. I think it's a little overkill.

CHAIR DEVENY: I'd like to move along here. Do any other Board members have questions of --

MS. CLERGET: I think you need to hear from the other parties, too.

CHAIR DEVENY: We do. Could we hear from Signal Peak attorney.

MR. LUCAS: Actually, Madam Chair, if I could jump in there. Mark Lucas with the Department.

CHAIR DEVENY: You bet.

MR. LUCAS: As you know -- good morning, Madam Chair, Board members. As you know, we've taken really no position on this, and we've left it up to you, and the only reason I have jumped up
here is because it sounded like Mr. Hernandez was saying that there are no disputed facts in the Signal Peak case.

The facts are in fact disputed, and more importantly, the Department, the general proposition that we like to go with, and I think it's a good one, is that matters of disputed expert fact are ill suited to summary judgment. You have to have something so far over the top with an expert that you can just say, "We don't even need to put them in the chair and discuss this."

So we moved for partial summary judgment. We did not move for summary judgment in Signal Peak on the issue of what I will call hydrologic availability of replacement water, not because --

We probably could have because MEIC did not even come forward with an expert affidavit, but we didn't because we respect the science, we cherish the process in front of this Board, whichever way you want to go, and I just wanted to clarify that there are no -- we couldn't stipulate to a single fact in Signal Peak.

And at the end of summary judgment, if
you rule in our favor, there will still be one small issue of disputed fact requiring a hearing. So I would ask that you take that into consideration in reaching this decision as to which we otherwise have no position, and I'd like to make myself available for any questions the Board may have.

CHAIR DEVENY: Questions of Mr. Lucas?
(No response)

CHAIR DEVENY: Seeing none, could we hear from the Signal Peak attorney, please.

MR. MARTIN: Thank you, Madam Chair, members of the Board. My name is John Martin, and in addition to representing Western, I also represent Signal Peak.

I think that there must be some confusion. There are distinctly disputed facts in this particular litigation. In fact, DEQ's statement of disputed facts goes on for 150 pages. Ours goes on for 102 pages.
We only moved for partial summary judgment. We believe we're entitled to partial summary judgment, but we've left the hydrologic issues as issues that should be subject to trial.
My view, if you don't mind our interjecting it,
and we believe this is completely in the discretion of the Board, but my view is akin to Mr. Tweeten's.

We would want the same entity that hears the motion for summary judgment also hear the trial. And in my estimation, the likelihood of a trial is very, very high in this instance. There distinctly is no stipulation vis-a-vis these facts in this particular case. So if there are any questions, I'm happy to answer them.

CHAIR DEVENY: Any questions of Mr. Martin?

MR. MARTIN: And just one other point, and I apologize. It's advancing senility. It came to me late.

There are issues, technical legal issues, that you may actually benefit from having Ms. Clerget opine on. We have some res judicata issues in this case. They're a bit thorny, I have to admit. And it might be useful for the Board's purposes to have Ms. Clerget explain those issues and opine on them in the first instance. Thank you.

CHAIR DEVENY: Thank you, Mr. Martin.

There has been a motion before the Board. Is
there further Board discussion on the motion?

   MS. HORNBEIN: Madam Chair, I have a
   question for Counsel for the Board, a couple of
   questions actually.

   In this type of a situation, is it
   possible to get from you an opinion as to whether
   resolution on summary judgment grounds is
   appropriate?

   MS. CLERGET: How detailed of an opinion
do you want? I can give you an opinion right now
off the cuff, or I can give you a more detailed
opinion after I have more thoroughly reviewed the
briefs.

   MS. HORNBEIN: To start with, why don't
you give us your opinion right now.

   MS. CLERGET: I think it's possible that
some issues will be resolved on summary judgment,
but not all.

   MS. HORNBEIN: Follow up, Madam Chair?

   CHAIR DEVENY: Go ahead.

   MS. HORNBEIN: Would it be possible for
us to review the Board minutes from, I believe it
was 2016 when this was originally assigned for
procedural purposes?

   MS. CLERGET: I have them here if you'd
like to review them now, or I can read you the
operative portions. But essentially the point of
the discussion was that the prior Board had dealt
with Signal Peak a lot already, and so they were
familiar with the facts and the issues, and so
they were going to keep it for themselves for that
reason.

Obviously that's no longer the case
because only Chris is left. But that was their
main reasoning for why they wanted to keep it.

MS. HORNBEIN: Understood. Thank you.

CHAIR DEVENY: Any other questions or
comments from the Board members on the motion for
before us?

MS. HORNBEIN: Madam Chair, I apologize.
I would like to make one comment before we vote.

In this instance, I think I'm going to
vote for retaining the Hearing Examiner. I do
feel that there is a strong argument to be made
that when there is a question purely -- that's
appropriate for resolution on summary judgment, I
do think the Board has a role in that case, and it
might be appropriate to retain jurisdiction.

Given the turnover on the Board, and
lack of continuity of knowledge of this case and
the surrounding facts, I think it's appropriate in
this instance to refer it to Counsel, but I don't
necessarily think that's going to be the case in
every case.

CHAIR DEVENY: Thank you for that
opinion. I agree with it. Any other comments,
questions?

(No response)

CHAIR DEVENY: Let's have a vote then on
the motion that Chris made. All those in favor of
assigning the case to Sarah for its entirety -- is
that correct? Does that summarize it?

MS. CLERGET: (Nods head)

CHAIR DEVENY: -- please signify by
saying aye.

(Response)

CHAIR DEVENY: All those opposed.

(No response)

CHAIR DEVENY: Motion carries.

MS. CLERGET: Chris, I think we might
want to take a break because we need to set the
room up before the next argument.

CHAIR DEVENY: It's a good time to take
break. Let's come back here in fifteen minutes.

(Recessed at 10:11 a.m.)
and reconvened at 4:05 p.m. )

* * * * *

CHAIR DEVENY: Board Counsel update. Do we have any items?

MS. CLERGET: No.

CHAIR DEVENY: At this point I'd like to open up the meeting for any public comment on issues other than contested cases.

(No response)

CHAIR DEVENY: Seeing none, I would take a motion to adjourn.

BOARD MEMBER TWEETEN: So moved.

CHAIR DEVENY: It's been moved. I'll second it. All those in favor of adjourning, please signify by saying aye.

(No response)

CHAIR DEVENY: All those opposed.

(No response)

CHAIR DEVENY: The meeting is adjourned.

(The proceedings were concluded at 4:07 p.m. )

* * * * *
CERTIFICATE

STATE OF MONTANA )

: SS.

COUNTY OF LEWIS & CLARK )

  I, LAURIE CRUTCHER, RPR, Court Reporter,
Notary Public in and for the County of Lewis &
Clark, State of Montana, do hereby certify:

  That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing - 57 - 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.