BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING
August 9, 2019

TRANSCRIPT OF PROCEEDINGS

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

BEFORE CHAIR CHRIS DEVENY,
BOARD MEMBERS JOHN DEARMENT,
DEXTER BUSBY, MELISSA HORNBEIN,
DAVID LEHNHERR;
and CHRIS TWEETEN and HILLARY HANSON
(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. I'd like to call this meeting of the Board of Environmental Review to order. Lindsay, would you please take roll call.

MS. FORD: Chris Deveny.

CHAIR DEVENY: 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: Melissa Hornbein.

MS. HORNBEIN: Here.

MS. FORD: David Lehnherr.

MR. LEHNHERR: Here.

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

CHAIR DEVENY: Thank you. Let's go around the room and see who else is joining us
today, and we'll ask for people on the phone. Would you like to start over there.

MR. HAYES: I'm Ed Hayes, Acting Chief Legal for DEQ.

MS. BOWERS: Kirsten Bowers, attorney for DEQ.

MS. CLARK: I'm Rachel Clark with the Engineering Bureau for DEQ.

MR. PETTIS: Aaron Pettis, DEQ Legal.

MR. LUCAS: Mark Lucas, DEQ Legal.

MS. CHRISTOPHERSON: Sarah Christopherson, DEQ Legal.

MR. SEVERS: Eric Severs, DEQ Water Protection Bureau.

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

MS. MARQUIS: Vicki Marquis, with Copper Ridge and Reflections at Copper Ridge.

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

MS. MERKEL: Julie Merkel, DEQ Air Quality Bureau.

MS. PAYNE: Rhonda Payne, DEQ Air Quality Bureau.

MR. BARTON: Darryl Barton, DEQ Water
Protection Bureau.


MS. McLAUGHLIN: Joanna McLaughlin, DEQ Water Protection Bureau.

MS. RAO: Maya Rao, DEQ Water Protection Bureau.

CHAIR DEVENY: Thank you. The two gentlemen that just came in, could you just identify yourselves for the record.

MR. DORRINGTON: Matt Dorrington, Coal Section Supervisor.

MR. COLEMAN: I'm Ed Coleman, I'm the Bureau Chief over Coal and Opencut Mining Bureau.

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

CHAIR DEVENY: And are there other people on the phone besides our two Board members that would like to identify themselves for today's meeting?

(No response)

CHAIR DEVENY: I don't hear anybody. We'll move on then. We have two sets of minutes to approve. We had a special Board meeting on the 22nd of May, and we forgot to approve those at our
last meeting, so does the Board have any questions
or comments on those minutes?

(No response)

CHAIR DEVENY: Is there any public
comment on those minutes?

(No response)

CHAIR DEVENY: DEQ had none. Okay.

Hearing none, would somebody like to make a motion
that we approve the May 22nd meeting minutes.

MS. HORNBEIN: I'll move that we approve
the May 22nd meeting minutes.

MR. LEHNHERR: Second.

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

(No response)

CHAIR DEVENY: Hearing none, all those
in favor, signify by saying aye.

(Response)

CHAIR DEVENY: Any opposed?

(No response)

CHAIR DEVENY: Those minutes are
approved. Next we will be voting on adopting the
May 31st meeting minutes. Again, do Board members
have any corrections or additions to those
minutes?
MR. BUSBY: There is a name spelling error on 3(c)(2), the fourth paragraph down. I'm not Mr. Busy.

CHAIR DEVENY: Okay. Any other corrections or additions?

MR. LEHNHERR: I am questioning the time of adjournment. Did we adjourn at 11:00 a.m.? It seems like the meeting went longer than that.

MS. CLERGET: I think that's right.

MS. FORD: Yes, it did. I'll change it.

CHAIR DEVENY: So Lindsay will check the transcripts and correct that. And I also -- Melissa, did you have a request regarding the new --

MS. HORNBEIN: The new rules.

CHAIR DEVENY: Yes, you requested the Department provide updates regularly or --

MS. HORNBEIN: Yes.

CHAIR DEVENY: -- or on the issue of manganese.

MS. HORNBEIN: I believe so, yes. Your memory is --

CHAIR DEVENY: Would you like that added?

MS. HORNBEIN: Yes, I would. Thank you.
CHAIR DEVENY: I believe Melissa asked DEQ to provide updates, regular updates on the manganese rules, and we will do that later.

MR. MATHIEUS: Sure.

CHAIR DEVENY: George, did you have anything to add?

MR. MATHIEUS: So if everybody recalls, we bifurcated the rulemaking, and all I'll say is we're going to be more in a position in October to give a more thorough review. Did they say that while I was out of the room?

CHAIR DEVENY: No.

MR. MATHIEUS: Ironically I was just double checking with Mila, and that's the topic you guys were on.

CHAIR DEVENY: We'll take care of that in any event.

MR. MATHIEUS: So we'll do it in October.

CHAIR DEVENY: We will add that request to those minutes. Are there any other further additions or corrections to the May 31st minutes?

(No response)

CHAIR DEVENY: Any public comment on those minutes?
CHAIR DEVENY: Hearing none, do I have a motion to approve the May 31st minutes?

MR. BUSBY: So moved.

CHAIR DEVENY: I'll second it. It's been moved and seconded. Move to discussion.

(No response)

CHAIR DEVENY: All those in favor of approving the May 31st meeting minutes with the changes that we discussed, please signify by saying aye.

(No response)

CHAIR DEVENY: Any opposed?

(No response)

CHAIR DEVENY: Those meeting minutes are approved with the changes. And next we have briefing item updates from Sarah.

MS. CLERGET: All right. Taking your tour of the agenda, you have briefing items under II(A)(1)(a) CMG. This case was stayed on June 17th, 2019. They filed a status report in July indicating that technical settlement discussions are still underway, and that they're still working toward settlement, so that stay continues.

CHS, they're to file either a stipulated
settlement agreement or a motion giving me essentially new scheduling order dates by November 29th, 2019. So that one is stayed in the intervening time.

Absaloka Mine has been stayed pending the decision from the Supreme Court.

"C," the Signal Peak case, I'm going to skip that one for now because -- I'll come back to it.

So "D" is Montinore. This will be before the Board at its October meeting. DEQ Counsel is not present, couldn't be present today, so that one is coming in October. That is awaiting my decision, but it is completely briefed and ready to go for me, and so it will be before you guys in October.

The Laurel Refinery case. They again have the option to file either a settlement agreement or a motion with a new schedule by November 29th, 2019, so it is stayed in the intervening time.

Golden West. There are a number of motions pending before me right now, including a motion to dismiss, so I owe the parties the decision on those; and then depending on what that
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decision is and the parties' decisions about my
decision, that may or may not come before you in
October, or it may wait until it goes to hearing,
depending on the outcome of those decisions.

So that is pending decisions before me
on that motion to dismiss -- sorry -- it is a
motion for summary judgment, not a motion to
dismiss -- motion for summary judgment.

And No. G, a Major Facility Siting Act
case. This case, I wanted to give you guys a
heads up that the parties have mostly agreed to
and requested a very expedited schedule in this
case, so it's going to be very intense for us to
get everything done so that this can be on your
December 12th agenda for final decision.

And so I just want to plug that that
December 12th meeting, all of the parties and I
are going to work really, really hard to get that
on that December agenda, and it's really important
that everybody be present, even though it's
December, to do that, because their getting an
entire contested case done in six months is a big
task.

So that will be coming. There's a
pending motion to dismiss in that case in front of
me right now, so depending on the outcome of that, I guess it could be in front of you before then. But if the schedule proceeds as it's laid out, then it will be ripe for you in December.

Spring Creek Coal. There is a scheduling order from June, and the parties are proceeding accordingly.

Area F for Western Energy. They have a scheduling order, and they are proceeding through that.

I don't have 3(a), so I'll let DEQ do that.

And 3(b), I'm going to combine with the update for 2(c), which is Signal Peak, because as you guys may remember, the Signal Peak case, there was a piece of it, a subpoena issue, that went up to the District Court, and that has now worked its way through the District Court and is in front of the Supreme Court.

And the BER has hired outside Counsel to cover the BER for both the Signal Peak case and the Montana Environmental, MEIC case that you guys heard at the last meeting, has been appealed up to the District Court, so we've also hired Amy Christensen who is here, and so I'm going to let
her introduce herself and give you an update on those cases.

MS. BOWERS: Do you want an update on 3(a) from me?

MS. CLERGET: In a minute. Let me finish mine, and then we'll turn it over to you.

MS. CHRISTENSEN: It's nice to meet everybody. I'm Amy Christensen. I'm an attorney here in Helena. And Sarah asked me to help out on a couple of cases. So I met Chris -- good to see you. There is just these two cases. I have a very brief update. They haven't been developing very quickly at this point.

So on the Rosebud Mine case -- that's the one that's Sarah just mentioned involving MEIC -- that one has been served, the petition for judicial review has been served. It is now sitting in front of the District Court. Our answer or motion to dismiss, however we decide to proceed, will be due at the end of August, August 27th, so we'll be working on that. I think our intent is to file a motion to dismiss to try to get the Board out of that case.

The other case, the Signal Peak case, that's in front of the Montana Supreme Court. At
this point I think we're still waiting for the
record to be transmitted, and then after that
occurs, then the briefing will begin.

The Board filed a notice of
non-participation in that matter when it was in
front of the District Court, and so I anticipate
that that's likely what will happen in the Supreme
Court as well. So a very brief update for you.

CHAIR DEVENY: Thank you, Amy.

MS. CLERGET: Thank you. Just so you
guys are aware, the rest of the Signal Peak case
is still in front of me. It is proceeding
accordingly. So we're coming up on oral arguments
on cross motions for summary judgment sometime
next week or week after. So the rest of that, Amy
-- I have the underlying contested case, and it's
still going, and then Amy is taking the appeal,
just to make that distinction clear.

I think that's all for my update, and I
can turn it over to DEQ.

CHAIR DEVENY: Ms. Bowers, would you
like to give the DEQ update. Thank you.

MS. BOWERS: Madam Chair, members of the
Board, there is not much to report.

In Item 3(a), the Western Energy case
regarding the MPDES permit for the Rosebud Coal Mine, that is still before the Montana Supreme Court. The Court did request some additional briefing by the parties, and the parties simultaneously submitted the additional briefs on June 17th, and so we're still awaiting the Court's decision.

CHAIR DEVENY: Thank you. It has been on the agenda a long time. So those briefing items we're through with.

Next we have a rulemaking that the Department has requested that we initiate, so if we could turn that over to DEQ. George, do you have somebody that's going to speak for the Department?

MR. MATHIEUS: We do. Rachel Clark.

CHAIR DEVENY: Before you start, could you remind me what your name is.

MS. CLARK: Rachel Clark.

CHAIR DEVENY: And I just want to make sure that the Board understands, and that you make it clear, that there may be some parts in this proposed rule that we don't have authority for, so I just want to -- you're probably planning to address that, but I wanted to make sure that that
was the case.

MS. CLARK: Good morning, Madam Chair, members of the Board. My name is Rachel Clark. I am the Supervisor of the Public Water and Subdivisions Review Section in the Engineering Bureau in the Water Quality Division.

The Engineering Bureau reviews plans and specifications for public water and wastewater systems and subdivisions. The fees for public water and wastewater systems are adopted by the Board under its rulemaking authority in Montana Code Annotated 75-6-108.

Conversely the subdivision fees and rules are adopted by the Department under the Department's rulemaking authority.

We're here today to request that the Board initiate rulemaking to raise the public water and wastewater review fees under Administrative Rule 17.38.106. Often projects are subject to review under both of the sections, so it is important that comparable fees match, so we have prepared this as a joint rulemaking to ensure that fees are consistent between the sections.

In addition, the Department is proposing to adopt New Rule I regarding use of the municipal
facilities exclusion, but the item up for consideration by the Board today is solely the public water and wastewater fees.

The public water, engineering, and subdivision sections are both required by statute to set fees for reviewing plans commensurate with the cost to the Department of performing these services. Over the past three fiscal years, neither section has collected enough fees commensurate with our costs.

The Department is recommending a fee increase of 40 percent to the nearest even increment. We project that fee increase will be adequate to cover our costs up to year 2027. The last major increase for the public water and wastewater fees was almost a decade ago, in 2010.

The proposed rule package was presented to the Subdivision and Development Advisory Council and contracted counties. The Subdivision and Development Advisory Council is an ad hoc group of stakeholders representing developers, engineers, consultants, and other regulated communities brought together to make recommendations on our rules. Contracted counties are those that are contracted to review
subdivision files for DEQ.

Both groups were supportive of the rule package with minor changes to a few subdivision fee items, and those changes have been incorporated into the rule package before you. With that, I'm happy to answer any questions you may have.

CHAIR DEVENY: Thank you. Do Board members have questions of Ms. Clark?

MS. HANSON: This is Hillary. I don't have any questions, but I did want to let you guys know that the fees would impact my Health Department, and therefore I won't be voting on this.

CHAIR DEVENY: I didn't hear the last part of what you said, Hillary.

MS. HANSON: I don't think I should vote on anything related to this.

CHAIR DEVENY: Okay. We'll recuse you.

MS. HANSON: My Health Department.

CHAIR DEVENY: We'll recuse you from that. Thank you. Any other questions or comments from the Board?

(No response)

CHAIR DEVENY: It's pretty straight
forward. Are there any public comments on the
rules from anybody in the audience or on the
phone?

(No response)

CHAIR DEVENY: Hearing none, what is the
pleasure of the Board?

MR. DEARMENT: Madam Chair, I'd move
that we adopt the proposed rulemaking as presented
by the Department.

CHAIR DEVENY: It's actually to initiate
rulemaking.

MR. DEARMENT: Initiate. Yes. Thank
you.

CHAIR DEVENY: Could I modify that by
adding that we assign Sarah as the Hearing Officer
for the rulemaking?

MR. DEARMENT: Absolutely. Thank you.

CHAIR DEVENY: Is everybody clear then
on what we're voting on? Okay. It's been moved
and --

MR. BUSBY: I'll second that.

CHAIR DEVENY: -- we need a second then.

Okay. Thank you. All those in favor, signify by
saying aye.

(Response)
CHAIR DEVENY: Any opposed?

(No response)

CHAIR DEVENY: Okay. And we will note that Hillary was recused on that vote. Okay.

Thank you very much.

So Sarah, do you want to talk about the new case that's been filed before us.

MS. CLERGET: Yes. This is the standard options menu for you guys. You can choose to assign it to me or any Hearing Examiner for procedural purposes; you can decide to keep it entirely; or you can assign it to me for procedural and substantive purposes, me or any other Hearing Examiner you choose. I think you have the information in your packets for the case, the request for the hearing.

CHAIR DEVENY: So I would move that we assign Sarah Clerget as the Hearing Officer for the totality of the Alpine Pacific Utilities case. Is there any discussion or second of that?

MR. LEHNHERR: I'll second the motion.

CHAIR DEVENY: The motion has been seconded. Discussion?

MR. TWEETEN: I'll second it.

CHAIR DEVENY: David seconded it, Chris.
Thank you. We're having discussion now about the motion, which is to assign the case to Sarah in its entirety.

MS. HORNBEIN: Can we check in with Sarah on her workload?

MS. CLERGET: I'll say the same thing I say every time. As long as you guys are okay with getting additional help from the other attorneys at ALSB, we will deal with it as we can, which I understand to be the standing agreement. When you assign it to me, you assign it to ALSB essentially.

CHAIR DEVENY: Any other discussion or questions? Anybody feel differently? Do we want to take this one on instead of assigning it to Sarah? That's also an option.

(No response)

CHAIR DEVENY: Hearing and seeing no further discussion on this, we'll have a vote on the motion to assign the Alpine Pacific Utilities case to Sarah as the Hearing Officer for the totality of the case. All those in favor, signify by saying aye.

(Response)

CHAIR DEVENY: Any opposed?
(No response)

CHAIR DEVENY: Motion carries. David just pointed out that he believes our December meeting is on the 13th of December, rather than the 12th.

MS. CLERGET: That's probably my mistake.

CHAIR DEVENY: So just for clarification.

MS. CLERGET: The plug is for the 13th, not for the 12th. Sorry.

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(Board meeting recessed at 9:24 a.m. to hear oral arguments in BER 2015-01 WQ Reflections at Copper Ridge and BER 2015-02 WQ Copper Ridge Development Corporation and reconvened at 4:35 p.m.)

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CHAIR DEVENY: Sarah has --

MS. CLERGET: Yes, the Counsel update. So this is just something to run by you guys. I talked to Chris about it.

I was invited to speak at the Natural Resource Section of the Bar, which is the lawyers,
on the procedure for the BER, MAPA in general and the procedure for BER. And since I would be appearing in part as talking about the BER, and because I am the Hearing Examiner for the BER, Board attorney, I wanted you guys to know about that, and be sure it was okay with you that I do that. So I have tentatively said yes pending your approval, but I wanted you guys to hear about it --

CHAIR DEVENY: I thought it would be a fine thing to do. The more people that know what our procedures are out there I think the better.

BOARD MEMBER BUSBY: I think so.

CHAIR DEVENY: Does anybody have any problems with Sarah speaking before the Bar on behalf of what our Board does and what she does?

(No response)

CHAIR DEVENY: Hillary or Chris?

BOARD MEMBER HANSON: No problem.

MR. TWEETEN: No, I'm fine with it.

CHAIR DEVENY: You have our blessing.

MS. CLERGET: Okay. Thank you. That's all I have.

CHAIR DEVENY: With that, we'll take any public comment, if there is somebody on the phone
that wants to speak up. The room is otherwise pretty deserted.

(No response)

CHAIR DEVENY: Seeing none, would somebody make a motion to adjourn.

BOARD MEMBER BUSBY: I move we adjourn for the day.

CHAIR DEVENY: I'll second it. All those in favor, signify by saying aye.

(Response)

CHAIR DEVENY: All those opposed.

(No response)

CHAIR DEVENY: The motion passes. The meeting is adjourned.

(The proceedings were concluded at 4:39 p.m.)

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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 - 23 - 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.