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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

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BOARD MEETING )  
JANUARY 24, 2020 )

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TRANSCRIPT OF PROCEEDINGS

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Heard at Room 111 of the Metcalf Building  
1520 East Sixth Avenue  
Helena, Montana  
January 24, 2020  
9:00 a.m.

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

PREPARED BY: LAURIE CRUTCHER, RPR  
COURT REPORTER, NOTARY PUBLIC

1           WHEREUPON, the following proceedings were  
2 had and testimony taken, to-wit:

3                           \* \* \* \* \*

4           CHAIR DEVENY: Good morning, everybody.  
5 Welcome to the special meeting of the Board of  
6 Environmental Review. I'd like to call it to  
7 order, and Sara, would you please take a roll call  
8 to see if we have a quorum, and find out who  
9 joined us.

10           MS. NELSEN: Chris Deveny.

11           CHAIR DEVENY: Here.

12           MS. NELSEN: Dexter Busby.

13                   (No response)

14           MS. NELSEN: Dexter Busby.

15                   (No response)

16           MS. NELSEN: Hillary Hanson.

17           MS. HANSON: Here.

18           MS. NELSEN: John Dearment.

19           MR. DEARMENT: Here.

20           MS. NELSEN: Chris Tweeten.

21           MR. TWEETEN: Present.

22           MS. NELSEN: David Lehnherr.

23           MR. LEHNHERR: Here.

24           MS. NELSEN: And so we do have four  
25 Board members or more for a quorum either by phone

1 or in person.

2 CHAIR DEVENY: Okay. Great. Welcome,  
3 Board members. Happy New Year.

4 Let's go ahead and go around the room  
5 here, and check in, have introductions, and then  
6 we'll have introductions by phone if there are  
7 other people that have joined us. So we'll start  
8 with Sarah.

9 MS. CLERGET: Sarah Clerget, Board  
10 attorney.

11 MR. DAVIS: Tim Davis, DEQ liaison for  
12 the meeting.

13 MS. NELSEN: Sara Nelsen, interim Board  
14 secretary.

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

17 MR. PETTIS: Aaron Pettis, DEQ Legal.

18 MS. CLARK: Rachel Clark, supervisor of  
19 the Public Water and Subdivision Section.

20 MS. COLAMARIA: Angie Colamaria, Chief  
21 Legal, DEQ.

22 MR. HAYES: Ed Hayes, Deputy Chief  
23 Legal, DEQ.

24 CHAIR DEVENY: Okay. Great. Thank you.  
25 Are there other people on the phone that have

1 joined us this morning? If so, would you  
2 introduce yourselves.

3 (No response)

4 (Mr. Busby present)

5 CHAIR DEVENY: Any members of the public  
6 that want to chime in?

7 (No response)

8 CHAIR DEVENY: Okay. It looks like  
9 we'll go ahead and get started. We are here today  
10 solely to consider the adoption of rule amendments  
11 to ARM 17.38.106, and just a reminder that the BER  
12 jurisdiction is only for that, and not for the new  
13 rulemaking that is also part of this. At this  
14 point I would turn it to DEQ, Tim Davis.

15 MR. DAVIS: Madam Chair, Members of the  
16 Board, Rachel Clark, who is our Public Water and  
17 Subdivision Section Supervisor, is going to give a  
18 presentation on the Board rules, the rules before  
19 the Board, as well as the amendments that came out  
20 in response to comment.

21 CHAIR DEVENY: Ms. Clark.

22 MS. CLARK: Thank you. Good morning.  
23 My name is Rachel Clark, R-A-C-H-E-L C-L-A-R-K,  
24 and I'm the Supervisor of the Public Water and  
25 Subdivision Section of the Engineering Bureau.

1           The rule package you have before you  
2 today modifies the subdivision and public water  
3 and wastewater fees, and adopts New Rule I, which  
4 establishes eligibility requirements for  
5 municipalities and county water sewer districts to  
6 use the Sanitation Act exemption.

7           The subdivision fees and New Rule I are  
8 Department rules, so the only portion of the  
9 package up before the Board today is the public  
10 water and wastewater fees under Administrative  
11 Rule 17.38.106.

12           The Board and the Department conducted a  
13 public hearing for the proposed rules on September  
14 16th, and no member of the public attended the  
15 meeting or gave testimony during the hearing. The  
16 Board and Department also accepted written  
17 comments on the proposed rules from August 23rd  
18 through September 20th, and received five written  
19 comments. Those comments are addressed in the  
20 notice of amendment and adoption.

21           The only major change proposed to the  
22 Board rules in response to public comments was  
23 that the fees be phased in over several years,  
24 instead of a flat 40 percent one time increase.

25           In addition, the Environmental Quality

1 Council under their rule review authority objected  
2 to the rule package at their meeting in September.  
3 The EQC lifted their objection in January with the  
4 condition that the fees be scaled back to a one  
5 time 25 percent fee increase.

6 The Department recommends the Board  
7 adopt this proposed change to ARM 17.38.106, with  
8 the understanding that should the 25 percent fee  
9 increase not be sufficient to fully support the  
10 program, additional fee increases may be proposed  
11 in a future rulemaking.

12 The Department also recommends that the  
13 Board adopt an effective date of March 1st, 2020  
14 to give the regulated community advance notice of  
15 the proposed rule change.

16 In addition, the Department is proposing  
17 two other changes to the Department rules. Number  
18 one would be to have the subdivision water  
19 distribution fees match the public water fees; and  
20 also we propose to eliminate the requirement for a  
21 growth policy in New Rule I.

22 In summary, the Department recommends  
23 that the Board adopt the proposed changes to  
24 Administrative Rule 17.38.106 as modified in the  
25 draft notice of amendment. The Department also

1 recommends that the Board adopt the stringency,  
2 takings, and small business analysis, as well as  
3 the small business supplemental memorandum.

4 Thank you for your time, and I'm happy  
5 to answer any questions you may have.

6 CHAIR DEVENY: Thank you, Ms. Clark.  
7 Why don't you just stay up here because I think we  
8 might have a couple questions.

9 In your recommendations, do we also need  
10 to include the March 1st effective date change, if  
11 there were to be a motion?

12 MS. CLARK: Yes. It's in the draft  
13 notice of amendment. Yes.

14 CHAIR DEVENY: So it's in the draft, so  
15 it doesn't need to be a separate statement.

16 MS. CLARK: Correct.

17 CHAIR DEVENY: Do members of the Board  
18 have questions of Ms. Clark? One at a time.  
19 Go ahead, Dexter.

20 MR. BUSBY: I didn't catch when the last  
21 rate increase was passed. Could I get that info?

22 CHAIR DEVENY: They're looking for it.  
23 I believe it has been many years.

24 MR. DAVIS: 2012; isn't that right,  
25 Rachel?

1 MS. CLARK: I think so. Yes, I believe  
2 it has been since 2012.

3 MR. BUSBY: So it was eight years ago.

4 MS. CLARK: On the subdivision fees, and  
5 2010 for the public water fees.

6 CHAIR DEVENY: I remember you saying it  
7 had been ten years, I believe, when we first  
8 looked at this rule.

9 Any other questions from Board members?

10 MR. LEHNHERR: This is David. I have a  
11 question.

12 CHAIR DEVENY: Go ahead, David.

13 MR. LEHNHERR: Actually I had two  
14 questions, but Dexter's question answered one of  
15 mine.

16 My second question was regarding the 25  
17 percent increase. That increase apparently will  
18 not allow, is not sufficient to allow additional  
19 hiring of staff; is that correct?

20 MS. CLARK: That is correct.

21 CHAIR DEVENY: Any other questions?

22 MS. HANSON: This is Hillary. I guess I  
23 kind of had the same question. It was mentioned  
24 that you're going with 25 percent instead of the  
25 original 40 percent, and that you'll look at it to



1 see if it's sufficient to cover the costs.

2 I'm assuming there was already some cost  
3 analysis that came with this to get to the 40  
4 percent increase, so I guess I'm just curious on  
5 what the follow-up will be if this fee increase  
6 goes in place to analyze and see what it's doing  
7 in terms of covering costs.

8 MS. CLARK: We had estimated the  
9 original 40 percent increase would have taken the  
10 Department through to 2027 for our expected costs  
11 associated with the program. With this 25 percent  
12 fee increase, we expect it will take us through to  
13 2023.

14 Of course it depends on how many files  
15 come in the door, and that's not something we have  
16 control over, but I think it would be reasonable  
17 to expect this to last for around three years.

18 CHAIR DEVENY: Ms. Clark, I'm aware that  
19 the EQC has asked the Department to give regular  
20 updates with the data that you collect, to see  
21 what kind of increases in subdivision developments  
22 there are, and how your fees are holding up in  
23 terms of meeting that development growth. I would  
24 like you to also update the Board of Environmental  
25 Review with any data that you collect along the

1 way on probably the same frequency that you do the  
2 EQC.

3 MS. CLARK: Of course. Yes.

4 CHAIR DEVENY: Any other questions from  
5 Board members?

6 MS. HANSON: This is Hillary. I have  
7 one more question.

8 CHAIR DEVENY: Go ahead, Hillary.

9 MS. HANSON: Just I guess I'm curious,  
10 and this would be for DEQ fees across the board.  
11 Like for future smaller, incremental, more  
12 frequent incremental fee increases would be a  
13 better option, so I guess it's not even a question  
14 as much as a comment across the board of like how  
15 we can get away from doing big jumps like this,  
16 and maybe see these fees more frequently.

17 MS. CLARK: Certainly.

18 MR. DAVIS: Madam Chair, can I address  
19 that?

20 CHAIR DEVENY: Yes.

21 MR. DAVIS: Hillary, this is Tim Davis.  
22 We have looked at that. That was one of the  
23 options for potential future phasing. In response  
24 to comment received about phasing the fee, we're  
25 essentially adopting, proposing to adopt the 25

1 percent fee increase, which eliminates a shortfall  
2 in the program, and gives us time to look at other  
3 options on -- which would be potentially what  
4 you're proposing -- smaller incremental fee  
5 increases.

6 MS. HANSON: Thank you. And I'm not  
7 actually saying that I have an issue with this big  
8 piece, as much as I just think across the board  
9 you're going to get more support, not just from  
10 this Board, but from the public and others if you  
11 look at that.

12 MR. DAVIS: We'll do that. Thanks.

13 MS. HANSON: And not get in a scenario  
14 where you're 40 percent behind.

15 CHAIR DEVENY: I think that's a good  
16 point, Hillary. Thank you. Other questions or  
17 comments from Board members?

18 MR. BUSBY: This is Dexter.

19 MR. TWEETEN: Madam Chair.

20 CHAIR DEVENY: Let's hear from someone  
21 who hasn't spoken yet. Did I hear Chris?

22 MR. TWEETEN: Yes, you did.

23 CHAIR DEVENY: Go ahead, Chris, and  
24 Dexter, you're next.

25 MR. TWEETEN: I wonder if Ms. Clark

1 could summarize for us the grounds for objecting  
2 to the rule at 40 percent, and the discussions  
3 that led to a reduction to 25 percent. I'm  
4 curious.

5 MS. CLARK: I was not at the EQC meeting  
6 where this objection first came up, but my  
7 understanding is that they thought that the fee  
8 increase was too high, too much, and clearly they  
9 were willing to accept a smaller fee increase. So  
10 as far as I know, they had no objection to New  
11 Rule I or anything else except the 40 percent fee  
12 increase.

13 CHAIR DEVENY: Mr. Davis, could you kind  
14 of expound on that, since I know you were at the  
15 EQC meeting.

16 MR. DAVIS: Madam Chair, I'd be happy  
17 to. So yes, I think it was simply at the prior --  
18 So the EQC meeting, Environmental Quality Council  
19 meeting, which was only last week, the Council  
20 discussed the 25 percent versus 40 percent, and  
21 they voted to lift the objection based on the  
22 change, and the proposal that we would phase the  
23 fee increase over time, that this would be -- and  
24 if we were going to phase, we would have to come  
25 back with subsequent rulemaking; that this is just

1 the first phase. It actually passed  
2 overwhelmingly to let us go forward.

3 So to answer Chris's question, I really  
4 think it was just the sticker shock of the amount,  
5 the 40 percent; but once we were able to address  
6 their concerns, and answer their questions in  
7 front of the last Council meeting, they voted to  
8 let us proceed with the 25 percent as a first  
9 phase.

10 And then as the Chair pointed out, they  
11 requested that we come back on a six month basis  
12 to provide updates to timelines for our reviews,  
13 fees. And so as you requested, Madam Chair, we  
14 could bring that same report back to the BER going  
15 forward.

16 CHAIR DEVENY: Chris, does that answer  
17 your question?

18 MR. TWEETEN: Yes. Just a follow-up to  
19 clarify. So in effect what you've done is to  
20 adopt the phasing approach, but going through  
21 serial rulemaking as opposed to some phasing  
22 that's in the rule itself; is that correct?

23 MR. DAVIS: That is correct.

24 MR. TWEETEN: Okay. Thank you.

25 CHAIR DEVENY: Dexter, you had a

1 question?

2 MR. BUSBY: Yes. This is for Tim. Have  
3 you been running in arrears or in the red for the  
4 last couple three years, or what's the status?

5 MR. DAVIS: Yes, Dexter, we have. So  
6 this erases the shortfall. We have had to  
7 subsidize the program, so it raises the shortfall,  
8 and gives us -- as Ms. Clark pointed out -- it  
9 gives us a buffer to then look at what, if we need  
10 to do additional fee increases over the next  
11 couple years, what those might be.

12 MR. BUSBY: The other thing I noticed in  
13 my reading is that you have an efficiency study  
14 going, or plan to undertake one. Can you explain  
15 that a little bit.

16 MR. DAVIS: Madam Chair, Members of the  
17 Board, we've been working for really the last  
18 three years to increase the efficiency of our  
19 program, to improve communication. Two years ago  
20 we were not meeting statutory timelines for  
21 numerous reviews. We have not missed a statutory  
22 timeline in roughly two years.

23 So the fee increase allows us to  
24 maintain our existing staff, but we are  
25 undertaking, we have been and we are undertaking a

1 number of different efforts to make our reviews  
2 more efficient.

3 And the next step is comprehensive rule  
4 review of our subdivision, primarily our  
5 subdivision rules, to ensure that they are easily  
6 understood by the regulated community, so that  
7 they can get us applications that ideally we can  
8 review faster and easier.

9 And so that's kind of the next stage  
10 that we're looking for, and then we will be  
11 reporting back on -- and I think just this might  
12 address what you're asking, too -- but we will be  
13 reporting back on our timeline, and getting to a  
14 greater granularity on how long our reviews take,  
15 and how we're using fees.

16 Does that answer your question?

17 MR. BUSBY: Yes, that goes a long ways  
18 to answer it. I've got one real quick other  
19 question, and that's: How many subdivision  
20 reviews do you do in an average year, and is the  
21 rate changing or the numbers changing  
22 dramatically, or are we pretty constant?

23 MS. CLARK: We consistently do between  
24 400 and 500 review files here at DEQ, and then our  
25 contracted counties do another approximately 300

1 to 400 a year.

2 MR. BUSBY: Is that changing at all? Is  
3 it going up, down, or holding steady?

4 MS. CLARK: It is probably steady from  
5 2018 to 2019. Prior to that, as I'm sure  
6 everybody in Montana knows, we had a giant glut of  
7 new files in 2007/2008, and then it went steeply  
8 down for many years, and has been gradually  
9 picking up.

10 So I hope the levels that we are at  
11 today -- which haven't exceeded the number of new  
12 lots approved like in 2007 -- I hope that level is  
13 sustainable, so we don't over build too much and  
14 then crash again.

15 MR. BUSBY: Thank you.

16 CHAIR DEVENY: Do Board members have any  
17 other questions or comments regarding the rule  
18 amendments today?

19 (No response)

20 CHAIR DEVENY: Is there any public  
21 comment about the rules today that anybody would  
22 like to make?

23 (No response)

24 CHAIR DEVENY: Hearing none, I would  
25 like to move then that the Department adopt the



1 rule amendments to ARM 17.38.106 as modified in  
2 the draft notice of amendment, as well as adopting  
3 the stringency and takings analysis, and the small  
4 business impact analysis and supplemental  
5 memorandum.

6 MR. LEHNHERR: This is David. I'll  
7 second.

8 MS. CLERGET: You just said Department.  
9 I want to be clear. It's the Board that's  
10 adopting that.

11 CHAIR DEVENY: I will clarify my motion  
12 that it's the Board of Environmental Review that  
13 is adopting these rule amendments. Thank you, Ms.  
14 Clerget.

15 I believe this motion has been moved and  
16 seconded.

17 MR. LEHNHERR: Second the motion as  
18 modified.

19 CHAIR DEVENY: Is there a second on the  
20 modified motion?

21 MR. LEHNHERR: I'll second that. This  
22 is David.

23 CHAIR DEVENY: It's been seconded. All  
24 those in favor of -- Any discussion on the  
25 modified amendment motion?

1 (No response)

2 CHAIR DEVENY: Hearing none --

3 MS. HANSON: I just wanted to make the  
4 note that I'll be abstaining from voting. Our  
5 Health Department is a contractor with the  
6 subdivision program.

7 CHAIR DEVENY: Okay. Thank you,  
8 Hillary. No further discussion, we'll have a vote  
9 on the amended motion. All those in favor of  
10 amending my mistake of stating the Department  
11 instead of the Board of Environmental Review,  
12 please signify by saying aye.

13 (Response)

14 CHAIR DEVENY: Any opposed?

15 (No response)

16 CHAIR DEVENY: The amended motion  
17 passes. Now we will vote on the regular motion.  
18 First, is there discussion on the original motion  
19 that's been amended?

20 (No response)

21 CHAIR DEVENY: Hearing no discussion,  
22 all those in favor of the motion, please signify  
23 by saying aye.

24 (Response)

25 CHAIR DEVENY: Any opposed?

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(No response)

CHAIR DEVENY: Motion carries. Thank you, everybody, and we will now open this meeting for any general public comment, if there is any, on other issues besides what was on the agenda today.

(No response)

CHAIR DEVENY: Seeing and hearing none, this meeting is adjourned.

(The proceedings were concluded  
at (9:25 a.m. )

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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 - 19 - 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 \_\_\_\_\_, 2020.

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

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