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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
OCTOBER 9, 2020)

TRANSCRIPT OF PROCEEDINGS - VIA ZOOM

October 9, 2020
9:00 a.m.

BEFORE CHAIR CHRIS DEVENY,
BOARD MEMBERS JOHN DEARMENT,
DEXTER BUSBY, JEREMIAH LYNCH,
HILLARY HANSON, and DAVID LEHNHERR

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

3 * * * * *

4 CHAIR DEVENY: I'm going to go ahead and
5 call the meeting to order. Chris Deveny, Chair of
6 the Board of Environmental Review, and I call this
7 meeting to order on October 9th, 2020. And just
8 for the record, this meeting of the Board of
9 Environmental Review is being held using Zoom
10 technology because of the Corona 19 Virus
11 pandemic.

12 With that, I'll just go ahead and do
13 roll call today of the Board members. I'm
14 present. Dexter Busby.

15 BOARD MEMBER BUSBY: I'm here. Present.

16 CHAIR DEVENY: John DeArment.

17 BOARD MEMBER DeARMENT: Here.

18 CHAIR DEVENY: Hillary Hanson.

19 BOARD MEMBER HANSON: Here.

20 CHAIR DEVENY: David Lehnherr.

21 BOARD MEMBER LEHNHERR: Here.

22 CHAIR DEVENY: Jerry Lynch.

23 BOARD MEMBER LYNCH: Here.

24 CHAIR DEVENY: Chris Tweeten.

25 (No response)

1 CHAIR DEVENY: Chris Tweeten.

2 (No response)

3 CHAIR DEVENY: Deb, have you heard from
4 Chris whether he's able to attend or not?

5 MS. SUTLIFF: I'm sorry. No, I have not
6 heard from Chris.

7 CHAIR DEVENY: We have six out of seven.
8 We do have a quorum, so we'll go ahead and
9 continue. And with that, welcome, everybody, and
10 if DEQ could go ahead and do the introductions of
11 the DEQ staff, and then all members of the public
12 who are here. I'd also like to introduce Sarah
13 Clerget, our Board attorney. She is here as well.

14 Go ahead Deb or Tim, whoever is doing
15 that.

16 MR. DAVIS: Madam Chair, I'll kick off,
17 Deb, and then you can read through the names of
18 non-DEQ staff.

19 Again, this is Tim Davis. I am sitting
20 in for George Mathieus as the DEQ liaison to the
21 Board this morning. So I will read off the names
22 of the DEQ staff, and then Deb will read off the
23 names of the other attendees and their affiliation
24 one by one, and ask if each of you wishes to make
25 a public comment. Please just quickly say whether

1 you wish to make a public comment or not.

2 So for DEQ staff, there's Sandy Matule,
3 Ed Coleman, Joanna McLaughlin, Melinda Horn, Kayla
4 Glossner, Hannah New, Mark Lucas, Sandy Scherer,
5 Angie Colamaria, Kirsten Bowers, Aaron Pettis,
6 Chad Anderson, Rainie DeVaney, and Kurt Moser.
7 And I am just making one last pass to see if I
8 missed anyone.

9 MS. CHRISTOPHERSON: Sarah Christopher
10 for DEQ, Counsel, is on the phone as well.

11 MR. DAVIS: Thank you, Sarah.

12 MR. HAYES: Edward Hayes, Deputy Chief
13 Legal Counsel for DEQ is also here.

14 MR. DAVIS: Thanks, Ed. Did I miss any
15 other DEQ staff that didn't put their name in the
16 chat?

17 (No response)

18 MR. DAVIS: Okay. Deb, would you please
19 go through the names of the non-DEQ and their
20 affiliation, and please, again, if people can just
21 let us know verbally if you plan to comment or
22 not.

23 MS. SUTLIFF: Absolutely. We have Vicki
24 Marquis with Holland and Hart. Vicki, are you on?

25 MS. MARQUIS: Yes. Good morning. I'm

1 on. Can you hear me?

2 MS. SUTLIFF: Yes. Will you be
3 commenting today, Vicki?

4 MS. MARQUIS: No, but I am here
5 representing Alpine Pacific Utilities. That's one
6 of the contested cases that is on the Board's
7 agenda today for action. So if there are
8 questions related to that, I'm available to answer
9 them, or discuss whatever issues the Board might
10 have, or concerns, or questions.

11 MS. SUTLIFF: Thank you, Vicki. Also we
12 have John Martin.

13 MR. MARTIN: Yes. I'm representing
14 Signal Peak Energy, and I'm prepared to answer
15 questions that the Board may have about the newly
16 filed matter; and to the extent necessary, I'll
17 also be happy to answer questions with respect to
18 Westmoreland. Thank you.

19 MS. SUTLIFF: Thank you. Also John has
20 Trish, his assistant with him also. Trish. Thank
21 you for joining, John.

22 We have a guest Amelia. Amelia, can you
23 introduce yourself, please.

24 (No response)

25 MS. SUTLIFF: Amelia, can you unmute?

1 MR. DAVIS: Deb, I believe that's Amelia
2 Flannery with DEQ.

3 MS. SUTLIFF: Thank you. That about
4 wraps up the public. Of course Laurie Crutcher.
5 Thank you. She is our Clerk and Recorder, has
6 joined us today, and we sure appreciate her time
7 crunch on getting with us.

8 We have a guest Derf. I'm sorry. I'm
9 not -- I don't have your last name.

10 MR. DERF JOHNSON: This is Derf Johnson.
11 I'm with the Montana Environmental Information
12 Center.

13 MS. SUTLIFF: Thank you for joining us,
14 Derf. And will you have comments today?

15 MR. JOHNSON: No. I'm just listening
16 today. Thank you.

17 MS. SUTLIFF: Okay. Thank you. I do
18 believe I've wrapped up our guests. We do have
19 Anne Hedges. Anne is with MEIC. Thank you.
20 Anne, will you have comments today?

21 MS. HEDGES: Yes, thank you very much,
22 very, very briefly on the rulemaking section of
23 the agenda.

24 MS. SUTLIFF: Thank you. All right.
25 Madam Chair, members of the Board, Tim Davis, that

1 does conclude my list of guests at this time. ⁷

2 CHAIR DEVENY: Thank you, Deb. Are
3 there other members of the public that we may have
4 inadvertently missed? If so, please speak up now,
5 either on Zoom or on the phone.

6 BOARD MEMBER LYNCH: This is Board
7 Member Lynch, Madam Chair. I do see a Mark Lucas.
8 I don't know if we heard from him or not. Mr.
9 Lucas?

10 CHAIR DEVENY: He's with DEQ.

11 BOARD MEMBER LYNCH: I'm sorry. All
12 right. Thank you.

13 MR. BARNES: This is Corey Barnes from
14 Baker and Hostetler, LLP. I'm an attorney for
15 Westmoreland Mining. I do not plan on making a
16 comment.

17 CHAIR DEVENY: And I know Amy
18 Christensen, it looks like you're on.

19 MS. CHRISTENSEN: Yes. I'm here. Thank
20 you.

21 CHAIR DEVENY: Amy is our outside
22 attorney who will be speaking today obviously.
23 Any others that we may have missed?

24 MS. SUTLIFF: Haley Sir. Haley, are you
25 connected?

1 (No response)

2 MR. DAVIS: And Haley is with DEQ as
3 well.

4 CHAIR DEVENY: I believe we've got
5 everybody accounted for. If somebody checks in
6 during the meeting, we will ask them to introduce
7 themselves. Thank you, everyone, for your
8 patience in doing this. I know it's a little
9 cumbersome, but it's good that we get a record of
10 everybody who is attending. We're trying to do it
11 as expeditiously as possible.

12 So with that, we're going to go to the
13 Board minutes of the August 7th meeting, and
14 before I ask for --

15 Somebody tried to call in or --

16 (No response)

17 CHAIR DEVENY: I'd like to ask people to
18 mute their phones, if they could, please. We're
19 getting a lot of feedback.

20 I've found several places in the minutes
21 that I thought needed some clarification and
22 correction, and rather than belabor and take a lot
23 of time to go through each of those items, if it's
24 all right with the other Board members, I would
25 just like to ask DEQ to go back and revise them,

1 and we'll take a look at them at the next meeting,
2 and I'll be happy to send a list of my additions
3 and corrections to DEQ to do that.

4 Board members, are you comfortable with
5 postponing that and asking DEQ to come up with a
6 second draft of the minutes from the meeting?

7 MR. DeARMENT: Madam Chair, yes, that's
8 fine.

9 CHAIR DEVENY: Sorry. Just for
10 procedural purposes, do I need to make a motion to
11 that, or can we just ask DEQ to go back and redo
12 those?

13 MS. CLERGET: I don't think we need a
14 motion.

15 CHAIR DEVENY: Okay. Great. Well, I'll
16 be in touch then. Thank you.

17 With that, I'd like to move on to the
18 briefing items, and Sarah Clerget, our Board
19 attorney, will give us updates on all those
20 contested cases that we have.

21 MS. CLERGET: Okay, everybody. Bear
22 with me because Aleisha is out, she actually got
23 married last week, and so I have been on my own,
24 and you all who know me will know how difficult
25 that is for me. So if I mess something up, bear

1 with me. I just want to point out that there are
2 a few -- the agenda is a little confusing, and I
3 apologize for that.

4 Under the briefing items, there is one
5 new contested case that should be under action
6 items, and then it says "Action on Contested
7 Case," but then it appears in the briefing section
8 as opposed to in the action. There's actually two
9 action items that appear that say action items in
10 Section 3(c)(i), but they should be under action
11 items on contested cases, in addition to the new
12 cases. So I apologize. I'll make it clear as I
13 go through case-by-case.

14 So starting out, we have Copper Ridge
15 and Reflections. As you remember, this is both a
16 contested case and a District Court case. In the
17 contested case on July 9th, I held oral argument
18 on the motions for summary judgment, after issuing
19 orders on the motion in limine, and that is fully
20 briefed and waiting for decision.

21 In the meantime, they filed additionally
22 a motion to take judicial notice of fact, and a
23 motion to strike. Neither of those are fully
24 briefed yet. As for the District Court case, I
25 will turn it over to Amy for her update.

1 CHAIR DEVENY: Go ahead, Amy.

2 MS. CHRISTENSEN: So this case is in the
3 District Court in Billings --

4 CHAIR DEVENY: Excuse me, Amy. You're
5 kind of breaking up. Is it possible for you to
6 get closer to your speaker?

7 MS. CHRISTENSEN: Okay. So if that
8 works a little bit better.

9 CHAIR DEVENY: That's better for me.
10 Thank you.

11 MS. CHRISTENSEN: So this case is in the
12 District Court in Billings. It's there on an
13 intermediate petition for judicial review relating
14 to an appeal of a decision to consolidate the
15 cases. We filed a motion to dismiss because the
16 Board was named as a party. We don't believe the
17 Board should be a party to an appeal of one of its
18 own decisions.

19 That motion is fully briefed. We have
20 oral argument this week in front of Judge Harada.
21 She's indicated that she's ready to rule and could
22 do so as early as next week, so we should know
23 pretty soon what the outcome of that motion is.

24 MS. CLERGET: Continuing on, we've got
25 nonenforcement cases.

1 The first one is the City of Great
2 Falls. And you'll note that there was a motion
3 for dismissal or joint status report due by
4 October 2nd, which was when I had to submit this.

5 So since this was submitted, we've had
6 that come in, and they've indicated that they will
7 have their settlement documents filed by November
8 20th for approval from the Board at the December
9 meeting, so that will be coming before you guys or
10 hopefully be settled and dismissed at that point.

11 CHAIR DEVENY: Sorry, Sarah. You missed
12 the Murray case.

13 MS. CLERGET: Thank you. I apologize.
14 So Duane Murray was a new case that got assigned
15 to me at the last Board meeting, and they've
16 entered notices of appearance. Mr. Murray is
17 appearing pro se, and we have a DEQ attorney on
18 it. They have submitted their scheduling
19 proposals, and I issued a scheduling order at some
20 point this week, I think, or last week. Anyway
21 there is a scheduling order in place, and they are
22 proceeding according to that.

23 Moving on to Montanore Minerals. I have
24 not heard -- the parties have not filed anything
25 yet to tell me what the status is in the Supreme

1 Court, so for purposes of the contested case, I am
2 assuming that there has been no movement on that.

3 Spring Creek Coal is the next one. This
4 one is proceeding according to the scheduling
5 order, and discovery closes in January of 2021.

6 Moving on to CHS, this one, as you'll
7 see, we had a status conference on the 6th. I
8 spoke to the parties about the status of this. It
9 was somewhat dependent on the rulemaking that you
10 guys did on the arsenic, and they're working
11 diligently.

12 The parties have really been working
13 hard to get this settled; but I don't think by any
14 fault or remissness on their part, they couldn't
15 get the settlement documents done in time for you
16 to review them by this meeting.

17 So they've asked if they could have a
18 special meeting of the Board before the end of
19 October, because the current permit expires at the
20 end of October, and they need, as part of the
21 settlement, to modify that permit, and they have
22 to get that done before the permit expires at the
23 end of October.

24 So they're working hard to get their
25 settlement documents done, and they'll submit

1 them, and I'll give them to you. And I'd ask for
2 you guys -- I don't think this special meeting
3 will take more than about 15 or 20 minutes, but
4 Chris, I think you had a date in mind for that.

5 CHAIR DEVENY: I was on my schedule, and
6 I don't know why I missed that. Based on my
7 schedule, October 29th, which is a Thursday, at
8 9:00 a.m. would work best for me. I'm wondering
9 if Board members could weigh in whether that's a
10 possible date.

11 BOARD MEMBER HANSON: Can you say it
12 again, Chris?

13 CHAIR DEVENY: It would be Thursday,
14 October 29th at 9:00 a.m.

15 BOARD MEMBER LYNCH: That will work for
16 me. Thank you.

17 BOARD MEMBER DeARMENT: Madam Chair,
18 that works for me as well.

19 BOARD MEMBER LEHNHERR: David Lehnherr
20 here. That works for me also.

21 CHAIR DEVENY: Dexter or Hillary?

22 BOARD MEMBER HANSON: I have something
23 scheduled, but I could see if it can be rebooked.

24 BOARD MEMBER BUSBY: I may or may not be
25 available. I'm going to be traveling that day.

1 CHAIR DEVENY: And has Chris Tweeten
2 checked in yet today?

3 (No response)

4 CHAIR DEVENY: We'll follow up on that
5 later then, and make sure we've at least got a
6 quorum. Thank you, everybody.

7 Go ahead, Sarah.

8 MS. CLERGET: That will also apply to
9 the Laurel Refinery case, which is the next case
10 on the agenda.

11 Then we have Signal Peak Energy, Bull
12 Mountain. There is a District Court case and a
13 contested case. Amy, do you want to go forward on
14 the District Court case? It might be simpler.

15 MS. CHRISTENSEN: And that case went up
16 to the Montana Supreme Court, which found that
17 there were issues that needed to still be decided
18 at the administrative level, so they have remanded
19 it back. It should come back to the Board for
20 some further rulings at some point.

21 MS. CLERGET: So it has come back. The
22 parties discussed the remand with me, and we
23 proceeded with the trial, which was a four day
24 Zoom trial, and we're awaiting the transcript, and
25 then once the transcript is done, they'll do their

1 post hearing filings. After those are filed, we
2 will have closing arguments.

3 And I just got a motion for extension on
4 those, so it's going to be a little while before
5 we get that done, but they're big. Obviously it's
6 a four day trial, and they're big facts, so I'm
7 going to give them some time to get those post
8 hearing filings done.

9 Moving on from there, the Rippling Woods
10 Homeowners Association. There's a partial motion
11 for summary judgment that should be fully briefed
12 in November, so because it's partial, it will not
13 be dispositive. It will probably not come before
14 the Board unless the parties agree that it should
15 for some reason. So hopefully that motion will
16 get fully briefed and then it will be in front of
17 me for a decision.

18 Western Energy -- and I apologize. This
19 is Western Energy Area F, is how we refer to this
20 case to distinguish it. It's a little confusing
21 on the agenda because it appears that MEIC v. DEQ,
22 which is an appeal of the separate Western Energy
23 case, it appears that that is related to this
24 Western Energy case, and it's not. So I just want
25 to clarify.

1 So the Western Energy Area F case that
2 is in front of me has fully briefed summary
3 judgment motions. And we were going to have some
4 oral argument on those. Scheduling didn't work
5 out, and we may still, but I doubt it. I think I
6 can issue the decision without the oral arguments,
7 and I've discussed that with the parties.

8 I will just tell you that I had another
9 attorney that was helping me on some of these
10 bigger motions. And for those of you who don't
11 know, ALS is bleeding attorneys right now, so
12 we're down three attorneys, and I expect we will
13 be down more than that, and so the work load
14 situation is a problem.

15 So I lost my help, and I will do the
16 best I can to get both that and the Copper Ridge
17 motions done, but they are both big.

18 Contested cases not assigned to --
19 Sorry, Amy. Then you need to do the appeal of the
20 Western Energy AM4.

21 MS. CHRISTENSEN: This is another
22 District Court where we moved to dismiss on the
23 grounds that the Board should not be a party to an
24 appeal of one of its own decisions.

25 We lost that motion. We filed a

1 petition for writ of supervisory control with the
2 Montana Supreme Court, which was denied, so it
3 came back to the District Court to complete the
4 briefing on the petition for judicial review.

5 That briefing is completed. The Court
6 just set oral argument for December 16th in
7 Forsyth. I think pretty much everybody is going
8 to appear remotely for that, including the Judge.
9 At that point, it will be fully submitted, we'll
10 get a decision on the petition itself, and then we
11 can discuss whether to appeal the denial of the
12 motion to dismiss. So that's a little bit further
13 down the road, but I'll keep you posted.

14 CHAIR DEVENY: Thank you.

15 MS. CLERGET: So although the next three
16 cases appear under briefing items, they're
17 actually action items, and so I think they should
18 be dealt with under the action items of the
19 contested case portion, if that's all right with
20 you.

21 CHAIR DEVENY: Thank you, Sarah. I
22 think we need to hear from DEQ on the --

23 MS. CLERGET: Sorry. I'm getting ahead
24 of myself. Yes.

25 CHAIR DEVENY: Ms. Bowers, were you

1 planning to say anything about the case?

2 MS. BOWERS: Good morning, Madam Chair,
3 members of the Board.

4 So the next case on your agenda is the
5 appeal and request for hearing by Western Energy
6 Company regarding its MPDES permit for the Rosebud
7 Mine. And that case was stayed pending judicial
8 review. It's been all the way to the Supreme
9 Court, and remanded back to the First Judicial
10 District Court. And the parties are proceeding in
11 accordance with the scheduling order, and there's
12 really no other change to report at this time.

13 CHAIR DEVENY: Thank you, Ms. Bowers.
14 Go ahead, Sarah, on the contested cases.

15 MS. CLERGET: So Woodrock, Alpine, and
16 Westmoreland are all action items, and so I would
17 suggest that we do them with the other action
18 items.

19 And then there is one case under action
20 item that is not in fact an action item, so that's
21 B(1), which is the Talen Major Facility Siting Act
22 case. That case, it's just a briefing item that
23 it has been dismissed as described in the agenda.

24 So I think that's all for briefing
25 items, and everything else should be under action

1 items, if you want to wait on those.

2 CHAIR DEVENY: Okay. I wonder if we
3 shouldn't just go ahead and continue with the
4 contested cases, and then leave the rule to the
5 end, just because I kind of have a mindset now for
6 working with contested cases.

7 MS. CLERGET: Sure.

8 CHAIR DEVENY: If you would like to
9 continue. And tell us the order that you're going
10 to do those, and it would be helpful for me.

11 MS. CLERGET: So I'll take them in the
12 order that they are on the agenda.

13 So first you have Alpine Pacific
14 Utilities. So this is a case that is in your
15 packet for approval.

16 And I apologize because the packet pages
17 are not numbered, but if you look at the heading,
18 you can tell that this is -- There's a blue
19 heading on the top that tells you what item number
20 this is related to, and it's also got a heading on
21 it that says, "Alpine Pacific Utilities." So it's
22 listed as agenda Item II(A)(3)(c)(i) in your
23 packets, and it appears at PDF Page 6, so it
24 should be Page 6 for those of you in hard copy.

25 And the bottom line is that they have a

1 stipulation and request for attention of Board
2 jurisdiction, and because it would mean that the
3 Board itself needs to retain jurisdiction, I spoke
4 to the parties and asked them, and they agreed
5 that this is something that the Board should
6 decide instead of me.

7 And so it's in front of you for
8 approval. And you have the language there. I
9 hope that you've reviewed it. And as you've
10 heard, the parties are available if you have
11 questions.

12 CHAIR DEVENY: So if I'm not mistaken,
13 is the reason this is here is because of the fact
14 that our numeric nutrient criteria standards no
15 longer apply, and that we're now using a narrative
16 standard? If somebody from DEQ could just clarify
17 that for me.

18 MR. DAVIS: So Kirsten.

19 MS. BOWERS: Madam Chair, members of the
20 Board. In part, that's one of the things that
21 happened during the pendency of this case, is that
22 the numeric standards are no longer in effect, and
23 so that did change the nondegradation review that
24 would be done in this for this permit.

25 And that's one of the things that the

1 parties agreed to work on through the stipulation,
2 is in the event that Alpine should want to modify
3 the permit and increase their discharge amount,
4 then DEQ would conduct nondegradation review using
5 the narrative criteria. And I believe Vicki is on
6 if you have questions for Alpine, too.

7 BOARD MEMBER LYNCH: Madam Chair, this
8 is Board Member Lynch. I would like an
9 explanation, please, of when you're talking about
10 a narrative standard, what that entails.

11 CHAIR DEVENY: Go ahead, Ms. Bowers.

12 MS. BOWERS: Board Member Lynch, members
13 of the Board. So the narrative criteria for
14 nutrients, it's under our general prohibitions in
15 637, and that is that there shouldn't be any
16 discharge that would cause undesirable aquatic
17 life such as algae. So we try to pick a discharge
18 limit that wouldn't encourage algae growth or
19 other aquatic life, undesirable aquatic life.

20 BOARD MEMBER LYNCH: Follow-up question,
21 please. What's that based upon, the narrative
22 criteria. I'm struggling with numeric versus --
23 (inaudible) --

24 MS. BOWERS: I know. I understand. So
25 I don't know if Jon Kenning or anybody from DEQ

1 that could give you more scientific answer,
2 because I'm just applying the prohibitions in the
3 rules, and I'm told by the permitting folks that
4 the analysis is pretty close to what we do with
5 numeric criteria, but they kind of pick a number
6 that translates, that would translate the permit
7 requirements, and not allow increased algae
8 growth. I don't know if that was a very clear
9 answer.

10 CHAIR DEVENY: Just for a little
11 additional clarification, and just a reminder to
12 the Board members, I believe it was back in May or
13 June we were informed that EPA had denied the
14 nutrient criteria that had been approved by DEQ
15 and the Board, and we had to go back to the
16 narrative standard that was in place before the
17 nutrient standards were in place.

18 So Tim, if that's correct, please weigh
19 in, or correct me if I've got that wrong.

20 MR. DAVIS: Madam Chair, Board Member
21 Lynch. Yes, that's correct. The EPA's
22 disapproval of the nutrient variance rules
23 triggered provisions of the original adoption of
24 the numeric nutrient criteria -- that some people
25 refer to as the poison pill -- that then if there

1 was a disapproval by the Courts or EPA of our
2 general variance, then the numeric nutrient
3 criteria would go away as well.

4 With EPA's disapproval, that's what
5 occurred, so we are falling back on the nutrient
6 narrative standard that was in place prior to the
7 numeric nutrient criteria being adopted.

8 BOARD MEMBER LYNCH: This is Board
9 Member Lynch again. So DEQ's hands are sort of
10 tied, so to speak?

11 MR. DAVIS: Madam Chair, Board Member
12 Lynch. Yes. It's the nonseverability provisions
13 of the original adoption by the Board of the
14 criteria itself that triggered it.

15 BOARD MEMBER LYNCH: Thank you.

16 MR. DAVIS: And this question is, I
17 should note -- and Kirsten can dive in. This
18 question is in front of the Courts at this point
19 as well, so there was a case on this. So we will
20 certainly update the Board based on Court
21 decisions going forward.

22 BOARD MEMBER LYNCH: Thank you.

23 CHAIR DEVENY: Please do keep us
24 informed, because I know we had talked about
25 possibly discussing whether we needed to change

1 our rules as a result of this, so -- but back to
2 the case.

3 MR. LEHNHERR: Madam Chair. David
4 Lehnherr here.

5 CHAIR DEVENY: Yes. Go ahead, David.

6 MR. LEHNHERR: I just have one other
7 question. In this particular case, I'm wondering
8 what the discharge is. Is it a point source? And
9 what is the discharge into? Is it into a stream,
10 for example?

11 MS. BOWERS: Board Member Lehnherr and
12 members of the Board. It's a groundwater
13 pollution control system discharge permit. It is
14 a point source, and it discharges to groundwater.

15 MR. LEHNHERR: Thank you.

16 MS. MARQUIS: Madam Chair, if I could
17 provide just a little bit of context.

18 CHAIR DEVENY: Go ahead. Vicki Marquis.

19 MS. MARQUIS: Thank you. This is Vicki
20 Marquis. I represent Alpine Pacific Utilities,
21 and just a little bit of context for this permit
22 specifically.

23 The previous permit for Alpine Pacific
24 Utilities was issued before there was a numeric
25 criteria for nutrients, so it was originally

1 issued with narrative standards in place, and that
2 translated into effluent limits based on some
3 modeling work that was done by the permittee.

4 In the interim, the numeric standards
5 took place, and the permittee sought to increase
6 the volume of their discharge. Those are two
7 important changes.

8 And then of course the numeric criteria
9 went away, so we're sort of at the same place we
10 were originally, except that permittee now wants
11 -- well, could potentially want a larger volume.

12 So what we've agreed to in the
13 stipulation, as shown on Page 7 of the
14 stipulation, specifically Paragraphs 18 through
15 20, and that part of the stipulation requires the
16 permittee to go back, install a new monitoring
17 well -- which we've already submitted the plan for
18 that to DEQ.

19 And then it requires the permittee to
20 gather data, and do some modeling to show just
21 what the impact of the discharge might be on
22 surface water that is downstream from the
23 groundwater.

24 So based on that data and that modeling,
25 we anticipate that that will give the Department

1 the technical information that they need to devise
2 a permit limit that is appropriate, and that's one
3 of the reasons why this is in front of you today,
4 is to just document this agreement, to follow
5 these steps, to get to an appropriate limit for
6 the expanded volume.

7 CHAIR DEVENY: Thank you for that
8 clarification, Ms. Marquis. That was helpful.

9 Does DEQ have anything to add to that?
10 Clearly you're the other party to this stipulation
11 agreement.

12 MS. BOWERS: Madam Chair, Members of the
13 Board. No. Thanks, Vicki. That was a good
14 clarification, and DEQ is satisfied with the terms
15 of the settlement.

16 CHAIR DEVENY: Any questions from Board
17 members? Further clarification? Dexter, I see a
18 green light on. Did you have a question?

19 BOARD MEMBER BUSBY: I didn't, but I'll
20 ask one anyway. So both parties are in agreement
21 on the stipulation? There's no points in that of
22 disagreement?

23 CHAIR DEVENY: That's my understanding.

24 BOARD MEMBER BUSBY: I was going to say
25 that's to Vicki, if not you.

1 MS. MARQUIS: Madam Chair, Board Member
2 Busby. This is Vicki Marquis. And yes, Alpine
3 Pacific agrees to the terms of the stipulation,
4 and we would ask for the Board's approval today.
5 Thank you.

6 CHAIR DEVENY: Any other questions or
7 discussions from Board members?

8 (No response)

9 CHAIR DEVENY: So Sarah, just for
10 clarification, the question before the Board is
11 whether to approve, or deny, or change the
12 stipulation and request for retention of Board
13 jurisdiction?

14 MS. CLERGET: That's correct.

15 CHAIR DEVENY: Hearing no other
16 discussion, I will move that the Board of
17 Environmental Review approve the stipulation and
18 request for retention of Board jurisdiction on
19 this Alpine Pacific Utilities case.

20 BOARD MEMBER DeARMENT: Madam Chair,
21 this is John, and I'll second that.

22 CHAIR DEVENY: It's been second by John
23 DeArment. Is there any further discussion?

24 (No response)

25 CHAIR DEVENY: Hearing none, all those

1 in favor of the motion, signify by saying aye.

2 (Response)

3 CHAIR DEVENY: Any opposed?

4 (No response)

5 CHAIR DEVENY: Hearing none, the motion
6 passes unanimously.

7 Thank you. Okay.

8 MS. CLERGET: Just one point of
9 procedure. There's, as you'll see in your packet,
10 there's a signature line for me, and what we're
11 going to do is just change the signature so it's
12 for you, Chris, and then we'll return that to the
13 Board.

14 CHAIR DEVENY: Yes. That kind of
15 confused me, but that's not unusual. Thank you.

16 MS. CLERGET: So moving on to the next
17 -- and I'm getting feedback. If everybody would
18 mute their mikes again, please, or their phones.

19 So the next action item is the
20 Westmoreland Resources, and this is another
21 decision whether you guys want to approve what
22 they have put in front of you, and it appears in
23 your packet at Agenda Item II(A)(3)(c)(ii). And
24 it starts on Page 18 of your packet, PDF Page 18.

25 And this again is a motion for remand

1 and for suspension, and I would like the Board to
2 approve this, and the parties have agreed that it
3 should be in front of the Board instead of in
4 front of me because of the contents of it.

5 So the parties are both present if the
6 Board has any questions.

7 CHAIR DEVENY: Could somebody provide
8 context on this case, please.

9 MR. DAVIS: Kirsten, do you want to --

10 MS. BOWERS: Madam Chair, Members of the
11 Board, this case has been on your agenda for
12 awhile, and it's a similar issue to the issue that
13 was before the Court in the Rosebud case. It's
14 essentially an interpretation of DEQ's ephemeral
15 rule at 17.30.637(4).

16 And after the Supreme Court's decision
17 in the MEIC case, Westmoreland has -- the parties
18 have stipulated that DEQ would reevaluate the
19 permit in light of the Supreme Court's decision.
20 And the underlying permit that was appealed is
21 actually expired, and the mine has submitted, has
22 timely submitted an application for renewal.

23 So we are asking you to remand the
24 matter back to DEQ, and we will evaluate the
25 permit on renewal, and consider the Supreme

1 Court's decision.

2 CHAIR DEVENY: Thank you, Ms. Bowers.
3 Do Board members have questions of Ms. Bowers or
4 anyone else?

5 BOARD MEMBER DeARMENT: This is John.
6 Just for clarity. So DEQ and the other party both
7 agree? This is another case like Alpine where the
8 agency and the permittee are in agreement, yes?

9 MS. BOWERS: That's correct, Board
10 Member DeArment.

11 BOARD MEMBER DeARMENT: Yes.

12 MR. MARTIN: And on behalf of
13 Westmoreland Resources, we concur.

14 CHAIR DEVENY: That was Mr. Martin.
15 Please identify yourself for our Court Reporter.

16 MR. MARTIN: I'm sorry. I'll keep that
17 in mind next time. Thank you.

18 CHAIR DEVENY: Any other comments,
19 questions from Board members?

20 (No response)

21 CHAIR DEVENY: Would a Board member like
22 to make a motion at this point?

23 BOARD MEMBER LYNCH: This is Board
24 Member Lynch. I'll move to grant the request.

25 BOARD MEMBER DeARMENT: This is John.

1 I'll second.

2 CHAIR DEVENY: It's been moved and
3 seconded to remand the case back to the DEQ. Any
4 further discussion or questions?

5 (No response)

6 CHAIR DEVENY: All those in favor of the
7 motion, please signify by saying aye.

8 (Response)

9 CHAIR DEVENY: Any opposed?

10 (No response)

11 CHAIR DEVENY: Hearing none, the motion
12 passes unanimously.

13 Next, Sarah.

14 MS. CLERGET: Now we're going to move to
15 new cases. And I apologize for jumping around in
16 the agenda a little bit, but I think this makes
17 more sense to do all of the new cases together.
18 There are three of them. Again, I'm getting
19 feedback. If everybody could mute.

20 So the first one appears at your agenda
21 Item 3(b)(i), and this is Woodrock in your packet.
22 It appears at PDF Page 3. And you see a DEQ memo.

23 This is your standard menu of options
24 for opening a case. You can decide whether you
25 want to retain jurisdiction entirely, whether you

1 want to assign it for procedural purposes to a
2 Hearing Examiner, or whether you want to assign it
3 entirely for procedural and substantive decisions
4 to a Hearings Examiner, who will then bring a
5 final decision, recommended decision back to the
6 Board.

7 So those are your three options with
8 this case. And I would just ask if anybody makes
9 a motion to please be sure that if you are going
10 to assign it to a Hearing Examiner, you make clear
11 that it can be any Hearing Examiner at ALS, not
12 necessarily me.

13 CHAIR DEVENY: Thank you, Sarah. I
14 would so move that the Woodrock case, the new
15 contested case regarding Woodrock, be assigned for
16 all procedural and substantive purposes to a
17 Hearing Officer with the ALS office.

18 BOARD MEMBER DeARMENT: This is John.
19 I'll second that.

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

22 (No response)

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

1 (Response)

2 CHAIR DEVENY: Any opposed?

3 (No response)

4 CHAIR DEVENY: Motion carries. Next
5 one, Sarah.

6 MS. CLERGET: The next one is the matter
7 of Janet Savko, I believe, is how you pronounce
8 that, regarding floodplain setbacks. This appears
9 in your packet at PDF Page 85. And it is another
10 new case, and you have the same three menu items
11 in front of you, whether to retain jurisdiction
12 entirely, assign it for procedural purposes, or to
13 assign for all purposes. And this on your agenda,
14 just to be clear, is agenda Item 3(b)(ii).

15 CHAIR DEVENY: What's the Board's
16 pleasure?

17 BOARD MEMBER DeARMENT: This is John. I
18 would move that we assign this in its entirety to
19 Counsel, who may or may not be Sarah, or one of
20 her colleagues, as she's requested.

21 CHAIR DEVENY: It's been --

22 BOARD MEMBER BUSBY: I'll second that.

23 CHAIR DEVENY: Thank you, Dexter. It
24 was moved by John DeArment, seconded by Dexter to
25 assign this case in its whole entity to the ALS

1 Office as Hearing Officer. All those in favor,
2 signify by saying aye.

3 (Response)

4 CHAIR DEVENY: Any opposed?

5 BOARD MEMBER LYNCH: It's a PDF. As you
6 scroll back and forth, a number should show you --

7 CHAIR DEVENY: Somebody needs to mute
8 their phone, please. Any opposed?

9 (No response)

10 CHAIR DEVENY: Hearing none, motion
11 passes. Go ahead, Sarah.

12 MS. CLERGET: The last one is Signal
13 Peak Energy. And I apologize this came in to you
14 guys as an eleventh hour amendment to the packet,
15 and this is another new case that needs to be
16 assigned. And you have the same menu of options
17 available to you.

18 There's a slight wrinkle in this one,
19 because there is, simultaneous to the contested
20 case that appears in front of you as a new case,
21 there is a District Court case that is proceeding.

22 And we've asked the parties to be here
23 to explain why the contested case can proceed
24 while there is a parallel District Court action;
25 and also potentially to explain, if there are any

1 questions from the Board, why this came in at the
2 eleventh hour, and we didn't know about it until
3 then.

4 So it's the Board's pleasure whether
5 they have questions about either of those things.
6 Your only job on this one is to decide whether to
7 assign it or to keep it.

8 CHAIR DEVENY: I would like to hear the
9 parallel case discussion from somebody,
10 explanation from somebody, please.

11 MR. MARTIN: If Mr. Lucas would prefer
12 to go first, I'd be happy to defer to him. This
13 is John Martin, and I represent Signal Peak.

14 Just very briefly, this is an order from
15 DEQ. There were actually two different District
16 Court appeals that were filed, one that was filed
17 on behalf of Mr. Charter, the landowner, and one
18 that was filed on behalf of our client Signal
19 Peak. As a protective matter, we also filed
20 before the Board.

21 There was some question about the
22 jurisdiction of the District Court as opposed to
23 the Board, and I think it's probably unnecessary,
24 and in fact unwise for us to get into the details
25 of that issue.

1 Mr. Lucas and I have talked as recently
2 as last night, and we've also talked to Counsel
3 for the landowner, and our sense is that there is
4 a strong likelihood that this matter can be
5 resolved. Certainly the parties would like to
6 discuss settlement.

7 So our suggestion is that for the Board
8 proceeding, that we stay the Board proceeding for
9 a period of ninety days. We're planning on filing
10 a motion to that effect. Obviously this is
11 something that we've just discussed, and we would
12 want to bring the landowner's Counsel into the
13 discussions about what we do before the Board as
14 well. We just haven't had that opportunity.

15 And now I'll turn to Mr. Lucas to ask if
16 there is something else that he would like to add
17 to that explanation.

18 CHAIR DEVENY: Thank you, Mr. Martin.
19 Mr. Lucas, please go ahead.

20 MR. LUCAS: Thank you, Mr. Martin.
21 Madam Chair, Board members. I really don't have
22 anything to add to what Mr. Martin just told you.
23 I'm willing to stipulate on the record that DEQ
24 would accept a ninety day stay while we sort
25 things out, and try and resolve things. Thank

1 you.

2 CHAIR DEVENY: Thank you. Sarah, could
3 you please weigh in on that, and tell us how that
4 affects what might be before us in the packet.

5 MS. CLERGET: Sure. So the main thing
6 there is that if you want to keep it for any
7 reason, then you guys would be the ones to issue
8 the stay; and potentially if the landowner Mr.
9 Charter wants to intervene, you'd have to rule on
10 that intervention.

11 So if you're keeping the case, then you
12 would be the ones to do that. If you're assigning
13 it to a Hearing Examiner, then the Hearing
14 Examiner will be the one to do that, either for
15 procedural purposes or for substantive purposes.
16 And so it's your pleasure how you proceed, whether
17 you want a Hearing Examiner to manage that, or
18 whether you want to manage it yourselves.

19 CHAIR DEVENY: Okay.

20 BOARD MEMBER LYNCH: Madam Chair, this
21 is Board Member Lynch. Sarah, what's your
22 suggestion?

23 MS. CLERGET: I would suggest that you
24 give it to a Hearing Examiner. If there's a
25 settlement possibility, there may be -- and

1 there's probably going to be -- a motion to
2 intervene, it would be easier and faster for
3 everybody, I think, if you had a Hearing Examiner
4 managing the procedural aspects of it at least.

5 BOARD MEMBER LYNCH: Thank you.

6 CHAIR DEVENY: Further questions of Ms.
7 Clerget from Board members, or further
8 clarification questions of Mr. Martin or Mr. Lucas
9 from Board members?

10 (No response)

11 CHAIR DEVENY: Hearing none, I would
12 like to move that the Signal Peak Energy case be
13 assigned in its entirety, both procedurally and
14 substantively, to a Hearing Examiner with the
15 office of ALS.

16 BOARD MEMBER LYNCH: I'll second that.
17 This is Board Member Lynch.

18 CHAIR DEVENY: It's been seconded by
19 Jerry Lynch. Any discussion by Board members?

20 (No response)

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

23 (Response)

24 CHAIR DEVENY: Any opposed?

25 (No response)

1 CHAIR DEVENY: Hearing none, the motion
2 passes. Thank you.

3 MS. CLERGET: That completes all of the
4 action items on contested cases.

5 CHAIR DEVENY: Did we do Talen?

6 MS. CLERGET: Yes, I did that as a
7 briefing item. It got under action items --

8 CHAIR DEVENY: Okay. Thank you.

9 MS. CLERGET: -- inadvertently.

10 CHAIR DEVENY: I think we're through all
11 of the contested case work then, and we'll move
12 over to the rule adoption at this time. Tim
13 Davis, could you fill us in.

14 MR. DAVIS: Madam Chair, members of the
15 Board, Rainie DeVaney will be giving a brief
16 update on the rulemaking response to comments, and
17 I see her now, so I'll let her kick off.

18 CHAIR DEVENY: Ms. DeVaney, go ahead.

19 MS. DeVANEY: Thank you, Madam Chair,
20 and members of the Board. For the record, my name
21 is Rainie DeVaney, that's R-A-I-N-I-E last name
22 D-E-V-A-N-E-Y. I manage DEQ's MPDES permitting
23 program in the Water Quality Division. I'm here
24 to request that the Board adopt the MPDES rule
25 amendment as proposed, but with one change that I

1 will discuss in a minute.

2 As you may remember, the rule amendment
3 contains updates to adopt the new EPA application
4 forms, changes to maintain consistency with the
5 federal regulations governing the State's MPDES
6 program, and provides clarity and makes editorial
7 corrections.

8 The Board initiated rulemaking this
9 April, and provided opportunity for the public to
10 comment, both orally and in writing. The Board
11 received five public comments, and they are
12 addressed in the amendment and adoption notice.

13 DEQ is proposing one change in the rule
14 amendment in response to public comment, and that
15 is found in Subsection 1372 Sub (5) Sub (e). This
16 change would have allowed DEQ to publish notice of
17 major and general permitting activities on the
18 agency's website in lieu of newspaper
19 publications.

20 Instead, DEQ is proposing to maintain
21 the existing newspaper publication requirement,
22 and provide the option for additional public
23 notice on the Department's website.

24 In closing, the Department recommends
25 the Board adopt the rulemaking consistent with the

1 notice of amendment, and thank you. I'd be happy
2 to answer any questions.

3 CHAIR DEVENY: Are there questions of
4 Ms. DeVaney from Board members?

5 (No response)

6 CHAIR DEVENY: I'd like to comment that
7 I think you're wise to stick with including the
8 newspaper announcements. I think a lot of people
9 in Montana do continue to get their news that way.

10 BOARD MEMBER LYNCH: I agree with that.
11 This is Board Member Lynch. I totally agree with
12 that. That's a great suggestion.

13 BOARD MEMBER BUSBY: This is Dexter.
14 That would have been my comment on the original
15 rules, so I agree with you.

16 MS. DeVANEY: Thank you, Madam Chair.
17 Thank you, Board members.

18 CHAIR DEVENY: Thank you. At this point
19 it doesn't appear that the Board members have any
20 further questions or discussion, but I would like
21 to take public comment. Are there any members of
22 the public that wish to comment on the proposed
23 rulemaking?

24 MS. HEDGES: Hi. This is Anne Hedges
25 with Montana Environmental Information Center.

1 And I just want to echo what everybody just said.
2 I want to thank the Department for taking our
3 comments into consideration, looking at the lack
4 of connectivity in Montana, and realizing that if
5 people don't have notifications in their weekly
6 newspapers, oftentimes they just don't have the
7 ability to access information on the web.

8 So thank you very much to the Department
9 for getting that one right.

10 CHAIR DEVENY: Thank you, Ms. Hedges.
11 Are there other members of the public that would
12 wish to comment on the proposed rules?

13 (No response)

14 CHAIR DEVENY: Any further discussion
15 from Board members or questions?

16 (No response)

17 CHAIR DEVENY: With that, would somebody
18 like to entertain a motion?

19 BOARD MEMBER BUSBY: I would move that
20 we adopt the rules per se.

21 BOARD MEMBER LYNCH: I will second.

22 CHAIR DEVENY: It's been moved and
23 seconded that the Board adopt the rule amendments
24 set forth in the notice of amendment, as well as
25 the House Bill 521 and 311 analysis, as well as

1 the modification proposed this morning regarding
2 the newspaper additional communication method. Do
3 I have that correct, Rainie, or Tim?

4 MS. DeVANEY: Madam Chair, could you
5 please repeat the question for me?

6 CHAIR DEVENY: I just wanted to make
7 sure that the motion was clear to everybody that
8 Dexter made. It is to adopt the rule amendments
9 as set forth in the notice of amendment, along
10 with the House Bill 521/311 analysis, with the
11 amendment to the rule adding the newspaper
12 notification.

13 MS. DeVANEY: Madam Chair, members of
14 the Board. Yes, that sounds right.

15 CHAIR DEVENY: Okay. Thank you.
16 Dexter, is that what you wanted?

17 BOARD MEMBER BUSBY: Yes.

18 CHAIR DEVENY: It's been moved. Did we
19 have a second on Dexter's motion?

20 BOARD MEMBER LYNCH: This is Jerry
21 Lynch. I seconded.

22 CHAIR DEVENY: We have a second from
23 Jerry. Any further discussion from Board members
24 or questions?

25 (No response)

1 CHAIR DEVENY: Hearing none, all those
2 in favor of the motion before the Board, please
3 signify by saying aye.

4 (Response)

5 CHAIR DEVENY: Any opposed?

6 (No response)

7 CHAIR DEVENY: Hearing none, the motion
8 passes. Thank you, everyone.

9 With that, Sarah, we'll go back to you
10 for any Board Counsel update.

11 MS. CLERGET: I just have one request to
12 the Board, and that is similar to what we just did
13 in the new cases.

14 I just would like, because of the sort
15 of extended nature of the assignments of Hearing
16 Examiners throughout the life of these cases, I
17 would like to have a clarification in one place on
18 the record that all contested cases before the
19 Board are assigned to ALS as a Hearing Examiner,
20 and not to me personally.

21 And I would appreciate a motion from the
22 Board that clarified that, so that any prior
23 assignments might -- we don't have to fight about
24 it essentially.

25 CHAIR DEVENY: Do Board members have

1 questions of Sarah about that or need any further
2 clarification?

3 (No response)

4 CHAIR DEVENY: If not, I would so move
5 that all contested cases in the past and hereto
6 forward that are assigned are not specifically
7 assigned to Sarah Clerget, but are rather assigned
8 to the ALS Bureau attorneys to serve as Hearings
9 Officers.

10 BOARD MEMBER HANSON: Second.

11 CHAIR DEVENY: It's been seconded by
12 Hillary Hanson. Any discussion?

13 (No response)

14 CHAIR DEVENY: Hearing none, all those
15 in favor of the motion before the Board, signify
16 by saying aye.

17 (Response)

18 CHAIR DEVENY: Any opposed?

19 (No response)

20 CHAIR DEVENY: Hearing none, motion
21 carries.

22 MS. CLERGET: That's all I have.

23 CHAIR DEVENY: I realize that your
24 workload is really heavy, Sarah, and we appreciate
25 all the work you do for us.

1 MS. CLERGET: Thank you guys. I love
2 being BER Board Counsel. It is a pleasure.

3 BOARD MEMBER LYNCH: Sarah, this is
4 Jerry Lynch. That's not an indication you're
5 going anywhere, is it?

6 MS. CLERGET: I don't know that.

7 CHAIR DEVENY: That's an unfair
8 question. I'm sorry. You do a great job. Thank
9 you.

10 MS. CLERGET: Thank you.

11 CHAIR DEVENY: Anything else, Sarah?

12 MS. CLERGET: No. That's all.

13 CHAIR DEVENY: At this point, we'll open
14 up the meeting to any general public comment that
15 there may be on items that were not on the agenda
16 and that do not obtain to contested cases. Is
17 there any public comment at this time?

18 (No response)

19 CHAIR DEVENY: Is there any public
20 comment?

21 (No response)

22 CHAIR DEVENY: Hearing none, we'll move
23 on, and I believe we're through for the day, so I
24 will move that we adjourn.

25 BOARD MEMBER BUSBY: I second that

1 motion.

2 CHAIR DEVENY: It's been moved and
3 seconded that we adjourn. All those in favor,
4 signify by saying aye.

5 (Response)

6 CHAIR DEVENY: Any opposed?

7 (No response)

8 CHAIR DEVENY: Motion passes. This
9 meeting is adjourned. And I want to thank
10 everybody, all the Board members especially, for
11 their work, and Sarah, and DEQ members, and
12 members of the public who participated. I think
13 these meetings are going pretty well on Zoom
14 considering that it's kind of an awkward method.

15 So thank you, everyone, and we'll be in
16 touch about getting together again at the end of
17 the month to handle that special request.

18 (The proceedings were concluded

19 at 10:02 a.m.)

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C E R T I F I C A T E

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 - 48 - 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 26th day of
October, 2020.

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires
March 9, 2024.

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