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

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

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

BOARD MEMBER BUSBY: I'm here. Present.

CHAIR DEVENY: John DeArment.

BOARD MEMBER DeARMENT: Here.

CHAIR DEVENY: Hillary Hanson.

BOARD MEMBER HANSON: Here.

CHAIR DEVENY: David Lehnherr.

BOARD MEMBER LEHNHERR: Here.

CHAIR DEVENY: Jerry Lynch.

BOARD MEMBER LYNCH: Here.

CHAIR DEVENY: Chris Tweeten.

(No response)
CHAIR DEVENY: Chris Tweeten.

(No response)

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

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

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

Go ahead Deb or Tim, whoever is doing that.

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

Again, this is Tim Davis. I am sitting in for George Mathieus as the DEQ liaison to the Board this morning. So I will read off the names of the DEQ staff, and then Deb will read off the names of the other attendees and their affiliation one by one, and ask if each of you wishes to make a public comment. Please just quickly say whether
you wish to make a public comment or not.

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

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

MR. DAVIS: Thank you, Sarah.

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

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

(No response)

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

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

MS. MARQUIS: Yes. Good morning. I'm
on. Can you hear me?

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

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

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

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

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

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

(No response)

MS. SUTLIFF: Amelia, can you unmute?
MR. DAVIS: Deb, I believe that's Amelia Flannery with DEQ.

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

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

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

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

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

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

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

MS. SUTLIFF: Thank you. All right.

Madam Chair, members of the Board, Tim Davis, that
does conclude my list of guests at this time.

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

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

CHAIR DEVENY: He's with DEQ.

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

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

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

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

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

MS. SUTLIFF: Haley Sir. Haley, are you connected?
(No response)

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

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

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

Somebody tried to call in or --

(No response)

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

I've found several places in the minutes that I thought needed some clarification and correction, and rather than belabor and take a lot of time to go through each of those items, if it's all right with the other Board members, I would just like to ask DEQ to go back and revise them,
and we'll take a look at them at the next meeting, and I'll be happy to send a list of my additions and corrections to DEQ to do that.

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

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

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

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

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

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

MS. CLERGET: Okay, everybody. Bear with me because Aleisha is out, she actually got married last week, and so I have been on my own, and you all who know me will know how difficult that is for me. So if I mess something up, bear
with me. I just want to point out that there are a few -- the agenda is a little confusing, and I apologize for that.

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

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

In the meantime, they filed additionally a motion to take judicial notice of fact, and a motion to strike. Neither of those are fully briefed yet. As for the District Court case, I will turn it over to Amy for her update.
MS. CHRISTENSEN: So this case is in the District Court in Billings --

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

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

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

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

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

MS. CLERGET: Continuing on, we've got nonenforcement cases.
The first one is the City of Great Falls. And you'll note that there was a motion for dismissal or joint status report due by October 2nd, which was when I had to submit this. So since this was submitted, we've had that come in, and they've indicated that they will have their settlement documents filed by November 20th for approval from the Board at the December meeting, so that will be coming before you guys or hopefully be settled and dismissed at that point.

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

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

Moving on to Montanore Minerals. I have not heard -- the parties have not filed anything yet to tell me what the status is in the Supreme
Court, so for purposes of the contested case, I am assuming that there has been no movement on that.

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

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

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

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

So they're working hard to get their settlement documents done, and they'll submit
them, and I'll give them to you. And I'd ask for you guys -- I don't think this special meeting will take more than about 15 or 20 minutes, but Chris, I think you had a date in mind for that.

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

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

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

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

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

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

CHAIR DEVENY: Dexter or Hillary?

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

BOARD MEMBER BUSBY: I may or may not be available. I'm going to be traveling that day.
CHAIR DEVENY: And has Chris Tweeten checked in yet today?

(No response)

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

Go ahead, Sarah.

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

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

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

MS. CLERGET: So it has come back. The parties discussed the remand with me, and we proceeded with the trial, which was a four day Zoom trial, and we're awaiting the transcript, and then once the transcript is done, they'll do their
post hearing filings. After those are filed, we will have closing arguments.

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

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

Western Energy -- and I apologize. This is Western Energy Area F, is how we refer to this case to distinguish it. It's a little confusing on the agenda because it appears that MEIC v. DEQ, which is an appeal of the separate Western Energy case, it appears that that is related to this Western Energy case, and it's not. So I just want to clarify.
So the Western Energy Area F case that is in front of me has fully briefed summary judgment motions. And we were going to have some oral argument on those. Scheduling didn't work out, and we may still, but I doubt it. I think I can issue the decision without the oral arguments, and I've discussed that with the parties.

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

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

Contested cases not assigned to --

Sorry, Amy. Then you need to do the appeal of the Western Energy AM4.

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

We lost that motion. We filed a
petition for writ of supervisory control with the
Montana Supreme Court, which was denied, so it
came back to the District Court to complete the
briefing on the petition for judicial review.

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

CHAIR DEVENY: Thank you.

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

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

MS. CLERGET: Sorry. I'm getting ahead

CHAIR DEVENY: Ms. Bowers, were you
planning to say anything about the case?

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

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

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

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

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

So I think that's all for briefing items, and everything else should be under action
CHAIR DEVENY: Okay. I wonder if we shouldn't just go ahead and continue with the contested cases, and then leave the rule to the end, just because I kind of have a mindset now for working with contested cases.

MS. CLERGET: Sure.

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

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

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

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

And the bottom line is that they have a
stipulation and request for attention of Board jurisdiction, and because it would mean that the Board itself needs to retain jurisdiction, I spoke to the parties and asked them, and they agreed that this is something that the Board should decide instead of me.

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

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

MR. DAVIS: So Kirsten.

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

And that's one of the things that the
parties agreed to work on through the stipulation, is in the event that Alpine should want to modify the permit and increase their discharge amount, then DEQ would conduct nondegradation review using the narrative criteria. And I believe Vicki is on if you have questions for Alpine, too.

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

CHAIR DEVENY: Go ahead, Ms. Bowers.

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

BOARD MEMBER LYNCH: Follow-up question, please. What's that based upon, the narrative criteria. I'm struggling with numeric versus --

(inaudible) --

MS. BOWERS: I know. I understand. So I don't know if Jon Kenning or anybody from DEQ
that could give you more scientific answer,
because I'm just applying the prohibitions in the
rules, and I'm told by the permitting folks that
the analysis is pretty close to what we do with
numeric criteria, but they kind of pick a number
that translates, that would translate the permit
requirements, and not allow increased algae
growth. I don't know if that was a very clear
answer.

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

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

MR. DAVIS: Madam Chair, Board Member
Lynch. Yes, that's correct. The EPA's
disapproval of the nutrient variance rules
triggered provisions of the original adoption of
the numeric nutrient criteria -- that some people
refer to as the poison pill -- that then if there
was a disapproval by the Courts or EPA of our general variance, then the numeric nutrient criteria would go away as well.

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

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

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

BOARD MEMBER LYNCH: Thank you.

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

BOARD MEMBER LYNCH: Thank you.

CHAIR DEVENY: Please do keep us informed, because I know we had talked about possibly discussing whether we needed to change
our rules as a result of this, so -- but back to
the case.

MR. LEHNHERR: Madam Chair. David
Lehnerr here.

CHAIR DEVENY: Yes. Go ahead, David.

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

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

MR. LEHNHERR: Thank you.

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

CHAIR DEVENY: Go ahead. Vicki Marquis.

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

The previous permit for Alpine Pacific
Utilities was issued before there was a numeric
criteria for nutrients, so it was originally
issued with narrative standards in place, and that translated into effluent limits based on some modeling work that was done by the permittee. In the interim, the numeric standards took place, and the permittee sought to increase the volume of their discharge. Those are two important changes.

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

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

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

So based on that data and that modeling, we anticipate that that will give the Department
the technical information that they need to devise a permit limit that is appropriate, and that's one of the reasons why this is in front of you today, is to just document this agreement, to follow these steps, to get to an appropriate limit for the expanded volume.

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

Does DEQ have anything to add to that?

Clearly you're the other party to this stipulation agreement.

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

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

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

CHAIR DEVENY: That's my understanding.

BOARD MEMBER BUSBY: I was going to say that's to Vicki, if not you.
MS. MARQUIS: Madam Chair, Board Member

Busby. This is Vicki Marquis. And yes, Alpine Pacific agrees to the terms of the stipulation, and we would ask for the Board's approval today. Thank you.

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

(No response)

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

MS. CLERGET: That's correct.

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

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

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

(No response)

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

(Response)

CHAIR DEVENY: Any opposed?

(No response)

CHAIR DEVENY: Hearing none, the motion passes unanimously.

Thank you. Okay.

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

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

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

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

And this again is a motion for remand
and for suspension, and I would like the Board to
approve this, and the parties have agreed that it
should be in front of the Board instead of in
front of me because of the contents of it.

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

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

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

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

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

So we are asking you to remand the
matter back to DEQ, and we will evaluate the
permit on renewal, and consider the Supreme
Court's decision.

CHAIR DEVENY: Thank you, Ms. Bowers.

Do Board members have questions of Ms. Bowers or anyone else?

BOARD MEMBER DeARMENT: This is John.

Just for clarity. So DEQ and the other party both agree? This is another case like Alpine where the agency and the permittee are in agreement, yes?

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

BOARD MEMBER DeARMENT: Yes.

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

CHAIR DEVENY: That was Mr. Martin.

Please identify yourself for our Court Reporter.

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

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

(No response)

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

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

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

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

(No response)

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

(Response)

CHAIR DEVENY: Any opposed?

(No response)

CHAIR DEVENY: Hearing none, the motion passes unanimously.

Next, Sarah.

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

So the first one appears at your agenda Item 3(b)(i), and this is Woodrock in your packet. It appears at PDF Page 3. And you see a DEQ memo. This is your standard menu of options for opening a case. You can decide whether you want to retain jurisdiction entirely, whether you
want to assign it for procedural purposes to a Hearing Examiner, or whether you want to assign it entirely for procedural and substantive decisions to a Hearings Examiner, who will then bring a final decision, recommended decision back to the Board.

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

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

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

CHAIR DEVENY: It's been moved and seconded. Is there any 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. Next one, Sarah.

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

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

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

CHAIR DEVENY: It's been --

BOARD MEMBER BUSBY: I'll second that.

CHAIR DEVENY: Thank you, Dexter. It was moved by John DeArment, seconded by Dexter to assign this case in its whole entity to the ALS
Office as Hearing Officer. All those in favor, signify by saying aye.

(Response)

CHAIR DEVENY: Any opposed?

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

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

(No response)

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

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

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

And we've asked the parties to be here to explain why the contested case can proceed while there is a parallel District Court action; and also potentially to explain, if there are any
questions from the Board, why this came in at the
eleventh hour, and we didn't know about it until
then.

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

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

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

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

There was some question about the
jurisdiction of the District Court as opposed to
the Board, and I think it's probably unnecessary,
and in fact unwise for us to get into the details
of that issue.
Mr. Lucas and I have talked as recently as last night, and we've also talked to Counsel for the landowner, and our sense is that there is a strong likelihood that this matter can be resolved. Certainly the parties would like to discuss settlement.

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

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

CHAIR DEVENY: Thank you, Mr. Martin.

Mr. Lucas, please go ahead.

MR. LUCAS: Thank you, Mr. Martin.

Madam Chair, Board members. I really don't have anything to add to what Mr. Martin just told you. I'm willing to stipulate on the record that DEQ would accept a ninety day stay while we sort things out, and try and resolve things. Thank
CHAIR DEVENY: Thank you. Sarah, could you please weigh in on that, and tell us how that affects what might be before us in the packet.

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

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

CHAIR DEVENY: Okay.

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

MS. CLERGET: I would suggest that you give it to a Hearing Examiner. If there's a settlement possibility, there may be -- and
there's probably going to be -- a motion to
intervene, it would be easier and faster for
everybody, I think, if you had a Hearing Examiner
managing the procedural aspects of it at least.

BOARD MEMBER LYNCH: Thank you.

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

(No response)

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

BOARD MEMBER LYNCH: I'll second that.

This is Board Member Lynch.

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

(No response)

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

(Response)

CHAIR DEVENY: Any opposed?

(No response)
CHAIR DEVENY: Hearing none, the motion passes. Thank you.

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

CHAIR DEVENY: Did we do Talen?

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

CHAIR DEVENY: Okay. Thank you.

MS. CLERGET: -- inadvertently.

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

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

CHAIR DEVENY: Ms. DeVaney, go ahead.

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

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

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

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

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

In closing, the Department recommends the Board adopt the rulemaking consistent with the
notice of amendment, and thank you. I'd be happy
to answer any questions.

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

(No response)

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

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

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

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

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

MS. HEDGES: Hi. This is Anne Hedges
with Montana Environmental Information Center.
And I just want to echo what everybody just said. I want to thank the Department for taking our comments into consideration, looking at the lack of connectivity in Montana, and realizing that if people don't have notifications in their weekly newspapers, oftentimes they just don't have the ability to access information on the web.

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

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

(No response)

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

(No response)

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

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

BOARD MEMBER LYNCH: I will second.

CHAIR DEVENY: It's been moved and seconded that the Board adopt the rule amendments set forth in the notice of amendment, as well as the House Bill 521 and 311 analysis, as well as
the modification proposed this morning regarding the newspaper additional communication method. Do I have that correct, Rainie, or Tim?

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

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

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

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

BOARD MEMBER BUSBY: Yes.

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

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

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

(No response)
CHAIR DEVENY: Hearing none, all those in favor of the motion before the Board, please signify by saying aye.

(Response)

CHAIR DEVENY: Any opposed?

(No response)

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

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

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

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

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

CHAIR DEVENY: Do Board members have
questions of Sarah about that or need any further clarification?

(No response)

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

BOARD MEMBER HANSON: Second.

CHAIR DEVENY: It’s been seconded by Hillary Hanson. Any discussion?

(No response)

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

(Response)

CHAIR DEVENY: Any opposed?

(No response)

CHAIR DEVENY: Hearing none, motion carries.

MS. CLERGET: That's all I have.

CHAIR DEVENY: I realize that your workload is really heavy, Sarah, and we appreciate all the work you do for us.
MS. CLERGET: Thank you guys. I love being BER Board Counsel. It is a pleasure.

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

MS. CLERGET: I don't know that.

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

MS. CLERGET: Thank you.

CHAIR DEVENY: Anything else, Sarah?

MS. CLERGET: No. That's all.

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

(No response)

CHAIR DEVENY: Is there any public comment?

(No response)

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

BOARD MEMBER BUSBY: I second that
motion.

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

(Response)

CHAIR DEVENY: Any opposed?

(No response)

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

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

(The proceedings were concluded at 10:02 a.m.)

* * * * *
CERTIFICATE

STATE OF MONTANA

COUNTY OF LEWIS & CLARK

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

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