BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING
August 7, 2020

TRANSCRIPT OF PROCEEDINGS VIA ZOOM

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
August 7, 2020
9:00 a.m.

BEFORE CHAIR CHRIS DEVENY,
BOARD MEMBERS JOHN DEARMET,
CHRIS TWEETEN, DEXTER BUSBY,
JEREMIAH LYNCH, AND DAVID LEHNHERR
The following proceedings were had:

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CHAIR DEVENY: I will go ahead and call this meeting of the Board of Environmental Review to order. I'm Chris Deveny, Chair. I just wanted to mention for the record that we are holding this meeting using the Zoom virtual technology because of the COVID-19 pandemic. And it sounds like we have a dog in agreement there.

Anyway, so the meeting is called to order and, Deb, if you would go ahead and take roll call of board members and then do a preview of the people who signed in to today's meeting.

MS. SUTLIFF: All right. Chair Chris Deveny.

CHAIR DEVENY: Deveny. Here.

MS. SUTLIFF: Dexter Busby.

MR. BUSBY: I'm here.

MS. SUTLIFF: Hillary Hanson? (No response.) Hillary Hanson?

John DeArment.

MR. DEARMENT: Here.

MS. SUTLIFF: Chris Tweeten. (No
response.)

David Lehnherr.

MR. LEHNHERR: Here.

MS. SUTLIFF: And Judge Jerry Lynch.

MR. LYNCH: Present.

MS. SUTLIFF: We have Sarah Clerget.

MS. CLERGET: Present but I'm not a board member. Board attorney.

MS. SUTLIFF: Thank you. I'm sorry.

CHAIR DEVENY: We have five board members present so we do have a quorum today. So then, Deb, if you want to do the other introductions starting with our board attorney Sarah, that would be good.

MS. CLERGET: Sarah Clerget, I'm here.

MS. SUTLIFF: Thanks, Sarah.

All right. Moving on, then we have Lisa Lesofski. I'm sorry, Lisa, if I'm mispronouncing your name. Lisa is our clerk and recorder today for the board meeting.

We also online have Ed Hayes with DEQ legal. George Mathieu, DEQ deputy director. We have Dave Klemp. Troy Burrows. We have Tim Davis with DEQ. We have Sandy Scherer with the legal department here at DEQ. I apologize,
it's going really last. We have Amy Christensen. Also with DEQ we have Shawn Juers, Eric Campbell, Lisa Sullivan, Liz Ulrich, Ed Warner, Myla Kelly, Christine Weaver, Katie Alexander, Kurt Moser, Jon Staldine. I apologize if I'm mispronouncing names this morning. My tongue is all twisted up.

We have Norm Mullen, DEQ legal. We have Katy Callon with air quality. We have Mike Suplee, Ed Coleman, Rainey DeVane, Eric Sivers. Caroline -- oh, Caroline, I'm so sorry, Canarios. Kirsten Bowers with DEQ legal. We have Eric Schmidt, Hannah New. We have Peggy Trenk, Darryl Barton. Caroline, I do apologize for your last name. Julie Merkel. Jon Kenning, Maya Rao.

On the phone we have a Galen Steffens, Joanna McLaughlin. Rich Jost attending as well. I do hope I've captured everyone. I apologize if I haven't. If I haven't gotten to you, it looks like we've got everybody.

CHAIR DEVENY: Okay. Thank you, Deb.

MS. SUTLIFF: You're welcome.

CHAIR DEVENY: Is there anybody that Deb
Missed? Okay, thank you.

Moving on, we'll review the minutes of the last board meeting, which was on June 12th. Are there any additions or corrections to the minutes by board members? Any public comment on the minutes? Hearing none, I would move that we approve the minutes of the June 12th meeting. Is there a second?

MR. LYNCH: This is board member Lynch. I'll second.

CHAIR DEVENY: It's been moved and seconded. Any further discussion? Hearing none, all those board members in favor of approving the minutes of the June 12th meeting please signify by saying aye. (Response) Opposed? (No response.) Any opposed? Hearing none, the minutes are approved.

So let's move on to the briefing items with Sarah Clerget, our legal guru.

MS. CLERGET: Good morning, everybody. Moving through these on the agenda, 2A, water enforcement cases, we've got Copper Ridge and Reflections. This is the one that's on its third remand. It came back to me and I am continuing with the contested case while it's
also going in district court, and Amy will
update you on the district court piece.

    I had a motion in limine in front of me
that I ruled on denying the Copper Ridge and
Reflections motion in limine. There is a
motion for summary judgment fully briefed and
pending in front of me, so that's waiting for a
decision by me.

    And then, Amy, do you want to do the
district court case?

CHAIR DEVENY: So Amy Christensen is our
outside counsel that we've hired to assist the
board. So go ahead. Thank you, Amy.

MS. CHRISTENSEN: Thanks, Chris. So the
petition for judicial review in district court
is really still in its infancy. DEQ has
answered that. We had a little bit more time
to file an amended brief because we were
waiting to see what the Supreme Court was going
to do in a separate case.

    We are filing our answer brief -- we filed
our motion to dismiss in this case last week on
the same grounds as we filed in the Rosebud
Mine case, which is we don't feel like the
board should be a part of it when we're dealing
with judicial review of one of the board's decisions. So the answer brief to that will be due in another week and then it will be fully briefed and we'll wait for a decision from Judge Harada on that.

CHAIR DEVENY: So in about a week then?

MS. CHRISTENSEN: In about a week it will be fully briefed. We filed our motion to dismiss. Response brief is due in a week. We'll have a chance to file a reply brief and it will be briefed.

CHAIR DEVENY: Thank you. Somebody is not muted. If everybody could please check and see if the Zooms and phones are muted. We're getting a lot of interference here.

Thank you, Amy. And I've noticed that Chris Tweeten has joined us as board member, so please let the minutes reflect that he's joined the meeting.

Okay, Sarah. Why don't you go ahead and continue.

MS. CLERGET: All right. And then under -- there should have been an additional entry under enforcement cases and I apologize, this was my fault. It was left off. So there
should have been a 1B and that is the Signal Peak enforcement case, which is what has been dismissed and that's why I forgot to put it on there. So that was on your previous agendas but it has now -- the parties have settled and dismissed it, so that's why it is gone.

Two is nonenforcement cases. The first one is Alpine Pacific Utilities. On April 20th I issued an amended scheduling order and discovery is closing the end of August, so they're proceeding with that one.

Then in the City of Great Falls, which is B, I issued an order partially granting Calumet's request to file an amicus brief. That was on May 18th. Discovery is closing the beginning of August. Actually, I just received a motion for extension on that, so that date will move but not by much. I want to say it's to September. But they're generally proceeding.

Then Absaloka Mine, they're working towards a settlement. They asked for a continued stay, which I granted on July 29th. They have until September 9th at which they're either going to be dismissed because they've
 stayed or they're going to ask for a schedule order.

 Montanore Minerals. This is the one that's up in front of the Supreme Court on a parallel district court action that wasn't supposed to have anything to do with us but the decision in district court affected us. So it's fully briefed in front of the Supreme Court right now and awaiting decision. They're going to file a status with me within 30 days of the decision so that's stayed until we get that decision from the Supreme Court.

 Talen. On July 1st Talen gave a notice. I'm just going to read this. "That the parties have not reached a settlement resolving this contested case hearing and that Talen will relinquish the certificate amendments challenged in this proceeding." So that's -- they've agreed that they're going to essentially -- well, that they're going to relinquish the certificate. They're going to complete that relinquishment by August 31st and then move to dismiss by September 30th. So hopefully by our next meeting that one will be gone too.
Spring Creek Coal. This one has been actually renamed Navajo Transitional Energy Company after a transition of the certificate. I gave them an amended scheduling order on May 12th. Discovery closes January 2021. So they're proceeding per the schedule.

CHS. This one is stayed pending actually the rulemaking that's in front of you today on the arsenic. So I've had a couple of scheduling conferences and we're continuing the stay until a conference on September 4th based on what happens today.

H is Laurel Refinery. That is the same update as above.

Signal Peak, this one Amy is going to give you the district court update, but the contested case proceeds in front of me. They've done all of their prehearing briefing. There was a motion in limine that I issued an order on on July 29. We have a prehearing conference set for August 11, and the hearing in this matter will go August 18th. I just talked to the parties the day before yesterday and we've decided -- everybody has agreed that we're going to do that hearing remotely. So it
will probably take two to three days but it's going to be a little bit new territory for everybody to do the trial remotely, so we'll see how that goes.

Moudy Pit. This update is actually the end of it is wrong and I needed to correct it. I had said that there were no dispositive motions filed by the deadline and that I would schedule a conference. But I was looking at a previous scheduling order so, in fact, they have another month to file dispositive motions. So discovery closes on August 5th and then we may or may not get dispositive motions on that case.

Western Energy Area F. The parties have cross-moved for partial summary judgment and the motions are fully pending in front of me. So that one is waiting for a decision by me, but it's a big one so it takes some time.

We've got -- oh, I'm sorry, Amy. I forgot.

CHAIR DEVENY: Let's go back and have Amy give us the update on the Signal Peak.

MS. CLERGET: Sorry.

CHAIR DEVENY: That's okay.
MS. CHRISTENSEN: I didn't want to interrupt Sarah because she was on a roll. So I thought we'd circle back.

CHAIR DEVENY: She was on a roll.

MS. CHRISTENSEN: So in the Signal Peak case, which is I, we did get a ruling from the Montana Supreme Court in that. The parties had taken a decision from the district court on some subpoena dispute up to the Montana Supreme Court. The Montana Supreme Court issued a ruling June 23rd. They felt that we did not have enough rulings from the board in order for the upper courts to make a decision on that, so they have remanded the matter back to the board to address some discovery issues and make some rulings before they can address the constitutional issues. So this one is coming back and it will -- there will be some additional rulings required before it going anywhere else.

And then I can move on to the Western Energy Rosebud Mine case, which is subparagraph L. This is one that we talked about quite a bit in the last meeting or two because the issue in that case is whether or not the board
should be made a party on judicial review of
one of its own decisions and because that issue
was resurfacing in many cases, it was decided
to file a motion to dismiss before the district
court to see if we could get the board out of
the case. That motion to dismiss was denied.

We filed a petition for writ of
supervisory control with the Supreme Court,
which is a kind of immediate appeal to see if
the Court would jump in and make a decision
before the district court action was complete.
It's an extraordinary remedy and,
unfortunately, the Supreme Court decided that
we had not established sufficient urgency and
need for that type of extraordinary remedy,
that immediate appeal, and so they denied the
writ, which means the district court judicial
review had been stayed while the Supreme Court
was considering the petition. So the district
court is back on track now.

We're filing an answer brief in that case
today, which will be a very simple sort of
statement that we believe that it's more
appropriate for the parties to the case to
present their positions rather than for the
board to advocate in defense of its own decision.

So essentially at some point we'll get a decision on the merits of the petition for judicial review from the district court and at that point we'll be in a position to appeal the issue of whether the board should be a party to the Supreme Court and at that point we could present the issue on its merits and the Court could consider it. So they essentially denied our petition for a writ of supervisory control more on a technical issue, not on the merits of the argument that we were making.

So unfortunately we're back in district court. We're going to have to ride this one out. There is probably going to be oral argument scheduled at some point. There is a little bit more briefing to do, but that case is kind of rolling along at this point.

CHAIR DEVENY: Thank you, Amy. Go ahead, Sarah.

MS. CLERGET: I'm done. The next one is DEQ.

CHAIR DEVENY: You're right. DEQ, do you want to give an update, Ms. Bowers? Kirsten?
MS. BOWERS: Good morning, Madam Chair, members of the board. The next case is the Western Energy permit appeal that has been stayed on your agenda pending judicial review and that's associated with a case, MEIC and Sierra Club versus DEQ and Western Energy Company, that went to the Supreme Court. The Supreme Court, the Montana Supreme Court issued its opinion back in September of 2019 and remanded the case back to district court on certain questions of fact. And we're still proceeding on remand before the district court in accordance with the district court scheduling order. The parties are conducting discovery. So I'll just keep you posted on that.

CHAIR DEVENY: Thank you, Ms. Bowers.

Before we move on to the action items, I'd like to ask if there have been any other members of the public or staff members that have joined the Zoom meeting this morning?

MS. MARQUIS: Good morning. This is Vicki Marquis with Holland & Hart. I joined a little late. I'm sorry about that.

CHAIR DEVENY: Any others on phone or on
Zoom? It doesn't look like it.

Let's go ahead with the action items and, George, if you would like to do an introduction on the new rule or turn that over to someone?

MR. MATHIEUS: Thank you, Madam Chair, members of the board. Back in April the Department requested initiation of rulemaking for arsenic standards. I think Myla Kelly is going to make a presentation to you guys this morning.

CHAIR DEVENY: Okay. And Sarah held the hearing on that. There was a public comment period on that and so we're proceeding now and being asked to consider adoption of the new rule. So, Myla, if you'd like to give your presentation.

MR. DAVIS: Madam Chair, if I may. This is Tim Davis, water quality division administrator. Actually Mike Suplee, Dr. Mike Suplee was going to give the presentation.

CHAIR DEVENY: All right, Dr. Suplee.

DR. SUPLEE: Good morning, Madam Chair, members of the board. Again, my name is Mike Suplee. That's spelled S-u-p-l-e-e, and I'm in the water quality standards and modeling
section of the Montana DEQ.

I'm here today to request that the board adopt New Rule I as it was proposed. New Rule I, as you recall, pertains to natural and nonanthropogenic standards, including nonanthropogenic arsenic standards for four segments of the upper and middle Yellowstone River.

Since rulemaking was initiated by this body in April, there has been the requisite public comment period in a hearing. A number of comments were received. All were addressed and there were two major themes prevailing those comments. First, there was generally broad but not universal support for natural and nonanthropogenic standards and in particular the Yellowstone's nonanthropogenic arsenic standards. Further, there was phrase for the technical work the Department carried out to identify the Yellowstone's arsenic standards.

Second, there were requests for alterations to the rule to allow for certain permitting flexibilities be made available, specifically intake credits and mixing zones. Careful consideration was given to the
permitting flexibilities that were requested. In the end, however, it was concluded that the rule should be adopted as proposed without allowance for intake credits or mixing zones.

Regarding intake credits, I want to emphasize that when nonanthropogenic standards are developed in the way they were for arsenic on the Yellowstone River, the new standards already give dischargers credit for the naturally occurring concentrations above the current standard. As a result, any need for a water quality standards based intake credit is precluded by the nonanthropogenic standards themselves.

I have a figure I would like to present that would help illustrate this point, if Deb could pass screen share to me for just a quick moment.

MS. SUTLIFF: Mike, try your screen share at this point.

DR. SUPLEE: It says you've disabled it.

MS. SUTLIFF: It's not allowing me to enable it. I apologize.

DR. SUPLEE: We could either skip it or -- I did provide that PowerPoint slide to you
yesterday. Is there any way you can bring that up?

MS. SUTLIFF: Let's see if I can do that. We'll give it a try.

DR. SUPLEE: Thank you.

MS. SUTLIFF: I have it up on my screen. I'm not able to share that for some reason. I apologize. I'm having some technical difficulties with this presentation.

DR. SUPLEE: That's okay. It was just an illustration to help kind of make the point a little clearer regarding this issue. We'll probably be able to talk our way through it as we go forward.

So, anyway, that was that subject. And moving on to mixing zones, which was the other major permitting flexibility that was requested.

The Department also recommends that they're only appropriate when the background condition of the receding water is below the applicable water quality standard. Since nonanthropogenic standards, like the Yellowstone River's arsenic standards are established right at the central tendency of
the water body's nonanthropogenic concentration, the human-caused increase in the concentration will move the concentration away from its central tendency and away from the nonanthropogenic condition. Stated another way, mixing zones are not appropriate for nonanthropogenic standards because the water body has no submittal capacity above the nonanthropogenic standard.

The Department and I would like to thank the board for considering New Rule I and again request that the board adopt it as proposed. I would be happy to answer any questions you may have. Thanks.

CHAIR DEVENY: Thank you, Dr. Suplee. We're going to have public comment on these rules, proposed rules and I'd like to get an idea of the number of people that we have on today that are interested in commenting so that -- I may need to set some time limits. Is there a way to, for people to kind of indicate? Maybe we can do it verbally, people that are on the Zoom or by phone.

Nobody is planning to give public comment?

(Audio issue.)
CHAIR DEVENY: Was that Eric Schmidt because if it was, we didn't hear what you said. You didn't come through.

MS. MARQUIS: Madam Chair?

CHAIR DEVENY: Yes.

MS. MARQUIS: I represent the CHS Laurel Refinery. We have previously submitted public comments both orally and at the last board meeting, at the public hearing, and in writing and beyond those comments, we just stand behind those comments and would reiterate those. And we have nothing further.

CHAIR DEVENY: Thank you, Ms. Marquis.

All right. Well, it doesn't appear that we have a lot of people chomping at the bit to comment on this because I think the Department has provided a lot of opportunity to give public input on this and there was also the hearing. But I will open it to public comment and I'm going to ask anybody that does have comment on it to please limit their comments to the language of the proposed rule. And I'm going to limit anybody that does wish to speak to no more than ten minutes.

At that point is there anybody that wishes
to comment on Proposed Rule I? Is there
anybody that wishes to comment?

MR. SCHMIDT: This is Eric Schmidt again.
Can you hear me better now?

CHAIR DEVENY: We can, Eric. Thank you.
Please go ahead. If you could limit your
comments to the rule language and no longer
than ten minutes.

MR. SCHMIDT: Thank you, Madam Chair and
members of the board. My apologies. I seem to
have an issue with my web cam and Zoom
particularly. It turns me into Alvin and the
Chipmunks.

My name is Eric Schmidt and I am a
resident of Billings and I serve as the chair
of the Yellowstone Valley Citizens Council,
which is an affiliate of the Northern Plains
Resource Council, and I'm here today to speak
on behalf of the Yellowstone Valley Citizens
Council.

We are a grassroots conservation group of
over 500 members advocating for a healthy,
inviting, and sustainable community in the
Yellowstone Valley. Our members reside along
the Yellowstone River, drink its waters,
recreate in its waters, irrigate from its
cannels, and consider ourselves stewards of
this water body.

Arsenic is a known carcinogen that
accumulates over the life course and while the
limit for drinking water is ten micrograms per
liter, we also know that there is no safe level
of arsenic and that our drinking water
treatment facilities strive for zero micrograms
per liter. Given this information and our
interest in protecting the water body for our
county's residents and water users, we are
supportive of the nonanthropogenic standard
that is the most protective for human health
and the environment.

Additionally, we support DEQ's New Rule I
as proposed specifically in not allowing mixing
zones. We would also request the same
explicative and prohibitive language on intake
credits. By nature of a nonanthropogenic
standard, there is no assimilative capacity
rendering mixing zones and intake credits not
applicable. Mixing zones or intake credits
increases the potential to raise the arsenic
concentration of the river from human causes as
described in New Rule I.

We believe that such provisions are meant to circumvent environmental protections put in place through rulemaking.

We thank you for the opportunity to comment in favor of the adoption of New Rule I as proposed. Thank you again.

CHAIR DEVENY: Thank you, Mr. Schmidt. Are there any other members of the public that wish to comment on proposed New Rule I?

With that I'm going to close the public comment period for the proposed Rule I rule adoption and I would like to ask the members of the Board of Environmental Review if any of you have any questions or comments, questions of DEQ or just have any discussion, comments to bring up?

Dr. Lehnherr? Davis?

MR. LEHNHERR: Yes. Thanks. I just had a couple of questions for a couple of concepts that I'm wondering if Dr. Suplee could comment on briefly. I want to make sure I understand the concept of intake credits and mixing zones and I'm wondering if it's possible to put, to describe those two ideas in a nutshell, if
possible.

DR. SUPLEE: Yes, I think I can summarize those. So the idea behind intake credits is that there are places where it is known that a pollutant -- and that can be a naturally occurring pollutant too, so it could be man-caused or natural -- is above a water quality standard in an area and under certain circumstances a discharger or a user of the water is using that water without actually altering that particular pollutant concentration in any way. Rather than having to treat that pollutant down to the water quality standards applicable in their area, they can get a credit for the fact that it arrived at them in a high concentration and then they didn't change it.

If you look into the regulations and places where this is applied, there is basically five conditions that they ask that you meet and basically you can't really change the concentration of that pollutant or alter its chemical composition in any way, et cetera, et cetera. But all of those apply in cases where there is, as there is today on the
Yellowstone River, a water quality standard that is more stringent than in our case a naturally occurring pollutant condition, where you are going to be addressing that directly in this rulemaking by adopting a nonanthropogenic standard.

In the cases of mixing zones, because we looked at what the statute required of us, the statute essentially said that we have to -- if the standard is more stringent than the nonanthropogenic condition, we have to establish a standard at the nonanthropogenic condition.

So then the question becomes well, what do you use? The concentration in the river varies, of course, through times. And so after a great deal of consideration and discussion among many levels of people at DEQ, we basically concluded that the central tendency or some measure of central tendency of the water body is the best measure and so, therefore, you're setting the standard right at the middle point of what the river is like most of the time as an average, or in this case a median. At that point once you've established
that standard, essentially there is no assimilative capacity for more pollution or
more of the pollutant that you're discussing because it will move you away from the central
tendency, which is, as we've defined it and understand it, to be the best description of
the nonanthropogenic condition.

So that's why mixing zones really don't have a place in here because the river is right at that edge, right at that tipping point between -- right at the very concentration that is the standard itself. Does that help?

MR. LEHNHERR: Yes. Thank you.

MR. LYNCH: This is board member Lynch, Doctor. I do have one question for my own edification, and that is when we talk about this credit, can you explain that in layman's terms, I guess? How does that work?

DR. SUPLEE: Madam Chair, members of the board. Basically my understanding of how it works would be, again, if a concentration of a standard is -- let's just take the current condition we have on the Yellowstone River. We have a standard of ten and we know that the natural background concentration of the river
in some locations is as high as 28, as we've described it. What they would do is they would basically discount that amount, so that the discharger would not have to treat the discharge down to the standard.

MR. LYNCH: Okay. And that's essentially a constant in this regard that the Department knows what these various discharge concentrations would be and they know which discharge it would be entitled to as so-called credit?

DR. SUPLEE: Yes, that's the case.

MR. LYNCH: All right. Thank you.

CHAIR DEVENY: Are there other questions from board members?

MR. BUSBY: Yeah, this is Dexter.

CHAIR DEVENY: Go ahead, Dexter.

MR. BUSBY: Just a question for the Department, probably one of the Department lawyers that I think any of them could answer this.

Since this is supposed to be implementing 75-5-222, if you look at the very first line of 75-5-222 it says, "The Department may not apply a standard to a water body for water quality
that is more stringent than the nonanthropogenic condition of the water body."

If you set a standard at 28 and a water body goes to whatever you model was about 60 at a maximum, how do you say this is not in conflict with the statute?

CHAIR DEVENY: Mr. Moser, would you like to go ahead and address that?

MR. MOSER: Yes. Madam Chair, members of the board. I think what's important to remember is what the Department is actually doing is it's establishing what the nonanthropogenic condition is and this is what the board is essentially doing with all the Department's research. And so that's -- the nonanthropogenic condition is basically calculated -- and perhaps Dr. Suplee could talk about this in a little bit more detail. But we're establishing what the nonanthropogenic condition is. And so a single reading in the river is not the nonanthropogenic condition. We did develop the nonanthropogenic condition. I mean, the legislature said you have to base it on the nonanthropogenic condition and so that -- and that is something that we
established through research. And so it wouldn't conflict because we're not just talking about one reading in the river. So that would be the answer I think and, Mike, if you -- Dr. Suplee, if you want to elaborate on that perhaps.

   DR. SUPLEE: Madam Chair, members of the board, I think Kurt basically explained it correctly. All I would say is when you look at a concentration in a water body like the Yellowstone or in most cases, it's not a single number all the time, obviously. It changes. It changes with season, weather, snow melt, et cetera. So you have a range of numbers and what you went up with is -- and especially in the case of the Yellowstone River, I'm sure you've heard of the classic bell-shaped curve of a population of data and right in the middle of that bell curve is what we have concluded is basically the best description of the nonanthropogenic condition, its central tendency. It's where most of the data, most of the concentrations are most of the time in the river.

   MR. BUSBY: I would like to ask Chris the
same question, since he's our legal mind.

CHAIR DEVENY: Chris, would you like to respond?

MR. TWEETEN: Not really. It's a technical question and I would tend to defer to the expertise of the agency on that particular point. I don't see an inherent conflict with the statute and I guess I would -- I have no grounds on which to think that the agency's interpretation of the statute and the application of the data was wrong. So I think I'd -- that's about all I would have to say about that.

MR. DAVIS: Madam Chair, this is Tim Davis, Water Quality Division.

CHAIR DEVENY: Go ahead, Tim. And then, Sarah, you had a point to make.

MR. DAVIS: Can I break this down? I'm going to -- I am less technical than Dr. Suplee so let me put this into and see if I can answer Dexter's question in kind of a layman's terms.

We looked at several years of data that showed both the high and the lows that you see of arsenic in the river. That takes into account the periods when arsenic is above the
proposed standard and below the proposed standard. And so we looked at also potentially a seasonal standard that would have had different numbers based on the season.

After working with stakeholders, we agreed that having a single annual average would both be protective and that average, that standard, is within that average fluctuation between the high and the low. So it takes into account the protective and in the end it does address the economics of treating down lower than the seasonal standard would have proposed.

So it takes into account that natural variation and that's why we proposed a standard and worked with the stakeholders to do so.

CHAIR DEVENY: Dexter, has your question been answered?

MR. BUSBY: Not completely, because I can think of a really easy scenario where you've got a very high river standard and an ultralow water condition and -- not a standard but a content -- and you've got it set at, say, 28, which is your high setting, that you would be in conflict at that moment in time and probably not be able to enforce. If you did, you'd
probably get it thrown out.

I'm not sure we should adopt a rule that doesn't at all times reflect the exact language of the statute.

CHAIR DEVENY: Sarah, did you have a comment?

MS. CLERGET: Just maybe a follow-up question, clarification that Kurt could do.

So the statute says -- and Dexter had it right the first sentence. The second sentence says, "For the parameter for which the applicable standards are more stringent than the nonanthropogenic condition, the standard is the nonanthropogenic condition of the parameter in the water body. The Department shall implement the standard in a manner that provides for the water quality standards for downstream waters to be attained and maintained."

So, Kurt, I think the follow-up question from Dexter is you talked about you've determined through the research what the nonanthropogenic condition is, and Dr. Suplee and Tim just explained to us that the nonanthropogenic condition varies in the river
on the bell curve, and you've picked essentially a single point in that bell curve.

And so the correlation question that I have is between the statutes language for the nonanthropogenic condition and the rules language for the standard because the rule sets a standard that doesn't vary and the statute seems to contemplate that wherever the nonanthropogenic condition is is where the standard is.

So I just wanted you to explain how you got the one standard from the varying condition again.

MR. MOSER: Okay. Madam Chair and members of the board, I didn't catch all that. That was a little broken up but I think I got the gist of it.

Again, the statute talks about what the nonanthropogenic condition is. The nonanthropogenic condition is not going up to a point in time and taking a water sample. A nonanthropogenic condition has to be developed.

As the expert agency here, the Department has to figure out what that is and use a lot of science to do that. And that's why I do not
believe that establishing this as a single standard the way that the agency has done so somehow would create an instance of a violation or noncompliance with the directives of the legislature.

The nonanthropogenic condition is not -- or the agency is not looking at it as one single sample and I do not believe that is what the statute would require. Okay?

So I guess that -- that's about as clear as I can get on that. I mean, it's not one sample. The nonanthropogenic condition has been developed using the methodology that the agency did. That accounts for highs and lows. Every water quality standard, every numeric water quality standard -- and, again, Dr. Mike can talk about this more -- is some form of averaging that's occurring, and that's how you develop those numbers.

So I don't have anything further on that.

MR. DAVIS: Madam Chair, it's Tim Davis again. If I can provide one other detail that might help the board member understand.

The other piece of this is you have to keep in mind that treatment -- that dischargers
need to build treatment plants to be able to meet a standard and if they had to fluctuate daily all the way down to the low and all the way to the high, it would not be possible for them to match that day to day and they would have to build a treatment plant to treat all the way down to the lowest concentration.

And in this case when we proposed a seasonal standard, the main discharger, CHS, requested that we look at an annual average instead of two so that they knew what they were designing for. So, otherwise, you'd have to -- it's not possible from an implementation and enforcement and a discharger's perspective to have a standard that fluctuates every single day and treat it at different levels every single day.

CHAIR DEVENY: I'm going to ask people to check and make sure that their phones and their Zooms are muted. We're getting a little feedback from somebody. Thank you.

Other board member questions or comments? Hearing none, is there a motion by any of the board members to take action on this new rule? We have some options. One would be no action,
another would be to adopt the new rule as set forth, as well as adopting the House Bill 521 and 311 analysis, or a third option would be to make some modifications that we thought were appropriate and consistent with the hearing.

MR. TWEETEN: Madam Chair, this is Chris. I would move the second option.

CHAIR DEVENY: I would second that and I'll read it. It would be to adopt New Rule I as set forth in the notice of adoption and the House Bill 521 and 311 analysis, and this is pertaining to the natural and nonanthropogenic water quality standards.

It's been moved and seconded. Is there further discussion or any discussion on the motion?

MR. BUSBY: Yeah, this is Dexter. I personally don't think we should adopt a rule that has potential conflict with the statute it's trying to implement. So I would not support this.

CHAIR DEVENY: Okay. Any other discussion?

I would like to commend the Department for their outreach to stakeholders on this
particular issue and for really delving into
the science and basing their work on the
science, and I'm going to be in support of this
rule.

Any other comments or discussion from
board members before we vote? Hearing none,
al those in favor of the motion before the
board to approve New Rule I and House Bill 521
and 311 analysis, please signify by saying aye.
(Response) Any opposed?

MR. BUSBY: Aye.

CHAIR DEVENY: So we have four in favor
and one opposed. Motion carries. Rule I is
passed. Thank you, everybody.

And moving right along, we have air
quality fees rules. So, George.

MR. MATHIEUS: Thank you, Madam Chair,
members of the board. Just so there is not
confusion on the agenda, the title indicates
adoption but then the verbiage below indicates
that this is a proposal to initiate rulemaking.
I just wanted to make that clear. And Liz
Ulrich from the water (inaudible) will be
presenting.

CHAIR DEVENY: I didn't catch that. Who
is going to be presenting?

MR. MATHIEUS: Liz Ulrich.


MS. ULRICH: Thanks. Good morning, Madam Chair, members of the board. My name is Liz Ulrich, that's U-l-r-i-c-h. And I'm the supervisor of the analysis and planning section in the Department's Air Quality Bureau.

On April 12th, 2019 the board adopted a new subchapter of rules in ARM Title 17, Chapter 8, Subchapter 18.

CHAIR DEVENY: I'm sorry. I'm going to interrupt you. If everybody could please mute their phone or their Zoom, it would be appreciated. We're getting a lot of feedback.

Go ahead, Ms. Ulrich.

MS. ULRICH: So April 12th, 2019, the board adopted a new subchapter of rules in ARM Title 17, Chapter 8, Subchapter 18. These rules allowed the Air Quality Bureau to implement a registration program for sand and gravel, asphalt, and concrete facilities. At that time the Department said it would continue to engage stakeholders and develop a fee
structure to support the adopted registration program.

The Department has done this and today is asking the board to initiate rulemaking to amend ARM 17-8-501, 504, 505, and 510 pertaining to air quality operating fees for registered sand and gravel, asphalt, and concrete facilities.

The transition from a permitting program to a registration program requires a new fee structure. The fee structure is outlined in the rule notice in your packet on page 109.

Under the previous permitting program, the facilities paid an annual operating cost of $800 per year per permit and an application fee of $500 when a permit application was submitted.

Without this new rule, there would be no fees collected, as permits are no longer issued for these affected facilities. The new fee rule is designed to be revenue neutral, that is, to generate relatively the same amount of funding from the new registration program as was generated from the collection of the annual operating fee from the previous permitting
program.

As is the case with other fee assessments, the Air Quality Bureau will annually evaluate whether the fee rates for this registration program are adequate to fund the required work, will actively engage stakeholders in the process, and will return to the board if necessary to adjust the fees to cover the costs of the program.

This new fee structure will also result in a more equitable system for fee payers. Under the previous fee structure, the smaller operators paid more than their fair share while the large operators may have paid less. Under the proposed fee structure, most of the facilities will pay the same or less fees to the Department, while a smaller number of facilities may be paying more fees to the Department depending on their production levels.

In anticipation of this rulemaking, air quality staff engaged in many discussions with owners and operators of registration eligible facilities, the Montana Contractors Association, the opencut mining stakeholders,
and the Clean Air Act Advisory Committee, CAAAC. The CAAAC is made up of members of the regulated community, trade groups, and environment groups. Based on these conversations, the Department believes that the proposed structure represents the best option to fund the portable facility registration program.

Madam Chair, the Department recommends that the board initiate rulemaking, issue a notice of public hearing on the proposed amends, appoint a hearing examiner, schedule a hearing as described in the draft notice.

Thank you.

CHAIR DEVENY: Thank you, Ms. Ulrich.

Are there questions of DEQ from board members about the proposal to initiate rulemaking?

Hearing none, is there any public comment about whether or not the Department should initiate rulemaking on this issue?

Hearing none, is there interest on any of the board members' parts of having a motion to initiate the rule and assigning it to our hearings officer, Sarah Clerget, as the hearing
officer to hold the hearing on the rulemaking?

MR. BUSBY: I'll move that.

CHAIR DEVENY: It's been so moved. Do I hear a second?

MR. TWEETEN: Madam Chair, it's Chris. I'll second.

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

With that, we'll go ahead and take a vote. All those in favor of the initiating rulemaking and assigning the case to, the rule for the hearing to Sarah Clerget, please signify by saying aye. (Response) Any opposed? (No response) Hearing none, the motion carries.

Thank you.

MS. ULRICH: Thanks.

CHAIR DEVENY: Okay. Let's see. I believe we're heading toward the end. We do have -- George wanted to talk about a supplemental board meeting that might be needed.

MR. MATHIEUS: Yeah, Madam Chair, members of the board, Tim Davis is going to present to the board on this matter. Thank you.

CHAIR DEVENY: Thank you, George. Tim, go
MR. DAVIS: Madam Chair, members of the board. Again, Tim Davis, Water Quality Division administrator. We would like to request the board to hold a special session to initiate rulemaking on the Lake Koocanusa site-specific selenium standard. As you've had in other presentations, this has been years in the making and we're requesting that the board consider holding a special session to initiate rulemaking on either September 23rd or September 24th. That will allow us to -- the special session will allow us to move through the rulemaking process this year in a timely fashion.

We're required to -- we'll be having a 45-day public comment period and it will allow us to ideally be able to match the December 11th, or shoot for the December 11th board meeting to consider adoption.

CHAIR DEVENY: Are there any other dates that we could hold that meeting and still be meeting the deadline requirements?

MR. DAVIS: Madam Chair, members of the board, it would have to be -- given all the
alignment of getting the standard ready,
noticing, having a hearing in front of CAAAC
and then going through the public comment
period, it would probably -- it would have to
be around that date or sooner than that date,
so slightly sooner than that date.

If we are not able to hold a special
session around that, if it waited until the
October scheduled board meeting, we would not
be able to meet the December 11th hearing.

CHAIR DEVENY: I'm just thinking we're
going to have to probably throw out some
possible dates for board members and I'm
wondering if it could be earlier in September
or would there be a problem with holding, you
know, maybe giving the board an option of maybe
two dates or something or are those two dates
pretty important based on your scheduling?

MR. DAVIS: Madam Chair, members of the
board, it's probably -- that week is probably
the week it would have to be based on the
scheduling lining up finalizing the rule draft.

CHAIR DEVENY: Okay. So what I think I'll
suggest is that, because most of us might not
know what our plans are for those dates, is for
Deb to poll the board members and find out which -- throw out some date options starting with the 23rd and the 24th and see if we can get a quorum together on that date and, if not, we may have to look at a couple days earlier or whatever. I don't have a calendar in front of me right now.

So, Deb, could you within the next say couple weeks could you poll the board members? Maybe next week even?

MS. SUTLIFF: Absolutely. Yes.

CHAIR DEVENY: Will that work, Tim, and letting you know then?

MR. DAVIS: Madam Chair, that would be terrific. I'll work with Deb and work with Sarah and you to make sure we can find a date that works for the board and works for the time lines.

CHAIR DEVENY: Great.

MR. DAVIS: Thank you.

MR. TWEETEN: Madam Chair, this is Chris.

CHAIR DEVENY: Yeah, Chris.

MR. TWEETEN: Would it be advisable to adopt a motion at this point committing to having the special meeting on a date to be
determined at the convenience of all the
parties of the Department and the board
members, I guess? I wouldn't say all of the
parties but just the Department and the board
members.

CHAIR DEVENY: I don't think there is
anything wrong with having a motion to do that,
if you'd like to make one.

MR. TWEETEN: I'd so move.

MR. LYNCH: I'll second. This is board
member Lynch.

CHAIR DEVENY: It's been moved and
seconded to hold a meeting to consider the
adoption, to consider the initiation of
rulemaking for the Lake Koocanusa and Kootenai
River; is that correct?

MR. DAVIS: Correct.

CHAIR DEVENY: It's been moved and
seconded. All those in favor signify by -- or
is there any discussion?

MR. BUSBY: Yeah, this is Dexter. I have
a question for Tim, a real quick and easy one.

If this has been going on for years, how
come we're being pushed into a real tight time
frame on this?
MR. DAVIS: Madam Chair, members of the board, the goal is to wrap this up with this administration, not because we're concerned about the next administration, just because of all the time bringing all the parties on board, bringing them up to speed.

MR. BUSBY: Okay.

CHAIR DEVENY: Is there any public comment? Hearing none, is there further board discussion? All those in favor of the motion please signify by saying aye. (Response) All those opposed? (No response.) Motion carries. Thank you.

Next we have an item on the agenda that we need to discuss and that's --

MS. CLERGET: We still have the new contested case.

CHAIR DEVENY: I'm sorry. Well, let's do the new contested case then. Sarah, would you go ahead with that?

MS. CLERGET: Sure. So this is the notice of appeal that's in your packet by Mr. Duane Murry, numbered BER 2020-01, and we received a request for a hearing from him. And you guys just need to decide whether you want to keep
it, assign it, keep it for substantive purposes and assign it for procedural purposes. Those are your standard menu of options.

CHAIR DEVENY: Do any of the board members have pleasure with this?

MR. BUSBY: Yeah, what's this all about, Sarah?

MS. CLERGET: I don't really know, to be honest.

MR. BUSBY: Okay.

MS. CLERGET: All I have is the letter, so you have what I have.

MR. BUSBY: Okay.

MR. LYNCH: Sarah, could you run over our options again, please?

MS. CLERGET: Sure. You can keep the case yourself and act on all procedural and substantive matters yourself. You can assign it to a hearing examiner, me or somebody else for all purposes, meaning substantive and procedural, in which case it only comes back to you when there is a final proposed decision from me that is dispositive of the whole thing, or you can assign it to a hearing examiner, me or anybody else, for procedural purposes,
meaning I set the schedules and all that kind of stuff but you keep the substantive decisions. So if, for example, there is a motion for summary judgment, that comes directly to you before it goes to me, you do the hearing yourselves. So those are the three options.

MR. LYNCH: I'd move for option number two.

CHAIR DEVENY: So there is a motion to assign the case to Sarah for all procedural and for all matters; is that correct?

MS. CLERGET: Yes.

MR. TWEETEN: I'll second that.

CHAIR DEVENY: It's been seconded to assign the case to Sarah for all matters. Is there any discussion?

MS. CLERGET: Just a clarification, Chris, that you're assigning it to me, me being ALSB, so if I was hit by a bus it can be somebody else from ALSB.

CHAIR DEVENY: Thank you. All those in favor signify by saying aye. (Response) Any opposed? (No response) Hearing none, okay, Sarah, add it to your docket.
MS. CLERGET: Okay.

CHAIR DEVENY: I have jumped ahead and now we'll go back.

We've been utilizing Amy Christensen, and I think she's done a nice job as outside counsel. There is concern about the added expense that the board has when we hire outside counsel and I guess I'd like us to discuss as a board where we want to proceed, if we want to change any of our thoughts on having outside counsel, and what our options might be. And I'm going to lean heavily on Jerry and Chris because you guys know the system. And those of us who aren't attorneys are, at least I speak for myself, a little bit at a loss here about what to do.

MR. LYNCH: I think we have -- everybody has to mute again. I can't hear much.

CHAIR DEVENY: Could everybody please mute if you're not speaking, especially phones?

Thank you.

Jerry, did you hear what I said?

MR. LYNCH: I got the gist of it.

Obviously if the board is named, the board has to have an attorney to represent the board in
the proceeding; otherwise, there could be potentially some sort of default against the board and/or its members.

The question I have in terms of options is, not that Amy hasn't done a fantastic job, are there state agency lawyers that could undertake the same task? And, Chris, you're certainly more versed than I am on that. But not that I want to deprive Amy of a payday because, again, she's done a marvelous job but is there an option with the board being named as a party obviously that an agency lawyer could address?

MR. TWEETEN: Madam Chair, this is Chris. Can I respond to that?

CHAIR DEVENY: Yes, please do.

MR. TWEETEN: Okay. The idea of hiring outside counsel I think developed in discussions I was having with Sarah about what to do in these particular cases. And I think maybe, Sarah, you may have a better memory of this than I do -- I certainly hope you do -- of what the considerations were that led us to conclude that we should recommend to the board the hiring of outside counsel. But Sarah being
the attorney in the underlying matter as the hearing examiner representing the board in most of these cases, I think it was felt that having Sarah as our board counsel appear as an attorney in the appeal would basically present the -- or let me think about how to say this.

That the idea of our objection to these cases, to being named in these cases, that the board as decider is not an appropriate party I think applies to the board, I think it also applies to the board's hearing examiner, who was Sarah. So I think Sarah -- and, Sarah, please jump in and correct me if I've got this wrong -- I think we decided that the best course for the board was to hire independent outside counsel. There might, it seems to me, be some sort of implicit admission, I guess that -- well, maybe not. I'll strike that.

But certainly if we object to having the board as a party in these matters, that would certainly cover or extend to an objection that our counsel should be representing us in that matter. So we turn to the idea of outside counsel.

Agency Legal Services Bureau, of which
Sarah is a member, is the Attorney General's agency that provides counsel to state agencies in situations like this. If an agency counsel has a conflict of interest or if there is too much work for that particular agency counsel and they can't add this to their pile of work and still stay ahead of what they need to get done, those agencies have the option of turning to the Attorney General's office and asking to hire a lawyer out of Sarah's unit to represent the agency in a particular matter. That's how Agency Legal Services Bureau works. It's like an outside counsel firm except it's located inside state government. It's significantly more economical than hiring outside counsel, because I think Sarah's agency charges something like 106 bucks an hour as opposed to -- the average in Helena is probably over 200 bucks an hour for outside counsel right now. So there is a savings there.

The problem in this case, of course, is that Sarah relying on her colleagues at Agency Legal Services Bureau as she does, to the extent there is a consideration for not using Sarah as the counsel on these judicial review
communications, that would apply to the entirety of the ALSB as well.

The other option that we probably ought to look at is counsel from DEQ. I think ordinarily under the Administrative Procedure Act the default is unless an agency attach for administrative purposes, like we are to DEQ, unless they have their own lawyer, the Department is responsible for providing counsel for the attached agency. That's not appropriate in this case because the Department is a party to the appeal in almost all these cases. So that's not an option either.

So it seems to me that the only acceptable approach to this is to hire outside counsel. And we don't do it very often and I know that Amy has faced a flurry of these cases recently and the expenses are such that it's costing us money every time somebody does one of these. It's one of the reasons why we asked the Court to step in and disallow this practice, frankly, is that not only does it waste the agency's time but it also costs the agency money every time we have to do this.

Sarah, do you have anything to add or
change in what I just said?

MS. CLERGET: I agree with everything you said about ALS. I believe -- and this is a question for Chris. When we got Amy on board, I think she agreed to do it for the ALS rate, if I remember. So it's not -- I don't think it's actually costing you any more per hour than --

MR. TWEETEN: Okay.

CHAIR DEVENY: I'm not sure of that, Sarah. And I didn't have anything to do with the budget on that.

MR. TWEETEN: We're going to have to pull the contract with Amy and see what the rate is, which I've never seen and I don't know what the rate is but if that's -- if that's the case.

MR. LYNCH: I'll just follow up to Chris, if I could. Chris, I think when you very well articulated the options, you mentioned that at some point in time an option would be to have it land in the Attorney General's lap. Is that accurate?

And the reason I say that is this. We're dealing with this naming board members of this entity, our board, but that could happen across
all boards in the state if someone chose to do
that. So it seems to me -- if you agree, it
seems to me the Attorney General ought to take
a step to put an end to this, if that's an
option.

MR. TWEETEN: Sure. Having been next door
to the Attorney General for a long time, I've
never talked to General Fox about this, I don't
know what his attitude would be. The only
options that he would have would be ALSB, which
we've already talked about it being not an
attractive option, or assigning somebody from
his civil bureau to take this issue on and step
up and represent boards every time they want to
assert the defense that we're asserting. And
that's a possibility. I think it's probably
been done, although I can't remember a specific
instance during the time that I was there. But
it's certainly an option that the Attorney
General could entertain. He'd have to be
convinced, I think, that this was basically
what we failed to convince the Supreme Court of
that this is a significant and urgent problem
that he would have to step in on rather than
letting the appeals in these cases run their
course and get to the Supreme Court in the ordinary course of business.

I mean, it wouldn't be out of line to approach the Attorney General about this. My guess is you probably would talk to Chief Deputy Bennion about it first before it got on to General Fox's desk.

But that's certainly an option that could be looked at. I wouldn't be optimistic that he would want to do it but, on the other hand, I wouldn't rule it out. I don't know what his thoughts are about questions like this so I can't really say.

MR. LYNCH: This is Jerry again. I think we're probably all of the same mind that at present we allow Amy to complete her job on the case and perhaps get a favorable decision from the Supreme Court, which would negate any need to go to the Attorney General. In it doesn't turn out -- well, that will end the inquiry, I guess. It's either favorable or not favorable in terms of allowing board members or the board to be named.

At that point in time then the cost I think should fall upon the -- if the Supreme
Court disagrees with Amy's analysis, I doubt that it will but I'm not a prognosticater, then the cost I think should be absorbed by the Attorney General's office. But that's something to be dealt with in the future, I suspect.

MR. TWEETEN: All I would say in response to that, Madam Chair, is that in my experience the Attorney General and Department of Justice have never been anxious to absorb costs that they don't absolutely have to absorb, and they have a tight budget just like every state agency does. So that's all I guess I'd say about that.

MR. LYNCH: Thank you.

CHAIR DEVENY: Any further discussion or thoughts on this from board members?

MR. BUSBY: After listening to our legal minds talk about this, maybe we should encourage the Department to put a chunk of money in their budget to cover these costs.

MR. MATHIEUS: Can I respond to that, Madam Chair? From my perspective kind of what is driving this discussion, frankly, is me and my concerns and this is -- they're this simple.
In the last two years we've seen a significant increase in the board's budget. It is what it is.

At the same time I'm seeing a significant decline in revenues of the agency. So what I'm charged with is getting bills that I can't plan for. So this is just part of the dialogue. I'd like a way to work with the board to the best of our abilities to actually plan and predict costs and build a real budget. I mean, that's just responsible government. And we're not there today. And I'm not an attorney obviously, and I don't understand all of the nuances and ins and outs of just even this specific example we're talking about. It's my understanding that there are options. We've -- the board has been in I'll just say similar situations before and different paths have been taken.

So what I'm really asking, and some of the conversations I've had with the Chair, are just a way to predict and build a real budget and not just me getting bills and trying to come up with a way to pay for them, because I don't do it anymore. And right now we're building our
budget for the upcoming biennium so the timing
is perfect. And to the best of our ability --
and I know we can't predict everything but, I
mean, that's how we set budgets. So if there
is a way moving forward that we can do that,
I'll sleep a lot better.

MR. TWEETEN: Madam Chair, can I respond
to that or maybe have a dialogue with George
about that?

CHAIR DEVENY: Yes, please.

MR. TWEETEN: I don't think this has
changed since I left state government but,
George, in building your agency budget, don't
you start with the '21-'22 biennium and the
expenditures that are made in the '21-'22
biennium and use that as a starting place for
what the board's budget would be for the
upcoming two years?

MR. MATHIEUS: Madam Chair, member
Tweeten, yes, some of that is accurate. I
guess the point that I'm making is I've seen a
significant increase in the board's budget and
it's becoming less predictable.

MR. TWEETEN: Madam Chair, George, I
understand that. But I guess I'm -- what I'm
suggesting is that the expenditures that we've
made in the past year to retain Amy and use her
services are going to show up in our base
budget for the next biennium, are they not?

MR. MATHIEUS: Correct.

MR. TWEETEN: So unless we expect those
expenditures to increase and with the caveat
that budgeting is a crapshoot and, you know,
during the budget process in the legislature I
have seen things deleted from agency budgets
with no apparent reason whatsoever other than
that they're looking for numbers to cut out.
So you never know what the budget is going to
do -- excuse me, what the legislature is going
to do.

But at least going into the legislative
session when you go into the budget
subcommittees, I would expect that these
expenditures that we're going to make this year
are going to be part of the base budget that
the subcommittee will look at and subcommittees
sometimes go on budget-cutting rampages and
stuff gets thrown to the floor just because
they need to cut. And that's always a risk and
that's a fight you have to make with the
legislature all the way through the session sometimes.

But as a starting point I think these expenditures are going to be in the budget goes to the legislature unless the DEQ decides at some point to trim them from their budget request.

MR. MATHIEUS: Madam Chair, my response is it's not that black and white. I mean, we haven't asked in the past for a specific appropriation from the board and it's typically down at a level within the budget that isn't specifically talked about or articulated in our budget subcommittee and that process. It's down several layers.

And the way it's worked in the past is it's a combination of setting aside money in the director's office budget to pay for the general workings of the board, you know, even simple things like you guys' per diem and those things. Primarily the programs pay for, say, for example, we're working -- you guys are working on a coal case, right? And so we bill the coal program.

Where we're at right now is that we're
having -- in order to pay the bills, we're having to take it from other places and so it's not necessarily in that neat of a package. I'm taking it from anywhere I can within the agency.

MR. TWEETEN: George, thanks for reminding me of that. I had forgotten that you're largely a fee-based budget, you don't get as much general fund as some of the other agencies do. You're obligated to charge for your services. So that does complicate matters. I see what you're saying.

I don't know what the answer is but if you want to go into the idea of a line item budget for BER and then you're in a situation where if you overspend that you're going to try to be a part of the supplemental bill and this will be a very small part of the supplemental bill I would think because some of those expenditures are huge that go into that bill.

But that's an idea that I think we should talk about, certainly, if that would help address the problem from DEQ's perspective. I mean, I'm not personally that excited about it because, as you know, last session the BER was
a target and we came within the Governor's veto of being disincorporated as a board. So putting the board out there as an individual target in the budget subcommittee I guess is not ideal from the board's perspective. This is exactly contrary to the Department's interest because, you know, we like to wear beige and stay small if we can and the Department on the other hand is interested in finding a budget that it can tap for the board that doesn't require them to raid the budgets of all of your constituent agencies. I mean, I get the point. I get the problem.

So I guess it's not a suggestion that I make with a great deal of enthusiasm but I think we should certainly explore it.

MR. LYNCH: Madam Chair, if I may.

CHAIR DEVENY: Go ahead. Jerry.

MR. LYNCH: George, a quick question. I think you've already answered it, but the escalating budget of the board is mainly attributable to these additional legal costs or are there other areas?

MR. MATHIEUS: Madam Chair, member Lynch, I would say no. I mean, I think I did say
earlier I think it's just one piece of the puzzle. I mean, the costs have gone up and some of it's just more cases, more appeals, more whatever. Some of it's just the nature of the game.

But I'm just generally seeing a pretty significant increase and while this is one piece of it, the other, some other things that we've done or that the board has done with some of your rules and that, you know, just for me being able to say what does that mean, what generally do we think we're going to spend by making this decision and then I can plan for it.

So that's all it really is. I know some of it is out of our control because we can't predict, but it's not just the outside counsel.

MR. LYNCH: Okay. Thank you.

MR. MATHIEUS: You bet.

CHAIR DEVENY: Any further discussion? Just a second, Chris. I'd like to hear from Sarah, if we could.

MS. CLERGET: I was just going to offer. One of the tools that we've done for -- because I think the ALS is a cost, it's not just Amy.
ALS costs have certainly gone up. And one of
the things that we have offered that I've done
for agencies in the past is we can pull all
sorts of different billing numbers because
obviously I bill by the .1 and we break it out,
as George said, I bill to the BER general and
then I also bill per case so if it's a coal
case, it goes to the coal. And we have very
specific billing, you can track this is what it
takes to get to a motion for summary judgment,
this is what it takes to go through a hearing,
and this is the number of cases that I hold on
a very regular basis.

So those are all -- a billing analysis is
something I've done for clients before where I
come to you with essentially a presentation and
say look, this is the average of what it costs
in the life of a case, your sort of big cases
and then your small cases, this is what a case
costs, and this is how many cases I carry on
average and so, therefore, this is the amount
of time that you could expect that I will be
spending. Obviously that's going to change if
cases suddenly balloon or drop.

But we've got at least three years of data
now from me and then we do have some data
previously from the prior hearing examiners. I
think obviously with each hearing examiner or
board counsel those numbers change a little
bit, but for me you have at least three years
of data we can build a basic projection off of
if you want me to do that.

MR. MATHIEUS: Are you going to charge me?
MS. CLERGET: As I don't work if work
doesn't tell me, then I can't bill. I have to
bill everything. I mean, you can talk to John,
who is my supervisor. ALS does occasionally do
no charge things but they've been very angry at
me recently for no charging stuff. So I have
specifically been told that I'm not allowed to
no charge anything anymore because I was doing
it too much. But that's a conversation that
you can maybe have with John.

If this is in order to get ALS more
revenue ultimately, then I think ALS spending a
little bit of money or incorporating, absorbing
a little bit of money in order to get that
covered is not unreasonable to ask.

MR. TWEETEN: Madam Chair, just for the
record, ALSB is a fee-based agency as well.
They pay their staff out of the revenues that they generate by billing the agencies that they work for. So many of the same pressures that George was talking about that fall on DEQ are even more apparent with ALSB because it's a much smaller agency. I don't know how many FTE it has now but it's probably less than 20 I would guess when you count the support staff and paralegals and the attorneys. So there is a much smaller margin of error for ALSB when their revenues don't cover their costs. So that's why Sarah is under pressure to make sure that her billing is comprehensive because they can't really afford to do a lot of charity work or else their budget is not going to balance and then they will have to borrow money out of the Department of Justice budget, which won't please the Attorney General very much or his Central Services division, more to the point. So they're under the same pressure as the DEQ and that's why Sarah is obligated to bill all of this.

CHAIR DEVENY: Okay. Thanks for this discussion. And I don't mean to bring it to an end specifically but we are at 10:30 and we
probably -- if we don't move on, we're going to need to take a break to give our court reporter a break. So --

       MR. TWEETEN: Madam Chair, can I just ask you a question?

       CHAIR DEVENY: Yes.

       MR. TWEETEN: Are you open to the idea of having discussions with George about alternate methods of trying to budget for BER's expenditures? As we've discussed, you know, I don't -- as I said, I'm not enthusiastic about the idea of being an individual line item on DEQ's budget but there may be other opportunities to be more specific in the way our expenditures are accounted for in their budget.

       CHAIR DEVENY: Certainly I'm open to discussions and I think a lot of it has to occur with the board, although as volunteer board members we don't really have a lot to say, but I think there is a lot of coordination that can be done through Sarah and George. And I'm happy to be part of those conversations and would welcome any other board members that would join in on that as well.
MR. TWEETEN: I volunteer to help out in that discussion as well.

CHAIR DEVENY: George, if you have some ideas to bring to the -- maybe we just have a little subcommittee of Chris and I and, Jerry, would you be interested in joining that?

MR. LYNCH: I'd be happy to do it.

CHAIR DEVENY: And Sarah as well?

MS. CLERGET: Yes.

MR. TWEETEN: Sarah will have to bill him for it.

MS. CLERGET: Or I'll get fired. Sorry. They account for -- I mean every .1 of my day has to be accounted for.

CHAIR DEVENY: I think in the meantime we need to allow Amy to continue doing the work. Maybe we'll get a Supreme Court decision in that area but maybe the -- I guess it would be five of us to get together sometime and do a Zoom or a phone meeting and have some discussion of options that, George, you might have, be able to put out there after you've been given a chance to give it a little more thought and run it by some of your department folks.
MR. MATHIEUS: Thank you, Madam Chair, but not to oversimplify, but I've already got folks working on trends analysis on sort of what Sarah was talking about. And I think just simply, for example, the Department saying here is the next ten rulemakings we're anticipating, you know, and then how do we put a predictive cost to that, for example.

One of the things I mentioned earlier was the two-year rule review thing that the board picked up. I didn't anticipate that, so those types of things that may be coming down the pike that aren't necessarily just appeals that I think we could discuss and we could predict. And we don't need to do it in this forum and the board. So it's just a coming together and trying to figure out what our future looks like and how we can be more efficient at it.

CHAIR DEVENY: If you can put out some suggested dates for a phone call or a Zoom meeting and then with the five of us we can do that.

All right. Well, this has been a good discussion and I think we'll move on now.

Sarah, did you have any other board
counsel updates to give?

MS. CLERGET: No.

CHAIR DEVENY: And this is now an opportunity for the public to comment about anything that we've discussed today except for any of the contested cases. Is there anybody from the public that would like to discuss anything or bring up anything, make comments on anything? Hearing none, I would ask for a motion to adjourn.

MR. TWEETEN: So moved.

CHAIR DEVENY: It's been moved. I'll second it. Public comment on the adjournment? Hearing none, all those in favor of adjourning please signify by saying aye. (Response) Any opposed? (No response.) The meeting is adjourned.

(The meeting was adjourned at 10:36 a.m.)

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CERTIFICATE

I, LISA R. LESOFSKI, Registered Professional Reporter do hereby certify:

That the proceedings were taken before me at the time and place herein named, that the proceedings were reported by me and that the foregoing pages contain a true record of the proceedings to the best of my ability.

Dated this 27th day of August, 2020.

/s/
Lisa R. Lesofski
Notary Public for the State of Montana
Residing at Helena
My Commission Expires 3-31-2024