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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
DECEMBER 13, 2019)

TRANSCRIPT OF PROCEEDINGS

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
December 13, 2019
9:00 a.m.

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

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

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

3 * * * * *

4 CHAIR DEVENY: Good morning, everybody.
5 Welcome. I'd like to call this meeting of the
6 Board of Environmental Review to order. And Sara,
7 if you could take roll call of the Board members,
8 please.

9 MS. NELSEN: Is Chris Deveny here?

10 CHAIR DEVENY: Here.

11 MS. NELSEN: Dexter Busby.

12 MR. BUSBY: Here.

13 MS. NELSEN: Hillary Hanson.

14 (No response)

15 MS. NELSEN: John Dearment.

16 MR. DEARMENT: Here.

17 MS. NELSEN: Chris Tweeten.

18 (No response)

19 MS. NELSEN: And David Lehnherr.

20 MR. LEHNHERR: Here.

21 MS. NELSEN: There are six Board members
22 present for a quorum.

23 CHAIR DEVENY: Did Hillary respond?

24 MS. NELSEN: No, she did not.

25 MS. HANSON: I am here. Can you hear

1 me?

2 MS. NELSEN: Yes, we can, Hillary.
3 Thank you. So there are six Board members present
4 for a quorum.

5 CHAIR DEVENY: Thank you. Let's have
6 other introductions.

7 MS. CLERGET: Chris Tweeten is not on
8 the phone.

9 CHAIR DEVENY: It is just five because
10 Chris was not on the phone. He did say he would
11 call in.

12 MR. TWEETEN: This is Chris.

13 CHAIR DEVENY: There we go. Great. All
14 six of us are here then. So let's have
15 introductions.

16 MS. SOLEM: Aleisha Solem, Agency Legal
17 Services.

18 MS. CLERGET: Sarah Clerget. I'm the
19 Board attorney.

20 MR. DAVIS: Tim Davis. I'm sitting in
21 for George Mathieus as the Department liaison.

22 MS. NELSEN: Sara Nelsen. I'm the
23 interim Board secretary for the Board.

24 MS. BOWERS: Kirsten Bowers, DEQ Legal.

25 MS. SCHERER: Sandy Scherer, DEQ.

1 MR. MOSER: Kurt Moser, DEQ Legal.

2 MR. HAYES: Ed Hayes, Deputy Chief Legal
3 for DEQ.

4 MS. COLAMARIA: Angie Colamaria, Chief
5 Legal, DEQ.

6 MR. KENNING: Jon Kenning, DEQ Water
7 Quality.

8 MS. CHRISTOPHERSON: Sarah
9 Christopherson, DEQ Legal.

10 MR. ANDERSON: Chad Anderson, DEQ
11 Enforcement.

12 MR. LUCAS: Mark Lucas, DEQ Legal.

13 MR. CRONIN: Chris Cronin, Opencut
14 Mining Program Supervisor.

15 MR. SEVERS: Eric Severs, DEQ Water
16 Quality Division.

17 MS. McLAUGHLIN: Joanna McLaughlin, DEQ
18 Water Quality.

19 MS. HORNE: Melinda Horne, DEQ Water
20 Quality.

21 MS. RAO: Maya Rao, DEQ Water Quality.

22 MR. BARTON: Darryl Barton, DEQ Water
23 Quality.

24 CHAIR DEVENY: Thank you. And are there
25 any other individuals on the phone from the

1 public, or any agencies that would care to check
2 in this morning?

3 MS. JACOBSEN: Good morning. This is
4 Nancy Jacobsen with Rippling Woods Homeowners
5 Association.

6 CHAIR DEVENY: Thank you, Nancy.
7 Anybody else online this morning to check in?

8 MS. MARQUIS: Good morning. This is
9 Vicki Marquis. I'm an attorney with Holland and
10 Hart, and I represent CSH, Inc., and our notice of
11 appeal of the water discharge permit is featured
12 as one of the action items on your agenda today.

13 CHAIR DEVENY: Thank you, Vicki. Any
14 other members of the public want to check in by
15 phone?

16 MS. SLATER: Linda Slater, and I own
17 land near there.

18 CHAIR DEVENY: Thank you, Linda. Any
19 other members of the public?

20 MR. HOWELL: Michael Howell,
21 H-O-W-E-L-L, Bitterroot Star.

22 CHAIR DEVENY: Any other member of the
23 public on the phone today?

24 MR. VAUSE: Yes. My name is Kurt Vause,
25 resident of Victor, Montana, and an appellant in

1 your packet for today.

2 CHAIR DEVENY: Okay. Thank you. And I
3 think there was another person that spoke up.

4 MR. MAKI: Kevin Maki, KECI-TV.

5 CHAIR DEVENY: Thank you. Anybody else?

6 (No response)

7 CHAIR DEVENY: Any other members of the
8 public to check in this morning?

9 (No response)

10 CHAIR DEVENY: Thank you all. And I
11 would just remind you to please mute your phone
12 when not speaking. It will really make the
13 meeting go much smoother for everybody.

14 With that, we'll go on to review the
15 minutes of the October 4th meeting that was here.
16 Do any of the Board members have any additions or
17 corrections?

18 (No response)

19 CHAIR DEVENY: Hearing none, I do have
20 one addition I'd like to be made, and that has to
21 do with the fact that we did have public comment
22 on the rulemaking section. I just want that to be
23 in the record. So let me try to find it here for
24 a second.

25 This had to do with Section III(a) No. 1

1 on the action items under the adoption of the
2 requirements for the Regional Haze Program. I
3 would just like the minutes to reflect that we did
4 ask for public comments on those requirements, and
5 that there were none. So Sara, if you can make
6 those corrections.

7 MS. NELSEN: I will do that.

8 CHAIR DEVENY: Are there any other
9 additions or corrections that Board members would
10 like to have?

11 (No response)

12 CHAIR DEVENY: If not, could I entertain
13 a motion to approve the minutes.

14 MR. TWEETEN: This is Chris. So moved.

15 CHAIR DEVENY: It's been moved. Is
16 there a second to approve the minutes with the
17 correction that I submitted?

18 MR. LEHNHERR: This is David. I'll
19 second that motion.

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

22 (No response)

23 CHAIR DEVENY: Hearing none, all those
24 in favor of approving the minutes with the
25 addition that I suggested, please signify by

1 saying aye.

2 (Response)

3 CHAIR DEVENY: Any opposed?

4 (No response)

5 CHAIR DEVENY: Hearing none, the minutes
6 passed with the correction I submitted. Thank
7 you.

8 The next order of business is reviewing
9 and approving the 2020 schedule for next year.
10 The Board members were sent the schedule in their
11 packets, and were also contacted by Lindsay over
12 the last few weeks, and we came up with a list of
13 dates.

14 Hillary, I know you're not able to make
15 that April date, but I think given the number of
16 people that we have on the Board, it was probably
17 best to go ahead and suggest that date anyway.
18 Hope you're okay with that.

19 Any discussion about the dates for the
20 proposed meeting schedule?

21 MS. HANSON: Chris, this is Hillary.
22 I'm just looking. I think it was actually August
23 I can't make, not April.

24 CHAIR DEVENY: Oh, okay. Great. Well,
25 I'm sorry about the August date, too.

1 MS. HANSON: That's fine. I just wanted
2 to make sure that you guys knew what I meant, the
3 one that I was talking about.

4 CHAIR DEVENY: Okay. Thanks for
5 clarifying that. So I would like to move that we
6 establish the 2020 meeting schedule as in our
7 packet. Would there be a second to that motion?

8 MR. TWEETEN: This is Chris. I'd
9 second.

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

12 (No response)

13 CHAIR DEVENY: All those in favor of
14 approving the 2020 meeting schedule as in our
15 packet, please signify by saying aye.

16 (Response)

17 CHAIR DEVENY: Any opposed?

18 (No response)

19 CHAIR DEVENY: Hearing none, the motion
20 passes. I just realized that I didn't provide any
21 public comment opportunity for this, so we will
22 see if there was anybody that had any objections
23 to that schedule, if we need to go back and talk
24 about that any more.

25 (No response)

1 CHAIR DEVENY: Is there any public
2 comment about the schedule?

3 (No response)

4 CHAIR DEVENY: Hearing none, the motion
5 stands as we just voted on. Thank you, and we'll
6 move on to briefing items on the contested cases.
7 And Sarah, if you could give us an update.

8 MS. CLERGET: All right. Starting on
9 your agenda with briefing item II(A)(1)(a) CMG
10 Construction. There allegedly has been a
11 settlement reached, but it needs to be finalized,
12 and I have given them until December 16th, 2019 to
13 file that stipulation or respond to the discovery,
14 and I've indicated that there will be no further
15 extensions, as I've now given them several. So
16 hopefully that will be a final date for them to
17 get that settled.

18 Copper Ridge and Reflections. That one
19 we've issued a scheduling order, and set deadlines
20 for dispositive motions, which will be fully
21 briefed in June of 2020. And then depending on
22 whether or not there are motions filed, we'll set
23 a hearing schedule as necessary for that.

24 The non-enforcement cases, 2(a), Alpine
25 Pacific Utilities. There is a scheduling order.

1 Discovery closes June 2020.

2 The City of Great Falls, also a
3 scheduling order through dispositive motions. And
4 for the non-lawyers, when I say dispositive
5 motions, that means summary judgment motions
6 usually, so it's the big motions. So that's set
7 through -- dispositive motions will be briefed in
8 September of 2020.

9 (c), under 2(c) actually belongs in your
10 action items section, because that is a case
11 that's married to the CHS case. So the update on
12 that is the same as the CHS case, which as you see
13 later is an action item. So we'll wait and deal
14 with that when we get to the action items.

15 Westmoreland Resources. There is a
16 scheduling order, issued that November 27th, and
17 set dispositive motions, which will be briefed in
18 December of 2020. That's a ways out.

19 Montanore Minerals. It's stayed pending
20 what is going on in the Supreme Court right now
21 under the cause numbers there. So our underlying
22 case, which is ripe for decision from the Hearing
23 Examiner, is stayed, so I'm not issuing that
24 decision until we figure out what's going on with
25 the Supreme Court.

1 Golden West Properties. I allowed them
2 to file second motions for summary judgment. So I
3 ruled on the first motions for summary judgment,
4 and then there was some briefing, and requests for
5 a second round. I allowed that. They are fully
6 briefed in front of me, and ripe for decision, so
7 that's waiting on me and will be coming out
8 shortly.

9 Talen, which is the one that we were
10 supposed to have today, as you guys obviously saw
11 that you're not hearing that today. They have
12 filed something indicating that they needed to
13 dispense the schedule until they could file their
14 motions to govern the proceedings, which are due
15 December 17th. So I will have a better idea
16 what's going to happen. They moved the hearing to
17 January, but then suspended the schedule. So
18 December 17th, I'll know more, but the bottom line
19 is you're not hearing it today.

20 Spring Creek Coal. December 13th, 2019,
21 the parties will either file a stipulated
22 settlement agreement or a joint proposed
23 scheduling order. So they have indicated that
24 settlement is a possibility, and they're working
25 through that, and have until the end of the month.

1 Western Energy Area F, as we're calling
2 it. They're completing discovery, and dispositive
3 motions are due January 6th, 2020, although there
4 has been some indication that that might need to
5 be extended, but that's when they're currently
6 due.

7 And not assigned to a Hearing Examiner,
8 3(a), is a DEQ update, I believe.

9 MS. BOWERS: Good morning, members of
10 the Board. I'm Kirsten Bowers, DEQ attorney. And
11 just a brief update on the Rosebud case.

12 As provided in the short summary in your
13 packet, we have a final decision from the Supreme
14 Court, and the case has been remanded to the
15 District Court.

16 And then the Western Energy Company, the
17 only updates since the summary that's in your
18 packet is Western Energy Company filed a motion to
19 substitute the District Court Judge, Judge Seeley,
20 and so we don't know who our judge is yet. But
21 that matter is remanded to District Court for
22 decision on issues of material fact.

23 CHAIR DEVENY: Thank you, Ms. Bowers.

24 On that same case, I have an update from
25 our outside Counsel whom we've --

1 MS. CLERGET: It's not the same case.
2 It is a different case. Keep going. You're in
3 right place, but it's a different case.

4 CHAIR DEVENY: Moving forward. It's
5 another Western Energy case dealing with the
6 Montana Environmental Information Center, Sierra
7 Club, DEQ, Montana Board of Environmental Review,
8 and Western Energy.

9 So we were named in a case, and had to
10 obtain outside Counsel. And I've asked our
11 outside Counsel Amy Christensen to give us an
12 update on that, and I have a brief update from
13 her. I'm just going to read it.

14 "MEIC and the Sierra Club filed a
15 petition for judicial review of BER's decision to
16 approve the permit for the Rosebud Mine. BER
17 filed a motion to dismiss on the grounds that BER
18 should not have been named in the petition since
19 it was the deciding agency, and not a party to the
20 underlying contested case proceeding.

21 "The motion has been fully briefed and
22 is now awaiting a decision. The Judge issued a
23 scheduling order, which states that she will
24 decide the motion to dismiss on or before January
25 10th, 2020. The scheduling order also set

1 deadlines for further briefing in the case."

2 So that's still ongoing, and will
3 continue to be updated by our outside Counsel.

4 MS. CLERGET: That's the end. Now
5 you've got action items on new contested cases.

6 CHAIR DEVENY: Actually we're going to
7 slip in another category in here, which is going
8 to be No. 2. This was not in the packet, but we
9 do have something that came up with a DEQ
10 rulemaking issue. And I'm going to ask Tim Davis
11 of DEQ to give the Board an update on this, and
12 tell us what it is that they need from us.

13 MR. DAVIS: Thank you, Madam Chair.
14 Members of the Board, I want to give you an update
15 -- this is Tim Davis -- give you an update on the
16 rulemaking that the Board initiated to increase
17 engineering fees for public water wastewater
18 systems. It also included some rulemaking
19 involving a municipal facilities exclusion.

20 The Environmental Quality Council
21 objected to the rulemaking, and so therefore
22 rulemaking has been delayed until January 15th
23 when the Environmental Quality Council will meet
24 again, and decide whether to lift that objection
25 or not.

1 If they do lift that objection, DEQ, the
2 Department, would request that the Board hold a
3 special meeting to finalize the rulemaking so that
4 it can be submitted to the Secretary of State by
5 February 4th, which is the last filing deadline
6 prior to the end of the six month period that we
7 need to adopt rules within.

8 So we've already worked up a response to
9 comments for the Board. We are ready, once it's
10 lifted, to provide materials to the Board to be
11 able to act, but it would need to be -- and we
12 could talk, Madam Chair, if it may be beneficial
13 to set up a special hearing in case we need it.
14 If we don't, we can notify the Board, let you know
15 that they did not lift the objection.

16 CHAIR DEVENY: So Tim, if you could
17 clarify. So if they don't lift the objection, we
18 need to hold another hearing, or you guys have to?
19 How does that work?

20 MR. DAVIS: Madam Chair, if they do not
21 lift the objection, it's my understanding that the
22 six months will expire, and we would to have to
23 initiate, the Board would have to initiate new
24 rulemaking to go forward with the fees in the
25 future, with those rules in the future.

1 CHAIR DEVENY: Do Board members have
2 questions of Mr. Davis on this issue?

3 (No response)

4 CHAIR DEVENY: Any questions from Board
5 members?

6 (No response)

7 CHAIR DEVENY: So hearing none, I guess
8 we will ask for Sarah's suggestion on this.

9 MS. CLERGET: I was just going to
10 suggest if we want to ask Sara Nelsen to get us a
11 date. We probably want a little bit of time,
12 maybe the end of January would be a good target,
13 sometime in the last two weeks of January.

14 CHAIR DEVENY: So after we find out
15 whether they're going to lift their objections,
16 then if you could then poll the Board members, and
17 we could set up a meeting.

18 MS. NELSEN: So just to make sure I
19 understood that correctly, after the decision is
20 made with the meeting that Tim has had, I will
21 send a poll to Board members to schedule a special
22 meeting separate from the scheduled February one?

23 MS. CLERGET: I think we might want to
24 go ahead and just schedule it, so that we have it
25 on the calendar, and then we can always cancel it.

1 Go ahead and ask Sara to find a date at the end of
2 January.

3 CHAIR DEVENY: So don't wait. Go ahead
4 and schedule it, and then if we have to cancel it.

5 MS. NELSEN: I will do that and notify
6 you of the scheduled meeting.

7 CHAIR DEVENY: You'll need to poll the
8 Board members to find some possible dates, make
9 sure that we have a quorum.

10 MS. CLERGET: We'll work with her on
11 that.

12 MS. NELSEN: Got it.

13 MR. DAVIS: Thank you, Madam Chair.

14 CHAIR DEVENY: Anything else?

15 MR. DAVIS: The only other thing, if I
16 may take just a quick second. It's not on the
17 agenda specifically. But Angie Colamaria, our new
18 Chief Legal Counsel, is here when we did the quick
19 introductions. I just want to take a second just
20 to acknowledge her, and see if, Madam Chair, if
21 you had any questions for her, or wanted her to
22 just say hi, introduce herself. I don't know if
23 this is a correct place, but I thought I'd just
24 take the opportunity while my mike was hot to do
25 so.

1 CHAIR DEVENY: I think that would be
2 fine. If you'd like to come up and introduce
3 yourself. And welcome to Helena.

4 MS. COLAMARIA: Thanks. I'm happy to be
5 here, happy to be here in Helena. I've been here
6 for three weeks, so I'm still pretty new. I'm
7 also, just so you know, in the process of waiving
8 into the bar, so you're still going to see Ed and
9 the rest of the attorneys on Court documents,
10 Board documents, etc., while I'm still in that
11 process. But I'm really looking forward to
12 meeting everyone and working with you.

13 CHAIR DEVENY: Thank you. Welcome. So
14 we're ready to move on then to new contested
15 cases, and I'll turn this back over to Sarah
16 Clerget, our Board attorney.

17 MS. CLERGET: So in your packet you have
18 the materials from the new cases that we got.
19 There are fourteen of them. They all relate to
20 the same permit, that same Moudy Pit site. So I'm
21 assuming you've had the opportunity to look
22 through those materials.

23 And you have your standard menu of
24 options that you always have with the Hearing
25 Examiner, in addition to -- and just to clarify --

1 those are: You can keep the case in its entirety;
2 you can assign it to a Hearing Examiner for
3 procedural purposes only; you can assign it for
4 the dispositive motions stage through, for
5 example, summary judgment; or you can assign it in
6 its entirety to the Hearing Examiner. And the
7 Hearing Examiner can be me or anyone else of your
8 choosing.

9 And in addition to those regular menu of
10 options, because all of these cases relate to the
11 same site, I would suggest that you consider
12 consolidating them for procedural purposes, and
13 then take whatever action you're going to take in
14 terms of assigning it on all of them combined for
15 procedural purposes. So that would be my
16 recommendation, and it's up to the Board how you
17 want to proceed.

18 CHAIR DEVENY: Thank you, Sarah. I
19 think having looked at all these, since they're
20 all related, for procedural purposes it makes
21 total sense to consolidate these. So I would make
22 a motion to consolidate the fourteen cases for
23 procedural purposes.

24 MR. LEHNHERR: This is David. I second
25 that motion.

1 CHAIR DEVENY: It's been moved and
2 seconded to consolidate the fourteen cases for
3 procedural purposes. Is there any discussion by
4 Board members?

5 (No response)

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

9 (Response)

10 CHAIR DEVENY: Any opposed?

11 (No response)

12 CHAIR DEVENY: Hearing none, the
13 fourteen cases have been consolidated.

14 The next thing we need to do is to
15 decide whether we're going to keep these cases
16 ourselves, or to assign them to Sarah either for
17 procedural purposes or in their entirety. Do we
18 have discussion on this?

19 (No response)

20 CHAIR DEVENY: What's the pleasure of
21 the Board members?

22 MR. BUSBY: I would make a motion that
23 we assign it to Sarah for the entirety. This is
24 Dexter.

25 CHAIR DEVENY: Thank you, Dexter. It's

1 been moved that the fourteen consolidated cases be
2 assigned to our Hearing Officer Sarah Clerget for
3 the entirety of the cases. Is there a second?

4 I'll second it. It's been moved and
5 seconded. Is there any discussion by Board
6 members?

7 (No response)

8 CHAIR DEVENY: Hearing none, all those
9 in favor of assigning the fourteen consolidated
10 contested cases in their entirety to the Hearing
11 Officer, please signify by saying aye.

12 (Response)

13 CHAIR DEVENY: Are there any opposed?

14 (No response)

15 CHAIR DEVENY: Hearing none, the motion
16 carries, and these cases have been assigned to our
17 Hearings Officer. Is there anything further on
18 these, Sarah?

19 MS. CLERGET: No.

20 CHAIR DEVENY: Okay. Thank you.

21 MS. CLERGET: So now we move on to the
22 action items on contested cases.

23 The first one is Signal Peak Energy.
24 The District Court piece of it is not an action
25 item, but I wanted to keep them together so there

1 wasn't confusion. That one is just an update from
2 our outside Counsel.

3 CHAIR DEVENY: Again, this is Signal
4 Peak Energy/Bull Mountain Coal Mine permit case
5 where we were named as a party, and the case has
6 gone before the Supreme Court. We've had to go
7 hire outside Counsel to represent us, and Amy
8 Christensen's update on this is as follows:

9 "Signal Peak Energy appealed the
10 District Court order denying its request to obtain
11 discovery from two landowners, who were also
12 members of MEIC. In the District Court matter,
13 BER filed a notice of non-participation, and we
14 filed a similar notice in the appeal pending
15 before the Montana Supreme Court.

16 "Signal Peak has filed its opening brief
17 on appeal, and Respondents received an extension
18 until December 20th to file their response brief."

19 So this case, too, is ongoing, and we'll
20 continue to keep the Board updated.

21 MS. CLERGET: Then the contested case is
22 the action item that we need from you guys. There
23 has been a question raised, and I just need
24 clarification from the Board.

25 Does the Board intend to grant the

1 Hearing Examiner jurisdiction for the purposes of
2 deciding the summary judgment motions only, or for
3 the entirety of the case through the final
4 recommended decision or the FOFCOL? So I just
5 need that clarification, is the only action item.

6 CHAIR DEVENY: I went back through, and
7 perhaps some of you have, too, to look at the
8 record from our meeting on that, and I can
9 understand why there was a little confusion
10 because we had a motion, and then there was a very
11 lengthy discussion between the motion and when we
12 voted on it.

13 And when I called for the question on
14 the vote, I didn't represent what was actually in
15 the motion correctly. So we ended up voting on
16 something that wasn't actually in the motion. The
17 motion just dealt with the summary judgment part
18 of it, but after our discussion, it was clear the
19 Board was talking about assigning the case in its
20 entirety to our Hearings Officer.

21 But we do need to clarify that, and if
22 we could do that today in a motion to make sure
23 that everybody is clear on what the intention of
24 the Board was, which I believe was to assign the
25 case in its entirety to the Hearings Officer. Any

1 questions on that from Board members, or differing
2 opinions?

3 MR. BUSBY: This is Dexter, Chris. I
4 would make a motion that we assign the balance of
5 this case in its entirety to the Hearing Officer.

6 CHAIR DEVENY: Could you go ahead and
7 repeat that, Dexter.

8 MR. BUSBY: Yes. I would make a motion
9 that we assign the balance of this case in its
10 entirety to the Hearings Officer, because I agree
11 with you. I think that was our intent.

12 CHAIR DEVENY: Thank you, Dexter. I
13 would second that motion.

14 MR. LEHNHERR: I'll second that motion.

15 CHAIR DEVENY: Any further discussion by
16 Board members on this? I want to make sure that
17 we're real clear in what we're doing here.

18 (No response)

19 CHAIR DEVENY: Hearing none, all those
20 in favor of the motion to assign the case in its
21 entirety to the Hearing Officer, please signify by
22 saying aye.

23 (Response)

24 CHAIR DEVENY: Any opposed?

25 (No response)

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

3 MS. CLERGET: The second action item is
4 CHS, which also includes the Laurel Refinery case,
5 Permit No. 264, which is the one that I indicated
6 when I was doing the update should have moved with
7 CHS.

8 So this is the stipulation that you have
9 in your packet, and as explained in my motion, you
10 can approve or reject the stipulation. And my
11 understanding is that the parties are here and
12 available if you have questions, but I told them I
13 didn't believe you needed to hear from them unless
14 you had questions. So it is at your pleasure how
15 you would like to proceed.

16 CHAIR DEVENY: So the stipulations are
17 in the Board packet. I hope people have had a
18 chance to take a look at them. Does anybody have
19 any discussion or suggestions of how to move
20 forward with this?

21 (No response)

22 CHAIR DEVENY: Hearing no discussion, I
23 want to make sure I make this motion correctly, so
24 give me half a second here. I would move that the
25 Board approve the stipulation in the case of

1 CHS --

2 MS. CLERGET: Permit No. 264.

3 CHAIR DEVENY: -- Permit No. 264,
4 approve the stipulation in that referenced
5 contested case.

6 MS. CLERGET: Chris, I think you want to
7 adopt the Board order, the proposed Board order as
8 the final Agency action.

9 CHAIR DEVENY: And approve the proposed
10 Board order for final Agency decision. Do Board
11 members have any questions or comments on this?

12 MR. TWEETEN: This is Chris. I'll
13 second the motion.

14 CHAIR DEVENY: Thank you, Chris. Any
15 further discussion, questions?

16 MR. BUSBY: Could I get just a really,
17 really -- This is Dexter. Could I get really
18 brief explanation of the next steps before we vote
19 on this?

20 CHAIR DEVENY: Sure. Sarah.

21 MS. CLERGET: Dexter, do you have
22 questions for me on procedural stuff, or do you
23 need to hear from the parties on the substantive
24 stuff?

25 MR. BUSBY: I just need to hear from

1 you.

2 MS. CLERGET: So essentially what
3 happens here is that if you approve this, it takes
4 a piece of the contested case -- not all of it,
5 but a piece of it -- and settles that, and we have
6 a final agency decision on that portion, and then
7 the rest of the case continues in front of me.

8 MR. BUSBY: Okay. That's what I thought
9 Chris meant with her motion. I just wanted to
10 make sure.

11 CHAIR DEVENY: Thank you for clarifying
12 that, Sarah. Any other comments or questions from
13 the Board members?

14 (No response)

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

18 (Response)

19 CHAIR DEVENY: Any opposed?

20 (Response)

21 CHAIR DEVENY: Was there an opposition
22 vote?

23 (No response)

24 CHAIR DEVENY: I don't think so. I
25 think they were in all in favor. Okay. So the

1 motion passes. Thank you.

2 And with that, I think we're ready to
3 move on to the Board Counsel update, and we'll go
4 back to Sarah for that.

5 MS. CLERGET: So I have two issues for
6 the Board Counsel update.

7 The first is I want to just generally
8 alert the Board to the fact that the Coal Council
9 sent a letter to the Board which involved one
10 former Board member and current Board members, and
11 DEQ responded to that letter, and cc'd it to all
12 of the parties in any coal case that we have. And
13 we just wanted to let the Board know that that had
14 happened, and that the letter was floating around
15 out there.

16 The reason DEQ responded was because the
17 Governor asked DEQ for a response, and so I don't
18 think there is any further action there. It was
19 just an FYI for the Board. Anything else on that?

20 CHAIR DEVENY: I just wanted to say for
21 those of you who may not be aware, Melissa
22 Hornbein has resigned from the Board. She is the
23 former member that Sarah referred to. She's taken
24 another position that she thought would make it
25 difficult for her to serve on the Board.

1 I've been in contact with the Governor's
2 Office, and they are in the process of searching
3 for applicants for the Board of Environmental
4 Review position, and they hope to have someone
5 selected in the coming weeks. So I'm hopeful
6 we'll have a new Board member by February, but
7 probably not. Crossing my fingers.

8 MS. CLERGET: So that's it for the first
9 update.

10 The second item is we talked at the last
11 Board meeting about rules, and how we are working
12 to fulfill our statutory obligation to review our
13 rules every two years. We continue to work with
14 DEQ about that.

15 At the last meeting one of the things we
16 talked about was the procedural rules which don't
17 require as much coordination with the programs of
18 DEQ. Those are mostly stuff that we can do
19 ourselves. And Aleisha has been working on that a
20 little bit, and I've started some work on it.

21 But I wanted to ask you guys if it was
22 all right. What I would like to do is hold some
23 round tables even before I have a draft -- we
24 don't have anything formalized in a draft -- but
25 hold some round tables with what I would call the

1 stakeholders in the contested case process, our
2 regular, those who appear in front of us
3 regularly, and have some discussion with them
4 about process, and what they think might work, or
5 what they don't like, what isn't working, and see
6 if that can inform and update to the procedural
7 portions of the rules.

8 So I wanted to run that by you guys and
9 make sure that you thought that that was okay. I
10 expect probably one or two of those before I get a
11 final draft, and then maybe -- or draft, not a
12 final draft, but a draft -- and then potentially
13 give it back out to them, give a draft back out to
14 them, and have their thoughts before I even bring
15 anything formalized to you guys, is sort of the
16 process I was imagining, and I wanted to see if
17 you guys agree.

18 CHAIR DEVENY: Do Board members have any
19 feedback for Sarah, or any questions about her
20 idea of putting together these stakeholder groups?

21 MR. TWEETEN: This is Chris. I think it
22 sounds like a good idea.

23 CHAIR DEVENY: Thank you, Chris. Any
24 other comments from Board members?

25 (No response)

1 MS. CLERGET: I'll consider that
2 permission.

3 CHAIR DEVENY: I think it is a good
4 idea. I think we'll go ahead and get as much
5 input as you can.

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

7 CHAIR DEVENY: Then in terms of the DEQ
8 rules, I'm hoping that we're kind of moving on in
9 that direction, that things are happening, so that
10 we can continue to make sure that we're on top of
11 all of the rules of the Department, and
12 coordinating with Sarah.

13 MR. DAVIS: Madam Chair, this is Tim
14 Davis again. We can plan to give you an update in
15 your February meeting on that as well, if you'd
16 like.

17 CHAIR DEVENY: That would be great.
18 Thank you, Tim. Are there comments from Board
19 members?

20 (No response)

21 CHAIR DEVENY: You're not coming through
22 if somebody was trying to comment.

23 (No response)

24 CHAIR DEVENY: I think it was just
25 background noise. Thank you. Okay.

1 We're now ready to open up the meeting
2 for general public comment on any public matter
3 outside of contested cases. So if you have
4 comments on contested cases, I'm sorry, but we're
5 not allowed to hear those. Is there any general
6 public comment?

7 MR. TWEETEN: Madam Chair, this is
8 Chris.

9 CHAIR DEVENY: Yes, Chris, go ahead.

10 MR. TWEETEN: I observed that there are
11 a number of folks on the phone, maybe some folks
12 in the room as well, interested in the Moudy Pit
13 action. And understanding that this is not the
14 time for any comments with respect to the merits
15 of those contested cases, I wondered if any of
16 them might be permitted to comment with respect to
17 the Board's action today.

18 We're not hearing the merits of that
19 matter today. Any comments on the merits would be
20 out of order. But if any of them have any
21 observations or comments about our action today, I
22 would hope that we would be able to --

23 (inaudible) --

24 CHAIR DEVENY: I guess I'll ask our
25 attorney for her advice on this.

1 MS. CLERGET: I guess I'm a little
2 worried that we won't get into the substance,
3 Chris. But if you think that there is a way that
4 we can do that without getting into the substance,
5 I'll defer to you.

6 MR. TWEETEN: Well, I guess I'm not sure
7 there is. I just wanted to explain for the
8 benefit of those folks who went to the trouble of
9 getting on the phone this morning that we're not
10 ignoring your presence, understanding that you're
11 interested in the contested case that is not ready
12 for discussion on the merits yet.

13 And I think at the very least we should
14 give them an explanation as to the fact that the
15 statute that we're operating under requires us to
16 take public comment on matters outside of the
17 agenda, but we ordinarily don't receive comments
18 from parties with respect to matters that are on
19 the agenda, like the Moudy Pit matter.

20 I just think that folks might be
21 mystified as to why they went to the trouble of
22 getting on the phone at this early procedural
23 stage of that case, and not ready to hear the
24 merits, so that was my concern. I don't want
25 folks to think we've ignored them in that respect.

1 CHAIR DEVENY: I appreciate that, Chris,
2 and I think you're right. The people on the phone
3 do deserve to have an explanation of why we're not
4 taking comment on that, and I think you've
5 adequately and eloquently explained that.

6 So if there are members on the phone
7 that want to speak up only on the procedural
8 issues of what we did today by consolidating the
9 cases and assigning them to the Hearings Officer,
10 that they're welcome to speak up at this time, but
11 that nothing substantive about the case can be
12 talked about, and if it is brought up, we have no
13 other recourse but to cut you off.

14 So if there is anybody on the phone that
15 would wish to speak to the action that the Board
16 took today on the case, please speak up now, and
17 we'll take you one at a time.

18 MS. JACOBSEN: Madam Chairman, this is
19 Nancy Jacobsen from the Rippling Woods Homeowners
20 Association.

21 CHAIR DEVENY: Yes, Ms. Jacobsen.

22 MS. JACOBSEN: Thank you for listening.
23 You have made this process a lot easier for us.

24 CHAIR DEVENY: I'm sorry. Our Court
25 Reporter is having a hard time picking you up. Is

1 there a way for you to get closer to the phone?

2 MS. JACOBSEN: Yes. Let me take you off
3 speaker. Is that better?

4 CHAIR DEVENY: That's better. Thank
5 you.

6 MS. JACOBSEN: I'm Nancy Jacobsen from
7 Rippling Woods Homeowners Association. I just
8 wanted to give a shout out to Lindsay Ford, who
9 was extremely helpful in helping us coordinate and
10 understand the process, and we were fully advised
11 that this was strictly to put the case in front of
12 you, and determine how it is to proceed from here.

13 I do have one question. I don't know if
14 it's appropriate to ask, so I will put it forth,
15 because one of our -- We have seventy-plus members
16 that are involved in this appeal, and one of them,
17 and most of us think this, too, that we don't know
18 how the process works at this point, so we're
19 looking at two things.

20 One, the process and the steps that go
21 on from here, hoping that that will be divulged to
22 us in the process.

23 And the other comment was -- because
24 that is so important to us to know the procedures
25 and the steps. The other question was Judge

1 Jennifer Boatwright-Lint, who is one of our
2 appellants, had asked if there was -- in her
3 appeal if there was any way we could make meetings
4 here in the Bitterroot, since there are
5 seventy-plus of us that most of us have full-time
6 jobs, and the ability to get to Helena is really
7 difficult at best.

8 And I don't know if, again, if that is
9 something we talk about now or will come later, so
10 it's just an informational thing so I can update
11 the group.

12 CHAIR DEVENY: I'll ask Sarah Clerget,
13 our Board attorney to respond. Thank you.

14 MS. CLERGET: Sure. This is Sarah. And
15 you guys will be getting an order from me as the
16 Hearing Examiner that explains the procedure in
17 very great detail, and points you to the rules
18 that will govern the procedure, so hopefully that
19 will be helpful, and we'll work through that
20 process together.

21 As to the travel on the hearings, that
22 is actually a legitimate question for the Board.
23 Normally I hold hearings in Helena so that the
24 Board doesn't have to pay my travel, but if the
25 Board is willing to entertain paying the travel

1 for me to hold the hearings elsewhere, that is
2 something I'm willing to do. It is up to the
3 Board whether or not they want to do that.

4 CHAIR DEVENY: I think it would be very
5 appropriate for you to travel, given the large
6 number of interested parties in this case. So I
7 don't know that we would need a motion for that, I
8 think, but I think the Board members would
9 probably agree with me that it would be
10 appropriate for you to travel to the Bitterroot.

11 MS. CLERGET: So in that case we can
12 work out the specifics of that within our
13 contested case process, but you guys have now
14 heard that the Board is willing to pay the cost of
15 me coming down there, which will save you guys
16 some travel.

17 MS. JACOBSEN: That's excellent. Thank
18 you so much. We really appreciate that
19 consideration.

20 CHAIR DEVENY: Thank you, Ms. Jacobsen.
21 Are there other members of the public that wish to
22 speak?

23 (No response)

24 CHAIR DEVENY: Hearing none, I believe
25 we're ready for a motion to adjourn this meeting

1 unless anybody has anything else to bring up.

2 MR. BUSBY: So moved. This is Dexter.

3 CHAIR DEVENY: I'll second it. It's
4 been moved and seconded that we adjourn. All
5 those in favor, please signify by saying aye.

6 (No response)

7 CHAIR DEVENY: All those opposed.

8 (No response)

9 CHAIR DEVENY: Thank you everybody. And
10 happy holidays. We'll look forward to seeing you
11 in the new year.

12 (The proceedings were concluded

13 at 9:52 a.m.)

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C E R T I F I C A T E

STATE OF MONTANA)

: SS.

COUNTY OF LEWIS & CLARK)

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

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing - 39 - pages contain a true
record of the proceedings to the best of my
ability.

IN WITNESS WHEREOF, I have hereunto set my
hand and affixed my notarial seal
this _____ day of _____, 2019.

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

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