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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
August 9, 2019)

TRANSCRIPT OF PROCEEDINGS

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

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

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

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

3 * * * * *

4 CHAIR DEVENY: Good morning. I'd like
5 to call this meeting of the Board of Environmental
6 Review to order. Lindsay, would you please take
7 roll call.

8 MS. FORD: Chris Deveny.

9 CHAIR DEVENY: Here.

10 MS. FORD: Dexter Busby.

11 MR. BUSBY: Here.

12 MS. FORD: Hillary Hanson.

13 MS. HANSON: Here.

14 MS. FORD: John Dearment.

15 MR. DEARMENT: Here.

16 MS. FORD: Chris Tweeten.

17 MR. TWEETEN: Here.

18 MS. FORD: Melissa Hornbein.

19 MS. HORNBEIN: Here.

20 MS. FORD: David Lehnherr.

21 MR. LEHNHERR: Here.

22 MS. FORD: We have all seven Board
23 members present. We have a quorum.

24 CHAIR DEVENY: Thank you. Let's go
25 around the room and see who else is joining us

1 today, and we'll ask for people on the phone.

2 Would you like to start over there.

3 MR. HAYES: I'm Ed Hayes, Acting Chief
4 Legal for DEQ.

5 MS. BOWERS: Kirsten Bowers, attorney
6 for DEQ.

7 MS. CLARK: I'm Rachel Clark with the
8 Engineering Bureau for DEQ.

9 MR. PETTIS: Aaron Pettis, DEQ Legal.

10 MR. LUCAS: Mark Lucas, DEQ Legal.

11 MS. CHRISTOPHERSON: Sarah
12 Christopherson, DEQ Legal.

13 MR. SEVERS: Eric Severs, DEQ Water
14 Protection Bureau.

15 MR. LEAP: Landy Leap with Copper Ridge
16 and Reflections at Copper Ridge.

17 MS. MARQUIS: Vicki Marquis, with Copper
18 Ridge and Reflections at Copper Ridge.

19 MR. KLEMP David Klemp, DEQ Air Quality
20 Bureau.

21 MS. MERKEL: Julie Merkel, DEQ Air
22 Quality Bureau.

23 MS. PAYNE: Rhonda Payne, DEQ Air
24 Quality Bureau.

25 MR. BARTON: Darryl Barton, DEQ Water

1 Protection Bureau.

2 MS. SIR: Haley Sir, DEQ Water
3 Protection Bureau.

4 MS. McLAUGHLIN: Joanna McLaughlin, DEQ
5 Water Protection Bureau.

6 MS. RAO: Maya Rao, DEQ Water Protection
7 Bureau.

8 CHAIR DEVENY: Thank you. The two
9 gentlemen that just came in, could you just
10 identify yourselves for the record.

11 MR. DORRINGTON: Matt Dorrington, Coal
12 Section Supervisor.

13 MR. COLEMAN: I'm Ed Coleman, I'm the
14 Bureau Chief over Coal and Opencut Mining Bureau.

15 MS. KELLY: Mila Kelly, Water Quality
16 Planning Bureau.

17 CHAIR DEVENY: And are there other
18 people on the phone besides our two Board members
19 that would like to identify themselves for today's
20 meeting?

21 (No response)

22 CHAIR DEVENY: I don't hear anybody.
23 We'll move on then. We have two sets of minutes
24 to approve. We had a special Board meeting on the
25 22nd of May, and we forgot to approve those at our

1 last meeting, so does the Board have any questions
2 or comments on those minutes?

3 (No response)

4 CHAIR DEVENY: Is there any public
5 comment on those minutes?

6 (No response)

7 CHAIR DEVENY: DEQ had none. Okay.
8 Hearing none, would somebody like to make a motion
9 that we approve the May 22nd meeting minutes.

10 MS. HORNBEIN: I'll move that we approve
11 the May 22nd meeting minutes.

12 MR. LEHNHERR: Second.

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

15 (No response)

16 CHAIR DEVENY: Hearing none, all those
17 in favor, signify by saying aye.

18 (Response)

19 CHAIR DEVENY: Any opposed?

20 (No response)

21 CHAIR DEVENY: Those minutes are
22 approved. Next we will be voting on adopting the
23 May 31st meeting minutes. Again, do Board members
24 have any corrections or additions to those
25 minutes?

1 MR. BUSBY: There is a name spelling
2 error on 3(c)(2), the fourth paragraph down. I'm
3 not Mr. Busy.

4 CHAIR DEVENY: Okay. Any other
5 corrections or additions?

6 MR. LEHNHERR: I am questioning the time
7 of adjournment. Did we adjourn at 11:00 a.m.? It
8 seems like the meeting went longer than that.

9 MS. CLERGET: I think that's right.

10 MS. FORD: Yes, it did. I'll change it.

11 CHAIR DEVENY: So Lindsay will check the
12 transcripts and correct that. And I also --
13 Melissa, did you have a request regarding the
14 new --

15 MS. HORNBEIN: The new rules.

16 CHAIR DEVENY: Yes, you requested the
17 Department provide updates regularly or --

18 MS. HORNBEIN: Yes.

19 CHAIR DEVENY: -- or on the issue of
20 manganese.

21 MS. HORNBEIN: I believe so, yes. Your
22 memory is --

23 CHAIR DEVENY: Would you like that
24 added?

25 MS. HORNBEIN: Yes, I would. Thank you.

1 CHAIR DEVENY: I believe Melissa asked
2 DEQ to provide updates, regular updates on the
3 manganese rules, and we will do that later.

4 MR. MATHIEUS: Sure.

5 CHAIR DEVENY: George, did you have
6 anything to add?

7 MR. MATHIEUS: So if everybody recalls,
8 we bifurcated the rulemaking, and all I'll say is
9 we're going to be more in a position in October to
10 give a more thorough review. Did they say that
11 while I was out of the room?

12 CHAIR DEVENY: No.

13 MR. MATHIEUS: Ironically I was just
14 double checking with Mila, and that's the topic
15 you guys were on.

16 CHAIR DEVENY: We'll take care of that
17 in any event.

18 MR. MATHIEUS: So we'll do it in
19 October.

20 CHAIR DEVENY: We will add that request
21 to those minutes. Are there any other further
22 additions or corrections to the May 31st minutes?

23 (No response)

24 CHAIR DEVENY: Any public comment on
25 those minutes?

1 (No response)

2 CHAIR DEVENY: Hearing none, do I have a
3 motion to approve the May 31st minutes?

4 MR. BUSBY: So moved.

5 CHAIR DEVENY: I'll second it. It's
6 been moved and seconded. Move to discussion.

7 (No response)

8 CHAIR DEVENY: All those in favor of
9 approving the May 31st meeting minutes with the
10 changes that we discussed, please signify by
11 saying aye.

12 (Response)

13 CHAIR DEVENY: Any opposed?

14 (No response)

15 CHAIR DEVENY: Those meeting minutes are
16 approved with the changes. And next we have
17 briefing item updates from Sarah.

18 MS. CLERGET: All right. Taking your
19 tour of the agenda, you have briefing items under
20 II(A)(1)(a) CMG. This case was stayed on June
21 17th, 2019. They filed a status report in July
22 indicating that technical settlement discussions
23 are still underway, and that they're still working
24 toward settlement, so that stay continues.

25 CHS, they're to file either a stipulated

1 settlement agreement or a motion giving me
2 essentially new scheduling order dates by November
3 29th, 2019. So that one is stayed in the
4 intervening time.

5 Absaloka Mine has been stayed pending
6 the decision from the Supreme Court.

7 "C," the Signal Peak case, I'm going to
8 skip that one for now because -- I'll come back to
9 it.

10 So "D" is Montinore. This will be
11 before the Board at its October meeting. DEQ
12 Counsel is not present, couldn't be present today,
13 so that one is coming in October. That is
14 awaiting my decision, but it is completely briefed
15 and ready to go for me, and so it will be before
16 you guys in October.

17 The Laurel Refinery case. They again
18 have the option to file either a settlement
19 agreement or a motion with a new schedule by
20 November 29th, 2019, so it is stayed in the
21 intervening time.

22 Golden West. There are a number of
23 motions pending before me right now, including a
24 motion to dismiss, so I owe the parties the
25 decision on those; and then depending on what that

1 decision is and the parties' decisions about my
2 decision, that may or may not come before you in
3 October, or it may wait until it goes to hearing,
4 depending on the outcome of those decisions.

5 So that is pending decisions before me
6 on that motion to dismiss -- sorry -- it is a
7 motion for summary judgment, not a motion to
8 dismiss -- motion for summary judgment.

9 And No. G, a Major Facility Siting Act
10 case. This case, I wanted to give you guys a
11 heads up that the parties have mostly agreed to
12 and requested a very expedited schedule in this
13 case, so it's going to be very intense for us to
14 get everything done so that this can be on your
15 December 12th agenda for final decision.

16 And so I just want to plug that that
17 December 12th meeting, all of the parties and I
18 are going to work really, really hard to get that
19 on that December agenda, and it's really important
20 that everybody be present, even though it's
21 December, to do that, because their getting an
22 entire contested case done in six months is a big
23 task.

24 So that will be coming. There's a
25 pending motion to dismiss in that case in front of

1 me right now, so depending on the outcome of that,
2 I guess it could be in front of you before then.
3 But if the schedule proceeds as it's laid out,
4 then it will be ripe for you in December.

5 Spring Creek Coal. There is a
6 scheduling order from June, and the parties are
7 proceeding accordingly.

8 Area F for Western Energy. They have a
9 scheduling order, and they are proceeding through
10 that.

11 I don't have 3(a), so I'll let DEQ do
12 that.

13 And 3(b), I'm going to combine with the
14 update for 2(c), which is Signal Peak, because as
15 you guys may remember, the Signal Peak case, there
16 was a piece of it, a subpoena issue, that went up
17 to the District Court, and that has now worked its
18 way through the District Court and is in front of
19 the Supreme Court.

20 And the BER has hired outside Counsel to
21 cover the BER for both the Signal Peak case and
22 the Montana Environmental, MEIC case that you guys
23 heard at the last meeting, has been appealed up to
24 the District Court, so we've also hired Amy
25 Christensen who is here, and so I'm going to let

1 her introduce herself and give you an update on
2 those cases.

3 MS. BOWERS: Do you want an update on
4 3(a) from me?

5 MS. CLERGET: In a minute. Let me
6 finish mine, and then we'll turn it over to you.

7 MS. CHRISTENSEN: It's nice to meet
8 everybody. I'm Amy Christensen. I'm an attorney
9 here in Helena. And Sarah asked me to help out on
10 a couple of cases. So I met Chris -- good to see
11 you. There is just these two cases. I have a
12 very brief update. They haven't been developing
13 very quickly at this point.

14 So on the Rosebud Mine case -- that's
15 the one that's Sarah just mentioned involving MEIC
16 -- that one has been served, the petition for
17 judicial review has been served. It is now
18 sitting in front of the District Court. Our
19 answer or motion to dismiss, however we decide to
20 proceed, will be due at the end of August, August
21 27th, so we'll be working on that. I think our
22 intent is to file a motion to dismiss to try to
23 get the Board out of that case.

24 The other case, the Signal Peak case,
25 that's in front of the Montana Supreme Court. At

1 this point I think we're still waiting for the
2 record to be transmitted, and then after that
3 occurs, then the briefing will begin.

4 The Board filed a notice of
5 non-participation in that matter when it was in
6 front of the District Court, and so I anticipate
7 that that's likely what will happen in the Supreme
8 Court as well. So a very brief update for you.

9 CHAIR DEVENY: Thank you, Amy.

10 MS. CLERGET: Thank you. Just so you
11 guys are aware, the rest of the Signal Peak case
12 is still in front of me. It is proceeding
13 accordingly. So we're coming up on oral arguments
14 on cross motions for summary judgment sometime
15 next week or week after. So the rest of that, Amy
16 -- I have the underlying contested case, and it's
17 still going, and then Amy is taking the appeal,
18 just to make that distinction clear.

19 I think that's all for my update, and I
20 can turn it over to DEQ.

21 CHAIR DEVENY: Ms. Bowers, would you
22 like to give the DEQ update. Thank you.

23 MS. BOWERS: Madam Chair, members of the
24 Board, there is not much to report.

25 In Item 3(a), the Western Energy case

1 regarding the MPDES permit for the Rosebud Coal
2 Mine, that is still before the Montana Supreme
3 Court. The Court did request some additional
4 briefing by the parties, and the parties
5 simultaneously submitted the additional briefs on
6 June 17th, and so we're still awaiting the Court's
7 decision.

8 CHAIR DEVENY: Thank you. It has been
9 on the agenda a long time. So those briefing
10 items we're through with.

11 Next we have a rulemaking that the
12 Department has requested that we initiate, so if
13 we could turn that over to DEQ. George, do you
14 have somebody that's going to speak for the
15 Department?

16 MR. MATHIEUS: We do. Rachel Clark.

17 CHAIR DEVENY: Before you start, could
18 you remind me what your name is.

19 MS. CLARK: Rachel Clark.

20 CHAIR DEVENY: And I just want to make
21 sure that the Board understands, and that you make
22 it clear, that there may be some parts in this
23 proposed rule that we don't have authority for, so
24 I just want to -- you're probably planning to
25 address that, but I wanted to make sure that that

1 was the case.

2 MS. CLARK: Good morning, Madam Chair,
3 members of the Board. My name is Rachel Clark. I
4 am the Supervisor of the Public Water and
5 Subdivisions Review Section in the Engineering
6 Bureau in the Water Quality Division.

7 The Engineering Bureau reviews plans and
8 specifications for public water and wastewater
9 systems and subdivisions. The fees for public
10 water and wastewater systems are adopted by the
11 Board under its rulemaking authority in Montana
12 Code Annotated 75-6-108.

13 Conversely the subdivision fees and
14 rules are adopted by the Department under the
15 Department's rulemaking authority.

16 We're here today to request that the
17 Board initiate rulemaking to raise the public
18 water and wastewater review fees under
19 Administrative Rule 17.38.106. Often projects are
20 subject to review under both of the sections, so
21 it is important that comparable fees match, so we
22 have prepared this as a joint rulemaking to ensure
23 that fees are consistent between the sections.

24 In addition, the Department is proposing
25 to adopt New Rule I regarding use of the municipal

1 facilities exclusion, but the item up for
2 consideration by the Board today is solely the
3 public water and wastewater fees.

4 The public water, engineering, and
5 subdivision sections are both required by statute
6 to set fees for reviewing plans commensurate with
7 the cost to the Department of performing these
8 services. Over the past three fiscal years,
9 neither section has collected enough fees
10 commensurate with our costs.

11 The Department is recommending a fee
12 increase of 40 percent to the nearest even
13 increment. We project that fee increase will be
14 adequate to cover our costs up to year 2027. The
15 last major increase for the public water and
16 wastewater fees was almost a decade ago, in 2010.

17 The proposed rule package was presented
18 to the Subdivision and Development Advisory
19 Council and contracted counties. The Subdivision
20 and Development Advisory Council is an ad hoc
21 group of stakeholders representing developers,
22 engineers, consultants, and other regulated
23 communities brought together to make
24 recommendations on our rules. Contracted counties
25 are those that are contracted to review

1 subdivision files for DEQ.

2 Both groups were supportive of the rule
3 package with minor changes to a few subdivision
4 fee items, and those changes have been
5 incorporated into the rule package before you.
6 With that, I'm happy to answer any questions you
7 may have.

8 CHAIR DEVENY: Thank you. Do Board
9 members have questions of Ms. Clark?

10 MS. HANSON: This is Hillary. I don't
11 have any questions, but I did want to let you guys
12 know that the fees would impact my Health
13 Department, and therefore I won't be voting on
14 this.

15 CHAIR DEVENY: I didn't hear the last
16 part of what you said, Hillary.

17 MS. HANSON: I don't think I should vote
18 on anything related to this.

19 CHAIR DEVENY: Okay. We'll recuse you.

20 MS. HANSON: My Health Department.

21 CHAIR DEVENY: We'll recuse you from
22 that. Thank you. Any other questions or comments
23 from the Board?

24 (No response)

25 CHAIR DEVENY: It's pretty straight

1 forward. Are there any public comments on the
2 rules from anybody in the audience or on the
3 phone?

4 (No response)

5 CHAIR DEVENY: Hearing none, what is the
6 pleasure of the Board?

7 MR. DEARMENT: Madam Chair, I'd move
8 that we adopt the proposed rulemaking as presented
9 by the Department.

10 CHAIR DEVENY: It's actually to initiate
11 rulemaking.

12 MR. DEARMENT: Initiate. Yes. Thank
13 you.

14 CHAIR DEVENY: Could I modify that by
15 adding that we assign Sarah as the Hearing Officer
16 for the rulemaking?

17 MR. DEARMENT: Absolutely. Thank you.

18 CHAIR DEVENY: Is everybody clear then
19 on what we're voting on? Okay. It's been moved
20 and --

21 MR. BUSBY: I'll second that.

22 CHAIR DEVENY: -- we need a second then.
23 Okay. Thank you. All those in favor, signify by
24 saying aye.

25 (Response)

1 CHAIR DEVENY: Any opposed?

2 (No response)

3 CHAIR DEVENY: Okay. And we will note
4 that Hillary was recused on that vote. Okay.
5 Thank you very much.

6 So Sarah, do you want to talk about the
7 new case that's been filed before us.

8 MS. CLERGET: Yes. This is the standard
9 options menu for you guys. You can choose to
10 assign it to me or any Hearing Examiner for
11 procedural purposes; you can decide to keep it
12 entirely; or you can assign it to me for
13 procedural and substantive purposes, me or any
14 other Hearing Examiner you choose. I think you
15 have the information in your packets for the case,
16 the request for the hearing.

17 CHAIR DEVENY: So I would move that we
18 assign Sarah Clerget as the Hearing Officer for
19 the totality of the Alpine Pacific Utilities case.
20 Is there any discussion or second of that?

21 MR. LEHNHERR: I'll second the motion.

22 CHAIR DEVENY: The motion has been
23 seconded. Discussion?

24 MR. TWEETEN: I'll second it.

25 CHAIR DEVENY: David seconded it, Chris.

1 Thank you. We're having discussion now about the
2 motion, which is to assign the case to Sarah in
3 its entirety.

4 MS. HORNBEIN: Can we check in with
5 Sarah on her workload?

6 MS. CLERGET: I'll say the same thing I
7 say every time. As long as you guys are okay with
8 getting additional help from the other attorneys
9 at ALSB, we will deal with it as we can, which I
10 understand to be the standing agreement. When you
11 assign it to me, you assign it to ALSB
12 essentially.

13 CHAIR DEVENY: Any other discussion or
14 questions? Anybody feel differently? Do we want
15 to take this one on instead of assigning it to
16 Sarah? That's also an option.

17 (No response)

18 CHAIR DEVENY: Hearing and seeing no
19 further discussion on this, we'll have a vote on
20 the motion to assign the Alpine Pacific Utilities
21 case to Sarah as the Hearing Officer for the
22 totality of the case. All those in favor, signify
23 by saying aye.

24 (Response)

25 CHAIR DEVENY: Any opposed?

1 (No response)

2 CHAIR DEVENY: Motion carries. David
3 just pointed out that he believes our December
4 meeting is on the 13th of December, rather than
5 the 12th.

6 MS. CLERGET: That's probably my
7 mistake.

8 CHAIR DEVENY: So just for
9 clarification.

10 MS. CLERGET: The plug is for the 13th,
11 not for the 12th. Sorry.

12 * * * * *

13 (Board meeting recessed at 9:24 a.m.
14 to hear oral arguments in
15 BER 2015-01 WQ Reflections at Copper Ridge
16 and BER 2015-02 WQ
17 Copper Ridge Development Corporation
18 and reconvened at 4:35 p.m.)

19 * * * * *

20 CHAIR DEVENY: Sarah has --

21 MS. CLERGET: Yes, the Counsel update.
22 So this is just something to run by you guys.
23 I talked to Chris about it.

24 I was invited to speak at the Natural
25 Resource Section of the Bar, which is the lawyers,

1 on the procedure for the BER, MAPA in general and
2 the procedure for BER. And since I would be
3 appearing in part as talking about the BER, and
4 because I am the Hearing Examiner for the BER,
5 Board attorney, I wanted you guys to know about
6 that, and be sure it was okay with you that I do
7 that. So I have tentatively said yes pending your
8 approval, but I wanted you guys to hear about
9 it --

10 CHAIR DEVENY: I thought it would be a
11 fine thing to do. The more people that know what
12 our procedures are out there I think the better.

13 BOARD MEMBER BUSBY: I think so.

14 CHAIR DEVENY: Does anybody have any
15 problems with Sarah speaking before the Bar on
16 behalf of what our Board does and what she does?

17 (No response)

18 CHAIR DEVENY: Hillary or Chris?

19 BOARD MEMBER HANSON: No problem.

20 MR. TWEETEN: No, I'm fine with it.

21 CHAIR DEVENY: You have our blessing.

22 MS. CLERGET: Okay. Thank you. That's
23 all I have.

24 CHAIR DEVENY: With that, we'll take any
25 public comment, if there is somebody on the phone

1 that wants to speak up. The room is otherwise
2 pretty deserted.

3 (No response)

4 CHAIR DEVENY: Seeing none, would
5 somebody make a motion to adjourn.

6 BOARD MEMBER BUSBY: I move we adjourn
7 for the day.

8 CHAIR DEVENY: I'll second it. All
9 those in favor, signify by saying aye.

10 (Response)

11 CHAIR DEVENY: All those opposed.

12 (No response)

13 CHAIR DEVENY: The motion passes. The
14 meeting is adjourned.

15 (The proceedings were concluded

16 at 4:39 p.m.)

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STATE OF MONTANA)
 : SS.
COUNTY OF LEWIS & CLARK)

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

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing - 23 - 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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