BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING
JUNE 10, 2022

TRANSIMENT OF PROCEEDINGS (VIA ZOOM)

June 10, 2022
9:00 a.m.

BEFORE CHAIRMAN STEVEN RUFFATTO,
BOARD MEMBERS DAVID SIMPSON,
JON REITEN, JOSEPH SMITH, JULIA ALTEMUS
and DAVID LEHNHERR

PREPARED BY: LAURIE CRUTCHER, RPR
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WHEREUPON, the following proceedings were had and testimony taken, to-wit:

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CHAIR RUFFATTO: Thank you. I will call the meeting to order. And Sandy, would you please call the roll.

THE CLERK: Good morning. Chairman Ruffatto.

CHAIR RUFFATTO: Here.

MS. MOISEY-SCHERER: Vice Chair Aguirre.

(No response)

MS. MOISEY-SCHERER: Vice Chair Aguirre.

(No response)

MS. MOISEY-SCHERER: Board Member Smith.

BOARD MEMBER SMITH: Here.

CHAIR RUFFATTO: Board Member Lehnherr.

BOARD MEMBER LEHNHERR: Here.

CHAIR RUFFATTO: Board Member Reiten.

BOARD MEMBER REITEN: Here.

MS. MOISEY-SCHERER: Board Member Simpson.

BOARD MEMBER SIMPSON: Here.

MS. MOISEY-SCHERER: Board Member Altemus.

BOARD MEMBER ALTEMUS: I am here. Good
3
morning.

MS. MOISEY-SCHERER: Good morning. We
have a quorum.

CHAIR RUFFATTO: Thank you, Sandy. Can
you identify who else is on the call, please.

MS. MOISEY-SCHERER: Rebecca Harbage,
DEQ; Laurie Crutcher, Kurt Moser, DEQ; Michael
Russell, Agency Legal Services; Aislinn Brown,
Agency Legal Services; Caitlin Buzzas, Agency
Legal Services; Elena Hagen, Agency Legal
Services; Deputy Director Fehr, DEQ; Loryn
Johnson, DEQ; Mr. Gilbert from EarthJustice; Murry
Warhank; Sam Yemington; and Sarah Bordelon.

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(Kirsten Bowers, Nicholas Whitaker, Sarah
Christopherson, Jon Morgan, Jeremiah Langston,
Amanda Galvan, Derf Johnson, Ray Stout, and Galen
Steffens also present)

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CHAIR RUFFATTO: Thank you, Sandy. As
far as schedule for today, I'm hopeful that we can
get through this in an hour, so we'll work in that
direction.

Turning to the agenda, the first item is
review and approval of the minutes, and unless
there's an objection, let's take both of these
sets of minutes together and just have one motion.
Do I have a motion to approve the minutes of the
April 8th meeting and the May 23rd special
meeting?

BOARD MEMBER SMITH: So moved.

BOARD MEMBER SIMPSON: Second.

CHAIR RUFFATTO: A motion has been made
and seconded to approve these minutes.

Discussion.

BOARD MEMBER ALTEMUS: Mr. Chair, I
guess I have a question. I thought it was April
10th and May 23rd. Maybe I'm looking at the wrong
thing.

CHAIR RUFFATTO: I'm pretty sure it was
April 8th.

BOARD MEMBER ALTEMUS: I guess I'm
looking at the agenda. They have April 10th down,
and so maybe it was just a typo.

CHAIR RUFFATTO: On the minutes?

BOARD MEMBER ALTEMUS: On the agenda,
Table of Contents for today.

CHAIR RUFFATTO: I think that was a
typo. I think that was a typo.

BOARD MEMBER ALTEMUS: Okay. I just
wanted to make sure we have the right date. Thank you.

CHAIR RUFFATTO: Thank you, Julia. I appreciate that. Any other discussion?

(No response)

CHAIR RUFFATTO: There being no further discussion, all in favor, say aye.

(Response)

CHAIR RUFFATTO: Opposed.

(No response)

CHAIR RUFFATTO: The motion carries.

Then we're going to go to briefing items, and not wanting to take up too much time, I just wanted to first give anybody who knows of any updates from the write-ups on the agenda to let us know of any of those, and then I would like to ask the Board members if they have any questions or comments about the briefing items. Kirsten.

MS. BOWERS: Good morning, Chair Ruffatto, members of the Board. I believe on your agenda you have as a briefing item the petitions of Teck Coal and Lincoln County on the Lake Koocanusa selenium rules. And so I'm wondering if you want an update on the stringency findings today. And also there's a pending motion, and I'm
wondering if you'll take action on that, or do
that at your August meeting.

CHAIR RUFFATTO: Thank you, Kirsten. I
really appreciate that. I had noted that as
something I wanted to deal with, and in my mind I
had not included it under briefing items, but
you're exactly right. They are under briefing
items, so let's handle that separately immediately
after this first batch of briefing items. Does
that sound okay?

MS. BOWERS: Yes.

CHAIR RUFFATTO: Thank you, Kirsten.

MS. BOWERS: Thank you.

CHAIR RUFFATTO: Any other questions or
comments about the briefing items other than the
rule review on the selenium rule?

(No response)

CHAIR RUFFATTO: Hearing none, we will
move to the selenium rule review. And as you
recall, on April 8th we decided that matter, and
shortly thereafter we issued an order, a written
order.

A few weeks ago DEQ filed a motion to
amend, and responses have been filed to that
motion. It was my understanding that DEQ has an
opportunity to respond or to reply to those responses, so we felt that these motions were not ripe, or the motion was not ripe for consideration today because of the potential for a response.

So I think that maybe answers your question. We will not be deciding that today or discussing it. Thank you, Kirsten.

But we were aware that, and you had mentioned it at the last Board meeting, that you would give us an update on the status of what DEQ has done, so please give a brief discussion of that.

MS. BOWERS: Chair Ruffatto, members of the Board. Thank you for the opportunity to give you a quick update on our stringency findings. And I just want to preface it by saying that we are still finalizing our responses to comments on the draft stringency findings, and I would be happy to give you another update in August when we finalize the findings, but I'll give you an update what we have so far.

So in response to the Board's finding that the Lake Koocanusa water column standard is more stringent than comparable federal regulations or guidelines, DEQ began drafting findings
required in Section 75-5-203 Sub (2) and (3) of the statute to support the more stringent standard.

And the statute provides, as you know, that DEQ implements the remedy, and the remedy could be either revising the rule, or making the findings under the stringency statute; and DEQ is complying with the stringency provisions in the Water Quality Act by making the stringency findings based on evidence in the rulemaking record.

DEQ's proposed stringency findings were made available for public review and comment, and DEQ held a public hearing on its proposed stringency findings on April 26th, and we took comments at the hearing, and we took written comments through May 4th, and we will respond to all substantive comments from the public on the stringency findings, and the findings will be finalized June 14th, so that's next week on Tuesday.

We received nearly 150 comments, and we are still going through the process of reviewing those and responding to the comments. And the comments overwhelmingly support DEQ's stringency
findings and the Lake Koocanusa water column standard.

We went through the findings in 75-5-203 Sub (2) Sub (a), that the Lake Koocanusa water column standard is necessary to protect aquatic life from the toxic effects of selenium, and that the level of protection meets the protection goals defined for Lake Koocanusa, and the standards are consistent with best available science for selenium toxicity, and protect the selenium sensitive aquatic life in the watershed.

And we made findings under 75-5-203 Sub (2) Sub (b) that the standard to be imposed can mitigate harm to the environment, and is achievable under current technology.

Egg ovary tissue through 2020 for the Montana portion of Lake Koocanusa shows selenium levels above the 15.1 milligrams per kilogram in fish egg and ovary tissue.

And also it's notable that the downstream Kootenai River in Idaho has been listed as impaired due to selenium that's found in high levels in fish tissue.

So the Water Quality Act standard is set to protect those beneficial uses, and to prevent
further impacts and protect downstream uses.

The Lake Koocanusa water column standard can mitigate harm to aquatic life, and is achievable under current technology. And the Department went through the process of reviewing permits and activities on and around Lake Koocanusa, and determined that there are no point sources, no dischargers with selenium as a pollutant of concern.

These better known to contribute to selenium in the watershed are land disturbing activities, and the current treatment technology for those activities are best management practices, such as prevention of storm water from coming into contact with pollutants, and measures that would minimize impervious surface area and retain runoff, or it can be treated through infiltration, and the riparian buffers, and reduction of erosion to protect the surface waters from any direct site runoff that might contain pollutants.

Any mines or industrial sites in the area would have to document potential pollutants in a storm water pollution prevention plan, and provide adequate control measures to avoid impacts
to water quality, and they have to do that now anyway.

Any existing and future land disturbing and industrial operations are subject to these requirements, and no owner operator or permittee is expected to incur substantially increased treatment costs.

There are currently no planned point source dischargers to Lake Koocanusa with selenium as a pollutant of concern. And based on what we know about the geology in the area, on the Montana side of the border there isn't a natural source of selenium.

If there were to be a need for treatment, if there were a point source discharger with selenium as a pollutant of concern, there are some treatment technologies that could be employed that --

Like I said, we're still finalizing our findings, but we think that those treatment technologies could remove 90 percent or more of selenium, and that depends on how much of a concentration they were discharging of course.

But it's more likely that contributions of selenium would be controlled through BMP's
required under the general permits issued by DEQ, such as the general permit for storm water discharges associated with construction activity, the multi-sector general permit for storm water discharges associated with industrial activity, or the general permit for sand and gravel operations.

We also made findings under 203 sub (3) that the written findings must reference pertinent, ascertainable, and peer reviewed scientific studies contained in the record that contain the basis for the Department's conclusions.

And those findings do reference peer reviewed scientific studies such as EPA's 304A selenium guidance, studies by Jenni, Presser and Luoma, and the peer reviewed data base and interactive spreadsheets that were created for the selenium standard.

And also the written findings do include information from the hearing record regarding cost to the regulated community that are directly attributable to the proposed standard, and based on DEQ's review, there is no cost to the regulated community directly attributable to the Lake Koocanusa standard.
And the regulated community for purposes of this rule is within Montana because this is a site specific water column standard for Lake Koocanusa, Montana. It only applies within Montana's borders.

And there's no evidence in the record to suggest that the standard would result in increased treatment costs for Montana regulated owners or operators of land disturbing activities or facilities that would discharge to Lake Koocanusa.

DEQ will continue to engage with partners and the public, and follow the science and the law governing our work on the Lake Koocanusa water column standard. Thank you.

CHAIR RUFFATTO: Thank you, Kirsten.

Any members of the Board have comments or questions?

BOARD MEMBER SIMPSON: Mr. Chairman, this is Dave. One question.

In your analysis, have you considered the impact of a possible impairment determination? Because the standard that the Department has established is lower than what is present in the lake at the present time, based on the data I've
seen.

MS. BOWERS: Chair Ruffatto, Board Member Simpson, members of the Board.

We haven't assessed the lake yet, and you're right in observing that it could be listed as impaired. We have not considered economic impact of such an impairment listing.

But there are many water bodies in Montana listed as impaired, and I don't think there's much information to show that that necessarily causes an adverse economic impact on a community.

CHAIR RUFFATTO: Board Member Simpson, did that answer your question?

BOARD MEMBER SIMPSON: Well, I suppose it did. It sounds like it hasn't been examined.

One other question. And this to my recollection isn't specifically addressed in the statute, but are there any other water body specific standards in the country for selenium that would compare to what you're doing here?

MS. BOWERS: Chair Ruffatto, Board Member Simpson, members of the Board. I am not aware of another similar water body listed for selenium, but I have been told by our standards
folks that a very low site specific standard is
being considered in the San Francisco Bay, and I
don't know what the status of that is, but we
could update you on that in August when we provide
further update.

BOARD MEMBER SIMPSON: Thank you. I
guess it seems to me that that would be an
important point to include in your analysis as a
comparison with selenium standards in other parts
of the country.

MS. BOWERS: Okay.

CHAIR RUFFATTO: Thank you.

BOARD MEMBER SIMPSON: That's all I
have, Mr. Chair. Thank you.

CHAIR RUFFATTO: Thank you, David. Any
more questions or comments?

(No response)

CHAIR RUFFATTO: All right. Thank you.

Let's move on to the next agenda item.

It's the action item, the Signal Peak
matter, and I would just like to first kind of
recap where we're at.

We heard oral arguments on April 8th.
We deliberated at that time, including working
through a portion of the parties' exceptions. We
1 held a special meeting on May 23rd, and continued
deliberations, and completed the process of going
through the parties' exceptions. We also went
through that part of the proposed final order that
had been marked up based upon the earlier meeting
since then.

And then I guess I would say that then
on May 23rd, we went through the balance of the
exceptions at the special meeting, and today we
have a proposed draft final order that includes a
mark-up based upon what we discussed on May 23rd.

So what I propose to do today is to go
through that mark-up, covering the new changes
from before, from the May 23rd meeting, and I will
anticipate doing that kind of in big section by
big section to discuss any questions or comments,
and then I would suggest that we have one motion
at the end, and not have motions as we go through.

Is there any comments or suggestions on how I
propose that we address this matter?

(No response)

CHAIR RUFFATTO: If not, then we will
start in the first section. I want to go through,
I'm going to say Page 18 to 64, and I'm using the
numbers in the materials because that's the one I
could read the best -- they're all kind of overlapped there -- but Pages 18, or I should say 17 through 64.

And in this section, it's all clean-up changes with two exceptions. The first exception is the footnote on Page 22, which addresses the point of the use of DUA and DUB, and we discussed whether or not there was a difference between those two.

Board Member Simpson pointed out that he thought that it was likely that the intent was to refer to DUB as the geologic unit, and the DUA was intended to deal with the hydrologic function; and when we went through it, we felt that those terms were consistently applied with that in mind. So all we did was add the footnote on Page 22. Any questions or comments about that point?

(No response)

CHAIR RUFFATTO: By the way, I need to give our Board Counsel Mike Russell the credit. He was the one that carried the laboring oar on these revisions.

The next point in that first large section is on Page 65, and the deletions there are intended to deal with DEQ's exception regarding
whether DEQ had addressed the provision that is referred to. Any questions or comments about the change on Page 65?

(No response)

CHAIR RUFFATTO: If none, then I will go to Page 72, and deal with the section that I'm going to refer to as Pages 72 through 80, and this is the new write-up on the exceptions that we covered in the May 23rd special meeting. So I'm going to pause and give anybody a chance to raise any questions or discuss any points in that section.

(Pause)

CHAIR RUFFATTO: Hearing none, I'm going to move on to the next section, and this is Page 81 to the end, which starts with Conclusions of Law. And you'll recall that we went through a number of the conclusions of law on May 23rd, but we didn't go through quite all of them. There was a couple at the end we hadn't covered.

So in the conclusions of law, we have the changes that reflect our decisions on May 23rd regarding exceptions primarily of Signal Peak and DEQ. So I'm asking for any comments there.

(No response)
CHAIR RUFFATTO: And then finally on the last page, Page 88 I believe, is the change essentially that DEQ requested to make sure it didn't reflect that DEQ had challenged MEIC standing.

(No response)

CHAIR RUFFATTO: Hearing no comments, I would entertain a motion regarding the approval or rejection of the proposed draft order, and if we get a motion and a second, we will then have discussion generally.

BOARD MEMBER ALTEMUS: Mr. Chair, this is Julia. I move that we approve the draft order. Thank you.

CHAIR RUFFATTO: Thank you, Julia. Do we have a second?

BOARD MEMBER SIMPSON: Second.

CHAIR RUFFATTO: It's been moved and seconded that we approve the draft order as presented. Discussion.

BOARD MEMBER SIMPSON: Mr. Chairman, this is Dave. I'm not sure how much time I want to take with this, but just to refresh my memory, since we've been working on this for such a long time.
I went back through the findings of fact to satisfy myself, based on our discussion at the last special meeting, regarding the necessity that the decision be supported in its entirety by what we have in the findings of fact.

And during that discussion it came up that there was a discussion of Board Member Reiten's statement a couple of meetings ago regarding wells in the vicinity of the Bull Mountains.

And I wanted to point out Finding of Fact No. 118, which states that the 2016 PHC concluded that, "The deep underburden is an existing source of groundwater for purposes of private wells, public, water supply wells, livestock, and wildlife watering."

So I think that fact that was at issue is in fact addressed in the findings of fact, in the findings of fact and conclusions of law. So I just wanted to point that out.

CHAIR RUFFATTO: Good point, Dave.

Thank you.

BOARD MEMBER REITEN: Mr. Chairman, I did notice that, too. I looked at it. This is Jon. And I was going to bring it up, but I'm glad
Mr. Simpson did. Anyway, it appears that I wasn't too out of line with what I was saying. That's the only point I want to make. So thank you.

CHAIR RUFFATTO: Thank you, Jon, and you certainly weren't out of line. So any other comments or discussions?

(No response)

CHAIR RUFFATTO: If there is no further discussion, a motion has been made and seconded that we approve this document as the final order. All in favor, say aye.

(No response)

CHAIR RUFFATTO: Opposed.

BOARD MEMBER LEHNHERR: Nay.

CHAIR RUFFATTO: Since this is the final decision, let's have a roll call vote, please, Sandy.

MS. MOISEY-SCHERER: Chairman Ruffatto.

CHAIR RUFFATTO: Aye.

MS. MOISEY-SCHERER: Board Member Smith.

BOARD MEMBER SMITH: Aye.

MS. MOISEY-SCHERER: Board Member Lehnherr.

BOARD MEMBER LEHNHERR: Nay.

MS. MOISEY-SCHERER: Board Member
Reiten.

BOARD MEMBER REITEN: Aye.

MS. MOISEY-SCHERER: Board Member Simpson.

BOARD MEMBER SIMPSON: Aye.

MS. MOISEY-SCHERER: Board Member Altemus.

BOARD MEMBER ALTEMUS: Aye.

CHAIR RUFFATTO: Motion carries. Thank you all for working through that over time and today.

The next matter on the agenda is a new contested case in the matter of Luke Ployhar -- I have no idea if I pronounced that right -- for a review and determination made by DEQ on the application for an exploration license. It's BER 2022-03.

And we can assign this to a Hearing Examiner in its entirety for procedural purposes, or retain the case. If we assign it, I have talked to ALS, and the thought is that if we assign it, we will assign it to our Board Counsel Mike Russell. So do we have a motion? Yes, Doctor.

BOARD MEMBER LEHNHERR: Chairman
Ruffatto, just so we can get a discussion going,
I'll make a motion that we assign this case to a
Hearing Examiner for the totality of the case.

    CHAIR RUFFATTO: And Doctor, would you
include in that a motion that it be assigned to
Mike Russell?

    BOARD MEMBER LEHNHERR: Yes, let's add
that.

    CHAIR RUFFATTO: Thank you. Do we have
a second?

    BOARD MEMBER REITEN: I'll second that.

    CHAIR RUFFATTO: Thank you, Jon.

Discussion.

    (No response)

    CHAIR RUFFATTO: Well, I'll raise a
point. When we started in early 2021, I was
hesitant to assign all these cases to a Hearing
Examiner. Dr. Lehnherr advised us that we
probably need to because we do not have the
capacity as a board to, in most cases or in many
cases, to handle them, and I have now come to
agree completely with Dr. Lehnherr on that point.
So I'm in favor of assigning the case per the
motion. Any further discussion?

    (No response)
CHAIR RUFFATTO: Hearing none, all in favor of assigning this matter to Mike Russell as Hearing Examiner for the totality of the case, all in favor say aye.

(Response)

CHAIR RUFFATTO: Opposed.

(No response)

CHAIR RUFFATTO: The motion carries.

Moving to the next point, the Board Counsel update. Mr. Russell, what do you have to share with us?

MR. RUSSELL: Good morning, Chairman Ruffatto, and the rest of the members of the Board. One matter I wanted to address was one question brought up at the last Board meeting regarding specificity of parties' exceptions to proposed findings of fact and conclusions of law.

The question was whether procedurally the Board could require that specificity, because there was that concern that it was difficult to discern from the parties' specific exceptions what they actually were, in other words, to streamline the Board's ability to address those specific exceptions.

I've reviewed the BER policy and
procedures, specifically BER .2002.01.01, and those are the executive policies and procedures for the Board that are posted on the Board's website.

I believe that those policies and procedures could be revised to include specificity requirements, but those revisions I believe would need to go through the rulemaking process set forth in MAPA, so that would be something to consider. Aside from that, that's all I have for the Board today.

CHAIR RUFFATTO: Thank you. Any discussion?

BOARD MEMBER SIMPSON: Mr. Chairman, I guess -- This is Dave.

CHAIR RUFFATTO: Please go ahead, Dave.

BOARD MEMBER SIMPSON: Perhaps rather than deal with the issue right now, perhaps we ought to consider it as an agenda item for our next meeting.

CHAIR RUFFATTO: All right. I think that's a good idea. Any other questions or comments to Board Counsel?

(No response)

CHAIR RUFFATTO: Hearing none, we will
go on to the general public comment. The public
may comment on any public matter within the
jurisdiction of the Board that is not otherwise on
the agenda for the meeting, except individual
contested cases are not matters upon which the
public may comment.

So with that opening, is there any
public comment?

(No response)

CHAIR RUFFATTO: I'm assuming that no
one has their hand up who are not on the panel, so
we will assume there is no public comment at this
point, so I will then move to adjourn the meeting.

BOARD MEMBER SIMPSON: Second.

CHAIR RUFFATTO: All in favor, say aye.

(Response)

CHAIR RUFFATTO: Opposed.

(No response)

CHAIR RUFFATTO: Motion carries. And
thank you all for an efficient meeting. Finally
we have one a little shorter. So thank you. Have
a great weekend.

(The proceedings were concluded
at 9:40 a.m.)

* * * * *
CERTIFICATE

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 - 26 - 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 20th day of June, 2022.

________________________________________
LAURIE CRUTCHER, RPR
Court Reporter - Notary Public

My commission expires

March 9, 2024.
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wrong - 4:13

Y

Yemington - 3:13

yet - 14:4

you'll [2] 6:1, 18:17

Z

ZOOM - 1:8