

1
BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
2
OF THE STATE OF MONTANA
3

4
5 BOARD MEETING)
6 JUNE 10, 2022)
7

8 TRANSCRIPT OF PROCEEDINGS (VIA ZOOM)
9

10 June 10, 2022
11 9:00 a.m.
12

13 BEFORE CHAIRMAN STEVEN RUFFATTO,
14 BOARD MEMBERS DAVID SIMPSON,
15 JON REITEN, JOSEPH SMITH, JULIA ALTEMUS
16 and DAVID LEHNHERR
17
18
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20
21

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25

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

3 * * * * *

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

7 THE CLERK: Good morning. Chairman
8 Ruffatto.

9 CHAIR RUFFATTO: Here.

10 MS. MOISEY-SCHERER: Vice Chair Aguirre.
11 (No response)

12 MS. MOISEY-SCHERER: Vice Chair Aguirre.
13 (No response)

14 MS. MOISEY-SCHERER: Board Member Smith.
15 BOARD MEMBER SMITH: Here.

16 CHAIR RUFFATTO: Board Member Lehnher.
17 BOARD MEMBER LEHNHERR: Here.

18 CHAIR RUFFATTO: Board Member Reiten.
19 BOARD MEMBER REITEN: Here.

20 MS. MOISEY-SCHERER: Board Member
21 Simpson.

22 BOARD MEMBER SIMPSON: Here.

23 MS. MOISEY-SCHERER: Board Member
24 Altemus.

25 BOARD MEMBER ALTEMUS: I am here. Good

1 morning.

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

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

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

14 * * * * *

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

19 * * * * *

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

24 Turning to the agenda, the first item is
25 review and approval of the minutes, and unless

4
1 there's an objection, let's take both of these
2 sets of minutes together and just have one motion.
3 Do I have a motion to approve the minutes of the
4 April 8th meeting and the May 23rd special
5 meeting?

6 BOARD MEMBER SMITH: So moved.

7 | BOARD MEMBER SIMPSON: Second.

10 Discussion.

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

20 CHAIR RUFFATTO: On the minutes?

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

25 | BOARD MEMBER ALTEMUS: Okay. I just

1 wanted to make sure we have the right date. Thank
2 you.

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

5 (No response)

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

8 (Response)

9 CHAIR RUFFATTO: Opposed.

10 (No response)

11 CHAIR RUFFATTO: The motion carries.
12 Then we're going to go to briefing items, and not
13 wanting to take up too much time, I just wanted to
14 first give anybody who knows of any updates from
15 the write-ups on the agenda to let us know of any
16 of those, and then I would like to ask the Board
17 members if they have any questions or comments
18 about the briefing items. Kirsten.

19 MS. BOWERS: Good morning, Chair
20 Ruffatto, members of the Board. I believe on your
21 agenda you have as a briefing item the petitions
22 of Teck Coal and Lincoln County on the Lake
23 Koocanusa selenium rules. And so I'm wondering if
24 you want an update on the stringency findings
25 today. And also there's a pending motion, and I'm

1 wondering if you'll take action on that, or do
2 that at your August meeting.

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

11 MS. BOWERS: Yes.

12 CHAIR RUFFATTO: Thank you, Kirsten.

13 MS. BOWERS: Thank you.

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

17 (No response)

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

23 A few weeks ago DEQ filed a motion to
24 amend, and responses have been filed to that
25 motion. It was my understanding that DEQ has an

1 opportunity to respond or to reply to those
2 responses, so we felt that these motions were not
3 ripe, or the motion was not ripe for consideration
4 today because of the potential for a response.

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

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

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

22 So in response to the Board's finding
23 that the Lake Koocanusa water column standard is
24 more stringent than comparable federal regulations
25 or guidelines, DEQ began drafting findings

1 required in Section 75-5-203 Sub (2) and (3) of
2 the statute to support the more stringent
3 standard.

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

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

22 We received nearly 150 comments, and we
23 are still going through the process of reviewing
24 those and responding to the comments. And the
25 comments overwhelmingly support DEQ's stringency

1 findings and the Lake Koocanusa water column
2 standard.

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

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

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

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

24 So the Water Quality Act standard is set
25 to protect those beneficial uses, and to prevent

1 further impacts and protect downstream uses.

10

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.

22 Any mines or industrial sites in the
23 area would have to document potential pollutants
24 in a storm water pollution prevention plan, and
25 provide adequate control measures to avoid impacts

1 to water quality, and they have to do that now
2 anyway.

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

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

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

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

24 But it's more likely that contributions
25 of selenium would be controlled through BMP's

1 required under the general permits issued by DEQ,
2 such as the general permit for storm water
3 discharges associated with construction activity,
4 the multi-sector general permit for storm water
5 discharges associated with industrial activity, or
6 the general permit for sand and gravel operations.

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

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

19 And also the written findings do include
20 information from the hearing record regarding cost
21 to the regulated community that are directly
22 attributable to the proposed standard, and based
23 on DEQ's review, there is no cost to the regulated
24 community directly attributable to the Lake
25 Koocanusa standard.

1 And the regulated community for purposes
2 of this rule is within Montana because this is a
3 site specific water column standard for Lake
4 Koocanusa, Montana. It only applies within
5 Montana's borders.

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

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

16 CHAIR RUFFATTO: Thank you, Kirsten.
17 Any members of the Board have comments or
18 questions?

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

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

1 seen.

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

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

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

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

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

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

22 MS. BOWERS: Chair Ruffatto, Board
23 Member Simpson, members of the Board. I am not
24 aware of another similar water body listed for
25 selenium, but I have been told by our standards

15

1 folks that a very low site specific standard is
2 being considered in the San Francisco Bay, and I
3 don't know what the status of that is, but we
4 could update you on that in August when we provide
5 further update.

11 MS. BOWERS: Okay.

12 CHAIR RUFFATTO: Thank you.

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

17 (No response)

18 CHAIR RUFFATTO: All right. Thank you.
19 Let's move on to the next agenda item.

It's the action item, the Si

21 matter, and I would just like to first kind of
22 recap where we're at.

23 We heard oral arguments on April 8th.
24 We deliberated at that time, including working
25 through a portion of the parties' exceptions. We

1 held a special meeting on May 23rd, and continued
2 deliberations, and completed the process of going
3 through the parties' exceptions. We also went
4 through that part of the proposed final order that
5 had been marked up based upon the earlier meeting
6 since then.

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

12 So what I propose to do today is to go
13 through that mark-up, covering the new changes
14 from before, from the May 23rd meeting, and I will
15 anticipate doing that kind of in big section by
16 big section to discuss any questions or comments,
17 and then I would suggest that we have one motion
18 at the end, and not have motions as we go through.
19 Is there any comments or suggestions on how I
20 propose that we address this matter?

21 (No response)

22 CHAIR RUFFATTO: If not, then we will
23 start in the first section. I want to go through,
24 I'm going to say Page 18 to 64, and I'm using the
25 numbers in the materials because that's the one I

1 could read the best -- they're all kind of
2 overlapped there -- but Pages 18, or I should say
3 17 through 64.

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

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

18 (No response)

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

23 The next point in that first large
24 section is on Page 65, and the deletions there are
25 intended to deal with DEQ's exception regarding

1 whether DEQ had addressed the provision that is
2 referred to. Any questions or comments about the
3 change on Page 65?

4 (No response)

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

13 | (Pause)

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

25 (No response)

1 CHAIR RUFFATTO: And then finally on the
2 last page, Page 88 I believe, is the change
3 essentially that DEQ requested to make sure it
4 didn't reflect that DEQ had challenged MEIC
5 standing.

6 (No response)

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

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

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

17 BOARD MEMBER SIMPSON: Second.

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

21 BOARD MEMBER SIMPSON: Mr. Chairman,
22 this is Dave. I'm not sure how much time I want
23 to take with this, but just to refresh my memory,
24 since we've been working on this for such a long
25 time.

1 I went back through the findings of fact
2 to satisfy myself, based on our discussion at the
3 last special meeting, regarding the necessity that
4 the decision be supported in its entirety by what
5 we have in the findings of fact.

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

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

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

21 CHAIR RUFFATTO: Good point, Dave.
22 Thank you.

23 BOARD MEMBER REITEN: Mr. Chairman, I
24 did notice that, too. I looked at it. This is
25 Jon. And I was going to bring it up, but I'm glad

1 Mr. Simpson did. Anyway, it appears that I wasn't
2 too out of line with what I was saying. That's
3 the only point I want to make. So thank you.

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

7 (No response)

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

12 (Response)

13 CHAIR RUFFATTO: Opposed.

14 BOARD MEMBER LEHNHERR: Nay.

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

18 MS. MOISEY-SCHERER: Chairman Ruffatto.

19 CHAIR RUFFATTO: Aye.

20 MS. MOISEY-SCHERER: Board Member Smith.

21 BOARD MEMBER SMITH: Aye.

22 MS. MOISEY-SCHERER: Board Member
23 Lehnher.

24 BOARD MEMBER LEHNHERR: Nay.

25 MS. MOISEY-SCHERER: Board Member

1 Reiten.

2 BOARD MEMBER REITEN: Aye.

3 MS. MOISEY-SCHERER: Board Member
4 Simpson.

5 BOARD MEMBER SIMPSON: Aye.

6 MS. MOISEY-SCHERER: Board Member
7 Altemus.

8 BOARD MEMBER ALTEMUS: Aye.

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

12 The next matter on the agenda is a new
13 contested case in the matter of Luke Ployhar -- I
14 have no idea if I pronounced that right -- for a
15 review and determination made by DEQ on the
16 application for an exploration license. It's BER
17 2022-03.

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

25 BOARD MEMBER LEHNHERR: Chairman

1 Ruffatto, just so we can get a discussion going,
2 I'll make a motion that we assign this case to a
3 Hearing Examiner for the totality of the case.

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

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

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

11 BOARD MEMBER REITEN: I'll second that.

12 CHAIR RUFFATTO: Thank you, Jon.

13 Discussion.

14 (No response)

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

25 (No response)

24

1 CHAIR RUFFATTO: Hearing none, all in
2 favor of assigning this matter to Mike Russell as
3 Hearing Examiner for the totality of the case, all
4 in favor say aye.

5 | (Response)

6 CHAIR RUFFATTO: Opposed.

7 (No response)

8 CHAIR RUFFATTO: The motion carries.

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

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

I've reviewed the BER policy and

25
1 procedures, specifically BER .2002.01.01, and
2 those are the executive policies and procedures
3 for the Board that are posted on the Board's
4 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.

12 CHAIR RUFFATTO: Thank you. Any
13 discussion?

16 CHAIR RUFFATTO: Please go ahead, Dave.

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

24 (No response)

25 CHAIR RUFFATTO: Hearing none, we will

1 go on to the general public comment. The public
2 may comment on any public matter within the
3 jurisdiction of the Board that is not otherwise on
4 the agenda for the meeting, except individual
5 contested cases are not matters upon which the
6 public may comment.

7 So with that opening, is there any
8 public comment?

9 (No response)

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

14 BOARD MEMBER SIMPSON: Second.

15 CHAIR RUFFATTO: All in favor, say aye.

16 (Response)

17 CHAIR RUFFATTO: Opposed.

18 (No response)

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

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

25 * * * * *

1 C E R T I F I C A T E

2 STATE OF MONTANA)

3 : SS.

4 COUNTY OF LEWIS & CLARK)

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

8 That the proceedings were taken before me at
9 the time and place herein named; that the
10 proceedings were reported by me in shorthand and
11 transcribed using computer-aided transcription,
12 and that the foregoing - 26 - pages contain a true
13 record of the proceedings to the best of my
14 ability.

15 IN WITNESS WHEREOF, I have hereunto set my
16 hand and affixed my notarial seal this 20th day of
17 June, 2022.

18 19 LAURIE CRUTCHER, RPR

20 Court Reporter - Notary Public

21 My commission expires

22 March 9, 2024.

23

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