1	BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
2	OF THE STATE OF MONTANA
3	
4	BOARD MEETING)
5	October 14, 2022)
6	
7	TRANSCRIPT OF PROCEEDINGS
8	
9	Heard at the Montana Department of
10	Environmental Quality
11	Metcalf Building Room 111
12	1520 East Sixth Avenue, Helena, MT
13	October 14, 2022, 9:00 a.m.
14	
15	BEFORE CHAIRMAN STEVEN RUFFATTO (via Zoom),
16	VICE CHAIR STACY AGUIRRE,
17	BOARD MEMBERS DAVID SIMPSON,
18	JON REITEN (via Zoom), JOSEPH SMITH,
19	JULIA ALTEMUS (via zoom),
20	and DAVID LEHNHERR (via Zoom)
21	
22	PREPARED BY: LAURIE CRUTCHER, RPR
23	COURT REPORTER, NOTARY PUBLIC
24	lauriecrutcher@gmail.com
25	

WHEREUPON, the following proceedings were had:

* * * *

CHAIR RUFFATTO: Can you hear me? I want to say that I have asked Vice Chair Aguirre to chair this meeting because I'm not feeling well, and so I'm going to turn it over to her to conduct the meeting. Thank you, and thank you, Stacy.

VICE CHAIR AGUIRRE: You bet. Welcome.

I'm going to roll through this the best that I can
in Chairman Ruffatto's place. I just want to let
everybody know I probably expect this meeting to
last for a couple hours. That's the thought.

And so I'll call the meeting to order, and the first order of business is to call for a roll, if you would, please, Sandy.

MS. SCHERER: Chairman Ruffatto.

CHAIR RUFFATTO: Here.

MS. SCHERER: Vice Chair Aguirre.

VICE CHAIR AGUIRRE: Here.

MS. SCHERER: Board Member Altemus.

(No response)

MS. SCHERER: She's here but her mike didn't work. Board Member Lehnherr.

BOARD MEMBER LEHNHERR: Here.

1	VICE CHAIR AGUIRRE: Can everybody hear
2	us online? We're calling for roll. You can hear
3	us?
4	BOARD MEMBER ALTEMUS: I can now.
5	MS. SCHERER: Going back to roll call.
6	Board Member Reiten.
7	BOARD MEMBER REITEN: Here.
8	MS. SCHERER: Board Member Simpson.
9	BOARD MEMBER SIMPSON: Here.
10	MS. SCHERER: Board Member Smith.
11	BOARD MEMBER SMITH: Here.
12	MS. SCHERER: We have a quorum.
13	VICE CHAIR AGUIRRE: Thank you, Sandy.
14	I'd also now like to identify for the record
15	everybody that's on the Zoom call and also in
16	attendance here in the room with us. Maybe go
17	first in the room.
18	MS. SCHERER: I'm Sandy Scherer, Board
19	secretary.
20	MR. FEHR: James Fehr, Deputy, DEQ.
21	VICE CHAIR AGUIRRE: Stacy Aguirre, Vice
22	Chair.
23	BOARD MEMBER SIMPSON: Dave Simpson.
24	BOARD MEMBER SMITH: Joe Smith.
25	MR. RUSSELL: Michael Russell, Board

4 1 Counsel. 2 MS. MARQUIS: Good morning. My name is Vicki Marquis. I'm an attorney with Crowley Fleck 3 4 here today representing Teck. 5 MR. MOSER: Kurt Moser with DEQ Legal. MS. BOWERS: Kirsten Bowers, DEQ Legal. 6 7 MS. LODE: Emily Lode, DEQ. 8 MR. SMITH: Bob Smith, DEQ. 9 MS. PETERSON: Dicki Peterson, 10 Westmoreland Rosebud Mining. 11 MR. BATIE: Russell Batie, Westmoreland 12 Rosebud Mining. 13 MR. STEERE: Wade Steere, Westmoreland 14 Rosebud Mining. 15 MS. SCHERER: That is the room. For 16 attendees, Murry Warhank; Andy Janes; Anne; 17 Catherine Armstrong, DEQ; DEQ CPA 450; Chad 18 Anderson, DEQ; Heidi Barnes, DEQ; Jessica 19 Wilkerson, DEQ; Jon Metropolous; Kayla from 20 Yellowstone Public Radio; Ray Stout; Sam 21 Yemington, Holland and Hart; Tonya Fish, EPA. 22 VICE CHAIR AGUIRRE: Did you call John

VICE CHAIR AGUIRRE: Did we miss anybody

MS. SCHERER: And John Martin.

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Martin?

5 on the Zoom call? 1 MS. SCHERER: I called out everybody 2 that I saw. 3 4 5 (Also attending via Zoom: Director Chris Dorrington; Loryn Johnson; Sam King; Nicholas 6 7 Whitaker; Moira Davin; Rebecca Harbage; Lauren Sweeney; Lindsey Krywaruchka; Katie Garcin Forba; 8 Chad Anderson; Elena Hagen; Commissioners of 9 10 Lincoln County) 11 12 VICE CHAIR AGUIRRE: Okay. Thank you. 13 Now we'll move into the administrative items portion of the Board meeting, and review and 14 15 approval of the minutes for the August 12, 2022 meeting. Do we have a motion for adopting those 16 17 minutes? 18 BOARD MEMBER SIMPSON: So moved. 19 VICE CHAIR AGUIRRE: Second. 20 (No response) 21 VICE CHAIR AGUIRRE: I can second it.

VICE CHAIR AGUIRRE: Hearing none, I'll call for the vote. All in favor of adopting the

Any discussion on the meeting minutes?

(No response)

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meeting minutes as published. Can I do that? 1 2 MS. SCHERER: I think you can. VICE CHAIR AGUIRRE: Do you call for a 3 4 vote? 5 MS. SCHERER: Everybody just says aye. VICE CHAIR AGUIRRE: All in favor. 6 7 (Response) VICE CHAIR AGUIRRE: Opposed. 8 9 (No response) VICE CHAIR AGUIRRE: Hearing none, the 10 11 motion passes. 12 For Item B, the Adoption of Rules for 13 the Form of Exceptions to Proposed Findings of Fact and Conclusions of Law, is there any further 14 15 discussion on that item? 16 (No response) 17 VICE CHAIR AGUIRRE: No further 18 discussion? BOARD MEMBER SIMPSON: Madam Chair, I'll 19 20 just comment. I thought that we had concluded 21 that discussion at the last meeting, and seeing it 22 on the agenda, I guess I would question if there 23 was a reason for that, or whether it just carried 24 forward. 25 VICE CHAIR AGUIRRE: I think it might

have just carried forward. Does anybody have any additional thought on that? Chairman Ruffatto.

CHAIR RUFFATTO: I have no additional thoughts, and my thinking is it was carried forward, and there was no particular reason to discuss it unless someone wanted to.

VICE CHAIR AGUIRRE: Okay. Then we can just move on to Item C, which is the review and discussion of the 2023 Board meeting schedule.

And Sandy, did you want to say something about that?

MS. SCHERER: The schedule will be included in the December packet, so everybody has an opportunity to review it and look at their calendars for the next year.

VICE CHAIR AGUIRRE: Okay. All right. So we'll leave that.

Now for the briefing items. What I'm going to do is ask for any updates or any questions as we go through this, and we'll go through it page by page. So if you have any questions on anything or updates that's on that page, or questions that's on that page, then that will be the time to ask. So first off is Page 1. Any updates or questions on the item on Page 1?

1 (No response)

VICE CHAIR AGUIRRE: Hearing none, I'll move to Page 2, the matters on Page 2. Any updates or questions on Page 2, items on Page 2?

(No response)

VICE CHAIR AGUIRRE: Hearing none, I'll move on to Page 3. Are there any updates or questions on any of the items on Page 3?

MR. RUSSELL: Mr. Ruffatto has a hand

up.

CHAIR RUFFATTO: I just wanted to suggest that maybe Mr. Russell would update us on the last item on that page.

MR. RUSSELL: Sure. So this matter, the MEIC versus Signal Peak, is on judicial review.

There was a motion to dismiss that was fully briefed, and relatively recently decided by the Court, and that was denied, and the parties were directed to file answers.

The Board's plan at this point is to file a motion to dismiss of its own, consistent with its position in other cases that it's not a proper party to matters on judicial review, and that actually is set to be filed today.

VICE CHAIR AGUIRRE: Thank you for that

update.

CHAIR RUFFATTO: If I could add to that.

VICE CHAIR AGUIRRE: Chair Ruffatto.

CHAIR RUFFATTO: If I could add to that, if you recall at the last meeting, we talked about the possibility of just filing a notice of non-participation, but when Mike talked to Amy Christensen handling the Supreme Court appeal, she felt that that would hurt our case on appeal.

So consistent with the motion that was passed, Board Counsel was directed to do whatever it takes to protect the Board's interests, and it was decided that it was necessary to file a motion to dismiss to protect the Board's interests.

VICE CHAIR AGUIRRE: Thank you, Chairman Ruffatto.

MR. RUSSELL: I have no other updates on that.

VICE CHAIR AGUIRRE: Okay. Any further updates or discussion on Page 3 items?

(No response)

VICE CHAIR AGUIRRE: Hearing none, Page 4, any updates or discussions on items on Page 4?

(No response)

VICE CHAIR AGUIRRE: Hearing none, I'll

move to Page 5. Any updates or discussions on the matter on Page 5?

(No response)

VICE CHAIR AGUIRRE: Hearing none, I'll move to Page 6. Any updates or discussions on the item on Page 6?

MR. RUSSELL: I guess one update on that. The parties did file for an extension of time. The last update was that the parties were going to be submitting an updated scheduling order, from my recollection, and there was a subsequent filing where the parties indicated that they were exploring settlement options, and asked for additional time, so that's where that one is at.

VICE CHAIR AGUIRRE: Okay. Any further update or discussion on that update or the item on Page 6?

(No response)

VICE CHAIR AGUIRRE: Hearing none, I'll move to Page 7. Any updates or discussions on the items on Page 7?

(No response)

VICE CHAIR AGUIRRE: Hearing none, we'll move to Page 8. Any updates or discussions on the

items found on Page 8? 1 2 BOARD MEMBER SIMPSON: Madam Chairman, just a question with regard to item (h). 3 I see that Mr. Richards was ordered to file a more 4 5 definite statement by October 14th, which is today. I was wondering if we have any idea what 6 7 this appeal is about yet. Apparently not. MR. RUSSELL: I have no further 8 information on that. 9 10 BOARD MEMBER SIMPSON: Thank you. 11 VICE CHAIR AGUIRRE: Any further updates 12 or questions on items on Page 8? 13 (No response) VICE CHAIR AGUIRRE: Hearing none, move 14 15 to page -- I guess we're done with those. 16 17 (Petitions of Teck Coal, Limited, 18 and the Board of County Commissioners 19 of Lincoln County 20 Transcript bound separately) 21 22 (Reconvened at 10:50 a.m.) 23 VICE CHAIR AGUIRRE: Moving to the new 24 contested case, appeal, and request for hearing by

Westmoreland Rosebud Mining regarding issuance of

12 MPDES Permit No. MT0032042, Colstrip, Montana, BER 1 2022-06 WQ. 2 The Board decision here is to decide 3 4 whether to hear the case itself, or assign a 5 Hearing Examiner for some or the totality of the case, and I'd like to make a motion that we assign 6 7 a Hearing Examiner for the totality of the case, and assign that to Michael Russell. 8 9 BOARD MEMBER SIMPSON: Second. 10 VICE CHAIR AGUIRRE: Is there any 11 discussion on that? Chairman Ruffatto. 12 CHAIR RUFFATTO: I'm sorry. I forgot my 13 hand up. 14 VICE CHAIR AGUIRRE: Oh, okay. Is there 15 any discussion by the Board on this matter? 16

(No response)

VICE CHAIR AGUIRRE: Hearing none, I'll call for a vote on the motion. All in favor, say aye.

(Response)

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VICE CHAIR AGUIRRE: All opposed.

(No response)

VICE CHAIR AGUIRRE: Motion carries.

Moving to the Board Counsel update. Michael.

MR. RUSSELL: Thank you, Vice Chair

Aguirre. My primary update is my presentation to the Water Policy Interim Committee at the State Legislature a couple weeks ago following the Board's last meeting, where the motion on DEQ's pending motion to amend was not passed.

There were many questions as to why, including from the press, and so I responded to those. And I attended the committee meeting, and explained what happened essentially, which was that the Board had discussed and considered the pending motion, and held a vote on it, there were three votes in favor, two votes against, and that was insufficient to carry the motion pursuant to statute.

And that was the point that many were confused about, and for the record that particular statute is Montana Code Annotated Section 2-15-124(8) which states in part that a favorable vote of at least a majority of all members of a board is required to adopt any resolution, motion, or other decision unless otherwise provided by law.

So in considering that the Board has seven members, and there were only three in favor, that's not a majority, and the Board was not able

to pass the motion.

So that's the essence of my presentation to the interim committee. Members of the committee then expressed frustration at the Board's lack of progress on this particular matter, and that was in the context of their work, which was to put together a report on the selenium standards that they've been working on.

They've been tracking the Board's work on this particular case in relation to that report that they intend to present to the Legislature at the next session. So that makes sense that they're paying attention to what we were doing, but I reiterated that the Board is constrained by statute like any other governmental entity, and that is what we were left with, and that's essentially the conclusion that I had conveyed to them.

I also reminded them that the Board is comprised of volunteer members, and that has inherent constraints of its own.

So that was the primary, that was the gist of my comments to the committee. Now that the Board has made a decision on this particular matter, it's not clear to me whether they will

include that in their report.

After my comments and the committee's consideration, there were two subsequent votes on how to proceed that did not pass due to dead lock, so I believe the committee will proceed in submitting their report without the Board's findings.

VICE CHAIR AGUIRRE: Is that prudent?

MR. RUSSELL: That's not for me to

decide. I suspect that they're paying attention

to this meeting also, and they should be aware of

the Board's decision, and I don't see any reason

why the Legislature would not have that

information in considering how to proceed with

their business come the next session.

Aside from that, we've already discussed the Board's activities, or the Board's position on pending judicial review matter in the Signal Peak case, and I intend to proceed accordingly. I believe that's all I have unless the Board has specific questions for me.

VICE CHAIR AGUIRRE: Do any members of the Board have any questions for Counsel?

(No response)

VICE CHAIR AGUIRRE: Moving to the

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general public comment. Under this item, members
 1
     of the public may comment on any public matter
 2
     within the jurisdiction of the Board that is not
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 4
     otherwise on the agenda for the meeting.
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     Individual contested case proceedings are not
     public matters on which the public may comment.
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               So having read that, is there any public
     comment?
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 9
               (No response)
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               VICE CHAIR AGUIRRE: No public comment.
11
               (No response)
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               VICE CHAIR AGUIRRE: Hearing none, I'll
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     call for a motion to adjourn the meeting.
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               BOARD MEMBER SMITH:
                                     I'll motion to
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     adjourn.
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               BOARD MEMBER SIMPSON:
                                       Second.
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               VICE CHAIR AGUIRRE: All in favor of
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     adjourning the meeting, say aye.
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               (Response)
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               VICE CHAIR AGUIRRE: All opposed.
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               (No response)
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               VICE CHAIR AGUIRRE: Motion carries.
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     Thank you all.
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              (The proceedings were concluded
25
                      at 10:58 a.m.)
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CERTIFICATE 1 2 STATE OF MONTANA) : SS. 3 COUNTY OF LEWIS & CLARK 4 I, LAURIE CRUTCHER, RPR, Court Reporter, 5 Notary Public in and for the County of Lewis & 6 7 Clark, State of Montana, do hereby certify: That the proceedings were taken before me at 8 the time and place herein named; that the 9 10 proceedings were reported by me in shorthand and transcribed using computer-aided transcription, 11 12 and that the foregoing - 16 - 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 hand and affixed my notarial seal this 22nd day of 16 17 October, 2022. 18 19 LAURIE CRUTCHER, RPR 20 Court Reporter - Notary Public 21 My commission expires 22 March 9, 2024. 23 24

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