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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
October 14, 2022)

TRANSCRIPT OF PROCEEDINGS

Heard at the Montana Department of
Environmental Quality
Metcalf Building Room 111
1520 East Sixth Avenue, Helena, MT
October 14, 2022, 9:00 a.m.

BEFORE CHAIRMAN STEVEN RUFFATTO (via Zoom),
VICE CHAIR STACY AGUIRRE,
BOARD MEMBERS DAVID SIMPSON,
JON REITEN (via Zoom), JOSEPH SMITH,
JULIA ALTEMUS (via zoom),
and DAVID LEHNHERR (via Zoom)

PREPARED BY: LAURIE CRUTCHER, RPR
COURT REPORTER, NOTARY PUBLIC
lauriecrutcher@gmail.com

1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

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

9 VICE CHAIR AGUIRRE: You bet. Welcome.
10 I'm going to roll through this the best that I can
11 in Chairman Ruffatto's place. I just want to let
12 everybody know I probably expect this meeting to
13 last for a couple hours. That's the thought.

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

17 MS. SCHERER: Chairman Ruffatto.

18 CHAIR RUFFATTO: Here.

19 MS. SCHERER: Vice Chair Aguirre.

20 VICE CHAIR AGUIRRE: Here.

21 MS. SCHERER: Board Member Altemus.

22 (No response)

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

25 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

1 Counsel.

2 MS. MARQUIS: Good morning. My name is
3 Vicki Marquis. I'm an attorney with Crowley Fleck
4 here today representing Teck.

5 MR. MOSER: Kurt Moser with DEQ Legal.

6 MS. BOWERS: Kirsten Bowers, DEQ Legal.

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
23 Martin?

24 MS. SCHERER: And John Martin.

25 VICE CHAIR AGUIRRE: Did we miss anybody

1 on the Zoom call?

2 MS. SCHERER: I called out everybody
3 that I saw.

4 * * * * *

5 (Also attending via Zoom: Director Chris
6 Dorrington; Loryn Johnson; Sam King; Nicholas
7 Whitaker; Moira Davin; Rebecca Harbage; Lauren
8 Sweeney; Lindsey Krywaruchka; Katie Garcin Forba;
9 Chad Anderson; Elena Hagen; Commissioners of
10 Lincoln County)

11 * * * * *

12 VICE CHAIR AGUIRRE: Okay. Thank you.
13 Now we'll move into the administrative items
14 portion of the Board meeting, and review and
15 approval of the minutes for the August 12, 2022
16 meeting. Do we have a motion for adopting those
17 minutes?

18 BOARD MEMBER SIMPSON: So moved.

19 VICE CHAIR AGUIRRE: Second.

20 (No response)

21 VICE CHAIR AGUIRRE: I can second it.
22 Any discussion on the meeting minutes?

23 (No response)

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

1 meeting minutes as published. Can I do that?

2 MS. SCHERER: I think you can.

3 VICE CHAIR AGUIRRE: Do you call for a
4 vote?

5 MS. SCHERER: Everybody just says aye.

6 VICE CHAIR AGUIRRE: All in favor.

7 (Response)

8 VICE CHAIR AGUIRRE: Opposed.

9 (No response)

10 VICE CHAIR AGUIRRE: Hearing none, the
11 motion passes.

12 For Item B, the Adoption of Rules for
13 the Form of Exceptions to Proposed Findings of
14 Fact and Conclusions of Law, is there any further
15 discussion on that item?

16 (No response)

17 VICE CHAIR AGUIRRE: No further
18 discussion?

19 BOARD MEMBER SIMPSON: Madam Chair, I'll
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

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

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

7 VICE CHAIR AGUIRRE: Okay. Then we can
8 just move on to Item C, which is the review and
9 discussion of the 2023 Board meeting schedule.
10 And Sandy, did you want to say something about
11 that?

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

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

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

1 (No response)

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

5 (No response)

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

9 MR. RUSSELL: Mr. Ruffatto has a hand
10 up.

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

14 MR. RUSSELL: Sure. So this matter, the
15 MEIC versus Signal Peak, is on judicial review.
16 There was a motion to dismiss that was fully
17 briefed, and relatively recently decided by the
18 Court, and that was denied, and the parties were
19 directed to file answers.

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

25 VICE CHAIR AGUIRRE: Thank you for that

1 update.

2 CHAIR RUFFATTO: If I could add to that.

3 VICE CHAIR AGUIRRE: Chair Ruffatto.

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

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

15 VICE CHAIR AGUIRRE: Thank you, Chairman
16 Ruffatto.

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

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

21 (No response)

22 VICE CHAIR AGUIRRE: Hearing none, Page
23 4, any updates or discussions on items on Page 4?

24 (No response)

25 VICE CHAIR AGUIRRE: Hearing none, I'll

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

3 (No response)

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

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

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

19 (No response)

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

23 (No response)

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

1 items found on Page 8?

2 BOARD MEMBER SIMPSON: Madam Chairman,
3 just a question with regard to item (h). I see
4 that Mr. Richards was ordered to file a more
5 definite statement by October 14th, which is
6 today. I was wondering if we have any idea what
7 this appeal is about yet. Apparently not.

8 MR. RUSSELL: I have no further
9 information on that.

10 BOARD MEMBER SIMPSON: Thank you.

11 VICE CHAIR AGUIRRE: Any further updates
12 or questions on items on Page 8?

13 (No response)

14 VICE CHAIR AGUIRRE: Hearing none, move
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
25 Westmoreland Rosebud Mining regarding issuance of

1 MPDES Permit No. MT0032042, Colstrip, Montana, BER
2 2022-06 WQ.

3 The Board decision here is to decide
4 whether to hear the case itself, or assign a
5 Hearing Examiner for some or the totality of the
6 case, and I'd like to make a motion that we assign
7 a Hearing Examiner for the totality of the case,
8 and assign that to Michael Russell.

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)

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

20 (Response)

21 VICE CHAIR AGUIRRE: All opposed.

22 (No response)

23 VICE CHAIR AGUIRRE: Motion carries.
24 Moving to the Board Counsel update. Michael.

25 MR. RUSSELL: Thank you, Vice Chair

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

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

15 And that was the point that many were
16 confused about, and for the record that particular
17 statute is Montana Code Annotated Section
18 2-15-124(8) which states in part that a favorable
19 vote of at least a majority of all members of a
20 board is required to adopt any resolution, motion,
21 or other decision unless otherwise provided by
22 law.

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

1 to pass the motion.

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

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

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

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

1 include that in their report.

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

8 VICE CHAIR AGUIRRE: Is that prudent?

9 MR. RUSSELL: That's not for me to
10 decide. I suspect that they're paying attention
11 to this meeting also, and they should be aware of
12 the Board's decision, and I don't see any reason
13 why the Legislature would not have that
14 information in considering how to proceed with
15 their business come the next session.

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

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

24 (No response)

25 VICE CHAIR AGUIRRE: Moving to the

1 general public comment. Under this item, members
2 of the public may comment on any public matter
3 within the jurisdiction of the Board that is not
4 otherwise on the agenda for the meeting.
5 Individual contested case proceedings are not
6 public matters on which the public may comment.

7 So having read that, is there any public
8 comment?

9 (No response)

10 VICE CHAIR AGUIRRE: No public comment.

11 (No response)

12 VICE CHAIR AGUIRRE: Hearing none, I'll
13 call for a motion to adjourn the meeting.

14 BOARD MEMBER SMITH: I'll motion to
15 adjourn.

16 BOARD MEMBER SIMPSON: Second.

17 VICE CHAIR AGUIRRE: All in favor of
18 adjourning the meeting, say aye.

19 (Response)

20 VICE CHAIR AGUIRRE: All opposed.

21 (No response)

22 VICE CHAIR AGUIRRE: Motion carries.

23 Thank you all.

24 (The proceedings were concluded

25 at 10:58 a.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 - 16 - 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 22nd day of
October, 2022.

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires
March 9, 2024.

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