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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
April 19, 2024)

TRANSCRIPT OF PROCEEDINGS (VIA ZOOM)

April 19, 2024
9:00 a.m.

BEFORE CHAIRMAN DAVID SIMPSON,
BOARD MEMBERS JON REITEN, JOSEPH SMITH,
JULIA ALTEMUS, STACY AGUIRRE,
and JENNIFER RANKOSKY,

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

1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 CHAIR SIMPSON: It's 9:00. Let's bring
5 the meeting to order. Sandy, would you call the
6 roll, please.

7 MS. MOISEY-SCHERER: Good morning.
8 Chair Simpson.

9 CHAIR SIMPSON: Here.

10 MS. MOISEY-SCHERER: Vice Chair Aguirre.

11 VICE CHAIR AGUIRRE: Here.

12 MS. MOISEY-SCHERER: Board Member Smith.

13 BOARD MEMBER SMITH: Here.

14 MS. MOISEY-SCHERER: Board Member
15 Reiten.

16 BOARD MEMBER REITEN: Here.

17 MS. MOISEY-SCHERER: Board Member

18 Altemus.

19 BOARD MEMBER ALTEMUS: Good morning.

20 Here.

21 MS. MOISEY-SCHERER: We have a quorum.

22 BOARD MEMBER RANKOSKY: You didn't ask
23 me.

24 MS. MOISEY-SCHERER: Jennifer Rankosky.

25 I thought I called you. I'm sorry.

1 BOARD MEMBER RANKOSKY: Sorry. Maybe I
2 didn't hear it.

3 * * * * *

4 (Others present via Zoom:

5 Board Attorney Present: Terisa Oomens. DEQ

6 Personnel Present: Board Secretary, sandy Moisey

7 Scherer. Board Liaison: Deputy Director James

8 Fehr. DEQ Communications: Moira Davin, Rebecca

9 Harbage. DEQ Legal: Catherine Armstrong, Kirsten

10 Bowers, Sarah Christopherson, Sam King, Loryn

11 Johnson, Jeremiah Langston, Jon Morgan, Kurt

12 Moser, Aaron Pettis, and Kaitlin Whitfield.

13 DEQ Air, Energy and Mining: Sonja Nowakowski, Anne

14 Spezia. Other Parties Present: Laurie Crutcher,

15 Crutcher Court Reporting. Aislinn Brown, Elena

16 Hagen, Montana DOJ, Agency Legal Services Bureau.

17 Vicki Marquis, Mark Stermitz, Crowley Fleck.

18 Graham Coppes, Ferguson & Coppes, PLLC. David Kim

19 Wilson, Robert Farris-Olsen, Morrison Sherwood

20 Wilson & Deola. Frank Tabish, LHC MT. Jeff, LHC

21 MT. Todd Briggs - Westmoreland. David Smith, MT

22 Contractors Association. Gayla Nicholson. Jon,

23 Clearwater MT. Ken Stoeber, TMC-Belgrade. Terry

24 Martin-Denning. Libby Langston. Gayla

25 Nicholson.)

* * * * *

1
2 CHAIR SIMPSON: Before proceeding with
3 the agenda, my intention was to welcome our newest
4 Board member, Amanda Knuteson, who is filling the
5 attorney spot. I don't believe she's on the call
6 at this point. Sandy, do you know if she'll be
7 joining us?

8 MS. MOISEY-SCHERER: No, sir, I don't.
9 I sent her the information.

10 CHAIR SIMPSON: She probably saw the 212
11 page packet and decided maybe she'd made a
12 mistake? Yes? No? Maybe? Anyway, I'm pleased
13 to say that we have a full board again. It's
14 obviously taken a little while.

15 The first item on the agenda as always
16 is approval of the previous Board meeting minutes
17 February 16th. Is there a motion?

18 BOARD MEMBER SMITH: So moved.

19 CHAIR SIMPSON: Is there a second?

20 BOARD MEMBER REITEN: I'll second that.

21 CHAIR SIMPSON: It's been moved and
22 seconded to approve the February 16th meeting
23 minutes. Is there any discussion, additions, or
24 alterations, revisions to the minutes?

25 (No response)

1 CHAIR SIMPSON: All in favor, say aye.

2 (Response)

3 CHAIR SIMPSON: Opposed.

4 (No response)

5 CHAIR SIMPSON: Motion carries. Let's
6 move on to the briefing items. Terisa, would you
7 walk us through the briefing items and the
8 updates, please.

9 MS. OOMENS: Sure. So kind of like we
10 talked about a couple meetings ago, all of the new
11 updates or all of the new actions or tasks that
12 have taken place since the last meeting are in
13 bold.

14 The only one that I'm not sure made it
15 into the packet was on Sidney Sugars. They've
16 been working on their permit for awhile now. It's
17 anticipated that the parties will enter into a new
18 Administrative Order on Consent in the next month,
19 so they are making progress on those negotiations
20 between them and DEQ.

21 Other than that, I'm happy to answer any
22 questions, but all of the cases are moving forward
23 and going as they need to.

24 CHAIR SIMPSON: Well, let's just briefly
25 go through it page by page. Page 1, going into

1 Page 2, this is the Rosebud Mine AM4 case, I⁶
2 believe. Is there anything new on this, Terisa?
3 We've talked several times about speculating on
4 when we might hear from the Court on this. I
5 gather we have not yet.

6 MS. OOMENS: We have not. I did reach
7 out to the Court. The District Court has received
8 the remand from the Supreme Court. The District
9 Court then has to remand a portion of it back to
10 us. I've reached out to them. The Judge is in
11 other trials right now. I guess she has a couple
12 of trials back to back. So I'm not anticipating
13 that in the near future, but hopefully sometime in
14 the next couple months we'll receive that remand
15 from her.

16 CHAIR SIMPSON: Something to look
17 forward to to be certain.

18 MS. OOMENS: Right.

19 CHAIR SIMPSON: Moving on, starting on
20 Page 2 and continuing on Page 3 is the DEQ suit
21 against -- DEQ versus the Board having to do with
22 the selenium rule. There's a rather lengthy
23 update at the end.

24 And just to recap, the Judge has issued
25 several orders, three orders now on this. Two of

1 them are covered in this update. The first was
2 the Judge approved the consolidation of the cases,
3 that is DEQ versus BER, and MEIC, et al., versus
4 BER.

5 The second motion had to do with the
6 Teck Coal motion to strike a portion of DEQ's
7 reply brief. That was denied.

8 And then also since the packet went out
9 -- we received this early this week -- the Judge
10 has ruled on a number of counterclaims, and I have
11 a summary here from our attorney Dana Hupp. It's
12 rather lengthy, and I'm not going to read through
13 it. I'll just recap with the last paragraph,
14 entitled, "What this means for litigation going
15 forward."

16 "The environmental groups will have 14
17 days to file answers to BER's counterclaim. In
18 addition by limiting the litigation claims
19 relating to the interpretation of the stringency
20 statute, and whether BER erred in directing the
21 DEQ to initiate new rulemaking, Judge Seeley has
22 significantly reduced the complexity of the suit,"
23 meaning that there will be less recovery in
24 briefing, and hopefully a quicker resolution.

25 And she anticipates that Judge Seeley

1 will hold a scheduling conference sometime in late
2 May.

3 In summary, most of the counterclaims
4 were dismissed with the exception of those that
5 have to do specifically with the process that the
6 Board followed in issuing its order, so that
7 should -- as is stated here -- simplify things
8 considerably. Is there any questions from the
9 Board on that?

10 (No response)

11 CHAIR SIMPSON: We've waited a long time
12 for these orders, so now hopefully things will
13 start moving again.

14 BOARD MEMBER ALTEMUS: Chair Simpson --

15 CHAIR SIMPSON: I don't have my -- I
16 cannot see hands that are raised, so please speak
17 up.

18 BOARD MEMBER ALTEMUS: So Chair Simpson,
19 this is Julia Altemus. Can you forward that to
20 the Board when we're done?

21 CHAIR SIMPSON: I can certainly do that,
22 yes. I'll send it to Sandy and have her
23 distribute it.

24 BOARD MEMBER ALTEMUS: Great. I would
25 love to see it. Thank you.

1 CHAIR SIMPSON: Anything further on
2 that?

3 (No response)

4 CHAIR SIMPSON: Terisa, anything -- on
5 Page 3, it looks like we have an update on the
6 Westmoreland Resources appeal of the MPDES permit.

7 MS. OOMENS: Are you asking me if there
8 was an update? Sorry. I guess I just don't want
9 to bore you guys walking through each one.

10 CHAIR SIMPSON: I guess that's pretty
11 straight forward. Any other questions or comments
12 from the Board on the briefing items?

13 (No response)

14 CHAIR SIMPSON: I see there's been an
15 update to NorthWestern Energy -- excuse me --
16 Rosebud Mine. It's moving forward. It is
17 encouraging to see something happening on a number
18 of these cases, so hopefully things will move
19 forward expeditiously more so than they have been.
20 I didn't have any particular questions on these
21 briefing items, so unless there are other
22 questions from the Board, let's move on.

23 (No response)

24 CHAIR SIMPSON: Hearing none, let's
25 proceed to the action items.

1 The first has to do with the Notice of
2 Appeal and Request for Hearing by the Western
3 Sugar Cooperative regarding its Montana Pollution
4 Discharge Elimination System Permit No. MT0000281,
5 and that has to do with a settlement agreement to
6 be approved by the Board. I guess I would ask if
7 the parties are present, and whether they could
8 provide a brief update of what this settlement
9 agreement does.

10 MS. MARQUIS: Chairman Simpson, members
11 of the Board. This is Vicki Marquis. I represent
12 Western Sugar in this matter.

13 MR. MOSER: Mr. Chairman, members of the
14 Board, this is Kurt Moser. I represent Montana
15 DEQ in this matter.

16 CHAIR SIMPSON: I'm sorry. I'm rather
17 computer illiterate. I'm having trouble getting
18 back to the meeting screen here. I think I've
19 finally got it. Okay. Please proceed.

20 MR. MOSER: Can you hear me, Mr.
21 Chairman?

22 CHAIR SIMPSON: Yes, I can. Thank you.

23 MR. MOSER: Thank you. Again, this is
24 Kurt Moser with Montana DEQ.

25 Yes. The parties had filed a joint

1 motion for remand, and a stipulation for dismissal
2 of proceedings. And there is a fairly lengthy
3 settlement agreement that's attached to the joint
4 motion for remand, wherein during the proceeding,
5 basically the action of the agency was to issue a
6 permit.

7 Under the terms of the settlement, the
8 permit goes back to the agency, and under the
9 terms of that settlement agreement, and then the
10 at some point in the future the agency will, as
11 stated in the settlement agreement, the agency
12 will issue a new permit. And I guess at that
13 point if there are still issues with the permit
14 between the parties, the appeal process could be
15 pursued again, but at this point this matter would
16 be dismissed and removed from your docket.

17 CHAIR SIMPSON: Thank you, Mr. Moser.
18 Is there a representative of Western Sugar that
19 would care to make a comment?

20 MS. MARQUIS: Yes. Good morning,
21 Chairman Simpson, members of the Board. My name
22 is Vicki Marquis, and I represent the Western
23 Sugar Cooperative in this matter. Can you hear me
24 okay?

25 CHAIR SIMPSON: Yes, I can hear you.

1 MS. MARQUIS: Okay. Great. Thank you.
2 Yes. As Mr. Moser explained, the parties were
3 able to reach an agreement in this case. As
4 you'll see in the settlement agreement, one of the
5 issues involved groundwater and how discharges
6 move through groundwater.

7 And so on Page 9 of your packet, it's
8 Page 3 of the settlement agreement, it steps
9 through some of the timelines by which the Western
10 Sugar Cooperative will design a fate and transport
11 study, and then implement that study to collect
12 additional data that will go into an updated
13 renewal application, and be available for DEQ to
14 use when it issues the next draft permit.

15 So I think it was a good resolution.
16 We've all got some work to do in the interim, but
17 we're excited to move this forward without having
18 to go through expensive and time consuming
19 litigation.

20 CHAIR SIMPSON: Thank you, Ms. Marquis.
21 I can certainly agree. I compliment the parties
22 on making an effort to settle this and hopefully
23 move forward. Any other comments on this matter?

24 (No response)

25 CHAIR SIMPSON: Is there a motion?

1 VICE CHAIR AGUIRRE: Mr. Chairman, I
2 make a motion that we remand this matter to DEQ
3 for further consideration in accordance with the
4 terms of the settlement agreement.

5 CHAIR SIMPSON: Is there a second?

6 BOARD MEMBER RANKOSKY: Second.

7 CHAIR SIMPSON: It's been moved and
8 seconded to approve this settlement as requested
9 by the parties. Is there any discussion?

10 (No response)

11 CHAIR SIMPSON: Hearing none, all in
12 favor, say aye.

13 (Response)

14 CHAIR SIMPSON: Opposed.

15 (No response)

16 CHAIR SIMPSON: Motion carries. Thank
17 you.

18 * * * * *

19 (Protect the Clearwater Oral Argument
20 Opencut Mining permit #3473, BER 2023-03 OC
21 bound separately

22 9:18 a.m. to 10:55 a.m.)

23 * * * * *

24 CHAIR SIMPSON: Our next action item is
25 a new contested case or cases. We have three

1 petitions all having to do with the same project,
2 which is the gravel pit that's proposed outside of
3 Gallatin Gateway. I believe it's called the Black
4 Pit, if I'm not mistaken, from reading through all
5 the materials.

6 A couple of comments here. I guess the
7 first has to do with the fact that these are all
8 addressing the same project, and is there a motion
9 to consolidate these cases into one?

10 VICE CHAIR AGUIRRE: I have a question,
11 Chairman. I don't know that we should consolidate
12 them, because of the third contested case where
13 Gateway Conservation Alliance is the -- they're
14 different petitioners.

15 CHAIR SIMPSON: Well, we have three
16 different petitioners, but I do believe we have
17 the authority to consolidate these cases because
18 they address the same project.

19 VICE CHAIR AGUIRRE: I am respectfully
20 going to vote against consolidating them. I feel
21 they should be kept separate, based on issues that
22 are brought by individual petitioners.

23 CHAIR SIMPSON: Ms. Oomens, could you
24 advise us please on whether we have the authority
25 to consolidate these cases, and what reasons we

1 might have not to.

2 MS. OOMENS: Sure. So you do have the
3 authority. This would be very similar to what
4 happened with the Moudy Pit case. You had
5 multiple different individuals, multiple different
6 groups that had objected to the permit. But to
7 save the same argument being made in three
8 different cases, you could consolidate them all
9 into one.

10 You definitely have the authority.
11 Whether or not you want to I guess is a discussion
12 you can have amongst yourselves, but again, the
13 risk of not consolidating is that you have the
14 same argument being made in three different cases,
15 and the risk of possibly different decisions in
16 each case if they're assigned to different Hearing
17 Examiners.

18 And even though there may be three
19 different petitioners in the case, they can still
20 all make their own arguments. They don't have to
21 agree on arguments together, it is just it's all
22 heard in one spot by the same Hearing Examiner.

23 CHAIR SIMPSON: Thank you. Is there a
24 second to the motion?

25 BOARD MEMBER RANKOSKY: I'll second.

1 CHAIR SIMPSON: A motion has been made
2 and seconded. Further discussion.

3 BOARD MEMBER ALTEMUS: Mr. Chair, I
4 think in deference to the people that have filed
5 their petitions, I'm going to agree with Board
6 Member Aguirre that we keep them separate. So I
7 guess I will have to be a nay on the
8 consolidation. I just think in deference to their
9 issues, which they may blend together a bit, but
10 they may not, and so I would prefer to keep them
11 separate.

12 CHAIR SIMPSON: Thank you.

13 BOARD MEMBER SMITH: I'd like to hear a
14 little bit more. What specific issues would make
15 it easier to hear these cases separate rather than
16 combine them? It just seems inherently simpler to
17 me to combine these cases. And like Ms. Oomens
18 said, it seems like it would prevent a lot of
19 miscommunication or misunderstanding.

20 I guess is there some specific facts
21 here that we think would be better to keep them
22 separate?

23 VICE CHAIR AGUIRRE: I'm going to add to
24 Board Member Altemus's thought that we're
25 basically giving each petitioner their chance to

1 have a voice.

2 And I feel because this seems to be an
3 area that is going to be coming before us quite a
4 bit, based on the time we just spent in
5 discussion, and now these three new contested
6 cases, that giving those petitioners a voice I
7 think is important to the process, and letting
8 them be heard. And I believe that the ultimate
9 decisions that are made are better as a result of
10 giving the petitioners their individual voices.

11 BOARD MEMBER SMITH: I guess how by
12 combining it would they not still have their
13 individual voices heard? Because like someone
14 said, we just went through this on the Moudy Pit,
15 and there were multiple different parties on that
16 one, and I didn't feel like any of their voices
17 were not heard in that process.

18 CHAIR SIMPSON: If I could add to the
19 discussion, please. If we were to separate these
20 cases, we would have to hear all three before the
21 issue was resolved, and I believe Ms. Oomens makes
22 a good point, particularly if the cases went to
23 different Hearing Examiners, if they came up with
24 different results.

25 I'll also make the point -- this was

1 going to be my next motion -- that rather than
2 assign this to Hearing Examiner, it be heard by
3 the full Board, because this, I think as the point
4 has been made, this is a harbinger of things to
5 come. We're seeing a lot of these gravel pit
6 cases, we will see more of them, and it's an issue
7 that I think is going to need to be addressed more
8 directly by this Board going forward.

9 And when we get to the next item, that
10 is, the BER authorities memo, that will be a
11 subject of some discussion there as well.

12 BOARD MEMBER ALTEMUS: Chairman Simpson,
13 if I may. So if we assign each individual one to
14 a Hearing Examiner, and something different comes
15 out in each one, I don't think that's a bad thing.
16 That just means that different information came
17 forward. I don't think you're going to get the
18 same, and maybe we'll get the same decision.

19 But if we do decide to hear it before
20 the full Board, then we're going to hear them all
21 at the same time anyway. And then I guess my
22 question would be has anybody asked petitioners if
23 they're okay if we consolidate them? I mean they
24 may have really strong feelings that they want to
25 stand on their own, but maybe they don't.

1 BOARD MEMBER REITEN: Mr. Chairman, I
2 agree with Julia on this. I think that was -- I
3 was going to make the comment that what is the
4 status of these petitioners? Do they want to be
5 together or not? I think that might be a part of
6 the solution. Thank you.

7 CHAIR SIMPSON: Let me put that question
8 to our legal Counsel. Ms. Oomens.

9 MS. OOMENS: All we have from the
10 parties at this point is their Notice of Appeal
11 from each one. I will say that in the event the
12 Board decides to consolidate, the parties could
13 file a request to separate the cases back out if
14 they didn't like that they were consolidated.

15 But as far as have we asked the parties
16 if they're okay with consolidating, the answer to
17 that would be no, not at this point.

18 CHAIR SIMPSON: But there is a process
19 by which the parties could request to be heard
20 separately?

21 MS. OOMENS: Correct.

22 CHAIR SIMPSON: So rather than
23 consolidate the cases, as an alternative perhaps
24 the thing to do would be to make that request of
25 the parties.

1 VICE CHAIR AGUIRRE: Mr. Chairman, one
2 thing we might consider is that if we decide to
3 assign to a Hearing Examiner, we assign them all
4 to one Hearing Examiner. And there are
5 differences, some differences to the extent of the
6 petitioners' cases, and so they do have some
7 differences. There's some overlap, and then
8 there's some differences in each petitioner's
9 information they submitted.

10 CHAIR SIMPSON: Well --

11 VICE CHAIR AGUIRRE: We could assign
12 these to the same Hearing Examiner.

13 CHAIR SIMPSON: Well, and that's a
14 consideration as well. I don't know that any of
15 the points raised by the various petitioners are
16 in conflict with each other. I think there's
17 probably some value to be gained by considering
18 all of the various viewpoints at one time, which
19 other than simple efficiency and cost would be, to
20 me is an advantage to consolidating the cases, is
21 because you're bringing all of the points of view
22 into a single forum, rather than hearing them
23 separately.

24 I believe my motion has died for lack of
25 a second, so --

1 MS. MOISEY-SCHERER: Chair Simpson.

2 CHAIR SIMPSON: Yes.

3 MS. MOISEY-SCHERER: Sam King of DEQ has
4 his hand up.

5 CHAIR SIMPSON: Thank you. Mr. King,
6 comment?

7 MR. KING: Yes. Good morning, Board
8 Chair and Board members. Can everybody hear me?

9 CHAIR SIMPSON: Yes, I can.

10 MR. KING: I just want to jump in on
11 this discussion because I anticipate representing
12 DEQ with respect to this Black site, and obviously
13 don't want to speak for any of the petitioners for
14 those separate cases that all concern the same
15 site.

16 But at least from DEQ's perspective, I
17 think it would be preferable to have case
18 consolidation, just simply as a matter of
19 efficiency, and certainly acknowledging the
20 Board's concerns about ensuring that everybody has
21 their voice.

22 But I think from our perspective we
23 wouldn't think this would impede their ability to
24 raise and adjudicate their own claims to the
25 extent they are distinct from one another. And I

1 do think that it would be helpful, at least from
2 our perspective, just to sort of streamline this
3 process, and ensure we're not filing multiple
4 briefs on certain issues.

5 And the other consideration, too, is as
6 Board Chair noted, we're seeing an increased
7 number of litigation regarding these gravel pits,
8 and so that's also a factor I think from our
9 perspective that weighs in in trying to streamline
10 this process, just because we're going to be
11 litigating a lot of these cases.

12 So to the extent that we can streamline
13 that, I think that would be appreciated from the
14 Department's position. But that's all I have.
15 Thank you.

16 BOARD MEMBER REITEN: Mr. Chairman, I'd
17 like to second your motion.

18 CHAIR SIMPSON: Thank you, Jon. I
19 hadn't withdrawn it yet, so I guess we're still
20 working on that same motion.

21 BOARD MEMBER ALTEMUS: Could you repeat
22 your motion, Mr. Chair?

23 CHAIR SIMPSON: My motion was to
24 consolidate these cases, these three cases for the
25 purpose of --

1 BOARD MEMBER ALTEMUS: To have them to
2 go before a Hearing Examiner, or have a hearing
3 before the Board?

4 CHAIR SIMPSON: I planned on a separate
5 motion or a separate discussion, but since you
6 have raised it. As a matter of, just a matter of
7 general practice, we've been assigning these cases
8 to Hearing Examiners. And given the interest in
9 this case, and the fact that what's being
10 considered here is a commercial gravel pit with a
11 40 year life, I believe it's something where the
12 Board should participate in the process.

13 Now, what I envision is that our
14 attorney Ms. Oomens would take care of the -- or
15 someone in ALS would take care of all of the legal
16 processing that needs to be done, but that the
17 Board would participate in the hearing, which
18 might certainly take a day, it might take several
19 days, particularly with the three petitioners.

20 But this case is of sufficient
21 importance that I think the Board ought to take a
22 larger role than what we normally take by simply
23 assigning to a Hearing Examiner. So I will add
24 that to my motion, amend my motion to have the
25 Board participate actively in this case.

1 And I guess what I'm suggesting is some
2 type of hybrid. I know I'm not prepared to write
3 all of the legal documents that would need to be
4 dealt with here, not being an attorney.

5 BOARD MEMBER REITEN: I'll second the
6 amended motion.

7 VICE CHAIR AGUIRRE: Chair Simpson, I
8 was just going to ask for them not to be put
9 together. But if that's too late, then I was
10 going to ask for you to keep your original
11 consolidation motion separate from the process
12 motion.

13 CHAIR SIMPSON: Well, the process motion
14 will depend on the result of the consolidation
15 motion. I don't know that the Board is prepared
16 to hear three separate cases here on the same
17 subject.

18 BOARD MEMBER ALTEMUS: Mr. Chair, if
19 your motion is to consolidate and have them go
20 before a full Board hearing, then I would support
21 that. If your motion was to consolidate and go
22 before a Hearing Examiner, I would have to oppose.
23 But I think what I'm hearing you say is you want
24 to consolidate the three, and have them go before
25 the Board for a hearing, which I think then gives

1 them the opportunity to have their voice heard.

2 So then I would support that. Thank you.

3 CHAIR SIMPSON: Thank you, Julia. I've
4 kind of lost track of where we are with the
5 motion. And I believe the motion as it stands
6 right now is to consolidate and to hear the case
7 before the Board. And it's been seconded.

8 BOARD MEMBER REITEN: And I seconded it.

9 CHAIR SIMPSON: Am I correct? Further
10 discussion.

11 (No response)

12 CHAIR SIMPSON: All in favor, say aye.

13 (Response)

14 CHAIR SIMPSON: Opposed.

15 (No response)

16 CHAIR SIMPSON: Motion carries. Thank
17 you very much.

18 The next item is a memo that was
19 circulated to the Board having to do with Board of
20 Environmental Review powers, authorities, and
21 responsibilities. And this goes back to a
22 discussion we had a couple Board meetings ago
23 where I informed the Board I'd had discussions
24 with former Chair Steve Ruffato about the
25 possibility of going to the Legislature to try to

1 clarify the authority of the Board. And in making
2 that suggestion, I was assuming that the powers of
3 the Board flow through the authorities contained
4 in the environmental statutes that are
5 administered by the Department.

6 And so in investigating this, I went
7 through all of those statutes, and compiled what
8 at the time was about a 20 page memo, looking at
9 all of those responsibilities as referenced by the
10 environmental statutes.

11 And as it turned out, that was the wrong
12 rabbit trail to go down, because the
13 quasi-judicial functions -- we are a
14 quasi-judicial board -- the quasi-judicial
15 functions and operation of quasi-judicial boards
16 are addressed adequately in my opinion in Title 2,
17 General Administration, not Title 75,
18 Environmental, 76 which is water supply, and I
19 believe that 82 is mining.

20 So I've compiled this memo to provide to
21 the Board the language from the statutes, and I'm
22 just going to go through it here very quickly.

23 The first thing that is relevant here is
24 the creation of the Board of Environmental Review
25 in 1995 as part of Senate Bill 234. And it was a

1 real walk down memory lane looking at the
2 legislative hearings from 1995, because there are
3 a lot of acquaintances of mine who were involved
4 in that, both in the Legislature, and the
5 Environmental Quality Council, and in the
6 Governor's office. And in fact I talked to
7 several of them about their recollections of what
8 the legislative intent was here.

9 And I think it's pretty well stated in
10 both the Senate and House committee hearings that
11 the new Board of Environmental Review was to be a
12 public board established to provide an appeal
13 process, which is the contested case process that
14 we regularly go through, and oversight of the
15 Department decisions and rulemaking.

16 And at the same time, the BER was
17 designated as a quasi-judicial board, the
18 establishment of which requires members with
19 specific backgrounds. And I've included a copy of
20 the statute here as it reads.

21 "The Board of Environmental Review must
22 consist of a variety of backgrounds," which argues
23 pretty strongly that as a public board, we're to
24 bring our various areas of expertise to bear on
25 the activities of the Department, as well as the

1 contested cases that we consider. I'll get back
2 to that in just a moment.

3 In 2021, Senate Bill 233 transferred the
4 quasi-legislative responsibility under the various
5 environmental statutes from the Board to the
6 Department. I'm not sure that was necessarily a
7 bad thing. As it stood, there were some of the
8 statutes that specified rulemaking by the Board,
9 others by the Department.

10 And so what that bill did was -- it was
11 a very complicated and complex bill, if any of you
12 have read it -- long and complex I should say --
13 that went back and changed the language in each of
14 the environmental statutes to make it clear that
15 the rulemaking was to be the responsibility of the
16 Department, and not the Board.

17 So that takes us to definitions
18 contained in 2-15-102, MCA. Under those
19 definitions, the definition of agency includes a
20 board. Function -- which I think is an important
21 definition -- means a duty, power, or program
22 exercised or assigned to an agency, whether or not
23 specifically provided for by law.

24 Quasi-judicial function is defined as
25 well, which is in short the function of this

1 Board, "An adjudicatory function exercised by an
2 agency involving the exercise of judgment and
3 discretion, and making determinations in
4 controversies. The term includes, but is not
5 limited to, the functions of interpreting,
6 applying and enforcing existing rules and laws;
7 granting and denying privileges, rights, or
8 benefits; issuing, suspending, or revoking
9 licenses, permits, and certificates; determining
10 rights and interests of adverse parties;
11 evaluating and passing on facts; awarding
12 compensation; fixing prices; ordering action or
13 abatement of action; adopting procedural rules;
14 holding hearing and any other act necessary to the
15 performance of a quasi-judicial function."

16 Now, along with that, there is a public
17 participation statute which we observe in our
18 agendas, Board meeting agendas. But Montana
19 includes, the law includes the following
20 requirement with respect to public participation
21 in an agency meeting.

22 "The agenda must include an item
23 allowing public comment on any public matter that
24 is not on the agenda of the meeting, and that is
25 within the jurisdiction of the agency conducting

1 the meeting. However, the agency may not take
2 action on any matter discussed unless specific
3 notice of that matter is included on an agenda,
4 and public comment has been allowed on that
5 matter."

6 So what we have is a situation where
7 public participation is mandated by law, and
8 matters brought before the Board as a result of
9 public participation must be considered by the
10 Board, as far as whether or not any further action
11 is appropriate. And the action that would be
12 taken in such a case is holding a hearing. The
13 Board does have the authority to hold hearings.

14 So once a hearing is held, then the
15 Board may or may not take action in the form of an
16 order, and an order, the only form that an order
17 could take, that I could see, is an order to the
18 Department to initiate rulemaking on that
19 particular matter, whether it's new rulemaking,
20 whether it's amendments, or whether it's just a
21 question of reviewing a rule to see if a change is
22 appropriate.

23 So the quasi-judicial function and the
24 public participation requirements combine to
25 provide direction to the Board in how we should

1 proceed on various matters that come before us. I
2 think it also argues for the oversight function of
3 the Board when you consider the various -- that's
4 represented here by the various backgrounds that
5 we bring to bear on our participation in the
6 Board.

7 In looking at the various environmental
8 statutes, I think the one that most closely
9 describes the general powers of the Board is that
10 associated with the Air Quality Act, and that's
11 included in this memo at 75-2-111, Powers of the
12 Board, where it says, "The Board shall hold
13 hearings relating to any aspect of or matter in
14 the administration of this chapter in a place
15 designated by the Board. The Board may compel the
16 attendance of witnesses and the production of
17 evidence at hearings. The Board shall designate
18 an attorney to assist in conducting hearings, and
19 shall appoint a reporter who must be present at
20 all hearing, take full stenographic notes of all
21 proceedings, transcripts of which must be
22 available to the public at cost."

23 Two, "Issue orders necessary to
24 effectuate the purposes of this chapter." And
25 three, have the power -- Three isn't really

1 relevant. It's included in there, but it has to
2 do with non-ferrous smelters, something required
3 by federal statute.

4 Similar language, although not identical
5 language, generally not as detailed, is found in
6 programs for regulating water quality, coal and
7 uranium mine reclamation, metal mine reclamation,
8 opencut reclamation.

9 And I suppose one approach to this that
10 I'd been considering early on was to take this
11 language that's in the Air Quality Act and apply
12 it to all of the various statutes; but given the
13 direction that we have in Title 2, I don't think
14 that's necessary.

15 So I don't see any reason to proceed
16 with any proposed amendments to the Legislature
17 that would clarify Board responsibilities and
18 authorities. I think it's adequately presented
19 here. And I guess I'd be interested in any
20 thoughts or comments from the Board members,
21 because the question has been put to me a number
22 of times, which is what our authorities and
23 responsibilities are, and I think this lays it out
24 pretty well.

25 VICE CHAIR AGUIRRE: Chairman Simpson, I

1 100 percent agree with you that this lays it out
2 very well, and it was even a clarification I think
3 that needed to really be made for our Board
4 members, that the quasi-judicial responsibilities
5 still remain with the Board, and that the
6 quasi-legislative responsibilities were removed.

7 And the references that you made and the
8 way you went through this evaluation I think was
9 powerful to support, and beneficial to your
10 conclusion that no immediate need is there for
11 proposing legislation to clarify the powers. And
12 thank you. I appreciate your work on this very
13 much.

14 CHAIR SIMPSON: Thank you very much. It
15 was an interesting exercise, and extremely
16 educational, but I guess it demonstrates something
17 that I've tried to keep in mind through my whole
18 career. When I first started working, back -- I
19 think Grant may have been President -- but my
20 employer sent me to management school, and one of
21 the first things they hammered into our heads was
22 that, "Before you go to solve a problem, be sure
23 you have identified the problem."

24 And quite often we tend to come up with
25 solutions before having precisely identified what

1 the problem is. And not surprisingly, sometimes
2 one has to go down quite a few rabbit trails
3 before you find a rabbit, and this was a case
4 where I got a real education in State law, among
5 other things.

6 So I think I guess just to recap, this
7 Board's activities for the most part, with the
8 exception of the matter having to do with the
9 stringency of the selenium rule, have had to do
10 with contested cases, but our responsibilities and
11 authorities are not limited to contested cases.

12 Which brings me to my next point, if
13 there are no other comments on this.

14 BOARD MEMBER ALTEMUS: No, Mr. Chair,
15 other than to say thank you. That was a lot of
16 work, and so I really appreciate what you've done.
17 It's very helpful. Thank you.

18 BOARD MEMBER REITEN: Yes. Thank you
19 for your efforts, Mr. Chair.

20 CHAIR SIMPSON: Thank you very much.
21 Thanks to you all for your support here.

22 And so my next point is that we have
23 just been through a rather -- I don't know what's
24 the better word -- grueling or tedious review of
25 an opencut case, and then obviously we've got at

1 least one more coming up. I don't know how many
2 we have on the docket right now, but there are at
3 least two or three more coming through the
4 pipeline.

5 And so what I'd like to propose to the
6 Board is that we schedule a hearing on the opencut
7 statute and rules for the benefit of the Board, to
8 understand how the process works, and to probe as
9 to whether there are any changes to the rules that
10 might be appropriate in order to eliminate some of
11 these controversies that have come up
12 consistently, at least so far in our experience,
13 with the opencut statute.

14 I don't know enough about the process.
15 I haven't at this point taken the time to go and
16 read the statute and the rules. I'll take that
17 back. I did look at the statute. I haven't
18 looked at the rules.

19 But it's clear that there are going to
20 be quite a few of these cases coming our way, and
21 I think it would be to the benefit of the Board to
22 have an understanding of process and what's
23 involved, and also to provide any feedback to the
24 Department where we see potential improvements to
25 improve that process, and maybe avoid some of

1 these issues that at this point seem to accompany
2 opencut challenges.

3 BOARD MEMBER REITEN: Mr. Chairman, do
4 you anticipate having anyone from DEQ explain the
5 process to us, or what are you thinking?

6 CHAIR SIMPSON: I'm anticipating a
7 public hearing where the Department would be the
8 primary player here in explaining to us how the
9 process works, but I would also expect to hear
10 from the regulated community and the interested
11 parties, which would include environmental
12 interests as well, to try to get --

13 Well, our objective will be to get a
14 better understanding here of the opencut process
15 and issue in general, and to the point where, one,
16 it would be of great help to us in reviewing
17 future petitions; and secondly, not being familiar
18 with the rules that are governing this -- I mean
19 we had a long discussion today about this dryland
20 opencut rule. It sounds like maybe a little bit
21 more definition in that regard might be helpful.
22 I just don't know.

23 But in order to try to put some side
24 boards on this, I think it would be well worth our
25 time and the Department's time to go through a

1 hearing process to identify what those issues
2 might be.

3 BOARD MEMBER REITEN: I agree. I've got
4 several. I've worked with several people that are
5 concerned about some of the rules in places where
6 -- that are essentially dryland, but there's some
7 questions I have for DEQ on it. So I think it
8 would be great.

9 MS. MOISEY-SCHERER: Chair Simpson,
10 Graham Coppes of Ferguson and Coppes has his hand
11 up.

12 CHAIR SIMPSON: I'm sorry. Mr. Coppes.
13 I think your microphone is off.

14 MR. COPPES: I want to say I think
15 that's a fantastic idea. I really appreciate the
16 sentiment. And as you guys all probably are
17 aware, I represent four of the different
18 petitioners in cases in front of you right now,
19 and I know I could speak for all of those clients
20 that they would very much appreciate the
21 opportunity to share their side of the story, what
22 we have learned from litigating these cases
23 throughout the process, about how it works, and
24 ways in which that we believe it could be improved
25 from the public and sort of neighboring public

1 perspective.

2 So I just wanted to share. I think
3 that's a great idea, and I would very much
4 appreciate the opportunity to participate.

5 CHAIR SIMPSON: Thank you, Mr. Coppes.
6 And I guess I would emphasize that this is not
7 about any specific case, and we would not be
8 talking about specific cases, and in fact make an
9 effort to avoid talking about specific cases.
10 This is a general examination of the program, and
11 the issues that it brings to us.

12 MR. COPPES: Understood. And I just
13 feel like -- I understand DEQ would present, and
14 there may be I guess a different perspective on
15 how this process works as a whole from members of
16 the public that I would be happy to share.

17 CHAIR SIMPSON: Well, thank you. And
18 again, this is a public hearing, open to public
19 comment. I anticipate it would take the better
20 part of a day at least.

21 As far as the process for developing
22 this, I guess I'm pretty much at the mercy of the
23 Department as to how we would organize it. I
24 think -- I'm not really sure what process we need
25 to go through to come up with an agenda and to

1 schedule the hearing, that is, whether it ought to
2 be at a regular meeting, or whether we ought to
3 have a special meeting.

4 BOARD MEMBER ALTEMUS: Chair Simpson,
5 are you anticipating this being an in-person
6 hearing or hybrid, so the public has a better
7 ability to participate? I mean the cost of going
8 to Helena is going to be borne on DEQ for us. So
9 just trying to --

10 CHAIR SIMPSON: What I have in mind is a
11 hybrid meeting, where we would -- I would plan to
12 convene in Helena, and folks could participate in
13 person or remotely.

14 BOARD MEMBER ALTEMUS: Okay. Thank you.
15 I do think it's a great idea. Thanks.

16 CHAIR SIMPSON: Thank you, Julia. I
17 think probably where we ought to start is I will
18 make a motion that the Board proceed with a
19 hearing to review the opencut review process,
20 permit review process, and that we move forward
21 with developing an agenda, and to schedule a
22 hearing either at our next regular meeting or at a
23 separate meeting. What we might want to do is
24 have a two day meeting in Helena.

25 BOARD MEMBER ALTEMUS: Mr. Chair, and

1 then public notice. I'm not sure if it's 30 or 60
2 days, so keep that in mind if you're thinking it's
3 going to be a June BER meeting, if that would be
4 enough --

5 CHAIR SIMPSON: That is a good question.
6 I mean our Board meetings only have a one week
7 notice, but for a hearing, a public hearing of
8 this nature, I guess I'd have to ask Terisa if
9 there is a different notice requirement that we
10 would need to follow. I presume there is.

11 BOARD MEMBER ALTEMUS: There is for
12 sure.

13 MS. OOMENS: I don't know what it is off
14 the top of my head, what those requirements are,
15 but we'll make sure that we figure that out before
16 we schedule anything. Thank you for bringing that
17 up.

18 BOARD MEMBER RANKOSKY: I think the
19 month of June I will be out almost every Friday.
20 I could do a remote on a Friday, but I'll be
21 traveling every Friday in June.

22 BOARD MEMBER ALTEMUS: I'm not sure
23 you're going to get this together by the June
24 meeting.

25 CHAIR SIMPSON: Very possibly not, so

1 let's leave the scheduling out, and just proceed
2 with the planning. To restate, the motion is to
3 proceed with planning a public meeting on the
4 opencut review process.

5 BOARD MEMBER REITEN: I'll second that
6 motion.

7 CHAIR SIMPSON: It's been moved and
8 seconded. Further discussion.

9 (No response)

10 CHAIR SIMPSON: All in favor, signify by
11 saying aye.

12 (Response)

13 CHAIR SIMPSON: Opposed.

14 (No response)

15 CHAIR SIMPSON: Motion carries. Thank
16 you very much.

17 The next item on the agenda is general
18 public comment on matters within the jurisdiction
19 and purview of the Board, but not on today's
20 agenda.

21 (No response)

22 CHAIR SIMPSON: Hearing none, I have
23 nothing further on the Board Chair update. We did
24 talk about the DEQ versus BER, etc., litigation,
25 and also the review of powers, authorities, and

1 responsibilities. That's what I had on my list.
2 Any further comments, observations before we
3 adjourn?

4 VICE CHAIR AGUIRRE: Just another thank
5 you, Chairman Simpson, for leading us. I
6 appreciate you very much.

7 CHAIR SIMPSON: Well, thank you very
8 much. I appreciate that, Vice Chair Aguirre.

9 Hearing no further discussion, is there
10 a motion to adjourn?

11 BOARD MEMBER SMITH: I'll motion to
12 adjourn.

13 BOARD MEMBER ALTEMUS: I'll second.

14 CHAIR SIMPSON: A motion has been made
15 and seconded to adjourn. Before we go forward
16 with that vote, Board Member Rankosky noted
17 availability issues for her on Fridays. Before we
18 schedule our hearing on opencut, we'll be sure and
19 contact the Board members to be sure that we have
20 maximum availability for that meeting.

21 BOARD MEMBER RANKOSKY: Thank you.

22 CHAIR SIMPSON: All in favor of the
23 motion, say aye.

24 (Response)

25 CHAIR SIMPSON: Thank you very much,

1 everyone. Very productive meeting.

2 (The proceedings were concluded

3 at 11:41 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 - 43 - 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 25th day of
April, 2024.

Laurie Crutcher

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires
March 9, 2028.

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