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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
June 21, 2024)

TRANSCRIPT OF PROCEEDINGS (VIA ZOOM)

June 21, 2024
9:00 a.m.

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

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

1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 (PRESENT: Terisa Oomens, Board Counsel. DEQ
5 Personnel Present: Board Secretary: Sandy Moisey
6 Scherer. Board Liaison: Deputy Director James
7 Fehr; DEQ Communications: Mae Vader; DEQ
8 Enforcement: Chad Anderson; DEQ Legal: Catherine
9 Armstrong, Sarah Christopherson, Loryn Johnson,
10 Sam King, Jeremiah Langston, Kurt Moser, Aaron
11 Pettis, and Abby Sherwood; DEQ Air, Energy and
12 Mining: Zach Ashauer, Whitney Bausch, Ruby
13 Hopkins, Emily Lodman, Sonja Nowakowski, Anne
14 Spezia, Madeline VerWey; DEQ Water: Joe
15 Vanderwall.

16 Other Parties Present:

17 Laurie Crutcher, Crutcher Court Reporting;
18 Elena Hagen, Montana DOJ Agency Legal Services
19 Bureau; Samuel Yemington, Holland & Hart;
20 Frank Tabish, LHC MT; Russell Batie; Todd Briggs;
21 Bob Smith - Westmoreland; David Smith, MT
22 Contractors Association; Ken Stoeber
23 TMC-Belgrade; Barbara Chillcott, Western
24 Environmental Law Center; Cale Fisher,
25 Riverside Contracting; Roger Noble;

1 Representative Steve Gunderson)

2 * * * * *

3 CHAIR SIMPSON: Good morning, everyone.

4 It looks like most of us are ready to rock.

5 Welcome everybody to the meeting on coincidentally
6 the first full day of summer, and also the date of
7 the strawberry full moon, which I'm sure we're all
8 looking forward to this evening if the clouds
9 part.

10 First, before we -- let's go ahead and
11 take the roll, if you would do that, please,
12 Sandy.

13 MS. MOISEY-SCHERER: Chair Simpson.

14 CHAIR SIMPSON: Here.

15 MS. MOISEY-SCHERER: Vice Chair Aguirre.

16 VICE CHAIR AGUIRRE: Here.

17 MS. MOISEY-SCHERER: Board Member

18 Altemus.

19 BOARD MEMBER ALTEMUS: Here.

20 MS. MOISEY-SCHERER: Board Member

21 Knuteson.

22 BOARD MEMBER KNUTESON: Here.

23 MS. MOISEY-SCHERER: Board Member

24 Rankosky.

25 (No response)

1 MS. MOISEY-SCHERER: Board Member
2 Reiten.

3 BOARD MEMBER REITEN: Here.

4 MS. MOISEY-SCHERER: Board Member Smith.

5 BOARD MEMBER SMITH: Here.

6 MS. MOISEY-SCHERER: We have a quorum,
7 sir.

8 CHAIR SIMPSON: Thank you very much.
9 Before proceeding, I would like to welcome the
10 newest member of the Board, Amanda Knuteson.
11 Thank you so much for joining us, and look forward
12 to working with you as we go forward.

13 BOARD MEMBER KNUTESON: Thank you so
14 much. I'm really glad to be here.

15 CHAIR SIMPSON: The first item of
16 business is to review the minutes from the April
17 21 meeting. Are there any comments or changes to
18 the minutes?

19 (No response)

20 CHAIR SIMPSON: Is there a motion?

21 BOARD MEMBER ALTEMUS: Move to approve.

22 BOARD MEMBER SMITH: Second.

23 CHAIR SIMPSON: It's been moved and
24 seconded to approve the minutes from the April 21
25 meeting. All in favor, say aye.

1 (Response)

2 CHAIR SIMPSON: Motion carries.

3 Briefing items. Rather than go through these one
4 at a time, I have read through them. I don't
5 really have any questions or comments. I guess I
6 would ask the Board if there are any
7 clarifications or questions that we might want to
8 discuss before moving on with the briefing items.

9 (No response)

10 CHAIR SIMPSON: Hearing none, let's move
11 along to the action items. The first is in the
12 matter of Sidney Sugars, Incorporated's appeal of
13 Montana Pollution Discharge Elimination System
14 Permit No. MT0000248. I assume the parties are
15 represented. Could we have a brief review of
16 where we stand, and the action to be taken,
17 please. Anybody prepared to do that?

18 MS. MOISEY-SCHERER: Jeremiah Langston
19 of DEQ has raised his hand.

20 CHAIR SIMPSON: Mr. Langston.

21 MR. LANGSTON: Can you hear me?

22 CHAIR SIMPSON: Yes.

23 MR. LANGSTON: Okay. I'm pinch hitting
24 for Kirsten Bowers who is out of the office today.

25 On April 26th, 2024, Sidney Sugars filed

1 an unopposed motion to dismiss this appeal without
2 prejudice. DEQ and Sidney Sugars entered an
3 Administrative Order and Consent on April 25th,
4 2024 related to the closure of the plant.

5 Because of the closure of the plant,
6 Sidney Sugars no longer needs to maintain the
7 MPDES permit at issue in this appeal. However
8 Sidney Sugars will sell the property and transfer
9 the permit to a new owner/operator or permittee.

10 Any permit transfer will terminate the
11 AOC between DEQ and Sidney Sugars, and the
12 transfer of the permit must occur in accordance
13 with relevant administrative laws, and Sidney
14 Sugars must give DEQ at least thirty days notice
15 of the transfer, and DEQ may accept, modify, or
16 revoke, or reissue the permit.

17 The Hearing Examiner in this case
18 granted SSI's unopposed motion to dismiss on April
19 29th, and the Board now has to decide whether or
20 not to adopt the Hearings Examiner's order.

21 My understanding is that Counsel for
22 Sidney Sugars is unavailable for this action item,
23 but given all the filings in this case, they of
24 course support the dismissal of the appeal.

25 I'm happy to answer any additional

1 questions the Board might have.

2 CHAIR SIMPSON: Are there any questions
3 from the Board?

4 (No response)

5 CHAIR SIMPSON: Just to be sure we're
6 clear on this, the permit will remain in place; is
7 that correct?

8 MR. LANGSTON: Chair Simpson, the permit
9 will not be in place anymore because the project
10 is ending. The facility will close. However,
11 they may be able to transfer the permit to a new
12 applicant or a new owner, so I think maybe it's
13 fair to say it kind of exists in the strange
14 in-between position where it's no longer active.
15 Sidney Sugars cannot benefit from the permit any
16 more, but the permit may come into existence again
17 in the future if there's a future purchaser, and
18 if that were to happen, then DEQ would have to
19 decide whether or not a transfer of the permit was
20 appropriate.

21 Does that answer your question? I
22 apologize if I'm not being abundantly clear.

23 CHAIR SIMPSON: Well, I think so. So if
24 the plant changes ownership, essentially the
25 permit will become inactive for the time being,

1 but can be reactivated in the event there's an
2 application for a transfer, that is, the new owner
3 would not have to start from zero to apply for a
4 new MPDES permit; do I understand that correctly?

5 MR. LANGSTON: That's correct, Chairman
6 Simpson.

7 CHAIR SIMPSON: Any other questions?

8 (No response)

9 CHAIR SIMPSON: Is there a motion?

10 VICE CHAIR AGUIRRE: I'll make a motion
11 to adopt the Hearing Examiner's order on the
12 unopposed motion to dismiss appeal.

13 BOARD MEMBER REITEN: I'll second that
14 motion.

15 CHAIR SIMPSON: It's been moved and
16 seconded to accept the Hearing Examiner's
17 recommendation for dismissal of this appeal. Is
18 there any further discussion?

19 (No response)

20 CHAIR SIMPSON: All in favor, say aye.

21 (Response)

22 CHAIR SIMPSON: Opposed.

23 (No response)

24 CHAIR SIMPSON: Motion carries. Thank
25 you.

1 Let's move along to the next item. This
2 has to do with the renewal of MPDES permit No.
3 MT0000264 issued to CHS, Inc., for discharges from
4 the Laurel Refinery. There's an awful lot of
5 paper in our packet having to do with this case,
6 and I think I've finally sorted through it and
7 have a little bit of an understanding of what's
8 happening here. But is there anyone from the
9 Department or CHS who would like to review this
10 and clarify for the benefit of the Board?

11 MS. MOISEY-SCHERER: Kurt Moser has his
12 hand raised, Chairman.

13 MR. MOSER: Good morning.

14 CHAIR SIMPSON: Thank you. Please go
15 ahead.

16 MR. MOSER: Good morning, Mr. Chairman,
17 members of the Board. I believe that Ms. Vicki
18 Marquis should also be on the call this morning
19 representing CHS.

20 What CHS and DEQ have submitted for the
21 Board's consideration, a stipulation and a
22 proposed order. Effectively if the Board chooses
23 to adopt the order and the attached modified
24 permit which is attached as Exhibit A to that
25 order, and it's included in your packet of

1 materials, then basically the Board would then be
2 adopting that version of the permit as the final
3 agency decision.

4 The explanation or the reasons for the
5 changes to the permit or the withdrawal of certain
6 appeal items are explained within the stipulation
7 that's included in the packet. I think that
8 starts on, basically that starts on Page 3 of the
9 stipulation.

10 Basically as pertinent to the appeal
11 issue, there are three appeal issues in the case.
12 As pertinent to appeal issue one, CHS is
13 withdrawing its appeal of that issue. As
14 pertinent to appeal -- and that is the issue
15 regarding technology based effluent limitations in
16 a permit.

17 As pertinent to its appeal issue two,
18 the parties are agreeing that the compliance
19 schedule for hydrogen sulfide will be removed from
20 the permit, and CHS also then will agree to
21 withdraw its appeal of the related hydrogen
22 sulfide limitations.

23 And then final as to appeal issue number
24 three, we will be removing from the permit the
25 requirement to sample and report certain levels of

1 beta-emitters in millirems per liter, and instead
2 require data to be recorded in picocuries per
3 liter, and the explanation for that is contained
4 within that stipulation, that's paragraph No. 12.

5 And so should the Board decide to adopt
6 this final order in the case, then the permit will
7 be final, and then the case is essentially over.

8 And if Ms. Marquis would like to speak,
9 please, she should do so.

10 CHAIR SIMPSON: Is Ms. Marquis on the
11 call? She's not on my screen.

12 MS. MOISEY-SCHERER: She's not on the
13 call, sir.

14 CHAIR SIMPSON: Thank you. Any
15 questions from the Board for Mr. Moser?

16 (No response)

17 CHAIR SIMPSON: No questions?

18 (No response)

19 CHAIR SIMPSON: I have a question. As I
20 recall, there was an intervenor in this case. I
21 guess I don't understand what, if any,
22 implications there may be for this settlement
23 agreement if there's an intervenor involved.

24 MR. MOSER: Mr. Chairman, members of the
25 Board. I'm not sure if Barbara Chillcott is on

1 the line. She represented the intervenors. And I
2 don't want to speak for anybody. So I know that
3 the Hearing Examiner did recommend Board approval
4 of the stipulation and the final order.

5 MS. MOISEY-SCHERER: Chairman Simpson,
6 Barbara Chillcott has raised her hand.

7 CHAIR SIMPSON: Please go ahead. My
8 screen must be incomplete. I don't have all of
9 the participants on here. Please go ahead. I'm
10 sorry. Thank you.

11 MS. CHILLCOTT: Good morning.
12 Apologies. I got disconnected when I tried to
13 raise my hand. Sorry for the technical
14 difficulties.

15 My name is Barbara Chillcott, and I did
16 not catch the last bit that Kurt Moser offered. I
17 represent the intervening parties in this
18 contested case, the Montana Environmental
19 Information Center and Earthworks.

20 We did not participate in the settlement
21 discussions related to the stipulation in front of
22 you today. We are not opposed to the settlement
23 as agreed to between CHS and DEQ. And we were not
24 appearing in the case to discuss the issues with
25 the technology based effluent limits or the other

1 issue that was resolved by the stipulation, and so
2 while we're not opposed to the stipulation, we did
3 not participate in the discussion.

4 CHAIR SIMPSON: Thank you very much.
5 Any questions from the Board?

6 (No response)

7 CHAIR SIMPSON: Sounds pretty straight
8 forward. Is there a motion?

9 VICE CHAIR AGUIRRE: Chairman, I'll make
10 a motion that the Board adopt the recommendation,
11 and issue a final agency decision on the agreement
12 and stipulations. I might need an assist if I
13 didn't word that quite properly.

14 CHAIR SIMPSON: Is there a second?

15 BOARD MEMBER ALTEMUS: I'll second.
16 Thank you.

17 CHAIR SIMPSON: Thank you. It's been
18 moved and seconded to approve the settlement
19 agreement and the order to settle this matter.
20 Any further discussion?

21 (No response)

22 CHAIR SIMPSON: Hearing none, all in
23 favor, say aye.

24 (Response)

25 CHAIR SIMPSON: Opposed.

1 (No response)

2 CHAIR SIMPSON: Motion carries
3 unanimately.

4 The last action item has to do with the
5 matter of appeal and request for hearing by the
6 Dairy Subdivision, Missoula County, EQ No.
7 23-1751. I guess first of all, is the Dairy
8 Subdivision represented by anyone here at the
9 meeting?

10 (No response)

11 CHAIR SIMPSON: Apparently not. Ms.
12 Oomens, could you review for us what this is
13 about, please.

14 MS. OOMENS: Mr. Pettis from DEQ
15 represents DEQ in this matter, so he may have some
16 insight as well. But essentially the petitioner
17 -- I believe Tai Tam is how you say that -- has
18 ceased participation. They haven't been in
19 contact with me. They haven't responded to any of
20 my order deadlines.

21 And so I issued a show cause telling
22 them that they have to come forward and tell me
23 why they haven't participated, and why their
24 petition shouldn't be dismissed. Again, they
25 never participated in that, never reached out to

1 me, and so I've dismissed their appeal.

2 Again, if Mr. Pettis has anything to
3 add, that would be good, too.

4 CHAIR SIMPSON: Mr. Pettis.

5 MR. PETTIS: Good morning, Mr. Chair,
6 members of the Board. I know that Tai Tam did not
7 file their preliminary statement, and the last
8 couple emails that I sent to opposing Counsel went
9 unanswered, so -- And opposing Counsel, Tai Tam
10 was represented by Alan McCormick. I don't know
11 if he's elsewhere on the line.

12 CHAIR SIMPSON: Apparently not.

13 MS. OOMENS: I will also just mention
14 this is dismissed without prejudice, so
15 theoretically if Tai Tam comes forward later on
16 and says, "Hey, this is what happened," or
17 something like that, they can always bring their
18 petition again if need be.

19 CHAIR SIMPSON: Thank you, Ms. Oomens.
20 Any questions from the Board?

21 (No response)

22 CHAIR SIMPSON: Is there a motion?

23 BOARD MEMBER REITEN: I'll move that we
24 adopt the Hearing Examiner's position on this.

25 CHAIR SIMPSON: Is there a second?

1 BOARD MEMBER SMITH: I'll second.

2 CHAIR SIMPSON: Thank you. Any further
3 discussion?

4 (No response)

5 CHAIR SIMPSON: All in favor say aye.

6 (Response)

7 CHAIR SIMPSON: Opposed.

8 (No response)

9 CHAIR SIMPSON: Motion carries.

10 Before we move on, Sandy, I neglected to
11 ask for a list of people on the call. I have a
12 few on my screen, but I was wondering if you could
13 please review the people who are on the call.

14 MS. MOISEY-SCHERER: I sure will. Sandy
15 Moisey-Scherer, I'm the Board secretary; Aaron
16 Pettis of DEQ; Barbara Chillcott; Deputy Director
17 James Fehr; Kurt Moser, DEQ; Laurie Crutcher,
18 Court Reporter; Terisa Oomens, Montana Department
19 of Justice; Jeremiah Langston, DEQ; Sam King, DEQ;
20 Abigail Sherwood, DEQ; Anne Spezia, DEQ, Catherine
21 Armstrong, DEQ; Bob Smith; Cale Fisher; Chad
22 Anderson, DEQ; David Smith, Montana Contractors
23 Association; Elena Hagen, Department of Justice,
24 Agency Legal Services; Emily Lodman, DEQ; guest;
25 Joe Vanderwall; Ken Stoeber; Madeline VerWey, DEQ;

1 Ruby Hopkins, DEQ; Russell Batie; Samuel
2 Yemington; Sonja Nowakowski, DEQ; Todd; Whitney
3 Bausch, DEQ; and Zach Ashauer.

4 CHAIR SIMPSON: Thank you very much.
5 What I wanted to do was to alter our order of
6 items on the agenda a little bit, and do the Board
7 Chair update before the general public comment.
8 It's now 9:24, and we have gone through our agenda
9 items pretty quickly. I was anticipating that we
10 wouldn't finish with this until nearly ten.

11 So under the Board Chair update, one of
12 the items listed there is a follow up discussion
13 of opencut issues as a follow up to the last
14 meeting. In the packet there was included a stack
15 of documents having to do with background on open
16 cut statute, rules, regulations, etc., including a
17 couple of items from Legislative Services, one
18 having to do with House Bill 599 and the changes
19 it brought about; another having to do with the
20 history of the last twenty years of changes to the
21 opencut statute. There were a couple of items
22 from the DEQ website that I thought were rather
23 instructive and useful, and also some excerpts
24 from the statute and from the rules.

25 So what I had intended to do today, if

1 you recall, at the last meeting we had approved a
2 motion to hold an informational hearing on the
3 opencut program just for the benefit of the Board
4 to understand a little better what the nature of
5 the program is, and what some of the requirements
6 are, and the procedures.

7 DEQ has declined to participate in such
8 a hearing, and so that's the reason for all of
9 these documents, is to provide some background to
10 the Board on opencut.

11 Of course, the reason, the matter that
12 triggered this was the item we had at the agenda
13 on our last meeting having to do with the gravel
14 pit up in the Clearwater area, proposed gravel
15 pit; also the fact that we have a number of other
16 opencut cases on our docket that are working
17 through the process right now.

18 So my question to the Board members is:
19 Having had a chance to review this opencut
20 material, what is your view on whether or not this
21 material is sufficient from your standpoint to
22 provide at least a general understanding of the
23 opencut program? And I'd like to poll the Board
24 members on this. I'll start with Vice Chair Stacy
25 Aguirre. Your thoughts, please.

1 VICE CHAIR AGUIRRE: Thanks, Chairman
2 Simpson. When I conducted my review of this, I
3 did from the standpoint of being the regulated
4 community, and so I looked at it from the
5 standpoint if I was going to submit one of these
6 permit applications, is it clear, do I understand
7 what the requirements are, do I understand the
8 drylands part.

9 One thing that I first thought about is
10 in our role in looking at these contested cases,
11 the regulated community needs regulatory
12 certainty, and so I introduced that also into my
13 review to make sure that I understood as the
14 regulated community what I need to do; and I also
15 reviewed what others could do as far as concerns
16 about impact to water or different elements of the
17 process as well.

18 And based on my review, and reading
19 through the statutes and the materials, I feel
20 that I don't need more information. I feel like
21 it is very straight forward on what I'm required
22 to do in order to have a complete application, an
23 application that can work its way through the
24 review process, and become an approved permit.

25 So that's kind of I guess what I would

1 say is a high level summary of how I looked at
2 this, and what my thoughts are about the
3 information that's available, the guidance that is
4 there, and if I had regulatory certainty kind of
5 going through the process in order to get approval
6 from Montana DEQ to have this permit to operate
7 essentially.

8 I know that there's a lot of -- I feel
9 there's enough guidance in here about if there's
10 concerns about water quality from a third party,
11 if there's concerns, I think that it's very
12 straight forward on how they can get involved.
13 And in my mind, if they do have concerns, then
14 they need to get involved, and it's clear how they
15 do that, who they call.

16 It's also clear to me what the opencut
17 program does versus what other permits may or may
18 not be required as part of the process. I also
19 felt like that was clear guidance to both the
20 regulated community and to any third party that
21 possibly have concerns.

22 So that's I guess maybe a high level and
23 maybe some detail review thoughts from my review.

24 CHAIR SIMPSON: Okay. Thank you very
25 much. There were I guess two items I wanted to

1 highlight there. The first was just the adequacy
2 of the material. The second has to do with the
3 question of dryland permits, but I'd like to
4 reserve that until later. Let's just deal with
5 the first half of the question here.

6 VICE CHAIR AGUIRRE: One thing I'll say
7 before I forget, Chairman Simpson, is on the
8 second point in my review -- and I want everybody
9 to kind of have an insight into my mind on how I
10 thought about this.

11 I tried to, again, look at it from a
12 regulated community, and not say, "Oh, this rule
13 is good or not good." It's a rule. And so if
14 you're going to proceed, say, with the dryland
15 permitting process then you -- in my mind it was
16 clear. It wasn't a matter of debating whether it
17 was a good rule or a bad rule in my review, it was
18 was it clear?

19 CHAIR SIMPSON: And that's really the
20 question, I believe. And if you recall back to
21 our last meeting, the issue with the dryland was
22 not whether it's a good idea or a bad idea, it was
23 a question of -- in a case like we had with the
24 Clearwater, when it comes to the Board, is there
25 sufficient information to resolve a dispute as to

1 whether or not it is in fact a dryland site.

2 And I guess I'd like to acknowledge the
3 fact that that was not a unanimous vote. And
4 anyway, we can revisit that here in a little bit.
5 I'd like to work through just the general question
6 of whether there is sufficient information here
7 for the Board to decide essentially whether or not
8 we need to proceed with a hearing, but I think
9 it's an exercise we need to go through before
10 taking that next step. Anything further, Stacy?

11 VICE CHAIR AGUIRRE: Not at this time.

12 CHAIR SIMPSON: Thank you. Board Member
13 Altemus. Julia.

14 BOARD MEMBER ALTEMUS: Thank you, Mr.
15 Chair, members of the Board. First, thank you for
16 pulling all this information together -- I know
17 it's hard to slog through all the rules and where
18 they're at because they're everywhere -- and also
19 providing what the bill did and didn't do. So I
20 certainly appreciate having that all here.

21 I love information, but I also work with
22 the regulated community, so I kind of went through
23 it the same way that Vice Chair Aguirre did. And
24 I believe, for me, there's enough information
25 here, but I also know I have the ability if I'm

1 missing something to search it out.

2 So to make it short, I don't need
3 additional information at this time. And I can
4 address the dry cut later when you get to that
5 question, but thank you for polling us and pulling
6 the information together.

7 (Representative Steve Gunderson present)

8 CHAIR SIMPSON: Thank you very much,
9 Julia. Board Member Reiten.

10 BOARD MEMBER REITEN: Yes. I agree for
11 the most part that as a regulated community
12 person, you should have enough information, and we
13 have enough information to make decisions on this
14 based on this information.

15 I kind of looked at it both as if I was
16 being regulated, as part of the regulated
17 community, and if I had some concerns. And I
18 think my opinion is that there's enough
19 information for both cases, for both sides to be
20 looking at this to know what they need to do.

21 So I think I liked the information. It
22 would have been -- I still would have preferred to
23 have someone from DEQ present some of this for us,
24 but I think what we have is adequate. Thank you.

25 CHAIR SIMPSON: Thank you, Jon. Board

1 Member Smith.

2 BOARD MEMBER SMITH: Yes. I'll echo the
3 others. Thank you so much for pulling together
4 the information. I think it was really helpful.

5 I would say yes, it's clear to me what's
6 needed for these permits. I was looking at it
7 more from what question would I have in reviewing
8 one of these, like the Clearwater one, for
9 example, that we've already gone through, and
10 where it's clear, and where it's a little fuzzy,
11 like the gray areas.

12 For me I think I have the information I
13 need to feel like I can make a decision. I think
14 where it's a little gray is what we consider the
15 burden of proof on each of these required items to
16 be provided by both the applicant and the
17 appellants in case of these appeal. But I would
18 say yes, I've got what I need to I think make that
19 decision.

20 CHAIR SIMPSON: Thank you, Joe. Board
21 Member Knuteson, recognizing you didn't have the
22 pleasure of working through the last meeting with
23 us.

24 BOARD MEMBER KNUTESON: Chair Simpson,
25 members of the Board. Thank you. So I'm going to

1 do my utmost not to bog down our meeting with
2 newby questions, but I just had a couple of
3 questions before comments.

4 The first one, Chair Simpson, is the
5 purpose of our review of the information you
6 provided. Is that to decide if we are qualified
7 to hear these contested cases on these permits,
8 for us to make the determination instead of the
9 Hearing Examiner, or what is the -- do we have
10 enough information to do what? If you don't mind
11 just clarifying that for me. And I'm sorry again
12 if I've messed up.

13 CHAIR SIMPSON: Well, in my mind -- and
14 if anybody else had a different understanding.
15 Again, going back, this was triggered by the case
16 that we had at the last meeting where we had
17 motions for summary judgment from both the permit
18 holder and from the State, from DEQ, with regard
19 to a permit, a gravel pit permit, existing permit
20 along the Clearwater River south of Seeley Lake.

21 And it seemed that, at least with regard
22 to the issue in that particular case, there really
23 wasn't enough information in my mind for the Board
24 to make a decision. Recognizing that at that time
25 we had five additional appeals having to do with

1 gravel pits, it was my thought, and the Board
2 agreed, that it would be helpful if we had an
3 informational hearing -- in quotes -- where the
4 Department could review with the Board the
5 essential elements of the regulatory program.

6 It wasn't a matter of, quote, "being
7 qualified." I think what we need to do is, when
8 we hear these cases, rely on the testimony as it
9 comes from the permit holder and the Department
10 with regard to the specific elements of the
11 contested case, and then the Board is tasked with
12 making the final decision.

13 So it was just a matter of familiarity.
14 It wasn't a matter of being qualified or not
15 qualified to make the decision. I mean the
16 decision ultimately has to be made on the record
17 in the case, but I think it is helpful,
18 particularly in a matter where we have such a
19 line-up of cases coming down the pike, that it
20 would be useful for the Board to have a little
21 background knowledge of what the regulatory
22 program entails. That was the only purpose.

23 BOARD MEMBER KNUTESON: I appreciate
24 that. "Qualified" might have been the wrong term.
25 I meant prepared and informed enough to

1 competently manage these contested cases.

2 I guess from my perspective, I'm not
3 wearing my attorney hat when I remark as part of
4 this Board. We have our attorney. But I think
5 that one of the questions I had, too, was how does
6 this Board make determinations about which
7 contested cases the Board will decide versus which
8 will be assigned to a Hearing Examiner in the
9 context of these opencut permits in particular.

10 CHAIR SIMPSON: Well, that's a good
11 question, because by and large the Board has
12 assigned virtually all the cases that have come
13 before us to hearing examiners. At the last
14 meeting we had three petitions challenging a
15 permit decision near Gallatin Gateway, and in that
16 case, the Board voted to take the lead rather than
17 assign it to a Hearing Examiner.

18 And I can only speak for myself. I felt
19 it was important for the Board to take the lead on
20 that because it's a highly controversial case, and
21 we had multiple -- at the time we had multiple
22 appellants. As has happened two of those have
23 dropped out since that meeting, so there is only
24 one petitioner at this point. I guess the
25 petitioner is a better word than appellant.

1 So I think it's something -- to try and
2 answer your question, it's something that's
3 decided on a case-by-case basis. And I don't
4 know. Does anybody else, any of the other Board
5 members have any thoughts on that?

6 (No response)

7 MS. MOISEY-SCHERER: Chairman Simpson,
8 Representative Gunderson has joined the call and
9 he has raised his hand.

10 CHAIR SIMPSON: Representative
11 Gunderson. Welcome.

12 REPRESENTATIVE GUNDERSON: Sorry about
13 that. A little rusty on Zoom. Thank you, Chair.
14 Is there anything that I can add or answer
15 questions? Maybe just to kind of make sure
16 everybody knows who I am, I'm a fourth term
17 legislator in the House; two terms, two last terms
18 as the House Natural Resources Standing Committee
19 Chairman, and I'm also the current Chair of the
20 Environmental Quality Council.

21 CHAIR SIMPSON: Representative
22 Gunderson, I appreciate your joining us this
23 morning. I guess what I would like to do is
24 complete the discussion we're involved in, and
25 then I would like to ask you to review, to give us

1 a review of your view of this, and particularly
2 your experience with House Bill 599 and the
3 importance thereof, if that would be all right
4 with you.

5 REPRESENTATIVE GUNDERSON: I'm at your
6 beck and call, sir. I'll just mute myself, and
7 lower my hand, and wait until called upon.

8 CHAIR SIMPSON: Thank you very much.
9 We'll be back with you shortly.

10 REPRESENTATIVE GUNDERSON: Sounds good.
11 Thank you, sir.

12 CHAIR SIMPSON: Board Member Knuteson,
13 did we answer your question?

14 BOARD MEMBER KNUTESON: You did, and I
15 just had one more question, before I had remarks,
16 for Terisa Oomens, please, our Counsel.

17 MS. OOMENS: Sure. Go ahead.

18 BOARD MEMBER KNUTESON: So again, I hate
19 to put my ignorance on full display, but to what
20 extent is this Board -- are we informed by the
21 Supreme Court decisions on the rules that we're
22 reviewing here?

23 Because I noticed that the Clearwater
24 case has been submitted for a decision, which
25 hopefully will be forthcoming this summer. And I

1 didn't know if we -- Well, I'll let you answer
2 that. I would just like to know to what extent
3 that we would take into account decisions by the
4 Montana Supreme Court on these regulations, these
5 rules and regulations.

6 Because as a member, I mean I appreciate
7 the perspective of we review these as members of
8 the regulated community potentially, but I think
9 that members of the regulated community certainly
10 will be watching that case, and taking into the
11 account what the Court decision will be.

12 And that also leads to Director
13 Dorrington declining to provide us with the
14 informational meeting that we requested. In my
15 effort to try to fill in that very big gap that
16 that leaves, I went to that case in order to read
17 DEQ's briefs, I read the Amicus brief from the
18 Contractors Association.

19 And one of the things that stood out to
20 me from the Contractors brief was the statement
21 that the Opencut Act is not an all encompassing
22 act. Obviously it works in tandem with other
23 substantive regulations, Montana Water Quality
24 Act, Clean Water Act, Montana Water Use Act, as
25 well as applicable local zoning laws.

1 And with that in mind, I just, from my
2 perspective, I think I'm leaning towards I would
3 want more information. I wouldn't want to -- Even
4 if we have to get it elsewhere, if we need to go
5 to EQC or -- I would like this Board to have more
6 information than just what's in this packet today.

7 But again, I would like to request from
8 Terisa her input on to what extent we would even
9 factor in or discuss any Court decisions that
10 relate to these rules.

11 MS. OOMENS: So the Board operates
12 similar to a lower level District Court, and so we
13 are bound by merit decisions of the Montana
14 Supreme Court specifically, especially regarding
15 these rules.

16 I will say that -- I don't want to get
17 into Clearwater specifically just because I don't
18 think that's appropriate in this discussion, but
19 the way that it typically works is BER is the
20 final internal decision, and then if there are
21 further things that need to be decided, the BER
22 decision will be appealed to a District Court or
23 the Supreme Court. Does that answer your
24 question?

25 BOARD MEMBER KNUTESON: It does. I

1 understand that that's the way it works
2 procedurally. I'm trying to figure out
3 substantively what we're able to factor in, or
4 what we should be factoring in. Should we only be
5 looking at these rules? Should we read through
6 all of these acts, and just look at the rules, or
7 do we need to be briefed on some of the pertinent
8 cases that allow us to get a glimpse into how the
9 Courts interpret them? What's maybe not been
10 implemented the way that the rule might read, or
11 what's been deemed ambiguous, where the agency
12 gets more deference, that kind of discussion.

13 Is that something that we could benefit
14 from, or is that outside the scope of where we
15 need to be? Do we just need to be looking at the
16 rules and the acts?

17 MS. OOMENS: I think Court
18 interpretation would be great. This new House
19 Bill doesn't have a whole lot of Court
20 interpretation at this point unfortunately. But
21 if the parties brief that, that would be awesome.
22 If the Board wants to request that, that would be
23 great. I think it's definitely relevant to our
24 decision. We can't look at the rule on its own if
25 it's been interpreted further. So does that

1 answer your question?

2 BOARD MEMBER KNUTESON: It does. Thank
3 you. And I think that would lead me to I guess
4 respectfully disagree with my colleagues on the
5 Board who feel that we have sufficient information
6 before us. I would really like, if possible, to
7 have the educational session, whatever format that
8 would take. I would really like the gap filled
9 that DEQ has left. I think that we need more
10 education. That would be my vote if we were
11 voting. Is that an answer to your poll question,
12 Chair Simpson?

13 CHAIR SIMPSON: Yes, it is. Thank you
14 very much, Ms. Knuteson.

15 From my own standpoint in a general
16 sense, I think the information that's been
17 assembled gives us a good background on -- At
18 least from my standpoint having read through it
19 all, I understand a lot better how the process
20 works.

21 And of course I've got the benefit of a
22 background in mining myself, so it's something
23 where I could apply some experience and knowledge
24 from the work that I've done in the past.

25 I did have a number of my questions

1 answered that I had on my mind at the last
2 meeting. I guess I would emphasize that as we are
3 called on to make the ultimate decision on each of
4 these cases as it comes before us, we are to some
5 extent -- and correct me if I'm wrong, please,
6 Terisa -- but we are bound by the facts as brought
7 forward in the findings of fact and conclusions of
8 law presented to us by the Hearing Examiner.

9 However, the makeup of this Board by law
10 consists of various backgrounds, and the reason
11 for that I believe -- I don't know that it's
12 stated in statute -- but it stands to reason that
13 as a citizen board, we're called on to bring our
14 background and knowledge as well into the process
15 of making these decisions under the Administrative
16 Procedure Act.

17 And as far as the question having to do
18 with opencut, I'm not really sure that we need I
19 guess what I'd call a full blown informational
20 review in a formal hearing setting, given the
21 information that is available to us.

22 However, there is the question that came
23 before us at the last meeting having to do with
24 the dryland permit, which was a new concept to me.
25 I don't know if there have been -- It's the first

1 one that's come to the Board on that basis, that
2 is, is this a dryland -- given the criteria, is
3 this a dryland permit or not.

4 And so I guess I've got the question of
5 whether the Department, the applicant, and
6 ultimately the Board would be better served if the
7 applicant were required to provide something more
8 definitive than a certification with respect to
9 the number of residences, and the presence or
10 absence of hydrologic features than what we've
11 seen in the one case that we've looked at.

12 Again, it was mentioned by Ms. Oomens
13 that discussing that case specifically is not
14 appropriate, and as we talk about this further, I
15 think we have to avoid talking about cases that
16 are pending before us. However, the matters that
17 have come up so far are all public information
18 flowing from the last meeting, so I don't know
19 that there's a problem there. I don't believe
20 there is.

21 So with that, I'd then ask the second
22 question is: Specifically with regard to the
23 information that is supplied by the applicant with
24 regard to the criteria for a dryland site, I fully
25 understand the reasoning behind the dryland

1 classification. What concerned me was that if
2 there is a petition challenging a permit that
3 comes to the Board, that the Board have sufficient
4 information to make a decision.

5 In this case, that case has not gone to
6 hearing yet, so that may be one reason why the
7 specifics weren't included in the findings of fact
8 and conclusions of law. It was strictly a
9 consideration for a motion for summary judgment.

10 But I guess I would raise the second
11 question then with my fellow Board members is:
12 What are your thoughts, having read through the
13 rules, and the background, and also the discussion
14 at the last meeting, as to whether the
15 requirements for the dryland permit are
16 sufficient, and in particular, recognizing that
17 the law is -- it's stated clearly in the law
18 what's required.

19 The question in my mind is whether the
20 regulation then that is based on the law is
21 sufficient, and whether there is an opportunity to
22 provide more information consistent with what's
23 required in the law, but not in excess, which of
24 course isn't permitted.

25 So with that, I guess I'd like to poll

1 the Board one more time, but I see it is two
2 minutes until ten. Rather than start down that
3 road, why don't we take a break, reconvene at ten
4 minutes after ten, and then we will -- What I'd
5 like to do then is to bounce this question off the
6 Board members, and then we'll move into public
7 comment. Thank you.

8 (Recess taken)

9 CHAIR SIMPSON: We will bring the
10 meeting back to order. Sandy, would you call the
11 roll, please.

12 MS. MOISEY-SCHERER: Yes, sir. Chair
13 Simpson.

14 CHAIR SIMPSON: Here.

15 MS. MOISEY-SCHERER: Vice Chair Aguirre.

16 VICE CHAIR AGUIRRE: Here.

17 MS. MOISEY-SCHERER: Board Member
18 Altemus.

19 BOARD MEMBER ALTEMUS: Here.

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

22 BOARD MEMBER KNUTESON: Here.

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

25 BOARD MEMBER REITEN: Here.

1 MS. MOISEY-SCHERER: Board Member Smith.

2 BOARD MEMBER SMITH: Here.

3 MS. MOISEY-SCHERER: We have a quorum,
4 sir.

5 CHAIR SIMPSON: Thank you. Okay. To
6 pick up where we left off, I'd just like to have a
7 brief statement from the point of view from each
8 of the Board members on this question of the
9 dryland permits.

10 The requirements, as I recall, are that
11 there be -- make sure I get it right -- be less
12 than ten residences within a half mile; that the
13 operation not intersect any hydrologic features,
14 including streams, ponds, or groundwater.

15 So the question is whether -- And all we
16 have to base this on is the one project that's
17 come before us. But having read through the law,
18 and having read through the statute and the rules
19 that implements, the implementing rules, what's
20 your view on whether there is sufficient
21 information there for, number one, the Department
22 to make an evaluation.

23 And secondly -- and this is why I
24 suggested we pursue this a little bit -- is if
25 there's enough information there for the Board to

1 make a determination if the permit is appealed.

2 Once again, Vice Chair Aguirre.

3 VICE CHAIR AGUIRRE: Chairman Simpson, I
4 feel like I addressed that with my earlier
5 comments, and wrap that dryland opencut mining
6 permit application into my overall comments. Like
7 I stated, I went through all those requirements,
8 and they're prescriptive as far as my review of
9 them. And so an applicant needs to follow them,
10 and Montana DEQ will evaluate on those. So
11 they're prescriptive requirements.

12 I feel like my comments really
13 characterize the process I went through to look at
14 this, and my thoughts about there being enough
15 information, or the requirement being adequate to
16 provide the information Montana DEQ needs, has
17 requested and needs to make a decision on a
18 permit.

19 CHAIR SIMPSON: Thank you.

20 BOARD MEMBER AGUIRRE: Does that spark a
21 question from you?

22 CHAIR SIMPSON: Well, I just want to get
23 each Board member's view of this before we move to
24 the next stage, and so you've answered my
25 question. So thank you. Board Member Altemus.

1 BOARD MEMBER ALTEMUS: Thank you, Chair
2 Simpson. So setting aside the case that brings
3 all this together -- I'm trying to not bleed over
4 into that -- and just looking at the bill, House
5 Bill 599, looking at the rules that came out of
6 that bill, and then the law, to me I would agree
7 with Vice Chair that there is sufficient
8 information.

9 I think what happens is there's always
10 subject to interpretation of the rules, and this
11 is why these cases come before us, because there's
12 different interpretations of the rules. But if
13 you go back to the underlying bill, House Bill
14 599, it's really clear.

15 What isn't in House Bill 599, though, is
16 the actual term "dryland cut," whatever you want
17 to call it. That's not in there. So opencut,
18 that word, that terminology appears in the rules,
19 and it's never defined in the bill. It's defined
20 later.

21 But all those requirements to do this,
22 whether it's the less than ten dwelling units,
23 that's really well defined; how far from a water
24 body, that's really well defined; the fact that
25 the permitter has to provide a Cadastral or ground

1 truthing certificate, really defined.

2 So I think the information is there, but
3 is it sufficient going forward? I guess time will
4 tell, as all these interpretations come before us.
5 So I guess I'll just leave it at that.

6 CHAIR SIMPSON: Thank you very much.
7 Board Member Reiten.

8 BOARD MEMBER REITEN: I think it's -- I
9 see a bit of a problem in the fact that just by
10 calling something dryland, if you're the operator,
11 doesn't necessarily mean that it's dryland. You
12 have to have evidence, you have to have data, you
13 have to have information to prove that. And I
14 think in that last case we had some issues with
15 that.

16 But the main things is that we need that
17 information. A person just can't call it that,
18 it's got to be shown that that's the case. And I
19 felt that, the only one we looked at, I felt we
20 were a little bit shorted on some of that.

21 And as well as the opinion on what's an
22 occupied residence, or whatever the property,
23 occupied property, I think that appears to have
24 different opinions of different size. So I think
25 there needs to be very good clarity on that before

1 we can even think about ruling that. So that's my
2 opinion.

3 CHAIR SIMPSON: Thank you very much,
4 Jon. Board Member Smith.

5 BOARD MEMBER SMITH: I would agree with
6 the other Board members so far, all of them, in
7 that I feel like the information presented here in
8 statute is clear enough for us and DEQ to make a
9 recommendation.

10 I think where maybe we're breaking down
11 a little bit, because we're talking about two
12 different things, do we have the information here,
13 versus did we have the information in that last
14 case that we saw to make a determination, and I
15 think those are two different things.

16 I would say yes, I feel like the
17 statutes are clear, but as we go to review the
18 next case, we might request a lot more information
19 on that case, just like a burden of proof. I look
20 at it from the attorney standpoint, but Board
21 Member Knuteson might look at it from a Court
22 decision standpoint. And so I would say yes, I
23 feel like House Bill 599 and the statutes are
24 clear.

25 CHAIR SIMPSON: Thank you, Joe. Board

1 Member Knuteson.

2 BOARD MEMBER KNUTESON: Thank you, Chair
3 Simpson. I actually agree with Member Reiten, his
4 remarks. Again, I'm a newby here, but how are
5 applicants determining that it's dryland in the
6 first place? What information is submitted to
7 determine that it's dryland?

8 VICE CHAIR AGUIRRE: Chairman Simpson,
9 can I interject a thought that I feel is relevant
10 to Board Member Knuteson's question, and also some
11 of the other input.

12 CHAIR SIMPSON: Please do.

13 VICE CHAIR AGUIRRE: So one of the
14 opportunities when you do opencut mining
15 permitting in Montana is to request a
16 preapplication meeting with Montana DEQ. And in
17 my experience as part of the regulated community,
18 those preapplication meetings are extremely
19 valuable to guide the regulatory community through
20 the permitting process and the requirements of the
21 permitting process.

22 So I think that somewhat speaks to your
23 question about how does somebody arrive at that
24 point where they're going to apply for a dryland
25 opencut mining permit. One, the requirements are

1 stated in there about what the permit application
2 for the dryland, you know, the proximity to water,
3 and the proximity to occupied dwellings, but also
4 that opportunity for that preapplication meeting,
5 and that compliance assistance is there, too.

6 And I don't know. You know, I can't
7 characterize how often that opportunity is acted
8 on. And as the regulated community, probably
9 you're going about your business in the right way,
10 that's an opportunity that might be missed, but
11 that would assist us with our work.

12 CHAIR SIMPSON: Thank you. Board Member
13 Knuteson.

14 BOARD MEMBER KNUTESON: Thank you, Vice
15 Chair Aguirre. That is helpful. I think that I
16 would reserve taking a position on this just until
17 I do a little bit more research on my own beyond
18 just what I read in the packet today.

19 And I really appreciated that
20 Representative Gunderson is here today, so I think
21 maybe his input will be valuable as well, because
22 I know that I've read -- and obviously I don't --
23 this doesn't govern us, but I can't escape living
24 in a universe of reading newspaper articles.

25 And I know Representative Gunderson had

1 mentioned potentially refining this rule in the
2 next legislative session. I don't know if he can
3 speak to that. But I would be interested to know
4 if he can, in what ways he might augment this or
5 change this, or thread that needle.

6 But I'm going to reserve taking a firm
7 position either way. I need more information
8 personally. That might not mean that you-all, the
9 rest of you do. So thank you.

10 CHAIR SIMPSON: Thank you very much.

11 Well, I guess my view on this is that the
12 requirements are clearly stated in the statute. I
13 don't think, certainly don't think there's an
14 issue there. The question is the manner in which
15 it's presented to the Department and to the Board.

16 With respect to the dryland permit, my
17 understanding is less than ten occupied
18 residences, that the site does not -- I'm not sure
19 if this word is actually used -- but does not
20 intersect hydrologic resources -- streams, ponds,
21 or groundwater.

22 And I guess I'm relying on my own
23 experience, having dealt for years with the
24 process of permitting coal mines. We rely heavily
25 on maps, and all maps that were submitted with

1 those applications needed to be certified, some
2 just by someone with the authority, others by a
3 registered professional engineer.

4 But what I'm going to suggest is --
5 actually it's more of a question -- is would it be
6 consistent with the statute for the Department to
7 state either in the rules or otherwise that a map
8 could be either required or requested that would
9 show the proposed, the location of the proposed
10 operation, that is the pit, the permit area; the
11 residences within a half mile; hydrologic
12 features; and also a simplified cross section
13 showing ground elevation, elevation of the pit
14 floor, and elevation of the groundwater surface.

15 That would provide a documented record
16 of what the situation is, much more so than a
17 written certification that none of these features
18 are -- that all these features are in compliance.

19 So that's my thought. It's a question
20 as to what form the information is provided, and
21 with that, I would ask Representative Gunderson --
22 again, thank you for joining us today -- and if
23 you could enlighten the Board on some of the
24 questions that have been raised, and also just
25 some background on House Bill 599, it would be

1 greatly appreciated.

2 REPRESENTATIVE GUNDERSON: Thank you,
3 Mr. Chair. And if you could indulge me for a
4 minute, I've got something that I would like to
5 read as a comment. And again, to give you a
6 background, I've worked with opencut specifically
7 for the past three sessions, and the goal of all
8 of those efforts have been to streamline the
9 permitting process. And if you actually go back
10 through all of the laws that we've written and the
11 bills we've written, they've been specifically to
12 do that, and I think we've accomplished it.

13 599 was one to actually separate out
14 certain pits that would meet that dryland rural
15 permit status, and would require even less
16 permitting. I think if we start getting into this
17 certification and tearing it apart, one of the
18 things we've done is we've actually gutted 599 and
19 a lot of the laws that we've written in the
20 attempt to streamline the process.

21 But if you'd indulge me, like I say, I
22 do have a comment I'd like to read.

23 Chair Simpson, Board members, thank you
24 for the ability to comment today as the sponsor of
25 HB 599.

1 Opencut was, is, and continues to be a
2 reclamation law, how to return the land back to as
3 close to its original use and contours as
4 possible. Opencut sites supply the very
5 foundations for our homes, roads, and highways.
6 Bipartisan amendments to the opencut laws have
7 been made over the past twenty plus years.

8 Since the passage of HB 599 in 2021, the
9 world has not come to a fiery end. I believe we,
10 the people of Montana, have benefit from not
11 seeing a huge increased price from the critical
12 minerals and products that are produced by opencut
13 projects.

14 Opencut is not a property rights law,
15 nor should it be bastardized into a weapon to be
16 used that to end. Property rights dictate the
17 property owner's right to develop his or her
18 property as they see fit. Using the might, maybe,
19 or possible "create environmental damage" mantra
20 bastardizes our well laid out and proven
21 environmental law.

22 The "not in my back yard" thinking has
23 some validity, but to bastardize our well-intended
24 and proven environmental law to use for their own
25 ends is unconscionable. To question our

1 permitting agencies, who for almost 40 years have
2 been gaining experience, is just plainly wrong.

3 The NGO's have questioned the permitting
4 agencies' abilities and the findings produced to
5 permit a project, and they've developed that
6 process into a tool to slow or stop development in
7 mining and timber projects. That tool was used
8 quite extensively over the last many decades to
9 use liberal Judges to stop good, badly needed
10 projects. We're now seeing a retooling of that
11 tool to be used against opencut projects.

12 The Clearwater opencut case should be a
13 clear visual representation of the use of that
14 tool. The Clearwater pit has two, mind you, two
15 EA's, Environmental Assessments, written by two
16 separate agencies, DEQ and DNRC.

17 Clearly all of the information to stop
18 and end this litigation lies in those two
19 documents and their findings. How can two
20 separate EA's get it wrong? How can two separate
21 agencies that utilize pure proven science to find
22 the Clearwater opencut project would do no
23 environmental harm?

24 Which do we believe and trust, the NGO's
25 and the non-educated public, and the opinions of

1 "not in my back yard" folks, or the proven
2 scientific studies and findings of these agencies
3 with decades of proven decisions? Do we allow the
4 weaponization of the opencut law?

5 I believe that we, the people of
6 Montana, will see huge price increases in the many
7 critical opencut minerals that these projects, as
8 they're slowed, stymied, or completely stopped.
9 An opencut project moved many, many miles further
10 and further into rural area will not only
11 monetarily increase prices, but increase the very
12 impacts to our environment the NGO's are telling
13 us they want to protect us from.

14 Longer delivery routes will not only
15 increase our use of fossil fuels to transport
16 further, but increase the release of the
17 pollutants these folks are asking you to help
18 curb, by denying permits where the materials are
19 found to exist, and the property owner wishes to
20 develop.

21 Your findings today should answer the
22 questions raised on all the other projects. Don't
23 allow the use of a bastardized interpretation of
24 the law to be used to cloud the great work of our
25 agencies. Again, thank you for the opportunity to

1 testify.

2 One of the things that I would like to
3 say, maybe answering Board Member Knuteson's
4 question, and I can paraphrase a little bit. The
5 information that the agencies glean from these
6 permit applications, it isn't written on a bar
7 napkin. There's a lot of information out there
8 available that would help an operator certify a
9 permit.

10 And again, we're talking about known
11 areas that do not have an impact to water, and are
12 far enough from populations of people to not be a
13 big issue. And the thing is if the operator does
14 not follow that permit, and enforcement takes
15 over, and he's got to, he or she has got to bring
16 that project into compliance or he loses the
17 permit. So again, it's not just a wholesale dig
18 it, dump it high, and leave it.

19 And again, anything that starts not
20 using that certification basically cuts 599 and
21 the reasoning for bringing that amendment to
22 opencut. I guess are there any other questions
23 that I can specifically answer?

24 CHAIR SIMPSON: Any questions from the
25 Board?

1 BOARD MEMBER ALTEMUS: Mr. Chair, this
2 is Julia Altemus. If I may ask a question real
3 quick?

4 CHAIR SIMPSON: Please.

5 BOARD MEMBER ALTEMUS: Thanks for being
6 here, Representative Gunderson. Board Member
7 Knuteson mentioned that there might be, or you
8 might be thinking of an amendment to 599 in the
9 next session. Do you have a response to that?
10 Are you thinking that there needs to be some
11 tweaking of this piece of legislation?

12 REPRESENTATIVE GUNDERSON: Mr. Chair,
13 Board Member Altemus. I'm a little torn by that.
14 I believe Board Member Altemus said it's pretty
15 well cut and dried of what is needed, and
16 rulemaking that I actually was a part of as the
17 sponsor I think answered all the questions that
18 are out there.

19 There are actually comments being made
20 on opencut projects that are standard projects,
21 and the nay sayers, and NGO's, and people that
22 have a problem with it are actually using 599 to
23 justify that problem or questioning the permit.
24 And they aren't even under that jurisdiction of
25 HB599.

1 So tweaking of it, I'm open to it. In
2 fact what I would probably offer, if somebody can
3 come up with a way to tighten up those rules, I'd
4 be more than happy to bring it to EQC, and
5 actually have us come up with a committee bill
6 that would either, one, put that into MCA; or to
7 ask DEQ Opencut and the Mining administrator to
8 rulemake to add that further into rules.

9 BOARD MEMBER ALTEMUS: Thank you.

10 CHAIR SIMPSON: Any other questions for
11 Representative Gunderson?

12 BOARD MEMBER REITEN: Chairman Simpson,
13 members of the Board, and Representative
14 Gunderson. I don't really have a question, but my
15 comment is: I do agree that it's clear what the
16 rules are. They are clear. But I think it
17 depends on who defines those. And for us to
18 evaluate any contentious or a concern about it, we
19 need to have that information.

20 And that's all I -- I think we need to
21 be able to evaluate it real easily. I liked Chair
22 Simpson's idea of a map, and a couple of like
23 figures describing the area. That would make it a
24 lot easier to visualize and understand what the
25 problems are, if any, or at least to be able to

1 evaluate it.

2 So that's mainly a comment I've got, but
3 I'd be open for discussion if anyone has any more.

4 BOARD MEMBER ALTEMUS: Mr. Chair, may I
5 make another comment, ask a question?

6 CHAIR SIMPSON: Yes.

7 BOARD MEMBER ALTEMUS: So I do like your
8 idea of the additional information, I guess. The
9 question I have is: I think we as a Board have a
10 right, obligation, if we think we're missing
11 information, to ask that of the petitioner for
12 sure, or the permittee.

13 I guess I worry that if we ask the DEQ
14 to open up rules, lots of crazy stuff can happen
15 when you open up rules, because then it goes up to
16 public comment. So then I'm a little concerned
17 about that, because you really could lose the
18 basis of House Bill 599.

19 Maybe you involve EQC to direct somebody
20 to do something. But I guess my question is: Is
21 it sufficient for the Board just to ask questions
22 or for more information for these projects instead
23 of opening up the law or the rules?

24 REPRESENTATIVE GUNDERSON: Mr. Chair, if
25 I could maybe respond to that?

1 CHAIR SIMPSON: Yes, please. I was just
2 going to ask if you had a response.

3 REPRESENTATIVE GUNDERSON: Mr. Chair,
4 and I guess this is basically pointed toward all
5 the Board members, not anyone specifically.

6 Last session one of the Representatives
7 brought HB581. And Board Member Altemus, you're
8 spot on. When you try to open up something to
9 make minor tiny changes, there's always someone
10 there to come in, and to actually gut what is
11 there already, and to insert their thinking on how
12 it should be, experience or not.

13 And again, the Representative that
14 brought 581 had no experience in natural
15 resources, let alone opencut, and was attempting
16 to change all of the public comment periods, and
17 even add additional public comment periods, to
18 where they would bog down the process to not only
19 a slow crawl, but in some cases paralyze it.

20 So again, I agree. We have to be
21 careful in how we approach this. Actually the
22 more I think about it, it's probably -- A very
23 simple fix would be to have EQC bring a bill that
24 specifically addresses the current predicament I
25 think you feel you're in, in lack of information,

1 that if there is a contentious project, and once
2 it's been challenged, that the operator supply
3 that information, and maybe have DEQ or DNRC,
4 whichever agency would be applicable, to quickly
5 review that, and just make sure that it does jive
6 with reality, what's on the ground. Mr. Chair.

7 VICE CHAIR AGUIRRE: Chairman Simpson,
8 can I --

9 CHAIR SIMPSON: Please.

10 VICE CHAIR AGUIRRE: -- address that.

11 So in my review of the regulation, there is a
12 requirement for a public notice by the operator.
13 They have to submit public notice. And in there
14 is a requirement for a location map that meets
15 requirements that are spelled out in 17.24.221.

16 And in that, there is a big laundry list
17 of items that would be provided on the site map,
18 and there is a specific reference to the location
19 map in the application, but in the public notice
20 and the information that has to be provided, the
21 information that you have stated you're seeking is
22 in that laundry list.

23 So again, as several of -- I think Board
24 Member Altemus said it well, and that there's an
25 interpretation issue here. But the reality is

1 that the rule provides that requirement or that
2 opportunity already to request that information.
3 And the way that the rule references back to the
4 plan of operation maps gives DEQ already the
5 ability to -- or I should say it in the reverse --
6 the permittee being required to provide that
7 information.

8 So I kind of think that speaks to
9 several comments made by Representative Gunderson,
10 and all of the other Board members. So I guess my
11 point there is that there's already that detail in
12 the rule.

13 REPRESENTATIVE GUNDERSON: Mr. Chair, if
14 I could request Board Member Aguirre to say that
15 MCA again. I think I wrote it down wrong.

16 VICE CHAIR AGUIRRE: It was 17.24.221,
17 and --

18 CHAIR SIMPSON: That's the rule.

19 VICE CHAIR AGUIRRE: -- it's No. 3. And
20 it talks to, "Site maps must show and identify the
21 following existing and proposed features as
22 applicable."

23 The reference that I was going from,
24 Representative Gunderson, was from 17.24.228, and
25 it is (c)(ii), and it's part of the public notice

1 process, and it references back to that plan of
2 operation map section. Did I make that clear or
3 did I confuse it more?

4 CHAIR SIMPSON: If I could interrupt for
5 just a moment, Board Member Aguirre, or Vice Chair
6 Aguirre. I don't believe that a dryland permit
7 requires a plan of operation.

8 BOARD MEMBER AGUIRRE: It does not,
9 you're correct, but it still requires a location
10 map.

11 CHAIR SIMPSON: It does require a
12 location map.

13 VICE CHAIR AGUIRRE: Yes, it does, it
14 requires a location map. And there is extra
15 language in the rule already to request those
16 kinds of details. So there's already a regulatory
17 mechanism in place that doesn't, in my mind, need
18 to be tweaked in any way. But it's in the dryland
19 opencut mining permit application, it's Item (e),
20 a location map is required.

21 The level of detail for a dryland
22 opencut mining permit is as Representative
23 Gunderson reviewed and stated. It's a
24 streamlining of the process, but the regulation
25 itself provides opportunity for information.

1 CHAIR SIMPSON: Thank you.

2 Representative Gunderson. Oh, Board Member Smith.

3 BOARD MEMBER SMITH: It seems like we're
4 all talking about the same thing here, but we're
5 kind of talking in circles a little bit. I mean I
6 think when it comes down to it, we were presented
7 a case, and we saw two more cases coming down the
8 pipe on the same thing that was based on statutes
9 from a new bill, and I don't think we had the
10 information to really make a determination, but I
11 think we do now.

12 But I think part of the issue was, like
13 Representative Gunderson mentioned, that it had
14 two EA's. I'm looking at our Board materials from
15 the last meeting, and we weren't presented any of
16 that, and I think that's where the disconnect is.
17 It's not around the statutes per se, it's around
18 the information that we had to make a decision on
19 that case.

20 CHAIR SIMPSON: Thank you, Joe, and I
21 certainly agree. Representative Gunderson,
22 anything further you'd like to add?

23 REPRESENTATIVE GUNDERSON: Mr. Chair,
24 and specifically back to Board Member Smith. In
25 my comments, that is the reason that I

1 specifically pointed out that the Clearwater pit
2 has two EA's from two separate agencies, DNRC and
3 DEQ, and that data is all within those EA's, not
4 to even include the permit application.

5 At some point, I think we have to all
6 agree that this issue is being tooled up to just
7 be a "not in my back yard," or "we feel it's going
8 to be an environmental hazard." I guess the
9 question would be, is maybe to ask DEQ Opencut how
10 many opencut permits, since the opencut process
11 was initiated, have been ecological disasters that
12 are still brewing today, and I believe that that
13 number will be very, very close to zero. We're
14 not working with open pit mining. We're not even
15 working with underground mining. We're scratching
16 the surface, and recontouring it, taking out
17 gravel, and rocks, and making them into littler
18 rocks.

19 So I think we have to look at the number
20 of contentious litigation processes that have been
21 brought forth, and when they've happened, how many
22 opencut permits were questioned, let's say, ten
23 years ago, twenty years ago, and I think you'll
24 find that number just keeps increasing.

25 The actual physical possibility of

1 environmental damage isn't there and never has
2 been, and if something does happen, that's why the
3 DEQ bonds all projects, is that they take into
4 account mitigation to reclaim that ground, and
5 they'll remove the permit flat out if there is
6 damage.

7 So again, I guess I'm just going back to
8 are we bastardizing well-intended law to try to
9 stop, slow or stop opencut mining, or where it's
10 at. Mr. Chair.

11 CHAIR SIMPSON: Thank you,
12 Representative Gunderson. I think I'd like to
13 move along here. First I would ask if there are
14 any others on the call who would like to comment
15 on this matter, any public comment.

16 BOARD MEMBER REITEN: Mr. Chairman,
17 members of the Board, I just have one other
18 comment regarding all of this.

19 And to my knowledge, some of that
20 material, like the EA's that Representative
21 Gunderson talked about, should probably have been
22 in our packet, or something referring to that
23 that, "Here's the information you might need to
24 evaluate this." That's all I'd say.

25 I think that I agree with everyone's

1 statements, and especially Representative
2 Gunderson's, that there's very, very little chance
3 of environmental harm coming from some of these
4 things, but for this dryland, if they're going
5 call it dryland, you need to have the evidence to
6 show that it truly is dryland. So I'll leave it
7 at that. Thank you.

8 CHAIR SIMPSON: Thank you, Board Member
9 Reiten.

10 Well, I guess to wrap this up, I'll try
11 to be brief here. As far as -- I have to agree
12 that in terms of the potential for environmental
13 harm, gravel pits are in my mind pretty innocuous
14 compared to other kinds of development that might
15 occur. It's just a matter of digging a hole in
16 the ground, and as Representative Gunderson
17 stated, turning big rocks into little rocks.

18 Gravel, except in rare instances, is not
19 reserved as a mineral typically. It doesn't come
20 under the definition of mineral, if my
21 understanding is correct. So gravel ownership
22 goes with the surface ownership, and so it is
23 property rights, certainly a matter of property
24 rights, if the landowner chooses to develop a
25 gravel deposit.

1 My sole concern here is that in
2 instances where permit issuance by the Department
3 is petitioned to the Board, that the Board have
4 sufficient information to be able to make a
5 decision, a determination, and narrowing it down
6 even further on the question of what documentation
7 is necessary to support the decision that the
8 project is in fact a dryland, quote, end quote,
9 dryland pit under the statute and the rules.

10 I have no quarrel with the statute
11 certainly, and no quarrel with the rules per se.
12 It's just -- and I believe the Department, based
13 on the language of the statute, has the authority
14 to ask for information on hydrologic resources and
15 the number of residences that would be within a
16 half mile or whatever distance is applicable.

17 So with that, I guess I have two
18 questions for the Board. First is: At our last
19 meeting we made the decision to proceed with the
20 hearing opencut, which I think as a practical
21 matter we've just had. So is there a motion to
22 proceed or not proceed with the further hearing on
23 the opencut program in general?

24 VICE CHAIR AGUIRRE: Mr. Chairman, I'd
25 like to make a motion not to proceed with a

1 public, request for a public hearing.

2 CHAIR SIMPSON: Is there a second?

3 BOARD MEMBER ALTEMUS: I'll second.

4 CHAIR SIMPSON: It's been moved and
5 seconded not to proceed with the public hearing
6 that we contemplated at the last meeting. Is
7 there any further discussion from the Board?

8 BOARD MEMBER ALTEMUS: Mr. Chairman, I
9 guess I would like to say thank you for the
10 opportunity to have this conversation/discussion.
11 I mean I've learned a lot more than we had going
12 into the last meeting, so I feel very comfortable
13 with Vice Chair Aguirre's motion. Thank you.

14 CHAIR SIMPSON: Thank you, Julia.
15 Further comment, discussion.

16 (No response)

17 CHAIR SIMPSON: A motion has been made
18 and seconded. All in favor say aye.

19 (Response)

20 CHAIR SIMPSON: Opposed.

21 BOARD MEMBER KNUTESON: Nay.

22 CHAIR SIMPSON: Roll call vote, please.

23 MS. MOISEY-SCHERER: Chair Simpson.

24 CHAIR SIMPSON: Aye.

25 MS. MOISEY-SCHERER: Vice Chair Aguirre.

1 VICE CHAIR AGUIRRE: Aye.

2 MS. MOISEY-SCHERER: Board Member

3 Altemus.

4 BOARD MEMBER ALTEMUS: Aye.

5 MS. MOISEY-SCHERER: Board Member

6 Knuteson.

7 BOARD MEMBER KNUTESON: Nay.

8 MS. MOISEY-SCHERER: Board Member

9 Reiten.

10 BOARD MEMBER REITEN: Aye.

11 MS. MOISEY-SCHERER: Board Member Smith.

12 BOARD MEMBER SMITH: Aye.

13 CHAIR SIMPSON: Motion carries. Thank
14 you very much.

15 The next question is whether any more
16 discussion, investigation, whatever you want to
17 call it, with regard to this question of the
18 information required to support a determination
19 that a gravel operation meets the dryland
20 classification. Is there a motion whether or not
21 to proceed with the matter further?

22 VICE CHAIR AGUIRRE: Chairman Simpson, I
23 guess I feel confused by that question.

24 CHAIR SIMPSON: My question is there
25 were two questions that I had laid out for the

1 Board with respect to this. The first was the
2 question of whether we needed to proceed with a
3 full blown hearing on the regulatory program as it
4 relates to opencut in general for the information
5 of the Board, so that we could be a little better
6 educated in cases going forward. I believe we've
7 accomplished that with the package of information,
8 and the Board has agreed with that.

9 And perhaps we don't need a further
10 motion. The specific question that I had raised
11 is your analysis, and position, thoughts on the
12 informational requirements. Based on the
13 discussion and what we've heard, I guess I would
14 like to have a motion on whether or not -- yes or
15 no -- should we or should we not proceed with any
16 further discussion of the question of --
17 specifically the question of criteria for dryland
18 gravel operations.

19 VICE CHAIR AGUIRRE: Chairman Simpson, I
20 guess my thought is that -- It's not a motion as
21 much as what I think I heard, that we just want to
22 be provided with -- for a contested case, we want
23 to be provided with all of the information that we
24 need to make a decision, because we possibly
25 uncovered that we maybe -- and I don't think it is

1 a lack of desire, but --

2 CHAIR SIMPSON: Well, Vice Chair
3 Aguirre, that's my question exactly, is on this
4 particular question, I don't want to be put in a
5 position, as we have been at our last meeting
6 where we're asked to make a decision with
7 information, inadequate information.

8 And there's argument that all of the
9 information that was required under the rules was
10 provided to us. I did not agree with that
11 position. So my question is whether this Board
12 needs to examine any further the discussion that
13 we've had here today, the question of criteria,
14 the question of the criteria to be provided to the
15 Board, and by extension to the Department in their
16 consideration of an application, specifically to
17 the matter of the classification of whether an
18 opencut gravel operation is a standard permit or a
19 dryland permit.

20 Maybe I'm splitting hairs here. I don't
21 know. But I just want to be satisfied that we
22 have, either have or have not answered that
23 question.

24 BOARD MEMBER ALTEMUS: Mr. Chair -- go
25 ahead, Jon. I'm sorry.

1 BOARD MEMBER REITEN: Mr. Chairman, I
2 think we should be -- We need that information,
3 and maybe it's rather than going through a motion,
4 we just need it on an individual case. If we say,
5 if we see the packet, and see the information that
6 was provided, and it doesn't tell us what we need
7 to know, we need to ask for more. We can do it on
8 a specific case, or I would be happy to provide a
9 motion to say that we need these specific items.

10 I don't know. I'm not sure the best way
11 to proceed on this, but I think we do need to make
12 sure we get it, and maybe it's supplied in other
13 cases. I don't know if we can do it individually,
14 or do we need to have a separate thing
15 specifically asking for this information. We need
16 it. Undoubtedly we need it.

17 BOARD MEMBER ALTEMUS: Mr. Chairman, may
18 I make a comment?

19 CHAIR SIMPSON: Yes.

20 BOARD MEMBER ALTEMUS: I agree with
21 Board Member Reiten, but I think what I was going
22 to say is I think a motion right now, I'm a little
23 hesitant, because I don't want the Board to get
24 boxed into a decision, because we might say that
25 there's three or four things more that would be

1 helpful, but honestly there might be seven or
2 eight things more that are helpful.

3 I think we learned where to find
4 information, we've learned now what we need to ask
5 for, and we have that ability to do so going
6 forward. And I think everybody is on notice that
7 these need to have more information, the agencies
8 are on notice as well as we are.

9 So I would be hesitant to enter into a
10 motion right now. I just think we have enough to
11 move forward with these cases. Personally I think
12 we do. I guess that would be my comment. Thank
13 you.

14 CHAIR SIMPSON: My concern is that at
15 our last meeting we did exactly as Jon stated,
16 that is, the case came to us as a motion for
17 summary judgment, and we remanded it because the
18 information wasn't there to make the decision. As
19 a result of that remand, rather than being
20 decided, this case is now going to go forward to
21 hearing, rather than being decided on the spot.

22 And so the Board of course isn't in the
23 position of writing rules. I don't know the rule
24 is necessary here. I think probably we have made
25 our position clear to the Department, that there

1 needs to be some manner of documentation when it
2 comes to classifying an opencut operation as
3 dryland or not.

4 I guess my question was: Do we need to
5 pursue the matter further, or do we put it to bed
6 right now? And if we don't, the consensus seems
7 to be that we probably don't need a motion based
8 on the discussion. Is that a fair assessment?

9 (Nods heads)

10 CHAIR SIMPSON: How does the rest of the
11 Board feel about that?

12 BOARD MEMBER SMITH: I agree. I don't
13 think we need to make a motion right now. I think
14 we need to continue with the cases before us
15 through the normal review process, and if we need
16 more information, we'll request it at that time.

17 VICE CHAIR AGUIRRE: Agreed.

18 BOARD MEMBER REITEN: Mr. Chairman, I
19 see your point that this could potentially extend
20 the time period that we review this. That's the
21 only negative part of it. I do in general agree,
22 but I'm concerned that we might have been able to
23 deal with it right away if the right information
24 would have been there.

25 So it's hard to put a specific -- like

1 Julia Altemus mentioned -- like there might be
2 other things that come up, too. So I don't know.
3 But I think we can probably deal with it on an
4 individual basis just as well as through an
5 overall motion right now. Thank you.

6 CHAIR SIMPSON: The consensus -- and
7 again, I'm not convinced that we need a motion.
8 So I believe we have beat this dead horse
9 sufficiently. Let's put it that way. Is there
10 any disagreement with that position?

11 (No response)

12 CHAIR SIMPSON: Apparently not. Okay.
13 Well, in that case, we have made the decision not
14 to pursue the public hearing on opencut in general
15 any further.

16 So with that, let's move on. All we
17 have left is -- Under Board Chair update, I didn't
18 have anything further than the question of the
19 opencut. I did want to work through that, and I'm
20 pleased that we were able to do that. Again, I'd
21 like to thank Representative Gunderson for joining
22 us. Your comments have been very helpful in the
23 Board's deliberations. I see you have your hand
24 up, Representative Gunderson. Please proceed.

25 REPRESENTATIVE GUNDERSON: Thank you,

1 Mr. Chair, and Board members, and thank you for
2 the opportunity to help educate you on HB599 and
3 the opencut process. And I would like to extend
4 that if you do ever have any questions or need
5 clarifications from the legislative side, that I'm
6 always available. Mr. Chair.

7 CHAIR SIMPSON: Thank you very much for
8 your help once again. Thanks for joining us this
9 morning, and your time.

10 Proceeding forward, the only remaining
11 item on the agenda other than adjournment is
12 general public comment on matters within the
13 jurisdiction of the Board that were on today's
14 agenda and are not related to any contested cases.
15 Is there any general public comment?

16 (No response)

17 MS. MOISEY-SCHERER: I'm not seeing any
18 hands, sir.

19 CHAIR SIMPSON: Hearing none, is there a
20 motion to adjourn.

21 BOARD MEMBER SMITH: So moved.

22 BOARD MEMBER ALTEMUS: I'll second.

23 CHAIR SIMPSON: It's been moved and
24 seconded to adjourn this meeting of the Board of
25 Environmental Review. Thank you very much,

1 everyone. I appreciate all of your participation
2 and comment today. We'll see you in a couple
3 months.

4 BOARD MEMBER ALTEMUS: Do we need a
5 motion to adjourn? We did. I'm sorry.

6 CHAIR SIMPSON: We have a motion, but we
7 need a vote. All in favor say aye.

8 BOARD MEMBER ALTEMUS: Oh, that's what
9 we need. Thank you. Sorry.

10 (Response)

11 CHAIR SIMPSON: Sorry. I got off track
12 as usual.

13 BOARD MEMBER ALTEMUS: Me, too.

14 CHAIR SIMPSON: Thank you again,
15 everyone.

16 (The proceedings were concluded
17 at 11:12 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 -73- 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 24th day of
June , 2024.

Laurie Crutcher

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

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