

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: DECKER COAL) CASE NO.
COMPANY'S REQUEST FOR HEARING) BER 2025-01 SM
REGARDING PERMIT C1987001C)
(WEST DECKER MINE) AND PERMIT)
C1983007 (EAST DECKER MINE))

TRANSCRIPT OF PROCEEDINGS (VIA ZOOM)
REQUEST FOR HEARING

April 11, 2025

9:40 a.m.

BEFORE CHAIRMAN DAVID SIMPSON,
BOARD MEMBERS JOSEPH SMITH,
JULIA ALTEMUS, JENNIFER RANKOSKY,
and AMANDA KNUTESON

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1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 (Board Member Knuteson not present)

5 CHAIR SIMPSON: Let's move on. We have
6 two cases, two new cases, actually intertwined
7 cases, having to do with Appeal of the Notice of
8 Violation issued to Decker Coal Company, and
9 the second having to do with the Department order
10 to revise the permit.

11 These issues are rather intertwined and
12 complex. I spent a lot of time this week going
13 through all of it to try to come up with a
14 rational way to approach it. Ordinarily this
15 would just be a question of whether we retain
16 jurisdiction or assign it to a Hearing Examiner,
17 but this is a little bit more involved.

18 First I would ask -- We're also being
19 asked --

20 COURT REPORTER: Could I interrupt? I
21 don't believe Ms. Knuteson is on the call.

22 MS. MOISEY-SCHERER: I'm not seeing her.
23 This is Sandy. I'm not seeing her.

24 CHAIR SIMPSON: She's not returned yet.

25 MS. OOMENS: Do we want to maybe take a

1 quick five, ten minute break while we figure that
2 Out? Because I do think we need her to make --

3 CHAIR SIMPSON: I believe we do, too. I
4 was just going to try calling her. And it will be
5 time to take a break pretty soon anyway, so why I
6 don't I try calling her. Why don't we reconvene
7 in say ten minutes. Ten minutes would be 9:53.
8 Let's just say five minutes to ten let's
9 reconvene. And in the meantime I'll try calling
10 her and see if we can't get her back on the call.

11 (Board Member Knuteson present)

12 BOARD MEMBER KNUTESON: Sorry about
13 that. I have no idea. It completely cut out, and
14 I had to restart everything, so I'm sorry if you
15 stalled everything for me, but I'm here.

16 CHAIR SIMPSON: Thank you very much.

17 BOARD MEMBER KNUTESON: I don't know
18 what it was. Sorry about that.

19 CHAIR SIMPSON: We were just about to
20 take a break, but let's continue for a few minutes
21 and take a break here about ten.

22 Anyway, I'm not sure how much of the
23 intro that you were here for, Amanda, but we have
24 two appeals here having to do with the Decker Coal
25 Company's mine permits. And I spent a lot of time

5
1 on this trying to get a handle on what's the best
2 way to approach it.

3 The way I'd like to start here is to ask
4 representatives of Decker Coal and DEQ to present
5 to the Board their view of what these cases are
6 about. Is there a representative from Decker Coal
7 on the call?

8 MS. MOISEY-SCHERER: Chair Simpson,
9 Vicki Marquis is the representative, and she has
10 been promoted to speak.

11 MS. MARQUIS: Hi. Good morning. I'm
12 Vicki Marquis representing Decker Coal on both of
13 the matters.

14 CHAIR SIMPSON: Thank you. Sorry. The
15 way my screen is set up, I couldn't see that you
16 were on the call.

17 MS. MARQUIS: I am here.

18 CHAIR SIMPSON: Please proceed.

19 MS. MARQUIS: Yes. Thank you for
20 opportunity.

21 As you noticed in the materials, Decker
22 Coal first filed an appeal of both of these
23 actions. It was filed by Tay Tonozzi with Decker
24 Coals' parent company, Lighthouse Resources.

25 I was retained after that, and updated

1 those filings by requesting that the Board
2 separate those into two appeals because they do
3 involve two separate permits, and two separate
4 actions by the Department of Environmental
5 Quality.

6 The first is at the East Decker coal
7 mine, and that involves, as you noted, a notice of
8 noncompliance and order of abatement. That is one
9 issue that is appealed by the East Decker permit.

10 This second issue involves the permit at
11 the West Decker Coal mine, and that issue is an
12 order to revise the permit, and that's a separate
13 appeal.

14 An additional issue on the East Decker
15 appeal is because that was a Notice of
16 Noncompliance with an Order of Abatement, and the
17 appeal for compliance ran within thirty days,
18 which was the appeal period, and then was
19 subsequently extended by the Department to the end
20 of April.

21 Once that abatement period expires, it
22 seems likely that the Department intends to take
23 additional enforcement actions or that is a
24 possibility. And so the additional filing you
25 have before you on East Decker is a motion to

7

1 suspend the abatement requirements, and that
2 appears at Page 61.

3 That's our brief in support -- the
4 motion is actually a couple pages ahead of that --
5 but our arguments are outlined beginning at Page
6 61. I can go through those for you now. I don't
7 know if that's what you wish, or if you just want
8 some background information now. I'm happy to do
9 either, or simply answer your questions, whatever
10 you prefer.

11 But our thought process was -- and you
12 see this in the affidavits provided by Matt Gupta
13 and Tay Tonozzi that is attached to our motion to
14 suspend the abatement requirements -- that any
15 further enforcement action is improper while this
16 appeal is pending.

17 The Board has authority to suspend those
18 abatement requirements, and without suspending the
19 abatement requirements, there is some real harm
20 that could occur to Decker Coal in terms of other
21 actions that will adversely impact their ability
22 to do reclamation.

23 So those are the documents ahead of you
24 today. We have asked in the motion to suspend the
25 abatement requirements that if the Board cannot

1 decide whether to suspend those during the entire
2 pendency of this case, that we at least suspend
3 those while they're deciding the motion, so that
4 that April 29th deadline does not take effect.

5 So again, I'm happy to go through all of
6 our arguments, or provide background information
7 on both cases, or simply answer whatever questions
8 you might have.

9 CHAIR SIMPSON: Before moving on, if I
10 could ask a question, Ms. Marquis.

11 Is the Board being asked to separate
12 these cases, or has that been accomplished with
13 your filings?

14 MS. MARQUIS: My assumption is that it
15 has been accomplished with our filings. There are
16 two case numbers assigned, one for West Decker and
17 one for East Decker.

18 CHAIR SIMPSON: Thank you. Is there
19 anyone from the Department that would like to
20 comment on this at this point?

21 MR. KING: Yes. Thank you, Board Chair
22 Simpson and Board Members. Sam King for DEQ.
23 I'll be representing DEQ, together with Jeremiah
24 Langston.

25 In these cases, I agree with Ms. Marquis

1 about her assessment of what these cases are
2 about. The Department is also in agreement that
3 the matter should probably be held separate. As
4 she mentioned, they are separate permits. And
5 even though they're both run by Decker Coal
6 Company, they are at different stages in DEQ's
7 enforcement action, and they do concern distinct
8 issues.

9 I don't think it is appropriate for this
10 Board to get ahead of itself, and issue any stay
11 or suspend any order. DEQ has not yet filed its
12 brief in response to Ms. Marquis's motion to
13 suspend on the East Decker site. We do intend to
14 file that response today.

15 You will see our arguments in response
16 to her request, but if you would like a quick
17 summary of our position, essentially it's that
18 there isn't any statutory regulatory authority --
19 respectfully -- to this Board that it has to
20 suspend any violation order that's been issued by
21 the Department.

22 And the other thing I'd like to point
23 out, the only thing the Agency has asked of Decker
24 is to submit an updated reclamation plan, which is
25 in their best interests because Decker has

1 indicated to the agency that -- several factors
2 for the Board's consideration.

3 But one, Decker is not mining coal
4 anymore. They're just in the reclamation phase.
5 They've ceased many mining operations.

6 So the question now is they need to get
7 these sites reclaimed. They have failed to adhere
8 to their reclamation schedule, and because they've
9 failed to adhere to their reclamation schedule as
10 previously approved by the Agency, you need to
11 then get new approval from DEQ on a new
12 reclamation plan, because if you don't have that,
13 if you don't have an enforceable timeline, you
14 have to complete backfilling and grading within
15 two years of cessation.

16 Because they're out of whack with what
17 they previously stated to the Department they
18 would do, they just need to give us new
19 information that we can then approve, and
20 therefore they'll be in compliance.

21 And that's also to their benefit because
22 Lighthouse moved to reopen its own bankruptcy
23 case. The sureties that have posted the
24 performance bond have represented that they aren't
25 going to give DEQ any more money to complete

1 reclamation, which is problematic to them because
2 Decker is going to rely on bond release to
3 continue to move forward with reclamation.

4 DEQ cannot process any bond release
5 applications if it doesn't have an enforceable
6 reclamation plan from which it can measure what it
7 has accomplished in purposes of reclamation.

8 So much has been made about this Notice
9 of Noncompliance and Order of Abatement, but
10 really all we're requesting is to abate the
11 violation by giving us an updated reclamation
12 plan. If they do that, that's in their interests.

13 And even if they didn't, hypothetically
14 let's say they didn't do that by the end of the
15 month, the Agency is required to then place them
16 in the Applicant Violator System.

17 But that isn't actually of any harm to
18 Decker, and it doesn't relieve them of their
19 reclamation obligations, because an AVS system
20 only is effective if there is some existing permit
21 application that you're awaiting for approval
22 from. They don't have any existing permit
23 application in either Montana or at their separate
24 mine in Wyoming that would hold up anything.
25 And as soon as they were to actually submit an

12
1 updated reclamation plan, then they would be taken
2 off that AVS system.

3 So one, there isn't any harm to Decker;
4 and secondly, as you'll see in the brief that we
5 file later today, the Board has specific
6 obligations that are laid out to it in statute and
7 regulation. The statutes that Decker cites do not
8 grant the Board the authority to suspend DEQ's
9 order, and neither does the regulation, and Decker
10 sites ARM 17.24.425(3), but that only applies to
11 issuances of permits. It does not apply to
12 issuances of violations. So that's our position.

13 CHAIR SIMPSON: I have one question, if
14 I could. As a result of this violation, is there
15 a definable environmental harm?

16 MR. KING: No, not at this moment that
17 I'm aware of. The violation is with respect to
18 not having an enforceable reclamation plan that
19 permits reclamation beyond this two year time
20 period that has been approved, because the
21 previously approved reclamation plan stated that
22 basically you can only exceed this two year time
23 frame if you get approval from the Department to
24 do so.

25 DEQ previously granted that approval.

1 Decker didn't follow its own reclamation plan, and
2 so therefore all of the other dates throughout its
3 reclamation plan are now inconsistent with DEQ's
4 previous approval.

5 All we're asking of Decker is to
6 resubmit new information, so that we can give them
7 approval, and therefore they're not out of
8 compliance with either ARM 17.24.313, which lays
9 out a majority of the reclamation plan
10 requirements, or ARM 17.24.501(6)(d), which states
11 that you need DEQ's authorization to complete
12 backfilling and regrading on a time period beyond
13 two years.

14 So that's all we're asking. It's not a
15 heavy ask.

16 CHAIR SIMPSON: Thank you, Mr. King.
17 Ms. Marquis, would you care to respond.

18 MS. MARQUIS: Yes. Thank you, Board
19 Chair. A couple things.

20 First of all, it appears that the
21 Department's argument hinges on accepting that
22 Decker is in violation of their reclamation plan,
23 which is not true at all. Our argument is that we
24 are in compliance with the reclamation plan. In
25 fact, Decker moved more material last year than we

1 were required to. We are ahead of schedule on the
2 reclamation plan.

3 What this comes down to is DEQ seems to
4 be asking for or requiring some very detailed
5 nuances in the reclamation plan that are beyond
6 their authority. And what I heard today from Sam
7 King with the description of the violation, that's
8 a little bit different than what appears in the
9 Notice of Noncompliance.

10 The Notice of Noncompliance indicates
11 that the violation is because Decker moved
12 material with their draglines and dozers, which is
13 very efficient and less expensive, instead of
14 using a truck and shovel fleet. That doesn't mean
15 that Decker didn't do reclamation. In fact,
16 Decker was able to do more reclamation using their
17 dragline and dozer as opposed to a truck and
18 shovel fleet.

19 But what I heard today was that DEQ
20 doesn't have an enforceable reclamation plan for
21 some reason. I don't understand how that can be
22 when they've had an approved reclamation plan that
23 has been updated regularly with the Department.
24 So we do have an enforceable reclamation plan with
25 milestones that are clear, and specific volume

1 requirements for the amount of material that has
2 to be moved.

3 As you're probably aware or can imagine,
4 the bulk of the reclamation is backfilling these
5 deep pits that are dug when the coal is removed.
6 So the bulk of the reclamation at this point is
7 backfilling those deep pits, and that's measured
8 by keeping track of the volume of material that is
9 moved into the pits. Decker is ahead of schedule
10 in terms of moving that material.

11 I also heard the Department talk about
12 the sureties, and Decker's reliance on bond
13 releases. Those are irrelevant to the matters
14 before you, except to the extent that further
15 enforcement is certainly going to damage Decker's
16 ability to work with their sureties, and it is
17 going to damage the ability of Decker to pursue
18 permitting in Wyoming that would generate revenue
19 that then can help fund reclamation in Montana.

20 And listing in the AVS is actually a big
21 threat to Decker. I don't know that anybody likes
22 to be listed on any list of a violator, a violator
23 system. It's not helpful for anyone, and it
24 assumes that a violation occurred, where in this
25 case a violation hasn't occurred.

1 And that's the ultimate question in
2 front of this Board is: Was there a violation
3 that supports the Notice of Noncompliance that was
4 issued by DEQ? Our position is no. We're ahead
5 of schedule in terms of reclamation. There's been
6 no violation.

7 And in terms of ordering a suspension of
8 the abatement requirements, we cited to a statute
9 in law, and that citation is to Section 82-4-254
10 Subparagraph (1)(c), and that statute says, quote,
11 "The period permitted for correction of a
12 violation does not, in the case of any review
13 proceeding under 82-4-251(6), end until entry of a
14 final order suspending the abatement
15 requirements," end quote.

16 Within that it cites to this Section
17 82-4-251 Subparagraph (6). That is the statute
18 that gives Decker the ability to appeal the Order
19 of Abatement to this Board. So this violation is
20 proceeding for review pursuant to that statute.
21 So the statute applies, and it says that the
22 period of time permitted to correct a violation
23 doesn't expire until the Board has issued an order
24 suspending the abatement requirements.

25 That clearly implies that you have

17
1 authority to do that, to order suspension of the
2 abatement requirements, and that while you're
3 considering whether or not to order suspension,
4 that the period allowed for Decker in this case to
5 correct a violation does not expire.

6 That's all we're asking of the Board at
7 this point is to make a determination before the
8 end of this month, before the April 29th deadline
9 from DEQ kicks in, that if the period of time to
10 correct the violation doesn't expire, and then
11 asking the Board to issue an order suspending the
12 abatement requirements pending determination of
13 this case which will determine the issue of
14 whether or not a violation has occurred that
15 supports DEQ's Notice of Noncompliance.

16 Thank you for your time on this, and
17 again, I'm available for whatever questions you
18 might have.

19 CHAIR SIMPSON: Thank you very much, Ms.
20 Marquis.

21 MR. KING: Board Chair Simpson.

22 CHAIR SIMPSON: Yes, Mr. King.

23 MR. KING: May I respond just briefly
24 here?

25 CHAIR SIMPSON: Certainly.

1 MR. KING: Thank you. A couple things.
2 So DEQ hasn't received any update to their
3 existing reclamation plan since 2022. Decker
4 cites to their revegetation plan as supposedly
5 being the entire reclamation plan update, and
6 that's not accurate.

7 A revegetation plan is in ARM
8 17.24.313(8). If you look at the Notice of
9 Noncompliance and Order of Abatement, it does not
10 cite anything to do with revegetation. DEQ
11 doesn't have a problem with their revegetation
12 plan. It has a problem with a host of a bunch of
13 other issues in their reclamation plan.

14 So I want to be really clear that that
15 is not the reclamation plan, that is not the
16 updated reclamation plan. It doesn't have
17 anything to do with the violation.

18 The other thing I'd like to point out is
19 Decker talks about, "Well, we're actually ahead of
20 schedule because we moved more material than
21 previously anticipated with the dragline." DEQ
22 isn't faulting them for moving more material with
23 a dragline.

24 The problem is in their reclamation plan
25 they commit to also deploying truck and shovel

1 fleets repeatedly, and then made repeated
2 representations that they were going to follow
3 that commitment. They never did that. And just
4 because you've decided on one hand to move more
5 material with a dragline doesn't excuse you from
6 complying with the other components of the plan.

7 And further Decker is just missing the
8 point here. The point is even if you're ahead of
9 schedule for backfilling, you're still beyond the
10 two year time commitment. So if you're ahead of
11 schedule, then you're also ahead of schedule with
12 when you need to do all of your other reclamation
13 plan commitments.

14 And because you're ahead of schedule
15 with all of your other reclamation plan
16 commitments, we still need an updated reclamation
17 plan to explain when those things are going to
18 occur. So that is the basis for the violation.
19 We just need this new information.

20 I want to also talk about Ms. Marquis's
21 reference to 254(1)(c). Based on her reading of
22 this provision, it would basically contradict
23 directly the language in 251(6), which says just
24 because you filed an appeal before this Board, it
25 explicitly states it does not stay any of DEQ's

1 orders.

2 And so basically Decker is arguing that
3 254(1)(c) provides an exception to 251(6). That
4 doesn't make any sense, and it doesn't make any
5 sense because 254(1)(c), what that provision is
6 actually stating is that you aren't off the hook
7 as a violator to comply just because you filed an
8 appeal.

9 What it's saying is until you have a
10 final order -- and I want to emphasize that word
11 final order, not a temporary order -- until you
12 have a final order from a Board, or a District
13 Court if you choose to appeal that, then you need
14 to comply with the Agency's order that it issued.
15 And if you don't, then the penalties are going to
16 keep running because that's what Section 251 talks
17 about is getting penalties for failing to abate
18 violations.

19 In fact it doesn't mention the Board at
20 all, or authority where the Board can just jump in
21 and issue a stay. And I think that's an important
22 consideration here, because again, with all due
23 respect, the Board is very important -- very
24 grateful for its ability to hear these complex
25 contested cases -- but the Board, just like DEQ,

1 is a creature of statute.

2 It is not blessed with all the authority
3 of, say, a District Court, and there's extensive
4 case law on this topic where it can grant relief
5 in equity by just issuing stays or doing things
6 like that. So unless that authority is explicitly
7 spelled out to the Board, then it would be
8 exceeding its jurisdiction to go ahead and
9 intervene and issue an order that it doesn't have
10 authority to issue.

11 And I think that's important. So
12 basically what Decker is inviting this Board to do
13 is reversible error. But again, I urge the Board
14 to at the least not make a decision until we've
15 had an opportunity to submit our brief. Decker
16 will certainly have an opportunity to reply.

17 But certainly the easiest way for this
18 case to resolve, in the best instance that I've
19 explained to Ms. Marquis before, which is in
20 Decker's best interest, is just get us an updated
21 enforceable reclamation plan that mirrors the past
22 reclamation plan with updated timelines. That's
23 really all we're asking.

24 They previously did that. They haven't
25 adhered to it. We just need a new one. It's a

1 simple fix. Thank you.

2 CHAIR SIMPSON: Mr. King, has there been
3 a penalty assessment on this violation?

4 MR. KING: At this juncture, no, Chair
5 Simpson, because we actually were surprised that
6 we did receive this amount of push-back.

7 I'd also like to note I did talk to
8 Counsel for Zurich, which is one of the primary --
9 provided the primary surety bond in this case.
10 They've also indicated to me that they are
11 expecting enforceable benchmarks for Decker to
12 adhere to if they're going to continue to provide
13 any sort of further support to Decker in
14 furtherance of their reclamation obligations.

15 And I do want to also just briefly point
16 out that an AVS, just because you're listed in an
17 AVS doesn't mean that there's necessarily
18 irreparable harm that's affiliated with this.
19 Decker hasn't pointed to any specific permit
20 pending, and they certainly don't have one in
21 Montana, so there could only be one in Wyoming.
22 There isn't any permit pending in Wyoming.

23 So just because you're listed on the AVS
24 until you get us the information that we've asked
25 for doesn't actually do anything negative for them

1 in practice. And as soon as they get us that
2 information and comply with the request, they're
3 off the AVS, so --

4 MS. MARQUIS: Decker objects to the
5 Department's continuing representation of what
6 third parties may say or may feel, including the
7 sureties in this action. Those parties aren't
8 here to speak for themselves. It's improper for
9 the Department to raise those issues as if they
10 speak for those third parties.

11 Additionally, Decker objects to the
12 Department's representations of what's in Decker's
13 best interests. I don't think the Department is
14 qualified to say that.

15 CHAIR SIMPSON: Thank you very much, Mr.
16 King, Ms. Marquis. Before we start Board
17 deliberation on this, why we don't take a ten
18 minute break, come back at twenty minutes after
19 ten.

20 (Recess taken)

21 CHAIR SIMPSON: Sandy, are we ready to
22 continue?

23 MS. MOISEY-SCHERER: Yes, sir.

24 CHAIR SIMPSON: Would you please call
25 the roll.

1 MS. MOISEY-SCHERER: Yes, sir. Chair
2 Simpson.

3 CHAIR SIMPSON: Here.

4 MS. MOISEY-SCHERER: Board Member
5 Altemus.

6 BOARD MEMBER ALTEMUS: Here.

7 MS. MOISEY-SCHERER: Board Member
8 Knuteson.

9 BOARD MEMBER KNUTESON: Here.

10 MS. MOISEY-SCHERER: Board Member
11 Rankosky.

12 BOARD MEMBER RANKOSKY: I'm here.

13 MS. MOISEY-SCHERER: Board Member Smith.

14 BOARD MEMBER SMITH: Here.

15 MS. MOISEY-SCHERER: We have a quorum,
16 sir.

17 CHAIR SIMPSON: Thank you. And when we
18 opened the meeting, I neglected to ask you to let
19 us know who else was participating in the meeting,
20 who else was present for the meeting. Catch up
21 with that, please.

22 MS. MOISEY-SCHERER: We have Terisa
23 Oomens, Board attorney; Sam King, DEQ Counsel;
24 Deputy Director James Fehr; Vicki Marquis, Counsel
25 for Crowley Fleck; Catherine Armstrong, DEQ;

1 CBA696; David Wilson; Elena Hagen, Agency Legal
2 Services; Emma Gronda, DEQ; Eric Dahlgren, DEQ;
3 Josh Bridgeman; Laurie; Matt Gupta; Mike Glenn;
4 S. Temple; Samuel Yemington; Director Sonia
5 Nowakowsky of DEQ; and Nick Whitaker, DEQ.

6 CHAIR SIMPSON: Thank you. Let's
7 proceed. I guess I'd like to start off the
8 discussion by just noting that as I noted earlier,
9 I've spent a quite bit of time going through the
10 filings on these Decker cases. I'm not sure if
11 I'm cursed or blessed by having considerable
12 knowledge about the issues here by having spent
13 forty years in coal mine permitting, so I think I
14 have a little bit of an idea of what's going on.

15 I guess my reaction was that I was more
16 than a little frustrated, thinking that it really
17 didn't have to get to this point, particularly on
18 these orders. The violation, that's another
19 issue.

20 But on the orders, I'm kind of surprised
21 that, one, that Decker would not have updated
22 their reclamation plans when they notified the
23 Department that they were going to cease mining.
24 Maybe they did, maybe they didn't. I don't know,
25 but it appears not. And secondly that if they did

1 not, then that the Department didn't require them
2 to do so.

3 So I don't know what the history is
4 there. It's probably irrelevant at this point.
5 But normally this is when I would ask for a motion
6 to consider whether the Board ought to retain
7 jurisdiction or whether we ought to assign this to
8 a Hearing Examiner.

9 However, in order to guide the
10 discussion, I'd like to go through my suggestion
11 at this point for how we deal with this, and I
12 would like to discuss it with the Board, and also
13 seek advice from our Counsel as to whether this is
14 permissible for us to do. We've already -- we
15 don't have to deal with the question of whether to
16 separate East and West Decker. That's been done.

17 So with respect to East Decker and the
18 Notice of Noncompliance, my suggestion would be to
19 separate the violation per se from the abatement
20 order, and assign the violation to ALS -- we're
21 certainly not prepared to litigate the matters of
22 this violation at this Board meeting. We've had a
23 lot of arguments back and forth on that -- and for
24 the Board to assume jurisdiction over the
25 abatement order, and then to stay that abatement

1 order until the June 13th BER meeting.

2 Also assume jurisdiction over the West
3 Decker order to revise Permit C1987001C, to stay
4 the order for the permit until the June 13th BER
5 meeting.

6 And issue an order to the parties for
7 mandatory settlement negotiations on the matters
8 contained in these orders to begin as soon as
9 possible to review at the June 13th Board meeting
10 where the question of what the status of those
11 Board orders would be going forward.

12 My concern, first concern, is that the
13 reclamation of these mines be completed in an
14 orderly fashion. I think I would speak for the
15 Board in that regard. We can certainly discuss
16 that.

17 As I said, I think we need to take a
18 step backwards and see if we can't settle these
19 matters. I think from my own standpoint, based on
20 my experience in the coal mining industry, I can
21 agree that what we need to see here is for each
22 mine, that is for East Decker and for West Decker,
23 a reclamation plan going forward with definition
24 of the yards of the material to be moved, both
25 spoil and soil; the acreage to be reclaimed; and

1 then milestones along the way to measure progress.

2 Also one of the issues I think
3 identified in both of these orders, at least one,
4 was reclamation facilities. That's a little bit
5 of a negative, but that's a separate issue, and
6 may or may not involve a lot of earth moving, but
7 certainly dismantling or demolition of facilities,
8 removal from the site, etc., is a significant
9 undertaking as well.

10 But that is in a nutshell conceptually
11 what I think would be a reasonable approach here.
12 I guess I'd like to start by inviting comment from
13 the Board. Any thoughts?

14 BOARD MEMBER ALTEMUS: Board Chair
15 Simpson, Julia Altemus. I'm going to defer to
16 your expertise. This is not my wheelhouse. But I
17 would like to hear from our Board attorney for one
18 thing.

19 But I do agree that I was a little
20 surprised that it got to this level. I don't
21 think it had to go to this level. So whatever we
22 can do to move it along faster, so that we don't
23 have this outstanding for the next five years.

24 CHAIR SIMPSON: Thank you, Julia. And I
25 guess I would comment that the reason that is

1 driving the suggestion is that I'm afraid that if
2 we just follow our normal process, and whether
3 jurisdiction is assumed by the Board or assigned
4 to a Hearing Examiner, that reclamation operations
5 will cease while all this plays out, and that to
6 me is not an acceptable result. We need to keep
7 the process moving. And given our experience with
8 contested cases, we know how long they can take to
9 resolve. Further thoughts?

10 BOARD MEMBER KNUTESON: Chair Simpson,
11 Amanda here. I also would defer to your expertise
12 in this. You have a very relevant background.

13 I would just comment that reading
14 through everything, and seeing the allegations of
15 regulatory overreach, and sort of inside abuses of
16 discretion, and DEQ's assertions, and not having
17 the benefit of DEQ's brief, leaves us in the
18 position I think of not having quite enough
19 information, even though we've had the benefit of
20 Mr. King sort of summarizing what their position
21 would be.

22 And in this area in particular, because
23 it is so technical, and so industry specific, I
24 mean I saw, you know, the allegation that there
25 aren't specific regulations that enable the Agency

1 to require what they're requiring. That sort of
2 discussion I think is difficult for us to have,
3 and in my experience with the Agency, this is
4 exactly where they have very broad discretion, and
5 they enjoy a lot of deference.

6 So again, I would defer to you, and I
7 wouldn't want to make a decision today that stalls
8 all remediation efforts. So if you can come up
9 with a compromise there, have our Counsel advise
10 as to what we could do that would keep action
11 moving forward, and give us the benefit of seeing
12 DEQ's brief as soon as that's available, I would
13 appreciate that.

14 CHAIR SIMPSON: Thank you very much,
15 Amanda. And I guess I would further comment that
16 the fact that we have not yet seen the DEQ's brief
17 is -- Well, I would argue for deferring action in
18 some way, and undertaking settlement discussions I
19 think is perhaps the proper way to do that.
20 Terisa, what are your thoughts on this?

21 MS. OOMENS: I guess I'll start this by
22 saying that I spent quite a bit of time in the
23 last couple days trying to differentiate for
24 myself the difference between 251(6) and
25 254(1)(c), which both parties seem to be reading

1 very differently.

2 And so if I understood what you said
3 correctly, the violation would be put to a Hearing
4 Examiner, i.e. me, and the abatement would be kept
5 by the Board; is that kind of the motion we're
6 operating under right now?

7 CHAIR SIMPSON: That's correct.

8 MS. OOMENS: So if I'm reading these
9 statutes correctly, the violation, which is then
10 going to be given to a Hearing Examiner, would be
11 under 254, and the abatement would be under 251.
12 I'm open to discussion about that, but that's kind
13 of how I'm reading the statute at this point.

14 Which would mean that the abatement, the
15 filing of the application for review, which is now
16 put in front of the Board, doesn't operate as a
17 stay, but the Board shall make findings of fact,
18 and issue a written decision incorporating an
19 order either vacating, affirming, modifying, or
20 terminating that Order of Abatement.

21 So the way I read that statute, the
22 Board has authority to modify the abatement order
23 by DEQ, and if that modification is to stay the
24 order pending or put it on hold pending a BER
25 decision, I think that the statute allows for

1 that.

2 Again, I'm open to discussion, or if I
3 said that in a weird way that you didn't
4 understand, I'm open to trying it a different way,
5 but that's my take on the statutes.

6 CHAIR SIMPSON: Thank you very much.
7 That's very helpful. We're not talking about an
8 indefinite stay. Thirty days is not a long time
9 to make significant revisions to a reclamation
10 plan, especially for an area the size of Decker
11 mine.

12 Just as an aside, I did go on to Google
13 Earth and take a look at the latest aerial
14 photography from the Decker Mine area, and there's
15 obviously been some reclamation in progress there,
16 but there's quite a bit of area involved, and
17 quite a bit more dirt to move.

18 So Decker mine has been operating for
19 more than fifty years. I don't recall exactly
20 what year they started. I think it was in
21 probably the late '60s sometime. But it's going
22 to take -- it's going to take more than a wave of
23 the wand to complete the reclamation down there.
24 It's going to take awhile.

25 So I think there needs to be a

1 reasonable attainable schedule developed as a
2 commitment to get the work done, and I think
3 that's what we're all talking about here. I think
4 it's a question of how we get there. So further
5 comment and discussion from the Board. Thank you,
6 Terisa.

7 (No response)

8 CHAIR SIMPSON: Further comment?
9 Discussion?

10 (No response)

11 CHAIR SIMPSON: If we move forward with
12 the plan that I just outlined --

13 MR. KING: Board Chair Simpson, this is
14 Sam King again. May I have just a brief
15 opportunity here before a motion is made? I just
16 want to make sure that it's clear on the record.

17 Again, it is DEQ's position that you
18 need to read 254 and 251 in conjunction with one
19 another. If you're looking at 254, it explicitly
20 states that just because you've made a petition
21 for review before the Board, it does not operate
22 as a stay of an order.

23 251 speaks to penalties that are
24 accrued, and says, "The period permitted for
25 correction of the violation does not, in the case

1 of any review proceeding under 251, end until
2 entry of a final order suspending the abatement
3 requirements, or until entry of an order of the
4 Court ordering suspension of the abatement
5 requirements."

6 You have to read those two sections in
7 harmony. And 254 is stating, what it's stating
8 really is that until there is a final order
9 suspending the abatement requirements, then the
10 violator still needs to comply with that order.

11 So what that means is, in reading that
12 in connection with 254, is the petition for review
13 doesn't stay that obligation, and that obligation
14 continues unless and until you get the final
15 order. It does not operate as an opportunity for
16 this Court to grant temporary relief.

17 The only way, the only instances where
18 temporary relief can be granted by this Board are
19 with respect to ARM 17.24.425(3), and that
20 provision only applies to certain instances where,
21 say, DEQ grants or denies a permit. It does not
22 apply to instances where a violation has been
23 issued.

24 So I just want to make that really clear
25 for the record because it sounds like the Board is

1 about to stay DEQ's order, and again, that would
2 be beyond the authority of this Board.

3 I recognize that the Board wants to get
4 this site reclaimed, and certainly that is our
5 interest as well, but that's what spurred this
6 violation and order to abate in the first
7 instance.

8 I also want to make clear this violation
9 was issued back in January. We extended that.
10 It's been ninety days. All Decker had to do was
11 start submitting information to the Department so
12 it could further extend that time period.

13 But if the Board is going to exercise in
14 what DEQ believes is authority it doesn't have by
15 ordering a stay of DEQ's order, then my request
16 then is that I receive a written order, because if
17 that's the case, I do intend to appeal that
18 interlocutory order to a District Court for a
19 determination on that specific issue.

20 So just before a motion is made, that
21 is, please and thanks, that's my request is that
22 it be written.

23 CHAIR SIMPSON: Mr. King, I understand
24 your position, and I think it's something for the
25 Board to take into consideration. I guess I would

1 ask you. I guess what I see is the way things
2 have evolved or devolved here, we've created a
3 situation where there is a tight timeline for what
4 it appears to me to be significant and major
5 changes in the reclamation plan, which may or may
6 not be achievable in the time frame allowed.

7 And as a practical matter, I think it's
8 in all of our interests to get these reclamation
9 plans revised in short order, and get moving on
10 their implementation. And if we don't have the
11 option of going into settlement negotiations, that
12 it creates an untenable situation, at least it
13 appears to. So how do we keep the work going?

14 MR. KING: Chair Simpson, just to
15 respond to that. One, we're expecting that the
16 work does continue. In fact if the work were to
17 cease, we would issue additional violations, and
18 we will issue additional violations.

19 If you look at the Notice of
20 Noncompliance -- and this seems to address your
21 question, and I recognize that there's presumably
22 what Decker believes to be factual issues that
23 they would like to address in this proceeding -- a
24 long history of broken promises of where, "We're
25 going to deploy this truck and shovel fleet.

1 We're going to begin doing soil lay down and
2 reseeding," and these things never occurred.

3 And DEQ has been doing this, dealing
4 with this for years and years to no avail. And
5 we're at the position now that we need to make
6 sure, one, that we hold adequate -- we need to
7 make sure, one, as is we're obligated to do, that
8 we have adequate bond held.

9 And right now if Decker isn't going to
10 proceed on the timeline that it proceeds on, then
11 they're going to fall farther and farther behind
12 on bond, because we're going to have to keep up
13 with inflationary costs, we have to do bond
14 recalculation.

15 And if they can't meet these
16 recalculation costs, then we're going to have to
17 proceed to forfeiture, because DEQ has to make
18 sure that it has enough bond to hold if Decker
19 walks away.

20 And so the only way to do that is to
21 make sure we have an enforceable reclamation plan
22 that makes sure they're hitting these benchmarks
23 moving forward.

24 And so to me, happy to engage in
25 settlement discussions. I'm surprised we've

1 gotten such push-back in this instance for what
2 isn't really a heavy ask, in my view. Basically
3 it's just updated time frames and commitments for
4 when they're going to do what they originally said
5 they were going to do.

6 And I do understand where the Board is
7 coming from with respect to, "Here we are, and
8 what are we going to do if we can't stay the
9 Department's order?" I mean to me, my thought is
10 then that's a signal to Decker that "If I don't
11 want to obtain any violations --" which I will
12 note they will have the opportunity to appeal
13 those as well -- then it's a signal to them they
14 should probably get us the information that we
15 need, which makes sure that we're covered, and
16 they're covered, and that the work is getting
17 done.

18 But otherwise I think it's just, you
19 know, they've delayed, and they've delayed, and
20 they've delayed, this is just -- If the Board is
21 going to suspend DEQ's authority, that's just
22 additional incentive to drag their feet, and
23 that's something we certainly don't want to see
24 going forward, and the more they keep dragging
25 their feet, the more likelihood it is that they're

1 going to be short on their bond going forward.

2 And so I actually think it's counter --

3 MS. MARQUIS: Mr. Chair --

4 MR. KING: Vicki, let me finish. I
5 actually --

6 BOARD MEMBER ALTEMUS: No. This is a
7 Board meeting.

8 MR. KING: Sorry.

9 BOARD MEMBER ALTEMUS: Mr. Chair, I
10 think we're devolving into tit for tat and saying
11 some things that are derogatory without being able
12 to respond. This is not what this is about.

13 So I do appreciate the DEQ's position,
14 but I think that the conversations right now are
15 not helpful. I think the Board needs to figure
16 out what it's going to do. If we have a specific
17 question, we can ask, but just allowing this
18 conversation to go on being derogatory, I don't
19 care what side it's on, is not helpful. So that's
20 my two cents. I'm sorry.

21 BOARD MEMBER KNUTESON: May I ask a
22 question, please?

23 CHAIR SIMPSON: Thank you, Julia. Yes,
24 please, Amanda.

25 BOARD MEMBER KNUTESON: Ms. Marquis, so

1 I read everything that was filed. But can you
2 just explain succinctly what calamity will ensue
3 should we not bar any -- should we not stand
4 between you guys and DEQ? On April 29th, what is
5 the calamity you envision occurring?

6 MS. MARQUIS: What we envision occurring
7 is what the Department has expressed to Decker and
8 what you've heard today. We envision they will
9 issue a Notice of Violation; they will list Decker
10 in the AVS system; and they will proceed to
11 prosecute the Notice of Violation; and proceed
12 with AVS listings.

13 That's not helpful for anyone here.
14 Decker is continuing to reclaim. Decker's
15 reclamation is ongoing. They haven't stopped
16 reclaiming. They're continuing to reclaim. As I
17 said, they are ahead on the reclamation. They
18 don't intend to stop reclaiming.

19 They do need some clarity on whether or
20 not the Notice of Noncompliance is valid. They
21 feel it is not. And we need that clarity because
22 it will help us determine the level of detail
23 required in the reclamation plans.

24 Decker did submit an update to their
25 reclamation plan in December of 2024. It was

1 rejected by DEQ. There's requests for this high
2 level of detail that either sets Decker up to --
3 you know, they have to comply with those exact
4 details, which don't work on the ground when
5 you're doing reclamation. So that question of
6 whether a violation occurred or not is important
7 for Decker to get resolved.

8 In the interim, the Order of Abatement
9 poses a real threat to them. We do understand,
10 and that's why we filed the motion to stay the
11 Order of Abatement, which is separate from filing
12 the appeal.

13 Now, the statute you talked about, 251
14 Subparagraph (6), says the appeal doesn't stay the
15 Order of Abatement. We agree. That's why we
16 filed a separate motion to ask for that stay,
17 which we feel we're entitled to under the statute
18 254, as well as our due process rights.

19 And that's something that you see in the
20 federal law. We feel it exists in the Montana law
21 and is supported by the Montana constitutional
22 right to due process.

23 So we just want the enforcement to be
24 stayed until these questions are worked out.
25 We're not staying reclamation on the ground --

1 that's going to continue to occur -- but we don't
2 want any more adverse actions to occur because
3 that doesn't help anybody. Does that answer your
4 question?

5 BOARD MEMBER KNUTESON: It does. Thank
6 you.

7 CHAIR SIMPSON: Question for Ms.
8 Marquis. Counsel for the Department makes the
9 point that what's being asked here in this
10 abatement is not a heavy lift. I don't have it
11 right in front of me, but as I recall, it includes
12 quite a bit of detail with respect to various
13 aspects of the reclamation plan. Is this
14 something that's doable in thirty days? Is this a
15 reasonable order?

16 MS. MARQUIS: In terms of the
17 Department's request? Are you asking if that's
18 reasonable, thirty days?

19 CHAIR SIMPSON: Well, I'm asking your
20 view of -- I mean I think I know it already -- but
21 Counsel for the Department is saying that
22 responding to this abatement order is not a heavy
23 lift, and I can see that if that's what's required
24 is to get the ball rolling, but if you're looking
25 for a completed revised reclamation plan, that's

1 not something that is done easily or quickly,
2 given the amount of engineering that's involved.

3 So I'm trying to get a handle on just
4 what the response to the abatement order has got
5 to look like from the viewpoint of the operator.

6 MS. MARQUIS: A lot of the question from
7 Decker's standpoint is the level of detail. You
8 see on the conditions to abate, which is in your
9 packet Page 81, and there they ask for timetables
10 for compliance to complete the backfilling.

11 And that is part of what Decker provided
12 in December 2024, and was rejected, I believe
13 because there wasn't enough detail. They want a
14 timeline for mine pit dewatering; we don't find
15 that level of detail in the rules. The sequence
16 of soil lay down, and the details for the soil
17 pile that will be used for the specific fields;
18 again, that's a level of detail that we don't find
19 in the rule.

20 So part of the question is if Decker has
21 to provide that level of detail, yes, that will
22 take much longer, and it will require a
23 reclamation plan that is so detailed that if you
24 have conditions that are beyond anyone's control
25 -- such as drought, or work force delays, or

1 weather complications -- you'd be out of whack
2 with that schedule very easily, whereas if you
3 have something with some built-in flexibility, but
4 with some defined timelines, like we have now on
5 the volumes of material that are required, that
6 can move forward in a reasonable fashion.

7 So to get to the level of detail that
8 the Department is requesting would take an
9 enormous amount of time, and likely result in
10 something that who knows if it will be
11 implementable or not to that exacting level.

12 Decker has submitted some revisions as
13 recently as last December, that they feel are
14 adequate and comply with the rules. So there's
15 sort of two questions going on here. But updates
16 that are needed would likely take more than thirty
17 days, but to get to this level of detail that the
18 Department asks for will take even longer than
19 that.

20 So I hope I answered your question. If
21 not, please let me know and I'll try to do better.

22 CHAIR SIMPSON: Thank you. We're kind
23 of between a rock and a hard place here because
24 it's like the old adage "You can't get there from
25 here."

1 What I'm looking for is application of a
2 little bit of common sense here to get this ball
3 rolling, and get a workable reclamation plan, but
4 we're being hindered by what's been filed already.
5 And it doesn't look as if -- Let's just say
6 there's this substantial question as to whether we
7 can stop the clock on that.

8 MR. KING: Board Chair Simpson.

9 CHAIR SIMPSON: Further thoughts after
10 this discussion? Terisa.

11 MS. OOMENS: I think, like I've said
12 previously, the parties are obviously reading that
13 statute differently, or the play between 254 and
14 251. I don't personally think that it's clear
15 cut.

16 I think that obviously if we decide to
17 make a stay, DEQ has made their position fairly
18 clear. If we decide not to do a stay, the
19 ramifications to Decker Coal have been stated and
20 discussed at length.

21 I don't know that there's a clear path
22 forward. Obviously I support whatever decision
23 the Board makes, but maybe a solution would be to
24 set a mandatory settlement deadline by the 29th of
25 this month. That doesn't give the parties a whole

1 lot of time, but it would at least get them
2 talking before the deadline for this runs. That's
3 just my suggestion. I'm sorry I don't have more
4 direction for us.

5 CHAIR SIMPSON: Thank you very much.
6 Mr. King, you had something to say.

7 MR. KING: Thank you, Board Chair. I
8 was just going to propose that our request is,
9 before any motion is made, to at least have the
10 benefit of DEQ's submitting its brief that will be
11 submitted today, and whatever the Board is going
12 to do, at least it has briefing on the issue.

13 And then again, if it is going to issue
14 any sort of stay or suspension temporarily of
15 DEQ's order, I would request just that it be in
16 writing.

17 CHAIR SIMPSON: Thank you.

18 MS. MOISEY-SCHERER: Chair Simpson, this
19 is Sandy. Vicki Marquis has her hand up.

20 CHAIR SIMPSON: Yes, Sandy. I'm sorry?

21 MS. MOISEY-SCHERER: Vicki Marquis has
22 her hand up, sir.

23 CHAIR SIMPSON: I'm sorry. Like I say,
24 I can't see her on my screen. Ms. Marquis.

25 MS. MARQUIS: Chair Simpson. I was

1 going to say I agree with DEQ to the extent that
2 their brief should be something that is put in
3 front of the Board, and the Board has an
4 opportunity to review that, as well as Decker's
5 reply brief, which we will commit to filing within
6 a week after receipt of the Department's brief.
7 So that will put all of the briefing in front of
8 the Board by late next Friday. We can commit to
9 do that so you have all the arguments in writing
10 before you.

11 CHAIR SIMPSON: Just a question. My
12 understanding is that regardless of what we do
13 here, the clock keeps running on the abatement
14 order; is that correct?

15 MS. MARQUIS: Until the Board reaches a
16 decision would be our interpretation.

17 MR. KING: Board Chair Simpson, this is
18 Sam King. I haven't talked to Ms. Marquis about
19 this, but I suppose if you wanted to expedite
20 this, I'll defer to whatever she wants to do, but
21 I don't know what --

22 It seems to me this isn't an intensive
23 fact finding inquiry here. Maybe she feels
24 differently. But it seems to me that part of what
25 they're contesting is that the rules don't permit

1 the level of detail that we've requested, so that
2 seems to me to be a question of law based on the
3 regulations that are cited in the Notice of
4 Noncompliance.

5 And I will note that DEQ did submit a
6 reply or a clarification in response, and noted
7 one area where they cited the incorrect regulation
8 with the correct regulation cited in there.

9 But if the Board wants to hear that
10 expeditedly, DEQ is not opposed to that. Then
11 they could just issue a final order about whether
12 that level of detail is required or not, and so
13 the parties can just get on with it.

14 Alternatively I just want to make clear
15 that we're not expecting that any submission from
16 Decker will necessarily satisfy all criteria and
17 requirements by the end of the month. We're just
18 asking for a submission of literally anything that
19 is attempting to try and get this done, and so we
20 can --

21 If that's the effort, then I don't
22 anticipate further sort of violations in the
23 interim. Thank you.

24 CHAIR SIMPSON: Thank you, Mr. King.
25 Well, what I had suggested was that the abatement

1 order be separated from the violation. Based on
2 the conversation we've had, I question whether
3 that is an option, which is why I wanted to bring
4 up this discussion before we had a motion, because
5 it raises a question in my mind as well.

6 Let's move to that in just a minute, and
7 move over to West Decker. In West Decker we have
8 an order of the Department which I believe is on
9 the -- and again, I don't have that right in front
10 of me right now -- but I believe is on the same
11 time frame of thirty days. And I believe in that
12 case --

13 Let me ask the question. I believe in
14 that case that the Board would have the authority
15 to stay that, and require settlement discussions
16 to try and resolve the issues. Am I correct about
17 that or am I not? That is, does the Board have
18 the authority to stay that order pending efforts
19 to settle?

20 MS. OOMENS: If that was directed at me,
21 I believe that whether it's East Decker or West
22 Decker, my understanding is that the statutes
23 would apply the same. And so if we don't have
24 authority to stay East Decker, I don't think we
25 have authority to stay West Decker, but I'll open

1 that up to the parties as well.

2 CHAIR SIMPSON: The difference is that
3 the order on West Decker is not an abatement order
4 for a violation. It's an order to update the
5 reclamation plan. And again, it's got some fairly
6 tight time frames on it, which is why I felt it
7 was important initially to stay the order, or both
8 orders for that matter, until the issues could be
9 addressed and hopefully resolved.

10 If we don't -- So I'm trying to get a
11 handle on whether it's one and the same situation
12 for both orders, where one involves a violation --
13 is an abatement, and the other one is not.

14 Any thoughts on that?

15 MR. KING: Board Chair Simpson. Yes,
16 thank you. And so yes, I haven't had an
17 opportunity, because it was recently filed, to
18 delve into Decker's motion to suspend in that one.
19 I suspect the arguments are very much the same,
20 and DEQ will be of the position that, as Ms.
21 Oomens pointed out, that the authority to suspend
22 just doesn't exist for the same reason as it
23 doesn't exist in East.

24 I will state that with regard to the
25 enforcement action, there's just been an order

1 issued to update the reclamation plan, and for
2 some reason that order isn't met or attempted to
3 be met -- and I use "attempted" as an important
4 nuance here because we're just looking for sort of
5 effort on their part -- then we would proceed to
6 the next phase, which would be a Notice of
7 Noncompliance and Order to Abate. So essentially
8 West Decker in DEQ's view is one step behind where
9 East Decker is at.

10 Again, as with East Decker we don't
11 anticipate any sort of penalty at this juncture or
12 anything of that nature. But DEQ does have the
13 authority to extend the time to comply upon their
14 request, and so as long as steps are being made,
15 we will consider that. Thank you.

16 MS. MOISEY-SCHERER: Chair Simpson,
17 Vicki Marquis has her hand up again.

18 CHAIR SIMPSON: Ms. Marquis.

19 MS. MARQUIS: Thank you. I just wanted
20 to point out Decker did file a motion for
21 temporary relief from DEQ's order in the West
22 Decker matter. We just filed that I believe
23 yesterday.

24 And in there we do cite direct authority
25 provided in the rules. It's ARM 17.24.414

1 Subparagraph (4), which gives West Decker the
2 authority to seek an appeal through this Board;
3 and that rule refers to ARM 17.24.425 -- I might
4 have those backwards -- which in Subparagraph (3)
5 of that rule does provide for temporary relief, so
6 the Board does have clear authority to issue that
7 temporary relief.

8 We believe there's clear authority in
9 both cases, East Decker and West Decker, although
10 the source of that authority arises from different
11 rules and statutes.

12 CHAIR SIMPSON: Thank you. Ms. Oomens.

13 MS. OOMENS: I am in the process of
14 trying to pull up that ARM that Ms. Marquis
15 referenced.

16 BOARD MEMBER ALTEMUS: Board Chair, this
17 is Julia Altemus. May I ask Mr. King a question,
18 please?

19 CHAIR SIMPSON: Certainly.

20 BOARD MEMBER ALTEMUS: Mr. King,
21 apparently there was -- Decker did submit a
22 reclamation plan in December, which was denied.
23 Can you tell us why? Because if you stated that
24 you were willing to look at -- if we said
25 something about rules don't support the level of

1 detail, and we wanted them to be able to do
2 something that was less detailed, you maybe would
3 consider that. I guess I would like to know why
4 you denied their plan in December.

5 MR. KING: Thank you, Board Member
6 Altemus. I believe it's for all the reasons laid
7 out in the NON, is it does require a certain level
8 of detail.

9 I know Decker is going to disagree with
10 me on this point, but if you look at what we've
11 requested in the Order to Abate, and reference to
12 those rules, those rules are very extensive as to
13 what is required for a reclamation plan. So to
14 suggest that there's lots of flexibility built in
15 here is just not -- I don't think that's an
16 accurate statement.

17 If there are instances where an entity
18 is unable to comply with the current reclamation
19 plan, it needs to then come to the Agency and seek
20 additional approval, with good cause and good
21 justification for doing so.

22 All of that said, I do think it's been
23 over-stated today how difficult this would be to
24 do, because Decker isn't starting from scratch.
25 It has a lot of this information before it

1 already.

2 The biggest thing it needs to do is
3 change the timelines for when this is going to
4 happen going forward, because the timelines as
5 originally stated were not complied with, throwing
6 the timelines for every other phase of reclamation
7 off. And so we need information that can update
8 that. That is the biggest ask, and I don't think
9 it is overly burdensome.

10 BOARD MEMBER ALTEMUS: Thank you for
11 your response.

12 MR. KING: Thank you.

13 CHAIR SIMPSON: Further questions or
14 comments from the Board?

15 BOARD MEMBER ALTEMUS: Mr. Chair, just
16 my thoughts. I agree we're between a rock and a
17 hard place. It feels like we have to choose the
18 lesser of two evils. But we don't have the DEQ
19 order, and we don't have what was filed by Decker
20 yesterday and what's going to be filed by DEQ
21 today. We just don't have all that information.

22 So how we move forward to not do harm to
23 Decker, but not cause DEQ to want to go to court?
24 I mean I don't like being threatened with court.
25 I mean that's just not helpful in my mind. So how

1 we thread that needle without having all of the
2 information that we need, and a very short
3 timeline, honestly is very frustrating. That's my
4 comment.

5 CHAIR SIMPSON: Thank you, Julia. I
6 certainly share your frustration. I'm just
7 turning over alternatives in my mind. Could we
8 take a ten minute break. I'd like to try and let
9 some of this sink in, and then when we return,
10 we'll proceed with motions.

11 (Recess taken)

12 CHAIR SIMPSON: Sandy, are we ready to
13 continue?

14 MS. MOISEY-SCHERER: Yes, sir.

15 CHAIR SIMPSON: Sorry. If I've been a
16 minute or two late. I've been leafing through my
17 aged copy of the regulations. It's kind of like
18 trying to read War and Peace in five minutes. But
19 anyway, let's take roll again, please.

20 MS. MOISEY-SCHERER: Yes, sir. Chair
21 Simpson.

22 CHAIR SIMPSON: Here.

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

25 BOARD MEMBER ALTEMUS: Here.

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

3 BOARD MEMBER KNUTESON: Here.

4 MS. MOISEY-SCHERER: Board Member
5 Rankosky.

6 BOARD MEMBER RANKOSKY: Here.

7 MS. MOISEY-SCHERER: Board Member Smith.

8 BOARD MEMBER SMITH: Here.

9 CHAIR SIMPSON: Thank you. During the
10 break I took the opportunity to look up the rules
11 that we've been discussing here, and I believe
12 that with respect to East Decker, I have to concur
13 with the Department that the rule is pretty clear
14 that the Board cannot stay an abatement order
15 associated with a violation.

16 That being the case, is there a motion
17 to assign the East Decker case, the violation
18 abatement order, to a Hearing Examiner or to
19 retain it by the Board?

20 (No response)

21 CHAIR SIMPSON: Is there a motion?

22 BOARD MEMBER ALTEMUS: Chair Simpson,
23 may I ask what is your preference?

24 CHAIR SIMPSON: I don't believe we have
25 a choice. Well, I shouldn't say that. We don't

1 have a choice as far as separating the abatement
2 order from the Notice of Noncompliance. I would
3 prefer in terms of assigning this, I would prefer
4 to assign it to a Hearing Examiner.

5 BOARD MEMBER ALTEMUS: That was my
6 question. Thank you. So I will make that motion
7 that we assign this East Decker abatement order to
8 a Hearing Examiner.

9 CHAIR SIMPSON: Is there a second?

10 BOARD MEMBER RANKOSKY: Second.

11 CHAIR SIMPSON: It's been moved and
12 seconded to assign the East Decker violation
13 appeal in its entirety to Agency Legal Services to
14 a Hearing Examiner. Further discussion.

15 BOARD MEMBER SMITH: Chair Simpson, I
16 have a quick question on that.

17 CHAIR SIMPSON: Yes. I'm sorry.

18 BOARD MEMBER SMITH: A quick question on
19 that. Given the complexities of this, and I think
20 we've kind of beat it to death, but we've also
21 discussed the lacking information we have, like
22 DEQ's brief.

23 Would it make sense to keep it with the
24 Board just until the next meeting, and then maybe
25 assign it to Hearing Examiner after that?

1 CHAIR SIMPSON: We can certainly do
2 that.

3 BOARD MEMBER SMITH: What would be your
4 preference thinking about that approach?

5 CHAIR SIMPSON: Well, I guess in order
6 to answer that question, the briefing that we're
7 expecting, that's on this case, is it not?

8 BOARD MEMBER SMITH: That's my
9 understanding.

10 CHAIR SIMPSON: That's my understanding,
11 too. Is that correct, Mr. King?

12 MR. KING: That is correct, Board Chair
13 Simpson. You will receive a brief from -- you or
14 the Hearing Examiner, I guess whatever you decide
15 to do, will receive DEQ's response brief today,
16 and I suppose Decker's brief by next week.

17 But again, there was a similar brief
18 request for a stay that was also filed in the West
19 Decker case as well, although that was just filed
20 a day or two ago, I believe. So I hope that
21 answers your question.

22 CHAIR SIMPSON: It does. Thank you. So
23 anyway, Joe, to answer your question, yes, that is
24 an option, and given the briefing that we're about
25 to receive, I think that may be the way to go.

1 BOARD MEMBER SMITH: I think my only
2 fear -- we can go ahead and assign it to a Hearing
3 Examiner. I think typically when we do that, we
4 get very limited briefing unless we ask, and it
5 requires more I guess self-discipline on our part.
6 But once we assign it to a Hearing Examiner, it
7 from our standpoint kind of goes away at a certain
8 point until there's some conclusion.

9 And especially given some of the things
10 that are going on here that we want to keep moving
11 forward, not assigning could potentially keep it I
12 guess further up on the radar for next meeting,
13 but we could also assign it and just commit that
14 we're going to dig into the details a little bit
15 more next meeting, too, which is also an option.

16 CHAIR SIMPSON: Thank you very much. I
17 think that's certainly a relevant point. We have
18 a motion before us.

19 BOARD MEMBER ALTEMUS: I can withdraw my
20 motion and make a new one if you would like.

21 CHAIR SIMPSON: Please.

22 BOARD MEMBER ALTEMUS: So I'm going to
23 withdraw the motion that we assign the East Decker
24 motion to abate -- what did I say -- I withdraw my
25 motion -- I've got so many notes on my notepad

1 right now -- in favor of a different motion. I
2 think you might have to vote on that withdrawal.

3 CHAIR SIMPSON: The motion has been
4 withdrawn. Is there a new motion?

5 BOARD MEMBER ALTEMUS: Go ahead, Joe.

6 BOARD MEMBER SMITH: I'll motion that we
7 retain this case -- and I guess for clarity I
8 think we're only talking about the East Decker
9 case right now -- but that we retain it under
10 Board control until next meeting.

11 CHAIR SIMPSON: Is there a second?

12 BOARD MEMBER ALTEMUS: I'll second it.

13 CHAIR SIMPSON: Further discussion.

14 (No response)

15 CHAIR SIMPSON: All in favor, say aye.

16 (Response)

17 CHAIR SIMPSON: Opposed.

18 (No response)

19 CHAIR SIMPSON: Motion carries. Now,
20 with respect to West Decker, the order that the
21 Department has issued was issued under 17.24.414,
22 "Review of existing permits. The Department shall
23 review each operating permit issued during the
24 term of the permit. This review must occur not
25 later than the middle of the permit term.

1 "After this review, the Department may
2 by order require reasonable revision or
3 modification of the permit provisions to ensure
4 compliance with the act and the subchapter. The
5 Department shall send a copy of its decision to
6 permittee.

7 "Any order of the Department requiring
8 revision or modification of permits must be based
9 upon written finding, and must be subject to the
10 provisions for administrative review provided in
11 ARM 17.24.425."

12 So that is the standard of review, and
13 that is -- as soon as I can find it here -- that
14 is the same standard that is applied to permit
15 actions. So I conclude from that that the Board
16 does have the authority to stay that order.

17 And so what I would suggest in that
18 instance is that we consider, number one, assuming
19 the jurisdiction over the case by the Board, as
20 opposed to assigning it to a Hearing Examiner.
21 That would be point number one.

22 And then the second, which would be a
23 separate action, is a decision whether or not to
24 stay that order, and require, order mandatory
25 settlement discussions.

1 MR. KING: Board Chair Simpson, I
2 apologize for interrupting. Sam King, DEQ.

3 CHAIR SIMPSON: Yes.

4 MR. KING: Again, our request is that
5 we'd have an opportunity, whether you decide to
6 take the case, either the full Board or the
7 Hearing Examiner, we're just asking for an
8 opportunity to respond to that motion.

9 I do want to make it clear that even if
10 temporary relief is available to Decker in that
11 instance, that they have to show certain factors
12 in 17.24.425. So just because the stay is
13 technically available doesn't necessarily mean it
14 is automatic. And so I do, again, would like to
15 have an opportunity to respond to that before a
16 decision is heard on that motion. Thank you.

17 BOARD MEMBER KNUTESON: Chair Simpson,
18 this is Amanda.

19 CHAIR SIMPSON: Yes, Amanda.

20 BOARD MEMBER KNUTESON: I was going to
21 say that my position, my personal position, would
22 be that I wouldn't support a stay prior to
23 receiving the response from DEQ on West Decker,
24 and where I stand on that. I think that -- go
25 ahead.

1 CHAIR SIMPSON: Well, I understand. The
2 thing I'm weighing is that the timeline on that is
3 only thirty days, and we don't have another
4 meeting for another two months.

5 BOARD MEMBER KNUTESON: Is this Board --
6 are you unable to call a special meeting, have a
7 special meeting?

8 CHAIR SIMPSON: We can call a special
9 meeting when we have the documentation, but
10 meanwhile the clock is running, is it not?

11 BOARD MEMBER KNUTESON: It is.

12 CHAIR SIMPSON: That's my understanding.
13 What's to prevent the Board from staying this
14 until we have an opportunity to review all of the
15 filings? It doesn't appear that West Decker has
16 got the urgency that East Decker has because a
17 violation has been issued, and also East Decker is
18 where the primary reclamation work is taking
19 place. It sounds as if West Decker is pretty much
20 stagnant right now as far as reclamation work. Is
21 that an accurate assessment? I'm asking Mr. King.

22 MR. KING: Board Chair Simpson, that is
23 an accurate assessment from DEQ's perspective.

24 MS. MARQUIS: Board Chair, I would just
25 highlight that there is reclamation ongoing at

1 West Decker. They're required to move a certain
2 amount of loose cubic yards, 25,000 every year,
3 which they're meeting, and that's been --

4 CHAIR SIMPSON: That's almost a
5 de minimis amount of earth moving. So I guess my
6 point is that there's not an environmental issue,
7 an urgent environmental issue in West Decker that
8 would cause environmental harm in the event there
9 were a stay here. At least from everything I've
10 read so far, that's my conclusion.

11 First off, we've got to make a decision
12 whether or not to, at some point whether or not to
13 stay this in response to Decker's motion. That
14 being the case, we don't really --

15 Help me out here, Terisa. I'm trying to
16 be a lawyer when I'm not. But I think we can
17 defer any action on this -- no, we can't, because
18 the clock is running right now. So I'm not even
19 completing my sentences here.

20 If we defer any action on this, the time
21 frame that was ordered by the Department is going
22 to run out. So --

23 MS. OOMENS: I will say this. If you
24 defer it until June as --

25 CHAIR SIMPSON: So I think that's the

1 justification for -- The justification for
2 deferring is that we'll see all of the filings on
3 this, but there's not a condition in the field
4 that creates a hazard, if you will, created by
5 staying this until our next meeting when we have
6 all the information, and at that point we can
7 decide whether to grant or deny Decker's request.

8 I think at that point it's decided. We
9 don't have a contested case going forward. Am I
10 right about that?

11 MS. OOMENS: I think it would depend on
12 what decision the Board makes, but yes, I mean
13 theoretically the decision by the Board would be
14 on the entire abatement notice, correct?

15 CHAIR SIMPSON: Well, it's an order to
16 revise the permit. And in reading through it,
17 there's a lot of information that's being
18 required. And so rather than force that issue
19 under a fixed timeline of thirty days, I guess I'm
20 hopeful that the parties could come to an
21 agreement on that within sixty, which would be in
22 time for our next meeting, and the question would
23 become moot. But I would prefer that the parties
24 try to hash this out rather than doing it under
25 the force of an order. Further thoughts on this,

1 Terisa, before we move to a motion?

2 MS. OOMENS: I would agree with the ARM
3 that you read, 17.24.414, that references 425.
4 425 says that the Board can grant temporary relief
5 as it deems appropriate. However, they do have to
6 make some findings in order to grant that relief.

7 And so one of them is that all parties
8 in the proceeding have been notified and given an
9 opportunity to be heard. I think that that's been
10 met today. Both parties have argued back and
11 forth on whether a stay would be appropriate.

12 And the second one is the person
13 requesting the relief show that there's a
14 substantial likelihood that they will prevail on
15 the merits. I think that's a determination the
16 Board would have to make if they're going to issue
17 that stay -- I'm not saying that at the end of the
18 decision Decker will win -- but that based on what
19 they have in front of them, they have a
20 substantial likelihood of winning.

21 I would go back what Member Knuteson
22 said, that I think it would be hard to make that
23 determination without full briefing. I think
24 we're really in a tricky spot in the timeline
25 right now.

1 CHAIR SIMPSON: We are. I guess our
2 choices here are to stay this until we can read
3 all the briefing at the next meeting or at a
4 special meeting, if we were to deny the motion.

5 BOARD MEMBER ALTEMUS: Board Chair
6 Simpson, can we table this until we can read all
7 the briefings and have a special meeting? Is
8 tabling possible? Do we have to make a motion?

9 CHAIR SIMPSON: We can table it, but the
10 clock will be running. Again, I don't have that
11 order up right now. When does the order require
12 that the work be done? It's thirty days. When
13 would that be from the date of the order? Can
14 somebody tell me?

15 MR. KING: Board Chair Simpson, this is
16 Sam King for DEQ. It was extended, so it's
17 actually already been extended to ninety days, so
18 it would run the same time as East. I believe
19 April 29th.

20 CHAIR SIMPSON: It's been extended to
21 ninety days. Has East been extended then?

22 MR. KING: Yes, East was originally
23 thirty, and it was extended additional time at
24 their request, that's why it is April, because it
25 was originally only thirty.

1 CHAIR SIMPSON: I see. Okay. I was
2 confused on that point. I'm sorry. I interrupted
3 you.

4 MR. KING: No, you're good. I just
5 wanted to offer -- I don't anticipate DEQ's brief
6 being super long. I should be able to get our
7 response before the Board by the end of next week,
8 to keep this expedited so you can decide for West.

9 CHAIR SIMPSON: When is the timeline for
10 West as it stands right now? Ninety days?

11 MR. KING: Well, it's April 29th because
12 we've already extended it.

13 BOARD MEMBER ALTEMUS: Both are April
14 29th.

15 CHAIR SIMPSON: I was confused. I
16 thought that was East, or are they both on the
17 same timeline?

18 MR. KING: They're both on the same
19 timeline currently, although they are at different
20 phases of enforcement. There hasn't been an
21 enforcement for West yet because their time hasn't
22 expired to comply.

23 CHAIR SIMPSON: Exactly.

24 MS. MARQUIS: Excuse me. Chairman
25 Simpson, may I just add one quick thing from

1 Decker?

2 CHAIR SIMPSON: Yes.

3 MS. MARQUIS: Again, we will commit to
4 providing a reply brief within a week of receiving
5 the Department's response brief. So I think in
6 both cases, East and West, they would be both
7 fully briefed before the end of the month, if I've
8 got the calendar correct, and all of the briefing
9 would be submitted to the Board by April 25th. We
10 could try to get briefs earlier if that's
11 possible.

12 So if that would help in the Board's
13 deliberations about when and if to set a special
14 meeting by the end of the month, that would be --
15 there's an opportunity there to have all of the
16 briefing and have additional oral argument if the
17 Board determines necessary in both cases, East and
18 West. If schedules allow for a special meeting,
19 we would be willing to make that work on our end
20 as well.

21 CHAIR SIMPSON: Just one more time, Ms.
22 Marquis. When would you expect to have your reply
23 briefing?

24 MS. MARQUIS: Within a week of the
25 Department's response brief. I believe in the

1 East Decker case, the Department said their brief
2 would be filed today. We will have our reply
3 brief in within a week. That would be April 18th
4 our reply would be in. And the East Decker motion
5 to stay would be fully briefed by April 18th.

6 For West Decker, what I heard the
7 Department say is they would commit to filing a
8 response brief by April 18th. We would then reply
9 to that within a week, by April 25th. So for West
10 Decker it would be fully briefed by April 25th.

11 CHAIR SIMPSON: Could we schedule, Board
12 members, could we schedule a special meeting on
13 the 25th?

14 BOARD MEMBER ALTEMUS: I'll make it
15 happen.

16 CHAIR SIMPSON: Me, too.

17 BOARD MEMBER KNUTESON: Yes.

18 BOARD MEMBER SMITH: Yes, I'm available.

19 BOARD MEMBER RANKOSKY: I'm available.

20 CHAIR SIMPSON: Thank you. Is there a
21 motion to table until the meeting, until the
22 special meeting on the 25th?

23 BOARD MEMBER ALTEMUS: I move that we
24 table this issue until we can have a special
25 meeting on April 25th.

1 CHAIR SIMPSON: Is there a second?

2 BOARD MEMBER SMITH: I'll second.

3 CHAIR SIMPSON: It's been moved and
4 seconded to table the Decker West issue until a
5 special meeting to be held on April 25th. Further
6 discussion.

7 BOARD MEMBER RANKOSKY: Are we looking
8 at the 9:00 hour?

9 CHAIR SIMPSON: Presumably.

10 BOARD MEMBER RANKOSKY: Okay.

11 CHAIR SIMPSON: Do we need a different
12 time?

13 BOARD MEMBER RANKOSKY: I'm just making
14 sure.

15 CHAIR SIMPSON: I'm hopeful that that
16 meeting won't take too long in contrast to the
17 discussion. I think we've worked this about as
18 far as we can work it, understanding what's within
19 our purview and what is not.

20 A motion has been made and seconded to
21 table West Decker until the April 25th special
22 meeting. All in favor, say aye.

23 (Response)

24 CHAIR SIMPSON: Motion carries. Thank
25 you very much. That was kind of grueling at

1 times, but a very good and productive discussion I
2 believe.

3 (The proceedings were concluded
4 at 11:51 a.m.)

5 * * * * *

C E R T I F I C A T E

STATE OF MONTANA

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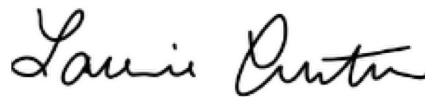
COUNTY OF LEWIS & CLARK

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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 - 72 - 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 21st day of
April, 2025.



LAURIE CRUTCHER, RPR

Court Reporter - Notary Public

My commission expires

March 9, 2028.

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