

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 2025-02 SM
REGARDING PERMIT C1983007)
(EAST DECKER MINE)))

TRANSCRIPT OF PROCEEDINGS (VIA ZOOM)
REQUEST FOR HEARING AND ORAL ARGUMENT

April 25, 2025

9:00 a.m.

BEFORE CHAIRMAN DAVID SIMPSON,
VICE CHAIR STACY AGUIRRE,
BOARD MEMBERS JOSEPH SMITH,
JENNIFER RANKOSKY,
and AMANDA KNUTESON

PREPARED BY: LAURIE CRUTCHER, RPR
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A P P E A R A N C E S

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1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 CHAIR SIMPSON: This is the special
5 Board meeting of the BER. Let's bring the meeting
6 to order. Sandy, would you take the roll, please.

7 MS. MOISEY-SCHERER: Chair Simpson.

8 CHAIR SIMPSON: Here.

9 MS. MOISEY-SCHERER: Vice Chair Aguirre.

10 VICE CHAIR AGUIRRE: Here.

11 MS. MOISEY-SCHERER: Board Member
12 Knuteson.

13 BOARD MEMBER KNUTESON: Here.

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

16 BOARD MEMBER RANKOSKY: Here.

17 MS. MOISEY-SCHERER: Board Member Smith.

18 BOARD MEMBER SMITH: Here.

19 MS. MOISEY-SCHERER: Board Member
20 Altemus emailed this morning she would not be in
21 attendance.

22 CHAIR SIMPSON: We do have a quorum?

23 MS. MOISEY-SCHERER: We have five. We
24 have a quorum.

25 CHAIR SIMPSON: Thank you. For the

1 record, would you go through the list of others
2 who have joined the meeting.

3 MS. MOISEY-SCHERER: I'm Sandy
4 Moisey-Scherer, Board secretary; Laurie Crutcher,
5 Court Reporter; Sam King, DEQ; Counsel Terisa
6 Oomens, Board attorney; Morgan Pettit, Crowley
7 Fleck. I'm just now promoting Vicki Marquis to
8 panelist. Eric Dahlgren, DEQ; Deputy Director
9 James Fehr; Alli Calkins, DEQ; Brian Schrage;
10 Carli; Dan Walsh, DEQ; Elena Hagen, Agency Legal
11 Services; Emily Lodman, DEQ; Emma Gronda, DEQ;
12 Isabelle Nebel, DEQ; Jeremiah Langston, DEQ; Josh
13 Bridgeman; Ric Casteel; Sabrina Temple; Samuel
14 Yemington; Director Nowakowski of DEQ; Todd
15 Briggs; and Nick Whitaker of DEQ.

16 * * * * *

17 (ALSO PRESENT: Mae Vader, Catherine Armstrong,
18 Chad Anderson, Carli Bluhm, Matt Guptill, Bob
19 Smith)

20 * * * * *

21 CHAIR SIMPSON: Thank you, Sandy. Let's
22 proceed. The first item on the agenda is in the
23 matter of Decker Coal Company's request for
24 hearing regarding permit C1983007, East Decker
25 Mine, Case No. BER 2025-02 SM.

1 On February 28th, 2025 Decker Coal
2 Company filed a request for hearing regarding the
3 Notice of Noncompliance and Order of Abatement
4 issued January 29th, 2025 by DEQ.

5 On March 28, 2025, DCC, Decker, filed a
6 motion to suspend abatement requirements with a
7 brief in support. The purpose of this hearing to
8 consider that motion only as an initial matter in
9 this case.

10 Before we proceed with oral argument on
11 that point, there's another matter that I would
12 like to address first which has been brought up
13 during the briefing by the parties.

14 DEQ has asserted that this is not a MAPA
15 hearing. Decker Coal has filed a brief in
16 opposition to that position. So I'd like to hear
17 -- Let's try to limit our comments to five
18 minutes, from DEQ first, as to their basis for
19 that position; and then response from Decker Coal.
20 Mr. King.

21 MS. MOISEY-SCHERER: Chair Simpson, this
22 is Sandy.

23 CHAIR SIMPSON: Yes, Sandy.

24 MS. MOISEY-SCHERER: Sam King said that
25 he is working on getting his equipment to work.

1 CHAIR SIMPSON: Let's hold for a minute
2 and hopefully he'll be able to join us here
3 shortly.

4 MR. KING: I apologize for the delay,
5 and not everything is working, but happy to
6 address this issue of whether this is a MAPA
7 contested case proceeding.

8 From DEQ's perspective this is not a
9 MAPA contested case proceeding subject to Title II
10 Chapter 4 Part 6. Instead it is a hearing before
11 the Board, and I think that is made clear by the
12 specific language that you find in 82-4-251(6).

13 Now, Decker makes an argument that the
14 legislative history supports this as being a MAPA
15 contested case proceeding, and they cite some
16 testimony from Neil Harrington from DEQ, who I
17 believe sponsored the bill when it was brought
18 forth to amend this. And I don't believe that
19 that testimony supports this being a MAPA
20 contested case proceeding. I think it actually
21 supports the opposite.

22 During those amendments really what
23 happened was they just transferred any hearings
24 from the Department to the Board. Now, it did
25 amend 84-2-251 sub (3), where if you issue an

7

1 order and a penalty affiliated with that order
2 that becomes a MAPA contested case proceeding.
3 They did not similarly amend Subpart (2), nor
4 Subpart (6) which is the issue here.

5 I think that renowns to -- let me back
6 up. Simply just because there are instances where
7 the Board can have a hearing before it, but it's
8 not a full trial type civil bench trial
9 proceeding.

10 So I think the distinction is, as laid
11 out in the statute, is when it's simply an order
12 that's been issued to abate, then it's subject to
13 a hearing before the Board. When there is a
14 penalty, a violation and a penalty that's
15 affiliated with that violation, it is then subject
16 to a MAPA contested case proceeding. We are not
17 at that stage yet, and so I think that's the
18 important distinction here. And had the
19 Legislature intended for this to be a MAPA
20 contested case proceeding it would have laid that
21 out.

22 The other thing I'd like to note is
23 82-4-206 of MSUMRA lays out what the specific MAPA
24 contested case proceeding instances are when
25 there's been some sort of application that has

8

1 been submitted, or a new mine application for
2 instance. So it lays out explicitly what those
3 instances are. That is not this instance here.

4 And Decker has made this argument that
5 82-4-206 language is not exhaustive, and I
6 disagree with that statement because there isn't
7 any sort of caveat in language that "including but
8 not limited to." When the Legislature amended
9 251, it could have specifically put in language
10 like it did in 251 sub (3) that this is subject to
11 a MAPA contested case proceeding subject to
12 Section 206, and it didn't do that for Subparts
13 (1) and (2).

14 And so yes, it's our position that there
15 is a hearing available, and that based on that
16 hearing, the Board can issue findings of fact and
17 conclusions of law, a final order, if you will,
18 but is not subject to the same sort of MAPA
19 contested case proceeding.

20 The other thing Decker argues as well
21 "It's a hearing, so therefore it's a hearing
22 that's subject to MAPA contested case
23 proceedings." To me that's sort of circular
24 logic. There are instances where the Board has
25 the opportunity to review certain decisions by the

1 Agency that aren't necessarily subject to MAPA.

2 I think another good example is in MEPA,
3 for instance, in 75-1-201 Sub (9), which allows
4 the Board to review DEQ's level of environmental
5 review, and give an advisory opinion, but that,
6 too, as this Board has previously found, is not
7 subject to a MAPA contested case proceeding.

8 So yes, I mean again, I think this goes
9 back to -- I'm sort of getting ahead of myself
10 here -- but the Board, like DEQ, is a creature of
11 statute. I'm not trying to kneecap the Board in
12 what it can and can't do, but the Montana Supreme
13 Court has routinely found that the same sort of
14 flexibility, I would say, to hear all facets of a
15 case before a District Court is not the same when
16 it concerns a quasi-judicial agency like the Board
17 of Environmental Review.

18 It's a creature of statute. Its powers
19 and duties have to be explicitly delegated by the
20 Legislature, and if they're not, then it's an
21 encroachment on those separation of powers. And
22 so the Montana Supreme Court has found that
23 several times now with various boards that are
24 acting in quasi-judicial agencies, and I think
25 Decker is basically asking for a proceeding that

1 the Legislature has not delegated.

2 CHAIR SIMPSON: Thank you, Mr. King.
3 Ms. Marquis.

4 MS. MARQUIS: Hi. Good morning,
5 Chairman Simpson, members of the Board. Can you
6 hear me okay?

7 CHAIR SIMPSON: Yes.

8 MS. MARQUIS: Okay. Great. Thank you.
9 First I want to take a second to introduce the
10 Decker General Manager out at the East Decker Coal
11 mine is Mr. Matt Guptill, who is here in Billings
12 with me today. We also have Ms. Sabrina Temple,
13 who is Decker's permit coordinator. She is with
14 us virtually on the line. I thank you for your
15 time. Thanks for convening this special meeting.

16 To address the issue squarely, this is
17 absolutely a MAPA contested case hearing. You
18 know your authorities better than most, and if you
19 look, what other types of hearings does the Board
20 conduct? When you conduct a hearing, it is a MAPA
21 contested case hearing.

22 Now, DEQ wants to rely on the statute
23 82-4-206. It's not exclusive. That's not the
24 end-all be-all, and maybe that legislative history
25 bears out that they wanted some clarity on what

1 hearings move from the DEQ level to the BER level
2 at that time, but make no mistake that access to a
3 contested case hearing in front of the Board has
4 been and remains in statute.

5 Clearly when the amendments were made in
6 2005, you can see that the language is there. It
7 says that, "The person may request a hearing
8 before the Board on that order." DEQ's testimony
9 at that time was clear. They view that as a
10 contested case hearing.

11 Now DEQ takes the opposite position that
12 it's not a contested case hearing. Well, that's a
13 problem, because if it's not a contested case
14 hearing, how does the Board get to findings of
15 fact, conclusions of law, and an order? How do
16 you find any facts if you do not have a contested
17 case hearing where you receive evidence and
18 testimony, you can subpoena witnesses, you can
19 take judicial notice of facts. That's how you
20 find facts. That's the process that you go
21 through in a contested case hearing.

22 Simply having oral argument in front of
23 the Board does not present you with the option to
24 have any evidence or testimony that either the
25 Board or its Hearing Examiner can consider,

1 including the cross-examination and the cumulative
2 effects of all of the witness testimony. That's
3 what is required to find findings of fact.

4 It's not here in an oral argument, or
5 it's not here in a hearing that provides no
6 opportunity for evidentiary documents to be
7 admitted into evidence or for witness testimony.

8 Now DEQ I heard today, they called the
9 Montana Supreme Court holding circular logic, but
10 the Montana Supreme Court has been clear. When
11 the Legislature intends to provide contested case
12 proceedings, it enacted statutes stating that
13 there's a right to a hearing. That's a quote from
14 Rusby Kirschner (phonetic), it's cited on Page 4
15 of our reply brief. So it couldn't be more
16 plainer. Where the Legislature intends for a
17 contested case hearing, they cite that there will
18 be a hearing.

19 Now, DEQ raised a couple of other areas,
20 other processes that are not provided in the
21 statutes at issue here. They raise a process from
22 MEPA where the Board can issue an advisory
23 opinion. That's not what we're asking for here,
24 and that's not what the statute allows.

25 The statute allows the Board to make the

1 final decision on this Notice of Noncompliance and
2 Order of Abatement. The only way the Board can do
3 that is by conducting a contested case hearing
4 that provides an opportunity for each party to
5 present evidence, testimony, and argument on all
6 of the issues. That's a requirement straight out
7 of Montana Administrative Procedure Act or MAPA,
8 and that applies in this issue.

9 The language in Section 82-4-251
10 Subparagraph (c) makes clear that the Board's job
11 here ultimately is to make findings of fact, issue
12 a written decision incorporating an order
13 vacating, affirming, modifying, or terminating the
14 order. There's no way for this Board to get there
15 unless they have a contested case hearing.
16 There's no other type of hearing provided in
17 statute.

18 The other point that's important here is
19 to note that at the federal level, this is exactly
20 what happens is a contested case hearing, and as
21 you know, and I think Montana DEQ has raised this,
22 Montana is required to regulate under MSUMRA in a
23 way that is consistent with and aligned with the
24 federal level requirements in SMCRA.

25 SMCRA provides the analog of a contested

14

1 case hearing; they provide a hearing under the
2 federal level Administrative Procedure Act. Here
3 in Montana it's the Montana Administrative
4 Procedure Act.

5 So in order for Montana to be consistent
6 with and not in conflict with SMCRA, Decker has a
7 right to a contested case hearing on the Notice of
8 Noncompliance and Order of Abatement. Now, I want
9 to make clear that at this juncture, we're not
10 asking the Board to make its final determination
11 absent evidence and testimony.

12 What we're asking for is what is also
13 provided at the federal level, and that is an
14 acknowledgment that while this process plays out,
15 while Decker has an opportunity to tell its story,
16 that the Order of Abatement, the abatement
17 requirements are suspended, and that there's no
18 additional adverse action taken by DEQ against
19 Decker while this contested case proceeding plays
20 out.

21 So yes, it's clear in statute, it's
22 clear in case law, that this is a contested case
23 hearing, and it should proceed as such. Thank
24 you.

25 CHAIR SIMPSON: Thank you, Ms. Marquis.

1 Ms. Oomens, Board Counsel. We've heard from the
2 parties. What are your thoughts on this?

3 MS. OOMENS: The way that I read the
4 statute, it's a contested case hearing under MAPA.
5 I don't see an area where you could have a
6 contested case proceeding, especially when 206
7 Subsection (2) specifically references MAPA. I
8 don't see how we get around MAPA, but that's how I
9 read the statute.

10 CHAIR SIMPSON: Thank you, Ms. Oomens.
11 One thing I'd like to point out is that nobody has
12 mentioned 82-4-205 that I can recall. And 205
13 specifies the responsibilities of the Department
14 and the responsibilities of the Board in
15 administration of this act. And the
16 responsibility of the Board is one line, and I
17 will quote it here, 82-4-205(3). "The Board shall
18 conduct contested case hearings under this part."

19 Now, there are a number of places in
20 this statute, 251 being one of them, where
21 reference is made to appealing to the Board. It
22 seems to me as a logical matter that where the
23 Board is involved, whatever matter the Board is
24 considering is a contested case hearing.

25 And what we're doing today is we're not

1 trying this case on its merits. What we've got
2 before us is a preliminary motion to suspend the
3 abatement requirements from Decker Coal.

4 MS. MOISEY-SCHERER: Chair Simpson, this
5 is Sandy. Sam King has his hand up.

6 CHAIR SIMPSON: Yes. Yes, Mr. King.

7 MR. KING: Thank you, Board Chair, and
8 if I may just briefly respond.

9 I think some of the disconnect here is:
10 Are all contested case hearings necessarily
11 subject to the Administrative Procedure Act of
12 Montana? And I would say no, that's not true.

13 Now, the Board's attorney referenced 251
14 Sub (2) as referencing 206. That's not accurate.
15 251 Sub (3)(a) references 82-4-206, and that's not
16 what we're operating under -- or excuse me --
17 254(3)(a). We're referencing 82-4-254(2) which
18 makes no reference to 82-4-206. It is possible to
19 have a --

20 You know, to me, contested case means an
21 adverse party -- we certainly have an adverse
22 party here -- and it calls for a hearing, so
23 certainly there's an evidentiary hearing, where
24 the Board then receives factual information from
25 the parties and evidence that informs whether or

1 not the order was properly issued.

2 But that doesn't follow that that's
3 necessarily subject to this protracted MAPA
4 contested case proceeding in Title 2 Chapter 4
5 Part 6. It's possible to have a hearing without
6 having this protracted length of time, and I think
7 that's also indicative of the fact that there
8 isn't temporary relief contemplated for under 254
9 Sub (2) because there's no need for temporary
10 relief because this isn't some sort of protracted
11 sort of evidentiary issue that proceeds under
12 Title 2 of MAPA. Had the Legislature intended so,
13 it would have referenced that.

14 Now, point taken then under 205, the
15 Board certainly has the authority to hear
16 contested cases, and certainly we're not disputing
17 that. We do that all the time. But that still
18 requires that the specific provision that is being
19 appealed in Title 82 grants the authority to the
20 Board to hear a MAPA contested case proceeding
21 under the MAPA provisions, and that's not what was
22 done here.

23 And certainly the Legislature knows how
24 to do this, because at the same time they amended
25 Subpart 3 under 82-4-254, they could have done the

1 same under 82-4-254(2) and they did not.

2 The other argument I heard was that
3 while under the Surface Mining Control Reclamation
4 Act, the federal standard, it permits this
5 protracted contested case proceeding under the
6 Administrative Procedure Act. That's not a
7 compelling argument because there are differences
8 between MSUMRA and SMCRA. All that's required is
9 that the federal government first reviews and
10 approves any state law changes. There's plenty of
11 instances where state law does not track identical
12 to federal law, and that is true here as well.

13 And with regards to whether temporary
14 relief is available, I think that's also telling
15 that because there is a protracted evidentiary
16 hearing in federal law, 30 USC 1275 permits a
17 party to seek temporary relief of an order. There
18 is no such language in MSUMRA.

19 So I'll leave it at that, but I do want
20 to clarify that there is the ability for the Board
21 to have a hearing without it being subject to the
22 processes laid out in Title 2 Chapter 4 Part 6.
23 Thanks.

24 CHAIR SIMPSON: Thank you, Mr. King. I
25 guess one thing I'd like to point out is that

1 we're operating under 251 not 254. 254 has to do
2 with violations and penalties, and there's been no
3 Notice of Violation issued in this case. We do
4 have a Notice of Noncompliance, and along with an
5 abatement order, but the violation notice has not
6 yet been issued, violation notice and calculation
7 of penalty.

8 So I guess for the time being, we will
9 have to disagree. In terms of the real world, I'm
10 not sure what difference it makes, but as I say,
11 this is a preliminary step in the contested case
12 having to do with the Notice of Noncompliance.

13 And I guess another point I'd like to
14 make is that in that section, there is no mention
15 of an abatement order. There is a cessation
16 order, but an abatement notice, and that is the
17 notice that is referenced in 251(6) in our view.

18 MS. MOISEY-SCHERER: Chair Simpson, this
19 is Sandy. Board Member Knuteson and Vice Chair
20 Aguirre have their hands up.

21 CHAIR SIMPSON: Vice Chair Aguirre.

22 MS. MOISEY-SCHERER: And Board Member
23 Knuteson.

24 VICE CHAIR AGUIRRE: Please take Board
25 Member Knuteson's comments first.

1 CHAIR SIMPSON: Okay. Thank you. Board
2 Member Knuteson.

3 BOARD MEMBER KNUTESON: Board Chair
4 Simpson, thank you. I just had a quick question
5 for Mr. King just for clarity.

6 Was your position that the triggering or
7 the threshold issue here would be if there had
8 been an accompanying penalty that this would
9 trigger MAPA? Is that what I heard you say
10 earlier?

11 MR. KING: Yes, Board Member Knuteson.
12 That is DEQ's position. Had we issued some sort
13 of penalty in accompaniment with the violation,
14 then yes, it would trigger a MAPA contested case
15 proceeding as far as invoking Title 2 Chapter 4
16 Part 6 of MAPA, but not if there was no penalty
17 issued, which there hasn't been here.

18 BOARD MEMBER KNUTESON: Follow-up, Board
19 Chair Simpson. Mr. King, if you -- Depending on
20 the Board's decision, if the DEQ is free to impose
21 a penalty tomorrow, then we'd be back here under
22 the MAPA proceeding, correct?

23 MR. KING: That's correct.

24 BOARD MEMBER KNUTESON: Thank you.

25 MR. KING: Presuming there was another

1 appeal, but yes.

2 CHAIR SIMPSON: Vice Chair Aguirre,
3 questions.

4 VICE CHAIR AGUIRRE: My question is very
5 simple. Are the parties at a point where you
6 can't work through this without this hearing? Is
7 that where that's at? Is there no opportunity for
8 the parties to sit down and work through this?

9 MS. MARQUIS: I can answer that, Board
10 Chair Simpson, and I'm sure DEQ would like to
11 weigh in as well.

12 VICE CHAIR AGUIRRE: I would actually
13 like both parties to respond to that. Thank you.

14 MS. MARQUIS: Thank you for the
15 question, Board Member Aguirre. And I do want to
16 respond to some of the contentions that DEQ raised
17 a bit ago about this, but first I'll address the
18 instant question, which is whether there's been an
19 opportunity for the parties to work through this.

20 Yes, Decker has tried and continues to
21 try. One of our opening conversations with the
22 DEQ was, "Can we settle this? Can we pump the
23 brakes and get more time so we can settle this?"
24 The response Decker has gotten is that DEQ is
25 steam rolling towards the April 29th deadline to

1 list in the AVS system, which will be extremely
2 detrimental to Decker for a number of reasons.

3 We have had additional discussions since
4 the last Board meeting. We've worked very hard.
5 We've presented a settlement proposal to DEQ
6 earlier this week. DEQ was gracious and heard
7 that out and responded again yesterday. So the
8 parties are working. We are communicating. I
9 think there are good faith efforts to resolve
10 this.

11 I don't know that it will be resolved
12 before April 29th, and I don't know what will
13 happen on April 29th, but I know what DEQ has made
14 clear in their briefing, and as you can see as
15 well, going forward full steam ahead with their
16 intentions.

17 And if I may take a moment just to
18 address some other matters. DEQ mentioned that
19 MSUMRA does not have to be consistent, wholly
20 consistent with SMCRA, and I'd like to read just
21 from the federal law. This is 30 USC Section 1253
22 Subparagraph (a)(7), and that requires that,
23 "State programs have to demonstrate that their
24 rules and regulations are consistent with
25 regulations issued by the Secretary pursuant to

1 this chapter." So DEQ very much -- MSUMRA very
2 much has to be consistent with SMCRA.

3 And the other point I'll make is that if
4 this isn't a MAPA contested case hearing, then
5 what kind of contested case hearing is it?
6 Because I can find no other type of contested case
7 hearing in statute. That's a term of art, it's
8 defined within MAPA, it's used exclusively for
9 MAPA contested cases. So when it's a contested
10 case hearing, it means just that, it's a MAPA
11 contested case hearing.

12 Now, it sounds like DEQ may have some
13 concerns about a protracted hearing. I don't
14 believe this has to be that protracted. We can
15 work to expedite areas where we can, but the point
16 of MAPA is to provide some due process safeguards.
17 We want to ensure that happens, but we are not in
18 this to drag it out ad infinitum. We can work
19 together to move this through the system as
20 quickly as possible. Thank you for indulging me.

21 CHAIR SIMPSON: Thank you, Ms. Marquis.
22 Any other questions from the Board? I've got one
23 more question, but I'd like to hear from any other
24 Board members first.

25 VICE CHAIR AGUIRRE: I would still like

1 to hear from Mr. King on my question.

2 CHAIR SIMPSON: I'm sorry. Go ahead,
3 Sam.

4 MR. KING: Thank you, Vice Chair
5 Aguirre, and thank you, Board Chair.

6 I do take issue with the sort of
7 hyperbolic claim we're moving full steam ahead.
8 DEQ did make clear to Decker that there is no
9 discretion in DEQ's statute that if you fail to
10 comply with an Order of Abatement within 90 days,
11 you have to go into the Applicator/Violator
12 System. There's no wiggle room on that point.

13 Now yes, certainly DEQ -- You know,
14 Decker is correct, like we've engaged in
15 discussions. There is a potential path forward
16 here, but at the same time, DEQ doesn't believe
17 that it is incorrect with respect to what we're
18 asking under the rules for a sufficient
19 reclamation plan.

20 And certainly DEQ has to make sure that
21 those statutes and those regulations are being
22 complied with at all times, and we're not willing
23 to budge or relax our standards just so we can
24 have this go away.

25 It's particularly important here because

1 as you know, the only remaining thing for Decker
2 to do at both sites is just reclaim. And so we
3 need to have a lot of certainty about what Decker
4 is going to do, in the order it's going to do it,
5 and when it's going to do it, so that we can make
6 sure that we're sufficiently bonded, and that they
7 can go forward and know with confidence that they
8 will qualify for bond release.

9 So we're open to some discussion about
10 trying to resolve this issue, but that we are
11 limited by what our authority is, and we're not of
12 the position that we're going to compromise what
13 our authority, what we believe needs to be
14 demonstrated in a sufficient reclamation plan just
15 to get this issue resolved.

16 Now, Decker may disagree with us, and
17 clearly they do about what might be required here,
18 but if that's the option, like it's very important
19 to the Department, and in fact it's our obligation
20 to make sure that the State statutes and
21 requirements are being complied with.

22 The other point I'd just like to touch
23 on again very quickly here is nobody is suggesting
24 that the federal standards are the floor of
25 regulation, but state law standards can be more

1 stringent.

2 Here just because there isn't a process
3 in state law standard does not mean that it is
4 less stringent than federal law. In fact arguably
5 it's more stringent because it does not have the
6 same sort of opportunity to suspend a proceeding
7 that would occur under federal law. So thank you.

8 CHAIR SIMPSON: Mr. King, if I could ask
9 you -- let me back up. Any other questions from
10 the Board for either party? Ms. Knuteson.

11 BOARD MEMBER KNUTESON: Chair Simpson,
12 another question for Mr. King, kind of a follow up
13 to my point before.

14 So is it DEQ's position that this
15 mandatory listing of Decker in the violator
16 registry that's imminent, it will happen Tuesday
17 barring action here, that that's not a penalty, or
18 that that's so speculative that we're not allowed
19 to consider that as a factor?

20 MR. KING: Thank you, Board Member
21 Knuteson. Yes. It is our position that whether
22 -- and I think this really goes to the heart, and
23 I don't want to get ahead of myself here, but I
24 think this really goes to the heart of the issue
25 here, is that 251(6) states, "The filing of an

1 application for review under this subsection may
2 not operate as a stay of any order or notice."

3 And so because of that reason and that
4 explicit language, there isn't an opportunity to
5 delay that through the Board. There isn't a
6 process that's been laid out here. And Decker, we
7 did grant an extension up to 90 days. The
8 original deadline is 30 days. We extended that
9 deadline to 90 days.

10 They can remediate this by just giving
11 us the plan, but they haven't wanted to do so,
12 apparently because they believe that it's not
13 required. So on that point, I guess we're at for
14 the time being an impasse.

15 Alternatively, yes, they would be
16 technically placed in an AVS, but from my view,
17 that's not particularly unusual for coal companies
18 to be put into the AVS for failing to comply with
19 orders. I mean I'm not sure if there's a mine in
20 Montana that's never been listed in the AVS at
21 some point.

22 The only time that becomes an issue is
23 if there is an application pending either before a
24 state agency or the Office of Surface Mining, and
25 if there is, neither of those entities can grant

1 you a new permit.

2 So Decker has suggested that being
3 listed in the AVS is really bad for them, but I'm
4 not aware of any permit that is actually pending,
5 certainly not in Montana, and I'm not aware of any
6 other state permits or federal permits that are
7 currently pending. So I'm not sure what sort of
8 irreparable injury or harm that would necessarily
9 occur. And upon rectifying DEQ's order, they're
10 delisted from the AVS. I hope that answers your
11 question.

12 CHAIR SIMPSON: Thank you, Mr. King. I
13 see Ms. Marquis has got her hand up, but there's
14 two questions I'd like to ask first.

15 Number one, I think we need to move on
16 here pretty quickly. But in your view, what is
17 the practical impact on the case before us as to
18 whether or not it falls under the contested case
19 hearing per your reasoning?

20 MR. KING: I apologize Board Chair. Was
21 that question directed at me?

22 CHAIR SIMPSON: Yes. I'm sorry.

23 MR. KING: And can you restate your
24 question?

25 CHAIR SIMPSON: My question is: You've

1 asserted that this is not a contested case hearing
2 under MAPA. In your reasoning, what is the
3 practical impact on the process if you're correct
4 that this is not a contested case hearing. If
5 this is some other kind of a hearing, what is the
6 practical impact on the case that we're
7 considering right now? And does it have any
8 impact? Because it doesn't seem to me that
9 there's any real difference no matter what you
10 call it.

11 MR. KING: I don't know if I necessarily
12 agree with you, Board Chair. I mean to me,
13 running through the hypothetical scenario here,
14 the Board will schedule a hearing; the parties
15 will be allowed at that hearing to present
16 evidence. It's sort of just a truncated process
17 of each party has an opportunity to present
18 evidence, has an opportunity to present witnesses,
19 has the opportunity to present papers, much of
20 which is already before this Board. And then
21 based on that, the Board will just issue findings
22 of fact, conclusions of law, and an order.

23 Now, let's say hypothetically that this
24 hearing happens after April 29th, that Decker is
25 listed in the AVS. Obviously at the same time

1 they go into an AVS, there's a new violation
2 that's issued, and upon the new violation that's
3 being issued, that violation is subject to
4 penalties.

5 Now, that case will be subject to a MAPA
6 contested case procedure, but at the same time, if
7 the hearing held in this case determines that the
8 violation, the initial violation and order to
9 abate was improper, then I think that also
10 resolves the subsequent contested case, and
11 therefore the penalty shouldn't have been issued,
12 and they're removed from the AVS system. I think
13 that's how that process works.

14 Alternatively I think it also resolves
15 it if the initial order -- or if in this hearing
16 the Board determines that the order was properly
17 issued, then Decker needs to comply with that or
18 it may appeal that to a District Court. Did that
19 answer your question?

20 CHAIR SIMPSON: Yes. Thank you. One
21 other comment. You cited 251(6), "The filing of
22 an application for review under this subsection
23 may not operate as a stay of any order or notice."

24 That's true, the filing, the mere filing
25 by Decker does not stay the order. However, the

1 Board is not prevented from modifying that order
2 under this section, so I have to disagree with
3 your conclusion as to what the powers of the Board
4 are in this instance.

5 MR. KING: Sorry to interrupt, Board
6 Chair. You're correct. The Board could modify
7 the order, but it's still in the context of a
8 final order, is our position. So yes, the order
9 could be subject to change. There could be
10 modifications to the order as well.

11 CHAIR SIMPSON: Thank you, Mr. King. I
12 see, Ms. Marquis, you've got your hand up. Did
13 you have another comment? I'd like to move on
14 here quickly, but go ahead.

15 MS. MARQUIS: Certainly. I just wanted
16 to respond with a couple of points. First of all,
17 we all agree that Section 251 Subparagraph (6) has
18 been triggered, and that's what provided Decker
19 the right to appeal this Notice of Noncompliance
20 and Order of Abatement.

21 254 Subparagraph (1)(c) absolutely
22 applies because it applies, too, in the case of
23 any review proceeding under 251 Subparagraph (6).
24 So Subparagraph 254(1)(c) absolutely applies in
25 this instance.

1 And the second thing I want to raise is
2 let's not blow past this threshold issue here.
3 Decker appealed the Notice of Noncompliance and
4 Order of Abatement because it does not believe
5 that any noncompliance occurred.

6 So before we get down the road with
7 DEQ's request for amending this, and modifying
8 that, and presenting this information and that
9 information, let's look at the threshold question
10 was: Did they have authority to issue the Notice
11 of Noncompliance and Order of Abatement? And
12 Decker believes no, they did not.

13 DEQ can't point to any reclamation that
14 is missing out at East Decker mine. Why? It's
15 because they're more than nine million loose cubic
16 yards ahead of schedule. All of the reclamation
17 that's been required to be done has been done. So
18 let's not blow past that threshold issue, and
19 let's look at what triggers the ability for DEQ to
20 order abatement, make sure that trigger has
21 actually been triggered. We believe it has not.

22 And this isn't just an issue of Decker
23 should just fix the reclamation plan and move
24 forward. As you'll see, and I think it's borne
25 out in this case, it very much feels like we're

1 setting ourselves up for a game of gotcha, and
2 that's an untenable position for Decker to be in.

3 To the point on whether an AVS listing
4 is a penalty, I'll give you the perspective from
5 industry, from the actual coal miners on the
6 ground who bear the brunt of that listing. It
7 absolutely is a penalty. Anytime you're listed as
8 a violator in your field, in your industry, it's a
9 penalty. It impacts your relationships, it
10 impacts how the public views you.

11 In this case it will have a very
12 detrimental impact on the permit for their Black
13 Butte Mine in the state of Wyoming that's
14 currently undergoing permitting actions. The
15 equity they will raise from mining there will be
16 used to fund reclamation at East Decker.

17 So yes, listing in the AVS system is a
18 penalty. It has very detrimental effects
19 especially where Decker is willing and able to get
20 reclamation done, but they can't stop the funding,
21 and they can't be hampered by Notices of
22 Noncompliance for things that simply aren't
23 noncompliance. And I will leave it at that for
24 now. Thank you, Chairman Simpson, for letting me
25 speak.

1 CHAIR SIMPSON: Thank you, Ms. Marquis.
2 I'm afraid we're kind of getting ahead of
3 ourselves because I'm sure that these are topics
4 that I'm sure will be discussed when we get to
5 oral arguments in the case before us.

6 Vice Chair Aguirre, I see you have your
7 hand up.

8 VICE CHAIR AGUIRRE: I just have another
9 question, and I feel like this is a very valuable
10 discussion for what's being put in front of us,
11 but I want to go off of Board Member Knuteson's
12 questioning about a violation, and specifically
13 the AVS system listing. And this is probably a
14 question for Mr. King, and please correct me if I
15 didn't hear this right. But an actual violation
16 hasn't been issued; is that correct?

17 MR. KING: That's not exactly correct,
18 Vice Chair Aguirre. A violation has been
19 issued --

20 CHAIR SIMPSON: Mr. King, if I could
21 interrupt for just a second. I was saving this
22 question for a little bit later on, but since this
23 issue has arisen, I'll ask it now.

24 Can you explain to the Board what the
25 sequence of events is from the issuance of a

1 noncompliance forward through the enforcement
2 process, please. And I think that will answer the
3 question.

4 MR. KING: So thank you, Board Chair.
5 When there's a Notice of Noncompliance and an
6 Order of Abatement, then the path forward is you
7 can rectify the noncompliance within the time
8 period granted to abate the noncompliance. We've
9 laid out the path forward. Upon compliance with
10 that, then the violation has been abated. Does
11 that answer your question?

12 CHAIR SIMPSON: To interject here --

13 VICE CHAIR AGUIRRE: It didn't quite
14 answer my line of questioning.

15 CHAIR SIMPSON: If I could interject
16 here, please. The Notice of Noncompliance has
17 been issued. In my experience, the abatement
18 order that accompanies the Notice of Noncompliance
19 is to fix the problem, whatever it was. But the
20 next step in the process, in my experience, is the
21 Notice of Violation and Penalty Assessment. Is
22 that a correct statement, Mr. King?

23 MR. KING: That's correct.

24 CHAIR SIMPSON: I think that's the
25 normal sequence of events.

1 MR. KING: You are correct. That is the
2 normal sequence of events. There's been a Notice
3 of Noncompliance, and it is a violation, but it's
4 a minor one for which civil penalty is, the
5 Department determined, isn't appropriate. And
6 then within 90 days after the issuance of the
7 Notice of Noncompliance, the Department shall
8 serve a Notice of Violation and a Penalty Order,
9 or a Notice of Violation and Waiver of Penalty,
10 and that's in ARM 17.24.1211(1).

11 So I think that also gets at your
12 question, Vice Chair Aguirre. There is
13 technically a violation, but it is a noncompliance
14 coupled with an Order of Abatement. And then the
15 next step is a Notice of Violation and a Penalty,
16 and if you fail to abate, a cessation order, to
17 cease the failure to abate.

18 VICE CHAIR AGUIRRE: My question is
19 surrounding then listing in the AVS system. Based
20 on the discussion and the questions -- like going
21 back to Board Member Knuteson's questions, and
22 then also Chair Simpson's questions -- a listing
23 in the AVS system is based on the actual
24 violation; is that correct?

25 So I'm just trying to be clear because I

1 know that's an issue for Decker, and I'm trying to
2 be clear about what actually does drive that
3 listing in the AVS system. My thinking, based on
4 listening, is that an actual violation would drive
5 that, and not a Notice of Noncompliance, so I'm
6 trying to understand that listing.

7 MR. KING: Once you issue a cessation
8 order when you fail to abate the noncompliance, it
9 is both a violation, penalty, AVS listing.

10 VICE CHAIR AGUIRRE: So then on April
11 29th, that is when the Notice of Noncompliance
12 then turns to a violation and an automatic entry
13 of that into the AVS system, or is there another
14 opportunity to address that actual issuance of the
15 violation?

16 MR. KING: Both of those things are
17 true. There's another opportunity. There's a
18 contested case that can be filed upon the issuance
19 of the violation and the penalty, and also if you
20 fail to abate the noncompliance -- which is itself
21 a violation, but not one that rises to the level
22 of a penalty -- you are in the AVS.

23 There is exceptions for extending yet
24 again this 90 day deadline, but that is before the
25 authority of the Department, and that's at

1 17.24.1206 Sub (5), which lays out certain
2 criteria where an applicant can make a submission
3 to the Department essentially, or certain other
4 various scenarios, and then there is justifiable
5 reason and good cause that permit the Department
6 to extend that deadline further. But we have not
7 received anything in that regard.

8 VICE CHAIR AGUIRRE: Thank you.

9 CHAIR SIMPSON: If I could interject.
10 It's a rather complex process, at least in my mind
11 it is.

12 But if I understand correctly, there are
13 two situations that can lead to an AVS listing.
14 First there's a pattern of violations, that is,
15 multiple violations within a specified period of
16 time on similar matters, but within the mine
17 operation. The other is a cessation order. And a
18 cessation order I believe is also appealable, but
19 if I understand you correctly, Mr. King, issuance
20 of a cessation order would trigger an AVS listing;
21 is that correct?

22 MR. KING: That is correct.

23 CHAIR SIMPSON: Okay. Thank you. It's
24 10:00. Let's take a ten minute break, and then
25 proceed with the matter at hand on Decker's motion

1 to suspend the abatement requirements. See you in
2 ten minutes.

3 (Recess taken)

4 CHAIR SIMPSON: Let's reconvene. Sandy,
5 would you call the roll, please.

6 MS. MOISEY-SCHERER: Chair Simpson.

7 CHAIR SIMPSON: Here.

8 MS. MOISEY-SCHERER: Vice Chair Aguirre.

9 VICE CHAIR AGUIRRE: Here.

10 MS. MOISEY-SCHERER: Board Member

11 Knuteson.

12 BOARD MEMBER KNUTESON: Here.

13 MS. MOISEY-SCHERER: Board Member

14 Rankosky.

15 BOARD MEMBER RANKOSKY: Here.

16 MS. MOISEY-SCHERER: Board Member Smith.

17 BOARD MEMBER SMITH: Here.

18 MS. MOISEY-SCHERER: We have a quorum,

19 sir.

20 CHAIR SIMPSON: Thank you, Sandy. Let's
21 proceed with the hearing regarding Decker Coal's
22 motion to suspend abatement requirements of the
23 Notice of Noncompliance. Ms. Marquis, would you
24 care to start out. Let's try to limit our
25 presentations here to twenty minutes. We've all

1 read the briefs, and we discussed a lot of the
2 issues tangentially at least in our earlier
3 discussion, so let's work with twenty minutes, and
4 then ten minutes for rebuttal. Ms. Marquis.

5 MS. MARQUIS: Thank you very much,
6 Chairman Simpson. Again, I appreciate the Board's
7 time in this special meeting to consider these
8 important issues.

9 I'm going to first talk a little bit
10 about the Board's authority to provide some
11 clarity as to whether this is a NON or a Notice of
12 Violation, and which statute we're operating
13 under, as well as what due process requires.

14 And then I'm going to move into a little
15 bit of the merits of this, because I want to
16 assure the Board that we do like have a likelihood
17 of succeeding on the merits, so I'm going to talk
18 a little bit about that extensive timeline that I
19 provided, talk again -- I've already mentioned
20 earlier -- why Decker believes the Notice of
21 Noncompliance is invalid.

22 And finally illustrate why moving
23 forward, without suspending the abatement
24 requirements at this juncture, just pending the
25 final contested case hearing, will be extremely

1 detrimental to Decker.

2 So first, on the Board authority,
3 there's no dispute that DEQ's Notice of
4 Noncompliance and Order of Abatement was issued
5 pursuant to the statute 82-42-251(2). DEQ agrees
6 that you can say that this is a violation. We see
7 it on Pages 4 and 5 of their order. They cite
8 Section 254 and 251 extensively. So this is a
9 violation.

10 When you read the statute, it doesn't
11 say a Notice of Noncompliance, it says a Notice of
12 Violation. DEQ has called it a Notice of
13 Noncompliance. I know that term of art is used in
14 their rules. But for the statutes at issue here
15 that we're operating under, this is a violation
16 which DEQ is pursuing. Decker has a right to a
17 contested case hearing. That's clear. DEQ noted
18 that in the notice they provided to Decker.

19 So Decker's request for due process
20 starts right now. It started when we filed our
21 appeal of the Notice of Noncompliance and Order of
22 Abatement. And you can see the importance of it
23 when we filed our motion to stay the abatement
24 requirements.

25 As I mentioned earlier, the two statutes

1 251 and 254 are not siloed. They do interconnect,
2 and that's because Section 254 Subparagraph (1)(c)
3 refers back exactly to the statute that gives
4 Decker its right to appeal here. It refers back
5 to 251 Subparagraph (6).

6 That statute says, "The period permitted
7 for correction of a violation does not in the case
8 of any review proceeding under 82-4-251(6) --"
9 that's us here right now, that's this proceeding
10 -- "and contested case. The period for correction
11 does not end until entry of a final order."

12 Now, there's no conflict with 251
13 Subparagraph (6) because Subparagraph (6) just
14 says they don't automatically get it. We don't
15 automatically get to suspend the abatement
16 requirements.

17 But as the Board has noted, the Board
18 has authority to modify the order, and under 254
19 Subparagraph (1)(c), the Board does have
20 authority, when it's been requested by the
21 permittee, the Board does have authority to order
22 suspension of the abatement requirements. And
23 while that decision is pending, the time permitted
24 for Decker to correct whatever alleged violations
25 does not expire. That means that the Order of

1 Abatement period does not expire during the
2 pendency of this contested case.

3 We have already talked about the SMCRA
4 requirements. We provided a series of decisions
5 under SMCRA that those decisions come from the
6 IBLA, which is the federal analog of this Board,
7 and very clearly there in the same situation,
8 where there's been a violation cited, that board,
9 the IBLA, often provides for temporary relief and
10 stays the abatement requirements pending the final
11 decision on whether there was a violation or not.

12 So definitely the Board has authority to
13 conduct a contested case hearing, and the Board
14 has authority to recognize and declare that the
15 time period for Decker to correct the alleged
16 violations does not expire during the pendency of
17 this contested case hearing.

18 As you heard from the Department, if
19 that doesn't happen, the Department will go
20 forward with the AVS listing, which is going to be
21 extremely detrimental to Decker.

22 I'd like to talk a little bit about why
23 the notice is invalid in the beginning. Decker's
24 position has been that there's no noncompliance
25 here. To bring this back down to a scale that

1 most of us can likely understand, I don't know
2 that everyone has seen a dragline, but they're
3 giant. They're gigantic. They can move a lot of
4 dirt. So if you can move dirt with a dragline,
5 it's a lot more efficient than using a truck and
6 shovel fleet.

7 The comparison is if I dug a giant hole
8 in the park next to my house, and they said, "You
9 have to come fill that in," and I said, "Okay.
10 I'll pick up my hand shovel, and I'll be over, and
11 I'll fill it in," it would take me a long time to
12 fill that hole in; but if there's a backhoe right
13 there available, and I use the backhoe, I get the
14 same work done, but I do it quicker and more
15 efficiently.

16 The same is true here for the East
17 Decker Mine. They have a dragline available.
18 They have used it very efficiently and very
19 effectively. In August, by August and in
20 September, Decker informed the Department that
21 they were more than six million loose cubic yards
22 ahead of their reclamation schedule. That number
23 has only gone up because they haven't stopped
24 reclaiming. In December, they were more than nine
25 million loose cubic yards ahead of schedule.

1 So when DEQ says, "Something is not
2 right. There is a violation or noncompliance,"
3 what is the violation? What is the noncompliance?
4 The only thing they cite to in their order is that
5 Decker did not get the truck and shovel fleet up
6 and running, but DEQ doesn't point to any
7 reclamation that wasn't done. It was all done,
8 and even more than that was done. Decker is ahead
9 of schedule. There's been no noncompliance.

10 Curiously in DEQ's response brief, it
11 seemed like they had switched the argument a
12 little bit, and they were trying to allege that
13 Decker does not have a valid reclamation plan.
14 That's incorrect. Decker has had a valid
15 reclamation plan approved by the Department all
16 along. That's a requirement to have a permit.

17 If Decker didn't have a reclamation
18 plan, then it wouldn't have a permit. Decker has
19 a permit, they have a reclamation plan, and
20 they're following that reclamation plan.

21 So DEQ has changed how they describe the
22 violation, but if we look at the words of the
23 order, what triggered all of this was DEQ's
24 concern about not using the truck and shovel
25 fleet. That doesn't mean reclamation didn't

1 occur. Reclamation and more than the reclamation
2 that was required did occur.

3 And part of the reason I included the
4 timeline -- and I apologize for providing so many
5 documents, but I wanted to make sure that the
6 Board had the actual complete story and the
7 complete history in front of it. I wanted the
8 Board to see the back and forth between Decker and
9 DEQ that continues today.

10 I also wanted the Board to see that DEQ
11 goes out there and inspects the mine every single
12 month. All of those inspections, there were no
13 follow up items noted, there were no maintenance
14 items noted, there were no issues of
15 noncompliance, until Decker got the Notice of
16 Noncompliance and Order of Abatement from DEQ out
17 of the blue.

18 Realizing that they hadn't done anything
19 wrong, they immediately appealed that, but they
20 also responded to that. The same day that we
21 amended the request for a hearing on the Notice of
22 Noncompliance, Decker submitted a reply letter to
23 the Department on February 28, 2025. And they
24 pointed out all of the areas where they're already
25 in compliance.

1 Now, if DEQ wants a little bit more or
2 different information, that's part of what we're
3 trying to work out now, but to say that Decker
4 does not have a reclamation plan is patently
5 false. Decker has a reclamation plan that has
6 been approved by the Department, and they are
7 following it. Are there adjustments that can be
8 made? Perhaps, and that's what we're working
9 through. But make no mistake Decker has a valid
10 reclamation plan, and they're following it.

11 You can see in the Department's March
12 25th letter responding to Decker's response. We
13 are making some headway. You can see that they've
14 agreed to accept for a weed management plan what
15 Decker has been providing all along, which is a
16 copy of their plan that's signed and approved by
17 Big Horn County.

18 So we're making progress, we're going to
19 understand one another, but the Notice of
20 Noncompliance and the Order of Abatement are
21 invalid. There's no proper basis for them.
22 There's been no noncompliance.

23 And the impact of the Department's
24 decision is extreme for Decker. I want to spend
25 just a few minutes on this because I don't think

1 it can be over-emphasized. That listing in the
2 AVS system has a huge impact. That is open for
3 the public to view, so it's going to impact their
4 relationships, their funding.

5 Importantly here it's going impact their
6 relationships with the surety companies that
7 provide the bonds for their reclamation. As DEQ
8 noted, the mine is in reclamation now. That's
9 what the mine is doing. There's no more coal
10 coming out, there's no more income stream from
11 that mine.

12 They're in reclamation, they're doing
13 the work, they're ahead of schedule, but listing
14 them in the AVS moving forward with penalties for
15 something that is not a violation is very
16 detrimental.

17 Decker has also the Black Butte Mine in
18 Wyoming. That's an important piece here, because
19 that is their income stream. That's where they
20 get funding, and that funding helps fund the
21 reclamation at East Decker.

22 Now, if Decker had actually done
23 something wrong, you could bet they'd be out there
24 fixing it. That's what they do. If they have a
25 chance to do more reclamation, that's what they've

1 done. If they've done something wrong, they'd be
2 out there fixing it.

3 Here they very much believe they haven't
4 done anything wrong. They see the pathway this is
5 leading down. They view it as providing all these
6 extensive details on their plan will be -- set
7 them up for another scenario, just like the truck
8 the shovel fleet did. They let DEQ know they were
9 going to use the truck and shovel fleet, and what
10 happened with that information? It was used
11 against them, despite the fact that they're ahead
12 of reclamation.

13 So to the extent they need to provide
14 details to comply with the rule, they're willing
15 to do that, but providing all these additional
16 details that set them up for a game of gotcha puts
17 them in an untenable position where they could
18 potentially be right back here.

19 Finally I just want to address the
20 contested case issue. I said before, and I'll
21 just say it again, if this is not a MAPA contested
22 case, then what kind of contested case is it?
23 There is no other type of contested case.

24 Due process rights are extremely
25 important. If you take a truncated process that

1 does not include discovery, does not include a
2 full opportunity to present witnesses, and
3 testimony, and cross-examine, depose witnesses
4 ahead of time, you're truncating the due process
5 that is due to the permittee in this instance.

6 MAPA does provide an informal process.
7 Decker did not choose to go down that road.
8 Decker very much wants a formal contested case
9 process, but we're willing to work to make it
10 streamlined and move forward efficiently and
11 effectively. The due process rights are extremely
12 important. You see this in Montana in MSUMRA, it
13 exists at the federal level in SMCRA.

14 That's really all that Decker is asking
15 for is a chance to go through that due process
16 contested case hearing, and while we're going
17 through that and telling our story, let's hit the
18 pause button on further enforcement and further
19 abatement requirements, put that at a stand still
20 while this contested case plays out. That's all
21 we're asking for is an opportunity to tell our
22 story.

23 At the end of the day, whatever the
24 Department decides -- or whatever the Board
25 decides will be the final decision, and we'll move

1 forward from there, but while this contested case
2 plays out, Decker should not be subject to any
3 further enforcement, including listing in the AVS
4 system.

5 Thank you for your time. I believe I
6 have just a few minutes left. I'd like to add
7 those to my rebuttal time period if that would be
8 appropriate. Thank you.

9 CHAIR SIMPSON: Thank you very much.
10 Mr. King.

11 MR. KING: Yes. Thank you, Board Chair
12 and Board members. I'd like to zoom out just for
13 a second, and obviously respond to Decker's
14 arguments.

15 But there's really two things at play
16 here. There's really two big issues. One are the
17 procedural questions. Does the Board have
18 authority to unilaterally stay DEQ's order during
19 the pendency of this proceeding, whether or not
20 it's a MAPA contested case proceeding subject to
21 Title 2(4)(6)? Do they have that authority?
22 And then secondly, even if they do, is Decker
23 likely to prevail on the merits?

24 The Board should just resolve this
25 question under this first procedural issue. As

1 I've noted before, and as the Board is well aware,
2 251 Sub (6) says explicitly that the filing of an
3 application does not stay the Department's order.
4 That language doesn't have any sort of wiggle room
5 there.

6 Decker says that, well, in fact
7 254(1)(c) does provide the Board with this
8 authority, but Decker never explains, and notably
9 never even cites in its reply brief, 251 Sub (6)
10 and explaining how it can harmonize these two
11 statutory provisions, because if you accept
12 Decker's reading that 254(1)(c) allows the Board
13 to stay the order, it reads out the entire
14 requirements and runs counter to the language in
15 251(6), and that can't be.

16 You have to harmonize those statutes,
17 and the only logical reading to harmonize those
18 statutes is Decker still has to comply, meaning
19 the time permitted to comply with the order
20 continues until it gets a final order from this
21 Board or a Court that says they don't have to.

22 And it further renders a nullity the
23 remaining language about the 30 day provision that
24 if you don't comply, the Department will take
25 additional action, meaning it will impose

1 penalties. So that's the only logical way to read
2 this.

3 I'd also like to point out that Decker's
4 reading is premised on this idea that, well, it
5 can request temporary relief, a/k/a, a stay of the
6 DEQ's order, and the Board can grant it.

7 But to reach that conclusion would
8 require the Board to read language into 251 -- or
9 excuse me -- 254(1)(c) where there is an
10 opportunity for the party that's appealing the
11 order to request a stay and for the Board to grant
12 the stay, and there is no such language, and that
13 violates a central canon of statutory
14 construction.

15 Again, this goes back to this idea of
16 what the Board as a creature of statute can do.
17 Even in its quasi-judicial capacity, the Montana
18 Supreme Court has said that those powers have to
19 be explicitly delegated, and they haven't been in
20 this particular instance.

21 There are instances where temporary
22 relief is available, and that is in ARM 17.24.425,
23 and even Decker concedes that there isn't any
24 explicit characterizations about how the Board is
25 to go about granting such a stay for relief in

1 statute.

2 I think that tells me, that should tell
3 the Board everything they need to know, is that if
4 that power is not in there, then it doesn't exist,
5 and 17.24.425 isn't applicable.

6 Secondly, I'd like to get back to this
7 idea of relying on SMCRA language, and that while
8 in SMCRA there is a process, and it is explicitly
9 laid out in statute where a party can seek
10 temporary relief. And I think the fact that it is
11 in SMCRA, and it isn't in MSUMRA, is telling.

12 The Board can't use, just go use SMCRA
13 for its authority. The Montana Supreme Court has
14 already rejected that argument in the Westmoreland
15 case when MEIC opportunistically tried to use
16 SMCRA statutes and case law to further its
17 position.

18 And the Montana Supreme Court said
19 explicitly, this is under MSUMRA, "Under MSUMRA,
20 the State has primacy to regulate coal mining in
21 Montana and Montana law controls." Montana law
22 doesn't permit this avenue, and therefore all of
23 these IBL cases that Decker relies on are in
24 opposite to this proceeding.

25 So on those grounds alone, that should

1 really be the end of the argument. That's all the
2 Board needs to know. But even if it gets there,
3 even if it wants to start diving into the merits
4 at this point in time, then Decker still isn't
5 likely to succeed.

6 Here's the big issue really is Decker
7 put in its plan what it was going to do, and what
8 it said it was going to do is that it was going to
9 move a certain number of cubic yards per year with
10 a dragline, and additionally it was going to move
11 a certain number of cubic yards per year, up to
12 three million cubic yards per year, with a truck
13 and shovel fleet.

14 The issue is Decker didn't do, didn't
15 deploy the truck and shovel fleet. They didn't
16 move any of the material with the truck and shovel
17 fleet. Never deployed. It's also undisputed that
18 Decker never did any revegetation and seeding.

19 Now, there may or may not be good reason
20 for those things -- right -- but that doesn't
21 permit Decker to then just do whatever it wants,
22 saying, well, we previously approved this plan.
23 Decker didn't follow the plan, and therefore,
24 because you didn't follow the plan, the plan that
25 we previously approved is not in compliance with

1 MSUMRA.

2 We enforce the requirements of MSUMRA
3 based on the information that you put in your
4 approved plan. If that plan changes, okay.
5 Things change. But if things change, then the
6 plan needs to be updated.

7 And so the issue here is because they're
8 out of compliance because they didn't deploy the
9 truck and shovel fleet, because they didn't do any
10 reseedling, they just need to give us an updated
11 reclamation plan with this information, because
12 that's how we do -- that's how everything gets
13 tied together.

14 That's how we calculate bond, that's how
15 we calculate the time period with which these
16 major steps are going to be completed. It can't
17 just be, "I'm going to do what I want whenever I
18 want, depending on conditions, and I don't have to
19 keep the Department apprised of those things." To
20 accept that premise would run counter to what the
21 MSUMRA statute and regulations require.

22 I do also want to just point out one
23 thing, because you've heard a lot about the
24 backfilling, and "We're way ahead of schedule.
25 We're at six million cubic yards, and now we're at

1 nine million cubic yards ahead of schedule," and
2 one, that hasn't been confirmed either.

3 Two, the second thing I'd like to point
4 out is that we have given Decker adequate time to
5 address changes to the reclamation plan. In fact,
6 DEQ sent Decker a letter back in August 30th of
7 last year, a status letter, letting them know
8 about updates that needed to be made to the
9 reclamation plan.

10 Further, Decker then also submitted a
11 deficient minor revision, that's Minor Revision
12 119, that purported to update that reclamation
13 schedule. It was not approved in the deficiency
14 process because it didn't provide enough
15 information to satisfy the rules and regulations.
16 So they already know they needed to update their
17 reclamation plan, so to turn around and say that
18 they didn't know, or "We're so surprised," is just
19 not true.

20 The other thing I heard was, "Why didn't
21 we issue any maintenance items?" Well, in fact we
22 can't issue any maintenance items any more.
23 Office of Surface Mining already told DEQ that
24 there isn't an opportunity to issue maintenance
25 items any longer, and that was with respect to a

1 ten days notice for the Signal Peak Mine, I
2 believe.

3 And we defended this issue of
4 maintenance items. That is no longer an
5 opportunity to be used under the MSUMRA process.
6 OSM was very clear that when there hasn't been
7 compliance with MSUMRA, you have to just issue a
8 Notice of Noncompliance or violation letter.

9 Finally, I'd also just like to briefly
10 touch on this idea of this being a MAPA formal
11 contested case hearing as the only way to satisfy
12 due process. One, that's an over-statement.

13 And two, even if temporary relief is
14 available, the Board doesn't have the authority to
15 use the due process clause of the Montana
16 Constitution to unilaterally change the procedures
17 that have been explicitly laid out -- right -- any
18 more than just the Board or DEQ could change a
19 permit decision, even if a permit complied with
20 the substantive laws to say, "Well, we can't
21 approve it because we don't believe that it
22 complies with the clean and healthful provision of
23 the Montana Constitution."

24 I mean we just can't do that. If you
25 satisfy -- The statutory criteria drives

1 everything that we do. We can't just
2 independently go to the Constitution and make
3 unilateral decisions. The question is for the
4 Legislature whether those proceedings that have
5 been laid out are sufficient to satisfy those
6 constitutional obligations.

7 To the extent Decker truly believes that
8 any hearing that's conducted here doesn't satisfy
9 their due process rights, which they'd also have
10 to point to a specific deprivation of life, or
11 liberty, or property, to prevail on, not some
12 speculative future injury about AVS listing --
13 then their remedy to do so is to challenge that
14 before a Montana District Court that those
15 processes laid out are unconstitutional. But
16 again, it's not a factor here even presuming
17 temporary relief were available.

18 And finally I'd like to point out Decker
19 has never explained really about why its
20 previously approved reclamation plan, which now
21 needs alteration because it didn't follow the
22 previously approved schedule, satisfies the
23 criteria that DEQ laid out in its Notice of
24 Noncompliance and Order to Abate.

25 Let me give you an example. So for

1 example, if you pull up their purported previously
2 approved reclamation plan, DEQ's Order of
3 Abatement requested updates to include detailed
4 steps and dates for completion for backfilling,
5 including map of reclamation sequence.

6 The only thing that is in this
7 reclamation plan -- if you don't mind, let me
8 share my screen here for a second. Can everybody
9 see this? This is their detailed time table for
10 major steps. This is at Page 4.

11 It's just a general time frame when
12 we're going to do things, and then just a
13 statement that there are instances however where
14 this scenario is not possible. And it's a summary
15 of approximate mining reclamation sequence and
16 time frames for a typical cut.

17 Now, if you look at ARM 17.24.313(1)(b),
18 (d), and (g), which is cited in our brief, what's
19 required under that is extensive. And I've heard
20 a lot of hyperbole about how we don't need to
21 satisfy that level of detail, but I'm not sure how
22 one single page in this purported reclamation plan
23 satisfies that requirement.

24 And furthermore, they didn't even
25 satisfy the requirements that they put in there

1 for utilizing the truck and shovel fleet despite
2 multiple, multiple, multiple inspections done by
3 the Department noting that they haven't done
4 exactly what they said they were going to do in
5 additional representations that they were going to
6 do that.

7 Another example. In the Order of
8 Abatement, we talk about mine pit dewatering.
9 There's nothing in there -- that's also under ARM
10 17.24.313(1)(b), (d), and (g). This plan right
11 here that is purportedly sufficient has no
12 reference to how mine pit dewatering is going to
13 occur.

14 Similar example. In the Order of
15 Abatement we talk about soil lay down and details
16 on a soil pile. In this plan that you're looking
17 at right here, it just recites that Decker is
18 going to comply with the Administrative Rules in
19 soil lay down, and sampling, and seeding.

20 DEQ knows what the rules say. It's
21 Decker's obligation to give us information about
22 how it's going to satisfy these requirements, or
23 at least in what order it's going to do it.

24 The same thing, Order of Abatement. DEQ
25 asks for a plan for permanent mitigation of coal

1 smokers citing Rule 17.24.523, and ARM
2 17.24.308(1)(d). Decker's reclamation plan has no
3 reference to these coal smokers.

4 Talks about Order of Abatement for
5 removal of buildings and other support facilities,
6 again citing to ARM 17.24.308(1)(b). Their plan
7 on Page 58 here just cites the rule back to us.
8 Right here, "At the end of the life of the mine
9 all facilities listed under this statute will be
10 removed unless otherwise approved by the
11 Department."

12 Great. How is that going to happen?
13 Are you going to put the facilities in the pit?
14 What is the sequence of events? Are you going to
15 put them in the pit, and then backfill over the
16 top of them? Are you going to fill in the pit and
17 then you're going to take the facility structures,
18 and move them off site to a landfill?

19 There's just some basic details we need
20 to know here, and the reason we need to know them
21 and the sequence of events is because that's how
22 we calculate the bond.

23 Similarly, the order states, "Give us
24 information on facility sampling for
25 hydrocarbons," citing ARM 17.24.308(1)(c). The

1 plan is completely silent. Doesn't talk about
2 that.

3 So these are just basic requirements.
4 DEQ in fact does have the authority, and must
5 issue orders to a permittee whenever it needs
6 additional information to make sure that MSUMRA is
7 being complied with, and that the reclamation plan
8 meets these requirements.

9 It is just a basic expectation here. I
10 don't believe that it's too much to ask. And with
11 respect to you, Board Chair Simpson, I believe
12 that your experience shows you that like this is
13 just a general expectation for any company in
14 Montana.

15 And I believe that having that
16 information also renowns to their benefit, because
17 MSUMRA also requires that in order to have --
18 Having a sufficient reclamation plan is important,
19 so that somebody can go forward with confidence
20 that they can have their bonds released, that,
21 "Hey, I put information before the Department
22 laying out what I was going to do, and the order I
23 was going to do it, and when I go do that, I know
24 that I can come to you, you can give me money
25 back, I can go forward, and we can just keep

1 moving down here."

2 It can't be, "I'm just going to do what
3 I want, whenever I want, and if things change, I
4 don't really need to let the Department know." Of
5 course things change, but then you need to just
6 update the plan accordingly.

7 In summary, these are simple issues.
8 Decker did not adhere to their previously approved
9 reclamation schedule, and because of that, their
10 previously approved reclamation plan is -- they
11 need a new one. That's it. That's all the agency
12 is asking.

13 And if Decker wants turn this into a big
14 hearing or a MAPA contested case proceeding, okay,
15 but I think the bigger issue before this Board
16 here today is that there isn't authority for the
17 Board, for better or worse, to unilaterally stay
18 DEQ's order during the pendency of this
19 proceeding, and DEQ asks that the Board deny
20 Decker's motion. Thank you.

21 CHAIR SIMPSON: Thank you, Mr. King.
22 Ms. Marquis, rebuttal.

23 MS. MARQUIS: Yes. Thank you very much.
24 Again, we heard a lot from DEQ about what they
25 want in a reclamation plan, and we've just

1 witnessed DEQ point out the deficiencies in a
2 reclamation plan that they approved. They had
3 that before them. They went through it all,
4 looked at it all, they approved it, and now they
5 find deficiencies in it.

6 And let's not forget the fact that the
7 reason they're ordering these to be fixed is
8 because they cite a noncompliance against Decker
9 for moving more dirt last year than they were
10 required to. So because they moved more dirt, DEQ
11 concludes that the reclamation plan is garbage,
12 and they need to start over.

13 That does not make any sense at all.
14 Decker is ahead of schedule. They have moved more
15 dirt. DEQ now says that it's not been verified,
16 but if you refer to your timeline, Item No. 58 on
17 January 15th, 2025, DEQ approved Minor Revision
18 115. That's for the 2024 bond calculation. That
19 bond calculation was based on the amount of
20 material that needs to be moved going forward.

21 So DEQ has had that information in front
22 of them, they have reviewed it, they approved the
23 bond calculation based off of it. So this isn't a
24 surprise to the Department, and this isn't
25 something that they have questioned ever.

1 Now, DEQ says that Decker has to let the
2 Department know when things change. Decker did
3 that. Item 56 on the timeline, December 2nd,
4 2024, Minor Revision 119. That is where Decker
5 said, "Things have changed. We're going to move a
6 different volume of material because we've already
7 moved a lot." And they submitted that minor
8 revision to account for that going forward.

9 You'll see also in the timeline DEQ,
10 like Mr. King noted, they found a deficiency in
11 it. That's Item No. 59. They found a deficiency,
12 and sent it back to Decker. That was January
13 22nd.

14 Seven days later, one week later, DEQ
15 sends the Notice of Noncompliance and Order of
16 Abatement. What would have happened had that
17 minor revision review process been allowed to play
18 out? We don't know, because it got preempted by
19 an enforcement action and threats of listing in
20 the AVS system, issuing a cessation order,
21 forfeiting the bond.

22 Those threats are all throughout the
23 DEQ's briefing, and it's all been part of the
24 conversation between Decker and DEQ. What would
25 have happened if we would have just let that minor

1 revision process play out, and give Decker more
2 than seven days to respond to that deficiency
3 letter? That didn't happen.

4 I would ask -- I believe Morgan Pettit
5 is on line, and she could share her screen
6 quickly. Because the schedule the Department put
7 up in front of you -- they argued this in their
8 response brief -- they said that's not the
9 operative schedule. Here's the operative
10 schedule. There's where the numbers are. That's
11 the detail that Decker provided to DEQ, and that
12 was Decker's commitment.

13 Now, at the time they put that together,
14 did they know they were going to be required to
15 use a truck, a shovel, and dozer, and not be able
16 to move the same amount of material but more
17 efficiently? They didn't know that would get them
18 a Notice of Violation or Notice of Noncompliance.
19 And in fact they did comply with all those
20 numbers, and they've moved more, and DEQ cannot
21 and does not argue any differently.

22 So thank you, Morgan, for providing
23 that. I think unless the Board has questions on
24 that, we'll stop sharing, and I'll continue on
25 here for a minute.

1 DEQ says that the statutory language
2 should drive the Board's consideration of this
3 motion and we agree. Our due process clause
4 arguments are to point out that the statutes
5 provided in MSUMRA and in MAPA are important
6 because they provide those due process safeguards.
7 Going off on some different process with some
8 different type of hearing that's not MAPA doesn't
9 have those due process safeguards. That's very
10 important to Decker moving forward.

11 In terms of 251 versus 254, Decker only
12 argues for this Board to recognize 251
13 Subparagraph (c), which says that the filing
14 doesn't automatically trigger a suspension of the
15 abatement requirements.

16 DEQ says you have to harmonize that with
17 254, but then DEQ proposed a reading of it that
18 completely reads out the first part of Section 254
19 Subparagraph (1)(c), which is that the period
20 permitted for correction of a violation does not
21 end until entry of a final order. That is
22 triggered upon a motion from the Permittee to the
23 Board to suspend the abatement requirements.

24 That's what Decker did here, exercised
25 their rights under that statute to ask the Board

1 to suspend the abatement requirements to give us a
2 chance to tell our story, and figure out all of
3 this stuff, and figure out whether there was a
4 noncompliance or not. If there's not a
5 noncompliance, then the Order of Abatement falls
6 apart. It's built on a house of cards.

7 DEQ also said that Decker concedes the
8 Board doesn't have this power. We never conceded
9 that. Our arguments have been very strong. The
10 Board has the power to modify the order under
11 251(6), and the Board has also the authority to
12 recognize that 254 Subparagraph (1)(c) allows that
13 the period of time permitted to correct the
14 violation does not expire pending this contested
15 case hearing.

16 We pointed you to the Rule 17.24.425 as
17 guidance only. We've never claimed that that
18 controls in this instance. It's guidance only.

19 And we're not saying that the Board
20 should rely on SMCRA instead of MSUMRA. Just as a
21 reminder, in the Department's response brief they
22 said, "Wait a minute. We can't have a contested
23 hearing and go through all this. We have to go
24 straight to AVS, or we're going to be out of
25 compliance with SMCRA, and we're going to be in

1 jeopardy of losing our program."

2 Well, we have proven that that's false.
3 We've shown the Board that under SMCRA this is
4 exactly the process that happens. The eight IBLA
5 cases that we provided are based on the SMCRA laws
6 that they follow, which track very closely with
7 the Montana laws.

8 It provides that when the permittee asks
9 that the abatement requirements be stayed, the
10 Board has the authority to do that. So it's a
11 parallel track. It's not binding upon the Board,
12 but it is guiding. And it's pretty telling when
13 the Department comes here today saying they prefer
14 a process that provides less due process, and is
15 more stringent and more punitive than what the
16 federal process provides in SMCRA.

17 I don't believe that's correct, and I
18 don't believe that was intended when the
19 Legislature enacted MSUMRA and these provisions.

20 Again, I just want to re-emphasize that
21 Decker has a reclamation plan that was reviewed
22 and approved by the Department. The timeline
23 shows that Decker has been consistent in offering
24 minor revisions to upgrade that plan. The
25 timeline shows that the Department has been

1 consistent in inspecting the mine, not finding any
2 noncompliance.

3 Decker moved more material than it was
4 required to, not by a little, but by a lot.
5 They're than nine million loose cubic yards ahead
6 of schedule. That's important. They're moving
7 forward. It's great to have a mining company when
8 they're finished mining that is that aggressive
9 about reclamation. What did Decker get for it?
10 They got a Notice of Noncompliance.

11 All we're asking is hit the pause
12 button, no more enforcement of that until we've
13 had a chance to tell our story, and get to a final
14 order from the Board in this contested case
15 hearing. Thank you very much.

16 CHAIR SIMPSON: Thank you, Ms. Marquis.
17 Mr. King, further comments.

18 MR. KING: Just briefly, Board Chair. I
19 don't want to repeat myself too much, but again,
20 Decker conflates what federal law requires or
21 permits and what State law requires.

22 If DEQ doesn't follow the State program,
23 then Decker is out of compliance with its State
24 program, and there are consequences for that. It
25 doesn't matter if the State agency just says,

1 "Well, whatever our actions were complied with
2 federal law, so therefore it's no big deal." The
3 question is whether it complied with its own State
4 law proceedings.

5 That's the question, because DEQ has
6 primacy. OSM looks at whether we're complying
7 with our own State law requirements, which have
8 previously been approved by the federal
9 government.

10 And tellingly there just isn't a process
11 that is laid out, and Decker can't point to one,
12 where a party can file a motion, seek a temporary
13 relief or a stay of the order, because there isn't
14 one that exists.

15 And my point was Decker concedes that
16 17.24.425 can be used as guidance. I think that's
17 the operative fact is if the Board is having to
18 make this process up to consider whatever it
19 wants, then that is not a grant of authority
20 that's been explicitly delegated by the
21 Legislature.

22 And again, if you accept Decker's
23 argument, then 251(6) is completely meaningless,
24 and it puts these statutes at utter odds with each
25 other. And there is a logical way to harmonize

1 these statutes, and the logical way is: The
2 violator isn't off the hook with complying with
3 the order until it gets a final order.

4 Because there might be subsequent
5 violations that are issued by the Department --
6 right -- during the pendency of any proceeding.
7 And we know that because 251(6) says that filing
8 an application for appeal doesn't stay the
9 Department's order. So you need to comply, and
10 you still have to comply unless and until you get
11 a final order saying you don't; and if you don't
12 get that, you still have to comply with those
13 things as listed in the Department's order.

14 251 doesn't say anything about filing a
15 motion. It doesn't say anything about what the
16 Board should consider upon the filing of a motion.
17 And the Board can't just read in language that
18 while federal law permits this procedure,
19 therefore so too does the State law. That's just
20 not how this process works.

21 State law is controlling. The State
22 Legislature still makes the State law, not the
23 federal government. The federal government just
24 gives its review and approval so as long as it's
25 not less stringent than the federal standards.

1 Secondly Decker still fails to explain
2 how if you don't follow your previously approved
3 reclamation plan, you don't need to update it.
4 They haven't updated satisfactorily their
5 reclamation plan based on their changes that they
6 unilaterally did.

7 Whether they move more material, whether
8 they move less material, the fact of the matter
9 remains they put in their reclamation plan, "We're
10 going to move this amount of material with this
11 specific equipment during these years." If you
12 don't do that, because there's something that's
13 changed, you need to give us new information for
14 us to approve, and they have yet to do so.

15 And again, the silence is telling about
16 all of these other things that they're explaining
17 somehow satisfy MSUMRA's demanding requirements
18 for reclamation.

19 Now, they do point -- and to their
20 point, we did approve this previous reclamation
21 plan, but that doesn't excuse us from making sure
22 that any plan that was previously approved
23 satisfies MSUMRA's requirements, and they can't
24 explain why any of these other requirements we put
25 in there in the order to abate satisfy the

1 requirements of MSUMRA. I haven't heard a single
2 argument about why they do.

3 So it's just a basic expectation.
4 Again, it's not a heavy lift, so even if the Board
5 gets to the merits of this at this juncture, it
6 should still deny Decker's motion, but it needn't
7 get there because there isn't any authority to
8 even consider the motion. Thank you very much.

9 CHAIR SIMPSON: Thank you, Mr. King.
10 It's 11:01. Why don't we take a ten minute break,
11 collect our thoughts, and then we will proceed
12 with questions from the Board.

13 (Recess taken)

14 CHAIR SIMPSON: Sandy, it looks like
15 we're ready to resume. Would you take the roll,
16 please.

17 MS. MOISEY-SCHERER: Chair Simpson.

18 CHAIR SIMPSON: Here.

19 MS. MOISEY-SCHERER: Vice Chair Aguirre.

20 VICE CHAIR AGUIRRE: Here.

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

23 BOARD MEMBER KNUTESON: Here.

24 MS. MOISEY-SCHERER: Board Member
25 Rankosky.

1 BOARD MEMBER RANKOSKY: Here.

2 MS. MOISEY-SCHERER: Board Member Smith.

3 BOARD MEMBER SMITH: Here.

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

6 CHAIR SIMPSON: Thank you. Let's
7 proceed with the questions from the Board. One
8 thing I'd like to mention before we move forward
9 is that we're not litigating the merits of the
10 Notice of Noncompliance, and we've bounced back
11 and forth between that and the requirements of the
12 abatement order quite a bit during the oral
13 arguments.

14 So I'd like to, to the extent we can,
15 limit our questions and discussion to the
16 abatement order itself, and the matter before us,
17 which is whether or not to suspend that abatement
18 order. Questions from the Board.

19 BOARD MEMBER KNUTESON: (Indicating)

20 CHAIR SIMPSON: I see a hand up there.

21 BOARD MEMBER KNUTESON: Chair Simpson.
22 Amanda Knuteson. I would like to ask Mr. King a
23 question.

24 CHAIR SIMPSON: Please proceed.

25 BOARD MEMBER KNUTESON: Mr. King, just

1 for clarity, you today focused primarily on --
2 There's been a lot of discussion about the truck
3 and shovel versus dragline violations or
4 deviations from that reclamation plan that's in
5 place, and then the lack of seeding.

6 Those were cited as deviations or
7 violations of that reclamation plan that would I
8 guess be a foundation or give you the authority
9 then to demand another reclamation plan, right?

10 An amended.

11 But in your reply brief -- and I
12 actually thought this was more compelling, but
13 again, I lack probably the background to make that
14 statement. But for me personally, arguing that
15 "The approved mine plan, poor conservation plan,
16 and reclamation plan must be revised to be kept
17 current with mine operation with changes on the
18 ground," and the Notice of Cessation of Mining
19 Operations being that triggering event.

20 I thought that was the more substantive
21 foundation for requiring this more detailed
22 reclamation plan than what's in place now. And am
23 I misunderstanding something? Could you clarify
24 that for me, or maybe Ms. Marquis would -- but Mr.
25 King, I'd like to start with you if you don't

1 mind.

2 MR. KING: Yes. Absolutely. And if I'm
3 understanding -- Let me make sure that I'm
4 understanding your question correctly is: "The
5 Notice of Noncompliance was based on failure to
6 follow your previously approved reclamation plan,"
7 right?

8 And then the second piece was, "But you
9 need to update the reclamation plan based on the
10 status of things on the ground;" is that right?
11 And you found that second piece more compelling?
12 Am I understanding just the premise --

13 BOARD MEMBER KNUTESON: I'm trying to
14 sort of marry the conversations we had at our
15 regular meeting, and then what I'm hearing today.
16 And obviously we dedicated so much time, and still
17 don't have an answer to even what kind of hearing
18 are we having right now, and how does what kind of
19 hearing we're having right now impact what
20 decisions we can make today or what actions we can
21 take. That's separate.

22 But you had cited in your reply brief,
23 and spend a fair amount of time, and I think
24 starts on Page 7, response brief, under 82-4-234,
25 you sort of -- There was a timeline set forth, and

1 it showed we got -- so you have the Notice of
2 Violation related to that truck and shovel versus
3 dragline scenario and the seeding, but then you
4 had subsequently notice that they were going to
5 stop mining, and then DEQ, I think, with a demand
6 for the more detailed reclamation plan.

7 And at the last hearing we heard a lot
8 about the level of detail being unreasonable or
9 unduly burdensome to Decker. And maybe we're
10 getting too much into the merits. But I just
11 wanted to see if you could clarify for me.

12 You have those violations or deviations,
13 whatever you're calling them, alleged violations,
14 and then you have 82-4-234, which to me seems to
15 indicate unequivocally, at the point you received
16 Notice of Cessation of Mining Operations, MDEQ's
17 position is that you would have authority to
18 demand that more detailed or highly detailed
19 reclamation plan that is being argued as unduly
20 burdensome by Decker. Is that accurate?

21 MR. KING: I understand. I do want to
22 point out that with all due respect, there's maybe
23 some conflation of issues between West Decker and
24 East Decker.

25 So with West Decker it was: We received

1 Notice of Cessation of Operations and "We're
2 forfeiting our right to mine." And I don't want
3 to jump ahead here. But the reclamation plan as
4 it existed was contingent on future mining up
5 until 2030. And so upon this notice where things
6 on the ground change, then our action was, "Okay,
7 we need an updated reclamation plan to be
8 consistent with the operation."

9 It's sort of similar here, but the
10 noncompliance and the order to abate was based on
11 the fact that the previous -- not on the cessation
12 of mining -- but on the previously approved plan
13 that said, "We're going to deploy a truck and
14 shovel fleet." Does that answer your question?

15 BOARD MEMBER KNUTESON: It does. Thank
16 you very much. I was conflating a little bit. I
17 appreciate that clarification. Thank you.

18 CHAIR SIMPSON: Thank you. Joe, you
19 have your hand up.

20 BOARD MEMBER SMITH: Back to the
21 original question of the Order of Abatement. I
22 think at our last regular scheduled meeting, we
23 talked a lot about wanting to make sure the
24 reclamation efforts actually continued.

25 In the documents there seems to be

1 disagreement between DEQ and the mine on whether
2 reclamation actions can actually continue. I'd
3 love to hear a statement from Mr. King and Ms.
4 Marquis about if reclamation efforts can actually
5 continue if we do nothing today.

6 MR. KING: I'm happy to go first, but
7 yes, it's our expectation that of course
8 reclamation efforts will go forward. I don't
9 believe Decker has put anything in their brief
10 that would indicate some tangible thing that
11 reclamation is not going to go forward.

12 I mean as it states, I believe that's in
13 17.24 -- I might be getting this backwards -- 522,
14 that regardless of the status of any permit you
15 have to complete your reclamation. You're still
16 on the hook for the reclamation.

17 Now, practically speaking, it seems like
18 there's this argument that if they're put on the
19 AVS they can't go forward with reclamation. I'm
20 not sure why that is. Right? Like why is that
21 so? And if you don't, then you are, subsequent to
22 further enforcement action.

23 So our expectation is of course
24 reclamation will keep going forward, but also you
25 are still operating under a schedule that is no

1 longer operative because the previously approved
2 schedule has not been adhered to.

3 So I guess that's our position on it,
4 and I haven't heard anything that is based on
5 tangible evidence other than argument of Counsel
6 that there is going to be a cessation of
7 reclamation just because you're listed in the AVS.

8 BOARD MEMBER SMITH: Ms. Marquis.

9 MS. MARQUIS: Thank you for the
10 question, Board Member Smith. I'm going to read
11 from the affidavit of Tay Tonozzi, who is the CEO
12 of Decker's parent company, Lighthouse Resources.
13 I believe it is tangible evidence, not just
14 argument from Counsel.

15 He says in Paragraph 5, "Any further
16 adverse action stemming from the notice, including
17 a cessation order or listing in the AVS, would
18 significantly undermine Decker's reclamation
19 efforts at both the East Decker and West Decker
20 mines. The reclamation is currently funded with
21 money received from Decker's sureties.

22 "Additionally, revenues from Lighthouse
23 Resource joint interest in the Black Butte coal
24 project located in Wyoming are intended to fund
25 reclamation at both East Decker and West Decker.

1 Any further adverse action stemming from the
2 notice will jeopardize relationships with the
3 sureties, as well as the permitting actions in
4 Wyoming, both of which are critical to funding
5 reclamation in Montana."

6 So while DEQ may say that they would
7 craft a cessation order that allows reclamation to
8 continue -- and definitely Decker wants to
9 continue reclaiming. That's why they're going
10 ahead of schedule.

11 The reality is this is a stack of
12 dominoes. There's going to be an effect from
13 listing in the AVS. We don't want to see what
14 that effect will be. We'd rather just drive on
15 with the reclamation without worrying about the
16 impacts to relationships, the optics of it, and
17 permitting, and the income stream from Wyoming.

18 BOARD MEMBER SMITH: So Ms. Marquis, you
19 make the case around, the business case of being
20 able to fund the reclamation, but I just want to
21 know specifically.

22 It sounds like you're both in agreement
23 that functionally speaking, irregardless of the
24 funding constraints, reclamation can continue,
25 correct?

1 MS. MARQUIS: Depending on DEQ's next
2 moves, and the extent of whatever order they issue
3 next, theoretically it could continue, yes.
4 Realistically is a different question.

5 BOARD MEMBER SMITH: But from a funding
6 standpoint, I mean you're talking about how the
7 business is able to fund reclamation, but isn't
8 that why the bond exists?

9 MS. MARQUIS: Yes, but bonds are
10 complicated, and as you may be aware, there was a
11 bankruptcy case here, and that dealt with the
12 sureties and the bonding, and there's a
13 complicated arrangement for how the reclamation
14 will be funded as a result of that.

15 So the sureties put money in, but they
16 also expect bond releases, so that they can sort
17 of turn over some money and keep moving forward.
18 If there's an implication that the bond release
19 isn't going to be met, or that Decker is mired up
20 in the AVS system in a Notice of Noncompliance,
21 I'm not sure what that does to the surety
22 situation and their funding.

23 BOARD MEMBER SMITH: Another question
24 somewhat unrelated. So there's a lot of
25 conversation about backfilling being ahead of

1 schedule, and then whether or not that conforms to
2 the type of backfill methods in the plan.

3 Very quickly. I don't want to belabor
4 this too much. But what efforts have been made by
5 the mine to verify the backfill quantities to the
6 DEQ?

7 MS. MARQUIS: The bond calculation is
8 submitted annually, and part of that bond
9 calculation goes through an estimation of how much
10 material needs to be moved to fully backfill those
11 pits. That's how they base the amount of the
12 bond. And that's where it gets relooked at.

13 That's an annual requirement that Decker
14 submits their proposed bond calculation, and as a
15 mine revision, it goes through the deficiency
16 process. And we talked about earlier, Item No. 58
17 on the timeline is the most recent time when DEQ
18 approved Minor Revision 115 with the 2024 bond
19 calculation.

20 In there we say that Decker did address
21 the cut fill volumes using Minor Revision 109, and
22 the latest approved post-mining topography. So
23 the cut fill volumes --

24 And this is going to be a crude
25 explanation -- I'm not a miner or an engineer --

1 but it's my understanding that the post-mining
2 topography establishes what the level, surface
3 level is going to look like. And so the pit is
4 dug out down here, and then the cut fill volumes
5 tell them how much volume is needed to get up to
6 where the post-mine topography requires it to be.

7 So that's where those numbers and
8 calculations are done and reviewed. Does that
9 answer your question?

10 BOARD MEMBER SMITH: So when you
11 referenced the --

12 CHAIR SIMPSON: Excuse me, Joe. If I
13 could chime in here, please. If I understood your
14 question correctly, it was: How are the volumes
15 verified or reported?

16 BOARD MEMBER SMITH: Just to be honest,
17 I don't understand why there's so much
18 conversation around if -- from purely a
19 backfilling standpoint. I mean that's just
20 quantity of material. I don't understand why
21 there's so much disagreement over whether that
22 happened or not.

23 I understand that there's methods, and
24 that seems like an easy thing to rectify on if it
25 was done by one method or another. I just don't

1 understand why there's disagreement around the
2 quantities. That seems like a very simple thing
3 to rectify.

4 CHAIR SIMPSON: Well, if I could -- and
5 please, somebody from Decker correct me if I'm
6 wrong, but this is based on my own experience in
7 the mining industry.

8 Dragline volumes are measured by hourly
9 productivity and the number of buckets. Bucket
10 has a fixed volume. And the system in the
11 dragline keeps track of the number of swings. And
12 so you have an accurate, reasonably accurate
13 measure of the number of yards moved.

14 In the case of mobile equipment, it's
15 load counts, how many truckloads, and the volume
16 of the trucks. When you're talking about dozers,
17 it's more a question of hourly productivity, but
18 for dragline and mobile equipment, typically
19 mining operations track that daily. The foremen
20 are required to report all the quantities moved
21 during that day. That goes for both coal and
22 dirt. And so that's how those numbers are
23 generated typically.

24 BOARD MEMBER SMITH: And I totally
25 understand that. Also Ms. Marquis made note of

1 this, that some topography was provided. I mean
2 ultimately regardless of method, the method
3 matters from a means and methods as far as a cost
4 standpoint, what's it cost. It might cost
5 different amounts in the bond calculations where
6 they're using one piece of equipment versus
7 another to move the same amount of material.

8 I think what I'm getting at is the
9 actual volumes moved. If that's what's important,
10 that's an easy thing to measure based on
11 topography over time.

12 MS. MARQUIS: Exactly, Member Smith, and
13 I'm told that Decker does survey with a drone
14 every month to measure what the topography is.
15 They compare it to the post-mining topography.
16 And that way they're also able to keep track of
17 how much fill they're putting into the pits.

18 They also file an annual report with the
19 Department every year. I'm told they just filed
20 one that provides some of the detail as well.

21 BOARD MEMBER SMITH: For Mr. King, can
22 you say whether the actual material, amount of
23 material that needed to be moved in the original
24 permit, has that happened?

25 MR. KING: We can't -- To your question,

1 Board Member Smith, we cannot confirm that. You
2 know, we haven't gotten verification from Decker.
3 The best we've got is the annual mine report, as
4 Decker notes, and in that annual mine report, we
5 have to calculate that volume ourselves.

6 Now, it's important to note that moving
7 yardage of material does not equate to moving that
8 into the final pit area. So just because you've
9 scooped dirt doesn't necessarily mean it went
10 where it needed to go.

11 So as an example, our program has found
12 that handling of one pile three different times at
13 Pit 20 just to get it into the pit. So you can
14 move a lot of material. The question is where are
15 you moving it to. We need to know that
16 information as well.

17 Now, I'd also just like to briefly touch
18 on this idea of -- and maybe I'm reading into this
19 too much, so I apologize. But it seems to be
20 like, "Well, if I'm moving material, who cares
21 what equipment I'm using, moving that material
22 with, whether I'm moving it with a truck and
23 shovel fleet, am I moving it with a dragline,"
24 whatever. If you're moving material, you're
25 moving material. Okay.

1 But they have different purposes. And I
2 think it's important to note that when you are on
3 -- one, we need to know, if you're going to
4 specify what equipment you're going to use, we
5 need to know that information. And if you're
6 going to put in there that, one, "I'm going to use
7 a truck and shovel fleet," then we need to know
8 that information. And if you're not, we need that
9 updated information.

10 Secondly, when you are thinking about
11 reclamation, these aren't just sort of disparate
12 ideas of, "Well, I'm going to move dirt. At some
13 point I'm going to reseed. At some point I'm
14 going to revegetate." These things all get tied
15 together, and there is a hierarchy and there's an
16 order of operations. You can't lump a truck and
17 shovel and dragline yards in the same spot.

18 Decker's right. A dragline, it's
19 efficient in that you can move a lot of dirt, but
20 you can't use a dragline to access and adequately
21 relocate every single yard of material, nor does
22 it place topsoil over backfill. So regardless of
23 how much material you use, you need different
24 equipment to conduct different aspects of the
25 reclamation.

1 So what you need to know in order to
2 adequately calculate the bond that we hold, and
3 the timeline of reclamation, we need to know
4 basically the order that you're going to do things
5 in, and the speed with which you're going to do
6 things in, because that's then going to drive
7 every other aspect of the reclamation plan.

8 If I finish filling the pit, then I lay
9 the topsoil, then that's going to drive the
10 reseeding process. I need to know in what order
11 those things are going to happen. It can't just
12 be this sort of haphazard, "I'll do this, but then
13 I moved over here, and I did some over here, and
14 then I did this," because they need to progress in
15 the order that they progress in, because as soon
16 as you're done with one, that's going to drive the
17 sort of next phase.

18 So I think it's an over-simplification
19 to say, "Well, I just used the dragline instead."
20 And even if that's permissible, you just need to
21 explain to the Agency that that's what you are
22 going to intend to do, and if you've now deviated
23 from that plan, we just need new information that
24 says, "Okay. Well, what's your new plan?" And
25 that's what we're asking for here. So I hope

1 that's helpful.

2 BOARD MEMBER SMITH: I think so. I
3 don't want to talk in circles on this anymore.
4 Still, though, there seems to be a disagreement
5 over whether reclamation activities has happened
6 or not, and I still just don't understand. These
7 are simple things to identify.

8 And I guess what ultimately I'm trying
9 to figure out is: Has Decker not provided
10 information that would be helpful in that process,
11 or is DEQ getting hung up on the specific minutiae
12 of how that's done? I mean I understand why
13 that's important, but I still don't know exactly
14 where I stand on that, but I don't know that I
15 want to belabor that any more. I'll return it to
16 Chair Simpson.

17 CHAIR SIMPSON: Thank you, Joe. Just
18 going forward here, I think some of your questions
19 will be answered. I've got a list of questions I
20 want to go through. I wanted to hear from the
21 rest of the Board first, but I think maybe some of
22 those questions you've got may be cleared up as we
23 go through those. Further questions from the
24 Board.

25 (No response)

1 CHAIR SIMPSON: Seeing none, I have a
2 several questions. First is just a matter of
3 information.

4 It's stated along the way that
5 Lighthouse had gone into bankruptcy, and I presume
6 has emerged from that process. Is that the case?
7 And when did that happen?

8 MS. MARQUIS: That is correct, Chairman
9 Simpson. I am not sure when that happened.
10 They've been out of bankruptcy for quite awhile,
11 and that's what enabled the reclamation to move
12 forward.

13 CHAIR SIMPSON: That's sufficient.
14 Thank you.

15 MR. KING: Board Chair Simpson, if you
16 don't mind, I'd just like to tag on to that.
17 Lighthouse Resources did file a motion to reopen
18 the bankruptcy, which was granted. DEQ did
19 participate in a settlement negotiation.

20 But the purpose of the motion to reopen
21 the bankruptcy was that one of the sureties, there
22 was allegations that one of the sureties was not
23 adhering to their obligations based on the
24 previously approved bankruptcy plan for funding
25 additional reclamation in what's called a sinking

1 fund.

2 So that hasn't been resolved. We did
3 engage in a mediation. I'm not at liberty to
4 discuss what those communications were in the
5 bankruptcy. They are privileged communications
6 just between Counsel. So that is technically
7 still ongoing.

8 CHAIR SIMPSON: Thank you, Mr. King.
9 And the reason for the question is just to clarify
10 that reclamation operations aren't being hampered
11 in any way by ongoing Chapter 11 proceedings.

12 The next question, and some of these I
13 think we've got information in all of the filings,
14 but I just want to clarify for the purposes of the
15 discussion.

16 When Decker filed its Notice of
17 Cessation of Mining on April 8th, 2021, was the
18 entirety of coal removal described in the permit
19 complete -- and of course this has to do with East
20 Decker -- that is, was there permitted coal still
21 remaining when mining ceased?

22 MS. MARQUIS: Chairman Simpson.

23 CHAIR SIMPSON: Ms. Marquis.

24 MS. MARQUIS: It sounds to me like the
25 answer might be a little more complicated than

1 that. Because it went through the bankruptcy,
2 whatever coal was remaining was impacted by the
3 bankruptcy.

4 CHAIR SIMPSON: I'm not sure I
5 understand what you're driving at. The question
6 is: When coal mining ceased, had all of the coal
7 contemplated by the permit been removed?

8 MS. MARQUIS: Can you give me a two
9 minute recess so I can find the answer to that
10 question for you?

11 CHAIR SIMPSON: We'll come back to that.
12 Again, this is for Decker. Has Decker been
13 working on responding to the abatement order while
14 all of this has been in progress? And will Decker
15 be able to respond by Tuesday?

16 MS. MARQUIS: Chairman Simpson, Decker
17 has been working on settlement negotiations with
18 the Department. I think we've come a long way. I
19 don't know that we're going to have an agreement
20 by Tuesday. Perhaps we will, maybe we won't. I
21 don't know.

22 In any event, that's the route we've
23 been taking. We do have I believe a couple more
24 minor revisions to update the weed management plan
25 that are pending and ready to be filed, so we're

1 making progress. But to say that it will all be
2 resolved by Tuesday, I don't think I can make that
3 representation to you here today. Not to say
4 they're not working on it.

5 CHAIR SIMPSON: Thank you. Next
6 question. Looking at the reclamation plan as it
7 stands right now, and it's expected that there
8 will be significant volume moved by trucks and
9 shovels. Am I correct in assuming that the PMT
10 can't be achieved without -- alone by dragline --
11 excuse me -- can't be achieved alone by dragline
12 and dozers, and requires truck and shovel dirt to
13 meet PMT elevations?

14 MR. KING: Chairman Simpson, that's
15 DEQ's position is you would need different
16 equipment in order to get PMT, because as I
17 previously represented, and I think as you know,
18 just moving dirt isn't necessarily one and the
19 same. There is equipment that dictates what you
20 can and can't do.

21 MS. MARQUIS: Chairman Simpson --

22 CHAIR SIMPSON: The question is -- I
23 know -- if I can speak for just a moment. Looking
24 at the aerial photos, it's obvious that there's a
25 lot of out-of-pit spoils there at East Decker, and

1 I'm presuming that at least some of that material
2 will be required for fill, and that's why the
3 concern about the truck and shovel operation. Is
4 that an accurate statement?

5 MS. MARQUIS: Chairman Simpson, my
6 understanding is to achieve PMT, you would need a
7 truck and shovel fleet, for example to add the
8 topsoil on top of that, and to do some final
9 working. But that doesn't mean that reclamation
10 can't occur by backfilling the pits, and I think
11 this is what I described to the Board at the last
12 meeting was backfilling the pit is the bulk, is
13 the work that's being done now, and that is being
14 done.

15 Once they get close to PMT, perhaps that
16 truck and shovel fleet will be necessary. It
17 would be necessary for topsoiling perhaps, but at
18 this point backfilling is complete, and more than
19 sufficient volume has been moved with the dragline
20 for backfilling the pits.

21 CHAIR SIMPSON: Here's why I asked for
22 the clarification. The law requires achievement
23 of what we in the business refer to as AOC,
24 approximate original contour. It has nothing to
25 do with the esteemed Congresswoman from Brooklyn.

1 But it's not required to be -- and has to be of
2 similar character as it was before mining, but not
3 necessarily the same elevation.

4 And so I guess what I'm asking is I
5 don't know much about the Decker operation down
6 there, other than what I can see from the aerial
7 photographs, but it appears to me that there was
8 probably some high overburden coal there, that in
9 order to access, the dragline had to be
10 prestripped with mobile equipment, and that's
11 where the out-of-pit spoils originated.

12 So my question is: With the situation
13 as it is right now, can approximate original
14 contour be achieved, the PMT, can it be achieved
15 solely by dragline and dozer fill, or were
16 out-of-pit spoils necessary in order to achieve
17 the PMT?

18 MS. MARQUIS: Chairman Simpson, I don't
19 think that's the issue before us today, but
20 respectfully, like we just discussed, there may be
21 times when the truck and shovel fleet is
22 necessary.

23 What is important is DEQ hasn't
24 identified any area where a truck and shovel fleet
25 was needed to reach the PMT or the AOC, and it

1 didn't happen. If that was DEQ's claim, that's a
2 different conversation about what does it look
3 like on the ground in a particular spot, and what
4 does Decker need to do to fix that.

5 That's not DEQ's claim here. DEQ can't
6 point to any specific reclamation that hasn't been
7 done. If they had, we'd be talking about things
8 like you're raising, like the PMT and the AOC,
9 where is that not met, but that's not DEQ's claim
10 here.

11 Their claim here is straight forward,
12 "You said truck and shovel. You didn't use truck
13 and shovel, and that's a violation," and we
14 disagree because the reclamation was done.

15 CHAIR SIMPSON: As I said earlier, we're
16 not in a position right now to be litigating the
17 Notice of Noncompliance. What I'm trying to get
18 at is the amount of -- the nature and the amount
19 of work involved in creating the post-mining
20 topography that's going to be acceptable under the
21 law and to DEQ. That's why the question.

22 MS. MARQUIS: Chairman Simpson, I want
23 to make sure we're still talking about East
24 Decker, which has an approved PMT in place.

25 CHAIR SIMPSON: I guess I have to go

1 back to my original question, and that is: When
2 mining ceased on April 8th, as proposed April 8th,
3 2021, which is over four years ago, was the
4 entirety of the coal contemplated by the permit
5 removed, or was there coal left in the ground?
6 That is, did the final pit end up in the same
7 place, or did it end up someplace else? Did it
8 end up short? It makes a big difference as to
9 whether or not the original PMT is valid or not.
10 That's where I'm going with this.

11 MR. KING: Board Chair Simpson, if I
12 may --

13 MS. MARQUIS: -- deflect this to Morgan
14 Pettit if I could, please? I know she's
15 researching that, and likely has the answer for
16 you, if I could have Morgan answer, please.

17 CHAIR SIMPSON: Mr. King, did you have
18 something to add to that?

19 MR. KING: Yes. So the final pit did
20 end up short, and there is an approved PMT at
21 East, but whether or not your approved PMT can be
22 met is dictated by the order of operations that
23 you use the equipment in.

24 CHAIR SIMPSON: So there is -- I guess
25 I'm a little confused here, because I had assumed

1 -- maybe incorrectly -- that, number one, not all
2 the coal had been recovered. Therefore the pit
3 did not end up in the previously projected
4 location. Therefore a modification of the PMT
5 would be required to account for that. If that's
6 not the case, I'm not really sure what this
7 dispute is all about --

8 MS. MARQUIS: Chairman Simpson, can I
9 have Morgan jump in here?

10 CHAIR SIMPSON: -- other than that may
11 be contained in the permit. I'm sorry. Ms.
12 Marquis.

13 MS. MARQUIS: I just asked if I could
14 have Ms. Morgan Pettit answer this question.
15 She's an associate here at Crowley Fleck, and has
16 been into the details on this, and I think she's
17 got your answer for you.

18 CHAIR SIMPSON: Okay. Yes, please.

19 MS. PETTIT: Chair Simpson, thank you,
20 and thank you, Vicki, for allowing me some time to
21 answer this question as best as I can,
22 understanding that none of us attorneys arguing
23 today are experts at crafting PMT's, or laying
24 dirt down as required in a PMT.

25 But it is my understanding that as you

1 state, mining ceased in April 2021, and while --

2 The issue I just wanted to kind of reframe a
3 little bit in how the federal government looks at
4 is not --

5 When mining ceases, perhaps earlier than
6 it was supposed to, the issue is not whether
7 there's mine-able coal left per se. The issue
8 actually turns to whether there's economically
9 viable coal left to mine. I'm sure you are aware
10 of that.

11 So at the time that mining ceased or the
12 bankruptcy occurred -- Let's just actually make
13 sure that's clear. At the time of bankruptcy,
14 Decker continued to mine. When it was realized by
15 Decker and the folks that they were working with
16 through the bankruptcy that there was no more
17 economically viable coal to mine, that's when
18 Decker requested the Order of Temporary Cessation
19 of Mining Operations. So that's where we're at in
20 that today.

21 The PMT that was approved, I believe it
22 was approved after the bankruptcy occurred, so
23 that PMT and the reason it's not at issue in this
24 case is what DEQ and Decker are advocating is
25 correct, and that's why the issue then turns to

1 like what is in the reclamation plan to meet the
2 PMT.

3 Hopefully that provides some
4 clarification. If it doesn't, I'm happy to answer
5 any more questions about that that I can,
6 understanding that truly we need testimony from
7 those on the ground to fully answer your question,
8 or a mine tour, which I'm sure East Decker would
9 be happy to provide.

10 CHAIR SIMPSON: I'm just trying to
11 understand the situation, because it does relate
12 to what happens going forward.

13 I guess one of the questions I have is
14 in going through the timeline -- which I found to
15 be very helpful. I mean it's obvious there's been
16 a lot of back and forth between the Department and
17 Decker over the last several years. But I saw
18 that Decker contracted with CDG Engineers to do a
19 new PMT, and I presumed that the purpose of that
20 PMT was to base it on the configuration on the
21 ground as it is or was at that time.

22 Now, one of the realities here is that a
23 PMT that's prepared at the time of permit
24 application is a projection. It's an engineering
25 projection of how the dirt is going to lie, and

1 how it's then going to be recontoured and
2 reclaimed.

3 However, once mining has ceased, the
4 condition on the ground is known, that is, the
5 dirt is where it is. So that provides an
6 opportunity to take a fresh look at the
7 recontouring, and look at, one, the amount of dirt
8 available; number two, the amount of fill that's
9 required; and what is the most economic way to
10 achieve approximate original contour in the PMT,
11 and it almost certainly would result in some at
12 least minimal changes from the PMT that were
13 approved at the time of permit.

14 So my question is: Was that the purpose
15 of the CDG effort? And it appears that it's just
16 been kind of brushed aside, and I don't understand
17 why, because -- I'm just curious as to what the
18 background is there, because if in fact that's
19 what it was intended to accomplish, then one of
20 the major requirements required of Decker has been
21 done, the construction of a new PMT.

22 MS. MARQUIS: Chairman Simpson.

23 CHAIR SIMPSON: Yes.

24 MS. MARQUIS: I do see on the timeline
25 here Item No. 21, September 20th, 2022, DEQ

1 approved Minor Revision 109 which revised the PMT
2 to its current form. I'm sorry I didn't find that
3 earlier. I even put it in bold so I'd be able to
4 find it, and I missed it. So that is after the
5 notice of cessation of mining that you stated was
6 April 8th, 2021. Does that help?

7 CHAIR SIMPSON: Particularly -- Let me
8 find it here. If you'll excuse me. I have piles,
9 and piles, and piles of paper. I'm from the old
10 school. If it's not on paper, it doesn't exist.

11 September 20th, 2022 revise the PMT to
12 its current form. January 11th, 2024, this is No.
13 30, Decker submits for a major revision to DEQ
14 proposing to revise MR109 to approve PMT for East
15 Decker, Exhibit KK. CDG consultants were again
16 used to create this PMT.

17 Maybe I'm not understanding this right.
18 But then under 37, it says, "DEQ implies that the
19 proposed PMT deviates too much from the
20 approximate original contour, and has indicated it
21 will not approve the revision."

22 And I'm trying to figure out if this is
23 relevant at all to what we're discussing here in
24 terms of having a valid PMT based on mining having
25 stopped short of where it was originally

1 projected.

2 MS. MARQUIS: Chairman Simpson, I'll
3 defer to Morgan again on this one, if you don't
4 mind.

5 CHAIR SIMPSON: Sure. Please.

6 MS. PETTIT: Thank you, Board Chair
7 Simpson. That's a great question, and I do have
8 some background on the TR4 Amendment that Decker
9 requested. I don't have all of it. Like I said,
10 I think the technical folks could speak to it
11 better than I can.

12 But what I understand is that -- and
13 kind of what you were asking -- is the 2022 PMT
14 revision was to address the fact that Decker was
15 no longer mining, while the TR4 amendment that
16 they proposed was actually just an amendment to
17 the PMT specifically pertaining to certain
18 drainages within the permit area that Decker
19 proposed changing to promote wildlife habitat and
20 increased grass diversity in certain areas.

21 And that is the reason that they
22 consulted with CDG on that. Like the timeline
23 states, that amendment has not been approved by
24 DEQ. In fact, there's been certain conversations
25 that have been held with DEQ regarding that

1 amendment that has made it pretty confusing for
2 the folks, DEQ and Decker, to come to an amenable
3 understanding on where that issue lies. But
4 currently it is unapproved.

5 CHAIR SIMPSON: Thank you. That
6 clarifies it for me. It's not exactly as I had
7 understood it. This is a -- The last question I
8 have is --

9 MS. MOISEY-SCHERER: Chair Simpson, this
10 is Sandy. Sam King had his hand up.

11 CHAIR SIMPSON: I was going to -- I have
12 a request for Mr. King, so Mr. King, why don't you
13 go first, and then I'll ask my question.

14 MR. KING: I was just going to chime in
15 that there is an approved PMT for East Decker, as
16 Decker said. The question now is do we have
17 sufficient information before us to ensure that
18 the PMT can be built, and it's DEQ's position that
19 TR4 isn't relevant to this proceeding.

20 The question regarding the PMT is, at
21 least from our view, that's pretty relevant when
22 it comes to the issue of West Decker, but for East
23 Decker it is not.

24 CHAIR SIMPSON: Okay. Well, that
25 answers my question, because what I've been trying

1 to get at is whether there's a need to generate a
2 new PMT, and the answer to that is no for East
3 Decker. That's important. Sorry to spend so much
4 time on that.

5 The question I have for you: What
6 happens next if the Board denies Decker's
7 petition, and the 90 day abatement period that
8 expires on April 28th expires on April 28th?
9 What happens next? Where does it go?

10 MR. KING: I think where it goes is we
11 issue a cessation order if we don't get the
12 updates. We issue a penalty to Decker, and they
13 go into the AVS system until that penalty is
14 rectified. They have an opportunity to appeal
15 that decision to this Board.

16 CHAIR SIMPSON: -- to be gained by
17 issuing a cessation order on a mine that's in
18 reclamation?

19 MR. KING: Because the cessation order
20 isn't targeted to the activity necessarily on the
21 ground. The cessation order is targeted to the
22 noncompliance. The noncompliance, currently the
23 way to abate the prior noncompliance is by giving
24 an updated reclamation plan, because you've
25 changed the things that you're going to do, you've

1 changed the order of operations on the ground.

2 Again, okay, you know, ideally where
3 you're going to do that, you would have submitted
4 a minor revision in the past. We didn't get
5 there. So if the cessation is directed towards
6 cessating the ongoing noncompliance, which is
7 giving us the reclamation plan, there isn't a
8 cessation to quit mining. There isn't a cessation
9 to quit reclaiming.

10 CHAIR SIMPSON: Thank you. That's not
11 consistent with my understanding of a cessation
12 order, but it answers the question. Thank you
13 very much. Any other questions from the Board?
14 That's all I've got.

15 BOARD MEMBER KNUTESON: (Indicating)

16 CHAIR SIMPSON: Hearing none, let's move
17 forward with Board deliberations on this question.

18 BOARD MEMBER KNUTESON: Chair Simpson, I
19 just had one question. It will be quick. This is
20 Amanda.

21 CHAIR SIMPSON: Yes.

22 BOARD MEMBER KNUTESON: For Mr. King
23 again, just to clarify my line of questioning
24 before. So your position was that this is not a
25 MAPA proceeding because this was a Notice of

1 Violation with no accompanying penalty, and that
2 the AVS listing is not a penalty for purposes of
3 triggering that MAPA process? The AVS listing is
4 not a penalty?

5 MR. KING: Well, not quite. So our
6 position is it's a Notice of Noncompliance, which
7 is a violation, and I think it's somewhat a
8 distinction without a difference in the extent
9 it's a degree, it's different in degree, not kind,
10 right?

11 You can issue just a violation violation
12 accompanied by a penalty. That goes straight to a
13 MAPA contested case proceeding, in I believe it's
14 251(3). Right? This was under Sub (2) where
15 there wasn't this immediate threat of
16 environmental harm. You're in noncompliance. It
17 didn't warrant a penalty. You can abate that
18 through giving us the information that we've
19 requested. That is subject to a hearing before
20 the Board, and then the Board can vacate, modify,
21 do whatever it needs to do.

22 I don't think it's worth conflating the
23 AVS because that is a subsequent action taken by
24 the Department if you fail to abate, which then is
25 subject to a MAPA contested case proceeding. So

111
1 that triggering event has not yet occurred. If
2 and when that occurs, a MAPA contested case
3 proceeding, then obviously you have all the due
4 process rights you have to challenge it in that
5 separate proceeding.

6 Now, one will certainly inform the
7 other, and if we get to that scenario -- which
8 seems like we might -- then maybe it's best to
9 consolidate these two things, because the
10 predicate question is: Is there a violation to
11 begin with? Does that make sense?

12 BOARD MEMBER KNUTESON: It does. Thank
13 you.

14 CHAIR SIMPSON: Stacy, do you have your
15 hand up?

16 VICE CHAIR AGUIRRE: Yes. I just have a
17 quick question. Is there any other ongoing
18 violation matters between Montana DEQ and Decker
19 on this permit?

20 MR. KING: Currently at East, no. I
21 mean if we're just excluding West, if we're just
22 talking about East Decker, no. We're asking for
23 the updated reclamation plan.

24 VICE CHAIR AGUIRRE: So there's no other
25 violations out on the AVS system or in process?

1 MR. KING: (Shakes head)

2 CHAIR SIMPSON: Thank you. Further
3 questions from the Board.

4 (No response)

5 CHAIR SIMPSON: Let's proceed with Board
6 deliberations.

7 MR. KING: Board Chair Simpson, before
8 we dive in, is it okay if we take just five
9 minutes so I can get some water?

10 CHAIR SIMPSON: Good point. Thank you,
11 Mr. King. I see it's slightly after noon. I
12 would like to if at all possible finish this case
13 before -- I would like to take a break right now,
14 but we have another case after this one.
15 Hopefully it won't take nearly as long. I guess
16 we should be thinking about whether we want to
17 take a lunch break. Since I don't eat lunch, I'm
18 not really sensitive to that issue. But yes,
19 let's reconvene at ten minutes after twelve.

20 (Recess taken)

21 CHAIR SIMPSON: It looks like everybody
22 is here. Let's reconvene. Sandy, would you take
23 the roll, please.

24 MS. MOISEY-SCHERER: Chair Simpson.

25 CHAIR SIMPSON: Here.

1 MS. MOISEY-SCHERER: Vice Chair Aguirre.

2 VICE CHAIR AGUIRRE: Here.

3 MS. MOISEY-SCHERER: Board Member

4 Knuteson.

5 BOARD MEMBER KNUTESON: Here.

6 MS. MOISEY-SCHERER: Board Member

7 Rankosky.

8 BOARD MEMBER RANKOSKY: Here.

9 MS. MOISEY-SCHERER: Board Member Smith.

10 BOARD MEMBER SMITH: Here.

11 MS. MOISEY-SCHERER: We have a quorum,

12 sir.

13 CHAIR SIMPSON: Thank you very much.

14 Board members, any points of discussion or a

15 motion to start with?

16 BOARD MEMBER KNUTESON: Chair Simpson, I

17 would like for our Board attorney to advise us,

18 having heard all of the different arguments. I

19 still would like know from her what kind of

20 hearing she thinks we're having, and what actions

21 are available to us.

22 CHAIR SIMPSON: Terisa.

23 MS. OOMENS: Sure. So the way that I

24 see this hearing is honestly outside of even the

25 MAPA discussion that we're having, because the

1 motion that was made at the last hearing, and the
2 reason for the last meeting -- the reason we're
3 having this hearing is to discuss the stay or the
4 temporary relief that was requested.

5 Now, a hearing on the merits will come
6 following that. Whether that's a MAPA contested
7 hearing or some other type of contested hearing,
8 either way it's not the hearing that we're having
9 today. The only thing we're considering today is
10 whether we can stay the order, or notice of
11 abatement, or whatever the verbiage is that we're
12 using, whether we can stay the action by DEQ, not
13 whether we're on the merits.

14 Whether, again, whether that's under
15 MAPA or not frankly in my mind is irrelevant. I
16 hope that answers your question.

17 BOARD MEMBER KNUTESON: It does. Thank
18 you. And your position on whether or not we can
19 issue the stay. Do we have authority to issue a
20 stay?

21 MS. OOMENS: So the way that I read that
22 is under 251, so 82-4-251, the filing of an
23 application for review under this section may not
24 operate as a stay. Number one, that does not say
25 that a stay cannot be issued by some other manner.

1 Number two, it says that the stay, it may not
2 operate as a stay, meaning that in some instances
3 it may, in some instances it may not.

4 This is not an "it shall not operate as
5 a stay." I know as attorneys you can commiserate
6 with "may" versus "shall" and how we really like
7 to focus on words like that. And so again, I
8 think automatically is a stay issued? No. But
9 251(6) does not mean that we cannot issue a stay.

10 And under 254, I think this may be one
11 of the examples of when a stay can be issued,
12 because a final -- because the permit, the period
13 permitted for correction of the violation does not
14 end until a final order.

15 I know I got a little convoluted in the
16 middle there, but does that make sense?

17 BOARD MEMBER KNUTESON: It does makes
18 sense. I just wondered if there is also any
19 ability to put side boards on the duration of the
20 stay, or if once -- should the stay be issued, it
21 has this indefinite nature, potentially years
22 long. Do you have any comments on that?

23 MS. OOMENS: Sure. I don't think that
24 there's limitation in the statute, but that
25 doesn't mean that the Board can't issue a stay for

1 two weeks, or 90 days, or something shorter than a
2 full contested case. That's what we're being
3 asked to do, but it doesn't mean that we can't
4 have a shorter time frame.

5 BOARD MEMBER KNUTESON: Thank you.

6 MS. OOMENS: You're welcome.

7 CHAIR SIMPSON: Thank you. Well, any
8 further comment from the Board? I mean I've
9 obviously got some idea on this I'll bring
10 forward, but I'd like to hear from the rest of the
11 Board first.

12 VICE CHAIR AGUIRRE: Chairman Simpson,
13 are you wanting a motion and then a discussion, or
14 are you still wanting discussion?

15 CHAIR SIMPSON: Well, I'm looking for
16 discussion. The reason -- Generally we start with
17 a motion, and the reason for the motion is to
18 focus the discussion. However, in my mind that's
19 not a hard and fast rule. There are issues here
20 that we need to discuss one way or the other.

21 So I've got some thoughts on this that I
22 want to bring before the Board -- I'm not going to
23 phrase it as a motion -- for discussion, but as I
24 said, we've all read the briefs, and we've all
25 heard the testimony -- or excuse me -- the oral

1 arguments. And if someone has some strong
2 feelings one way or the other which way this
3 should go, I think now is the time to talk about
4 it.

5 VICE CHAIR AGUIRRE: I guess from my
6 standpoint, I am not in favor of approving a stay.
7 What I do have in my mind is the idea of the AVS
8 system, and needing to go to that step, because to
9 me, it seems like a compliance demonstration
10 matter to comply with the permit.

11 And the one thing that I've heard in
12 this that I consider as important is Decker's
13 concern about it going into the AVS system.
14 Otherwise on the merits of the stay, I'm not
15 inclined to approve a stay.

16 CHAIR SIMPSON: Thank you. Any other
17 thoughts?

18 BOARD MEMBER SMITH: Chair Simpson, I
19 appreciate Ms. Aguirre's comments, because I think
20 -- although my mind could be changed based on your
21 thoughts right now, the reason we held this
22 meeting was two things: One, this was somewhat of
23 a new case on whether or not we could even issue
24 the stay, and we weren't quite sure. We felt like
25 we were between a rock and a hard place last

1 meeting.

2 But the other thing is it felt like a
3 sense of urgency, to make sure reclamation
4 activities continued, and it seems like now that
5 that's not the same type of threat that it seemed
6 to pose before. It also seems like a lot of this
7 is probably way more complicated than even that.

8 But for now I just don't know if this is
9 the time and place for us to issue this,
10 especially given a little bit of -- it seems more
11 certain now than it has been, but it just doesn't
12 seem the time to do this to me.

13 I think furthermore I'm not -- there's
14 still a lot of unanswered questions around even
15 the merits of the disagreements around the
16 reclamation plan, and what happened, and what
17 didn't happen, but what it does seem like is if
18 Decker mining had spent as much time responding to
19 the merits of -- or the questions from DEQ rather
20 than the discussions we're having now, it seems
21 like a lot of those things might have been
22 resolved. And that's all.

23 CHAIR SIMPSON: Thank you, Joe. Any
24 other thoughts?

25 BOARD MEMBER KNUTESON: Chair Simpson,

1 all I was going to say is that I just keep getting
2 hung up on this. I don't think this is a basis
3 for us to make our decision, but hearing the
4 alarming potential for Decker, because I'm hearing
5 that, "Hey, we're going to fund our continued
6 reclamation using the equity generated by the
7 Wyoming operation, which will be undermined by the
8 publication in the AVS," right?

9 So essentially there's this pressure of
10 like maybe potential insolvency at least with
11 regards to the reclamation, that gives the sense
12 of urgency that I may not otherwise have, and I
13 don't know that that's a basis for issuing a stay,
14 and this is part of why it would have been so
15 preferable for DEQ and Decker to have sorted this
16 out outside the context of a hearing like this,
17 because as practical matter we don't want DEQ to
18 do anything that jeopardizes the reclamation, but
19 also we don't want to reward I guess what I'm
20 seeing as -- not reward, but just take sort of an
21 extraordinary action that undermines DEQ's
22 discretion and authority based on an insolvency
23 problem. So that's sort of the stress that I'm
24 under right now with this decision.

25 CHAIR SIMPSON: Thank you. Further

1 comment from the Board.

2 (No response)

3 CHAIR SIMPSON: I guess first of all, at
4 the last meeting when we considered this, I think
5 the first statement I made was that my main
6 concern with this whole case is getting the
7 reclamation done at Decker. A lot of this in my
8 mind is a distraction.

9 And I think also there's a lot of
10 frustration, certainly on my part and I'm hearing
11 it from other Board members as well, that this has
12 gone on now for, well, since -- If you look at it
13 from the time that the Notice of Cessation was
14 delivered, it's been four years now, and it seems
15 to me that a lot of those issues should have been
16 resolved a long time ago between the parties.

17 As far as what we do now, I'm going to
18 throw out for -- put before the Board for
19 discussion -- I'm not going to make this in the
20 form of a motion. I think we need to discuss it
21 first.

22 One, I think that the motion should be
23 denied, and the reason being that I really don't
24 see a lot to be gained by creating a situation
25 where action of any kind is deferred during the

1 course of a contested case hearing because that
2 could take a couple years.

3 Second, I'm also concerned about the
4 deadline on Tuesday, but I do think based on 251
5 that this Board has authority to modify the
6 abatement notice. So considering that the Notice
7 of Noncompliance and abatement order was issued on
8 January 29th, we are now almost exactly at 90
9 days. It will be 90 days on Tuesday which is the
10 deadline.

11 So what I would suggest is that in
12 addition to denying the motion for suspension of
13 the abatement order, is to extend the time by 90
14 days, and direct the Department and Decker to
15 collaborate on resolving the issues.

16 I guess I would encourage the parties to
17 let the technicians handle this, at least to rough
18 it out, but at the end of that period of time I
19 would hope that the requirements of the abatement
20 order have all been met, and if not, that there is
21 at least an agreed upon plan for moving forward
22 with getting those issues resolved. So that's
23 where I am, and that's what I'd like to discuss
24 here before we entertain motions.

25 VICE CHAIR AGUIRRE: Going back to some

1 of the questions previously brought up especially
2 by Board Member Knuteson and Terisa's response, do
3 we have the ability -- as Board Member Knuteson
4 characterized -- put side boards on like that?

5 I'm not clear on that. I mean I feel
6 the same as Board Member Smith and Board Member
7 Knuteson do about the feeling that going into the
8 AVS system is not a favorable thing for sure.

9 However, I don't know if putting that side board
10 on is the right thing to do either because it's
11 the process, and whether I like it or not, it's
12 the process. And only DEQ probably can make some
13 sort of decision to have some sort of decision on
14 delaying that listing on the AVS system. I see
15 Mr. King has his hand up.

16 CHAIR SIMPSON: Well, that's the purpose
17 of extending the period by another, by 90 days is
18 to account for the fact that it's taken this long
19 for the matter to come before the Board.

20 Also we're hearing from Decker Coal that
21 they and DEQ have been working together to resolve
22 these issues right along. It sounds like progress
23 has been made. I would hope that that process
24 would continue and reach a resolution before the
25 expiration of another 90 days.

1 But the purpose of modifying the order
2 rather than issuing a stay is to accomplish just
3 that, that is, to avoid forcing Decker Coal into
4 an AVS situation, which seems very likely to
5 happen if we don't take some action here. I don't
6 see that as being constructive in any way. Sorry.
7 Go ahead.

8 VICE CHAIR AGUIRRE: Right. I'm just
9 going to say that I'm not in favor of adding that
10 amendment. I've expressed my wishes that Montana
11 DEQ would consider not doing that, based on what
12 Decker has shared on how damaging that could be to
13 them.

14 Yet I feel, as has been expressed, that
15 it seems like there's been time to work this out.
16 It's like a four year thing. And so extending it
17 90 days I feel is not -- I just don't feel like
18 that's beneficial to the matter. I mean two
19 things can be true at one time, right? I feel the
20 AVS listing is truly, you know, could have an
21 impact on Decker Coal. However, I also feel like
22 this should have been resolved, or could have been
23 resolved, and so I'm not immediately in favor of
24 putting an extension on it. Thank you.

25 CHAIR SIMPSON: Other comments from the

1 Board?

2 (No response)

3 CHAIR SIMPSON: Mr. King, I see your
4 hand up. Do you have something to say?

5 MR. KING: I do, Board Chair. Thank
6 you. A couple of considerations here.

7 So on this question of -- I wanted to
8 briefly address the Board attorney's comment about
9 "may not" versus "shall not." I've litigated this
10 precise issue in Montana's First Judicial
11 District, and I was on the side that "may not
12 grant discretions" to do things.

13 And Judge Abbott in the First Judicial
14 District said "may not" does not permit
15 discretion. "May" permits discretion. So "may
16 not" is a nondiscretionary duty. So I offer these
17 things as consideration.

18 And again, it's our position that if
19 there's a process here for granting temporary
20 relief, that process has to be laid out in
21 statute. You can't just make it up.

22 Secondly, the Board certainly has the
23 authority to modify, or vacate, or terminate the
24 order, but that is in the context of a final
25 order. I don't believe it can be an interlocutory

1 order.

2 The third thing I just want to point out
3 is there is a process for extending the 90 day
4 period, but that process is for the Department to
5 grant the extension if that extension satisfies
6 certain, one of the three or four factors in ARM
7 17.24.1206(5)(b).

8 So we haven't received any submission
9 from Decker that would justify yet extending this
10 90 day period. The ball is sort of in their
11 court, but we haven't received those things. What
12 my concern is personally is two fold, both of the
13 practical implications here if the Board were to
14 grant a stay.

15 But bigger than that is that if the
16 Board orders this temporary stay, then DEQ now
17 isn't complying with its own MSUMRA statutes and
18 regulations, and that's problematic for the
19 Agency. And I'm just asking that we don't get an
20 order to that effect.

21 I understand we want to work this out.
22 We want to work this out, too. But this has been
23 a long time coming; and two, I do think that the
24 AVS listing is overblown.

25 In order for that to happen, an actual

1 concrete, tangible effect, there has to be a
2 pending permit application either for a state
3 program or a federal program, and I haven't seen
4 any evidence that there is a pending permit
5 application for the Wyoming mine, such that I'm
6 not sure how the AVS listing would necessarily
7 jeopardize those things. As soon as they satisfy
8 the requirements that we've asked for, they're
9 back out.

10 So that's my spiel. And I guess my last
11 just request is if there is some -- we don't want
12 to get in trouble for violating our own
13 regulations or statutes, so if there is some
14 motion to delay this listing where we're now in
15 violation of our statute, I would please like that
16 in writing, any order that's issued. Thank you.

17 BOARD MEMBER RANKOSKY: Chair Simpson.

18 CHAIR SIMPSON: Regardless of what we
19 do --

20 BOARD MEMBER RANKOSKY: This is Jen
21 Rankowsky.

22 CHAIR SIMPSON: Go ahead, please.

23 BOARD MEMBER RANKOSKY: I guess I may be
24 over-simplifying things, and I'm in the world --
25 You know, I come here on the Board as a health

1 officer. We have to comply with DEQ regulations
2 all of the time. When they ask for more things,
3 we give them to them in the appropriate amount of
4 time.

5 I'm just having a really hard time just
6 not saying the regulations are known, and I just
7 don't know why we just don't have them comply.
8 Like they knew the rules when they went in, you
9 know, it's laid out. I agree with the DEQ
10 attorney that they're just trying to get them to
11 comply, and to give them the information.

12 In my world, that's what we do on a
13 daily basis so we don't get into these problems.
14 We try to have conversations, and we try to work
15 it out with DEQ on certain things when it goes up
16 to that level, when we go through the appeals
17 process and everything. So I guess that's where
18 I'm standing. Like I'm not sure why we're not --

19 It seems simple to me, but maybe I'm way
20 over-simplifying it of -- they should just comply.
21 Just my thoughts.

22 CHAIR SIMPSON: Thank you. Anything
23 further? Is there a motion?

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

1 CHAIR SIMPSON: Oh, I'm sorry. I didn't
2 see it. Go ahead, Vicki.

3 MS. MARQUIS: Thank you, Chair Simpson,
4 members of the Board. I just wanted to reiterate
5 that there's been no noncompliance here, and that
6 back and forth with the agency you can see very
7 clearly in the timeline.

8 And to suggest that Decker has created
9 this position that elevated this to the Board is
10 wrong because Decker was very much doing what it
11 felt the rules and regulations required, and
12 submitting information to the Department. They
13 were doing more reclamation than required.

14 The Department elevated it by issuing a
15 Notice of Noncompliance, so at that point Decker
16 had very few options available to it. It is in
17 compliance with the requirements, and working out
18 the details of the reclamation plan -- which
19 again, isn't connected to the noncompliance DEQ
20 alleged -- but that has been an ongoing process,
21 and will continue.

22 But I do want to point out that all the
23 reclamation plan was previously approved by DEQ,
24 and the components are, significant components, as
25 we talked about, the PMT, has been approved very

1 recently. So it's not as if Decker has done
2 nothing over the last four years. I just want to
3 make that clear. Decker has been doing its part,
4 and submitting the updates as required. Thank
5 you.

6 CHAIR SIMPSON: Thank you, Ms. Marquis.
7 I guess to follow that up, I would note that the
8 timeline that has been provided to us shows that
9 there has been a lot going on during that period.

10 Another factor here that I think is
11 important to consider is that the Notice of
12 Noncompliance has to do with the reclamation
13 actions on the ground that were or were not taken
14 by Decker as they relate to the requirements of
15 the permit.

16 The abatement, the notice of abatement
17 has to do with updating the permit. It doesn't
18 have anything to do with action on the ground. It
19 has to do with updating the permit, and bringing
20 it into compliance. DEQ feels that certain
21 aspects of the permit are not in compliance.
22 Decker obviously disagrees.

23 I guess one thing I would point out is
24 -- and I think the point has been made -- that
25 rules must be complied with. And I also want to

1 note that when push comes to shove, the discretion
2 of the Department in implementing and enforcing
3 the surface mining law is broad, and the
4 likelihood of prevailing on an argument that a
5 particular requirement of the Department is out of
6 line in my mind is pretty questionable, based on
7 my own experience.

8 So as I said before, whether you call it
9 a stay or a modification, the modification in my
10 mind and my understanding is authorized under
11 251(6), "The Board shall make findings of fact and
12 issue a written decision incorporating an order,
13 vacating, affirming, modifying, or terminating the
14 order."

15 And the order that we're contemplating
16 here is a modification of the abatement portion
17 only. The question of the Notice of Noncompliance
18 itself is something that will be subject to a
19 contested case process unless it is withdrawn by
20 the Petitioner.

21 So again to reiterate, there's been a
22 lot of back and forth on this. The 90 day
23 timeline will expire in just a few days. None of
24 us has a feel for how far apart the parties are
25 here, but we understand there has been negotiation

1 going on. I feel they should be given an
2 opportunity to finish this process, since there is
3 no matter here that is an imminent threat to the
4 environment or public safety. And I also feel
5 that it's important that we avoid if at all
6 possible the AVS listing. Anything further from
7 the Board members?

8 (No response)

9 CHAIR SIMPSON: Is there a motion?

10 VICE CHAIR AGUIRRE: Chairman Simpson,
11 I'll make a motion that we disapprove the motion
12 to suspend abatement requirements.

13 CHAIR SIMPSON: Is there a second?

14 BOARD MEMBER KNUTESON: I second that
15 motion.

16 CHAIR SIMPSON: A motion has been made
17 and seconded to disapprove or deny the motion.
18 Further discussion.

19 BOARD MEMBER KNUTESON: Chair Simpson, I
20 would just say in support of that just that my
21 sense is there would need to be extraordinary
22 circumstances that would give us a sense that the
23 Department has acted I guess in an arbitrary
24 fashion. That's how I feel personally.

25 I think that the threshold for that

1 hasn't been reached here clearly, so that
2 likelihood of success on the merits, I can't get
3 there with this, and that's why I'm taking this
4 position and backing Vice Chair Aguirre. I think
5 that the Department is acting within its
6 discretion. I don't see anything random, or
7 totally unreasonable, based on the record we have
8 before us.

9 So I would support -- this is just my
10 rationale for supporting that denial of the stay
11 as opposed to what you had proposed.

12 CHAIR SIMPSON: A motion has been made
13 and seconded. All in favor, say aye. Roll call
14 vote.

15 MS. MOISEY-SCHERER: Chair Simpson.

16 CHAIR SIMPSON: Aye.

17 MS. MOISEY-SCHERER: Vice Chair Aguirre.

18 MS. VICE CHAIR AGUIRRE: Aye.

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

21 BOARD MEMBER KNUTESON: Aye.

22 MS. MOISEY-SCHERER: Board Member
23 Rankosky.

24 BOARD MEMBER RANKOSKY: Aye.

25 MS. MOISEY-SCHERER: Board Member Smith.

1 BOARD MEMBER SMITH: Aye.

2 MS. MOISEY-SCHERER: It's a unanimous
3 vote, sir.

4 CHAIR SIMPSON: Motion carries. As far
5 as a modification to the Order of Abatement to
6 provide more time for the parties to negotiate a
7 settlement, I do not hear any support coming from
8 the Board for that idea. Is there any further
9 discussion on that point?

10 (No response)

11 CHAIR SIMPSON: Expecting there will not
12 be a second, I will make the motion that the
13 abatement order be modified to extend the
14 abatement period for 90 days, recognizing that
15 it's taken 90 days for the Board to get to this
16 point. Is there a second?

17 (No response)

18 CHAIR SIMPSON: Motion dies for lack of
19 a second. I believe we're finished with this
20 item.

21 (The proceedings were concluded
22 at 12:47 p.m.)

23 * * * * *

24

25

C E R T I F I C A T E

STATE OF MONTANA

)

: SS.

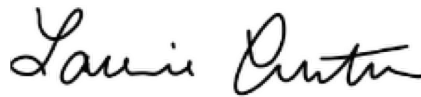
COUNTY OF LEWIS & CLARK

)

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 - 133 - 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 30th day of
April, 2025.



LAURIE CRUTCHER, RPR

Court Reporter - Notary Public

My commission expires

March 9, 2028.

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