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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
FEBRUARY 26, 2021)

TRANSCRIPT OF PROCEEDINGS (VIA ZOOM)

FEBRUARY 26, 2021
9:00 a.m.

BEFORE CHAIRMAN STEVEN RUFFATO,
BOARD MEMBERS DAVID SIMPSON,
JON REITEN, JOSEPH SMITH,
HILLARY HANSON, and DAVID LEHNHERR

PREPARED BY: LAURIE CRUTCHER, RPR
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1 WHEREUPON, the following proceedings were
2 had and testimony taken, to-wit:

3 * * * * *

4 CHAIRMAN RUFFATO: Thank you. Then I'll
5 call the meeting to order. First I want to
6 welcome everybody, and I'm glad to meet you in
7 this manner. And I would like to just say that
8 I'm a new appointee. My name is Steve Ruffato.
9 I'm a new appointee, and I'm honored to be
10 appointed to this Board, and I would request any
11 help you can give me as I stumble through it. I
12 would welcome that.

13 So I'll call the meeting to order, and
14 the first order of business I believe would be
15 roll call. Madam Secretary, can you conduct roll
16 call.

17 MS. WITTENBERG: Yes, I can. Chairman
18 Ruffato.

19 CHAIRMAN RUFFATO: Here.

20 MS. WITTENBERG: Board member Lehnherr.

21 BOARD MEMBER LEHNHERR: Here.

22 MS. WITTENBERG: Board member Simpson.

23 BOARD MEMBER SIMPSON: Here.

24 MS. WITTENBERG: Board member Hanson.

25 BOARD MEMBER HANSON: Here.

1 MS. WITTENBERG: Board member Reiten.

2 BOARD MEMBER REITEN: Here.

3 MS. WITTENBERG: Board member Smith.

4 BOARD MEMBER SMITH: Here.

5 MS. WITTENBERG: And let it be noted
6 Board member Lynch is absent.

7 CHAIRMAN RUFFATO: So we have six out of
8 seven, so we have a quorum. And I reviewed some
9 prior meetings, so I believe maybe the next order
10 of business is to determine the folks that are
11 present in addition to the Board; is that correct?

12 MS. WITTENBERG: Yes, I can read off the
13 names. I apologize. I've got some DEQ staff in
14 here as well. Bronya Lechtman.

15 MS. LECHTMAN: Yes. That's me.

16 MS. WITTENBERG: And if you could say
17 who you're with.

18 MS. LECHTMAN: Sorry. I'm with the
19 Northern Plains Resource Council.

20 MS. WITTENBERG: And I apologize. The
21 names are shifting as I'm doing this. Darryll
22 Barton.

23 MR. BARTON: Yes, I'm with DEQ.

24 MS. WITTENBERG: Dave Kuzara.

25 MR. KUZARA: Yes, with Westmoreland

1 Absaloka Mining.

2 MS. WITTENBERG: Julia Giffin.

3 MS. GIFFIN: I'm an attorney for Fort
4 Peck.

5 MS. WITTENBERG: Mark Stermitz.

6 MR. STERMITZ: I'm with the Crowley
7 Fleck Law Firm representing Riverside Contracting.

8 MS. WITTENBERG: Stacy. I have a Stacy
9 with no last name.

10 (No response)

11 MS. WITTENBERG: Stacy, can you unmute.

12 MR. STERMITZ: This is Mark Stermitz. I
13 think that might be Stacy Hill who is with
14 Riverside. I don't know what the technical issue
15 is, but I know she wanted to join today.

16 MS. WITTENBERG: And Vicki Marquis.

17 MS. MARQUIS: Hi. Good morning. My
18 name is Vicki Marquis. I'm an attorney with
19 Holland and Hart in the Billings office. I have
20 some cases, I represent some clients with cases in
21 front of the Board. None are on the agenda today,
22 but I am here to listen to and answer whatever
23 questions might come up. Thank you.

24 MS. WITTENBERG: And Stacy just
25 confirmed in the chat that that's Stacy with

1 Riverside Contracting.

2 I do have a phone, last digits 086.

3 Could you identify yourself.

4 MR. HAYES: Joyce, this is Ed Hayes with
5 DEQ.

6 MS. WITTENBERG: Did I miss anyone who
7 was not a Board member or with DEQ?

8 MS. THOMSEN: Hi. Martha Thomsen with
9 Baker Botz here for Talen Montana.

10 MS. WITTENBERG: Anyone else?

11 MR. STERUP: Rob Sterup here for Talen
12 Montana.

13 MR. MACKEY: Good morning. My name is
14 Alex Mackey. I am an ecologist with the coal
15 program with DEQ, and I am just sitting in to
16 listen to the flow of how the BER flows and try to
17 get some experience.

18 MS. WITTENBERG: Thank you. I think
19 George, our Deputy Director, wanted to address the
20 Board next.

21 MR. MATHIEUS: Thanks, Joyce. Mr.
22 Chair, Board members, welcome. My name is George
23 Mathieus. I'm the Deputy Director, and I serve as
24 the liaison to the Board for the Department. And
25 the plan today was just to try to keep this Board

1 meeting -- I'll just say for lack of a better term
2 -- simple with an orientation, and dealing with a
3 couple cases that need assigned.

4 So with that, I'm going to ask
5 permission to be able to step out today.
6 Unfortunately it's the legislative session three
7 days before transmittal, so I'm pretty much going
8 around the clock. So I don't know that you guys
9 need me today, but I at least wanted to get on and
10 say hi, and at least see faces. Not the same as
11 doing it in person, but just wanted to say
12 welcome. I look forward to working with you guys
13 moving forward.

14 CHAIRMAN RUFFATO: George, thank you.
15 Did you want to step out now, or were you going to
16 make a presentation?

17 MR. MATHIEUS: Pardon me, Mr. Chair. I
18 missed. You cut out. I missed what it said.

19 CHAIRMAN RUFFATO: Were you wanting to
20 step out now, or were you going to start the
21 presentation for the Board?

22 MR. MATHIEUS: Mr. Chair, no, I was just
23 going to sit in. There's others that are going to
24 run the presentation. So I'm just going to step
25 off, and you guys enjoy.

1 CHAIRMAN RUFFATO: That sounds good.
2 Thank you.

3 MR. MATHIEUS: Thank you. Take care,
4 everybody.

5 CHAIRMAN RUFFATO: I would just ask the
6 secretary. The normal order of business would be
7 to approve minutes at this point, based on prior
8 agendas, but I take it there are no minutes to
9 approve at this time; is that correct?

10 MS. WITTENBERG: That is correct. We'll
11 worry about that at the next meeting.

12 CHAIRMAN RUFFATO: So at this point, I
13 think the first agenda item is an introduction. I
14 think the way I read the agenda, it was going to
15 be some discussion of the interaction between the
16 Board and DEQ, and is there someone in DEQ going
17 to give that presentation?

18 MS. CLERGET: I can step in for George
19 here. This is Sarah Clerget, and I am an attorney
20 at DEQ now, but about a month ago I was actually
21 the Board attorney for the Board. And so while I
22 represent DEQ, and I do not represent the Board,
23 George asked me to step in today and help orient
24 you guys, and kind of you give some procedural
25 background.

1 I won't be touching on anything
2 substantive. I want to be clear that I'm not
3 giving anybody any legal advice. That is the
4 purview of your Counsel, and Katherine Orr, and
5 she is your lawyer. We're going to work on more
6 presentation later.

7 But I wanted to introduce myself, and
8 make it clear what my role is. You'll see me more
9 this meeting in this capacity than you will. From
10 here on out I will be representing DEQ probably in
11 contested cases in front of you. But for the
12 purposes of today, I'm just helping out.

13 The main thing that I think you need to
14 understand about the interaction between the Board
15 and DEQ is that the Board is administratively
16 attached to DEQ, and there is a section in your
17 packet that explains what administrative
18 attachment means. It's the law actually on
19 administrative attachment.

20 And the point of that is that DEQ
21 provides, according to that statute, DEQ provides
22 some administrative help to the Board, but other
23 than that, the Board is independent. And as you
24 know, the Board reviews a lot of what DEQ does, so
25 it's kind of a tense relationship sometimes

1 because we at DEQ try to help you in a lot of
2 ways, but we also are a party that appears in
3 front of you.

4 So the Board secretary Joyce is very
5 nicely stepping in, but right now the Board
6 secretary position is vacant, and they're going to
7 fill it as soon as possible. The Board secretary
8 is not a full-time position. It is actually
9 doubled with the Administrative Assistant for the
10 Director.

11 So BER has no staff. Essentially the
12 only staff that is provided is through DEQ, and
13 sort of just by tradition, there's nothing formal
14 in the relationship between the Board secretary
15 and the Board. It's just sort of been that the
16 Administrative Assistant has been lent to be the
17 Board secretary.

18 And the Board attorney is -- and
19 Katherine can explain this more -- comes from
20 Agency Legal Services Bureau, so you'll understand
21 that later. But the Board really has no staff,
22 and so DEQ often tries to step in and help, but
23 the Board secretary has to walk a very fine line
24 because a lot of the attorneys that appear before
25 the Board also are in literally the same space

1 where the Board secretary is, and the Board
2 secretary sometimes helps them out.

3 So we have created -- Well, I shouldn't
4 say we. When I was the Board attorney, there was
5 a Venn diagram that was created that helped the
6 Board secretary kind of understand that
7 distinction, and when information stays with the
8 Board and can't go to DEQ, and when information
9 stays with DEQ and can't go to the Board.

10 So that's just a heads up that that's
11 how it works. And generally George Mathieus, who
12 was here before, he is the liaison between the
13 Board and DEQ, so if there's any questions
14 regarding anything having to do with the DEQ, he's
15 the one who fields those questions, and he's the
16 one that the Board communicates with.

17 So hopefully there shouldn't be any
18 communication between us at DEQ other than through
19 George for you guys, except when George delegates
20 things.

21 And so I think that's the overall
22 understanding of how the agency interacts with the
23 Board. If anybody has any questions, I'm happy to
24 answer.

25 CHAIRMAN RUFFATO: Thank you, Sarah.

1 MR. LUCAS: Mr. Chair, members of the
2 Board. My name is Mark Lucas. I'm also a staff
3 attorney with DEQ, and I will also be appearing in
4 front of you on contested cases, and rulemaking.

5 And I just wanted to clarify or add to
6 that. And Sarah, you can tell me if I have it
7 wrong. Communications with anyone at DEQ about a
8 contested case is in fact ex parte communication.
9 So we just wanted to be clear on that part. Thank
10 you, Mr. Chair.

11 MS. CLERGET: Yes. I think Katherine
12 will go into that a little bit more later, so we
13 can talk through the details of that, but Mark is
14 absolutely right, especially we have to be careful
15 in the contested cases.

16 CHAIRMAN RUFFATO: Thank you, Mr. Lucas.
17 Thank you, Ms. Clerget. Do the Board members have
18 any questions about what has been presented?

19 (No response)

20 CHAIRMAN RUFFATO: If not, let's go on
21 to the next presentation, and this is by Ms.
22 Clerget and Ms. Orr on the legal duties of the
23 Board, and whichever one of you is going to start,
24 please go ahead.

25 MS. ORR: Good morning, everybody. I'm

1 Katherine Orr. I'm the Acting Bureau Chief of
2 Agency Legal Services, and I have been working for
3 Agency Legal Services for a long time, and part of
4 my responsibilities about seven years ago included
5 representing the Board of Environmental Review,
6 and I did that for a number of years.

7 And today I'm taking over, perhaps
8 temporarily, to jump in and provide part of the
9 orientation for you all today, and also to help
10 with the assignment of the cases that have come
11 before you, which we will talk about later.

12 And Sarah has very kindly agreed to help
13 with this presentation. As you just heard, she is
14 an attorney who just came from Agency Legal
15 Services, and so you're getting all sorts of
16 talent here to help out today.

17 As far as the orientation, I think I'll
18 go first, and my big challenge I think is to avoid
19 you all having to slog through a voluminous amount
20 of information. And I'd like to say at the outset
21 that when you're approaching anything new, there's
22 the overview, and then there are the details that
23 follow, and those details are going to unfold as
24 you gain experience on the Board. And some of you
25 have already been on the Board.

1 So the first thing I would say is by all
2 means feel free to call me anytime with your
3 questions about matters such as recusal,
4 conflicts, ex parte communications, talking to one
5 another about cases. Just anything that comes up,
6 I am here, 444-0160.

7 So anyway, why don't I jump in, and then
8 Sarah will take over. I'm going to go over
9 general statutes, Board duties, contested cases,
10 and within the contested cases subset, I'll be
11 talking a little bit about how that goes. And
12 Sarah will be handling rulemaking, ethical
13 requirements, open meetings, and submission of
14 materials to the Board.

15 But again, this is a voluminous amount
16 of material, and so some of this is -- you're
17 going to hear it today, but by all means ask
18 again.

19 The Board is part of a role in State
20 Government, as you know, whose purpose is to
21 follow the constitutional requirement of ensuring
22 a safe, clean, and healthful environment. And we
23 didn't put into the materials today something that
24 we should have, which address the policy and
25 purposes of some of these environmental laws from

1 which and regarding which you will be required to
2 apply and enforce.

3 And I can send those to you later after
4 the meeting, and for example, there's air quality.
5 The Legislature in 75-2-102, the Legislature,
6 mindful of its constitutional obligations under
7 Article 2 Section 3, and Article 9 of the Montana
8 Constitution, has enacted the Clean Air Act of
9 Montana.

10 It is the Legislature's intent that the
11 requirements of Part 1 through 4 of this chapter
12 provide adequate remedies for the protection of
13 the environmental life support system from
14 degradation, and provide adequate remedies to
15 prevent unreasonable depletion and degradation of
16 natural resources.

17 So we're all part of a role here to
18 implement the legislative intent, the
19 constitutional intent, and that is set forth in
20 the statutes.

21 The Board, as you probably know already,
22 is basically an appellate board. It's
23 intermediate between the Department and District
24 Court. And there are many, many, many, many, many
25 statutes which the Board has authority to apply

1 when there is an appeal, and that is in your
2 packet Pages 020 to 030. And we'll be going over
3 those in a little bit.

4 Basically the Board handles contested
5 case hearings and rulemaking, and there are other
6 functions as well involving input of the public on
7 matters of the policy. So those are the main
8 responsibilities.

9 And generally speaking these contested
10 cases can be handled by you directly; they can be
11 handled partially by your Board attorney, or in
12 this case Agency Legal Services in general, of
13 which I'm the Bureau Chief; or totally by the
14 delegated attorney.

15 And as I understand it from Sarah, for
16 the contested cases, there has been total
17 delegation of the cases to her as the Hearing
18 Officer.

19 And so now, the question each time for
20 the Board, when these new cases are presented to
21 you, is do you want to delegate the case entirely
22 to Agency Legal Services and one of the attorneys
23 will be the Hearing Officer; do you want to
24 delegate it partially, where the attorney would
25 handle the prehearing matters, and you would

1 handle matters, say, on summary judgment, that
2 sort of thing.

3 And that's addressed in the agenda,
4 those three options for each one of the cases that
5 will come before it today.

6 Regarding the general statutes, there's
7 the statute creating the Board, there's the
8 statute saying that the Board is a quasi-judicial
9 board, and there's the statute which talks about
10 allocation for administrative purposes only.

11 And that statute 2-15-121 is a general
12 statute applying to all boards, including this
13 one. And it answers your question, Mr. Chair,
14 about the interaction between the Board and the
15 Department in more detail.

16 And basically the Department handles
17 matters of budget, recordkeeping, reporting,
18 clerical functions of the agency, and the
19 Department handles budgetary requests.

20 And you can review this in more detail,
21 but I would just say in general the Department
22 handles clerical staff and budgetary matters, and
23 the Board otherwise is independent. And that was
24 the intent of the Legislature, because in fact, as
25 Sarah said, there are going to be times when the

1 Board in a contested case situation makes
2 decisions about whether the Department's actions
3 were correct or not correct under the law.

4 The Board is a quasi-judicial board,
5 which in essence means that it has judicial
6 powers. And the Board has seven members. A
7 quorum is four members. And in order to effect a
8 vote, the Board has to have a vote of four at the
9 very least. It's really important for all of the
10 Board members to participate, so that there is a
11 quorum, so the vote can be taken, and effect the
12 business of the Board. So those are the main
13 points there.

14 If you turn to -- it's in the materials
15 Pages 020 through 030. These are very useful.
16 It's the frequently asked questions section that
17 we put in your packet. And it goes into details
18 about contested cases, but it also has a very long
19 and useful list of all of the statutes that the
20 Board might be involved in applying, and the
21 statutes which give parties the ability to appeal
22 from a Department decision.

23 And they are numerous, and these
24 statutes are complicated, and as you will find
25 out, air quality, asbestos control, degradation of

1 high quality waters, appeals from holders of water
2 quality permits, appeal of certain water quality
3 fee assessments, appeal of fee assessments for
4 public supply system, and public water supply,
5 appeal from violation of waste and litter control
6 laws. The list goes on. So there's lots of
7 material here.

8 Today you've got four cases. One is a
9 Major Facilities Siting Act appeal from the
10 decision of the Department regarding remedies, and
11 assurance, and financial insurance; one involves
12 an opencut mining case; and two involve a 401
13 certification of the Keystone Pipeline. So it's a
14 broad set of statutes that you're dealing with.

15 I myself have been involved almost for
16 my entire legal career with the Administrative
17 Procedure Act in part. And that's in your
18 materials 033 and 081 through 085, and I'm going
19 to talk about that just a little bit now.

20 Let's assume that you may have delegated
21 a case for contested case purposes to the Agency
22 Legal Services Bureau. We are within the Justice
23 Department. We've been around for years and
24 years. And what we do basically is we help out
25 other agencies in State government. We're a

1 defense firm, and we also handle cases as Hearing
2 Officers for various State agencies. And that's
3 how we happen to be involved with the Board of
4 Environmental Review.

5 And under the Administrative Procedures
6 Act, the Board -- like I've talked about -- can
7 delegate to the Agency Legal Services Bureau to
8 handle the contested cases fully or partially, and
9 that's in 2-4-611. I'm on Page 081.

10 And these contested cases are very much
11 like a trial. I would say they're more informal,
12 but very similar. There's discovery, there are
13 Rules of Evidence, there are prehearing orders to
14 lay out the road map for how the discovery and
15 then the hearing will proceed. We have prehearing
16 orders. We have opening statements. On occasion
17 we have subpoena power. So it's very much like a
18 trial.

19 And then the Hearing Officer, upon
20 hearing the evidence, and the standard of review
21 is preponderance of the evidence, makes findings
22 of facts and conclusions of law, and that's the
23 first step.

24 And then the second step with these
25 contested cases is the Board attorney brings the

1 decision that's been made by the Hearing Officer
2 to you, and you vote on that, whether you want to
3 accept the decision in total, or whether you think
4 the conclusions of law are not correct, or whether
5 you think that the findings of fact have not been
6 based on the evidence.

7 And the Administrative Procedure Act is
8 quite clear about that step, that when the Board
9 is in a position to vote on a decision that's been
10 made, the Board, if it overturns findings of fact,
11 has to hear the whole record or read the whole
12 record.

13 If it's just a decision of the Board
14 that they're finding fault with the conclusions of
15 law, they don't have to read the whole record. So
16 it may vary case to case, and of course the Board
17 may find that the decision that's been rendered is
18 properly based on the findings of fact, and makes
19 proper conclusions of law, and the Board will
20 vote, and vote to uphold that decision.

21 There's also an intermediate step when
22 there have been findings of fact and conclusions
23 of law issued, then the parties have a right upon
24 notice to file exceptions, and the Board can hear
25 those exceptions. So that's an overview of that,

1 and that's in the materials for which I just gave
2 you the page number.

3 Ex parte consultation. That's in
4 2-4-613, and there's also other case law that's
5 been developed in the common law.

6 And there's another part of the packet
7 that talks about that in Pages 067 through 075,
8 which is a nice memorandum written by a former
9 member of the Legal Services Bureau, Clyde
10 Peterson, who addresses for another board, but it
11 applies here, about the prohibition against ex
12 parte consultations.

13 And the Board makes decisions as a board
14 together. It can't make decisions, you know, like
15 have two of you get together and say, "Oh, well,
16 we're going to vote this way," or someone
17 buttonholes you in the halls -- metaphorically --
18 and says, "What about this piece of evidence? We
19 think you ought to rule this way."

20 Well, that is way outside the bounds of
21 the requirements of these statutes in common law.
22 You are prohibited from taking in information
23 outside of these more formally set hearing
24 contexts, both contested case and rulemaking. You
25 may not do that. And I guarantee people will

1 approach you.

2 But the way that in a contested case
3 information is taken in is very specifically
4 controlled. It's controlled in the context of the
5 contested case hearing, and it's controlled
6 subject to the Rules of Evidence.

7 So for example, something that might
8 appear in a newspaper, that is not appropriate for
9 you to read or take into account. And like I say,
10 any information that you've taken in as a, quote,
11 "informal matter" should be disregarded because it
12 has to come in through these formal channels or
13 else it will be attackable. So that's ex parte
14 communications.

15 What I was just talking to you about as
16 far as the exceptions, that's in 2-4-621, and
17 believe me, we will be looking at the language of
18 this statute in the future.

19 Final orders. You all perhaps already
20 can understand that there is a right of judicial
21 review of parties if they don't approve of or want
22 to challenge a decision that's been issued by the
23 Board. And that's judicial review, and that's in
24 Title 2 Chapter 4 Part 7. And we can get into
25 that a little bit.

1 There are very specific standards for
2 review from the Board. Those standards include
3 that the administrative findings, inferences,
4 conclusions are in violation of constitutional
5 provisions; in excess of statutory authority; made
6 upon unlawful procedure; affected by another error
7 of law; clearly erroneous in view of the reliable,
8 probative, and substantial evidence on the whole
9 record; arbitrary or capricious; characterized by
10 abuse of discretion; or the findings of fact were
11 not, essential to the decision, were not made
12 although requested.

13 Those are sort of -- that's the general
14 outline of how a Board decision may be overturned.
15 So we have to operate within these guidelines that
16 we don't run afoul of these standards.

17 And then in your materials is a case,
18 Montana Environmental Information Center versus
19 Montana Department of Environmental Quality, which
20 sets forth the burden of proof, and the standard
21 of proof.

22 What else do we have here? Does anyone
23 have any questions at this point?

24 CHAIRMAN RUFFATO: Are there any
25 questions from anyone?

1 BOARD MEMBER SIMPSON: Yes. This is
2 Dave Simpson, Mr. Chairman. One question of
3 clarification.

4 I understood you to say, Katherine, that
5 the limits on ex parte communication also apply to
6 rulemaking.

7 MS. ORR: Yes.

8 BOARD MEMBER SIMPSON: I don't
9 understand quite how that should be applied.

10 MS. ORR: Rulemaking -- as Sarah will
11 talk about in more detail -- is also a hearing,
12 and the hearing brings notices, and brings in the
13 public, and stakeholders, and the Department, to
14 bring together ideas about whether the rule has
15 been -- properly addresses what the required or
16 desired change is.

17 What I'm saying is that's in the context
18 of a hearing. And information regarding
19 suggestions for changes of the rule should be
20 taken down and placed in the record in the course
21 of the rulemaking proceeding. Otherwise it can't
22 be counted. I hope that -- Does that address
23 somewhat what you were asking?

24 BOARD MEMBER SIMPSON: So the members of
25 the Board cannot contact directly employees of the

1 Department regarding rulemaking?

2 MS. ORR: What I'd say is yes, they can,
3 but in the actual rulemaking proceeding -- which
4 Sarah will go into -- if there's a piece of
5 information that should be put in, it should be
6 put in by who it is that is involved with the
7 rulemaking hearing.

8 The Board makes the ultimate decision
9 through -- Well, first it's delegated to the
10 Hearing Officer, the rulemaking Hearing Officer,
11 and then the Board votes on it. But if there's a
12 matter that should be discussed with the
13 Department or another stakeholder, that's
14 permissible, but that information has to come in
15 in the rulemaking proceeding itself or else it
16 can't be counted.

17 CHAIRMAN RUFFATO: Dave, did that help
18 clarify?

19 BOARD MEMBER SIMPSON: Yes, it helps
20 clarify. I guess I only had one other question,
21 and that is with regard to rulemaking as to what
22 the procedure is, if there is one, for the Board
23 initiating rulemaking.

24 MS. ORR: Well, as you know, the
25 Legislature can be the instigator for rules to be

1 promulgated, and the statutes say that the Board
2 may be the initiator of rulemaking within its
3 discretion. So yes, it does do that.

4 BOARD MEMBER SIMPSON: Well, that's what
5 I thought, but I wanted to be sure on that point.
6 Thank you very much.

7 CHAIRMAN RUFFATO: Thank you, Dave and
8 Katherine. I understand that Sarah may have some
9 additional comments on that in her presentation.

10 MS. ORR: Yes.

11 CHAIRMAN RUFFATO: I was just going to
12 ask for any other questions from the Board.

13 (No response)

14 CHAIRMAN RUFFATO: I have a question,
15 and I don't know if it's appropriate to drill down
16 on it now a little bit, and that's the assignment
17 to Hearing Officers.

18 MS. ORR: Let's do that.

19 CHAIRMAN RUFFATO: My question really is
20 I think that what you have outlined is there are
21 three possibilities -- a procedural assignment, a
22 complete assignment, or no assignment -- and I
23 wanted to really kind of drill down into the
24 procedural assignment, and what that means versus
25 the substantive assignment, and I'll maybe ask a

1 specific question.

2 I get the sense that if the case is
3 assigned substantively, that the Hearing Officer
4 is going to have the ability to rule on motions,
5 such as motions for summary judgment; is that
6 correct?

7 MS. ORR: That's correct.

8 CHAIRMAN RUFFATO: And is that rule on,
9 a ruling on a motion for summary judgment, will
10 that be reviewable by the Board, or is that the
11 law then of that contested case?

12 MS. ORR: No. It can be reviewed by the
13 Board; and especially if it's a final disposition,
14 the Board has to review it.

15 CHAIRMAN RUFFATO: And maybe my question
16 then bears on: When is that reviewed? Is that
17 reviewed immediately, or is that reviewed later
18 after it's gone to hearing?

19 MS. ORR: If I'm understanding
20 correctly, it would be reviewed after the Hearing
21 Officer makes a decision, and then it's taken to
22 the Board if it's a final disposition.

23 And the Board has absolute latitude to,
24 at the outset, determine how it wants to do that.
25 If you want to hear oral argument on summary

1 judgment, you can. If you -- and like we've been
2 saying -- If you want to hear the whole case, you
3 can, and in which case the Board attorney would
4 help you with suggestions about rulings during the
5 proceeding.

6 CHAIRMAN RUFFATO: Thank you. That's
7 very helpful. I'm sure I'm going to have more
8 questions, but one more question.

9 If this is assigned, if a case is
10 assigned to the Hearing Examiner for the entire
11 case, is that cast in stone, or can that be
12 modified later on?

13 MS. ORR: I think it can be modified at
14 any time because it's a delegation, and we'd have
15 to figure out how that would come up such that you
16 would do it. But yes, I think you can alter a
17 delegation at any time.

18 CHAIRMAN RUFFATO: Thank you, Katherine,
19 and I just want to say I appreciate there's a lot
20 of information here, as you say, and I'm going to
21 have questions, and I appreciate your offer. I
22 expect other Board members will also appreciate
23 your offer to answer questions. If there isn't
24 anything more on that --

25 BOARD MEMBER SIMPSON: This is Dave

1 Simpson again. One more question, and that is:
2 As far as management of a contested case, if the
3 case is heard by a Hearing Examiner, is the case
4 based entirely on written record, or are there
5 oral arguments?

6 MS. ORR: Both. It's like a trial.
7 There's testimony, there's written evidence, and
8 argument by -- it's applicable that participating
9 lawyers --

10 BOARD MEMBER SIMPSON: Well, then my
11 next question is: That being the case, can the
12 Board delegate the management of the written
13 record, but hear oral arguments as a Board as part
14 of a contested case?

15 MS. ORR: Delegate the written record?
16 I'm sorry.

17 BOARD MEMBER SIMPSON: The motions,
18 briefing, and briefings, and scheduling. I mean
19 how is that handled if the Board -- Let's suppose
20 that the Board opts to take on the case as a Board
21 rather than delegate it. How are the mechanics of
22 the appeal handled? The mechanics of the case.
23 Excuse me.

24 MS. ORR: I think typically what would
25 be done is that you would rely on the Hearing

1 Examiner, the Board attorney, to handle the sort
2 of the housekeeping matters of scheduling, making
3 sure that discovery is taken care of; and then on
4 a substantive motion, like a motion for summary
5 judgment, you could hear that; or if there are no
6 motions for summary judgment, you can hear the
7 oral argument, if you wanted to structure it that
8 way.

9 BOARD MEMBER SIMPSON: Thank you very
10 much.

11 CHAIRMAN RUFFATO: Thank you, Dave.
12 Thank you, Katherine. Any more questions?

13 (No response)

14 CHAIRMAN RUFFATO: All right. I think
15 the next presentation would be by Sarah; is that
16 correct?

17 MS. ORR: Yes.

18 MS. CLERGET: All right. I'm going to
19 go through rulemaking, ethics, open meetings, and
20 submitting materials to the Board.

21 And before I do that, I just wanted to
22 make another note I should have made at the
23 beginning. Sometimes the Board is named as a
24 party in a District Court or other proceeding, and
25 so while Katherine is your Board attorney, and ALS

1 is your Hearing Examiner, there are instances
2 where you have another attorney in addition that's
3 managing cases.

4 For example, when I was a Hearing
5 Examiner, some of the decisions that I proposed to
6 the Board, some of the cases that I heard, were
7 appealed to District Court, and in those appeals
8 the Board was named as a party, so the Board has
9 to appear in District Court and participate in the
10 proceedings.

11 In those instances, the Hearing Examiner
12 can't -- the Hearing Examiner and Board attorney
13 can't appear to represent essentially the decision
14 that the Board attorney put before the Board. So
15 in those instances, the Board hires outside
16 Counsel.

17 There are currently three cases
18 outstanding, two of which are active, where the
19 Board has hired outside Counsel. That outside
20 Counsel is Amy Christensen and her firm.

21 We didn't ask her to be here today
22 because there's no briefing on any of the cases,
23 so there was no need for her to be here, but I
24 just want you to know that there is another
25 attorney out there representing the Board, and

1 when you get to the briefing items on the cases,
2 then she will update you on what those are, so
3 that was just an FYI I should have given you in
4 the beginning.

5 CHAIRMAN RUFFATO: Thank you, Sarah. As
6 long as we've gotten into that a little bit, I do
7 have a question along those lines. Is the Hearing
8 Examiner known to the Board when the decision is
9 made whether to refer it to a Hearing Examiner, or
10 is it just referred to ALS?

11 MS. CLERGET: I'll defer to Katherine on
12 that one.

13 MS. ORR: Mr. Chairman, we're plowing
14 new ground here, because formerly it was Sarah who
15 was both the Board attorney and who handled the
16 contested cases. Presently we have four attorneys
17 who were acting as Hearing Examiners in various
18 Board cases that are ongoing right now.

19 And foreseeing that this would happen
20 when Sarah left, I believe a motion was put before
21 the Board in the last Board hearing in December in
22 which it was determined that the delegation would
23 be to Agency Legal Services; and then in that case
24 the Bureau Chief -- me presently -- would
25 determine who the Hearing Examiners would be.

1 And we're hoping over time that the
2 attorneys will develop an expertise -- water, air,
3 etc. And I owe you an apology because I should
4 have foreseen that the Board would want to know
5 these Hearing Officers by experience and by Zoom
6 call, at the very least.

7 And what I would propose is that in the
8 next hearing that we have before the Board that we
9 do that, that I introduce you to those various
10 attorneys who are working on ongoing cases, if
11 that appeals to you.

12 CHAIRMAN RUFFATO: Thank you, Katherine,
13 and I think your suggestion is a good one.

14 MS. ORR: Okay.

15 CHAIRMAN RUFFATO: Go ahead, Sarah.

16 MS. CLERGET: If I could just jump in
17 quickly. I want to clarify. That December
18 seconded motion, that was the Board, the prior
19 Board had determined that ALS would be the Hearing
20 Examiner, and that ALS could designate.

21 I just want to clarify -- Katherine
22 knows this, so I'm not speaking out of turn. I
23 think she just forgot -- is that the Board has
24 traditionally used ALS. That has always been the
25 case as far as I know. But there is nothing set

1 in stone that the Board has to use ALS, and there
2 have been instances in the past where the Board
3 was able to say, in consultation with the Board
4 attorney and ALS, to say, "We like this attorney,"
5 or "We don't like that attorney as our Hearing
6 Examiner."

7 So there is flexibility there in
8 consultation with ALS, and with your --
9 internally. So it's not to say that the Board is
10 necessarily locked in, but that has just always
11 been how it is, mostly because ALS is a lot
12 cheaper than hiring anybody else. And frankly,
13 they have a lot of expertise in MAPA cases and
14 being Hearing Examiners, so -- but just so you
15 know.

16 CHAIRMAN RUFFATO: Thank you for that
17 clarification, Sarah. And Sarah, please proceed
18 with your points.

19 MS. CLERGET: So I'm going to start with
20 open meetings, and if you look on Page 003 in your
21 packet, I think this is the best overview. It's
22 only one page. Obviously we didn't include all of
23 the necessary law because frankly it's voluminous,
24 and very confusing.

25 So the best advice -- not that I'm

1 giving you legal advice -- but the best general
2 procedural advice I can give you is to talk to
3 your attorney when you have questions about this,
4 because it's very nuanced.

5 Essentially the problem in Montana is
6 that you have a little bit of a conflict between
7 the right to privacy and the right to know, both
8 of which are constitutional rights, and we have to
9 walk a line between those two things. And
10 sometimes that can get a little complicated, and
11 it takes a balancing test, which attorneys are
12 familiar with, ALS attorneys are familiar with,
13 and they can help you.

14 But what you need to know for the
15 purposes of meetings is that if you make a
16 decision that is not public, that the public has
17 not had a chance to participate in, or if you have
18 made a decision that was not private when it
19 should have been, then either of those decisions
20 can be invalidated.

21 So it's very important that you pay
22 attention to these rules because any decision that
23 you make -- if it was public when it should have
24 been private, or if it was private when it should
25 have been public -- can be invalidated.

1 So the main thing usually for the Board,
2 you often don't have private matters. Usually
3 private matters involve something like a personnel
4 issue -- which the Board doesn't have any staff,
5 so you don't really have to worry about that --
6 medical issues, issues dealing with juveniles,
7 things like that.

8 So for the most part, the Board doesn't
9 have those. In my experience as a Board attorney
10 since -- I think I was the Board attorney since
11 2017 -- we never had a reason to close a meeting
12 for any reason. But just to be aware that that is
13 a thing, and you may have to do it. The question
14 is if you feel like you need to, then ask your
15 attorney.

16 And so for the most part, the Board has
17 to worry about the right to know, which involves
18 the public participating. Essentially the
19 elements of that are that the public gets adequate
20 notice of what the Board is going to do. You do
21 that in your agendas and in the materials.

22 We have a Board policy, which I'll get
23 to later, that explains how you submit stuff to
24 the Board, and when you submit stuff to the Board.
25 The rule essentially is that -- and you can change

1 this as you want to -- but the rule has been that
2 you have to submit everything to the Board at
3 least a week in advance, because we have to put
4 together those packets for you, and the Board
5 agenda.

6 And we want you guys to have time to
7 review the stuff that's in the packet, and the
8 public to have time to review what's in the packet
9 and on the agenda. So there isn't a set standard.
10 Reasonable is the standard in the statutes and the
11 case law.

12 We've determined in the past that a week
13 is reasonable. Other boards have determined if
14 there's something that came up, that they can do
15 it as little as 24 hours. It's up to you guys.
16 Frankly, not that I'm giving you legal advice, but
17 in the past it has been that the more time, the
18 better.

19 So it's important that the things,
20 anything that you're going to consider be on an
21 agenda, and you can't take action on any item
22 unless it appears on the agenda as an action item,
23 because that's what gives the public the notice
24 that those are the decisions you're going to be
25 making.

1 And you also can't make any decision
2 until you've allowed public comment on that
3 decision, unless it's a contested case. Like
4 contested cases are different. There's no public
5 comment on contested cases. So everything I'm
6 talking about are your other matters aside from
7 contested cases.

8 You have to allow public comment on the
9 issue before the decision is made because that's
10 what makes the public comment meaningful. So if
11 you, for example, make a decision, and then allow
12 general public comment at the end, that's not
13 sufficient because the public hasn't got to
14 comment before you make the decision.

15 So generally what happens is that you
16 have the agenda with your action items on it, you
17 produce the materials that you're going to be
18 considering so everybody knows what the Board is
19 considering -- that's essentially your record.

20 And then you hear whatever information
21 you need to from, let's say, the Department if
22 it's a rulemaking, or from the parties that are
23 interested if it's a matter of public concern.
24 Then you allow general public comment, then you go
25 into your motions and your deliberation of the

1 Board, and your decision.

2 So that's generally how it goes to
3 ensure that you meet the requirements of the
4 public notice.

5 Generally Robert's Rules are a good way
6 to proceed. I'm sure Chair Ruffato knows those.
7 If anybody has any questions about them, there's a
8 great training out there provided by the State on
9 Robert's Rules. I'm pretty sure it's free for
10 everybody, and so I highly recommend that.

11 The other thing that is important to
12 highlight here about public meetings, and
13 sometimes boards get crossways with this, is that
14 as Katherine said, everything has to happen on the
15 record during a public meeting.

16 So public meetings have a definition,
17 and that definition includes anytime the Board is
18 doing anything on which they may make a decision,
19 and therefore you can have a public meeting, or a
20 meeting of the Board should be public, over email,
21 for example, or on the phone.

22 Anytime a quorum of the Board is
23 together, and they're talking about an issue that
24 should be public, that's of public interest, it
25 has to be done in a way that the public can

1 participate. So you can't email each other on an
2 issue, on which you're going to make a decision,
3 because that discussion that's happening in the
4 email is something that should be happening in a
5 public forum where the public can hear.

6 So you have to be very careful about the
7 communications that you make, and make sure
8 everything is done on the record. I think
9 generally the best way to think about it for
10 everybody is: If I were a member of the public,
11 and I were highly suspicious of government
12 activity, what would I feel like I need to know
13 about what the Board is doing.

14 And if you kind of use that as a
15 benchmark, it's usually a good way to check your
16 gut, and if you have any questions, you ask your
17 attorney. But the main thing you need to know is
18 that whatever happens, whatever a board is basing
19 their decision on has to be in done in public, in
20 the light of day, and usually at a meeting.

21 Meetings. We've determined through
22 research that meetings can obviously happen on
23 Zoom, they can happen by telephone, they can
24 happen in person. There's a number of ways to
25 allow them to happen, and that's all fine, as long

1 as you notice to the public in advance how the
2 meeting is going to happen.

3 So the public doesn't necessarily have a
4 right to an in-person meeting. They can have a
5 right to a telephonic or a Zoom meeting as long as
6 there is access and notice.

7 I think that covers open meetings unless
8 anyone has any questions.

9 CHAIRMAN RUFFATO: Any questions on
10 those points?

11 (No response)

12 CHAIRMAN RUFFATO: Sarah, you will
13 probably -- I have a question, and that is you
14 said that what we're talking about now is public
15 meetings. Are you going to go over the parallel
16 rules with respect to the contested cases?

17 MS. CLERGET: Katherine will do that or
18 answer any questions that you have about that.
19 I'm not going to touch contested cases because I'm
20 going to be appearing in front of you.

21 CHAIRMAN RUFFATO: I understand.

22 MS. CLERGET: And Chair Ruffato, I don't
23 want to overstep my bounds here, but it's been an
24 hour, and usually our Court Reporter needs a break
25 after about an hour, so this is a good stopping

1 place in my presentation if you want to take a
2 break.

3 CHAIRMAN RUFFATO: I think that would be
4 a good idea. Do we need a motion for that, or can
5 I just declare that we're going to take a ten
6 minute break?

7 MS. ORR: I think you can just say that
8 you want to take a break.

9 CHAIRMAN RUFFATO: Thank you. Let's
10 take a ten minute break, and reconvene at 10:13.

11 (Recess taken)

12 CHAIRMAN RUFFATO: We'll reconvene. I
13 will call the meeting back in order. And Sarah,
14 if you would continue, I'd appreciate it.

15 MS. CLERGET: Sure. I am continuing
16 with rulemaking. So the best thing to look at in
17 your packet is on Pages 40 to 41. And this is a
18 rulemaking overview that was written by John
19 North, who was the prior Chief Legal at DEQ, and
20 it was written many years ago, as you can tell, in
21 2013, but it's very much applicable still. And it
22 takes you through the process in a very general
23 overview.

24 And then you can see the particular
25 statutes are included in your packet for you to

1 read in more detail later. If you have questions,
2 again, ask your attorney.

3 Generally the process for rulemaking is
4 that, in front of the Board, is that there are two
5 different kinds of rules. First are rules that
6 are brought before the Board by the Department,
7 and the second kind of rules are rules that the
8 Board initiates itself.

9 In the past, again since 2017, in my
10 experience, the Board has not brought rules
11 itself. Most of the rules are brought, well, all
12 of the rules since 2017 have been brought by the
13 Department.

14 However, when I was the Board attorney,
15 I had begun working on a series of procedural
16 rules for the Board that memorialized and put into
17 rule what is currently the policy on submissions
18 to the Board, which we'll get to later.

19 So the Board can initiate its own rules.
20 They can be substantive, if necessary, or they can
21 be procedural, but those are certainly not the
22 norm.

23 So the norm for rulemaking in front of
24 the Board is that the Department puts together a
25 rule package. They bring it to the Board. The

1 package includes the proposed rules, which usually
2 come in the form of a current rule that's
3 redlined, or a proposed new rule. They look like
4 the rules that go eventually to the Secretary of
5 State's Office, so this is essentially an initial
6 draft of the rulemaking by the Department.

7 That gets put in the packet for the
8 Board, and put on the Board agenda as an action
9 item. The Board decides at that point whether or
10 not they're going to proceed with rulemaking
11 process, or whether they don't want to do
12 rulemaking on this particular rule. Then if they
13 don't want to proceed, then that's the end of the
14 question.

15 If they do want to proceed, then the
16 next step is that usually there's a Hearing
17 Examiner assigned to monitor the process and to
18 hold a public hearing on the rules. Generally
19 that's ALS, but as I said before, you can pick
20 whoever you want. And it can be a member of the
21 Board as well if you'd like it to be.

22 The Department then takes care of the
23 procedural stuff. There was a person at the
24 Department, Sandy Scherer, who handled this. Her
25 position is currently vacant. They're working on

1 filling it, so when that new person comes in, they
2 will be sort of rule helper from the Department
3 who helps the Board.

4 She sends the notice, the public notice
5 out in requirement with the statute -- that
6 includes publication in the newspaper, public
7 posting on the website, all those sorts of things
8 -- that says, "The Board is considering this rule.
9 Please submit either written comments, or there
10 will be a public hearing on this day."

11 Then, again usually the Hearing Examiner
12 from ALS, but whoever it is, holds a public
13 hearing on the rule. The public can come and make
14 comment. Those are memorialized by a Court
15 Reporter. And they can also submit written
16 materials or comments.

17 Sometimes those are very detailed and
18 technical, and come from experts; sometimes they
19 are just public saying "We support" or "Don't
20 support."

21 Then after that process, DEQ usually
22 comes back to the Board with a packet that says,
23 "Here are all of the comments. Here's what
24 happened." And there's a report from the Hearing
25 Examiner that says, "This is what happened at the

1 public hearing." There's the transcript of the
2 public hearing.

3 That whole package comes before the
4 Board, and then the Board decides whether or not,
5 based on all of those comments, and there's also a
6 presentation by the Department in order for you to
7 ask whatever questions you have of the Department.
8 Usually those are done by technical staff, in
9 addition to administrative staff.

10 So for example, George, the liaison,
11 might do it, or he might delegate it to, for
12 example, the director of the Air Quality Program.
13 Then the director of the Air Quality Program may
14 have technical people available to answer any
15 technical questions you have.

16 Then you can allow additional public
17 comment at the meeting. You don't have to, but
18 it's important that even if you do allow public
19 comment at the Board meeting, what you're
20 considering when you consider rules are the record
21 that has been made of the rules.

22 So that includes the original rule
23 hearing that was held by the Hearing Examiner, and
24 the written comments. So you have to be very
25 careful that if you allow public comment at a

1 Board meeting after that record, that packet has
2 been created, that essentially it's just an
3 opportunity for people to speak, but you can't
4 consider that information in your decision on
5 whether or not to adopt the rules, or to adopt
6 them and modify them in some way.

7 Because again, those people who have
8 followed the appropriate process, those people
9 have made their written comments, and come to the
10 hearing and made their comments, they are the ones
11 who followed the appropriate process, and you
12 don't want people to be able to highjack that and
13 come in at the last minute at the Board meeting,
14 because that doesn't allow the Department or
15 anybody else to respond to the comments in an
16 appropriate way.

17 So when we say that you need to be
18 careful to consider the record, the record in a
19 rulemaking process is the hearing and the written
20 comments. So those come before you along with the
21 presentation, and then you decide. You can modify
22 the rules, you can decide not to adopt them, you
23 can adopt part of them, not all of them, or you
24 can adopt all of them.

25 And generally if you have questions of

1 the Department -- I know that was a question from
2 Board Member Simpson before -- that time is the
3 time where you ask them. Sometimes Board members
4 have questions when there's the initial question
5 of whether or not we're going to initiate
6 rulemaking. You can ask the Department questions
7 then, but usually what happens is that the
8 questions to the Department come when there's the
9 discussion of whether or not you're going to adopt
10 these rules.

11 With the rule packet that comes from the
12 Department are a number of things that the Board
13 is required by statute to do. A few of those
14 examples appear in your packet at Pages 36, 37, 38
15 and 39.

16 So those generally are three things.
17 One is if there is legislation that requires the
18 Board to initiate this rulemaking -- so
19 essentially the statute, they've created a statute
20 that says, "Here's what's required, and the Board
21 shall or may promulgate rules to apply this
22 statute."

23 If that happens, then the Board has to
24 notify the sponsor of the legislation when the
25 rules are being promulgated. So an example of

1 that is in your packet at 36.

2 In addition, the Department does what we
3 call a stringency analysis, which is essentially a
4 determination of whether those rules are more or
5 less stringent than the federal counterparts, and
6 those you can see an example of that on 037. Then
7 there is also -- yes, 37 and 38. I apologize.

8 Then there is also a takings analysis
9 that has to happen, and this is essentially a
10 determination of whether this is going to cause a
11 takings, meaning a financial taking from anyone.
12 And that analysis you can see is a checklist that
13 happens. There's an example on Page 39 of your
14 materials.

15 So those all come, those things are done
16 by the Department, and they come with the rule
17 package. So you just have to be careful just to
18 note that when you're adopting or modifying a rule
19 package, that you have to be careful to include
20 all of those things, because if you don't, then
21 you haven't checked all the boxes that you have to
22 check for MAPA for an appropriate rulemaking
23 process.

24 So the other thing I want to go through
25 is I'm going to share my screen. I apologize that

1 this is not included in your packet. Maybe I'm
2 going to share my screen. No, maybe I'm not.
3 That's not allowed. Joyce, you don't have the
4 ability to let me share my screen, do you?

5 CHAIRMAN RUFFATO: Excuse me. I didn't
6 hear that, Sarah.

7 MS. CLERGET: I was asking Joyce if she
8 had the ability to let me share my screen. I
9 don't think she does because I think it's Sandy
10 who initiated the meeting.

11 But anyway, there is a memo that I wrote
12 when I was the Board attorney that is an update to
13 some of the materials that appear in your packet.
14 And I apologize. It should have been in your
15 packet, and it's my fault that wasn't because I
16 forgot -- that this had happened in the
17 intervening time since the last time I did this
18 orientation. So we can send that around to you.

19 It's essentially an update, because some
20 of the information that appears in your packet on
21 the areas where rulemaking is -- where the Board
22 has rulemaking authority have changed over the
23 years, and so I did a memo that lays out in which
24 areas the Board has rulemaking authority.

25 And interestingly not always -- There

1 are some instances where the Legislature has said
2 the Board may initiate rulemaking, and some places
3 where the Legislature has said the Board shall or
4 must initiate rulemaking. And so this memo lays
5 out where those are.

6 You'll see that it's a draft, it has
7 draft stamped all over it, and part of that was
8 because DEQ hadn't had a chance to review this
9 memo, and so this was essentially my first go at
10 it, and so it never got finalized. But I do think
11 that it helps you update the areas where you have
12 rulemaking authority.

13 And then the nice thing about that is
14 you can check when you have a rule coming in, the
15 rule package from the Department, you can check it
16 has the statutes that state where your authority
17 comes from, and what your authority is, and so you
18 can go look at those. It's just a cross-reference
19 that's nice.

20 But again, the best thing, if you have
21 questions, is to ask your attorney, because she
22 has all of this information. So I just wanted to
23 alert you to the fact that was there, and some of
24 the information in your packet is a little bit
25 old, and so it has changed.

1 CHAIRMAN RUFFATO: Excuse me, Sarah.
2 Can I just get confirmation that you are going to
3 send that out to the Board members.

4 MS. CLERGET: Katherine, is that okay?

5 MS. ORR: Oh, yes. That's fine.

6 MS. CLERGET: Yes, I will do that.

7 CHAIRMAN RUFFATO: And while I'm at it,
8 Katherine, you also indicated that there was some
9 materials that you thought we should have seen,
10 and frankly I didn't make a note, but can you get
11 that out to us?

12 MS. ORR: Yes. We will include it all
13 in one blast to you.

14 CHAIRMAN RUFFATO: That would be great.
15 I appreciate it very much. Thank you. Go ahead,
16 Sarah.

17 MS. CLERGET: Sure. The only other
18 thing that I wanted to offer was you talked a
19 little bit earlier about ex parte communication,
20 and I wanted to give you an example of ex parte
21 communication that occurred actually at the prior
22 meeting, or before the prior meeting in December,
23 is a good example of how ex parte communication
24 happens with the Board.

25 In that instance, the Board had gone

1 through the initiation -- they had decided to
2 initiate rulemaking. Then we'd had the hearing
3 and the written comments. The packet had been put
4 together, and it was posted on the website, the
5 agenda was posted.

6 And a few days before the Board meeting
7 on the rulemaking, an individual from the public
8 contacted each of the Board members by email with
9 a very long and detailed technical email, and
10 included technical exhibits in the email that were
11 never submitted during the formal process. So
12 they were never submitted as a comment, written or
13 otherwise, they were never submitted during the
14 hearing, so they were not part of the record.

15 And then we also had a very large number
16 of people show up at the Board meeting, and want
17 to comment on the rulemaking, who had not appeared
18 at the actual rule hearing. And so the Board had
19 to be very clear.

20 We published the email that everybody
21 received to be above board and say, "This is the
22 email that the Board received. This is ex parte
23 contact. The Board will not be considering
24 anything in this email. It is not part of the
25 record, but we just wanted to let everybody know

1 that it occurred."

2 And then the Board made their decision
3 based neither on the public comments that were
4 given at the Board meeting, and not on the email
5 that they had received. So that's a good example
6 of the ex parte communication, and how you have to
7 be careful about it.

8 The best thing to do -- which everybody
9 did in that instance -- was as soon as they
10 received the email, they forwarded it to their
11 attorneys and, "FYI. I'm getting this. What do I
12 do with it?" And the attorney, me in that
13 instance, said, "Disregard it," and then we
14 followed the process I described.

15 CHAIRMAN RUFFATO: Thank you.

16 MS. CLERGET: I think that is all I have
17 on rulemaking unless anyone has any questions.

18 CHAIRMAN RUFFATO: Any questions on
19 rulemaking?

20 (No response)

21 MS. CLERGET: All right. Then Chair
22 Ruffato, if it's all right, I will continue to
23 submitting materials.

24 CHAIRMAN RUFFATO: Please do. Thank
25 you.

1 MS. CLERGET: So this appears on Page 44
2 to 49 of your packet, and this is essentially a
3 memo -- or excuse me -- a policy that the Board
4 implemented, and the idea was that this would be a
5 policy as sort of stopgap between the fact that
6 there was nothing, and the fact that there weren't
7 any rules.

8 And I wrote this as the Board attorney,
9 and it's essentially what appears in the
10 scheduling orders that come in contested cases,
11 but we wanted to make it -- there's a little bit
12 of additional stuff for Board meetings
13 specifically.

14 But generally it tells the public how
15 you submit something to the Board, what the
16 process is, what you can and can't submit; ex
17 parte, it describes ex parte contact, and explains
18 to the public that you can't do that.

19 And unfortunately on Page 4, which is
20 your Page 47, the contact information on there is
21 old because Lindsay Ford is no longer the Board
22 secretary, and obviously I'm no longer the Hearing
23 Examiner, so that will need be updated.

24 But in general, this gives you an
25 overview of the process. And the main thing again

1 to note there is that things must come in a week
2 before. It's important that if they don't come in
3 a week before, that we don't consider them,
4 because then we don't get enough time to post
5 them, and give the public notice that's required.

6 The contested case stuff that comes in,
7 I'll let Katherine talk a little bit more about
8 that, but just generally that is submitted through
9 the Hearing Examiner and through the hearing
10 assistant, and also to the Board secretary, but
11 the Board secretary doesn't really handle it.
12 It's essentially ALS handles it.

13 So there should never be anything
14 submitted on a contested case directly to the
15 Board. That comes in a separate process, because
16 there are specific rules about what the Board can
17 and cannot see in the process of the --
18 Essentially you need to get a complete packet when
19 you consider a contested case, and not piecemeal.
20 So that's why you'll see in the policy that things
21 on contested cases are submitted separately.

22 And the other thing to note there is
23 that, as I said, we were working on rules for
24 this, it never completed, but if the Board wanted
25 to initiate rules on that, this would be one place

1 that it's possible for you to do some procedural
2 rules to formalize this more than a policy.

3 The other note is sometimes things come
4 in to the Board, you'll unfortunately see,
5 sometimes they're very huge. They're voluminous.
6 Hundreds of pages. And those instances, depending
7 on the case, there will sometimes be times where
8 you'll want things in advance, so you have more
9 than a week to look at them, because they're
10 difficult and detailed.

11 And those things may come out to you
12 piecemeal. Whenever that happens, they will also
13 be posted on the website as part of the packet.
14 They may not be posted right at the same time you
15 get them, they may not post until the week before,
16 but they will always, if you get them early, they
17 will always be posted and become part of the
18 public record. So I wanted to make a note that
19 that's the only deviation from the policy is that
20 sometimes we give you extra time.

21 I think that is all I had to say on
22 submitting materials unless anybody has any
23 questions.

24 CHAIRMAN RUFFATO: Any questions on
25 submitting materials?

1 (No response)

2 CHAIRMAN RUFFATO: If not, please
3 proceed, Sarah.

4 MS. CLERGET: The last thing is ethics,
5 and this appears the best, again, the best
6 overview of this appears on Page 42 and 43 of your
7 packet. This is again an overview that was
8 written by John North many, many years ago, but it
9 still applies.

10 The statutes on ethics are in your
11 packet. Your attorney obviously is a huge
12 resource for you on any ethics questions, and I
13 really encourage you, if you ever have a question
14 like, "Should I recuse myself from this issue?
15 I'm not sure whether this is an ethical issue or
16 not," those are all questions that you should pose
17 to your attorney.

18 There is also another resource that
19 appears in this material. And I apologize. I
20 don't have a pinpoint cite for that. But the
21 Commission on Political Practices are sort of the
22 keeper of these ethical rules. They're the ones
23 that if there is an ethical violation, they're the
24 ones that prosecute it.

25 And Jaime MacNaughton is their attorney,

1 and she's a phenomenal resource on ethics. So if
2 you have any other questions, that's another great
3 place to look. Their website has a lot of
4 information, a lot of frequently asked questions.
5 So that's another great resource for you.

6 Essentially the big ethics points that I
7 want to hit are in this overview. The first thing
8 you need to know is that as a Board member, you
9 are considered a public employee, and that's
10 important because the statutes say, "This is what
11 a public employee can and cannot do." So even
12 though you're a Board member, you're not really
13 getting paid that much, you're still considered a
14 public employee, and therefore all of the ethics
15 rules apply to you. And the portion of this
16 statute that requires that is cited in this memo.

17 There are three sections of the Public
18 Employee Ethics Code that apply to you very
19 specifically, and then a bit of a fourth again.
20 Those are cited.

21 And then there's an additional one for
22 the Board of Environmental Review that doesn't
23 occur in other boards, and that is under federal
24 law, it's not allowed that anybody who has
25 decision making authority over coal issues can

1 have any financial interest in coal.

2 And so therefore there's an additional
3 piece of paper that you're going to have to fill
4 out that we'll probably get to you before the next
5 meeting that states, "These are my financial
6 interests," and then you list them out, and none
7 of them involve coal, and you sign off on that,
8 and that's to comply. And then the Board
9 secretary keeps track of those to just make sure
10 that we're in compliance with the federal law that
11 nobody is getting kickbacks from coal essentially.

12 And gifts are pretty straight forward.
13 A gift is anything that is \$50 or more in value,
14 and that value is the key part of that because
15 it's not just a gift that costs more than \$50, it
16 can be labor, it can be a break on a loan, it can
17 be any number of travel -- you know, you get to
18 stay in a hotel for a reduced rate -- any number
19 of those things. If it's worth more than \$50,
20 then it is considered a gift and that's improper.

21 And again, the Commission on Political
22 Practices has a lot of rulings on what is
23 considered a gift, and how they value things. So
24 if you have any questions about that, in addition
25 to your attorney, that's a great resource.

1 Financial interests and transactions. A
2 lot of this is gut instinct. You know, you can't
3 have a financial interest in something that you're
4 presiding over. So if you have a question about
5 whether or not you do, again, go to your attorney.

6 The most important thing to note here is
7 that it's not just while you're a Board member,
8 but actually after you're a Board member as well.
9 They want to make sure that there's a period of
10 time after being a Board member that you're not
11 going essentially and using your Board status to
12 get a financial gain afterwards in a matter that
13 you were directly involved in. And that appears
14 under the "Former Board members." There's some
15 more discussion about that in addition to the
16 financial interest.

17 Lobbying. Obviously there's a lot of
18 additional rules about lobbying, but the big thing
19 you need to know is that as a Board member, you
20 cannot participate in lobbying activities.

21 And employment is the other big thing.
22 Employment and contracts sort of goes along with
23 financial interests. You can't take a contract
24 essentially with any State entity or an entity
25 that contracts with the State to do work that is

1 related to what you did as a Board member for at
2 least six months following the end of the time
3 that you're a Board member, and obviously while
4 you're a Board member.

5 And the same thing. You can't take a
6 job that would involve you being, you having
7 direct -- matters in which you are directly
8 involved during the course of your employment as a
9 Board member.

10 So I think that pretty much covers the
11 ethics issues. Like I said, they're set out. The
12 statutes themselves are there if you want to look
13 at them. But the best thing to do if you have a
14 question, is to ask the specific question.

15 I got a lot of questions as a Board
16 attorney about, "Look, I had this involvement.
17 I'm a member of this group, and this group is
18 appearing before me as party in this matter. What
19 do I do about that?," and your attorney can talk
20 through that with you.

21 So unless there's any questions, I think
22 that's all I have on ethics.

23 CHAIRMAN RUFFATO: Are there any
24 questions about ethics?

25 (No response)

1 CHAIRMAN RUFFATO: I have a question,
2 and this is probably for Katherine, and that is we
3 have been referred to attorneys, the Board
4 attorney, and maybe the Commission on Practice
5 attorney, to ask questions about any of these
6 issues.

7 And I wanted to find out if there's any
8 prohibition on Board members contacting Katherine
9 or some other attorney to discuss these issues
10 privately, or is that something that is going to
11 violate the public right to know?

12 MS. ORR: I don't think it violates the
13 public right to know.

14 CHAIRMAN RUFFATO: Is there any
15 restrictions on it other than just being
16 courteous, and make sure we don't overburden you?

17 MS. ORR: I think as a courtesy it would
18 be good to let me know, but I think the
19 determination centers on whether the question
20 affects a matter of business of the Board, and if
21 it doesn't, then I don't think it runs afoul of
22 any of the ex parte communications, or
23 prohibitions against making a decision outside of
24 the context of a Board meeting.

25 CHAIRMAN RUFFATO: Thank you, Katherine.

1 BOARD MEMBER HANSON: Katherine, can you
2 put your email address in the chat, or can we get
3 it in some way? I don't see it in the --

4 MS. ORR: You bet.

5 BOARD MEMBER HANSON: Thank you.

6 CHAIRMAN RUFFATO: Are there any other
7 comments or questions by the Board on what we've
8 covered so far?

9 (No response)

10 CHAIRMAN RUFFATO: If not, then have we
11 completed the orientation portion of this meeting?

12 MS. WITTENBERG: Mr. Chairman, I do have
13 a few things to go over administratively with you
14 guys.

15 CHAIRMAN RUFFATO: I am sorry, Joyce. I
16 see that on the agenda. Yes.

17 MS. WITTENBERG: It's pretty quick.

18 CHAIRMAN RUFFATO: Okay. Please
19 proceed.

20 MS. WITTENBERG: So a few things.
21 Hallie, the person that was in the position
22 previously, was supposed to send you all some
23 forms to complete, and I don't know that that
24 happened. I didn't see any completed forms.

25 So what's going to happen is within the

1 next week, I'm going to send you mail. I'll
2 probably have to email you all and get your
3 mailing addresses. I'm going to mail you a couple
4 forms. One is the LSM form that Sarah talked
5 about; and then the other is a W-9 form, and
6 that's how we get your honorarium to you.

7 I will tell you now, but I'll also be
8 clear, and when I send it to you there are a
9 couple things. One form asks for a Social
10 Security number, and another one asks for your
11 bank account number so they can do direct deposit.

12 And I will ask that you don't put those
13 on the form, that when I get the form back from
14 you, I will call you directly, and we put it on a
15 sticky note to get to Financial Services, and as
16 soon as they have done what they need to, that
17 sticky note gets shredded, and not with your
18 documents at all, so nobody can get their hands on
19 that information. So those will be coming to you.

20 In there also is we need to have some
21 contact information for Board members on our
22 website, on the Board website. So there will be
23 another form in there asking you what information
24 you want on there. Previously Board members liked
25 to have, like their email address is a great one

1 to have, phone number if you want, sometimes they
2 put their mailing address in there, but we're
3 mostly electronic these days, and so email is
4 probably the best. But you can make that decision
5 on those. I will send a self-addressed stamped
6 envelope with that, so you can just turn around
7 and mail it back to us.

8 I think Sarah also talked to you and
9 touched on this, is that BER packets are typically
10 posted one week prior to the meeting. So meetings
11 usually happen on a Friday, so the Board packet
12 gets posted usually the Friday before that
13 meeting, and then you will get an email from the
14 Board secretary letting you know that it's been
15 posted, and you can go out there and download it.

16 There is a \$50 honorarium per day for
17 the meetings. In the future, if we ever get back
18 to where we're having in-person meetings, there is
19 also your travel would get reimbursed as well, but
20 we'll address that when that day comes, if it
21 does. And that is all that I have.

22 CHAIRMAN RUFFATO: Thank you, Joyce.
23 Any questions for Joyce on those points?

24 BOARD MEMBER LEHNHERR: Mr. Chairman.
25 Joyce, there was some -- I may have misunderstood

1 and wanting to clarify regarding the contact
2 information for Board members. Did you say that
3 that contact information would go on the website?

4 MS. WITTENBERG: Yes, that is
5 information that I'm looking for, but it's
6 whatever you decide. So I might have your mailing
7 address, but you may have told me that only your
8 email address is what should be on the website,
9 and so that's all that would be on the website.

10 BOARD MEMBER LEHNHERR: I'm wondering,
11 because there was some discussion, because we have
12 occasionally been contacted inappropriately, for
13 lack of a better term, by members of the public,
14 and there was some discussion of not having any
15 contact information, so that members of the public
16 would not be tempted to contact us. So I was just
17 following up on that.

18 MS. WITTENBERG: That's new to me.
19 Katherine, maybe you or Sarah can address that,
20 because I haven't been with the Board for a quite
21 awhile, so I was not aware of that.

22 CHAIRMAN RUFFATO: Katherine, could you
23 address that question? Because it is a good
24 point, it seems, that when you put contact
25 information of the Board members, you're inviting

1 contact.

2 MS. ORR: Yes. And Mr. Chair, I think
3 the solution is to say that to contact the Board
4 members, just give the secretary, your Board
5 secretary's contact information, and then it can
6 be distributed appropriately.

7 CHAIRMAN RUFFATO: I'm sorry. I didn't
8 understand that, Katherine, and maybe I just
9 didn't hear.

10 MS. ORR: Two things. One, I think it
11 is a good idea not to give out direct contact
12 information with Board members. Two, I think it's
13 a good idea to instead give the Board secretary's
14 contact information on the Board website, and that
15 is so that that's in conformance with the policy
16 that was developed that Sarah referred to
17 regarding submission of materials to the Board,
18 which is in your packet. So that's what I would
19 suggest.

20 CHAIRMAN RUFFATO: What I'm hearing you
21 suggest is that the website have no Board member
22 direct contact information, and that any contact
23 come through the Board secretary? Is that what I
24 heard?

25 MS. ORR: Yes.

1 CHAIRMAN RUFFATO: Is it appropriate for
2 us to discuss that now, or is that something that
3 we should bring up at a later Board meeting?

4 MS. ORR: Well, we didn't notice it, so
5 you might want to put it on the agenda for a
6 future meeting.

7 CHAIRMAN RUFFATO: Thank you. That
8 would make sense to me. Let's plan on doing that.
9 David.

10 BOARD MEMBER LEHNHERR: I just wanted to
11 say thank you to Joyce and everyone that
12 participated in the conversation, and welcome to
13 all the new Board members.

14 CHAIRMAN RUFFATO: Thank you, David.
15 And I would add my thanks to Joyce, and Katherine,
16 and Sarah for their excellent presentation. It's
17 a lot of information. I'm sure I'm going to have
18 more questions, but that's a great overview.

19 Before we move on, does anyone have any
20 additional questions or comments before we move to
21 the contested cases?

22 BOARD MEMBER SIMPSON: Mr. Chairman,
23 this is Dave Simpson. I have one minor request,
24 and that is if we get another Board package of
25 over 400 pages, could we have a table of contents

1 at the start, please?

2 MS. WITTENBERG: I can address that. So
3 typically there would have been. This was kind of
4 a -- the previous person left kind of rather
5 quickly, and I found out about it a little bit
6 later, and so jumped in and to get this out there.

7 And so normally it would have a table of
8 contents, and there are links in it as well. And
9 normally they have the Bates numbering from Page 1
10 all the way. And I believe that the attorneys
11 refer to the Bates numbering to make it easy for
12 you to find things within the document.

13 CHAIRMAN RUFFATO: Thank you for the
14 question, Dave, and thank you for the answer,
15 Joyce. Does that answer your question, Dave?

16 BOARD MEMBER SIMPSON: Yes, it does.
17 Thank you very much.

18 CHAIRMAN RUFFATO: Thank you. Any other
19 questions or comments?

20 (No response)

21 CHAIRMAN RUFFATO: If not, I think it's
22 appropriate to move to the action items, the
23 contested cases. And I am going to ask Katherine.
24 Are these initially presented by you as the Board
25 attorney?

1 MS. ORR: Yes, they are. And Mr. Chair,
2 members of the Board, typically, the agenda is
3 rather specific about the noticed item, the
4 noticed contested case, that is before the Board,
5 so that the Board can determine how it wants to
6 handle the contested case. Also the agenda is
7 specific about ongoing cases.

8 And we didn't do that this time, but we
9 will in the future, so that you know for every
10 pending case what the status of it is, whether
11 it's in discovery phase, whether there's been a
12 motion submitted of some type or another, like for
13 summary judgment motion, so that you know that at
14 all times.

15 CHAIRMAN RUFFATO: Thank you.

16 MS. ORR: So today -- and I can launch
17 into this if you want. The determination for the
18 Board in each one of these four cases is do they
19 want to delegate it, and do they want to delegate
20 in part, and that's certainly up to you. So with
21 that, I might be able to proceed, or whatever is
22 your wish here.

23 CHAIRMAN RUFFATO: Well, does any member
24 of the Board have comment on how they would like
25 to proceed?

1 (No response)

2 CHAIRMAN RUFFATO: My suggestion would
3 be that we go case-by-case, and consider what is
4 before the Board, if that's appropriate,
5 Katherine.

6 MS. ORR: Yes. I'd be glad to do it
7 that way.

8 MS. COLAMARIA: Katherine, Mr. Chair,
9 this is Angie Colamaria. I'm the Chief Legal here
10 at DEQ. Just before we start, we just wanted to
11 make a little clarification about two of the
12 agenda items, if that's okay.

13 CHAIRMAN RUFFATO: Yes. That would be
14 fine.

15 MS. COLAMARIA: So just the normal text
16 that we put for these agenda items is what
17 Katherine just said. You can choose to partially
18 delegate, fully delegate, not delegate at all.

19 There are two matters on there regarding
20 the Keystone Pipeline, and the 401 certification.
21 For those, because of our rules, our
22 Administrative Rules, you have to appoint a
23 Hearing Examiner. You don't have the choice to do
24 it yourself for those two cases.

25 So I think that was probably what was

1 going to happen anyway, just the text says that
2 you have the three choices, but you only have the
3 one in this, is to appoint the Hearing Examiner
4 for those 401 cases.

5 CHAIRMAN RUFFATO: Thank you for that
6 clarification. Katherine, please go ahead.

7 MS. ORR: Okay. The first one is in the
8 matter of notice of contest and request for
9 hearing by Talen Montana, LLC, regarding the
10 selection of a remedy, and setting of financial
11 assurance for the Colstrip Steam Electric Station
12 Units 1 and 2 by the Montana Department of
13 Environmental Quality.

14 And the whole reason I read this title
15 is it pretty much sets forth what this case is
16 about. This is a Colstrip. It's a challenge
17 under the Major Facility Siting Act regarding
18 MDEQ's remedy selection and financial assurance
19 directives contained in the Department's November
20 17th letter, and the remedy decision document.

21 I'm going to just cut to the chase here.
22 There are lots of procedures that the Department
23 undertook that are being challenged here -- the
24 CCR rule, which is a rule that addresses
25 disposition of wastes -- and all sorts of other

1 things, public notice, etc.

2 But what the petitioner is asking for is
3 for the Board to deem the Department's remedy
4 decision document and related selection of a
5 remedy and imposition of financial assurance void
6 ab initio, vacated, set aside, enjoined, and
7 remanded to the Department for further review and
8 conformance with requirements of the
9 administrative decision on consent which was
10 formulated some years ago, the Major Siting Act,
11 the Administrative Procedures Act, and the Montana
12 Administrative Rules, and those of federal
13 regulations.

14 And the contesters request that the
15 Board stay, keep in abeyance the Department's
16 remedy selection and financial assurance decision
17 pending resolution of this matter by the Board
18 through the duration of any appeals, and further
19 requests all preliminary and other relief that the
20 Board deems just and appropriate.

21 Now, I really summarized here, and I
22 have read through this. It's quite detailed, but
23 those are sort of the outlined problems and
24 requests that have been detailed by Counsel for
25 Talen Montana.

1 CHAIRMAN RUFFATO: Thank you, Katherine.
2 I had a question. As I read through it, it
3 suggested that there was some dispute resolution
4 process going on now, or at least back when the
5 petition was filed; is that correct?

6 MS. ORR: I believe so, yes.

7 CHAIRMAN RUFFATO: And --

8 MS. ORR: I don't know the disposition
9 of this, if that's what you're asking. We can
10 sure find out.

11 MS. THOMSEN: Mr. Chairman and Ms. Orr,
12 this is Martha Thomsen for Talen Montana. We'd be
13 happy to answer any questions you-all have about
14 the current status of dispute resolution which is
15 indeed ongoing.

16 CHAIRMAN RUFFATO: I don't really need
17 answers to the status of it, except that the stay
18 that was requested, is that requested for purposes
19 of the dispute resolution, or is that a separate
20 issue?

21 MS. ORR: Mr. Chairman, the way I read
22 that is it's a separate issue.

23 CHAIRMAN RUFFATO: Okay. Thank you. So
24 if I understand our action item today, it's
25 whether we want to assign this to a Hearing

1 Examiner or not, and if so, procedural or
2 procedural and substantive; is that correct?

3 MS. ORR: That's correct.

4 CHAIRMAN RUFFATO: May I ask one more
5 question? David, you raised your hand.

6 BOARD MEMBER LEHNHERR: Go ahead with
7 your question, Steve.

8 CHAIRMAN RUFFATO: My question was: Can
9 we -- because there are at least four of us on
10 here that are just trying to figure out how these
11 procedures work, is it possible for us to assign
12 this to a Hearing Examiner for procedurally today,
13 just so things can be moving, and then consider
14 later whether or not we want to assign it in
15 totality or substantively?

16 MS. ORR: Mr. Chair, I think that's
17 perfectly acceptable.

18 CHAIRMAN RUFFATO: David, did you have
19 any other comments or questions?

20 BOARD MEMBER LEHNHERR: I was just going
21 to make a motion as a starting point for
22 discussion, and if the Board did not like the
23 motion, it could be voted against, but at least we
24 could use it as a point of discussion.

25 CHAIRMAN RUFFATO: Please make the

1 motion and we will discuss.

2 BOARD MEMBER LEHNHERR: Thank you. I
3 would move that in the matter of contested case
4 (A)(1) that we assign a Hearing Examiner for the
5 totality of the case.

6 BOARD MEMBER HANSON: Second.

7 CHAIRMAN RUFFATO: Who was the second?

8 BOARD MEMBER HANSON: (Indicating)

9 CHAIRMAN RUFFATO: Hillary. Thank you.

10 A motion has been made and seconded that the
11 matter be assigned to a Hearing Examiner for the
12 totality of the case. Discussion. Hillary.

13 BOARD MEMBER HANSON: I have been on the
14 Board for awhile. I guess I would encourage
15 towards totality actually as the first route to
16 go. To go the other route is an extreme amount of
17 time for the Board. And so David maybe can jump
18 in, too. But that would be my take from my past
19 experience, is it's a much better route as a Board
20 member, unless we are all willing to spend a great
21 deal of time to do the totality piece of this.

22 CHAIRMAN RUFFATO: Thank you, Hillary.
23 Any other discussion? Yes, David.

24 BOARD MEMBER SIMPSON: This is Dave
25 Simpson. This particular case, at least from what

1 my initial reaction to it, is that it's rather
2 atypical, at least comparing it to the other cases
3 that have been brought that are about to be
4 brought forward on today's agenda.

5 This is a big deal, and I'm inclined not
6 to assign the entire case. I think that once we
7 proceed with the initial steps, we'd be in a much
8 better position to decide whether we wanted to at
9 some point hear or consider at least part of this
10 case, that is as it develops as a full board.

11 There are a lot of issues brought up
12 here that I think require some investigation. I
13 think it's premature obviously to get into any of
14 the specific points, but some of the allegations
15 here I find more than a little troubling. And so
16 I think it's incumbent on the Board to keep the
17 option open to take a look at this as a Board.

18 CHAIRMAN RUFFATO: Thank you, David.
19 David Lehnherr.

20 BOARD MEMBER LEHNHERR: Thank you, Mr.
21 Chairman. I have to concur with what Hillary
22 said. And I've been on the Board not for a long
23 time, but for a little while, and I think I'm
24 halfway to my JD, and I assume when I get off the
25 Board I'll have an honorary JD. I've learned

1 quite a bit.

2 I know that it was covered somewhat in
3 the orientation, but there will be a
4 determination, a FOFCOL, findings of fact and
5 conclusions of law, that the Hearing Examiner
6 comes up with, and that is presented to the Board,
7 and there is always the opportunity for the Board
8 to dispute or to disagree with part or all of that
9 FOFCOL, and at that point take matters more into
10 their own hands.

11 CHAIRMAN RUFFATO: Thank you. Any other
12 discussion?

13 (No response)

14 CHAIRMAN RUFFATO: I do have a question.
15 If we were to pass the motion as presented --
16 that's to assign this to a Hearing Examiner in
17 totality -- could we at a later point pull that
18 authority back? And I'm thinking now of David
19 Simpson's point that we may have reason to do that
20 if this looks like it's something that the Board
21 wants to get deeper into.

22 MS. ORR: Mr. Chair, I haven't come
23 across this in practice. I'm just trying to think
24 through how it would work. I think it's better to
25 designate at the outset what you'd want to do. I

1 would recommend that.

2 And you can say, as you discussed
3 initially, the Hearing Examiner will handle the
4 procedural matters prehearing, and then the Board
5 would hear any motions or actions that are
6 dispositive, like a decision on a summary judgment
7 motion, or the actual contested case hearing.

8 So I guess I would recommend against
9 sort of changing midstream as far as the
10 delegation. I think it's possible under the terms
11 of the meaning of delegation, but I guess I'd
12 recommend against it practically.

13 CHAIRMAN RUFFATO: Thank you, Katherine.
14 I have another question of you, Katherine. Would
15 it be appropriate for the parties to comment on
16 what their wishes would be for what the Board
17 would do here?

18 MS. ORR: I don't think so, Mr. Chair.
19 I think now we have the hats of the decision
20 maker, and there are certain aspects of these
21 contested cases where the parties are allowed the
22 opportunity to present their case, and choosing
23 the decision maker isn't one of them.

24 CHAIRMAN RUFFATO: So I heard you say
25 that it would not be appropriate to ask for input

1 from the parties.

2 MS. ORR: That's right.

3 CHAIRMAN RUFFATO: Okay. Thank you.

4 Discussion.

5 (No response)

6 CHAIRMAN RUFFATO: In that case I'll
7 call for the question. The motion has been made
8 and seconded that we assign this to a Hearing
9 Examiner for the totality of the case. All in
10 favor, say aye.

11 BOARD MEMBER LEHNHERR: Aye.

12 BOARD MEMBER SMITH: Aye.

13 BOARD MEMBER HANSON: Aye.

14 BOARD MEMBER REITEN: Aye.

15 CHAIRMAN RUFFATO: Opposed, same sign.

16 BOARD MEMBER SIMPSON: No.

17 CHAIRMAN RUFFATO: The ayes have it.

18 The motion is passed. And it's been an hour
19 again. Should we have a break again, and come
20 back for the second, third, and fourth cases?

21 Mr. Reiten, Mr. Smith, Ms. Hanson, and
22 Dr. Lehnherr voted aye. Mr. Simpson voted no. I
23 would have voted aye. Let's take a ten minute
24 break and we'll come back at 11:20.

25 (Recess taken)

1 CHAIRMAN RUFFATO: I will call the
2 meeting back into order. Before we move on, I
3 have a comment, and a request, and a question.

4 My comment is that I share Dave
5 Simpson's concerns about assigning cases to
6 Hearing Examiners when they are very significant,
7 and frankly all cases are significant for the
8 parties involved. So I think those decisions need
9 to be made carefully.

10 My second comment or request is: Can we
11 in the future know who we're assigning cases to?
12 And I think, Katherine, that you said that at the
13 next meeting you would introduce us to the
14 examiners, and so I would like to make sure that
15 we have that in front of the Board so we know the
16 Hearing Examiners.

17 And then the other comment I would make
18 is that even though we're making this assignment
19 today to an unknown Hearing Examiner, as I
20 understood the orientation, we have the ability to
21 affect that at a later date; is that correct,
22 Katherine?

23 MS. ORR: Mr. Chair, that is correct.

24 CHAIRMAN RUFFATO: Okay. Thank you.

25 Yes, David.

1 BOARD MEMBER LEHNHERR: Mr. Chair, this
2 is just a minor procedural question. I may be
3 remembering incorrectly, but it seemed like after
4 we take a break, we'd take a roll call. And maybe
5 that wasn't necessary. I just want to make sure
6 we're not missing something that we used to do in
7 the past that was recommended. Like I say, it may
8 not be necessary, and so I'm just inquiring.

9 CHAIRMAN RUFFATO: I appreciate the
10 inquiry. And in the past, was that roll taken, or
11 can we just look at the screen, and who is all
12 there? I'll ask Joyce to take a roll call.

13 MS. WITTENBERG: Chair Ruffato.

14 CHAIRMAN RUFFATO: I'm here.

15 MS. WITTENBERG: Board member Lehnherr.

16 BOARD MEMBER LEHNHERR: Here.

17 MS. WITTENBERG: Board member Simpson.

18 BOARD MEMBER SIMPSON: Here.

19 MS. WITTENBERG: Board member Hanson.

20 BOARD MEMBER HANSON: Here.

21 MS. WITTENBERG: Board member Reiten.

22 BOARD MEMBER REITEN: Here.

23 MS. WITTENBERG: Board member Smith.

24 BOARD MEMBER SMITH: Here.

25 MS. WITTENBERG: We have a quorum.

1 CHAIRMAN RUFFATO: All right. Thank
2 you. And thank you, Mr. Lehnherr, for reminding
3 us of that technicality. Let's go to the second
4 case. Katherine.

5 MS. ORR: So Mr. Chair, members of the
6 Board, in your packet is an appeal that's an
7 opencut mining permit challenge by, it looks like,
8 surrounding landowners, and filed under
9 82-4-427(1) regarding opencut mining permits. And
10 there's not too much more to say about that at
11 this point.

12 CHAIRMAN RUFFATO: Thank you, Katherine.
13 As I read it, I didn't see a lot more detail than
14 that, so there's probably not much more to say.
15 Sarah, please.

16 MS. CLERGET: I just wanted to make a
17 slight clarification to what's in the packet. In
18 the packet there's a memo that says this case is
19 to me as Hearing Examiner. And I just wanted to
20 clarify for the record that that was an old memo,
21 and I was never the Hearing Examiner on this case,
22 and my name just was left on there from prior
23 memos. So just it was a typo. I've never been
24 assigned. I just wanted to clarify that for the
25 record.

1 CHAIRMAN RUFFATO: Thanks for the
2 clarification, Sarah. I think on this one again,
3 we have the same choice as before: Assigned
4 procedurally; assigned totality; or no assignment
5 at all. Do we have a motion to get discussion
6 started?

7 BOARD MEMBER SIMPSON: Dave Simpson.
8 I'll make the motion that we assign this case in
9 its totality.

10 CHAIRMAN RUFFATO: Second?

11 BOARD MEMBER LEHNHERR: I'll second
12 that. This is David.

13 CHAIRMAN RUFFATO: Thank you. A motion
14 has been made and seconded that we assign the
15 second case, the Riverside Contracting case, in
16 its totality. Discussion?

17 (No response)

18 BOARD MEMBER REITEN: I've got a
19 question on that. So a lot of the technical
20 information, will that come through the Hearing
21 Examiner? I'm not sure who to address this to.

22 MS. ORR: Mr. Chair, may I answer that?

23 CHAIRMAN RUFFATO: Yes, Katherine,
24 please respond.

25 MS. ORR: Mr. Chair, Board Member

1 Reiten. Yes, it will all come before you at the
2 end of the disposition of the contested case, if
3 that answers your question.

4 BOARD MEMBER REITEN: I guess so,
5 because I'm kind of familiar with that area, and I
6 just don't know what their concerns are, and
7 what's going on. So I've actually mapped the
8 groundwater out there years and years ago.

9 MS. ORR: Oh, okay. Well, to follow up,
10 Mr. Chair. You'll be presented with findings of
11 fact, and that will give you a sense of all of the
12 background details.

13 BOARD MEMBER REITEN: Excellent.

14 CHAIRMAN RUFFATO: Thank you for your
15 question, Mr. Reiten. And I would like to see in
16 the briefing at the next meeting a little more
17 detail on this appeal, because as I said, the
18 detail was pretty miniscule, and if we are going
19 to be monitoring the course, it would seem
20 appropriate that we know a little more about the
21 case. Is that possible?

22 MS. ORR: Mr. Chair, let me get some
23 clarification. When these come in, it's typically
24 the notice of appeal. Did you have more
25 information that you had in mind that you wanted?

1 CHAIRMAN RUFFATO: Well, I would just
2 like to know what the appeal is about, and the
3 concerns, because they aren't expressed in the
4 notice of appeal. And I think that's what Jon was
5 concerned about, was that we're making assignments
6 and making decisions without very much
7 information.

8 MS. ORR: I see the problem. Mr. Chair,
9 it may be difficult to get more information than
10 what is provided in the notice of appeal. There
11 can be a presentation of the statutes involved, if
12 that helps, but --

13 CHAIRMAN RUFFATO: May I ask then -- and
14 maybe I'm just mistaken. I take it there was no
15 additional material provided than with the notice
16 of appeal; is that correct?

17 MS. ORR: Not that I know of. Mr.
18 Chair, if I could ask Joyce maybe if she knows of
19 any additional information.

20 MS. WITTENBERG: No. What was in the
21 packet, that was all that was received.

22 CHAIRMAN RUFFATO: Thank you.

23 BOARD MEMBER SIMPSON: Mr. Chairman,
24 could I ask a question, please? Dave.

25 CHAIRMAN RUFFATO: Yes, Dave. Go ahead.

1 BOARD MEMBER SIMPSON: I'm not quite
2 sure how to phrase this, but it seems to me it
3 would make sense in a case like this, and the
4 previous one also, for the Board to receive a
5 brief presentation from the Department as to what
6 the history of the case and what it's all about.
7 I see a problem, though, since the Department is a
8 party to the case, whether that might not be
9 appropriate.

10 So anyway, that is my question, is
11 whether it would be possible to have someone from
12 Department staff brief us on the history of the
13 case, and what the issues are.

14 MS. ORR: Mr. Chair, may I pitch in?

15 CHAIRMAN RUFFATO: Yes, Katherine,
16 please respond.

17 MS. ORR: What we could do perhaps is
18 obtain, in this case for example, the permit, but
19 really it's when you get into a contested case and
20 hear the claims in more detail that you then are
21 going to become familiar, and you can't really
22 become familiar with the details except in the
23 context of a contested case setting.

24 So I know that's almost a tautology, but
25 we could try to find the underlying documents, for

1 example, like the permit.

2 CHAIRMAN RUFFATO: Okay. Mr. Lucas, I'm
3 reluctant to ask you to comment, but you turned on
4 your camera, suggesting that you had a comment; is
5 that the case?

6 MR. LUCAS: Mr. Chair, members of the
7 Board, I turned on my camera in case the Board or
8 someone was looking to answer a question with
9 respect to a matter where the parties are
10 represented by Counsel and it's before the Board,
11 and would therefore be inappropriate for DEQ to
12 comment on this case at this time.

13 However, I am in agreement with
14 Katherine as to how these things in general come
15 in front of the Board, and how the facts are
16 developed through the course of the litigation
17 once they get to a Hearing Examiner, and we have a
18 scheduling order that directs us to file certain
19 things, which will eventually provide a full
20 picture for both parties.

21 In fact, I'm not even Counsel of record
22 on the case under discussion, so she might have
23 something to add to that. Thank you.

24 CHAIRMAN RUFFATO: Thank you. Is there
25 any more discussion on this motion?

1 (No response)

2 CHAIRMAN RUFFATO: If not, a motion has
3 been made and seconded to assign the Riverside
4 Contracting case to a Hearing Examiner in
5 totality. All in favor, say aye.

6 (Response)

7 CHAIRMAN RUFFATO: Opposed.

8 (No response)

9 CHAIRMAN RUFFATO: The motion carried
10 unanimously. All right. Let's go to the third
11 case. And Mr. Lehnherr.

12 BOARD MEMBER LEHNHERR: Mr. Chairman, as
13 I've mentioned, I'm not an attorney, and I think
14 especially in the non-attorneys, I've become
15 somewhat familiar with FOFCOLS, and yet I think
16 hardly anyone who isn't an attorney is -- hardly
17 anyone is familiar with FOFCOL.

18 And it might be helpful to have someone
19 from DEQ explain to the non-attorneys what we end
20 up getting with the FOFCOL, which we use basically
21 before making a final determination on a case.

22 Because there was -- Board member Reiten
23 mentioned wanting more details, and I know that
24 from past experience, some of these cases end up
25 handing us hundreds of pages of information,

1 details of all sorts, and it might be helpful to
2 have a little review, just a real brief overview
3 of FOFCOLS, so that we're all on the same page as
4 far as what they represent goes.

5 CHAIRMAN RUFFATO: Pardon me for my
6 ignorance, David, but you're talking about a
7 FOFCOL. Are you talking about findings of fact
8 and conclusions of law?

9 BOARD MEMBER LEHNHERR: Yes. Sorry.
10 That's correct.

11 CHAIRMAN RUFFATO: Okay. Katherine, I
12 think that would be good for all of us to
13 understand what that is, and I know that you went
14 through it ahead of time in the orientation, but
15 if you would provide those of us that are new a
16 little better understanding of what happens when
17 we get to that point.

18 MS. ORR: I'll do my best, Mr. Chair.
19 In your materials, if you look at -- So here I am,
20 I'm already referring you to some materials. But
21 if you look at Pages 090 through 097, that is an
22 example of findings of fact and conclusions of law
23 and a proposed order.

24 And depending on the complexity of the
25 case, the findings of fact are gleaned by the

1 Hearing Officer or decision maker from the record.
2 The parties know that they should introduce facts,
3 either through testimony or written evidence, that
4 address elements of what it is that's being
5 claimed.

6 So let's say you have a violation of the
7 Opencut Mining Act. Some of the facts that are
8 important are whether, for example, the permit was
9 over-inclusive and infringes on a neighbor's land,
10 or would have an impact on neighbor's land. That
11 could be a finding of fact.

12 Then under the Opencut Mining Act, it's
13 anyone who files a claim must have submitted
14 comments before the permit was issued by
15 Department of Environmental Quality. So that
16 would be a finding of fact.

17 There are foundational issues which
18 establish that the party has a right to bring the
19 appeal, the appeal is timely, and that they're
20 addressing the elements of the statute that
21 involves the appeal.

22 Conclusions of law address which laws
23 apply to the determination of whether the appeal
24 is well taken or not. So that's sort of an
25 outline of what I think you were asking.

1 And Mr. Chairman, just to add. When I'm
2 writing findings of fact and conclusions of law, I
3 want to know what the applicable law is, and then
4 I plug in the facts that are pertinent to those
5 determinations. That's just the way I handle it.
6 So is that clear as mud?

7 CHAIRMAN RUFFATO: Oh, it is very
8 helpful, Katherine. Very helpful. Sarah, you had
9 something to say.

10 MS. CLERGET: I just wanted to add in
11 addition to the FOFCOL that you get -- and the
12 FOFCOL can come at any dispositive stage, so it
13 could be a motion to dismiss early on the case, it
14 could be at summary judgment, or it could come
15 after a hearing. Whatever the moment is in the
16 case, where the case would end is when you get
17 your proposed findings of fact and conclusions of
18 law.

19 In addition to that, which isn't in the
20 packet, you always, by statute, the parties are
21 allowed to make exceptions, written exceptions to
22 the proposed findings of fact and conclusions of
23 law by the Hearing Examiner, so they tell you what
24 they think the Hearing Examiner got right or
25 wrong; and then they're by statute permitted to

1 make oral argument in front of the Board on the
2 proposed FOFCOL.

3 So when you're reviewing a decision by a
4 Hearing Examiner at any stage that would be
5 dispositive, you will always have in front of you
6 the proposed decision, and then the parties'
7 written response to it in the packet, and then
8 there will be time scheduled at the meeting where
9 you will hear oral argument from the parties, and
10 you can ask them and/or your Board attorney any
11 questions that you have.

12 CHAIRMAN RUFFATO: Thank you, Sarah.
13 Are there any other Board questions on this
14 learning process?

15 BOARD MEMBER SIMPSON: Mr. Chairman,
16 Dave Simpson again. I think that's a good way to
17 describe it, is a learning process. I'll speak
18 for myself, and I suspect that Mr. Reiten is in
19 the same boat. We're both technical guys, and
20 we're not used to making decisions on anything
21 without data.

22 But in this role, I guess what I'm
23 beginning to understand is that we will see that
24 data when the time comes to make the final
25 decision, rather than at the front end. We'll see

1 it at the back end. That's my understanding from
2 what I'm hearing right now.

3 CHAIRMAN RUFFATO: Thank you, Dave. I
4 think that is a good observation.

5 I will ask a question because I think it
6 might be helpful. My understanding from reading
7 the packet is that there are different standards
8 applied when the Board reviews the findings of
9 fact versus conclusions of law.

10 I'll start backwards. But on the
11 conclusions of law, it seems to me that the
12 Administrative Procedure Act says that we are
13 totally open to consider those; but on findings of
14 fact, there is a -- I hate to use the word, but
15 it's a legal word -- essentially a presumption
16 that the findings of fact are accurate, so long as
17 we can find some evidence in the record. Is that
18 correct? And I'll direct that question to
19 Katherine.

20 MS. ORR: Mr. Chairman, there's no
21 presumption that the findings of fact are correct,
22 but I think I know what you're getting at.

23 The Administrative Procedure Act
24 requires that if the final decision maker wasn't
25 there at the hearing, and having reviewed the

1 findings of facts believes that they aren't
2 supported by the evidence, then the final decision
3 maker can substitute in the findings of facts that
4 they think are or it thinks are appropriate. And
5 in order to do that, you, the Board, the final
6 decision maker, has to review the entire record.

7 CHAIRMAN RUFFATO: Any other questions
8 or comments on that point? Sarah, did you pop on?

9 MS. CLERGET: I am just going to point
10 you in the packet to Pages 86 to 89, and that's
11 the memo that usually accompanies, or had
12 accompanied at least my in the past FOFCOLS, that
13 explains what your options are, and what the
14 standards are.

15 So your Board attorney may have a
16 different one, but in the past that's the one that
17 we used, so I just for the purposes of orientation
18 wanted you to see that walk through.

19 CHAIRMAN RUFFATO: Thank you. Any other
20 comments or questions from the Board on this point
21 before we move on?

22 (No response)

23 CHAIRMAN RUFFATO: Let's move on to the
24 third case, which is the first Keystone case. And
25 I think I understood what we were told earlier by

1 Ms. Colamaria was that we have no choice here; is
2 that accurate, Katherine?

3 MS. ORR: Mr. Chair. It is accurate.
4 In fact there's this note to that effect in the
5 chat area. But yes, BER must appoint a Hearing
6 Examiner for 401 appeals.

7 CHAIRMAN RUFFATO: And is that
8 appointment for the totality of the case only?

9 MS. ORR: Mr. Chair, that's up to the
10 Board. Oh, I see, because of this -- I hadn't
11 thought of that. I would think so.

12 CHAIRMAN RUFFATO: You would think that
13 it's for the totality of the case?

14 MS. ORR: Yes. I mean I can re-review
15 the rule, but given the direction that -- Maybe
16 the Chief Counsel would be able to address that
17 now, if she's still on the Zoom call.

18 MS. COLAMARIA: Mr. Chair, members of
19 the Board. I'm still on. But like Katherine, we
20 also have not researched that exact scenario, the
21 half and half scenario. The rules just say that
22 the Board must appoint a Hearing Examiner. So my
23 initial thought is that doesn't mean you can
24 appoint a Hearing Examiner for part of the case.

25 CHAIRMAN RUFFATO: Thank you. Do we

1 have a motion on this case?

2 BOARD MEMBER SIMPSON: Mr. Chairman,
3 this is Dave Simpson. I have a couple of
4 questions I would like to ask, the first one being
5 both of these cases seem to be addressing the same
6 issue. Will they be heard separately, or will
7 they be combined, or is there a choice?

8 CHAIRMAN RUFFATO: I don't know the
9 answer to that question, Dave, but maybe Katherine
10 or Angie can answer that.

11 MS. ORR: Mr. Chair, I would say that
12 they can either be consolidated or not, and it
13 might be a very good idea to consolidate them.

14 CHAIRMAN RUFFATO: A follow-up question
15 then. Is that a decision for the Board or for the
16 Hearing Examiner?

17 MS. ORR: Again, I think since the
18 delegation seems to be total, Mr. Chair, I think
19 that would be up to the Hearing Examiner.

20 CHAIRMAN RUFFATO: Any other questions
21 or comments?

22 BOARD MEMBER SIMPSON: A second
23 question. Are there other permits held by
24 Keystone XL for the pipeline? Do they have a
25 major facility siting permit? Is it required for

1 that?

2 CHAIRMAN RUFFATO: Is there anybody on
3 the call that can answer that?

4 (No response)

5 CHAIRMAN RUFFATO: If not, David, I
6 think that might be a good question that will come
7 up, but let's go past that now. I'm not sure how
8 relevant that would be to the question before us.

9 BOARD MEMBER SIMPSON: I may be getting
10 a little bit too far into the weeds here. I'm
11 just trying to understand from a permitting
12 standpoint what's going on here. But maybe we'd
13 better hold off on that until we know a little bit
14 more about the case, once it's progressed.

15 CHAIRMAN RUFFATO: Yes, David Lehnherr.

16 BOARD MEMBER LEHNHERR: Mr. Chairman,
17 I'm just wondering from a procedural standpoint if
18 we had motions that assigned, two different
19 motions that assigned each of those final
20 contested cases to a Hearing Examiner, if we would
21 need, say, a third motion saying that we are fine
22 with a Hearing Examiner consolidating those two
23 cases.

24 CHAIRMAN RUFFATO: That's a good point.

25 MS. ORR: Mr. Chair.

1 CHAIRMAN RUFFATO: Yes, Katherine.

2 MS. ORR: I don't know if you are
3 wanting me to answer that or not, but --

4 CHAIRMAN RUFFATO: Go ahead.

5 MS. ORR: I think at the outset, that
6 that would be acceptable.

7 CHAIRMAN RUFFATO: Okay. Thank you. We
8 don't have a motion on the table, do we?

9 COURT REPORTER: I don't believe so.
10 You can ask Joyce.

11 MS. WITTENBERG: There's no motion yet.

12 CHAIRMAN RUFFATO: It was my
13 understanding we don't have a motion yet.

14 MS. WITTENBERG: No.

15 CHAIRMAN RUFFATO: Do we have a motion
16 on -- I would say we could make a motion on either
17 or both cases, because it looks like our hands are
18 tied. Do I have a motion?

19 (No response)

20 CHAIRMAN RUFFATO: I will move that both
21 the Keystone XL cases be assigned in their
22 totality to a Hearing Examiner.

23 BOARD MEMBER SIMPSON: Second.

24 CHAIRMAN RUFFATO: Discussion.

25 (No response)

1 CHAIRMAN RUFFATO: All in favor, say
2 aye.

3 (Response)

4 CHAIRMAN RUFFATO: Opposed.

5 (No response)

6 CHAIRMAN RUFFATO: The motion passes
7 unanimously. David, were you inclined to make a
8 motion on your point?

9 BOARD MEMBER LEHNHERR: Forgive me if my
10 wording is not quite right, but I would move that
11 the Board approves consolidation of contested
12 Items 3 and 4 if a Hearing Examiner feels that
13 that is appropriate.

14 CHAIRMAN RUFFATO: Is there a second?

15 BOARD MEMBER REITEN: I'll second.

16 CHAIRMAN RUFFATO: A motion has been
17 made and seconded that -- and I'll state this the
18 way I think it was stated -- that if the Hearing
19 Examiner determines that it is appropriate to
20 consolidate these cases, the Board approves of
21 that.

22 BOARD MEMBER LEHNHERR: Yes.

23 CHAIRMAN RUFFATO: Any discussion?

24 (No response)

25 CHAIRMAN RUFFATO: All in favor of the

1 motion, say aye.

2 (Response)

3 CHAIRMAN RUFFATO: Opposed.

4 (No response)

5 CHAIRMAN RUFFATO: The motion carries
6 unanimously.

7 I think at this point, we have a time
8 when we open up the meeting to any public comments
9 that were not covered previously. So are there
10 any comments from the public that have not been
11 discussed previously in this meeting?

12 (No response)

13 CHAIRMAN RUFFATO: Hearing none, I would
14 move that this meeting be adjourned.

15 BOARD MEMBER SIMPSON: Second.

16 CHAIRMAN RUFFATO: All in favor, say
17 aye.

18 (Response)

19 CHAIRMAN RUFFATO: The meeting is
20 adjourned.

21 (The proceedings were concluded

22 at 11:52 a.m.)

23 * * * * *

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C E R T I F I C A T E

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STATE OF MONTANA)
: SS.
COUNTY OF LEWIS & CLARK)

I, LAURIE CRUTCHER, RPR, Court Reporter,
Notary Public in and for the County of Lewis &
Clark, State of Montana, do hereby certify:

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing - 102 - 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 6th day of
March, 2021.

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

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