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

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WHEREUPON, the following proceedings were
had and testimony taken, to-wit:

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CHAIRMAN RUFFATO: Thank you. Then I'll

call the meeting to order. First I want to
welcome everybody, and I'm glad to meet you in
this manner. And I would like to just say that
I'm a new appointee. My name is Steve Ruffato.

I'm a new appointee, and I'm honored to be
appointed to this Board, and I would request any
help you can give me as I stumble through it. I
would welcome that.

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

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

CHAIRMAN RUFFATO: Here.

MS. WITTENBERG: Board member Lehnherr.

BOARD MEMBER LEHNHERR: Here.

MS. WITTENBERG: Board member Simpson.

BOARD MEMBER SIMPSON: Here.

MS. WITTENBERG: Board member Hanson.

BOARD MEMBER HANSON: Here.
MS. WITTENBERG: Board member Reiten.

BOARD MEMBER REITEN: Here.

MS. WITTENBERG: Board member Smith.

BOARD MEMBER SMITH: Here.

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

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

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

MS. LECHTMAN: Yes. That's me.

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

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

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

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

MS. WITTENBERG: Dave Kuzara.

MR. KUZARA: Yes, with Westmoreland
Absaloka Mining.

MS. WITTENBERG: Julia Giffin.

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

MS. WITTENBERG: Mark Stermitz.

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

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

(No response)

MS. WITTENBERG: Stacy, can you unmute.

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

MS. WITTENBERG: And Vicki Marquis.

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

MS. WITTENBERG: And Stacy just confirmed in the chat that that's Stacy with
Riverside Contracting.

I do have a phone, last digits 086.

Could you identify yourself.

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

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


MS. WITTENBERG: Anyone else?

MR. STERUP: Rob Sterup here for Talen Montana.

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

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

MR. MATHIEUS: Thanks, Joyce. Mr. Chair, Board members, welcome. My name is George Mathieus. I'm the Deputy Director, and I serve as the liaison to the Board for the Department. And the plan today was just to try to keep this Board
meeting -- I'll just say for lack of a better term -- simple with an orientation, and dealing with a couple cases that need assigned.

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

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

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

CHAIRMAN RUFFATTO: Were you wanting to step out now, or were you going to start the presentation for the Board?

MR. MATHIEUS: Mr. Chair, no, I was just going to sit in. There's others that are going to run the presentation. So I'm just going to step off, and you guys enjoy.
CHAIRMAN RUFFATO: That sounds good. Thank you.

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

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

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

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

MS. CLERGET: I can step in for George here. This is Sarah Clerget, and I am an attorney at DEQ now, but about a month ago I was actually the Board attorney for the Board. And so while I represent DEQ, and I do not represent the Board, George asked me to step in today and help orient you guys, and kind of you give some procedural background.
I won't be touching on anything substantive. I want to be clear that I'm not giving anybody any legal advice. That is the purview of your Counsel, and Katherine Orr, and she is your lawyer. We're going to work on more presentation later.

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

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

And the point of that is that DEQ provides, according to that statute, DEQ provides some administrative help to the Board, but other than that, the Board is independent. And as you know, the Board reviews a lot of what DEQ does, so it's kind of a tense relationship sometimes.
because we at DEQ try to help you in a lot of ways, but we also are a party that appears in front of you.

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

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

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

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

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

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

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

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

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

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

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

(No response)

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

MS. ORR: Good morning, everybody. I'm
Katherine Orr. I'm the Acting Bureau Chief of Agency Legal Services, and I have been working for Agency Legal Services for a long time, and part of my responsibilities about seven years ago included representing the Board of Environmental Review, and I did that for a number of years.

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

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

As far as the orientation, I think I'll go first, and my big challenge I think is to avoid you all having to slog through a voluminous amount of information. And I'd like to say at the outset that when you're approaching anything new, there's the overview, and then there are the details that follow, and those details are going to unfold as you gain experience on the Board. And some of you have already been on the Board.
So the first thing I would say is by all means feel free to call me anytime with your questions about matters such as recusal, conflicts, ex parte communications, talking to one another about cases. Just anything that comes up, I am here, 444-0160.

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

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

The Board is part of a role in State Government, as you know, whose purpose is to follow the constitutional requirement of ensuring a safe, clean, and healthful environment. And we didn't put into the materials today something that we should have, which address the policy and purposes of some of these environmental laws from
which and regarding which you will be required to apply and enforce.

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

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

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

The Board, as you probably know already, is basically an appellate board. It's intermediate between the Department and District Court. And there are many, many, many, many, many statutes which the Board has authority to apply
when there is an appeal, and that is in your packet Pages 020 to 030. And we'll be going over those in a little bit.

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

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

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

And so now, the question each time for the Board, when these new cases are presented to you, is do you want to delegate the case entirely to Agency Legal Services and one of the attorneys will be the Hearing Officer; do you want to delegate it partially, where the attorney would handle the prehearing matters, and you would
handle matters, say, on summary judgment, that sort of thing.

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

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

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

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

And you can review this in more detail, but I would just say in general the Department handles clerical staff and budgetary matters, and the Board otherwise is independent. And that was the intent of the Legislature, because in fact, as Sarah said, there are going to be times when the
Board in a contested case situation makes decisions about whether the Department's actions were correct or not correct under the law.

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

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

And they are numerous, and these statutes are complicated, and as you will find out, air quality, asbestos control, degradation of
high quality waters, appeals from holders of water quality permits, appeal of certain water quality fee assessments, appeal of fee assessments for public supply system, and public water supply, appeal from violation of waste and litter control laws. The list goes on. So there's lots of material here.

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

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

Let's assume that you may have delegated a case for contested case purposes to the Agency Legal Services Bureau. We are within the Justice Department. We've been around for years and years. And what we do basically is we help out other agencies in State government. We're a
defense firm, and we also handle cases as Hearing Officers for various State agencies. And that's how we happen to be involved with the Board of Environmental Review.

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

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

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

And then the second step with these contested cases is the Board attorney brings the
decision that's been made by the Hearing Officer
to you, and you vote on that, whether you want to
accept the decision in total, or whether you think
the conclusions of law are not correct, or whether
you think that the findings of fact have not been
based on the evidence.

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

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

There's also an intermediate step when
there have been findings of fact and conclusions
of law issued, then the parties have a right upon
notice to file exceptions, and the Board can hear
those exceptions. So that's an overview of that,
and that's in the materials for which I just gave you the page number.

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

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

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

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

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

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

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

    Final orders. You all perhaps already can understand that there is a right of judicial review of parties if they don't approve of or want to challenge a decision that's been issued by the Board. And that's judicial review, and that's in Title 2 Chapter 4 Part 7. And we can get into that a little bit.
There are very specific standards for review from the Board. Those standards include that the administrative findings, inferences, conclusions are in violation of constitutional provisions; in excess of statutory authority; made upon unlawful procedure; affected by another error of law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; arbitrary or capricious; characterized by abuse of discretion; or the findings of fact were not, essential to the decision, were not made although requested.

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

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

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

CHAIRMAN RUFFATO: Are there any questions from anyone?
BOARD MEMBER SIMPSON: Yes. This is Dave Simpson, Mr. Chairman. One question of clarification.

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

MS. ORR: Yes.

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

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

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

BOARD MEMBER SIMPSON: So the members of the Board cannot contact directly employees of the
Department regarding rulemaking?

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

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

CHAIRMAN RUFFATO: Dave, did that help clarify?

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

MS. ORR: Well, as you know, the Legislature can be the instigator for rules to be
promulgated, and the statutes say that the Board may be the initiator of rulemaking within its discretion. So yes, it does do that.

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

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

MS. ORR: Yes.

CHAIRMAN RUFFATO: I was just going to ask for any other questions from the Board. (No response)

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

MS. ORR: Let's do that.

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

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

MS. ORR: That's correct.

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

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

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

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

And the Board has absolute latitude to, at the outset, determine how it wants to do that. If you want to hear oral argument on summary
judgment, you can. If you -- and like we've been saying -- If you want to hear the whole case, you can, and in which case the Board attorney would help you with suggestions about rulings during the proceeding.

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

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

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

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

BOARD MEMBER SIMPSON: This is Dave
Simpson again. One more question, and that is:

As far as management of a contested case, if the case is heard by a Hearing Examiner, is the case based entirely on written record, or are there oral arguments?

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

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

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

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

Excuse me.

MS. ORR: I think typically what would be done is that you would rely on the Hearing
Examiner, the Board attorney, to handle the sort of the housekeeping matters of scheduling, making sure that discovery is taken care of; and then on a substantive motion, like a motion for summary judgment, you could hear that; or if there are no motions for summary judgment, you can hear the oral argument, if you wanted to structure it that way.

BOARD MEMBER SIMPSON: Thank you very much.

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

(No response)

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

MS. ORR: Yes.

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

And before I do that, I just wanted to make another note I should have made at the beginning. Sometimes the Board is named as a party in a District Court or other proceeding, and so while Katherine is your Board attorney, and ALS
is your Hearing Examiner, there are instances
where you have another attorney in addition that's
managing cases.

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

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

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

We didn't ask her to be here today
because there's no briefing on any of the cases,
so there was no need for her to be here, but I
just want you to know that there is another
attorney out there representing the Board, and
when you get to the briefing items on the cases, then she will update you on what those are, so that was just an FYI I should have given you in the beginning.

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

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

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

And foreseeing that this would happen when Sarah left, I believe a motion was put before the Board in the last Board hearing in December in which it was determined that the delegation would be to Agency Legal Services; and then in that case the Bureau Chief -- me presently -- would determine who the Hearing Examiners would be.
And we're hoping over time that the attorneys will develop an expertise -- water, air, etc. And I owe you an apology because I should have foreseen that the Board would want to know these Hearing Officers by experience and by Zoom call, at the very least.

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

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

MS. ORR: Okay.

CHAIRMAN RUFFATO: Go ahead, Sarah.

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

I just want to clarify -- Katherine knows this, so I'm not speaking out of turn. I think she just forgot -- is that the Board has traditionally used ALS. That has always been the case as far as I know. But there is nothing set
in stone that the Board has to use ALS, and there have been instances in the past where the Board was able to say, in consultation with the Board attorney and ALS, to say, "We like this attorney," or "We don't like that attorney as our Hearing Examiner."

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

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

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

So the best advice -- not that I'm
giving you legal advice -- but the best general procedural advice I can give you is to talk to your attorney when you have questions about this, because it's very nuanced.

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

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

So it's very important that you pay attention to these rules because any decision that you make -- if it was public when it should have been private, or if it was private when it should have been public -- can be invalidated.
So the main thing usually for the Board, you often don't have private matters. Usually private matters involve something like a personnel issue -- which the Board doesn't have any staff, so you don't really have to worry about that -- medical issues, issues dealing with juveniles, things like that.

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

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

We have a Board policy, which I'll get to later, that explains how you submit stuff to the Board, and when you submit stuff to the Board. The rule essentially is that -- and you can change
this as you want to -- but the rule has been that
you have to submit everything to the Board at
least a week in advance, because we have to put
together those packets for you, and the Board
agenda.

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

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

So it's important that the things,
anything that you're going to consider be on an
agenda, and you can't take action on any item
unless it appears on the agenda as an action item,
because that's what gives the public the notice
that those are the decisions you're going to be
making.
And you also can't make any decision until you've allowed public comment on that decision, unless it's a contested case. Like contested cases are different. There's no public comment on contested cases. So everything I'm talking about are your other matters aside from contested cases.

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

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

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

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

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

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

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

    Anytime a quorum of the Board is together, and they're talking about an issue that should be public, that's of public interest, it has to be done in a way that the public can
participate. So you can't email each other on an issue, on which you're going to make a decision, because that discussion that's happening in the email is something that should be happening in a public forum where the public can hear.

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

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

Meetings. We've determined through research that meetings can obviously happen on Zoom, they can happen by telephone, they can happen in person. There's a number of ways to allow them to happen, and that's all fine, as long
as you notice to the public in advance how the meeting is going to happen.

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

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

CHAIRMAN RUFFATO: Any questions on those points?

(No response)

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

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

CHAIRMAN RUFFATO: I understand.

MS. CLERGET: And Chair Ruffato, I don't want to overstep my bounds here, but it's been an hour, and usually our Court Reporter needs a break after about an hour, so this is a good stopping
place in my presentation if you want to take a break.

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

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

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

(Recess taken)

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

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

And then you can see the particular statutes are included in your packet for you to
read in more detail later. If you have questions, again, ask your attorney.

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

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

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

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

So the norm for rulemaking in front of the Board is that the Department puts together a rule package. They bring it to the Board. The
package includes the proposed rules, which usually come in the form of a current rule that's redlined, or a proposed new rule. They look like the rules that go eventually to the Secretary of State's Office, so this is essentially an initial draft of the rulemaking by the Department.

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

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

The Department then takes care of the procedural stuff. There was a person at the Department, Sandy Scherer, who handled this. Her position is currently vacant. They're working on
filling it, so when that new person comes in, they will be sort of rule helper from the Department who helps the Board.

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

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

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

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

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

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

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

So that includes the original rule hearing that was held by the Hearing Examiner, and the written comments. So you have to be very careful that if you allow public comment at a
Board meeting after that record, that packet has been created, that essentially it's just an opportunity for people to speak, but you can't consider that information in your decision on whether or not to adopt the rules, or to adopt them and modify them in some way.

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

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

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

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

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

If that happens, then the Board has to notify the sponsor of the legislation when the rules are being promulgated. So an example of
that is in your packet at 36.

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

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

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

So the other thing I want to go through is I'm going to share my screen. I apologize that
this is not included in your packet. Maybe I'm going to share my screen. No, maybe I'm not. That's not allowed. Joyce, you don't have the ability to let me share my screen, do you?

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

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

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

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

And interestingly not always -- There
are some instances where the Legislature has said the Board may initiate rulemaking, and some places where the Legislature has said the Board shall or must initiate rulemaking. And so this memo lays out where those are.

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

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

But again, the best thing, if you have questions, is to ask your attorney, because she has all of this information. So I just wanted to alert you to the fact that was there, and some of the information in your packet is a little bit old, and so it has changed.
CHAIRMAN RUFFATO: Excuse me, Sarah.

Can I just get confirmation that you are going to send that out to the Board members.

MS. CLERGET: Katherine, is that okay?

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

MS. CLERGET: Yes, I will do that.

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

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

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

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

In that instance, the Board had gone
through the initiation -- they had decided to initiate rulemaking. Then we'd had the hearing and the written comments. The packet had been put together, and it was posted on the website, the agenda was posted.

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

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

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

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

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

CHAIRMAN RUFFATO: Thank you.

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

CHAIRMAN RUFFATO: Any questions on rulemaking?

(No response)

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

CHAIRMAN RUFFATO: Please do. Thank you.
MS. CLERGET: So this appears on Page 44 to 49 of your packet, and this is essentially a memo -- or excuse me -- a policy that the Board implemented, and the idea was that this would be a policy as sort of stopgap between the fact that there was nothing, and the fact that there weren't any rules.

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

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

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

But in general, this gives you an overview of the process. And the main thing again
to note there is that things must come in a week before. It's important that if they don't come in a week before, that we don't consider them, because then we don't get enough time to post them, and give the public notice that's required.

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

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

And the other thing to note there is that, as I said, we were working on rules for this, it never completed, but if the Board wanted to initiate rules on that, this would be one place
that it's possible for you to do some procedural
rules to formalize this more than a policy.

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

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

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

CHAIRMAN RUFFATO: Any questions on
submitting materials?
MS. CLERGET: The last thing is ethics, and this appears the best, again, the best overview of this appears on Page 42 and 43 of your packet. This is again an overview that was written by John North many, many years ago, but it still applies.

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

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

And Jaime MacNaughton is their attorney,
and she's a phenomenal resource on ethics. So if you have any other questions, that's another great place to look. Their website has a lot of information, a lot of frequently asked questions. So that's another great resource for you.

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

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

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

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

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

And again, the Commission on Political Practices has a lot of rulings on what is considered a gift, and how they value things. So if you have any questions about that, in addition to your attorney, that's a great resource.
Financial interests and transactions. A lot of this is gut instinct. You know, you can't have a financial interest in something that you're presiding over. So if you have a question about whether or not you do, again, go to your attorney.

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

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

And employment is the other big thing. Employment and contracts sort of goes along with financial interests. You can't take a contract essentially with any State entity or an entity that contracts with the State to do work that is
related to what you did as a Board member for at
least six months following the end of the time
that you're a Board member, and obviously while
you're a Board member.

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

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

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

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

CHAIRMAN RUFFATO: Are there any
questions about ethics?

(No response)
CHAIRMAN RUFFATO: I have a question, and this is probably for Katherine, and that is we have been referred to attorneys, the Board attorney, and maybe the Commission on Practice attorney, to ask questions about any of these issues.

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

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

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

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

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

MS. ORR: You bet.

BOARD MEMBER HANSON: Thank you.

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

(No response)

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

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

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

MS. WITTENBERG: It's pretty quick.

CHAIRMAN RUFFATO: Okay. Please proceed.

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

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

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

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

In there also is we need to have some contact information for Board members on our website, on the Board website. So there will be another form in there asking you what information you want on there. Previously Board members liked to have, like their email address is a great one
to have, phone number if you want, sometimes they put their mailing address in there, but we're mostly electronic these days, and so email is probably the best. But you can make that decision on those. I will send a self-addressed stamped envelope with that, so you can just turn around and mail it back to us.

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

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

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

BOARD MEMBER LEHNHERR: Mr. Chairman. Joyce, there was some -- I may have misunderstood
and wanting to clarify regarding the contact information for Board members. Did you say that that contact information would go on the website?

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

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

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

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

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

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

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

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

MS. ORR: Yes.
CHAIRMAN RUFFATO: Is it appropriate for us to discuss that now, or is that something that we should bring up at a later Board meeting?

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

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

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

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

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

BOARD MEMBER SIMPSON: Mr. Chairman, this is Dave Simpson. I have one minor request, and that is if we get another Board package of over 400 pages, could we have a table of contents
at the start, please?

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

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

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

BOARD MEMBER SIMPSON: Yes, it does.

Thank you very much.

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

(No response)

CHAIRMAN RUFFATO: If not, I think it's appropriate to move to the action items, the contested cases. And I am going to ask Katherine. Are these initially presented by you as the Board attorney?
MS. ORR: Yes, they are. And Mr. Chair, members of the Board, typically, the agenda is rather specific about the noticed item, the noticed contested case, that is before the Board, so that the Board can determine how it wants to handle the contested case. Also the agenda is specific about ongoing cases.

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

CHAIRMAN RUFFATO: Thank you.

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

CHAIRMAN RUFFATO: Well, does any member of the Board have comment on how they would like to proceed?
(No response)

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

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

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

CHAIRMAN RUFFATO: Yes. That would be fine.

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

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

So I think that was probably what was
going to happen anyway, just the text says that
you have the three choices, but you only have the
one in this, is to appoint the Hearing Examiner
for those 401 cases.

CHAIRMAN RUFFATTO: Thank you for that
clarification. Katherine, please go ahead.

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

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

I'm going to just cut to the chase here.
There are lots of procedures that the Department
undertook that are being challenged here -- the
CCR rule, which is a rule that addresses
disposition of wastes -- and all sorts of other
But what the petitioner is asking for is for the Board to deem the Department's remedy decision document and related selection of a remedy and imposition of financial assurance void ab initio, vacated, set aside, enjoined, and remanded to the Department for further review and conformance with requirements of the administrative decision on consent which was formulated some years ago, the Major Siting Act, the Administrative Procedures Act, and the Montana Administrative Rules, and those of federal regulations.

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

Now, I really summarized here, and I have read through this. It's quite detailed, but those are sort of the outlined problems and requests that have been detailed by Counsel for Talen Montana.
CHAIRMAN RUFFATO: Thank you, Katherine. I had a question. As I read through it, it suggested that there was some dispute resolution process going on now, or at least back when the petition was filed; is that correct?

MS. ORR: I believe so, yes.

CHAIRMAN RUFFATO: And --

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

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

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

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

CHAIRMAN RUFFATO: Okay. Thank you. So if I understand our action item today, it's whether we want to assign this to a Hearing
Examiner or not, and if so, procedural or procedural and substantive; is that correct?

MS. ORR: That's correct.

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

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

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

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

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

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

CHAIRMAN RUFFATO: Please make the
motion and we will discuss.

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

    BOARD MEMBER HANSON: Second.

    CHAIRMAN RUFFATO: Who was the second?

    BOARD MEMBER HANSON: (Indicating)

    CHAIRMAN RUFFATO: Hillary. Thank you.

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

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

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

    BOARD MEMBER SIMPSON: This is Dave Simpson. This particular case, at least from what
my initial reaction to it, is that it's rather atypical, at least comparing it to the other cases that have been brought that are about to be brought forward on today's agenda.

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

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

CHAIRMAN RUFFATO: Thank you, David.

David Lehnherr.

BOARD MEMBER LEHNHERR: Thank you, Mr. Chairman. I have to concur with what Hillary said. And I've been on the Board not for a long time, but for a little while, and I think I'm halfway to my JD, and I assume when I get off the Board I'll have an honorary JD. I've learned
quite a bit.
I know that it was covered somewhat in
the orientation, but there will be a
determination, a FOFCOL, findings of fact and
conclusions of law, that the Hearing Examiner
comes up with, and that is presented to the Board,
and there is always the opportunity for the Board
to dispute or to disagree with part or all of that
FOFCOL, and at that point take matters more into
their own hands.

CHAIRMAN RUFFATO: Thank you. Any other
discussion?

(No response)

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

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

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

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

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

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

CHAIRMAN RUFFATO: So I heard you say that it would not be appropriate to ask for input
from the parties.

   MS. ORR: That's right.

   CHAIRMAN RUFFATO: Okay. Thank you.

Discussion.

   (No response)

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

   BOARD MEMBER LEHNHERR: Aye.

   BOARD MEMBER SMITH: Aye.

   BOARD MEMBER HANSON: Aye.

   BOARD MEMBER REITEN: Aye.

   CHAIRMAN RUFFATO: Opposed, same sign.

   BOARD MEMBER SIMPSON: No.

   CHAIRMAN RUFFATO: The ayes have it.

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

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

   (Recess taken)
CHAIRMAN RUFFATO:  I will call the
meeting back into order. Before we move on, I
have a comment, and a request, and a question.

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

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

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

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

CHAIRMAN RUFFATO:  Okay. Thank you.

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

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

MS. WITTENBERG: Chair Ruffato.

CHAIRMAN RUFFATO: I'm here.

MS. WITTENBERG: Board member Lehnherr.

BOARD MEMBER LEHNHERR: Here.

MS. WITTENBERG: Board member Simpson.

BOARD MEMBER SIMPSON: Here.

MS. WITTENBERG: Board member Hanson.

BOARD MEMBER HANSON: Here.

MS. WITTENBERG: Board member Reiten.

BOARD MEMBER REITEN: Here.

MS. WITTENBERG: Board member Smith.

BOARD MEMBER SMITH: Here.

MS. WITTENBERG: We have a quorum.
CHAIRMAN RUFFATO: All right. Thank you. And thank you, Mr. Lehnherr, for reminding us of that technicality. Let's go to the second case. Katherine.

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

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

MS. CLERGET: I just wanted to make a slight clarification to what's in the packet. In the packet there's a memo that says this case is to me as Hearing Examiner. And I just wanted to clarify for the record that that was an old memo, and I was never the Hearing Examiner on this case, and my name just was left on there from prior memos. So just it was a typo. I've never been assigned. I just wanted to clarify that for the record.
CHAIRMAN RUFFATO: Thanks for the clarification, Sarah. I think on this one again, we have the same choice as before: Assigned procedurally; assigned totality; or no assignment at all. Do we have a motion to get discussion started?

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

CHAIRMAN RUFFATO: Second?

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

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

(No response)

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

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

CHAIRMAN RUFFATO: Yes, Katherine, please respond.

MS. ORR: Mr. Chair, Board Member
Reiten. Yes, it will all come before you at the end of the disposition of the contested case, if that answers your question.

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

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

BOARD MEMBER REITEN: Excellent.

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

MS. ORR: Mr. Chair, let me get some clarification. When these come in, it's typically the notice of appeal. Did you have more information that you had in mind that you wanted?
CHAIRMAN RUFFATO: Well, I would just like to know what the appeal is about, and the concerns, because they aren't expressed in the notice of appeal. And I think that's what Jon was concerned about, was that we're making assignments and making decisions without very much information.

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

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

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

MS. WITTMENBERG: No. What was in the packet, that was all that was received.

CHAIRMAN RUFFATO: Thank you.

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

CHAIRMAN RUFFATO: Yes, Dave. Go ahead.
BOARD MEMBER SIMPSON: I'm not quite sure how to phrase this, but it seems to me it would make sense in a case like this, and the previous one also, for the Board to receive a brief presentation from the Department as to what the history of the case and what it's all about. I see a problem, though, since the Department is a party to the case, whether that might not be appropriate.

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

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

CHAIRMAN RUFFATO: Yes, Katherine, please respond.

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

So I know that's almost a tautology, but we could try to find the underlying documents, for
example, like the permit.

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

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

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

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

CHAIRMAN RUFFATO: Thank you. Is there any more discussion on this motion?
(No response)

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

(Response)

CHAIRMAN RUFFATO: Opposed.

(No response)

CHAIRMAN RUFFATO: The motion carried unanimously. All right. Let's go to the third case. And Mr. Lehn Herr.

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

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

Because there was -- Board member Reiten mentioned wanting more details, and I know that from past experience, some of these cases end up handing us hundreds of pages of information,
details of all sorts, and it might be helpful to
have a little review, just a real brief overview
of FOFCOLS, so that we're all on the same page as
far as what they represent goes.

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

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

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

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

And depending on the complexity of the
case, the findings of fact are gleaned by the
Hearing Officer or decision maker from the record. The parties know that they should introduce facts, either through testimony or written evidence, that address elements of what it is that's being claimed.

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

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

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

Conclusions of law address which laws apply to the determination of whether the appeal is well taken or not. So that's sort of an outline of what I think you were asking.
And Mr. Chairman, just to add. When I'm writing findings of fact and conclusions of law, I want to know what the applicable law is, and then I plug in the facts that are pertinent to those determinations. That's just the way I handle it. So is that clear as mud?

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

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

In addition to that, which isn't in the packet, you always, by statute, the parties are allowed to make exceptions, written exceptions to the proposed findings of fact and conclusions of law by the Hearing Examiner, so they tell you what they think the Hearing Examiner got right or wrong; and then they're by statute permitted to
make oral argument in front of the Board on the proposed FOFCOL.

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

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

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

But in this role, I guess what I'm beginning to understand is that we will see that data when the time comes to make the final decision, rather than at the front end. We'll see
it at the back end. That's my understanding from what I'm hearing right now.

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

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

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

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

The Administrative Procedure Act requires that if the final decision maker wasn't there at the hearing, and having reviewed the
findings of facts believes that they aren't supported by the evidence, then the final decision maker can substitute in the findings of facts that they think are or it thinks are appropriate. And in order to do that, you, the Board, the final decision maker, has to review the entire record.

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

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

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

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

(No response)

CHAIRMAN RUFFATO: Let's move on to the third case, which is the first Keystone case. And I think I understood what we were told earlier by
Ms. Colamaria was that we have no choice here; is that accurate, Katherine?

   MS. ORR: Mr. Chair. It is accurate.

   In fact there's this note to that effect in the chat area. But yes, BER must appoint a Hearing Examiner for 401 appeals.

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

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

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

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

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

   CHAIRMAN RUFFATO: Thank you. Do we
have a motion on this case?

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

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

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

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

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

CHAIRMAN RUFFATO: Any other questions or comments?

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

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

   (No response)

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

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

   CHAIRMAN RUFFATO: Yes, David Lehnherr.

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

   CHAIRMAN RUFFATO: That's a good point.

   MS. ORR: Mr. Chair.
CHAIRMAN RUFFATO: Yes, Katherine.

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

CHAIRMAN RUFFATO: Go ahead.

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

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

COURT REPORTER: I don't believe so.

You can ask Joyce.

MS. WITTENBERG: There's no motion yet.

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

MS. WITTENBERG: No.

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

(No response)

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

BOARD MEMBER SIMPSON: Second.

CHAIRMAN RUFFATO: Discussion.

(No response)
CHAIRMAN RUFFATO: All in favor, say aye.

(Response)

CHAIRMAN RUFFATO: Opposed.

(No response)

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

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

CHAIRMAN RUFFATO: Is there a second?

BOARD MEMBER REITEN: I'll second.

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

BOARD MEMBER LEHNHERR: Yes.

CHAIRMAN RUFFATO: Any discussion?

(No response)

CHAIRMAN RUFFATO: All in favor of the
motion, say aye.

(Response)

CHAIRMAN RUFFATO: Opposed.

(No response)

CHAIRMAN RUFFATO: The motion carries unanimously.

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

(No response)

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

BOARD MEMBER SIMPSON: Second.

CHAIRMAN RUFFATO: All in favor, say aye.

(Response)

CHAIRMAN RUFFATO: The meeting is adjourned.

(The proceedings were concluded at 11:52 a.m.)

* * * * *
CERTIFICATE

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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