

A P P E A R A N C E S

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ALSO PRESENT: Jim Jensen, MEIC

1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 HEARINGS OFFICER CLERGET: So for the
5 record, I'm Sarah Clerget, and I'm the Hearing
6 Officer in this matter, which is being recorded
7 directly after the adjourned BER meeting. And on
8 the phone I have representatives of Talen. In the
9 room I have representatives for DEQ and for
10 Westmoreland. And I would like everybody to put
11 their name on the record of this hearing, please.

12 MR. HAYES: This is Ed Hayes, Counsel
13 for DEQ.

14 MR. LUCAS: Mark Lucas, Counsel for DEQ.

15 MR. CHEREN: Robert Cheren, Counsel for
16 Westmoreland.

17 HEARINGS OFFICER CLERGET: Talen, would
18 you guys identify yourselves for the record,
19 please.

20 MR. FRANK: Sure. This is Joshua Frank
21 from Baker Botts on behalf of Talen.

22 MR. STERUP: Rob Sterup, Brown Law Firm
23 on behalf of Talen.

24 MR. BOOHER: And this is Marty Booher,
25 Baker Hostetler, on behalf of Westmoreland.

1 MS. DOMINGUEZ: Rosario Doriott
2 Dominguez, Baker Hostetler, also on behalf of
3 Westmoreland.

4 MR. COTTRELL: Jeremy Cottrell,
5 Associate General Counsel, Westmoreland.

6 HEARINGS OFFICER CLERGET: Now having
7 those appearances, I want to state the status
8 right now.

9 In front of me I have just been given
10 jurisdiction over an emergency motion for
11 expedited relief from ARM 17.20.1803(d), which was
12 filed by Westmoreland on May 20th; and then I have
13 a response from DEQ which was filed today.

14 And I understand from both filings that
15 they have been served on Westmoreland and on DEQ,
16 but Talen has not been served on either filing,
17 although Talen, I think I just heard you say that
18 you have received them recently. So you have
19 them, although you weren't served with them
20 originally?

21 MR. FRANK: This is Josh Frank. Yes,
22 just before the hearing I saw that they were
23 online, so probably ten minutes before the
24 hearing. So I just have just had the opportunity
25 to read them, but have not consulted fully with my

1 client about them.

2 HEARINGS OFFICER CLERGET: So Talen --

3 MR. HAYES: For the record, I do not
4 think they have received a copy of my brief that I
5 filed because I did not serve them.

6 HEARINGS OFFICER CLERGET: I think we
7 posted it on the website, so they should have it
8 through that.

9 Now, Talen, I want to be clear. In my
10 understanding, you are the applicant or permittee;
11 is that correct?

12 MR. FRANK: That is correct.

13 HEARINGS OFFICER CLERGET: Before we get
14 to the emergency motion for expedited relief, I
15 want to deal with a preliminary matter that I
16 think might moot that issue.

17 My reading of 75-20-223(1)(c) says, "If
18 a hearing is requested by someone other than an
19 applicant or permittee --" in this case that would
20 be Westmoreland -- "the applicant or permittee may
21 file a written election with the Board within 15
22 days of receipt of the request for a hearing, and
23 elect to have the matter proceed to a hearing
24 before the Board, or have the matter submitted
25 directly to a District Court for judicial review

1 of the agency action."

2 It goes on to say, "The party who
3 requests the hearing may also elect" the same
4 thing.

5 So by my reading of that statute, either
6 the applicant or permittee -- meaning Talen -- or
7 Westmoreland can elect to have this matter proceed
8 to a hearing before the Board, or have it go
9 directly to District Court, and the deadline for
10 that happening is within 15 days, which is the
11 same deadline that we're dealing with in
12 17.20.1803.

13 And if you were going to go to District
14 Court directly anyway, then we probably wouldn't
15 need to deal with whether or not we need expedited
16 relief from 17.20.1803(d).

17 So what I would like to know is if
18 anybody, Westmoreland or Talen, intends to take
19 advantage of that, so that we can save everybody
20 some time and energy.

21 MR. CHEREN: So Westmoreland is not
22 prepared at this time to make that election, which
23 again is due in 15 days. Also we're not 100
24 percent sure that we're not going to see this
25 argument if we proceed to a District Court, the

1 same argument. So I think we're not in a position
2 to at this time say that we're electing to go
3 before the District Court at this time.

4 HEARINGS OFFICER CLERGET: Okay. Talen.

5 MR. FRANK: We're in the same position.
6 We're still evaluating whether or not to make the
7 election to the District Court.

8 HEARINGS OFFICER CLERGET: Well, I
9 understand the potential prejudice to everybody by
10 having oral argument on the emergency motion right
11 now, with Talen having not been served and having
12 not become an Intervenor, if that is in fact what
13 they intend to do.

14 However, I do think there is some merit
15 to having some argument on this as soon as
16 possible, and what I am going to allow everybody
17 to do is make the oral argument to the extent that
18 they can right now. And I recognize why we need a
19 decision on this quickly.

20 So Talen, I'm going to let DEQ and
21 Westmoreland make their arguments now, and then if
22 you would like to file something responsive to
23 their arguments that they make today, you can do
24 so tomorrow by noon, and then I will have a
25 decision out by tomorrow, by the end of tomorrow.

1 Would that satisfy everybody that we're
2 getting a decision quickly enough so that they can
3 either deal with the provisions of 1803 if
4 necessary, or seek whatever additional relief they
5 need?

6 MR. CHEREN: Yes.

7 MR. HAYES: That satisfies DEQ.

8 HEARINGS OFFICER CLERGET: Talen, does
9 that seem like an appropriate way to proceed?

10 MR. FRANK: I think that's fine. I
11 would just add that we'd like the opportunity
12 after the parties argue to -- I mean I'll see how
13 it goes. We might have something to add at the
14 end, so we'd like that opportunity.

15 HEARINGS OFFICER CLERGET: All right.
16 To that end, if you intend to -- My guess is that
17 you intend to become an intervenor in this
18 proceeding; is that a correct assumption?

19 MR. FRANK: Yes. My understanding was
20 that upon the filing of the appeal that there
21 would be a pretrial order sent that would explain
22 how to intervene. So yes, our intent is
23 definitely to be an intervenor.

24 HEARINGS OFFICER CLERGET: All right.
25 Give me one second please while I need to check

1 something in the rules.

2 MR. FRANK: Just reflecting on it, I was
3 under the impression that we were automatically an
4 intervenor, to intervene as the certificate
5 holder, that --

6 HEARINGS OFFICER CLERGET: No, that's --

7 MR. FRANK: Regardless, we intend to be
8 an intervenor.

9 HEARINGS OFFICER CLERGET: Let me check
10 something here, because my intention is if you
11 would like to be an intervenor, unless I find some
12 reason why you can't, I think you can just make
13 that motion right now, but I want to check.

14 DEQ and Westmoreland, do you have any
15 reason that you know of that they can't just make
16 a motion to be an intervenor right now?

17 MR. HAYES: This is Ed Hayes for DEQ. I
18 don't, and it would be my understanding that they
19 clearly have standing to be an intervenor, and DEQ
20 would not object to any motion for them to
21 intervene.

22 MR. CHEREN: Westmoreland does not
23 object to their intervention, or know of any
24 reason why they cannot intervene.

25 HEARINGS OFFICER CLERGET: It looks like

1 Rule 24(a)(2), "Untimely motion. Permit anyone to
2 intervene who claims an interest relating to the
3 property or transaction to the subject of the
4 action," which is certainly the case. So Talen,
5 would you like to make a motion to intervene
6 pursuant to Rule 24(a)(2)?

7 MR. FRANK: Yes, pursuant to Rule
8 24(a)(2), we would like to move to intervene in
9 this proceeding.

10 HEARINGS OFFICER CLERGET: That motion
11 is granted. We can follow that up with a written
12 motion and order, but for the purposes of today,
13 that means you are an intervenor. So now we
14 officially have three parties, and everybody is
15 represented.

16 All right. So let's hear oral argument
17 on the emergency motion for expedited relief from
18 17.20.1803(d).

19 MR. CHEREN: So in order to understand,
20 there is several reasons why we're asking for
21 relief, several bases, and there's some questions
22 about which one, the authority to proceed. But we
23 need to kind of start with what this proceeding is
24 about, and the magnitude of the proceeding.

25 And this is a proceeding about the Major

1 Facility Siting Act, which forbids amending away
2 the environmental protection that's required by a
3 certificate. So we have a proceeding here where
4 Talen went and got an ancillary amendment to their
5 State air permit. You have two air permits when
6 you are in Montana. You have what's called a
7 Title 5 permit, and then you have another permit.

8 So they went and got an amendment to
9 their other permit that was final March 13th, and
10 that amendment, in terms of the substance, in
11 terms of what's in the permit and what they
12 changed, simply relates to a small aspect of what
13 Talen wants to do here.

14 What Talen wants to do is substitute
15 seven million tons a year of Montana coal from
16 across the street in Colstrip with coal from 300
17 miles away in Wyoming. And there is a legal
18 requirement under the Major Facility Siting Act to
19 minimize environmental impact by only burning the
20 mine mouth coal.

21 They want to remove that. In their
22 application, they only dealt with a small part of
23 this, which was for fugitive emissions from a few
24 parts of the handling facilities. They talked
25 about this desire that they have to get rid of

1 this provision in their certificate, and replace
2 seven million tons a year of coal from outside of
3 the state.

4 So our objection obviously, which they
5 have anticipated, is that this is going to degrade
6 the environment without any need to do so, and
7 that it's unlawful under the Act, that it's
8 unreasonable, and that they can't get this
9 amendment.

10 Our issue that brings us here today is
11 that this sequence of events where they went and
12 got that permit amendment, this ancillary small
13 piece of the permit amendment, and then forwarded
14 to the Board within ten days.

15 We anticipated that the argument would
16 be made, and now the Department has made, that
17 maybe that brings us under 1803, and we think that
18 that's an erroneous reading of 1803. It doesn't
19 make sense under the context. And if anything, we
20 have to definitely limit the application of 1803
21 just to those small pieces of things that were in
22 that air permit.

23 So 1803, it says right at the top, is
24 when you go get some other permit that you have
25 amended, you have a certificate under the Major

1 Facility Siting Act that makes you comply with all
2 of your permits, and sometimes those are
3 specified.

4 So if you go get this other permit
5 amended, we're going to have an expedited
6 procedure for you to fix your certificate when it
7 doesn't really implicate anything to do with the
8 Major Facility Siting Act. That's what's there.

9 The procedure for this proceeding is in
10 the statute, it's in 223, and you were reading
11 from it, and it says that if it proceeds before
12 the Board, it's a contested case under the Montana
13 Administrative Procedure Act before the Board.

14 It's not this short cut procedure for
15 technical and conforming amendments where
16 technically you need to amend your certificate
17 because maybe you've changed a pollution control
18 or something like that, because EPA has
19 promulgated a new regulation, like they do so
20 often.

21 So we think this proceeding is in no way
22 supposed to come within 1803, but when we saw
23 Talen go and do this strange thing of talking
24 endlessly in this application -- I shouldn't say
25 endlessly -- but talking about a provision that

1 they weren't seeking in that application for their
2 air permit amendment, analyzing the coal before --
3 and then forwarding it within the ten days.

4 We're like, "Okay, we're worried that
5 they're going to be arguing --" and I guess we'll
6 find out today -- that 1803(d) imposed this
7 totally unreasonable fourteen day deadline that
8 doesn't make any sense given the complexity of
9 this case, given the stakes of this case, given
10 the fact that what we're dealing with here
11 requires expert testimony, and given that this is
12 a case where the people of Colstrip, the workers
13 for Westmoreland, and the State of Montana, and
14 Montana's environment, all have huge equities in
15 this proceeding.

16 We want regular order. We want the
17 opportunity to develop and present our evidence on
18 all of the environmental impacts that haven't been
19 considered here.

20 So this idea that 1803 applies, we
21 anticipated it, it was a concern. We raised the
22 matter last Friday on the phone call. We
23 appreciate Mark Lucas was on the phone, and you
24 were on the phone, and we raised this issue, and
25 people said, "Huh, maybe this is -- this is at

1 least -- we need to think about this," which is
2 why we asked for the meeting, that noticed that
3 this issue would be dealt with on Friday.

4 And we timely put together a motion, we
5 filed it on Monday. And I know it was posted on
6 the internet yesterday, just clearing that up a
7 bit.

8 But substantively speaking, we don't
9 think 1803 has any place in this proceeding
10 whatsoever, if you read the heading, read the
11 sequence of what it's talking about, and read it
12 in the context of the statute, 75-20-223.

13 The Board did not thirty years ago just
14 flout the Legislature's direction that it be a
15 contested case. They were dealing with a set of
16 cases where the Board had to amend certificates
17 for conforming and technical reasons.

18 I understand that the Department's
19 argument, which they made in their motion, was,
20 "Well, it doesn't expressly say that it only
21 applies there," and they're right. That's why
22 we're here, and we have this concern, is about
23 that we think it's confusing.

24 You read the heading, you read the
25 sequence, and you say, "What does this apply to?,"

1 and when it's ambiguous as to whether or not this
2 means just the reference to within the
3 jurisdiction of the Board, it's like, "What is
4 going on here?"

5 We agree with that issue, but in
6 context, it just makes no sense that when the
7 statute says you're going to have a contested case
8 proceeding under the Administrative Procedures
9 Act, that you have this lightning quick procedure
10 where you have to submit evidence in fourteen
11 days.

12 So that doesn't make sense, and we don't
13 think it applies. We think that it's a narrow
14 regulatory provision, and so that's our argument.
15 We don't think it applies. We think the Board's
16 argument is wrong.

17 Now, it's really important. The Board
18 has said 1803, and this motion or this opposition
19 to the motion, they say it applies to every single
20 amendment to a certificate.

21 HEARINGS OFFICER CLERGET: Sorry, I just
22 want to be clear. You mean DEQ said that.

23 MR. CHEREN: DEQ. I apologize. So
24 they're saying it applies globally. It has to
25 apply to some subset. There's no way that you can

1 get a certificate for a tiny project and quadruple
2 the size of it, and then insist that anyone who
3 wants to challenge it is in fifteen days. That
4 doesn't make sense.

5 So the question is if you're
6 interpreting this, what does it apply to? It
7 makes perfect sense that when utility mack comes
8 out from the US EPA, and you've got to tinker
9 around with things, and it's, "Oh, technically I
10 need to get an amendment to my certificate to make
11 this small change," yes, let's have an expedited
12 proceeding.

13 But it makes absolutely no sense to
14 think that the constitutionally guaranteed
15 environmental protection from the Major Facility
16 Siting Act is limited in this way, when someone
17 comes in and they say, "We want to get rid of this
18 major, major element of the environmental impact
19 minimization of the project."

20 And the other reason that we need more
21 time, and that more time is warranted, is that the
22 findings that are referenced in the application
23 and in the Board's -- the Department's documents,
24 the Department doesn't discuss the 1979 findings
25 that specifically addressed diesel emissions from

1 trains, and being a mine mouth power plant,
2 instead of a load center power plant, and avoiding
3 transportation emissions.

4 Those findings, which were made in 1979
5 after the Montana Supreme Court said, "You can't
6 ignore this mine mouth versus not issue." Those
7 findings, in order to get them, we had to send an
8 associate from Baker on literally just like days
9 of correspondence with people, trying to even just
10 get a copy of it, and they reference all of this
11 testimony, and what is known as an ethically long
12 administrative proceeding. They reference it as
13 the basis by which they have to burn just Rosebud
14 coal and be a mine mouth power plant.

15 Now, our problem is that the legal
16 requirement that they have to show to get an
17 amendment approved, that Talen has to show, is
18 that it doesn't materially affect those findings.

19 Well, today, just yesterday I finally
20 got a copy of some of the key findings, and then
21 it cites evidence. I don't have a copy of that.
22 I don't think the Board has a copy of that. I
23 don't think the Department has a copy of that. I
24 don't know whether Talen has a copy of that.

25 But there is a huge amount of assessment

1 that has to go in here just on that one issue
2 alone, that we definitely have cause to say, "You
3 can't make us put all of our evidence in about
4 findings that aren't accessible by no fault of us
5 as a party."

6 And in terms of the issue of waiver and
7 your jurisdiction in order to waive it, so this is
8 an issue which if people who follow the Supreme
9 Court cases in recent years, there has been all of
10 these cases about what's jurisdictional versus
11 not.

12 And the Department is going back to a
13 case from 1989, where back in those days, what the
14 Court, Supreme Court has called the bad hole days,
15 that they weren't so clear about what was
16 jurisdictional not jurisdictional.

17 The Supreme Court in Arbonne 2006
18 (phonetic) said, "Guys, we need to be really
19 careful about this, what's jurisdictional and
20 not," and the Supreme Court of Montana in BNSF
21 Railway Company v. Cringle (phonetic), there is
22 two cases there, and they cite other cases.

23 Montana followed that retrenchment of
24 jurisdictional versus non-jurisdictional acts. So
25 you can't go back to a case from 1989.

1 When you look at the more recent cases,
2 there is three categories of deadline rules. The
3 first category is the jurisdictional rule that
4 cannot be waived by the opposing party. The
5 second category is a mandatory claim processing
6 rule. The third category is a non-mandatory claim
7 processing rule, one that doesn't have additional
8 requirements.

9 So if it is jurisdictional, then the
10 other side can't waive it. If it's a mandatory
11 claim processing rule, then you have a much more
12 stringent standard in order to get around that,
13 and deciding whether equitable tolling applies or
14 it's just forfeiture, or what are those
15 circumstances. That's something that's being
16 worked out literally in the cases.

17 But before getting to what Montana has
18 said about a mandatory claim processing rule,
19 there are ordinary claim processing rules here,
20 and we think that this is one. We don't think
21 that this language satisfies the requirements to
22 be a mandatory claim processing rule in this
23 situation.

24 But in Montana, the exceptions are if
25 you may have reasonable diligence to preserve your

1 legal rights, but have been prevented from doing
2 so by circumstances beyond your control.

3 I don't think there is any question that
4 Westmoreland is being diligent in these
5 proceedings. We filed a 27 page notice of
6 hearing. We related all of these facts. We set
7 forth forty legal arguments. We have people
8 preparing experts right now.

9 Our concern isn't that we don't want to
10 be diligent or that we want to wait. It's that we
11 want this proceeding to -- the State to have the
12 benefit, and you to have the benefit, of all of
13 the evidence presented, in a quality that warrants
14 the stakes of this proceeding for the state, and
15 the people, and the environment.

16 So we are definitely being diligent. We
17 definitely meet the standard in Montana for even a
18 categorical claim processing rule. But we don't
19 even think this is that. We think it's a lower
20 standard. So it doesn't apply, it should be
21 waived.

22 And if the Board -- the Department's,
23 the DEQ's opposition brief says, "Well, you cite
24 the Constitution, and you don't have case law
25 support," well, I'll cite the Constitution of the

1 State of Montana. I'll cite Article 2, Section
2 17. And we have a right and we have an
3 opportunity to be heard appropriately to the
4 proceeding, and this is a proceeding that is about
5 the future and survival of this mine.

6 We absolutely have a due process right
7 that's implicated in this proceeding, and telling
8 us that we need to have all of this evidence on
9 this extremely fast tracked, unlawful removal of
10 an environment protection certificate that impacts
11 us in this way, that impacts the community in this
12 way, we absolutely have -- There are
13 constitutional implications to this case. I don't
14 think you need to get there.

15 HEARINGS OFFICER CLERGET: I can't get
16 there. I'm not the executive branch. The BER
17 can't decide constitutional issues. So there is
18 -- but I recognize you need to make your record.

19 MR. CHEREN: Correct me if I'm wrong,
20 but I think that -- Board Member Tweeten, wasn't
21 there a motion on that, that they were going to
22 bring that up before the Board as a whole, because
23 they didn't agree on that question? We don't have
24 to get there, but --

25 I mean I think you can certainly read

1 the rules. This is how you get there. You can
2 read these rules knowing that when DEQ and the
3 Board prepared them, that they knew what the
4 Constitution said about our rights, and this was
5 not an attempt as an end run around our rights to
6 jam us if there's an amendment in the future for
7 any Major Facility Siting Act anywhere in the
8 state.

9 This was simply dealing with a routine
10 administrative process. That's what it was about.
11 There is no way that anybody would have ever
12 thought that two weeks was constitutional at that
13 time. So that's a way to get there without -- as
14 the executive branch, but --

15 HEARINGS OFFICER CLERGET: I have a
16 couple of questions. First, I'm reading -- In
17 reading the ARM, I want to be clear that you
18 haven't requested a show cause hearing, have you?

19 MR. CHEREN: We -- On Wednesday I think
20 we called and we said, "What do we call this?,"
21 right? And the reason we were calling to say,
22 "What do we call this?" is we want to make sure
23 that we're styling it correctly.

24 I believe that we have filed a notice of
25 contested case. I believe that was the

1 appropriate thing under the statute under 223, but
2 we now have the Board -- the Department arguing
3 that this is under 1803, in which you would
4 interpret it as a request for a show cause
5 hearing.

6 But I think that gets to an issue, which
7 is: If you're going to apply 1803, the only thing
8 that you would apply it to is the part of this
9 that implements the permit amendment to MAQPD
10 Permit 0513-10 to get to version eleven. That's
11 the only thing that would be a show cause hearing,
12 and the rest of it needs to proceed --

13 HEARINGS OFFICER CLERGET: I'm sorry.
14 You're going to have to back up and explain that
15 one more time because I'm not sure I'm following
16 that argument.

17 MR. CHEREN: Sure. So it's possible
18 we've requested two hearings at once.

19 HEARINGS OFFICER CLERGET: So I have
20 your notice of contest here in front of me, and
21 the thing that it appears to be contesting is the
22 Major Facility Siting Act certificate amendment
23 from March 15th of 2019.

24 MR. CHEREN: That is correct.

25 HEARINGS OFFICER CLERGET: Is that one

1 or both of the things that you just said?

2 MR. CHEREN: That would be all of --
3 both of the things that we're saying, is that to
4 the extent -- and we think this is absolutely
5 wrong -- that 1803 could potentially apply under
6 these circumstances with this kind of manner, that
7 the only thing that it could apply to would be the
8 part of this that implements the permit amendment
9 to their air permit, which doesn't actually relate
10 to stripping out the requirements to burn local
11 coal.

12 So if you apply to just that, like
13 literally the things that they amended out of that
14 air permit, that's a small issue in this case
15 compared to removing the requirement that they
16 minimize the impact to the environment by not
17 trucking -- by having 1.3 billion ton miles of
18 coal crisscrossing the state of Montana.

19 So if you just look at what they got
20 changed in their permit, their air permit, even
21 though they said they were asking for all these
22 things in the application, as a technical matter,
23 that's much more narrow.

24 So it's possible to interpret this as
25 there is a show cause hearing on implementing

1 changes to the air permit; but again, I don't
2 think that applies here because I think those
3 implementing changes are when EPA changes the
4 regulations and says, "Look. You've got to have
5 -- instead of the continuous emission monitoring
6 that you're doing right now, you need to do
7 different continuous emission monitoring, and your
8 certificate says, 'I'm going to use this type of
9 continuous emission monitoring.'"

10 But it's a change in emissions
11 monitoring or something like that, where you have
12 an external reason that you need to update your
13 permit.

14 Here they want to build this coal
15 hauling facility. So we think that under the
16 rules, that's something that comes up -- it
17 doesn't mean you get to end run around anything.

18 But we would distinguish those two
19 things, what they actually got changed in their
20 air permit, and what they haven't changed yet,
21 because it's a requirement of the certificate in
22 their Title 5 permit, which is just citing a
23 certificate.

24 HEARINGS OFFICER CLERGET: So I just
25 want to be sure I'm following. So I'm looking at

1 the first page of the Major Facility Siting Act
2 certificate amendment, and there is Items 1 and 2
3 of that. Do those correspond to the one and two
4 that you're talking about now?

5 MR. CHEREN: The first one being the --

6 HEARINGS OFFICER CLERGET: The air
7 quality permit, to modify the Montana Air Quality
8 Permit 0513-10.

9 MR. CHEREN: Right. Let me look.

10 HEARINGS OFFICER CLERGET: And then the
11 second thing is utilize rail or truck delivery
12 facilities for non-Rosebud coal.

13 MR. CHEREN: I don't think that it
14 breaks down like that, as that being the
15 distinction. Otherwise I would be standing here
16 saying it's a really clean distinction. It's not
17 a clean distinction.

18 They talk about two different things
19 that they want to do. One is they want to build
20 this 160 acre rail handling facility. They've
21 gotten amendments to deal with the fugitive
22 amendments component to that.

23 So if you tease that out and say that
24 applies, I think that's wrong, but that's not
25 nearly as big of a deal as this thing that really

1 had nothing to do with that permit amendment, even
2 though it was discussing the application, which is
3 the switch from local coal to coal 300 miles away.

4 HEARINGS OFFICER CLERGET: So both of
5 those issues are contained in the entire body of
6 the Major Facility Siting Act certificate
7 amendment, right?

8 MR. CHEREN: Yes.

9 HEARINGS OFFICER CLERGET: Okay. That
10 makes more sense to me.

11 MR. CHEREN: I think just -- We may be
12 filing a, have to file -- they did a second
13 document on May 10th. We may do a protective
14 filing on Friday.

15 But our position is that that document
16 says they're going to grant everything, even
17 though it doesn't document all of its reasoning,
18 so we think that's the operative document, but
19 there is a second document, and there may be a
20 second appeal.

21 HEARINGS OFFICER CLERGET: Okay. I have
22 two more questions for you. The first is to the
23 point of this being jurisdictional, 17.20.1803(c)
24 says, "Upon timely filing a request for a hearing,
25 the Board shall" -- That's not a "may," that's a

1 "shall" -- "hold a show cause hearing."

2 So that indicates to me that you don't
3 have to request a show cause hearing, that the
4 minute you request any kind of hearing, we have to
5 hold a show cause hearing.

6 But then (d) also says, "A person
7 requesting a show cause hearing," which would seem
8 to indicate to me that you would need to request a
9 show cause hearing in order to trigger the 15 day
10 deadlines.

11 MR. CHEREN: Sure. Absolutely. So the
12 answer to that question is that -- and the Supreme
13 Court just weighed into this in the Nutricycle
14 (phonetic) case, and basically the "shall" still
15 doesn't get you to claim processing.

16 Here is an example of mandatory claims
17 -- of not being able to be subject to exceptions
18 in appropriate circumstances when justice
19 requires.

20 In that case, the federal rules had a
21 deadline, and they had another provision of
22 another rule that said this: It said rule -- the
23 appellate rules can be waived for good cause
24 except that one. They said all of the rules
25 except that one can be subject to equitable

1 tolling.

2 That's what it takes. It's not just the
3 "shall" in order to get -- Like even if it is a
4 claim, a mandatory claim processing rule to
5 eliminate judicial and discretionary safety
6 valves, it's got to be that specific. That's the
7 standard where under current case law in the state
8 of Montana that you have to meet, based on when
9 you look at these two cases from the Supreme Court
10 and Montana's juris prudence, which closely tracks
11 what the Supreme Court is doing in this area, and
12 clearing up a lot of law in this issue.

13 HEARINGS OFFICER CLERGET: So do you
14 believe that the ARM is in conflict with the
15 statute, or is there a way that they can be read
16 to --

17 MR. CHEREN: The way to read them not in
18 conflict is to interpret this as being simply a
19 business rule for a very small number of issues
20 dealing with conforming and technical amendments.

21 If you read the heading, and you think
22 about it, and you interpret it narrowly, as we're
23 interpreting it, then it's not in conflict. And I
24 think that's important because I don't think --

25 This was one of these rules that was

1 promulgated towards the beginning. I don't think
2 that they were --

3 HEARINGS OFFICER CLERGET: 1984 by my
4 research.

5 MR. CHEREN: I don't think that they
6 were looking in 1984 to ignore 223's direction
7 that you hold a contested case pursuant to the
8 Administrative Procedure Act. That's pretty
9 specific.

10 HEARINGS OFFICER CLERGET: Well, so that
11 brings me to my second question for you, which is:

12 So I went back and looked at the
13 legislative history of both the statute and the
14 ARM, and it looks to me like originally the ARM
15 was referencing a procedure through the Board of
16 Health, when there is a request for an amendment
17 through the Board of Health, and the certificate
18 holder is requesting a show cause hearing after
19 that process.

20 So just a heads-up to DEQ that this
21 question is going to come to you, too.

22 Do you know anything about the history
23 of that? Was it in fact a different process than
24 this amendment process that we're using now?

25 MR. CHEREN: When you go back and you

1 look at the permits that the Board of Health was
2 doing, it's a similar thing where you have to --
3 the certificates for the Major Facility Siting Act
4 are including provisions that conform to rules and
5 permits issued by the Board of Health.

6 And so it's simply just we know that we
7 have -- it's like your Title 5 permit, where
8 incorporating all these other permit provisions,
9 that could be an administrative nightmare. So
10 that further makes clear that this is supposed to
11 narrowly apply as opposed to the broad -- this
12 governs every single proceeding.

13 We think it was literally just somebody
14 thought, "Hey, what happens if the Board of Health
15 --" I mean think about this. With Colstrip, if
16 the Board of Health changed some things because
17 the US EPA told them that they had to change
18 something, and they said, "We need to change this
19 in your permit, and now we're going to have a
20 whole hearing on that," that's what this rule was
21 aimed at, was somebody had come up with that
22 scenario.

23 That's not this case. That's not
24 anything like this case. This is a case where the
25 central thing they're trying to do is get rid of

1 a core component of the certificate.

2 HEARINGS OFFICER CLERGET: But then the
3 flip side of that is that the statute has been
4 amended several times since that ARM, and the ARM
5 hasn't changed since 1984. This statute has
6 changed several times. And the statute doesn't
7 ever clearly articulate a difference between the
8 kinds of processes or amendments that you're
9 talking about.

10 MR. CHEREN: Right. I think that the
11 answer to that question is this is a de minimis
12 exception to 223. There are de minimis and then
13 the certificates. De minimus is read into every
14 single legal framework. There are de minimis
15 certificate amendments, and so the Legislature
16 doesn't have to tell the Department to create a de
17 minimis certificate amendment procedure, and they
18 also would have no reason to object.

19 And I would bet that if any member of
20 the Legislature called the Department and said,
21 "What is this?," they would have said, "This is a
22 de minimis certificate amendment. This is not
23 cutting off people's rights that you guaranteed in
24 223."

25 HEARINGS OFFICER CLERGET: I think I

1 want to hear from DEQ and Talen, and those folks
2 who have appeared in front of me before know that
3 I generally will devolve into question and answer,
4 so you'll probably be back later. Let's hear from
5 DEQ now.

6 MR. HAYES: On that specific issue or --

7 HEARINGS OFFICER CLERGET: Go ahead.

8 MR. JENSEN: May I just interrupt for a
9 moment, please? My name is Tim Jensen. I'm with
10 the Montana Environmental Information Center.

11 This hearing is not being conducted with
12 public's input. We are not able --

13 HEARINGS OFFICER CLERGET: No. This is
14 a contested case.

15 MR. JENSEN: It doesn't matter. This is
16 a public --

17 HEARINGS OFFICER CLERGET: No, wait.
18 Stop. This is a contested case process. This is
19 a hearing before the Hearing Examiner. There is
20 no opportunity for public comment here.

21 MR. JENSEN: I'm not asking public
22 comment -- on participation. People are not able
23 to call in. We've had members who wanted to
24 listen in. They are unable to get on.

25 HEARINGS OFFICER CLERGET: There are

1 often contested case proceedings that are not able
2 to be called.

3 MR. JENSEN: No, but your notice said
4 people would be able to do so.

5 HEARINGS OFFICER CLERGET: The BER
6 meeting was held, and that was publicly available.
7 People could call into that.

8 MR. JENSEN: But you're not --

9 HEARINGS OFFICER CLERGET: That is not
10 this. This --

11 MR. JENSEN: -- extending that to this
12 contested case hearing?

13 HEARINGS OFFICER CLERGET: No. This
14 is -- Go ahead.

15 MR. JENSEN: How do you say your last
16 name?

17 HEARINGS OFFICER CLERGET: My name is
18 Clerget.

19 MR. JENSEN: Thank you.

20 HEARINGS OFFICER CLERGET: I want to be
21 clear that is not the Board meeting. This is a
22 proceeding that's happening different. And most
23 of all, that I know of, proceedings in a contested
24 case that appear before a Hearing Examiner, the
25 public is welcome to come sit in the room, but we

1 do not make them available by phone. So this is
2 standard operating procedure for a hearing.

3 MR. JENSEN: Is the press aware of that
4 restriction?

5 HEARINGS OFFICER CLERGET: It is common
6 practice for a contested case hearing. It is very
7 rare to have a contested case proceeding open by
8 phone. Now, the BER proceedings are different,
9 but this is -- I'm a Hearing Examiner, and this is
10 -- so that does usually not happen by phone, and
11 the public is not to participate in those. The
12 public may listen, but you are not to be heard as
13 a party during this.

14 I would encourage you -- you can file as
15 an intervenor if you would like to become a party,
16 but this is not a party -- this is not a
17 proceeding for anyone other than the parties to be
18 heard.

19 MR. JENSEN: Was this contested case
20 hearing noticed at the same time on the same
21 agenda as the BER meeting?

22 HEARINGS OFFICER CLERGET: Contested
23 case hearings do not have the same notice
24 requirements as the BER.

25 MR. JENSEN: I'm just asking if this one

1 happened to have been noticed.

2 HEARINGS OFFICER CLERGET: No. This is
3 a separate occurrence from the BER meeting.

4 MR. JENSEN: Completely separate.

5 HEARINGS OFFICER CLERGET: Yes. This is
6 something that --

7 MR. JENSEN: Was there notice --

8 HEARINGS OFFICER CLERGET: It doesn't
9 need to be noticed. I don't want to have this
10 debate with you right now. You can --

11 MR. JENSEN: I don't care if you don't
12 want to have this debate with me right now. I'd
13 like to know when the public was meant to be able
14 to participate in this hearing under the statute.

15 HEARINGS OFFICER CLERGET: There is no
16 public participation in a contested case process.
17 So --

18 MR. JENSEN: Chris, is that your
19 understanding?

20 MR. HAYES: It is my understanding --
21 This is Ed Hayes, Chief Legal Counsel. A
22 contested case is not a meeting of a public body
23 that needs to be noticed under Montana's public
24 notice requirements for meetings of boards, other
25 government agency --

1 MR. JENSEN: This is not a public --

2 MR. HAYES: It's not a public meeting.

3 MR. JENSEN: Public hearing.

4 MR. HAYES: It's a hearing under MAPA,
5 and those are to my knowledge --

6 MR. JENSEN: It has to be noticed under
7 -- as long as this objection is placed on the
8 record. This is going to require some
9 interpretation. I don't think you're right, Ed.

10 HEARINGS OFFICER CLERGET: I would just
11 ask you to sit down, please, and you're welcome to
12 listen. More than the door is open, you're
13 welcome to -- the public is always welcome to
14 listen, but this is not a time for public comment.

15 Let's continue with DEQ's argument.

16 MR. HAYES: DEQ sort of understands some
17 of the concerns that Westmoreland advances in
18 terms of the complexity of the issues and the
19 mistakes, at least for Westmoreland as they see
20 it, in regards to their view of whether they need
21 to submit the testimony and the evidence within 15
22 days under Subsection (d) of 1803.

23 But that really is beside the point,
24 because before you in black and white are
25 jurisdictional requirements that must be followed

1 before the Board has jurisdiction to hear a show
2 cause hearing, and the complexity, the stakes, the
3 expert testimony that needs to be developed, the
4 fact that -- the assertion that Subsection (d)
5 applies only to technical or de minimis
6 amendments, none of that is included in the plain
7 language of the rule, which must be followed
8 because it's clear and unambiguous.

9 To do otherwise would insert obviously
10 something in the statute that's not there in
11 violation of the rules of construction.

12 In regard to the amendment itself that
13 DEQ received from Talen, I think the Hearings
14 Examiner was on the right track in looking at that
15 actual language of the proposed amendment.

16 The proposed amendment was meant to do
17 two things: It was meant to allow Talen
18 flexibility to use coal, not only continuing from
19 Westmoreland, but also from other sources of coal,
20 some in Montana, some in Wyoming. And then the
21 second purpose of the amendment was to modify the
22 facility at Colstrip in order to receive coal in a
23 stockpile, and also a new rail off-loading
24 facility.

25 And so when you look at what you were

1 referring to, No. 1 and No. 2 in the amendment and
2 on the document you were referring to, No. 1
3 refers to the amendment application as it relates
4 to obtaining coal from other sources; and as No. 1
5 indicates that amendment to follow, or proceeded,
6 or was predicated on the application that they had
7 submitted to DEQ's Air Quality Program, Montana
8 Air Quality Permit 0513-10.

9 And then the second reason for the
10 construction of the coal mine load-out facility is
11 set forth in the second paragraph, and that was to
12 implement, or is predicated on authorization under
13 Montana Air Quality Permit 0513-11.

14 Obviously both of those have different
15 contributions potentially to air emissions, No. 1
16 actually burning of coal from the other sources
17 out of the stack of Colstrip; and No. 2 the
18 load-out facility concerns of emissions from the
19 unloading of the coal, whatever.

20 So both portions of the amendment
21 application were predicated on other permits that
22 DEQ was processing, or amending, or had amended.

23 HEARINGS OFFICER CLERGET: Can I ask
24 you. Do you think that there is a distinction
25 between a show cause hearing as contemplated by

1 1803 and the contested case hearing as
2 contemplated by 75-20-223?

3 The addition of the show cause language
4 in that ARM, it seems to indicate something
5 different for me than what is contemplated by the
6 statute.

7 MR. HAYES: Let me answer your question
8 by explaining DEQ's view in terms of the interplay
9 between 20-223, the statute, and the
10 Administrative Rule.

11 If you look at 75-20-219, there is
12 Subsection (1), Subsection (2), and Subsection
13 (3). And at the end of Subsection (3) is that a
14 if a hearing is required under 75-20-223, the
15 party requesting the hearing has the burden of
16 showing by clear and convincing evidence that the
17 Department's determination is not reasonable.

18 So it's at that point in 219, actually
19 is what I'm referring to, what's discussed above
20 there is subject to a hearing requested under
21 75-20-223 Sub (2).

22 But then there is the tack-on of
23 Subsection (4), and the language of Subsection (4)
24 is important. It reads, "If an amendment is
25 required for a certificate that would affect,

1 amend, alter, or modify a decision, opinion,
2 order, certification, or air or water quality
3 permit issued by the Department or Board, the
4 amendment must be processed under the applicable
5 statutes."

6 And if you look at the first language of
7 the Administrative Rule ARM 20.1803, it mirrors
8 exactly that language in Sub (4). "An amendment
9 affecting, amending, altering, or modifying a
10 decision, opinion, order, certification, or permit
11 issued by the Department of Environmental Quality
12 or Board."

13 So it's the same language. And then if
14 you look at the footnote of 1803, it indicates
15 that it's implementing 75-20-219. So it's not
16 implementing 75-20-223(2). So it's my view
17 that --

18 HEARINGS OFFICER CLERGET: I don't know,
19 because 219, Subsection (3) of 219 implicates 223,
20 too, so --

21 MR. HAYES: But in that case it wouldn't
22 -- DEQ would have said, or the Board would have
23 said implement 75-20-219 and 223, which --

24 HEARINGS OFFICER CLERGET: All right,
25 but --

1 MR. HAYES: But even if you don't want
2 to go there, I think the plain language used both
3 in Subsection (4) of 219, and then in the first
4 language in 17.20.1803, in my view it's clear that
5 1803 is implementing Subsection (4) of 75-20-219.

6 HEARINGS OFFICER CLERGET: But what are
7 the applicable statutes administrated by the
8 Department or Board if not 223? Are they -- I
9 mean is it the air quality?

10 MR. HAYES: Right. Correct.

11 HEARINGS OFFICER CLERGET: So the
12 argument there would be --

13 MR. HAYES: Right.

14 HEARINGS OFFICER CLERGET: -- correct me
15 if I'm wrong -- but we need a petition for an
16 amendment of the air quality permit, which would
17 be entirely different than the Major Facility
18 Siting Act certificate amendment that we're
19 talking about, right?

20 MR. HAYES: Right.

21 HEARINGS OFFICER CLERGET: So that would
22 seem that we need -- that DEQ would need something
23 entirely different in order to modify that air
24 permit, right?

25 MR. HAYES: If they were solely

1 challenging the provisions of the air quality
2 permit, that would be correct. If they're saying
3 somehow DEQ's incorporation of the air quality
4 permit modification has somehow jeopardized
5 complying with the provisions of the certificate
6 itself, then that would be an appeal under the
7 Major Facility Siting Act subject to the appeal
8 provisions, subject to 219.

9 MR. CHEREN: So I think he just hit it
10 on the head. It's incorporation of a change to a
11 another permit. The other permit that was
12 changed, and he cited, 0513-10, was changed to
13 0513-11, does not have a change in that permit to
14 allow them to burn coal from Wyoming.

15 HEARINGS OFFICER CLERGET: But that's an
16 appeal of a different issue, right? I mean that's
17 a --

18 MR. CHEREN: Exactly. If I could lay
19 this out, what they're saying is that sometimes
20 you have an appeal of a different issue, and then
21 you also have to change your certificate to match
22 it because you can't violate your certificate in
23 order to comply with the other permit.

24 That's all 1803 is about. It's that you
25 do the other proceeding for the other reason, and

1 then you incorporate it, and it's a streamlined
2 procedure for incorporation. That's what 1803 is
3 about.

4 If there was another proceeding, there
5 was a permit issued, and that's a separate
6 proceeding, and just incorporating the only
7 changes there, this proceeding is of much broader
8 scope.

9 HEARINGS OFFICER CLERGET: So I just
10 want to make sure I understand what you're saying.

11 Then there would be a process
12 essentially appealing the amendment to the air
13 quality permits?

14 MR. CHEREN: We had that opportunity to
15 amend that permit, to appeal that permit, and
16 because of that opportunity, that's why you
17 streamline it here, because we would have had a
18 contested case. If we challenged the tiny little
19 changes they made to their air permit for fugitive
20 emissions, we would have already had a proceeding.

21 So this provision says you don't need to
22 have a full dress hearing if there was a separate
23 one, but again in this case, the ballgame is
24 something that wasn't changed in the air permit,
25 but I think we're getting close to exactly what

1 1803 does.

2 HEARINGS OFFICER CLERGET: So Ed, that
3 question then comes back to DEQ. If four says, if
4 75-20-219(4) says an air quality permit issued by
5 the Department must be processed under the
6 applicable statutes, which would mean an appeal of
7 an air quality permit amendment, then I think --
8 if I'm following your argument -- 1803 wouldn't
9 apply under Subsection (4), because then we're
10 going to go to the appeal for the air quality
11 permit amendment.

12 MR. CHEREN: This deals with there's two
13 appeal opportunities. That's what this is about.

14 MR. HAYES: Right. Subsection (4) of
15 219 is talking about two different amendments, one
16 amendment to the certificate issued under the
17 Major Facility Siting Act; and then there is the
18 amendments in this case of an air quality permit
19 that has to be processed under the provisions of
20 the Air Quality Program.

21 HEARINGS OFFICER CLERGET: But --

22 MR. HAYES: And it's subject to appeal
23 under the Air Quality Program.

24 HEARINGS OFFICER CLERGET: Then, again,
25 I mean if I'm reading (4), it says, "If an

1 amendment is required to a certificate --" so
2 that's the Major Facility Siting certificate --
3 "that would affect, amend, alter, or modify --"
4 something something -- "of an air quality permit.

5 So if the Major Facility Siting
6 certificate is going to modify or amend an air
7 quality permit, the amendment must be processed
8 under the applicable statutes administrated by the
9 Department, which to me says the applicable
10 statutes for amending an air quality permit, which
11 is not 1803. 1803 is very specifically about the
12 Major Facility Siting Act, right?

13 MR. HAYES: Right.

14 HEARINGS OFFICER CLERGET: So at least
15 with respect to Subsection (4), it would seem that
16 for the air quality permit piece of it, we're not
17 under 1803, which sort of subverts your argument
18 because you are proceeding, if anything, under
19 1803.

20 MR. CHEREN: That's correct. That's
21 correct. It's that -- There is two different
22 orders of operation here. You could want to do a
23 Major Facility Siting Act permit process to build
24 a power plant, and you're going to need an air
25 permit, a water permit, and a certificate under

1 the MFSA, and it says this proceeding under MFSA
2 in this statute, you still have to go do the other
3 proceedings for air and water. Okay?

4 Now, you've got your air permit, and
5 you've got your power plant built, and you've got
6 your certificate, so you've got three things: The
7 power plant, and the permit, and the certificate.

8 This 1803 is even narrower, that says if
9 you go get a change to your air permit, and you
10 need to update your certificate, we already know
11 that you're going to -- people are going to be
12 able to appeal the change to that permit under the
13 rules of that program, so there is really not many
14 questions for the Board if you're just
15 implementing, incorporating a change to your air
16 permit.

17 And if that's all you're doing, and it's
18 just a technical conforming, "We've got to fix the
19 certificate," they're saying, "Well, technically
20 you're going to get a second appeal, but it's
21 going to be a narrower appeal because you're
22 getting two bites at the apple."

23 But that's only where the thing driving
24 the process is the certificate. And if I can just
25 -- this is really key. The paragraphs you read,

1 the Paragraph 1 doesn't refer to the permit
2 amendment, it refers to the application to amend
3 the permit, which had all of this extraneous
4 material, which is quite frankly why we're here
5 today, because we were concerned that this was an
6 end run around MFSA.

7 So the actual amendment to that permit
8 does not have anything to do with burning coal
9 from Wyoming, other than there is this small
10 little piece of it, but it doesn't talk about this
11 restriction of which coal they burn.

12 So we have a separate legal right to
13 challenge that permit, and in addition, if all we
14 were doing was challenging whether the Board
15 should update the permit, that's 1803; but that's
16 not what we're doing because this proceeding is
17 about a totally separate legal obligation in the
18 certificate. It's not even in that permit. It's
19 in some other permit, it's in the Title 5 permit.

20 So this proceeding is about a change.
21 You've changed the fundamental aspect of the
22 certificate, and saying that 1803 governs is
23 saying that the tail wags the dog, because they
24 happened to go get some other random permit change
25 that they can then constrain our contested case

1 under the Administrative Procedure Act appeal
2 rights for the amendment to the certificate.

3 HEARINGS OFFICER CLERGET: DEQ, do you
4 have any other argument that you want to make
5 before I let Talen give their piece?

6 MR. HAYES: I would just point out that
7 I think under 1803 under Paragraph 1, it's clear
8 that when there is an amendment to another
9 ancillary permit, and that that needs to be
10 incorporated then back into the certificate, that
11 is what triggers 17.20.1803. That's both
12 expressed in the title of the rule, and then in
13 the first -- in Subsection (1).

14 And that is where we are in regards to
15 the application submitted by Talen to DEQ to
16 modify its certificate of compliance to
17 incorporate the modifications that were made to
18 the air quality permits.

19 HEARINGS OFFICER CLERGET: Talen, are
20 you still there?

21 MR. FRANK: Yes.

22 HEARINGS OFFICER CLERGET: Would you
23 like to offer any argument at this time?

24 MR. FRANK: Respectfully, I think it
25 would be for us to file something, as you

1 suggested, so that we can have a little bit of
2 time to formulate our response. And I would ask
3 for perhaps, given the complexity of the issue,
4 perhaps at least a couple more hours to finalize a
5 filing.

6 I understand the need for speed, but we
7 want to get this right. So if we could have until
8 the end of the day tomorrow, I think we would
9 appreciate that.

10 HEARINGS OFFICER CLERGET: I apologize
11 because I don't have the calendar in front of me,
12 but the 15 days is up the Monday after the 31st,
13 right? Which is the second of June?

14 MR. CHEREN: Yes, that's how we're
15 interpreting it.

16 HEARINGS OFFICER CLERGET: Okay.

17 MR. CHEREN: I think that puts you in an
18 uncomfortable position, given our need for
19 exigency, given that we specifically asked for
20 direction, we emailed them the notice of hearing
21 that contained the statement that this issue was
22 going to be heard before the Board today.

23 So they knew about this on Friday, and
24 I'm confident that they could have taken the time
25 to work on this. And quite frankly --

1 MR. STERUP: Did you email us the brief?

2 MR. CHEREN: -- the way that they did
3 their application, where they talk about all of
4 this extraneous material --

5 MR. STERUP: (Inaudible)

6 MR. CHEREN: -- and the timing of this,
7 I find it -- would have a hard time expecting that
8 they will represent to you that they were not
9 aware of this issue before last Friday either, so
10 I think --

11 MR. STERUP: -- (inaudible) -- needed to
12 notify us when you didn't send us the brief.

13 HEARING OFFICER CLERGET: Let's
14 everybody back up, because we're trying to get
15 this all on the record. So folks on the phone,
16 can you identify yourself, and then say your
17 piece.

18 MR. STERUP: Rob Sterup, and then I'll
19 yield the floor to Josh. I want to respond to the
20 comment that Westmoreland knew that we needed to
21 be notified of the agenda. They sent it to us,
22 but I would point out that they did not provide us
23 the brief.

24 HEARINGS OFFICER CLERGET: Well --

25 MR. FRANK: This is Joshua Frank for

1 Talen. I mean I would echo that. We did see the
2 hearing agenda, but we did not receive any copies
3 of the briefs, and happened to see them today when
4 they were posted.

5 So we're not trying to play any games
6 here, and we think we can offer meaningful
7 response that will help a decision on this. We
8 would just like a sufficient amount of time to do
9 that. If need be, we'll get something in by 2:00
10 tomorrow --

11 MR. CHEREN: I think we can withdraw --

12 HEARINGS OFFICER CLERGET: Wait. Let
13 him finish. Sorry. Finish, please.

14 MR. FRANK: But I think an additional
15 two hours would allow us to give you a better
16 product that will be more useful. So if we could
17 have until 5:00 p.m. tomorrow, I think that's a
18 small concession to ask for.

19 MR. CHEREN: We will withdraw our
20 objection to 5:00 p.m. tomorrow, but I think that
21 this emphasizes that needing to go from a Friday
22 to a Thursday to address a discrete legal issue
23 suggests that -- why something in which all of
24 these workers have the stakes of whether they're
25 going to keep their jobs, that our case shouldn't

1 have to be on in 15 days.

2 So we withdraw our objection to that,
3 and we will have to be faster on the jump if we
4 have to get relief from the Court. But 5:00 p.m.
5 tomorrow is fine if you can rule on Friday.

6 HEARINGS OFFICER CLERGET: I recognize
7 the need, or the request for an expedited ruling,
8 and why that is; but ultimately the most important
9 thing here is that we get it right. So I care
10 more about it being right, and if you guys have to
11 seek some additional relief, then that's fine.

12 The other thing I would request is that
13 if anybody is going to choose to file this
14 election under 223(1)(c) that takes us directly to
15 District Court, the sooner you could do that the
16 better, because it will make everybody's life --
17 if you're going to District Court anyway, then
18 there is no point in having a decision on this.

19 So I would just ask that if between the
20 time that Talen files their response and I issue a
21 decision, if anybody comes to a decision about
22 whether or not they're going to take that
23 election, please don't hesitate to file it
24 immediately.

25 So I guess I want to put this question

1 forward to all three of the parties for a specific
2 answer. My inclination is that 17.20.1803 is in
3 conflict with 75-2-223. It seems to me that
4 (1)(a) contemplates a MAPA proceeding, and it
5 seems that 1803 contemplates a show cause hearing
6 that happens in 15 days, which is certainly not a
7 MAPA proceeding, or at least it's not a MAPA
8 proceeding that I believe is contemplated by
9 (1)(a).

10 So if those are in conflict, and if this
11 is a -- I know that 1803 is a BER rule. Isn't it
12 the BER's obligation to attempt to reconcile their
13 rule with the 223(1)(a) whenever possible such
14 that we're interpreting 1803 in a way that makes
15 it not in conflict? Let's just take that question
16 first. Isn't that the obligation of the BER?
17 I'll pose that to DEQ first, I guess.

18 MR. HAYES: I think it's the obligation
19 or the goal under statutory construction is to
20 find a way to construe the statutes to be
21 consistent with each other, and to give effect to
22 all.

23 And as I've indicated before, it's my
24 perception that 1803 was specifically enacted to
25 implement 17.20.219(4), where as the run of the

1 mill --

2 HEARINGS OFFICER CLERGET: Where are you
3 getting that? Because I mean I've looked through
4 the legislative history of 1803, and I don't see
5 that. It doesn't say when it was enacted that
6 that was its purpose.

7 MR. HAYES: I'm going basically on clear
8 language, the repetition of that language in
9 Subsection (4) of 219, and then the repetition of
10 that same language in 17.20.1803(1).

11 HEARINGS OFFICER CLERGET: Okay.

12 MR. HAYES: And it's my view that the
13 implementing footnote of 17.20.1803 does not
14 reference the 223, 75-20-223.

15 HEARINGS OFFICER CLERGET: To your
16 knowledge, has there ever been in front of the BER
17 an appeal of an amendment pursuant to this rule?

18 MR. HAYES: To my knowledge, there has
19 not been an appeal to the Board either under
20 75-20-223 or ARM 17.20.1803.

21 HEARINGS OFFICER CLERGET: So we have no
22 essentially precedential procedure here.

23 MR. HAYES: That would be correct.

24 HEARINGS OFFICER CLERGET: And then do
25 you think -- I'll pose this to DEQ, but then I

1 will probably want answers from everybody else,
2 too.

3 Do you think that 1803 can be read,
4 putting together (c) and (d), to be discussing a
5 show cause hearing as separate from -- a request
6 for a show cause hearing, which is something
7 separate from the contested case hearing in 223?
8 Would that be a way to reconcile the ARM and the
9 statute, such that -- whereas here there has not
10 been a request for a show cause hearing, and
11 therefore 1803 would not apply?

12 MR. HAYES: Well, I think in Subsection
13 (c) where it says request for hearing, it's
14 actually talking about a request for a show cause
15 hearing, because the first lead-in to Subsection
16 (d), "A person requesting a show cause hearing
17 shall file."

18 I understand your point that there is
19 somewhat of an inconsistency. Sometimes it uses
20 just "hearing" and sometimes "show cause hearing,"
21 but in my construction of (c) and (d) it's
22 referring to the show cause hearing.

23 HEARINGS OFFICER CLERGET: Which is
24 something different. I mean to request a show
25 cause hearing appears to me to be something that

1 you're requesting internal to a contested case
2 hearing.

3 For example, like I'm requesting a show
4 cause hearing in this matter on a discovery issue,
5 or on a -- I mean there is any number of show
6 cause hearings that you can request within the
7 context of a contested case hearing, which is
8 something different than the contested case
9 hearing itself. Do you follow my logic there?

10 And it's potentially one way to read
11 them, so that they're not in conflict, is that
12 there is a contested case hearing that occurs
13 pursuant to 75-20-223(1)(a), when an entity is
14 appealing DEQ's decision; and then within that,
15 pursuant to 1803(d), you could request a show
16 cause hearing, and then all of the evidence for
17 the show cause hearing essentially would need to
18 be submitted within 15 days, but that show cause
19 hearing would presumably be something different or
20 reduced from the entirety of the contested case.

21 MR. HAYES: I'm not sure that makes
22 sense, because the entirety of this contested case
23 is the two amendments that I've talked about. And
24 it would seem to me that it wouldn't be the intent
25 to provide two avenues to -- if I'm hearing you

1 right -- challenge the validity of the DEQ's
2 amendment, giving the option of a show cause
3 hearing --

4 HEARINGS OFFICER CLERGET: No, I think
5 you'd have the contested case hearing, and then
6 you can request the show cause hearing within the
7 context of the contested case hearing on a
8 smaller, on some subset of the contested case, is
9 what --

10 But again, I'm struggling to reconcile
11 these, and I'm trying to find a way that they can
12 -- if they can't be reconciled, it seems to me
13 that the statute trumps. It has to. So -- Right?

14 MR. HAYES: Well, I guess I don't see
15 your interpretation, because for example in 1803
16 Sub(c), it says, "Upon timing filing of the
17 request for hearing, the Board shall hold a show
18 cause hearing why the proposed action should not
19 be taken." It's talking about the entirety, not
20 just some sort of subset of what's before the
21 Board on the MAPA contested case.

22 HEARINGS OFFICER CLERGET: But then so
23 is it your argument that then this 15 day
24 proceeding that's contemplated by 1803(d)
25 constitutes the MAPA hearing that 223

1 contemplates? Because that's the only other way
2 to read them without a conflict, as I see it.

3 And I am struggling, because my guess is
4 -- and I would love for somebody to give me some
5 more information on this -- is that this ARM was
6 put in place in 1984 when there was a Board of
7 Health, and an entirely different structure, and
8 nobody has changed it in the intervening time.

9 The statute has changed, and we're left
10 with a relic here that contemplates a procedure
11 that's different than the procedure contemplated
12 by 223. And in that case, the statute has to
13 trump, I think.

14 But if somebody has any other
15 information that's other than speculative -- I've
16 heard a lot of speculation, but I haven't seen any
17 legislative history, or any precedential case, or
18 anything specifically to 1803 that tells me
19 that --

20 MR. HAYES: My only opinion is that I
21 also looked at the rulemaking history of 1803, and
22 saw the 1984 amendment, and in my reading of that,
23 it was not really relative to this proceeding or
24 substantive.

25 I thought the amendment was -- At one

1 time the Board of Health was the entity that had
2 the authorization to issue certificates of
3 compliance. At some point DEQ stepped in the
4 shoes of the Board. But at that time, I'm not
5 aware of any changes in the process or anything.

6 So even though now the rule might refer
7 to the DEQ instead of the Board, I don't think
8 that amendment had any impact on the actual
9 procedure.

10 HEARINGS OFFICER CLERGET: Talen, I
11 guess you've heard my question, so to the extent
12 that your filing wants to address any of those
13 questions, I'm guessing you're not prepared to
14 answer them now.

15 MR. FRANK: Sorry. You broke up a
16 little bit there. But I don't think we are -- the
17 time to respond to that. We did hear your
18 questions, and we'll do our best to put whatever
19 light we can on it in our filing tomorrow.

20 HEARINGS OFFICER CLERGET: All right.
21 Do you have any response to my question?

22 MR. CHEREN: Yes. I think the show
23 cause language, it trips us up, too. I mean we're
24 operating very quickly like in our motion, our
25 emergency motion. If somebody referred wrong and

1 refers to a show cause hearing is what we
2 requested, and that's not what we want, because
3 this is confusing, and it hasn't been done before,
4 and there is not a lot of precedent. But I wish
5 that --

6 I did look at the administrative
7 history, and often I've gone back and found things
8 and said, "Here's the answer," and this one, the
9 record is not very clear, but I think the show
10 cause tells you that the question is when someone
11 comes to get their certificate amendment and says,
12 "I've gotten this other technical change done to
13 this permit," the only thing that would be decided
14 in a show cause hearing is is that true, not
15 whether you're complying with MFSA.

16 And it's not 223. It's just a show
17 cause hearing about whether or not at that time a
18 different agency had in fact completed its
19 procedures in the proper way. That's what this
20 was contemplating, is a show cause hearing about
21 whether or not the facts of a technical amendment
22 actually occurring. It's not contemplating 223,
23 it's not implementing 223. It's just dealing with
24 the fact that you had two different agencies doing
25 two different things, when it was the Board of

1 Natural Resources and it was the Board of Health.
2 So I think that's all it is.

3 HEARINGS OFFICER CLERGET: All right. I
4 apologize. I have one more question. I know
5 that's a famous lawyer -- "One more question."

6 You guys made a bunch of jurisdictional
7 arguments, and I just want to be clear. Despite
8 the potentially jurisdictional nature of this ARM,
9 even if it's jurisdictional, the statute would
10 still trump if they're in conflict; do you
11 disagree with that?

12 MR. HAYES: I would not disagree with
13 that.

14 HEARINGS OFFICER CLERGET: Do you guys
15 -- I'm assuming you don't disagree with that.

16 MR. CHEREN: We don't disagree with
17 that. I think that's correct.

18 HEARINGS OFFICER CLERGET: Talen, you
19 can address that as well if you want in your
20 filing.

21 So here's what we're going to do.
22 Talen, you have until -- you can go ahead and have
23 until midnight tomorrow. We'll give it a Federal
24 Court deadline. So you have until tomorrow at
25 midnight to file a response based on this oral

1 argument to both DEQ's response to the emergency
2 motion and the emergency motion itself.

3 And then I will issue an order on
4 Friday. And again, if anybody is going to go to
5 District Court in the intervening time, please let
6 me know that. And hopefully that will give
7 everybody enough time that if they need to go to
8 District Court based on my ruling, they can do
9 that.

10 MR. CHEREN: That's enough time.

11 HEARINGS OFFICER CLERGET: So with the
12 exception of Talen's additional filing, I will
13 take this under advisement, and I will issue an
14 order. I also issue an order -- I will try to
15 issue an order today.

16 MR. FRANK: I'm sorry. You're breaking
17 up for those of us on the phone.

18 HEARINGS OFFICER CLERGET: I will try to
19 issue an order today. I don't know if it's going
20 to happen today or tomorrow, just opening, stating
21 the caption of the case, that Talen is an
22 Intervenor.

23 So if you guys could go ahead and issue,
24 if you could send me notices of appearance, that
25 would be really helpful, so that I know that I'm

1 sending that to the right place. And then you can
2 file something, notices of appearance and then a
3 written motion for intervention, so that I can get
4 that all on the written record.

5 MR. STERUP: Your email?

6 HEARINGS OFFICER CLERGET: You can send
7 that to my email. It's sclerget@mt.gov. It's
8 also on the BER website in the policy there.

9 MR. STERUP: Thank you.

10 HEARINGS OFFICER CLERGET: Thank you
11 everybody.

12 (The proceedings were concluded
13 at 3:44 p.m.)

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

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

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing - 65 - 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 _____ day of _____, 2019.

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires
March 9, 2020.

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