BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING
AUGUST 13, 2021

TRANSCRIPT OF PROCEEDINGS (VIA ZOOM)

August 13, 2021
9:00 a.m.

BEFORE CHAIRMAN STEVEN RUFFATO,
BOARD MEMBERS DAVID SIMPSON,
JOSEPH SMITH, JULIA ALTEMUS
HILLARY HANSON, and DAVID LEHNHERR

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WHEREUPON, the following proceedings were had:

* * * * *

(Board Member Simpson not present)

CHAIR RUFFATO: Good morning, everyone. It's 9:00, so I want to call this meeting to order. Regan, would you please call roll.

MS. SIDNER: I will. Chair Ruffato.

CHAIR RUFFATO: Here.

MS. SIDNER: Board Member Lehnherr.

BOARD MEMBER LEHNHERR: Here.

MS. SIDNER: Board Member Smith.

BOARD MEMBER SMITH: Here.

MS. SIDNER: Board Member Simpson.

(No response)

MS. SIDNER: Board Member Simpson.

(No response)

MS. SIDNER: Board Member Hanson.

(No response)

MS. SIDNER: I think I see her name trying to connect. Board Member Hanson, can you hear?

(No response)

MS. SIDNER: Board Member Altemus.

BOARD MEMBER ALTEMUS: Good morning.
CHAIR RUFFATO: Board Member Reiten.
(No response)

MS. SIDNER: Board Member Reiten.
(No response)

MS. SIDNER: Board Member Hanson just wrote in the chat that she's present, she's just having audio issues. That does give us a quorum.

CHAIR RUFFATO: Thank you, Regan. Would you please then go through and identify all of the folks for the record on the meeting, probably starting with the DEQ folks.

MS. SIDNER: Yes. I see Kurt Moser; Mark Lucas; Chris Cronin; Catherine Armstrong; Myla Kelly; Nick Whitaker; Aaron Pettis; Angela Colamaria; George Mathieus, our staff liaison. Have I missed any DEQ folks?

MR. SMITH: This is Bob Smith with the coal program.

MS. SIDNER: Bob Smith, and I see Rebecca Harbage as well.

CHAIR RUFFATO: Thank you, Regan. Can we go on to the other folks that are on the call.

MS. SIDNER: John Martin; Catherine Laughner; Kaitlyn Buzzas; Clayton Elliott; Brian Balmer; Marie Kellner; Paul Skubinna; S. R.
Yemington; Tanya Fish; Andrew Cziok; Tamara Johnson; Julia Giffin; Randal McNair; Stu Levitt; William Hollahan; our Court Reporter, Laurie Crutcher; our Board attorney Katherine Orr; Vicki Marquis. We do have one phone connectee. If you could give us your name, that would be great.

MR. DOUD: Certainly. This is Jeffrey Doud. I'm with Agency Legal Services.

MS. SIDNER: Thank you. Have I missed anybody?

(No response)

CHAIR RUFFATO: Thank you, Regan. Is there anybody who has not been identified?

MS. SIDNER: It looks like I missed two, David Brooks and Shelly Mitchell. Anybody else?

CHAIR RUFFATO: Thank you, Regan.


CHAIR RUFFATO: All right. Thank you, Regan. Let's move to the administrative items.

The first order of business is to approve the minutes from the June 11th, 2021 meeting. I'm assuming all of the Board members have reviewed those minutes. Do we have a motion for approval?

BOARD MEMBER SMITH: So moved.
CHAIR RUFFATO: And a second.

BOARD MEMBER LEHNHERR: I'll second that motion.

CHAIR RUFFATO: A motion has been made and seconded to approve the minutes from the June 11th meeting. Any discussion?

(No response)

CHAIR RUFFATO: I'll call the question. All in favor, say aye.

(Response)

CHAIR RUFFATO: Opposed, same sign.

(No response)

CHAIR RUFFATO: Motion passes unanimously.

The agenda calls for any public comment on those minutes. Are there any public comments on the minutes from the June 11th meeting?

(No response)

CHAIR RUFFATO: Hearing none, I will move on to the next item. This would be "B" under administrative items.

I just want to take this opportunity to remind all the Board members, myself included, and all the parties, to be diligent to avoid ex parte communications and contacts.
I raise this because I had an attempted contact, ex parte contact. I shut it down. I'm sure that the individual involved, I'm sure that person's intentions were fine and well meaning, but we need to be cautious of avoiding ex parte contacts. Any discussion from the Board on that point?

(No response)

CHAIR RUFFATO: Hearing none, I will move on to Item C, and this is Dave Simpson's proposal. Is Dave on the call?

(No response)

CHAIR RUFFATO: I think let's postpone that then, because I'd like Dave to be on the call for that discussion, so let's postpone it. When Board Member Simpson comes on the call, we'll pick it up later. Please help me to remember that if he comes on.

Moving on to Administrative Item D. This item relates to a matter that has come up a couple times in 2021, and that is the situations where we have little or no information about new cases, and this Board has to make a decision about whether to assign the cases, or the case. And we have talked about the fact that it's not
comfortable making that decision in a vacuum with no information about the case, or at least not adequate information.

Board Counsel Orr suggested that maybe we should adopt a policy regarding having sufficient information, and I thought that was a great idea. So I want to make a motion that we direct Board Counsel Orr to draft a policy that will be considered at the October 8th meeting that will provide a means for us to have sufficient information when we consider new cases. Is there a second to my motion?

BOARD MEMBER SMITH: I'll second that.

CHAIR RUFFATO: Thank you, Joe. A motion has been made and seconded that we request Board Counsel Orr to draft a policy for consideration at the October 8th meeting to ensure that we have adequate information when we consider new cases.

As far as discussion, the first point of discussion would be to say that this has occurred twice in 2021 where we didn't have adequate information. It's not true of the new cases this time. So most of the time I think we will have it based upon the notice of appeal, but there are
times when we don't. That's the reason why I think it's a good idea. Any other discussion?

BOARD MEMBER HANSON: I guess, Chairman, I'm just a little unclear on what we would consider adequate information, like what you're thinking will be written into that policy with specifics on adequate information.

CHAIR RUFFATO: Well, one of the documents that would be very helpful would be the document from which the appeal is taken, and that is the most likely document that would be helpful.

BOARD MEMBER HANSON: Okay. Thank you for the clarification.

CHAIR RUFFATO: I've discussed this with Katherine, and she believes that we can take judicial notice of public documents, such as the order or other determination from which the appeal is taken. Any other discussion?

(No response)

CHAIR RUFFATO: If there's no other discussion, I will call the question. All in favor of the motion, say aye.

(Response)

CHAIR RUFFATO: Opposed, same sign.

(No response)
CHAIR RUFFATO: The motion passes unanimously.

Going to the agenda item under Administrative Item E, the question has arisen about the appointment of Hearing Examiners, and as you read through the briefing items, you will see that in many cases a certain individual, particularly Sarah, was appointed as Hearing Examiner, or so it says, and then when Sarah left ALS, other ALS lawyers were appointed, and then when some of them left, another ALS lawyer was appointed. And those last two appointments occurred, or assignments I should call them, occurred without Board action.

A question has been raised about that, so we went back and looked at that process, and we found that Sarah had identified this as a problem in 2020, and at the October 9th meeting a motion was made and passed unanimously that in all cases, both retroactively and going forward, the Board appoints ALS as the Hearing Examiner, and then ALS assigns the appropriate lawyer; then if that lawyer were to leave ALS, ALS would assign a different lawyer.

I bring this up just for clarification
purposes, and kind of as a housekeeping matter. I think on the next agenda we will reword the briefing statements to reflect the action that the Board took on October 9th. Is there any discussion of this point?

(No response)

CHAIR RUFFATO: I don't think we need any motion here. I was just wanting to inform the Board members in particular of this circumstance.

Going on to the briefing items. I intend to handle this --

MR. MARTIN: Mr. Chairman.

CHAIR RUFFATO: Yes, Mr. Martin.

MR. MARTIN: I apologize. This is John Martin, and as I'm sure everyone appreciates, I represent Signal Peak Energy and Westmoreland Rosebud Mining.

And without getting into a level of detail that's inappropriate, I'd like to remind the Board of the provision of six-eleven-one that requires appointment, quote, "for the particular matter," end quote.

And I don't think at this time it's appropriate for me to go into any more detail, unless of course, Mr. Chairman, you or another
member of the Board would have a question. Thank you.

CHAIR RUFFATO: Thank you, Mr. Martin. Do any of the Board members have a question?

(No response)

CHAIR RUFFATO: Okay. We will move on then. Thank you.

Briefing items. What I'm going to do on this one is like we did last time. I'm not going to go through them one by one. I'm assuming that everybody has read the descriptive paragraph for each item. So I'm going to take two steps.

First I'm going to ask all the Hearing Examiners that are on, and Katherine Orr, who is taking a poll I think, to ask whether or not there are any changes or updates to any of the items on the briefing items. That will be the first thing that I want to do. I'm going to pause in a minute, and see if there are any. But after that, I'm going to ask the Board members if they have any questions about any of the Board items.

So going back to the first point, Hearing Examiners and Katherine, are there any updates or changes that you're aware of from the written descriptions in the agenda?
MS. ORR: Good morning, Mr. Chair,

members of the Board. Katherine Orr speaking.

I have asked the Hearing Examiners late
yesterday if there are any changes to the agenda
items, and received responses back that there were
not. They are listening in right now, and I don't
think any of them has any changes as of this
morning, but if any Hearing Examiner does, please
let the Chairman know. And I think we can
indicate by their silence that there hasn't been a
change.

CHAIR RUFFATO: Thank you, Katherine.

And I agree. I will pause for any Hearing
Examiner that wants to speak up.

(No response)

CHAIR RUFFATO: Hearing none, I'm going
to move on to the second point about the briefing
items, and that is to ask the Board members: Does
anybody have any questions about any of the
briefing items?

(No response)

CHAIR RUFFATO: I do have a couple of
questions, that I don't think they will be hard
questions.

But I'm looking on Page 8 Item (h) which
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is the Keystone XL Pipeline matter where Northern Plains Resource Council and Sierra Club filed a Notice of Appeal. And I saw in the materials that there is a proposed order for Katherine Orr as Hearing Examiner to sign to dismiss that matter.

Katherine, can you tell me. Is that in a position where you are in a position to proceed to sign that dismissal order?

MS. ORR: Mr. Chair, yes, it is.

CHAIR RUFFATO: Thank you. My next question is on the very next matter, which is also the Keystone XL matter, where there were different Appellants, and I was wondering if you know. Is that going to proceed or likely to proceed in the same way as the one we just talked about?

MS. ORR: Mr. Chair, I do not know that.

CHAIR RUFFATO: Thank you.

MS. ORR: Mr. Chair, we're due for a scheduling conference, as you see, on September 10th, so presumably the parties are in the process of determining whether they're going to ask for a dismissal now.

CHAIR RUFFATO: Okay. Thank you. I have no other questions. Any other questions from Board members on briefing items?
(No response)

(Board Member Simpson present)

CHAIR RUFFATO: Hearing none, I'm going to go on to action items.

And the first matter is the notice of appeal and request for hearing by the City of Great Falls. We have received a stipulation by the parties where they have resolved the final issue. There were, if I recall correctly, five issues. Four of them were resolved by a previous stipulation, and now the fifth one is a subject of a stipulation that is before the Board. The action that we're asked to take is either to accept or reject the stipulation. Do I have a motion from the Board to either accept or reject the stipulation in the Great Falls case?

(No response)

CHAIR RUFFATO: I will move that we accept the stipulation in the Great Falls case as presented in the Board materials. Is there a second?

BOARD MEMBER LEHNHERR: I'll second that motion.

CHAIR RUFFATO: Thank you, Doctor.

Discussion?
(No response)

(Share screen)

CHAIR RUFFATO: Any discussion?

(No response)

CHAIR RUFFATO: Hearing none, I will call the question. All in favor of the motion that has been made and seconded that we accept the stipulation in the Great Falls matter, all in favor say aye.

(Response)

CHAIR RUFFATO: Opposed, same sign.

(No response)

CHAIR RUFFATO: It passes unanimously.

I would just ask. Katherine, would you prepare any necessary order for my signature as Board Chairman to implement the motion that was just made and passed?

MS. ORR: Mr. Chair, members of the Board, I think you see a document on your screen. Do you see that now, the Board order for final agency decision?

CHAIR RUFFATO: I do see it. I can't scroll down and see the whole thing for some reason. There we go.

MS. ORR: And I apologize that you
haven't seen this before, but this was a document that was requested to be put in the Board packet, and both parties have presented it.

And with your indulgence, if you could review this, and then agree to the language, and then I can prepare a final one that doesn't say "proposed" on it, and then that matter will be closed. We could have you sign the final version with "proposed" taken off after this meeting.

CHAIR RUFFATO: Very good. Can you start at the top again, and slowly scroll down so we can all read it.

(Share screen)

BOARD MEMBER LEHNHERR: Excuse me. Chairman Ruffato, this is David Lehnherr. I'm wondering if we could have this document emailed to the Board members.

CHAIR RUFFATO: I'm sure we can. For what purpose? For us to review now, Doctor?

BOARD MEMBER LEHNHERR: If it arrived in time, but it would be nice to have it for our records as well.

CHAIR RUFFATO: Absolutely. We can do that. Julia.

BOARD MEMBER ALTEMUS: Mr. Chairman,
it's actually in the packet, and it was on my screen. So it starts on Page 22. I believe it's in the packet. It's on Page 22, starts on Page 22 of the BER packet. If you go to the website and just open up the packet for the Board, it's I believe on Page 22 -- (inaudible) -- the wrong one but that is -- (inaudible) --

CHAIR RUFFATO: I am not able to do that, Julia, right now. I have to say that I looked through the packet and didn't find this order, but I could have easily missed it. I found the stipulation, but I didn't find the proposed order.

BOARD MEMBER ALTEMUS: Maybe I'm looking at the wrong thing. I apologize.

CHAIR RUFFATO: Katherine, please scroll down.

MS. ORR: Okay.

CHAIR RUFFATO: Please scroll down again. Let me ask a question. Is there somebody on the call that is representing the City of Great Falls?

MS. MARQUIS: Mr. Chairman, members of the Board. This is Vicki Marquis, with Holland and Hart in the Billings office, and I represent
the City of Great Falls in this matter.

CHAIR RUFFATO: Thank you, Ms. Marquis. Is this the order that the parties have agreed upon?

MS. MARQUIS: Mr. Chair, members of the Board. Yes, it is. This proposed order, along with the stipulation and Exhibits A and B, were all filed with the Hearing Examiner at the same time.

They do appear in different places in the Board packet. The stipulation, as has been noted, appears on Page 22 of the packet. Exhibits A and B, which are copies of the modified printed one that is in final form in Exhibit B, shows the changes and track changes. Those are found in the supplemental materials at Pages 17 and 42.

And this proposed order was filed at the same time, but it doesn't appear in the Board packet unfortunately. But yes, this is the same.

CHAIR RUFFATO: Thank you, Ms. Marquis.

Mr. Moser, are you on?

MR. MOSER: Yes, Mr. Chairman and members of the Board. I'm Kurt Moser. I represent DEQ in this matter. This is the order that we filed on June 14th with the other
documents.

CHAIR RUFFATO: Thank you. Well, then for the record, I'm going to make another motion. I'm going to move that we authorize me as Chair to execute this order as final agency action. Do I have a second to that motion?

BOARD MEMBER ALTEMUS: I'll second.

CHAIR RUFFATO: Thank you, Julia. A motion has been made and seconded that the Board authorize me to sign this order with the word "proposed" taken off of it as the final agency action. All in favor say aye.

(Response)

CHAIR RUFFATO: Opposed, same sign.

(No response)

CHAIR RUFFATO: Motion carries. I believe that disposes of this item. Is there any other comments or discussion we need to undertake with respect to this item?

(No response)

CHAIR RUFFATO: If not, then I'm going to move on to Action Item 2, and this relates to the Signal Peak matter. And Signal Peak had asked us to put this on the agenda, which we did. Specifically put on the agenda was the request by
Signal Peak to reclaim jurisdiction.

Following that request, the Hearing Examiner made a decision on the request for the Board to reclaim jurisdiction, and also issued her proposed findings of fact and conclusions of law; and then following that, Signal Peak requested this item to be removed from the agenda.

My inclination would be to just move on, but I wanted to make sure that there were no members on the Board that wanted to discuss this item or ask any questions.

(No response)

CHAIR RUFFATO: Hearing none, I'm going to move on to Item 3, and this is the selenium rule matter. This was a petition filed by Teck Coal to review the selenium rule that was adopted by the Board in December of 2020, specifically to review the rule pursuant to Montana Code Annotated 75-5-203, and that's essentially a statute that states that no rules can be adopted that are more stringent than the federal standard or guideline.

At this meeting, we are not going to address the merits of the petition, but the first question that we have to address is the process for addressing the petition.
And in that regard, I would note that Senate Bill 233, which removed rulemaking authority from the Board, potentially would impact our handling of this petition. And in that regard, I would note that contrary to what the agenda says, it says that this petition was filed on July 1st. We looked into that, and concluded that it was in fact filed on June 30th.

That distinction is critical, or it may be critical, I should say, because the Senate Bill 233 went into effect on July 1st, and it modified the controlling statute, the stringency statute, 75-5-203.

So the first thing I'd like to do, if there's no objection, I'd like to ask a question of the petitioner to clarify what the petitioner is asking for. How does Senate Bill 233 affect that, in the petitioner's view? How does that affect the process? And what is the petitioner asking for in specific?

Who is representing -- Ms. Marquis, are you representing --

MS. MARQUIS: Mr. Chairman, members of the Board. My name is Vicki Marquis with Holland and Hart. I represent Teck Coal, filed the
petition that you have before you relative to the selenium rulemaking.

And I would direct your attention to Page 16 of the petition, the relief requested. And it's important to note here that this is a narrow petition. It's filed pursuant to the statute 75-5-203 subparagraph (4), so it's not a contested case. It is connected to rulemaking, but it does not reopen the entire rulemaking at this stage.

The other thing that's important is this is a rule that the Board promulgated, so the rulemaking record belongs to the Board, and that's important because of the responses to comments that were provided explaining this issue to the public were written by the Board, approved by the Board, and provided to the public as public notice.

So the first relief that's requested on Page 16 is for the Board to declare that the new rule is more stringent than the federal guideline for selenium in lentic water, and therefore the provisions of Montana Code Annotated 75-5-203 do apply.

We feel that that is a determination
that is well within the Board's authority to make
based on the statute, and based on the fact that
it's the Board rulemaking record that we're
talking about, and the Board actually promulgated
the rule.

Additionally, under Paragraph 2 of the
relief requested, we asked the Board to consider
what was published to or provided to the public in
terms of public notice, and make a determination
that the requisite notice to the public was not
provided, either initially or in subsequent
publication of the rule during its promulgation.

Again, it's our position that that is
within the Board's authority as the entity that
conducted the rulemaking, and was in charge of the
rulemaking record and the publications.

The third request for relief is similar,
and again, requires the Board to make a
determination based on the Board's record and the
notice to the public that was provided by the
Board during the promulgation.

The fourth request for relief again asks
the Board to take a look at its rulemaking record,
which is closed at this point, and is the universe
of the record for that promulgation; and consider
whether any of those items that are required by statute for a standard that is more stringent than federal can be supported by the rulemaking record as it stands, and we believe that they cannot. And then the final request is to initiate or direct further proceedings consistent with the statute. And again, we believe that the rulemaking record, as it stands, belongs to the Board, and it is well within the Board's authority to make determinations of what that record says, and what information is in that record, and how the statute that we've cited applies to the promulgated rule.

We do recognize there may be a question of who has rulemaking authority going forward, and if the Board were to determine that additional rulemaking is required, we've provided this provision to allow the Board to direct how that may occur, recognizing that this petition is directed at a rulemaking that the Board conducted, and it's the Board's rulemaking record.

Does that answer your question, Mr. Chairman, and members of the Board?

CHAIR RUFFATO: Do any members of the Board have any followup questions? And I don't
mean to get into this in any great detail, but I
did want the petitioner to explain.

Actually I have a question, Ms. Marquis.

Does the filing date of June 30th versus July 1st
have any bearing on your analysis?

MS. MARQUIS: Mr. Chairman, members of
the Board. Yes, it does. This was filed before
the effective date of the Senate Bill which
removed the rulemaking authority, to provide an
opportunity for the Board to own this rulemaking,
and direct actions going forward.

It's an acknowledgment that this
rulemaking was conducted by the Board, and any
further actions should necessarily involve the
Board going forward.

CHAIR RUFFATO: Thank you. Before we
move on, I want to ask if there's anyone from DEQ
that has any comments in response to Ms. Marquis's
comments. You may not be prepared to do that and
that's fine, but if there is someone from DEQ that
represents the DEQ that has some comments, I would
invite those now.

MR. MOSER: Mr. Chairman and members of
the Board. This is Kurt Moser. I'm standing in
for Kirsten Bowers today, and who was I guess on
this matter for DEQ. I just wanted to let you know we are intending to intervene in this petition, and should be filing something fairly soon along those lines.

I guess I'd rather not comment any more, other than to say I am aware that in the Board's record, there is an analysis that was done that the Board adopted already, and the Board has already concluded that the selenium standards that were adopted were not more stringent than federal. So there was a specific analysis that was done that the Board adopted that is within its record that states that.

CHAIR RUFFATO: Thank you, Mr. Moser. I'm not going to ask you for additional comments on this because I think there are potential questions on how we proceed. And so first of all I want to ask the Board members if you have any comments, questions, about the matters that we're discussing.

BOARD MEMBER LEHNHERR: Chair Ruffato.

BOARD MEMBER ALTEMUS: I'm sorry. Go ahead.

BOARD MEMBER LEHNHERR: Go ahead.

BOARD MEMBER ALTEMUS: Members of the
Board, I just want to bring to your attention --
and this may or may not have anything to do with
what we're talking about now with the review of
the rule -- but the Water Policy Interim Committee
is looking at this issue, and they were given a
similar bill, House Bill 77, is that the standard
relating to Lake Kookanusa. So it is under review
by that Water Policy publicly -- (inaudible) --
and coming up with some proposed legislation for
the 2023 legislative session. If you're not
aware, I just want to make you aware of that
situation. Thank you.

CHAIR RUFFATO: Thank you, Julia. Dr.
Lehnherr.

BOARD MEMBER LEHNHERR: Yes. I find it
interesting. Later on the Copper Ridge case came
up, and it's sort of being held up as an example
of a case that is complex, and convoluted, and may
represent some inefficiencies or issues that need
to be addressed.

But I think this case is a great case of
a real waste of the Board's time. This issue was
dealt with last year, and came to a very
scientifically sound conclusion that was in the
best interests of Montana and its water ways, and
that now we have a corporation trying to circumvent the DEQ.

And so I would say we should just do whatever we can to avoid further involvement with this case, and let the good judgment that the Board made last year stand. That's my comment.

Thank you.

CHAIR RUFFATO: Thank you, Doctor. Any other discussion by Board members?

BOARD MEMBER SIMPSON: Mr. Chairman, can you hear me?

CHAIR RUFFATO: I can, David. Welcome.

BOARD MEMBER SIMPSON: I have been fighting with my computer here for the last 50 minutes. I think I've finally been able to join the meeting. So I apologize for not joining earlier, but for some reason my Zoom program wasn't working right.

Anyway, as far as this issue goes, I guess the only comment I have is that it sounds as if there have been some procedural questions raised with regard to administrative procedure as far as adoption of the final rule. And if there is an issue to be discussed, that would appear to be it.
CHAIR RUFFATO: Thank you, David. Any other comments or discussion by Board members?

(No response)

CHAIR RUFFATO: As I stated, I think the first thing, we need to deal with this petition. I'm not comfortable. I don't know the correct procedure to follow.

And so what I'm going to move is that the Board Counsel draft a public notice requesting written comments on the appropriate process for addressing the Teck Coal petition. Those written comments are to be filed by September 24th -- that's two weeks in advance of our October 8th meeting -- and that this Board will address the question of process at our October 8th meeting. Is there a second to my motion?

BOARD MEMBER SIMPSON: Second.

CHAIR RUFFATO: Discussion.

(No response)

CHAIR RUFFATO: Is there any discussion by Board members?

(No response)

CHAIR RUFFATO: Absent any discussion, I call the question. All in favor of the motion say aye.
(Response)

CHAIR RUFFATO: Opposed, same sign.

BOARD MEMBER LEHNHERR: Nay.

CHAIR RUFFATO: The motion passes. So Katherine, if you would draft a public notice pursuant to my motion, we will get that posted, and then we will address this question of process; not the merits, but the question of process at the October 8th meeting.

MS. ORR: Okay. So noted.

CHAIR RUFFATO: Thank you, Katherine. I'm going to move on to the new cases. I think we're at a good breaking point. Why don't we take a ten minute break, and then come back and go to the new cases.

And then David, at some point before the end of the meeting I'm going to want to discuss your memo to the Board, and the issue that you raised. And I'll give you warning. I'm going to ask you to give a little initial presentation of your proposal. But we won't do that -- We'll probably do that just before the general public comment, so kind of the last item before the general public comment. So let's take a ten minute break, and let's be back at 10:05.
(Recess taken)

(Board Member Hanson not present)

(Board Member Smith not present)

CHAIR RUFFATO: I'm going to call the meeting back into order, and I would ask Regan to take roll.

MS. SIDNER: Steve Ruffato.

CHAIR RUFFATO: Here.

MS. SIDNER: Board Member Lehnherr.

BOARD MEMBER LEHNHERR: Here.

MS. SIDNER: Board Member Smith.

(No response)

MS. SIDNER: Board Member Smith.

(No response)

MS. SIDNER: Board Member Simpson.

BOARD MEMBER SIMPSON: Here.

MS. SIDNER: Board Member Hanson.

(No response)

MS. SIDNER: Board Member Hanson.

(No response)

MS. SIDNER: Board Member Altemus.

BOARD MEMBER ALTEMUS: Here.

MS. SIDNER: And Board Member Reiten.

(No response)

MS. SIDNER: We have four.
CHAIR RUFFATO: Thank you, Regan. I think we will wait for Joe to come back. Board Member Hanson has sent an email and said that she would not be available between ten and eleven. So let's wait a moment for Board Member Smith.

(Board Member Smith present)

BOARD MEMBER SMITH: Can you hear me now?

CHAIR RUFFATO: Thank you, Joe.

MS. MARQUIS: Mr. Chairman, members of the Board.

CHAIR RUFFATO: Yes.

MS. MARQUIS: I'm very sorry to interrupt. I was looking for a way to do this gracefully.

I talked to Ms. Orr over the break, and I wondered if I could ask one thing of the Board, one clarification on the motion that you made in regard to the selenium petition.

And that is I understand you're asking for public comment on what process to use when considering the petition, and I would ask as the petitioner if we could file a response to those public comments, request to file comments, that as the petitioner I believe it would be appropriate
for us to respond to the public comments.

And we could do that within a week after the deadline you've set for the public comment, so that it would not hold up the meeting process. I do understand that the statute gives the Board eight months to deal with this issue, so it's not a huge amount of time we have to work with, so I wanted to raise that and ask for that accommodation, please, or that extra step.

And then I did also just want to clarify that it's our understanding that the study being conducted by the legislative interim committee is based on a joint resolution that is really targeting the technical aspects of the rule, and really gets into the details and the science behind it, which is separate from what this petition is asking, which is strictly narrow to the statute of the no more stringent than federal requirement. Thank you for letting me jump in with that.

CHAIR RUFFATO: Thank you, Ms. Marquis. Katherine, can I ask you what your thoughts are on the request.

MS. ORR: Mr. Chairman, members of the Board. I think it's a reasonable request. I
would suggest that the Department also be able to provide responses to the comments to make the process fair, I guess.

CHAIR RUFFATO: That makes sense, and I would add not just the Department. I would add anybody. Because I view this as -- and tell me if I'm mistaken -- but I view this as a broader issue than just between --

MS. ORR: Yes.

CHAIR RUFFATO: -- between Teck and DEQ. So rather than amend the prior motion, I would make another motion that would say that -- I'm going to say that to give the Board and the staff time to get this in the packet, we would need those comments no later than the end of the day on Wednesday before the Board agenda goes out. So I don't have a calendar in front of me, but I'm guessing that would be the 5th; is that correct?

MS. SIDNER: Chair Ruffato, the Board meeting I believe is October 8th, which means the Board materials are posted on line October 1st, so fairly quick before that. It would be September 29th.

CHAIR RUFFATO: Thank you. Thanks for that correction. So my motion is that the
petitioner, or that anyone, that the public notice will allow the petitioner and anyone else to file responses to the comments that are filed by September 24th no later than September 29th. Do I have a second to that motion?

BOARD MEMBER SIMPSON: Second.

CHAIR RUFFATO: Any discussion?

BOARD MEMBER SIMPSON: Just to go through it one more time, could we please kind of recap the substance of what we're doing here?

CHAIR RUFFATO: We're going to put out a public notice that the Board will be receiving written comments by September 24th on the process for dealing with Teck Coal's petition; and then we'll receive comments from anybody by September 29th responding, responsive comments, by September 29th. Does that make sense, Dave?

BOARD MEMBER SIMPSON: Yes, it makes sense. I must have misunderstood the first motion that was made on the subject, because my understanding at that time was that we're going to ask for a legal review of the procedural issues that were raised in the petition.

CHAIR RUFFATO: I don't think -- I think your understanding is correct, but the legal
review will be based upon the comments that will be made, and the reason for that is that I don't think there is a statutory or regulatory answer that is clear based upon the statutes and regulations as to what the process should look like, especially given SB233.

So we want the petitioner and other folks to weigh in on that, so we have the best information available to make a decision on that procedural process.

BOARD MEMBER SIMPSON: Okay.
Understood. I missed that fine point. Thank you.

CHAIR RUFFATO: Any other discussion?
(No response)

CHAIR RUFFATO: A motion has been made and seconded that the public notice that Board Counsel drafts will allow for written comments in response to the initial comments to be filed no later than the end of the day on September 29th. All in favor, say aye.

(Response)

CHAIR RUFFATO: Opposed, same sign.
(No response)

CHAIR RUFFATO: The motion passes.
Then we're going to move on to new
cases. The first one is the notice of appeal and request for hearing by Westmoreland and Rosebud Mining regarding MPDES Permit No. MT00223965. That was a request for a hearing to address -- or an appeal from a very narrow, but technical point, on electrical conductivity.

The Board, our task today is to decide whether we retain this case, assign this case to a Hearing Examiner in part or in whole. Do we have a motion from the Board to initiate discussion? Upon which to base our discussion, I should say.

BOARD MEMBER SIMPSON: I'll make that motion that the case be referred to a Hearing Examiner.

CHAIR RUFFATO: Is there a second?

Dave, allow me to clarify, and do you mean in whole or in part? I'll state that a little differently. Do we want it referred for procedural matters only, or for procedures and substance?

And recall that by referring it to the Hearing Examiner, we will then have an opportunity to review the proposed findings of fact and conclusions of law that are ultimately proposed by the Hearing Examiner.
So having spoken too much already, David, I'm going to ask you. Are you wanting to refer this for procedural matters only, or for procedure and substantive matters?

BOARD MEMBER SIMPSON: My motion is to refer it for both procedural and substantive matters. I'm a little confused as to how procedural issues relate to electrical conductivity, but just for clarification, I believe we already have a case having to do with MPDES and Rosebud Mine. Am I not mistaken?

CHAIR RUFFATO: I'm not sure, David. I'm looking back. I'm not seeing it, David.

BOARD MEMBER SIMPSON: I think it goes back some time. I believe it may be in the District Court. It may have already been decided. Well, it's just a question. I don't think it's related to this particular issue.

CHAIR RUFFATO: Do I have a second on the motion to assign ALS as a Hearing Examiner for this matter both as to substance and procedure?

BOARD MEMBER LEHNHERR: I'll second the motion.

CHAIR RUFFATO: Thank you, Doctor. Discussion?
(No response)

CHAIR RUFFATO: Any discussion on the motion that's been made and seconded?
(No response)

CHAIR RUFFATO: Just so we have at least one point of discussion, I agree with the motion. Any further discussion?
(No response)

CHAIR RUFFATO: A motion has been made and seconded that we refer the Westmoreland and Rosebud Mining Company appeal and request to a Hearing Examiner/ALS for both substantive and procedural matters. All in favor, say aye.
(Response)

CHAIR RUFFATO: Opposed, same sign.
(No response)

CHAIR RUFFATO: The motion passes unanimously.

We will move on to the second item.

This is the notice of appeal and request for hearing by Oreo's Refining regarding solid waste license 574, and we have essentially the same question again, and that is what do we do initially.

And we have the two basic points,
whether we assign it or retain it. If we assign it, to what extent do we assign it. But I would add that I think possibly we might consider other options here. But before I go into that, I want to ask is Ms. Mitchell on this call? Thank you. I see you. And is there someone from the DEQ that is on the call that is familiar with this, and representing DEQ?

MR. WHITAKER: Yes, Mr. Chair, members of the Board. This is Nick Whitaker, staff attorney with DEQ representing DEQ in this matter.

CHAIR RUFFATO: Thank you, Mr. Whitaker. I don't want to get into any merits or anything here. I would make an observation that from reading the documents that were filed with the notice of appeal, it looks on its face like this could or should be a matter that might be likely to be able to be resolved fairly quickly. And my question to both Ms. Mitchell and to Mr. Whitaker is: Is this a matter it looks like could be resolved fairly quickly?

(No response)

CHAIR RUFFATO: Ms. Mitchell, do you have a thought on that? You're muted. Can you unmute yourself? There you are.
MS. MITCHELL: Yes. I believe it can be, and it should have never gotten to this point. They just have not communicated with me.

CHAIR RUFFATO: Thank you. I don't want to get into the merits. I just want to ask that question. Mr. Whitaker, do you think this is something that is likely to be resolved fairly quickly?

MR. WHITAKER: Mr. Chair, I will say possibly at this point, but I just don't want to make any guarantees in regard to that.

CHAIR RUFFATO: Okay. Thank you. Board members, we need to make a decision. I have to say myself I'm a little reluctant to assign this to a Hearing Examiner, and start the process that could get fairly complicated procedurally pretty quickly if there's a good chance that this could be resolved quickly or fairly quickly.

So at this point, I would entertain a motion or discussion on the points that we've talked about so far.

BOARD MEMBER SMITH: Chairman Ruffato, I think it would be good to discuss specifically what our options are other than assigning this to a case examiner.
CHAIR RUFFATO: Good point. I was being kind of a nebulous on that, wasn't I? I'm sorry.

I've given this some thought, and there are a couple of things that come to my mind. We could postpone a decision in hopes that the parties can get this resolved quickly, and thereby avoid a waste of resources with a lengthy process. We could ask the parties to try to get it resolved over the next some period of time, and then give us notice, and then we can act after that.

I also thought that this might be an instance where the informal procedure that Mr. Simpson is going to talk about might be appropriate. Those are my thoughts, but those are just my thoughts.

BOARD MEMBER SMITH: I think that leads to my next question. One of those options would be let the two parties work it out amongst themselves between now and sometime probably the next Board meeting. Is that something they're interested in?

CHAIR RUFFATO: I don't want to put them on the spot any further than obviously the petitioner or the appellant is, and DEQ has indicated a willingness possibly of doing that.
So I think I don't want to put them on the spot any further. Is that okay?

BOARD MEMBER SMITH: (Nods head)

CHAIR RUFFATO: Because they weren't prepared to really respond to those questions, but --

MS. MITCHELL: I was.

CHAIR RUFFATO: Yes, you were. I'm sorry. I mean we can give them that time. Actually my thought would be less than two months, because you can tell from the petition that this is a pretty time sensitive matter for the appellant. And so I would be inclined to give them maybe a month to try to figure it out, and if that doesn't work, then take the next step, and I think we could build that into a motion.

MS. ORR: Mr. Chairman, may I jump in here?

CHAIR RUFFATO: Please.

MS. ORR: Mr. Chairman, members of the Board. What we have here is an appeal, and you're asking really for the appeal to be, shall we say, delayed or suspended. And I would I guess be deferential to the parties in terms of whether they -- especially the appellant, whether she
wants to go ahead, because it is filed, and it is a contested case now.

One option would be for the Board to take responsibility for the case, not assign it, and then issue an order setting forth the time frames for bringing it to hearing, and in that order there would be an option for them to waive the formal hearing process, and to go into the process that Board Member Simpson was recommending that does exist in the Administrative Procedure Act. I didn't know if you wanted to go that route, but you do have an appeal before you.

CHAIR RUFFATO: I am not opposed to what you're suggesting. What I hear you saying is that at this point at least, the Board would retain jurisdiction, would give the parties -- and the Board would issue an order that gave the parties a period of time to resolve it. If it's not resolved by that period of time, then the Board would issue an order, essentially a scheduling order, that would also include the option to use an informal process.

MS. ORR: That's correct, Mr. Chairman.

CHAIR RUFFATO: I will try to state that as a motion if no one else wants to, and then we
can see if it gets a second, and then we can
discuss it.

I will move that the Board retain
jurisdiction of this matter, and that the Board
issue an order requesting the parties to report
back to the Board by September 10th as to whether
or not an early resolution has been made. If not,
then following that September 10th report from the
parties, if it hasn't been resolved, the Board
will issue a scheduling order scheduling a
hearing.

BOARD MEMBER SIMPSON: Second.

CHAIR RUFFATO: Discussion.

BOARD MEMBER LEHNHERR: Chairman Ruffato.

CHAIR RUFFATO: Yes, Doctor.

BOARD MEMBER LEHNHERR: I'm just wanting
some clarification. So if we say schedule a
hearing, would that be different than assigning it
to a Hearing Examiner?

CHAIR RUFFATO: Yes, it would be.

Actually I want to amend my motion to also include
in the order the option to handle it through the
informal procedure. Dave, are you willing to
accept that addition to the motion as the
BOARD MEMBER SIMPSON: Yes, Mr. Chairman.

CHAIR RUFFATO: So in answer to your question, David, we would retain jurisdiction, and then set a hearing for this matter if it hasn't been resolved, or the parties don't agree to an informal process.

And the informal process, if you read David's material, it does not involve a formal hearing.

BOARD MEMBER LEHNHERR: Thank you.

CHAIR RUFFATO: Any further discussion?

MR. WHITAKER: Mr. Chair, this is Nick Whitaker again. I just want to make sure I'm clear on what that next step after September 10th, if it this doesn't get resolved before then, looks like, and just to make sure.

We're making no decisions at that point as far as what the process is. All the parties are reserving their rights to agree to or not as far as the informal process goes, and as well if when you say issuing a scheduling order, setting a hearing, if it does go to formal process, and we'd reserve the right to have all of the prehearing
process as well under that formal proceeding. I'm not sure that made sense.

CHAIR RUFFATO: I think I understand. And Mr. Whitaker, the Board Counsel would draft that scheduling order, and the option for an informal process with some time frames; and if the parties do not agree to an informal process, then we would be into the more formal process with the prehearing procedures that you describe, which are the ones that are intended to be avoided by the informal process.

BOARD MEMBER SIMPSON: Mr. Chairman, this is Dave Simpson. I share your concern about referring, assigning this case to a Hearing Examiner, because as you pointed out, time is of the essence. It could drag on for a very long time.

On the other hand, I guess I'd raise the question. If we did take that route, and assign it to a Hearing Examiner, as I understand the informal process that's authorized by the rules -- and we're going to talk about that in a little bit. We're getting maybe a little bit ahead of ourselves.

The informal process is contingent on
agreement on the facts, that is stipulation to the facts, and at that point, all of the discovery and so on can be waived, and the process moves forward to a hearing, which would be either in front of a Hearing Examiner or in front of the Board at the Board's discretion.

So I'm just a little uncertain. I guess I'd ask the question. If we were to go that route, and refer it to a Hearing Examiner, what would happen? That is, what we've seen happen in some previous cases is that immediately scheduling orders, the first thing that happens is a scheduling order, and then we start talking about discovery, and so on and so forth.

This case appears to be rather straightforward. It would seem to me that a hearing, whether it was conducted by the Board or a Hearing Examiner, could be done fairly quickly if the parties agree to what the issue is here, if they agree to the facts. And so we have heard from the petitioner. We have not heard from the Department, which makes it kind of hard to decide which way to go on it.

CHAIR RUFFATO: David, I share your concern, but I don't think it's appropriate for us
to press the parties for more arguments and for
more points at this point. We're too premature.

But I think that one thing you said that
I would agree with, that if we assign it to a
Hearing Examiner, that starts the process down the
typical road of discovery, prehearing motions, and
all of that, which as you point out could be time
consuming and resource consuming. So that is the
reason why I have moved that we retain
jurisdiction and handle it in the way that we
have.

And I don't think the Board -- It's my
thought that if the informal process is not
accepted by both parties, I don't think the Board
is in a position to deny either party the normal
process that has been traditionally undertaken at
this point.

BOARD MEMBER SIMPSON: Agreed. I think
really what's at issue here is understanding and
defining just what that informal process is. And
so that being the case, my suggestion is that we
stick with the motion.

CHAIR RUFFATO: Right. And at this
point, David, all we have is the statute and what
it says. Maybe when we get done with your
proposal, we'll have more detail on that, but for
now all we have is the statute and the regulations
that deal with the informal process, and Board
Counsel will take those into consideration as she
drafts the order that this motion would call for.
Any more discussion?

(No response)
CHAIR RUFFATO: Any more discussion?
(No response)
CHAIR RUFFATO: Hearing none, I'll call
the question. All in favor of the motion say aye.

(Response)
CHAIR RUFFATO: Opposed, same sign.
(No response)
CHAIR RUFFATO: The motion passes. And
Katherine, we're loading you up here, another task
for you to draft an order to implement that, and
I'm happy to work with you on that.

MS. ORR: Thank you. I look forward to
it.

CHAIR RUFFATO: I think that deals with
everything except let's talk about the Board
Counsel update. I'm not sure if there's anything,
Katherine, but you may be have something.

MS. ORR: You might want to insert at
this time Board Member Simpson's presentation.

CHAIR RUFFATO: I agree. I thought we would just finish this update, and go from there to Board Member Simpson's --

MS. ORR: Okay. I have no further input at this time.

CHAIR RUFFATO: Thank you, Katherine. I have a couple of things for the Board Counsel and slash the Board secretary Regan.

At the October 8th meeting, we are going to have at least two pretty significant matters with I expect a lot of documentation, and I don't find that a week's time is really very adequate for the Board members to review all that, digest it, and process it.

So I'm asking, Katherine, can we get the documents? They all have to be filed by September 24th except for the responses now that we're going to get by September 29th. But can the Board get those as soon as they're filed so that we can start to review that?

MS. ORR: Chairman Ruffato, I think it should be possible.

CHAIR RUFFATO: So I make that request then, and secretary, please note that, so that we
can have those documents and start reviewing them as early as possible, so we're fully prepared for the October 8th meeting. Mr. Mathieus.

MR. MATHIEUS: I got a note from the Board secretary that her power went out, so she's momentarily offline, but I put in my notes that I noted your point.

CHAIR RUFFATO: Thank you. Okay. Mr. Simpson, Board Member Simpson, you presented us with a memo, and some other documents. I would like to have that discussion now. This is going back to agenda item under Administrative Items Agenda Item C. So the floor is yours, David.

BOARD MEMBER SIMPSON: Thank you very much, Mr. Chairman.

To go back a little bit, this whole idea was triggered by the April meeting where we had two cases to decide. The first was the Copper Ridge issue having to do with the sedimentation problem, the sedimentation issue. That case took six years to resolve.

And after reading through all of the background on that, and considering where the case had gone, I have to say I was pretty unhappy and frustrated with an issue taking that long to
resolve, and figure there has to be a better way.

The second issue, or the second case that came up was the Murry case, and that had to do with a subdivision issue up in the Malta area. And that one seemed to be, at least based on the issues at hand, a fairly uncomplicated case, but it was referred to us for dismissal because of procedural problems with discovery, and expert witnesses, etc., when the petitioner really didn't have any intent to go that direction. So it seemed to me that the standard, what we have come to recognize is the standard contested case procedure, be somewhat an overkill for that situation.

So I went back, and to familiarize myself with the statute and rules having to do with contested cases, and found that there is a statutory basis reflected in the regulations for an informal procedure under the Administrative Procedure Act.

I have no idea to what extent that procedure is in use or has been in use. Of course in a number of cases there are settlements that result through the process. But in the procedure as I understand it, there is an opportunity for an
informal conference between the parties to define the issues.

And one of the issues that would be discussed is whether or not there is agreement between the parties on the facts. If there's not agreement on the facts, it appears to me that there is no choice but to go ahead with the standard contested case procedure.

If there is agreement on the facts that can be stipulated, and a hearing can be held, either by a Hearing Examiner or by the Board -- which it's still -- It's process that is informal, not the hearing. It is a formal hearing, and the record is kept, and it can be appealed to District Court by either party if they're unhappy with the outcome.

That's my understanding of it. And I guess my first question is to Board Counsel, whether that's a correct interpretation, and to what extent the opportunity for an informal conference and an informal procedure is or has been utilized. Is there a standard practice?

Secondly, in order to implement a practice, is the statutory and regulatory background we have sufficient, or is this
something that the Board should consider writing rules on?

Because it seems to me that rather than go directly to a scheduling order that contemplates discovery, and expert witnesses, etc., etc., there should be an opportunity for a less formal procedure if it's appropriate.

Obviously it's not going to be appropriate for every case. In fact, a number of cases where it could be used might be relatively few. But anything that would help to move things forward and clear our docket would certainly be helpful in terms of efficiency in both time and resources.

So rather than go through the whole memo, I think you've seen it, and the legal background is quoted and cited there. So Mr. Chairman, I guess that wraps it up unless there are further questions.

CHAIR RUFFATO: Thank you, Mr. Simpson. I'm wondering. Your memo asks for a study, and I expect that Katherine could respond in part to your question, but I think it's more complicated than a response, an oral response now. That's my thinking.
I'm wondering if you want to make a motion that we direct Counsel to undertake that study, and provide initially a written report on that, on the questions you asked in your memo. But I'm open to that motion, or any other motion; or if the Board members would like to discuss this further before we make a motion, that's fine, too.

Mr. Mathieus.

MR. MATHIEUS: Mr. Chair, thank you. Just a couple of quick comments, and they're similar to the comments I made last Board meeting, so I want to make sure I'm being clear so that the Board understands where I'm coming from.

So last meeting we talked a little bit about budgets, and just my concern with budget. Those concerns have not changed.

So what I would ask is as you guys make decisions on -- I will just call them -- new things, if you will, that you want to do, like the concept of a rulemaking, I would just ask that you work with me, because I want to make sure I have the budget to do whatever it is you're proposing.

So here's something simple, is that I don't think it's a good use of either the Board's time or the public's time to hash that out in one
of these meetings, but I think I can sit down with either yourself or another Board member, and potentially Katherine, just to get our heads around, "These are the kind of things the Board wants to do over the next year. These are what we think it's going to cost," and then I could budget appropriately; or just even keep the Board informed if there is a budget for that.

So I'm just trying to be responsible. The money tree out front is pretty dry right now, so I just would ask that of the Board. Thank you.

CHAIR RUFFATO: Thank you, George. I was hoping that Board Member Simpson's proposal would be music to your ears because his proposal is intended to reduce the cost and resources that are being expended by these costly lengthy proceedings, so I was hoping that was the case.

MR. MATHIEUS: Understood. I just don't know what it's going to cost us to start that, but I understand. Thank you.

BOARD MEMBER SIMPSON: Mr. Chairman, as I said, I'm not certain that we need to go through a rulemaking process. Maybe we do. I also don't know whether a policy statement would be sufficient, that is, a policy statement would say
something to the effect that when these cases are referred to a Hearing Examiner, the Hearing Examiner's first responsibility is to hold an informal conference to define the issues, and determine if there is an alternate approach to the full contested case process, whether that be a mediation, dispute resolution process, or an abbreviated hearing process that would bypass all of the discovery and so on, and that typically goes with it.

So I have more questions than answers right now, so I suppose that the resolution to ask Board Counsel to put together responses to the questions that would be raised would be very helpful. I'll make that motion.

CHAIR RUFFATO: Is there a second to that motion?

(No response)

BOARD MEMBER LEHNHERR: I was just wanting to make sure I knew what the motion was. If we could get it restated somehow, that would be appreciated. Thank you.

CHAIR RUFFATO: David, I will try to restate the motion, and then you tell me if I'm wrong.
Board Member Simpson has made a motion
that we assign to the Board Counsel the task of
conducting a study to respond to your memo, and
the questions posed in that memo, and then come
back to the Board with a written response. Is
that stated accurately, David?

BOARD MEMBER SIMPSON: That's stated
accurately, and I unfortunately don't have a copy
of the memo right in front of me to be able to
read off what those questions are, but I think
we've pretty much covered them.

The question is, one of them was to what
extent informal procedure has been employed;
whether the statute and regulations are sufficient
to implement those processes; whether we need, the
Board needs to consider rulemaking, and I would
add to that whether a policy statement would be
sufficient.

But I would refer back to the memo. I
think there are four questions. And as I said, I
don't have a copy, and I don't have them committed
to memory right now.

CHAIR RUFFATO: That's fine, David.
Doctor, does that answer your question?

BOARD MEMBER LEHNHERR: Yes, thank you.
CHAIR RUFFATO: A motion has been made and seconded. Any further discussion?

BOARD MEMBER LEHNHERR: Chairman Ruffato.

CHAIR RUFFATO: Yes.

BOARD MEMBER LEHNHERR: I just wanted to say that I hope that we would not have to make decisions based on budgetary considerations, although that's often how the real world works, but it can also be a reflection of the consequences of inadequately funding state agencies, but then that's not really something we're involved with here.

In general, though, I support Board Member Simpson's idea of a study, and some clarification on a process of informal review of cases. Otherwise I suspect the issue will just sort of be hanging out there, and it might be an option that could be utilized but we don't utilize it because we don't have clarification about it. So I think a study would be a good idea.

CHAIR RUFFATO: Thank you, Doctor. Any more discussion?

(No response)

CHAIR RUFFATO: Any further discussion?
CHAIR RUFFATO: Hearing none, I will call the question. All in favor of the motion say aye.

CHAIR RUFFATO: Opposed.

CHAIR RUFFATO: So the motion has been made and seconded, and passed unanimously.

Before we move on, I wanted to make a couple of points that go to David's motion. Well, first of all, I've talked to Katherine about this a little bit, and she will likely assign another lawyer to do some research into this, and help with the study. I just wanted to let everyone know that that is out there.

I would also encourage Katherine and whoever she gets help from to feel free to consult with the Board members, and particularly Board Member Simpson, as the process goes, just to make sure that we get the questions answered.

And I would also refer Katherine to the round table that was mentioned at the last meeting from a year and a half ago, where those folks that generally practice in front of the Board had made
some recommendations. I had the sense that those recommendations were out there, but maybe hadn't been acted on, and they might bear upon this subject. So please follow up on that.

I had a note here to make sure we consult with Mr. Mathieus if we do this, so let's keep talking to Mr. Mathieus about the budgetary issues, and what that might take. I'm not sure if that happens during this process or after, but let's keep that in mind.

Then I wanted to point out a couple of things that I think are significant. I reviewed some Board policies in the last few days, and one of them is that the Board has a policy that when there's a request for a hearing that it come to a hearing within 120 days of filing the appeal. I think that has been honored in the breach a lot more than it's been honored. And so I think that if we as a Board, Hearing Examiners, and parties, would adhere to that goal, we would speed these things up.

And then I would suggest that this study include a goal for matters to come to the Board within a certain amount of time after a hearing, and I would think maybe that 120 days is a good
number, but I don't know if that's a good number. But I see lots of extensions, lots of delays, and those are often appropriate if there is good cause; but absent good cause, these things need to move along. One of the good causes obviously is if there is serious diligent settlement negotiations, you never want to preclude those.

And then I wanted to just call everybody's attention to Parkinson's Law, which says that, essentially says that work expands to fill the time allowed. And I think one of the things we should keep in mind is that's true; and a corollary to that is that as the work expands, the resources being expended expand. So we want to keep that time allowed tight enough to make it efficient.

Those are thoughts that I would pass on to Katherine and whoever she's working with as they go forward. Any more discussion on this point before we move on?

MS. ORR: Mr. Chair, I had a question.

CHAIR RUFFATO: Please. Go ahead.

MS. ORR: Would it be useful, would you like to know, have a brief analysis of why some of
these -- not why -- but the procedure that has
lengthened some of these hearings in the past,
some of these cases in the past?

I notice, for example, there's been
formal input to the Board from decisions of the
Hearing Officer either on discovery or summary
judgment motions that were partial summary
judgment motions, and that can considerably
contribute to delay. And I would be glad, if
you're interested, to sort of analyze some of
these cases for those delaying measures.

Some of them I think were encouraged.
Like there was an example where the Board tasked
the Hearing Examiner to write a response or an
order for a summary judgment motion, and then it
went back before the Board, and it went back and
forth.

I would suggest that that process can be
foreshortened, but first of all, you may want an
analysis of what has happened in the past,
realizing that Parkinson's Law should not take
over.

CHAIR RUFFATO: I personally would be
delighted if your study includes that kind of
analysis. Anything that can improve the process
or may improve the process, let's talk about it. Anything else?

MS. ORR: No, Mr. Chair. Thank you for that clarification.

CHAIR RUFFATO: If there's no other discussion on this point, let's go to general public comment. Dave.

BOARD MEMBER SIMPSON: Mr. Chairman.

CHAIR RUFFATO: Go ahead, Dave.

BOARD MEMBER SIMPSON: This is Dave. One other question I'd like to ask before we move on. Is there any chance that we will be returning to in-person meetings anytime in the near future?

CHAIR RUFFATO: I don't have the answer to that question, but Mr. Mathieus maybe does.

MR. MATHIEUS: Mr. Chair, I'm anticipating that the answer is yes.

CHAIR RUFFATO: Good. Thank you.

BOARD MEMBER SIMPSON: The answer is yes?

CHAIR RUFFATO: That's what he said.

MR. MATHIEUS: We're working on it.

BOARD MEMBER SIMPSON: Thank you very much. I much prefer in-person meetings anyway, but after fighting with my Zoom this morning for
more than a half hour just trying to join the
meeting, it left me pretty frustrated.

MR. MATHIEUS: Mr. Chair, I would just
add that obviously the entire executive is looking
at this issue, and coming up with a consistent
way. I think hybrid meetings, as I'll call them,
are probably here to stay, but we're working
towards what that looks like in the upcoming --

BOARD MEMBER LEHNHERR: Thank you.

CHAIR RUFFATO: Thank you, Mr. Mathieus.

Dr. Lehnherr.

BOARD MEMBER LEHNHERR: I would just say
that -- Mr. Mathieus has addressed it somewhat --
but I think we should, no matter what, always
retain an option for a Zoom option or something
like that. I guess that would be a hybrid
meeting.

CHAIR RUFFATO: Thank you. I agree,
David. Any other discussion?

(No response)

CHAIR RUFFATO: Okay. We're going to go
to the general public comment, and keep in mind
that this is only for matters that were not
already on the agenda, and we're not to discuss
contested cases. So is there any general public
comment that falls into what's left there? Which probably isn't a lot, but maybe there is something. Yes.

MS. KELLNER: Mr. Chairman, and members of the Committee. I'm Marie Kellner with Idaho Conservation League, and I actually have a question about that, because what I was here to provide just a very brief comment was related to one of the things on your agenda, but it is the selenium standard -- not the process, but the standard itself. And I wondered if that was appropriate or not.

CHAIR RUFFATO: It's not within the guidelines, Ms. Kellner. And the way I see this process going, you will have that opportunity, but I don't want to open it up to that right now.

MS. KELLNER: Thank you very much. I realized as I was reading the public comment guidelines. It wasn't clear to me exactly. We certainly don't want to overstep bounds.

Just when I have a moment, I want to say while I'm familiar with the adage, I've never heard the term "Parkinson's Law," so thank you for educating this morning because I see it all the time. Thank you.
CHAIR RUFFATO: Thank you. Any other public comment?

(No response)

CHAIR RUFFATO: Any other public comment?

(No response)

CHAIR RUFFATO: Then I will entertain a motion to adjourn.

BOARD MEMBER LEHNHERR: I move that we adjourn the meeting.

CHAIR RUFFATO: Thank you, Doctor.

Second.

MS. ALTEMUS: Second. This is Julia.

CHAIR RUFFATO: All in favor, say aye.

(Response)

CHAIR RUFFATO: Opposed.

(No response)

CHAIR RUFFATO: Motion passes unanimously, and thank you everyone for participating. I think it was a good meeting.

Thank you.

(The proceedings were concluded at 11:09 a.m.)

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C E R T I F I C A T E

STATE OF MONTANA

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 - 68 - pages contain a true
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IN WITNESS WHEREOF, I have hereunto set my
hand and affixed my notarial seal this 14th day of
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LAURIE CRUTCHER, RPR
Court Reporter - Notary Public

My commission expires
March 9, 2024.
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necessary - 15:15
needs - 59:16
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