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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

PREPARED BY: LAURIE CRUTCHER, RPR
COURT REPORTER, NOTARY PUBLIC
lauriecrutcher@gmail.com

1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 (Board Member Simpson not present)

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

8 MS. SIDNER: I will. Chair Ruffato.

9 CHAIR RUFFATO: Here.

10 MS. SIDNER: Board Member Lehnherr.

11 BOARD MEMBER LEHNHERR: Here.

12 MS. SIDNER: Board Member Smith.

13 BOARD MEMBER SMITH: Here.

14 MS. SIDNER: Board Member Simpson.

15 (No response)

16 MS. SIDNER: Board Member Simpson.

17 (No response)

18 MS. SIDNER: Board Member Hanson.

19 (No response)

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

23 (No response)

24 MS. SIDNER: Board Member Altemus.

25 BOARD MEMBER ALTEMUS: Good morning.

1 CHAIR RUFFATO: Board Member Reiten.

2 (No response)

3 MS. SIDNER: Board Member Reiten.

4 (No response)

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

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

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

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

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

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

23 MS. SIDNER: John Martin; Catherine
24 Laughner; Kaitlyn Buzzas; Clayton Elliott; Brian
25 Balmer; Marie Kellner; Paul Skubinna; S. R.

1 Yemington; Tanya Fish; Andrew Cziok; Tamara
2 Johnson; Julia Giffin; Randal McNair; Stu Levitt;
3 William Hollahan; our Court Reporter, Laurie
4 Crutcher; our Board attorney Katherine Orr; Vicki
5 Marquis. We do have one phone connectee. If you
6 could give us your name, that would be great.

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

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

11 (No response)

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

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

16 CHAIR RUFFATO: Thank you, Regan.

17 MS. SIDNER: Ann Sexton.

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

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

25 BOARD MEMBER SMITH: So moved.

1 CHAIR RUFFATO: And a second.

2 BOARD MEMBER LEHNHERR: I'll second that
3 motion.

4 CHAIR RUFFATO: A motion has been made
5 and seconded to approve the minutes from the June
6 11th meeting. Any discussion?

7 (No response)

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

10 (Response)

11 CHAIR RUFFATO: Opposed, same sign.

12 (No response)

13 CHAIR RUFFATO: Motion passes
14 unanimously.

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

18 (No response)

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

22 I just want to take this opportunity to
23 remind all the Board members, myself included, and
24 all the parties, to be diligent to avoid ex parte
25 communications and contacts.

1 I raise this because I had an attempted
2 contact, ex parte contact. I shut it down. I'm
3 sure that the individual involved, I'm sure that
4 person's intentions were fine and well meaning,
5 but we need to be cautious of avoiding ex parte
6 contacts. Any discussion from the Board on that
7 point?

8 (No response)

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

12 (No response)

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

19 Moving on to Administrative Item D.
20 This item relates to a matter that has come up a
21 couple times in 2021, and that is the situations
22 where we have little or no information about new
23 cases, and this Board has to make a decision about
24 whether to assign the cases, or the case. And we
25 have talked about the fact that it's not

1 comfortable making that decision in a vacuum with
2 no information about the case, or at least not
3 adequate information.

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

13 BOARD MEMBER SMITH: I'll second that.

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

20 As far as discussion, the first point of
21 discussion would be to say that this has occurred
22 twice in 2021 where we didn't have adequate
23 information. It's not true of the new cases this
24 time. So most of the time I think we will have it
25 based upon the notice of appeal, but there are

1 times when we don't. That's the reason why I⁸
2 think it's a good idea. Any other discussion?

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

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

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

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

19 (No response)

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

23 (Response)

24 CHAIR RUFFATO: Opposed, same sign.

25 (No response)

1 CHAIR RUFFATO: The motion passes
2 unanimously.

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

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

25 I bring this up just for clarification

1 purposes, and kind of as a housekeeping matter. I
2 think on the next agenda we will reword the
3 briefing statements to reflect the action that the
4 Board took on October 9th. Is there any
5 discussion of this point?

6 (No response)

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

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

12 MR. MARTIN: Mr. Chairman.

13 CHAIR RUFFATO: Yes, Mr. Martin.

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

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

23 And I don't think at this time it's
24 appropriate for me to go into any more detail,
25 unless of course, Mr. Chairman, you or another

1 member of the Board would have a question. Thank
2 you.

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

5 (No response)

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

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

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

22 So going back to the first point,
23 Hearing Examiners and Katherine, are there any
24 updates or changes that you're aware of from the
25 written descriptions in the agenda?

1 MS. ORR: Good morning, Mr. Chair,
2 members of the Board. Katherine Orr speaking.

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

12 CHAIR RUFFATO: Thank you, Katherine.
13 And I agree. I will pause for any Hearing
14 Examiner that wants to speak up.

15 (No response)

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

21 (No response)

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

25 But I'm looking on Page 8 Item (h) which

1 is the Keystone XL Pipeline matter where Northern
2 Plains Resource Council and Sierra Club filed a
3 Notice of Appeal. And I saw in the materials that
4 there is a proposed order for Katherine Orr as
5 Hearing Examiner to sign to dismiss that matter.

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

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

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

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

17 CHAIR RUFFATO: Thank you.

18 MS. ORR: Mr. Chair, we're due for a
19 scheduling conference, as you see, on September
20 10th, so presumably the parties are in the process
21 of determining whether they're going to ask for a
22 dismissal now.

23 CHAIR RUFFATO: Okay. Thank you. I
24 have no other questions. Any other questions from
25 Board members on briefing items?

1 (No response)

2 (Board Member Simpson present)

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

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

17 (No response)

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

22 BOARD MEMBER LEHNHERR: I'll second that
23 motion.

24 CHAIR RUFFATO: Thank you, Doctor.
25 Discussion?

1 (No response)

2 (Share screen)

3 CHAIR RUFFATO: Any discussion?

4 (No response)

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

10 (Response)

11 CHAIR RUFFATO: Opposed, same sign.

12 (No response)

13 CHAIR RUFFATO: It passes unanimously.

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

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

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

25 MS. ORR: And I apologize that you

1 haven't seen this before, but this was a document
2 that was requested to be put in the Board packet,
3 and both parties have presented it.

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

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

13 (Share screen)

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

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

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

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

25 BOARD MEMBER ALTEMUS: Mr. Chairman,

1 it's actually in the packet, and it was on my
2 screen. So it starts on Page 22. I believe it's
3 in the packet. It's on Page 22, starts on Page 22
4 of the BER packet. If you go to the website and
5 just open up the packet for the Board, it's I
6 believe on Page 22 -- (inaudible) -- the wrong one
7 but that is -- (inaudible) --

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

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

16 CHAIR RUFFATO: Katherine, please scroll
17 down.

18 MS. ORR: Okay.

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

23 MS. MARQUIS: Mr. Chairman, members of
24 the Board. This is Vicki Marquis, with Holland
25 and Hart in the Billings office, and I represent

1 the City of Great Falls in this matter.

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

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

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

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

20 CHAIR RUFFATO: Thank you, Ms. Marquis.
21 Mr. Moser, are you on?

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

1 documents.

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

7 BOARD MEMBER ALTEMUS: I'll second.

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

13 (Response)

14 CHAIR RUFFATO: Opposed, same sign.

15 (No response)

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

20 (No response)

21 CHAIR RUFFATO: If not, then I'm going
22 to move on to Action Item 2, and this relates to
23 the Signal Peak matter. And Signal Peak had asked
24 us to put this on the agenda, which we did.

25 Specifically put on the agenda was the request by

1 Signal Peak to reclaim jurisdiction.

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

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

12 (No response)

13 CHAIR RUFFATO: Hearing none, I'm going
14 to move on to Item 3, and this is the selenium
15 rule matter. This was a petition filed by Teck
16 Coal to review the selenium rule that was adopted
17 by the Board in December of 2020, specifically to
18 review the rule pursuant to Montana Code Annotated
19 75-5-203, and that's essentially a statute that
20 states that no rules can be adopted that are more
21 stringent than the federal standard or guideline.

22 At this meeting, we are not going to
23 address the merits of the petition, but the first
24 question that we have to address is the process
25 for addressing the petition.

1 And in that regard, I would note that
2 Senate Bill 233, which removed rulemaking
3 authority from the Board, potentially would impact
4 our handling of this petition. And in that
5 regard, I would note that contrary to what the
6 agenda says, it says that this petition was filed
7 on July 1st. We looked into that, and concluded
8 that it was in fact filed on June 30th.

9 That distinction is critical, or it may
10 be critical, I should say, because the Senate Bill
11 233 went into effect on July 1st, and it modified
12 the controlling statute, the stringency statute,
13 75-5-203.

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

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

23 MS. MARQUIS: Mr. Chairman, members of
24 the Board. My name is Vicki Marquis with Holland
25 and Hart. I represent Teck Coal, filed the

1 petition that you have before you relative to the
2 selenium rulemaking.

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

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

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

25 We feel that that is a determination

1 that is well within the Board's authority to make
2 based on the statute, and based on the fact that
3 it's the Board rulemaking record that we're
4 talking about, and the Board actually promulgated
5 the rule.

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

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

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

22 The fourth request for relief again asks
23 the Board to take a look at its rulemaking record,
24 which is closed at this point, and is the universe
25 of the record for that promulgation; and consider

1 whether any of those items that are required by
2 statute for a standard that is more stringent than
3 federal can be supported by the rulemaking record
4 as it stands, and we believe that they cannot.

5 And then the final request is to
6 initiate or direct further proceedings consistent
7 with the statute. And again, we believe that the
8 rulemaking record, as it stands, belongs to the
9 Board, and it is well within the Board's authority
10 to make determinations of what that record says,
11 and what information is in that record, and how
12 the statute that we've cited applies to the
13 promulgated rule.

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

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

24 CHAIR RUFFATO: Do any members of the
25 Board have any followup questions? And I don't

1 mean to get into this in any great detail, but I
2 did want the petitioner to explain.

3 Actually I have a question, Ms. Marquis.
4 Does the filing date of June 30th versus July 1st
5 have any bearing on your analysis?

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

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

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

23 MR. MOSER: Mr. Chairman and members of
24 the Board. This is Kurt Moser. I'm standing in
25 for Kirsten Bowers today, and who was I guess on

1 this matter for DEQ. I just wanted to let you
2 know we are intending to intervene in this
3 petition, and should be filing something fairly
4 soon along those lines.

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

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

21 BOARD MEMBER LEHNHERR: Chair Ruffato.

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

24 BOARD MEMBER LEHNHERR: Go ahead.

25 BOARD MEMBER ALTEMUS: Members of the

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

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

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

21 But I think this case is a great case of
22 a real waste of the Board's time. This issue was
23 dealt with last year, and came to a very
24 scientifically sound conclusion that was in the
25 best interests of Montana and its water ways, and

1 that now we have a corporation trying to
2 circumvent the DEQ.

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

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

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

12 CHAIR RUFFATO: I can, David. Welcome.

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

19 Anyway, as far as this issue goes, I
20 guess the only comment I have is that it sounds as
21 if there have been some procedural questions
22 raised with regard to administrative procedure as
23 far as adoption of the final rule. And if there
24 is an issue to be discussed, that would appear to
25 be it.

1 CHAIR RUFFATO: Thank you, David. Any
2 other comments or discussion by Board members?

3 (No response)

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

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

17 BOARD MEMBER SIMPSON: Second.

18 CHAIR RUFFATO: Discussion.

19 (No response)

20 CHAIR RUFFATO: Is there any discussion
21 by Board members?

22 (No response)

23 CHAIR RUFFATO: Absent any discussion, I
24 call the question. All in favor of the motion say
25 aye.

1 (Response)

2 CHAIR RUFFATO: Opposed, same sign.

3 BOARD MEMBER LEHNHERR: Nay.

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

10 MS. ORR: Okay. So noted.

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

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

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(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.

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

6 (Board Member Smith present)

7 BOARD MEMBER SMITH: Can you hear me
8 now?

9 CHAIR RUFFATO: Thank you, Joe.

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

12 CHAIR RUFFATO: Yes.

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

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

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

1 for us to respond to the public comments.

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

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

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

24 MS. ORR: Mr. Chairman, members of the
25 Board. I think it's a reasonable request. I

1 would suggest that the Department also be able to
2 provide responses to the comments to make the
3 process fair, I guess.

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

9 MS. ORR: Yes.

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

19 MS. SIDNER: Chair Ruffato, the Board
20 meeting I believe is October 8th, which means the
21 Board materials are posted on line October 1st, so
22 fairly quick before that. It would be September
23 29th.

24 CHAIR RUFFATO: Thank you. Thanks for
25 that correction. So my motion is that the

1 petitioner, or that anyone, that the public notice
2 will allow the petitioner and anyone else to file
3 responses to the comments that are filed by
4 September 24th no later than September 29th. Do I
5 have a second to that motion?

6 BOARD MEMBER SIMPSON: Second.

7 CHAIR RUFFATO: Any discussion?

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

11 CHAIR RUFFATO: We're going to put out a
12 public notice that the Board will be receiving
13 written comments by September 24th on the process
14 for dealing with Teck Coal's petition; and then
15 we'll receive comments from anybody by September
16 29th responding, responsive comments, by September
17 29th. Does that make sense, Dave?

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

24 CHAIR RUFFATO: I don't think -- I think
25 your understanding is correct, but the legal

1 review will be based upon the comments that will
2 be made, and the reason for that is that I don't
3 think there is a statutory or regulatory answer
4 that is clear based upon the statutes and
5 regulations as to what the process should look
6 like, especially given SB233.

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

11 BOARD MEMBER SIMPSON: Okay.

12 Understood. I missed that fine point. Thank you.

13 CHAIR RUFFATO: Any other discussion?

14 (No response)

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

21 (Response)

22 CHAIR RUFFATO: Opposed, same sign.

23 (No response)

24 CHAIR RUFFATO: The motion passes.

25 Then we're going to move on to new

1 cases. The first one is the notice of appeal and
2 request for hearing by Westmoreland and Rosebud
3 Mining regarding MPDES Permit No. MT00223965.
4 That was a request for a hearing to address -- or
5 an appeal from a very narrow, but technical point,
6 on electrical conductivity.

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

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

15 CHAIR RUFFATO: Is there a second?

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

21 And recall that by referring it to the
22 Hearing Examiner, we will then have an opportunity
23 to review the proposed findings of fact and
24 conclusions of law that are ultimately proposed by
25 the Hearing Examiner.

1 So having spoken too much already,
2 David, I'm going to ask you. Are you wanting to
3 refer this for procedural matters only, or for
4 procedure and substantive matters?

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

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

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

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

22 BOARD MEMBER LEHNHERR: I'll second the
23 motion.

24 CHAIR RUFFATO: Thank you, Doctor.
25 Discussion?

1 (No response)

2 CHAIR RUFFATO: Any discussion on the
3 motion that's been made and seconded?

4 (No response)

5 CHAIR RUFFATO: Just so we have at least
6 one point of discussion, I agree with the motion.
7 Any further discussion?

8 (No response)

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

14 (Response)

15 CHAIR RUFFATO: Opposed, same sign.

16 (No response)

17 CHAIR RUFFATO: The motion passes
18 unanimously.

19 We will move on to the second item.
20 This is the notice of appeal and request for
21 hearing by Oreo's Refining regarding solid waste
22 license 574, and we have essentially the same
23 question again, and that is what do we do
24 initially.

25 And we have the two basic points,

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

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

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

22 (No response)

23 CHAIR RUFFATO: Ms. Mitchell, do you
24 have a thought on that? You're muted. Can you
25 unmute yourself? There you are.

1 MS. MITCHELL: Yes. I believe it can
2 be, and it should have never gotten to this point.
3 They just have not communicated with me.

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

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

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

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

22 BOARD MEMBER SMITH: Chairman Ruffato, I
23 think it would be good to discuss specifically
24 what our options are other than assigning this to
25 a case examiner.

1 CHAIR RUFFATO: Good point. I was being
2 kind of a nebulous on that, wasn't I? I'm sorry.

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

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

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

22 CHAIR RUFFATO: I don't want to put them
23 on the spot any further than obviously the
24 petitioner or the appellant is, and DEQ has
25 indicated a willingness possibly of doing that.

1 So I think I don't want to put them on the spot
2 any further. Is that okay?

3 BOARD MEMBER SMITH: (Nods head)

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

7 MS. MITCHELL: I was.

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

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

19 CHAIR RUFFATO: Please.

20 MS. ORR: Mr. Chairman, members of the
21 Board. What we have here is an appeal, and you're
22 asking really for the appeal to be, shall we say,
23 delayed or suspended. And I would I guess be
24 deferential to the parties in terms of whether
25 they -- especially the appellant, whether she

1 wants to go ahead, because it is filed, and it is
2 a contested case now.

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

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

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

24 CHAIR RUFFATO: I will try to state that
25 as a motion if no one else wants to, and then we

1 can see if it gets a second, and then we can
2 discuss it.

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

12 BOARD MEMBER SIMPSON: Second.

13 CHAIR RUFFATO: Discussion.

14 BOARD MEMBER LEHNHERR: Chairman
15 Ruffato.

16 CHAIR RUFFATO: Yes, Doctor.

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

21 CHAIR RUFFATO: Yes, it would be.
22 Actually I want to amend my motion to also include
23 in the order the option to handle it through the
24 informal procedure. Dave, are you willing to
25 accept that addition to the motion as the

1 second?

2 BOARD MEMBER SIMPSON: Yes, Mr.
3 Chairman.

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

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

12 BOARD MEMBER LEHNHERR: Thank you.

13 CHAIR RUFFATO: Any further discussion?

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

19 We're making no decisions at that point
20 as far as what the process is. All the parties
21 are reserving their rights to agree to or not as
22 far as the informal process goes, and as well if
23 when you say issuing a scheduling order, setting a
24 hearing, if it does go to formal process, and we'd
25 reserve the right to have all of the prehearing

1 process as well under that formal proceeding. I'm
2 not sure that made sense.

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

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

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

25 The informal process is contingent on

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

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

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

24 CHAIR RUFFATO: David, I share your
25 concern, but I don't think it's appropriate for us

1 to press the parties for more arguments and for
2 more points at this point. We're too premature.

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

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

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

23 CHAIR RUFFATO: Right. And at this
24 point, David, all we have is the statute and what
25 it says. Maybe when we get done with your

1 proposal, we'll have more detail on that, but for
2 now all we have is the statute and the regulations
3 that deal with the informal process, and Board
4 Counsel will take those into consideration as she
5 drafts the order that this motion would call for.
6 Any more discussion?

7 (No response)

8 CHAIR RUFFATO: Any more discussion?

9 (No response)

10 CHAIR RUFFATO: Hearing none, I'll call
11 the question. All in favor of the motion say aye.

12 (Response)

13 CHAIR RUFFATO: Opposed, same sign.

14 (No response)

15 CHAIR RUFFATO: The motion passes. And
16 Katherine, we're loading you up here, another task
17 for you to draft an order to implement that, and
18 I'm happy to work with you on that.

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

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

25 MS. ORR: You might want to insert at

1 this time Board Member Simpson's presentation.

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

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

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

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

16 So I'm asking, Katherine, can we get the
17 documents? They all have to be filed by September
18 24th except for the responses now that we're going
19 to get by September 29th. But can the Board get
20 those as soon as they're filed so that we can
21 start to review that?

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

24 CHAIR RUFFATO: So I make that request
25 then, and secretary, please note that, so that we

1 can have those documents and start reviewing them
2 as early as possible, so we're fully prepared for
3 the October 8th meeting. Mr. Mathieus.

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

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

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

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

22 And after reading through all of the
23 background on that, and considering where the case
24 had gone, I have to say I was pretty unhappy and
25 frustrated with an issue taking that long to

1 resolve, and figure there has to be a better way.

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

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

21 I have no idea to what extent that
22 procedure is in use or has been in use. Of course
23 in a number of cases there are settlements that
24 result through the process. But in the procedure
25 as I understand it, there is an opportunity for an

1 informal conference between the parties to define
2 the issues.

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

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

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

23 Secondly, in order to implement a
24 practice, is the statutory and regulatory
25 background we have sufficient, or is this

1 something that the Board should consider writing
2 rules on?

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

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

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

20 CHAIR RUFFATO: Thank you, Mr. Simpson.
21 I'm wondering. Your memo asks for a study, and I
22 expect that Katherine could respond in part to
23 your question, but I think it's more complicated
24 than a response, an oral response now. That's my
25 thinking.

1 I'm wondering if you want to make a
2 motion that we direct Counsel to undertake that
3 study, and provide initially a written report on
4 that, on the questions you asked in your memo.
5 But I'm open to that motion, or any other motion;
6 or if the Board members would like to discuss this
7 further before we make a motion, that's fine, too.
8 Mr. Mathieus.

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

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

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

23 So here's something simple, is that I
24 don't think it's a good use of either the Board's
25 time or the public's time to hash that out in one

1 of these meetings, but I think I can sit down with
2 either yourself or another Board member, and
3 potentially Katherine, just to get our heads
4 around, "These are the kind of things the Board
5 wants to do over the next year. These are what we
6 think it's going to cost," and then I could budget
7 appropriately; or just even keep the Board
8 informed if there is a budget for that.

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

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

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

21 BOARD MEMBER SIMPSON: Mr. Chairman, as
22 I said, I'm not certain that we need to go through
23 a rulemaking process. Maybe we do. I also don't
24 know whether a policy statement would be
25 sufficient, that is, a policy statement would say

1 something to the effect that when these cases are
2 referred to a Hearing Examiner, the Hearing
3 Examiner's first responsibility is to hold an
4 informal conference to define the issues, and
5 determine if there is an alternate approach to the
6 full contested case process, whether that be a
7 mediation, dispute resolution process, or an
8 abbreviated hearing process that would bypass all
9 of the discovery and so on, and that typically
10 goes with it.

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

16 CHAIR RUFFATO: Is there a second to
17 that motion?

18 (No response)

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

23 CHAIR RUFFATO: David, I will try to
24 restate the motion, and then you tell me if I'm
25 wrong.

1 Board Member Simpson has made a motion
2 that we assign to the Board Counsel the task of
3 conducting a study to respond to your memo, and
4 the questions posed in that memo, and then come
5 back to the Board with a written response. Is
6 that stated accurately, David?

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

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

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

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

25 BOARD MEMBER LEHNHERR: Yes, thank you.

1 CHAIR RUFFATO: A motion has been made
2 and seconded. Any further discussion?

3 BOARD MEMBER LEHNHERR: Chairman
4 Ruffato.

5 CHAIR RUFFATO: Yes.

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

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

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

24 (No response)

25 CHAIR RUFFATO: Any further discussion?

1 (No response)

2 CHAIR RUFFATO: Hearing none, I will
3 call the question. All in favor of the motion say
4 aye.

5 (Response)

6 CHAIR RUFFATO: Opposed.

7 (No response)

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

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

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

22 And I would also refer Katherine to the
23 round table that was mentioned at the last meeting
24 from a year and a half ago, where those folks that
25 generally practice in front of the Board had made

1 some recommendations. I had the sense that those
2 recommendations were out there, but maybe hadn't
3 been acted on, and they might bear upon this
4 subject. So please follow up on that.

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

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

22 And then I would suggest that this study
23 include a goal for matters to come to the Board
24 within a certain amount of time after a hearing,
25 and I would think maybe that 120 days is a good

1 number, but I don't know if that's a good number.

2 But I see lots of extensions, lots of
3 delays, and those are often appropriate if there
4 is good cause; but absent good cause, these things
5 need to move along. One of the good causes
6 obviously is if there is serious diligent
7 settlement negotiations, you never want to
8 preclude those.

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

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

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

23 CHAIR RUFFATO: Please. Go ahead.

24 MS. ORR: Would it be useful, would you
25 like to know, have a brief analysis of why some of

1 these -- not why -- but the procedure that has
2 lengthened some of these hearings in the past,
3 some of these cases in the past?

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

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

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

23 CHAIR RUFFATO: I personally would be
24 delighted if your study includes that kind of
25 analysis. Anything that can improve the process

1 or may improve the process, let's talk about it.
2 Anything else?

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

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

8 BOARD MEMBER SIMPSON: Mr. Chairman.

9 CHAIR RUFFATO: Go ahead, Dave.

10 BOARD MEMBER SIMPSON: This is Dave.

11 One other question I'd like to ask before we move
12 on. Is there any chance that we will be returning
13 to in-person meetings anytime in the near future?

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

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

18 CHAIR RUFFATO: Good. Thank you.

19 BOARD MEMBER SIMPSON: The answer is
20 yes?

21 CHAIR RUFFATO: That's what he said.

22 MR. MATHIEUS: We're working on it.

23 BOARD MEMBER SIMPSON: Thank you very
24 much. I much prefer in-person meetings anyway,
25 but after fighting with my Zoom this morning for

1 more than a half hour just trying to join the
2 meeting, it left me pretty frustrated.

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

9 BOARD MEMBER LEHNHERR: Thank you.

10 CHAIR RUFFATO: Thank you, Mr. Mathieus.
11 Dr. Lehnherr.

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

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

20 (No response)

21 CHAIR RUFFATO: Okay. We're going to go
22 to the general public comment, and keep in mind
23 that this is only for matters that were not
24 already on the agenda, and we're not to discuss
25 contested cases. So is there any general public

1 comment that falls into what's left there? Which
2 probably isn't a lot, but maybe there is
3 something. Yes.

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

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

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

21 Just when I have a moment, I want to say
22 while I'm familiar with the adage, I've never
23 heard the term "Parkinson's Law," so thank you for
24 educating this morning because I see it all the
25 time. Thank you.

1 CHAIR RUFFATO: Thank you. Any other
2 public comment?

3 (No response)

4 CHAIR RUFFATO: Any other public
5 comment?

6 (No response)

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

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

11 CHAIR RUFFATO: Thank you, Doctor.
12 Second.

13 MS. ALTEMUS: Second. This is Julia.

14 CHAIR RUFFATO: All in favor, say aye.

15 (Response)

16 CHAIR RUFFATO: Opposed.

17 (No response)

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

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

24 * * * * *

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C E R T I F I C A T E

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

I, LAURIE CRUTCHER, RPR, Court Reporter,
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Court Reporter - Notary Public
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March 9, 2024.

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