BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING
OCTOBER 8th, 2021

TRANSCRIPT OF PROCEEDINGS (VIA ZOOM)

October 8, 2021
9:00 a.m.

BEFORE CHAIRMAN STEVEN RUFFATO,
BOARD MEMBERS DAVID SIMPSON,
JON REITEN, JOSEPH SMITH, and DAVID LEHNHERR
(Via Zoom)

PREPARED BY: LAURIE CRUTCHER, RPR
COURT REPORTER, NOTARY PUBLIC
lauriecrutcher@gmail.com
WHEREUPON, the following proceedings were had and testimony taken, to-wit:

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CHAIR RUFFATO: Good morning, everyone.

Welcome. I believe it's time to call the meeting to order. So Regan, are you on?

MS. SIDNER: I am.

CHAIR RUFFATO: Thank you. Would you call roll, please.

MS. SIDNER: Yes. Chair Ruffato.

CHAIR RUFFATO: Here.

MS. SIDNER: Board Member Lehnherr.

BOARD MEMBER LEHNHERR: Here. I am in a different time zone, and we'll hope my WiFi works, but there may be some difficulty. But I'm here for now.

MS. SIDNER: Board Member Simpson.

BOARD MEMBER SIMPSON: Here.

MS. SIDNER: Board Member Reiten.

BOARD MEMBER REITEN: Here.

MS. SIDNER: Board Member Smith.

(No response)

MS. SIDNER: That's on me. He's in the waiting room. Hang on one moment. Board Member Smith, are you connected to audio yet?
BOARD MEMBER SMITH: Yes, I am. Thank you.

MS. SIDNER: Board Member Altemus.

(No response)

MS. SIDNER: Board Member Altemus.

(No response)

MS. SIDNER: And I believe that's everybody.

CHAIR RUFFATO: Did Board Member Altemus respond?

MS. SIDNER: No.

CHAIR RUFFATO: Was that a yes?

MS. SIDNER: No. Sorry.

CHAIR RUFFATO: She did not respond. So we have five of us here; is that right?

MS. SIDNER: Correct.

CHAIR RUFFATO: All right. We have a quorum.

For those who -- I assume you all know that Board Member Hanson resigned, and I'm told that a new Board Member has been or is being appointed, but that person is not here today.

Anyway, we have a quorum.

So Regan, if you would -- First of all, I'd like to know who is there on the Board in
person. Is it just Board Member Simpson, or is Board Member Smith also there in person?

BOARD MEMBER SIMPSON: Mr. Chairman, I'm the only one. This is Dave.

CHAIR RUFFATO: All right. Thanks, Dave. If you, Regan, would identify all the folks that are on at the meeting, and also start with DEQ, and then go to others.

MS. SIDNER: Okay. We have Chad Anderson who is acting staff liaison today; Chris Cronin; Amy Steinmetz; Kirsten Bowers; Nick Whitaker; Aaron Pettis; Angela Colamaria; Kurt Moser; Brent -- (inaudible) -- I believe that's everyone. Have I missed anyone from the Department of Environmental Quality?

(No response)

CHAIR RUFFATO: Thank you, Regan. If you would go on to the other folks that are present.

MS. SIDNER: We have Vicki Marquis; Clayton Elliott; Aaron Bolton; Catherine Laughner; Murry Warhank; Dana Hupp; Wyatt Petryshen; Alexis Adams; Jeremy Craft; Caitlin Buzzas; Andrew Cziok; Lauren Sullivan; Aislinn Brown; Derf Johnson; Randy Janes; Emily Qiu; John Metropoulis; Ellie
Hudson-Heck; Eric Regensberger, he's with DEQ; Jason Gildea; Katherine Orr, our Board Counsel; and Laurie Crutcher, our Court Reporter. Have I missed anybody?

(No response)

CHAIR RUFFATO: Thank you, Regan. I think -- I can't confirm, but if no one is speaking up, I think you have everyone.

First of all, I don't know how long this meeting is going to last, but I was just going to mention that if it lasts into this afternoon, we will break for lunch. And I've communicated with Regan last night and this morning, and we will break for lunch in sufficient time for you to go to a restaurant. I'm not sure if the meeting will last that long. It will depend.

Our first order of business on the agenda is to approve the minutes from the last meeting, and those were distributed in your packet. So first of all, I would ask if the Board members have any comments regarding the minutes.

BOARD MEMBER SIMPSON: Mr. Chairman, this is Dave. The roll call reflects that I was not present at the meeting. I was not at the time of the roll call, but I would ask that it be noted
that I joined the meeting late due to computer issues.

CHAIR RUFFATO: I think that's appropriate. Actually when I look at the list, David, I think it's more of a typographical error. The last name there is David Smith, and we don't have a David Smith, so I think that was intended to be you.

So do we have a motion to amend -- or to approve the minutes with the amendment that it reflect that Board Member Simpson was present?

BOARD MEMBER SMITH: Yes, I'll motion to approve the minutes with the added change that Board Member Simpson was present.

CHAIR RUFFATO: Thank you.

BOARD MEMBER LEHNHERR: I would second the motion. This is David.

CHAIR RUFFATO: Thank you, David. Thank you, Joe. It's been moved and seconded that the Board minutes with the change be approved. All in favor, say aye.

(Response)

CHAIR RUFFATO: Opposed, same sign.

(No response)

CHAIR RUFFATO: The Board minutes are
approved.

I have a couple of comments relating to the minutes. Those comments are, number one, we talked about two things last meeting: One the study that the Board asked for regarding expediting processes. There's been work done on that, but it was not ready to submit, to bring to Board at this meeting. I wanted to update the Board on that.

And the other one was a policy on information provided to the Board for new cases. Again, there's been work done on that, but it was not ready to bring to the Board, and we will do that. We will bring both of those to the Board when they're ready.

Any other comments from the Board about the minutes?

(No response)

CHAIR RUFFATO: Any public comments regarding the minutes?

(No response)

CHAIR RUFFATO: If not, we will move on to the briefing items. We'll handle these like we have the last several meetings. First, I'm going to ask the Hearing Examiners and our Counsel if
there are any changes on any of the items. We are not going to go through them one by one, but please speak up if there are any changes or updates since the minutes came out on the briefing items.

MS. ORR: Mr. Chair, may I comment?

CHAIR RUFFATO: Yes, please.

MS. ORR: Mr. Chair, members of the Board. Good morning. I have asked Counsel for all of these, Counsel Hearing Officers, for all of these cases to let me know whether there have been any changes in their cases since the agenda was developed.

And the answer is that there have been no changes since the agenda was developed, with the exception of Signal Peak Energy, I would say. And we will get to that as an action item.

CHAIR RUFFATO: Thank you, Katherine.

MS. ORR: I'm sorry. There might be one matter to talk about regarding Oreo's Refining, but do you want me to talk about that right now?

CHAIR RUFFATO: Please do.

MS. ORR: Okay. Just so the Board knows, there was an order issued to the parties asking them to try to settle the case, and the
parties filed a joint status report on September 10th timely, and they have indicated that they are attempting to settle this, conferring with one another, and they asked for more time to try to accomplish that. They've asked for more time until October 12th.

And I don't think this is an action item for the Board, but just to say that the Chairman has signed that request for an extension, and the parties have until October 12th to file, either settle or file a status report with the Board.

CHAIR RUFFATO: Thank you, Katherine. That was important to update because we talked about that last meeting. Thank you.

Do any of the Board members have any questions about the briefing items? And again, I'm not going to go through them one by one, but if you have a question about any of them, please ask that now.

(No response)

CHAIR RUFFATO: Hearing no questions, we will move on to the next item on the agenda, and that is the action items.

And the first action item is the appeal of the amended application of AM3, AM3 amended
application, amended application of Signal Peak for the Bull Mountain coal mine, and we're scheduled to hear oral arguments today on the exceptions.

I'll first ask: Who is here that is representing the parties in this? Let's start with the petitioner. Who is representing the petitioner?

(No response)

CHAIR RUFFATO: Is there no one here representing the petitioner?

(No response)

CHAIR RUFFATO: Who is here? Go ahead.

MS. MARQUIS: Excuse me. Board Members, Chair, are you looking for a representative from Signal Peak?

CHAIR RUFFATO: No. I think the petitioner would be the party that appealed, which would be, I think it would be MEIC or EarthJustice. Do we not have a representative?

MR. JOHNSON: Mr. Chairman, this is Derf Johnson with the Montana Environmental Information Center. And my apologies. I am going to need to make a phone call regarding my co-Counsel, and get him on to the hearing here, because he has been
tracking this, and that should take me about two
minutes.

CHAIR RUFFATO: Thank you, Mr. Johnson.

And who is here representing the DEQ on this
matter?

MS. COLAMARIA: Mr. Chair, this is Angie
Colamaria. We are going to have to do the same
thing. I think there may have been a
misunderstanding on the oral argument schedule.
It's our understanding that we were still in
briefings. So I'm going to have to also do a
phone call, and get our Counsel on the phone.

CHAIR RUFFATO: Thank you, Ms.
Colamaria. And is there anybody here representing
Signal Peak?

MS. MARQUIS: Chair Ruffato, Members of
the Board. My name is Vicki Marquis with Holland
and Hart, and we represent Signal Peak. However,
I believe that the exceptions briefing has not
been completed, and I believe this is the matter
in which DEQ attorney Mark Lucas filed an
unopposed motion for an extension on briefing.

So I'm not certain that the exceptions
have been fully briefed, and are ripe for oral
argument in front of the Board. I believe that's
where the confusion is occurring.

CHAIR RUFFATO: I saw an order that called for exceptions to be filed by September 1, responses by September 15. Those deadlines were not met. I don't understand that. I think I'm going to ask our Counsel to let me know what she knows about this. It seems a little strange to me.

MS. ORR: Mr. Chairman, members of the Board, and Counsel for the parties. What appears to have happened is that the parties filed their exceptions, and they were given an order -- as Chairman Ruffato has mentioned -- to file response briefs on September 15th, which did not happen.

And then yesterday the parties filed a joint motion for extension of time to file response to exceptions to proposed findings of fact with the Hearing Officer, Ms. Buzzas.

And this case has been referred to the Board. It's no longer in the hands of the Hearing Examiner, and so it wouldn't be appropriate for Ms. Buzzas to address that order, or that joint motion, and here we are before the Board.

And if the parties wish to orally request a motion for extension today, I think that
would be appropriate, basically reiterating their motion with the Board, and I guess that motion would consist of a request for more time to file responses to exceptions.

So with that, I guess I would turn it over to Chair Ruffato, and he may want to entertain arguments or a formal request from the parties' representatives.

BOARD MEMBER LEHNHERR: Chairman Ruffato.

CHAIR RUFFATO: Yes.

BOARD MEMBER LEHNHERR: This is David Lehnherr.

CHAIR RUFFATO: Go ahead, David.

BOARD MEMBER LEHNHERR: I would just ask, would like a little bit of clarification -- and Ms. Orr, you may able to help with this.

It seems like there has been a proposed FOFCOL, and yet I haven't seen that in any of our documentation. It seems a little bit unusual to be dealing -- I've never encountered this situation where a FOFCOL was in the works, but I haven't seen the final FOFCOL, and here we are, the Board, dealing with issues related to a proposed FOFCOL.
And maybe I missed it in the paperwork, but I haven't seen the actual proposed FOFCOL.

CHAIR RUFFATO: David, that's a good question, and you're exactly right. It did not show up in the Board meeting materials.

We identified that issue last weekend, and I think on Monday it was emailed out to all the Board members. So you probably got it, but maybe you didn't have a chance to see it.

BOARD MEMBER LEHNHERR: All right. Thank you. Maybe I missed that. Thank you.

CHAIR RUFFATO: It certainly was an oversight in the Board materials, meeting materials.

I will entertain a request from one of the parties, if they want to make it, or if -- I think we're missing all of the attorneys that are directly representing the parties, so maybe we should table this, and go on to the next item, and then we can come back to it, unless Ms. Marquis, as the Holland and Hart lawyer, wants to speak up.

MS. MARQUIS: Chairman Ruffato, members of the Board. I think it would be better if -- I would hate to speak to this without the DEQ attorney Mark Lucas and MEIC's attorney present.
So I think it would be better to table it, if the Board is amenable to that. And I apologize for the confusion.

CHAIR RUFFATO: Okay. Thank you, Ms. Marquis. We will table it. Regan, would you make sure I come back to this before the end of the meeting?

MS. SIDNER: Yes, Chair Ruffato.

CHAIR RUFFATO: Yes. Thank you.

MR. JOHNSON: Mr. Chairman, my apologies. I was trying to get my co-Counsel on here who has been tracking this matter much more closely than I have, and wasn't able to digest all of the conversation.

He's going to be on shortly just to clarify when we come back to this matter later on in the agenda.

CHAIR RUFFATO: Thank you, Mr. Johnson. I appreciate that.

MR. JOHNSON: Well, it was more of a question. We will revisit this matter later on in the agenda? Is that your intent?

CHAIR RUFFATO: Yes, that's my intention.

MR. JOHNSON: Okay. Thank you.
CHAIR RUFFATO: Thank you. So now we will move on to the next item, which is a new contested case, in the matter of Sidney Sugars, Incorporated, appeal of the Montana Pollution Discharge Elimination System Permit two four eight.

And I'm assuming all of the Board members have reviewed the appeal document, and our task today is to figure out if we are going to assign that to a Hearing Examiner, or if we are going to retain it, or if we are going to assign it to a Hearing Examiner for procedural matters and retain it for substantive matters. Does any member of the Board have a motion on that question?

(No response)

CHAIR RUFFATO: Maybe if we don't get a motion, do we have some discussion that might lead towards a motion on this matter?

(No response)

CHAIR RUFFATO: If not then I --

BOARD MEMBER SIMPSON: Mr. Chairman.

CHAIR RUFFATO: Yes.

BOARD MEMBER SIMPSON: This is Dave Simpson. I guess given past practice, my
assumption was that we would consider referring
this to a Hearing Examiner.

CHAIR RUFFATO: Yes. That is kind of
the normal practice. We have talked a number of
times about whether or not that should be routine,
or whether we should consider it each time a
little more carefully.

As I read the petition, this seems like
this involves a number of fairly important legal
matters, and also a fair number of technical
matters. I'm not sure how that cuts necessarily,
but in my mind we should not do a knee jerk assign
it to a Hearing Examiner in every case, although
this may be an appropriate case to assign to a
Hearing Examiner. Yes, Board Member Lehnherr.

BOARD MEMBER LEHNHERR: Thank you,
Chairman Ruffato. I want to make sure you can
hear me. I agree that we shouldn't automatically
refer to a Hearing Examiner, but it often is a
good course of action. And I think it's good to
keep mind that that doesn't mean we will not have
input down the road, but often the Hearing Officer
can gather testimony, and input, and the
appropriate documents, and sort of distill it for
us somewhat.
I guess I'm just wanting to verify or reiterate that that doesn't mean we don't have the final say.

CHAIR RUFFATO: Very good point. Thank you, David. Is there a motion given that discussion?

BOARD MEMBER REITEN: Mr. Chairman, this is Jon Reiten. I move that we move this to a Hearing Officer for further review.

CHAIR RUFFATO: Jon, can I ask you to clarify that? Do you want that to refer to a Hearing Examiner in its entirety, or just for procedural matters?

BOARD MEMBER REITEN: I would say in its entirety.

CHAIR RUFFATO: A motion has been made. Is there a second to the motion to assign this to ALS for all matters in this case? I'm looking for a second.

BOARD MEMBER LEHNHERR: I will second that. This is David.

CHAIR RUFFATO: Thank you, David. Discussion?

(No response)

CHAIR RUFFATO: A motion has been made.
BOARD MEMBER SIMPSON: Mr. Chairman.

CHAIR RUFFATO: Yes.

BOARD MEMBER SIMPSON: This is Dave. I guess I'm still turning over in my mind the issue of expedited procedures.

This appears to be a rather complex case with multiple technical issues as well as legal issues, and I wonder if there's anything to be gained by requesting that the Hearing Examiner conduct an informal conference with the parties to flesh out the key issues, and whether there are any points that can be -- facts that can be stipulated -- let's put it that way -- to perhaps bring about a more streamlined process.

CHAIR RUFFATO: I certainly think that is always a good thing to occur. Katherine, maybe you can speak to that. My sense would be that the Hearing Examiners would always make that effort, but that should be something that we should be talking about in our study as to whether or not that actually occurs in every case.

MS. ORR: Mr. Chairman, members of the Board. I'd be glad to supplement here.

Actually this request, this appeal, for one thing has distilled for review some of the
provisions of the permit, so that's very useful.

Also what seems to be happening with these kinds of cases is the Department and the appellant or other intervenors do get together, and try to resolve the terms informally -- if you've noted from other cases -- which could be encouraged.

And as Chairman Ruffato says, typically in these contested cases, what you've said, Board Member Simpson, does occur. The Hearing Examiner asks before the hearing, for example, whether there's an agreed statement of facts where the parties can get together. And as to the key issues, as I've said, I think those have already been kind of distilled out here.

So I understand the concern to streamline, and I think the Hearing Examiner can be informed that that is a serious consideration for this Board, and the Hearing Examiner can try to encourage the parties not, for example, to have discovery disputes, to resolve the discovery disputes informally.

Just as an editorial comment, my study of some of the past ways that the cases have been handled yields two thoughts: One, anytime there's
a referral to the Board for an interlocutory appeal, that's very time consuming, and perhaps that can be curtailed.

And the other thing is as a matter of the Administrative Procedure Act, the Hearing Examiner can ask in every case if the parties want to resolve this informally. In fact we're viewing that as a requirement. So that will be done, and I hope Member Simpson is encouraged by that.

But at any rate these are complex cases, and if the parties choose to litigate them in the formal sense, the Hearing Examiner will conduct the case accordingly.

CHAIR RUFFATO: Thank you, Katherine. And David, I agree with your concern. I agree this is an important issue. I think this discussion is very helpful as we move towards the study that we started last meeting. So thank you, Dave, and thank you, Katherine. Any other comments or discussion?

(No response)

CHAIR RUFFATO: A motion has been made and seconded to assign the Sidney Sugars case in its entirety to ALS for a Hearing Examiner. All in favor, say aye.
(Response)

CHAIR RUFFATO: Opposed, same sign.

(No response)

CHAIR RUFFATO: It passes unanimously.

Now we'll go on to the next item on the agenda, the rule review. It's the petition of Teck Coal, Limited, to review the selenium rule that was adopted by this Board last December. So we'll move into that at this point.

First of all, to all those who commented, at that last meeting the Board requested that we receive -- or that the interested parties provide comments to be used to address the petition of Teck Coal. We received a number of comments, and I want to thank everyone. They were very helpful and enlightening to me, and I assume so for the rest of the Board.

Based on those comments, and my understanding, I think we have several steps to take, and I will start with what I think is the first step, but don't -- if the Board members have other ideas than what I'm going to suggest, please speak up.

But the first step I think we need to decide is based on the numerous comments that
requested or recommended that we simply reject the petition, and dismiss the petition without further consideration.

The most complete articulation of that recommendation was made by EarthJustice in their comments and responsive comments, so I think the first step is to decide if we are going to consider the petition or reject it without consideration, based upon the arguments and the comments made in that regard.

So I will first ask if anyone has a motion on that point. Does anyone have a motion on whether we reject the petition based upon the arguments made by EarthJustice and the other and various other commenters, or to accept the petition, and consider it, and establish a process? That's the question.

BOARD MEMBER SIMPSON: Mr. Chairman.

CHAIR RUFFATO: Go ahead.

BOARD MEMBER SIMPSON: This is Dave. I'd like to, before we consider a motion for either action, there are some comments I would like to make at some point, either now or at the appropriate time if a motion is made. I would request which is more appropriate.
CHAIR RUFFATO: David, I think if you want to make those comments now, it's fine. If you'd rather wait until there's a motion on the table, I'm fine with that, too. Whichever you prefer.

BOARD MEMBER SIMPSON: I think I'd prefer to make those comments now.

I've gone back and read in detail, and reread a number of the documents that were provided to us in the course of this. And I realize that this has been a long process, and we are -- the new Board members. Excuse me -- are not privy to all of the long history on this.

However, looking at the MCA state regulations "no more stringent than federal regulations or guidelines" under which this petition has been filed, I think there are some questions that need to be raised.

The determination was made by the Board that the change in standard from 1.5 to 0.8 micrograms per liter was not more stringent than the federal, based on the fact that the analysis was conducted under -- using procedures that were approved by the Environmental Protection Agency.

However, any time there is a deviation
from the EPA standards, which typically are adopted by reference, there has to be a process whereby EPA approves the change, as well as the methodologies that were used to make the determination.

So the question then becomes if that's the case, can that argument be used as a justification for any adoption of a more stringent regulation than is recommended by EPA? If it is the case, then it makes the statute 75-5-203 irrelevant.

So my view on this is that in a strictly mathematical sense 0.8 certainly is a more stringent standard than 1.5. My view is that the petition should be accepted, and that DEQ should in turn be directed to make the demonstration required by the statute.

Whether it will change anything remains to be seen, but there are other issues concerning the technical aspects of this that I won't get into right now, depending on which direction this goes. But that would be my preference, and I'm prepared to make the motion. I guess I'd hold off until -- there may be other comments from other members of the Board.
CHAIR RUFFATO: Thank you, David. Dr. Lehnherr, I think I saw your hand go up, but maybe not.

BOARD MEMBER LEHNHERR: Well, actually I raised it virtually. I'll lower it. I will wait until we have a motion before I comment further. Thank you.

CHAIR RUFFATO: Thank you, Doctor. Any other comments from the Board before Mr. Simpson makes his motion?

(No response)

CHAIR RUFFATO: Board Member Simpson, are you prepared to make that motion?

BOARD MEMBER SIMPSON: Mr. Chairman, I would move that the petition from Teck Coal regarding compliance with the 75-5-203 MCA be accepted, and the Department be directed to prepare the demonstration that's required under that statute.

I would also note that this is not a rulemaking, and that we are far away from any rulemaking that may or may not occur as a result.

CHAIR RUFFATO: Board Member Simpson, I think there are two concepts in your motion that I would like to ask you if you intend that. The
first concept is that we accept the petition and consider it; and the second point in your motion relates to the Department's role in that.

I think those are two separate issues. And I would second your motion if you would amend it to just be the first concept, and that is that the Board accept the petition, and establish a process for considering it, and leave out the second one.

BOARD MEMBER SIMPSON: Mr. Chairman, I accept your amendment to the motion.

CHAIR RUFFATO: Then I second the motion. A motion has been made that the Board accept the petition of Teck Coal, and establish a process for considering the petition. Discussion, please.

(No response)

CHAIR RUFFATO: Is there any discussion on the motion? Dr. Lehnherr.

BOARD MEMBER LEHNHERR: Thanks. I'll be a broken record here, but I think it's pretty clear that the selenium standard that was adopted by the previous Board did not exceed the EPA standard, and EPA essentially said that.

And again, I think a more important
point, that I think this is a pretty egregious
example of a polluter or potential polluter trying
to take advantage of a reconstituted Board after
last year's election to do an end run around a
very sound decision that the Board made, and an
end run around the DEQ.

So I think personally I don't know what
word to use -- outrageous -- whatever word, I
think it has to be pretty strong. Again, I
realize I'm just a broken record here, but I feel
that needs to be said. Thank you.

CHAIR RUFFATO: Thank you, Doctor. Your
comments are respected, and don't worry about
being a broken record. I understand your
position. Any other comments? Discussion?

(No response)

CHAIR RUFFATO: I will offer my
thoughts. I think that the statute is fairly
clear that this petition is in order. It
contemplates a review after a rule has been
adopted. That seems clear to me.

And so I think the Board has an
obligation to accept the petition and consider it,
and the issue raised by Dr. Lehnherr is a matter
that we will need to consider, and that is the
substantive issue that we need to consider when we take up the petition. So I am going to vote in favor of this motion.

Is there any other discussion before we vote on this motion?

BOARD MEMBER REITEN: Mr. Chairman, this is Jon Reiten. I would agree with Dr. Lehnherr. I think the ruling, the decision was made previously, and I don't see that it's right for us to overturn it right now, so I'm going to vote against it.

CHAIR RUFFATO: All right. Any other discussion?

(No response)

CHAIR RUFFATO: Is there any objection to moving on to vote on the motion?

(No response)

CHAIR RUFFATO: A motion has been made and seconded that we accept the petition, and that we consider it and adopt the process. All in favor, say aye.

(Response)

CHAIR RUFFATO: Opposed, same sign.

(Response)

CHAIR RUFFATO: I think that means that
we don't have a decision. Regan, would you please call the roll and ask for a yes or a no on this motion.

MS. SIDNER: Yes. Chair Ruffato.

CHAIR RUFFATO: I vote yes.

MS. SIDNER: Board Member Lehnherr.

BOARD MEMBER LEHNHERR: No.

MS. SIDNER: Board Member Simpson.

BOARD MEMBER SIMPSON: Yes.

MS. SIDNER: Board Member Reiten.

BOARD MEMBER REITEN: No.

MS. SIDNER: Board Member Smith.

BOARD MEMBER SMITH: Yes.

MS. SIDNER: And I believe Board Member Altemus is still absent.

CHAIR RUFFATO: If I'm not mistaken, this means that we have not made a decision; is that right, Katherine? Because we need a majority to make a decision, a majority of the Board. We need four members of the Board.

MS. ORR: Mr. Chair, members of the Board, that is correct. So right now you don't have enough impetus from the Board to go forward with the petition.

CHAIR RUFFATO: But we also don't have
enough to dismiss the petition, correct?

MS. ORR: Mr. Chair, members of the
Board, that's correct. If you wanted to
recharacterize the motion or have further
discussion on that, you can, but at this point,
there's been no vote to carry the petition
forward.

CHAIR RUFFATO: Understood. That would
suggest to me that we need a motion in order to
make sure we're -- we can't move. I would say we
need a motion to dismiss the petition, and we'll
see how that comes out.

BOARD MEMBER REITEN: I make a motion
that we dismiss the petition.

BOARD MEMBER LEHNHERR: I will second
that motion. This is David.

CHAIR RUFFATO: A motion has been made
and seconded that we dismiss the petition and not
consider it. Discussion.

(No response)

CHAIR RUFFATO: I will just state that
I've already stated my position, so I will be
voting no on this motion. Is there any objection
to moving to a vote on this motion?

(No response)
CHAIR RUFFATO: Hearing no objection, let's take a roll call again. All in favor of the motion say aye.

BOARD MEMBER REITEN: Aye.
BOARD MEMBER LEHNHERR: Aye.
CHAIR RUFFATO: All opposed.
BOARD MEMBER SMITH: No.
BOARD MEMBER SIMPSON: No.
CHAIR RUFFATO: All right. Regan, would you please take a roll call vote on this motion, yes or no.

MS. SIDNER: Yes. Chair Ruffato.
CHAIR RUFFATO: No.
MS. SIDNER: Board Member Lehnherr.
BOARD MEMBER LEHNHERR: Yes.
BOARD MEMBER SIMPSON: No.
MS. SIDNER: Board Member Reiten.
BOARD MEMBER REITEN: Yes.
MS. SIDNER: Board Member Smith.
BOARD MEMBER SMITH: No.
MS. SIDNER: Member Altemus is not with us today.
CHAIR RUFFATO: Board members, we need to make a decision on our next step then. We have to make a decision at some point.
I'm going to suggest that we schedule a special meeting as soon as we can when we can get more members of the Board present, so we can make a decision on this point. And the reason why I think we should do it quickly is that if we take it up, we have a short time frame to get it resolved, and so I don't think we can wait until the next meeting. I think we need to do that, make a decision as soon as possible.

So I move that we direct the secretary to find a date when we will have more than the five of us present at a special meeting as soon as possible, and I assume we're going to need to notice that meeting, and give, I would expect, at least a seven day notice on that. Would that be right, Katherine?

MS. ORR: Yes, Mr. Chair.

CHAIR RUFFATO: So I move we instruct the secretary to schedule a meeting as soon as possible, give appropriate notice for a special meeting to address this agenda item.

BOARD MEMBER SIMPSON: Second.

CHAIR RUFFATO: Discussion.

(No response)

CHAIR RUFFATO: Before we go forward,
something just occurred to me. Katherine, would there be another procedural step that we could take instead of a special meeting? Could we adjourn this meeting until we get more members of the Board present so we could do it sooner?

MS. ORR: I'm not quite --

CHAIR RUFFATO: Not adjourn it. That's the wrong word. Could we postpone the meeting to another day in the near future, and then we wouldn't have to notice it?

MS. ORR: Mr. Chair, members of the Board. I think you've already noticed various items for this meeting, and it would be important to carry forward with those, for example the Signal Peak issue.

So I think really the best -- my advice is the best course is to schedule a special meeting. And you might get an indication, since people are gathered here, the Board members, and ask them alternative dates if they are able to access that at this short notice. That might help the Board secretary.

CHAIR RUFFATO: Good idea, Katherine. I think we should take up the motion first, and then we will look at our schedule and find out when we
might be able to schedule a meeting, a special
meeting. Dr. Lehnherr.

BOARD MEMBER LEHNHERR: Chairman
Ruffato, I just am wondering if you could clarify
the need for a special meeting as opposed to
waiting. I guess the next meeting would be in
December. But I suspect that the matter will be
disposed of somewhat readily. So if you could
just clarify that. It may be totally appropriate
to have a special meeting, but if you could just
clarify your concerns, that would be helpful.
Thank you.

CHAIR RUFFATO: I will clarify my
concerns. If we take up the matter, we will need
to have a period of time. If you read through the
proposed processes, those processes are going to
take a period of time, depending on which process
we would adopt. But it's a period of time that
will clearly entail months to get comments, to
analyze the issues, and to make a decision. That
will clearly take months.

The statute under which we are operating
gives an eight month period to reach a final
conclusion. Now, if the Board, for example,
decides that the regulation is not more stringent,
then -- or not the proposed regulation -- but the
adopted regulation is not more stringent, then the
matter will be concluded.

But if the Board decides that it is more
stringent, then there's additional work that needs
to be done, and it all has to be done within eight
months. We already are into that two and a half
months, so we don't have a lot of time left, and
that's the reason I think it is urgent to make the
decision.

And of course if the decision is to
reject the petition, it's no longer urgent, or if
the decision is that it's not more stringent, if
the rule is not more stringent, then that will be
the end of it.

But in the third scenario, if we decide
that the rule is more stringent, then there's
going to be a serious time crunch, and so I want
to anticipate the possibility of that third
scenario.

BOARD MEMBER LEHNHERR: Thank you.

CHAIR RUFFATO: Any further discussion?

(No response)

CHAIR RUFFATO: Any objection to
proceeding with a vote on the motion?
CHAIR RUFFATO: Hearing none, a motion has been made and seconded to direct the secretary to schedule, to notice and schedule a special meeting as early as possible to consider the Teck Coal matter. All in favor, say aye.

(No response)

CHAIR RUFFATO: Opposed.

(No response)

CHAIR RUFFATO: The motion carries unanimously.

So to help out Regan, let's give her an idea. Now I expect that all of us cannot be definitive, but let's give her an idea of when this could occur. We're going to need a seven day notice period, so it can't occur any sooner than the week after next. So does anybody have any idea of their availability the week after next?

BOARD MEMBER SMITH: Chairman Ruffato, I would say I am available next, the Friday after next. That would be October 22nd.

CHAIR RUFFATO: Joe, would you available any earlier that week? Because we could notice this as early -- probably not, probably not on Monday, but it seems like we could have the
meeting October 20th through the 22nd, anytime during that time.

BOARD MEMBER SMITH: Yes, it looks like I could do October 20th as well.

CHAIR RUFFATO: But not the 21st?

BOARD MEMBER SMITH: No.

CHAIR RUFFATO: I can't do the 20th, so I guess the 22nd is the best date that week. Board Member Reiten, are you available on the 22nd?

BOARD MEMBER REITEN: Right now I'm traveling, and I don't have my calendar, but I think I am available. I just can't completely verify it.

CHAIR RUFFATO: Good. Thank you. Dr. Lehnherr, are you available on the 22nd?

BOARD MEMBER LEHNHERR: Yes. My preference would be the following week, but I can make the 22nd work, technology willing.

CHAIR RUFFATO: Understood. Board Member Simpson.

BOARD MEMBER SIMPSON: Yes, I'm available.

CHAIR RUFFATO: All right. I think that accounts for all five of us. Regan, let's shoot
for the 22nd, but if you would get an email out
today to all members confirming their availability
on the 22nd, and then follow up if it turns out
that is not a good date for at least -- I mean
hopefully we can get all six of us.

I'm not sure how soon the new member
will be on board. I don't know where that process
is at, but we need at least the six of us before I
think we can make a decision. Is that understood,
Regan, or have I been unclear?

MS. SIDNER: Chair Ruffato, I will do
that. Thank you.

CHAIR RUFFATO: Thank you, Regan, very
much.

How about if we take a ten minute break
at this point, and we will reconvene in ten
minutes.

(Recess taken)

CHAIR RUFFATO: I will call the meeting
back into order, and I would ask if Regan would
take the roll call.

MS. SIDNER: Chair Ruffato.

CHAIR RUFFATO: Here.

MS. SIDNER: Board Member Lehnherr.

BOARD MEMBER LEHNHERR: Here.
MS. SIDNER: Board Member Simpson.

BOARD MEMBER SIMPSON: Here.

MS. SIDNER: Board Member Reiten.

(No response)

CHAIR RUFFATO: Board Member Reiten.

(No response)

MS. SIDNER: Board Member Smith.

BOARD MEMBER SMITH: Here.

MS. SIDNER: Board Member Altemus.

(No response)

CHAIR RUFFATO: Board Member Altemus.

(No response)

CHAIR RUFFATO: Board Member Reiten, did you return?

(No response)

MS. SIDNER: That gives us four.

CHAIR RUFFATO: We'll wait a minute.

MS. SIDNER: Board Member Reiten.

BOARD MEMBER REITEN: Here.

MS. SIDNER: Perfect.

CHAIR RUFFATO: We have a quorum. I believe that we at this point should go back to the Signal Peak matter. Do we have representatives of the parties available now?

MR. HERNANDEZ: Mr. Chair, Shiloh
Hernandez for petitioners. I'm here and prepared
to speak on this matter.

CHAIR RUFFATO: Thank you, Mr. Hernandez. Is there anybody here for DEQ?

MS. COLAMARIA: Mr. Chair, this is Angie
Colamaria, Chief Legal at DEQ. I'm still unable
to get a hold of Mr. Lucas. He's out today. But
I can speak about procedure and status.

CHAIR RUFFATO: Thank you, Ms. Colamaria. How about for Intervenor Signal Peak?

MR. YEMINGTON: Mr. Chair, Sam
Yemington, attorney with Holland and Hart, on
behalf of Signal Peak.

CHAIR RUFFATO: Thank you. I guess
maybe first I would ask one of you what has
transpired in terms of the order that required
exceptions by September 1 and responses by
September 15th.

MR. HERNANDEZ: Mr. Chair, members of
the Board. I can speak to that. I think we're
all on the same page.

All parties filed exceptions to the
proposed ruling on October 1st, and responses to
those exceptions are not due until the 15th, but I
understand that DEQ, on behalf of all the parties,
filed a joint motion for an extension of that
deadline until the end of -- the beginning of
November, on account of DEQ's Counsel Mr. Lucas
leaving DEQ, and having shuffled through --

    No, actually he's in the process of
leaving DEQ, but I understand Ms. Colamaria, and
he's trying to wrap things up, so it's a bit of a
juggle for him. So that's where things stand.
We're hoping to finish briefing by early November.

    MS. COLAMARIA: That's right. The
motion we filed yesterday asked for an extension
until November 5th.

    But just to clarify, on August 11th,
Hearing Examiner Buzzas did give us an extension,
granted an extension of time until the 15th of
October. So I think that's probably where some of
the confusion was, is that we currently have an
extension until the 15th of October. We asked for
a little more time because of the scheduling
conflicts.

    CHAIR RUFFATO: That does help.

    MR. YEMINGTON: Mr. Chair, member of the
Board, just for the sake of the record, everything
represented by the parties and Single Peak agrees
with.
We would just note that the impetus for the initial extension after the decision was issued by the Hearing Examiner, the impetus for that initial extension was competing deadlines with another contested case proceeding, and as represented by the Department, that initial extension was granted by the Hearing Examiner on the 11th of August, and exceptions have been filed to my knowledge by all parties, and we're still working with an October 15th deadline to respond to those exception, with an understanding that the Department has requested an extension, given Mr. Lucas' commitments in leaving the Department.

CHAIR RUFFATO: Katherine, you commented earlier that because this matter had been submitted to the Board, that the Hearing Examiner no longer had jurisdiction. Do these additional facts change that position, or that view?

Because I think we just learned a new fact that I didn't know until just now, and that was that there was an extension granted by the Hearing Examiner for the exceptions to be filed by September 15th and responses by October 5th. So maybe this is not in the Board's hands yet, it's still in the Hearing Examiner's hands.
MS. ORR: I think the decision was submitted -- the FOFCOL was submitted to the Board in August, and at that point it was under the aegis of the Board.

And the Board has looked at exceptions, and has been reviewing those for the purposes of this meeting, and oral argument was set before the Board at this meeting, and I think it's up to the Board to determine whatever direction the parties request the Board to go.

And that can certainly include acknowledgment of the extension, or granting of an additional extension. Apparently there's a request to have an extension until November, according to this joint motion. So that's what I would advise you.

CHAIR RUFFATO: Thank you, Katherine.

Then I will take the comments that have been made as a request to grant an extension until November 5th for responses to exceptions to be filed. Do any of the representatives disagree with that?

MR. HERNANDEZ: Yes. That sounds good.

MS. COLAMARIA: (Nods head)

CHAIR RUFFATO: Board members, we need to decide whether or not we're going to grant an
additional extension beyond the initial extension that we granted. I think it's pretty simple that we should probably do that.

So I will make a motion that we grant an extension to November 5th to file exceptions -- to file responses to the exceptions that have been filed. Is there a second?

BOARD MEMBER REITEN: I'll second that.

CHAIR RUFFATO: It's been seconded, it's been moved and seconded. The second was by Board Member Reiten, and the motion was made by me. It's been moved and seconded that we grant an extension to the parties to file responses to the exceptions until November 5th. Any discussion?

(No response)

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

(Response)

CHAIR RUFFATO: Opposed.

(No response)

CHAIR RUFFATO: Motion passes. The extension is granted. So I guess that concludes that matter for today.

I think the next item on the agenda is
the Board Counsel update, if you have anything, Katherine, or if the Board has any questions of Katherine.

MS. ORR: Mr. Chair, members of the Board, I don't have an update other than what we've been discussing.

CHAIR RUFFATO: Thank you. Any questions of Board Counsel?

(No response)

CHAIR RUFFATO: If not, we'll move on to the general public comment item, and so I will ask. Any member of the public that wants to comment on anything, any public matter within the jurisdiction of the Board that has not otherwise been addressed in the agenda.

(No response)

CHAIR RUFFATO: Any public comment?

(No response)

CHAIR RUFFATO: Hearing none, I think we're at the end of our agenda.

BOARD MEMBER SIMPSON: Mr. Chair, can I make one request, please, one comment.

CHAIR RUFFATO: Absolutely.

BOARD MEMBER SIMPSON: This has to do with Board process.
I wanted to raise the question of whether it would be possible to send out, to notice and send out -- excuse me -- to send out the Board materials to the members of the Board two weeks ahead of time, so that if there are any questions or requests for additional information, they can be completed before the noticing deadline, seven days before the meeting.

CHAIR RUFFATO: I agree completely with that request. Now, I'm not sure if it's possible to get all of that out, but I believe I asked for a similar -- I mean a similar request at the last meeting that the Board members get materials as soon as possible.

I can tell you that I spent many hours over the last week digesting the Signal Peak matter and being frustrated, and I think these matters are sufficiently complex that you can't expect the Board members to digest it in a week, when some of these matters have been pending, and complicated matters pending for five years.

So I agree completely with Board Member Simpson that Board members should receive materials absolutely as soon as they're available, and if that comes in piecemeal, I have no problem
with that, and then you put in the final material for the meeting that goes out to the public. But I think we need more time.

BOARD MEMBER REITEN: I strongly agree with you. Jon Reiten, Mr. Chairman.

CHAIR RUFFATO: Thank you. Katherine, do you have any comment on that request?

MS. ORR: Mr. Chair, members of the Board. I think given the complexity of these documents, it's very important that the Board get them as soon as possible, as you say.

The only thing I would add is as you've seen, documents pour into the Board before the meeting and sometimes right before the meeting, and it's going to be unavoidable that documents need to be provided to the Board as they come in.

And I think as a matter of law and notice, there's a time past which the notice to the public in the packet has to be whatever is reasonable, and usually that's seven days, but I've seen cases and handled cases where the reasonableness of it was less than seven days.

It kind of depends on what it is that you're trying to accomplish, but with that caveat, I wholeheartedly agree and will try to comply with
that objective.

CHAIR RUFFATO: Very good. Thank you. Thank you Board Member Simpson for bringing it up.

As a good example, when responses to exceptions are filed on November 5th, hopefully we get them on November 6, 5th or 6th. At that point, I can tell you that it's fresh in my mind. Now I would rather review them at that point than just prior to another meeting.

So is there any other public comments or Board comments at this point?

BOARD MEMBER SIMPSON: Just to follow up on that. What's the current required timeline for documents to go to the Board secretary prior to a meeting?

CHAIR RUFFATO: Yes. Go ahead, Regan.

MS. SIDNER: Mr. Chairman, members of the Board. I typically get the documents from the public and from the Agency Legal Services about eight days before the Board meeting, and they need to be posted online about seven days before the Board meeting per policy. As Board Counsel Orr stated, culture is to submit documents kind of at the eleventh hour.

CHAIR RUFFATO: Thank you, Regan. I
could be wrong, but I'm thinking about the calendar, and it seems like the Friday two weeks before the meeting is a date when all documents should be to you, Regan. Is that not happening, or is that just new applications?

MS. SIDNER: I believe you're correct. I think this requires some more in-depth conversation between Board Counsel Orr and myself. I think your request is reasonable, and we should be able to adjust our internal policies to make that happen. We just need to have some more in-depth conversations between her and I.

CHAIR RUFFATO: That's great, Regan. I appreciate it. And I particularly feel that our Hearing Examiners should be attuned to this, because they're working with us all the time, and we should not be working at the eleventh hour. And I'm afraid that if we do, it's going to cause more difficulties and more delay if we don't honor this request. So thank you.

Any more discussions? Dr. Lehnherr.

BOARD MEMBER LEHNHERR: Thank you, Chairman Ruffato. I would just ask that -- I think the piecemeal is okay to an extent, but not too piecemeal I would ask, since it's so easy to
patch items electronically that if, say for example, there are documents associated with a FOFCOL, that you would, say, put any documents that place new documents in perspective along with the new documents.

Say if there's, for example, a FOFCOL, that new documents pertaining to maybe some FOFCOL along with it, just so we're not getting a document that is sort of not placed in perspective by not having its other documents along with it.

CHAIR RUFFATO: I think that's a reasonable request, and I would just ask the secretary and Counsel to provide documents in a manner to the Board that is useful, and use your judgment on that. At the end of the process, I believe we will get all of the documents in a package which will be the Board material. So it's not like we won't eventually have them all in a package. So thank you.

BOARD MEMBER SIMPSON: Mr. Chairman, just to amplify a little bit on the subject. There's really two reasons I had in mind.
One of course we've already discussed, to give Board members as much time as possible to review the documents, but the other is to avoid
putting ourselves in the position where the
meeting has already been noticed, documents have
been overlooked in the public notice such that the
seven day requirement would not be met; that is,
should additional, should something be overlooked
and it's picked up by the Board in the meantime,
that word would come back to the Board secretary
before the seven day deadline, if that makes any
sense.

CHAIR RUFFATO: It does. I'm not
confident that the seven day deadline is a hard
deadline, but that's something we'll maybe have to
consider.

An example of that was the Signal Peak
findings and conclusions that was not included in
the Board materials, and so we'll be discussing
that and considering that further. Thank you,
Dave. Any other discussion?

(No response)

CHAIR RUFFATO: If not, a motion to
adjourn would be in order.

BOARD MEMBER SIMPSON: So moved.

CHAIR RUFFATO: I second that motion.

It's been moved and seconded that we adjourn. All
in favor, say aye.
(Response)

CHAIR RUFFATO: Opposed.

(No response)

CHAIR RUFFATO: Motion passes unanimously. We are adjourned. Thank you all for your careful attention, and we will be seeing you I hope on the 22nd. Thank you.

(The proceedings were concluded at 10:35 a.m. )

* * * * *
CERTIFICATE

STATE OF MONTANA  

: SS.

COUNTY OF LEWIS & CLARK  

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

That the proceedings were taken before me at the time and place herein named; that the proceedings were reported by me in shorthand and transcribed using computer-aided transcription, and that the foregoing - 53 - pages contain a true record of the proceedings to the best of my ability.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 10th day of October, 2021.

__________________________

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

Yemington [3]
41:11, 41:12, 42:22

Welcome - 2:5

Whatever [3]
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Whereby - 25:3

WHEREOF - 54:15

WHEREUPON - 2:1

whether [10]
8:11, 17:5, 17:6, 19:11, 19:20,
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Whichever - 24:4

Whitaker - 4:12

wholeheartedly - 48:25

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Zoom [2] 1:8, 1:16