BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING
OCTOBER 29, 2021

TRANSCRIPT OF PROCEEDINGS (VIA ZOOM)

October 29, 2021
9:00 a.m.

BEFORE CHAIRMAN STEVEN RUFFATTO,
BOARD MEMBERS DAVID SIMPSON,
JON REITEN, JOSEPH SMITH, JULIA ALTEMUS
STACY AGUIRRE, and DAVID LEHNHERR

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 RUFFATTO: Good morning, everyone. Welcome. I will call this special meeting of the Board of Environmental Review to order. First of all, I'd like -- Lauren, I understand that you are acting secretary this morning.

MS. ANDERSON: I am, yes.

CHAIR RUFFATTO: Welcome.

MS. ANDERSON: Thank you.

CHAIR RUFFATTO: Can you call the roll call of the Board, please.

MS. ANDERSON: Yes. Chairman Ruffato.

CHAIR RUFFATTO: Here.

MS. ANDERSON: Board Member Lehnherr.

(No response)

MS. ANDERSON: Board Member Lehnherr.

(No response)

MS. ANDERSON: Board Member Simpson.

BOARD MEMBER SIMPSON: Here.

MS. ANDERSON: Board Member Aguirre.

(No response)

MS. ANDERSON: Board Member Aguirre.

(No response)
CHAIR RUFFATTO: Stacy, I see that you're on. I think that Lauren is asking you to respond.

(No response)

CHAIR RUFFATTO: Let's come back to Stacy, Lauren.

MS. ANDERSON: Board member Reiten.

BOARD MEMBER REITEN: Here.

MS. ANDERSON: Board Member Smith.

BOARD MEMBER SMITH: Here.

MS. ANDERSON: Board Member Altemus.

BOARD MEMBER ALTEMUS: Here.

MS. ANDERSON: Board Member Aguirre.

(No response)

CHAIR RUFFATTO: It looks like she might be having trouble with her audio. Maybe she's going to call in.

BOARD MEMBER AGUIRRE: Hello.

CHAIR RUFFATTO: Yes. Is this Stacy -- How do you pronounce your last name, Stacy?

BOARD MEMBER AGUIRRE: (No response)

CHAIR RUFFATTO: Stacy Aguirre, are you there?

(No response)

(Dr. Lehnherr present)
CHAIR RUFFATTO: Lauren, am I pronouncing her name correctly?

MS. ANDERSON: I believe so. Aguirre, I believe.

CHAIR RUFFATTO: Aguirre. Stacy, can you hear us?

(No response)

CHAIR RUFFATTO: Please keep trying to connect, Ms. Aguirre, and we will go on. I see that Board Member Lehnherr has joined. Do you want to call him?

MS. ANDERSON: Board Member Lehnherr.

BOARD MEMBER LEHNHERR: Here.

CHAIR RUFFATTO: We have a quorum. I wanted at this point to introduce our new Board member, Stacy Aguirre. I have not heard her. And Stacy, if you get your audio, please speak up as soon as you can speak up if you can hear us.

So I'd like, Lauren, if you would go ahead and identify who else is on the Zoom meeting, I would appreciate it, for the record.

MS. ANDERSON: Angie Colamaria.

CHAIR RUFFATTO: Excuse me. Also start with DEQ and then go to the others.

MS. ANDERSON: Okay. Angie Colamaria,
George Mathieus.

   MR. MATHIEUS:  Good morning.

   MS. ANDERSON:  Kevin Stone, Lauren Sullivan. Did I miss anybody from DEQ?

   MS. BOWERS:  This is Kirsten Bowers.

   I'm DEQ Legal Counsel.

   MS. STEINMETZ:  Amy Steinmetz, DEQ Water Quality Division Administrator.

   MS. KELLY:  Myla Kelly, DEQ, Water Quality Standards.

   CHAIR RUFFATTO:  Anybody else from DEQ?

   (No response)

   MR. MATHIEUS:  It looks like that's it, Chairman.

   CHAIR RUFFATTO:  Thank you.

   UNKNOWN SPEAKER:  Chairman Ruffato, I noticed in the chat room that Stacy has a couple comments, saying she's here and trying to call in.

   BOARD MEMBER AGUIRRE:  Now I've got double -- here we go. Here I am. Can you hear me?

   CHAIR RUFFATTO:  Yes.

   BOARD MEMBER AGUIRRE:  Are you hearing an echo?

   CHAIR RUFFATTO:  No. Yes?
BOARD MEMBER AGUIRRE: I'm going to try to hang up the call or get out of Zoom. Which one?

CHAIR RUFFATTO: I do not know what's better. Ms. Aguirre, can you hear us? You're on mute now.

BOARD MEMBER AGUIRRE: (Indicating affirmative in the chat box)

CHAIR RUFFATTO: Thank you. All right. If we've identified everybody from DEQ, for the record let's identify everyone else that's on. Lauren, can you start that, and then we'll have those that you don't call speak up.

MS. ANDERSON: Yes. Andy Janes.

MR. JANES: Yes. Thanks.

MS. ANDERSON: David Simpson.

CHAIR RUFFATTO: David is a Board member.

MS. ANDERSON: C. Pepino. Derf Johnson.

MR. JOHNSON: Good morning.

MS. ANDERSON: Ellie Hudson-Heck.

MS. HUDSON-HECK: Good morning.

MS. ANDERSON: Erin Sexton.

MS. SEXTON: Good morning.

MS. ANDERSON: Jason Gildea.
MR. GILDEA: Good morning.

MS. ANDERSON: Katherine Orr.

MS. ORR: Good morning.

MS. ANDERSON: Murry Warhank.

MR. WARHANK: Yes.

MS. ANDERSON: Steven Fifer.

MR. FIFER: Good morning.

MS. ANDERSON: Tonya Fish.

MS. FISH: Good morning.

MS. ANDERSON: Wyatt Petrychen.

MR. PETRYCHEN: Good morning.

MS. ANDERSON: Did I miss anyone?

MS. MARQUIS: Hi. Good morning. This is Vicki Marquis.

MR. LETCHER: Good morning. This is Commissioner Josh Letcher from Lincoln County.

CHAIR RUFFATTO: Anyone else?

MS. TRANK: Peggy Trank, Treasure State Resources Association.

CHAIR RUFFATTO: Anyone else that hasn't announced themselves?

BOARD MEMBER AGUIRRE: Chairman, this is Stacy Aguirre. Can you hear me now?

CHAIR RUFFATTO: Yes, I can, Stacy.

Thank you.
BOARD MEMBER AGUIRRE: Awesome. I apologize for all of the technical difficulties.

CHAIR RUFFATTO: No worries at all. I think we have identified everybody.

Now that we can hear you, Stacy, I don't want to put you on the spot, but if you could tell us just briefly a little bit about yourself so the rest of us know you a little better, I would appreciate it.

BOARD MEMBER AGUIRRE: Okay. Well, I'm very honored to be part of this Board and effort. I have a fairly significantly long career, mostly working in process engineering, and the energy industry, both mining, oil and gas, transmission, and storage for natural gas.

I graduated from Montana Tech -- go Diggers -- and currently live in Glendive, Montana. I'm from Deer Lodge, Montana originally, so I'm a Montana person through and through.

CHAIR RUFFATTO: Thank you very much. I appreciate that.

BOARD MEMBER AGUIRRE: Just a quick summary.

CHAIR RUFFATTO: That's what I wanted, so thank you very much.
We will move on now to our agenda. As you all know, this is the special meeting where we'll be dealing with the selenium rule for lentic water adopted by this Board last December. As I speak, I'm just going to call that "the rule."

We have two petitions to review the rule under Montana Code Annotated 75-5-203. These petitions are from Teck Coal and the Commissioners of Lincoln County, and I'm going to refer to those as "the petitions" so I don't stumble over myself too much.

At our October 8th meeting, this matter was on our agenda, but only had five members there, and we could not get a majority to move forward one way or the other, so we called this special meeting because of the time constraints involved.

Before we get started, I'd just like to point out that these petitions present a fairly narrow issue, and that's whether the Board complied with MCA 75-5-203 when it adopted the rule. We will not be addressing under these petitions the merits of the rule, but only the legal issue of compliance with the statute.

Before I go on, I would ask if the Board
has any questions about that point or if anybody would disagree with that point.

(No response)

CHAIR RUFFATTO: Hearing none, I'll move on. The first thing I would like to do is to outline how I perceive that this meeting will proceed. Of course, the Board can at any time change the order or approach, but I thought I'd outline what I thought would be a good approach.

First of all, we have two petitions, and they are very similar. They present the same issues. And so the first question I think we should consider is whether we should consolidate those two petitions.

The second point is to decide if we will dismiss the petitions without further consideration or adopt the process. Assuming we decide not to dismiss, then we will determine the process for considering the petition.

So I'll repeat those. It's kind of in three steps: Consolidation; whether or not to dismiss immediately; and then if we get to the point where we don't dismiss it immediately, we will move on to determining the process. Does anybody have any questions or objections on
proceeding in that manner?

(No response)

CHAIR RUFFATTO: Okay. Then I will move
to the first question that I posed, and that is:
We have two petitions. They are very similar,
present the same issues, they will be based on the
same record. And so I would entertain a motion to
consolidate if someone would want to make that
motion. Joe.

BOARD MEMBER SMITH: Yes. Chair
Ruffato, I would motion to combine the two
petitions, both from Teck Coal and from the
Lincoln County Commissioners.

BOARD MEMBER LEHNHERR: I'll second it.

CHAIR RUFFATTO: Thank you, Doctor.

Discussion.

(No response)

CHAIR RUFFATTO: There being no
discussion, I will call the question if there's no
objection. The motion has been made and seconded
to consolidate the two petitions for purposes of
review, and it's been made and seconded. All in
favor, say aye.

(Response)

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

CHAIR RUFFATTO: The motion passes unanimously.

Then we come to the question of whether we should dismiss the petitions immediately. There were a number of comments that we received that advocated for immediate dismissal. I want to point out that this is not about whether the rulemaking complied, but whether we are going to consider the petitions and consider the arguments pro and con. So it's only to determine whether we dismiss immediately without further consideration, or establish a process for considering the petitions. Do I have a motion so we can start discussion on that point? Dr. Lehnherr.

BOARD MEMBER LEHNHERR: Chair Ruffato, I move that we dismiss the petitions immediately.

CHAIR RUFFATTO: A motion has been made that we dismiss the petitions immediately. Is there a second?

BOARD MEMBER REITEN: I second that motion.

CHAIR RUFFATTO: A motion has been made and seconded that we dismiss the petitions immediately. Discussion.
BOARD MEMBER SIMPSON: Mr. Chairman.

CHAIR RUFFATTO: Yes. Board Member Simpson.

BOARD MEMBER SIMPSON: Is this the appropriate time to address the legal aspects of 203(4), and how it applies to these petitions?

CHAIR RUFFATTO: I believe so.

BOARD MEMBER SIMPSON: I spent quite a bit of time taking a look at this, and the 203(4) is pretty specific in its language relating to the right of a person affected to file a petition if they feel that the adopted standard is more stringent than the Federal standard. So I guess that is, at least in my mind, that's the first question is whether or not these petitions are properly filed under the statute.

The second is that if you read the statute, it says that it is -- "The Board may not adopt a rule that implements 75-5-301, 302, 303, or 310 that is more stringent than the comparable federal regulations or guidelines that address the same circumstances."

And 310 is of interest because it has to do with the adoption of site specific standards for aquatic life.
It's not exactly the same situation because I believe the intent is to be tied to specific permits, but it does address adoption of standards for protection of aquatic life, which is what this standard is.

But 310 includes language stating that site specific standards of water quality must be developed in accordance with the procedures set forth in draft or federal regulations, guidelines, or criteria.

So what that means to me is that in making 203 applicable to 310, it is contemplated that EPA standards will be used in the development of any aquatic standard. So as a matter of general practice, published EPA standards for water quality are adopted or incorporated in DEQ rules. Any deviation requires justification to and review and approval by EPA implicitly or expressly use of EPA approved procedures to adopt a new standard.

And further EPA rarely, if ever, rejects state standards more stringent than Federal standards. Hence these EPA approved or recommended procedures does not and cannot substitute for compliance with 75-5-203. If it
did, 75-5-203 would have no applicability, which was clearly not the intent.

So I understand the point of view that as a matter of principle the decision that has been made is final, should not be revisited, and should not be revisited, but whether the new adopted standard of .8 micrograms per liter of selenium is appropriate is not the issue at the juncture.

The question is a procedural one: Did the Board comply with 75-5-203 MCA? And since simple math shows that the new Montana standard of .8 is more stringent than the existing standard of 1.5, the EPA standard, and acknowledged by EPA that it is more stringent, I believe that the earlier decision by the Board is defective in that it did not comply with 75-5-203. Review and approval by EPA can't substitute for compliance with that standard, in my opinion.

CHAIR RUFFATTO: Thank you, David. Any other discussion? David Lehnerr.

BOARD MEMBER LEHNHERR: Thank you, Chairman Ruffato. Of course I have a slightly different perspective. There are multiple reasons why I think we should dismiss these petitions


immediately, but I'll just hit on a couple points.

One is that this past Legislature essentially took away our rulemaking authority, it's retroactive removal, and that's a significant point; but also it's very clear that the EPA -- it's very clear we last year did not adopt a standard that was more stringent than the EPA standard, and the EPA has made it very clear that we did not adopt a more stringent standard.

I think you know that my position is that this is a waste of time, and we have a lot of better things to do. That is why I'm in support of dismissing these petitions immediately.

CHAIR RUFFATTO: Thank you, Doctor. Any other discussion? Joe.

BOARD MEMBER SIMPSON: Mr. Chairman, if I could make one more point. I don't believe that what we're considering here is rulemaking. If we make the decision to accept the petitions and ask for review, the only time, the only circumstance in which there would be a new rulemaking would be if a decision is made to revise the standard as it exists right now, which is 0.8. So what we're talking about is a legal requirement for procedure and consideration, not a rulemaking.
CHAIR RUFFATTO: Thank you, David. Joe, you had a comment.

BOARD MEMBER SMITH: Yes. I would just say that I'm in agreement with Board Member Simpson. I do really appreciate Dr. Lehnherr's comments, and the process that they took, but I think at this stage, like you said, and I think like Board Member Simpson said, all this is is following the process in 75-5-203(4) that allows a petition to take place. It's not anything more than that, and so I think we should follow that process.

CHAIR RUFFATTO: Thank you, Joe. Any other discussion?

BOARD MEMBER REITEN: I guess I will have to make a little bit of a comment. Mr. Chairman, I do agree with Dr. Lehnherr. I believe that they spent enough time on this previously dealing with making the rule, and it doesn't -- like changing, it sounds like the process is potentially leading to a change of the rule, which I don't think we need to do right now.

But I agree with Dr. Lehnherr. I think EPA has clearly showed their support for this rule, and showed that it did not violate the
federal standards.

CHAIR RUFFATTO: Thank you, Jon. And any other discussion? Go ahead, Stacy.

BOARD MEMBER AGUIRRE: As a new Board member, when I looked at this, my perspective -- and I appreciated Board Member Simpson's description that this is procedural, as Joe also, or Board Member Smith, also lined out.

And when I first looked at it as a new Board member, that's what I saw. I didn't look at the actual criteria. I mean I did look at the criteria obviously, but I didn't look at the decision before us today based on those standards, but on procedure. So I support that thought about procedure needs to move forward.

CHAIR RUFFATTO: Thank you, Stacy. Any other comments?

(No response)

CHAIR RUFFATTO: I will offer my thought. While I completely respect Board Member Lehnherr's and Board Member Reiten's position, I think that the issue here is procedural, as Stacy states, and Board Member Simpson, and Board Member Smith. I believe that if we were to dismiss this without considering it, it would be a violation of
the statute, and if appealed we would be reversed, and it would come right back, and we'd have to do it.

So I think it's actually a better use of time to process the petitions, and reach a conclusion, and in that process, we will hear the arguments pro and con, both from the Board members and the interested public. So I'm against the motion that's on the table. Any other comments from Board members?

BOARD MEMBER ALTEMUS: Chairman Ruffato, this is Julia Altemus, Board Member. I am in agreement with the Chair and others that are concerned about dismissing the petition. Thank you.

CHAIR RUFFATTO: Thank you. Any more discussion?

(No response)

CHAIR RUFFATTO: If there is none, if no one has objection to closing discussion, I will call the question.

(No response)

CHAIR RUFFATTO: Hearing no objections, a motion has been made and seconded that we dismiss the petition without further
consideration. All in favor say aye.

BOARD MEMBER REITEN: Aye.

BOARD MEMBER LEHNHERR: Aye.

CHAIR RUFFATTO: Opposed, same sign.

(Response)

CHAIR RUFFATTO: We will take a roll call. Lauren, can you take a roll call of the Board members to make sure we have that recorded, the votes. Would you call the Board members and ask whether they're voting yes or no.

MS. ANDERSON: Yes. Board Member Smith, opposed or for?

BOARD MEMBER SMITH: Is the call aye or nay or --

MS. ANDERSON: Aye or nay, correct.

BOARD MEMBER SMITH: Nay.

MS. ANDERSON: Board Member Altemus, aye or nay.

BOARD MEMBER ALTEMUS: Nay.

MS. ANDERSON: Board Member Reiten, aye or nay.

BOARD MEMBER REITEN: Aye.

MS. ANDERSON: Board Member Aguirre, aye or nay.

BOARD MEMBER AGUIRRE: Nay.
MS. ANDERSON: Board Member Simpson, aye or nay.

BOARD MEMBER SIMPSON: Nay.

MS. ANDERSON: Board Member Lehnherr, aye or nay.

BOARD MEMBER LEHNHERR: Aye.

CHAIR RUFFATTO: Board Member Ruffato votes nay. The motion fails.

I think we need a motion going the other way, and I'll make that motion. I move that the Board adopt a process to consider the petitions of Teck Coal and Lincoln County. Is there a second?

BOARD MEMBER SIMPSON: Second.

CHAIR RUFFATTO: A motion has been made and seconded that we adopt the process to consider the petitions. Discussion.

(No response)

CHAIR RUFFATTO: If no one has any objection, I will close the discussion and call for the question.

(No response)

CHAIR RUFFATTO: The motion has been made and seconded that the Board adopt a process to consider the petitions of Teck Coal and the Lincoln County Commissioners. All in favor, say
aye.

(Response)

CHAIR RUFFATTO: Opposed, nay.

BOARD MEMBER LEHNHERR: Nay.

BOARD MEMBER REITEN: Nay.

CHAIR RUFFATTO: I don't think there's a need to poll the members unless someone asks for it.

(No response)

CHAIR RUFFATTO: Okay. Let's move on to the next question, and that is what process we will follow, and I'm going to suggest that we break this down into a couple of questions.

In the comments that we received prior to the October 8th meeting, there were two basic processes that were proposed.

DEQ proposed a process that was quite formal. It looked like a contested case kind of process, kind of the litigation model, and it would involve motion process and then eventually a hearing. I'm going to refer to that as the contested case model.

The other model proposed by Teck Coal is less formal. It does not look like a contested case. It's more streamlined, and I'll call that
one the non-contested case model.

Do I have a motion as to which of those
two we follow, or if someone wants make a motion
about some other process?

(No response)

CHAIR RUFFATTO: I will make a motion
then. I will move that we follow the
non-contested case, less formal, more streamlined
process, as proposed by Teck Coal. Is there a
second?

BOARD MEMBER SIMPSON: Second.

CHAIR RUFFATTO: Discussion.

BOARD MEMBER SIMPSON: Mr. Chairman, I
guess the question I would have is before
proceeding with a vote, could we review what that
procedure would be as outlined?

I mean I don't see a reason to proceed
with a contested case type of process. It seems
to me it would be far more intricate than it needs
to be, and the reality is that there has been an
awful lot of work done in developing the standard
as it was adopted. So it makes sense to me to
build on that record, which I think is far more
easily done in a less formal process.

CHAIR RUFFATTO: Since I made the
motion, I will tell you what I have in mind. As
Teck Coal proposed, or what I have in mind -- and
I don't want this to be a part of the motion
because I think we are going to get bogged down in
the details. So I was hoping we could make the
big picture decision, and then get down into the
details.

But what I have in mind is to have a
process whereby all interested parties would have
an opportunity to comment in writing and orally at
a public meeting. There would be an opportunity
for written responses. The written comments, oral
comments and the written responses would all be
submitted to the Board. The Board would consider
those and make a decision.

That's the process I have in mind, but I
don't want to necessarily debate all those. I
just want to kind of get the big parameters.
That's the purpose of my motion. Any more
discussion? Dr. Lehnherr.

BOARD MEMBER LEHNHERR: Chairman
Ruffato, I appreciate your motion. I'm wondering
if you could maybe in a nutshell say why you're
concerned about going through a more formal sort
of contested case format at this point.
CHAIR RUFFATTO: Yes, I will. First of all, I don't think it's a contested case. And secondly, I think that there's more opportunity for the public to participate if we don't go through a contested-case-like process. That process would call for intervention, and motions to intervene, and then motion practice, which would be very time consuming, and also would potentially exclude members of the public that are interested that might not be familiar with that process and have trouble dealing with it.

I think that the process that I am proposing would be more open to the public. And another factor is the contested case process would be very time consuming, and the other one I think we could handle it in a lot shorter time frame, and as you know, we do have a statutory timeline here. So those are my reasons. Go ahead, Doctor.

BOARD MEMBER LEHNHERR: I'm wondering if it would be appropriate -- I'm asking for your opinion here, Chairman Ruffato -- to have someone, Counsel from the DEQ, give their thoughts on what you're proposing. Is that something that would be reasonable?

CHAIR RUFFATTO: Actually I don't have
any objection to that, if the comments are short, and then we would give the Teck Coal representative an opportunity to counter those comments. So is someone from DEQ prepared to address this?

MS. BOWERS: Yes, Chair Ruffato, members of the Board. My name is Kirsten Bowers. I'm a DEQ attorney.

And the process that DEQ proposed wasn't really a full contested case hearing. We agree this isn't a contested case. It's more likened to a review of a prior final decision of the BER that 17.30.632 was not more stringent than comparable federal regulations or guidelines, that is at the same circumstance under 75-5-203.

And that decision -- I want to point out -- was made after consideration of a very comprehensive rulemaking record, and after written and oral comments from the public.

So I think DEQ and Teck, just based on the comments that are in the record, we agree that if the Board is going to reconsider that determination under 75-5-203 sub (4), that it should be made based on the rulemaking record, and that rulemaking record should be compiled by the
Board and made available to the public. 

DEQ's recommended process was that after compiling and making the record available to the public and the interested parties, that there would be time for the parties to review the record and maybe make motions to supplement if they feel the record is not complete. There would have to be some basis for supplementation.

Then DEQ proposed a briefing schedule that would include motions, response replies, and I think that could be a fairly quick briefing schedule, and then oral argument. After that the Board would propose a determination, there would be opportunity for public comment on the proposed determination, and then a final determination by the Board.

And DEQ also would propose that there be an opportunity for the parties to file motions to intervene. DEQ's motion to intervene is in the Board's materials for the meeting today, and that motion to intervene should be permitted based on Montana Rule of Civil Procedure 24(b) because DEQ is the agency that administers the Water Quality Act and rules adopted under that act.

DEQ's motion is timely, and it does not
prejudice the petitioners, and could be helpful to
the Board because DEQ is familiar with the
rulemaking record. That's all I have for now.
Thank you.

CHAIR RUFFATTO: Thank you, Ms. Bowers.

Is there someone from Teck Coal, who also made a
proposal, that would want to respond?

MS. MARQUIS: Yes. Thank you. Good
morning, Chairman Ruffato, members of the Board.

My name is Vicki Marquis with Holland and Hart in
Billings, Montana. I represent Teck Coal on this
petition.

And first I wanted to note that given
that the Board has consolidated the petitions
between Teck Coal and Lincoln County
Commissioners, there is an eight month deadline
provided in statute, and Teck Coal does not oppose
going off of the deadline based on when Lincoln
County filed their petition. So I think that puts
the deadline for a decision a little bit further
out, and we're not opposed to that. I just wanted
to note that.

In response to DEQ's comments on the
process, and as we noted on Page 18 in our
response to comments, we agree with DEQ's
suggestion that the rulemaking record be made available to the public and to the Board members. We think that it would be really very helpful, especially if it could be Bates numbered and provided in a searchable format. That would be helpful for everyone.

We do think that it's important to understand that the rulemaking is closed, and so options to supplement or amend the rulemaking record, while there might be a case where it would be appropriate, this should be very carefully considered and only narrowly allowed. The rulemaking is closed. The documents were all submitted to EPA as part of their approval package, and EPA approved the rule, so that should confine the universe of documents that are part of the rulemaking record.

Our reasons for proposing the less formal process, as we outlined in our filing, are it's not a contested case. These provisions in statutes that allow for a petition don't expressly set up an adversarial proceeding, and I think that's right, because as you've noted, this matter is important to the public, and it should be open and easy for the public to participate.
By going through a more formal contested case type proceeding, it requires people to participate only after they've been successfully allowed to intervene, and that is a daunting process in and of itself. It involves legal filings, and responses, and replies to those, and so the petition process seems to be better suited to open public participation, as the Board has already allowed. By allowing written comments, responses to written comments, and by allowing oral comments at a hearing, that leaves it open for broad public participation, and that's the process that Teck Coal supports. Thank you.

CHAIR RUFFATTO: Thank you, Ms. Marquis. Thank you both. Any more discussion from the Board? Dr. Lehnherr.

BOARD MEMBER LEHNHERR: Well, it sounds like what we have is not so much a contested case format as something that the DEQ proposed, which may be sort of a compromise between a true contested case format and what Teck Coal is proposing.

And like I say, I'm a bit uncomfortable. I feel like this process is being rushed; and I'm also a bit uncomfortable with a proposal submitted
by an obviously biased party, a party that isn't
even from Montana. Both processes allow for
public involvement, it's just the way in which the
public is involved. So I just have to say I'm
wary of a proposal made by Teck Coal.

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

BOARD MEMBER SIMPSON: Mr. Chairman, I
believe there is a representative of the Lincoln
County Commission present. I wonder -- just
asking -- if they might have a comment.

CHAIR RUFFATTO: Great point, David. I
should have thought of that. If there's a
representative of Lincoln County here, and if that
person would like to speak up, I would like to
hear their comments, too. I apologize for not --

MR. WARHANK: Chair Ruffato, my name is
Murry Warhank. I'm the attorney representing the
Lincoln County Board of Commissioners in this
matter.

We believe that the option that you have
referred to as the less formal option is better
for the reasons that Ms. Marquis stated, primarily
that it allows for freer public participation in
the process.
CHAIR RUFFATTO: Thank you, Mr. Warhank.

Thank you, David. Any other discussion?

(No response)

CHAIR RUFFATTO: Hearing none, I will call the question if there is no objection.

COURT REPORTER: Mr. Chairman.

CHAIR RUFFATTO: Yes.

COURT REPORTER: This is Laurie Crutcher. There was something in the chat that one of the Lincoln County Commissioners was trying to get out of the waiting room. I don't know if he had a comment.

MS. ANDERSON: I currently don't have anyone in the waiting room.

CHAIR RUFFATTO: You don't see anybody in the waiting room?

MS. ANDERSON: No.

CHAIR RUFFATTO: All right. Well, we have a representative from Lincoln County that has spoken and is here, so I think we will move on.

A motion has been made and seconded that we adopt a less formal, non-litigation, non-contested case model for the process. All in favor, say aye.

(Response)
CHAIR RUFFATTO: Opposed, nay.

BOARD MEMBER LEHNHERR: Nay.

BOARD MEMBER REITEN: Nay.

CHAIR RUFFATTO: Lauren, let's poll the Board members aye or nay on this motion.

MS. ANDERSON: Chairman Ruffato.

CHAIR RUFFATTO: Aye.

MS. ANDERSON: Board Member Lehnherr.

BOARD MEMBER LEHNHERR: Nay.

MS. ANDERSON: Board Member Simpson.

BOARD MEMBER SIMPSON: Aye.

MS. ANDERSON: Board Member Aguirre.

BOARD MEMBER AGUIRRE: Aye.

CHAIR RUFFATTO: Board Member Reiten.

BOARD MEMBER REITEN: Nay.

MS. ANDERSON: Board Member Smith.

BOARD MEMBER SMITH: Aye.

MS. ANDERSON: Board Member Altemus.

BOARD MEMBER ALTEMUS: Aye.

CHAIR RUFFATTO: The motion passes.

It's been nearly an hour. How about if we take a ten minute break, and then we will move on, and in that process we will get into the details of the process. So we will reconvene at 10:03.

(Recess taken)
CHAIR RUFFATTO: Call the meeting back into order. Lauren, could you call the roll of the Board.

MS. ANDERSON: Chairman Ruffato.

CHAIR RUFFATTO: Here.

MS. ANDERSON: Board Member Lehnherr.

BOARD MEMBER LEHNHERR: Here.

CHAIR RUFFATTO: Board Member Simpson.

BOARD MEMBER SIMPSON: Here.

MS. ANDERSON: Board Member Aguirre.

(No response)

MS. ANDERSON: Board Member Aguirre.

(No response)

CHAIR RUFFATTO: Stacy.

BOARD MEMBER AGUIRRE: Here.

MS. ANDERSON: Board Member Reiten.

BOARD MEMBER REITEN: Here.

CHAIR RUFFATTO: Board Member Smith.

BOARD MEMBER SMITH: Here.

CHAIR RUFFATTO: Board Member Altemus.

BOARD MEMBER ALTEMUS: Here.

CHAIR RUFFATTO: All the Board members are present. I would like -- I didn't outline this at all because I didn't expect it, but I would like to discuss the statutory time frame.
The Petitioner Teck Coal has stated its position that it's acceptable to go by the time frame based on the petition filing by Lincoln County. I want to first confirm with Ms. Marquis. Did I hear that correctly?

MS. MARQUIS: Chairman Ruffato, yes, we did. We're not opposed to going off of the County Commissioners' petition for the time frame.

CHAIR RUFFATTO: Thank you. So my first question is to -- I don't want to put you on the spot, Katherine -- but do you have a view as to whether or not the Board can proceed on that basis legally?

MS. ORR: Mr. Chair, members of the Board. I think they can because the petition was consolidated with Lincoln County's petition, and that can serve as the springboard for the time frame.

CHAIR RUFFATTO: Thank you. In that event I would entertain a motion to use the time frame, the eight month time frame, based upon the petition filed by Lincoln County.

BOARD MEMBER SIMPSON: So moved.

CHAIR RUFFATTO: Thank you, David. Any second?
BOARD MEMBER ALTEMUS: I'd second. This is Julia.

CHAIR RUFFATTO: A motion has been made and seconded, seconded by Board Member Altemus. A motion has been made and seconded that we proceed based on the time frame starting with the filing of the petition by the Commissioners of Lincoln County. Any discussion by the Board?

(No response)

CHAIR RUFFATTO: I think it's a good idea.

BOARD MEMBER REITEN: What does that mean? Mr. Chairman, what is the date we're looking at to start?

CHAIR RUFFATTO: Give me one second and I'll tell you. October 14th is when the Lincoln County petition was filed, so that extends the time frame roughly three and a half months, which certainly helps. It doesn't alleviate all of the time pressure, but it helps. Any discussion?

(No response)

CHAIR RUFFATTO: A motion has been made and seconded that we proceed in the consolidated matter of the petitions of Teck Coal and Lincoln County Commissioners based upon the date of the
filing of the Lincoln County Commissioners' petition. All in favor, say aye.

(Response)

CHAIR RUFFATTO: Opposed, nay.

(No response)

CHAIR RUFFATTO: I'm going to do that again. I jumped the gun. All in favor say aye.

(Response)

CHAIR RUFFATTO: Opposed, nay.

(No response)

CHAIR RUFFATTO: It passes unanimously.

At this point I'd like to move to a point that DEQ raised about the record. All folks who have spoke to the issue, both in writing and orally, have indicated that it is the rulemaking record before the Board that we will consider.

DEQ has raised the question of amending or supplementing that record. I have been visiting with Katherine Orr about this, and she has been working on compiling the record. And we recognize, both Katherine and I recognize the importance of compiling the record, and I also recognize that there can be extensive disputes about the record sometimes. I don't know if there will be here, but there can be.
So I'm going to make a motion to address that, and then we'll have discussion, and we can consider how we're going to move forward. I move that we delegate to Board Counsel Katherine Orr the responsibility of compiling the record, and putting it on the website, and doing so as requested by the parties that have spoke to the issue, that is, with Bates numbers, and hopefully it will be searchable.

And I also include in my motion authorization to Katherine Orr to contact those individuals that she thinks will be helpful to compile that record. It's been a little bit of a task so far, but it's to give her discretion. And then we will place that on the website.

So I'll state that again, hopefully more concisely. I move that we delegate to Katherine Orr the responsibility of compiling the record, and placing it on the website, and in doing so, she can consult with whoever she, in her discretion, feels it would be appropriate to compile that record accurately. Is there a second?

BOARD MEMBER SMITH: I'll second.

CHAIR RUFFATTO: Discussion.
BOARD MEMBER AGUIRRE: Mr. Chairman.

BOARD MEMBER REITEN: Mr. Chairman.

CHAIR RUFFATTO: Yes.

BOARD MEMBER AGUIRRE: Go ahead, Jon.

BOARD MEMBER REITEN: I've got a quick question, showing my ignorance, I think. What is a Bates number? I'm assuming it's something that we can easily locate or references different parts of the text. Am I correct?

CHAIR RUFFATTO: Yes. Every document or every page, I believe every page, in the record will have a number, so when folks are referring to the record, they can refer to the Bates number.

BOARD MEMBER REITEN: Thank you.

BOARD MEMBER AGUIRRE: I just have a question for clarification, Chairman.

CHAIR RUFFATTO: Yes. Go ahead, Stacy.

BOARD MEMBER AGUIRRE: The record that we're putting on the website, because of the decisions we've -- or the actions we've taken today, how is it related to what DEQ talked about, or is it a separate record based on the petitions that would just be on our website, or is it attached to the DEQ's record, or how does that work? Is that a confusing question?
CHAIR RUFFATTO: Well, I think it's a confusing issue, so it's appropriate to be a little bit confusing. So Katherine, can you address that? Because you've been looking at this.

MS. ORR: Yes, Mr. Chair, members of the Board, Board Member Aguirre. These records for rulemaking are a discrete entity, and what they consist of, what the record consists of here, is all of the comments that were submitted upon the initial notice of the rule, and then the comments that were submitted precedent to issuance of the final rule.

And that comment process usually is done in a meeting setting, and it can be fairly truncated. And I don't know in this case really how many situations there were where there were either oral or written comments submitted according to the suggested language of the rule, but I think it was fairly truncated.

So the task is to get together all of those comments, written and oral, that addressed the proposed rule as it was initially noticed, and then the proposed rule as it was finally noticed.

And then after that, what happened was
the Board published the rule, and all of the comments that were considered to be important to the Board for response were published, so there was a final rule published and all of those comments, so that's part of the record as well.

CHAIR RUFFATTO: Thank you, Katherine. I want to follow up a little bit on Stacy's question. I maybe heard it wrong, but I had the sense that she was asking a question, or at least embedded in her question was the relationship between the record, that DEQ record, and the Board record, and --

BOARD MEMBER AGUIRRE: That's correct.

CHAIR RUFFATTO: Okay. That's what I thought. And the question I have there is the Board record is the rulemaking record, and the it's not the DEQ record that would be involved; is that correct, Katherine?

MS. ORR: Mr. Chair, members of the Board. I guess I need maybe some clarification. But I think the Department participated in the rulemaking by way of submitting comments, so that is part of the record. So are we talking about DEQ's petition now? Is that the question?

CHAIR RUFFATTO: No.
MS. ORR: Not petition, but response I mean.

CHAIR RUFFATTO: I think the question is DEQ submitted comments, and everything that DEQ submitted to the Board of course would be part of the record, but documents that DEQ did not submit to the Board would not be part of the record; would this be accurate?

MS. ORR: Mr. Chair, members of the Board, yes, it's whatever was formally submitted that the Board contemplated that will constitute the record.

CHAIR RUFFATTO: Stacy, does that answer your question?

BOARD MEMBER AGUIRRE: Yes, it does. Thank you very much, Katherine, and Chairman. I just wanted to make sure there wasn't going to be more confusion created on the record, and therefore the actions we're taking.

CHAIR RUFFATTO: Thank you.

MS. ORR: May I make a comment?

CHAIR RUFFATTO: Yes, Katherine. Go ahead.

MS. ORR: Mr. Chair, members of the Board. It does appear that Teck Coal and DEQ have
stipulated that there would be no additions to the record, that the record as it existed would be what this Board would address, just to make that clear.

CHAIR RUFFATTO: That's the way I read their filings, yes.

BOARD MEMBER AGUIRRE: That was kind of the basis of my question then, too, not creating new record.

CHAIR RUFFATTO: Correct. The way I look at this, Stacy, is this is a legal question based upon an existing record.

BOARD MEMBER AGUIRRE: Thank you, Chairman and Katherine, for addressing that.

CHAIR RUFFATTO: Kirsten Bowers, you raised your hand. I don't want to open this up generally, but I know you have something to say, so go ahead.

MS. BOWERS: I don't know if this is out of order, but I just wanted to clarify that the rulemaking record is the BER's rulemaking record, and it consists of all of the presentations, all of the comments, written and oral, transcripts, rule notices, everything that was in front of the Board at the time of the rulemaking.
And I also wanted to raise a point that when the record is compiled and made available to the public, in DEQ's proposed process we suggested a time for parties to move to supplement the record, but not really to add to what was in front of the Board at the time of rulemaking, but just to review the record, and make sure it's complete because it's hard, without seeing what Katherine has put together, it's hard to commit that, yes, that's the whole record. Things can get left out, and I think the parties should have the opportunity to look at the record and make sure it's complete.

CHAIR RUFFATTO: I understand your concern. On the other hand, I think that it would bog the process down to have a formal process of briefing on the record.

And so what the purpose for my motion, part of my motion, to give Counsel the ability to speak to folks who have an interest in this to make sure the record is compiled.

I'm anticipating that Katherine Orr will visit with you probably, will probably visit with Vicki Marquis and others that might be interested to compile the record. That was part of the
purpose of my motion.

And then I would say that if at the end of the process, what is posted, if someone believes that there needs to be a correction, they can include that in their comments; and if there's a document that Ms. Orr did not include because she didn't think it was a part of the record or was overlooked somehow, then DEQ or anybody else can include that in their comments. David, did you raise your hand?

BOARD MEMBER LEHNHERR: Thanks. Yes. I just was wanting some clarification about the record that we're talking about. We have, of course, all of the documents in the record that led up to the Board's decision last year, and then this year, a new -- it was reopened by the petition that Teck Coal made. And since that reopening, there have been a lot of public comments made, for example.

Will the record include the documents and the public input that has happened since Teck's petition this year?

CHAIR RUFFATTO: I would offer my opinion that would be no, in my view, but let me ask Katherine if she agrees.
MS. ORR: Mr. Chair, members of the Board. I think what we've done here is to date primarily comment has solicited comments on the process, and that's what we're trying to isolate now; and then there'll be an opportunity to submit comments in a substantive sense. And I would think that if people wanted to resubmit what they've submitted to date in this sort of processed phase, they're certainly able to do that in any form.

CHAIR RUFFATTO: Does that answer your question, Doctor?

BOARD MEMBER LEHNHERR: Thanks.

CHAIR RUFFATTO: Any more discussion?

(No response)

CHAIR RUFFATTO: Hearing none, if there's no objection, I will call the question. A motion has been made and seconded that we delegate to Board Counsel Katherine Orr the responsibility of compiling the record and placing it on the website, and in doing so, she is authorized to use her discretion to contact whoever she thinks would be helpful to compile an accurate record. All in favor, say aye.

(Response)
Opposed nay.

(No response)

Motion carries unanimously. In anticipation of getting to this point, I drafted a motion yesterday, and I asked Katherine if she could put that motion up. At this point I'm going to call it a proposed motion. Can you put that on the screen for everybody to read, Katherine?

MS. ORR: Mr. Chair, I can. Jeremy is our paralegal, and he's been listening in, and he will put it up on the screen. Let me go make sure that all of that is in place. I'll be right back.

CHAIR RUFFATTO: Thank you, Katherine.

(Share screen)

* * * * *

"Move that BER counsel prepare a scheduling order for the Chairman's signature which establishes a process by which interested parties may comment in writing and orally in a public meeting on BER's stringency review of ARM 17.30.632(7)(a) under Mont. Code Ann. Section 75-5-203 pursuant to the petitions of Teck Coal Limited and the Board of County Commissioners of Lincoln County, Montana, including an opportunity
for responsive written comments. Such scheduling order shall be consistent with the determinations and discussions of this Board previously in this meeting and shall provide for the comments to be submittal to the Board as soon as reasonably possible but no later than January 31, 2022."

* * * * *

CHAIR RUFFATTO: I will let you all read this, and then I will point out a few things that I want to make sure you catch when you read it, so please read through it.

The points I would like to bring to your attention, I want to point out that it contemplates comments in writing and orally in a public meeting, and that then there would be an opportunity for written responses to the written comments.

That gives the parties the opportunity, the people that are interested, an opportunity to illuminate the issues for the Board, and hopefully through those comments the Board will get a full understanding of the pros and cons of the arguments, and those comments will undoubtedly refer to the record, and the Board of course will also have access to the record.
And my thought is to have that submitted to the Board by January 31st. I am staying with that date. When we were dealing with the eight month period from June 30th, that didn't give us any time really to consider it, but I thought that was the shortest time possible. We needed that much time. We have another, a few more months, but I think we need that to complete the process after this.

So I would entertain any Board member to propose this motion. If no one wants to, I will.

BOARD MEMBER SIMPSON: Mr. Chairman.

CHAIR RUFFATTO: Yes.

BOARD MEMBER SIMPSON: Digressing for just a minute from the language of the motion.

Looking at 75-5-203(2), it says, "The Board may adopt a rule to implement this chapter that is more stringent than comparable federal guidelines or regulations only if the Board makes a written finding, after public hearing and public comment based on evidence in the record, that the proposed state standard requirement protects public health and the environment of the state, and the state standard or requirement to be imposed to mitigate harm to the public health or
environment and is achievable under current technology."

And then three, "The written finding must reference pertinent, ascertainable, and peer reviewed scientific studies contained in the record that forms the basis for the Board's conclusion. The written finding must also include information from the hearing record regarding the cost to the regulated community that are directly attributable to the proposed state standard or requirement."

I guess my point is that the end product is a written finding by the Board, and it at least to some extent involves a re-examination of the technical record. And without getting specific, I guess I'll make it known, and it will come as no surprise, I have a number of questions on the technical record that at some point during this process I think will need to be discussed.

But I guess my question is: Does the procedure that we're contemplating focus on this written finding?

CHAIR RUFFATTO: It focuses on the petitions that have been filed, which include the issue that you have raised. So I anticipate that
the comments that are filed will address all of
the issues that have been raised by the two
petitions, and that is one of them.

BOARD MEMBER SIMPSON: And then also
looking ahead to Paragraph 4 of that statute, "If
the Board determines that the rule is more
stringent than the comparable federal regulations
or standard or guidelines --" which is I presume
the finding I'm looking for -- "the Board shall
comply with this section either by revising the
rule to confirm to the federal regulations or
guidelines, or by making the written finding as
provided under Subsection (2) within a reasonable
period of time not to exceed eight months."

So the written finding supports the more
stringent standard that has at this point been
adopted. The other option is to revert to the
federal standard. I'm trying to figure out how
all of this -- and I think we all are -- trying to
figure out how it all fits together to reach that
end point.

CHAIR RUFFATTO: You've asked an
excellent question, and one that I don't have an
answer to. And the reason why I think it's an
open question is that the issue you've identified
is a part of the process that we have to figure out.

DEQ would say based upon Senate Bill 233 that once -- and I don't want to put words in their mouths -- but if the Board decides that it's more stringent, then everything goes to DEQ. The petitioners would say that the Board has more authority than that.

Again, that is the question that I expect the comments to illuminate for us, and there will be arguments on both sides of that, and we will see what arguments are made. Does that make sense, David?

BOARD MEMBER SIMPSON: Yes, it makes sense.

CHAIR RUFFATTO: I have not heard a motion, unless I missed it, so I will move the motion that is on the screen. Is there a second?

BOARD MEMBER AGUIRRE: I'll second.

This is Stacy.

CHAIR RUFFATTO: Thank you, Stacy. A motion has been made and seconded. Discussion.

BOARD MEMBER LEHNHERR: Chairman

Ruffato.

CHAIR RUFFATTO: Yes, Doctor.
BOARD MEMBER LEHNHERR: Thank you.
Since we're digressing a bit, I would hate to see
the Board spend a lot of time reviewing what the
Board went through last year. It was a very
involved, very scientifically sound and thorough
process.

The primary question is whether or not
the Board created a standard which is more
stringent than the EPA standard. That doesn't
require a time consuming revisiting of the entire
issue. It's a fairly specific question, and I
just would hate to see us wasting a lot of time on
this issue when there are so many important things
we have to do.

CHAIR RUFFATTO: Thank you, David. Just
call for my response to that is that I agree with
you 100 percent, that it's a narrow issue. In my
view we're not going to get into the merits of the
rule. We're going to get into whether or not the
rule is more stringent than the federal standard,
and then whatever flows from that.

If we say it's not more stringent, we're
done. If we say it is more stringent, then we
need to go to a couple of other questions, but
those questions are narrow, too. So I agree
completely with you, David. Any more discussion?

BOARD MEMBER SIMPSON: Yes, Mr. Chairman. This is Dave Simpson. First of all, I think Dr. Lehnherr raises an excellent point, and I agree also, and I think it gives us a little bit of guidance in that we at some point will have to come to a bifurcation point here, depending on whether or not the Board decides that the rule is in fact more stringent or if it is not more stringent, because under 203, there are two courses of action.

One is to defend the existing standard with a written finding. The other is to revert to the existing -- quote, "existing," close quote -- EPA rule. So I suppose at some point early in the process we will have to make that determination of more stringent or not.

CHAIR RUFFATTO: David, I don't contemplate it being bifurcated, but we could do that. We could set up a process to take it in two steps. My concern with that is timing, so my thinking is that we address the points in the petition, and that the comments should address all of the points in the petition, and that we don't take it as a two step process. That's what I'm
proposing.

BOARD MEMBER SIMPSON: Mr. Chairman, the petitioner specifically makes the point that the adopted standard is more stringent than the federal rule.

CHAIR RUFFATTO: Agreed, and we will make that determination. Any more discussion?

(No response)

CHAIR RUFFATTO: Hearing none, a motion has been made and seconded per the language on the screen, and we will get that to Laurie. Does anybody object to closing discussion and debate?

(No response)

CHAIR RUFFATTO: Hearing none, all in favor of the motion, say aye.

(Response)

CHAIR RUFFATTO: Opposed, nay.

(No response)

CHAIR RUFFATTO: The motion carries unanimously.

That brings us to one final what I'm going to consider a housekeeping point, and that is DEQ's motion to intervene, and I think we need to just deal with that, and I believe that DEQ will have the ability to fully -- Well, I'll back
Because we decided not to follow a contested case model, my view is that motions for intervention are inappropriate and are not necessary. Anybody, including DEQ, can participate fully and completely in the process, and there's no obstacles to that.

So I move that we deny the motion only because it has been rendered moot by our decision to follow a process that allows DEQ to participate fully without intervention.

BOARD MEMBER SIMPSON: Second.


MS. BOWERS: Thank you, Chair Ruffato, members of the Board. I would just like to speak briefly to the motion if allowed.

CHAIR RUFFATTO: Please go ahead.

MS. BOWERS: Thank you, Chair Ruffato. Respectfully DEQ disagrees that the motion to intervene is moot just because this isn't a contested case.

This case could be likened to a declaratory judgment. You are being requested to review a prior decision and make a determination
on that decision, and DEQ's motion to intervene is proper.

And under Montana Rules of Civil Procedure which guide the BER's proceedings, under 24(b)(2), DEQ's motion is permissible because DEQ is the State agency that administers the Water Quality Act and the rules adopted under that act. DEQ's intervention can be helpful to the Board in making its determination on stringency.

And finally it's DEQ that will implement any remedy if the Board should determine that the rule is more stringent. After Senate Bill 233, DEQ would make the findings in 203 Sub (2) or revise the standard.

And the Board has no authority to void the rule. That would be rulemaking, which the Board has no authority to undertake after July 1st. Thank you.

CHAIR RUFFATTO: I'm going to let Ms. Marquis respond, but I think you went well beyond the motion to intervene question with your points. You went to points that I think will be debated in the process, and that is what's the result, and what happens after or if the Board's decides it's more stringent. And it's clear that DEQ -- and
Teck -- and I don't know about Lincoln County --
would disagree with your position.
   So I don't really need or want any more
discussion on the substance there, but I would ask
the Lincoln County representative and the Teck
Coal to respond, but limit your response to the
motion to intervene because I think it's a totally
different question.

MS. MARQUIS: Thank you, Chairman
Ruffato, members of the Board.
   On behalf of Teck Coal, we don't object
to DEQ's participation. We recognize that DEQ as
the proponent of the rule has a lot of knowledge
about the process and what happened and what is in
the record, and that will be useful to the Board
in this petition process.

   As we pointed out in our response to
DEQ's motion to intervene, we don't think that the
Rule of Civil Procedure 24(b)(2) for intervention
applies to this petition process. There's no
explicit link that allows that.

   However, again, we don't think
intervention is necessary for DEQ to participate.
We acknowledge that the Board remains free to ask
questions and receive responses from any
participant, any member of the public, and of course that goes for DEQ as well. Thank you.

CHAIR RUFFATTO: The representative of Lincoln County, Mr. Warhank, do you have a comment?

MR. WARHANK: Yes, sir. We agree with the comments that you've made, as well as the comments that Ms. Marquis has made. We don't have any problem with DEQ's participation, but whether or not that means that they should intervene, I think we would defer to you.

CHAIR RUFFATTO: Thank you. Any more discussion by the Board? Yes, Dr. Lehnherr.

BOARD MEMBER LEHNHERR: Chairman Ruffato, just as a sort of point of information, what would be the practical implications of allowing DEQ to intervene or not to intervene, and what would be the downside of allowing intervention?

CHAIR RUFFATTO: Well, I'm going to respond on my thinking, but then I'm going to ask Katherine to respond, too. Because it's not a contested case proceeding, intervention seems inappropriate, and so that would be suggesting that we aren't
following the earlier decision by this Board.

And if DEQ would be allowed to intervene
-- whatever that would mean in this process. I
do not know that it would mean anything -- but then
the question would be: Would other interested
parties have to intervene in order to participate
fully?

So I think the downside would be
confusion, and not helpful, and I do not think it
is necessary. Katherine, feel free to disagree
with me, and any other member of the Board
disagree with me, but those are my thoughts.

MS. ORR: Okay. Mr. Chairman, members
of the Board, I see the petitioners and the
Department as basically on the same footing
because this is simply a review by the Board under
75-5-203(4) of the question of stringency.

So I do not see this -- and I did some
research on the question of just what it is that
we're handling here, and it's distinct, I think.
I do not think it's a petition for rulemaking, and
I do not think it's a petition for a declaratory
action. To me simply it's a review of stringency.

And I know that the petitioners have
included requests for relief that sort of skew it
toward -- if I can use that word -- toward a kind of a contested case outcome. But I see them as being on the same footing, whatever we call this animal, but I see this as simply a review of the stringency question.

CHAIR RUFFATTO: Thank you, Katherine. Any more discussion on the motion?

(No response)

CHAIR RUFFATTO: Hearing none, I will call the question, if there are no objections to closing debate.

(No response)

CHAIR RUFFATTO: A motion has been made and seconded that the motion of DEQ to intervene in this process is denied on the grounds that DEQ -- is moot because DEQ can fully participate without intervention. All in favor, say aye.

(Response)

CHAIR RUFFATTO: Opposed, nay.

(No response)

CHAIR RUFFATTO: The motion carries unanimously. Let me find my agenda.

BOARD MEMBER LEHNHERR: Chairman Ruffato.

CHAIR RUFFATTO: Yes.
BOARD MEMBER LEHNHERR: I should have said something sooner. I would like to abstain from that vote.

CHAIR RUFFATTO: So noted.

BOARD MEMBER LEHNHERR: Thank you.

CHAIR RUFFATTO: It was not unanimous, but it passed.

I think we're ready to move on to the next item. That's the Board Counsel update. And Katherine, I don't have any idea if you have anything you want to say. Maybe you don't.

MS. ORR: Mr. Chair, members of the Board. I don't. This is a special meeting, and I think we've covered the elements confined by this meeting.

CHAIR RUFFATTO: Thank you. The agenda calls for general public comment on any public matter that is not otherwise on the agenda and not a contested case. Is there any public comment?

(No response)

CHAIR RUFFATTO: Hearing none, I move to adjourn.

BOARD MEMBER LEHNHERR: I'll second that motion.

CHAIR RUFFATTO: It's been moved and
seconded that we adjourn. All in favor, say aye.

(Response)

CHAIR RUFFATTO: Opposed, nay.

(No response)

CHAIR RUFFATTO: We are adjourned.

Thank you, everyone, for your participation. It was very useful.

(The proceedings were concluded at 10:54 a.m.)

* * * * *
CERTIFICATE

STATE OF MONTANA             :

COUNTY OF LEWIS & CLARK      :

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

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing - 63 - 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 11th day of
November, 2021.

________________________________

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