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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

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BOARD MEETING )  
OCTOBER 29, 2021 )

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TRANSCRIPT OF PROCEEDINGS (VIA ZOOM)

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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

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1           WHEREUPON, the following proceedings were  
2 had and testimony taken, to-wit:

3                           \* \* \* \* \*

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

9           MS. ANDERSON: I am, yes.

10          CHAIR RUFFATTO: Welcome.

11          MS. ANDERSON: Thank you.

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

14          MS. ANDERSON: Yes. Chairman Ruffato.

15          CHAIR RUFFATTO: Here.

16          MS. ANDERSON: Board Member Lehnherr.

17                   (No response)

18          MS. ANDERSON: Board Member Lehnherr.

19                   (No response)

20          MS. ANDERSON: Board Member Simpson.

21          BOARD MEMBER SIMPSON: Here.

22          MS. ANDERSON: Board Member Aguirre.

23                   (No response)

24          MS. ANDERSON: Board Member Aguirre.

25                   (No response)

1 CHAIR RUFFATTO: Stacy, I see that  
2 you're on. I think that Lauren is asking you to  
3 respond.

4 (No response)

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

7 MS. ANDERSON: Board member Reiten.

8 BOARD MEMBER REITEN: Here.

9 MS. ANDERSON: Board Member Smith.

10 BOARD MEMBER SMITH: Here.

11 MS. ANDERSON: Board Member Altemus.

12 BOARD MEMBER ALTEMUS: Here.

13 MS. ANDERSON: Board Member Aguirre.

14 (No response)

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

18 BOARD MEMBER AGUIRRE: Hello.

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

21 BOARD MEMBER AGUIRRE: (No response)

22 CHAIR RUFFATTO: Stacy Aguirre, are you  
23 there?

24 (No response)

25 (Dr. Lehnherr present)

1 CHAIR RUFFATTO: Lauren, am I  
2 pronouncing her name correctly?

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

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

7 (No response)

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

12 MS. ANDERSON: Board Member Lehnherr.

13 BOARD MEMBER LEHNHERR: Here.

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

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

22 MS. ANDERSON: Angie Colamaria.

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

25 MS. ANDERSON: Okay. Angie Colamaria,

1 George Mathieus.

2 MR. MATHIEUS: Good morning.

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

5 MS. BOWERS: This is Kirsten Bowers.  
6 I'm DEQ Legal Counsel.

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

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

11 CHAIR RUFFATTO: Anybody else from DEQ?  
12 (No response)

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

15 CHAIR RUFFATTO: Thank you.

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

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

22 CHAIR RUFFATTO: Yes.

23 BOARD MEMBER AGUIRRE: Are you hearing  
24 an echo?

25 CHAIR RUFFATTO: No. Yes?

1 BOARD MEMBER AGUIRRE: I'm going to try  
2 to hang up the call or get out of Zoom. Which  
3 one?

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

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

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

14 MS. ANDERSON: Yes. Andy Janes.

15 MR. JANES: Yes. Thanks.

16 MS. ANDERSON: David Simpson.

17 CHAIR RUFFATTO: David is a Board  
18 member.

19 MS. ANDERSON: C. Pepino. Derf Johnson.

20 MR. JOHNSON: Good morning.

21 MS. ANDERSON: Ellie Hudson-Heck.

22 MS. HUDSON-HECK: Good morning.

23 MS. ANDERSON: Erin Sexton.

24 MS. SEXTON: Good morning.

25 MS. ANDERSON: Jason Gildea.

1 MR. GILDEA: Good morning.

2 MS. ANDERSON: Katherine Orr.

3 MS. ORR: Good morning.

4 MS. ANDERSON: Murry Warhank.

5 MR. WARHANK: Yes.

6 MS. ANDERSON: Steven Fifer.

7 MR. FIFER: Good morning.

8 MS. ANDERSON: Tonya Fish.

9 MS. FISH: Good morning.

10 MS. ANDERSON: Wyatt Petrychen.

11 MR. PETRYCHEN: Good morning.

12 MS. ANDERSON: Did I miss anyone?

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

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

17 CHAIR RUFFATTO: Anyone else?

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

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

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

24 CHAIR RUFFATTO: Yes, I can, Stacy.

25 Thank you.

1 BOARD MEMBER AGUIRRE: Awesome. I  
2 apologize for all of the technical difficulties.

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

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

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

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

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

22 BOARD MEMBER AGUIRRE: Just a quick  
23 summary.

24 CHAIR RUFFATTO: That's what I wanted,  
25 so thank you very much.



1           We will move on now to our agenda. As  
2 you all know, this is the special meeting where  
3 we'll be dealing with the selenium rule for lentic  
4 water adopted by this Board last December. As I  
5 speak, I'm just going to call that "the rule."

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

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

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

25           Before I go on, I would ask if the Board

1 has any questions about that point or if anybody  
2 would disagree with that point.

3 (No response)

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

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

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

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

1 proceeding in that manner?

2 (No response)

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

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

14 BOARD MEMBER LEHNHERR: I'll second it.

15 CHAIR RUFFATTO: Thank you, Doctor.  
16 Discussion.

17 (No response)

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

24 (Response)

25 CHAIR RUFFATTO: Opposed, same sign.

1 (No response)

2 CHAIR RUFFATTO: The motion passes  
3 unanimately.

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

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

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

21 BOARD MEMBER REITEN: I second that  
22 motion.

23 CHAIR RUFFATTO: A motion has been made  
24 and seconded that we dismiss the petitions  
25 immediately. Discussion.

1 BOARD MEMBER SIMPSON: Mr. Chairman.

2 CHAIR RUFFATTO: Yes. Board Member  
3 Simpson.

4 BOARD MEMBER SIMPSON: Is this the  
5 appropriate time to address the legal aspects of  
6 203(4), and how it applies to these petitions?

7 CHAIR RUFFATTO: I believe so.

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

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

23 And 310 is of interest because it has to  
24 do with the adoption of site specific standards  
25 for aquatic life.

1           It's not exactly the same situation  
2 because I believe the intent is to be tied to  
3 specific permits, but it does address adoption of  
4 standards for protection of aquatic life, which is  
5 what this standard is.

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

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

21           And further EPA rarely, if ever, rejects  
22 state standards more stringent than Federal  
23 standards. Hence these EPA approved or  
24 recommended procedures does not and cannot  
25 substitute for compliance with 75-5-203. If it

1 did, 75-5-203 would have no applicability, which  
2 was clearly not the intent.

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

10 The question is a procedural one: Did  
11 the Board comply with 75-5-203 MCA? And since  
12 simple math shows that the new Montana standard of  
13 .8 is more stringent than the existing standard of  
14 1.5, the EPA standard, and acknowledged by EPA  
15 that it is more stringent, I believe that the  
16 earlier decision by the Board is defective in that  
17 it did not comply with 75-5-203. Review and  
18 approval by EPA can't substitute for compliance  
19 with that standard, in my opinion.

20 CHAIR RUFFATTO: Thank you, David. Any  
21 other discussion? David Lehnherr.

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

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

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

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

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

16 BOARD MEMBER SIMPSON: Mr. Chairman, if  
17 I could make one more point. I don't believe that  
18 what we're considering here is rulemaking. If we  
19 make the decision to accept the petitions and ask  
20 for review, the only time, the only circumstance  
21 in which there would be a new rulemaking would be  
22 if a decision is made to revise the standard as it  
23 exists right now, which is 0.8. So what we're  
24 talking about is a legal requirement for procedure  
25 and consideration, not a rulemaking.



1 CHAIR RUFFATTO: Thank you, David. Joe,  
2 you had a comment.

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

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

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

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

1 federal standards.

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

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

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

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

18 (No response)

19 CHAIR RUFFATTO: I will offer my  
20 thought. While I completely respect Board Member  
21 Lehnherr's and Board Member Reiten's position, I  
22 think that the issue here is procedural, as Stacy  
23 states, and Board Member Simpson, and Board Member  
24 Smith. I believe that if we were to dismiss this  
25 without considering it, it would be a violation of

1 the statute, and if appealed we would be reversed,  
2 and it would come right back, and we'd have to do  
3 it.

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

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

16 CHAIR RUFFATTO: Thank you. Any more  
17 discussion?

18 (No response)

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

22 (No response)

23 CHAIR RUFFATTO: Hearing no objections,  
24 a motion has been made and seconded that we  
25 dismiss the petition without further

1 consideration. All in favor say aye.

2 BOARD MEMBER REITEN: Aye.

3 BOARD MEMBER LEHNHERR: Aye.

4 CHAIR RUFFATTO: Opposed, same sign.

5 (Response)

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

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

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

15 MS. ANDERSON: Aye or nay, correct.

16 BOARD MEMBER SMITH: Nay.

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

19 BOARD MEMBER ALTEMUS: Nay.

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

22 BOARD MEMBER REITEN: Aye.

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

25 BOARD MEMBER AGUIRRE: Nay.

1 MS. ANDERSON: Board Member Simpson, aye  
2 or nay.

3 BOARD MEMBER SIMPSON: Nay.

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

6 BOARD MEMBER LEHNHERR: Aye.

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

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

13 BOARD MEMBER SIMPSON: Second.

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

17 (No response)

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

21 (No response)

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

1 aye.

2 (Response)

3 CHAIR RUFFATTO: Opposed, nay.

4 BOARD MEMBER LEHNHERR: Nay.

5 BOARD MEMBER REITEN: Nay.

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

9 (No response)

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

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

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

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

1 one the non-contested case model.

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

5 (No response)

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

11 BOARD MEMBER SIMPSON: Second.

12 CHAIR RUFFATTO: Discussion.

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

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

25 CHAIR RUFFATTO: Since I made the

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

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

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

21 BOARD MEMBER LEHNHERR: Chairman  
22 Ruffato, I appreciate your motion. I'm wondering  
23 if you could maybe in a nutshell say why you're  
24 concerned about going through a more formal sort  
25 of contested case format at this point.



1           CHAIR RUFFATTO: Yes, I will. First of  
2 all, I don't think it's a contested case. And  
3 secondly, I think that there's more opportunity  
4 for the public to participate if we don't go  
5 through a contested-case-like process. That  
6 process would call for intervention, and motions  
7 to intervene, and then motion practice, which  
8 would be very time consuming, and also would  
9 potentially exclude members of the public that are  
10 interested that might not be familiar with that  
11 process and have trouble dealing with it.

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

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

25           CHAIR RUFFATTO: Actually I don't have

1 any objection to that, if the comments are short,  
2 and then we would give the Teck Coal  
3 representative an opportunity to counter those  
4 comments. So is someone from DEQ prepared to  
5 address this?

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

9 And the process that DEQ proposed wasn't  
10 really a full contested case hearing. We agree  
11 this isn't a contested case. It's more likened to  
12 a review of a prior final decision of the BER that  
13 17.30.632 was not more stringent than comparable  
14 federal regulations or guidelines, that is at the  
15 same circumstance under 75-5-203.

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

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

1 Board and made available to the public.

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

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

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

25 DEQ's motion is timely, and it does not

1 prejudice the petitioners, and could be helpful to  
2 the Board because DEQ is familiar with the  
3 rulemaking record. That's all I have for now.  
4 Thank you.

5 CHAIR RUFFATTO: Thank you, Ms. Bowers.  
6 Is there someone from Teck Coal, who also made a  
7 proposal, that would want to respond?

8 MS. MARQUIS: Yes. Thank you. Good  
9 morning, Chairman Ruffato, members of the Board.  
10 My name is Vicki Marquis with Holland and Hart in  
11 Billings, Montana. I represent Teck Coal on this  
12 petition.

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

23 In response to DEQ's comments on the  
24 process, and as we noted on Page 18 in our  
25 response to comments, we agree with DEQ's

1 suggestion that the rulemaking record be made  
2 available to the public and to the Board members.  
3 We think that it would be really very helpful,  
4 especially if it could be Bates numbered and  
5 provided in a searchable format. That would be  
6 helpful for everyone.

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

18 Our reasons for proposing the less  
19 formal process, as we outlined in our filing, are  
20 it's not a contested case. These provisions in  
21 statutes that allow for a petition don't expressly  
22 set up an adversarial proceeding, and I think  
23 that's right, because as you've noted, this matter  
24 is important to the public, and it should be open  
25 and easy for the public to participate.

1           By going through a more formal contested  
2 case type proceeding, it requires people to  
3 participate only after they've been successfully  
4 allowed to intervene, and that is a daunting  
5 process in and of itself. It involves legal  
6 filings, and responses, and replies to those, and  
7 so the petition process seems to be better suited  
8 to open public participation, as the Board has  
9 already allowed. By allowing written comments,  
10 responses to written comments, and by allowing  
11 oral comments at a hearing, that leaves it open  
12 for broad public participation, and that's the  
13 process that Teck Coal supports. Thank you.

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

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

23           And like I say, I'm a bit uncomfortable.  
24 I feel like this process is being rushed; and I'm  
25 also a bit uncomfortable with a proposal submitted

1 by an obviously biased party, a party that isn't  
2 even from Montana. Both processes allow for  
3 public involvement, it's just the way in which the  
4 public is involved. So I just have to say I'm  
5 wary of a proposal made by Teck Coal.

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

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

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

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

21 We believe that the option that you have  
22 referred to as the less formal option is better  
23 for the reasons that Ms. Marquis stated, primarily  
24 that it allows for freer public participation in  
25 the process.

1 CHAIR RUFFATTO: Thank you, Mr. Warhank.  
2 Thank you, David. Any other discussion?

3 (No response)

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

6 COURT REPORTER: Mr. Chairman.

7 CHAIR RUFFATTO: Yes.

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

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

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

17 MS. ANDERSON: No.

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

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

25 (Response)



1 CHAIR RUFFATTO: Opposed, nay.

2 BOARD MEMBER LEHNHERR: Nay.

3 BOARD MEMBER REITEN: Nay.

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

6 MS. ANDERSON: Chairman Ruffato.

7 CHAIR RUFFATTO: Aye.

8 MS. ANDERSON: Board Member Lehnherr.

9 BOARD MEMBER LEHNHERR: Nay.

10 MS. ANDERSON: Board Member Simpson.

11 BOARD MEMBER SIMPSON: Aye.

12 MS. ANDERSON: Board Member Aguirre.

13 BOARD MEMBER AGUIRRE: Aye.

14 CHAIR RUFFATTO: Board Member Reiten.

15 BOARD MEMBER REITEN: Nay.

16 MS. ANDERSON: Board Member Smith.

17 BOARD MEMBER SMITH: Aye.

18 MS. ANDERSON: Board Member Altemus.

19 BOARD MEMBER ALTEMUS: Aye.

20 CHAIR RUFFATTO: The motion passes.

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

25 (Recess taken)

1 CHAIR RUFFATTO: Call the meeting back  
2 into order. Lauren, could you call the roll of  
3 the Board.

4 MS. ANDERSON: Chairman Ruffato.

5 CHAIR RUFFATTO: Here.

6 MS. ANDERSON: Board Member Lehnherr.

7 BOARD MEMBER LEHNHERR: Here.

8 CHAIR RUFFATTO: Board Member Simpson.

9 BOARD MEMBER SIMPSON: Here.

10 MS. ANDERSON: Board Member Aguirre.

11 (No response)

12 MS. ANDERSON: Board Member Aguirre.

13 (No response)

14 CHAIR RUFFATTO: Stacy.

15 BOARD MEMBER AGUIRRE: Here.

16 MS. ANDERSON: Board Member Reiten.

17 BOARD MEMBER REITEN: Here.

18 CHAIR RUFFATTO: Board Member Smith.

19 BOARD MEMBER SMITH: Here.

20 CHAIR RUFFATTO: Board Member Altemus.

21 BOARD MEMBER ALTEMUS: Here.

22 CHAIR RUFFATTO: All the Board members  
23 are present. I would like -- I didn't outline  
24 this at all because I didn't expect it, but I  
25 would like to discuss the statutory time frame.

1           The Petitioner Teck Coal has stated its  
2 position that it's acceptable to go by the time  
3 frame based on the petition filing by Lincoln  
4 County. I want to first confirm with Ms. Marquis.  
5 Did I hear that correctly?

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

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

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

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

23          BOARD MEMBER SIMPSON: So moved.

24          CHAIR RUFFATTO: Thank you, David. Any  
25 second?

1           BOARD MEMBER ALTEMUS: I'd second. This  
2 is Julia.

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

9           (No response)

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

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

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

21          (No response)

22          CHAIR RUFFATTO: A motion has been made  
23 and seconded that we proceed in the consolidated  
24 matter of the petitions of Teck Coal and Lincoln  
25 County Commissioners based upon the date of the

1 filing of the Lincoln County Commissioners'  
2 petition. All in favor, say aye.

3 (Response)

4 CHAIR RUFFATTO: Opposed, nay.

5 (No response)

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

8 (Response)

9 CHAIR RUFFATTO: Opposed, nay.

10 (No response)

11 CHAIR RUFFATTO: It passes unanimously.

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

17 DEQ has raised the question of amending  
18 or supplementing that record. I have been  
19 visiting with Katherine Orr about this, and she  
20 has been working on compiling the record. And we  
21 recognize, both Katherine and I recognize the  
22 importance of compiling the record, and I also  
23 recognize that there can be extensive disputes  
24 about the record sometimes. I don't know if there  
25 will be here, but there can be.

1           So I'm going to make a motion to address  
2           that, and then we'll have discussion, and we can  
3           consider how we're going to move forward. I move  
4           that we delegate to Board Counsel Katherine Orr  
5           the responsibility of compiling the record, and  
6           putting it on the website, and doing so as  
7           requested by the parties that have spoke to the  
8           issue, that is, with Bates numbers, and hopefully  
9           it will be searchable.

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

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

24           BOARD MEMBER SMITH: I'll second.

25           CHAIR RUFFATTO: Discussion.

1 BOARD MEMBER AGUIRRE: Mr. Chairman.

2 BOARD MEMBER REITEN: Mr. Chairman.

3 CHAIR RUFFATTO: Yes.

4 BOARD MEMBER AGUIRRE: Go ahead, Jon.

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

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

14 BOARD MEMBER REITEN: Thank you.

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

17 CHAIR RUFFATTO: Yes. Go ahead, Stacy.

18 BOARD MEMBER AGUIRRE: The record that  
19 we're putting on the website, because of the  
20 decisions we've -- or the actions we've taken  
21 today, how is it related to what DEQ talked about,  
22 or is it a separate record based on the petitions  
23 that would just be on our website, or is it  
24 attached to the DEQ's record, or how does that  
25 work? Is that a confusing question?

1           CHAIR RUFFATTO: Well, I think it's a  
2 confusing issue, so it's appropriate to be a  
3 little bit confusing. So Katherine, can you  
4 address that? Because you've been looking at  
5 this.

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

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

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

25           And then after that, what happened was



1 the Board published the rule, and all of the  
2 comments that were considered to be important to  
3 the Board for response were published, so there  
4 was a final rule published and all of those  
5 comments, so that's part of the record as well.

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

13 BOARD MEMBER AGUIRRE: That's correct.

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

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

25 CHAIR RUFFATTO: No.

1 MS. ORR: Not petition, but response I  
2 mean.

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

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

13 CHAIR RUFFATTO: Stacy, does that answer  
14 your question?

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

20 CHAIR RUFFATTO: Thank you.

21 MS. ORR: May I make a comment?

22 CHAIR RUFFATTO: Yes, Katherine. Go  
23 ahead.

24 MS. ORR: Mr. Chair, members of the  
25 Board. It does appear that Teck Coal and DEQ have

1 stipulated that there would be no additions to the  
2 record, that the record as it existed would be  
3 what this Board would address, just to make that  
4 clear.

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

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

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

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

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

19 MS. BOWERS: I don't know if this is out  
20 of order, but I just wanted to clarify that the  
21 rulemaking record is the BER's rulemaking record,  
22 and it consists of all of the presentations, all  
23 of the comments, written and oral, transcripts,  
24 rule notices, everything that was in front of the  
25 Board at the time of the rulemaking.

1           And I also wanted to raise a point that  
2 when the record is compiled and made available to  
3 the public, in DEQ's proposed process we suggested  
4 a time for parties to move to supplement the  
5 record, but not really to add to what was in front  
6 of the Board at the time of rulemaking, but just  
7 to review the record, and make sure it's complete  
8 because it's hard, without seeing what Katherine  
9 has put together, it's hard to commit that, yes,  
10 that's the whole record. Things can get left out,  
11 and I think the parties should have the  
12 opportunity to look at the record and make sure  
13 it's complete.

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

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

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

1 purpose of my motion.

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

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

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

23 CHAIR RUFFATTO: I would offer my  
24 opinion that would be no, in my view, but let me  
25 ask Katherine if she agrees.

1 MS. ORR: Mr. Chair, members of the  
2 Board. I think what we've done here is to date  
3 primarily comment has solicited comments on the  
4 process, and that's what we're trying to isolate  
5 now; and then there'll be an opportunity to submit  
6 comments in a substantive sense. And I would  
7 think that if people wanted to resubmit what  
8 they've submitted to date in this sort of  
9 processed phase, they're certainly able to do that  
10 in any form.

11 CHAIR RUFFATTO: Does that answer your  
12 question, Doctor?

13 BOARD MEMBER LEHNHERR: Thanks.

14 CHAIR RUFFATTO: Any more discussion?

15 (No response)

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

25 (Response)

1 CHAIR RUFFATTO: Opposed nay.

2 (No response)

3 CHAIR RUFFATTO: Motion carries  
4 unanimately. In anticipation of getting to this  
5 point, I drafted a motion yesterday, and I asked  
6 Katherine if she could put that motion up. At  
7 this point I'm going to call it a proposed motion.  
8 Can you put that on the screen for everybody to  
9 read, Katherine?

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

14 CHAIR RUFFATTO: Thank you, Katherine.

15 (Share screen)

16 \* \* \* \* \*

17 "Move that BER counsel prepare a  
18 scheduling order for the Chairman's signature  
19 which establishes a process by which interested  
20 parties may comment in writing and orally in a  
21 public meeting on BER's stringency review of ARM  
22 17.30.632(7)(a) under Mont. Code Ann. Section  
23 75-5-203 pursuant to the petitions of Teck Coal  
24 Limited and the Board of County Commissioners of  
25 Lincoln County, Montana, including an opportunity

1 for responsive written comments. Such scheduling  
2 order shall be consistent with the determinations  
3 and discussions of this Board previously in this  
4 meeting and shall provide for the comments to be  
5 submittal to the Board as soon as reasonably  
6 possible but no later than January 31, 2022."

7 \* \* \* \* \*

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

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

18 That gives the parties the opportunity,  
19 the people that are interested, an opportunity to  
20 illuminate the issues for the Board, and hopefully  
21 through those comments the Board will get a full  
22 understanding of the pros and cons of the  
23 arguments, and those comments will undoubtedly  
24 refer to the record, and the Board of course will  
25 also have access to the record.



1           And my thought is to have that submitted  
2 to the Board by January 31st. I am staying with  
3 that date. When we were dealing with the eight  
4 month period from June 30th, that didn't give us  
5 any time really to consider it, but I thought that  
6 was the shortest time possible. We needed that  
7 much time. We have another, a few more months,  
8 but I think we need that to complete the process  
9 after this.

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

12           BOARD MEMBER SIMPSON: Mr. Chairman.

13           CHAIR RUFFATTO: Yes.

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

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

1 environment and is achievable under current  
2 technology."

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

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

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

23 CHAIR RUFFATTO: It focuses on the  
24 petitions that have been filed, which include the  
25 issue that you have raised. So I anticipate that

1 the comments that are filed will address all of  
2 the issues that have been raised by the two  
3 petitions, and that is one of them.

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

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

22 CHAIR RUFFATTO: You've asked an  
23 excellent question, and one that I don't have an  
24 answer to. And the reason why I think it's an  
25 open question is that the issue you've identified

1 is a part of the process that we have to figure  
2 out.

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

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

14 BOARD MEMBER SIMPSON: Yes, it makes  
15 sense.

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

19 BOARD MEMBER AGUIRRE: I'll second.  
20 This is Stacy.

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

23 BOARD MEMBER LEHNHERR: Chairman  
24 Ruffato.

25 CHAIR RUFFATTO: Yes, Doctor.

1 BOARD MEMBER LEHNHERR: Thank you.

2 Since we're digressing a bit, I would hate to see  
3 the Board spend a lot of time reviewing what the  
4 Board went through last year. It was a very  
5 involved, very scientifically sound and thorough  
6 process.

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

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

22 If we say it's not more stringent, we're  
23 done. If we say it is more stringent, then we  
24 need to go to a couple of other questions, but  
25 those questions are narrow, too. So I agree

1 completely with you, David. Any more discussion?

2 BOARD MEMBER SIMPSON: Yes, Mr.

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

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

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

1 proposing.

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

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

8 (No response)

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

13 (No response)

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

16 (Response)

17 CHAIR RUFFATTO: Opposed, nay.

18 (No response)

19 CHAIR RUFFATTO: The motion carries  
20 unanimously.

21 That brings us to one final what I'm  
22 going to consider a housekeeping point, and that  
23 is DEQ's motion to intervene, and I think we need  
24 to just deal with that, and I believe that DEQ  
25 will have the ability to fully -- Well, I'll back

1 up.

2 Because we decided not to follow a  
3 contested case model, my view is that motions for  
4 intervention are inappropriate and are not  
5 necessary. Anybody, including DEQ, can  
6 participate fully and completely in the process,  
7 and there's no obstacles to that.

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

12 BOARD MEMBER SIMPSON: Second.

13 CHAIR RUFFATTO: Discussion? Ms.  
14 Bowers.

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

18 CHAIR RUFFATTO: Please go ahead.

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

23 This case could be likened to a  
24 declaratory judgment. You are being requested to  
25 review a prior decision and make a determination



1 on that decision, and DEQ's motion to intervene is  
2 proper.

3 And under Montana Rules of Civil  
4 Procedure which guide the BER's proceedings, under  
5 24(b)(2), DEQ's motion is permissible because DEQ  
6 is the State agency that administers the Water  
7 Quality Act and the rules adopted under that act.  
8 DEQ's intervention can be helpful to the Board in  
9 making its determination on stringency.

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

15 And the Board has no authority to void  
16 the rule. That would be rulemaking, which the  
17 Board has no authority to undertake after July  
18 1st. Thank you.

19 CHAIR RUFFATTO: I'm going to let Ms.  
20 Marquis respond, but I think you went well beyond  
21 the motion to intervene question with your points.  
22 You went to points that I think will be debated in  
23 the process, and that is what's the result, and  
24 what happens after or if the Board's decides it's  
25 more stringent. And it's clear that DEQ -- and

1 Teck -- and I don't know about Lincoln County --  
2 would disagree with your position.

3 So I don't really need or want any more  
4 discussion on the substance there, but I would ask  
5 the Lincoln County representative and the Teck  
6 Coal to respond, but limit your response to the  
7 motion to intervene because I think it's a totally  
8 different question.

9 MS. MARQUIS: Thank you, Chairman  
10 Ruffato, members of the Board.

11 On behalf of Teck Coal, we don't object  
12 to DEQ's participation. We recognize that DEQ as  
13 the proponent of the rule has a lot of knowledge  
14 about the process and what happened and what is in  
15 the record, and that will be useful to the Board  
16 in this petition process.

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

22 However, again, we don't think  
23 intervention is necessary for DEQ to participate.  
24 We acknowledge that the Board remains free to ask  
25 questions and receive responses from any

1 participant, any member of the public, and of  
2 course that goes for DEQ as well. Thank you.

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

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

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

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

20 CHAIR RUFFATTO: Well, I'm going to  
21 respond on my thinking, but then I'm going to ask  
22 Katherine to respond, too.

23 Because it's not a contested case  
24 proceeding, intervention seems inappropriate, and  
25 so that would be suggesting that we aren't

1 following the earlier decision by this Board.

2 And if DEQ would be allowed to intervene  
3 -- whatever that would mean in this process. I  
4 don't know that it would mean anything -- but then  
5 the question would be: Would other interested  
6 parties have to intervene in order to participate  
7 fully?

8 So I think the downside would be  
9 confusion, and not helpful, and I don't think it  
10 is necessary. Katherine, feel free to disagree  
11 with me, and any other member of the Board  
12 disagree with me, but those are my thoughts.

13 MS. ORR: Okay. Mr. Chairman, members  
14 of the Board, I see the petitioners and the  
15 Department as basically on the same footing  
16 because this is simply a review by the Board under  
17 75-5-203(4) of the question of stringency.

18 So I don't see this -- and I did some  
19 research on the question of just what it is that  
20 we're handling here, and it's distinct, I think.  
21 I don't think it's a petition for rulemaking, and  
22 I don't think it's a petition for a declaratory  
23 action. To me simply it's a review of stringency.

24 And I know that the petitioners have  
25 included requests for relief that sort of skew it

1 toward -- if I can use that word -- toward a kind  
2 of a contested case outcome. But I see them as  
3 being on the same footing, whatever we call this  
4 animal, but I see this as simply a review of the  
5 stringency question.

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

8 (No response)

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

12 (No response)

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

18 (Response)

19 CHAIR RUFFATTO: Opposed, nay.

20 (No response)

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

23 BOARD MEMBER LEHNHERR: Chairman  
24 Ruffato.

25 CHAIR RUFFATTO: Yes.

1 BOARD MEMBER LEHNHERR: I should have  
2 said something sooner. I would like to abstain  
3 from that vote.

4 CHAIR RUFFATTO: So noted.

5 BOARD MEMBER LEHNHERR: Thank you.

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

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

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

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

20 (No response)

21 CHAIR RUFFATTO: Hearing none, I move to  
22 adjourn.

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

25 CHAIR RUFFATTO: It's been moved and

1 seconded that we adjourn. All in favor, say aye.

2 (Response)

3 CHAIR RUFFATTO: Opposed, nay.

4 (No response)

5 CHAIR RUFFATTO: We are adjourned.

6 Thank you, everyone, for your participation. It

7 was very useful.

8 (The proceedings were concluded

9 at 10:54 a.m. )

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

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

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



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