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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
DECEMBER 10, 2021)

TRANSCRIPT OF PROCEEDINGS (VIA ZOOM)

December 10, 2021
9:00 a.m.

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

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1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 CHAIR RUFFATTO: Good morning, everyone.
5 Welcome. I believe it's time for this meeting to
6 start, so I will call it to order. And Regan,
7 could you please call the roll of the Board
8 members.

9 MS. SIDNER: Chair Ruffatto.

10 CHAIR RUFFATTO: Here.

11 MS. SIDNER: Board Member Lehnherr.

12 BOARD MEMBER LEHNHERR: Here.

13 MS. SIDNER: Board Member Simpson.

14 BOARD MEMBER SIMPSON: Here.

15 MS. SIDNER: Board Member Aguirre.

16 Board Member Aguirre.

17 (No response)

18 CHAIR RUFFATTO: We can't hear you,
19 Stacy, but we can see you. So I think we can call
20 her here, but we'll make sure that when we -- that
21 somehow she can communicate. Maybe she needs to
22 call in again.

23 MS. SIDNER: Board Member Reiten.

24 BOARD MEMBER REITEN: Here.

25 MS. SIDNER: Board Member Smith.

1 BOARD MEMBER SMITH: Here.

2 MS. SIDNER: Board Member Altemus.

3 (No response)

4 MS. SIDNER: Board Member Altemus.

5 (No response)

6 MS. SIDNER: Still connecting to audio,
7 I believe.

8 BOARD MEMBER ALTEMUS: Here.

9 MS. SIDNER: Board Member Aguirre, can
10 you try one more time?

11 (No response)

12 MS. SIDNER: I will troubleshoot with
13 you privately, Board Member Aguirre.

14 CHAIR RUFFATTO: We have a quorum. So
15 let's start out -- let's identify everyone else
16 that's here. Regan, can you start with DEQ folks.

17 MS. SIDNER: Yes, Chair Ruffatto. I see
18 Staff Liaison James Fehr; Angela Colamaria; Chad
19 Anderson; Catherine Armstrong; Ed Hayes; Kayla
20 Glossner; Nick Whitaker; Sarah Christopherson;
21 Aaron Pettis; Kurt Moser; Lauren Johnson; Kirsten
22 Bowers. Have I missed any DEQ members? Christine
23 Weaver. Did I miss anybody else from DEQ?

24 MS. SULLIVAN: Lauren Sullivan with DEQ.

25 MS. SIDNER: Thank you, Lauren. Anybody

1 else from DEQ that I've missed?

2 (No response)

3 MS. SIDNER: Chair Ruffatto, do you want
4 me to move on to non-DEQ members?

5 CHAIR RUFFATTO: Please.

6 MS. SIDNER: Vicki Marquis; Clayton
7 Elliott; Andrew Cziok; Katherine Orr, our Board
8 attorney; John Martin; C. Laughner -- I believe
9 that's Caitlin? Caitlin or Catherine Laughner. I
10 apologize. I didn't get everybody written down.
11 I have to scroll.

12 MS. ORR: That would be Caitlin Buzzas,
13 I think. Do you have her?

14 MS. SIDNER: Caitlin Buzzas, are you
15 present?

16 (No response)

17 MS. SIDNER: I don't believe so. I
18 don't have her.

19 MS. ORR: All right.

20 MS. SIDNER: Sam Yemington; Martha
21 Thomson. Have I missed anybody?

22 (No response)

23 MS. SIDNER: Hearing no response.

24 CHAIR RUFFATTO: Thank you. George
25 Mathieus is not on. I thought he might be. Since

1 he's not, I would ask James to convey our thanks
2 to George for his years of service to the State
3 and to this Board. I wanted to thank him, so
4 would you convey that to him? I'd appreciate it.

5 And then I wanted to introduce to
6 everyone James Fehr. He is our new liaison with
7 DEQ. James, if you'd be comfortable, if you could
8 just tell us a couple of things about yourself,
9 and it would probably be helpful for everybody.

10 MR. FEHR: Absolutely. Thank you very
11 much. So I just rejoined DEQ starting November
12 1st. I worked with DEQ as their HR manager back
13 from 2010 to 2012. After I was the HR manager
14 here, I went on to work for the City of Helena as
15 their Human Resource Director. And during the
16 pandemic I was the Chief Human Resource Officer
17 for Department of Public Health and Human
18 Services.

19 I am a native Montanan. I grew up in
20 Corvallis, so I'm a Bitterrooter; graduated from
21 University of Montana, so western Montana boy.
22 Happy to be here.

23 CHAIR RUFFATTO: Welcome, James. Glad
24 you're here.

25 I think our next order of business -- If

1 I didn't say it, I wanted to state that we have a
2 quorum. All Board members are present. So I
3 wanted to declare a quorum. And then we'll move
4 on with our agenda items.

5 The first one is we will vote on the
6 minutes of the last two meetings. We will take
7 them one at a time, and the first one is the
8 October 8th meeting, and I would like to start out
9 by moving to amend the minutes in a few respects,
10 and so I will go through that.

11 The first amendment would be on Page 2,
12 Roman Numeral III(1) in the sixth line, replace
13 the word "exceptions" with the words "response
14 briefs."

15 Then in that same paragraph, in the
16 seventh line, the sentence that starts with, "Oral
17 argument did not proceed," put a period after the
18 word "proceed," and then delete the rest of that
19 sentence all the way to the end.

20 And then add the following sentence,
21 "The Board granted an extension to file response
22 briefs until November 5, 2021."

23 And then on Page 3 on the Board Counsel
24 update, in the second line after the word "Board,"
25 delete the words "secretary to be noticed to the

1 Board and the public for review."

2 I read through the -- or that's the end.
3 After I state "review," that's the end of the
4 insert. I read through the transcript, and I
5 believe these are accurate. Do I have a motion to
6 second my amendment to these minutes?

7 BOARD MEMBER SIMPSON: I second. This
8 is Dave.

9 CHAIR RUFFATTO: Is there any
10 discussion, or questions as to why I have amended
11 these?

12 (No response)

13 CHAIR RUFFATTO: If there's no
14 objection, no further discussion, I will call the
15 question. A motion has been made and seconded to
16 amend the minutes as stated. All in favor, say
17 aye.

18 (Response)

19 CHAIR RUFFATTO: Opposed, nay.

20 (No response)

21 CHAIR RUFFATTO: Motion carries. Now I
22 would entertain a motion to adopt these minutes as
23 amended.

24 BOARD MEMBER AGUIRRE: I'll make a
25 motion to adopt the minutes as amended.

1 BOARD MEMBER LEHNHERR: I'll second
2 that.

3 CHAIR RUFFATTO: Thank you, David.
4 Thank you, Stacy. Did you get that, Board Member
5 Aguirre? We can hear you fine now. And then
6 Board Member Lehnherr seconded the motion. Any
7 discussion?

8 (No response)

9 CHAIR RUFFATTO: Hearing none, all in
10 favor say aye.

11 (Response)

12 CHAIR RUFFATTO: Opposed, nay.

13 (No response)

14 CHAIR RUFFATTO: It carries.

15 Now we'll go to the Board minutes of the
16 October 29th special meeting. Is there any
17 discussion?

18 (No response)

19 CHAIR RUFFATTO: I would entertain a
20 motion to adopt those minutes.

21 BOARD MEMBER REITEN: So moved.

22 BOARD MEMBER AGUIRRE: Second.

23 CHAIR RUFFATTO: A motion was made by
24 Board Member Reiten, and I think it was seconded
25 by Board Member Aguirre. Any discussion?

1 (Response)

2 CHAIR RUFFATTO: Opposed, nay.

3 (No response)

4 CHAIR RUFFATTO: It carries.

5 Board Member Aguirre, am I pronouncing
6 your name correctly?

7 BOARD MEMBER AGUIRRE: It's Aguirre.

8 CHAIR RUFFATTO: Thank you.

9 BOARD MEMBER AGUIRRE: You bet.

10 CHAIR RUFFATTO: At this point it also
11 calls for any public comment on the minutes. Is
12 there any public comment on the minutes we have
13 just adopted?

14 (No response)

15 CHAIR RUFFATTO: Hearing none, we'll
16 move on.

17 Several meetings ago we received a memo
18 from Board Member Simpson about potentially
19 speeding up some of these cases, and one of the
20 focuses was the potential for informal processes.

21 In response to that memo, ALS has
22 prepared a memo that was in the Board meeting
23 packet, and I'd like to give Board Member Simpson
24 a chance to explain where we're at in that process
25 of considering that, and then we can have some

1 discussion and go from there. Board Member
2 Simpson, are you okay with --

3 BOARD MEMBER SIMPSON: Thank you, Mr.
4 Chairman. And I'd like to thank the Department of
5 Justice for putting together the response, and it
6 was very helpful and very clarifying.

7 We had a conference call on this a week
8 or so ago. And I guess just to summarize where I
9 think we stand is, first of all, it's pretty clear
10 that there are some, in fact probably a majority
11 of the cases that come before the Board, that
12 really don't lend themselves well to an informal
13 process, particularly those that involve a third
14 party. It's just hard to see how something like
15 this might be applied.

16 The other major take-away was that up to
17 this point, there has been no use, at least in
18 recent years, of informal processes in these
19 contested cases that are brought before the Board,
20 even though an informal process is authorized by
21 statute and regulation.

22 So I think as a first step, our
23 understanding is that the first mention of the
24 possibility of implementing or utilizing informal
25 process would be, has been at the prehearing

1 conference.

2 That process is being changed, we
3 understand, to include the mention for a --
4 include the statement of the opportunity to use an
5 informal process in the scheduling order, initial
6 scheduling order, which I think is a step in the
7 right direction. That process is I believe being
8 implemented.

9 I guess in my own mind, since this
10 process has not been used in any recent case
11 certainly, there's a great deal of question, and
12 certainly in my mind, as to what an informal
13 process would look like.

14 The obvious requirement is that the
15 rights of the parties are protected, and that the
16 record is built that can be then carried forward
17 to District Court, should either party desire to
18 appeal it, and the statute does authorize an
19 appeal to the District Court where an informal
20 process is used.

21 So what I'd request is that a process be
22 outlined as to what the informal procedure would
23 look like, so that those who are considering
24 whether or not to utilize it know what they're
25 getting into.

1 Right now there really isn't anything,
2 other than the language of the statute and the
3 rules -- which I think I guess from my own
4 viewpoint is a little bit mushy. So that in my
5 mind would be the next step, is to try to define
6 what the alternative process would look like, so
7 that petitioners who desire, who might desire to
8 use it would know what they're getting into.

9 In addition to that, there's a question
10 as to whether or not DEQ would consent to an
11 informal process, since it requires the agreement
12 of the parties. So that's a second question that
13 I think is worth bringing up and looking into.

14 And Mr. Chairman, I think that about
15 covers it. Did I miss anything?

16 CHAIR RUFFATTO: So I think you covered
17 it well, Dave. Board members, do you have any
18 questions or want to discuss this?

19 BOARD MEMBER LEHNHERR: Chairman
20 Ruffatto.

21 CHAIR RUFFATTO: Yes. Board Member
22 Lehnherr, go ahead.

23 BOARD MEMBER LEHNHERR: I think Board
24 Member Simpson raises some great points there, and
25 I just appreciate his bringing the issue up, and I

1 look forward to whatever clarification is offered
2 of the good questions he just raised.

3 CHAIR RUFFATTO: Thank you. Any other
4 points or questions?

5 (No response)

6 CHAIR RUFFATTO: I would add one point,
7 or a couple of things.

8 First, the statute requires -- it
9 doesn't just authorize informal process, but it
10 requires the parties to be offered the chance at
11 an informal process; and we think including that
12 offer essentially in the initial order is a good
13 move in the right direction to implement the
14 statute clearly.

15 Another question, a question that Mr.
16 Simpson raised, and that is whether or not DEQ
17 would be willing to consider informal processes,
18 or an informal process, if the party appealing the
19 DEQ action were willing to do so.

20 I'm not going to put DEQ on the spot
21 because I'll tell you, the Board members, that I
22 asked that question yesterday, but I'm guessing
23 there hasn't been a chance to consider it. But if
24 DEQ wants to respond, they can, but I don't want
25 to put you on the spot at all. So we can talk

1 about that later.

2 MR. FEHR: No response on that today.
3 We'll have a discussion internally.

4 CHAIR RUFFATTO: Thank you very much,
5 James.

6 As far as Board Member Simpson's point
7 about better defining what an informal process
8 would look like, yesterday ALS got to me, and I
9 got to Mr. Simpson just before this meeting, an
10 order that is going to help start -- a possible
11 example order that would start to help define
12 that, but I'm not ready to talk about it. And as
13 I said, I just sent to it Mr. Simpson, Board
14 Member Simpson this morning, so I'm guessing he's
15 not ready to talk about it either. But that
16 process is ongoing, so we will report back at a
17 later date.

18 Any comments or questions about what I
19 have said here?

20 BOARD MEMBER AGUIRRE: Mr. Chairman, I
21 have a quick question. How do we, as Board
22 members, then participate in the movement forward
23 of that study, or that example, or is that
24 something that's just taken on by Board Member
25 Simpson?

1 CHAIR RUFFATTO: I considered whether we
2 needed to have Board action on that first step,
3 but because it's required by statute, we just
4 implemented that first step of including it in the
5 first order.

6 At some point I anticipate coming back
7 to the Board with more specific proposals or
8 concepts, at which time the Board will have an
9 opportunity to further consider it, but that
10 doesn't foreclose the potential for discussing it
11 in more detail right now, if you've had a chance
12 to read that memo and have some thoughts that
13 you'd like to add. And I'm sorry. Go ahead.

14 BOARD MEMBER AGUIRRE: I was just
15 thanking you, and I do not have enough insight yet
16 to offer any comment, but will make sure that I
17 get to that point.

18 CHAIR RUFFATTO: Thank you. Any other
19 discussion?

20 I would like to call out one other
21 provision in that memo. And by the way, I want to
22 mention that the memo was a little out of order in
23 the meeting materials, so maybe you didn't catch
24 it. It was at the very tail end. So if you
25 didn't catch it before, it's at the very tail end.

1 So if you haven't had a chance to read it, please
2 read it.

3 But one of the recommendations is the
4 concern about what the word here is used -- well,
5 the attempts to move matters from the Hearing
6 Examiner to the Board before the matter is
7 completed, and it suggests that those be
8 discouraged.

9 And I guess I agree with that. At this
10 point I don't think -- I'm not prepared to suggest
11 anything more than that point, but we may be
12 considering that further, too. In my mind,
13 matters that are -- what's referred to as --
14 interlocutory, probably shouldn't come to the
15 Board unless it's really unusual circumstances.
16 But for now, at least I'm not going to suggest any
17 action by the Board. Any discussion of that
18 point?

19 (No response)

20 CHAIR RUFFATTO: We have on here the
21 possibility of public comment, and the thought
22 there was on the informal process. Because we
23 have a lot of folks who have been in front of the
24 Board a lot, I thought it might be useful if
25 anybody here on the Zoom meeting had any comments

1 about the potential of an informal process. I
2 wanted to open it up to anybody who wanted to
3 offer comments or suggestions.

4 BOARD MEMBER AGUIRRE: Mr. Chairman, is
5 it better to wait for DEQ's input on public
6 comment on informal process? I was thinking from
7 my regulatory standpoint, if you're looking at,
8 say, informal process that people would go through
9 directly with DEQ, and public comment into that.

10 CHAIR RUFFATTO: Very good point. I
11 expect, as the concept requires, it requires the
12 consent of both DEQ and the appealing party, so
13 your point is very well taken.

14 And so I think that you're probably
15 right, that depending on what DEQ tells us, that
16 would probably affect the public comment. But
17 again, I want to offer the chance to anybody. If
18 they want to make a comment, they can, but Board
19 Member Aguirre's point is well taken.

20 (No response)

21 CHAIR RUFFATTO: I take it there's no
22 public comment forthcoming, so we'll move on to
23 the next item, and that's determining the schedule
24 for 2022 for the Board meetings, and I'm hopeful
25 that the Board members have all taken a look at

1 the proposed schedule.

2 And I would start out. If there's a
3 motion to adopt it, I would entertain that motion,
4 or if there's some concern that somebody has with
5 that schedule, let's talk about it.

6 BOARD MEMBER REITEN: Mr. Chairman, this
7 is Jon Reiten. My only concern is that Fridays
8 and Mondays can be difficult for me personally,
9 because if I'm going anywhere, that's when it's
10 going to happen. So that's my only concern.
11 Tuesday, Wednesday, Thursday anytime would work,
12 but Fridays and Mondays, for me it is difficult.
13 I'm not sure if that's for anyone else. And I'm
14 not that concerned about it, because if we know in
15 advance I can make plans. So that's just my
16 little concern.

17 CHAIR RUFFATTO: Thanks, Jon. Any other
18 discussion?

19 MS. SIDNER: Chairman Ruffatto. May I
20 make a comment?

21 CHAIR RUFFATTO: Yes. Please.

22 MS. SIDNER: It is not discussed on this
23 page what time these meetings should start.
24 Historically we begin the meetings at 9:00, I
25 believe, but that is something we could discuss at

1 this point as well if 9:00 doesn't work. I know
2 for me personally, 9:00 is not great, but I'm not
3 a Board member. So I just wanted to point out
4 that that is not on this page, the start time of
5 the meetings.

6 CHAIR RUFFATTO: We certainly can
7 discuss that, Regan. Thank you. So any more
8 discussion on both the timing and the dates?

9 BOARD MEMBER SIMPSON: Mr. Chairman, I
10 guess I have to agree with Board Member Reiten
11 that Fridays and Mondays up against a weekend can
12 be an inconvenience; and on the other hand, I
13 believe that for certainly as long as I can
14 remember, these meetings have been held on
15 Fridays. I'm not sure why that is, but maybe
16 there is a reason behind it.

17 BOARD MEMBER ALTEMUS: Mr. Chair, this
18 is Julia. I don't have a preference of dates, but
19 I would agree 9:00 to try to meet in person and
20 are traveling, that might be a problem with us
21 traveling.

22 CHAIR RUFFATTO: Julia, just so I
23 understand what you were saying, what you're
24 saying is that if we're meeting in person, 9:00
25 might not be the best, and I take it that would

1 probably be because some people may want to drive
2 to Helena on Friday morning; is that what you're
3 thinking?

4 BOARD MEMBER ALTEMUS: That's correct.
5 Thank you.

6 CHAIR RUFFATTO: Any more discussion?

7 BOARD MEMBER LEHNHERR: Chairman
8 Ruffatto, this is David Lehnherr. I am wondering
9 if DEQ can provide any perspectives since
10 organizationally they're heavily involved. Do
11 they have a perspective on what date and what time
12 works best? Thank you.

13 CHAIR RUFFATTO: Thank you, David. I
14 agree. If there's anybody on the meeting who has,
15 No. 1, some history as to why it's Friday; No. 2,
16 would it be a problem if we moved it from Friday;
17 and No. 3, is there anything magic about 9:00.

18 MR. FEHR: I'm going to defer to our
19 Chief Legal. She's got a little bit more history.
20 This works for me today just fine. So Ms.
21 Colamaria, do you have any feedback?

22 MS. COLAMARIA: Thanks, James. I would
23 say if we're going move it off of a Friday,
24 Mondays are definitely not good for DEQ. We've
25 got a lot of organizational meetings on that day,

1 just across the agency. We haven't had a problem
2 with Fridays.

3 I do know that people do tend to, if
4 they're going to go on a long vacation, they leave
5 on a Friday, but we haven't had a problem with
6 working around that. But I think maybe we would
7 be fine with like a Thursday or any other day
8 organizationally.

9 CHAIR RUFFATTO: I can say for myself
10 that the day doesn't matter to me, and the time
11 doesn't matter to me, so I would entertain a
12 motion on -- Let's start with the time. Let's
13 decide what time we should start.

14 And if there's a motion that someone
15 wants to make, I am fine to make the motion, or
16 fine to entertain a motion on 9:00. I wouldn't
17 want to move it past 10:00 in case there are long
18 meetings, but I think 9:00 or 10:00 would work.

19 BOARD MEMBER AGUIRRE: I'll just make a
20 comment before that that I'm coming from a long
21 way, and I'm very much in favor of in-person
22 meetings, and I know 9:00 isn't great, but Friday
23 at 9:00 works pretty well for me as far as a day
24 and traveling back, if I'm going to travel back.
25 I'm also open to what people decide.

1 CHAIR RUFFATTO: Does anyone want to
2 make a motion?

3 (No response)

4 CHAIR RUFFATTO: In order to keep the
5 discussion going, I will move that we keep the
6 time at 9:00, and I'm doing that just to move it
7 forward, and because that's historically how it's
8 been done. I move that we keep the time at 9:00.

9 BOARD MEMBER LEHNHERR: I will second
10 that motion, Chairman Ruffatto.

11 CHAIR RUFFATTO: Thank you. Any further
12 discussion?

13 BOARD MEMBER SIMPSON: Mr. Chairman, I
14 concur with the motion, but I'd also suggest that
15 when we get to point where we're considering a
16 return to in-person meetings, that we might want
17 to revisit this.

18 CHAIR RUFFATTO: I will make a point
19 that there are kind of -- it cuts both ways for a
20 lot of people. If I'm traveling from the Billings
21 area, I would probably prefer to drive back as
22 early as possible, too. So it kind of cuts both
23 ways. I would probably come up on Thursday, for
24 example, and drive back Friday afternoon. So it
25 kind of cuts both ways, but we can handle it

1 either way. So any more discussion?

2 BOARD MEMBER ALTEMUS: May I ask a
3 question, Mr. Chair?

4 CHAIR RUFFATTO: Certainly.

5 MS. ALTEMUS: So in 2022, are you
6 thinking that it would strictly be in person, or
7 are we going to try to do hybrid continuing, so
8 you have an option to be online and not traveling
9 bad roads? Because I've done bad roads into
10 Helena for years in the morning, and it's not fun.

11 CHAIR RUFFATTO: I'm going to state my
12 view. I think that we should maintain the option
13 for virtual at all times, but it may be that the
14 DEQ folks have a different view, but my view would
15 be we should maintain the option for virtual
16 meetings, but encourage people to come to
17 in-person meetings.

18 I would ask if DEQ has a view on whether
19 or not, as we move forward and start in-person
20 meetings, and encourage them, will we maintain the
21 ability to have some folks on Zoom?

22 MR. FEHR: Yes, I'm sure that we're able
23 to manage that in the Metcalf Building.

24 CHAIR RUFFATTO: Ms. Colamaria, I expect
25 that you can comment on back before COVID. I

1 assume that it was made available, maybe not by
2 Zoom, but by conference call; is that correct?

3 MS. COLAMARIA: That's correct. I have
4 only been here for two years, so I don't have a
5 lot of back history, but the four months I was
6 here before COVID, that was an option to have a
7 hybrid. And our policy since COVID has been to
8 always bring the public meeting up for hybrid
9 option, and so we would continue to do that.

10 CHAIR RUFFATTO: Thank you. Any further
11 discussion on the motion?

12 (No response)

13 CHAIR RUFFATTO: A motion has been made
14 and seconded that we continue to start the
15 meetings at 9:00 a.m. All in favor, say aye.

16 (Response)

17 CHAIR RUFFATTO: Opposed, nay.

18 (No response)

19 CHAIR RUFFATTO: Motion carries. Now
20 let's talk about Fridays. I think that, again,
21 this cuts both ways. For some Board members, they
22 would like to have the opportunity to drive back
23 home on a weekend rather than on a work day. I
24 assume that's what you're stating, Board Member
25 Aguirre, right?

1 BOARD MEMBER AGUIRRE: Actually I would
2 probably drive home on Friday afternoon, a long
3 day, weather permitting. So I'm good with Friday.

4 I would prefer not to have the meeting
5 in the middle of the week, and Monday appears to
6 not be a great day, but Friday works. Thursday
7 would work. I'd prefer not to have Tuesday or
8 Wednesday meetings, but I'll make whatever work.

9 CHAIR RUFFATTO: Thank you. I would
10 entertain a motion on what day of the week.

11 MR. REITEN: Mr. Chairman, I'd like to
12 make a motion we have the meetings on Thursdays,
13 keep to the same general calendar, but it would
14 just be a day earlier than what has been
15 published.

16 CHAIR RUFFATTO: Thank you, Board Member
17 Reiten. Is there a second?

18 BOARD MEMBER LEHNHERR: Chair Ruffatto,
19 I'll second that motion.

20 CHAIR RUFFATTO: Thank you. Discussion.

21 BOARD MEMBER ALTEMUS: Mr. Chair, this
22 is Julia Altemus again. Thursdays is really
23 problematic for me. I have a lot of meetings
24 during the week, and Friday mornings work better
25 for me, but I'll just have to try to make it work

1 if Thursday works best for everybody else. Thank
2 you.

3 CHAIR RUFFATTO: Board Member Smith, you
4 had your hand up.

5 BOARD MEMBER SMITH: I just wanted to
6 state my standpoint. I think everybody else has.
7 To be honest, I'm fairly indifferent on when we
8 have it, so that's why I really haven't provided
9 much comment.

10 If we have the option, and a fair number
11 of Board members would be attending in person, I
12 would probably do that, and at 8:00 in the
13 morning, I would probably just come up the same
14 day and leave when it's done, so --

15 CHAIR RUFFATTO: Any more discussion on
16 the motion to move the Board meeting to Thursday?

17 BOARD MEMBER AGUIRRE: I am with Board
18 Member Altemus. Thursday, I will make it work,
19 but I will have to change some significant
20 meetings. I'll have to adjust with that.

21 CHAIR RUFFATTO: Any more discussion?

22 BOARD MEMBER SIMPSON: Mr. Chairman, I
23 tend to agree. I think, as you say, it cuts both
24 ways, and even though at this stage of my life in
25 retirement one day is about the same as the next,

1 but I'm inclined to keep the meetings on Friday.

2 CHAIR RUFFATTO: Any more discussion?

3 BOARD MEMBER LEHNHERR: Chairman

4 Ruffatto, this is David Lehnherr. I have a lot of
5 flexibility as far as the day goes, so I'll

6 probably just abstain from the vote, and let the
7 people that have more investment in the day of the
8 week decide this matter.

9 CHAIR RUFFATTO: Thank you, David. Any
10 more discussion?

11 (No response)

12 CHAIR RUFFATTO: I appreciate the
13 discussion, and I appreciate the concerns. I'm
14 probably going to vote against this motion, not
15 because I care much, but because I think most of
16 DEQ and most of those that appear before DEQ on a
17 regular basis have thought of this as a Friday
18 meeting, and I'm inclined, since it does cut both
19 ways and folks have views both ways, I'm going to
20 vote against the motion. Any more discussion?

21 (No response)

22 CHAIR RUFFATTO: Hearing none, a motion
23 has been made and seconded that the meetings be
24 moved to Thursday. All in favor, say aye.

25 (Response)

1 CHAIR RUFFATTO: Opposed, nay.

2 (Response)

3 CHAIR RUFFATTO: Motion fails. Let's do
4 a roll call vote.

5 MS. SIDNER: Chair Ruffatto.

6 CHAIR RUFFATTO: Nay.

7 MS. SIDNER: Board Member Lehnherr.

8 BOARD MEMBER LEHNHERR: Abstain.

9 CHAIR RUFFATTO: Board Member Simpson.

10 BOARD MEMBER SIMPSON: Nay.

11 MS. SIDNER: Board Member Aguirre.

12 BOARD MEMBER AGUIRRE: Nay.

13 MS. SIDNER: Board Member Reiten.

14 BOARD MEMBER REITEN: Aye.

15 MS. SIDNER: Board Member Smith.

16 BOARD MEMBER SMITH: Abstain.

17 MS. SIDNER: Board Member Altemus.

18 BOARD MEMBER ALTEMUS: Nay.

19 CHAIR RUFFATTO: At this point, I will
20 make a motion that we adopt the schedule that was
21 proposed.

22 BOARD MEMBER SIMPSON: Second.

23 CHAIR RUFFATTO: That was seconded by
24 Board Member Simpson. Discussion.

25 (No response)

1 CHAIR RUFFATTO: Hearing none, if
2 there's no objections to call the question, all in
3 favor, say aye.

4 (Response)

5 CHAIR RUFFATTO: Opposed.

6 (No response)

7 CHAIR RUFFATTO: The motion carries.

8 Thank you all.

9 The next are briefing items. I'm going
10 to ask those Hearing Examiners that are in the
11 meeting and Board Counsel Orr if there are any
12 updates or changes to the updates that were
13 included in the agenda.

14 MS. ORR: Mr. Chair, this is Katherine
15 Orr. I'm not aware of any changes, although for
16 example in the Duane Murray case, which is on Page
17 2, there was a hearing yesterday, but there hasn't
18 been a decision issued yet, and that's the only
19 change that I know of.

20 Interestingly, in (c), this is the
21 Sidney Sugars case, the parties were asked if they
22 wanted to have an informal process, and they said
23 no. I thought you'd be interested in that.

24 Other than that, there have been no
25 changes other than what's on the agenda here.

1 CHAIR RUFFATTO: Thank you. Then I will
2 ask the Board members if you have any questions or
3 comments about any of the briefing items.

4 (No response)

5 CHAIR RUFFATTO: I had a couple of
6 questions and comments if no one else has any. My
7 first question was on the Murray case, and is Ms.
8 Brown on the call?

9 MS. ORR: Unfortunately she is not
10 today. She is on her first day of vacation.

11 CHAIR RUFFATTO: All right. Got it. I
12 was just curious. Maybe you know. Did Mr. Murray
13 appear at that hearing?

14 MS. ORR: He did.

15 CHAIR RUFFATTO: Okay. Thank you.
16 That's all I wanted to know.

17 MS. ORR: And she is going to put in the
18 order what his response was.

19 CHAIR RUFFATTO: Okay. Thank you. I
20 was hoping he did because that was the issue
21 before that we had. So thank you.

22 MS. ORR: And you wanted to comment on
23 Page 6. I think you wanted to bring up to the
24 Board -- this is the MEIC and Sierra Club versus
25 DEQ and Western Energy.

1 This is the case where Judge Bidegaray
2 issued a decision, and there could be a point
3 where the Board is going to have to review the
4 question of whether to appeal Judge Bidegaray's
5 denial of the BER's motion to dismiss as a party.
6 That's on Page 6 right above the action items. I
7 don't know if you're there yet, but I just wanted
8 to bring that to your attention.

9 CHAIR RUFFATTO: I appreciate the
10 reminder, and we will discuss that a little bit
11 now. Thank you, Katherine.

12 I'm hopeful that the Board members have
13 read, or if they haven't read, the two decisions
14 in that case. That's again on Page 6, the MEIC
15 versus DEQ case. There were two decisions in the
16 packet. The one decision denied the Board's
17 motion to dismiss, and the other decision was a
18 decision on the merits of the judicial review of
19 the Board's decision.

20 I hope you all get a chance to read
21 those, but I wanted to talk about this a little
22 bit to introduce to the Board members -- other
23 than Board Member Lehnerr, who I'm sure is
24 familiar with the issue here -- but just to make
25 sure that you all kind of understand what's going

1 on here.

2 Over the last few years, and maybe
3 before that, but certainly over the last few
4 years, the Board has been named several times in
5 these cases where the Board's action is being
6 subjected to judicial review.

7 And the prior Board -- Well, first of
8 all, it's been the Board's position that it should
9 not be named, it's inappropriate to name the
10 Board, and unnecessary. And so in the past the
11 Board determined to hire Amy Christensen to see if
12 we could get some rulings that said the Board
13 could be dismissed and was not necessary.

14 Two District Courts have ruled against
15 the Board on that, and therefore have kept the
16 Board as a party in those cases. In this
17 particular case, it's one of the two where the
18 District Court said, "No, we're going to keep the
19 Board in the case as a party."

20 The issue that I think drove this for
21 the Board was the cost and hassle of hiring a
22 lawyer to represent the Board in these matters
23 where the Board's decision is being reviewed, and
24 it arguably is not the place of the Board, at
25 least in most cases, for the Board to go in and

1 defend its position. The parties will argue those
2 points. And so that has been the position of the
3 Board.

4 Now that this case has been -- there's
5 been a ruling on the merits, and we anticipate
6 that there will probably be an appeal. This could
7 be the case that the Board should take to the
8 Supreme Court on this issue of whether or not the
9 Board should be named and get a definitive ruling.

10 So that's the issue. And I'm not asking
11 for any action at this meeting. We don't know
12 when we will be called upon to make that decision,
13 but I wanted to explain the situation to the Board
14 members so you're a little bit prepared and can be
15 thinking about it as we move towards that
16 potential decision. Is there any questions or
17 discussion?

18 BOARD MEMBER LEHNHERR: Chairman
19 Ruffatto.

20 CHAIR RUFFATTO: Yes. Board Member
21 Lehnherr.

22 BOARD MEMBER LEHNHERR: I think you
23 provided a good summary. Cost was an issue, and
24 since we are a quasi-judicial body, I think it was
25 felt also that involving the Board or keeping the

1 Board involved as a party was sort of like asking,
2 was sort of like if a judicial decision was
3 reviewed or was appealed, that keeping the Board
4 as a party would sort of be like trying to involve
5 a Court that made a decision as a party in
6 whatever decision they made on appeal. I may not
7 have been clear there.

8 CHAIR RUFFATTO: You were very clear.
9 That's exactly right. That's exactly the point.
10 And I certainly -- That's really a good
11 clarification for the issue. Yes. Thanks, David.

12 And I would add that I don't know what
13 has motivated parties to bring the Board in. I
14 can speculate, and I will speculate. I think it's
15 a matter of caution, that they don't want to get a
16 determination that they needed the Board and did
17 not name the Board. So I think it's a cautionary
18 move on part of the lawyers, and we all know that
19 lawyers are risk averse, so they don't want to
20 take any chances. Any further discussion?

21 (No response)

22 CHAIR RUFFATTO: If none, we will move
23 on. But I will point out that in addition to the
24 issue we've been discussing, I would encourage you
25 all to read that decision on the merits, because

1 there are a number of points in that that will
2 affect, or at least have implications in other
3 actions that we will be taking up. So please,
4 when you get a chance, read that decision.

5 It is now almost 10:00. So how about we
6 take a ten minute break, and reconvene at 10:10.

7 (Recess taken)

8 CHAIR RUFFATTO: I'm going to call the
9 meeting back into order. Regan, would you please
10 call the roll of the Board.

11 MS. SIDNER: Chair Ruffatto.

12 CHAIR RUFFATTO: Here.

13 MS. SIDNER: Board Member Lehnherr.

14 BOARD MEMBER LEHNHERR: Here.

15 MS. SIDNER: Board Member Simpson.

16 BOARD MEMBER SIMPSON: Here.

17 MS. SIDNER: Board Member Aguirre.

18 BOARD MEMBER AGUIRRE: Here.

19 MS. SIDNER: Board Member Reiten.

20 BOARD MEMBER REITEN: Here.

21 MS. SIDNER: Board Member Smith.

22 BOARD MEMBER SMITH: Here.

23 MS. SIDNER: Board Member Altemus.

24 BOARD MEMBER ALTEMUS: Here.

25 MS. SIDNER: Thank you.

1 CHAIR RUFFATTO: Thanks, Regan. We have
2 a quorum.

3 We're now going to the action items.
4 The first action item is the Oreo Refining case
5 which we discussed at the end of August. And we
6 have received a couple of status reports, and the
7 last status report signed by both DEQ and the
8 Petitioner said that they could not reach a
9 settlement, so the Board now has to decide whether
10 or not we are going to assign this case to ALS as
11 a Hearing Examiner, either in whole or in part.

12 So that's where we're at. I would
13 entertain a motion or open it up to discussion,
14 whichever you prefer.

15 BOARD MEMBER LEHNHERR: Chairman
16 Ruffatto.

17 CHAIR RUFFATTO: Yes.

18 BOARD MEMBER LEHNHERR: Just as a point
19 from which to base discussion, I would like to
20 make a motion that we assign this case to a
21 Hearing Examiner in its entirety.

22 CHAIR RUFFATTO: Motion accepted. Is
23 there a second?

24 BOARD MEMBER REITEN: I'll second it.

25 CHAIR RUFFATTO: Thank you. Discussion.

1 BOARD MEMBER SIMPSON: Mr. Chairman, I'm
2 not sure I have a clear picture of what the
3 process would be should the Board decide to take
4 this up as opposed to assigning it to a Hearing
5 Examiner.

6 The issue seems to be fairly narrow, and
7 I wonder if we could discuss for a minute just
8 what it would mean in terms of Board obligations
9 if we were to take this on directly.

10 CHAIR RUFFATTO: We can discuss that,
11 and if I told you I knew exactly what it would
12 look like, I would not be telling the truth
13 because I don't know exactly what it would look
14 like. So I'm going to ask Katherine if she can
15 outline what it would look like, if she would be
16 so kind.

17 MS. ORR: I would be glad to. This is a
18 case involving the issuance of a license to
19 operate a solid waste system, and the Board -- It
20 is in a contested case stage, and you would direct
21 me to issue a prehearing order on behalf of the
22 Board, which Chair Ruffatto would sign, and it
23 would lay out the processes for prehearing
24 matters, and then the hearing itself.

25 And the Board -- There may be discovery

1 motions before it gets to the contested case
2 stage, but the parties would submit their filings
3 regarding that to the Board, and the Board could
4 entertain those in its meeting or a special
5 meeting.

6 And then at the actual contested case
7 hearing, the parties would assemble and present
8 their evidence and witnesses before the Board.
9 And you could use my help in organizing the
10 exhibits, and helping you rule on questions of
11 admissibility of the exhibits, or help you
12 entertain objections regarding testimony along the
13 way.

14 And the burden of proof I believe would
15 be on the owner of Oreo's Refining, so that entity
16 or person would go first. Then the Department
17 would go second. They would put on their case.
18 And then the Board would have the ability to
19 question the witnesses as they are presented, and
20 then the Board would deliberate, and vote on the
21 relief.

22 CHAIR RUFFATTO: Board Member Simpson,
23 did that help?

24 BOARD MEMBER SIMPSON: It does help.
25 And correct me if I'm wrong, but from the

1 information that's been provided to the Board, it
2 sounds as if this is an issue of whether or not
3 the DEQ will either renew or restore the solid
4 waste processing license for Oreo.

5 And the Petitioner has made the case
6 that, among other things, her livelihood depends
7 on this, and so time is of the essence. So that's
8 why the case has caught my attention.

9 And just as kind of a side note, it
10 strikes me as one that might very well be a
11 candidate for an informal process should the
12 Petitioner decide to go that way.

13 So I don't know. I'm just very -- let's
14 put it this way. I'm a little bit bothered by the
15 fact that just as a matter of routine we refer
16 these cases to Hearing Examiners, and the reason
17 seems to be the amount of work that is involved in
18 administering these cases, which under a contested
19 case is considerable. And I guess ultimately it
20 comes back to the Board for a final decision.

21 I'm just having a hard time
22 understanding what the advantages and
23 disadvantages are from a management perspective of
24 how the Board proceeds in a case like this one.
25 That's why I raised the question.

1 CHAIR RUFFATTO: Board Member Smith.

2 BOARD MEMBER SMITH: Chair Ruffatto, and
3 Ms. Orr, maybe this would help answer some of Mr.
4 Simpson's questions and mine. How long do we
5 think it would take, or I guess how many meetings?
6 If we were to hear this as a Board, how many
7 meetings do we think it would take for just this
8 case?

9 And I know that's probably not a fair
10 question, because I'm sure it varies quite a bit
11 depending on the complexity of the case. This
12 seems like a simple case compared to some of them.
13 So how many meetings do we think it would take if
14 we were to do this as a board?

15 MS. ORR: Mr. Chair, I could perhaps
16 weigh in on that.

17 CHAIR RUFFATTO: Please.

18 MS. ORR: Chair Ruffatto, Board Members.
19 That's very, very hard to say, of course, because
20 we don't know if there's going to be a motion for
21 summary judgment, we don't know if there's going
22 to be a request to handle or involve the parties
23 in discovery, and we don't know if there are going
24 to be discovery disputes.

25 But I would think this would be a fairly

1 simple matter, and I think the initial order could
2 maybe try to say something like the Board would
3 like to have as streamlined a process as possible,
4 and so just leave it at that. We don't want to
5 infringe on their due process rights. But I just
6 can't predict, to be honest.

7 CHAIR RUFFATTO: Thank you, Katherine.
8 I have some thoughts that I will share. I don't
9 know how helpful they will be.

10 When I first read the appealing
11 document, I thought it should be a simple thing to
12 resolve. Since they've tried for two months and
13 haven't got anywhere, it seems like it's not so
14 simple, and I'm guessing there's a lot more to
15 this than what we have seen.

16 So my reaction is it may not be a simple
17 matter, and as Katherine says, I think how many
18 meetings, how much time of this Board is just an
19 open question.

20 And I harken back to an earlier meeting
21 this year when Board Member Lehnherr said this
22 gets to be complicated, and a lot of work, and
23 it's important to seriously consider assigning it.

24 After watching these cases for a year,
25 and looking at them, unless this Board wants to

1 spend a lot more time than I think we are now
2 spending, I think by and large we will probably
3 want to assign them to a Hearing Examiner.

4 I think the question of an informal
5 process is probably still open here, but even
6 that, because it's not well defined, I'm thinking
7 that that would not be an easy process in front of
8 the Board, and so I'm inclined to assign it in its
9 entirety.

10 And pardon me, but I think a motion has
11 been made and seconded, right? There was a
12 second. I think I seconded it, or maybe Dave did.
13 I can't remember. So any more discussion? I'm
14 going to vote in favor of the motion. Joe.

15 BOARD MEMBER SMITH: Yes, Chair
16 Ruffatto. I would say I am probably going to vote
17 in favor of the Hearing Officer also, although I
18 do concur with Mr. Simpson on all of his thoughts
19 also, wanting to take every opportunity we have to
20 streamline the process, but not seeing a good
21 opportunity to do that yet.

22 CHAIR RUFFATTO: Thank you. Any more
23 discussion?

24 BOARD MEMBER SIMPSON: Mr. Chairman, I'm
25 inclined to vote in favor of the motion as well.

1 However, I guess I would raise the question that
2 as this case proceeds, of course at every meeting
3 we get our status report on each of the cases
4 that's in progress.

5 I'm just wondering if there is --
6 thinking out loud here, and probably not getting
7 very far -- but of keeping a little closer tabs on
8 the process to kind of -- well, let me rephrase
9 that -- for the Board to be more involved than it
10 typically is in a case assigned to a Hearing
11 Examiner.

12 I don't know the -- I don't even know if
13 it's a valid question. I'm just raising it to see
14 if there are hybrid options that might be employed
15 here.

16 BOARD MEMBER ALTEMUS: Mr. Chair, this
17 is Julia Altemus. I agree with Board Member
18 Simpson. I think if we were more involved as we
19 go forward with the process, we might learn some
20 lessons as far as -- we might have decided that
21 may be a benefit for this case to doing a formal
22 process, but if we can stay more involved at least
23 so we'll learn along the way as we move forward to
24 the next one. Thank you.

25 CHAIR RUFFATTO: All good points. Thank

1 you. Any more discussion?

2 (No response)

3 CHAIR RUFFATTO: If no one objects, I'm
4 going to call the question.

5 (No response)

6 CHAIR RUFFATTO: All in favor of the
7 motion to assign this matter, the Oreo Refining
8 matter, to ALS as a Hearing Examiner for the case
9 in its entirety, say aye.

10 (Response)

11 CHAIR RUFFATTO: Opposed.

12 (No response)

13 CHAIR RUFFATTO: Motion carries. I'm
14 going to make another motion. I'm going to move
15 that the Hearing Examiner, that we direct the
16 Hearing Examiner to, before this matter moves into
17 a formal contested case, I'm going to direct the
18 Hearing Examiner to hold a conference call or a
19 Zoom call where the parties can discuss the
20 possibility, the option and possibility of
21 agreeing to an informal process.

22 BOARD MEMBER SIMPSON: Second.

23 CHAIR RUFFATTO: A motion has been made
24 and seconded that we direct the Hearing Examiner
25 to hold a conference call or a Zoom call as the

1 first step to offer the option and discuss the
2 informal process. Any discussion?

3 BOARD MEMBER LEHNHERR: Chairman
4 Ruffatto, this is David Lehnherr. On its surface
5 the motion sounds like a good idea. I'm wondering
6 if Katherine Orr can weigh in with her perspective
7 on the matter.

8 MS. ORR: I would be glad to, Chair
9 Ruffatto, if I may.

10 CHAIR RUFFATTO: Please do.

11 MS. ORR: Chair Ruffatto, members of
12 Board. I think that's very doable and it would
13 certainly draw attention to the option. As you
14 know, the parties have to waive in writing the
15 informal process, so easy to do. That can go in
16 the prehearing order.

17 I don't know if there's anything more to
18 say about that, and I think you're contemplating
19 that the conference would address that issue
20 exclusively.

21 CHAIR RUFFATTO: That's what my motion
22 contemplates instead of -- yes.

23 MS. ORR: So that's very doable.

24 CHAIR RUFFATTO: Any more discussion?

25 (No response)

1 CHAIR RUFFATTO: Mr. Whitaker, I would
2 call on you, but I see that Ms. Mitchell is not on
3 the call, so I don't feel really good about that.
4 If you wanted to speak specifically to the
5 informal process and the likelihood, I would be
6 happy to do that, but I'm not requiring you to do
7 that.

8 MR. WHITAKER: Chair Ruffatto, yes.
9 Nick Whitaker on behalf of DEQ. No, I have
10 nothing further to add. Thanks.

11 CHAIR RUFFATTO: Thank you. Any more
12 discussion?

13 (No response)

14 CHAIR RUFFATTO: A motion has been made
15 and seconded that we direct the Hearing Examiner
16 to hold a conference call or a Zoom meeting with
17 the parties as the first step in this process
18 where the option of an informal process will be
19 offered, explained, and discussed, and a
20 determination made at that time or a reasonable
21 time after that whether the parties will agree to
22 it. I'll call the question unless there's more
23 discussion.

24 (No response)

25 CHAIR RUFFATTO: All in favor, say aye.

1 (Response)

2 CHAIR RUFFATTO: Opposed, nay.

3 (No response)

4 CHAIR RUFFATTO: Motion carries.

5 We'll go to the next matter. This is
6 the matter of the Notice of Appeal and Request for
7 Hearing by Western Energy Company, BER Case
8 2012-12. I emphasize that number because this
9 case has been pending since 2012, but it's gone
10 through a lot of things, and I don't think -- I
11 think the parties have been working on a
12 resolution all that time.

13 A motion, an unopposed motion by the
14 Appellant and DEQ, and it's unopposed by
15 Intervenor MEIC, to dismiss this case as moot, and
16 the reason for it being moot is that the 2012
17 permit that this proceeding was about has been
18 superseded by a permit effective August 1st, 2021.

19 I don't think it's necessary to call on
20 the parties unless some Board member wants to call
21 on the parties. I think representatives of the
22 parties are both here, but it seems like this
23 first -- that the mootness of this case seems
24 clear, but let's first have a motion on whether or
25 not we want to grant the motion to dismiss this

1 matter as moot.

2 BOARD MEMBER SIMPSON: So moved.

3 CHAIR RUFFATTO: Is there a second?

4 BOARD MEMBER SMITH: I'll second.

5 CHAIR RUFFATTO: A motion has been made
6 and seconded that we grant the motion to dismiss
7 this case as moot. Discussion.

8 BOARD MEMBER SIMPSON: Mr. Chairman,
9 having read through all of that, I think I have an
10 understanding of what has transpired, and what has
11 brought us to this point, but I'm wondering if we
12 couldn't call on the parties to just give a brief
13 statement as to what it is that has gotten us
14 here.

15 CHAIR RUFFATTO: We definitely can.

16 BOARD MEMBER SIMPSON: Twelve years and
17 five minutes.

18 CHAIR RUFFATTO: I'm going to call on
19 Ms. Marquis to speak first, and then we'll give
20 DEQ a chance to respond if they want to.

21 MS. MARQUIS: Certainly. Thank you,
22 Chairman Ruffatto, members of the Board. My name
23 is Vicki Marquis, and I'm with Holland and Hart.
24 We represent Westmoreland in this matter.

25 As Board Chairman informed you, this is

1 a joint motion by both Westmoreland and DEQ. It's
2 not opposed by MEIC and Sierra Club who intervened
3 in this case.

4 The appeal was originally filed by
5 Westmoreland in 2012 challenging certain aspects
6 of their MPDES or water discharge permit. The
7 administrative litigation followed, and
8 Westmoreland and DEQ reached an agreement that the
9 permit be remanded back to DEQ and modified.

10 At the same time the permit was
11 challenged by MEIC and Sierra Club in the District
12 Court.

13 So the permit was remanded in this
14 administrative action back to DEQ, and this appeal
15 was stayed, and the language used in that stay is
16 found on Page 87 of your Board materials. It was
17 stayed until resolution of the permit
18 modifications and, quote, "any other pending
19 administrative or judicial proceedings concerning
20 the final permit decision," end quote.

21 So because we had a District Court
22 challenge going on, that took a long, long time.
23 There was a decision reached by Judge Seeley that
24 was appealed to the Montana Supreme Court. The
25 Montana Supreme Court issued a decision, and

1 remanded the case back to District Court.

2 It went back in front of Lewis & Clark
3 District Court before Judge Abbott, and in that
4 matter, there was some discovery and there was
5 some litigation.

6 In the meantime DEQ issued the new 2021
7 MPDES or water discharge permit to Westmoreland.
8 All the parties agreed that that permit did
9 supersede the previous permits, provides a new
10 document to be appealed and/or challenged, and
11 that District Court case was dismissed as moot for
12 lack of jurisdiction.

13 So that dismissal of the District Court
14 case fulfills the condition of the stay that the
15 Board had this 2012 case under, which was
16 resolution of the litigation. So there's nothing
17 more to litigate or appeal on this case.

18 There was a permit issued in 2012. That
19 permit has been superseded by the recently issued
20 2021 permit, which is distinct in its own right,
21 as is obvious because it's also the next action
22 item on your agenda.

23 So this motion was filed jointly by DEQ
24 and Westmoreland and unopposed, and we request
25 that the Board grant it and dismiss this case as

1 moot. Thank you.

2 CHAIR RUFFATTO: Does the DEQ
3 representative want to speak to this? Kirsten.

4 MS. BOWERS: Good morning, Chairman
5 Ruffatto, members of the Board. Ms. Marquis
6 summarized the long litigation and administrative
7 process accurately as far as DEQ is concerned, and
8 we agree that the case should be dismissed because
9 the underlying 2012 permit is now superseded by
10 the 2021 renewal.

11 CHAIR RUFFATTO: Thank you, Ms. Bowers.
12 Is there anybody in the meeting from MEIC or
13 Sierra Club? Are they represented?

14 (No response)

15 CHAIR RUFFATTO: Apparently not. It was
16 unopposed by them, so we can only assume that they
17 would agree with what has been said.

18 BOARD MEMBER SIMPSON: Dave Simpson.
19 May I make a comment?

20 CHAIR RUFFATTO: I was going to try to
21 be funny. I hope you understood all that.

22 BOARD MEMBER SIMPSON: Just a comment,
23 Mr. Chairman, brief comment.

24 I think if you just cut down to the
25 bottom line on this, it is that the process of

1 appealing the permit lasted much longer than the
2 permit itself. The permit term expired before the
3 case could be decided, and so the new permit has
4 resolved the issues. Does that pretty much sum it
5 up, Ms. Marquis?

6 MS. MARQUIS: The new permit renewal
7 does provide a new document that can be
8 challenged. I won't speak to whether it resolves
9 all the issues. It certainly does resolve most of
10 the issues that were in the litigation, and moots
11 out the pending litigation and the appeal.

12 BOARD MEMBER SIMPSON: Thank you, Mr.
13 Chairman, for indulging me.

14 CHAIR RUFFATTO: You bet. So any more
15 discussion?

16 (No response)

17 CHAIR RUFFATTO: If there's no more
18 discussion, a motion has been made and seconded
19 that the Board grant the motion to dismiss this
20 matter as moot. All in favor, say aye.

21 (Response)

22 CHAIR RUFFATTO: Opposed, nay.

23 (No response)

24 CHAIR RUFFATTO: The motion passes.

25 We'll go to the next action item, and as

1 it has been mentioned, this matter is on the new
2 permit that was granted and effective August 1 of
3 2021.

4 And the parties have reached an
5 agreement and a stipulation on this matter, and
6 they have asked the Board to enter the proposed
7 order that will be the final agency decision, and
8 it resolves the dispute between Westmoreland and
9 DEQ, at least to the extent of the appealed item.

10 On this one, because we're being asked
11 to make a substantive decision, I'm going to ask
12 again for the parties to explain to the Board the
13 status of this, and I will start with DEQ, and
14 then have -- I say status -- but explain what
15 you're asking the Board to do, and I'll start with
16 DEQ and then go to Westmoreland.

17 MS. BOWERS: Chair Ruffatto, Members of
18 the Board. The only issue on appeal was the
19 electrical conductivity standard for planned
20 discharges from the Rosebud Mine, and actually
21 only the average monthly limit was modified from
22 what the permit had at 229 microsiemens per
23 centimeter to 500, which is consistent with the
24 water quality standard in 17.30.670 sub (4), and
25 no other provisions in the permit are modified.

1 DEQ was satisfied with the stipulation
2 to modify the permit as proposed because no
3 discharge may exceed that 500 limit, and this only
4 applies to discharges from Lee Coulee, which is
5 seven outfalls at the mine, and those outfalls
6 have not discharged during the past permit term
7 which started in 2012.

8 So the Department is satisfied that
9 water quality is protected by the modification,
10 and ask the Board to adopt the stipulation and
11 resolve the case.

12 CHAIR RUFFATTO: Ms. Marquis, do you
13 want to speak for Westmoreland again?

14 MS. MARQUIS: Thank you, Board Chairman,
15 members of the Board. Ms. Bowers gave an accurate
16 summary of stipulation and the issues in this
17 appeal. The only thing I would add is just to
18 note that this issue was not associated with the
19 appeal of the litigation that we just discussed.
20 So this was a new issue, and we've resolved it as
21 Ms. Bowers explained. Thank you.

22 CHAIR RUFFATTO: Thank you both. Any
23 discussion by the Board, or motion?

24 BOARD MEMBER REITEN: Mr. Chairman, I
25 move that we accept this decision, or whatever it

1 is.

2 CHAIR RUFFATTO: Second. I'm calling
3 for a second.

4 BOARD MEMBER SIMPSON: Second.

5 CHAIR RUFFATTO: It's been moved by
6 Board Member Reiten, seconded by Board Member
7 Simpson, that we adopt the proposed order as
8 agreed to by the parties as the final agency
9 decision. Discussion.

10 BOARD MEMBER SIMPSON: Mr. Chairman, if
11 I could make a comment on this.

12 The issue here has to do with electrical
13 conductivity of any discharges in Lee Coulee.
14 That discharge, if I remember right -- I don't
15 have it right in front of me -- it's 500
16 microsiemens per centimeter in terms of electrical
17 conductivity.

18 The reason for that number is the
19 in-stream standard for Rosebud Creek, as well as
20 Tongue River, Powder River -- and I may be missing
21 a drainage here -- that was implemented and
22 adopted by the Board some years ago, establishing
23 in-stream standards for electrical conductivity,
24 i.e., salinity, and a sodium adsorption ratio in
25 these discharges.

1 What is interesting is that in many
2 cases, the actual levels of these parameters in
3 these drainages exceed the standard. So what the
4 Board essentially did, in my view -- and this is
5 really just kind of tangential to our core
6 discussion here -- but it has created a situation
7 of impairment by issuance of a rule, and therefore
8 affects any discharges, any new discharges in the
9 drainage.

10 The reason I bring it up is that we have
11 another issue before us having to do with selenium
12 in Lake Kooconusa, which to me is a parallel
13 issue.

14 So just in case there was any confusion
15 as to why this set of discharge points has a
16 different standard than other discharge points
17 associated with the mining operation, that's my
18 understanding of how we got here; and if I'm
19 wrong, I'd like to be corrected, but I think
20 that's the case.

21 CHAIR RUFFATTO: Any responsive comments
22 or discussion?

23 (No response)

24 CHAIR RUFFATTO: Thank you.

25 MR. MARTIN: Mr. Chair, members of the

1 Board.

2 CHAIR RUFFATTO: Yes.

3 MR. MARTIN: Let me just confirm Member
4 Simpson's memory. I think what you just recounted
5 is entirely accurate as to how it was that this
6 situation came to pass, and let me say on behalf
7 of our client we appreciate the comment.

8 CHAIR RUFFATTO: Any other comments from
9 DEQ or Board members?

10 (No response)

11 CHAIR RUFFATTO: Any more discussion on
12 the motion?

13 (No response)

14 CHAIR RUFFATTO: Hearing none, and if
15 there's no objection to calling the question.

16 (No response)

17 CHAIR RUFFATTO: A motion has been made
18 and seconded that we adopt the proposed Board
19 order as final agency decision. All in favor, say
20 aye.

21 (Response)

22 CHAIR RUFFATTO: Opposed, nay.

23 (No response)

24 CHAIR RUFFATTO: The motion carries.

25 Let's go on now to the item rule review,

1 and this is the selenium standard case. We don't
2 have any action to take here.

3 I wanted to just comment that the
4 schedule for how we're going to address this is on
5 the website. I assume everyone that's interested
6 has taken a look at that. I will just outline the
7 high points.

8 The record, the rulemaking record will
9 be placed on the website on or before December
10 15th. Comments will need to be submitted by
11 January 14th, responsive comments by January 21st;
12 and then we're going to have a public meeting on
13 January 31st, the time and place and details of
14 that will be provided later; and then it will be
15 ready to be submitted to the Board.

16 Is there any questions, comments,
17 discussion by the Board on this matter?

18 (No response)

19 CHAIR RUFFATTO: As I said, there's no
20 action for us to take, so absent discussion,
21 comments, I'm going to move on.

22 BOARD MEMBER AGUIRRE: I have a quick
23 question, Chairman Ruffatto.

24 CHAIR RUFFATTO: Yes.

25 BOARD MEMBER AGUIRRE: When there's

1 comments received that are addressing other
2 matters outside of the specific matter of the
3 stringency review, do we still post those
4 comments, or are those comments removed from the
5 record, or how does that work?

6 CHAIR RUFFATTO: I'm going to offer my
7 view of that, but then I'm going to ask Katherine
8 to disagree with me or agree.

9 I don't think that the Board or Board
10 Counsel should be making the decision as to
11 whether or not comments beyond the stringency
12 review should be removed from the record. It's my
13 view that it will be our job to sift through that,
14 and for each of us to disregard the ones that
15 don't address the specific matter at hand.

16 Katherine, do you think that's a fair
17 approach, or do you have a different view?

18 MS. ORR: Chair Ruffatto, I think that
19 is the best approach.

20 BOARD MEMBER AGUIRRE: Thank you.

21 CHAIR RUFFATTO: You bet. Any other
22 comments?

23 (No response)

24 CHAIR RUFFATTO: Hearing no other
25 comments, I'm going to go on to Board Counsel

1 update. Katherine, do you have anything to
2 discuss with us?

3 MS. ORR: Mr. Chair, members of the
4 Board, I do not. Maybe in reference to the
5 previous agenda items, I hope it's clear that the
6 submissions go to the Board secretary. So I just
7 wanted to make that little addition.

8 CHAIR RUFFATTO: Thank you, Katherine.
9 Any questions for Katherine?

10 (No response)

11 CHAIR RUFFATTO: Hearing none, I'm going
12 to go on to the general public comment. I'll open
13 it up for public comment for anything within the
14 jurisdiction of the Board that is not otherwise
15 covered by the agenda, except that individual
16 cases, contested cases, are not public matters,
17 and therefore not appropriate for public comment.
18 Is there any public comment?

19 (No response)

20 CHAIR RUFFATTO: Hearing none, I would
21 thank you all, and I would move for adjournment.

22 BOARD MEMBER LEHNHERR: Chair Ruffatto,
23 I move that we adjourn the meeting.

24 CHAIR RUFFATTO: I second it. A motion
25 has been made and seconded to adjourn the meeting.

1 All in favor, say aye.

2 (Response)

3 CHAIR RUFFATTO: Opposed.

4 (No response)

5 CHAIR RUFFATTO: Motion passes. We are
6 adjourned. Thank you, everyone.

7 (The proceedings were concluded
8 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 - 61 - 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 2nd day of
January, 2022.

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

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