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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the Matter of the Petitions of Teck)
Coal Limited and the Board of County)
Commissioners of Lincoln County,)
Montana, for review of ARM)
17.30.632(7)(a) pursuant to Mont. Code)
Ann. Section 75-5-203 - Stringency)
Review of Rule Pertaining to Selenium)
Standard for Lake Koocanusa)

TRANSCRIPT OF PROCEEDINGS - VIA ZOOM

Heard Via Zoom

August 12, 2022

9:42 a.m.

BEFORE CHAIRMAN STEVEN RUFFATTO,
BOARD MEMBERS DAVID SIMPSON,
JON REITEN, JULIA ALTEMUS
and DAVID LEHNHERR

PREPARED BY: LAURIE CRUTCHER, RPR

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1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 CHAIR RUFFATTO: That brings us up to
5 the selenium matter, and I think it might be --
6 The first order, what we're going to do first is
7 have oral arguments, ten minutes from each side,
8 so that would take us up past 10:00. So I'm
9 inclined to take a short break now, so we can
10 handle this in one continuous approach, but if
11 anybody objects to that, I'm willing to hear other
12 ways of proceeding.

13 (No response)

14 CHAIR RUFFATTO: All right. Let's take
15 a ten minute break, and we'll reconvene at 9:53.
16 Hopefully in the next hour we will complete this
17 matter.

18 (Recess taken)

19 CHAIR RUFFATTO: I'll reconvene the
20 meeting, and Sandy, please call the roll of the
21 Board.

22 MS. MOISEY-SCHERER: Chairman Ruffatto.

23 CHAIR RUFFATTO: Here.

24 MS. MOISEY-SCHERER: Vice Chair Aguirre.

25 (No response)

1 MS. MOISEY-SCHERER: Board Member

2 Altemus.

3 BOARD MEMBER ALTEMUS: Present.

4 MS. MOISEY-SCHERER: Board Member

5 Lehnherr.

6 BOARD MEMBER LEHNHERR: Here.

7 MS. MOISEY-SCHERER: Board Member

8 Reiten.

9 BOARD MEMBER REITEN: Here.

10 MS. MOISEY-SCHERER: Board Member

11 Simpson.

12 BOARD MEMBER SIMPSON: Here.

13 MS. MOISEY-SCHERER: We have a quorum.

14 CHAIR RUFFATTO: Thank you. For the
15 benefit of the Board, we have advised the parties
16 that DEQ will have ten minutes to argue. DEQ can
17 split that up between opening and rebuttal however
18 they would like. Then we will give Lincoln County
19 and Teck Coal ten minutes, and they can split that
20 up however they want, but ten minutes between
21 them. And then following, and then if there's
22 rebuttal by DEQ. Following that, we will have
23 questions from the Board. Following that we will
24 deliberate, and there may be more questions from
25 the Board at that point.

1 Any questions or comments about that
2 process?

3 (No response)

4 CHAIR RUFFATTO: If not, please, just so
5 we know, how does DEQ propose to present their
6 arguments?

7 MS. BOWERS: Good morning, Chair
8 Ruffatto, members of the Board. For the record
9 I'm Kirsten Bowers, DEQ attorney, and I'll be
10 making the argument for DEQ, and I'll reserve two
11 minutes for rebuttal.

12 CHAIR RUFFATTO: Thank you, Ms. Bowers.
13 And for Lincoln County and Teck Coal, how do you
14 propose to proceed?

15 MR. WARHANK: This is Murry Warhank for
16 Lincoln County. We intend to provide argument on
17 some of the procedural issues for perhaps a minute
18 or two, and then Ms. Marquis will be presenting
19 argument on the other issues for the remaining
20 time.

21 CHAIR RUFFATTO: Thank you. Let's get
22 started then, Ms. Bowers, with your argument. You
23 have eight minutes.

24 MS. BOWERS: Okay. Thank you. On
25 December 11th, 2020, the Board adopted site

1 specific selenium standards for Lake Koocanusa and
2 the Kootenai River in accordance with the Montana
3 Water Quality Act and the Montana Administrative
4 Procedure Act.

5 At the time of the adoption, the Board
6 determined the site specific selenium criteria for
7 Lake Koocanusa of .8 micrograms per liter was
8 consistent with EPA's current recommended selenium
9 criterion guidelines for fresh water bodies
10 because it was developed using federally
11 recommended site specific procedures.

12 On June 30th, 2021, Teck, and on October
13 14th, 2021, Lincoln County, petitioned the Board
14 to reconsider the stringency determination.

15 In its final agency action and order
16 dated April 19th, 2022, the Board reversed its
17 prior stringency findings under 75-5-203, Montana
18 Code Annotated, and found the Lake Koocanusa water
19 column standard codified in Administrative Rules
20 of Montana 17.30.632 Sub(7) Sub(a) is more
21 stringent than comparable Federal regulations or
22 guidelines.

23 Upon the Board's finding that the Lake
24 Koocanusa water column standard for selenium is
25 more stringent than Federal, DEQ implemented the

1 remedy in Section 75-5-203, Montana Code
2 Annotated, which provides DEQ may either make the
3 written findings to support the more stringent
4 standard, or revise the rule to conform to the
5 Federal standard.

6 DEQ acknowledges and respects the
7 Board's authority to reconsider and reverse its
8 previous stringency determination.

9 DEQ made the findings required in
10 75-5-203 Sub (2) and Sub (3), Montana Code
11 Annotated, made its proposed findings available to
12 the public, and the public had the opportunity to
13 provide both written and oral comments. The
14 stringency findings were finalized June 14th,
15 2022.

16 In its pending motion to alter or amend
17 the Board's final agency action and order, DEQ
18 respectfully requests the Board strike the portion
19 of its order that provides, "Because the Board's
20 rulemaking failed to comply with 75-5-203, Montana
21 Code Annotated, in order to have a valid and
22 enforceable lake water column standard, new
23 rulemaking must be initiated." This is in part
24 Roman Numeral IV, Paragraph 6 of the Board's order
25 on Page 20.

1 The Board's interpretation and
2 application of 75-5-203 Sub (4), Montana Code
3 Annotated, is erroneous, and may be the basis of a
4 motion to alter or amend as the stringency statute
5 sets forth the applicable remedy to be implemented
6 by DEQ.

7 The Board's stringency determination
8 answered the narrow question whether
9 Administrative Rule of Montana 17.30.632 Sub(7)
10 Sub(a) is more stringent than comparable Federal
11 regulations or guidelines.

12 Upon the Board's determination that the
13 rule is more stringent than Federal, the
14 stringency statute sets forth specific remedies
15 which DEQ followed.

16 The plain language of the stringency
17 statute remedy provision provides if the Board
18 determines that the rule is more stringent than
19 comparable Federal regulations or guidelines, the
20 Department shall comply with the section by either
21 revising the rule to conform to the Federal
22 regulations or guidelines, or by making the
23 written finding as provided under Subsection (2)
24 within a reasonable period of time not to exceed
25 eight months after receiving the petition.

1 A petition under this section does not
2 relieve the petitioner of the duty to comply with
3 the challenged rule. A petition under the
4 stringency statute cannot be used to invalidate or
5 make a rule adopted in accordance with MAPA
6 unenforceable.

7 Petitioners argue DEQ's motion to be
8 disallowed as an impermissible motion for
9 reconsideration because DEQ is rearguing issues it
10 has already raised in the stringency petitions
11 before the Board; but DEQ could not have raised or
12 argued issues related to the legality of Paragraph
13 6 of the order until after the order was issued.

14 The Board's materials for the April 8th,
15 2022 meeting contained the proposed findings of
16 fact and conclusions of law that did not contain
17 Paragraph 6 of the final order. Instead the
18 Board's initial proposed remedy provided the
19 stringency statute set forth the applicable remedy
20 to be implemented by DEQ.

21 The language in Paragraph 6 of the order
22 was inserted by the Board as an amendment to the
23 proposed findings of fact and conclusions of law
24 during the April 8th, 2022 Board meeting.

25 DEQ respectfully requests that the Board

10

1 reconsider its order and strike Paragraph 6. The
2 language in Paragraph 6 ignores the plain
3 statutory language in 75-5-203 Sub (4), Montana
4 Code Annotated, which provides the remedy
5 available to a successful petitioner under the
6 stringency provisions in the Montana Water Quality
7 Act, and this remedy has been implemented by DEQ.

8 DEQ's motion is appropriate to correct
9 the error. The language in the Board order at
10 Paragraph 6 that provides, "Because the Board's
11 rulemaking failed to comply with 75-5-203, Montana
12 Code Annotated, in order to have a valid and
13 enforceable lake water column standard, new
14 rulemaking must be initiated" ignores DEQ's
15 authority to implement the remedy, and ignores the
16 fact that the remedy may involve a rule revision
17 or the findings necessary to support a more
18 stringent than Federal standard.

19 Petitioner Teck's argument that 75-5-203
20 Sub (4), Montana Code Annotated, requires the
21 written findings in Sub (2) be made before the
22 rule adoption is unworkable because it would
23 require initiation of rulemaking in all cases, and
24 it impermissibly reads the alternative remedy to
25 make the findings necessary to support a more

1 stringent than Federal standard out of the
2 statute.

3 Furthermore, a petition under 75-5-203,
4 Montana Code Annotated, may be brought when a
5 petitioner believes a more stringent rule was
6 adopted without the necessary findings, and this
7 may arise when the rulemaking agency was wrong in
8 its conclusion that the rule was not more
9 stringent than Federal, or when a comparable
10 Federal regulation is adopted after the State's
11 rulemaking.

12 Teck's interpretation that the
13 stringency findings must be made either concurrent
14 with or before a rulemaking ignores the
15 alternative form of the statutory remedy, which
16 allows the Department to either revise the rule to
17 conform to the Federal regulations or guidelines
18 or make the written findings.

19 Under Teck's interpretation, the
20 rulemaking agency could never make the written
21 findings to address a more stringent than Federal
22 standard. This interpretation is counter to the
23 plain statutory language, and it fails to
24 recognize Montana is not prohibited from adopting
25 more stringent than Federal standards under

1 75-5-203, but a more stringent standard must be
2 supported by the findings in 75-5-203 Sub (2) and
3 (3), Montana Code Annotated.

4 Upon the Board's determination that ARM
5 17.30.632 Sub (7) Sub (a) is more stringent than
6 Federal, DEQ made the findings in 75-5-203 Sub (2)
7 and Sub (3), Montana Code Annotated. DEQ's
8 interpretation is in accordance with the
9 stringency provision of the Montana Water Quality
10 Act, which grants DEQ the authority to implement
11 the remedy which may involve either rulemaking to
12 adopt a rule that's consistent with comparable
13 Federal regulations or guidelines, or make the
14 stringency findings necessary to support the more
15 stringent standard.

16 DEQ chose to make the findings in
17 75-5-203 Sub (2) and (3), Montana Code Annotated,
18 in response to the Board's determination that the
19 Lake Koocanusa water column standard for selenium
20 is more stringent than Federal.

21 CHAIR RUFFATTO: Thank you, Ms. Bowers.
22 Were you done?

23 MS. BOWERS: I just have one more thing.

24 CHAIR RUFFATTO: Okay. Go ahead.

25 MS. BOWERS: Just to wrap up, DEQ

1 respectfully requests that the Board strike
2 Paragraph 6 on Page 20 of the order. This
3 correction is necessary to acknowledge the clear
4 statutory language in the Montana Water Quality
5 Act stringency provisions, authorizing DEQ to
6 implement the remedy which may involve a rule
7 revision or the findings necessary to support a
8 more stringent than Federal standard. Thank you.

9 CHAIR RUFFATTO: Thank you, Ms. Bowers.
10 Mr. Warhank.

11 MR. WARHANK: Yes, sir. Thank you.
12 Murry Warhank for Lincoln County. Thanks for
13 opportunity to speak today. I'll be brief.

14 My clients have become increasingly
15 frustrated with this process because the Board
16 made a clear finding about the rulemaking in this
17 case being invalid, and despite that finding being
18 several months ago, nothing has changed in this
19 case, and nothing has changed in the facts on the
20 ground.

21 Primarily today I'm here to argue that a
22 Rule 59 motion in this case is not an appropriate
23 way to go about this. Now, both parties have
24 cited to you the Lee case, which is controlling
25 from the Montana Supreme Court.

1 The Lee case talks about where Rule 59
2 is appropriate, but more importantly it talks
3 about where Rule 59 is not appropriate, and it is
4 not appropriate where parties can and should have
5 brought arguments, and where parties did bring
6 arguments that they reargue in a motion for
7 reconsideration. That's exactly what's happened
8 here.

9 Now, the Board has its own recollection
10 of its proceedings, and it has written transcripts
11 of its proceedings, and it should look to those
12 transcripts, because specifically in the hearing
13 that was had in these proceedings in February of
14 this year, there was a tremendous -- where a good
15 discussion and argument was had specifically on
16 the point of whether or not DEQ had to reinitiate
17 rulemaking on this where the same arguments were
18 raised on this point.

19 Now, I understand that DEQ disagrees
20 with the Board's decision, but it is not
21 appropriate to take a second bite at the apple
22 under a Rule 59 motion under the Supreme Court's
23 reasoning in Lee.

24 Now, the Board may have authority under
25 other provisions of law to consider those

1 arguments, but for the same reason that the
2 Supreme Court decided Lee, those same policy
3 reasons would apply to the Board's considerations
4 of its power today.

5 It has already made the determination
6 that it is being asked to reconsider today. It
7 has already considered the arguments before it,
8 and has rejected those, and it should continue to
9 reject those today. So that's why I would pass it
10 over to my colleague, Ms. Marquis.

11 CHAIR RUFFATTO: Thank you, Mr. Warhank.
12 Ms. Marquis.

13 MS. MARQUIS: Thank you. My name is
14 Vicki Marquis. I'm with Holland and Hart in
15 Billings. I still represent Teck in this matter.

16 We agree with Lincoln County and Mr.
17 Warhank's arguments, and the issue today is not
18 DEQ's authority to choose one remedy or the other.
19 DEQ has just told you that the order ignores its
20 authority, but that's not true. Nothing in the
21 Board's order prohibits the DEQ from pursuing
22 either one of the two remedy options. Both
23 options remain available to the Department.

24 The issue here today is really about the
25 Board's authority. Now, DEQ assumes a very narrow

1 Board authority, limited only to determining
2 whether a rule is more stringent than Federal.
3 That's not what the law says.

4 We see this in the stringency statute
5 itself. Subparagraph (4) clearly states that the
6 Board will review the rule. That's very broad
7 language. We also know that the Board has broad
8 quasi-judicial authority to evaluate facts,
9 interpret the statute, and make a determination.
10 That's also found in the law, and its very broad
11 authority provided in statute 2-15-3502.

12 That's exactly what the Board did in
13 this case. The Board here found that neither its
14 initial publication nor its final publication told
15 the public that the standard at issue here was
16 more stringent than Federal, or that the written
17 findings were required. That's found in Findings
18 2, 3, and 5.

19 Additionally the Board considered the
20 legislative history of the stringency statute, and
21 words of the statute, and found that the statute
22 requires that the public be informed when a
23 standard is more stringent than Federal, and that
24 the public be informed of that stringency at the
25 front end, at the beginning of the rulemaking in

17
1 the initial publication. That's in Findings 24
2 and 25.

3 An important conclusion that the Board
4 reached here is Conclusion of Law 18, where the
5 Board found that the rulemaking, quote, "violates
6 the stringency statute," end quote. None of those
7 findings or conclusions have been challenged by
8 the Department.

9 Those findings and conclusions lead to
10 only one clear and rational conclusion, and that
11 is, as the Board found in its order, that a new
12 rulemaking is required in order to have a valid,
13 enforceable, site specific water column standard
14 for Lake Koocanusa.

15 The rulemaking violated the law.
16 Therefore the rule cannot stand. That premise is
17 supported by Federal case law and by State case
18 law. We've cited those cases on Pages 13 and 14
19 of our response brief which appear in the Board's
20 packet at Pages 79 and 80.

21 The Department has not argued against
22 any of that case law that we presented. Notably
23 on the Federal side, the Action Smoking and Health
24 case holds that when a rule violates the law, it
25 is vacated, and the previous rule is reinstated.

1 The analogous holding in the State law is found in
2 the Clark Fork Coalition versus Tubbs, a case
3 we've cited in our most recent filing.

4 And further at the State level, the
5 State case law clearly holds that when a rule is
6 promulgated in violation of the law, it cannot be
7 enforced. That is found in the cases State versus
8 Vainio, or the Rosebud County case, or most
9 notably the Northwest Airlines case. I'm going to
10 highlight that case for a minute because it's
11 directly on point here.

12 In that case, the Court said it was not
13 deciding whether the tax formula that was used was
14 correct or not. Rather because that tax formula
15 did not go through the lawful rulemaking, it could
16 not be used.

17 The same is true here. The Board order
18 did not decide what the correct numeric standard
19 should be. The Board said that because that
20 numeric standard was not promulgated through the
21 proper rulemaking that it cannot be used. The
22 Board order directly followed on binding Montana
23 case law.

24 When a rulemaking violates the law, the
25 rule cannot be used. It's invalid and

1 unenforceable. That is the law in Montana, and
2 DEQ cannot and has not argued otherwise.

3 Instead, DEQ argues two things. First,
4 they say that Petitioners should have petitioned
5 for new rulemaking. In effect what they're saying
6 is that every time a rule is challenged, the
7 challenger must also petition for new rulemaking.
8 Otherwise the rule remains valid regardless of
9 whether we challenge it or not.

10 That does not make sense, and it's
11 contrary to the law as highlighted by the holding
12 in Northwest Airlines, Rosebud, and the Vainio
13 cases cited in our brief. When the rulemaking
14 violates the law, the rule is invalid.

15 Second, DEQ claims that the order
16 conflicts with the stringency statute, and that
17 the statute somehow allows DEQ to remedy the
18 violation by make a written finding outside of the
19 rulemaking process, but that's not correct.

20 If we look at the statutes, specifically
21 let's go to Subparagraph (4), where it provides
22 that second remedy option. It says that the
23 Department may make the written findings as
24 provided under Subsection (2). We can't read that
25 part out of the statute. So we need to go up to

1 Subsection (2).

2 And Subsection (2) says that the
3 Department may adopt a rule that clearly -- that
4 means, that implies that the rulemaking has to
5 happen. But then it goes on to say that the
6 Department may adopt a rule only if the Department
7 makes a written finding.

8 Those two words are important, and they
9 have to have effect in the statute. They may not
10 until -- The Department may adopt a rule, but not
11 until it has made the written findings. It
12 requires a certain order in which things have to
13 be done.

14 Now consider if I told my son that he
15 may drive my car only if he has a valid driver's
16 license, and then my son proceeds to drive my car
17 for a year and a half, never gets a valid driver's
18 license, has his buddy make sure that he can
19 complete all of the tasks covered by the driver's
20 test, but he never goes to the proper licensing
21 authority and gets the license. He's still
22 driving illegally. He still hasn't complied with
23 the conditions that I placed upon him to drive my
24 car.

25 The same is true here. The statute says

1 DEQ may adopt the rule only if, not until it makes
2 the written finding. Here DEQ has not made the
3 written findings. It cannot adopt the rule. The
4 rule is invalid until a new rulemaking occurs.
5 The standard remains illegal, and DEQ has not
6 satisfied the condition that's clearly set out in
7 the statute that's provided in Subsection (4)
8 which incorporates Subsection (2).

9 The Board made the right decision here.
10 The standard is invalid and unenforceable. That
11 principle is supported by Federal case law, it's
12 supported by State case law, and by the statute
13 itself, and it's common sense. DEQ's motion
14 should be denied.

15 CHAIR RUFFATTO: Thank you, Ms. Marquis.
16 Ms. Bowers, please proceed with your rebuttal.

17 MS. BOWERS: Thank you, Chair Ruffatto,
18 members of the Board.

19 First off, the interpretation urged by
20 Petitioners violates the rules of statutory
21 construction which do not allow a decision maker
22 to declare something that is not contained in the
23 clear language of the statute to be there, or to
24 omit what is there, and that's what the Montana
25 statutory construction provisions are at 1-4-101,

1 Montana Code Annotated.

2 The initial rulemaking was conducted in
3 accordance with MAPA, and under what was then the
4 Board's authority to adopt water quality standards
5 under 75-5-301, Montana Code Annotated. And if
6 the Petitioners wanted to invalidate the rule,
7 they could have petitioned for rulemaking under
8 MAPA, and instead they petitioned for the Board's
9 reconsideration of its stringency determination,
10 and that is subject to a clear statutory remedy.

11 And the remedy goes to the Department,
12 and the Department can choose between either
13 adopting a rule that is consistent with the rule
14 standards, or making the findings in 75-5-203 Sub
15 (2), and it doesn't require new rulemaking to make
16 those findings.

17 That's inconsistent with the clear
18 statutory language, which provides a remedy if, as
19 in this case, where the Board was found to be
20 wrong in its initial stringency determination.
21 The remedy provides a way to go back and make
22 stringency findings to support its more stringent
23 rule.

24 The statutory provisions also
25 contemplate a situation where the Federal

1 requirements might be adopted after State
2 rulemaking, and then the Department would also
3 have the opportunity, if there were a petition
4 under the stringency statute, to make findings in
5 accordance with 75-5-203 Sub (2) and Sub (3). So
6 the Department has implemented the remedy that the
7 stringency statute sets out.

8 I also want to add that the Department
9 rulemaking is not static with regard to water
10 quality standards. DEQ regularly reviews and
11 updates water quality standards, and DEQ will
12 review the standards in 17.30.632 in its next
13 triennial review process.

14 This is expected to be complete at the
15 end of 2023. This will provide an opportunity to
16 consider new data, new information, and any
17 revisions to 17.30.632 Sub(7) Sub(a) would occur
18 after rulemaking during this process, but this
19 process would be conducted in accordance with
20 MAPA, the Water Quality Act, and it would be based
21 on sound science --

22 CHAIR RUFFATTO: Ms. Bowers, your time
23 is passed. Do you have a final point you want to
24 make?

25 MS. BOWERS: Well, I just want to

1 briefly touch on the Tubbs decision, Clark Fork
2 Coalition versus Tubbs, and that decision really
3 isn't precedent in this case because it didn't
4 involve a stringency determination. The Tubbs
5 case involved a question of validity under the
6 statutory authority. And in this case, the rule
7 is not challenged under the Department or the
8 Board authority under the Water Quality Act or
9 MAPA. That's it for me. Thank you.

10 CHAIR RUFFATTO: Thank you, Ms. Bowers.
11 All right. I'm going to open it up for questions
12 from the Board to the parties.

13 BOARD MEMBER SIMPSON: Mr. Chairman,
14 this is Dave Simpson. I have a question for Ms.
15 Bowers.

16 CHAIR RUFFATTO: Please proceed.

17 BOARD MEMBER SIMPSON: Ms. Bowers, you
18 mentioned a periodic review of water quality
19 rules, and raised a question in my mind that is
20 only tangential to what we're talking about here
21 today.

22 But the Department had committed to a
23 monitoring program for selenium in Lake Koocanusa,
24 and the organisms in Lake Koocanusa. Has that
25 monitoring proceeded as planned? And will that

1 data be available for the next review?

2 MS. BOWERS: Board Member Simpson,
3 members of the Board. In its next triennial
4 review, the Department would review any new data
5 that's available, and I do believe there is
6 additional monitoring ongoing this 2022 season. I
7 want to mention that there are more technical
8 people on the call that could probably answer that
9 better than I can. Myla Kelly is here, and so is
10 Lauren Sweeney.

11 CHAIR RUFFATTO: David, I guess I think
12 it's fine for you to direct that question to one
13 of the technical folks.

14 BOARD MEMBER SIMPSON: Yes, Mr.
15 Chairman. If there is someone present at the
16 Board meeting who could answer that, I would
17 appreciate it, just as a matter of general
18 information.

19 MS. KELLY: Chair Ruffatto, my name is
20 Myla Kelly. I'm the manager of our Water Quality
21 Standards and Modeling Section, and I think I can
22 address that.

23 There are a number of partnerships that
24 continue to be ongoing and doing monitoring work
25 on Lake Koocanusa. That includes the US

1 Geological Survey, Teck Coal, the US EPA, as well
2 as Montana DEQ. And data is being collected and
3 will continue to be collected through the season,
4 and were there to be -- and that data could be
5 considered during the triennial review process.

6 CHAIR RUFFATTO: Thank you, Ms. Kelly.
7 David, did that answer your question?

8 BOARD MEMBER SIMPSON: That answers my
9 question. Thank you very much.

10 CHAIR RUFFATTO: Thank you. Dr.
11 Lehnherr, you have your hand up.

12 BOARD MEMBER LEHNHERR: Yes. Thank you,
13 Chairman Ruffatto. I have a question for Ms.
14 Marquis.

15 Back when the previous Board approved
16 this rule, after a long meeting, and a rigorous
17 evaluation involving dozens of citizens, and
18 politicians, and scientists, some people said,
19 "Well, this rule will not affect Teck Coal. It's
20 a foreign corporation. Montana has no authority
21 in dealing with foreign corporations, so this
22 won't affect Teck Coal."

23 Then the political climate changed, and
24 the Board was reconstituted, and Teck came back
25 and said apparently, or felt they must have been

1 affected by the rule.

2 Back in the February meeting of this
3 year, we went through a series of questions, and
4 looked at the State regulation on stringency, but
5 we did not address a very significant section,
6 Section (4), that says, "A person affected by a
7 rule," blah, blah, blah, "may petition the Board
8 to review the rule."

9 Looking beyond the ridiculous sort of
10 legal technicality that a corporation is
11 considered a person, you must feel that Teck is
12 affected by this rule. I'm just wondering how
13 Teck is affected by this rule.

14 MS. MARQUIS: Chairman Ruffatto, Board
15 Member Lehnherr. Thank you for the question. I
16 know this has gotten some oral argument and some
17 time and some comments on this issue. As we
18 pointed out in our petition, and throughout our
19 arguments, the impact on Teck was made clearly
20 apparent immediately after the rule was published
21 in its final publication.

22 In what was close to his last day there
23 at DEQ, then the Director at that time, Shaun
24 McGrath, wrote a letter -- I think it went to the
25 State Department, and we've cited it as an exhibit

1 to our petition.

2 And in that letter he clearly is
3 directing and asking for an IGC referral. He's
4 asking for action against Teck based on this
5 standard. So clearly Teck is a target, and the
6 reason that the standard is what DEQ is using to
7 aim at Teck and get some action out of Teck, we
8 don't know what.

9 The second thing I would raise is that
10 DEQ has recently said that it does intend to march
11 forward with further an assessment of Lake
12 Koocanusa that will likely result in an impairment
13 determination, because we know the existing level
14 of selenium in the lake has remained constant for
15 a number of years, and that level right now is
16 greater than the .8 standard that DEQ would like
17 to recognize, but is now invalid.

18 So based on an assessment and what
19 appears to be a foregone conclusion that the lake
20 would be listed as impaired, DEQ has said that it
21 would propose a waste load allocation that it
22 would then take to the Canadian government to have
23 that enforced.

24 And it's been clear throughout their
25 technical documents and throughout their

1 rulemaking that they view Teck as the source of
2 selenium coming from Canada, so that, too, is
3 another piece of evidence that shows that the
4 reason for the standard appears to be that it
5 allows for the lake to be listed as impaired, and
6 that impairment then in turn allows DEQ to go to
7 the government of Canada and ask for some sort of
8 pollution reduction scheme aimed at Teck.

9 So that's how we see the impact. Those
10 are sort of the bread crumbs that have been left
11 for us. Does that answer your question, Dr.
12 Lehnherr?

13 BOARD MEMBER LEHNHERR: Yes. Thank you.

14 CHAIR RUFFATTO: Any more questions?

15 (No response)

16 CHAIR RUFFATTO: I would like to ask a
17 question of Ms. Marquis. How do you address the
18 point that Ms. Bowers makes that the standard, or
19 the approach that you, that Teck Coal and Lincoln
20 County propose would make it impossible to comply
21 with the statute in any rulemaking process?

22 MS. MARQUIS: Chairman Ruffatto, members
23 of the Board. Thank you for the question. I was
24 scratching my head over that because I don't see
25 that at all in the statute.

1 Subparagraph (4) does provide two
2 remedies to the Department. Both of those
3 remedies require additional rulemaking. It's
4 clear that the first remedy is to revise the rule
5 to conform with the Federal regulations. It
6 doesn't say it requires rulemaking. It implies
7 that rulemaking is required. We know that
8 rulemaking is required to revise the rule.

9 So under the second remedy, it says they
10 can make a written finding, but they have to do so
11 in accordance with Subparagraph (2). Subparagraph
12 (2) says that they may adopt a rule only if they
13 make the written findings.

14 And as I argued, the term "only if"
15 requires those two things to happen in a specific
16 order. The written finding has to be made, and
17 then the Department can adopt the rule. So they
18 can initiate rulemaking, make the written
19 findings, allow the public to comment on it, and
20 then they can finalize the rule and adopt the
21 rule.

22 I don't see how that is impossible, or
23 how that nullifies that remedy, as DEQ has argued.
24 It does require additional rulemaking, but both of
25 the remedies available to them do.

1 We're not arguing that Montana can never
2 adopt a standard more stringent than Federal.
3 That's not the case. Clearly there's a process in
4 place where the Department can do that. It's not
5 like most of the states. I think this was cited
6 in one of our earlier briefs, but there are about
7 13 states that say absolutely not, no standard can
8 ever be more stringent than Federal.

9 Montana is not one of those states.
10 Montana says we can have a standard more stringent
11 than Federal, but if we're going to do that, these
12 are the things we want to look at, and this is
13 what we want the public to be made aware of at the
14 front end. These are the written findings that we
15 require must be made at the front end before the
16 standard is put in place.

17 So there's a clear path to get there.
18 It's not impossible, and I guess I don't
19 understand why it's being viewed as impossible
20 because there is a clear path. It does involve
21 rulemaking, and there's a way to get there.

22 And I might point out also that the
23 rulemaking that the Board originally did took just
24 two months, so when we talk about rulemaking,
25 that's not an insurmountable obstacle. It's

1 something that can be done within a matter of
2 months. It does not take years or decades. It
3 can be done in as quickly as just over two months.

4 CHAIR RUFFATTO: Thank you, Ms. Marquis.
5 Ms. Bowers, would you elaborate on your point --
6 because I'm having trouble understanding your
7 point -- about making it impossible to adopt any
8 rule more stringent.

9 MS. BOWERS: Chair Ruffatto, members of
10 the Board. My point was that upon a petition for
11 stringency review, the successful petitioner is
12 entitled to the remedy provided in the stringency
13 statute, and that remedy is implemented by DEQ,
14 and there are two potential remedies: One is
15 rulemaking to adopt a rule consistent with the
16 Federal standard or guidelines; the second is to
17 make the required findings, which is what DEQ did.

18 Ms. Marquis's interpretation of the
19 stringency statute inserts requirements that are
20 not there, and omits requirements that are there,
21 and violates statutory interpretation.

22 For example, in Subsection (4), there is
23 a provision in Part (b) for a person to petition
24 the Board to review a rule under Subsection (4)
25 when the Federal government adopts a comparable

1 rule or guideline after the State does its
2 rulemaking. So that remedy would also give the
3 State the opportunity to make the findings. It
4 doesn't have to do a whole new rulemaking to make
5 those findings.

6 The Department did make the findings in
7 accordance with Subpart (2) of the stringency
8 statute because it made the findings after a
9 public hearing and a public comment period, and
10 based on evidence in its rulemaking record.

11 CHAIR RUFFATTO: Thank you, Ms. Bowers.
12 Any more questions?

13 (No response)

14 CHAIR RUFFATTO: I have one more
15 question then. Ms. Bowers, I would like to
16 understand any -- the reasons -- Well, you have
17 stated the one reason why DEQ chose the course
18 that it chose. Why did it choose that course
19 instead of the -- in my mind -- course that did
20 not raise the issue that we're debating now? Why
21 did it choose that course versus the rulemaking
22 course?

23 MS. BOWERS: Chair Ruffatto, members of
24 the Board. In my view, the Department chose the
25 course of making the written findings because it

1 believes the .8 water column standard is based on
2 sound science, and protects the uses in Lake
3 Koocanusa.

4 As I said before, those standards are
5 periodically reviewed. This doesn't mean the
6 Department will never change the standard or won't
7 go through a rulemaking to revisit the standard,
8 but to do it, it's a huge undertaking. We would
9 want to look at more data, and give the public the
10 opportunity to comment in a MAPA process that
11 might take longer than eight months.

12 CHAIR RUFFATTO: Let me make sure you
13 understood my question. You had a choice. I
14 recognize that DEQ's goal is to establish a .8
15 standard, and it had two courses of action to do
16 that in 2022: The way you did it, and the -- I'm
17 going to call it -- an unprecedented process or a
18 rulemaking process.

19 Why did the DEQ not pursue the
20 rulemaking process when it could have done that in
21 a short period of time, as demonstrated by past
22 practice, and avoid the question that we're
23 debating now? Why did it ignore what the Board
24 did and choose the more risky process?

25 MS. BOWERS: Chair Ruffatto, members of

1 the Board. I don't think DEQ agrees that it chose
2 a risky process. It chose a process that's
3 clearly available in the statute as one of the
4 remedies upon a finding that a standard is more
5 stringent than Federal.

6 CHAIR RUFFATTO: All right. Thank you.
7 Any more questions?

8 (No response)

9 CHAIR RUFFATTO: All right. Let's move
10 to the point of starting our deliberations, and to
11 open those deliberations, I would entertain a
12 motion to either deny or grant DEQ's motion to
13 amend.

14 BOARD MEMBER ALTEMUS: Mr. Chair, I'm
15 going to make a motion that we deny the DEQ's
16 request to reverse our earlier decision.

17 CHAIR RUFFATTO: Is there a second?

18 (No response)

19 CHAIR RUFFATTO: I will second that
20 motion. Discussion.

21 BOARD MEMBER SIMPSON: Mr. Chairman,
22 members of the Board, this is Dave Simpson. I've
23 made it clear at previous Board meetings that I
24 feel the technical basis for this 0.8 standard is
25 seriously flawed, and I believe that Teck Coal has

1 a point in suggesting, making the point that it
2 was structured to create an impairment in Lake
3 Koocanusa. I see no point in revisiting that
4 territory.

5 However, I guess I would observe that
6 Paragraph (4) of 203 is controlling here, and I
7 would make the observation that this language is
8 under the water quality section. It's not under
9 the Montana Administrative Procedure Act. So the
10 argument that the procedure under MAPA is somehow
11 flawed, I just don't see that.

12 So I feel that despite my reservations
13 about the rule, the Department is correct in this
14 case where Paragraph (4) controls. Within a
15 reasonable period of time not to exceed eight
16 months after receiving a petition, a petition
17 under this section does not relieve the Petitioner
18 of the duty to comply with the challenged rules.

19 Paragraph (4) contemplates a situation
20 where a rule is adopted and a petition is received
21 challenging the stringency issue. So I'm going to
22 support the Department and vote no on this motion.

23 CHAIR RUFFATTO: Thank you, David. Any
24 more discussion? Dr. Lehnherr.

25 BOARD MEMBER LEHNHERR: Thank you,

1 Chairman Ruffatto.

2 Back when this rule was approved with
3 the previous Board, the Board considered testimony
4 from a broad consortium of public officials,
5 citizens, the top water quality scientists in
6 North America, if not the world. There were
7 hundreds of pages of peer reviewed studies and
8 findings presented.

9 The bottom line is that the Board acted
10 appropriately and with the best interests of
11 Montana, Lake Koocanusa, and its watershed, and in
12 the best interests of Montana. And then we got
13 into this issue of stringency, and I think that's
14 probably one of -- the crux of the issue,
15 because --

16 And I've been trying to come up with an
17 analogy, and I think a good analogy is baking a
18 cake. And you buy a cake mix, and the recipe says
19 bake this for so many minutes at a certain
20 temperature, and then there's an asterisk, and
21 that asterisk says, "But you need to adjust the
22 baking temperature and time based on your
23 altitude."

24 And I think what we're -- the problem
25 here is that we are taking a guideline, an EPA

1 guideline that is anything but a hard and fast
2 rule, and we're trying to say there's a stringency
3 here, where if you're above this number you're not
4 more stringent, and if you're below this number
5 you're more stringent.

6 But the EPA guideline is not a concept
7 that we can apply stringency to because there's a
8 huge asterisk associated with that EPA guideline
9 that says you must apply this, or you should apply
10 this to your specific site, which means we can't
11 take that number and say it's higher or lower.

12 Black and white thinking doesn't do
13 anyone any good, but because of this obsession
14 with stringency, we've over several meetings now
15 been trying to hammer a round peg into a square
16 hole, and we're sort of digging ourselves deeper
17 and deeper into a hole.

18 So the fatal flaw in all this is that we
19 tried to apply a stringency criterion when it's
20 not a guideline or a number that you can apply
21 stringency criterion to.

22 But even if we say -- even though we've
23 erred in many ways along this pathway, let's say
24 we are going to try and hammer that darn round peg
25 into a square hole, apply a stringency criterion

1 even -- and this is what we've talked about
2 several times -- even if we say it is more
3 stringent, fortunately in Montana, we can have a
4 more stringent standard, even though -- it's silly
5 to even be talking about stringency in this case,
6 but we can apply a more stringent standard.

7 But because of this pathway we've
8 chosen, we ended up with a FOFCOL -- which I have
9 a lot of questions about -- how do we fix this
10 mess that we've gotten into? Of course, the first
11 thing, when you find yourself in a hole, the first
12 thing you do is stop digging.

13 And I think the best way to stop digging
14 and climb out of this hole is to follow the DEQ's
15 recommendation, and just omit the section of the
16 FOFCOL, the conclusions of law, and let them sort
17 of reinvent the wheel that was invented back in
18 December of 2020, and come up with, you know, jump
19 through the hoops and come up with the necessary
20 written findings that will allow a selenium
21 standard that is in the best interests of Lake
22 Koocanusa and its watershed to stay in place. I
23 hope I made sense.

24 CHAIR RUFFATTO: Thanks, Doctor. Any
25 more discussion? Yes, Ms. Altemus.

1 BOARD MEMBER ALTEMUS: Thank you, Mr.
2 Chair. I guess from my perspective -- and I'm not
3 an attorney -- but I guess from my perspective it
4 feels like this Board overturned a previous
5 Board's order based on that the stringency
6 standard -- not the EPA guidance -- was more
7 strict than the EPA standard.

8 So if you go right -- For me I have to
9 go back to what is actually in law and we're
10 talking about, and not go back and hash over what
11 you've already talked about.

12 But the Board made a decision in April
13 to overturn that previous Board's decision, and
14 because of that, because we felt like that
15 standard was more stringent than the EPA standard,
16 that that should have required the State to do
17 rulemaking, because then you do have impacts to
18 the local community. If it's more stringent, you
19 have impacts to that local community. To me, then
20 that deserves rulemaking, not just written
21 findings.

22 And if you look at the written findings
23 that I have reviewed -- and I have listened to the
24 legislative hearings -- I don't see that the
25 written findings really went outside of the

1 original written findings that they came up with
2 with the previous Board's decision.

3 So for me today I have not heard
4 anything that would make me change my mind as far
5 as how we voted previously in April, so that's why
6 I made the motion. I do believe that we need to
7 reject the DEQ's motion. Thank you.

8 CHAIR RUFFATTO: Thank you, Ms. Altemus.
9 Any more discussion?

10 (No response)

11 CHAIR RUFFATTO: Mr. Simpson? Oh, maybe
12 not. All right. Well, I have some comments.
13 Mine are going to sound lawyer-like because this
14 is a legal question, and the issue in my mind is
15 the importance of following -- of the rule of law.
16 That's what we're talking about is whether it's a
17 rule of law or whether an agency can establish a
18 goal and get there however they want. It's
19 important for administrative agencies to follow
20 the law, and to follow the will and intent of the
21 Legislature.

22 In my mind, as the Board has determined,
23 the Board in 2020 clearly violated the stringency
24 statute when it promulgated the rule. It is a
25 long established concept that if rulemaking fails

1 to comply with the law, it is invalid. That is a
2 rule of law, and if you don't follow the statute,
3 then the rule is invalid.

4 And what is important here is DEQ has
5 never acknowledged the general law, the black
6 letter law that a rule adopted in violation of a
7 statute is void from the beginning. DEQ has never
8 tried to address that question, or explain why it
9 doesn't apply.

10 And there is nothing in this statute
11 which would suggest that general administrative
12 law does not apply. And so what we're faced with
13 is DEQ has never told us why it doesn't apply, so
14 I have to look beyond what they have argued and
15 say, "Maybe what they're arguing is," and the only
16 way I think you think get there is to say that the
17 stringency statute overrides, supersedes
18 administrative law.

19 And I think that the law as adopted
20 clearly shows a different intent from the Montana,
21 by the Montana Legislature, and I'm going to read
22 some language from the enactment. This is from
23 House Bill 521, and I quote.

24 "The Legislature intends that in
25 addition to all requirements imposed by existing

1 law and rules, the Board or the Department include
2 as part of the initial publication and all
3 subsequent publications of a rule or written
4 finding if the rule in question contains any
5 standards or requirements that exceed the
6 standards or requirements imposed by comparable
7 Federal law."

8 The point, the important language there
9 is this is in addition to all requirements, and
10 all requirements imposed by existing law and
11 rules. So the point is that the statute clearly
12 pulls in all of the other law, including the
13 general law that says if you adopt a rule that
14 violates the statute, it is invalid from the
15 beginning.

16 And another provision, and I will quote
17 this one. "As part of the formal rulemaking
18 process, the public should be advised of the
19 agency's conclusions about whether analogous
20 Federal standards sufficiently protect the health,
21 safety, and welfare of Montana citizens." The
22 critical language there is "as part of the formal
23 rulemaking process."

24 Now, that, those concepts are
25 incorporated in the statute, as Ms. Marquis

1 explained. You have to look at the -- where it
2 says you have to adopt it pursuant to Paragraph
3 (2). That means that it has to happen in
4 conjunction with a formal rulemaking process.

5 So in my mind the process was flawed.
6 The agency failed. The Board back in 2020 and DEQ
7 now has failed to follow the will and intent of
8 the Legislature, and that's the principle we need
9 to uphold.

10 Whether or not the rule should be
11 adopted, if it goes through a full rulemaking
12 process, that's a question we don't have to decide
13 at this point at least. So I'm just talking about
14 what is important from the rule of law point of
15 view as opposed to an agency deciding it wants
16 "X," and going about it however it thinks best.

17 And there's nothing in this statute that
18 contradicts the general rule that if the initial
19 rulemaking was contrary to the statute, the rule
20 as promulgated is invalid. And if DEQ believes
21 that, they can go back and do the rulemaking --
22 which they elected not to do, and I don't
23 understand why they didn't, because it would seem
24 like it would have been, in their view at least,
25 the same process they undertook.

1 But that's kind of beside the point.

2 The point is they didn't follow the law, and our
3 ruling was an accurate statement of the law.

4 Therefore I'm going to vote to deny this, the
5 motion, and we can --

6 I think the Board has discretion to
7 either deny it based upon the procedural issues
8 argued by Mr. Warhank --- I think those are valid
9 points -- or on the substance that was argued by
10 Ms. Marquis, or both. I don't think we even -- we
11 wouldn't have to agree on what grounds, but in my
12 view, we need to deny the motion, and that's my
13 points.

14 BOARD MEMBER SIMPSON: Mr. Chairman, if
15 I could raise a question. I understand the
16 rationale that you've just outlined, and I guess I
17 will say I'm not steadfast in my position. I can
18 be persuaded.

19 Where I'm having a problem is
20 reconciling the concept of a rule being invalid if
21 it does not follow the procedure, with the
22 language in Paragraph (4) that says that, again,
23 has to do with challenging a rule which is already
24 in place, that a petition under this section does
25 not relieve the petitioner of the duty to comply

1 with the challenged rule. Is that in conflict
2 with the established law that you just described?

3 CHAIR RUFFATTO: I don't think so. In
4 my view -- and this hasn't been addressed by the
5 parties very much -- but that sentence was
6 included in the original act, and in the original
7 act, as now, there are two ways that a petition
8 could come before the Board to challenge the
9 stringency where you do have a valid rule.

10 Those two ways are under Paragraph (5),
11 that says if the Federal standard is established
12 after the rule is adopted, you can still challenge
13 it. Now in that case, there would have been a
14 valid rule adopted because the stringency statute
15 did not apply because there was no Federal
16 standard, so we have a valid rule.

17 So that sentence you're talking about
18 would apply in that circumstance, and in another
19 circumstance where it would apply when the statute
20 was adopted, it took, it made, it gave it
21 retroactive effect. In other words, there could
22 have been a rule adopted before 1995 that was
23 validly adopted, but now when we pass the
24 stringency statute, there's a potential for a
25 challenge.

1 Now, the rule is going to be valid, and
2 so that sentence makes sense in those two
3 circumstances. It does not make sense when the
4 agency clearly violated Section (1) and (2) of the
5 statute, which says that you cannot adopt a rule
6 more stringent unless you do this, to do these
7 things, which are all required in the rulemaking
8 process, not after the fact when the agency has
9 predetermined how it's going to go and why it
10 thinks it needs to go there.

11 So in my mind this is a classic case
12 where the agency has made up its mind what it
13 wants to get accomplished, and it's going to get
14 there even without going through the legal process
15 to get there.

16 BOARD MEMBER SIMPSON: Thank you very
17 much for the explanation. I understand the
18 distinction, and I am persuaded. I'll support the
19 motion.

20 CHAIR RUFFATTO: Any more discussion?

21 (No response)

22 CHAIR RUFFATTO: A motion has been made
23 and seconded to deny the motion. Is there any
24 further discussion?

25 (No response)

1 CHAIR RUFFATTO: Is there any further
2 discussion?

3 (No response)

4 CHAIR RUFFATTO: Does anyone have
5 objection to calling the question?

6 (No response)

7 CHAIR RUFFATTO: All right. All in
8 favor of the motion to deny DEQ's motion, say aye.

9 (Response)

10 CHAIR RUFFATTO: Opposed.

11 (Response)

12 CHAIR RUFFATTO: Sandy, would you do a
13 roll call vote, please.

14 MS. MOISEY-SCHERER: Chairman Ruffatto.

15 CHAIR RUFFATTO: In favor of the motion.

16 MS. MOISEY-SCHERER: Board Member
17 Altemus.

18 BOARD MEMBER ALTEMUS: In favor of the
19 motion. Thank you.

20 MS. MOISEY-SCHERER: Board Member
21 Lehnherr.

22 BOARD MEMBER LEHNHERR: Not in favor.

23 MS. MOISEY-SCHERER: Board Member
24 Reiten.

25 BOARD MEMBER REITEN: Not in favor.

1 MS. MOISEY-SCHERER: Board Member
2 Simpson.

3 BOARD MEMBER SIMPSON: In favor.

4 CHAIR RUFFATTO: Given that result, we
5 cannot grant the motion. I'm going to ask Ms.
6 Bowers and Ms. Marquis to tell us what your
7 thoughts are, in view of the fact that we do not
8 have enough votes to pass that motion. Where are
9 we at?

10 I'll start with you, Ms. Bowers. Where
11 do you think we're at? What should we do at this
12 point?

13 MS. BOWERS: Chair Ruffatto, members of
14 the Board, I guess I'm going to defer to your
15 attorney on that. You have a quorum, and you
16 voted with a majority of your quorum, but I'll let
17 Mr. Russell --

18 CHAIR RUFFATTO: Let me state that I'm
19 confident that we cannot accept that decision.
20 Okay. We need a majority of the Board, not a
21 majority of those present. So we have not denied
22 the motion at this point in my mind.

23 Now the question is: Are we -- I mean
24 is that the end of this motion? Or I guess my
25 question -- I should have been more clear. Do we

1 table it until we have more members and
2 potentially can reach a majority of the Board, or
3 does this end the process because we did not grant
4 the motion?

5 MS. BOWERS: Well, Chair Ruffatto,
6 members of the Board. You do have another
7 selenium lake case, selenium related matter
8 pending, so I guess you could -- I mean it's up to
9 your discretion, but I guess you could table this.

10 CHAIR RUFFATTO: Ms. Marquis, do you
11 have a view? Then I will ask the Board Counsel,
12 but I wanted your views before I did that.

13 MS. MARQUIS: Thank you. Chairman
14 Ruffatto, members of the Board. The rule, Montana
15 Rule of Civil Procedure 59, which is the rule that
16 DEQ cites as their authority for filing the
17 motion, and as you know, we've argued that the
18 rule doesn't apply here.

19 If you consider that rule, because
20 that's what DEQ cited as their authority, it says
21 that within -- if it's not addressed within -- if
22 the motion is not addressed within 60 days of its
23 filing date, the motion must be deemed denied. So
24 there is that time limitation provided by Montana
25 Rule of Civil Procedure 59.

1 CHAIR RUFFATTO: Thank you, Ms. Marquis.

2 MS. MOISEY-SCHERER: Chairman Ruffatto,
3 Mr. Warhank had his hand up.

4 CHAIR RUFFATTO: Thank you. Mr.
5 Warhank.

6 MR. WARHANK: My point was going to be
7 the same, that perhaps the appropriate method of
8 deciding should just be to allow the motion to
9 become deemed denied under Rule 59.

10 CHAIR RUFFATTO: Thank you, Mr. Warhank.
11 Mr. Russell, do you have something to add?

12 MR. RUSSELL: I think Ms. Bowers had her
13 hand up. I don't know if you want me to --

14 CHAIR RUFFATTO: Thank you. Ms. Bowers.

15 MS. BOWERS: Thank you. Chair Ruffatto,
16 members of the Board. With regard to Montana Rule
17 of Civil Procedure 59, the Board can extend that
18 time period. So I mean if the Board chose to
19 table this, they could extend the time period.

20 CHAIR RUFFATTO: Thank you. Mr.
21 Russell.

22 MR. RUSSELL: Well, if we don't have the
23 requisite Board members here to make a decision
24 one way or another on the pending motion, then
25 perhaps the best option would be to table it until

1 October, but there is the Rule 59 matter which
2 also is up to the Board's discretion.

3 So I'm afraid I don't have a solid
4 answer for you, but I think that the point that
5 there is another pending motion in the selenium
6 standard matter that will be taken up at the next
7 Board meeting presumably may make that the
8 appropriate time to rule on this pending motion
9 also.

10 CHAIR RUFFATTO: Thank you, Mr. Russell.
11 Well, I'm going to move that the Board exercise
12 its discretion and table this motion until the
13 next meeting, or table this matter until the next
14 meeting, because we cannot get a majority of the
15 Board one way or the other at this point.

16 BOARD MEMBER ALTEMUS: I'll second that.

17 CHAIR RUFFATTO: Discussion.

18 (No response)

19 CHAIR RUFFATTO: Any discussion?

20 (No response)

21 CHAIR RUFFATTO: Absent any discussion,
22 a motion has been made and seconded that we table
23 DEQ's motion to amend. And all in favor, say aye.

24 (Response)

25 CHAIR RUFFATTO: Opposed.

1 (No response)

2 CHAIR RUFFATTO: Motion passes. Let's
3 take a ten minute break. I said we'd get done in
4 two hours. I'm sorry. That's not going to
5 happen, but hopefully it won't take very long to
6 finish up.

7 MS. MOISEY-SCHERER: Chairman Ruffatto,
8 Vicki Marquis has her hand up.

9 CHAIR RUFFATTO: Thank you. Ms.
10 Marquis, please.

11 MS. MARQUIS: I'm sorry. I do have a
12 point. I was just checking. Ms. Bowers is
13 correct. The rule says that if the Court issues
14 an order within the 60 days extending the time in
15 which to rule on the motion, the time for ruling
16 may be extended; but if the motion is not ruled
17 upon within 120 days from its filing date, it will
18 be deemed denied.

19 And someone should check my math here,
20 but I believe 120 days from the filing date is
21 September 14th, and that obviously is earlier than
22 your October meeting. I just wanted to point that
23 out to the Board.

24 CHAIR RUFFATTO: I'm going to exercise
25 my discretion as Chairman. I think that the

1 parties have argued effectively in the briefs that
2 Rule 59 is a reasonable procedure to follow, but
3 not controlling. So I believe that the motion to
4 table should stand, and that we not follow the
5 Rule 59 to have it deemed denied at the end of 120
6 days. I take that position, but if anybody wants
7 to make a motion to the contrary, please do so.

8 (No response)

9 CHAIR RUFFATTO: All right. The DEQ's
10 motion is tabled until the October meeting. Any
11 more points on this matter?

12 (No response)

13 CHAIR RUFFATTO: Thank you. We'll take
14 a break until 11:18, and hopefully we can wrap
15 things up fairly quickly.

16 (The proceedings were concluded
17 at 11:08 a.m.)

18 * * * * *

C E R T I F I C A T E

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 - 54 - 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 22nd day of
August, 2022.

LAURIE CRUTCHER, RPR

Court Reporter - Notary Public

My commission expires

March 9, 2024.

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