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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

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BOARD MEETING )  
SEPTEMBER 29, 2017 )

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TRANSCRIPT OF PROCEEDINGS

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Heard at Room 111 of the Metcalf Building  
1520 East Sixth Avenue  
Helena, Montana  
September 29, 2017  
9:00 a.m.

BEFORE CHAIR CHRIS DEVENY,  
BOARD MEMBERS JOHN DEARMENT,  
DEXTER BUSBY, TIM WARNER, HILLARY HANSON;  
and CHRIS TWEETEN (By telephone)

PREPARED BY: LAURIE CRUTCHER, RPR  
COURT REPORTER, NOTARY PUBLIC

1           WHEREUPON, the following proceedings were  
2 had:

3                           \* \* \* \* \*

4           CHAIR DEVENY: I'd like to call this  
5 meeting of the Board of Environmental Review to  
6 order, and if we could have a roll call. Lindsay,  
7 do you do that?

8           MS. FORD: Yes. John Dearment.

9           MR. DEARMENT: Here.

10          MS. FORD: Tim Warner.

11          MR. WARNER: Here.

12          MS. FORD: Chris Deveny.

13          CHAIR DEVENY: Yes, I'm here.

14          MS. FORD: Hillary Hanson.

15          MS. HANSON: Here.

16          MS. FORD: Dexter Busby.

17          MR. BUSBY: Here.

18          MS. FORD: Chris Tweeten.

19          MR. TWEETEN: Here.

20          MS. FORD: John Fenton is absent.

21          CHAIR DEVENY: Thank you, Lindsay. Next  
22 on the order of business is the approval of  
23 minutes from the last meeting. You've all read  
24 those. However because Chris Tweeten was the only  
25 one who was present at that meeting, I'd like to

1 call on you, Chris, to indicate whether or not you  
2 feel we should approve these minutes.

3 MR. TWEETEN: I don't have any  
4 corrections to suggest.

5 CHAIR DEVENY: Is there a motion to  
6 approve the minutes of the last meeting?

7 MR. WARNER: So moved.

8 CHAIR DEVENY: It's been moved. Is  
9 there a second?

10 MR. DEARMENT: Second.

11 CHAIR DEVENY: All in favor, please say  
12 aye.

13 (Response)

14 CHAIR DEVENY: Those opposed.

15 (No response)

16 CHAIR DEVENY: The minutes have been  
17 read and approved. Sarah, I was going to ask you.  
18 You had some suggestions yesterday about minutes,  
19 and I want to ask you to talk to the Board about  
20 that.

21 MS. CLERGET: This is Sarah Clerget, and  
22 I'm an attorney for the Board. And I just wanted  
23 to offer that I think the Board might like to  
24 decide which is the official record, because we  
25 have a Court Reporter here taking verbatim

1 transcript, and then I understand that the past  
2 practice has been to also do minutes, and that  
3 would seem to me to be a duplication, and I wanted  
4 the Board to discuss whether they want the minutes  
5 for any particular reason, or whether we should  
6 just designate the verbatim transcript as the  
7 official record of the meeting.

8 CHAIR DEVENY: Any thoughts on that?

9 MR. TWEETEN: Madam Chair, this is  
10 Chris. While I understand the utility of a  
11 transcript of the meeting, and I think that the  
12 meetings should continue to be recorded for that  
13 purpose, it is a little burdensome on the Board  
14 members to have to review the entire transcript  
15 for a two, three, four, five hour, however long  
16 meeting for purposes of approving that as the  
17 official record at every meeting.

18 I think our minutes have -- in my  
19 experience anyway -- have been quite detailed and  
20 accurate, and they do provide a good summary of  
21 what transpired at the meeting. So I guess my  
22 position would be that I would like to maintain  
23 the policy of recording the meeting for purposes  
24 of posterity, and having the Court Reporter there  
25 for that purpose, but continuing to have

1 abbreviated minutes prepared in the same way that<sup>5</sup>  
2 they've been traditionally for the Board for the  
3 purpose of approval of the meetings.

4 CHAIR DEVENY: Any other comments by  
5 Board members?

6 (No response)

7 CHAIR DEVENY: Thank you, Chris. I  
8 think I concur. I think it is helpful to have a  
9 summary of the meetings rather than having to go  
10 through the entire record. So thank you for  
11 bringing that up. I think we will continue to  
12 have the minutes prepared as in the past.

13 So next we're going to have contested  
14 case updates, and again, I'd like to turn this  
15 over to Sarah Clerget, our Board attorney.

16 MS. CLERGET: Sure. And just to  
17 clarify, so the first items on the agenda are  
18 briefing items. So these are not items that  
19 require any action by the Board, it is just  
20 essentially a status update. And you have most of  
21 the information I'm going to give you on the  
22 agenda, but I'm happy to answer questions, and  
23 just kind of to go through.

24 As you can see, they're split into  
25 enforcement case and non-enforcement cases, so the

1 first two briefing items, 1(a) and (b), are  
2 essentially mirror images of each other with two  
3 different subdivisions. And the status of those  
4 is that essentially summary judgment was granted  
5 in part and denied in part, and there is a hearing  
6 request, which is currently scheduled for January.  
7 So I will be conducting a hearing on those cases  
8 in January.

9 And just so you guys understand, that  
10 was previously delegated to the Hearing Examiner  
11 to take all the way through the hearing stage and  
12 present you with the proposed decision.

13 So the (c) under briefing items, sub (1)  
14 is again enforcement action of the Open Cut Mining  
15 Act. There is essentially a stay in place while  
16 they're attempting to resolve the case themselves.

17 (d) is another enforcement action about  
18 reclamation under the terms of the permit, and a  
19 scheduling order was issued and is in effect,  
20 which means that sort of the case is proceeding  
21 along its designated schedule.

22 The way that works, just so you guys  
23 know, is the parties agree about a schedule, and  
24 then they bring it to me, and I approve it, or in  
25 this case the prior attorney approved it. So

1 that's a schedule that's essentially set by  
2 parties based on their needs.

3 (e) under that is another enforcement  
4 action for the Open Cut Mining, and we have cross  
5 motions for summary judgment pending in front of  
6 me, so I will be issuing an order on summary  
7 judgment, and depending on how that comes out, it  
8 may be in front of you guys, or it may continue on  
9 to a hearing. So we don't know about that one  
10 yet. It's in front of me for a decision right  
11 now.

12 CHAIR DEVENY: Excuse me, Sarah. Let's  
13 just stop here and ask Board members if they had  
14 any questions about the enforcement cases.

15 (No response)

16 CHAIR DEVENY: I had one on No. (d),  
17 when you say a scheduling order was issued, and --  
18 I'm sorry -- on No. (c), when you said they were  
19 close to resolution. Is there a time limit on  
20 that?

21 MS. CLERGET: I don't believe so. I can  
22 check right now. But essentially I check in to  
23 make sure that we don't need to issue a new  
24 scheduling order. So I don't know off the top of  
25 my head, but Aleisha will answer that question

1 particularly. But we won't just let it sit there  
2 for months and months.

3 CHAIR DEVENY: Thank you. So proceeding  
4 on to non-enforcement cases.

5 MS. CLERGET: All right. So Phillips 66  
6 is a modification of a discharge permit. And the  
7 proceedings are stayed because essentially this is  
8 just when we're monitoring that the parties comply  
9 with the terms of the stipulation. So there is  
10 not a lot for anybody to do on that one right now.

11 The LT Trucking case. Essentially we're  
12 waiting for discovery to run on this case. That's  
13 another one where the schedule is in place. We're  
14 letting the parties do their thing until it's  
15 ready for a decision point. So just letting it  
16 run its course.

17 Westmoreland Resources. There is a stay  
18 in place while they're trying to get a proposed  
19 schedule. It's in front of the Supreme Court  
20 right now, so we won't do anything on this one  
21 until the Supreme Court does something. When that  
22 happens, then we'll issue an order depending on  
23 what the outcome of that is.

24 Signal Peak. It's pending resolution of  
25 discovery disputes, the overall scheduling order,



1 so we're working through discovery essentially.  
2 There is going to be motions in that case as well.  
3 So it's sort of dependent on how well discovery  
4 goes at this point.

5 Payne Logging. An order granting  
6 summary judgment was issued. There are  
7 exceptions, and it will be before the Board  
8 probably at the next meeting. They have to finish  
9 their exceptions, and we have to put it in a  
10 package together for the Board. So that one is  
11 coming in front of you guys relatively soon.

12 Western Energy. It is an expert dispute  
13 right now, so it is still in the discovery stages.  
14 There aren't any pending motions right now. We're  
15 working through those discovery issues.

16 Montinore Minerals. Essentially we're  
17 in the beginning stages of getting a schedule in  
18 place that everybody can agree to.

19 Glacier Ranch. This just an FYI for you  
20 that it's been dismissed, so there is nothing  
21 anybody needs to do about that one. It's one of  
22 the ones that I was explaining when parties just  
23 agree that there is a dismissal, then it is just  
24 an FYI for you that that case has gone away.

25 Montana Northwest. Essentially there is

1 going to be a motion to dismiss. We don't have it  
2 yet, but it will go away shortly.

3 The Laurel Refinery Case. We're staying  
4 the schedule while they attempt to resolve the  
5 case without us. So they're discussing things,  
6 and I will check back in with them in February,  
7 and see how those discussions are going.

8 CHAIR DEVENY: Let me just break there.  
9 Do any Board members have any questions or  
10 comments regarding these non-enforcement cases?

11 (No response)

12 CHAIR DEVENY: Hearing none, go ahead  
13 and continue.

14 MS. CLERGET: I want to jump back to  
15 answer your question on the Goran issue from the  
16 first enforcement cases. There was an update at  
17 the end of August saying they were close to  
18 settlement, so hopefully soon, I guess is the  
19 answer to that question, but it is being  
20 monitored.

21 CHAIR DEVENY: Thank you.

22 MS. CLERGET: And going on to No. 3,  
23 I'll turn it over actually to DEQ to do this one  
24 because it's not in front of the Hearing Examiner  
25 right now.

1           MR. NORTH: Madam Chair, new members,  
2 John North. This one was initially a contested  
3 case appeal of a discharge permit, and then it was  
4 transferred to District Court, and the Board  
5 stayed the existing administrative action.

6           In the District Court here in Helena,  
7 the District Judge invalidated the discharge  
8 permit, and the matter is now before the District  
9 Court to determine attorneys fees. The Court did  
10 hold that attorneys fees were due to the  
11 plaintiffs attorney, and we're in the last stages  
12 of trying to determine the amount of the fees  
13 owing. I anticipate that will be taken care of  
14 probably before the next meeting.

15           And then Western Energy Company has  
16 already attempted once to appeal to the Supreme  
17 Court by filing a Supreme Court appeal notice.  
18 The Court rejected it and said it wouldn't hear  
19 the case until the District Court decided the  
20 attorneys fees issue finally. So once that's  
21 done, I think that there is probably a high  
22 potential that that case will then go to the  
23 Supreme Court, and so then the Board would just  
24 continue to monitor this until that appeal is  
25 done.

1                   CHAIR DEVENY: Thank you, John. Board  
2 members have any questions on that one?

3                   (No response)

4                   CHAIR DEVENY: Thank you, Sarah. I'll  
5 now turn it over to our Board liaison John North  
6 today to talk about some other briefing items  
7 including water quality standards.

8                   MR. NORTH: Thank you, Madam Chair.  
9 Eric Urban from the Water Quality Division will  
10 provide that to you. At some point he'll have a  
11 power point, and for those of you who would have a  
12 hard time seeing it, these chairs of course are  
13 open in the front row here.

14                   MR. URBAN: Madam Chair, members of the  
15 Board, I think it would be good idea to find a  
16 viewing seat.

17                   So Madam Chair, members of the Board,  
18 for the record, my name is Eric Urban. I'm the  
19 Bureau Chief with the Water Quality Division. I  
20 have the privilege of overseeing our Water Quality  
21 Standards Program, our Monitoring Assessment  
22 Program, and our Clean Water Act Data Information  
23 Storage.

24                   I guess before I get started I would  
25 like to take a minute and quickly introduce a few

1 of the key players in the Water Quality Division.  
2 Firstly I think I owe it to myself to introduce my  
3 boss, Mr. Tim Davis. And then managing our Water  
4 Quality Standards Section is Myla Kelly. And two  
5 of the staff that have worked diligently on the  
6 Senate Bill 325 rulemaking are also in the room  
7 today. We have Amy Steinmetz and Melissa Schaar.  
8 These are all faces and names that you'll be  
9 seeing in the future, as there is a fairly active  
10 workload coming for updating water quality  
11 standards regulations, and that will be falling on  
12 the shoulders of the Board.

13 So I guess today I'd like to take the  
14 opportunity to give a little background on water  
15 quality standards, where they came from, what they  
16 are, and some of the pieces that make them what  
17 they are.

18 I find it quite fascinating looking at  
19 the history of standards in Montana. We were  
20 quite ahead of the nation. It is my understanding  
21 that in 1907 we had our first water quality  
22 regulations regarding sewage treatment after a  
23 typhoid outbreak along the Highline.

24 Since that time we've made progressive  
25 advances in our Water Quality Act, and in the

1 1950s, we've got water quality standards that are  
2 very much set up in the fashion that we see today,  
3 both at our State level and at the Federal Clean  
4 Water Act level. They have very much the very  
5 same structure from the 1950s as they do today.

6 So several revisions lead us today to  
7 the Montana Water Quality Act, which is our  
8 governing act here in Montana. And then of course  
9 the 1972 Federal Clean Water Act, we have received  
10 delegated authority to implement many programs  
11 within the Clean Water Act, including the MPDES,  
12 Pollution Discharge Elimination Program, and our  
13 Water Quality Standards Program.

14 Not all states have done this. Some  
15 states, that primacy still lays on the shoulders  
16 of the federal government.

17 So often a question that we hear is who  
18 the standards apply to. The answer is everyone.  
19 Functionally how they apply to everyone is quite  
20 different. If you are a point source in Montana,  
21 that being largely thought of as a pipe or a  
22 defined contribution to a water body, you're  
23 required to have a discharge permit, one that  
24 describes all the nuances necessary to comply with  
25 the State law in order to minimize pollution.

1 Industry, publicly owned utilities, wastewater  
2 treatments for towns, etc., are good examples.

3 Also we have our nonpoint source  
4 community -- ag, forestry, septic systems, etc.  
5 That community is also asked to comply with our  
6 water quality standards. However, it is on a  
7 voluntary basis, and we here at DEQ have a fairly  
8 active program that has dedicated much of their  
9 time to working with the nonpoint source  
10 community, as they are a significant contributor  
11 to water concerns in Montana and every state in  
12 the nation.

13 So this is my attempt to boil down  
14 pretty much the majority of the Clean Water Act  
15 into a single slide, at least from the standards  
16 perspective. There is three main components that  
17 build a standard, and I guess one of the things  
18 I'd like to really encourage us to think about  
19 when we think of the word "water quality standard"  
20 is it is really the State's goal for a water body.  
21 And there could be multiple goals, but when we  
22 think standard, we should be thinking that is the  
23 goal for our streams, and rivers, and lakes.

24 To keep things confusing in Montana, we  
25 use the words "beneficial use" both with water

1 quality and water quantity. While they're  
2 related, they're quite separate in our regulations  
3 and how we use them, but largely that's what we  
4 want to do with our water criteria.

5           Again, to add a little confusion we  
6 often use the word "criteria" synonymously with  
7 the word "water quality standard."

8           And then anti-degradation is referred to  
9 as nondeg, anti-deg, and it can largely be thought  
10 of as protecting water for water's sake; not  
11 necessarily protecting water for a use, but just  
12 protecting water because it is clean water. I'll  
13 get into these a little more.

14           And then off to the side, I guess we've  
15 got our implementing regulations and requirements,  
16 and there is quite a few of those. I won't go  
17 into them in too much detail today, but just  
18 letting you know those are also regulations that  
19 the Board has the right to oversee.

20           So here's another example of the same  
21 thing. Common uses in Montana that are designated  
22 are aquatic life, recreation, drinking water, ag  
23 criteria. Most people think of it as  
24 concentration. There are concentrations or  
25 numbers, but we also have narrative criteria that



1 are kind of a no toxic and toxic amount sort of  
2 criteria. So the criteria must be protective of  
3 the use. We have a number that must protect  
4 aquatic life, and likewise a different number for  
5 drinking water, a different number for  
6 agriculture. Those in the end in a permitting  
7 action, most frequently the permit will be written  
8 to protect the most sensitive use that's been  
9 designated for that water body.

10 And I do apologize, Board Member  
11 Tweeten. I'm on Slide 5 at this point.

12 MR. TWEETEN: Thank you.

13 MR. URBAN: The bottom right circle, the  
14 anti-degradation circle, is really broken down  
15 into three different levels, Tier 1, Tier 2, Tier  
16 3. So Tier 1 is a scenario where either the  
17 regulations or the conditions of the water body  
18 have defined it as not being a high quality water.  
19 So perhaps it's high in a certain pollutant. In  
20 that case, a new source would be asked to hold the  
21 line.

22 A Tier 2 water is a high quality water,  
23 and that's where you can think of it as a more  
24 pristine water that has significant difference  
25 between the water quality standard and current

1 conditions. So it is quite clean compared to the  
2 standard. In those cases, we have requirements to  
3 look at them, and hold that high quality water  
4 unless there is a good justification why not to.

5 And then Tier 3 waters are outstanding  
6 resource waters, and those are designated not to  
7 outlaw discharge, but to hold the line and say if  
8 there is one, it will be held to current  
9 concentration of the stream. Those in Montana  
10 referred to are national parks and wildernesses at  
11 this point.

12 The implementing regulations. Here is a  
13 few examples of them. Our Discharge Elimination  
14 System program has extensive regulations governing  
15 how they draft permits. Our TMDL program, which  
16 stands for total maximum daily load, is a program  
17 that looks at not just a singular contribution to  
18 a water body, but rather all the contributions to  
19 the water body, and divvies that up back into  
20 permits and other restoration plans. And it does  
21 not create a new standard. It's based on the  
22 existing standard. And then mixing zones,  
23 variances, etc. There are many others.

24 So here is the same slide again with a  
25 little more real life example. Our use is aquatic

1 life. Arsenic is a pollutant, and we have a water  
2 quality concentration standard of 150 micrograms  
3 per liter. And then again, the nondeg piece for  
4 new sources.

5 So in a nutshell, that is a Water  
6 Quality Standard. I've taken the pretty high  
7 level approach at that. I guess at this point if  
8 there is any questions or clarifications that I  
9 could offer, I'd be happy to.

10 MR. DEARMENT: Madam Chair. And for  
11 Chris's benefit, this is John Dearment.

12 Mr. Urban, is the insignificance in C02  
13 defined formally somehow?

14 MR. URBAN: Madam Chair, Board member  
15 Dearment, yes. The different tiers and the  
16 approaches to what is significant, insignificant,  
17 are defined in Administrative Rule 17.30  
18 subchapter 700. It is broken out into different  
19 categories. So for example, a carcinogen has less  
20 tolerance as opposed to a pollutant that's  
21 categorized as toxic or harmful. So the short  
22 answer is yes.

23 MR. DEARMENT: Thank you.

24 CHAIR DEVENY: Kind of a follow up on  
25 that. Chris, this is Chris Deveny.

1           For the "authorization to degrade may  
2 allow more change," is that also in with those  
3 standards that you were just talking about? Can  
4 you expand on that a little bit more. Maybe give  
5 an example.

6           MR. URBAN: Madam Chair, members of the  
7 Board, the authorization to degrade -- Let me see  
8 if I can give a generic example here. So perhaps  
9 a new source is coming in, and the nondeg starting  
10 point requires them to meet insignificant levels  
11 for their discharge, and that would be quite  
12 challenging for some.

13           An authorization to degrade would be a  
14 request to go somewhere between current condition  
15 and the Water Quality Standard. It does not allow  
16 you to exceed the standard, so the stream will be  
17 protected, but it allows the applicant to provide  
18 a demonstration of the social and economic  
19 importance of the project. Also it requires them  
20 to provide a demonstration of the highest feasible  
21 technology that they would be using. It pushes  
22 the applicant towards the best that they can do,  
23 but it allows the State to consider the social and  
24 economic importance of the project, whether it is  
25 a town or an industry or --

1 CHAIR DEVENY: Okay. Thank you.

2 MR. URBAN: And that process is laid out  
3 quite thoroughly also in ARM 17.30 subchapter 7.

4 So I guess I'll end this portion of the  
5 talk on water quality standards kind of with  
6 potential -- and I stress the word "potential" --  
7 areas for near future rulemaking.

8 So surface water quality standards, we  
9 are required by statute and Federal regulations to  
10 review those every three years. We've just  
11 completed that, but we'll likely be picking that  
12 up again shortly.

13 Mixing zones. We've done some on the  
14 ground field testing this year. We've done some  
15 significant review of our regulations versus  
16 federal, versus some other State regs. I'm not  
17 sure there'll be changes coming yet, but I thought  
18 I'd put it up there just in case.

19 Groundwater standards. Montana has  
20 primacy over our groundwater, whereas we operate  
21 in kind of a shared role with our surface water  
22 with our Federal partners at EPA. We see their  
23 potential to revise some of our standards to  
24 clarify groundwater and surface water, and draw a  
25 bit of a cleaner line there.

1           Also how you calculate a groundwater  
2 standard will be different than how we calculate  
3 some of the surface water standards. So there is  
4 likely some revisions coming on that front.

5           Classifications, which are really just  
6 groupings of beneficial uses, as I mentioned  
7 earlier, our current system is very much like the  
8 1950s version. There is likely some benefit to  
9 updating that.

10           And then our MPDES program. In order to  
11 maintain primacy with our Federal counterparts, we  
12 have to keep in line with their changes, and it  
13 has been some time since we've revised our  
14 permitting regs, so likely you'll be seeing a rule  
15 package in the near future on that.

16           And I guess that's going to be my segue  
17 into the last item, which will be Senate Bill 325  
18 codified at 75-5-222, and that is I guess the next  
19 subject on the agenda. So unless there's other  
20 questions, I'll roll to that.

21           (No response)

22           CHAIR DEVENY: I don't think anybody has  
23 any.

24           MR. URBAN: So Senate Bill 325 was a  
25 bill sponsored by good Senator Keane, who I

1 believe is in the audience today. The bill is  
2 largely made of two parts. There is sub (1),  
3 which generally can be referred to as a natural  
4 conditions provision. And I'll break these down  
5 in future slides

6 Again, I apologize, Mr. Tweeten. I'm on  
7 Slide 8 now.

8 The second part of the statute is  
9 focused on variances, and directs the Board to  
10 adopt rules in order for the Department to issue  
11 variances. So this slide is really to point out  
12 that there is two very different pieces to the  
13 statute. One is natural and does not require the  
14 Board to adopt rules. The other is specific to  
15 variances, and rules will be proposed to the Board  
16 shortly for initiation.

17 So the non-anthropogenic question or  
18 natural question has been one that Montana has  
19 faced for quite some time. I'd like to point out  
20 that 75-5-306 is part of the Water Quality Act. I  
21 paraphrase here, but it basically says it's not  
22 necessary to treat waste purer than natural.

23 That's been part of the act since around  
24 1967, and for lack of a better term, it passes a  
25 common sense test. If you have a naturally high

1 concentration in a water body, you can spend a lot  
2 of energy, time, money, to try and treat effluent  
3 much, much cleaner than that, but in the end  
4 result, the natural condition will often dominate.  
5 So it kind of tends to spin your wheels, and spend  
6 energy and money for little or any gain, so that's  
7 kind of the concept behind 75-5-306.

8 In 2015, the Legislature adopted the  
9 first part there, and it further directs the  
10 Department not to write discharge permits to a  
11 standard that is more stringent than the natural  
12 condition. And then it goes on to say that if  
13 that is the case, then the non-anthropogenic  
14 condition is the standard.

15 That becomes a bit challenging in  
16 practice. The variability in one stream is  
17 different than the variability in another. There  
18 is always going to be discussion on what is  
19 natural. And then ultimately you get a large data  
20 set. You have to pick a number out of it. So it  
21 becomes quite challenging, and it is one that in  
22 order to implement consistently, we feel that it  
23 would benefit greatly from rules to be adopted.

24 Now, at this point, we focused on the  
25 pollutant arsenic. Arsenic is naturally occurring



1 in Montana, coming from Yellowstone Park. It  
2 occurs in very high concentrations. And we've  
3 done significant work on both the data collection  
4 and analysis side, demonstrating that it is  
5 natural, and how to choose that number out of it.  
6 Unfortunately at this point we're still not to the  
7 point where we feel we have a rule package that  
8 could be adopted by both Montana and approved by  
9 our Federal counterpart, so we're working  
10 diligently with them on that. We'll provide  
11 updates in the future.

12 So moving on to Part 2, Variances.  
13 Again, it directs the Board to adopt rules in  
14 order for the Department to issue variances from  
15 standards. It has two caveats in the statute: It  
16 can't be reasonably expected to be remediated  
17 within the term of a permit, which is typically  
18 five years; and then also the discharge cannot  
19 materially contribute to the condition. So in  
20 other words, they can't be one of the major  
21 reasons the water body is having issues.

22 So in 2016 the Department formed a work  
23 group. That work group has been actively meeting,  
24 first on a monthly basis, and a little recently,  
25 but we've had great participation from the

1 stakeholders. It is a wide audience of interests,  
2 and has been very productive for the Department.

3 Before I go on, a little context for  
4 this legislation. Why would you want a variance?  
5 And the background was: Picture a small community  
6 or a municipality, and picture a stream that's got  
7 an upstream mine, abandoned mine, and copper would  
8 be coming out of both. One, the abandoned mine  
9 would have significantly higher copper than the  
10 municipality.

11 However, in some scenarios, the most  
12 obvious and quickest way that a permit or a  
13 regulation would impact either of them would be  
14 through the municipality, through a permitting  
15 program. That in some scenarios would result in  
16 almost no improvement to the stream, since their  
17 contribution was significantly less than the  
18 historic mining.

19 In order to honor the goal of cleaning  
20 up the abandoned mine project, we really couldn't  
21 change the Water Quality Standard to provide  
22 relief for the municipality, so the variance is a  
23 way to do that, to look at the real problem, the  
24 major contributor first, to provide time for the  
25 community; and then if and when the major source

1 of copper were cleaned up, then the community  
2 could consider looking at themselves also, at a  
3 time where their contribution would be one of the  
4 significant contributions.

5 So that's kind of the background. It  
6 was largely thought of from a municipality or a  
7 community perspective.

8 It is appropriate to apply a variance  
9 when your goal for the water body or your Water  
10 Quality Standard is accurate. If you question the  
11 Water Quality Standard for the water body, we  
12 should be questioning whether or not to proceed  
13 with the variance.

14 Under the Clean Water Act, there are  
15 really six justifications for when a variance can  
16 be used. In this scenario, two of those jump out  
17 as ones that we would likely consider. One is  
18 that human caused conditions prevent attainment;  
19 and the other would be a wide spread social and  
20 economic impact. Although the others are not  
21 ruled out, those are the two that we think would  
22 play most likely into this statute.

23 And the variance simply provides a  
24 limited time for a discharger to exceed Water  
25 Quality Standards. Ultimately it doesn't remove

1 the standard, though, so it is still in play, just  
2 sometime down the road.

3 And I don't necessarily need to get into  
4 the details of this. This is largely just to show  
5 you that this is what the draft rule looks like.  
6 It is a series of steps and questions. And when  
7 we return to request initiation of rulemaking,  
8 we'll be going through this in detail with you,  
9 and making sure we address your questions at that  
10 point. But it is simply a "Will the receiving  
11 water be cleaned up in the next five years?," yes,  
12 no, type of a scenario. So it is pretty straight  
13 forward.

14 And then I guess finally I would end  
15 with there is two pieces to 75-5-222. One does  
16 not require rulemaking -- that's our  
17 non-anthropogenic or natural piece -- and we're  
18 kind of in a review phase right now with our  
19 Federal counterparts to determine the future of  
20 that.

21 And sub (2), which is the variance  
22 process, we have our draft rule; we have guidance  
23 documents to go with it. Further our work group  
24 has had -- we've asked for final comments from  
25 them, and we've received significant comments on

1 sub (1), largely supportive comments for sub (2).  
2 So at this point, we feel confident that we have  
3 the work group support to go forward with  
4 initiation of rulemaking for sub (2), and you will  
5 be seeing that in the very near future.

6 So with that, I guess I'll turn it back  
7 to the Board if there is further questions.

8 CHAIR DEVENY: Thank you, Eric. That  
9 was very well done, and very interesting. Do  
10 Board members have any questions of Eric at this  
11 time?

12 (No response)

13 CHAIR DEVENY: Chris, are you still on  
14 line?

15 MR. TWEETEN: Yes, Madam Chair, I am.

16 CHAIR DEVENY: Any questions?

17 MR. TWEETEN: I don't have any.

18 CHAIR DEVENY: Well, I'm sure we will in  
19 the future as these rules come before us, but  
20 thank you very much. And back to you, John, for  
21 the next item.

22 MR. NORTH: Yes. This one pertains to  
23 air quality fees, so Liz Ulrich will make the  
24 presentation from our Air Energy and Mining  
25 Division.

1 MS. ULRICH: Good morning, Madam Chair,  
2 members of the Board. My name is Liz Ulrich, and  
3 I'm the Analysis and Planning Services Section  
4 Supervisor for the Air Quality Bureau here at DEQ.  
5 The air quality rules, specifically ARM 17.8.510,  
6 require the Department to report to the Board  
7 annually on air quality fees that are anticipated  
8 for the next calendar year, and that's why I'm  
9 here today.

10 Not quite 75 percent of the Air Quality  
11 Bureau is funded by fees collected from either  
12 permitted or registered sources, either through an  
13 application or registration fee and/or from  
14 emissions from these sources. The Legislature has  
15 set the appropriation for the Department, and then  
16 you as the Board establish the fee schedule  
17 sufficient to collect enough revenue to support  
18 that appropriation.

19 There are a lot of changes happening in  
20 the air quality world, from large sources of  
21 emissions in Montana shutting down, to changes in  
22 Federal regulations; and the Air Quality Bureau  
23 hasn't raised fees since 2009, but one may occur  
24 in 2018, although we don't know yet exactly how  
25 much or which fees will be impacted.

1           As we evaluate our program, we will  
2 involve our stakeholders, especially the Clean Air  
3 Act Advisory Committee, CAAAC. If there is a fee  
4 change, it will come before the Board around May  
5 or June of 2018, giving us enough time to  
6 incorporate those changes into our November 2018  
7 billing circle. Are there any questions?

8           (No response)

9           CHAIR DEVENY: It doesn't look like it.  
10 Thank you, Liz. The next item on our agenda are  
11 the action items and initiation of rulemaking.  
12 Again, I'll turn it over to John North, our  
13 liaison for today.

14           MR. NORTH: Madam Chair, this being an  
15 air quality rulemaking, it falls to our Air Energy  
16 and Mining Division, and Julie Ackerlund is here  
17 from that division to make this presentation.

18           MS. ACKERLUND: Madam Chair, members of  
19 the Board, my name is Julie Ackerlund, and I'm  
20 representing the Department of the Air Quality  
21 Bureau. Today, the Department is asking that the  
22 Board initiate rulemaking to adopt multiple  
23 amendments to the Air Quality Rules in ARM 17.8.

24           Annually the Department comes before you  
25 requesting that we go through an initiation and

1 incorporation by reference, so that the Federal  
2 air quality statutes and regulations are updated.  
3 The incorporation by reference update is  
4 accomplished by amending the dates of the editions  
5 of the Code of Federal Regulations and the US  
6 Code. We also update the website address at that  
7 time.

8 So in the rules in your packet, what  
9 you'll see is that we're proposing to amend these  
10 rules to the July 1st, 2016 edition of the Code of  
11 Federal Regulations, and to the 2015 version of  
12 the US Code. This IBR -- Incorporation By  
13 Reference -- amendment ensures that the Montana  
14 rules are current; it allows the Department to  
15 maintain authority and Federal delegation of the  
16 Montana Air Quality Program, and to implement  
17 Federal emission standards.

18 One of the other items you'll also find  
19 in your packet in Enclosure No. 2 is a summary  
20 table that identifies all the changes that  
21 occurred in the Code of Federal Regulations, and  
22 I'd like to just point out a couple highlights  
23 from those tables that are in your packet.

24 In particular, these are ones that  
25 affect what we have included as exemptions in our



1 rules. The brick and structural clay products  
2 manufacturing industry and the clay ceramics  
3 manufacturing industry have been exempted in our  
4 rules, and currently, the EPA has adopted new  
5 versions of those rules. They were exempted  
6 because they had been vacated.

7 So in 40 CFR Part 63 Subparts JJJJJ --  
8 that's five "J's" -- and KKKKK -- five "K's" --  
9 we'd like to remove those exemptions from our  
10 rules that are in Rule 102.

11 As a follow up to that, we're also  
12 proposing in these rule amendments to include new  
13 exemptions to those rules. The crude oil and  
14 natural gas facilities have a regulation in 40 CFR  
15 Part 60 subpart OOOOa, and there's also  
16 regulations for the electric generating utilities.  
17 Those are in 40 CFR Part 60 Subpart TTTT. That's  
18 part of the Clean Power Plan.

19 Both of these regulations are under  
20 litigation right now, and federally these rules  
21 are being reconsidered by EPA. So the fate of  
22 these regulations are quite uncertain at this  
23 time. We would not like to adopt those into the  
24 air quality rules, but list them as exemptions in  
25 Rule 102.

1 Additional changes that the Department  
2 would like to request is that in numerous  
3 subchapters of our rules, we list incorporation by  
4 reference where referenced material from that  
5 individual subpart can be located. We've done  
6 this 13 times throughout the subchapters of the  
7 Air Quality Rules, and we would like to propose to  
8 consolidate all of those referenced locations  
9 because they are the same materials, the same  
10 locations that are being referenced, into just one  
11 subchapter into the general provisions.

12 And so we find that this would be  
13 beneficial to our rules. It would enhance future  
14 abilities to make updates to those locations, and  
15 it would also reduce the size of the Air Quality  
16 Rules. At this time, those locations that we are  
17 referencing need updates, so you'll see that as  
18 well in the packet.

19 Another item that we would like to do  
20 with this rulemaking in Rule No. 202, we have  
21 referenced the Montana Ambient Air Monitoring  
22 Program Quality Assurance Project Plan. A long  
23 name there. We generally refer to it as the QAPP.  
24 Right now we're referring to a 2013 version of the  
25 QAPP, and we would like to adopt the 2017 version

1 of the QAPP into our rules.

2 The QAPP describes the quality system  
3 implemented to ensure that the ambient air  
4 monitoring data we collect supports the monitoring  
5 objectives that we have. The document right now  
6 has at the beginning of it an extensive table that  
7 will show what those changes are between the 2013  
8 version of the QAPP and the proposed 2017 version  
9 of the QAPP.

10 This QAPP really documents how the  
11 monitoring program intends to collect  
12 representative monitoring data, and to control  
13 measurement uncertainty to the appropriate level,  
14 to ensure that our data is of the highest quality  
15 and of acceptable value.

16 Another item that we have in our  
17 rulemaking package was to make some changes into  
18 the Subchapter 9 rules. There had been two items  
19 identified for corrections in those rules, and at  
20 this time I'd like to withdraw the correction to  
21 Rule 901. In that particular case, we had  
22 identified a change to the definition of a  
23 precursor, and just this week we were advised not  
24 to make that change, that our rules as they stand  
25 actually meet the federal requirements for

1 defining what a precursor is.

2 So we would like to have you folks  
3 approve to adopt our notice of proposed amendments  
4 without including changes to Rule 901. However,  
5 we would still like to keep the rule change to  
6 904. That had an incorrect cross-reference. It  
7 was an internal reference within our rules. So we  
8 still need to have that rulemaking change taken  
9 care of.

10 So at this time I just want to request  
11 that the Board approve the Department's notice of  
12 proposed amendments with the changes to Rule 901  
13 and its following discussion. And with that,  
14 Madam Chair, the Department would like to thank  
15 you, and if there is any questions that the Board  
16 has, I would be happy to take those.

17 MR. BUSBY: Real easy question. What's  
18 the practical effect of all these changes? There  
19 is a lot of them in this listing. What is the  
20 practical effect on the permitted community?

21 MS. ULRICH: For the permitted  
22 community, they need to have new regulations in  
23 our rules for our IBR, so that they will then have  
24 to follow the current requirements out there.  
25 There is a potential for losing our Federal

1 delegation if we don't maintain current rules.

2 For purposes of the QAPP, the same thing  
3 holds. Those rules really are meant more for our  
4 program, but many industries that are required to  
5 have an ambient monitoring program would want to  
6 follow the most current rules which our QAPP would  
7 have.

8 The consolidation of all of our  
9 locations where we are incorporating the  
10 referenced cites for where they could find  
11 information, it would be simpler for them to find  
12 it in our general provisions, and have the most  
13 current information there with updated addresses  
14 and locations for them.

15 MR. BUSBY: I understand that portion of  
16 your answer, but let's focus on the QAPP for a  
17 minute. To the regulated community, does these  
18 changes make any substantial changes, or are they  
19 more reference changes? Or in other words, what's  
20 it going to cost them?

21 MS. ULRICH: Madam Chair, member Busby,  
22 at this point in time, the changes are not going  
23 to make direct effects to those industries in the  
24 state, other than what we typically would have  
25 seen by adopting the incorporation by reference

1 with those updates. So there won't be significant  
2 changes as the industry would be operating at this  
3 point in time.

4 MR. BUSBY: At what point in time will  
5 they be, or will there be a point in time? I  
6 understand incorporation by reference. I'm not  
7 arguing about that. What I'm trying to find out  
8 is what is the actual effect of the rules changes?

9 MS. ULRICH: For the oil and gas  
10 industry?

11 MR. BUSBY: Any industry.

12 MS. ULRICH: The exceptions there would  
13 affect them by us not being required to enforce  
14 those Federal regulations. Madam Chair, can I  
15 defer to my QAPP expert here?

16 CHAIR DEVENY: Yes.

17 MR. KUENZLI: Madam Chair, members of  
18 the Board, good morning. For the record, my name  
19 is Doug Kuenzli.

20 In terms of your questions regarding the  
21 effects of the QAPP changes, there really would  
22 not be any to industry. Essentially they broke  
23 apart one of the rules and separated those  
24 requirements that were combined for state  
25 monitoring programs, designed to ensure compliance

1 or demonstrate compliance with various National  
2 Ambient Air Quality Standards. They were all  
3 combined into one rule. They separated those out  
4 so industry is in a separate rule.

5 The conditions are relatively the same.  
6 There are some stipulations in there in terms of  
7 essentially how they operate their auditing  
8 program, and how it is defined. So in the rule,  
9 they establish what they call a primary quality  
10 assurance organization, so the State of Montana is  
11 in essence a primary assurance organization, so we  
12 oversee our monitoring program.

13 Industry in some states would have to  
14 take on that role, and so that would add some  
15 burden to them. In the State of Montana, we do  
16 not do that. We have not taken on that  
17 responsibility for a long time, so essentially  
18 there should not be any changes.

19 There are some minor changes to how they  
20 -- certain audit protocols, but they still have to  
21 perform those audits, and it just adds a little  
22 bit more requirements to it, so it's really -- in  
23 terms of expense and effort, it should not be any  
24 to industry.

25 MR. BUSBY: Okay. Thank you.

1 CHAIR DEVENY: Do Board members have any  
2 other questions of Ms. Ackerlund?

3 (No response)

4 CHAIR DEVENY: And John, I just have a  
5 procedural question. Do we have public comment on  
6 that before we call for a motion?

7 MR. NORTH: Yes. Because this is an  
8 action item, it requires public comment.

9 CHAIR DEVENY: This is an action item  
10 requiring public comment. I'm wondering if there  
11 are any members of the audience who would like to  
12 speak to this matter? If so, if you would  
13 approach the microphone and introduce yourself.

14 MR. KEANE: Madam Chair, my name is Jim  
15 Keane. I'm a House member from House District 73  
16 in Butte. Not on this item, but I would like to  
17 comment on the one previous to that, if you would  
18 allow that, so I can be on my way.

19 CHAIR DEVENY: Regarding which?

20 MR. KEANE: Regarding Senate Bill 325.

21 CHAIR DEVENY: Yes, I think that's  
22 appropriate.

23 MR. KEANE: Thank you, Madam Chair.  
24 Senate Bill 325, at the time I was a Senator. And  
25 it is kind of frustrating to be here over two



1 years later, and still not have the rules for  
2 Senate Bill 325. And the reason I say that, in  
3 developing Senate Bill 325, I worked very closely  
4 with the Department in all aspects of that bill.  
5 And the Department and I, when we passed 325, I  
6 had their full support of Senate Bill 325 because  
7 we worked together with that.

8 Here we are over two years later, and we  
9 still don't have the rules for Senate Bill 325.  
10 So I would encourage the Board to work with the  
11 Department just as I have, and get 325 and the  
12 rules for water on the way.

13 And the reason for this is while -- this  
14 discussion in my community and in several  
15 communities around the state of Montana, they  
16 can't comply. So what they have to do is get a  
17 variance, and we've been getting variances in  
18 several communities, especially in my community  
19 because it is heavily impacted by metals.

20 And to me, it just seemed unreasonable  
21 that we just have these rules that we continue to  
22 get variances for ongoing, so we work with the  
23 Department to come up with a way to pass under the  
24 law a bill that would help communities and  
25 industry to comply with the rules. So I would ask

1 you to work on that, Madam Chair.

2 CHAIR DEVENY: Thank you. So duly  
3 noted. Are there any other comments from members  
4 of the public?

5 (No response)

6 CHAIR DEVENY: If not, would one of the  
7 Board members care to suggest a motion that would  
8 authorize DEQ to initiate rulemaking as described  
9 in the draft notice of proposed amendment of  
10 rules.

11 MR. DEARMENT: Madam Chair, I will move  
12 that we move forward with rulemaking as requested  
13 by DEQ.

14 CHAIR DEVENY: I believe we need to take  
15 out the one reference that Julie Ackerlund  
16 mentioned. Would you care to --

17 MR. DEARMENT: I move that we deal with  
18 that as well. Thank you.

19 CHAIR DEVENY: What's the protocol? I  
20 know we need a second, but in terms of reading  
21 what the motion is, do you think we have that  
22 clarified enough?

23 MR. NORTH: Yes, for an initiation, I  
24 believe so, yes.

25 CHAIR DEVENY: Is there a second on the

1 motion?

2 MR. BUSBY: Second.

3 CHAIR DEVENY: The motion has been moved  
4 and seconded. All those in favor, signify by  
5 saying aye.

6 (Response)

7 CHAIR DEVENY: Any opposed?

8 (No response)

9 CHAIR DEVENY: Motion passes. Thank  
10 you.

11 We're next going to move to new  
12 contested cases, and I'll turn it over to Sarah  
13 Clerget, our Board attorney.

14 MS. CLERGET: I wasn't sure whether the  
15 things I have made it into your packet, so I have  
16 additional copies. And Chris, I emailed you the  
17 copies of things that I'm about to hand out. So  
18 this is my paralegal Aleisha, and she's going to  
19 help us out. She's going to hand out something to  
20 you that has a DEQ letterhead on it, and this is  
21 for the case that you need to assign. So if you  
22 have it in your packet, I apologize for  
23 duplicating, but I have additional copies.

24 CHAIR DEVENY: Is this the Dickinson  
25 subdivision?

1 MS. CLERGET: Yes.

2 CHAIR DEVENY: I have a copy. Do other  
3 members have a copy?

4 MR. DEARMENT: I don't have one with me.

5 MS. CLERGET: We're going to get copies  
6 of other things we're going to go over in just a  
7 minute in case you don't have them.

8 So this is a new contested case that you  
9 guys need to assign to a Hearings Examiner, and as  
10 we went over in orientation, you have the four  
11 options for how you want to assign it to a  
12 Hearings Examiner. You can choose to assign it,  
13 as you've seen kind of the previous stuff that was  
14 in the briefing items; you can choose to assign it  
15 sort of entirely to the Hearing Examiner, and have  
16 the Hearing Examiner just give you a proposed  
17 decision at the end and hear oral argument; you  
18 can assign it for the purposes of procedural  
19 motions only, and keep all substantive motions for  
20 yourself; you can assign it where the Board hears  
21 any summary judgment motions that might be in the  
22 case; or you can assign it to the Board for the  
23 Hearing Examiner to deal with everything except  
24 the hearing.

25 So those are sort of your four options.

1 And the material on what the case is about is in  
2 front of you. Essentially it is a dispute about  
3 water in the subdivision. So with that, I'll  
4 leave it up to you to discuss or ask any questions  
5 that you have about what you want to do with this  
6 case.

7 CHAIR DEVENY: Thank you, Sarah. This  
8 was all in the packet that was sent to Board  
9 members electronically, so hopefully you've all  
10 had a chance to read that. And let's have a  
11 discussion about what the Board might want to do  
12 with this.

13 My initial thinking is that we assign it  
14 to Sarah as the Hearing Officer to take it through  
15 the process. Any other thoughts on this by any  
16 Board members?

17 MR. DEARMENT: Madam Chair, I was  
18 thinking the same.

19 MS. HANSON: Yes. I also concur.

20 CHAIR DEVENY: So would somebody care to  
21 initiate a motion to assign the case in the matter  
22 of Dennis and Sandra Dickinson's appeal of DEQ  
23 subdivision section contract reviewer's decision  
24 to deny the Dickinson subdivision application, DEQ  
25 No. 17-1398 in Jefferson County, Montana, to

1 assign this case to our Hearings Officer Sarah  
2 Clerget.

3 MS. HANSON: I so move.

4 CHAIR DEVENY: It's been moved. Is  
5 there a second?

6 MR. WARNER: Second.

7 CHAIR DEVENY: It's been moved and  
8 seconded. All in favor, please say aye.

9 (Response)

10 CHAIR DEVENY: Opposed.

11 (No response)

12 MS. CLERGET: So the next matter on the  
13 agenda is the final action on contested cases.  
14 The first item under here is the Columbia Falls  
15 case. This case, my understanding is that not all  
16 of the parties are available. If my understanding  
17 is incorrect, please correct me, if there is  
18 somebody from Columbia Falls in the audience.

19 Without somebody from both parties  
20 present, I do not believe that the Board can take  
21 any action on this right now. Just as an FYI,  
22 this is a case that was heard by the prior  
23 Hearings Examiner to me, and it was a five day  
24 hearing. And the question now is what to do if  
25 the Hearing Examiner is declared unavailable. And

1 that discussion I believe needs to happen with the  
2 parties present, so I would advise the Board at  
3 this point to table it until the next meeting when  
4 we can make sure that both parties are present for  
5 that discussion.

6 CHAIR DEVENY: And Sarah, what happens  
7 if the parties continue to not show up?

8 MS. CLERGET: At that point, BER could  
9 probably decide that the Hearings Examiner was  
10 unavailable, but you would have to order a new  
11 hearing, because the parties need to all agree  
12 that matters of credibility are not at issue. And  
13 if the parties can't agree to that, then BER is  
14 going to have to order that the hearing be redone  
15 in front of a new Hearings Examiner. So I would  
16 suggest that that conversation needs to happen  
17 with the parties, and that BER should not take  
18 action until the other parties are present to have  
19 that discussion.

20 CHAIR DEVENY: Okay. It sounds like  
21 there is nothing we can do on this today then.  
22 That's what you're advising.

23 MS. CLERGET: That would be my advice.

24 MR. DEARMENT: Madam Chair, was Columbia  
25 Falls available? Did you have a commitment from

1       them to be here today? Have you heard from them?  
2       Or it's not Columbia Falls.

3               MS. CLERGET: I had information from DEQ  
4       that they would not be here, so I'm not sure how  
5       that conversation happened. But I believe my  
6       information from DEQ is that -- I believe they  
7       were informed, but I did not do that myself so I  
8       can't tell you. I will make sure that I inform  
9       them before the next meeting.

10              CHAIR DEVENY: If between then and now  
11       you could research real clearly what our options  
12       are.

13              MS. CLERGET: Yes.

14              CHAIR DEVENY: That would be great. I  
15       am concerned that this has drug out for a really  
16       long time, and the previous Board dealt with it,  
17       and I hope that we can come to a resolution of  
18       this at the next meeting.

19              MR. TWEETEN: Madam Chair, this is  
20       Chris. Are we on the Columbia Falls Aluminum  
21       matter right now?

22              CHAIR DEVENY: Yes, we are.

23              MR. TWEETEN: Can I ask -- Well, first  
24       of all, just for background, I don't know that  
25       anybody else at the table today was on the Board



1 when this matter got into the situation it was in,  
2 and this is my recollection, and I certainly would  
3 stand to be corrected if someone goes to the Board  
4 minutes and finds that something different  
5 happened.

6 But my recollection is that Mr. Reed,  
7 who was actually two Hearings Examiners removed  
8 from Sarah, conducted the hearing in this matter.

9 CHAIR DEVENY: Chris, are you still  
10 there?

11 MR. TWEETEN: (Inaudible)

12 CHAIR DEVENY: Chris, I think we've lost  
13 you.

14 MR. TWEETEN: (Inaudible)

15 CHAIR DEVENY: Chris, we can't hear you.  
16 Just a second. John, is there technical  
17 difficulties?

18 MR. TWEETEN: (Inaudible)

19 CHAIR DEVENY: Excuse me. Chris, we  
20 can't hear you. It seems like there is a  
21 technical issue probably on your end.

22 MR. TWEETEN: Is that better?

23 CHAIR DEVENY: Yes. Would you start  
24 over?

25 MR. TWEETEN: Okay. My recollection of

1 this -- and again, I would certainly stand to be  
2 corrected if someone refers to the minutes or  
3 something else, and they show something different,  
4 I certainly stand to be corrected.

5 But my recollection of this is that Mr.  
6 Reed, who was then the Hearings Examiner at the  
7 time of this hearing, and he's the one who  
8 conducted the hearing, heard the witnesses and so  
9 forth, that before he was able to produce his  
10 proposed findings and conclusions, he left his  
11 position with Agency Legal Services, and therefore  
12 ceased to be our Board attorney, and actually left  
13 the country. He was in Kosovo, if I remember  
14 right.

15 And he made a commitment before he left  
16 that he would produce the proposed findings and  
17 conclusions in this matter from whatever remote  
18 location he was at, and submit them to the Board,  
19 so that the new Hearings Examiner, who was then  
20 Mr. Haladay, would not have to go back and  
21 recreate the record, or hold another hearing.

22 And the Board as I recall passed a  
23 motion that indicated that the Board would accept  
24 Mr. Reed's proposed findings and conclusions,  
25 which I believe is what is in front of us today,

1 and would allow Mr. Haladay to control the matter  
2 for purposes of scheduling, and other hearing  
3 motions, and so forth on the matter, in the  
4 interim before the proposed findings and  
5 conclusions were submitted by Mr. Reed.

6 So the situation, as I recall, was Mr.  
7 Reed was going to produce the findings and  
8 conclusions, and that for all other purposes Mr.  
9 Haladay was going to be designated as the Hearings  
10 Examiner for the matter. And that was our effort  
11 then to comply with the absent Hearings Examiner  
12 problem that this case was going to present.

13 And now we have Mr. Reed's proposed  
14 findings and conclusions, which are what's in the  
15 packet for today.

16 MS. CLERGET: Chris, I'm going to  
17 interrupt you for one second. We do not have the  
18 proposed findings and conclusions. That's on a  
19 separate -- that's on the next case.

20 MR. TWEETEN: So there are two CFAC  
21 cases?

22 MS. CLERGET: No. You have the Heart K  
23 Land proposed findings and conclusions in front of  
24 you. You do not have the Columbia Falls.

25 CHAIR DEVENY: Yes, we do.

1           MR. TWEETEN: I'm looking at something  
2 that's captioned "In the matter of Columbia Falls  
3 Aluminum Company," and it says, "DEQ's Proposed  
4 Findings of Fact, Conclusions of Law, Final  
5 Decision, and Order."

6           CHAIR DEVENY: Yes. That was in the  
7 packet.

8           MR. TWEETEN: That's the proposed  
9 findings and conclusions, then, right? And there  
10 is a signature line for Mr. Reed there. I'm  
11 confused. Never mind.

12          MS. CLERGET: I'm sorry. This should  
13 not have been in your --

14          MR. TWEETEN: So Mr. Reed has not  
15 submitted his proposed findings and conclusions?

16          MS. CLERGET: No.

17          MR. TWEETEN: Has anybody been in touch  
18 with Mr. Reed?

19          MS. CLERGET: I guess, Chris, I want to  
20 back up for one second. I'm a little nervous  
21 about having this discussion at all without the  
22 parties present, so I will defer to your expertise  
23 as a Board member about whether you're comfortable  
24 having this discussion without the parties  
25 present. But my advice would be to wait until we

1 can have the parties in order to have --

2 MR. TWEETEN: Thanks, Sarah. My  
3 question simply goes to the status of the matter  
4 at this point, rather than the merits. I'm just  
5 trying to figure out what the status of it is  
6 right now, because the last time the Board  
7 considered this, we were still expecting that Mr.  
8 Reed would be submitting proposed findings and  
9 conclusions. And so my understanding from what  
10 you told me today is that he has not done that.

11 MS. CLERGET: No, he has not done that.

12 MR. TWEETEN: And the question before  
13 the Board right now is what do we do, I guess,  
14 assuming that Mr. Reed is not going to submit his  
15 findings and conclusions; is that right?

16 MS. CLERGET: That's correct.

17 MR. TWEETEN: Okay. Now I understand.  
18 All right. Thank you.

19 Madam Chair, if I might. I agree with  
20 Counsel. I think that it would be the appropriate  
21 thing to do, would be to defer this matter to our  
22 next meeting. I understand the desire to get  
23 closure on this, and I think so far, as I recall,  
24 all Counsel involved in this matter were in  
25 agreement that we have a procedural conundrum

1 here; and as desirable as it would be to get the  
2 matter to conclusion, we also need to do it in  
3 compliance with MAPA.

4 And so absent any objection from the  
5 parties -- and this is on the agenda, and the  
6 parties were therefore on notice that it was going  
7 to be discussed at this meeting -- absent any  
8 objection from the parties, I think it's  
9 appropriate to move the matter to the next  
10 meeting, and then our attorney can be in  
11 communication with the parties' Counsel, and  
12 explain to them that our next meeting would be the  
13 appropriate time for them to provide their views  
14 on how we proceed in this matter in the absence of  
15 Mr. Reed's contribution to the final record.

16 CHAIR DEVENY: Would you like to make  
17 that in the form of a motion?

18 MS. CLERGET: If I might interrupt for  
19 one second. This is Sarah. Since the Board has  
20 delegated this to the Hearings Examiner,  
21 previously Haladay, who I've taken over for, for  
22 procedural purposes, I believe it would be  
23 possible for me to hold a status conference with  
24 the parties to discuss this with the parties, so  
25 that we've had that discussion before we get to

1 the next meeting, and hopefully can have a shorter  
2 presentation for the Board at that point. So I  
3 might offer that as an option for the Board as  
4 well.

5 MR. TWEETEN: I have a motion then I'd  
6 like to offer, and it has three parts. First, I  
7 move first that this matter be reassigned to our  
8 current Counsel Sarah Clerget to act as Hearings  
9 Examiner for all procedural matters in the same  
10 sense that Mr. Haladay was.

11 Second, I move that we request Ms.  
12 Clerget to convene a status conference with  
13 Counsel for the parties, at which they are to  
14 discuss the status of the matter, and any thoughts  
15 that they might have to assist the Board in  
16 proceeding with this case in the absence of any  
17 proposed findings and conclusions from Mr. Reed.

18 And third, that we move consideration of  
19 this matter to our next meeting.

20 CHAIR DEVENY: Thank you, Chris. So  
21 there is a motion before the Board to reassign the  
22 Columbia Falls Aluminum Company's appeal of the  
23 DEQ's modification of the Montana Pollutant  
24 Discharge Elimination System permit in Columbia  
25 Falls, Flathead County, to reassign this case to

1 attorney Sarah Clerget for procedural matters; and  
2 that Sarah also convene a status conference with  
3 the affected parties to discuss how to proceed in  
4 this matter if the former Hearings Officer Ben  
5 Reed does not come through with the final  
6 decision, conclusions and the final decision  
7 order; and that this be taken up by our Board at  
8 the next meeting. Did I get that straight, Chris?

9 MR. TWEETEN: I believe you did.

10 CHAIR DEVENY: So that's the motion  
11 before the Board. Is there a second?

12 MR. DEARMENT: Second.

13 CHAIR DEVENY: The motion has been moved  
14 and seconded. Let's vote. All those in favor,  
15 please signify by saying aye.

16 (Response)

17 CHAIR DEVENY: Those opposed, nay.

18 (No response)

19 CHAIR DEVENY: None. So the motion has  
20 passed.

21 MS. CLERGET: Yes. And just a point of  
22 procedure. I don't know how this DEQ proposed  
23 findings of fact and conclusions of law got in  
24 your packet, but if anybody has not looked at it  
25 yet, please do not look at it. If you have, we'll



1 have to deal with that, but if you haven't, don't.  
2 Is that clear? Thank you.

3 So moving on to the second action item  
4 under No. 2, this is the proposed decision on the  
5 Heart K Land and Cattle Company, and again, I have  
6 copies if it didn't make it into anybody's packet.  
7 And Chris, this is in your email as well.

8 MR. TWEETEN: Thank you.

9 MS. CLERGET: This is pretty straight  
10 forward. It is a stipulation, settlement  
11 agreement that has been reached between the  
12 parties, and essentially it is a request from the  
13 parties for BER to adopt their settlement, or  
14 approve their settlement -- excuse me -- and  
15 dismiss the case. So I have prepared a proposed  
16 decision for you that essentially says that, that  
17 I'm proposing that you will adopt, approve their  
18 settlement, and dismiss the case.

19 CHAIR DEVENY: Is that written  
20 somewhere?

21 MS. CLERGET: It is. It should be in  
22 your --

23 MS. SOLHEIM: There's two documents,  
24 there's the stipulation, and then there's the --

25 CHAIR DEVENY: Then the recommended

1 order.

2 MS. SOLHEIM: Yes.

3 MS. CLERGET: So the recommended order  
4 at the bottom, you can see the two pieces for the  
5 recommendation. And ultimately this is something  
6 that you will have to sign, Chris, if the Board is  
7 in agreement.

8 CHAIR DEVENY: Is there any discussion  
9 on this particular matter, in the matter of and  
10 Heart K Land and Cattle Company's appeal of the  
11 certification conditions for Application No.  
12 Montana 4010948, etc., Yellowstone River?

13 MR. TWEETEN: Madam Chair, just a  
14 question for Sarah. Sarah, have you reviewed the  
15 stipulation and recommended order, and is it  
16 legally sufficient? Is there any reason we ought  
17 to be concerned about signing it?

18 MS. CLERGET: I have reviewed it, and I  
19 discussed it with the parties, and no, I do not  
20 believe there is any reason that you should be  
21 concerned about it.

22 MR. TWEETEN: Okay. Well, if no one  
23 else has a question about this, Madam Chair, I  
24 would move that Board authorize the Chair to sign  
25 this matter on behalf of the Board, disposing of

1 this case pursuant to the stipulation.

2 CHAIR DEVENY: Is there any other  
3 discussion?

4 (No response)

5 CHAIR DEVENY: Did you make that in the  
6 form of a motion, Chris?

7 MR. TWEETEN: I think I did. I tried  
8 to.

9 CHAIR DEVENY: Is there a second to the  
10 motion?

11 MR. WARNER: Second.

12 CHAIR DEVENY: It's been moved and  
13 seconded. All in favor, say aye.

14 (Response)

15 CHAIR DEVENY: Any opposed, say nay.

16 (No response)

17 CHAIR DEVENY: The motion has been  
18 moved, and seconded, and passed. Sarah, that  
19 looks like it is everything you've got on the  
20 agenda. Was there anything else?

21 MS. CLERGET: That's all of the action  
22 items.

23 CHAIR DEVENY: Thank you very much. And  
24 I guess we're getting near the end of the meeting,  
25 and at this point, I'd like to open up this

1 meeting to any public comments that anybody in the  
2 room may have. If anybody would like to speak up  
3 about any matter that we discussed today except  
4 for contested cases or other matters that are not  
5 on the agenda, please come forward and state your  
6 name.

7 (No response)

8 CHAIR DEVENY: Seeing none, at this  
9 point --

10 MR. BUSBY: I have a question for water  
11 quality folks.

12 CHAIR DEVENY: Eric.

13 MR. BUSBY: How do you intend to address  
14 Senator, now Representative Keane's concerns about  
15 the time element on Senate Bill 325 --

16 MR. URBAN: Madam Chair.

17 MR. BUSBY: -- timing wise.

18 MR. URBAN: Madam Chair, Board member  
19 Busby. The Department has -- a bit of the delay  
20 has been both on the technical side, making sure  
21 our rules align with the approvable federal  
22 equivalent, but largely on the consensus building  
23 side, and making sure that our stakeholders have  
24 comfort in the rules before we initiated  
25 rulemaking, or proposed initiation.

1           So to counter that, I anticipate the  
2 Board seeing this rule package in front of you at  
3 the next Board meeting.

4           MR. BUSBY: Thank you.

5           CHAIR DEVENY: Thank you, Eric. Any  
6 other Board members have any comments they'd like  
7 to make?

8           (No response)

9           CHAIR DEVENY: I just have one, and that  
10 has to do with three members of the Board of  
11 Environmental Review that served the last I guess  
12 four years, and they were Joan Miles, who was  
13 Chair, Marietta Canty, Robin Shropshire, and of  
14 course Chris Tweeten who is the only carry over  
15 from that Board. But I'd like to just publicly  
16 acknowledge their work, and thank them for their  
17 service to the State of Montana.

18           MR. TWEETEN: Madam Chair, I hope I  
19 speak for all of those folks in saying it has been  
20 a privilege to serve, and I'm personally looking  
21 forward to the opportunity to work with the new  
22 Board going forward for the remainder of my second  
23 term.

24           CHAIR DEVENY: Thank you, Chris, and  
25 likewise the Board's pretty much brand new except

1 for Chris, and it has been great getting to just  
2 briefly meet all of you, and look forward to  
3 working with you in the years ahead. John, you  
4 had a comment.

5 MR. NORTH: Madam Chair, yes. Thank  
6 you. I'd just like to point out to all of the  
7 Board members that you have requested that the  
8 Department propose a 2018 schedule as soon as  
9 possible. It is normally on the Board agenda for  
10 December to set the next year's meeting schedule,  
11 and it will be.

12 And the factor that we wait for is when  
13 the Secretary of State publishes its 2018  
14 publication schedule for the Administrative  
15 Register for the next year. That usually happens  
16 in October. And you've requested that we commence  
17 with a proposed schedule as soon as we can after  
18 that point, and we will do that.

19 So as soon as the Secretary of State  
20 publishes that, we will prepare a proposed agenda,  
21 we'll circulate it to the Board members with the  
22 idea that the Board members can then tell us in  
23 advance if they've got a problem with any  
24 particular date, with the idea being to try and  
25 set the schedule as soon as possible to avoid any

1 conflicts that might come up, and to let Board  
2 members know so they can plan their next year. So  
3 we will do that, and then whatever we come up with  
4 will be on the agenda in December for formal  
5 adoption.

6 CHAIR DEVENY: Thank you, John, and I  
7 believe the next meeting is December 8th.

8 MR. NORTH: I believe so, yes.

9 CHAIR DEVENY: Does anybody else have  
10 anything they'd like to bring up at this time?

11 (No response)

12 CHAIR DEVENY: I'd like to entertain a  
13 motion to adjourn.

14 MR. BUSBY: So moved.

15 MR. WARNER: Second.

16 CHAIR DEVENY: It's been moved and  
17 seconded that we adjourn. Everybody in favor,  
18 please say aye.

19 (Response)

20 CHAIR DEVENY: None opposed. The  
21 meeting is adjourned.

22 (The proceedings were concluded  
23 at 10:31 a.m. )

24 \* \* \* \* \*

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

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

That the proceedings were taken before me at  
the time and place herein named; that the  
proceedings were reported by me in shorthand and  
transcribed using computer-aided transcription,  
and that the foregoing - 63 - pages contain a true  
record of the proceedings to the best of my  
ability.

IN WITNESS WHEREOF, I have hereunto set my  
hand and affixed my notarial seal  
this \_\_\_\_\_ day of \_\_\_\_\_, 2017.

\_\_\_\_\_  
LAURIE CRUTCHER, RPR  
Court Reporter - Notary Public  
My commission expires  
March 9, 2020.



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