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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

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BOARD MEETING )  
August 5, 2016 )

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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  
August 5, 2016  
9:00 a.m.

BEFORE CHAIRMAN MICHELE REINHART-LEVINE,  
BOARD MEMBERS MARIETTA CANTY,  
CHRIS TWEETEN, ROY O'CONNOR  
(By telephone)

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

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

3                           \* \* \* \* \*

4           CHAIRMAN REINHART-LEVINE: Now we have a  
5 quorum, with me, Chris, Marietta, and Roy. That's  
6 four out of seven Board members, so with that, I  
7 can call this meeting to order, and we can start  
8 with review and approval of the minutes. Were  
9 there any edits to the minutes?

10                   (No response)

11           CHAIRMAN REINHART-LEVINE: Hearing none,  
12 can I have a motion to approve the minutes?

13           MR. O'CONNOR: So moved. This is Roy.

14           CHAIRMAN REINHART-LEVINE: Is there a  
15 second?

16           MS. CANTY: I'll second that.

17           CHAIRMAN REINHART-LEVINE: All in favor,  
18 vote aye.

19                   (Response)

20           CHAIRMAN REINHART-LEVINE: The minutes  
21 have been approved. The next agenda item is  
22 contested case updates. Is Mr. Reed there?

23           MR. REED: I am. Thank you very much,  
24 Madam Chair.

25           CHAIRMAN REINHART-LEVINE: Thank you,

1 Mr. Reed.

2 MR. REED: As to the enforcement cases  
3 that have been assigned to me at this point, (a)  
4 Highlander Bar seems to be on track to resolving  
5 itself.

6 For both of the Copper Ridge  
7 Subdivisions, unfortunately the non-contested case  
8 resolution was unsuccessful, and so the parties  
9 are now on schedule to have a contested case  
10 hearing sometime next year. That's for both (b)  
11 and (c).

12 In (d), in the matter of the violations  
13 of the Water Quality Act by Buscher Construction,  
14 I should be getting pretrial motions along with  
15 supporting briefs and exhibits no later than  
16 October 12th, and we're on track to have a hearing  
17 in this matter on or about October 12th of this  
18 year.

19 In non-enforcement cases assigned to me,  
20 that's No. 2, in (a), the parties currently remain  
21 in compliance with the terms of the stipulation.

22 With (b), Columbia Falls Aluminum  
23 Company, we are on track to have our proposed  
24 stipulated statements of fact and motions in  
25 limine and a prehearing conference with a hearing

1 scheduled for November of this year.

2 Heart K Land and Cattle has a motion for  
3 summary judgment that's been entirely briefed that  
4 is currently before me.

5 In (d), an amended scheduling order has  
6 been filed in Absaloka Mine.

7 In the matter of the notice of appeal in  
8 (e), that requires very little comment. The  
9 schedule is moving on.

10 In (f), the parties filed cross motions  
11 for summary judgment, in Payne Logging. I issued  
12 a proposed order granting the Department's motion  
13 for summary judgment. However, the parties are  
14 probably -- Payne is going to take some time and  
15 determine whether it's going to ask for a hearing  
16 before the entire Board on the matter. That  
17 however will not come before the Board prior to  
18 its end of December meeting, so I'll keep the  
19 Board updated on that matter.

20 For (g), Western Energy Company Rosebud  
21 Strip Mine, that matter has been briefed for  
22 summary judgment, but we're still awaiting a reply  
23 brief.

24 In the matter of LT Trucking, moving on  
25 to (h), the matter was appealed by the person that

1 I believe is the Director, or President, or owner  
2 of LT Trucking in his personal capacity. However  
3 because LT Trucking is in fact a limited liability  
4 company, he can't represent LT Trucking, so I've  
5 issued a prehearing order as indicated that  
6 requires him to find Counsel or the matter is  
7 going to need to be dismissed.

8 And a scheduling order was issued in  
9 (i), the appeal of the denial of the nondeg review  
10 for Lakes at Heron Subdivision on July 13th, so  
11 the parties should be moving forward with that.

12 And then under No. 3, the Western Energy  
13 Company's BER 2012-12, Judge Seeley has issued an  
14 order on summary judgment, but has not entered a  
15 formal final judgment, so the Board is not really  
16 in a position to act on that matter. I've asked  
17 Mr. North whether he's inclined to kind of chivvy  
18 the Judge along, and he's indicated that he's not,  
19 so I think the matter will simply stay on the  
20 Judge's desk until such time as it returns to the  
21 Board. Mr. North is signalling that he'd like to  
22 correct me.

23 MR. NORTH: Madam Chair, members of the  
24 Board, this is John North. What you said is  
25 absolutely correct, but I want to add one thing,

1 and that is the issue of whether or not attorneys  
2 fees will be granted needs to be determined before  
3 the judgment can become final, and there may be a  
4 petition for attorney fees filed soon. I'm not  
5 sure. But that will need to be resolved first,  
6 and that would be what's holding it up until that  
7 can be determined.

8 MR. REED: So my only comment to that to  
9 the Board is that in my experience, that's likely  
10 to add a rather significant amount of time for  
11 this matter to come back to the Board.

12 And that wraps up the contested case  
13 update. Do the Board members have any questions,  
14 comments, or concerns?

15 (No response)

16 MR. REED: Madam Chair, that concludes  
17 this portion of the agenda.

18 CHAIRMAN REINHART-LEVINE: Thank you,  
19 Mr. Reed. We'll now move on to Item B, other  
20 briefing items. I'll turn that over to you, Mr.  
21 Mathieus.

22 MR. MATHIEUS: Thank you, Madam Chair.  
23 Item No. 1. So in conversations I had with Joan  
24 Miles, there was a request to provide a couple  
25 briefing items today on specifically Otter Creek

1 and Senate Bill 325. So first up is Mr. Eric<sup>7</sup>  
2 Urban.

3 MR. URBAN: Madam Chair, members of the  
4 Board, for the record, my name is Eric Urban. I'm  
5 the Bureau Chief of the Water Quality Planning  
6 Bureau.

7 So a little brief background on the site  
8 specific standards for Otter Creek. The  
9 Department reviewed the existing numeric water  
10 quality standards for salinity, and compared that  
11 against a forty plus year data set, and came to  
12 the finding that implementing the existing numeric  
13 standard was difficult given the natural condition  
14 of the water body.

15 So we proposed to the Board a  
16 modification of that, to which additional time was  
17 requested. Given current circumstances at the  
18 Otter Creek watershed, pursuing site specific  
19 standards is not a Department priority at this  
20 time, and little work has been done since our last  
21 time in front of the Board.

22 The work that has been done has been  
23 additional data collection throughout the winter  
24 months to shore up our data set there, and at this  
25 point, our future efforts are working on other

1 rulemakings that may potentially address similar  
2 issues, and those are the Senate Bill 325 Work  
3 Group and rulemakings for that.

4 So with that, I think I will leave this  
5 briefing quite brief, and turn it back to you. If  
6 you have questions, I'm available.

7 CHAIRMAN REINHART-LEVINE: Are there any  
8 questions from the Board?

9 MS. CANTY: This is Marietta. I just  
10 wanted to ask Eric. We went through this before,  
11 and it seems like we just weren't reaching a  
12 resolution. So at this point then are we just  
13 collecting more data -- if I'm hearing that right  
14 -- collecting more data, and seeing what happens  
15 with Senate Bill 325 as maybe possibly resolving  
16 some of the issues at Otter Creek?

17 MR. URBAN: Madam Chair, Ms. Canty.  
18 That's partially correct. We are pursuing with  
19 Senate Bill 325, and seeing how that will address  
20 the concerns. As far as data collection, we will  
21 be scaling back any future data collection. Our  
22 data set is quite substantive, and we will not be  
23 pursuing additional information at this time.

24 MS. CANTY: Thank you.

25 MR. MATHIEUS: Madam Chair, if I may.



1                   CHAIRMAN REINHART-LEVINE: Yes.

2                   MR. MATHIEUS: This is George. I think  
3 simply put, the Otter Creek site specific  
4 standards were a priority for us because we had a  
5 permit waiting, and we wanted to ensure that we  
6 could provide the best permit available. And so  
7 now with that not sitting right at our front door,  
8 obviously it is not a high priority for us, and so  
9 we're using our resources elsewhere, as Eric  
10 indicated.

11                   And obviously we do anticipate, as we  
12 have these conversations in this room with this  
13 body, about the similarities between Senate Bill  
14 325 and the site specific standards on Otter  
15 Creek, just from the perspective of dealing with  
16 the natural conditions. So we'll focus our  
17 efforts there.

18                   MR. O'CONNOR: George, this is Roy. Are  
19 you heading in the direction of making a statewide  
20 ruling on this, or are you considering still doing  
21 it on a drainage basis?

22                   MR. MATHIEUS: Roy, I'll just say that  
23 the concept behind Senate Bill 325 was a broader  
24 across-the-state look at natural conditions, and  
25 trying to set up -- for lack of a better word --

1 sort of a formula for how to determine that.  
2 We'll always have the ability to even take that a  
3 step further, and do site specific standards, and  
4 I think we would weigh those on a case-by-case  
5 basis. And I think probably the driving factor is  
6 technically going to be the amount of data, but  
7 Eric may be able to expand on that better than I,  
8 unless you're satisfied with that answer.

9 MR. O'CONNOR: I'm satisfied. I know it  
10 is going to take a lot of work and thought about  
11 this. I was just curious what approach you were  
12 taking. Thank you.

13 CHAIRMAN REINHART-LEVINE: Mr. Mathieus,  
14 Mr. Urban, it seems like that was the extent of  
15 the briefing on Agenda Item No. 1. Do we take  
16 public comment on Agenda Item No. 1?

17 MR. MATHIEUS: No need to, Madam Chair.

18 CHAIRMAN REINHART-LEVINE: With that,  
19 I'm going to segue into Agenda Item No. 2  
20 regarding SB325. Were there additional things  
21 that you would like to say about that, Mr.  
22 Mathieus or Mr. Urban?

23 MR. MATHIEUS: Madam Chair, this is  
24 George. I believe Myla Kelly is going to speak  
25 specifically to the progress made in Senate Bill

1 325.

2 MS. KELLY: Madam Chair, members of the  
3 Board, my name is Myla Kelly. I'm the Water  
4 Quality Standards and Modeling supervisor here at  
5 the Water Quality Division at Montana DEQ.

6 The Department has been working with a  
7 diverse group of stakeholders to develop rules for  
8 MCA 75-5-222, Senate Bill 325, also referred to as  
9 the State regulations for natural conditions, and  
10 I wanted to give you just a brief on the  
11 progression of this effort.

12 So as a little bit of a point of  
13 context, in case you don't remember verbatim what  
14 that statute involves, the statute is divided into  
15 two sections. Part 1 we refer to as the  
16 non-anthropogenic section, and that section  
17 specifies that the Department may not apply a  
18 standard to a water body that is more stringent  
19 than the non-anthropogenic or the non-human caused  
20 condition of the water body.

21 So in a scenario where we have a  
22 parameter -- iron, arsenic, salinity, whatever  
23 that parameter may be -- and the current water  
24 quality standard is more stringent than the  
25 non-anthropogenic condition, the standard would be

1 the non-anthropogenic condition. So that's Part 1  
2 of the statute.

3 Then Part 2 of the statute is what we  
4 refer to as the variance section, and that section  
5 specifies that in a scenario where we have a water  
6 quality standard that, again, is more stringent  
7 than the condition of a water body, but Part 1  
8 does not apply, so it is not a result of a  
9 non-anthropogenic cause. In that case, the Board  
10 would adopt rules to issue a variance from the  
11 standards under the condition that, No. 1, the  
12 water body condition cannot be remediated during  
13 the permit term, and No. 2, the discharge won't  
14 materially contribute to the condition. So that's  
15 the statute itself in the two parts.

16 So to develop rules to actually  
17 implement the statute, the Department has convened  
18 a Senate Bill 325 Work Group that's comprised of  
19 representatives of the Northern Plains Resource  
20 Council, the Montana Mining Association, the  
21 Treasure State Resource Industry Council, the  
22 Montana Coal Council, the Clark Fork Coalition,  
23 the Tongue River Water Users Group, Montana  
24 Environmental Information Center, Montana  
25 Stockgrowers, Montana League of Cities and Towns,

1 Montana Association of Conservation Districts,  
2 representatives of the oil and gas and forestry  
3 industries, as well as our own Department  
4 technical staff and EPA representatives.

5 So we meet monthly, and that process  
6 began in January, so we're about seven months into  
7 the process, and the members of the work group  
8 have been engaged and present at the meetings  
9 throughout the entirety.

10 The scope of the effort is significant,  
11 and we optimistically began with a one year time  
12 frame from our point of inception of the work  
13 group to an actual Senate Bill 325 rulemaking  
14 package, where we had buy-in from the work group.  
15 We began with tackling what we thought was sort of  
16 the easier bit of rulemaking, and that was the  
17 Part 2 and the variance section.

18 We now have draft rule language on which  
19 we're addressing work group comments, and we have  
20 a draft guidance document which will support that  
21 rule language.

22 With regards to Part 1, we spent a  
23 significant amount of time discussing various  
24 approaches on just how to determine what a  
25 non-anthropogenic condition is. This

1 demonstration of natural or non-anthropogenic is  
2 not new to the Department, and the methods that we  
3 have utilized and developed up to this point  
4 include modeling, mass balance equations, and  
5 comparison to reference conditions.

6           So we have spent quite a bit of time  
7 talking about those different methodologies.  
8 We've drafted some rule language that's undergoing  
9 internal Department review, and we've queried on  
10 monitoring and assessment, as well as our TMDL  
11 programs, to get an idea of what those particular  
12 parameters are that they're seeing out on the  
13 ground that are often higher than our standards,  
14 without seeming to be influenced by anthropogenic  
15 conditions, and that list included iron, salinity,  
16 and aluminum.

17           So our next steps include finalizing our  
18 Part 2 rules and guidance, and then further  
19 refining our Part 1 rules, and developing an  
20 associated supporting document which would be a  
21 circular to support those Part 1 rules.

22           Any questions?

23           CHAIRMAN REINHART-LEVINE: Are there any  
24 questions from the Board?

25           MS. CANTY: This is Marietta again. I

1 was just wondering. So you think you have sort of  
2 draft guidance of the first part; is that right?  
3 I'm just wondering when we'll see that, or when we  
4 can expect schedule wise.

5 MS. KELLY: Sure. Thank you. We will  
6 be -- I think that we would provide that to the  
7 Board once we had a buy-in and okay from the work  
8 group. I don't know. I'm not sure what the  
9 schedule would be for that. Maybe if we would --  
10 I guess that's a question, if we would do that in  
11 parts.

12 MR. MATHIEUS: This is George. I think  
13 first off, our goal is to ensure that we provide a  
14 rule package to the Board that's gained unanimous  
15 support. As Myla has alluded to, we want to just  
16 ensure that we get all of the information needed  
17 to the Board in adequate time before we would ever  
18 propose rulemaking, so that the Board is well  
19 versed in the subject matter. And I think at this  
20 point it is just a little hard to determine what  
21 the time frame of that is, because you heard the  
22 size of the work group, and those things could all  
23 take more time, but I think in the end, they're  
24 worth it.

25 MS. CANTY: Okay. Thank you.

1                   CHAIRMAN REINHART-LEVINE: Are there  
2 additional questions from Board members?

3                   (No response)

4                   CHAIRMAN REINHART-LEVINE: Mr. Mathieus,  
5 Ms. Kelly, I have a question. Do you have a sense  
6 of about how many streams this would apply to?

7                   MS. KELLY: No, we have not gone down  
8 that road yet.

9                   CHAIRMAN REINHART-LEVINE: When do you  
10 anticipate looking at that question about how many  
11 streams currently exceed standards in their  
12 natural conditions?

13                   MS. KELLY: Well, I think the first  
14 heavy part in that question is determining how we  
15 figure out what's anthropogenic and what's not  
16 anthropogenic, and so when we get to the point  
17 where we have a process that's approved by the  
18 work group members and also by EPA, where we do  
19 have that buy-in and that approval process on how  
20 we determine that, then we could take the step as  
21 far as determining which streams or water bodies  
22 qualified under that process.

23                   CHAIRMAN REINHART-LEVINE: Okay. Thank  
24 you. Anything else, Ms. Kelly or Mr. Mathieus?

25                   MS. KELLY: No.



1 MR. MATHIEUS: Not from me.

2 CHAIRMAN REINHART-LEVINE: Okay. With  
3 that, let's move on to Briefing Item No. 3.

4 MR. MATHIEUS: Madam Chair, Chief Legal  
5 Counsel John North.

6 MR. NORTH: Madam Chair, members of the  
7 Board, I think you have a letter dated July 12th  
8 of this year in your packet from the Director, and  
9 that's the basis or the subject matter of this  
10 briefing. Chairman Miles asked that somebody  
11 brief the Board a little bit more on that.

12 And this relates to the Signal Peak  
13 Mine. As you will recall, in January the Board  
14 issued a final order ordering that the Department  
15 redo the CHIA for the Bull Mountain Mine, and  
16 ordering that the revised findings and the CHIA be  
17 completed within 180 days, and that then would  
18 pencil out to July 12th of this year.

19 We received a revised application  
20 including a preliminary hydrologic consequences  
21 document, or a probable hydrologic consequences  
22 document, and proceeded through the regular permit  
23 review process. That includes issuance of a  
24 notice of acceptability, and then that triggers a  
25 public review period, including the right of the

1 public to submit comments, objections, and that  
2 sort of thing.

3 The statute provides that we then must  
4 issue the final findings within 45 days. Because  
5 the public notice was issued in the Roundup paper,  
6 which is a weekly paper, we were not able to  
7 completely synchronize the 45 day period and the  
8 180 day period; and because the 45 day period  
9 expired on July 8th, which was Friday, whereas the  
10 180 day period expired the next Tuesday on July  
11 12th.

12 As we got to the end of the process, we  
13 determined that it could actually benefit from the  
14 additional four days, and so we contacted the  
15 company, the company had no objection for us  
16 taking the full 180 days, and so we did that, and  
17 we issued the final findings and revised CHIA on  
18 July 12th.

19 You were provided the letter because the  
20 statute provides that anytime that we exceed the  
21 time limit provided in the statute, we must notify  
22 the Board, and so that's what we did on July 12th.  
23 That is all I have at this point.

24 CHAIRMAN REINHART-LEVINE: Okay. Thank  
25 you, Mr. North. Are there questions from the

1 Board?

2 MR. O'CONNOR: I've not seen the letter.  
3 I don't know if it was in a packet that I missed  
4 or what. I would appreciate a copy of it, please.

5 MR. NORTH: We will certainly get that  
6 to you right after the meeting.

7 MR. O'CONNOR: Thank you.

8 CHAIRMAN REINHART-LEVINE: Any  
9 additional questions for Mr. North?

10 (No response)

11 CHAIRMAN REINHART-LEVINE: Hearing none,  
12 let's move on to Action Item 4, Subpart A, New  
13 Contested Cases.

14 MR. REED: Madam Chair, if I may. The  
15 Department received an appeal in this matter, and  
16 then I issued a proposed scheduling order.  
17 According to the proposed schedule filed by the  
18 Department, it was my impression that Big Rock,  
19 LLC, was going to be providing the Department with  
20 a more definite statement. I'm not sure that  
21 that's happened, but in any case, the Department  
22 and Big Rock have provided a proposed schedule to  
23 me. I simply haven't issued the scheduling order  
24 as yet. There is space in my schedule for me to  
25 be the Hearing Examiner in this matter.

1 CHAIRMAN REINHART-LEVINE: All right.

2 So Mr. Reed, given what you said that last part,  
3 may we assign you as the Hearing Examiner in that  
4 matter?

5 MR. REED: I'd be delighted, Madam  
6 Chair.

7 CHAIRMAN REINHART-LEVINE: Thank you,  
8 Mr. Reed. Is there a motion to that effect?

9 MS. CANTY: So moved. This is Marietta.

10 CHAIRMAN REINHART-LEVINE: Is there a  
11 second?

12 MR. O'CONNOR: I'll second.

13 CHAIRMAN REINHART-LEVINE: Thank you.  
14 All those in favor, say aye.

15 (Response)

16 CHAIRMAN REINHART-LEVINE: Mr. Reed,  
17 you've been so assigned.

18 MR. REED: Thank you very much, Madam  
19 Chair.

20 CHAIRMAN REINHART-LEVINE: Moving on to  
21 Action Item 4, Subpart B and C, and initiation of  
22 rulemaking.

23 MR. MATHIEUS: Madam Chair, this is  
24 George. Today Liz Ulrich from the Air Quality  
25 Bureau will be presenting this item.

1 MS. ULRICH: Good morning, Madam Chair,  
2 members of the Board. My name is Liz Ulrich, and  
3 I'm representing the DEQ's Air Quality Bureau.  
4 I'm here today to request that the Board adopt the  
5 proposed amendment to an air quality rule related  
6 to prevention of significant deterioration  
7 permitting provisions.

8 Earlier this year at the April 8th BER  
9 meeting, I on behalf of the Department recommended  
10 the Board initiate rulemaking to remove the 24  
11 hour averaging period from the PM2.5 SMC, or the  
12 significant monitoring concentration for  
13 particulate matter with a diameter of less than  
14 2.5 microns.

15 We didn't receive any comments regarding  
16 the proposed amendment to ARM 17.8.818. Upon  
17 adoption of this amendment, the Department will  
18 submit the revised rule into the Montana State  
19 Implementation Plan, ensuring Montana's ongoing  
20 new resource review, prevention of significant  
21 deterioration program authority. Again, I'm  
22 requesting that the Board adopt the amended ARM  
23 17.8.818 as proposed in the draft notice for  
24 amendment. Are there any questions?

25 CHAIRMAN REINHART-LEVINE: Are there any

1 questions?

2 (No response)

3 CHAIRMAN REINHART-LEVINE: Hearing no  
4 questions from the Board, is there any public  
5 comment?

6 (No response)

7 MR. MATHIEUS: It doesn't look like  
8 there is any, Madam Chair.

9 CHAIRMAN REINHART-LEVINE: Hearing no  
10 questions and no comments, is there a motion to  
11 amend the Administrative Rules as proposed?

12 MR. TWEETEN: Madam Chair, this is  
13 Chris. So moved.

14 CHAIRMAN REINHART-LEVINE: Thank you,  
15 Chris. Is there a second?

16 MS. CANTY: I'll second.

17 CHAIRMAN REINHART-LEVINE: All those in  
18 favor, say aye.

19 (Response)

20 CHAIRMAN REINHART-LEVINE: The motion to  
21 amend the Administrative Rules as proposed has  
22 passed.

23 The next item on the agenda is general  
24 public comment. Is there any general public  
25 comment?

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(No response)

MR. MATHIEUS: It doesn't look like there is any, Madam Chair.

CHAIRMAN REINHART-LEVINE: Hearing none, this meeting is adjourned.

(The proceedings were concluded at 9:39 a.m. )

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

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

That the proceedings were taken before me at  
the time and place herein named; that the  
proceedings were reported by me in shorthand and  
transcribed using computer-aided transcription,  
and that the foregoing - 23 - 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 \_\_\_\_\_, 2016.

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



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