BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
October 16, 2015)

TRANSCRIPT OF PROCEEDINGS

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
October 16, 2015
9:00 a.m.

BEFORE CHAIRMAN JOAN MILES,
BOARD MEMBERS MARIETTA CANTY,
CHRIS TWEETEN, DR. ROBERT BYRON,
ROY SAYLES O'CONNOR,
and MICHELE REINHART LEVINE

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

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

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(Board Member Sayles O'Connor not present)

CHAIRMAN MILES: Good morning, everyone. We'll call the meeting to order. I appreciate everyone that's here, all the Board members, all audience members. The first item of business is to review and approve the minutes from July 31st, 2015. Do I have a motion to approve the minutes?

DR. BYRON: So moved.

CHAIRMAN MILES: Second.

MS. CANTY: I'll second.

CHAIRMAN MILES: Any discussion? I do have one correction in the minutes. I don't have it in front of me, but the very first call to order said, "The Board of Environmental Review's regularly scheduled meeting was called to order by Madam Chair Shropshire," and I believe that was me that called the meeting to order, so that needs to be corrected. Any further discussion?

(No response)

CHAIRMAN MILES: All in favor, please say aye.

(Response)

CHAIRMAN MILES: Opposed.

(No response)

CHAIRMAN MILES: Hearing none, the minutes are approved.

I'd like to turn it over to George for just a couple minutes about some procedural things today.

MR. MATHIEUS: Thank you, Madam Chair, members of the Board. The first thing is folks

might notice the room is slightly rearranged from our normal Board meeting. Today we're sort of doing a dry run. We're going to try to start live streaming these meetings, in the hopes that it will provide better opportunities for the public that have to travel long distances for these meetings. So today we're merely videotaping the meeting to try to work out any kinks in logistics, so just so everybody what knows what's going on over here.

Secondly, some members expressed interest in wanting to set the calendar for next year today, which we typically do in December. Primarily why we wait until December is we wait for the Secretary of State filing dates. However

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we have those today, and so I would propose that the Board tentatively pick their dates today, and then we can formally adopt them at the December meeting since we didn't publicly notice them on the agenda today. And I do have a handout that aligns with the Secretary of State's filing dates that you can use as a starting point if you wish.

CHAIRMAN MILES: Do we want to do that now?

MR. MATHIEUS: I would propose that you do it now.

CHAIRMAN MILES: By the way, we know that Roy is on his way, so we do have a quorum to begin business. We don't have any Board members on the phone. We do have Heidi Kaiser, and there is someone else, a member of the public, so a couple of folks listening in.

So the proposed dates are February 5th, April 8th, June 3rd, August 5th, September 30th, and December 9th. This seems a little different. I think normally we've been looking at the end of the month.

MR. MATHIEUS: Madam Chair, excuse me. Mr. North just informed me that it was actually Roy O'Connor is the one who wanted to discuss the

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agenda today, based on his schedule, and he's not here, so --

CHAIRMAN MILES: It was actually Dr. Byron.

MR. MATHIEUS: Oh, it was.

CHAIRMAN MILES: It was.

MR. MATHIEUS: Easy enough then.

CHAIRMAN MILES: I'm just wondering, are those the Secretary of State dates on here, or are they the proposed dates for our meetings?

MR. MATHIEUS: They're the proposed dates for your meetings, and how they align with the Secretary of State dates.

CHAIRMAN MILES: Does anybody have any comment or heartburn on any of these?

MR. TWEETEN: My problem is I may be teaching next semester, and I don't know yet what my schedule is going to be. I will work around that if need be.

CHAIRMAN MILES: I was going to say I've got a few in there that are tentative, but

we'll --

Then I think we'll give Roy a chance to look at those when he gets here, but I think tentatively we can look at those dates, and then you can put those on the agenda for the next meeting. And our next meeting is when? It is December --

MR. NORTH: Fourth, I think.

CHAIRMAN MILES: So then we'll move to contested case debriefing items, and we'll get some contested case updates from Ben.

MR. REED: Thank you, Madam Chair. As far as the enforcement cases assigned to me, Highlander Bar and Grill has been stayed pending resolution by the parties.

In "B" and "C," the scheduling orders have both been stayed.

And in "D," there has been a proposed schedule filed, and I'm going to be issuing a scheduling order forthwith.

Moving on to nonenforcement cases, all three of A, B, and C are moving forward, or are in the same status as they were during our last meeting, I should say.

The stay in YELP is continuing. The parties in Phillips 66 are complying with the terms of the stipulation. And as far as I'm aware in CFAC, the matter is proceeding at pace.

I have no information on WECO at this time, although I suspect Mr. North can fill us in on the status of that.

CHAIRMAN MILES: Do you have any information on that, John? Item No. 3, contested cases not assigned to a Hearing Examiner.

MR. NORTH: Madam Chair, members of the Board, John North, Chief Legal Counsel. I think the status is still unchanged. It is before the Judge for a decision, but the decision hasn't been made yet.

CHAIRMAN MILES: Thank you. Any questions on any of those items?

(No response)

CHAIRMAN MILES: We'll move to one of our major items today, which is going to be briefing on the water quality standards, TMDL's, and electrical conductivity and sodium adsorption ratio standards that we discussed last month, or two months ago, for Otter Creek. And I appreciate the Department's coming back here with some more information for us; and also the message that you sent to the Board, George, that said that there are some discussions going on with all the parties, so we appreciate hearing that.

MR. MATHIEUS: Madam Chair, if I may. Members of the Board, and the audience, just a little preview.

So we're providing a briefing item today for Otter Creek site specific standards, and I think just reflecting on the last Board meeting, the Department has decided to take a step back and

try to engage our partners more effectively. We have had the opportunity to do that recently, and the Board did provide some questions to us, and looking over those questions, we thank the Board for those questions.

Those questions are very detailed and technical, and I would say quite diverse, and I think we had feared or anticipated potentially going down a path of a very long meeting, and we were concerned about potentially confusing the room. And so our strategy today again is to take a step back. We're going to focus on some fundamentals that we believe are going to touch on the questions the Board asked, and we're certainly happy to provide more detail to those questions if the Board desires, but I would propose that we kind of see today. We are going against the grain a little bit, but we don't have a power point slide. We've got a few hand-outs.

Really our hope today is that we engage in a conversation, and that the Department continue to work with our partners to figure out the details of this process. So with that, Madam Chair, I'll give you some hand-outs.

CHAIRMAN MILES: I would just add that we will have an opportunity after we hear from the Department, if there is other members of the public that would like to comment. And we appreciate very much the work that you're doing. I do apologize that one of the questions that was included in there related to Signal Peak. I thought I had deleted that.

MR. MATHIEUS: We do have an army of scientists here today if necessary, but Eric Urban will be walking you through these hand-outs.

CHAIRMAN MILES: Thank you very much.

MR. URBAN: Madam Chair, members of the board, for the record, my name is Eric Urban, Bureau Chief, Water Quality Planning Bureau. I have with me today Eric Makus, our water quality modeler; Amy Steinmetz, one of our water quality standards experts; and Mr. John Kenning, Bureau Chief of the Water Permitting Bureau.

I guess for the audience, we have copies of this hand-out handed to them, and we're making additional copies at the moment. If you don't have one, they'll be here momentarily.

So I guess I'd like to start -- I know the agenda calls this a briefing item, and as George suggested, maybe that's a bit of a misnomer. I'd prefer this to be a conversation. So with that, I'm hoping and anticipating interaction questions from the Board.

We're going to cover four major points today, the first point being why review the EC SAR criteria for Otter Creek; and while there is obvious answers to that, there is some that are behind the scenes a little further that provide really the foundation for that. We'll be looking at the Department's effort to characterize natural, define that true definition of natural

for Otter Creek. We'll have a representative hand-out to look at data on Otter Creek; and then finally we're going to talk about the three different approaches to defining natural that are available to the Department and the Board today.

So if you turn to the second page, it's titled, "Why review the EC SAR criteria for Otter Creek." I'll have to give a couple of pauses in here. I included direct quotes that are very pointed to the subject, and important for us to understand. So if you will, the first bullet is a citation from the Administrative Rules 17.30.670 sub (4), and it is the current EC SAR criteria that were adopted by the Board in 2003.

So as you can see, the rule seems very explicit that the criteria for EC is 500, and the SAR is several numbers there, depending on monthly or max. And the background behind that is that this was a criteria that was meant to protect the tributaries over a very large landscape in southeast Montana, so large that depending on how you count the streams, there could be upwards of 200, 200 plus tributaries within that that would be affected directly by this tributary rule.

So when the Board was looking at this in 2003, there was a decision to make a conservative assumption, and we looked at the most sensitive soils in the area. And so rightfully so, when you look at a very large landscape, you find that there is a sensitive soil out there, and that was the basis for coming up with a criteria of 500.

So the next bullet that you'll see there is a response to comment from the Board. So a member of the public commented and asked a question about point sources, and how they would interact with this proposed criteria in the case where ambient conditions were higher than the criteria. And the Board's response is very pertinent to this discussion. I'll give you a minute to read that.

CHAIRMAN MILES: Any questions? Comments? I do have one question, but I don't know if this actually belongs here. But we heard in July, I think during Ms. Steinmetz's presentation, that the current standards were not enforceable. Was that the case? How did that change from 2003? Not enforceable meaning that they couldn't be met in that drainage.

MR. URBAN: Madam Chair, members of the Board, I guess what that is alluding to is the fact that when we read the Board's response to this, it becomes a criteria of 500 or natural, and so that becomes the challenge. So when we look at the data, 500 is an exceptionally rare number for that stream, so the question becomes: What is natural? I believe that's what was being spoken in July.

So I guess I'd add that the Board's response is technically accurate, in that treating to purer than natural is not necessary to protect

the river. It is simply adding cleaner water than natural will work for a very short distance, but long term it is ineffective in improving the river. Not only is it a technically accurate response, it is very much accurate with Montana State statute, which is the 75.5.306 that directs the Department and the Board that we cannot require discharges to treat to purer than natural.

And further to that, it is not a concept that Montana is alone on. It is a concept that is adopted by many states in the US.

(Board Member Sayles O'Connor present)

MR. URBAN: And we're not alone in this. And I guess I'd say that the Board's response was very accurate.

So in 2003, we adopted the criteria with this caveat of natural built in, and by and large it has been on the books without application. What I mean by that is we haven't had to implement it in a discharge permit.

So when the discharge permit was proposed to the Department from the proposed mine in Otter Creek, it made it a priority for the

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Department, it made a priority for us, to understand how to implement, quote, "natural." And that is the foundation of why we're here today, why we're reviewing the EC SAR criteria for Otter Creek.

So if you will, the next question is: Are there anthropogenic sources, are there human influences in Otter Creek that would lead us to believe the data we collect there could be improved upon. So is there something we could do in Otter Creek to reduce salt concentrations today, or is the data we collect in Otter Creek simply natural as it is today?

So there are several approaches to do that, but perhaps the most defensible, the most rigorous approach we could do, was to model this. So we had our staff take on an exhaustive effort of collecting all of the data for Otter Creek, a model that includes the local geology, the land uses, the rain, climate data, etc., and essentially we built a really large math equation. From that, we can take and calibrate it to the existing data, and see how do we make the model better, so we can predict -- well, really predict backwards.

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So we now go into this model, and remove any land uses that could affect salt. So we've done that. We've taken out all the land uses that could affect salt, and what we find is that even in pre-man conditions, we don't see a significant change in what we would expect for salt for the stream.

Now, intuitively that makes sense when you look at Otter Creek. It is a 400,000 acre watershed. There are no point sources today. The land use that may affect salts would be irrigated agriculture. In this case, it is less than one percent of the watershed, so it is very little

land use going on that would affect the salts.
Additionally, the local geology is extremely salty, and we would expect that the results of the model meet intuition, in that the concentrations we find today are very much what we would have expected 50 years ago, 100 years ago. So our conclusion is that EC/SAR values are natural in Otter Creek. So throughout the watershed when you collect a data point, what you're collecting is very much similar to what we would have seen historically.
CHAIRMAN MILES: Anyone have questions?

My question -- I'm trying to remember. I thought this was discussed during the July meeting, that there was some question about where some of those samples were taken from for the modeling, and if it really covered the entire area. Could you talk a little bit more about that.
MR. URBAN: Madam Chair, members of the Board, samples for the model were collected throughout the watershed. There is a large data set near the mouth, but there are samples throughout the watershed. If it is your pleasure, we have an additional map that we could hand out that shows the spatial distribution of our sampling.
CHAIRMAN MILES: Sure. That would help. Thanks.
MR. URBAN: So I should add that this modeling effort has been reviewed by multiple technical experts, and stakeholders, EPA, and to date the response has been very favorable, and few questions or issues with the modeling effort. So we feel very comfortable that the model has accurately done its job, and demonstrated that there is little improvement to do in Otter Creek,

little to none.
CHAIRMAN MILES: And when you say the existing EC SAR values are natural, that particular concentration will depend on where you're taking it from, where you're looking at in the basin there?
MR. URBAN: Madam Chair, that is correct. And we'll touch on it later, but you'll see that on the Page 2 of your handout there. There is a gauge station upstream of the mouth, and generally speaking, as you head upstream in this watershed, salt concentrations increase, so it gets saltier towards the headwaters.
And that's due in large part to your getting to closer to the geological sources of salt. When you get closer to the mouth of the river, you're down in the alluvial of the Otter Creek and Tongue watershed, and so there is some additional dilution. So the USGS site near the mouth is likely cleaner than much of the watershed.
CHAIRMAN MILES: Anyone else? I'm not the only one that needs this tutorial. Thanks.
MR. URBAN: So at this point we have a

model that's done its job, and quite frankly its job is over. So we put that model back on the shelf. There is no modeled data to be used for interpreting natural at this point. We can use all data collected throughout the watershed. There is no use or need to model any information.

MR. SAYLES O'CONNOR: Madam Chair. It doesn't take into account volume of water, does it -- in other words, gallons per minute, or anything like that, CFS -- so that you're -- Primarily this is a low flow stream, so you've got your high salinities during the low flows, right?

MR. URBAN: Madam Chair, Mr. O'Connor. The model is calibrated to all weather events, so it accurately predicts high flow, low flow, and everything in between, so its ability to show natural does include the different flow patterns.

MR. SAYLES O'CONNOR: Okay. Thank you.

MR. URBAN: So now that we're done with the model, we literally put it away, and now we're looking at real data. So the graph in front of you is a histogram of samples collected, so it is a distribution. It shows how many samples of a certain concentration. And what you have in front of you is information from 1974 to quite literally last month, and it is year around data. It is collected at the USGS station near the mouth of Otter Creek.

And I use this as an example really. The SAR data is similar. It is a ratio, though, and so there was a question regarding whether or not the Department used projected information on SAR, and that is not the case. So the Department's efforts for developing criteria with SAR were solely using laboratory data, and not projected information, so all information in front of us today is technically accurate.

And like I mentioned, if you look at this distribution, as you would go upstream, this distribution would shift to the right, so it would slide to higher concentrations as we go upstream. So at the mouth of Otter Creek, we have -- I guess the majority of our samples are in that 2750 to 3000 EC, and at this point I don't think there is much discussion whether or not this is an accurate, a natural data set. This is Otter Creek, and so with that, I would argue that the interpretation of natural is in front of us.

So that's a real advantage to this subject matter. Natural is here in front of us with data, and so now the goal and the challenge for the Board and the Department is to represent that in rule so we can properly protect natural. So this is what we want to see going forward, is a similar distribution to this, and that includes the high flow scenarios and the low flow scenarios.

Also I would add, now that we've done the model, we look at this distribution, we see that there is no improvement to be made, and so we

come to the conclusion that this stream is not what we call impaired; and when we make that decision, that means there is no TMDL necessary, and what that says is we don't have a need to write a restoration plan for this watershed because there isn't improvement to be done here with respect to the salts.

CHAIRMAN MILES: Any questions on that?

(No response)

CHAIRMAN MILES: Thanks.

MR. URBAN: So on the next page, I guess we get to the real options for the Board and the Department. And what we have available are three separate yet similar approaches to defining natural.

This is a table that shows the three

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options on the left. There is interpreting the statute. That statute 75.5.306 was initiated in the Montana Water Quality Act in 1967; there is Senate Bill 325 which was signed into statute in 2015; and there is the option of site specific standards, which the Department has and the Board have had available to them for a long time now.

So I'll start with 75.5.306. So the development process, and what we refer to that is simply taking that data, that information, and making that conversion into a number or set of numbers that can then inform the permit. The act at this point tells us, the Department, to make that interpretation, and that would be done by our permitting program. So it is a relatively narrow participation in that development process, and the outcome of that would be that number or set of numbers.

The public participation in that process would simply be seen in the fact sheet of a discharge permit where the public would have the opportunity to comment on the fact sheet, but not necessarily the number that was derived by the Department that interpreted natural.

So there has been a lot of questions

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about Senate Bill 325, and I think a lot of those questions are yet to be answered as we begin outreach and discussions with our stakeholders on that, but I can speak at a relatively high level on Senate Bill 325.

It's a bill that had two parts to it. There was a natural component with Sub (1), and there was a variance component Sub (2). So with respect to Otter Creek, I really do not see any need to discuss the variance subject. It is really out of play for anything we can envision in Otter Creek.

So I'll focus on Sub (1), which is defining a natural process. So it requires rulemaking, so we would be coming to the Board requesting rulemaking. The Department would be working for the Board in providing the technical expertise on that, and there would be a very robust public participation, as any rulemaking has. The outcome of that rulemaking, we would

anticipate to be the same criteria that we would get through the previous option where the Department does it internally.

The public participation, while being very robust through rulemaking, the rule is

anticipated to provide a process, and I highlighted that in the handout because it is very important, because essentially what we would come up with is a math equation that defines natural, and you'd have the equation, but you would not have the answer in rule.

So from a transparency perspective, the public, industry, other interested parties, would see a math equation, and it would be difficult to anticipate how that would inform a discharge permit. It has very much so value when it comes to providing a more simple approach for assessment purposes for the Department, and in some cases discharge permits, where it provides a robust process to inform permits, yet it does not have the answer, but the math equation.

The third option is a site specific criteria.

CHAIRMAN MILES: Excuse me a minute. You said the variance component was not in play. Would you just explain why.

MR. URBAN: Madam Chair, members of the Board. As the statute was written, the variance component considers streams where there is a problem upstream of a discharge, one that is not

associated with a discharge.

So picture a small town that's discharging into a heavily metals contaminated stream. They have no control or ability to lower those concentrations on their own, so the question was should we ask that small town to spend incredible capital to treat, when their potential to improve the stream is very little. So that variance process will allow them time and the State time to clean up the major source in the watershed, before we would ask a small town to treat for metals.

So the site specific option is something that we've had the authority to do for quite some time, and again, it includes the Board, a robust rulemaking process, and public participation. And again, I'd note that ideally all three of these processes will land on the same criteria, the same number or set of numbers that represent that natural distribution.

This process allows the public to participate in not only the equation, but the outcome, so the Board would have authority to set the number, the criteria. So unlike Senate Bill 325 option, it has the equation and the answer in

it. So from a transparency perspective, it's more robust. The answer is included in rule.

CHAIRMAN MILES: Any questions?

MS. CANTY: I have a question. So when you say that the math equation, the number is used

to inform the permit, what do you mean by inform exactly? So then the permit can be written in various ways to meet that number, can vary? The number wouldn't vary, but the ways to meet it would? Would you explain that.
MR. URBAN: Madam Chair, Ms. Canty, that's an excellent question. There is often a thought that an MPDES permit and a water quality standard are a one-to-one relation, and that is not true. There is very much site specific -- bad word choice -- there's very local information used to inform a permit, so the in-stream concentrations, the permit's proposed effluent and volume. And so in many scenarios, the standard does not equal the permit limits. It is more often the permit limits are much less than the standard, so the standard informs a permit.
MS. CANTY: So volume has a big part in the permit then, or can?
MR. URBAN: Madam Chair, Ms. Canty,

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absolutely. So when we look at writing a discharge permit, one of the first steps is to protect the worst case scenario, so a permit is written to protect that very low flow. We call it the 7Q10. In the case of Otter Creek, that happens to be zero. So the permit is written to protect the worst case scenario, and we look at the proposed discharges, also worst case scenario, which would be their highest flow and worst concentration. So we combine those two to provide limits.
MS. CANTY: Okay. Thank you.
MS. REINHART-LEVINE: Madam Chair, Mr. Urban. I just want to make sure that I'm understanding you correctly. Are you saying that it is not as helpful to have a general definition of natural first that can be sort of looked at as a general framework statewide, sort of a bigger picture first, because there would just be a math equation, and that's why you're sort of zeroing in on Otter Creek in a very site specific way to show how a math equation would be applied in a site specific area, instead of having a general framework, and looking at how generally natural could be applied statewide?

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MR. URBAN: Madam Chair, Ms. Reinhart-Levine, when we look at larger areas, there is obviously going to have to be assumptions made. So the larger the area, the more streams included, assumptions will be made. And so the Senate Bill 325 at a statewide level will have some assumptions in it, and we very much tend to make them conservative assumptions.
Now, the more local any standard, the more information you have on a more specific area, the more refined it will be. So I hope that answers your question.
CHAIRMAN MILES: George.
MR. MATHIEUS: Madam Chair, I might just add to that, just sort of making the differences between site specific standards and Senate Bill

325.

And Senate Bill 325 did contemplate sort of a streamlined process, which obviously that provides benefit for the Department, in the sense that with our stream assessments, it simplifies things for us, and even for some permit limits, but it didn't preclude us from not developing site specific standards. So the concept is there are going to be cases where it may make more sense, it

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just may make more sense to go the site specific route, because maybe it is a complicated system or it is a complicated permit, and then that added public involvement.

So I think one of the questions was can one inform the other. The answer is yes. But I think it's generally okay to take a look at these on a case-by-case basis, and say, "Does this process work here, or does it need to be more refined?" Does that help?

MS. REINHART-LEVINE: It does. I guess one comment or concern that I have is you're looking at how to apply Senate Bill 325 in one very narrow context of Otter Creek, which is in some ways very atypical of what you would have water quality issues and challenges with other streams. A concern that I have is we're not looking at a broader framework first. We're so zeroed in on this one particular area. I wonder what the ramifications would be when you try to apply Senate Bill 325 to other areas.

And so I'm kind of wondering if it would make more sense to pull back and look at natural in a broader context first, instead of just having natural right out of the chute in this one

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particular drainage. And that's the concern that I'm raising. You're looking at rulemaking, which I kind of think as more of an overarching umbrella, first, and then you look at the streams individually underneath that. I feel like we've jumped into the very narrow focus without the overarching umbrella. So that's the concern that I have. I wonder if that makes sense to you.

MR. MATHIEUS: Madam Chair, Ms. Reinhart-Levine, it does make sense, and I think one of the goals today was to try to be as clear as possible of what the approaches are, or what the alternatives are, and so that's why we've kind of laid these out in the three options that we have.

As I said earlier, I would propose that the Department have the opportunity to continue to walk through what makes the most sense in this scenario, but at the end of the day, it's still the Board's prerogative to make these decisions, and that's why we have tried to lay them out the way we have.

CHAIRMAN MILES: One other question on Senate Bill 325. So we have, the Board has responsibility under that particular statute to

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adopt some rules, and is that what you're

referring to, Michelle?
MS. REINHART-LEVINE: Yes, that is correct.
CHAIRMAN MILES: And what's the plan there?
MR. URBAN: Madam Chair, members of the Board, the Department is currently working with stakeholders trying to develop a working group with our stakeholders. We have got an exhaustive list of members that we are going to invite to participate and help direct our efforts in drafting those rules. We anticipate our first meeting to be mid-November next month.
MR. SAYLES O'CONNOR: Is that in reference to a broad rule or this specific rule to Otter Creek?
MR. URBAN: Madam Chair, Mr. O'Connor, the work group will be looking at a statewide effort.
CHAIRMAN MILES: So broader. So then the obvious question is then why, or least for me, why then try to do an Otter Creek site specific standard prior to that? Does that make sense?
MR. URBAN: Madam Chair, members of the

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Board, it's certainly a question we've been asked, and the Department had taken the direction of going the site specific route primarily based on the concept that it is the ultimate certainty in rule for a contentious stream. So it provided the ultimate transparency in the rule.
MS. CANTY: I have a question then. So if Senate Bill 325, if that were further along, I think what -- Are you saying then that Otter Creek would end up site specific anyway because of the unique circumstances? And you still have that option under Senate Bill 325 always to do the site specific; is that correct?
MR. URBAN: Madam Chair, Ms. Canty, I guess that would be the decision of the Board whether we would do that. It is something that has benefits. It is a stream that's unique, in the fact that the amount of information we have here is bar none. There are very, very few streams in the state that we have any kind of data set that represents this. So with that, there is opportunity to be very near field and focused with that stream.
MR. MATHIEUS: I was just going to say the answer is yes.

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MS. CANTY: Thank you.
CHAIRMAN MILES: Any other questions right now?
(No response)
CHAIRMAN MILES: So I guess one other question I had, thinking back to some of the testimony that we heard or comments we heard, was the applicability of one set of numbers to the entire basin, and that was of concern particularly for some upstream users or potentially upstream development. How does one set of numbers address that variation in the basin, versus perhaps the

equation approach, where maybe you would be taking into account the natural condition in a particular area, and the volume, and things like that?
MR. URBAN: Madam Chair, that's an excellent question. I guess to that I would say we're continuing to have very productive discussions with our stakeholders, and it may not need a single number. It may be more refined than a single number.
CHAIRMAN MILES: I really do appreciate the fact that the Department and the stakeholders are working on this. That's very appreciated.
MS. REINHART-LEVINE: Madam Chair,

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seeking another clarification. When you are talking about stakeholders, are you talking about on Otter Creek specifically right now, or are you talking about in the broader context for Senate Bill 325?
MR. URBAN: Madam Chair, Ms. Reinhart-Levine, yes.
MS. REINHART-LEVINE: Both of the above. Madam Chair, follow up. Are your conversations with stakeholders looking at standards that do adjust for time of year and flow? For example, for those seasonal runoff events where your water quality is better, is that something that the standards could account for?
MR. URBAN: Madam Chair, Ms. Reinhart-Levine, there certainly is opportunity in the standards setting process to adjust for seasonal needs. At this point, our data set doesn't reflect a lot of seasonal changes. However, I would caveat that we're quite aware and certain that those seasonal uses are occurring, so we are very interested in protecting that and we're obligated to protect those.
There are additional nuances in the permitting process that provide additional

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protection for high flow scenarios. I mentioned earlier that permits are written to a very worst case, so we write them to comply with zero flow in a stream such as this. And so any flow above zero, there is dilution available. That gets kind of technical and complicated, but the short answer would be we're very much looking to provide protection, either through the standard or the permitting process to those events.
MS. REINHART-LEVINE: Thank you.
MR. MATHIEUS: Madam Chair, I would just add that from our perspective, anything is on the table. I think we want this to be something that folks can get behind, so I think that there is enough nuances and technical specifics to it that it warrants these discussions that you're bringing up, and I'm assuming others. So at the end of the day, we want to make sure that we protect the uses, and what's the best way to do that.
CHAIRMAN MILES: Do you have more right now, Eric?
MR. URBAN: Madam Chair, I do not. I would just close with: We're continuing to work

with stakeholders, and not specific to Otter Creek, and that includes everyone involved with the system, and we're very optimistic that we will come back to the Board with a solution to the question.

CHAIRMAN MILES: So at this point we can expect to hear from the Department down the road, not only on Otter Creek, but on the Senate Bill 325 rules proposal as well. Keep us posted on that.

MR. URBAN: Absolutely, Madam Chair. We will be providing a briefing of our progress on Senate Bill 325 as soon as we're to that point.

MR. SAYLES O'CONNOR: Madam Chair. The initial reading of some of this is stating you want to set a level at 3100, EC at 3100, was something that frightened me a bit, because I didn't see that as protecting the historical uses that you now confirm is so important, so I'm glad to hear the information you've just given us. Thank you.

MS. CANTY: I'd like to ask more specifically. I think we've been talking about it, but just to be specific about it. If the level were set at 3100, let's say that's the standard, the permit process, though, could alter that. So let's say for the irrigators who irrigate in the spring runoff, maybe there is a several month period of time. Can a permit be written for a development that won't allow discharges during that time, so it won't affect their water quality at the time they irrigate? Is that correct?

MR. URBAN: Madam Chair, Ms. Canty, I do not believe we have the authority to say no. Rather we would have the authority to set a different bar, perhaps a more stringent bar in those scenarios.

CHAIRMAN MILES: Since this is really intended to be conversational, we may have more questions for the Department, or more comments.

MR. URBAN: Absolutely. We'll be available for questions, and I thank you for your time.

CHAIRMAN MILES: Thank you. I appreciate it. Is there anyone else who would like to comment on this?

MS. KAISER: I just have one question. Could I get a copy of your handout?

CHAIRMAN MILES: This is Heidi Kaiser on the phone, and I'm sure you have an email address for Heidi.

MR. URBAN: Madam Chair, absolutely. We will find a way to post this to our Board website.

MS. KAISER: Thank you.

MR. HAYES: Madam Chair, and members of the committee, my name is Art Hayes, Jr. I live at Birney, Montana. I'm the President of the Tongue River Water Users Association.

I would like to address kind of three

issues that have kind of been discussed here today, water quality standards. When we adopted these standards in 2003, we thought they would be protective. The only -- and I guess the answer is either yes or no. In Tongue River, no, they're not protective, because that's where the discharges are. We are constantly over the 1000 EC standard, mainly in the early spring.

Where the standards have worked are in the tributaries like Hanging Woman, Otter Creek. The reason is because there is no discharges. It is natural.

The other thing I'd like to address, and that you're not hearing from the Department, is different types of water. The basic water of Otter Creek and the alluvium is sodium sulphate water. Water that would be discharged from the

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mine, the deeper waters, are highly different. They're a sodium bicarbonate water. So in sodium, I have deep wells into coal veins, because that's one of our sources of water. The EC may only be 700, and it is a sodium bicarbonate water, but the SAR's go up to 70. So you're putting a different type of water into Otter Creek than what is natural, and it would not fit the natural criteria to put this high sodium bicarbonate water into the creek.

The question just came up just now, can we discharge -- is there a time when people are not irrigating? We irrigate on these side creeks -- Hanging Woman, Otter Creek -- when there is a flow. You can't irrigate with one CFS or two CFS of highly saline water. But when that snow melt comes, those cloud bursts, yes, we can irrigate because that dilutes that water, that sodium sulphate water, down to where we can irrigate with it, and we have for hundreds of years, and our fields are still very productive.

This spring we saw damage caused by high EC water in Tongue River to some of our irrigated fields. So I guess you've got to look at all of the scientific stuff that -- you know, EC and SAR

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are nice, but you've got to look at the different types of water there in that creek. Thank you.

CHAIRMAN MILES: Thank you. Any questions?

(No response)

CHAIRMAN MILES: Anyone else? Thank you very much.

MR. MUGGLI: Madam Chair, Board members, I'm Steve Muggli from Miles City. My family has farmed over there since the 1920s.

I think one thing that we need to look at here is let's go back and look at historically what the Tongue River and all its tributaries were fifty years ago, what that quality of water was then, and let's look at it now, what is the quality of water now.

Over the past fifty years, the quality of water has continued to go down. I realize DEQ has a very precarious job to do. They have to

balance development, urban things, agriculture, and on and on it goes. But when we look at the decisions that have been made over the past fifty years, there is one thing that's for sure, and we have a historical record: The quality of water has continued to go down. How long and how much

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longer are we going to continue to do this?

Now, you take the water that's going to be discharged out of Otter Creek. If industry goes in there and discharges one gallon, it will end up in the Tongue River. That one gallon over natural will degrade the Tongue River.

We have to look at what we're doing downstream. Eastern Montana is covered with soils like we have at Miles City, and that is going to affect agriculture all the way to the North Dakota border. We can't pick out one industry to help keep our water quality up. We have to look at everything that goes on in these drainages. That's industry, urban, agriculture, forestry. I don't care what it is. We have to look at all of it.

If there is any one of those or all of these causing a degradation of water, it is DEQ's responsibility, and those of us are that involved in the degradation, to try to mitigate that as much as we can. We need to look at the historical record. If we don't know where we came from, we're not going to know where we're going, and our quality of water continues to go down.

My farm in Miles City, we have spent

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literally millions of dollars to overcome bad water. We started out with changing tillage methods, to try to improve the flow through, and this, and that. That didn't work. We finally got a point of diversion. Instead of diverting out of the Tongue River, we divert water out of the Yellowstone, and put in -- spent millions of dollars putting in sprinklers, and I might add, we got no government assistance to do it because we don't believe in it. But we put sprinklers in. Now our quality of agriculture yields are going up.

The last twenty years irrigating out of the Tongue River, our yields across the farm dropped an average of 40 percent. We did everything in our power to try to figure out what we were doing wrong. We got people from the Salinity Lab out of California to come and look, and they said there is no way you can irrigate on these soils with this water.

So after many years of production going down, it is like how can we stay in business if we continue to use this water? Hence we made the decision to go to a different watershed to get our water out of the Yellowstone.

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Now, I guess I kind of have a problem with industry coming in. Are they going to be allowed to discharge any water? Any water that they discharge is going to affect downstream uses.

We've seen that in the past with the coal field developments in southern Montana and Wyoming. They were allowed to discharge water. It had an adverse affect on me.

It cost me and my family millions of dollars to try to mitigate this problem. Shouldn't part of that burden have been placed on industry? And part of that burden placed on industry would not have allowed them to discharge the water in the first place.

We're smart enough people to be able to look back and say, ladies and gentlemen, this isn't working. Our water quality is going down. I'm not blaming anybody, but I'm blaming everybody, myself included. We took our water for granted for many, many years. We can't do that anymore, ladies and gentlemen. And we can go back and look historically as to what has happened. Our water is getting worse, and worse, and worse.

We can live without electricity, we can live without industry, but ladies and gentlemen,

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we can't live without food. Yes, maybe eastern Montana does not produce tremendous amounts of food, but it does feed quite a few people. We're putting that in jeopardy.

This is one of the few countries in the whole world that jeopardizes their food production. We can go back and we can look at some of the studies that have been done over the years as to how many acres are no longer farmable throughout the whole world because of this very problem. The amount of acres that have gone out of agriculture production world wide is astronomical, and we're doing the same thing right now.

We know how to prevent it, but we're not doing it. So let's all work together. We have to work together as a group. We can't divide ourselves up into little segments fighting each other. We have to work as a group. And I'm very confident we can do it, but we just have to say okay, let's bury our differences. The end result is clean water. This is what we're all after. That's what we're all doing here today.

We need to work together. And if we keep allowing discharge permits, and so on and

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forth, it ain't going to happen, ladies and gentlemen. Look at the historical record. So let's try to work together. Let's get to the bottom of this.

If we can't discharge, if an industry can't discharge any water into a stream, that's the way it is, if they can't afford to run their industry because they can't discharge water, they can't afford to treat the water. I don't go into business trying to do something that I can't afford to do. If industry can't afford to treat water, then I guess the coal is going to have to stay there until we can afford to treat the water. Then we can use the coal.

But let's work together here. I know we

can. We can resolve this. We can not only prevent the water from getting worse, but we can actually make the water better, but we have to work together, and I think today is good start. Thank you.

CHAIRMAN MILES: Thank you, Mr. Muggli. Is there anyone else who would like to comment?

MS. DUNNING: Good morning, Madam Chair. My name is Daranne Dunning, and I'm here representing Northern Plains Resource Council. I spoke at the last Board meeting, and so I think I adequately covered the points at the last meeting. I'll spare you the power point this time around. But just to reiterate.

Our two concerns are, and those two concerns still remain, that any water quality standards that are set must protect the beneficial use on Otter Creek, and that is for those high flow, high quality water events that the irrigators on Otter Creek use; and that we also need to make sure that we're protecting the downstream water quality on the Tongue.

And we've heard today and at the last meeting from several irrigators on the Tongue. We know that the Tongue regularly doesn't meet water quality, even with the current standards that are in place. And the concern is that by raising those water quality standards in Otter Creek, and perhaps eventually then other tribs, we're looking at allowing more salt into the Tongue. The Tongue is in a place that it just cannot handle that.

Another concern with the Tongue is that there is inadequate enforcement written into the proposed rule and in the permitting process itself to be able to protect the Tongue. A couple of comments. I mean those are our big concerns. A couple of comments specific to today and the rule in general.

I think it is important to keep in mind that the purpose of water quality standards is to protect beneficial use. The current standards that are in place were written to be able to protect specific beneficial uses in the Tongue River and in tributaries such as Otter Creek.

The discussion that we're having about natural and being able to connect that to a certain data set completely divorces the description and that relationship between protecting the beneficial use and what a natural condition is year around. We need to make sure that any water quality standards as they're written continue to maintain and protect beneficial use, and not just arbitrarily represent an average of what's happening in that stream year around.

I don't believe that the current standards need to be changed, but in the event of any rulemaking, we do want to work with the Department to make sure we're protecting ranchers and irrigators in Otter Creek and the Tongue, and

to make sure that we are meeting those two goals that I mentioned at the beginning.

There has been a lot of focus on the specific number that's mentioned in the rule, but I also do want to say that I think there are a number of other areas in which the rule needs to be changed, and that's just to make sure that the rule is reflecting the Department's description of what the rule is going to do, and I think that there are some differences between those two things that need to be changed.

The other thing that I did want to comment on about the handout that DEQ provided this morning, specifically on the page where they're talking about 75.5.306, Senate Bill 325. Now, part of Senate Bill 325 -- and that is the important part for here today. That's the part that actually mentions rulemaking to set water quality standards. That's 75.5.222. Notably that just went into effect October 1st, 2015, so that wasn't actually in effect at the last Board meeting.

I just want to note, and perhaps this is a question for the Department, a note for the Board. I'm confused by one thing on this handout,

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and on that, it says that, "The natural criteria used to inform the MPDES permit is the same." And I do want to ask a question on that, because the terminology in those two statutes is actually different, and I'm just going to throw this out there. I think it's something that we need to address.

75.5.306 uses the term "natural," and that term is actually defined in the statute, and natural as is defined in 75.5.306 does actually take into account certainly human influences.

Now, Senate Bill 325, 75.5.222, does not use the term "natural," it uses the term "non-anthropogenic." And I would like the Department to address how they think that those terms, if they do think those terms mean the same thing. I think, just my basic reading of this, I think they mean different things, and I would like perhaps the Board to just note that, and DEQ to address that if they do think those terms are the same.

The other big picture concern that I want to raise and reiterate is that I think it is appropriate to consider the salt loading in water quality standard on a watershed basis, and my

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concern with this rule is what we're doing by just deciding how we're going to increase water quality standards for Otter Creek, increase those numbers, that we're not adequately looking at the big picture of what other drainages may also be impacted in the future. How is that going to impact the Tongue? We need to be able to look at this on a -- the water quality levels on a watershed basis.

So those are sort of a wrap-up of my previous comments, and a few new questions and

comments that I wanted to make today. Thank you for the time to allow the public to comment on that.

And I would also, for the record for DEQ, if there is going to be a meeting of stakeholders concerning implementation of 325, I'd like to formally request that Northern Plains and any other group, especially in southeastern Montana such as the Tongue River Water Users -- I imagine they also may be interested -- that we be afforded the opportunity to participate in that process. Thank you.

CHAIRMAN MILES: I don't know if the Department is interested in talking about

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non-anthropogenic versus natural at this point, or knowing that that's a topic to be considered.

MR. MATHIEUS: Sure. Madam Chair, we can. Sure. Mr. North will.

MR. NORTH: Madam Chair, members of the Board, John North.

The way the Department views Senate Bill 325 versus 306 of the current Water Quality Act is that 306 is broader, and it defines certain man-made influences as still being natural. Senate Bill 325 uses the term non-anthropogenic for the purpose of only including a subset of what is in 306. And so truly Senate Bill 325 includes only those things that are natural in the more common meaning of the word, i.e., non-human caused.

CHAIRMAN MILES: Thank you. Anyone else have any comments?

MS. LINDLIEF-HALL: Good morning, Madam Chair, members of the committee. My name is Brenda Lindlief-Hall. I am an attorney. I represent the Tongue River Water Users Association. I've represented them since 2000, and so I have been through multiple rulemakings, and specifically the rulemaking that set the

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current standards that we have been discussing.

I would like to just back up a little bit, though, and talk about some of the background and some of the driver for this discussion about rulemaking, and resetting water quality standard for Otter Creek.

To the best of my knowledge, the Department of Environmental Quality has sent Otter Creek Coal two deficiency letters requesting additional information on water quality and water quantity data for the proposed Otter Creek Mine. I don't know if those deficiency letters have been responded to or not. To the best of my knowledge, Otter Creek Coal has not yet responded, so there is a lot of information that is missing that the DEQ doesn't have regarding the amount of discharges.

I believe that during the July BER meeting, a representative for Otter Creek Coal indicated that they were going to make that a zero discharge mine, that they were going to do 100 percent containment, so that begs the question why

change the water quality standards for a permit that apparently will not ever be required.

Other information that is missing and

that is critical is the alluvial valley floor determination, and that doesn't really go to the MPDES permit and the water quality standards, but it certainly addresses water issues, the extent of the alluvial valley floor, how much irrigation would be impacted, the draw-down on the water from Otter Creek, the potential draw-down or additions of -- as Mr. Hayes pointed out -- a different kind of water, water with different constituents, different parameters in it.

So I think that there are many unanswered questions regarding water quality, regarding water quantity. In looking at one of the charts that DEQ handed out, I think it is the EC/SAR chart, it is the one with red, it says "Frequency Distribution of Real Data." There are no dates on this, so it is really hard for us to look at this. It seems very simplistic to me. When were we seeing this 500, 750, 1000 EC?

I guess I feel like I just need more information. I just feel like I really need a lot more information. I think this is pretty simplistic. I think you've heard multiple people now that there are those times of year when the water quality is very good. The land uses it to

naturally subirrigate. People use it to irrigate. All the water from Otter Creek. It's one of the major tributaries to the Tongue River.

And as you've heard, the water quality in the Tongue River has been continually declining. Starting in the early 1970s, Decker Coal started discharging into the Tongue River, into the reservoir. I think currently under two of their discharge permits, Decker Coal is discharging about 3700 gallons per minute every day continuously into the Tongue River Reservoir. There are I believe a handful of other permits that allows Decker Coal to discharge intermittently.

That's a lot of water. That's a lot of very high saline, untreated water, that is going into the Tongue River Reservoir, and into the Tongue River. Starting in the late 1990s, probably the late 1990s, I think in 1999, the coal bed methane industry came into Montana. They were discharging millions of pounds of salts and sodium every year into the Tongue River, and that doesn't take into account the discharges coming in from Wyoming, from coal bed methane development in Wyoming.

So Tongue River has had lots of insults. When we went into this rulemaking originally starting in 2001, we knew what was going on. I think there was ample science. Industry came in, took depositions; they challenged Montana's water quality standards in State and Federal Court; it went up to the Montana Supreme Court; the Montana

Supreme Court upheld these standards.

I think that to just cherry pick one comment out of the administrative record about point source discharges, I think there were a lot comments in the administrative record showing that people had real concerns about not exceeding that 500 EC on the tributaries at all. So I think that we can probably go back and get a lot of really good information that has not yet been presented to this body.

And I guess just finally, I've heard that the DEQ wants to have meetings, or is planning on having meetings with its partners. I don't know who it considers the partners to be, but the Tongue River Water Users Association has met previously with the Department of Environmental Quality. We haven't been invited to any future meetings, and we would welcome that

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opportunity to sit down and discuss with you as a whole. I don't know that we want to meet with you individually. I think that my organization would prefer to meet as a whole to discuss this because this is something that affects everyone. Thank you.

CHAIRMAN MILES: Thank you. I do believe that it's the Department intention to continue working with a number of stakeholders, and digging into more information, so you all have that same information, what the Department is talking about. Any further comment?

MR. GILBERT: Madam Chair, members of the Committee, my name is Steve Gilbert. I live in Helena. I'm here today as an interested Montana citizen. I confess that although I am just a citizen in this proceeding, I worked as a biologist for ten years on the Tongue River from the Wyoming border to Ashland, and in some cases down as far as Miles City, so I'm very familiar with the situation and what has taken place over the last thirty years or more since I started working there.

One of the things that interested me in this meeting is the use of the word

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"transparency." And I have to say there is an elephant in the room, too, for someone who hasn't been involved in this process, and the words Arch Coal come to mind. DEQ did not use those words. They didn't even really refer much to stakeholders, and somehow I missed the transparency in that.

As was mentioned before, I do have some questions that are kind of general comments. Why is it important to reevaluate Otter Creek? I think if we're going to reevaluate Otter Creek, we need to either say we're doing this to accommodate the interests of Arch Coal, or we say we're going to do this for every stream across the Board in Montana, not just Tongue River. If it is important to know what's going on in Otter Creek, it is important to know what's going on in Rock Creek, or just pick one across the state.

I find it also interesting that the DEQ chose to do extensive modeling on this one stream. Modeling. Why not gather actual factual data? You may not know that the USGS monitoring station at the lower end of Otter Creek is probably the only one in the vicinity that does not record a daily SAR value. You can get the EC. There is no SAR there. If this is such an important stream, why do we have to speculate on SAR across the board yearly?

As Ms. Lindlief-Hall mentioned, the discharges at Decker were something that were overlooked in the whole process of setting standards during the coal bed methane era. I don't have the citation, but there is a report that was done that actually discussed the volume of water going into -- and this is high SAR, high EC water coming out of the Decker mines, but it's not in thousands of gallons per minute, it's in CFS.

This water was totally ignored during the process of setting standards by DEQ during the Abe Horpstad era, and it is interesting because there was an assumption that this is such a large body of water, that we don't need to be concerned about downstream effects. The solution to pollution is dilution.

In this case, at low flows, at low volumes of water in the reservoir, there was a continual flow of high SAR, high EC water flowing into the reservoir. That water, it continues on down to drainage all times of the year, and it has an impact. These are things I think we need to evaluate, if we're also looking at Otter Creek, and we can't pass up the opportunity to realize that the only reason Otter Creek was chosen here as kind of a poster child for water quality in the state is because of Arch Coal. Let's talk about the elephant. Why accommodate industry on one river? Thanks.

MS. CANTY: I have question for you, since you're a biologist. Technically -- So what would happen then if Otter Creek is discharging a greater volume of water, this higher SAR, EC, whatever, what effect is it going to have on the stream biota? The Tongue River is quite a bit larger. So is it going to sort of dilute the concentrations in the Tongue River, and perhaps help? Is it going to be a higher concentration in the Tongue River? Is it going to hurt?

I know there is some difference, too, between concentration and mass loading, and I think we have to be concerned about what stays on the banks, or what gets irrigated, and then stays in the watershed. But if you could just sort of give me a technical answer on what happens to the stream --

MR. GILBERT: I can speculate for you. One of the other interesting things here is that some of what you're talking about is the bailiwick

of Montana Department of Fish, Wildlife and Parks. To my knowledge they have not been involved in gathering any kind of data anywhere. Below Tongue River Dam, during the onset of coal bed methane and pumping high SAR, high EC water, directly into the Tongue River, you would think that Fish, Wildlife and Parks would actually have data that addressed the effects.

We do know through a -- it is a relatively anecdotal series of studies done by a biology class from Colstrip -- that we lost entire biota, macroinvertebrates. We lost I think pretty much the entire group of stone flies below the dam. It's as a result -- if you want to speculate again -- of higher concentrations of poison in the water. What that actually does to fish, we can't say for sure, but we know that as we raise the EC and the SAR, it is not going to help them.

What this begs -- if we're going to talk about any river in Montana, any stream, any tributary to Tongue River -- it begs study. FWP should have been gathering data.

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Well, let me back up. I worked on the CX Ranch from 1977 to 1986 gathering data for a proposed coal mine there. It was Consolidation Coal property. During that period we gathered fisheries, aquatics, water quality, wildlife, soils, vegetation; we did alluvial valley studies; we gathered a lot of data on Squirrel Creek, which runs through the CX Ranch. And interestingly, none of that data appeared anywhere in the EIS prepared by Bureau of Land Management for the development of the entire industry in the southeast Montana wide coal bed methane march.

We need that information. If we're going to be honest here, we need to say -- as many of you have already said -- "Why just look at Otter Creek?" Well, the only reason we're looking at Otter Creek specifically now is in regard to changing standards is because of Arch Coal. If DEQ doesn't accommodate Arch Coal by changing the standards, they can't mine there.

Let's be fair. Let's gather that fisheries data, macroinvertebrate data, start -- and it's late in the game. Start now. Let's not continue to gamble. We're gambling with things that are kind of finite. The soils issues with

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the Muggli farm operation. We pour enough high SAR water on those clay soils, and they seize up, and there are no more crops. But what's that same water doing to the aquatic insects and fish?

No one knows because we don't have the data. DEQ doesn't have the data. Fish, Wildlife and Parks doesn't have the data. If we are going to set standards that will maybe be enforced -- which of course they haven't been -- let's get some data on which we can base our facts.

MS. CANTY: Thank you.

MS. HEDGES: Madam Chair, members of the Board, Ann Hedges of the Montana Environmental Information Center, and I promise to be quick.

I think you've heard over the course of the last couple meetings a smattering of the issues that are before you. I think that it is very complicated. I think everybody in this room is looking for certainty in an outcome. I think that that's the challenge, because they're looking for certainty for a different reason.

And the reason that the irrigators are looking for certainty is because their livelihoods depend upon it. They have had certainty for a quite a few years, and that is changing with what

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the Legislature did potentially, and that makes them nervous, understandably so, because their livelihoods are stake. So how to do you help provide certainty in this very complex situation?

And I just want to talk very briefly about the process that you need to -- I would recommend that you use to get there, and the process isn't starting with the minutiae. The process is doing what we do in the law. In the law you start broadly. You say, "Here is the law," and then you funnel that information down to help guide you in rulemaking, and then you funnel that down to help guide you in the permitting process.

If you start by telling people that there is going to be a change, and that change is going to be implemented at the bottom level of that rung, which is the permitting process, you have created great uncertainty for them because you haven't created the side boards initially.

We now have some side boards in the law regarding what natural means. It is time to take that next step, and it is not going all the way to the end of the game. The next step is to define what natural really means in a more functional

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manner than what exists in the law today. The law is a start, and then you make rules to implement that law, and then you make a rule to implement something on a really smaller scale geographically.

If you start at the end, you are going to cause uncertainty for everybody, and you're going to have a situation which you're going to have to back pedal to try to start redefining what natural is in your rulemaking. I don't understand why this is somehow turned on its head. I think that's part of the conflict that we're facing here today. I think it really behooves us to take that step back, to take this in stages, and not to jump to the end first.

And one of the things in that type of funnel system that you should be looking at is not just Otter Creek. Again, if you start by saying what is this new standard going to be at Otter Creek, you start at the end of the process for the definition; but for the water quality you have as well, because as we know, this is a watershed that is productive agriculturally, it is important agriculturally, and livelihoods depend on getting it right.

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And we can't just take Otter Creek in isolation. Again, that's getting really site specific at the very beginning. What we should be doing is saying let's take a look at that watershed and figure out how to protect the Tongue, and that includes the tributaries, which include Otter Creek. But let's start more broadly and move to the more narrow issue, and that will help us define what we want the outcome to be at the very end of the day, which is the water quality standards and implementation through permitting for Otter Creek. But let's start step, by step, by step, and not jump to the end of the process first. Thank you.

CHAIRMAN MILES: Thank you, Ms. Hedges. Board members, any further questions or comments? Department?

(No response)

CHAIRMAN MILES: Thank you all. That was very informative, and a lot of work to get done, and I appreciate the Department's commitment to begin working on that, and as well as the Senate Bill 325 issues, because I think that they very interrelated.

We'll take a break, take about a ten

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minute break before we get into new contested cases. I think that business will go fairly quickly. Ten minutes.

(Recess taken)

CHAIRMAN MILES: I'd like to get started again. I would like to reconvene. We're at Item No. 3 on our agenda to look at some new contested cases, and our decisions on those matters will be whether this Board wants to take those matters up directly or assign them to a Hearings Examiner. And there is no public comment on that, but we can discuss these with Ben. So Ben, I'm going to turn it over to you.

MR. REED: Thank you, Madam Chair. For all one and two, I've established some initial prehearing protocols. I've sent out a prehearing protocol on No. 2.

No. 1 has generated a bit of a problem -- not a problem as such -- but the appeal was initiated by the chief operating officer of the umbrella corporation that controls all three of the entities that are involved in these permits.

CHAIRMAN MILES: Ben, I think it would be good if we do one by one, and then take a motion on those separately. So if you can give an

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overview of the first one.

MR. REED: Certainly. I apologize, Madam Chair. When we received the appeal in the initial in for 2015-04 A, B, and C, we received it from the chief operating officer of the corporation that's the umbrella corporation for all three entities. It was a Mr. Pozzi. That gentleman later contacted me, and informed me that they would be withdrawing the appeal for all three. However, since that time, we haven't heard

anything from the gentleman, so I'm preparing to issue a prehearing order in the matter that I hope will include some dispositive language indicating that if the matter isn't taken up relatively quickly, that the appeal will be dismissed.
CHAIRMAN MILES: So is it appropriate then for us to consider assigning a permanent Hearing Examiner, or should we just wait on what happens here?
MR. REED: I believe it is most appropriate to assign a Hearing Examiner.
CHAIRMAN MILES: Is there a motion to that effect?
DR. BYRON: So moved.
CHAIRMAN MILES: Moved by Dr. Byron.

Second?
MR. TWEETEN: I'll second.
CHAIRMAN MILES: Mr. Tweeten seconded. Any discussion on this matter?
(No response)
CHAIRMAN MILES: All in favor, please say aye.
(Response)
CHAIRMAN MILES: Opposed.
(No response)
CHAIRMAN MILES: Hearing none, the motion carries. That matter is assigned to Ben as permanent Hearing Examiner.
MR. REED: And then in both Nos. 2 and 3, I've issued a proposed scheduling order, but have done nothing further, so both No. 2 and No. 3, it would be appropriate for the Board to assign a permanent Hearing Examiner. They've not specifically requested a Board hearing.
CHAIRMAN MILES: Thank you. So I think still for the record, we should do these one at a time. So the first one would be in the matter of Heart K Land and Cattle Company, their appeal of its final certification with conditions. Is there a motion to assign that to a permanent Hearings

Examiner?
MR. TWEETEN: Madam Chair, may I ask a question? Ben, did I understand you to say they have not asked for a hearing yet?
MR. REED: They have. They've not asked for one specifically before the Board.
MR. TWEETEN: I see. Thank you.
CHAIRMAN MILES: Do we have a motion to assign that to a Hearing Examiner?
MR. TWEETEN: So moved.
CHAIRMAN MILES: Mr. Tweeten moved. Is there a second?
DR. BYRON: Second.
CHAIRMAN MILES: Dr. Byron seconded. Thank you. Any further discussion?
(No response)
CHAIRMAN MILES: All in favor, please say aye.
(Response)
CHAIRMAN MILES: Opposed.
(No response)

CHAIRMAN MILES: Hearing none, the motion carries unanimously.

The final one would be in the matter of Westmoreland Resources appeal of the final MPDES permit. I won't go through all those numbers. You have them on the agenda. Is there a motion to assign that case to a permanent Hearing Examiner?

MS. REINHART-LEVINE: So moved.

CHAIRMAN MILES: Thank you.

MS. CANTY: I'll second the motion.

CHAIRMAN MILES: Thank you. Any further discussion on that matter?

MR. TWEETEN: Madam Chair, thirty years ago I worked on a lawsuit involving this mine, and I seriously doubt any information that developed in the course of that lawsuit has any currency with respect to any issues that are going on now, but I wanted to put that on the record as a disclosure. I don't believe I have any conflict of interest or anything, but I did want to make a record of the fact that that relationship existed a long time ago, but if I discover there is anything even tangentially related to matters that I worked on previously, I'll let the Board know.

CHAIRMAN MILES: Thank you. I was just going to say that you can let us know if you do discover any of that. Any further discussion? Thank you for that notification.

(No response)

CHAIRMAN MILES: All in favor, please say aye.

(Response)

CHAIRMAN MILES: Opposed.

(No response)

CHAIRMAN MILES: Hearing none, the motion carries unanimously.

We will now move to Item B, which is the initiation of rulemaking, and the DEQ will -- George, are you going to handle this?

MR. MATHIEUS: Madam Chair, members of the Board, not specifically, but I will introduce Mr. Eric Merchant.

MR. MERCHANT: Madam Chair, members of the Board, again, for the record, my name is Eric Merchant, and I'm with the Department's Air Quality Bureau.

I guess I would note right out of the gate that it doesn't appear there's much interest in this topic as a briefing item. With this action, the Department is proposing the repeal of certain air quality rules which either, one, are no longer used; two, for which the affected sources are not longer operational; or three, for which corresponding federal rules have been invalidated.

Importantly, I also wanted to note here that our primary stakeholder, the Clean Air Act Advisory Committee, which is comprised of industry, environmental groups, citizens, state and federal regulators, they have been advised on

this action. To date we haven't received any substantive comment or input.

So the first two rules that you have for repeal in your packet there are ARM 17.8.334 and ARM 17.8.335. These rules apply to existing -- importantly -- existing aluminum reduction plants which are operating in Montana. At the time these rules were adopted, the only existing aluminum plant in the state of Montana was the Columbia Falls Aluminum Company, or CFAC, and that remains true today. Many of you may know that CFAC has in fact shut down and ceased operations at this time.

So therefore, because there are no existing aluminum plants operating in Montana, ARM 17.8.334 and ARM 17.8.335 no longer apply to any facilities, and therefore are no longer necessary. Also importantly any future aluminum plant that may choose to operate, locate and operate in Montana will be regulated appropriately by

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Montana's federally approved air permitting programs, and also there are certain federal standards that would apply, such as New Source Performance Standards.

Again, specific to ARM 17.8.334, this action will serve a dual purpose. ARM 17.8.334 is contained in Montana's federally approved State Implementation Plan or SIP. The SIP constitutes Montana's plan for complying with the Federal Clean Air Act, and it is administered by the Federal EPA, Environmental Protection Agency. The SIP consists of narrative rules, agreements, technical documentation, which individual states use to achieve and maintain compliance with the National Ambient Air Quality Standards.

On May 22nd, 2015, EPA found that ARM 17.8.334 provides an automatic exemption from emission limitations during startup, shut down, and/or malfunction events, or SSM events. This is important because what happened here is this rule effectively allowed this facility to violate standards during these SSM events. EPA found that that was impermissible under the Clean Air Act, and because it's contained in our SIP, our State Implementation Plan, this is a serious issue for

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them.

So as a result of the EPA finding, Montana must correct or remove ARM 17.8.334 from the SIP by November 22nd of next year, which is eighteen months from EPA's finding.

So if the Board repeals this rule today or starts the process to repeal this rule today, the Department would then simply withdraw this rule from the State Implementation Plan, thereby taking care of EPA's concerns.

ARM 17.8.335, just jumping back to that, is a state only rule, not contained in Montana's SIP, and therefore is not affected by EPA's finding in this case on that issue, because that rule does in fact also provide certain exemptions from emission limitations for necessary maintenance of pollution control equipment.

You've got some of that information in your packet as well.

So skipping to a different topic, but a rule that we're asking for repeal is ARM 17.8.772. The Board adopted this rule effective October 27th of 2006, and this was in response to the Federal Clean Air Mercury Rule or CAMR. CAMR established a federal mercury emissions trading budget, and

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allowed states to adopt cap and trade rules modeled after EPA regulations. In response Montana adopted ARM 17.8.772.

Subsequently, the Federal DC Circuit Court of Appeals vacated CAMR on February 8th, 2008. Because CAMR was invalidated by the Federal Courts, Montana is not required to submit mercury allowance allocations. Also because there is no federal mercury trading budget, and no state allocations, the Department has not been using or submitting such allocations, and will not do so in the future at least under this rule.

The Department however will continue to regulate mercury emissions from electrical generating units under ARM 17.8.771 -- that is a Montana State rule -- and then also of course applicable federal program, such as the mercury and air toxic standards.

Again, the rules today that we're proposing to repeal include ARM 17.8.334 and 335 specific to CFAC, which is now shut down; and then ARM 17.8.772 related to mercury cap and trade.

I also did want to point out today that for future reference, we are planning as a bureau, as an agency, for future air quality rule repeals.

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As an example of that, there are additional rules that apply directly to CFAC in our Administrative Rules, and some of them are in the State Implementation Plan or SIP. Right now we are in discussion and ongoing evaluation with the Environmental Protection Agency, and also internally, on when and what rules we might, in that group, that we might seek repeal in front of this body as well.

And also, of course, if we have any future repeals, we will continue to work with our primary stakeholders, the Clean Air Act Advisory Committee, so that everybody is on the same page, and we all understand what the Department is trying to do, and that we get any feedback in front of the process.

So in closing, I just wanted to say the Department recommends the Board initiate rulemaking on this for the proposed action, and I also wanted to thank you for your time, and wondered if there were any questions at this time.

CHAIRMAN MILES: Any questions from the Board?

MR. TWEETEN: I'm a little unclear. You may have touched this in your remarks, but it

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didn't sink for me if it you did.

When future aluminum plants, if someone

were to acquire the CFAC site and want to redevelop it as an aluminum plant, as unlikely as that may be factually -- I don't know if there is any possibility of that happening -- but if there were to be a proposal to establish a plant in the future, and we repeal these regs, what's there to regulate emissions from those future plants?

MR. MERCHANT: Madam Chair, Mr. Tweeten. Yes, I did allude to that, and maybe it was glossed over. We have existing federally approved permitting programs. This source would be subject, any new source would be subject to those requirements. And these rules were also developed a very long time ago for a specific source, and so of course they wouldn't have the flexibility for a new source of proposing -- that they would be proposing.

The important point here is that the rule does say specifically existing aluminum plants. That would be that one plant that existed at the time when the rule was developed, and only that one plant that existed at the time that the rule was developed. So they're effectively

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defunct rules. They don't have any purpose.

CHAIRMAN MILES: So even if there was development on that same site, it would be a new --

MR. MERCHANT: It would be a new source, yes.

CHAIRMAN MILES: So if I understand correctly, 334 and 335 are really no longer applicable, and in fact are problematic leaving them on there, the provisions about, what you said about the SIP. And do you envision needing to replace 772 with anything? I think you said 771 would take care of it?

MR. MERCHANT: Madam Chair, the Board, yes. For 334 and 335, and that's the CFAC facility. Those are -- and we just talked -- they're done. And yes, 334 in fact has been deemed by the EPA to cause some real problems for Montana's implementation of the Clean Air Act. But 772 doesn't apply. Its corresponding federal program was vacated. And we do have, Montana does have mercury limitations on electrical generating units in place in 771, and there are also federal programs that we, as a state, implement as a delegated program.

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CHAIRMAN MILES: Any further questions?

(No response)

CHAIRMAN MILES: Is there anyone from the public that wishes to comment?

(No response)

CHAIRMAN MILES: Seeing none, is there a motion to initiate rulemaking to repeal ARM 17.8.334, 17.8.335, and 17.8.772?

MS. CANTY: So moved.

CHAIRMAN MILES: Marietta Canty moved to initiate rulemaking. Is there a second?

MR. SAYLES O'CONNOR: Second.

CHAIRMAN MILES: Thank you, Roy. Any

further discussion?
(No response)
CHAIRMAN MILES: All in favor, please say aye.
(Response)
CHAIRMAN MILES: Opposed.
(No response)
CHAIRMAN MILES: Hearing none, the motion carries unanimously to initiate that rulemaking. Thank you. Thanks, Eric. George, No. 2.
MR. MATHIEUS: Thank you, Madam Chair.

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For Item No. 2, I believe we have Mr. J. J. Conner.
MR. CONNOR: Madam Chair, members of the Board, my name is J.J. Connor, and I'm the unit coordinator for the DEQ Open Cut Mining Program. Today I'm in front of you requesting initiation of the rulemaking to adopt new and revised rules in order to make general revision of the rules implementing the Open Cut Mining Act, ARM Title 17, Chapter 24, Subchapter 2, and these are in response to the acts enacted in 2007, 2009, and 2013 legislative sessions.
Starting with the 2013 legislative session, the proposed changes to the rules implement Senate Bill 332, and provide in principle the following items: One, the proposed rule changes provide a fast track process available to permitted operators for a limited open cut operation of less 10,000 cubic yards. This change replaces the previous short form by increasing the time that an operator could operate from six months to a year, and increasing the amount that they could mine from 5,000 cubic yards to 10,000 cubic yards.
Two, the proposed rule changes provide

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that unpermitted operators have the duty to provide annual production reports, and pay annual production fee.
Three, the proposed rule changes provide for modification of reclamation requirements to accommodate landowner designation of produced materials for personal use, and identification of private roads that would not be permitted or reclaimed.
Four, the proposed rules changes provide clarification of the notice requirements for properties with multiple owners.
For the 2009 legislative session, the proposed changes to the rules implement House Bill 678, and the proposed revisions are as follows: One, the proposed rule change would implement revised public notice requirements; two, the proposed rule changes would follow the statutory changes to the application process by striking provisions for application review in favor of citation of the act; three, the proposed rule changes would repeal the provision for mandatory inspection upon submittal of an application to the Department; four, the proposed rule changes

implement the annual production fee of two and a half cents per cubic yard.

For the 2007 legislative changes, proposed change to the rules implement House Bill 383, and revise the rules to provide for calculation of reclamation security, the bond, based on the actual estimated cost of reclamations of a site by a third party contractor.

In addition to these legislative changes, the following rule changes are proposed in an effort to clarify historic problematic areas within the existing rules: Number one, clarifying the proposed rules and the information required on the landowner consultation form.

Two, provide for circumstances when amendments to the permit would require consultation with the landowner by the applicant.

Three, provide procedures that specify the requirements of a limited open cut operation that occurs within 300 feet of an existing operation.

Four, provide an expedited amendment process in the event that an operator only desires to extend the reclamation date for their existing operation that is no more than five years old.

Provide for phased bond release.

Six, require operators to sign and identify stock piles on site.

Seven, clarify the requirements for test hole information by providing specific requirements that would be followed by the operator when obtaining soil and overburden information for their applications to submit to the Department

Eight, updating provisions and requirements for maps to be submitted with an application, thereby making it clear to the operator what was required on each specific map that is required for their application.

Although there are numerous strike-outs and additions in the proposed rules, most of these changes were done to clarify and simplify the rules by reorganizing and streamlining them into similar sections to improve clarity. In other words, the mine rules were put in the mining section, and the reclamation rules were put in the reclamation section.

Also the proposed changes repeal two sections deemed to be redundant, and eliminate concepts that have been a source of confusion, such as the distinction between mine level and facility level areas. Overall the rules were revised by eliminating redundant provisions and improving syntax throughout.

The Open Cut Mining Program has provided stakeholder outreach since December 2013. We've met several times in the last two years. The Open Cut Program and the stakeholder group has worked together to revise the rules that we have presented today.

Thank you for your consideration, and is there any questions that you may have on the proposed rule changes?

CHAIRMAN MILES: Any questions?

(No response)

CHAIRMAN MILES: Thank you for mentioning -- I did have a question about if there had been any stakeholder participation in this, and you've answered that. I'm just curious about this. I don't mean to be critical. I'm just curious if some of these rule changes are as a result of statutory changes from 2007 and 2009, how have the existing rules and those statutory requirements been reconciled during the past six, seven years?

MR. CONNOR: Madam Chair, members of the

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Board, functionally we've implemented the changes as the acts came out. One way that we did that was obviously working with our stakeholders, but implementing through form changes that we would roll out.

CHAIRMAN MILES: What do you mean by that, form changes?

MR. CONNOR: Applications. The operator is required to submit an application to the Department for a permitting application, and we have changed our application materials on our website that the operator can download, and submit to the Department for their proposed --

CHAIRMAN MILES: And those reflect some of those statutory, earlier statutory provisions?

MR. CONNOR: They reflect all the statutory changes.

MR. SAYLES O'CONNOR: Madam Chair, I have a question. Can you define stakeholders? When you say stakeholders, are you talking about industry? And who else is involved? Neighbors or facilities?

MR. CONNOR: Our stakeholder group is quite large, and includes industry, at times private landowners that may have a gravel pit on

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their property, it includes environmental groups. Whoever wants to be on the stakeholder list is on it. We promote that, and have worked with them over the last few years.

CHAIRMAN MILES: Any further questions?

(No response)

CHAIRMAN MILES: Thank you. So Board members, I should have been a little clearer on the first rulemaking. Just to clarify that, we have a couple of options. We can initiate rulemaking and issue the attached notice of public hearing on proposed adoption that was included in your Board packets; we can modify the notice and initiate rulemaking; or we can determine that the adoption of the rules is not appropriate and deny the request to initiate rulemaking. Is there a motion from the Board on one of these options?

MS. CANTY: I'm just looking in the back row there, and I'm seeing lots of faces that don't look like they agree with that. Do we have that

incorrect or --
MR. MERCHANT: Madam Chair, members of the Board, are we talking about the rulemaking that I introduced?
CHAIRMAN MILES: Right. We already acted on the ones that you introduced, and I just should have been clearer that we had options. I said I would accept a motion to initiate rulemaking, and I wanted to specify that this Board has the option of either initiating as is, modifying, or not proceeding. So we're working on the Open Cut Mining Act proposal right now.
MR. MATHIEUS: Madam Chair, might it be appropriate ask for public comment at this time?
CHAIRMAN MILES: Thank you. I forgot that. Is there anyone from the public that would like to comment on these proposed changes to the Open Cut Mining Act?
MR. HEGREBERG: Madam Chair, members of the Board, for the record, my name is Cary Hegreberg. I'm the Executive Director of the Montana Contractors Association. Our association represents the companies that produce collectively most of the gravel and asphalt in the state of Montana. We are among the stakeholders that have been actively participating with the DEQ over the past number of years in the stakeholders group.
Some of you in the room may recall some rather contentious legislative hearings over the bills that passed, resulting in why we're here today looking at these proposed rules. I will say that the DEQ has done a tremendous job of trying to bring the various interests together that work together and sometimes at odds in the legislative process to get those bills passed, and DEQ has really gone overboard in trying to bring public involvement into this process, to meet the concerns of industry, and private landowners, and counties.
And we are very supportive of the DEQ's move today to propose these rules. We've been working very closely with the agency and the staff to develop this template that you're looking at today. I would say there'll probably be very little comment from our member companies from this time moving forward because the agency has done a great job of trying to incorporate our ideas and concerns into the draft that's been presented. So I would certainly be happy to answer any questions.
One I guess comment. I just returned from a trip to North Dakota where I grew up, and my family farms up in the northwestern corner of that state where there has been a tremendous amount of oil exploration and production in the last several years, and it takes a phenomenal amount of gravel to improve the roads, and to put the drill pads in for those oil wells, and gravel in that part of the state is very scarce.
And I was given a pretty good lesson in

how reclamation laws really should work, because North Dakota really doesn't have much in terms of reclamation laws, and there are some producers that are leaving some pretty terrible eyesores on private land in the northwestern corner of that state. And I don't think it is appropriate to leave land in worse shape than you found it.

And so I got a little personal lesson up close with some of the neighbor properties where I grew up, and so I just want to pass that along. From the standpoint of our producers, we think that DEQ has done a great job of trying to balance the various interests in our state. Thank you.

CHAIRMAN MILES: Thank you, Mr. Hegreberg. Any questions?

(No response)

CHAIRMAN MILES: Is there anyone else who would like to comment on these proposed rules?

(No response)

CHAIRMAN MILES: Seeing none. George, thank you. I think now we're looking at a motion from the Board on the Department's request to initiate rulemaking.

MS. REINHART-LEVINE: So moved.

CHAIRMAN MILES: Thank you.

MR. TWEETEN: Second.

CHAIRMAN MILES: It has been moved and seconded. Is there any further discussion on initiating rulemaking and issuing the draft notice of public hearing that was included in our packet?

(No response)

CHAIRMAN MILES: All in favor, please say aye.

(Response)

CHAIRMAN MILES: Opposed.

(No response)

CHAIRMAN MILES: Motion passes unanimously. George, No. 3.

MR. MATHIEUS: Thank you, Madam Chair. The Department would like to propose that we strike three from the agenda. We determined that we have some more work to do on this item, and propose that we bring it back in December. And I think we didn't realize that until we'd already sent out the draft agenda, so that we just thought that would be easier to take care of it here.

CHAIRMAN MILES: That sounds great. I wasn't looking forward to reading through every one of those changes as we moved to initiate rulemaking. So we'll look for that in December or whenever the Department is ready. That's it for initiation of rulemaking.

Item C, we have some final action on the rules that we actually initiated in July regarding conflict of interest and the Federal Clean Air Act, and George, would you like to introduce that.

MR. MATHIEUS: Madam Chair, Mr. John North, Chief Legal Counsel, will be presenting that for us today.

CHAIRMAN MILES: While John is coming up to the podium, folks might want to get to page --

I think it is 266 of your Board packet, because there is, as I understand a specific amendment that you are requesting, and that language is on Page 266.

MR. NORTH: Thank you, Madam Chair. That's correct. This matter was brought to the Board because of a notification from EPA that our State Implementation Plan or SIP needed to be amended to include conflict of interest

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requirements that are contained in Section 128 of the Federal Clean Air Act. And I won't repeat, since you took that up in July, I won't repeat what those are.

I will just tell you that the Board did initiate without a hearing; public comment was opened; and the only comment received was the Department's comment in support of the rulemaking. No comment was received from members of the public.

After the rulemaking was initiated, however, we discovered that there was one problem, and this is what the Chair was referring to in New Rule II, and that is that it indicates in the proposed rulemaking that if the Board, or a Board member has a conflict, if the Board member derives a significant portion of income from a regulated person, which would mean then the requisite percentage -- which is either 10 or 50 percent -- would have to have been received from one regulated entity. And of course, the federal rule says that you qualify as having a conflict if you receive that percentage cumulatively from regulated entities.

And I apologize for this. Computers are

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good, but sometimes combining drafts can also lead to this type of an error. But we submitted a comment requesting that the Board change that from "a regulated person" to "regulated persons." And we confirmed with EPA that EPA would consider that to be a significant deficiency in the rule, such that SIP approval would not occur. They did confirm that.

And so the Department requests then that the Board adopt the proposed rules with that change, and adopt also the House Bill 521 and 311 analyses that have been provided. Basically the 521 analysis indicates that this wouldn't constitute a taking under the federal or state constitutions; and the 311 analysis is whether or not it is more stringent than federal, and it is not. It basically repeats federal requirements. Thank you.

CHAIRMAN MILES: Thank you. And I actually misspoke when I said Page 266. That was the reference to the 521 analysis, and I think your language, the proposed language for going from "a regulated person" to "regulated persons" was on Page 272. You have summarized that motion that includes that particular change, as well as

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the 521 and 311 analysis.

MR. NORTH: Yes.
CHAIRMAN MILES: Is there discussion or questions from the Board members?
(No response)
CHAIRMAN MILES: Any member of the public want to comment on this proceeded rule?
(No response)
CHAIRMAN MILES: Seeing none, the Chair would entertain a motion to either adopt this, or to modify it, or to not take action.
DR. BYRON: So move that we adopt with the proposed amendments.
CHAIRMAN MILES: Thank you. Dr. Byron moved. Is there a second?
MR. TWEETEN: Second.
CHAIRMAN MILES: Mr. Tweeten seconded it. Is there any further discussion on this proposal?
(No response)
CHAIRMAN MILES: All in favor, please say aye.
(Response)
CHAIRMAN MILES: Opposed.
(No response)

CHAIRMAN MILES: Hearing none, motion pass unanimously.
MR. REED: Madam Chair, if I may. I apologize for having been asleep at the switch previously, but under Roman III(B)(2), I believe that the Department recommended that the Board initiate rulemaking and appoint a Hearings Examiner as well, and I don't believe that the motion that was entertained was also appointing a Hearing Examiner.
I'm not sure if in Roman III(B)(1), since there is no public hearing, I don't think that a Hearing Examiner is absolutely crucial, but for (B)(2), I think there may be one.
CHAIRMAN MILES: So was reference to that in the materials in the packet? It is not in the agenda here, but we can certainly modify that.
MR. NORTH: Madam Chair, John North. I believe that the motion -- while you're correct, I think the motion did indicate to go out with the notice that had been provided, which does provide for a Hearing Officer.
CHAIRMAN MILES: We did specifically mention with the attached notice.
MR. REED: Madam Chair, thank you very much.
CHAIRMAN MILES: Did we vote on that last one? Okay.
I think we are up to the point of taking final action on contested cases. This discussion might go on awhile. We'll take just a five minute break. Marietta needs to recuse herself from this portion of the meeting.
(Recessed at 11:35 a.m. and reconvened at 1:15 p.m.)
CHAIRMAN MILES: I believe Item 2 and 3 under final action on contested cases actually do

not require action, and Ben, would you please explain that.

MR. REED: Both of those matters were assigned to me as the Hearing Examiner, and therefore they don't require any Board action.

CHAIRMAN MILES: The final agenda item. Is there any general public comment?

(No response)

CHAIRMAN MILES: General public comment?

(No response)

CHAIRMAN MILES: Hearing none, is there a motion to adjourn?

MR. TWEETEN: So moved.

MR. O'CONNOR: Second.

CHAIRMAN MILES: All in favor, please say aye.

(Response)

CHAIRMAN MILES: Opposed.

(No response)

CHAIRMAN MILES: Thanks for a good discussion. I appreciate the conversation and the concerns, and I hope we have taken the right avenue here, and move forward. Meeting is adjourned.

(The proceedings were concluded at 1:16 p.m.)

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C E R T I F I C A T E

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

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

That the proceedings were taken before me at the time and place herein named; that the proceedings were reported by me in shorthand and transcribed using computer-aided transcription, and that the foregoing - 96 - 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 , 2015.

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires
March 12, 2016.

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