

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
MARCH 31, 2017)

TRANSCRIPT OF PROCEEDINGS

Heard at Room 111 of the Metcalf Building

1520 East Sixth Avenue

Helena, Montana

March 31, 2017

10:00 a.m.

BEFORE CHAIRMAN JOAN MILES,
BOARD MEMBERS CHRIS TWEETEN, DR. ROBERT BYRON;
and ROBIN SHROPSHIRE (By telephone)

PREPARED BY: LAURIE CRUTCHER, RPR

COURT REPORTER, NOTARY PUBLIC

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ORIGINAL

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

3 * * * * *

4 CHAIR MILES: I think Robin Shropshire
5 is on the phone, so we'll call the meeting to
6 order. Thanks everyone for being here, those of
7 you who are on the phone and those of you who are
8 here in person. This is the March 31st, 2017
9 meeting of the Board of Environmental Review.

10 Joyce, do you want take roll call.

11 MS. WITTENBERG: I can do that. Joan.

12 CHAIR MILES: Here.

13 MS. WITTENBERG: Chris.

14 MR. TWEETEN: Here.

15 MS. WITTENBERG: Robert.

16 DR. BYRON: Here.

17 MS. WITTENBERG: Robin.

18 MS. SHROPSHIRE: Here.

19 MS. WITTENBERG: Is anybody else on the
20 phone?

21 (No response)

22 CHAIR MILES: We may or may not hear
23 from Michele on the phone, but I think we'll hear
24 her if she comes on. So we do have a quorum. The
25 first item of business is to review and approve

1 the minutes from January 31st. I did note a³
2 couple of just very minor typos in the minutes and
3 gave those to Joyce. They were not substantive
4 except for the misspelling of Robin's name. I
5 thought that was a substantive mistake on the
6 minutes. So I think the motion, unless anyone has
7 other corrections to the minutes, would be to
8 approve the minutes with corrections, and Joyce
9 will take care of that.

10 MR. TWEETEN: So moved.

11 DR. BYRON: Second.

12 CHAIR MILES: It's been moved and
13 seconded. Any further discussion?

14 (No response)

15 CHAIR MILES: All in favor, please say
16 aye.

17 (Response)

18 CHAIR MILES: Opposed.

19 (No response)

20 CHAIR MILES: Hearing none, that passes
21 unanimously with the small corrections I've given
22 to Joyce.

23 We'll go to contested case update, and
24 we'll hear from Andres Haladay, our Board
25 attorney.

1 MR. HALADAY: Thank you, Chair. Just
2 going down the list, starting with enforcement
3 cases assigned to the Hearing Examiner.

4 Items (a) and (b), which I'm just going
5 to colloquially call Copper Ridge 1 and Copper
6 Ridge 2 at this point, both have been submitted
7 fully on cross motions for summary judgment, so
8 those are pending before the Hearing Examiner, and
9 a decision may be forthcoming.

10 In terms of Item (c), Buscher
11 Construction, in front of each of you who are
12 present -- and I apologize to the individuals on
13 the phone -- there is a stipulation entered by the
14 parties dismissing this, pursuant to functionally
15 Rule 41, and so that's signed. It didn't make the
16 agenda because of the late date, but this matter
17 will just be removed from the Board's agenda going
18 forward.

19 CHAIR MILES: Just for Robin's
20 information, we do have that. It is just a short
21 two page order, and it is signed by the Department
22 of Environmental Quality and the attorney for
23 Buscher Construction. So thank you.

24 MR. TWEETEN: Andres, I always have to
25 ask this question. Is this dismissal with or

1 without prejudice?

2 MR. HALADAY: Without it being
3 mentioned, the general default would be with
4 prejudice. I know in the last one we did it
5 didn't say, and the Chair wrote in "with
6 prejudice." In that case, I thought it was okay
7 to allow that because the Department was agreeing
8 to it, and present. The same would probably hold
9 true today. This is an enforcement case, and as a
10 result, it would be functionally the Department
11 who would be the most prejudiced if it was
12 dismissed with prejudice, and they didn't want it
13 to be.

14 Likewise, because of the timing
15 deadlines in appealing these, it functionally is
16 dismissed with prejudice regardless of whether it
17 says with or without prejudice, because no one
18 could resuscitate this.

19 MR. TWEETEN: Just for future reference,
20 it might help to put that in explicitly, so also
21 the parties who aren't lawyers will understand
22 what's going on.

23 MR. HALADAY: Sure, and that's probably
24 something that when I receive these on my end, I
25 can either insert or ensure with the parties, and

1 I see Mr. North nodding that that can probably be
2 done in the future.

3 MR. TWEETEN: Great. Thanks.

4 CHAIR MILES: Thank you.

5 MR. HALADAY: Item (d) Goran, what is
6 there for the Board, a scheduling order is in
7 effect, and discovery is ongoing. Nothing
8 additional to report on Goran.

9 Item (e), that's Oil Field Rock and
10 Logistics. Motions and replies to motions to
11 intervene have been submitted and briefed. That
12 is fully briefed. But at the same time, the
13 parties who are currently in this matter requested
14 a delay in providing their proposed scheduling
15 order so that they have further time to converse,
16 and so that is delayed until I believe April 7th,
17 so something should be forthcoming one way or the
18 other from the parties at that point.

19 In the matter of Vanak Transportation,
20 as you can see, the Department submitted a motion
21 to dismiss on March 9th. No response was
22 forthcoming from Vanak. A show cause order is
23 probably the next step in that matter as we
24 haven't heard from Vanak Transportation.

25 Is there any additional questions on any

1 of the enforcement cases?

2 (No response)

3 MR. HALADAY: I'll turn to the
4 non-enforcement cases.

5 Phillips 66 is the same report as last
6 time, what's before the Board. There is an order
7 approving stipulation to stay the appeal, and the
8 parties have been ordered to comply with the terms
9 of the stipulation.

10 In LT Trucking, a scheduling order was
11 put into effect. Discovery is ongoing. The
12 parties are proceeding under that scheduling
13 order.

14 In the matter of Heart K, if the Board
15 recalls, that's one where summary judgment was
16 denied, and the parties agreed to come and enter a
17 new scheduling order post denial of summary
18 judgment. The parties did provide a proposed
19 scheduling order. It was my fault. I missed
20 that. It was submitted, so that order has been
21 entered, and so there is a scheduling order in
22 effect.

23 Westmoreland, nothing to report there.
24 Still waiting on a status report within thirty
25 days of any order issued by the Montana Supreme

1 Court.

2 Item (e), Laurel Refinery, the same as
3 before. A scheduling order is in effect and
4 discovery is ongoing.

5 Item (f), Signal Peak Energy's Bull
6 Mountain Coal Mine No. 1. The Department recently
7 filed a motion to compel discovery and to stay
8 some deadlines regarding depositions in this
9 matter. It hasn't been close enough to receive
10 any response from the opposing side yet, so we're
11 still waiting on that briefing, so that's mid
12 briefing at this point.

13 Item (g), Timbershor, the two motions to
14 dismiss were converted into summary judgment
15 motions due to the parties including matters
16 outside of the record in their briefs. Those
17 summary judgment motions are now fully briefed,
18 and are just awaiting disposition.

19 Item (h), Payne Logging, a scheduling
20 order is in effect. The parties are complying
21 with it.

22 And Item (i), Western Energy Company
23 Rosebud, there are now multiple motions regarding
24 discovery. One is fully briefed having to do with
25 the scheduling order that was entered after this

1 Board denied summary judgment back in December;
2 and there is a second motion that is partially
3 briefed regarding certain witnesses that were
4 named by the Petitioners in that case.

5 Any questions on the non-enforcement
6 cases from the Board?

7 (No response)

8 CHAIR MILES: Okay. Thank you. Move
9 on.

10 MR. HALADAY: Contested cases not
11 assigned to a Hearing Examiner. I don't know if
12 Mr. North wants to give a brief update.

13 MR. NORTH: Madam Chair, members of the
14 Board, John North, Chief Legal Counsel for DEQ.
15 The status hasn't changed. We're still awaiting
16 the Judge's order on the motion for attorneys
17 fees, and the matter cannot proceed until that
18 occurs, so we're still waiting.

19 CHAIR MILES: All right. Thank you.

20 MR. HALADAY: Other briefing items.
21 This was Eureka Pellet Mill. This one actually
22 hasn't been on the Board's agenda. It was left
23 off for some reason for the last few. As you can
24 see, on January 30th, the parties entered into a
25 stipulation to dismiss this matter. I don't see

1 that a copy was put in the agenda. We can find a
2 copy and get it to the Board, but it is the same
3 as Buscher and the previous cases that are
4 dismissed under Rule 41. And so that one has been
5 put on the agenda, and it will be removed off of
6 the next agenda.

7 CHAIR MILES: I guess maybe for the
8 purpose of having complete records, maybe if there
9 was a copy of it included. Would the minutes
10 contain copies of those orders?

11 MR. MATHIEUS: (Nods head)

12 MR. HALADAY: So if there is no other
13 questions on those, that is the end of the
14 briefing items.

15 CHAIR MILES: Thanks. We'll move on to
16 action items, and there is a couple of new
17 contested cases, and these are all included in one
18 of the attachments to the agenda, so I'll let you
19 start with those, Andres.

20 MR. HALADAY: Sure. So a little bit
21 more substance than some of the previous items
22 that the Board has received at the last couple of
23 meetings on these appeals. I'd leave it to the
24 pleasure of the Board to determine if the Board
25 wants to keep these items assigned, any or all of

1 them, to a Hearing Examiner.

2 With regard to Item No. 3, Glacier Ranch
3 Subdivision, I would certainly recommend that one
4 be assigned to a Hearing Examiner, solely because
5 there are some procedural issues. It is hard to
6 tell who exactly the appealing party is, and it
7 appears to be signed on behalf of a corporation
8 without an attorney, and so procedurally it's
9 probably better to suss out some of those issues
10 without having the Board have to get mired down in
11 those questions. Otherwise, I would leave it to
12 the Board, unless you have any questions.

13 CHAIR MILES: Do you want to just give
14 us a brief couple sentences about these. And I
15 don't know -- Then we can decide if we need to do
16 these under individual motions, or take one motion
17 to assign the three cases to a Hearing Examiner.

18 MR. HALADAY: Absolutely. Wagoner
19 Family Partnership, I think that's Item No. 1,
20 that's an appeal from a violation of the Opencut
21 Mining Act. Again, just briefly looking at it,
22 this doesn't appear to be -- this is just off the
23 cuff -- but all that substantive or complicated of
24 a matter. I'm not sure that the Board would want
25 to hold on to it specifically.

1 The additional item of Montanore, that
2 has to do with an MPDES permit approval, five
3 sections of it, that Montanore is appealing from,
4 and that one has a bit more substance to it, it
5 appears. We received at least one contact from an
6 outside party interested in potentially
7 intervening, just asking about the process for how
8 that happens, so that one may attract slightly
9 more interest just from a substantive level.

10 And then again my comments with regard
11 to Glacier. That has to do with the review of a
12 water system, but I would certainly recommend that
13 that one be assigned, just to sort out the
14 questions of attorney, circumstances, sort of like
15 Vanak Transportation right now.

16 CHAIR MILES: Any questions from the
17 Board members?

18 (No response)

19 CHAIR MILES: Do any of the Board
20 members see the need to retain any of these
21 directly?

22 (No response)

23 CHAIR MILES: Then I think we could have
24 probably one motion to assign the three new
25 contested cases to a Hearing Examiner.

1 MR. TWEETEN: So moved.

2 CHAIR MILES: Chris has moved.

3 DR. BYRON: Second.

4 CHAIR MILES: Rob has seconded. Any
5 further discussion?

6 (No response)

7 CHAIR MILES: All in favor, please say
8 aye.

9 (Response)

10 CHAIR MILES: Opposed.

11 (No response)

12 CHAIR MILES: Hearing none, thank you,
13 and I appreciate that's more work piled on your
14 desk, but I appreciate your work on that.

15 MR. HALADAY: Happy to do it.

16 CHAIR MILES: Thank you. Move on to
17 final action on contested cases, and I believe
18 this is probably the next attachment that was on
19 -- that's Big Rock, LLC.

20 MR. HALADAY: So just by way of
21 background, this is Item No. 1, Big Rock, LLC,
22 violations of the Opencut Mining Act. The quick
23 procedural background you probably saw in the
24 proposed order, but Big Rock generally did not
25 participate in any of the proceedings. A show

1 cause order was issued. The Department moved to
2 dismiss. A show cause order was issued.
3 Ultimately there was no response to that. And so
4 I generated proposed findings of fact, conclusions
5 of law, and order for the Board's consideration.

6 I tried to include all of the documents
7 that would allow the Board to see that Big Rock
8 was given sufficient notice and opportunity to be
9 heard in this matter. The parties had an
10 opportunity to file objections or exceptions to
11 this. No one chose to, and as a result, it was
12 put on the Board's agenda.

13 CHAIR MILES: Any questions?

14 (No response)

15 CHAIR MILES: So just procedurally, do
16 we need to sign the order, or do we approve the
17 order?

18 MR. HALADAY: I think you would just
19 adopt as your final agency decision --

20 CHAIR MILES: -- the proposed findings
21 of fact, conclusion --

22 MR. HALADAY: -- the proposed findings
23 of fact, conclusions of law, and order, and that
24 would then become the Board's decision. If the
25 Board wanted to make changes or amendments to any

1 of the specific findings of fact or conclusions of
2 law, that would change things slightly.

3 CHAIR MILES: Any questions from the
4 Board, or any need to make any changes in the
5 proposed order, and findings of fact, conclusions
6 of law?

7 MR. TWEETEN: I have no questions, and I
8 don't see any reason to make any editorial
9 changes.

10 CHAIR MILES: So you just need a motion
11 to accept it?

12 MR. HALADAY: I think, yes, a motion to
13 adopt the Hearing Examiner's proposed findings of
14 fact, conclusions of law, and proposed order, as
15 the Board's final decision.

16 CHAIR MILES: Is there a motion to that
17 effect?

18 DR. BYRON: So moved.

19 CHAIR MILES: Dr. Byron moved.

20 MR. TWEETEN: Second.

21 CHAIR MILES: Chris seconded. Any
22 further discussion?

23 (No response)

24 CHAIR MILES: All in favor, please say
25 aye.

1 (Response)

2 CHAIR MILES: Any opposed?

3 (No response)

4 CHAIR MILES: Motion carries. Thank
5 you. Take that one off the list. Columbia Falls.

6 MR. HALADAY: Columbia Falls Aluminum
7 Company. So I guess I'll give a little bit of
8 background first. This was, as I understand it, a
9 four day hearing was held back in November of 2016
10 by the Board's former Board attorney.

11 Under the Montana Administrative
12 Procedures Act, proposed findings of fact,
13 conclusions of law in a contested case proceeding
14 that goes to hearing is supposed to be done by the
15 individual who actually presided over the hearing,
16 in part for that individual to assess any
17 necessary credibility determinations of witnesses.
18 Reviewing bodies have very deferential treatment
19 to a Hearing Examiner or Judge's determinations of
20 credibility, and determining which facts to agree
21 with and which to not agree with when two parties
22 have differing statements of the facts.

23 However, MAPA also provides a mechanism
24 for if a Hearing Examiner or the presiding officer
25 becomes unavailable at some point, for a Board or

1 an agency to reassign it to a different Hearing
2 Examiner, and provides mechanisms for how the
3 matter can be resolved, as my memo set out.
4 Basically the parties can agree to allow the
5 record to be reviewed if there is no disagreements
6 with regards to witness credibility. The parties
7 can waive credibility issues.

8 If the parties can't reach a consensus
9 on that, then really there is no recourse other
10 than to have the matter reheard, which I think is
11 something generally nobody wants to do in these
12 cases.

13 Those provisions, 621 and 622 of MAPA,
14 appear to provide that it is the Board's ultimate
15 determination whether or not the individual is
16 unavailable. It appears to be, in this case,
17 arguably met if you have an individual who leaves
18 State employment, is out of the country, and was
19 generally unavailable to render the opinion.

20 However, the Board also has a general
21 due process obligation outside of the
22 Administrative Procedures Act to provide parties
23 meaningful opportunity to be heard, and so it was
24 my recommendation that the parties be allowed to
25 be heard in this matter with regard to their

1 opinion of whether the Hearing Examiner should be
2 declared unavailable.

3 Part of the due process considerations
4 that are again not contained in MAPA, but that the
5 Montana Supreme Court has laid out, have to do
6 with whether the delay in the rendering of a
7 decision is caused by the agency or the Board in
8 this case, or by parties themselves. And so in a
9 case where the party actually acquiesces or agrees
10 to the delay, they can't be heard to then complain
11 later that they weren't provided that meaningful
12 opportunity.

13 So it seemed a good opportunity for the
14 Board to ask the parties where they were on this,
15 given that the matter was heard in November, and
16 everyone had agreed that the former Hearing
17 Examiner would address it, and to date I had had
18 no information one way or the other that this
19 matter was being worked on.

20 Update since my memorandum. I had a
21 chance to speak with Mr. Reed just this past week,
22 who indicated that he is indeed still working on
23 it, and intends to provide proposed findings of
24 fact and conclusions of law.

25 Given my read of the parties' respective

1 filings after the memorandum, and that
2 representation by Mr. Reed, I'd probably recommend
3 that the Board table any determination with regard
4 to unavailability at this time; probably not deny
5 it just for the purposes of if it needs to be
6 resuscitated at some point, it is easier to take
7 it off the table.

8 But that said, I believe the Board
9 should give the parties opportunity to be heard at
10 this point, and I'm guessing it won't change their
11 respective opinions, given that Mr. Reed has now
12 stated affirmatively that he intends to still
13 pursue this matter, but I'd be happy to answer any
14 questions before that.

15 CHAIR MILES: I just have a few
16 comments, too. One of the reasons that we had
17 this on the agenda, Andres and I have had some
18 conversations about it, and we had not heard
19 anything from Ben, so we didn't know the status of
20 things. And we have an obligation as a Board to
21 not unnecessarily delay action. That's our
22 obligation to act on and resolve these matters.
23 So we wanted to bring this to the Board's
24 attention.

25 I do appreciate the memos that both of

1 the parties submitted that said you're willing to
2 wait. I think we'd probably bring it up again in
3 June to find out the status of it. I would
4 anticipate that we'll have something from Mr. Reed
5 by that time. But I think it is important to have
6 the record show that we've had this discussion,
7 because we recognize that this is getting
8 postponed, and it is important to have your
9 written statements, and I would welcome before we
10 move on to have any other statements that you'd
11 like to give the Board, that we have that in the
12 record that we've had that discussion. So Chris.

13 MR. TWEETEN: Before we hear from the
14 parties, I've got a question for Counsel. Did Mr.
15 Reed give you any idea when he might be prepared
16 to submit this proposed findings and conclusions
17 document?

18 MR. HALADAY: Board Member Tweeten, no,
19 and I intentionally didn't ask, just given the
20 fact that despite him being the former Board
21 Counsel and me being current, we're not the same
22 individual in that sense, and so I'm a little wary
23 of inquiring into his mental processes and those
24 things. I can understand your question.

25 MR. TWEETEN: Understandable. Right.

1 One other question. Once the proposed decision is
2 prepared by the Hearing Examiner, under MAPA the
3 parties have an opportunity to review it, and
4 state exceptions, and file briefs, and so forth,
5 and then the matter goes to the Board for
6 determination if there is any exception from
7 either party submitted to the Hearing Examiner's
8 decision.

9 My question is: Do you think it would
10 be inappropriate for the Board to, once that
11 document comes out and the parties have a chance
12 to review it, and I'm expecting that exceptions
13 would be filed, if exceptions are filed, can we
14 roll this whole issue together for oral argument
15 in front of the Board, including any objections to
16 the process for producing the proposed findings
17 and conclusions, and objections as far as
18 timeliness, plus objections on the merits? I
19 think we could probably roll all of that stuff
20 together for argument before the Board at one
21 time. Do you disagree with that?

22 MR. HALADAY: I think that's absolutely
23 correct. Process-wise, the way I would just see
24 it, as in any case, the parties will be given -- I
25 don't see a problem with me giving the parties,

1 when the decision comes in, just setting deadlines
2 for them to provide those exceptions, deeming the
3 matter submitted, and then providing it to you all
4 as a matter of process; then at that point, in
5 those exceptions, the parties can raise sort of
6 any of their concerns in this matter.

7 And of course, again, given the case law
8 that exists with regard to due process and
9 meaningful opportunities to be heard, this case
10 doesn't even register on the scale, but it is
11 always important to make sure that the Board is
12 diligently pursuing that obligation, and
13 ultimately if the parties are displeased with the
14 Board process, they always have ultimate recourse
15 to District Court to raise those arguments.

16 And that's where those cases have been
17 adjudicated in the past, is District Court
18 determinations of whether the whole process met
19 constitutional standards, and so that one issue
20 would probably not be one for the Board
21 necessarily. The parties could register those
22 complaints, but generally the reviewing Courts
23 have been pretty deferential to allowing parties
24 to raise constitutional concerns before either
25 District Court or Montana Supreme Court, and not

1 have the Board make those determinations.

2 MR. TWEETEN: Okay. Thank you very
3 much.

4 CHAIR MILES: Thanks.

5 MR. TWEETEN: Can we hear from Counsel?

6 CHAIR MILES: Yes.

7 MR. MOZER: Madam Chair, members of the
8 Board, my name is Kurt Mozer, and I'm the Counsel
9 for DEQ in this matter. And this is John Tietz
10 right here from CFAC.

11 CHAIR MILES: Thanks for coming in.

12 MR. MOZER: I guess at this point, you
13 do have our statements that we filed. We believe
14 it is premature at this time to transfer it.
15 During the course of the hearing, Mr. Reed did
16 indicate that he was leaving. He also indicated
17 that he had every intention of completing his
18 responsibilities. He asked for post hearing
19 briefing on the matter, and we had scheduled the
20 date to submit the proposed findings and
21 conclusions of law on February 3rd. So that was
22 all sort of contemplated, knowing he was leaving,
23 knowing he was going to Europe. And so at this
24 time, I believe it is premature.

25 I do think that you don't -- Again, we

1 appreciate the timeliness concerns always. At
2 this point there does appear to be case law on the
3 matter as far as how long it can go. Certainly if
4 it goes too long, then there are due process
5 concerns, but at this point I don't think we're
6 even close to that area yet. So we support
7 certainly the delay at this point, keeping it with
8 Ben for the time being, and then checking later to
9 see how progress is going.

10 CHAIR MILES: I think we're all relieved
11 to know that we've been in touch with Ben, and
12 he's working on it.

13 MR. TIETZ: Madam Chair, members of the
14 Board, John Tietz again for Columbia Falls
15 Aluminum. I concur with everything that Kurt just
16 said. Hearing that Ben is actually still around
17 gives us a little bit more assurance, that it is
18 going to be proceeding, and so we would concur
19 that we should let that happen and play out before
20 anybody makes a decision to short circuit the
21 process that was already contemplated at the time
22 the hearing was conducted.

23 CHAIR MILES: Thank you. And I just
24 would state I know Ben has all the best intentions
25 to get this done. I just know what it is like

1 when you leave a job, and then you leave the
2 country to boot, it is hard to pick it up again.
3 I'm glad he's been in touch, and he's working on
4 that, and happy to do that, and thank you for
5 agreeing to that, and that's in the record, and
6 we'll bring it up in June, or maybe we won't bring
7 it up in June, but somebody might bring up in
8 June.

9 MR. TWEETEN: Madam Chair, may I? Just
10 a comment.

11 CHAIR MILES: Yes.

12 MR. TWEETEN: It seems to me, after
13 hearing from our Counsel, and hearing from the
14 parties, that assuming we get the proposed
15 decision from Ben between now and June, what we
16 should do then is appoint Mr. Haladay as the
17 successor Hearing Examiner for purposes of dealing
18 with all the procedural ins and outs of getting it
19 in front of the Board, extensions of time for
20 filing objections to the proposed decision and so
21 forth. Somebody needs to handle those procedural
22 details, and if we substitute Mr. Haladay for Mr.
23 Reed, that would let Andres take care of all of
24 those procedural things.

25 CHAIR MILES: Do we do that at the time

1 everything is filed?

2 MR. TWEETEN: I would think we would
3 wait until after the proposed decision. If we
4 substitute him now, then Ben doesn't have any
5 jurisdiction anymore. So once that decision is
6 in, the parties need to have somebody to turn to
7 in the event they need relief. The time deadline
8 I think is set in statute for thirty days, I
9 think, if I remember correctly. So if anybody
10 needs relief from that or any other procedural
11 issue comes up, we have somebody there to deal
12 with it, rather than having to bring it in front
13 of the whole Board.

14 CHAIR MILES: So in term of timing,
15 would we wait until our meeting in June, or would
16 we perhaps have a special meeting via conference
17 call to do that?

18 MR. TWEETEN: As I said, I don't think
19 we can do it before Ben submits the proposed
20 decision. And perhaps we could adopt a motion
21 today that would make that substitution effective
22 as of the date that the proposed decision is
23 received by the Board, and that way we wouldn't
24 have to come together again and take it up in a
25 special meeting by phone or something like that.

1 CHAIR MILES: Any comment from the
2 Department or parties on that? Does that work? I
3 think your point is well taken that we need
4 somebody then that would be able to handle
5 logistics.

6 MR. MOZER: Madam Chair, members of the
7 Board, we have no objection to that approach.

8 CHAIR MILES: That would be contingent
9 -- it would be effective at the date that that is
10 submitted? Mr. Tietz.

11 MR. TIETZ: Yes. Just to clarify that
12 just for procedural matters, that the actual
13 substantive decision would still be Mr. Reed's,
14 and it would just be to shepherd the process along
15 from the point that he submits his decision to the
16 Board's consideration. I don't think CFAC would
17 have a problem with that.

18 MR. TWEETEN: Andres, do you see any
19 problem with doing that?

20 MR. HALADAY: No. I think you can make
21 probably essentially a preemptive motion that just
22 says upon the receipt of the proposed findings of
23 fact, conclusions of law, and proposed order in
24 this matter, the matter is reassigned to the
25 Board's attorney for the purposes to deal with any

1 procedural matters necessary to bring this to the
2 Board for a final agency decision.

3 MR. TWEETEN: Okay. Great. Madam
4 Chair, I would move that as of the date that the
5 proposed decision in this Columbia Falls Aluminum
6 matter is received by the Board, Mr. Reed be
7 relieved of his responsibilities as Hearing
8 Examiner with the Board's thanks, and Mr. Haladay
9 be substituted as the Hearing Examiner for
10 procedural matters that require attention prior to
11 the time that the merits are submitted to the
12 Board.

13 CHAIR MILES: Is there a second for that
14 motion?

15 DR. BYRON: Second.

16 CHAIR MILES: Rob Byron has seconded.
17 Any further discussion?

18 (No response)

19 CHAIR MILES: Any comments by the
20 Department or CFAC?

21 (No response)

22 CHAIR MILES: All right. Thank you.
23 All in favor, please say aye.

24 (Response)

25 CHAIR MILES: Opposed.

1 (No response)

2 CHAIR MILES: That's a good solution.
3 Thank you. So that's a contingency.

4 MR. HALADAY: One thing, Chair. I would
5 probably just recommend, given that there is the
6 recommended final action that this matter be
7 removed and reassigned, and still technically
8 pending on the agenda. I'd probably recommend
9 that the Board just table consideration of Item 2,
10 my original memorandum in this matter, just so
11 that loose end is cleaned up.

12 CHAIR MILES: Okay. Is there a motion
13 then to I guess table any decision on --

14 MR. HALADAY: -- the unavailability of
15 the current Hearing Examiner until such time that
16 a Board member wants to take it off the table. If
17 that never happens, it would essentially just sort
18 of lie fallow and die. And if for some reason we
19 arrived at June or the meeting thereafter, and the
20 parties were still waiting, it could essentially
21 be --

22 CHAIR MILES: -- taken off the table.

23 MR. HALADAY: And again, as I said
24 before, the Board doesn't need the acquiescence of
25 the parties to declare a Hearing Examiner

1 unavailable. The Board could do that on its own.
2 The parties could raise those objections, and
3 those objections could be argued to, again, a
4 reviewing tribunal at a later date. But leaving
5 that opportunity for the Board to determine I
6 think is a benefit, but again, I'd leave it to the
7 Board.

8 CHAIR MILES: I don't think that whole
9 thing was a motion. Do you want to state a
10 motion?

11 MR. TWEETEN: I'm not sure that, having
12 just adopted the motion that we did, that any
13 further action is required with respect to the
14 question of the unavailability of Mr. Reed as the
15 Hearing Examiner. We basically moved that issue
16 down the road, and made a procedural contingency
17 to take effect after the proposed decision is
18 submitted.

19 Having said that, out of deference to
20 Counsel, I'm happy to move to lay on the table for
21 the time being. That's what laying on the table
22 means.

23 CHAIR MILES: So that would be to table
24 any further action on -- I just want to make sure
25 Laurie can get the proper motion.

1 MR. TWEETEN: Table any further action
2 on the question of the unavailability of the
3 Hearing Examiner.

4 DR. BYRON: Second.

5 CHAIR MILES: Any further discussion?

6 (No response)

7 CHAIR MILES: All in favor, please say
8 aye.

9 (Response)

10 CHAIR MILES: Hearing none, motion
11 passes. Thank you very much, Andres, for your
12 work on that, and for the discussion, and Chris,
13 for your clarification.

14 MR. TWEETEN: Madam Chair, I'd just
15 observe that, and we all hope that we never have
16 to approach this question of unavailability again,
17 and that everything will proceed in an orderly
18 way; but in the event we have to revisit this
19 issue, let's all remember the first thing we have
20 to do is take it off the table.

21 CHAIR MILES: Thanks. I think there is
22 one last item under final action on contested
23 cases.

24 MR. HALADAY: That's right. It is Clark
25 Canyon Hydroelectric Project. This is really just

1 a notice to the Board. We've actually had three
2 of these at this meeting. This is another party
3 stipulation to dismiss this matter. In this case
4 with prejudice is noted. I see Board Member
5 Tweeten is nodding there. So Clark Canyon will be
6 removed. No further action is necessary from the
7 Board, and that's that unless you have questions.

8 CHAIR MILES: Questions?

9 MR. TWEETEN: No.

10 DR. BYRON: No.

11 CHAIR MILES: Thanks for your work on
12 this.

13 Before we move on to final adoption of
14 rules and initiation of rulemaking, I wanted to
15 just ask Andres and maybe the Department, too, to
16 give us the status of the proposed legislation
17 that would eliminate the Board, and I'm just
18 asking that because I'm wondering how everything
19 would transition if that passes, and when an
20 effective date of it would be, and what would
21 happen to some of these issues that the Board has
22 taken on, what would happen at that point. So
23 just a little update on information there would be
24 appreciated.

25 MR. HALADAY: So from my end, just

1 procedurally, I believe it is SB337 was heard in
2 the Senate Natural Resources Committee. It passed
3 out of committee, and went to the Senate floor
4 where I believe it passed third reading. It
5 passed second. I heard that hearing, and it
6 recently passed third hearing, and so it's been
7 transferred to the House. I'm not sure if a
8 hearing date has been set yet. It will go before
9 House Natural Resources.

10 Functionally, it basically removes
11 references. It eliminates the Board of
12 Environmental Review. That's the title of the
13 bill. It removes references to the Board of
14 Environmental Review, the Board, from anywhere in
15 the code, and replaces that reference with the
16 Department. So from a just purely legal
17 functional sense, the Department will take over
18 all of the Board's current responsibilities under
19 law. I don't know how the Department intends to
20 implement it or anything more than that.

21 CHAIR MILES: Does anyone know what the
22 effective date of that bill would be?

23 MR. MATHIEUS: Madam Chair, I believe it
24 is October 1st.

25 CHAIR MILES: So we'd still be able to

1 finish up at least some of the things that we're
2 involved in at this point if that passes.

3 I also know that there was or is a
4 resolution for confirmation for several of the
5 Board members. Do you know the status of that?
6 Has a date been set on that?

7 MR. MATHIEUS: Madam Chair, I do not
8 believe a hearing date has been set. I can
9 confirm that, but I'm not positive.

10 MR. TWEETEN: Has the Governor
11 transmitted those reappointments to the Secretary
12 of State? Have the appointments even been made at
13 this point? I have not heard about it.

14 CHAIR MILES: The confirmation hearings
15 are for Rob, Michele, and Roy O'Connor, who were
16 appointed two years ago. They've never gone
17 through the confirmation procedure. The remaining
18 four of us -- you, and I, and Robin, and Marietta
19 -- I guess are still on the Board until any new
20 appointments are made, and maybe that's in limbo
21 right now to determine what happens with the
22 Senate Bill 337.

23 MR. TWEETEN: I don't know if the
24 Governor is waiting until after the session ends
25 to make those appointments. I'm sure making

1 appointments probably slides down the list of
2 important things to do during a legislative
3 session, so --

4 CHAIR MILES: Right.

5 MS. SHROPSHIRE: Especially if we're
6 eliminated.

7 MR. TWEETEN: If we get sunsetted, then
8 we could save ourselves some trouble.

9 MR. HALADAY: Chair, there are three
10 resolutions out there with regard to the three
11 members who would need to be confirmed by the
12 Senate. At this time they haven't been, as Mr.
13 Mathieus pointed out, tee'd up for any hearing or
14 consideration by the Senate at this point. The
15 Senate has been considering other board
16 appointments.

17 CHAIR MILES: I would just ask, out of
18 courtesy to my colleagues who have not been
19 appointed yet, that they be notified as soon as
20 possible, because I know there was a request that
21 they be available for those confirmation hearings.
22 So I just think it would be the courteous thing to
23 do to give people as much notice as possible, if
24 they're expected to come all the way to Helena,
25 particularly Dr. Byron, who has a long distance to

1 come, and Michele who has a brand new baby. So if
2 we can try to find out when and if that would be
3 scheduled, but I understand, as Robin pointed out,
4 maybe that's just in limbo as well.

5 MR. MATHIEUS: Madam Chair, we were
6 asked to notify the Board members. I think I
7 maybe did that a month or so ago. And I think
8 Michele confirmed that she was unable to travel,
9 and I believe Roy was somewhere warm during the
10 anticipated time. So if that changes, I'll make
11 sure that we communicate with the Board members as
12 quickly as possible.

13 CHAIR MILES: Okay. Thank you. And I
14 guess if that resolution is not heard, what would
15 be the status then of the three Board members?
16 Let's say that this elimination bill passes, and
17 the Board stays in existence until October. What
18 if there is just four of us on the Board, or three
19 of us? Yes, I guess four.

20 MR. NORTH: Madam Chair, members of the
21 Board, John North. Yes, if the Legislature
22 adjourns sine die without having approved those
23 three Board members, they are no longer on the
24 Board, and at that point, the Board would just
25 consist of the four hold over members. And so

1 that would mean -- unless the Governor were to
2 appoint other people to fill in, assuming --

3 If the bill were to pass, so that the
4 Board would remain in existence just until October
5 1st, then it would be a four person board unless
6 the Governor appointed other interim Board
7 members, and those interim Board members could not
8 be the members that had not received confirmation.
9 And if the Governor did not do that, we'd have a
10 four person Board, and according to the
11 quasi-judicial board statute, that would mean
12 every action would have to be unanimous in order
13 to be taken.

14 CHAIR MILES: I know that if the
15 Legislature were to take affirmative action not to
16 confirm, they would no longer be on the Board, but
17 you're saying even if they just take no action?

18 MR. NORTH: Right. That's the way
19 that's been interpreted.

20 CHAIR MILES: I don't really like to be
21 a wait and see kind of person. I would like to be
22 able to plan to meet my responsibilities. But I
23 guess we're just under a wait and see status right
24 now.

25 MR. TWEETEN: Madam Chair, you've been

1 in the Legislature. You know how things can --

2 CHAIR MILES: A lot can happen in the
3 last month.

4 MR. TWEETEN: -- get bogged down in that
5 situation, so we're sort of at their mercy.

6 CHAIR MILES: I will not be in state for
7 the June meeting, but I will be available by
8 phone. But I guess before we got into any issue
9 about who would chair that meeting, we can wait
10 and see. Thank you.

11 I think we're looking at adoption of the
12 final water quality standards, so Amy. I think we
13 will move over to the side here. Do you have
14 something you're going to show us?

15 MS. STEINMETZ: Madam Chair, I do not.

16 CHAIR MILES: I thought you were getting
17 something ready.

18 MS. STEINMETZ: For Myla.

19 CHAIR MILES: So that's on the next one.

20 MS. STEINMETZ: Good morning, Madam
21 Chair, members of the Board. My name is Amy
22 Steinmetz, and I work in the Water Quality
23 Standards and Modeling Section in the Water
24 Division at DEQ.

25 On December 9, 2016, the Board adopted

1 to initiate rulemaking for several water quality
2 standards amendments, including adoption by
3 reference of an updated version of Department
4 Circular DEQ7. Changes to DEQ7 were proposed
5 primarily to be consistent with federal
6 regulations, and the major changes proposed to the
7 water quality standards rules included addition of
8 a second EPA approved method for E. coli
9 measurement, as well as modification of surface
10 water use class designations, including latitude
11 and longitude, removing tribal waters from our use
12 classifications because we do not have
13 jurisdiction over those waters.

14 A public hearing was held on February
15 10th, and public comment period closed February
16 20th. The Board received one comment. The
17 commenter noted that the referenced dose for
18 pesticide Penoxaden had been changed by the EPA's
19 Office of Pesticides. We used that reference dose
20 in our calculation of the proposed water quality
21 standards, updated water quality standard for
22 Penoxaden.

23 We recommend updating again the standard
24 for Penoxaden based on the new reference dose, and
25 adopting the rest of the amendments as initiated

1 in December.

2 CHAIR MILES: And we have in our packet
3 the House Bill 521 analysis and all of that.

4 MS. STEINMETZ: That is correct.

5 CHAIR MILES: Are there any questions
6 for Amy?

7 (No response)

8 CHAIR MILES: Thanks for your work on
9 this. That was pretty impressive. There was one
10 comment that was submitted.

11 MS. STEINMETZ: Madam Chair, that is
12 correct.

13 CHAIR MILES: So the Board's options are
14 to either adopt the proposed amendments as set
15 forth in the attached draft notice of amendment,
16 which includes the required analyses, adopt the
17 proposed amendments with any revisions, or decide
18 not to adopt the amendments, and the Department's
19 recommendation is that we adopt the rules, and we
20 adopt the House Bill 521 and 311 analyses, the
21 Presiding Officer's report, and proposed
22 amendments with modifications as set forth. Is
23 there a motion from the Board?

24 MR. TWEETEN: So moved.

25 CHAIR MILES: To adopt the Department's

1 recommendation?

2 MR. TWEETEN: Yes.

3 DR. BYRON: Second.

4 CHAIR MILES: Any further discussion?

5 (No response)

6 CHAIR MILES: All in favor, please say
7 aye.

8 (Response)

9 CHAIR MILES: Any opposed?

10 (No response)

11 CHAIR MILES: Thank. Very much. Motion
12 passes. The rules have been adopted. Great work
13 on that. That was a big challenge.

14 At this point we'll move over to the
15 chairs on the side for a brief presentation, and
16 this has to do with the rules pursuant to
17 75-5-222, but I forget what the Senate Bill was --
18 325, which was the one about -- Well, you'll get
19 into it. But part of that statute deals with
20 requirement for the Board to adopt certain rules.
21 And again I'm assuming, if we begin this
22 rulemaking process, and if anything were to
23 change, would you have to start it over again, or
24 would it just substitute the Department as the
25 entity adopting the rules?

1 MR. NORTH: (Nods head)

2 CHAIR MILES: All right. Robin, I think
3 you probably hopefully got the email with the
4 attachment of today's presentation, and then
5 we'll --

6 MS. SHROPSHIRE: I did, yes.

7 CHAIR MILES: We'll get back together
8 when the presentation is over.

9 MS. KELLY: Good morning, Madam Chair,
10 members of the Board. My name is Myla Kelly, I'm
11 the Section Supervisor for the Water Quality
12 Standards and Modeling in the Water Quality
13 Division here at Montana DEQ. As Madam Chair
14 said, we're here today to request initiation of
15 rulemaking to implement MCA 75-5-222 Sub (2), the
16 statute that states if pollution upstream of a
17 discharger is due to anthropogenic sources, a
18 variance from water quality standards may be
19 appropriate under certain conditions. Today I'd
20 like to brief you on the components of the
21 proposed rule, and address any questions that you
22 have.

23 As I've noted to the Board in the past
24 briefing, this product has been achieved through a
25 public stakeholder work group process. That was

1 our Senate Bill 325 work group. The work group
2 began meeting in January of 2016, and is comprised
3 of representatives from Montana of widely varying
4 interests: Industry, environmental, agriculture,
5 local government.

6 Throughout the development of the
7 proposed rule, in addition to working with our
8 stakeholder work group, we've worked hand in hand
9 with the US EPA to address ideas, concerns, and
10 requests all along the way. This proposed rule
11 has had multiple reviews by the work group itself,
12 by EPA, by DEQ Legal Division, and WPCAC, the
13 Water Pollution Control Advisory Council; and
14 after this extensive process, we feel it is ready
15 to present to the Board and request initiation of
16 rulemaking.

17 So as you may recall, Senate Bill 325
18 was codified as Montana Code Annotated MCA
19 75-5-222, and it contains two provisions -- I'll
20 refer to those as Part 1 and Part 2 -- for which
21 we're pursuing rulemaking. We've previously
22 briefed you on our progress on both Part 1 and
23 Part 2 of the statute, and due to the distinct
24 independence of both parts, and the differing time
25 lines, Part 1 rule writing is still in progress,

1 and Part 2 is complete. We come to you today to
2 request initiation of rulemaking for Part 2 only,
3 and will follow in a subsequent meeting with Part
4 1.

5 The first provision of the statute
6 states that DEQ may not apply a water quality
7 standard to a water body that is more stringent
8 than the nonanthropogenic condition of the water
9 body. The second provision of the statute states
10 that if pollution upstream of a discharger is due
11 to anthropogenic sources, a variance from
12 standards may be appropriate under certain
13 conditions.

14 Long term historic pollution sources
15 such as those that might result from historic
16 mining in a watershed, and that may eventually be
17 remediated, are the primary type of pollution that
18 this second part of this bill was seeking to
19 address. So an example for an application of this
20 type of variance is a community grappling with
21 treating water that includes a legacy source
22 upstream. We'll look at a few scenarios in a
23 minute. So again, it is the second part of the
24 statute that we're focusing on today.

25 So as we discuss the components of the

1 proposed new rule, it is important to keep in mind
2 that this rule describes the process of applying
3 for a variance under the conditions in the statute
4 or proposed rule. This is not a general variance.
5 For each applicant seeking a variance under this
6 rulemaking, they'll have to request an individual
7 variance that will go through its own individual
8 rulemaking process, requiring adoption by the
9 Board and approval by EPA.

10 So in summary, the new rule sets forth
11 the conditions under which an applicant may apply
12 for a variance from water quality criteria, and
13 specifies that the applicant cannot materially
14 contribute to the condition of the water, of the
15 receiving water body; and it also describes how
16 the highest attainable condition of the water body
17 must be met under the variance, and outlines
18 requirements for DEQ approval, and the periodic
19 review of the variance.

20 So hopefully you've all had the
21 opportunity to review the proposed rule language
22 in your board packet materials, and I'd just like
23 to bring your attention to that language.

24 Sub (1) of the rule aligns the rule
25 language with the statute itself. Sub (2) of the

1 rule aligns the rule language with the federal
2 regulations that require that a variance issued
3 from a water quality standard represent the
4 highest attainable condition of the water body
5 that is reasonable achievable.

6 Sub (3) and (4) of the rule requires
7 determination of whether reasonable alternatives
8 exist that would eliminate the need for a
9 variance, and require subsequent consult with the
10 applicant.

11 Sub (5) describes review by the
12 Department and the requirement for adoption by the
13 Board in a formal rulemaking process.

14 And Sub (6) requires a five year review
15 period, and the review conditions of the variance.

16 So I'd like to walk you through the
17 process of this rulemaking of this rule language,
18 and the process of how we determine whether a
19 variance under this rulemaking under 75-5-222 is
20 appropriate. So this flow chart element, as well
21 as the guidance for the decision points that we'll
22 go through in this flow chart, are described in a
23 supporting guidance document that we have
24 developed for this rule. It's called the
25 Implementation Guidance for 75-5-222(2), MCA,

1 Variances, and it is posted online on our Senate
2 Bill 325 work group, if you'd like to look at it.

3 So Step 1 in this process, we ask the
4 first question, and that is: Is the condition of
5 the receiving water likely to be remediated in the
6 next five years? If the answer is yes, then a
7 variance is not appropriate under this process.

8 CHAIR MILES: So what happens in the
9 meantime then, if they're allowed five years to
10 remediate?

11 MS. KELLY: So if the receiving water
12 wasn't likely to be -- if it was likely to be
13 remediated in the next five years, then we would
14 go through a different process. It is probably
15 not a legacy mining issue. It's something that is
16 a temporary condition, and that would be a
17 different process that we would go through.

18 CHAIR MILES: Okay. Thank you.

19 MS. KELLY: So if the answer is no, then
20 we move on to the next question, and this is a
21 stipulation in the statute. We go on to the next
22 question, and that is: Can the water quality
23 standard be achieved through a permit related
24 action? So for example, this could be a
25 compliance schedule or a TMDL that states that the

1 discharge is a nonsignificant contribution to the
2 water quality problem.

3 If the answer is yes to that question,
4 that does not preclude the need for a variance, or
5 preclude the applicant from seeking a variance,
6 but it does inform the applicant that there may be
7 another path forward. So if this is true, so if
8 this is not true, the permit -- the water quality
9 standard cannot be achieved through other permit
10 related actions, then we move on to the next
11 question, and that is: Are the water quality
12 standards unattainable because the applicant has
13 demonstrated that one of the six factors in EPA's
14 federal requirements for variances has been met?

15 So there are six options to justify not
16 meeting a water quality standard under federal
17 regulations. These factors range from natural
18 conditions -- which we're addressing in the
19 rulemaking for Part 1 of the statute -- to the
20 presence of dams.

21 So we believe that two of those six
22 factors are most relevant to this rulemaking, and
23 those are human caused pollution prevents
24 attainment of the use, and the source cannot be
25 remediated, or would cause more environmental

1 damage to correct than leave in place; and the
2 second is that meeting the water quality standard
3 would cause substantial and widespread economic
4 harm.

5 For the second factor, DEQ has developed
6 extensive and detailed guidance on how to carry
7 out a substantial and widespread harm analysis for
8 a permit application in both the public and the
9 private sector, and that guidance is located on
10 DEQ's water quality standard web page. It is part
11 of our base numeric standards implementation
12 guidance.

13 So meeting one of these federal factors,
14 one of these six factors, and most likely one of
15 these two is a federal requirement, as well as a
16 state statute requirement.

17 So back to our flow chart. So now if we
18 have answered yes on this question, now we've
19 moved on to Question No. 4. Will the discharge
20 materially contribute to the condition of the
21 water body? So what does this mean? Well, each
22 situation is going to be different. The exact
23 method by which we or DEQ determine material
24 contributions to the condition of the receiving
25 waters will vary, so I'll tell you our rationale

1 on this topic, and then show you some scenarios
2 which may or may or may not be considered by the
3 Department as material contribution.

4 First, as you know, pollutants are
5 grouped on their risk to human health and the
6 environment, and they're grouped in categories --
7 carcinogens, toxics, and harmful parameters -- so
8 it is likely that when reviewing material
9 contribution, DEQ will be more stringent when
10 reviewing a variance for carcinogens versus toxics
11 versus harmful.

12 Second, the Department will use its
13 discretion on a case-by-case basis to assess
14 material contribution. I think you'll see why in
15 a second.

16 So let's look at a couple of material
17 contributions scenarios, that I think are helpful
18 in illustrating what this concept means, and why
19 this assessment would need to be taken on a
20 case-by-case basis.

21 So this is just a completely made up
22 hypothetical watershed, and in each of the
23 scenarios that we'll look at, we have this
24 hypothetical water quality standard of 25
25 milligrams per liter.

1 So in this illustration, as a result of
2 legacy mines that are in the upper part of this
3 watershed, the water body is exceeding its current
4 standard until about river kilometer 36. And at
5 this point, we have a tributary which is providing
6 extensive dilution, substantial dilution to our
7 water body, and as a result, beyond this junction,
8 our water quality standard is being met. And with
9 no additional point source, this is something that
10 DEQ regularly models.

11 So in this illustration, the same
12 watershed, same legacy mines, and now we have a
13 point source here, and we could think of this as a
14 town or a community, and now this point source is
15 discharging to this segment of the water body
16 which we know is exceeding water quality
17 standards.

18 But we can model. We can add this point
19 source, this community discharge, to the water
20 body, to the ambient condition of the water body,
21 and in this case, the point source is not
22 extending the distance of the exceedence. So the
23 water body is still attaining water quality
24 standards at river kilometer 36, again, as a
25 result of the dilution that's coming in from

1 tributary four. So from a distance perspective,
2 we would not see a material contribution.

3 However, we would also need to consider
4 how much more above the standard this point source
5 has elevated the concentration of a pollutant
6 within the succeeding reach. So there are no
7 concrete rules for how much is too much above
8 ambient conditions, and this is where again the
9 Department would have discretion, and would more
10 stringently evaluate carcinogens versus toxics
11 versus harmful parameters.

12 So finally, in this example we've got
13 the same watershed again, the same legacy mines,
14 the same point source, but in this scenario the
15 point source has actually pushed the pollutant
16 farther downstream. So now the water quality
17 standard is not being attained until river
18 kilometer 21. This would be considered clearly
19 material contribution.

20 So each scenario -- and again, this is
21 just a made-up watershed. So each scenario, each
22 application will be unique, and would be reviewed
23 by DEQ, and would be part of the applicant's
24 variance application materials, that again must be
25 approved by the Board and by EPA in individual

1 rulemaking.

2 So back to our flow chart. We're coming
3 to the end here. With Question 4, assuming we've
4 answered no, that no material contribution is
5 occurring, now the applicant has successfully, or
6 has moved through the variance process, and the
7 applicant may now apply for a variance. The
8 applicant may be eligible to receive the variance
9 from the water quality standards, but again,
10 subject to DEQ review, Board review and adoption,
11 and EPA review and final approval. So just
12 remember again that each variance application is
13 subject to separate and individual rulemaking
14 procedure.

15 Any questions?

16 MS. SHROPSHIRE: Madam Chair, I have a
17 couple of questions. This is Robin.

18 CHAIR MILES: Go ahead, Robin.

19 MS. SHROPSHIRE: I don't know if you
20 guys are hearing feedback, but I apologize. I've
21 got a little feedback on this end. But the No. 1
22 of the flow chart is the condition of receiving
23 water likely to be remediated in the next five
24 years.

25 Let me take a step back. Conceptually I

1 like this idea. In terms of actual
2 implementation, some of these thresholds that have
3 to be met seem pretty complex. And so as far as
4 No. 1 goes, is it likely to be remediated in the
5 next five years, sometimes it is not clear cut,
6 five years or what that really means.

7 But let's say it is clearly identified
8 that it's going to take five years to remediate
9 something. I think what I heard is that there is
10 a different process in place you could follow by
11 -- I wouldn't want somebody's permit to have to be
12 delayed for five years until the source was
13 remediated, and so can you help me understand what
14 you would do. If you knew it was going to be five
15 years, would you delay issuing a permit, or is
16 there a different path that somebody could follow
17 to get a permit?

18 MS. KELLY: So is your question -- just
19 to make sure I understand. So you're saying if in
20 the next five years the condition was likely to be
21 remediated, would we hold off on going through the
22 variance process or --

23 MS. SHROPSHIRE: Yes. So the way I read
24 it is somebody applies for a permit, but there is
25 an upstream source that is causing them to not be

1 able to meet the limits, and we know that it is
2 going to take five years before it can be
3 remediated, and so under that situation, no
4 variance would be allowed.

5 And so in a situation where somebody
6 might have to wait five years for it to be
7 remediated, is there a separate process that they
8 could follow so that they didn't have to wait five
9 years in order to get a permit? Does that make
10 sense?

11 MS. KELLY: Yes. I think that the
12 intent of this bill was really for situations
13 where there was historic substantial remediation
14 that needed to be remediated upstream of the
15 source. And so I think this is written in
16 statute, this condition of needing to be, if it
17 was not going to be remediated in the next five
18 years. So I think we would look at this --

19 This I would imagine would be in
20 consultation with the Department on -- If it was
21 four years, or five years, or six years, I think
22 that we would just work closely with the
23 Department, and if there was a better path than
24 going through this variance process and individual
25 rulemaking, then we would suggest whatever was the

1 most efficient path for the applicant. Would you
2 agree?

3 MS. SHROPSHIRE: That makes sense to me.
4 The way the flow chart is written, it just says
5 done, no variance allowed. And so one thought is
6 that it not be necessarily so --

7 The way it's written out sounds like if
8 they couldn't meet that threshold, then they
9 couldn't get a permit, and that seems counter to
10 what the intention of this is.

11 MS. KELLY: Point taken. And I think it
12 was really designed to kind of create the most
13 efficient pathway for the --

14 MR. KENNING: Madam Chair, members of
15 the Board. My name is Jon Kenning. I'm the Water
16 Protection Bureau Chief. I run the permitting
17 program.

18 Any permit that comes in will undergo a
19 review process, and we have methods for situations
20 where it may only take three years. We will,
21 through our permitting process, come up with a way
22 to get somebody permitted, if possible.

23 MS. SHROPSHIRE: That's helpful. And
24 again, I guess in terms of the rulemaking, the
25 scope of the rulemaking, I would hope that those

1 kind of discussions are part of the scope. So
2 that's helpful.

3 Madam Chair, can I ask a couple more
4 questions?

5 CHAIR MILES: Yes. Thank you, Robin.
6 You're coming across loud and clear, and I do
7 appreciate that question. That was a little bit
8 of what I was trying to get at on that five year
9 thing, and I think you explained it a little bit
10 better. So thanks, and certainly have another
11 question.

12 MS. SHROPSHIRE: So the other one, this
13 may be -- and again, I'm looking at the flow
14 chart, No. 3 in particular. It references the 40
15 CFR applicability. I'm sure one of the things you
16 guys have talked about is some historic metals
17 contaminated streams, there is argument about
18 whether or not it's anthropogenic or naturally
19 caused. And so in my experience, people can
20 promote one or the other, but sometimes there is
21 not a real clear test of is it anthropogenic or is
22 it naturally caused.

23 And so in a situation like that, is
24 there going to be guidance on how you determine if
25 something is anthropogenic, or what if you don't

1 know? How do you propose handling those
2 situations?

3 MS. KELLY: Well, we are in the initial
4 stages, or the mid stages of writing up the rules
5 for just how we make that determination of
6 anthropogenic versus nonanthropogenic in Part 1 of
7 the statute, so I think the guidance that comes
8 through that will make it quite clear on how we
9 make that determination.

10 MS. SHROPSHIRE: And will that be done
11 prior to this then?

12 MS. KELLY: No, that will come after
13 this rulemaking.

14 CHAIR MILES: So Robin, I think this is
15 a little confusing in areas, but I think we're
16 being asked to implement the part of the statute
17 that would establish a process for the Board to
18 follow for cases where a variance may be
19 necessary. And you're right. We're asked to do
20 this. We're doing this right now actually before
21 we see any of the substantive rules, but I don't
22 know that that would really necessarily change our
23 process for handling variances.

24 MS. KELLY: No, I don't think it would.
25 I think they are quite distinct. The Part 1 is

1 really aimed at nonanthropogenic conditions, and
2 Part 2 is really aimed at when something isn't
3 considered, can be definitively considered
4 nonanthropogenic, but just the distinction between
5 anthropogenic and nonanthropogenic, I think that
6 the Rules for Part 1 would assist with that.

7 CHAIR MILES: So nothing in the rules
8 being proposed today would necessarily change.
9 Regardless of what you propose for Part 1 --

10 MS. KELLY: Correct. Right.

11 CHAIR MILES: -- our process would
12 likely remain the same.

13 MS. KELLY: It would remain the same,
14 yes. That's correct.

15 CHAIR MILES: Does that make sense?

16 MS. SHROPSHIRE: I think so, and just
17 also making sure that the scope is broad enough to
18 -- it sounds like it is not applicable. But yes,
19 that does make sense.

20 CHAIR MILES: I think that will be
21 something, should we proceed with this rulemaking,
22 that we visit with the Department about as they
23 get into the other rulemaking, to just confirm
24 that there is no inconsistencies there between the
25 variance regulations and the rules defining

1 anthropogenic sources.

2 MS. KELLY: Absolutely.

3 CHAIR MILES: Any other questions?

4 Chris.

5 MR. TWEETEN: Ms. Kelly, I don't know if
6 this is a question that should go to you or
7 somebody else, so feel free to hand it off if it
8 is not something that's within your expertise.

9 Why is this a rulemaking? The process
10 of going through and evaluating an individual
11 variance, why is that a rulemaking?

12 MS. KELLY: Well, I could hand it to
13 John to maybe answer that question, or to follow
14 this comment up. What I would say to that is that
15 this provides the specific, the explicit authority
16 for and the framework for how to walk through, how
17 to go through the variance process.

18 MR. TWEETEN: But is there some statute
19 or something that dictates that this be processed
20 as a rulemaking as opposed to a contested case or
21 some other kind of determination?

22 MS. KELLY: I'll punt that one to John.

23 MR. NORTH: Madam Chair and Mr. Tweeten,
24 the statute simply says that in order to allow the
25 Department to commence or to grant a variance,

1 that the Board has to adopt rules that are
2 consistent with federal rules to establish the
3 criteria, and then that establishes the process.
4 And the fact that it is a rulemaking I think comes
5 from the fact that EPA considers these things to
6 be standards, which then have to go to the
7 standards setting body.

8 MR. TWEETEN: I was a little confused
9 because in the lower left hand corner it says,
10 "Individual variance/rulemaking." And what I
11 garnered from that was that each time there is an
12 application for a variance, there's going to be a
13 rulemaking that goes with that.

14 And it doesn't seem to fit the
15 definition of rule in MAPA because MAPA says that
16 a rule is a policy statement of general
17 application. And this is not general application,
18 this is a determination of a specific right or
19 privilege that the applicant gets, based on a
20 specific set of facts, and that's not general
21 application. That seems to me to fit more in the
22 contested case realm than it does in the
23 rulemaking realm.

24 I would think it would be much simpler
25 -- and again, if there is a specific statute that

1 controls this, then I'll shut up -- but I think if
2 you treated it as any other permit or grant of
3 permission by the Department, and let the
4 applicant come in and make a showing that the
5 applicant satisfies all of these six, or four, or
6 however many criteria that are set by EPA; and
7 then should the Department rule against the
8 applicant, the applicant can then seek a contested
9 case hearing.

10 That would seem to make more sense to me
11 than to go through rulemaking, which is basically
12 notice and comment. The applicant's proposal
13 would be put out for public comment, and the
14 Department would decide whether to have a hearing,
15 and after that, the whole record would be shipped
16 to the decision maker to decide whether to adopt a
17 rule or not. That doesn't make sense to me in my
18 own little strange lawyer world. So can you help
19 me out with that?

20 MR. NORTH: Madam Chair, Mr. Tweeten, I
21 understand exactly what you're saying there, and I
22 think it is a question of compliance with federal
23 requirements.

24 So what I would suggest would be that in
25 order to address that, that we would modify the

1 notice to simply address that as an issue and
2 request comment on it, so that it could be
3 addressed then. We could do further analysis with
4 EPA and it could be addressed upon final
5 rulemaking.

6 MR. TWEETEN: Does it provide the
7 applicant with due process? Rulemaking, as I
8 understand it, is essentially a policy making
9 choice on behalf of the agency, and it's informed
10 by a lot of things, including any number of
11 different specific sets of facts that commenters
12 might want to bring in front of the agency to
13 complain about what the proposed rule does or
14 doesn't do.

15 In this situation, it seems to me that
16 the applicant has certain due process rights that
17 would ensure that the Department reasonably
18 evaluated the facts that had been presented, and
19 provided a fair opportunity to produce evidence
20 and so on and so forth, and if somebody wanted to
21 come in and contest the application for a
22 variance, the applicant ought to have the
23 opportunity to cross-examine any witnesses and so
24 forth. That's a contested case. That's not a
25 rulemaking. Rulemaking doesn't provide for

1 cross-examination.

2 So I guess I'd suggest that maybe the
3 Department consider whether this fits better into
4 the contested case process than it does to
5 rulemaking, in light of the fact that the
6 applicant, it seems to me, by statute or
7 regulation has the right to have the variance if
8 the applicant can produce evidence that satisfies
9 all of the criteria. And if the agency were to
10 decide not, the applicant ought to have the right
11 to have that decision reviewed. And I don't think
12 there is individual review of rulemaking under
13 MAPA.

14 So it just confuses me that this looks
15 like it is sort of at best a hybrid of contested
16 case and rulemaking, and I think in my mind it
17 falls closer to contested case than it does to
18 rulemaking.

19 MR. NORTH: Madam Chair and Mr. Tweeten.
20 I understand that as well, and I think if the
21 Department were to make a determination that a
22 variance should not be granted, I think that the
23 applicant could obtain a contested case on that
24 issue, and get their due process, and that
25 somewhat resolves your consideration there, your

1 concern there. However, under this rule, it would
2 then go through the rulemaking process as well.

3 MR. TWEETEN: And the Board would adopt
4 a rule governing the availability of a variance on
5 this particular set of facts?

6 MR. NORTH: Yes.

7 MR. TWEETEN: Again, I just suggest that
8 doesn't fit the definition of rule under MAPA, so
9 I think there is a conflict in here somewhere.

10 MR. NORTH: I understand what you're
11 saying, and again, the reason is because of the
12 EPA. So I don't quite know how to resolve the
13 issue that you have at this particular point. I
14 guess I could ask Myla, or George, or whoever, if
15 they feel like they would want to put this off
16 until the June meeting in order for us to work
17 with the EPA and try and resolve this first.

18 MR. TWEETEN: It just seems to me that
19 that might be a good idea because -- I'm just
20 speculating about this, but it seems to me these
21 variance applications might very well be the
22 subject of considerable public discussion and
23 interest, and people who are opposed in concept to
24 the idea of variances might pull out any stop they
25 have in order to try to block a variance,

1 including arguments based on the fact that this
2 procedure doesn't seem to fit within the
3 definitions of MAPA. So if there is some way to
4 brainstorm this to resolve that concern, it might
5 not be a bad idea to look for it before we adopt
6 the rules.

7 CHAIR MILES: I would agree that that
8 might be less complicated than trying to change
9 the proposal midstream. I will ask for public
10 comment on this, too, before we conclude.

11 Robin, we just have a little conference
12 going on here. Did you conclude anything?

13 MR. NORTH: No.

14 MS. SHROPSHIRE: Did you have a question
15 for me?

16 CHAIR MILES: No. I was just letting
17 you know that there was some people looking at
18 statutory language here.

19 MS. SHROPSHIRE: Okay. The silence made
20 sense.

21 CHAIR MILES: Myla, do you have any
22 other comments?

23 MS. KELLY: No, Madam Chair. We can
24 take that into consideration. We can come back at
25 the June meeting and discuss what we've found.

1 CHAIR MILES: If time is not of the
2 essence. Go ahead, Robin.

3 MS. SHROPSHIRE: I should know the
4 answer to this, but I'll ask it. If you determine
5 that a water body exceeds the water quality
6 standards due to natural conditions, is there a
7 process for a variance for that in place?

8 MS. KELLY: That is what we're working
9 on with Part 1 of the rulemaking of the statute.

10 MS. SHROPSHIRE: That is the part, is
11 the variance for naturally existing?

12 MS. KELLY: Yes. It is not exactly a
13 variance process, but the acknowledgment that --
14 but yes, that the water quality standard is being
15 exceeded due to nonanthropogenic conditions. Yes.

16 MS. SHROPSHIRE: Maybe I just missed the
17 "non" somewhere. Maybe that is what was confusing
18 me. Sorry. I've got to go back and look at the
19 flow chart again. I think I maybe somehow missed
20 that part. Thank you.

21 CHAIR MILES: Unless there is any other
22 questions, thank you very much. I'll ask for some
23 questions from the public or comments from the
24 public on this matter.

25 MR. FIX: Madam Chair, members of the

1 BER, I'm Mark Fix, and I'm a rancher on the Tongue
2 River about 20 miles southwest of Miles City,
3 Montana. I'm also Past Chair of the Northern
4 Plains Resource Council.

5 Northern Plains works to protect water
6 quality, family farms, and ranchers, and the
7 lifestyle we live in Montana. We have a lot of
8 questions about the proposal, and we wish to
9 suggest changes that should be made before this
10 procedure is finalized.

11 For example, we are concerned that this
12 variance procedure will give industries a way
13 around the Clean Water Act. It seems that the
14 procedure has proposed risks, ignore cleaning up
15 the pollutant source, and instead simply draft a
16 variance to get around the problem. What will
17 happen to the original source of the pollutant?
18 Would it ever be addressed and cleaned up?

19 The variance process should in no way
20 detract from the urgency of addressing legacy
21 pollution. The Berkeley Pit in Butte is a good
22 example of this concern. We know that will fill
23 in in a few years, and then begin polluting
24 downstream. It seems that at that point every
25 discharger on that stream will be asking for a

1 variance.

2 The purpose of water quality standards
3 under the Clean Water Act is to protect designated
4 uses. In southeastern Montana, that means
5 protecting aquatic life, and keeping the water
6 suitable for irrigation. That requirement still
7 applies even when a variance is sought, and the
8 BER should make that obligation clear.

9 The proposed rule states that, and I
10 quote (ii), "The interim effluent condition that
11 reflects the greatest pollutant reduction that is
12 achievable," and it goes on. The BER needs to
13 make clear that this requirement means that the
14 best available technology will be applied. For
15 coal mine and coal bed methane related
16 dischargers, this means that salty water can be
17 cleaned before discharge. Thus no variance should
18 ever be needed in our area because the water can
19 be cleaned in a reasonable, economically feasible
20 manner. The rule should make clear that best
21 available technology requirements are applied
22 first before any consideration of variance is
23 needed.

24 Part of the discharge permit requires
25 that nondegradation must be evaluated. Nondeg

1 requires that you cannot increase the flow in a
2 water body by more than 15 percent. If the
3 discharger is increasing the flow in the stream,
4 it will push pollutants downstream more quickly
5 and farther. It seems that this variance would
6 have to be for a very limited time frame, and I
7 think that five years would be too long for a
8 variance to be granted. It seems that this is
9 something that should be reviewed on a yearly
10 basis to see if the water quality is getting
11 better.

12 As always, the key to the success of any
13 proposed action is to have good data. A good
14 baseline must be obtained and there must be
15 continued monitoring to be sure that pollution
16 loading is not increasing. Will the monitoring be
17 done by the discharger, or will DEQ be doing the
18 monitoring?

19 In Section 3(d), the rule states that
20 other Department actions could be taken. This is
21 very vague language, and leaves the door open for
22 DEQ to simply state that they would let the
23 discharge occur and do nothing. That would fall
24 under the guidance of 3(d). If there are
25 legitimate actions that DEQ would take, they

1 should be listed in this rule and put out for
2 discussion.

3 Ultimately this vagueness is at the
4 heart of our concerns about the rule, and where we
5 see the greatest need for clarification. For
6 instance, we like that the rule requires that a
7 variance not materially contribute to a water
8 way's degraded condition. Section 1(d) however,
9 DEQ's draft guidance on Pages 1-5 and 1-6 suggest
10 that there are no hard and fast rules, and this
11 section would be interpreted at the agency's
12 discretion on a case-by-case basis.

13 While we appreciate the hard work and
14 intent of agency staff, we're worried that this
15 type of broad language could risk creating new
16 rules that undermine water quality and the Clean
17 Water Act. More generally, it seems that makes
18 potentially clear how this rule could be applied
19 to pollution from legacy mines around Butte, for
20 instance, but how would this variance procedure
21 apply to Tongue River, where abandoned coal bed
22 methane wells in Wyoming continue to contribute to
23 salt loading.

24 We'd like to see either a clarification
25 as to where this rule specifically applies, or

1 some broader explanation as to how it would be
2 applied in different scenarios. Thank you for
3 allowing me to comment. We'll continue to be
4 engaged in this process as it moves forward.

5 CHAIR MILES: Thank you, Mr. Fix. Any
6 questions?

7 (No response)

8 CHAIR MILES: Would you be able to leave
9 a copy of your testimony with the Department?

10 MR. FIX: (Complies)

11 CHAIR MILES: Is there anyone else who
12 would like to comment?

13 MS. LJNDLIEF-HALL: Madam Chair, members
14 of the committee, my name is Brenda Lindlief-Hall.
15 I'm here on behalf of the Tongue River Water Users
16 Association, an organization of irrigators on the
17 Tongue River in southeastern Montana.

18 I appreciate Mr. Tweeten's concerns. I
19 understand that 40 CFR 131.14 does provide a means
20 for water quality standards variances, and such
21 variances do have to be approved or disapproved by
22 the EPA on a case-by-case basis. However, I also
23 agree with Mr. Fix's points about the requirements
24 for best available technology for nondegradation
25 review, and the necessity of protecting uses.

1 And so I would simply suggest, as Mr.
2 Fix did, that if this does proceed to rulemaking,
3 that the rule be tightened up to include the best
4 available technology requirements, the nondeg
5 requirements are applicable, and also to ensure
6 that it addresses the two different scenarios that
7 really are contemplated. One is for variances for
8 nonanthropogenic sources, or where the water
9 quality is degraded due to nonanthropogenic
10 sources, and where they are also degraded as a
11 result of anthropogenic sources, because it gets a
12 little bit tricky.

13 Down on the Tongue River, for instance,
14 there has been salt loading from coal bed methane
15 development, there's salt loading from coal mines
16 from Decker Coal in particular, and it is
17 difficult to tease out what is man caused and what
18 is natural, or what is nonanthropogenic and what
19 is anthropogenic. The water quality there is
20 better upstream than it is as it moves downstream,
21 in part due to nonanthropogenic sources, the
22 contribution of salt loads from side streams and
23 those sorts of things.

24 So it is a different scenario than the
25 legacy mining situation that was laid out where

1 the water quality is worse upstream, and gets
2 better downstream. So I think there are some
3 scenarios that need to be played out and more
4 clearly defined in the process.

5 CHAIR MILES: Thank you. Any questions?

6 (No response)

7 CHAIR MILES: Any further comment?

8 (No response)

9 CHAIR MILES: Any discussion from Board
10 members?

11 (No response)

12 CHAIR MILES: I guess at this point, we
13 have been asked to initiate rulemaking. Our
14 choices are to initiate rulemaking with the
15 attached notice of public hearing, determine that
16 the new rule is not appropriate and decline
17 initiation of rulemaking, or modify the notice and
18 initiate rulemaking.

19 I personally think that enough issues
20 have been raised, not only what you have raised
21 about individual rulemaking for variances, but
22 what we've heard from the public today, to perhaps
23 not take action at this time, and ask the
24 Department to look into all of these issues that
25 have been brought to our attention. And I think

1 since time is really not of the essence here,
2 since the rest of the statutory requirements are
3 still underway, that it is not going to harm us to
4 postpone the initiation of that. Does that work
5 for the Department?

6 MR. MATHIEUS: Madam Chair, it does.

7 CHAIR MILES: Other Board members? Does
8 anyone disagree with that approach?

9 (No response)

10 CHAIR MILES: So we just take no action
11 today, and can come back in June or later. Thank
12 you very much for the work on this. I know this
13 is really complicated, and I guess it is a little
14 hard -- I'm seeing it now -- to just do one part
15 of this before a lot of the rest of it is done,
16 because that may address certainly some of the
17 issues that were brought to our attention by
18 members of the public who spoke. Thank you. So
19 we'll come back to revisit this.

20 Any other items that any member of the
21 public would like to testify or speak to the Board
22 about today?

23 (No response)

24 CHAIR MILES: Open comment?

25 (No response)

1 CHAIR MILES: I have one last question
2 for John, and this is a totally hypothetical
3 discussion about what might happen with the Board.
4 You mentioned that if there is no confirmation
5 hearing -- So if the bill passes, nothing happens
6 until October; but if there is no confirmation
7 hearing, we would then be a four member Board, and
8 decisions would have to be unanimous. What would
9 happen under the likely scenario that someone
10 would have to recuse themselves from voting on
11 certain issues?

12 MR. NORTH: Madam Chair, there is other
13 people here who could probably offer as good of an
14 opinion as I could, but my opinion would be the
15 Board could not take action on those.

16 MR. HALADAY: Functionally you wouldn't
17 have a quorum for that specific issue, and so it
18 would essentially get carried over, sort of in a
19 situation where you have a Board that can't
20 approve its minutes or anything, and they just
21 kind of get bumped down the road until the next
22 time a quorum is present.

23 MR. TWEETEN: Or until it falls in the
24 lap of the Department, and then the Department
25 will have to figure out some sort of transition

1 process to move those unresolved matters from the
2 jurisdiction of the Board to the jurisdiction of
3 the Department, whether things need to be done
4 over that were initiated by the Board, and whether
5 you have to go back to square one and do them in
6 front of the Department, or how those things can
7 be accommodated.

8 MR. NORTH: Madam Chair, Mr. Tweeten. I
9 think that, as I recall the statutes and Title II
10 that talk about this kind of thing, we simply
11 accede to whatever proceedings are before the
12 Board at the time and complete them.

13 MR. TWEETEN: To the extent you can do
14 that consistent with the Administrative Procedure
15 Act.

16 MR. NORTH: Correct.

17 MR. TWEETEN: I don't envy you.

18 MS. SHROPSHIRE: Could the Governor
19 appoint new members?

20 CHAIR MILES: Yes.

21 MS. SHROPSHIRE: That would have to go
22 through confirmation next time?

23 MR. TWEETEN: Yes, the next time the
24 Legislature meets.

25 CHAIR MILES: Yes. I don't know if the

1 Governor could appoint seven new members. Four of
2 us technically, our terms are up.

3 MR. NORTH: Madam Chair, the Board
4 could, but your terms are not up until a successor
5 is appointed, and so if the Governor took no
6 action, you would continue until the Board went
7 out of existence.

8 CHAIR MILES: Well, I guess that we'll
9 just have to wait and see here. Any other items?
10 But I do think that that's an important -- my
11 question about if somebody has to recuse
12 themselves, if there are just four Board members,
13 because that's been an issue with any items
14 related to coal which seem to be the big issues
15 that come before the Board.

16 So any other discussion? I think at
17 that point, since I know I won't be here for the
18 June meeting in person, although like I said, I
19 will be able to participate by phone, and since I
20 did not request reappointment to the Board, this
21 likely could be my last. I guess we'll see what
22 happens in June.

23 But I wanted to thank all my colleagues.
24 It has been a privilege working with you. I
25 appreciate all the support from all the Department

1 staff who have been here. Andres, I appreciate
2 your support, and the assistance we had from Ben
3 during the first three-and-a-half years. And
4 Laurie, thank you for always being here. I think
5 that's it. I have enjoyed it, and this may not be
6 it depending on what happens. So thank you very
7 much. Meeting adjourned.

8 (The proceedings were concluded
9 at 11:38 a.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 - 79 - 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 15th day of April, 2017.


LAURIE CRUTCHER, RPR

Court Reporter - Notary Public

My commission expires

March 9, 2020.

