

1 BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
2 OF THE STATE OF MONTANA

3
4
5 BOARD MEETING)
6 JANUARY 14, 2010)

7
8 TRANSCRIPT OF PROCEEDINGS

9
10 Heard at Room 35 of the Capitol Building
11 Helena, Montana
12 January 14, 2010
13 9:00 a.m.

14
15 BEFORE CHAIRMAN JOSEPH RUSSELL,
16 BOARD MEMBERS HEIDI KAISER,
17 LARRY ANDERSON, ROBIN SHROPSHIRE,
18 JOE WHALEN, MARVIN MILLER (all by telephone);
19 and LARRY MIRES

20
21 PREPARED BY: LAURIE CRUTCHER, RPR
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1 WHEREUPON, the following proceedings were
2 had and testimony taken, to-wit:

3 * * * * *

4 CHAIRMAN RUSSELL: It is 9:04 by my
5 watch, and I'll call this special meeting of the
6 Board of Environmental Review to order. It is, as
7 I mentioned, a special meeting, and Tom, since
8 we're on teleconference, could you go ahead and
9 have a roll call, and then after that, let's see
10 who else is out there.

11 MR. LIVERS: That sounds good, Mr.
12 Chairman. Mr. Chairman, members of the Board, for
13 the record, my name is Tom Livers, I'm Deputy
14 Director of the Department of Environmental
15 Quality. And quickly I'll run through the roll
16 call of Board members. Mr. Anderson.

17 MR. ANDERSON: Present.

18 MR. LIVERS: Ms. Kaiser.

19 MS. KAISER: Present.

20 MR. LIVERS: Mr. Miller.

21 MR. MILLER: Here.

22 MR. LIVERS: Mr. Mires.

23 MR. MIREs: Here.

24 MR. LIVERS: Ms. Shropshire.

25 MS. SHROPSHIRE: Here.

1 MR. LIVERS: And --

2 MR. BEAUDRY: Haley Beaudry with
3 Columbia Falls Aluminum.

4 MR. LIVERS: Thank you. Anyone else on
5 the line that hasn't been recognized?

6 (No response)

7 MR. LIVERS: And Ms. Shipp, were you
8 broadcasting or recording this for the network?

9 MS. SHIPP: If I can have permission to
10 record it, we would love to do that.

11 MR. LIVERS: You certainly have that
12 right, and certainly permission, so as long as
13 folks are aware of that, that will be fine.

14 MS. SHIPP: All right. Thanks.

15 MR. LIVERS: Thank you. Okay. Mr.
16 Chairman, there is one action item on, and that
17 is: The Department is requesting that the Board
18 terminate the greenhouse gas rulemaking, and
19 cancel the January 22nd hearing on the rules.

20 And just a minor point of clarification,
21 that hearing was going to come at the same time as
22 the regular January Board meeting, so we would
23 still be holding the January Board meeting, we
24 would simply be canceling the rules hearing
25 portion of that meeting, and we can talk later

1 MR. LIVERS: Mr. Whalen.

2 MR. WHALEN: Here.

3 MR. LIVERS: Mr. Chairman.

4 CHAIRMAN RUSSELL: Here.

5 MR. LIVERS: Thank you. Also in the
6 room we've got several Department staff members,,
7 our Director; we've got a representative from the
8 media; we've got a representative from the
9 Environmental Quality Council; and we have a few
10 interested parties as well, perhaps three or four
11 members of the regulated community representatives
12 there.

13 If I could please go through the phone
14 list, and have folks introduce themselves who are
15 on the phone for the record, and identify your
16 affiliation, I would appreciate it. I think I
17 heard Bill Thompson.

18 MR. THOMPSON: That's right, with
19 NorthWestern Energy.

20 MR. LIVERS: Thank you Bill, and Ross.

21 MR. WELCHER: Ross Welchel (phonetic)
22 and Rick Walsh, Northwestern Energy.

23 MR. LIVERS: Thank you. Hailey Shipp.

24 MS. SHIPP: Hailey Shipp, Northern Ag
25 Network.

1 perhaps at the end of the meeting if we want to do
2 that meeting via teleconference, since this
3 hearing will take a substantial chunk out of the
4 agenda, if that's the action the Board takes.

5 CHAIRMAN RUSSELL: All right. That
6 sounds good. So Tom, do you want to give a little
7 history of why we're meeting in special meeting
8 today.

9 MR. LIVERS: You bet. Thank you, Mr.
10 Chairman. I'll start, just kind of run through
11 things. I know the Board knows all this from what
12 happened in December, but I do think there is some
13 value in just kind of summarizing the original
14 rationale behind the Department's request that you
15 initiate rulemaking in December, and I'll recap
16 the more recent actions that have led to our most
17 recent recommendation and this special meeting.

18 In December, the Department did request
19 that the Board initiate rulemaking on greenhouse
20 gases. We were requesting that the Board adjust
21 the permitting threshold that would be in
22 existence should greenhouse gases become regulated
23 pollutants.

24 The impetus for that is some federal
25 action that would cause greenhouse gases to join

1 the list of regulated pollutants. Specifically
2 EPA issued its endangerment finding in December,
3 and then it has two pending rulemakings out now,
4 the light duty vehicle rule, and what they're
5 calling the tailoring rule.

6 Both are anticipated to be final
7 sometime in the next couple of months, and the
8 effect of either of those rules becoming final
9 would then cause carbon dioxide, methane, and four
10 other greenhouse gases to be included as regulated
11 pollutants, and then subject, in our case, to
12 Montana permitting regulations.

13 So we've been watching this. The whole
14 idea with the rulemaking was to make sure we were
15 poised and ready when those came in.

16 The federal government in the tailoring
17 rule, as I mentioned, is proposing that it would
18 establish a permitting threshold, and it would not
19 subject entities under that threshold to
20 greenhouse gas permitting requirements. They're
21 proposing a range, but all indications are it will
22 come in at the 25,000 tons per year level.

23 We had proposed in our draft rules to
24 the Board that Montana adopt the same permitting
25 threshold that the federal government adopts, and

1 that those rules would take effect only if and
2 when the federal rules take effect.

3 Our concern was that without this
4 threshold, we would be subject -- greenhouse gas
5 actions would be subject to existing permit
6 thresholds in Montana law, and that would be as
7 low as 25 tons per year. What that would do
8 essentially is small actions, as small as
9 replacement of a home furnace, would be subject to
10 permit regulations. We saw that as an immense and
11 unnecessary regulatory burden on Montanans.

12 Secondly, we were concerned with the
13 workload impacts, we knew we wouldn't be able to
14 meet that, and all that essentially for very
15 little or no environmental benefit, so we wanted
16 to put some side boards up once these federal
17 rules become available, and we wanted to be able
18 to act in a timely way, so that we didn't have a
19 gap while we were trying to adopt State rules
20 after the federal rules take effect. That was the
21 original rationale.

22 The Environmental Quality Council of the
23 Montana Legislature met last week, had a hearing
24 on this issue, and filed a formal objection to
25 this rulemaking, and I'll summarize the major

1 concerns that the Council had. Todd Evertz
2 representing the Council is also going to be
3 available for questions later if I've maybe
4 inaccurately or improperly summarized some things.
5 I'm sure he could clarify some of those.

6 But the concerns that they stated in
7 their formal notice, first, they addressed the
8 reasonable necessity of the rulemaking, and stated
9 that that had not been clearly and thoroughly
10 demonstrated as required in Montana law. They
11 also felt that this rulemaking was premature
12 because the federal government has not yet acted,
13 and there was uncertainty over exactly what the
14 EPA rules would ultimately look like, and even
15 some uncertainty on when or if those would be
16 instituted.

17 The other concern is because of our
18 requirements to not adopt regulations more
19 stringent than the federal government, or without
20 a burden of proof on that, the EQC felt we were
21 unable to satisfy that statutory provision because
22 of the uncertainty as to exactly what would be in
23 the final federal rules, so we couldn't make those
24 determinations that these were no more stringent.

25 And finally, there was an additional

1 legal concern that this could potentially result
2 in an unlawful delegation of legislative
3 authority, and effectively causing the Legislature
4 to delegate its sovereign power to the federal
5 government because of the number of provisions in
6 our rule that keyed off of whatever action and
7 time frames the feds would implement on.

8 So those were basically the EQC
9 objections. The effect of the objection that was
10 filed prevents the Board from adopting these rules
11 until the last filing date within the six month
12 window of the rule adoption, so that is
13 essentially June 24th. So with this objection in
14 place, the Board is not able to adopt these rules
15 prior to June.

16 In the Department's opinion, that
17 defeats the purpose of the rulemaking. The whole
18 rationale for going forward on this time frame was
19 going to try to be ready to act immediately in the
20 wake of the federal rule, and avoid the dilemma of
21 either having to issue hundreds of unnecessary
22 permits, or knowingly violate State law by not
23 issuing those permits.

24 But with this delay, and no indication
25 on our part that there would be any movement on

1 the EQC to reverse that decision, that objection,
2 we feel that we've lost any benefit with
3 proceeding. We recognize there are certain risks
4 with the uncertainty in this; and this rulemaking,
5 as it stands under the delay, would only be going
6 forward with those risks without the associated
7 benefit. So that's the rationale for our request
8 today.

9 I also want to summarize some of the
10 concerns that we heard both at the December Board
11 meeting and at the EQC meeting. Concerns included
12 a lack of stakeholder input prior to the
13 initiation; we feel that's valid. Particularly in
14 our air rules, we have a very good stakeholder
15 process in place. We use it. It works for us. I
16 think folks are generally very appreciative of it,
17 and we end up with better rules. We felt, given
18 the timing of the endangerment finding and the
19 federal rulemaking, we really weren't able to
20 undertake that process as we normally would, so we
21 accept that criticism.

22 There certainly was criticism on the
23 uncertainty surrounding these rules, both the
24 substance and time frame for implementation. It's
25 our belief that we crafted enough safeguards in

1 understanding, or some legitimate concerns as
2 well. But as a result of the delay that's now in
3 effect, we see really no value to proceeding with
4 this rulemaking. In fact, it makes sense at this
5 point to terminate.

6 We'll continue to watch closely what EPA
7 does, what the federal government does in adoption
8 of its rule, and implementation schedule,
9 challenges, that sort of thing, and determine once
10 federal action is final what is the logical course
11 for Montana to proceed on. So that essentially
12 summarizes the Department's position, Mr.
13 Chairman.

14 CHAIRMAN RUSSELL: Are there members of
15 the Board that have any questions of the
16 Department, or -- well, primarily to the
17 Department at this point.

18 MS. SHROPSHIRE: Joe, this is Robin. I
19 did have one question.

20 CHAIRMAN RUSSELL: Go ahead.

21 MS. SHROPSHIRE: I just wanted to -- if
22 he could explain briefly just the EQC's authority
23 to make this termination or recommendation.

24 MR. LIVERS: Mr. Chairman, this is Tom.
25 I'll take the first stab at that. I don't know if

1 the draft rules to deal with that uncertainty, but
2 the uncertainty is out there. Some saw
3 rulemaking, this rulemaking, as an action to begin
4 to regulate greenhouse gases, and or at a minimum,
5 have the effect of sending that message out.

6 We strongly disagree with that
7 interpretation. The federal government is making
8 the decision to regulate greenhouse gases. This
9 rulemaking would have simply put some limits on
10 that regulation. So we really think that's an
11 unfair characterization of the rules, and an
12 unfortunate message to go out.

13 We also heard a concern that somehow
14 this rulemaking would subject agricultural
15 operations, particularly livestock, to air quality
16 permitting, and that's not the case either. There
17 is an ag exemption in the Montana Clean Air Act
18 that limits the Board and DEQ's authority to
19 regulate agricultural operations from an air
20 quality standpoint, so that would not have
21 affected that exemption or limitation to these
22 rules, essentially wouldn't have impacted
23 livestock operations.

24 So I think there were some concerns
25 around the rulemaking, maybe due to a lack of

1 one of the attorneys in the room, either
2 Katherine, David, or possibly Todd Evertz from the
3 Legislative Environmental Policy Office, would
4 want to elaborate on that.

5 But essentially executive branch
6 agencies have legislative committees -- in this
7 case quasi, in that there are a couple of members
8 of the public as well on EQC -- but those
9 committees have a regulatory reporting oversight
10 authority for the agencies they oversee.

11 So it's a legislative safeguard that
12 while the executive branch has rulemaking
13 authority, particularly during the interim between
14 legislative sessions, those committees exist to
15 review, or have the opportunity at least to review
16 any executive branch rulemaking, and ensure to
17 their satisfaction that it's following statutory
18 requirements.

19 If they feel there is someplace where
20 we've deviated from those statutory requirements,
21 then they have the ability to file these
22 objections. That is it in a nutshell. I don't
23 know if anyone would like to add to that.

24 CHAIRMAN RUSSELL: What were the
25 statutory requirements that we were deviating?

1 MR. LIVERS: Mr. Chairman, those are the
2 ones that I summarized very briefly: The
3 reasonable necessity -- and I've got the MCA
4 citations here -- but the reasonable necessity;
5 the inability to assure that we're no more
6 stringent than federal regulation; and then in
7 addition to the statutory requirements, the
8 potential for the unlawful delegation of
9 legislative authority.

10 And beyond that, if the Board wants to
11 pursue that, I think Mr. Evertz might be in the
12 best position to expound on that.

13 MR. ANDERSON: This is Larry Anderson.
14 Could someone state specifically what the
15 resolution of the EQC was, what they voted on?

16 MR. LIVERS: Mr. Anderson, let me check
17 to see. I don't have that in front of me. I
18 think Mr. Evertz probably does.

19 MR. EVERTZ: Mr. Chairman, members of
20 the Board, this is Todd Evertz, staff to the
21 Legislative Environmental Quality Council.

22 We sent over a letter to the Board of
23 Environmental Review and the Chair. The
24 resolution was basically the objection to the
25 notice of rulemaking for greenhouse gas emissions,

1 and that objection is authorized under the Montana
2 Administrative Procedures Act.

3 MR. WHALEN: Mr. Chairman, on those two
4 legal points that were raised by the EQC, their
5 argument, does Department Legal Staff concede
6 those legal arguments to the EQC?

7 CHAIRMAN RUSSELL: Do we have any
8 choice? Tom.

9 MR. LIVERS: Mr. Chairman, I'm not -- we
10 don't feel -- On the unlawful delegation of
11 authority, we feel that's arguable, but that's not
12 the primary basis for EQC's objection. It is
13 those two statutory references. I would say if we
14 were to --

15 I don't even know honestly what
16 authority we might have to challenge those
17 legally. Clearly we thought we had a sufficient
18 statement of reasonable necessity; and while we
19 understand the uncertainty, the concerns over the
20 uncertainty in the federal regulation, we also
21 felt we have put in place in the rules safeguards
22 to deal with those uncertainties. So I don't know
23 that we fully agree with the legal basis for those
24 concerns.

25 MR. WHALEN: Thank you, Tom.

1 CHAIRMAN RUSSELL: But it doesn't
2 matter.

3 MR. LIVERS: That's correct.

4 CHAIRMAN RUSSELL: I do want to open
5 this up to those others that are participating
6 today. I know there is a few folks on the phone,
7 and I don't think it's appropriate at this point
8 to kind of rehash what we did here at the last
9 Board meeting when we did initiate, but certainly
10 anything that enhances positions would be fine.
11 Maybe limit it to five minutes at most.

12 So before we take any action, is there
13 anyone participating in this call or in the room
14 that would like to speak to the Board?

15 MR. LIVERS: Mr. Chairman, why don't I
16 first ask if anyone in the room wants to address
17 the Board at this time?

18 CHAIRMAN RUSSELL: That would be great.

19 MR. LIVERS: Does anyone care to? We do
20 have one, Mr. Chairman.

21 MR. PARKER: Mr. Chairman, members of
22 the Board, my name is Jim Parker. I'm Manager of
23 Environmental Compliance Services with PPL
24 Montana, and I just want to make brief comments.

25 I just want to say that we agree with

1 DEQ's recommendation here today to not proceed
2 with this rulemaking, and in addition to that, we
3 thank them for it. We believe and we agree with
4 statements that DEQ has made in their comments to
5 EPA that EPA should give the State more time to
6 implement any rulemaking that it should undertake.

7 And as we said before, we question some
8 of the thresholds. There is some technical
9 concerns about the rule itself -- I won't get into
10 those -- but we feel that any efforts going
11 forward should be focused on working with EPA to
12 try to get more time to implement any federal
13 greenhouse gas initiatives that come about, and we
14 look forward to working with DEQ further on this
15 matter. Thank you very much.

16 CHAIRMAN RUSSELL: Thanks, Jim.

17 MR. LIVERS: Is there anyone else here
18 in the room that would like to comment?

19 (No response)

20 MR. LIVERS: It doesn't appear so, Mr.
21 Chairman.

22 CHAIRMAN RUSSELL: All right. Anyone on
23 the phone?

24 (No response)

25 CHAIRMAN RUSSELL: All right. We have a

1 Department recommendation. Do we have a motion on
2 the floor to vacate our rulemaking regarding this
3 matter?

4 MR. WHALEN: We don't.

5 MR. MILLER: This is Miller. I move
6 that we do.

7 CHAIRMAN RUSSELL: It's been moved. Is
8 there a second?

9 MR. LIVERS: Mr. Chairman -- Well, I'll
10 wait for the second.

11 CHAIRMAN RUSSELL: Is there a second?

12 MS. KAISER: I'll second.

13 CHAIRMAN RUSSELL: It's been moved and
14 seconded. Further discussion? Tom.

15 MR. LIVERS: Mr. Chairman, I'd ask that
16 the motion adopted be to terminate rulemaking,
17 greenhouse gas rulemaking, and cancel the January
18 22nd hearing on this rule.

19 CHAIRMAN RUSSELL: All right. Thanks
20 for the clarification. Is that all right with
21 you, Marvin?

22 MR. MILLER: Yes, I so move.

23 CHAIRMAN RUSSELL: And okay with you,
24 Heidi?

25 MS. KAISER: Yes, it is.

1 because just because we vacate our -- I don't know
2 if that automatically does anything to them, and
3 they still have a position on the table. So I
4 hope that when the Feds do come down with
5 greenhouse gas initiating rules, that EQC will let
6 the Department and the Board of Environmental
7 Review do what's right for Montana.

8 All right. I'm off my soap box now.
9 Any further questions or discussion from the
10 Board?

11 (No response)

12 CHAIRMAN RUSSELL: Hearing none, all
13 those in favor -- Well, let's do this by roll.
14 Tom, will you get ready to do that?

15 MR. LIVERS: Mr. Chairman, we can do
16 that, and thank you for your comments regarding
17 the Department. It's much appreciated.

18 CHAIRMAN RUSSELL: So all those in
19 favor, signify by saying aye on roll call vote.

20 MR. LIVERS: Mr. Anderson.

21 MR. ANDERSON: Aye.

22 MR. LIVERS: Ms. Kaiser.

23 MS. KAISER: Aye.

24 MR. LIVERS: Mr. Miller.

25 MR. MILLER: Aye.

1 CHAIRMAN RUSSELL: Before we take
2 action, I just want to make a comment, whether
3 it's appropriate or not.

4 First of all, I want to thank the
5 Department. Several phone calls went into
6 initiating the rulemaking, and quite frankly I
7 felt that the Department was looking clearly at
8 Montana's interests in trying to get ahead of
9 this, what the EPA was likely to do in the next
10 few months. So I compliment the Department to
11 having the vision to move forward, and I'm a
12 little concerned that we didn't -- that that
13 wasn't recognized by the Environmental Quality
14 Council.

15 I also know that the Department in their
16 forward thinking is going to work to try to get
17 some timed implement, which implement the
18 greenhouse gas rule, specifically the light duty
19 truck and the tailoring rule. When it hits
20 Montana, we wanted to get ahead of it, and I know
21 now we won't be getting ahead of it, and I hope
22 that we'll have some time to implement this at the
23 State level.

24 Secondly, I hope that the Environmental
25 Quality Council will reconsider their position,

1 MR. LIVERS: Mr. Mires.

2 MR. MIRES: Aye.

3 MR. LIVERS: Ms. Shropshire.

4 MS. SHROPSHIRE: Aye.

5 MR. LIVERS: Mr. Whalen.

6 MR. WHALEN: No.

7 MR. LIVERS: Chairman Russell.

8 CHAIRMAN RUSSELL: Aye.

9 MR. LIVERS: The vote is six to one.

10 CHAIRMAN RUSSELL: All right. Well,
11 because we are meeting, is there anyone in the
12 audience that would like to address the Board on
13 any other matter that pertains to the Board?

14 MR. LIVERS: It doesn't appear so here
15 in the room, Mr. Chairman.

16 CHAIRMAN RUSSELL: I guess we can stay
17 on the record. Tom, what do you feel -- Without
18 the hearing, do we have substantive enough to
19 meet, or should we just meet telephonically?

20 MR. LIVERS: Mr. Chairman, we've got a
21 couple rule initiations, I think easily less than
22 a couple hour Board meeting, so I would certainly
23 be happy to set up a telephone conference for next
24 Friday.

25 MS. SHROPSHIRE: Mr. Chairman, if it

1 helps in making that decision, I'm going to have
 2 to call in regardless, if that's appropriate. So
 3 I won't be there, I won't be able to be there, but
 4 I would like to call in, if that's acceptable.
 5 CHAIRMAN RUSSELL: Well, that would be
 6 very acceptable. Anyone else comment on that?
 7 (No response)
 8 CHAIRMAN RUSSELL: So next Friday we'll
 9 meet by telephone, and I'm sure that the Staff and
 10 Tom will get us ready to go for that.
 11 MR. LIVERS: Sounds good, Mr. Chairman.
 12 Thank you.
 13 CHAIRMAN RUSSELL: I'll entertain a
 14 motion to adjourn.
 15 MR. MILLER: This is Miller. I so move.
 16 CHAIRMAN RUSSELL: Second.
 17 MR. WHALEN: I'll second, Mr. Chairman.
 18 CHAIRMAN RUSSELL: All those in favor,
 19 signify by saying aye.
 20 (Response)
 21 CHAIRMAN RUSSELL: Motion is carried.
 22 Meeting is adjourned.
 23 (The proceedings were concluded
 24 at 9:30 a.m.)
 25 * * * * *

1 CERTIFICATE
 2 STATE OF MONTANA)
 3 : SS.
 4 COUNTY OF LEWIS & CLARK)
 5 I, LAURIE CRUTCHER, RPR, Court Reporter,
 6 Notary Public in and for the County of Lewis &
 7 Clark, State of Montana, do hereby certify:
 8 That the proceedings were taken before me at
 9 the time and place herein named; that the
 10 proceedings were reported by me in shorthand and
 11 transcribed using computer-aided transcription,
 12 and that the foregoing - 23 - pages contain a true
 13 record of the proceedings to the best of my
 14 ability.
 15 IN WITNESS WHEREOF, I have hereunto set my
 16 hand and affixed my notarial seal
 17 this day of , 2010.
 18
 19 LAURIE CRUTCHER, RPR
 20 Court Reporter - Notary Public
 21 My commission expires
 22 March 9, 2012.
 23
 24
 25