

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)

JANUARY 25, 2013)

TRANSCRIPT OF PROCEEDINGS

Heard at Room 111 of the Metcalf Building

1520 East Sixth Avenue

Helena, Montana

January 25, 2013

9:00 a.m.

BEFORE CHAIRMAN JOSEPH RUSSELL,
BOARD MEMBERS, HEIDI KAISER,
LARRY ANDERSON, ROBIN SHROPSHIRE,
JOE WHALEN, and MARVIN MILLER (By telephone);
and LARRY MIRES

PREPARED BY: LAURIE CRUTCHER, RPR

COURT REPORTER, NOTARY PUBLIC

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

3 * * * * *

4 CHAIRMAN RUSSELL: It is 9:00, and I
5 will call this regular meeting of the Board of
6 Environmental Review to order. Tom, would you go
7 through the roll call again.

8 MR. LIVERS: Mr. Chairman, members of
9 the Board, for the record, Tom Livers, Deputy
10 Director of the Department of Environmental
11 Quality. Mr. Mires.

12 MR. MIRES: Here.

13 CHAIRMAN RUSSELL: Ms. Kaiser.

14 MS. KAISER: Here.

15 MR. LIVERS: Ms. Shropshire.

16 MS. SHROPSHIRE: Here.

17 MR. LIVERS: Mr. Miller.

18 MR. MILLER: Here.

19 MR. LIVERS: Mr. Anderson.

20 MR. ANDERSON: Here.

21 MR. LIVERS: Mr. Whalen.

22 MR. WHALEN: I'm here.

23 MR. LIVERS: Chairman Russell.

24 CHAIRMAN RUSSELL: Here. The first item
25 on the agenda are review and approval of the

1 minutes of the December 7th, 2012 Board meeting.

2 MR. MIRES: So move to approve. Mires.

3 CHAIRMAN RUSSELL: Is there a second?

4 MR. MILLER: Second. Miller.

5 CHAIRMAN RUSSELL: It's been seconded by
6 Marv. Further discussion?

7 MS. KAISER: I just have one question.
8 I noticed that there was request by you, Joe, I
9 believe, for an update on the Bakken field. I
10 didn't see that on the agenda.

11 CHAIRMAN RUSSELL: I think in
12 discussions with Tom, we thought that that would
13 be more appropriately done in person.

14 MS. KAISER: Okay.

15 MR. LIVERS: Mr. Chairman, Ms. Kaiser,
16 that's correct. We talked it over. We've got
17 plenty of information we would like to share, but
18 it seemed like that would be a better thing to
19 take care of at an in-person meeting, and I think
20 for a variety of reasons, we'll plan on an
21 in-person meeting at the next meeting in March.

22 MS. KAISER: I think that's a great
23 idea.

24 MR. LIVERS: Mr. Chairman, again, Board
25 Attorney Katherine Orr is delayed at another

1 hearing. So -- I'm sorry. We have not taken
2 action on the adoption of the minutes. My
3 mistake.

4 CHAIRMAN RUSSELL: All those in favor.

5 (Response)

6 CHAIRMAN RUSSELL: Opposed.

7 (No response)

8 CHAIRMAN RUSSELL: Motion carries
9 unanimately.

10 MR. LIVERS: I think just since the
11 Board Attorney is not present, it's really not
12 appropriate to go over the contested case
13 information now, and why don't we go straight into
14 the one rulemaking item, III(A)(1). And we have
15 here in Helena Mr. Pizzini to address this.

16 MR. PIZZINI: Good morning, Chairman
17 Russell, members of the Board. For the record, my
18 name is Eugene Pizzini. I'm the rules manager for
19 the Public Water and Subdivisions Bureau.

20 On September 27th, the Board of
21 Environmental Review initiated rulemaking to amend
22 the Public Water Supply Rules. On November 28th,
23 Katherine Orr conducted a public hearing on the
24 proposed amendments.

25 The first proposed amendment would

1 create a new line item and associated fee dealing
2 with engineering review. The proposed line and
3 fee would, the end result would be about 40
4 percent reduction in the costs associated with
5 doing plan review of slip line.

6 Proposed New Rule I is intended to
7 implement new authority that was authorized in the
8 2009 Legislature dealing with the repair of
9 significant deficiencies. The Department worked
10 with its focus group, which consists of municipal
11 systems, private systems, contract operators,
12 technical assistance providers, federal agencies,
13 and other interested parties in drafting these
14 proposed amendments.

15 No comments were received through the
16 comment period. Therefore, the Department
17 recommends adoption as proposed in the notice for
18 public hearing on the proposed amendments. Thank
19 you.

20 CHAIRMAN RUSSELL: Thanks. Board
21 members, do you have any comments or questions for
22 the Department?

23 (No response)

24 CHAIRMAN RUSSELL: It seems pretty
25 straight forward. Tom, is there anyone there or

1 anyone on -- I guess there is no one else on the
2 phone. Is anyone there that wants to speak to
3 this matter?.

4 MR. LIVERS: Mr. Chairman, I can check.
5 There are some members of the public in the
6 audience.

7 (No response)

8 MR. LIVERS: There doesn't appear to be
9 anyone who wants to speak on this issue.

10 CHAIRMAN RUSSELL: I would entertain a
11 motion to adopt the rule as proposed, accept the
12 Presiding Officer's report, House Bill 521 and 311
13 analysis. There were no comments, so no responses
14 to comments. So do I have a motion?

15 MR. WHALEN: So moved, Mr. Chairman.
16 Whalen.

17 MR. MILLER: I'll second. This is
18 Miller.

19 CHAIRMAN RUSSELL: It's been seconded by
20 Miller. Further discussion.

21 (No response)

22 CHAIRMAN RUSSELL: It should all be this
23 easy, right?

24 MR. PIZZINI: Exactly.

25 CHAIRMAN RUSSELL: Hearing none, all

1 those in favor, signify by saying aye.

2 (Response)

3 CHAIRMAN RUSSELL: Opposed.

4 (No response)

5 CHAIRMAN RUSSELL: Motion carries

6 unanimately.

7 Since now we're done with everything but

8 Katherine's stuff --

9 MR. LIVERS: Mr. Chairman, we don't
10 really have a good sense of just how long the
11 delay for the other hearing will be. We might
12 choose to recess the meeting and recontact the
13 Board members when Ms. Orr is present.

14 CHAIRMAN RUSSELL: I pretty much could
15 do that, but what's the rest of the Board feel
16 about that?

17 MS. KAISER: I'm open for that.

18 MR. ANDERSON: I'm in Helena at a
19 seminar, so I left the room to do this. I guess
20 you can call me on my cell phone and I can do that
21 again.

22 MR. LIVERS: Another suggestion, Mr.
23 Chairman. Really we do have some members of the
24 public here, but I don't know that there is any
25 items on the agenda that are time critical. It

1 would simply be the briefing from your attorney
2 with any updates that are not reflected in the
3 agenda. So arguably I think it is -- I'm not
4 aware of anything that would be harmed by not
5 dealing with that, or not receiving that update at
6 this point.

7 CHAIRMAN RUSSELL: I'm kind of thinking
8 the same way, although there is one thing on the
9 agenda I'm trying to get to, but it is not
10 appropriate to address it without Katherine here.

11 MS. SHROPSHIRE: Could we propose that
12 we set a half an hour. That way, members of the
13 public or others that are interested have a set
14 time frame to call back in, and hopefully
15 Katherine will be available; take a thirty minute
16 recess, and call back in.

17 (Ms. Orr Present)

18 MR. LIVERS: And actually Katherine was
19 just able to arrive, so we might just take a five
20 minute recess, give her some time to get settled,
21 and then could reconvene at that time.

22 CHAIRMAN RUSSELL: All right. I'm going
23 to stay on the line.

24 MR. LIVERS: I think if folks want to
25 stay on the line, just so she has a chance to kind

1 of settle in. I can give you a cue perhaps. Why
2 don't we look at about five minutes.

3 CHAIRMAN RUSSELL: We're recessed.

4 (Recess taken)

5 MR. LIVERS: Mr. Chairman, I think we're
6 good on our end. I can do a quick roll call if
7 you'd like to make sure everybody is back.

8 CHAIRMAN RUSSELL: Whether Katherine is
9 back or not, I'm going to get everything, all the
10 information we need.

11 MR. LIVERS: Why don't I run through a
12 quick roll call. Mr. Mires.

13 MR. MIRES: Here.

14 MR. LIVERS: Ms. Kaiser.

15 MS. KAISER: Here.

16 MR. LIVERS: Ms. Shropshire.

17 MS. SHROPSHIRE: Here.

18 MR. LIVERS: Mr. Miller.

19 MR. MILLER: Here.

20 MR. LIVERS: Mr. Anderson.

21 MR. ANDERSON: Here.

22 MR. LIVERS: Mr. Whalen.

23 MR. WHALEN: Here.

24 MR. LIVERS: Chairman Russell.

25 CHAIRMAN RUSSELL: I'm here.

1 MR. LIVERS: It sounds like we're ready
2 to go.

3 CHAIRMAN RUSSELL: All right.
4 Katherine, we are on Item II, briefing items on to
5 you, which are all of them, so --

6 MS. ORR: Mr. Chairman, members of the
7 Board, on the first matter, Any Time Septic, BER
8 2011-6, an order on a renewed motion for summary
9 judgment was issued on January 17th, 2013, and the
10 next step in that case will be that there will be
11 a contested case hearing on the penalty phase of
12 the case.

13 On the next item, Ronan Public Water
14 Supply System, that case has been deemed submitted
15 concerning a pending motion for summary judgment
16 filed by the Department, and that will be ruled on
17 shortly.

18 On the next item involving Valley County
19 Refuse District, there was an order that was
20 issued vacating the hearing set for January 23rd,
21 and resetting it for March 27th. Oral argument
22 was heard on the pending motion for summary
23 judgment this week on January 23rd, and a
24 recommended order will be coming out on that
25 shortly.

1 The next item, there is nothing to
2 report. And going down here to Item No. 3,
3 involving in the matter of the request for hearing
4 by William E. Smith on behalf of Mike Adkins, I
5 think the Board all remembers that there is
6 somewhat of a parallel proceeding of that case in
7 Park County, and we will be receiving a status
8 report on that case in the next Board meeting on
9 -- actually the status report is due on March
10 27th, which is a little bit after the scheduled
11 Board meeting, but maybe the parties could report
12 at the next meeting on that. That would be
13 useful. And that's all I had.

14 CHAIRMAN RUSSELL: Not really because
15 now we're going on to new contested cases.

16 MS. ORR: Okay. The first item, both of
17 these in the New Contested Cases section involve a
18 challenge to the issuance of an air quality
19 permit, one at the Colstrip steam electric
20 station, and the other one at the JE Corette
21 electric steam station. So that's all I had
22 there.

23 CHAIRMAN RUSSELL: All right. New
24 contested cases. Board, do you have any questions
25 for Katherine?

1 MR. MIRES: This is Larry Mires. I do
2 have one question.

3 On the second contested case with the
4 Corette steam electric station, I recall some kind
5 of a notice that PPL was planning on shutting that
6 down, and that they were not going to move
7 forward. Is that official, or is that just
8 speculation on PPL's part? Do we have any -- I
9 guess my question would be: If PPL is in fact
10 going to shut down the Corette station, then
11 doesn't this become a moot issue or not? I don't
12 know.

13 MS. ORR: Mr. Chairman, I don't have
14 information about that. And it could possibly
15 become moot if that were the case.

16 MS. SHROPSHIRE: Mr. Chairman, this is
17 Robin. I need -- the big question is whether or
18 not we're going to hear these ourselves.

19 CHAIRMAN RUSSELL: That would be a very
20 big question.

21 MR. WHALEN: Mr. Chairman, this is
22 Whalen. In response to that question, in going
23 through the agenda packet, it is pretty clear to
24 me that a lot of work went into the commenting on
25 both of those cases, and I really feel that it's

1 incumbent upon the Board to at least hear one of
2 those two cases, and if there is some questions
3 with respect to whether there is any life cycle on
4 case No. 2, I would be inclined to want to hear
5 case No. 1.

6 CHAIRMAN RUSSELL: I agree, Joe. Any
7 other comments?

8 MS. SHROPSHIRE: I'm in agreement with
9 that as well. This is Robin.

10 MR. MILLER: I am, too. Miller.

11 MR. ANDERSON: Larry Anderson is in
12 agreement as well.

13 MR. MIRES: Mires the same.

14 CHAIRMAN RUSSELL: All right. Well, I
15 guess --

16 MS. KAISER: Mr. Chairman, this is
17 Heidi. I'm recusing myself from any action on
18 this, this case and the following item.

19 CHAIRMAN RUSSELL: Okay. So I guess we
20 aren't going to assign this to you Katherine, but
21 there is probably some prehearing stuff that is
22 going to continue to happen that we would like you
23 to take care of as the Interim Hearings Examiner.
24 Are you able to do that?

25 MS. ORR: Yes.

1 CHAIRMAN RUSSELL: All right. So do we
2 have -- Actually my PDF file will not roll
3 smoothly, so I feel like I'm actually getting sea
4 sick.

5 Well, Katherine, do you have a feel for
6 how this is going to proceed? This is a big case.

7 MS. ORR: Yes, Mr. Chairman. I do not.
8 I simply do not.

9 CHAIRMAN RUSSELL: It looks like the
10 Appellants used EarthJustice letterhead, but
11 they're not a party, right?

12 MS. ORR: Let me find those files. I'm
13 looking at the file.

14 CHAIRMAN RUSSELL: It looks like MEIC
15 and Sierra Club, but --

16 MS. ORR: I think it is EarthJustice,
17 MEIC, and Sierra Club.

18 CHAIRMAN RUSSELL: It is?

19 MR. ANDERSON: Yes.

20 MS. ORR: So that would be my response
21 to that.

22 CHAIRMAN RUSSELL: Okay. Well, I know
23 you don't have a feel for how the -- Do you have a
24 feel for how long it would take to actually come
25 up as a contested case?

1 MS. ORR: Not yet, Mr. Chairman.

2 CHAIRMAN RUSSELL: Will there be a lot
3 of discovery and a lot of prehearing motions?

4 MS. ORR: Mr. Chairman, I think it would
5 be probably easier to tell you that in the next
6 meeting. These kinds of cases involve expert
7 witness testimony, so those necessarily involve
8 depositions, so it could go that way, in which
9 case the process could take as long as a year.

10 CHAIRMAN RUSSELL: Is there any way you
11 could have a prehearing conference with the
12 parties?

13 MS. ORR: Mr. Chairman, I always have a
14 prehearing conference with the parties, and --
15 Well, initially I ask them to submit a scheduling
16 order, and I usually do that a little later in the
17 case. But your point is you're wondering about
18 sort of the numbers, and types of witnesses, and
19 how long this will take?

20 CHAIRMAN RUSSELL: I'm just trying to
21 get a feel. I don't have a very good feel for
22 this case.

23 MS. ORR: Yes. Well, I'd be glad --

24 CHAIRMAN RUSSELL: We've seen the
25 parties before, and it has been exhaustive.

1 MS. ORR: Okay.

2 CHAIRMAN RUSSELL: The earlier the
3 better probably, just to give the Board an idea.

4 MS. ORR: Okay. And I will also obtain
5 clarification on the parties.

6 CHAIRMAN RUSSELL: Okay. The notice
7 doesn't have EarthJustice in there, but --

8 MS. ORR: Typically when you use the
9 full address of an organization in association
10 with your name, you're representing that they're
11 parties, but I agree this is confusing, because
12 the notice just says that the parties are MEIC and
13 the Sierra Club. So it does need clarification.

14 CHAIRMAN RUSSELL: Okay. Well, Board
15 members, do you have any other questions or
16 comments for Katherine?

17 (No response)

18 CHAIRMAN RUSSELL: Hearing none, we'll
19 move on, on other action on contested cases.

20 MS. ORR: Mr. Chairman, on the first
21 item, Brad Blakeman and Camas Prairie, this agenda
22 item is going to be moved to the March meeting
23 because Mr. Blakeman didn't receive notice of this
24 agenda item. It gives the parties a little bit
25 longer to try to sort out with him what can be

1 done.

2 CHAIRMAN RUSSELL: We should expect him
3 to be in our presence again?

4 MS. ORR: I don't think necessarily, but
5 I think the idea behind this was to confer with
6 him, and to try to figure out a plan for
7 compliance.

8 CHAIRMAN RUSSELL: Most likely in March
9 we'll have a plan.

10 MS. ORR: That would be the case.

11 CHAIRMAN RUSSELL: But we'll have to
12 come up with a penalty?

13 MS. ORR: Yes, that's very much a
14 consideration for the Board.

15 CHAIRMAN RUSSELL: So will the
16 Department argue -- (inaudible) --

17 MR. LIVERS: Joe, could you repeat that?
18 You're breaking up.

19 CHAIRMAN RUSSELL: Where is the static
20 coming from? It is getting really bad on my end.

21 MR. WHALEN: I'm going to mute mine and
22 see if I'm the cause of the static.

23 CHAIRMAN RUSSELL: Well, you may have
24 been, because it is gone. So everyone can talk
25 right now except for Joe; is that what I'm

1 getting?

2 MR. LIVERS: I think that's correct.

3 CHAIRMAN RUSSELL: All right. Joe, when
4 it starts to get garbly again, we're guessing
5 you're going to want to talk.

6 So we still could hear oral argument for
7 the penalty, Katherine?

8 MS. ORR: Yes, that is correct, although
9 you did hear -- There was oral argument already on
10 penalties.

11 CHAIRMAN RUSSELL: All right.

12 MS. ORR: If you'd like, I can summarize
13 the record for you.

14 CHAIRMAN RUSSELL: That might be a good
15 idea.

16 MS. ORR: Okay.

17 CHAIRMAN RUSSELL: So the next item up.

18 MS. ORR: The next item, again, this Any
19 Time Septic. And there was a recommended order on
20 the renewed motion for summary judgment that was
21 issued this month, and I understand that is not
22 with the packet. So what I would recommend is
23 that we also place this before you in the March
24 agenda -- I hate to do that -- so you can review
25 the order, and then decide to adopt it or reject

1 it.

2 And the parties also will be given an
3 opportunity to file exceptions just as sort of a
4 precaution, and the issue of penalties still needs
5 to be taken up by way of a contested case.

6 CHAIRMAN RUSSELL: Okay. That's fine
7 with me.

8 MS. ORR: So is it okay to go on to the
9 next item?

10 CHAIRMAN RUSSELL: Yes, Katherine,
11 please.

12 MS. ORR: This is a case that was filed
13 under the Major Facilities Siting Act, and there
14 is an unusual provision, this code Section
15 75-20-223, which allows a party who -- The statute
16 reads, "If the applicant or permittee is not the
17 person who requested the hearing," which is the
18 case here, "and has elected to have the matter
19 submitted to the District Court, the person who
20 submitted the request for hearing shall file a
21 petition for review of the permit decision."

22 So here PPL removed the case in essence
23 to District Court, and MEIC, Sierra Club, and
24 National Wildlife Federation filed a petition for
25 review, which I had to confirm in the record.

1 So this has been properly removed to the
2 District Court, and the Board won't have anything
3 more to do with this case. It is unusual because
4 usually the way the jurisdiction of the Board
5 terminates is through either disposition on the
6 merits or some sort of dispositive final motion,
7 like a motion to dismiss or motion for summary
8 judgment, but that didn't happen in this
9 situation.

10 And I just thought the Board would like
11 an explanation. There is no vote needed, but
12 that's what happened in this case.

13 CHAIRMAN RUSSELL: This was about
14 siting?

15 MS. ORR: Yes.

16 CHAIRMAN RUSSELL: So my guess is there
17 was an appeal to the Board?

18 MS. ORR: There was initially.

19 CHAIRMAN RUSSELL: Okay. But even
20 though there was an appeal, we don't have to take
21 any action to say we're not going to move forward
22 with it.

23 MS. ORR: Right, and that's by the
24 wording of this statute.

25 CHAIRMAN RUSSELL: Okay. I guess I

1 haven't looked at that. Thanks, Katherine.

2 Tom, before we go to general comment, is
3 there anything else that I missed or we missed?

4 MR. LIVERS: No, Mr. Chairman. You
5 covered the agenda. I would probably just put in
6 a reminder that the next Board meeting is
7 scheduled for Friday, March 22nd. We are planning
8 on an in-person meeting.

9 And the reminder, there are four seats
10 on the Board whose terms have expired, and those
11 four individuals continue to serve until there is
12 an appointment by the new Governor. Just a
13 reminder, if you have not contacted the Governor's
14 appointments person if you're interested in
15 continuing to serve, please do so. If you need
16 any of that information, let me know.

17 That's it, Mr. Chairman.

18 CHAIRMAN RUSSELL: All right. Thanks.
19 Well, the last thing on the agenda is reserved for
20 public comment. Is there anyone there or on the
21 phone that would like to address the Board?

22 (No response)

23 MR. LIVERS: No one here in Helena, Mr.
24 Chairman.

25 CHAIRMAN RUSSELL: All right. Well,

1 seeing no further action, is there a motion to
2 adjourn?

3 MR. MILLER: So moved. This is Miller.

4 CHAIRMAN RUSSELL: It's been moved by
5 Marv. Is there a second?

6 MR. MIRES: Mires, second.

7 CHAIRMAN RUSSELL: Larry seconds. Any
8 further discussion by the Board?

9 (No response)

10 CHAIRMAN RUSSELL: Hearing none, all
11 those in favor, signify by saying aye.

12 (Response)

13 CHAIRMAN RUSSELL: All right. We will
14 see you in March.

15 (The proceedings were concluded

16 at 9:29 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 - 22 - pages contain a true
record of the proceedings to the best of my
ability.

IN WITNESS WHEREOF, I have hereunto set my
hand and affixed my notarial seal
this day of , 2013.

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