

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
JANUARY 28, 2011)

TRANSCRIPT OF PROCEEDINGS

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
January 28th, 2011
9:00 a.m.

BEFORE CHAIRMAN JOSEPH RUSSELL,
BOARD MEMBERS LARRY MIRES, HEIDI KAISER,
LARRY ANDERSON, ROBIN SHROPSHIRE,
JOE WHALEN, and MARVIN MILLER (All by Phone)

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

3 * * * * *

4 CHAIRMAN RUSSELL: Since everyone is
5 here, it is 9:05, and I'll call this regular
6 meeting of the Board of Environmental Review to
7 order. The first item on the agenda is review and
8 approval of the minutes of the December 3rd, 2010
9 meeting. Comments? Questions? Clarifications?

10 MR. MIRES: I would so move that we
11 approve the minutes.

12 CHAIRMAN RUSSELL: It's been moved by
13 Larry. Is there a second?

14 MR. MILLER: This is Marv. I second.

15 CHAIRMAN RUSSELL: It's been seconded by
16 Marv. Further questions?

17 (No response)

18 CHAIRMAN RUSSELL: Hearing none, all
19 those in favor, signify by saying aye.

20 (Response)

21 CHAIRMAN RUSSELL: Opposed.

22 (No response)

23 CHAIRMAN RUSSELL: All right. Motion
24 carries unanimously. The next item on the agenda
25 are the updates from Katherine regarding the

1 contested cases. Katherine.

2 MS. ORR: Good morning, Mr. Chairman,
3 members of the Board. What I would propose to do
4 here is just make some comments on some of the
5 cases where there has been some movement on the
6 case since the agenda was sent out.

7 On Item II(A)(1)(d), I call this the
8 J. R. Enterprise case. There is a summary
9 judgment that was filed by the Department; a
10 response was filed on January 20th; and so a reply
11 could be forthcoming on that, and then that will
12 be deemed submitted.

13 On Item (e), sub (e), Roseburg Forest
14 Products, a hearing is set for February 28th, but
15 that could be moved to later on in the year,
16 probably May or June.

17 On Item (f), which involves Holcim,
18 Incorporated, there is a fourth order granting
19 extension of time in which the parties have to
20 either settle the case or propose a prehearing
21 order.

22 On Item sub (h) and sub(i), there have
23 been motions to dismiss the appeal filed by MATL,
24 and the briefing has been submitted for Ronald and
25 Debbie Laubach. And there is going to be oral

1 argument in the Maurer Farms case on February 3rd,
2 and then that will be deemed submitted.

3 And you'll see on Page 3 of the agenda,
4 In the Matter of the Violations of the Montana
5 Underground Storage Tank Act by Juniper Hill
6 Farms, there was a motion for rehearing from
7 Juniper Hill, and the Department filed an
8 opposition to that motion, and some sort of
9 disposition of that will occur in the next meeting
10 before the Board on the 25th.

11 And that's all for that segment of the
12 agenda.

13 CHAIRMAN RUSSELL: Thanks, Katherine. I
14 just want to put it on record that on Item (g),
15 Greg McDonald actually called me one day. I
16 literally made no comment to him about -- I told
17 him I could only talk about process, not talk
18 about the substance of the case, and turned it
19 back and asked him to talk to the Department. I
20 did call the Department and I think John North was
21 notified that he had contacted me.

22 MR. LIVERS: That's correct.

23 CHAIRMAN RUSSELL: I just bring it up to
24 Board members because that is a clear problem for
25 us to take calls from people in the works.

1 MS. KAISER: Joe, this is Heidi. He
2 also called me, and said he had talked to you, and
3 I told him that I couldn't discuss it with him.

4 CHAIRMAN RUSSELL: And that's good,
5 Heidi. I think we've been around long enough to
6 know, and others on the Board do know that, too,
7 but we just can't discuss these matters when we've
8 turned them over. And we only act collectively as
9 a board, we don't act individually, and we don't
10 have ex parte communications with case
11 participants.

12 All right. With that in mind, we will
13 go to Item III(A)(1), executive summary for rule
14 adoption regarding Administrative Rule 17.38.204.

15 MR. LIVERS: Mr. Chairman, thank you.
16 And thanks for the reminder on the contested case
17 issue as well.

18 This morning for the Department we've
19 got Eugene Pizzini.

20 MR. PIZZINI: Good morning, Chairman
21 Russell, members of the Board. For the record, my
22 name is Eugene Pizzini, and I'm the rules expert
23 for the Public Water Supply Section.

24 On October 8th, 2010, the BER initiated
25 rulemaking to amend the Public Water Supply Rules.

1 The proposed amendment is to correct a previous
2 adoption that failed to adopt all portions of
3 federal requirement. As primacy requirements go,
4 this one is needed. This is the MCL for bromate
5 and chloride. It was an oversight or typo that we
6 don't have it now.

7 When we initially adopted the rule, we
8 did public notice, we did hearing, and it was
9 clear in the statement of reasonable necessity
10 that we intended to adopt the MCL; but because of
11 the way it was adopted, we don't have it, and we
12 need it.

13 So in October we initiated this, and
14 proposed to do it without a public hearing. We
15 did not hold a public hearing. We did send out
16 notice and received no comments based on the
17 notice. Therefore, the Department recommends that
18 the Board adopts the amendment as proposed.

19 CHAIRMAN RUSSELL: Well, thank you. Are
20 there any questions for Gene before we take action
21 on this?

22 (No response)

23 CHAIRMAN RUSSELL: Is there anyone in
24 the audience that would like to speak to this
25 matter?

1 MR. LIVERS: No, Mr. Chairman.

2 CHAIRMAN RUSSELL: Okay. With that in
3 mind, I would entertain a motion to adopt the rule
4 as written, accept the House Bill 521 and 311
5 analysis. And we didn't have a hearing, right?

6 MR. LIVERS: Correct.

7 CHAIRMAN RUSSELL: So that's all we have
8 to accept and adopt. Do I have a motion?

9 MR. MILLER: I so move. This is Miller.

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

12 MR. MIRES: This is Larry. I'll second
13 it. Mires.

14 CHAIRMAN RUSSELL: Larry Mires seconded
15 it. Any further discussion?

16 (No response)

17 CHAIRMAN RUSSELL: Hearing none, all
18 those in favor, signify by saying aye.

19 (Response)

20 CHAIRMAN RUSSELL: Opposed.

21 (No response)

22 CHAIRMAN RUSSELL: Motion carries
23 unanimously. Nicely done, and with plenty of
24 speed.

25 So the next item on the agenda is

1 another executive summary request for rule
2 adoption regarding ARM 17.8.102.

3 MR. LIVERS: Mr. Chairman, another
4 incorporation by reference this morning. Deb
5 Wolfe will be here for this one.

6 MS. WOLFE: Thank you. Good morning.
7 For the record, my name is Debra Wolfe, and I work
8 in the Air Resources Management Bureau. I'm here
9 today to represent the Department regarding action
10 on the proposed incorporation by reference
11 rulemaking.

12 As a state with authority in delegation
13 for the administration of various federal air
14 quality programs, Montana maintains its primacy in
15 part by adopting and implementing the most current
16 federal regulatory provisions. The Department
17 supports the Board's proposal to amend ARM
18 17.8.102 to adopt revisions to federal regulations
19 published in the July 1st, 2009 edition of the
20 Code of Federal Regulations, and revisions to
21 State Administrative Rules published in the
22 December 31st, 2009 edition of the ARM.

23 The Department believes the integrity of
24 air quality programs in Montana is maintained in
25 part when the Board adopts and incorporates by

1 reference federal regulations, including new
2 source performance standards and national emission
3 standards for hazardous air pollutants.

4 This action will ensure that Montana's
5 air quality rules are at least as stringent as
6 federal air quality regulations, maintain primacy
7 and federal delegation of Montana's air quality
8 program, and ensure the timely implementation of
9 emission standards that were developed on the
10 federal level pursuant to a nationwide program of
11 emission control.

12 The Department held a hearing on this
13 matter on December 6th, 2010. No comments were
14 received. The Department recommends that the
15 Board adopt the amendment as described in the
16 proposed MAR notice published November 12th, 2010.
17 Thank you.

18 CHAIRMAN RUSSELL: Thanks, Deb.
19 Questions for the Department from the Board?

20 (No response)

21 CHAIRMAN RUSSELL: Anyone out there in
22 the audience that wants to speak to this matter
23 before we take this up?

24 MR. LIVERS: No, Mr. Chairman.

25 CHAIRMAN RUSSELL: Thanks, Tom. With

1 that in mind, I will entertain a motion to adopt
2 as requested, accept the Presiding Officer's
3 report, the House Bill 521 and 311 analysis, and
4 that would be it. Is there a motion?

5 MS. KAISER: So moved.

6 CHAIRMAN RUSSELL: It's been moved by
7 Heidi. Is there a second?

8 MR. MILLER: This is Miller. I'll
9 second it.

10 CHAIRMAN RUSSELL: It's been seconded by
11 Marv. Further discussion?

12 (No response)

13 CHAIRMAN RUSSELL: Hearing none, all
14 those in favor, signify by saying aye.

15 (Response)

16 CHAIRMAN RUSSELL: Opposed.

17 (No response)

18 CHAIRMAN RUSSELL: Motion carries
19 unanimously. All right. The next item on the
20 agenda are new contested case appeals. Katherine.

21 MS. ORR: Mr. Chairman, members of the
22 Board, the first case that came in is a case out
23 of Roundup, Signal Peak Energy at Bull Mountain
24 Mine No. 1. It involves an underground coal mine.

25 And the violation consists of these

1 facts. The soil was being used as a temporary
2 earthen tailgate to hold fluid coal waste in the
3 bed of trucks, and that's a violation of Montana
4 Code Annotated 82-4-232 which says that in the
5 process of this mining, top soil is to be removed
6 in a separate layer, and later returned as a top
7 layer after whatever mining, backfilling, grading
8 has been done. And the notice of violation
9 alleges one day of violation, and the penalty
10 sought by the Department is \$3,000.

11 CHAIRMAN RUSSELL: Okay. And apparently
12 they don't like that. All right. Katherine,
13 you're available?

14 MS. ORR: Yes.

15 CHAIRMAN RUSSELL: I would entertain a
16 motion to appoint Katherine the permanent Hearings
17 Examiner on this case.

18 MR. WHALEN: Joe Whalen. For a number
19 of reasons on both sides of this question, I
20 really think the Board ought to hear this issue,
21 and I would so move.

22 CHAIRMAN RUSSELL: All right. Is there
23 a second?

24 MR. ANDERSON: This is Larry Anderson.
25 We haven't heard anything since I've been on the

1 Board, so I would second it.

2 CHAIRMAN RUSSELL: It's been moved and
3 seconded. Is there discussion by the Board?

4 MS. KAISER: Mr. Chairman, this is
5 Heidi.

6 CHAIRMAN RUSSELL: I guess you're going
7 to recuse yourself.

8 MS. KAISER: I am. For the record, I
9 recuse myself from taking action on this item.

10 CHAIRMAN RUSSELL: Further discussion?

11 MR. WHALEN: Mr. Chairman, just to
12 provide a little rationale for the motion, on the
13 Signal Peak side, as a Board member, I'd like to
14 learn more about this top soil removal process, I
15 want to learn more about alleged violations,
16 determine their severity, because I think much of
17 the concern over the appeal has to do with the
18 gravity of the violations.

19 On the other side, there is a history of
20 previous violations at this mine, and so I would
21 kind of like the Board to hear both sides of this
22 question, and kind of balance that out. As Larry
23 just pointed out, I think it is time that we hear
24 an issue. So thank you for your consideration.

25 CHAIRMAN RUSSELL: All right. Any other

1 comments?

2 (No response)

3 CHAIRMAN RUSSELL: All right. There is
4 a motion on the floor for the Board to hear this,
5 and of course, Katherine would still do all our
6 prehearing work on this as is customary. So all
7 those in favor, signify by saying aye.

8 (Response)

9 CHAIRMAN RUSSELL: Opposed.

10 (No response)

11 CHAIRMAN RUSSELL: Motion carries. All
12 right. Thanks. So Katherine, you'll just keep us
13 in the loop.

14 MS. ORR: Yes, I will.

15 CHAIRMAN RUSSELL: Orders and --

16 MS. ORR: Yes.

17 CHAIRMAN RUSSELL: How about we move to
18 the next one, Public Water Supply, Belle Creeke.

19 MS. ORR: This is a case out of Butte,
20 and it's a public water supply violation. It
21 involves a public water supply system that serves
22 Belle Creeke Dental under a public water supply
23 permit. And Belle Creeke Dental has been
24 characterized as a supplier of water, and is a
25 transient, non-community water system, so that

1 sets up certain requirements.

2 And one of the requirements is that
3 there be monthly monitoring for total coliform
4 bacteria. In this case, the violation was that
5 there was no monitoring of the public water supply
6 for total coliform bacteria in the months April,
7 June, and August of 2010, and the penalty sought
8 is \$768.

9 CHAIRMAN RUSSELL: All right. Thank
10 you. Well, we'll kick this one off. Katherine,
11 you're available?

12 MS. ORR: Yes.

13 CHAIRMAN RUSSELL: I would entertain a
14 motion to appoint Katherine the permanent Hearings
15 Examiner on this.

16 MR. MILLER: This is Miller. I so move.

17 CHAIRMAN RUSSELL: It's been moved to
18 Marv. Is there a second?

19 MS. SHROPSHIRE: I'll second it. This
20 is Robin.

21 CHAIRMAN RUSSELL: It's been seconded by
22 Robin. Further discussion?

23 (No response)

24 CHAIRMAN RUSSELL: Hearing none, all
25 those in favor, signify by saying aye.

1 (Response)

2 CHAIRMAN RUSSELL: Opposed.

3 (No response)

4 CHAIRMAN RUSSELL: Motion carries. The
5 last one in this section is in the matter of
6 violation of the Montana Strip and Underground
7 Mine Reclamation Act, Carbon County Holdings, LLC.

8 MS. ORR: Mr. Chairman, members of the
9 Board, this is a case involving a violation of the
10 Montana Strip and Underground Mining Reclamation
11 Act. The violation is a failure to obtain a
12 prospecting permit prior to conducting drilling
13 operations, and the penalty sought is \$20,700.

14 The scheme of this statute requires that
15 when you're prospecting for coal, you have to have
16 received written approval by the Department prior
17 to that.

18 CHAIRMAN RUSSELL: Which apparently they
19 didn't do.

20 MS. ORR: Right.

21 CHAIRMAN RUSSELL: Okay. And you said
22 \$20,000?

23 MS. ORR: Yes.

24 CHAIRMAN RUSSELL: Wow. That's a big
25 one. Well, I'll just entertain a motion.

1 MR. WHALEN: Mr. Chairman, given the
2 gravity of the fine, and the fact that the
3 Appellant has requested a hearing, I would like to
4 hear this matter, so I would so move.

5 CHAIRMAN RUSSELL: It's been moved to
6 have the Board hear this matter. Is there a
7 second?

8 MR. ANDERSON: Larry Anderson will
9 second that.

10 CHAIRMAN RUSSELL: It's been moved and
11 seconded. Comments? Questions?

12 MR. WHALEN: A question for Katherine.

13 MS. ORR: Yes.

14 MR. WHALEN: They were drilling for
15 coal?

16 MS. ORR: Prospecting, yes.

17 MR. WHALEN: Okay. Thank you.

18 CHAIRMAN RUSSELL: Any further questions
19 or discussions?

20 (No response)

21 CHAIRMAN RUSSELL: All right. Question
22 on the floor. All those in favor of the Board
23 hearing this matter, signify by saying aye.

24 (Response)

25 CHAIRMAN RUSSELL: Opposed.

1 (No response)

2 CHAIRMAN RUSSELL: All right. Motion
3 carries. I only heard three aye's, but --

4 MS. SHROPSHIRE: I said aye, but it was
5 kind of quiet.

6 CHAIRMAN RUSSELL: You just said it to
7 yourself?

8 MS. SHROPSHIRE: No. I don't think it
9 transmitted.

10 CHAIRMAN RUSSELL: All right. The last
11 matter before the Board is Final Action on
12 Contested Cases, Matter of Violations of the Clean
13 Air Act of Montana by Todd Michael Mihalko.
14 Katherine.

15 MS. ORR: Mr. Chairman, members of the
16 Board, this was a case settled under Rule 41 of --
17 well, the Montana Rules of Civil Procedure involve
18 a dismissal under 41, and then administratively
19 we've adopted that rule informally as a guide.

20 This case involves a situation out of
21 Clancy, Montana, where a contractor for Mr.
22 Schmaus -- which was a case that you all may
23 remember -- was burning slash piles, and the piles
24 were smoldering from January 25th, 2009 to
25 February 3rd of 2009. And this particular

1 contractor had failed to obtain a ventilation
2 forecast, and had allowed these piles to burn over
3 those days that I mentioned. And a penalty was
4 sought of \$4,800, and I don't have that right in
5 front of me, but I think the settled penalty was
6 in the \$500 range.

7 CHAIRMAN RUSSELL: Okay. You probably
8 don't have anyone in enforcement there, do you,
9 Tom?

10 MR. LIVERS: Mr. Chairman, John Arrigo
11 is here.

12 CHAIRMAN RUSSELL: Clancy is in
13 Broadwater County?

14 MS. ORR: It's in Jefferson County.

15 CHAIRMAN RUSSELL: Do they have an air
16 pollution control program there?

17 MR. LIVERS: No, Mr. Chairman.

18 CHAIRMAN RUSSELL: So all of the open
19 burning activities are actually regulated by the
20 State?

21 MR. LIVERS: Yes.

22 CHAIRMAN RUSSELL: In that county?

23 MR. LIVERS: That's right, Mr. Chairman.

24 CHAIRMAN RUSSELL: Just a point of
25 clarification. And those things are really hard

1 to put out sometimes, especially when you don't
2 want to. All right. So I have a dismissal order
3 in front of me, and I would entertain a motion to
4 have the Board Chair sign on behalf of the Board
5 for Case BER 2010-10-AQ.

6 MR. MIRES: Larry Mires so moves.

7 CHAIRMAN RUSSELL: Moved by Larry. Is
8 there a second?

9 MR. MILLER: I'll second it. Miller.

10 CHAIRMAN RUSSELL: It's been seconded by
11 Marv. Any questions, comments?

12 (No response)

13 CHAIRMAN RUSSELL: All right. All those
14 in favor, signify by saying aye.

15 (Response)

16 CHAIRMAN RUSSELL: Opposed.

17 (No response)

18 CHAIRMAN RUSSELL: Motion carries
19 unanimously. All right. I think the last item on
20 the agenda is public comment. Is there anyone
21 that would like to address the Board on matters
22 that pertain to the Board?

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

25 CHAIRMAN RUSSELL: All right. With that

1 in mind, I would entertain a motion to adjourn.

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

3 CHAIRMAN RUSSELL: It's been moved. Is
4 there a second?

5 MS. KAISER: This is Heidi. I'll second
6 it.

7 CHAIRMAN RUSSELL: It's been seconded by
8 Heidi. All those in favor, signify by saying aye.

9 (Response)

10 CHAIRMAN RUSSELL: Opposed.

11 (No response)

12 CHAIRMAN RUSSELL: Meeting is adjourned.

13 MR. LIVERS: Mr. Chairman, just a
14 reminder, the next meeting is March 25th; and
15 after that, it's May 13th. And we'll work with
16 Katherine on the two cases that the Board has
17 elected to hear, and wherever possible, try to
18 schedule that around a regular board meeting.

19 CHAIRMAN RUSSELL: My winter and spring
20 are just slammed, so hopefully we can keep them to
21 the scheduled events.

22 MR. LIVERS: We'll certainly work to do
23 that, Mr. Chairman.

24 (The proceedings were concluded
25 at 9:30 a.m.)

C E R T I F I C A T E

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

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

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing - 20 - 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 , 2011.

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires
March 9, 2012.