

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

3

4 THOMPSON RIVER CO-GEN) BER 2006-18 AQ
5 AIR QUALITY PERMIT NO.)
6 3175-04)

7

8 TRANSCRIPT OF PROCEEDINGS - ORAL ARGUMENT

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10 Heard at the Metcalf Building
11 1520 East Sixth Avenue
12 Helena, Montana
13 May 30, 2008
14 10:20 a.m.

15

16 BEFORE CHAIRMAN JOSEPH RUSSELL,
17 BOARD MEMBERS LARRY MIRES, GAYLE
18 SKUNKCAP, BILL ROSSBACH, ROBIN SHROPSHIRE;
19 DON MARBLE and HEIDI KAISER (By telephone)

20

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1 WHEREUPON, the following proceedings were
2 had:

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4 CHAIRMAN RUSSELL: We're going to go
5 ahead and get started again. The next matter is
6 the notice of appeal and request for hearing of
7 the Citizen Awareness Network, Women's Voices of
8 the Earth, and the Clark Fork Coalition regarding
9 DEQ's approval of the Thompson River CO-Gen, LLC,
10 Air Quality Permit No. 3175-04, BER 2006-18 AQ.
11 Katherine.

12 MS. ORR: Mr. Chairman, members of the
13 Board, this item is up before the Board on
14 basically three matters. One is for the Board to
15 approve the findings of fact, conclusions of law,
16 and order that I'm recommending to the Board, and
17 you have that in your packet. The parties have
18 indicated that they're not objecting to those
19 findings of fact and conclusions of law. However,
20 the Department and TRC are asking that the remand
21 language be clarified along the lines of the
22 language that they've proposed, and so we need to
23 hear from Counsel for the Petitioners on whether
24 they have an objection to that language. So the
25 first item is the order.

1 And then the Petitioners have submitted
2 an objection to prehearing rulings that I made
3 regarding the scope of the hearing vis-a-vis the
4 permit, and the influence of ongoing enforcement
5 actions against TRC on the issuance of the permit
6 and the conditions of the permit.

7 So I guess what I would recommend is
8 that we first hear from Counsel for the
9 Petitioners on whether Counsel has an objection to
10 the clarification language that the Department and
11 TRC have submitted that would constitute the
12 remand language, and that would be Mr. Tuholske
13 who is here.

14 MR. TUHOLSKE: Mr. Chairman, members of
15 the Board, for the record, my name is Jack
16 Tuholske. I'm appearing here on behalf of the
17 Petitioners. And I do want to note that in the
18 audience there are a number of folks that have
19 come up from Thompson Falls to listen to the
20 Board's deliberations and hear the oral argument.

21 As far as the specific request to amend
22 the order, the pleading is clear, and I just want
23 to emphasize on the record that they're not taking
24 exception to the order itself, and that the order
25 is going to stand.

1 We believe that the language drafted by
2 Ms. Orr in the remand is clear and is acceptable
3 to our clients, and I would defer I guess to Ms.
4 Orr, as the person that drafted the order, that if
5 she felt that the clarification was necessary and
6 appropriate within the intent of her order, that
7 this portion of which we agree with, then it would
8 be okay with us. If she has concerns about it,
9 and it doesn't reflect the intent of her original
10 order, then we would ask that the order as written
11 remain in place.

12 CHAIRMAN RUSSELL: Thank you.

13 MS. ORR: You might want to hear from
14 Counsel for the Department and from TRC on this
15 matter.

16 MR. RUSOFF: For the record, I'm David
17 Rusoff, attorney for the Montana Department of
18 Environmental Quality. And I really don't have
19 much to add, other than a couple of specific
20 reasons for suggesting clarifying the language of
21 the proposed order.

22 The first paragraph of the proposed
23 order on Page 31 of the Hearing Examiner's
24 proposed findings, conclusion, and order proposes
25 that the Board remand the permit to conduct a

1 supplemental BACT analysis for periods of
2 non-steady state operation, and the pollutants at
3 issue in the contested case were nitrogen oxide
4 and sulphur dioxide, so we suggested that that be
5 clarified in the proposed order.

6 The next sentence of the proposed order
7 states, "This determination should include an
8 analysis of the impact of the new BACT standards
9 on overall BACT determined emission limits," and
10 the intent of our proposed clarification there was
11 to make sure the "should" I guess be a little bit
12 more definitive; and the same thing for the last
13 paragraph, "It is also recommended that the permit
14 be revised to address the Hearing Examiner's
15 concern as to whether or not the present permit
16 conditions assure compliance with the ambient air
17 quality standards."

18 And so we propose that that be a little
19 bit more definitive, just so that when we're
20 working -- if the Board remands the permit -- so
21 when we're working with the permit applicant,
22 there just isn't any misunderstanding as to what
23 the Board is requiring, and what the Board is
24 saying, "Well, we're merely recommending, but
25 we're not requiring this," and to make sure again

1 that the pollutants that we're working with the
2 permit applicant on are the correct pollutants of
3 concern to the Board. Thank you.

4 CHAIRMAN RUSSELL: Thompson River.

5 MR. UDA: Mr. Chairman, members of the
6 Board, my name is Mike Uda. I'm Counsel for
7 Thompson River Power, who is the new owner of
8 Thompson River CO-Gen, LLC. And I don't really
9 have anything to add to David's explanation of why
10 we requested the clarification. We just wanted to
11 be absolutely clear about what the scope of the
12 order was, and what was being expected of my
13 client. Thank you.

14 CHAIRMAN RUSSELL: It's my understanding
15 that for four hours a day, this thing -- they have
16 to clean the grates, and that changes the
17 emissions quite a bit, twice -- by two hours,
18 right?

19 MS. ORR: Mr. Chairman, members of the
20 Board, that time frame is not set in stone, and it
21 can fluctuate; but generally that is the idea,
22 four to maybe even more hours.

23 CHAIRMAN RUSSELL: And is it possible to
24 understand what potential emission limits need to
25 be set by a BACT analysis during that time? You

1 know the record better than I do.

2 MS. ORR: Mr. Chairman, I think a BACT
3 analysis is required for startup and shut down.

4 CHAIRMAN RUSSELL: And as Mr. Tuholske
5 had mentioned, because you have been asked as the
6 presiding officer of this to further clarify the
7 order, do you believe it needs to be clarified?

8 MS. ORR: Mr. Chairman, members of the
9 Board, I don't see any problem with the suggested
10 language.

11 CHAIRMAN RUSSELL: To add the suggested
12 language?

13 MS. ORR: To add it, yes.

14 MR. ROSSBACH: Is there a draft of some
15 actual language somewhere that I have not seen?

16 MS. ORR: There is. It is in the notice
17 of intent not to file exceptions to the Hearing
18 Examiner's findings of fact and conclusion of law.

19 CHAIRMAN RUSSELL: Can you give us a
20 hint where it is?

21 MS. SHROPSHIRE: On Page 2, I think.

22 MS. ORR: It is set forth in single
23 space down at the bottom.

24 CHAIRMAN RUSSELL: So --

25 MS. ORR: It goes on to the next page at

1 the top.

2 CHAIRMAN RUSSELL: If you have no
3 objection to that, since that wasn't in front of
4 us, should we move to add that?

5 MS. ORR: What I would recommend is that
6 we hear from Petitioners' Counsel on the other
7 issues which may impact the wording of this order,
8 depending on what the Board decides, and then to
9 take up the issue of the wording of the order, and
10 when you do that, move to also include this
11 language.

12 MR. TUHOLSKE: Mr. Chairman, members of
13 the Board, again Jack Tuholske on behalf of the
14 Petitioners here. And I want to thank the Board
15 for the opportunity to present oral argument. I
16 will try to keep it as brief as I can.

17 Just briefly by way of background, this
18 involves a facility that has been constructed at
19 Thompson Falls. It uses a used stoker boiler that
20 was imported from North Carolina. The plant was
21 originally permitted, went through a series of
22 startup operations, has never functioned for an
23 extended period of time without violating the air
24 quality standards of the permits that were in
25 place; and that sent the Applicant back to the

1 Department for an amended permit, which resulted
2 in changes to the original permit, modifications;
3 and we subsequently appealed that permit, and went
4 through a contested case hearing.

5 And I'll talk about this in a little
6 greater detail, but one of the claims that we
7 think should have been heard in more detail that
8 wasn't heard was a fine of approximately \$1.8
9 million that was levied by the Department, I think
10 one of the largest fines that they've ever levied
11 for a plant of this size, based upon violations of
12 the old permit.

13 The matter went through a contested case
14 proceeding, and as a result of that, the Hearing
15 Examiner made two rulings that we take exception
16 to, and are presenting that to the Board for its
17 consideration.

18 The first issue had to do with the
19 denial of our effort to amend the affidavit of
20 appeal that we originally filed in this case, and
21 the need for an amendment arose after we went
22 through the discovery process, contracted with an
23 expert to do a review of the data and the
24 information from the file and additional
25 information that we gathered during the discovery

1 process; and our expert told us at that time that
2 he felt that this plant should have been permitted
3 as a major source based upon the actual heat input
4 capacity of the boiler, and therefore it should
5 have gone through a PSD analysis and the other
6 technical, and more exacting, more demanding, and
7 more protective requirements that are necessary to
8 permit a major source.

9 And this information arose, like I said,
10 we understood it as it developed during the course
11 of discovery and the development of our expert's
12 affidavit during the contested case proceeding.
13 And so when we had that information, we moved to
14 amend our affidavit to include this claim that
15 they should have done a major source review, and
16 this was done. In December of 2006, we filed a
17 motion to amend.

18 Discovery was still open at that time,
19 and the hearing was ultimately held in May, six
20 months after we made our motion. And in addition
21 to that, we had not sought a stay of the permit,
22 so the company was theoretically free to operate
23 its facility if it wanted to. And so we moved to
24 amend, and that motion was denied.

25 And it's our position that the motion to

1 amend should be governed by the Montana Rules of
2 Civil Procedure which generally govern contested
3 case proceedings, and as the attorneys that are
4 part of this Board understand, and as I think we
5 can agree on in general, the Rules of Procedure to
6 amend a Complaint are very liberal, and Courts
7 generally allow amendments. And the cases where
8 they don't allow amendments are situations where
9 you to try to amend the Complaint after judgment
10 is entered, after the case is over, or at the
11 eleventh hour right before trial.

12 And the general rule is that amendments
13 should be allowed. And I won't cite chapter and
14 verse cases and so forth, but in the exceptions
15 that we filed -- and you're welcome to read those
16 -- the cases say that it's even more liberal when
17 you're dealing with administrative proceedings,
18 because those in general have a more relaxed
19 standard, and aren't held to sort of the stricter
20 standards that you find in a courtroom. And
21 that's how we conduct our MAPA contested case
22 hearings. They tend to be a lot less formal than
23 a trial.

24 And so we believed that because we were
25 moving well in advance of the hearing, and it was

1 based upon information that we developed through
2 discovery, that we should be permitted to bring
3 this claim at the hearing, and the Hearing
4 Examiner denied the claim.

5 Now, the arguments in favor of denying
6 the amendment are basically two fold: Number one,
7 the Department has argued that the requirement to
8 file an affidavit in the air quality statutes sort
9 of supersedes the Rules of Civil Procedure, and
10 that once you file your affidavit, you're stuck
11 with it, and I think that argument is wrong for
12 two reasons:

13 Number one, the affidavit requirement
14 simply sets out a statute of limitations, a time
15 frame. It says you have to file it within thirty
16 days. It does not say that you can't amend your
17 affidavit. The statute does not prohibit an
18 amendment, and because MAPA is conducted under the
19 Montana Rules of Civil Procedure, you have to look
20 to the Rules of Civil Procedure as to when an
21 amendment should be allowed, and those are very
22 liberal rules.

23 And so I think the argument that it is
24 prohibited by -- I think it's Section 211 -- I
25 think is wrong because the statute doesn't

1 prohibit amendment. It just sets out a time
2 frame. And it's like if I filed a MEPA claim, I
3 have to file it within 60 days now under the
4 rules, but there is no prohibition for me to amend
5 my Complaint later; and if I file a regular tort
6 claim, or a workers comp, or any other type of a
7 lawsuit, the deadline is to get the Complaint in
8 the door. The Rules of Civil Procedure then take
9 over and govern the process, which allows a
10 liberal amendment.

11 The other argument that they make is
12 that -- and that the Hearing Examiner accepted is
13 that this amendment was proposed too late in the
14 process. And I don't think that that is an
15 accurate argument. If you look at how the Montana
16 Courts have dealt with it, the places they've
17 denied amendment have been, like I said, on the
18 eve of trial, and this, like I said, was six
19 months out from the hearing; it was filed while
20 discovery was still open; it was not prejudicial.

21 Yes, it would have required the parties
22 to do more work, but that's what happens anytime
23 you amend a pleading. And under the existing case
24 law, we were well within the parameters for a
25 timely amendment.

1 The other issue that they raise is that
2 we didn't expressly raise a major source issue in
3 our comments, and we did not expressly cite the
4 regulation that governs major source review in our
5 comments. I will agree with that.

6 But again, that's a question of whether
7 we exhausted our remedies properly. It isn't a
8 question of whether or not we should be permitted
9 to amend and bring that claim forward. Then if we
10 do that, they can try to dismiss and say we didn't
11 exhaust, and we are going to say that we felt like
12 we raised the issue generally, based upon the
13 information that we had, and that it's not unusual
14 that when new information is discovered, you can
15 posit your claims in a somewhat different manner.

16 And so we're asking the Board to reverse
17 on that, which would result in a remand, to accept
18 our amended affidavit. And these pleadings are
19 all in the file if you want to read the paragraphs
20 that we want to include. They are in our Brief in
21 Support of Motion to Amend. And we would ask that
22 we be permitted to amend and go forward with
23 presenting that claim.

24 It doesn't mean we're going to prevail
25 on the claim. We're not prevailing. We're not

1 asking you to rule on the substance of it. We
2 just want to go forth with it in front of the
3 Hearing Examiner.

4 The second issue -- and I'll be brief
5 with this -- has to do with a claim that we did
6 put in our affidavit, which said that based upon
7 the regulations governing the granting of air
8 quality permits, that DEQ should have considered
9 what we're going to call the "bad actor status of
10 the applicant" in deciding whether or not to issue
11 a permit, and whether -- in formulating the terms
12 and conditions.

13 And we think that this particular
14 Applicant has an egregious history of violating
15 permits issued for this facility, and that that
16 should have been taken into account when you
17 conditioned or made a decision to grant or deny
18 this amendment.

19 And again, in our exceptions -- and I'm
20 not going to read these chapter and verse -- but
21 in the exceptions that we filed dated April 28th,
22 2008, we set out a number of violations that --
23 this comes from the Department's own files,
24 beginning with the very first permit -- the
25 facility was not built according to the standards

1 and specifications; that when they operated the
2 facility, that they could not operate it within
3 compliance, but they kept operating it, resulting
4 in this very large fine -- that incidentally DEQ
5 has now reduced by a very large percentage -- and
6 a number of other very -- and they were originally
7 fined \$112,000 for earlier violations, and then
8 fined, like I said, \$1.8 million for additional
9 violations.

10 And so our argument is that the
11 Applicant here has a history of willful
12 violations. They're going to take exception to
13 that, and I'm not asking the Board to make any
14 finding today as to whether or not these are bad
15 actor violations and should be considered.

16 But what I am asking the Board today to
17 rule on is that when the Department has evidence
18 of willful permit violations on behalf of the
19 Applicants, that the Department, within its
20 authority and discretion as set forth in the
21 Administrative Rules which state that the permit
22 must contain any conditions necessary to assure
23 compliance with the Clean Air Acts and so forth --
24 and that's ARM 17.8.749(1) -- that that gives the
25 Department broad discretion to consider whether or

1 not a bad actor should have additional permit
2 requirements, or the permit should be denied in
3 its entirety.

4 And the Department said, "We simply
5 don't have the discretion to consider that
6 evidence at the hearing," and filed a motion in
7 limine which resulted in us, the Petitioners,
8 being precluded from putting that evidence on at
9 the hearing.

10 And so we would ask the Board to reverse
11 that finding, and state that it is within the
12 Department's discretion to consider whether or not
13 the Applicant is a, quote unquote, "bad actor,"
14 and whether that should factor into the type of
15 permit conditions that are placed, or whether or
16 not the permit shall be issued.

17 With that, I would like to just conclude
18 by stating that I recognize that this Board cannot
19 address constitutional issues. I'm not asking you
20 to do that.

21 But I want you to understand that the
22 incorporation of the constitutional duties into
23 the air quality laws, and the duties themselves,
24 in my clients' view, make DEQ our trustee, our
25 guardian, our protector of our air quality; and

1 that that should -- if there is a close call to be
2 made on either of those cases, that those
3 constitutional principles would urge the
4 Department to err on the side of letting in an
5 amendment to see if this facility really is a
6 major source, or letting in evidence about bad
7 actor, so that they could make the decision based
8 upon those factors.

9 I would like to, if I could, just
10 reserve a couple of minutes for rebuttal. Thank
11 you very much.

12 CHAIRMAN RUSSELL: Thanks.

13 MR. ROSSBACH: What was the information
14 that -- What was the nature of the information
15 that your expert learned in discovery that led to
16 him taking the opinion that this was a major
17 source?

18 MR. TUHOLSKE: He reviewed information
19 about the operation, the monitoring and data about
20 the operation of the plant, and discovered that on
21 one instance that the heat input actually exceeded
22 the requirements for major source review; and
23 based upon his analysis and his understanding of
24 the size of the stoker boiler, the coal input
25 capacity, and burning rates, and things that

1 frankly are over my head, he told us that, "I
2 think this should have undergone major source
3 review."

4 MR. ROSSBACH: That was information that
5 you learned -- Was that information that was
6 available to you prior to the time of the
7 affidavit?

8 MR. TUHOLSKE: I can't tell you for
9 certain as I sit here whether all of that
10 monitoring data and other information was made
11 available, but what was not made available -- what
12 we didn't know and didn't understand was the
13 significance of it.

14 That's part of my argument here today is
15 that as citizens initiating this affidavit
16 process, that sometimes they don't have the
17 resources to go out and hire an expert, and to get
18 involved into the minutiae until they make the
19 decision to appeal it, and that's what happened
20 here. We hired an expert after the affidavit was
21 filed, and it was based upon his ability to
22 analyze this information that this claim arose.

23 MR. ROSSBACH: Has there been any -- Has
24 the Department provided any kind of contrary
25 opinions regarding major source based upon what

1 your expert has said? Has there been a discussion
2 about the sort of factual dispute about whether it
3 is or is not a major source with the Department?

4 MR. TUHOLSKE: Mr. Chairman, members of
5 the Board, I would tell you that I think they
6 would probably dispute it; but we -- in terms of a
7 -- there was no evidence that was allowed to be
8 presented at the hearing, so we really didn't go
9 to the mat on that issue.

10 MR. ROSSBACH: I just wondered if there
11 had been any discussions about that.

12 MR. TUHOLSKE: I think I would have to
13 defer to my co-Counsel on that. I don't remember
14 specific discussions going to the merits of it
15 other than the discussion saying, "We're going to
16 oppose your motion. We don't think that it's
17 proper."

18 MR. ROSSBACH: My last sort of big
19 picture question on this is: So if we grant your
20 motion, what does that do to the process that
21 we're in now? It's kind of a concern to me.
22 We've got an order, a proposed order remanding to
23 the Department. It sounds like what you're asking
24 us is to go back and have a whole new hearing on
25 whether or not it is or is not a major source, and

1 if it is a major source, then that then changes
2 the whole process. It seems like the effect is
3 going to send this thing back to another major
4 hearing if we do this, or am I mistaken on that?

5 MR. TUHOLSKE: I think that's correct,
6 and I think it is a profound issue that is being
7 presented because of that, and frankly that's why
8 we think the information should have come in the
9 first time so we could have done the whole kit and
10 caboodle at once, but the decision was made before
11 the hearing to deny the amendment.

12 But you are correct that if the
13 amendment is permitted, that there would have to
14 be some kind of a -- it would be a limited
15 proceeding, but it certainly would set it back
16 into a contested case posture.

17 MR. ROSSBACH: Is there any other
18 alternative to sending the whole thing back? Is
19 there a process where this issue of major source
20 could be separately -- could that be a separate
21 contested case?

22 MR. TUHOLSKE: I don't know the answer
23 to that. We certainly would be willing to develop
24 some kind of a stipulation to streamline the
25 process. But as I envision it, we would have to

1 go back to a contested case proceeding on this
2 affidavit because we're amending the affidavit,
3 just like when you amend a Complaint, it's still
4 part of the original case that was filed.

5 MR. ROSSBACH: My problem is that we've
6 got an order, a proposed order remanding this
7 thing to do a BACT, and I hate to slow that
8 process down because I think this needs to be
9 done. It's been going on for a long time. I'm
10 confused about how this is going to benefit your
11 clients by sending the thing back and letting them
12 continue. I don't know what the consequences of
13 that would be, in terms of them continuing to
14 operate, etc., without the remand going forward
15 now.

16 MR. TUHOLSKE: Mr. Chairman, members of
17 the Board, I appreciate that concern, and I guess
18 as I envision this situation, the Board has before
19 it an order of which very significant portions of
20 it -- we didn't take exceptions to some
21 significant findings on BACT, big picture BACT,
22 and they didn't take exceptions to the finding on
23 the startup and shut down BACT, and so that is
24 before you sort of no longer contested.

25 And I would think, assuming that you

1 approve that portion of the order here today, that
2 that would go back on remand, and we certainly
3 would not object to that. We don't want to unduly
4 delay the remand or the implementation of the
5 parts of the order we did not take exception to,
6 and that we would get together with the Hearing
7 Examiner, and develop some kind of a schedule for
8 a contested case proceeding.

9 Which again, because this issue -- the
10 amendment was denied, we didn't really engage in
11 any further discovery, didn't certainly get to
12 what their experts would say, and so I think that
13 that factual predicate needs to get out there, and
14 present it to the Hearing Examiner, and I think it
15 could be done in a fairly quick time frame.

16 I don't know the length of time for the
17 remand, but certainly that is going to have to go
18 through a somewhat formal process and be submitted
19 to the Department, and I think could potentially
20 be the subject of some kind of an appeal or
21 something if my clients were not satisfied with
22 the way the remand was implemented.

23 MR. ROSSBACH: I guess my question is:
24 Are you suggesting that there could be two tracks
25 here, that we can order the remand, but then also

1 order a rehearing on the separate issue? I'm
2 confused from an administrative procedure point of
3 view whether that's something that we can do.

4 MR. TUHOLSKE: And frankly we are in new
5 territory here because I'm not aware of this
6 situation. I couldn't find any administrative
7 decisions of this Board addressing the amendment
8 issue, but I guess that's how I would envision it.

9 MR. ROSSBACH: Then I have a second
10 question, which goes also to essentially the big
11 picture on the second issue.

12 What do you think would have been the
13 difference if there had been bad actor, if they
14 were going to go forward, and what would be the
15 difference now on remand in terms of BACT, etc.?
16 I'm not sure what the consequences of a decision
17 of them being a bad actor would have done. And
18 haven't we changed ownerships a little bit here,
19 too?

20 MR. TUHOLSKE: Mr. Chairman, members of
21 the Board, you are correct that we have changed
22 ownerships, and frankly, I'm not sure how that
23 would unfold here because that has just happened
24 very recently, and I'm not even sure if it's been
25 formally substituted or presented to the Board.

1 But in terms of the practical
2 considerations, in terms of additional monitoring,
3 or more stringent permit requirements, or other
4 conditions that could be inserted into the permit,
5 that is what we hope the Department would
6 consider, and if appropriate, would impose those.

7 Again, we wish that we had been able to
8 address this issue at the hearing, and get that
9 matter resolved before we had to bring it to the
10 Board in this dual posture.

11 MR. ROSSBACH: So what would be the
12 additional conditions? What types of things are
13 you suggesting? That's what I don't understand.

14 MR. TUHOLSKE: They could impose more
15 frequent or more stringent monitoring
16 requirements; they could impose different
17 limitations within the NOx and SOx discharge
18 limits.

19 MR. ROSSBACH: Thank you.

20 CHAIRMAN RUSSELL: Thanks. I think the
21 Department is next up. Do you have any response?

22 MR. RUSOFF: I would like to respond if
23 there are no further questions for Mr. Tuholske.

24 CHAIRMAN RUSSELL: I think the
25 Department should respond. We can always double

1 back if we need to. That's a legal term, "double
2 back."

3 MR. RUSOFF: Thank you. Again, for the
4 record, I'm David Rusoff, attorney for the Montana
5 Department of Environmental Quality. And I do
6 have a few brief prepared remarks that I'd like to
7 present, but before I do that, I would like to
8 just briefly respond to couple of the points that
9 Mr. Tuholske raised on behalf of the Petitioners.

10 Mr. Tuholske asserted that the Montana
11 Administrative Procedure Act and contested cases
12 that are conducted under that Act is conducted
13 under the Montana Rules of Civil Procedure, and
14 that's not correct. As a matter of law, there is
15 no reference to the Rules of Civil Procedure in
16 MAPA, although I don't disagree with the --

17 And backing up a little bit. There is a
18 specific reference to the Montana Rules of
19 Evidence in MAPA, but not the Rules of Civil
20 Procedure.

21 But I don't disagree with the general
22 proposition that it's generally appropriate to
23 refer to the Rules of Civil Procedure to the
24 extent that they're not inconsistent with
25 specifically applicable statutes and rules.

1 In this particular case, Rule 15(a),
2 which is the basis for the Petitioners' motion to
3 amend their affidavit, does seem to be
4 inconsistent with the specific statute that
5 creates the right to contest an air quality permit
6 before this Board, and that proceeding is a
7 specific creature of Montana statute; and as I'll
8 discuss in a few moments, it has some very
9 specific requirements for initiating a contested
10 case appeal to this Board.

11 The next point I wanted to briefly
12 respond to is that today before the Board the
13 Petitioners argue that their motion is based upon
14 information that they obtained only during the
15 discovery process, and as I'll discuss in a
16 minute, that information was really available to
17 the public and Petitioners throughout the permit
18 proceeding.

19 But in fact, what they stated in their
20 brief motion, which was presented to the Hearing
21 Examiner, was quote, "Petitioners seek to amend
22 their affidavit to clarify issues that were raised
23 in comments, and to ensure that all related
24 matters are brought in one action." And the
25 Hearing Examiner found specifically that the

1 proposed amendments were not a mere clarification
2 of any claims that the Petitioners have previously
3 brought, and in fact, she went back and looked at
4 the Petitioners' comments that they had submitted
5 on the draft permit, and you'll note in her
6 decision that she could find no reference to the
7 new claims that the Petitioners were proposing to
8 add through their motion.

9 To avoid duplication and keep this as
10 brief as possible, the attorney for Thompson River
11 Power, Mike Uda, and I have agreed that we'll
12 split up our presentation this morning, and I'll
13 address the Petitioners' first exception, and
14 he'll then address the Petitioners' second
15 exception. I guess I would like to just briefly
16 note that I have discussed his presentation on the
17 second exception, and his presentation does
18 reflect the Department's position on that
19 exception regarding the bad actor claim.

20 And I'd like to, before I address the
21 Petitioners' first exception, I'd like to also
22 briefly again reiterate that we did file the
23 request for the clarification of the proposed
24 order, and there was no intent in that request to
25 change the proposed order. We didn't file any

1 exceptions to it, and again, we're just merely
2 seeking clarification so that there aren't any
3 misunderstandings down the road between the
4 Department and the permit applicant, or between
5 the Department and the Board or anyone else.

6 The last objection that the Petitioners
7 filed which Mr. Tuholske briefly discussed, that
8 being their alleged constitutional claim, I'm not
9 going to discuss in any detail. The Petitioners
10 noted in -- while they're characterizing it as an
11 exception, they acknowledge that this Board does
12 not have subject matter jurisdiction to consider
13 constitutional claims.

14 But the issue that I would like to
15 address again is the Petitioners' argument that
16 the Hearing Examiner erred in denying their motion
17 to amend their hearing affidavit to add a new
18 claim. And I'm not going to go through all of the
19 details of the briefs that the Department and TRC
20 filed in response to that motion, but I would like
21 to just briefly note that the Petitioners haven't
22 raised any new arguments that they didn't present
23 to the Hearing Examiner; and they haven't provided
24 this Board with any basis upon which to reverse
25 the Hearing Examiner's decision.

1 We believe the Hearing Examiner made the
2 correct decision. Petitioners' affidavit did not
3 assert facts that could be construed as indicating
4 that the TRC facility, now the TRP facility,
5 should have been considered as a major stationary
6 source. That facility was constructed years
7 before this permit proceeding even arose, and that
8 issue was never raised at that time either.

9 The Hearing Examiner also found, as I
10 just mentioned, that even going back and looking
11 at the Petitioners' comments on the draft permit,
12 that Petitioners had never raised this issue, and
13 that the proposed amendment was based on different
14 alleged facts that don't relate to the claims in
15 the original affidavit.

16 Again, the requirement that specifically
17 applies to initiation of a contested case
18 challenging an air quality permit before this
19 Board is found in a specific statutory provision
20 in Section 75-2-211 subsection (10) of the Montana
21 Code Annotated, which states that, quote, in
22 relevant part, "An affidavit setting forth the
23 grounds for the request must be filed within
24 thirty days after the Department renders its
25 decision."

1 So again, this case is not analogous to
2 general civil litigation where the plaintiff
3 merely files a complaint, and there may be a trial
4 some years down the road, and the matter is not
5 necessarily handled on a very expedited basis, and
6 there isn't any specific requirement as to the
7 contents of that Complaint.

8 So pursuant to the specific statute that
9 applies in this case, the Petitioners have thirty
10 days after the date of the Department's decision
11 to disclose the claims underlying their request
12 for a contested case hearing, and that disclosure
13 is important to the parties because it provides
14 the Respondents in the case -- in this case the
15 Department and TRC -- with the issues that they
16 need to be prepared to address at the contested
17 case hearing. So once that 30 day period for
18 setting forth their grounds expired, the
19 Petitioners were specifically barred by that
20 statute from adding entirely new grounds for the
21 hearing request.

22 And I want to really emphasize that the
23 Department is not arguing and the Hearing Examiner
24 did not find that in no event can a petitioner
25 ever amend a hearing affidavit, for example, to

1 actually clarify a claim made in the original
2 affidavit, or make the affidavit more specific, or
3 to correct mistakes in the affidavit. Those sorts
4 of amendments wouldn't substantially alter the
5 nature of the case. However, adding the
6 Petitioners' new claim in this case would have
7 constituted setting forth a separate new ground
8 for the hearing request, and again, that was
9 required to be done within thirty days.

10 And that claim would have fundamentally
11 altered the nature of the case, because as Mr.
12 Tuholske mentioned, the permits for this facility
13 have been processed all along under the rules
14 applicable to minor stationary sources, and the
15 rules applicable to major stationary sources
16 include several requirements that do not otherwise
17 apply. So there is an important distinction.
18 It's just not just a clarification of their
19 challenge to the BACT analysis that was done for
20 the permit modification.

21 But even if you assume it may be
22 appropriate to look at Rule 15(a), the
23 Petitioners' motion also didn't meet the
24 requirements of that rule, and I think that the
25 Hearing Examiner found that in her decision.

1 Under that rule, the Petitioners would have been
2 allowed to amend their hearing affidavit only by
3 the consent of other parties, or by leave of the
4 Hearing Examiner and ultimately this Board; and
5 Petitioners did not obtain the consent of the
6 Department and TRC, so leave of the Hearing
7 Examiner and this Board would have been required.

8 And again, the information that relates
9 to the Petitioners' proposed new claim has been
10 part of the administrative record for this
11 facility all along. Petitioners had the
12 opportunity throughout the permitting proceeding
13 which they were following to review that record,
14 and they had ample time in response to the permit
15 application, in response to the draft permit, and
16 in response to the Department's decision to review
17 that record and determine any claims that they
18 thought they actually had.

19 So the Petitioners couldn't demonstrate
20 to the Hearing Examiner, and they didn't even
21 argue in their motion to the Hearing Examiner,
22 that their proposed amendment was based upon new
23 information that was not previously available to
24 them.

25 When the Petitioners filed their motion

1 to amend, the Department and TRC had already spent
2 a considerable amount of time in preparing and
3 serving discovery requests to the Petitioners,
4 which again were based upon the claims that we
5 believed were at issue as stated in the
6 Petitioners' hearing affidavit. The Department
7 had filed a motion to dismiss several of those
8 claims, and allowing Petitioners to add their
9 proposed new claim at that point in the case would
10 have required preparation and issuance of
11 additional discovery requests, preparation -- as I
12 think Mr. Tuholske alluded to -- of new expert
13 reports addressing the proposed new claim, and
14 probably other discovery as well likely would have
15 required --

16 (Ms. Kaiser not present)

17 MR. RUSOFF: -- a round of motions in
18 regard to the new claim, and easily could have
19 substantially delayed the contested case
20 proceeding.

21 So we do believe in fact that granting
22 the Petitioners' motion would have caused
23 substantial prejudice to other parties in the
24 case.

25 I'm assuming that you have the

1 Petitioners' motion to amend in your file. If you
2 look at it, you can see that essentially it's
3 about two pages. Down below the caption, it
4 starts here, a quarter of the page on Page 1, a
5 full Page 2, and then a partial Page 3.

6 And the Petitioners argued in that brief
7 motion that, again, not based on new information,
8 but the basis for the motion was, "The proposed
9 amendments do not fundamentally alter the nature
10 of the case," and the three new paragraphs in the
11 proposed amended affidavit arise out of the same
12 nucleus of facts that gave rise to the original
13 affidavit.

14 However, as the Hearing Examiner
15 correctly found, neither of those arguments by the
16 Petitioners were correct. The proposed amendments
17 would have fundamentally altered the nature of the
18 case three months after the Petitioners were
19 required to specify the grounds for their hearing
20 request. And the new claim did not arise out of
21 the same nucleus of facts underlying the original
22 claim.

23 The Petitioners failed to demonstrate or
24 even assert to the Hearing Examiner, so that she
25 could make an informed ruling, any good reason for

1 not including this new claim in their original
2 hearing affidavit; and that Petitioners also
3 failed to demonstrate or even assert any good
4 reason for at least not raising their proposed new
5 claim prior to completion of substantial
6 prehearing proceedings.

7 So the standard of this Board's review
8 for a Hearing Examiner's decision denying a motion
9 to amend, if you look to Rule 15(a) for guidance,
10 is the abuse of discretion standard; and given the
11 untimeliness of the Petitioners' motion, and their
12 failure to assert any good cause to the Hearing
13 Examiner for their motion, even if that rule
14 applied, the Hearing Examiner clearly did not
15 abuse her discretion in denying the Petitioners'
16 motion to amend, and the Department and TRP's
17 request that the Board deny the Petitioners'
18 exception, and accept the Hearing Examiner's
19 decision. Thank you. And I'll be glad to answer
20 any questions now or later.

21 MS. SHROPSHIRE: Is this facility a
22 major source?

23 MR. RUSOFF: We don't have a record on
24 that. I guess the record is that this facility,
25 several permits have been processed for this

1 facility pursuant to the rules for minor
2 stationary sources, and that issue was never
3 raised, as far as I'm aware, prior to the
4 Petitioners' motion to amend their affidavit.

5 Backing up a little bit. I don't want
6 to mislead you. As Mr. Tuholske noted, I think
7 the issue first arose in an allegation by a
8 witness who the Petitioners had hired to testify
9 for them in the case.

10 MS. SHROPSHIRE: In terms of permit
11 levels, is the differences between major and minor
12 is if it emits greater than ten tons per year --
13 is that over simplifying it -- of certain
14 pollutants?

15 MR. RUSOFF: That wasn't the issue
16 raised by the Petitioners.

17 MS. SHROPSHIRE: But in general, is that
18 how you determine a major source?

19 MR. RUSOFF: The requirements at issue
20 are a certain level of tons of criteria
21 pollutants, hazardous pollutants, or a certain
22 level of Btu's; and the issue raised by the
23 Petitioners' witness was the potential Btu of the
24 boiler.

25 MS. SHROPSHIRE: And I'm just doing some

1 simple -- I'm looking at the permit levels, and I
2 guess I'm just confused because if -- Let's say
3 NOx or SOx, if we use either one of those.
4 Looking at the permit, it looks like for any
5 individual one of those pollutants, that it would
6 be more than ten tons per year by the permit
7 levels. And so I don't know if I'm over
8 simplifying this, but just even looking at the
9 emission levels, it looks like it's a major
10 source.

11 MR. RUSOFF: The ten ton threshold that
12 you're referring to does not apply to NOx or SOx.
13 The level is substantially higher. And there
14 hasn't been any allegation in the case that the
15 major source threshold was triggered by the levels
16 of any particular pollutants expected to be
17 emitted from the facility.

18 MS. SHROPSHIRE: Would PM10 count?

19 MR. RUSOFF: All pollutants would count.

20 MS. SHROPSHIRE: For the ten ton limit?

21 MR. RUSOFF: No. It's not a hazardous
22 air pollutant.

23 MS. SHROPSHIRE: So it's only hazardous
24 air pollutants that are --

25 MR. RUSOFF: I don't have the regulatory

1 definition of major source status in front of me.
2 I could look at it. But I can tell you that the
3 threshold for determining major source status in
4 regard to criteria air pollutants is substantially
5 higher than ten tons. I believe it's either 100
6 tons or 250 tons depending upon the type of
7 facility. But I don't want to mislead the Board
8 because I don't have the definition in front of
9 me.

10 And then I also do believe that there is
11 a reference to hazardous air pollutants also, but
12 I'm not sure if it's in that portion of the Act or
13 not. I know, for example, for applicability of
14 MACT standards, that the threshold, as I recall,
15 is ten tons of a particular hazardous air
16 pollutant, or 25 tons of cumulative hazardous air
17 pollutants, but that wasn't an issue in this case.

18 MS. SHROPSHIRE: And then I wasn't sure
19 if that ton value counted during startup and shut
20 down, or maintenance, or only during normal
21 operating conditions. Would that tonnage count
22 for startup and shut down?

23 MR. RUSOFF: I can't answer that
24 question. Again, I can only say that that wasn't
25 an issue that was raised by the Petitioners.

1 Again, the issue that they raised was an issue
2 regarding the potential Btu capacity of the
3 particular boiler.

4 MS. SHROPSHIRE: And then if you
5 discovered that the amount of emissions were
6 greater than that cut-off, if you did include
7 emissions during startup and shut down or
8 maintenance, and this did become a major source,
9 how would DEQ deal with that? Regardless of
10 amendments or any of that. If you discovered this
11 was a major source, how would you deal with that?

12 MR. RUSOFF: Well, anything I say is
13 probably somewhat speculative, but I can tell you
14 how I think we would respond to it.

15 I think if the Department obtained
16 information during a permit proceeding indicating
17 that a proposed new or modified emitting unit
18 should be processed under different rules, then
19 the Department would start over, depending on
20 where it was in the process. If it had issued a
21 draft permit, it would start over, and request
22 that information from the -- enough information
23 from the Applicant to, I guess, to be comfortable
24 that either the facility was or was not a minor
25 source. And I guess if we concluded that it was,

1 then we would just start over in the process.

2 MS. SHROPSHIRE: If it was after a
3 permit had been issued, and you discovered that it
4 was actually a major source, how would you deal
5 with that?

6 MR. RUSOFF: Again, anything I say is
7 somewhat speculative. I can tell you from my
8 experience that we did in one case, based on a
9 totally different set of circumstances, rescind a
10 permit, and there wasn't any specific statutory
11 regulatory procedure for that. But we obtained
12 additional information from the permittee that we
13 had not had during the permitting proceeding, and
14 determined that if we'd had that information, we
15 would have denied the application or processed it
16 differently, and I don't really recall what the
17 situation was. I believe it was a portable
18 generating, temporary generating facility.

19 CHAIRMAN RUSSELL: Wouldn't all of this
20 be part of the conditions of your initial permit,
21 and a violation of those conditions would have
22 sent it back anyway? Supposing this was to
23 happen. If they were operating above their Btu's,
24 which would be a condition of the permit, you
25 basically find them in violation of the permit and

1 take action.

2 MR. RUSOFF: I think that's correct, and
3 I think that's a good point. The permit in this
4 case, as I recall, does contain a limitation and a
5 monitoring, continuous monitoring requirement. I
6 believe it's a continuous monitoring requirement
7 for heat input. And so that is correct, that if
8 testing it indicated that the boiler was exceeding
9 any permitted limit, then that would be a
10 violation of the permit, and we would proceed
11 accordingly.

12 MS. SHROPSHIRE: Is it conceivable that
13 one could meet the levels of the permit as a
14 minor, but if it were -- and still be a major
15 source? Does that make sense? They may not be in
16 violation of the permit as a minor source, but it
17 still might be a major source?

18 MR. RUSOFF: I'm not the best person to
19 answer this, but I will tell you that I believe
20 you're correct, that when we determine -- or the
21 rule determines -- Board's rule bases the
22 determination on major source status on potential
23 emissions, and most facilities would never operate
24 at their highest potential. They typically
25 operate far below their potential. So I believe

1 that you're correct.

2 MS. SHROPSHIRE: And is it your opinion
3 that you don't believe they're a major source
4 then?

5 MR. RUSOFF: I don't have any opinion on
6 it. There isn't any record. All we know is that
7 -- All we have in the record is the Petitioners'
8 witness's assertion that he believes the data from
9 the boiler indicated that the boiler had the
10 potential to exceed the two hundred and -- I
11 believe 250 million Btu threshold limit for
12 determining a major source.

13 MS. SHROPSHIRE: It wasn't based on a
14 pollutant, but the Btu values; is that correct?

15 MR. RUSOFF: That's my recollection.

16 CHAIRMAN RUSSELL: Any other questions?

17 MR. ROSSBACH: Let me kind of step back
18 so I understand this. During the process of
19 giving the permit -- or there is a permit process,
20 and you submit a proposed draft permit; isn't that
21 correct?

22 MR. RUSOFF: The Department issues a
23 draft decision.

24 MR. ROSSBACH: There is a permitting
25 process. They apply for a permit. Then you

1 review their application, and you submit a draft
2 permit, correct?

3 In that process, was the question of
4 whether they were a major source or not ever
5 considered, reviewed, or discussed within the
6 Department?

7 MR. RUSOFF: I can't answer that from
8 the record.

9 MR. ROSSBACH: Not the record. What do
10 you know about it? It's not the record.

11 MR. RUSOFF: I can't speak outside the
12 record in this case. I wasn't involved in the
13 permitting decision either.

14 MR. ROSSBACH: So my problem is this:
15 If this information was available to -- the same
16 information was equally available to the
17 Department and the expert, it seems like -- was
18 there a reason -- Why did the Department not
19 consider whether it was or was not a major source?
20 I'm troubled by that. Do you have any information
21 about that?

22 MR. RUSOFF: Well, sure. The Department
23 is not conceding that the permit should have been
24 processed as a major stationary source.

25 MR. ROSSBACH: I know they're not

1 conceding it, but they had the information, the
2 same information that the expert relied on in
3 making that decision. Once that expert came up
4 with that, was that ever considered by the
5 Department, to your knowledge, what the expert had
6 just said about the capacity of the boiler being
7 -- exceeding the minor source exception?

8 MR. RUSOFF: The only answer I can give
9 you is that in response -- backing up a little
10 bit. Mr. Tuholske filed a motion to amend the
11 Complaint referring to the expert witness report,
12 and the Department and TRC opposed that motion,
13 and it was denied. So there was never any record
14 developed based upon the information that the
15 Petitioners' witness reviewed that he alleged
16 indicated to him that the boiler had that
17 capacity.

18 I know I'm not answering your question,
19 but that's the only answer I can give you.

20 MR. ROSSBACH: The application for a
21 permit was under the minor source designation,
22 correct?

23 MR. RUSOFF: Yes. And this was the
24 fourth application that had been submitted for
25 this particular facility. It was the third permit

1 that was actually issued. There was one
2 application that was denied over the course of
3 several years. They were all submitted under the
4 minor source rules.

5 MR. ROSSBACH: And in the draft, was
6 there ever any discussion -- I haven't seen the
7 draft, so I'm troubled by -- was there a
8 discussion about whether even the minor source was
9 applicable or not, minor source rules were
10 applicable or not? Was that ever an issue?

11 MR. RUSOFF: In the draft for this
12 particular permit modification at issue?

13 MR. ROSSBACH: In the discussions about
14 whether it was or was not a minor source.

15 MR. RUSOFF: I can't answer that without
16 spending quite a bit of time and looking at the
17 draft permit. I could provide it, but I didn't
18 bring it with me, and I don't want to mislead you.
19 I can't tell you. I don't know if that's
20 something that's standard, where we go through,
21 "These are the potential emissions of criteria
22 pollutants, hazardous pollutants, and this is the
23 potential Btu capacity of the boiler." That may
24 be in there. I don't remember.

25 MR. ROSSBACH: And let me ask you the

1 same question I asked Mr. Tuholske. What would be
2 -- If we were to send this back, if we were to
3 grant the motion to amend, what would that entail?
4 Would you still go forward on doing the BACT part
5 of this? Would we be able to remand, send it back
6 for another hearing on just that issue?

7 You're an expert on administrative
8 procedure, at least purportedly, and so I'm
9 troubled by -- I don't understand how this process
10 would work any differently.

11 MR. RUSOFF: First of all, I'm not
12 purporting to be an expert on administrative
13 procedures. I'm merely relaying the substance of
14 MAPA concerning applicable rules.

15 And I guess as Mr. Tuholske, I don't
16 know. I hadn't really thought about that. I
17 think the first thing that would come to my mind
18 is if the Hearing Examiner had granted the motion
19 to amend the affidavit -- again, as I think I
20 indicated in my remarks -- is that the other
21 parties would have had to consider any appropriate
22 motions that would relate to that new claim, a
23 motion to dismiss, a motion for summary judgment.
24 I'm not saying that those motions would have been
25 filed, but that would be the first thing that

1 would -- review of that would be the first thing
2 that would come to my mind. So I don't know
3 whether the case would proceed to a hearing or
4 not.

5 MR. ROSSBACH: I understand that. But
6 would the order to remand to do a BACT, would that
7 still -- could we still remand to do the BACT, and
8 also have another hearing on the major source
9 issue? Is that a -- That's what I don't
10 understand enough about administrative procedure,
11 how something like that might work.

12 MR. RUSOFF: It's a good question,
13 because essentially the Board -- I'm just trying
14 to think this through -- would be invalidating a
15 portion of the permit, the startup and shut down
16 limits of the permit, or those conditions that
17 allow the facility to operate differently during
18 startup and shut down conditions than during
19 normal operation. That would be the issue on
20 remand, would be to review those conditions again,
21 and make a BACT determination for those
22 conditions.

23 So I guess I have a hard time sort of
24 getting my arms around how this remand would
25 relate to that. I think the Board, if it

1 determines that the Hearing Examiner abused her
2 discretion in denying the motion, would be sending
3 the case back, this particular contested case back
4 for further work on that issue; and I think the
5 other issue would proceed separately, where we
6 would come back --

7 If the permit applicant submits a BACT
8 analysis for startup and shut down, we would go
9 through the normal permit process, and determine
10 whether the application is complete, issue a draft
11 permit for public comment, and make a final
12 decision, and then the affected parties would have
13 the opportunity to have the Board review that
14 decision.

15 So they seem like separate proceedings
16 to me on the surface. I'm not saying they
17 couldn't be joined. But without thinking about
18 it, it would seem to me that you would have to do
19 them as two separate proceedings saying, "We think
20 the pending case before us needs more work, but
21 we're invalidating another portion of the permit
22 and sending that back for a basically totally new
23 proceeding that may result in another contested
24 case or it may not."

25 MR. ROSSBACH: I guess then -- I'm

1 trying to go back to what Robin was saying.

2 If this thing goes forward as a minor
3 source, and we don't reverse the Hearing Examiner,
4 what do you do to monitor this project? Clearly
5 the history of this project is fraught with
6 violation after violation.

7 And what I have problems with is: If in
8 fact they are applying as a minor source, and then
9 going to go back and operate with a much higher
10 Btu limit, how do we get a handle on that? How do
11 we make sure that if this thing goes back, and
12 supposedly operating as a minor source, that it
13 will in fact operate as a minor source? How do we
14 get our hands around that?

15 MR. RUSOFF: I think that's a good
16 question, and I think it goes back to Chairman
17 Russell's question, which is -- And again, I'm not
18 probably the best person to speak to this from a
19 technical standpoint -- but my understanding of
20 the difference really is the review of the
21 application, not the operation of the facility,
22 because the permit is going to require BACT for
23 the criteria pollutants, BACT emission limits,
24 that the permit includes substantial continuous
25 emission monitoring requirements, and ambient

1 monitoring requirements, to ensure that the
2 ambient air quality standards aren't exceeded.

3 So I don't think that's an issue. I
4 think the issue -- and I believe this is
5 consistent with Mr. Tuholske's argument -- is
6 whether not certain pre-permit review proceedings
7 are required such as --

8 MR. ROSSBACH: No, I understand that.
9 Let me cut to the chase. I'm going to back to
10 what Robin said. So you give them a permit as a
11 minor source, and they're operating, and they have
12 certain emission limits, etc., etc., so all of the
13 things you said; but in fact instead of operating
14 at 190, whatever number, they're operating at 250,
15 which their boiler has the capacity to do. How do
16 we find that out? How do we get our hands on
17 that? How do we know that they got a permit for a
18 minor source, and in fact then went out and
19 operated as a major source?

20 This is a company that so far has not --
21 has had one thing after another, and the record is
22 clear that they have one after another --

23 MR. WALLANDER: I'd like to interject.
24 This is Ray Wallander. I'm Counsel for Wayzata
25 Investment Partners. We're the owner of Thompson

1 River Power.

2 Many times in this hearing today there
3 has been statements about our continuous
4 violations. We took these assets through a
5 foreclosure back in November. There is no item in
6 the record, there is no evidence that Thompson
7 River Power has ever violated any rules of
8 Montana. And actually I'd like Mr. Tuholske at
9 this point to retract his statement that, quote,
10 "This applicant has an egregious history of
11 violating the rules."

12 It's getting to the point where we're
13 getting tarred with the brush of someone else's
14 bad acts. It's sort of punishing a third party
15 for the acts of someone else, and we just ask that
16 that be noted.

17 CHAIRMAN RUSSELL: I think your Counsel
18 was going to address this, so after David, your
19 Counsel will address that matter.

20 I tend to agree a little bit about this,
21 because we have a permit, and we need to stick to
22 the case.

23 MR. ROSSBACH: I'm trying to find out
24 what happens if -- I'm concerned that they're
25 going to run as a major source.

1 CHAIRMAN RUSSELL: Well, and you know
2 what, I have to believe the Department will make
3 this company comply with the permit and the
4 conditions.

5 MR. ROSSBACH: That's what I want to
6 know, how that's going to happen.

7 CHAIRMAN RUSSELL: I think that our job
8 is to keep the case at hand, and expect the
9 Department to do their job, and we should do ours.

10 MS. SHROPSHIRE: (Indicating)

11 CHAIRMAN RUSSELL: No, I'm going to cut
12 this off. David, did you need to respond any more
13 to the last --

14 MR. RUSOFF: No, I don't have anything
15 further.

16 CHAIRMAN RUSSELL: If not, I'd like to
17 hear from the Counsel for Thompson River Power.

18 MR. UDA: Thank you, Mr. Chairman,
19 members of the Board. My name is Mike Uda, and I
20 represent the Applicant for this particular air
21 quality permit, which is Thompson River Power, and
22 not Thompson River CO-Gen. Although I certainly
23 recognize the need to clarify the record, I
24 apologize for the disruption. I think my client
25 just feels strongly that they want to make it

1 very, very clear for the record that they are not
2 the prior owners of this facility, and that it's
3 unfair to tar them with the same brush that would
4 apply to Thompson River CO-Gen.

5 Before I forget, I did want to say that
6 we are joining obviously in the Department's
7 opposition to the Petitioners' exception regarding
8 amending the affidavit, and I don't want to spend
9 any additional time on that other than to say
10 that we agree with Mr. Rusoff's statements.

11 I think we basically have four arguments
12 on this whole bad actor issue. I would prefer to
13 talk about it as far as a compliance issue,
14 because from our standpoint -- not defending what
15 went on before -- that's really what we're talking
16 about here.

17 The first point I want to make is that,
18 as Mr. Wallander pointed out, Thompson River Power
19 foreclosed on Thompson River CO-Gen last year.
20 There was a new permit, the 05 version I believe
21 -- is that correct -- that now identifies Thompson
22 River Power as the owner of the project.

23 Mike Underwood and Barry Bates, who was
24 the primary owners of Thompson River Co-Gen, have
25 no interest whatsoever in Thompson River Power.

1 It's a completely different entity. I think the
2 point that Mr. Wallander was trying to make was
3 that this seems an awful lot like: Somebody buys
4 a car, drives while drunk, and gets in an
5 accident; and then the car is repossessed by the
6 bank; and then you hold the bank responsible for
7 what the prior driver did.

8 And really that's what we're talking
9 about here. Wayzata has, we believe -- the new
10 owners of Thompson River Power -- have an
11 admirable history as far as compliance, and so we
12 don't think that it's fair to tar Thompson River
13 Power with that same brush.

14 In particular, I also wanted to point
15 out that this is essentially -- the purpose for
16 introducing this evidence was never really made
17 particularly clear by the Petitioners. It seemed
18 to me that the attempt was simply to smear the
19 Applicant. Now, had the Hearing Examiner's ruling
20 gone the other way, we can assure you that we
21 would have vigorously disputed the
22 characterizations of these violations, because we
23 didn't believe even back then as TRC that these
24 were intentional bad actor type violations, that
25 there were other explanations for what went on,

1 and there would have been a lengthy hearing on
2 that point.

3 The Hearing Examiner's ruling is
4 important to keep in mind here. The date of that
5 ruling was April 27th, 2007. And what the Hearing
6 Examiner stated was, "To make monitoring or
7 reporting requirements more onerous because of
8 past non-compliance seems somewhat punitive, and
9 collateral to the issues of which technologies,
10 and monitoring, and reporting systems TRC is
11 committed to implement to ensure future
12 compliance. Failure to follow the prescribed
13 monitoring and reporting requirements under the
14 permit may be a matter for a future enforcement
15 action if the circumstances warrant one."

16 We think here that applies with even
17 more force because you have a completely new
18 owner; no relationship between the prior owner and
19 the new owner.

20 I think there is, second of all, that if
21 you look at what would be requested on a remand on
22 this issue, what would that hearing look like?
23 All of the compliance issues have been resolved.
24 So both sides would be forced to relitigate an
25 issue regarding compliance that they've agreed to

1 settle. What would that hearing even look like?
2 Would it even be rational to hold such a hearing?

3 And I think the third thing that you
4 have to think about in respect to the request for
5 remand here is: What does the remand, the scope
6 of the remand hearing do to the overall permit
7 application? Because right now we have a track
8 that's been identified by Mr. Rossbach, and a
9 separate potential track that we're dealing with
10 with respect to how we would process the whole
11 question of whether this is a major stationary
12 source, and then another whole track to decide
13 whether or not it was even appropriate to apply
14 the standard for bad actor to an entirely new
15 owner of the facility, when all of the penalties
16 and everything else have been resolved.

17 I think that's a very problematic thing,
18 and it also raises a substantial legal question.
19 In fact, is this particular exception moot as it's
20 applied to Thompson River Power?

21 I believe -- and the second major issue
22 I want to address. I believe that the Hearing
23 Examiner's ruling was correct primarily because of
24 this Board's rule. There was a rule that was
25 adopted in 2002, and it's ARM 17.8.749(4), and it

1 states, "The Department shall issue a Montana air
2 quality permit unless the Department demonstrates
3 that the emitting unit is not expected to operate
4 in compliance with the applicable rules,
5 standards, or other requirements."

6 This kind of goes to the question that
7 was raised by both Ms. Shropshire and Mr.
8 Rossbach, which is: The Department obviously
9 believed under the permit that they were going to
10 operate in compliance with it, or they wouldn't
11 have issued the draft decision.

12 But also more importantly, 749(4)
13 specifically addressed this issue. In response to
14 comments received back in 2002, the Board stated,
15 quote, "Permitting and compliance are separate
16 functions, and past compliance is not presently a
17 factor in the issuance of a new permit." This was
18 what the Board said.

19 On that basis alone, the only possible
20 result of the Petitioners' request to include bad
21 actor status in this hearing was the result
22 reached by the Hearing Examiner.

23 A third point, which is sort of related
24 to the prior point, has to do with the standard,
25 the burden imposed upon Petitioners under the

1 Montana Supreme Court decision MEIC versus DEQ.

2 And I'm not going to waste time citing to the
3 decision. I think you all are aware of what it
4 is.

5 But it basically requires the
6 Petitioners to identify a statute, a regulation,
7 or something else that says they're not -- that
8 they erred when they failed to consider bad actor
9 status. They have repeatedly -- And at the
10 hearing on this matter, the Hearing Examiner again
11 asked them, "What rule or statute are you talking
12 about?," and they couldn't identify one.

13 And so what you're really talking about
14 here is this express direction from the Board,
15 authority from the Supreme Court saying, "In order
16 to prevail on a challenge to an air quality permit
17 appeal, you have to identify a statute or a rule,"
18 and not only have they not done that, the Board's
19 express rule is directly to the contrary. The
20 Hearing Examiner's result was therefore obviously
21 proper.

22 My final point here is that I believe
23 the Hearing Examiner was very judicious in how she
24 handled this particular issue at hearing. In our
25 motion in limine, which the Hearing Examiner

1 ultimately granted, she reserved ruling on this
2 question until the hearing; and during the hearing
3 at several different points, there was an
4 opportunity and an attempt by Petitioners to show
5 the relationship, on the one hand, between
6 permitting, and on the other hand with compliance.

7 And I think Mr. Rossbach's questions are
8 well taken as far as what are we really talking
9 about here. Are you talking about making the
10 standards more stringent, more stringent than what
11 is required to protect human health and the
12 environment? How is that just not punitive? How
13 is that following the law?

14 There is all kinds of questions that
15 could have been raised. The Petitioners were
16 simply unable to persuade the Hearing Examiner
17 that there was any real relationship between
18 permitting on the one hand, and compliance on the
19 other.

20 In summing up TRP's position -- and
21 again, I want to clarify. We are not Thompson
22 River CO-Gen. We believe it would be unlawful and
23 unfair for this Board to reverse the Hearing
24 Examiner on this issue, to punish TRP, a wholly
25 unrelated entity, for the past compliance issue of

1 Thompson River CO-Gen; nor would it make sense to
2 have a hearing that involves settled compliance
3 matters. I would be nothing more at that point
4 than a collateral attack on those settlements.

5 Second: Thompson River Power also
6 believes that the Hearing Examiner was correct in
7 applying the relevant law, and concluding that the
8 Department was not permitted by Board rule ARM
9 17.8.749(4) to consider past compliance issues.

10 Third: TRP continues to believe that
11 the Petitioners have not met their burden set
12 forth in the Supreme Court's MEIC versus DEQ case
13 to identify a statute or rule that DEQ violated by
14 not taking into account past compliance issues.
15 As stated previously, Board rule ARM 17.8.749(4)
16 required DEQ to do precisely the opposite of what
17 Petitioners urge.

18 Fourth: TRP believes the Hearing
19 Examiner provided Petitioners with an opportunity
20 at hearing to explain how past compliance relates
21 to the TRP's permit, and was not able to convince
22 the Hearing Examiner it was relevant.

23 And before I conclude, one point I want
24 to make is: Mr. Tuholske pointed out that there
25 is discretion for the Board and -- for DEQ --

1 excuse me -- under 749(1), but I believe the
2 lawyers on the Board know that a more specific
3 rule or statute governs over a more general one.
4 There is a specific direction to DEQ not to
5 consider compliance issues when deciding when to
6 issue a permit.

7 In conclusion, TRP believes there is no
8 basis for reversing the Hearing Examiner on the
9 bases alleged by Petitioners, namely that the
10 Hearing Examiner failed to consider compliance
11 issues of Thompson River CO-Gen as applied to
12 Thompson River Power. Thank you.

13 CHAIRMAN RUSSELL: Any questions for Mr.
14 Uda?

15 MR. SKUNKCAP: I don't know if this is a
16 question, just a statement. Back at the beginning
17 when you mentioned the car seller, if a car seller
18 is selling you a car and is he responsible. So if
19 the car has no brakes, do you keep running
20 somebody over?

21 MR. UDA: Well, I think in the analogy,
22 Mr. Chairman, members of the Board -- I'm sorry.
23 Did I interrupt you?

24 MR. SKUNKCAP: That analogy. Just
25 answer that.

1 MR. UDA: Well, my analogy was I think
2 somewhat different. Maybe I was unclear. My
3 analogy was that somebody buys a car; the bank
4 finances the car; the person who buys the car goes
5 and gets in an accident, drinking or driving or
6 whatever else; the bank then forecloses; then owns
7 the collateral, the car; and then you decide to
8 hold the bank responsible for the actions of
9 driver. We don't do that in the law.

10 MR. SKUNKCAP: Okay.

11 CHAIRMAN RUSSELL: Any other questions
12 for TRP?

13 MR. MARBLE: This is Don Marble. I had
14 a question.

15 Before you bought this place, you must
16 have done a pretty thorough investigation, and you
17 knew there had been problems, and you just --
18 We've amply talked about the problems here. And I
19 don't know whether it was fraud or not, but it was
20 a terrible experience of running a plant. Did you
21 just feel, "We're doing to have to -- there is so
22 many problems that come under this plant," or did
23 you just think that, "Well, that's what -- we're
24 like the used car dealer. We don't guarantee
25 anything. We're just foreclosing on the car"?

1 And that's our problem. I don't think
2 the car analogy fits very good. You're buying a
3 plant that could pollute a whole community, and
4 you ought to make sure you know what you're
5 getting into, and you should agree to be held
6 responsible for problems that come up from before
7 you bought it. So what do you think about that?

8 MR. UDA: Mr. Chairman, members of the
9 Board --

10 MR. WALLANDER: If it's okay with the
11 Board, this is Ray from Wayzata again. I'd like
12 to respond directly to that.

13 CHAIRMAN RUSSELL: You know what, I'm
14 going to let your Counsel do it, because that's --

15 MR. MARBLE: I want to hear from
16 Counsel.

17 CHAIRMAN RUSSELL: I want to hear
18 Counsel also. That's who's here, that's who's
19 going to respond. I'm sure he'll represent you
20 quite well.

21 MR. UDA: Thank you, Mr. Chairman.
22 First of all, I guess again I would dispute the
23 analogy that Mr. Marble has made here. We believe
24 we've done substantial due diligence. We have
25 spent millions and millions of dollars on

1 upgrading the equipment in the plant; applying a
2 new SNCR system for NOx control; applying a new
3 semi-dry scrubber system to ensure the SOx
4 control; additional, many additional permitting
5 compliance and other measures that have been
6 taken.

7 We believe we've exercised responsibly.
8 We believe Wayzata is a responsible corporate
9 citizen, and we believe going forward, we don't
10 anticipate any problems because we've done the
11 work in the investment.

12 And in our situation, again to
13 reiterate, this was a foreclosure, and we're going
14 forward with the plant. And we believe, and we're
15 optimistic, that we'll operate in full compliance
16 with the law.

17 MR. MARBLE: And that law includes the
18 renewal of the permit that says that this is a
19 minor facility, and you're not going to -- if you
20 go with that, you recognize you're going to pay
21 the price?

22 MR. UDA: Yes, Mr. Marble, I believe
23 that's correct.

24 CHAIRMAN RUSSELL: I know we're going to
25 have to take a break here within the next few

1 minutes.

2 MR. ROSSBACH: I want to just follow up
3 on that. This comes back -- you heard my
4 questions of Mr. Rusoff, and that this is kind of
5 my concern about this that: If in fact this
6 facility has the capacity to operate at a much
7 higher height input or output -- I'm not sure --
8 what assurances can you give us that it's not
9 going to happen, that it's not going to be a major
10 source, or that if it does become a major source,
11 you're going to get the Department involved in
12 reevaluating it? How can we be assured as a Board
13 that we don't need to impose additional standards?

14 MR. UDA: First of all, I think -- I
15 think the Chairman has pointed out, and Mr. Rusoff
16 has pointed out -- I don't want to get too far
17 afield from the record here.

18 But what I can tell you is that we have
19 emission limitations, including those related to
20 boiler output, that we have to operate in
21 compliance with or we get penalized. And we have
22 monitoring requirements I believe related to that,
23 and those are also imposed upon us, and if we
24 exceed that, we get in trouble.

25 I can tell you and assure you that it is

1 our intention to operate in compliance with the
2 permit, and not to exceed the emission
3 limitations, boiler heat input limitations, that
4 are currently in that permit.

5 I also will say that there is capacity
6 for a boiler, but as a factual matter, most people
7 don't operate their boilers all out all of the
8 time because it causes significant operational
9 problems.

10 MR. ROSSBACH: So there are heat
11 limitations in the permit? That's what the
12 question was.

13 MR. UDA: That's correct.

14 MR. ROSSBACH: Thank you.

15 CHAIRMAN RUSSELL: Jack, did you want to
16 really quick -- and then we're going to take a
17 break.

18 MR. TUHOLSKE: Mr. Chairman, members of
19 the Board, first of all, on who the party in
20 interest is here, the pleadings that I received
21 say that these gentlemen -- is it says, "Attorneys
22 for Thompson River CO-Gen." I just found out 60
23 seconds ago that a new permit had been issued. We
24 may have been able to avoid this issue if I had
25 been informed. But their own pleadings are still

1 saying they're representing Thompson River CO-Gen.

2 The other point I want to make has to do
3 with I think the more profound issue here frankly,
4 and that's the amendment. And I just want to tell
5 you that this didn't arise out of thin air. The
6 permits that they issued previously, they kept
7 violating. This thing kept -- The standard is 250
8 million Btu's, and they started out in the low
9 100's, and then they were 150, and then they were
10 196; and the same with the SOx and the NOx limits.
11 They kept going up and up.

12 They couldn't operate this facility
13 anywhere within what they were saying they were
14 going to do. We couldn't interpret the data. We
15 gave it to our expert. And if you would look on
16 Page 9, and 10, and 11 of the expert report of Dr.
17 Ron Sahu, he explains why he believes that this is
18 a major source right now today, not that it might
19 not operate as a major source -- that's evidence
20 that it can -- but it is a major source here
21 today. That is the testimony we were prevented
22 from putting on because we were denied our
23 amendment. And that is really the issue is:
24 Should they have allowed leave to amend so that
25 Dr. Sahu could testify why this thing right now is

1 a major source?

2 And in response to Mr. Rossbach's
3 question, the Department did have this same data
4 about the ever-increasing heat outputs and
5 pollutant outputs. Thank you very much.

6 CHAIRMAN RUSSELL: We're going to take a
7 break, and let's reconvene at noon, and I think we
8 can start with the motion generally, and nest
9 anything that we need to do to modify this.

10 (Recess taken)

11 (Mr. Skunkcap not present)

12 CHAIRMAN RUSSELL: We're going to get
13 started again. I think we've heard from the
14 parties to the extent we need to. At this time I
15 will take a general motion to move this forward,
16 and if we have any issues that require nesting of
17 any motions, we'll take those up at that time.

18 Is there anyone who would like to make a
19 motion at this point?

20 MR. ROSSBACH: I would move that we
21 adopt the findings and proposed order with the
22 addition of the essentially agreed to modified
23 language on the order of remand.

24 CHAIRMAN RUSSELL: Is there a second?

25 MR. MIRES: Second.

1 CHAIRMAN RUSSELL: Seconded by Larry.

2 Any further discussion?

3 MR. ROSSBACH: I just have a couple of
4 points. First, I'm going to accept in good faith
5 the statements made by the new owners that they
6 are not the bad actors that their prior actors
7 were.

8 But with the understanding of some
9 scepticism given the nature of the history of
10 this, that I'm going to request that we have once
11 this new -- I'm assuming there is going to have to
12 be a new BACT and a new permit that includes the
13 operating during shut down -- that's what we're
14 ordering here. I hope that we pass this motion --
15 and that as a result of this, I'm going to request
16 that the DEQ have some periodic reporting to us
17 about the compliance on this particular plant, and
18 particularly that we monitor closely the Btu
19 issues that the Petitioners' expert has raised.

20 I'm troubled by that, but I don't feel
21 we have an adequate record on that, but I feel
22 like I think I can get my hands around the idea
23 that if, in the operation under a new permit that
24 has proper limits on it, after a proper BACT is
25 done, that there will be remedies available should

1 the Btu's exceed -- or should the Btu calculations
2 be such that it is in fact operating as a major
3 source, not a minor source.

4 That's what I want to make sure, that
5 there is a handle on that, that I -- and then sort
6 of that is my second point. I'm very sympathetic
7 to the Petitioners' concerns about major source,
8 because I understand there are very significant
9 differences in terms of the regulatory standards
10 that apply. And if in fact this does start
11 operating as a major source, I want to make sure
12 that the Department takes notice of that, and that
13 the additional requirements are imposed.

14 My problem and the concern that I have
15 is that I do think that administrative procedures
16 are different from the Rules of Civil Procedure,
17 in the sense of the affidavit having to be more
18 specific, and I do think it was a significant
19 difference. It's a close question, though, and I
20 wish there was some additional authority on this
21 that I felt comfortable with. And I appreciate
22 this.

23 But I want to make sure that everybody
24 here knows that we are deeply concerned about this
25 major source issue, and that we're going to be

1 asking the Department to be carefully monitoring
2 the future operation of this, so we don't have
3 this history again. I'm just adamant that that's
4 going be the way I'm going to be looking at this
5 project.

6 CHAIRMAN RUSSELL: Thanks.

7 MR. ROSSBACH: I do think this project
8 has the potential of being a source of energy that
9 is needed, but I'm going to be sure that the DEQ
10 is carefully monitoring this particular project.
11 It's kind of like they're on probation, in my
12 view.

13 CHAIRMAN RUSSELL: But not double secret
14 probation.

15 MR. ROSSBACH: No. This is very open
16 and obvious probation.

17 CHAIRMAN RUSSELL: Tom, a question for
18 the Department, because I totally concur with Bill
19 that I think that because we are the court here,
20 that one of the things that would make us more
21 comfortable is some very periodic update of
22 compliance with the conditions. And can we be
23 assured that as soon as the BACT analysis is done,
24 and those limits are completely set, that we can
25 have those conditions, the data that make the

1 conditions compliant, can we be assured that we
2 can get those?

3 MR. LIVERS: Mr. Chairman, members of
4 the Board, the Department is willing to provide
5 frequent briefings to the Board on this permit and
6 the compliance issues, limits.

7 CHAIRMAN RUSSELL: Further discussion by
8 the Board? We do have a motion.

9 (No response)

10 MR. MIRES: Question.

11 CHAIRMAN RUSSELL: I wish Gayle was
12 here. Don, are you on?

13 (No response)

14 CHAIRMAN RUSSELL: Heidi, are you on?

15 (No response)

16 CHAIRMAN RUSSELL: We do have a quorum.

17 If everyone votes in the affirmative, then we
18 actually are done. So I will call for the
19 question. All those in favor, signify by saying
20 aye.

21 (Response)

22 CHAIRMAN RUSSELL: Opposed.

23 (No response)

24 CHAIRMAN RUSSELL: Hearing none, the
25 roll call would have been Bill, Larry, Robin, and

1 Joe voted for this, and we'll move along.

2 Thank you very much for your time today,
3 and I appreciate your consideration. And I can
4 assure the Thompson Falls folks that we will keep
5 the Department to compliance with the issues. And
6 I'm sure that the new owners will do the same.

7 MR. UDA: Absolutely.

8 MR. LIVERS: Mr. Chairman, one question.
9 There was never a vote specifically on the
10 exceptions.

11 CHAIRMAN RUSSELL: I don't know if we
12 have to because we accepted the Hearings
13 Examiner's -- The exceptions were to the Hearing
14 Examiner's report, and we adopted that, so I
15 believe we've covered that.

16 MR. LIVERS: So by definition or by
17 default, then you've acted on those exceptions?

18 CHAIRMAN RUSSELL: Correct. That's how
19 I would have -- because that's what the --

20 MR. LIVERS: I'd certainly defer to
21 Katherine on that. I just wanted to make sure
22 that that was explicit.

23 (The proceedings were concluded
24 at 12:10 p.m.)

25 * * * * *

1 C E R T I F I C A T E

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 - 75 - 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 _____, 2008.

18

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

23

24

25