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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of: the Notice) CASE NO.
of Appeal and Request for) BER 2021-06-SWP
Hearing by)
Oreo's Refining Regarding)
Solid Waste License)
Expiration (license #574))

TRANSCRIPT OF PROCEEDINGS (VIA ZOOM)
APPEAL AND REQUEST FOR HEARING

June 9, 2023
9:27 a.m.

BEFORE CHAIRMAN DAVID SIMPSON,
BOARD MEMBERS JON REITEN, JOSEPH SMITH,
JULIA ALTEMUS, STACY AGUIRRE, JEN RANKOSKY,
and LEE BRUNER

PREPARED BY: LAURIE CRUTCHER, RPR
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A P P E A R A N C E S

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APPEARING ON BEHALF OF THE PETITIONER:

MS. SHELLY MITCHELL (pro se) (via Zoom)

ATTORNEY APPEARING ON BEHALF OF THE DEPARTMENT:

MR. NICHOLAS WHITAKER, ESQ. (via Zoom)
Staff Attorney
Montana Department of Environmental
Quality
Legal Unit, Metcalf Building
P.O. Box 200901
Helena, MT 59620-0901

1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 CHAIR SIMPSON: Second action item,
5 III(b), is the matter of notice of appeal and
6 request for hearing by Oreo's Refining regarding
7 solid waste license expiration.

8 I believe we had a request from Shelly
9 Mitchell of Oreo to speak before the Board, and
10 what I'd like to do is to provide an opportunity
11 for Oreo and the Department to make their oral
12 comments to the Board before we proceed with a
13 decision on the finding of fact and draft --
14 excuse me -- the proposed finding of fact and
15 conclusion of law that's before us on this case.

16 And I guess I would suggest that we try
17 to limit comments to fifteen minutes max, maximum,
18 and then five minutes more for follow up. So is
19 Ms. Mitchell on the call?

20 MS. MITCHELL: Yes, I am.

21 CHAIR SIMPSON: Okay. You have the
22 floor.

23 MS. MITCHELL: I want to thank everyone
24 for allowing me to give my oral arguments.

25 I did not agree with the Hearing

1 Examiner's findings. I believe that some things
2 were completely left out.

3 For three years I was operating my
4 business as a mobile unit. With Dusty Johnson's
5 help, she helped with the paperwork to get it
6 submitted and approved, and a part of that was a
7 new site plan and permission from the Missoula
8 Health Department, which Mr. Whitaker has
9 completely glossed over.

10 I submitted into evidence the email
11 between Dusty Johnson and I during that process of
12 me getting approved to be mobile. Mr. Whitaker
13 has -- and that email has also been produced as
14 evidence. His response was that that's not what
15 the email was talking about, but he has given no
16 other explanation for that email.

17 And the follow-up email that was in
18 evidence was, "Do you need to come and do an
19 inspection before I turn in the keys to Missoula
20 Ave.?" And the answer was no. So DEQ knew I was
21 not at Missoula Ave. for three years.

22 So when the next renewal came, I put on
23 the P.O. Box because that was a permanent address.
24 Mobile does not mean permanent. I still had no
25 idea that anything was wrong. I submitted that,

1 and the renewal, the license came back to me with
2 Missoula Ave. I had -- While the DEQ changed it
3 when I submitted as a P.O. Box, again, they still
4 did not come to me. Now, did it have Missoula
5 Ave. on it after that? Yes, the recycling
6 license.

7 I have a brain injury. Missoula Ave.
8 was very familiar. I had no idea that it was not
9 supposed to be there. But they still didn't come
10 to me.

11 The July before I got the letter from
12 the DEQ, Ms. Johnson again knew that I was still
13 mobile. Then I get this letter saying that Ms.
14 Johnson was sent out to verify that I was not at
15 Missoula Ave., that I'm operating illegally, and I
16 need to submit a new address.

17 I submitted a new address. It was not
18 approved because it wasn't in Missoula County.
19 Ms. Johnson knew that I was not at Missoula Ave.

20 And I'm the only one that has been put
21 under oath. I've had to do this all by myself.
22 No attorney would take my case because there was
23 no money, because my business was shut down. I
24 was operating illegally without a recycling
25 license, and the prime time of when recycling

1 picks up is in the summertime.

2 They had ample time to notify me. They
3 did not act in any good faith. I tried to contact
4 Rick Thompson, tried calling to no avail. I sent
5 him an email asking, "Can you reinstate my license
6 for six months until I look for a permanent place,
7 so I can make money to be able to pay for the rent
8 extra," and I got absolutely no response.

9 The act of no -- I mean they had no good
10 faith in this whole matter. They knew prior to
11 not reissuing my license what they were going to
12 do. Why didn't they call me? They did nothing.
13 They didn't notify me that I had rights, until I
14 filed with the BER, and then they started
15 conversations with me.

16 I had to sell off parts of my business
17 supplies to cover the expenses, I lost my housing,
18 and my business is now permanently closed.

19 I have made the claim that they did this
20 with malice and intent, and the reasons for that
21 is that they knew, and they never reached out,
22 they never called and said, "Hey, we made a
23 mistake."

24 Mr. Whitaker has claimed that the DEQ is
25 not responsible for their employees. I was, as a

1 business owner, I wasn't responsible for my
2 employees. And it was like, "Oh, well. You're
3 just a little business."

4 I did the city's e-waste, I did the
5 banks' e-waste, I did the community's e-waste.
6 And within a letter just destroyed everything.
7 And I believe that -- would it be nice to go back
8 hindsight to say, "Oh, you know, you weren't
9 legally?," well, that's fine now. Then work with
10 me, but they didn't do that.

11 So what I'm asking for is the judgment
12 in my favor. I had wonderful friends that stepped
13 up to pay my bills. They still need to be paid
14 back. And through a judgment from the Board, I
15 can take that to an actual Court. But again,
16 whoever has the most money wins, and they made
17 sure I had no moneys. I'm a small business.

18 And the other fact was, that had been
19 overlooked, was that I did get approval from the
20 Missoula health district, and that they could have
21 talked to me besides taking this action. It seems
22 very, very drastic.

23 So at this point I don't think I have
24 much else to say except my rebuttal to Mr.
25 Whitaker. But I do think that the facts were not

1 totally laid out in a way that --

2 You know, the law states that I can't be
3 mobile. Okay. That's fine. But to me that's a
4 separate issue from the actions of the last three
5 years saying, "Oh, you were not at Missoula Ave."
6 when they had known. And I don't understand.

7 I'm the one that -- I was put under
8 oath. Ms. Johnson was never put under oath.
9 Oreo's Refining had no money to do that. So why
10 Ms. Johnson acted cowardly and did not say, "Hey,
11 this is what happened. I'm sorry. Let's make
12 this right. Let's fix this." I got nothing.

13 So I am actually done. I don't think I
14 need fifteen minutes.

15 CHAIR SIMPSON: Thank you very much, Ms.
16 Mitchell. We'll defer questions until we've heard
17 from the Department. Who is speaking on behalf of
18 the Department? Mr. Whitaker; is that correct?

19 MR. WHITAKER: Yes. Good morning, Chair
20 Simpson, members of the Board. Yes, Nick Whitaker
21 on behalf of the Department.

22 I guess before I get started, I don't
23 think you guys can see my video. Is there a way
24 to get my video showing so you can see me?

25 CHAIR SIMPSON: No, we can't.

1 MR. WHITAKER: Okay. Sorry about that.
2 Thank you, Sandy. Like I said Nick Whitaker on
3 behalf of the Department here.

4 Just to I guess explain this case from
5 DEQ's point of view, and then to respond to Ms.
6 Mitchell's argument there, I think this case is
7 straight forward.

8 The material facts are not in dispute
9 here, and the material fact being that Ms.
10 Mitchell is no longer operating at the Missoula
11 Avenue location for which she was licensed, and
12 hasn't been for some time.

13 What was before DEQ was an application
14 renewal for that facility at Missoula Avenue, and
15 as Ms. Mitchell noted, DEQ issued a letter to her
16 after receiving that application, requesting an
17 updated address based on the Department's
18 understanding that she was no longer there.

19 Ms. Mitchell mentioned her mobile
20 facility. And the Department has argued
21 throughout that it just doesn't have the authority
22 to grant the sort of mobile license that she is
23 talking about.

24 The proposed order before the Board I
25 think lays that out. There's a number of

1 different criteria, location specific criteria,
2 and the solid waste rules that would apply to her
3 facility that you just simply can't meet with the
4 sort of mobile facility, where you're going to
5 operate everywhere.

6 And then the other component of this is
7 that the Solid Waste Management Act is situated
8 such that DEQ issues a license, but then that
9 license is validated by the local health officer
10 for the county in which the facility is located.

11 And so I think the situation here kind
12 of illustrates the issue with a mobile license.
13 And Ms. Mitchell's facility on Missoula Avenue was
14 approved by the Missoula County Health Department.

15 After she transitioned, I suppose, to a
16 mobile facility, she was operating both out of
17 Missoula County and Ravalli County. And obviously
18 if we were just going to issue a mobile license,
19 Ravalli County would have been denied their chance
20 to have an input and validate that license.

21 So just to summarize, the issue here is
22 narrow. We've got the undisputed fact that there
23 was an application for a license renewal for the
24 Missoula Avenue location of Missoula County; Ms.
25 Mitchell is not operating there.

1 DEQ correctly withheld the license, did
2 not issue a license on that application, based on
3 the fact that there just isn't a facility at that
4 address.

5 Just to address a couple of the things
6 that Ms. Mitchell said. I think what I heard from
7 her was primarily I guess frustration with perhaps
8 her view of sort of the communication between DEQ
9 and her. And I think what she was looking for, at
10 least my understanding, was just better
11 communication, "Hey, there's this discrepancy.
12 Let's get it addressed."

13 And I guess from my perspective, from
14 DEQ's perspective, the letter we sent to her in
15 July of 2021 was exactly what she was looking for,
16 right? We said, "We received your application.
17 You're not at that address. Please provide us
18 with an updated facility address so that we can
19 reissue the license."

20 Unfortunately since that point we just
21 haven't been able to get this thing resolved, and
22 get her relicensed, but it's not from lack of
23 effort from DEQ's part. DEQ's goal here has been
24 compliance assistance. Obviously we strongly
25 disagree with the characterization that we're

1 trying to drive her out of business, or just take
2 away her license. All we're trying to do is bring
3 her business into compliance with the Montana
4 Solid Waste Management Act.

5 And I hope Ms. Mitchell would agree that
6 over the last couple years we spent a lot of time
7 and resources trying to do that. Unfortunately we
8 just haven't been able to resolve this issue.

9 So having not been able to resolve the
10 issue, DEQ had been moving for summary judgment.
11 The Hearing Examiner correctly granted DEQ's
12 summary judgment motion, issued a proposed order,
13 and DEQ requests that the Board adopt that order
14 as the final agency action and order of the Board.

15 And I'm happy to answer any questions,
16 but that's all I have for now. Thanks.

17 CHAIR SIMPSON: Thank you very much, Mr.
18 Whitaker. Ms. Mitchell, anything further?

19 MS. MITCHELL: Am I unmuted? I'm
20 unmuted right now?

21 MS. MOISEY-SCHERER: Yes, you are.

22 MS. MITCHELL: Okay. Do I believe that
23 the DEQ during that time -- Mr. Whitaker stated
24 that that letter was my communication, but then
25 the question still remains: Why did they wait

1 until my license had expired to notify me?

2 If they were really wanting to help, why
3 wouldn't they have contacted me three years ago or
4 two, or before they sent me a letter that I was
5 operating illegally, and they were not going to
6 renew my license.

7 The other question, the DEQ knew I was
8 not at Missoula Ave., and whether or not having
9 the Missoula health district approve of me being
10 mobile, you know, that -- and maybe I didn't fit
11 all of the other qualifications. They still have
12 the obligation to come to me, and not wait and not
13 renew my license during that time. They have the
14 obligation to have communication way before they
15 took an action that terminated my business.

16 So I do not agree with Mr. Whitaker's
17 take that the DEQ has gone above and beyond
18 because they lacked the communication for three
19 years.

20 And I did submit on the application in
21 2018 an address. They changed it back. They
22 didn't update on their side, or they just flat out
23 ignored it. At that point someone should have
24 come to me in good faith and said, "Hey, we can't
25 have this address," because the DEQ knew for three

1 years I was not at Missoula Ave., and they waited
2 three years to take this action. No good faith.
3 That's all I have.

4 CHAIR SIMPSON: Thank you, Ms. Mitchell.
5 Anything further, Mr. Whitaker, before we proceed
6 with questions from the Board?

7 MR. WHITAKER: Chair Simpson, nothing
8 from me. Thanks.

9 CHAIR SIMPSON: I have one question I'd
10 like to ask before I open up questions in general,
11 and that is an explanation of the nature of your
12 business, Ms. Mitchell. I seem to recall it has
13 something to do with recycling of electronic
14 equipment, but I think it's important that the
15 Board have an understanding of just what it is
16 that we're talking about here.

17 Solid waste covers a lot of ground, and
18 so could you give us a brief overview of the
19 nature of your business, please.

20 MS. MITCHELL: Yes. So I collected
21 electronic waste, which is computers, laptops,
22 those things, from businesses and some government
23 agencies in the community. I took those, and
24 dismantled them. Some of the components I
25 actually removed from the circuit boards that

1 could be put back into play.

2 Everything then, once dismantled, was
3 recycled locally. The only thing that went to the
4 landfill was the plastic, because it has fire
5 retardant, and to burn that to waste energy would
6 have been highly inappropriate for the
7 environment, and so the safest place for it was in
8 the landfill.

9 That made my business 90 percent --
10 well, technically zero waste is 90 percent.
11 Everything else then could be taken locally. And
12 I chose to use a local recycler that was ran and
13 owned here in Missoula, instead of using a
14 corporate one to do my recycling. And that's -- I
15 mean everything had its place once it was
16 dismantled.

17 I charged very little because people,
18 some people had thought recycling should be free.
19 I had free pick-up for a very long time until the
20 last year of my business, I had to charge a \$10
21 fee for that. But that's pretty much it. It was
22 long hours.

23 CHAIR SIMPSON: What I'm trying to wrap
24 my head around is: Is there any difference in the
25 way you conduct your business between your

1 permanent location on Missoula Avenue or your
2 mobile business?

3 That is, when you were in a permanent
4 location, were you storing e-waste equipment on
5 site, or was it going -- you said, you told us a
6 minute ago that whatever wasn't recycled went to
7 the landfill, which I presume is the city landfill
8 or county landfill. It's not something operated
9 by you personally. Is that the case? Do I
10 understand that correctly?

11 MS. MITCHELL: Some things have to be
12 stored. To make any kind of money, you have to be
13 in bulk. It takes 90 computer towers gutted, just
14 the steel of that, to get one ton of steel. When
15 the tariffs were happening one ton of steel was
16 \$10.

17 It was not feasible to go to recycle
18 that. Sometimes you have to store it. Sometimes
19 you only get four, or two, like say computer
20 towers from a business; you may get fifteen to
21 thirty. To make any money with those things, the
22 copper, the wires, do need to be stored.

23 What made things different was that I
24 could actually go to people a lot easier, and a
25 lot of people did not want the DEQ involved in

1 their life. Finding businesses to host Oreos,
2 finding other homeowners, people just did not want
3 the DEQ in their life, and it made things
4 extremely difficult to find places to rent.

5 So being mobile gave me the freedom to
6 actually go to people, and do their e-waste there,
7 which ended up being more profitable than having
8 to pay rent at a facility because rent is
9 extremely -- rent costs a lot. And in the winter
10 times you don't make a lot. People recycle less.

11 CHAIR SIMPSON: So you're storing, the
12 materials you're talking about, in the mobile
13 trailer? That's what I'm trying to get at.

14 MS. MITCHELL: Some of it, yes, was
15 stored there, and things that weren't finished
16 were stored in the back of my truck, like the
17 steel, bagged up copper, those things. So yes,
18 they were stored in the horse trailer until they
19 were -- or my truck until they were taken to the
20 recycling center.

21 BOARD MEMBER RANKOSKY: Can I ask a
22 question? What does the board -- the health
23 department -- were they -- how were they involved
24 in this, the local health department?

25 MS. MITCHELL: I went to -- so when Ms.

1 Johnson and I were talking to me becoming mobile,
2 she said that I needed approval from the health
3 department, so I went down.

4 I talked with two people, and then I got
5 to the person that I needed to talk to, and I went
6 over what I did, and he said that I would need
7 permission, if I would like to park like at
8 Rosauer's parking lot or something like that, that
9 they felt there was no hazard, there was no reason
10 not to, and that it was a good idea to be mobile
11 for the community. Yeah.

12 BOARD MEMBER RANKOSKY: Okay.

13 CHAIR SIMPSON: Other questions either
14 for Ms. Mitchell or Mr. Whitaker?

15 BOARD MEMBER BRUNER: Mr. Chairman, I
16 have a question for Mr. Whitaker. Mr. Whitaker,
17 actually two questions.

18 We have before us the proposed findings
19 of fact, conclusion of law, and order on summary
20 judgment. Did DEQ file any exceptions to those?

21 MR. WHITAKER: We did not.

22 BOARD MEMBER BRUNER: Thank you.

23 Second, is there -- I read that order, but is
24 there anything in that order or in this proceeding
25 that would prevent the applicant from reapplying

1 for another license in the future, assuming that
2 the conditions could be met?

3 MR. WHITAKER: Chair Simpson, Mr.
4 Bruner, not at all. We've recommended that she
5 reapply, and it's a free application, and it's a
6 free license for a recycle and collection facility
7 licenses.

8 BOARD MEMBER BRUNER: Thank you,
9 Counsel. That's all I've got.

10 CHAIR SIMPSON: Another question for Mr.
11 Whitaker. Where is the environmental harm here?

12 MR. WHITAKER: Chair Simpson, I think --
13 I understand your question. I mean what -- DEQ
14 solid waste program is I think constrained by, you
15 know, to implement the statutes we're tasked with
16 implementing.

17 One of those things is under the Solid
18 Waste Management Act there's facility specific,
19 location specific criteria that applicants must
20 comply with to be entitled to a license; and
21 there's both the DEQ aspect and the local
22 government aspect with this.

23 And for DEQ to issue a mobile license
24 would be to -- it would not be in compliance with
25 the Solid Waste Management Act because it would

1 just ignore those location specific criteria; and
2 then it would also undermine the authority or the
3 role that the local government plays in this.

4 And just to kind of expand upon this,
5 based on what Ms. Mitchell said, and the question
6 about the Missoula County Health Department
7 approval of this, of a mobile facility.

8 In the record you'll find that Ms.
9 Mitchell had been staying and storing e-waste down
10 in Ravalli County for I believe a couple of years
11 preceding this matter, including e-waste stored in
12 a garage at a residence down there.

13 And obviously Missoula, regardless of
14 any approval from the Missoula County Health
15 Department, there needs to be Ravalli County input
16 and validation of that process, if they could.

17 So I mean this is simply one of those
18 issues where DEQ can only act in a way in
19 accordance with the Solid Waste Management Act,
20 and the authority we're given to us, and we just
21 simply don't possess the authority to issue these
22 sort of blanket mobile licenses in which Ms.
23 Mitchell or another person could just be anywhere
24 without really knowledge of either DEQ or the
25 local government. And so really that's the

1 primary focus point at play here.

2 And I guess just to follow up and more
3 directly answer your question, Chair Simpson, I
4 mean obviously this e-waste that you have, you
5 know, certain pieces to them that do provide
6 potential for environment harm if not properly
7 disposed of.

8 Obviously if Ms. Mitchell was operating
9 on the banks of the Clark Fork River or something
10 like that, and there was an incident, all of a
11 sudden you've got 90 computer towers disposed in
12 the Clark Fork River, I guess obviously it's not
13 to the level of other things DEQ deals with, but
14 there's not a lack of environmental harm here.

15 CHAIR SIMPSON: Is there, in the solid
16 waste act or the rules implementing the solid
17 waste act, is there separate rules for e-waste, or
18 are the rules of a general nature regarding solid
19 waste disposal or recycle operations?

20 I guess I'm not familiar with those
21 rules. The question of having to have a fixed
22 address at a fixed site that can be inspected by
23 the Department, that, from what you said earlier,
24 I understand is contained in the statute as
25 opposed to the rules; is that correct?

1 MR. WHITAKER: Yes. The statute, Chair
2 Simpson, yes. I mean the statutory provision is
3 of a general nature regarding location specific
4 criteria, and there really -- you know, the
5 Legislature sort of deferred to DEQ, gave DEQ
6 rulemaking authority to implement more specific
7 rules regarding the location of the facilities.

8 CHAIR SIMPSON: But there's no specific
9 rules directed at e-waste; is that correct?

10 MR. WHITAKER: Chair Simpson, that's
11 correct. This is a recycling collection facility.
12 There's a few specifics around there, but the
13 location specific criteria I think apply generally
14 to all solid waste management systems.

15 CHAIR SIMPSON: Any further questions
16 from the Board? I see a few hands up. Julia.

17 BOARD MEMBER ALTEMUS: Chairman Simpson,
18 actually Vice Chair Aguirre had her hand up first,
19 so if she'd like to go first and then I'll go
20 second.

21 BOARD MEMBER AGUIRRE: That's fine,
22 Julia. Go ahead.

23 BOARD MEMBER ALTEMUS: Well, I guess the
24 question I have for Mr. Whitaker, is this -- Do
25 you have other businesses like this in the state,

1 or is Oreo Refining an anomaly? Do you have other
2 requests to be mobile, or are they all stationary,
3 or maybe this is the only one in the state?

4 MR. WHITAKER: Ms. Altemus, members of
5 the Board. So my understanding is that there are
6 other businesses that provide a similar sort of,
7 "We'll come to you and pick up your e-waste" sort
8 of service, but each one of those is licensed by
9 DEQ at a specific facility location, and we
10 license the place where essentially that comes
11 back to, right? And it gets consolidated at a
12 warehouse or a certain facility and then stored
13 there, and the actual kind of processing of the
14 solid waste is done there.

15 But my understanding is there are other
16 businesses out there that do kind of go around
17 business to business to collect e-waste.

18 BOARD MEMBER ALTEMUS: Okay. Thank you.

19 CHAIR SIMPSON: Stacy.

20 BOARD MEMBER AGUIRRE: So my question is
21 also for Mr. Whitaker.

22 What actual license did you issue to
23 Oreo to begin with? Was it a recycling license?
24 Like what was the actual license that you issued?

25 MR. WHITAKER: Ms. Aguirre, members of

1 the Board. So we issued a recycling collection
2 facility license to Oreo's Refining, and that is
3 just a specific type of solid waste management
4 system license.

5 BOARD MEMBER AGUIRRE: Okay. In that
6 application, did you have an understanding that
7 there would be mobile collection events that were
8 part of the business?

9 MR. WHITAKER: Ms. Aguirre, members of
10 the Board. I mean certainly -- I'm not sure if
11 it's in the record what DEQ's understanding was
12 regarding that, but there are --

13 So we license, right, the actual
14 facility itself, but we also issue a different
15 license for mobile collection events, and there's
16 household e-waste collection events that go on,
17 and people just submit a brief application --
18 again, it's free -- just to kind of notify DEQ
19 that this is what's going on, and "We're going to
20 be collecting e-waste here at this location, and
21 then we're going to be taking it to 'X' spot."

22 And so Ms. Mitchell had received, had
23 applied and received for those types of collection
24 event, businesses -- or events in the past.

25 BOARD MEMBER AGUIRRE: Could you repeat

1 that? Ms. Mitchell did apply for those
2 applications to do the e-waste collection events?

3 MR. WHITAKER: I think on at least one
4 occasion in the past, I think she had applied for
5 and received those e-waste collection event
6 licenses.

7 Again, I think that's separate. I don't
8 want to get too hung up on that because that's
9 just a separate type of license that's really not
10 relevant here, because it's different from the
11 facility license we're talking about right now.

12 BOARD MEMBER AGUIRRE: I kind of feel
13 like it's relevant in what was the Department's
14 understanding or direction to Ms. Mitchell when
15 the original license application was applied for
16 that it really was --

17 I understand the rules about the site
18 specific stuff, so I do understand that. I'm just
19 trying to get the context for -- if the Department
20 understood about the mobile part, and then maybe
21 made recommendations working with Oreo that each
22 time they did a collection event, they needed to
23 have that license application for each individual
24 collection event separately, or --

25 I'm just trying to get context of within

1 that site specific recycling facility license
2 application, if there was an understanding of this
3 mobile component.

4 MR. WHITAKER: Yes. Ms. Aguirre,
5 members of the Board. I think if you look at what
6 DEQ submitted in the record, I mean the initial
7 recycling collection facility license application
8 was for the Missoula Avenue, 2206 Missoula Avenue
9 location.

10 And you'll see in the record, if you
11 went back and looked, you would see there was maps
12 of exactly where the e-waste was going to be
13 collected, and stored, and what was going to be
14 done specific at that location.

15 Ms. Mitchell alluded to this in her
16 initial testimony, but there was back and forth
17 between her and Dusty Johnson in 2018 related to a
18 mobile facility, or her doing some sort of mobile
19 license -- or mobile operations. Excuse me. And
20 that's in the record, and obviously DEQ's position
21 is that this isn't --

22 I apologize. It keeps bouncing you
23 around, Ms. Aguirre.

24 BOARD MEMBER AGUIRRE: I apologize. I
25 raised my hand again, just for a follow up

1 question, so I apologize for that.

2 MR. WHITAKER: No worries. And so
3 anyway, this really comes back down to what can
4 DEQ do going forward, notwithstanding what anyone
5 particularly at DEQ said in the past.

6 And I think DEQ just relies on the fact
7 that we just don't have that authority to issue a
8 mobile license. We've never issued a mobile
9 license to Ms. Mitchell. If you look in the
10 record, every license we've issued to her has been
11 for that Missoula Avenue facility location.

12 And that's what we've been working with
13 with Ms. Mitchell over the past several years,
14 since we sent that letter, was to just bring her
15 operations in line with what DEQ can do under the
16 Montana Solid Waste Management Act.

17 BOARD MEMBER AGUIRRE: So I think it
18 goes back to the question asked by Board Member
19 Altemus about whether this was a one-off situation
20 or are other businesses operating in the state.

21 I know that you said that the mobile
22 part of it isn't what's at issue, yet in the
23 documents it specifically talks about not being
24 able to permit a mobile solid waste management
25 system because it would violate statutory

1 provisions, although this kind of business is
2 operating in the state of Montana.

3 So based on all the discussions and the
4 questions that have been asked, I think what I'm
5 trying to find out is if DEQ -- it's not clear to
6 me what originally was licensed and what really
7 changed as far as having an understanding that
8 there was a mobile component to this.

9 There's a disconnect, and I don't know
10 that I'm doing a great job of explaining or trying
11 to understand what seems to be a disconnect. I
12 mean I totally understand the Department's solid
13 waste recycling facility components. Like I mean
14 that makes sense. Everything is fine there. It
15 was just with this mobile part, knowing that this
16 was an e-collection business and recycling.

17 I'm just kind of -- there seems to be a
18 disconnect. I don't know if you can help me
19 understand or not.

20 MR. WHITAKER: Sure. Yes. Ms. Aguirre,
21 members of the Board, yes. I understand where
22 you're coming from now a little better.

23 So I just want to make the distinction
24 here between the sort of the event of going out in
25 the community and collecting e-waste, or any type

1 of waste from someone, and the actual facility.

2 Right?

3 And so what we're licensing here is the
4 actual facility. Obviously I mean even every
5 solid waste, every landfill in the county, they've
6 got trucks that go out to each house and pick up
7 the waste, but then they bring it back to the
8 landfill, and we license and regulate the landfill
9 itself.

10 I think it's no different here. Ms.
11 Mitchell, or any other business wanting to do sort
12 of e-waste collection is welcome to go out and do
13 that, go out to a bank or another business and
14 collect whatever e-waste they have.

15 But then when they take it back to a
16 specific facility, and then store that for a
17 period of time and process that waste further at
18 that facility, it's that facility that we're
19 regulating.

20 And so here Ms. Mitchell in 2017 I think
21 when she first got her license, the place she was
22 taking it back to was at Missoula Avenue, and so
23 we licensed that facility at Missoula Avenue.

24 At some point in time she left Missoula
25 Avenue, and then has been doing the processing --

1 in her words -- out of this horse trailer or her
2 truck. But then we still need to license that
3 facility somewhere.

4 In simplest terms, the truck parks
5 somewhere at night. Here the record evidence
6 shows that at least some of the waste was being
7 stored in a garage down in Ravalli County, and
8 that's what we need to license here.

9 And so where DEQ is stuck from issuing
10 just a mobile license to Ms. Mitchell is that if
11 she's going to park the truck on Monday night in
12 Missoula County, and then Tuesday night in Ravalli
13 County, and then so on and so forth, we need to be
14 able to license a specific facility location. And
15 then both DEQ and the relevant local government
16 under the solid waste act has to have knowledge of
17 where that is. We can't just say, "You've got a
18 mobile license. You're free to operate wherever
19 you want to in the state of Montana." Does that
20 help, Ms. Aguirre, explain that --

21 BOARD MEMBER AGUIRRE: Yes, that does.
22 Thank you, Mr. Whitaker.

23 CHAIR SIMPSON: Mr. Bruner.

24 BOARD MEMBER BRUNER: Thank you, Mr.
25 Chairman. Mr. Whitaker, you appear to be on the

1 hot seat. A couple more questions for you.

2 In reading the proposed findings of fact
3 and conclusions of law, the order addresses
4 17.50.508 for the authority that you need to have
5 the physical location, airports, ownership of the
6 property, etc. Am I correct in assuming those are
7 the rule requirements that are being -- that are
8 the issue here?

9 MR. WHITAKER: Mr. Bruner, members of
10 the Board. Yes, that's correct.

11 BOARD MEMBER BRUNER: My read of the
12 statute was those are promulgated under 75-10-201,
13 that in subsection (3) says, "The application must
14 contain the name and business address of the
15 applicant, the location of the proposed solid
16 waste system," etc. Is that the statutory
17 authority under which that rule is promulgated?

18 MR. WHITAKER: Mr. Bruner, members of
19 the Board. Yes, I believe so. I think it would
20 be under that one, and then as well 17.10.204 is
21 the Department's rulemaking authority as well.

22 BOARD MEMBER BRUNER: Sure, and 204
23 gives you the powers and duties of the Department.
24 Right. Okay. I'm with you there.

25 It seems to me that 17.50.508 is -- and

1 I understand that's the purpose of rulemaking is
2 to flesh out the statutes -- but it contains a lot
3 of requirements that could arguably be beyond the
4 scope of 75-10-201. Would you agree with that or
5 disagree with that, and if so, why?

6 MR. WHITAKER: Mr. Bruner, members of
7 the Board. I would disagree with that. I think
8 again, if I point back to 75-10-204, if you look
9 at 75-10-204 sub (4), then this is again setting
10 out what the Department's rulemaking, what we
11 shall, you know, adopt rules governing solid waste
12 management systems, and we talk about the
13 suitability of the site from a public health
14 standpoint when hydrology, geology, and
15 climatology are considered. I think the
16 combination of those two is where that authority
17 comes from.

18 BOARD MEMBER BRUNER: Sure. And I think
19 we covered this, but following up. This mobile
20 recycling facility operation that's at issue,
21 there doesn't appear to have been any finding that
22 it would impact hydrogeology, geology, or
23 climatology, correct?

24 MR. WHITAKER: Are you saying a finding
25 by the -- Sorry. Mr. Bruner, members of the Board

1 -- a finding by the DEQ?

2 BOARD MEMBER BRUNER: Let's go a little
3 broader than that. Is there any evidence in the
4 record that it would impact any of those three
5 factors?

6 MR. WHITAKER: Mr. Bruner, members of
7 the Board. I don't know if that analysis was ever
8 done. Again, I think the circumstances here you
9 look at -- we received an application for a
10 recycling collection facility for fiscal year 2022
11 to be located at 2206 Missoula Avenue in Missoula
12 County.

13 We responded to that with a letter
14 saying, "You're not operating there. Please
15 provide information about --" you know, "please
16 provide an updated facility address."

17 And Ms. Mitchell -- we just haven't
18 gotten beyond that point. We've had many
19 discussions with Ms. Mitchell. Since then she's
20 mentioned this mobile facility, but she never --
21 you know, the application before DEQ at the time
22 it sent the letter in July of 2021 was for a
23 facility at a location that she's just simply not
24 operating at.

25 BOARD MEMBER BRUNER: Follow-up

1 question, Mr. Chairman.

2 Mr. Whitaker, under 75-10-206, it reads,
3 "A person may apply to the Board for a variance."

4 Question No. 1: Is that the Board of
5 Environmental Review in that --

6 MR. WHITAKER: Mr. Bruner, members of
7 the Board, yes.

8 BOARD MEMBER BRUNER: Okay. And has
9 there been any discussion of whether a variance
10 from 17.50.508 would be appropriate in this
11 situation? I'll tell you, I didn't see any,
12 but --

13 MR. WHITAKER: Mr. Bruner, members of
14 the Board. I don't think there would be anything
15 in the record to that effect, but that was -- we
16 had several meetings with Ms. Mitchell trying to
17 resolve this issue before we kind of moved into
18 the procedures of the contested case, and that was
19 brought up at one point I recall, but it's been a
20 little while now.

21 BOARD MEMBER BRUNER: Thank you, Mr.
22 Chairman, Mr. Whitaker. That's all I have.

23 CHAIR SIMPSON: Any further questions
24 from the Board?

25 (No response)

1 CHAIR SIMPSON: Before we proceed with a
2 motion and discussion, why don't we take a ten
3 minute break. Reconvene at 10:27 a.m.

4 (Recess taken)

5 CHAIR SIMPSON: It looks like Board
6 Member Reiten is the only remaining member who
7 hasn't rejoined. Jon, are you there?

8 (No response)

9 CHAIR SIMPSON: Let's reconvene. Sandy,
10 will you repeat the roll call, please.

11 MS. MOISEY-SCHERER: Yes, sir. Chair
12 Simpson.

13 CHAIR SIMPSON: Here.

14 MS. MOISEY-SCHERER: Board Member
15 Aguirre.

16 BOARD MEMBER AGUIRRE: Here.

17 MS. MOISEY-SCHERER: Board Member
18 Altemus.

19 BOARD MEMBER ALTEMUS: Here.

20 MS. MOISEY-SCHERER: Board Member
21 Bruner.

22 BOARD MEMBER BRUNER: Here.

23 MS. MOISEY-SCHERER: Board Member
24 Rankosky.

25 BOARD MEMBER RANKOSKY: Here.

1 MS. MOISEY-SCHERER: Board Member

2 Reiten.

3 BOARD MEMBER REITEN: Here.

4 MS. MOISEY-SCHERER: Board Member Smith.

5 BOARD MEMBER SMITH: Here.

6 MS. MOISEY-SCHERER: We have a quorum,

7 sir.

8 CHAIR SIMPSON: Thank you. In the
9 matter of Oreo Refining, it's time for the Board
10 to make a decision on this. Do we have a motion?

11 MS. MOISEY-SCHERER: Chair Simpson,
12 there was a raised hand by Shelly Mitchell before
13 the break.

14 CHAIR SIMPSON: Oh, I'm sorry. I missed
15 that. Ms. Mitchell, before we proceed, did you
16 have something to say?

17 MS. MITCHELL: Yes. It was a response
18 to the question to Mr. Whitaker about -- what was
19 the word that Mr. Bruner had mentioned? I want to
20 say deviance, but it's not deviance.

21 CHAIR SIMPSON: The variance?

22 MS. MITCHELL: Yes. I remember during
23 the conversations with Mr. Whitaker, and with Rick
24 Thompson, I had asked for that, and I was told
25 that it didn't apply to this case, that they can't

1 change State law.

2 So I was wanting to go for that for the
3 time to be able to find -- in their terms -- a
4 permanent place. That's why I needed the six
5 months to be able to make income, to be able to
6 see if anyone would host my business, because the
7 DEQ -- nobody wants them in their lives because
8 they're not accountable, and they're not
9 transparent. And so everyone I talked to said no.
10 They wanted me, but they could not risk having the
11 DEQ in their lives.

12 But I did ask for that to happen, an
13 exception to rule, and I was denied. That's it.

14 CHAIR SIMPSON: Lee, you had brought up
15 the issue of the variance. Is that contained in
16 statute, or rule, or both?

17 BOARD MEMBER BRUNER: Chair Simpson, it
18 is contained in statute, and you'll find it at
19 75-10-206. I think it would be before us if one
20 was requested and DEQ denied it.

21 Now I understand that we have a person
22 appearing pro se in this case, and that sometimes
23 makes these procedural hurdles a bit obtuse and
24 difficult. I get that. I'm concerned.

25 It certainly is there. I think at least

1 on first read it appears that it might apply, but
2 I'm not sure it's before us.

3 CHAIR SIMPSON: Thank you. Any further
4 comments, questions, before we proceed with a
5 motion?

6 (No response)

7 CHAIR SIMPSON: Is there a motion?

8 MS. MOISEY-SCHERER: Board Member Bruner
9 has his hand up, sir.

10 CHAIR SIMPSON: Mr. Bruner.

11 BOARD MEMBER BRUNER: Sorry. I'm still
12 learning the protocols of the Board.

13 CHAIR SIMPSON: Sorry. I'm still
14 learning to look for the hand.

15 BOARD MEMBER BRUNER: I'm going to
16 preface my motion with a comment that I think this
17 is a good business. I hope that there's a path
18 that it can operate. It provides a good service.

19 And I reached my conclusion based in
20 large part on Mr. Whitaker's representation that
21 there's certainly a path forward for this
22 applicant to continue to pursue a license, perhaps
23 under a variance, perhaps under some other thing.

24 With that said -- which is probably
25 completely inappropriate -- I move that we adopt

1 the proposed findings, conclusions, and order of
2 the Hearings Examiner in this case.

3 BOARD MEMBER AGUIRRE: I second.

4 CHAIR SIMPSON: It's been moved and
5 seconded that the Board accept the findings of
6 fact, conclusions of law, prepared by the Hearing
7 Examiner, the proposed -- I should say the
8 proposed findings of fact, conclusions of law.
9 Discussion? Oh, excuse me. I'm getting ahead of
10 the game here. We have a first and second. All
11 in favor say aye.

12 Let me back up. I'm getting ahead of
13 myself here.

14 BOARD MEMBER ALTEMUS: Yes. We need
15 comment first.

16 CHAIR SIMPSON: I'm getting ahead of
17 myself. I'm sorry. Let's proceed with
18 discussion. It's been moved and seconded.

19 BOARD MEMBER ALTEMUS: Mr. Chair, this
20 is Ms. Altemus. I guess I will vote in favor, but
21 I would really encourage the DEQ and Ms. Mitchell
22 to continue to work on this. I do think there's a
23 path forward with a variance. I would love for
24 that to get worked out, and if it doesn't get
25 worked out, for her to bring a variance to the

1 Board.

2 But unfortunately I think for me, I'm
3 going to have to vote in favor of this motion, but
4 I certainly am sympathetic to her plight, and wish
5 that she will continue, because I do think she
6 offers a great business, and I think it's
7 important that she be able to -- small business is
8 tough, period, but when you've got environmental
9 issues involved, it just makes it that much
10 tougher. So that would be my comment.

11 CHAIR SIMPSON: Further discussion?

12 BOARD MEMBER REITEN: Mr. Chairman, this
13 is Jon Reiten, and the rest of the Board. I guess
14 I reluctantly would have to go along with it, too.
15 It's unfortunate that it doesn't appear that DEQ
16 is able to keep these conversations going between
17 small businesses sometimes. That's unfortunate.
18 I just know that's the way it goes sometimes.
19 Thank you.

20 MS. MOISEY-SCHERER: Board Member Bruner
21 has his hand up.

22 CHAIR SIMPSON: Mr. Bruner.

23 BOARD MEMBER BRUNER: I'm also learning
24 to run the technology. There. Down now.
25 Sometimes I think we should meet in person. Us

1 old guys and technology, not good.

2 CHAIR SIMPSON: I second that motion as
3 an old guy myself. Further discussion?

4 (No response)

5 CHAIR SIMPSON: I agree with the motion
6 because I don't believe that we have any other
7 choice under the statute. On the other hand, I
8 certainly sympathize with the position of the
9 petitioner here, because it seems like it's one of
10 those bureaucratic situations where you can't get
11 there from here. And perhaps the variance
12 provision provides a path. I don't know.

13 I think we have two choices, or maybe we
14 have two choices, and that's what I'd like to
15 discuss. One is just to proceed with a vote, and
16 accept the findings of fact, conclusions of law,
17 and request that the parties continue working
18 toward a solution here, perhaps through the
19 variance provision.

20 My question is whether there is an
21 alternate path, and that is to remand this back to
22 the Hearing Examiner with the issue of the
23 potential for a variance addressed. Is that a
24 logical and legal path that we might consider? I
25 put that to our attorney, Ms. Oomens.

1 MS. OOMENS: Because a variance was not
2 discussed with the Hearing Examiner previously, I
3 don't think you can just hand it back to her and
4 ask to her to consider one. They would have to go
5 through the process with DEQ, and then appeal it
6 to the Board.

7 BOARD MEMBER AGUIRRE: I'm in agreement
8 with that. I think we have to focus on what is
9 before us.

10 CHAIR SIMPSON: I'm sorry, Terisa, I
11 heard what you said, but it didn't sink in. If
12 you could maybe explain that a little bit more
13 thoroughly.

14 I mean my understanding has been if
15 there are facts that were not considered by the
16 Hearing Examiner in producing the findings of fact
17 and conclusions of law, that it could be remanded.
18 Are you telling me that the whole process would
19 have to start over again?

20 MS. OOMENS: What the Hearing Examiner
21 considered was not a variance, it was the license
22 itself, and so you can't remand to the Hearing
23 Examiner to consider a whole new issue, which
24 would be the variance.

25 Now, if Ms. Mitchell worked with DEQ and

1 asked for a variance, and DEQ said no, she could
2 then appeal that to the Board, but you can't put a
3 whole new issue -- the variance -- in front of the
4 Hearing Examiner now without having gone through
5 the process with DEQ first.

6 CHAIR SIMPSON: Okay. Now I've got it.
7 Thank you.

8 MS. OOMENS: You're welcome.

9 CHAIR SIMPSON: Further discussion?

10 (No response)

11 CHAIR SIMPSON: Hearing none, all in
12 favor, say aye.

13 (Response)

14 CHAIR SIMPSON: Opposed.

15 (No response)

16 CHAIR SIMPSON: Motion carries. As a
17 follow up, I would certainly encourage, as the
18 point was made here earlier during our discussion,
19 for Ms. Mitchell and the Department to find some
20 solution to this.

21 I'm certainly sympathetic to the needs
22 of small business, and in particular somebody's
23 livelihood is at stake here, so that's something
24 that I think needs to be considered in any further
25 actions. But I would encourage exploration of the

1 variance option. I guess our next item is --

2 MS. MOISEY-SCHERER: Mr. Chairman, Board
3 Member Reiten has hand up.

4 CHAIR SIMPSON: Yes. Mr. Reiten. I'm
5 sorry.

6 BOARD MEMBER REITEN: Chairman Simpson,
7 Board Members. The thing that kind of concerns me
8 about this - and I'm not sure what we can do at
9 this point -- but it's almost --

10 According to Ms. Mitchell's testimony,
11 it seems like the option of a variance meaning
12 wasn't fully explained, and who she would go to to
13 get the variance, so maybe we can make sure that
14 DEQ -- or we can suggest that DEQ clearly opens
15 that up to small businesses like hers, is that
16 there is an option of getting a variance and going
17 to the Board. Thank you.

18 CHAIR SIMPSON: Thank you, Jon. I
19 certainly agree with that. Any further thoughts
20 on the Oreo case and a variance or other course of
21 action that might be considered by the petitioner
22 before we move on?

23 (No response)

24 CHAIR SIMPSON: Okay. Let's proceed.

25 (The proceedings were concluded at 10:44 a.m.)

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C E R T I F I C A T E

STATE OF MONTANA)

: SS.

COUNTY OF LEWIS & CLARK)

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

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing -44- 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 22nd day of
June, 2023.

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires
March 9, 2024.

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