

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the Matter of: Appeal and
Request for Hearing Regarding
MDEQ's Decision on MAQP #5263,
Calumet/Montana Renewables.

Case No.
BER 2026-01 AQ

TRANSCRIPT OF THE PROCEEDINGS - ORAL ARGUMENT
(VIA ZOOM)

BEFORE CHAIR DAVID SIMPSON,
BOARD MEMBERS JULIA ALTEMUS, JENNIFER RANKOSKY,
ALLAN PAYNE, and JOSEPH SMITH

June 26, 2026
10:21 a.m.

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A P P E A R A N C E S

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1 WHEREUPON, the proceedings were had as follows:

2 CHAIR SIMPSON: The next item on our agenda is in
3 the matter of the appeal and request for hearing regarding
4 MDEQ's decision on Montana Air Quality Permit No. 5263-03,
5 the Calumet/Montana Renewables, BER 2026-01 AQ.

6 Before we move into the oral argument, I just wanted
7 to take a minute and kind of recap where we are on this.
8 When we first received this petition, there was -- the
9 board discussion centered on whether or not the Board
10 should accept or reject this petition considering the fact
11 that there was no affidavit filed with the petition as
12 required by the rules. Of course, the petitioner
13 acknowledged that the petition did not include the -- did
14 not include an affidavit, so certainly there was
15 recognition that it was, in fact, required.

16 It was the Board's -- or my view at least, and it's
17 not a matter that was voted on, but I think -- that I
18 recall, but anyway, because this is a pro se petition, and
19 on DEQ's suggestion, it was decided that a meeting would
20 be arranged with the petitioner to review the process and
21 try to, to come up with a process that would give us a
22 more definitive basis for the appeal. That meeting was
23 scheduled, but it never happened because the petitioner
24 couldn't make it. And then, of course, since that time,
25 we've had filings by MRL, first a motion to intervene, and

1 second a motion to dismiss.

2 So we'll proceed with oral arguments now. What I
3 would ask is that in presenting your arguments, rather
4 than break this up, that you address the question of the
5 motion to intervene and also motion to dismiss in your
6 oral argument. Again, 15 minutes, please.

7 MRL, you have the floor.

8 MS. CLERGET: Thank you so much, Chair Simpson,
9 members of the Board. My name is Sarah Clerget, and I'm
10 from the law firm of Holland & Hart, and with me is my
11 co-counsel, Matthew Salzman. And we also have with us a
12 representative from Montana Renewables, the CEO,
13 Bruce Fleming.

14 And I want to introduce who our client is and why
15 we're so proud to represent them. Montana Renewables
16 operates the Great Falls Renewable Plant, and it is the
17 leading producer in North America of sustainable aviation
18 fuel. They make 100 percent renewable jet fuel. They
19 supply the Army National Guard, Malmstrom Air Force Base,
20 and local airports in Montana with this fuel.

21 To make it, they use feedstock which is locally and
22 regionally sourced. They make -- they use things like
23 used cooking oil from fast food restaurants, so McDonalds'
24 old cooking oil, unused beef tallow from meat processors,
25 and vegetable oils that would otherwise not be saleable,

1 and they turn them into jet fuel, which is, as far as I'm
2 concerned, where science meets magic. And they do this
3 with power that they make themselves on site. The plant
4 is powered by renewable energy, including on-site
5 renewable hydrogen.

6 And if you care about air quality, this is a project
7 that replaces fossil aviation fuels with 100 percent
8 renewable and sustainable aviation fuel and it literally
9 makes the sky cleaner, and it does so using this clean,
10 renewable energy with a process that has been thoroughly
11 vetted and approved by DEQ and the EPA. And, in fact, it
12 is supported by the Department of Energy because it is
13 such an exciting program for the nation.

14 There have been a lot of baseless accusations and
15 false claims about the conduct of other companies and
16 Montana Renewables being wrongly ascribed this action, but
17 it's actually a nationally recognized Montana success
18 story, an environmental success story, and a renewable
19 energy success story.

20 But the air permit involved in this matter allows
21 Montana Renewables to continue operating the expansion
22 project which has been approved by DOE, DEQ, and EPA, and
23 because of this appeal that we're discussing today from
24 Ms. Otero, that expansion has been put on hold. My
25 client's project is being derailed at great expense. The

1 economy is being hurt from the construction jobs, the
2 supply orders being lost, and frankly, the environment is
3 being hurt because the planes keep flying using more
4 fossil fuels than the sustainable aviation fuel from
5 Montana Renewables would otherwise replace.

6 So I want to briefly outline the law, but frankly,
7 it's pretty straightforward, and I'm mostly here to answer
8 your questions. As you know, there are two motions. And
9 this was put together by Board Attorney Hupp in her
10 memorandum. There are two issues: First, you resolve the
11 intervention; second, you resolve the motion to dismiss.

12 The undisputed facts and law show you that the appeal
13 must end today. The memo says if intervention is met,
14 which it is, the Board must grant intervention. And if
15 the motion to dismiss is granted, which it should be
16 because the Board doesn't have jurisdiction, then the
17 matter ends. And both of these things are true, and we
18 should go home today.

19 The motion to intervene I'll just briefly touch on.
20 You, as a board, I know routinely approve intervention.
21 This is the same as all of those other cases. We hold the
22 permit, and there is literally nothing more important to
23 this operation than this permit, and it significantly
24 affects our business.

25 So under the four factors, it's timely, the case

1 hasn't even been accepted yet, we have an interest that
2 would be impaired, and we have -- sorry, we have an
3 interest, it is impaired, and we don't have adequate
4 representation by another party because DEQ represents the
5 public interest and not the business interest like we do.
6 So four factors, intervention met. Easy decision to make.
7 Once you allow us to intervene, you handle the motion to
8 dismiss.

9 A few points in addition to what the Chair said
10 earlier: I want to give you a few dates. On July 15th,
11 DEQ received Montana Renewables' modification application.
12 It was then thoroughly evaluated by DEQ for five months.
13 This was on top of all of the other review that we've had,
14 which -- a lot of which is included in your packet so that
15 you can see how well this has been vetted.

16 On December 15th, DEQ granted the modification and
17 issued the permit. That started the 30-day clock, so the
18 deadline was January 14th of 2026 for an appeal to be
19 filed. On January 14th, at 11:59:13, Ms. Otero e-mailed
20 the board secretary requesting a hearing.

21 And as Chair Simpson said, she did not have the
22 affidavit. In fact, she said "No legal affidavit
23 accompanies this request," and called the requirement a
24 method for intimidating and discouraging public
25 participation. She predicted the denial of this Board

1 based on the absence of an affidavit. Those were her
2 words. And -- but she proceeded anyway, allegedly because
3 she was having -- her conscience compelled it. So she
4 recognized that the appeal should be dismissed, but said
5 essentially she wanted to say her piece anyway.

6 On February 20th, the matter appeared on the public
7 agenda, and Ms. Otero did not appear. And then on
8 March 17th, we filed the motion to intervene and the
9 motion to dismiss. It wasn't until March 23rd, which is
10 over two months after the January 14 appeal deadline, that
11 Ms. Otero submitted an affidavit, essentially admitting
12 that an affidavit is a thing she can do, she's capable of
13 doing it, she just chose not to do it when it was due.

14 And so, therefore, for those last two months, and then
15 since the proceeding has extended here, Montana Renewables
16 has been in a state of limbo and uncertainty for
17 six months waiting for the finality of this permit and the
18 ability to continue what they should lawfully be allowed
19 to do under that permit.

20 The 12(b)(6) standard for dismissal, it's appropriate
21 where the petition reveals jurisdictional deficiency.
22 That's clear from the case law I've cited in the brief. I
23 don't think we need to go over that. There is -- the
24 reason, the ultimate reason that this needs to be
25 dismissed is because of the requirements of the statute.

1 And again, this is in the briefing, but it's 75-2-211(10).

2 And it is very clear that there are three requirements
3 in the statute. First, there is the 30-day deadline. And
4 just a note that there was actually a 15-day deadline
5 earlier, but I think everybody has given Ms. Otero a
6 little bit of easier route by saying that since the
7 affidavit is due in 30 days, that that's a 30-day
8 deadline.

9 So you have a 30-day deadline. And the reason for
10 that is that there is certainty. The Legislature knows
11 that businesses can't operate in a, in a state of
12 uncertainty; and, therefore, they have compromised by
13 allowing a period where people can appeal, giving the
14 public adequate opportunity but also putting a bookend of
15 a date certain on there so that after some particular
16 point in time, which the Legislature determined to be
17 30 days, the business should be allowed to operate with
18 certainty.

19 And Ms. Otero essentially blew this deadline by
20 waiting to file the affidavit until after day 90, over
21 2 months after the deadline. And if she had come in and
22 submitted everything on day 90, I submit to you that this
23 would be an easy case. You would say nope, you're outside
24 of the deadline by 2 months, we don't need to talk about
25 anything else, we don't have jurisdiction.

1 The second requirement is that the request must set
2 forth the grounds for the request. This is the clear
3 reason, is we need to know what we're here to talk about,
4 and the company and DEQ have to have an adequate
5 opportunity to prepare a defense, and so it makes sense.
6 It's another reasonable thing to expect. And I'll submit
7 to you that if she had filed a blank piece of paper on
8 day 14 or if she had submitted something that had no
9 reasoning in it, this would be another easy thing to
10 dismiss. You would say you have not stated a basis for,
11 for your appeal and there is nothing further to talk
12 about, your -- this case is dismissed.

13 The third requirement is the affidavit. This is no
14 less of a requirement than the first two. So again,
15 there's a reason here. Affidavits are particularly
16 important. And Board Attorney Hupp went through in the
17 memo an explanation of what the affidavits are and gave
18 you sort of the explanation of the requirements of the
19 affidavit, the definition.

20 They're really important -- the Legislature elevates
21 certain facts by requiring them to be under oath. This
22 happens you see in all kind of court proceedings. Rather
23 than just have somebody come in and submit written
24 testimony that they can make up or use AI to make up, they
25 actually have a human being show up and swear, a human

1 being who they can verify is a real human who is speaking
2 only on their behalf unassisted, and that the facts that
3 they are stating are -- they have reviewed or they are
4 certain enough that they are willing to swear under
5 penalty of perjury. This is what prevents the spurious
6 allegations that are wild spaghetti thrown at the wall
7 that have no support whatsoever.

8 And in this particular instance, the Legislature
9 specifically decided that it needed all three. We know
10 that's not the case in all instances because there are
11 other places, even in the environmental statutes, where
12 appeals are not required to have a sworn affidavit.
13 You've seen in MSUMRA there are places -- in that
14 instance, there is no affidavit, it's only a notice of
15 hearing, and, therefore, somebody can file something that
16 is for the purpose of harassment only. And that was a
17 distinct possibility here that the Legislature intended to
18 prevent.

19 So an affidavit is not something that's just a silly
20 procedural hurdle. It is an intentional choice by the
21 Legislature to elevate something as superior and
22 important, and, therefore, it is just as much a
23 requirement and should be just as easily dismissed as the
24 other two requirements in the statute.

25 The other reason that this matters is that Ms. Otero

1 didn't say I wasn't able to get an affidavit, she didn't
2 say I have -- I don't understand the affidavit
3 requirement; and, in fact, as we said, she went and got
4 one later, so we clearly know that she was capable of
5 doing that. In her own words, she identified that it
6 wasn't done and that she essentially just chose not to do
7 it.

8 So my client has been held up for six months in this
9 very important project based on the fact, essentially,
10 that Ms. Otero couldn't be bothered to go to the bank and
11 get the affidavit notarized. And that's not fair, and
12 it's not what the Legislature intended. And that is why
13 these requirements are jurisdictional.

14 The question in Ms. Hupp's memo that was left at the
15 end was is "must," the word "must" jurisdictional.
16 Because those requirements, those three requirements we
17 just talked about each have a "must" attached to them.
18 And Montana agency law answers this question very clearly,
19 that a board or an agency has only the powers the
20 Legislature confers.

21 And you don't have to take my word for it. In the
22 brief, we've given you six different cases, ranging from
23 1952 to as recent as 2024, that state this very clearly.
24 For example, in the City of Polson case, which was decided
25 in 1970, the agency, quote, "may not assume jurisdiction

1 without express delegation by the Legislature," end quote.
2 City of Billings vs. the PSC was the same situation.
3 Thomas v. Gallatin County was the same situation, saying
4 that it requires strict compliance with statutory
5 prerequisites before the agency may exercise jurisdiction.

6 MEIC -- or, sorry, MCI Telecommunication vs. Montana
7 DPS Regulation, this is another quote. After one day late
8 of filing, the Court said, quote, "This is ineffective for
9 any purpose and thus fails to confer jurisdiction," end
10 quote. Again, that was one day late within -- with a
11 filing.

12 Again, I won't go through all of these. Just one more
13 case to highlight. It's a very long name. It's referred
14 to as In Re McGurran in our brief, and it says, quote,
15 "Thus, the filing deadlines for petitions for judicial
16 review are jurisdictional in nature, and, therefore, the
17 failure to seek" juris -- excuse me, "the failure to seek
18 judicial review of an administrative ruling within the
19 time prescribed by the statute makes such an appeal
20 ineffective for any purpose," end quote.

21 So you have lots of statutory -- or, excuse me, lots
22 of case authority for the fact that "must" is
23 jurisdictional, and respectfully, therefore, you just
24 don't have the power to change the statutory requirements
25 or the jurisdictional grant you've been given, and you

1 have to dismiss the case because the three requirements of
2 the statute aren't met.

3 we therefore ask that, first, you grant the limited
4 appearance and the motion to intervene under
5 Rule 24(a)(2); and then second, that you grant the motion
6 to dismiss because the affidavit requirements of Montana
7 Code Annotated 75-2-211(10) are mandatory and
8 jurisdictional and were not met, and, therefore, the Board
9 does not have jurisdiction to hear this matter. And for
10 that, I'll stand for questions.

11 CHAIR SIMPSON: Thank you, Ms. Clerget.

12 Ms. Otero.

13 MS. OTERO: Yes.

14 CHAIR SIMPSON: 15 minutes, please.

15 MS. OTERO: I am here.

16 CHAIR SIMPSON: You have 15 minutes, please, and
17 then there will be 5 minutes for rebuttal.

18 MS. OTERO: Very good. Thank you. I would like
19 to clarify one thing. On April 3rd at 1:43 p.m., I
20 received an e-mail from Atali (phonetic) and he passed
21 along an e-mail from Lanni Klasner, who is the
22 communications manager for Montana Renewables. And in
23 that e-mail, she said:

24 Hi, Steve. Thank you for reaching out and for your
25 continued interest in Montana Renewables' progress. Since

1 our July 2025 public announcement, we have taken the
2 following steps forward. We have purchased some of the
3 necessary equipment and are currently working with
4 engineering consultants as we continue to advance the
5 project. In parallel, we are further optimizing our water
6 use strategy by evaluating and integrating new technology,
7 resulting in significant reductions in overall water
8 consumption. Additionally, Montana Renewables began a
9 planned operational shutdown in early March to support the
10 MaxSAF expansion and complete other turnaround activities.
11 The shutdown is expected to last approximately 48 days.
12 All my best, Lanni M. Klasner, Communications Manager for
13 Calumet/Montana Renewables.

14 The idea that their entire operation has been shut
15 down for the last six months appears to be unfounded and
16 not supported by Lanni Klasner's e-mail to my colleague.

17 So with that, I wish you all a good morning,
18 Chairman Simpson and members of the Board. My name is
19 Angela Otero. I am a resident of Pondera County, Montana,
20 and I appear before you today as a pro se petitioner. I
21 submitted formal public comment to the DEQ during the
22 comment period on MAQP 5263-03, and I am directly and
23 adversely affected by DEQ's decision, the two requirements
24 the governing statute sets for standing to request this
25 hearing.

1 On January 14th, 2026, I filed a timely request for a
2 hearing with this Board. I am asking the Board to deny
3 Montana Renewables' motion to dismiss and allow this
4 appeal to proceed to the merits.

5 I will address three things this morning: First,
6 which statute actually governs the proceeding; second, why
7 the affidavit question does not require dismissal under
8 that statute; and third, why this Board has both the
9 authority and the discretion to proceed.

10 Part 1, the governing statute. The first and most
11 fundamental issue before this Board is which statute
12 governs. DEQ's own permit cover letter dated
13 December 15th, 2025, signed by DEQ's own permitting
14 officials, Eric Merchant and Craig Henrikson of the
15 Air Quality Bureau, designated Section 75-2-213(1)(a) of
16 the Montana Code Annotated as the governing appeal
17 statute. DEQ classified this permit as an energy
18 development project. DEQ told me to file my hearing
19 request within 30 days and set that deadline as
20 January 14th, 2026. I filed on January 14th, 2026.

21 Now, MRL filed three documents in this proceeding: A
22 motion to intervene, a motion to dismiss, and a combined
23 reply. Not one of those documents addresses Section
24 75-2-213(1)(a). Not one of them explains why the energy
25 development project appeal track that DEQ itself

1 designated does not govern. Instead, MRL cited
2 three different statutes across its three filings, and
3 none of them is the statute that DEQ designated.

4 In its motion to intervene and motion to dismiss,
5 MRL cited Section 75-5-218(5). Title 75, Chapter 5, is
6 the Montana Water Quality Act. It covers water quality
7 permits. It has no air quality permit provisions. This
8 is the wrong chapter of Title 75 entirely.

9 In its combined reply, MRL acknowledged the error and
10 said the correct statute should have been Section
11 75-2-211(10), what I will call MRL's corrected citation.
12 However, MRL's corrected citation begins with the words,
13 and I want to be precise here, "except as provided in
14 75-2-213." The Legislature wrote an express exception for
15 proceedings governed by Section 75-2-213. This proceeding
16 is governed by that section. The statute MRL cited in its
17 correction expressly exempts this proceeding from its own
18 reach by its own terms.

19 There is a further problem with MRL's corrected
20 citation. The statutory text MRL quoted in its reply with
21 a 30-day filing deadline and "must include" language is
22 the text of the operating permit provision. It is not the
23 text of MRL's corrected citation. MRL changed the
24 citation number without changing the quoted text.

25 Across three filings, MRL has never quoted the text of

1 the statute it now claims governs. Board Counsel's
2 memorandum applied the operating permit provision, but
3 that provision applies to permits under 75-2-217, which
4 governs Title 5, Federal Major Source Operating Permit.
5 MAQP 5263-03 is not a Title 5 operating permit. DEQ did
6 not invoke Section 75-2-217 in its cover letter. Board
7 Counsel's memorandum does not address Section
8 75-2-213(1)(a) at any point.

9 Because the governing statute is Section
10 75-2-213(1)(a), the analysis the Board needs to conduct
11 differs materially from the analysis in that memorandum.
12 The governing statute, Section 75-2-213(1)(a), states in
13 two separate sentences, quoting verbatim from the Montana
14 Code Annotated 2025, "The request for hearing must be
15 filed within 30 days after the department renders its
16 decision. An affidavit setting forth the grounds for the
17 request must be filed with the request for a hearing."

18 Two sentences. The deadline is in the first sentence;
19 the affidavit requirement is in the second sentence. The
20 second sentence carries no deadline of its own.

21 A motion to dismiss built on the wrong statute cannot
22 establish that the Board lacks jurisdiction under the
23 right one. The Board must apply Section 75-2-213(1)(a),
24 the statute that the DEQ designated in its cover page.

25 Part 2, the affidavit question. MRL's entire argument

1 rests on the phrase "must include," language that appears
2 in the operating permit provision, which does not govern
3 this proceeding. The governing statute uses fundamentally
4 different language in a fundamentally different structure.
5 The Legislature wrote three different provisions with
6 three different structures. Each difference is
7 deliberate.

8 The operating permit provision, one huge sentence, is
9 "The request for a hearing must be filed within 30 days
10 and must include an affidavit." Simultaneous, one
11 deadline.

12 MRL's corrected citation, two sentences, two
13 independent deadlines: Request within 15 days, affidavit
14 within 30 days. Sequential, separate deadlines.

15 The governing statute, however, has two sentences,
16 one deadline, no independent affidavit deadline: The
17 request must be filed within 30 days; and the affidavit
18 must be filed with the request.

19 The Legislature demonstrably knew how to impose
20 simultaneity. It did so in the operating permit
21 provision. It demonstrably knew how to assign the
22 affidavit its own independent deadline. It did so in
23 MRL's corrected citation. In the governing statute,
24 however, it did neither of those things. It used "filed
25 with" in a separate sentence, with no independent

1 deadline. Under the canon of construction that MRL has
2 self-cited, the Board cannot insert what the Legislature
3 omitted. MRL is asking the Board to read a simultaneity
4 requirement into a statute that does not contain one.

5 There is one more point. DEQ's cover letter told me
6 the request must contain an affidavit. The governing
7 statute says the affidavit must be filed with the request.
8 "Contain" and "filed with" are not the same words. The
9 word "contain" does not appear in the statute. DEQ
10 paraphrased its own designated statute using a stricter
11 word than the statute actually requires. I was given a
12 description of my obligation that overstated what the law
13 requires.

14 Neither the statute nor DEQ's cover letter placed a
15 deadline on the affidavit separately from the hearing
16 request. There is no basis in the governing statute for
17 the claim that the affidavit was required simultaneously
18 with the January 14th, 2026 filing.

19 Part 3, the Board's authority and the cure. This
20 Board has the authority and the discretion to proceed. On
21 April 16, 2026, this Board issued an order signed by
22 Chairman Simpson stating that the Board has inherent
23 discretionary authority to control the administration of
24 proceedings in this matter, citing Section 2-15-102(10) of
25 the Montana Code Annotated. That statute defines the

1 Board's quasi-judicial function to expressly include
2 adopting procedural rules and any act necessary to the
3 performance of that function.

4 MRL's reply did not address that order. MRL did not
5 address Section 2-15-102(10). Instead, MRL argued the
6 Board has no discretion without engaging the authority the
7 Board's own legal counsel cited for that discretion.

8 The Montana Supreme Court has recognized that agencies
9 have wider discretion than boards in determining what
10 actions to entertain. Williamson vs. Montana Public
11 Service Commission -- I'm sorry, Public Service
12 Communications, 2012 MT 32. And Board's Counsel own --
13 Board Counsel's own memorandum acknowledged that if the
14 affidavit requirement is not jurisdictional, the Board may
15 treat the omission as a procedural defect, consider
16 whether my subsequent submission cured it, and determine
17 whether equitable considerations permit the appeal to
18 proceed on the merits.

19 Now I want to address directly what Board Counsel's
20 memorandum quotes from my January 14th hearing request,
21 that I stated I was not an attorney nor qualified to
22 complete an affidavit. I filed at 11:58 p.m., two minutes
23 before the deadline. I was not in a position to consult
24 an attorney at that hour. I had never prepared or filed
25 an affidavit before. I had not been provided a form or a

1 template or a guideline on what a compliant affidavit must
2 contain, and I simply just didn't know what was involved.
3 I thought an attorney had to file an affidavit.

4 The BER publishes no guidance document for pro se
5 petitioners on this question. The DEQ's own cover letter
6 described the requirement using the word "contain," a word
7 that does not appear in the governing statute, and I was
8 given a paraphrase, not the statutory text. I did not
9 understand at that time the critical nature of the
10 affidavit requirement until I had read and worked through
11 MRL's motion documents over several days.

12 Here is what the cured record shows: During -- I'm
13 sorry. On March 20th, 2026, I submitted a written
14 response to MRL's motion at 9:44 a.m. during the Board's
15 special meeting, and I then joined that meeting
16 electronically at approximately 9:58 a.m.

17 while present on the call, I transmitted the following
18 to Board Counsel Hupp at 10:49 a.m.: "Would the Board
19 consider allowing me to verbally offer an affidavit under
20 oath that my statements are true based on my knowledge and
21 belief and reasonable investigation of the facts presented
22 in the application and draft permit? If so, I would like
23 to cure my procedural error at this meeting." The Board
24 did not reject that offer.

25 I researched affidavit requirements over the weekend

1 following the March 20th hearing. I then drafted the
2 affidavit, and on March 23rd, 2026, the first weekday
3 after the hearing on which notarial services were
4 available to me, I executed a notarized affidavit before
5 the notary public, Verrhanda Eaglespeaker, who resides in
6 Valier, Montana, commission expiring July 2, 2029.

7 I transmitted it to Board Counsel, both DEQ attorneys,
8 and the Board Secretary that afternoon. It was received
9 and assigned Docket No. 12-1. It has never been rejected.
10 The board order has declared it -- I'm sorry. No board
11 order has declared it invalid or untimely. The affidavit
12 swears under oath to the truth of my January 14, 2026
13 hearing request, identified by name, date, and time, which
14 sets forth the grounds for this appeal. That is precisely
15 what the governing statute requires.

16 In closing, members of the Board, MRL filed three
17 documents in this proceeding. Across all three is applied
18 the wrong statute. It never addressed the statute DEQ
19 designated as governing. It characterized my substantive
20 claims as baseless, but explicitly stated it will not
21 address the merits because they were not properly before
22 the Board. MRL identified no specific factual error, no
23 specific regulatory misstatement, and no specific
24 inaccuracy in any substantive ground I raised.

25 On that last point, MRL and I agree on one thing: The

1 merits should be before this Board. That is because what
2 I am ask -- I'm sorry. That is what I'm asking for, not a
3 determination today that I am right; a determination that
4 this Board has the authority to hear this case and decide
5 it on the merits. The affidavit is in the record at
6 Docket 12-1. The grounds are sworn to. The statute DEQ
7 designated does not impose the jurisdictional bar MRL
8 argues. This Board has the discretion, confirmed in its
9 own April 16th order, to proceed.

10 I respectfully request that Montana Renewables' motion
11 to dismiss be denied and that this appeal proceed to a
12 hearing on the merits. Thank you.

13 CHAIR SIMPSON: Thank you, Ms. Otero.

14 Ms. Clerget, rebuttal. Five minutes, please.

15 MS. CLERGET: Yes. Thank you, Chair. First, to
16 the statutory points that she makes about 75-2-213 versus
17 75-2-211(10), she's correct. We corrected the statutory
18 cite in our subsequent brief. The correct statute is
19 75-2-211.

20 I will point your, your attention to page 285 in your
21 materials, which includes the decision from the permit
22 from DEQ. And it cites specifically in subsection (3)(e)
23 statute 75-2-211 and -- as the operating statute.
24 Additionally, on page 673 in your materials, Ms. Otero
25 herself, in her comment, her original comment, cited the

1 same statute, 75-2-211, as operative. And so it is the
2 operative statute. It is the statute that requires the
3 air permit and makes sure that you can't operate without
4 one.

5 However, even assuming arguendo, which we don't
6 concede at all, but even assuming that Ms. Otero's point
7 about 213 were correct, which it isn't, if you look at the
8 language in the statute -- and I apologize because I can't
9 share my screen, I don't think. But the language in the
10 statute, I will read it. It says -- This is in
11 75-2-213(1)(a). It says "The request for a hearing must
12 be filed within 30 days after the Department renders its
13 decision." So she's correct, it's a 30-day deadline. And
14 then it says "An affidavit setting forth the grounds for
15 the request must be filed with the request for a hearing."

16 It is impossible to file an affidavit with the request
17 for a hearing if the request for a hearing must be filed
18 within 30 days. So it is -- I, I don't understand her
19 argument about the fact that you could somehow submit an
20 affidavit after 30 days when the statute specifically says
21 that you must file it with the request for a hearing,
22 which must be filed within 30 days. So even under 213,
23 filing an affidavit 2 months after the deadline would not
24 be with the request for a hearing.

25 Additionally, she, she admitted in her original filing

1 that she needed the affidavit, so it's, it's entirely
2 unclear how you can argue now that you didn't need an
3 affidavit somehow based on this statute that requires the
4 affidavit be filed with the hearing when you already
5 admitted that you needed the affidavit and that you were
6 able to go to get one.

7 In addition to that, she also made a point about the
8 water treatment and this e-mail from Laurie Klasner. And
9 I want to clear up, I did not say in my original argument
10 that the plant is shut down. We have an existing air
11 permit that we operate under, and we're doing that now,
12 and so this is a modification to that air permit. So the
13 plant is not shut down. What's at issue here is the
14 expansion of the plant, which is the subject of the
15 permit, and that development has been arrested by this
16 proceeding.

17 So the expansion has -- There are things that we have
18 essentially taken a risk to do. So we've spent money
19 knowing that it is entirely possible that that money could
20 be ill-spent and we just lose it if this hearing were to
21 proceed and we were to somehow inexplicably lose, which I
22 absolutely do not concede because this is a very good
23 permit. But we know that we take that risk and spend that
24 money.

25 There's only so much risk you can take as a business,

1 though. So we can do things like, yes, ask engineers to
2 write some plans and order a few things that aren't too
3 expensive. But when it comes to the construction, we
4 can't construct anything. We can't ask for that kind of
5 capital investment or make that kind of capital investment
6 based on a risk that is still outstanding for the last
7 six months. And anybody who runs a business can
8 understand that.

9 And so that's what I'm talking about when I say that
10 there has been material harm here in this delay and that
11 the development of this project that should -- that is the
12 basis of this solidly issued permit for expansion has been
13 halted.

14 And with that, I'll stand for any additional
15 questions. Thank you.

16 CHAIR SIMPSON: Thank you, Ms. Clerget.

17 Ms. Otero, five minutes' rebuttal.

18 MS. OTERO: Thank you. MCA Section 75-5-218(5),
19 yes, I did include that language in my response that I
20 sent on March 19, 2026, to Legal Counsel Hupp. However, I
21 was using the language found in the motion to dismiss and
22 motion to intervene submitted by MRL. That actual section
23 does not exist. It is reserved as -- Section 75-5-215 and
24 75-5-220 are reserved in the actual legislative language.
25 So, therefore, the section does not exist, and, therefore,

1 it cannot be a valid argument against something that I
2 would have submitted.

3 Now, with regard to filing my affidavit well beyond
4 the 30-day deadline that is being claimed, I want to be
5 precise about which statute applies, because the answer
6 depends on this. I raised, I raised Section 75-2-211(10)
7 for a specific and limited purpose; to show that the text
8 MRL quoted in its motion does not match the statute MRL
9 claims to have corrected in the combined reply. I am not
10 arguing that Section 75-2-210 -- I'm sorry, 211(10)
11 governs this proceeding. The governing statute is Section
12 75-2-213(1)(a), the statute DEQ designated on the face of
13 this permit.

14 The governing statute carries no independent affidavit
15 deadline. Under Section 75-2-213(1)(a), the governing
16 statute, the affidavit requirement appears in a separate
17 sentence from the deadline. The first sentence states
18 that requests for hearing must be filed within 30 days. I
19 filed my hearing request on January 14, 2026, within
20 30 days.

21 The second sentence states an affidavit must be filed
22 with the request. It carries no independent deadline of
23 its own, no time qualifier. There is no within-30-days
24 requirement, no "must include" language. Under the canon
25 of construction MRL itself cited, MCA Section 1-2-101,

1 this Board cannot insert a deadline the Legislature did
2 not write. Under the governing statute, there is no
3 independent affidavit deadline for my March 23rd affidavit
4 to have missed.

5 why was the affidavit not filed sooner? The complete
6 record. The next business day after I filed, January 15,
7 2026, at 2:00 p.m., I received an e-mail from Board
8 Secretary Sandy Moisey Scherer stating, complete text,
9 "This has been received. Thank you." No deficiency
10 notice, no statement that the affidavit was missing, no
11 direction to cure, no reservation of acceptance. An
12 unqualified acknowledgment of receipt from the official
13 DEQ's own cover letter designated to receive hearing
14 requests.

15 Between January 15th and February 24th, a period of
16 40 days spanning the entire remaining appeal window, I
17 received no further communication from this Board.
18 Board Counsel's first contact came February 24th, 4 days
19 after a meeting I was not notified of in advance, and
20 addressed scheduling, not cure.

21 I did not receive MRL's motion to dismiss until
22 March 17th, the first document in this proceeding
23 explaining in legal terms what a compliant affidavit
24 requires and that MRL was arguing a jurisdictional bar.
25 From that date, I received -- I'm sorry. From the date I

1 received MRL's motion, I acted. I submitted a written
2 response on March 20th and a second response on
3 March 23rd. I offered to cure the deficiency in real time
4 at the March 20th meeting. I executed a notarized
5 affidavit on March 23rd and transmitted it to the
6 Board Counsel that afternoon, both DEQ attorneys, and the
7 Board Secretary.

8 The gap between January 14th and March 23rd is not a
9 delay on my part. It is the period during which I lacked
10 the information necessary to understand that cure was
11 available, what form it must take, and that I needed to
12 act. The affidavit is in the record as Docket No. 12-1.
13 It was received, docketed, and never rejected. No board
14 order has declared it invalid or untimely. The cure
15 exists. I am asking this Board to exercise the discretion
16 in its own April 16th order -- that its own April 16th
17 order confirmed it has and proceed to the merits.

18 And I would like to add that it was not until I
19 received MRL's motions to dismiss and intervene that I
20 realized that incarcerated people could file these
21 affidavits. I just had no idea. I thought they were
22 legal documents that had to be completed by an attorney,
23 and since I was not an attorney, I, I just didn't believe
24 I had the ability and power to, to execute one of these.
25 It was after I received her motion that I realized I could

1 file this myself, and I did the research, I wrote the
2 affidavit, I took it to the notary, I had it notarized,
3 and I submitted it as soon as I could, which was
4 March 23rd. Thank you.

5 CHAIR SIMPSON: Thank you, Ms. Otero.

6 Questions from the Board?

7 BOARD MEMBER PAYNE: I have a question, a
8 question of Ms. Otero. There are two motions in front of
9 the Board, yet your arguments have gone to the motion to
10 dismiss. Are you opposing, you know, the motion to
11 intervene?

12 MS. OTERO: No.

13 BOARD MEMBER PAYNE: Okay.

14 And I have a question for Dana. Is Ms. Otero's
15 affidavit, is the sum total of it what appears on page 706
16 of our records? Is that what she submitted as her
17 affidavit?

18 MS. HUPP: I am checking that.

19 That is correct.

20 BOARD MEMBER PAYNE: Okay.

21 MS. HUPP: Board Member Payne, just for the
22 record, that is Document 12-1 in the Board's records.

23 BOARD MEMBER PAYNE: Okay. I don't have any
24 further questions.

25 CHAIR SIMPSON: Other questions from the Board?

1 I have a question for Ms. Clerget, and that is we've
2 been going back and forth about the, about the affidavit.
3 I'm not really clear on what the purpose of the affidavit
4 is in terms of supporting the petition. That is what,
5 what is the purpose of the affidavit?

6 what we deal -- this Board -- The reason I ask the
7 question is this Board deals with a number of different
8 environmental statutes, and this is the only one I'm aware
9 of that requires an affidavit with the petition. So could
10 you clarify that for me, please.

11 MS. CLERGET: Sure. There's -- the basic purpose
12 is that it ensures that what the applicant files is
13 accurate, true, most importantly, and has a basis in fact
14 such that they're willing to swear to it under oath and
15 pursuant to the possibility of being prosecuted for
16 perjury if they're wrong. And there are lots of instances
17 in Montana law where the Legislature determines that that
18 sort of requirement is necessary to prevent people making
19 things up or doing what somebody else has -- you know,
20 attesting to something somebody has told them that they
21 don't actually know or things that they haven't actually
22 looked into, things that are beyond their personal
23 knowledge.

24 For example, when you're testifying in court, the
25 judge or a jury makes a determination based on a sworn

1 testimony. They will not make a determination based on
2 unsworn testimony. So a court determines that it is
3 important enough that those facts be true that they
4 require a sworn testimony.

5 And I can't tell you, frankly, why in this instance
6 the Legislature thought it was important enough. My guess
7 is because most of these air permits are for major
8 facilities; some are energy based, some are not, but
9 they're usually major manufacturing facilities that are of
10 high importance economically and sometimes for
11 infrastructure in Montana. And so it's likely that the
12 Legislature in this instance thought that these permits
13 were particularly important enough that they wanted to
14 make sure that people who are making allegations that
15 would hold those permits up, that would do the kind of
16 damage that it's doing to my client right now, could only
17 be done based on verifiable facts that could be sworn to.

18 And the main reason -- I mean, you've seen, I know,
19 from some of your other cases that there are people and
20 instances where unfounded accusations are made for the
21 purposes of harassing or for the purposes of, frankly,
22 spaghetti at the wall. In this instance, the Legislature
23 said that's not enough; we don't want to allow somebody to
24 come in and make wild accusations that aren't based in
25 fact enough that they're willing to swear to it under

1 penalty of perjury and, and arrest this entire process.

2 So they, they do serve a very important purpose in the
3 law in general and I think in these permits in particular.

4 CHAIR SIMPSON: Thank you, Ms. Clerget.

5 Any other questions from the Board?

6 (No response.)

7 CHAIR SIMPSON: Let's move forward, then. First,
8 the motion to intervene. It seems pretty clear to me
9 that, obviously, MRL has an interest here.

10 BOARD MEMBER PAYNE: I would make a motion that
11 the Board grants the motion to intervene.

12 BOARD MEMBER SMITH: I'll second.

13 CHAIR SIMPSON: It's been moved and seconded that
14 the Board grant MRL's motion to intervene. Any further
15 discussion.

16 (No response.)

17 CHAIR SIMPSON: Hearing none, all in favor say
18 aye.

19 (Response.)

20 CHAIR SIMPSON: Opposed.

21 (No response.)

22 CHAIR SIMPSON: The motion is approved
23 unanimously.

24 Next we proceed to the motion to dismiss.

25 BOARD MEMBER PAYNE: I would make -- for

1 discussion purposes, I'll make a motion that the Board
2 grant the motion to dismiss.

3 BOARD MEMBER RANKOSKY: Second.

4 CHAIR SIMPSON: It's been moved and seconded that
5 the Board grant the motion to dismiss. Discussion.

6 BOARD MEMBER PAYNE: In my reading of this, I
7 think the statute does require the affidavit. We gave,
8 you know, Ms. Otero some grace here at the beginning
9 because it was a little unclear what her petition was.
10 I -- so I think that the controlling statute requires it.
11 I do think it's jurisdictional.

12 Also, just looking at her affidavit itself, I'm not
13 sure it complies with the requirements of an affidavit.
14 It says it's sworn, but there's no under penalty of
15 perjury. I think we've given the pro se -- as a pro se, I
16 think we've given her quite a bit of slack here. But I --
17 you know, the Legislature has made this a requirement. I
18 don't think we get to second-guess them. So I think it's
19 appropriate that we, we grant the motion to dismiss.

20 CHAIR SIMPSON: Further discussion.

21 BOARD MEMBER SMITH: I'll just say I agree with
22 Board Member Payne. I think the MCA is clear that the
23 affidavit is required. And I also agree that I think we
24 need to dismiss.

25 CHAIR SIMPSON: Julia, any further thoughts?

1 BOARD MEMBER ALTEMUS: Chairman, no, I agree. I
2 just, I find it frustrating that there's been so much code
3 clutter in the last conversation. There's just a lot of
4 code thrown out there that I'm not sure was all relevant.
5 I find that frustrating. But I do agree with Board
6 Members Payne and Smith. But thanks for letting me speak.

7 CHAIR SIMPSON: Thank you.

8 Jen, any further thoughts?

9 BOARD MEMBER RANKOSKY: No. I agree with them.
10 You have to follow the, follow the rules.

11 CHAIR SIMPSON: It has been moved and seconded
12 that MRL's motion to dismiss be granted.

13 Sandy, let's take a roll call vote, please.

14 MS. MOISEY SCHERER: Chair Simpson.

15 CHAIR SIMPSON: Aye.

16 MS. MOISEY SCHERER: Board Member Altemus.

17 BOARD MEMBER ALTEMUS: Aye.

18 MS. MOISEY SCHERER: Board Member Payne.

19 BOARD MEMBER PAYNE: Aye.

20 MS. MOISEY SCHERER: Board Member Rankosky.

21 BOARD MEMBER RANKOSKY: Aye.

22 MS. MOISEY SCHERER: Board Member Smith.

23 BOARD MEMBER SMITH: Aye.

24 CHAIR SIMPSON: Motion passes unanimously.

25 Thank you very much, everyone. Let's take another

1 10-minute break and then we will proceed with those few
2 items left on the agenda.

3 MS. CLERGET: Thank you.

4 CHAIR SIMPSON: Return at, let's say, 11:25.

5 (The proceedings were concluded at 11:15 a.m.)

6 * * * *

1 COURT REPORTER'S CERTIFICATE

2
3 STATE OF MONTANA)
4 COUNTY OF LEWIS AND CLARK) ss.
5

6
7 I, CHERYL A. ROMSA, Court Reporter, residing in
8 Helena, Montana, do hereby certify:
9

10 That the foregoing proceedings were reported by
11 me in shorthand and later transcribed into typewriting;
12 and that the foregoing transcript of the proceedings
13 consisting of -37- pages of typewritten material
14 constitute a full, true, and accurate transcript of my
15 stenotype notes of the proceedings had and taken in the
16 above-entitled matter at the time and place hereinbefore
17 mentioned to the best of my ability.
18

19 DATED this the 20th day of July, 2026.
20

21 /s/Cheryl A. Romsa
22 CHERYL A. ROMSA
23
24
25

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