

MINNESOTA ENVIRONMENTAL QUALITY BOARD
MEETING MINUTES
Thursday, February 19, 2004
Pollution Control Agency Board Room

EQB Members Present: Robert A. Schroeder, Bruce Bomier, Sheryl Corrigan, Jerome Deal, Art Dunn, Gene Hugoson, Dianne Mandernach, Susan McCarville, Mary Mellen, Gene Merriam, Jonathon Bloomberg, Paige Winebarger and Glenn Wilson

EQB Members Absent: Matt Kramer, Lt. Governor Molnau

I. Adoption of Agenda and Minutes from January 15, 2004 Environmental Quality Board Meeting

Citizen Member Winebarger moved to adopt minutes and agenda Citizen Member Melen seconded, the motion carried.

II. Chairs Report:

No Report

III. Executive Director's Report:

Mr. Sullivan reported to the Board that staff will put together a plan in some detail on how to inspect and document the length of the Hutchinson Pipeline when the snow melts. It will be our intent to be back in front of the Board with a plan or proposal on how we intend on going forward with the Boards review and input into the plan.

IV. Committee Report

No Report

V. Legal Counsel Report:

Legal Counsel Wagenius told the Board last month about the O'Neal case which concerned the environmental review of the Livinggood feedlot. At the time a Writ of Mandamus had been sought ordering the EQB to order the PCA to withdraw their EAW and prepare a new EAW. District Court made an affirmative decision on that issue, the Ramsey County District Court denied the Writ of Mandamus, and therefore the EQB doesn't have to order the PCA to withdraw their EAW. We received the decision we sought from the court.

VI. Agency and Citizen Update:

No Report

VII. Hutchinson Pipeline:

Mr. Mitchell, EQB Staff summarized he had two reasons for recommending that the Board lift the suspension. Those two reasons are: 1)it would cost a lot of time, effort and money to litigate whether the Board had authority to suspend the permit and staff believes those resources would be better served addressing whether the City has properly restored the land in accordance with the permit. 2)Regardless of what the situation was in December and the status of pipeline then, no one here is saying that the residents of Hutchinson should not be supplied with gas.

There were three conditions attached to the suspension order that HUC was suppose to take to reinstate the permit, 1)to make the commitment to pay for crop losses, the city has made no commitment in that regard, 2)the City was suppose to pay the EQB expenses related to this matter, and that money has not be reimbursed, 3)HUC was suppose to make available documents that the EQB requested back in November and December, and they will make some documents available, some documents they say they don't have and some documents they say are private.

When the snow melts, the investigation will continue on whether restoration has been performed properly as the permit and Agricultural Mitigation Plan a condition of the permit require. A landowner who is not part of the Sib Ren Fair group has written a letter to the Board about concerns about how the pipeline was constructed and the how the restoration was performed. We still may be on course to end up in court on this matter to achieve compliance with the plan and we need for the landowners to understand that reinstatement of the permit is not a change in direction and that we do intend to follow whether the agricultural mitigation permit was complied with and to investigate these underlying issues. We want to find out what the City plans to do in the future about the Fairfax tap and whether there is any review or permit for that tap. The Board passed a resolution in December directing the City to tell us about their intentions regarding the tap and that resolution should continue until we receive that information. The prime reason that we should reinstate the permit is that fact that we should avoid the cost of litigating the issue of whether the Board has the authority to suspend the permit. The Board's action to reinstate the permit should be conditioned on the City signing a voluntary stipulation of dismissal which will be filed with the Court of Appeals and then making sure that the Court of Appeals actually dismisses the underlying appeal. If the appeal is not dismissed then the prime reason for reinstating the permit and avoiding those costs will not be the fact.

You have the resolution and Findings of Fact, and Conclusion and Order in your packet. The voluntary stipulation of dismissal must be executed by the City and accepted by the Court before the reinstatement is effective. So we are here to ask that you pass the resolution adopting the Findings of Fact and Conclusions and Order reinstating the permit and revoking the suspension order.

Commissioner Wilson asked if the New Ulm tap has been completed.

Mr. Mitchell responded no. The New Ulm tap was permitted locally but staff did prepare an information book because the pressure is under the jurisdictional level for an EQB permit. We have heard concern about the New Ulm route and whether it was routed through a wild life management area but there is no new information available. The confusion over the Fairfax tap is that we are not certain whether it is New Ulm or HUC that is planning to build the tap. There is a landowner in the area where the two pipelines meet and he has signed an easement to allow the construction of the valving station on his property and he stated to me that he signed an agreement with the City of New Ulm. We need more information.

Commissioner Wilson asked a follow up question of whether we know for certain whether any work was done after the suspension order was given.

Mr. Mitchell stated that the suspension order was issued on December 18, 2003. The next day we received a call that there was construction going on at Town Border Station #2 (TBS #2) and continued through the weekend. That work was necessary to get the gas from the 90 mile pipeline to the distribution system. The City continues to state that the permit doesn't apply to the Town Border Station and this is another issue that is under review and dispute.

Commissioner Corrigan asked if it was true that the City is now taking the position that the EQB has no authority to require the City to comply with the Agricultural Mitigation Plan.

Mr. Mitchell responded that it was his understanding that the City's' position is that the EQB has no authority to require compliance with the Agricultural Mitigation Plan, has no authority to conduct inspections and lacks other authorities but she can ask the City's' legal counsel her question.

Commissioner Corrigan asked if the Agricultural Mitigation Plan was a condition of the permit that was received by the City.

Mr. Mitchell responded it certainly was part of the permit and it was negotiated, the City did agree to comply with the plan and the underlining statute that you have to restore the land.

Commissioner Corrigan asked if the Board reinstates the permit, what are the Board's options in regard to compliance with the Agricultural Mitigation Plan.

Mr. Mitchell responded that the underlying obligation to comply mitigation plan will continue to be pursued, we will have to conduct an investigation and we are still trying to get information from the City .

Testimony:

Mr. Johnson and Ms. Kennedy from Lindquist and Vellum representing Sib Ren Fair said they were here to oppose reinstatement of the permit and at a minimum to request that the Board tables the action until a future meeting. The opposing counsel has said that the Board would be wallowing in documents at this point and that has not happened. If and when the Board receives those documents the Board should review those documents before making the decision to reinstate the permit. Sib Ren Fair represents about 50% of the landowners along the pipeline. The state gave this entity a permit to trench, lay the pipe and restore the land. The restoration was not done and now the staff is recommending reinstatement of the permit, in effect rewarding the City by lifting the suspension. Their attorneys have said that the construction is complete, but in our view construction includes restoration.

Staff is saying that future enforcement actions will follow, but the City has shown that they are reluctant to comply with any EQB requests and you will likely end up back in court were you are right now to enforce the permit. You have a very good case right now and should carry this case forward at this time.

Ms. Kennedy said that Hutchinson's appeal does not only concern this Board's authority to permit but it focuses on the Board's fundamental authority to impose an agricultural mitigation plan. From

Hutchinson's statement of the case, in connect to the case and pursuant to MN Statutes 116I the City has applied for and received a pipeline routing permit from the EQB. As part of the permit the EQB purported to impose a number of requirements related to the mitigation of impact on the agricultural land. The EQ B had no statutory authority to impose such requirements the alleged violation of which the EQB claims in support of the suspension of the case. We are very concerned that for this Board to rescind suspension and agree to voluntarily dismiss the appeal will signal something less than confidence. As Mr. Johnson noted that if the permit is reinstated and we have to go the route of investigation the Board will end up in court in the end. Minnesota Statutes 116I.015 gives this Board, actually empowers this Board, to set out procedures to follow in order to route and permit. In Minnesota case law there is law that defines implied authority, when the administrative agency has the authority to issue a permit by implication the agency has the authority to rescind that permit if the conditions under which the permit was granted are not complied with. We believe the case is very strong. We feel it is ironic for Hutchinson who violated landowners rights is now saying they are not being given due process. We urge you to stay the course, and defend these people.

Commissioner Hugoson stated that this case just will just not go away. He said he felt a certain responsibility and duty in what people think about government. This case gives government a bad name. There are two things that he has resolved on this whole situation. First, we need to do what we can to change the ambiguity in statutes and rules and make some of the necessary changes that will ensure that something like this never happens again. Second, we need to make sure that people who have been wronged be righted. If he believed that retaining the suspension would ensure that, he would urge the Board not to support staff recommendation. Hutchinson is more interested in pursuing lawsuits then dealing with the situation. We will probably end up in litigation regardless, so we might as well focus on litigation on how these people are going to be compensated down the road. The investigation has got to be addressed and this situation is heart wrenching for the people who have to show up here month after month. This particular project has been so badly handled for so long it is beyond comprehension and even if the suspension order is lifted, this issue is not over. We as a Board should pursue this issue vehemently and every way we can so this never happens again.

Mr. Johnson said that Hutchinson is maintaining that it complied with the mitigation plan but yet the mitigation plan has a requirement that 45 days after construction they should meet with each landowner to discuss the impacts the pipeline has caused. If the pipeline was complete as Hutchinson has said on December 10, those 45 days have come and gone. Landowners have been waiting for the visit from Hutchinson representatives and there have been no visits so the noncompliance continues. There are a number of letters from county inspectors saying basically that everything was fine, we find that hard to believe since there are documented violations in regard to drain tile that were addressed in the stipulation agreement and secondly the violations that were addressed in the suspension order. We think the heart of the problem here is that the county inspectors are not equipped to do the job. The most important part of the revocation of the permit is the message you are sending, which is deference to the city and that the state is abandoning the landowners. We seriously doubt that you will effectively pursue this problem if you reinstate the permit.

Citizen Member McCarville asked if there was a form letter provided by Hutchinson for all the county inspectors to follow, because they all look so alike.

Commissioner Merriam asked Mr. Johnson or Ms. Kennedy why effective pursuit would be affected by either of the Board's actions, a suspended permit or our revoking the suspended permit.

Mr. Johnson stated that if the Board stayed its course, defended your position in the Court of Appeals and the Court upheld your decision and then you seek enforcement action in District Court then you have the strength of a Court of Appeals decision behind you. The standard of review in this case is that your actions were arbitrary and capricious, those standards are very difficult to meet and the Courts are bound to show great deference to you as an administrative agency in determining whether your actions were arbitrary and capricious. By reinstating the permit, the next legal action would be to go to District Court basically on a new record and the burden of proof would be on the EQB and you would likely be back in the Court of Appeals.

Director Dunn asked what obligation the City of Hutchinson has to comply with a permit that has been suspended.

Mr. Johnson suggested that the City has the obligation to comply with the three conditions of rescinding the suspension the Board placed on the City. They have chosen not to comply with those conditions which mean you would need to go to court to force compliance. .

Citizen Member Bomier asked what the practical effect of this decision.

Mr. Johnson stated that the pipeline was laid and that gas is flowing through the pipe, while this matter is waiting for a decision from the Court of Appeals that would continue to happen. Once the Court of Appeals makes its decision and assuming they decide in your favor it would be up to you to decide what to do next. You could seek to shut off the gas, or seek to enforce the three conditions that you sought before the suspension order was lifted.

Citizen Member Bomier clarified that no one at the EQB is seeking to shut off the gas.

Mr. Johnson stated that the opposing counsel and the City states that the suspension order has no meaning at this point but we find that hard to believe because they have appealed that decision and that they are strenuously seeking that you reinstate the suspension. Clearly the suspension order is trouble for them and we think this suspension puts a cloud over their financial status and from an accountant's perspective and lawyer doing due diligence on this matter it would be flagged as a significant liability.

Citizen Member Winebarger suggests that financial status is a valid point, do we have information on what effects the suspension order would cause?

Mr. Sullivan reported that he specifically asked the counsel from Hutchinson whether they would accrue any benefit from rescinding the suspension and they specifically said no.

Testimony:

Mr. Arnold Koenig and Michael Koenig stated that they were landowners along the pipeline and that they owned parcels 212, 208, 207, and 206. Mr. Arnold Koenig stated that he passed out folders to the Board and would like to summarize the contents. The first three sheets in the folder deal with notice to Hutchinson that they were not tilling the soil properly, there are letters listing all the complaints written to the county inspectors, the cost of righting the problems if they did the work themselves and there are also pictures that show how the soil was trenched, mixed, compacted and the rocks left on the land. Soil samples are included which show that the soils were mixed. The last pictures are from the Olson farm, you received her complaint letter earlier but there is also a letter from the county inspector

stating that the restoration is completed. There are pictures of the land before the work was started and now that the restoration of the land is complete, what will grow on that land now.

Mr. Michael Koenig added that he requested copies of the complaints that he made with the McLeod County Inspector and that he repeatedly asked for copies and no copies were delivered to him. Mr. Arnold Koenig added that the county inspector was shown where the problems were and there was no follow through on the complaints. He contacted the county inspector at a later time and he said that all the work was satisfactory and that the complaints were resolved.

Mr. Mark Klinkner, Watonwan County introduced himself and said Watonwan County is where the pipeline construction started and where the dispute about renters having rights began. Some of the people along the pipeline were not notified in the proper 90 days. Mr. Sorensen, county pipe inspector and Mr. Logan were running around trying to get the landowners to sign so that the construction could start work. The ditch work kept moving even when there was a court order not to start on a property, they just walked right onto the land and didn't care. We reported all the complaints to Mr. Mitchell. On the Spitzner farm in St. James the work wasn't done right, soils were mixed and they were never notified that the construction crew was coming. When Mr. Spitzner saw that the construction crew was going on his land he went out and tried to stop the crew but the sheriff came out and said that he was obstructing the construction work. On Mr. Sweetbaur's land they were not suppose to be on that property but they showed up Saturday at 6:00 a.m. Our county attorney could not be reached until after 9:00 a.m. to stop the work but we finally did get the crew off the property. With all the problems it was decided by the EQB staff to have a meeting in St. James to try to get the problems sorted out and there were 30 landowners present. How can those people say there were not any problems? On the Wyrens land they didn't lay back the land correctly and there were rocks lying on the land and we found out later that the construction crew had buried some of the rocks. The inspectors could not keep up to the construction crew and note all the problems.

Chair Schroeder wanted to be sure that the landowners understood that the Board was addressing the suspension of the permit and not precluding any potential lawsuit at a later date.

Mr. James Mayer, Sibley County and he owned land along the pipeline. The only time the county inspector showed up is when he complained. The county inspector was a very busy man, he was overseeing a project in the watershed district, he was combining beans and corn and he was only in Cornish Township to the best of his knowledge four times on my four complaints. He stopped the construction crew because they were not complying with the agricultural agreement he was told to make the best of a bad situation. The landowner said he tilled last fall and could see where the pipelines crossed and he said he could see how the soil was layered. The John Deere tractor that was doing the construction was an 8430, a Nebraska test said that the tractor has 179 horsepower, no dual or triplet tires. The tractor operator was told by the county inspector to dig a couple inches deeper but got bogged down. This is how the construction advanced from Trimont, he was the first landowner to stop them and tell them they were doing it wrong. The tractor was way too small to do the job that it was suppose to do and he is stuck with a lot of compaction. He brought in pictures to show the Board the compaction problems and rocks.

Mr. Ronald Bastian, Sibley County landowner said his experience with the county inspector happened on three occasions. The first meeting was on my field about the amount of possible tile cuts, the second meeting was in the field after the top soil was pushed back and the trenching had already begun, and the third meeting took place on my neighbors place while they were repairing tile. On all

of these occasions he said the work was not in compliance with the agricultural mitigation plan but the county inspector said it didn't matter. The Sibley County, Planning and Zoning Director told me after he complained to him that the matter was not in his control. My opinion is that everyone who cares hopes that the EQB stands up to HUC.

Mr. Frank Johnson said he has property in Renville County but has interests in McLeod County. The reinstatement of the HUC permit raises very serious concerns. If HUC is already distributing gas to the residents of Hutchinson why is it so important for the permit to be rescinded? It would be a serious mistake to remove the suspension and would assure the HUC that no violations of any permit requirement have occurred. It is essential that the EQB not reinstate the permit under these circumstances. The landowners concerns are unimportant to those building the pipeline. Despite the landowner's comments to the county inspectors, they all certified that the work had been done properly, something is wrong.

Mr. Johnson has been a designee of Mr. Emit McCormick for his property in McLeod County since 2002. Many times since then Mr. Logan and myself have discussed issues on this property. No opportunity ever occurred to resolve these issues before the crew arrived to install the pipeline, since the property was adjacent to Hutchinson. Mr. McCormick has long considered having housing built or other uses for the property so pipeline routing through his property was important. Hutchinson wanted to place the pipeline in the center of the property but Mr. McCormick wanted the pipeline further to the east. Mr. McCormick, his counsel and he discussed this, the result was that we were to contact the City of Hutchinson who had the authority to move the pipeline to a different placement. At the meeting the request was denied including a different placement of the pipeline. To agree with HUC easement proposal would get the pipeline moved to disagree the HUC would place the pipeline where they wanted.

Another unusual practice occurred on the Grant Berkstohler property in McLeod County, parcel 192B. In late November in 2003 an above ground valve structure, dual valve structure was erected on the northwest corner of his property and was enclosed by a steel fence. It was all completed with no contact or no permission by Mr. Berkstohler. The landowners are going to request that this structure be removed. My request is for the EQB not to reinstate the suspension order and that action will preserve the integrity of the EQB and set an example for the future.

Testimony:

Mr. Christopher Dietzen said the matter before the Board is whether the suspension order should be rescinded. We support the recommendation of staff. There are a number of reasons why the order should be rescinded. The issue is really simply this; if you leave the suspension order in place the City of Hutchinson is in a position that it has to go forward with the appeal. If we were to withdraw the appeal at this point then the EQB would certainly have the authority to shut off the gas at least if the order is not appealed and that would jeopardize 15,000 residents of the City of Hutchinson that rely on gas both winter and summer. Right now, staff has stated that the order is moot, gas is flowing and no one here has indicated a desire to shut off the gas so the appropriate thing to do is to dismiss the appeal by stipulation. Before the meeting I signed a document that will dismiss the appeal that was prepared by your legal counsel and we are prepared to go forward on that basis.

We are not here to say that all of our issues have been resolved, what we are saying is that since the January Board Meeting we have been working very hard to resolve issues we can. We have tried to close the gap and I think we have made progress. We have had a meeting where we aired all the

issues, we made a commitment to produce documents and we have traveled to Omaha to get document from the consultant, we have documents from the soil scientist Mr. Lawler and Mr. Bovee, we have documents from the construction company JoMax, we have 2,700 pages of documents that are available for EQB review. We have tried to comply as much as possible. The documents are available. We think that is a sign of good faith and have produced everything that we think is responsive to the EQB request.

In respect to the Agricultural Mitigation Plan we contacted the county inspectors and talked with them about whether the work was done in compliance. We have letters from all the inspectors and they believe that they complied with the mitigation plan. They have inspected the pipeline and that is their responsibility. The county inspectors asked us if we could provide an outline of what they could put in a letter, they don't write letters they are inspectors. The farmers that have come here today, they love their land and it's important to them, they feel that we have not complied but we are not going to be able to settle that point today. We have had numerous contacts with all the farmers that have testified today and there are explanations for all of these situations. We think that there is a difference of opinion between HUC and the farmers on whether there has been compliance. We think we have and are prepared to address those issues. If the suspension order stands all the rights and privileges of the permit are also suspended and that means there is no permit or enforceable agricultural mitigation plan from that technical perspective. That should be your reason for rescinding the suspension order. From our perspective we have to go forward with the Appeal because of the 15,000 residents in Hutchinson. Certainly from the EQB perspective if we are unable to resolve the issues to the EQB satisfaction there is the enforcement action and we hope that is not necessary, that is your weapon to apply pressure to the HUC that ensure that the issues are resolved. All the Court of Appeals will address is whether you have the authority to suspend a permit.

In regard to the question asked by Commissioner Wilson on the Fairfax Tap, Mr. Dietzen has gathered information and expects to send a letter to the EQB. The City of Fairfax has a five mile pipeline that runs parallel to a county highway and the HUC pipeline runs perpendicular and underneath that pipeline. The discussion is simply to allow the City of Fairfax to tap into HUC pipeline. At least preliminarily we think there is an exemption for a requirement for a permit for that issue.

Chair Schroeder asked whether either of them is the attorney for the City of New Ulm and City of Hutchinson?

Mr. Dietzen responded that he represented the City of Hutchinson.

Mr. Hanson responded that he represented the City of New Ulm when they did their EQB permitting. But I have not done any work for them since then. There was an information book prepared and a meeting with the county commissioners and I represented them during that process which occurred last June. But have not represented them since or have I worked on the Fairfax Tap.

Mr. Dietzen continued that Mr. Sullivan asked whether there were any financial benefits that accrued if the suspension order is rescinded by the City of Hutchinson. There are no financial benefits, the benefit is to resolve the issue of whether the EQB is going to turn off the gas. There were a number of issues raised by the farmers but we have a difference of opinion and this is not the correct forum to resolve those issues and this is not the correct time or place to go into detail on those issues. We think we have complied but will take another look at those issues later.

Chair Schroeder asked for Mr. Dietzen's approach to address the landowners concerns.

Mr. Dietzen stated that there is an Agricultural Mitigation Plan which is a document between us and the EQB and we have said that we are willing to attempt to work through the issues in that plan. In regard to the individual farmers, they have condemnation claims so they have a different forum available to them for remedy. The City's responsibility in all of this is to investigate and to resolve legitimate claims as a governmental body.

Chair Schroeder asked just to make sure from an administrative standpoint, is there is any problem with staff reviewing and making copies of the documents you have collected.

Mr. Dietzen said that he and Mr. Wagenius have had several conversations about how we might do that. Those documents are available and we are working through the details.

Chair Schroeder asked about inspection fees from the Board. Those fees were part of the stipulation agreement with the City of Hutchinson prior to the suspension.

Mr. Dietzen said that he was aware of the issue of expenses because it came up at the December Board Meeting. The expenses totaled \$20,000 of which \$8,000 had been expended through the date of the hearing. He has asked Mr. Wagenius for some breakdown of the \$20,000 and said that they were willing to discuss that issue.

The Chair asked if there was any change in his client's stipulation agreement and the expenses.

Legal Counsel Wagenius wanted to make clear that the City has an obligation to pay all of the administrative costs of processing the permit and to completion and termination of the permit. It is not limited to the inspection fees, it is all process and legal costs. What has happened in the past is the applicant has paid an initial fee, this is a requirement in the rules based on the statute. The applicant pays that up front, after that the experience has been the project manager on staff calls the applicant and says we are getting low on funds so they send in another check. The process set up in the rules is that an actual invoice is sent to the applicant and that they would then pay. The staff has followed the process that when the funds are low they called the applicant. That process worked with the City until sometime in the fall when they stopped responding to the calls and are now demanding an invoice. The City has a legal right to require an invoice from the staff. This is a self funding process where the applicant funds the whole permit process and is clearly set out in statute. There is no question that there should be no taxpayer money involved or expended in a permit from beginning to end. In my opinion the statute is perfectly clear on payment of fees. The problem may be on the legal requirement to send out an invoice.

Mr. Mitchell stated that the power plant siting program and the pipeline permitting program are both run the same way in regard to funding. The statutes say that the applicant has to pay all the costs. When they apply for a permit we say we need some money to start the process and a certain amount is submitted. We try to keep a positive balance in these accounts. When you need a permit the applicant is always happy to give you a check because of whatever is required and we can get the check. Beginning last July, the funds were starting to get short and started spending a lot of time on this matter. In November, we wrote to Mr. Spethman with a plea for money because it was running out and could you send a check for \$25,000. We presently have expended \$20,000 in unreimbursed fees and there is nothing looking forward to an additional investigation. I gave Mr. Hanson the latest

statement in December and would be happy to provide another statement for the amount that has presently expended.

Mr. Dietzen said that the issue of cost was an issue that they were willing to resolve. But that was a lesser priority than other issues of the agricultural mitigation plan. We are certainly willing to take another look at that expense and comply with our obligations. The issue from the HUC standpoint as to whether we have an obligation to pay for costs of the EQB in defending itself in a lawsuit which would relate in costs after December 18.

Chair Schroeder asked if costs associated with the investigation will be reimbursed to the EQB.

Mr. Dietzen said that his recommendation to his client was that the HUC would be proactive and do an inspection as soon as appropriate, due to weather conditions. We would be willing to address EQB investigation costs if after they review the inspection documents provided by HUC there were still more questions or problems. Frankly I have not discussed this with my client so I don't know what their views might be but it seems duplicative to have two inspections.

Commissioner Corrigan asked if he would answer the question. The question was; does your client intend to reimburse the EQB for the costs that have been incurred up until now and going forward for the inspection.

Mr. Dietzen responded that the question that he was responding to was whether we would commit to pay inspection costs this spring. He answered that because he has not talked with his client and that they should avoid duplicative costs. He can't answer for his client.

Citizen Member Winebarger asked Mr. Dietzen to answer the question asked by Commissioner Corrigan.

Mr. Dietzen said without talking to his client he can't make a commitment for this spring.

Citizen Member Bloomberg suggested that his client is sitting in the room, perhaps he could come up and answer the question.

Mr. Dietzen asked what the EQB investigation would entail and what kind of expenditure is being talked about.

Commissioner Corrigan suggested that staff has been discussing the elements and scope of the investigation for several months with you and your client. She said she hoped that at this point that HUC would make a good faith commitment to work with the EQB staff and commit to paying the past costs which are on record as well as future costs.

Chair Schroeder said in part 10 of the Stipulation Agreement that HUC signed is a statement that says: the costs of any investigation conducted by the EQB after discussion with the City will be charged to the City as part of the costs of administration of the permit. Is there any change to that commitment?

Mr. Dietzen said that the issue of costs was not resolved in the proposed findings so he had not discussed that with my client. There are three issues in regard to costs: (1.)Costs incurred before December 18, (2.)Costs that have been incurred after December 18, and (3.)Future inspection costs. He will need to talk to his client in regard to the costs.

Director Dunn asked if the City acknowledges the validity of the agricultural mitigation plan and are willing to work to ensure that it is complied with.

Mr. Dietzen said that he and his client are willing to have that discussion, to settle the dispute. We raised the legal issue about whether the EQB had that authority and have not conceded that issue but as a sign of good faith we have said that we will try to resolve those issues.

Citizen Member Bomier stated that he thinks Commissioner Corrigan's question was answered.

Chair Schroeder said that we heard at the December Board Meeting the pipeline was complete. We also are aware in the agricultural mitigation plan there is a requirement of meeting with the landowners within 45 days of completion. What are your plans in that regard?

Mr. Dietzen said that he understood from his client that we do intend to meet with the landowners.

Citizen Member McCarville asked if HUC could speak to a schedule. When will the meetings take place, where will the meetings take place, when will the meetings be completed, and what are the results of those meetings?

Mr. Dietzen said that a time schedule could be set up with staff, in terms of who we have talked with and in terms of resolutions he would need his client to come up and testify. If you would give me a minute with my client, he will ask him to come up and testify.

Citizen Member Bomier stated that we need to make clear that whatever we do during the suspension we do not intent to shut off the gas. I think we need to memorialize that in the record. He is asked if he could hold that motion until after all the discussion.

Mr. Dietzen presented his client Mr. Spethman who does not have authority to make commitments on behalf of the HUC. HUC is a political body that has to act just like yours does. Mr. Dietzen said as the litigation counsel he is willing to recommend that upon receiving an invoice that his client would pay expenses up to December 18, 2003 and after that he will review expenses and what relates to litigation. With respect to the inspection perhaps there is a way that his client and staff of the EQB could jointly do the investigation. He can't say that HUC will commit to paying for the investigation when he doesn't know what the scope of service is he or his client can't make that commitment.

Commissioner Corrigan said what she is hearing for the record is that they are prepared to come forth with payment as long as we can agree on the scope of services, is that correct?

Mr. Dietzen said he is willing to recommend that the HUC pay inspection expenses based on the scope of services and joint participation.

Commissioner Corrigan stated that the verbiage from the stipulation agreement compels HUC to pay for the investigation costs? Isn't that correct? Why is this such a potentially contentious moment for Mr. Dietzen and his client? What this leads me to believe is that perhaps the agreements, the discussions and all of the talk that we have heard is just that, just talk and there is no good faith here for Mr. Dietzen and his client to actually comply with anything that we as a body have asked for.

Mr. Dietzen has a different view than this Board does. He thinks there are certainly obligations in the stipulation agreement that we will comply with, he is simply suggesting to the Board that it is not a simple matter for them to commit to an investigation when they don't know what the scope is.

Citizen Member McCarville stated that HUC is already outside the 45 days in which you are supposed to meet with the farmers along the route. How have you already done that and what have been the results with the farmers? How does the whole process work?

Mr. Spethman responded that he had already contacted a majority of landowners. The only landowners that they have not contacted are the ones with condemnation procedures. We felt it would not be productive with those landowners. We have had numerous contacts with all the landowners including the ones who have testified here today, trying to make a resolution to those issues. Unfortunately, the parties are unable to resolve those issues. We address the issues the landowners have at least as much as they possibly can. This is a contentious issue since day one, even before the EQB staff became involved. There is enough blame to go around for everyone here. The best resolution is to try and settle this situation outside the courts but he doesn't know whether that is possible. All the different bodies have different goals.

Mr. Dietzen wanted to pursue something with Commissioner Corrigan. Our understanding of the stipulation agreement is that our obligation costs were that there would be discussion with EQB staff about the scope of services. What he was saying was consistent with the stipulation agreement and he thinks that he is showing good faith.

Commissioner Corrigan said she would reserve her judgment but until now she doesn't think the actions of the HUC show good faith.

Citizen Member McCarville stated she agreed with Commissioner Corrigan. What does Mr. Spethman think it would take for agreement with a landowner like Mr. Koenig?

Mr. Spethman said he didn't know and maybe the condemnation process will resolve the problem. There is a very wide divide between what is expected versus what we can actually do for the landowner.

Mr. Dietzen said that what Mr. Spethman and he need to do is to investigate each claim and then meeting with the farmer and try to adjust the claims. Each claim is going to be unique and we are going to pursue this matter along those lines. The unresolved claims will have to go to condemnation proceedings but it is in their interest to investigate to find out what the claims are, to find out what the potential damages are and to resolve those claims.

Commissioner Mandernach asked Mr. Spethman what is the process and how often has there been a mutually agreed on settlement? And as a follow-up question were the landowners satisfied.

Mr. Spethman responded that he has talked with individual landowners with easements and with condemnations. He stated that out of the 10 most recent he has answered all questions or gave directions that the landowner was looking for. As for the satisfaction, Commissioner you would have to ask the landowner. My opinion is that the landowners were satisfied. We have had over 65% of the landowners sign easements and of those we have received a majority of the releases and where we have asked those landowners if there were any other issues to be resolved. We used the EQB drafted complaint process that was part of the Agricultural Mitigation Plan and have addressed all the

documented complaints we have received. We don't document some issues like moving rocks and boulders, taking trees down, etc. We are not saying that we are perfect but we have tried to address those issues and we have tried to do good things for landowners.

Director Dunn asked whether the connection to Northern Natural Gas Pipeline still exist.

Mr. Spethman responded that the connection between Northern Natural Gas and the City of Hutchinson still exists. We have two connections that serve the city, TBS #1 and TBS #2. TBS #2 is fully functional and serving Hutchinson since December 10 and 11, 2003. TBS #1 is on our property and is not functional but we don't have an issue with Northern Natural Gas because they have been able to secure easements ourselves on City property to connect to our distribution system. So the issue between Northern Natural Gas and HUC is a moot issue, in my opinion.

Director Dunn asked again whether the connection between your utility and Northern Natural Gas Pipeline still exist.

Mr. Spethman responded yes. There were three reasons that we built this pipeline; 1)to serve the city at a cost effective rate for natural gas; 2)provide redundancy, and 3)capacity is the key point here. Without the capacity to flow gas the price is astronomical.

Citizen Member Bomier stated that the Board is not arguing that you didn't need the pipeline what we are saying is how you performed the work. When you heard that the Board had suspended your pipeline permit, did you authorize work to continue?

Mr. Spethman replied that they were working on TBS Station #2.

Citizen Member Bomier followed-up again with when HUC heard that the Board pulled their permit, did work continue.

Mr. Spethman said that the HUC never stopped working on the pipeline.

Citizen Member Bomier asked if under advice of legal counsel you continued to work.

Mr. Spethman answered that his legal counsel did not give him direction, his decision was made prior to the Board meeting where the suspension had occurred. He said that he understood the permitting process correctly, we put a permit in for the construction of a transmission pipeline from Trimont to the City of Hutchinson or our TBS Station and that was approved. Anything from the end of the permit forward is owned by the City of Hutchinson from a distribution standpoint so when we received the suspension we were finished with the construction of the pipeline. We were working on our own infrastructure to support our city.

Citizen Member Bomier responded that it is your position that the construction of the pipeline was already completed and that the suspension meant nothing?

Mr. Spethman responded yes sir.

Citizen Member Bomier stated that no matter what happens with the suspension no one on the Board is suggesting that the gas be shut off in Hutchinson. In fact I would like to make a motion and have it on the record: The motion reads:

“The Board’s intent is not to interfere, in any case, with the flow of natural gas to the customers of the Hutchinson Utility Commission whether or not we preserve the suspension.”

Citizen Member Mary Mellen seconded the motion.

Citizen Member Bomier said the logic here is that you are talking about a statement of conduct not about threatening safety or well being of the Hutchinson customers. Mr. Dietzen’s reasons for bringing the case to the Court of Appeals is based on the EQB not having authority and his being unsure what suspension means. This motion takes one of the reasons for his case away.

Chair Schroeder asked for a voice vote on the motion, the motion carried. The Chair then suggested that the members take a look at the proposed resolution reinstating the amended pipeline routing permit issued to Hutchinson Utilities Commission, revoking the suspension order issued on December 18, 2003.

Citizen Member Bloomberg moved the resolution and Commissioner Corrigan seconded the motion. Citizen Member Bloomberg stated ultimately this is probably the right course in terms of the Court of Appeals dispute but he felt strongly that within the resolution or independent of the resolution we need to express the will of this body in terms of giving directions to staff and how they proceed from this point on. It is clear to him that there are very significant unresolved issues with the way that the City of Hutchinson has preceded with this matter. He wants to make sure that nothing the Board does with this action will interfere with this Boards ultimate authority and in fact Mr. Dietzen has conceded this, that if the City doesn’t comply with the terms of the mitigation plan or any other terms of the permit they will be facing an enforcement action. His opinion, and he hopes the other members agree, is that staff should be given direction to proceed with the investigation as expeditiously as possible that our authority to pursue litigation remains in place, that there are still unresolved issues with respect to the Data Practices Act request where we would have authority to litigate if necessary and that we have ultimate authority to enforce the conditions of the permit. Perhaps Legal Counsel Wagenius can help us to incorporate or amend that will, if it is the will of this body into the record.

Attorney Ms. Kennedy asked the Board to be heard on a very important issue. HUC has said they don’t believe they did anything significantly wrong but more importantly that landowner’s proper redress is in the condemnation process. The condemnation damages process is as follows: commissioners are appointed, each client will then have to hire a soil scientist and pay attorney fees, the soil scientist will have to gather the evidence, the burden will be on the landowners, the expense will be on the landowners. Counsel and landowners will have to go before the commission proceeding and establish the kind of thing you never establish at proceedings, incorrect construction activities. Usually you just establish the value of the land that was taken, here we will have to do that and then move on to the significant and very expensive burden of proof. Ms. Kennedy suggested that at the end of the day her clients will have to pay more for representation than they can reasonably hope to get back in this process. This issue would be much better handled by you, you have the expertise, and you have the power. The idea of actual crop loss over a ten year period makes my client’s whole and nothing else. She urged the Board to help the landowners with that.

Mr. Dietzen stated that crop loss is an element of damages in condemnation proceeding. The attorney fees are not recoverable in those proceedings but they do get \$1,500 for an appraisal. The more important point is what Citizen Member Bloomberg said which was that the message is loud and clear to the City that if they can't resolve these issues with you that there will be an enforcement action.

Citizen Member Bomier stated that after the Williams pipeline blew up and a few people were killed the legislature decided it had a real investment in where a pipeline with over a 1,000 psi is routed. This is the twentieth time we have worked with this process and never in all of these involvements, evolved into this type of an issue. We have always been able to work with the folks, Hutchinson is a very unusual situation which threatens the fundamental activities of our institution. It is my opinion but it appears that the City either doesn't have the information that is necessary to perform a job of this size or doesn't want to share it, there is no other way around that. We have been dancing in the shadows of information for so long, in his opinion no matter what happens we need to send a communication to the State Auditor explaining that we feel this whole process needs to be reviewed and audited and that our staff be with the State Auditor. They have the power of subpoena we don't, they can actually go out and talk to these people who have supposedly been watching the process and find out what happened. The HUC has claimed that they don't have information or can't reveal the information on this extensive project about the process. Working in conjunction with the State Auditor might enable us to get the information. The Board is not trained to look into shadows or darkness but the State Auditor has tools to get to the root of the problem, we are talking about something that could blow up and personally don't have confidence that this organization has the capacity to properly govern and monitor this matter. My preference is not to amend the resolution but after discussion he would like discuss a formal communication to the State Auditor in this matter.

Citizen Member Winebarger said with regard to the proposed resolution that there is no doubt that there are multiple issues and multiple dimensions of problems that need to be addressed. One issue that has been bothering her is the nonpayment of expenses involved with this permit up to the December 18, 2003 meeting.

Mr. Mitchell responded that he has provided Mr. Hanson with a statement that he had in December and my recollection is that the amount was about \$8,000. The latest statement he has from the accounting people in our office is that the amount would be a little over \$20,000. He has not provided a statement to Mr. Hanson of staff and legal counsel time spent already but an invoice has not been formally sent.

Citizen Member Winebarger would like to amend the resolution to include the unpaid expenses. The point that she is trying to make is that there are significant concerns about how much good faith is really being shown and if the invoice for \$8,000 was delivered in December and those amounts were legitimately charged from statutory fees that the EQB is entitled to, she doesn't understand why the payment has not been made. This is just one more example of questionable good faith.

Legal Counsel Wagenius suggested the place that it fits most easily into the resolution is the first paragraph that it would in fact be adding a condition to the effectiveness of the order. Adding the amendment before the semicolon at the end of the first paragraph something like—and pay the approximate \$8,000 to the agency for expenses as indicated on a statement given to the City in December.

Citizen Member McCarville then suggested that if you put a dollar amount in the resolution that HUC might think that is all that is owned.

Commissioner Merriam stated that he has concerns about payment in the resolution because it may look like quid pro quo, that if HUC gives the EQB the money we will rescind the permit. In my opinion we have adequate remedies to deal with the unpaid expenses.

Legal Counsel Wagenius stated that Citizen Member Bloomberg raised an issue about the effect of the resolution and order that would be issued as a result of an affirmative vote on the resolution. That issue is already taken care of in Finding #9 where it stated that both the City and the EQB recognize that both parties reserve all legal arguments in the event new litigation becomes necessary to resolve the differences between the parties. If that doesn't give Member Bloomberg or other members of the Board enough comfort then you could add to the resolution an additional paragraph after the last be it resolved which would say something like be it resolved neither this order or this stipulation of dismissal constitutes a resolution of any issues other than rescission of the order to suspend the permit and dismissal of the appeal.

Commissioner Corrigan stated that she agreed that it is a good idea to state affirmatively the language our legal counsel just stated. The Commissioner then moved to amend the existing resolution to reflect the verbiage that Mr. Wagenius gave us.

Citizen Member Bloomberg seconded that amendment to the resolution but he has an amendment he would like to add to the existing resolution. He would like to have something along the lines of "The Board reaffirms it's commitment to obtain the City's full compliance with the permit and direct staff to vigorously pursue enforcement of the terms of the permit in any way necessary up to and including litigation

Commissioner Corrigan seconded Citizen Member Bloomberg's amendment to the resolution. The Commissioner wanted to clarify how the Board got here and where the Board goes after. This resolution is simply one of the steps that need to be taken when we initially revoked the permit to find the right tool to send the message to the HUC that what they were doing was not okay with the EQB and that the HUC should do what they said they would do. The revocation of the permit was not the right tool and that doesn't mean that from her perspective and the Board's perspective that we will not pursue the right tool to get HUC to fulfill their commitments. She wants everyone in the room to understand that we will pursue every appropriate avenue to bring satisfaction to the folks.

Legal Counsel Wagenius stated that the resolutions by Commissioner Corrigan and Citizen Member Bloomberg are different enough that they should be in separate resolutions. The resolutions will consecutively follow the three be it resolves with Commissioner Corrigan's number four and Citizen Member Bloomberg's number five.

4. BE IT FURTHER RESOLVED, that neither this order nor the stipulation of dismissal constitutes a resolution of any issues other than rescission of this order suspending the permit and dismissal of the appeal; and

5. BE IT FURTHER RESOLVED, that the Board reaffirms it's commitment to obtain the City's full compliance with the permit and direct staff to vigorously pursue enforcement of the terms of the permit in any way necessary up to and including litigation.

Chair Schroeder asked for discussion, there being none took a voice vote. The additions to the resolution carried.

Counsel Wagenius added the stipulation of voluntary dismissal that was drafted by staff and Mr. Dietzen has executed includes language that the Board should understand. The language states: “therefore, the parties hereby agree and stipulate to the entry of an order by the Court of Appeals dismissing the above captioned appeal pursuant to Minnesota Rule of Civil Appellate procedure 142.01 and directing the parties to bear their own costs, attorney fees and any other fees in this matter. The parties request approval of the dismissal by this Court.

Members of this Board or others could look at this language and think this waives or excuses the fees we have brought up today. This language is not meant to cover the fees that are payable by the City to the EQB.

Chair Schroeder asked for a role call vote on the amended resolution before the Board.

**PROPOSED RESOLUTION
REINSTATING AMENDED PIPELINE ROUTING PERMIT
ISSUED TO HUTCHINSON UTILITIES COMMISSION
AND REVOKING SUSPENSION ORDER ISSUED
ON DECEMBER 18, 2003**

BE IT RESOLVED, that the proposed Findings of Fact, Conclusions and Order Reinstating Permit and Revoking Suspension Order (MEQB Docket 02-33-PRP-HUC) are hereby adopted, upon condition that the City of Hutchinson execute a voluntary stipulation of dismissal pursuant to Minnesota Rules of Civil Appellate Procedure 142.01; and

BE IT FURTHER RESOLVED, that the Chair of the Environmental Quality Board is hereby authorized to execute the Order Reinstating Permit and Revoking Suspension Order on behalf of the Board; and

BE IT FURTHER RESOLVED, that counsel for the Environmental Quality Board is hereby authorized to execute on behalf of the Environmental Quality Board the voluntary stipulation of dismissal executed by counsel for the City of Hutchinson and to take all actions necessary to obtain approval of the Court of Appeals of the dismissal of the appeal; and

BE IT FURTHER RESOLVED, that the Order Reinstating Permit and Revoking Suspension Order shall become effective upon approval of the stipulation of dismissal by the Court of Appeals.

BE IT FURTHER RESOLVED, that neither this Order nor the Stipulation of Dismissal constitutes a resolution of any issues other than rescission of this order suspending the permit and dismissal of the appeal; and

BE IT FURTHER RESOLVED, that the Board reaffirms it’s commitment to obtain the City’s’ full compliance with the permit and direct staff to vigorously pursue enforcement of the terms of the permit in any way necessary up to and including litigation.

Chair Schroeder stated the vote was 10 to 2 the amended resolution passed.

Citizen Member Bomier moved that a summary of the Hutchinson Utility Commission matter be shared in writing with the State Auditor.

Citizen Member McCarville seconded the motion

Citizen Member Mellen agreed with Member Bomier stating that fair value be given to the landowners. When the Auditor reviews this matter, if we pursue this as litigation this will set precedents on our decision making in the future.

**RESOLUTION OF THE
MINNESOTA ENVIRONMENTAL QUALITY BOARD**

February 19, 2004

BE IT RESOLVED that the EQB refer the matter of the Hutchinson Pipeline to the State Auditor and request that the State Auditor review the entire matter.

Chair Schroeder asked if there was other discussion on matter, there being none then called for a voice vote on the motion. The motion carried.

VIII. Amendments to Pipeline Statutes – Chapter 116I

Mr. Mitchell, EQB Staff summarized that current events has prompted staff to draft legislation for the Board to consider that would allow further clarification of issues regarding pipeline permitting. The draft legislation is in your packets and if the Board adopts or endorses the legislation then staff would be directed to pursue enactment in the legislative process. We would continue to assert that we have this authority but issues have arisen and it makes sense to seek some clarifying amendments.

Citizen Member Winebarger asked about the effective date and whether there will be any retroactive aspect to the legislation.

Mr. Mitchell responded that the effective date would be the day after enactment. He interpreted the statute to say that if there had been violations in the past, then here is the authority that the EQB could then assert for those passed violations. If you want to pursue this issue further perhaps the correct forum would be the legislative committees.

Director Dunn asked if we are proposing this legislation during this legislative session.

Mr. Mitchell responded with the Board guidance we would move forward with these clarifying amendments during this legislative session. We would proceed expeditiously on this matter.

Citizen Member McCarville asked if there was a way to incorporate crop loss or value into the clarifying amendments.

Mr. Mitchell responded that there is nothing in the draft legislation that would cover the determination of crop loss other than the statutory goal to restore the land to the condition it was in prior to construction.

Mr. Sullivan stated that the legislation is simply focused on the ambiguities of the EQB fundamental authorities to issue permits and enforce conditions around the permits. As we move forward with the legislative process, very often amendments are offered and issued and language gets changed. As the legislation moves forward we would work with the legislative staff as the process unfolds to resolution.

Citizen Member Winebarger suggested that in the second line of the resolution the word clarify to ratify would strengthen the draft legislation.

Chair asked for discussion, there were none and that since there was no discussion about the word change that matter is dropped. He asked for a motion on the resolution.

Citizen Member Winebarger made a motion to adopt the resolution, Director Dunn seconded.

Proposed Resolution

BE IT HEREBY RESOLVED that the Minnesota Environmental Quality Board finds that amendment of Minn. Stat. s^S1161.015 to clarify the authorities of the Board is appropriate and directs the Chair to act on behalf of the Board to conduct such activities as are necessary to bring this matter to the attention of the Legislature and to adopt legislative changes in accordance with the suggested changes included in the draft language prepared by the staff.

Chair Schroeder announced a roll call vote on the resolution, the vote passed 11 to 0 and the resolution carried.

IX. Environmental Review Mandatory Categories Study

Mr. Scherkenbach summarized the two documents received by the members. The first document is the sheet that lists the questions raised at a February 6, 2004 meeting of the Stakeholders' group. What should be brought to your attention is that there were fundamental issues raised at that meeting on the study scope, intent or purpose and how the study moves forward. The Stakeholders' group will meet the second week of March and he would like to present ideas for the next steps for the study. He has made it very clear to them that he will provide timely information, ask for feedback on proposed ideas on he intends to proceed and draft products but that the Board will have final say on the study. My recommendation to the Board on Question 1 is to focus on the mandatory categories that already exist and my recommendation on Question 3 is not getting involved in the designation of the responsible governmental unit issues. The Board should keep me advised as to whether there are any additional thoughts, problems or issues that you think this study should focus.

Commissioner Corrigan agrees with Mr. Scherkenbach's responses to Questions 1 and 3 from the stakeholder's group meeting. Previous efforts have tried to focus on a larger examination of the environmental review and have gotten mired in detail.

Citizen Member Bomier suggested that the issue to him that is significant is the different units of governments and thresholds and how staff handles those issues. The medium here is part of the message so that we have standard that we can sell to environmental review clients.

Mr. Scherkenbach stated that when we go to the next level and decide which categories to focus next, the process issues become important. If there are other issues that Board Members identify, please contact me. The next steps will be the analysis of the activity on EAWs and EISs over the last four years and how to bring in the stakeholders that were or might have been participants in the activity. What were the successes, barriers, timing, costs and process? This step will take the longest because we need to consistently define activity.

Chair Schroeder asked for a motion to adjourn. Commissioner Corrigan moved and Citizen Member Bloomberg seconded. Meeting was adjourned.