



AGENDA

BOARD OF ENVIRONMENTAL REVIEW

THURSDAY, MARCH 29, 2007

METCALF BUILDING, ROOM 111

1520 EAST SIXTH AVENUE, HELENA, MONTANA

BOARD MEMBERS WILL BE PRESENT VIA TELECONFERENCE.

NOTE: Individual agenda items are not assigned specific times. For public notice purposes, the Board will begin the meeting no earlier than the time specified. However, the Board might not address the specific agenda items in the order they are scheduled. Persons with disabilities, who need an accommodation in order to participate in this meeting, should contact the Board Secretary at (406) 444-2544.

9:00 A.M.

I. ADMINISTRATIVE ITEMS

A. REVIEW AND APPROVE MINUTES

1. January 26, 2007, regularly scheduled Board meeting.

[Draft Minutes](#)

II. BRIEFING ITEMS

A. CONTESTED CASE UPDATE

1. Cases assigned to Hearing Officer Katherine Orr
 - a. **In the matter of CR Kendall Corporation's request for a hearing to appeal DEQ's decision to deny a minor permit amendment under the Metal Mine Reclamation Act, BER 2002-09 MM.** The Hearing Examiner, upon request of the parties, has vacated the hearing schedule and placed the case on hold until further notice of one or more of the parties or upon initiative of the Hearing Examiner.
 - b. **In the matter of Violations of the Water Quality Act by ASARCO, Inc., BER 2005-09 WQ.** The Board received a request for hearing regarding an *Administrative Penalty Order* issued by DEQ for the alleged failure to pay annual permit fees on the MGWPCS permit for discharges from the Paymaster Mine Adit located in Lewis and Clark County. DEQ claims ASARCO should have paid permit fees for a permit that ASARCO argues should have been terminated in 2002. The Hearing Examiner issued a Stay of Proceedings on January 19, 2006, upon the notification of the Department of the bankruptcy proceeding.
 - c. **In the matter of the issuance of the Air Quality Permit for the Roundup Power Project, Permit No. 3182-00, BER 2003-04 AQ.** On June 6, 2005, the Montana Supreme Court remanded an appeal to the District Court. On June 15, 2005, the district Court remanded the case to the Board. The Board was to decide whether to make a new decision based on the record or to receive additional evidence. On July 29, 2005, the Board issued an *Order Staying Contested Case Proceedings* indefinitely. On August 24, 2005, Hearing Examiner Katherine Orr issued an *Assumption of Jurisdiction* referencing the *Order Staying Contested Case Proceedings*.
 - d. **In the matter of the request for hearing of Kountry Korner Enterprises, d/b/a Kountry Korner Café, regarding violations of the Montana Public Water Supply Laws, BER 2006-09 PWS.** The Board received the request for hearing March 27, 2006. By Stipulation, the proceedings were stayed until December 20, 2006. On December 21, the parties filed a *Stipulation For Continuing Stay Of Board Proceedings*. By order dated January 3, 2007, the case is stayed until March 18, 2007.
 - e. **In the matter of the Montana Environmental Information Center's appeal of Air Quality Permit No. 3182-01, issued for the Roundup Power Project, BER 2005-21 AQ.** The parties have requested a hearing in January 2007. Bull Mountain filed a *Motion for Summary Judgment*

on October 27, 2006. MEIC filed a *Motion for Summary Judgment* on October 30, 2006. On November 9, 2006, Bull Mountain filed the *Permittee Bull Mountain's Brief in Opposition to MEIC's Motion for Summary Judgment*. On November 13, 2006, the Department filed the *Department of Environmental Quality's Brief in Answer to Motions for Summary Judgment*. On November 27, 2006, the Montana Environmental Information Center filed a *Reply Brief in Support of its Motion for Summary Judgment* and the Permittee Bull Mountain filed a *Reply Brief in Support* of its motion. On November 10, 2006, MEIC filed a *Response Brief in Opposition to Permittee Bull Mountain's Motion for Summary Judgment*. On January 9, 2007, an order vacating the hearing date until disposition on the motions was entered.

- f. **In the matter of the appeal by Willow Creek Sewer District regarding violations of the Water Quality Act, BER 2006-13 WQ.** The Board received the appeal May 23, 2006. The parties have requested until January 31, 2007, to either submit a settlement agreement or a proposed schedule. Upon a request for an extension, the parties have until April 13, 2007, to submit a hearing schedule or reach settlement.
- g. **In the matter of the Notice of Appeal and Request for Hearing of the Citizens Awareness Network, Women's Voices for the Earth, and the Clark Fork Coalition regarding DEQ's approval of the Thompson River CO-Gen, LLC, Air Quality Permit No. 3175-04, BER 2006-18 AQ.** The Board received the appeal via email on September 3, 2006. On November 30, the DEQ filed a *Motion For Partial Dismissal For Failure To State A Claim And Motion For Partial Dismissal For Lack Of Subject Matter Jurisdiction*. On December 19, the Petitioner's filed a *Motion And Brief For Leave To File Amended Affidavit* and a *Response To Opposition To Motion To Dismiss*. On January 2, 2007, the DEQ filed a *Brief In Opposition To Petitioner's Motion For Leave To File Amended Affidavit* and a *Reply Brief In Support Of Motion For Partial Dismissal For Failure To State A Claim And Motion For Partial Dismissal For Lack Of Subject Matter Jurisdiction*. On January 2, 2007, Thompson River CO-Gen also filed a *Brief In Opposition To Petitioner's Motion For Leave To File Amended Affidavit*. On February 2, 2007, the Board issued an *Order on Motion for Leave to File Amended Complaint* (denied) and an *Order on Motion for Partial Dismissal for Failure to State a Claim and for Lack of Subject Matter Jurisdiction* (denied in part and granted as to the constitutional claims). There are pending *Motions in Limine* filed by the Department and Thompson River Co-Gen, a *Motion for Partial Dismissal For Failure to State a Claim or Alternatively a Motion in Limine* filed by Thompson River Co-Gen, a *Motion for Partial Summary Judgment* filed by the Department of Environmental Quality and notices concerning the absence of opposition to pending motions and requests for extension filed by the Petitioners.
- h. **In the matter of violations of the Metal Mine Reclamation Act by Marty J. and Sinda M. Puryer, as individuals and d/b/a Paul Kurth Mining, for the failure to post reclamation bond, BER 2006-21 MM.** The Board received the request for hearing on September 20, 2006. Standing Interim Hearing Examiner Katherine Orr issued a *First Prehearing Order* on November 14, 2006. The parties are working on a prehearing schedule. A *First Scheduling Order* was issued on January 4, 2007. A hearing is set for July 30, 2007.
- i. **In the matter of the appeal by Dan Fuchs, Broken 7 Subdivision, regarding Gallatin City-County Health Department's denial of a request to change a provision of the original certificate of subdivision approval, BER 2006-22 SUB.** The Board received the appeal on September 27, 2006. Standing Interim Hearing Examiner Katherine Orr issued a *First Prehearing Order* on October 31, 2006. On December 28, 2006, the DEQ submitted a *Proposed Schedule*. A *Scheduling Order* was issued on January 25, 2007. A hearing is set for July 23, 2007.
- j. **In the matter of the appeal by the City of Bozeman regarding the DEQ's final decision for MPDES Permit No. MT0022608, BER 2006-23 WQ.** The Board received the appeal on September 29, 2006. Standing Interim Hearing Examiner Katherine Orr issued a *First Prehearing Order* on October 31, 2006. On November 20, 2006, the DEQ submitted a request

for extension of time to file a proposed schedule. Hearing Examiner Katherine Orr granted the request on December 15, 2006, giving the parties until January 19, 2007, to file a proposed schedule. The parties were granted an extension until April 6, 2007, to file a proposed schedule for the conduct of prehearing matters.

- k. **In the matter of violations of the Montana Strip and Underground Mine Reclamation Act by BMP Investments, Inc., at the Bull Mountains Mine #1, BER 2006-24 SM.** The Board received the request for hearing on October 10, 2006. Standing Interim Hearing Examiner Katherine Orr issued a *First Prehearing Order* on October 31, 2006. The parties submitted a *Joint Proposed Prehearing Schedule* on November 16, and Hearing Examiner Katherine Orr issued a *First Scheduling Order* on December 15, 2006. This matter is set for hearing on July 17, 2007.
- l. **In the matter of the appeal by the Butte-Silver Bow Public Works Department, regarding Final MPDES Permit No. MT0022012, BER 2006-27 WQ.** The Board received the request for hearing on November 1, 2006. A *First Prehearing Order* was issued by Hearing Examiner Katherine Orr on November 13, 2006. On November 22, 2006, the DEQ requested an extension of time for filing a proposed schedule to allow the parties to explore settlement possibilities. By order dated January 26, 2007, the parties were given until February 27, 2007, in which to attempt to reach settlement or file a proposed prehearing and hearing schedule.
- m. **In the matter of violations of the Water Quality Act and the Public Water Supply Laws by Brady County Water and Sewer District, BER 2006-29 WQ.** The Board received the appeal on November 13, 2006. Hearing Examiner Katherine Orr issued a *First Prehearing Order* on December 15, 2006. On December 20, 2006, the DEQ filed a request for a 60-day extension of time to file a proposed schedule in order to allow the parties an opportunity to conduct settlement discussions. By order dated January 3, 2007, the parties were given until March 10, 2007, to attempt to reach settlement or file a proposed pre-hearing and hearing schedule.
- n. **In the matter of violations of the Montana Strip and Underground Mine Reclamation Act by Westmoreland Mining, LLC, d/b/a Western Energy Co., BER 2006-30 SM.** The Board received the request for hearing on December 15, 2006.
- o. **In the matter of violations of the Water Quality Act at Cenex Harvest States fueling facility on Highway 83, Condon, BER 2006-28 WQ.** The Board received the request for hearing on November 6, 2006. Hearing Examiner Katherine Orr issued a *First Prehearing Order* on December 15, 2006. The Appellant, Cenex, Harvest States, filed a *Withdrawal of Appeal* on February 19, 2007. An *Order of Dismissal* is prepared for the Board.

B. CASES IN LITIGATION

1. **In the matter of the Petition for Review of Hazardous Waste Final Permit No. MTHWP-03-01 issued to Flying J Petroleum, Inc. (BER 2003-14 HW).** Flying J requested a hearing under the Montana Hazardous Waste Act to review the final decision of DEQ to issue a Hazardous Waste Final Permit to Flying J for its former refinery located near Cut Bank. A *Petition for Judicial Review* was filed by Flying J on August 18, 2006. On September 13, 2006, the Board Secretary mailed a certified copy of the record to the Ninth Judicial District Court. The certified record was received by the court September 14, 2006. On October 3, 2006, the Board Secretary found that the exhibits to the Petition for Review had been omitted from the original submission and sent a certified copy of the exhibits to the court. On September 27, 2006, the Board filed a *Motion to Dismiss the Board*. Flying J filed a response opposing the Motion to Dismiss on October 12, 2006. On November 9, 2006, the Board filed a *Reply in Support of Motion to Dismiss*.

III. ACTION ITEMS

A. FINAL ACTION ON APPEALS

1. **In the matter of the request for hearing of the Teton County Airport Commission regarding violations of the Montana Underground Storage Tank Act at the Choteau Airport, BER 2006-15 UST.** The Board received the request for hearing June 2, 2006. On October 11, 2006, the Department filed a *Motion for Partial Summary Judgment with Supporting Brief*. No response was filed by the Petitioner. The parties signed a *Stipulation to Dismiss* on February 8, 2007, with an *Administrative Order on Consent* as an attachment. An order to dismiss the case will be presented for the Board's approval.
2. **In the matter of the request for hearing of U.S. Customs and Border Protection regarding a notice of violation concerning the Del Bonita Border Station, BER 2006-16 PWS.** The Board received the request for hearing June 8, 2006. A *Scheduling Order* was issued on September 27, 2006. On November 22, 2006, the parties filed a *Stipulation For Stay Of Board Proceedings*. The parties signed a *Stipulation to Dismiss* on January 16, 2007, and an *Administrative Order On Consent* on January 3, 2007. An order to dismiss the case will be presented for the Board's approval.
3. **In the matter of violations of the Montana Underground Storage Tank Act at Elliston Store, BER 2006-20 UST.** The Board received a request for hearing on September 6, 2006. A *Scheduling Order* was issued by Standing Interim Hearing Examiner Katherine Orr on September 27, 2006, and again on October 4, 2006, to effect a minor correction. On January 30, 2007, the parties signed a *Stipulation for Dismissal*. An order to dismiss the case will be presented for the Board's approval.

B. NEW CONTESTED CASE APPEALS

1. **In the matter of violations of the Clean Air Act of Montana by Flathead County, BER 2007-01 AQ.** The Board received the request for hearing on February 2, 2007. A *First Prehearing Order* was issued March 14, 2007.
2. **In the matter of the appeal by the Missoula County Public Works Department regarding MPDES Permit No. MT0020168 and DEQ's response to public comments and submitted documents regarding the permit.** The Board received the appeal February 16, 2007. On March 14, 2007, Ms. Orr issued a *First Prehearing Order*.
3. **In the matter of the appeal by Jill and Joseph Slevin regarding Gallatin County's denial of a request for waiver to build a home.** The Board received the appeal on March 21, 2007.

IV. GENERAL PUBLIC COMMENT

Under this item, members of the public may comment on any public matter within the jurisdiction of the Board that is not otherwise on the agenda of the meeting. Individual contested case proceedings are not public matters on which the public may comment.

V. ADJOURNMENT