



P. O. Box 200901 • Helena, MT 59620-0901 • (406) 444-2544 • Website: www.deq.state.mt.us

AGENDA

BOARD OF ENVIRONMENTAL REVIEW

FRIDAY, MAY 29, 2009

METCALF BUILDING, ROOM 111

1520 EAST SIXTH AVENUE, HELENA, MONTANA

NOTE: Individual agenda items are not assigned specific times. For public notice purposes, the meeting will begin 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) 444-6701.

9:00 A.M.

I. ADMINISTRATIVE ITEMS

A. REVIEW AND APPROVE MINUTES

1. March 6, 2009, teleconference Board meeting. [MINUTES](#)
2. March 27, 2009, regularly scheduled Board meeting. [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.** An EIS on the mine closure plan is on hold until collection of water quality data is completed. Once the data has been collected, the EIS will be completed and the case may become moot. The case is stayed pending completion of the EIS. The parties anticipate completion of the EIS in 2009.
 - b. **In the matter of Violations of the Water Quality Act by ASARCO, Inc., BER 2005-09 WQ.** A *Stay of Proceedings* was issued by the Hearing Examiner on January 19, 2006, upon notification by the Department of the bankruptcy proceeding.
 - c. **In the matter of the appeal by Southern Montana Electric (SME) regarding its Air Quality Permit No. 3423-00 for the Highwood Generation Station, BER 2007-06 AQ.** The Department of Environmental Quality filed a status report on September 19, 2008, requesting a stay until the EPA evaluated a reference test method for condensable particulate matter and SME filed a status report on September 19, 2008, requesting a stay of 6 months. An *Order Granting Stay of Proceedings* was issued by the Hearing Examiner on December 19, 2008. The stay is in place until March 19, 2009. On April 2, 2009, the Board received an *Unopposed Motion of Petitioner Southern Montana Electric Generation and Transmission Cooperative, Inc., For an Additional Stay of Proceedings*. The request in the motion is to delay proceedings until January 1, 2010. On May 18, 2009, the Hearing Examiner granted the stay and requested a status report on September 15, 2009.
 - d. **In the matter of the appeal by Eastgate Water and Sewer Association of Helena Sand and Gravel, Inc.'s Opencut Permit No. HSG-017, BER 2008-08 OC.** (The Board has retained jurisdiction on this case to hear contested case matters.) On March 25, 2009, the parties filed a *Second Proposed Prehearing Schedule*. Hearing Examiner Katherine Orr issued an *Order Adopting Second Proposed Prehearing Schedule* on April 2, 2009.

- e. **In the matter of violations of the Montana Water Quality Act by Wilderness Club, LLC., at the Wilderness Club Eureka, Lincoln County, Montana, BER 2008-13 WQ.** (The Board has retained jurisdiction on this case to hear contested case matters.) On April 6, 2009, Hearing Examiner Katherine Orr issued a *Second Scheduling Order*. A telephonic prehearing conference is scheduled for December 4, 2009, and the hearing is scheduled for December 11, 2009, before the Board. On May 14, 2009, the Wilderness Club filed a *Motion for Summary Judgment*.
 - f. **In the matter of the appeal and request for hearing by Montana Environmental Information Center, Citizens for Clean Energy, Sierra Club, and National Parks Conservation Association of the Southern Montana Electric Generation and Transmission Cooperative Highwood Generating Station Air Quality Permit No. 3423-01, BER 2008-23 AQ.** (The Board has retained jurisdiction on this case to hear contested case matters.) On February 17, 2009, Respondent-Intervenor Southern Montana Electric Generation and Transmission Cooperative, Inc. (SME) filed a *Motion to Stay Proceedings* until June 17, 2009. On February 17, 2009, the Appellants filed a *Response to SME Motion to Stay* supporting the stay on certain conditions. On February 26, 2009, Respondent-Intervenor, SME filed a *Reply*. On March 11, 2009, Hearing Examiner Katherine Orr issued an *Order Granting Stay* until June 17, 2009.
 - g. **In the matter of violations of the Montana Water Quality Act by Jim Gilman Excavating, Inc., at Augusta-South, Lewis and Clark County, BER 2008-24 WQ.** On March 20, 2009, after consultation with the Appellant, the DEQ filed a *Request for Extension*. Hearing Examiner Katherine Orr issued a First Order Granting Extension of Time on April 2, 2009, giving the parties until June 23, 2009, to file a proposed prehearing schedule or settlement documents.
 - h. **In the matter of violations of the Metal Mine Reclamation Act by Saturday Sunday, LLC. Deer Lodge County, BER 2009-02 MM.** The parties submitted a proposed pre-hearing and hearing schedule on February 26, 2009. Hearing Examiner Katherine Orr issued a *First Scheduling Order* on March 19, 2009. A contested case hearing has been set for June 19, 2009.
 - i. **In the matter of violations of the Montana Public Water Supply Laws by Hugh Black-ST. Mary Enterprises, Inc. at the ST. Mary Lodge and Resort Public Water Supply System, PWSID #MT0002754, ST. Mary, Glacier County, BER 2009-04 PWS.** The Board received the request for hearing on February 3, 2009. On February 6, 2009, Standing Interim Hearing Examiner Katherine Orr issued a *First Prehearing Order*.
 - j. **In the matter of the appeal by the River Rock County Water and Sewer District regarding its MDEQ Permit No. MTX000147 for its wastewater treatment facility, BER 2009-05 WQ.** The River Rock County Water and Sewer District filed a Second Unopposed Motion for Extension of Time on April 8, 2009. On May 7, 2009, Hearing Examiner Katherine Orr issued a *Second Order Granting Extension of Time* allowing the parties until June 1, 2009, to file a proposed hearing schedule or submit settlement documents.
 - k. **In the matter of violations of the Montana Underground Storage Tank Act by Flying J Inc. at Flying J Travel Plaza, 112000 Browns Gulch Road, Butte, Silver Bow County, BER 2009-06 UST.** Hearing Examiner Katherine Orr issued the *First Prehearing Order* on March 19, 2009. The Board received a *Proposed Prehearing Schedule* from the parties on April 2, 2009. A Scheduling Order was issued on May 18, 2009. A hearing is set for September 21, 2009.
2. Cases in litigation
- a. **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.** On December 22, 2008, the District Court issued an Order Denying Petitioners' Motion for Summary Judgment, affirming the February 2, 2007, order of the hearing officer concerning the denial of Petitioner's Motion for Leave to File an Amended Affidavit and affirming the order of the Board of June 11, 2008. The District Court also denied Intervenor's

(Thompson River Power) Motion to Dismiss. A Notice of Entry of Judgment was filed on January 5, 2009, by the Respondent-Intervenor, Thompson River Power. Petitioners filed a Notice of Appeal to the Montana Supreme Court on January 30, 2009. The Petitioners obtained an extension of the time in which to file their opening brief, and their brief is due on May 22, 2009. Briefs of Intervenor DEQ and TRP, and the Board, if the Board participates in the appeal, will be due within 30 days after service of the Petitioners' brief.

- b. **In the matter of the appeal by Citizens for Clean Energy (CCE) and Montana Environmental Information Center (MEIC) regarding Air Quality Permit No. 3423-00 issued to Southern Montana Electric (SME) for its Highwood Generating Station, BER 2007-07 AQ.** On January 12, 2009, SME filed a Request for Oral Argument, requesting that the district court schedule oral argument for sometime after January. On February 20, 2009, CCE and MEIC filed *Petitioners' Second Notice of Supplemental Authority*, attaching new EPA Administrator Lisa Jackson's February 17, 2009, letter to Sierra Club, granting its January 6, 2009, amended petition for reconsideration of EPA's December 18, 2008, memorandum. On March 18, 2009, SME filed a Motion to Postpone Setting Oral Argument, requesting that the court not take action on SME's motion for oral argument until after June 17, 2009, which would coincide with the stay of proceedings granted to SME by the Board's hearing examiner in the air quality permit contested case pending before the Board. SME stated in its motion that it was requesting the stay of the district court proceeding for the same reason it requested a stay of the contested case proceeding, which was to allow its application for an air quality permit for a gas-fired power plant to go forward without further litigating its permit for a coal-fired power plant permit during the same timeframe. CCE and MEIC opposed SME's stay request; DEQ did not. On March 20, 2009, the district court granted SME's motion to stay scheduling of oral argument.

B. LEGISLATION WRAP-UP

III. ACTION ITEMS

A. INITIATION OF RULEMAKING AND APPOINTMENT OF HEARING OFFICER

The Department will propose that the Board concur in its recommendation to initiate rulemaking to:

1. Amend ARM 17.50.403 and 17.50.410 pertaining to the correction of outdated citations and references to solid waste rules that are currently being proposed for repeal in a Department rulemaking, the addition of a definition of "contaminated soil," and minor editorial revisions that are not intended as substantive changes. No hearing is contemplated; therefore, the appointment of a hearing officer is not required. [ATTACHMENT](#)
2. Amend ARM 17.30.702, 17.36.101, 17.36.102, 17.36.103, 17.36.104, 17.36.323, 17.36.345, 17.36.911, 17.36.912, 17.36.914, 17.36.916, 17.36.918, 17.36.922, 17.38.101, 17.55.102 and adopt New Rules I and II pertaining to Department Circular DEQ-4 and gray water reuse. [ATTACHMENT](#)
3. Amend ARM 17.8.501, 17.8.504, 17.8.505, and 17.8.514 for the annual adjustment of air quality operation and open burning fees. [ATTACHMENT](#)
4. Update the Air Quality Incorporation by Reference Rules at ARM 17.8.102, 17.8.302, 17.8.767, 17.8.802, 17.8.822, 17.8.902, and 17.8.1002 (annual update and housekeeping changes). [ATTACHMENT](#)

B. REPEAL, AMENDMENT OR ADOPTION OF FINAL RULES

1. In the matter of the adoption of model organizational rulemaking and contested case rules as revised by the Secretary of State and Attorney General pursuant to HB 70 of the 2007 Legislature, which transferred certain model rules from the Attorney General to the Secretary of State. The Department proposes the Board adopt the rules as published in the Notice of Proposed Amendment. [ATTACHMENT](#)

C. NEW CONTESTED CASE APPEALS

1. **In the matter of the request for hearing by Sandy Rose regarding the Notice of violation of the Montana public Water Supply Laws by Canyon Ferry Mansion, Inc., at Canyon Ferry Mansion, PWSID #MT0004387, Helena, Lewis and Clark County, BER 2009-08 PWS.** The Board received the request for hearing on April 30, 2009. A First Prehearing Order was issued on May 18, 2009. The Board may appoint a permanent hearing examiner or decide to hear the matter. [ATTACHMENT](#)
2. **In the matter of the Notice of Violations of the Montana Water Quality Act by North Star Aviation, Inc. at Ravalli County Airport, Ravalli County, BER 2009-10 WQ.** The Board received the request for hearing on May 13, 2009. The Board may appoint a permanent hearing examiner or decide to hear the matter. [ATTACHMENT](#)
3. **In the matter of violations of the Clean Air Act of Montana by Sheep Mountain Properties, LLC, Jefferson County, BER 2009-11 AQ.** The Board received the request for hearing from Joseph Schmaus on May 20, 2009. The Board may appoint a permanent hearing examiner or decide to hear the matter. [ATTACHMENT](#)

D. FINAL ACTION ON CONTESTED CASES

1. **In the matter of violations of the Hazardous Waste Act by the Three W's, Inc., and Montana Waste Systems, Inc., BER 2008-07 HW (MT Waste Systems).** On April 24, 2009, the Board received a *Stipulation for Dismissal* signed by the parties. An *Order of Dismissal* will be presented for signature by the Chairman. [ATTACHMENT](#)
2. **In the matter of violations of the Hazardous Waste Act by the Three W's, Inc., and Montana Waste Systems, Inc., BER 2008-09 HW (Three W's).** (The Board has retained jurisdiction on this case to hear contested case matters.) On April 24, 2009, the parties filed a *Stipulation for Dismissal*. An *Order of Dismissal* will be presented for signature by the Chairman. [ATTACHMENT](#)
3. **In the matter of the appeal by the USDA Forest Service Northern Region of the air quality major open burning permit fee for calendar year 2009, BER 2009-01 AQ.** On April 13, 2009, the Board received a *Stipulation by Department of Environmental Quality and USDA Forest Service for Dismissal of Contested Case*. An *Order of Dismissal* will be presented for signature by the Chairman. [ATTACHMENT](#)
4. **In the matter of violations of the Opencut Mining Act by Daniels County at the D. Hanrahan Pit, Daniels County, BER 2009-03 OC.** On May 6, 2009, the Board received a *Stipulation to Dismiss*. An *Order of Dismissal* will be presented for signature by the Chairman. [ATTACHMENT](#)
5. **In the matter of the request for hearing by William Gross regarding the notice of termination of his MDEQ MPDES Suction Dredge General Permit No. MTG70267, BER 2009-07 WQ.** The Board received the request for hearing on April 28, 2009. On May 12, 2009, the Board received a letter from Mr. Gross indicating he had resolved the issue and was dropping his appeal. An *Order of Dismissal* will be presented for signature by the Chairman. [ATTACHMENT](#)
6. **In the matter of the Notice of Violation of the Montana Underground Storage Tank Act by Amsden, LLC at The Corner Store, Powder River County, Montana, BER 2009-09 UST.** The Board received the request for hearing on May 5, 2009. An *Order of Dismissal* will be presented for signature by the Chairman. [ATTACHMENT](#)

IV. GENERAL PUBLIC COMMENT

- A. 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