



Montana Board of Environmental Review

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AGENDA

BOARD OF ENVIRONMENTAL REVIEW

FRIDAY, DECEMBER 11, 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. October 2, 2009, Board meeting. [ATTACHMENT](#)

B. PROCEDURAL ITEMS

1. Board authority when a case is being dismissed under Rule 41(a).
2. Dismissal of cases with prejudice vs. without prejudice.

C. SET 2010 BER MEETING DATES [ATTACHMENT](#)

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 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.) The hearing had been scheduled for December 11, 2009, but the scheduling order has been vacated at the request of the parties because a settlement has been reached. This case will come before the Board for final action (dismissal) in 2010.
 - d. **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 *Appellant's Motion to Vacate Scheduling Requirements & to Continue Hearing* on October 13, 2009. Hearing Examiner Katherine Orr issued an *Order Vacating Scheduling Order* on November 6, 2009, giving the parties until January 15, 2010, to provide a status of the case or propose a new schedule.

- e. **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.** On July 15, 2009, the Department submitted a *Proposed Schedule*. On December 2, 2009, a *Scheduling Order* was issued by the Hearing Examiner with a hearing date of January 25, 2010.
- f. **In the matter of violations of the Clean Air Act of Montana by Sheep Mountain Properties, LLC, Jefferson County, BER 2009-11 AQ.** On August 25, 2009, the Department filed *The Department's Motion to Compel and for Sanctions*. No response was filed by Sheep Mountain. On September 21, 2009, the Board received *The Department's Motion to Vacate Schedule Until After Ruling on Discovery Motion*. Hearing Examiner Katherine Orr issued an *Order Vacating Scheduling Order* on November 5, 2009, and an *Order Granting Motion to Compel* on November 6, 2009.
- g. **In the matter of violations of the Montana Septage Disposal and Licensure Laws by Steven Kunkel, d/b/a Montana Septic Service, at Great Falls Wastewater Treatment Plant, Great Falls, Cascade County, BER 2009-17 SDL.** On October 13, 2009, the Department filed a *Motion to Dismiss & Supporting Brief*. Hearing Examiner Katherine Orr issued an *Order Denying Dismissal* on November 12, 2009. A *First Prehearing Order* was issued on December 2, 2009.
- h. **In the matter of violations of the Montana Underground Storage Tank Act by Juniper Hill Farm, LLC, at Lakeside General Store, Lewis and Clark County, BER 2009-18 UST.** Hearing Examiner Katherine Orr issued the First Prehearing Order on November 10, 2009. An *Agreed Proposed Prehearing Schedule* was filed on November 20, 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.** Petitioners filed a Notice of Appeal to the Montana Supreme Court on January 30, 2009. The Petitioners filed their Supreme Court brief on May 21, 2009. The Department and Thompson River Power, Inc., filed answer briefs, as Intervenor-Respondents in the case, on June 18 and 22, 2009, respectively. The Board is named as the respondent, but has not appeared in the case. The Petitioners filed their reply brief on July 9, 2009, under an agreed extension of time. On November 12, 2009, the Supreme Court issued an order classifying the appeal as being submitted on the briefs, without oral argument.
- 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 July 27, 2009, the District Court scheduled a status conference to be held on August 24, 2009. On August 18, 2009, SME filed a motion to dismiss the judicial review proceeding with prejudice, based on mootness arising from voluntary revocation of SME's air quality permit. On August 19, 2009, the District Court vacated the status conference. On September 1, 2009, the Petitioners filed a response requesting that the court dismiss the case without prejudice. On October 19, 2009, the District Court dismissed the case without prejudice.

B. OTHER BRIEFING ITEMS

- 1. Coal Bed Methane (CBM)
- 2. Gallatin Outstanding Resource Water (ORW) Rulemaking

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 17.38.106 regarding engineering plan fees. The Legislature intends for the Department to collect fees for engineering review that are commensurate with the costs of those review. The Department has modified its fees in 2005 and 2007 to address legislative audits that found the department was not recovering those costs. The Department is projecting a revenue shortage of \$246,000 in FY 2010 based on FY 2009. The proposed fee changes will affect all water and wastewater systems submitting plans and specifications to the Department for review and approval and should enable the department to collect fees commensurate with its costs. [ATTACHMENT](#)
2. Amend ARM 17.24.1109 to delete one of the factors a bank must meet in order to issue a letter of credit acceptable to the Department as a reclamation bond, in part, because the factor precludes state banks from being a qualifying bank. The remaining factors provide a sufficient basis for the Department to evaluate the financial strength of a bank issuing a letter of credit. [ATTACHMENT](#)
3. Adopt new rules and make amendments in Title 17, Chapter 8, subchapters 5, 6, 7, 8, 9, and 12 to set minor and major source permitting thresholds for greenhouse gas emissions. [ATTACHMENT](#)

B. REPEAL, AMENDMENT OR ADOPTION OF FINAL RULES

1. In the matter of the amendment of ARM 17.30.201 to adjust the water discharge permit fee schedule for application, authorizations and annual permit fees. [ATTACHMENT](#)
2. In the matter of the amendment of 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. [ATTACHMENT](#)

C. NEW CONTESTED CASE APPEALS

1. **In the matter of the request for hearing regarding the revocation of certificate of approval ES#34-93-C1-4 for the Fort Yellowstone Subdivision, Park County, BER 2009-20 SUB.** The Board received the appeal on October 13, 2009. Hearing Examiner Katherine Orr issued the *First Prehearing Order* on October 29, 2009, giving the parties until November 13, 2009, to propose a schedule. On November 13, 2009, the Department filed a *Request for Extension*, requesting a 90-day extension of time to file a proposed schedule. The Board may appoint a permanent hearing examiner or decide to hear the matter. [ATTACHMENT](#)
2. **In the matter of the request for hearing by the City of Great Falls regarding the DEQ’s notice of final decision for MPDES Permit No. MT0021920, BER 2009-21 WQ.** The Board received the appeal on October 29, 2009. Hearing Examiner Katherine Orr issued the *First Prehearing Order* on November 12, 2009. The Board may appoint a permanent hearing examiner or decide to hear the matter. A *Joint Request for an Extension to Reply to First Prehearing Order* was file on November 30, 2009. [ATTACHMENT](#)
3. **In the matter of the request for hearing by John McInerney, Bob Haney, and Marwin Hofer regarding the revocation of certificate of approval ES#34-93-C1-4 for the Fort Yellowstone Subdivision, Park County, BER 2009-22 SUB.** The Board received the appeal on November 3, 2009. Hearing Examiner Katherine Orr issued the *First Prehearing Order* on

November 12, 2009. The Board may appoint a permanent hearing examiner or decide to hear the matter. [ATTACHMENT](#)

4. **In the matter of violations of the Montana Strip and Underground Mine Reclamation Act by Signal Peak Energy, LLC at Bull Mountain Mine #1, Roundup, Musselshell County, BER 2009-23 SM.** The Board received the appeal on November 4, 2009. Hearing Examiner Katherine Orr issued the *First Prehearing Order* on November 12, 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 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 (SME) 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 August 19, 2009, the Board received *Respondent-Intervenor Southern Montana Electric's Motion to Dismiss Appeal with Prejudice and Memorandum in Support*. On September 2, 2009, the Board received *Appellant's Response to SME's Motion to Dismiss with Prejudice*. On November 5, 2009, Hearing Examiner Katherine Orr issued a *Proposed Order of Dismissal* to dismiss the case without prejudice. On November 23, 2009, the Hearing Examiner issued a *Notice of Opportunity to File Exceptions*, allowing the Respondent Intervenor, SME, until December 1, 2009, to file exceptions, and the Appellants until December 4, 2009, to file a response. Oral argument will be held on any exceptions received. An order to dismiss the case may be presented for the Chair's signature. [ATTACHMENT](#)
2. **In the matter of violations of Montana Public Water Supply Laws by Anaconda Country Club, Anaconda, Deer Lodge County, BER 2009-12 PWS.** On October 6, 2009, the Board received a *Stipulation for Dismissal* filed under Rule 41(a) and signed by the parties. An order to dismiss the case will be presented for the Chair's signature. [ATTACHMENT](#)
3. **In the matter of violation of the Montana Underground Storage Tank Act by Stockton Oil Company at Soco Express #10, Yellowstone County, BER 2009-14 UST.** On September 29, 2009, the parties filed a *Stipulation to Dismiss* under Rule 41(a). An order to dismiss the case will be presented for the Chair's signature. [ATTACHMENT](#)
4. **In the matter of violations of the Montana Septage Disposal and Licensure Laws by Craig Sundberg, d/b/a Sunny's Septic Service and Excavating, Anaconda, Deer Lodge County, BER 2009-15 SDL.** On September 14, 2009, the Department filed a *Notice of Intent to Dismiss*, informing the Board that the parties have agreed to dismiss the case and expect to file a stipulation in the near future. On October 14, 2009, the Board received a *Stipulation for Dismissal* filed under Rule 41(a) and signed by the parties. An order to dismiss the case will be presented for the Chair to sign. [ATTACHMENT](#)
5. **In the matter of violations of Montana Public Water Supply Laws by Cottonwood Camp, a Montana L.L.P. at Cottonwood Camp Fort Smith, PWSID MT0003301, Fort Smith, Big Horn County, BER 2009-19 PWS.** The Board received the appeal on October 9, 2009. On November 6, 2009, the Board received a *Motion to Dismiss Request for Hearing and Notice of Appeal* from the appellant. An order to dismiss the case will be presented for the Chair to sign. [ATTACHMENT](#)
6. **In the matter of violations of the Metal Mine Reclamation Act by Paradine Mining, Inc., Broadwater County, BER 2009-16 MM.** On November 25, the Board received an

Administrative Order on Consent and a Stipulation to Dismiss [pursuant to Rule 41(a)] and Request for Dismissal from the parties. An order to dismiss the case will be presented for the Chair to sign. [ATTACHMENT](#)

E. OTHER ACTION ON CONTESTED CASES

1. **In the matter of violations of the Metal Mine Reclamation Act by Saturday Sunday, LLC. Deer Lodge County, BER 2009-02 MM.** The Department of Environmental Quality filed a *Motion for Summary Judgment* on May 26, 2009. The Appellant filed an *Opposition to the Department's Motion for Summary Judgment and Cross-Motion for Summary Judgment* on June 11, 2009. The Department filed a *Reply Brief* on June 29, 2009. The hearing examiner issued an *Order Vacating Dates in First Prehearing Order* on June 17, 2009, postponing the hearing until further notice. On September 22, 2009, the Hearing Examiner issued a *Proposed Order on Cross Motions for Summary Judgment* granting the *Motion for Summary Judgment* filed by the Appellant. On October 2, 2009, the Board determined to adopt the *Proposed Order on Cross Motions for Summary Judgment*. The Board Chair signed an *Order of the Board* providing the Appellant the opportunity to file exceptions to the *Proposed Order on Cross Motions for Summary Judgment* by November 16, 2009. No exceptions were filed. An *Order Adopting Proposed Order on Cross Motions for Summary Judgment* will be presented for signature by the Chair. [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