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AGENDA

BOARD OF ENVIRONMENTAL REVIEW

FRIDAY, JANUARY 22, 2010

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. HEARING

The Board will hold a hearing to take public comment regarding the matter of new rules and 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

II. ADMINISTRATIVE ITEMS

A. REVIEW AND APPROVE MINUTES

1. December 11, 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.

III. 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.** This case is stayed on request of the parties.
 - 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 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.
 - d. **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 December 4, 2009, the DEQ submitted a *Request for Stay of Scheduling Order* to allow the parties time to pursue settlement discussions. An *Order Granting Stay of Scheduling Order* was issued on January 6, 2010.

- e. **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. On December 11, 2009, the Board received *The Department's Motion for Sanctions*. An *Order* on this motion was issued on January 8, 2010.
 - f. **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.** Hearing Examiner Katherine Orr issued the *First Prehearing Order* on December 17, 2009.
 - g. **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.** On December 9, 2009, the Board received *The Department's First Disclosure Statement*. A *Scheduling Order* was issued on January 6, 2010.
 - h. **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.** On November 13, 2009, the Department filed a *Request for Extension*, requesting a 90-day extension of time to file a proposed schedule. On January 6, 2010, Hearing Examiner Katherine Orr issued an *Order Granting Extension*.
 - i. **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.** A *Joint Request for an Extension to Reply to First Prehearing Order* was filed on November 30, 2009. On January 6, 2010, Hearing Examiner Katherine Orr issued an *Order Granting Extension*.
 - j. **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.** Hearing Examiner Katherine Orr issued the *First Prehearing Order* on November 12, 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.

IV. 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 17.30.617 to designate the mainstem Gallatin River from the Yellowstone National Park boundary to the confluence of Spanish Creek as an Outstanding Resource Water (ORW) and to amend ARM 17.30.638 to add a new subsection clarifying that discharges to ground water with a direct hydrologic connection to an ORW are within the statutory mandate prohibiting any permanent change in the water quality of an ORW resulting from point source discharges. The Department will request that the Board issue a notice of supplemental rulemaking to extend the comment period. ATTACHMENT
2. Delete ARM 17.38.234(6)(d)(ii) to conform this rule with the federal standard; Amend ARM 17.38.248 to remove the language, "... to a customer that is billed directly or otherwise held directly responsible by a public water supply system supplier for payment of that service"; Amend ARM 17.40.206 to set a 30 day waiting period, after application for operator certification testing is received, before applicant can take the test; and Amend ARM 17.38.249 to include transient systems that treat their water to achieve drinking water standards to require a certified operator. ATTACHMENT
3. Amend ARM 17.8.745 to reduce the per-ton threshold exempting de minimis changes at permitted facilities from the requirement to obtain a Montana Air Quality Permit. The existing threshold would be amended from 15 tons per year to 5 tons per year. ATTACHMENT

B. NEW CONTESTED CASE APPEALS

1. **In the matter of the appeal and request for hearing by Fidelity Exploration & Production Co. of the DEQ's denial of the request for modification of Fidelity's MPDES Permit No. MT0030457, BER 2009-24 WQ.** The Board received the appeal on December 15, 2009. Hearing Examiner Katherine Orr issued the First Prehearing Order on December 31, 2009. The Board may appoint a permanent hearing examiner or decide to hear the matter. ATTACHMENT
2. **In the matter of violations of the Montana Public Water Supply Laws by Jason Ellsworth at SFE Unapproved, Hamilton, Ravalli County, BER 2010-01 PWS.** The Board received the appeal on January 4, 2010. The Board may appoint a permanent hearing examiner or decide to hear the matter. ATTACHMENT
3. **In the matter of violations of the public Water Supply Laws by High Spirits Entertainment, LLC at High Spirits Club and Casino, Florence, Ravalli County, BER 2010-02 PWS.** The Board received the appeal on January 4, 2010. The Board may appoint a permanent hearing examiner or decide to hear the matter. ATTACHMENT
4. **In the matter of the request for hearing by AquaFlo, LLC, of DEQ's Notice of Final Decision regarding Montana Ground Water Pollution Control System Permit No. MTX000121 and the Permit Fact Sheet, Helena, Lewis and Clark County, BER 2010-03 WQ.** The Board received the appeal on January 7, 2010. The Board may appoint a permanent hearing examiner or decide to hear the matter. ATTACHMENT

C. FINAL ACTION ON CONTESTED CASES

1. **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 parties

have reached a settlement in this case. An order to dismiss the case will be presented for signature by the Chair. ATTACHMENT

D. OTHER ACTION ON CONTESTED CASES

1. **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. At its December meeting, the Board chose to not appoint a hearing examiner, but instead delay action until the January meeting. The Board may appoint a permanent hearing examiner or decide to hear the matter. ATTACHMENT
2. **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 on Partial Dismissal of Appeal* will be presented for signature by the Chair. ATTACHMENT

V. 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.

VI. ADJOURNMENT