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**TELECONFERENCE MINUTES
JANUARY 22, 2010**

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 9:02 a.m., on Friday, January 22, 2010, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present: Larry Anderson

Board Members Present via Phone: Chairman Joseph Russell, Marvin Miller, Heidi Kaiser, Larry Mires, Robin Shropshire, and Joe Whalen

Board Attorney Present: Katherine Orr, Attorney General's Office, Department of Justice

Board Secretary Present: Joyce Wittenberg

Court Reporter Present: Laurie Crutcher, Crutcher Court Reporting

Department Personnel Present: Tom Livers (Deputy Director); Jim Madden, David Rusoff, Jane Amdahl, Carol Schmidt, and Norman Mullen – Legal; Jon Dilliard, Eugene Pizzini, and Eric Regensburger – Public Water Supply & Subdivisions Bureau; Julie Merkel, Charles Homer, Vickie Walsh, Debbie Skibicki, Jenny O'Mara, Skye Hatten, and Debra Wolfe – Air Resources Management Bureau; Bob Bukantis – Water Quality Planning Bureau; John Arrigo and Frank Gessaman – Enforcement Division

Interested Persons Present (*Disclaimer: Names are spelled as best they can be read from the official sign-in sheet.*): Don Allen – Western Environmental Trade Association; Jim Parker – PPL Montana; Brenda Lindlief-Hall

I. GHG Hearing

Chairman Russell announced that the hearing had been cancelled prior to the meeting due to the action taken at the January 14 teleconference.

II.A.1 Review and Approve December 11, 2009, meeting minutes.

Chairman Russell asked if any Board members had any corrections or changes for the minutes. When no one responded, he called for a motion to approve the minutes as written. Ms. Kaiser so MOVED. Mr. Mires SECONDED the motion. The motion CARRIED with a unanimous VOTE.

II.B.1 Briefing on Board authority when a case is being dismissed under Rule 41(a).

Ms. Orr said that 41(a) is a rule of civil procedure. She said parties to a contested case may request a 41(a) dismissal when there is a stipulation by both parties; this in effect requests that the Board divest itself of jurisdiction in the case. She also said that, unless otherwise specified, a 41(a) dismissal is without prejudice.

II.B.2 Briefing regarding the difference between cases being dismissed with and without prejudice.

Ms. Orr explained that a dismissal without prejudice is as if the rights of the parties had not been adjudicated or resolved, as if there is a clean slate – the parties could file another appeal if a new identical permit were issued. She said a dismissal with prejudice means that the rights have been deemed to have been substantively resolved, and that there may not be a filing of the same claims.

Discussion took place regarding this issue, as well as the 41(a) issue.

III.A.1.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. [*No discussion took place regarding this agenda item.*]

III.A.1.b In the matter of violations of the Water Quality Act by ASARCO, Inc., BER 2005-09 WQ.

Ms. Orr said this case was stayed in 2006 and that a trustee for the company needs to sign off on the dismissal.

III.A.1.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.

Ms. Orr said the parties have proposed another hearing schedule.

- III.A.1.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. [*No discussion took place regarding this agenda item.*]
- III.A.1.e In the matter of violations of the Clean Air Act of Montana by Sheep Mountain Properties, LLC, Jefferson County, BER 2009-11 AQ.
- Ms. Orr said the department had filed a motion for sanctions, due to some non-responsiveness by the Appellant, and that she had issued an order granting the motion.
- III.A.1.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.
- Ms. Orr said the department had filed a motion for a more definite statement to clarify the claims.
- III.A.1.g In the matter of violations of the Montana Underground Storage Tank Act by Juniper Hill farm, LLC, at Lakeside General Store, Lewis & Clark County, BER 2009-18 UST.
- Ms. Orr said there had been a recent request to alter some of the dates in the scheduling order.
- III.A.1.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.
- Ms. Orr said there has been a request to consolidate this case with Case No. BER 2009-22 SUB (Item III.A.1.j, below).
- III.A.1.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. [*No discussion took place regarding this agenda item.*]
- III.A.1.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.
- See Item III.A.1.h, above.
- III.A.2.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.

Ms. Orr reported that there had been no change in this case.

IV.A.1 In the matter of DEQ's request to initiate rulemaking to amend ARM 17.30.617 and ARM 17.30.638 regarding Outstanding Resource Water (ORW) designation of a portion of the Gallatin River.

Mr. Bukantis provided a brief history of the rulemaking, of which the initial public comment period closed in November 2006, and that there had been a series of extensions since that time. He recommended the Board initiate rulemaking to extend the public comment period.

Eric Regensberger responded to questions from the Board.

After some discussion on the matter, including that the Board had originally held the hearing for this, Chairman Russell called for public comment. There was no response. Chairman Russell then called for a motion to initiate the rulemaking and extend the public comment period to April 23, 2010. Mr. Miller so MOVED. Mr. Mires SECONDED the motion. The motion CARRIED with a unanimous VOTE.

IV.A.2 In the matter of DEQ's request to initiate rulemaking to delete ARM 17.38.234(6)(d)(ii) and to amend ARM 17.38.248, 17.40.206, and 17.38.249 regarding Public Water Supply Laws.

Mr. Livers explained that DEQ is withdrawing this rulemaking request, and apologized for the last-minute withdrawal. He said there were three parts to the rulemaking: one would have changed the manner in which fees are charged to certain entities; one was a departmental rule only, which required no action from the Board; and the last was relatively minor and did not justify rulemaking on its own. He said the fee portion was the issue, and that in the spirit of state government looking at cost containment measures, the department decided to withdraw the request.

IV.A.3 In the matter of DEQ's request to initiate rulemaking to 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.

Mr. Homer said the department is requesting the Board change the threshold at which de minimis changes may be made at permitted facilities without having to modify the permit. He provided a summary of the SIP (State Implementation Plan) process. He said this had been presented to CAAAC (Clean Air Act Advisory Council). Mr. Homer said the department requests that the Board initiate the rulemaking and assign a presiding officer.

Mr. Homer and Ms. O'Mara responded to questions from the Board.

Chairman Russell called for public comment on the matter; no one responded. He then called for a motion to initiate the rulemaking, to appoint Ms. Orr as the

permanent hearings examiner, and modify the proposed notice to reflect a March 18 date for submitting written views, arguments, or data. Mr. Whalen so MOVED. Mr. Miller SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- IV.B.1 In the matter of the appeal by Fidelity Exploration & Production Co. of the DEQ's denial of the request for modification of Fidelity's MPDES Permit No. MT00030457, BER 2009-24 WQ.

Chairman Russell called for a motion to appoint Ms. Orr as the permanent hearings examiner for this matter. Mr. Miller so MOVED. Mr. Mires SECONDED the motion. Ms. Kaiser recused herself from this matter. During further discussion, Mr. Whalen announced his interest in hearing this case. Chairman Russell called for a VOTE on the motion, and it FAILED 3-3.

Mr. Whalen MOVED for the Board to hear this matter. Mr. Anderson SECONDED the motion. The motion CARRIED with a 6-0 VOTE.

- IV.B.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.

Chairman Russell called for a motion to appoint Ms. Orr as the permanent hearings examiner for this matter. Mr. Whalen so MOVED. Mr. Miller SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- IV.B.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.

Mr. Arrigo responded to Board member questions during a brief discussion.

Chairman Russell called for a motion to appoint Ms. Orr as the permanent hearings examiner for this matter. Mr. Miller so MOVED. Mr. Whalen SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- IV.B.4 In the matter of the request for hearing by AquaFlo, LLC, of DEQ's final decision regarding Montana Ground Water Pollution Control System Permit No. MTX000121 and the permit fact sheet, Helena, Lewis & Clark County, BER 2010-03 WQ.

Chairman Russell called for a motion to appoint Ms. Orr as the permanent hearings examiner. Ms. Shropshire so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- IV.C.1 In the matter of violations of the Montana Water Quality Act by Wilderness Club, LLC, at the Wilderness Club Eureka, Lincoln County, BER 2008-13 WQ.

Mr. Mires MOVED to authorize the Chair to sign the order dismissing the case.

- Mr. Miller SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- IV.D.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.
- Ms. Orr reported that she had issued the First Prehearing Order.
- Chairman Russell suggested not taking action on this to leave it open for the Board to hear if it wants to.
- IV.D.2 In the matter of violations of the Metal Mine Reclamation Act by Saturday Sunday, LLC, Deer Lodge County, BER 2009-02 MM.
- Ms. Orr explained that cross motions for summary judgment had been filed, and proposed that the department's motion for summary judgment be granted.
- Chairman Russell called for a motion to authorize him to sign the order for partial dismissal of the appeal. Mr. Mires so MOVED. Ms. Shropshire SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- V. General Public Comment
- Chairman Russell asked if anyone in the audience would like to address the Board on matters pertaining to the Board. No one responded.
- VI. Adjournment
- Chairman Russell called for a motion to adjourn. Ms. Kaiser so MOVED. Mr. Miller SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- The meeting adjourned at 10:41 a.m.

Board of Environmental Review January 22, 2010, minutes approved:

JOSEPH W. RUSSELL, M.P.H.
CHAIRMAN

BOARD OF ENVIRONMENTAL REVIEW

DATE