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**AGENDA**

BOARD OF ENVIRONMENTAL REVIEW

FRIDAY, MARCH 19, 2010

METCALF BUILDING, ROOM 111

1520 EAST SIXTH AVENUE, HELENA, MONTANA

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**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. January 14, 2010, Board teleconference meeting. [ATTACHMENT](#)
2. January 22, 2010, Board teleconference meeting. [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.** On January 12, 2010, the department filed a status report in the case stating that the parties agree that the case should continue to be stayed.
  - 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 Metal Mine Reclamation Act by Saturday Sunday, LLC. Deer Lodge County, BER 2009-02 MM.** On January 25, 2010, Chairman Russell signed an *Order on Partial Dismissal of Appeal*. Hearing Examiner Katherine Orr issued an *Order Regarding Submission of Prehearing & Hearing Dates*, giving the parties until February 20, 2010, to propose a schedule.
  - 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. On January 15, 2010, the department filed a *Second Proposed Schedule*. Ms. Orr issued the *Second Scheduling Order* on February 12, 2010, setting the hearing for June 14, 2010.
  - 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 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, giving the parties until April 5, 2010, to file settlement documents or a proposed hearing schedule.

- 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. On December 11, 2009, the Board received *The Department's Motion for Sanctions*. An *Order Granting Motion for Sanctions* was issued on January 8, 2010. On January 29, Sheep Mountain filed a *Response to Department's First and Second Request for Discovery*.
- 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 January 7, 2010, the department filed a *Proposed Prehearing Schedule*, and on January 19, it filed *Department's Application for More Definite and Detailed Statement, with Brief*. Hearing Examiner Katherine Orr issued a *Scheduling Order* on January 20, 2010.
- 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.** A *Scheduling Order* was issued on January 6, 2010. On January 12, the DEQ filed *The Department's Motion to Modify Scheduling Order*, and on January 15, attorney for the appellant filed a *Motion for Telephonic Pretrial Conference*. Hearing Examiner Katherine Orr issued a *Second Scheduling Order* on January 25, 2010, to address the department's unopposed January 12 submittal. On March 1, 2010, the Board received *The Department's Motion for Summary Judgment and Brief in Support of the Department's Motion for Summary Judgment*.
- i. **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 2009-20/22 SUB.** On January 14, 2010, the department, after consultation with attorney for the Appellants, filed a *Request for Consolidation and Extension* to consolidate cases BER 2009-20 SUB and BER 2009-22 SUB. On January 25 and February 9, 2010, Hearing Examiner Katherine Orr issued an *Order Granting Request for Consolidation and Extension*, giving the parties until April 23, 2010, to settle or file a proposed hearing schedule.
- j. **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.** On February 17, 2010, the parties filed a *Joint Request for Second Extension to Reply to First Prehearing Order*.
- k. **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. Hearing Examiner Katherine Orr issued the *First Prehearing Order* on January 13, 2010. On January 25, the department filed a *Request for Extension*. Ms. Orr issued an *Order Granting Extension of Time* on February 9, 2010, giving the parties until March 5, 2010, to settle or file a proposed hearing schedule. On March 5, 2010, the department filed a second *Request for Extension*.

1. **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. Hearing Examiner Katherine Orr issued the *First Prehearing Order* on January 13, 2010. On January 26, the department filed a *Request for Extension*. Ms. Orr issued an *Order Granting Extension of Time* on February 12, 2010, giving the parties until March 12, 2010, to settle or file a proposed hearing schedule.
- m. **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. Hearing Examiner Katherine Orr issued the *First Prehearing Order* on January 20, 2010. On January 27, the complainant filed a *Stipulated Request for Extension of Time to File a Proposed Schedule*. Ms. Orr issued an *Order Granting Request for Extension of Time* on February 9, 2010, giving the parties until April 2, 2010, to settle or file a proposed hearing schedule.
2. Cases the Board has retained unto itself or has not assigned to a hearings examiner
  - a. **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.** (At its January 22 meeting, the Board voted to retain this matter unto itself.) The Board received the appeal on December 15, 2009. Hearing Examiner Katherine Orr issued the *First Prehearing Order* on December 31, 2009. On January 15, 2010, attorney for the appellant filed a Request for Extension, and Ms. Orr granted the extension on February 12, giving the parties until March 16, 2010, to settle or file a proposed hearing schedule.
  - b. **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.** (At its December 11, 2009, meeting, the Board chose to not appoint a hearing examiner.) The Board received the appeal on November 4, 2009. Hearing Examiner Katherine Orr issued the *First Prehearing Order* on November 12, 2009. On December 7, 2010, attorney for the appellant filed a *Request for Extension to Submit Proposed Schedule*.

### 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 410. At the March 29, 2009, BER meeting the Department requested rulemaking authority for these same proposed revisions to ARM 17.50.403 and 410. The Department did not want to adopt these revisions, in particular, the update of the citations, before the associated "rewrite of the solid waste rules" rulemaking was completed. Section 2-4-305(7), MCA, requires that an adoption notice be published within 6 months of the publishing of notice of the proposed rule revisions. The Department was unable to meet the 6-month requirement because the adoption notice for the associated rulemaking took longer to complete than anticipated due to the number of comments received and the time needed to develop responses. The adoption notice for the associated rulemaking will be published on February 11, 2010. It is now appropriate for the BER to initiate rulemaking to adopt the proposed revisions to ARM 17.50.403 and 410. [ATTACHMENT](#)

2. Amend ARM 17.38.201A(1) to update the adoption by reference to the 2009 edition of the Code of Federal Regulations; amend language in ARM 17.38.216(3)(k) through (o) to clarify regulatory language; delete ARM 17.38.234(6)(d)(ii) to conform this rule with the federal standard by removing a numeric value associated to the term “not detected” for purposes of reporting. [ATTACHMENT](#)
3. The Department requests authorization to request comment on Montana’s water quality standards as part of the 2010 triennial water quality standards review. In addition, the Department is recommending rulemaking to establish new and revised water quality standards in Circular DEQ-7. The revisions to Circular DEQ-7 will be incorporated by reference by amending rules in ARM Title 17, Chapter 30, Subchapters 5, 6, 7, and 10, pertaining to mixing zones, surface water quality standards, nondegradation requirements, and ground water rules. The Department also proposes incorporating the new and revised water quality standards in Circular DEQ-7 by amending ARM Title 17, Chapter 36, Subchapter 3, pertaining to subdivisions; ARM Title 17, Chapter 55, Subchapter 1, pertaining to CECRA; and ARM Title 17, Chapter 56, Subchapter 5, pertaining to underground storage tanks. The proposed rulemaking is primarily intended to update certain water quality standards in DEQ-7 and incorporate DEQ-7 into the above rules. The proposed rulemaking also includes amending and repealing existing rules in Montana’s surface water quality standards, ARM Title 17, Chapter 6. The Department recommends initiating rulemaking for the proposed changes. [ATTACHMENT](#) [POWERPOINT](#)

B. REPEAL, AMENDMENT OR ADOPTION OF FINAL RULES

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 reviews. 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](#)

C. NEW CONTESTED CASE APPEALS

1. **In the matter of the appeal by the 7<sup>th</sup> Day Adventist Church/Christian School, Hamilton, Ravalli County, BER 2010-04 PWS.** The Board received the appeal on February 4, 2010. Interim Hearing Examiner Katherine Orr issued the First Prehearing Order on February 12, 2010. The Board may appoint a permanent hearing examiner or decide to hear the matter. [ATTACHMENT](#)

D. OTHER ACTION ON CONTESTED CASES

1. **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. On January 26, 2010, the Supreme Court issued its decision, reversing the decision of the district court and the Board and ruling that the Petitioners’

proposed amendments to their hearing affidavit related back to their original affidavit and were permissible pursuant to Rule 15(c) of the Montana Rules of Civil Procedure. On February 11, 2010, the Supreme Court remitted the case to the district court for that court to remand the case to the Board for further proceedings. On February 17, 2010, the district court remanded the case to the Board with instructions for the Board to remit the matter to the hearing examiner. The Board may take action on those instructions.

[ATTACHMENT](#)    [ORDER](#)

**E. OTHER ACTION ITEMS**

1. To facilitate reclamation of the McLaren tailings near Cooke City, the Department is requesting that the Board authorize the Chairman to sign a material purchase agreement with Barrick Minerals. Under the agreement, Barrick would purchase the tailings from the Board and pay for the tailings based on their assayed value. This would allow removal of some of the tailings from the site. [ATTACHMENT](#)    [POWERPOINT](#)

**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**