

BOARD OF ENVIRONMENTAL REVIEW
FRIDAY, APRIL 17, 2020
METCALF BUILDING, ROOM 111
1520 EAST 6th AVENUE, HELENA, MONTANA

NOTE: Interested persons, members of the public, and the media are welcome to attend at the location stated above. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this meeting. Please contact the Board Secretary by telephone at 444-5270, or by e-mail at lindsay.ford@mt.gov, at least 24 hours before the meeting to advise her of the nature of the accommodation(s) needed.

9:00 AM

I. ADMINISTRATIVE ITEMS

A. REVIEW AND APPROVE MINUTES

1. The Board will vote on adopting the January 24, 2020, meeting minutes.
2. The Board will vote on adopting the February 7, 2020, meeting minutes.

Public Comment.

II. BRIEFING ITEMS

A. CONTESTED CASE UPDATES

1. Enforcement cases assigned to the Hearing Examiner
 - a. **In the Matter of Violations of the Water Quality Act by Reflections at Copper Ridge, LLC, at Reflections at Copper Ridge Subdivision, Billings, Yellowstone County (MTR105376), BER 2015-01 WQ and In the Matter of Violations of the Water Quality Act by Copper Ridge Development Corporation at Copper Ridge Subdivision, Billings, Yellowstone County (MTR105377), BER 2015-02 WQ.** On April 17, 2015, Copper Ridge Development Corporation and Reflections at Copper Ridge, LLC filed a Notice of Appeal and Request for hearing with the Board. A hearings examiner was appointed to the contested case and, after a short stay, the parties filed cross-motions for Summary Judgment. The prior hearing examiner, Mr. Haladay, issued an Order granting in part and denying in part both parties' Motions for Summary Judgment on August 1, 2017. Ms. Clerget assumed jurisdiction as the hearing examiner on September 8, 2017. On February 22, 2018 she denied CR/REF's motion to reconsider Mr. Haladay's summary judgment rulings and ruled on the parties' motions in limine. She then conducted a three-day hearing on February 26-28, 2018. Based on that hearing, Ms. Clerget issued Proposed Findings of Fact and Conclusions of Law (FOFCOL) to the Board on July 16, 2018. At the December 7, 2018 meeting, the BER lost its quorum before it could reach a final decision. The BER then requested additional briefing from the parties regarding the owner/operator issue and set a special meeting for February 8, 2019 to continue oral argument. The parties each submitted additional briefs on the owner/operator issue on January 17, 2019. At the February 8, 2019 special meeting, the BER clarified and interpreted the definition of "owner or operator" in the Administrative Rule,

vacated the proposed FOFCOL, and remanded the matter back to Ms. Clerget for further proceedings. Consistent with the Board's instructions, Ms. Clerget reviewed the available record, consulted with the parties, issued Orders holding that the record would be re-opened with respect to the owner/operator issue, and set a second hearing schedule. On May 2 and 8, 2019, CR/REF filed *Motions in Limine*. Ms. Clerget heard oral argument on those motions at the pretrial conference on May 23, 2019 and prior to the hearing granted them. Ms. Clerget held a second, one-day hearing on June 13, 2019, on the owner/operator issue. On July 8, 2019, Ms. Clerget issued her proposed FOFCOL on the owner operator issue. The Board reviewed the second proposed FOFCOL and heard oral argument from the parties at its August 9, 2019 meeting. The Board then remanded the case back to Ms. Clerget for additional findings concerning the 4 photographs excluded by the grant of CR/REF's *Motions in Limine* prior to the June 13, 2019 owner/operator hearing. Consistent with the Board's instructions, Ms. Clerget consulted with the parties and set a new schedule for the third remand. On February 21, 2020 Ms. Clerget issued an Order denying CR/REF's motion to sever the two cases (CR and REF) and ordered that the cases proceed as combined for procedural purposes. The parties therefore continue to proceed according to the current Scheduling Order (issued November 25, 2019) for the third remand, with discovery closing at the end of April.

- b. **In the Matter of the Notice of Appeal and Request for Hearing by Signal Peak Energy, LLC Regarding November 13, 2019 Notice of Violation and Administrative Compliance and Penalty Order, BER 2019-22 SM.** On December 16, 2019, the Board received an appeal from Signal Peak Energy, LLC. That same day, DEQ filed a Notice of Appearance and a Motion to Dismiss Claim. On December 26, 2019, Signal Peak filed a Motion for Extension of time. On December 30, 2019, Signal Peak filed a Joint Motion for Stay. On December 31, 2019, the Board Chair issued an Order Granting the Unopposed Joint Motion to Stay the Proceedings. On February 7, 2020 the Board assigned the case, in its entirety, to Sarah Clerget as hearing examiner. On March 26, 2020 the parties filed separate status reports, both requesting extensions of the stay, but for different periods (DEQ requested two weeks, and Signal Peak requested 60 days). On April 1, 2020 Ms. Clerget issued an order granting the stay and ordering the parties to either file a stipulation for dismissal based on settlement or a proposed litigation schedule by April 30, 2020.
2. Non-enforcement cases assigned to the Hearings Examiner
 - a. **In the Matter of the Notice of Appeal and Request for Hearing by Alpine Pacific Utilities Regarding Issuance of MPDES Permit No. MTX000164, BER 2019-06 WQ.** On July 3, 2019 Alpine Pacific Utilities filed a request for hearing with the Board. The Board assigned Sarah Clerget as the hearing examiner on August 9, 2019. On February 7, 2020 DEQ and Alpine filed a joint motion for stay of proceedings. The parties indicated in their motion that they are in settlement discussions. Ms. Clerget issued an Order granting the stay on February 10, 2020 and directed the parties to file a status report with an amended proposed schedule within 30 days. The parties filed a joint status report as directed, made a joint motion for 30-day extension, and provided an alternative proposed amended schedule. On March 12, 2020, Ms. Clerget granted the joint motion to

stay. The parties are expected to file either a proposed settlement or a proposed amended schedule by April 13, 2020.

- b. **In the Matter of the Notice of Appeal and Request for Hearing by City of Great Falls Regarding Issuance of MPDES Permit No. MT0021920 BER 2019-07 WQ.** On August 9, 2019, the City of Great Falls filed a request for hearing with the Board. The Board assigned Sarah Clerget as hearing examiner on October 4, 2019. A Prehearing Order was issued in this case on October 15, 2019 and the parties submitted an agreed upon schedule on October 29, 2019. Ms. Clerget issued a Scheduling Order on October 31, 2019. The parties submitted a joint motion to amend portions of the October Scheduling Order. Ms. Clerget granted that motion and Amended the scheduling order on March 20, 2020. Calumet Montana Refining, LLC has filed a motion to file brief as amicus curiae, which was fully briefed on March 2, 2020. Ms. Clerget will issue an order on that motion as soon as possible.
- c. **In the Matter of Westmoreland Resources, Inc.'s, Appeal of Final MPDES permit No. MT0021229 Issued by DEQ for the Absaloka Mine in Hardin, Big Horn County, MT, BER 2015-06 WQ.** On September 25, 2015, Westmoreland Resources, Inc. filed a notice of appeal and request for hearing. A hearing examiner was assigned and Sarah Clerget assumed jurisdiction on September 8, 2017. When Ms. Clerget assumed jurisdiction, the case had been stayed pending a Montana Supreme Court decision. That decision was issued in September 2019. On November 22, 2019, the parties submitted a joint proposed schedule. Ms. Clerget issued a Scheduling Order on November 27, 2019, which set deadlines through dispositive motions, which will be fully briefed in December of 2020.
- d. **In the Matter of the Notice of Appeal and Request for Hearing by Montanore Minerals Corporation Regarding Issuance of MPDES Permit No. MT0030279, Libby, Montana, BER 2017-03 WQ.** Ms. Clerget conducted a two-day hearing on this matter on December 3-4, 2018. At the parties' request, Ms. Clerget also allowed oral argument before her on May 7, 2019, regarding the parties' proposed FOFCOLs. On August 19, 2019, Montanore filed a Notice of Supplemental Authority. The Notice stated that on July 24, 2019, the First Judicial District Court had issued its Order on cross motions for summary judgment in Cause No. CDV 2017-641 (a declaratory relief action brought in District Court by MEIC, Save Our Cabinets, and Earthworks challenging DEQ's issuance of MPDES Permit No. MT0030279). While the District Court action was ostensibly limited to conditions of the MPDES Permit that were not at issued before the Board, the District Court Order vacated the entire Permit, thus affecting the status of this contested case. Through status reports filed on September 13, 2019, DEQ and Montanore requested a stay of this case pending the outcome of any Supreme Court appeal of the District Court Order. On September 17, 2019, Ms. Clerget granted the stay. The parties have cross-appealed the District Court's decision to the Supreme Court under Cause No. DA 19-0553. The appellants filed their opening briefs on January 24, 2020. The appellees have requested and were granted an extension of time until April 10, 2020 in which to file their response brief.

- e. **In the Matter of the Application for an Amendment of a Major Facility Siting Act Certificate by Talen Montana LLC, BER 2019-04 MFSA.** On May 17, 2019, Westmoreland Mining LLC and Westmoreland Rosebud Mining LLC filed a Notice of Contest with the Board. Sarah Clerget was appointed hearing examiner on May 22, 2019. On July 12, 2019, Talen filed a Motion to Dismiss Westmoreland's Appeal, which was fully briefed on August 8, 2019. On August 14, 2019, Ms. Clerget held oral argument on Talen's Motion to Dismiss, at which all parties appeared and argued. On August 20, 2019, Ms. Clerget issued an Order granting in part and denying in part Talen's Motion to Dismiss. The Order also reset some of the procedural deadlines. On November 13, 2019, the parties filed an "Expedited Joint Motion to Suspend Schedule." The parties sought to suspend the schedule for 30 days pending motions to govern proceedings. On December 17, 2019, the parties filed a Joint Motion to Govern Proceedings which suspended the proceedings through January 17, 2020. On January 17, 2020, Talen filed a Motion requesting a continued stay or, in the alternative, a return to active litigation. Westmoreland filed a Motion to Vacate, which essentially requests dismissal of the case. The motions are fully briefed and awaiting a decision from Ms. Clerget. The parties have also filed a Joint Notice of Executed Coal Supply Agreement. On March 12, 2020 Ms. Clerget asked the parties for additional briefing regarding the Joint Notice, which they completed. The supplemental briefing indicated that the Executed Coal Supply Agreement does not fundamentally change the parties' positions as stated in their briefs. Ms. Clerget will issue an order on the pending motions as soon as possible.
- f. **In the Matter of the Notice of Appeal and Request for Hearing by Spring Creek Coal, LLC Regarding Issuance of MPDES Permit No. MT0024619, BER 2019-02 WQ.** On April 12, 2019, the BER appointed Sarah Clerget as hearing examiner to preside over this contested case. Ms. Clerget issued a Scheduling Order on June 21, 2019 setting October 31, 2019 as the deadline for parties to file proposed scheduling deadlines or a stipulation. By the October deadline the parties filed a Joint Motion for Extension of Time which was granted. The parties then filed two subsequent motions for extensions of time citing settlement negotiations, which Ms. Clerget granted, ordering that the parties will either file a stipulated settlement agreement or a joint proposed scheduling order by May 1, 2020.
- g. **In the Matter of the Notice of Appeal and Request for Hearing by CHS, Inc. regarding issuance of MPDES Permit No. MT0000264, BER 2019-01 WQ.** On February 8, 2019, the BER appointed Sarah Clerget as hearing examiner to preside over this contested case. The Board directed Ms. Clerget to consolidate this case with BER 2015-07 WQ for scheduling purposes. On July 15, 2019, this contested case was stayed pending settlement of several of the contested issues in this case. The parties submitted a Stipulation on December 4, 2019 settling appeal issues Nos. 3, 4, 6, 7, and partially No. 5. On December 13, 2019, the Board issued an Order for Final Agency Decision adopting the Stipulation of Appeal Issues Nos. 3, 4, 6, 7, and partially No. 5. Ms. Clerget conducted scheduling conferences with the parties in January and March and subsequently issued Orders continuing a stay in this case due to pending DEQ rulemaking, which has the potential to affect the remaining issues in the case. A status conference will be held with the parties on April 24, 2020.

- h. **In the Matter of the Notice of Appeal of Final MPDES Permit No. MT0000264 Issued by DEQ for the Laurel Refinery in Laurel, Yellowstone County, Montana, BER 2015-07 WQ.** On February 8, 2019, the BER appointed Sarah Clerget as hearing examiner to preside over this contested case. The Board directed Ms. Clerget to consolidate this case with BER 2019-01 WQ (CHS) for scheduling purposes, and therefore update on this case is the same as above.
- i. **An Appeal in the Matter of Amendment Application AM3, Signal Peak Energy LLC's Bull Mountain Coal Mine #1 Permit No. C1993017, BER 2016-07 SM.**
 - I. **District Court Case:** The parties took a subpoena dispute to the District Court on June 1, 2018 with Cause No. DV 18-0869. The BER was named as a Defendant in that District Court case, and Ms. Clerget filed a "Notice of Non-Participation" before the District Court on behalf of the BER. The District Court issued a ruling on the subpoena issue on November 14, 2018 and attorney's fees on March 25, 2019. On May 22, 2019 Signal Peak appealed to the Montana Supreme Court in Cause No. DA 19-0299. Opening briefs were filed September 20, 2019. The BER has retained Amy Christensen to represent it before the Supreme Court.
 - II. **Contested Case:** On May 31, 2019 the Board assigned the case to Ms. Clerget. Ms. Clerget issued an Order on Cross Motions for Summary Judgment on November 14, 2019, which granted partial summary judgment on one issue, and denied summary judgment on the remaining issues. A scheduling conference was held on November 26, 2019 and a two-day hearing is scheduled for April 2020. Consistent with the Scheduling Order, the parties all filed *Motions in Limine*, which were fully briefed on March 19, 2020. Ms. Clerget held telephonic oral argument on those *Motions in Limine* on March 30, 2020. Prior to the oral argument, the parties also discussed and agreed to reschedule the April in-person hearing due to the Covid-19 pandemic. The parties are discussing new hearing dates with the hearing assistant, but it seems likely the hearing will be rescheduled for mid-August 2020. Ms. Clerget will issue an order on the *Motions in Limine* as soon as possible.
- j. **In the Matter of the Notice of Appeal by the Rippling Woods Homeowners Association, et al., Regarding Approval of Opencut Mining Permit No. 2949, Moudy Pit Site, Ravalli County, MT, BER 2019-08 through 21 OC.** Between November 8, 2019 and November 29, 2019, the Board received fourteen appeals from various parties regarding the approval of Opencut Mining Permit No. 2949. On December 13, 2019, the Board consolidated for procedural purposes BER 2019-08 through 21 OC. On December 19, 2019, Ms. Clerget issued a Prescheduling Order seeking clarification as to the parties' representation in this matter. Several parties and the homeowner's association submitted notices of appearance. John De Groot (BER 2019-13 OC), Robert N. Beall, Robert Beall Jr., Keith Beall (BER 2019-21 OC), Stephen Richard and Victoria Angyus (BER 2019-09 OC) and Linda Slater (BER 2019-11 OC) failed to enter notices of appearances, and therefore their cases were dismissed on January 30, 2020. Attorneys for the Bloomquist Firm have since entered notices of appearance for the remaining individual residents and the homeowner's association. Pursuant to

the January 30, 2020 Scheduling Order and a stipulation of all parties, the HOA and Residents filed an amended Statement of Issues on Appeal on February 21, 2020. The parties are proceeding according to the Scheduling Order, with dispositive motions to be fully briefed by August 4, 2020.

3. Contested Cases not assigned to a Hearing Examiner

a. **In the Matter of the Notice of Appeal and Request for Hearing by Western Energy Company (WECO) regarding its MPDES Permit No. MT0023965 issued for WECO's Rosebud Mine in Colstrip, BER 2012-12 WQ.**

On September 10, 2019, the Montana Supreme Court issued its opinion reversing the First Judicial District Court in Montana Environmental Information Center and Sierra Club v. Montana DEQ and Western Energy Company. The Montana Supreme Court reversed the District Court on decisions of law and determined that DEQ properly interpreted rules implementing the Montana Water Quality Act (specifically ARM 17.30.637(4)). In so doing, the Court recognized that DEQ has the flexibility to exempt ephemeral waters from the water quality standards applicable to Class C-3 waters without the Board of Environmental Review reclassifying the waters. The Court also determined that DEQ lawfully permitted representative sampling of outfalls under Western Energy Company's MPDES permit. The Montana Supreme Court remanded the case back to District Court for further proceedings to determine certain issues of material fact, specifically whether DEQ acted properly in regard to a stretch of East Fork Armells Creek that is potentially impaired and intermittent, whether it is necessary for DEQ to adopt a TMDL for impaired segments of East Fork Armells Creek, and whether the representative monitoring selected by DEQ is factually supported. On October 10, 2019, MEIC and Sierra Club (MEIC) filed a petition for rehearing to amend the Opinion arguing the Montana Supreme Court's remedy, reversing the District Court's summary judgment and remanding questions of fact to the District Court is in conflict with controlling decisions that were not addressed by the Montana Supreme Court. DEQ and WECO objected to MEIC's petition. On November 19, 2019, the Montana Supreme Court held its Order was not in conflict with a statute or controlling decision not addressed and MEIC's petition for rehearing was denied. On December 6, 2019, Westmoreland Rosebud Mining Company (formerly Western Energy Company) filed a motion for substitution of District Judge Seeley. Judge Seeley invited Judge Reynolds to assume jurisdiction of the case. Jurisdiction was assumed by Judge Reynolds on December 18, 2019. On April 7, 2020, Plaintiffs (MEIC and Sierra Club) filed a motion for scheduling conference.

III. ACTION ITEMS

A. APEAL, AMEND, OR ADOPT FINAL RULES

1. **The Department requests the Board initiate rulemaking for NEW RULE I.**

The department has developed nonanthropogenic arsenic standards for segments of the Yellowstone River. The river originates in Yellowstone National Park, and the park's geothermal features are a natural source of elevated arsenic. As a result, arsenic concentrations are naturally elevated above the human health standard (10 µg/L) from the park to approximately Billings, MT. During the meeting the department will provide the scientific and technical background on the development of the

standards, recommend standards for four different river segments, and request the board initiate rulemaking.

Public comment.

2. **The Department will propose that the Board initiate rulemaking for proposed amendments to ARM 17.30.1202, 17.30.1203, 17.30.1304, 17.30.1322, 17.30.1331, 17.30.1340, 17.30.1341, 17.30.1342, 17.30.1344, 17.30.1345, 17.30.1346, 17.30.1350, 17.30.1354, 17.30.1361, and 17.30.1372 to:**
 - a. maintain consistency with the federal program,
 - b. adopt the updated federal individual permit application forms,
 - c. provide flexibility in the public notice process by eliminating the requirement to publish notice in newspapers, and
 - d. provide clarity and reduce redundancy through editorial corrections.

Public comment.

B. ACTION ON CONTESTED CASES

1. **In the Matter of Notice of Appeal of Opencut Mining Permit #2351 Issued to Golden West Properties, LLC by Frank and Paulette Wagner Regarding Concerns and Unanswered Questions. BER 2018-04 OC, and In the Matter of Notice of Appeal of Opencut Mining Permit #2351 Issued to Golden West Properties, LLC by David Weyer on behalf of the Residents of Walden Meadows Subdivision. BER 2018-05 OC.** On August 30, 2019, Ms. Clerget issued her Order on the parties' motions including (1) leave to file second amended complaint; (2) motion in limine; and (3) cross-motions for summary judgment. Golden West and DEQ requested a new pretrial motion deadline, which was granted on September 18, 2019. The parties submitted an amended agreed upon schedule and Ms. Clerget issued an Amended Scheduling Order on September 25, 2019. Pursuant to the schedule, DEQ and Golden West filed second motions for summary judgment, which (after several extensions) were fully briefed on November 21, 2019. On January 30, 2020, Ms. Clerget issued her Proposed Findings of Fact and Conclusions of Law to the Board, recommending dismissal the case based on the prior order on Motions to Dismiss and the Second Motions for Summary Judgment. On February 21, 2020, counsel for the Residents filed an Unopposed Motion to Dismiss Frank and Paulette Wagner from this case. That same day the parties filed a Stipulation for Dismissal of Appeal, which asks the Board to dismiss the case, but also enter the Proposed FOFCOL as the Board's final order.
2. **Montana Environmental Information Center, and Sierra Club v. Montana Department of Environmental Quality, Montana Board of Environmental Review, and Western Energy Co. (DV-2019-34, Rosebud County)(District Court).** On June 6, 2019 the BER issued its final agency action in BER 2016-03 SW ("Western Energy"). On July 3, 2019 Conservation Groups filed a Petition for Review of Final Agency Action. The BER is named as a Defendant in the Petition. The BER has retained Amy Christensen to represent it in this matter at the District Court. On March 12, 2020 the Court issued an Order denying the Board's Motion to Dismiss.
3. **In the Matter of Notice of Appeal and Request for Hearing by Western Energy Company Regarding Approval of Surface Mining Permit No. C2011003F, BER**

2019-03 OC and BER 2019-05 OC. On May 31, 2019, the BER appointed Sarah Clerget as hearing examiner to preside over the contested case for procedural purposes only, stating that the Board would revisit the assignment if/after dispositive motions were filed. Ms. Clerget has now presided over the procedural aspect of the case and the parties have proceeded according to her scheduling order. Discovery is now complete, and all of the parties have submitted partial motions for summary judgment, which are now all fully briefed. The Board must now decide whether it wishes to retain the summary judgment review and decision – and if so, the logistics and timing of that review with the parties – or assign the case to a hearing examiner in its entirety.

IV. BOARD COUNSEL UPDATE

Counsel for the Board will report on general Board business, procedural matters, and questions from Board Members.

V. GENERAL PUBLIC COMMENT

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