

BOARD OF ENVIRONMENTAL REVIEW
FRIDAY, OCTOBER 9, 2020
9:00 am – 11:00 am
DEQ ZOOM CONFERENCE

NOTE: Board members, the Board attorney, and secretary will be participating telephonically. Interested persons, members of the public, and the media are welcome to attend at the location stated above. Members of the public and press also may join Board members with prior arrangement. Contact information for Board members is available on the Board's Website (<http://deq.mt.gov/DEQAdmin/ber/board>) or from the Board Interim Secretary, Deb Sutliff (dsutliff@mt.gov). The Board will make reasonable accommodations for persons with disabilities who wish to participate in this meeting. Please contact the Board Secretary by e-mail at dsutliff@mt.gov, no later than 24 hours prior to the meeting to advise her of the nature of the accommodation needed.

9:00 AM

I. ADMINISTRATIVE ITEMS

A. REVIEW AND APPROVE MINUTES

1. **The Board will vote on adopting the August 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.
 - i. **Contested Case:** On April 9, 2020 CR/REF filed a Motion *in Limine* and a Motion for Summary Judgment on May 22, 2020. On June 9, 2020, Ms. Clerget issued an Order denying CR/REF's Motion in Limine. On July 9, 2020, Ms. Clerget held oral argument on CR/REFs Motion for Summary Judgement. That motion is fully briefed and awaiting decision. As of September 15, the parties have also fully briefed CR/REF's "Motion to Take Judicial Notice of Fact" and CR has also filed a "Motion to Strike" that is not yet fully briefed.
 - ii. **District Court case:** [see Memo from Amy Christensen]

- b. **In the matter of the notice of appeal by Duane Murray regarding the notice of violations and administrative compliance and penalty order (Docket No. SUB-18-01; ES#36-93-L1-78; FID 2568), BER 2020-01 OC.** On July 22, 2020 Duane Murray filed a request for hearing with the Board. At its August 2020 meeting the Board appointed Sarah Clerget to preside over this contested case. On September 9, 2020 Ms. Clerget issued a Prescheduling Order. The parties have entered Notices of Appearance and their initial proposed scheduling orders are due to Ms. Clerget by October 2, 2020.

2. **Non-enforcement cases assigned to the Hearings Examiner**

- a. **In the matter of the Notice of Appeal and Request for Hearing by City of Great Falls Regarding Issuance of MPDES Permit No. MT0021920.** Ms. Clerget issued an Amended Scheduling Order on March 20, 2020, based on a Motion from the parties. Calumet Montana Refining, LLC has filed a motion to file brief as amicus curiae, Ms. Clerget issued an Order partially granting Calumet's request on May 18, 2020. The parties filed a motion for extension on August 4, 2020 requesting extension of the discovery and dispositive motions deadlines. Ms. Clerget issued an Order on August 6, 2020 extending those deadlines. On September 14, 2020 the parties filed a "Joint Notice of Pending Settlement." Ms. Clerget issued an Order vacating the remaining deadlines and directing the parties to file either a motion for dismissal or a joint status report by October 2, 2020.
- b. **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, BER2017-03 WQ.** A two-day hearing on this matter on held on December 3-4, 2018. An oral argument on the parties' proposed FOFCOLs was held on May 7, 2019, making it ripe for decision from the hearing examiner. 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 challenging DEQ's issuance of MPDES Permit No. MT0030279. While the District Court action was 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 case. 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, which was granted on September 17, 2019. The parties have cross-appealed the District Court's decision to the Supreme Court under Cause No. DA 19-0553. The matter is fully briefed at the Supreme Court and awaiting decision. The parties will have 30 days in which to file a status report with Ms. Clerget once the Supreme Court issues a decision.
- c. **In the Matter of the Notice of Appeal and Request for Hearing by Spring Creek Coal, LLC Regarding Issuance of MPDES Permit No. MT0024619.** On April 12, 2019, the BER appointed Sarah Clerget as hearing examiner to preside over this contested case. On May 8, 2020, the parties filed a Joint Motion to Substitute, requesting that Navajo Transitional Energy Company, LLC replace Spring Creek Coal as a party, as it had replaced Spring Creek Coal as the permit holder. The motion to substitute was granted on May 13, 2020 and an Amended Scheduling Order was issued on May 12, 2020. The parties are proceeding according to that order, with discovery closing in January 2021.

- d. **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 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 in January, March, and September and subsequently issued Orders continuing a stay in this case due to rulemaking regarding arsenic that has the potential to affect the remaining issues in the case. The parties have a status conference schedule for October 6, 2020 where they will update Ms. Clerget as to the potential settlement of this case.
- e. **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.
- f. **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:** [see Memo from Amy Christensen]
 - ii. **Contested Case:** August 18th-21st the parties participated in the contested case hearing. Proposed findings of fact and conclusions of law are due from the parties on November 9, 2020.
- g. **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. Several parties were dismissed from the appeals and a Scheduling Order was issued on January 31, 2020. On May 26, 2020, DEQ filed a Motion to Dismiss, which was fully briefed on June 9, 2020. On June 10, Petitioners filed a Notice that they were seeking a Declaratory Ruling from DNRC. On June 10th, Ms. Clerget ordered the parties to indicate whether they wanted a stay pending DNRC's ruling. The parties disagreed about whether a stay was necessary and on June 26, 2020, Ms. Clerget issued an order that the matter would proceed as scheduled through the dispositive motions deadline. On July 20, 2020, Ms. Clerget issued an Order denying DEQ's Motion to Dismiss. The same day, DEQ filed a Motion for Clarification, and Ms. Clerget issued an Order of Clarification. DEQ filed a partial motion for summary judgment on September 29, 2020. The parties should have the motion fully briefed by November 2020.
- h. **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. At the Board's last meeting, it voted to assign the case in its entirety to Ms. Clerget. The parties have cross moved for partial summary judgment, and the Motions are fully briefed and pending a decision from the hearing examiner.

- i. 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"). [See Memo from Amy Christensen]
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.** The permit appeal is stayed pending judicial review. 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. The parties are proceeding in accordance with the scheduling order entered by the First Judicial District Court on remand.

b. **New Contested Cases**

1. **In the matter of notice and appeal by Woodrock, Inc., regarding permit suspension order of Opencut Mining Permit No. 2677, Stipek Site, Dawson County, MT BER 2020-02 OC.** On August 19, 2020, the Board received a request for hearing from Woodrock, Inc. The Board can decide to assign a hearings examiner for procedural issues in this case, hear the case itself, or assign a hearing examiner for the totality of the case.

c. **Action on Contested Cases**

1. **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.** This matter was stayed on February 10, 2020. As ordered, the parties filed a joint status report and proposed scheduling order on April 13, 2020. On April 20, 2020, Ms. Clerget issued an Amended Scheduling

Order and discovery closed in August. On September 14, 2020, the parties filed a “Stipulation and Request for Retention of Board Jurisdiction.” The Board needs to determine whether it will retain jurisdiction and issue the proposed order from the parties.

2. **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 and Ms. Clerget assumed jurisdiction on September 8, 2017. The case was stayed pending a Montana Supreme Court decision, which was issued in September 2019. On April 24, 2020, the parties filed a Joint Motion for Stay indicating that they are working toward settlement of the case. That motion was granted on April 28, 2020 and the case was stayed until July 24, 2020. The parties filed a Joint Motion to Continue Stay on July 24, 2020 and September 9, 2020, which was granted on July 29, 2020 and September 9, 2020. On September 30, 2020 the parties filed a “Joint Motion to Remand and Suspension of Proceedings.” The Board needs to determine whether it will remand the case to DEQ pursuant to the settlement agreement and suspend proceedings.

III. ACTION ITEMS

A. RULE ADOPTION

1. **The Department will propose that the Board adopt 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:
 - i. maintain consistency with the federal program,
 - ii. adopt the updated federal individual permit application forms, and
 - iii. provide clarity and reduce redundancy through editorial corrections.

B. CONTESTED CASES

1. **In the Matter of the Application for an Amendment of a Major Facility Siting Act Certificate by Talen Montana LLC.** 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 1, Talen gave notice “that the parties have not reached a settlement resolving this contested case hearing and that Talen will relinquish the MFSA certificate amendments challenged in this proceeding...” The parties filed a Joint Stipulation of Dismissal on September 29, 2020. The matter is therefore dismissed and closed.
2. **In the Matter of the Notice of Appeal By Nicholas and Janet Savko, Regarding Floodplains Setbacks, Gallatin County, MT, BER 2020-03 SUB.** On September 28, 2020 the Board of Environmental Review received a request for hearing.

3. **In the Matter of the Notice of Appeal By Signal Peak Energy, Regarding purporting to rule on an alleged impairment of water rights under Montana Code § 82-4-253.** On October 7, 2020 by the Board of Environmental Review received a request for hearing.

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