



**BOARD OF ENVIRONMENTAL REVIEW  
MINUTES  
August 7, 2020**

**Call to Order**

Chairperson Deveny called the meeting to order at 9:00 a.m.

**Attendance**

**Board Members Present**

By ZOOM: Chairperson, Christine Deveny  
John DeArment, David Lehnerr, Hillary Hanson, Chris Tweeten, Dexter Busby, Jerry Lynch  
A quorum of the Board was present.

**Board Attorneys Present**

Sarah Clerget, Attorney General's Office (AGO)  
Amy Christensen, Attorney with Christensen and Prezeau

**Department Personnel Present**

Board Liaison: George Mathieus  
Interim Board: Secretary Deb Sutliff  
Legal: Ed Hayes, Sandy Moisey-Scherer, Kirsten Bowers, Kurt Moser, Angie Colamaria, Sarah Christofferson, Norm Mullen  
Enforcement: Chad Anderson, Rich Jost  
Air Quality: Dave Klemp, Troy Burrows, Shawn Juers, Liz Ulrich, Katie Alexander, Katy Callon, Julie Merkel, Jon Staldine  
Water Quality: Tim Davis, Myla Kelly, Dr. Mike Suplee, Lauren Sullivan, Galen Steffens, Hannah New, Darryl Barton, Jon Kenning, Maya Rao, Eric Sivers, Joanna McLaughlin  
Water Protection: Jon Kenning, Kristy Fortman, Rainey DeVaney, Christine Weaver  
Federal Superfund and Construction: Keith Large  
Coal and Opencut Mining: Jon Staldine, Ed Coleman

**Other Parties Present**

Lisa Lesofski, Court Reporter  
Vicki Marquis, Holland & Hart  
Eric Schmidt, Billings resident, Chair of the Yellowstone Valley Citizens Council (YVCC)  
Peggy Trenk, Treasure State Resources  
Caroline Canrios, Northern Plains Resource Council

## **I.A. Administrative Items – Review and Approve Minutes**

### **I.A.1. June 12, 2020, Meeting Minutes**

Chairperson Deveny moved to approve the minutes. Board Member Lynch seconded the motion, which passed unanimously.

## **II.A.1. Briefing Items – Enforcement Cases assigned to the Hearing Examiner**

### **II.A.1.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.**

Ms. Clerget stated she was continuing with the contested case while it's also going in District Court. Ms. Clerget stated she had a motion in limine that she ruled on denying the Copper Ridge and Reflections motion. Ms. Clerget added that there is a Motion for Summary Judgment waiting for her decision.

Ms. Christensen added that the Petition for Judicial Review in District Court. There was a little bit more time to file an amended brief while waiting to see what the Supreme Court was going to do in a separate case. Ms. Christensen stated that they had filed their Motion to Dismiss in this case last week on the same grounds as filed in the Rosebud Mine case, which is they don't feel like the Board should be a part of it when we're dealing with Judicial Review of one of the Board's decisions. The answer brief to that will be due in another week and then it will be fully briefed and then wait for a decision from Judge Harada.

### **II.A.1.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.**

Ms. Clerget verbally added this item, which did not appear on the agenda as the parties have settled and dismissed it.

## **II.A.2. Briefing Items – Non-Enforcement Cases Assigned to a Hearing Examiner**

### **II.A.2. 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.**

Ms. Clerget stated that on April 20 she issued an Amended Scheduling Order, and Discovery is closing the end of August. This Matter is proceeding.

### **II.A.2. 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.**

Ms. Clerget stated that she has issued an order partially granting Calumet's request to file an amicus brief, that was on May 18. Discovery is closing the beginning of August. Ms. Clerget had just received a Motion for Extension; the date will move, but not by much – possibly in September. This Matter is proceeding.

II.A.2. 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.**

Ms. Clerget stated that Westmoreland Resources is working towards a settlement. Westmoreland Resources asked for a Continued Stay, which she granted on July 29. Westmoreland Resources has until September 9, at which time the Matter will either be dismissed, because they've stayed, or Westmoreland Resources will ask for a Scheduling Order.

II.A.2.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, BER2017-03 WQ.**

Ms. Clerget informed members that this Matter is up in front of the Supreme Court on a parallel district court action; this Matter wasn't supposed to have anything to do with the Board, but the decision in district court affected it. This Matter is fully briefed in front of the Supreme Court and awaiting decision. Montanore Minerals is going to file a Status within 30 days of the decision. This is Stayed until a decision comes from the Supreme Court.

II.A.2.e. **In the Matter of the Application for an Amendment of a Major Facility Siting Act Certificate by Talen Montana LLC.**

Ms. Clerget stated that on July 1 Talen gave a Notice reading, "The Parties have not reached a settlement resolving this Contested Case Hearing and that Talen will relinquish the Certificate Amendments challenged in this proceeding." The Parties agreed that they're going to Relinquish the Certificate. The Relinquishment should be complete by August 31 and then move to Dismiss by September 30.

II.A.2. 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.**

Ms. Clerget stated that this item has been renamed Navajo Transitional Energy Company (NTEC) after a transition of the Certificate. Ms. Clerget gave NTEC an Amended Scheduling Order on May12. Discovery closes January 2021. NTEC is proceeding per the schedule.

II.A.2. 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.**

Ms. Clerget informed members that this is Stayed pending the current Rulemaking item in this agenda on the arsenic. Ms. Clerget has had a couple of scheduling conferences and is Continuing the Stay until a conference on September 4 based on today's outcome.

II.A.2. 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.**

Ms. Clerget informed members that CHS is Laurel Refinery and the same update as referenced above in II.A.2.g.

II.A.2.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.**

Ms. Clerget introduced Ms. Christensen for the district court update. Ms. Clerget added that the Contested Case proceeds in front of her and prehearing briefing is complete. There was a Motion in Limine that she issued an Order on July 29. Ms. Clerget stated she has a prehearing conference set for August 11 and the hearing in this Matter will go August 18. Ms. Clerget added that she just talked to the parties a couple days prior and the parties have agreed that the hearing will be facilitated remotely and will probably take two to three days as virtual technology is new territory for all parties.

Ms. Christensen added that she did get the ruling from the Montana Supreme Court. The parties had taken a Decision from the district court on a Subpoena dispute, to the Montana Supreme Court. The Montana Supreme Court issued a ruling June 23. The Court felt that we did not have enough rulings from the Board for the upper Courts to make a decision. The Montana Supreme Court Remanded the Matter back to the Board to address some discovery issues and make some rulings before they can address the constitutional issues. This one is coming back and there will be some additional rulings required before it moves any further.

II.A.2.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.**

Ms. Clerget stated that the Association has another month to file Dispositive Motions. Discovery closes on August 5 and then may or may not get Dispositive Motions on this case.

II.A.2.k. **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.**

Ms. Clerget stated that the parties have cross-moved for partial Summary Judgment and the Motions are fully pending in front of her and waiting a decision.

II.A.2. l. **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).**

Ms. Christensen informed members that this has been discussed the last meeting or two because the issue in the case is whether or not the Board should be made a party on Judicial Review of one of its own decisions and because that issue was resurfacing in many cases, it was decided to file a Motion to Dismiss before the District Court to see if we could get the Board out of the case. That Motion to Dismiss was denied. The Board filed a Petition for Writ of Supervisory Control with the Montana Supreme Court, in an immediate appeal to see if the court would jump in and make a decision before the District Court action was complete. Ms. Christensen added that it is an extraordinary remedy and, unfortunately, the Montana Supreme Court decided that the Board had not established sufficient urgency and need for that type of extraordinary remedy, the immediate appeal. The Writ was denied, which means the District Court judicial review had been Stayed while the Montana Supreme Court was considering the Petition. The District Court is back on track now and the Answer Brief, in that case, is being filed today, which will be a very simple sort of statement that we believe that it's more appropriate for the parties to the case to present their positions rather than for the Board to advocate in defense of its own decision. The Board will receive a decision on the

merits of the petition for judicial review from the District Court and at that point the Board will be in a position to appeal the issue of whether they should be a party to the Supreme Court and at that point we could present the issue on its merits and the court could consider it. The court essentially denied the Petition for a Writ of Supervisory Control more on a technical issue, not on the merits of the argument we make. This Matter is back in District Court and the Board will have to ride this one out. There is probably going to be an Oral Argument scheduled at some point still more briefing to do; nevertheless, moving forward.

### **II.A.3. Contested Cases not assigned to a Hearing Examiner**

#### **II.A.3.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.**

Ms. Bowers informed members that this case is Western Energy Permit Appeal that has been Stayed pending judicial review and that's associated with a case – MEIC and Sierra Club versus DEQ and Western Energy Company – that went to the Supreme Court. The Montana Supreme Court issued its opinion back in September of 2019 and remanded the case back to District Court on certain questions of fact. The Department is still proceeding on remand before the District Court in accordance with the District Court Scheduling Order. The parties are conducting Discovery. Ms. Bowers will keep the Board posted.

### **III. A. Action Items – Adoption Final Rules**

#### **III.A.1. The Department Requests the Board Adopt - NEW RULE I**

Mr. Mathieus informed members that back in April the Department of Environmental Quality (Department) requested Initiation of Rulemaking for Arsenic Standards. Mr. Mathieus introduced Myla Kelly, DEQ Water Quality Standards and Modeling Manager, to make a presentation. Mr. Davis redirected the presentation to Dr. Michael Suplee, DEQ Water Quality Science Specialist with Standards and Modeling.

Dr. Suplee addressed the Board adding the request that the board adopt New Rule I as it was proposed. Dr. Suplee continued that New Rule I pertained to Natural and Nonanthropogenic Standards, including Nonanthropogenic Arsenic Standards for four segments of the upper and middle Yellowstone River. Since Rulemaking was initiated by this Board in April, there has been the requisite public comment period in a hearing and a number of comments were received. Two major themes prevailing from those comments received. 1). Generally, there was the broad but not universal support for Natural and Nonanthropogenic Standards and in particular the Yellowstone's Nonanthropogenic Arsenic Standards. Further, there was phrase for the technical work the Department carried out to identify the Yellowstone's arsenic standards. There were requests for alterations to the rule to allow for certain permitting flexibilities be made available, specifically, intake credits and mixing zones. Dr. Suplee wanted to emphasize that when Nonanthropogenic Standards are developed in the way they were for Arsenic on the Yellowstone River, the new standards already give dischargers credit for the naturally occurring concentrations above the current standard. As a result, any need for a Water Quality Standard based intake credit is precluded by the Nonanthropogenic standards themselves. The Department also recommends that they're only appropriate when the background condition of the receding water is below the applicable Water Quality Standard.

Chair Deveny requested comments from the public.

Ms. Marquis introduced herself as a representative of the CHS Laurel Refinery and added that CHS has previously submitted public comments and they stand behind those comments and would reiterate those.

Chair Deveny requested comments regarding Proposed Rule I.

Mr. Schmidt introduced himself as a Billings resident and said he serves as the Chair of the Yellowstone Valley Citizens Council (YVCC), which is an affiliate of the Northern Plains Resource Council, and that he was speaking on behalf of the YVCC. Mr. Schmidt added that the YVCC supports DEQ's New Rule I.

Board Member Lehnerr directed questions to Dr. Suplee to further understand the concept of intake credits and mixing zones. Mr. Suplee responded.

Board Member Lynch requested clarification in the credits and Dr. Suplee responded.

Board Member Busby directed his question to the Department Lawyers regarding a potential conflict with the statute. Mr. Moser responded.

Board Member Tweeten voiced his concerns on technical questions on the Department's interpretation of the statute and the application of the data. Mr. Davis responded.

Ms. Clerget followed up with clarification adding the second sentence of statute.

Mr. Moser and Mr. Davis provided further explanation.

Board Member Tweeten moved to adopt New Rule I as set forth in the notice of adoption and House Bill 531 and 311 analysis, pertaining to the natural and nonanthropogenic water quality standards. Chair Deveny seconded the motion and called for discussion on the motion.

Board Member Busby stated that he did not think the Board should adopt a rule that has potential conflict with the statute it's trying to implement.

No further discussion. The motion passed 4 to 1 with Board Member Busby opposed.

III.A.2. **The Department requests that the Board Initiate Rulemaking to Amend ARM 17-8-501, 504, 505, and 510**

Ms. Ulrich addressed the Board, asking to initiate rulemaking to Amend ARM 17-8-501, 504, 505, and 510 pertaining to Air Quality Operating Fees for registered sand and gravel, asphalt, and concrete facilities. Ms. Ulrich continued, that under the previous permitting program, the facilities paid an annual operating cost of \$800 per year per permit and an application fee of \$500 when a permit application was submitted. Without this new rule, there would be no fees collected, as permits are no longer issued for these affected facilities. The new fee rule is designed to be revenue neutral, that is, to generate relatively the same amount of funding from the new registration program as was generated from the collection of the annual operating fee from the previous permitting program.

Chair Deveny asked Board members if there were any questions or comments about the proposal to initiate rulemaking or whether the Department should initiate rulemaking on this issue. Hearing none, Chair Deveny asked for public comments on whether the Department should initiate rulemaking on this issue. There were no public comments.

Chair Deveny asked Bboard members for a Motion to Initiate the Rule and assign it to hearings officer, Sarah Clerget, to hold the hearing on the rulemaking.

Board Member Busy moved to initiate rulemaking and assigned the rule hearing to Sarah Clerget. Board Member Tweeten seconded the motion, which passed unanimously.

### III.A.3. **Initiation of Rulemaking**

Mr. Davis addressed the Board requesting the Board hold a special session on or near September 24 to initiate rulemaking on the Lake Kookanusa site-specific selenium standard.

Mr. Tweeten moved to hold the special meeting on a date to be determined at the convenience of all the parties, the Department, and the Board members. Mr. Lynch seconded the motion.

Chair Deveny asked for comments or questions. There were no comments.

Board Member Tweeten moved to hold a meeting to consider initiating rulemaking for the Lake Kookanusa and Kootenai River. Board Member Lynch seconded the motion, which passed unanimously.

### III.B. **New Contested Cases**

#### III.B.1. **In the Matter of the Notice of Appeal by Mr. Duane Murray, BER 2020-01, SUB-18-01.**

Ms. Clerget introduced the Notice of Appeal by Mr. Duane Murry. Ms. Clerget informed members of their options to keep the case and act on all procedural and substantive matters or to assign it to a hearing examiner, keeping it for substantive purposes and assigning it for procedural purposes.

Mr. Lynch made the motion to assign the case to Agency Legal Services Bureau (ALSB) for all procedural and for all matters. Mr. Tweeten seconded the motion.

Chair Deveny asked for comments or discussion. There were none. Board Member Lynch moved to assign the case in its entirety to Sarah Clerget and/or ALS Bureau attorneys to act as hearing examiner. Board Member Tweeten seconded the motion, which passed unanimously.

### IV. **Board Counsel Update**

The Board discussed the cost of outside counsel, and decided how to proceed utilizing outside counsel in the future on current District and Supreme Court actions.

### V. **Public Comment**

No comments were offered.

## VI. Adjournment

Chairperson Deveny motioned to adjourn at 10:40. Mr. Tweeten seconded and the motion carried unopposed.

Board of Environmental Review August 7, 2020, minutes approved:

/s/  
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CHRISTINE DEVENY  
CHAIRPERSON  
BOARD OF ENVIRONMENTAL REVIEW

December 14, 2020  
DATE