

**BOARD OF ENVIRONMENTAL REVIEW
MINUTES**

October 9, 2020

Call to Order

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

Attendance

Board Members Present

By ZOOM: Chairperson Chris Deveny, David Lehnherr, Dexter Busby, John DeArment, Jeremiah Lynch, Hillary Hanson

A quorum of the Board was present

Board Attorneys Present

Sarah Clerget, Attorney General's Office (AGO)

Amy Christensen, Attorney with Christensen and Prezeau

DEQ Personnel Present

Board liaison: Tim Davis

Interim Board Secretary: Deb Sutliff

DEQ Legal: Angie Colamaria, Ed Hayes, Sandy Moisey-Scherer, Kirsten Bowers, Kurt Moser, Aaron Pettis, Mark Lucas, Sarah Christofferson

Enforcement: Chad Anderson

Water Quality: Tim Davis, Sandy Matule, Rainie DeVaney, Joanna McLaughlin, Kayla Glossner, Hannah New, Amelia Flanery, Haley Sir, Melinda Horne

Coal and Opencut: Ed Coleman

Other Parties Present

Laurie Crutcher, Laurie Crutcher Court Reporting

Vicki Marquis, Holland and Hart;

John Martin & Trish, Signal Peak Energy;

Derf Johnson, MT Environmental Information Center;

Anne Hedges, MEIC;

Corey Barnes, Baker and Hostetler, LLP (Attorney for Westmoreland Mining)

I. ADMINISTRATIVE ITEMS

A. REVIEW AND APPROVE MINUTES

- I.A.1 | The August 7, 2020 meeting minutes were postponed for corrections and additions from DEQ. A second draft will be voted on at the next meeting.

II. BRIEFING ITEMS

A. CONTESTED CASE UPDATES

1. 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.** 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 Judgment. 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:** This case is in the District Court in Billings on an intermediate petition for judicial review relating to an appeal of a decision to consolidate the cases. A Motion to Dismiss was filed due to the Board being named as party. This Motion is fully briefed and is scheduled for oral argument, this week, in front of Judge Harada.

II.A.1.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

II.A.2.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. 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.

II.A.2.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.

II.A.2.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.

II.A.2.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. CHS has requested a Special Meeting of the Board before the end of October due to the expiration on their existing permit.

Chair Deveny proposed Tuesday, October 29, 2020, at 9 am as the time for a special meeting of the Board. Not all members of the board could confirm their availability, so the discussion of possible dates was postponed.

II.A.2.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 the previous.

II.A.2.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:** Ms. Christensen informed members that the case has gone up to the District Court, which found that there were issues that needed to still be decided at the administrative level, so they have remanded it back. It should come back to the Board for some further rulings.
- ii. **Contested Case:** August 18-21 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. Ms. Clerget stated that the case has come back to the Board and Ms. Clerget proceeded with the trial. Ms. Clerget informed members that she has received a Motion for Extension and

II.A.2.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.

II.A.2.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")

II.A.3. ACTION ITEMS: 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.** The parties are proceeding in accordance with the scheduling order. There are no other changes to report.
- II.A.3.b. **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.
- Chair Deveny moved to approve the stipulation and request for retention of Board jurisdiction. Board Member DeArment seconded the motion, which passed unanimously.
- II.A.3.c **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, the Board of Environmental Review received a request for hearing.
- Chair Deveny moved to assign the contested case in its entirety, procedural and substantively, to a hearing examiner with the office of ALS. Board Member Lynch seconded the motion, which passed unanimously.

III.A.1. ACTION ITEMS: Rule Adoption

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.

Board Member Busby moved to adopt the rule amendments as set forth in the notice of amendment, along with House Bill 521/311 analysis, with the amendment to the rule adding the newspaper notification. Board Member Lynch seconded the motion, which passed unanimously.

IV. Board Counsel Update

Ms. Clerget requested, for clarification in one place on the record, that all contested cases before the Board are assigned to ALS as a Hearing Examiner, and not to her personally. She asked for a motion from the Board that clarified that.

Chair Deveny moved to clarify that all contested cases currently assigned to Ms. Clerget are assigned to the ALS Bureau attorneys and, therefore, any can serve as hearing officers. Board Member Hanson seconded the motion, which passed unanimously.

V. Public Comment: No comments offered

VI. Adjournment

Chairperson Deveny motioned to adjourn at 10:02 a.m., Mr. Busby seconded, and the motion was carried unopposed.

Board of Environmental Review October 9, 2020 minutes approved:

/s/
CHRISTINE DEVENY
CHAIRPERSON
BOARD OF ENVIRONMENTAL REVIEW

December 14, 2020
DATE