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MINUTES
December 11, 2009

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 9:08 a.m., on Friday, December 11, 2009, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present: Chairman Joseph Russell, Marvin Miller, Heidi Kaiser, Larry Mires, Robin Shropshire, Larry Anderson, and Joe Whalen (via telephone)

Board Attorney Present: None

Board Secretary Present: Joyce Wittenberg

Court Reporter Present: Laurie Crutcher, Crutcher Court Reporting

Department Personnel Present: Richard Opper (Director), Tom Livers (Deputy Director) and Lisa Peterson – Director's Office; John North, Jim Madden, Carol Schmidt, David Rusoff, Jane Amdahl, Claudia Massman, and Norman Mullen – Legal; Judy Hanson and Karen Simpson – Permitting & Compliance Division; Jenny Chambers and Kari Smith – Water Protection Bureau; Eugene Pizzini, Eric Regensberger, Channah Wells, and Steve Kilbreath – Public Water Supply & Subdivisions Bureau; David Klemp, Vickie Walsh, Paul Skubinna, Dave Aguirre, Charles Homer, Eric Merchant, Mark Ewanic, and Debra Wolfe – Air Resources Management Bureau; Rick Thompson – Waste and Underground Tank Management Bureau; Janet Kessler – Office of Financial Services; George Mathieus – Planning Division; Bob Bukantis and Art Compton – Water Quality Planning Bureau; John Arrigo and Ed Coleman – Enforcement Division

Interested Persons Present (*Disclaimer: Names are spelled as best they can be read from the official sign-in sheet.*): Gary Forrester – MDU Resources; Jessie Lutner - Browning, Kaleczyc, Berry and Hoven; David Hoffman, Jim Parker – PPL Montana; Jeff Chaffee – Bison Engineering; Anne Hedges – Montana Environmental Information Center; John Camden – Montana Rural Water Systems; Todd O'Hair – Cloud Peak Energy; Mary Jaraczski – Southern Montana Electric; Bud Clinch – Montana Coal Council; Dave Galt – Montana Petroleum Association; Don Allen – Western Environmental Trade Association; Mike Murphy – Montana Water Resources Association; Cary Hegreberg – Montana Contractor's Association; Mark Lambrecht – self; Chuck Magraw – Natural Resources Defense Council

I.A.1 Review and approve October 2, 2009, Board meeting minutes.

Mr. Whalen MOVED for the approval of the October 2, 2009, Board meeting minutes. Mr. Miller SECONDED the motion. The motion CARRIED with a unanimous VOTE.

I.B.1 Board authority when a case is being dismissed under Rule 41(a). (briefing)

I.B.2 Dismissal of cases with prejudice vs. without prejudice. (briefing)

These items were rescheduled for the next meeting, since Ms. Orr, the Board's attorney, was not present.

I.C Set 2010 BER Meeting Dates

Discussion took place regarding the proposed dates; some Board members were not available on some of the dates proposed. The Board agreed on January 22, March 19, May 14, July 23, October 1, and December 3. Chairman Russell called for a motion to approve the dates. Ms. Kaiser so MOVED. Mr. Miller SECONDED the motion. The motion CARRIED with a unanimous VOTE.

II.A CONTESTED CASE UPDATES

Due to the absence of Ms. Orr, the Board's attorney, no updates beyond those provided in the agenda were given.

II.B.2 Gallatin River Outstanding Resource Water (ORW) Rulemaking Briefing

Mr. Livers explained that the BER had initiated rulemaking and had extended the comment period a few times, and DEQ expects to ask the Board to extend it again at the January meeting. He said the parties are currently discussing alternatives to ORW designation that would similarly protect water quality.

Mr. Bukantis provided an overview of ORW designation, how it fits into Montana's water quality standards, including the nondegradation provision of the standards. He provided a brief history and overview of the designation process and briefly reviewed the proposed rule. He said the Board was petitioned in 2001 to designate the stretch of the Gallatin River between Yellowstone Park and the confluence of Spanish Creek as an Outstanding Resource Water, and that in March of 2002 the Board accepted the petition, which triggered the need for an EIS. The EIS was completed in 2006 and the Board initiated the rulemaking and held a public hearing the same year, subsequently extending the comment period a few times.

Mr. Bukantis responded to questions from Board members regarding ORW designation and water quality standards. Ms. Chambers responded to questions from Board members regarding water discharge permitting.

Mr. Regensburger provided a summary about: the criteria used to determine point sources, the area affected by the point source determination, and the impacts of ORW designation. He then responded to questions from Board members.

II.B.1 Coal Bed Methane CBM Briefing

Mr. Bukantis provided a briefing of CBM development and rulemaking, including the need to protect irrigated agriculture, why the Board adopted standards for electric conductivity and sodium adsorption ratio, technical issues, and overview of the history and current status. He then responded to questions from Board members.

III.A.1 In the matter of the DEQ's request to initiate rulemaking to amend ARM 17.38.106 regarding engineering fees.

Mr. Pizzini explained this rulemaking was part of a multi-year effort to bring the fee collections in line with statutory requirements. Prior to the creation of DEQ and the Board of Environmental Review, the Board of Health made a policy decision that federal funds from EPA should partially subsidize review of engineering plans and specifications for water and wastewater systems. Based on this decision, the program was funded 50 percent through federal funds and 50 percent through fees. A 2002 Legislative audit determined this practice was out of compliance with statute, which requires the department to collect fees commensurate with the DEQ's costs for plan and specification review. The Board of Environmental Review initiated rule amendments in 2005 to address the issue, but due to the amount of the fee increase needed, the department had decided to phase the increase over a few years, resulting in initiation of further rulemaking in 2007 and again now. Mr. Pizzini provided cost and revenue projections, and recommended the Board initiate the rulemaking and appoint a hearings officer. He also responded to questions from the Board.

Mr. Whalen MOVED to initiate the rulemaking and to appoint a hearings examiner. Ms. Shropshire SECONDED the motion.

Further discussion took place. Mr. Pizzini and Mr. Livers responded to questions from the Board.

Chairman Russell called for public comment on the rulemaking; there was no response. He called for a VOTE on the motion, and the motion CARRIED unanimously.

III.A.2 In the matter of the DEQ's request to initiate rulemaking to 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.

Mr. North explained the rulemaking and provided background on the purpose of the rulemaking. He said that although the executive summary requests that the Board

appoint a hearings officer, the department anticipates that the rule will not be controversial, so the department is requesting initiation without holding a public hearing. He then responded to questions from Board members.

Chairman Russell called for public comment; there was no response. He called for a motion to initiate the rulemaking. Mr. Miller so MOVED. Mr. Anderson SECONDED the motion. Ms. Kaiser RECUSED herself. The motion CARRIED with a 5-0 VOTE.

III.A.3 In the matter of the DEQ's request to initiate rulemaking to adopt new rules and make amendments in Title 17, Chapter 8, subchapters 5, 6, 7, 8, 9, and 12 to set minor and major source permitting thresholds for greenhouse gas emissions.

Mr. Livers introduced the rulemaking and highlighted some key issues. He said this rulemaking is not a decision to regulate greenhouse gases. Pending EPA action would cause greenhouse gases to be added to the list of regulated pollutants, which would immediately subject them to Montana's permitting requirements. The rulemaking before the Board would limit the impact of that action by establishing a permitting threshold consistent with the threshold proposed by EPA.

Ms. Walsh reviewed some of the terminology dealing with air quality permitting and explained the purpose of this rulemaking. She described the three EPA actions driving the department's current request for rulemaking: the recent EPA endangerment finding, EPA and DOT's pending light-duty vehicle rule, and EPA's pending "tailoring rule" to establish a federal permitting threshold for greenhouse gases. Ms. Walsh described the contingencies and controls the department placed in the proposed state rules. She requested the Board initiate rulemaking and appoint a hearing officer. She then responded to questions from Board members.

Chairman Russell called for public comment.

Mr. Galt said MPA is very concerned by the EPA action and spoke against this proposed rulemaking.

Mr. Parker said PPL Montana has some serious concerns with the proposed rule.

Mr. Allen presented a statement on behalf of Pat Kimmet that expressed concern with the proposed rulemaking. He then spoke on behalf of WETA saying that moving forward with this proposal at this time is a cause of concern to many people.

Ms. Hedges spoke in favor of the rulemaking.

Mr. Forrester spoke against the proposed rulemaking saying this is not the appropriate time.

Mr. O'Hair provided testimony neither for nor against the proposed rulemaking, but expressing concern for the uncharacteristic lack of stakeholder involvement to date.

Mr. Magraw testified that this rulemaking wasn't as big of a deal as it is being made out to be, that this is a prudent way to proceed.

Further discussion ensued, and Ms. Walsh responded to Board member questions.

Mr. Livers provided more information about the inherent range that currently exists in the rulemaking. Both he and Mr. Klemp responded to questions from Board members.

Mr. Mires MOVED to add a range that would identify the 25,000 tons per year, and create a range of 25 tons to 50,000 tons per year. Ms. Shropshire SECONDED the motion. Additional discussion took place, then Chairman Russell called for a VOTE and the motion CARRIED unanimously.

After further discussion, Mr. Whalen MOVED that the Board initiate the rulemaking and appoint a hearings officer. Mr. Anderson SECONDED the motion.

Chairman Russell expressed a desire for the Board to hear this matter, and Mr. Whalen concurred.

Mr. Whalen made a REVISED MOTION to initiate the rulemaking and for the Board to hold the public hearing. Mr. Anderson concurred with the revised motion. Chairman Russell called for VOTE, and the motion CARRIED with a 5-2 VOTE. The Board will hold the public hearing at its January 22, 2010, meeting, and the public comment period will close February 5, 2010.

III.B.1 In the matter of final action regarding the amendment of ARM 17.30.201 to adjust the water discharge permit fee schedule for application, authorizations, and annual permit fees.

Ms. Chambers said the department requests the Board commence with final adoption of the rules. She said there had been a lot of stakeholder involvement that began prior to the Board's initiation of the rulemaking in July 2009. She responded to questions from Board members

Chairman Russell called for a motion to adopt the rule as amended and to accept the presiding officer's report, the 521 and 311 analyses, and the department's responses to comments. Ms. Shropshire so MOVED. Mr. Miller SECONDED the motion. Chairman Russell called for public comment on the rulemaking.

Mr. Hegreberg provided comment, commending Ms. Chambers and her staff for their process of involving stakeholders, but conveying general concerns about the rule.

Mr. Galt provided comment, neither for nor against the rulemaking. He commended the department on their public and stakeholder involvement.

- III.C.4 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.

The Board chose to take no action on this matter at this time. It will decide at the January meeting if it wishes to hear this case itself.

- III.D.1 In the matter of the appeal and request for hearing by Montana Environmental Information Center, Citizens for Clean Energy, Sierra Club, and National Parks Conservation Association of the Southern Montana Electric Generation and Transmission Cooperative (SME) Highwood Generating Station Air Quality Permit No. 3423-01, BER 2008-23 AQ.

Chairman Russell said the parties had settled the matter, and he called for a motion to authorize him to sign the order of dismissal. Mr. Mires so MOVED. Mr. Miller SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- III.D.2 In the matter of violations of Montana Public Water Supply Laws by Anaconda Country Club, Anaconda, Deer Lodge County, BER 2009-12 PWS.

Chairman Russell said the parties had filed a stipulation for dismissal under Rule 41(a). He called for a motion to authorize him to sign the order to dismiss the case. Mr. Miller so MOVED. Ms. Shropshire SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- III.D.3 In the matter of violation of the Montana Underground Storage Tank Act by Stockton Oil Company at Soco Express #10, Yellowstone County, BER 2009-14 UST.

Chairman Russell said the parties had filed stipulations for dismissal under Rule 41(a). He called for a motion to authorize him to sign the order to dismiss the case. Ms. Kaiser so MOVED. Mr. Miller SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- III.D.4 In the matter of violations of the Montana Septage Disposal and Licensure Laws by Craig Sundberg, d/b/a Sunny's Septic Service and Excavating, Anaconda, Deer Lodge County, BER 2009-15 SDL.

Chairman Russell said the parties had submitted a stipulation for dismissal under Rule 41(a). He called for a motion to authorize him to sign the order dismissing the case. Mr. Miller so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- III.D.5 In the matter of violations of Montana Public Water Supply Laws by Cottonwood Camp, a Montana LLP at Cottonwood Camp Fort Smith, PWSID MT0003301, Fort Smith, Big Horn County, BER 2009-19 PWS.

Chairman Russell explained that the appellant filed a motion to dismiss the appeal. He called for a motion to authorize him to sign the order dismissing the case. Mr. Mires so MOVED. Ms. Shropshire SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.D.6 In the matter of violations of the Metal Mine Reclamation Act by Paradine Mining, Inc., Broadwater County, BER 2009-16 MM.

Chairman Russell called for a motion to authorize him to sign the order for dismissal. Mr. Whalen so MOVED. Mr. Miller SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.E.1. In the matter of violations of the Metal Mine Reclamation Act by Saturday Sunday, LLC, Deer Lodge County, BER 2009-02 MM.

This matter was postponed until the January 2010 meeting.

IV.A General Public Comment


Chairman Russell asked if anyone in the audience would like to speak to any matters that pertain to the Board. No one responded.

V. Adjournment

Chairman Russell called for a motion to adjourn. Mr. Mires so MOVED. Mr. Miller SECONDED the motion. The motion CARRIED with a unanimous VOTE.

The meeting adjourned at 4.07 p.m.

Board of Environmental Review December 11, 2009, minutes approved:



JOSEPH W. RUSSELL, M.P.H.
CHAIRMAN
BOARD OF ENVIRONMENTAL REVIEW

2/4/2010
DATE