

**BOARD OF ENVIRONMENTAL REVIEW
MINUTES**

April 17, 2020

Call to Order

The Board of Environmental Review's meeting was called to order by Chairperson Deveny at 9:00 a.m., on Friday, April 17, 2020, electronically via Zoom Meeting.

Attendance

Board Members present via Zoom: Chairperson Chris Deveny, Dexter Busby, David Lehnherr, John DeArment, Chris Tweeten, Jeremiah Lynch

Board Members Absent: Hilary Hanson

Board Attorney Present: Sarah Clerget, Attorney General's Office (AGO)

Board Liaison Present: George Mathieus

Board Secretary Present: Lindsay Ford

Court Reporter Present: Laurie Crutcher, Crutcher Court Reporting

Department personnel present:

Angie Colamaria, Sandy Scherer, Tim Davis, Kirsten Bowers, Mike Suplee, Rainie DeVaney, Martin VanOort, Christine Weaver, Joanna McLaughlin, Chris Cronin, Myla Kelly, Jon Kenning, Mark Lucas, Kurt Moser, Sarah Christopherson, Darryl Barton, Matt Dorrington, Lauren Sullivan, Galen Steffens, Maya Rao, Ed Hayes

Interested and other parties present: Vicki Marquis, Sarah Bordelon, Sam Yemington – Holland and Hart, Shiloh Hernandez – Western Environmental Law Center, John Martin – Westmoreland Rosebud Mining, and the International Union of Operating Engineers Local 400, Amy Christensen – Christensen & Prezeau, Peggy Trenk – Treasure State Resources Association, Alan Olson – Montana Petroleum Association, Aleisha Solem – Agency Legal Services, Shane LaCasse, George Fink – CHS, Caroline Canarios, Emma Kerr-Carpenter – Northern Plains Resource Council, Bobby Cheren, Corey Barnes – Baker Hostetler

Roll was called: six Board Members were present via Zoom, forming a quorum.

I.A. Administrative Items - Review and Approve Minutes

I.A.1. January 24, 2020, Meeting Minutes

Dr. Lehnherr moved to approve the meeting minutes. Chairperson Deveny seconded the motion, which passed unanimously.

I.A.2. February 7, 2020, Meeting Minutes

Chairperson Deveny moved to approve the meeting minutes. Mr. DeArment seconded the motion which passed unanimously.

II.A.1. Briefing Item - Contested Case Updates - 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.

Copper Ridge and Reflections at Copper Ridge made a motion to sever the two cases. Ms. Clerget denied the motion as the cases are combined only for procedural purposes. The parties are proceeding according to the scheduling order and discovery closes at the end of April 2020. Motions in *Limine* have been filed but are not fully briefed.

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.

The parties filed separate status reports. Ms. Clerget continued the stay and ordered the parties either file a stipulated dismissal or a proposed litigation schedule.

II.A.2. Briefing Item - Contested Case Updates - Non-Enforcement Cases Assigned to the 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.

The case has been stayed pending a proposed settlement from the parties. Since the agenda issuance, the parties filed a proposed settlement on April 13, 2020. The parties indicated settlement discussions are ongoing and asked for a litigation

schedule. Ms. Clerget entered a scheduling order that set a proposed hearing in late January 2021.

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, BER 2019-07 WQ.

A scheduling order was issued in October of 2019 and amended in March. Calumet Refinery has made a motion to file an amicus brief which is before Ms. Clerget for decision.

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.

On November 22, 2019, the parties submitted a joint proposed schedule. Ms. Clerget then issued a scheduling order. The case is proceeding and dispositive motions should be fully briefed in December.

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.

This matter is stayed pending the outcome of a Supreme Court appeal.

Mr. Lynch noted that he is recusing himself from the case.

II.A.2.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 January 17, 2020, Talen filed a motion requesting a continued stay while Westmoreland filed a motion to vacate. The motions are fully briefed and awaiting Ms. Clerget's decision.

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, BER 2019-02 WQ.

Ms. Clerget granted motions for extensions for settlement negotiations until May 1, 2020.

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.

The case is stayed pending DEQ rulemaking. A scheduling conference is set for April 24, 2020.

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.**

The case is stayed pending DEQ rulemaking. A scheduling conference is set for April 24, 2020.

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.**

- i. **District Court Case:** Ms. Christensen stated the case is before the Montana Supreme Court and is fully briefed. BER filed a notice of non-participation and is awaiting a decision from the Supreme Court.
- ii. **Contested Case:** The parties have filed Motions in *Limine*. A telephonic oral argument on the motions was held March 30, 2020. The motions are fully briefed and before Ms. Clerget. The parties have agreed to reschedule the contested case hearing in this matter to August 2020.

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.**

A scheduling order is in place and the parties are proceeding accordingly.

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 stated DEQ and Western Energy Company jointly filed a status report for the Court's consideration and also requested a stay of the case until the renewed permit issues or for six months. MEIC has indicated they would oppose the stay. The case is awaiting an order for scheduling conference.

III.A.1. Action Item - Appeal, Amend, Or Adopt Final Rules

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

Dr. Suplee briefed the Board. Dr. Suplee, Mr. Kenning and Mr. Moser answered questions.

Chairperson Deveny opened it up for public comment.

Mr. Hernandez commented his concern whether DEQ and the Board considered the additional constraints from the Federal Clean Water Act.

Ms. Marquis commented on behalf of CHS and suggested edits to the rulemaking.

Ms. Trenk commented on behalf of Treasure Resources Association in support of the rulemaking and urged the department to continue working with the stakeholders.

Ms. Canarios commented on behalf of Western Plains Resource Association in support of the rulemaking.

Mr. Fink commented in support of moving forward with an annual standard.

Mr. Tweeten moved to initiate rulemaking as proposed by the Department and to appoint Sarah Clerget to conduct the rulemaking hearing. Mr. Lynch seconded the motion which passed unanimously.

III.A.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,
- d. and provide clarity and reduce redundancy through editorial corrections.

Ms. McLaughlin briefed the Board. Ms. McLaughlin answered questions.

Chairperson Deveny opened it up for public comment. None were offered.

Mr. DeArment moved to initiate rulemaking as proposed by the Department. Mr. Tweeten seconded the motion which passed unanimously.

III.B.1. Action on Contested Cases

III.B.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.**

Ms. Clerget briefed the Board and answered questions.

Mr. Tweeten moved to adopt the Hearing Examiner's proposed findings of fact conclusion of law, and August Order as the Board's decision and that the request for dismissal with prejudice be overruled. Chairperson Deveny seconded the motion which passed unanimously.

III.B.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.

Ms. Christensen briefed the Board, answered questions, and gave the Board their options.

The Board had discussion.

Mr. Tweeten moved to direct Ms. Christensen to initiate discussions with the parties regarding a stipulation that the Board may be dismissed as a party in this case; in the event Ms. Christensen is unsuccessful securing a stipulation, she be authorized to file a petition for a writ of supervisory control, asking the Court to rule that in all cases such as this, it is not necessary or appropriate to have the BER as a party when reviewing the Board's decisions in the District Court or on appeal. Dr. Lehnherr seconded the motion which passed unanimously.

III.B.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.

Ms. Clerget briefed the Board, answered questions, and gave the Board their options.

Mr. Tweeten moved to assign all remaining issues in this matter to Sarah Clerget for her determination as the Hearing Examiner. Mr. Busby seconded the motion, which passed unanimously.

IV. Board Counsel Update

Ms. Clerget updated the Board on recent EPA action and litigation that raised issued with the Board's rules on numeric water quality standards.

Ms. Clerget also stated the BER rule review is progressing.

V. Public Comment

None were offered.

VI. Adjournment

Mr. Tweeten moved to adjourn the meeting. Mr. Lynch seconded the motion which passed unanimously. Chairperson Deveny adjourned the meeting at 1:54 p.m.

Board of Environmental Review April 17, 2020, minutes approved:

CHRISTINE DEVENY
CHAIRPERSON
BOARD OF ENVIRONMENTAL REVIEW

DATE