

BOARD OF ENVIRONMENTAL REVIEW
FRIDAY, AUGUST 9, 2019
METCALF BUILDING, ROOM 111
1520 EAST 6th AVENUE, HELENA, MONTANA

NOTE: Interested persons, members of the public, and the media are welcome to attend at the location stated above. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this meeting. Please contact the Board Secretary by telephone or by e-mail at Lindsay.Ford@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 May 22, 2019 meeting minutes.
2. The Board will vote on adopting the May 31, 2019 meeting minutes.

Public Comment.

II. BRIEFING ITEMS

A. CONTESTED CASE UPDATE

1. Enforcement cases assigned to the Hearing Examiner
 - a. **In the matter of the Notice of Appeal and Request for Hearing by CMG Construction, Inc. Regarding Notice of Violations and Administrative Compliance and Penalty Order, Docket No. OC-17-12, BER 2017-08 OC.** On June 12, 2019, the parties filed a Joint Motion to Stay Schedule citing a potential settlement of this matter. Ms. Clerget issued an Order Granting Stay on June 17, 2019 and the parties filed a status report on July 17, 2019, indicating technical discussions regarding settlement are still underway.
2. Non-enforcement cases assigned to the Hearings Examiner
 - a. **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 July 8, 2019, the parties filed a Motion to Stay the Amended Scheduling Order citing settlement discussions. On July 15, 2019, Ms. Clerget granted the stay. The parties are to file either a stipulated settlement agreement or a joint motion with revised procedural dates for the remaining of the schedule by November 29, 2019.
 - b. **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.** This matter has been stayed since

March 28, 2018, pending the Montana Supreme Court decision in *MEIC and Sierra Club v. DEQ and Western Energy*. The parties will file a status report within 30 days of the Supreme Court's decision, which has not yet occurred.

- c. **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.** In the continuing Contested Case action, the parties have filed cross-motions for summary judgment. At its May 31, 2019 meeting, the Board voted to transfer jurisdiction to hearing examiner Clerget to render a proposed decision on the parties' cross-motions for summary judgment. Oral argument on the parties' motions is set for August 22, 2019. The parties took a subpoena dispute to the District Court on June 1, 2018 with Cause No. DV 18-0869. The BER was named as a Defendant in that District Court case, and Ms. Clerget filed a "Notice of Non-Participation" before the District Court on behalf of the BER. The District Court issued a ruling on the subpoena issue on November 14, 2018 and attorney's fees on March 25, 2019. On May 22, 2019 Signal Peak appealed to the Montana Supreme Court in Cause No. DA 19-0299. The District Court has transmitted the record and the Supreme Court has set a briefing schedule. The BER has retained outside counsel to represent it before the Supreme Court.
- 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.** 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. Counsel for DEQ was unavailable for the August BER meeting and so the parties agreed this case would not go before the BER until the October meeting. Ms. Clerget will issue her Proposed FOFCOL and this matter will be before the Board at its October meeting.
- 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 WQ for scheduling purposes. On July 8, 2019, the parties filed a Motion to Stay the Amended Scheduling Order citing settlement discussions. On July 15, 2019, Ms. Clerget granted the stay. The parties are to file either a stipulated settlement agreement or a joint motion with revised procedural dates for the remaining of the schedule by November 29, 2019.
- f. **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.** The parties have filed several motions including (1) leave to file second amended complaint; (2) motion in *limine*; and (3) cross-motions for summary judgment. Oral Argument on all motions is set for August 5, 2019.

- g. **In the Matter of the Application for an Amendment of a Major Facility Siting Act Certificate by Talen Montana LLC.** On May 22, 2019, the BER appointed Sarah Clerget as hearing examiner to preside over the contested case on substantive and procedural issues. Based on the Motions and oral argument, Ms. Clerget issued an order on May 24, 2019 holding that the 15-day deadline in Admin. Rule 17.20.1803(d) did not apply and the case would proceed as a MAPA contested case. Pursuant to the Prescheduling Order of June 6, 2019, the parties submitted proposed schedules. The parties were able to agree on some of the dates and deadlines, and agreed that the hearing should be extremely expedited, but disagreed about whether there should be a dispositive motions deadline and whether the hearing should be held in December 2019 or January 2020. On June 28, 2019, Ms. Clerget issued a First Scheduling Order with an extremely expedited schedule that adopted the parties agreed-on dates, set dispositive motions deadlines for October, and set a hearing beginning on November 12, 2019. With the set schedule, this matter will be before the BER for decision at its December 12, 2019 meeting. The parties are proceeding according to the schedule.
- h. **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. Ms. Clerget issued a Scheduling Order on June 21, 2019 and the parties are proceeding accordingly.
- i. **In the Matter of Notice of Appeal and Request for Hearing by Western Energy Company Regarding Approval of Surface Mining Permit No. C2011003F.** On May 31, 2019, the BER appointed Sarah Clerget as hearing examiner to preside over the contested case. Ms. Clerget issued a Scheduling Order on July 2, 2019, and the parties are proceeding according to that Order.

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.** On April 30, 2019, the Montana Supreme Court ordered Plaintiff and Appellees Montana Environmental Information Center and Sierra Club, and the Defendants and Appellants DEQ and Western Energy Company to submit addition simultaneous briefing on three issues: 1 – the legal basis for DEQ's representative monitoring protocol for precipitation-driven events; 2- the basis (based on data in the administrative record) for DEQ's selection of the 20 representative outfalls out of all the active outfalls; and 3 – address the 2014 modifications to MPDES Permit No. MT0023965 including evidence in the administrative record and arguments made before the Board that support or contradict the District Court's decision to invalidate the Permit as modified in 2014, and address Western Energy Company's argument that the District Court should not have reviewed the administrative decision to renew MPDES Permit No. MT0023965 until the 2014 modifications to the Permit were

complete. The parties submitted additional briefs on June 17, 2019, and await the Montana Supreme Court's decision.

- b. **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"). On July 3, 2019 Conservation Groups filed a Petition for Review of Final Agency Action. The BER is named as a Defendant in the Petition. Conservation Groups have contacted the BER regarding service and have served the Attorney General's office. The BER has retained outside counsel to represent it in this matter.

III. ACTION ITEMS

A. APPEAL, AMEND, OR ADOPT FINAL RULES

1. **The department requests the Board to initiate rulemaking to increase engineering review fees for public water and wastewater systems under ARM 17.38.106.**

Public Comment.

B. NEW CONTESTED CASE

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.** On July 3, 2019, the Board received a request for hearing. 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.

Public Comment.

C. ACTION ON CONTESTED CASES

1. **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 February 8, 2019 the BER remanded these cases to Ms. Clerget on the owner/operator issue. Ms. Clerget conducted a one-day remand hearing on June 13, 2019 and issued her proposed Findings of Fact and Conclusions of Law (FOFCOL) on the owner/operator issue on July 8, 2019. DEQ has filed exceptions to the order, and CR/REF have responded to those exceptions. The Board will hear oral argument and then this matter is ripe for decision by the Board.

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