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BOARD OF ENVIRONMENTAL REVIEW
FRIDAY, FEBRUARY 7, 2020
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 at 444-5270, or by e-mail at snelsen@mt.gov, at least 24 hours before the meeting to advise her of the nature of the accommodation(s) needed.

9:00 AM

I. ADMINISTRATIVE ITEMS

A. REVIEW AND APPROVE MINUTES

1. The Board will vote on adopting the December 13, 2019, meeting minutes.

Public Comment.

II. BRIEFING ITEMS

A. CONTESTED CASE UPDATES

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 January 3, 2020, DEQ filed a Motion to Dismiss. CMG failed to respond to that motion. On January 28, 2020, Ms. Clerget issued an Order dismissing the case.
 - b. **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.** At its August 9, 2019 meeting the Board remanded this case back to Ms. Clerget for additional findings concerning the 4 photographs excluded at the June 13th owner/operator hearing. The parties have fully briefed a motion to sever these cases and an order will be issued at a later date.
2. Non-enforcement cases assigned to the Hearings Examiner
 - 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. On August 9, 2019, the BER appointed Sarah Clerget as hearing examiner to preside over this contested case. On September 9, 2019, Ms. Clerget issued a scheduling order and the parties are proceeding through discovery, which closes in June of 2020.

- 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.** On August 9, 2019, the Board received a request for hearing. At its October meeting the Board appointed Sarah Clerget to act as hearing examiner in this case. A Prehearing Order was issued in this case on October 15, 2019 and the parties submitted an agreed upon schedule on October 29th. Ms. Clerget issued a Scheduling Order on October 31, 2019 which set a schedule through dispositive motions, which will be fully briefed in September of 2020.
- 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.** This case had been stayed pending a Montana Supreme Court decision, which was issued in September 2019. Pursuant to Ms. Clerget's order, the parties submitted a joint proposed schedule on November 22, 2019. Ms. Clerget issued a Scheduling Order on November 27, 2019, which set deadlines through dispositive motions, which will be fully briefed in December of 2020.
- 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, making it ripe for decision from the hearing examiner. On August 19, 2019, Montanore filed a Notice of Supplemental Authority. The Notice stated that 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 by MEIC, Save Our Cabinets, and Earthworks 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. Through status reports filed on September 13, 2019, the DEQ and Montanore requested a stay of this case pending the outcome of any Supreme Court appeal of the District Court Order. On September 17, 2019, Ms. Clerget issued an Order staying this matter. The parties have cross-appealed the District Court's decision to the Supreme Court under Cause No. DA 19-0553. The appellants filed their opening briefs on January 24, 2020.

- e. **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.** On August 30, 2019, Ms. Clerget issued her Order on the parties' motions including (1) leave to file second amended complaint; (2) motion in *limine*; and (3) cross-motions for summary judgment. Golden West and DEQ requested a new pretrial motion deadline, which was granted on September 18, 2019. The parties submitted an amended agreed upon schedule and Ms. Clerget issued an Amended Scheduling Order on September 25, 2019. Pursuant to the schedule, DEQ and Golden West filed second motions for summary judgment, which (after several extensions) were fully briefed on November 21, 2019. The hearing examiner issued her Order dismissing this case on January 30, 2020. This matter will be before the Board at its April Meeting.
- f. **In the Matter of the Application for an Amendment of a Major Facility Siting Act Certificate by Talen Montana LLC.** On July 12, 2019, Talen filed a Motion to Dismiss Westmoreland's Appeal, which was fully briefed on August 8, 2019. On August 14, 2019, Ms. Clerget held oral argument on Talen's Motion to Dismiss, at which all parties appeared and argued. On August 20, 2019, Ms. Clerget issued an Order granting in part and denying in part Talen's Motion to Dismiss. The Order also reset some of the procedural deadlines. On November 13, 2019, the parties filed an "Expedited Joint Motion to Suspend Schedule". The parties sought to suspend the schedule for 30 days pending motions to govern proceedings. On December 17, 2019, the parties filed a Joint Motion to Govern Proceedings which suspended the proceedings through January 17, 2020. On January 17, 2020, the parties filed a Motion for Stay and a Motion to Vacate. Briefing on those motions is underway and once fully briefed a decision will be issued by the hearing examiner.
- g. **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. By February 28, 2020 the parties will either file a stipulated settlement agreement or a joint proposed scheduling order.
- 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.** On May 31, 2019, the BER appointed

Sarah Clerget as hearing examiner to preside over the contested case. On October 21, per DEQ's request, Ms. Clerget stayed discovery deadlines pending resolution of a discovery motion. DEQ filed a Motion for Protective order on October 25, 2016 and on October 29, 2019 MEIC filed a response and Motion to Compel. Both motions were fully briefed, and oral argument was held on November 13, 2019. Ms. Clerget issued an order denying the protective order and compelling discovery on November 27, 2019. The parties are completing discovery accordingly and all of the parties have submitted partial motions for summary judgment. Once the motions are briefed, a decision will be issued by Ms. Clerget.

- i. **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 15, 2019, this contested case was stayed pending settlement of several of the contested issues in this case. The parties submitted a Stipulation on December 4, 2019 settling appeal issues Nos. 3, 4, 6, 7, and partially No. 5. 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 a scheduling conference in January and subsequently issued an Order continuing the stay due to rulemaking that has the potential to affect the remaining issues in the case. A status conference will be held with the parties in March 2020.
- j. **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 above.
- k. **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:** 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. Opening briefs were filed September 20, 2019. The BER has retained Amy Christensen to represent it before the Supreme Court.

- ii. **Contested Case:** Ms. Clerget assumed jurisdiction from the prior hearing examiner on September 8, 2017, for procedural purposes only. On April 5, 2019 cross motions for summary judgment were fully briefed (DEQ's Motion is for partial summary judgment). On May 31, 2019 the Board assigned the case to Ms. Clerget. Ms. Clerget issued an Order on Cross Motion for Summary Judgment on November 14, 2019, which granted partial summary judgment on one issue, and denied summary judgment on the remaining issues. A scheduling conference was held on November 26, 2019 and the contested case is scheduled for hearing in April 2020.

- I. **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. On December 19, 2019, Ms. Clerget issued a Prescheduling Order seeking clarification as to the parties' representation in this matter. Several parties and the homeowner's association have made notices of appearance. John De Groot (BER 2019-13 OC), Robert N. Beall, Robert Beall Jr., Keith Beall (BER 2019-21 OC), Stephen Richard and Victoria Angyus (BER 2019-09 OC) and Linda Slater (BER 2019-11 OC) filed to enter notices of appearances, therefore their cases were dismissed on January 30, 2020, when Ms. Clerget issued a Scheduling 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 September 10, 2019, the Montana Supreme Court issued its opinion reversing the First Judicial District Court in Montana Environmental Information Center and Sierra Club v. Montana DEQ and Western Energy Company. The Montana Supreme Court reversed the District Court on decisions of law and determined that DEQ properly interpreted rules implementing the Montana Water Quality Act (specifically ARM 17.30.637(4)). In so doing, the Court recognized that DEQ has the flexibility to exempt ephemeral waters from the water quality standards applicable to Class C-3 waters without the Board of Environmental Review reclassifying the waters. The Court also determined that DEQ lawfully

permitted representative sampling of outfalls under Western Energy Company's MPDES permit. The Montana Supreme Court remanded the case back to District Court for further proceedings to determine certain issues of material fact, specifically whether DEQ acted properly in regard to a stretch of East Fork Armells Creek that is potentially impaired and intermittent, whether it is necessary for DEQ to adopt a TMDL for impaired segments of East Fork Armells Creek, and whether the representative monitoring selected by DEQ is factually supported. On October 10, 2019, MEIC and Sierra Club (MEIC) filed a petition for rehearing to amend the Opinion arguing the Montana Supreme Court's remedy, reversing the District Court's summary judgment and remanding questions of fact to the District Court is in conflict with controlling decisions that were not addressed by the Montana Supreme Court. DEQ and WECO objected to MEIC's petition. On November 19, 2019, the Montana Supreme Court held its Order was not in conflict with a statute or controlling decision not addressed and MEIC's petition for rehearing was denied. On December 6, 2019, Westmoreland Rosebud Mining Company (formerly Western Energy Company) filed a motion for substitution of District Judge Seeley. Judge Seeley invited Judge Reynolds to assume jurisdiction of the case. Jurisdiction was assumed by Judge Reynolds on December 18, 2019.

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. The BER has retained Amy Christensen to represent it in this matter at the District Court.

B. OTHER BRIEFING ITEMS

- 1. The Department will update the Board about upcoming proposed rulemaking to establish a nonanthropogenic water quality standard for arsenic in the Yellowstone River.**

III. ACTION ITEMS

A. APEAL, AMEND, OR ADOPT FINAL RULES

- 1. The Department is requesting that the Board solicit comments from all interested persons on any water quality standard found in the Administrative Rules of Montana. Title 17 chapter 30.**
Public comment.

B. NEW CONTESTED CASE

1. **In the Matter of the Notice of Appeal and Request for Hearing by Signal Peak Energy, LLC, BER 2019-22 SM, Regarding November 13, 2019 Notice of Violation and Administrative Compliance and Penalty Order.**

On December 16, 2019, the Board received an appeal from Signal Peak Energy, LLC. That same day, the Department of Environmental Quality filed a Notice of Appearance and a Motion to Dismiss Claim. On December 26, 2019, Signal Peak filed a Motion for Extension of time. On December 30, 2019, Signal Peak filed a Joint Motion for Stay. On December 31, 2019, the Board Chair issued an Order Granting the Unopposed Joint Motion to Stay the Proceedings. The parties shall provide the Board with a status update regarding disposition of settlement no later than March 26, 2020.

Public comment.

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

**BOARD OF ENVIRONMENTAL REVIEW
MINUTES**

December 13, 2019

Call to Order

The Board of Environmental Review's meeting was called to order by Chair Deveny at 9:00 a.m., on Friday December 13, 2019, in Room 111 of the Metcalf Building, 1520 East 6th Avenue, Helena, Montana.

Attendance

Board Members Present in person: Chair Christine Deveny, Dexter Busby, John DeArment, David Lehnherr

Board Members Present by Phone: Chris Tweeten, Hillary Hanson

Board Members Absent: None

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

Board Liaison Present: Tim Davis

Board Secretary Present: Sara Nelsen, Interim

Court Reporter Present: Laurie Crutcher, Crutcher Court Reporting

Department Personnel Present: Darryl Barton, Eric Sivers, Chris Cronin, Sarah Christopherson, Maya Rao, Melinda Horne, Chad Anderson, Joanna McLaughlin, Kirsten Bowers, Sandy Scherer, Kurt Moser, Ed Hayes, Angie Colamaria, Jon Kenning, Sarah Christopherson, Mark Lucas

Interested & Other Persons Present: Aleisha Solem-Agency Legal Services, Nancy Jacobson-Rippling Woods Homeowners Association, Vicki Marquis-Holland and Hart, Linda Slater, Michael Howell-Bitterroot Star, Kurt Vause, Kevin Maki/KECI-TV

Roll was called: four Board members were present in person and two Board members were present via teleconference, providing a quorum.

I.A. Administrative Items – Review and Approve Minutes

I.A.1. October 4, 2019 Meeting Minutes

Chair Deveny requested section III.A.1, rulemaking, be corrected to reflect that she called for comments on the regional haze program requirements and none were made.

Chris Tweeten motioned for the corrected minutes to be approved, David Lehnerr seconded, which passed unanimously.

I.B.1. REVIEW AND APPROVE 2020 SCHEDULE

Chair Deveny moved to establish the 2020 meeting schedule as presented, Chris Tweeten seconded. The motion passed unanimously.

Chair Deveny called for public comments and received none.

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

II.A.1. 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.

Ms. Clerget indicated the parties have until December 16, 2019 to file either a stipulation or respond to discovery requests. Several extensions have been given and no further extensions will be given to the parties.

II.A.1. b. 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 that a Scheduling Order through dispositive motions has been issued to the parties. Dispositive motions, if any will be fully briefed in June of 2020.

II.A.2. Briefing Items – 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.

Ms. Clerget stated a Scheduling Order is in place and discovery closes in June of 2020.

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.

Ms. Clerget stated this case also has a Scheduling Order in place through dispositive motions. Dispositive motions will be fully briefed in September of 2020.

II.A.2.c. **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 stated this is actually an action item that should be handled with the other CHS case. The update for this case will be handled with BER 2019-01 WQ.

II.A.2.d. **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 a scheduling order was issued through dispositive motions which will be fully briefed in December of 2020.

II.A.2.e. **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 stated the case is stayed pending the parties' appeal to the Montana Supreme Court.

II.A.2.f. **In the Matter of Notice of Appeal of Opencast 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 reported that a second round of motions for summary judgment have been fully briefed and a decision on those motions for summary judgment will be coming out shortly.

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

Ms. Clerget stated that the schedule has been dispensed pending the parties' filing motions to govern proceedings which are due December 17, 2020. Once the parties file their motions, Ms. Clerget will have a better idea about the remainder of the proceeding.

II.A.2.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.**

Ms. Clerget reported that the parties have until the end of the month to file either a stipulated settlement agreement or a joint proposed scheduling order.

- II.A.2.i. **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.**

Ms. Clerget stated the parties are in the process of completing discovery. Dispositive motions are due January 6, 2020.

II.A.3. Briefing 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**

Kirsten Bowers indicated the Supreme Court has issued its decision reversing the First Judicial District Court. The case has been remanded back to the District Court. Western Energy Company filed a motion to substitute and the parties are waiting for the case to be assigned to another judge.

- II.A.3.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).**

Chair Deveny relayed outside Counsel Amy Christensen's update: The judge has issued a scheduling order which indicates the Board's motion to dismiss will be decided by January 10, 2020. The scheduling order set additional deadlines for further briefing on the case.

II.B.1 Briefing Items – Other

- II.B.1.a. **Department Rulemaking Update** Tim Davis gave an update on rulemaking to increase engineering fees for public water wastewater systems; a municipal facilities exclusion is included. Due to objection from the Environmental Quality Council rulemaking is delayed until January 15, 2020 as the Department waits for the Council's decision.
- II.B.1.b. **Introduction of the Department's Chief Legal Counsel, Angie Colamaria**

III.A. Action Items – New Contested Case

- III.A.1.-14 **In the Matter of the Notice of Appeal and Request for Hearing 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 OC through 21 OC.**

Ms. Clerget gave the Board members their options, including assigning it to the Hearings Examiner.

Chairperson Deveny moved to consolidate the fourteen cases for procedural purposes. Member Lehnherr seconded the motion, which passed unanimously.

Member Busby moved to assign Sarah Clerget to the contested cases in their entirety. Chairperson Deveny seconded the motion, which passed unanimously.

III.B. Action Items – Contested Cases

III.B.1. **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 [update only]:** this portion of the case is not an action item but was kept with the contested case. Outside Counsel Amy Christenson's update was read by Chairperson Deveny. The Board has filed its notice of non-participation and Signal Peak has filed its opening brief and Respondents have received an extension until December 20, 2020 to file their response brief.
- ii. **Contested Case [action item]:** Ms. Clerget stated that there have been questions raised and she needs clarification from the Board as to whether the Board intended to grant the hearing examiner jurisdiction for the purpose of deciding summary judgment motions only or for the entirety of the case?

Member Busby moved to assign the remainder of the case in its entirety to the hearings examiner. Chairperson Deveny seconded the motion which passed unanimously.

III.B.2. **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, and 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.**

Chair Deveny moved to approve the stipulation in the case of Permit MT0000264 and approved the proposed Board order for final agency decision. Chris Tweeten seconded the motion which passed unanimously.

IV. Board Counsel Update

Ms. Clerget informed the Board that a letter involving one former and one current Board members was sent by the Coal Council. The Governor's office requested DEQ responded to the letter. DEQ did so and sent a copy to every party in any coal case that the Board currently has.

Ms. Clerget informed the Board about proposed stakeholder roundtables regarding the Board's statutory obligation to review their rules every two years.

V. Public Comment

Nancy Jacobson from the Rippling Woods Homeowners Association provided comments and requested future meetings be held in the Bitterroot, if possible.

VI. Adjournment

Mr. Busby moved to adjourn the meeting, Chair Deveny seconded, and the motion passed unanimously. Chair Deveny adjourned the meeting at 9:52 a.m.

Board of Environmental Review December 13, 2019, minutes approved:

CHRISTINE DEVENY
CHAIRPERSON
BOARD OF ENVIRONMENTAL REVIEW

DATE

**BOARD OF ENVIRONMENTAL REVIEW
AGENDA ITEM
EXECUTIVE SUMMARY
FOR
WATER QUALITY STANDARDS TRIENNIAL REVIEW**

AGENDA#

AGENDA ITEM SUMMARY: Conduct a required triennial review of Montana's water quality standards.

LIST OF POTENTIALLY AFFECTED RULES: Any water quality standard found at ARM Title 17, chapter 30.

AFFECTED PARTIES SUMMARY: Anyone with an interest in water quality standards may provide comment during the triennial review comment period.

BACKGROUND: The Montana Water Quality Act and the Federal Clean Water Act require that the State of Montana review and, as appropriate, adopt new or revised water quality standards at least every three years. Public input is an important piece of the review process, and federal regulations require that a public hearing be held to review applicable water quality standards as part of the triennial review.

BOARD OPTIONS:

The Board may:

1. Hold a public hearing and accept public comments on Montana's water quality standards as part of a required triennial review of those standards; or
2. Determine that a triennial review is not appropriate at this time and deny the Department's request.

DEQ RECOMMENDATION:

The Department recommends that the Board hold a public hearing and accept public comments on Montana's water quality standards as part of a required triennial review of those standards.

TO: Sarah Clerget, Hearing Examiner
Board of Environmental Review

FROM: Sara Nelsen, Interim Board Secretary
P.O. Box 200901
Helena, MT 59620-0901

DATE: December 16, 2019

SUBJECT: Board of Environmental Review Case No. BER 2019-22 SM



BEFORE THE BOARD OF ENVIRONMENTAL REVIEW	
OF THE STATE OF MONTANA	
IN THE MATTER OF: 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	Case No. BER 2019-22 SM

On December 13, 2019, the BER received the attached appeal.

Please serve copies of pleadings and correspondence on me and on the following DEQ representatives in this case.

Mark Lucas
Legal Counsel
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Ed Coleman, Bureau Chief
Opencut Mining Bureau
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Attachment(s)

From: Solem, Aleisha
Sent: Monday, December 16, 2019 9:42 AM
To: Nelsen, Sara <SNelsen@mt.gov>
Subject: FW: Notice of Appeal on Behalf of Signal Peak Energy, LLC

Hi Sara,

Attached is a new cases that the BER received on Friday from Holland and Hart. You should be receiving an original in the mail.

Thanks,

Aleisha Solem
Paralegal/Investigator
Agency Legal Services
Montana Department of Justice
P.O. Box 201440
1712 Ninth Ave.
Helena, MT 59620
Ph: (406) 444-1496
Fax: (406) 444-4303

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From: Arlene Forney <AForney@hollandhart.com>
Sent: Friday, December 13, 2019 4:45 PM
To: Briese, Stacy <sbriese@mt.gov>; Clerget, Sarah <SClerget@mt.gov>; Solem, Aleisha <ASolem@mt.gov>; Lucas, Mark <Mark.Lucas@mt.gov>; Coleman, Edward <EColeman@mt.gov>; Moisey Scherer, Sandy <Sscherer@mt.gov>
Cc: Matthew H. Dolphay <MHDolphay@hollandhart.com>; Vicki A. Marquis <VAMarquis@hollandhart.com>; John C. Martin <JCMartin@hollandhart.com>
Subject: [EXTERNAL] Notice of Appeal on Behalf of Signal Peak Energy, LLC

*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*

Attached is a Notice of Appeal for the above-captioned matter. The original will be overnighted to the Board Secretary, and copies will be distributed as noted on the Certificate of Service.

Arlene S. Forney
Assistant to Matthew H. Dolphay
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ATTORNEYS FOR SIGNAL PEAK
ENERGY, LLC

**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA**

<p>IN THE MATTER OF:</p> <p>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</p>	<p>CAUSE NO. BER 2019-_____</p> <p>NOTICE OF APPEAL</p>
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Pursuant to Mont. Code Ann. § 82-4-254(3)(a) and Admin R. Mont. 17.24.1211(2), Signal Peak Energy, LLC (“Signal Peak”) appeals the issuance of, and requests a hearing before the Board of Environmental Review (“Board”) on, the Notice of Violation and Administrative Compliance and Penalty Order for violations of the Montana Musselshell, County, Montana, Permit #C1993017 (“Order”) issued to Signal Peak by the Montana Department of Environmental Quality (“DEQ”).¹ This Notice of Appeal “entitle[s]” Signal Peak “to a hearing before the board under 82-4-206 on the issues of whether the alleged violation has occurred and whether the penalty proposed to be assessed is proper.” Mont. Code Ann. § 82-4-254(3)(a). The Board has authority to hear contested case appeals of DEQ’s notices of violation and penalty orders and the Board has authority to affirm, modify, or reverse the Order. *Id.*

I. Brief Background of Appeal

Signal Peak operates an underground coal mine, known as the Bull Mountain Coal Mine # 1, under Permit No. C1993017 (the “Permit”), located near Roundup in Musselshell County, Montana. Signal Peak’s water monitoring program is set forth in the Monitoring and Quality Assurance Plan (“MQAP”) approved by DEQ and appended to its Permit. The MQAP provides, in addition to

¹ Signal Peak’s appeal also includes the appeal of any orders upon which the Order is based, relies, are incorporated into the Order, or are attached, or otherwise predate the Order in the enforcement action, including DEQ’s Notice of Noncompliance and Order of Abatement.

monthly and/or quarterly monitoring of the many springs on the surface of the Mine, for monitoring of certain springs on a weekly basis. While denominated as monitoring, the weekly monitoring imposed by the MQAP does not require the collection of data associated with pollutants, but rather merely the observation of flow. Observations of frozen surface water, in the midst of a Montana winter have, at best, very limited value.

In fact, over the last five years, during the winter months, 87 percent of the springs subject to weekly observation have been frozen or dry. In addition, DEQ personnel have explained that the purpose these weekly observations is to alert the Mine and regulators of any interruption in water for cattle that might be caused by mining. DEQ personnel have said that this weekly monitoring is necessary only when cattle are in the field grazing. Indeed, in May 2018, DEQ suggested that weekly monitoring could be discontinued from October through March when cattle are not in the vicinity of the mining operation.²

The MQAP provides the area in which monitoring is required as follows:

Weekly Spring Monitoring – In accordance with Appendix 313-2, weekly monitoring of flow/discharge will be conducted for springs listed in permit Appendix 313-2 (see Table 314-3.1) that are within 1,000 feet of the edge of a panel being mined.

² DEQ offered to allow suspension of mining during the time when cattle are absent. But DEQ appended an obligation to “double-up” on observations during other parts of the year. Ultimately, Signal Peak rejected this suggestion, in part, because it would appear to have no scientific basis for doubling the observations during these times.

MQAP at p. 47. The referenced “Appendix 313-2,” which is the Bull Mountains Mine Spring Mitigation Plan, specifies:

In order to detect potential impacts to springs, weekly monitoring of flow/discharge and pond levels (where applicable) will be conducted for all springs identified in Appendix 314-3, Table 314 3.1. This weekly monitoring will commence two months prior to longwall mining beneath each identified spring and continue for twelve months after longwall undermining the same spring. This weekly monitoring will also be conducted for springs that are within 150 feet of the edge of a panel being mined.

Appendix 313-2 at p. 313-2-1 (Section 1.0).

The MQAP also included, at the time period relevant to the Order, language that provided Signal Peak with authority to notify DEQ of circumstances, including inclement weather, that relieved Signal Peak from its weekly observations:

The operator recognizes that unexpected circumstances (e.g., *inclement weather, safety hazards*, or unusual site conditions) may occasionally preclude completion of monitoring activities as described herein. In the event that monitoring cannot be completed as described, the operator will notify DEQ in a timely manner (before the scheduled monitoring event, if possible) and propose revisions to the monitoring plan, as appropriate.

(emphasis added). DEQ’s MQAP language does not provide a limit on the timing for the notice except to the extent that it requires advance notice.

For many years, DEQ has required Signal Peak conduct weekly observations pursuant to the MQAP. This monitoring is in addition to the regular monthly, quarterly, semi-annual and annual monitoring provided by a Signal Peak

contractor. In years past, during the winter, Signal Peak had simply written “inaccessible” in its report on the many occasions that personnel were unable to reach monitoring locations. Signal Peak repeatedly noted the inaccessible monitoring locations beginning at least as early as December of 2016 and then every year thereafter, up to and including the immediately preceding winter of 2017/2018. DEQ never found fault with this approach and never requested more information about the conditions or inaccessibility of these sampling points.

The 2017/2018 and the 2018/2019 winters were unusually severe in the Bull Mountains. Signal Peak confronted conditions that challenged its responsibility for the safety of its employees. In instances where employees attempted to monitor an “inaccessible” location, they traveled on very rough dirt trails that were often impassible or nearly impassible due to snow and mud. In addition, because these locations are remote, employees attempting to reach monitoring locations generally have no cellular phone service and communication was difficult.

In recent winters, there have been serious incidents in the Bull Mountains. For example, in February 2019 two ranchers travelling on their own property above the Mine were stranded in a storm and suffered severe frostbite in a life-threatening incident. Fortunately, a neighbor was able to reach them in time to prevent their deaths. Over time, Signal Peak has had vehicles run off these trails and, on several occasions, vehicles have been stuck on these impassible trails. On

other occasions, monthly inspection reports have documented the DEQ's inability to inspect areas of the mine due to inclement weather. On a DEQ periodic inspection in March 2018, a Signal Peak jeep became stuck in the mine's "facilities area." In fact, several years ago, *during the summer*, a DEQ employee was injured when her four-wheeler ran off the trail. During the monthly inspections of the Mine for December, January, and February of this last winter, DEQ's own inspectors opted not to visit weekly monitoring locations due to inclement weather.

On December 14, 2018, Signal Peak formally notified DEQ it would not be sending personnel to remote areas of the mine to conduct the weekly inspections due to safety concerns. Signal Peak noted the decision was based upon the very harsh winter conditions. Following the protocol in the Permit, this notice was provided in advance of the monitoring at issue.

Despite the notice, Signal Peak continued to monitor through the end of December 2018. The *only* period during which Signal Peak did not monitor was January 1 to February 24, 2019. During this time, conditions were undeniably severe, and mine personnel would have been exposed to severe winter hazards while attempting to visit the monitoring locations. DEQ visited the site on January 28, 2019 and again on February 11, 2019. Though clearly aware Signal Peak was not conducting monitoring, DEQ personnel did not tell Signal Peak, during these visits, that DEQ believed Signal Peak was violating the MQAP

provision. Nor did DEQ provide an indication anytime between January and March that DEQ believed Signal Peak was in violation of the MQAP. Instead recognizing the severity of the winter, DEQ gave every indication that it acceded to Signal Peak's continued suspension of monitoring for March.

Notwithstanding opportunities to raise the issue earlier in January or February while on site, on August 22, 2019, six months after the suspended weekly monitoring, DEQ issued a Notice of Noncompliance and Order of Abatement No. CN2019002 ("NON") to Signal Peak, alleging the extreme weather conditions did not exist from December 16, 2018 through February 23, 2019. *See* NON, pp. 2-3. DEQ directed Signal Peak to submit a revision to the MQAP eliminating the language that allows Signal Peak to suspend monitoring due to inclement weather. *Id.* at 3. DEQ threatened Signal Peak with an "immediate" cessation order, i.e., an order shutting down the mine, if Signal Peak refused to revise its Permit to eliminate the language and replace it with DEQ's preferred language. (DEQ appears to have drafted MQAP language and certainly approved its text.) In response to the NON, Signal Peak provided the requested amendment to the MQAP, stating that Signal Peak "provides this amendment under protest and solely to address DEQ's demand for this revision to 'abate' alleged monitoring violations set forth in the NON, and in recognition of DEQ's threat that the Department would issue a cessation order against operations at SPE's Bull Mountain Coal

Mine No. 1 if SPE did not submit this revision.” *See* October 21, 2019 Signal Peak Letter to DEQ, pp. 1 - 2. DEQ has since inserted the changes to the MQAP language and the MQAP has been modified accordingly. DEQ’s demand was well beyond any administrative authority to order “abatement,” and, in light of DEQ’s *ultra vires* action, this language should be rescinded.

II. Order Appealed

On November 13, 2019, DEQ issued the Order, claiming violations of ARM 17.24.646(1), the MQAP, and Appendixes 313-2 and 314-4 of the Permit. DEQ alleges Signal Peak failed to conduct required monitoring at spring 14325, 14415, 16145, 16255, 16355, 16365, 16655, 16755, and 17685 from December 16, 2018, through February 23, 2019; alleges 73 total individual monitoring commitments were not conducted; and alleges Signal Peak failed to demonstrate the winter conditions precluded monitoring. *See* Order, ¶¶ 23-26.³ Among other things, the Order directed Signal Peak to submit a revision to the MQAP in accordance with the NON, to eliminate the previously approved and relied-upon language that allows Signal Peak to suspend monitoring due to inclement weather. *See* Order, ¶ 27. As noted above, by the time of the Order, Signal Peak had already agreed, under protest, to the requested revisions and had submitted a revised MQAP to

³ The penalty calculation seemingly reduces the number of alleged violates from 73 to 59 based on Signal Peak’s monitoring during the last two weeks in December.

DEQ. *See* October 21, 2019 Signal Peak Letter to DEQ, pp. 1 – 2, as well as attachment with revisions included. The Order imposes an administrative penalty in the amount of \$153,400. *See* Order, ¶ 29.

Signal Peak has continually tried to work with DEQ, through letters dated September 23, 2019, and October 21, 2019, in-person meetings and teleconferences, to resolve this dispute but has been unable to do so. Signal Peak now timely appeals the Order.

III. Basis for Appeal

Signal Peak appeals the Order on multiple grounds, including:

A. General Issues Appealed

1. DEQ improperly concluded Signal Peak violated ARM 17.24.646(1), the MQAP, and Appendixes 313-2 and 314-4 of the Permit. Signal Peak's actions conformed with applicable law, the MQAP, the Permit, and established regulatory practices. In accordance with the MQAP, the Permit, and as authorized by law, Signal Peak properly suspended monitoring due to inclement weather to ensure the safety of its employees.

2. DEQ improperly assessed a \$153,400 penalty against Signal Peak. DEQ incorrectly calculated the penalty, giving no consideration to Signal Peak's compliance with ARM 17.24.646(1), the MQAP, the Permit, and established regulatory procedures. Furthermore, even assuming a violation, taking into

account the factors set forth in Mont. Code Ann. § 82-4-1001 and Admin R. Mont. 17.24.1211, the penalty is grossly excessive. Lastly, DEQ miscalculated the penalty by, among other things, miscalculating the base penalty and adjustments to the base penalty, as well as miscalculating the number of days Signal Peak was not in compliance.

3. DEQ improperly unilaterally directed Signal Peak to modify the MQAP. DEQ did not have statutory or regulatory authority to order revisions to the Permit through the NON and does not have such authority to do so through the Order.

4. DEQ improperly threatened Signal Peak with “cessation” of operations if it did not comply with the modification to the Permit. This is a violation of constitutional right to due process and an opportunity to be heard under the United States and Montana Constitutions. By demanding Signal Peak place its employees in danger during inclement weather conditions or face an immediate cessation of operation, DEQ forced Signal Peak to decide between protecting its workers’ lives or their jobs. Certainly, issuing a cessation order shutting down the mine without the benefit of a hearing in which Signal Peak is allowed to be heard and voice concerns for its employees’ safety does not comport with due process requirements.

5. DEQ is equitably estopped from penalizing Signal Peak for suspending monitoring during inclement weather. In previous years, including in the year immediately preceding year at issue, DEQ personnel have recognized the safety issues associated with the weekly monitoring during the winter and the need for Signal Peak to suspend monitoring during inclement weather. Both DEQ and Signal Peak sought to revise the language of the Permit to avoid placing Signal Peak personnel in dangerous situations. Moreover, Signal Peak relied upon DEQ's previous course of conduct, and DEQ did not require that Signal Peak visit sites that are inaccessible. Rather, the agency accepted submissions that denoted "inaccessible" monitoring sites without further description.

6. DEQ improperly failed to give Signal Peak mitigating credit for changing the language in the MQAP to the requested language. Instead, DEQ continues to Order Signal Peak to change the language despite the fact that Signal Peak has already done so, albeit under protest.

B. Specific Issues Appealed

1. DEQ improperly concluded Signal Peak did not follow the approved monitoring plan. At the relevant times, the approved monitoring plan included a provision to suspend monitoring activities due to unexpected circumstances (e.g., inclement weather, safety hazards or unusual site conditions). Signal Peak submitted timely notification of monitoring suspension to DEQ. In accordance

with the approved monitoring plan, after notification to DEQ, suspension of weekly monitoring was allowed and was not a violation of the then-approved monitoring plan.

2. DEQ erred by concluding no “unexpected circumstance[s]” occurred between December 16, 2018, through February 23, 2019, justifying preclusion of monitoring. Records of weather-related conditions for the times and locations involved confirm that Signal Peak employees could not safely conduct the monitoring activities that are the subject of the Order.

For example:

- It appears that DEQ may not have taken into account the cumulative effects of weather during this timeframe. Ongoing snow accumulation resulted in impassible trails, dangerous icy conditions, and significant windblown drifts making access to the sampling locations dangerous and/or impossible. Mine weather station records for Dunn Mountain document the deep snow conditions that existed throughout the period from mid-December through all of February. The following summarizes the data:

Month	Monthly Snowfall Amount	Total for Year
Nov-18	3.46"	
Dec-18	3.06"	cumulative 6.52"
Jan-19	2.2"	cumulative 8.7"
Feb-19	38.9"	cumulative 47.6"
Mar-19	43.3"	cumulative 90.9"

- Temperature data also confirm that accessing the monitoring locations at the specified times presented unacceptable safety hazards for workers. Mine weather station records for Dunn Mountain show the temperature hazards presented during the time period at issue:

Month	Low Temp	Avg. Temp
Dec-18	-1 degrees	28 degrees
Jan-19	-2.3 degrees	29.8 degrees
Feb-19	-16.6 degrees	5.5 degrees
Mar-19	-17 degrees	28.2 degrees

- DEQ’s contemporaneous monthly inspection reports document inaccessible conditions:
 - The January 2019 Inspection report notes temperature and wind chill did not allow inspection of subsidence cracks on Dunn Mountain;
 - The February 2019 inspection report notes that the Dunn Mountain site is inaccessible due to sub-zero temperatures and deep snow;
 - The March 2019 inspection report notes that the South Portal area is not accessible due to deep snow; and
The April 2019 inspection report notes that the South Portal area is not accessible due to soft, muddy roads.

3. DEQ overlooked the impact of the federal Mining Safety and Health Act (“MSHA”). The MSHA makes clear that the safety of miners is paramount. *See* Mine Act, Section 2(a) (“the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource – the miner”). Consequently, “the existence of unsafe and unhealthful conditions and practices in the Nation’s coal or other mines . . . cannot be tolerated”. *See* Mine Act §2(d). Operators and miners have the “primary responsibility” to prevent the existence of unsafe conditions. *See* Mine Act §2(d). Signal Peak’s MSHA obligations include protecting workers from dangerous conditions at remote

springs during Montana winters. *See* 30 C.F.R. §§ 77.200, .204, 205. MSHA guidance also specifically addresses risks from exposure to frigid temperatures. *See* MSHA Safety Alert, Cold Stress Related Injuries (2018) (“Cold stress is a condition occurring when the body can no longer maintain a normal temperature. The condition can result in very serious cold-related illnesses and injuries, permanent tissue damage or death. Those working in cold environment—with low temperatures, high wind speed, humidity, and/or contact with cold water or surfaces—are particularly susceptible to cold stress.”). Requiring monitoring at remote spring locations during hazardous winter conditions runs contrary to the letter and intent of the MSHA.

4. DEQ improperly alleges violations arising from Signal Peak’s failure to conduct weekly monitoring at, among other springs, springs 14325 and 14415, that are not located within 1000 feet of the edge of a panel being mined and would not be mined within the next two months and therefore are not subject to the monitoring requirements at issue. *See* Attached Figure.

5. DEQ improperly alleges Signal Peak did not conduct monitoring when, in fact, monitoring took place. In particular, Signal Peak conducted weekly spring monitoring on December 21st and December 27th, 2018. In the Order, DEQ states it is “choosing to accept” (Order, ¶ 25) that Signal Peak conducted this monitoring and in its penalty calculation DEQ appears to reduce the violation

number from 73 to 59. *See* Department of Environmental Quality – Enforcement Program Settlement Penalty Calculation Worksheet (“Penalty Worksheet”), p. 2. Yet, in its Penalty Calculation # 1, DEQ appears to assert Signal Peak’s violations include the last two weeks of December. *Id.* at p. 1 (alleging violations for “December 16, 2018 through February 23, 2019, at Bull Mountain Coal Mine #1” and alleging “SPE failed to conduct the required weekly flow monitoring a total of 73 times at the Springs”). Insofar as DEQ maintains Signal Peak did not conduct monitoring on December 21st and December 27th, 2018, the Order is in error.

6. DEQ improperly alleges violations for failure to conduct weekly monitoring at locations that include Springs 14325, 14415, 16255, and 17685. During discussions on a potential modified MQAP, DEQ agreed no future monitoring need be required for these locations during December, January, and February. DEQ has implicitly recognized that suspending monitoring at these locations during the winter months would not create environmental harm, would not impair DEQ’s efforts to characterize and track potential mining impacts, and would not affect the DEQ’s ability to enforce other requirements or permit obligations. In short, the Department has acknowledged that suspending this monitoring would be entirely reasonable. Even assuming DEQ continues to claim technical violations at some of these locations, these circumstances strongly

mitigate any potential penalty factors under DEQ's regulations at ARM 17.4.301 to 17.4.308.

7. The Order incorrectly concludes the alleged violations have the potential to impact DEQ's administration of rules or statutes under ARM 17.4.304(5)(b). *See* Penalty Worksheet, p. 1. Signal Peak's safety-driven decisions not to dispatch employees to conduct the monitoring at issue did not involve routine or ongoing failures to monitor. Signal Peak's decisions were based on hazardous weather conditions and DEQ-approved language in the MQAP allowing Signal Peak to refrain from monitoring where circumstances made that monitoring unsafe. Substantial data about the locations at issue already existed and additional data would be gathered after the winter months, as soon as the conditions for travel and access to remote areas were again safe. Moreover, in many instances, the locations to be sampled would not have produced any useful information because the springs at issue were not flowing during the time period at issue. Signal Peak has previously documented this "no flow" condition in its discussions with DEQ. Finally, the MQAP provided for suspension of monitoring in unsafe conditions and DEQ agreed to work with Signal Peak to clarify and simplify those MQAP provisions. The mutually acknowledged need to waive monitoring when conditions made that monitoring unsafe, confirms that

monitoring for particular weeks during the winter was not essential to the DEQ's ability to fulfill its regulatory obligations.

8. DEQ incorrectly failed to give Signal Peak credit for penalty mitigation based on circumstances, good faith, and cooperation, in accordance with ARM 17.4.304 and other matters in accordance with ARM 17.4.308, but instead improperly imposes an additional adjustment to the penalty for circumstances. *See* Penalty Worksheet, p. 2. Signal Peak did not conduct the monitoring that is the subject of the Order because frigid weather and snow accumulation presented hazards to the employees that would have to travel to the remote locations and conduct sampling. Signal Peak believed in good faith that its actions complied with the terms of the MQAP, the Permit, and the established regulatory practice. These factors mitigate against any significant penalty.

9. DEQ incorrectly imposed an adjustment penalty based on the circumstances. *See* Penalty Worksheet, p. 2. As detailed above, Signal Peak acted reasonably under the circumstances. In addition to the above, other mitigation circumstances counsel against a significant penalty.

- Weekly spring monitoring is extra monitoring intended to occur between the regular monthly spring monitoring visits to identify quickly any possible mine impacts to livestock.
 - DEQ has a decade's worth of monitoring data demonstrating that springs are unlikely to be impacted by mining; i.e., with

approximately one-half of the mine plan now complete, only one spring (17145) has possibly had even a *temporary* mining impact.

- As represented by DEQ at the May 2, 2018 meeting, the primary purpose of weekly monitoring is to ensure there is water for livestock. Yet, livestock are typically not present at any of these springs in the described time period due to winter conditions in the Bull Mountains. Therefore, livestock could not be impacted.
- Wildlife, if present in vicinity of any of these springs, would not be restricted to a particular area (unlike livestock).
- Regular monthly monitoring was completed at these springs.
- Signal Peak has previously provided documentation in the MR253 application that weekly flow monitoring of springs in winter months provides very limited useful data.

10. The NON and Order exceed DEQ's authority by requiring Signal Peak to revise its Permit. Specifically, paragraph 27 of the Order demands that Signal Peak submit a revised "MQAP outlined in section 4(a) of the NON," which substantially revised the previously DEQ-approved language allowing Signal Peak to suspend monitoring due to inclement weather. As stated above, Signal Peak revised MQAP under protest and threat of cessation of mining operation. However, Signal Peak appeals DEQ's decision to require the changes to the MQAP. DEQ does not have unilateral authority to achieve a permit revision by the above administrative enforcement mechanisms. Moreover, by demanding these changes to the MQAP, DEQ tacitly admits the former language in the MQAP

allowed Signal Peak to suspend monitoring and that its actions complied with the MQAP language, as written.

11. DEQ's threat of mine closure amounts to an unconstitutional violation of due process. DEQ's NON and Order, coupled with the threat of an "immediate" cessation order, left Signal Peak without effective recourse. The company was forced to choose between acceding to a change in the terms of its permit or having its facility shut down. In other words, Signal Peak had to choose between protecting its workers' lives or their jobs. DEQ advanced an *in terrorem* threat that it would issue a cessation order, effectively terminating 300 jobs, if Signal Peak did not accede to DEQ's demand for its preferred language in the Permit. This threat was wholly disproportionate to the requested change in language. Absent a pre-deprivation hearing, this process constituted a violation of Signal Peak's due process rights. Perhaps most notably, the required "abatement action" does not conform to the applicable regulatory structure. Mandating a proposed revision to the language of the MQAP appears to be neither "abatement" nor "action" of the sort appropriate in an "emergency." Indeed, changing the language of the requirements that were allegedly violated does not abate a violation, it seeks to change the rules of the MQAP and illustrates Signal Peak's compliance with the original language.

12. In conclusion, DEQ's Order ignores the safety issue that was central to the approved MQAP language that applied during the time periods at issue. Considering the DEQ-approved terms of the governing language of the MQAP at the time of the alleged violations, the Permit, the established regulatory practices, and the limited value of the monitoring data, Signal Peak took the most appropriate course of action by ensuring the safety of its employees while honoring notice requirements to DEQ. Based upon the facts set forth above and others, which will be proven in the course of litigating this appeal, Signal Peaks asks the Board to reverse or modify DEQ's Order because no violations occurred, no penalty is warranted, and DEQ has unlawfully exceeded its authority.

DATED this 13th day of December 2019.



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ATTORNEYS FOR SIGNAL PEAK ENERGY,
LLC

CERTIFICATE OF MAILING

I hereby certify that on this 13th day of December 2019, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties or their counsel of record as set forth below:

Sara Nelson (original) Secretary, Board of Environmental Review Montana Department of Environmental Review P.O. Box 200901 Helena, MT 59620-0901 SNelson@mt.gov	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail
Sarah Clerget, Hearing Examiner Agency Legal Services Bureau 1712 Ninth Avenue P.O. Box 201440 Helena, MT 59620-1440 sclerget@mt.gov	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail
Aleisha Solem Paralegal to Sarah Clerget, Hearing Examiner ASolem@mt.gov	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail
Mark Lucas Montana Department of Environmental Quality 1520 East Sixth Avenue P.O. Box 200901 Helena, MT 59620-0901 mark.lucas@mt.gov sscherer@mt.gov	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail
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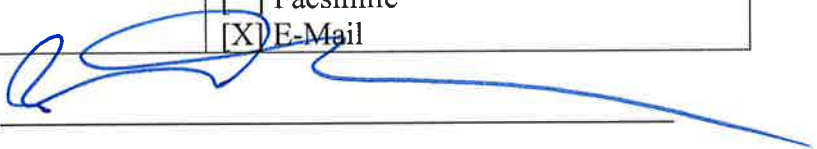
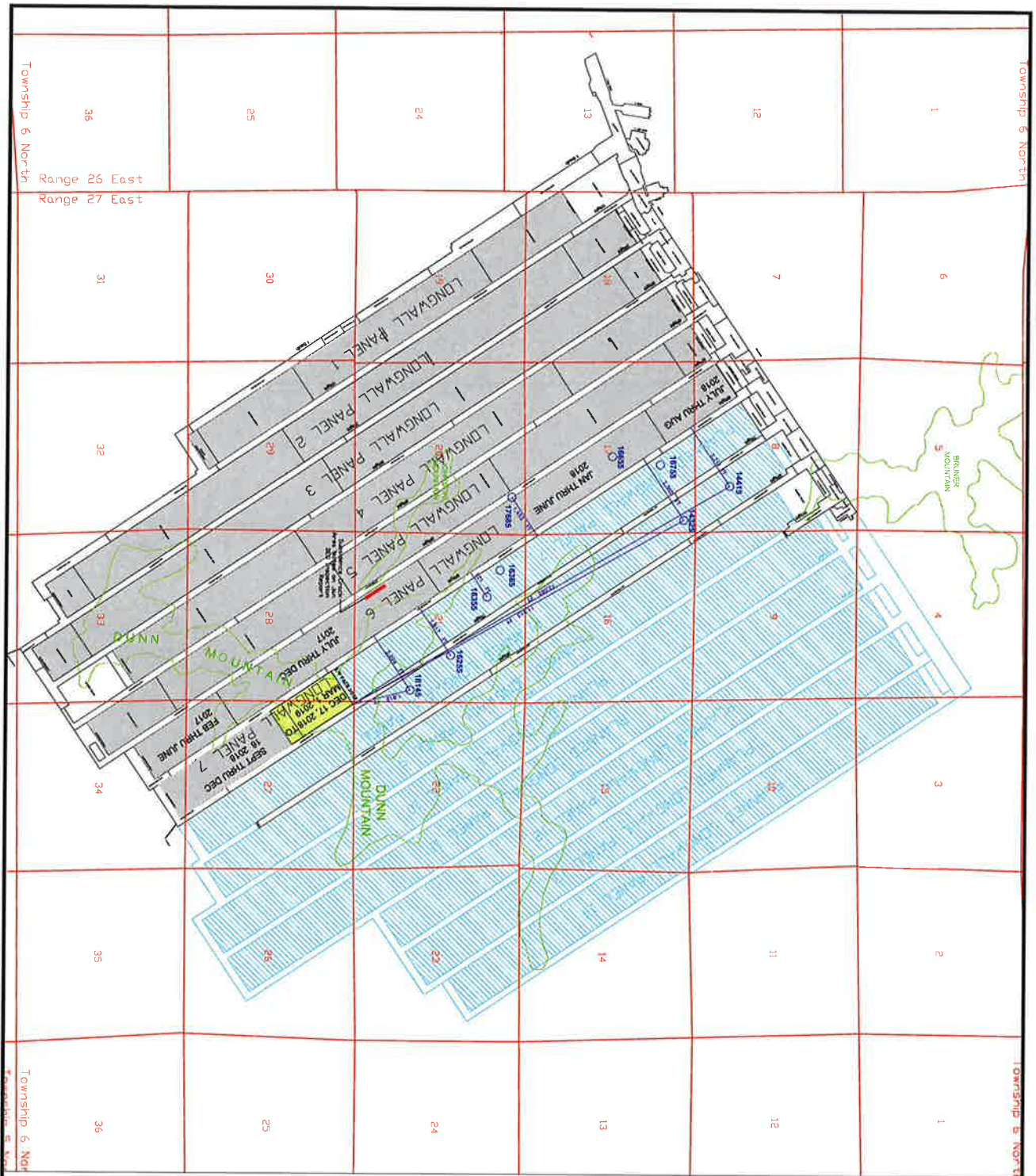


EXHIBIT A



LEGEND

- 1,000 FT — APPROX DISTANCE FROM LW PANEL BEING MINED
- 4825 SPRING LOCATION
- LONGWALL (MINED BEFORE DEC 17, 2019)
- LONGWALL (MINED DEC 17, 2019 — MAR 1, 2019)
- CONTINUOUS MINER (MINED)
- FUTURE PLANNED CONTINUOUS MINER MINING
- FUTURE PLANNED LONGWALL MINING
- TOP OF MOUNTAINS



SIGNAL PEAK ENERGY
BULL MOUNTAINS MINE NO. 1
 MISSOULA COUNTY, MONTANA
 YELLOWSTONE COUNTY, MONTANA
 SM-19-02 FIGURE
 DECEMBER 12, 2019

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Department of Environmental Quality*

**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA**

<p>IN THE MATTER OF:</p> <p>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</p>	<p>BER 2019-22 SM</p> <p>NOTICE OF APPEARANCE</p>
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NOTICE IS HEREBY GIVEN that Mark L. Lucas enters his appearance as counsel of record for the Montana Department of Environmental Quality in the above-captioned matter.

December 16, 2019



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Department of Environmental Quality*

**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
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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 MOTION TO DISMISS SIGNAL PEAK ENERGY'S TENTH CLAIM OF ERROR
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NOW COMES the Montana Department of Quality (alternately “DEQ” or the “Department”) by and through its undersigned counsel and pursuant to M.R.Civ.P. 12(b)(6) and respectfully moves for dismissal of the Tenth Specific Claim of Error alleged by Signal Peak Energy, LLC (“SPE”) insofar as SPE contends that the compliance directive contained in the Department’s November 13, 2019 Administrative Order (the “AO”), which imposed a unilateral amendment to SPE’s coal mining permit, exceeded the Departments’ authority. For the reasons set forth herein, the Department’s motion should be granted in all respects.

Argument

SPE's December 13, 2019 Notice of Appeal ("SPE's Appeal") alleges in pertinent part as follows:

10. The NON and Order exceed DEQ's authority by requiring Signal Peak to revise its Permit. Specifically, paragraph 27 of the Order demands that Signal Peak submit a revised "MQAP outlined in section 4(a) of the NON," which substantially revised the previously DEQ-approved language allowing Signal Peak to suspend monitoring due to inclement weather. As stated above, Signal Peak revised MQAP under protest and threat of cessation of mining operation. However, Signal Peak appeals DEQ's decision to require the changes to the MQAP. DEQ does not have unilateral authority to achieve a permit revision by the above administrative enforcement mechanisms. . .

Contrary to SPE's contentions, DEQ has express and plenary authority to issue orders modifying the permit.

Section 82-4-237(3), MCA states: "When problems are revealed by review of new information or as a result of field inspections, the department may order necessary changes in the mining and reclamation plans to ensure compliance with this part." ARM 17.24.1202(3) similarly states: "The department may order changes in mining and reclamation plans as are necessary to ensure compliance with the Act and the rules adopted pursuant thereto."

Consequently, SPE's claim that the Department lacks the authority to order necessary changes in SPE's mining and reclamation plan fails as a matter of law,

and should be dismissed.

Respectfully submitted,

December 16, 2019



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mark.lucas@mt.gov
*Attorney for Respondent Montana
Department of Environmental Quality*

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of December, 2019, a true and accurate copy of DEQ's Motion to Dismiss Signal Peak Energy's Tenth Claim of Error in BER 2019-22 SM was mailed by electronic mail, addressed as follows:

Original by electronic mail:

Sarah Clerget
Hearing Examiner
Agency Legal Services Bureau
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asolem@mt.gov;

Sara Nelsen
Secretary, Board of Environmental
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Sandy Scherer, Legal Secretary
DEPARTMENT OF ENVIRONMENTAL
QUALITY

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ATTORNEYS FOR SIGNAL PEAK
ENERGY, LLC

**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA**

<p>IN THE MATTER OF:</p> <p>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</p>	<p>CAUSE NO. BER 2019-22 SM</p> <p>MOTION FOR AN EXTENSION OF TIME TO RESPOND TO MOTION TO DISMISS</p>
---	--

Signal Peak Energy, LLC (“Signal Peak”) hereby submits to the Board of Environmental Review and to the Hearing Examiner this motion for an extension of time to respond (“Motion”) to DEQ’s December 16, 2019 Motion to Dismiss (“Motion to Dismiss”). Counsel for Signal Peak has attempted to contact DEQ counsel regarding this Motion but has been unable to do so, likely due to the holiday season. Signal Peak’s time to respond to the Motion to Dismiss is currently December 30, 2019. Signal Peak requests an extension until January 10, 2020.

This matter has not yet been assigned to the Hearing Examiner, but the Board is not scheduled to meet prior to Signal Peak’s time to respond to the Motion to Dismiss, so Signal Peak is submitting this Motion to the Board as well as to the Hearing Examiner. Because it is unclear who will act on the Motion, Signal Peak is submitting two separate proposed Orders.

DATED this 26th day of December 2019.

/s/ Matthew H. Dolphay

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John C. Martin
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ATTORNEYS FOR SIGNAL PEAK ENERGY,
LLC

CERTIFICATE OF MAILING

I hereby certify that on this 26th day of December 2019, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties or their counsel of record as set forth below:

Sara Nelson Secretary, Board of Environmental Review Montana Department of Environmental Review P.O. Box 200901 Helena, MT 59620-0901 SNelson@mt.gov	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail
Sarah Clerget, Hearing Examiner Agency Legal Services Bureau 1712 Ninth Avenue P.O. Box 201440 Helena, MT 59620-1440 sclerget@mt.gov	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail
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/s/ Matthew H. Dolphay

**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA**

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	CAUSE NO. BER 2019-22 SM ORDER GRANTING MOTION FOR AN EXTENSION OF TIME TO RESPOND TO MOTION TO DISMISS
--	--

After considering Signal Peak Energy, LLC's motion for an extension of time to respond ("Motion") to DEQ's December 16, 2019 Motion to Dismiss, and for good cause appearing, it is **HEREBY ORDERED**:

1. The Motion is GRANTED;
2. Signal Peak shall have until January 10, 2020 to respond to DEQ's December 16, 2019 Motion to Dismiss.

DATED this _____ day of _____ 2020.

BOARD OF ENVIRONMENTAL REVIEW
P.O. Box 200901
Helena, MT 59620-0901

CERTIFICATE OF MAILING

I hereby certify that on this _____ of _____ 2020, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties or their counsel of record as set forth below:

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**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA**

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	CAUSE NO. BER 2019-22 SM ORDER GRANTING MOTION FOR AN EXTENSION OF TIME TO RESPOND TO MOTION TO DISMISS
--	--

After considering Signal Peak Energy, LLC's motion for an extension of time to respond ("Motion") to DEQ's December 16, 2019 Motion to Dismiss, and for good cause appearing, it is **HEREBY ORDERED**:

1. The Motion is GRANTED;
2. Signal Peak shall have until January 10, 2020 to respond to DEQ's December 16, 2019 Motion to Dismiss.

DATED this _____ day of _____ 2020.

SARAH CLERGET
Hearing Examiner
Agency Legal Services Bureau
1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440

CERTIFICATE OF MAILING

I hereby certify that on this _____ of _____ 2020, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties or their counsel of record as set forth below:

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Mark Lucas Montana Department of Environmental Quality 1520 East Sixth Avenue P.O. Box 200901 Helena, MT 59620-0901 mark.lucas@mt.gov sscherer@mt.gov	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail
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Attorneys for Montana Department of
Environmental Quality

**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA**

<p>IN THE MATTER OF:</p> <p>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</p>	<p>CAUSE NO. BER 2019-22 SM</p> <p>JOINT <u>UNOPPOSED</u> MOTION FOR A STAY OF PROCEEDINGS</p>
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Signal Peak Energy, LLC (“Signal Peak”) and the Montana Department of Environmental Quality (“DEQ”) (collectively, “Parties”) hereby submit this Joint Unopposed Motion for a Stay of Proceedings (“Motion”) to the Board of Environmental Review (“Board”). The Parties request the Board stay all proceedings, including the current briefing deadlines for the pending motion to dismiss, for a period of 90 days until March 26, 2020. The Parties are negotiating settlement and believe that there is a strong likelihood that the matter will be resolved in a settlement. The Parties agree to provide the Board with a status update regarding the disposition of settlement no later than March 26, 2020. A proposed Order is submitted with this motion.

This matter has not yet been assigned to the Hearing Examiner, and no scheduling order has issued. The Parties seek to avoid unnecessary expenditure of resources in the expectation that the matter can be resolved expeditiously through settlement. A stay of the proceedings will not prejudice any party and early resolution of this matter will advance judicial and administrative economy.

WHEREFORE, the Parties respectfully request that the Board enter an order staying the proceedings and briefing deadlines for a period of 90 days until March 26, 2020. A proposed Order is attached.

DATED this 30th day of December 2019.

/s/ Mark Lucas

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Montana Department of Environmental
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/s/ John C. Martin

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Matthew H. Dolphay
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401 North 31st Street, Suite 1500
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Billings, Montana 59103-0639
ATTORNEYS FOR SIGNAL PEAK
ENERGY, LLC

CERTIFICATE OF MAILING

I hereby certify that on this 30th day of December 2019, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties or their counsel of record as set forth below:

Sara Nelson Secretary, Board of Environmental Review Montana Department of Environmental Review P.O. Box 200901 Helena, MT 59620-0901 SNelson@mt.gov	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail
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Aleisha Solem Paralegal to Sarah Clerget, Hearing Examiner ASolem@mt.gov	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail
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/s/ Matthew H. Dolphay

**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA**

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	CAUSE NO. BER 2019-22 SM ORDER GRANTING UNOPPOSED JOINT MOTION TO STAY PROCEEDINGS
--	---

Having reviewed the parties' Unopposed Joint Motion to Stay Proceedings, it is HEREBY ORDERED that the Unopposed Joint Motion to Stay Proceedings is GRANTED and all proceedings and briefing deadlines in this action are hereby STAYED until March 26, 2020. It is further Ordered that the parties shall provide the Board with a status update regarding the disposition of settlement no later than March 26, 2020.

DATED this _____ day of _____ 2020.

BOARD OF ENVIRONMENTAL REVIEW
P.O. Box 200901
Helena, MT 59620-0901

CERTIFICATE OF MAILING

I hereby certify that on this _____ of _____, 2020, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties or their counsel of record as set forth below:

Sara Nelson Secretary, Board of Environmental Review Montana Department of Environmental Review P.O. Box 200901 Helena, MT 59620-0901 SNelson@mt.gov	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail
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**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA**

<p>IN THE MATTER OF:</p> <p>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</p>	<p>CAUSE NO. BER 2019-22 SM</p> <p>ORDER GRANTING UNOPPOSED JOINT MOTION TO STAY PROCEEDINGS</p>
--	---

On behalf of the Board of Environmental Review I hereby ORDER that the Unopposed Joint Motion to Stay Proceedings is GRANTED and all proceedings and briefing deadlines in this action are hereby STAYED until March 26, 2020. It is further Ordered that the parties shall provide the Board with a status update regarding the disposition of settlement no later than March 26, 2020.

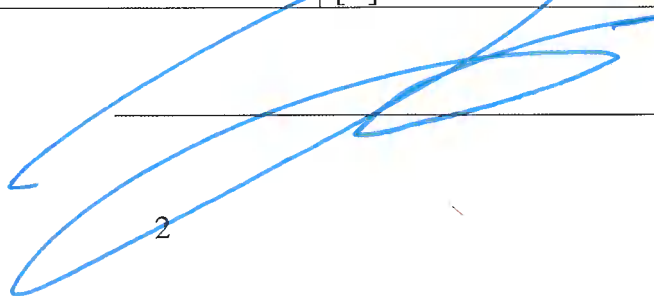
DATED this 31st day of December 2019.

/s/Chris Deveny
Chair
BOARD OF ENVIRONMENTAL REVIEW
P.O. Box 200901
Helena, MT 59620-0901

CERTIFICATE OF MAILING

I hereby certify that on this 31st of December, 2019, I caused to be served a true and correct copy of the *Order Granting Unopposed Joint Motion to Stay Proceedings* to all parties or their counsel of record as set forth below:

Sara Nelson Secretary, Board of Environmental Review Montana Department of Environmental Review P.O. Box 200901 Helena, MT 59620-0901 SNelson@mt.gov	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail
Sarah Clerget, Hearing Examiner Agency Legal Services Bureau 1712 Ninth Avenue P.O. Box 201440 Helena, MT 59620-1440 sclerget@mt.gov	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail
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