

BOARD OF ENVIRONMENTAL REVIEW
FRIDAY, FEBRUARY 7, 2020
METCALF BUILDING, ROOM 111
1520 EAST 6th AVENUE, HELENA, MONTANA

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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