

**BOARD OF ENVIRONMENTAL REVIEW
MINUTES**

February 8, 2019

Call to Order

The Board of Environmental Review's meeting was called to order by Chairperson Deveny at 9:00 a.m., on Friday, February 8, 2019 in Room 111 of the Metcalf Building, 1520 East 6th Avenue, Helena, Montana.

Attendance

Board Members Present in person: Chairperson Christine Deveny, John DeArment, Chris Tweeten, Dexter Busby, Hillary Hanson

Board Members Present by Phone: None

Board Members Absent: John Felton

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

Board Liaison Present: George Mathieus

Board Secretary Present: Lindsay Ford

Court Reporter Present: Laurie Crutcher, Crutcher Court Reporting

Department Personnel Present: Kirsten Bowers, Ed Hayes, Kurt Moser, Sarah Christofferson, Sandy Scherer, Nick Whittaker, Aaron Pettis – LEGAL; Mindy McCarthy, Myla Kelly, Rainie Devaney, Eric Urban, Tim Davis, Jon Kenning, Joanne McLaughlin, Derek Fleming – WQD; Susan Bawden – ENF; Amy Reynolds – WMRD; Chris Yde – AEMD

Interested & Other Persons Present: Vicki Marquis – Holland and Hart; John Tietz, Cathy Laughner– BKBH; Landy Leep – Copper Ridge Development; Peggy Trenk – Treasure State Resources Association; Brad Longcake – Montana Petroleum Marketers and Convenience Stores

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

I.A. Administrative Items – Review and Approve Minutes

I.A.1. December 7, 2018 Meeting Minutes

Mr. DeArment moved to approve the meeting minutes. Mr. Busby seconded the motion, which passed unanimously.

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 said there is a scheduling order in place and the parties are proceeding accordingly.

II.A.1.b. In the Matter of Appeal Revocation of Cosa, Fischer Land Development Subdivision [ES# 42-78-S3-173] and Fischer Homes [ES# 42-80-T1-15], Roger Emery, Sidney, Richland County, Montana. [FID# 2214], BER 2018-03 SUB.

Ms. Clerget stated the parties have come to an agreement in principal and a status conference is set for February 11, 2019.

II.A.1.c. In the matter of violations of the Opencut Mining Act by Wagoner Family Partnership, d/b/a Wagoner's Sand and Gravel, at River Gravel Pit, Flathead County, Montana (Opencut No. 1798; FID 2512), BER 2017-02 OC.

Ms. Clerget said the case was dismissed with prejudice.

II.A.1.d. In the Matter of Violation of the Metal Mine Reclamation Act by Little Bear Construction, Inc. at Bob Weaver Pit, Granite County, Montana. (SMED NO. 46-117C; FID # 2567), BER 2018-02 MM.

Ms. Clerget stated the parties are to file a status report and she anticipates it will be settled shortly.

II.A.2. Briefing Items – Non-Enforcement Cases Assigned to a Hearing Examiner

II.A.2.a. 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 the case is stayed and she's waiting on the decision in MEIC and Sierra Club v. DEQ and Western Energy currently before the Supreme Court.

II.A.2.b. 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.

Ms. Clerget said the parties have submitted summary judgement motions and the motions will be ripe for decision soon.

II.A.2.c. In the matter of Appeal Amendment AM4, Western Energy Company Rosebud Strip Mine Area B, Permit No. C1984003B, BER 2016-03 SM.

Ms. Clerget stated she has the proposed findings of facts and conclusions of law from the parties and will have a decision to the Board soon.

II.A.2.d. In the matter of the notice of appeal and request for hearing by Montanore Minerals Corporation Regarding Issuance of MPDES Permit No. MT0030279, Libby, Montana, BER 2017-03 WQ.

Ms. Clerget stated the proposed findings of facts and conclusions of law are due to her and a hearing is set for March 22, 2019.

II.A.2.e. In the matter of the notice of appeal of final MPDES Permit No. MT0000264 issued by DEQ for the Laurel Refinery in Laurel, Yellowstone County, Montana, BER 2015-07 WQ.

Ms. Clerget stated she would discuss this in combination with the new contested case, agenda item III.B.1.

II.A.2.f. In the Matter of Notice of Appeal of Opencut Mining Permit #2351 Issued to Golden West Properties, LLC by Frank and Paulette Wagner Regarding Concerns and Unanswered Questions. BER 2018-04 OC, and In the Matter of Notice of Appeal of Opencut Mining Permit #2351 Issued to Golden West Properties, LLC by David Weyer on behalf of the Residents of Walden Meadows Subdivision. BER 2018-05 OC.

Ms. Clerget has issued a scheduling order and the parties are proceeding accordingly.

II.A.2.g. In the matter of Columbia Falls Aluminum Company's (CFAC) appeal of DEQ's modification of Montana Pollutant Discharge Elimination System Permit No. MT0030066, Columbia Falls, Flathead County, Montana, BER 2014-06 WQ.

Mr. Moser stated the parties have engaged in discussions about the site. In October, DEQ staff visited the site and determined it would no longer need to have a discharge permit and because of that, the agency filed a notice of intent to terminate the permit and is currently out for public notice. Ms. Laughner stated CFAC had nothing to add and would wait until the public comment period closes.

I.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.

Ms. Bowers stated the matter is fully briefed before the Supreme Court and oral argument is set for March 13.

III.A. Action Items – APPEAL, AMEND, OR ADOPT FINAL RULES:

- III.A.1. **The department requests that the board extend the comment period by 45 days for proposed amendments to Administrative Rules of Montana (ARM) pertaining to ground water standards incorporated by reference into Department Circular DEQ-7.**

Mr. Urban briefed the Board and answered questions.

Ms. Marquis commented that Talon Montana supports the Department's request for a 45-day extension and asked for further information be provided by the Department at the beginning of the extended comment period.

Ms. Trenk stated Treasure State Resources, the Montana League of Cities and Towns and the Montana Association of Realtors supports the Department's request.

Mr. Olson stated the Montana Petroleum Association supports the Department's request.

Mr. Longcake stated the Montana Petroleum Marketers and Convenience Store Association supports the Department's request.

Mr. Tweeten MOVED to extend the comment period by 45 days, to add a second hearing to be held on March 19 and to assign the hearing to the Hearing Officer. Mr. Busby SECONDED. The motion PASSED unanimously.

III.B. New Contested Cases

- III.B.1. **In the Matter of: Notice of Appeal and Request for Hearing by CHS, Inc. Regarding Issuance of MPDES Permit No. MT0000264, BER 2019-01 WQ.**

Ms. Clerget stated this new contested case has the same permit number as agenda item II.A.2.e. She gave the Board members their options, including assigning it to the Hearings Examiner and answered questions.

Mr. Moser and Ms. Marquis briefed the Board and answered questions on the original and new case.

Mr. DeArment moved to combine the two cases for procedural purposes and to assign the matter to the Hearings Examiner for the totality of the case. Chairperson Deveny seconded the motion, which passed unanimously.

III.C. Action on Contested Cases

- III.C.1. **In the matter of violations of the Water Quality Act by Reflections at Copper Ridge, LLC, at Reflections at Copper Ridge Subdivision, Billings, Yellowstone County (MTR105376), BER 2015-01 WQ and In the matter of violations of the Water Quality Act by Copper Ridge Development Corporation at Copper Ridge Subdivision, Billings, Yellowstone County (MTR105377), BER 2015-02 WQ.**

The Board heard oral arguments from parties and held discussion. Board Member Busby moved to grant Copper Ridge and Reflections at Copper Ridge's Motion for

Summary Judgment and reverse the Hearing Examiner's decision that Copper Ridge and Reflections at Copper Ridge are owner/operators. Board Member Hanson seconded the motion.

Board Member Tweeten moved to substitute the motion by vacating the Proposed Findings of Fact and Conclusions of Law and Order on Summary Judgment finding that the conclusions of law were incorrect and there were insufficient facts before the Board for a decision and remanded the matter for further proceedings, consistent with the Board's interpretation of the statute: that the statutory definition of owner/operator speaks to the person who owns, operates, or supervises the project at the time that the storm water discharges take place and that having had the opportunity to take steps that might have controlled those discharges at some point in the past does not make one an owner or operator for purposes of the statute. Board Member Hanson seconded. the motion, which passed unanimously.

Board Member Tweeten moved to direct the hearing examiner to place the burden of proof on the Department of Environmental Quality under the appropriate legal standard as stated above. The Board left it to the discretion of the Hearing Examiner to determine if there were sufficient facts on the record to make findings of fact and conclusions of law consistent with the Board's interpretation of the statute and burden of proof, or whether an additional fact-finding hearing was necessary. Board Member Busby seconded the motion, which passed unanimously.

IV. Board Counsel Update

Ms. Clerget had no updates.

V. General Public Comment

None were offered.

VI. Adjournment

Mr. Tweeten moved to adjourn the meeting. Ms. Hanson seconded the motion, which passed unanimously. Chairperson Deveny adjourned the meeting at 1:52 p.m.

Board of Environmental Review February 8, 2019 minutes approved:


CHRISTINE DEVENY

CHAIRPERSON
BOARD OF ENVIRONMENTAL REVIEW

4/12/19
DATE