

**BOARD OF ENVIRONMENTAL REVIEW
MINUTES**

May 31, 2019

Call to Order

The Board of Environmental Review's meeting was called to order by Chairperson Deveny at 10:30 a.m., on Friday, May 31, 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, Melissa Hornbein, Dexter Busby, Chris Tweeten, David Lehnherr

Board Members Present by Phone: Hillary Hanson

Board Members Absent: None

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: Sandy Scherer, Kirsten Bowers, Norm Mullen, Kurt Moser, Sarah Christopherson, Terry Mavencamp, Jon Morgan, Susan Bawden, Martin VanOort, Emily Hinz, David Klemp, Chris Yde, Liz Ulrich, Julie Merkel, Mark Lucas, Aaron Pettis, Eric Regensburger, Mike Suplee, Jon Kenning, Johanna McLaughlin, Derek Fleming, Tim Davis, Lauren Sullivan, Myla Kelly, Rebecca Harbage, Kevin Krogstad

Interested & Other Persons Present: Aleisha Solem – Agency Legal Services; John Martin, Samuel Yemington – Holland and Hart; Wade Steere – Western Energy Company; peggy Trenk – Treasure State Resources Association; Alan Olson – Montana Petroleum Association; Cody Ferguson – Northern Plains Resource Council; Shiloh Hernandez – Western Environmental Law Center, Derf Johnson, MEIC;

Interested & Other Persons Present by Phone: Travis Ross – Missoula County Health Department; Vicki Marquis – Holland and Hart

Roll was called: six Board members were present in person and one Board member was present via teleconference, providing a quorum.

I.A. Administrative Items – Review and Approve Minutes

I.A.1. April 12, 2019 Meeting Minutes

Mr. Tweeten 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 she held a scheduling conference on April 2, 2019. The parties agreed to a schedule for discovery. A scheduling order was issued, and the parties are proceeding accordingly.

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 there was a final prehearing schedule and it was decided there needed to be an additional factual hearing. The hearing is scheduled, and the case is proceeding.

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

II.A.2.a. In the Matter of the Application for an Amendment of a Major Facility Siting Act Certificate by Talen Montana LLC, BER 2019-04 MFSA.

Ms. Clerget said an emergency meeting was held. After the emergency meeting, a hearing was held. Talen moved to intervene, and the motion was granted. The parties have to decide whether or not to go directly to District Court or proceed down the contested case path in front of the Board.

II.A.2.b. In the Matter of the Notice of Appeal and Request for Hearing by Spring Creek Coal, LLC regarding issuance of MPDES Permit No. MT0024619, BER 2019-02 WQ.

Ms. Clerget issued a prescheduling order on 5/29 and will get a schedule in place.

II.A.2.c. 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.

Ms. Clerget stated this case has been consolidated with case BER 2015-07 WQ. A scheduling order has been issued and the parties are proceeding accordingly.

- 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 the case has been stayed since March 28, 2018 pending the resolution of the Supreme Court case Sierra Club v. DEQ.

- 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, BER 2017-03 WQ.**

Ms. Clerget said a hearing was held, the parties submitted post hearing briefs and it’s before her for a decision.

- II.A.2.f. **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 case has been consolidated with BER 2019-01. A scheduling order is in place and the parties are proceeding accordingly.

- II.A.g. **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 said the parties filed cross motions for summary judgment which are before her for decision.

II.A.3. Contested Cases not assigned to a Hearing Examiner

- II.A.3.a. **In the matter of the notice of appeal and request for hearing by Western Energy Company (WECO) regarding its MPDES Permit No. MT0023965 issued for WECO’s Rosebud Mine in Colstrip, BER 2012-12 WQ.**

Ms. Bowers stated the Montana Supreme Court requested additional briefing and the briefs are due June 17, 2019.

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

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

Dr. Suplee briefed the Board and answered questions regarding the adoption of proposed groundwater standards.

Mr. Ross stated Missoula City-County Health Department would be interested in working with the Department on the next steps but would like to see it move sooner than later.

Ms. Hornbein requested the Department update the Board on the iron and manganese issue at the next Board meeting.

Mr. Tweeten moved to adopt the rules as proposed. Mr. Busby seconded the motion which passed unanimously.

- III.A.2. **In the matter of final adoption of New Rule I (17.30.1702) and the proposed amendments to Administrative Rules of Montana (ARM) 17.30.1001, 17.30.1334, 17.36.103, 17.36.345, 17.38.101, 17.50.819 and Department Circulars DEQ-1, DEQ-2, and DEQ-3 as noticed in MAR 17-404 with modifications.**

Mr. Regensburger briefed the Board and answered questions regarding the adoption of proposed setback rules between sewage lagoons and wells.

Ms. Hornbein moved to adopt the rules as proposed. Chairperson Deveny seconded the motion which passed unanimously.

III.B. New Contested Cases

- III.B.1. **In the Matter of the 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 gave the Board members their options, including consolidating this case and the below-mentioned case, BER 2019-05 OC, and assigning it to the Hearings Examiner.

Mr. Tweeten moved to consolidate cases BER 2019-03 OC and BER 2019-05 OC for procedural purposes and assign the matter entirely to the Hearings Examiner. Mr. Busby seconded the motion, which passed unanimously.

- III.B.2. **In the Matter of the Notice of Appeal and Request for Hearing by the Montana Environmental Information Center and Sierra Club regarding approval of surface mining permit no. C2011003F, BER 2019-05 OC.**

(See above)

III.C. Action on Contested Cases

- III.C.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.**

Ms. Clerget briefed the Board and answered questions on the issues surrounding this case.

Mr. Tweeten moved that the Board refer to Counsel, acting as Hearing Examiner, the pending summary judgment motions in the matter of Signal Peak Energy, Bull Mountain Coal Mine No. 1, for the preparation of a proposed decision in accordance with MAPA, which would then be brought back to the Board for further proceedings. Mr. DeArment seconded the motion. The Board then heard from the parties and asked questions. The board voted on the motion which passed unanimously.

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

Western Energy filed an Affidavit to Exclude Board Members Deveny and Lehnherr. The Board discussed the Affidavit. Board Members took no action so the Affidavit was denied for a lack of motion.

Western Energy filed a Motion to Strike which was withdrawn.

Board Member Tweeten moved to affirm the Hearing Examiner's Order on the Motions in Limine, incorporating the order into the proposed findings of fact and conclusion of law currently before the board. Board Member Busby seconded the motion which passed unanimously.

Board Member Busby moved to accept the Hearing Examiner's Proposed Findings of Facts adding language into the Proposed Order that any contrary findings of fact that have been offered by the parties are rejected as being contrary to the facts as found by the Hearing Examiner. Board Member Tweeten seconded the motion, which passed unanimously.

Chairperson Deveny moved to adopt the Conclusion of Law that places the burden of proof on the Petitioners, MEIC. Board Member Tweeten seconded the motion, which passed

Board Member Tweeten moved to amend Conclusion of Law No. 12 as follows:

Conservation Groups have the burden to show, by a preponderance of the evidence, that DEQ had information available to it at the time of issuing the permit that indicated ~~issuing the permit could result that the project at issue is not designed to prevent in~~ land uses or beneficial uses of water from being adversely affected, water quality standards from being violated, or water rights from being impacted. Mont. Code Ann. §§ 82-4-203(31), 203(32), 222(1)(1), 226(8), 227(3)(a); Admin. R. Mont. 17.24.401-405; Signal Peak, BER-2-13-07-SM at 87.

amend Conclusion of Law No. 18 as follows:

Conservation Groups did not provide sufficient evidence to show ~~a more likely than not possibility~~ that the AM4 Amendment ~~will result in~~ is not designed to prevent "material damage" as defined in Mont. Code. Ann. §§ 82-4-203(24), (31) and Admin. R. Mont. 17.24.301(31), (32), (55), (68). Mont. Code Ann. §82-4-227(3)(a), Admin. R. Mont. 17.24.405(6)(c).

Board Member Busby seconded the motion which passed 6 to 1. Board Member Hornbein dissenting.

Board Member Tweeten moved to accept Conclusions of Law Nos. 1 through 5. Board member Hornbein seconded the motion which passed 6 to 1. Board Member Hanson dissenting.

Chairperson Deveny moved to adopt Conclusions of Law Nos. 5 through 11. Board Member Tweeten seconded the motion which passed unanimously.

Board Member Tweeten moved to adopt Conclusions of Law Nos. 13 through 17. Chairperson Deveny seconded the motion which passed unanimously.

Board Member Tweeten moved to adopt Conclusion of Law No. 19. Board Member Busby seconded the motion which passed unanimously.

Board Member Tweeten moved to adopt Conclusion of Law Nos. 20 through 27. Chairperson Deveny seconded the motion which passed unanimously.

Board Member Tweeten moved to adopt Conclusions of Law Nos. 28 through 38. Board Member Busby seconded the motion which passed unanimously.

Board Member Busby moved to adopt Conclusions of Law Nos. 39 through 43. Board Member Tweeten seconded the motion.

Board Member Tweeten moved to Amend the motion. Mr. Tweeten moved to amend Subsection B of the discussion section of the Proposed FOFCOL on page 71 by striking the word "possibility" and inserting the word "probability" and then on page 76 striking the work "possibility" and inserting the word "probability" and then on page 88 in Conclusion of Law 39 after the word "above" insert the words, "As amended by the Board,". Board Member Busby seconded the amendment.

Board Member Tweeten withdrew the amendment (Tr. 206:2-18) in part, with respect to Conclusion of Law No. 39 and amended the motion to amend Conclusion of Law No. 39 on page 88 to read as follows:

Conservation Groups failed to present the evidence necessary to establish facts essential to a determination that the AM4 permit is not designed to prevent material damage.

Conclusion of Law No. 40 amended to add the words "Essential to a determination the AM4 permit was not designed to prevent material damage" in the second line of 40 after the words "AM4 permit."

Conclusion of Law No. 42 amended to add the words "The determination that the AM4 permit was not designed to prevent material damage to aquatic life use of EFAC" in the second line of 42 after the words "AM4 permit."

Board Member Busby seconded the motion to amend which passed unanimously.

The motion as amended passed unanimously.

Board Member Tweeten moved to adopt Conclusion of Law 44 and therefore it is ordered sub a and b paragraphs on page 90 of the Proposed Decision. The motion was withdrawn.

Board Member Tweeten moved to decline to adopt the discussion section of the proposed decision with the exception of subsection (b). Chairperson Deveny seconded the motion which passed 6 to 1. Board Member Hornbein dissenting. Board Member Tweeten moved to adopt Conclusion of Law No. 44 and the order provisions of the "therefore it is ordered" paragraph including subparagraphs (a) and (b) found on page 90 of the hearing examiner's proposed decision. Board Member Busby seconded the motion, which passed unanimously.

IV. Board Counsel Update

None were offered.

V. General Public Comment

None were offered.

VI. Adjournment

Ms. Hornbein moved to adjourn the meeting. Chairperson Deveny seconded the motion, which passed unanimously. Chairperson Deveny adjourned the meeting at 4:07 pm.

Board of Environmental Review May 31, 2019 minutes approved:



CHRISTINE DEVENY
CHAIRPERSON
BOARD OF ENVIRONMENTAL REVIEW

10-1-19
DATE

