

**BOARD OF ENVIRONMENTAL REVIEW
MINUTES**

August 9, 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, August 9, 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, David Lehnerr

Board Members Present by Phone: Hillary Hanson, Chris Tweeten

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: Ed Hayes, Rachel Clark, Aaron Pettis, Mark Lucas, Sarah Christopherson, Eric Sivers, Dave Klemp, Julie Merkel, Rhonda Payne, Darryl Barton, Haley Sir, Johanna McLaughlin, Maya Rao, Matt Dorrington, Ed Coleman, Myla Kelly

Interested & Other Persons Present: Aleisha Solem – Agency Legal Services; Landy Leep, Vicki Marquis, – Copper Ridge;

Roll was called: five 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. May 22, 2019 Meeting Minutes

Ms. Hornbein moved to approve the meeting minutes. Mr. Lehnherr seconded the motion, which passed unanimously.

I.A.2. May 31, 2019 Meeting Minutes

Mr. Busby stated a spelling error on III.3.2 of the agenda. Mr. Busy should be Mr. Busby.

Mr. Lehnherr questioned the time of adjournment. The time states 11:00 a.m. and the meeting adjourned at 4:07 p.m.

Ms. Hornbein proposed to add that on agenda item III.A.1. she requested the Department provide an update at the next meeting on the manganese rules.

Mr. Busby moved to approve the minutes with the proposed changes. Chairperson Deveny 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 stated the case was stayed on June 17, 2019. The parties filed a status report in July indicating technical settlement discussions are still underway. The case will continue to be stayed.

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

II.A.2.a. In the matter of the Notice of Appeal and Request for Hearing by CHS, Inc. regarding issuance of MPDES Permit No. MT0000264, BER 2019-01 WQ.

Ms. Clerget stated the parties are to file either a stipulated settlement agreement or a motion for new scheduling deadlines by November 29, 2019. The case is stayed in the intervening time.

II.A.2.b. In the matter of Westmoreland Resources, Inc.'s, appeal of final MPDES permit No. MT0021229 issued by DEQ for the Absaloka Mine in Hardin, Big Horn County, MT, BER 2015-06 WQ.

Ms. Clerget said the case is stayed pending a decision from the Supreme Court.

II.A.2.c. An appeal in the matter of amendment application AM3, Signal Peak Energy LLC's Bull Mountain Coal Mine #1 Permit No. C1993017, BER 2016-07 SM.

Ms. Clerget said the subpoena issue was decided at the District Court level and was appealed to the Supreme Court. The Board hired outside counsel to represent it at the Supreme Court.

Ms. Christensen stated the record has yet to be transmitted to the Supreme Court and after it is transmitted briefing will begin. Ms. Christensen stated that the Board filed a notice of non-participation at the District Court level and anticipates the same at the Supreme Court level.

Ms. Clerget stated the remainder of the contested case is still before her and is proceeding accordingly.

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, BER2017-03 WQ.**

Ms. Clerget stated the case is fully briefed and will be before the Board at the October meeting.

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 said the parties have the option to file either a settlement agreement or a motion for a new schedule by November 29, 2019. The case is stayed in the intervening time.

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 said the case has several pending motions before her. Once she issues a decision on those motions and the parties make a decision regarding her order, the matter may or may not be before the Board in October.

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 the parties have agreed to a mostly expedited schedule and will be before the Board at the December meeting for a final decision.

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

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.

Ms. Clerget said there is a scheduling order in place and the parties are proceeding through the scheduling order.

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 Supreme Court requested additional briefing by the parties. The parties submitted the additional briefs June 17, 2019 and are still awaiting the court's decision.

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).

Ms. Christensen, the Board's outside counsel, stated the petition for judicial review was served and the Board's answer or motion to dismiss will be due at the end of August. She said her intent is to file a motion to dismiss to get the Board out of the case.

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

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

Ms. Clark briefed the Board and answered questions.

Ms. Hanson was recused from taking action.

Mr. DeArment moved to initiate the proposed rulemaking as presented. Chairperson Deveny proposed to modify the motion by assigning Sarah Clerget as the hearing officer for the rulemaking. Mr. Busby 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 Alpine Pacific Utilities regarding issuance of MPDES permit no. MTX000164, BER 2019-06 WQ.

Ms. Clerget gave the Board members their options, including assigning it to the Hearings Examiner. Chairperson Deveny moved to assign Sarah Clerget as the hearing examiner for the totality of the case. Mr. Lehnherr 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 the parties.

Chairperson Deveny moved to approve Findings of Fact 1-10. Member Hansen seconded. The motion passed unanimously.

Chairperson Deveny moved to approve Findings of Fact 11-13. Member Tweeten seconded. The motion passed unanimously.

Chairperson moved to approve Finding of Fact 14. Member Lehnherr seconded the motion. The motion passed unanimously.

Chairperson Deveny moved to approve Finding of Fact 15. Member Hornbein seconded the motion. The motion passed unanimously.

Chairperson Deveny moved to approve FOF 16. Member Busby seconded the motion. The motion passed unanimously.

Chairperson moved to approve FOF 17. Member Lehnherr seconded the motion. The motion passed unanimously.

Member Hornbein moved to approve FOF 18. Member Busby seconded the motion. The motion passed 5 to 1. Member Lehnherr opposed.

Member Tweeten to approve FOF 19-21. Member Busby seconded the motion. The motion passed 5 to 1. Member Lehnherr opposed.

Member Tweeten moved to approve FOF 22-28. Member Busby seconded the motion. The motion passed 4 to 2. Members Lehnherr and Hornbein opposed.

Member Busby moved to approve FOF 29-33. Chairperson Deveny seconded the motion. The motion passed 4 to 2. Members Lehnherr and Hornbein opposed.

Member Tweeten moved to approve FOF 34-39. Member Busby seconded the motion. The motion passed 5 to 1. Member Lehnherr opposed.

Chairperson Deveny moved to approve FOF 40-42. Member Hansen seconded the motion. The motion passed unanimously.

Chairperson Deveny moved to approve FOF 43-53. Member Busby seconded the motion. The motion fails 3 to 3. Members Hornbein, Lehnherr and Hansen opposed.

Member Tweeten moved to find that the hearing examiner abused her discretion with regard to the four photographs excluded by the Motion in *Limine* and the matter be

remanded back to the hearing examiner to take additional evidence regarding the photographs from DEQ and CR/REF to include maps created from the photographs, and maps of the areas covered by the permits-and determine: (1) if the additional evidence changes the FOF or COL; (2) if so, submit modified FOFCOL; and (3) if not, then submit a memo to that effect. Member Lehnherr seconded the motion which passed unanimously.

IV. Board Counsel Update

Ms. Clerget told the Board she was invited to speak at the Natural Resource Section of the Bar on the procedure of the BER. Chairperson Deveny and Board members gave their consent.

V. General Public Comment

None were offered.

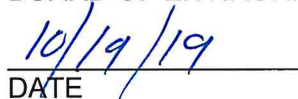
VI. Adjournment

Mr. Busby moved to adjourn the meeting. Chairperson Deveny seconded the motion, which passed unanimously. Chairperson Deveny adjourned the meeting at 4:39 pm.

Board of Environmental Review August 9, 2019 minutes approved:



CHRISTINE DEVENY
CHAIRPERSON
BOARD OF ENVIRONMENTAL REVIEW


DATE