

**BOARD OF ENVIRONMENTAL REVIEW
MINUTES**

June 12, 2020

Call to Order

Chairperson Deveny called the meeting to order at 9:00 a.m.

Attendance

Board members present

By ZOOM: Chairperson Chris Deveny, David Lehnherr, Dexter Busby, John DeArment, Chris Tweeten, Jerry Lynch, Hillary Hanson

Board attorney present

Sarah Clerget, Attorney General's Office (AGO)

Department personnel present

Board liaison George Mathieus

Interim Board secretary Deb Sutliff

Legal: Kirsten Bowers, Kurt Moser, Angie Colamaria, Sarah Christofferson

Enforcement: Chad Anderson

Water Quality: Tim Davis, Myla Kelly, Mike Suplee, Lauren Sullivan, Galen Steffens

Water Protection: Jon Kenning, Kristy Fortman

Waste Management & Remediation, Federal Superfund and Construction Bureau: Keith Large

Coal: Emily Hinz

Interested and other parties present

Laurie Crutcher, Laurie Crutcher Court Reporting; Amy Christensen, Attorney with Christensen and Prezeau; Michele Ryan-Aylward, BC Ministry of Environment-British Columbia; Tammy Johnson, MT Mining Association; Nancy Jacobsen, Big Creek Coalition; Peggy Trank, State Resources Association

I.A. Administrative Items – Review and Approve Minutes

I.A.1. April 17, 2020, Meeting Minutes

Chairperson Deveny moved to approve the minutes. Mr. DeArment 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 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 this case has been pending since April 17, 2015, when Copper Ridge Development Corporation and Reflections at Copper Ridge, LLC filed a Notice of Appeal and Request for hearing with the Board.

- i. **Contested Case:** 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. On February 21, 2020 Ms. Clerget issued an Order denying CR/REF's motion to sever these cases and ordering that the cases proceed as combined for procedural purposes. On April 23, 2020 Ms. Clerget issued an order requesting that the parties indicate whether a stay of the underlying contested case was appropriate, given the District Court appeal (below). The parties indicated they did not want a stay and therefore the underlying contested case has continued simultaneous to the appeal. CR/REF have filed a Motion in Limine and a Motion for Summary Judgment. The Motion in Limine is fully briefed and awaiting decision, the Motion for Summary Judgment is not yet fully briefed. On May 21, 2020 DEQ filed a Motion for Amended Scheduling Order and on May 27, 2020 CR/REF responded in opposition. That motion is not yet fully briefed.
- ii. **District Court case:** On April 20, 2020, BER became aware of a Petition for Judicial Review, Cause No. DV 20-0445, filed in the Thirteenth Judicial District court by CR/REF. The Petition appeals, Ms. Clerget's February 21, 2020 Order denying CR/REF's Motion to Sever the cases. The Board was named as a party in that action and has retained outside counsel, Amy Christensen, to represent it. On May 15, 2020, the hearing assistant transmitted the administrative record to the District Court, however

there are some issues involving the administrative record that the parties are working through rules.

II.A.1.b. 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.

On April 30th, the parties filed a joint status report, and she issued a scheduling order on May 7th. Discovery closes in September 2020 so they're proceeding along that scheduling order. An update from your agenda. DEQ has a pending motion to dismiss filed early on in this case, which

has been sort of pushed down the road, and I just granted Signal Peak an extension to respond to that, which will be fully briefed on June 23rd. So that will be a motion for Ms. Clerget's decision, once it's fully briefed.

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 Alpine Pacific Utilities Regarding Issuance of MPDES Permit No. MTX000164, BER 2019-06 WQ.

Ms. Clerget issued an amended scheduling order on April 20th. The parties are proceeding with expert disclosures due at the end of June.

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.

Ms. Clerget issued an amended scheduling order on March 20th. Calumet Montana Refining, LLC, filed a motion to for leave to file as amicus curia, which means "a friend of the Court." Ms. Clerget also issued an order granting their request to file as an amicus. The parties are proceeding according to the scheduling order, which is in the discovery phases.

II.A.2.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.

Ms. Clerget stated this case has been under a motion to stay for a while. They will have to file an update on June 24th, so she will get more information at that point.

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.

Mr. Clerget reminded members, that this has been stayed pending a decision from the Supreme Court.

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

Ms. Clerget issued an order on the pending motion to stay or a motion for a scheduling order, and motion to vacate. The parties have a status report due July 1st. They are going to indicate at that point whether they've reached a final settlement. Absent a final settlement, Talen will inform me that they relinquish the certificate amendment that they challenged in this proceeding, and then they'll complete relinquishment by August 31st, or the parties will move to dismiss the proceeding on or before September 30th.

II.A.2.f. 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 May 8th, the parties filed a joint motion to substitute Spring Creek Coal for the Navaho Transitional Energy Company, and to replace Spring Creek Coal as the permit holder and the party of interest in this case. That motion was granted on May 13th, and an amended scheduling order was issued. Since then, MEIC has filed an unopposed motion to amend

the notice of appeal, which was granted on June 9th, the parties are proceeding through discovery which ends January of 2021.

II.A.2.g. 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.

This case requires that rulemaking on arsenic to be completed before it can continue, a status conference was held on April 24th, and order continuing the stay of this case until September 4th of 2020, pending the rulemaking on the arsenic was issued that day as well.

II.A.2.h. 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 informed members that they have consolidated this case with CHS, so its update is the same.

II.A.2.i. 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 stated this is the MPDES permit case.

Ms. Christensen added, District Court case is now up on appeal to the Montana Supreme Court. The Board has filed a notice of nonparticipation in that case, so we have just been monitoring it. It has been fully briefed and now just it's awaiting a decision, which is expected anytime.

Ms. Clerget stated, the contested case continued while the case was appealed to District, and now also Supreme Court. The parties filed a motion in limine in February of 2020. Oral argument was held on that in March of 2020. It is fully briefed and awaiting Ms. Clerget's decision. The hearing is scheduled for August of 202.

II.A.2.j. 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.

Ms. Clerget states the DEQ filed a motion to dismiss, which is not yet fully briefed, so that will be pending my decision once it is.

II.A.2.k. 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 and BER 2019-05 OC.

The parties have cross-moved for partial summary judgment, and the motions are fully briefed and awaiting Ms. Clerget's decision.

II.A.2.L. 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 informed members that this is a case that we talked about pretty extensively at the last Board meeting. It involves the Rosebud Mine. She had previously filed a motion to dismiss in front of the District Court arguing that BER should not have been a party to that case. She lost the motion, and so at the last meeting we talked about what we were going to do next and a decision was made to see if the Conservation Groups were willing to let us out of the case before we took the issue to the Supreme Court, and if they were not willing to do so, to file a petition for writ of supervisory control to the Montana Supreme Court to address the issue. She did have some conversations with the Conservation Groups. She wasn't successful in convincing them to let us out, so she did file a motion for a writ of supervisory control. She filed that on May 22nd. And a writ of supervisory control is considered an extraordinary remedy. They're not automatically granted. It's not like a regular appeal where you ask the Court to consider an issue and they just do. This has to be convinced to consider the case, really to consider the issue at this point in the case. And they can just dismiss it and say, "We don't think this is an appropriate issue to be considered on supervisory control." We did overcome that hurdle. The Court has accepted the case, and they have ordered a summary response from the Conservation Groups and the District Court. The District Courts typically don't respond in these types of situations. The Conservation Groups have thirty days to respond, so their response is due June 29th, so end of this month. And then I don't know how long it will take to get a response from the Supreme Court. We likely won't have an opportunity to file a reply brief. It would be unusual if we were granted oral argument. So probably once the Conservation Groups submit their response, it will be submitted 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 addressed members and introduced that the case has been remanded to the District Court by the Montana Supreme Court on certain questions of material fact, and the parties are just proceeding under Judge Reynolds' scheduling order. So, there's really nothing beyond that. Ms. Bowers offered to keep members updated as milestones occur.

II.B. DEQ Briefing Items

II.B.1. Tim Davis gave the Board some background and an update on recent developments in Water Quality Standards including Numeric Nutrient Criteria.

II.B.2. Myla Kelley gave the Board some background and an update on Lake Koocanusa.

IV. Board Counsel Update

Ms. Clerget stated she had rulemaking on the procedural rules that the Board had initiated, and that has been put on hold with COVID and not working full-time. Ms. Clerget indicated the status of that hasn't moved forward at all. They are working on a few policies on

docketing, based upon some of the docketing issues that we've had in cases going up to District Court. Possibly by the next meeting they will have something to bring to the Board, whether it's a policy or a proposed rule that we can get some standardization in our docketing. They had talked about a system for filing for contested cases, Ms. Clerget informed members about different IT systems that folks had used to get prior BER decisions up in a more accessible public format. And I have continued working with both DOJ IT and Department of Administration IT. I know the tech people are talking to each other about the PSC system, and my understanding at very high levels is that there is a possibility that because D of A designed the PSC docketing system that it is something that we could adapt for relatively little money. We'd still have to pay D of A because of how -- they're like ALS. They're self-funded, so that's how they support their budget. We would have to pay them a little bit to adapt that system. I don't have an estimate yet -- they're going to work on what the estimate would be for that -- but I understand it to be a relatively small amount of money, because most of the work is all done. All we'd have to do is just translate it a little bit to fit with our website and our specific needs. There are pieces of it that we did not need. So that project is continuing as well, although more slowly than otherwise, because frankly I'm at capacity with the contested cases. Also, Ms. Clerget informed members that she has another attorney from ALS helping her with at least the summary judgment decisions that are pending.

V. Public Comment

| None were offered.

VI. Adjournment

| Chairperson Deveny motioned to adjourn at 9:57, Mr. Tweeten seconded, motion was carried unopposed.

Board of Environmental Review June 12, 2020 minutes approved:



CHRISTINE DEVENY
CHAIRPERSON
BOARD OF ENVIRONMENTAL REVIEW

9/30/20
DATE