



**AGENDA**  
**BOARD OF ENVIRONMENTAL REVIEW**  
**TUESDAY, JANUARY 22, 2008**  
**METCALF BUILDING, ROOM 111**  
**1520 EAST SIXTH AVENUE, HELENA, MONTANA**

**NOTE:** Individual agenda items are not assigned specific times. For public notice purposes, the Board will begin the meeting no earlier than the time specified. However, the Board might not address the specific agenda items in the order they are scheduled. Persons with disabilities, who need an accommodation in order to participate in this meeting, should contact the Board Secretary at (406) 444-2544.

**9:00 A.M.**

**I. ADMINISTRATIVE ITEMS**

**A. REVIEW AND APPROVE MINUTES**

1. **September 28, 2007**, regularly scheduled Board meeting.
2. **November 30, 2007**, regularly scheduled Board meeting.

**II. BRIEFING ITEMS**

**A. CONTESTED CASE UPDATE**

1. Cases assigned to Hearing Officer Katherine Orr
  - a. **In the matter of CR Kendall Corporation's request for a hearing to appeal DEQ's decision to deny a minor permit amendment under the Metal Mine Reclamation Act, BER 2002-09 MM.** On April 27, 2007, Hearing Examiner Katherine Orr issued an *Order Requesting Status Report*. On May 16, 2007, DEQ filed a *Status Report*. An EIS and closure plan should be completed and evaluated in 2008.
  - b. **In the matter of the issuance of the Air Quality Permit for the Roundup Power Project, Permit No. 3182-00, BER 2003-04 AQ.** On July 29, 2005, the Board issued an *Order Staying Contested Case Proceedings* indefinitely. On August 24, 2005, Hearing Examiner Katherine Orr issued an *Assumption of Jurisdiction* referencing the *Order Staying Contested Case Proceedings*.
  - c. **In the matter of Violations of the Water Quality Act by ASARCO, Inc., BER 2005-09 WQ.** A *Stay of Proceedings* was issued by the Hearing Examiner on January 19, 2006, upon notification by the Department of the bankruptcy proceeding.
  - d. **In the matter of the appeal by Willow Creek Sewer District regarding violations of the Water Quality Act, BER 2006-13 WQ.** On January 8, 2008, a *Status Report* was filed. The DEQ is drafting an AOC and will be proposing that an order for dismissal be signed at the April 4, 2008 meeting.
  - e. **In the matter of the Notice of Appeal and Request for Hearing of the Citizens Awareness Network, Women's Voices for the Earth, and the Clark Fork Coalition regarding DEQ's approval of the Thompson River CO-Gen, LLC, Air Quality Permit No. 3175-04, BER 2006-18 AQ.** A hearing was held in May, 2007. On September 7, 2007, the Permittee filed a *Notice of Supplemental Authority*. Proposed Findings of Fact and Conclusions of Law are due.
  - f. **In the matter of the appeal by the City of Bozeman regarding the DEQ's final decision for MPDES Permit No. MT0022608, BER 2006-23 WQ.** On January 11, 2008, the parties filed a *Status Report*.
  - g. **In the matter of the appeal by the Butte-Silver Bow Public Works Department, regarding Final MPDES Permit No. MT0022012, BER 2006-27 WQ.** The parties submitted a *Request for Extension* on January 7, 2008.

- h. **In the matter of violations of the Clean Air Act of Montana by Flathead County, BER 2007-01 AQ.** The parties have informally notified Hearing Examiner Katherine Orr, as of January 4, 2008, that they are in the process of finalizing a settlement agreement.
- i. **In the matter of the appeal by the Town of Superior, BER 2007-05 WQ, regarding final MPDES Permit No. MT0020664, issued to the Town of Superior.** Hearing Examiner Katherine Orr issued a *Third Order Granting Extension* on November 15, 2007, giving the parties until December 14, 2007 to file a proposed pre-hearing and hearing schedule. On January 11, 2008, the parties filed a *Request for Extension*, asking for a stay until November 1, 2008.
- j. **In the matter of the appeals by Southern Montana Electric (SME), Citizens for Clean Energy (CCE) and Montana Environmental Information Center (MEIC) regarding Air Quality Permit No. 3423-00 issued to SME for its Highwood Generation Station, BER 2007-06 & 07 AQ.** Hearing Examiner Katherine Orr issued a *Scheduling Order* on July 31, 2007. The two appeals under BER 2007-06 and BER 2007-07 are consolidated for pre-hearing matters. On BER 2007-06 AQ, all parties filed a *Stipulation to Modify Briefing Schedule and Extend Filing Deadline for Initial Briefs of Permittee and State of Montana* giving the State of Montana and Permittee until November 16, 2007, to file their pre-trial motions as well as MEIC and Citizens for Clean Energy. Response briefs are due on December 4, 2007, and reply briefs are due on December 11, 2007. Oral argument on the cross motions for summary judgment was presented on December 21, 2007. Oral argument on the motions for summary judgment concerning the legal question of whether CO2 is subject to BACT analysis occurred on January 11, 2008. A contested case hearing on the issue of whether the proper BACT analysis for PM 2.5 occurred will be held starting at 10am on January 22, 2008, and will end the evening of January 23, 2008.
- k. **In the matter of violations of the Water Quality Act by North Valley Hospital, Flathead County, BER 2007-08 WQ.** On January 10, 2008, a *Status Report* was filed. The DEQ is projecting that the case will settle and the parties will present an order for dismissal for the April 4, 2008 meeting.
- l. **In the matter of violations of the Opencut Mining Act by Big Rock, LLC, at the Wheeler Gravel Pit, Missoula County, BER 2007-11 OC.** A hearing is scheduled for March 14, 2008. Big Rock filed a request to extend the period of discovery from December 20, 2007 to December 31, 2007 and the date for filing motions with supporting briefs from January 7, 2008 to January 15, 2008. On January 7, 2008, the DEQ filed a *Motion for Summary Judgment on the Issue of Liability with Supporting Brief*.
- m. **In the matter of the appeal by ExxonMobil regarding its final MPDES Permit No. MT-0028321 for its Billings Refinery, BER 2007-12 WQ.** Hearing Examiner Katherine Orr issued a *Second Order Granting Extension* on November 8, 2007; giving the parties until April 1, 2008, to file a proposed hearing schedule.
- n. **In the matter of violations of the Open Cut Mining Act by John Schlecht, d/b/a John Schlecht Excavating, at the Schlecht Sand and Gravel Pit, Ravalli County, BER 2007-13 OC.** Hearing Examiner Katherine Orr issued a *First Scheduling Order* on November 8, 2007. A telephonic prehearing conference is scheduled for January 30, 2008, and a hearing is scheduled for February 8, 2008. The Department filed a *Motion to Compel Discovery and Disclosure* on December 6, 2007, and a *Motion for Summary Judgment on the issue of Liability* on December 17, 2007. The Appellant has not responded as of January 4, 2008.
- o. **In the matter of violation of the Water Quality Act by Jack Mountain Estates Subdivision, Jefferson County, BER 2007-15 WQ.** Hearing Examiner Katherine Orr issued a *First Scheduling Order* on November 8, 2007. On January 9, 2008, the parties filed an *Unopposed Motion to Amend First Scheduling Order* requesting to change the telephonic prehearing conference to the week of June 23, 2008, and the hearing to the week of July 7, 2008.
- p. **In the matter of Violations of the Water Quality Act by the Montana Department of Transportation and Ascorp, Inc., D/B/A Debco Construction, at Sportsman's Campground – East, Silver Bow County, Montana, BER-2007-17 WQ.** On January 8, 2008, a *Status Report* was

filed. The DEQ is drafting an AOC and will be proposing that an order for dismissal be signed at the April 4, 2008 meeting.

- q. **In the matter of violations of the Opencut Mining Act by Prairie Sand and Gravel, Inc., at the state site in Roosevelt County, Montana, BER 2007-18 OC.** On January 11, 2008, the parties filed a *Proposed Prehearing Schedule*. A prehearing conference is proposed for the week of May 9, 2008, and a hearing is proposed for the week of May 16, 2008.
- r. **In the matter of violations of the Montana Water Quality Act by 48 North, Pc. at Spring Creek Estates Subdivision, Kalispell, Montana, BER 2007-21 WQ.** On January 4, 2008, Hearing Examiner Katherine Orr issued a *First Scheduling Order*. A telephonic pre-hearing conference is scheduled for July 7, 2008, and a hearing is scheduled for July 14, 2008.
- s. **In the matter of violations of the Opencut Mining Act by Stephen M. Swan, d/b/a Swan Creek Concrete Company at the South Boulder Grazing Site, Jefferson County, Montana, BER 2007-22 OC.** On January 4, 2008, Hearing Examiner Katherine Orr issued a *First Scheduling Order*. A telephonic pre-hearing conference is scheduled for April 28, 2008, and a hearing is scheduled for May 19, 2008.
- t. **In the matter of the appeal by CHS Inc. regarding it's Title V operating permit No. OP1821-01 for the Laurel Refinery, Laurel, Montana, BER 2007-23 AQ.** Hearing Examiner Katherine Orr issued a *First Scheduling Order* on January 4, 2008. A telephonic pre-hearing conference is scheduled for May 27, 2008, and a hearing is scheduled for June 3, 2008.
- u. **In the matter of the appeal by the City of Whitefish regarding its MPDES permit No. MT0020184 for the Wastewater Facility, Whitefish, Montana, BER 2007-24 WQ.** On November 23, 2007, the parties filed a *Joint Request for an Extension of Time to Respond to First Prehearing Order*. Hearing Examiner Katherine Orr issued an *Order Granting Extension* on January 4, 2008, giving the parties until February 1, 2008 to file a proposed pre-hearing and hearing schedule.
- v. **In the matter of violations of the Opencut Mining Act by Joe Beasley at the Silverstone Site, Flathead County, Montana, BER 2007-25 OC.** Hearing Examiner Katherine Orr issued a *First Scheduling Order* on January 4, 2008. A telephonic pre-hearing conference is scheduled for April 7, 2008, and a hearing is scheduled for April 21 2008.
- w. **In the matter of the appeal by Adios Recycling regarding DEQ's denial of its Motor Vehicle Wrecking Facility License, Alberton, Montana, BER 2007-26 JV.** A *Prehearing Order* requesting a prehearing and hearing schedule from the parties was issued on November 13, 2007 On January 2, 2008, the Hearing Examiner issued a *First Scheduling Order* setting a hearing date for May 12, 2008 and an *Order on Department's Application for More Definite and Detailed Statement* granting the Department's request for a more definite statement. The Department filed a *Motion and Brief to Dismiss Appeal* on January 4, 2008.

## B. CASES IN LITIGATION

1. **In the matter of the Petition for Review of Hazardous Waste Final Permit No. MTHWP-03-01 issued to Flying J Petroleum, Inc. (BER 2003-14 HW).** On January 7, 2008, the district court issued an order affirming the decision of the Board to grant partial summary judgment for the Department on Flying J's claim that the Department erred in deciding to use a permit rather than an administrative order for post-closure care and corrective action at the closed Flying J refinery. The court agreed with the Board's conclusion that the Department did not have authority to review such a decision. The court also found that Flying J failed to support its claim to the court that the Board's hearing examiner had advocated for the Department during the Board's hearing regarding the Department's motion for partial summary judgment.

### III. ACTION ITEMS

#### A. REPEAL, AMENDMENT OR ADOPTION OF FINAL RULES

1. In the matter of the amendment of ARM 17.30.617 to designate the mainstem Gallatin River from the Yellowstone National Park boundary to the confluence of Spanish Creek as an Outstanding Resource Water (ORW) and to amend ARM 17.30.638 to add a new subsection clarifying that discharges to ground water with a direct hydrologic connection to an ORW are within the statutory mandate prohibiting any permanent change in the water quality of an ORW resulting from point source discharges. The Department will request that the Board issue a notice of supplemental rulemaking to extend the comment period. **Executive Summary**      **Notice of Extension**      **Comment**

#### B. NEW CONTESTED CASE APPEALS

1. **In the matter of the appeal by ExxonMobil regarding its Air Quality Operating Permit No. OP1564-02 for the Billings Refinery, Yellowstone County, Montana, BER 2007-27 AQ.** The Board received the **appeal** on November 30, 2007. The Board may appoint a permanent hearing examiner or decide to hear the matter.
2. **In the matter of violations of the Water Quality Act by Park County, Gardiner, MT, BER 2008-01 WQ.** The Board received the **appeal** on January 9, 2008. The Board may appoint a permanent hearing examiner or decide to hear the matter.

#### C. FINAL ACTION ON CONTESTED CASES

1. **In the matter of violations of the Metal Mine Reclamation Act by Marty J. and Sinda M. Puryer, as individuals and d/b/a Paul Kurth Mining, for the failure to post reclamation bond, BER 2006-21 MM.** Hearing Examiner Katherine Orr issued a *Third Order Setting Date for Prehearing Conference and Hearing* on November 15, 2007. On December 20, 2008, the parties submitted an *Amended Agreement to Vacate Hearing Upon Payment of Bond* and a proposed Order vacating the rescheduled hearing. In the Agreement Mr. Puryer agreed to make a partial payment of \$5,000.00 on December 21, 2007 and a final payment of \$59,335.00 by January 4, 2008 toward the outstanding bond obligation. The Hearing Examiner signed the order vacating the hearing on January 3, 2008. The funds were received on January 4, 2008. On January 10, 2008, the parties filed a *Stipulation and Request for Dismissal*. An **order** to dismiss the case will be presented for the Board's approval.
2. **In the matter of violations of the Montana Public Water Supply laws by Malsam Water Conditioning, Inc., d/b/a Culligan of Great Falls, Inc., at Culligan Water Conditioning Great Falls, BER 2007-10 PWS.** On December 17, 2007, the parties filed a *Stipulation to Dismiss* and an *Administrative Order on Consent*. An **order** to dismiss the case will be presented for the Board's approval.
3. **In the matter of violations of the Opencut Mining Act by Kenneth Mikesell at the Kenneth Mikesell site, White Sulphur Springs, Montana, BER 2007-19 OC.** On January 3, 2008, the parties filed a *Stipulation to Dismiss* and an *Administrative Order on Consent*. An **order** to dismiss the case will be presented for the Board's approval.

### IV. GENERAL PUBLIC COMMENT

- A. 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.

**JANUARY 22, 2008, 10:00 A.M. continuing JANUARY 23, 2008, 8:00 A.M.**

### V. SME HEARING

- A. **In the matter of the appeals by Southern Montana Electric (SME), Citizens for Clean Energy (CCE) and Montana Environmental Information Center (MEIC) regarding Air Quality Permit No. 3423-00 issued to SME for its Highwood Generation Station, BER 2007-06 & 07**

**AQ.** The claims of petitioners CCE and MEIC in their affidavit pertaining to the alleged failure of the DEQ to regulate PM 2.5 emissions when permitting the Highwood Generation Station will be heard on the merits in a contested case proceeding.

**VI. GENERAL PUBLIC COMMENT**

- A. 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.

**VII. ADJOURNMENT**