



AGENDA

BOARD OF ENVIRONMENTAL REVIEW

FRIDAY, JANUARY 23, 2009

METCALF BUILDING, ROOM 111

1520 EAST SIXTH AVENUE, HELENA, MONTANA

NOTE: Individual agenda items are not assigned specific times. For public notice purposes, the meeting will begin 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) 444-6701.

9:00 A.M.

I. ADMINISTRATIVE ITEMS

A. REVIEW AND APPROVE MINUTES

1. December 5, 2008, 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.** An EIS on the mine closure plan is on hold until collection of water quality data is completed. Once the data has been collected, the EIS will be completed and the case may become moot. The case is stayed pending completion of the EIS. The parties anticipate completion of the EIS in 2009.
- b. **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.
- c. **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.** On November 20, 2008, the Hearing Examiner issued a *Fourth Order Granting Extension*. The parties had until January 6, 2009, to file a proposed settlement or a pre-hearing schedule.
- d. **In the matter of the appeal by Southern Montana Electric (SME) regarding its Air Quality Permit No. 3423-00 for the Highwood Generation Station, BER 2007-06 AQ.** The Department of Environmental Quality filed a status report on September 19, 2008, requesting a stay until the EPA evaluated a reference test method for condensable particulate matter and SME filed a status report on September 19, 2008, requesting a stay of 6 months. An *Order Granting Stay of Proceedings* was issued by the Hearing Examiner on December 19, 2008.
- e. **In the matter of violations of the Water Quality Act by Park County, Gardiner, MT, BER 2008-01 WQ.** On September 5, 2008, the parties were granted an extension to December 5, 2008, to complete a Supplemental Environmental Plan (SEP) and settlement documents. The DEQ filed a *Status Report and Request for Extension* on December 5, 2008. The requested extension is for 90 days and is for the purpose of finalizing the supplemental environmental project to repair an impaired stream.
- f. **In the matter of violations of the Hazardous Waste Act by the Three W's, Inc., and Montana Waste Systems, Inc., BER 2008-07 HW (MT Waste Systems).** On January 13, 2009, the parties were granted an extension until February 19, 2009, to present a proposed settlement or submit a pre-hearing schedule.

- g. **In the matter of the appeal by Eastgate Water and Sewer Association of Helena Sand and Gravel, Inc.'s Opencut Permit No. HSG-017, BER 2008-08 OC.** (The Board has retained jurisdiction on this case to hear contested case matters.) On December 2, 2008, the parties jointly filed a *Motion to Stay*. An Order Granting Stay of Proceedings was filed on December 9, 2008, giving the parties until February 9, 2009, to settle or propose a hearing schedule. The parties are still involved in settlement negotiations.
- h. **In the matter of violations of the Hazardous Waste Act by the Three W's, Inc., and Montana Waste Systems, Inc., BER 2008-09 HW (Three W's).** (The Board has retained jurisdiction on this case to hear contested case matters.) On November 20, 2008, the Hearing Examiner issued a *Second Order Granting Extension* until February 19, 2009, for the parties to provide settlement documents or submit a pre-hearing schedule.
- i. **In the matter of violations of the opencut mining act by TMC, Inc. at the Nuss Pit, Gallatin County, Montana, BER 2008-10 OC.** The parties have settled this matter and are in the process of signing an Administrative Order on Consent.
- j. **In the matter of the violations of the Opencut Mining Act by Helena Sand and Gravel, Inc. at the Lake Helena Drive Pit, Lewis and Clark County, Montana, BER 2008-12 OC.** The parties have verbally agreed on a settlement and are finalizing a written agreement.
- k. **In the matter of violations of the Montana Water Quality Act by Wilderness Club, LLC., at the Wilderness Club Eureka, Lincoln County, Montana, BER 2008-13 WQ.** (The Board has retained jurisdiction on this case to hear contested case matters.) On November 20, 2008, the Board received a *Witnesses and Exhibits* document from the appellant. A telephonic pre-hearing conference will be held on May 19, 2009, and a hearing is set for May 27, 2009. The hearing date may be changed to coincide with a regularly scheduled meeting date of the Board.
- l. **In the matter of violations of the Montana Public Water Supply Laws by Loyal Order of the Moose #639, Helena, Montana, BER 2008-14 PWS.** An *Order Granting Extension* was issued on November 20, 2008, by the Hearing Examiner. The parties have until January 22, 2009, to respond to the First Prehearing Order.
- m. **In the matter of violations of the Montana Underground Storage Tank Act by Dutton School District 28 at Dutton Public School, Dutton, Montana, BER 2008-16 UST.** A pre-hearing conference is scheduled for March 31, 2009, and a hearing is scheduled for April 15, 2009.
- n. **In the matter of violations of the Montana Underground Storage Tank Act by Tom Pelican and Theresa Pelican at Swan Lake Stage Stop, 72241 Highway 83, Swan Lake, Lake County, Montana, BER 2008-18 UST.** The parties have verbally agreed on a settlement and are finalizing a written agreement.
- o. **In the matter of the appeals of the Record of Decision under the Major Facility Siting Act related to the Montana Alberta Tie Ltd. transmission line, BER 2008-19, 20, 21-MFS, by Jerry McRae and Katrina Wilson Martin, Chris Stephens, and Michael Koenig.** On December 23, 2008, the three cases were consolidated and the party NaturEner USA, LLC, was allowed intervenor status. On January 13, 2009, the Board received *Appellant Martin's Withdrawal from Case No. BER 2008-19 MFS*, withdrawing appellant Katrina Wilson Martin. On January 15, 2009, the Board received *More Detailed Statements of Claims* from Appellant's Koenig and McRae. There is a prehearing conference on May 4, 2009. The hearing is scheduled for May 18-22, 2009.
- p. **In the matter of the appeal and request for hearing by Montana Environmental Information Center, Citizens for Clean Energy, Sierra Club, and National Parks Conservation Association of the Southern Montana Electric Generation and Transmission Cooperative Highwood Generating Station Air Quality Permit No. 3423-01, BER 2008-23 AQ.** (The Board has retained jurisdiction on this case to hear contested case matters.) Hearing Examiner Katherine Orr issued a *First Prehearing Order* on December 8, 2008. On December 10, 2008, the appellants filed an *Affidavit of Montana Environmental Information Center, Et Al.* setting forth the grounds for their

request for hearing. On December 19, 2008, Hearing Examiner Katherine Orr issued an *Order Granting Extension* after the parties requested an extension of time to submit a proposed prehearing and hearing schedule. The parties now have until January 16, 2009, to submit a prehearing and hearing schedule.

2. Cases in litigation

- a. **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.** On December 22, 2008, the District Court issued an Order denying Petitioners' Motion for Summary Judgment, affirming the February 2, 2007, order of the hearing officer concerning the denial of Petitioner's Motion for Leave to File an Amended Affidavit and affirming the order of the Board of June 11, 2008. The District Court also denied Intervenors' (DEQ's and Thompson River Power's) Motion to Dismiss. A Notice of Entry of Judgment was filed on January 5, 2009, by the Respondent-Intervenor, Thompson River Power.
- b. **In the matter of the appeal by Citizens for Clean Energy (CCE) and Montana Environmental Information Center (MEIC) regarding Air Quality Permit No. 3423-00 issued to Southern Montana Electric (SME) for its Highwood Generating Station, BER 2007-07 AQ.** On June 30, 2008, CCE and MEIC filed a district court Petition for Review of the Board's May 30, 2008, Order finding that a Best Available Control Technology (BACT) analysis was not required for carbon dioxide (CO₂), because it is not a regulated air pollutant. SME intervened by Court order on September 19, 2008. DEQ filed a Motion to Strike affidavits filed by the Petitioners with their Opening Brief. SME joined in this motion. SME and DEQ filed Answer Briefs in response to the Opening Brief of the Petitioners on October 21, 2008. On October 21, 2008, the National Rural Electric Cooperative Association filed an amicus brief in support of respondents SME and DEQ. On December 12, 2008, the parties filed supplemental briefs regarding the November 13, 2008, decision of the U.S. Environmental Appeals Board in the case of *In re: Deseret Power Electric Cooperative*. On December 31, 2008, DEQ filed a further Notice of Supplemental Authority, attaching EPA's *Interpretation of Regulations that Determine Pollutants Covered By Federal Prevention of Significant Deterioration (PSD) Permit Program*, issued by EPA in response to the *Deseret* decision. On January 12, 2009, SME filed a Request for Oral Argument, requesting that the district court schedule oral argument for sometime after January.

- B. UPPER BLACKFOOT MINING COMPLEX - David Bowers will brief the Board on the present status of the Upper Blackfoot Mining Complex. The briefing will provide a short history of events from the time the Board rescinded ASARCO's Temporary Standards permit for the UBMC to the present. **ATTACHMENT**
- C. LEGISLATION BRIEF – DEQ will provide a summary of its proposed Legislation, as well as other Bills of interest. **ATTACHMENT**
- D. GALLATIN OUTSTANDING RESOURCE WATER (ORW) BRIEFING - The Department will provide a brief presentation relative to: 1) ORW designation and nondegradation policy as a component of water quality standards; and 2) how we evaluated the potential for groundwater connection to surface water in the EIS to assure that nutrients from septic systems would not cause a permanent change in water quality of the Gallatin River. **ATTACHMENT**

III. ACTION ITEMS

A. INITIATION OF RULEMAKING AND APPOINTMENT OF HEARING OFFICER

The Department will propose that the Board concur in its recommendation to initiate rulemaking to:

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. **ATTACHMENTS**

2. Adopt model organizational rulemaking and contested case rules as revised by the Secretary of State and Attorney General pursuant to HB 70 of the 2007 Legislature, which transferred certain model rules from the Attorney General to the Secretary of State. Because the Department does not expect any public comments, the Department is proposing that the Board proceed with this rulemaking without scheduling a public hearing. **ATTACHMENTS**

B. REPEAL, AMENDMENT OR ADOPTION OF FINAL RULES

1. In the matter of the amendment of ARM 17.8.308, 17.8.504, 7.8.744, and 17.8.1205 regarding agricultural exemptions from air quality rules and changes regarding operating permit application and Montana Air Quality Application processes and the associated fee rule. The Department will recommend the adoption of the rule as the Board proposed in the notice of rulemaking. **ATTACHMENTS**

C. NEW CONTESTED CASE APPEALS

1. **In the matter of violations of the Montana Water Quality Act by Jim Gilman Excavating, Inc., at Augusta-South, Lewis and Clark County, BER 2008-24 WQ.** The Board received the appeal on December 8, 2008. The Board may appoint a permanent hearings examiner or decide to hear the matter. **APPEAL**
2. **In the matter of the appeal by the USDA Forest Service Northern Region of the air quality major open burning permit fee for calendar year 2009, BER 2009-01 AQ.** The Board received the appeal on January 16, 2009. The Board may appoint a permanent hearings examiner or decide to hear the matter. **APPEAL**

D. FINAL ACTION ON CONTESTED CASES

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.** On December 19, 2008, Hearing Examiner Katherine Orr issued an *Order to Submit Proposed Scheduling Order*. The parties have entered into a stipulation to dismiss this case and an *Order of Dismissal* will be presented for signature by the Chairman. **DISMISSAL ORDER**
2. **In the matter of violations of the Opencut Mining Act by James Timis at the Timis Excavation Site Flathead County, MT, BER 2008-02 OC.** On December 11, 2008, the parties filed a *Stipulation to Dismiss*. An *Order of Dismissal* will be presented for signature by the Chairman. **DISMISSAL ORDER**
3. **In the matter of violations of the Montana Septic Disposal and Licensure laws by Missoula Septic Service, Inc., Missoula, Montana, BER 2008-17 SDL.** On January 16, 2009, the parties filed a *Stipulation to Dismiss*. An *Order of Dismissal* will be presented for signature by the Chairman. **DISMISSAL ORDER**
4. **In the matter of the appeal by the USDA Forest Service Northern Region of the air quality major open burning permit fee for calendar year 2009, BER 2008-22 AQ.** On January 15, 2009, DEQ filed a *Motion to Dismiss Without Prejudice*. A *Dismissal Order* will be presented for signature by the Chairman. **DISMISSAL ORDER**

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.

V. ADJOURNMENT