



**AGENDA**

BOARD OF ENVIRONMENTAL REVIEW

FRIDAY, MARCH 27, 2009

METCALF BUILDING, ROOM 111

1520 EAST SIXTH AVENUE, HELENA, MONTANA

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**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. January 23, 2008, regularly scheduled Board meeting. [MINUTES](#)

**B. WELCOME NEW BOARD MEMBERS, ORIENTATION, REFRESHER**

**C. SET DECEMBER MEETING DATE (4<sup>th</sup> or 11<sup>th</sup>)**

**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 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. The stay is in place until March 19, 2009.
- d. **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 February 25, 2009, DEQ’s attorney filed a *Request for Extension*. Hearing Examiner Katherine Orr issued a *Third Order Granting Extension* on March 5, 2009, allowing the parties until April 24, 2009, to present proposed settlement documents or to propose a pre-hearing and hearing schedule.
- e. **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 will be asked to submit a proposed prehearing and hearing schedule.

- f. **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 February 25, 2009, DEQ's attorney filed a *Request for Extension*. On March 5, 2009, Hearing Examiner Katherine Orr issued a *Corrected Third Order Granting Extension* giving the parties until April 24, 2009, to present proposed settlement documents or to propose a hearing schedule.
- g. **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.
- h. **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.) On February 17, 2009, Respondent-Intervenor Southern Montana Electric Generation and Transmission Cooperative, Inc. (SME) filed a *Motion to Stay Proceedings* until June 17, 2009. On February 17, 2009, the Appellants filed a *Response to SME Motion to Stay* supporting the stay on certain conditions. On February 26, 2009, Respondent-Intervenor, SME filed a *Reply*. On March 2, 2009, the Appellants requested a telephonic status conference.
- i. **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. A *First Prehearing Order* was issued on March 9, 2009. The parties have until March 20, 2009, to file a proposed pre-hearing and hearing schedule.
- j. **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. Hearing Examiner Katherine Orr issued the *First Prehearing Order* on February 6, 2009. On February 23, 2009, the Board received a *Motion for Extension of Time to Submit Prehearing Schedule*, submitted by DEQ's attorney. The parties have been given until March 13, 2009 to file a proposed pre-hearing 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 Intervenor's (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. Petitioners filed a Notice of Appeal to the Montana Supreme Court on January 30, 2009.
- 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 (CO<sub>2</sub>), 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 November 10, 2008, CCE and MEIC filed Petitioners' Reply Brief and Petitioners' Opposition to Motion to Strike. On November 20, 2008, DEQ filed its Reply Brief in Support of Motion to Strike. 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 December 18, 2008, *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. On February 20, 2009, CCE and MEIC filed Petitioners' Second Notice of Supplemental Authority, attaching new EPA Administrator Lisa Jackson's February 17, 2009, letter to Sierra Club, granting its January 6, 2009, amended petition for reconsideration of EPA's December 18, 2008, memorandum.

#### B. LEGISLATION BRIEFING

### III. ACTION ITEMS

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

1. In the matter of the amendment of ARM 17.40.318 and the adoption of New Rule I pertaining to state revolving fund and public water and sewer projects eligible for categorical exclusion from MEPA review. [ATTACHMENTS](#)
2. The Department is proposing an addition to Administrative Rules of Montana (ARM) Title 17, Chapter 8, Subchapter 1 to exempt from incorporation by reference an emission standard for mercury, which has been vacated by the courts. [ATTACHMENTS](#)

#### B. NEW CONTESTED CASE APPEALS

1. **In the matter of violations of the Metal Mine Reclamation Act by Saturday Sunday, LLC. Deer Lodge County, BER 2009-02 MM.** The Board received the request for hearing on January 23, 2008. On February 6, 2009, Standing Interim Hearing Examiner Katherine Orr issued a *First Prehearing Order*. The parties submitted a proposed pre-hearing and hearing schedule on February 26, 2009. The Board may appoint a permanent hearing examiner or decide to hear the matter. [APPEAL DOCUMENTS](#)
2. **In the matter of violations of the Opencut Mining Act by Daniels County at the D. Hanrahan Pit, Daniels County, BER 2009-03 OC.** The Board received the request for hearing on January 27, 2009. On February 6, 2009, Standing Interim Hearing Examiner Katherine Orr issued a *First Prehearing Order*. The parties submitted a proposed pre-hearing and hearing schedule on March 3, 2009. The Board may appoint a permanent hearing examiner or decide to hear the matter. [APPEAL DOCUMENTS](#)
3. **In the matter of violations of the Montana Public Water Supply Laws by Hugh Black-ST. Mary Enterprises, Inc. at the ST. Mary Lodge and Resort Public Water Supply System, PWSID #MT0002754, ST. Mary, Glacier County, BER 2009-04 PWS.** The Board received the request for hearing on February 3, 2009. On February 6, 2009, Standing Interim Hearing Examiner Katherine Orr issued a *First Prehearing Order*. The Board may appoint a permanent hearing examiner or decide to hear the matter. [APPEAL DOCUMENTS](#)
4. **In the matter of the appeal by the River Rock County Water and Sewer District regarding its MDEQ Permit No. MTX000147 for its wastewater treatment facility, BER 2009-05 WQ.** The

Board received the appeal on February 13, 2009. A *First Prehearing Order* was issued on March 5, 2009. The Board may appoint a permanent hearing examiner or decide to hear the matter. [APPEAL DOCUMENTS](#)

5. **In the matter of violations of the Montana Underground Storage Tank Act by Flying J Inc. at Flying J Travel Plaza, 112000 Browns Gulch Road, Butte, Silver Bow County, BER 2009-06 UST.** The Board received the appeal via fax on March 4, 2009. The Board may appoint a permanent hearing examiner or decide to hear the matter. [APPEAL DOCUMENTS](#)

#### C. FINAL ACTION ON CONTESTED CASES

1. **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 March 6, 2009, the parties submitted a *Stipulation for Dismissal*. An *Order of Dismissal* will be presented for signature by the Chairman. [DISMISSAL ORDER](#)
2. **In the matter of violations of the Water Quality Act by Park County, Gardiner, MT, BER 2008-01 WQ.** On March 3, 2009, the parties filed a *Stipulation for Dismissal*. An *Order of Dismissal* will be presented for signature by the Chairman. [DISMISSAL ORDER](#)
3. **In the matter of violations of the opencut mining act by TMC, Inc. at the Nuss Pit, Gallatin County, Montana, BER 2008-10 OC.** On January 22, 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 violations of the Montana Public Water Supply Laws by Loyal Order of the Moose #639, Helena, Montana, BER 2008-14 PWS.** On February 25, 2009, the Board received a *Stipulation for Dismissal*, signed by both parties. An *Order of Dismissal* will be presented for signature by the Chairman. [DISMISSAL ORDER](#)
5. **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.** On February 17, 2009, the Board received a *Stipulation to Dismiss*, signed by the parties. An *Order of Dismissal* will be presented for signature by the Chairman. [DISMISSAL ORDER](#)
6. **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.** On February 9, 2009, the Board received a *Stipulation to Dismiss*, signed by the parties. An *Order of Dismissal* will be presented for signature by the Chairman. [DISMISSAL ORDER](#)
7. **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.** On March 10, 2009, the Board received a *Stipulation to Dismiss*, signed by the parties. An *Order of Dismissal* 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