

BOARD OF ENVIRONMENTAL REVIEW  
FRIDAY, MAY 31, 2019  
METCALF BUILDING, ROOM 111  
1520 EAST 6<sup>th</sup> AVENUE, HELENA, MONTANA

**NOTE:** Interested persons, members of the public, and the media are welcome to attend at the location stated above. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this meeting. Please contact the Board Secretary by telephone or by e-mail at [Lindsay.Ford@mt.gov](mailto:Lindsay.Ford@mt.gov) no later than 24 hours prior to the meeting to advise her of the nature of the accommodation needed.

**9:00 AM**

**I. ADMINISTRATIVE ITEMS**

**A. REVIEW AND APPROVE MINUTES**

1. The Board will vote on adopting the April 12, 2019 meeting minutes.

Public Comment.

**II. BRIEFING ITEMS**

**A. CONTESTED CASE UPDATE**

1. Enforcement cases assigned to the Hearing Examiner
  - 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.** On February 9, 2018, the Board assigned Ms. Clerget to be the hearing examiner. At the parties' request, this case was stayed from July 23, 2018 until April 2, 2019. Ms. Clerget held a scheduling conference in this case on April 2, 2019 and the parties agreed to a schedule for discovery. On May 13, 2019, Ms. Clerget issued a Scheduling Order adopting the schedule, and the parties are proceeding accordingly. An additional scheduling conference is scheduled for July 26, 2019.
  - b. **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.** On July 16, 2018, Ms. Clerget issued her Proposed Findings of Fact Conclusions of Law. The parties submitted their exceptions briefs and the matter was fully briefed and before the Board for oral argument at the December 2018 meeting, however, the Board lacked a quorum. The Board requested additional briefing from the parties on the owner/operator issue, which the parties submitted. At the February 2019 meeting, the board vacated the Proposed Findings of Fact and Conclusions of Law and Order on Summary Judgment and remanded the matter for further proceedings, consistent with the Board's interpretation of the statute. Ms. Clerget determined that the facts in the record were insufficient with respect to the owner/operator

issue. The parties were given additional time for discovery, which they completed. CR/REF filed two Motions in Limine, to which DEQ responded and oral arguments were held on those on May 23, 2019, at the final prehearing conference. A one-day hearing is scheduled for June 5, 2019, on the owner-operator issue.

2. Non-enforcement cases assigned to the Hearings Examiner
  - a. **In the Matter of the Application for an Amendment of a Major Facility Siting Act Certificate by Talen Montana LLC, BER 2019-04 MFSA** On May 22, 2019, the BER appointed Sarah Clerget as hearing examiner to preside over this contested case. On the same day, Ms. Clerget held a hearing on Westmoreland's "Emergency Motion for Expedited Relief from ARM 17.20.1803(d)." At the hearing, Ms. Clerget granted Talen Montana's oral Motion to Intervene as a party in the case and allowed Talen until midnight on May 23, 2019 to file a responsive brief, which Talen did. Ms. Clerget issued her decision on the Emergency Motion on May 24, 2019.
  - b. **In the Matter of the Notice of Appeal and Request for Hearing by Spring Creek Coal, LLC regarding issuance of MPDES Permit No. MT0024619, BER 2019-02 WQ.** On February 12, 2019, the Board received a request for hearing. On April 12, 2019, the Board assigned Ms. Clerget as the hearing examiner. Ms. Clerget will issue a scheduling order in this matter as soon as possible.
  - c. **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.** On February 8, 2019, the BER appointed Sarah Clerget as hearing examiner to preside over this contested case. The Board directed Ms. Clerget to consolidate this case with BER 2015-07 WQ for scheduling purposes. Ms. Clerget issued a Scheduling Order on March 13, 2019. On April 22, 2019, the parties entered a stipulation regarding some of the appealed permit provisions and CHS accordingly filed an Amended Notice of Appeal. The parties are proceeding according to the Scheduling Order.
  - d. **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.** This matter has been stayed since March 28, 2018, pending the Montana Supreme Court decision in *MEIC and Sierra Club v. DEQ and Western Energy*. The parties will file a status report within 30 days of the Supreme Court's decision, which has not yet occurred.
  - e. **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 held a two-day hearing on this matter on December 3-4, 2018. The parties submitted proposed FOFCOLs and responses, and Ms. Clerget held closing/oral arguments on those on May 7, 2019. The matter is therefore ripe before Ms. Clerget for a proposed decision. However, counsel for DEQ will not be available during the Board's August meeting, and the parties have agreed that this matter will therefore not come before the BER for final decision until

the October meeting. Ms. Clerget will therefore issue her proposed decision in time to have the matter before the Board at the October meeting.

- f. **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.** On February 8, 2019, the BER appointed Sarah Clerget as hearing examiner to preside over this contested case. The Board directed Ms. Clerget to consolidate this case with BER 2019-01 WQ for scheduling purposes. Ms. Clerget issued a Scheduling Order on March 13, 2019 and the parties are proceeding accordingly.
- g. **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.** On August 10, 2018, the Board assigned this case to Sarah Clerget as hearing examiner. Based on the parties requests, Ms. Clerget as issued several modified Scheduling Orders and extensions. Pursuant to the most recent schedule, the parties have filed cross Motions for Summary Judgment, which will be fully briefed on June 7, 2019. Ms. Clerget will review those filings and issue a proposed Order on Summary Judgment to the Board as soon as possible.

3. Contested Cases not assigned to a Hearing Examiner

- 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.** On April 30, 2019, the Montana Supreme Court ordered Plaintiff and Appellees Montana Environmental Information Center and Sierra Club, and the Defendants and Appellants DEQ and Western Energy Company to submit addition simultaneous briefing on three issues: 1 – the legal basis for DEQ's representative monitoring protocol for precipitation-driven events; 2- the basis (based on data in the administrative record) for DEQ's selection of the 20 representative outfalls out of all the active outfalls; and 3 – address the 2014 modifications to MPDES Permit No. MT0023965 including evidence in the administrative record and arguments made before the Board that support or contradict the District Court's decision to invalidate the Permit as modified in 2014, and address Western Energy Company's argument that the District Court should not have reviewed the administrative decision to renew MPDES Permit No. MT0023965 until the 2014 modifications to the Permit were complete.

### III. ACTION ITEMS

#### A. APPEAL, AMEND, OR ADOPT FINAL RULES

- 1. **The department requests that the board adopt proposed amendments to the Administrative Rules of Montana (ARM) pertaining to ground water standards incorporated by reference into Department Circular DEQ-7.**

Specifically, the department requests that the board adopt ground water standards for: diallate; dioxane, 1,4-; perfluorooctane sulfonate (PFOS); and perfluorooctanoic acid (PFOA). The board initiated rulemaking for the affected board rules at its December 7, 2018 regular meeting.

Public Comment.

2. **In the matter of final adoption of New Rule I (17.30.1702) and the proposed amendments to Administrative Rules of Montana (ARM) 17.30.1001, 17.30.1334, 17.36.103, 17.36.345, 17.38.101, 17.50.819 and Department Circulars DEQ-1, DEQ-2, and DEQ-3 as noticed in MAR 17-404 with modifications.** The amendments include adding or updating a citation to ARM 17.30.1702. The 2017 Legislature required the Department to initiate rulemaking to implement HB 368 - establishing the minimum setback distance between water wells and sewage lagoons. ARM 17.30.1702 implements HB 368 and establishes those minimum setbacks.

Public Comment.

#### B. NEW CONTESTED CASE

1. **In the Matter of the Notice of Appeal and Request for Hearing by Western Energy Company regarding approval of surface mining permit no. C2011003F, BER 2019-03 OC.** On May 17, 2019, the Board received a request for hearing. The Board can decide to assign a hearings examiner for procedural issues in this case, hear the case itself, or assign a hearing examiner for the totality of the case.
2. **In the Matter of the Notice of Appeal and Request for Hearing by the Montana Environmental Information Center and Sierra Club regarding approval of surface mining permit no. C2011003F, BER 2019-05 OC.** On May 20, 2019, the Board received a request for hearing. The Board can decide to assign a hearings examiner for procedural issues in this case, hear the case itself, or assign a hearing examiner for the totality of the case.

#### C. ACTION ON CONTESTED CASES

1. **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.** The parties have filed cross Motions for Summary Judgment, which were fully briefed on April 5, 2019. The prior Board assigned this case to the previous hearing examiner for procedural purposes only. Therefore, the Summary Judgment Motions will be before the BER for oral argument substantive decision, absent a decision otherwise from the current Board. On May 17, 2019, Ms. Clerget informed the parties that the Board would consider this procedural issue at the May 31, 2019 meeting and, at the Board's discretion, the parties might be heard on the issue. Additionally, on May 22, 2019, the Board received a Notice of Appeal from the Montana Supreme Court, indicating that Signal Peak is appealing the decisions of Montana Thirteenth Judicial District Court, Yellowstone County, in Cause No. DV-18-896 (Orders dated November 14, 2018 and March 25, 2019, Judgment entered on April 22, 2019). Those decisions

involve the request for a subpoena in the contested case before the hearing examiner, which the parties took to District Court for resolution. The Board is a party to this appeal, as it was a party to the underlying District Court case, although the Board filed a “Notice of Non-Participation” in the matter. Unless the Board requests otherwise, Ms. Clerget will represent the Board to the extent necessary before the Montana Supreme Court in the matter.

2. **In the matter of Appeal Amendment AM4, Western Energy Company Rosebud Strip Mine Area B, Permit No. C1984003B, BER 2016-03 SM.** Ms. Clerget conducted a four-day hearing in this matter that concluded on March 22, 2018. After several extensions, the parties submitted their post-hearing filings on September 27, 2018. On October 23, 2018, Western Energy filed a notice of bankruptcy. On November 16, 2018, the parties held a status conference and agreed that the bankruptcy filing does not stay this proceeding. Ms. Clerget issued her Proposed Findings of Fact and Conclusions of Law (FOFCOL) on April 11, 2019. All three parties have filed exceptions to the FOFCOL, which have been provided to the Board. The parties will present oral argument at the May 31, 2019 meeting and the matter is then ripe for decision by the BER.

#### **IV. BOARD COUNSEL UPDATE**

Counsel for the Board will report on general Board business, procedural matters, and questions from Board Members.

#### **V. GENERAL PUBLIC COMMENT**

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.

#### **VI. ADJOURNMENT**