

BOARD OF ENVIRONMENTAL REVIEW
DECEMBER 11, 2020
9:00 am
DEQ ZOOM CONFERENCE

NOTE: Board members, the Board attorney, and secretary will be participating electronically. Interested persons, members of the public, and the media are welcome to attend via Zoom or telephonically. Members of the public and press also may join Board members with prior arrangement. Contact information for Board members is available on the Board's Website (<http://deg.mt.gov/DEQAdmin/ber/board>). The Board will make reasonable accommodations for persons with disabilities who wish to participate in this meeting. Please contact the Board Secretary by e-mail at jwittenberg@mt.gov, no less 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 October 9, 2020, meeting minutes.

Public Comment.

2. The Board will vote on adopting the August 7, 2020, meeting minutes.

Public Comment.

B. REVIEW AND APPROVE 2021 MEETING SCHEDULE

1. The Board will establish the 2021 meeting schedule.

Public Comment.

II. BRIEFING ITEMS

A. CONTESTED CASE UPDATES

1. Enforcement cases assigned to the Hearing Examiner

- 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.** On April 17, 2015, 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:** On April 9, 2020, CR/REF filed a Motion *in Limine*, and a Motion for Summary Judgment on May 22, 2020. On June 9, 2020, Ms.

Clerget issued an Order denying CR/REF's Motion in Limine. On July 9, 2020, Ms. Clerget held oral argument on CR/REFs Motion for Summary Judgement. That motion is fully briefed and awaiting decision. As of September 15, the parties have also fully briefed CR/REF's "Motion to Take Judicial Notice of Fact" and CR has also filed a "Motion to Strike," which is now fully briefed.

ii. **District Court Case:** [see Memo from Amy Christensen]

b. **In the matter of the notice of appeal by Duane Murray regarding the notice of violations and administrative compliance and penalty order (Docket No. SUB-18-01; ES#36-93-L1-78; FID 2568), BER 2020-01 OC.** On July 22, 2020, Duane Murray filed a request for hearing with the Board. At its August 2020 meeting, the Board appointed Sarah Clerget to preside over this contested case. On September 9, 2020, Ms. Clerget issued a Prescheduling Order. The parties filed a proposed schedule on October 2, 2020. Ms. Clerget issued a scheduling order on October 6, 2020, and the parties are proceeding according to that schedule with discovery closing in March 2021.

2. Non-enforcement cases assigned to the Hearings Examiner

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.** At the Board's last meeting it voted to adopt the parties Stipulation and Request for Retention of Board Jurisdiction. The parties filed a Joint Status Report on November 2, 2020, and Alpine is to provide DEQ confirmation that the ambient ground water monitoring has been installed no later than April 20, 2021.

b. **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.** On September 25, 2015, Westmoreland Resources, Inc. filed a notice of appeal and request for hearing and Ms. Clerget assumed jurisdiction on September 8, 2017. The case was stayed pending a Montana Supreme Court decision, which was issued in September 2019. On April 24, 2020, the parties filed a Joint Motion for Stay indicating that they are working toward settlement of the case. That motion was granted on April 28, 2020, and the case was stayed until July 24, 2020. The parties filed a Joint Motion to Continue Stay on July 24, 2020, and September 9, 2020, which was granted on July 29, 2020, and September 9, 2020. On September 30, 2020, the parties filed a "Joint Motion to Remand and Suspension of Proceedings." The BER granted that Motion on October 9, 2020, and issued its Order granting remand on November 16, 2020. The parties are to file a joint status report to the BER no later than June 30, 2021.

c. **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.** A two-day hearing on this matter was held on December 3-4, 2018. Oral argument on the parties' proposed FOFCOLs was held on May 7, 2019, making it ripe for decision from the hearing examiner. On July 24, 2019, the First Judicial District Court had issued its Order on cross motions for summary judgment in Cause No. CDV 2017-641, a declaratory relief action brought in District Court challenging DEQ's issuance of MPDES Permit No. MT0030279. While the District Court action was limited to conditions of the

MPDES Permit that were not at issue before the Board, the District Court Order vacated the entire Permit, thus affecting the status of this case. On September 13, 2019, DEQ and Montanore requested a stay of this case pending the outcome of any Supreme Court appeal of the District Court Order, which was granted on September 17, 2019. The parties cross-appealed the District Court's decision to the Supreme Court under Cause No. DA 19-0553. On November 17, 2020, the Supreme Court issued a decision vacating the permit and remanding the case to DEQ. The parties have until December 17, 2020, to file a joint status report indicating if or how they intend to proceed with the contested case given the Supreme Court's decision.

- d. **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 April 12, 2019, the BER appointed Sarah Clerget as hearing examiner to preside over this contested case. On May 8, 2020, the parties filed a Joint Motion to Substitute, requesting that Navajo Transitional Energy Company, LLC replace Spring Creek Coal as a party, as it had replaced Spring Creek Coal as the permit holder. The motion to substitute was granted on May 13, 2020, and an Amended Scheduling Order was issued on May 12, 2020. The parties are proceeding according to that order, with discovery closing in January 2021.
- e. **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.**
 - i. **District Court Case:** [see Memo from Amy Christensen]
 - ii. **Contested Case:** August 18-21 the parties participated in the contested case hearing. The parties have requested an extension and their Proposed Findings of Fact and Conclusions of Law are due on December 18, 2020, with responses due February 5, 2021.
- f. **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.** Between November 8, 2019, and November 29, 2019, the Board received fourteen appeals from various parties regarding the approval of Opencut Mining Permit No. 2949. On December 13, 2019, the Board consolidated for procedural purposes BER 2019-08 through 21 OC. Several parties were dismissed from the appeals and a Scheduling Order was issued on January 31, 2020. DEQ filed a Partial Motion for Summary Judgment on September 29, 2020. The remaining appellants filed a response on October 21, 2020, and DEQ filed a reply on November 4, 2020. Oral argument on DEQ's Partial Motion for Summary Judgment will be held in January 2021.
- g. **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.** On May 31, 2019, the BER appointed Sarah Clerget as hearing examiner to preside over the contested case for procedural purposes only. At the Board's August meeting, it voted to assign the case in its entirety to Ms. Clerget. The parties cross moved for partial summary judgment, and Westmoreland also filed a Motion to Dismiss. On

November 24, 2020, Ms. Clerget issued an order denying Westmoreland's Motion to Dismiss, denying Conservation Groups' Motion for Partial Summary Judgment, and granting Westmoreland's and DEQ's Motions for Partial Summary Judgment. Ms. Clerget held a status conference on December 4, 2020, at which all parties could not agree to bring the motions decision before the Board. Therefore, the case will proceed to a hearing on the one remaining issue. The parties will propose a schedule for the prehearing filings and dates for a hearing shortly.

- h. **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).** [see Memo from Amy Christensen]
 - i. **In the Matter of Notice of Appeal by Nicholas and Janet Savko, Regarding Floodplain Setbacks, Gallatin County, MT, BER 2020-03 SUB.** On October 9, 2020, the BER appointed Sarah Clerget as hearing examiner to preside over this contested case. Ms. Clerget issued a Prehearing Order on November 10, 2020. On November 25, 2020, the parties requested a stay for 60 days. That request was granted on November 30, 2020, and the parties will file either a stipulation or proposed schedule to Ms. Clerget by January 25, 2021.
 - j. **In the Matter of Notice of Appeal by Signal Peak Energy LLC, Regarding Purporting to Rule on An Alleged Impairment of Water Rights Permit No. C1993017, Roundup, Musselshell County, MT, BER 2020-04 SM.** On October 9, 2020, the BER appointed Sarah Clerget to preside over this contest case hearing as its hearing examiner. On November 10, 2020, Ms. Clerget issued a Prehearing Order. The parties filed a Stipulation to Stay Proceedings on November 13, 2020. Ms. Clerget stayed the proceedings on November 20, 2020, and the parties will file either a stipulation or proposed schedule to Ms. Clerget by February 25, 2021.
 - k. **In the Matter of Notice of Appeal by Woodrock, Inc., Regarding Permit Suspension Order of Opencut Mining Permit No. 2677, Stipek Site, Dawson County, MT, BER 2020-02 OC.** On October 9, 2020, the BER appointed Sarah Clerget as hearing examiner of this contested case. Ms. Clerget issued a Prehearing Order on November 10, 2020. The order directed parties to file a notice of appearance by November 20, 2020, and a proposed schedule by December 1, 2020. The parties filed an Unopposed Motion to Stay the Proceedings on November 30, 2020; Ms. Clerget granted that motion the same day. The parties have until January 29, 2021, in which to file either a stipulation or proposed schedule.
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.**

III. ACTION ITEMS

A. APPEAL, AMEND, OR ADOPT FINAL RULES

1. In the matter of final adoption of the proposed amendments to ARM 17.8.501, 504, 505, and 510 Air Quality Operation Fees for Registered Sources, to adequately fund the air quality portable registration program, as noticed in MAR 17-413.

Public Comment.

2. In the matter of final adoption of proposed amendments of Administrative Rules of Montana (ARM) 17.30.602 and proposed NEW RULE I, pertaining to selenium standards for Lake Kootenai and the Kootenai River.

Public Comment.

B. NEW CONTESTED CASES

1. **In the matter of notice of appeal and request for hearing by the Western Sugar Cooperative regarding its Montana Pollutant Discharge Elimination System Permit No. MT0000281 issued October 29, 2020, BER 2020-05 WQ.** On November 24, 2020, the Board received a Notice of Appeal from Western Sugar Cooperative. 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 Notice of Appeal and Request for Hearing by Westmoreland Resources, Inc. Regarding October 27, 2020 Notice of Violation and Administrative Compliance and Penalty Order, BER 2020-06 SM.** On November 25, 2020, the Board received a Notice of Appeal from Westmoreland Resources. 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. **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 20, 2020, based on a Motion from the parties. Calumet Montana Refining, LLC has filed a Motion to File Brief as Amicus Curiae. Ms. Clerget issued an Order partially granting Calumet's request on May 18, 2020. The parties filed a Motion for Extension on August 4, 2020, requesting extension of the discovery and dispositive motions deadlines. Ms. Clerget issued an Order on August 6, 2020, extending those deadlines. On September 14, 2020, the parties filed a "Joint Notice of Pending Settlement." Ms. Clerget issued an Order vacating the remaining deadlines and directing the parties to file either a motion for dismissal or a joint status report by October 2, 2020. The parties filed a Joint Status Report on October 2, 2020, a Joint Status Report and Proposed Settlement on November 20, 2020, and a Stipulation for Final Agency Decision on November 25, 2020. The Board must decide whether to approve or reject the stipulation as its Final Agency Action.

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 for the meeting. Individual contested case proceedings are not public matters on which the public may comment.

VI. ADJOURNMENT