DEQ Montana Department of Environmental Quality

Board of Environmental Review

Memo

TO: Sarah Clerget, Hearing Examiner
Board of Environmental Review

FROM: Deb Sutliff, Interim Board Secretary
P.O. Box 200901
Helena, MT 59620-0901

D. S.

DATE: July 2, 2020

SUBJECT: Board of Environmental Review Case No. BER 2020-01 SUB

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW

OF THE STATE OF MONTANA

IN THE MATTER OF: NOTICE OF APPEAL BY DUANE MURRAY REGARDING APPROVAL OF DOCKET NO. SUB-18-01	Case No. BER 2020-01 SUB

On July 2, 2020 the BER has received the attached request for hearing to appeal.

Please serve copies of pleadings and correspondence on me and on the following DEQ representatives in this case.

Attachment

From: Duane Murray
1568 US Highway 191 South
Malta, MT 59538

To: Board of Secretary
Board of Environmental Review
PO Box 200901
Helena MT 59620-0901

Date: July 22, 2020

Re: Appeal
Notice of Violation and Administrative Compliance and Penalty Order
Docket No. SUB-18-01; ES #36-93-L1-78; FID 2568

Dear Board,

I respectfully request a hearing to appeal the above Notice of Violation.

Duane Murray

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

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)	**CASE NO. BER 2020-01 SUB**

PREHEARING ORDER

On July 22, 2020,Duane Murray (Mr. Murray) filed a request for hearing with the Montana Board of Environmental Review (BER) regarding the Department of Environmental Quality's (DEQ) Notice of Violation and Administrative Compliance and Penalty Order. This appeal was numbered Case No. BER 2020-01 OC.

At its meeting on August 7, 2020, the BER assigned this case to a hearing examiner, Sarah Clerget, pursuant to its authority under the Montana Administrative Procedure Act (MAPA), Title Two, Chapter Four, Part 6, governing contested cases. Mont. Code Ann. §§2-4-601 through 631. Ms. Clerget therefore steps into the shoes of the BER and has jurisdiction to hear and make decisions on this cases and issue binding orders (much like an administrative law

judge or magistrate) until the case is ready for a final (dispositive) decision. Mont. Code Ann. §§2-4-602 through 614. At that point, Ms. Clerget will write a proposed final decision (a.k.a Proposed Findings of Fact and Conclusions of Law or FOFCOL). *See* Mont. Code Ann. §2-4-621. Ms. Clerget will submit the Proposed FOFCOL to the BER, who will hear objections to the FOFCOL from the parties and then make the final decisions on this case. *See* Mont. Code Ann. §2-4-621.

This Order sets forth general procedures that will govern this contested case proceeding before the hearing examiner. Failure to comply with this Order may result in rejected filings, additional filing requirements, or sanctions up to and including dismissal.

IT IS ORDERED:

1. APPLICABLE RULES. This hearing and all prehearing matters will be conducted pursuant to the Montana Administrative Procedures Act (MAPA), Title 2, Chapter 4, Part 6, MCA, the Montana Rules of Civil Procedure, Montana Rules of Evidence, and the Administrative Rules of Montana (ARMS), including but not limited to ARM 17.4.101, adopting the Attorney General's model rules. All of these procedural rules may be found online, for free, and parties are expected to know and abide by these rules.[1]

[1] MAPA is available at: https://www.leg.mt.gov/bills/mca/title_0020/chapter_0040/part_0060/sections_index.html Montana Rules of Civil Procedure are available at: https://www.leg.mt.gov/bills/mca/title_0250/chapter_0200/parts_index.html

2. BER MEETINGS. Notice is hereby given that the procedural status (only procedure, not the substance) of this case will be discussed at all subsequent Board of Environmental Review meetings until a final agency decision is rendered and any appeal is complete. The schedule and agenda for BER meetings are available online at http://deq.mt.gov/DEQAdmin/ber, and all meetings are open to the public, either telephonically or in person. Parties are encouraged, although not required, to check this website regularly for updates and attend any BER meeting that includes this case on the agenda.

3. REPRESENTATION AND APPEARANCES. Any person appearing in the contested case proceeding may be accompanied, represented, and advised by an attorney licensed to practice law in the State of Montana, but is not required to hire an attorney and may represent himself or herself in the proceeding. Because this action is a civil action (not a criminal action), there is no guaranteed right to representation by an attorney and an attorney will not be provided. It is important to note, however, that by law someone who is not an attorney may only represent him or herself—not any other person. Additionally, an entity (like a business or a not-for-profit organization) must always be represented by a lawyer. Pursuant to Mont. Code Ann. § 37-61-201 any person who appears before a judicial body,

Montana Rules of Evidence are available at: https://www.leg.mt.gov/bills/mca/title_0260/chapters_index.html
Administrative Rules of Montana (including BER and DEQ's rules and the Attorney General Model Rules for contested cases) are available at: https://sosmt.gov/arm/titlenumbers/

referee, commissioner, or other officer appointed to determine any questions of law or fact by a court or who shall engage in the business and duties and perform such acts, matters, and things are usually done or performed by an attorney at law in the practice of his profession shall be deemed practicing law. Montana Ethics Opinion 000008 provides that an attorney or administrative law judge may not ethically permit a corporation to represent itself *pro se* through an unlicensed individual, stating, "[a] lawyer should assist in preventing unauthorized practice of law." People are therefore only allowed to represent their own, individual interest, and cannot litigate for a spouse or other entity's interest without a licensed attorney.

Ms. Clerget, the hearing examiner in the instant case, is a licensed attorney and subject to the constraints established for attorneys (set forth above). Therefore, Ms. Clerget cannot allow a non-lawyer to represent the interests of other people (e.g. one person representing the interests of another).

Therefore, **by September 18, 2020, all parties in all cases must file either a *Pro Se* Appearance or a Notice of Appearance by counsel, as set forth below:**

a. **File a *Pro Se* Appearance**: a concise, signed, statement that indicates that the named individual who filed the appeal will be appearing *pro se*, e.g. "My name is _____ and I have filed this appeal, Case No. ____, on my own behalf and will be appearing *pro se* (without a lawyer) to represent my own interests in this appeal." These

statements must also include the contact information, such as physical and/or email addresses where filings will be served and indicate whether the individual will be using traditional or electronic filing (as set forth below in Section 4). Each individual appearing must file and sign his or her own statement. Statements filed or signed on behalf of another person (e.g. a spouse) will be rejected.

b. **File a Notice of Appearance by counsel**, indicating the names and contact information for any lawyer appearing on behalf of a party. In addition to listed counsel, represented parties may indicate one additional person (e.g. a client or paralegal) to add to the certificate of service. Application for appearances *Pro Hac Vice*, if applicable, must be filed pursuant to Section VI of the Montana Rules of Admission to the State Bar of Montana.

4. FILING. Parties may file by electronic or traditional methods as set out below. **Electronic filing is the preferred method of filing; hard copies are not required if parties use electronic filing.** Whatever method is used, when proposed orders, statements of undisputed or disputed fact, or proposed findings of fact and conclusions of law are submitted with a filing (even a hard copy filing), such filings must also be provided to the hearing assistant in Microsoft Word format (in addition to .pdf format) so that the document can be edited. Although

discovery documents should not be routinely filed, when a motion or brief is filed making reference to discovery documents, the party filing the motion or brief should also attach the relevant discovery documents.

a. *Electronic Filing.* If a party chooses to use electronic filing, in addition to parties on the service list, e-mail filings must be sent to:

1. SClerget@mt.gov
2. Asolem@mt.gov
3. DSutliff@mt.gov

Electronic filings will be accepted until midnight of the filing deadline; the document will be deemed "filed" based on the date and time received by my Hearing Assistant, Aleisha Solem. All briefs and motions filed electronically **must be in PDF format, in a manner that is searchable by electronic means**. For electronically filed documents, a party may sign the document electronically, rather than a hand signature in the following manner: "/s/ Jane E. Attorney."

b. *Traditional Filing.* If a party chooses to use traditional filing, original documents shall be sent, or hand delivered for filing to the following address:

SARAH CLERGET, Hearing Examiner
c/o ALEISHA SOLEM, Hearing Assistant
Agency Legal Services Bureau
1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440

Any hard copy filing that contains more than 100 pages of exhibits must be accompanied by an electronic copy of the exhibits. Any exhibit provided in an electronic format must be its own individual file with the name of the exhibit and a brief description, in the following format: "Exhibit A – Affidavit of John Doe." Single files containing multiple exhibits will be rejected and returned for reformatting. Electronic exhibits that are too large to send via a single email must be provided in PDF form on removable media (thumb drive, CD-ROM, etc.) or through the State of Montana's EPass File Share system for the transmission of larger exhibit files. Parties should not send multiple emails with exhibits attached.

5. FORM OF FILINGS: **Briefs in support of a motion and response briefs are limited to 6500 words. Reply briefs are limited to 3250 words.** Word limitations are computed to exclude the caption, signature lines, tables, appendices or certificates of compliance and service. Any motion to file an over-length brief must be presented reasonably in advance of the briefing at issue. Any motion for over-length brief filed contemporaneously with an over-length brief will be denied. Tables of contents and tables of authority are not required but are highly recommended, particularly for those filings over 4,000 words. Any motion or brief with more than three exhibits or affidavits attached should be accompanied by a table of exhibits. All filings should be in Times New Roman font, size 14, and double-spaced.

6. SERVICE: It is expected all parties consent to service by electronic mail, unless a party provides written notice to the contrary. Copies of all documents filed must be served electronically upon the opposing party. A certificate of service must be provided for each filed document. Parties must file a notice of appearance indicating their preferred service address both physically and electronically. Parties and the hearing examiner will serve those individuals listed on the Notices of Appearance or the individuals filing Pro Se Statements (pursuant to Section 4, above) with every filing, confirmed through certificate of service. **It is the responsibility of each individual appearing to update the tribunal and all other parties with any change to contact information. Failure to appear or respond to correspondence and filings sent to the contact information on file with the tribunal may result in a default judgment and dismissal.**

7. EX PARTE COMMUNICATIONS: The Montana Administrative Procedure Act in Mont. Code Ann. § 2-4-613, and the Attorney General's Model Rule 18 in Mont. Admin. R. 1.3.222, prohibit *ex parte* communications (communications without all parties present) with a hearing examiner concerning any issue of fact or law in a contested case. In other words, **there will be no communication with the hearing examiner unless all parties are present**. This assures all parties that there is no unknown communication of any kind between

the hearing examiner and a party: anything said to the hearing examiner is said in front of everyone, all the time.

8. COMMUNICATIONS: **As with any other court proceeding, communication with the hearing examiner (the Court) concerning this case will be conducted on the record, in the form of filings**. Any communication—email, telephone, letter, or in person (even if it is not ex-parte communication)—concerning this case with the hearing examiner outside of filings submitted on the record (as described in Section 4, above) is prohibited. Emailing, calling, or sending letters to the hearing examiner directly, or CC'ing the hearing examiner on such communications, will result in sanctions. The only exception to this rule (i.e. the only time that informal, non-record communication is permitted) is when parties communicate with the hearing assistant (not the hearing examiner) for purely procedural purposes. For example, a party my call or email the hearing assistant to ask a question about how to file something, to confirm receipt of a filing, or (when directed by the hearing examiner) to discuss dates for scheduling a telephonic conference or hearing. The hearing assistant cannot and will not discuss the substance of any matter or provide any legal advice to any party, however. The hearing assistant, Aleisha Solem, may be reached at asolem@mt.gov or 406-444-1496 during normal business hours.

9. BRIEFING SCHEDULE: All motions and briefs will follow the scheduling as set forth in Rule 2 of the Montana Uniform District Court Rules, unless an alternative schedule is ordered.

10. SCHEDULING: The parties **must file proposed schedules by October 2, 2020**. To the extent possible, working together to propose a schedule on which everyone could agree would be helpful, but parties may file separate proposed schedules. DEQ must provide a copy of its proposed schedule in Microsoft Word format (as well as pdf), via e-mail, to the e-mail addresses set forth in Section 4 above. The parties are free to provide for any case-specific dates, but at a minimum, the schedule must include dates for the following:

a. initial disclosures by each party to the other party(ies) of:
    1) the name and address of each individual likely to have discoverable facts that the disclosing party may use to support its claims or defenses; and,
    2) a copy of, or a description by category and location of, all documents and tangible things that are in the possession, custody, or control of the disclosing party and that the disclosing party may use to support its claims or defenses;
b. completion of discovery (if any party wishes to conduct discovery) such that responses to all discovery requests are due by this date, after which discovery will be closed;
c. staggered or simultaneous expert disclosures and rebuttal expert disclosures, as decided by the parties;
d. dispositive motions deadline;
e. motions hearing, if requested, to hear argument on any motions.

11. SUMMARY JUDGMENT: Any party filing a motion for summary judgment must simultaneously file a separate Statement of Undisputed Facts. The Statement of Undisputed Facts must set forth in serial form each fact on which the party relies to support the motion, along with a pinpoint cite to the specific evidence to support each fact. The moving party must e-mail a word processing version of the Statement of Undisputed Facts to each party against whom summary judgment is sought and the hearing examiner.

Any party opposing a motion for summary judgment must file a separate Statement of Disputed Facts simultaneously with (but separate from) their response brief. The Statement of Disputed Facts must set forth whether each fact in the moving party's Statement is "undisputed" or "disputed." Any "disputed" fact must be accompanied by a pinpoint citation to the specific piece of evidence to oppose the fact. Failure to provide a pinpoint cite for a "disputed" fact will result in the fact being treated as "undisputed."

Any party opposing a motion for summary judgment may also add to their Statement of Disputed Facts additional facts to oppose summary judgment. Any additional fact must be set forth in serial form, along with a pinpoint cite to the specific evidence to support the fact. The responding party must e-mail a word processing version of the Statement of Disputed Facts to each party against whom summary judgment is sought, and the hearing examiner.

In lieu of the foregoing, the parties can agree to file a joint statement of stipulated facts. Failure to file a Statement of Undisputed Facts will result in the motion being refused. Failure to file a Statement of Disputed Facts will be deemed an admission that no material facts are in dispute.

DATED this 9th day of September, 2020.

/s/ Sarah Clerget
SARAH CLERGET
Hearing Examiner
Agency Legal Services Bureau
1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing to be emailed to:

Deb Sutliff
Secretary, Board of Environmental Review
Department of Environmental Quality
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901
DSutliff@mt.gov

Duane Murray
1568 US Highway 191 South
Malta, MT 59538

Angie Colamaria
Montana Department of Environmental Quality
1520 East Sixth Ave.
Helena, MT 59601
Angela.Colamaria@mt.gov

DATED: 9/9/20

/s/ Aleisha Solem
Aleisha Solem, Paralegal

Sept 9, 2020

File a Pro Se Appearance

My name is Duane E. Murray and I have filed this appeal case number BER 2020-01 SUB on my own behalf and will be appearing pro se (without a lawyer) to represent my own interest in this appeal.

Duane Murray
1568 US Highway 191 South
Malta MT 59538
(406)390-5825
con3hom@hotmail.com

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

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)	**CASE NO. BER 2020-01 SUB**

ORDER

On September 19, 2020, Mr. Murray filed a document titled "*File a Pro Se Appearance*" (herein Appearance). However, the Appearance was emailed to the undersigned and the hearing assistant without a "cc" to Counsel for DEQ, Aaron Pettis, who filed a Notice of Appearance on September 15, 2020. The Hearing Assistant has forwarded the Appearance to DEQ Counsel. However, Mr. Murray is reminded to carefully review the Prescheduling Order, issued on September 9, 2020, as it sets forth detailed instructions regarding filing. For example, all filings (including those electronically filed by email) must include a Certificate of Service (see example below) and must be served on Counsel for DEQ (in the case of electronic filing, this is done by emailing Mr. Pettis on the same email to the undersigned and the hearing assistant). Additionally, all parties are reminded that

there should be no communication with the undersigned or the Hearing Assistant except through filings, where all parties are included in the communication. This is to ensure that there is no *ex parte* communication and the hearing process is transparent and fair. If Mr. Murray has any questions regarding how to file a document, he may email the Hearing Assistant at asolem@mt.gov and include Mr. Pettis on the email (the undersigned hearing examiner should not be included on such an email). IT IS SO ORDERED.

DATED this 23rd day of September, 2020.

/s/ Sarah Clerget
SARAH CLERGET
Hearing Examiner
Agency Legal Services Bureau
1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing to be emailed to:

Deb Sutliff
Secretary, Board of Environmental Review
Department of Environmental Quality
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901
DSutliff@mt.gov

Duane Murray
1568 US Highway 191
South Malta, MT 59538
con3hom@hotmail.com

Aaron Pettis
Montana Department of Environmental Quality
1520 East Sixth Ave.
Helena, MT 59601
APettis@mt.gov

DATED: 9/23/20

/s/ Tiffany Hoffman
Tiffany Hoffman, Paralegal

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

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)	**CASE NO. BER 2020-01 SUB**

SCHEDULING ORDER

On September 9, 2020, the Hearing Examiner ordered the Department of Environmental Quality (DEQ) and Duane Murray (Mr. Murray), collectively "the Parties," to file a proposed schedule by October 2, 2020. Counsel for DEQ and Mr. Murray have conferred and agree on the following proposed schedule:

1. The following schedule is set:

   a. On or before **October 23, 2020**, Mr. Murry may file for a more definite statement;

   b. On or before **October 30, 2020**, parties may file for the joinder/intervention of additional parties.

c. On or before **November 6, 2020**, parties shall exchange but not file (1) the name and address of each individual likely to have discoverable facts the disclosing party may use to support its claims or defenses; (2) and a copy of a description by category and location of, all documents and tangible things that are in the possession, custody, or control of the disclosing party and that the disclosing party may use to support its claims or defenses.

d. On or before **January 8, 2021**, parties shall exchange but not file a list of any potential expert witnesses and associate exhibits and state the substance of expected expert testimony.

e. On or before **February 5, 2021**, parties shall exchange but not file a list of rebuttal expert witnesses and associated exhibits and state the substance of the expected rebuttal expert testimony.

f. On or before **March 19, 2021**, discovery shall be completed. "Completed" means that interrogatories, requests for production, and requests for admissions must be served so that required **responses are due on or before this date**, and that all depositions are completed.

g. Any dispositive motions, together with supporting briefs and exhibits, shall be served and filed with the hearing examiner by **April 23, 2021**. Responsive briefs shall be filed by **May 14, 2021**, and reply briefs by **May 28,**

2021. If any party requests oral argument on any dispositive motions, the hearing for such will be set at a later date.

2. A party's failure to appear for any conference, and/or failure to obey orders issued by the undersigned may result in sanctions against that party that can include entry of default, dismissal of an appeal, imposition of liability or other appropriate sanctions.

3. The foregoing schedule will not be modified absent good cause pursuant to Mont. R. Civ. Pro 16(4). Motions for extension of time will not be granted if good cause is not shown, even if unopposed. Motions for extension of time should be filed well in advance of the deadline to avoid disrupting the schedule.

DATED this 6th day of October, 2020.

/s/ Sarah Clerget
SARAH CLERGET
Hearing Examiner
Agency Legal Services Bureau
1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing to be emailed to:

Deb Sutliff
Secretary, Board of Environmental Review
Department of Environmental Quality
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901
DSutliff@mt.gov

Duane Murray
1568 US Highway 191 South
Malta, MT 59538
con3hom@hotmail.com

Aaron Pettis
Montana Department of Environmental Quality
1520 East Sixth Ave.
Helena, MT 59601
APettis@mt.gov

DATED: 10/6/2020 */s/ Tiffany Hoffman*

Aaron Pettis
Dept. of Environmental Quality
Legal Unit, Metcalf Building
1520 East Sixth Avenue
P.O. Box 200901
1520 East Sixth Avenue
Helena, MT 59620-0901
(406) 444-1422
APettis@mt.gov

Attorney for DEQ

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

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)	)	Case No. BER 2020-01 SUB

Motion to Dismiss and Brief in Support

Appellant Duane Murray has failed to comply with the Hearing Examiner's Scheduling Order that required, among other things, that the parties exchange initial disclosures by November 6, 2020; expert disclosures and associated exhibits by January 8, 2021; and rebuttal expert witnesses and associated exhibits by February 5, 2021. Accordingly, the Montana Department of Environmental ("Department") respectively moves, pursuant to Rules 16(f) and 41(b) of the Rules of Civil

Procedure; Paragraph 6 of the Prehearing Order; and Paragraph 2 of the Scheduling Order to dismiss this proceeding with prejudice. In the alternative, the Department respectfully moves that the Hearing Examiner order Mr. Murray to show cause why this proceeding should not be dismissed.

RELEVANT FACTS

Mr. Murray initiated this proceeding by appealing an Administrative Order issued from the Department's Enforcement Program. On September 9, 2020, the Hearing Examiner issued the Prehearing Order, which warned, among other things, that failure to respond to correspondence and filings sent to the contact information on file with the Hearing Examiner may result in a default judgment and dismissal. (Prehearing Order ¶ 6). The Hearing Examiner further required the Parties to submit a proposed scheduling order that included, among other things, a date for initial disclosures of individuals with discoverable facts and of documents that the disclosing party may use to support its claims and defenses, expert disclosures and associated exhibits, and rebuttal expert witnesses and associated exhibits. (*Id.* ¶ 10).

The undersigned and Mr. Murray conferred and agreed that initial disclosures be completed by November 6, 2020; that expert disclosures be completed by January 8, 2021; and rebuttal expert witnesses be completed by February 8, 2021. (Parties' Proposed Scheduling Order at 2). These dates were adopted by the Hearing

Examiner and incorporated into the Scheduling Order. (Scheduling Order ¶ (1)(c)–(e)). In issuing the Scheduling Order, the Hearing Examiner also warned that any failure to obey any order issued by the Hearing Examiner could result in sanctions, including entry of default, dismissal, imposition of liability, or other appropriate sanctions. (*Id.* ¶ (2)).

The Department served on Mr. Murray its disclosures as required by the Scheduling Order. Mr. Murray did not do likewise, nor did he respond to the undersigned's attempts to contact him and receive his initial disclosures. Mr. Murray has not contacted the undersigned regarding his failure to complete the disclosures as required.

APPLICABLE LAW

The Montana Rules of Civil Procedure apply to this proceeding. (Prehearing Order ¶ 1). While *pro se* litigants are entitled to some leeway, they still must adhere to procedural rules. *Cox v. Magers*, 2018 MT 21, ¶ 15. The failure to abide by a scheduling order constitutes both a failure to comply with the rules of procedure and a failure to comply with a court order. *McKenzie v. Scheeler*, 285 Mont. 500, 506 (1997).

Rule 16(f)(1)(C), M.R.C.P., provides, in relevant part, that "the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)–(vii), if a party . . . fails to obey a scheduling order or other pretrial order." In turn, Rule

37(b)(2)(A) provides that the court may issue just orders if a party fails to obey a discovery order or permit discovery, including, among other things, dismissal of the action or proceeding in whole or in part or rendering a default judgment against the disobedient party. Likewise, Rule 41(b) provides that an action may be dismissed if the plaintiff fails to prosecute the case, fails to comply with the rules of civil procedure, or fails to comply with an order of the court.

DISCUSSION

1. The Hearing Examiner should dismiss this proceeding for Mr. Murray's failure to comply with the Scheduling Order.

Mr. Murray has repeatedly failed to participate in the proceedings he initiated.[1] Neither his *pro se* status nor his intentions, whatever they may be, excuse him from complying with the Hearing Examiner's orders. *Cox*, 2018 MT 21, ¶ 15; *Seal v. Woodrows Pharm.*, 1999 MT 247, ¶ 22 ("The purpose of these sanctions is to deter parties from being unresponsive to the judicial process regardless of the intent, or lack thereof, behind such unresponsiveness.").

Furthermore, prejudice is inherent and impermissible when a party's failure to comply with discovery procedures effectively halts the discovery process.

[1] Mr. Murray did submit a More Definite Statement on October 23, 2020. However, doing so was necessary to avoid dismissal, *see* Section 76-4-126(1), MCA, (requiring that a hearing request must state the reason for the request), and does not excuse his later failure to provide required disclosures.

Culbertson-Froid-Bainville Health Care Corp. v. JP Stevens & Co. Inc., 2005 MT 254, ¶ 18, 329 Mont. 38, 45. The initial disclosures in this case were required by the Hearing Examiner. The purpose of initial disclosures is "to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information." Fed. R. Civ. P. 26, Notes of Advisory Committee on Rules—1993 Amendment; *see U.S. Fid. & Guar. Co. v. Rodgers*, 267 Mont. 178, 181–82, 882 P.2d 1037, 1039 (1994) (explaining that interpretation of the federal rules has persuasive application to the interpretation of the state rules).

These basic disclosures provide the crucial preliminary information needed to develop a litigation strategy, to determine who should be deposed, and to craft interrogatories and requests for admission. The Department should not be saddled with the burdens of litigation in a case Mr. Murray initiated if he has no interest in complying with the basic requirements of the Scheduling Order. What's more, the Department should not be burdened with the additional work to ferret out through discovery the basic information that was required by the Scheduling Order to streamline these proceedings.

Dismissal is therefore the appropriate sanction. The Hearing Examiner has already warned Mr. Murray in two orders that his failure to comply could lead to dismissal. (Prehearing Order ¶ 6; Scheduling Order ¶ (2)). The Hearing Examiner should impose the warned sanction. *Smith v. Butte-Silver Bow Cnty.*, 276 Mont.

329, 340 (1996) ("[W]here a court expressly warns of the consequences to follow from a party's failure to comply, the court should impose sanctions accordingly.").

Additionally, Mr. Murray made no responses to the undersigned's requests for initial disclosures. This unresponsiveness warrants dismissal. *See, e.g.*, *Landauer v. Kehrwald*, 225 Mont. 322, 325 ("A party displaying an attitude of unresponsiveness to the judicial process warrants the imposition of sanctions, including dismissal."); *Audit Services v. Kraus Construction Inc.*, 189 Mont. 94, 615 P.2d 183, 187–88 (1980) (explaining that a default judgment as a sanction is available "when the adversary process has been halted because of an essentially unresponsive party" and serves a deterrent "to those parties who choose delay as part of their litigative strategy"), *overturned on other grounds by Quantum Elec., Inc. v. Schaeffer*, 2003 MT 29, ¶ 30, 314 Mont. 193, 64 P.3d 1026.

Mr. Murray's failure to provide a court-ordered disclosure is simply not a tactical option for him to ignore. The obligation to provide disclosures was mandatory under the Scheduling Order and as stipulated by the parties and served to provide a framework for the Tribunal's resolution of any disputed issue of fact. Nor can Mr. Murray cure his unresponsiveness by now deciding to participate. *E.g.*, *Landauer*, 225 Mont. at 324 (noting that courts should "punish[] transgressors rather than patiently trying to encourage their cooperation"); *Dassori v. Roy Stanley Chevrolet Co.*, 224 Mont. 178, 180–181 (1986) (explaining that a "last-minute

tender of relevant documents could not cure the problem [he] had previously created" (quotation omitted)).

For all these reasons, the Department respectfully requests the Hearing Examiner to dismiss this proceeding with prejudice. In the alternative, the Department requests that the Hearing Examiner order Mr. Murray to show cause why this proceeding should not be dismissed.

DATED this 19th day of March, 2021.

Respectfully submitted,

/s/ Aaron Pettis

Aaron Pettis
Attorney for Montana Department of Environmental Quality

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of March, 2021, a true and accurate copy of DEQ's Motion to Dismiss and Brief in Support in BER 2020-01 SUB was mailed by electronic mail, addressed as follows:

Original by electronic mail:

Lindsey Simon
Hearing Examiner
Agency Legal Services Bureau
1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440
lindsey.simon@mt.gov;
akraske@mt.gov;

Joyce Wittenberg
Secretary, Board of Environmental Review
Department of Environmental Quality
1520 East 6th Avenue
P.O. Box 200901
Helena, MT 59620-0901
jwittenberg@mt.gov;

Duane Murray
1568 US Highway 191 South
Malta, MT 59538
con3hom@hotmail.com;

Sandy Scherer, Paralegal
DEPARTMENT OF ENVIRONMENTAL QUALITY

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

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)	**CASE NO. BER 2020-01 SUB**

ORDER TO SHOW CAUSE

On September 9, 2020, former Hearing Examiner Sarah Clerget issued a Prescheduling Order setting the applicable procedural rules for this contested case action. Ms. Clerget warned that "[f]ailure to comply with this Order may result in rejected filings, additional filing requirements, or sanctions up to and including dismissal." Prehearing Ord. at 2. On October 6, 2020, Ms. Clerget issued a Scheduling Order ("October 2020 Scheduling Order") setting various procedural deadlines including deadlines for the exchange of initial disclosures. On January 15, 2021, the undersigned assumed jurisdiction of this contested case.

On March 19, 2021, the Montana Department of Environmental Quality ("DEQ") filed a Motion to Dismiss and Brief in Support ("Motion"). The Motion requests that the undersigned dismiss Appellant Duane Murray's ("Mr. Murray")

appeal for failure to comply with the October 2020 Scheduling Order as Mr. Murray had failed to exchange initial disclosures by the deadlines set in the October Scheduling Order.

A hearing examiner may "regulate the course of hearings," including entering orders, such as pre-hearing scheduling orders. Mont. Code Ann. § 2-4-611; Mont. Admin R. 1.3.218. "The purpose of a [prehearing] scheduling order is to instruct the parties to complete certain pretrial activities such as discovery and filing pretrial motions by a specific date. This scheduling order allows the district court to better control trial proceedings by resolving many issues during the pretrial phase of the case." *Stevenson v. Felco Indus*., 2009 MT 299, ¶ 32, 352 Mont. 303, 216 P.3d 763.

The September 9, 2020 Prehearing Order issued by Ms. Clerget notified the parties that Montana Rules of Civil Procedure would apply to this proceeding. M.R.Civ.P. 16 provides guidance that a hearing examiner may impose "just orders" if a party or attorney fails to obey a scheduling order or other pretrial order. M.R.Civ.P. 16(f)(1)(C); *see also Kingsbury Ditch Co. v. Dep't of Nat. Res. & Conservation*, 223 Mont. 379, 381, 725 P.2d 1209, 1210 (1986) (considering, without deciding, hearing officer's decision to not employ sanctions for discovery abuse). Likewise, Mont. Admin. R. 1.3.214(1) states:

(1) In a contested case, if a party does not appear to contest an

> intended agency action, the agency may enter a default order. If a default is entered, pursuant to 2-4-623, MCA, the order must be in writing and include findings of fact and conclusions of law.

Finally, M.R.Civ.P. 41(b) permits dismissal of an action for failure of a party to comply with a court order.

IT IS THEREFORE ORDERED:

1. Mr. Murray shall file and serve, no later than **April 2, 2021**, a response showing cause as to (a) why DEQ's Motion to Dismiss should not be deemed well-taken, and (b) why this matter should not be dismissed pursuant to M.R. Civ. P. 16(f) and 41(b).

2. Mr. Murray's response must provide both legal analysis and a detailed factual explanation of why Mr. Murray believes good cause exists.

3. Failure to file a response on or before April 2, 2021 will result in the dismissal of this proceeding.

DATED this 23rd day of March, 2021.

/s/ Lindsey Simon
LINDSEY SIMON
Hearing Examiner
Agency Legal Services Bureau
1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing to be emailed to:

Joyce Wittenberg
Secretary, Board of Environmental Review
Department of Environmental Quality
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901
JWittenberg@mt.gov

Duane Murray
1568 US Highway 191 South
Malta, MT 59538
con3hom@hotmail.com

Aaron Pettis
Montana Department of Environmental Quality
1520 East Sixth Ave.
Helena, MT 59601
APettis@mt.gov

DATED: 3/23/21

/s/ Aleisha Kraske
Aleisha Kraske, Paralegal

TO: LINDSEY SIMON
Hearing Examiner
Agency Legal Services Bureau
1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440

From: Duane Murray
1568 US Highway 191 So
Malta MT 59538

RE: Case #. BER 202-01 SUB
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)

Date: April 2, 2021

I did not exchange of initial disclosures. I did not have any future documents to disclose, nor expert witness to list.

I should not have to be a lawyer, nor should I have to hire a lawyer to file an appeal with a state agency.

Duane Murray

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

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)	**CASE NO. BER 2020-01 SUB**

PROPOSED ORDER GRANTING MOTION TO DISMISS

This matter came before the Hearing Examiner on the Department of Environment Quality's ("DEQ's") *Motion to Dismiss and Brief in Support*.

PROCEDURAL HISTORY

On July 22, 2020, Duane Murray ("Mr. Murray") filed a request for hearing with the Montana Board of Environmental Review ("BER") regarding the Department of Environmental Quality's ("DEQ") Notice of Violation and Administrative Compliance and Penalty Order. This appeal was numbered Case No. BER 2020-01 OC.

At its meeting on August 7, 2020, the BER assigned this case to a hearing examiner, Sarah Clerget, who issued a *Prescheduling Order* on September 9, 2020 setting forth detailed instructions regarding filing and service in this contested

case. On September 19, 2020, Mr. Murray filed a document titled *File a Pro Se Appearance* by emailing it to Ms. Clerget and the hearing assistant without providing a copy to counsel for DEQ, which did not comply with the service instructions in the *Prescheduling Order*.

Ms. Clerget issued an *Order* on September 23, 2020 ("September Order"), reminding Mr. Murray of the filing and service requirements as outlined in the Prescheduling Order and ordering Mr. Murray to email hearing assistant with any questions he may have on filing documents. The September Order directed Mr. Murray to include counsel for DEQ on any such email communications.

On October 6, 2020, Ms. Clerget issued a *Scheduling Order* to the parties which included dates for pre-trial exchanges and lay and expert witness disclosure. On January 15, 2021, the undersigned assumed jurisdiction of this matter as hearing examiner for the BER. On March 19, 2021, DEQ filed a *Motion to Dismiss and Brief in Support* requesting Mr. Murray's appeal be dismissed pursuant to Mont. R. Civ. P. 16(f) and 41(b) for failure to abide by the *Scheduling Order* and rules of procedure. DEQ Mot., at 3.

The undersigned issued an *Order to Show Cause* on March 23, 2021 directing Mr. Murray to "file and serve, no later than **April 2, 2021**, a response showing cause as to (a) why DEQ's Motion to Dismiss should not be deemed well-taken, and (b) why this matter should not be dismissed pursuant to Mont. R. Civ. P.

16(f) and 41(b).” Order to Show Cause, at 3.

On April 2, 2021, Mr. Murray contacted the hearing assistant via telephone to ascertain “what DEQ wants from me [Mr. Murray]?” He then emailed a document to the hearing assistant titled, “Order to Show Cause” which stated, “I did not exchange of initial disclosures. I did not have any future documents to disclose, nor expert witness to list.”[1] This document was not submitted to the Hearing Examiner, DSutliff@mt.gov, or counsel for DEQ, and thus it did not comply with the filing and service instructions set forth in both the *Prescheduling Order* and the *September Order*.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Mr. Murray was warned in the *Prescheduling Order*, the September Order, and the *Order to Show Cause* that he must file *and serve* all pleadings on DEQ and that failure to comply could lead to dismissal. Although a *pro se* litigant is given a certain amount of latitude with respect to procedural oversights, Mr. Murray has already been given latitude following his non-compliant filing of the *File a Pro Se Appearance*, and “it is reasonable to expect all litigants, including those acting pro se, to adhere to procedural rules.” *Sun Mountain Sports, Inc. v. Gore*, 2004 MT 56, ¶ 28, 320 Mont. 196, 85 P.3d 1286 (quoting *Greenup v. Russell*, 2000 MT 154, ¶

[1] Mr. Murray’s filing was docketed but not served and is attached to this Order as Exhibit A.

15, 300 Mont. 136, 3 P.3d 124).

Additionally, the *Order to Show Cause* warned that Mr. Murray's response must provide both a legal analysis and a detailed factual explanation of good cause as to why he failed to follow the above orders. Mr. Murray's submission contains only factual explanations as to why he has not disclosed any documents or expert witnesses in this matter. It contained no legal analysis and no factual explanation as to why he has not disclosed the name and addresses of each individual likely to have discoverable facts he may use to support his claims or defenses, as outlined in the *Scheduling Order*.

Mr. Murray has failed to provide good cause for why he did not comply with the disclosure requirement in the *Scheduling Order*, he has not provided the information ordered in the *Order to Show Cause*, and he has repeatedly failed to follow the filing and service requirements in the *Prescheduling Order*.

The previous Hearing Examiner ordered that the Montana Rules of Civil Procedure applied to this proceeding, and neither party objected. Even when the Montana Rules of Civil Procedure do not explicitly govern per statute or administrative rule, "they may still serve as guidance for the agency and the parties." *Citizens Awareness Network v. Mont. Bd. of Envtl. Review*, 2010 MT 10, ¶ 20, 355 Mont. 60, 227 P.3d 583 (citing *Moen v. Peter Kiewit & Sons' Co.*, 201 Mont. 425, 434, 655 P.2d 482)).

Mont. R. Civ. P. 16(f)(1)(C) provides that sanctions, including those authorized by Rule 37(b)(2)(A)(ii)–(iv), may be imposed against a party who fails to obey a scheduling order. Mont. R. Civ. P. 41(b) also states that a defendant may move to dismiss an action based on the plaintiff's failure to comply with a court order. In this proceeding, as the party requesting the hearing, Mr. Murray is analogous to the plaintiff. As the responding party, DEQ is analogous to the defendant.

A sanction in the form of dismissing this proceeding is also available under Mont. R. Civ. P. 37(b)(2)(A)(v), which applies pursuant to ARM 17.4.101(1) and ARM 1.3.217(1). The failure to make the required initial disclosures is akin to a discovery issue because the purpose of both initial disclosure requirements and discovery is to facilitate the disclosure of relevant information between the parties.

Therefore, IT IS ORDERED:

1. DEQ's Motion to Dismiss is GRANTED pursuant to M. R. Civ. P. 16(f)(1)(C), 37(b)(2)(A)(v), and 41(b) for failure to comply with the Scheduling Order and the March 23, 2021 Order to Show Cause.

2. Mr. Murray's appeal is dismissed with prejudice.

This Proposed Order will go before the BER, which constitutes the "officials who are to render the decision." Mont. Admin. R. 1.3.223(1). The parties will have the opportunity to make oral argument before the BER concerning the

undersigned's Proposed Order. Based on the Proposed Order and any oral arguments presented, the BER will decide the final agency action pursuant to the options stated in Mont. Code. Ann. § 2-4-621 at its next scheduled meeting on April 23, 2021. The location, time, and agenda for the BER meeting, as well as the materials available to the BER members for review, will be available on the BER's website http://deq.mt.gov/DEQAdmin/ber at least one week in advance of the BER meeting. The parties are encouraged to regularly check the Board's website for any additional updates on the meeting.

DATED this 12th day of April, 2021.

/s/ Lindsey Simon
LINDSEY SIMON
Hearing Examiner
Agency Legal Services Bureau
1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing to be emailed to:

Joyce Wittenberg
Secretary, Board of Environmental Review
Department of Environmental Quality
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901
jwittenberg@mt.gov

Duane Murray
1568 US Highway 191
South
Malta, MT 59538
con3hom@hotmail.com

Aaron Pettis
Montana Department of Environmental Quality
1520 East Sixth Ave.
Helena, MT 59601
APettis@mt.gov

DATED: 4/12/21

/s/ Aleisha Kraske
Aleisha Kraske, Paralegal

TO: LINDSEY SIMON
Hearing Examiner
Agency Legal Services Bureau
1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440

From: Duane Murray
1568 US Highway 191 So
Malta MT 59538

RE: Case #. BER 202-01 SUB
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)

Date: April 2, 2021

I did not exchange of initial disclosures. I did not have any future documents to disclose, nor expert witness to list.

I should not have to be a lawyer, nor should I have to hire a lawyer to file an appeal with a state agency.

Duane Murray