

**BOARD OF ENVIRONMENTAL REVIEW  
MINUTES**

**March 31, 2017**

Call to Order

The Board of Environmental Review's meeting was called to order by Chairperson Miles at 10:01 a.m., on Friday, March 31, 2017, in Room 111 of the Metcalf Building, 1520 East 6<sup>th</sup> Avenue, Helena, Montana.

Attendance

Board Members Present: Chairperson Joan Miles, Dr. Robert Byron, Chris Tweeten

Board Members Present by Phone: Robin Shropshire

Board Members Absent: Roy O'Connor, Marietta Canty, Michelle Reinhart-Levine

Board Attorney Present: Andres Haladay, Attorney General's Office

Board Liaison Present: George Mathieus

Board Secretary Present: Joyce Wittenberg (interim)

Court Reporter Present: Laurie Crutcher, Crutcher Court Reporting

Department Personnel Present: Christopher Dorrington – AEMD; Tim Davis, Kari Smith – WQD; Eric Urban, Melissa Schaar, Myla Kelly, Amy Steinmetz – WQPB; Jon Kenning, Christine Weaver – WPB; Julie Merkel, Julie Ackerlund – AQB; Todd Teegarden, Barb Kingery – ENGB; Aaron Pettis, John North, Norman Mullen, Kirsten Bowers, Kurt Moser - Legal

Interested Persons Present: Art Hayes, Brenda Lindlief-Hall – Tongue River Water Users Association; Peggy Trenk – Treasure State Resources Association; Mark Fix, Ella Smith – Northern Plains Resource Council; John Tietz – Columbia Falls Aluminum Company; Steve Gilbert

Interested Persons Present by Phone: none

Roll was called: four Board members were present, providing a quorum.

### **I.A. Administrative Items – Review and Approve Minutes**

#### **I.A.1. | January 31, 2017, Meeting Minutes**

Chairperson Miles noted that she provided the interim secretary with some minor edits and called for a motion to adopt the minutes with the corrections. Mr. Tweeten so MOVED and Dr. Byron SECONDED. The motion CARRIED 4-0.

### **II.A.1. Briefing Items – Enforcement Contested Cases assigned to the Hearing Examiner**

II.A.1.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.

Mr. Haladay said this matter was fully submitted on cross motions for summary judgment and is pending before the hearing examiner.

II.A.1.b. | 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.

Mr. Haladay said this matter also was fully submitted on cross motions for summary judgment and is also pending before the hearing examiner.

II.A.1.c. | In the matter of violations of the Water Quality Act by Buscher Construction and Development, Inc., at Poly Vista Estates, Trailhead, and Falcon Ridge II Subdivisions, Billings, Yellowstone County, BER 2015-03 WQ.

Mr. Haladay said there is a stipulation entered by the parties to dismiss the matter pursuant to Rule 41 and it was signed, effectively dismissing the matter.

Discussion ensued as to whether the case was dismissed with or without prejudice. Mr. Tweeten suggested that all future dismissals include this.

II.A.1.d. | An appeal in the matter of violation of the Opencut Mining Act by Goran, LLC, at the Goran unpermitted gravel pit, Stillwater County, Montana (Opencut No. 2790; FID 2500), case number BER 2016-09 OC.

Mr. Haladay said a scheduling order is in effect for this matter and that discovery is ongoing.

II.A.1.e. | In the matter of Appeal of Oil Field Rock and Logistics, Docket No. OC-16-12 (FID 2506), Redstone, Montana, Case No. BER 2016-11 OC.

Mr. Haladay said motions and replies to motion to intervene have been submitted and fully briefed. He said the deadline for submitting proposed scheduling orders has been delayed to April 7 at the request of the parties.

II.A.1.f. In the matter of Appeal of Vanak Transportation, Docket No. SW-16-01, Toronto, Ontario, Case No. BER 2017-01 SW.

Mr. Haladay said the department had submitted a motion to dismiss and there was no response from Vanak. He said a show cause order would likely be the next step.

## II.A.2. Briefing Items – Non-Enforcement Contested Cases Assigned to a Hearing Examiner

II.A.2.a. In the matter of Phillips 66 Company’s appeal of Outfall 006 Arsenic Limits in Montana Pollution Discharge Elimination System Permit No. MT0000256, Billings, Yellowstone County, MT, BER 2014-05 WQ.

Mr. Haladay said the status of this matter remains unchanged – an order approving stipulation to stay the appeal is in effect and the parties have been ordered to adhere to the terms of the stipulation.

II.A.2.b. In the matter of LT Trucking, LLC, appeal Riverside Contracting Inc., Reclamation Bond Release Permit #2083, CVID#17280, BER 2016-04 OC.

Mr. Haladay said a scheduling order is in effect for this matter and discovery is ongoing.

II.A.2.c. In the matter of Heart K Land & Cattle Co.’s appeal of its final 401 Certification with conditions, BER 2015-05 WQ, application No. MT4010948; MWO-2013-00590-MTB-Addendum, issued by DEQ for the Yellowstone River, Park County, MT.

Mr. Haladay said the parties had submitted a proposed scheduling order and that it is in effect.

II.A.2.d. In the Matter of Westmoreland Resources, Inc.’s, BER 2015-06 WQ, appeal of final MPDES permit No. MT0021229 issued by DEQ for the Absaloka Mine in Hardin, Big Horn County, MT.

Mr. Haladay said he is still waiting for a status report within 30 days of any order issued by the Montana Supreme Court.

II.A.2.e. 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.

Mr. Haladay said a scheduling order is in effect for this case and that discovery is ongoing.

II.A.2.f. An appeal in the matter of amendment application AM3, Signal Peak Energy LLC’s Bull Mountain Coal Mine #1 Permit No. C1993017, case number BER 2016-07 SM.

Mr. Haladay explained that the department had filed a motion to compel discovery and to stay some deadlines regarding depositions for this matter, and that a response had not yet been received.

II.A.2.g. | In the matter of Appeal the Conditions of the Certification for Timbershor at Finley Point Wastewater subdivision rewrite Lake County E.Q. #15-1971, Lake County, Montana, Case No. BER 2016-10 SUB.

Mr. Haladay explained that the two motions to dismiss were converted into summary judgment motions due to the parties including matters outside of the record in their briefs. He noted that the summary judgment motions are fully briefed and awaiting disposition.

II.A.2.h. | In the matter of termination by DEQ of the application by Payne Logging, Inc., requesting to move boundaries of the Payne Logging facility in Libby, Lincoln County, Montana, Case No. BER 2015-08 JV.

Mr. Haladay said a scheduling order is in effect for this case and that parties are complying with it.

II.A.2.i. | In the matter of appeal Amendment AM4, Western Energy Company Rosebud Strip Mine Area B, Permit No. C1984003B, Case No. BER 2016-03 SM.

Mr. Haladay explained that there were now multiple motions regarding discovery in this matter: one is fully briefed, and the other is partially briefed.

### **II.A.3. Briefing Items – Contested Cases Not Assigned to a Hearing Examiner**

II.A.3.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.

Mr. North said the status of this has not changed: they are still waiting for the Judge's order on the motion for the attorney's fees, and the matter cannot proceed until that occurs.

### **II.B. Other Briefing Items**

II.B.1. | In the matter of the revocation of Montana Air Quality Permit No. MAQP #3039-02, issued to Eureka Pellet Mills (INC.), Superior, Mineral County, Case No. BER 2015-04 AQ.

Mr. Haladay noted that this case had been missing from the previous few agendas for an unknown reason. He said the parties had entered into a stipulation to dismiss the matter on January 30, and it would be dismissed under Rule 41.

Chairperson Miles requested a copy of the stipulation be included in the record for this meeting since it was missing from the Board packet.

### III.A. Action Items – New Contested Cases

- III.A.1. In the matter of appeal violations of the Opencut Mining Act by Wagoner Family Partnership, d/b/a Wagoner's Sand and Gravel, at River Gravel Pit, Flathead County, Montana (Opencut No. 1798; FID 2512), Case No. BER 2017-02 OC.
- Mr. Haladay said this case doesn't appear to be a substantive or complicated matter, and that he wasn't sure the Board would want to hold onto it.
- III.A.2. 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, Case No. BER 2017-03 WQ.
- Mr. Haladay explained that the appeal has to do with five sections of an MPDES permit approval, and that at least one of those items appears to have more substance to it. He also said at least one outside party was interested in intervening in the matter.
- III.A.3. In the matter of appeal Glacier Ranch Subdivision PWSID# MT0004700 Phase 4 Review of Public Water and Sewer Main extensions EQ#17-1391, Somers, Montana, Case No. BER 2017-04 SUB.
- Mr. Haladay said this case has to do with review of a water system and he recommended the Board assign the matter to a hearing examiner.
- III.A.1-3 Chairperson Miles called for a motion to assign all three new contested cases to a hearings examiner. Mr. Tweeten so MOVED. Dr. Byron SECONDED the motion. The motion CARRIED 4-0.

### III.B. Action Items – Final Action on Contested Cases

- III.B.1 In the matter of appeal of violations of the Opencut Mining Act by Big Rock, LLC, at Wheeler Gravel Pit, Missoula County, Montana, Case No. BER 2016-06 OC (Opencut No. 719; FID 2471).
- Mr. Haladay noted that the appellant, Big Rock, did not participate in any of the proceedings, the department moved to dismiss, and a show cause order was issued to which there was no response. He said because of this, he prepared a proposed findings of fact, conclusions of law, and order for the Board's consideration.
- Chairperson Miles called for a motion to adopt the hearing examiner's proposed findings of fact, conclusions of law, and proposed order. Dr. Byron so MOVED. Mr. Tweeten SECONDED the motion. The motion CARRIED 4-0.
- III.B.2. In the matter of Columbia Falls Aluminum Company's (CFAC) appeal of DEQ's modification of MPDES Permit No. MT0030066, Columbia Falls, Flathead County, Montana, Case No. BER 2014-06 WQ.
- Mr. Haladay explained that the Board's former attorney had held a four-day hearing on this matter and that said attorney had indicated his intention to still provide proposed findings of fact and conclusions of law. He noted that the parties were in agreement to

wait for the findings of fact and conclusions of law from the former Board attorney and recommended the Board table any decision with regard to the former Board attorney's unavailability at this time. He further suggested the parties be given opportunity to be heard regarding the matter.

The parties agreed that it would be premature at this time to transfer the case to another hearing examiner, as the previous one had indicated he had every intention of completing it.

After some discussion, Mr. Tweeten MOTIONED to relieve Mr. Reed of his responsibilities as hearing examiner for this case, and to substitute Mr. Haladay for procedural matters upon receipt of the proposed decision. Dr. Byron SECONDED the motion. The motion CARRIED 4-0.

Upon further discussion, Mr. Tweeten MOTIONED to table any further action on the question of unavailability of the Hearing Examiner. Dr. Byron SECONDED the motion. The motion CARRIED 4-0.

III.B.3. An appeal in the matter of Section 401 Water Quality Certification issued for DEQ Application No. MT4011012, the Clark Hydroelectric Project, Beaverhead County, Montana, Case No. BER 2016-08 WQ.

Mr. Haladay explained that this is really just a notice to the Board that the parties have stipulated to dismiss the matter, with prejudice.

Off Agenda Chairperson Miles requested the status of the proposed legislation that would eliminate the Board. Discussion took place regarding the matter and regarding the status of Board Member terms.

### III.C. Action Items – Repeal, Amendment, or Adoption of Final Rules

III.C.1. In the matter of amendment of water quality standards rules included in ARM 17.30, subchapters 5, 6, 7, and 10 pertaining to mixing zones, surface water quality standards, nondegradation, and groundwater standards as set forth in MAR Notice No. 17-389.

Ms. Steinmetz reminded the Board that it had initiated rulemaking for several water quality standards amendments December 9, 2016; that the changes included adoption by reference of an updated version of Circular DEQ-7; that a public hearing was held February 10; and that one comment was received regarding the referenced dose for pesticide Penoxaden. Ms. Steinmetz said the department recommends updating the standard for Penoxaden and adopting the rest of the amendments as initiated in December.

Mr. Tweeten MOTIONED to update the standard for Penoxaden and adopt the rest of the amendments as initiated in December. Dr. Byron SECONDED the motion. The motion CARRIED 4-0.

### III.D. Action Items – Initiation of Rulemaking

III.D.1. | In the matter of DEQ’s proposal for a new rule to implement 75-5-222(2), MCA.

Ms. Kelly said the department is requesting initiation of rulemaking to implement 75-5-222(2), MCA, and briefed the Board on the components of the proposed rule. She explained that proposal was achieved through a public stakeholder work group process. Ms. Kelly provided a PowerPoint presentation regarding the aspects of the rulemaking.

Ms. Kelly, Mr. Kenning, and Mr. North responded to questions from the Board. It was suggested that the department consider comments provided by the Board and perhaps discuss the results at the June meeting.

Mr. Fix suggested changes be made before the rule is final.

Ms. Lindlief-Hall concurred with Mr. Fix that changes should be made to the rule before it is finalized.

The Board concluded that it would take no action on this rulemaking so the department could address comments received and come back in June or a later date.

### IV. General Public Comment

| No general public comment was provided.

Chairperson Miles initiated a brief discussion regarding the required confirmation hearings for unconfirmed Board members. She thanked the Board attorney, the court reporter, and DEQ staff for their assistance throughout her tenure.

### V. Adjournment

| Chairperson Miles adjourned the meeting at 11:38 a.m.

Board of Environmental Review March 31, 2017, minutes approved:

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JOAN MILES  
CHAIRPERSON  
BOARD OF ENVIRONMENTAL REVIEW

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DATE