

BOARD OF ENVIRONMENTAL REVIEW
FRIDAY, AUGUST 7, 2020
METCALF BUILDING, ROOM 111
1520 EAST 6th 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 at 444-5270, or by e-mail at dsutliff@mt.gov, at least 24 hours before the meeting to advise her of the nature of the accommodation(s) needed.

9:00 AM

I. ADMINISTRATIVE ITEMS

A. REVIEW AND APPROVE MINUTES

1. The Board will vote on adopting the June 12, 2020, meeting minutes.

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 Judgment. That motion is fully briefed and awaiting decision.
 - ii. **District Court case:** On April 20, 2020, BER became aware of a Petition for Judicial Review, Cause No. DV 20-0445, filed in the Thirteenth Judicial District court by CR/REF. The Petition appeals, pursuant to § 2-4-701, MCA ("Immediate review of agency action"), Ms. Clerget's February 21, 2020 Order denying CR/REF's Motion to Sever the cases. The Board was named as a party in that action and has retained outside counsel, Amy Christensen, to

represent it. On May 15, 2020, the hearing assistant transmitted the administrative record to the District Court.

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.** This matter was stayed on February 10, 2020. As ordered, the parties filed a joint status report and proposed scheduling order on April 13, 2020. On April 20, 2020, Ms. Clerget issued an Amended Scheduling Order and the parties are proceeding accordingly, with discovery closing at the end of August.
 - b. **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 are proceeding according to the Amended Scheduling Order, with discovery closing at the beginning of August and dispositive motions due at the end of August.
 - c. **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, which was granted on July 29, 2020. The parties have until September 9, 2020 at which time the parties must file either a joint motion for dismissal, a joint motion for remand of the permit to DEQ, or a joint proposed schedule.
 - d. **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. An 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 issued 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 have cross-appealed the District Court's decision to the Supreme Court under Cause No. DA 19-0553. The matter is fully briefed at the Supreme Court and awaiting decision. The parties will have 30 days in which to file a status report with Ms. Clerget once the Supreme Court issues a decision.

- e. **In the Matter of the Application for an Amendment of a Major Facility Siting Act Certificate by Talen Montana LLC.** On May 17, 2019, Westmoreland Mining LLC and Westmoreland Rosebud Mining LLC filed a Notice of Contest with the Board. Sarah Clerget was appointed hearing examiner on May 22, 2019. On May 15, 2020, the parties indicated that they had reached an agreement on a path forward that did not require a completed case management schedule. Ms. Clerget ordered the parties to file a status report by July 1, 2020 indicating whether they have reached a final settlement in this case. On July 1, Talen gave notice "that the parties have not reached a settlement resolving this contested case hearing and that Talen will relinquish the MFSa certificate amendments challenged in this proceeding..." The parties will complete the relinquishment by August 31, 2020 and move to dismiss this proceeding on or before September 30, 2020.
- f. **In the Matter of the Notice of Appeal and Request for Hearing by Spring Creek Coal, LLC Regarding Issuance of MPDES Permit No. MT0024619.** 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.
- g. **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. On December 13, 2019, the Board issued an Order for Final Agency Decision adopting the Stipulation of Appeal Issues Nos. 3, 4, 6, 7, and partially No. 5. Ms. Clerget conducted scheduling conferences in

January and March and subsequently issued Orders continuing a stay in this case due to rulemaking regarding arsenic that has the potential to affect the remaining issues in the case. Ms. Clerget conducted a status conference with the parties on April 24, 2020 and subsequently issued an Order continuing the stay and setting a scheduling conference for September 4, 2020.

- h. **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 (CHS) for scheduling purposes, and therefore update on this case is the same as above.
- i. **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:** The parties took a subpoena dispute to the District Court on June 1, 2018 with Cause No. DV 18-0869. The BER was named as a Defendant in that District Court case, and Ms. Clerget filed a "Notice of Non-Participation" before the District Court on behalf of the BER. The District Court issued a ruling on the subpoena issue on November 14, 2018 and attorney's fees on March 25, 2019. On May 22, 2019 Signal Peak appealed to the Montana Supreme Court in Cause No. DA 19-0299. Opening briefs were filed September 20, 2019. The BER has retained Amy Christensen to represent it before the Supreme Court.
 - ii. **Contested Case:** The parties have completed all prehearing exchanges and filings, and all had filed Motions *in Limine*. On July 29, 2020, Ms. Clerget issued an Order on the parties Motions *in Limine*. The parties will participate in a prehearing conference on August 11, 2020 and the hearing in this matter will start on August 18, 2020 and expected to last two days.
- j. **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. On May 26, 2020, DEQ filed a

Motion to Dismiss, which was fully briefed on June 9, 2020. On June 10, Petitioners filed a Notice that they were seeking a Declaratory Ruling from DNRC. On June 10th, Ms. Clerget ordered the parties to indicate whether they wanted a stay pending DNRC's ruling. The parties disagreed about whether a stay was necessary and on June 26, 2020, Ms. Clerget issued an order that the matter would proceed as scheduled through the dispositive motions deadline. On July 20, 2020, Ms. Clerget issued an Order denying DEQ's Motion to Dismiss. The same day, DEQ filed a Motion for Clarification, and Ms. Clerget issued an Order of Clarification. No dispositive motions were filed by the dispositive motions deadline of June 30, 2020. Discovery closes on August 5, 2020. A scheduling conference is being set to discuss moving this matter to hearing.

- k. **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 last meeting, it voted to assign the case in its entirety to Ms. Clerget. The parties have cross moved for partial summary judgment, and the Motions are fully briefed, a decision will be issued shortly.

- l. **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).** On June 6, 2019, the BER issued its final agency action in BER 2016-03 SW ("Western Energy"). On July 3, 2019 Conservation Groups filed a Petition for Review of Final Agency Action. The BER is named as a Defendant in the Petition. The BER has retained Amy Christensen to represent it in this matter at the District Court. On March 12, 2020, the Court issued an Order denying the Board's Motion to Dismiss.

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.**

The permit appeal is stayed pending judicial review. On September 10, 2019, the Montana Supreme Court issued its opinion reversing the First Judicial District Court in Montana Environmental Information Center and Sierra Club v. Montana DEQ and Western Energy Company. The Montana Supreme Court reversed the District Court on decisions of law and determined that DEQ properly interpreted rules implementing the Montana Water Quality Act (specifically ARM 17.30.637(4)). In so doing, the Court recognized that DEQ has the flexibility to exempt ephemeral

waters from the water quality standards applicable to Class C-3 waters without the Board of Environmental Review reclassifying the waters. The Court also determined that DEQ lawfully permitted representative sampling of outfalls under Western Energy Company's MPDES permit. The Montana Supreme Court remanded the case back to District Court for further proceedings to determine certain issues of material fact, specifically whether DEQ acted properly in regard to a stretch of East Fork Armells Creek that is potentially impaired and intermittent, whether it is necessary for DEQ to adopt a TMDL for impaired segments of East Fork Armells Creek, and whether the representative monitoring selected by DEQ is factually supported. Judge Reynolds assumed jurisdiction of the case and the parties are proceeding in accordance with his scheduling order.

III. ACTION ITEMS

A. ADOPT FINAL RULES

1. The Department requests the board adopt NEW RULE I.

At the board's April 17, 2020 meeting, the department requested initiation on nonanthropogenic arsenic standards for certain segments of the Yellowstone River. The public comment period and hearing have been completed and the board and department have responded to the comments on the rule. The department requests that the board adopt New Rule I as proposed.

2. The Department requests that the Board initiate rulemaking to:

Establish a fee structure to adequately fund the implementation of the air quality portable registration program that was adopted by the Board in 2019.

3. Initiation of Rule Making

The Department would like to request a supplemental Board meeting to be held in late September to request initiation of rule-making for selenium water quality standards for Lake Kookanus and the Kootenai River.

B. NEW CONTESTED CASE

1. In the Matter of the Notice of Appeal by the Mr. Duane Murray, BER 2020-01, SUB-18-01.

On November 8, 2019 the BER received a request for hearing.

C. OUTSIDE COUNSEL

The Board will discuss the cost of outside counsel, and decide how to proceed utilizing outside counsel in the future on current District and Supreme Court actions.

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