

**BOARD OF ENVIRONMENTAL REVIEW
October 8, 2021 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. 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 DEQBERSecretary@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 August 13, 2021 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. **District Court Case:** This matter is before the District Court on judicial review following an intermediate agency ruling. DEQ began separate enforcement actions against Copper Ridge Development Corp. and Reflections at Copper Ridge, LLC, for violations of the Montana Water Quality Act. The enforcement actions were followed by separate administrative appeals. The cases were consolidated before a hearing examiner at Petitioners' request. Following an evidentiary ruling that would allow for the admission of certain photographs, Petitioners moved to separate the cases again because the evidence to be admitted pertained to only one Petitioner. The motion was denied. The hearing examiner also denied Petitioners' subsequent motion in limine. Petitioners then filed a petition for judicial review of the hearing examiner's intermediate rulings and named the BER and DEQ as Respondents. BER filed a motion to dismiss on the grounds that BER should not have been named in the petition since it was not a party to the underlying contested case hearing. The motion was briefed and argued on October 7, 2020. On March 17, 2021, Judge Harada

denied BER's motion to dismiss. She determined that while BER is not a required party, it may be named as a party on judicial review. She has not yet issued a decision on the underlying petition for judicial review.

- b. **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. At its December 2020 meeting, the Board assigned this case to former Hearing Examiner Sarah Clerget. The parties filed a Joint Motion for Stay on January 12, 2021 which was granted the same day. On January 20, 2021, Hearing Examiner Jeffrey Doud took responsibility for this matter as a hearing officer. The parties filed a Joint Status Report on March 12, 2021 indicating that they are working toward settlement. The parties then, filed a second motion to extend the stay of the proceedings, seeking to extend the stay for 45-days. On May 28, 2021, the parties filed a joint scheduling order that Hearing Examiner Doud granted on June 1, 2021. The parties recently filed a joint motion to extend the deadlines for filing of expert disclosures and exhibit lists. In that Motion, the parties reiterated their position that they were working towards a resolution of this matter. On August 16, 2021, the Hearing Examiner Doud issued an order of dismissal and this matter is now fully resolved.
 - c. **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 SUB.** At its April 2021 meeting, the Board remanded this matter back to Hearing Examiner Lindsey Simon for further proceedings. On May 17, 2021, Hearing Examiner Simon issued an Order on Remand setting the remaining procedural deadlines in this case. On May 28, 2021, DEQ filed a "Motion to Amend the Scheduling Order and to Reopen Discovery for a Limited Purpose." On June 1, 2021, William Holahan took responsibility of this matter as a hearing examiner and on June 4, 2021 issued an Order granting DEQ's Motion to Amend. Hearing Examiner Holahan also issued an Amended Scheduling Order that same day. Discovery closed on August 3, 2021. On August 25, 2021, DEQ filed another unopposed motion to amend the scheduling order; The Hearing Examiner granted the motion and issued a new schedule. On September 13, 2021, Aislinn Brown took responsibility of this matter as a hearing examiner. On September 29, 2021, DEQ filed a motion for summary judgment. Mr. Murray's response is due October 20.
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 October 9, 2020 meeting it voted to adopt the parties Stipulation and Request for Retention of Board Jurisdiction. On May 3, 2021, the parties filed an update with Hearing Examiner Lindsey Simon stating that pursuant to the Stipulation, Alpine had submitted the monitoring well plan to DEQ, that DEQ has approved the monitoring well installation plan, and that the monitoring well has been installed. On June 11, 2021, William Holahan took responsibility for this matter as a hearing examiner. On August 2, 2021, the parties filed a Joint Status Report with the Hearing Examiner. Alpine Pacific Utilities has not exercised its discretion under the Stipulation that would trigger

reporting of additional activities at this time to the Board. The Board retains jurisdiction in the case that the stipulated terms are not implemented and approved by DEQ. Status reports are due every three months. The Board's jurisdiction extends at the latest to July, 2024.

- 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 former Hearing Examiner Sarah Clerget took responsibility for this matter as a hearing officer 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 filed a joint status report on June 30, 2021 stating that they continue to work through the settlement agreement provisions and update to the permit renewal information.
- c. **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 former Hearing Examiner Sarah Clerget 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. On January 21, 2021, Hearing Examiner Andrew Cziok took responsibility for this matter as a hearing officer of this contested case. The parties filed a Joint Motion for Remand of permit and Suspension of Proceedings on March 17, 2021. Hearing Examiner Cziok granted that Motion, and the parties filed a status report on June 30, 2021 stating DEQ had noticed the draft modification of permit to the public on June 14, 2021. The public was able to comment on the draft permit modification through July 15, 2021. DEQ will respond to the public comments.
- d. **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. Former Hearing Examiner Eckstein held Oral argument on DEQ's Partial Motion for Summary Judgment on February 11, 2021. Hearing Examiner Snowberger issued a "Notice of Substitution" on March 12, 2021. On April 12, 2021, Ms. Snowberger issued a Disclosure and Status Conference stating that she had a potential conflict and set a status conference for April 15,

2021. Ms. Snowberger issued a Notice of Recusal on May 13, 2021, and Hearing Examiner Caitlin Buzzas issued a Notice of Substitution that same day. On September 15, 2021, DEQ made a Motion to Strike the Appellants' Motion for partial summary judgment as untimely. On September 24, 2021, the Plaintiffs issued their Response. Hearing Examiner Buzzas is reviewing the Motion to Strike and will issue a decision on the Motion and subsequently on the Motion for Partial Summary Judgment as applicable by October 31, 2021.

- e. **In the Matter of Notice of Appeal and Request for Hearing by Western Energy Company Regarding Approval of Surface Mining Permit No. C2011003F, BER 2019-05 OC.** On May 31, 2019, the BER appointed former Hearing Examiner Sarah Clerget 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 proceed to a hearing on the one remaining issue. Former Hearing Examiner Clerget issued an Amended Scheduling Order on January 14, 2021. Hearing Examiner Jeffrey Doud took responsibility for this matter as a hearing officer as of January 20, 2021. A four-day hearing took place on June 2-4 and 21, 2021. The parties sought an extension of time to file their respective proposed finding of fact and conclusions of law which was granted. The parties are due to file their respective FOFCOLS on October 8, 2021 and their response briefs on November 12, 2021.

- f. **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).** In July 2019, MEIC and the Sierra Club filed a petition for judicial review of BER's decision to approve a permit to expand the Rosebud Mine. BER filed a motion to dismiss on the grounds that BER should not have been named in the petition since it was the deciding agency, not a party to the underlying contested case proceeding. Judge Bidegaray denied the motion on March 12, 2020. The Montana Supreme Court denied our petition for writ of supervisory control to have the Order reviewed before the case was fully decided by the District Court and remanded the case.

The petition for judicial review has been fully briefed, and the parties presented oral argument on December 16, 2020. Petitioners recently submitted supplemental authority, and the Respondents (other than BER) responded. The matter has been fully submitted, and we are just waiting for a decision from Judge Bidegary. Once a decision is issued, we will have an opportunity to appeal the Order requiring the BER to remain in the case and will need to discuss how to proceed at that time.

- g. **In the matter of the Notice of Appeal and Request for Hearing Regarding DEQ's Issuance of a Final Section 401 Water Quality Certification #MT4011079 to Transcanada Keystone Pipeline LP for the Keystone XL Pipeline Project, BER 2021-01 WQ.** On January 4, 2021, the Northern Plains Resource Council and Sierra Club filed a "Notice of Appeal and Request for

Hearing.” At its February 2021 meeting the Board appointed Agency Legal Services as Hearing Examiner of this contested case. Katherine Orr was assigned as Hearing Examiner of this matter and on March 9, 2021, she issued an Order to Set Scheduling Conference. The scheduling conference was held on March 15, 2021, and the parties agreed to stay this matter until further indication the case should go forward pursuant to decisions made by the Federal government regarding the Keystone XL Pipeline Project. A Status Conference was held on April 20, 2021, with both parties being represented by counsel. Parties agreed to continue the stay of this matter and set another Status Conference for July 12, 2021. A status conference was held on July 12, 2021, wherein the parties agreed to continue the stay and set another Status Conference for September 10, 2021. The parties discussed that recent decisions made by the Army Corp of Engineers would likely make this matter moot. This case was dismissed on August 26, 2021.

- h. In the Matter Indigenous Environmental Network’s and North Coast Rivers Alliance’s Appeal of the Montana Department of Environmental Quality’s Final Determination to Issue a 401 Water Quality Certification for the Keystone XL Pipeline, DEQ Application No. MT4011079, BER 2021-02 WQ.** On February 1, 2021, the Indigenous Environmental Network and North Coast Rivers Alliance filed a “Notice of Appeal and Request for Hearing.” At its February 2021 meeting the Board appointed Agency Legal Services as Hearing Examiner of this contested case. Katherine Orr was assigned as Hearing Examiner of this matter and on March 9, 2021, she issued an Order to Set Scheduling Conference. The scheduling conference was held on March 15, 2021, and the parties agreed to stay this matter until further indication the case should go forward pursuant to decisions made by the Federal government regarding the Keystone XL Pipeline Project. A Status Conference has been was held on April 20, 2021, with both parties being represented by counsel. Parties agreed to continue the stay of this matter and set another Status Conference for July 12, 2021. A Status Conference was held on July 12, 2021, wherein the parties agreed to continue the stay and set another Status Conference for September 10, 2021. The parties discussed that recent decisions made by the Army Corp of Engineers would likely make this matter moot. This case was dismissed on September 14, 2021.
- i. In the Matter of Contest and Request for Hearing by Talen Montana, LLC Regarding the Selection of a Remedy and Setting of Financial Assurance for the Colstrip Steam Electric Station Units 1 & 2 by the Montana Department of Environmental Quality, BER 2020-07 MFSA/WQA.** On December 17, 2020, Talen Montana LLC filed a Request for Hearing and Protective Notice of Contest. The parties requested the proceeding be stayed pending completion of dispute resolution. That request was granted by former Board Chair Deveny on December 18, 2020. Katherine Orr was assigned as Hearing Examiner for this matter and issued an Order to Set Scheduling Conference on March 9, 2021. The parties filed a Joint Request to Continue Stay of BER Proceedings on March 18, 2021. Ms. Orr signed an Order Continuing Stay and Delaying Scheduling Conference Until Expiration of Stay Order on March 19, 2021. This matter will be stayed until DEQ Director’s final decision following dispute resolution. This matter continues to be stayed pending DEQ Director’s final decision.

- j. **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. At its December meeting, the Board assigned this matter to former Hearing Examiner Clerget. Ms. Clerget issued a Prehearing Order on January 4, 2021. Hearing Examiner Andrew Cziok took responsibility for this matter as a hearing officer on January 21, 2021. Mr. Cziok issued a Scheduling Order on March 16, 2021. On June 28, 2021, Western Sugar Cooperative filed a Motion for Declaratory Ruling. The motion was denied on August 24, 2021. Western Sugar Cooperative refiled its motion as a motion for summary judgment and the matter should be fully briefed in the middle of October 2021.
 - k. **In the matter of the notice of appeal and request for hearing by Westmoreland And Rosebud Mining LLC regarding issuance of MPDES Permit No. MT 0023965 (BER 2021 -05 WQ).** Westmoreland Rosebud Mining LLC appealed the issuance of MPDES Permit MT 0023965. The Appeal is limited to the electrical conductivity effluent limitation for discharges into Lee Coulee. Hearing Examiner Drew Cziok has been assigned as hearing examiner in this case.
 - l. **In the matter of: Notice of Appeal and Request for Hearing by Oreo's Refining Regarding Solid Waste License Expiration (License #574).** On August 28, 2021, the Board issued Prehearing Order requesting that the parties attempt settlement of the appeal by September 9, 2021. On September 10, 2021 the parties filed a Joint Status Report and Unopposed Motion for Stay of Proceedings. The Board Chairman has signed an Order granting a continuance until October 12, 2021 for the parties to attempt to reach settlement.
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.** This matter has been stayed pending resolution of Montana Environmental Information Center and Sierra Club v. Montana DEQ and Western Energy Company (now on remand to the First Judicial District Court as Cause No. CDV 2012-1075). On September 10, 2019, the Montana Supreme Court reversed the First Judicial 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)). The Court recognized that DEQ has the flexibility to exempt ephemeral waters from certain water quality standards applicable to Class C-3 waters without BER 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 the District Court for further proceedings to determine certain issues of material fact, specifically whether DEQ acted properly regarding 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. On July 6, 2021, First Judicial District Court Judge Abbott granted DEQ's and Westmoreland Rosebud Mining, LLC's (formerly WECO) joint motion to stay the litigation due

to the fact that a renewed version of MT0023965 took effect on August 1, 2021. The District Court will hold a status conference in the case of November 4, 2021 to consider a pending motion to dismiss.

III. ACTION ITEMS

1. **An appeal in the matter of amendment application AM3, Signal Peak Energy LLC's Bull Mountain Coal Mine #1 Permit No. C1993017, BER 2016-07 SM.** On August 18-21, 2020, the parties participated in a contested case hearing. The parties filed their Proposed Findings of Fact and Conclusions of Law on December 18, 2020. As of March 31, 2021, Hearing officer Caitlin Buzzas has taken responsibility for this matter. On May 27, 2021, Signal Peak filed a Motion for the Board to Reclaim Jurisdiction. Ms. Buzzas denied the Motion on July 30, 2021. She issued proposed findings of fact and conclusions of law on July 30, 2021. An Order was issued by Ms. Buzzas noticing the parties that they could file exceptions. The Board will hear oral argument on the exceptions and it will decide to adopt, deny or amend the proposed findings of fact and conclusions of law in this meeting.

IV. NEW CONTESTED CASES

1. **In the matter of Sidney Sugars Incorporated Appeal of Montana Pollutant Discharge Elimination System Permit No. MT0000248, BER 2021-07 WQ.** Pursuant to Mont.. Admin. R.17.30.1370(f), Sidney Sugars Incorporated, SSI ,is appealing portions of Montana MPDES Renewal Permit No. MT 0000248 issued by DEQ to SSI on August 31, 2021 and is requesting a hearing. SSI is requesting the Board to reverse or modify appealed portions of the Renewal Permit.

V. RULE REVIEW

1. **In the matter of adoption of new rule I pertaining to selenium standards for Lake Kooconusa, BER 2021-04 WQ.** On June 30, 2021 and July 1, 2021, the Board received a request from Teck Coal Limited for the Board to review Montana Administrative Rule 17.30.632 to determine whether it is more stringent than the comparable federal guideline in violation of the Montana Water Quality Act. The Board issued a Public Notice on August 27, 2021 inviting comment on the process to evaluate the stringency of the rule. Comments were due on September 24, 2021. The Public Notice also invited response to the comments suggesting a process by September 28, 2021. The Board will analyze the comments and responses to comments in this meeting.

VI. BOARD COUNSEL UPDATE

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

VII. 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.

VIII. ADJOURNMENT