

**BOARD OF ENVIRONMENTAL REVIEW
December 10, 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 October 8 and October 29 meeting minutes.

Public Comment.

- B. Progress of the study to determine bases if any to reduce time to process appeals before the Board.**

Public Comment

- C. The Board will determine the schedule of its meetings in 2022.**

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 the notice of appeal by Duane Murray regarding the notice of violations and administrative compliance and penalty order (Docket No. SUB-18-01; ES#36-93-L1-78; FID 2568), BER 2020-01 OC.**

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. Dispositive motions were due September 29, 2021; if no such motions were filed, the parties would propose dates for an evidentiary hearing by October 13, 2021. On September 13, 2021, Aislinn Brown took responsibility of this matter as a hearing examiner. On September 30, 2021, DEQ filed a motion for summary judgment. Mr. Murray did not respond by the deadline of October 21. On November 30, 2021, the Hearing Examiner ordered oral argument on the limited question of how to interpret the Certificate of Subdivision Plat Approval, to take place on December 9 at 9am.

- c. **In the Matter of Sidney Sugars Incorporated Appeal of Montana Pollutant Discharge Elimination System Permit No. MT0000248, BER 2021-07 WQ**

On September 30, 2021, Sidney Sugars Incorporated filed a Notice of Appeal concerning appeal of portions of MPDES Renewal Permit. No. MT 0000248 which was issued by DEQ to Sidney Sugars Incorporated on August 31, 2021. On October 8, 2021, the Board assigned this case to ALS. This case has been assigned to Aislinn Brown who will be conducting a conference with the parties to establish a schedule for pre-hearing and hearing matters. On November 30, 2021, the Hearing Examiner issued a prehearing order to the parties.

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. The parties submitted a joint status report to Hearing Officer Doud on November 1, 2021, advising of the progress they have made in this matter.

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. ALS was assigned as Hearing Examiner. 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 ALS 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 August 26, 2021, Appellants' issued Notice of Issue and Motion for Summary Judgment. On September 15, 2021, DEQ made a Motion to Strike the Appellants' Motion for summary judgment as untimely and requested that if motion is denied, that the Hearing Examiner set a briefing schedule for responses and reply. On September 24, 2021, the Plaintiffs issued their Response. On November 10, 2021, a scheduling conference was held with the parties. An Order was issued giving DEQ until January 18, 2022, to file their response and Appellants have until January 25, 2022, to file their reply.

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 ALS 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 ALS. The parties cross moved for partial summary judgment, and Westmoreland also filed a Motion to Dismiss. On November 24, 2020, former Hearing Officer 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 proceeded 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 were due to file their respective FOFCOLS on October 8, 2021, and their response briefs on November 12, 2021. Thereafter, DEQ sought an 80-day extension to file their response brief following Mr. Lucas' withdrawal from the matter and assignment of a new DEQ attorney. Petitioners opposed the extension. Hearing Examiner Doud granted DEQ's request for an extension. The parties' response briefs are now due on January 31, 2022.

- f. **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. The Board assigned this matter to ALS as Hearing Examiner. 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. The parties filed a Joint Status Report on October 28, 2021, in which they indicated that on October 18, 2021, the parties reached a settlement agreement that was signed by the MDEQ Director and a representative for Talen Montana. The Parties deemed the dispute resolution complete and the matters underlying Talen Montana's Notice of Contest resolved. The parties filed a Stipulation for Dismissal without an order pursuant to Rule 41 (a)(1)(A)(ii), M.R.C.P., on November 8, 2021.

- g. **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 ALS as Hearing Examiner and former Hearing Officer Clerget was assigned. 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 DEQ filed its response brief. DEQ requested a hearing on the motion for summary judgment. An oral argument was held on November 9, 2021. The Hearing Examiner issued an order seeking proposed orders on the motion for summary judgment to be filed by December 17, 2021.

3. Contested Cases not assigned to a Hearing Examiner

- a. **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 took 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. The proposed findings of fact and conclusions of law were provided to the Board for action at its August 13, 2021, meeting thereby placing responsibility

on the Board to render a final decision after exceptions were filed. The parties filed their exceptions and responses to exceptions. On October 25, 2021, DEQ filed a Motion for Clarification and Request for Stay of Oral Argument pending Appearance of successor counsel. On November 11, 2021, MEIC responded to DEQ's Motion and stated it does not oppose DEQ's request to set the date for oral argument on exceptions before the Board. The Board under Chair Ruffatto's signature issued an Order dated November 23, 2021, in which oral argument on the exceptions and responses to exceptions will be held at the first regularly scheduled Board meeting of 2022.

b. 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 was fully submitted, and Judge Bidegaray issued a decision in favor of MEIC. Since then, DEQ and the intervenors (mining companies) have asked for some clarification on the Order and a stay pending appeal to the Montana Supreme Court. If a judgement is entered and appeals are begun, the Board will need to decide whether to appeal denial of its motion to dismiss it as a party to the case.

III. ACTION ITEMS

a. 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. On November 3, 2021, the parties filed a Joint Status Report and reported that they cannot reach a settlement. They are requesting this matter move forward with the contested case procedures under Title 2, chapter 4, part 6, MCA. The Board may determine to hear the case itself or to assign a hearing examiner for all or a portion of the case.

b. 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. On or before August 15, 2021, the parties are to either move to dismiss First Judicial District Court Cause No. CDV 2012-1075 or move for a status conference to determine future proceeding in the case. On November 10, 2021, the parties jointly filed an unopposed motion to dismiss with the Board.

- c. **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. The Board assigned this matter in its entirety to ALS as Hearing Examiner. Hearing Examiner Drew Cziok has been assigned as hearing examiner in this case. The parties filed a Stipulation for Final Agency Decision on November 23, 2021 together with a Proposed Board Order for Final Agency Decision.

IV. RULE REVIEW

- a. **In the Matter of Adoption of New Rule I pertaining to Selenium Standards for Lake Koochanusa, 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 analyzed the comments and responses to comments at the special meeting on October 29, 2021. On October 29, 2021, the Board determined that a scheduling notice would be issued for submission of public comments and that the

review will not be in a contested case format. On November 23, 2021, the scheduling notice was posted on the Board website. The record on the rule proceedings from 2020 will be posted on December 15, 2021.

V. BOARD COUNSEL UPDATE

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

VI. 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.

VII. ADJOURNMENT