

BOARD OF ENVIRONMENTAL REVIEW
AUGUST 13, 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 June 11, 2021, meeting minutes.

Public Comment.

B. The Board will address the prohibition against *ex parte* contacts with the Board.

C. The Board will address a study to be assigned and conducted to determine how to reduce the time to process appeals to the Board including informal disposition, mediation, clarifying the scope of delegation including instances when review by the Board, if a case has been delegated to a hearing officer, may be referred to the Board in an interlocutory matter or when remand is appropriate.

D. The Board will address potential adoption of a policy regarding which underlying documents must be submitted in addition to or with an appeal such as the documents triggering the appeal in order for the Board to determine how to delegate the case or retain it.

E. The Board will address the delegation of authority to Agency Legal Services and Hearing Examiners within it that has occurred and may occur going forward.

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. In the interim, the remainder of the case that was pending before the BER was dismissed, and DEQ has not appealed. As such, even if Petitioners were to prevail in District Court, there is no case before BER to which the matter could be remanded. DEQ is currently trying to determine if Petitioners will dismiss the District Court case for that reason.

- 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.
- 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 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 will close in early August 2021 and the parties may file dispositive motions by the end of August.

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 Hearing Examiner William Holahan. 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 by the terms of the Stipulation.
 - 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 notice 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 within 45 days and issue a final administrative decision on the modified permit.

- 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. Hearing Examiner Buzzas is reviewing the file and will issue a decision on DEQ's Motion for Partial Summary Judgment by October 1, 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 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 are to file their proposed findings of fact and conclusions of law in September with responses due in October, 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 BER's 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 Notice of Appeal by Signal Peak Energy LLC, Regarding Purporting to Rule on An Alleged Impairment of Water Rights Permit No. C1993017, Roundup, Musselshell County, MT, BER 2020-04 SM.** On October 9, 2020, the BER appointed former Hearing Examiner Sarah Clerget to preside over this contest case hearing. On November 10, 2020, Ms. Clerget issued a Prehearing Order. The parties filed a Stipulation to Stay Proceedings on November 13, 2020. Ms. Clerget stayed the proceedings on November 20, 2020. Hearing Examiner Andrew Cziok took responsibility for this matter as a hearing officer on January 21, 2021. On February 11, 2021, the parties filed a Stipulated Motion to Extend Stay of Proceedings Pending Settlement Negotiations. Mr. Cziok issued an Order granting the stay on February 12, 2021. The parties filed a Joint Stipulation for Dismissal on May 14, 2021. On May 27, 2021, Hearing Examiner Cziok issued an Order dismissing this case without prejudice pending the District Court's final disposition of the SPE District Court Appeal and final resolution of any appeals from the District Court's final disposition.
- h. **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. A stipulation for Dismissal has ben filed and the Hearing Examiner will issue an Order of Dismissal upon request of the parties.
- i. **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.

- j. **In the Matter of Notice of Appeal and Request for Hearing Regarding DEQ's Approval of Riverside Contracting, Inc.'s Opencut Mining Permit #3234 (Arrow Creek Site), BER 2020-08 OC.** On December 23, 2020, Appellants 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. On March 12, 2021, Hearing Examiner Cziok issued a Prehearing Order to the parties. Riverside Contracting filed a Petition to Intervene on March 25, 2021. DEQ and the Appellants filed a Joint Proposed Schedule on March 26, 2021, the Petition to Intervene and the Proposed Schedule were granted on April 1, 2021. The parties were proceeding according to the Scheduling Order with discovery closing December 2021. A stipulation for Dismissal Under Rule 41(a)(1)(A)(ii) stipulating to dismiss without an order has been filed.
 - k. **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.
 - l. **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 Department of Environmental Quality requested an extension of time in which to respond to the Motion, which was granted. The matter should be fully briefed in the beginning of August upon submission of a reply brief at which time Mr. Cziok will rule on the Motion.
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. 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.

- b. **In the matter of the request for appeal and hearing of the permit revocation order for the Lucy Sandbox Gravel Pit (Permit # 2328, Lucy's Sandbox Gravel Pit, Richland County, MT), BER 2021-03 OC.** On May 17, 2021, the Board received a request for hearing. The case was presented as a new contested, which came before the Board at its June 11, 2021 meeting. The board tabled the matter pending further information from the Appellant. On August 6, 2021, DEQ and the Appellant filed a Joint Stipulation for Dismissal under Mont. R. Civ. 41(a)(1)(A)(ii) requesting dismissal without an order. This matter is dismissed pursuant to the Parties' stipulation.

III. ACTION ITEMS

1. **In the Matter of the Notice of Appeal and Request for Hearing by City of Great Falls Regarding Issuance of MPDES Permit No. MT0021920, BER 2019-07 WQ.** On November 25, 2020, DEQ and the City of Great Falls filed a "Stipulation for Final Agency Decision". At its December 2020 meeting, the Board approved the Stipulation and on January 5, 2021 issued a "Board Order for Final Agency Decision" resolving appeal issues No. 1, 3, 4, and 5. The parties continued to update Hearing Examiner Doud and on June 14, 2021 filed a "Stipulation for Final Agency Decision" resolving appeal issue No. 2. The Board can decide to either accept or reject the stipulation.

2. **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 the contested case hearing. The parties filed their Proposed Findings of Fact and Conclusions of Law on December 18, 2020. On January 21, 2021, Hearing Examiner Andrew Cziok took responsibility

for this matter as a hearing officer of this contested case. As of March 31, 2021, Hearing Examiner Caitlin Buzzas has taken responsibility for this matter as a hearing officer. On May 27, 2021, Signal Peak filed a Motion for Board to Reclaim Jurisdiction. Ms. Buzzas issued an Order on Signal Peak's motion on July 30, 2021 and subsequently, her proposed findings of fact and conclusions of law on July 30, 2021. The parties may file exceptions which necessitate a final hearing by the Board on adoption, amendment or reversal of the Findings of Fact and Conclusions of Law at the Board's meeting on October 8, 2021. Signal Peak has requested that this matter be put on the agenda for this meeting to consider its motion for the Board to reclaim jurisdiction.

3. **Review of Administrative Rule 17.30.632 pertaining to selenium standards for Lake Koochanusa.** On July 1, 2021, the Board received a request 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 can decide to assign review to a rule reviewer within Agency Legal Services Bureau or retain responsibility itself to review the rule and determine whether the rule is more stringent than comparable federal regulations or guidelines. If the Board retains responsibility, it will determine a process and timeframe for the rule review upon written comment by the affected parties to be submitted by October 8, 2021.

IV. NEW CONTESTED CASES

1. **In the matter of the notice of appeal and request for hearing by Westmoreland and Rosebud Mining LLC regarding issuance of MPDES Permit No. MT0023965, (BER 2021-05 WQ).** On July 8, 2021, the Board received a request for hearing. The Board can decide to assign a hearings examiner for procedural issues in this case, hear the case itself, or assign a hearing examiner for all or a portion of the case.
2. **In the matter of: Notice of Appeal and Request for Hearing by Oreo's Refining Regarding Solid Waste License Expiration (License #574).** On July 29, 2021, the Board received a request for hearing. The Board can decide to assign a hearings examiner for procedural issues in this case, hear the case itself, or assign to a hearing examiner for all or a portion of the case.

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