

**BOARD OF ENVIRONMENTAL REVIEW  
February 25, 2022, 9:00 AM  
DEQ ZOOM CONFERENCE**

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**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](mailto: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 the December 10, 2021, meeting minutes.

Public Comment.

**B. INFORMAL AND FORMAL PROCESS FOR HEARING APPEALS**

1. The Board will address the informal and formal processes for hearing appeals.

**C. VICE-CHAIR APPOINTMENT**

1. The Board will appoint a Vice-Chair.

**D. HEARING EXAMINERS**

1. The Board will discuss hearing examiners for the Board for future cases or to replace hearing examiners who have departed from ALSB.

**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 9 a.m. The Hearing Examiner heard oral argument, and DEQ submitted a post oral argument supplement on December 28, 2021, with exhibits. The Hearing Examiner is preparing a ruling on the Motion for Summary Judgment.

**c. 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 determined that this matter should be heard by a Hearing Examiner. Caitlin

Buzzas of ALSB has been assigned as the Hearing Examiner in this matter. The parties filed a Joint Proposed Scheduling Order, and a Scheduling Conference was held on February 14, 2022. A Scheduling Order is in place.

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 on November 1, 2021, advising of the progress they have made in this matter. This matter has been reassigned to Madison Mattioli as Hearing Examiner.

**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. On December 27, 2021, Petitioner Navajo Transitional Energy Company (“NTEC”) filed an Unopposed Motion for Voluntary Dismissal and a proposed Order. On December 28, 2021, the Hearing Examiner signed an Order Granting Motion to Dismiss.

**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. DEQ filed their response brief on January 18, 2022, and Appellants filed their reply brief on January 24, 2022. This matter is now being considered by the Hearing Examiner.

**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 and ordered the parties to file their response briefs on January 31, 2022. On December 17, 2021, DEQ filed a Motion for Stay Pending Appeal of the AM4 Decision to the Montana Supreme Court and a Brief in Support. MEIC filed a response to the Motion for Stay on January 2, 2022, and DEQ filed their reply brief on January 13, 2022. That same day, DEQ filed a Motion for Extension of Time to File Response Findings of Fact and Conclusions of Law to Allow Hearing Examiner to Rule on DEQ's Motion for Stay and a Notice of Issue for DEQ's Motion to Stay of the Area F Permit Appeal Pending Appeal of AM4 Decision. On January 20, 2022, Michelle Dietrich issued a Notice of Assumption by Hearing Examiner and ordered that a new deadline for submittal of Response Findings of Fact and Conclusions of Law will be extended to 45 days after the Hearing Examiner decides DEQ's Motion to Stay the appeal pending the appeal of the AM4 decision.

**f. 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. MT000281 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. The Parties filed their proposed orders on the motions for summary judgment on January 7, 2022. On February 8, 2022, the Hearing Examiner issued an Order Denying Western Sugar Cooperative's Motion for Summary Judgment. The Parties filed a Stipulated Amended Scheduling Order on February 15, 2022. This case will now continue forward to a hearing.

**g. 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. The Parties submitted a Stipulated Scheduling Order. On January 3, 2022, the Hearing Examiner issued a Scheduling Order.

3. Contested Cases not assigned to a Hearing Examiner

**III. ACTION ITEMS**

**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. On December 23, 2021, DEQ filed a Motion for and Brief in Support of Stay Pending Appeal of the AM4 Decision to the Montana Supreme Court with a supporting Affidavit of Travis Dunkle. On January 3, 2022, Chairman Ruffatto issued an Order Setting Oral Argument for February 25, 2022, the Board's next regularly scheduled meeting. On January 6, 2022, Jeremiah Langston filed a Notice of Appearance of Counsel on behalf of DEQ. Petitioners filed a Response to DEQ's Motion for Indefinite Stay on January 10, 2022, and a supporting exhibit. On January 20, 2022, DEQ filed its Reply Brief in Support of Motion for Stay. The Board will now hear oral argument regarding the stay by the parties and will determine whether to grant the stay during the Board meeting on February 25, 2022.

**b. In the Matter of Adoption of New Rule I pertaining to Selenium Standards for Lake Koocanusa, 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 on the process to be used 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 regarding the process of evaluation 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 was posted on December 15, 2021. Public comments on the stringency were filed and posted on January 2022 prior to the public meeting. The Public Comment meeting was held on January 31, 2022. Teck Coal, DEQ and MEIC and Earth Justice filed proposed decision documents February 11, 2022. The Board will deliberate on the comments, meeting transcript and filings and determine stringency issues.

**c. 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. On February 11, 2022, the Board secretary received three appeals to the Montana Supreme Court stemming from the judgment in this matter, two of which name the Board. The Board will make a determination whether to participate in the appeals. The Board's decision will be in executive session.

#### **IV. NEW CONTESTED CASE**

- a. **In the Matter of: Appeal and Request for Hearing by Montanore Minerals Corporation Regarding Issuance of MPDES Permit No. MT0030279, Libby Montana, BER 2022-01-WQ**

On January 28, 2022, Montanore Minerals Corporation filed a Notice of Appeal and Request for Hearing with exhibits regarding DEQ's denial of Montanore's permit renewal application for its MPDES permit. 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 the totality 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**