

BOARD OF ENVIRONMENTAL REVIEW
August 12, 2022, 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 the June 10, 2022, meeting minutes.

B. In Person Board Meetings.

1. The Board will discuss whether it should hold in person meetings.

C. Adoption of Rules for the Form of Exceptions to proposed FoFCoLs.

1. The Board will discuss the possibility of establishing such rules.

II. BRIEFING ITEMS

A. CONTESTED CASE UPDATES

1. Enforcement cases assigned to the Hearing Examiner

a. In the matter of Notice of Appeal and Request for Hearing by Oreo's Refining Regarding Solid Waste License Expiration (License #574) BER 2021-06 SWP.

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 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 requested 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. On May 23, 2022, Tal Goldin of Disability Rights of Montana filed a Limited Notice of Appearance of Counsel on behalf of

Licensee, Shelly Mitchell, and an unopposed motion and brief for the sole purpose of seeking an order from the Hearing Examiner granting her a reasonable accommodation for her disability pursuant to her right to effective communication. The parties filed a Joint Proposed Amended Scheduling Order on May 23, 2022. On May 25, 2022, the Hearing Examiner granted the motion for reasonable accommodation and issued the joint amended scheduling order. On July 7, 2022, DEQ filed a Motion for Summary Judgment and Brief in Support along with a Statement of Undisputed Facts. Also on July 7, 2022, Ms. Mitchell of Oreo's Refining filed a brief with corresponding exhibits. On July 28, 2022, DEQ filed a response to Oreo's Refining's brief and a Statement of Disputed Facts. The Hearing Examiner will review the briefing and issue a decision.

b. In the Matter of Luke Ployhar, for review of determination made by the Department of Environmental Quality on the Application for Exploration License #00860, BER 2022-03 HR.

On May 27, 2022, Luke Ployhar filed a request for review with respect to his Exploration License and DEQ's determination in its Final Environmental Assessment issued February 2, 2022. At the June 10, 2022, meeting, the Board assigned Michael Russell as the Hearing Examiner in this matter. An Initial Procedural Order was filed on July 22, 2022, and the parties have until August 31, 2022, to submit a proposed scheduling order.

2. Cases in Court

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.

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 issued a decision on the

underlying petition for judicial review. While the District Court case was pending, the case proceeded at the administrative level, and the BER issued a decision in May 2021, that has not been appealed. The case is just awaiting dismissal.

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. On October 27, 2021, Judge Bidegaray issued a decision in favor of the conservation groups. On January 28, 2022, the Court issued its Order on Remedy and vacated the permit, effective April 1, 2022. DEQ and the mine appealed to the Montana Supreme Court in three separate actions and filed motions requesting the vacatur be stayed pending the appeal. The Court stayed the vacatur until it could consider the motions, which are still pending.

On May 26, 2022, Ms. Christensen and Mr. Segrest filed a Notice of Appeal on behalf of the Board of Environmental Review. All appeals have now been consolidated into one case. Opening briefs for all parties are due on August 10, 2022.

3. Non-enforcement cases assigned to a Hearing 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 case 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 as of February 14, 2022. The parties filed a Joint Status Report on February 24, 2022. A Joint Status Report was filed on May 24, 2022.

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 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 had 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. A recommended decision has been drafted and the final recommended decision is expected by September 1, 2022.

d. In the Matter of Notice of Appeal and Request for Hearing by MEIC and Sierra Club Regarding Approval of Surface Mining Permit No. C2011003F for Western Energy Company, 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. On February 28, 2022, Petitioners filed a Notice of Supplemental Authority. DEQ filed a Clarification of MEIC's Notice of Supplemental Authority. On March 10, 2022, Patrick Risken filed a Notice of Assumption by Hearing Examiner and is preparing a decision on pending issues. On April 26, 2022, DEQ filed a Notice of Supplemental Authority with exhibit. Petitioners filed a Response to DEQ's Notice of Supplemental Authority on May 27, 2022. Michael Russell has taken over as Hearing Examiner and this matter has been stayed pending the outcome of the Montana Supreme Court's ruling regarding the AM4 decision. DEQ will provide a status report on or by September 30, 2022.

e. 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. 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. At its February 25, 2022, meeting, the Board assigned this case to Patrick Risken as Hearing Examiner. On March 10, 2022, Patrick Risken issued a Notice of Assumption by Hearing Examiner and a Stipulated Scheduling Order. On June 3, 2022, the parties filed a Joint Motion to Rescind the Scheduling Order. The Hearing Examiner granted the Motion to Rescind on June 7, 2022, suspending further action or filings until September 30, 2022, by which date the parties will file a revised stipulated scheduling order.

f. 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 conducted 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. On May 18, 2022, Sidney Sugars filed a Motion for Partial Summary Judgment with a Statement of Undisputed Facts and exhibits. The parties filed a Joint Motion for Second Amendment of Scheduling Order on May 23, 2022. The Hearing Examiner granted the motion and issued a Second Amended Scheduling Order on May 26, 2022, ordering that DEQ shall file their response brief on or before June 20, 2022, and Sidney Sugars shall file their reply brief on or before July 22, 2022. On June 16, 2022, DEQ filed an unopposed motion for a third amended scheduling order, which the Hearing Examiner granted, extending DEQ's deadline to respond to summary judgment to June 27, 2022, and Sidney Sugars' deadline to respond to July 29, 2022. On June 27, 2022, DEQ filed its brief in opposition of Sidney Sugars' motion for partial summary judgment. On July 25, 2022, Sidney Sugars filed an unopposed

motion for an extension to file its reply brief, which the Hearing Examiner granted. The brief is now due August 10, 2022.

g. 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. At the meeting on February 25, 2022, the Chairman recused himself and Vice-Chair, Stacy Aguirre, is presiding over this matter. The Board assigned this case to Rob Cameron. On March 9, 2022, DEQ filed a motion to dismiss based on lack of subject matter jurisdiction and standing. Montanore counsel filed its response to DEQ's motion to dismiss on March 24, 2022. DEQ filed its response brief on April 6, 2022. The Hearing Examiner issued a Prehearing Order on April 8, 2022. On May 13, 2022, the Hearing Examiner denied DEQ's motion to dismiss. On May 18, 2022, the Hearing Examiner issued a Stipulated Scheduling Order setting out the contested case deadlines, including a hearing to occur in early 2023. MEIC filed a Motion to Intervene in this matter on May 20, 2022. On June 3, 2022, Montanore Minerals filed a Response Opposing Proposed Intervenors' Motion to Intervene. MEIC filed a Reply in Support of Motion to Intervene on June 17, 2022, with exhibits. Montanore Minerals filed a Motion to Strike on July 1, 2022. MEIC filed a response to Montanore's Motion to Strike on July 18, 2022.

h. In the Matter of: Request for Hearing by Harry Richards, Lincoln County, MT, Case No. BER 2022-02 HW.

On March 22, 2022, BER received a Request for Hearing from Harry Richards. On June 1, 2022, the Hearing Examiner sent a letter to Mr. Richards requesting more information regarding Mr. Richards' complaint and what result or outcome is being sought. The Hearing Examiner again sent a letter to Mr. Richards on July 1, 2022, requesting additional information regarding his appeal and to date has not received a response.

III. ACTION ITEMS

a. Montana Environmental Information Center v. Montana Department of Environmental Quality, Montana Board of Environmental Review, and Signal Peak Energy, LLC, DV-56-2022-0000722-JR.

This was an appeal from DEQ's approval of Signal Peak Energy, LLC's amendment application AM3 to the Bull Mountains Coal Mine #1 Permit No. C1993017. The Board issued a final order on June 16, 2022, upholding DEQ's approval. On July 21, 2022, MEIC filed a Petition for Review of Final Agency Action in Yellowstone County District Court. MEIC included the Board as a named party. The Board will consider how it wishes to be involved in this judicial review action.

b. In the Matter of: Petitions of Teck Coal Limited and the Board of County Commissioners of Lincoln County, Montana, for Review of ARM 17.30.632(7)(A) Pursuant to Mont. Code Ann. Section 75-5-203 – Stringency Review of Rule Pertaining to Selenium Standard for Lake Koocanusa, BER 2021-04 and 08 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 and responses on the stringency review were filed and posted in 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 on February 11, 2022. At the February 25, 2022, meeting, the Board deliberated on the rule-making record, public comments, meeting transcript and other filed documents; heard oral argument by certain interested parties; and by motions voted on by the Board decided various issues presented by the petitions. On April 8, 2022, the Board conducted further deliberations and considered and approved, with certain amendments, a proposed decision. The Board issued a Final Agency Decision on April 19, 2022. DEQ filed a Motion to Alter or Amend on May 17, 2022. On May 31, 2022, the Board of County Commissioners of Lincoln County and Teck Coal filed responses to DEQ's motion to alter or amend the Final Agency Decision. On June 14, 2022, DEQ filed a reply brief to its motion to alter or amend. A Joint Notice and Motion to Submit Final Agency Action to EPA was filed by Lincoln County and Teck Coal on July 20, 2022. The joint motion is not ripe for decision.

The Board will consider DEQ's Motion to Alter or Amend the Board's Final Agency Decision.

IV. NEW CONTESTED CASE

a. In the Matter of: Appeal and Request for Hearing by Valley Garden Land & Cattle LLC Regarding Issuance of Opencut Mining Permit #674, Amendment #3, BER 2022-04 OC.

On June 22, 2022, Valley Garden Land and Cattle LLC filed a Notice of Appeal and Request for Hearing challenging the Montana Department of Environmental Quality's ("DEQ") issuance of an Amendment to Open Cut Mining Permit to A. M. Welles, Inc., for expansion of an existing pit (known as "DSL Site") on Montana State Trust Lands between McAllister and Ennis, Madison County, Montana. On June 27, 2022, Chairman Ruffatto issued an Order re Informal Procedures. On June 30, 2022, Plaintiff's requested an informal conference to discuss the informal/formal procedure options. DEQ also filed a request for an informal conference on July 14, 2022. An informal conference will be scheduled with the parties. The Board can decide to hear the case itself or assign a hearing examiner for some or the totality of the case.

b. In the Matter of: Appeal and Request for Hearing Regarding Rosebud Mine Area B Amendment 5 Permit Number C1984003B, BER 2022-05 SM.

On June 27, 2022, the Montana Environmental Information Center (MEIC) and Sierra Club filed a Notice of Appeal and Request for Hearing pursuant to Montana Code Annotated (MCA) § 82-4-206(1)-(2), and Administrative Rule of Montana (ARM) 17.24.425(1), regarding Montana Department of Environmental Quality's May 27, 2022, approval of the Area B Amendment 5 (AMS) for the Rosebud Strip Mine, in Colstrip, Montana. Chairman Ruffatto issued an Order re Informal Procedures to the parties on July 8, 2022. A Joint Motion for Informal Conference was filed on July 13, 2022. On July 28, 2022, Westmoreland Rosebud Mining, LLC and International Union of Operating Engineers, Local 400 filed a Motion to Intervene. An informal conference was held on July 28, 2022, wherein the parties discussed the possibility of informal procedures, but ultimately decided this matter should be contested formally. The Board can decide to hear the case itself or assign a hearing examiner for some or 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