

**BOARD OF ENVIRONMENTAL REVIEW  
August 11, 2023, 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 June 9, 2023, meeting minutes.

**II. BRIEFING ITEMS**

**A. CONTESTED CASE UPDATES**

**1. Cases in Court**

**a. 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 cases were consolidated, and the Court stayed the vacatur pending resolution of the appeals.

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. With briefing completed, oral argument was heard before the Montana Supreme Court on April 3, 2023, and a decision is pending.

**b. 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. Signal Peak Energy filed a Motion to Dismiss on August 12, 2022. At the August BER meeting the Board passed a motion to have Board counsel, Mike Russell, participate in the process as little as possible, but as appropriate preserving the Board's rights. On August 25, 2022, MEIC filed a response to the Motion to Dismiss. On September 8, 2022, Signal Peak filed a Reply in Support of the Motion to Dismiss, and filed a Notice of Submittal on September 13, 2022. On October 14, 2022, Board counsel filed a Motion to Dismiss and Brief in Support. On October 17, 2022, SPE filed a Motion for Clarification or Order on Motion to Dismiss. MEIC filed a Response to BER's Motion to Dismiss on October 31, 2022. Counsel for the Board filed a Reply in Support of Motion to Dismiss on November 16, 2022. On December 19, 2022, Signal Peak Energy filed a Motion for Judgment on the Pleadings, and MEIC filed their Response to SPE's Motion for Judgment on the Pleadings on January 27, 2023. Board counsel, Aislinn Brown, filed a Notice of Substitution of Counsel on January 31, 2023, replacing Michael Russell. On April 19, 2023, the Court issued an Order Staying BER's Motion to Dismiss in the interest of judicial economy pending the decision by the Montana Supreme Court in DA 22-0064, and ordered that BER shall remain a party to this judicial review process in the interim. The Court advised that BER may file a notice of non-participation. On May 2, 2023, Ms. Terisa Oomens filed a Notice of Appearance of Counsel and a Notice of Non-Participation on behalf of BER. A Scheduling Order was filed on May 12, 2023. Board Counsel will continue to monitor this matter as it proceeds forward.

**c. Montana Department of Environmental Quality v. Montana Board of Environmental Review, Teck Coal Limited, and the Board of County Commissioners of Lincoln County, Case No. CDV 2023-21.**

**Montana Environmental Information Center, Clark Fork Coalition, Idaho Conservation League, Idaho Rivers United v. Montana Board of Environmental Review, Teck Coal Limited, and The Board of County Commissioners of Lincoln County, Lewis and Clark County, Cause No. DV-23-0366.**

On January 9, 2023, DEQ filed a Petition for Judicial Review of the BER's Final Agency Action and Order (04/19/2022) and the BER's Order Denying DEQ's Motion to Alter or Amend (12/12/2022). The Petition pertains to the selenium standard for Lake Koocanusa. On March 28, 2023, the District Court granted the State's Unopposed Motion to Intervene. All Respondents, including the BER, filed answers to the Petition in March of 2023. The BER, the State, and Teck Coal also filed counterclaims. On May 9, 2023, DEQ filed a Motion to Dismiss the Respondents' counterclaims. The District Court issued a scheduling order on May 11, 2023, setting the completion of discovery for August 28, 2023; the

deadline for DEQ's Motion for Summary Judgment on November 3, 2023; and the deadline for Respondent's and Respondent-Intervenor's Responses and Cross Motions for Summary Judgment on December 8, 2023. On May 23, 2023, the BER, Teck Coal, and the State filed response briefs in opposition to DEQ's Motion to Dismiss. The DEQ filed its reply brief on June 6, 2023. The Motion to Dismiss is fully briefed and pending. The DEQ transmitted the Administrative Record on June 29, 2023.

On May 18, 2023, Montana Environmental Information Center, Clark Fork Coalition, Idaho Conservation League, and Idaho Rivers United filed a second lawsuit challenging the Board's Orders identified above. The Respondents, including the BER, answered the MEIC Complaint the week of July 17, 2023.

On June 9, 2023, the BER, Teck Coal, Lincoln County, and the State filed a Joint Motion to Consolidate Cases and For Scheduling Conference and/or Briefing on Record Issues, seeking to have the two lawsuits consolidated and a new case schedule. DEQ opposed that Motion and the Conservation Groups took no position. That Motion has been fully briefed and is awaiting a decision. On June 29, 2023, BER retained outside counsel, Dana Hupp of Worden Thane P.C., to represent it in these pending lawsuits. Ms. Hupp filed her notices of appearance the same day.

NOTE: Any legal advice from BER counsel regarding this matter will be given in a closed session.

## 2. Non-enforcement cases assigned to a Hearing Examiner

### a. **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. This matter has been stayed pending the outcome of the Montana Supreme Court's ruling regarding the AM4 decision. DEQ filed a Status Report on September 29, 2022, indicating there has been no change in the status of this matter. This matter was assigned to Rob Cameron as Hearing Examiner at the December 9, 2022, Board meeting. On March 24, 2023, DEQ filed a Status Report indicating the AM4 decision has been scheduled for oral argument before the Montana Supreme Court on April 3, 2023, and that the DEQ will continue to provide status updates commensurate with the Hearing Examiner's June 30, 2022, Order until a decision has been reached by the Montana Supreme Court. The AM4 matter is still pending decision by the Montana Supreme Court. On June 30, 2023, the DEQ filed a Status Report indicating there has been no change in the status of this matter and a decision is pending by the Montana Supreme Court.

**b. 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 was 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. On August 24, 2022, the parties filed a Joint Status Report. Matthew Dolphay filed a Notice of Withdrawal of Counsel on August 29, 2022. Alpine Pacific Utilities continues to be represented by Victoria Marquis. A Joint Status Report was filed on November 23, 2022, indicating that Alpine continues pursuing the requested information to cure the deficiencies in the permit application and anticipates submitting a deficiency response in the next three months. The parties filed a Joint Status Report on November 23, 2022. On February 27, 2023, the parties filed a Joint Status Report. On March 14, 2023, Hearing Examiner Oomens filed a Notice of Change in Hearing Examiner. On May 31, 2023, the Parties filed a Joint Status Report indicating that Alpine submitted an updated application and non-degradation analysis to DEQ on February 21, 2023, to meet the requirement in paragraph 20 of the Board's Order adopting the Stipulation; DEQ reviewed Alpine's updated application and non-degradation analysis; DEQ sent Alpine a fee deficiency letter on March 3, 2023, and DEQ received the full amount on March 14, 2023; DEQ sent Alpine a second deficiency notice pertaining to deficiencies in Alpine's updated permit application on April 7, 2023; on May 1, 2023, Alpine responded to the notice of deficiency; after further discussions, Alpine resubmitted the application on May 24, 2023; DEQ is currently reviewing the May 1 and 24, 2023 submittals. The next Joint Status Report is due on August 25, 2023.

**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. On January 19, 2023, Liz Leman issued a Notice of Assumption of Jurisdiction assuming duties as the Hearing Examiner in this matter. On January 19, 2023, the Appellants' filed their third and fourth Notices of Issue. DEQ attorney, Colson Williams filed a Notice of Substitution of counsel replacing Lee McKenna on January February 2, 2023. Hearing Examiner Leman issued an Order Regarding Motions on February 3, 2023. A scheduling conference occurred on February 15, 2023. On February 16, 2023, the Hearing Examiner issued a Scheduling Order. The parties exchanged supplemental discovery on or before March 29, 2023. On May 17, 2023, DEQ filed a Motion to Dismiss and Brief in Support. Both Appellants and DEQ filed their Witness and Exhibit List on May 18, 2023. A hearing in this matter was heard before Hearing Examiner Leman on June 19<sup>th</sup> and 20<sup>th</sup>. A decision is pending by the Hearing Examiner.

**d. 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. At the August 12, 2022, the Board passed a motion to appoint Mike Russell as the Hearing Examiner in this matter. A Stipulated Scheduling Order was filed by the parties on November 4, 2022, and was issued by the Hearing Examiner. This matter was assigned to Rob Cameron as Hearing Examiner during the December 9, 2022, Board meeting. Western

Sugar filed an Unopposed Motion to Amend Discovery Deadlines on December 16, 2022. On January 10, 2023, Hearing Examiner Cameron issued an Order Granting Motion to Amend Discovery Deadlines. On February 23, 2023, WSC filed a Motion to Amend the Scheduling Order. Hearing Examiner Cameron issued an Order Granting the Motion to Amend on the same day. A second Motion to Amend Scheduling Order was filed on May 26, 2023, by Western Sugar. On May 30, 2023, the Hearing Examiner issued an Order Granting Motion to Amend Scheduling Order. The parties are ordered to exchange witness lists on September 15, 2023; attend a prehearing conference during the week of October 16, 2023; and a hearing is set for November 13, 2023.

**e. 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. Sidney Sugars Inc., filed its Reply in Support of its Motion for Partial Summary Judgment on August 10, 2022. The Hearing Examiner advised the Board during the August 12, 2022, meeting that the motion for summary judgment was fully briefed. On August 31, 2022, DEQ filed a Request for Oral Argument. Oral argument was held on January 13, 2023. The parties were ordered to file their proposed findings of facts and conclusions of law by January 27, 2023, to which both parties complied. On February 10, 2023, the Hearing Examiner issued an Order Requesting Information to Sidney Sugars regarding plant closure. On February 24, 2023, Sidney Sugars filed its Response to the Hearing Examiner's Request for Status and Motion for Stay. Hearing Examiner Brown issued an Order Granting Motion for Stay on February 28, 2023. SSI filed a Status Report on May 23, 2023, indicating that SSI is still unclear what impact the changes at SSI's operating facility will have on the pending appeal before BER. SSI is currently working to understand how its Montana Pollution Discharge Elimination System permit will be utilized at the plant going forward. SSI has been

communicating with DEQ and expects to have a scheduling meeting with DEQ personnel. The parties are ordered to file the next status report on August 25, 2023.

**f. 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 voted to appoint Mike Russell as Hearing Examiner in this matter on August 12, 2022. The Hearing Examiner ordered an informal conference on August 16, 2022. An Initial Procedural Order was issued on August 18, 2022. On September 7, 2022, A.M. Welles, Inc., filed an uncontested Motion to Intervene. The Hearing Examiner granted the Motion to Intervene on September 12, 2022, and issued a Scheduling Order on September 19, 2022. On December 5, 2022, DEQ filed a Motion to Vacate the Scheduling Order. This matter was assigned to Rob Cameron at the December 9, 2022, Board meeting. Hearing Examiner Cameron issued an Order Vacating the Scheduling Order on December 29, 2022. On January 3, 2023, an Order Setting Scheduling Conference was issued, setting the conference for January 19, 2023. The Hearing Examiner issued an Order on January 20, 2023, regarding the Administrative Record filed in this matter. The Hearing Examiner declined to order the removal of the subject documents from the record at this time. A Scheduling Order was issued on February 24, 2023, and the parties were ordered to exchange witness and exhibit list by March 27, 2023. DEQ filed its list of hybrid witnesses with exhibits on March 27, 2023. On March 30, 2023, Intervenor A.M. Welles, Inc., filed a Notice to Adopt DEQ's Hybrid Witness Disclosures and Exhibits. The Hearing Examiner issued an Amended Scheduling Order on April 11, 2023. On May 23, 2023, Petitioner's filed their Expert Disclosure. DEQ filed their Expert Witness Disclosures on May 30, 2023. Petitioners filed their Rebuttal Expert Witness Disclosures on June 6, 2023. On June 12, 2023, DEQ filed their Rebuttal Expert Witness Disclosures. Petitioners filed an Unopposed Motion to Amend Scheduling Order on June 13, 2023. On June 13, 2023, the Hearing Examiner issued an Order Extending Discovery Deadline granting Petitioner's request that the discovery deadline be extend to July 14, 2023.



**g. 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 voted to appoint Mike Russell as the Hearing Examiner in this matter at the August 12, 2022, meeting. On August 15, 2022, the Petitioner's filed a response to WRM's motion to intervene. An Initial Procedural Order was issued on August 18, 2022. On August 29, 2022, WMR filed a reply in support of its Motion to Intervene. The Hearing Examiner granted the Motion to Intervene on September 12, 2022. The parties filed Joint Motion for Case Management Order on September 16, 2022. A Scheduling Order was issued on September 19, 2022. An Amended Notice of Appeal and Request for Hearing was filed on November 7, 2022. Rob Cameron was assigned as the Hearing Examiner in this matter at the December 9, 2022, Board meeting. On February 3, 2023, the parties filed a Joint Motion to Modify Scheduling Order. The Hearing Examiner issued an Amended Scheduling Order on February 6, 2023. On April 10, 2023, Westmoreland filed a Motion for Protective Order and Brief in Support. Petitioners filed a Motion for Extension to file a response brief on April 14, 2023, and the Hearing Examiner granted the Order the same day. On May 4, 2023, the Petitioners filed their Response to Intervenor-Respondents' Motion for Protective Order. On May 19, 2023, the parties jointly filed a Motion to Amend Scheduling Order. The Hearing Examiner issued an Amended Scheduling Order on May 22, 2023, providing that any dispositive motions, together with supporting briefs be filed on August 18, 2023. On May 22, 2023, Westmoreland filed their Reply in Support of Motion for Protective Order. Petitioners filed a Notice of Submission on May 23, 2023. On June 6, 2023, the Hearing Examiner issued an Order Re: Motion for Protective Order granting in part and denying in part. On June 21, 2023, the Hearing Examiner issued an Order Re: Site Inspection. The parties filed a Joint Motion and Brief in Support for Stipulated Protective Order on June 22, 2023. On June 28, 2023, the Hearing Examiner issued another Order Re: Site Inspection and Anderson Deposition. On July 10, 2023, Westmoreland Counsel filed a Motion for a Protective Order. Petitioner's filed a Response to Motion for a Protective Order on July 26, 2023. A reply brief is due on August 9, 2023.

**h. In the Matter of: Renewal of MPDES Permit No. MT0000264, Issued September 30, 2022, to CHS, Inc., for Discharges from the Laurel Refinery, BER 2022-07 WQ.**

On October 31, 2022, CHS Inc., filed a Notice of Appeal and Request for Hearing pursuant to Montana Code Annotated § 75-5-403(2) and Administrative Rules of

Montana 17.30.1370(4), as the permit renewal applicant, appealing the Montana Department of Environmental Quality's ("DEQ") renewal of Montana Pollutant Discharge Elimination System ("MPDES") Permit No. MT0000264. At the December 9, 2022, Board meeting this matter was assigned to Rob Cameron as Hearing Examiner. On January 26, 2023, the Conservation Groups filed a Motion to Intervene. On February 9, 2023, DEQ filed a Response to Motion to Intervene. CHS, Inc., filed a Response Opposing Motion to Intervene on February 10, 2023, with a brief in support. The Conservation Groups filed their reply brief on February 28, 2023. CHS filed an Objection and Request for Oral Argument on March 17, 2023. On April 5, 2023, the Hearing Examiner issued an Order granting CHS's request for oral argument. CHS filed a Request for Judicial Notice on April 11, 2023. On April 13, 2023, CHS filed a Notice of Availability for oral argument. The Hearing Examiner issued an Order Setting Oral Argument on April 18, 2023, setting oral argument for May 25, 2023. On May 2, 2023, the Hearing Examiner issued an Order Granting Request for Judicial Notice of Facts. CHS filed a Notice of Supplemental Authority on May 24, 2023. On June 23, 2023, CHS, Inc., filed a Point Brief on Intervention and the Conservation Group filed a Point Brief on Administrative Exhaustion. On July 5, 2023, the Hearing Examiner issued an Order on Conservation Groups' Motion to Intervene granting in part and denying in part. The Groups may be heard with respect to their first and second issues, as they are substantially related to those raised by CHS concerning Hydrogen Sulfide limits. The Conservation Groups are not entitled to be heard with respect to their third issue concerning a nondegradation analysis because it is beyond the scope of issues raised by CHS. The Hearing Examiner also issued a Prehearing Order on July 5, 2023, ordering the parties to propose a schedule upon which this case will proceed by August 2, 2023.

**i. In the Matter of the Hearing Request for Exploration License #00680, Butte Highlands Site; Five-Year Bond Determination, BER 2023-01 OC.**

On April 26, 2023, the Independent Manager for Highland Mining, LLC, the managing member of Butte Highlands JV, LLC ("BHJV") requested a hearing before BER regarding the Department of Environmental Quality's March 30, 2023, final bond determination for the Butte Highlands Mine for Exploration License #00680. The Board assigned this matter to ALSB at the June 9, 2023, meeting, and Terisa Oomens issued a Notice of Hearing Examiner on June 15, 2023. A Prehearing Order was issued on June 15, 2023. Both DEQ and Highland Mining filed their Preliminary Prehearing Statements on June 28, 2023. The parties filed a Stipulated Scheduling Proposal on June 28, 2023. The Hearing Examiner issued the Stipulated Scheduling Order on June 28, 2023. A Joint Motion to Stay the Scheduling Order was filed on July 31, 2023. The Hearing Examiner issued an Order Granting Stay on July 31, 2023, staying the proceedings until October 6, 2023, at which time the parties must file settlement documents or a revised stipulated schedule.

**j. In the Matter of the Formal Appeal Challenging the Department of Environmental Quality's ("DEQ") Approval of Riverside Contracting's Opencut Mining Permit #3415 for the Marvin Rehbein Site Near Arlee in Lake County, Montana, BER 2023-02 OC.**

On May 3, 2023, Friends of the Jocko ("FotJ") and Jim Coefield, individually filed a formal appeal challenging the DEQ's approval of Riverside Contracting's Opencut Mining Permit #3415 for the Marvin Rehbein Site near Arlee in Lake County, Montana. The Board assigned this matter to ALSB at the June 9, 2023, meeting. On June 15, 2023, Terisa Oomens issued a Notice of Hearing Examiner. Hearing Examiner Oomens issued a Prehearing Order on June 15, 2023. Both DEQ and Friends of the Jocko filed their Preliminary Prehearing Statements on June 28, 2023. Riverside Contracting Inc. filed an Unopposed Petition to Intervene on July 28, 2023. A Scheduling Order was issued on June 29, 2023, ordering the parties to exchange Initial Disclosures on October 27, 2023, Discovery to be complete on March 15, 2024, and any Dispositive Motions filed on April 19, 2024. On July 31, 2023, the Hearing Examiner issued an Order Granting Riverside Intervention.

**k. In the Matter of Appeal and Request for Hearing by Protect the Clearwater Regarding Issuance of Opencut Mining Permit #3473, BER 2023-03 OC.**

On May 26, 2023, Protect the Clearwater and Libby Langston, Gayla Nicholson, Jeff Dickerson and Terry Martin Denning, individually filed a formal appeal challenging the Department of Environmental Quality's approval of LHC, Inc.'s ("LHC") Opencut Mining Permit #3473 for the Clearwater State ("Clearwater") Site near Seeley Lake, Montana in Missoula County. The Board assigned this matter to ALSB at the June 9, 2023, meeting. On June 15, 2023, Terisa Oomens issued a Notice of Hearing Examiner. DEQ and Petitioner filed their Preliminary Prehearing Statements on June 28, 2023. On June 29, 2023, the Hearing Examiner issued a Scheduling Order. Petitioner filed a Motion to Amend Scheduling Order on August 1, 2023, and the Hearing Examiner issued an Order Granting Motion to Amend Scheduling Order on the same day. Simultaneous Expert Witness Disclosures are due on August 11, 2023, and Rebuttal Expert Witness Disclosures are due August 25, 2023. Discovery closes on September 29, 2023, and Dispositive Motions are due October 30, 2023.

**3. Cases not assigned to a Hearing Examiner.**

**a. 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. On August 3, 2022, the DEQ filed a response to the Joint Notice and Motion to Submit Final Agency Decision and on August 17, 2022, the Petitioners filed their Reply in Support. At the October 14, 2022, Board meeting, the Board voted to deny DEQ's motion to alter or amend and direct Board Counsel, working with the Chairman, to draft a reasoned decision stating the basis for the Board's denial of the motion. The Board also voted to grant Lincoln County's and Teck Coal's joint Motion to submit the Final Agency Action to EPA and requested that Lincoln County and Teck Coal jointly file a proposed letter to the EPA transmitting the Board's order. On November 4, 2022, Lincoln County and Teck Coal jointly submitted a draft proposed letter to the EPA.

At the December 9, 2022, Board meeting the Board considered the draft decision and voted 5-2 to approve the decision. The Board also considered the draft letter to the EPA transmitting the Board's Final Agency Action and voted 5-2 to approve sending the letter and Final Agency Action to the EPA. On February 8, 2023, the Board received correspondence from Kathleen Becker, Regional Administrator for the EPA Region 8, indicating that the EPA will not begin considering the Board's request until the EPA has been notified by the State that the ongoing legal processes have concluded.

### **III. ACTION ITEMS**

- a. In the Matter of: Appeal and Request for Hearing by Westmoreland Rosebud Mining LLC Regarding Issuance of MPDES Permit No. MT0032042, Colstrip, MT, BER 2022-06 WQ**

On September 9, 2022, Westmoreland Rosebud Mining LLC filed a Notice of Appeal and Request for Hearing regarding the issuance of MPDES Permit No.

MT0032042. At the October 14, 2022, the Board moved to assign this matter to Mike Russell as Hearing Examiner to preside over the contested case. This matter was reassigned to Rob Cameron at the December 9, 2022, Board meeting. A Prehearing Order was issued on February 6, 2023. The parties filed a Joint Motion to Stay on February 10, 2023. The parties also filed a Stipulation for Final Agency Decision on February 10, 2023. On February 14, 2023, Hearing Examiner Cameron granted the Parties' Joint Motion to Stay pending the Board's final determination of the Parties' proposed Stipulation. At the February 24, 2023, BER meeting the Board approved the proposed Stipulation and passed the Final Agency Action. The Board then requested that Board Counsel issue an Order to the parties requiring responses to the Board Member questions at the April 7, 2023, meeting. The parties subsequently filed their Joint Responses to BER Order on March 24, 2023. The Board heard from the parties regarding the settlement agreement at the April 7, 2023, meeting. The Board motioned and passed that the parties update the Board at each Board meeting. On May 31, 2023, the parties provided an update stating, "Under the terms of the Stipulation, DEQ and Westmoreland will compile and obtain data necessary to determine the nonanthropogenic condition of EC and SAR in state waters receiving discharges authorized under MPDES Permit No. MT0032042 ("Receiving Waters"). DEQ prepared a draft Quality Assurance Project Plan (QAPP) and Westmoreland provided comments on the QAPP. DEQ and Westmoreland are currently in the process of finalizing the QAPP, which will describe analytical methods and approaches for developing site specific EC and SAR standards for the Receiving Waters."

For the 8/11/2023 BER meeting, the parties provide the following update to the BER related to DEQ and Westmoreland's progress under the Stipulation and the BER's Final Agency Action in the above-named case: "Under the terms of the Stipulation, DEQ and Westmoreland are compiling existing data necessary to determine the nonanthropogenic condition of EC and SAR in state waters receiving discharges authorized under MPDES Permit No. MT0032042 ("Receiving Waters"). DEQ prepared a draft Quality Assurance Project Plan (QAPP) and Westmoreland provided comments on the QAPP. DEQ plans to finalize the QAPP by August 31, 2023. The QAPP will describe analytical methods and approaches for developing site specific EC and SAR standards for the Receiving Waters. After the QAPP is finalized, the work to compile and evaluate data, to determine whether additional data collection is required, and to develop NAS standards will proceed in accordance with BER's Final Agency Decision."

**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. In January 11, 2023, Mr. Martin withdrew as counsel of record for Westmoreland. Westmoreland will continue to be represented by Holland and hart LLP counsel. On May 31, 2023, Hearing Examiner Terisa Oomens issued a Notice of Change in Hearing Examiner.

On July 18, 2023, Hearing Examiner Oomens issued an Order Setting Status Conference and a Status Conference was held on July 24, 2023. The parties agreed to providing an update to the Board at the August meeting with follow up deadlines for the October meeting.

**c. 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, Rob Cameron, 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. Mr. Richards filed a response letter on August 10, 2022. A Prehearing Order was issued on August 17, 2022, and a Scheduling Order was issued on September 27, 2022. Mr. Richards was ordered to file a more definite statement by October 14, 2022. On October 14, 2022, Mr. Richards filed a letter with Mr. Whitaker, which was forwarded to the Hearing Examiner on October 17, 2022, and appears to be a more definite statement by Mr. Richards. On February 23, 2023, DEQ filed a Motion to Amend the Scheduling Order. The Hearing Examiner issued a First Amended Scheduling Order on March 24, 2023, ordering that discovery shall be completed by April 28, 2023, and dispositive motions are due by June 2, 2023. DEQ filed a Motion for Summary Judgment and a Statement of Undisputed Facts on June 2, 2023. Mr. Richards never filed a response. On July 24, 2023, the Hearing Examiner issued a Findings of Fact, Conclusions of Law and Summary Judgment Order. The Board will now decide whether to adopt the Hearing Examiner’s Findings of Fact, Conclusions of Law and Summary Judgment Order.

**d. In the Matter of: Denial of Opencut Mine Permit #3115 for FirstMark Materials – Oscar’s Site, BER 2022-08 OC.**

On December 21, 2022, FirstMark Materials, LLC and Croell, Inc., filed a Notice of Appeal and Request for Hearing appealing the Department of Environmental Quality’s denial of Opencut Mine Permit #3115 to FirstMark for Oscar’s Site. At the February 24, 2023, BER meeting, the Board voted to assign this matter in its totality to Agency Legal Services Bureau. On March 20, 2023, Liz Leman issued a Notice of Assumption as Hearing Examiner in this matter. On March 21, 2023,

Ms. Leman issued an Initial Procedural Order, ordering the parties to file a proposed contested case schedule by April 21, 2023. A Stipulated Schedule was filed on April 21, 2023. On April 25, 2023, a Scheduling Order was issued. On April 28, 2023, the parties filed a Stipulated Settlement Agreement and a Motion for Dismissal with Prejudice. On May 1, 2023, the Hearing Examiner issued an Order Dismissing Appeal. The Board will now decide whether to adopt the Hearing Examiner's Order Dismissing Appeal.

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

**a. In the Matter of Appeal and Request for Hearing by the Dairy Subdivision, Missoula County EQ #23-1751, BER 2023-04 SUB.**

On June 23, 2023, Professional Consultants Inc. (PCI) and Tai Tam LLC filed a notice of appeal and request for hearing regarding Department of Environmental Quality's June 9, 2023, denial of the deviation request and source specific mixing zone, EQ #23-1751. 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: Request for Hearing on Order of Revocation of Certified Operator License Number 9301, BER 2023-05 PWS**

On July 14, 2023, William Deveny filed a request for hearing on the decision by DEQ to revoke his Certified Operator License Number 9301. The Board can decide to hear the case itself or assign a hearing examiner for some or the totality of the case.

#### **V. 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.

#### **VI. BOARD CHAIR UPDATE**

Chairman Simpson will report on general Board business, procedural matters, and questions from Board Members.

#### **IV. ADJOURNMENT**