

BOARD OF ENVIRONMENTAL REVIEW
April 19, 2024, 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 February 16, 2024, 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.

The Montana Supreme Court has issued an Opinion in this matter. A portion of the issues will be remanded back to the Board for decision. Once the remand is

received, the Board will have to decide whether to hear the case itself or assign to a hearing examiner for some or the totality of the case.

The Supreme Court has remanded this matter back to the District Court and the District Court is considering how to remand it back to the Board. This matter is pending remand from the District Court.

b. 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.

The aforementioned Motions are still pending before Judge Seeley and there are no scheduling orders in either case. On September 5, 2023, the Conservation

Groups filed a Motion to Intervene in the lawsuit filed by DEQ. That Motion was unopposed. Judge Seely has not issued an order with respect to that Motion. The parties in the DEQ lawsuit have also exchanged initial discovery.

On October 6, 2023, the Court granted the Conservation Groups Motion to Intervene in the DEQ lawsuit.

On March 6, 2024, the Court granted Respondents' Motion to Consolidate Cases. In the same Order, the Court denied Respondents' request for a scheduling conference as premature. "[U]pon issuance of orders on the pending Motion to Dismiss and Motion to Strike, the Court will issue a new Stipulated Scheduling Order, pursuant to which the parties will propose new deadlines."

On March 7, 2024, the Court denied Respondent Teck Coal's Motion to Strike a Portion of the DEQ's Reply Brief in Support of its Motion to Dismiss. In its Motion to Strike, Teck argued that in DEQ's Reply Brief, for the first time, raised the question of "whether DEQ properly followed the explicit statutory remedy enacted by the Legislature to address the [Board's] determination that ARM 17.30.632(7)(a) is more stringent than comparable federal regulations or guidelines." (emphasis added.)

The Court denied Teck's Motion based upon its finding that the DEQ's Petition set forth the procedure the DEQ is to follow when the Board finds a State rule more stringent than a federal regulation or guideline and how the DEQ followed that procedure in this instance. The Court found that the "DEQ seeks to show that they, not BER, followed the correct procedure" and that, having raised the question at issue in its Petition, it is improper and unnecessary to strike the statement complained of in Teck's Motion.

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 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 updates to the permit renewal information. On 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. On November 24, 2023, the parties submitted a First Amendment to Settlement Agreement, providing procedural background and mutually agreed task deadlines for end of year 2023 proceeding into 2024.

Westmoreland was to provide DEQ with an updated renewal application by April 1, 2024. By July 1, 2024, or within four months of receipt of the updated renewal application, DEQ shall prepare a draft permit.

b. 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 the 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 September 29, 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. On November 22, 2023, DEQ submitted a Status Report indicating that the Montana Supreme Court has issued an Opinion in the AM4 matter.

On March 8, 2024, the Petitioners filed an Unopposed Motion to Lift Stay and Set a Briefing Deadline. The Hearing Examiner issued an Order Granting Motion to Lift Stay and Setting Briefing Scheduling on March 21, 2024, providing that responses to the proposed Findings of Fact and Conclusions of Law shall be filed and served on or before April 19, 2024.

c. 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. On August 25, 2023, the parties filed a Joint Status Report indicating that Alpine applied to modify the existing MGWPCS permit to which DEQ sent Alpine a Notice of Deficiency; Alpine responded with an updated application on June 24, 2023; DEQ subsequently sent an email to Alpine on July 24, 2023, summarizing the remaining issues with Alpine's application and DEQ will follow up the email with a detailed NoD by the end of August 2023. The next joint status report is due on November 27, 2023.

On November 27, 2023, the parties filed a Joint Status Report indicating that Alpine and DEQ continue to work through issues related to Alpine's application. The parties met on November 8, 2023. Alpine is currently assembling information requested by DEQ and will submit to DEQ for review. The next status report is due on February 27, 2024.

On February 27, 2024, the parties filed a Joint Status Report indicating that Alpine and DEQ continue to work through issues related to Alpine's application to modify the existing Montana Ground Water Pollution Control System. Alpine has investigated several avenues for collecting the requested data by DEQ. In January 2024, Alpine compiled and provided DEQ shallow aquifer test data from a nearby site. DEQ is currently reviewing the information. The next status report is due on May 27, 2024.

d. 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 jointly filed a Motion to Extend the Stay on August 8, 2023. Hearing Examiner Brown issued an Order Granting Joint Motion to Extend Stay on August 9, 2023. On November 1, 2023, SSI filed a Status Report indicating that DEQ and SSI continue to discuss the status of SSI's Sidney facility. DEQ and SSI representatives are in the process of discussing an administrative order on consent and various aspects of the closure plan. It is unclear to what extent and how long SSI will need to utilize its MPDES permit as part of the closure process. It is likely the parties will enter into a new administrative order on consent by the close of the calendar year or soon thereafter.

On January 9, 2024, the parties filed a Joint Motion to Extend Stay. The Hearing Examiner issued an Order Setting Status Conference for January 25, 2024, on January 9, 2024. On January 24, 2024, SSI filed a Notice of Filing SSI's Annual Report. A Status Hearing was held on January 25, 2024, during which the parties explained that SSI is still winding down operations, but a small amount of water in one of the ponds requires them to keep the permit until closure. After the hearing, the Hearing Examiner issued an Order Extending Stay of Appeal until July 15, 2024, and ordering counsel for SSI to submit a status report to the Hearing Examiner on April 15, 2024.

e. 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 extended to July 14, 2023. On September 8, 2023, the Petitioner filed a Motion to Limit Scope of Hearing/Motion in *Limine* with a Brief in Support. DEQ filed a Motion for Judicial Notice and a Motion for Hearing Examiner to Visit DSL Site on September 25, 2023. AM Welles, Inc., filed a Response in Opposition to Petitioner's Motion in *Limine* on September 25, 2023. On September 25, 2023, DEQ filed a Response to VGLLC's Motion to Limit Hearing Scope. Petitioner filed a Response to Motion for Judicial Notice on September 26, 2023. On September 27, 2023, Petitioners filed a Response to DEQ's Motion for Hearing Examiner to View the DSL Site.

Petitioner filed a Motion for Summary Judgment on October 3, 2023, with a Brief in Support. On October 3, 2023, DEQ filed a Motion in *Limine* to prohibit VGLLC from referring to filed discovery as the administrative record and to prohibit VGLLC from referring to, or making a claim under, any other statute other than the Opencut Act in this contested case hearing with a Briefs in Support. DEQ also filed its Motion for Summary Judgment on October 3, 2023, with a Statement of Undisputed Facts. Petitioner filed an Unopposed Motion to Amend Scheduling Order and a Motion to Extend Deadline for Summary Judgment Briefing, and to Set a Hearing for Motions in *Limine* on October 6, 2023. The Hearing Examiner issued an Order Amending Scheduling Order on October 6, 2023, providing that parties file responses to summary judgment by November 6, 2023. Petitioner filed its Reply Brief in Support of Petitioner's Motion to Limit Scope of Hearing/Motion in *Limine*. On October 10, 2023, DEQ filed its Reply to VGLLC's Response to DEQ Motion to Take Judicial Notice.

On October 11, 2023, DEQ filed a Reply to VLGGC Response to DEQ Motion for Hearing Examiner to View DSL Site and Memorandum in Support. Petitioner filed a Combined Response in Opposition to DEQ's Motion in *Limine* in October 17, 2023. On October 23, 2023, AM Welles filed a Response in Opposition to Petitioner's Motion to Extend Deadline for Summary Judgment Briefing and to Set a Hearing for Motions in *Limine*. On the same day, DEQ filed a Response to Valley Garden's Motion to Suspend Briefing. On October 26, 2023, Valley Garden filed a Reply to Respondents' Response to Petitioner's Motion to Suspend Briefing as well as a Notice of Submittal. On October 30, 2023, the Hearing Examiner issued an Order Staying Summary Judgment Briefing. DEQ filed its Replies to Plaintiff's Combined Response to DEQ's Motions in *Limine* on November 3, 2023. On November 6, 2023, the Hearing Examiner issued an Order Setting Hearing for December 14, 2023, on the outstanding motions in *limine*.

On December 1, 2023, DEQ filed a Notice of Additional Authority. On December 11, 2023, the Hearing Examiner issued an Order Continuing Hearing due to illness. DEQ filed a Motion for Reconsideration and Vacatur of Suspension of Summary Judgment Briefing Pending Resolution of Motions in *Limine* with a Brief in Support. On December 27, 2023, Valley Garden filed a Brief in Opposition to DEQ's Motion for Reconsideration. DEQ filed a Reply to Valley Garden's Response to DEQ's Motion for Reconsideration on January 10, 2024. Valley Garden filed an Opposed Motion to Schedule Hearing on all Pending Motions on January 30, 2024.

On February 13, 2024, DEQ filed a Response to Valley Garden's Motion for Hearing. Valley Garden filed its Reply in Support of Motion to Schedule Hearing on all Pending Motions on February 21, 2024. On March 21, 2024, the Hearing Examiner issued an Order requiring the parties to file status reports on pending motion and setting a Status Conference for April 4, 2024. On March 29, 2024, both parties filed their Status Reports. DEQ filed a Notice of Supplemental Authority on April 4, 2024. On April 5, 2024, the Hearing Examiner issued an Order RE Valley Garden's Summary Judgment Brief requiring Valley Garden to resubmit its Motion for Summary Judgment and Statement of Undisputed Facts in compliance with the Initial Procedural Order on or before April 15, 2024.

f. 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 a 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. Petitioners filed a Response to Motion for a Protective Order on July 26, 2023. The parties file a Joint Reply in Support of Motion for Protective Order on August 14, 2023. On August 23, 2023, Petitioners, Westmoreland and International Union of Operating Engineers, Local 400, and DEQ all filed their Motions for Summary Judgment with Brief in Support and Statements of Undisputed Facts. The parties filed a Joint Motion for Extension of Dispositive Motion Response and Reply Briefing Deadlines on September 14, 2023, and the Hearing Examiner granted the Motion on September 18, 2023. Petitioner filed an Unopposed Motion for Extension on October 11, 2023. On

October 11, 2023, the Hearing Examiner issued an Order Granting the Motion for Extension providing that the response briefs on Summary Judgment are due on October 18, 2023, and the reply briefs are due on November 8, 2023.

On October 18, 2023, Petitioners' Response to Respondents' Motions for Summary Judgment along with a Statement of Stipulated Facts. DEQ filed its Brief in Opposition to Petitioners' Motion for Summary Judgment, and WRM filed its Response Brief to Petitioners' Summary Judgment Motion on October 18, 2023. DEQ and WRM filed a Joint Motion to Strike on October 18, 2023, with a brief in support and a Joint Statement of Disputed Facts. On October 31, 2023, Petitioners filed an Unopposed Motion for Extension of Time. The Hearing Examiner granted the Motion for Extension on the same day. On November 6, 2023, Petitioners filed a Response to Motion to Strike. On November 17, 2023, DEQ and WRM filed a Joint Motion for Extension of Deadline to Reply in Support of Joint Motion to Strike. The Hearing Examiner granted the joint motion for extension on November 20, 2023. On November 28, 2023, DEQ and WRM filed their Joint Reply in Support of Motion to Strike.

On December 21, 2023, WRM and IUO filed their Reply in Support of Summary Judgment. DEQ also filed their Reply Brief in Support of Summary Judgment on December 21, 2023. Petitioners filed their Combined Reply to DEQ and WRM's Response Briefs in Support of Motion for Summary Judgment on December 21, 2023, along with a Supplemental Statement of Disputed Facts.

g. 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 non-degradation analysis because it is beyond the scope of issues raised by CHS. The Hearing Examiner also issued a Prehearing Order on July 5, 2023. The parties filed a Stipulated Scheduling Order on August 2, 2023. On August 3, 2023, the Hearing Examiner issued a Scheduling Order, providing that the parties shall exchange lists of expert witnesses by November 17, 2023; Discovery shall be completed by January 26, 2024, parties shall file Dispositive Motions by February 23, 2024; and the Hearing will be held during the week of April 22, 2024.

CHS Inc., filed a Motion to Amend Scheduling Order on January 19, 2024. On January 24, 2024, the Hearing Examiner issued an Order Granting CHS Inc.'s Unopposed Motion to Amend the Scheduling Order, providing that the deadline for discovery to be completed by February 29, 2024, dispositive motions due on April 5, 2024, and any motions hearing will occur the week of May 27, 2024.

On February 26, 2024, the parties filed a Joint Motion for 60-Day Stay to allow the parties to conduct settlement discussions. The Hearing Examiner granted the Motion on February 27, 2024, providing that the parties should file a status report on April 22, 2024.

h. 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. On October 27, 2023, Petitioners filed their Initial Disclosures. On January 26, 2024, all involved parties filed their Expert Witness Disclosures.

On February 16, 2024, DEQ filed its Rebuttal Expert Disclosure. DEQ filed an Unopposed Motion for Stipulated Protective Order on March 1, 2024. The Hearing Examiner issued an Order RE: Stipulated Protective Order on March 4, 2024.

i. **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 assigned this matter to ALSB at the August meeting. Terisa Oomens with ALSB filed a Notice of Hearing Examiner on August 31, 2023, and issued a Prehearing Order. DEQ filed an Unopposed Motion for Extension of Time on September 12, 2023. On September 13, 2023, the Hearing Examiner issued an Order Granting DEQ's Unopposed Motion for Extension of Time providing that the parties must inform the Hearing Examiner whether they jointly waive a formal MAPA proceeding by September 22, 2023; the parties shall file Preliminary Prehearing Statements and a proposed Scheduling Order on October 6, 2023. DEQ filed a Notice Regarding Informal Proceedings on September 22, 2023, indicating the Department does not intent to waive formal MAPA proceedings. Tia Tam, LLC filed an Unopposed Motion for Extension of Time on October 6, 2023. On October 10, 2023, the Hearing Examiner issued an Order Granting Tia Tam's Unopposed Motion for Extension.

On November 7, 2023, Tai Tam, LLC filed an Unopposed Motion for Extension of Time to extend deadlines. On November 14, 2023, the Hearing Examiner issued a Revised Order Granting Tai Tam's Unopposed Motion for Extension of Time providing that the parties shall file Preliminary Prehearing Statements and a proposed Scheduling Order by January 19, 2024. A Scheduling Conference will be held on January 24, 2024.

On January 19, 2024, DEQ filed a Status Update and Unopposed Motion for Extension of Time. The Hearing Examiner issued an Order Granting DEQ's Unopposed Motion for Extension of Time, providing that the parties shall prepare and submit a settlement agreement or proposed scheduling order on February 19, 2024.

On February 20, 2024, DEQ filed a Proposed Scheduling Order. On February 21, 2024, the Hearing Examiner issued a Scheduling Order providing that Professional Consultants Inc., must have an attorney file a Notice of Appearance by March 22, 2024, and Preliminary Prehearing Statements must be filed on or before April 5, 2024. Professional Consultants Inc., failed to have an attorney appear in this matter. DEQ filed its Preliminary Prehearing Statement on April 5, 2024.

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 Kocanusa, 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.

b. 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. On 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."

For the October 20, 2023, meeting DEQ submitted the following update: Under the terms of the Stipulation, DEQ and Westmoreland are compiling and obtaining data necessary to determine the nonanthropogenic condition of EC and SAR in state waters receiving discharges authorized under MPDES Permit No. MT0032042 ("Receiving Waters"). On August 31, 2023, DEQ and Westmoreland

finalized the “Quality Assurance Project Plan (QAPP) for Identifying Nonanthropogenic Water Quality Criteria for Electrical Conductivity (EC) and Sodium Adsorption Ratio (SAR) for Specified Tributaries of Rosebud Creek” which describes analytical methods and approaches for developing EC and SAR nonanthropogenic standards for the Receiving Waters.

Since finalizing the QAPP, and in accordance with the Stipulation, Paragraph 21(c), DEQ and Westmoreland have compiled existing water quality data. DEQ Standards and Modeling Section completed its data compilation consulting the national Water Quality Portal, Montana’s MT-eWQX (EQuIS) database, DEQ’s Coal program, and DEQ’s MPDES program. Westmoreland compiled and submitted its data.

In accordance with the Stipulation, Paragraph 21(d), DEQ is now in the process of evaluating the compiled existing data. Within 30 days of receiving all the data, or by October 30, 2023, DEQ will make a written determination whether ambient EC and SAR concentrations in the Receiving Waters exceed the applicable water quality criteria in ARM 17.30.670(4) for EC and SAR. If, in accordance with the Stipulation, Paragraph 21(e), DEQ determines additional data is required to conclude ambient EC and SAR concentrations in the Receiving Waters exceed the criteria in ARM 17.30.670(4), or to properly develop nonanthropogenic standards for EC and SAR for the Receiving Waters, Westmoreland and DEQ will develop a Sampling and Analysis Plan (SAP) to fill the data gaps within 45 days of DEQ’s determination that additional data is required. Westmoreland will be responsible for obtaining additional data in accordance with the SAP.

On November 22, 2023, DEQ counsel, Ms. Bowers provided an update indicating that DEQ and Westmoreland finalized the Quality Assurance Project Plan (QAPP) in accordance with the Stipulation paragraph 21(c). Since finalizing the QAPP, DEQ and Westmoreland have compiled existing water quality data. In accordance with Stipulation paragraph 21(d), DEQ evaluated the compiled existing data and made a written determination. In accordance with Stipulation paragraph 21(e), DEQ determined additional data is required to properly develop nonanthropogenic standards (NAS) for EC and SAR for the Receiving Water. By November 29, 2023, DEQ will determine whether NAS sources alone cause EC and SAR to exceed the standards in the Receiving Waters pursuant to Stipulation paragraph 21(f). By December 15, 2023, Westmoreland and DEQ will develop a Sampling and Analysis Plan (SAP) to fill the data gaps. DEQ and Westmoreland continue to consult on topics related to completing the next steps under the Stipulation including those described in Stipulation paragraph 21(g).

On February 2, 2024, Kirsten Bowers sent the following update: “After determining that additional data are required to properly develop nonanthropogenic standards for EC and SAR for the Receiving Waters, DEQ and Westmoreland developed a Sampling and Analysis Plan (SAP) (finalized on 12/15/23; minor edits made on 12/22), in accordance with the Stipulation Paragraph 21(e). Westmoreland will be responsible for obtaining additional data in accordance with the SAP. The SAP specifies that site visits for the purposes of sampling must occur every month for twelve months. Sampling will begin in February 2024 and end in January 2025 or, alternately, “If sampling does not

begin by February 2024, 12 months of sampling from the actual beginning date must be completed.”

On April 4, 2025, Kirsten Bowers sent the follow up update: “DEQ and Westmoreland are proceeding with data collection to develop nonanthropogenic standards for electrical conductivity (EC) and sodium adsorption ratio (SAR) for the Receiving Waters. Westmoreland began collecting data in February in accordance with the Sampling and Analysis Plan (SAP) developed by the parties pursuant to the Stipulation, Paragraph 21(e). The SAP specifies that site visits for the purposes of sampling must occur every month for twelve months.

At its February 16, 2024, meeting, Board Chair Simpson asked if DEQ reviewed and considered historic data collected by the Peabody Big Sky Mine in the Rosebud Creek drainage. DEQ is considering all available data, including previously collected historical data from the Big Sky Mine, in its evaluation of nonanthropogenic conditions for EC and SAR in the receiving waters of Lee Coulee and Richard Coulee. This data includes a range of years from 1984 to 2022 for the receiving waters of Lee Coulee, and a range of 1973 to 2022 for receiving waters of Richard Coulee.”

c. 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 voted to assign this matter to ALSB at the August meeting. Terisa Oomens with ALSB issued a Notice of Hearing Examiner and a Prehearing Order on August 31, 2023. On September 12, 2023, DEQ filed an Unopposed Motion for Extension of Time. The Hearing Examiner issued an Order Granting Motion for Extension of Time on September 15, 2023, providing that the parties shall file their Preliminary Prehearing Statements and a proposed Scheduling Order on October 13, 2023; and the Scheduling Conference will be held on October 16, 2023.

On September 22, 2023, DEQ filed a Notice Regarding Informal Proceedings. On October 13, 2023, DEQ filed its Preliminary Prehearing Statement. On October 20, 2023, the Hearing Examiner issued a Scheduling Order providing that Mr. Deveny should file his prehearing statement by October 20, 2023; joinder or intervention of parties must be made by October 30, 2023, and discovery is to be completed by January 26, 2024.

On January 11, 2024, DEQ counsel filed a Notice of Dismissal with correspondence from the Appellant indicating that he no longer wished to pursue his appeal and accepts the revocation of his operator. On January 16, 2024, the Hearing Examiner issued an Order of Dismissal Without Prejudice. The Board will now decide whether to adopt the Hearing Examiner’s Order of Dismissal Without Prejudice and issue a Final Agency Action dismissing this matter.

On March 8, 2024, Chair Simpson issued the Final Agency Action and this matter was dismissed without prejudice. The matter will be closed and removed from the agenda after the April 19, 2024, meeting.

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 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 19th and 20th.

On December 29, 2023, the Hearing Examiner issued a Findings of Facts, Conclusions of Law, and Recommended Decision as well as an Order on Exceptions. Appellants filed a Statement of Exceptions to the FoFCoL and requested oral argument before the Board on January 15, 2024. DEQ filed its Exceptions to the FoFCoL on January 16, 2024. On January 29, 2024, DEQ filed its Response to Petitioners' Brief on Exceptions. Petitioners did not file a response to DEQ's Exceptions.

At the February 16, 2024, meeting the Board heard oral argument from the parties, reviewed the proposed Findings and Fact and Conclusions of Law, the parties' Exceptions and Response to the Exceptions. The Board voted

to revise the Proposed FoFCoL in Paragraphs 149, 150 and 154 and adopt the remainder of the proposed FoFCoL. On March 8, 2024, Chair Simpson issued the Final Agency Action and Order of the Board. This matter is now closed and will be removed from the agenda after the April 19, 2024, meeting.

III. ACTION ITEMS

a. 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 proceed 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. On September 15, 2023, Western

Sugar filed an unopposed motion to amend the scheduling order. The Hearing Examiner issued an Order Amended Scheduling Order on September 25, 2023.

WSC and DEQ each filed a Motion in *Limine* on December 1, 2023. On December 15, 2023, both parties filed their respective responses to the Motions in *Limine*. The parties filed a Joint Motion re: Prehearing Issues on December 20, 2023, and a Joint Motion for Extension to file reply briefs on December 21, 2023. The Hearing Examiner issued an Order Granting Joint Motion for Extension on December 21, 2023. On January 5, 2024, WSC filed a Motion to Strike and Reply in Support of Motion in *Limine*. DEQ filed its Reply Brief in Support of Its Motion in *Limine* on January 5, 2024. The parties filed a Joint Motion to Stay Proceedings on January 11, 2024, indicating that the parties are entering into a settlement agreement. The Hearing Examiner granted the stay on January 12, 2024.

On February 29, 2024, the parties filed a Joint Motion for an Extension to File Settlement Agreement and Related Motions and the Hearing Examiner granted the motion the same day, giving the parties until March 22, 2024, to file the Settlement Agreement and related motions. On March 22, 2024, the parties filed a Joint Motion for Remand and Stipulation for Dismissal of Proceedings with a signed Settlement Agreement attached. That same day the Hearing Examiner issued an Order Granting Joint Motion for Remand and Dismissal. The parties jointly request the Board remand this matter to DEQ for further consideration, in accordance with the terms of the Settlement Agreement.

b. 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. The parties filed simultaneous Expert Witness Disclosures on August 11, 2023. Protect the Clearwater filed an Unopposed Motion for Extension of Time on September 21, 2023. Petitioners filed an Opposed Motion to Stay Proceedings on September 25, 2023, with a Brief in Support. On September 27, 2023, the Hearing Examiner issued an Order Granting Extension of Time providing that Discovery shall be completed on October 27, 2023, and Dispositive Motions are due on November 29, 2023. DEQ and LHC filed their Responses to Motion for Stay on October 10, 2023. On October 11, 2023, the Hearing Examiner issued an Order Granting Oral Argument, which will be held on October 18, 2023.

On October 16, 2023, Petitioners filed their Reply Brief in Support of Motion to Stay Proceedings. On October 20, 2023, the Hearing Examiner issued an Order on Motion to Stay denying the Motion to Stay. On November 21, 2023, Petitioners filed an Unopposed Motion to Amend Scheduling Order. The Hearing Examiner issued an Order Granting Motion to Amend Scheduling Order on November 28, 2023.

On December 1, 2023, the Petitioners filed a Motion in *Limine* and to Limit Scope of Hearing, as well as a Motion for Summary Judgment. DEQ filed their Motion for Summary Judgment with Brief in Support and a Statement of Undisputed Facts on December 1, 2023. On December 11, 2023, the parties filed a Joint Motion to Amend Deadlines, and the Hearing Examiner granted the Motion on December 12, 2023. On December 22, 2023, DEQ filed a Response to Petitioners' Motion in *Limine*, a Response to Petitioners' Motion for Summary Judgment, and a Statement of Disputed Facts. Petitioners filed a Brief in Opposition to DEQ's Motion for Summary Judgment. On December 22, 2023, LHC Inc., filed a Combined Response to Motions for Summary Judgment and a Response to Petitioners' Motion in *Limine* to Limit Scope of Hearing. Petitioners filed a Reply Brief in Support of Motion in *Limine* and to Limit Scope of Hearing and a Reply Brief in Support of Petitioners' Motion for Summary Judgment on January 12, 2024. On January 12, 2024, DEQ filed a Reply to Petitioners' Response to DEQ's Motion for Summary Judgment. The Hearing Examiner is currently drafting an order on pending motions.

On March 8, 2024, the Hearing Examiner issued a Proposed Findings of Fact and Conclusions of Law and an Order on Exceptions. DEQ and Petitioners filed their Exceptions to Proposed Findings of Fact and Conclusions of Law on March 22, 2024. On April 5, 2024, the parties filed their Responses to the respective Exceptions. This matter is now before the Board to hear oral argument from the parties and determine whether to adopt, reject, or modify the Hearing Examiner's Proposed Findings of Fact, Conclusions of Law and issue a decision.

IV. NEW CONTESTED CASE

- a. **In the Matter of: Notice of Appeal and Request for Hearing on TMC Inc., Permit No. 3462/Black Pit, Case No. BER 2024-01 OC.**

On March 13, 2024, Gary L. Bilotti filed a letter requesting that the Board review and reject the TMC Inc., 3462/Black gravel pit. 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: Notice of Appeal of DEQ Opencut Mining Permit No. 3462, Decision (3/1/24) and Environmental Assessment, Case No. BER 2024-02 OC.**

On March 29, 2024, Theresa Seth filed an Appeal of DEQ Opencut Mining Permit #3462, Decision (3/1/24) and Environmental Assessment requesting the

Board rescind the permit. The Board can decide to hear the case itself or assign a hearing examiner for some or the totality of the case.

c. In the Matter of: Notice of Appeal and Request for Hearing by Gateway Conservation Alliance Regarding Issuance of Opencut Mining Permit No. 3462, Case No. BER 2024-03 OC.

On March 29, 2024, Gateway Conservation Alliance filed a Notice of Appeal and Request for Hearing regarding the issuance of Opencut Mining Permit No. 3462 to TMC Inc., asking the Board to set aside the permit as being unlawful. The Board can decide to hear the case itself or assign a hearing examiner for some or the totality of the case.

V. BER AUTHORITIES MEMO

The Board will discuss BER's authorities and responsibilities.

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. BOARD CHAIR UPDATE

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

VIII. ADJOURNMENT