

**BOARD OF ENVIRONMENTAL REVIEW
MEETING MINUTES**

DECEMBER 10, 2021

Call to Order

Chairperson Ruffatto called the meeting to order at 9:01 a.m.

Attendance

Board Members Present

By Zoom: Chairman Steven Ruffatto; Board Members Joseph Smith, David Lehnherr, Jon Reiten, David Simpson, Julia Altemus, Stacy Aguirre

A quorum of the Board was present.

Board Attorney(s) Present

Katherine Orr, Attorney General's Office, Department of Justice

DEQ Personnel Present

Board Liaison: James Fehr

Board Secretary: Regan Sidner

DEQ Legal: Kirsten Bowers, Nicholas Whitaker, Catherine Armstrong, Aaron Pettis, Sarah Christopherson, Angela Colamaria, Kurt Moser, Loryn Johnson, Ed Hayes, Lee McKenna

Public Policy: Rebecca Harbage, Moira Davin

Water Quality: Jon Kenning, Lauren Sullivan, Kayla Glossner, Christine Weaver, Heather Henry, Darryl Barton

Enforcement: Chad Anderson

Other Parties Present

Laurie Crutcher, Laurie Crutcher Court Reporting

Vicki Marquis

Clayton Elliott

Andrew Cziok

John Martin

Catherine Laughner

Sam Yemmington

Martha Thomsen

Jeffrey Doud

Caitlin Buzzas

I. ADMINISTRATIVE MATERIALS

A. Review and Approve Minutes

A.1. The Board will vote on adopting the October 8, 2021 Meeting Minutes

Chair Ruffatto moved to approve the October 8, 2021 meeting minutes with the following amendments: On page two of the minutes document, item III.1., in the sixth line replace the word "exceptions" with the words "response briefs." Then in that same paragraph, in the 7th line the sentence that starts with "oral argument did not proceed", put a period after the word proceed, and then delete the rest of that sentence all the way to the end. And then add the following sentence "The Board granted an extension to file response briefs until the November 5, 2021." On page three of the minutes document, under the Board Counsel update, in the second line after the word board, delete the words "secretary to be noticed to the Board and the public for review." Board member Lehnherr seconded the motion. The motion passed unanimously.

Board Member Aguirre moved to adopt the October 8, 2021 meeting minutes as amended; Board Member Lehnherr seconded. The motion passed unanimously.

The Board will vote on adopting the October 29, 2021 Special Meeting Minutes

There was no board discussion and no public comment.

Board Member Reiten moved to approve the October 29, 2021 special meeting minutes; Board Member Aguirre seconded. The motion passed unanimously.

B. Progress of the study to determine bases if any to reduce time to process appeals before the Board.

The Board discussed Board Member Simpson's original memo regarding informal process for addressing appeals, as well as ALS' response memo, and the Board Members' hopes and intentions moving forward.

C. The Board will determine the schedule of its meetings in 2022.

Board Members discussed the proposed schedule for BER meetings in 2022, discussing the day and time of the meetings.

Chair Ruffatto moved that the Board continue to meet at 9 AM on the designated meeting days; Board Member Lehnherr seconded. The motion carried unanimously.

Board Member Reiten moved that the meeting days be moved to Thursdays, one day prior to each proposed date; Board Member Lehnherr seconded. The motion was not carried, with Board Member Reiten assenting, Board Members Smith and Lehnherr abstaining, and Chair Ruffatto and Board Members Altemus, Aguirre, and Simpson dissenting.

Chair Ruffatto moved to adopt the proposed schedule; Board Member Simpson seconded. The motion carried unanimously.

II. BRIEFING ITEMS

A. CONTESTED CASE UPDATES

II.A.1.b. **In the matter of the notice of appeal by Duane Murray regarding the notice of violations and administrative compliance and penalty order (Docket No. SUB-18-01; ES#36-93-L1-78; FID 2568), BER 2020-01 OC.** Board Counsel Orr provided the following update: on December 9, 2021, the parties held oral argument, and no order has yet been written by the hearing examiner. Mr. Murray appeared, and Hearing Examiner Brown will put in the order what his response was.

II.A.1.c. **In the Matter Sidney Sugars Incorporated Appeal of Montana Pollutant Discharge Elimination System Permit No. MT0000248, BER 2021-07 WQ.**

Board Counsel Orr provided the following update: the parties on the Sidney Sugars case were asked if they wanted an informal process and they declined.

II.A.3.b. **Montana Environmental Information Center, and Sierra Club v. Montana Department of Environmental Quality, Montana Board of Environmental Review, and Western Energy Co. (DV-2019-34, Rosebud County) (District Court).**

Chair Ruffatto discussed the history related to the Board being named in appeals to district courts for judicial review, of which this case is one. It has been the Board's position that it is inappropriate for the Board to be named. In the past the Board hired outside counsel, Amy Christensen of Christensen and Prezeau, PLLP, for dismissal. Two district courts have ruled against the Board on that and kept the Board as a party, including this case. One driving issue for the Board is the impediments of retaining counsel to defend its position, when it has been the position of the Board that it is not the Board's place to defend its position. Now that there has been a ruling on the merits in this case, and an appeal is anticipated, this could be a case that the Board takes to the Supreme Court on the issue of whether or not the Board should be named. Chair Ruffatto did not ask for Board action at the time of the meeting.

III. ACTION ITEMS

III.a. **In the matter of: Notice and Appeal and Request for Hearing by Oreo's Refining Regarding Solid Waste License Expiration (License #574).**

Board Member Lehnerr moved to assign the case to a Hearing Examiner in its entirety; Board Member Reiten seconded. Motion carried unanimously.

Chair Ruffatto moved that the Board direct the Hearings Examiner to begin by scheduling a conference or videoconference call to offer the option for an informal process, before proceeding onto the formal contested case process; Board Member Simpson seconded. Motion carried unanimously.

III.b. **In the matter of the notice of appeal and request for hearing by Western Energy Company (WECO) regarding its MPDES Permit No. MT0023965 issued for WECO's Rosebud Mine in Colstrip, BER 2012-12 WQ.**

Board Member Simpson moved to grant the Motion to Dismiss the case as moot; Board Member Smith seconded. Motion carried unanimously. The parties discussed the history and longevity of the case before the Board.

III.c. | **In the matter of the notice of appeal and request for hearing by Westmoreland and Rosebud Mining LLC regarding issuance of MPDES Permit No. MT 0023965 (BER 2021-05 WQ).**

Board Member Reiten moved that the Board adopt the proposed order as agreed to by the parties as the final agency decision; Board Member Simpson seconded. Motion carried unanimously.

IV. RULE REVIEW

IV.a. | **In the Matter of Adoption of New Rule I pertaining to Selenium Standards for Lake Kooconusa, BER 2021-04 WQ.**

The schedule for proceeding with the issue is posted on the Board of Environmental Review website. Submissions should be sent to the Board Secretary.

VI. BOARD COUNSEL UPDATE

| No Board Counsel update was provided.

VII. GENERAL PUBLIC COMMENT

| No public comment was given.

VII. ADJOURNMENT

| Board Member Lehnerr moved to adjourn the meeting; Chair Ruffatto seconded. Motion carried unanimously. The meeting adjourned at 10:53 AM.

Board of Environmental Review December 10, 2021, minutes approved:

/s/ Steven Ruffatto
STEVEN RUFFATTO
CHAIRMAN
BOARD OF ENVIRONMENTAL REVIEW

February 25, 2022
DATE