

**BOARD OF ENVIRONMENTAL REVIEW
MEETING MINUTES**

FEBRUARY 25, 2022

Call to Order

Chairperson Ruffatto called the meeting to order at 9:00 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

Roll was called and a quorum was present.

Board Attorney(s) Present

None

DEQ Personnel Present

Board Liaison: James Fehr

Board Secretary: Shawna Pieske, Sandy Moisey Scherer

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

Public Policy: Rebecca Harbage, Moira Davin

Water Quality: Jon Kenning, Myla Kelly, Lauren Sullivan

Other Parties Present

Laurie Crutcher, Crutcher Court Reporting

Catherine Laughner (BKBH) - Western Sugar Cooperative

Aislinn Brown, Caitlin Buzzas, Patrick Risken, Jeffrey Doud, Elena Hagen - Montana DOJ Agency Legal Services Bureau

Aaron Bolton, MTPR

Brian Balmer, US Fish and Wildlife Service

Vicki Marquis (Holland and Hart) – Teck Coal

Sarah Bordelon (Holland and Hart) – Western Energy Company and Signal Peak Energy

Sam Yemington (Holland and Hart)

Robert Cameron (Jackson Murdo and Grant)

Erin Sexton

Peggy Trenk, Treasure State Resources

Derf Johnson, MEIC

Shiloh Hernandez (Earth Justice) – MEIC

Murray Warhank (Jackson, Murdo & Grant) - Lincoln County Board of Commissioners

I. ADMINISTRATIVE MATERIALS

A. Review and Approve Minutes

A.1. The Board will vote on adopting the December 10, 2021 Meeting Minutes

Board member Smith MOVED to approve the December 10, 2021 meeting minutes. Board member Lehnherr SECONDED. The motion PASSED unanimously.

There was no board discussion and no public comment.

B. Informal and formal process for hearing appeals before the Board.

Board member Simpson MOTIONED that for each new appeal the Board immediately issue an order that describes and compares the formal and informal procedures, and requires the parties to indicate if they wish to waive the formal procedure and proceed under an informal procedure. Board member Lehnherr SECONDED.

The Board engaged in discussion. The motion PASSED unanimously.

Ms. Colamaria asked that the Board include a detailed description of the two choices, formal versus informal processes, in any correspondence so the parties can make an informed decision. Chair Ruffatto indicated that a description regarding processes would be included in any correspondence so the parties would know what they are agreeing to. Ms. Colamaria asked that DEQ be given an opportunity to comment. Chair Ruffatto agreed to allow DEQ to comment.

C. Vice-Chair Appointment.

Chair Ruffatto discussed the need to appoint a Vice-Chair for the Board and MOVED to appoint Board member Aguirre as Vice-Chair. Board member Lehnherr SECONDED. The motion PASSED unanimously.

D. Hearing Examiners.

Chair Ruffatto discussed the turnover of Hearing Examiners at Agency Legal Services (ALS), and the number of Hearing Examiners for new cases will be reduced to two. The Hearing Examiners will be Rob Cameron of Jackson Murdo and Grant and Patrick Riskin of ALSB. The Board would not be appointing ALS broadly and current ALS Hearing Examiners will proceed with handling their cases.

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.

Chair Ruffatto provided an update to the Board as Board Counsel Orr was not present. Exceptions are being filed and this matter will be on the agenda for the next Board meeting.

II.A.1.f. In the Matter of the notice of appeal and request for hearing by the Western Sugar Cooperative regarding its Montana Pollutant Discharge Elimination System Permit No. MT0000281, BER 2020-05 WQ.

Chair Ruffatto MOVED to appoint Patrick Riskin with ALS as the Hearing Examiner for the entirety of the case. Board member Lehnherr SECONDED. The motion PASSED unanimously.

II.A.1.e. In the Matter of Notice of Appeal and Request for Hearing by Western Energy Company Regarding Approval of Surface Mining Permit No. C2011003F, BER 2019-05 OC.

Ms. Bordelon stated a notification had been received that a Hearing Examiner had assumed jurisdiction for this case. She asked if this Hearing Examiner would continue or if one of the new Hearing Examiners would take over, and whether the Board would formally appoint a Hearing Examiner pursuant to the applicable statute.

Chair Ruffatto MOVED that Michelle Dietrick of ALS be appointed Hearing Examiner for this case. Board member Lehnherr SECONDED. The motion PASSED unanimously.

III. ACTION ITEMS

III.a. An appeal in the matter of amendment application AM3, Signal Peak Energy LLC's Bull Mountain Coal Mine #1 Permit No. C1993017, BER 2016-07 SM.

The Board heard oral argument from the parties.

Board member Simpson MOTIONED to deny DEQ's petition for stay and for the Board to move forward with the decision based on the facts at the next Board meeting. Board member Lehnherr SECONDED. The motion PASSED six to one, with Board member Aguirre dissenting.

Chair Ruffatto MOTIONED that each party shall submit a short 5-page brief by March 18, 2022, regarding whether the AM4 District Court decision is binding upon the Board. Board member Reiten SECONDED. The motion PASSED unanimously.

III.b. **In the Matter of Adoption of New Rule I pertaining to Selenium Standards for Lake Kocanusa, BER 2021-04 WQ.**

For question 1 regarding if the lake water column standard (.8 µg/L) (the “Standard”) was more stringent than the comparable federal guideline, Ms. Bowers, Ms. Kelly, and Ms. Marquis briefed the Board and answered questions.

Board member Lehnherr wanted to register a complaint about how the January 31st public hearing was held. Public hearings are not a place for debate but rather a place to present both sides. They are an opportunity to solicit public input, and everyone gets the same amount of time to speak. Unfortunately, the Hearing Officer allowed some people who had already spoken to speak for an additional length of time, which was highly inappropriate.

The Board engaged in discussion. Board member Simpson MOTIONED that the rule specifying the 0.8 µg/L is more stringent than the 1.5 µg/L guideline specified by the EPA. Board member Aguirre SECONDED. The motion PASSED five to two, with Board members Lehnherr and Reiten dissenting.

For question 2 regarding what the remedy/consequence of the failure to comply with the Stringency Statute is, Ms. Bowers, Ms. Kelly, and Ms. Marquis briefed the Board and answered questions.

The Board engaged in discussion. Chair Ruffatto MOTIONED that DEQ is obligated to follow the statute and must initiate rulemaking. Board member Simpson SECONDED. Board member Lehnherr asked if the motion could be made more succinct. Chair Ruffatto WITHDREW his motion and Board member Simpson WITHDREW his second.

The Board engaged in discussion. Chair Ruffatto MOVED the remedy be for DEQ to comply with 75-5-203, MCA, and that it must do so by initiating rulemaking to adopt a rule consistent with the stringency statute because the Board’s rulemaking was invalid as to the 0.8 µg/L standard. The motion died due to lack of a second.

Chair Ruffatto MOVED the remedy be for DEQ to comply with 75-5-203, MCA. Board member Smith SECONDED. The motion PASSED unanimously.

For question 4 regarding Teck Coal Limited having standing, Ms. Bowers and Ms. Marquis briefed the Board and answered questions.

The Board engaged in discussion. Board member Simpson MOVED that Teck Coal has standing and Chair Ruffatto SECONDED. The motion PASSED five to two, with Board members Lehnherr and Reiten dissenting.

For question 5 regarding the initial notice of rulemaking with respect to the .8 lake standard failing to comply with the Stringency Statute, Ms. Bowers and Ms. Marquis briefed the Board and answered questions.

The Board engaged in discussion. Vice-Chair Aguirre MOTIONED that the initial notice of rulemaking with respect to the .8 lake standard failed to comply with the stringency statute. Board member Simpson SECONDED. The motion PASSED five to two, with Board members Lehnherr and Reiten dissenting.

For question 6 regarding whether the rulemaking record with respect to the .8 lake standard contains evidence that would support the findings required by the Stringency Statute, Ms. Bowers and Ms. Marquis briefed the Board and answered questions.

The Board engaged in discussion. Vice-Chair Aguirre MOTIONED that the rulemaking record with respect to the .8 lake standard does not contain the evidence required by the stringency statute to support the findings. Chair Ruffatto SECONDED.

Chair Ruffatto asked Vice-Chair Aguirre if she would consider amending her motion to include the phrase "all the findings." Vice-Chair Aguirre AMENDED her motion to include this language and Chair Ruffatto SECONDED. The motion PASSED five to two, with Board members Lehnerr and Reiten dissenting.

For question 7 regarding whether the Stringency Statute requires peer-reviewed scientific studies to support the findings required by the Stringency Statute, Ms. Bowers and Ms. Marquis briefed the Board and answered questions.

Board member Simpson MOTIONED that the stringency statute requires peer-reviewed scientific studies to support the findings. Vice-Chair Aguirre SECONDED. The motion PASSED unanimously.

IV. NEW CONTESTED CASES

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

Chair Ruffatto recused himself regarding this matter. Vice-Chair Aguirre MOTIONED to assign the case in entirety to the Hearing Examiner. Board member Simpson SECONDED the motion. Vice-Chair Aguirre AMENDED her motion to assign the case to Hearing Examiner Rob Cameron. Board member Simpson SECONDED. The motion PASSED six to zero, with Chair Ruffatto abstaining.

V. BOARD COUNSEL UPDATE

No Board Counsel update was provided.

VI. GENERAL PUBLIC COMMENT

No public comment was given.

VII. ADJOURNMENT

Chair Ruffatto MOVED to adjourn the meeting; Board member Simpson SECONDED. The motion PASSED unanimously. The meeting adjourned at 5:02 PM.

Board of Environmental Review February 25, 2022, minutes approved:

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

April 8, 2022
DATE