



**BOARD OF ENVIRONMENTAL REVIEW
MEETING MINUTES**

AUGUST 12, 2022

Call to Order

Chairman Ruffatto called the meeting to order at 9:00 a.m.

Attendance

Board Members Present

By Zoom: Chairman Steven Ruffatto; Board Members Julia Altemus, David Lehnherr, Jon Reiten, and David Simpson.

Roll was called and a quorum was present.

Board Attorney Present

Michael Russell

DEQ Personnel Present

Board Liaison: James Fehr

Board Secretary: Sandy Moisey Scherer

Director: Chris Dorrington

DEQ Legal: Catherine Armstrong, Kirsten Bowers, Sarah Christopherson, Angie Colamaria, Loryn Johnson, Jeremiah Langston, Lee McKenna, Nicholas Whitaker

Public Policy: Moira Davin

Water Quality: Myla Kelly, Lauren Sweeney

Air, Energy & Mining: Sonja Nowakowski

Enforcement: Heidi Barnes, Sarah Ogden

Other Parties Present

Laurie Crutcher, Crutcher Court Reporting

Aislinn Brown, Caitlin Buzzas, Elena Hagen - Montana DOJ Agency Legal Services Bureau

Jason Mohr, Montana Legislative Services Division

Sam Yemington (Holland and Hart) – Signal Peak Energy

Vicki Marquis (Crowley Fleck) – Teck Coal

Murry Warhank (Jackson Murdo & Grant) – Board of County Commissioners of Lincoln County, MT

Ray Stout, Kootenai Valley Record

Andy Janes

Deb Carroll

Tonya Fish, EPA

I. ADMINISTRATIVE MATERIALS

A. Review and Approve Minutes

A.1. The Board will vote on adopting the June 10, 2022, Meeting Minutes

Board member Altemus MOVED to approve the June 10, 2022, meeting minutes. Board member Simpson SECONDED. The motion PASSED unanimously.

There was no board discussion or public comment.

A.2. In Person Board Meeting Discussion

The Board discussed meeting remotely and in-person. Chairman Ruffatto said that the goal is to meet one time per year in-person so the Board could get to know each other better. Board members said that the interpersonal dynamic is important and may help in deliberations.

Chairman Ruffatto MOVED that the Board designate one meeting per year when all Board members will make an effort to get to Helena for an in-person meeting, and that the first one will be October 14, 2022. Board member Simpson SECONDED.

Discussion ensued. Chairman Ruffatto commented that hybrid meetings were more difficult for the Court Reporter so this will need to be taken into consideration.

Chairman Ruffatto AMENDED his motion to include a goal of having at least a majority of the Board present for the October meeting. The Board will be polled in advance, and if there will not be a majority of the Board planning on being in Helena, the in-person meeting will not be held. Board member Simpson ACCEPTED the amended motion.

Board member Altemus asked that when the Board finds a date that works for the majority that it not involve winter travel but have an option for Zoom. Chairman Ruffatto agreed.

The motion passed unanimously.

Chairman Ruffatto asked Board Secretary Sandy Moisey Scherer to email all Board members to let them know about this discussion and ask that this item be placed on their calendars. He also asked her to contact Board members three weeks prior to the meeting to inquire who will be in attendance.

A.3. Adoption of Rules for the Form of Exceptions to proposed FOFCOLS

The Board discussed the recent Signal Peak Energy case where FOFCOL exceptions were received without addressing specific relief for the Board to consider. This created confusion and extra work for the Board.

Discussion ensued. No motion was presented, and no vote taken.

II. BRIEFING ITEMS

Chairman Ruffatto reviewed the briefing items and asked the Board for comments. He brought the Board's attention to DV-2019-34 (WECO). This is the case that is currently before the Montana Supreme Court and the Board is a party to the appeal. This case will have a bearing on one of the action items in today's meeting.

Board member Lehnherr inquired about BER 2022-03 HR (Ployhar) as he thought he heard something regarding a fine. Board Attorney Russell said the case is a challenge to DEQ's determination that an environmental impact survey should be done and he has no knowledge of a fine. A procedural order has been issued and a proposed scheduling order should be completed by the end of the month.

Chairman Ruffatto brought the Board's attention to BER 2019-05 OC (WECO). Patrick Risken has been the Hearing Examiner but is no longer with ALS. Chairman Ruffatto MOVED to assign Board Counsel Russell to be the Hearing Examiner. Board member Simpson SECONDED. The motion PASSED unanimously.

Chairman Ruffatto directed the Board's attention to BER 2020-05 WQ (Western Sugar). Patrick Risken has been the Hearing Examiner in this case as well. Chairman Ruffatto MOVED to assign Board Counsel Russell to be the Hearing Examiner. Board member Lehnherr SECONDED. The motion PASSED unanimously.

For BER 2021-07 (Western Sugar), Hearing Examiner Aislinn Brown advised the Board that the Motion for Summary Judgment has been fully briefed.

III. ACTION ITEMS

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

The Board discussed MEIC's appeal of the Board's final order filed in Yellowstone County District Court. Chairman Ruffatto said the Board has been named as a party in this judicial review proceeding. The Board currently has an issue in front of the Supreme Court and should not spend resources and money raising that issue here. Chairman Ruffatto said that the Board should file a Notice of Non-Participation and that the Board will simply monitor case. If there's a reason the Board needs to participate more actively, Board Counsel can do that or bring it to the Board for a decision whether it should participate more actively.

Chairman Ruffatto MOVED that the Board participate in this case as little as possible; that the Board appoint Board Counsel Russell to file an appropriate pleading demonstrating that; in that pleading, make any reservations he thinks are appropriate to reserve the Board's rights with respect to the issue that is before the Supreme Court; and also to reserve the Board's right to get involved if there's a reason for the Board to do so. Board member Reiten SECONDED. The motion PASSED unanimously.

III.b. **In the Matter of: Petitions of Teck Coal Limited and the Board of County Commissioners of Lincoln County, Montana, for Review of ARM 17.30.632(7)(A) Pursuant to Mont. Code Ann. Section 75-5-203 – Stringency Review of Rule Pertaining to Selenium Standard for Lake Koocanusa, BER 2021-04 and 08 WQ**

Oral argument was held regarding DEQ's Motion to Alter or Amend the Board's Final Agency Decision.

Board member Simpson asked about DEQ's selenium monitoring. Kirsten Bowers stated that in its next triennial review, the Department would review any new data available. Myla Kelly responded that there are a number of partnerships that continue to be ongoing and performing monitoring work on Lake Koocanusa. The partnerships include the US Geological Survey, Teck Coal, the US EPA, as well as Montana DEQ. Data is being collected through the season and that data could be considered during the triennial review process.

Board member Lehnher asked Vicki Marquis how Teck is affected by the rule. Ms. Marquis said that the impact on Teck was made apparent immediately after the rule was published as former DEQ Director Shaun McGrath wrote a letter to the State Department. He clearly was directing and asking for an IGC referral, asking for action against Teck. Ms. Marquis said that DEQ intends to move forward with assessment of Lake Koocanusa that will likely result in an impairment determination. She said that DEQ would propose a waste load allocation that it would then take to the Canadian government to have enforced. DEQ views Teck as the source of selenium coming from Canada and would ask for some sort of pollution reduction aimed at Teck.

Chairman Ruffatto asked Vicki Marquis for clarification regarding the point DEQ makes that the standard, or the approach that Teck Coal and Lincoln County propose, would make it impossible to comply with the statute in any rulemaking process. Ms. Marquis said she did not see that at all in the statute. The Department is provided two remedies in ARM 17.30.632(4), both of which require rulemaking. In ARM 17.30.632(2), the Department may adopt a rule only if they make written findings. Teck is not arguing that Montana can never adopt a standard more stringent than Federal and there's a process in place where the Department can do that. Montana can have a standard more stringent but this needs to be disclosed before a standard is put in place. Rulemaking is required to revise the rule, and this can be completed in a couple of months.

Chairman Ruffatto asked Kirsten Bowers about DEQ's point regarding making it impossible to adopt any rule more stringent. Ms. Bowers said that upon a petition for stringency review, the successful petitioner is entitled to the remedy provided in the stringency statute, and that remedy is implemented by DEQ. There are two potential remedies: One is rulemaking to adopt a rule consistent with the Federal standard or guidelines; and the second is to make the required findings, which DEQ did. Ms. Marquis' interpretation of the stringency statute inserts requirements that are not there and omits requirements that are there, thus violating statutory interpretation. The Department did make the findings in accordance with the stringency statute (75-5-203(2), MCA) because it made the findings after a public hearing and a public comment period, and based on evidence in its rulemaking record.

Chairman Ruffatto asked Ms. Bowers why DEQ chose the course that it did. Ms. Bowers said that the 0.8 standard is based on science. Ms. Bowers stated that DEQ chose the course of making the written findings because it believes the .8 water column standard is based on sound science and protects the uses in Lake Koocanusa. The standards are reviewed periodically, and the Department would want to look at more data and give the public opportunity to comment in a MAPA process.

Chairman Ruffatto asked Ms. Bowers why DEQ did not pursue the rulemaking process, ignoring what that the Board did and choose a risky process? Ms. Bowers said that DEQ does not agree that it chose a risky process but chose a process that is clearly available in the statute as one of the remedies upon a finding that a standard is more stringent than Federal.

The Board deliberated about DEQ's Motion to Alter or Amend the Board's Final Agency Decision. Board member Altemus MOVED to deny DEQ's Motion to Alter or Amend the Board's Final Agency Decision. Chairman Ruffatto SECONDED. The Board discussed the Motion in greater detail. The vote was 3-2 to DENY DEQ's Motion but Chairman Ruffatto concluded that the vote at issue was insufficient because it was not supported by a majority of all Board members.

Chairman Ruffatto asked legal counsel for the parties for their opinion about the vote and all gave their opinions. Rule 59 of the Montana Rules of Civil Procedure says that it is the Board's discretion whether or not to extend the time period for this decision. Board Counsel Russell said that perhaps the best option would be to table this until the October meeting, given there's another pending motion in the selenium standard matter.

Chairman Ruffatto MOVED that the Board exercise its discretion and table this motion until the next meeting, as the Board cannot get a majority vote. Board member Altemus SECONDED. The motion PASSED unanimously.

Ms. Marquis commented that 120 days from the filing date would be September 14th, which is earlier than the Board's October meeting. Chairman Ruffatto said he would exercise his discretion as Chairman and that the motion to table will stand.

IV. NEW CONTESTED CASE

IV.a. **In the Matter of: Appeal and Request for Hearing by Valley Garden Land & Cattle LLC regarding Issuance of Opencut Mining Permit #674, Amendment #3**

Chairman Ruffatto MOVED to assign the case in entirety to Board Attorney Michael Russell as the Hearing Examiner. Board member Reiten SECONDED. The motion PASSED unanimously.

IV.b. **In the Matter of: Notice of Appeal and Request for Hearing Rosebud Mine Area B Amendment 5 Permit Number C1984003B**

Chairman Ruffatto MOVED to assign the case in entirety to Board Attorney Michael Russell as the Hearing Examiner. Board member Lehnerr SECONDED. The motion PASSED unanimously.

V. BOARD COUNSEL UPDATE

None.

VI. GENERAL PUBLIC COMMENT

No public comment was given.

VII. ADJOURNMENT

Chairman Ruffatto MOVED to adjourn the meeting; Board member Simpson SECONDED. The motion PASSED unanimously. The meeting adjourned at 11:28 AM.

Board of Environmental Review August 12, 2022, minutes approved:

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

October 14, 2022
DATE