



**BOARD OF ENVIRONMENTAL REVIEW  
MEETING MINUTES**

**APRIL 19, 2024**

**Call to Order**

Chair Simpson called the meeting to order at 9:00 a.m.

**Attendance**

**Board Members Present**

By Zoom: Chair Dave Simpson; Vice Chair Stacy Aguirre; Board Members Julia Altemus, Jennifer Rankosky, Jon Reiten, and Joe Smith.

Roll was called and a quorum was present.

Chair Simpson announced that the Governor has appointed Amanda Knuteson to replace Lee Bruner on the Board.

**Board Attorney Present**

Terisa Oomens

**DEQ Personnel Present**

Board Secretary: Sandy Moisey Scherer

Board Liaison: Deputy Director James Fehr

DEQ Communications: Moira Davin, Rebecca Harbage

DEQ Legal: Catherine Armstrong, Kirsten Bowers, Sarah Christopherson, Loryn Johnson, Sam King, Jeremiah Langston, Jon Morgan, Kurt Moser, Aaron Pettis, and Kaitlin Whitfield

DEQ Air, Energy and Mining: Sonja Nowakowski, Anne Spezia

**Other Parties Present**

Laurie Crutcher, Crutcher Court Reporting

Aislinn Brown, Elena Hagen – Montana DOJ Agency Legal Services Bureau

Vicki Marquis, Mark Stermitz – Crowley Fleck

Graham Coppes – Ferguson & Coppes PLLC

David Kim Wilson, Robert Farris-Olsen – Morrison Sherwood Wilson & Deola

Frank Tabish, LHC MT

Jeff, LHC MT

Todd Briggs - Westmoreland

David Smith - MT Contractors Association

Gayla Nicholson

Jon, Clearwater MT

Ken Stoeber - TMC-Belgrade

Terry Martin-Denning

Libby Langston

Gayla Nicholson

**I. ADMINISTRATIVE MATERIALS**

**A. Review and Approve Minutes**

**A.1. The Board will vote on adopting the February 16, 2024, Meeting Minutes.**

Board member Smith moved to APPROVE the February 16, 2024, meeting minutes. Board member Reiten SECONDED. The motion PASSED unanimously.

There was no board discussion or public comment.

**II. BRIEFING ITEMS**

Chair Simpson and Board Counsel Oomens offered clarification regarding cases.

Board Counsel Oomens said that the District Court has received the remand for BER 2016-03 SM (Western Energy). The District Court will remand a portion of the case back to the BER, but will be delayed as the judge has a couple of trials back-to-back - the remand will hopefully be received in the next couple of months.

Chair Simpson said he had received information regarding the DEQ v. Board litigation (Selenium). There were three orders issued by the Court and legal counsel for the BER, Dana Hupp, sent a summary. Board member Altemus asked that this summary be sent to Board members and Chair Simpson said that he would have the Board Secretary send on his behalf.

The Board did not have any questions.

**III. ACTION ITEMS**

**a. In the Matter of: Notice of Appeal and Request for Hearing by the Western Sugar Cooperative regarding its Montana Pollution Discharge Elimination System Permit No. MT0000281, BER 2020-05 WQ**

Chair Simpson asked if the parties were present. Kurt Moser of DEQ and Vicki Marquis of Crowley Fleck were present.

Vice Chair Aguirre moved to REMAND the matter to DEQ for further consideration in accordance with the terms of the Settlement Agreement. Board member Rankosky SECONDED. The motion PASSED unanimously.

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**

Chair Simpson asked if the parties were present. Kaitlin Whitfield of DEQ, Graham Coppes of Ferguson & Coppes, and Mark Stermitz of Crowley Fleck were in attendance and presented oral argument before the Board.

Discussion ensued.

Chair Simpson motioned to REMAND this matter back to the Hearing Examiner for more clarification. Board member Altemus SECONDED.

Discussion ensued.

Chair Simpson restated his motion to REMAND the matter back to the Hearing Examiner with specific attention to: 1) Whether there was agreement regarding facts to support summary judgment; 2) With respect to residences (that a number is given), and a map showing the location of the proposed gravel pit relative to other features (including the river, water bodies, and dwellings), and 3) Definitive information on the water table, and how it relates to the depth of the pit (i.e., the elevation to – difference in elevation between the groundwater surface and the bottom of the pit); and also a re-examination of the word “affect” and how we deal with it in this context. Board member Reiten SECONDED.

The motion PASSED 5-1, with Vice Chair Aguirre dissenting.

**IV. NEW CONTESTED CASES**

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.**

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.**

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.**

Chair Simpson moved to CONSOLIDATE the three new contested cases. Board member Rankosky SECONDED.

Discussion ensued.

Chair Simpson amended his motion to CONSOLIDATE the cases, but the hearing would be heard before the Board. Board member Reiten SECONDED. The motion PASSED unanimously.

**V. BER AUTHORITIES MEMO**

Chair Simpson performed a review and analysis of current law regarding power, authorities, and responsibilities of the BER, which is a quasi-judicial board. The purpose was to support a decision whether or not to propose a bill in the 2025 legislature to address and clarify matters. From his analysis and review, Chair Simpson concluded that there is no immediate need for clarification of Board powers.

Chair Simpson proposed the Board schedule a hearing on the opencut statute and rules for the benefit of the Board, to understand how the process works, and to probe as to whether there are any changes to the rules that might be appropriate to eliminate some of the controversies that have come up consistently with the opencut statute. This would be a general examination of the program, and the issues that it brings to the Board.

Discussion ensued. Chair Simpson mentioned that specific cases would not be addressed in this meeting.

Chair Simpson motioned that the Board PROCEED with a hearing to review the Opencut review permit process, permit review process, and move forward with developing an agenda; and to schedule a hearing either at the next regular meeting or at a separate meeting. Board member Reiten SECONDED. The motion PASSED unanimously.

**Vi. GENERAL PUBLIC COMMENT**

None.

**VI. BOARD CHAIR UPDATE**

Chair Simpson mentioned that the Selenium case, litigation and the BER responsibilities had been discussed earlier in the meeting.

**VI. ADJOURNMENT**

Board member Smith MOVED to adjourn the Board Meeting; Board member Altemus SECONDED. The motion PASSED unanimously. The meeting was adjourned at 11:40 A.M.

Board of Environmental Review April 19, 2024, minutes approved:

/s/ David Simpson  
DAVID SIMPSON  
CHAIR  
BOARD OF ENVIRONMENTAL REVIEW

June 21, 2024  
DATE