

BOARD OF ENVIRONMENTAL REVIEW
FRIDAY, OCTOBER 4, 2019
METCALF BUILDING, ROOM 111
1520 EAST 6th AVENUE, HELENA, MONTANA

NOTE: Interested persons, members of the public, and the media are welcome to attend at the location stated above. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this meeting. Please contact the Board Secretary by telephone or by e-mail at Lindsay.Ford@mt.gov no later 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 August 9, 2019 meeting minutes.

Public Comment.

II. BRIEFING ITEMS

A. CONTESTED CASE UPDATE

1. Enforcement cases assigned to the Hearing Examiner
 - a. **In the matter of the Notice of Appeal and Request for Hearing by CMG Construction, Inc. Regarding Notice of Violations and Administrative Compliance and Penalty Order, Docket No. OC-17-12, BER 2017-08 OC.** On June 12, 2019, the parties filed a Joint Motion to Stay Schedule citing a potential settlement of this matter. Ms. Clerget issued an Order Granting Stay on June 17, 2019 and the parties filed a status report on July 17, 2019, indicating technical discussions regarding settlement are still underway. In August the parties submitted differing status reports. On September 3, 2019, Ms. Clerget held a scheduling conference to discuss setting this matter for hearing. At the conference, the parties requested additional time to discuss settlement. The parties are to file a status report by October 1st. If substantive progress toward settlement has not occurred by that time, this matter will be set for hearing.
 - b. **In the matter of violations of the Water Quality Act by Reflections at Copper Ridge, LLC, at Reflections at Copper Ridge Subdivision, Billings, Yellowstone County (MTR105376), BER 2015-01 WQ and In the matter of violations of the Water Quality Act by Copper Ridge Development Corporation at Copper Ridge Subdivision, Billings, Yellowstone County (MTR105377), BER 2015-02 WQ.** At its August 9, 2019 meeting the Board remanded this case back to Ms. Clerget for additional findings concerning the four photographs excluded at the June 13, 2019, owner/operator hearing. On September 9, 2019, Ms. Clerget held a status conference with the parties and discussed the schedule. The parties requested staggered initial disclosures ending October 25, 2019. After those disclosures, by November 8, 2019, the parties will provide a stipulated schedule for additional deadlines, including time for additional discovery and depositions, pretrial exchanges, and an additional

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hearing date. The parties have indicated they expect the additional hearing to take at least a day.

2. Non-enforcement cases assigned to the Hearings Examiner

- a. **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.** On August 9, 2019, the BER appointed Sarah Clerget as hearing examiner to preside over this contested case. On September 9, 2019, Ms. Clerget issued a scheduling order and the parties are proceeding through discovery, which closes in June of 2020.
- b. **In the matter of the Notice of Appeal and Request for Hearing by CHS, Inc. regarding issuance of MPDES Permit No. MT0000264, BER 2019-01 WQ.** On February 8, 2019, the BER appointed Sarah Clerget as hearing examiner to preside over this contested case. The Board directed Ms. Clerget to consolidate this case with BER 2015-07 WQ for scheduling purposes. On July 8, 2019, the parties filed a Motion to Stay the Amended Scheduling Order citing settlement discussions. On July 15, 2019, Ms. Clerget granted the stay. The parties are to file either a stipulated settlement agreement or a joint motion with revised procedural dates for the remaining of the schedule by November 29, 2019.
- c. **In the matter of the notice of appeal of final MPDES Permit No. MT0000264 issued by DEQ for the Laurel Refinery in Laurel, Yellowstone County, Montana, BER 2015-07 WQ.** On February 8, 2019, the BER appointed Sarah Clerget as hearing examiner to preside over this contested case. The Board directed Ms. Clerget to consolidate this case with BER 2019-01 WQ (CHS) for scheduling purposes, and therefore update on this case is the same as above.
- d. **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.** This matter has been stayed since March 28, 2018, pending the Montana Supreme Court decision in *MEIC and Sierra Club v. DEQ and Western Energy*. The Supreme Court issued its decision on September 10, 2019 and the parties will file a status report by October 10, 2019.
- e. **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.**
 - i. **District Court Case:** The parties took a subpoena dispute to the District Court on June 1, 2018 with Cause No. DV 18-0869. The BER was named as a Defendant in that District Court case, and Ms. Clerget filed a "Notice of Non-Participation" before the District Court on behalf of the BER. The District Court issued a ruling on the subpoena issue on November 14, 2018 and attorney's fees on March 25, 2019. On May 22, 2019 Signal Peak appealed to the Montana Supreme Court in Cause

No. DA 19-0299. Opening briefs were filed September 20, 2019. The BER has retained Amy Christensen to represent it before the Supreme Court.

- ii. **Contested Case:** Ms. Clerget assumed jurisdiction from the prior hearing examiner on September 8, 2017, for procedural purposes only. On April 5, 2019 cross motions for summary judgment were fully briefed (DEQ's Motion is for partial summary judgment). On May 31, 2019 the Board assigned the case to Ms. Clerget for all purposes, including a decision on the pending summary judgment motions. Based on counsels' schedules, Ms. Clerget held oral Argument on the motions for summary judgment on August 22, 2019. The matter is now fully submitted to Ms. Clerget for a decision, which may be before the Board at the December 13, 2019 meeting (depending on the outcome and the parties' preferences).

- f. **In the matter of the notice of appeal and request for hearing by Montanore Minerals Corporation Regarding Issuance of MPDES Permit No. MT0030279, Libby, Montana, BER2017-03 WQ.** A two-day hearing on this matter on held on December 3-4, 2018. An oral argument on the parties' proposed FOFCOLs was held on May 7, 2019, but the parties agreed that this matter would not be before the Board until the October 2019 meeting, based on availability of counsel. On August 19, 2019, Montanore filed a Notice of Supplemental Authority. The Notice stated that on July 24, 2019, the First Judicial District Court had issued its Order on cross motions for summary judgment in Cause No. CDV 2017-641, a declaratory relief action brought in District Court by MEIC, Save Our Cabinets, and Earthworks challenging DEQ's issuance of MPDES Permit No. MT0030279. While the District Court action was limited to conditions of the MPDES Permit that were not at issued before the Board, the District Court Order vacated the entire Permit, thus affecting the status of this case. Through status reports filed on September 13, 2019, the DEQ and Montanore requested a stay of this case pending the outcome of any Supreme Court appeal of the District Court Order. On September 17, 2019, Ms. Clerget issued an Order staying this matter.

- g. **In the Matter of Notice of Appeal of Opencut Mining Permit #2351 Issued to Golden West Properties, LLC by Frank and Paulette Wagner Regarding Concerns and Unanswered Questions. BER 2018-04 OC, and In the Matter of Notice of Appeal of Opencut Mining Permit #2351 Issued to Golden West Properties, LLC by David Weyer on behalf of the Residents of Walden Meadows Subdivision. BER 2018-05 OC.** On August 30, 2019, Ms. Clerget issued her Order on the parties' motions including (1) leave to file second amended complaint; (2) motion in limine; and (3) cross-motions for summary judgment. On September 25, 2019 Ms. Clerget issued a scheduling order setting this matter for hearing.

- h. **In the Matter of the Application for an Amendment of a Major Facility Siting Act Certificate by Talen Montana LLC.** On July 12, 2019, Talen filed a Motion to Dismiss Westmoreland's Appeal, which was fully briefed on August 8, 2019. On August 14, 2019, Ms. Clerget held oral argument on

Talen's Motion to Dismiss, at which all parties appeared and argued. On August 20, 2019, Ms. Clerget issued an Order granting in part and denying in part Talen's Motion to Dismiss. The Order also reset some of the procedural deadlines. The dispositive motions are due to be fully briefed by October 28, 2019 and a four-day hearing is set to begin on November 12, 2019. The parties are proceeding according to the extremely expedited schedule, which will put the case before the BER at the December 13, 2019 meeting.

- i. **In the Matter of the Notice of Appeal and Request for Hearing by Spring Creek Coal, LLC Regarding Issuance of MPDES Permit No. MT0024619.** On April 12, 2019, the BER appointed Sarah Clerget as hearing examiner to preside over this contested case. Ms. Clerget issued a Scheduling Order on June 21, 2019 and the parties are proceeding accordingly. By October 31, 2019 the parties will either file a stipulated settlement agreement or a joint proposed scheduling order.
- j. **In the Matter of Notice of Appeal and Request for Hearing by Western Energy Company Regarding Approval of Surface Mining Permit No. C2011003F, BER 2019-03 OC.** On May 31, 2019, the BER appointed Sarah Clerget as hearing examiner to preside over the contested case. Ms. Clerget issued a Scheduling Order on July 2, 2019. On September 3, 2019, Westmoreland Rosebud Mining LLC, Western Energy Company and the International Union of Operating Engineers, Local 400 have sought to intervene in this matter. No parties filed an objection to this intervention, on September 25, 2019 Ms. Clerget issued an Order Granting Westmoreland's intervention.

3. Contested Cases not assigned to a Hearing Examiner

- a. **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.** On September 10, 2019, the Montana Supreme Court issued its opinion reversing the First Judicial District Court in Montana Environmental Information Center and Sierra Club v. Montana DEQ and Western Energy Company. The Montana Supreme Court determined that DEQ properly interpreted rules implementing the Montana Water Quality Act (specifically ARM 17.30.637(4)). In so doing, the Court recognized that DEQ has the flexibility to exempt ephemeral waters from the water quality standards applicable to Class C-3 waters without the Board of Environmental Review reclassifying the waters. The Court also determined that DEQ lawfully permitted representative sampling of outfalls under Western Energy Company's MPDES permit. The Montana Supreme Court remanded the case back to District Court for further proceedings to determine whether DEQ acted properly in regard to a stretch of East Fork Arnells Creek that is potentially impaired and intermittent, whether it is necessary for DEQ to adopt a TMDL for impaired segments of East Fork Arnells Creek, and whether the representative monitoring selected by DEQ is factually supported.
- 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). On June 6, 2019 the BER issued its final agency action in BER 2016-03 SW ("Western Energy"). On July 3, 2019 Conservation Groups filed a Petition for Review of Final Agency Action. The BER is named as a Defendant in the Petition. The BER has retained Amy Christensen to represent it in this matter at the District Court.

B. OTHER BRIEFING ITEMS

1. **The Department would like to brief the Board on our outreach, actions and timeline for requesting adoption of a human health based manganese groundwater standard.**

III. ACTION ITEMS

A. APPEAL, AMEND, OR ADOPT FINAL RULES

1. **In 2012, to meet the requirements of the federal Regional Haze program, the U.S. Environmental Protection Agency adopted a Federal Implementation Plan establishing emission limits for several power plants and industrial facilities in Montana. Recently, the Department's Air Quality Bureau has been working with stakeholders to develop a State Implementation Plan to replace the federal requirements and put the state of Montana back in the lead for Regional Haze. The Air Quality Bureau is asking the Board, on behalf of the parties, to issue Orders adopting the federal requirements. Effective on adoption in and issuance of a Board Order, the requirements will be enforceable by the Department.**

Public Comment.

B. NEW CONTESTED CASE

1. **In the Matter of the Notice of Appeal and Request for Hearing by City of Great Falls Regarding Issuance of MPDES Permit No. MT0021920.** On August 9, 2019, the Board received a request for hearing. The Board can decide to assign a hearings examiner for procedural issues in this case, hear the case itself, or assign a hearing examiner for the totality of the case.

Public Comment.

IV. BOARD COUNSEL UPDATE

Counsel for the Board will report on general Board business, procedural matters, and questions from Board Members.

V. 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 of the meeting. Individual contested case proceedings are not public matters on which the public may comment.

VI. ADJOURNMENT