

**BOARD OF ENVIRONMENTAL REVIEW
MINUTES**

December 11, 2020

Call to Order

Chairperson Deveny called the meeting to order at 9:04 a.m.

Attendance

Board Members Present

By ZOOM: Chairperson Chris Deveny, David Lehnherr, Dexter Busby (phone), John DeArment, Jeremiah Lynch, Chris Tweenen

A quorum of the Board was present

Board Attorneys Present

Sarah Clerget, Attorney General's Office (AGO)

DEQ Personnel Present

Board Liaison: George Mathieus

Interim Board Secretary: Joyce Wittenberg

DEQ Legal: Angie Colamaria, Ed Hayes, Kirsten Bowers, Kurt Moser, Mark Lucas, Sarah Christofferson, Norm Mullen

Water Quality: Tim Davis, Galen Steffan, Jon Kenning, Myla Kelly, Lauren Sullivan, Mike Suplee

Air Quality Bureau: Dave Klemp, Julie Merkel, Liz Ulrich, Troy Burrows

Coal and Opencut: Ed Coleman

Other Parties Present

Laurie Crutcher, Laurie Crutcher Court Reporting

Vicki Marquis (also for City of Great Falls), Matthew Dolphay (phone) – Holland and Hart/ Westmoreland Resources

William Geer (also for Hellgate Hunters and Anglers), Christopher Servheen, Alec Underwood – Montana Wildlife Federation

John Kilpatrick – US Geological Survey

Genny Hoyle, Gary Aitken Jr. (Chairman), Sue Ireland (Fish & Wildlife Director) – Kootenai Tribe of Idaho

Scott Spaulding – US Forest Service

Michael Jamison – National Parks Conservation Association

Jim Vashro – Flathead Wildlife, Inc.

Dave Hadden – Headwaters Montana

Colby Blair – Last Resort Outfitters

David Kassarah – Westmoreland Resources

Gregory Hoffman – US Army Corps of Engineers

Trevor Selch – Montana Fish, Wildlife and Parks

Shelly Fyant (Chairwoman), Stu Levit – Confederated Salish and Kootenai Tribes

Ayn Schmit, Tonya Fish – US Environmental Protection Agency

Lars Sander-Green, Randall Macnair, Eddie Petryshen – Wildsight Conservation

Garrett Visser – Idaho Wildlife Federation

Anne Fairbrother – Exponent, Inc.
 David Blackburn – Kootenai Angler
 Michael Ryan – British Columbia Environment
 Jill Weitz – Salmon Beyond Borders
 Dr. Rachel Malison – Monitoring Montana Waters at Flathead Lake Biological Station
 Brad Smith, Ellie Hudson Heck – Idaho Conservation League
 Duncan Stewart – Embassy of Canada
 David Brooks, Clayton Elliot – Montana Trout Unlimited
 Bob Steed – Idaho Department of Environmental Quality
 Peggy Trank – Treasure State Resources Association
 Travis Meyers – CDM Smith
 Camille LeBlanc – Friends of Kootenay Lake Stewardship Society
 Kendra Norwood – West Kootenay EcoSociety
 Bill Hanlon – North American Board of Directors for Back Country Hunters and Anglers
 Tim Lenihan – Kootenai Valley Trout Unlimited Club
 Rodney Lance Veolia [*no affiliation identified*]
 Erin Sexton [*no affiliation identified*]
 Kristen Boyd [*no affiliation identified*]
 John Bergenske [*no affiliation identified*]
 John Avery [*no affiliation identified*]
 Ryland Nelson [*no affiliation identified*]

I. ADMINISTRATIVE ITEMS

A. REVIEW AND APPROVE MINUTES

I.A.1	<p>October 9, 2020</p> <p>There was no Board discussion and no public comment.</p> <p>Board Member Lynch moved to approve the October 9, 2020, meeting minutes. Chair Deveny seconded the motion, which passed unanimously.</p>
I.A.2	<p>August 7, 2020</p> <p>Chair Deveny noted that the Board had previously requested revisions to the August 7, 2020, meeting minutes, and that the revisions were made.</p> <p>There were no public comments.</p> <p>Chair Deveny moved to approve the revised August 7, 2020, meeting minutes. Board Member DeArment seconded the motion, which passed unanimously.</p>
I.A.3	<p>September 24, 2020</p> <p>There was no Board discussion and no public comment.</p> <p>Board Member Lynch moved to approve the September 24, 2020, meeting minutes. Chair Deveny seconded the motion, which passed unanimously.</p>

I.A.4 | **October 29, 2020**

There was no Board discussion and no public comment.

Chair Deveny moved to approve the October 29, 2020, meeting minutes. Board Member Lehnherr seconded the motion, which passed unanimously.

B. REVIEW AND APPROVE 2021 MEETING SCHEDULE

I.B.1 | **2021 Meeting Schedule**

There was no Board discussion and no public comment.

Board Member Lynch moved to approve the proposed 2021 meeting schedule of February 12, April 16, June 11, August 13, October 8, and December 10. Board Member DeArment seconded the motion, which passed unanimously.

II. BRIEFING ITEMS

A. CONTESTED CASE UPDATES

1. Enforcement cases assigned to the Hearing Examiner

II.A.1.a | **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.**

- i. **Contested Case:** Ms. Clerget stated she has motions for summary judgement, a motion to strike, and a motion to take judicial notice pending before her and that she would issue decisions before the next meeting.
- ii. **District Court case:** Chair Deveny provided an update stating that the Board filed a motion to dismiss on the grounds that the Board should not have been named in the Petition for Judicial Review. She noted oral argument has been held and a decision is pending from District Court.

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.**

Ms. Clerget said she issued a scheduling order in this matter and the parties are proceeding according to that order.

2. Non-enforcement cases assigned to the Hearings Examiner

II.A.2.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.**

Ms. Clerget said the Board has already taken action on the Stipulation and Request for Retention of Board jurisdiction and that she would notify the Board when Alpine provides confirmation that the ambient groundwater monitoring has been installed per the Stipulation.

- II.A.2.b **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.**
- Ms. Clerget said the parties are to file a joint status report by June 30, 2021.
- II.A.2.c **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.**
- Ms. Clerget said the Supreme Court issued a decision for this case on November 17 and the parties have until December 17 to file a joint status report indicating how they wish to proceed.
- II.A.2.d **In the Matter of the Notice of Appeal and Request for Hearing by Spring Creek Coal, LLC Regarding Issuance of MPDES Permit No. MT0024619, BER 2019-02 WQ.**
- Ms. Clerget said an Amended Scheduling Order was issued on May 12, 2020, and that the parties are proceeding according to that order, with discovery closing in January 2021.
- II.A.2.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:**

Ms. Clerget said the District Court case went up to the Supreme Court and came back down and was remanded back to the Board.
 - ii. **Contested Case:**

Ms. Clerget said the parties participated in a four-day hearing. The parties have Proposed Findings of Fact and Conclusions of Law due December 18, 2020, with responses due February 5, 2021. Once responses are filed, Ms. Clerget will issue her proposed findings of facts and conclusion of law.
- II.A.2.f **In the Matter of the Notice of Appeal by the Rippling Woods Homeowners Association, et al., Regarding Approval of Opencut Mining Permit No. 2949, Moudy Pit Site, Ravalli County, MT, BER 2019-08 through 21 OC.**
- Ms. Clerget said oral argument is scheduled for January 2021 on DEQ's Partial Motion for Summary Judgement.
- II.A.2.g **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 and BER 2019-05 OC.**
- Ms. Clerget said there were three partial motions for summary judgement and a motion to dismiss filed in the case. Ms. Clerget issued a decision on those motions on November 24. The Order dispensed of all issues, except for one, which will proceed to a hearing.
- II.A.2.h **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 Deveny said this case had been assigned to Amy Christensen and the matter is presently scheduled for oral argument in District Court on December 16. She noted that a Joint Motion to Strike exhibits that were attached to the Petitioner's Reply Brief was pending before the Court. The parties have asked the Court to rule on the Motion to Strike before proceeding to oral argument on the petition, but the Court has not yet ruled on that request.

- II.A.2.i | **In the Matter of Notice of Appeal by Nicholas and Janet Savko, Regarding Floodplain Setbacks, Gallatin County, MT, BER 2020-03 SUB.**
- Ms. Clerget said she granted the parties' request for stay, and that the parties will file a proposed schedule or stipulation for dismissal by January 25, 2021.
- II.A.2.j | **In the Matter of Notice of Appeal by Signal Peak Energy LLC, Regarding Purporting to Rule on An Alleged Impairment of Water Rights Permit No. C1993017, Roundup, Musselshell County, MT, BER 2020-04 SM.**
- Ms. Clerget said this case is stayed and the parties have until February 25, 2021, to file either a stipulation for dismissal or a schedule.
- II.A.2.k | **In the Matter of Notice of Appeal by Woodrock, Inc., Regarding Permit Suspension Order of Opencut Mining Permit No. 2677, Stipek Site, Dawson County, MT, BER 2020-02 OC.**
- Ms. Clerget said she granted an Unopposed Motion to Stay on November 30 and the parties have until January 29, 2021, to file a stipulation or a proposed schedule.

3. Contested Cases Not Assigned to a Hearing Examiner

- II.A.3.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.**
- Ms. Bowers stated that the case went to the Montana Supreme Court and was remanded back to the District Court. Jurisdiction of the case has been assumed by Judge Abbot. Ms. Bowers stated DEQ and Westmoreland have renewed a Joint Motion to Stay the litigation. The Plaintiffs are opposed to the Motion. The Motion is awaiting decision from the Court.

III. ACTION ITEMS

A. Appeal, Amend, or Adopt Final Rules

- III.A.1 | **In the matter of final adoption of the proposed amendments to ARM 17.8.501, 504, 505, and 510 Air Quality Operation Fees for Registered Sources, to adequately fund the air quality portable registration program, as noticed in MAR 17-413.**
- Ms. Ulrich reminded the Board that they approved initiation of the rulemaking at their August 7 meeting and that a public hearing was held September 25 and no additional comments were received. She requested the Board adopt the proposed amendments.
- There were no public comments.
- Board Member DeArment moved to approve the House Bill 521 and 311 Analyses and adopt the amended rules. Chair Deveny seconded the motion, which passed unanimously.
- III.A.2 | **In the matter of final adoption of proposed amendments of Administrative Rules of Montana (ARM) 17.30.602 and proposed NEW RULE I, pertaining to selenium standards for Lake Koocanusa and the Kootenai River.**
- On behalf of DEQ, Director McGrath made opening statements in favor of the rulemaking, and Ms. Kelly and Ms. Sullivan provided a presentation supporting the rulemaking.

There was a brief discussion pertaining to some ex parte communications that occurred prior to the Board meeting. The materials from those communications were included in the Board packet for transparency.

The following attendees provided comment in support of the rulemaking: William Geer, Christopher Servheen, Greg Hoffman, Genny Hoyle, Dave Hadden, Colby Blair, Jim Vashro, Trevor Selch, Shelly Fyant, Stu Levit, Ayn Schmit, Michael Jamison, Lars Sander-Green, Garrett Visser, Eddie Petryshen, Sue Ireland, Jill Weitz, Rachel Malison, Brad Smith, David Brooks, Clayton Elliot, Erin Sexton, Randall Macnair, John Bergefske, Camille LeBlanc, Kendra Norwood, Bill Hanlon, Tim Lenihan, Ryland Nelson and Gary Aitken Jr.

Vicki Marquis and Anne Fairbrother provided comment in opposition of the rulemaking.

John Kilpatrick provided comment from a neutral position.

The Board held discussion on the rulemaking and asked questions of the presenters and commenters.

Board Member DeArment moved to adopt the proposed rules as amended, along with the House Bill 521 and 311 Analyses. Chair Deveny seconded the motion, which passed 5 to 1 with Board Member Busby dissenting.

B. New Contested Cases

III.B.1 | In the matter of notice of appeal and request for hearing by the Western Sugar Cooperative regarding its Montana Pollutant Discharge Elimination System Permit No. MT0000281 issued October 29, 2020, BER 2020-05 WQ.

Chair Deveny moved to assign the case to Agency Legal Services' attorneys for all procedural and substantive matters. Board Member Lehnherr seconded the motion, which passed unanimously.

III.B.2 | In the matter of Notice of Appeal and Request for Hearing by Westmoreland Resources, Inc. Regarding October 27, 2020 Notice of Violation and Administrative Compliance and Penalty Order, BER 2020-06 SM.

Chair Deveny moved to assign the case to Agency Legal Services' attorneys for all procedural and substantive matters. Board Member Tweeten seconded the motion, which passed unanimously.

C. Action on Contested Cases

III.C.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.

The parties reached a settlement on all but one issue. Board Member Tweeten moved to approve the stipulation. Board Member Lynch seconded the motion, which passed unanimously.

IV. BOARD COUNSEL UPDATE

| No update was provided.

V. GENERAL PUBLIC COMMENT

| No public comment was offered.

VI. ADJOURNMENT

Chair Deveny moved to adjourn. Board Member Busby seconded the motion, which passed unanimously. The meeting adjourned at 12:39 p.m.

Board of Environmental Review December 11, 2020, minutes approved:

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

April 27, 2021
DATE