

1 BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
2 OF THE STATE OF MONTANA

3
4 IN THE MATTER OF AMENDMENT No. 3)
5 TO THE MINING PERMIT FOR BULL)
6 MOUNTAIN COAL MINE NO. 1)
7 (PERMIT ID: SMP C1993017))

8
9 TRANSCRIPT OF PROCEEDINGS

10
11 Heard at Room 111 of the Metcalf Building
12 1520 East Sixth Avenue
13 Helena, Montana
14 December 4, 2015
15 10:00 a.m.

16
17 BEFORE CHAIRMAN JOAN MILES,
18 BOARD MEMBERS CHRIS TWEETEN, DR. ROBERT BYRON,
19 ROY SAYLES O'CONNOR, ROBIN SHROPSHIRE,
20 MICHELE REINHART LEVINE; and
21 HEARINGS EXAMINER BEN REED.

22
23 PREPARED BY: LAURIE CRUTCHER, RPR
24 COURT REPORTER, NOTARY PUBLIC
25

1 A P P E A R A N C E S

2 ATTORNEYS APPEARING ON BEHALF OF WEIC AND MEIC:

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. SHILOH HERNANDEZ, ESQ.
Western Environmental Information Center
103 Reeder's Alley
Helena, MT 59601

ATTORNEY APPEARING ON BEHALF OF DEQ:

MR. DANA DAVID, ESQ.
Special Assistant Attorney General
Department of Environmental Quality
Legal Unit, Metcalf Building
P.O. Box 200901
Helena, MT 59620-0901

ATTORNEY APPEARING ON BEHALF OF SIGNAL PEAK ENERGY:

MR. STEVEN WADE, ESQ.
Attorney at Law
Browning, Kalczyk, Berry & Hoven
P.O. Box 1697
Helena, Montana 59624

♀

1
2
3
4
5
6

WHEREUPON, the following proceedings were

had:

* * * * *

CHAIRMAN MILES: I think we'll call the meeting back to order. I haven't heard anyone else on the phone, so I think we'll proceed.

7 I'm going to open the discussion for the
8 Board on finalizing our findings of fact and
9 conclusions of law in regard to the Signal Peak
10 case. I want to just take a minute. I'm going to
11 turn it over to Ben, and I want to just take a
12 minute to say that I was working with Ben recently
13 just going through the order, and I think asking
14 some questions of him about timing, and
15 implication, and what are we exactly doing in the
16 order, because we hadn't really come to that stage
17 of the discussion; and I think it raised a number
18 of questions that then Ben spoke with the parties.

19 So I anticipate today that we will ask
20 some questions of the parties, so we really
21 understand exactly how we want to word the order,
22 and what we want to be in it, as well as going
23 through the findings and the conclusions; and I
24 think we do need to take some time to go through
25 those conclusions to see if there is anything that

♀

4

1 we do not want in here.
2 Our directions to Ben were to put
3 everything in there that was in the MEIC proposal,
4 but based on our discussions or based on our
5 reasoning for ruling in favor of MEIC, we may want
6 to look at those conclusions, and see if we're
7 comfortable with them. So I anticipate that we'll
8 be having some discussion here for the next hour
9 or two.

10 So Ben, I'm going to turn it over to

11 you. Thank you.

12 MR. REED: Thank you, Madam Chair. I
13 sent out an email to Board members. The Board
14 previously agreed to adopt in whole the findings
15 of fact and conclusions of law of MEIC. This led
16 to a couple of problems that I was attempting to
17 resolve, and did to a greater or lesser extent in
18 a way that I explained in my email to the Board.
19 So I'd like to go through that email.

20 The other problem was with respect to
21 the findings of fact that had been put forward by
22 the adverse parties, by DEQ and SPE, and the way
23 in which I addressed those is something that I'll
24 also take up. But since this email came out, I've
25 had some discussion with the parties, and with Mr.

♀

1 Tweeten, and somewhat changed my position from
2 what the initial email said. So the current
3 solution is vastly more straight forward, so it is
4 an improvement. It does no significant harm to
5 anything other than my own estimation of my
6 professional acumen.

7 The two issues that I would call to the
8 Board's attention in which the conclusions of law
9 differ from those that were set out by MEIC are
10 that in Paragraph 64, MEIC stated that the Board
11 reviewed DEQ's decision to approve a coal mine
12 expansion de novo with no deference accorded to
13 the Agency, and then cited a case called MEIC
14 versus DEQ.

15 BOARD MEMBER REINHART-LEVINE: Did you
16 say 64?

17 MR. REED: It is still Page 29 of the
18 draft.

19 CHAIRMAN MILES: Thank you.

20 MR. REED: The long and short is that I
21 think that that's not precisely what the case
22 says. It is arguably what the case says, but I
23 thought that it would be more appropriate, and do
24 no harm to MEIC's argument, to simply set forth
25 the actual holding of the case. I've since shared

♀

1 that opinion with DEQ, SPE, and MEIC. Neither DEQ
2 nor SPE had a problem with it, and MEIC thought
3 that it was appropriate as well.

4 CHAIRMAN MILES: And that's the language
5 that you now have in Paragraph 64, "The Board may
6 in its discretion rely entirely on the record
7 before it," or receive -- is that the paragraph
8 you're talking about?

9 MR. REED: Yes, Madam Chair. I note
10 that there are, by the way, two periods at the end
11 of that sentence, which is something that I'll
12 clean up prior to the final. But yes, the current
13 Paragraph 64 states the actual holding of the
14 case.

15 CHAIRMAN MILES: Thank you.

16 MR. REED: Moving then to the third
17 point that I made in the email that I sent out to
18 the Board. In Paragraph 66, in its initial

19 conclusions of law, MEIC stated that the only
20 relevant analysis is that which had been contained
21 within the four corners of the CHIA, and the only
22 relevant facts were those before the Agency at the
23 time of its permitting decision.

24 That was a slight misstatement of its
25 argument, and I think it was probably either a

♀

1 typo, or one of those grammatical errors that⁷
2 creep into everyone's writing. I changed it to
3 state that the only relevant analysis is what was
4 contained within the four corners of the CHIA,
5 which is not a change, and the only relevant facts
6 are those concluded by the Agency in the
7 permitting process before the Agency made its
8 permitting decision, which I think, as I said,
9 more closely tracks MEIC's overall argument.

10 Again, I shared those with Counsel for
11 all parties, and no one objected to those changes
12 and conclusions.

13 CHAIRMAN MILES: In Paragraph 66?

14 MR. REED: Yes, Madam Chair.

15 CHAIRMAN MILES: As it stands right now.
16 You've got two points in your email about
17 Paragraph 66.

18 MR. REED: I'm not sure that I do, Madam
19 Chair. I think all I said was that the primary
20 question was whether MEIC's argument was, as I
21 understood it, that the only information that
22 could be in the CHIA was the information that was

23 either available to the Department at the time of
24 the drafting of the CHIA, as opposed to just what
25 was in the CHIA. And so that was just a minor bit

♀

1 of clean-up on my part. As I say, MEIC did not⁸
2 object. It's not I think a significant change in
3 the conclusions of law.

4 CHAIRMAN MILES: I don't disagree with
5 that. The email that you sent describing some of
6 the changes you made, Item No. 2 talks about --

7 MR. REED: I'm sorry. I was going to
8 address Item No. 2 separately.

9 CHAIRMAN MILES: That also says
10 Paragraph 66.

11 MR. REED: Yes, it does, yes, and I
12 apologize for that lack of clarity.

13 CHAIRMAN MILES: So one and three we're
14 settled on, unless anyone has any questions.

15 MR. REED: Right. One and three raised
16 no eyebrows. No. 2 did, and this is going to be
17 slightly more discursive, and I apologize because
18 I speak slowly, but as I said, I think that the
19 conclusion that I have come to is going to be
20 different from what I had in the email, but it is
21 a substantially more straight forward solution to
22 the problem.

23 CHAIRMAN MILES: Are we in --

24 MR. REED: We're not in my changes. The
25 changes that I made as per the email, I would like

♀

1 to withdraw those changes, and suggest a
2 substantially more straight forward --

3 CHAIRMAN MILES: What paragraph are you
4 talking about?

5 MR. REED: This would be essentially
6 what in the draft became Paragraphs 61 and 62.

7 CHAIRMAN MILES: Thank you. About MAPA
8 defining a contested case?

9 MR. REED: Yes. Then I refer to a
10 statement that MEIC made in Paragraph 66 that's
11 not germane to this discussion.

12 One of the problems that I had while
13 engaging in my analysis was that while this matter
14 was a hearing, there was no evidence offered. The
15 parties essentially agreed that there were no
16 issues of material fact, which is to say all of
17 the parties agreed on all of the underlying facts.

18 The problem then became by and large how
19 to address some of the issues that Mr. Tweeten
20 raised in his concurring statement, which is to
21 say that there were a variety of facts that needed
22 to be addressed as findings of fact potentially.
23 The problem is that if you have a party that is
24 adversely affected, you have to address that
25 party's findings of fact.

♀

1 And so the way that I attempted to
2 address this, which I believe is incorrect and
3 which I think that the parties correctly disagreed

4 with, is to say that this was not in fact a
5 contested case hearing in a very narrow sense.
6 And the parties raised an issue of if you have
7 something that quacks like a duck, and looks like
8 a duck, you can go pretty deep into
9 technicalities, but ultimately it is a duck.

10 The solution that Mr. Tweeten suggested
11 to me is if you look on Page 28 of the draft order
12 that I sent around, Paragraph 61 and 62 can simply
13 be crossed out, and a paragraph can be inserted --
14 and the numbering of paragraphs falls apart at
15 this point -- a paragraph can be inserted that
16 says because no material issues of fact -- because
17 the parties agreed that there were no conflicting
18 issues of material fact, none of the proposed
19 findings of fact that were offered by DEQ or SPE
20 are contradicted by these conclusions of law.

21 And I think it cuts through the Gordian
22 knot of whether these are actually findings of
23 fact, or whether we had evidence before the Board
24 how exactly to handle the findings of fact in
25 question.

♀

11
1 BOARD MEMBER REINHART-LEVINE: Would you
2 repeat that one more time.

3 MR. REED: Certainly. And again this is
4 sort of --

5 BOARD MEMBER TWEETEN: I was just going
6 to suggest before you do that, I would suggest
7 that the substituted language track the language

8 of Rule 56, which is genuine issues of material
9 fact, and that's what a Court will be looking for
10 if this matter were to go in front of a Court on
11 judicial review. So I would suggest that you use
12 that language, instead of the language that you
13 have in there describing what the standard is.
14 The standard is pretty clear, and Courts have
15 applied it for a long time, and kind of have a
16 pretty good handle on what it means.

17 MR. REED: Madam Chair. Thank you, Mr.
18 Tweeten. Madam Chair, Ms. Reinhart-Levine, the
19 language in question would read, "Because the
20 parties agreed that there were no genuine issues
21 of material fact, none of the proposed findings of
22 fact offered by DEQ or SPE are contradicted by
23 these conclusions of law."

24 CHAIRMAN MILES: Are contradicted by
25 these conclusions of law?

♀

1 MR. REED: Yes.

2 CHAIRMAN MILES: And that you believe is
3 supported by what was in all of the briefs, that
4 there weren't differing findings of fact?

5 MR. REED: Madam Chair, it is an
6 interesting question. One of the problems that I
7 have in giving a completely direct answer to it is
8 that very few of the findings of fact are findings
9 of fact per se. The findings of fact that were
10 presented would be items that if they were offered
11 in court would require substantially more

12 foundation than was presented to the Board. And
13 so I'm less comfortable than I might be in
14 asserting that at their core, none of those
15 findings of fact --

16 I think that you could find very minor
17 differences in the end result of the findings of
18 fact, but I think ultimately they are sort of like
19 the parable of the blind man and the elephant.
20 They all proceed ultimately from the material in
21 the CHIA, which was asserted by the parties to be
22 the basis for this motion for summary judgment.
23 And so all of them assume the facts that were set
24 out in the CHIA and were used by the Department in
25 developing the CHIA. However, some of those

♀

1 findings of fact take some portions of the overall
2 facts and privilege them, I'll say, more than
3 others.

4 BOARD MEMBER TWEETEN: Madam Chair, if I
5 might. I generally agree with what Ben said. I
6 think what, from my perspective as an old lawyer,
7 is that the all of the findings and conclusions
8 seem to rest on the same set of historical facts,
9 in the sense that this is what happened on this
10 day, the CHIA is a document, here is a copy of it,
11 its language is what it is, those sort of things;
12 but all of the parties in their proposed findings
13 of fact engaged in argumentation as well.

14 And lawyers do this all the time. When
15 you're drafting your proposed findings and

20 in the other briefs?

21 BOARD MEMBER TWEETEN: Madam Chair, I
22 think that's right.

23 CHAIRMAN MILES: Michele.

24 BOARD MEMBER REINHART-LEVINE: Madam
25 Chair, Mr. Reed. So we have an obligation to

♀

1 examine and deliberate on each proposed ¹⁵ finding,
2 correct? Because it quacks like a duck, so it is
3 a contested case, so the Board need to address the
4 findings of fact and conclusions of law submitted
5 by each of the parties, right?

6 MR. REED: Madam Chair, Ms.
7 Reinhart-Levine, yes, that's correct.

8 BOARD MEMBER REINHART-LEVINE: And your
9 suggested paragraph is a way to address the
10 findings of fact submitted by DEQ and SPE for that
11 purpose.

12 MR. REED: That's correct.

13 BOARD MEMBER TWEETEN: Madam Chair, just
14 if I might add one additional observation. During
15 the break, Ben and I had a chance to talk, and I
16 don't think it just quacks like a duck, I think it
17 is a duck. I think there was a hearing in this
18 case. It wasn't an evidentiary hearing, it was a
19 hearing on oral argument, but there's a lot of law
20 in Montana for the position that if there aren't
21 genuine issues of material fact, the agency does
22 not have to hold an evidentiary hearing, and can
23 essentially decide a case on summary judgment,

24 which is what we did.

25 So that's one of the reasons I think why

♀

1 Ben crossed out those two paragraphs, ¹⁶ is that they
2 proceeded from the assumption there may not have
3 been a hearing in this case, but I think as a
4 matter of law, what happened two meetings ago when
5 Counsel presented their oral arguments on their
6 motions was in fact a hearing.

7 So I'm satisfied that this is a
8 contested case under MAPA, and that the rules
9 regarding contested cases and also the rules about
10 judicial review of contested cases would apply if
11 this matter were taken up on appeal.

12 BOARD MEMBER REINHART-LEVINE: Madam
13 Chair, a question for Mr. Tweeten. Are you
14 satisfied that this proposed paragraph stating
15 that findings of fact by DEQ and SPE would not be
16 contradicted by our conclusion, that that
17 satisfies our obligations to agree or disagree
18 with each of the parties' findings of fact?

19 BOARD MEMBER TWEETEN: Madam Chair,
20 Michele. As you know, at the last meeting I had
21 problems with the idea of adopting the entire
22 document that was submitted by MEIC, and one of
23 the reasons that I had some misgivings about that
24 was that we have not done exactly what you just
25 described with respect to all of the issues that

♀

1 were raised by MEIC in their motion for summary
2 judgment, and that are covered by their proposed
3 findings and conclusions.

4 I don't want to reargue the motion that
5 I made, but my thought was that it becomes a much
6 more streamlined and simple task if the Board
7 makes enough of a finding to conclude that the
8 permit is flawed and needs to be vacated, and then
9 not go into any other issues beyond the ones that
10 are necessary to make that final conclusion of
11 law.

12 So in answering your question, I don't
13 think that what Ben has said in this paragraph
14 demonstrates that the Board has in fact considered
15 individually each ground for summary judgment that
16 was offered by MEIC, and fly specked the proposed
17 findings of fact in support of all of those
18 issues, and considered the correctness of the
19 legal assertions that were made with respect to
20 every single issue that MEIC raised. I don't
21 think that's been done.

22 CHAIRMAN MILES: How would you suggest
23 that be accomplished?

24 BOARD MEMBER TWEETEN: Well, I'd suggest
25 it not be accomplished, and we go back to the idea

♀

1 that I had. But if the Board thinks that it is
2 necessary -- and I think it is. If Madam Chair is
3 going to put her name at the bottom of this on

4 behalf of the Board, you just go through the
5 findings grouped issue by issue, and consider
6 those findings, and either ratify them as being
7 supported by the record or not.

8 And if there are significant deviations
9 in those proposed findings from what the Board
10 thinks is a reasonable assessment of the facts,
11 then I guess we would have to amend the motion
12 that we passed at the last meeting, and rather
13 than adopt them in their totality, we would adopt
14 them except as modified in the Board's findings of
15 fact, conclusions of law, and order.

16 So that's what I think needs to happen
17 here. If we want to be able to say with a
18 straight face that we have in fact reviewed all of
19 these findings of fact with respect to all of the
20 issues raised in MEIC's motion for summary
21 judgment, we actually have to do that.

22 CHAIRMAN MILES: Ben.

23 MR. REED: Madam Chair. With all that
24 having been said, I was able to speak with the
25 parties yesterday, and we had some discussion of

♀

1 the practical, both some of the legal and
2 practical issues that were going to be raised at
3 today's meeting. The parties have a couple of
4 suggestions about the way in which the Board's
5 determination might be effected without unduly
6 harming any of the parties and be effected most
7 efficiently, and so they're prepared to answer any

8 of the questions that the Board may have at this
9 time.

10 CHAIRMAN MILES: Any other comments
11 right now? I'm concerned about a couple of
12 things, and I want to make sure that as this
13 matter is remanded, that we are very clear about
14 what we believe was legally inadequate in terms of
15 the permit that was granted. On the other hand, I
16 don't want to make that so narrow because we maybe
17 focus on one small issue that it becomes just a
18 paper exercise to fix one thing. I think there
19 are a lot of very important issues brought in
20 here, and if it needs us going through them all, I
21 think we need to do that.

22 I think to say that probably the one
23 thing we talked about the most was the 50 year
24 time frame. I don't think that was the only
25 issue. It wasn't the only issue that persuaded

♀

1 me. I don't know about other people. So I want
2 to make sure that we are very thorough in what we
3 send back. I'm also concerned about what the
4 implications of that are, and how the next steps
5 take place, without causing any unintended
6 consequences.

7 So what's the Board's pleasure on
8 proceeding here? We could hear from the parties.
9 Ben said he has talked to the parties about some
10 of the bigger issue of perhaps how the order is
11 worded, the final order; and then we can decide

12 how to proceed on the findings and conclusions.
13 And I guess if it takes us all day to go through
14 them, we may need to do that, or at least try to
15 pick out places that we don't feel that maybe are
16 the embellished areas that we thought we need to
17 do that.

18 I want this to be right. I don't want
19 it to be just pick on one issue that we all felt
20 stood out to us, because I'm not sure that really
21 gives -- It doesn't give the Department guidance,
22 and I think it's unfair if it is just, "Well, this
23 one stood out, so let's just send it back for that
24 one reason." I think there was more than that, at
25 least in my opinion.

♀

1 Any comments before I'll ask the
2 parties?

3 MR. REED: Madam Chair, the thing that I
4 would point out is that if the Board goes through
5 with ratifying the current, the draft order that
6 it voted on in its last meeting, the only things
7 that need to be addressed are the degree to which
8 the findings of fact within the SPE's and DEQ's
9 proposed findings of fact and conclusions of law
10 are at odds ultimately with the order, or I guess
11 the order is at odds with those findings of fact.

12 And so my suggestion would be that if
13 the Board hears from the parties, and finds that
14 it is necessary to go through and address each of
15 those findings of fact that was offered by SPE and

16 DEQ, I can simply run up six copies of those
17 adverse findings of fact for the Board, and we can
18 go through them at the Board's leisure.

19 CHAIRMAN MILES: So you're saying we
20 need to go through all of the MEIC ones as well
21 as --

22 MR. REED: Madam Chair, no. What I'm
23 saying is that the Board has adopted MEIC's
24 findings of fact. What needs to be addressed is
25 the findings of fact, is I think solely the

♀

1 findings of fact for SPE and DEQ. That's what the ²²
2 statute requires. However --

3 CHAIRMAN MILES: That may not be
4 necessary?

5 MR. REED: Well, as a practical matter,
6 it may not be necessary, Madam Chair; and as a
7 legal matter, I think that those can be, depending
8 on the Board's pleasure, those can either be
9 addressed as a whole as being, as Mr. Tweeten
10 suggested, founded on facts not in dispute, and
11 simply nuanced through argumentation; or the Board
12 can address them individually. But I don't think
13 the Board does not absolutely have to -- there is
14 nothing in the statute that requires the Board to
15 drill down into each of those findings of fact and
16 go from there. But I would suggest asking the
17 parties what their current status is.

18 CHAIRMAN MILES: I will give time to
19 each party. I think I'd like to start with Mr.

20 Hernandez as the prevailing party in this case.

21 MR. HERNANDEZ: Absolutely. Thank you,
22 Madam Chair, honorable members of the Board. Good
23 morning. Thank you for deliberating this case. I
24 understand the findings of fact are quite lengthy,
25 and it is kind of a bear, but I appreciate your

♀

23

1 bearing with us.

2 So what I wanted to talk about, and what
3 I spoke with Ben and my esteemed colleagues about
4 on Wednesday, was the proper remedy in this case.
5 There was some question about what authority the
6 Board has to issue different remedies upon ruling
7 that the CHIA is inadequate. MEIC's belief is
8 that the available remedy is quite clear -- we
9 addressed it in our findings of fact and
10 conclusions of law -- that a permit application
11 may not be approved absent a valid CHIA.

12 However, MEIC here is interested in a
13 reasonable remedy that is able to protect our
14 interests in clean water, and that may also be
15 able to protect the interests of both DEQ and SPE.
16 Particularly we're interested in clean water, not
17 putting people out of work. And we think that
18 there is space for negotiation between the parties
19 on this matter, and it seems clear from my
20 discussions with Steve and with Dana that there is
21 space to negotiate.

22 So in light of that, what we would like
23 to propose to the Board is that -- and this is

24 just about remedy -- that the Board bifurcate its
25 ruling on the merits and the remedies ruling.

♀

24

1 This is, as Mr. Tweeten knows, and Ms.
2 Reinhart-Levine, Ms. Miles, the lawyers know that
3 it is not uncommon in court cases where the Court
4 will issue a ruling on the merits, and let the
5 parties hash out a remedy in hopes that they can
6 select the most efficient remedy that works for
7 everyone.

8 So what we would suggest is that the
9 Board issue an order saying that the CHIA is
10 legally inadequate, and then instead of a remedy
11 -- and that the real question here is whether or
12 not to vacate the permit. The matter has to be
13 remanded to DEQ in any event. But instead of
14 making a ruling on whether or not to vacate, the
15 Board would just grant the parties through January
16 15th -- and this is a date that I picked out just
17 because it accommodates the holidays, and gives
18 the parties a little bit of time. I'm certainly
19 willing to discuss whether or not another date
20 works better -- but through a certain period of
21 time, to either "A," reach an agreement, a
22 stipulated agreement that we can submit to the
23 Board; or "B," submit simultaneous briefs of "X"
24 length of pages, preferably short, ten to fifteen
25 pages, on what the proper remedy is.

♀

1 I think that that would avoid any
2 challenges about remedy; it would encourage the
3 parties to negotiate; and if negotiations fail,
4 then the Board would have briefs on which to
5 assess the proper remedy. I'm hopeful that we can
6 reach an agreement on remedy that can just be
7 stamped by the Board and move forward there.

8 A couple of issues that have come up,
9 that will come up, are first, the timing. The
10 Board, as you mentioned at the hearing last time,
11 has ninety days to issue a final decision in a
12 contested case after the case is deemed submitted.
13 Assuming that was the 16th of October at the last
14 hearing, the Board would have through mid February
15 to issue its final decision here, or mid January;
16 we would need an additional thirty days.

17 The statute provides for a request by
18 the parties for an additional thirty days upon a
19 showing of a good cause. I think the prospect of
20 a negotiated settlement on remedy is sufficient
21 cause to extend the period for a decision for
22 thirty days. And I assume, I think the parties
23 can all agree that we'd like to request thirty
24 additional days, if the Board is amenable to this
25 approach.

♀

1 CHAIRMAN MILES: And that is for the 26
2 remedy portion of it?

3 MR. HERNANDEZ: Yes, just the remedy
4 portion. We would ask that the Board issue a

5 written decision on the merits ruling saying that
6 the CHIA is inadequate for reasons discussed in
7 our proposed findings and conclusions.

8 There would have to be an adjustment to
9 the proposed conclusions in order to address the
10 remedy. Specifically the last paragraph in the
11 conclusion, it just says that the permit is set
12 aside because there is no valid CHIA. That would
13 just be deleted, and then in the final order,
14 which in the proposed findings and conclusions
15 that MEIC submitted would be Paragraphs 140, 141,
16 and 142, they would simply be deleted, and in
17 their place, the Court would direct the parties to
18 confer on the appropriate remedy, and then issue
19 -- present the Board either with a stipulated
20 agreement that could be turned into some sort of
21 consent decree on the 15th, or alternatively
22 submit simultaneous briefs on what the proper
23 remedy should be, and then just leave it at that.

24 So that's the proposal that we have --
25 it's all that we've discussed. We haven't talked

♀

1 about having to make findings on each of the²⁷
2 conclusions and findings, which is provided for in
3 the statute. And if the Board wishes, I could
4 address that. My position is basically that you
5 guys are right, that it has to be addressed. The
6 statute says to deny the findings of the party,
7 then you have to do them individually, or some --

8 Specifically I'm not sure if DEQ and SPE
Page 23

9 would be willing to say that they stipulate that
10 there are indeed no issues of fact, and that that
11 can be foregone, and basically waive that
12 requirement. That might save everyone a bit of
13 time. But absent that, I think that it just has
14 to be done. If there are no questions, I'll sit
15 down.

16 CHAIRMAN MILES: I do have a question.
17 Any questions from any other Board members?

18 BOARD MEMBER TWEETEN: Madam Chair, if
19 you don't mind me going ahead of you.

20 Counsel, the last point that you talked
21 about, the idea that there might be some sort of a
22 stipulation on the part of the parties to waive
23 the requirement that the Board's final order
24 address individually each of the proposed findings
25 of fact and conclusions of law of the other

♀

1 parties, is that something you've discussed with
2 Counsel or --

3 MR. HERNANDEZ: No, I haven't. I
4 thought it flowed from the briefs that repeatedly
5 say that there is no genuine issues of material
6 fact, and no disputed facts in this case. I
7 haven't. They might say it's totally unwarranted.

8 BOARD MEMBER TWEETEN: And the consent
9 decree that you're talking about would cut off the
10 possibility of any appeal to District Court with
11 the initial conclusion that the CHIA is
12 inadequate.

13 MR. HERNANDEZ: I think that would be
14 subject to discussion, but it would operate as the
15 final decision of the Board, and I assume that it
16 would cut off any prospect for appeal, because
17 frankly MEIC would require that. There is no
18 sense in reaching a settlement if it subsequently
19 can be appealed. There may be room for
20 disagreement on that, but I don't see it as a
21 possibility.

22 The prospect of a consent decree that
23 would foreclose appeal I think doesn't get us
24 around the question of making specific findings in
25 each of them, because for all we know, we might

♀

1 not reach an agreement. 29

2 BOARD MEMBER TWEETEN: I'm trying to
3 think about whether there are any options out
4 there that would allow the Board to put off the
5 obligation to consider every one of the findings
6 of fact by both of the other parties and at
7 today's meeting, which is something I would submit
8 we're not prepared for right now, or at least I'm
9 not prepared for. I don't know what Ben has in
10 store for us as he rolls this proposed order out.

11 But if we could find a way, think of a
12 way procedurally to push that issue down the road
13 to a subsequent meeting, and allow you folks to
14 sit around a table and try to hammer out how to
15 end this case, that would certainly be efficient
16 for the Board in terms of the expenditure of its

17 time and its staff's time, and I'm not sure that a
18 formal order from the Board adopting your client's
19 proposed findings of fact is necessary to kick off
20 that negotiation process that you're talking
21 about.

22 Do you disagree with that, or do you
23 think we have to have an order on the merits
24 before you can negotiate about remedy?

25 MR. HERNANDEZ: Madam Chair, Mr.

♀

1 Tweeten. I don't think it is necessary, but I
2 think it is a requirement that our clients would
3 insist on. We think that the matter, as a matter
4 of precedent and a matter of how a CHIA is done,
5 it's a really important issue that goes beyond
6 this case. It's something that we've been at
7 loggerheads with the Agency for awhile, and we
8 think that it has to be cleared up.

9 That's why we would really condition our
10 negotiations on issuance of a final order on the
11 merits. So it is not required, but we are willing
12 to be a little stubborn on this. I apologize for
13 that. I understand it's a burdensome process.

14 BOARD MEMBER TWEETEN: But you think it
15 is required, but not necessarily required today?
16 The parties understand where the Board is going on
17 this, I think. There is a certain amount of
18 formality in the obligation to go through and vet
19 all of the other proposed findings and
20 conclusions, and come up with explanations for why

21 each one of them was not adopted.

22 But you have a sense from the motion we
23 adopted, which is still passed by the Board, that
24 the Board is of the opinion that the CHIA is
25 inadequate, and therefore the permit can't stand

‡

1 in its present configuration. So I think to ³¹
2 finalize that with a final order on the merits
3 through that bifurcation process that you talked
4 about, I don't see how that necessarily forecloses
5 you from trying to settle the remedy part.

6 MR. HERNANDEZ: Madam Chair, Mr.
7 Tweeten. Our concern is that even though this
8 Board has made it clear, we think that the
9 precedent has to be made clear. This illustrious
10 Board won't be around forever, alas. And so as a
11 matter of precedent, we really think it is
12 important, so that's kind of our precondition.
13 And I hate to be obstinate up here. I understand.
14 I hope that there is some possibility of moving
15 forward without having to go through 80 pages of
16 proposed findings of fact and conclusions of law
17 this morning and this afternoon.

18 The only suggestion I have is that maybe
19 the other parties might stipulate or waive that
20 process. I don't think it is necessary, given
21 that there really is not a dispute about facts.
22 It really is a question of how the law is
23 interpreted. I hope it is possible. I'm not
24 certain that it is. That's where we're at. I beg

25 your indulgence. I apologize for being a little

♀

32

1 bit stubborn on this.

2 BOARD MEMBER TWEETEN: No apology
3 necessary, but you still haven't answered my
4 question. Does it have to be done today, or is
5 that something we could do within the 120 day
6 period that's running right now?

7 MR. HERNANDEZ: It could be done under
8 the 120 day period. We're reluctant to really
9 give up. Frankly we believe that the law is quite
10 clear on the appropriate remedy, and we think that
11 we're in a strong position legally to demand a
12 strong remedy. We're willing to forego that
13 strong medicine and be reasonable, but kind of the
14 precondition for that is that we want a clear
15 ruling on the merits.

16 It doesn't have to be issued today
17 perhaps, but if we get to 90 days, then it starts
18 to be becoming unclear about whether or not we'll
19 have time to do that if negotiations fall apart,
20 and that could back us into a corner about trying
21 to reach some kind of agreement that we might not
22 otherwise want.

23 So the short answer is no, it doesn't
24 have to be issued today; but if the Board was
25 willing to push this off to the next meeting in

♀

33

1 January or February, I think it would be a
2 non-starter for us. We would like to be
3 reasonable and try to accommodate the Board's
4 concerns, both with time and having the adequate
5 ability to look at this and vet their arguments;
6 but if it were pushed out to February or January,
7 I think it would actually be an impediment to
8 negotiations, because for the reasons I said, we
9 would be uncertain about whether or not a final
10 decision on the merits would be issued, and it
11 would affect our negotiating position. I'm kind
12 of thinking this through right now.

13 CHAIRMAN MILES: We're putting you on
14 the spot.

15 BOARD MEMBER TWEETEN: And then you need
16 to consult with your client obviously. This is an
17 idea that you may not have had a chance to
18 thoroughly vet with MEIC, so I don't want to put
19 you on the spot on that basis either.

20 But I guess I'm not sure I necessarily
21 understand or agree with your point that the
22 adoption of a final order complying with MAPA that
23 would happen a month from now, say, would impede
24 your settlement negotiations. The Board is on
25 record through a motion that's been passed on a

♀

34
1 majority vote by the Board members that the permit
2 has to be vacated, so I don't understand why the
3 anticipation of a final order would necessarily
4 stand in the way of you all sitting down and

5 talking about remedy.

6 MR. HERNANDEZ: Madam Chair, Mr.

7 Tweeten. I'm thinking on my feet here, and the
8 way that I had envisioned it was that if we reach
9 a stipulated agreement on remedy, that we would
10 submit it to the Board to approve as some sort of
11 consent decree, give it your imprimatur, and then
12 let the case go forward with obligations to Signal
13 Peak and obligations to DEQ flowing from that.

14 But if we were to not have a decision on
15 the merits at that time, and reach an agreement,
16 then we don't have -- it seems like it could
17 eclipse the need for having a ruling on the merits
18 that says, "This is how a CHIA is supposed to go
19 forward. This is how the CHIA provision is
20 supposed to be interpreted." It's not a question
21 of minimizing harm, but really it is a red line
22 that has to be addressed and has to be addressed
23 thoroughly.

24 I worry that if we kind of lump them
25 together that the important legal decisions on how

♀

35
1 a CHIA is conducted would get lost in the mix, and
2 I'm trying to verbalize how they could be mixed
3 together in one order from the Board, but it
4 doesn't seem really clear to me. It seems like it
5 would result us working with Signal Peak and DEQ
6 to draft a consent decree that includes all the
7 findings of fact and conclusions of law, and then
8 additional remedy part to it that would be both

9 approved by the Board.

10 And maybe I'm missing something. I
11 probably am. But it just seems cumbersome in my
12 thinking.

13 BOARD MEMBER TWEETEN: Thank you.

14 CHAIRMAN MILES: And I'd like to hear
15 from the other parties, because we may find a
16 resolution to this. But I do want to thank you
17 very, very much, because you are on very firm
18 ground. It was a unanimous decision of the Board
19 that the CHIA was insufficient, pending some
20 qualifications that Mr. Tweeten mentioned, but it
21 was a unanimous decision. And we would have the
22 right, and you would have the right for us to
23 issue an order today that vacated the permit.

24 And I appreciate very much your
25 willingness to work with the parties, because you

♀

1 mentioned something -- and I don't know that ³⁶
2 you're the one to address it, but I think we'll
3 probably hear from the other parties -- but you
4 mentioned about the potential for putting people
5 out of work, and those were the questions that I
6 had for Ben. I just didn't understand what the
7 current status quo was, what is going on, what
8 will change or could change depending on the
9 order. And you may not be the person to elaborate
10 on your comment there, but I think we'll hear
11 that, and I appreciate that very much.

12 So I think we need to look pretty

13 carefully at recognizing that we made a fairly
14 unanimous decision, and we need to move forward
15 with that, but look at ways to -- I think your
16 proposal to have a separate discussion about a
17 remedy is one that I certainly appreciate. That's
18 not really a question. That's a statement. But
19 if you have a comment.

20 MR. HERNANDEZ: Thank you, Madam Chair.
21 I appreciate it. We would like to be reasonable.
22 We don't want to put anyone out of work. We want
23 to protect the water, we want to protect the
24 people that depend on it.

25 CHAIRMAN MILES: I assume that Counsel

♀

1 for Signal Peak can explain a little bit more
2 about the concept of putting people out of work.

3 MR. HERNANDEZ: That's the situation
4 where we're really in the dark. We don't have all
5 the facts on how the operation is, where they're
6 at, how much they can do before they reach the
7 Amendment 3 area, what preparatory work has to be
8 done. So we're not certainly -- and that's
9 something we'd like to discuss with them further
10 in negotiations.

11 CHAIRMAN MILES: We may get back to you
12 with more questions. Does anyone have any
13 questions?

14 (No response)

15 CHAIRMAN MILES: Who would like to go
16 next, the Department or --

17 MR. WADE: Thanks, Madam Chair, members
18 of the Board. I'm Steve Wade here on behalf of
19 Signal Peak Energy. And you're right. We wanted
20 to provide some background with respect to the
21 ongoing operations at the Signal Peak Mine.

22 You've also kind of heard that we are --
23 I think the parties collectively, based upon
24 conversations within the last 24 hours, kind of
25 share a common goal. But to put that in context,

♀

1 you specifically asked about the risks to jobs and
2 things like that. I just wanted to explain
3 exactly what's going on at the mine right now.

4 This is small to see. I have extra
5 copies that we can hand out. We didn't really
6 want to -- I wanted to make sure people could
7 illustrate it, because the mine process at Signal
8 Peak is complex, and it is also coordinated, not
9 only with the equipment, but also with the
10 permitting perspective. It's kind of like an
11 ongoing process that has to be finely
12 choreographed to make sure it meets that --

13 But you can see this -- and if you want
14 copies, I can hand them out to make it a little
15 clearer -- but the black panels, these are panels,
16 illustrate mining that's already gone on. And so
17 right here, this is what Panel 5 is. It's the
18 black and red line.

19 They currently have mined long haul
20 mining through just a portion of Panel 5. The red

21 line is where it is projected to go sometime in
22 May. They're projected to be wrapping up Panel 5
23 around May 2016.

24 CHAIRMAN MILES: That's your existing
25 permit, not the expansion permit?

♀

1 MR. WADE: That's right. That's under
2 Amendment No. 2, not at issue in this proceeding.

3 Then what you'll see is Panel 6 and
4 Panel 7. There are some red lines over here that
5 indicate ongoing, or black lines indicating
6 ongoing development work, and red lines about
7 where development work would be around March of
8 2016.

9 The reason I bring that up is because
10 you have to have ongoing development of the future
11 work to be able to facilitate the movement of the
12 long wall miner. If you have a disruption, and in
13 this case a vacation of Amendment No. 3,
14 development work would have to be immediately shut
15 down in Panel 6 and 7. And what it does is that
16 would put two-thirds of the work force at Signal
17 Peak Energy out of work, two-thirds of roughly 300
18 employees.

19 The development work is the most labor
20 intensive part of the work, but it is also
21 coordinated, as I said, choreographed to time.
22 There is a certain float period you can have when
23 you reach the end of a long wall mining panel to
24 be able to move, but that window is kind of short.

25 And to bring that I think back into

♀

1 perspective on kind of the discussion that was ⁴⁰
2 going on earlier about timing and kind of pushing
3 the issue down the road, Signal Peak isn't here
4 today to talk, to argue about the CHIA or the PHC.
5 We understand you guys have voted. We want to
6 talk about having an order done in a manner that
7 does not vacate the permit, doesn't put those jobs
8 at risk, but allows the Department a process that
9 can start quickly to update the CHIA to address
10 the noted issues.

11 And that process we already know what it
12 is because it is a regulatory process. I think
13 Shiloh had mentioned it before. There is going to
14 be some information, probably an updated PHC
15 submitted. And the process we envision we think
16 is already established. It is really the
17 regulatory process, one where there is the back
18 and forth deficiency process over the PHC; there
19 is public comment; it is transparent. But what we
20 really need to have the Board do, if it's so
21 inclined, is to figure out timing in a way that
22 allows the Department to go through the process,
23 the parties and the rest of the public to vet the
24 process, and reach a conclusion before the end of
25 Long wall mining in No. 5.

♀

1 I understand there is some nuances that ⁴¹
Page 35

2 -- Our preference really is to have the Board
3 direct the Department as quickly as possible, if
4 not today, to start that process, because what we
5 don't want to have happen is too much time goes by
6 before the Department has the possession of the
7 amendment to continue the work, and then we're
8 looking at May coming up.

9 And so then I think then we'd be
10 artificially shortening that permitting and review
11 process of the CHIA if we want to make sure it
12 gets done right. And we really think that that's
13 something that is possible for the Board to do.
14 We think that there is sufficient case law out
15 there. Frankly, what we started looking at was
16 the recently issued Spring Creek Mining decision
17 by the Federal Court that said, "Look, Agency, fix
18 the problems. You have 180 days. And in doing
19 that, we're going to kind of hold off and see what
20 happens, but we're not going vacate it."

21 Vacating Amendment No. 3 would have
22 devastating effects on the employees and the
23 operations, and it would be long term, if not
24 unrecoverable from.

25 CHAIRMAN MILES: Thank you, Mr. Wade.

♀

1 Questions?

2 BOARD MEMBER REINHART-LEVINE: Madam
3 Chair, Mr. Wade. Can you just show on the map
4 everything that is included in this particular
5 permit, including but beyond also Panel 6 and 7,

6 so we have a better sense of the scope of this
7 particular permit.

8 MR. WADE: If you want a copy of this.

9 MR. SAYLES O'CONNOR: Madam Chair, we
10 really can't see that from here. If we could get
11 copies, that would be great.

12 CHAIRMAN MILES: Do you mind if I ask
13 another question while that's going on? Oh, you
14 have copies.

15 MR. WADE: (Provides document)

16 CHAIRMAN MILES: So there is extra
17 you've just given us.

18 MR. WADE: So what you'll see on the
19 map, as I mentioned, those black lines are panels,
20 and the red is projected work. And the thing
21 that's a little misleading on this map is you'll
22 see where it says "Amendment 2 Boundary." That is
23 why -- that's the permit boundary that SPE had
24 been operating under.

25 CHAIRMAN MILES: Where is that?

♀

1 MR. WADE: If you look just to the right
2 over here, you see Amendment No. 2, with the line
3 to this dark black line. So that was SPE's
4 commonly understood and depicted Amendment No. 2
5 boundary. It wasn't until after this Board's last
6 meeting that, unbeknownst to Signal Peak, that
7 mine boundary actually has some adjustments made
8 to it, and it goes into Panel 6, which is why the
9 vacating of Amendment No. 3 causes huge problems

10 for the mine.

11 CHAIRMAN MILES: Does Amendment No. 3
12 have everything through long wall 15?

13 MR. WADE: Through 14. So that's the
14 problem that's been created, and why there is so
15 much risk in how the remedy, so to speak, is
16 implemented.

17 CHAIRMAN MILES: So, Mr. Wade, are you
18 willing to basically go with the proposal that Mr.
19 Hernandez made about perhaps bifurcating our
20 decision, so we make a decision on the CHIA today,
21 and that the parties would work out a solution to
22 a remedy and the timing for that?

23 MR. WADE: Madam Chair, like I said, how
24 the Board ultimately wants to decide its proposed
25 findings and conclusions, we know you've already

♀

1 voted on that. What we're really interested in⁴⁴
2 doing is addressing the process and getting it
3 started quickly. We are concerned that by just
4 creating the 30 day period, that then we're now
5 looking past May, and doesn't help solve our
6 problem.

7 We think there is a way. We think that
8 you can look at the Spring Creek case, pick 180
9 days from now, establish the process that it will
10 be pursuant to the regulations, get the thing back
11 to DEQ today without vacating it, and allow that
12 process to commence. If there is other issues, we
13 are more than willing to enter into discussions.

14 We just want the Board to understand how important
15 the timing is, and too much of a delay, it either
16 truncates and will result in not a very good
17 process, or it will go too long and interrupt the
18 operations. And I've already explained the
19 consequences.

20 CHAIRMAN MILES: Do you have any comment
21 about the obligation that we have to go through
22 all of the findings of fact that you proposed in
23 your materials?

24 MR. WADE: Madam Chair, I think I was
25 the first one to respond to Ben and say we think

♀

1 it is a contested case, and I haven't really⁴⁵
2 thought about that much, other than to know --
3 because we were working yesterday trying to figure
4 out this remedy part. But I think it is a
5 statutory obligation.

6 The question was whether we would
7 stipulate not to have to do that. I can't answer
8 that right now because I don't know where this is
9 going; and depending on where it goes, we would --
10 we understand the consequences. We want to
11 reserve all our rights if this can't get worked
12 out in a proper way.

13 BOARD MEMBER TWEETEN: Mr. Wade, since
14 you were the one who handed this document out, I'm
15 assuming that your client doesn't have any
16 objection to the Board looking at it, even though
17 it is not part of the record in this case.

18 MR. WADE: No. I was going to use it
19 for illustration. I recognized that was small.
20 You do have to understand that that one boundary
21 line apparently is not accurate, that it is
22 through Panel 6 and through the Panel 6 which
23 interrupts that. But we understand it is a public
24 document.

25 BOARD MEMBER TWEETEN: That's not my

♀

1 point. My point is under MAPA, we're restricted
2 in considering in this case to matters that are
3 found in the record, and I just want to make sure
4 that the parties are comfortable with us looking
5 at this document, and are willing to confirm on
6 the record they don't object to us looking at it,
7 so that's clear.

8 MR. WADE: We're certainly fine with it.
9 Like I said, this is a development that occurred
10 after your last Board meeting, and we think it is
11 important for people to understand why vacatur of
12 the amendment or setting aside Amendment No. 3 is
13 important.

14 CHAIRMAN MILES: Thank you. Any other
15 questions?

16 MR. SAYLES O'CONNOR: Madam Chair, I
17 assume the Signal Peak 2 is the unmined area that
18 you're showing on the map, and Signal Peak 1, your
19 present mine, is that boundary line is the
20 difference between the two of those properties?

21 MR. WADE: So the actual boundary, as I

22 understand it from the Department, is not that
23 black line that you see there that has the line
24 setting Amendment 2 boundary, that that boundary
25 actually impacts LW6, Long Wall 6.

♀

1 MR. SAYLES O'CONNOR: So how long have⁴⁷
2 you been mining permit boundary No. 1?

3 MR. WADE: We're in Permit Amendment No.
4 2.

5 MR. SAYLES O'CONNOR: Oh, there's the
6 battery. How long have you been mining there?

7 MR. WADE: Several years.

8 MR. SAYLES O'CONNOR: And the boundary
9 has been off for that long?

10 MR. WADE: Well --

11 MR. SAYLES O'CONNOR: I guess I don't
12 understand. The boundary has to do with the
13 permits, or does it have to do with the mining
14 leases, or what exactly is the boundary?

15 MR. WADE: Madam Chair. The boundary is
16 actually related to the permit amendment. There
17 are complicating factors because there is a number
18 of different approvals you have to get. You have
19 to get your mine site plan, your mine site permit,
20 you have to get your mining permit, you also have
21 to get -- because there is federal lands here, you
22 have to get OSM approval.

23 So all of those I think complicate the
24 issue, and usually the boundaries are established
25 as you step out and get your new amendments to

♀

48

1 your mining permit. I don't know if that answers
2 your question, but I'm trying to be simplistic on
3 a fairly complicated process.

4 MR. SAYLES O'CONNOR: I'm just surprised
5 with all that goes into these, permitting and
6 mining and everything else, that this boundary has
7 just in the last thirty days been moved.

8 MR. WADE: I would think that that would
9 be a great question for DEQ. Mr. David can better
10 answer it.

11 MR. DAVID: I can answer your question.

12 CHAIRMAN MILES: We'll call you next.

13 MR. SAYLES O'CONNOR: I'll hold it then.

14 CHAIRMAN MILES: I just have one other
15 question, and maybe it's not germane here, but if
16 the mine was contemplated to be this large, why
17 was the original permit just for a very small
18 portion of it?

19 MR. WADE: I'm not sure I have the
20 entire history with me, but generally the way the
21 coal mine permitting works -- and DEQ can
22 certainly answer this -- is you get a five year
23 mine permit to actually mine. So the way they do
24 it is you do it five years; as you move, then you
25 go through a new permitting process to expand.

♀

49

1 Generally the mine site is larger. That changes,

2 though, at times because you may not have had the
3 leases for the federal coal, you may not have had
4 the state coal, so you have to have control and
5 right to mine the minerals before you can get your
6 mining permit, and that's why things are
7 incrementally stepped, and as I mentioned,
8 choreographed and complex as things go forward.

9 CHAIRMAN MILES: We may have more
10 questions. Thank you very much. Department.

11 MR. DAVID: Madam Chair, members of the
12 Board, I'm Dana David, DEQ Legal Counsel. There's
13 a lot of things I want to say here, but let me
14 just answer the question of the moment about the
15 permit boundary. The line on the map is correct,
16 so --

17 CHAIRMAN MILES: Which line?

18 MR. DAVID: The line that's designated
19 here as Amendment 2 boundary. But there is a
20 little bit of nuance here. So Signal Peak is
21 permitted up to that permit boundary, but the mine
22 plan does not include Panel 6. The approved mine
23 plan does not include Panel 6 because at the time
24 that Amendment 2 was approved, Signal Peak did not
25 have the right to mine the blue square, which is

♀

1 State land.

2 So although the permit boundary goes
3 beyond Panel 6, the current approved mine plan
4 does not include the panel. The Amendment 3
5 application that is the subject of this appeal

6 does include Panel 6 into the current mine plan.
7 So there is a regulatory distinction between what
8 is the permit area, and then what you can mine
9 within the permit area. So that's the distinction
10 here.

11 So that line is not necessarily
12 incorrect. That's probably the nuance that --
13 maybe that was the source of Signal Peak's
14 confusion, that usually you just assume that
15 whatever is in the permit area you can mine it,
16 but in this case it was excluded from the mine
17 plan because at the time that Amendment 2 was
18 approved by the Department, they didn't have the
19 rights to that very small corner of the State
20 land, that blue square, and for that reason it was
21 kept out of the mine plan.

22 BOARD MEMBER REINHART-LEVINE: Madam
23 Chair, Mr. David. Is the basic permit that is at
24 issue at this time basically covering then
25 everything from Panel 6 through Panel 15?

♀

51

1 MR. DAVID: That's correct.

2 BOARD MEMBER REINHART-LEVINE: Thank
3 you.

4 CHAIRMAN MILES: A quick question. Is
5 the scrutiny that is given to expansion
6 applications the same as that original
7 application?

8 MR. DAVID: Madam Chair, members of the
9 Board. The permit matter that's before the Board

10 today is a permit amendment, and the permit
11 amendment is treated exactly the same as a new
12 permit for procedural review process, except for
13 the fact that you have an existing permit, which
14 is a large part of the information base that the
15 Agency would consider in reviewing the amendment
16 application. So this is amendment, the
17 application, and it would require basically the
18 same amount of scrutiny as an original application
19 for a new mine.

20 CHAIRMAN MILES: Thank you.

21 BOARD MEMBER REINHART-LEVINE: Madam
22 Chair, Mr. David. Can you discuss the
23 Department's timeline in responding to our
24 concerns over the sufficiency of the CHIA, and
25 addressing those things, such as Class 2 versus

♀

1 Class 3 water, such as the 50 years, those ⁵²type of
2 items, and how quickly those things could be
3 addressed.

4 MR. DAVID: Madam Chair, Ms.
5 Reinhart-Levine, I would love to. First as a
6 general overview, certainly the Department
7 appreciates the unanimous decision that the Board
8 rendered on October 16th, appreciate that the
9 Board has found that the CHIA legally defective.
10 The Department also appreciates the opportunity to
11 try to reach a conclusion here that permits the
12 mine to keep functioning and keep people in work.

13 The Department is confident, and it

14 apologizes, that the CHIA that was prepared
15 apparently was inadequate to convince the Board
16 that the mine is designed to prevent material
17 damage, i.e., the mine is designed such that there
18 will be not any significant contamination of
19 groundwater or damage to the hydrologic balance
20 outside the permit area. The Department is
21 confident that that is true.

22 It's unfortunate the current CHIA has
23 not been able to demonstrate that to the Board,
24 but the Department is comfortable that it can
25 revise the CHIA in a way that would persuade the

♀

1 Board that the conclusions that were made in
2 support of this permit approval are correct, and
3 so would appreciate the opportunity to revise the
4 CHIA in order to do that, understanding that the
5 CHIA is based on the probable hydrologic condition
6 determination that's provided by the mining
7 company, so to a large degree, the CHIA is based
8 on the language that's in the PHC, so in order to
9 revise the CHIA, we would also require the mining
10 company to provide us with a revised PHC.

11 I think that a lot of the basis for Mr.
12 Wade's concern about timing is it would be nice if
13 we could today get an order of the Board at least
14 directing the Department to begin work on revising
15 the PHC, and also to direct Signal Peak to provide
16 a new and revised CHIA that would address the
17 issues that the Board discussed at the October

18 16th Board meeting.

19 With that in mind, again understanding
20 MEIC's interest in getting an order issued today,
21 and also the Board's anticipated rather daunting
22 task of having to go through and analyze all of
23 the findings of fact that the Department included
24 in its proposed findings of fact and conclusions
25 of law, perhaps -- I'm just kind of throwing this

♀

1 out here as a compromise on my feet -- what the⁵⁴
2 Board can consider is maybe today issuing a
3 general order concluding that the CHIA is legally
4 defective for the reasons stated in the last
5 meeting, and then directing DEQ to go forward and
6 revise -- direct Signal Peak to issue a revised
7 PHC, and hence revise the CHIA.

8 What the Department is concerned about
9 is that any order of the Board today would be
10 determined, or could be understood legally as a
11 final order, which would curtail any of the rights
12 of the parties to judicial review, or to protect
13 its interests in the event that the final order of
14 the Board would be objectionable. So our largest
15 concern is whatever order the Board issues today,
16 that it would allow DEQ to go back to the drawing
17 board on the CHIA, would not foreclose the due
18 process rights that both DEQ and Signal Peak would
19 have in a final order of the Board.

20 CHAIRMAN MILES: Questions?

21 BOARD MEMBER REINHART-LEVINE: Madam

22 Chair, Mr. David. Please respond to Mr.
23 Hernandez's proposal about bifurcation and how
24 that relates to your comment regarding
25 preservation of legal rights for DEQ and SPE.

♀

1 MR. DAVID: I believe that we are ⁵⁵
2 amenable to bifurcation, with the idea that
3 however the bifurcation would work, that it would
4 not result in a final order today disposing of --
5 that would actually trigger the thirty day appeal
6 deadline on the existing -- on the Board's
7 decision on the merits of the CHIA. That's
8 probably our biggest concern, that whatever order
9 the Board issues, that it would contemplate that
10 there would be final order of the Board, and in
11 that final order all of the rights of the parties
12 would be preserved until a final order of the
13 Board disposing of this matter is issued and
14 approved by the Board.

15 I think also with the suggestion I've
16 provided to the Board, if MEIC agrees, that also
17 probably -- I think that would also give you
18 reason not to have to go through -- I agree with
19 Mr. Wade. I think the statute is very clear that
20 the Board does indeed -- I mean our briefing to
21 the Board and also our proposed findings of fact
22 and conclusions of law also had specific findings
23 of fact. They're there, and those findings of
24 fact are what the Department relied for the
25 arguments it made to the Board.

3 in getting some sort of order from the Board today
 4 that supports the permit is legally defective, and
 5 then also would give the Board -- would preserve
 6 all the parties' rights to a final decision; and
 7 also would relieve the Board of the necessity of
 8 picking through all these findings if some of them
 9 might change or might be different when the new
 10 CHIA comes out, at such time the new CHIA is
 11 prepared by the Department.

12 CHAIRMAN MILES: Any further questions?

13 BOARD MEMBER TWEETEN: I'm just a little
 14 confused, I have to say. You have a permit
 15 application that starts this process off, and as
 16 part of the approval for the permit, you have to
 17 do a CHIA, which has been done, and you've
 18 approved the permit; and the decision to approve
 19 the permit is in front of us now under MAPA and
 20 authorizing statutes for the Board because the
 21 argument has been made that the CHIA that you've
 22 already done is inadequate. That's the case
 23 that's in front of us now.

24 And I don't understand, I have to
 25 confess, how you're going to -- how do we send

♀

1 this case back to DEQ to prepare a second CHIA
 2 without ruling that the first one is inadequate in
 3 advance?

4 MR. DAVID: Madam Chair, Mr. Tweeten.
 5 Because if you actually look at the Title Chapter
 6 6 of MAPA is fairly loose, and there is no

7 language in that that says the Board can't do it.
8 As a matter of fact --

9 BOARD MEMBER TWEETEN: But that's not
10 the standard legally. Legally the Board can only
11 do what the Legislature has authorized us to do,
12 not everything except what the Legislature has
13 prohibited, so --

14 I'm not trying --

15 MR. DAVID: If you have that concern --
16 I have thought about that, that perhaps the issue
17 would be raised. If you wanted to do it fairly
18 within the four corners of procedure, and not have
19 any possible loose ends to this, what the Board
20 would have to do is to rescind its decision that
21 this matter has been submitted to final
22 determination, conclude that there are factual
23 inconsistencies in the CHIA, and remand the CHIA
24 back to DEQ to clarify those legal --

25 Basically you're saying that summary

♀

1 judgment has failed, and you're asking the parties
2 to come forward and clarify the factual
3 inconsistencies. We could do it through briefing,
4 or we could do it by just providing a revised PHC
5 and the CHIA to you.

6 BOARD MEMBER TWEETEN: Well, that ship
7 has sailed. We had that argument two meetings ago
8 about whether summary judgment was appropriate in
9 this case or not, and last meeting the Board
10 passed a motion. Inherent in that motion was the

11 concept that summary judgment was appropriate. So
 12 it is a little late in the day to suddenly have a
 13 party who represented to us to two meetings ago
 14 that this matter was ripe for summary judgment,
 15 come in and suggest that we do a 180 on that
 16 issue, and find, say, that it is not, after we did
 17 what you asked us to do two meetings ago.

18 MR. DAVID: I would respectfully submit,
 19 Madam Chair, Mr. Tweeten, I would respectfully
 20 submit that no ship has sailed until the Board has
 21 actually signed an order.

22 CHAIRMAN MILES: Mr. David, are you
 23 willing to continue in negotiations with the other
 24 parties as proposed by Mr. Hernandez to come up
 25 with a remedy if we were to issue a final order on

♀

60

1 the merits today --
 2 MR. DAVID: Madam Chair. I think Mr.
 3 Hernandez very accurately spelled out, explained
 4 to the Board kind of the process that we were
 5 looking at, is that we would go forward, and
 6 attempt to negotiate a stipulation, and basically
 7 the stipulation would be a procedural stipulation
 8 for how DEQ would review the CHIA. Basically the
 9 idea would be that after DEQ directed -- I think
 10 just this is just going to be agreement in
 11 principle -- after DEQ directed SPE to go back and
 12 revise the PHC, that we would give Signal Peak an
 13 opportunity to comment on the PHC before we issue
 14 a final CHIA.

19 position here right now to waive the requirement
20 that the Board actually specifically review all
21 the findings in DEQ's submittal.

22 CHAIRMAN MILES: Thank you.

23 BOARD MEMBER TWEETEN: Madam Chair. Mr.
24 David, please have a seat. This is not a
25 question, this is just sort of thinking on my feet

♀

62

1 except I'm not on my feet.

2 The requirement that all of the parties'
3 proposed findings and conclusions be addressed is
4 part of the section of MAPA dealing with the
5 issuance of a final order, and I gather that the
6 three parties are asking us not to issue a final
7 order at this point.

8 Now, I am sensitive to Counsel for
9 MEIC's position that they don't want to lose any
10 ground as a condition of engaging in these
11 settlement talks. I get that. But I would submit
12 that if we're not going to issue a final order
13 that's fully dispositive of the case today, and
14 under MAPA a final order is an order that disposes
15 of everything that's in front of the Agency, so
16 there is nothing left for the Agency to do, that's
17 what constitutes a final order under MAPA.

18 And I gather that it is not being
19 suggested that we do that today, and I'm sensing
20 that the Board is at least willing to consider not
21 issuing a final order today. I guess I would say
22 in response to that if we're not going to issue a

23 final order today, why do we want to go through
24 the exercise today of fly specking all of the
25 proposed findings of fact, and deciding which ones

♀

1 we're going to reject and why, when we're not⁶³
2 going to be issuing a final order today.

3 We've got at least until January, it
4 seems to me, to be prepared for the opportunity to
5 enter a final order if these negotiations don't
6 bear fruit; or even if they do, we're going to
7 have to issue a final order of some kind of at
8 some point. But we've got the luxury of not, it
9 seems to me, crafting the language that would be
10 in our final order today if we're not going to
11 issue a final order today.

12 So I would suggest that the response to
13 MEIC's concern is the one that I mentioned before.
14 The Board has passed a motion that essentially
15 unanimously concluded what needs to be done here,
16 and I have a separate statement indicating that I
17 don't necessarily agree with all of the Board's
18 reasoning in reaching that conclusion, but I
19 certainly agree with the conclusion that the CHIA
20 is defective, and that the permit cannot be
21 allowed to stand without further work being done
22 by DEQ to shore up the inadequacies in the
23 existing process.

24 That's already on the record. That was
25 done at our last meeting. It was done unanimously

♀

64

1 by the Board. It would require an affirmative
2 vote of at least three members of the Board to
3 reverse that decision in the future, and I'm not
4 sensing any sentiment on the part of the Board to
5 do that at this stage. Certainly nobody, as I can
6 tell anyway, is having second thoughts about
7 whether the finding of deficiencies in the CHIA is
8 right or not. I think we all still think that it
9 is right.

10 So to Counsel's concern about whether
11 they're going to be necessarily back sliding, or
12 the Board is going to back slide on the finding
13 that was made at the last meeting that, despite my
14 objection, adopted in full everything that was in
15 MEIC's proposed findings and conclusions. That's
16 a done thing, and it would take, as I said, a
17 majority vote of the Board to reconsider that at
18 this point, unless we've got some by-law that says
19 that there is something more than an majority is
20 required for a reconsideration. I'm not familiar
21 with that.

22 So let's assume it is a majority vote.
23 Somebody is going to have to move to reconsider
24 that, and the Board is going to have to vote, on a
25 vote of at least three members of the Board, agree

♀

65

1 to rescind that decision. So that doesn't seem to
2 me to be likely, and I think that while I

3 understand that MEIC would be much more
4 comfortable if there was a semi-final order issued
5 here, the fact of the matter is that until we
6 issue it as a final order, anything in it is
7 interlocutory and subject to change.

8 So I don't think Counsel is placing his
9 bets on the right horse here when he's saying that
10 we need to have something that looks like a final
11 order but isn't a final order to give them the
12 confidence to go ahead and negotiate the question
13 of what the remedy should be.

14 So I'm just throwing that out as an
15 observation. When we get to the point of
16 considering an action on this, I think frankly Mr.
17 David's idea has some appeal, and when we get
18 around to talking about what we're going to do
19 about this, I'm inclined to think that if we
20 maintain jurisdiction of the appeal on the permit,
21 and reaffirm what we decided last meeting, and
22 then issue a partial remand for the purposes of
23 giving the Department jurisdiction to go forward
24 with further consideration of the CHIA, that would
25 pretty much take care of what we need to do today.

♀

1 And during the time when the parties are
2 negotiating about a remedy, our Counsel can be
3 assisting us in getting ready to rule on all of
4 the parties' proposed findings and conclusions,
5 because I understand that Ben has done a
6 tremendous amount of work on this, but I don't

7 think that the work that would need to be done to
8 be helpful to the Board in going through finding
9 by finding, and conclusion by conclusion, the
10 several hundred findings that are on the table
11 right now, and conclusions that are on the table,
12 I don't think that's been done yet in a way that
13 makes it efficient for the Board to consider that.

14 What I'd like to see in that respect is
15 something that isolates all of the separate issues
16 that are raised by MEIC in its proposed findings
17 and conclusions, and to have Ben, issue by issue,
18 pull out and segregate all of the findings of fact
19 and conclusions of law that pertain to each issue,
20 and that way I think that makes it much more
21 efficient and rational, in my mind, for us to look
22 at it issue by issue, take up the findings and
23 conclusions issue by issue, rather than just
24 starting at the beginning of the document and
25 going through them one to 150, or however many

♀

67

1 there are.

2 So that's kind of where my thinking is
3 headed right now, just for the Board's
4 information.

5 CHAIRMAN MILES: I'm going to call on
6 you in just a second. I do want to have Mr.
7 Hernandez respond as well.

8 But my concern about the general order
9 that Mr. David talked about, we have an obligation
10 to make a final decision on this, and I don't

15 wanted us to provide that information today so
16 that we didn't kick the can down the road. What I
17 heard from Mr. David was, "Don't make a decision."
18 And so I'd like to hear from Mr. Wade again in
19 regards to how we issue a decision that provides
20 that clear guidance, without hurting the remedy
21 negotiation aspect, and while making it clear what
22 we want on water quality, at the same time
23 preserving jobs and the current operations.

24 MR. WADE: Madam Chair, I think it is
25 somewhat of a nuanced response, because I think I

♀

1 heard -- I don't know who said it. It might have⁶⁹
2 been Mr. Tweeten -- refer to kind of a partial
3 order that at least remands the thing to let DEQ
4 start the process.

5 I guess when we were preparing for this,
6 I really didn't anticipate getting into the
7 argument over the other stuff. Our focus has been
8 on the path forward. However, I think the Board
9 has a lot of discretion in what it can do. I
10 think it can probably issue a partial order today
11 to partially remand it, and deal with how to go
12 through the laundry list of findings of fact and
13 conclusions of law.

14 I don't foresee us having that battle.
15 If we're going to have that battle, that would be
16 sometime in the future. Signal Peak is prepared
17 to move as quickly as possible with the parties
18 through the established permitting process to get

19 the deficiencies solved.

20 And I don't know if that's the answer
21 you're looking for, but the way I viewed it really
22 was not -- That coming in here the Board could
23 issue a decision, its final decision, and that
24 decision would say, "Department, you have 180 days
25 in which to complete the process,

♀

1 Department/Signal Peak to complete the process to
2 update the CHIA."

3 That time period would start within
4 three or five days from now. During that time
5 period, you'd follow the required permit process,
6 that you'd invite the updated PHC from Signal
7 Peak. You have need to have a little bit of time
8 for the back and forth for deficiencies. Then
9 that would be done, and it would go out to public
10 comment. Then after public comment, public
11 review, then the Department would have the
12 opportunity to make its decision. And that would
13 have to be done with the 180 days to kind of
14 coalesce with the operations and the development
15 work out there, so we don't run into that problem.

16 CHAIRMAN MILES: Why are you picking 180
17 days?

18 MR. WADE: Frankly the 180 days is the
19 precedent in the Spring Creek Mine case; and we
20 also think that coincidentally it actually ties
21 right around the end of Panel 5 as well. So we
22 have two things. We wanted to look to make sure

23 that it wasn't arbitrary; but we also wanted to
24 look at a time period that was sufficient to allow
25 a meaningful CHIA process to address the concerns

♀

71

1 that have been noted going forward.

2 And then frankly the order that I would
3 envision -- and this is a little bit separate --
4 but that the Board would retain some jurisdiction.
5 If the CHIA wasn't issued within that 180 days,
6 that's when the Board could then resurrect the
7 vacating issue. If it was, the way I would
8 envision it is then this case would be done, you
9 would have the order with the stuff that the Board
10 has already decided; and because the process
11 followed the regular permitting process, there
12 would be a new opportunity for a challenge for
13 interested parties once a new CHIA decision and
14 amendment was done.

15 That's conceptually the framework that
16 we had, and that's kind of what we've been
17 discussing. We have not wanted to get into this
18 other part. We're frankly most interested in
19 getting the process started, fix the issues, and
20 not disrupt the mine operations.

21 CHAIRMAN MILES: Thank you. Mr.
22 Hernandez, what's going on through your head at
23 this point? Then I probably will need to take a
24 short break before we resolve what we're doing.

25 MR. HERNANDEZ: Thank you, Chairman

♀

1 Miles, honorable members of the Board.

2 I think a break is warranted. I heard a
3 lot of discussion up here from my friends and
4 opposing Counsel that frankly troubles me and
5 confuses me. I think that we would appreciate a
6 little bit of time to talk with them, and make
7 sure we can all be on the same page as to what is
8 going forward.

9 I think that Dana did a good job up here
10 confusing the Board about the distinction between
11 a final order and a final written decision. The
12 final order is what a contested case can produce.
13 I looked at -- it doesn't appear to be defined in
14 MAPA, but Montana Code Annotated 2-4-623, that's
15 the provision that requires looking at each
16 proposed finding. Subsection (1)(a) of that
17 section talks about a final decision, and that's
18 what we're asking for on the merits -- sorry. A
19 final order -- a final order on the merits.

20 The final decision, if you look on the
21 other page, it is 2-4-702, that's the judicial
22 review provision, what DEQ has to follow to appeal
23 any decision from this Board. That is keyed on a
24 final written decision, not a final order, and
25 it's no different from a District Court. A

♀

1 District Court will issue orders. They're final
2 for all basic purposes. They're not preliminary,
3 they're orders, it's all consummated with a final

4 remedies decision and judgment.

5 Here we're just asking you to break up
6 the final order on merit and remedy. We want a
7 final decision of the Board that says, "This is
8 what the merits decision is. This is how a CHIA
9 operates," and then give the parties an
10 opportunity to discuss remedy. By doing that,
11 making a final decision on issuing a final order
12 on the merits, it is not a final appealable
13 decision under the judicial review provisions
14 2-4-702, that would in any way trigger the appeal
15 period, or therefore affect DEQ's or Signal Peak
16 Energy's appeal rights.

17 That's not a concern here. I think that
18 given these representations, there is no chance
19 that they would try to appeal and subsequently be
20 foreclosed based on their not appealing the merits
21 order first. We've basically said that we
22 understand the rules, that the final order on the
23 merits doesn't trigger the appellate review time
24 period.

25 The final decision is what would be the

♀

1 merits, and I just really want to be clear to ⁷⁴
2 break those out. We don't want some preliminary,
3 partially cooked, not clear rule. We want a final
4 order on the merits. The final order on remedy,
5 we can get to that. Hopefully we can negotiate a
6 decision. I think that we need to speak with
7 Signal Peak Energy and with DEQ to get on the same

8 page here, because I think there's some divergence
9 that is troubling to my clients and is troubling
10 to me, but that is the general proposition.

11 I'm sorry that this procedural
12 requirement of making a finding on each proposed
13 finding is being held over us as like the sword of
14 Damocles, that we have to do this. It's not that
15 we can't do it, it's just that nobody wants to go
16 through the time of doing it, the procedural
17 tedious task that I feel is being forced upon the
18 Board to forego issuing a final order on the
19 merits, which is what is really our precondition
20 for negotiating a remedy.

21 So I just wanted to pull that apart. I
22 think that we're talking almost past each other.
23 We're close, but we're saying different things,
24 and it really affects what we're asking the Board
25 to do today. So I would appreciate the

♀

75
1 opportunity to speak with my friends and opposing
2 Counsel about this for ten, fifteen minutes, to
3 see if we could get on the same page, if that's
4 all right with the Board.

5 CHAIRMAN MILES: Yes. And you are
6 familiar I'm sure with the Spring Creek decision.

7 MR. HERNANDEZ: I am, yes, and 180 days,
8 that was just the --

9 CHAIRMAN MILES: I guess I'm not asking
10 so much about 180 days in that decision, and I
11 don't know if any of the other Board members are

12 aware of it, but I did read that case. I think it
13 is essentially -- to take 180 days out of there,
14 because I'm not sure why they put that in there,
15 but essentially in that case --

16 It is a very similar case where the NEPA
17 process was inadequate, and that the Court
18 recommended that vacating the permit be deferred
19 for a period of time from the date of the final
20 order on the motion for summary judgment. So
21 that's basically what you're asking, is that we
22 make our final order on the summary judgment
23 motion, but we're working with the parties to look
24 at some way to defer --

25 MR. HERNANDEZ: -- ruling on vacatur.

♀

76

1 Yes, that's right. And there are other
2 distinctions that they talk about, the surface
3 mining law and NEPA, but they're not relevant as
4 far as what we're asking for is that exact
5 bifurcation.

6 CHAIRMAN MILES: That's exactly what
7 happened in that decision. There is strong
8 precedent.

9 MR. HERNANDEZ: There are a handful of
10 other cases, mining cases, from Federal Courts in
11 the past year that have done just that, that have
12 said, "Okay. Here is the merits. Parties, take
13 thirty days." The proposal that we're offering is
14 taken from another mining case from District of
15 Colorado. It is High Country Conservation

24 setting aside of the permit that is in the
25 proposed findings and conclusions that we

♀

1 submitted, Paragraphs 138, 140, 141 and 142.⁷⁹ In
2 their place, that the Board would remand --

3 CHAIRMAN MILES: I want to get to that
4 place. So you said 138, 139 --

5 MR. HERNANDEZ: Not 139. 138, 140, 141,
6 and 142. That's just the language about setting
7 aside the permit.

8 CHAIRMAN MILES: You don't actually have
9 a 142, Ben.

10 MR. REED: I don't, Madam Chair. I've
11 renumbered the originals as submitted by MEIC.

12 CHAIRMAN MILES: Do you know exactly
13 what --

14 MR. REED: I think I do in fact.

15 MR. HERNANDEZ: Basically it would just
16 be removing any language that speaks of remedy.

17 The one remedy that we are willing to
18 concede at this point is the remand. I think all
19 parties are in agreement that a remand could occur
20 immediately, and the Agency could begin correcting
21 this CHIA.

22 Then the order would have language
23 saying that the Board will not make any decision
24 on the question of vacatur, but the parties shall
25 have until the 15th of January to confer amongst

♀

1 themselves and either, one, reach a stipulated
2 agreement that could be submitted to the Board, or
3 submit simultaneous briefs not to exceed whatever
4 page limit you guys think is appropriate -- I
5 suggest ten to fifteen pages -- on the remedy, the
6 appropriate remedy. There has been a lot of paper
7 in this case.

8 So that's it. The crux of what we were
9 talking about before was this question about going
10 through each individual finding of fact and
11 conclusion of law. With respect to that, the
12 parties are willing just to say that none of them
13 object to the Board adopting the order today, but
14 reserve the right to challenge any fact or
15 conclusion.

16 I think this leaves some stuff unsaid,
17 but I think it is good enough for the parties.
18 Whether or not it is good enough for the Board is
19 for you guys. But that's what where I think we
20 are. I think if there is anything I've left out,
21 the other parties can go forward, and to the
22 degree that there isn't agreement on any further
23 point, I think we just have to leave it to the
24 Board to make up its mind.

25 CHAIRMAN MILES: Thank you so much for

♀

1 your help and willingness to work on that. Mr.
2 Wade.

3 MR. WADE: Madam Chair, members of the

4 Board. I guess what I want to convey is to get a
5 sense of how close we are. Signal Peak, though,
6 does want to go on record that it would reserve
7 all of its appealable rights with respect to going
8 forward.

9 On the issue of the conclusions of law
10 and findings of fact, I mentioned this earlier in
11 an order of adopting it. We view the Board as
12 having voted on that previously. Our big issue is
13 having the amendment vacated, what it does to the
14 operation of the employees, as well as
15 facilitating an appropriate time frame for the
16 development of an updated CHIA by the Department.

17 We have some concern. We would leave it
18 to the Board over the 30 day period. It seems
19 like that just kind of hangs it out. We think
20 that having a time period established would be a
21 good idea. So I think in general, what you see is
22 conceptually a big picture. We're all trying to
23 get to the same deal, we just have a different
24 view on some of the details of how you get there,
25 and you guys will have to decide that. But we

♀

1 would continue to want to make sure that we can
2 give the mine and its employees certainty as it
3 goes forward, and not just the 30 day lumps.

4 CHAIRMAN MILES: Thank you. Department.

5 MR. DAVID: Madam Chair, members of the
6 Board. I'd like to thank you all so much for your
7 indulgence while we try to hash this out.

12 should make an effort before we've actually
13 finalized that order to go through those, and
14 establish sort of our rationale more clearly as to
15 why we adopted those, so that's clear information
16 for the Department.

17 I think the other findings of fact deal
18 with what's in Signal Peak and DEQ's briefs, which
19 for the Administrative Procedures Act, we do need
20 to go through those. So we have talked about
21 going through MEIC's findings of facts right now,
22 and asking Ben to help go through the other sets
23 of findings from the other two parties, and help
24 lump them together, or look at them.

25 An awful lot of them and all of the

♀

1 briefs are right out of the CHIA, so it is very
2 simple, but there may be some others that we need
3 to discuss if we reject those and why, and that
4 Ben could help us do that within probably the next
5 two weeks, and then we would have a special
6 meeting to take final action.

7 I'm going to ask Ben and Chris, based on
8 what has just been discussed, does that change
9 anything? Should we go ahead with that? Thank
10 you all very much. I think you're right that
11 we're all conceptually in the same place. We just
12 want to get moving forward on this, and have it be
13 very clear, and get it done, and give the
14 Department really clear information, and establish
15 our record so it's very defensible.

16 BOARD MEMBER TWEETEN: Thanks. Madam
17 Chair. I think it's a bad idea to bifurcate this
18 case and issue a final order today on one part of
19 it and remand the other part. The thirty day time
20 period for taking a case to judicial review in
21 front of the District Court is not in our control.
22 If you need relief from that, you have to apply to
23 the District Court, because it is essentially
24 jurisdictional.

25 Once the thirtieth day has passed, you

♀

1 are time barred by statute from seeking judicial
2 review from that point forward. So we don't have
3 the authority as Board to extend that thirty day
4 period of time, that's in statute, and the only
5 party that would be able to give you relief from
6 that particular provision would be the District
7 Court.

8 So if we issue a final order on any part
9 of this case, I think there is a risk going
10 forward. And the parties can waive all they want,
11 but the thirty days I think is jurisdictional,
12 just like the time for filing notice of appeal
13 would be from District Court. So the Judge may
14 not be able to overlook that, if he determines, he
15 or she determines, in reading the statute that
16 something we did triggered running of that thirty
17 days inadvertently, and somebody tries to get to
18 the Court after that thirty day period has run.

19 I think what Madam Chair has outlined

20 briefly is -- let me put some more detail to that.
21 The idea would be that the Board, led by Ms.
22 Reinhart-Levine, will go through the MEIC findings
23 of fact, provide the rationale for the Board in
24 adopting those findings of fact, so the parties
25 will know how we feel about all those issues that

♀

1 are addressed in MEIC's findings of fact, and why
2 we adopted them, why the Board adopted them in
3 whole, but we will not issue a final order on that
4 part of the case today.

5 We will reconvene probably sometime
6 during Christmas week by telephone, and before
7 that time, we've asked Counsel to give us a
8 memorandum in effect that will give us a road map
9 to work through all of the other parties' findings
10 of fact and conclusions of law; single out those
11 that are simply quotations from the CHIA, for
12 example, "The document speaks for itself. There
13 is no dispute about what the document says," so
14 those we can say there is basically subsumed in
15 the MEIC's proposed findings, and should be
16 considered as having been in effect adopted.

17 Any that take issue at any point for any
18 reason with the findings that MEIC filed will have
19 to distinguish and discuss why we preferred MEIC's
20 approach to that particular question to the one
21 that was offered by the parties. And as I said,
22 the plan is that Counsel will give us that road
23 map document sometime within the next two weeks,

24 and then we will reconvene by telephone during
25 Christmas week for a special meeting, and during

♀

1 that telephone conference we will go through, and
2 formulate our thoughts with respect to all of
3 those other findings of fact and conclusions from
4 the other parties, which will then be reduced to
5 writing; and when we get to the point of issuing a
6 final order, those will be incorporated in the
7 final order separately.

8 What I think we can do now, and what I
9 think the Chair and others on the Board have
10 individually considered, is that we can in effect
11 issue a partial remand at this point for purposes
12 of further consideration by the parties of the
13 issue of remedy, and all we have to say in that
14 respect is that the parties have requested that we
15 remand for the purpose of consideration of an
16 additional approach to remedies, and we're in our
17 discretion willing to grant them that opportunity.

18 So we will remand, and the period of the
19 remand will be this long, and so on and so forth,
20 what conditions will be for ending the remand and
21 bringing the case back, so that at all times the
22 Board will maintain jurisdiction over the matter.

23 There will not be a final order on any
24 issues, so the time for appealing will not begin
25 to run. We would I think in the motion clearly

♀

1 state that it is our intention not to make a final
2 decision on any question until we've made a final
3 decision on all questions, and that should make it
4 clear that whatever we're doing today is not
5 intended to be a final order that triggers the
6 running of the thirty days for judicial review.

7 So that would give you all a window. I
8 think it would give SPE the clarity that it needs
9 with respect to what the Board's intentions are
10 going forward. I think it will give MEIC the
11 assurance that it's asking for that the Board
12 meant what it said in October when we adopted
13 their findings in total. It will give the
14 Department what it needs, which is the time to go
15 back and refashion the CHIA, and figure out what,
16 if anything, it does to the permitting decision as
17 refashioned by the Department.

18 So I think this is a procedure that
19 meets all of your requirements without creating
20 any undue risks that we might inadvertently issue
21 a final order of some kind that might deprive one
22 of you of your appeal rights to District Court,
23 while at the same time giving you all what you
24 need to have in your hand during the negotiation
25 process to come.

♀

89
1 Madam Chair, have I sort of capsulized
2 that correctly?

3 CHAIRMAN MILES: Yes. I need a little
4 bit more clarity on issuing a final order that

5 also has a remedy in there, and some timing there,
6 because I don't think we want to delay on that.

7 BOARD MEMBER TWEETEN: Well, we've
8 already voted to vacate by adopting the findings
9 that MEIC initially proposed, but I guess I take a
10 different approach than Counsel for MEIC does with
11 respect to the effect of these decisions that we
12 make prior to the issuance of a final order.

13 The term "interlocutory," which lawyers
14 use all the time, means not final. So anything
15 that we issue in this case as a result of a motion
16 or any order that the Chair signs prior to the
17 final decision is interlocutory. It is not final,
18 and it's subject to being changed by the Board for
19 good cause anytime up to the issuance of the final
20 decision.

21 Once we issue the final decision, and
22 that's approved by a vote of the Board and signed
23 by the Chair, then it is a done deal, and the only
24 place that the case can go is up at that point in
25 terms of somebody seeking judicial review. But up

♀

1 until that time, nothing that we do is ⁹⁰final.

2 So my thinking is that we can go ahead
3 and reaffirm our decision to adopt MEIC's proposed
4 findings and conclusions, subject to minor
5 amendments as to form that our Counsel may deem to
6 be advisable, and remand the remedy section of the
7 case back to DEQ for further consideration, all
8 the while not having entered a final order.

9 And then once January rolls around and
10 the parties have settled on the remedy question --
11 which I'm confident that you will -- then that
12 portion can come up, and we can issue a final
13 order at that point. And January 14th I think is
14 the running of ninetieth day on making that
15 decision, by my count anyway. Sometime before
16 midnight on January 14th we can issue a final
17 decision that includes the MEIC's findings of
18 fact, as we've tweaked them as to form and so
19 forth through the efforts of our Counsel.

20 Plus as a consent decree essentially,
21 whatever settlement you all reach on the question
22 of remedy, and that document will include all of
23 the disclaimers that you've asked for with respect
24 to everything is without prejudice, to your
25 raising on appeal whatever issues you want to

♀

91

1 raise.

2 At that point we will have all the
3 pieces of a final order in place. We'll have the
4 findings of fact and conclusions of law that we've
5 adopted, following whatever special meeting we
6 have later this month; we will have our response
7 to the findings of fact proposed by the other
8 parties to include in that order; and we'll have
9 the remedy piece that you all agree to put in
10 place as a consent decree.

11 And if you fail to reach an agreement,
12 obviously then the prior motion will control, and

13 we'll simply vacate and send it back, and you'll
14 go back to square one and start over, because
15 that's what we've already voted to do.

16 So at that time we'll be ready to issue
17 a final order, and the thirty day period of time
18 would run from whatever date the Chair signs that
19 final order that we will put together, once we
20 know that you either have or have not reached a
21 consensus on the issue of remedy. Does that help?

22 CHAIRMAN MILES: Any questions? Any
23 comments from the parties on that approach?

24 MR. HERNANDEZ: If I may. It's not
25 everything I wanted. I can live with it. A

♀

1 question of clarity. I just want to know what you
2 expect from us. You mentioned that you would like
3 some memoranda from the parties on findings of
4 fact and conclusions of law, I thought I heard?

5 CHAIRMAN MILES: No.

6 MR. HERNANDEZ: Any objections to that?

7 BOARD MEMBER TWEETEN: I think what I
8 said was that we're going to get a memorandum from
9 our attorney. When I said Counsel, I mean Counsel
10 in the singular, not putting any burden on you all
11 to do that. Our task is relatively ministerial.
12 What we have to do is make sure that we cover all
13 of the findings that you also have proposed, and
14 either said first they're subsumed in the findings
15 that MEIC offered that we've already adopted; or
16 in the alternative, that they're not subsumed in

17 the MEIC findings, and we're not going to adopt
18 these, and here is the reason why.

19 And we can group them together, so if
20 there are similar findings proposed by the
21 Department and by SPE, we can group all those
22 together and deal with them as a bunch. "We've
23 got findings one, two, four, six, and eight from
24 the Department, and findings nine, twelve, and
25 fifteen from SPE, all of which say essentially the

♀

93

1 same thing, and we're not going to adopt those,
2 and here is why."

3 CHAIRMAN MILES: And we felt that was a
4 more efficient use of our time, rather than just
5 walking through all of those today. It has to be
6 done, and so we're going to do it, but Ben is
7 going to sort of do the ground work for it, and
8 then we know exactly which ones are right out of
9 the CHIA, and which ones we accept, and which ones
10 we don't. So we're not asking you to do anything
11 there. What we're prepared to do now is to just
12 basically reaffirm and go through MEIC's findings
13 of fact, so the Department has very clear
14 direction and information from us on our rationale
15 for doing that.

16 MR. HERNANDEZ: Thank you, Madam Chair,
17 Mr. Tweeten.

18 BOARD MEMBER TWEETEN: Can I add one
19 more thing? I think you mentioned the idea of the
20 parties all agreeing that you don't want to make a

21 big deal of the obligation to respond to each one
22 of the individual findings of fact of the other
23 parties.

24 The reason I'm not thrilled about that
25 idea is that that requirement doesn't exist for

‡

94
1 your benefit, it exists for the benefit of the
2 Court on judicial review. It's designed to make
3 sure the Court has a full understanding of what
4 the Board actually did.

5 And you can stipulate all you want about
6 that, but if the Judge isn't satisfied with what's
7 in the order with respect to that, and isn't about
8 to go and do our job him or herself, they're just
9 going to throw it back to us, and tell us, "This
10 is inadequate. It doesn't comply with the
11 statute. I don't care what the parties say, I
12 want this done." I don't think that you want that
13 kind of a road block in front of your case, so
14 that's why I'm not wild about going that
15 direction.

16 MR. HERNANDEZ: Thank you. I
17 understand. Mr. Tweeten, Madam Chair. That makes
18 sense. It's tedious. I appreciate you guys
19 taking the effort to do that.

20 So let me just repeat so that I
21 understand what is expected of me. What the
22 parties have to do now is to go back and try to
23 reach some kind of agreement with respect to the
24 vacatur. Beyond that, there's nothing. You're

25 not asking us to file additional briefs by the

♀

1 15th or anything. If we don't reach an agreement,⁹⁵
2 vacatur is there as the alternative, and any
3 agreement we have to have, we have to submit to
4 you sufficiently in advance of January 14th so
5 that you may incorporate it into the final
6 appealable decision; is that right, or is there a
7 date by which you need it? The 14th --

8 BOARD MEMBER TWEETEN: I would say we
9 need at least a week's notice as to whether you've
10 got it settled or not. If you do, if you could
11 boil those terms of the settlement down into a
12 document that we can incorporate by reference in
13 the final order, that would be I think the most
14 efficient thing for us.

15 Failing that, you can tell us what the
16 terms are, and I guess we'll ask our Counsel to
17 regurgitate those into the order, and put them in
18 that way. But ideally something that the three of
19 you have signed off on that we can just
20 incorporate by reference as the remedy section of
21 the decision, since it is going to be in effect a
22 partial consent decree anyway. And I think that
23 would be the most efficient way to do that.

24 MR. HERNANDEZ: I agree, Mr. Tweeten.
25 Madam Chair. Thank you. I understand.

♀

1 BOARD MEMBER TWEETEN: If we can have
2 that by the 7th, that would be good, of January.

3 MR. HERNANDEZ: I anticipate putting
4 together essentially a consent decree on that.

5 CHAIRMAN MILES: I think our intent is
6 hopefully before Christmas, if we can do it, the
7 Department can help us put together a conference
8 call for the Board members to go through the work
9 that Ben does, and then we would basically just be
10 waiting for your agreement, so we can actually
11 issue this final order by January 14th.

12 MR. HERNANDEZ: Thank you. Thank you
13 for your time. That's all I have, if you have no
14 questions.

15 CHAIRMAN MILES: Anyone else? I think
16 Michele actually did have a question for Mr. Wade.

17 BOARD MEMBER REINHART-LEVINE: Madam
18 Chair, Mr. Wade. You had mentioned that there was
19 maybe some disagreement or some different
20 viewpoints on certainty, and I wanted to better
21 understand what you meant by certainty, and what
22 you were looking for there.

23 MR. WADE: The certainty that we're
24 looking for is actually a time where there isn't
25 this back and forth idea of vacatur. You heard us

♀

97
1 mention 180 days, but really the most important
2 time for us to make sure that this Amendment No. 3
3 currently stays active is until Panel 5 long wall
4 mining is complete.

5 That is the certainty really that we're
6 looking for, is that we're not going to start
7 going down the CHIA process and the PHC process,
8 and then all of a sudden turn around and then be
9 back here having the permit potentially vacated.
10 We want that process to be able to see itself
11 through, so that the new CHIA, updated CHIA
12 process, is completed, so it removes the cloud and
13 the risk over what is essentially two-thirds of
14 the employees at Signal Peak.

15 CHAIRMAN MILES: We're assuming that
16 that is what will be worked out in the remedy
17 portion that we're asking the groups to come back
18 with.

19 MR. WADE: Okay.

20 CHAIRMAN MILES: Anyone else?

21 (No response)

22 CHAIRMAN MILES: Then I think we need to
23 get to work. Thank you all. I really appreciate
24 all the work you've done. I know this has been a
25 long day, and I think we're getting there. We

♀

1 want to actually do due diligence right now, as I
2 mentioned, to just establish for the record --
3 because we didn't spend a lot of time at the last
4 Board meeting -- just to go through the findings,
5 and really establish our rationale for the motion
6 that we passed. I'm going to turn it to Michele
7 for that. We'll take ten minutes. 1:30, 1:45
8 we'll be back.

9 (Recess taken)

10 CHAIRMAN MILES: We're going to get
11 started. We will be working from the original --
12 brief --

13 BOARD MEMBER TWEETEN: Proposed findings
14 of fact.

15 CHAIRMAN MILES: -- from the original
16 proposed findings of fact submitted by Montana
17 Environmental Information Center. As opposed to
18 working through the proposed order, this one will
19 be clearer because some numbers changed in the
20 order, and so we're going to work with your
21 original document. Anyone on the phone, that's
22 what we're working from, the proposed findings of
23 fact and conclusions of law submitted by MEIC.

24 Did you get that message? I was told,
25 Ben told me he had said that.

♀

1 UNKNOWN SPEAKER: We were working with
2 Ben out there, so hopefully we're working on the
3 same sheet of music.

4 CHAIRMAN MILES: I'm sorry about that.
5 I went to find you, and he said he'd taken care of
6 it, so he's the one that needed to know.

7 We're going to begin our work of going
8 through this document, and establishing the record
9 for our rationale for the motion that we made in
10 October, and I'll turn it over to Michele
11 Reinhart-Levine.

12 BOARD MEMBER REINHART-LEVINE: Madam

13 Chair, members of the Board. I made a motion to
14 adopt MEIC's findings of fact and conclusions of
15 law on October 16th. I move to amend that motion
16 as passed to modify as follows:

17 I move that we amend the motion to
18 reaffirm adoption of MEIC's findings of fact and
19 conclusions of law as modified by our Board Legal
20 Counsel Ben Reed, except for findings of fact and
21 conclusions of law dealing with setting aside the
22 permit. I move that we exclude all mention of
23 vacating the permit from our findings and
24 conclusions of law.

25 Secondly, I move that we amend our

♀

1 motion to get a special meeting to consider a
2 response to the findings of fact by DEQ and SPE as
3 required by Montana Code Annotated 2-4-623 subpart
4 (4).

5 Thirdly, I direct our Legal Counsel to
6 prepare a memo for us prior to our special
7 meeting, and to analyze the findings of fact
8 proposed by DEQ and SPE, and recommend Board
9 action in compliance with Montana Code Annotated
10 2-4-623 subpart (4).

11 Fourthly, I move to amend my prior
12 motion to partially remand to the DEQ to allow the
13 parties to negotiate an agreement as to the
14 appropriate remedy for the violations outlined in
15 the Board's findings of fact and conclusions of
16 law. The parties must report the success or

17 failure of their negotiation discussions to
18 resolve the issue to the Board by January 7th,
19 2016.

20 And then with that, Madam Chair, I'd
21 like to have some discussion on the motion to
22 amend.

23 BOARD MEMBER TWEETEN: I'll second the
24 motion.

25 CHAIRMAN MILES: It's been moved and

♀

1 seconded, and we'll open it up for discussion.

2 BOARD MEMBER REINHART-LEVINE: Madam
3 Chair, I believe that amending the motion would
4 allow for us to meet our statutory obligation to
5 lay out our rationale for our decision, as well as
6 to give us time to address the findings of fact
7 and conclusions of law of DEQ and SPE after review
8 by our Legal Counsel Ben Reed.

9 I think that this amendment through
10 motion also makes sense to allow the parties more
11 time to negotiate, and to come up with a mutually
12 agreeable solution to both address the water
13 quality concerns that the Board had with the
14 deficiencies in the CHIA, while allowing mining to
15 continue at SPE.

16 And with that, Madam Chair, I would like
17 to go through some of our rationale for the
18 findings of fact and conclusions of law set forth,
19 as well as what we're excluding.

20 CHAIRMAN MILES: Before you do that, are

21 there any questions or comments from other Board
22 members?

23 (No response)

24 CHAIRMAN MILES: Please proceed. Thank
25 you.

♀

1 BOARD MEMBER REINHART-LEVINE: Madam
2 Chair, members of the Board, looking at MEIC's
3 proposed findings of fact and conclusions of law,
4 the introductory findings are fine. They just
5 state some general background facts. The factual
6 setting, that is all straight forward as set forth
7 in Paragraph 2.

8 The same with Paragraph 3. That just
9 describes the hydrological setting.

10 Paragraph 4 deals with the wetland
11 vegetation area. That is fine.

12 Paragraph 5 deals with the vegetative
13 communities, as well as the wildlife communities.
14 That's a straight forward fact.

15 Paragraph 6 deals with the dominant
16 historical land use in the area, including
17 ranching. That's fine and straight forward.

18 Paragraph 7 deals with coal mining in
19 the area. That's also straight forward.

20 Paragraph 8 also deals with some of the
21 historical background.

22 Then the next section is permitting
23 proceedings. So Paragraphs 9, 10, 11, 12, 13, 14,
24 and 15 deal with some of the procedural history.

25 That is not disputed.

♀

1 The next section, Hydrological Overview
2 on Page 6, discusses the Mammoth coal aquifer.
3 That is not disputed. That's straight forward.

4 Paragraph 18 further describes the
5 Mammoth coal aquifer and the domestic wells in
6 that aquifer. That is not disputed.

7 Paragraph 19 deals with the proposal to
8 remove additional millions of tons of coal,
9 describing the operation. That's straight
10 forward.

11 Paragraph 20 describes the long wall
12 panel mining. That is also straight forward.

13 Paragraph 21 deals with the proposed
14 mine expansion.

15 Paragraph 22 deals with some of the
16 water quality issues that can develop from the
17 mining process.

18 On Page 9, we have findings of fact
19 relating to the degradation of water. This is
20 information that comes directly from the CHIA, and
21 is not disputed.

22 That also applies to Paragraph 24 which
23 cites the CHIA, as well as the PHC.

24 Turning to Page 10, Paragraph 25 deals
25 with definition of Class 2 groundwaters. That's

♀

1 not in dispute.

2 Paragraph 26 deals with Class 3
3 groundwaters. That's not in dispute.

4 Paragraph 27 discusses DEQ projections
5 for gob water, and that also cites the CHIA.
6 That's not in dispute.

7 On Page 11, groundwater migration is
8 discussed, and there are citations to the
9 groundwater model. That is straight forward and
10 not in dispute.

11 Page 12 Paragraph 30 discusses the gate
12 roads, and also cites the CHIA and the PHC.
13 Again, these are facts that are not in dispute.

14 Paragraph 31 also cites the groundwater
15 model needs the same record.

16 Same with Paragraph 32 regarding gob
17 water mining and different scenarios.

18 Paragraphs 33 and 34 also deal with the
19 groundwater model, and are citations to the
20 existing record.

21 On Page 14, mitigation is discussed, and
22 again, there is a citation in Paragraph 35 to the
23 CHIA and the PHC.

24 With Paragraph 36, that also deals with
25 mitigation water and citations to the record.

♀

1 Paragraph 37 is another citation to the
2 groundwater model.

3 On Page 16, then we have an overview of
4 DEQ's material damage assessment and
5 determination, with again additional citations to

6 the CHIA.

7 Paragraphs 39, 40, and 41 also cite the
8 CHIA directly, as do Paragraphs 42, 43, 44, and
9 45. So these are all things that are in the
10 existing record. They are not in dispute. They
11 are part of the parties' stipulation to the fact
12 that there are no genuine issues of material fact.

13 Next looking at Page 21, with
14 administrative proceedings, this is an overview of
15 the procedural history. That applies to
16 Paragraphs 47 all the way through Paragraph 58.
17 That is not disputed.

18 Paragraph 59 is basically us reaffirming
19 that there are no general issues of material fact,
20 and that resolution of this matter is appropriate
21 via summary judgment based on the undisputed
22 record, and that paragraph is fine.

23 Next looking at the conclusions of law,
24 unfortunately my document stops at Page 24. I do
25 think we probably ought to discuss the conclusions

♀

1 of law as well.

2 CHAIRMAN MILES: So we go into the draft
3 document, the draft order. We all have that. You
4 didn't change any of the conclusions?

5 MR. REED: Not significantly, other than
6 the ones that --

7 CHAIRMAN MILES: -- we talked about.

8 MR. REED: -- other than the ones that I
9 addressed at the outset, I did not. I would say,

10 however, that the only problem with that is the
11 renumbering, but they start at 60, so perhaps
12 that's not going to be a problem at all.

13 CHAIRMAN MILES: I think we can follow
14 it on here. You've printed yours out.

15 BOARD MEMBER REINHART-LEVINE: Shall I
16 operate off your draft?

17 MR. REED: Madam Chair, Ms.
18 Reinhart-Levine --

19 BOARD MEMBER REINHART-LEVINE: In the
20 alternative, if you happen to have MEIC's handy, I
21 can operate off of that.

22 MR. REED: I'll get that printed if
23 you'll give me about one minute.

24 CHAIRMAN MILES: While we're getting
25 that information printed, why don't we settle on a

♀

1 date for the special meeting to look at Ben's
2 summary of the findings of fact from the other two
3 parties. And it looks like the week following
4 Christmas, so it would be Monday the 28th, Tuesday
5 the 29th --

6 BOARD MEMBER TWEETEN: Monday, Tuesday,
7 Wednesday, Thursday. Friday is New Years Day.

8 CHAIRMAN MILES: So I would prefer we
9 keep it on the 28th, 29th, or 30th. Is there a
10 preference? Again, I think we can do it over the
11 phone. I'll be here, I'll come in here so it can
12 be open to the public.

13 BOARD MEMBER DR. BYRON: I propose

14 Tuesday the 29th.

15 CHAIRMAN MILES: I actually have a
16 conference call from 8:00 until 10:30 that day. I
17 could do it after that. We can set it up for
18 anytime. About how about 11:00 on Tuesday the
19 29th? Hearing no objection, I'm going to wait and
20 just double check with Ben on that date, and if
21 not, we can plan to do this 11:00 a.m. on Tuesday
22 the 29th of December, and I don't think it is
23 going to take more than an hour. Ben, December
24 29th?

25 MR. REED: (Indicating)

♀

1 CHAIRMAN MILES: The 29th at 11:00.¹⁰⁸
2 We'll make sure George gets that message before we
3 leave.

4 So we're going to move into conclusions
5 of law here, and Michele will be working from the
6 original document submitted by MEIC. The rest of
7 us don't have paper copies of that, so if you
8 could find it on your computers, or it is
9 comparable to what's in the draft order. You
10 might just go a little slower.

11 MR. REED: They're going to be bringing
12 other copies.

13 MR. DAVID: Are the copies that are
14 being brought of the draft order? The one I gave
15 her was the draft order.

16 CHAIRMAN MILES: No, we went back to the
17 original. I'm not sure there is a big difference.

18 MR. DAVID: The paragraph numbers will
19 be off.

20 MR. HERNANDEZ: I have an extra copy. I
21 can review it on my computer if that helps.

22 CHAIRMAN MILES: I know I've got it. I
23 just need to find it. Five minute pause here.

24 (Recess taken)

25 CHAIRMAN MILES: Robin, are you still

♀

109

1 with us?

2 (No response)

3 MR. HERNANDEZ: Madam Chair, I have a
4 question. I won't be in Helena on the 29th. Is
5 there a call-in number that will be available?

6 CHAIRMAN MILES: We just picked that
7 date. Is there a better date?

8 MR. HERNANDEZ: It can work if I can
9 call in.

10 CHAIRMAN MILES: I don't have the number
11 yet, but we'll get the Department to set it up.
12 I'll be here. It will be a phone-in number here,
13 and we'll make sure you get it.

14 MR. HERNANDEZ: I'll be able to talk to
15 the secretary of the Board and get the phone
16 number?

17 CHAIRMAN MILES: Yes.

18 Who is on the phone, please?

19 MR. WISE: Chris Wise. (Phonetic)

20 CHAIRMAN MILES: We noticed one other
21 typo on the proposed order, and it was the same

22 correction that I had noted last meeting, but it
23 didn't get recorded, and it is on Page 9 of the
24 order. I think it is on Page 9.

25 MR. HERNANDEZ: Paragraph 9 on Page 4.

♀

1 CHAIRMAN MILES: It is on Page 7 of ¹¹⁰
2 proposed order, Ben. Thank you. It should say
3 October 2012, not 2015.

4 MR. REED: I see it.

5 MR. SAYLES O'CONNOR: It says October
6 5th.

7 MR. REED: 2012. Thank you. Madam
8 Chair.

9 CHAIRMAN MILES: We're going to get
10 started again, continuing with the conclusions of
11 law.

12 BOARD MEMBER REINHART-LEVINE: Madam
13 Chair, members of the Board. Looking at Page 27
14 of MEIC's proposed conclusions of law starting
15 with Paragraph 60, this basically just cites MAPA
16 regarding contested cases and a cite to Montana
17 Code Annotated. So that conclusions of law is
18 fine.

19 CHAIRMAN MILES: We decided to keep that
20 in after the discussion this morning.

21 BOARD MEMBER REINHART-LEVINE: Indeed.
22 This is a contested case, and so that Paragraph 60
23 is appropriate.

24 Likewise Paragraph 61 is also okay. It
25 is the definition of contested case from the
Page 96

♀

111

1 statute.

2 Paragraph 62 needs to be stricken
3 because it is alleging that this is not a
4 contested case, which is incorrect. So we would
5 request that staff prepare the draft to strike
6 Paragraph 62.

7 Paragraph 63 is a reiteration of the
8 fact that there are no genuine issues of material
9 fact that are disputed, and there are no evidence
10 or facts presented to the Board outside of the
11 CHIA or other parts of the administrative record.

12 CHAIRMAN MILES: Are you reading from
13 the draft, or are you reading from MEIC's?

14 BOARD MEMBER REINHART-LEVINE: I'm
15 reading from MEIC's.

16 CHAIRMAN MILES: I don't think so.

17 BOARD MEMBER TWEETEN: I think you're
18 reading from Ben's draft.

19 MR. DAVID: (Provides document)

20 BOARD MEMBER REINHART-LEVINE: Indeed
21 that is correct.

22 BOARD MEMBER TWEETEN: Which one are we
23 going to do?

24 BOARD MEMBER REINHART-LEVINE: I think
25 we need to do MEIC's.

♀

112

1 CHAIRMAN MILES: I have the original

2 MEIC one. Do you have the original?

3 BOARD MEMBER TWEETEN: I'll have it in a
4 moment here.

5 BOARD MEMBER REINHART-LEVINE: I regret
6 the confusion here.

7 CHAIRMAN MILES: We're going to start
8 over again with the conclusions of law working
9 from MEIC's draft proposed findings -- I shouldn't
10 even say draft -- MEIC's proposed findings and
11 conclusions.

12 BOARD MEMBER REINHART-LEVINE: Starting
13 over.

14 So Paragraph 60 states that the Board
15 reviewed DEQ's decision to approve a coal mining
16 expansion de novo with no deference to the Agency.
17 For that one, I believe we had a substitution for
18 that paragraph, so we would strike Paragraph 60,
19 and instead insert Paragraph 64 from Ben Reed's
20 draft, which states, "The Board may in its
21 discretion rely entirely on the record before it,
22 or receive additional evidence on such matters as
23 it may deem appropriate," citing Montana
24 Environmental Information Center versus DEQ 2005
25 MT 96, Paragraph 18. So we'll make that

♀

113
1 substitution of Paragraph 64 in the draft, and
2 strike Paragraph 60 from MEIC's original findings
3 of fact and conclusions of law.

4 Paragraph 61. This is a reference to
5 the Montana Strip and Underground Mine Reclamation

6 Act, and it is a cite to the statute Section
7 82-4-206, so that is fine. It also contains
8 language that contested case provisions of MAPA
9 apply to a hearing before the Board. That also is
10 fine.

11 Paragraph 62 is another reference to
12 MAPA. Then on to Page 25, and that section is
13 fine.

14 Paragraph 63 is a further citation to
15 Title 82, and that is straight forward. It is
16 another citation of the law. And then there is a
17 citation to Administrative Rule 17.24.314 Subpart
18 (5) citing the standards for CHIA, and that is
19 fine.

20 Paragraph 64 is a citation to Rule 56
21 from the Montana Rules of Civil Procedure
22 regarding summary judgment. That is fine.

23 Paragraph 65 basically notes that the
24 parties agree there are no disputed issues of
25 fact, and all relevant facts are those in the

♀

1 administrative record. So that is not disputed,
2 so Paragraph 65 is fine.

3 Paragraph 66 is that DEQ and SPE contend
4 that DEQ should be permitted to support the
5 adequacy of its CHIA, and so that is basically a
6 summary of DEQ's argument, so that is fine.

7 Paragraph 67 states that the Board
8 disagrees that DEQ should be allowed to raise new
9 facts, argument, and analysis, and I believe that

10 Paragraph 67 is inconsistent with Paragraph 64,
11 which allows us to receive additional evidence as
12 we see appropriate. So I would recommend we
13 strike Paragraph 67. Is there any objection to
14 that?

15 CHAIRMAN MILES: I think that's
16 inconsistent with what we've been doing, which was
17 looking at the phrase we've been using, the four
18 corners of the CHIA.

19 BOARD MEMBER TWEETEN: May I propose
20 that instead of keeping the entire paragraph or
21 striking the entire paragraph, we strike the
22 portion that ends in a period immediately before
23 the words "under MSUMRA, DEQ's CHIA." I think the
24 first paragraph makes an argument that we're not
25 accepting, but from the point that I indicated

♀

115

1 forward, I think it is fine.

2 CHAIRMAN MILES: Okay.

3 BOARD MEMBER REINHART-LEVINE: So
4 basically after MSUMRA, you would strike that, the
5 rest of the paragraph?

6 BOARD MEMBER TWEETEN: Strike everything
7 up until that.

8 CHAIRMAN MILES: No. That's the
9 language that I was talking about that we were
10 looking at the relevant analysis is what is
11 contained in the four corners of the CHIA, and
12 only those relevant facts are before the Agency at
13 the time of its permitting decision.

14 BOARD MEMBER REINHART-LEVINE: Is
15 everyone in agreement on that? So then Paragraph
16 67 would be amended as stated by Mr. Tweeten and
17 Madam Chair.

18 Paragraph 68 is basically a further
19 statement that DEQ's findings be based on the
20 record evidence supporting its decision, and that
21 evidence must be shared with the public; that DEQ
22 is required to provide its specific reasons for
23 its permitting decision; and basically alleging
24 that DEQ should not be permitted to present new
25 evidence, analysis, or argument. As everyone okay

♀

1 with Paragraph 68, or are there any objections?

2 CHAIRMAN MILES: I concur with that.

3 BOARD MEMBER REINHART-LEVINE: So then
4 we would also adopt Paragraph 68.

5 Paragraph 69 is along the same lines of
6 not having additional new evidence, analysis, be
7 presented. So it appears the Board would also
8 adopt Paragraph 69; is that right?

9 (Affirmative response)

10 BOARD MEMBER REINHART-LEVINE: So that
11 basically limits the record to the record before
12 us.

13 Paragraph 70 basically is along the same
14 lines. The Board notes that while DEQ asserts the
15 right to provide new evidence, basically DEQ has
16 stated that all relevant information was limited
17 to the administrative record. Are there any

18 objections to Paragraph 70?

19 (No response)

20 BOARD MEMBER REINHART-LEVINE: Seeing
21 none, the Board would adopt Paragraph 70.

22 Paragraph 71 is basically allowing DEQ
23 to present its arguments to explain and
24 demonstrate basically what is in the record before
25 the Agency, and that is basically a furtherance of

♀

1 the paragraphs that we have already adopted.¹¹⁷ So
2 we would also adopt that paragraph.

3 Moving on to Page 30, this is statutory
4 and regulatory background on the Strip and
5 Underground, the Surface Mining Control and
6 Reclamation Act, SMCRA. That's a citation of
7 statute, so that's fine. And then there is some
8 citation of case law regarding SMCRA, so I think
9 Paragraph 72 is fine.

10 Paragraph 73 states the principal
11 purpose of SMCRA, so that is fine. That's not in
12 dispute. That's just a direct quotation from the
13 statute.

14 Paragraph 74 basically cites case law
15 stating that SMCRA establishes a system of
16 cooperative federalism, and that is fine. It is
17 just a direct citation from case law.

18 Paragraph 75 basically states that under
19 SMCRA, the Department of Interior may grant state
20 regulatory authority over coal mining if the state
21 demonstrates that it has the capacity to implement

22 the program and meet minimum federal standards.
23 So that's also just an explanation of the existing
24 law. That's fine.

25 Paragraph 76 is the citation to case law

♀

1 and statute regarding safeguards against the
2 ineffective State regulation of coal mining
3 operations, so that again is citations to statute
4 and case law, so no issues with that. That seems
5 straight forward.

6 Paragraph 77 is the central purpose of
7 SMCRA is to protect water resources from coal mine
8 development under the statute, so no issues there;
9 and that citizens may petition for prohibition of
10 coal mining that affects aquifer and aquifer
11 recharge where mining will cause a substantial
12 loss or reduction of long range productivity of
13 water supply. Again, that's directly from
14 statute, so that is fine.

15 Paragraph 78 is additional citation to
16 SMCRA.

17 Paragraph 79 is a further citation to
18 SMCRA.

19 Paragraph 80 is in regards to Montana's
20 delegated program under Title 82. There is also a
21 citation to Montana Constitution. So there are no
22 issues with that paragraph.

23 Paragraph 81 is a further citation of
24 the statute and the requirements from Title 82, as
25 well as from administrative law, regarding

♀

1 material damage. So that is straight forward. ¹¹⁹

2 Paragraph 82 is a citation to the
3 Administrative Rules governing Cumulative
4 Hydrologic Impact Assessment, or the CHIA. So
5 again, that's just a straight citation, so that's
6 fine.

7 Paragraph 83 is the definition from the
8 statute regarding material damage, so again, it is
9 just a direct quote of statute. That's fine.

10 Paragraph 84 is in regards to the US
11 Secretary of Interior striking down amendments by
12 the 2003 Montana Legislature, and there is a
13 citation to the Federal Register for that. So
14 that's straight forward.

15 Continuing on, Page 34 part (c), DEQ's
16 CHIA employed an incorrect material damage
17 standard. So Paragraph 85 states that as matter
18 of law, the CHIA employed the incorrect legal
19 standard in its material damage assessment and
20 determination, that the CHIA was not sufficient to
21 determine whether the proposed operation has been
22 designed to prevent material damage to the
23 hydrologic balance outside of the permit area.

24 And building on all of the citations
25 that have previously been stated, I believe that

♀

1 this paragraph is acceptable for the reasons that ¹²⁰
2 I'll get into as we continue further on, but I do

3 think that DEQ did apply the incorrect legal
4 standard regarding material damage, so I would
5 agree with Paragraph 85.

6 Regarding Paragraph 86, the statute
7 requires DEQ to assess whether a proposed mining
8 operation has been designed to prevent material
9 damage. Again, that's not disputed. That
10 obligation comes directly from statute and from
11 Administrative Rule. And further Paragraph 86
12 states what the definition of material damage is,
13 so that's straight forward.

14 Paragraph 87 states that the material
15 damage assessment and determination in the CHIA
16 basically failed to assess whether the proposed
17 mining operation will cause violation of water
18 quality standards outside of the permit area. And
19 I do agree with that statement, so therefore I
20 would also adopt Paragraph 87.

21 CHAIRMAN MILES: Concur.

22 BOARD MEMBER REINHART-LEVINE: Instead
23 of the CHIA determining that no material damage
24 was expected because any degradation of
25 groundwater quality is not expected to render

♀

1 groundwaters unsuitable for current or anticipated
2 use, that's a direct cite from the CHIA, and I do
3 believe that is the incorrect legal standard, so I
4 would adopt Paragraph 87.

5 Paragraph 88 states DEQ's material
6 damage assessment and determination failed to

7 address either the threshold or limit for material
 8 damage to groundwater quality in the CHIA itself
 9 laid out in the table. And it goes on to state,
 10 "Material damage determination failed to assess
 11 whether there would be any persistent or long term
 12 change in water quality within the permit area
 13 that is approaching or exceeding narrative or
 14 numeric limits, and may be expected to extend to
 15 areas outside of the permit area with time."

16 The CHIA's material damage assessment
 17 did not address the limit of whether violation of
 18 water quality standards would occur outside of the
 19 permit area, and so I do agree with Paragraph 88,
 20 and I would encourage DEQ and SPE to address that
 21 deficiency moving forward.

22 Paragraph 89, "The CHIA's complete
 23 failure to address applicable water quality
 24 standards was unlawful and in violation of the
 25 statute and the Administrative Rules," and again,

♀

1 it was finding that the CHIA was unlawful because
 2 it failed to adequately address impacts to
 3 groundwater, so I would also agree with that
 4 statement that the CHIA did not address the
 5 applicable water quality standards when making the
 6 material damage assessment, and I would also find
 7 that to be in violation of the applicable statute
 8 and Administrative Rule. So I would adopt
 9 Paragraph 89.

10 Paragraph 90, "DEQ contends that the
 Page 106

11 standard employed in the material damage
 12 assessment and determination of the CHIA that no
 13 material damage is expected because any
 14 degradation of groundwater is not expected to
 15 render groundwater unsuitable is basically
 16 equivalent to applicable narrative and
 17 nondegradation standards." I think that DEQ erred
 18 in how it reviewed material damage in relation to
 19 groundwater quality, so for that reason, I would
 20 adopt Paragraph 90.

21 CHAIRMAN MILES: Agreed.

22 BOARD MEMBER REINHART-LEVINE: Paragraph
 23 91 goes on to say that why DEQ was mistaken.
 24 First DEQ is wrong that MEIC's sole concern is
 25 with DEQ's failure to consider potential water

♀

1 quality violations of narrative and nondegradation
 2 standards for salinity. MEIC raised two separate
 3 claims, first that a material damage assessment
 4 employed the incorrect legal standard, and second,
 5 that the record evidence did not support DEQ's
 6 conclusion that the mine expansion was designed to
 7 prevent material damage.

8 While MEIC's second claim focused on
 9 salinity, its first claim addressed DEQ's failure
 10 to address potential violations of water quality
 11 standards in general, so that is basically a
 12 reference directly to the briefs and to the
 13 arguments that MEIC raised, and when MEIC raised
 14 them; and so for those reasons, I would adopt

15 Paragraph 91 because MEIC did raise water quality
16 standards in general.

17 Paragraph 92, "The material damage
18 standard employed in the CHIA was not equivalent
19 to any of the water quality standards applicable
20 to Class 2 groundwater," and so I would adopt
21 Paragraph 92 because the material damage standard
22 employed in the CHIA was not sufficient to address
23 the applicable water quality standards, especially
24 those applied to Class 2 groundwater; and I would
25 encourage DEQ and SPE to address that in the CHIA

♀

1 and moving forward.

2 Paragraph 93, "The Administrative Rules
3 establish three general water quality standards
4 applicable to Class 2 groundwater," and those are
5 set forth here. Again, I would encourage that the
6 parties address Class 2 groundwater standards in
7 the remand process. So I would adopt Paragraph 93
8 for that reason.

9 Paragraph 94. This relates to DEQ's
10 CHIA failing to address numeric water quality
11 standards, and those would be those set forth in
12 Administrative Rule 17.30.1006, that is whether
13 groundwater pollution from the mine would violate
14 human health standards listed in DEQ7. So again,
15 I would encourage the parties to address Paragraph
16 94 moving forward.

17 "DEQ attempts to excuse this failure by
18 asserting that numeric standards are not of

19 concern because groundwater monitoring wells have
20 not detected any exceedences," and that is from
21 DEQ's surreply. "The CHIA however refutes DEQ's
22 argument. It says no exceedences of DEQ7
23 standards were observed in any of the Mammoth coal
24 aquifers because mine dewatering produces
25 groundwater flows toward the mine workings during

♀

125
1 mining. No water quality effects are expected
2 during mining."
3 Then it goes on to say, "The absence of
4 exceedences in groundwater monitoring wells is not
5 because there is no potential for such
6 exceedences. Instead as the CHIA clarifies, it is
7 because at present, groundwater is flowing towards
8 the mining. Only after mining ceases will
9 degraded gob water from the mine workings begin to
10 flow away from the mine." So after mining ceases,
11 the water flowing away from the mine needs to be
12 addressed in the CHIA moving forward, in my
13 opinion. So for that reason I would adopt
14 Paragraph 94.

15 Moving on to Paragraph 95, "DEQ's CHIA
16 failed to address narrative water quality
17 standards." This is on Page 38. "The standard
18 applied by the CHIA is not expected to render
19 groundwater suitable for current or anticipated
20 use is not equivalent to the narrative standard
21 for Class 2 groundwater." So moving forward, I
22 encourage the parties to address the standard for

23 Class 2 groundwater.

24 The narrative standard for Class 2
25 groundwater prohibits increases in pollution that

♀

1 render the waters harmful, detrimental, or ¹²⁶
2 injurious to the beneficial uses of Class 2 water,
3 and that the beneficial uses are set forward.
4 The current CHIA does not address each beneficial
5 use. It only addressed the anticipated uses, such
6 as livestock and domestic use. So I think in that
7 aspect the CHIA was inadequate, and it needs to
8 address all of the beneficial uses set forth in
9 Class 2 groundwater from the Administrative Rule.
10 So for those reasons, I would adopt Paragraph 95,
11 because I would agree that current and anticipated
12 use is narrower than beneficial use, and is less
13 protective as was the inadequate standard.

14 So then moving on to Paragraph 96, the
15 CHIA and the record evidence indicate the
16 potential for groundwater outside of the permit
17 area to degrade from Class 2 to Class 3, and then
18 it sets forth the beneficial uses for Class 3.
19 Degradation of groundwater from Class 2 to Class 3
20 either eliminates or limits each designated
21 beneficial use. Pollution that eliminates or
22 curtails the beneficial use is harmful,
23 detrimental or injurious to the beneficial use,
24 and therefore would violate the narrative
25 standards. I agree with that interpretation of

♀

127

1 the law, and I would encourage DEQ to address
2 Paragraph 96 moving forward.

3 Paragraph 97, "DEQ contends that
4 potential degradation of groundwater from Class 2
5 to Class 3 would not violate the narrative water
6 quality standard because the uses that would be
7 eliminated, such as water supply and irrigation,
8 are not feasible to due to the load trends."

9 Basically it's saying that it's not
10 really happening in the Mammoth coal aquifer now.
11 I disagree with DEQ's interpretation of the law
12 there, and I think that it needs to look at the
13 uses that would be lost by the degradation of
14 groundwater from Class 2 to Class 3 in the CHIA
15 moving forward. So for those reasons, I would
16 adopt Paragraph 97.

17 Paragraph 98. "DEQ's argument which
18 focuses exclusively on uses that are eliminated
19 does not account for the use of the Class 2 water
20 that while not eliminated, are limited if the
21 water is degraded to Class 3. Class 2 groundwater
22 may be used for drinking water for most livestock
23 and wildlife, but Class 3 groundwater may only be
24 used for drinking water for some livestock and
25 wildlife," so that is still a degradation.

♀

128

1 "Class 2 groundwater may be used for
2 most commercial and industrial purposes, but Class

3 3 groundwater may only be used for some commercial
4 and industrial purposes. Thus the degradation
5 from Class 2 to Class 3 may be harmful,
6 detrimental, or injurious to some beneficial
7 uses." So the CHIA moving forward needs to
8 address this potential degradation from Class 2
9 Class 3. So for those reasons, I would adopt
10 Paragraph 98.

11 Paragraph 99, "Second, DEQ's argument
12 about eliminated uses is unsupported by the law or
13 facts. As a matter of law, there is no
14 feasibility exception to the narrative water
15 quality standards for Class 2 groundwater." And I
16 would agree with that as a correct interpretation
17 of the law.

18 "The regulations create a narrow
19 exception to groundwater quality standards for
20 groundwater with low hydrologic conductivity, but
21 that exception is only for Class 3 and Class 4
22 groundwater, and it is only for groundwater with a
23 hydrologic conductivity of less than .1 feet per
24 day. Because most groundwater in the Mammoth coal
25 aquifer is Class 2 groundwater with a hydraulic

♀

1 conductivity of .16 feet per day, according to the
2 CHIA, the narrow exception does not apply." And I
3 would agree with that the statement.

4 "The regulations express recognition for
5 this narrow exception, which precludes an
6 adjudicative body or a Court from implying

7 additional exceptions," and then case law is
8 cited. For those reasons, I would adopt Paragraph
9 99.

10 I'm on Page 41, Paragraph 100.

11 "Further, there is no evidence in the record that
12 groundwater from the coal aquifer is not capable
13 of being used for irrigation or public or private
14 water supply. The only citation offered by DEQ
15 regarding irrigation says nothing about the
16 suitability for the Mammoth coal aquifer for
17 irrigation." So this is something that should be
18 addressed moving forward, and for those reasons I
19 would adopt Paragraph 100.

20 Paragraph 101, "Nor does the record
21 compiled by DEQ demonstrate that the Mammoth coal
22 aquifer is not suitable for public or private
23 water supply due to its low hydrologic
24 conductivity in the arable mountains. The Mammoth
25 coal aquifer is an important source of water, and

♀

1 some of the highest yielding wells and springs are
2 sourced in the Mammoth coal aquifer."

3 "Domestic wells also tap this aquifer,
4 and the Board notes that the pumping rate is
5 sufficient for SPE's public water supply well, so
6 no evidence shows that the Mammoth coal aquifer
7 cannot produce similar yield."

8 So for those reasons, I would encourage
9 the parties to look at the Mammoth coal aquifer's
10 suitability for public or private water supplies,

11 and any potential impacts to those moving forward.

12 And for that reason, I would adopt Paragraph 101.

13 Paragraph 102. "While the CHIA states
14 that the hydrologic conductivity of the Mammoth
15 coal aquifer is typically inadequate to provide a
16 reliable source of well water, it is acknowledged
17 that a few production wells are completed in the
18 coal." This is in the CHIA.

19 "Nor is it significant that no wells
20 produce water solely from the Mammoth coal
21 aquifer. That does not mean that it is not
22 possible for wells to produce water solely from
23 the Mammoth coal aquifer. Numerous springs,
24 including high yielding springs, are sourced in
25 this aquifer, and because there are wells into

♀

1 this aquifer, post mining water pollution is
2 expected to affect those; and in sum, no evidence
3 in the record demonstrates that the Mammoth coal
4 aquifer could not feasibly be a source of
5 irrigation, public or private water supply."

6 So again, I would encourage SPE and DEQ
7 to examine the impacts to wells in the aquifer,
8 and I would adopt Paragraph 102.

9 On Page 43, Paragraph 103. "DEQ
10 contends that the CHIA's failure to consider all
11 beneficial uses was justified because the
12 provisions of MSUMRA that protect the hydrologic
13 balance must be construed to require only
14 reasonable and feasible constraints on mine

15 operations." That is basically a summary of DEQ's
 16 argument, and the Board disagrees with that. I
 17 think that it is inappropriate to only look at
 18 reasonable and feasible constraints, and that the
 19 CHIA needs to consider all beneficial uses moving
 20 forward.

21 Paragraph 104 is additional summary of
 22 DEQ's argument, basically saying that a coal mine
 23 operator must minimize disturbances to the
 24 prevailing hydrologic balance at the mine site,
 25 but Paragraph 104 goes on to say, "An operator's

♀

1 duty to minimize disturbance to the hydrologic
 2 balance does not alter DEQ's duty to withhold a
 3 permit in the first instance unless and until the
 4 applicant demonstrates and the record shows that
 5 the operation has been designed to prevent
 6 material damage to the hydrologic balance outside
 7 of the permit area," and that's a cite to the
 8 statute.

9 "Prevent does not mean minimize," and
 10 I agree with that statement, that "prevention" is
 11 a much stronger word than the word "minimize."
 12 And I agree with the statement, "The Board must
 13 honor the legislative decision to use the word
 14 'prevent' and not 'minimize,'" and I agree with
 15 the citation to statute and to the case law there.

16 The word "prevent" was intentional by
 17 the Legislature. That word has meaning, and we
 18 cannot convey a different meaning to the word

19 "prevent." So for those reasons, I would adopt
20 Paragraph 104.

21 Paragraph 105. "DEQ also cites a
22 sentence in the legislative history that reads,
23 'The total prevention of adverse hydrologic
24 effects from mining is impossible, and thus the
25 bill sets attainable standards to protect the

♀

1 hydrologic balance of impacted areas." This is ¹³³
2 cited in DEQ's response brief at Page 33.

3 But the next sentence of the report
4 clarifies, "The imperative provisions of SMCRA,
5 and the Montana equivalent in Title 82, may
6 preclude mining altogether in certain critical and
7 hydrologically fragile areas to prevent
8 irreparable damage," and then there is a quote to
9 the congressional history. "For most critical
10 areas and in certain fragile hydrological
11 settings, the bill sets standards that are
12 imperative to begin to assure that adverse impacts
13 to the hydrologic balance are not irreparable."

14 So that is basically a cite to the
15 historical and to the legislative intent of the
16 statute, so I agree with that Paragraph 105.

17 Paragraph 106 on Page 45. "Contrary to
18 DEQ's position, MSUMRA, like SMCRA, requires the
19 adjustment of a mining operation to the
20 environmental protection standards, rather than
21 the opposite. The drafters of SMCRA rejected the
22 notion that the standard should be adjusted to an

23 what an individual mine operator states they can
24 or cannot afford, noting that SMCRA laws were
25 inadequate because they were tailored to suit

♀

1 ongoing mine practices, rather than requiring
2 modifications of mining practices to meet
3 established standards. If a mine operation cannot
4 meet mandatory legal standards, the DEQ's legal
5 duty is to deny approval of a mining operation
6 unless or until the mining operation can be
7 adjusted to meet the standard under the statute.
8 DEQ may not adjust the law to allow the mining
9 operation to proceed."

10 I do agree with that statement. The law
11 is what it is, and DEQ and SPE must follow the
12 law.

13 Then moving on to Part 3. "DEQ's CHIA
14 failed to address nondegradation water quality
15 standards."

16 Under Paragraph 107. "contrary to DEQ's
17 assertion, the standard applied in CHIA's material
18 damage assessment and determination was not
19 equivalent to the nondegradation standard for
20 salinity." So I agree with that statement, that
21 the material damage assessment is not equivalent
22 to the standard for salinity alone.

23 Paragraph 108 basically cites that, "The
24 nondegradation standard for Class 2 groundwater
25 prohibits increases in any parameter that would

♀

1 cause a violation of the nondegradation
2 provisions. Under the administrative regulations
3 of the nondegradation provisions of Part 75-5-303,
4 a change in groundwater quality is deemed
5 insignificant and therefore exempt from further
6 nondegradation review if it meets the criteria set
7 forward in the Administrative Rule. "

8 Paragraph 108 is just basically a
9 citation to what the statute and Administrative
10 Rules require, so that paragraph is fine.

11 Likewise Paragraph 109 is a recitation
12 of the standards set forth in the Administrative
13 Rule, as well as in statute, in regards to the
14 nondegradation review, and so for those reasons,
15 Paragraph 109 is fine.

16 Paragraph 110 on Page 47 is a citation
17 to the administrative rule regarding the standard
18 for salinity, which may be deemed insignificant if
19 it will not have a measurable effect on any
20 existing or anticipated use or cause measurable
21 change in aquatic life. As noted, the CHIA
22 determined that material damage was not expected
23 to occur because any degradation of groundwater
24 quality is not expected to render groundwater
25 unsuitable. The standard employed in material

♀

1 damage determination of the CHIA is less stringent
2 than the nonsignificance degradation standard.
3 Thus the standard employed in the CHIA was not

4 equivalent to the nondegradation water quality
5 standard for Class 2 water."

6 I agree with that statement. I would
7 encourage DEQ and SPE to address that in the CHIA
8 moving forward.

9 Paragraph 111 states that, "Further,
10 even if the standard employed in the CHIA were
11 equivalent to the standard in the Administrative
12 Rule, DEQ would still have been required to
13 consider the discretionary factors set forth in
14 Administrative Rule 17.30.715 part (2), including
15 the length and time the degradation will occur.
16 The CHIA nowhere examines the length of time that
17 polluted water will continue to migrate from the
18 mine void after the cessation of mining," and it
19 says, "beyond the arbitrary 50 year horizon
20 established in the groundwater model."

21 I agree that the 50 year horizon
22 established in the groundwater model is arbitrary,
23 and I do not think it is consistent with statute
24 or Administrative Rule. I would encourage DEQ and
25 SPE to address the 50 year horizon, and rectify

♀

1 that in the CHIA moving forward.

2 Paragraph 111 goes on to state, "Indeed
3 in its responses to MEIC's discovery responses,
4 DEQ asserted it was unable to speculate on how
5 long the water in the mine void would continue to
6 degrade, or how long the degraded water would
7 continue to migrate away from the mine." I would

8 submit that is not consistent with the standard
9 regarding material damage, and would encourage the
10 parties to address that moving forward.

11 Paragraph 112 on Page 48. "The CHIA's
12 material damage assessment and determination was
13 not equivalent to nondegradation standards for
14 Class 2 groundwater because it did not assess
15 whether changes in salinity concentrations would
16 have a measurable effect on existing and
17 anticipated use as required by Administrative Rule
18 17.30.715(1) part (h) because the analysis did not
19 consider the discretionary factors of this
20 Administrative Rule, including the length of time
21 of the degraded water, and how long it will
22 continue to migrate from the mine." So I would
23 encourage to CHIA to address those moving forward.

24 Paragraph 113. "In sum, the CHIA's
25 material damage assessment and determination

♀

1 failed to address whether the proposed mining
2 operation would cause violation of water quality
3 standards outside the permit boundary. As such it
4 was insufficient as a matter of law." I would
5 agree with that statement. I do believe that the
6 CHIA needs to address any proposed violations of
7 water quality standards outside the permit
8 boundary, and so I would encourage the parties
9 that address that moving forward.

10 Moving now on to Paragraph 114. This is
11 a citation of Montana Code Annotated 82-4-227

12 that, "The Department may not approve an
13 application for strip or underground coal mining
14 or a major revision unless the application
15 affirmatively demonstrates that the assessment of
16 the probable cumulative impacts on all anticipated
17 mining in the area on the hydrologic balance has
18 been made by the Department, and the proposed
19 operations of the mining operation has been
20 designed to prevent material damage to the
21 hydrologic balance outside of the permitting
22 area." So Paragraph 114 is just a recitation of
23 the applicable statute, and that is straight
24 forward and fine.

25 Likewise Paragraph 115 is a citation of

♀

1 the implementing regulation, and that is fine. ¹³⁹

2 Paragraph 116 on Page 49 is a citation
3 to the statute and the Administrative Rule that is
4 applicable. That is fine.

5 Paragraph 117 states that, "The
6 application and the record before DEQ showed only
7 that the proposed operation may or may not be
8 designed to prevent material damage outside the
9 permit area within 50 years after mining. This
10 showing does not constitute affirmative evidence
11 that the cumulative hydrologic consequences will
12 not result in material damage to the hydrologic
13 balance outside of the permit area." And I agree
14 with that statement, and I encourage DEQ and SPE
15 to look at potential damages to the hydrologic

16 balance outside of the permit area beyond the 50
17 years.

18 Paragraph 118. "The record demonstrates
19 that at present, the groundwater in the Mammoth
20 coal aquifer is predominantly high quality Class 2
21 water, and DEQ and SPE agree that the cessation of
22 mining of gob water in the mine void will degrade
23 from Class 2 to Class 3." So that is a citation
24 to the record, and that is not disputed. So I
25 would adopt Paragraph 118.

♀

1 Paragraph 119. "Because degradation of ¹⁴⁰
2 high quality Class 2 groundwater to low quality
3 Class 3 groundwater eliminates some beneficial
4 uses and limits others, it violates the narrative
5 water quality standard," and there is a citation
6 to the Administrative Rule which prohibits
7 increase in any parameter that renders the water
8 harmful, detrimental, or injurious to beneficial
9 uses. And I agree that degradation of Class 2
10 water groundwater to low quality Class 3
11 groundwater does eliminate the beneficial use, and
12 would violate narrative water quality standards.
13 For that reason, I would adopt Paragraph 119, and
14 I would encourage the parties to address that
15 paragraph moving forward.

16 Paragraph 120 states that, "The only
17 analysis that considered migration of the plume
18 and polluted gob water beyond the mine permit
19 boundary was the groundwater model. The

20 groundwater model conducted a particle tracking
21 evaluation under two different scenarios, one in
22 which the gate roads collapse and one in which
23 they remain intact. Neither the groundwater
24 model, the PHC, or the CHIA stated that either
25 scenario was more likely than the other.

♀

1 Presently the mine gate roads have tended to
2 remain intact. It may be that while some gate
3 roads remain intact, and that others collapse --"
4 and that is according to the CHIA -- "after the
5 conclusion of mining, the gate roads may remain
6 intact or may collapse," and that's according to
7 the groundwater model.

8 I would consider that the CHIA look at
9 whether or not the roads may not collapse, and
10 what will happen in that scenario. Because
11 Paragraph 120 is just a citation to the existing
12 record, I would adopt it.

13 Paragraph 121. "Using a 50 year time
14 frame, the particle tracking evaluation determines
15 that in Scenario 2 in which the gate roads remain
16 intact, the degraded gob water will migrate beyond
17 the mine permit boundary in numerous locations."
18 That is a citation to the groundwater model.

19 "In Scenario 1, in which the gate roads
20 collapse, the gob water would migrate more slowly,
21 traveling approximately half the distance it would
22 in Scenario 2. In Scenario 1, the degraded gob
23 water would migrate towards, but would not pass

24 the mine permit boundary within 50 years."

25 Again, I would adopt Paragraph 121

♀

1 because I think the 50 year time frame is ¹⁴²
2 arbitrary, and is not consistent with the statute
3 or Administrative Rule.

4 Paragraph 122 states, "The record
5 evidence presented by SPE in the groundwater
6 model, and other evidence before DEQ at the time
7 of its decision, demonstrated only that it was not
8 likely that degraded water that violates water
9 quality standards would migrate beyond the mine
10 permit boundary. The lack of any likelihood or
11 defensible level of confidence that material
12 damage would not result does not constitute an
13 affirmative demonstration of record evidence that
14 expansion of the mine is designed to prevent
15 material damage to the hydrologic balance outside
16 of the permit area."

17 I agree with Paragraph 122, and I would
18 again encourage the DEQ and SPE to address this
19 deficiency in the CHIA moving forward.

20 Paragraph 123 states that, "In light of
21 the uncertainty surrounding whether the gate roads
22 will remain intact, DEQ's 2013 EA determined that
23 material damage outside the permit area will not
24 occur because of factors that the groundwater
25 model has failed to address," and then there is a

♀

1 citation to the Environmental Assessment, and then
2 there is also a citation to the groundwater model.

3 "The analysis does not meet the
4 standards of Title 82-4-227 or the Administrative
5 Rule. An analysis that is not conducted and
6 evidence that is not presented does not constitute
7 an affirmative demonstration on the basis of
8 information set forth in the application, or
9 information otherwise available as compiled by the
10 Department."

11 I would agree with that statement, and
12 would encourage DEQ and SPE to address Paragraph
13 123 moving forward.

14 Moving on to Page 53, Paragraph 124.
15 "In a briefing before this Board, DEQ developed
16 various additional arguments. DEQ contended that
17 the evidence before the Agency was sufficient to
18 support permit approval because the gob water is
19 not likely to migrate a distance beyond the permit
20 boundary within 50 years, and because the
21 pollution impacts would be limited to the Mammoth
22 coal aquifer and upper underburden. Gob water
23 will migrate no further than a few hundred feet
24 outside the permit boundary 50 years after mining.
25 Contamination by higher salinity water migrating

♀

1 outside the permit will affect only, if at all,
2 water in the Mammoth coal and possibly the upper
3 underburden."

4 "This argument fails because it is
5 premised on the mistaken belief that Montana Code
6 Annotated 82-4-227(3)(a) does not establish a
7 prohibition, but merely requires DEQ to develop
8 reasonable and feasible measures to minimize
9 potential impacts. As explained above, this
10 statute employs the term 'prevent,' and 'prevent'
11 does not mean minimize, a term used elsewhere in
12 the statute. The express language of the statute
13 allows no exception for small amounts of material
14 damage that harm only one or potentially two
15 aquifers."

16 Because I agree that "minimize" is not
17 the same as "prevent," I would adopt Paragraph
18 124, and I would encourage DEQ and SPE to address
19 Paragraph 124 moving forward.

20 Paragraph 125 on Page 54. "DEQ argues
21 in its brief that the gob water will not migrate
22 beyond the permit boundary because the gate roads
23 are designed to collapse. DEQ's proposed
24 analysis, however, was not presented in the CHIA
25 or in the 2013 Environmental Assessment, and as

♀

1 such, is not properly before the Board, providing
2 that the CHIA must be sufficient for a material
3 damage determination. Both the CHIA and the PHC
4 determined that it is uncertain whether the gate
5 roads would collapse," and there's a citation to
6 the CHIA and the PHC.

7 "As mentioned, the transparency

8 requirements and the public oversight provisions
9 would be nullified if during a contested case
10 proceeding, DEQ could present analysis and
11 arguments that were never articulated in the CHIA
12 or other written findings. The CHIA must be
13 sufficient for a material damage determination,
14 and DEQ's written findings must confirm based on
15 record evidence that cumulative hydrologic impacts
16 will not result in material damage."

17 I agree with the statements made in
18 Paragraph 125 regarding the uncertainty regarding
19 the gate roads, and the standard of what must be
20 in the CHIA. I would encourage SPE and DEQ to
21 address Paragraph 125 moving forward.

22 CHAIRMAN MILES: Michele, I agree. I
23 guess I would just add. I can't remember where I
24 read it. There has been so much material on this.
25 But it talked about the fact that some of the

♀

1 original gate roads, some have collapsed and some
2 haven't; is that correct?

3 BOARD MEMBER REINHART-LEVINE: That is
4 correct.

5 CHAIRMAN MILES: And the fact that we
6 don't know --

7 BOARD MEMBER REINHART-LEVINE: There is
8 also a statement in the PHC which is cited in
9 Paragraph 125 stating that mine roads have tended
10 to remain intact, and also acknowledging that the
11 gate road integrity may persist far into the

12 future. So given that the gate roads may not
13 collapse, that needs to be addressed in the CHIA
14 moving forward, and that is captured by this
15 paragraph.

16 Paragraph 126 basically again notes,
17 "Ground movement should be relatively uniform and
18 subsidence gradual because of massive sandstone
19 beds. These should concentrate the overburden
20 loads on the gate pillars, causing them to crush
21 and lower the surface uniformly. The CHIA also
22 states that the gate roads are designed to yield
23 as the adjacent panel is mined out. These
24 statements, however, cannot bear the weight that
25 DEQ places on them. First, as SPE pointed out,

♀

1 the actual operation of the mine has disproved the
2 initial engineering prediction. Presently the
3 gate roads are remaining intact."

4 So that needs to be addressed moving
5 forward, because the gate roads may not collapse.
6 So for those reasons, I would adopt Paragraph 126.

7 Paragraph 127 is also regarding
8 presumptions regarding the collapse of the gate
9 roads, and again it is limited to the arbitrary 50
10 year horizon which we have already rejected. So
11 for those reasons, I would support adoption of
12 Paragraph 127.

13 Paragraph 128 states that, "By law, DEQ
14 may not ignore the long term water pollution
15 impacts of the mine." That statement is

16 consistent with a statute, and so I would agree
17 with it. "The statute does not contain an
18 exception for material damage outside of the
19 permit area that occurs 50 years after mining,"
20 and I agree with that statement. So for that
21 reason, I also agree with the sentence that, "The
22 Board declines DEQ's invitation to write such an
23 exception into the law regarding the 50 years
24 after mining." So for those reasons, I would
25 adopt Paragraph 128.

♀

1 Paragraph 129 relates to the legislative
2 history of SMCRA, and shows that Congress enacted
3 the CHIA provision to prevent long term impacts to
4 water resources. So I think that is another
5 reason why the 50 year time frame is arbitrary.

6 Paragraph 129 goes on to state, "These
7 specific standards are emphasized at the permit
8 approval stage due to the critical and long term
9 impacts mining can have on water resources of the
10 affected area." For those reasons, I would
11 encourage SPE and DEQ to look at the long term
12 impacts that mining may have beyond 50 years.

13 "When OSM promulgated its initial
14 regulations implementing SMCRA's hydrology
15 protections, the Federal Agency declared that the
16 time frame for the analysis must be co-extensive
17 with the time period, and that such impacts are
18 expected to persist. The impacts resulting from
19 mining reclamation activities may extend beyond

20 the time frame required to complete actual mining
21 and reclamation. The predictive analysis in the
22 PHC determination, and therefore the CHIA, must
23 cover the full extent of such impacts. That must
24 be the full extent of long term impacts. As the
25 Montana Supreme Court has taught, and Montana

♀

1 history repeatedly shows, long term pollution
2 impacts from mining are among the most serious
3 environmental problems because after the mine
4 closes, the mine operator will be gone, and the
5 polluted discharge will continue and cannot be
6 shut off."

7 I agree with that citation to the
8 Federal Register and to case law. For those
9 reasons, I would adopt Paragraph 129, and I would
10 urge SPE and DEQ to look at the long term
11 potential pollution impacts.

12 Paragraph 130. "Indeed, with respect to
13 water quality, the CHIA determined that the
14 appropriate time frame for analysis was the period
15 50 years after cessation of mining. The CHIA
16 determined that the impacts of the draw down
17 outside of the permit boundary were acceptable
18 because groundwater will recover to near premining
19 levels approximately 50 years after cessation of
20 mining." That's under the CHIA.

21 "DEQ cannot have it both ways. If the
22 period after 50 years is appropriate for assessing
23 impacts to water quantity, it must also be

24 appropriate for assessing impacts to water
25 quality. In short, there is no basis in law for

♀

1 limiting the material damage assessment and
2 determination to 50 years."

3 I agree with that statement, and that's
4 why I would adopt Paragraph 130, because there is
5 no place in the law allowing the analysis to be
6 limited to 50 years.

7 Paragraph 131 again is in regards to the
8 polluted gob water migrating beyond the permit
9 boundary, and it also relates to water being
10 replaced by water from the deep underburden
11 aquifer. And I would agree with Paragraph 131
12 because I disagree with DEQ's argument.

13 Paragraph 132. "DEQ's migration
14 argument repeats the CHIA's misunderstanding of
15 material damage to the hydrologic balance.
16 Replacing water supplies polluted by the mining
17 operation only alleviates harm to existing and
18 anticipated water users, but it does not prevent
19 violation of water quality standards. It is
20 violation of water quality standards regardless of
21 the effect on existing and anticipated water use
22 that is the standard for material damage."

23 I agree with that statement, which comes
24 from the statute, and therefore would adopt
25 Paragraph 132.

♀

1 Moving on to Page 59, Paragraph 133.
2 This is in regards to mitigation, and it states,
3 quote, "Second, the proposed mitigation from water
4 from the deep underburden aquifer is illusory, and
5 SPE admitted repeatedly in the record that the
6 groundwater model admits that there are multiple
7 physical and legal barriers to the use of the deep
8 underburden aquifer as a source of mitigation
9 water," and it cites the groundwater model for
10 that premise.

11 "Thus the PHC concluded that further
12 investigation was required to determine whether
13 the deep underburden aquifer would be suitable to
14 meet all potential mitigation needs," and there is
15 a cite to the PHC.

16 "The mere possibility of mitigation is
17 not sufficient to meet the standard of Montana
18 Code Annotated 82-4-227, and the Administrative
19 Rule." I agree with that statement. Mitigation
20 is not sufficient to meet the legal standard. So
21 for that reason, I would urge DEQ and SPE to
22 address Paragraph 133, and I would adopt Paragraph
23 133.

24 Paragraph 134 on Page 60 states, "DEQ
25 may not approve a permit unless the application

♀

1 affirmatively demonstrates, and the Department's
2 written findings confirm on the basis of
3 information set forth in that application or
4 otherwise available that is compiled by the
Page 132

5 Department, that the cumulative hydrologic impacts
6 will not result in material damage to the
7 hydrologic balance outside the permit area." And
8 that is a citation directly to the Administrative
9 Rule and the statute.

10 This paragraph goes on to state, quote,
11 "Here at most the record demonstrates that the
12 proposed expansion mine may or may not be designed
13 to prevent material damage outside of the permit
14 area for 50 years, and there may or may not be
15 water available to mitigate the operations'
16 impacts to water quality and quantity. This
17 statement does not satisfy the legal standard of
18 MSUMRA." I agree with that statement, for all the
19 reasons previously discussed.

20 Paragraph 135 discusses that, "The
21 proposed 7,161 acre expansion of the Bull Mountain
22 Mine is a considerable undertaking. It promises
23 sizable economic benefits. However, as the
24 Montana Department of State Lands determined years
25 ago, it threatens significant economic harm in the

♀

1 long term." There is a citation to the record
2 regarding that statement.

3 "The record before the Board suggests
4 that long term environmental harm may also result.
5 The Bull Mountains are an arid landscape.
6 Existing ranching operations and ecosystem in the
7 Bull Mountains are wholly dependent on the area's
8 limited water resources," and there is additional

9 citation to the record for that statement.

10 Because that statement is backed up by
11 the record, including the 1992 EIS at subpart (4),
12 I would adopt Paragraph 135.

13 Paragraph 136 states that, "The MSUMRA
14 prohibits DEQ from approving an application to
15 expand unless the permit application affirmatively
16 demonstrates, and DEQ confirms in writing, that
17 the operation is designed to prevent material
18 damage." Again, that's the same statute, the same
19 citation to the statute and Administrative Rule.

20 "By statute, DEQ's material damage
21 assessment and determination must consider whether
22 the mine expansion will cause violation of water
23 quality standards."

24 I agree with this paragraph because it
25 is a correct citation of the statute and

♀

1 Administrative Rule.

2 Paragraph 137 addresses that, "DEQ's
3 approval of SPE's application committed two
4 errors. The first error is DEQ's material damage
5 determination failed to consider whether the mine
6 expansion would lead to violations of water
7 quality standards. Second, the record evidence
8 did not affirmatively demonstrate that the mine
9 expansion is designed to prevent material damage
10 to the hydrologic balance outside the permit area.
11 Instead it demonstrated that the mine expansion as
12 currently designed may or may not cause damage

13 outside the permit area in the next 50 years, and
14 that there may or may not be water resources
15 available for mitigation."

16 I agree with that statement. Again, the
17 50 years is arbitrary, and is not consistent with
18 statute, nor is the mitigation analysis.

19 Paragraph 138. "Because DEQ is
20 prohibited from approving a permit application
21 until it makes findings required by Montana Code
22 Annotated 82-4-227 and the Administrative Rules,
23 DEQ's approval for the application must be set
24 aside."

25 I disagree with this paragraph, and

♀

1 would recommend that we strike Paragraph 138 to ¹⁵⁵
2 allow the parties the time to address the
3 appropriate remedy. So for those reasons, I would
4 reject Paragraph 138.

5 Moving on to Paragraph 139. "It is
6 hereby ordered that MEIC's motion for summary
7 judgment is granted, and SPE's cross motion for
8 summary judgment is denied." I would agree with
9 Paragraph 139 and with our intent to grant MEIC's
10 motion for summary judgment, because I concur that
11 DEQ applied the wrong legal standard to the CHIA
12 analysis. So for those reasons, I would adopt
13 Paragraph 139.

14 I would reject Paragraph 140 because 140
15 would set aside the permit, and we have stated we
16 want the parties to have an opportunity to further

17 negotiate a remedy. So for those reasons, I would
18 strike Paragraph 140.

19 I would also for that same reason strike
20 Paragraph 141 to allow the parties to further
21 negotiate an appropriate remedy.

22 Paragraph 142 would allow the Board to
23 remand this matter to DEQ for further proceedings
24 consistent with this order. I would recommend
25 that we keep Paragraph 142. I think that will be

♀

1 consistent with still allowing the parties to
2 negotiate a remedy.

3 I think that Paragraph 143 is fine. It
4 just relates to whether or not the Sierra Club
5 would be joined, and that would be denied as moot,
6 and I think that paragraph is fine.

7 So Madam Chair, members of the Board,
8 for all of those reasons, after reviewing the
9 MEIC's proposed findings of fact and conclusions
10 of law, those that we have decided to adopt,
11 amend, or reject, I would urge the Board to
12 support the motion I made to amend my prior motion
13 to adopt the --

14 CHAIRMAN MILES: It's a substitute
15 motion?

16 BOARD MEMBER REINHART-LEVINE: It is a
17 motion to amend the motion that I made on October
18 16th. I can make it a substitute motion if you
19 think that would be --

20 BOARD MEMBER TWEETEN: Madam Chair, as
Page 136

21 it relates to the changing of the motion
22 previously adopted, I think motion to amend is
23 appropriate. We can't substitute the motion
24 because it is already done.

25 Madam Chair, one suggestion. In the

‡

1 heading immediately preceding Paragraph 139, I¹⁵⁷
2 would strike the word "final," since we've agreed
3 pursuant to the motion that we would not be
4 adopting a final order, and just make it "order"
5 rather than "final order."

6 BOARD MEMBER REINHART-LEVINE: Madam
7 Chair, I would agree.

8 CHAIRMAN MILES: Are there any other
9 questions or comments?

10 (No response)

11 CHAIRMAN MILES: Have we included
12 everything we need language wise in the order part
13 of it at this stage to move to remand it to the
14 Department, and to move forward, and that we will
15 then undertake an analysis of the other findings
16 of facts?

17 MR. REED: Yes, Madam Chair, I believe
18 so.

19 CHAIRMAN MILES: Then is there any
20 further discussion?

21 (No response)

22 CHAIRMAN MILES: I would ask as we vote
23 if we would verbally vote in either favor or
24 opposition to the motion, and if in favor, that

25 you would state that you concur with the reasons

♀

1 and rationale outlined by Board Member
2 Reinhart-Levine. 158

3 BOARD MEMBER SAYLES O'CONNOR: I agree
4 with it, and concur with the motions by Board
5 Member Reinhart-Levine.

6 BOARD MEMBER DR. BYRON: I also agree
7 with it and concur with the motions by Board
8 Member Reinhart-Levine.

9 BOARD MEMBER TWEETEN: Madam Chair, I do
10 as well.

11 BOARD MEMBER REINHART-LEVINE: Madam
12 Chair, I concur with the motion that I made, and
13 the reasons for which I made it.

14 CHAIRMAN MILES: Board Chair Miles
15 concurs, and for the reasons stated. Thank you.
16 Robin, I don't think you're on the phone, are you?

17 (No response)

18 CHAIRMAN MILES: So that's a unanimous
19 vote of this Board.

20 MR. SAYLES O'CONNOR: Madam Chair, many
21 thanks to Board Member Reinhart-Levine for going
22 through the effort necessary to organize our
23 thoughts for us like that. Thank you.

24 BOARD MEMBER REINHART-LEVINE: Thank you
25 for suffering through it.

♀

1 CHAIRMAN MILES: I think we actually all
2 have a better understanding of things to be able
3 to do that at this stage. We would appreciate the
4 Department setting up a conference call, special
5 meeting, for Tuesday, December 29th at 11:00 a.m.

6 MS. HOULE: Room 111 is free the entire
7 day if you need an actual meeting room.

8 CHAIRMAN MILES: Is this room open? I
9 don't really care what -- I can come and be here
10 for that, so that if any members of the public
11 want to be here as well, we can have it in this
12 room.

13 MS. HOULE: We can do that.

14 CHAIRMAN MILES: So we can do that over
15 the phone, Ben and I will be here at a minimum,
16 depending on your travel schedules. If you would
17 make sure the phone number, the call-in number is
18 provided to the parties, and the public, and the
19 members.

20 BOARD MEMBER TWEETEN: Madam Chair, if I
21 might. In light of the motion that we just
22 adopted, I would call your attention to the
23 concurring statement that I drafted and had
24 circulated.

25 In light of the motion we just adopted

♀

1 for which I voted, I will withdraw this document,
2 and I have no plans to request that it be included
3 with the final decision.

4 CHAIRMAN MILES: Thank you. We did try

5 hard to address some of the questions you brought
6 up in there.

7 Is there any other business to come
8 before the Board before I call for public comment?

9 (No response)

10 CHAIRMAN MILES: No further business.

11 Are there any general comments from the public?

12 (No response)

13 CHAIRMAN MILES: Hearing none, we're
14 adjourned. Thank you very much.

15 (The proceedings were concluded
16 at 3:24 p.m.)

17 * * * * *

18
19
20
21
22
23
24
25

♀

1 C E R T I F I C A T E

2 STATE OF MONTANA)

3 : SS.

4 COUNTY OF LEWIS & CLARK)

5 I, LAURIE CRUTCHER, RPR, Court Reporter,
6 Notary Public in and for the County of Lewis &
7 Clark, State of Montana, do hereby certify:

8 That the proceedings were taken before me at

9 the time and place herein named; that the
10 proceedings were reported by me in shorthand and
11 transcribed using computer-aided transcription,
12 and that the foregoing - 160 - pages contain a
13 true record of the proceedings to the best of my
14 ability.

15 IN WITNESS WHEREOF, I have hereunto set my
16 hand and affixed my notarial seal
17 this _____ day of _____, 2015.

18
19
20
21
22
23
24
25

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires
March 12, 2016.

♀