



**BOARD OF ENVIRONMENTAL REVIEW
MEETING MINUTES**

APRIL 8, 2022

Call to Order

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

Attendance

Board Members Present

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

Roll was called and a quorum was present.

Board Attorney Present

Katherine Orr

DEQ Personnel Present

Board Liaison: James Fehr

Board Secretary: Sandy Moisey Scherer

DEQ Legal: Kirsten Bowers, Nicholas Whitaker, Catherine Armstrong, Aaron Pettis, Sarah Christopherson, Angela Colamaria, Kurt Moser, Loryn Johnson, Ed Hayes, Lee McKenna, Jeremiah Langston, Sarah Clerget

Public Policy: Rebecca Harbage, Moira Davin

Water Quality: Amy Steinmetz, Myla Kelly, Margarite Juarez Thomas

Enforcement: Chad Anderson, Susan Bawden

Air, Energy & Mining: Bob Smith, Emily Lodman

Other Parties Present

Laurie Crutcher, Crutcher Court Reporting

Aislinn Brown, Caitlin Buzzas, Patrick Risken, Jeffrey Doud, Elena Hagen - Montana DOJ Agency Legal Services Bureau

Vicki Marquis (Holland and Hart) – Teck Coal

Sarah Bordelon (Holland and Hart) – Western Energy Company and Signal Peak Energy

Sam Yemington (Holland and Hart)

Robert Cameron (Jackson Murdo and Grant)

Derf Johnson, MEIC

Shiloh Hernandez (Earth Justice) – MEIC

Anne Hedges, MEIC

Tonya Fish, EPA

Aaron Bolton, Montana Public Radio

Andy James

Donna Martin

Jason Gildea

Ray Stout

Stephen Pfeffer

Duane Murray

I. ADMINISTRATIVE MATERIALS

A. Review and Approve Minutes

A.1. The Board will vote on adopting the February 25, 2022, Meeting Minutes

Board member Smith MOVED to approve the February 25, 2022, meeting minutes. Board member Altemus SECONDED. The motion PASSED unanimously.

There was no board discussion or public comment.

II. BRIEFING ITEMS

A. CONTESTED CASE UPDATES

Chairman Ruffatto noted that there was one change on the agenda regarding a District Court case (DV 2019-34 Rosebud Mine). The Montana Supreme Court said that the appeals are not timely. The Board will be filing an appeal when appropriate.

Chairman Ruffatto MOVED that Hearing Examiner appointments be made and confirmed for the following cases:

- BER 2019-05 OC - Patrick Riskin
- BER 2019-06 WQ – Madison Mattioli
- BER 2019-08 through 21 OC – Caitlin Buzzas
- BER 2019-05 OC – Patrick Riskin
- BER 2020-01 SUB – Aislinn Brown
- BER 2021-06 WQ - Caitlin Buzzas
- BER 2021-07 WQ – Aislinn Brown

Board member Reiten SECONDED. The motion PASSED unanimously

ACTION ITEMS

III.

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

Chairman Ruffatto commented that this proposed FOFCOL was to implement decisions that made at the Board meeting on February 25th. Two issues were less definitive at the last meeting – one, whether the board was to conclude that new rulemaking is required; and two, whether the record contains sufficient evidence. There was a motion made at the last meeting, but it was not specific. DEQ issued a notice that answered one of the outstanding questions, which was whether DEQ was going to proceed with new rulemaking. DEQ has not initiated new rulemaking but another process.

The Board engaged in discussion regarding the proposed FOFCOL, with Board member Lehnherr stating that he felt that a FOFCOL is unnecessary and asked why the Chairman wrote the FOFCOL instead of ALS. Chairman Ruffatto explained why he felt that the FOFCOL was necessary and why he wrote it. The Board engaged in additional discussion.

The Board engaged in further discussion. Chairman Ruffatto MOVED to add language that "Teck and Lincoln County each have standing to bring the petitions." Board member Simpson SECONDED. The motion PASSED 4-2, with Board members Lehnherr and Reiten dissenting.

The Board engaged in discussion regarding a request to ask DEQ to begin the rulemaking process, for the record. Board member Altemus MOVED to add language "Because the Board's rulemaking failed to comply with Section 75-5-203, MCA, in order to have a valid and enforceable lake water column standard, new rulemaking must be initiated." Board member Simpson SECONDED.

Chairman Ruffatto asked legal counsel for the parties for comment, and the Board engaged in further discussion. Ms. Bowers stated that in the initial publication of the rule, the public did have opportunity to comment and that the rule did contain a statement that the rule was not more stringent than Federal regulations. This is the reason the Board did not make the findings. Basing a determination that the rulemaking is defective on the fact that the public was not given notice of the Board's stringency determination is not factually correct as DEQ received comments from the public regarding stringency. Ms. Marquis stated that she agreed with Chairman Ruffatto's statement that the initiation of rulemaking needed to comply with the stringency statute, and it did not.

The motion PASSED 4-2, with Board members Lehnherr and Reiten dissenting.

Chairman Ruffatto MOVED to adopt the proposed decision document as amended as the final decision document of the Board. Board member Simpson SECONDED. The motion PASSED 4-2, with Board members Lehnherr and Reiten dissenting.

III.b. **In the matter of the notice of appeal by Duane Murray regarding the notice of violations and administrative compliance and penalty order (Docket No. SUB-18-01; ES#36-93-L1-78; FID 2568), BER 2020-01 OC.**

The Board heard arguments from Mr. Murray and Mr. Pettis. The Board discussed the proposed FOFCOL and noted that in Paragraph 5, the case cited does not stand for the proposition stated .

Chairman Ruffatto MOVED to strike Paragraph 5. Board member Simpson SECONDED. The motion PASSED unanimously.

Chairman Ruffatto MOVED to strike the last sentence and "DEQ determined that" from Paragraphs 22 and 29. Board member Lehnherr SECONDED. The motion PASSED 6-0.

Chairman Ruffatto MOVED to rewrite the penalty provision to provide that if it is confirmed that the disconnect as required by DEQ has occurred, the penalty assessed to Mr. Murray will be waived. Board member Reiten SECONDED. The motion PASSED unanimously.

Chairman Ruffatto MOVED to adopt the full FOFCOL as the Board amended be the decision of the Board. Board member Altemus SECONDED. The motion PASSED unanimously.

III.c. **An appeal in the matter of amendment application AM3, Signal Peak Energy LLC's Bull Mountain Coal Mine #1 Permit No. C1993017, BER 2016-07 SM.**

The Board heard oral argument from the parties on the exceptions to the proposed FOFCOL (including the binding effect of the AM4 decision).

The Board engaged in discussion. Board member Simpson asked Mr. Hernandez about the one hundred gallon/minute calculation used by MEIC and how many acres the mine comprised. Mr. Hernandez addressed the question regarding the calculation and stated that the mine is over 7,000 acres. The Board discussed exceptions to the proposed FOFCOL.

The Board utilized the outline for its deliberations, attached to these minutes. References in these minutes to various exceptions refer to the attached outline.

Chairman Ruffatto MOVED that the Board accept MEIC Exception a., that the judicial deference afforded agencies is not applicable to Board review of DEQ decisions (see MEIC v. DEQ 2005 MT 96), but the Board "may utilize" DEQ's "experience, technical competence, and specialized knowledge. . . in the evaluation of evidence" 2-4-612(7), MCA; that the proposed FOFCOL language on pages 38-39 referring to judicial deference be deleted; and that the proposed FOFCOL appropriately utilizes DEQ's "experience, technical competence, and specialized knowledge... in the evaluation of evidence" but does not afford judicial type deference to DEQ. Board member Simpson SECONDED. The motion PASSED unanimously.

Chairman Ruffatto MOVED that the Board reject MEIC Exception b.; that ARM 17.24.304(1)(f)(iii) is the controlling regulation with respect to alternative water supplies for mitigation of water supplies adversely impacted by mining; and that even if ARM 17.24.405(6) was applicable the result would not be different. Board member Smith SECONDED. The motion PASSED unanimously.

Chairman Ruffatto allowed oral argument regarding MEIC's Exception c. Board members asked questions of legal counsel representing the three parties.

Board member Simpson MOVED to reject MEIC's Exception c.; that ARM 17.24.304(1)(f)(iii) requires the mine permit application include a description of alternative water supplies that [*more likely than not*] could be developed as a water replacement source not that the application include a description of alternative water supplies that could have [*a mere possibility*] of being developed as a replacement source; and that the proposed FOFCOL clearly applies a "preponderance of the evidence" [more likely than not] standard of proof, the appropriate standard, not an "impossible" standard. Board member Reiten SECONDED. The motion PASSED unanimously.

Chairman Ruffatto allowed oral argument regarding MEIC's Exception d.

Chairman Ruffatto MOVED that the Board is not bound by the District Court decision in MEIC v. MDEQ (DV 19-34/Rosebud Mine AM4); and that the Board is bound by the Montana Supreme Court decision in MEIC v. DEQ 2005 MT 96 and that the controlling regulation ARM 17.24.425(7) which establishes that the burden of proof is on the party seeking to reverse the DEQ decision appealed from. Board member Simpson SECONDED. The motion PASSED unanimously.

Board member Simpson MOVED that even if the burden of proof is placed on DEQ and Signal Peak the Findings of Fact demonstrate that they carried the burden of proof. Board member Reiten SECONDED. The motion PASSED 5-1, with Board member Lehnerr dissenting.

The Board members discussed MEIC's Exception e, that the water quantity analysis is unsupported. Board member Simpson MOVED to reject MEIC Exception e. Board member Altemus SECONDED. The motion PASSED unanimously.

Board member Simpson MOVED to reject MEIC Exceptions f and g. Board member Smith SECONDED. The motion PASSED 5-1, with Board member Lehnherr dissenting.

Board member Reiten MOVED to reject MEIC's Exception h. Board member Altemus SECONDED. The motion PASSED 5-1, with Board member Lehnherr dissenting.

Chairman Ruffatto MOVED that a proposed final FOFCOL be prepared by ALS working with the Board Chair for submission to the Board for its review and approval; that the proposed final FOFCOL reflect that the Board has considered all of the exceptions filed by the parties; that the proposed final FOFCOL reflect the motions passed by the Board in this meeting; and to the extent appropriate the Board deliberations in this meeting; that the proposed final FOFCOL may include points in the parties' briefs even though not specifically addressed in the deliberations; and that the proposed final FOFCOL correct obvious inadvertent errors and typos contained in the proposed FOFCOL prepared by the Hearing Examiner. Board member Simpson SECONDED.

Board member Simpson asked that the Board provide a redline draft of the FOFCOL, showing all changes and deletions.

Chairman Ruffatto ACCEPTED the amended request.

Board member Lehnherr asked if the revised proposed FOFCOL could be presented to the attorneys of the three parties involved in case there are language issues or other problems that may need to be addressed. Chairman Ruffatto said he was open to the three attorneys offering comment on the revised FOFCOL, but the document would not be open to briefing and formal arguments.

The motion PASSED unanimously.

Board member Simpson asked for a special board meeting to finish this matter instead of waiting until the next meeting in June. Board members Altemus and Lehnherr concurred.

Chairman Ruffatto agreed and said that a special meeting will be scheduled soon.

IV. NEW CONTESTED CASE

IV.a. | **In the Matter of: Request for Hearing by Harry Richards, Lincoln County, MT, Case No. BER 2022-02 HW.**

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

V. BOARD COUNSEL UPDATE

| No Board Counsel update was provided.

VI. GENERAL PUBLIC COMMENT

| Angie Colamaria inquired regarding the status of the informal process document and when a timeline for that comment period or opportunity will begin. Chairman Ruffatto stated that Board Attorney Orr sent him a draft of the document, but he has not completed his review. He said he hoped to have this document available for the next Board meeting.

| No public comment was given.

VII. ADJOURNMENT

| Board member Simpson MOVED to adjourn the meeting; Board member Altemus SECONDED. The motion PASSED unanimously. The meeting adjourned at 4:43 PM.

Board of Environmental Review April 8, 2022, minutes approved:

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

June 10, 2022
DATE

Signal Peak Energy – Possible Board Motions
(Prepared prior to oral argument; oral argument must be considered before using)

1. MEIC Exceptions

a. Deference to DEQ

Move:

That the Board accept MEIC Exception a., that the judicial deference afforded agencies is not applicable to Board review of DEQ decisions (see MEIC v. DEQ 2005 MT 96), but the Board “may utilize” DEQ’s “experience, technical competence, and specialized knowledge....in the evaluation of evidence.” MCA 2-4-612(7);

That the proposed FOFCOL language on pages 38-39 referring to judicial deference be deleted; and
That the proposed FOFCOL appropriately utilizes DEQ’s “experience, technical competence, and specialized knowledge....in the evaluation of evidence” but does not afford judicial type deference to DEQ.

b. Failure to address “reclamation” claim

Move:

That the Board reject MEIC Exception b.;

That ARM17.24.304(1)(f)(iii) is the controlling regulation with respect to alternative water supplies for mitigation of water supplies adversely impacted by mining; and

That even if ARM 17.24.405(6) was applicable the result would not be different.

c. “Impossible” standard of proof

Move:

That the Board reject MEIC Exception c.;

That ARM17.24.304(1)(f)(iii) requires the mine permit application include a description of alternative water supplies that [more likely than not] could be developed as a water replacement source not that the application include a description of alternative water supplies that could have [a mere possibility] of being developed as a replacement source; and

That the proposed FOFCOL clearly applies a “preponderance of the evidence” [more likely than not] standard of proof, the appropriate standard, not an “impossible” standard.

d. Burden of Proof

Move:

That the Board is not bound by the District Court decision in MEIC v. MDEQ (DV 19-34/Rosebud Mine AM4); and

That the Board is bound by the Montana Supreme Court decision in MEIC v. DEQ 2005 MT 96 and the controlling regulation ARM 17.24.425(7) which establish that the burden of proof is on the party seeking to reverse the DEQ decision appealed from.

Possible additional motion regarding burden of proof:

Move that even if the burden of proof is placed on DEQ and Signal Peak the Findings of Fact demonstrate that they carried the burden of proof.

Balance of MEIC Exceptions:

OR Move that the Board **accept** MEIC Exception [state letter e., f. or....].

Move that the Board **reject** MEIC Exception [state letter e., f. or....].

DEQ Exceptions:

OR Move that the Board **accept** DEQ Exception [state letter a., b., c., or d.].

Move that the Board **reject** DEQ Exception [state letter a., b., c., or d.].

SPE Exceptions:

OR Move that the Board **accept** SPE Exception [state letter a., b., c., or d.].

Move that the Board **reject** SPE Exception [state letter a., b., c., or d.].

Additional motion:

Move:

That a proposed final FOFCOL be prepared by ALS working with the Board Chair for submission to the Board for its review and approval;

That the proposed final FOFCOL reflect that the Board has considered all of the exceptions filed by the parties;

That the proposed final FOFCOL reflect the motions passed by the Board in this meeting, and to the extent appropriate the Board deliberations in this meeting;

That the proposed final FOFCOL may include points in the parties' briefs even though not specifically addressed in the deliberations; and

That the proposed final FOFCOL correct obvious inadvertent errors and typos contained in the proposed FOFCOL prepared by the Hearing Examiner.