

**BOARD OF ENVIRONMENTAL REVIEW
MEETING MINUTES**

MAY 23, 2022

Call to Order

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

Attendance

Board Members Present

By ZOOM: Chairman Steven Ruffatto; Vice Chair Stacy Aguirre; Board Members Joseph Smith, David Lehnerr, Jon Reiten, David Simpson, and Julia Altemus

A quorum of the Board was present

Board Attorney(s) Present

Michael Russell, Attorney General's Office, Department of Justice

Board Secretary: Sandy Moisey Scherer

Court Reporter: Laurie Crutcher, Crutcher Court Reporting

DEQ Personnel Present

Board Liaison: James Fehr, Deputy Director

Board Secretary: Sandy Moisey Scherer

DEQ Legal: Jeremiah Langston, Sarah Christopherson, Loryn Johnson

Air, Energy & Mining: Martin VanOort

Public Policy: Moira Davin

Other Parties Present

Laurie Crutcher, Laurie Crutcher Court Reporting

Sarah Bordelon, Sam Yemington, Vicki Marquis – Holland and Hart/Westmoreland Resources

Shiloh Hernandez – Earthjustice/MEIC

Derf Johnson - MEIC

Chairman Ruffatto introduced Michael Russell, the new attorney for the Board of Environmental Review. Mr. Russell gave a brief description of his qualifications and background. Chairman Ruffatto thanked Katherine Orr of ALS for her service to the Board over the last year and a half.

I. ACTION ITEM

- 1. 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.**

Board member Lehnerr prefaced his involvement in the meeting by stating that he would be dissenting with many motions being voted on but wanted to advise the Board, to be sensitive to everyone's time. Chairman Ruffatto thanked Board member Lehnerr for this information.

Mr. Hernandez commented about Board member Reiten's statement regarding knowledge of replacement water in the Bull Mountains. Mr. Hernandez stated that Board member Reiten's comment regarding familiarity with the Bull Mountains and water in this area was outside of the record, and that he wished to place an objection. MEIC desires to preserve any objection it may have.

Chairman Ruffatto thanked Mr. Hernandez for his comment.

The Board resumed their deliberations of the proposed FOFCOL, beginning with MEIC Exception i. See deliberation outline attached hereto. Chairman Ruffatto MOVED to reject this exception. Board member Simpson SECONDED. The motion PASSED 6-1, with Board member Lehnherr dissenting.

For MEIC Exception j, Board member Simpson MOVED to reject this exception. Vice Chair Aguirre SECONDED. The motion PASSED 6-1, with Board member Lehnherr dissenting.

For MEIC Exception k, Chairman Ruffatto MOVED to reject this exception as the FOFCOL addresses the amount of water in the aquifer and the 100 gallon/minute discussion numerous times. Board member Altemus SECONDED. The motion PASSED 6-1, with Board member Lehnherr dissenting.

For MEIC Exception l, Chairman Ruffatto MOVED to reject this exception as the CHIA was not in error when read in its totality. Board member Simpson SECONDED. The motion PASSED 6-1, with Board member Lehnherr dissenting.

For MEIC Exception m, Chairman Ruffatto asked if the three parties would stipulate to change that the finding of fact was for the Rosebud Mine and not for the Bull Mountain Mine. All parties agreed to accept the change in wording from Rosebud Mine to Bull Mountain Mine.

Chairman Ruffatto MOVED to accept the exception upon the stipulation of all parties to this change in wording from the Rosebud Mine to Bull Mountain Mine without reviewing the entire record. Board member Reiten SECONDED. The motion PASSED unanimously.

For MEIC Exception n, Board member Simpson MOVED to reject this exception. Chairman Ruffatto SECONDED. The motion PASSED 6-1, with Board member Lehnherr dissenting.

For MEIC Exception o, Chairman Ruffatto MOVED to reject this exception. Vice Chair Aguirre SECONDED. The motion PASSED 6-1, with Board member Lehnherr dissenting.

For MEIC Exception p, Chairman Ruffatto MOVED to reject this exception. Board member Altemus SECONDED. The motion PASSED 6-1, with Board member Lehnherr dissenting.

For MEIC Exception q, Chairman Ruffatto MOVED to reject this exception. Board member Simpson SECONDED. The motion PASSED 6-1, with Board member Lehnherr dissenting.

For MEIC Exception r, Board member Reiten MOVED to reject this exception. Chairman Ruffatto SECONDED. The motion PASSED 6-1, with Board member Lehnherr dissenting.

For MEIC Exception s, Chairman Ruffatto MOVED to reject this exception. Board member Simpson SECONDED. The motion PASSED 6-1, with Board member Lehnherr dissenting.

For MEIC Exception t, Chairman Ruffatto MOVED to reject this exception. Board member Reiten SECONDED. The motion PASSED 6-1, with Board member Lehnherr dissenting.

For MEIC Exception u, Vice Chair Aguirre MOVED to reject this exception. Chairman Ruffatto SECONDED. The motion PASSED 6-1, with Board member Lehnherr dissenting.

For MEIC Exception v, Chairman Ruffatto MOVED to reject this exception. Board member Altemus SECONDED. The motion PASSED 6-1, with Board member Lehnherr dissenting.

Board member Simpson commented that the Board should discuss whether it would be appropriate for the Board to establish that for exceptions to FOFCOL to be considered by the Board, that specific relief be requested. Chairman Ruffatto said that this was something the Board should discuss in a subsequent meeting, to see if this is legally supportable. Chairman Ruffatto asked the Board Attorney to put this item on an agenda.

The Board then discussed DEQ's Exceptions.

For DEQ's Exception a, Chairman Ruffatto MOVED to reject this exception as it does not need to be addressed. Board member Lehnherr SECONDED. The motion PASSED unanimously.

For DEQ's Exception b, Chairman Ruffatto MOVED to accept conceptually this Exception, but use language put together by the Board Attorney. Board member Altemus SECONDED. The motion PASSED 6-1, with Board member Lehnherr dissenting.

For DEQ's Exception c, Chairman Ruffatto MOVED to reject this exception as it relates to COL paragraphs 21 and 22. Board member Simpson SECONDED. The motion PASSED unanimously.

For DEQ's Exception d, Chairman Ruffatto MOVED to accept this exception. Vice Chair Aguirre SECONDED. The motion PASSED unanimously.

The Board then discussed SPE's Exceptions.

For SPE's Exception a, Chairman Ruffatto MOVED to accept this exception. Board member Simpson SECONDED. The motion PASSED 6-1, with Board member Lehnherr dissenting.

For SPE's Exception b, Chairman Ruffatto MOVED to reject this exception. Board member Reiten SECONDED. The motion PASSED unanimously.

For SPE's Exception c, Chairman Ruffatto split this in two: one, to reject SPE's exception and two, the addition of a sentence.

For the first piece of SPE's Exception c, Chairman Ruffatto MOVED to reject this exception to the extent it relates to the burden of proof. Board member Reiten SECONDED. The motion PASSED unanimously.

For the second piece of SPE's Exception c, Chairman Ruffatto MOVED to accept SPE's additional sentence. Vice Chair Aguirre SECONDED. The motion PASSED 6-1, with Board member Lehnherr dissenting.

For SPE's Exception d, Chairman Ruffatto MOVED to accept this exception. Board member Altemus SECONDED. The motion PASSED 6-1, with Board member Lehnherr dissenting.

The Board then began discussion of the FOFCOL mark-up. Chairman Ruffatto stated, in reflecting on Mr. Hernandez's earlier objection regarding information outside the record, Mr. Hernandez's objection is well taken. Chairman Ruffatto MOVED that the objection Mr. Hernandez raised be upheld, and that

any evidence that is not included in the FOF be excluded from consideration. Board member Altemus SECONDED. The motion PASSED 6-1, with Board member Simpson dissenting.

The Board began discussion of the FOFCOL mark-up and Chairman Ruffatto gave counsel for the three parties opportunity to address any language that misstated what the Board has determined or if there would be better language. Mr. Langston noted that on page 434, the citation was incorrect. The correct citation should be Mont. Code Ann. § 82-4-253(3)(d), not 82-4-227(3)(a). Chairman Ruffatto asked the Board Attorney to make a record of this suggested correction for the next version of the FOFCOL.

Chairman Ruffatto MOVED to accept the first two sections, Introduction and Procedural History, subject to additional changes based on this meeting and the next meeting. Board member Lehnherr SECONDED, and the motion passed unanimously.

For the Legal Standard section (pages 432 through 434), it was noted on page 434 that there was an error in that the word "quality" was used instead of "quantity". Chairman Ruffatto MOVED to accept the Legal Standard portion, subject to the citation correction. Board member Reiten SECONDED, and the motion passed unanimously.

Mr. Yemington commented that there were two primary acronyms, one being DUB or DUA. SPE would support a consolidation or consistency between DUB or DUA for the same geologic resource. Mr. Hernandez said that MEIC had no objection to the clarification of the acronym. Chairman Ruffatto asked the Board Attorney to review this proposed change and report at the next board meeting. The Board will decide at the meeting whether to make the proposed change.

Mr. Langston offered a clarification that in the CHIA, the reference is to DUB. SPE used DUA and that is where the divergent usage comes from. Chairman Ruffatto appreciated the clarification. Board member Simpson said that there may be a rationale for keeping the language as is and changes may not be necessary. Mr. Hernandez said that much of this is a matter of semantics, but MEIC is not waiving their argument that the FOFCOL confuses the scope of the geologic unit with the extent of the aquifer. Chairman Ruffatto said that any changes should be only correction of mistakes, rather than changes to the FOFCOL. He asked the Board Attorney to review and report his recommendation at the next meeting.

For the FOFCOL, paragraphs 1-14, Chairman Ruffatto MOVED to accept these paragraphs subject to minor errors that have been corrected. Board member Lehnherr SECONDED. Upon further discussion by the Board, Chairman Ruffatto WITHDREW his motion, and Board member Lehnherr WITHDREW his second.

Vice Chair Aguirre MOVED to approve the findings of fact section with note to the change in No. 54, which changes the reference from Rosebud Mine to Bull Mountain, and making a note that any other changes are obvious typographical errors. Board member Simpson SECONDED.

Mr. Hernandez noted that the name of the mine should be Bull Mountains, plural. Chairman Ruffatto asked DEQ and SPE if they opposed this change. Mr. Langston said that DEQ did not oppose the change, and Mr. Yemington said that SPE did not oppose the change.

Vice Chair Aguirre AMENDED her motion to include the correction to Bull Mountains. Board member Simpson SECONDED. The motion PASSED 6-1, with Board member Lehnherr dissenting.

For the Discussion section pages 463 – 466, Chairman Ruffatto MOVED to accept these pages. Vice Chair Aguirre SECONDED, and the motion PASSED unanimously.

For pages 466 – 475, Chairman Ruffatto MOVED to accept that portion of the discussion. Board member Altemus SECONDED. The motion PASSED 6-1, with Board member Lehnherr dissenting.

For pages 476 – 481, Vice Chair Aguirre MOVED to approve the exception discussion section in the mark-up version that the Board is looking at in its entirety. Chairman Ruffatto SECONDED. The motion PASSED 6-1, with Board member Lehnherr dissenting.

For the COL section, Chairman Ruffatto MOVED to accept COL 1 - 20. Vice Chair Aguirre SECONDED, and the motion PASSED unanimously.

Paragraphs 21, 22 and 23 were skipped as these paragraphs are being revised with information from today's meeting, and the Board will consider these paragraphs at the next Board meeting.

For COL paragraph 24, Chairman Ruffatto MOVED to accept COL 24, understanding that the number will change due to the split of paragraph 23. Vice Chair Aguirre SECONDED. The motion PASSED 6-1, with Board member Lehnherr dissenting.

Chairman Ruffatto MOVED to accept the Order section subject to change to reflect that DEQ did not oppose MEIC's standing. Vice Chair Aguirre SECONDED. The motion PASSED 6-1, with Board member Lehnherr dissenting.

II. ADJOURNMENT

Chairman Ruffatto MOVED to adjourn the meeting; Vice Chair Aguirre SECONDED. The motion PASSED unanimously. The meeting adjourned at 10:58 AM.

Board of Environmental Review May 23, 2022, minutes approved:

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

June 10, 2022
DATE

Signal Peak Energy – BER 2016-07 – Deliberation Outline

1. MEIC Exceptions

- a. Deference to DEQ: MEIC Exc. p. 2; DEQ Resp. pp. 2-3; SPE Resp. pp. none
- b. Failure to address “reclamation” claim: MEIC Exc. pp. 4-15 et seq.; DEQ Resp. pp. 14-16; SPE Resp. pp. 11-12, 19-24
- c. “Impossible” standard of proof: MEIC Exc. pp. 5-15 et seq.; DEQ Resp. p. 4; SPE Resp. pp. 11,17-18
- d. Burden of Proof: MEIC Exc. pp. 6-14; DEQ Resp. pp. 3-5; SPE Resp. pp. 1-5, 11-19; MEIC Supp. pp. 2-4; DEQ Supp. pp. 1-5; SPE Supp. pp. 1-5
- e. Water quantity analysis unsupported: MEIC Exc. pp. 14-17; DEQ Resp. pp. 23-35; SPE Resp. pp. 29-32,44-48
- f. Water quality analysis unsupported: MEIC Exc. pp. 17-20; DEQ Resp. pp. 5-8, 35-36; SPE Resp. pp. 49-51
- g. Lack of bonding for water treatment: MEIC Exc. pp. 19-20; DEQ Resp. pp. 7-8; SPE Resp. p. 23
- h. Legal availability analysis unsupported: MEIC Exc. pp. 20-23; DEQ Resp. pp. 8-13; SPE Resp. p. 52
- i. Failure to address proposed findings generally: MEIC Exc. pp. 23-25; DEQ Resp. pp. 16-19; SPE Resp. pp. 25-27
- j. Failure to address SPE’s design standards violations: MEIC Exc. pp. 25-26; DEQ Resp. pp. 19-23; SPE Resp. pp. 27-29
- k. Failure to address 2013 100gpm replacement water needs estimate: MEIC Exc. pp. 26-28; DEQ Resp. pp. 23-26; SPE Resp. pp. 29-33, 44-46
- l. Failure to address DEQ’s admission that CHIA water assessment mistaken: MEIC Exc. pp. 16-17, 28-29; DEQ Resp. pp. 26-30; SPE Resp. pp. 29-33
- m. Finding 54 unsupported – Rosebud v. Bull Mountain Mine: MEIC Exc. p. 29; DEQ Resp. none; SPE Resp. p. 34
- n. Findings 77-82, 92 and 95 unsupported – see i, j, k, and l above: MEIC Exc. pp. 29-30; DEQ Resp. pp. 16-30; SPE Resp. pp. 34-42
- o. Finding 97 unsupported – “likely many miles” v. “may be several miles”: MEIC Exc. pp. 30-31; DEQ Resp. pp. 36-37; SPE Resp. pp. 42-43
- p. Finding 97 unsupported – continuity of formation: MEIC Exc. pp. 31-32; DEQ Resp. pp. 36-37; SPE Resp. pp. 42-43

- q. Finding 99 unsupported – the extent of DUA: MEIC Exc. p. 32; DEQ Resp. pp. 24-32; SPE Resp. p. 43
 - r. Finding 114 unsupported – evidence of water quality impacts: MEIC Exc. pp. 32-33; DEQ Resp. pp. 5-7, 19-23, 35-36; SPE Resp. pp. 43-44
 - s. Finding 123 unsupported – water quantity needs: MEIC Exc. pp. 33-34; DEQ Resp. pp. 23-35; SPE Resp. pp. 44-48
 - t. Finding 130 unsupported – water rights evaluation: MEIC Exc. p. 34; DEQ Resp. pp. 8-13; SPE Resp. pp. 48-49
 - u. Finding 143 unsupported – water treatment: MEIC Exc. p. 34-35; DEQ Resp. pp. 5-7; SPE Resp. pp. 49-51
 - v. Finding 145 unsupported – legal barriers: MEIC Exc. p. 35; DEQ Resp. pp. 8-13; SPE Resp. p. 52
2. DEQ Exceptions
- a. MEIC’s exempt well permits argument: DEQ Exc. pp. 2-4, 6-9; MEIC Resp. pp. 2-5
 - b. DEQ’s response to MEIC’s exempt well argument: DEQ Exc. pp. 4, 9-14; MEIC Resp. pp. 5-6
 - c. Conclusions of Law 21 and 22 – burden of proof: DEQ Exc. pp. 4-6, 14-16; MEIC Resp. pp. 2, 7-8; SPE Exc. pp. 3-4
 - d. Opposition to MEIC standing: DEQ Exc. pp.6, 16-17; MEIC Resp. pp. 8 fn. 3
3. SPE’s Exceptions
- a. Hearing Examiner appointment: SPE Exc. pp. 4, 5-8; MEIC Resp. pp. 8-10
 - b. Uncertainty regarding volume of replacement water: SPE Exc. pp. 8-9; MEIC Resp. pp. 11-13
 - c. Conclusions of Law 21 and 22 – burden of proof: SPE Exc. pp. 10-11; MEIC Resp. pp. 2, 7-8, 13-14
 - d. Conclusion of Law 23 – clarification of claims addressed: SPE Exc. pp. 11-14; MEIC Resp. pp.2, 13