

**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA**

**IN THE MATTER OF:
APPEAL AMENDMENT AM4, WESTERN
ENERGY COMPANY, ROSEBUD STRIP
MINE AREA B, PERMIT NO. C1984003B**

CASE NO. BER 2016-03 SM

ORDER ON MOTIONS IN LIMINE

BACKGROUND

Together, the parties have filed five motions in limine in this case, as follows: Intervenor Respondents, Western Energy Company, Natural Resource Partners, L.P., International Union of Operating Engineers, Local 400, and Northern Cheyenne Coal Miners Association (WECo) filed a (1) *Motion in Limine Regarding Issues Waived* and a separate (2) *Motion in Limine to Preclude Evidence that Contradicts Petitioners' Rule 30(B)(6) Testimony*. The Montana Department of Environmental Quality (DEQ) filed its (3) *First Motion in Limine*. The Montana Environmental Information Center and Sierra Club (collectively Conservation Groups) filed a (4) *Motion in Limine to Exclude Expert Testimony by DEQ and Michael Nicklin about the Health of Aquatic Life in East Fork Armells*

Creek, as well as a separate (5) *Motion in Limine to Exclude Extra-Record Evidence and Reasoning*. The motions were fully briefed on March 5, 2018.

The parties requested oral argument which was held on March 13, 2018. At the end of oral argument, the undersigned issued an oral ruling from the bench on two and a half of these motions: WECO's (2) *Motion in Limine to Preclude Evidence that Contradicts Petitioners' Rule 30(B)(6) Testimony*; Conservation Groups' (4) *Motion in Limine to Exclude Expert Testimony by DEQ and Michael Nicklin about the Health of Aquatic Life in East Fork Armells Creek*; and part (b) of DEQ's (3) *First MOTION in Limine*, regarding Conservation Groups' responses to Interrogatories and Requests for Admission (RFAs). As indicated during the hearing, this written order reiterates the oral rulings and resolves the remaining motions in limine.

DISCUSSION

The remaining motions on which the undersigned did not rule during the oral argument include: Part (a) of DEQ's (3) *First Motion in Limine* regarding limiting Conservation Groups' evidence to such issues raised in the August 3, 2015 comments and the January 4, 2016 Notice of Appeal; WECO's (1) *Motion in Limine Regarding Issues Waived*; and Conservation Groups' (5) *Motion in Limine to Exclude Extra-Record Evidence and Reasoning*.

Although couched in different ways, these motions all contemplate the same

thing: that all the evidence presented during the hearing should be limited by what happened during the administrative process.

The administrative process in this case began in 2009, when WECO submitted its permit application and the original PHC to DEQ. WECO and DEQ then engaged in a correspondence that included at least 8 deficiency letters and responses, all of which were publicly available. During this time, DEQ also responded to public records requests, including at least one from MEIC. WECO then issued an addendum to the PHC in January of 2015. On July 8, 2015, DEQ released a draft of the EA Checklist and Written Findings for the AM4, indicating that DEQ intended to approve the permit. Conservation Groups filed written objections on August 3, 2015 (“objections”). On December 3, 2015, DEQ issued its final EA Checklist and on December 4, 2015, DEQ issued its final Written Findings and CHIA approving the AM4 permit. On January 5, 2016, Conservation Groups filed their Notice of Appeal before the BER. The remainder of the procedural history of this case is contained within the docket of this case.

All the parties agree that at the hearing on this issue MEIC has the burden to prove by a preponderance of the evidence that the AM4 permit, and the corresponding CHIA, were not “designed to prevent material damage.” *MEIC v. DEQ*, 2005 MT 96; MCA 82-4-227(3)(a). Conservation Groups seek to limit DEQ and WECO to the CHIA and exclude any evidence that came “post hoc” - i.e. after

the CHIA. This indicates some agreement from the Conservation Groups that the relevant evidence is only that which appears in, or serves to directly explain, the prior administrative record. Similarly, DEQ and WECO both seek to limit Conservation Groups to the record they created before the agency - i.e. those issues raised in the objections to the Written Findings and also preserved in the notice of appeal. If the Conservation Groups are desirous of limiting the evidence presented by DEQ and WECO to the issues raised by the administrative record, and DEQ and WECO are desirous of limiting the Conservation Groups' evidence to only those issues raised in the administrative record, then the parties actually seem to agree (without actually agreeing) that it is the administrative process that determines the relevance of all the evidence offered at the hearing. If evidence can be tied to the administrative process, as either offered to explain the permit decision or the objections to it, then it is relevant and admissible. If it cannot be tied to the administrative record, then it is probably not admissible.

All of the relevant statutes, rules, and the statements from BER itself—in *Signal Peak*, No. BER 2013-07 SM (Jan. 14, 2016), *Sterling Mining*, Permit No. 2414-04 (Jan. 13, 2003), and at the conclusion of the summary judgment hearing in this case—seem to contemplate an evidentiary hearing, resolving disputed issues of material fact, that reviews and explains of the administrative decisions made by DEQ during this administrative process and ultimately determines the sufficiency

of the permit decision and its CHIA. This hearing must therefore fall somewhere between a records review and a freewheeling attack on, or defense of, the permit. All parties are limited by the permitting process itself—DEQ and WECO are limited by the CHIA and the Written Findings and Conservation Groups are limited by their written objections and the notice of appeal. No party may bring entirely new evidence, but all parties can “explain and demonstrate that the evidence before the agency at the time of its permitting decision and the analysis within the CHIA satisfy,” or, according to the Conservation Groups, do not satisfy “the applicable legal standards.” *Signal Peak*, No. BER 2013-07 SM ¶ 70.

In other words, Conservation Groups may explain and support their objections to DEQ’s written findings, using expert testimony as necessary, in an effort to meet its burden to show by a preponderance that DEQ should not have issued the permit over its objections. DEQ and WECO may in turn explain and support the CHIA and written findings, with expert testimony as needed. Neither party, however, may make arguments or present evidence that is entirely new, or which it cannot tie back to the administrative record before DEQ at the time of the permitting decision.

From this administrative record, it is clear to the undersigned that anyone from the public, including Conservation Groups, has had ample notice and opportunity to examine, in exhaustive detail, the permit at issue in this case. It is

true that DEQ did not issue a draft CHIA, and therefore did not offer the public the opportunity to object to or comment on that specific document before it was issued – the objections that Conservation Groups made were to the draft checklist and written findings only. It also appears to be true that the objections to DEQ’s acceptability determination were due approximately four months before the CHIA was finalized and made public.

However, there does not appear to be any argument that anything contained in the CHIA was manifestly new or different than any of the issues previously raised by the administrative record between 2009 and 2015. In other words, the undersigned is not aware of any argument by Conservation Groups that anything in the CHIA was an entirely surprising issue, unheard of in the previous six years, never mentioned by the PHC, the PHC addendum, or any of the deficiency correspondence. Rather, the Conservation Groups have argued that potential evidence in this case was not contained in the CHIA¹ – not that anything in the CHIA was a surprise.

If, however, the Conservation Groups can point to a portion of the CHIA that contains an entirely new issue, never canvased anywhere in the previous years of administrative record and to which they had no opportunity to object prior to

¹ As discussed above, DEQ and WECos are equally limited by the administrative record.

filing the notice of appeal in this case, then the undersigned will entertain such a discussion. The ultimate purpose of this hearing is the sufficiency of the CHIA and the permit. Therefore, if there were a fundamental issue with the CHIA and the permit, and if that issue were introduced for the first time with the publication of the CHIA and after the public had an opportunity to make objections, then this appeal before the BER would be the only forum in which to address such a deficiency. While this seems unlikely, it does present a very limited instance in which an appeal before the BER would be the public's only opportunity to object to and potentially correct a deficiency with the CHIA that was previously unaddressed in the administrative record. If Conservation Groups can articulate such an instance in this case, where they have not been previously given any notice or opportunity to object, then the undersigned will entertain an offer of evidence. Otherwise, as described above, the Conservation Groups will be limited to those issues contained in the administrative record, including those issued raised in their August 3, 2015 objections and also preserved in the January 4, 2016 Notice of Appeal. DEQ and WEC0 will similarly be limited to those issues presented in the administrative record, including the written findings and the CHIA.

While these principles will guide specific evidentiary rulings during the hearing, and should guide the evidence offered into evidence by all parties, the undersigned is not comfortable, based on the current record, issuing specific

rulings on the items of evidence listed, mentioned, or summarized in the various motions. Thus, evidence will be admitted or refused based on contemporaneous objections at the hearing, consistent with the conclusions herein.

ORDER

Based on the forgoing IT IS HEREBY ORDERED:

1. WECO's (1) *Motion in Limine Regarding Issues Waived* is DENIED in part and GRANTED in part. Conservation Groups' evidence will be limited to those issues that were raised in the administrative process and put before DEQ in advance of the permitting decision, as described *infra*.

2. WECO's (2) *Motion in Limine to Preclude Evidence that Contradicts Petitioners' Rule 30(B)(6) Testimony* is DENIED. As stated at the end of oral argument, Conservation Groups' experts will be permitted to testify consistent with their respective expert disclosures (as allowed by prior rulings).² The parties should object to at the hearing to any evidence offered that they contend is inconsistent with the 30(b)(6) testimony and that also does not appear in the expert disclosures and supplementary disclosures; rulings on such evidence will be made on a case-by-case basis.

² This testimony will, of course, be limited concomitant with the rulings in this Order.

3. DEQ's (3) *First Motion in Limine*:

a. Part (a) of this motion is GRANTED in part and DENIED in part. Conservation Groups' evidence will be limited to those issues that were raised in the administrative process and put before DEQ in advance of the permitting decision, including those issues raised in the August 3, 2015 Written Objections and the January 4, 2016 Notice of Appeal. However, the undersigned will not rule on the specific items to be excluded (for example, those items listed in (a) through (d) on page 9 of DEQ's motion), unless and until those items are offered as evidence and if there is a contemporaneous objection at the hearing. In such instances, Conservation Groups should be prepared to point to the specific portion(s) of the administrative record that they allege put the issue before DEQ at the time of the permitting decision. If specific evidence is excluded at the hearing, Conservation Groups may make offers of proof if they so choose.

b. Part (b) of this motion, to exclude Conservation Groups' answers to Interrogatories Nos. 37-46 and RFAs Nos. 68, 69, 70, and 74, is DENIED. As stated at the end of oral argument, the parties are reminded that there are several other rules of evidence (for example, hearsay) that may affect if or how these responses are admissible, and these must be resolved based on contemporaneous objections at the hearing.

4. Conservation Groups' (4) *Motion in Limine to Exclude Expert Testimony by DEQ and Michael Nicklin about the Health of Aquatic Life in East Fork Armells Creek* is GRANTED in part and DENIED in part. As stated at the end of oral argument, DEQ and WEC's experts can testify about the Arcadis report to the extent they can explain how they relied on it to reach their expert opinions (as, for example, hydrologists). Testimony by these experts about the data or method underlying the report, beyond those contained in the expert disclosures, will not be permitted. From the disclosures, however, it does not appear that DEQ/WEC's intends to introduce such evidence through any of these experts. To the extent such evidence is proposed or offered at the hearing, objections from MEIC based on this Motion in Limine will be entertained.

5. Conservation Groups' (5) *Motion in Limine to Exclude Extra-Record Evidence and Reasoning* is GRANTED in part and DENIED in part. DEQ and WEC's evidence will be limited to evidence that "explain[s] and demonstrate[s] that the evidence before the agency at the time of its permitting decision and the analysis within the CHIA satisfy applicable legal standards." *Signal Peak*, No. BER 2013-07 SM ¶ 70. However, the undersigned will not rule on the specific items to be excluded (for example, the seven items listed in the motion), unless and until those items are offered as evidence and if there is a contemporaneous objection at the hearing. In such instances, DEQ and WEC's should be prepared to

point to the specific portion(s) of the CHIA that they allege address the issue. If specific evidence is excluded, DEQ and WECOA may make offers of proof if it so chooses at the hearing.

DATED this 15th day of March, 2018.

/s/ Sarah Clerget _____

SARAH CLERGET

Hearing Examiner

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Order on Motions in Limine to be mailed to:

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DATED: 3/15/18

/s/ Aleisha Solem