



MEMORANDUM

To: Board of Environmental Review

From: Kirsten H. Bowers
DEQ Attorney

Re: HB 521 Analysis and Takings Checklist

MAR Notice No. 17-414

In the matter of the amendment of ARM 17.30.602 and the adoption of the selenium standards in NEW RULE I for Lake Kooacanusa and the Kootenai River

Date: September 9, 2020

HB 521 Analysis

The Board's authority to adopt the proposed rules is found in the Montana Water Quality Act at §§ 75-5-201 and 75-5-301, MCA. Pursuant to § 75-5-203, MCA ("HB 521"), the Board may not adopt a rule that is more stringent than comparable federal regulations or guidelines that address the same circumstances, unless the Board makes certain written findings establishing the need for the rule.

NEW RULE I will implement site-specific selenium standards for Lake Kooacanusa and the mainstem Kootenai River. In 2015, the Department began a coordinated effort with an international working group consisting of U.S. and Canadian stakeholders to develop site-specific selenium criteria for Lake Kooacanusa. That work has resulted in the standards proposed in NEW RULE I. It is necessary to adopt the proposed numeric selenium standards to incorporate the best available science for selenium toxicity and protect selenium-sensitive aquatic life in the Kootenai watershed, where selenium concentrations have been increasing due to large-scale metallurgical coal mining in Canada.

Currently, there is a chronic aquatic life selenium standard of 5 µg/L applicable to all Montana waters (Department Circular DEQ-7). This selenium standard was based on 1987 EPA guidance. The proposed selenium standards in NEW RULE I are 0.8 µg/L for Lake Kooacanusa and 3.1 µg/L for the mainstem Kootenai River. The proposed selenium standards in NEW RULE I are more

stringent than the chronic aquatic life selenium standard in DEQ-7. However, the selenium standards in NEW RULE I are not more stringent than currently recommended federal criteria. The proposed water column standard for the mainstem Kootenai River (3.1 µg/L) corresponds to the current (2016) EPA 304(a) criterion for lotic (flowing) waters. The proposed water column standard for Lake Koocanusa (0.8 µg/L) is based on EPA 304(a) fish tissue criteria and site-specific bioaccumulation modeling, following site-specific procedures set forth by EPA in its current 304(a) guidance. NEW RULE I also includes three fish-tissue standards (egg/ovary, muscle, and whole body, expressed as mg/kg dry weight) which correspond exactly to EPA's currently recommended 304(a) fish tissue criteria. Therefore, the proposed Kootenai River and Lake Koocanusa water column and fish tissue standards are no more stringent than currently recommended EPA 304(a) criteria because they correspond to federal standards or were developed using federally-recommended site-specific procedures.

The amendment to ARM 17.30.602 and the adoption of NEW RULE I pertaining to selenium standards for Lake Koocanusa and the Kootenai River adopt standards that are not more stringent than currently recommended EPA criteria. Therefore, written findings required by § 75-5-203(2), MCA are not necessary.

Private Property Assessment Act

The Private Property Assessment Act, § 2-10-101, MCA *et seq*, requires that, prior to adopting a proposed rule that has taking or damaging implications for private real property, an agency must prepare a taking or damaging impact statement. Action with taking or damaging implications" means:

[A] proposed state agency administrative rule, policy, or permit condition or denial pertaining to land or water management or to some other environmental matter that if adopted and enforced would constitute a deprivation of private property in violation of the United States or Montana Constitution.

Section 2-10-103, MCA.

Section 2-10-104, MCA, requires the Montana Attorney General to develop guidelines, including a checklist, to assist agencies in determining whether an agency action has taking or damaging implications. A completed Attorney General checklist for the proposed rules is attached. Based on the guidelines provided by the Attorney General, the proposed rule amendments do not constitute an "action with taking or damaging implications" in violation of the United States or Montana Constitutions.

Attachment: Attorney General HB 311 Checklist

PRIVATE PROPERTY ASSESSMENT ACT CHECKLIST

DOES THE PROPOSED AGENCY ACTION HAVE TAKINGS IMPLICATIONS
UNDER THE PRIVATE PROPERTY ASSESSMENT ACT?

Yes	No	
<u> X </u>	<u> </u>	1. Does the action pertain to land or water management or environmental regulation affecting private real property or water rights?
<u> </u>	<u> X </u>	2. Does the action result in either a permanent or indefinite physical occupation of private property?
<u> </u>	<u> X </u>	3. Does the action deprive the owner of all economically viable uses of the property?
<u> </u>	<u> X </u>	4. Does the action deny a fundamental attribute of ownership?
<u> </u>	<u> X </u>	5. Does the action require a property owner to dedicate a portion of property or to grant an easement? [If the answer is NO, skip questions 5a and 5b and continue with question 6.]
<u> </u>	<u> </u>	5a. Is there a reasonable, specific connection between the government requirement and legitimate state interests?
<u> </u>	<u> </u>	5b. Is the government requirement roughly proportional to the impact of the proposed use of the property?
<u> </u>	<u> X </u>	6. Does the action have a severe impact on the value of the property?
<u> </u>	<u> X </u>	7. Does the action damage the property by causing some physical disturbance with respect to the property in excess of that sustained by the public generally? [If the answer is NO, do not answer questions 7a through 7c.]
<u> </u>	<u> </u>	7a. Is the impact of government action direct, peculiar, and significant?
<u> </u>	<u> </u>	7b. Has government action resulted in the property becoming practically inaccessible, waterlogged, or flooded?
<u> </u>	<u> </u>	7c. Has government action diminished property values by

more than 30% and necessitated the physical taking of adjacent property or property across a public way from the property in question?

Taking or damaging implication exist if YES is checked in response to question 1 and also to any one or more of the following questions: 2, 3, 4, 6, 7a, 7b, 7c; or if NO is checked in response to questions 5a or 5b.

If taking or damaging implication exists, the agency must comply with 2-10-105, MCA, of the Private Property Assessment Act, to include the preparation of a taking or damaging impact assessment. Normally, the preparation of an impact assessment will require consultation with agency legal staff.