

**BOARD OF ENVIRONMENTAL REVIEW  
OCTOBER 8, 2021**

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**BOARD OF ENVIRONMENTAL REVIEW  
October 8, 2021 9:00 AM  
DEQ ZOOM CONFERENCE**

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**NOTE:** Board members, the Board attorney, and secretary will be participating electronically. Interested persons, members of the public, and the media are welcome to attend via Zoom or telephonically. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this meeting. Please contact the Board Secretary by e-mail at [DEQBERSecretary@mt.gov](mailto:DEQBERSecretary@mt.gov), no less than 24 hours prior to the meeting to advise her of the nature of the accommodation needed.

**9:00 AM**

**I. ADMINISTRATIVE ITEMS**

**A. REVIEW AND APPROVE MINUTES**

1. The Board will vote on adopting August 13, 2021 meeting minutes.

Public Comment.

**II. BRIEFING ITEMS**

**A. CONTESTED CASE UPDATES**

1. Enforcement cases assigned to the Hearing Examiner
  - a. **In the matter of violations of the Water Quality Act by Reflections at Copper Ridge, LLC, at Reflections at Copper Ridge Subdivision, Billings, Yellowstone County (MTR105376), BER 2015-01 WQ and In the matter of violations of the Water Quality Act by Copper Ridge Development Corporation at Copper Ridge Subdivision, Billings, Yellowstone County (MTR105377), BER 2015-02 WQ.** On April 17, 2015, Copper Ridge Development Corporation and Reflections at Copper Ridge, LLC, filed a Notice of Appeal and Request for hearing with the Board.
  - i. **District Court Case:** This matter is before the District Court on judicial review following an intermediate agency ruling. DEQ began separate enforcement actions against Copper Ridge Development Corp. and Reflections at Copper Ridge, LLC, for violations of the Montana Water Quality Act. The enforcement actions were followed by separate administrative appeals. The cases were consolidated before a hearing examiner at Petitioners' request. Following an evidentiary ruling that would allow for the admission of certain photographs, Petitioners moved to separate the cases again because the evidence to be admitted pertained to only one Petitioner. The motion was denied. The hearing examiner also denied Petitioners' subsequent motion in limine. Petitioners then filed a petition for judicial review of the hearing examiner's intermediate rulings and named the BER and DEQ as Respondents. BER filed a motion to dismiss on the grounds that BER should not have been named in the petition since it was not a party to the underlying contested case hearing. The motion was briefed and argued on October 7, 2020. On March 17, 2021, Judge Harada

denied BER's motion to dismiss. She determined that while BER is not a required party, it may be named as a party on judicial review. She has not yet issued a decision on the underlying petition for judicial review.

- b. **In the matter of Notice of Appeal and Request for Hearing by Westmoreland Resources, Inc. Regarding October 27, 2020 Notice of Violation and Administrative Compliance and Penalty Order, BER 2020-06 SM.** On November 25, 2020, the Board received a Notice of Appeal from Westmoreland Resources. At its December 2020 meeting, the Board assigned this case to former Hearing Examiner Sarah Clerget. The parties filed a Joint Motion for Stay on January 12, 2021 which was granted the same day. On January 20, 2021, Hearing Examiner Jeffrey Doud took responsibility for this matter as a hearing officer. The parties filed a Joint Status Report on March 12, 2021 indicating that they are working toward settlement. The parties then, filed a second motion to extend the stay of the proceedings, seeking to extend the stay for 45-days. On May 28, 2021, the parties filed a joint scheduling order that Hearing Examiner Doud granted on June 1, 2021. The parties recently filed a joint motion to extend the deadlines for filing of expert disclosures and exhibit lists. In that Motion, the parties reiterated their position that they were working towards a resolution of this matter. On August 16, 2021, the Hearing Examiner Doud issued an order of dismissal and this matter is now fully resolved.
- c. **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 SUB.** At its April 2021 meeting, the Board remanded this matter back to Hearing Examiner Lindsey Simon for further proceedings. On May 17, 2021, Hearing Examiner Simon issued an Order on Remand setting the remaining procedural deadlines in this case. On May 28, 2021, DEQ filed a "Motion to Amend the Scheduling Order and to Reopen Discovery for a Limited Purpose." On June 1, 2021, William Holahan took responsibility of this matter as a hearing examiner and on June 4, 2021 issued an Order granting DEQ's Motion to Amend. Hearing Examiner Holahan also issued an Amended Scheduling Order that same day. Discovery closed on August 3, 2021. On August 25, 2021, DEQ filed another unopposed motion to amend the scheduling order; The Hearing Examiner granted the motion and issued a new schedule. On September 13, 2021, Aislinn Brown took responsibility of this matter as a hearing examiner. On September 29, 2021, DEQ filed a motion for summary judgment. Mr. Murray's response is due October 20.

## 2. Non-enforcement cases assigned to the Hearings Examiner

- a. **In the matter of the Notice of Appeal and Request for Hearing by Alpine Pacific Utilities Regarding Issuance of MPDES Permit No. MTX000164, BER 2019-06 WQ.** At the Board's October 9, 2020 meeting it voted to adopt the parties Stipulation and Request for Retention of Board Jurisdiction. On May 3, 2021, the parties filed an update with Hearing Examiner Lindsey Simon stating that pursuant to the Stipulation, Alpine had submitted the monitoring well plan to DEQ, that DEQ has approved the monitoring well installation plan, and that the monitoring well has been installed. On June 11, 2021, William Holahan took responsibility for this matter as a hearing examiner. On August 2, 2021, the parties filed a Joint Status Report with the Hearing Examiner. Alpine Pacific Utilities has not exercised its discretion under the Stipulation that would trigger

reporting of additional activities at this time to the Board. The Board retains jurisdiction in the case that the stipulated terms are not implemented and approved by DEQ. Status reports are due every three months. The Board's jurisdiction extends at the latest to July, 2024.

- b. **In the matter of Westmoreland Resources, Inc.'s, appeal of final MPDES permit No. MT0021229 issued by DEQ for the Absaloka Mine in Hardin, Big Horn County, MT, BER 2015-06 WQ.** On September 25, 2015, Westmoreland Resources, Inc. filed a notice of appeal and request for hearing and former Hearing Examiner Sarah Clerget took responsibility for this matter as a hearing officer on September 8, 2017. The case was stayed pending a Montana Supreme Court decision, which was issued in September 2019. On April 24, 2020, the parties filed a Joint Motion for Stay indicating that they are working toward settlement of the case. That motion was granted on April 28, 2020, and the case was stayed until July 24, 2020. The parties filed a Joint Motion to Continue Stay on July 24, 2020, and September 9, 2020, which was granted on July 29, 2020, and September 9, 2020. On September 30, 2020, the parties filed a "Joint Motion to Remand and Suspension of Proceedings." The BER granted that Motion on October 9, 2020, and issued its Order granting remand on November 16, 2020. The parties filed a joint status report on June 30, 2021 stating that they continue to work through the settlement agreement provisions and update to the permit renewal information.
- c. **In the Matter of the Notice of Appeal and Request for Hearing by Spring Creek Coal, LLC Regarding Issuance of MPDES Permit No. MT0024619, BER 2019-02 WQ.** On April 12, 2019, the BER appointed former Hearing Examiner Sarah Clerget to preside over this contested case. On May 8, 2020, the parties filed a Joint Motion to Substitute, requesting that Navajo Transitional Energy Company, LLC replace Spring Creek Coal as a party, as it had replaced Spring Creek Coal as the permit holder. The motion to substitute was granted on May 13, 2020, and an Amended Scheduling Order was issued on May 12, 2020. On January 21, 2021, Hearing Examiner Andrew Cziok took responsibility for this matter as a hearing officer of this contested case. The parties filed a Joint Motion for Remand of permit and Suspension of Proceedings on March 17, 2021. Hearing Examiner Cziok granted that Motion, and the parties filed a status report on June 30, 2021 stating DEQ had noticed the draft modification of permit to the public on June 14, 2021. The public was able to comment on the draft permit modification through July 15, 2021. DEQ will respond to the public comments.
- d. **In the Matter of the Notice of Appeal by the Rippling Woods Homeowners Association, et al., Regarding Approval of Opencut Mining Permit No. 2949, Moudy Pit Site, Ravalli County, MT, BER 2019-08 through 21 OC.** Between November 8, 2019, and November 29, 2019, the Board received fourteen appeals from various parties regarding the approval of Opencut Mining Permit No. 2949. On December 13, 2019, the Board consolidated for procedural purposes BER 2019-08 through 21 OC. Several parties were dismissed from the appeals and a Scheduling Order was issued on January 31, 2020. DEQ filed a Partial Motion for Summary Judgment on September 29, 2020. The remaining appellants filed a response on October 21, 2020, and DEQ filed a reply on November 4, 2020. Former Hearing Examiner Eckstein held Oral argument on DEQ's Partial Motion for Summary Judgment on February 11, 2021. Hearing Examiner Snowberger issued a "Notice of Substitution" on March 12, 2021. On April 12, 2021, Ms. Snowberger issued a Disclosure and Status Conference stating that she had a potential conflict and set a status conference for April 15,



2021. Ms. Snowberger issued a Notice of Recusal on May 13, 2021, and Hearing Examiner Caitlin Buzzas issued a Notice of Substitution that same day. On September 15, 2021, DEQ made a Motion to Strike the Appellants' Motion for partial summary judgment as untimely. On September 24, 2021, the Plaintiffs issued their Response. Hearing Examiner Buzzas is reviewing the Motion to Strike and will issue a decision on the Motion and subsequently on the Motion for Partial Summary Judgment as applicable by October 31, 2021.

- e. **In the Matter of Notice of Appeal and Request for Hearing by Western Energy Company Regarding Approval of Surface Mining Permit No. C2011003F, BER 2019-05 OC.** On May 31, 2019, the BER appointed former Hearing Examiner Sarah Clerget to preside over the contested case for procedural purposes only. At the Board's August meeting, it voted to assign the case in its entirety to Ms. Clerget. The parties cross moved for partial summary judgment, and Westmoreland also filed a Motion to Dismiss. On November 24, 2020, Ms. Clerget issued an order denying Westmoreland's Motion to Dismiss, denying Conservation Groups' Motion for Partial Summary Judgment, and granting Westmoreland's and DEQ's Motions for Partial Summary Judgment. Ms. Clerget held a status conference on December 4, 2020, at which all parties could not agree to bring the motions decision before the Board. Therefore, the case proceed to a hearing on the one remaining issue. Former Hearing Examiner Clerget issued an Amended Scheduling Order on January 14, 2021. Hearing Examiner Jeffrey Doud took responsibility for this matter as a hearing officer as of January 20, 2021. A four-day hearing took place on June 2-4 and 21, 2021. The parties sought an extension of time to file their respective proposed finding of fact and conclusions of law which was granted. The parties are due to file their respective FOFCOLS on October 8, 2021 and their response briefs on November 12, 2021.
- f. **Montana Environmental Information Center, and Sierra Club v. Montana Department of Environmental Quality, Montana Board of Environmental Review, and Western Energy Co. (DV-2019-34, Rosebud County) (District Court).** In July 2019, MEIC and the Sierra Club filed a petition for judicial review of BER's decision to approve a permit to expand the Rosebud Mine. BER filed a motion to dismiss on the grounds that BER should not have been named in the petition since it was the deciding agency, not a party to the underlying contested case proceeding. Judge Bidegaray denied the motion on March 12, 2020. The Montana Supreme Court denied our petition for writ of supervisory control to have the Order reviewed before the case was fully decided by the District Court and remanded the case.

The petition for judicial review has been fully briefed, and the parties presented oral argument on December 16, 2020. Petitioners recently submitted supplemental authority, and the Respondents ( other than BER) responded. The matter has been fully submitted, and we are just waiting for a decision from Judge Bidegary. Once a decision is issued, we will have an opportunity to appeal the Order requiring the BER to remain in the case and will need to discuss how to proceed at that time.

- g. **In the matter of the Notice of Appeal and Request for Hearing Regarding DEQ's Issuance of a Final Section 401 Water Quality Certification #MT4011079 to Transcanada Keystone Pipeline LP for the Keystone XL Pipeline Project, BER 2021-01 WQ.** On January 4, 2021, the Northern Plains Resource Council and Sierra Club filed a "Notice of Appeal and Request for

Hearing.” At its February 2021 meeting the Board appointed Agency Legal Services as Hearing Examiner of this contested case. Katherine Orr was assigned as Hearing Examiner of this matter and on March 9, 2021, she issued an Order to Set Scheduling Conference. The scheduling conference was held on March 15, 2021, and the parties agreed to stay this matter until further indication the case should go forward pursuant to decisions made by the Federal government regarding the Keystone XL Pipeline Project. A Status Conference was held on April 20, 2021, with both parties being represented by counsel. Parties agreed to continue the stay of this matter and set another Status Conference for July 12, 2021. A status conference was held on July 12, 2021, wherein the parties agreed to continue the stay and set another Status Conference for September 10, 2021. The parties discussed that recent decisions made by the Army Corp of Engineers would likely make this matter moot. This case was dismissed on August 26, 2021.

- h. **In the Matter Indigenous Environmental Network’s and North Coast Rivers Alliance’s Appeal of the Montana Department of Environmental Quality’s Final Determination to Issue a 401 Water Quality Certification for the Keystone XL Pipeline, DEQ Application No. MT4011079, BER 2021-02 WQ.** On February 1, 2021, the Indigenous Environmental Network and North Coast Rivers Alliance filed a “Notice of Appeal and Request for Hearing.” At its February 2021 meeting the Board appointed Agency Legal Services as Hearing Examiner of this contested case. Katherine Orr was assigned as Hearing Examiner of this matter and on March 9, 2021, she issued an Order to Set Scheduling Conference. The scheduling conference was held on March 15, 2021, and the parties agreed to stay this matter until further indication the case should go forward pursuant to decisions made by the Federal government regarding the Keystone XL Pipeline Project. A Status Conference has been was held on April 20, 2021, with both parties being represented by counsel. Parties agreed to continue the stay of this matter and set another Status Conference for July 12, 2021. A Status Conference was held on July 12, 2021, wherein the parties agreed to continue the stay and set another Status Conference for September 10, 2021. The parties discussed that recent decisions made by the Army Corp of Engineers would likely make this matter moot. This case was dismissed on September 14, 2021.
- i. **In the Matter of Contest and Request for Hearing by Talen Montana, LLC Regarding the Selection of a Remedy and Setting of Financial Assurance for the Colstrip Steam Electric Station Units 1 & 2 by the Montana Department of Environmental Quality, BER 2020-07 MFSA/WQA.** On December 17, 2020, Talen Montana LLC filed a Request for Hearing and Protective Notice of Contest. The parties requested the proceeding be stayed pending completion of dispute resolution. That request was granted by former Board Chair Deveny on December 18, 2020. Katherine Orr was assigned as Hearing Examiner for this matter and issued an Order to Set Scheduling Conference on March 9, 2021. The parties filed a Joint Request to Continue Stay of BER Proceedings on March 18, 2021. Ms. Orr signed an Order Continuing Stay and Delaying Scheduling Conference Until Expiration of Stay Order on March 19, 2021. This matter will be stayed until DEQ Director’s final decision following dispute resolution. This matter continues to be stayed pending DEQ Director’s final decision.

- j. **In the matter of notice of appeal and request for hearing by the Western Sugar Cooperative regarding its Montana Pollutant Discharge Elimination System Permit No. MT0000281 issued October 29, 2020, BER 2020-05 WQ.** On November 24, 2020, the Board received a Notice of Appeal from Western Sugar Cooperative. At its December meeting, the Board assigned this matter to former Hearing Examiner Clerget. Ms. Clerget issued a Prehearing Order on January 4, 2021. Hearing Examiner Andrew Cziok took responsibility for this matter as a hearing officer on January 21, 2021. Mr. Cziok issued a Scheduling Order on March 16, 2021. On June 28, 2021, Western Sugar Cooperative filed a Motion for Declaratory Ruling. The motion was denied on August 24, 2021. Western Sugar Cooperative refiled its motion as a motion for summary judgment and the matter should be fully briefed in the middle of October 2021.
  - k. **In the matter of the notice of appeal and request for hearing by Westmoreland And Rosebud Mining LLC regarding issuance of MPDES Permit No. MT 0023965 (BER 2021 -05 WQ).** Westmoreland Rosebud Mining LLC appealed the issuance of MPDES Permit MT 0023965. The Appeal is limited to the electrical conductivity effluent limitation for discharges into Lee Coulee. Hearing Examiner Drew Cziok has been assigned as hearing examiner in this case.
  - l. **In the matter of: Notice of Appeal and Request for Hearing by Oreo's Refining Regarding Solid Waste License Expiration (License #574).** On August 28, 2021, the Board issued Prehearing Order requesting that the parties attempt settlement of the appeal by September 9, 2021. On September 10, 2021 the parties filed a Joint Status Report and Unopposed Motion for Stay of Proceedings. The Board Chairman has signed an Order granting a continuance until October 12, 2021 for the parties to attempt to reach settlement.
3. Contested Cases not assigned to a Hearing Examiner
- a. **In the matter of the notice of appeal and request for hearing by Western Energy Company (WECO) regarding its MPDES Permit No. MT0023965 issued for WECO's Rosebud Mine in Colstrip, BER 2012-12 WQ.** This matter has been stayed pending resolution of Montana Environmental Information Center and Sierra Club v. Montana DEQ and Western Energy Company (now on remand to the First Judicial District Court as Cause No. CDV 2012-1075). On September 10, 2019, the Montana Supreme Court reversed the First Judicial District Court on decisions of law and determined that DEQ properly interpreted rules implementing the Montana Water Quality Act (specifically ARM 17.30.637(4)). The Court recognized that DEQ has the flexibility to exempt ephemeral waters from certain water quality standards applicable to Class C-3 waters without BER reclassifying the waters. The Court also determined that DEQ lawfully permitted representative sampling of outfalls under Western Energy Company's MPDES permit. The Montana Supreme Court remanded the case back to the District Court for further proceedings to determine certain issues of material fact, specifically whether DEQ acted properly regarding a stretch of East Fork Armells Creek that is potentially impaired and intermittent, whether it is necessary for DEQ to adopt a TMDL for impaired segments of East Fork Armells Creek, and whether the representative monitoring selected by DEQ is factually supported. On July 6, 2021, First Judicial District Court Judge Abbott granted DEQ's and Westmoreland Rosebud Mining, LLC's (formerly WECO) joint motion to stay the litigation due

to the fact that a renewed version of MT0023965 took effect on August 1, 2021. The District Court will hold a status conference in the case of November 4, 2021 to consider a pending motion to dismiss.

### III. ACTION ITEMS

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.** On August 18-21, 2020, the parties participated in a contested case hearing. The parties filed their Proposed Findings of Fact and Conclusions of Law on December 18, 2020. As of March 31, 2021, Hearing officer Caitlin Buzzas has taken responsibility for this matter. On May 27, 2021, Signal Peak filed a Motion for the Board to Reclaim Jurisdiction. Ms. Buzzas denied the Motion on July 30, 2021. She issued proposed findings of fact and conclusions of law on July 30, 2021. An Order was issued by Ms. Buzzas noticing the parties that they could file exceptions. The Board will hear oral argument on the exceptions and it will decide to adopt, deny or amend the proposed findings of fact and conclusions of law in this meeting.

### IV. NEW CONTESTED CASES

1. **In the matter of Sidney Sugars Incorporated Appeal of Montana Pollutant Discharge Elimination System Permit No. MT0000248, BER 2021-07 WQ.** Pursuant to Mont.. Admin. R.17.30.1370(f), Sidney Sugars Incorporated, SSI, is appealing portions of Montana MPDES Renewal Permit No. MT 0000248 issued by DEQ to SSI on August 31, 2021 and is requesting a hearing. SSI is requesting the Board to reverse or modify appealed portions of the Renewal Permit.

### V. RULE REVIEW

1. **In the matter of adoption of new rule I pertaining to selenium standards for Lake Koocanusa, BER 2021-04 WQ.** On June 30, 2021 and July 1, 2021, the Board received a request from Teck Coal Limited for the Board to review Montana Administrative Rule 17.30.632 to determine whether it is more stringent than the comparable federal guideline in violation of the Montana Water Quality Act. The Board issued a Public Notice on August 27, 2021 inviting comment on the process to evaluate the stringency of the rule. Comments were due on September 24, 2021. The Public Notice also invited response to the comments suggesting a process by September 28, 2021. The Board will analyze the comments and responses to comments in this meeting.

### VI. BOARD COUNSEL UPDATE

Counsel for the Board will report on general Board business, procedural matters, and questions from Board Members.

### VII. GENERAL PUBLIC COMMENT

Under this item, members of the public may comment on any public matter within the jurisdiction of the Board that is not otherwise on the agenda for the meeting. Individual contested case proceedings are not public matters on which the public may comment.

### VIII. ADJOURNMENT



**BOARD OF ENVIRONMENTAL REVIEW  
MEETING MINUTES**

**AUGUST 13, 2021**

**Call to Order**

Chairperson Ruffatto called the meeting to order at 9:01 a.m.

**Attendance**

**Board Members Present**

By Zoom: Chairman Ruffatto; Board Members Joseph Smith, Julia Altemus, David Lehnher, Hillary Hanson, David Smith

A quorum of the Board was present.

**Board Attorney(s) Present**

Katherine Orr, Attorney General's Office, Department of Justice

**DEQ Personnel Present**

Board Liaison: George Mathieus

Board Secretary: Regan Sidner

DEQ Legal: Kurt Moser, Mark Lucas, Angie Colamaria, Kirsten Bowers, Aaron Pettis, Nick Whitaker, Catherine Armstrong

Public Policy: Rebecca Harbage

Water Quality: Myla Kelly

Mining: Bob Smith

**Other Parties Present**

Laurie Crutcher, Laurie Crutcher Court Reporting

Vicki Marquis, Sam Yemington, John Martin - Holland & Hart

Catherine Laughner - representing Western Sugar Cooperative

Andrew Cziok, Caitlin Buzzas, Jeffrey Doud - Montana DOJ Agency Legal Services Bureau

Julia Griffin

Clayton Elliott

Brian Balmer

Marie Kellner

Paul Skubinna

Tanya Fish

Tamara Johnson

Julia Giffin

Randal McNair

Stu Levitt

William Hollahan

David Brooks

Shelly Mitchell

Ann Sexton

## I. ADMINISTRATIVE MATERIALS

### A. REVIEW AND APPROVE MINUTES

#### A.1. The Board will vote on adopting the August 13, 2021 meeting Minutes

There was no board discussion and no public comment.

Board member Smith moved to approve the August 13, 2021 meeting minutes; Chair Ruffatto seconded. The motion passed unanimously.

#### B. The Board will address the prohibition against *ex parte* contacts with the Board.

Chair Ruffatto cautioned Board Members on avoiding *ex parte* communication attempts. There was no discussion from Board Members on this point.

#### C. The Board will address a study to be assigned and conducted to determine how to reduce the time to process appeals to the Board including informal disposition, mediation, clarifying the scope of delegation including instances when review by the Board, if a case has been delegated to a hearing officer, may be referred to the Board in an interlocutory matter or when remand is appropriate.

Board members discussed the process for addressing matters before the Board and the timeframe associated with this process. Members discussed methods for improved efficiency. Chair Ruffatto moved to request Board Counsel Orr to conduct a study to respond to the questions posed in Board Member Simpson's memo; Board Member Simpson seconded. The motion passed unanimously.

#### D. The Board will address potential adoption of a policy regarding which underlying documents must be submitted in addition to or with an appeal such as the documents triggering the appeal in order for the Board to determine how to delegate the case or retain it.

Chair Ruffatto made a motion that the Board direct Board Counsel Orr to draft a policy that will be considered at the October 8 meeting that will provide a means for the Board to have sufficient information when considering new cases; Board Member Smith seconded. The members discussed examples of the topic, and clarified the desire. The motion passed unanimously.

#### E. The Board will address the delegation of authority to Agency Legal Services and Hearing Examiners within it that has occurred and may occur going forward.

Board members discussed the process for assigning Hearing Examiners. John Martin, representing Signal Peak Energy and Westmoreland Rosebud Mining, provided comment.

## II. BRIEFING ITEMS

### A. CONTESTED CASE UPDATES

Chair Ruffatto asked the Hearing Officer of each case for updates to the brief in the agenda, and provided an opportunity for Board Members to ask questions.



- A.2.h. **In the matter of the Notice of Appeal and Request for Hearing Regarding DEQ's Issuance of a Final Section 401 Water Quality Certification #MT4011079 to Transcanada Keystone Pipeline LP for the Keystone XL Pipeline Project, BER 2021-01 WQ.** Chair Ruffatto asked Board Counsel Orr if the proposed order to dismiss is in place and in a position to proceed. Board Counsel Orr indicated that it is.
- A.2.i. **In the Matter Indigenous Environmental Network's and North Coast Rivers Alliance's Appeal of the Montana Department of Environmental Quality's Final Determination to Issue a 401 Water Quality Certification for the Keystone XL Pipeline, DEQ Application No. MT4011079, BER 2021-02 WQ.** Chair Ruffatto asked if the matter is likely to proceed in the same was as II.A.2.h., In the matter of the Notice of Appeal and Request for Hearing Regarding DEQ's Issuance of a Final Section 401 Water Quality Certification #MT4011079 to Transcanada Keystone Pipeline LP for the Keystone XL Pipeline Project, BER 2021-01 WQ. Board Counsel Orr indicated that she did not know.

### III. ACTION ITEMS

1. **In the Matter of the Notice of Appeal and Request for Hearing by City of Great Falls Regarding Issuance of MPDES Permit No. MT0021920, BER 2019-07 WQ.** Chair Ruffatto moved that the Board accept the stipulation in the Great Falls case as presented in the Board materials; Board Member Lehnher seconded. The motion passed unanimously. Board Counsel Orr will prepare the necessary order for Chair Ruffatto's signature as Board Chairman to implement the motion.
2. **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.** Signal Peak requested that the matter be put on the agenda with the request that the Board reclaim jurisdiction. Following the request, the Hearing Examiner made a decision on the request for the Board to reclaim jurisdiction, and also issued her proposed FOFCOL. Following that, Signal Peak requested that the item be removed from the agenda.
3. **Review of Administrative Rule 17.30.632 pertaining to selenium standards for Lake Koocanusa.** The petition filed by Teck Coal to review the selenium rule adopted by the Board in December 2020, pursuant to MCA 75-5-203. Chair Ruffatto moved that the Board Counsel draft a public notice requesting written comments on the appropriate process for addressing the Teck Coal petition; Board member Simpson seconded. Written comments are to be filed electronically with the Board Secretary by September 24. The motion passed by four to one with Board Member Lehnher dissenting.

Chair Ruffatto moved that the public notice that the Board Counsel drafts will allow for written comments in response to the initial comments to be filed no later than September 29; Board Member Simpson seconded. The motion passed unanimously. Interested parties will have the opportunity to review and respond to the public comments, filed electronically with the Board Secretary by September 29.

### IV. NEW CONTESTED CASES



1. In the matter of the notice of appeal and request for hearing by Westmoreland and Rosebud Mining LLC regarding issuance of MPDES Permit No. MT0023965, (BER 2021-05 WQ). Board Member Simpson moved to refer the case to a Hearing Examiner for both procedural and substantive matters; Board Member Lehnherr seconded. The motion passed unanimously.
2. In the matter of: Notice of Appeal and Request for Hearing by Oreo's Refining Regarding Solid Waste License Expiration (License #574). Chair Ruffatto moved that the Board retain jurisdiction of the matter, and that the Board issue an order requesting the parties to report back to the Board by September 10 as to whether or not an early resolution has been made. If not, then following that September 10 report from the parties, if the issue has not been resolved, the Board will issue a scheduling order to schedule a hearing. The motion includes the option to handle the issue through informal procedure. Board Member Simpson seconded. The motion passed unanimously. Board Counsel Orr will draft an order to implement this.

#### V. BOARD COUNSEL UPDATE

Chair Ruffatto requested that any meeting materials for the October 8 Board Meeting that are available to the Board in advance of the one-week public notice timeline be made available to the Board Members.

#### VI. GENERAL PUBLIC COMMENT

No public comment was offered.

#### VII. ADJOURNMENT

Board Member Lehnherr moved to adjourn; Board Member Altemus seconded. The motion passed unanimously. The meeting adjourned at 11:09 AM.

Board of Environmental Review August 13, 2021, minutes approved:

\_\_\_\_\_  
 /s/  
 STEVEN RUFFATTO  
 CHAIRMAN  
 BOARD OF ENVIRONMENTAL REVIEW

\_\_\_\_\_  
 DATE

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Department of Environmental Quality  
Air, Energy and Mining Division*

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

<p>IN THE MATTER OF:</p> <p>APPEAL AMENDMENT  APPLICATION AM3, SIGNAL PEAK  ENERGY LLC'S BULL MOUNTAIN  MINE NO. 1, PERMIT NO. C1993017</p>	<p>Case No. BER 2016-07 SM</p> <p><b>MONTANA DEPARTMENT OF  ENVIRONMENTAL QUALITY'S  EXCEPTIONS ON POINTS OF  LAW TO PROPOSED FINDINGS  OF FACT AND  CONCLUSIONS OF LAW</b></p>
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Respondent, Montana Department of Environmental Quality (the "Department" or "DEQ") respectfully submits the following Exceptions on Points of Law to the Hearing Examiner's July 30, 2021, Proposed Findings of Fact and Conclusions of Law (the "Proposed Decision") pursuant to the Order on Exceptions and Notice of Submittal dated July 30, 2021 and § 2-4-621(3), MCA. While the Proposed Decision is in DEQ's favor, several

minor errors of law therein require correction by the Board of Environmental Review of the State of Montana (“BER”).

This matter concerns Signal Peak Energy (“SPE”) Bull Mountain Permit No. C1993017 Mine Amendment No. 3 (“AM3”). The Petitioner herein, Montana Environmental Information Center (“MEIC”) assumed but failed to sustain a burden of proof to show that the record before DEQ failed to affirmatively demonstrate the existence of water supplies that could be developed to replace water supplies diminished or otherwise adversely impacted by AM3. Proposed Decision at 53-54, Conclusion of Law (“COL”) ¶¶ 20-23 citing § 82-4-227(1), MCA and ARM 17.24.304(1)(f)(iii).

#### Summary of and Bases for DEQ’s Exceptions

First, the Proposed Decision erroneously admitted and considered evidence and claims of legal error which were not raised in Petitioner’s permitting phase comments to DEQ and preserved in Petitioner’s Notice of Appeal. Petitioner’s untimely argument that so-called Montana Department of Natural Resources (“DNRC”) “Exempt Well Permits” are not legally available to mitigate water supplies that may be impacted by

coal mining (Proposed Decision at 48) was raised for the first time in Petitioner's post-hearing brief and entertained over DEQ's timely objection in DEQ's post-hearing rebuttal brief. The Proposed Decision erred in allowing Petitioner to raise new claims of agency legal error for the first time in Petitioner's post-hearing brief.

BER precedent clearly requires Petitioners to exhaust their administrative remedies before both DEQ and BER by raising claims in permitting phase comments and by preserving such claims in their Notice of Appeal. *In re Rosebud AM4 Amendment*, ("Rosebud AM4") BER 2016-03 SM, Board Order (June 6, 2019) at 4-6, see also *In re Signal Peak Energy Bull Mountain Mine No. 1*, ("Signal Peak AM3 Part I"), BER-2-13-07-SM, Findings of Fact, Conclusions of Law and Order (Jan. 14, 2016) at ¶¶ 56; 66; 124.

Such BER precedent is based upon the requirements of the Montana Surface and Underground Mine Reclamation Act ("MSUMRA"). Once DEQ provided public notice that DEQ had found the AM3 application acceptable, Petitioners were required to present any Objections to that decision to DEQ. § 82-4-231(8)(e), MCA. DEQ was then required to address any such Objections in its Written Findings, which also must include a Cumulative Hydrologic Impact Assessment



(“CHIA”) § 82-4-231(8)(f), MCA; ARM 17.24.405(5) and (6).

BER’s requirement that a Petitioner in an MSUMRA appeal exhaust their administrative remedies before BER in the contested stage of proceedings by preserving claims in Petitioners’ Notice of Appeal (*see Rosebud AM4*, BER 2016-03 SM at 4) is likewise consistent with MSUMRA. Section 82-4-231(9), MCA, requires that a Notice of Appeal of a DEQ MSUMRA decision “must contain the grounds upon which the requester contends that the decision is in error.” MAPA, § 2-6-602(d), MCA, similarly requires a person initiating a contested case proceeding to provide “a short and plain statement of the matters asserted.”

Second, the Proposed Decision mistakenly concludes that DEQ did not respond to Petitioner’s untimely claims that DEQ committed legal error in approving AM3 because DNRC Exempt Well Permits are not legally available to mitigate impacts to water supplies from coal mining operations. Proposed Decision at 48. The record instead reflects that DEQ first objected to and then responded to this untimely and incorrect legal contention in DEQ’s February 5, 2020, Response to MEIC’s Proposed Findings of Fact and Conclusions of Law (“FOFCOLs”).

Third, the Proposed Decision erroneously and apparently inadvertently reached legal conclusions which could arguably stand for the proposition that

the applicant SPE was required to affirmatively demonstrate, *in the contested case proceeding*, the legal and practical availability of replacement water sources to mitigate any water supplies impacted by mining. Proposed Decision, Conclusions of Law Nos. 21 and 22.

As the SJ Order explained, MSUMRA “prohibits DEQ from approving a permit unless the “applicant has affirmatively demonstrated” that the Administrative rules will be observed. Mont. Code Ann. § 82-4-227(1).” Id. at 19. Here, SPE was required to affirmatively demonstrate to DEQ, *during the permitting phase*, that alternative water supplies (not to be disturbed by mining) existed which “could be developed to replace water supplies diminished or otherwise adversely impacted in quality or quantity by mining activities so as not to be sustainable for the approved postmining land uses.” ARM 17.24.304(1)(f)(iii); § 82-4-227(1), MCA.

On appeal, the burden shifted to Petitioners to show a more likely than not probability that such alternative water supplies could not be developed to replace any water supplies impacted by AM3, and that DEQ had thus violated the law in approving AM3. *See Rosebud AM4*, BER 2016-03-SM, Conclusions of Law Nos. 5-13 (explaining shift in burden of proof to Petitioners in the contested case phase). DEQ’s Proposed Conclusions of Law Nos. 3 and 4 (which were not adopted in their entirety by the Hearing

Examiner) accordingly reflected the shift in the burden of proof to Petitioners.

Lastly, the Proposed Decision mistakenly concludes that DEQ opposed MEIC's standing, while the record reflects that DEQ expressly took no position on this issue.

**First DEQ Exception on Point of Law:** *The Proposed Decision Erroneously Entertained Claims of Agency Legal Error Which Were Raised for the First Time in Petitioner's Post-Hearing Brief*

The "central issue" in this case is the physical and legal availability of the Deep Underburden Aquifer to serve as a source of replacement water for beneficial uses lost or diminished by AM3 mining operations. Proposed Decision at 6. As the November 13, 2019, Order on Cross Motions for Summary Judgment (the "SJ Order") explained, DEQ's decision on AM3 included a finding that

even if replacement water were necessary, it likely would not be needed in quantities greater than 35gpm or 10 acre-feet/year, for which an "exempt well permit" is available. Ex. DEQ 11; *Clark Fork Coalition v. Tubbs*, 2016 MT 229, ¶¶12-13; ARM 36.12.101(13).

SJ Order at 20.

Petitioners failed to raise any claim that DNRC Exempt Well Permits were only available for housing developments at any point before DEQ in the permitting



phase, or in this contested case in their notice of appeal the BER, their discovery responses or their January 31, 2020, Pretrial Memo.<sup>1</sup> DEQ's Responses to MEIC's Proposed Conclusions of Law Nos. 76-81 timely interposed DEQ's objections to this newly raised legal argument on administrative exhaustion and Rule 37(c)(1) grounds.

Petitioner may not raise a new claim of agency legal error for the first time in their post-hearing brief. *Rosebud AM4 Amendment*, BER 2016-03 SM, Board Order (June 6, 2019) at 4-6; Conclusions of Law Nos. 13-17. The doctrine of exhaustion of administrative remedies is a well-settled principle in administrative law. See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51, 58 (1938). The purpose of the exhaustion doctrine is to allow a government agency "to correct its own errors within its specific expertise before a court interferes." *Bitterroot River Protection Ass'n v. Bitterroot Conservation Dist.*, 2002 MT 66, P22, 309 Mont. 207 (2002). An agency decision may not be reversed "unless the administrative body not only has erred but has erred against objection made at the appropriate time under its practice." *U.S. v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 37 (1952).

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<sup>1</sup> See DEQ Exs-1-3, MEIC June 13, 2016, Objections to AM3 with Exhibits A and B thereto, *passim*; DEQ Exs. 12-13, MEIC Discovery Responses, *passim*; DEQ Ex. 12, Hutson Expert Disclosure, *passim*; DEQ Ex. 14, Hutson Deposition, *passim*; DEQ Ex-22, MEIC Supplemental Discovery Responses, *passim*; MEIC January 31, 2020, Pretrial Memo, *passim*. Nor was the claim that DNRC Exempt Well Permits were not legally available for groundwater appropriations to mitigate any impacts to water supplies from AM3 raised in Petitioner's August 11, 2016, Notice of Appeal.

As BER explained in *Signal Peak AM3 Part I*, the BER's MSUMRA permitting rules

would be rendered a dead letter or hollow formality if, in a contested case proceeding, DEQ were permitted to present all new evidence, analysis, and argument to support its permitting decision that was never compiled in the record, articulated in its CHIA, or made available to the public. Mont. Code Ann. § 1-2-101 (laws should not be construed in a way that renders other provisions meaningless); *In re Signal Peak*, *supra* BER-2-13-07-SM at ¶ 67. P. 57, citing ARM 17.24.405(5) and (6).

MSUMRA and the Board's rules implementing MSUMRA would likewise be rendered meaningless if MEIC is to be allowed to raise claims of legal error to the Board which MEIC failed to raise in the permitting process before the Department.

**Relief Requested:** The BER should correct such errors of law in the Proposed Decision' pursuant to § 2-4-612(3), MCA by

i: deleting the following paragraph from Page 48 of the Proposed Decision:

However, MEIC argues that the provision in the DNRC guidance document applies to housing developments and not coal mines permitted under Mont. Code Ann. Title 82. MEIC Prop. FOFCOL at ¶ 74-81. The other parties did not discuss this provision specifically, however, it was not shown by a preponderance of the evidence that there is a legal barrier that precludes the deep underburden aquifer

from use. . .

and

- ii: adopting DEQ's Proposed Conclusion of Law No. 13 (discussed below) and adding it to the final BER decision.

**Second DEQ Exception on Point of Law:** *The Proposed Decision Erroneously Found that DEQ Failed to Respond to Petitioner's Untimely Claim of Agency Legal Error Regarding DEQ's Reliance on DNRC Exempt Well Permits to Mitigate any Impacts to Water Supplies by AM3.*

The Proposed Decision (and the underlying DEQ permitting record) thus contemplate that (if necessary) DNRC "exempt well permits" for up to 35 gpm or 10 acre-feet/year, were a legally available mitigation option for any water supplies impacted by AM3 mining operations. DEQ Ex. 6, Appendix III to Written Findings, Public Comment Response at 5-6, ¶ 8; Hrg. Tr. Day 4, at 856:8-22; Proposed Decision Finding of Fact ("FOF") ¶¶ 37, citing DEQ Ex. 6, Written Findings at 5-6; *see also* Proposed Decision pp. 48-49 ("Discussion" section).

The Proposed Decision, however, finds in pertinent part as follows:

DEQ's analysis of legal availability of replacement water is based on guidance from the DNRC that Signal Peak could use exempt wells to replace any impacted springs. Tr. at 541:2 to 542:2. However, MEIC argues that the provision in the DNRC guidance document applies to



housing developments and not coal mines permitted under Mont. Code Ann. Title 82. MEIC Prop. FOFCOL at ¶ 74-81. The other parties did not discuss this provision specifically, however, it was not shown by a preponderance of the evidence that there is a legal barrier that precludes the deep underburden aquifer from use.

Proposed Decision at 48 (emphasis supplied). The Proposed Decision is incorrect insofar as it finds that DEQ did not specifically address Petitioners arguments that the DNRC Exempt Well Guidance (DEQ Ex-21) “applies to housing developments and not coal mines. . .” Proposed Decision at 48.

DEQ’s Responses to MEIC’s FOFCOLs not only responded to but refuted Petitioner’s untimely and ultimately incorrect argument that Exempt Well Permits are only available for housing projects. *See* DEQ Response to MEIC Proposed FOF No. 101 and Responses to MEIC Proposed COLs Nos. 76-78 and 80-81.

As DEQ’s response to MEIC Proposed FOFCOL No. 101 explained, the DNRC Guidance states that it “is intended to provide *general guidance* in applying the Montana First Judicial Court’s recent Order on Petition for Judicial Review in *Clark Fork Coalition, et al. v. Tubbs et al.*” *Id.*, citing DEQ Ex. 21, DNRC Combined Appropriation Guidance, at 1. DEQ’s Response to MEIC Proposed FOFCOL No. 101 further explained:

While the *Clark Fork Coalition* decision addressed a challenge to DNRC's combined appropriation rule in the context of a housing subdivision, nothing in the DNRC Guidance states or implies that it is limited to housing subdivisions.

Mr. Van Oort explained that "exempt wells could be used, and that those wells would not be considered combined appropriations." Hrg. Tr. Day 3, at 541:21-23; *see also* DEQ Ex. 21, DNRC Combined Appropriation Guidance, at 1 (stating "One can still seek a water right for one or more 'exempt' wells pursuant to § 85-2-306(3), MCA, and other statutory provisions including a beneficial water use permit under § 85-2-311, MCA"). This conclusion was presented in DEQ's response to comments (DEQ Ex. 6) that at the time of the AM3 approval in 2016 DNRC was still issuing exempt well permits for wells such as would likely be used for mitigation. DEQ Ex. 6 at 5-6.

DEQ Response to MEIC's FOCOL No. 101. DEQ's Response to MEIC

Proposed FOFCOL No. 97 further elaborated as follows:

The Department considered and responded to Petitioner's objections and concluded that any springs potentially impacted by subsidence and requiring mitigation could be replaced by exempt wells because the springs' flow rates do not exceed the exempt well 35 gallon per minute pumping limit. DEQ Ex. 6, Appendix III to Written Findings, Public Comment Response at 5-6, ¶ 8; DEQ Ex. 21, DNRC Combined Appropriation Guidance; Hrg. Tr. Day 3, at 537:19-539:1, 542:2-7; *see also* DEQ Proposed FOF at 15, ¶ 43 (explaining the same). In doing so, the Department responded to Petitioner's objections regarding the legal availability of the DUB to serve as a source of replacement water by pointing out that no legal barrier thereto existed. DEQ Ex. 6, Appendix III to Written Findings, Public Comment Response at 5-6, ¶ 8; Hrg. Tr.

Day 2, at 417:5-418:4; Hrg. Tr. Day 4, at 712:13-713:9; MSJ Order at 10-12, ¶ 13; see also DEQ Proposed FOF at 15, ¶ 44 (explaining the same).

DEQ Response to MEIC FOFCOL No. 97. DEQ's Response to MEIC's

Conclusion of Law No. 79 further explained as follows:

The project at issue is not a subdivision and the record does not reflect that a combined appropriation is at issue herein. Mr. Van Oort explained that "exempt wells could be used, and that those wells would not be considered combined appropriations." Hrg. Tr. Day 3, at 541:21-23; *see also* DEQ Ex. 21, DNRC Combined Appropriation Guidance, at 1 (stating "One can still seek a water right for one or more 'exempt' wells pursuant to § 85-2-306(3), MCA, and other statutory provisions including a beneficial water use permit under § 85-2-311, MCA"). This conclusion was presented in DEQ's response to comments (DEQ Ex. 6) that at the time of the AM3 approval in 2016 DNRC was still issuing exempt well permits for wells such as would likely be used for mitigation. DEQ Ex. 6 at 5-6.

DEQ Response to MEIC FOFCOLS, Proposed Conclusion of Law No. 97.

Finally, as DEQ's Response to MEIC's Conclusion of Law No. 80 explained (and as the DNRC Exempt Well Guidance reflects), the statute itself most certainly does not limit Exempt Well Permits to household uses:

Further, except in circumstances not present herein "ground water may be appropriated by a person who has a possessory interest in the property where the water is to be put to beneficial use." Section 85-2-306(1)(a), MCA. A



“beneficial use” is in turn defined to mean: “a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses.” Section 85-2-102(5)(a), MCA.

DEQ Response to MEIC FOFCOLs, Response to Conclusion of Law No. 80 (emphasis supplied). Accordingly, a DNRC Exempt Well Permit can be utilized to appropriate groundwater for any beneficial use, and not merely for household purposes as Petitioner untimely contends.

Following the contested case hearing, DEQ’s December 18, 2020, Proposed Findings of Fact and Conclusions of Law (“DEQ FOFCOLs”) accordingly proposed the following Conclusion of Law:

13. Petitioner also failed to present any evidence, affirmative or otherwise, that wells over 35 gpm – the limit for a DNRC “exempt” permit – would be needed for replacement sources. Mr. Hudson only provided hypothetical scenarios not supported by any analysis based on likely impacts. *Id.*, *passim*; see *Clark Fork Coalition v. Tubbs*, 2016 MT 229, ¶¶12-13, 384 Mont. 503, 380 P.3d 771 (citing § 85-2-306(3)(a)(iii), MCA) and DEQ Ex. 21, DNRC Combined Appropriation Guidance (discussing “exempt” well permits) see also SPE Ex. 27, Spring Impact Detection and Mitigation at Table 314-3-1 and MEIC Ex. 15 Table 314-3-1 (identifying springs potentially requiring mitigation following mining impacts); DEQ Ex. 5, CHIA at 12-16, Table 7-1 (showing springs with greater than 0.5 gpm median baseline flow rate, none of which exceed 35 gpm); DEQ Ex. 6, Appendix



III to Written Findings, Public Comment Response at 5-6, ¶ 8; Hrg. Tr. Day 4, at 856:8-22; DEQ Ex. 11, DUB Report; ARM 17.24.304(1)(f)(iii); MSJ Order at 20.

DEQ FOFCOLs, Conclusion of Law No. 13. The Proposed Decision erroneously declined to adopt this conclusion of law.

**Relief Requested:** The BER should correct such errors of law in the Proposed Decision' pursuant to § 2-4-612(3), MCA by

i: deleting the following paragraph from Page 48 of the Proposed Decision:

However, MEIC argues that the provision in the DNRC guidance document applies to housing developments and not coal mines permitted under Mont. Code Ann. Title 82. MEIC Prop. FOFCOL at ¶ 74-81. The other parties did not discuss this provision specifically, however, it was not shown by a preponderance of the evidence that there is a legal barrier that precludes the deep underburden aquifer from use. . .

and

ii: adopting DEQ's Proposed Conclusion of Law No. 13 and adding it to the final BER decision.

**DEQ's Third Exception on Point of Law:** *The Proposed Decision Fails to Properly Differentiate the Applicant's Burden of Proof in the Permitting Phase and the Petitioner's Burden of Proof in the Contested Case Phase.*

The Proposed Decision's Conclusions of Law Nos. 21 and 22 states that SPE

had a burden to demonstrate compliance with MSUMRA and that SPE met this burden. SPE most certainly assumed and sustained the burden to affirmatively demonstrate to DEQ that there exist alternative water sources which could be developed to mitigate any impacts to water supplies from AM3 *during the permitting phase*. ARM 17.24.304(1)(f)(iii); § 82-4-227(1), MCA).

As BER precedent makes clear, however, the burden shifts to the Petitioner who appeals a DEQ decision to demonstrate via the contested case process that DEQ violated the particular law at issue. *See Rosebud AM4*, BER 2016-03-SM, Conclusions of Law Nos. 5-13 (citations omitted) (explaining shift in burden of proof to Petition in contested case phase).

**Relief Requested:** BER should correct the Proposed Decision by deleting the Proposed Conclusions of Law Nos. 21 and 22, which read:

21. Signal Peak was required to affirmatively demonstrate that there were alternative water supplies not to be disturbed by mining that could be developed to replace water supplies diminished or otherwise adversely impacted in quality or quantity by AM3. Mont. Code Ann. § 82-4-227 (1).

22. Signal Peak affirmatively demonstrated that there are water supplies that could be developed to replace water supplies diminished or otherwise adversely impacted as contemplated by Mont. Code Ann. § 82-4-227 (1). FOF ¶¶ 65-151.

and substituting DEQ's Proposed Conclusions of Law Nos. 3 and 4, which read as follows:

3. During the permitting process before DEQ, SPE was required to "affirmatively demonstrate[]" (among other things) to DEQ pursuant to ARM 17.24.304(1)(f)(iii) that there were alternative water supplies not to be disturbed by mining that could be developed to replace water supplies diminished or otherwise adversely impacted in quality or quantity by AM3, in order for DEQ to approve the AM3 Amendment. Section 82-4-227(1), MCA.

4. During the contested case hearing before the BER, MEIC is required to show by a preponderance of the evidence before the BER that DEQ violated ARM 17.24.304(1)(f)(iii) by identifying a replacement water source that could not be used to replace springs and stream reaches that may be dewatered by AM3 (SPE Ex. 9, MEIC Notice of appeal at 2-3, ¶ 5) to meet its burden of proof. MSJ Order at 14-15, 29; *Mont. Env'tl. Info. Ctr.*, ¶ 16 (citing §§ 26-1-401 and -402, MCA); *Western Energy Appeal Amendment AM4*, BER 2016-03 SM, Findings of Fact, Conclusions of Law and Order (June 6, 2019) at 74, ¶ 5.

**DEQ's Fourth Exception on Point of Law:** *The Proposed Decision's Decretal Paragraph (a) Erroneously States that DEQ Opposed MEIC's Standing in this Case and Should be Corrected.*

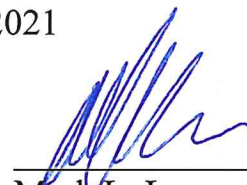
The Department made a case-specific decision to not contest MEIC's standing in this case, as is reflected in DEQ's Responses to MEIC's FOFCOLs ¶¶ 25-32 (Responses to MEIC Proposed Findings of Fact) and ¶¶ 7-10 (Responses to MEIC Proposed Conclusions of Law).

Decretal Paragraph (a) of the Proposed Decision, which denied SPE's directed verdict as to MEIC's standing, mistakenly states that DEQ opposed MEIC's standing. Id. at 54. The Department accordingly requests correction of the Proposed Decision to reflect DEQ's position herein.

### Conclusion

Based on all the foregoing, the Department respectfully requests BER to correct the errors of law in the Proposed Decision pursuant to § 2-4-621(3), MCA.

Respectfully submitted this 3<sup>rd</sup> day of September 2021



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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 3rd day of September 2021 a true and correct copy of the foregoing was served by electronic mail to the persons addressed below as follows:

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## MONTANA BOARD OF ENVIRONMENTAL REVIEW

<p>IN THE MATTER OF:</p> <p>APPEAL AMENDMENT          APPLICATION AM3, SIGNAL PEAK          ENERGY LLC'S BULL MOUNTAIN          MINE NO. 1, PERMIT NO. C1993017</p>	<p>Case No. BER 2016-07 SM</p> <p><b>INTERVENOR-RESPONDENT'S          EXCEPTIONS TO PROPOSED          FINDINGS OF FACT AND          CONCLUSIONS OF LAW</b></p> <p><b>ORAL ARGUMENT REQUESTED</b></p>
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## INTRODUCTION

After five years of litigation and a complex procedural history spanning five hearing examiners, this contested case is now before the Board of Environmental Review (the “Board”). The Hearing Examiner’s Proposed Findings of Facts and Conclusions of Law (“Proposed Order”) reach the correct result: Petitioner Montana Environmental Information Center (“MEIC”) failed to present sufficient evidence to overcome a M.R.C.P. 52 Motion for Judgment as a Matter of Law, much less the evidence necessary to prove any of its claims. Accordingly, the Board should adopt the Hearing Examiner’s Proposed Order and enter judgment in favor of Respondent Department of Environmental Quality (the “Department” or “DEQ”) and Intervenor-Respondent Signal Peak Energy, LLC (“Signal Peak” or “SPE”).

The Board’s review of the Proposed Order is constrained by law. While the Board has the discretion to “reject or modify the *conclusions of law and interpretation of administrative rules*” as it deems appropriate, the Board may *not* “reject or modify the *findings of fact* unless” the Board “first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.” § 2-4-621(3), MCA.

Signal Peak does not take issue with any proposed Finding of Fact and therefore does not request the Board to undertake a review of the complete record. Signal Peak does, however, request the Board to exercise its discretion to modify certain Conclusions of Law and pieces of the “Discussion” section of the Proposed Order to resolve ambiguities in the proposed text. Therefore, Signal Peak submits this brief identifying exceptions to the Proposed Order pursuant to § 25-4-621, MCA, to assist the Board in developing its Final Decision.

### **ARGUMENT**

The Proposed Order reaches the correct result based upon the evidence presented – a directed verdict on the merits and judgment in favor of DEQ and Signal Peak. However, Signal Peak urges the Board to modify certain conclusions of law and pieces of the “discussion” section to resolve possible ambiguities in the Proposed Order.

First, Signal Peak incorporates by reference and adopts the Third Exception raised by DEQ. *See* DEQ’s Exceptions on Points of Law to Proposed Findings of Fact and Conclusions of Law at 14-16. Signal Peak joins in DEQ’s request that the Board revise the text of Conclusions of Law 21 and 22 to clarify that the applicant’s burden during the permitting phase ends when DEQ decides to issue the permit and that, in the contested case, the party alleging the violation of law bears the burden to prove error in DEQ’s decision. DEQ proposes substitute text

for Conclusions of Law 21 and 22. Signal Peak endorses that substitute text with the additional modification to Conclusion of Law 22 discussed below in Signal Peak Exception Two.

Second, the Proposed Order incorporates the Hearing Examiner's order on Signal Peak's Request for the Board to Reclaim Jurisdiction. Signal Peak maintains that the Hearing Examiner is not authorized to decide such a request and urges the Board to take appropriate action to clarify the delegation of authority to the Hearing Examiner by adding specific text to the Discussion addressing compliance with applicable law on the appointment of hearing examiners.

Third, Signal Peak agrees with the Hearing Examiner's ultimate conclusion in the Discussion on pages 45-48 that MEIC did not carry its burden to prove that DEQ erred in determining that Signal Peak properly identified a source of replacement water that could be used if necessary. However, one sentence of the Discussion appears inconsistent with the conclusions of law and should be omitted from the Final Decision or modified to resolve the inconsistency. Further, Signal Peak suggests revisions to Conclusion of Law 22 to better articulate the link between the conclusion of law expressed and the findings of fact upon which it rests.

Finally, Signal Peak proposes that the Board replace Conclusion of Law 23, which reaches the ultimate conclusion that MEIC did not carry its burden to prove

that DEQ violated the law in its approval of AM3, into two separate conclusions of law addressing each of MEIC's remaining claims identified in the Findings of Fact. Signal Peak further requests the Board to adopt conclusions of law on each of the remaining claims that identify, with reference to the Findings of Fact, the basis for the conclusion that MEIC failed to carry its burden to prove each claim.

#### **I. SIGNAL PEAK EXCEPTION ONE: HEARING EXAMINER JURISDICTION**

After the current Hearing Examiner assumed jurisdiction for this matter, Signal Peak filed a Request for the Board to Reclaim Jurisdiction on the grounds that the current examiner is disqualified by law due to flaws in her appointment. Signal Peak argued that the Hearing Examiner's assumption of jurisdiction raised two questions regarding compliance with § 2-4-611(1), MCA. *See* Request for BER to Reclaim Jurisdiction of Contested Case Proceeding at 6-7 (May 27, 2021); Affidavit of John C. Martin, ¶¶ 14, 18-24 (June 9, 2021); Reply In Support of Request to Reclaim Jurisdiction (June 28, 2021). First, that statute authorizes ***an agency***, such as the Board, to appoint hearing examiners: "An agency may appoint hearing examiners for the conduct of hearings in contested cases." The record at the time of Signal Peak's request did not demonstrate that the Board had appointed the current Hearing Examiner. Second, the statute requires that "[a] hearing examiner must be assigned ***with due regard to the expertise required for the***

*particular matter.*”<sup>1</sup> (Emphasis added.) Again, the record at the time of Signal Peak’s request did not demonstrate that the question of the Hearing Examiner’s expertise for the current contested case was considered.

Rather than referring Signal Peak’s request to the Board so, as required by § 2-4-611(4), MCA, “the agency” could “determine the matter as part of the record and decision in the case,” the Hearing Examiner issued an order purporting to resolve the issue. *See* Order Denying Request to Reclaim Jurisdiction (July 30, 2021) (“July Order”); *see also* Proposed Order, Discussion at pg. 39. The July Order asserts that the Hearing Examiner’s appointment was proper because six months before she assumed jurisdiction a previous hearing examiner requested the Board to clarify that “all contested cases before the Board are assigned to [Agency Legal Services] as a Hearing Examiner, and not me personally,” a clarification that was adopted via Board motion. July Order at 9. At the August 2021 Board meeting, the Board acknowledged that “assignments” of Hearing Examiners had “occurred without Board action.” BER Aug. 2021 Mtg., Tr. at 9:12-14. The Board stated its intent to “reword the briefing statements” to reflect the blanket assignment to Agency Legal Services made by the Board on October 9, 2020. *Id.*, Tr. 10:2-4.

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<sup>1</sup> While subsection (2) of the provision authorizes an agency to “request a hearing examiner from an agency legal assistance program,” it does not waive the particularity requirement of subsection (1) if the agency chooses to request assistance from Agency Legal Services.



Notwithstanding the Board's action on October 9, 2020, Signal Peak remains concerned that delegating to Agency Legal Services the task of assigning a Hearing Examiner to a specific case may violate the particularity requirement in § 2-4-611(4), MCA. Here, no party other than Signal Peak raised the issue. *See Petitioner's Response to Signal Peak Energy's Motion for the Board to Reclaim Jurisdiction*, attached as Exhibit A. Nevertheless, to avoid the risk of extensive additional process that might follow in the event a reviewing court does not agree that the Board's blanket assignment to Agency Legal Services referenced in the July Order satisfies the § 2-4-611(1), MCA, particularity requirement, and remands the case to the Board, Signal Peak requests that the Board take appropriate action to document compliance with all relevant statutory provisions related to the jurisdiction of the current hearing examiner.

**Requested Relief:** Signal Peak requests that the Board include the following language in its Final Decision:

On October 9, 2020, the Board confirmed its intent to appoint Agency Legal Services as the Hearing Examiner for this matter. When the individual who presided over the contested case hearing left Agency Legal Services, this contested case was assigned to another attorney within Agency Legal Services, and then, subsequently to Hearing Examiner Buzzas who reviewed the record and prepared the Proposed Order. Although the assignment to Hearing Examiner Buzzas occurred without Board action, the Board finds that her assignment, made subject to the Board's appointment of Agency Legal Services as the Hearing Examiner for this contested case, satisfied the requirements of § 2-4-611(4), MCA, because we find that Ms. Buzzas

had the requisite experience to complete the remaining tasks for this contested case at the time of her assignment.

## **II. SIGNAL PEAK EXCEPTION TWO: EVALUATION OF THE VOLUME OF REPLACEMENT WATER**

The Proposed Order reaches the correct result by rejecting MEIC's claim that DEQ violated § 82-4-227(1), MCA, in approving AM3 with the deep aquifer underburden as one of the sources of possible replacement water because MEIC did not carry its burden of proof to demonstrate error in the analysis presented by Signal Peak and confirmed by DEQ. *See Proposed Conclusions of Law 22 and 23.* This conclusion is amply supported by the evidence presented at hearing, as demonstrated by the cited Findings of Fact. However, one sentence of the Discussion appears inconsistent with the conclusions of law and should be omitted from the Final Decision. Further, Signal Peak suggests revisions to Conclusions of Law 21 and 22 to better articulate the link between the conclusions of law expressed and the findings of fact upon which they rest.

### **A. Discussion Text Page 47**

The Proposed Findings of Fact describe the detailed analysis undertaken by Signal Peak and reviewed by DEQ to evaluate the sufficiency the deep underburden aquifer as a source of replacement water, both in terms of quantity and quality. *See Proposed Findings of Fact 65-119, 126-142, and 145-150.* The Proposed Order summarizes the extensive analysis DEQ considered to "assess the water bearing properties of the deep underburden." *Id.* Yet the first sentence of

the final paragraph on page 47 of the Discussion could be read to indicate that DEQ had *no* information about the quantity of water in the deep underburden, and that the law requires no information: “While the quantity of water in the underburden is unknown, there was no evidence presented to show this violated the law.” Discussion at 47. Such an interpretation of the sentence is belied by the Findings of Fact and the remainder of the Discussion. Indeed, the third sentence of that paragraph provides a more accurate statement of the law: “However, no evidence was shown to conclude that the ‘description of alternative water supplies’ *requires an exact or specific quantity.*” *Id.* at 47-48 (emphasis added). The sentence to which Signal Peak objects is overly broad and an incorrect statement of both the facts found and the interpretations of the law espoused in the Proposed Order.

**Requested Relief:** Signal Peak requests the Board to delete the first sentence of the final paragraph from the “Discussion” regarding the water quantity at page 47:

~~While the quantity of water in the underburden is unknown, there was no evidence presented to show this violated the law.~~

In the alternative, Signal Peak requests that the Board modify the first sentence of the last paragraph on page 47 as follows:

While the exact quantity of water in the underburden is unknown (and could not be known), there was no evidence presented to show this violated the law.

## B. Conclusions of Law 21 and 22

As noted above, Signal Peak joins in DEQ's Third Exception seeking to revise the language of Conclusions of Law 21 and 22 to distinguish the applicant's burden during the permitting phase from the petitioner's burden of proof in the contested case. Conclusion of Law 22 correctly concludes that Signal Peak carried its burden in the permitting phase. Notwithstanding, Signal Peak suggests that the Board further revise Conclusion of Law 22 to summarize the Findings of Fact on which it is based, *i.e.*, the detailed physical investigations Signal Peak undertook to characterize the capacity of the deep underburden aquifer. Signal Peak's proposed revisions are intended to incorporate the Findings of Fact on which the Conclusion of Law is based into the text of the Conclusion of Law.

**Requested Relief:** Signal Peak requests that the Board adopt one of two alternative revisions to Conclusion of Law 22. If the Board accepts DEQ's proposal to replace Conclusions of Law 21 and 22 with DEQ's Proposed Conclusions of Law 3 and 4, Signal Peak requests the Board modify DEQ Proposed Conclusion of Law 3 by adding a final sentence as follows:

3. During the permitting process before DEQ, SPE was required to "affirmatively demonstrate[]" (among other things) to DEQ pursuant to ARM 17.24.304(1)(f)(iii) that there were alternative water supplies not to be disturbed by mining that could be developed to replace water supplies diminished or otherwise adversely impacted in quality or quantity by AM3, in order for DEQ to approve the AM3 Amendment. Section 82-4-227(1), MCA. **DEQ confirmed that Signal Peak satisfied this obligation by investigation into the geologic and**

**hydrologic properties of the deep underburden aquifer as compared to the anticipated probable replacement. FOF ¶¶ 65-150.**

If the Board rejects DEQ’s proposed alternative language, Signal Peak requests the Board to modify Conclusions of Law 21 and 22 from the Proposed Order as follows:

**Conclusion of Law 21: In the permitting phase** Signal Peak was required to affirmatively demonstrate that there were alternative water supplies not to be disturbed by mining that could be developed to replace water supplies diminished or otherwise adversely impacted in quality or quantity by AM3. Mont. Code Ann. § 82-4-227(1).

**Conclusion of Law 22: In the permitting phase** Signal Peak affirmatively demonstrated **with investigation into the geologic and hydrologic properties of the deep underburden aquifer as compared to the anticipated probable replacement needs, and DEQ confirmed,** that there are water supplies that could be developed to replace water supplies diminished or otherwise adversely impacted as contemplated by Mont. Code Ann. § 82-4-227(1). FOF ¶¶ 65-150.

**III. SIGNAL PEAK EXCEPTION THREE: CLARIFICATION OF CLAIMS ADDRESSED IN CONCLUSION OF LAW 23**

Conclusion of Law 23 concludes that MEIC did not carry its burden in this contested case to prove by a preponderance of the evidence that DEQ violated the law in approving the AM3 permit amendment. As drafted, Conclusion of Law 23 encompasses both of MEIC’s remaining claims identified in Finding of Fact 46:

(a) that SPE’s application and the Department’s CHIA “do not affirmatively demonstrate that there is sufficient high quality water available to replace spring and stream reaches that may be dewatered due to subsidence-related impacts” and (b) that SPE’s reclamation plan does not provide “specific hydrological reclamation plans for



spring and stream reaches until specific water resources are impacted by longwall mining activities.”

Conclusion of Law 23 does not clearly distinguish between the two claims or articulate a link between the facts found and the ultimate conclusion reached.

Addressing both claims in one conclusion of law has some merit because MEIC has used the terms “replacement” and “reclamation” interchangeably throughout the contested case, creating the impression that MEIC considers them part of the same claim. For example, although the Order on Summary Judgment understood MEIC’s Notice of Appeal and Request for Hearing to make two separate claims regarding reclamation and replacement, it acknowledged that MEIC’s argument “conflat[ed]” the two issues. Order on Summary Judgment at 28 n.9. The Order on Summary Judgment provided legal guidance to MEIC regarding the distinction between the two standards, explaining that a “permittee is required to ‘replace the water supply’” of an adversely affected user under 17.24.648 ARM, whereas if there is no such user, the “qualitative reclamation standard” of 17.24.634 ARM applies. *Id.* Notwithstanding that clarification, MEIC’s Pretrial Memorandum continued to use the terms “replacement” and “reclamation” interchangeably, and possibly as part of the same claim. *See* Petitioner’s Pretrial Memorandum, ¶¶ 4-7, 12, 16-22.

At hearing, MEIC continued mixing and matching “reclamation” and “replacement.” MEIC’s opening statement asserted that “the evidence will show

that . . . DEQ and Signal Peak Energy have still failed to affirmatively demonstrate that **reclamation** of water resources impacted by the Bull Mountain Mine can be accomplished.” Tr. 20:15-18 (emphasis added). Yet the testimony on “reclamation” that MEIC elicited from Mark Hutson, its sole expert witness, focused on the quantification of the water available in the deep underburden aquifer. *See* Proposed Findings of Fact 120-125. As explained in the Order on Summary Judgment, the **quantity** of water available in the deep underburden is relevant only for questions going to the **replacement** obligation, not the **qualitative reclamation** obligation. Mr. Hutson presented no opinion on the qualitative reclamation standard and disclaimed any intent to provide an opinion on mining regulations or DEQ’s obligation to assess mining impacts. Tr. 94:10-15; 268:8-18. Indeed, the only witness qualified as an expert in “reclamation” was presented by Signal Peak. Tr. 731:10-12 (Judd Stark).

Signal Peak requests that the Board provide the clarity in its Final Order that MEIC has failed to establish over five years of litigation on any of its claims by separating Conclusion of Law 23 into two separate conclusions of law addressing each of the claims identified in Finding of Fact 46. Signal Peak further requests that the Board adopt text for each conclusion of law that supports, with reference to the applicable Findings of Fact, the conclusion that MEIC failed to prove either claim by a preponderance of the evidence. Specifically, as to MEIC’s

“replacement water” claim, Signal Peak requests that the Board adopt a conclusion of law explaining that MEIC’s expert witness questioned but presented no evidence or opinion to refute the information developed by Signal Peak and confirmed by DEQ demonstrating that the deep underburden aquifer could be developed to replace water supplies that may be diminished or otherwise adversely affected by AM3. As to MEIC’s reclamation claim, Signal Peak requests that the Board adopt a conclusion of law explaining that MEIC presented no evidence to support its claim regarding reclamation.

**Relief Requested:** Signal Peak requests that the Board replace Conclusion of Law 23 with the following two conclusions of law:

**Proposed Conclusion of Law 23:** Because MEIC’s sole expert witness questioned but proffered no evidence or opinion rebutting Signal Peak’s and DEQ’s conclusion that the deep underburden aquifer “could” be developed to replace water supplies diminished or otherwise adversely impacted in quality or quantity by AM3 and conceded that the deep underburden aquifer “could” be used for that purpose, MEIC has failed to meet its burden to prove its claim by a preponderance of the evidence that DEQ violated the law in approving the AM3 permit amendment by failing to require provision for adequate replacement water. FOF ¶¶ 122-125, 139, 143-144.

**Proposed Conclusion of Law 24:** Because MEIC failed to present credible evidence challenging the sufficiency of Signal Peak’s reclamation plans, MEIC has failed to meet its burden to prove its claim by a preponderance of the evidence that DEQ violated the law in approving the AM3 permit amendment by failing to require adequate reclamation plans. FOF ¶¶ 70, 72, 73, 83-96, 120.

## CONCLUSION

For the foregoing reasons, Signal Peak respectfully requests the Board to adopt the Proposed Order with the modifications identified herein.

DATED: September 15, 2021.

/s/ John C. Martin

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## CERTIFICATE OF SERVICE

The undersigned certifies that on September 15, 2021, the foregoing document was delivered or transmitted to the person(s) named below as follows:

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Caitlin Buzzas, Hearing Examiner Agency Legal Services Bureau 1712 Ninth Avenue P.O. Box 201440 Helena, MT 59620-1440 CaitlinBuzzas@mt.gov	<input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Personal Delivery
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/s/ Trisa J. DiPaola



# **Exhibit A**

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

<p>IN THE MATTER OF:</p> <p>APPEAL AMENDMENT          APPLICATION AM3, SIGNAL          PEAK ENERGY LLC'S BULL          MOUNTAIN MINE NO. 1, PERMIT          NO. C1993017</p>	<p>Case No. BER 2016-07 SM</p> <p><b>PETITIONER'S RESPONSE TO          SIGNAL PEAK ENERGY'S          MOTION FOR THE BOARD TO          RECLAIM JURISDICTION</b></p>
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**INTRODUCTION**

Respondent-Intervenor Signal Peak Energy's (Signal Peak) "request" for the Board of Environmental Review (Board) to "reclaim" jurisdiction is procedurally precluded and, on the substance, has no merit. Procedurally, Signal Peak is barred from arguing against the jurisdiction of the Hearing Examiner because the coal

company has twice successfully advocated for such jurisdiction, despite the two-tier review that this entails. Judicial estoppel prohibits such overt gamesmanship. This resolves the matter and no further analysis is required.

To the degree that the substance of the request warrants consideration, it cannot withstand scrutiny. First, Signal Peak's request bereft of any *statutory* basis for the Board to "reclaim" jurisdiction. Second, Signal Peak's ostensible desire to expedite resolution of this matter would not be advanced—but hindered—by its request because the Hearing Examiner, Caitlin Buzzas, has been working diligently on the matter for over two months and has nearly completed the proposed ruling (that the Board and Signal Peak previously requested). Third, the coal company's unfounded allegations regarding the expertise of Examiner Buzzas are both improper and false.

Finally, the affidavit filed by Signal Peak's attorney, John Martin, on June 9, 2021, is also procedurally improper, unsupported, and false. Moreover, in further demonstration of the coal company's inability to keep its story straight, Mr. Martin's attack on the Hearing Examiner's competence directly contradicts his own judicial admission at the status conference on June 2, 2021, in which he made "absolutely clear" that the coal company's position was not "based upon any level of competence" of the Hearing Examiner because "there is no question, your

Honor, but what you're a competent lawyer." Video of Status Conference, at 05:12 to 05:34 (June 2, 2021).

Signal Peak's request and Mr. Martin's affidavit have no merit and should be denied.

## **BACKGROUND**

Petitioner Montana Environmental Information Center (MEIC) filed this contested case in August 2016. Not. of Appeal (Aug. 11, 2016). The parties engaged in extensive discovery with minimal involvement of any hearing examiner. The discovery process ultimately resulted in Signal Peak suing MEIC and two of its members, in 2018, in an attempt to enforce subpoenas for internal communications and depositions. *See Signal Peak Energy, LLC, v. Mont. Env'tl. Info. Ctr.*, No. DV 18-869, at 1 (Mont. 13th Jud. Dist. Ct. Nov. 14, 2018) (attached as Exhibit 1). This derivative litigation appeared to be strategic litigation against public participation (SLAPP). *Id.* at 9 (noting indication that "Signal Peak is using litigation to retaliate against their [MEIC and their members'] opposition to Signal Peak's mining operations"). In November 2018, the district court ruled against Signal Peak, holding that the coal company's subpoenas violated the constitutional rights of MEIC and its members. *Id.* at 11-13. On appeal, in June 2020, the Montana Supreme Court dismissed Signal Peak's suit altogether, holding that the company improperly filed the suit in the first place without allowing the hearing

examiner to address the disputed subpoenas. *Signal Peak Energy, LLC, v. Mont. Env'tl. Info. Ctr.*, DA 19-299 (June 23, 2020) (attached as Exhibit 2). Thus, this contested case was substantially delayed by Signal Peak's improvidently filed SLAPP suit.

Meanwhile, on May 31, 2019, after the case was assigned to its third hearing examiner for pretrial matters (with no objection from Signal Peak), the Board addressed whether the merits of this case should be reviewed first by a hearing examiner, who would produce proposed findings and conclusions. BER Tr. at 33:17 to 34:15 (May 31, 2019).<sup>1</sup> Erstwhile Board Member Chris Tweeten, an experienced lawyer of administrative law, recommended "using our Hearing Examiner to make proposed decisions" as an "efficient way to handle these matters." *Id.* at 34:25 to 35:16. Mr. Tweeten explained that he "value[d] the input of Counsel with respect to how these arguments ought to be analyzed, as I think important advice for the Board in how to proceed." *Id.* at 35:17-22. He then moved the Board to refer the "pending summary judgment motions" to a hearing examiner to make a "proposed decision." *Id.* at 35:23 to 36:3; *id.* at 37:21 to 38:3.

Undersigned counsel for MEIC explained to the Board that granting jurisdiction to a hearing examiner to issue proposed rulings would result in a two-tiered review

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<sup>1</sup> This transcript is available at <http://deq.mt.gov/DEQAdmin/ber/agendasmeetings>.



process, with two rounds of briefing. *Id.* at 40:20 to 41:14. Mr. Tweeten, however, maintained that “it’s useful for the Board members to have the viewpoint of our Counsel with respect to how contested matters ought to be resolved, and to receive that in the form of a proposed decision,” which is “most consistent with the statutes in MAPA that deal with receiving advice from a Hearing Examiner.” *Id.* at 47:15-23.

Counsel for Signal Peak in turn agreed with Mr. Tweeten’s proposal for the two-tiered review process, in which the hearing examiner would issue a proposed ruling: “[M]y view is akin to Mr. Tweeten’s.” *Id.* at 53:1-3 (statement of Signal Peak’s attorney, Mr. Martin). Signal Peak then went further and argued that given the technical legal issues involved in this case, the company believed it would be preferable for a hearing examiner to issue a proposed decision for the Board to review: “There are issues, technical legal issues, that you may actually benefit from having Ms. Clerget opine on. We have some res judicata issues in this case. They’re a bit thorny, I have to admit. And it might be useful for the Board’s purposes to have Ms. Clerget explain those issues and opine on them in the first instance.” *Id.* at 53:16-23. Signal Peak raised no concerns about the efficiency of the two-tiered review process. In response to Signal Peak’s urging, the Board voted to “assign the case to Sarah [the Hearing Examiner] *for its entirety*.” *Id.* at 56:9-19 (emphasis added).

After former Hearing Examiner Clerget issued a ruling on the pending summary judgment motions, MEIC stated that it believed that the Board was required to review that proposed ruling, given Mr. Tweeten's motion to refer only the "pending summary judgment motions" to the hearing examiner for a proposed decision. The Parties attended a status conference on this issue. At the status conference, Signal Peak again insisted that jurisdiction should remain with the hearing examiner to issue a proposed decision following a hearing, as the most efficient course. Audio Recording of Status Conference 10:25 to 11:26 (Nov. 26, 2019). At the ensuing Board meeting in December 2019, the Board clarified that it had intended to assign the case in its entirety to a hearing examiner, "through the final recommended decision or the FOFCOL [proposed findings of fact and conclusions of law]." BER Tr. at 23:21 to 24:20 (Dec. 13, 2020).<sup>2</sup> Erstwhile Member Dexter Busby, an environmental scientist, then moved to assign the entirety of the case to the hearing examiner, and the motion passed unanimously. *Id.* at 25:3 to 26:2.

Hearing Examiner Clerget presided over the ensuing hearing from August 18-21, 2020. The hearing was conducted via zoom and a video recording of the hearing was made. The Parties then submitted proposed findings and conclusions

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<sup>2</sup> This transcript is also available at <http://deq.mt.gov/DEQAdmin/ber/agendasmeetings>.

on December 12, 2020. In January 2020, Ms. Clerget took a position with Respondent Department of Environmental Quality (DEQ). On January 21, 2021, Andrew Cziok briefly assumed jurisdiction as Hearing Examiner and provided notice to all Parties. On February 5, 2020, the Parties submitted responses to the proposed findings and conclusions. On March 31, 2021, Hearing Examiner Caitlin Buzzas assumed jurisdiction and provided notice to all parties. From the date Examiner Buzzas assumed jurisdiction, she has been working diligently toward preparation of the proposed findings and conclusions requested by the Board. Video of Status Conference, at 00:40 to 00:58 (June 2, 2021).

Nearly two months after Examiner Buzzas assumed jurisdiction, on May 27, 2021, one day before the submittal deadline for the Board's June 11, 2021 meeting,<sup>3</sup> Signal Peak filed its "request for the Board of Environmental Review to reclaim jurisdiction." This request cites no statutory authority for its unorthodox proposal and includes no supporting materials. The gist of the request is that it would be inefficient for Examiner Buzzas to begin reviewing the record from step one and redundant for a hearing examiner and the Board to both review the record, i.e., the two-tiered review process. Signal Peak now argues that this case does not

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<sup>3</sup> See Board Calendar, *available at* <http://deq.mt.gov/Portals/112/DEQAdmin/BER/Documents/BERCalendars/2021Calendar.pdf>.

involve technical issues that the Board would benefit from having the hearing examiner opine on. Finally, Signal Peak asserts that Examiner Buzzas does not appear to have applicable expertise, but the Board does. Signal Peak provides no evidence beyond its *ipse dixit* to support its assertions.

On June 2, 2021, Examiner Buzzas convened a status conference. At the status conference the Hearing Examiner informed the Parties that since her appointment nearly two months earlier, she has been working “quite diligently” on the proposed findings and conclusions and was “fairly close” to a proposed decision, which could be issued as soon as July (a matter of weeks). Video of Status Conference, at 00:40 to 00:58, 25:08-25:25 (June 2, 2021). Signal Peak stated that it appreciated the Hearing Examiner’s diligence but maintained that its concern was with the “two different layers of review,” which would entail two rounds of briefing. *Id.* at 03:10 to 03:48. Nevertheless, Signal Peak wanted to make “absolutely clear” that its position was not based on any concerns of “some sort of bias” or “based upon any level of competence” of the hearing examiner because “there is no question, your Honor, but what you’re a competent lawyer.” Video of Status Conference, at 05:12 to 05:34 (June 2, 2021). Noting the Hearing Examiner’s published work in the field of environmental law, Signal Peak wanted to be clear that the company did not “assert anything of that nature.” *Id.* at 05:30 to 05:50.

The following day, on June 3, 2021, Examiner Buzzas emailed the Parties and stated that MEIC would have until June 14, 2021, to file its response to Signal Peak's motion. On June 9, 2021, Signal Peak's counsel, Mr. Martin, filed a document entitled "2-4-211(4), MCA [sic] Affidavit of John C. Martin." The affidavit again requests the Board to "reclaim" jurisdiction in this case. Without any citation to evidence, Mr. Martin now asserts "[u]pon information and belief" that Examiner Buzzas lacks necessary expertise and that, accordingly, she should be disqualified pursuant to § 2-4-611(4), MCA.

## DISCUSSION

### **I. Signal Peak is judicially estopped from arguing that the Board should assume jurisdiction for the sake of efficiency.**

Judicial estoppel is intended to "prevent the use of inconsistent assertions and to prevent parties from playing fast and loose with the courts." *Nelson v. Nelson*, 2002 MT 151, ¶ 20, 310 Mont. 329, 50 P.3d 139.

Judicial estoppel doctrine is equitable and is intended to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories. The purpose of the doctrine of judicial estoppel is to reduce fraud in the legal process by forcing a modicum of consistency on the repeating litigant.

*Id.* (quoting 28 Am. Jur. 2d Estoppel and Waiver § 74 (2000)). Thus, judicial estoppel "binds a party to her judicial declarations, and precludes her from taking a position inconsistent with them in a subsequent action or proceeding." *Id.*, ¶ 22.



Here, the principal basis for Signal Peak’s request is, as articulated by Mr. Martin at the status conference, the “two different layers of review,” first by the Hearing Examiner and subsequent by the Board, which would entail two rounds of briefing. Video of Status Conference, at 03:10 to 03:48 (June 2, 2021). However, Signal Peak twice successfully argued that jurisdiction in this matter should be assigned to a hearing examiner, *despite* this two-tiered review process, including two rounds of briefing. BER Tr. at 33:17 to 34:15, 53:1-23 (May 31, 2019); Audio Recording of Status Conference 10:25 to 11:26 (Nov. 26, 2019) (insisting that jurisdiction remain with hearing examiner through preparation of proposed decision and admitting that Signal Peak previously opposed sending the matter directly to the Board). Thus, having twice prevailed on arguments that jurisdiction in this matter should be assigned to a hearing examiner despite the two-tiered review process contemplated by the Montana Administrative Procedure Act (MAPA), § 2-4-621(1)-(4), MCA, Signal Peak may not now be heard to argue that the Board should “reclaim” jurisdiction due to the supposed inefficiency of this two-tiered review process. *Nelson*, ¶¶ 20-22. The required “modicum of consistency” precludes the coal company from advancing this argument, which is fatal. *Id.*, ¶ 20 (quoting 28 Am. Jur. 2d Estoppel and Waiver § 74 (2000)).

## **II. The substance of Signal Peak’s motion has no merit.**

### **A. Signal Peak’s improper interlocutory motion is not supported by any law.**

Despite its repeated and successful prior arguments that the Board should assign jurisdiction of this matter to a hearing examiner, Signal Peak now requests that jurisdiction be returned to the Board because the company has ostensibly reevaluated the efficiencies of the process. Request for Board to Reclaim Jurisdiction at 4-7. But Signal Peak’s shifting predilections are no basis for an interlocutory request for the Board to reassume jurisdiction that the Board has repeatedly assigned to a hearing examiner. *Cf.* Mont. R. Civ. P. 59(e) (grounds for altering or amending a judgment); *Signal Perfection, Ltd. v. Rocky Mountain Bank-Billings*, 2009 MT 365, ¶ 13, 353 Mont. 237, 224 P.3d 604 (explaining that analogous motion to amend judgment is no basis for litigant taking second bite at the proverbial apple). Notably, Signal Peak cites no statutory basis for its unorthodox request. The coal company cites the provisions of MAPA that provide for the two-tiered review process that results when a case is assigned to a hearing examiner. *Id.* at 4-5 (citing §§ 2-4-621, 622, MCA). Those provisions, however, do not establish an interlocutory process for returning jurisdiction to the Board.

Signal Peak also cites § 2-4-611(1), MCA, which provides for the appointment of hearings examiners. However, beyond the company’s hypocritical grousing that “[i]t is unfair to the Parties and the Replacement Hearing Examiner

and contrary to § 2-4-611(1), MCA to proceed with two layers of review,” Request for Board to Reclaim Jurisdiction at 6-7, the company cites nothing in this provision that permits the Board to reconsider its prior decisions to confer jurisdiction on a hearing examiner. Section 2-4-611(1), MCA, allows the Board to assign cases to hearing examiners, as here, with “due regard to the expertise required.” However, Signal Peak’s counsel, Mr. Martin, made “absolutely clear” at the status conference that the coal company was not challenging Ms. Buzzas’s qualifications. Video of Status Conference, at 05:12 to 05:34 (June 2, 2021). Counsel’s statements, such as these, are binding. *E.g., Butynski v. Springfield Terminal R. Co.*, 592 F.3d 272, 277 (1st Cir. 2010).

Finally, in its conclusion, Signal Peak cites § 2-4-611(4), MCA, without explanation or elaboration. While this provision allows for disqualification of a hearing examiner for bias or disqualification by law, such allegations must be raised “not less than 10 days *before* the original date set for the hearing.” *Id.* (emphasis added). While Signal Peak likely intends to stretch the meaning of this statute to allow it to raise such claims at a later time *after* the hearing, the Board (like the Hearing Examiner) is not free to “insert what has been omitted or omit what has been inserted” in a statute. § 2-4-101, MCA. Because this provision limits such requests to the period prior to a hearing, § 2-4-611(4), MCA, is inapplicable. Moreover, Mr. Martin made clear at the status conference that Signal Peak was not

raising any arguments related to the bias or competence of Examiner Buzzas.

Video of Status Conference, at 05:12 to 05:34 (June 2, 2021). Signal Peak is bound by the assertions of its counsel. *Butynski*, 592 F.3d 277.

In sum, because Signal Peak cites no authority other than its own reevaluation of the efficiency of using a hearing examiner, its “request” for the Board to “reclaim” jurisdiction is without any legal basis and should, therefore, be denied. Such baseless motions practice taxes the resources of the Parties and the Board. *See* Mont. R. Civ. P. 1.

**B. Signal Peak’s arguments about efficiency have no merit, given the Hearing Examiner’s diligent review of this case and impending proposed ruling.**

In addition to the foregoing, Signal Peak’s newfound arguments about the supposed efficiency of returning jurisdiction to the Board after a hearing examiner has reviewed the record but prior to a proposed decision are untenable as a matter of fact. Signal Peak premises its argument on the supposed inefficiency of having a hearing examiner start at “square one” or “start from zero” in reviewing this case. Request for Board to Reclaim Jurisdiction at 3, 4, 5. Consequently, the coal company now argues that it will “expedite” the case resulting in a final order “issued in a timely fashion.” *Id.* at 5-6.<sup>4</sup> Notably, Signal Peak chose to delay for

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<sup>4</sup> It bears noting that much of the delay in resolution of this case resulted from Signal Peak’s improperly filed SLAPP suit filed against MEIC and its members.

nearly two months, before filing its “request” on the eve of the Board’s June 11, 2021.

At present, it is clear from Examiner Buzzas’s statements at the status conference that she has been working “quite diligently” on this matter and that a proposed order will likely be issued before the Board’s next meeting in August, in a matter of weeks. Video of Status Conference, at 00:40 to 00:58, 25:08-25:25 (June 2, 2021). As such, Signal Peak’s motion will, if anything, impede efficient resolution of this matter by wasting the months of effort Examiner Buzzas has already put into this case and requiring the Board’s seven members, five of whom were just recently appointed, to begin review of the voluminous record in this case. Signal Peak is requesting a monumental waste of resources. *See* Mont. R. Civ. P. 1 (rules must be construed to secure “just, speedy, and inexpensive determination of every action and proceeding”). Moreover, the redundancy that Signal Peak asserts “may” occur is only possible, not probable. *See* Request for Board to Reclaim Jurisdiction at 5; *cf.* at 6 (stating inaccurately that the Board would be “require[ed]” to review the entire record).<sup>5</sup> As Signal Peak knows, if the Board

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<sup>5</sup> Signal Peak asserts that the Hearing Examiner will somehow lack information “on the prior hearing examiner’s procedural and evidentiary rulings and without the ability to call forth additional information or argument from the parties.” Request for Board to Reclaim Jurisdiction at 3. But the Hearing Examiner does have access to all prior procedural and evidentiary rulings. And, regardless who is hearing examiner, no one can reopen the hearing record to “call forth additional

agrees with the Hearing Examiner's decision, it need not conduct a "review of the complete record." § 2-4-621(4), MCA. And, again, Signal Peak previously agreed with former Member Tweeten that it would be *more* efficient for a hearing examiner to review the record first and issue a proposed ruling. BER Tr. at 47:15-23, 53:1-23 (May 31, 2019). The coal company's shifting positions warrant skepticism.

Signal Peak further contradicts itself when it writes that "[t]his is not a case where the Board requires technical or other support from a Hearing Examiner to distill the scientific or legal questions at issue." Request for Board to Reclaim Jurisdiction at 7. But previously counsel for Signal Peak made the opposite argument: "There are issues, technical legal issues, that you may actually benefit from having Ms. Clerget [the Hearing Examiner] opine on. We have some res judicata issues in this case. They're a bit thorny, I have to admit. And it might be useful for the Board's purposes to have Ms. Clerget explain those issues and opine on them in the first instance." BER Tr. at 53:16-23 (May 31, 2019). Again, the coal company cannot have it both ways.

Finally, Signal Peak argues that the Board should now "reclaim" jurisdiction because of the Board's expertise as "hydrologists, environmental scientists, and

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information." Further, if the hearing examiner desires further oral argument, that option is available. As such, Signal Peak's argument has no merit.



mining lawyers.” Request for Board to Reclaim Jurisdiction at 7. But that was also the case in 2019 when Signal Peak took the opposite position, arguing that the Board should confer jurisdiction on a hearing examiner because it would be helpful to the Board. By law the Board must have members with expertise in hydrology and environmental sciences. § 2-5-3502(2), MCA. As such, this is no valid basis for Signal Peak’s ever-evolving arguments. *Nelson*, ¶¶ 20-22.

### **III. Signal Peak’s attorney’s unsupported attack on the Hearing Examiner’s expertise is both improper and false.**

Thirteen days after filing its “request” for the Board to “reclaim” jurisdiction and two workdays before the due date of MEIC’s response brief, Signal Peak’s attorney, Mr. Martin, filed an affidavit raising still more novel (and inconsistent) arguments for the Board to “reclaim” jurisdiction. Martin Aff. (June 9, 2021). This continued maneuvering is improper, unsupported, and without merit.

First, Mr. Martin asserts that the affidavit is premised on the disqualification provisions of § 2-4-611(4), MCA. Martin Aff., ¶ 26. But as noted, any affidavit under this provision “must be filed not less than 10 days before the original date set for the hearing.” § 2-4-611(4), MCA. The hearing is nearly a year past. As such, Mr. Martin’s affidavit is untimely and therefore procedurally barred by the plain language of the very statute it cites.

Second, Mr. Martin now asserts that Examiner Buzzas should be disqualified because she supposedly lacks “experience with underground mining,

the Montana Strip and Underground Mining and Reclamation Act, MAPA, the technical issues involved in this case, or the unwritten bases for evidentiary rulings<sup>[6]</sup> made by Ms. Clerget in the hearing.” Martin Aff., ¶ 25.<sup>7</sup> But Mr. Martin is once more at war with his own prior statements. At the status conference, Mr. Martin cited one of Examiner Buzzas’s publications in environmental law to support his “absolutely clear” assertion that that the coal company’s position was not “based upon any level of competence” of the hearing examiner because “there is no question, your Honor, but what you’re a competent lawyer.” Video of Status Conference, at 05:12 to 05:34 (June 2, 2021). Signal Peak is bound by Mr. Martin’s judicial admission and may not now shift its position with respect to Examiner Buzzas’s qualifications. *Butynski*, 592 F.3d 277; *Nelson*, ¶¶ 20-22.

Third, Mr. Martin provides absolutely zero evidence for his attacks on the qualifications of Examiner Buzzas, but only cites to his “information and belief.” Martin Aff., ¶ 24. Nor does he provide any evidence beyond vague “information and belief” that Board members “have extensive experience with the requirements

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<sup>6</sup> It is not clear what Signal Peak means by the “unwritten bases for evidentiary ruling.” There is a video recording of the hearing, so any asserted basis for the prior Hearing Examiner’s ruling will be apparent. It is not clear, however, that any such rulings are presently in dispute (Signal Peak cites nothing specific).

<sup>7</sup> Section 2-4-611(4) does not provide for disqualification for lack of expertise, and Signal Peak presents no argument that the Hearing Examiner is somehow disqualified “by law.” This is another basis for rejecting Mr. Martin’s arguments.

of MAPA and MSUMRA.” *Id.*, ¶ 25. Such unsubstantiated attacks on the competence of a Hearing Examiner, like any judicial officer, are improper. *Folsom v. City of Livingston*, 2016 MT 238, ¶¶ 37-40, 385 Mont. 20, 31, 381 P.3d 539, 548 (Shea, J., concurring).

Finally, even cursory review of the Board’s prior meetings and legal publications would demonstrate that, contrary to Mr. Martin’s unsubstantiated allegations, Examiner Buzzas is abundantly qualified to serve as a hearing examiner in this matter. In April the Montana Department of Justice Agency Legal Services Bureau notified the Board of the qualifications of its Hearing Examiners, detailing Examiner Buzzas’s extensive experience in “science and environmental policy,” her service on the Public Lands and Resources Law Review at the University of Montana School of Law, and her prior experience as a hearing administrator.<sup>8</sup> And Mr. Martin—when he previously admitted Examiner Buzzas’s qualifications—stated that he apparently read at least one of Examiner Buzzas’s scholarly publications on environmental law.<sup>9</sup> Video of Status Conference, at 05:12

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<sup>8</sup> Board of Environmental Review Agendas and Minutes, <http://deq.mt.gov/DEQAdmin/ber/agendasmeetings> (follow “AGENDA ITEM I.B” for April 23, 2021, meeting).

<sup>9</sup> *E.g.*, Caitlin Buzzas, *Natural Resources Defense Counsel, Inc. v. Pritzker*, Public Land & Res. L. Rev., Vol. 8, Article 8 (2016), *available at* [https://scholarship.law.umt.edu/plrlr/vol0/iss7/8/?utm\\_source=scholarship.law.umt.edu%2Fplrlr%2Fvol0%2Fiss7%2F8&utm\\_medium=PDF&utm\\_campaign=PDFC](https://scholarship.law.umt.edu/plrlr/vol0/iss7/8/?utm_source=scholarship.law.umt.edu%2Fplrlr%2Fvol0%2Fiss7%2F8&utm_medium=PDF&utm_campaign=PDFC) overPages; Caitlin Buzzas, *EarthReports, Inc. v. FERC*, Public Land & Res. L.

to 05:34 (June 2, 2021). It is thus abundantly clear that Ms. Buzzas is a highly qualified hearing examiner. Mr. Martin's unsupported attacks have no merit and, indeed, are contradicted by his own prior statements.

### CONCLUSION

In sum, Signal Peak's "request" and Mr. Martin's affidavit have no merit and should be denied.

Respectfully submitted this 14th day of June, 2021.

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Rev., Vol. 8, Article 21 (2017), *available at*  
[https://scholarship.law.umt.edu/plrlr/vol0/iss7/21/?utm\\_source=scholarship.law.umt.edu%2Fplrlr%2Fvol0%2Fiss7%2F21&utm\\_medium=PDF&utm\\_campaign=PDFCoverPages](https://scholarship.law.umt.edu/plrlr/vol0/iss7/21/?utm_source=scholarship.law.umt.edu%2Fplrlr%2Fvol0%2Fiss7%2F21&utm_medium=PDF&utm_campaign=PDFCoverPages).

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was delivered  
via email to the following:

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Dated: June 14, 2021.

/s/ Shiloh Hernandez  
Shiloh Hernandez



MONTANA THIRTEENTH JUDICIAL DISTRICT COURT  
YELLOWSTONE COUNTY

SIGNAL PEAK ENERGY, LLC,

Plaintiff,

vs.

MONTANA ENVIRONMENTAL  
INFORMATION CENTER, STATE OF  
MONTANA BOARD OF ENVIRONMENTAL  
REVIEW, ELLEN PFISTER, and STEVE  
CHARTER,

Defendants.

CAUSE NO. DV 18-869

JUDGE DONALD L. HARRIS

ORDER

Signal Peak Energy, LLC seeks a declaratory ruling from this Court that neither the United States Constitution nor Montana's Constitution protects Defendants Ellen Pfister or Steve Charter from complying with subpoenas for discovery Signal Peak issued in Cause No. BER 2016-07 SM. In that case, Defendant Montana Environmental Information Center ("MEIC") has appealed the Montana Department of Environmental Quality's ("DEQ") issuance of a coal mining permit to Signal Peak. The appeal is pending before the Montana Board of Environmental Review ("Board").

1 Signal Peak's subpoenas broadly required Pfister and Charter to produce all  
2 communications, including electronic communications, that they have had with anyone  
3 or any entity about the impact that Signal Peak's underground mining or mining by any  
4 other company has had on their land's water resources. The subpoenas also require  
5 Pfister and Charter to submit to depositions. MEIC, Pfister, and Charter moved to  
6 quash the subpoenas on several grounds, including whether the subpoenas violated  
7 MEIC's, Pfister's and Charter's constitutional rights. The Board's Hearing Examiner,  
8 Sarah Clerget, questioned whether the Board had jurisdiction to decide the  
9 constitutional issues raised by the subpoenas. The parties agree that the constitutional  
10 issues must be decided in District Court. Each party has moved for summary judgment  
11 on whether Signal Peak's subpoenas violate the Defendants' constitutional rights.  
12  
13

## 14 DISCUSSION

### 15 I. Jurisdiction

16 In *Jarussi v. Board of Trustees*, 204 Mont. 131, 135-36, 664 P.2d 316, 318  
17 (Mont. 1983), the Montana Supreme Court held that, "Constitutional questions are  
18 properly decided by a judicial body, not an administrative official, under the  
19 constitutional principle of separation of powers." Whether Signal Peak's subpoenas  
20 violate the Defendants' constitutional rights presents a constitutional question that must  
21 be decided by a court. This Court has both subject matter jurisdiction and personal  
22 jurisdiction to decide this question.  
23

### 24 II. Arguments

25 Defendants MEIC, Pfister, and Charter argue that Signal Peak's subpoenas  
26 violate their First Amendment rights to free speech, assembly, and to petition to redress  
27

1 governmental action under the United States Constitution, Pfister and Charter are  
2 MEIC members. They also own ranches that have been or may soon be adversely  
3 affected by Signal Peak's underground mining operations. They are particularly  
4 concerned about how underground mining will diminish the quantity and quality of the  
5 water they use for living and raising livestock. Pfister and Charter have been vocal  
6 opponents of underground mining for many years, even before Signal Peak took over  
7 mining operations near their property. They contend that Signal Peak's subpoenas  
8 seek irrelevant, inadmissible information and are designed to deter them from  
9 exercising their First Amendment rights.  
10

11 Signal Peak argues: (1) that its subpoenas are within the bounds of acceptable  
12 discovery; (2) that the subpoenas have not and will not discourage the defendants from  
13 exercising their First Amendment rights; and (3) Signal Peak needs the information to  
14 adequately address the issues MEIC now raises in its appeal before the Board. Signal  
15 Peak requests this Court to declare that the subpoenas issued to Pfister and Charter do  
16 not violate their or MEIC's rights under the United States or Montana Constitution.  
17

### 18 **III. The Scope of Proceedings Before the Board.**

19 The Board's review of DEQ's decision to issue a mining permit to Signal Peak is  
20 confined to the record developed before the DEQ. As the Board ruled in MEIC's first  
21 appeal of Signal Peak's mining permit, Signal Peak's initial permit application, Signal  
22 Peak is not entitled to supplement the record with evidence that was not before the  
23 DEQ when it decided to issue Signal Peak's mining permit:  
24

25 65. DEQ and SPE contend that DEQ should be permitted to  
26 support the adequacy of its CHIA and permitting decision with extra-  
27 record evidence, as well as with arguments and analyses that were never  
articulated in the CHIA. As support for its position, DEQ cites *Montana*



1 *Environmental Information Center v. DEQ*, 2005 MT 96, 326 Mont. 502,  
2 112 P.3d 964, and Mont. Code Ann. § 2-4-623(1).

3 66. Under MSUMRA, DEQ's CHIA alone "must be sufficient to  
4 determine, for purposes of a permit decision, whether the proposed  
5 operation has been designed to prevent material damage to the  
6 hydrologic balance outside the permit area." ARM 17.24.314(5). Thus,  
7 the only relevant analysis is that contained within the four corners of the  
8 CHIA and the only relevant facts are those concluded by the agency in the  
9 permitting process before the agency makes its permitting decision.

10 67. Further support for the Board's conclusion is found in ARM  
11 17.24.405(6), which requires DEQ issue written findings based on record  
12 evidence to support its permitting decision. The written findings must be  
13 shared with the interested public. *Id.* 17.24.405(5). These provisions,  
14 which require DEQ to provide specific reasons for its permitting decision  
15 (including those in the CHIA) based on evidence "compiled by the  
16 department," would be rendered a dead letter or hollow formality if, in a  
17 contested case proceeding, DEQ were permitted to present all new  
18 evidence, analysis, and argument to support its permitting decision that  
19 was never compiled in the record, articulated in its CHIA, or made  
20 available to the public. Mont. Code Ann. §1-2-101 (laws should not be  
21 construed in a way that renders other provisions meaningless); see also  
22 *NRDC v. OSM*, 89 I.B.L.A. 1, 29 (1985) ("The recitation of statutory  
23 findings is insufficient if the permit record does not affirmatively  
24 demonstrate that OSM [U.S. Office of Surface Mining] made a [CHIA] of  
25 all anticipated mining in the area and the proposed operation has been  
26 designed to prevent material damage to the hydrologic balance outside  
27 the permit area."); *Id.* At 32 (stating that only the regulatory authority's  
CHIA may satisfy the CHIA requirement).

28 68. Allowing DEQ to present new evidence, analysis, and  
29 argument to support its CHIA and permitting decision would also negate  
30 MSUMRA's goals of public participation. As noted, DEQ must provide the  
31 interested public with written findings based on record evidence  
32 demonstrating, among other things, that "cumulative hydrologic impacts  
33 will not result in material damage to the hydrologic balance outside the  
34 permit area." ARM 17.24.405(5), (6)(c). These provisions allow the public  
35 to oversee DEQ's permitting decision and decide, in turn, whether to  
36 pursue an appeal and contested case. *Id.* 17.24.425(1). The public's  
37 ability to rely on DEQ's express written findings and analysis supporting its  
38 permitting decision is for naught if at the contested case stage, the agency  
39 is permitted to present extra-record evidence and manufacture novel  
40 analysis and argument. See *Friends of the Wild Swan v. DNRC*, 2000 MT  
41 209, ¶ 35, 301 Mont. 1, 6 P.3d 972 ("The public is not benefited by  
42 reviewing an EIS [environmental impact statement] which does not



explicitly set forth the actual cumulative impacts analysis and the facts which form the basis for the analysis.”); cf. *NRDC*, 89 I.B.L.A. at 96-97 (Frazier, Admin. J., concurring)(“Like an environmental impact statement (and for similar reasons), the [CHIA] must ‘explain fully its course of inquiry, analysis, and reasoning,’...” (quoting *Minn. Pub. Interest Research Group v. Butz*, 541 F.2d 1292, 1299-300 (9<sup>th</sup> Cir. 1976))). In effect, DEQ’s position would allow the agency to conceal its actual analysis and evidence until a member of the public makes the significant investment necessary to engage in extensive litigation in a contested case proceeding with the agency.

69. The Board notes that while DEQ asserts the right to provide new evidence, analysis, and argument to support its CHIA, in response to MEIC’s discovery requests about the persistence and expected extent of groundwater pollution, DEQ repeatedly stated that the relevant information was limited to the administrative record existing at the time of the permitting decision and that DEQ was “unable” to provide any information about anticipated groundwater pollution impacts beyond that contained in the record documents. DEQ Discovery Resp. at 20-22. If, as DEQ asserted in its discovery responses, the only relevant evidence is that contained in the permitting record, then extra-record evidence and novel analyses are also not relevant to the determination of the validity of DEQ’s CHIA.

70. This is not to say that DEQ is limited in its permitting defense to presenting the administrative record to the Board and saying no more. DEQ’s counsel may surely present argument to explain and demonstrate that the evidence before the agency at the time of its permitting decision and the analysis within the CHIA satisfy applicable legal standards. **What the agency may not do is present newly developed evidence that was not before the agency at the time of its decision or analysis that was not contained within the CHIA.** See ARM. 17.24.314(5) (stating that the CHIA “must be sufficient” for the material damage determination); *Id.* 17.24.405(6)(c) (stating that the permitting decision must be based on findings “on the basis of information set forth in the application or information otherwise available that is compiled by the department”). (emphasis supplied)

*In Re Bull Mountain Mine No. 1*, No. BER 2013-07 SM at 56-59, (Jan. 14, 2016).

DEQ issued the mining permit that MEIC has appealed in this case on July 16, 2016. Signal Peak’s subpoenas were issued on March 30, 2018, over a

1 year and a half after the record DEQ relied upon in making its decision had been  
2 made.

#### 3 **IV. Constitutional Protections**

4 The First Amendment protects the rights of free speech, assembly, and to  
5 petition to redress governmental action. *NAACP v. Alabama*, 357 U.S. 449, 460-66  
6 (1958). Those same rights are also protected by Mont. Const. art. II, § 6 (freedom of  
7 assembly); Mont. Const. art. II, § 7 (freedom of speech, expression, and press); Mont.  
8 Const. art II, § 8 (right of participation). Montana's Constitution also expressly protects  
9 the right to privacy: "The right of individual privacy is essential to the well-being of a free  
10 society and shall not be infringed without the showing of a compelling state interest."  
11 Mont. Const. art. II, § 10.  
12

13  
14 MEIC, Pfister, and Charter assert that Signal Peak's subpoena violates their  
15 constitutional rights to free speech, assembly, and to advocate against DEQ's issuance  
16 of an underground mining permit to Signal Peak. They argue that the subpoenas  
17 served upon them by Signal Peak were triggered by MEIC's current appeal and are  
18 intended to discourage them from continuing to speak against Signal Peak's mining  
19 operations and from being MEIC members.  
20

21 To support their claims, Pfister, Charter, and Jim Jensen, MEIC's Executive  
22 Director, have submitted Declarations. Those Declarations sufficiently establish that  
23 Signal Peak's subpoenas have had and will continue to have a chilling effect on MEIC  
24 and its members by seeking their private communications, subjecting them to  
25 expensive and time-consuming litigation, and targeting them for advocating against  
26 Signal Peak's mining operations. The Court finds that the Declarations satisfy the  
27



1 Defendants' initial burden of establishing a *prima facie* case that the discovery  
2 requested by Signal Peak will have a chilling effect on the Defendants' Constitutional  
3 rights of free speech, assembly, to petition for redress of governmental action, and  
4 privacy. *Perry v. Schwarzenegger*, 591 F.3d 1147, 1163 (9<sup>th</sup> Cir. 2010).

5  
6 The Pfister and Charter Declarations demonstrate that the documents and  
7 depositions sought by Signal Peaks subpoena: (1) would discourage Pfister and  
8 Charter from communicating with MEIC and other MEIC members about coal mining  
9 and the DEQ's oversight; (2) would deter them for speaking publicly against Signal  
10 Peak or other business interests that threaten to harm the environment; (3) would  
11 diminish their willingness to continue as MEIC members; (4) would likely subject them  
12 to retaliation and/or public hostility from pro-mining individuals and groups; and (5)  
13 would threaten their livelihood as ranchers.

14  
15 MEIC's Declaration demonstrates that Signal Peak's subpoenas: (1) will  
16 significantly impair MEIC's ability to attract and maintain members; (2) will decrease its  
17 ability to protect the environment from harmful energy development; (3) will chill open  
18 communication between MEIC and its members; and (4) will cause other MEIC  
19 members to refuse to speak publicly against Signal Peak's mining operations.

20  
21 It is well-established that, "Effective advocacy of both public and private points of  
22 view, particularly controversial ones, is undeniably enhanced by group association."  
23 *NAACP v. Alabama*, 357 U.S. 1, 15 (1976). Via the Fourteenth Amendment, the First  
24 Amendment applies to state action such as the discovery sought by Signal Peak's  
25 subpoena. *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973); *Perry*, 591 F.3d at 1159-60.  
26  
27 Once a *prima facie* showing is made that such discovery "will result in (1) harassment,

1 membership withdrawal, or discouragement of new members, or (2) other  
2 consequences which objectively suggest an impact on, or 'chilling of', the members'  
3 associational rights," then only a compelling state interest and the absence of any less  
4 restrictive means to obtain the information will suffice to justify infringing upon First  
5 Amendment rights. *Perry*, 591 F.3d at 1160-61.

7 **V. Compelling Interest and Unavailability.**

8 To prevail, Signal Peak must demonstrate a compelling need for the information  
9 it has subpoenaed and that the information is unavailable elsewhere. Signal Peak must  
10 show more than whether the information is discoverable under the Rule 26(b)(1),  
11 M.R.Civ.P. Rule 26(b)(1) only requires that the information sought be reasonably  
12 calculated to lead to the discovery of admissible evidence. To infringe upon  
13 constitutional rights, however, Signal Peak must demonstrate that the information  
14 sought through discovery is not only highly relevant, but that the information is not  
15 available from another source. *Id.* at 1161-62.

17 The Court finds that the information Signal Peak seeks to discover by subpoena  
18 is not discoverable under Rule 26(b)(1), is not highly relevant, and is available from  
19 another source. The Board's review of DEQ's decision to issue a mining permit to  
20 Signal Peak is confined to the record that existed when the DEQ made its decision.  
21 Through discovery, Signal Peak seeks to supplement that record with additional facts it  
22 hopes to learn through the subpoenas. In a previous ruling, however, the Board has  
23 made it quite clear that it will not permit Signal Peak or any other party to supplement  
24 the record on appeal. Signal Peak's subpoenas will not lead to the discovery of  
25 admissible evidence because the factual record has already been made.  
26  
27



1 Nor can the information Signal Peak now seeks to discover from Pfister and  
2 Charter be highly relevant or unavailable from another source. To the extent the DEQ  
3 considered or relied upon any information Pfister or Charter provided, it is already part  
4 of the record or in DEQ's possession. Signal Peak either already has this information  
5 or can readily obtain it from the DEQ. To the extent the DEQ did not rely upon any  
6 information from Pfister or Charter in making its decision, any information they might  
7 have is irrelevant.  
8

9 Finally, on December 6, 2017, in a Status Report filed with the Hearing  
10 Examiner, Signal Peak represented that all discovery had been completed except for  
11 expert depositions of Peter Mahrt, Mark Hudson, and Dr. Michael Nicklin. Depositions  
12 of Pfister and Charter were not mentioned. Yet, as set forth in Signal Peak's brief,  
13 Signal Peak has been acutely aware of Pfister's and Charter's pre-permit and post-  
14 permit opposition to Signal Peak's mining operations. If Signal Peak genuinely believed  
15 that Pfister or Charter had discoverable information that was highly relevant to MEIC's  
16 appeal, then Signal Peak would not have represented to the Hearing Examiner in  
17 December 2017 that only three expert depositions remained to be taken. The timing of  
18 Signal Peak's subpoenas and this lawsuit leads credence to the Defendants' claims  
19 that Signal Peak is using litigation to retaliate against their opposition to Signal Peak's  
20 mining operations.  
21  
22

23 **VI. State Constitutional Protections.**

24 Though the parties have focused their arguments on the constitutional  
25 protections guaranteed under the First Amendment, the Court finds that the  
26 Defendants' rights to privacy, freedom of speech and assembly, and participation under  
27

1 Montana's Constitution are impermissibly infringed by Signal Peak's subpoenas.

2 Montana's Constitution "affords citizens broader protection of their right to  
3 privacy" than the U.S. Constitution. *Gryczan v. State*, 283 Mont. 433, 448, 942 P.2d  
4 112, 121 (1997). Montana's Constitution expressly recognizes and protects the right to  
5 privacy. Mont. Const. art. II, § 10. As a result, the Montana Supreme Court has held  
6 that an individual's privacy shall not be infringed without the showing of a compelling  
7 state interest. *State v. Bullock*, 272 Mont. 361, 383, 901 P.2d 61, 75-76 (1995).

9 Under Montana's Constitution, the information subpoenaed by Signal Peak is  
10 within the Defendants' right to privacy if: (1) the person(s) claiming the right have a  
11 subjective or actual expectation of privacy; and (2) society is willing to recognize that  
12 subjective or actual expectation as reasonable. *Bullock*, 272 Mont. at 375, 901 P.2d at  
13 70 (citing *Katz v. United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 516 (1967)). First, the  
14 Court finds that the Defendants have an actual expectation of privacy in their  
15 communications with MEIC and its members because those communications occurred  
16 in private. *E.g.*, *State v. Solis*, 214 Mont. 310, 314, 693 P.2d 518, 520 (1984).

18 Second, society recognizes that Defendants' expectation of privacy is  
19 reasonable. Courts have routinely denied discovery requests that would have a chilling  
20 effect on an advocacy organization's ability to communicate with or retain members.  
21 *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010) (granting protective order  
22 against discovery of an advocacy organization's "internal campaign communications");  
23 *Lighthouse Res., Inc. v. Inslee*, No. 3:18-CV-05005-RJB, 2018 U.S. Dist. LEXIS 127064  
24 (W.D. Wash. July 30, 2018) (granting protective order against disclosure of advocacy  
25 organization's "internal documents" such as plans or policies communicated within the  
26  
27



1 organization); *Pebble Ltd. P'ship. v. EPA*, 310 F.R.D. 575.(D. Alaska 2015) (quashing  
2 subpoenas seeking discovery from organizations advocating in a federal agency  
3 determination under the Clean Water Act); *Muslim Cmty. Ass'n of Ann Arbor v. Pittsfield*  
4 *Township*, No. 12-CV-10803, 2014 U.S. Dist. LEXIS 184684 (E.D. Mich. July 2, 2014)  
5 (quashing a subpoena to depose a citizen who had advocated to a decision-making  
6 body against the subpoenaing party's interests). Under Montana's Constitution, the  
7 Defendants have a right to privacy for their internal communications. Signal Peak has  
8 failed to demonstrate a compelling interest for infringing upon that right or upon their  
9 rights to free speech, assembly, and participation.  
10

11 **VII. Signal Peak's Subpoenas are Unwarranted and Oppressive.**

12  
13 Signal Peak argues that the minimal impact its subpoenas will have on Pfister  
14 and Charter is outweighed by Signal Peak's right to discover the basis of any new  
15 information that MEIC might present on appeal. Signal Peak contends any new  
16 information MEIC presents is likely to come from Pfister or Charter given the location of  
17 their ranches and their outspoken opposition to Signal Peak's mining operations.  
18

19 As discussed earlier, the Board has already ruled that an appeal of DEQ's  
20 decision to issue Signal Peak a mining permit must be confined to the record before the  
21 DEQ when DEQ made its decision. Neither Signal Peak nor MEIC is permitted to  
22 supplement that record with new information on appeal. Signal Peak's concern that  
23 MEIC will supplement the record with new information from Pfister or Charter is  
24 misplaced.  
25

26 The Court also disagrees that Signal Peak's subpoenas will have little impact  
27 upon Pfister or Charter. Pfister and Charter are members of MEIC. They are not MEIC

1 officers, directors, or employees. They did not appeal DEQ's issuance of the mining  
2 permit to Signal Peak and MEIC is not calling them as witnesses. If Pfister or Charter  
3 provided any information that the DEQ relied upon as establishing relevant facts for its  
4 decision to issue Signal Peak's mining permit, that information is already part of the  
5 record. It is far from clear, however, whether the DEQ relied upon any information from  
6 Pfister or Charter. For example, the information about water flows for Bull Spring on  
7 Pfister's land was garnered from well monitoring data, not from Pfister.

9 It appears that Pfister and Charter contributed little or no relevant information  
10 that the DEQ relied upon in issuing Signal Peak a mining permit. The DEQ issued the  
11 mining permit despite their opposition. Nonetheless, Pfister and Charter find  
12 themselves in the cross hairs of Signal Peak's subpoenas. Those subpoenas seek all  
13 communications Pfister and Charter have ever had with any:  
14

15 ...person, partnership, corporation, association, or other legal entity or any  
16 political subdivision or agency of the state or federal government,  
17 concerning impacts to water resources located on your land, including  
18 springs, seeps, wells, and streams, that you claim have resulted from  
underground mining by Signal Peak Energy, LLC or any other mining  
company in the vicinity of the Bull Mountain Mine No. 1.

19 In equally broad language the subpoenas also seek all written or electronic  
20 evidence of impacts to water resources, including historical flow rates on Pfister's and  
21 Charter's land, that they believe resulted from underground mining by Signal Peak or  
22 any other mining company. But that's not all. Signal Peak's subpoenas also require  
23 Pfister and Charter each to submit to depositions that can last up to seven hours.

25 In depositions, Signal Peak will likely question Pfister and Charter about every  
26 conversation they have had with their family, friends, acquaintances, MEIC members,  
27 MEIC employees, governmental employees, Signal Peak employees, employees of any



1 other mining companies, and employees of other businesses/professions that might  
2 have been related to their ranching operations, water resources, and opposition to  
3 underground mining. Such questioning will require Pfister and Charter to reveal their  
4 political associations and to identify others they know who oppose Signal Peak's mining  
5 operations, but do not wish to publicly express their view. Far from having minimal  
6 impacts, Signal Peak's subpoenas will eviscerate Pfister's and Charter's ability to have  
7 private conversations with other MEIC members. In addition, being subject to seven  
8 hours of deposition questioning is a significant burden, and, under these circumstances,  
9 constitutes an impermissible infringement on Pfister's and Charter's fundamental rights  
10 to free speech, assembly, to petition to redress governmental action, and privacy under  
11 the United States and Montana Constitutions.  
12

#### 13 CONCLUSION

14  
15 For the reasons discussed above, the Court **GRANTS** the Defendants' Motion  
16 for Summary Judgment and **DENIES** Signal Peak's Motion for Summary Judgment.

#### 17 ATTORNEYS FEES AND COSTS

18 On or before November 30, 2018, the Defendants' shall file a motion with a  
19 supporting brief and necessary affidavits setting forth the legal basis for and amount of  
20 the attorneys' fees and costs Defendants MEIC, Pfister and Charter are seeking to  
21 recover. Signal Peak shall have 14 days to file its response. The Defendants shall  
22 have 7 days to file a reply. If necessary, the Court will set a hearing on the Defendants'  
23 motion. With regard to the amount of fees and costs being sought, Signal Peak shall  
24 specifically identify those fees and costs to which it objects and those fees and costs to  
25 which it does not object. If Signal Peak objects to the amount of attorneys' fees and  
26  
27

1 costs being sought by the Defendants, Signal Peak shall furnish the Defendants with all  
2 statements for attorneys' fees and costs it has received from the counsel it retained on  
3 this case for their fees and costs incurred during the same time period that the  
4 Defendants are seeking to recover attorneys' fees and costs. Signal Peak may redact  
5 from those statements all information protected from disclosure by the attorney/client  
6 privilege or work product doctrine. Unredacted copies, however, shall be provided to  
7 the Court and filed under seal. All such statements shall be furnished and filed on or  
8 before Signal Peak's response brief is due.  
9

10 DATED this 14<sup>th</sup> day of November, 2018.

11  
12  
13   
14 DONALD L. HARRIS, District Court Judge

15 cc: William W. Mercer/Samuel R. Yemington, Holland & Hart, P O Box 639, Billings, MT 59103  
16 John C. Martin, Holland & Hart, Holland & Hart, P O Box 68, Jackson, WY 83001  
17 Shiloh Hernandez, Western Environmental Law Center, 103 Reeder's Alley, Helena, MT 59601  
18 L. Randall Bishop, 601 E. Central Avenue, Missoula, MT 59801  
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06/23/2020

Bowen Greenwood  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Case Number: DA 19-0299

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 19-0299

SIGNAL PEAK ENERGY, LLC,

Plaintiff and Appellant,

v.

MONTANA ENVIRONMENTAL INFORMATION  
CENTER, STATE OF MONTANA BOARD OF  
ENVIRONMENTAL REVIEW, ELLEN PFISTER,  
and STEVE CHARTER,

Defendants and Appellees.

FILED

JUN 23 2020

Bowen Greenwood  
Clerk of Supreme Court  
State of Montana

ORDER

In this matter, Signal Peak, LLC (Signal Peak) has appealed from an order granting summary judgment to Defendants Montana Environmental Information Center (MEIC), State of Montana Board of Environmental Review (BER), Ellen Pfister (Pfister), and Steve Charter (Charter) (collectively, Defendants) on Signal Peak's complaint for declaratory relief concerning a discovery dispute that arose in a BER contested case. However, upon a review of the parties' briefing and the administrative record, we have concluded that procedural irregularities and unresolved administrative issues prohibit the Court from proceeding on the appeal, including reaching the merits of pending constitutional issues, and that the case must be remanded for further proceedings before the agency.

On August 11, 2016, MEIC filed a Notice of Appeal and Request for Hearing ("AM3 appeal") with BER challenging the Department of Environmental Quality's (DEQ) issuance of a coal mining permit to Signal Peak in 2013. Pfister and Charter had provided comments during the permitting process, are members of MEIC, and separately own surface lands located above the mining operations proposed by Signal Peak in its AM3 application. After a series of discovery disputes between the parties that required the



extension of discovery deadlines, the hearing examiner issued a scheduling order in the AM3 appeal that required remaining discovery to be completed by April 30, 2018.

On March 30, 2018, Signal Peak issued deposition notices and subpoenas duces tecum for Pfister and Charter, requiring they produce any written communications between them and entities or associations concerning impacts to water resources located on their surface lands. MEIC moved to quash the deposition notices and subpoenas on April 17, 2018, arguing that the depositions were inappropriate, unduly burdensome, overbroad by seeking information that had not been before the DEQ in the permitting process, improperly seeking privileged communications between MEIC and its members, and violative of Pfister's and Charter's constitutional rights to associate and petition the government for redress of grievances. Pfister and Charter joined MEIC's objections, and Signal Peak opposed the motion to quash.

The hearing examiner conducted a hearing on the motion on May 23, 2018, which essentially was a discussion between counsel for the parties and the examiner. Except for a later order simply staying the discovery deadlines pending resolution of the litigation that the parties would subsequently commence in the District Court, no written order was entered by the hearing examiner regarding the discovery issues and objections raised by the parties. The record captures only counsel's discussion with the hearing examiner about the requested depositions, particularly, the hearing examiner's concern about the constitutional issues raised within MEIC's motion to quash the depositions:

[A]s a preliminary matter, I have one issue that's burning for me that I want you all to address. . . based on Montana Supreme Court case law, and specifically there is the Jarussi case and there are several others that discuss the separation of powers issue between MAPA and agencies deciding constitutional issues. In my understanding, I have no jurisdiction to decide constitutional issues and my inclination, unless you folks can convince me otherwise, is that that is a question for the District Court to resolve;

So I guess what I need from you then, from potentially everybody, is a practical solution about how we're going to deal with this First Amendment problem and the jurisdiction piece of it;

[I]f we can fashion a solution here that [will] deal with the concerns without having to go to District Court, that would obviously be preferable. But if you're going to go to the District Court anyway *if the decision is anything other than a grant of the motion to quash*, then you might need to bring the First Amendment problems to District Court and you can deal with them anyway. *So practically, I need you all to tell me whether you want a decision from me on this or whether you want me to stay the underlying decision, or the underlying case while you go to District Court.* . . . I will give you all until next Friday. I'm not going to issue an order on this, so just orally I will give you until next Friday to provide me with supplemental briefing all at the same time. . . . *My inclination is to not address the First Amendment or to make a record as to why I'm not addressing it, why I don't think it has to be addressed, it can be avoided, and then to make the ruling on the burden and the other issues.* [(Emphasis added)].

The hearing examiner inquired whether MEIC would withdraw its constitutional challenges, apparently believing this would permit the examiner to enter an order on “the other issues,” namely, the non-constitutional grounds raised for quashing the deposition and subpoenas, but MEIC declined, stating that the “First Amendment concerns here are paramount.” MEIC did advance alternative, non-constitutional arguments that the subpoenas sought privileged communications, sought information not presented to DEQ that would be “reopening” the record, were retaliatory, and overly burdensome. In the discussion, Signal Peak and MEIC appeared to agree that the discovery requests could be modified to be less burdensome, but also appeared to view the constitutional issues as primary. The hearing examiner ordered supplemental filings and, on June 1, 2018, the date the supplemental submissions were due, Signal Peak filed a status report that concurred with MEIC that “the [h]earing [e]xaminer and the Board of Environmental Review lack jurisdiction to decide the constitutional issue that the [Defendants] advanced in [their] Motion to Quash,” but contended the Defendants had “presented no legitimate ground for the putative deponents to avoid their obligations to respond to discovery.”

As noted, no written order was entered by the hearing examiner on either the constitutional or non-constitutional issues raised by the Defendants' motion to quash, and

after careful review of the record, we can discern no oral ruling on these issues either. In its briefing to this Court, Signal Peak offers that the hearing examiner “implicitly declin[ed] to quash the subpoena on the other grounds raised by MEIC, not[ing] that the remaining constitutional issue could only be addressed by the judiciary, not by the executive branch,” but we are hard pressed to discern even an implicit ruling. Rather, it appears the hearing examiner was focused on resolution of the “jurisdiction piece of it,” that is, the constitutional issues that the agency did not have jurisdiction to resolve, and directed the parties to proceed to the courts for a decision on those issues. Despite expressing an inclination, the hearing examiner never did “make the ruling on the burden and the other issues.” If Signal Peak’s assessment of an implicit ruling was correct, Signal Peak would have been the prevailing party before the hearing examiner, and yet it was Signal Peak, not MEIC, that initiated litigation by filing a Complaint for Declaratory Judgment before the District Court seeking a declaration that “complying with discovery would not infringe the Defendants’ constitutional rights and order the Parties to abide by applicable rules and respond to discovery.” More importantly, no one in this matter seemed to recognize that resolution of the non-constitutional objections to the discovery by the hearing examiner was a prerequisite to reaching the constitutional objections. A ruling that the depositions were improper on these non-constitutional grounds may well have mooted the constitutional objections.

At a minimum, the hearing examiner was presented with arguments concerning: the legality of additional discovery at this stage of the proceeding; the scope and burden of the requested subpoenas and depositions; the potentially privileged communications that would be encompassed by requests for communications between Pfister, Charter, and the associations; and the standing of MEIC to file a motion to quash on behalf of its members. As a consequence of the failure to resolve these non-constitutional discovery issues, this Court has been presented with arguments about administrative procedure for which there is no final ruling from the agency, or any ruling at all, that provides the agency’s decision and rationale, including its interpretation of governing statutes and regulations. For

example, the parties argue at length about the scope of review for BER proceedings, with Signal Peak contending that “the BER is *not* ‘confined to the record’ relied on by DEQ, but must receive evidence on any issue raised in the permitting process,” citing Admin. R. M. 1.3.217-221 and 1.3.230 (2020), and *MEIC v. DEQ*, 2005 MT 96, ¶¶ 13, 22-25, 326 Mont. 502, 112 P.3d 964. Defendants respond that “the only relevant analysis [for a permit appeal] is that contained within the four corners of the [technical review]. . . . BER is unambiguous that extra-record evidence is not allowed,” citing § 82-4-227(3)(c), MCA, Admin. R. M. 17.24.405(6), and an administrative decision in *In re Bull Mountains*, No. BER 2013-07 SM, 56-57 (Mont. BER, Jan. 14, 2016). The District Court decided these administrative issues without the benefit of an agency decision or rationale about the agency’s application of its regulations, and then proceeded to decide the constitutional issues.

While it is correct that the agency cannot resolve constitutional issues, *Jarussi v. Board of Trustees*, 204 Mont. 131, 135-136, 664 P.2d 316, 318 (1983), the administrative scope of review issue presented here, as well as the discovery issues that lie within the hearing examiner’s discretionary governance, such as whether requested depositions are overly burdensome, must first be addressed and resolved by the agency before judicial review of any constitutional questions can be undertaken. Otherwise, the parties are seeking an advisory opinion from the courts on constitutional questions that may never be ripe or dispositive. “We have repeatedly recognized that courts should avoid constitutional issues whenever it is possible to decide a case without reaching constitutional considerations.” *In re G.M.*, 2008 MT 200, ¶ 25, 344 Mont. 87, 186 P.3d 229 (internal citation omitted). Further, “[t]he well-settled principle undergirding the exhaustion doctrine is that ‘no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.’” *Shoemaker v. Denke*, 2004 MT 11, ¶ 18, 319 Mont. 238, 84 P.3d 4 (internal citation omitted). Consequently, it is necessary to remand this matter for completion of the necessary administrative process by the agency. Therefore,

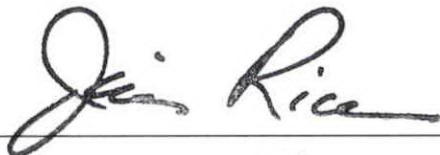

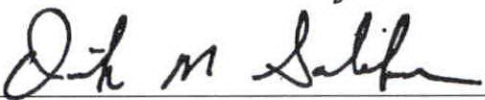

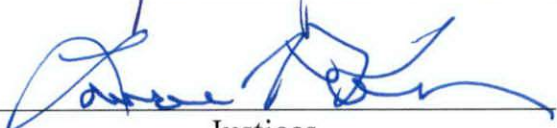


IT IS ORDERED that this appeal is DISMISSED WITHOUT PREJUDICE. The judgment of the District Court is VACATED.

IT IS FURTHER ORDERED that this matter is REMANDED to BER for further proceedings consistent with this order.

The Clerk is directed to provide a copy of this Order to counsel of record, to the Thirteenth Judicial District Court, and BER.

DATED this 23<sup>rd</sup> day of June, 2020.

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

<p>IN THE MATTER OF:</p> <p>APPEAL AMENDMENT          APPLICATION AM3, SIGNAL          PEAK ENERGY LLC'S BULL          MOUNTAIN MIN NO. 1, PERMIT          NO. C1993017</p>	<p>Case No. BER 2016-07 SM</p> <p><b>PETITIONER'S EXCEPTIONS TO          HEARING EXAMINER'S          PROPOSED FINDINGS OF FACT          AND CONCLUSIONS OF LAW</b></p>
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## INTRODUCTION

Petitioner Montana Environmental Information Center (MEIC) takes exception to the Proposed Findings of Fact and Conclusions of Law (Proposed Findings and Conclusions) prepared by the Hearing Examiner. First, the Proposed Conclusions of law suffer multiple systemic flaws. They fail entirely to address the legal basis of MEIC's claims—Administrative Rule of Montanan (ARM) 17.24.405(6)(a)—and they impose an unlawful and “impossible” burden of proof. Under any lawful burden of proof, the competent evidence presented at hearing demonstrates that the Department of Environmental Quality's (DEQ) analysis of replacement water quantity, quality, and legal availability was unlawful and irrational.

The Proposed Findings of Fact similarly suffer from systemic errors. They fail to lawfully address each of MEIC's proposed findings. They further neglect to address critical lines of evidence, including DEQ's and Signal Peak Energy's (SPE) decade-long, continuing violation of the design standards for assessing impacts to surface waters; SPE's admission that replacement water needs exceed 100 gallons per minute (gpm), which the chosen replacement water source cannot supply; and DEQ's admission that the analysis of replacement water in DEQ's permitting decision was plainly mistaken. These errors are fatal. In addition,

multiple proposed findings are unsupported by substantial, competent evidence or lawful procedure, as elaborated below.

## **ARGUMENT**

### **I. STANDARDS OF REVIEW**

Under the Montana Administrative Procedure Act (MAPA), a party adversely affected by a proposed decision may submit “exceptions and present briefs and oral argument to those who are to render the decision.” Mont. Code Ann. § 2-4-621(1). At this stage of the review process, DEQ is not afforded any measure of deference by the Montana Board of Environmental Review (Board). *MEIC v. DEQ (MEIC I)*, 2005 MT 96, ¶¶ 18-26, 326 Mont. 502, 112 P.3d 964 (rejecting argument in permit appeal that the Board should review DEQ’s decision “with deference”).

When a hearing examiner issues a proposed decision, the Board reviews both legal conclusions and findings of fact:

The agency may adopt the proposal for decision as the agency’s final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

Mont. Code Ann. § 2-4-621(3).

Under the Montana Strip and Underground Mine Reclamation Act (MSUMRA), review of DEQ’s decision to issue a strip-mining permit is strictly limited to the analysis in the agency’s permitting documents. *In re Bull Mountains Mine*, No. BER 2013-07 SM, at 56-59 (Mont. Bd. of Env’tl. Rev. Jan. 14, 2016).

At the next stage, on judicial review, courts afford a degree of deference to agency decisions “that require scientific expertise or are highly technical in nature.” *DeBuff v. DNRC*, 2021 MT 68, ¶ 24, 403 Mont. 403, 482 P.3d 1183. This deference, however, is limited. Courts will conduct a “thorough and careful review of the administrative record” and will defer only to “consistent, rational, and well-supported agency decision-making.” *Id.* (quoting *MEIC v. DEQ (MEIC II)*, 2019 MT 213, ¶ 26, 397 Mont. 161, 451 P.3d 493)). “This requires that an agency cogently explain why it has exercised its discretion in a given manner.” *Id.* (cleaned up) (quoting *MEIC II*, ¶ 97). An agency’s “decision must be judged on the grounds and reasons set forth in the challenged” decision documents—“no other grounds should be considered.” *MTSUN, LLC v. Mont. Dep’t of Pub. Serv. Regul.*, 2020 MT 238, ¶ 51, 401 Mont. 324, 472 P.3d 1154.

## **II. EXCEPTIONS TO PROPOSED CONCLUSIONS OF LAW**

### **A. The Proposed Findings fail to address MEIC’s legal claims.**

The Proposed Findings and Conclusion arbitrarily fail to consider “all relevant factors.” *DeBuff*, ¶ 41. Failure to address an important element of a party’s

claim is grounds for reversing an agency's decision. *Id.* ¶¶ 42-44. An agency may not simply ignore a party's position. *Green v. Shalala*, 51 F.3d 96, 101 (7th Cir. 1995).

MEIC's central claim in this permit appeal is that DEQ and Respondent SPE failed to comply with ARM 17.24.405(6)(a), which provides:

The department may not approve an application submitted pursuant to ARM 17.24.401(1) unless *the application affirmatively demonstrates and the department's written findings confirm*, on the basis of information set forth in the application or information otherwise available that is compiled by the department, that:

(a) the application is complete and accurate, that the applicant has complied with the Act and rules, and that *the applicant has demonstrated reclamation can be accomplished ....*

*Id.* (emphasis added); Notice of Appeal at 1-3 (Aug. 11, 2016); Pet'r's Proposed FOFCOL at 49, ¶ 42 (Dec. 18, 2020). The Proposed Findings and Conclusions, however, fail entirely to address this legal provision. *See generally* Proposed FOFCOL at 1-55. Instead of addressing the analytical mandate for the "applicant [to] demonstrate[] [that] reclamation can be accomplished," the Proposed Findings focus on the much less demanding provision for applicants to supply "baseline information" about water supplies that "could be developed." Proposed Findings at 7 (citing ARM 17.24.304(1)(f)(iii)); *see also id.* at 8, 38, 43, 46, 47, 50, 54. While "could" denotes mere possibility, "can" denotes the demonstrated ability to accomplish reclamation. This systemic failure to address MEIC's actual claim is

arbitrary and unlawful, undermining the Proposed Findings and Conclusions in their entirety.

**B. The Proposed Findings and Conclusions created and imposed an unlawful and impossible standard of proof.**

The Proposed Findings and Conclusions must be rejected because they would create what is literally an impossible legal standard: to succeed on their claim that SPE and DEQ had not met their burden to “affirmatively demonstrate[]” that “reclamation can be accomplished,” the Proposed Findings and Conclusions require MEIC to affirmatively demonstrate that replacement water “could *not* be used to replace” impacted water resources, i.e., that there are “barriers that would make getting [replacement] water impossible.” Proposed FOFCOL at 43, 45.

Aside from citations to a prior hearing examiner’s summary judgment ruling, which has no precedential value, the Proposed Findings cite no authority for this standard, which is akin to requiring a criminal defendant to prove their innocence. It is simply incorrect. By statute, the burden is on the permit applicant and regulatory authority to show that reclamation can be accomplished. Even if this burden shifts during administrative review—which MEIC disputes (as elaborated below)—the burden on the permit challenger is not to marshal evidence to demonstrate that reclamation is impossible, but rather to demonstrate that applicant’s evidence of reclamation was insufficient or that DEQ’s analysis was irrational.



A hypothetical example demonstrates the fundamental flaw of the burden imposed by the Proposed Findings and Conclusions. If an applicant submitted *no* evidence regarding reclamation, but DEQ nevertheless approved the permit, that would plainly violate ARM 17.24.405(6)(a), which requires the applicant to demonstrate that reclamation can be accomplished. Yet under the standard imposed by the Proposed Findings and Conclusions, a challenge to that decision would necessarily fail unless the challenger marshaled the detailed hydrologic and engineering evidence required to demonstrate that reclamation is “impossible.” This turns the precautionary approach of MSUMRA, which prohibits mining unless the applicant affirmatively demonstrates that environmental harm will not occur, on its head. *See* ARM 17.24.405(6); Mont. Code Ann. § 82-4-227(1). The plain language of MSUMRA and controlling precedent, including the Board’s prior ruling on this very matter, refute the burden of proof created by the Proposed Findings and Conclusions.

1. MSUMRA places the burden of proof on DEQ and SPE to show that reclamation of water resources can be accomplished.

The governing statute does not permit the standard of proof conceived by the Proposed Findings and Conclusions. MSUMRA establishes a precautionary approach to coal mining by which mining may not be permitted unless and until the mine applicant demonstrates that environmental harm will not occur. Thus,

MSUMA expressly places the burden of proof on the applicant to demonstrate compliance with the law. Mont. Code Ann. § 82-4-227(1) (“The applicant for a permit or major revision has the burden of establishing that the application is in compliance with this part and the rules adopted under it.”). The applicant and DEQ specifically carry the burden of “affirmatively demonstrat[ing]” that “reclamation can be accomplished.” ARM 17.24.405(6)(a).<sup>1</sup> This is, in effect, a preponderance of the evidence standard. *See Steadman v. SEC*, 450 U.S. 91, 100-02 (1981) (adopting preponderance of evidence for adjudication under federal Administrative Procedure Act).

This is consistent with the leading academic publication on the federal Surface Mining Control and Reclamation Act (SMCRA), with which MSUMRA must comply.<sup>2</sup> McElfish & Beier, *Env’tl Law Instit*, *Environmental Regulation of Coal Mining* at 55 (1990) (“The burden is on the applicant to demonstrate that reclamation ... is feasible. An applicant must provide specific details of both the proposed mine operation and the reclamation activities. This forces the operator to identify potential environmental effects before mining begins.”); *id.* at 61 (“The

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<sup>1</sup> As noted above, the Proposed Findings ignore this provision, on which MEIC’s claim is based, entirely.

<sup>2</sup> State laws that are inconsistent with SMCRA are “superseded” by the federal standard. 30 U.S.C. § 1255(a); *Trustees for Alaska v. Gorsuch*, 835 P.2d 1239, 1242 (Alaska 1992).

applicant must bear the burden of demonstrating that the operation can avoid adverse consequences so that reclamation is feasible.”). Thus, it is the burden of the applicant and DEQ to demonstrate that “reclamation can be accomplished.” ARM 17.24.405(6)(a). It is emphatically not the burden of the public to demonstrate that reclamation is “impossible.” Proposed FOFCOL at 45. The Proposed Findings’ assertion, based on the prior summary judgment ruling, that these standards are equivalent is mistaken. Consider again the familiar criminal law analogy: the prosecution’s burden to prove guilt beyond a reasonable doubt is not equivalent to requiring the accused to prove their innocence.

The correct operation of this burden of proof in a permit appeal, as here, is demonstrated by this Board’s recent decision in *In re Bull Mountains*, No. BER 2013-07 SM. There DEQ and SPE argued that the mine would not cause material damage because any damaged water supplies could be replaced and reclaimed. *Id.* at 84. This Board rejected the argument because of uncertainties about the physical and legal availability of replacement water. *Id.* at 85 (finding argument for water replacement “illusory” because of “multiple physical and legal barriers to using the deep underburden aquifer as a source of mitigation water”). Thus, this Board explained that “the mere possibility of mitigation is not sufficient.” *Id.* Citing the “affirmatively demonstrates” language from ARM 17.24.405(6), the Board concluded that, in light of the burden of SPE and DEQ to prove that environmental

harm will not occur, a showing by SPE and DEQ that replacement water “may (or may not)” be available “does not satisfy the legal standard of MSUMRA.” *In re Bull Mountains*, No. BER 2013-07 at 86.

The Montana Supreme Court’s decisions under the analogous Montana Water Use Act (MWUA) demonstrate that the burden of proof established for a permit applicant *remains with the applicant* in a contested case challenging the permitting decision. Under the MWUA, like MSUMRA, an applicant for a permit has the burden of proving that certain environmental harms will not occur. Mont. Code Ann. § 85-2-311(1) (requiring that “applicant proves by a preponderance of the evidence that [certain] criteria are met”); *see* Mont. Code Ann. § 82-4-227(1). In *Bostwick Properties, Inc. v. DNRC*, 2013 MT 48, ¶ 36, 369 Mont. 150, 296 P.3d 1154, the Court explained that the statutory burden of proof remains with the applicant to show that environmental harm will not occur and does not shift in a contested case over a permitting decision. Consistent with the Board’s analysis in *In re Bull Mountains*, the Court explained that the agency should “deny a permit where uncertainty exists” about potential environmental effects; thus, uncertainty is a basis for denying, not granting, a permit. *Bostwick*, ¶¶ 34-36. The Court repeated this analysis in *DeBuff*, ¶ 39, explaining that in a contested case challenging a water use permitting decision, the burden “remained” with the applicant to prove environmental harm would not result. So too here. Indeed, the

legislative history of SMCRA, on which MSUMRA is modeled, is explicit on this point: the “applicant is required to ... assume, if a public hearing is held [on a permit, i.e., a contested case], the burden of proving that the application is in compliance with State and Federal laws.” S. Rep. No. 95-128, at 80 (1977).

In sum, the Proposed Findings and Conclusions improperly flip the burden of proof by requiring MEIC to prove that reclamation would be “impossible.” This “impossible” standard is palpably unlawful.

2. The holding in *MEIC I* is not applicable to an MSUMRA permit appeal, as here, where by statute the burden rests on the applicant.

The Proposed Findings and Conclusions erroneously conclude that, contrary to the Montana Supreme Court’s teachings in *Bostwick* and *DeBuff*, the burden of proof shifted from SPE and DEQ to MEIC in the contested case proceeding. Proposed FOFCOL at 51, ¶ 9. This was premised on the Court’s analysis of a Clean Air Act permit in *MEIC I*. Proposed FOFCOL at 51, ¶ 9. *MEIC I*, however, is distinguishable and, even if it were relevant, *MEIC I* does not support the “impossible” burden of proof fashioned by the Proposed Findings and Conclusions.

In *MEIC I*, plaintiffs challenged DEQ’s issuance of an air quality permit for a proposed massive coal plant adjacent to the Bull Mountains Mine. *Id.* ¶¶ 1, 6. One issue was which party bore the burden of proof in a contested case before the



Board. *Id.* ¶ 10. The Court held that the burden rested with the plaintiffs. *Id.* ¶ 16. The Court grounded its decision on the fact that the statute at issue—Montana’s Clean Air Act program—did not contain a specific provision regarding the burden of proof. *Id.* ¶¶ 13-14. Absent a specific statutory provision in the Clean Air Act allocating the burden of proof, the Court relied on default statutory provisions that the burden of proof rested with the party that would be defeated if no evidence were produced. *Id.* ¶¶ 14-16.

*MEIC I* is not relevant here because unlike the Clean Air Act, MSUMRA has statutory and regulatory provisions that expressly place the burden of proof on the permit applicant and DEQ. Mont. Code Ann. § 82-4-227(1); ARM 17.24.405(6)(a). If the applicant and DEQ do not present an “affirmative[] demonstrate[ion]” that “reclamation can be accomplished” (equivalent to a preponderance of the evidence standard) the permit application is defeated. ARM 17.24.405(6)(a) (“The department may not approve ...”). As the Court explained in *Bostwick*, ¶¶ 34-36, and *DeBuff*, ¶ 39, this statutory burden remains with the permit applicant in a contested case challenging the permitting decision. And, as noted, it was the express design of Congress that this burden remain with the applicant in SMCRA/MSUMRA proceedings. S. Rep. No. 95-128, at 80. This Board applied the same approach in *In re Bull Mountains*. As such, the Clean Air Act burden at issue in *MEIC I* is not applicable to MSUMRA.

3. Alternatively, even if the burden shifts, it still only requires MEIC to defeat the evidence and analysis presented by DEQ and SPE.

Finally, even assuming *arguendo* that the Clean Air Act approach from *MEIC I* were applicable here, it would not justify the “impossible” standard applied in the Proposed Findings and Conclusions, by which the public is forced to prove that environmental harm will certainly occur. After allocating the burden of proof, the Court in *MEIC I* reviewed DEQ’s permitting decision. The issue was whether DEQ had lawfully determined that pollution from the proposed coal plant would not result in adverse impacts to visibility in certain protected areas. *MEIC I*, ¶¶ 27-28. The applicable rules prohibited DEQ from issuing a permit unless and until the applicant demonstrated that no adverse visibility impacts will occur. *Id.* ¶ 28. In issuing the permit, DEQ had deferred to federal agencies’ analysis of visibility impacts, rather than reaching its own independent determination. *Id.* ¶ 35. The Court held that this was error because DEQ was required to conduct its own independent evaluation of visibility. *Id.* ¶ 37. In remanding the case to the Board, the Court set forth the appropriate analysis:

Thus, on remand the Board shall enter findings of fact and conclusions of law determining whether, based on all the evidence presented, *Bull Mountain* [the permit applicant] *established that emissions from its proposed project will not cause or contribute to adverse impact on visibility in the [protected areas].*

*Id.* ¶ 38 (emphasis added).

Far from supporting the “impossible” standard applied in the Proposed Findings, *MEIC I* demonstrates three critical points. First, in reviewing a permitting decision by DEQ, if the agency’s legal analysis is mistaken or arbitrary, the permit will not stand, regardless of the substantive burden of proof. *Id.* ¶¶ 37-38.<sup>3</sup> Second, in a contested case over a permit where the permitting burden is originally on the applicant to show environmental harm will not occur, the Board reviews whether, in view of the evidence presented, the applicant has “established” certain adverse environmental impacts will not occur. *Id.* ¶ 38. Third, in no event is the burden on the public to affirmatively demonstrate that adverse environmental impacts will occur. *Id.* Thus, even applying the more stringent Clean Air Act standard articulated in *MEIC I*, the relevant inquiry is whether, based on the record compiled by DEQ, the applicant—SPE—“affirmatively demonstrate[d]” that “reclamation can be accomplished.” ARM 17.24.405(6)(a). The “impossible” standard imposed in the Proposed Findings and Conclusions, in which the public is

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<sup>3</sup> This is the universal standard. If any agency’s permitting decision is premised on a mistaken or irrational analysis, it must be reversed. *E.g.*, *Clark Fork Coal. v. DEQ*, 2008 MT 407, ¶¶ 47-50, 347 Mont. 197, 197 P.3d 482 (reversing DEQ’s issuance of a Clean Water Act pollution discharge permit where the agency simply assumed that pollution would be perpetually treated without adequate supporting analysis or information). Even where the agency does not bear the burden of proof, as in the MWUA, failure by the agency to consider relevant factors or to cogently explain its decision is basis for overturning the permitting decision. *DeBuff*, ¶ 39.

required to demonstrate that reclamation is not possible, Proposed FOFCOL at 43-49, is mistaken as a matter of law.

**C. Under any lawful standard of review, DEQ’s analysis of water quantity was unsupported and irrational.**

The Proposed Findings and Conclusions recognize that neither DEQ nor SPE determined how much replacement water would be needed or how much replacement water was available in the deep aquifer. Proposed FOF COL at 46 (noting that “it would certainly be helpful to know the quantity of the water with some certainty”). Despite this omission, the Proposed Findings conclude that because reclamation remained possible and was not shown by MEIC to be impossible (there “could” be enough replacement water), DEQ had satisfied MSUMRA. This was error.

First, as noted, the Proposed Findings and Conclusions erroneously focus on the incorrect legal standards, addressing only the preliminary requirement for the applicant to collect “baseline information” about replacement water sources that “could be developed.” *Id.* at 46; ARM 17.24.304(1)(f)(iii). The Proposed Findings and Conclusions ignore the subsequent rigorous analytical requirement that DEQ and the SPE must “affirmatively demonstrate[]” that “reclamation can be

accomplished.” ARM 17.24.405(6)(a).<sup>4</sup> Second, as noted, the “impossible” standard, which requires the public to demonstrate that reclamation is “impossible,” is erroneous and without support in MSUMRA, MAPA, or Montana precedent. As this Board explained in *In re Bull Mountains*, the “mere possibility” that the deep aquifer can supply replacement water “is not sufficient,” No. BER 2013-07 SM at 85—it is not an “affirmativ[e] demonstrate[ion]” that “reclamation can be accomplished.” ARM 17.24.405(6)(a).

Under a correct review that assesses DEQ’s analysis and SPE’s evidence, DEQ’s compete failure to take a hard look at the quantity of replacement water needs or the quantity of water available to meet those needs was unlawful. *DeBuff*, ¶¶ 41-44 (agency’s failure to consider important information affecting water availability was arbitrary and unlawful). Here, not only did DEQ fail to assess how much replacement water would probably be needed, DEQ “never even calculated a ballpark figure for how much water would need to be replaced.” Tr. at 575:25 to 576:3.<sup>5</sup> This oversight is significant because the only quantitative assessment of replacement water needs—prepared by SPE’s own expert, Dr. Nicklin—found that

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<sup>4</sup> Reclamation includes replacement of any damaged water resources. ARM 17.24.1116(6)(d).

<sup>5</sup> The Proposed Findings and Conclusions cite various permitting documents, Proposed FOFCOL at 47, but none of them contains a calculation of replacement water needs or available water in the deep aquifer. Tr. at 575:25 to 576:3.

such needs could “substantially exceed 100 gpm [gallons per minute].” MEIC Ex. 17 at 85.<sup>6</sup> SPE, itself, conceded that the record does not affirmatively demonstrate that the deep aquifer can supply 100 gpm in replacement water without impacting existing users.<sup>7</sup> Tr. at 877:12-20, 878:6 to 879:20. Indeed, it was on the basis of replacement water needs *potentially* exceeding 100 gpm that the Board previously found SPE’s water replacement plans legally insufficient. *In re Bull Mountains*, No. BER 2016-07 SM at 85-87, as the Proposed Findings and Conclusions recognize. Proposed FOFCOL at 11-12, ¶ 16-19. Given the central importance of the quantity of replacement water needed and available, it was irrational and arbitrary for DEQ to fail entirely to quantify how much replacement water would be needed and how much replacement water was available. *DeBuff*, ¶¶ 40-44.

Equally unlawful, DEQ admitted that the analysis contained in its primary permitting document (the cumulative hydrologic impact assessment or “CHIA”) was mistaken. In the CHIA, DEQ stated that “water quantity in the deeper underburden [is] sufficient to provide for use at the OSW [office supply well] and any mitigation wells which may become necessary in the future.” DEQ Ex. 5 at 70.

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<sup>6</sup> Because this figure did not include impacted wells, it is a significant underestimate. Tr. 322:5-18, 327:1-8, 882:23 to 883:4.

<sup>7</sup> Reclamation of water resources includes replacement of water sources impacted by mining or reclamation. ARM 17.24.1116(6)(d). As such, replacement water cannot impact existing water users.



DEQ, however, admitted that this was mistaken and that the agency never assessed whether the deep aquifer had sufficient quantity to meet “any” mitigation needs which “may become necessary.” Tr. at 574:22 to 575:5. While at hearing DEQ’s witness Mr. Van Oort equivocated and asserted that the agency had meant to write something different, Tr. at 573:15 to 575:8, the agency’s decision must stand or fall based on the analysis in the CHIA, as the Proposed Findings recognize. Proposed FOFCOL at 51, ¶ 6. An agency decision premised on an incorrect analysis is unlawful and irrational. *MEIC v. DEQ (MEIC III)*, 2020 MT 288, ¶¶ 22, 27-28, 402 Mont. 128, 476 P.3d 32.

**D. Under any lawful standard of review, DEQ’s analysis of water quality was unsupported and irrational.**

The Proposed Findings and Conclusions further err in accepting DEQ’s erroneous conclusion that replacement water of suitable quality is available in the deep aquifer. The proposed decision accurately finds that the deep aquifer’s “median sodium concentration (356 mg/L) exceeds the CHIA’s recommended guidance for livestock watering (300 mg/L)” and that “domestic wells completed in the [deep aquifer] likely contain natural levels of arsenic over the DEQ-7 HHS [health and human standard] for arsenic.” Proposed Findings at 35, ¶¶ 136, 141. There is no dispute that surface waters above the mine do not have sodium or arsenic levels that are harmful to livestock and humans. DEQ Ex. 5, tbls. 2-1, 2-3, 7-2, 7-3, 7-4. The Proposed Findings also accurately conclude that replacement

water must be “in like quality, quantity, and duration.” Proposed FOFCOL at 50, ¶ 3. Despite finding that the deep aquifer is not of like quality to threatened water resources above the mine but is, in fact, harmful to livestock and humans, the Proposed Findings and Conclusions perplexingly concluded that the deep aquifer could nevertheless serve as a suitable source of replacement water. *Id.* at 45. This was error.

First, the Proposed Findings and Conclusions cite arguments from the prior hearing examiner’s summary judgment decision in which SPE and DEQ “dispute the fact that arsenic and sodium levels in the underburden will be above the requisite levels.” Proposed FOFCOL at 45. Not only are second-hand allegations appearing in the summary judgment order not cognizable evidence, the Proposed Findings and Conclusions in fact find that the evidence presented at hearing refuted the arguments of SPE and DEQ and showed that sodium and arsenic in the deep aquifer exceed the standards set by DEQ itself. Proposed FOFCOL at 35, ¶¶ 136, 141.

Second, again citing the prior ruling on summary judgment, the Proposed Findings assert that “a simple commercially-available filtration system would solve the problem.” *Id.* at 45. But again, the summary judgment order is not evidence. Moreover, DEQ’s only witness, Mr. Van Oort, did not present any qualified testimony about treatment. Tr. at 554:9-23. SPE’s expert, Dr. Nicklin, testified

about treatment for sodium, but he also was never qualified as an expert in water treatment. Tr. at 873:8-24. More importantly, any testimony by Dr. Nicklin about water treatment systems for sodium was improper *post hoc* evidence that did not appear in any permitting documents.<sup>8</sup> *MTSUN*, ¶ 51 (*post hoc* arguments improper); *In re Bull Mountains*, No. BER 2013-07 SM at 56, *cited in* Proposed FOFCOL at 51, ¶ 6. Moreover, SPE never disclosed any testimony by Dr. Nicklin about treatment for sodium in either its expert disclosure or its responses to MEIC's discovery requests, and, as such, Dr. Nicklin's testimony about supposed treatment was inadmissible and may not be relied upon by the Board. Pet'r's MIL at 11 & Exs. 1-2 (Feb. 14, 2020); Pet'r's Reply in Supp. of MIL at 12-15 (Mar. 19, 2020); Mont. R. Civ. P. 37(c)(1). What's more, no permitting materials discuss water treatment and no bonding funds such treatment that will be required in perpetuity after the closure of the mine. *See generally* DEQ Ex. 7; DEQ Ex. 8; Tr. at 797:25 to 798:20. It is arbitrary and capricious for DEQ or the Board to assume perpetual treatment of replacement water from the deep aquifer in the absence of any information about such treatment system in the permit application and without any bond to support such necessary treatment. *Clark Fork Coal.*, ¶¶ 44-48; *Citizens Organized Against Longwalling v. Div. of Reclamation*, 535 N.E.2d 687, 696-99

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<sup>8</sup> The CHIA mentioned treatment systems for arsenic, but said nothing about treatment for excessive sodium. DEQ Ex. 5 at 42.

(Ohio App. 1987) (bare promise to replace damaged water insufficient). Every one of these flaws forecloses reliance on Dr. Nicklin's unsubstantiated mention of treatment for sodium.

In sum, the Proposed Findings and Conclusions' assessment of replacement water quality is in error. The evidence admitted at the hearing demonstrates that the chemical composition of the deep aquifer is not of like quality to the water resources above the mine and that it would be harmful to livestock and humans. There was no competent evidence about treatment of this noxious water and no description or bonding for perpetual treatment in the permit application. This does not constitute an affirmative demonstration that the deep aquifer can be used to replace and reclaim clean water resources damaged by the mine.

**E. Under any lawful standard of review, DEQ's analysis of the legal availability of replacement water was mistaken and irrational.**

This Board previously held that SPE's plans to replace waters impacted by its coal mine were illusory because neither SPE nor DEQ had addressed potential "legal barriers" that SPE's expert, Dr. Nicklin, had identified regarding use of the deep aquifer as a replacement water source. *In re Bull Mountains*, No. BER 2013-07 at 85. MSUMRA requires permit applicants and DEQ to assess the impacts of mining and reclamation operations on water rights, any "impact" to which is considered impermissible material damage. ARM 17.24.314(1), (5); Mont. Code Ann. § 82-4-203(32). Reclamation of water resources must be able to replace any

water supplies that are adversely affected by mining or reclamation. ARM 17.24.1116(6)(d)(iv). DEQ is prohibited from issuing a coal mining permit unless and until the applicant affirmatively demonstrates and DEQ confirms that “reclamation can be accomplished.” ARM 17.24.405(6)(a).

Here, DEQ’s assessment of impacts to water rights was based solely on its review of a guidance document from the Department of Natural Resources and Conservation (DNRC) about use of the exempt well loophole from the MWUA for housing developments (not coal mines). Tr. at 538:20 to 539:3, 541:2 to 542:2; DEQ Ex. 21 at 2. Based on its inexpert review of this guidance document related to housing developments, DEQ determined that any necessary replacement wells would be exempt wells and not combined appropriations and, therefore, not subject to any limitations under the MWUA. Tr. 541:2 to 542:2. DEQ’s analysis is legally erroneous because the law analyzed in the DNRC guidance document (House Bill 168) only applied to housing developments under Title 76 of the Montana Code, and only to housing developments in existence in 2014 or for which applications were submitted by 2014. DEQ Ex. 21; 2015 Mont. Laws ch. 221, § 1. The Proposed Findings and Conclusions recognize that DEQ and SPE “did not discuss this provision specifically” in their briefing. Proposed FOFCOL at 48. Nevertheless, the Proposed Findings and Conclusions conclude that SPE and DEQ

adequately addressed the issue of legal availability of replacement water. *Id.* at 49.

This was error.

An agency's permitting decision that is premised on an error of law is unlawful. *MEIC I*, ¶¶ 37-38; *MEIC III*, ¶¶ 22-27; *Clark Fork Coal.*, ¶¶ 39-49. The Proposed Findings and Conclusions overlook this bedrock rule by focusing on the mistaken and unsupported "impossible" standard, by which a DEQ permitting decision is upheld, regardless of its correctness, unless the public affirmatively demonstrates that reclamation is impossible. Proposed FOFCOL at 45, 49. But as noted, the "impossible" standard has no basis in law or precedent. *See supra* Argument Part II.B. The Proposed Findings and Conclusions also incorrectly rely on DEQ's assertion in its response to public comments that replacement wells would not constitute "combined appropriations" and therefore would be exempt from MWUA limitations pursuant to House Bill 168. Proposed FOFCOL at 49 (citing DEQ Ex. 6 at 5-6 (citing H.B. 168 (reprinted at 2015 Mont. Laws ch. 221, § 1))). But as noted, by its own terms, House Bill 168 applies to housing developments under Title 76, not coal mines under Title 82. 2015 Mont. Laws ch. 221, § 1. This fundamental legal error renders DEQ's permitting decision incorrect and unlawful. *MEIC I*, ¶¶ 37-38; *MEIC III*, ¶¶ 22-27; *Clark Fork Coal.*, ¶¶ 39-49.

Finally, the Proposed Findings and Conclusions assert that the deep aquifer's ability to supply replacement water "has been recognized for many decades,"



citing a Montana Bureau of Mines and Geology report from 1982. Proposed FOFCOL at 49 (citing MEIC Ex. 19 at 43). This citation, however, contains only one general sentence stating that aquifers below the mining operations “would also furnish alternative water supplies for shallow wells and springs adversely affected by mining.” MEIC Ex. 19 at 43. Not only is there no detailed analysis of any particular deep aquifer (regarding water quantity or quality), but the report contains absolutely no analysis of the relevant issue—the legal availability of water in the deep aquifer. It, therefore, provides no support to DEQ’s plainly erroneous analysis of the legal availability of replacement water in the deep aquifer.

### **III. EXCEPTIONS TO PROPOSED FINDINGS OF FACT**

The Proposed Findings of Fact similarly include both systemic and specific errors, which are addressed sequentially below.

#### **A. The Proposed Findings fail to respond to MEIC’s detailed proposed findings.**

The Board should reject the Proposed Findings of Fact, first, because they fail to satisfy the Board’s obligation to address all relevant factors and evidence in reaching its decision. Under MAPA, a proposed decision must respond to a party’s proposed findings of fact: “If, in accordance with agency rules, a party submitted proposed findings of fact, the decision must include a ruling upon each proposed finding.” Mont. Code Ann. § 2-4-623(4). The Montana Supreme Court has explained, “It is, of course, the duty of PSC [the agency conducting the contested

case] to make explicit findings on material issues raised in the administrative proceedings[,] ... and the findings on material issues should be sufficient to permit a reviewing court to follow the reasoning process of the agency.” *Montana-Dakota Utils. Co. v. Mont. Dep’t of Pub. Serv. Regul.*, 223 Mont. 191, 196, 725 P.2d 548, 551 (1986) (citation omitted); *N. Plains Res. Council v. Bd. of Nat. Res. & Conservation*, 181 Mont. 500, 523, 594 P.2d 297, 310 (1979) (finding in appeal from MAPA contested case that the agency’s “lack of any specific findings in this disputed factual area” was error). Further, it is arbitrary for an agency to fail to address relevant factors in reaching a decision. *DeBuff*, ¶¶ 43-44.

While the Montana Supreme Court has not always required strict adherence to the requirement of Montana Code Annotated § 2-4-623(4) to rule on all proposed findings, *Ex rel. Mont. Wilderness Ass’n v. Bd. of Nat. Res. & Conservation*, 200 Mont. 11, 39-40, 648 P.2d 734, 749 (1982), an agency’s findings of fact must nevertheless address and grapple with contrary evidence. *Diaz v. Chater*, 55 F.3d 300, 307 (7th Cir. 1995) (“An ALJ may not select and discuss only that evidence that favors his ultimate conclusion, but must articulate, at some minimum level, his analysis of the evidence to allow the appellate court to trace the path of his reasoning. An ALJ’s failure to consider an entire line of evidence falls below the minimal level of articulation required.” (internal citation omitted)); accord *N. Plains Res. Council*, 181 Mont. at 522-23, 594 P.2d at 310.

Here, the Proposed Findings violate MAPA by failing to rule on any of MEIC's proposed findings of fact and also failing to address critical lines of evidence. The most important revelations of the hearing were the admissions by DEQ and SPE that the company has repeatedly and continually violated requirements for monitoring and assessing impacts of subsidence on surface waters for a decade. Pet'r's Proposed FOFCOL at 10, ¶ 36 to 14, ¶ 47. In short, SPE's existing mining permit contains meticulously detailed "design standards"<sup>9</sup> for assessing impacts of mining to water resources. SPE Ex. 25. These provisions are legally binding and enforceable. Mont. Code Ann. § 82-4-254(1). SPE's consultants admitted in open court that the company has *never* complied with these requirements and, worse, that this decade-long continuing violation occurred with the knowledge and acquiescence of DEQ. Tr. at 772:19-25, 773:8-10, 774:12-14, 786:7-17, 787:9-13, 893:23 to 894:3. This line of evidence was of capital importance because DEQ and SPE purported to base their (vague and equivocal) assumptions about replacement water needs on their assessments of the impacts of mining on existing water resources. Tr. at 649:3-13, 654:10-14, 866:21-867:3, 887:23 to 888:16, 888:22-25. Indeed, the Proposed Findings appear to rely heavily

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<sup>9</sup> The purpose of "design standards" is to "obviate[] the battle of the experts" over whether a mine is sufficiently protecting environmental values. McElfish & Beier, *supra* at 62-63. Failure to follow the design standard alone demonstrates a permit violation. *Id.* at 62.

on DEQ's decision to require water replacement for only one spring that had been undermined. Proposed FOFCOL at 23-25, ¶¶ 73-81. These findings have no value in light of SPE's and DEQ's ongoing unlawful failure to follow the permit's design standards for assessing impacts to water resources. It is fundamental to the rule of law that a party cannot "take advantage of its own wrong." *Kauffman-Harmon v. Kauffman*, 2001 MT 238, ¶ 19, 307 Mont. 45, 36 P.3d 408 (quoting Mont. Code Ann. § 1-3-208). Worse, SPE's and DEQ's ongoing and knowing failure to comply with legally binding permit provisions requiring collection and preservation of data regarding mining impacts constituted spoliation. *Spotted Horse v. BNSF Ry. Co.*, 2015 MT 148, ¶¶ 27-31, 379 Mont. 314, 350 P.3d 52. It is arbitrary and unlawful for the Proposed Findings to fail entirely to address this critical line of evidence. Mont. Code Ann. § 2-4-623(4); *N. Plains Res. Council*, 181 Mont. at 522-23, 594 P.2d at 310; *Diaz*, 55 F.3d at 307; *DeBuff*, ¶¶ 43-44.

It was also unlawful for the Proposed Findings to fail to address the *only* actual quantification of replacement water needs and the testimony of SPE's own expert that the deep aquifer could *not* supply that quantity of water. This Board in *In re Bull Mountains* held that SPE's arguments about using the deep aquifer to replace water polluted by the mine were mistaken because of, among other things, uncertainty that the aquifer could supply over 100 gpm in replacement water. No. BER 2013-07 SM at 84-87. This conclusion was based on a report by SPE's own

hydrologist, Dr. Nicklin. *Id.* at 85; MEIC Ex. 17 at 85. While this analysis was conducted in 2013 before the Board remanded the matter to DEQ for further analysis, SPE and Dr. Nicklin never developed another estimate of replacement water needs. Tr. at 857:9-13, 887:23 to 888:12. And DEQ “never even calculated a ballpark figure” of how much replacement water would be needed. Tr. at 575:25 to 576:3. Thus, the 100 gpm figure was the *only* estimate of replacement water needs. Moreover, this 100 gpm figure was a significant underestimate because it did not include replacement of impacted wells (it only assessed springs and streams). Tr. at 322:12-18, 327:1-8, 883:2-4. And critically, SPE’s expert, Dr. Nicklin, testified that the record did not affirmatively demonstrate that the deep aquifer could supply 100 gpm without impacting other users (which is prohibited). Tr. 877:11-19, 879:12-20. Accordingly, it is arbitrary and unlawful for the Proposed Findings to fail to address this line of evidence. Mont. Code Ann. § 2-4-623(4); *N. Plains Res.*

*Council*, 181 Mont. at 522-23, 594 P.2d at 310; *Diaz*, 55 F.3d at 307; *DeBuff*, ¶¶ 43-44.<sup>10</sup>

The final major line of evidence that the Proposed Findings failed entirely to address was DEQ’s admission that the CHIA’s assessment of reclamation water—the only analysis on which the permitting decision may stand<sup>11</sup>—was mistaken. In the CHIA, DEQ stated that “water quantity in the deeper underburden [is] sufficient to provide for use at the OSW [office supply well] and any mitigation wells which may become necessary in the future.” DEQ Ex. 5 at 70. DEQ, however, admitted that this was mistaken and that the agency never assessed whether the deep aquifer had sufficient quantity to meet “any” mitigation needs that “may become necessary,” as the CHIA asserted. Tr. at 573:15 to 575:1. As noted, SPE’s expert testified that the record did not demonstrate that the deep aquifer could supply 100 gpm of replacement water without affecting other water

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<sup>10</sup> The Proposed Findings further err in failing to address the evidence showing that DEQ’s only witness, Mr. Van Oort, did not conduct the spring impact analysis, did not know what method was used to assess impacts to springs, and did not even know what the permit required regarding assessment of spring impacts. Tr. at 622:22 to 623:3, 625:6-10, 630:19-23, 640:11-16, 642:3-13. This evidence forcefully demonstrated that DEQ’s purported analysis of impacts to springs was not reliable. The Proposed Findings’ failure to address this evidence was unlawful. Mont. Code Ann. § 2-4-623(4); *N. Plains Res. Council*, 181 Mont. at 522-23, 594 P.2d at 310; *Diaz*, 55 F.3d at 307; *DeBuff*, ¶¶ 43-44.

<sup>11</sup> *MTSUN*, ¶ 51 (post hoc arguments improper); *In re Bull Mountains*, No. BER 2013-07 SM at 56, *cited in* Proposed FOFCOL at 51, ¶ 6.



users. Tr. 877:11-20, 879:12-20. A permitting decision may not rest on an erroneous analysis, particularly one of such central importance. *MEIC I*, ¶¶ 37-38; *MEIC III*, ¶¶ 22-27; *Clark Fork Coal.*, ¶¶ 39-49. The failure of the Proposed Findings to assess this line of evidence was arbitrary and unlawful. Mont. Code Ann. § 2-4-623(4); *N. Plains Res. Council*, 181 Mont. at 522-23, 594 P.2d at 310; *Diaz*, 55 F.3d at 307; *DeBuff*, ¶¶ 43-44.

**B. Numerous findings of fact are not supported by substantial, competent evidence or essential requirements of law.**

In addition to the foregoing systemic errors, the following findings are not supported by competent, substantial evidence or are procedurally improper or both<sup>12</sup>:

- Proposed Finding 54 refers to the “Rosebud Mine.” The cited testimony, however refers to the Bull Mountains Mine, which is the mine at issue in this case. Tr. 34:1-7, 63:23 to 64:1. As such, Proposed Finding 54 is not supported by substantial evidence.
- Proposed Findings 77 to 82 and Proposed Findings 92 and 95 refer to DEQ’s and SPE’s assessments of impacts of mining to water resources, without acknowledging DEQ’s and SPE’s continuing violation of the permit’s legally binding design standards for assessing

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<sup>12</sup> See Mont. Code Ann. § 2-4-621(3).

such impacts (which constitute spoliation and unlawful conduct) and without acknowledging DEQ’s unreliable testimony regarding the agency’s assessment of impacts to surface water resources. *See supra* Part III.A. The Proposed Findings cannot simply ignore, but must address, contrary evidence. *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 384 (4th Cir. 1994) (“Conversely, when faced with evidence in the record contradicting his conclusion, an ALJ must affirmatively reject that contradictory evidence and explain his rationale for so doing.”). This renders the Proposed Findings procedurally improper and unsupported by substantial competent evidence.

- Proposed Finding 97 states that fluvial sandstone channels in the underburden “are likely many miles wide and reflect a high sinuosity or continuous meandering of the paleostream.” The cited evidence—MEIC Ex. 21 at 3.2.5—does not support this proposed finding. This report does not say that the channels are “likely” “many” miles wide, but rather that they “may be several miles wide.” *Id.* Several means “more than one” or “more than two *but fewer than many*.” Merriam-Webster Dictionary, [www.merriam-webster.com](http://www.merriam-webster.com) (definition of

“several”) (emphasis added). Proposed Finding 97 is not supported by substantial evidence.

- Proposed Finding 97 also states that the sandstone channels that comprise the deep aquifer are “continuous throughout the Bull Mountain[s] area” because of outcroppings of the unit in various creek drainages. The Proposed Findings cite MEIC Ex. 21 at 3.2.5 as support, but that document, an addendum to the permit, does not state that the channel sandstones are continuous. The only remaining support is a citation to DEQ Ex. 11 at 3, which does state that the outcrops suggest that the underburden unit is “continuous” throughout the area; however, as noted above, the author of the report, Dr. Nicklin, clarified at hearing that while the unit may be continuous, the sandstone channels themselves, which bear water, are not. Tr. at 907:7 to 908:23. Dr. Nicklin admitted that the underburden unit is “definitely not homogenous” and that the sandstone channels are “lenticular” and “pinch[] out.” *Id.* All reports on record and the testimony of Mr. Hutson, the only qualified expert in fluvial sedimentology, agreed that the sandstone channels in the deep aquifer are not continuous, but pinch out over short distances. SPE Ex. 18 at 298; MEIC Ex. 19 at 15; MEIC Ex. 20 at 6; MEIC Ex. 21 at 15; Tr. at

90:4 to 91:4, 96:11-12, 103:10-15, 304:12-22. In fact, MEIC Ex. 19, on which the Proposed Findings rely elsewhere, expressly states that “[a]lthough the sandstone units are prominently displayed in outcrop, most are lenticular and cannot be traced over large areas in the subsurface.” MEIC Ex. 19 at 15. As such, the statement in Proposed Finding 97 that the sandstone channels are continuous based on outcropping is not supported by substantial evidence.

- Proposed Finding 99 states that the “DUA [deep underburden aquifer] extends over a broad area throughout the Bull Mountains area, approximate dimensions are about 14 miles wide and 22 miles long trending along the axis of the Bull Mountain[s] syncline.” At hearing, however, the author of the cited report, Dr. Nicklin, clarified that these dimensions did not measure the extent of the *deep aquifer*, as stated in Proposed Finding 99, but only the “model grid.” Tr. at 907:7 to 908:23. The larger underburden layer, Dr. Nicklin explained, is “definitely not homogenous” but “lenticular” channels that “pinch out.” *Id.* Mr. Hutson made the same clarification. Tr. at 304:12-22. As such, Proposed Finding 99 is not supported by substantial evidence.
- Proposed Finding 114 notes that the 2016 Probable Hydrologic Consequences (PHC) report concluded that “[t]here is presently no

evidence of surface water quality impacts associated with mining.”

This proposed finding, however, fails to acknowledge DEQ’s and SPE’s continuing violation of the permit’s legally binding design standards for assessing such impacts. *See supra* Part III.A. DEQ’s and SPE’s action constitutes spoliation and unlawful conduct, from which neither may gain advantage. *See supra* Part III.A. Moreover, as the Proposed Findings recognize elsewhere, the CHIA rejected the PHC’s analysis and concluded that at least one spring, spring 17275, had experienced water quality impacts associated with mining. *See* Proposed FOFCOL at 23, ¶ 77. As such the Proposed Finding 114 is procedurally improper and unsupported by substantial competent evidence. *See*, 36 F.3d at 384.

- Proposed Finding 123 notes that Mr. Hutson “did not quantify or otherwise calculate the anticipated replacement water need.” While Mr. Hutson did not *independently* quantify replacement water needs, the undisputed evidence shows that he relied on Dr. Nicklin’s calculation that replacement water needs could substantially exceed 100 gpm. Tr. at 140:2-4 (“The only number that I’ve seen in the Nicklin modeling reports w[as] the 100-plus gallons of water—gallons per minute.”); MEIC Ex. 17 at 85. As noted, Dr. Nicklin never

revised this figure, and DEQ did not even develop a ballpark figure.

Tr. at 857:9-13, 887:23 to 888:12; Tr. at 575:25 to 576:3. The

Proposed Findings cannot ignore this undisputed evidence of substantial replacement water needs. *See*, 36 F.3d at 384.

- Proposed Finding 130 states that DEQ “identified and evaluated the surface water rights within the AM3 surface water Cumulative Impact Area.” While the cited evidence demonstrates that DEQ identified and listed the surface water rights, the evidence does not indicate anywhere that DEQ “evaluated” these surface water rights. In fact, DEQ testified that it did not evaluate any impacts to water rights based on its review of the DNRC guidance documents related to housing developments. Tr. 541:2 to 542:2. As such, the assertion in Proposed Finding 130 that DEQ “evaluated” surface water rights is not supported by substantial competent evidence.
- Proposed Finding 143 states that “Dr. Nicklin not[ed] that treatment systems are available for sodium.” This statement is not supported by substantial competent evidence and is procedurally improper because, as noted, Dr. Nicklin’s testimony about treatment for sodium was not supported by any particular expertise, was *post hoc*, undisclosed in



discovery, and without any detailed support or funding in the permit.

*See supra* Argument Part II.D.

- Proposed Finding 145 states that DEQ “identified no legal barriers precluding the [deep aquifer] as a source of replacement water.”

While it is true that based on a legally erroneous analysis, DEQ reached this conclusion, DEQ’s analysis was still erroneous, rendering its permitting decision unlawful. *See supra* Argument Part II.E.

## CONCLUSION

In sum, the Proposed Findings suffer multiple systemic and specific flaws with respect to both proposed conclusions and factual findings. The Board should reject the Proposed Findings and hold that DEQ’s permitting decision was unlawful or, alternatively, remand to the Hearing Examiner for resolution of the errors identified above.

Respectfully submitted this 15th day of September, 2021.

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered  
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Dated: September 15, 2021.

/s/ Shiloh Hernandez  
Shiloh Hernandez



TO: Katherine Orr, Board Attorney  
Board of Environmental Review

FROM: Regan Sidner, Board Secretary  
P.O. Box 200901  
Helena, MT 59620-0901

DATE: September 30, 2021

SUBJECT: Board of Environmental Review Case No. BER 2021-07 WQ

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

IN THE MATTER OF: SIDNEY SUGARS  
INCORPORATED APPEAL OF MONTANA  
POLLUTANT DISCHARGE ELIMINATION  
SYSTEM PERMIT NO. MT0000248

Case No. BER 2021-07 WQ

On September 30, 2021, the BER received the attached request for hearing via email. Please serve copies of pleadings and correspondence on me and on the following DEQ representatives in this case.

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STATE OF MONTANA BOARD OF ENVIRONMENTAL REVIEW

<p>IN THE MATTER OF:</p> <p>SIDNEY SUGARS INCORPORATED          APPEAL OF MONTANA POLLUTANT          DISCHARGE ELIMINATION SYSTEM          PERMIT NO. MT0000248</p>	<p><b>NOTICE OF APPEAL AND          REQUEST FOR HEARING</b></p>
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In accordance with Mont. Code Ann. § 75-5-403(2) (2021) and Mont. Admin. R. 17.30.1370(4) (June 30, 2021), Sidney Sugars Incorporated (“SSI”) hereby gives notice that it appeals portions of Montana Pollution Discharge Elimination System (“MPDES”) Renewal Permit No. MT0000248, which was issued by the Montana Department of Environmental Quality’s (“DEQ”) to SSI on August 31, 2021 (hereinafter “Renewal Permit”, Ex. 1), and requests a hearing before the Board.

SSI respectfully requests that the Board reverse or modify the appealed

portions of the Renewal Permit with appropriate instruction to the department. The DEQ's decisions with respect to the appealed provisions prejudice the substantial rights of SSI. Further, the DEQ's decisions with respect to these permit provisions were in excess of its statutory authority, affected by errors of law, clearly erroneous, arbitrary and capricious, and/or otherwise in violation of law.

Specifically, the DEQ erred when:

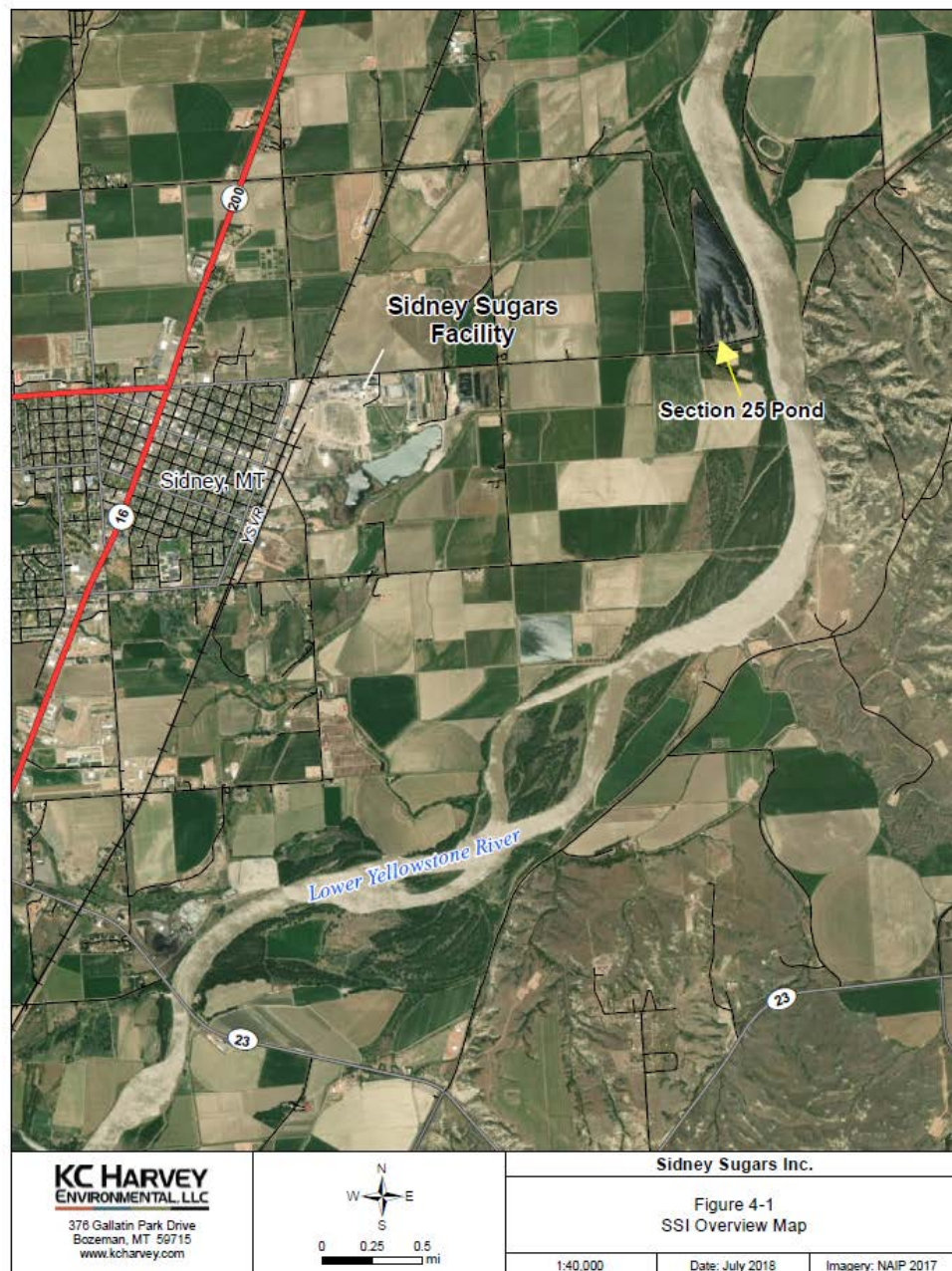
1. Applying technology-based effluent limitations ("TBELs") to discharges from SSI's Section 25 Pond (Outfalls 001 and 002);
2. Rejecting SSI's proposed compliance monitoring approach for 5-day Biological Oxygen Demand ("BOD<sub>5</sub>") in Section 25 Pond (Outfall 002);
3. Rejecting the DEQ permit writer and SSI's increased TBELs for BOD<sub>5</sub> based on updated load calculations that reflect SSI's updated production rates; and
4. Applying numeric effluent limitations with respect to *E. coli* and fecal coliform rather than applying case-specific limitations or best management practices ("BMP") that reflect the natural source of these pathogens and the fact that these sources are non-toxic to humans.

## **BACKGROUND**

SSI owns and operates a sugar beet processing facility in Sidney, Montana. Sidney is a rural community of 6,400 people located in the northeast corner of Montana, ten miles from the North Dakota border. The facility was built in 1925 and has been operating since that time.



SSI, which acquired the facility from Holly Sugars in 2002, is a cornerstone of the local economy, employing 130 full-time employees, 130 seasonal employees, and 210 harvest employees. In addition, SSI purchases beets from 120 local farmers in the Lower Yellowstone River Valley, who collectively produce close to 950,000 tons of beets annually.



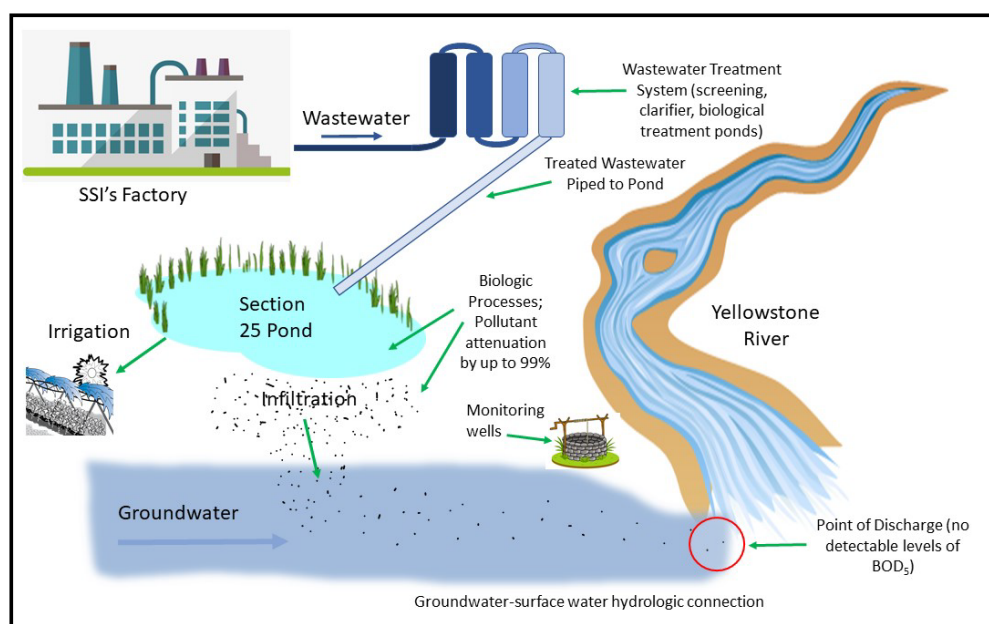
In an average season, SSI's processing facility generates 250 million pounds of sugar. SSI processes pulp and other byproducts remaining after sugar removal from which it is able to produce approximately 120,000 tons of agri-products such as beet pulp pellets, sugar beet pulp shreds, and beet molasses.

SSI's facility, like all sugar beet processing operations, generates a significant amount of process wastewater enriched with organic matter from washing and processing the sugar beets. The level of organic matter contained in the wastewater is measured by the BOD<sub>5</sub>. The majority of the wastewater is recycled and used for processing the beets or for other operational purposes. However, a portion of SSI's wastewater cannot be recycled and is managed by SSI through various means, including treatment, land application (crop irrigation), storage/infiltration, and discharge.

The current wastewater treatment system utilizes a screening plant to separate large solids and a wastewater clarifier to settle mud solids such that a majority of water is reused for the transport of beets into the factory. Any excess wastewater is conveyed from the clarifier by a ditch to a series of large treatment ponds near the factory site for settling, and aerobic and anaerobic biodegradation. These facilities are located next to the SSI factory.

Treated water from the last of the treatment ponds that is not recycled flows through a 1.5-mile pipeline to Section 25 Pond for storage, additional treatment,

beneficial use, and discharge. Holly Sugars (SSI's predecessor) constructed the 100-acre, naturally lined, Section 25 Pond in 1976 to store and further treat the facility's wastewater prior to discharge via infiltration to groundwater in accordance with its, MPDES Permit. A significant amount of the water stored and treated in Section 25 Pond is used to support nearby center-pivot irrigation systems in accordance with the MPDES Permit and a Farm Management Plan. SSI's wastewater management and treatment system, consisting of water reuse/recycling, conveyance structures, ponds, and beneficial use irrigation, represents the best practicable control technology, referred to as "land-based disposal," stipulated by the U.S. Environmental Protection Agency ("EPA") for sugar beet processing facilities. SSI's wastewater treatment facilities are currently undergoing extensive upgrading and maintenance in accordance with a Compliance Plan developed between the DEQ and SSI in 2018.



*Section 25 Pond (Outfalls 001 and 002)*

SSI's Renewal Permit allows it to manage wastewater piped to Section 25 Pond. SSI is permitted to pump, and historically did pump, wastewater from Section 25 Pond into a ditch (Outfall 001) that allows the wastewater to flow directly into the nearby Yellowstone River. SSI, in recent years, has not been actively discharging water through Outfall 001.

Additionally, wastewater held in Section 25 Pond, that has not evaporated, is used for irrigation or infiltrates into the underlying soils and groundwater. Studies by SSI's consultants suggest that a hydrologic connection exists between the groundwater below Section 25 Pond and the Yellowstone River, theoretically enabling the remaining portion of SSI's wastewater from Section 25 Pond to travel via groundwater to the Yellowstone River.

However, the vast majority of the pollutants in SSI's wastewater disposed of in Section 25 Pond never reach the Yellowstone River through this indirect, underground pathway. This is due to attenuation, i.e. the biological process that occurs in Section 25 Pond, and the soils and groundwater below, which significantly lessens the amount of pollutants in the pond wastewater prior to discharge. Microorganisms, naturally present in the pond water and soils beneath Section 25 Pond, utilize the organic matter (as measured by BOD<sub>5</sub>) as a food and energy source, resulting in significant reductions in BOD<sub>5</sub> concentrations and loads

reaching groundwater monitoring wells between Section 25 Pond and the Yellowstone River, and the River itself.

Municipalities and industries around the world depend on this biological process to remove organic wastes from waters and soils. This natural process is so effective that BOD<sub>5</sub> and other pollutants in the discharge to groundwater from Section 25 Pond are reduced by up to 99 *percent* from the concentrations in the wastewater, and any impact on BOD<sub>5</sub> levels in the Yellowstone River resulting from SSI's discharge to Section 25 Pond is undetectable. (Tech. Mem. from Cascade Earth Sciences to Sidney Sugars Inc., Wastewater Pond Seepage BOD Study for Compliance Protocol Dev. (Jan. 4, 2016).)

*Historic Permitting of SSI's Treated Wastewater Discharge*

The DEQ closely regulates SSI's direct and indirect discharges of wastewater from Section 25 Pond through SSI's MPDES Permit. SSI's MPDES Permit, first issued in the 1970s, initially contained a single "outfall" (i.e., the discharge point of a waste stream into a body of water) via the ditch to the Yellowstone River, as described above. The effluent limits for this outfall ("Outfall 001") were based upon the federal TBELs applicable to discharges from beet sugar processing operations and included limits for BOD<sub>5</sub>. *See* 40 C.F.R. pt. 409 (effluent limitation guidelines for the Sugar Processing Point Source Category).



In approximately 1998, the DEQ added “Outfall 002” to SSI’s 1998 MPDES Permit (“1998 Permit”). The 1998 Permit described Outfall 002 as “Seepage to the Yellowstone River, from beneath the evaporation/infiltration pond.” Outfall 002, for the first time, regulated the indirect pathway described above by which residual pollutants in SSI’s treated wastewater infiltrate through the soil below Section 25 Pond and travel via groundwater to enter the Yellowstone River.

The facility’s 1998 Permit required SSI to meet the BOD<sub>5</sub> TBEL at both Outfall 001 and 002. SSI’s compliance with the TBEL limits, including BOD<sub>5</sub>, was measured by a composite of samples from three groundwater monitoring wells (“Monitoring Wells”) located between the Yellowstone River and the east side of Section 25 Pond. Since the addition of Outfall 002 to the Permit, SSI’s samples from the Monitoring Wells have consistently met, and continue to meet, the BOD<sub>5</sub> TBEL. In fact, the average and the single highest BOD<sub>5</sub> loads measured in samples from the groundwater wells between the Pond and the Yellowstone River over the last five years were 1.3 and 10.2 pounds per day, respectively. These values are notably lower than the average monthly TBEL of 3,342 pounds per day for BOD<sub>5</sub> stipulated both by the MPDES permit the DEQ reissued to SSI in 2009 (“2009 Permit”) and the Renewal Permit. Furthermore, BOD<sub>5</sub> was not detected above laboratory detection limits in 46 of the total 96 groundwater well samples collected during these last five years.



When the DEQ issued the 2009 Permit, the agency made a significant change to the location where SSI must monitor for, and demonstrate compliance with, the BOD<sub>5</sub> TBEL for Outfall 002. Specifically, the DEQ moved the monitoring/compliance point from the Monitoring Wells to the outlet pipe discharging wastewater into Section 25 Pond (“Outfall INTL”). This change was significant because whereas the Monitoring Wells are located at a point *after* the Section 25 Pond attenuation process occurs (which naturally reduces BOD<sub>5</sub> concentrations by up to 99 percent), the outlet pipe discharging wastewater into Section 25 Pond, i.e. Outfall INTL, is an “internal” outfall, located *before* the attenuation process occurs. (Fact Sheet, SSI Permit No. MT0000248, DEQ Permitting and Compliance Division 10 (DEQ 2009).) As a result of this dramatic shift in the DEQ’s monitoring/compliance approach, SSI was unable to meet the TBEL for BOD<sub>5</sub> at Outfall INTL throughout the sugar beet processing season, even though SSI was still easily meeting them at the Monitoring Wells and even though *no* detectable levels of BOD<sub>5</sub> were reaching the Yellowstone River.

To address this situation, the DEQ and SSI worked cooperatively together and entered an Administrative Order on Consent (“AOC”) in January 2014. The AOC, along with its subsequent amendments, extended the date for compliance with the Outfall INTL limits for BOD<sub>5</sub>, fecal coliform bacteria, and pH. The amended AOC is currently extended to March 31, 2024. SSI has continued to be

compliant with the terms of the Compliance Plan associated with the AOC, including spending millions of dollars in improvements to the plant's infrastructure and conducting studies to determine how SSI can achieve final compliance with its permit conditions.

*SSI's August 31, 2021 Renewal MPDES Permit*

SSI and the DEQ, throughout the permit renewal period, discussed alternative regulatory approaches for Section 25 Pond and other regulatory aspects of the Renewal Permit. SSI, including its employees, consultants, and attorneys, worked proactively with the DEQ throughout the process. The DEQ did agree to move the monitoring/compliance from Outfall INTL into the Section 25 Pond itself, but that change still does not give SSI the complete benefit of the land-based attenuation processes (treatment) that occur and which should be taken into account as part of SSI's wastewater management system. As set forth herein, SSI is appealing and requesting a hearing on four specific provisions/decisions made by the DEQ in the final Renewal Permit issued on August 31, 2021.

**REGULATORY SCHEME**

The Clean Water Act ("CWA") was established "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). It seeks to eliminate the discharge of pollutants into navigable waters, and has an "interim goal of water quality which provides for the protection and

propagation of fish, shellfish, and wildlife and provides for recreation in and on the water . . . .” *Id.* § 1251(a)(1)-(2). Generally, the CWA prohibits the discharge of any “pollutant” (broadly defined) from a point source to waters of the United States except in compliance with one of several statutory exceptions, the most important of which is pollutants discharged under a valid National Pollution Discharge Elimination System (“NPDES”) permit.

NPDES permits can be issued either by the United States Environmental Protection Agency (“EPA”) under Federal NPDES regulations or by a state with an EPA-approved NPDES permit program that conforms to the Federal NPDES program. The EPA approved Montana’s NPDES permit program in June 1974. The DEQ regulates the program in accordance with rules set forth in Chapter 17.30 of the Administrative Rules of Montana, which incorporates by reference many EPA NPDES regulations and standards, including the TBELs at issue in this matter. *See* Mont. Admin. R. 17.30.1344.

Montana’s NPDES permit program, like the Federal NPDES program, provides a two-step process for establishing effluent limitations for discharges to surface waters. *See generally* Mont. Admin. R. 17.30.1202(13) (defining “effluent limitations”). First, NPDES permits must contain limits based upon any applicable TBELs. *See* Mont. Admin. R. 17.30.1203; *see also* 33 U.S.C. § 1311(b)(1)(A). TBELs, as the name suggests, are based solely on technology. The TBELs are set

at levels that the EPA determines dischargers within an industrial category *should* be able to meet for a particular pollutant using currently available treatment technologies. However, dischargers are free to use any available control technique, so long as they meet the limits.

The second type of effluent limitation that applies in MPDES permits are water quality-based effluent limitations (“WQBELs”). WQBELs are set at levels designed to ensure the water body receiving a facility’s discharge will meet all applicable state water quality standards (“WQS”). As a result, WQBELs can vary from permit to permit, depending upon the classification and existing water quality of the receiving water. By contrast, TBELs are not dependent upon the quality of the receiving water. SSI’s appeal is focused on the DEQ’s application of TBELs in the Renewal Permit.

## **STATEMENT OF THE ISSUES INVOLVED**

### *The DEQ Erred When Applying TBELs to Groundwater Discharges from Section 25 Pond*

As discussed below and in SSI’s comments on the draft Renewal Permit, the DEQ erred when applying TBELs to discharges to groundwater from Section 25 Pond. (Comments submitted by Sidney Sugars, Inc. in Response to Public Notice No. MT-20-19 regarding Draft MPDES Permit No. MT0000248 at 017-022 (Jan. 19, 2021), Ex. 2.) The Federal CWA NPDES permitting program, which the DEQ implements through its EPA-approved MPDES permit program, only applies to

point source discharges of pollutants to “waters of the United States,” a term that does not include groundwater. Thus, the requirement to obtain an NPDES permit – as well as aspects of the NPDES permit program such as the requirement to meet the federal beet sugar TBELs at issue here – does not apply to discharges to groundwater.

This fact is reflected in Montana’s discharge rules that incorporate the federal TBELs by reference, which specify that the TBELs apply only to point source discharges of wastewater into “state surface waters,” and not discharges to groundwater. Mont. Admin. R. 17.30.1201; *see also* Mont. Admin. R. 17.30.1203 (variance procedure for TBELs apply to surface water discharge); Mont. Admin. R. 17.30.602(31) (defining “surface waters” to exclude water bodies used solely for treating, transporting, or impounding pollutants); Mont. Code Ann. § 75-5-103(32)(a) (excluding ponds or lagoons used solely for treating, transporting, or impounding pollutants from the definition of “State waters.”).

Additionally, Section 25 Pond is not a “point source,” which is a threshold requirement not only for CWA jurisdiction generally, but also specifically for the application of technology-based standards under federal and state law. *See* Mont. Admin. R. 17.30.1201(1) (providing that TBELs and other effluent limitations established under subchapter 12 apply to “*point sources* discharging wastes into state *surface waters*” (emphases added) ... “in a manner that implements the

national pollutant discharge elimination system (NPDES) established under ... the federal Clean Water Act.”). Numerous federal courts interpreting the CWA have recently concluded that seepage to groundwater from large storage/treatment ponds does not constitute a discharge from a “point source” for purposes of CWA jurisdiction, even where pollutants in the seepage may eventually reach jurisdictional surface waters.<sup>1</sup>

This conclusion is also consistent with the underlying “technology” that the beet-sugar TBELs were based upon. The EPA’s 1974 Development Document, which it published as technical support for the beet-sugar TBELs, makes clear that the EPA based the beet-sugar TBELs on “technology” that relied upon “land disposal” of wastewater, a term it used to include both land application and disposal to unlined holding ponds. (Beet Sugar Processing: Subcategory of the Sugar Processing Point Source Category, Dev. Doc. 130–131 (EPA Jan. 1974).)

The EPA noted that land disposal could potentially result in the seepage of wastewater to soil and groundwater, with subsequent migration through groundwater to surface water (i.e., exactly the situation with Section 25 Pond), but

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<sup>1</sup> See, e.g., *Sierra Club v. VA Elec. & Power Co.*, 903 F.3d 403 (4th Cir. 2018) (concluding that landfill and settling ponds could not be “point sources” under the CWA); see also *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925, 934 n. 8 (6th Cir. 2018) (holding that coal ash storage ponds are not point sources because they “are not conveyances—they do not ‘take or carry [pollutants] from one place to another’”); *Tenn. Clean Water Network v. TVA*, 905 F.3d 436, 441, 444 (6th Cir. 2018) (citations omitted) (finding 65-acre coal ash storage site was not a point source); *Toxics Action Ctr., Inc. v. Casella Waste Sys., Inc.*, 347 F. Supp. 3d 67,75 (D. Mass. 2018) (finding unlined municipal landfill did not constitute a point source under the CWA).



made no mention of this type of groundwater to surface water discharge (“GSWD”) being subject to the TBELs. (*See generally* EPA Beet Sugar Processing Dev. Doc.) To the contrary, the EPA’s only reference to GSWDs was to the positive environmental effects of land disposal; the agency wrote: “waste water returned to the ground through land disposal . . . may be reclaimed as ground water supply or eventually finds its way, generally in a purified state, back to surface waters.” *Id.* at 137.

In the case of Section 25 Pond, actual monitoring data indicates that this water does eventually find its way back to surface waters in a purified state as a result of Section 25 Pond’s attenuation process, with BOD<sub>5</sub> and other pollutants being almost entirely eliminated by the time any wastewater reaches the receiving surface water, the Yellowstone River. In sum, Section 25 Pond is a non-point source discharging to water that is not subject to the TBELs (groundwater) utilizing a technology specifically recommended by the EPA as a means of accomplishing exactly what SSI is accomplishing at Section 25 pond, i.e. stopping wastewater from reaching surface waters. Accordingly, SSI’s Section 25 Pond seepage should not be subject to federal jurisdiction, including the TBELs.

Notwithstanding this clear EPA guidance, the DEQ appears to believe that it has independent authority to impose the federal TBELs under state law. However, under federal law, the federal TBELs are exclusively implemented

through NPDES permits as effluent limits on discharges to “surface water,” not groundwater. Montana’s EPA-authorized NPDES program meets and incorporates the Federal NPDES requirements with little to no change, particularly with the direct incorporation of the federal TBELs by reference. Mont. Admin. R. 17.30.1203.

*The DEQ Further Erred When Rejecting SSI’s Proposed  
TBEL Monitoring Approach for BOD<sub>5</sub>*

SSI proposed a TBEL compliance monitoring approach for BOD<sub>5</sub>, even though it disagreed with the DEQ (and continues to disagree) that the TBELs apply to discharges to groundwater from Section 25 Pond. SSI’s proposed monitoring approach takes into account the attenuation (biodegradation) of organic matter (BOD<sub>5</sub>) that occurs in and below the pond, but subtracts the diluting effect of the groundwater. (*See* Ex. 2, Comments submitted by Sidney Sugars, Inc. Regarding Draft MPDES Permit No. MT0000248 at 021-022.) This method is based on actual data from ongoing wastewater and groundwater monitoring and site-specific hydrogeological studies, allowing SSI to quantify the level of BOD<sub>5</sub> from SSI’s wastewater that enters the Yellowstone River. (Exec. Summ. by KC Harvey Env’t, LLC and Sidney Sugars Inc., Proposed Approach for Monitoring Compliance with Tech. Based Effluent Limits for Biological Oxygen Demand (BOD<sub>5</sub>) in the Section 25 Pond at the Sidney Sugars, Inc. Facility, MPDES Permit No. MT 0000248, July 21, 2020.)

Even if TBELs did apply to seepage from Section 25 Pond (a point SSI does not concede), they would need to be applied at or prior to “the point of discharge.” *See* Mont. Admin. R. 17.30.1203(7); *see also* Technology-based treatment requirements in permits, 40 C.F.R. § 125.3 (2021). The “point of discharge” is the physical location where pollutants are added to a jurisdictional surface water. *See* Mont. Admin. R. 17.30.1304(22) (defining “discharge of a pollutant” as the “addition of any pollutant or combination of pollutants to state waters from any point source” (emphasis added) and Mont. Admin. R. 17.30.1201 (indicating that TBELs only apply to point sources “discharging wastes into state *surface waters*” (emphasis added) (not the broader “state waters” used elsewhere in 17.30, which includes groundwater)).<sup>2</sup>

Consequently, even if the TBELs applied to discharges that reach jurisdictional surface waters only after first migrating through groundwater, the “point of discharge” – the point where water must be measured for compliance with the TBELs – is at the point where the pollutants emerge through the hydrologically connected groundwater and are “added” to a state surface water. For seepage from Section 25 Pond, the “point of discharge” for purposes of the

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<sup>2</sup> In addition, the federal TBELs, which are incorporated by reference unchanged in Montana regulations, are “effluent limitations” which, by definition, apply only to “discharges,” meaning the “addition” of pollutants to “*navigable waters*” (i.e., surface waters, not groundwater). General Definitions, 40 C.F.R. § 401.11(i) (defining “effluent limitation”) and (h) (defining “discharge of pollutant(s)” for federal TBELs).

TBELs is, thus, where pollutants are “added” to the Yellowstone River (i.e., at or near the groundwater monitoring wells located between Section 25 Pond and the river).

Importantly, a limited exception to the requirement to monitor at the “point of discharge” is inapplicable in this case. Both federal and state regulations provide that when monitoring for compliance with the TBELs at the point of discharge is “impractical or infeasible” – i.e., where the point of discharge is inaccessible or where the wastes are so diluted as to make monitoring impracticable – the DEQ may apply the TBELs further upstream, at an internal monitoring location. Mont. Admin. R. 17.30.1345(10); Calculating NPDES permit conditions, 40 C.F.R. § 122.45(h). However, the monitoring approach SSI’s consultant proposed – the technical merit of which DEQ has not apparently questioned – to accurately monitor levels of BOD<sub>5</sub> from Section 25 Pond at the actual point of discharge is neither impractical nor infeasible. Moreover, *this method expressly accounts for and removes any reduction of BOD<sub>5</sub> that occurs as a result of groundwater dilution*. The DEQ erred in rejecting SSI’s proposed monitoring approach, instead making the point of compliance the water in Section 25 Pond, which is not representative of discharges into state surface waters.

*The DEQ Erred When Failing to Update SSI's Load Calculations – Neither Antibacksliding nor Nondegradation Prohibits DEQ from Adjusting SSI's BOD<sub>5</sub> and TSS Effluent Limits to Reflect Updated Production Rates*

The DEQ erred when determining that it must maintain SSI's effluents limits at the levels that were established in SSI's 1998 Permit. (Ex. 2, SSI Comments Regarding Draft MPDES Permit No. MT0000248 at 005-008). The DEQ's interpretation and application of the CWA antibacksliding provisions and state nondegradation rules represent errors of law which SSI respectfully requests the Board corrects. (See Fact Sheet, SSI Permit No. MT0000248, DEQ Water Quality Division 27, Table 13 (DEQ 2020) (hereinafter "Renewal Permit Fact Sheet") (listing "Nondeg & Anti-backsliding" as the "basis" for the proposed BOD<sub>5</sub> and TSS limits).) These provisions do not provide a basis for imposing limits other than the properly calculated increased TBELs of 7,194 lb/day and 4,356 lb/day included by the DEQ permit writer in the Renewal Permit Fact Sheet.

Antibacksliding

The EPA regulations concerning antibacksliding allow effluent limits based upon federally promulgated TBELs (such as the beet sugar TBELs at issue in this matter contained in Sugar Processing Point Source Category, 40 C.F.R. pt. 409) to be less stringent than previous limits where "the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or

revocation and reissuance under § 122.62.” Establishing limitations, standards, and other permit conditions, 40 C.F.R § 122.44(l)(1), incorporated by reference in Mont. Admin. R. 17.30.1344(2)(b).

In the Renewal Permit, the DEQ based the TSS and BOD<sub>5</sub> limits upon SSI’s sugar production levels in 1998, which the Renewal Permit Fact Sheet indicates was 1.52 MM lb/day. However, the “circumstances” regarding SSI’s capacity to produce sugar have “materially and substantially” changed since that time, justifying the higher calculated limits. Specifically, in 2005, SSI invested \$2.5 million in two low sugar pans that allowed SSI to produce significantly more sugar and accounted for the bulk of the increase in sugar production capacity between 1998 and today. (*See* Renewal Permit Fact Sheet, 27, Table 13) (reflecting SSI’s average reported sugar production as 1.52 MM lb/day in 1998 and 1.67 MM lb/day today).)

Importantly, the BOD<sub>5</sub> and TSS limits in SSI’s 2009 Permit were based upon the 1990 reported sugar production levels and did not reflect the increased sugar production resulting from the addition of the two new batch pans in 2005. Exactly why the expanded sugar production was not accounted for in recalculated TBELs in the 2009 Permit is unclear. Regardless of the reasons, however, the “circumstances” on which SSI’s 2009 Permit were based, i.e., sugar production levels that predated the new batch pans, “have materially and substantially



changed.” 40 C.F.R. § 122.44(l)(1). It is arbitrary and capricious for the DEQ to maintain the TBELs based upon SSI’s 1998 sugar production levels. The Board should order the DEQ to revise the Renewal Permit to include properly calculated maximum daily and average monthly BOD<sub>5</sub> and TSS limits of 7,194 lb/day and 4,356 lb/day respectively.

### Nondegradation

The DEQ also asserts that it was required to maintain SSI’s BOD<sub>5</sub> and TSS limits at 1998 levels because of nondegradation (*see* Renewal Fact Sheet, 27). The DEQ apparently based this assertion on the erroneous assumption that the reissuance of SSI’s Renewal Permit with the new, properly calculated limits would trigger nondegradation, and SSI has not made a nondegradation demonstration. However, Montana’s nondegradation review requirements only apply to “any activity of man resulting in a new or increased source which may cause degradation.” Mont. Admin. R. 17.30.705(1). Accordingly, for nondegradation to apply to SSI’s permitted “activity,” two factors must be met: (a) there must be a “new or increased source,” and (b) the new or increased source must be one that “may cause degradation.” The DEQ can and should reissue SSI’s higher calculated BOD<sub>5</sub> and TSS limits without triggering nondegradation because neither of these factors are met.

SSI's wastewater discharge activities are neither a "new or increased source" nor a potential cause of "degradation," as these terms are defined by rule and statute. Accordingly, nondegradation is not triggered and is thus not a basis for the DEQ to maintain the prior permit limits for BOD<sub>5</sub> and TSS. For this reason and because, as discussed above, antibacksliding also does not apply, the DEQ erred in not applying the revised production-based calculation of the TBELs (BOD<sub>5</sub> and TSS), i.e., a maximum daily limit of 7,194 lbs/day and an average monthly limit of 4,356 lbs/day for both parameters, as SSI requested.

*The DEQ Erred in Applying Numeric Effluent Limitations  
with Respect to E. Coli and Fecal Coliform*

During the permit renewal process and the development of the Compliance Plan for the AOC, the DEQ concurred that a study regarding the nature and origin of elevated fecal coliform and *E. coli* be carried out by SSI. (Ex. 2, SSI's Comments Regarding Draft MPDES Permit No. MT0000248 at 002-005). In response, SSI retained the Montana State University Walk Laboratory and KC Harvey Environmental, LLC to study the source and nature of fecal coliform and *E. coli* bacteria in SSI's wastewater management system. (Tech. Mem. from KC Harvey Env't, LLC to Sidney Sugars, Inc., Study of Fecal Coliform at the Sidney Sugars Wastewater Treatment Sys.: Presence, Source Host Identification, Pathogenic Risk, Lab'y Rev., and Literature Rev. (Apr. 30, 2019).) The results of that study confirmed that the sources of these bacteria are wildlife and,

specifically, the presence of waterfowl, and that the bacterium are not a human health risk. It is SSI's understanding that the DEQ concurs with these findings.

Best management practices ("BMP") are authorized in place of numeric effluent limitations where the imposition of numeric limitations is infeasible. 40 C.F.R. 122.44(k), incorporated by reference in Mont. Admin. R. 17.30.1344. SSI is not able to control the presence of waterfowl on/in its ponds nor the occurrence of a major precipitation event which has been shown to exacerbate the impact from waterfowl. Consequently, the imposition of numeric limits is infeasible as contemplated by 40 C.F.R. 122.44(k). SSI thus requested a "case specific" or BMP alternative to the proposed *E. coli* and fecal coliform limits. In SSI's Renewal Permit, the DEQ erred by denying this request and applying numeric limits instead of the appropriate "case specific" or BMP alternative.

### CONCLUSION

SSI respectfully requests that the appealed portions of the Renewal Permit should be reversed or modified by this Board with appropriate instruction to the department. The DEQ's decisions were in excess of its statutory authority, affected by errors of law, clearly erroneous, arbitrary and capricious, and/or otherwise in violation of law.

//

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Submitted this 30th day of September, 2021.

WORDEN THANE P.C.  
*Attorneys for Sidney Sugars  
Incorporated*

/s/Dana L. Hupp  
Dana L. Hupp

## CERTIFICATE OF SERVICE

I certify that on September 30, 2021, I served a copy of the preceding document by e-mail on the following:

Ms. Regan Sidner  
Board Secretary  
Board of Environmental Review  
Email: [deqbersecretary@mt.gov](mailto:deqbersecretary@mt.gov)

Kirsten H. Bowers  
Special Assistant Attorney General  
DEQ Director's Office  
E-mail: [kbowers@mt.gov](mailto:kbowers@mt.gov)

/s/Dana L. Hupp  
\_\_\_\_\_  
Dana L. Hupp

Major Industrial  
Permit No.: MT0000248

## MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY

### AUTHORIZATION TO DISCHARGE UNDER THE MONTANA POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with Montana Water Quality Act, Title 75, Chapter 5, Montana Code Annotated (MCA) and the Federal Water Pollution Control Act (the "Clean Water Act"), 33 U.S.C. § 1251 *et seq.*,

#### **Sidney Sugars Incorporated**

is authorized to discharge from its **Sugar Beet Processing Facility**

located at **35140 County Road 125, Sidney, MT in Richland County**

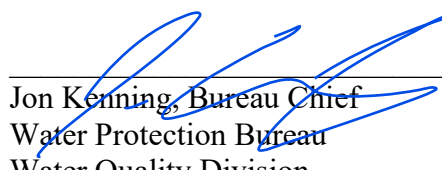
to receiving waters named, **the Yellowstone River, and Class I and II ground water**

in accordance with discharge point(s), effluent limitations, monitoring requirements and other conditions set forth herein. Authorization for discharge is limited to those outfalls specifically listed in the permit.

This permit shall become effective: **October 1, 2021**

This permit and the authorization to discharge shall expire at midnight, **September 30, 2026**

FOR THE MONTANA DEPARTMENT OF  
ENVIRONMENTAL QUALITY



\_\_\_\_\_  
Jon Kenning, Bureau Chief  
Water Protection Bureau  
Water Quality Division

Issuance Date: August 31, 2021



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**I. EFFLUENT LIMITS, MONITORING REQUIREMENTS & OTHER CONDITIONS****A. Description of Discharge Points and Mixing Zone**

The authorization to discharge provided under this permit is limited to those outfalls specially designated below as discharge locations. Discharges at any location not authorized under an MPDES permit is a violation of the Montana Water Quality Act and could subject the person(s) responsible for such discharge to penalties under the Act. Knowingly discharging from an unauthorized location or failing to report an unauthorized discharge within a reasonable time from first learning of an unauthorized discharge could subject such person to criminal penalties as provided under Section 75-5-632 of the Montana Water Quality Act.

<u>Outfall</u>	<u>Description</u>
001	<p><b>Location:</b> At the end of the pipe, at 47°43'49.44"N, 104°05'47.27"W, discharging from the Section 25 Pond into the Yellowstone River through a dedicated effluent ditch.</p> <p><b>Mixing Zone:</b> None.</p> <p><b>Treatment Works:</b> Clarification, biological activity, and settling.</p>
002	<p><b>Location:</b> Infiltration through ground water from the Section 25 pond to the Yellowstone River, with the mid-point at 47°43'23" N, 104°5'46.5" W.</p> <p><b>Mixing Zone:</b> None.</p> <p><b>Treatment Works:</b> Clarification, biological activity, and settling.</p>
003	<p><b>Location:</b> Infiltration from various unlined wastewater factory ponds, discharging into Class II ground water, 47°42'58.6"N, 104°07'26.7"W.</p> <p><b>Mixing Zone:</b> None.</p> <p><b>Treatment Works:</b> Clarification, biological activity, and settling.</p>

## B. Effluent Limits

### 1. Outfall 001

Effective immediately and lasting the duration of the permit, the following limits must be met at the Section 25 Pond discharge pipe:

Table 1: Final Effluent Limits – Outfall 001			
Parameter	Units	Effluent Limitations	
		Maximum Daily Limit	Average Monthly Limit
pH	s.u.	Within the range 6.0 to 9.0	
Temperature	° F	90	--
Fecal Coliform Bacteria	#org/100 mL <sup>(1)</sup>	400	--
<i>E coli</i> Bacteria - summer <sup>(2,3)</sup>	#org/100 mL <sup>(1)</sup>	252	126
<i>E coli</i> Bacteria - winter <sup>(2,3)</sup>	#org/100 mL <sup>(1)</sup>	1,260	630
Oil & Grease	mg/L	10	--
Footnotes: (1) Number of organisms (#org) / 100 mL to be reported based on units from 40 CFR 136-approved test method conducted (either colony-forming units, cfu or most probable number, mpn). (2) <i>E. coli</i> bacteria monthly limit is based on the geometric mean. (3) Summer is defined as April 1 through October 31, and winter is defined as November 1 through March 31.			

There shall be no discharge which causes visible oil sheen in the receiving stream.

There shall be no acute toxicity in the effluent.

### 2. Outfall 002

Effective immediately and lasting the duration of the permit the following limits must be met within the Section 25 Pond:

<b>Table 2: Final Effluent Limits – Outfall 002</b>			
<b>Parameter</b>	<b>Units</b>	<b>Effluent Limitations</b>	
		<b>Maximum Daily Limit</b>	<b>Average Monthly Limit</b>
pH	s.u.	Within the range 6.0 to 9.0	
Temperature	° F	90	--
Fecal Coliform Bacteria	#org/100 mL	400	--
<i>E. coli</i> Bacteria - summer <sup>(1,2)</sup>	#org/100 mL	252	126
<i>E. coli</i> Bacteria - winter <sup>(1,2)</sup>	#org/100 mL	1,260	630
Footnotes:			
(1) Number of organisms (#org) / 100 mL to be reported, based on units from 40 CFR 136-approved test method conducted (either colony-forming units, cfu or most probable number, mpn).			
(2) <i>E. coli</i> bacteria monthly limit is based on the geometric mean.			
(3) Summer is defined as April 1 through October 31, and winter is defined as November 1 through March 31.			

### 3. Sum of Outfalls 001 and 002

Effective immediately and lasting through the duration of the permit, the following effluent limits must be met as the sum of the loads from Outfalls 001 and 002:

<b>Table 3: Final Effluent Limits – SUM Outfalls 001 + 002</b>			
<b>Parameter</b>	<b>Units</b>	<b>Effluent Limitations</b>	
		<b>Maximum Daily Limit</b>	<b>Average Monthly Limit</b>
5-Day Biochemical Oxygen Demand	lb/day	5,013	3,342
Total Suspended Solids	lb/day	5,013	3,342
Total Nitrogen (TN) <sup>(1)</sup>	lb/day	--	378
Total Phosphorus (TP) <sup>(1)</sup>	lb/day	--	24
Footnotes:			
(1) The load limits for TN and TP are effective August 1 <sup>st</sup> through October 31 <sup>st</sup> .			

### C. Monitoring Requirements

At a minimum, upon the effective date of this permit, Sidney Sugars, Inc. (SSI) shall monitor the following constituents at the frequency and with the type of measurement indicated; samples or measurements shall be representative of the volume and nature of the monitored discharges. If no discharge occurs during the entire monitoring period, it shall be stated on the electronic Discharge Monitoring Report (NetDMR) Form that no discharge or overflow occurred.

Samples shall be collected, preserved and analyzed in accordance with approved procedures listed in 40 CFR 136. Unless SSI requests and DEQ agrees to another

reporting level in writing, data supplied for each parameter must either have a detection or meet the Required Reporting Value (RRV) in Circular DEQ-7 as provided below.

### 1. Effluent

Self-monitoring of effluent shall be conducted at the following locations, unless another location is requested and approved by DEQ in writing:

- Outfall 001 – at the end-of-pipe as water is pumped into the effluent ditch;
- Outfall 002 – a composite of at least four aliquots taken from the Section 25 Pond. One of the aliquots can be from Outfall 001 or land application; at least three aliquots must be from representative depths within different quadrants of the pond as proposed by SSI and agreed to by DEQ, in writing (see Special Conditions);
- INTL – end of pipe prior to entering the Section 25 Pond.

If no discharge occurs during the entire monitoring period, it shall be stated on the NetDMR that no discharge or overflow occurred.

#### a. Outfall 001

At a minimum, the following constituents shall be monitored at the frequencies and with the types of measurements indicated, during any periods with discharge from Outfall 001 (see **Table 4**):

<b>Table 4: Outfall 001 Monitoring Requirements</b>					
<b>Parameter</b> <i>TR = Total Recoverable</i>	<b>Unit</b>	<b>Minimum Monitoring Frequency</b>	<b>Sample Type <sup>(1)</sup></b>	<b>RRV</b>	<b>Reporting Requirement</b>
Discharge Flow	mgd	1/Day <sup>(2)</sup>	Instantaneous	--	Daily Max & Mo Avg
	MG/Month	1/Month	Calculated	--	Value
	# Days	1/Month	Calculated	0.5	Value
5-Day Biochemical Oxygen Demand	mg/L	1/Week	Composite	4	Daily Max & Mo Avg
	lb/day	1/Month	Calculated	--	Monthly Avg <sup>(3)</sup>
Total Suspended Solids	mg/L	1/Week	Composite	10	Daily Max & Mo Avg
	lb/day	1/Month	Calculated	--	Monthly Avg <sup>(3)</sup>
pH	s.u.	2/Week	Instantaneous	0.1	Daily Min and Daily Max
Temperature	° F	2/Week	Instantaneous	0.1	Daily Min and Daily Max
Fecal Coliform	#org/100 mL	1/Week	Grab	1	Daily Max
<i>E. coli</i> bacteria	#org/ 100 mL	1/Week	Grab	1	Daily Max and Geo Mean
Oil & Grease	Y/N	2/Week	Visual	--	Y/N
	mg/L	1/Year <sup>(4)</sup>	Grab	1	Value
Total Ammonia as N	mg/L	1/Month	Composite	0.07	Value
Total Kjeldahl Nitrogen (TKN)	mg/L	2/Month <sup>(5)</sup>	Composite	--	Monthly Avg
Nitrate + Nitrite as N (N+N)	mg/L	2/Month <sup>(5)</sup>	Composite	0.02	Monthly Avg
	mg/L	1/Quarter			Value

**Table 4: Outfall 001 Monitoring Requirements**

Parameter <i>TR = Total Recoverable</i>	Unit	Minimum Monitoring Frequency	Sample Type <sup>(1)</sup>	RRV	Reporting Requirement
Total Nitrogen as N (TN)	mg/L	2/Month <sup>(5)</sup>	Calculate <sup>(6)</sup>	--	Monthly Avg
	lb/day	1/Month <sup>(5)</sup>	Calculated	--	Monthly Avg <sup>(3)</sup>
Total Phosphorus as P (TP)	mg/L	2/Month <sup>(5)</sup>	Composite	--	Monthly Avg
	lb/day	1/Month <sup>(5)</sup>	Calculated	--	Monthly Avg <sup>(3)</sup>
Sulfate	mg/L	1/Quarter	Composite	10	Value
Fluoride	mg/L	1/Quarter	Composite	0.2	Value
Iron, TR	mg/L	1/Quarter	Composite	0.02	Value
Arsenic, TR	µg/L	1/Quarter	Composite	1	Value
Lead, TR	µg/L	1/Quarter	Composite	0.3	Value
Mercury, TR	µg/L	1/Quarter	Composite	0.005	Value
Selenium, TR	µg/L	1/Quarter	Composite	1	Value
Aluminum, dissolved	µg/L	Semi-annual <sup>(7)</sup>	Composite	9	Value
Antimony, TR	µg/L	Semi-annual <sup>(7)</sup>	Composite	0.5	Value
Barium, TR	µg/L	Semi-annual <sup>(7)</sup>	Composite	3	Value
Beryllium, TR	µg/L	Semi-annual <sup>(7)</sup>	Composite	0.8	Value
Cadmium, TR	µg/L	Semi-annual <sup>(7)</sup>	Composite	0.03	Value
Chromium, Total	µg/L	Semi-annual <sup>(7)</sup>	Composite	10	Value
Copper, TR	µg/L	Semi-annual <sup>(7)</sup>	Composite	2	Value
Nickel, TR	µg/L	Semi-annual <sup>(7)</sup>	Composite	2	Value
Thallium, TR	µg/L	Semi-annual <sup>(7)</sup>	Composite	0.2	Value
Zinc, TR	µg/L	Semi-annual <sup>(7)</sup>	Composite	8	Value
Whole Effluent Toxicity (WET), Acute <sup>(8)</sup>	% Effluent	1/Quarter	Grab	NA	Value

**Footnotes:**

- (1) See Definition section at end of permit for explanation of terms.
- (2) See Special Conditions for flow monitoring requirements. Flow must be measured +/- 10% of actual discharge rates.
- (3) The monthly averages are calculated by averaging the loads only on days with discharge.
- (4) SSI shall take one grab sample per year, plus any time oil & grease is visually detected.
- (5) Nutrients (TKN, N+N, TN, and TP) are to be sampled twice per month during the nutrient growing season of August 1<sup>st</sup> to October 31<sup>st</sup>, during periods of discharge. N+N monitoring is reduced to quarterly during the non-growing season.
- (6) Total Nitrogen calculated as the sum of TKN plus N+N.
- (7) Semi-annual metals testing to be conducted twice a year at least four (4) months apart, for four years (2022 to 2025).
- (8) WET testing of two-species quarterly until SSI passes four consecutive tests, at which case SSI can request to reduce WET testing to two-species semi-annually. See narrative discussion of permit for additional details.

**b. Outfall 002**

At a minimum, the following constituents shall be monitored at the frequencies and with the types of measurements indicated, during any periods with discharge from Outfall 002 (i.e. any periods with wastewater in the pond) (see **Table 5**):



**Table 5: Outfall 002 Monitoring Requirements**

<b>Parameter</b> <i>TR = Total Recoverable</i>	<b>Unit</b>	<b>Min Monitoring Frequency</b>	<b>Sample Type <sup>(1)</sup></b>	<b>RRV</b>	<b>Reporting Requirement <sup>(2)</sup></b>
Discharge Flow <sup>(2)</sup>	Staff Gauge (ft)	1/Week	Instantaneous	0.1	Monthly Avg
	Wetted Acres	1/Week	Calculated <sup>(3)</sup>	--	Monthly Avg
	mgd	1/Month	Calculated <sup>(3)</sup>	--	Monthly Avg
5-Day Biochemical Oxygen Demand	mg/L	1/Week	Aliquots	4	Monthly Avg
	lb/day	1/Month	Calculated <sup>(3)</sup>	--	Monthly Avg
Total Suspended Solids	mg/L	1/Week	Aliquots	10	Monthly Avg
	lb/day	1/Month	Calculated <sup>(3)</sup>	--	Monthly Avg
pH	s.u.	1/Week	Instantaneous	0.1	Daily Min & Daily Max
Temperature	° F	1/Month	Instantaneous	0.1	Daily Max
Fecal Coliform	#org/100 mL	1/Week	Aliquots	1	Daily Max
<i>E. coli</i> bacteria	#org/ 100 mL	1/Week	Aliquots	1	Daily Max and Geometric Mean
Oil & Grease	Y/N	1/Week	Visual	--	Y/N
	mg/L	<sup>(4)</sup>	Aliquots	1	Value
Total Ammonia as N	mg/L	1/Month	Aliquots	0.07	Value
Total Kjeldahl Nitrogen (TKN)	mg/L	2/Month <sup>(4)</sup>	Aliquots	--	Monthly Avg
Nitrate + Nitrite as N (N+N)	mg/L	2/Month <sup>(4)</sup>	Aliquots	0.02	Monthly Avg
	mg/L	1/Quarter			Value
Total Nitrogen as N (TN)	mg/L	2/Month <sup>(4)</sup>	Calculated <sup>(5)</sup>	--	Monthly Avg
	lb/day	1/Month <sup>(4)</sup>	Calculated <sup>(3)</sup>	--	Monthly Avg
Total Phosphorus as P (TP)	mg/L	2/Month <sup>(4)</sup>	Aliquots	--	Monthly Avg
	lb/day	1/Month <sup>(4)</sup>	Calculated <sup>(3)</sup>	--	Monthly Avg
Sulfate	mg/L	1/Quarter	Composite	10	Value
Fluoride	mg/L	1/Quarter	Composite	0.2	Value
Iron, TR	mg/L	1/Quarter	Aliquots	0.02	Value
Arsenic, TR	µg/L	1/Quarter	Aliquots	1	Value
Lead, TR	µg/L	1/Quarter	Aliquots	0.3	Value
Mercury, TR	µg/L	1/Quarter	Aliquots	0.005	Value
Selenium, TR	µg/L	1/Quarter	Aliquots	1	Value
Aluminum, dissolved	µg/L	Semi-annual <sup>(6)</sup>	Aliquots	9	Value
Antimony, TR	µg/L	Semi-annual <sup>(6)</sup>	Aliquots	0.5	Value
Barium, TR	µg/L	Semi-annual <sup>(6)</sup>	Aliquots	3	Value
Beryllium, TR	µg/L	Semi-annual <sup>(6)</sup>	Aliquots	0.8	Value
Cadmium, TR	µg/L	Semi-annual <sup>(6)</sup>	Aliquots	0.03	Value
Chromium, Total	µg/L	Semi-annual <sup>(6)</sup>	Aliquots	10	Value
Copper, TR	µg/L	Semi-annual <sup>(6)</sup>	Aliquots	2	Value
Nickel, TR	µg/L	Semi-annual <sup>(6)</sup>	Aliquots	2	Value
Thallium, TR	µg/L	Semi-annual <sup>(6)</sup>	Aliquots	0.2	Value
Zinc, TR	µg/L	Semi-annual <sup>(6)</sup>	Aliquots	8	Value

**Table 5: Outfall 002 Monitoring Requirements**

Parameter <i>TR = Total Recoverable</i>	Unit	Min Monitoring Frequency	Sample Type <sup>(1)</sup>	RRV	Reporting Requirement <sup>(2)</sup>
Footnotes:					
(1) See Definition section at end of permit for explanation of terms. "Aliquots" are samples taken from at least four pond locations (including up to one from either Outfall 001 or land application) per the Section 25 Pond Monitoring Program that SSI is required to develop as a Special Condition. The four aliquots may be combined and analyzed and reported together or analyzed separately and averaged and reported.					
(2) Monthly averages are calculated by averaging the loads only on days with discharge (i.e. standing water).					
(3) SSI shall convert the weekly staff gauge reading to wetted surface area (acres) and convert to the discharge flow rate based on the equation $\text{mgd} = 0.12''/\text{day} \times \text{acres} \times 0.027154$ . The calculated discharge rate will be used to calculate loads ( $\text{lb/day} = \text{mg/L} \times \text{mgd} \times 8.34$ ). SSI shall take a grab sample any time oil & grease is visually detected.					
(4) Nutrients are to be sampled twice per month during the growing season of August 1 <sup>st</sup> to October 31 <sup>st</sup> . N+N monitoring is reduced to quarterly during the non-growing seasons.					
(5) Total Nitrogen calculated as the sum of TKN plus N+N.					
(6) Semi-annual metals testing to be conducted twice a year at least four (4) months apart, for four years (2022 to 2025).					

**c. Sum of Outfalls 001 & 002**

At a minimum, the following constituents shall be reported at the frequencies and with the types of measurements indicated, based on the sum of the loads calculated each month at Outfall 001 and Outfall 002 (see **Table 6**).

<b>Table 6: SUM Outfalls 001 + 002 Monitoring Requirements</b>				
Parameter	Unit	Minimum Monitoring Frequency	Sample Type	Reporting Requirement <sup>(1)</sup>
5-Day Biochemical Oxygen Demand (BOD <sub>5</sub> )	lb/day	1/Month	Calculated	Max Daily <sup>(2)</sup> and Monthly Avg
Total Suspended Solids (TSS)	lb/day	1/Month	Calculated	Max Daily <sup>(2)</sup> and Monthly Avg
Total Nitrogen as N (TN)	lb/day	1/Month <sup>(3)</sup>	Calculated	Monthly Avg
Total Phosphorus as P (TP)	lb/day	1/Month <sup>(3)</sup>	Calculated	Monthly Avg
Footnote:				
(1) The monthly averages are calculated summing the average loads for each outfall using only days with discharge.				
(2) Maximum daily loads for BOD <sub>5</sub> and TSS = the maximum daily discharge from Outfall 001 + monthly average discharge from Outfall 002.				
(3) TN and TP monitoring is required only during the Yellowstone River nutrient growing season of August 1 <sup>st</sup> to October 31 <sup>st</sup> .				

**d. INTL**

At a minimum, SSI shall monitor the partially treated wastewater as it enters the Section 25 Pond at INTL, as follows (see **Table 7**):

<b>Table 7: INTL Monitoring Requirements</b>					
<b>Parameter</b>	<b>Unit</b>	<b>Minimum Monitoring Frequency</b>	<b>Sample Type</b>	<b>RRV</b>	<b>Reporting Requirement <sup>(1)</sup></b>
Discharge Flow	mgd	1/Week	Instantaneous <sup>(2)</sup>	--	Daily Max & Mo Avg
	MG/Month	1/Month	Calculated	--	Value
	# Days	1/Month	Calculated	0.5	Value
Footnotes: (1) Monthly average is calculated by averaging only on days with discharge. (2) Flow must be measured +/- 10% of actual discharge rates.					

## 2. Monitoring Wells

### a. Upgradient Monitoring Wells

At a minimum, the following constituents shall be monitored at upgradient monitoring wells for the Section 25 Pond (wells P-1 and P-5) and the Factory Ponds (well MW-7) and reported on the NetDMR at the frequencies indicated below (see **Table 8**). If SSI wants to change the ambient monitoring locations, they must submit a proposal to DEQ and receive authorization, in writing:

<b>Table 8: Ambient Monitoring Wells P-1, P-5, and MW-7</b>					
<b>Parameter</b>	<b>Unit</b>	<b>Minimum Monitoring Frequency</b>	<b>Sample Type</b>	<b>RRV</b>	<b>Reporting Requirement</b>
Static Water Level	ft amsl	1/Quarter	Instantaneous	--	Avg Value
Specific Conductivity	μS/cm	1/Quarter	Instantaneous	--	Avg Value
Temperature	° F	1/Quarter	Instantaneous	0.1	Avg Value
pH	s.u.	1/Quarter	Instantaneous	0.1	Avg Value
Iron, total recoverable	mg/L	1/Quarter	Grab	0.02	Avg Value
Arsenic, total recoverable	μg/L	1/Quarter	Grab	1	Avg Value
Ammonia, Total as N	mg/L	1/Quarter	Grab	0.07	Avg Value
Nitrate + Nitrite as N	mg/L	1/Quarter	Grab	0.02	Avg Value

### b. Section 25 Pond – Wells P-2, P-3, and P-4

At a minimum, the following constituents shall be monitored at Section 25 Pond downgradient wells P-2, P-3, P-4 and reported on the NetDMR at the frequencies indicated below (see **Table 9**):

**Table 9: Downgradient of Section 25 Pond (Wells P-2, P-3, and P-4)**

Parameter	Unit	Minimum Monitoring Frequency	Sample Type	RRV	Reporting Requirement <sup>(1)</sup>
Static Water Level	ft amsl	1/Quarter	Instantaneous	--	Value
Iron, total recoverable	mg/L	1/Quarter	Grab	0.02	Value
Arsenic, total recoverable	µg/L	1/Quarter	Grab	1	Value
Ammonia, total as N	mg/L	1/Quarter	Grab	0.07	Value
Nitrate + Nitrite as N	mg/L	1/Quarter	Grab	0.02	Value
Footnotes: (1) Grab samples from the three wells shall be individually analyzed and reported.					

c. Outfall 003 Downgradient Monitoring Wells

At a minimum, the following constituents shall be monitored at downgradient monitoring wells for the Factory Ponds (MW-2R, MW-3, MW-4, MW-5, and MW-14) and reported on the NetDMR at the frequencies indicated below (see **Table 10**):

**Table 10: Factory Ponds (Outfall 003) Downgradient Monitoring Wells**

Parameter	Unit	Minimum Monitoring Frequency	Sample Type	RRV	Reporting Requirement
Static Water Level	ft amsl	1/Quarter	Instantaneous	--	Value
Specific Conductivity	µS/cm	1/Quarter	Instantaneous	--	Avg Value
Temperature	° F	1/Quarter	Instantaneous	0.1	Avg Value
pH	s.u.	1/Quarter	Instantaneous	0.1	Avg Value
Sulfate	mg/L	1/Quarter	Composite	10	Value
Fluoride	mg/L	1/Quarter	Composite	0.2	Value
Iron, total recoverable	mg/L	1/Quarter	Grab	0.02	Value
Arsenic, total recoverable	µg/L	1/Quarter	Grab	1	Value
Ammonia, Total as N	mg/L	1/Quarter	Grab	0.07	Value
Total Kjeldahl Nitrogen (TKN)	mg/L	1/Quarter	Grab	--	Value
Nitrate + Nitrite as N (N+N)	mg/L	1/Quarter	Grab	0.02	Value
Total Nitrogen as N	mg/L	1/Quarter	Calculated <sup>(1)</sup>	--	Value
Total Phosphorus as P	mg/L	1/Quarter	Composite	--	Value
Footnote: (1) Total Nitrogen is the sum of TKN plus N+N.					

### 3. Reporting Requirements

#### Composite

Composite samples shall be flow proportioned. A composite sample shall, as a minimum, contain at least four (4) samples collected over the compositing period. The

time between the collection of the first sample and the last sample shall not be less than six (6) hours nor more than 24 hours. Acceptable methods for preparation of composite samples are described in the Definitions section of this permit.

#### Aliquots

Aliquots are grab samples as identified in the SSI Section 25 Pond sampling plan, that are either combined as one sample for analysis or are analyzed separately and averaged.

#### Load Calculations for Direct Discharge

For direct discharges to surface water, effluent limits or monitoring requirements that are expressed in terms of load (lb/day) must be based on total mass of the discharge in accordance with the relevant definitions in Part V of this permit, of “Arithmetic Mean” or “Arithmetic Average;” “Average Monthly Limit;” “Daily Discharge;” and “Daily Maximum Limit.”

The load for a given parameter shall be calculated using the following equation:

- Load (lb/day) = Concentration (mg/L) x Discharge Flow Rate (mgd) x 8.34

The discharge flow rate is based on the recorded flow on the day that the sample was taken. The average monthly load shall be calculated based on the average of all daily loads calculated for the calendar month.

#### Load Calculations for Ground Water Infiltration

For discharge to surface water through ground water, effluent limits or monitoring requirements that are expressed in terms of load (lb/day) must be based on total mass of the discharge in accordance with the relevant definitions in Part V of this permit, of “Arithmetic Mean” or “Arithmetic Average;” “Average Monthly Limit;” as well as the above definition of composited aliquot. Because infiltration does not vary significantly day-to-day, the appropriate minimum monitoring period is weekly.

- Weekly load (lb/day) = Composited aliquot concentration (mg/L) x Discharge Flow Rate (mgd) x 8.34

The discharge flow rate is based on the recorded pond level height on the day that the sample was taken, converted into infiltration rate. The average monthly load shall be calculated based on the average of all weekly loads calculated for the calendar month.

### **4. Whole Effluent Toxicity Monitoring – Acute Toxicity**

Starting in the first calendar quarter following the effective date of the permit, the permittee shall conduct an acute static replacement toxicity test on a composite sample of the effluent. Testing will employ two species per quarter and will consist of five effluent concentrations (100, 50, 25, 12.5, and 6.25 percent effluent) and a control. Dilution water and the control shall consist of the receiving water

(moderately hard, or a laboratory reconstituted water that matches the hardness of the receiving water, may be used in accordance with WET methods).

Samples shall be collected on a two-day progression; i.e., if the first quarterly sample is on a Monday, the second quarter sample shall be on a Wednesday, etc. Saturdays, Sundays and Holidays will be skipped in the progression.

The static renewal acute toxicity tests shall be conducted in general accordance with the procedures set out in *Methods for Measuring the Acute Toxicity of Effluents and Receiving Waters to Freshwater and Marine Organisms*, EPA-821-R-02-012 and the *Region VIII EPA NPDES Acute Test Conditions - Static Renewal Whole Effluent Toxicity Test*. The permittee shall conduct a 48-hour static renewal acute toxicity test using *Ceriodaphnia dubia* and a 96-hour static renewal acute toxicity test using *Pimephales promelas* (fathead minnow). The control of pH in the toxicity test utilizing CO<sub>2</sub> enriched atmospheres is allowed to prevent rising pH drift. The target pH selected must represent the pH value of the receiving water at the time of sample collection.

Acute toxicity occurs when 50 percent or more mortality is observed for either species at any effluent concentration. If more than 10 percent control mortality occurs, the test is considered invalid and shall be repeated until satisfactory control survival is achieved, unless a specific individual exception is granted by DEQ. This exception may be granted if less than 10 percent mortality was observed at the dilutions containing high effluent concentrations.

If acute toxicity occurs in a routine test, an additional test (a resample test) shall be conducted within 14 days of the date the permittee is informed of the test failure. If acute toxicity occurs in the resample test, then the permittee is required to:

- a. Increase the WET testing frequency from quarterly to monthly until further notified by DEQ; and
- b. Undertake a Toxicity Reduction Evaluation (TRE) /Toxicity Identification Evaluation (TIE).

In all cases, the results of all WET tests must be submitted to DEQ in accordance with Part II of this permit.

The quarterly results from the laboratory shall be reported electronically via NetDMR along with the Discharge Monitoring Report submitted for the end of the reporting calendar quarter (e.g., whole effluent results for the reporting quarter ending March 31<sup>st</sup> shall be reported with the March DMR due April 28<sup>th</sup> with the remaining quarterly reports submitted with the June, September, and December DMRs, respectively). The format for the laboratory report shall be consistent with the latest revision of *Region VIII Guidance for Acute Whole Effluent Reporting*, and shall include all chemical and physical data as specified.

If the results for four consecutive quarterly tests indicate no acute toxicity, the permittee may request a reduction to semi-annual acute toxicity testing on two species, in writing. DEQ may approve or deny the request based on the results and

other available information without an additional public notice. If the request is approved, the test procedures are to be the same as specified above for the test species.

## **D. Special Conditions**

### **1. Toxicity Reduction Evaluation/ Toxicity Identification Evaluation**

Should acute toxicity be detected in the required resample, a TRE/TIE shall be undertaken by the permittee to establish the cause of the toxicity, locate the source(s) of the toxicity, and develop control or treatment for the toxicity.

A TRE plan needs to be submitted to DEQ within 45 days after confirmation of the continuance of effluent toxicity (resample). If the TRE/TIE establishes that the toxicity cannot be eliminated, the permittee shall submit a proposed compliance plan to DEQ. The plan shall include the proposed approach to control toxicity and a proposed compliance schedule for the implementation of the proposed approach. If the approach and schedule are acceptable to DEQ, this permit may be reopened and modified.

Failure to initiate or conduct an adequate TRE/TIE, or delays in the conduct of such tests, shall not be considered a justification for noncompliance with the whole effluent toxicity limits contained in Part I.B of this permit.

### **2. Storm Water**

SSI shall evaluate the impact from all indirect storm water runoff, and by no later than **September 30, 2024**, SSI shall submit findings from the evaluation to DEQ that includes:

- i) A figure to provide a clear depiction of all open piles of beet storage, beet by-products, and any other supplemental material such as coal and coal ash piles that may impact indirect storm water runoff into the Factory Ponds system.
- ii) An estimate for the volume of indirect storm water runoff that reaches the Factory Ponds and basis for the estimate.
- iii) Storm water quality analysis from at least four storm (or snow melt) events collected at each indirect storm water outfall for the following parameters, at a minimum:
  - pH
  - TSS
  - TN
  - TP
  - BOD<sub>5</sub>
  - Ammonia
  - *E. coli* bacteria



A sample must be taken within the first 30 minutes of flow and additional samples may be taken as desired.

If warranted, a description of any Best Management Practices implemented or planned to reduce pollutant loading from storm water.

### 3. Water Balance

Since compliance with load limits depend on accurate flow accounting, DEQ is requiring that SSI perform the following:

#### a. Flow Meters

SSI shall include the technical design details, calibration methods, and monitoring and recordkeeping procedures for flow meters or structures (such as weir or Parshall Flume) as part of their O&M Manual, at the following locations as a minimum. By **September 30, 2022**, SSI shall:

- *Water Input*: identify location(s) to monitor plant water use, install operable flow meter(s) or structure(s) at these locations, calibrate, and initiate monitoring and recordkeeping,
- *INTL meter for discharge out of 1.2-mile pipe*: calibrate the flow meter,
- *Outfall 001*: install a means of measuring the effluent flow, such as a flow meter, flume, or weir with measurement capabilities in accordance with DEQ design standards, including a recording device or totalizer; calibrate; and initiate monitoring and recordkeeping, and
- *Land Application*: calibrate the flow meter.

SSI shall check calibration of the measurement devices to ensure the flow is within 10% of the metered rate at least annually.

SSI shall submit a copy of the relevant parts of the O&M Manual and the results of the calibrations to DEQ within 14 days of the due date.

#### b. Flow Balance

By **September 30, 2024**, SSI shall:

- Submit an annual flow balance for the previous calendar year for the Section 25 Pond, including all inputs and outputs either measured (including inflow from INTL, Outfall 001, and Land Application and volume change), or calculated (evaporation and precipitation). The difference will be attributed to ground water infiltration or explained.

By **September 30, 2025**, SSI shall:

- Submit a facility-wide annual flow balance for the previous calendar year starting with water inputs from Factory Lake and beets through the Factory Ponds to the

Section 25 Pond. The balance will include references to the sources of information for any estimated (i.e. not monitored or measured) water inputs or outputs. The ground water losses for the Factory Ponds and ditch will be based on the results of the fate and transport study (see Special Condition 5, below). SSI shall continue to submit the annual flow balance until they request to cease, and DEQ agrees in writing

#### **4. Outfall 002 – Section 25 Sampling Plan**

SSI shall develop and submit a sampling plan for Outfall 002 (the Section 25 Pond infiltration) no later than **November 1, 2021**. The sampling plan shall include the quadrants, depth, and sampling methods for obtaining four representative samples for each parameter (“aliquots”). SSI may design the sampling plan to be seasonal and may propose changes to DEQ as experience dictates. SSI shall follow the sampling plan unless changes are proposed, and DEQ approves the changes, in writing.

#### **5. Outfall 003 – Ground Water Discharge from Factory Ponds**

SSI is required to provide a comprehensive fate & transport study by **September 30, 2024**. This ground water study shall include:

- *Quantify and qualify the infiltration from the Factory Ponds.*

SSI shall quantify the infiltration rate from each factory pond, including the ditch, monthly. This includes supporting information such as each ponds’ wetted surface area, pond lining, and underlying soil type. If a pond (or ditch) is unlined, SSI shall provide plans and schedules for a seepage study, and conduct the seepage study by **September 30, 2025**.

Qualification of the infiltrate should include average pond concentrations for each parameter of concern, monthly.

The ground water study must include a plan for identifying and testing for the parameters of concern, listed in the table below, in all Outfall 003 discharge locations (all unlined factory ponds and the ditch). This study plan will include:

- a. Identification and location of each unlined factory pond and the ditch (“Outfall 003”).
- b. Identification and location of each “Outfall 003” sample location.
- c. An initial screening plan for the identified sample locations for all potential parameters of concern presented in the table below. The initial screening shall be capable of detecting the parameter or analyzing at the reporting level (RL) (which is either the Required Reporting Value (RRV) as provided in the Department Circular DEQ-7 or other detection level specified by DEQ).

The initial screening for each unlined pond shall include at least three (3) monthly samples during the upcoming 2021/2022 campaign. DEQ requires the initial screening (see **Table 11**) to include analysis for both dissolved and total

recoverable metal fractions (other than aluminum which is only the dissolved fraction).

<b>Table 11: Factory Ponds Parameters of Concern</b>		
<b>Screening POC <sup>(1)</sup></b>	<b>Units</b>	<b>Reporting Level <sup>(2)</sup></b>
Aluminum, dissolved	µg/L	9
Antimony	µg/L	0.5
Arsenic	µg/L	1
Barium	µg/L	3
Beryllium	µg/L	0.8
Cadmium	µg/L	0.03
Chromium	µg/L	10
Copper	µg/L	2
Iron	mg/L	0.020
Lead	µg/L	0.3
Mercury	µg/L	0.005
Nickel	µg/L	2
Selenium	µg/L	1
Thallium	µg/L	0.2
Zinc	µg/L	8
Fluoride	mg/L	0.2
Specific Conductivity	µS/cm	--
pH	s.u.	0.1
Temperature	Deg F	0.1
<i>E. coli</i> bacteria	#org/100 mL	1
Ammonia, Total as N	mg/L	0.07
Total Kjeldahl Nitrogen (TKN)	mg/L	0.225
Nitrate + Nitrite	mg/L	0.02
Total Nitrogen	mg/L	0.245
Total Phosphorus	mg/L	0.003
Footnotes:		
1) Metals include both Total Recoverable and Dissolved unless otherwise indicated.		
2) The Reporting Level (RL) is the Required Reporting Value provided in Department Circular DEQ-7, or other detection limit identified by DEQ. If reporting non-detects the RRVs or lower must be achieved.		

- d. Parameters that are found to be present above the listed RRV or RL in any of the unlined ponds or the ditch will be sampled and analyzed monthly from any unlined pond or ditch with standing water for two campaigns (2022/2023 and 2023/2024).
- *Identify the ground water pathway and mixing zone boundary for all pollutants monitored, including those in **Tables 10 & 11**.*

If SSI wishes to request a ground water mixing zone, the request must clearly delineate the proposed boundary and provide sufficient information to defend it.

This includes specifying the type of ground water mixing zone requested as follows:

- a standard ground water mixing zone (ARM 17.30.517) including, at a minimum, demonstration that the requested mixing zone will comply with the requirements of ARM 17.30.508, or
- source-specific ground water mixing zone (ARM 17.30.518), including, at a minimum, demonstration that the requested mixing zone will comply with the requirements of ARM 17.30.506 and .508 and the provisions of 75-5-303, MCA.

## **6. Land Application – Farm Management Plan**

SSI must maintain and follow their Farm Management Plan (FMP). At least once every five years, SSI shall review and update the FMP, as necessary to maintain soil health and ensure that wastewater is applied at rates optimal for agronomic uptake of nutrients. The date of the review and signatures of the reviewers shall be included.

In addition:

- To protect public health SSI shall install highly visible signs at access roads that allows approach to the irrigated fields. The signs shall state: 'No Trespassing – Agricultural Fields Irrigated with Reclaimed Wastewater,' or an approved equivalent. SSI shall maintain a map with the locations where signs have been installed as part of their FMP.
- SSI must document how carryover of treated wastewater effluent outside the buffer zone will be eliminated. SSI shall develop and implement practices in the FMP for high wind management to minimize overspray. The use of end guns for irrigation is prohibited.
- SSI must document how they will prevent runoff into ditches or other surface waters, including by shutting down the land application during significant precipitation or snow melt.

Confirmation that the FMP was reviewed and is up to date, including implementation of the above requirements, must be submitted to DEQ by **April 1, 2022**. SSI must keep the current FMP available on-site.

## **7. Annual Report**

SSI shall submit an annual report to DEQ no later than January 28<sup>th</sup>, that summarizes the progress made on each of the above Special Conditions for the previous year and the actions planned for the upcoming year.

## **II. MONITORING, RECORDING AND REPORTING REQUIREMENTS**

### **A. Representative Sampling**

Samples taken in compliance with the monitoring requirements established under Part I of the permit shall be collected from the effluent stream prior to discharge into the receiving waters. Samples and measurements shall be representative of the volume and nature of the monitored discharge.

### **B. Monitoring Procedures**

Monitoring must be conducted according to test procedures approved under Part 136, Title 40 of the Code of Federal Regulations, unless other test procedures have been specified in this permit. All flow-measuring and flow-recording devices used in obtaining data submitted in self-monitoring reports must indicate values within 10 percent of the actual flow being measured.

### **C. Penalties for Tampering**

The Montana Water Quality Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate, any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than \$25,000, or by imprisonment for not more than six months, or by both.

### **D. Reporting of Monitoring Results**

Monitoring results must be reported within a Discharge Monitoring Report (DMR). Monitoring results must be submitted electronically (NetDMR web-based application) no later than the 28<sup>th</sup> day of the month following the end of the monitoring period. Whole effluent toxicity (biomonitoring) results must be reported with copies of the laboratory analysis report on forms from the most recent version of EPA Region VIII's "Guidance for Whole Effluent Reporting." If no discharge occurs during the reporting period, "No Discharge" must be reported within the respective NetDMR submittal. All other reports required herein, must be signed and certified in accordance with Part IV.G 'Signatory Requirements' of this permit and submitted to DEQ at the following address:

Montana Department of Environmental Quality  
Water Protection Bureau  
PO Box 200901  
Helena, Montana 59620-0901

### **E. Compliance Schedules**

Reports of compliance or noncompliance with, or any progress reports on interim and final requirements contained in any Compliance Schedule of this permit shall be submitted no later than 14 days following each schedule date unless otherwise specified in the permit.

**F. Additional Monitoring by the Permittee**

If the permittee monitors any pollutant more frequently than required by this permit, using approved analytical methods as specified in this permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the Discharge Monitoring Report. Such increased frequency shall also be indicated.

**G. Records Contents**

Records of monitoring information shall include:

1. The date, exact place, and time of sampling or measurements;
2. The initials or name(s) of the individual(s) who performed the sampling or measurements;
3. The date(s) analyses were performed;
4. The time analyses were initiated;
5. The initials or name(s) of individual(s) who performed the analyses;
6. References and written procedures, when available, for the analytical techniques or methods used; and
7. The results of such analyses, including the bench sheets, instrument readouts, computer disks or tapes, etc., used to determine these results.

**H. Retention of Records**

The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least three years from the date of the sample, measurement, report or application. This period may be extended by request of DEQ at any time. Data collected on site, copies of Discharge Monitoring Reports, and a copy of this MPDES permit must be maintained on site during the duration of activity at the permitted location.

**I. Twenty-four Hour Notice of Noncompliance Reporting**

1. The permittee shall report any serious incidents of noncompliance as soon as possible, but no later than twenty-four (24) hours from the time the permittee first became aware of the circumstances. The report shall be made to the Water Protection Bureau at (406) 444-5546 or the Office of Disaster and Emergency Services at (406) 324-4777. The following examples are considered serious incidents:
  - a. Any noncompliance which may seriously endanger health or the environment;
  - b. Any unanticipated bypass which exceeds any effluent limitation in the permit (See Part III.G of this permit, "Bypass of Treatment Facilities"); or
  - c. Any upset which exceeds any effluent limitation in the permit (see Part III.H of this permit, "Upset Conditions").

2. A written submission shall also be provided within five days of the time that the permittee becomes aware of the circumstances. The written submission shall contain:
  - a. a description of the noncompliance and its cause;
  - b. the period of noncompliance, including exact dates and times;
  - c. the estimated time noncompliance is expected to continue if it has not been corrected; and
  - d. steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.
3. DEQ may waive the written report on a case-by-case basis if the oral report has been received within 24 hours by the Water Protection Bureau, by phone, (406) 444-5546.
4. Reports shall be submitted to the addresses in Part II.D of this permit, "Reporting of Monitoring Results."

**J. Other Noncompliance Reporting**

Instances of noncompliance not required to be reported within 24 hours shall be reported at the time that monitoring reports for Part II.D of this permit are submitted. The reports shall contain the information listed in Part II.I.2 of this permit.

**K. Inspection and Entry**

The permittee shall allow the head of DEQ or the Director, or an authorized representative thereof, upon the presentation of credentials and other documents as may be required by law, to:

1. Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;
2. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;
3. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and
4. Sample or monitor at reasonable times, for the purpose of assuring permit compliance, any substances or parameters at any location.



### **III. COMPLIANCE RESPONSIBILITIES**

#### **A. Duty to Comply**

The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application. The permittee shall give DEQ advance notice of any planned changes at the permitted facility or of an activity which may result in permit noncompliance.

#### **B. Penalties for Violations of Permit Conditions**

The Montana Water Quality Act provides that any person who violates a permit condition of the Act is subject to civil or criminal penalties not to exceed \$10,000 per day of such violation. Any person who willfully or negligently violates permit conditions of the Act is subject to a fine of not more than \$25,000 per day of violation, or by imprisonment for not more than two years, or both, for subsequent convictions. MCA 75-5-611(9)(a) also provides for administrative penalties not to exceed \$10,000 for each day of violation and up to a maximum not to exceed \$100,000 for any related series of violations. Except as provided in permit conditions on Part III.G of this permit, "Bypass of Treatment Facilities" and Part III.H of this permit, "Upset Conditions," nothing in this permit shall be construed to relieve the permittee of the civil or criminal penalties for noncompliance.

#### **C. Need to Halt or Reduce Activity not a Defense**

It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

#### **D. Duty to Mitigate**

The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.

#### **E. Proper Operation and Maintenance**

The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of the permit. However, the permittee shall operate, as a minimum, one complete set of each main line unit treatment process whether or not this process is needed to achieve permit effluent compliance.

**F. Removed Substances**

Collected screenings, grit, solids, sludges, or other pollutants removed in the course of treatment shall be disposed of in such a manner so as to prevent any pollutant from entering any waters of the state or creating a health hazard.

**G. Bypass of Treatment Facilities**

1. Bypass not exceeding limitations. The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of Parts III.G.2 and III.G.3 of this permit.
2. Notice:
  - a. Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least 10 days before the date of the bypass.
  - b. Unanticipated bypass. The permittee shall submit notice of an unanticipated bypass as required under Part II.I of this permit, "Twenty-four Hour Reporting."
3. Prohibition of bypass:
  - a. Bypass is prohibited and DEQ may take enforcement action against a permittee for a bypass, unless:
    - 1) The bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;
    - 2) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and
    - 3) The permittee submitted notices as required under Part III.G.2 of this permit.
  - b. DEQ may approve an anticipated bypass, after considering its adverse effects, if DEQ determines that it will meet the three conditions listed above in Part III.G.3.a of this permit.

**H. Upset Conditions**

1. Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with technology based permit effluent limitations if the requirements of Part III.H.2 of this permit are met. No determination made during administrative review of claims that noncompliance was caused by upset,

and before an action for noncompliance, is final administrative action subject to judicial review (i.e. Permittees will have the opportunity for a judicial determination on any claim of upset only in an enforcement action brought for noncompliance with technology-based permit effluent limitations).

2. Conditions necessary for a demonstration of upset. A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:
  - a. An upset occurred, and that the permittee can identify the cause(s) of the upset;
  - b. The permitted facility was at the time being properly operated;
  - c. The permittee submitted notice of the upset as required under Part II.I of this permit, "Twenty-four Hour Notice of Noncompliance Reporting;" and
  - d. The permittee complied with any remedial measures required under Part III.D of this permit, "Duty to Mitigate."
3. Burden of proof. In any enforcement proceeding, the permittee seeking to establish the occurrence of an upset has the burden of proof.

#### **I. Toxic Pollutants**

The permittee shall comply with effluent standards or prohibitions established under Section 307(a) of the Clean Water Act for toxic pollutants within the time provided in the regulations that establish those standards or prohibitions, even if the permit has not yet been modified to incorporate the requirement.

#### **J. Changes in Discharge of Toxic Substances**

Notification shall be provided to DEQ as soon as the permittee knows of, or has reason to believe:

1. That any activity has occurred or will occur which would result in the discharge, on a routine or frequent basis, of any toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels":
  - a. One hundred micrograms per liter (100 µg/L);
  - b. Two hundred micrograms per liter (200 µg /L) for acrolein and acrylonitrile; five hundred micrograms per liter (500 µg /L) for 2,4-dinitrophenol and for 2-methyl-4, 6-dinitrophenol; and one milligram per liter (1 mg/L) for antimony;
  - c. Five (5) times the maximum concentration value reported for that pollutant in the permit application in accordance with 40 CFR 122.21(g)(7); or
  - d. The level established by DEQ in accordance with 40 CFR 122.44(f).

2. That any activity has occurred or will occur which would result in any discharge, on a non-routine or infrequent basis, of a toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following “notification levels”:
  - a. Five hundred micrograms per liter (500 µg /L);
  - b. One milligram per liter (1 mg/L) for antimony;
  - c. Ten (10) times the maximum concentration value reported for that pollutant in the permit application in accordance with 40 CFR 122.21(g)(7); or
  - d. The level established by DEQ in accordance with 40 CFR 122.44(f).

#### **IV. GENERAL REQUIREMENTS**

##### **A. Planned Changes**

The permittee shall give notice to DEQ as soon as possible of any planned physical alterations or additions to the permitted facility. Notice is required only when the alteration or addition could significantly change the nature or increase the quantity of pollutant discharged. This notification applies to pollutants which are not subject to effluent limitations in the permit.

##### **B. Anticipated Noncompliance**

The permittee shall give advance notice to DEQ of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.

##### **C. Permit Actions**

This permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.

##### **D. Duty to Reapply**

If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the permittee must apply for and obtain a new permit. The application must be submitted at least 180 days before the expiration date of this permit.

##### **E. Duty to Provide Information**

The permittee shall furnish to DEQ, within a reasonable time, any information which DEQ may request to determine whether cause exists for revoking, modifying and reissuing, or terminating this permit, or to determine compliance with this permit. The permittee shall also furnish to DEQ, upon request, copies of records required to be kept by this permit.

##### **F. Other Information**

When the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or any report to DEQ, it shall promptly submit such facts or information with a narrative explanation of the circumstances of the omission or incorrect submittal and why they weren't supplied earlier.

## **G. Signatory Requirements**

All applications, reports or information submitted to DEQ or the EPA shall be signed and certified.

1. All permit applications shall be signed as follows:
  - a. For a corporation: by a responsible corporate officer;
  - b. For a partnership or sole proprietorship: by a general partner or the proprietor, respectively;
  - c. For a municipality, State, Federal, or other public agency: by either a principal executive officer or ranking elected official.
2. All reports required by the permit and other information requested by DEQ shall be signed by a person described above or by a duly authorized representative of that person. A person is considered a duly authorized representative only if:
  - a. The authorization is made in writing by a person described above and submitted to DEQ; and
  - b. The authorization specified either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, operator of a well or a well field, superintendent, position of equivalent responsibility, or an individual or position having overall responsibility for environmental matters for the company. (A duly authorized representative may thus be either a named individual or an individual occupying a named position.)
3. Changes to authorization. If an authorization under Part IV.G.2 of this permit is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of Part IV.G.2 of this permit must be submitted to DEQ prior to or together with any reports, information, or applications to be signed by an authorized representative.
4. Certification. Any person signing a document under this section shall make the following certification:

“I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

**H. Penalties for Falsification of Reports**

The Montana Water Quality Act provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or noncompliance shall, upon conviction be punished by a fine of not more than \$25,000 per violation, or by imprisonment for not more than six months per violation, or by both.

**I. Availability of Reports**

Except for data determined to be confidential under 40 CFR Part 2, all reports prepared in accordance with the terms of this permit shall be available for public inspection at the offices of DEQ. As required by the Clean Water Act, permit applications, permits and effluent data shall not be considered confidential.

**J. Oil and Hazardous Substance Liability**

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under Section 311 of the Clean Water Act.

**K. Property Rights**

The issuance of this permit does not convey any property rights of any sort, or any exclusive privilege.

**L. Severability**

The provisions of this permit are severable, and if any provision of this permit, or the application of any provision of this permit to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this permit, shall not be affected thereby.

**M. Transfers**

This permit may be automatically transferred to a new permittee if:

1. The current permittee notifies DEQ at least 30 days in advance of the proposed transfer date;
2. The notice includes a written agreement between the existing and new permittees containing a specific date for transfer of permit responsibility, coverage, and liability between them;
3. DEQ does not notify the existing permittee and the proposed new permittee of an intent to revoke or modify and reissue the permit. If this notice is not received, the transfer is effective on the date specified in the agreement mentioned in Part IV.M.2 of this permit; and
4. Required annual and application fees have been paid.



**N. Fees**

The permittee is required to submit payment of an annual fee as set forth in ARM 17.30.201. If the permittee fails to pay the annual fee within 90 days after the due date for the payment, DEQ may:

1. Impose an additional fee assessment computed at the rate established under ARM 17.30.201; and,
2. Suspend the processing of the application for a permit or authorization or, if the nonpayment involves an annual permit fee, suspend the permit, certificate or authorization for which the fee is required. DEQ may lift suspension at any time up to one year after the suspension occurs if the holder has paid all outstanding fees, including all penalties, assessments and interest imposed under this subsection. Suspensions are limited to one year, after which the permit will be terminated.

**O. Reopener Provisions**

This permit may be reopened and modified (following proper administrative procedures) to include the appropriate effluent limitations (and compliance schedule, if necessary), or other appropriate requirements if one or more of the following events occurs:

1. Water Quality Standards: The water quality standards of the receiving water(s) to which the permittee discharges are modified in such a manner as to require different effluent limits than contained in this permit.
2. Water Quality Standards are Exceeded: If it is found that water quality standards or trigger values in the receiving stream are exceeded either for parameters included in the permit or others, DEQ may modify the effluent limits or water management plan.
3. TMDL or Wasteload Allocation: TMDL requirements or a wasteload allocation is developed and approved by DEQ and/or EPA for incorporation in this permit.
4. Water Quality Management Plan: A revision to the current water quality management plan is approved and adopted which calls for different effluent limitations than contained in this permit.
5. Toxic Pollutants: A toxic standard or prohibition is established under Section 307(a) of the Clean Water Act for a toxic pollutant which is present in the discharge and such standard or prohibition is more stringent than any limitation for such pollutant in this permit.
6. Toxicity Limitation: Change in the whole effluent protocol, or any other conditions related to the control of toxicants have taken place, or if one or more of the following events have occurred:

- a. Toxicity was detected late in the life of the permit near or past the deadline for compliance.
- b. The TRE/TIE results indicated that compliance with the toxic limits will require an implementation schedule past the date for compliance.
- c. The TRE/TIE results indicated that the toxicant(s) represent pollutant(s) that may be controlled with specific numerical limits.
- d. Following the implementation of numerical controls on toxicants, a modified whole effluent protocol is needed to compensate for those toxicants that are controlled numerically.
- e. The TRE/TIE revealed other unique conditions or characteristics which, in the opinion of DEQ, justify the incorporation of unanticipated special conditions in the permit.

## V. DEFINITIONS

1. **“Act”** means the Montana Water Quality Act, Title 75, chapter 5, MCA.
2. **“Administrator”** means the administrator of the United States Environmental Protection Agency.
3. **“Acute Toxicity”** occurs when 50 percent or more mortality is observed for either species at any effluent concentration. Mortality in the control must simultaneously be 10 percent or less for the effluent results to be considered valid.
4. **“Arithmetic Mean” or “Arithmetic Average”** for any set of related values means the summation of the individual values divided by the number of individual values.
5. **“Average Monthly Limit”** means the highest allowable average of daily discharges over a calendar month, calculated as the sum of all daily discharges measured during a calendar month divided by the number of daily discharges measured during that month.
6. **“Bypass”** means the intentional diversion of waste streams from any portion of a treatment facility.
7. **“Chronic Toxicity”** means when the survival, growth, or reproduction, as applicable, for either test species, at the effluent dilution(s) designated in this permit is significantly less (at the 95 percent confidence level) than that observed for the control specimens.
8. **“Composite samples”** shall be flow proportioned. The composite sample shall, as a minimum, contain at least four (4) samples collected over the compositing period. Unless otherwise specified, the time between the collection of the first sample and the last sample shall not be less than six (6) hours nor more than 24 hours. Acceptable methods for preparation of composite samples are as follows:
  - a. Constant time interval between samples, sample volume proportional to flow rate at time of sampling;
  - b. Constant time interval between samples, sample volume proportional to total flow (volume) since last sample. For the first sample, the flow rate at the time the sample was collected may be used;
  - c. Constant sample volume, time interval between samples proportional to flow (i.e. sample taken every “X” gallons of flow); and,
  - d. Continuous collection of sample, with sample collection rate proportional to flow rate.
9. **“Daily Discharge”** means the discharge of a pollutant measured during a calendar day or any 24-hour period that reasonably represents the calendar day for purposes of sampling. For pollutants with limits expressed in units of mass, the daily discharge is calculated as the total mass of the pollutant discharged over the day.

For pollutants with limits expressed in other units of measurement, the daily discharge is calculated as the average measurement of the pollutant over the day.

10. **"Daily Maximum Limit"** means the maximum allowable discharge of a pollutant during a calendar day. When expressed as units of mass, the daily discharge is cumulative mass discharged over the course of the day. When expressed as a concentration, it is the arithmetic average of all measurements taken that day.
11. **"Department"** or **"DEQ"** means the Montana Department of Environmental Quality (DEQ). Established by 2-15-3501, MCA.
12. **"Director"** means the Director of the Montana DEQ.
13. **"Discharge"** means the injection, deposit, dumping, spilling, leaking, placing, or failing to remove any pollutant so that it or any constituent thereof may enter into state waters, including ground water.
14. **"EPA"** means the United States Environmental Protection Agency.
15. **"Federal Clean Water Act"** means the federal legislation at 33 USC 1251, *et seq.*
16. **"Grab Sample"** means a sample which is taken from a waste stream on a one-time basis without consideration of flow rate of the effluent or without consideration for time.
17. **"Instantaneous Maximum Limit"** means the maximum allowable concentration of a pollutant determined from the analysis of any discrete or composite sample collected, independent of the flow rate and the duration of the sampling event.
18. **"Instantaneous Measurement,"** for monitoring requirements, means a single reading, observation, or measurement.
19. **"Minimum Level"** (ML) of quantitation means the lowest level at which the entire analytical system gives a recognizable signal and acceptable calibration point for the analyte, as determined by the procedure set forth at 40 CFR 136. In most cases the ML is equivalent to the Required Reporting Value (RRV) unless otherwise specified in the permit.
19. **"Mixing zone"** means a limited area of a surface water body or aquifer where initial dilution of a discharge takes place and where certain water quality standards may be exceeded.
20. **"Nondegradation"** means the prevention of a significant change in water quality that lowers the quality of high-quality water for one or more parameters. Also, the prohibition of any increase in discharge that exceeds the limits established under or determined from a permit or approval issued by the Department prior to April 29, 1993.

21. **“Regional Administrator”** means the administrator of Region VIII of EPA, which has jurisdiction over federal water pollution control activities in the state of Montana.
22. **"Severe property damage"** means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.
23. **“TIE”** means a toxicity identification evaluation.
24. **"TMDL"** means the total maximum daily load limit of a parameter, representing the estimated assimilative capacity for a water body before other designated uses are adversely affected. Mathematically, it is the sum of wasteload allocations for point sources, load allocations for non-point and natural background sources, and a margin of safety.
25. **“TRE”** means a toxicity reduction evaluation.
26. **"TSS"** means the pollutant parameter total suspended solids.
27. **"Upset"** means an exceptional incident in which there is unintentional and temporary noncompliance with technology-based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.



35140 County Road 125  
Sidney, MT 59270

January 19, 2021

VIA EMAIL

Mr. Jon Kenning, Chief  
Water Protection Bureau  
Water Quality Division  
Montana Department of Environmental Quality  
PO Box 200901  
Helena, MT 59620

Subject: Comments submitted by Sidney Sugars, Inc. in Response to Public Notice No. MT-20-19  
Regarding Draft MPDES Permit No. MT0000248.

Dear Mr. Kenning:

Sidney Sugars, Inc. (SSI) provides the attached comments with respect to the Department of Environmental Quality's (DEQ) Draft MPDES Renewal Permit and Fact Sheet (Permit No. MT0000248) for SSI's sugar beet facility located in Sidney, Montana (Public Notice No. MT-20-19 dated Nov. 30, 2020).

SSI would like to thank the DEQ for its ongoing efforts and willingness to work with SSI with respect to its MPDES Permit. Specifically, SSI appreciated the DEQ communicating its need for additional information and data when required during the renewal period. SSI and its consultants feel we have established a good working relationship with the DEQ and, while SSI continues to have concerns about aspects of the draft permit as outlined in this letter and Exhibit A, we are eager to continue working with the Department to address SSI's comments and ultimately implement a satisfactory new Permit.

Please do not hesitate to contact me with any questions or if the DEQ requires additional information concerning our comments. Again, thank you for the opportunity to comment on the Draft Permit and Fact Sheet. We appreciate your time and consideration in your review of and response to the following comments.

Sincerely,

David Garland  
General Manager, Sidney Sugars, Inc.

Attachments

cc: Dana Hupp  
Kevin Harvey

EXHIBIT 2-001



#### SUMMARY LIST OF COMMENTS BY TOPIC IN THE DRAFT PERMIT AND FACT SHEET:

1. **Outfall 001 and 002 Effluent Limits for Fecal Coliform and *E. coli***
  - a. Compliance with fecal coliform and *E. coli* effluent limits
  - b. Analytical method for determining fecal coliform counts
2. **Outfall 001 and 002 Biochemical Oxygen Demand (BOD<sub>5</sub>) and Total Suspended Solids (TSS) Technology Based Effluent Limits (TBELs)**
  - a. Updated TBEL load calculations for Outfalls 001 and 002
  - b. Applicability of TBELs at Outfalls 001 and 002 and SSI's proposed compliance monitoring approach for Outfall 002
3. **Proposed Flow Monitoring Requirement at the Outlet of the Aerobic Finger Pond (AFP)**
4. **Special Conditions**
  - a. Special Condition 4 – Outfall 002 / Section 25 Pond sampling plan
  - b. Special Condition 6 – Land application public health and safety measures
5. **Miscellaneous Clarifications and Requests to Correct Text in Draft Permit and Fact Sheet**
6. **Exhibit A (Legal comments concerning application of the federal TBELs)**

#### SPECIFIC COMMENTS

##### 1. Outfall 001 and 002 Effluent Limits for Fecal Coliform and *E. Coli*

##### a. Compliance with Fecal Coliform and *E. Coli* Effluent Limits

*This comment addresses the Draft Permit Page 4, Items B.1 and B.2; the Draft Permit Pages 7 and 9, Tables 4 and 5; and the Fact Sheet Page 43, D.4.3.*

##### ***Summary of Comment***

SSI requests that the DEQ reconsider the results of the scientific study prepared jointly by KC Harvey Environmental LLC (KC Harvey) and the Montana State University Walk Laboratory (discussed below) regarding the source and nature of fecal coliform and *E. coli* bacteria in SSI's wastewater treatment system when deriving bacteria effluent limits for Outfalls 001 and 002. SSI appreciates the DEQ's willingness to move the compliance monitoring point from INTL to Outfall 001 and 002. While monitoring bacteria at Outfall 002 should result in greater compliance, SSI is concerned that there may be times of the year, or during extreme precipitation events, where compliance with the fecal coliform and/or *E. coli* effluent limits in the Draft Permit will not be feasible. The KC Harvey – Montana State University study confirmed that the sources of these bacteria are wildlife, and specifically, the presence of waterfowl, and that they are not a human health risk. Moreover, SSI is unable to control the presence of waterfowl on/in the wastewater treatment system (WWTS) ponds nor the occurrence of a major precipitation event. It appears that the results of the study were not fully taken into account when the



DEQ assigned bacteria effluent limits for Outfalls 001 and 002. Therefore, SSI respectfully requests relief from the effluent limitations for bacteria in accordance with the additional background information and suggestions presented below.

#### ***Additional Background and Suggested Approaches***

In 1986, the Environmental Protection Agency (EPA) recommended monitoring for *E. coli* as the new standard for indicating the potential presence of disease-causing microorganisms (bacteria, viruses, and protozoan cysts) in water (i.e., pathogenic *E. coli*) rather than using total or fecal coliform counts for the protection of human health in non-drinking water. Most strains of *E. coli* do not cause human illness (that is, they are not human pathogens). Rather, they are a “pathogen indicator,” as defined in section 502(23) of the CWA as “a substance that indicates the potential for human infectious disease.” EPA states in their recommendation that “EPA, state, tribal and other decision makers retain the discretion to adopt approaches on a case-by-case basis that differ from those provided in this guidance where appropriate and consistent with statutory and regulatory requirements” (EPA. 2015. FAQ: NPDES Water-Quality Based Permit Limits for Recreational Water Quality Criteria, April 2, 2015. Accessed on January 7, 2021 at: [https://www.epa.gov/sites/production/files/2015-09/documents/npdes-water-quality-based-permit-limits-for-recreational-water-quality-criteria-faqs\\_0.pdf](https://www.epa.gov/sites/production/files/2015-09/documents/npdes-water-quality-based-permit-limits-for-recreational-water-quality-criteria-faqs_0.pdf)). In line with the federal recommendations, the State of Montana adopted this *E. coli* standard into the State water quality standards. Since 1986, new science and analytical methods for detecting human pathogenic risk in bacteria species (i.e., virulence genes in isolates of *E. coli*) have become available and widely used in scientific study. Until regulation catches up with the science, and the EPA releases an updated recommendation for monitoring human pathogens in water for discharge permits involving open water systems, SSI respectfully requests a “case-specific” or “best management practice” (BMP) alternative (as contemplated by EPA) to the proposed fecal coliform and *E. coli* effluent limits and monitoring requirements for SSI, as presented below.

SSI commissioned KC Harvey and the Montana State University Walk Laboratory to complete a study of the presence, source, and pathogenic risk of fecal coliform in the SSI WWTS during January and February of the 2018-2019 sugar beet campaign. Samples were collected from several locations throughout the WWTS ponds and sent to three different laboratories for fecal coliform analysis. In addition, samples from the same locations were sent to the Walk Laboratory at Montana State University where they were analyzed for coliform counts and the presence of *E. coli*, plus phylogenetic analyses, and pathogenic risk. Details of the study methods and results can be found in the study report previously submitted to the DEQ (KC Harvey, 2019)<sup>1</sup>.

Dr. Seth Walk, Ph.D., a specialist in the study of environmental *E. coli* and pathogens and an Associate Professor in the Department of Microbiology & Immunology at Montana State University, Bozeman, Montana summarized the findings of the study as follows:

*“With respect to direct pathogen risk, none of the E. coli isolates in this study carried genes encoding for known virulence factors. Thus, we found no evidence that pathogenic E. coli were present in any*

<sup>1</sup> KC Harvey Environmental, LLC (KC Harvey). 2019. Technical Memorandum: Study of Fecal Coliform at the Sidney Sugars Wastewater Treatment System: Presence, Source Host Identification, Pathogenic Risk, Laboratory Review, and Literature Review. Prepared by KC Harvey in collaboration with Dr. Seth Walk, Walk Laboratory, Montana State University for Sidney Sugars, Inc. dated April 30, 2019.

*sample. In summary, based on our analysis of 529 isolates, the data are telling us two important things. First, while there are high numbers of coliforms present, most are not E. coli and the E. coli present are not likely to be from humans. Second, the evidence supports wild and agricultural animals (esp. birds) are the biggest source of concern in this system because of the presence of A.1 and B1 E. coli phylogroups. Finally, the only observations that would be consistent with human fecal contamination were the presence of phylogroups A/C, B2.3, and F isolates, which were rare (16% and 6%) in both rounds of sampling. We should note that while the majority of human E. coli tend to belong to these three phylogroups, it is possible that even these isolates came from non-human hosts."*

SSI respectfully requests that the DEQ reconsider the scientific findings of this study, which indicates that the fecal coliform and the slight amount of *E. coli* found in the SSI WWTS (including Section 25 Pond) are environmentally sourced (i.e., from waterfowl) and present no significant human pathogenic risk. SSI is unable to control the presence of waterfowl residing on the open water ponds within the WWTS, nor the upstream source of water used by SSI from the Factory Lake (where fecal coliform has been measured by SSI as high as 8,400 MPNs). In consideration of these scientific findings, SSI respectfully requests that the DEQ consider an alternative compliance approach and alternative monitoring methods instead of those presented in the Draft Permit for fecal coliform and *E. coli* at Outfalls 001 and 002. SSI suggests that the alternative approach include on-going analyses to confirm that the bacteria present in the WWTS continues to be from wildlife sources and that there are no human pathogenic risks associated with Outfall 001 and 002 discharges. Considering the available science and analytical methods for determining pathogenic risk, SSI proposes that this approach include periodic (i.e., bi-annual or quarterly) sampling events for Outfalls 001 and 002 (during periods of discharge) to analyze coliform counts and measure *E. coli* presence, conduct phylogenetic analysis, and assess pathogenic risk. SSI recommends these analyses be completed by the Walk Laboratory at MSU-Bozeman. Results would then be reported in the appropriate DMR or via an annual report, whichever the DEQ prefers.

There are several regulatory bases for the type of approach SSI is proposing. With regard to fecal coliform TBELs determined in accordance with the federal sugar beet effluent limitation guidelines (ELGs) in 40 CFR pt. 409, first, the DEQ can and should conclude that the ELGs do not apply (see Comment 2.b. and Exhibit A below). Second, even if the federal ELG for fecal coliform were applicable, the DEQ could adopt SSI's alternative approach, in lieu of the calculated fecal coliform TBEL and in lieu of the proposed *E. coli* limits, as a best management practice (BMP). Under federal CWA regulations, BMPs are authorized in place of numeric effluent limitations where the imposition of numeric limitations is infeasible as indicated in 40 CFR 122.44(k), which is incorporated by reference in ARM 17.30.1344. As indicated above, the limits are infeasible due to the natural (wildlife) input of these bacteria throughout the water management system, including Factory Lake, which is the upstream source of water for SSI operations. Finally, as DEQ has discussed with SSI, an internal monitoring location could be appropriate for both fecal coliform and *E. coli*, as explained above; however, to-date SSI has been unable to locate a suitable internal monitoring location that is not open water. This further supports the fact that it is infeasible to accurately monitor for fecal coliform at Outfalls 001 and 002 (see 40 CFR 122.45(h)). Nonetheless, SSI requests that, to the extent SSI is required to monitor fecal coliform, DEQ allow SSI time to develop an appropriate internal monitoring location (if needed) and that this option be reflected in the Final Permit.



**b. Analytical Method for Determining Fecal Coliform Counts**

*This comment addresses the Draft Permit, Page 4, Tables 1 and 2, and Pages 7 and 9, Tables 4 and 5.*

SSI respectfully requests that the Final Permit include the option to analyze fecal coliform bacteria using the analytical Standard Method A9222D, which reports the resulting bacterial counts in CFU/100mL. As discussed below, SSI recently switched laboratories for MPDES permit compliance analysis services due to poor customer service and analytical method errors made by the previous laboratory (incorrect analytical parameters, insufficient detection limits, not observing hold times, etc.). The laboratory that SSI has chosen for ongoing MPDES compliance analyses performs the Standard Method A9222D (units 1 CFU/100mL) for analysis of fecal coliform. SSI has retained approval from its DEQ permit compliance contact/inspector, Mr. Dan Freeman, Environmental Science Specialist, to report fecal coliform counts in CFU rather than MPN units during the term of the current MPDES permit (email communication between SSI and Mr. Freeman dated December 6, 2019). SSI desires to continue reporting fecal coliform in CFU rather than MPN units going forward with the renewal permit.

As stated above, SSI previously experienced inaccurate representation of fecal coliform monitoring results using the Colilert-18 Method (units 1 MPN/100 mL). Results of the Colilert-18 Method are influenced by common characteristics of wastewater, such as sediment content and pH, which can affect the results. If the characteristics of the sample water are not within recommended ranges for the analytical method used, the sample requires dilution to bring it into an acceptable range. SSI discovered that the previous laboratory often did not dilute a sample when required, resulting in inaccurate results, despite SSI communicating with the laboratory that dilution of the samples may be required on occasion. In addition, because the samples are dynamic in nature (i.e., the characteristics change depending on progression of the treatment of the ponds and the seasonality of waterfowl presence), the laboratory needs to consistently adjust the dilution of the samples over the year. If the laboratory did not sufficiently dilute the sample to conditions required for an accurate analytical result using the Colilert-18 Method, then an inaccurate result was provided. SSI would like to avoid future data inaccuracies related to using this method to analyze fecal coliform and requests to shift to the Standard Method A9222D (units 1 CFU/100mL) of analysis going forward. SSI respectfully requests that the DEQ add a footnote to Tables 1 and 2 (page 4) and Tables 4 and 5 (pages 7 and 9) of the Draft Permit related to the fecal coliform units indicated in the tables stating, or similarly stating, that "Alternatively, fecal coliform count results may be reported in CFU/ 100 mL."

**2. Outfall 001 and 002 Biochemical Oxygen Demand (BOD<sub>5</sub>) and Total Suspended Solids (TSS) Technology Based Effluent Limits (TBELs)**

**a. Updated TBEL Load Calculations for Outfalls 001 and 002**

*This comment addresses the Fact Sheet, Page 27, item C, and the resulting BOD<sub>5</sub> and TSS TBELs proposed in the Draft Permit, Page 5 Table 3.*

SSI concurs with the load limits DEQ calculated for BOD<sub>5</sub> and TSS based upon SSI's actual sugar production levels. Fact Sheet p. 24 (calculating a maximum daily and average monthly limit for both parameters of 7,194 lb/day and 4,356 lb/day respectively). However, SSI disagrees with DEQ's apparent

conclusion that because of Clean Water Act antibacksliding provisions and state nondegradation rules, the DEQ must maintain SSI's effluent limits at the limits that were established in the 1998 permit, i.e., maximum daily and average monthly limits of 5,013 lb/day and 3,342 lb/day. *See* Fact Sheet, Table 13 (listing "Nondeg & Anti-backsliding" as the "basis" for the proposed BOD<sub>5</sub> and TSS limits). As explained below, SSI respectfully contends that these laws do not provide bases for imposing limits other than the properly calculated increased TBELs of 7,194 lb/day and 4,356 lb/day.

### ***Antibacksliding***

EPA regulations concerning antibacksliding allow effluent limits based upon federally promulgated effluent limitation guidelines (ELGs), such as the beet sugar ELGs at issue in this matter in 40 CFR pt. 409, to be less stringent than previous limits where "the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance under § 122.62." 40 CFR § 122.44(l)(1), incorporated by reference in ARM 17.30.1344(2)(b). In the Draft Permit, DEQ has based the TSS and BOD<sub>5</sub> limits upon SSI's sugar production level in 1998, which the Fact Sheet indicates was 1.52 MM lb/day. The "circumstances" regarding SSI's capacity to produce sugar have "materially and substantially" changed since that time, justifying the higher calculated limits.

Specifically, in 2005, SSI added to its production process two batch pans for boiling/crystallizing low raw juice. This stage in the sugar production process is the last opportunity to make sugar before sending the spent liquor to molasses. Prior to the 2005 changes, SSI had (a) 3 white pans (the initial attempt to crystalize sugar as part of this final process), (b) 2 high raw pans (the intermediate crystallization of spent liquor from the whites), and (c) 2 low raw pans (the last crystallization of spent liquor from the intermediates). Adding the two additional low raw batch pans in 2005, at a cost of approximately \$2.5 million, allowed SSI to change the overall boiling/crystallization scheme to 4 white pans, 2 high raw pans, and 3 low raw pans. This expanded sugar-end production capacity resulted in SSI being able to produce significantly more sugar and accounted for the bulk of the increase in sugar production capacity between 1998 and today. *See* Fact Sheet Table 13 (reflecting SSI's average reported sugar production as 1.52 MM lb/day in 1998 and 1.67 MM lb/day today).

Importantly, the BOD<sub>5</sub> and TSS limits in SSI's existing, 2009 permit were based upon the 1990 reported sugar production levels and did not reflect the increased sugar production resulting from the addition of the two new batch pans in 2005. Exactly why the expanded sugar production was not accounted for in recalculated TBELs in the 2009 permit is unclear. Part of the reason for this increase in production being overlooked in the 2009 permit may have been that SSI submitted its renewal application for the 1998 permit in 2002, three years before the batch-pan expansion project. As a result, the application reflected the old sugar-production rates. In addition, SSI's environmental manager was new at the time and may not have requested that DEQ recalculate the limits based on increased production. Plus, the overwhelming focus of SSI's comments on the draft permit at that time was on the addition of the new INTL compliance point and the alarming compliance issue this presented (and continues to present) for SSI; for this reason, other issues such as recalculating the TBELs may have been missed.

Regardless of the reasons, however, the "circumstances" on which SSI's 2009 permit were based, i.e., sugar-production levels that predated the new batch pans, "have materially and substantially changed." 40 CFR § 122.44(l)(1). Accordingly, antibacksliding is not applicable. DEQ is not required to maintain the



TBELs that were based upon 1998 sugar-production levels, and in the final permit, DEQ should include the properly calculated maximum daily and average monthly BOD<sub>5</sub> and TSS limits of 7,194 lb/day and 4,356 lb/day respectively.

### ***Nondegradation***

As noted, DEQ also identified nondegradation as a basis for maintaining SSI's BOD<sub>5</sub> and TSS limits at the 1998 level (*see* Fact Sheet page 27). SSI disagrees with DEQ's apparent conclusion that the reissuance of SSI's permit with the new properly calculated limits would trigger nondegradation. Montana's nondegradation review requirements only apply to "any activity of man resulting in a new or increased source which may cause degradation." ARM 17.30.705(1). Accordingly, for nondegradation to apply to SSI's permitted "activity," two factors must both be met: (a) there must be a "new or increased source," and (b) the new or increased source must be one that "may cause degradation." As discussed below, DEQ can and should reissue SSI's higher calculated BOD<sub>5</sub> and TSS limits without triggering nondegradation because neither of these factors are met. In addition, to the extent SSI did not request a nonsignificance review (*see* Fact Sheet 27), SSI does so now and notes that under Part I of DEQ's "Significance Determination Checklist" form, SSI's proposed discharge (with the higher calculated TBELs) qualifies for at least two of the applicability exclusions listed in the form, as outlined below.

**No "Degradation."** First, reissuing the permit with the higher calculated BOD<sub>5</sub> and TSS limits will not cause "degradation." ARM 17.30.702(3) defines "degradation" as "any increase of a discharge that exceeds the limits established under or determined from a permit or approval issued by the department prior to April 29, 1993" (emphasis added). Even though the higher calculated BOD<sub>5</sub> and TSS limits are greater than the limits established in SSI's pre-1993 MPDES permits, e.g., the 3,897 and 2,598 lb/day daily maximum/monthly-average BOD<sub>5</sub> and TSS limits in the 1990 permit, this does not constitute "degradation" because any such exceedances will not result from an "increase of a discharge," as required by the "degradation" definition. This is because, as explained below, while SSI's sugar production has *increased* since 1993, justifying increases in the production-based BOD<sub>5</sub> and TSS TBELs, the level of SSI's discharge of pollutants to state waters during the same time period has *decreased*.

A review of SSI's prior permitting documents indicates that SSI's wastewater discharge rate has steadily and dramatically decreased over time. For example, DEQ indicated in the 2009 permit fact sheet that "during the early 1970's, wastewater discharge rates were estimated and reported to the Department in the range of 4.2 to 6.0 million gallons per day" (MGD) and that in 1972, "production at the factory used 4,000 tons of beets per day and water use was six MGD." By contrast, DEQ indicated that the current metered flow data in 2009 (provided by SSI following a March 2009 MPDES compliance inspection) showed an average monthly discharge of 1.01 MGD to the Section 25 pond during the 2006-2007 campaign. Since the 2009 permit, SSI's discharge level has continued to decline to the current mean annual discharge rate of 0.31 MGD (*See* Fact Sheet page 7). This rate was previously 0.58 MGD incorporating the land application operation, but the land application is not considered a discharge in the 2020 Draft Permit as it is applied at agronomic rates.

Based on the current information stated in the DEQ Fact Sheet on page 6 and on SSI's website of 6,300 tons of beets processed, while SSI's 2020 beet processing rate is now 58% *more* than that reported in 1972 (6,300 tons of beets in 2020 versus 4,000 tons in 1972), SSI's discharge rate (0.31 MGD of water discharged in 2018/19 compared to 4.2 to 6.0 MGD in 1972 or 1.01 MGD in 2009) is dramatically *less*.

Note that during the same time period when SSI's factory flowrate has been steadily decreasing, the BOD<sub>5</sub> and TSS concentrations in SSI's wastewater have remained constant, and these concentrations are now anticipated to decrease as a result of the significant improvements SSI has been making to its wastewater treatment system (see Fact Sheet page 14). As a result, not only the discharge rate but also the pollutant loading to state waters has decreased.

Consequently, because SSI's permit application does not propose an "increase of a discharge," there will be no "degradation." This fact alone means that SSI's discharge proposed in the permit application does not trigger nondegradation under ARM 17.30.705(1). SSI's discharge also does not meet the statutory definition of "degradation" in M.S.A. 75-5-103(7) as "a change in water quality that lowers the quality of high-quality waters for a parameter." As outlined above, the rate of SSI's discharge in the proposed permit represents a decrease over previous levels. As a result, if anything, the proposed discharge will improve water quality, not lower it. In addition, DEQ indicates in the Fact Sheet that the receiving waters are not "high quality." For example, DEQ notes on page 29 of the Fact Sheet that the relevant segment of the Yellowstone River "is listed on the draft 2020 303(d) List because it does not fully support aquatic life" and is impaired for several parameters because of pollutant sources other than SSI. In addition, with regard to groundwater at Section 25 Pond, DEQ also states on page 31 of the Fact Sheet that "[a]lthough Class I groundwater is considered high quality water and subject to Montana Nondegradation Policy, the groundwater downgradient of the Section 25 Pond is within the groundwater mixing zone." Thus, under either definition, SSI's discharge will not cause "degradation."

***No "New or Increased Source."*** Second, SSI's discharge is also not a "new or increased source," and thus does not meet the other required factor for nondegradation to be triggered under ARM 17.30.705(1). DEQ rules define "new or increased source" as "an activity resulting in a change of existing water quality occurring on or after April 29, 1993." SSI was discharging prior to 1993 and is thus not a "new" source. SSI is also not an "increased" source under this definition because it has not caused a "change of existing water quality" from what existed in 1993. As explained above, the amount of SSI's discharge of BOD<sub>5</sub> and TSS has decreased since 1993 such that it could not have caused an adverse "change" in water quality from the water quality existing for these parameters in 1993.

In sum, SSI's wastewater discharge activities are neither a "new or increased source" nor a potential cause of "degradation," as these terms are defined by rule and statute. Accordingly, nondegradation is not triggered and is thus not a basis for DEQ to maintain the prior permit limits for BOD<sub>5</sub> and TSS. For this reason, and because, as discussed above, antibacksliding also does not apply, SSI respectfully requests that in the final Permit DEQ applies the revised production-based calculation of the TBELs (BOD<sub>5</sub> and TSS) presented on page 24 of the Fact Sheet in Table 10, i.e., a maximum daily limit of 7,194 lbs/day and an average monthly limit of 4,356 lbs/day for both parameters.

**b. Applicability of TBELs at Outfalls 001 and 002, and SSI's Proposed Compliance Monitoring Approach for Outfall 002 (see Exhibit A attached)**

During the permit renewal process, SSI submitted legal analyses regarding, and met with DEQ representatives to discuss, the applicability of NPDES/MPDES permitting requirements to groundwater to surface water discharges and associated matters. For the purpose of continuing this discussion, SSI has re-summarized its position on this matter in Exhibit A (see attached). SSI respectfully requests that the DEQ provide written analysis in its response to comments addressing the issues raised in Exhibit A.



Additionally, if DEQ determines that federal NPDES permitting requirements apply to groundwater to surface water discharges, then what is the legal basis for the DEQ's rejection of SSI's proposed compliance monitoring approach for BOD<sub>5</sub>? See KC Harvey Environmental, LLC's Proposed Compliance Approach for Monitoring Technology Based Effluent Limits for Biological Oxygen Demand (BOD<sub>5</sub>) in the Section 25 Pond, Rev. June 19, 2020. SSI's position regarding this matter is also summarized in Exhibit A.

### **3. Proposed Flow Monitoring Requirement at the Outlet of the Aerobic Finger Pond (AFP)**

*This comment addresses the Fact Sheet, Page 8, II.3.a, and Page 25, III.B.3; and the Draft Permit, Page 5, C.1., Page 10, C.1.d, and Page 16 D.3.a and b.*

SSI believes that the basis for the DEQ's proposed requirement for monitoring flow at the outlet of the Aerobic Finger Pond (AFP) is incorrect. SSI has provided information below as to the AFP to INTL pipeline to address the DEQ's concerns regarding potential groundwater infiltration and contribution to the Section 25 Pond. Based on this information, SSI respectfully requests that the proposed requirement for monitoring flow at the outlet of the AFP be excluded from the final permit.

The specifications of the pipeline that conveys treated wastewater between the AFP and INTL was never a topic of discussion in previous DEQ/SSI meetings or communications and, therefore, SSI was unaware that it was of concern to the DEQ. For the following reasons, groundwater will not flow into the pipeline. First, the pipeline is constructed of 15-inch Plastic Irrigation Pipe (PIP) such that corrosion of the pipeline is not an issue (i.e., the DEQ's reference to dissolved versus total iron concentrations as a concern). Second, in 2016, during the Section 25 Pond infiltration study completed by CES, SSI put a plug (a balloon) in the inlet of this pipeline (at the AFP outlet) to ensure no inflow into Section 25 Pond during the study. During the period when the pipeline was plugged, there was no inflow into the Section 25 Pond, signifying no groundwater infiltration into the pipeline.

In addition, and more recently, during construction periods for the pond improvements that SSI is currently completing in accordance with the Compliance Plan, water from the factory ponds has often been temporarily diverted elsewhere into the system. During these periods, there has been no inflow into the Section 25 Pond, a further indication that groundwater is not infiltrating into the pipeline. For example, in the summer of 2018, between August 30th and September 30th, SSI diverted the water from the factory ponds to the former Emergency/Duck Ponds (pre-reconstructed Emergency Pond) while removing sludge from the Anaerobic Reactor Pond (ARP). After removing the sludge, SSI then refilled the ARP with the water from the former Emergency/Duck Ponds. During this time there was zero flow recorded into Section 25 Pond at INTL, further indicating no groundwater infiltration into the pipeline. Another example occurred when, from June 24th to September 10th, 2019, SSI diverted storm runoff from the WWTS area back to the Factory Lake during construction of the new outlet structure in the AFP. During this time, there was also zero flow recorded at INTL going into the Section 25 Pond. During the off-campaign, water moves through the WWTS during times of precipitation, pond maintenance, and pond drain down, resulting in the off-campaign flows observed by the DEQ.

In consideration of the above information indicating that the flow measured at the outflow of the AFP is the same as that which is monitored at INTL, as well as the difficulty, impracticality, and expense of installing and operating a flow meter at the outflow, SSI respectfully requests that the AFP flow



monitoring requirement be excluded from the final permit. Monitoring flow at the outlet of the AFP would be redundant to the INTL flow monitoring requirement currently in place. Furthermore, with respect to the practicality of installing and operating a flow meter at the outflow of the AFP:

- SSI does not have access to power at the outlet of the AFP for an electronic meter such as ultrasonic or magmeter;
- The 15" PIP pipe is underground, so a Parshall Flume is not feasible; and
- The relatively large size of the 15" PIP pipe makes it a less than ideal monitoring location. SSI could try to install an ultrasonic meter on the pipe like that used at the outlet of the pipe (INTL) but power would be required and the pipe isn't "full" at the outlet of the AFP. It is full by the time it reaches the Section 25 Pond at INTL due to the elevation change, which is the reason a flow meter operates successfully at the end of the pipe at INTL. The flow at INTL is the same as what would be measured at the outlet of the AFP, as the pipe is made of plastic and not subject to corrosion (as indicated above).

#### **4. Special Conditions**

##### **a. Special Condition 4 – Outfall 002 / Section 25 Pond Sampling Plan**

*This comment addresses the Draft Permit, Page 5, C.1 and Page 17, D.4.*

SSI respectfully requests that the DEQ extend the time frame for developing and submitting a sampling plan for Outfall 002 from one month following the effective date of the Final Permit to six months. Monitoring the Section 25 Pond by collecting water samples from different areas of the Pond will be physically challenging in the winter due to the formation of ice on the water surface and in the summer months due to the vastness of the pond's surface area. SSI is committed to personnel safety and therefore requests an extended period to fully develop sampling methods and protocols that ensure sampling procedures are safe, and that data collected are representative of the water quality of the Section 25 Pond.

Furthermore, SSI would like to consider the installation of a properly designed and functional horizontal monitoring "well" to be located either immediately below or immediately above the clay layer/liner of the Section 25 Pond bottom. As DEQ indicates in the Fact Sheet (page 26), the current horizontal well installed below Section 25 some time ago is inoperable and not able to produce water for sample collection. It is SSI's understanding that the technology and engineering of horizontal wells has advanced over the last several years. Part of the reason for requesting additional time is to investigate these methods, and if feasible, design and install a new horizontal well or wells within or immediately below the clay layer. Alternatively, SSI is considering the installation of a horizontal "well" immediately above the clay layer. Conceptually, this would consist of a length of slotted well casing laid horizontally onto the bottom of the Pond during a low water period with an access on the bank for using a pump to collect water samples. It is SSI's understanding that this approach is used to monitor engineered landfills for leachate. A new horizontal sampling apparatus will likely require several months to engineer, install, and evaluate.

Therefore, SSI respectfully requests that DEQ add a statement to the Final Permit to reflect the option to use a horizontal well for monitoring Outfall 002 on page 5 under Section C.1 Effluent Monitoring Requirements for Outfall 002, such as: "...within quadrants of the pond OR via a new horizontal well located either immediately below or immediately above the clay layer in the Section 25 Pond, as proposed by SSI and agreed to by the DEQ, in writing." SSI suggests that compliance with the Final Permit be managed in accordance with the Administrative Order on Consent (AOC) during the time it takes to fully implement the final monitoring approach specified in the Outfall 002 sampling plan.

**b. Special Condition 6 – Land Application Public Health and Safety Measures**

*This comment addresses the Draft Permit, Page 18, D.6.*

Based on the location of the land application fields and SSI's operational practices for the irrigation pivots, SSI respectfully requests alternative public safety and health measures to those listed in the Draft Permit (page 18) for the land application operation. The land application area is shown in the DEQ's Figures 1 and 6 in the Fact Sheet. As indicated in Figure 1, the land application area can be accessed by two main roads that dead end at the end of the application fields and before the Yellowstone River (all private property), one leading to the Section 25 Pond on the northern boundary of the land application and the other on the southern boundary. Figure 6 in the Fact Sheet shows a closer view of the land application fields. There are no houses, public recreational areas, or direct access points to the Yellowstone River from the main access roads or from the fields themselves. For reference, the closest house to the land application is roughly 0.3 miles, as the crow flies, to the northwest. The public has no compelling reason to visit these fields and has not been observed doing so in the past.

SSI requests that the DEQ revise the health and safety measures by requiring SSI to install two highly visible signs, one on each main access road, stating "No Trespassing – Agricultural Fields Irrigated with Reclaimed Wastewater," or approved equivalent, and eliminating the proposed requirement to delineate a 200-foot buffer zone that physically restricts access to the land application fields, or signage posted every 250 feet. These measures would be costly to implement and would restrict access to, and maneuverability of, farm equipment in the fields.

Operationally, SSI is constantly developing its Farm Management Plan (FMP). Currently, the farmland owner and the operator closely oversee the pivots to make sure they do not malfunction and to quickly resolve situations, which are extremely rare, where the end guns are stuck spraying on either CR 125 (the field to the north of the pivots) or CR 124 (the field to the south). It is safer, weight-wise, to keep the pivots running full of water so that, in case of a high wind, they do not blow over and become damaged. SSI respectfully requests that the wind speed limit be eliminated and replaced with a requirement for routine checks by the operator during high wind occurrences to limit overspray.

## **5. Miscellaneous Clarifications and Requests to Correct Text in Draft Permit and Fact Sheet**

SSI respectfully requests that the following corrections be made to the Final Permit and the Fact Sheet.

### **a. Text describing the beet receipts and stockpiling needs correction.**

*See Fact Sheet, Page 6, II.A.1*

The text mentions that beets are stored on 30-acres northwest of the SSI factory. This needs to be corrected. Approximately 20% of the SSI beet crop is piled on the pile ground just southwest of the factory. The rest of the crop is piled and stored at several remote beet piling sites located near the towns of Culbertson, Fairview, Glendive, and Savage, Montana.

### **b. Text describing flow from the Factory Lake requires clarification.**

*See Fact Sheet, Page 7, II.A.2*

For clarification purposes, the normal operations flow from the Factory Lake is 555 gpm, whereas in the 2019/2020 campaign, the flow was about 700 gpm. The flow in the 2019/ 2020 campaign was roughly 25% more than a normal operational year rather than the “almost double” described in the Fact Sheet. SSI agrees with the statement about water recycling within the plant since the hot pond has been lined with bentonite. SSI intends to line the rest of the condenser ponds this summer to ultimately reduce water usage from the Factory Lake.

### **c. Text presenting the total annual discharge flow from Outfall 001 is incorrect.**

*See Fact Sheet, Page 9, II.A.3.a.i*

The sentence stating, “The average discharge rate during periods with discharge was 1.4 mgd and the maximum daily discharge rate was 4.0 mgd, for an annual total of 99 MG (2018) and 154 MG (2019)” incorrectly presents the annual total flow for 2018 and 2019. Please refer to the email correspondence from SSI to Christine Weaver (DEQ) dated 10.09.2020, titled “FW: SSI Water Balance,” which provided the total annual flows, in million gallons, from Outfall 001 and the land application from years 2015 to 2019. This data was used in calculations later in the Fact Sheet on Page 12 but has not been presented correctly here. The total annual flow from Outfall 001 in 2018 was 34.52 MG and for 2019 was 76.07 MG.

### **d. Similar to above, text presenting the total annual discharge flow from the land application is incorrect.**

*See Fact Sheet, Page 10, II.A.3.a.ii*

The sentence stating, “The average land application rate for the past five years was 1.1 mgd during the two to six months with land application, for an annual average of 0.38 mgd” incorrectly states the annual average flowrate. Please refer to the email correspondence from SSI to Christine Weaver (DEQ) dated 10.09.2020, titled “FW: SSI Water Balance,” which provided the total annual flows, in million



gallons, from Outfall 001 and the land application from years 2015 to 2019. This data was used in calculations later in the Fact Sheet on Page 12 but has not been presented correctly here. The total annual flows from the land application, shown in the table below, would be equal to an annual mean for the five years of 0.154 MGD.

Year	Annual Flow Total (million gallons; MG)
2015	68,589,772
2016	75,469,472
2017	90,713,129
2018	27,987,705
2019	18,795,762
2020	68,589,772

**e. Text correction.**

*See Fact Sheet, Page 12, II.A.3.a.iv(2)*

The text needs to be corrected in the second equation for the average annual flow out in which "22 MG Outfall 002" should read "22 MG Outfall 001."

**f. Please remove references regarding "groundwater to Yellowstone River" with respect to Outfall 003.**

*See Fact Sheet, Page 13, II.A.3.b; and Fact Sheet, Page 32, IV.A.3*

On page 13 of the Fact Sheet, please replace "Outfall 003 - Ground water to Yellowstone River," in reference to Outfall 003/Factory Ponds discharge to groundwater, with "(Outfall 003 – Groundwater)." Also, SSI requests that the sentence, "It is likely hydrologically connected to the Yellowstone River...may capture some of the effluent" on page 32 of the Fact Sheet be replaced with, "The fate and transport of discharged effluent to the groundwater at the Factory Ponds remains to be studied. It is unclear whether groundwater is hydrologically connected to the Yellowstone River, which is 1.5 miles northeast with several intermittent water bodies and other features between the Factory Ponds and the River that may preclude a direct path to the river."

Naming Outfall 003 as a discharge to groundwater only is consistent with the DEQ's description of Outfall 003 on page 3 of the Draft Permit as "Infiltration from.....factory ponds.....into groundwater," i.e., not a groundwater to surface water discharge. In addition, DEQ states throughout the Fact Sheet that further study needs to be completed in order to understand the fate and transport of discharge from the Factory Ponds (Outfall 003). Therefore, we are requesting that any statements related to the discharge of effluent to the Yellowstone River via groundwater in relation to Outfall 003 be removed or edited accordingly until further study can be completed by SSI in accordance with Special Condition 5 and the numerous references by the DEQ on pages 14, 32, and 38 and 59 of the Fact Sheet regarding required seepage studies, a fate and transport study, and an acceptable mixing zone study.

**g. Text correction.**

*See Fact Sheet, Page 14, II.A.3.b, Table 3*

SSI has consolidated the three ponds formerly making up the Emergency Ponds into one newly engineered pond termed the Emergency Pond (not plural). The acreage estimate for the Emergency pond is accurate at 9.5 acres.

**h. Text correction.**

*See Fact Sheet, Page 23, III.B.1, Table 8*

Please correct the latitude/ longitude for MW-3 in Table 8. The correct latitude/ longitude for MW-3 is 47° 43' 3.787" N, 104° 7' 13.413" W.

**i. Text correction.**

*See Fact Sheet, Page 23, III.B.1*

Please remove reference to "Loren Franklin" and replace with "KC Harvey Environmental."

**j. Text correction.**

*See Fact Sheet, Page 31, VI.A.2 Table 16*

Please remove reference to "Kevin Harvey" in footnote (1) of Table 16 and replace with "KC Harvey Environmental."

**k. pH water quality standards require clarification.**

*See Fact Sheet, Page 34, IV.B.1.c*

The bullets under item c. on page 34 of the Fact Sheet stating, "Not change the receiving water pH by 0.5 or more pH unit when the naturally occurring receiving water is 6.5 to 8.5" and "Not change the receiving water pH when the pH range is naturally outside of 6.5 to 8.5" incorrectly reference the pH range applicable to B-3 Classification Standards. In accordance with Montana ARM 17.30.625 B-3 Classification Standards, the pH range discussed in the above-mentioned section regarding pH water quality standards is 6.5 to 9.0. Specifically, listed in ARM 17.30.625 B-3 Classification Standards, Item 2c: "2) No person may violate the following specific water quality standards for waters classified B-3...(c) Induced variation of hydrogen ion concentration (pH) within the range of 6.5 to 9.0 must be less than 0.5 pH unit. Natural pH outside this range must be maintained without change. Natural pH above 7.0 must be maintained above 7.0." SSI respectfully requests that the pH range in this text be corrected to reflect the 6.5 to 9.0 units in ARM 17.30.625.2.c. SSI recognizes that the pH effluent limits listed in the Draft Permit are correct.

Comments submitted by SSI regarding Draft Permit and Fact Sheet for Permit No. MT0000248  
January 19, 2021

**I. Please clarify citation.**

*See Fact Sheet, Page 61, VIII Information Sources*

Please amend the citation regarding the Fecal coliform study as follows:

KC Harvey Environmental, LLC (KC Harvey). 2019. Technical Memorandum: *Study of Fecal Coliform at the Sidney Sugars Wastewater Treatment System: Presence, Source Host Identification, Pathogenic Risk, Laboratory Review, and Literature Review*. Prepared by KC Harvey in collaboration with Dr. Seth Walk, Walk Laboratory, Montana State University for Sidney Sugars, Inc. dated April 30, 2019.



Comments submitted by SSI regarding Draft Permit and Fact Sheet for Permit No. MT0000248  
January 19, 2021

**EXHIBIT A**

**LEGAL COMMENTS ON APPLICABILITY OF CWA/MWQA TO DISCHARGES FROM  
SECTION 25 POND AND COMPLIANCE MONITORING FOR BOD<sub>5</sub>**



**WORDEN  
THANE P.C.**  
ATTORNEYS AT LAW

*Established in 1924*

Donovan Worden, Sr.  
(1892 – 1967)  
Donovan Worden, Jr.  
(1918 – 2001)  
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## LEGAL COMMENTS ON APPLICABILITY OF CWA/MWQA TO DISCHARGES FROM SECTION 25 POND AND COMPLIANCE MONITORING FOR BOD<sub>5</sub>

During the renewal process for Montana Pollutant Discharge Elimination System (MPDES) permit MT0000248, permittee Sidney Sugars Incorporated (“SSI”) submitted legal analyses regarding, and met with Montana Department of Environmental Quality (DEQ) representatives to discuss, the applicability of NPDES/MPDES permitting requirements to groundwater-to-surface-water discharges (“GSWDs”) and associated matters. The legal issues raised by SSI included, but were not limited to, whether an MPDES permit is required for discharges to groundwater from Outfall 002 (seepage from SSI’s Section 25 Pond) and, if so, whether technology-based effluent limits (TBELs) derived pursuant to federal effluent limitations guidelines (ELGs) for the sugar beet processing industry apply to these discharges. Additionally, SSI requested a legal explanation with respect to why SSI’s proposed monitoring for BOD<sub>5</sub> in Section 25 Pond (which DEQ recognizes as a “treatment facility”) was rejected conceptually by the Water Protection Bureau.<sup>1</sup>

DEQ’s Fact Sheet, issued with the draft MPDES permit for SSI, did not provide the legal basis for DEQ’s position with respect to these issues previously raised by SSI. Consequently, SSI respectfully requests that DEQ consider the legal analyses previously provided to it by SSI (which will not be restated herein, but are incorporated by reference),<sup>2</sup> the United States Supreme Court’s opinion in *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), and the January 2021 EPA guidance document regarding the application of *Maui*. SSI further requests that DEQ provide a substantive response to these comments with citation to Montana law sufficient to allow SSI to meaningfully analyze DEQ’s position with respect to the specific issues raised below.

### Issue 1: Applicability of NPDES/MPDES Permitting Requirements to GSWDs

- a. How did DEQ apply the “functional equivalent test” as outlined in the Supreme Court’s decision in *Maui* under Montana law?
- b. Even if DEQ concludes that the discharge is subject to CWA jurisdiction, on what basis is DEQ applying TBEL’s for discharges from the Section 25 Pond to groundwater?

### SSI’s Comments on Issue 1:

- The federal Clean Water Act (CWA) NPDES permitting program, which DEQ implements in Montana through its

<sup>1</sup> Note, there appears to be confusion by DEQ counsel that SSI’s proposed compliance monitoring approach allowed for groundwater dilution. In the proposed compliance monitoring approach, groundwater dilution is calculated and is excluded for the purpose of calculating compliance.

<sup>2</sup> SSI submitted legal analyses regarding these issues to DEQ, including, but not limited to, on the following dates: E-mail to J. Kenning from K. Harvey (11/01/17); E-mail from D. Hupp to K. Bowers (12/14/2018); and E-mail to K. Moser from D. Hupp with attachments (6/24/20).

EPA-approved MPDES permit program, only applies to point source discharges of pollutants to “waters of the United States,” a term that does not include groundwater. Thus, the requirement to obtain an NPDES permit—as well as aspects of the NPDES permit program such as the requirement to meet the federal beet sugar TBELs at issue here—does not apply to discharges to groundwater. This fact is reflected in Montana’s discharge rules that incorporate the federal TBELs by reference, which specify that the TBELs apply only to point source discharges of wastewater to “state surface waters,” and not discharges to groundwater. ARM 17.30.1201.

- Notwithstanding the lack of CWA jurisdiction over groundwater discharges, federal and state courts have struggled over the last few decades to answer the question of whether a discharge from a point source that travels through a nonpoint source (e.g., groundwater) before reaching a jurisdictional surface water (e.g., the Yellowstone River) is subject to the CWA NPDES permitting requirement and related CWA requirements such as meeting the federal TBELs.
- The *Maui* decision finally settled this question, providing a nationally applicable, multi- and non-exclusive-factor framework (the “*Maui* factors”) for determining the applicability of federal NPDES permitting requirements to point source discharges of pollutants to groundwater.
- Yet, DEQ’s Fact Sheet does not contain an analysis of the *Maui* factors. SSI believes that the *Maui* factors and the EPA’s guidance are directly relevant and should be considered by DEQ. Specifically, SSI believes DEQ should have considered: (a) “the extent to which the pollutant is diluted or chemically changed as it travels,” and (b) “the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source.” *Maui*, 140 S.Ct. at 1476–77.
- This second factor is consistent with the district court in *Maui*, which held that before an NPDES permit under the CWA is required for a GSWD, “Plaintiffs must show that the level of pollutants emerging into navigable-in-fact water is *more than de minimis*.” *Hawai’i Wildlife Fund v. County of Maui*, 24 F. Supp. 3d 980, 998 (D. Ha. 2014) (emphasis added). There must actually be an “addition” of pollutants to jurisdictional waters (i.e., surface waters) for there to be a “discharge” under the CWA.
- Here, the amount of BOD entering the Yellowstone River is *de minimis*. Likewise, the BOD is “chemically changed” by biogeochemical reactions before reaching the groundwater and river.
- Additionally, SSI has previously raised the issue with DEQ of whether Section 25 Pond is a “point source,” which is a threshold requirement not only for CWA jurisdiction generally, but also specifically for the application of technology-based standards under federal and state law. See ARM 17.30.1201(1) (providing that TBELs and other effluent limitations established under subchapter 12 apply to “*point sources* discharging wastes into state *surface waters*” (emphases added) “in a manner that implements the national pollutant discharge elimination system (NPDES) established under...the federal Clean Water Act.”).
- Numerous federal courts interpreting the CWA have recently concluded that seepage to groundwater from large storage/treatment ponds does not constitute a discharge from a “point source” for purposes of CWA jurisdiction, even where pollutants in the seepage may eventually reach jurisdictional surface waters.
- The United States Court of Appeals for the Fourth Circuit, for instance, recently concluded that a



landfill and settling ponds used to store coal ash at a Virginia power plant were not “point sources.” *Sierra Club v. VA Elec. & Power Co.*, 903 F.3d 403 (4th Cir. 2018). The court first noted that the CWA’s definition “makes clear that some facility must be involved that functions as a discrete, not a generalized, ‘conveyance’” for there to be a point source discharge. *Id.* at 410. The court concluded that the landfill and settling ponds “were not created to convey anything and did not function in that manner.” *Id.* at 411. Rather, pollutants left the landfill and ponds to the groundwater via “rainwater and groundwater flowing diffusely through the soil.” *Id.* (emphasis removed). The landfill and ponds could thus not be “point sources” under the CWA because they “could not be characterized as discrete ‘points,’ nor did they function as conveyances.” *Id.*

- Section 25 Pond functions in exactly the same manner; it is designed to store and treat wastewater, not “convey” it, and any pollutants leaving the pond do so through diffuse infiltration.
- The Fourth Circuit’s holding also relied on the “larger scheme of pollution regulation” adopted by Congress under the CWA to reject the suggestion that the landfill and ponds could be point sources. *Id.* The court found that the definition of “point source” and the CWA’s effluent limitation enforcement scheme under 33 U.S.C § 1311—which uses TBELs such as the beet-sugar TBELs at issue in this matter to restrict the “quantities, rates, and concentrations” of discharged pollutants (33 U.S.C § 1362(11))—together illustrated Congress’s intent that the NPDES program target “measurable discharges of pollutants.” *Id.* (emphasis in original). Measuring and enforcing an effluent limitation is “virtually impossible” when “the alleged discharge is diffuse and not the product of a discrete conveyance,” as was the case with the landfill and the ponds in *Sierra Club* (and as is the case with seeps from a large basin like Section 25 Pond). *Id.*
- See also *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, 905 F.3d 925, 934 n. 8 (6th Cir. 2018) (holding that coal ash storage ponds are not point sources because they “are not conveyances—they do not ‘take or carry [pollutants] from one place to another’”); *Tennessee Clean Water Network v. TVA*, 905 F.3d 436, 441–444 (6th Cir. 2018) (citations omitted) (finding 65-acre coal ash storage site was not a point source); *Toxics Action Ctr., Inc. v. Casella Waste Sys., Inc.*, 347 F. Supp. 3d 67, 75 (D. Mass. 2018) (finding unlined municipal landfill did not constitute a point source under the CWA).
- EPA recently issued guidance (“EPA Guidance”) on implementing the “functional equivalent” test from the *Maui* case, which supports a conclusion that the seepage from Section 25 Pond—even if pollutants in the seepage *did* reach the Yellowstone River in detectable amounts, which they do not—is not a discharge of pollutants from a point source.<sup>3</sup>
- For example, the EPA Guidance emphasizes that “system design and performance” should be considered when determining if a discharge to groundwater is “from” a point source and thus subject to CWA requirements such as NPDES permitting and federal TBELs. EPA contrasted discharges from a pipe or other discrete conveyance with seepage discharges from basins like

<sup>3</sup> Wildeman, Anna, Ass. Administrator, EPA Office of Water, “Guidance Memorandum—Applying the Supreme Court’s *County of Maui v. Hawaii Wildlife Fund* Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program” (January 14, 2021) (previously issued in draft Dec. 8, 2020), attached hereto and available at [https://www.epa.gov/sites/production/files/2021-01/documents/final\\_ow\\_maui\\_guidance\\_document\\_-\\_signed\\_1.14.21.pdf](https://www.epa.gov/sites/production/files/2021-01/documents/final_ow_maui_guidance_document_-_signed_1.14.21.pdf).

Section 25 Pond that are designed to store wastewater and “treat or attenuate” pollutants rather than “convey” them to surface waters:

Maui directs that “[w]hether pollutants that arrive at navigable waters after traveling through groundwater are ‘from’ a point source depends upon how similar to (or different from) the particular discharge is to a direct discharge.” *Maui*, 140 S. Ct. at 147+6. The composition and concentration of discharges of pollutants directly from a pipe or other discernible, confined, and discrete conveyance into a water of the United States with little or no intervening treatment or attenuation often differ significantly from the composition and concentration of discharges of pollutants into a system that is engineered, designed, and operated to *treat or attenuate pollutants or uses the surface or subsurface to treat*, provide uptake of, or retain water or pollutants.... If a facility or system is designed and performs to discharge pollutants from a point source through groundwater and into a water of the United States, the owner or operator should contact its permitting authority to determine whether an NPDES permit is required. On the other hand, if a facility is *designed and performs with a storage or treatment system* such as a septic system, cesspool or settling pond...and these system components in *fact prevent or abate discharges of pollutants to waters of the United States*, such that the discharges either do not reach a water of the United States or because the discharge is not the “functional equivalent” of a direct discharge, it may be less likely that an NPDES permit would be required.

EPA Guidance 7–8 (emphases added).

- EPA’s Guidance compels a conclusion that the seepage from Section 25 Pond is not a discharge from a point source and should not be subject to CWA permitting requirements such as imposition of the beet-sugar TBELs. Section 25 Pond is precisely designed as a “storage and treatment” system, as DEQ acknowledges, that “uses the surface or subsurface to treat or attenuate” TSS and BOD<sub>5</sub> to de minimis levels when they reach the Yellowstone River.
- This conclusion is also consistent with the underlying “technology” that the beet-sugar TBELs were based upon. EPA’s 1974 Development Document, which EPA published as technical support for the beet-sugar TBELs, makes clear that EPA based the beet-sugar TBELs on “technology” that relied upon “land disposal” of wastewater, a term EPA used to include both land application and disposal to unlined holding ponds. *See* pages 130–131 of the Development Document. EPA noted that land disposal could potentially result in the seepage of wastewater to soil and groundwater, with subsequent migration through groundwater to surface water (i.e., exactly the situation with Section 25 Pond), but made no mention of this type of GSWD being subject to the TBELs. To the contrary, EPA’s only reference to GSWDs was to the positive environmental effects of land disposal; the agency wrote: “wastewater returned to the ground through land disposal...may be reclaimed as ground water supply or eventually finds its way, generally in a purified state, back to surface waters.” *Id.* at 137.
- These facts indicate that SSI’s Section 25 Pond seepage should not be subject to federal jurisdiction, including the TBELs.



- Notwithstanding this clear EPA guidance, DEQ seems to be asserting that even if a discharge is not subject to the CWA and NPDES permitting, DEQ nonetheless has independent authority to impose the federal TBELs under State law.
- However, under federal law, ***the federal TBELs are exclusively implemented through NPDES permits***. Montana's EPA-authorized NPDES program meets and incorporates the federal NPDES requirements with little to no change, particularly with the direct incorporation of the federal TBELs by reference. ARM 17.30.1203.
- We are aware of no Montana regulations independently authorizing DEQ to impose the federal TBELs on discharges not subject to federal jurisdiction, e.g., upon discharges solely to groundwater. And, as a practical matter, DEQ does not impose the TBELs upon groundwater-only discharges.

#### **Issue 2: Proposed Compliance Monitoring Approach for BOD<sub>5</sub>**

- If DEQ determines the CWA/MWQA applies, what is the legal basis for DEQ's rejection of SSI's proposed compliance monitoring approach for BOD<sub>5</sub> in the Section 25 Pond? (See KC Harvey Environmental, LLC's Proposed Compliance Approach for Monitoring Technology Based Effluent Limits for Biological Oxygen Demand (BOD<sub>5</sub>) in the Section 25 Pond, Rev. June 19, 2020)*

#### **SSI's Comments on Issue 2:**

- Under EPA NPDES regulations, incorporated into the ARM, TBELs must be applied at or prior to "the point of discharge." See ARM 17.30.1203(7); see also 40 C.F.R. § 125.3.
- Consistently with *Maui*, SSI interprets the "point of discharge" for GWSDs to mean the point where pollutants are added to a jurisdictional surface water *after* migrating to the surface water via groundwater.
- Under ARM 17.30.1201, TBELs apply to point sources "discharging wastes into state *surface waters*" (not the broader "state waters" used elsewhere in 17.30, which includes groundwater).
- In addition, the federal TBELs are "effluent limitations" which, by definition, apply only to "discharges," meaning the "addition" of pollutants to "*navigable waters*" (i.e., surface waters, not groundwater). 40 C.F.R. § 401.11(i) (definition of "effluent limitation") and (h) (definition of "discharge" for federal TBELs).
- For seepage from the Section 25 Pond, the "point of discharge" for purposes of the TBELs is, thus, where pollutants are "added" to the Yellowstone River (i.e., at or near the P Wells).
- When monitoring for compliance with the TBELs at the point of discharge is "impractical or infeasible"—e.g., where the point of discharge is inaccessible or where the wastes are so diluted as to make monitoring impracticable—the rules allow DEQ to apply the TBELs further upstream, at an internal monitoring location. ARM 17.30.1345(10); 40 C.F.R. § 122.45(h). This appears to have partially motivated DEQ to move the Section 25 Pond point of compliance from the P Wells to an "internal" location (INTL).



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- SSI's consultant has derived a method to accurately monitor levels of BOD<sub>5</sub> from Section 25 Pond at the actual point of discharge that is neither impractical nor infeasible. Importantly, ***this method expressly accounts for and removes any reduction of BOD<sub>5</sub> that occurs as a result of groundwater dilution.***
- In addition, DEQ's questions about the extent of wastewater treatment that occurs in the clay liner and sludge layer are, respectfully, misplaced. Fact Sheet, pp. 25–26. SSI has explained previously that while "the end of treatment" may be a relevant consideration in regulating SSI's discharge, this is not part of the legal standard for establishing an internal monitoring point for TBELs and is found nowhere in the applicable rules. ARM 17.30.1203(7) provides, in its entirety: "Technology-based treatment requirements are applied prior to or at the point of discharge." As discussed, the "point of discharge" for GSWDs is where pollutants from the wastewater are "added" to surface water, i.e., where the groundwater enters the river.
- As noted, if it were "impractical or infeasible" to accurately monitor the amount of TSS and BOD levels entering the Yellowstone River from groundwater, an internal monitoring location might be appropriate. But when, as in this case, a monitoring method *can* measure the level of pollutants entering the Yellowstone River and *can* remove and account for any dilution by groundwater, this is an appropriate method of monitoring the discharge from Section 25 Pond—regardless of where "treatment" ends.

Prepared By:

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

OFFICE OF WATER

**GUIDANCE MEMORANDUM<sup>1</sup>**

**SUBJECT:** Applying the Supreme Court's *County of Maui v. Hawaii Wildlife Fund* Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program

**FROM:** Anna Wildeman  
Acting Assistant Administrator

This memorandum provides focused guidance to the regulated community and permitting authorities, including the U.S. Environmental Protection Agency (EPA or Agency), on applying the recent decision of the United States Supreme Court in *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020) ("*Maui*"), on a case by case basis, in the Clean Water Act (CWA or the Act) Section 402 National Pollutant Discharge Elimination System (NPDES) permit program.<sup>2</sup> The *Maui* decision outlines seven non-exclusive factors for the regulated community and permitting authorities to consider when evaluating whether a discharge of a pollutant from a point source that travels through groundwater to a water of the United States is the "functional equivalent" of a direct discharge from a point source to a water of the United States. This guidance places the functional equivalent analysis into context within the existing NPDES permitting framework and identifies an additional factor for the regulated community and permitting authorities to consider when evaluating whether and how to perform a "functional equivalent" analysis.

**Background**

The CWA – initially enacted as the Federal Water Pollution Control Act Amendments of 1972 and subsequently amended – establishes the statutory structure for the regulation and permitting of discharges of pollutants to waters of the United States. The CWA Section 402 NPDES permitting program, whether implemented directly by EPA or by a state that is authorized to carry out its own program in lieu of the federal program, is limited to regulating the "discharge of a pollutant" from a

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<sup>1</sup> This guidance document does not have the force and effect of law and it does not bind the public in any way. By issuing this guidance, the Agency intends only to provide clarity to the public regarding existing requirements under the law or Agency policies. Consistent with *EPA Guidance; Administrative Procedures for Issuance and Public Petitions*, 85 Fed. Reg. 66230 (Oct. 19, 2020), EPA solicited public comments on this draft memorandum for thirty days. A summary response to major concerns and comments is available in Docket # EPA-HQ-OW-2020-0673.

<sup>2</sup> This guidance only addresses discharges of pollutants that reach waters of the United States through groundwater.

“point source” to “navigable waters,” terms which are all defined in the Act. Congress prohibited the “discharge of any pollutant” “from any point source” “to navigable waters” unless it is authorized, generally by a permit. See 33 U.S.C. §§ 1311, 1342, 1344, and 1362. The Act defines “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source.” *Id.* § 1362(12)(A). “Pollutant” means “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” *Id.* § 1362(6). The Act defines “navigable waters” as “the waters of the United States, including the territorial seas,” *id.* § 1362(7); a term that is more specifically defined in federal regulation. See 33 CFR 328.3 and 40 CFR 120.2. The Act defines a “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362 (14). The Act authorizes EPA to issue NPDES permits pursuant to Section 402(a), but if a state submits its own NPDES program to EPA for approval, EPA shall authorize the state to administer its own program unless EPA determines that the program does not meet the statutory criteria. *Id.* § 1342(b). When a state receives such authorization, EPA retains oversight and enforcement authorities. *Id.* §§, 1342(d), 1319.

Until recently, federal courts were divided on the question of whether a “discharge of a pollutant” subject to the CWA occurs when a pollutant is released from a point source and subsequently moves through groundwater before reaching a “water of the United States.” Three recent appellate court decisions highlighted this disagreement: *Hawai’i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737 (9th Cir. 2018) (holding that point source discharges to groundwater that reach jurisdictional surface waters are subject to CWA permitting where they are fairly traceable to the point source and more than *de minimis*); *Upstate Forever v. Kinder Morgan Energy Partners*, 887 F.3d 637, 651 (4th Cir. 2018) (holding that “a plaintiff must allege a direct hydrological connection between ground water and navigable waters in order to state a claim under the CWA for a discharge of a pollutant that passes through ground water,” and noting that the discharge at issue in the case occurred 1,000 feet or less from a navigable water which “provides strong factual support” for a conclusion that the discharge is covered under the CWA.); and *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, 905 F.3d 925 (6th Cir. 2018) & *Tenn. Clean Water Network v. TVA*, 905 F.3d 436 (6th Cir. 2018) (holding that the Ninth Circuit and Fourth Circuit approaches were “foreclose[d]” by the CWA, which applies only where pollutants are added directly to navigable waters “by virtue of a point-source conveyance,” rather than through some other mechanism like groundwater). In 2018, the County of Maui and Kinder Morgan both petitioned the U.S. Supreme Court for *certiorari* review of the Ninth and Fourth Circuit’s decisions, respectively.

The Supreme Court granted *certiorari* in the *Maui* case and heard oral argument on November 6, 2019. On April 23, 2020, the Court issued its decision, addressing the question whether a CWA NPDES permit may be required for releases of pollutants from a point source that reach a jurisdictional water through groundwater. The Court held that an NPDES permit is required for a discharge of pollutants from a point source that reach navigable waters after traveling through groundwater if that discharge is the “functional equivalent of a direct discharge from the point source into navigable waters.”<sup>3</sup> *Maui*, 140 S. Ct. at 1468. The Court explicitly rejected the Ninth Circuit’s overly broad “fairly traceable test.” *Id.* at 1470. Nonetheless, the Court’s opinion leaves significant uncertainty concerning how the regulated community and permitting authorities should evaluate point source discharges that travel

<sup>3</sup> On May 4, 2020, the Court granted *certiorari* in *Kinder Morgan*, and then vacated and remanded the case for further consideration in light of its decision in *Maui*. *Kinder Morgan* was subsequently settled without further court proceedings.



through groundwater before reaching a water of the United States. The Court outlined a non-exclusive list of seven factors that may be relevant in determining whether a discharge from a point source to a jurisdictional water is the “functional equivalent” of a direct discharge, depending on the circumstances of a particular case. Those factors are: (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, and (7) the degree to which the pollution (at that point) has maintained its specific identity. *Id.* at 1476-77. The Court explained that the “functional equivalent” analysis can be further refined through court decisions in individual cases – the traditional common-law method – and through EPA administrative actions or guidance. *Id.* at 1477.

This guidance provides EPA’s guidance to assist the regulated community and permitting authorities with applying the *Maui* holding in existing CWA NPDES permit programs and authorized state programs. Importantly, the *Maui* decision did not change the overall statutory or regulatory structure of the NPDES permit program, and EPA cannot modify the NPDES program through guidance. *See* 40 CFR Parts 122-24. *Maui*, however, identified an additional analysis that should be conducted in certain factual scenarios to determine whether an NPDES permit is required. This guidance is intended to inform how the Court’s “functional equivalent” analysis may be applied within the framework of the longstanding NPDES permit program. This guidance first reiterates the basic principles that govern whether a facility owner or operator may need an NPDES permit, and then identifies an additional factor that the regulated community and permitting authorities should consider when evaluating whether discharges of pollutants from point sources that travel through groundwater before reaching waters of the United States might require NPDES permit coverage.

#### **NPDES Permit Applicability and the Relationship to the “Functional Equivalent” Analysis**

Under the CWA, the discharge of any pollutant into a water of the United States is generally prohibited unless authorized by a permit. *See* 33 U.S.C. §§ 1311, 1342, 1344, and 1362. Typically, owners or operators of facilities or systems will analyze whether an NPDES permit is required and obtain coverage prior to assuming ownership or control of such a facility or system, or prior to discharging pollutants to a water of the United States. In some cases, a future discharge event either is not expected or happens by accident. The decision whether to seek and obtain NPDES permit coverage resides with the facility owner or operator; however, the failure to obtain coverage prior to a discharge exposes the owner or operator to potential civil or criminal enforcement and court orders mandating compliance with CWA permitting requirements.

EPA and its state and tribal partners frequently work with regulated entities to address factual scenarios where the need for NPDES permit coverage may be unclear. The Agency anticipates that the *Maui* decision likely will increase the instances where potentially regulated entities may have questions regarding whether and when to obtain permit coverage, particularly given the uncertainties associated with the Court’s fact-specific, multi-factor functional equivalent analysis. This section describes some existing baseline permitting principles to assist permitting authorities and regulated entities with these foundational questions.

The CWA, EPA’s regulations, and relevant court decisions provide certain threshold conditions that must be satisfied before the legal obligation to have an NPDES permit is triggered. First, there must be (or will be) an actual discharge of a pollutant to a water of the United States. Second, such a discharge must be from a point source. The *Maui* decision did not modify these two threshold conditions for

triggering NPDES permit applicability. Instead, *Maui* clarified that an NPDES permit is required for only a subset of discharges of pollutants that reach a water of the United States through groundwater – those that are the “functional equivalent” of direct discharges to jurisdictional waters. *Maui*, 140 S. Ct. at 1468, 1477. These concepts are described in more detail below.

**1. An actual discharge of a pollutant to a water of the United States is a threshold condition that must be satisfied before the need for an NPDES permit is triggered.**

Section 301(a) of the CWA prohibits unpermitted point source discharges of pollutants to waters of the United States. 33 U.S.C. § 1311(a). The responsibility to obtain an NPDES permit lies with the facility owner or operator. See generally 40 CFR Part 122. As articulated by the U.S. Court of Appeals for the Second Circuit and adopted by EPA, “in the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance.” *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 505 (2nd Cir. 2005). The court went on to clarify that “the Clean Water Act gives the EPA jurisdiction to regulate and control only *actual* discharges—not potential discharges, and certainly not point sources themselves.” *Id.*; see also *Nat’l Pork Producers Council v. EPA*, 635 F.3d 738, 744-45, 750-51 (5th Cir. 2011); *Service Oil, Inc. v. EPA*, 590 F.3d 545, 551 (8th Cir. 2009). This requirement of an actual discharge of pollutants to a water of the United States is a cornerstone of the NPDES permit program and a threshold condition that must be met before there is a need to consider whether the discharge occurs directly into a water of the United States or is a “functional equivalent” of a direct discharge into a water of the United States.

A release of pollutants from a point source is a necessary, but not a sufficient, condition for triggering the need for an NPDES permit. In other words, a release of pollutants from a point source that occurs near a water of the United States does not by itself trigger the NPDES permit requirement. The Supreme Court’s decision in *Maui* did not instruct NPDES permitting authorities to *assume* that discharges to groundwater that occur in the vicinity of a jurisdictional water are the “functional equivalent” of direct discharges to that water. Indeed, such discharges may never reach jurisdictional waters for a number of reasons, including characteristics of the pollutant itself and the nature of the subsurface aquifer and hydrogeology.

However, where there are indications that there may be a discharge of pollutants through groundwater to waters of the United States, the Agency recommends considering whether conducting a technical analysis would be prudent. Indications may include, for example, a discharge of highly mobile pollutants from a point source directly to sandy soils, or in an area with shallow groundwater in close proximity to a water of a United States. In cases like these, it may be informative to evaluate hydraulic conductivity based on the soil type or porosity and hydraulic gradient through which the pollutant travels, depth to groundwater, groundwater flowpath (including distance and transit time over which the pollutant reaches the receiving water of the United States), or pollutant-specific dynamics along the groundwater flowpath (e.g., sorption, biological uptake, microbial processing). The purpose of such an evaluation would be to understand not only whether an actual discharge of a pollutant is occurring to a water of the United States via groundwater, but also whether any such discharge is the “functional equivalent” of a direct discharge to a water of the United States.



In a typical NPDES permitting process, the facility owner or operator and its consultants may be asked to provide to the permitting authority engineering, modeling or other technical information to support a permit application. These analyses often evaluate the likely fate and transport of pollutants that travel from the point source and into the environment and are often included in the record of decision for a final NPDES permit. In an enforcement context, the enforcement agency is typically the entity performing the technical analysis to support an allegation that an unpermitted discharge of pollutants has occurred to waters of the United States. Importantly, a mere allegation (i.e., without supporting evidence) that a point source discharge of pollutants is or may be reaching a water of the United States via groundwater is likely not sufficient to trigger the need for an NPDES permit. An allegation alone, for example one made in a public comment on a draft NPDES permit for a surface water discharge from the same facility, typically would not trigger a requirement for the permitting authority to investigate the unsupported comment.

Neither the “functional equivalent” analysis set out by the Supreme Court nor the CWA itself requires a facility owner or operator or a permitting authority to prove the *absence* of a discharge. At the same time, it would be prudent for facility owners or operators to obtain an NPDES permit before they initiate a discharge of pollutants into waters of the United States to avoid potential CWA liability for unpermitted discharges.

**2. The discharge of pollutants that reaches, or will reach, a water of the United States must be from a point source to trigger NPDES permitting requirements.**

Another longstanding threshold condition that must be satisfied before the need for a permit is triggered is that the prohibition in CWA Section 301 applies to releases of pollutants from a *point source* that reach a water of the United States. As noted above, the CWA defines the term “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any *point source*.” 33 U.S.C. § 1362(12)(A) (emphasis added). The term “point source” is defined as “any discernible, confined and discrete conveyance. . . .” *Id.* § 1362(14). The Supreme Court in *Maui* reiterated this threshold condition: “[t]he statute couples the word ‘from’ with the word ‘to’ – strong evidence that Congress was referring to a destination (‘navigable waters’) and an origin (‘any point source’). Further underscoring that Congress intended this every day meaning is that the object of ‘from’ is a ‘point source’ – a source, again, connoting an origin.” *Maui*, 140 S. Ct. at 1473-74 (emphasis in original).

The threshold requirement of a release from a point source applies to discharges through groundwater no less than it applies to direct discharges. The Court’s decision in *Maui* reinforces this basic principle. *Maui* recognizes the need, set forth in the CWA, “to preserve state regulation of groundwater and other nonpoint sources of pollution.” *Id.* at 1476. Indeed, as the Court observed, the NPDES permitting provisions “say nothing at all about non-point source regulation or groundwater regulation.” *Id.* at 1471. The Court rejected the Ninth Circuit’s “fairly traceable” test in part because it could interfere “seriously with States’ traditional regulatory authority” over nonpoint source pollution and groundwater. *Id.* at 1471. The Court also declined to adopt “means-of-delivery” test (also known as the terminal point source theory, and which would have required a point source to convey the pollutant directly into a water of the United States), *id.* at 1474, and declined to exclude from the Act’s NPDES requirements the release of pollutants to groundwater, as presented in EPA’s Interpretive Statement, *id.* at 1470 (citing 84 Fed. Reg. 16810 (2019)). However, the Court affirmed that the CWA still requires a discharge of a pollutant from a point source to a water of the United States. If the pollutant travels through groundwater first, the same point source requirement applies; *Maui* instructs that “an addition [of a pollutant to



navigable waters] falls within the statutory requirement that it be ‘from any point source’ when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means.” *Id.* at 1476. Thus, a determination that there is or will be a point source discharge is a threshold condition that must be met before regulatory jurisdiction can be established under the CWA. Only after it is established that an actual discharge of pollutants from a point source to waters of the United States via groundwater occurs (or will occur) would there be a need to consider the Supreme Court’s “functional equivalent” analysis.

**3. Only a subset of discharges of pollutants to groundwater that ultimately reach a water of the United States are the “functional equivalent” of a direct discharge to a water of the United States.**

A demonstration that pollutants from a point source have reached or will reach a water of the United States via groundwater does not by itself trigger the requirement for an NPDES permit. *Id.* at 1476-77. To say otherwise would amount to adoption of the “fairly traceable” test that the *Maui* Court rejected. When a discharge of pollutants occurs or will occur from a point source to a water of the United States via groundwater, the Supreme Court has instructed that there are “many potentially relevant factors” that may be considered, depending on the circumstances, when determining whether the discharge is or will be the “functional equivalent” of a direct discharge. *Id.* at 1476-77. The Court explained that “an addition of pollutants falls within the statutory requirement that it be ‘from any point source’ when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means.” *Id.*

Discharges of pollutants that reach a water of the United States via groundwater may not be the “functional equivalent” of a direct discharge, based on a number of factors identified in *Maui*. The Agency’s experience indicates that science (e.g., characteristics of the pollutant itself and the nature of the subsurface aquifer and hydrogeology) informs the effect of time and distance traveled on a discharge, and thus whether that discharge is ultimately the “functional equivalent” of a direct discharge. In other words, what happens to the discharged pollutant over that time and distance traveled to the water of the United States, is critical to the “functional equivalent” analysis. Pollutants may be discharged from a point source and migrate through a system that treats, provides uptake of, dilutes, or retains pollutants before the pollutant reaches a water of the United States. If the pollutant composition or concentration that ultimately reaches the water of the United States is materially different from the composition or concentration of the pollutant as initially discharged, whether through chemical or biological interaction with soils, microbes, plants and their root zone, groundwater, or other pollutants, or simply through physical attenuation or dilution, it might not be the “functional equivalent” of a direct discharge to a water of the United States. By contrast, a discharge via groundwater that reaches a water of the United States in the same or nearly the same chemical composition and concentration may be more like a direct discharge to the jurisdictional water.

Historically, few NPDES permits have been issued for point source discharges of pollutants that reach waters of the United States via groundwater. Permits issued for these types of discharges were based on a case-by-case analysis that was grounded in a “direct hydrologic connection” analysis. *See e.g.*, 84 FR 16810, 83 FR 7126, 66 FR 2959. Compared with the hundreds of thousands of NPDES permits that have been issued since the inception of the program, the number of NPDES permits issued for discharges through groundwater is extremely low. EPA anticipates that the issuance of such permits will continue

to be a small percentage of the overall number of NPDES permits issued following application of the Supreme Court’s “functional equivalent” analysis.

### **Considering System Design and Performance as Part of the “Functional Equivalent” Analysis**

Based on EPA’s analysis of the Supreme Court’s decision, the Agency’s technical and scientific expertise, and its experience administering the NPDES permit program and overseeing authorized state NPDES programs for several decades, the Agency has identified an additional factor that may prove relevant and thus should be considered when performing a “functional equivalent” analysis: the design and performance of the system or facility from which the pollutant is released.

EPA has discretion to identify relevant factors beyond those the Court identified in *Maui*. *See* 140 S. Ct. at 1476-77. Even when an agency’s interpretation of an ambiguous statutory provision differs from a court’s interpretation, an agency may take such a construction because it remains the authoritative interpreter of the statutes it administers. *National Cable & Telecomm. Ass’n v. Brand X Internet Serv.*, 545 U.S. 967, 982 (2005). In this instance, EPA’s discretion to identify relevant factors beyond those the Court identified in *Maui* is fully consistent with, and specifically contemplated by, the *Maui* decision. *See* 140 S. Ct. at 1476-77. Although the design and performance of the system or facility from which the pollutant is released was not identified as a specific factor in *Maui*, inquiries concerning design and performance are important and relevant and are routinely considered by permitting authorities in the administration of the NPDES permit program. *See e.g.*, 40 CFR 122.21.<sup>4</sup> In many cases, a facility owner or operator may apply for an NPDES permit for an anticipated discharge from a new or proposed facility. In these cases, permitting authorities will likely establish NPDES permits based on the design of the new facility, including how the facility is planned and engineered to transfer, store, treat, or discharge wastewater. In other cases, the design and performance of an existing facility can provide important information about the function and effectiveness of the engineered system, which can also be informed by actual discharge data and water quality information. In both kinds of cases, the design and performance of the system or facility from which the pollutant is released can inform the scope and extent of the “functional equivalent” analysis and inform the factors identified in *Maui*.

*Maui* directs that “[w]hether pollutants that arrive at navigable waters after traveling through groundwater are ‘from’ a point source depends upon how similar to (or different from) the particular discharge is to a direct discharge.” *Maui*, 140 S. Ct. at 1476. The composition and concentration of discharges of pollutants directly from a pipe or other discernible, confined, and discrete conveyance into a water of the United States with little or no intervening treatment or attenuation often differ significantly from the composition and concentration of discharges of pollutants into a system that is engineered, designed, and operated to treat or attenuate pollutants or uses the surface or subsurface to treat, provide uptake of, or retain pollutants.

The design and performance of a system or facility can affect or inform all seven factors identified in *Maui*. For example, the point of discharge may be engineered to direct the pollutant into a subsurface aquitard or to a surface area designed to slow the transit time of a pollutant that ultimately reaches a water of the United States. Similarly, the point of discharge may be located to intentionally increase the

<sup>4</sup> NPDES permit application forms used when EPA is the permitting authority are available at <https://www.epa.gov/npdes/npdes-application-forms>.



distance the pollutant would travel before reaching a water of the United States. Other system or facility design and performance components may promote dilution, adsorption or dispersion of the pollutant, thereby affecting the extent to which the pollutant is chemically changed, the amount of pollutant entering the water of the United States relative to the amount of the pollutant that leaves the point source, and the degree to which the pollutant has maintained its specific identity at the point it reaches a water of the United States. Finally, a system may be designed and perform so that the discharge is either discrete and confined or diffuse, affecting the manner by which the pollutant may enter the water of the United States. The design and performance of the facility or system therefore informs the analysis of whether the release of a pollutant from that system is the “functional equivalent” of a direct discharge from a point source to a water of the United States.

If a facility or system is designed and performs to discharge pollutants from a point source through groundwater and into a water of the United States, the owner or operator should contact its permitting authority to determine whether an NPDES permit is required. On the other hand, if a facility is designed and performs with a storage, treatment or containment system such as a septic system, cesspool or settling pond; if the facility is operating as a runoff management system, such as with stormwater controls, infiltration or evaporation systems or other green infrastructure; or if the facility operates water reuse, recycling or groundwater recharge facilities, and these system components in fact abate discharges of pollutants to waters of the United States, such that the discharges either do not reach a water of the United States or because the discharge is not the “functional equivalent” of a direct discharge, it may be less likely that an NPDES permit would be required.

**Sidner, Regan**

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**From:** Lynn Savonen [REDACTED]  
**Sent:** Saturday, September 18, 2021 12:30 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

(PLEASE PROVIDE YOUR NAME AND MAILING ADDRESS HERE)

Thank you for the opportunity to provide comments on this issue.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Regards,  
Lynn Savonen  
6210 McCall St  
Bonners Ferry, ID 83805

**Sidner, Regan**

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**From:** Sharon Burdick [REDACTED]  
**Sent:** Sunday, September 19, 2021 9:00 AM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

(PLEASE PROVIDE YOUR NAME AND MAILING ADDRESS HERE)

Thank you for the opportunity to provide comments on this issue.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Regards,  
Sharon Burdick  
420 Last Chance Rd  
Sandpoint, ID 83864

**Sidner, Regan**

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**From:** Laurie Foutty [REDACTED]  
**Sent:** Sunday, September 19, 2021 4:30 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

(PLEASE PROVIDE YOUR NAME AND MAILING ADDRESS HERE)

Thank you for the opportunity to provide comments on this issue.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Regards,  
Laurie Foutty  
6146 N Harcourt Dr  
Coeur D'alene, ID 83815



**Sidner, Regan**

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**From:** John Hastings [REDACTED]  
**Sent:** Sunday, September 19, 2021 9:30 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

(PLEASE PROVIDE YOUR NAME AND MAILING ADDRESS HERE)

Thank you for the opportunity to provide comments on this issue.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Regards,  
John Hastings  
2002 Aspen Ln  
Sandpoint, ID 83864

**Sidner, Regan**

---

**From:** Arthur Buswell [REDACTED]  
**Sent:** Monday, September 20, 2021 7:30 AM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

(PLEASE PROVIDE YOUR NAME AND MAILING ADDRESS HERE)

Thank you for the opportunity to provide comments on this issue.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Regards,  
Arthur Buswell  
32 Park cri,  
Wardner, ID 83837

**Sidner, Regan**

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**From:** Gayla Moseley [REDACTED]  
**Sent:** Tuesday, September 21, 2021 10:00 AM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

(PLEASE PROVIDE YOUR NAME AND MAILING ADDRESS HERE)

Thank you for the opportunity to provide comments on this issue.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Regards,  
Gayla Moseley  
742 E Timber Ln  
Coeur D'alene, ID 83815

**Sidner, Regan**

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**From:** Clayton Elliott [REDACTED]  
**Sent:** Tuesday, September 21, 2021 2:19 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] MTU Comments on review process for stringency of state Selenium standard, ARM 17.30.632  
**Attachments:** 2021-09-14 MTUCommentsSeleniumBERReviewProcess FNL.pdf

Members of the Board of Environmental Review:

Please find attached comments from Montana Trout Unlimited concerning the request for public comment on potential review of the stringency standard pertaining to Montana's selenium standard in ARM 17.30.632. Do not hesitate to reach out to me if you have comments, questions, or need additional information.

Thank you in advance for your consideration,  
Clayton

**Clayton Elliott**  
*Conservation and Government Affairs Director*  
**Montana Trout Unlimited**



[www.montanatu.org](http://www.montanatu.org) [[montanatu.org](mailto:montanatu.org)]





September 24, 2021

Montana Trout Unlimited  
312 North Higgins, Suite 200  
P.O. Box 7186  
Missoula, Montana 59807

Montana Board of Environmental Review  
ATTN: Regan Sidner, Board Secretary  
P.O. Box 200901  
Helena, Montana 59620-0901

Sent by email to: [deqbersecretary@mt.gov](mailto:deqbersecretary@mt.gov)

Re: In the matter of the Review of Stringency of Rule Pertaining to Selenium Stands for Lake Koocanusa, pursuant to ARM 17.30.632

Board of Environmental Review Members:

Thank you for the opportunity to provide written comments on the proposed process for reviewing the stringency of the adopted selenium standards for Lake Koocanusa and the Kootenai River that is currently in front of the Board of Environmental Review (BER). We appreciate the thorough and transparent public process that brought us to the point of having an adopted rule, and we wish to go on record calling for an equally public process for any duplicative review that the BER may or may not choose to embark on now.

Founded in 1964, Montana Trout Unlimited (MTU) is the only statewide grassroots organization dedicated solely to conserving, protecting, and restoring Montana's coldwater fisheries. MTU is comprised of 13 chapters across the state, including in northwest Montana, and it represents approximately 4,500 Trout Unlimited members and supporters in the state. Our chapter leaders in the affected area have helped inform our comments to the Board.

For more than half a decade, the collaborative work of the Department of Environmental Quality (DEQ), Montana Fish, Wildlife, and Parks (FWP), United States Environmental Protection Agency (EPA), United States Geologic Survey (USGS), United States Fish and Wildlife Service (USFWS), multiple Tribal nations in the United States and Canada, the Province of British Columbia, and university scientists has been aimed at addressing the ongoing, long-term selenium pollution in the transboundary waters of Lake Koocanusa and the Kootenai River. MTU has reviewed, participated in, and encouraged this process with an emphasis on the goal of having DEQ set a site specific standard for selenium in the lake and river that is based on sound science in the interest of protecting one of northwest Montana's most valuable and intact wild

and native trout fisheries. The current standards adopted by DEQ in Administrative Rules of Montana (ARM) 17.30.632 do just that. Further, the process for adopting those rules involved considerable public deliberation, participation, and review.

For the purposes of these comments, we will refrain from discussing the substance of the petition of Teck Coal's duplicative request for review as well as the extensive public record that substantiate the rule, including on the specific questions posed by Teck Coal in their request. Rather, we first wish to formally request that the Board deny the duplicative request for review submitted by Teck Coal. On its face, the issue at question has been robustly considered and the standard of review met during the adoption of the rule. If the board should choose to not deny the request, MTU formally requests that any review process by which the Board chooses to move forward with such petition include meaningful public participation and review provided for in Title 2, Section 4 of the Montana Code Annotated (MCA) and afforded by the protections in Article II, Sections 8 and 9 of the Montana Constitution. We specifically ask that any such process of review include publicly noticed comment periods of at least sixty days and include at least one public meeting in Helena.

Please do not hesitate to contact us with any questions, or if you need additional information regarding the comments that we have submitted (via email at [clayton@montanatu.org](mailto:clayton@montanatu.org) or by phone at 406-543-0054). Again, we thank you for the opportunity to comment on this important topic.

Respectfully,



David Brooks  
Executive Director  
Montana Trout Unlimited



Clayton Elliott  
Conservation Director  
Montana Trout Unlimited

cc:

The Honorable Jon Tester, United States Senator  
The Honorable Steve Daines, United States Senator  
The Honorable Matt Rosendale, United States House of Representatives  
The Honorable Greg Gianforte, Governor of Montana  
Chris Dorrington, Director of Montana Department of Environmental Quality



**Sidner, Regan**

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**From:** Audrey Hopkins [REDACTED]  
**Sent:** Tuesday, September 21, 2021 7:49 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] protect our waters

Dear Montana Board of Environmental Review,

Thank you for the opportunity to provide comments on this issue.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Regards,  
Audrey Hopkins  
411 Deinhard Ln  
Mccall, ID 83638

**Sidner, Regan**

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**From:** Nicole Erickson [REDACTED]  
**Sent:** Tuesday, September 21, 2021 8:30 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

Thank you for the opportunity to provide comments on this issue.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Regards,  
Nicole Erickson  
15317 Gleneden  
Spokane, WA 99208

**Sidner, Regan**

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**From:** Joi Marker [REDACTED]  
**Sent:** Thursday, September 23, 2021 8:17 AM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Please please continue your bold stance protecting our waters

Dear Montana Board of Environmental Review,

Thank you for the opportunity to provide comments on this issue.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Regards,  
Joi Marker  
4711 W Hillcrest Dr  
Boise, ID 83705

**Sidner, Regan**

---

**From:** Alexa Fay [REDACTED]  
**Sent:** Thursday, September 23, 2021 3:31 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

Thank you for the opportunity to provide comments on this issue.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Regards,  
Alexa Fay  
1507 N 39th St  
Seattle, WA 98103

**Sidner, Regan**

---

**From:** Rhea Verbanic [REDACTED]  
**Sent:** Thursday, September 23, 2021 7:09 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

Thank you for the opportunity to provide comments on this issue.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Regards,  
Rhea Verbanic  
175 Goat Mountain Rd  
Bonners Ferry, ID 83805

**Sidner, Regan**

---

**From:** Patrick Rice [REDACTED]  
**Sent:** Thursday, September 23, 2021 7:30 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

Thank you for the opportunity to provide comments on this issue.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Regards,  
Patrick Rice  
16808 E Mission Pkwy  
Spokane Valley, WA 99016




**Sidner, Regan**

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**From:** Armstrong, Catherine  
**Sent:** Friday, September 24, 2021 11:10 AM  
**To:** DEQ BER Secretary; Steinmetz, Amy; wwmercer@hollandhart.com; Vicki A. Marquis; Arlene Forney  
**Cc:** Bowers, Kirsten  
**Subject:** Re: Lake Koocanusa, Case No. BER 2021-04 WQ  
**Attachments:** Comments on BER Process 9-24-21.pdf

Good morning,

Per the instructions of Kirsten Bowers, please see the attached DEQ Comments Regarding the Process the BER Should Undertake in Reviewing ARM 17.30.632 for Compliance with § 75-5-203, MCA. Copies will be sent per the Certificate of Service. If you have any questions, please do not hesitate to contact me.

Catherine Armstrong  
Paralegal  
MT Dept. of Environmental Quality  
1520 E 6<sup>th</sup> Ave, Legal Unit  
Helena, MT 59601  


Kirsten H. Bowers  
 Montana Department of  
 Environmental Quality  
 1520 East Sixth Avenue  
 P.O. Box 200901  
 Helena, MT 59620-0901  
 Telephone: (406) 444-4222  
 kbowers@mt.gov

*ATTORNEY FOR DEQ*

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

<b>IN THE MATTER OF: THE          REVIEW OF THE          STRINGENCY OF ARM          17.30.632 PERTAINING TO          SELENIUM STANDARDS FOR          LAKE KOOCANUSA</b>	<b>Case No. BER 2021-04 WQ</b>
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**MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY'S  
 COMMENTS REGARDING THE PROCESS THE BOARD OF  
 ENVIRONMENTAL REVIEW SHOULD UNDERTAKE IN REVIEWING  
 ARM 17.30.632 FOR COMPLIANCE WITH § 75-5-203, MONTANA CODE  
 ANNOTATED**

On June 30, 2021, Teck Coal Limited (Teck) filed a petition with the Board of Environmental Review (BER or Board) to review ARM 17.30.632, the site-specific water quality standard for selenium in Lake Koocanusa, to determine whether that rule is more stringent than comparable federal regulations or guidelines that address the same circumstance. By notice posted on the BER's

website, the BER is requesting written comments from interested parties “as to the process the Board should undertake in reviewing the stringency of ARM 17.30.632 pursuant to Mont. Code Ann. § 75-5-203, as amended.”

The Montana Department of Environmental Quality (DEQ) is the state government agency that administers the Montana Water Quality Act and the administrative rules adopted under that Act including ARM 17.30.632. Therefore, DEQ is an interested party in this matter and, through counsel, submits the following comments concerning the process the BER should undertake in reviewing ARM 17.30.632 for compliance with Mont. Code Ann. § 75-5-203:

1. The review process should include a deadline for joinder/intervention of additional parties.
2. The review process should include a deadline for the BER to compile an electronic copy of the BER’s administrative record supporting the amendment of ARM 17.30.602 and the adoption of NEW Rule I (codified as ARM 17.30.632) pertaining to selenium standards for Lake Koocanusa and the Kootenai River. *See Montana Administrative Register Notice 17-414, No. 24 (December 24, 2020).* The administrative record should be made available to interested parties in a PDF format that is searchable and has consecutively Bates numbered pages.

3. The review process should include a deadline for the interested parties to review the BER's administrative record and submit motions to supplement or amend the record. Any such motion to amend or supplement the BER's record must state the basis for supplementation or amendment. Supplementation or amendment of the record should only be allowed when necessary to complete the record that was before the Board when it amended ARM 17.30.602 and adopted of NEW Rule I (codified as ARM 17.30.632) and submitted to EPA for review and approval or disapproval pursuant to § 303(c)(3) of the Clean Water Act.
4. The review process should include a timeframe for the interested parties to stipulate to any facts, to the content of the administrative record, or to narrow the issues for the Board's review. The interested parties may request the assistance of the Board or its appointed Hearing Examiner to resolve any issue necessary for the parties to file dispositive motions on the issue whether ARM 17.30.632, the site-specific water quality standard for selenium in Lake Koocanusa, is more stringent than comparable federal regulations or guidelines that address the same circumstance.
5. The review process should include deadlines for:
  - a. filing dispositive motions including briefs in support;

- b. filing responses to dispositive motions;
  - c. filing replies to dispositive motions, and
  - d. hearing, if requested, to hear oral argument on any dispositive motions.
6. After, completion of briefing and oral argument, the BER should prepare a proposed written determination whether ARM 17.30.632 is more stringent than comparable federal regulations or guidelines.
7. The BER should open a public comment period on its proposed determination whether ARM 17.30.632 is more stringent than comparable federal regulations or guidelines. The BER may accept written comments and take oral comment at either a regularly scheduled BER meeting or during a special meeting of the BER. The BER will only consider comments from the public that are relevant to its proposed determination whether ARM 17.30.632 is more stringent than comparable federal regulations or guidelines that address the same circumstance.
8. After considering comments from the public, the BER should finalize its determination whether ARM 17.30.632 is more stringent than comparable federal regulations or guidelines.

9. If the BER determines ARM 17.30.632 is more stringent than comparable federal regulations or guidelines, the department shall either revise ARM 17.30.632 to conform to the applicable federal regulation or guidelines or the department shall make the written findings in § 75-5-203(2), MCA. *See* § 75-5-203, MCA as amended by Sec. 32 of Senate Bill 233 (adopted by the 67<sup>th</sup> Montana Legislature and effective July 1, 2021).

Respectfully submitted this 24th day of September 2021.

/s/ Kirsten Bowers

Kirsten H. Bowers

Attorney

Montana Dept. of Environmental Quality

1520 E. 6<sup>th</sup> Avenue

Helena, MT 59601

kbowers@mt.gov



**Certificate of Service**

I hereby certify that on this 24th day of September 2021, I caused a true and correct copy of the foregoing to be e-mailed to the following:

Regan Sidner, Board Secretary  
Department of Environmental Quality  
1520 East Sixth Avenue  
P.O. Box 200901  
Helena, MT 59620-0901  
Deqbersecretary@mt.gov

Amy Steinmetz  
Division Administrator  
Department of Environmental Quality  
1520 East Sixth Avenue  
P.O. Box 200901  
Helena, MT 59620-0901  
asteinmetz@mt.gov

William W. Mercer  
Victoria A. Marquis  
Holland & Hart LLP  
401 North 31st Street, Suite 1500  
P.O. Box 639  
Billings, Montana 59103-0639  
Telephone: (406) 252-2166  
wwmerc@hollandhart.com  
vamarquis@hollandhart.com  
aforney@hollandandhart.com

ATTORNEYS FOR TECK COAL  
LIMITED

By: /s/ Catherine Armstrong  
CATHERINE ARMSTRONG  
Paralegal  
Department of Environmental Quality

**Sidner, Regan**

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**From:** Ellie Hudson-Heck [REDACTED]  
**Sent:** Friday, September 24, 2021 11:18 AM  
**To:** DEQ BER Secretary  
**Cc:** Marie Kellner  
**Subject:** [EXTERNAL] Comments related to the process the Board should undertake in reviewing the stringency of ARM 17.30.632 pursuant to Mont. Code Ann. § 75-5-203, as amended.  
**Attachments:** 21.9.24 ICL Comments to Montana Board of Environmental Review (1) (1).pdf

Hi Regan,

On behalf of the Idaho Conservation League I would like to submit the following comments in regard to the process the Board should adopt to review the stringency of ARM 17.30.632 pursuant to Mont. Code Ann. § 75-5-203, as amended. Please feel free to reach out with any questions.

Thank you,

--

**Ellie Hudson-Heck**

She|Her|Hers ([what's this \[mypronouns.org\]](https://www.mypronouns.org/)?)

Conservation Assistant

Idaho Conservation League

PO Box 2308, Sandpoint, ID 83864

[REDACTED]

<http://www.idahoconservation.org> [[idahoconservation.org](http://www.idahoconservation.org)]



[Become a member \[idahoconservation.org\]](http://www.idahoconservation.org)



208.265.9565 • PO Box 2308, Sandpoint, ID 83864 • [www.idahoconservation.org](http://www.idahoconservation.org)

Regan Sidner  
Board Secretary  
Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901  
Submitted via email to [deqbersecretary@mt.gov](mailto:deqbersecretary@mt.gov)

September 24th, 2021

**Subject: Comments related to the process the Board should undertake in reviewing the stringency of ARM 17.30.632 pursuant to Mont. Code Ann. § 75-5-203, as amended.**

Dear Chairman Ruffatto and Members of the Board:

I am writing on behalf of the Idaho Conservation League to provide comments regarding the petition filed by Teck Coal Limited and the process the Board of Environmental Review (Board) should follow to review the stringency of ARM 17.30.632 pursuant to Mont. Code Ann. § 75-5-203. The Idaho Conservation League has been Idaho's leading voice for conservation since 1973. As Idaho's largest state-based conservation organization, we represent over 30,000 supporters, many of whom have a deep personal interest in protecting human health and the environment. The Idaho Conservation League works to protect these values through public education, outreach, advocacy and policy development.

As you know, the site-specific selenium criteria was derived from over 6 years of data collection in a collaboration between the Environmental Protection Agency (EPA), US Geological Survey (USGS), Montana Department of Environmental Quality (DEQ), the Kootenai Tribe of Idaho (KTOI), and the Confederated Salish and Kootenai Tribes (CSKT). It was incredible to witness such an inclusive, multi-governmental process, that resulted in the Board adopting a water quality criteria that not only protects Montana's Lake Koocanusa and the Kootenai River, but also the downstream portion of this watershed in Idaho.

No one in Montana or Idaho benefits from a review of the EPA approved Montana selenium criteria. All of the selenium pollution entering Montana and Idaho comes from Canadian coal mines owned and operated by Teck Coal. The Board's decision to approve the Montana selenium criteria provided an important stepping stone to successfully hold Teck accountable for polluting our downstream U.S. waterways. A review of this criteria threatens to weaken Montana's ability to protect U.S. waterways and only serves to benefit Teck Coal. As such, ICL requests that the Board of Environmental Review decline to adopt a process to review the stringency of ARM 12.30.632 pursuant to Mont. Code Ann. § 75-5-203.

ICL would like to reiterate that the state of Montana is obligated by the Clean Water Act to meet downstream water quality standards in Idaho. Idaho's current selenium criteria were approved by the Environmental Protection Agency (EPA) in 2019. The standards that apply to the Kootenai River require that the concentration of selenium in fish eggs and ovaries is not to exceed 15.1 mg/kg dry weight (IDAPA 58.01.02.210.01a, Table 1 footnote I). However, current water quality and fish tissue data (USGS <https://doi.org/10.5066/P9YYVV7R>) demonstrate that the Kootenai River is not in compliance with Idaho's selenium criteria. Indeed, this waterbody has been designated as 303(d) for selenium, requiring the development of a TMDL to achieve water quality standards and protect designated beneficial uses. The State of Idaho may assign a selenium waste load limit to the State of Montana. A reversal of Montana's recently adopted selenium standards for Lake Koocanusa and the Kootenai River would jeopardize Montana's ability to meet downstream water quality standards in Idaho. If the State of Montana chooses to repeal the new selenium standards for Lake Koocanusa and the Kootenai River, the Idaho Conservation League is prepared to pursue all administrative and legal avenues to protect water quality in Idaho's reach of the Kootenai River.

In addition, the process to review the stringency statute was completed as part of last year's adoption process and rulemaking. Therefore, there is no need for a process to be established. Furthermore, this past legislative session, Montana removed rulemaking authority from the Board, effective July 1, 2021. Senate Bill 233 transferred the review authority from the Board of Environmental Review to the Department of Environmental Quality, thus obviating the need for the Board to review this, much less establish a process to review it.

Adopting a process to review the stringency of the selenium criteria raises the question of whether the Board supports a Canadian mining company's interests over protecting Montana and Idaho's water quality and fish. In the best interest of Montana and Idaho, we urge you to not indulge in Teck's petition and simply decline to adopt a process to review the stringency of ARM 12.30.632 pursuant to Mont. Code Ann. § 75-5-203.

Sincerely,



Ellie Hudson-Heck, Conservation Assistant  
Idaho Conservation League  
[ehudsonheck@idahoconservation.org](mailto:ehudsonheck@idahoconservation.org)  
208.345.6933, ext. 402

**Sidner, Regan**

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**From:** Shiloh Hernandez [REDACTED]  
**Sent:** Friday, September 24, 2021 11:20 AM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] In re Review Selenium Standards - public comment  
**Attachments:** 2021-9-24 - comment on process for Teck Se Petition - MEIC CFC.pdf

Secretary Sidner,

Please see the attached comments of the Montana Environmental Information Center and Clark Fork Coalition on the process that the Board should employ to dispose of Teck Coal Limited's petition regarding the Board's 2020 Selenium Rule.

Sincerely,

Shiloh Hernandez  
*He/Him*  
Senior Attorney  
Northern Rockies Office  
313 East Main Street  
P.O. Box 4743  
Bozeman, MT 59772-4743

[REDACTED]  
[earthjustice.org](http://earthjustice.org) [\[nam04.safelinks.protection.outlook.com\]](mailto:nam04.safelinks.protection.outlook.com)



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September 24, 2021

Montana Board of Environmental Review  
 Regan Sidner, Board Secretary  
 Department of Environmental Quality  
 deqbersecretary@mt.gov

**Re: Teck Coal Limited petition to review whether new ARM 17.30.632 setting selenium standards for Lake Koocanusa is more stringent than federal guideline**

To whom it may concern,

In response to the Board of Environmental Review's (Board) notice to interested members of the public regarding Teck Coal Limited's (Teck) petition to weaken Montana's Selenium standards (Selenium Rule) for Lake Koocanusa, Earthjustice submits these comments on behalf of the Montana Environmental Information Center (MEIC) and Clark Fork Coalition. The Board requests public input on the process that the Board should follow to review Teck's petition.

In short, as elaborated below, the appropriate process should be simply to reject Teck's misguided petition out of hand. First, Teck raised the identical issue with the Board in 2020, and the Board specifically determined that the Selenium Rule was no more stringent than the federal standard. If Teck believed that the Board erred in that determination, the proper procedural recourse was judicial review. Having failed to pursue that remedy, the coal company's brazen request for this Board to conduct a do-over must be rejected.

Second, the Board should further reject Teck's petition because it is procedurally improper and beyond the jurisdiction of the Board. Teck has fashioned its petition as a petition for a declaratory ruling, under ARM 1.3.227, and in substance, the company asks the Board to reopen and review the rulemaking process. The Board, however, has no jurisdiction address these requests. Ultimately, Teck is seeking a remedy that is only available in district court or at the Montana Department of Environmental Quality (DEQ). Because Teck's petition is procedurally unavailing, it must be rejected.

**I. THIS BOARD EVALUATED TECK'S "STRICTER THAN FEDERAL" ARGUMENT WHEN IT PROMULGATED THE SELENIUM RULE IN 2020 AND DETERMINED THAT THE RULE WAS NOT MORE STRINGENT THAN THE FEDERAL STANDARD.**

The Board should reject Teck's illegitimate attempt to reopen the rulemaking record for the Selenium Rule. The core of Teck's request is for this Board to determine whether its Selenium Rule is more stringent than the freshwater Selenium Criteria established by the U.S. Environmental Protection Agency (EPA). Pet. at 1 (petitioning the Board to "review its new rule ARM 17.30.632 to determine whether the rule, specifically ARM 17.30.632(7)(a) which sets a





water quality standard for selenium in Lake Koocanusa of 0.8 micrograms per liter, is more stringent than the comparable federal guideline for selenium of 1.5 micrograms per liter<sup>1</sup>.”

As Teck acknowledges, it raised this very complaint in its comments on the Board’s rulemaking in October 2020. Pet. at 5, ¶ 9. The Board specifically rejected Teck’s argument, when it promulgated the final rule in December 2020, and instead determined the rule was not more stringent than federal criteria, which allow for site-specific standards:

COMMENT NO. 200: The proposed rule is illegal. The proposed rule is more stringent than the federal guideline for the water column concentration portion, but without the required compliance with 75-5-203(2), MCA. There must be evidence in the record that the proposed standard protects public health or the environment.

RESPONSE: The board disagrees that the proposed rule is illegal because it did not comply with 75-5-203(2), MCA. EPA’s 2016 selenium criterion document for freshwater contains an appendix, Appendix K. Appendix K describes methods by which site-specific selenium standards may be developed for individual waterbodies. Appendix K is discussed in twelve different locations throughout EPA’s 2016 selenium document. EPA is very clear that “states and tribes may choose to adopt the results of site-specific water column translations as site-specific criteria...” Montana chose this approach.

The selenium standards in proposed 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 sitespecific bioaccumulation modeling, following site-specific procedures set forth by EPA in its current 304(a) guidance. The fish tissue standards in NEW RULE I include egg/ovary, muscle, and whole body, expressed as mg/kg dry weight, correspond 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. Therefore, the board is not required to make written findings required by 75-5-203(2), MCA.

24 MAR 2336, 2398 (Dec. 24, 2020).

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<sup>1</sup> Teck misrepresents the federal standard, which, as EPA has explained, expressly permits more protective “site-specific water column criterion.” EPA, Aquatic Life Ambient Water Quality Criterion for Selenium—Freshwater (2016) (“All four elements of the freshwater selenium criterion may be modified to reflect site-specific conditions where the scientific evidence indicates that different values will be protective of aquatic life and provide for the attainment of designated uses.”).



The law values finality. *E.g.*, Kristine Davenport v. Odlin, 2014 MT 109, ¶ 12, 374 Mont. 503, 327 P.3d 478 (explaining the “strong policy favoring finality” that underlies the law of the case doctrine). Generally, adjudicative bodies, like the quasi-judicial Board, only revisit their prior decisions if doing so is supported by weighty interests. Kisor v. Wilkie, 139 S. Ct. 2400, 2422, (2019) (explaining that because *stare decisis*, or adherence to precedent, is the “foundation stone of the rule of law” because it promotes “the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions and contributes to the actual and perceived integrity of the judicial process,” departure from prior decisions is only warranted if there is a “special justification” (internal citations omitted)); June Med. Servs. L. L. C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (“The legal doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike.”). It would be arbitrary for the Board to reverse its prior legal determination when there has not been any change in the law or facts underlying that determination. Waste Mgmt. Partners of Bozeman, Ltd. v. Montana Dep’t of Pub. Serv. Regulation, 284 Mont. 245, 257, 944 P.2d 210, 217 (1997).

Here, Teck has offered no special justification for the Board to revisit its determination made just nine months ago that the Selenium Rule is not more stringent than the federal criteria that specifically allow site-specific standards. Indeed, in comments at the Board’s August meeting, counsel for Teck explained that Teck wishes to present no additional evidence and rely entirely on the “closed” rulemaking record to support its petition. BER Tr. at 23:12 to 23:24 (Aug. 13, 2021). As Board Member Lehnherr observed at the August meeting, “[T]his case is a great case of a real waste of the Board’s time. This issue was dealt with last year, and came to a very scientifically sound conclusion that was in the best interests of Montana and its water ways, and that now we have a corporation trying to circumvent the DEQ.” *Id.* at 27:21 to 28:2. Teck simply asks the Board to reverse its prior decision based on the same record, which it may not do. Waste Mgmt. Partners of Bozeman, Ltd., 284 Mont. at 257, 944 P.2d at 217.

Instead, if Teck was dissatisfied with the Board’s determination in December 2020 that the Selenium Rule is no more stringent than the federal standard, the company had the opportunity to seek judicial review. Mont. Code Ann. §§ 2-4-305, 506. Having failed to avail itself of the statutorily prescribed route for relief, Teck may not now be heard to ask the Board to engage in an arbitrary reversal of its prior determination.

The proper procedure for the Board is to dismiss Teck’s petition.

## **II. THIS BOARD HAS NO JURISDICTION EITHER TO ISSUE A DECLARATORY RULING ON THE VALIDITY OF THE SELENIUM RULE OR TO REOPEN THE 2020 RULEMAKING PROCESS, AS TECK REQUESTS.**

In addition to being foreclosed by this Board’s prior determination on this very issue just nine months ago, Teck’s petition is procedurally flawed. Teck has fashioned its petition as a request for a declaratory ruling pursuant to ARM 1.3.227, but that rule is not a proper vehicle for Teck’s request. Declaratory rulings under MAPA are limited to assessing whether a statute or a rule applies to a party:



Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. A copy of a declaratory ruling must be filed with the secretary of state for publication in the register. A declaratory ruling or the refusal to issue such a ruling shall be subject to judicial review in the same manner as decisions or orders in contested cases.

Mont. Code Ann. § 2-4-501; ARM 1.3.226 (same). This grant of authority is strictly limited to determining the applicability of statutes or rules. It is not a sweeping authorization to issue declaratory judgments on any given topic. Thus, in Thompson v. State, 2007 MT 185, ¶ 16, 338 Mont. 511, 167 P.3d 867, workers sought a declaratory ruling from the Workers Compensation Court (WCC) under Montana Code Annotated § 2-4-501 that certain statutes were unconstitutional. The WCC concluded that it had jurisdiction and issued the declaratory ruling, but the Montana Supreme Court reversed. Thompson, ¶ 35. The Court explained that Montana Code Annotated § 2-4-501 is limited to issuance of “declaratory rulings ... only as to the applicability of any statutory provision, rule or, order of the agency to that dispute.”

Here, as in Thompson, Teck does not seek a declaration as to the applicability of the Selenium Rule. Indeed, the company acknowledges that the rule does not directly apply to its coal mining operations in Canada, but contends that it indirectly affects the company by creating political pressure to limit its pollution. Pet. at 15, ¶ 23. As such, there does not appear to be any dispute about the applicability of the rule to Teck. Consequently, the Board does not have jurisdiction to issue a declaratory ruling on Teck’s petition that the rule violates Montana Code Annotated 75-5-203.

Further, at this Board’s August meeting, counsel for Teck asserted that the company was also not requesting a contested case hearing. BER Tr. at 22:3-8 (Aug. 13, 2021) (“It’s filed pursuant to the statute 75-5-203 subparagraph (4), so it’s not a contested case.”). This is fatal to Teck’s petition because the Montana Legislature removed the Board’s only other relevant authority, its rulemaking authority, in the past legislative session. 2021 Mont. Laws Ch. 324, § 31 (Senate Bill 233). Teck mistakenly suggested at the August Board meeting that this limitation did not apply because it filed its petition on the day before Senate Bill 233 became effective. BER Tr. at 25:6-11 (Aug. 13, 2021) (“This was filed before the effective date of the Senate Bill [233] which removed the rulemaking authority, to provide an opportunity for the Board to won this rulemaking and direct actions going forward.”). Senate Bill 233, however, was clear that any rulemaking process before the Board at the effective date of the law (July 1, 2021) would be transferred to DEQ upon the effective date of the law. 2021 Mont. Laws Ch. 324, § 112 (“Rulemaking authority and existing rules under the jurisdiction of the board of environmental review are transferred to the department of environmental quality on [the effective date of this act] [July 1, 2021].”). Consequently, the fact that Teck filed its petition on June 30, does not alter the fact that the Board no longer has authority to issue, amend, or revise rules.

In short, the Board does not have jurisdiction to grant Teck’s petition and should, therefore, dismiss the petition. The Board does not have jurisdiction to issue declaratory rulings on the lawfulness of the Selenium Rule, and it does not have the rulemaking authority to “[i]nitiate and/or direct further proceedings consistent with Montana Code Annotated § 75-5-203(4) to



revise ARM 17.30.632 so it conforms with the federal guideline for selenium in lentic water.” Pet. at 17, ¶ 5. If Teck wanted to seek review of the Selenium Rule, it could have sought judicial review, and if it wants to petition to amend the rule, it must do so through DEQ. Its current maneuver to convince the Board to revisit its 2020 determination that the Selenium Rule is no more stringent than the federal standard is procedurally improper and should be dismissed.

### CONCLUSION

It was only nine months ago that this Board rejected the issue at the core of Teck’s petition—that the Selenium Rule is more stringent than the federal criteria. Teck has presented to basis to justify revisiting that determination. Further, Teck’s petition is a procedurally improper request to this Board to act beyond its jurisdiction. As such, Teck’s petition should be dismissed.

Respectfully,

/s/ Shiloh Hernandez

Shiloh Hernandez

Earthjustice

Northern Rockies Office

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**Sidner, Regan**

---

**From:** Arlene Forney [REDACTED]  
**Sent:** Friday, September 24, 2021 11:31 AM  
**To:** DEQ BER Secretary  
**Cc:** Vicki A. Marquis; Bill Mercer  
**Subject:** [EXTERNAL] In the Matter Of: Adoption of New Rule I Pertaining to Selenium Standards for Lake Koocanusa, Cause No. BER 2021-04 WQ  
**Attachments:** Teck's Comments on the Petition Process.pdf

Please see attached Teck Coal Limited's Comments on the Petition Process regarding the process the BER should undertake in reviewing ARM 17.30.632 for Compliance with § 75-5-203, MCA. Copies will be distributed as noted on the Certificate of Service.

---

*Arlene S. Forney*

*Legal Assistant*

T [REDACTED]

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 ATTORNEYS FOR TECK COAL  
 LIMITED

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

<b>IN THE MATTER OF:</b>  <b>ADOPTION OF NEW RULE I          PERTAINING TO SELENIUM          STANDARDS FOR LAKE          KOOCANUSA</b>	<b>CAUSE NO. BER 2021-04 WQ</b>  <b>Teck Coal Limited’s Comments          on the Petition Process</b>
--	---

In accordance with the Board of Environmental Review’s (“Board’s”) public notice seeking comments on “the process the Board should undertake in reviewing the stringency of ARM 17.30.632,” Teck Coal Limited (“Teck”) submits the following comments.



## I. PROCESS CONSIDERATIONS

1. Pursuant to Montana Code Annotated § 75-5-203(4)(a), Teck<sup>1</sup> petitioned the Board “to review the rule” (ARM 17.30.632, the “Rule”) that was promulgated in December 2020. Such review requires consideration of the rulemaking record, which is comprised of the documents submitted to EPA for approval of the Rule and EPA’s response to that submittal. Because the Rule is final and approved by EPA, the rulemaking record is complete; therefore, no additional evidentiary hearing is allowable as part of the review.

2. The statute provides that a petition may be filed by “a person affected by the rule.” Mont. Code Ann. § 75-5-203(4)(a). The statute then indicates that the Board makes a determination and a remedy follows, as appropriate. *Id.* Rather than set up an adversarial proceeding, the statute simply allows a person to request the Board to make a determination. The statute does not anticipate intervention by opposing parties and intervention is not necessary because the Board has authority to “hold hearings necessary for the proper administration” of the statute, including hearings in which all interested members of the public may participate. Mont. Code Ann. § 75-5-202. This conforms with other provisions within the Water

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<sup>1</sup> Teck is “a person affected by” the Rule because Teck is a company that participated in and provided resources for the truncated collaborative process between DEQ and British Columbia that preceded and provided input for the rulemaking and because the Rule was designed to, has been used to, and does target Teck. *See* Petition, ¶¶ 20-23.

Quality Act that allow for petitions to the Board. Mont. Code Ann. §§ 75-5-312; 75-5-316 (allowing petitions for rulemaking to establish temporary water quality standards and outstanding resource water classifications, respectively, but not providing any adversarial process for the petition itself).

3. Teck's Petition presents the Board with four separate questions:

a. Is the Rule's water column criteria more stringent than the federal guideline for selenium in lentic water? If this question is answered in the negative, it is dispositive of the case and the Board need not proceed to the remaining questions. If, however, this question is answered in the affirmative, the Board then proceeds to the remaining three questions.

b. Did the initial and subsequent publications of the Rule provide the requisite notice to the public that the Rule was more stringent than the federal guideline?

c. Did the initial and subsequent publications of the Rule provide the findings, discussion of policy reasons, and analysis required by Montana Code Annotated § 75-5-203?

d. Does the rulemaking record contain appropriate support for the findings, discussion of policy reasons, and analysis required by Montana Code Annotated § 75-5-203?

4. If any one or more of the last three questions posed above (3.b, c, or d) is answered in the negative, the Board then considers an appropriate remedy. Pursuant to Montana Code Annotated § 2-15-3502, the Board serves a “quasi-judicial function,” which is defined as “an adjudicatory function exercised by an agency, involving the exercise of judgment and discretion in making determinations in controversies.” Mont. Code Ann. § 2-15-102(10). This includes “interpreting, applying, and enforcing existing rules and laws” and “evaluating and passing on facts,” which in this case involves the requirements of Mont. Code Ann. § 75-5-203. *Id.*

Because the Board has quasi-judicial authority and because the Board promulgated the Rule, the Board may interpret the Rule, including evaluation and determination of facts contained in the rulemaking record, and determine whether the Rule may be applied or enforced given the statutory mandate in Mont. Code Ann. § 75-5-203. That quasi-judicial authority does not limit, nor is it limited by, the statutory duty to either revise the Rule or make the requisite written finding if the Rule is found to be more stringent than the federal guideline. Therefore, if the Rule is found to be more stringent than the federal guideline, the Board has authority to, and should, declare the Rule void such that it cannot be applied or enforced absent the statutorily required revision or written finding.

## II. PROCESS OPTIONS

Considering all of the above, specifically the statutory provisions that allow petitions for Board action, the Board's authority, the process already provided by the Board for these comments, and the short time frame by which the petition process is to be completed (8 months per Mont. Code Ann. § 75-5-203(4)(a)), two options, accompanied by specific rules of engagement, emerge for consideration:

**A. Board Draft Followed by Hearing.** In this first option, the Board considers the Petition, drafts its determinations of the four questions posed by the Petition and proposes a remedy, if required. The Board then publishes its draft decision and holds a public hearing to receive comments on the draft. After consideration of the comments and revision of the draft (if and as appropriate), the Board then publishes its final decision.

**B. Hearing Followed by Board Decision.** Alternatively, in this second option, the Board holds a hearing first to receive comments from Petition proponents and Petition opponents. After consideration of the comments, the Board then publishes its final decision.

**C. Rules of Engagement.** Neither option provides for intervention of additional parties, but instead encourages broad participation through a public hearing. The hearing should be managed by allotting equal total time to proponents and opponents. Additionally, acknowledging the completed

rulemaking and the narrowness of Montana Code Annotated § 75-5-203, the comments received should be limited to: (1) evidence already contained in the rulemaking record and (2) comments relevant to the four questions posed by the Petition and the resulting remedy.

DATED this 24th day of September, 2021.

/s/ Victoria A. Marquis

William W. Mercer

Victoria A. Marquis

Holland & Hart LLP

401 North 31st Street

Suite 1500

P.O. Box 639

Billings, Montana 59103-0639

ATTORNEYS FOR TECK COAL LIMITED

## CERTIFICATE OF MAILING

I hereby certify that on this 24th day of September, 2021, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties or their counsel of record as set forth below:

Regan Sidner, Board Secretary Board of Environmental Review 1520 E. Sixth Avenue P.O. Box 200901 Helena, MT 59620-0901 deqbersecretary@mt.gov	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail
Arlene Forney Assistant to William W. Mercer and Victoria A. Marquis aforney@hollandhart.com	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

/s/ Victoria A. Marquis



**Sidner, Regan**

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**From:** Armstrong, Catherine  
**Sent:** Wednesday, September 29, 2021 12:44 PM  
**To:** Orr, Katherine; DEQ BER Secretary; [REDACTED]; Vicki A. Marquis; Arlene Forney  
**Cc:** Bowers, Kirsten  
**Subject:** DEQ's Response to Teck's Comments Re: BER Process  
**Attachments:** DEQResptoTeckCommentson BERProcess.pdf

Good afternoon,

Per the instructions of Kirsten Bowers, please see the attached DEQ's Response to Teck's Comments Regarding BER Process. Copies will be sent per the Certificate of Service. Should you have any questions, please do not hesitate to contact me.

Best regards,

Catherine Armstrong  
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MT Dept. of Environmental Quality  
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*ATTORNEY FOR DEQ*

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

<b>IN THE MATTER OF: THE REVIEW OF THE STRINGENCY OF ARM 17.30.632 PERTAINING TO SELENIUM STANDARDS FOR LAKE KOOCANUSA</b>	<b>Case No. BER 2021-04 WQ</b>
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**MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY'S  
RESPONSES TO TECK COAL LIMITED'S COMMENTS REGARDING  
THE PROCESS THE BOARD OF ENVIRONMENTAL REVIEW SHOULD  
UNDERTAKE IN REVIEWING ARM 17.30.632 FOR COMPLIANCE  
WITH § 75-5-203, MONTANA CODE ANNOTATED**

The Montana Department of Environmental Quality (DEQ) submits the following responses to comments from Teck Coal Limited (Teck) concerning the process the BER should undertake in reviewing ARM 17.30.632 for compliance with Mont. Code Ann. § 75-5-203 pursuant to the Board of Environment Review

(BER) public notice allowing responses to written comments from interested parties:

1. DEQ agrees with Teck that the BER's review of ARM 17.30.632 will require consideration of the rulemaking record and that the rulemaking record should include documents submitted to EPA for approval of the rule and EPA's response to that submittal. However, the rule review process should include a deadline for the interested parties to review the BER's rulemaking record and submit motions to supplement or amend that record. Such motions to amend or supplement the rulemaking record should only be granted when necessary to complete the record that was before the BER when it amended ARM 17.30.602 and adopted of NEW Rule I (codified as ARM 17.30.632) and submitted the rule amendment and adoption to EPA for review and approval or disapproval pursuant to § 303(c)(3) of the Clean Water Act.
2. DEQ disagrees that Teck is a person affected by the Rule. DEQ has no jurisdiction to regulate Teck's mining operations in Canada.
3. DEQ disagrees with Teck's assertion that this is a petition for "rulemaking." Teck is requesting the BER to review its rulemaking record and reconsider its prior determination under § 75-5-203, MCA

- that ARM 17.30.632 is not more stringent than comparable federal regulations or guidelines addressing the same circumstance.
4. DEQ disagrees with Teck's assertion that intervention of interested parties should not be allowed. DEQ should be allowed to intervene in this process pursuant to Rule 24(b)(2), M. R. Civ. P. Teck's claim is based on § 75-5-203, MCA and on ARM 17.30.632 and DEQ administers the Montana Water Quality Act and administrative rules adopted under that Act. Furthermore, the BER cannot grant Teck its requested relief, which is to revise the rule or make the required findings under § 75-5-203(2) and (3), MCA. As of July 1, 2021, DEQ rather than the BER has sole authority to adopt rules for the administration of the Montana Water Quality Act, subject to the provisions of § 75-5-203, MCA. *See* Senate Bill 233 (SB 233), Sections 31, 32, and 34. Under § 75-5-203, MCA, as amended by SB 233, DEQ may not adopt a rule that is more stringent than the comparable federal regulations or guidelines that address the same circumstances unless DEQ makes the written findings in § 75-5-203(2) and (3), MCA. A person affected by a rule that the person believes to be more stringent than comparable federal regulations or guidelines may petition the BER to review the rule. If the BER determines that the rule is more stringent than comparable federal

- regulations or guidelines, DEQ must either revise the rule to conform to federal regulations or guidelines or make the written findings in § 75-5-203(2) and (3), MCA. *See* SB 233, Sec. 32.
5. DEQ disagrees that the BER has authority to void ARM 17.30.632 even if the BER should reverse its prior determination and find that ARM 17.30.632 is more stringent than comparable federal regulations or guidelines addressing the same circumstance. Under § 75-5-203(4), MCA “[a] petition under this section does not relieve the petitioner of the duty to comply with the challenged rule.”

Respectfully submitted this 29<sup>th</sup> day of September 2021.

/s/ Kirsten Bowers  
Kirsten H. Bowers  
Attorney  
Montana Dept. of Environmental Quality  
1520 E. 6<sup>th</sup> Avenue  
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### Certificate of Service

I hereby certify that on this 29<sup>th</sup> day of September 2021, I caused a true and correct copy of the foregoing to be e-mailed to the following:

Katherine Orr, Board Attorney  
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ATTORNEYS FOR TECK COAL  
LIMITED

By: /s/ Catherine Armstrong  
CATHERINE ARMSTRONG  
Paralegal  
Department of Environmental Quality



**Sidner, Regan**

---

**From:** Arlene Forney <[REDACTED]>  
**Sent:** Wednesday, September 29, 2021 12:50 PM  
**To:** DEQ BER Secretary  
**Cc:** Vicki A. Marquis; Bill Mercer  
**Subject:** [EXTERNAL] In the Matter Of: Adoption of New Rule I Pertaining to Selenium Standards for Lake Koocanusa, Cause No. BER 2021-04 WQ  
**Attachments:** Teck's Response to Comments on the Proposed Process.pdf

Please see attached Teck's Response to Comments on the Petition Process regarding the process the BER should undertake in reviewing ARM 17.30.632 for Compliance with § 75-5-203, MCA. Copies will be distributed as noted on the Certificate of Service.

---

*Arlene S. Forney*

Legal Assistant

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**HOLLAND&HART**



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 LIMITED

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

<b>IN THE MATTER OF:</b>  <b>ADOPTION OF NEW RULE I          PERTAINING TO SELENIUM          STANDARDS FOR LAKE          KOOCANUSA</b>	<b>CAUSE NO. BER 2021-04 WQ</b>  <b>Teck's Response to Comments on          the Petition Process</b>
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In accordance with the Board of Environmental Review's ("Board's") Notice to Interested Members of the Public (the "Board's Notice") seeking comments on "the process the Board should undertake in reviewing the stringency of ARM 17.30.632," Teck Coal Limited ("Teck") submits the following responses to public comments received and provided on the Board's website on September 24, 2021. The process is necessary to evaluate the petition filed by Teck on June 30, 2021 (the "Petition") asking the Board to review the new rule ARM 17.30.632, specifically ARM 17.30.632(7)(a), pursuant to Montana Code Annotated § 75-5-203.

The Board posted six unique comments on the process by which the Petition should be reviewed by the Board. *See* 39-page .pdf document posted on the Board website’s link entitled “Read Public Comments” (the “Comments”). Twelve commenters provided the same form-type comment by email (collectively, the “Form Comments”). Montana Trout Unlimited, Montana Department of Environmental Quality, the Idaho Conservation League, Earthjustice on behalf of the Montana Environmental Information Center and the Clark Fork Coalition (collectively, “MEIC/CFC”), and Teck submitted individually unique comments.

### **RESPONSES TO COMMENTS BEYOND THE SCOPE OF THE NOTICE**

The Board’s Notice was expressly limited to “the process the Board should undertake in reviewing the stringency of ARM 17.30.632 pursuant to Mont. Code Ann. § 75-5-203, as amended.” Board Notice, p. 1. Further, “none of the comments submitted in September 2021 should address substantive bases for the Board to evaluate the stringency of suggested outcomes and supporting reasons for the Board at this juncture.” *Id.*, p. 2.

The Form Comments as well as comments filed by the Idaho Conservation League and MEIC/CFC include assertions and arguments beyond the scope of the Board’s Notice and irrelevant to the process by which the Board should review the Petition. Those irrelevant comments include: (1) comments opining about discharges from Teck’s mining operations, (2) comments opining about

downstream water quality in Idaho, and (3) comments mischaracterizing the federal requirement. Comments, pp. 1-6, 10-15, 24-25, 28. Teck respects the appropriate scope of the Board's Notice and only provides the following brief responses to state its position on the record and ensure that it does not waive any arguments on issues raised beyond the scope of the Board's Notice. Teck reserves the right to provide additional factual and legal briefing on the matters, as appropriate.

**A. Teck's Mining Operations.**

Comments that negatively characterize Teck's mining operations ignore the robust and comprehensive regulatory scheme by which Teck must abide. *See* Petition, ¶ 20 (referring to Ministerial Order M113, the 2014 Elk Valley Water Quality Plan, and Permit 107517, which includes enforceable selenium water quality compliance limits and site performance objectives). Implementation of the Elk Valley Water Quality Plan has prompted more than \$1 billion in Teck expenditures and installation of what is believed to be the largest water quality management program of its kind anywhere in the world. Teck currently treats 12.5 million gallons per day and is on track to expand to 20.8 million gallons per day by 2024 and 31.7 million gallons per day by 2031. Teck's water treatment facilities include conventional tank-based water treatment plants as well as cutting edge technology developed by premier scientists at Montana State University using

saturated rock fills to remove selenium.<sup>1</sup> Contrary to the comments, Teck is on the right path and will remain there, as required by British Columbian regulators. Should the Board desire further information, much is readily available online and at the Board's request, Teck would be happy to provide additional briefing and information.

**B. Water Quality in Idaho's Portion of the Kootenai River.**

The waterbody immediately upstream from Idaho is the Montana portion of the Kootenai River, not Lake Koocanusa. The water quality standards for the Kootenai River are not at issue in the Petition. Administrative Rule of Montana 17.30.632 contains eight standards: three fish tissue standards and one water column standard for the Kootenai River and three fish tissue standards and one water column standard for Lake Koocanusa. Of those eight standards, the Petition is limited to just one – the water column standard for Lake Koocanusa. Petition, p. 1. The standards set for the Kootenai River are not at issue in the Petition.

The water column standard for the Montana portion of the Kootenai River immediately upstream of Idaho is set at the federal guideline of 3.1 micrograms per liter and is the *same* as Idaho's water quality standards for selenium in the Kootenai River and nearly *four times higher* than the 0.8 micrograms per liter

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<sup>1</sup> Additional information about Teck's water treatment is available on their website at <https://www.teck.com/responsibility/sustainability-topics/water/water-quality-in-the-elk-valley/>.

water column standard for Lake Koocanusa. *Compare* IDAPA 58.01.02.210.01a, Table 1, n. 1 *with* Admin. R. Mont. 17.30.632(6) and (7)(b). Given that the standards for selenium in the Kootenai River are the same on both sides of the Idaho-Montana border, and (whether set at 0.8 or the federal guideline of 1.5 micrograms per liter) a more stringent standard applies further upstream in Lake Koocanusa, it is not reasonable to allege that Montana has somehow violated requirements with respect to downstream water quality.<sup>2</sup>

Assertions that “Montana is obligated by the Clean Water Act to meet downstream water quality standards in Idaho” and implied threats of future “administrative and legal avenues” are irrelevant and misplaced. Comments, pp. 1-6, 10-15, 25. Any implication that Montana could or would somehow be liable to the State of Idaho is wrong, as explained in Teck’s comment letter provided during the rulemaking. Petition, Ex. A, p. 16.

### **C. The Federal Requirement.**

The federal requirement is a substantive basis of the review requested by the Petition. Despite the Board Notice’s statement that none of “the substantive bases for the Board to evaluate stringency or suggested outcomes and supporting

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<sup>2</sup> Teck presumes comments about an “obligation” are premised on 40 CFR 131.10(b), which is different and requires a state “to take into consideration the water quality standards of downstream waters” and that water quality standards “provide for the attainment and maintenance of the water quality standards of downstream waters.”



reasons” should be included in the process comments, MEIC/CFC delve into the merits by providing their interpretation of the federal requirement. Comments, p. 28, n. 2. MEIC/CFC are wrong. As outlined in the Petition, focusing on additional procedures provided for site-specific standards instead of on the numeric values provided by EPA is misguided. Petition, ¶¶ 4-6, 12; Ex. B.

MEIC/CFC wrongly characterizes the guidance as a “federal standard.” Comments, p. 28, n. 2. The distinction is important, and the confusion is understandable because the public was led to believe that EPA recommended development of site-specific selenium standards “whenever possible.” 19 Mont. Admin. Register, Not. 17-414 (Oct. 9, 2020). That is plainly wrong, as noted in the Petition, supported by Montana case law, and echoed by the term “may” which appears throughout the portions of the EPA Guideline cited by MEIC/CFC and in the Board’s Response to Comment No. 200. Petition, ¶¶ 4-7; Comments. p. 28. Nothing in the EPA’s permissive statements allows a water quality standard rulemaking process to circumvent Montana law.

While the Board, in response to comments during the rulemaking, stated that the rule is “not more stringent than currently recommended federal criteria,” the federal agency that wrote the federal criteria disagreed. *Compare* Comments, p. 28 *with* Petition, Ex. B, p. 12, n. 22; p.2, n. 6; p. 6, n.11. The contradictory statements highlight the need for resolution of the Petition.

## **RESPONSES TO RELEVANT COMMENTS ON THE PROCESS**

Comments on the actual process include comments that no process should be adopted at all, but that if a process is adopted, it should be public, that the process should include a litigation-type schedule, and Teck's comments proposing a public process. Most of the comments request no process and Teck opposes and argues against those comments first. Teck has no objection to comments advocating for a public process, so long as the process is reasonable, focused on the issues raised in the Petition, and allows for timely decision.

### **A. Comments Requesting Dismissal of the Petition Without Review.**

Regarding the process by which the Board should handle the Petition, the Form Comments provide just one sentence urging the Board to "decline to adopt a process to review Teck's petition." Comments, pp. 1-6, 10-15. Montana Trout Unlimited, the Idaho Conservation League and MECI/CFC similarly request denial of the Petition, stating, respectively, that "the issue at question has been robustly considered and the standard of review met during the adoption of the rule," "the process to review the stringency statute was completed," and "the Board specifically determined that the Selenium Rule was no more stringent than the federal standard." Comments, pp. 9, 25, 27.

**1. Dismissal, without Review, would be Contrary to the Law.**

Declining to review the Petition is tantamount to declining to perform the Board's statutorily prescribed duties. The Board, whose members must meet specific qualifications, be appointed by the Governor and confirmed by the Montana Senate, is an "agency" – an "entity or instrumentality of the executive branch of state government." Mont. Code Ann. § 2-15-102(2). The Board's function is "quasi-judicial," meaning that it "exercise[s] ... judgment and discretion in making determinations in controversies." Mont. Code Ann. § 2-15-102(10). One such "controversy" that the law places within the Board's authority is, upon petition, to review a rule to determine whether it is "more stringent than comparable federal regulations or guidelines." Mont. Code Ann. § 75-5-203(4).

Teck properly petitioned the Board, as allowed and in accordance with Montana Code Annotated § 75-5-203(4). Review of the petition falls squarely within the Board's statutorily described duties. Therefore, suggestions that the Board simply decline to review the petition are contrary to Montana law. The Board can no more decline to review the Petition than a district court can decline to review a piece of litigation brought before it.

Furthermore, the very statute at issue in the Petition is at the heart of multiple regulatory schemes within the Board's purview. In addition to Montana Code Annotated § 75-5-203(4) in the Water Quality Act, the Clean Air Act of

Montana, the Public Water Supply statutes, and the Waste and Litter Control statutes all contain nearly identical statutes requiring specific findings be made when promulgating requirements that are more stringent than the federal rule or guideline. Mont. Code Ann. §§ 75-2-207; 75-2-301(4); 75-6-116; 75-10-107. All of those provisions also include a petition process by which the rule may be reviewed to ensure compliance with the statute. The concept of providing limits on requirements set more stringent than federal requirements is important enough that the Legislature enacted laws on the topic at least four different times in our environmental statutes and provided a petition process in each one. The issue is important to Montana; therefore, the Board should review the Petition.

## **2. The Petition Process is Necessary and Supports the Rule of Law.**

Some comments assert that the Petition “only serves to benefit Teck Coal,” places the Board in a position of “support[ing] a Canadian mining company’s interests over protecting Montana and Idaho’s water quality and fish” and is an “illegitimate attempt to reopen the rulemaking record.” Comments, pp. 24, 25, 27. Those comments go too far. The Petition is, by statute, limited to review of the rule for compliance with the law. Mont. Code Ann. § 75-5-203(4)(a). Compliance with the law benefits everyone – the rule of law is a fundamental principle of our society. Nothing is gained, and much is jeopardized by an unlawful rulemaking process. No one benefits from unlawful rulemaking.

The rulemaking process is of great importance in Montana. Specific rights and protections associated with rulemaking and legislating are provided throughout Montana’s Constitution and statutes. *See e.g.* Mont. Const., Art. II, § 8 (Right of Participation), § 9 (Right to Know); Mont. Const., Art. III, §§ 4, 5 (providing the rights of Initiative and Referendum); the Montana Administrative Procedure Act (Mont. Code Ann., Title 2, Chapter 4, Parts 2, 3, and 4); and the Montana Negotiated Rulemaking Act (Mont. Code Ann., Title 2, Chapter 5). Montana also established specific provisions for rulemaking processes in the context of environmental protections, specifically including *multiple* provisions addressing state requirements that are set more stringent than federal requirements or guidelines. Mont. Code Ann. §§ 75-2-207; 75-2-301(4); 75-5-203(4); 75-6-116; 75-10-107. Ignoring those provisions serves no benefit and undermines the very foundation of our society – the rule of law. The Petition is about the Board’s rulemaking process by which it promulgated the water column standard for Lake Koocanusa and ensuring that the Board’s rulemaking process was correct and in compliance with Montana law – which cannot be ignored.

### **3. The Petition Will Not Weaken Montana’s Standards.**

Some comments erroneously assert that review of the Petition “threatens to weaken Montana’s ability to protect U.S. waterways;” therefore, the Petition should not be reviewed at all. Comments, pp. 17, 24.

Nothing in the Petition prevents a water quality standard that is more stringent than the federal guideline and nothing in the Petition prevents the water column standard for Lake Koocanusa to be set at 0.8 micrograms per liter. The Petition only seeks compliance with Montana law that dictates the process and findings required for such a standard. The very statute invoked by the Petition provides a clear path to setting a standard more stringent than the federal guideline – make a “written finding after a public hearing and public comment and based on evidence in the record” that confirms” (1) the standard “protects public health or the environment of the state,” (2) it “can mitigate harm,” and (3) it “is achievable under current technology.” Mont. Code Ann. § 75-5-203(2). The Petition seeks clarity on whether the Board’s rulemaking process complied with those requirements. The Petition is about the Board’s rulemaking process; it does not prevent any particular numeric standard from being set, so long as it is set in accordance with the law. Likely we all agree that lawful standards are best, so review of the Petition should go forward to consider the lawfulness of this standard.

**4. Consideration of the Issue During Rulemaking Does Not Exempt the Rule from Statutory Review.**

The statute does *not* say that if, during rulemaking a comment is made about stringency and the Board provides a response, then no petition may be filed. No exemption is provided for final rules or for rules approved by the relevant federal



agency. In fact, the law specifically contemplates that a final rule would be in place before a person petitions the Board for review. Mont. Code Ann. § 75-5-203(4). If final rules were *per se* exempt from the statute, then the statute becomes meaningless. No one benefits from rulemaking that presents no opportunity for review – especially after EPA found, contrary to the rulemaking, that the rule is *more stringent* than their federal guideline. See Petition, ¶ 12 (citing EPA Approval and Rationale provided at Ex. B).

MEIC/CFC cite to a line of judicial cases for the premise that “*stare decisis*” and the “law of the case doctrine” prevent the Board from considering the Petition. Comments, p. 29. Far from the judicial setting of those cases, nothing in the Petition asks the Board to overturn a “long line of [judicial] precedents – each one reaffirming the rest and going back 75 years or more” as was at issue in the U.S. Supreme Court case cited by MEIC/CFC. *Kisor v. Wilkie*, 139 S.Ct. 2400, 2422 (2019). Here, no judicial or quasi-judicial authority has been exercised at all yet; only rulemaking authority, which is legislative in nature, not judicial. Mont. Code Ann. §§ 2-15-102(10) and (11) (specifically defining quasi-legislative authority, including rulemaking, as separate from quasi-judicial authority).

Judicial “methods and philosophy” are distinguished from “those of the political and legislative process” by the “constraint of precedent” embodied in *stare decisis*. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2134 (2020).

Thus, according to case law cited by MEIC/CFC, the Petition, which is reviewed pursuant to quasi-judicial authority, would only be constrained by previous judicial or quasi-judicial decisions, not by the legislative (rulemaking) process. Because no judicial or quasi-judicial decision has been made on this issue, there are no *stare decisis* or law of the case constraints. As noted above, this makes sense because if all final rules were exempted from review, the statute (and the four other similar statutes) become meaningless.

Further, the only reason “special justification” was needed in *Kisor* was because throughout the “75 years or more” of consistent judicial decisions, Congress had not legislated on the issue. *Kisor*, 139 S. Ct. at 2423. In contrast, here, the Legislature *has* legislated – it empowered the Board to review the rule; not just the proposed draft rule, but the finally promulgated rule. Simply refusing to even consider the Petition, as commenters advocate, is equivalent to refusing to exercise the power delegated to the Board. In the face of contradictory statements from EPA (received in February 2021, after the final rule promulgation in December 2020), which affirm that the water column standard set for Lake Koocanusa **is more stringent** than the federal guideline, the need to review the Petition is even greater.

## 5. Senate Bill 233 Does Not Exempt the Rule from Review.

The Idaho Conversation League and MEIC/CFC allege that since the Board no longer has rulemaking authority pursuant to Senate Bill 233, it need not review the Petition. Comments, p. 25, 30. But Senate Bill 233 specifically left responsibility for review of petitions filed under Montana Code Annotated § 75-5-203(4) with the Board.

The Board completed the rulemaking, it is the Board's rulemaking record that will be subject to the review requested in the Petition, and the Board retains authority to review the Petition. Senate Bill 233 changes none of that.

Nothing in Senate Bill 233 prevents the Board from reviewing its own previous actions to determine whether those actions complied with the law, making appropriate findings and declaring its previous actions void and/or unenforceable as appropriate. *See* Teck's Comments on the Petition Process, p. 4 (the Board has inherent authority to "interpret[], apply[], and enforc[e] existing rules and laws" and "evaluat[e] and pass[] on facts" *citing* Mont. Code Ann. § 2-15-102(10)).

If the Board voids the Rule, then a future rulemaking process can set the standard at whatever level it sees fit in compliance with the laws and rules.

Assuming *arguendo* that a future standard may seek to be more stringent than the federal requirement, and acknowledging that the rulemaking process for such a standard requires additional process and findings, the Board may recommend that

its Rule be replaced with the federal numeric guideline of 1.5 micrograms per liter to ensure clarity on what standard applies after the Rule is voided and until a later rule is promulgated. The other option if the Rule is found to be void, would be to allow the current state-wide standard of 5 micrograms per liter for Selenium to govern.

**6. Teck is not Limited to Judicial Review.**

MEIC/CFC's implication that Teck is limited to judicial review of the rulemaking also ignores and negates the statute. Comments, p. 29 ("Having failed to avail itself of the statutorily prescribed route for relief, Teck may not now be heard to ask the Board" to review the Petition). Nothing in the statutes cited by MEIC/CFC provides an exclusive remedy by judicial review. Nothing in those statutes forecloses judicial review subsequent to or contemporaneously with review of the Petition. Nothing in those statutes provides a lawful reason to wholly ignore the statutorily provided petition process. Judicial review of a rule and a petition pursuant to Montana Code Annotated § 75-5-203 are not mutually exclusive.

**7. The Board has Statutory Authority to Review the Petition, in Conjunction with or Independent of the Declaratory Ruling Provision.**

MEIC/CFC's next assertion, that the Board only has contested case authority and nothing more is plainly wrong and, once again, ignores the specific power delegated to the Board by the Legislature to hear petitions in accordance with

Montana Code Annotated § 75-5-203. As noted above, (*Supra*, § B.4.) and in Teck’s Comments on the Petition Process (p. 4), regardless of Senate Bill 233, the Board retains authority to review the Petition, interpret the Rule, including evaluation and determination of facts contained in the Board’s rulemaking record, and determine whether the Rule may be applied or enforced. Mont. Code Ann. § 2-15-102(10).

MEIC/CFC next focus only on the declaratory judgment provision cited in the Petition, completely ignoring the statutory provision that authorizes a person to file a petition and empowers the Board to decide the petition. Comments, p. 30; Mont. Code Ann. § 75-5-203. The petition at issue in *Thompson v. State*, 2007 MT 185, was reviewed pursuant to the Uniform Declaratory Judgments Act, not Mont. Code Ann. § 2-4-501 as MEIC/CFC assert. *Thompson*, ¶ 17. The Montana Supreme Court held that the Workers Compensation Court did not have authority pursuant to the Uniform Declaratory Judgments Act because it was “a court of limited jurisdiction” with “only such power as is expressly conferred by statute.” *Thompson*, ¶¶ 24-25. Neither the statute nor the rule cited by MEIC/CFC was at issue in *Thompson*; however, the Court analyzed what power the Workers Compensation Court did have and found that the statutory authority to provide a declaratory ruling (conferred by Montana Code Annotated § 2-4-501) and the court’s statutory authority (conferred in that case by Montana Code Annotated

§ 39-71-2905(1)) when “taken together ... authorize the WCC to issue declaratory rulings only in the context of a dispute concerning benefits under the Workers’ Compensation Act and only as to the applicability of any statutory provision, rule, or order of the agency in dispute.” *Thompson*, ¶ 25. In that case, because there was no dispute at issue except the constitutionality of certain statutes and because no issue arose from the application of the statutes, the Court held that the WCC did not have jurisdiction to issue a declaratory judgment holding the statutes unconstitutional. *Thompson*, ¶ 26.

Here, unlike *Thompson*, the statute specifically authorizes the Board to review the Petition. Mont. Code Ann. § 75-5-203(4). Further, the applicability of the Rule is at issue, specifically the Rule’s application to Lake Koocanusa, which does affect Teck. Teck never “contend[ed] that it indirectly affects the company by creating political pressure” as MEIC/CFC falsely allege. Comments, p. 30. Teck contended that the Rule “was designed to, has been used to, and does target Teck.” Petition, ¶ 23. The only reference to “pressure” was in a citation to DEQ’s explanation of the rule. The Board’s declaratory ruling authority specifically extends to rules that affect a party’s legal rights and even the Board has acknowledged that the Rule affects Teck. Admin. R. Mont. 1.3.226; Petition, ¶ 23. The Board’s declaratory ruling power allows review of the Petition.



**B. DEQ Comments.**

In general, Teck does not object to the process proposed by DEQ but notes that it contains several steps that seem to require briefing, consideration and decision by the Board prior to decision on the merits of the Petition. Given that the statute only provides eight months for the Petition to be decided and three months of that time has already run, DEQ's proposed process may not lead to a timely decision. Joinder or intervention of parties is not required, does not seem to be contemplated by the statute, and might frustrate public participation. *See* Teck's Comments on the Petition Process, pp. 2-3.

Teck agrees with DEQ's suggestion that the Board compile an electronic copy of the rulemaking record that would be available to interested persons in a searchable format that includes consecutive Bates numbered pages. Having such a marked, available and searchable record would be of great use to the interested parties and likely to the Board. However, motions or requests to supplement or amend the record should be limited in recognition that the rulemaking is complete and has been approved by EPA. The record should be confined to the documents submitted in the rulemaking packet provided to EPA by DEQ on December 28, 2020 and EPA's February 25, 2021 letter to the Board approving the Rule.

Teck does not agree that the Board should merely determine whether the Rule is more stringent than comparable federal regulations or guidelines and then

abdicate further decisions to DEQ. Instead, if the Board determines that the Rule is more stringent than the federal regulations or guidelines, the Board should admit its error, recognize the invalidity of the Rule and declare it void, unenforceable and inapplicable until and unless the statutory requirements are met.

### CONCLUSION

Comments advocating that the Board do nothing with the Petition are contrary to the law and should be rejected. Mont. Code Ann. § 75-5-203(4). Instead, the Board should adopt a reasonable public process that enables decision on the Petition and fashions a remedy within the statutorily prescribed eight-month deadline.

DATED this 29th day of September, 2021.

/s/ Victoria A. Marquis

William W. Mercer

Victoria A. Marquis

Holland & Hart LLP

401 North 31st Street, Suite 1500

P.O. Box 639

Billings, Montana 59103-0639

ATTORNEYS FOR TECK COAL LIMITED

## CERTIFICATE OF MAILING

I hereby certify that on this 29th day of September, 2021, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties or their counsel of record as set forth below:

Regan Sidner, Board Secretary Board of Environmental Review 1520 E. Sixth Avenue P.O. Box 200901 Helena, MT 59620-0901 deqbersecretary@mt.gov	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail
Arlene Forney Assistant to William W. Mercer and Victoria A. Marquis aforney@hollandhart.com	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

/s/ Victoria A. Marquis

The following comments from interested members of the public were received after the September 24, 2021 1:00 PM deadline, and therefore may not be considered by the Board of Environmental Review:

**Sidner, Regan**

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**From:** Molly Trautman <[REDACTED]>  
**Sent:** Wednesday, September 29, 2021 1:15 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Selenium pollution limits must stay.

Dear Montana Board of Environmental Review,

Thank you for the opportunity to provide comments on this issue. We all know that pollutants need to be going down not up. These companies must find other ways to deal with their waste instead of dumping them in the lap of our planet to clean up.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Regards,  
Molly Trautman  
1838 Broadmoor Dr  
Boise, ID 83705

**Sidner, Regan**

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**From:** Alida Bockino <[REDACTED]>  
**Sent:** Wednesday, September 29, 2021 1:16 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

Thank you for the opportunity to provide comments on this issue.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

A good decision was made last year and must continue to be enforced.

Regards,  
Alida Bockino  
1104 Pine Crest Rd  
Moscow, ID 83843



**Sidner, Regan**

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**From:** Linda Roche <[REDACTED]>  
**Sent:** Wednesday, September 29, 2021 1:18 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

Please continue with these protections!  
Thank you for the opportunity to provide comments on this issue.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Regards,  
Linda Roche  
12889 Willow Ave  
Grant, MI 49327

**Sidner, Regan**

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**From:** Kristen DeAngeli <[REDACTED]>  
**Sent:** Wednesday, September 29, 2021 1:21 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

Thank you for the opportunity to provide comments on this issue.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Thank you for your time and consideration!

Regards,  
Kristen DeAngeli  
371 N Arcadia St  
Boise, ID 83706

**Sidner, Regan**

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**From:** Charles Kilpatrick <[REDACTED]>  
**Sent:** Wednesday, September 29, 2021 1:25 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Regards,  
Charles Kilpatrick  
18289 S Woodland Shores Dr  
Coeur D'alene, ID 83814

**Sidner, Regan**

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**From:** Barclay Hauber <[REDACTED]>  
**Sent:** Wednesday, September 29, 2021 1:30 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

Thank you for the opportunity to provide comments on this issue.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition. Thank you.

Regards,  
Barclay Hauber  
160 Old Pollock Rd  
Pollock, ID 83547

**Sidner, Regan**

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**From:** Andrew Taylor <[REDACTED]>  
**Sent:** Wednesday, September 29, 2021 1:36 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

Thank you for the opportunity to provide comments on this issue. Please be a good neighbor.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Regards,  
Andrew Taylor  
4626 Mountain Park Rd  
Pocatello, ID 83202

**Sidner, Regan**

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**From:** Stacey Anderson <[REDACTED]>  
**Sent:** Wednesday, September 29, 2021 1:43 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

Thank you for the opportunity to provide comments on this issue.

Please stand strong against water pollution! Water of course is one of our most important resources! Mining is one of the dirtiest, devastating enterprises for the environment and yet the cleanup is often more costly than the minerals obtained!

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Regards,  
Stacey Anderson  
6325 N Monroe St  
Spokane, WA 99208



**Sidner, Regan**

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**From:** Dave Pietz <[REDACTED]>  
**Sent:** Wednesday, September 29, 2021 1:51 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

Thank you for the opportunity to provide comments on this issue.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

As a citizen of Idaho, I am concerned about the protection of the Kootenai River water quality. I grew up in Bonner's Ferry many years ago, and have returned to the Northern Idaho area after being elsewhere. I feel fortunate to live where our water resources are better than many other areas.

Regards,  
Dave Pietz  
110 Spur Dr  
Sandpoint, ID 83864

**Sidner, Regan**

---

**From:** Susan Bistline <[REDACTED]>  
**Sent:** Wednesday, September 29, 2021 2:00 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

Thank you for the opportunity to provide comments on this issue.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition. Time to stop polluting our planet-our only place to live.

Regards,  
Susan Bistline  
957 W Garfield Bay Rd  
Sagle, ID 83860

**Sidner, Regan**

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**From:** Daniel Roper <[REDACTED]>  
**Sent:** Wednesday, September 29, 2021 2:10 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

Hello,

Last year, the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Regards,  
Daniel Roper  
2556 9th Ave E  
Twin Falls, ID 83301

**Sidner, Regan**

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**From:** Lana Weber <[REDACTED]>  
**Sent:** Wednesday, September 29, 2021 2:21 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Please decline to adopt a process to review Teck's petition

Dear Montana Board of Environmental Review,

Thank you for the opportunity to provide comments on this issue.

As an Idahoan who has spent a great deal of time in North Idaho and Montana, I have been watching this issue closely.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Regards,  
Lana Weber  
1017 E Jefferson St  
Boise, ID 83712

**Sidner, Regan**

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**From:** Brad Lancaster <[REDACTED]>  
**Sent:** Wednesday, September 29, 2021 2:33 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

Thank you for the opportunity to provide comments on this issue.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Let's not allow the greedy & irresponsible actions of a few executives destroy our wild places, wild fish populations, & wildlife for the remaining 99.99% of us & our children & grandchildren.

Regards,  
Brad Lancaster  
10395 Nighthawk Cir  
Reno, NV 89523

**Sidner, Regan**

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**From:** Savannah Perry <[REDACTED]>  
**Sent:** Wednesday, September 29, 2021 2:46 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

Thank you for the opportunity to provide comments on this issue.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

I believe that it is the responsibility of the lawmakers to review these policies and protect the people and animals that cannot protect themselves. I respect the decisions made and ask for good judgement that will protect us all.

Regards,  
Savanah Perry  
4909 Sunflower Ave  
Pocatello, ID 83202



**Sidner, Regan**

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**From:** Todd Davis <[REDACTED]>  
**Sent:** Wednesday, September 29, 2021 3:00 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Protecting our waters

Dear Montana Board of Environmental Review,

I appreciate the opportunity to provide comments on this issue. Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Regards,  
Todd Davis  
3855 Collister Dr  
Boise, ID 83703

**Sidner, Regan**

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**From:** Ebony Yarger <[REDACTED]>  
**Sent:** Wednesday, September 29, 2021 3:15 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

Thank you for the opportunity to provide comments on this issue.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Thank you for your time and willingness to respond to my concerns. I look forward to hearing from you soon, take care.

Regards,  
Ebony Yarger  
357 Blue Lakes Blvd N  
Twin Falls, ID 83301

The following response to comments from members of the public was received after the September 29, 2021 1:00 PM deadline, and therefore may not be considered by the Board of Environmental Review:

**Sidner, Regan**

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**From:** Shiloh Hernandez <[REDACTED]>  
**Sent:** Wednesday, September 29, 2021 4:41 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] In re Review of Selenium Standards for Lake Koocanusa  
**Attachments:** 2021-9-29 - Resp to Teck petition comments - Earthjustice, MEIC, Clark Fork Coalition.pdf

Secretary Sidner,

Please see the attached response to comments submitted on September 24, 2021, in the above-referenced matter. Please let me know if you have any questions or concerns.

Sincerely,

Shiloh Hernandez  
*He/Him*  
Senior Attorney  
Northern Rockies Office  
313 East Main Street  
P.O. Box 4743  
Bozeman, MT 59772-4743

T: [REDACTED]  
F: [REDACTED]

[earthjustice.org](http://earthjustice.org) [\[nam04.safelinks.protection.outlook.com\]](mailto:[nam04.safelinks.protection.outlook.com])



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September 29, 2021

Montana Board of Environmental Review  
 Regan Sidner, Board Secretary  
 Department of Environmental Quality  
 deqbersecretary@mt.gov

**Re: Teck Coal Limited petition to review whether new ARM 17.30.632 setting selenium standards for Lake Koocanusa is more stringent than federal guideline**

To whom it may concern,

Pursuant to the Board of Environmental Review's (Board) notice regarding Teck Coal Limited's (Teck) petition to weaken Montana's Selenium standards (Selenium Rule) for Lake Koocanusa, Earthjustice submits these comments together with the Montana Environmental Information Center (MEIC) and Clark Fork Coalition. These comments respond to the comments submitted by Teck and other parties.

**I. TECK'S REQUEST CONFUSES RULEMAKING, ADJUDICATION, AND JUDICIAL REVIEW.**

Our prior comments demonstrated that Teck's petition improperly invites the Board to act beyond its jurisdiction and ultra vires. In its comments on procedure, Teck further muddles the picture, demonstrating that the best course of action is for the Board to simply dismiss the petition.

Initially, it appears that Teck has abandoned its request that the Board issue a declaratory ruling pursuant to Montana Code Annotated § 2-4-501 and ARM 1.3.227. Teck's comments do not refer to any of the processes related to declaratory rulings, even though its petition was supposedly a request for such a ruling. Compare Pet. at 1 (citing ARM 1.3.227), with Teck Cmts. at 1-6 (failing to mention rules related to declaratory rulings at all). This makes sense because the declaratory ruling laws plainly do not apply, as explained in our initial comments—Teck does not seek a ruling on the applicability of the Selenium Rule, but a ruling that the rule is “void.” See Teck. Cmts. at 4.

Having abandoned its declaratory ruling theory, Teck fails to anchor its petition to any other administrative procedure authorized by law, either an adjudication (i.e., a contested case) or a rulemaking. Worse, the company cobbles together disparate fragments of administrative law, which it presents as a Frankenstein-monster-like request to the Board to limit public participation and act beyond its statutory authority. Teck's proposal should be rejected.



At various points Teck asks the Board to “review” the “rulemaking record,” “including evaluation and determination of facts contained in the rulemaking record.” Teck Cmts. at 2, 4.<sup>1</sup> Teck requests that this review of the administrative record culminate in a “declar[ation]” that “the Rule [is] void.” *Id.* at 4. Teck asks this to occur pursuant to the Board’s “quasi-judicial authority.” *Id.* But that process is judicial review, which is not available to the Board, but reserved for state courts. Mont. Code Ann. §§ 2-4-305, 506.

Teck’s reference to the Board’s “quasi-judicial authority” also suggests the contested case proceedings provided for in the Montana Administrative Procedure Act (MAPA). *See* Mont. Code Ann. §§ 2-4-601 to -631. But at the Board’s August meeting, Teck represented to the Board that it was not seeking a contested case proceeding. BER Tr. at 22:3-8 (Aug. 13, 2021) (“It’s filed pursuant to the statute 75-5-203 subparagraph (4), so it’s not a contested case.”). Moreover, the process suggested by Teck—by which no other parties are permitted, no discovery occurs, no briefs are filed—is wholly inconsistent with the trial-type provisions of contested cases. *See* Mont. Code Ann. §§ 2-4-601 to -631.

Ultimately, the process recommended by Teck resembles notice-and-comment rulemaking, in which the Board “holds a public hearing to receive comments” and “publishes [a] decision” that repeals (“declare[s] void”) a rule. Teck Cmts. at 4-5. But, again, the Montana Legislature removed rulemaking authority from the Board. 2021 Mont. Laws Ch. 324, § 31 (Senate Bill 233).

It is Teck’s duty, as the proponent of a petition, to identify a lawful vehicle by which the Board may consider its petition. Teck’s having failed to do so, the Board should dismiss its petition and decline the invitation to act beyond its authority.

## **II. TECK’S INSISTENCE THAT THE BOARD ACT BEYOND ITS JURISDICTION BY FOLLOWING LAWS THAT HAVE BEEN REPEALED IS FURTHER REASON FOR DISMISSING ITS PETITION.**

It is clear that Teck is inviting the Board to act pursuant to the now-repealed provisions of Montana Code Annotated § 75-5-203(4) (2019). That provision, however, is no longer the law. The Board no longer has authority to follow the procedure set out in Montana Code Annotated § 75-5-203(4) (2019). Consequently, Teck’s petition should be dismissed.

Montana Code Annotated § 75-5-203(4) (2019) provided:

A person affected by a rule of the board that that person believes to be more stringent than comparable federal regulations or guidelines may petition the board to review the rule. If the board determines that the rule is more stringent than comparable federal regulations or guidelines, the board shall comply with this

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<sup>1</sup> Confusingly, Teck alternatively refers to the administrative record as “evidence already contained in the rulemaking record,” Teck Cmts. at 6, and as “the documents submitted to EPA for approval of the Rule and EPA’s response to that submittal.” *Id.* at 2.





section by either revising the rule to conform to the federal regulations or guidelines or by making the written finding, as provided under subsection (2), within a reasonable period of time, not to exceed 8 months after receiving the petition. A petition under this section does not relieve the petitioner of the duty to comply with the challenged rule. The board may charge a petition filing fee in an amount not to exceed \$250.

Teck asserted at the Board's August hearing that it had submitted its provision pursuant to this now-repealed provision. BER Tr. at 25:6-11 (Aug. 13, 2021) ("This was filed before the effective date of the Senate Bill [233] which removed the rulemaking authority, to provide an opportunity for the Board to own this rulemaking and direct actions going forward."). Consistent with that assertion, Teck's comments request the Board, not only to issue a determination of whether the Selenium Rule is more stringent than the federal rule, but also to revise and repeal the rule. Teck Cmts. at 4 (stating that the Board has authority to "revise the Rule" and requesting that the Board go farther and "declare the Rule void"). Teck then asserts that the Board must revise or repeal the rule in eight months, as provided by the now-repealed version of the law. *Id.* at 5.

The problem with Teck's position is that is premised on a statute that has been repealed. The provisions of Montana Code Annotated § 75-5-203(4) (2019) were amended last year by Senate Bill 233:

(4)(a) A person affected by a rule ~~of the board that~~ that the person believes to be more stringent than comparable federal regulations or guidelines may petition the ~~board~~ board to review the rule. If the ~~board~~ board determines that the rule is more stringent than comparable federal regulations or guidelines, the ~~board~~ department shall comply with this section by either revising the rule to conform to the federal regulations or guidelines or by making the written finding, as provided under subsection (2), within a reasonable period of time, not to exceed 8 months after receiving the petition. A petition under this section does not relieve the petitioner of the duty to comply with the challenged rule. The ~~board~~ department may charge a petition filing fee in an amount not to exceed \$250.

2021 Mont. Laws Ch. 324, § 32. Thus, the authority to revise or repeal the Selenium Rule, which Teck now invokes, no longer resides with the Board, but instead resides with the Department of Environmental Quality (DEQ). *See* Mont. Code Ann. § 2-4-302(1)(a); *id.* § 2-4-102(11)(a) (defining "rule" to include "amendment or repeal of a prior rule"). This is not changed by the fact that Teck filed its petition one day prior to the effective date of Senate Bill 233. That is because Senate Bill 233 had a transition provision by which any rulemaking authority or rules under the jurisdiction of the Board on the effective date of the law would be transferred to DEQ. 2021 Mont. Laws Ch. 324, § 112 ("Rulemaking authority and existing rules under the jurisdiction of the board of environmental review are transferred to the department of environmental quality on [the effective date of this act]."). Thus, any authority the Board previously possessed to revise or repeal rules (within an eight-month period) under Montana Code Annotated § 75-5-203(4) (2019), was transferred to DEQ under the new law. *See* Mont. Code Ann. § 75-5-203(4) (2021).



Montana Code Annotated §75-5-203(4)(a) (2021) provides:

A person affected by a rule that the person believes to be more stringent than comparable federal regulations or guidelines may petition the board to review the rule. If the board determines that the rule is more stringent than comparable federal regulations or guidelines, the department shall comply with this section by either revising the rule to conform to the federal regulations or guidelines or by making the written finding, as provided under subsection (2), within a reasonable period of time, not to exceed 8 months after receiving the petition. A petition under this section does not relieve the petitioner of the duty to comply with the challenged rule. The department may charge a petition filing fee in an amount not to exceed \$250.

Under the current law, the Board does not have authority to address the following questions posed by Teck:

- “Did the initial and subsequent publications of the Rule provide the requisite notice to the public that the Rule was more stringent than the federal guideline?”
- “Did the initial and subsequent publications of the Rule provide the findings, discussion of policy reasons, and analysis required by Montana Code Annotated § 75-5-203?”
- “Does the rulemaking record contain appropriate support for the findings, discussion of policy reasons, and analysis required by Montana Code Annotated § 75-5-203?”

Teck Cmts. at 3. Under the current law, answering these questions is the authority of DEQ or judicial review. The only question that the Board has authority to answer is whether the Selenium Standard is more stringent than the federal standard. And the Board already answered that question nine months ago with a resounding no. 24 MAR 2336, 2398 (Dec. 24, 2020).

In sum, the Board lacks jurisdiction to consider all but one of the questions posed by Teck and lacks jurisdiction to grant the remedy requested by Teck. And the Board has already answered the one question it has authority to address. There is nothing within the Board’s authority that remains to be done. As such, the Board should decline Teck’s invitation to act beyond its jurisdiction and dismiss Teck’s petition.

### **III. IF THE BOARD ADDRESSES WHETHER THE SELENIUM STANDARD IS MORE STRINGENT THAN THE FEDERAL STANDARD, IT SHOULD FOLLOW THE PROCEDURE PROPOSED BY DEQ.**

As noted, the Board only has authority under Montana Code Annotated § 75-5-203(4) to determine whether the Selenium Rule is more stringent than the federal criteria. Also as noted, the Board already made this determination only nine months ago. Teck has provided no basis for revisiting this rule in any non-arbitrary fashion. But assuming *arguendo* that the Board opted to entertain this single question (that it already resolved), it should do so by the process outlined by



DEQ: setting a schedule for intervention, compilation of the record, filing dispositive briefing, and oral argument. This would be, at minimum, consistent with the constitutional mandates for due process, public participation, and clean and healthful environment, Mont. Const. art. II, §§ 3, 8, 17,<sup>2</sup> and the minimum standards for an informal contested case proceeding. Mont. Code Ann. § 2-4-604.

Teck's one-sided proposal for the Board to limit public participation should be rejected. If the Board chooses to entertain the only issue that it has jurisdiction to consider—whether the Selenium Rule is more stringent than the federal criteria—it should follow the procedure proposed by DEQ.

### CONCLUSION

Teck boldly requests this Board to act beyond its jurisdiction and redo a determination that has already been made. The Board should decline this invitation and dismiss Teck's ill-conceived petition to void Montana's laws that protect its fisheries from toxic pollution.

Respectfully,

/s/ Shiloh Hernandez

Shiloh Hernandez

Earthjustice

Northern Rockies Office

313 East Main Street

P.O. Box 4743

Bozeman, MT 59772-4743

406.426.9649

shernandez@earthjustice.org

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<sup>2</sup> The substantive right to a clean and healthful environment includes procedural protections. See Park Cty. Env't Council v. DEQ, 2020 MT 303, ¶¶ 70-89, 402 Mont. 168, 477 P.3d 288.