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ATTORNEY FOR DEQ

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

<p>IN THE MATTER OF: ADOPTION OF NEW RULE I PERTAINING TO SELENIUM STANDARDS FOR LAKE KOOCANUSA</p>	<p>Case No. BER 2021-04 WQ</p>
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DEQ's Response to Teck's Petition to Review ARM 17.30.632

On December 11, 2020, the Montana Board of Environmental Review (“the Board”) adopted site-specific selenium water quality standards for Lake Kooconusa and the Kootenai River pursuant to its rulemaking authority under the Montana Water Quality Act. See §§75-5-201 and 75-5-301, MCA (2019). The Lake Kooconusa and Kootenai River selenium standards are now codified at Administrative Rule of Montana (ARM) 17.30.632. These selenium criteria

protect Class B-1 designated uses including growth and propagation of salmonid fishes and associated aquatic life. *See* ARM 17.30.609 and 17.30.623.

Upon adoption of ARM 17.30.632, the Board considered the requirement at § 75-5-203, MCA that the Board may not adopt rules more stringent than “comparable federal regulations or guidelines that address the same circumstance.” *See* 75-5-203(1), MCA; BER December 11, 2020 Transcript, page 130, line 19 – page 134, line 10 (adopting selenium standards for Lake Koocanusa and the Kootenai River and adopting DEQ’s stringency analysis under §§ 75-5-203). The Board determined that the site-specific selenium criterion for Lake Koocanusa of 0.8 micrograms per liter ($\mu\text{g/L}$) and the criterion for the Kootenai River of 3.1 $\mu\text{g/L}$ are consistent with EPA’s current recommended selenium criteria guidelines for freshwater bodies because they correspond to federal standards or were developed using federally recommended site-specific procedures.

In fact, the water column value of 0.8 $\mu\text{g/L}$ is a translation of the federal egg/ovary standard of 15.1 mg/kg dry weight (dw). EPA’s national selenium criteria are not water-based criteria. The national selenium criteria are based on fish tissue criteria with the egg/ovary criterion the foundation of all the federal selenium criteria. To be more stringent than the federal criteria, the site-specific standard for Lake Koocanusa would have to be based on an egg/ovary criterion that is less than 15.1 mg/kg dw.

Montana adopted the federal egg/ovary standard of 15.1 mg/kg dw and a whole-body fish tissue standard of 8.5 mg/kg dw. Both fish tissue standards are consistent with the federal criteria and the 8.5 mg/kg dw fish tissue standard is translated from the 15.1 mg/kg dw egg/ovary standard. These federal fish tissue standards were used by DEQ to derive the site-specific Lake Koocanusa water column value of 0.8 µg/L using site-specific bioaccumulation data for Lake Koocanusa following EPA's guidance.

The Board determined the adopted selenium standards for Lake Koocanusa and the Kootenai River are not more stringent than comparable federal guidelines addressing site-specific selenium criteria and the Board was, therefore, not required to make the written findings in §75-5-203(2) and (3), MCA. Teck is now asking the Board to reconsider this determination.

DEQ responds to the allegations in the Teck Petition to Review ARM 17.30.632 ("the Petition") as follows:

1. Paragraph 1 of the Petition purports to quote portions of §§ 75-5-203(2) and (3), MCA, to which no response is required. The cited statute speaks for itself. To the extent a response is required, DEQ denies the allegations.

2. Paragraph 2 of the Petition purports to quote portions of § 75-5-203(3), MCA, to which no response is required. The cited statute speaks for itself. To the extent a response is required, DEQ denies the allegations.

3. Paragraph 3 of the Petition purports to quote portions of the legislative history of House Bill 521, adopted by the 54th Montana Legislature (1995) to which no response is required. The cited Legislative history speaks for itself. To the extent a response is required, DEQ denies the allegations.

4. DEQ admits § 75-5-203, MCA provides the board may not adopt a rule that is more stringent than comparable federal regulations or guidelines that address the same circumstance without making the written findings in § 75-5-203(2) through (5), MCA. DEQ denies the remaining allegations in Paragraph 4 of the Petition including Teck's interpretation of the Montana Supreme Court's finding in the *Pennaco* case, where the Court rejected arguments that BER was required to issue written findings under § 75-5-203, MCA when it adopted numeric criteria for EC and SAR and classified EC and SAR as harmful parameters for purposes of nondegradation analysis. *Pennaco Energy, Inc v. Mont. Bd. Of Env'tl. Review*, 2008 MT 425, ¶43. Written findings under § 75-5-203, MCA, were not triggered by the Board's adoption of numeric criteria or by classification of the parameters as harmful in the *Pennaco* case because there were no corresponding federal standards or guidelines. *Id.* at ¶¶43 – 47.

5. Paragraph 5 of the Petition purports to quote portions of the July 13, 2016 Federal Register announcing the United States Environmental Protection Agency's (EPA) Clean Water Act Recommended National Aquatic Criteria for

selenium in freshwater (“2016 EPA Guidelines”) to which no response is required. The cited federal guidelines at 81 Fed. Reg. 45285 – 45287 speak for themselves. To the extent a response is required, DEQ denies the allegations.

6. Paragraph 6 of the Petition purports to quote portions of the 2016 EPA selenium guidelines. DEQ admits the adopted site-specific selenium criteria for Lake Koocanusa are consistent with EPA’s selenium criterion guidelines for freshwater bodies set forth in Appendix K of EPA’s 2016 selenium criterion document. The cited federal guidelines speak for themselves and, to the extent a response is required, DEQ denies the allegations.

7. The allegations in Paragraph 7 quote the Notice of Proposed Amendment and Adoption (MAR 17-414, No. 19 (10/09/2020); DEQ’s *Derivation of a Site-Specific Water Column Selenium Standard for Lake Koocanusa* (September 2020) (the “Derivation Document”); and the 2016 EPA Guidelines. These documents speak for themselves and are the best evidence of their content and meaning, to the extent a response is required, DEQ denies the allegations. DEQ denies ARM 17.30.632, as proposed or as adopted, is more stringent than comparable federal guidelines. *See* the Board’s Response to Comment 200, MAR 17-414, No. 24 (“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. . . 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. . . 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.”)

8. The allegations in Paragraph 8 purport to quote the Board’s Response to Comment 197, which explained the phrase “whenever possible” was in DEQ’s Reason Statement for New Rule I (codified as ARM 17.30.632) and was not in the rule itself. *See* MAR 17-414, No. 24 and MAR 17-414, No. 19. The responses to comments in MAR 17-414, No. 24 speak for themselves and are the best evidence of their content and meaning. To the extent a response is required, DEQ denies the allegations.

9. The allegations in Paragraph 9 purport to quote public comments by Teck and others on the Notice of Proposed Amendment and Adoption (MAR 17-414, No. 19) stating that the proposed standard of 0.8 micrograms per liter of selenium for Lake Koocanusa was more stringent than the federal guideline of 1.5 micrograms per liter for lentic water; and that the written finding pursuant to § 75-5-203, MCA had not been made. The public comments are in the Board’s rulemaking record and speak for themselves. The public comments are the best

evidence of their content and meaning, to the extent a response is required, DEQ denies the allegations.

10. The allegations in Paragraph 10 purport to quote the Board's Response to Comment 200, MAR 17-414, No. 24. The Board's responses to public comments are in the rulemaking record and speak for themselves. The Board's responses to public comments are the best evidence of their content and meaning, to the extent a response is required, DEQ denies the allegations. DEQ admits the Board adopted the proposed water quality standard of 0.8 micrograms per liter ($\mu\text{/L}$) selenium in Lake Koocanusa without making the written findings in § 75-5-203(2) and (3), MCA.

11. DEQ admits the allegations in Paragraph 11.

12. The allegations in Paragraph 12 purport to quote the United States Environmental Protection Agency (EPA) letter, dated February 25, 2021, approving the site-specific water quality standard for selenium in Lake Koocanusa of 0.8 $\mu\text{/L}$ in ARM 17.30.632. The February 25, 2021 EPA approval letter speaks for itself and is the best evidence of its content and meaning. To the extent a response is required, DEQ denies the allegations. DEQ further denies the allegations in Paragraph 12 that the Board erred when it promulgated ARM 17.30.632 without the findings in § 75-5-203(2) and (3), MCA and denies that Teck's petition is appropriate.

13. The allegations in Paragraph 13 purport to quote § 75-5-203(2)(a), MCA. The quoted statute speaks for itself and is the best evidence of its content and meaning. To the extent a response is required, DEQ denies the allegations. DEQ denies the allegations in Paragraph 13 that the Board did not consider background or natural sources of selenium. *See* Response to Comments 129, 130, and 199, MAR 17-414, No. 24. DEQ denies the allegations in Paragraph 13 that the Board did not consider fluctuating water elevations from Libby Dam operations, bank sloughing events along the reservoir which add selenium from soil to the lake, and tributary contributions of selenium. *See* Response to Comment 133, MAR 17-414, No. 24.

14. The allegations in Paragraph 14 purport to quote § 75-5-203(2)(b), MCA. The quoted statute speaks for itself and is the best evidence of its content and meaning. To the extent a response is required, DEQ denies the allegations in Paragraph 14. DEQ denies the record is devoid of evidence the site-specific standard for selenium is necessary to mitigate harm.

- a. DEQ denies the allegations in Paragraph 14(a) that there have been no documented reproductive effects on fish in Lake Koocanusa due to selenium. *See* Response to Comments 144 and 145, MAR 17-414, No. 24 (Toxic effects of selenium exposure most often occur at the reproductive stage. Waiting until there is a dramatic

- decline in fish populations to set a standard, would create a scenario that would be extremely challenging to recover from).
- b. DEQ denies the allegations in Paragraph 14(b) that there is no documented harm that justifies the rulemaking. *See* Response to Comments 137, 145, 150, and 199, MAR 17-414, No. 24 (water quality standards are established to protect beneficial uses The Presser and Naftz (2020) study shows the cross-sectional area of the reservoir over 1 µg/L is increasing over the last several years. Water quality standards must be set at concentrations that ensure continued protection of beneficial uses).
- c. DEQ admits the allegations in Paragraph 14(c) with the following qualification: A publicly reviewed assessment method is not required to adopt a water quality standard. *See* 40 CFR 131.6. DEQ is developing a fish tissue assessment method in collaboration with the state of Idaho, federal partners, and stakeholders. Currently, DEQ conducts assessments using its 2016 Standard Operating Procedure (SOP) for fish tissue analysis developed in anticipation of the continuing need for accurate data representing the levels of selenium found in fish species in Montana. *See* Response to Comment 53, MAR 17-414, No. 24.

- d. DEQ admits the allegations in Paragraph 14(d) with the following qualification: Recent studies with redbreasted sunfish are yielding more information on selenium bioaccumulation in redbreasted sunfish eggs and effects and the department will consider these studies after they go through the peer review process. *See* Response to Comments 141 and 147, MAR 17-414, No. 24. In fact, at the time of rulemaking, the data collected through 2019 recorded 9 individuals, spanning three fish species, with egg/ovary selenium tissue concentrations at or above 15.1 mg/kg dw. The highest recorded selenium concentrations occurred after the rulemaking in 2020 and showed some individuals at more than double the current 15.1 mg/kg dw egg/ovary standard. The Board made it clear that water quality standards are not set once harm occurs, but rather in advance of that, to protect beneficial uses before irreversible impacts occur. *See* Response to Comment 145, MAR 17-414, No. 24.
- e. DEQ admits the allegations in Paragraph 14(e) with the following qualification: The limited data cannot support Teck's conclusion that no harmful effects are occurring in Lake Koonapi. Existing data in certain species of both cyprinid and non-cyprinid fish

exceed the egg/ovary standard, which suggests impacts could already be occurring. DEQ admits most ovary concentrations fall below the 15.1 mg/kg dry weight (dw), but some species show elevated levels. See Response to Comment 146, MAR 17-414, No. 24.

- f. DEQ admits the allegations in Paragraph 14(f) with the following qualification: The 2012 determination that Lake Koocanusa was threatened for selenium was based on the best available information and science. The analysis used knowledge about current and future loading and full mixing within the reservoir. At the time of the initial threatened listing, there were no active treatment plants or other treatment technologies in operation in the Elk Valley, British Columbia, thus, the determination incorporated conservative assumptions (i.e., no treatment). *See* Response to Comments 48, 63, and 66, MAR 17-414, No. 24.
- g. The allegations in Paragraph 14(g) purport to quote the transcript of the December 11, 2020 Board Meeting, during which the Board adopted proposed amendments of ARM 17.30.602 and New Rule I (ARM 17.30.632). The transcript speaks for itself and is the best evidence of its content and meaning. To the extent a response is

required, DEQ denies the allegations in Paragraph 14(g).

However, DEQ admits that the Board acknowledged there are no sources of selenium in the portion of Lake Koocanusa within Montana's jurisdiction to regulate. DEQ denies that adoption of ARM 17.30.632 "cannot be used to mitigate any harm." Adoption of the standard in ARM 17.30.632 will be the basis for implementation of pollutant reduction plans to achieve the site-specific selenium standard and protect aquatic life in Lake Koocanusa and the Kootenai River. See Response to Comment 76, MAR 17-414, No. 24.

15. The allegations in Paragraph 15 purport to quote § 75-5-203(2)(b), MCA. The quoted statute speaks for itself and is the best evidence of its content and meaning. To the extent a response is required, DEQ denies the allegations in Paragraph 15. DEQ denies there is no evidence in the record that the Board considered available treatment technology and the cost of treatment. See Response to Comments 51, 62, and 78 MAR 17-414, No. 24.

a. The allegations in Paragraph 15(a) purport to quote the Board's response to comment 78. See Response to Comment 78 MAR 17-414, No. 24.

The quoted response to comment speaks for itself and is the best evidence of its content and meaning. To the extent a response is

- required, DEQ denies the allegations in Paragraph 15(a). DEQ admits the Board acknowledged there are no sources of selenium in the portion of Lake Koocanusa within Montana's jurisdiction to regulate.
- b. The allegations in Paragraph 15(b) purport to quote the Board's responses to comments. *See* MAR 17-414, No. 24. The Board's responses to comments speaks for itself and is the best evidence of its content and meaning. To the extent a response is required, DEQ denies the allegations in Paragraph 15(b). In fact, the Board acknowledged laboratories are currently achieving reporting limits below the proposed standard of 0.8 µg/L. *See* Response to Comments 58 and 59 MAR 17-414, No. 24. The Board further acknowledged selenium water quality data suggests selenium contribution from tributaries to the Lake Koocanusa and the Kootenai River are very low and would not contribute to standards exceedances. *See* Response to Comment 129 MAR 17-414, No. 24.
- c. The allegations in Paragraph 15(c) purport to quote the Board's responses to comments, comments from the public, and the Derivation Document. The public comments, the Board's responses to comments, and the Derivation Document speak for themselves and are the best evidence of their content and meaning. To the extent a response is required, DEQ

denies the allegations in Paragraph 15(c). The Board acknowledged calculations by the department demonstrated shoreline erosion along the reservoir is likely not a significant source of selenium in the watershed.

See Response to Comment 133 MAR 17-414, No. 24.

16. The allegations in Paragraph 16 purport to quote § 75-5-203(2)(c), MCA. The quoted statute speaks for itself and is the best evidence of its content and meaning. To the extent a response is required, DEQ denies the allegations in Paragraph 16. Furthermore, the Board's consideration of the small business impact analysis for the proposed rulemaking and the Board's responses to public comments are in the rulemaking record and speak for themselves. The Board's public rulemaking record is the best evidence of its content and meaning, to the extent a response is required, DEQ denies the allegations. The Board acknowledged there are no public or private entities discharging to the Kootenai River or Lake Koocanusa with Montana Pollutant Discharge Elimination System (MPDES) permit effluent limits for selenium. At this time, no permittee will be required to incur additional costs to treat wastewater for selenium to meet water quality-based effluent limits based on ARM 17.30.632. Land development activities, such as surface mining and construction, are already subject to general discharge permit requirements including implementation and maintenance of best management practices (BMPs). There are no foreseeable additional treatment

requirements associated with these land disturbing activities due to the adoption of ARM 17.30.632. *See* Response to Comments 26 and 45 MAR 17-414, No. 24.

17. The allegations in Paragraph 17 purport to quote § 75-5-203(3), MCA. The quoted statute speaks for itself and is the best evidence of its content and meaning. To the extent a response is required, DEQ denies the allegations in Paragraph 17. The Board acknowledged that, over a six-year period, scientific analysis was conducted by the world's leading selenium experts, the Lake Koocanusa Monitoring and Research Group and the Selenium Technical Committee (SeTSC), resulting in sound and peer reviewed findings that were published and shared in the public domain. *See* Response to Comment 20 MAR 17-414, No. 24.

18. DEQ admits the allegations in Paragraph 18 with the following qualification: The Board promulgated the rules at issue pursuant to §§ 75-5-201 and 75-5-301, MCA. As of July 1, 2021, DEQ rather than the Board 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.

19. The allegations in Paragraph 19 purport to quote § 75-5-203(4)(a), MCA. The quoted statute speaks for itself and is the best evidence of its content and meaning. To the extent a response is required, DEQ denies the allegations in

Paragraph 19. As of July 1, 2021, DEQ rather than the Board 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), Section 32. (As of July 1, 2021, § 75-5-203(4)(a) states: “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.”).

20. DEQ lacks sufficient knowledge to either admit or deny the allegations in Paragraph 20 and, therefore, denies the same.

21. DEQ admits Teck participated in the development of the selenium criteria for Lake Koocanusa and the Kootenai River adopted as ARM 17.30.632. DEQ denies the six-year development process of development was “truncated.”

22. DEQ admits the allegations in Paragraph 22.

23. DEQ denies the allegations in Paragraph 23.

24. DEQ denies the allegations in Paragraph 24.

25. To the extent any factual allegations in Teck's Petition to Review ARM 17.30.632 remain unanswered, DEQ denies those allegations.

26. The remaining Paragraphs (Section IV, 1 through 5) of Teck's Petition to Review ARM 17.30.632 state Teck's request for relief to which no response is required.

DEFENSES

1. The Board cannot grant the requested relief because as of July 1, 2021, DEQ rather than the Board 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 Board to review the rule. If the Board 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.

2. The Board did not adopt a standard more stringent than the comparable federal guideline and was not required to make the written findings in 75-5-203(2) and (3), MCA.

3. Teck is not a “person affected by” the standard who may petition the Board to review the rule. *See* Mont. Code Ann. § 75-5-203(4)(a). DEQ has no jurisdiction to regulate Teck’s mining operations in Canada.

WHEREFORE, DEQ requests:

1. That the Board deny the relief requested in Teck’s Petition to Review ARM 17.30.632.
2. Such other and further relief as the Board may deem just and proper.

DATED this 28th day of September 2021.

DEFENDANT DEQ

By: /s/Kirsten Bowers
KIRSTEN H. BOWERS
DEQ Attorney

Certificate of Service

I hereby certify that on this 28th day of September 2021, I caused a true and correct copy of the foregoing to be e-mailed to the following:

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*ATTORNEY FOR DEQ/APPLICANT
 FOR INTERVENTION*

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

<p>IN THE MATTER OF: ADOPTION OF NEW RULE I PERTAINING TO SELENIUM STANDARDS FOR LAKE KOOCANUSA</p>	<p>Case No. BER 2021-04 WQ</p>
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DEQ's MOTION TO INTERVENE

The Montana Department of Environmental Quality (“DEQ”), by and through counsel, respectfully moves to intervene in the above-captioned matter to assert the defenses set forth in the attached response to Teck Coal Limited’s (“Teck”) Petition to Review Administrative Rule of Montana (ARM) 17.30.632 for compliance with § 75-2-203, Montana Code Annotated (MCA). DEQ contacted

counsel for Teck, and Teck objects to the motion because it does not believe leave to intervene is necessary for DEQ to participate in this process.

DEQ seeks leave to intervene as a Respondent in this action on the grounds DEQ is a state government agency that may be permitted to intervene if a party's claim is based on a statute, or on a regulation issued under a statute that is administered by the agency. *See* Rule 24(b)(2), M. R. Civ. P. DEQ administers the Montana Water Quality Act, and Teck's claim is based on § 75-5-203, MCA of that Act. Teck's claim is also based on ARM 17.30.632, an administrative rule adopted under the Montana Water Quality Act that is administered by DEQ. DEQ's motion to intervene is timely and will not delay these proceedings or unduly prejudice Teck. Therefore, the DEQ should be granted leave to intervene under Rule 24(b)(2).

Respectfully submitted this 28th day of September 2021.

/s/ Kirsten Bowers
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NOTICE OF SUBMITTAL OF DEQ's MOTION TO INTERVENE

Comes now Montana Department of Environmental Quality ("DEQ") by and through its undersigned counsel and respectfully provides notice that DEQ's Motion to Intervene is submitted and ripe for the Board of Environmental Review's ("BER") disposition. DEQ filed its Motion to Intervene on September 28, 2021. Petitioner Teck Coal Limited ("Teck") filed its Response to DEQ's Motion to Intervene on October 5, 2021. Further briefing and oral argument has

neither been requested nor ordered with respect to DEQ's Motion to Intervene.

Teck states in its Response to DEQ's Motion to Intervene that it does not object to DEQ's participation and agrees that DEQ's participation in the BER's review of Administrative Rule of Montana (ARM) 17.30.632 for compliance with § 75-5-203, MCA may assist the BER. *See* Teck's Response to DEQ's Motion to Intervene at 2.

WHEREFORE, DEQ respectfully requests that BER render a decision on DEQ's Motion to Intervene in the above-captioned matter.

DATED this 21st day of October 2021.

/s/ Kirsten H. Bowers

Kirsten H. Bowers

DEQ Attorney

Certificate of Service

I hereby certify that on this 21st day of October 2021, I caused a true and correct copy of the foregoing to be e-mailed to the following:

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

IN THE MATTER OF:	CAUSE NO. BER 2021-04 WQ
ADOPTION OF NEW RULE I PERTAINING TO SELENIUM STANDARDS FOR LAKE KOOCANUSA	Petitioner's Response to DEQ's Motion to Intervene

On September 28, 2021, the Montana Department of Environmental Quality (“DEQ”) moved to intervene in the Petition filed by Teck Coal Limited (“Teck”). The Petition asks the Board of Environmental Review (“Board”) to review Administrative Rule of Montana 17.30.632, specifically subparagraph (7)(a), to determine its compliance with the statute requiring a water quality standard “that is more stringent than the comparable federal regulations or guidelines that address the same circumstances,” to undergo a specific process and be supported by specific findings. Mont. Code Ann. § 75-5-203.

Teck does not object to DEQ's participation in the Board's review and consideration of the Petition. Teck understands that DEQ, as a proponent of the rule, has knowledge of the rulemaking process at issue that might be useful to the Board.

As pointed out in Teck's September 24th comments and September 29th responses to comments on the process by which the Board should consider the Petition, the petition process does not implicate an adversarial proceeding that includes traditional litigation steps or motions practice.

DEQ relies on Montana Rule of Civil Procedure 24(b)(2) for intervention, but there is nothing in statute or rule that applies Montana's Rules of Civil Procedure to the Board's petition process. The Rules of Civil Procedure "govern the procedure in all civil actions and proceedings in the district courts of the state of Montana." Mont. R. Civ. P. 1. A "civil action is commenced by filing a complaint with the court." Mont. R. Civ. P. 3. Here, there is no civil action; therefore, the rules of civil procedure do not expressly apply to the Petition. Nor has DEQ pointed to any statute, rule or Board provision applying the Rules of Civil Procedure to the Petition process.

Intervention is not necessary to enable DEQ's (or any other interested person's) participation. The Board, of course, remains free to ask questions of and receive responses and information about the rulemaking from DEQ (or any other

interested person) throughout the Board's deliberations. Therefore, intervention is not necessary for DEQ to participate in the Board's review of the Petition.

DATED this 5th day of October, 2021.

/s/ Victoria A. Marquis

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ATTORNEYS FOR TECK COAL LIMITED

CERTIFICATE OF MAILING

I hereby certify that on this 5th day of October, 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:

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/s/ Victoria A. Marquis