Montana Department of Environmental Quality

BOARD OF ENVIRONMENTAL REVIEW
OCTOBER 29, 2021, SPECIAL MEETING

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BOARD OF ENVIRONMENTAL REVIEW
October 29, Special Meeting
DEQ ZOOM CONFERENCE

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, no less than 24 hours prior to the meeting to advise her of the nature of the accommodation needed.

9:00 AM

I. ACTION ITEMS

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. The Board addressed the rule review process on October 8, 2021 and is going to continue this discussion in the special meeting. The Board will determine the process for considering the petition.

2. **In the matter of adoption of new rule 1 pertaining to selenium standards for Lake Koocanusa, BER 2021-08 WQ.** On October 15, 2021, the Board received a request from the Board of County Commissioners of Lincoln County, Montana to review its new rule ARM 17.30.632(7)(a) to determine whether it is more stringent than the comparable federal guideline in violation of the Montana Water Quality Act. The Board will determine the process for considering the petition.

II. BOARD COUNSEL UPDATE

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

III. 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.

IV. ADJOURNMENT

Montana Department of Environmental Quality

Board of Environmental Review

Memo

TO: Katherine Orr, Board Attorney
Board of Environmental Review

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

DATE: July 6, 2021

SUBJECT: Board of Environmental Review Case No. BER 2021-04 WQ

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: ADOPTION OF NEW RULE I PERTAINING TO SELENIUM STANDARDS FOR LAKE KOOCANUSA	Case No. BER 2021-04 WQ

On July 1, 2021, the BER received the attached petiton for review via mail. Please serve copies of pleadings and correspondence on me and on the following DEQ representatives in this case.

Angela Colamaria
Chief Legal Counsel
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901
Angela.Colamaria@mt.gov

Amy Steinmetz
Water Quality Division Administrator
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901
ASteinmetz@mt.gov

Attachments

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
wwmercer@hollandhart.com
vamarquis@hollandhart.com

ATTORNEYS FOR TECK COAL LIMITED

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: **ADOPTION OF NEW RULE I PERTAINING TO SELENIUM STANDARDS FOR LAKE KOOCANUSA**	**CAUSE NO. _____** **PETITION TO REVIEW ARM 17.30.632 FOR COMPLIANCE WITH MONTANA CODE ANNOTATED § 75-5-203**

Pursuant to Montana Code Annotated § 75-5-203(4)(a) and Administrative Rule of Montana 1.3.227, Teck Coal Limited ("Teck") petitions the Board of Environmental Review ("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. Teck reserves, and by filing this petition does not waive, any of its legal rights and causes of action, including but not limited to those based

on Montana's lack of jurisdiction to enact a water quality standard targeting Teck's Elk Valley operations.

I. LEGAL BACKGROUND

1. Pursuant to the Montana Water Quality Act, the Board may not adopt a water quality standard "that is more stringent than the comparable federal regulations or guidelines that address the same circumstances" unless a specific written finding has been made regarding the need to protect "public health or the environment of the state," the standard's ability to mitigate harm to the public health or the environment, the achievability of the standard "under current technology," and "the costs to the regulated community." Mont. Code Ann. § 75-5-203(2) and (3).

2. The statutorily required written finding "must reference pertinent, ascertainable, and peer-reviewed scientific studies" contained in the rulemaking record. Mont. Code Ann. § 75-5-203(3).

3. Expressing a desire to reduce "redundant and unnecessary regulation" and to ensure that "the public [is] advised of the agencies' conclusions" regarding standards set more stringent than federal requirements, the Legislature intended that "the board or department include as part of the initial publication and all subsequent publications of a rule a written finding if the rule in question contains any standards or requirements" more stringent than the comparable federal

regulations or guidelines. 1995 Mont. Laws Ch. 471 (Mont. HB 521, 54th Legis. Sess. (April 14, 1995)). Further, the Legislature intended that the written finding "must include but is not limited to a discussion of the policy reasons and an analysis that supports the board's or department's decision." *Id*.

4. Mont. Code Ann. § 75-5-203 is "triggered" when EPA has promulgated a federal regulation or approved a guideline or criteria "addressing the particular parameter involved" or the specific discharge at issue. *Pennaco Energy v. Mont. Bd. of Envtl. Review*, 2007 Mont. Dist. LEXIS 513, *44 (reasoning based on legislative intent upheld in *Pennaco Energy, Inc. v. Mont. Bd. of Envtl. Review*, 2008 MT 425, 347 Mont. 415, 199 P.3d 191).

5. "EPA's recommended water quality criteria are scientifically derived *numeric values* that protect aquatic life or human health from the deleterious effects of pollutants in ambient water." 81 Fed. Reg. 45285, 45286 (July 13, 2016) (emphasis added). For selenium, the EPA-recommended numeric value that protects aquatic life in lentic water (still or slow-moving fresh water) is 1.5 micrograms per liter. *Id*.; EPA, *Aquatic Life Ambient Water Quality Criterion for Selenium – Freshwater 2016* (June 2016) (the "2016 EPA Guideline"), Table 1. The 1.5 micrograms per liter water column criterion, combined with fish tissue criteria, comprise EPA's "guidance to States and Tribes authorized to adopt water

quality standards under the Clean Water Act (CWA), to protect aquatic life from toxic effects of selenium." 2016 EPA Guideline, p. vii.

6. The 2016 EPA Guideline noted that "site-specific water column criterion element values *may* be necessary at aquatic sites with high selenium bioaccumulation." 2016 EPA Guideline, p. xiii (emphasis added).

II. FACTUAL BACKGROUND

7. On October 9, 2020, the Board proposed setting a water quality standard of 0.8 micrograms per liter selenium for Lake Koocanusa, which is a lentic water system.[1] 19 Mont. Admin. Register, Not. 17-414 (Oct. 9, 2020); DEQ, *Derivation of a Site-Specific Water Column Selenium Standard for Lake Koocanusa* (September 2020) (the "Derivation Document"), p. 15 ("construction of the Libby Dam in 1972 converted the Kootenai (Kootenay) river from a lotic to a lentic system"). The initial publication of ARM 17.30.632 did not indicate that the proposed rule was more stringent than the federal guideline nor did it provide the statutorily required written finding in accordance with Mont. Code Ann. § 75-5-203. Instead, the initial publication stated that the 2016 EPA Guideline "included a recommendation that states and tribes develop site-specific selenium standards, *whenever possible.*" 19 Mont. Admin. Register, Not. 17-414 (Oct. 9,

[1] The rulemaking at issue here was completed under the Board's authority prior to the July 1, 2021 effective date of Montana Senate Bill 233 from the 67th Legislature (2021). Therefore, the rulemaking record for ARM 17.30.632 is the Board's rulemaking record.

2020) (emphasis added). That differs from the 2016 EPA Guideline, which states that "site-specific water column criterion element values *may* be necessary at aquatic sites with high selenium bioaccumulation." 2016 EPA Guideline, p. xiii (emphasis added).

8. In response to a comment raised about the "whenever possible" language in the initial publication, the Board offered no further explanation conforming the rule to the 2016 EPA Guideline. 24 Mont. Admin. Register, Not. 17-414, Bd. Resp. to Cmt. No. 197.

9. At the rulemaking public hearing on November 5, 2020 and during the written public comment period that ended on November 23, Teck and others submitted public comments 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; therefore, the written finding was required pursuant to Montana Code Annotated § 75-5-203, and such finding had not been and could not be made. Ex. A ("Teck's Comment Letter"), pp. 15-16; *see also* written public comments submitted by Lincoln County Commissioners; Sen. Mike Cuffe and Rep. Steve Gunderson, state legislators representing Lincoln County; Mr. Donavan Truman, Kootenai Sand & Gravel, Inc.; Dr. Anne Fairbrother, Exponent; Mr. Mark Compton, American Exploration & Mining Association; Mr. Todd Butts, Mountain River Consulting; Mr. Alan

Prouty, J.R. Simplot Company; Ms. Tammy Johnson, Montana Mining Association; Ms. Peggy Trenk, Treasure State Resources Association; and Dr. Lisa Kirk, Environmin.

10. In response, the Board asserted that it "is not required to make written findings required by 75-5-203(2), MCA" because the proposed 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." 24 Mont. Admin. Register, Not. 17-414, Bd. Resp. to Cmt. No. 200. Therefore, the Board adopted the new water quality standard of 0.8 micrograms per liter selenium in Lake Koocanusa without making the written finding required by Montana Code Annotated § 75-5-203. *Id*.; ARM 17.30.632(7)(a).

11. On December 28, 2020, the rule, including the rulemaking record and other documents, was submitted to the EPA for approval or disapproval pursuant to the federal Clean Water Act.

12. In its rationale for approval of the rule, EPA noted that the new rule sets a water quality standard for selenium in Lake Koocanusa of 0.8 microgram per liter which "*is more stringent* than the recommended water column criterion element for lentic aquatic system in EPA 2016 (1.5 µg/L)." Ex. B (EPA Rationale (February 25, 2021)), p. 12 (pdf p. 15); n. 22 (emphasis added); *see also* p. 2 (pdf

p. 5), n. 6; p. 6 (pdf p. 9), n.11. EPA's conclusion makes clear that the Board erred when it promulgated the rule without the required written finding. Therefore, the Board's review of its prior action and its rulemaking record is appropriate under Montana Code Annotated § 75-5-203(4)(a), necessary, and imperative.

13. For water quality standards set more stringent than the federal guideline, Montana Code Annotated § 75-5-203(2)(a) requires there to be evidence in the Board's rulemaking record that the proposed standard protects public health or the environment. For ARM 17.30.632, contrary evidence exists, in part because the new rule does not account for naturally occurring and background levels of selenium. Ex. A, p. 15. Additionally, the "fluctuating water elevations resulting from Libby Dam operations," bank sloughing events along the reservoir which add selenium from soil to the lake, and tributary contributions of selenium were not appropriately considered. *Id*., pp. 13, 14.

14. Montana Code Annotated § 75-5-203(2)(b) requires there to be evidence in the rulemaking record that the proposed standard can mitigate harm to the public health or environment, but the Board's rulemaking record for ARM 17.30.632 is devoid of any evidence of an ability to mitigate any alleged harm. *Id*., pp. 15-16.

a. The six most recent years of data revealed selenium levels in Lake Koocanusa that are within the Montana state-wide selenium standard

of 5 micrograms per liter, the 2016 EPA Guideline of 1.5 micrograms per liter selenium, and the British Columbia Water Quality Guideline of 2.0 micrograms per liter selenium. *Id*., p. 9. The Board acknowledged Lake Koocanusa's compliance with the various selenium standards and that "[t]here have been no documented reproductive effects on fish in Lake Koocanusa." 24 Mont. Admin. Register, Not. 17-414, Bd. Resp. to Cmt. No. 136; 143.

b. Any conclusion about harm based on standards inapplicable in Montana during the Board's rulemaking (e.g., the proposed rule itself, the 2016 EPA Guideline which has not been adopted in Montana, or the British Columbia Water Quality Objective) does not provide a legal basis for finding harm in support of the rulemaking. Ex. A, p. 10.

c. Fish tissue criteria are an important part of the newly promulgated rule (*see* ARM 17.30.632(6)), but Montana does not have a vetted, approved, or written methodology for using fish tissue data to assess water quality pursuant to Title 75, Section 5, Part 7 of the Water Quality Act. Thus, there is no water quality assessment completed pursuant to the Water Quality Act that shows harm based on fish tissue data.

d. Even when considering fish tissue data in compliance with the new rule and the 2016 EPA Guideline, no harm caused by selenium is

revealed. When considering fish tissue samples, both the new rule and the 2016 EPA Guideline require use of an "average" or a "composite sample" of "a minimum number of five individuals from the same species". Ex. A, pp. 9-10; ARM 17.30.632(6). Instead of considering average or composite samples, the Board focused on three *individual* egg/ovary samples for redside shiner and one for peamouth chub. 24 Mont. Admin. Register, Not. 17-414, Bd. Resp. to Cmt. No. 146; Derivation Document, p. 25. Additionally, for egg/ovary fish tissue samples, the "only appropriate time to collect egg-ovary tissue from suitable species is when the female is gravid in the pre-spawn stage, just before mating and spawning." USGS Open File Report 2020-1098, Table 2, p. 23. If unripe tissue is used, the results "will not be representative for monitoring and assessment." *Id*. The Board acknowledged egg/ovary fish tissue sampling issues, specifically that "it has been a challenge to collect eggs from gravid females" but did not explain its reliance on unripe ovary data. 24 Mont. Admin. Register, Not. 17-414, Bd. Resp. to Cmt. No. 141; 143. Even so, individual egg/ovary samples collected for the most sensitive species in Lake Koocanusa (Cutthroat trout) remain below the EPA criteria. *Id*. Thus, no credible evidence of harm based on fish tissue samples has been presented in the Board's rulemaking record.

e. The Board did not respond to comments with any proof of harm, but rather a statement that "detrimental impacts *may* have already begun." 24 Mont. Admin. Register, Not. 17-414, Bd. Resp. to Cmt. No. 136 (emphasis added). However, no fish tissue samples exceeded the 2016 EPA Guideline's muscle criterion and "of the four whole body samples collected on the Montana portion of the reservoir, all were below [the 2016 EPA Guideline's whole body criterion]." 24 Mont. Admin. Register, Not. 17-414, Bd. Resp. to Cmt. No. 146; Derivation Document, p. 25.

f. The 2012 assessment of Lake Koocanusa as "threatened" was premised on projections that have proven wrong over time, further dispelling allegations of harm. Ex. A, p. 9; *see also* public comment letter from Rep. Steve Gunderson.

g. Board Members noted that there are no alleged sources of selenium within the state's regulatory jurisdiction; thus, even if harm is occurring (which it is not) the standard cannot be used by Montana to mitigate any alleged harm. *Id*., pp. 11-13, 16; Ex. C (12/11/20 Bd. Trans.), 107:25-108:2; 108:16-17; 128:9-13.

15. Montana Code Annotated § 75-5-203(2)(b) requires there to be evidence in the rulemaking record that the proposed standard "is achievable under

current technology." No such evidence exists in the rulemaking record. Ex. A, p. 16.

a. The Board stated that "[a]chievability will depend on the degree of work undertaken in Canada to control the elevated selenium loads coming out of the Elk River." 24 Mont. Admin. Register, Not. 17-414, Bd. Resp. to Cmt. No. 78. However, as noted above, Board Members recognized the inability of Montana to regulate work in Canada.

b. Naturally occurring selenium levels in Lake Koocanusa, as well as selenium contributions from other tributaries and other sources were not considered; therefore, the standard might never be achievable. In response to comments about tributary and background selenium contributions, the Board contradicted itself, stating that "all available data suggest that [tributary] contributions are lower than the proposed standards," but also admitting that the tributary sampling had limited sensitivity and could not accurately report selenium levels lower than 0.9 micrograms per liter. 24 Mont. Admin. Register, Not. 17-414, Bd. Resp. to Cmt. No. 129; 134; 132; 131. Because that reporting level of 0.9 micrograms per liter is greater than the new standard of 0.8 micrograms per liter, there is no assurance that the tributaries do not contribute selenium at levels near, at, or even slightly higher than the new standard. The Board referenced DEQ's 2016 tributary

data, which indicates that the Montana tributaries contributing to Lake Koocanusa contain between 0.04 and 1.1 micrograms per liter selenium.

c. Selenium contributions and impacts from operation of the Libby Dam, including bank sloughing within the reservoir, were not considered; therefore, the standard might never be achievable. Despite the significant water flow regimes caused by operation of Libby Dam and comments emphasizing the variable and drastic flows, the Board did not consider how the operation of Libby Dam affects water-column selenium levels in Lake Koocanusa. 24 Mont. Admin. Register, Not. 17-414, Bd. Resp. to Cmt. No. 152-155; Derivation Document, p. 15; *see also* written comments from Sen. Mike Cuffe). Nor did the Board consider how bank-sloughing along the shores of Lake Koocanusa affects sediment and water-column selenium levels in Lake Koocanusa, despite evidence collected by DEQ indicating the presence of selenium in soils along the banks and shoreline of the lake. Ex. A, pp. 13, 15 (referencing 2013 DEQ analysis and information that Libby Dam drawdowns average 111 feet and significantly impact aquatic life).

16. Montana Code Annotated § 75-5-203(3) requires there to be "information from the hearing record regarding the costs to the regulated community" yet no such information was provided for public review and

comment. Ex. A, p. 16. Instead, the Board asserted that "existing or proposed permitting or development activities within the State of Montana, are *irrelevant* to the development of the criteria." 24 Mont. Admin. Register, Not. 17-414, Bd. Resp. to Cmt. No. 96 (emphasis added). An analysis of impacts to small businesses was provided within the Board's December 11, 2020 meeting materials, upon which the public was provided limited opportunity to review and comment. The Board assumed, without any supporting analysis, that construction activities would be able to meet the standard using existing best management practices. 24 Mont. Admin. Register, Not. 17-414, Bd. Resp. to Cmt. No. 51.

17. Montana Code Annotated § 75-5-203(3) requires the Board to reference "pertinent, ascertainable, and peer-reviewed scientific studies." Many technical issues with the rule remain unresolved, including, notably, the fact that although the generic model provided by the U. S. Geological Survey was peer-reviewed, the new rule's technical support and derivation documents, including the model as it was applied to Lake Koocanusa, have not been peer-reviewed. Ex. A, pp. 6-8, 14-15.

III. PARTIES

18. The Board is a quasi-judicial board consisting of seven members appointed by the Governor, attached to DEQ for administrative purposes. Mont. Code Ann. § 2-15-3502. The Board, pursuant to its statutory authority,

promulgated the rules at issue in this litigation. 24 Mont. Admin. Register, Not. 17-414; Mont. Code Ann. §§ 75-5-301; 75-5-310.

19. Pursuant to Montana Code Annotated § 75-5-203(4)(a), the Board has authority to determine whether the rule at issue in this petition "is more stringent than comparable federal regulations or guidelines." If the Board declares that the rule is more stringent than the federal guidelines, the rule must be revised to conform to the federal regulations or guidelines, or written findings must be made based on the Board's rulemaking record "within a reasonable period of time, not to exceed 8 months after receiving the petition." Mont. Code Ann. § 75-5-203(4)(a).

20. Teck is a Canadian company conducting coal mining operations in the Elk Valley area in British Columbia. Teck's Elk Valley operations are subject to regulation by British Columbia pursuant to, among other laws, Ministerial Order No. M113, the 2014 Elk Valley Water Quality Plan, and Permit 107517 issued to Teck by the B.C. Ministry of Environment under the B.C. Environmental Management Act. The enforceable requirements of Permit 107517 include selenium water quality compliance limits and site performance objectives for Teck's discharges that eventually enter the Elk River, which is a tributary to Lake Koocanusa.

21. Teck participated in collaborative efforts, initiated by Teck's Canadian regulators, to consider whether British Columbia's Water Quality

Objective of 2.0 micrograms per liter is protective of Lake Koocanusa. Some of the information and data used, developed and considered in that truncated process, including information and data provided by Teck, is referenced and relied upon in the technical support documents that serve as the basis for the new rule, ARM 17.30.632.

22. Teck participated in the rulemaking for ARM 17.30.632 by attending public meetings, submitting formal written comments and delivering oral comments at public meetings, including the November 5, 2021 public hearing.

23. The new rule, ARM 17.30.632, was designed to, has been used to, and does target Teck. Ex. A., pp. 12-13; Ex. D, pp. 1-3 (DEQ Letter to IJC alleging "transboundary pollution" stemming from "Elk River valley mining operations" and requesting action); Ex. C, 109:4-14 (DEQ explaining the purpose of the rule is to "pressure" British Columbia so that an aligned (Montana) standard may be enforced against Teck); 24 Mont. Admin. Register, Not. 17-414, Bd. Resp. to Cmt. No. 30 (Board acknowledging and not disputing comment that "Teck is affected by the standard"). The process by which Teck is regulated pursuant to Canadian and provincial requirements was erroneously portrayed, wrongly used, and/or misinterpreted. Teck's information and data provided through the truncated collaborative process to review protection of Lake Koocanusa were also erroneously portrayed, wrongly used, and/or misinterpreted. Therefore, Teck is a

"person affected by" the standard who may petition the Board to review the rule. Mont. Code Ann. § 75-5-203(4)(a).

24. As required pursuant to Admin. R. Mont. 1.3.227(2)(h), Teck is aware that other public comments raised the same or similar concern (*see Supra* ¶ 2) regarding the new rule's stringency, which exceeds the 2016 EPA Guideline and triggers the requirements of Mont. Code Ann. § 75-5-203.

IV. RELIEF REQUESTED

THEREFORE, Teck respectfully requests that the Board:

1. Declare that ARM 17.30.632 is more stringent than the federal guideline for selenium in lentic water; therefore, the provisions of Montana Code Annotated § 75-5-203 apply.

2. Find that neither the initial nor subsequent publication of ARM 17.30.632 provided the requisite notice to the public that the water quality standard proposed for selenium in Lake Koocanusa was more stringent than the federal guideline.

3. Find that neither the initial nor subsequent publication of ARM 17.30.632 provided the requisite written finding, discussion of policy reasons, or analysis that supports the Board's decision to promulgate ARM 17.30.632, as required by Montana Code Annotated § 75-5-203.

4. Find that the Board's rulemaking record for ARM 17.30.632 does not support the written finding required by Montana Code Annotated §§ 75-5-203(2) and (3).

5. Initiate 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 by replacing the current 0.8 micrograms per liter water column standard for selenium in Lake Koocanusa with the federal guideline of 1.5 micrograms per liter selenium.

DATED this 30th day of June, 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 30th day of June, 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 (**original**) Board of Environmental Review 1520 E. Sixth Avenue P.O. Box 200901 Helena, MT 59620-0901 Regan.Sidner@mt.gov BER@MT.GOV	[ ] U.S. Mail [X] Overnight Mail [ ] Hand Delivery [ ] Facsimile [X] E-Mail
Arlene Forney Assistant to William W. Mercer and Victoria A. Marquis aforney@hollandhart.com	[ ] U.S. Mail [X] E-Mail

/s/ Victoria A. Marquis

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EXHIBIT A

HOLLAND&HART

Victoria A. Marquis
Associate
Phone 406.896.4612
vamarquis@hollandhart.com

November 23, 2020

SENT VIA E-MAIL sscherer@mt.gov

Board of Environmental Review
Sandy Scherer, Paralegal
Montana Department of Environmental Quality
1520 E. Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901

RE: In the Matter of the Amendment of ARM 17.30.602 and the Adoption of NEW RULE I pertaining to Selenium Standards for Lake Koocanusa and the Kootenai River, MAR Notice No. 17-414.

Dear Board Chair Deveny and Board Members:

Thank you for the opportunity to provide comments on the proposed site specific water quality standard for Lake Koocanusa and the Kootenai River cited above (Proposed Rule). This submission is made on behalf of Teck, a Canadian company, who operates in the Elk Valley, British Columbia.

Teck takes its commitment to sustainability and protecting water seriously and prioritizes this commitment across the organization. In fact, Teck is recognized around the world for its commitment and work. Teck was named to the Dow Jones Sustainability Index in 2020 for our 11th straight year. Teck was also named one of the Global 100 Most Sustainable Corporations and one of the Best 50 Corporate Citizens by Corporate Knights in 2020. Sustainalytics ranks Teck first in its Diversified Metals and Mining category. Teck is also currently listed on the MSCI World ESG Leaders, FTSE4Good Index, Bloomberg Gender Equality Index and Jantzi Social Index. Teck has more than 4,000 people employed at its operations in the Elk Valley, working hard to sustain their families and who are committed to protecting water quality on both sides of the border.

I. Summary

The Proposed Rule threatens interference with and impairment of Teck's operations in the Elk Valley, which are appropriately permitted and managed by the Province of British Columbia (B.C.), with input from the State of Montana. By deviating from the scientific process first initiated six years ago during permitting discussions and by asserting a water column standard that differs dramatically from the existing condition and from regulatory guidelines, the Proposed Rule goes too far, too fast without adequate scientific or operational support. The

water column standard offered in the Proposed Rule therefore appears unnecessary and unreasonable given the ongoing work of B.C. and Teck. Additionally, the evidence developed by DEQ does not support the Proposed Rule's departure from the United States' own federal guidelines issued by the Environmental Protection Agency (EPA). The process by which the Proposed Rule was developed is not consistent with Montana's previous deliberative rulemaking processes. The Proposed Rule is missing key inputs from the public, stakeholders, regulated community, and scientific experts. It is also technically deficient and not based on sound science. Furthermore, the Proposed Rule is not aligned with the Montana Water Quality Act and is unworkable, in part because it introduces poorly defined terms that are not compatible with the Montana Water Quality Act and because the tools needed to assess Lake Koocanusa and the Kootenai River as well as to implement, use, and enforce the Proposed Rule have not been developed or explained. Worse yet, the Proposed Rule does not comply with governing Montana statutes and has not been presented with enough information for the public to review and provide input on findings necessary to support a legally enforceable standard. The Proposed Rule is unnecessary, inconsistent, arbitrary and capricious.

II. Background

Teck has been an active participant on the Lake Koocanusa Monitoring and Research Committee (Committee) as well as observers to the Selenium Technical Subcommittee (Subcommittee) since the inception of those groups. The Montana Department of Environmental Quality (DEQ) has also been involved with those groups and has provided science-based technical advice to Teck's regulators in B.C. regarding development of Teck's 2014 Elk Valley Water Quality Plan through the Technical Advisory Committee (TAC). The TAC spent more than 200 hours meeting and discussing the Elk Valley Water Quality Plan and provided nearly 700 pieces of science-based advice to B.C. and Teck. The Elk Valley Water Quality Plan, developed with DEQ's input, provides enforceable site performance objectives for water quality in Teck's permitted mining operations in the Elk Valley.[1]

The TAC recommended that a site-specific ecological effects assessment be completed to evaluate whether the B.C. Water Quality Guideline of 2 micrograms per liter is protective of Lake Koocanusa. In 2014, the Committee and the Subcommittee were established, in part, for this purpose. DEQ is a member of the Committee and Co-Chair of the Subcommittee. Teck is a member of the Committee and an observer on the Subcommittee.

At that time, both the EPA guideline for selenium and Montana's selenium water quality standard were 5 micrograms per liter. Despite this, the Committee agreed to determine if the *lower* target of 2 micrograms per liter was protective of uses in Lake Koocanusa. The

[1] The Elk Valley Water Quality Plan was required by the Province of British Columbia pursuant to Ministerial Order No. M113 issued April 15, 2013 to "manage water quality to stabilize and reverse increasing trends in water contaminant concentrations" and to "set achievable water quality targets within the Elk Valley area." The Ministerial Order and the Elk Valley Water Quality Plan are available at: https://www2.gov.bc.ca/gov/content/environment/waste-management/industrial-waste/mining-smelting/teck-area-based-management-plan.

Committee adopted a collaborative, deliberative, and consensus-based process. As set forth in the draft memorandum of understanding, the Committee would:

> 1) collaborate for the purpose of protecting the uses of Lake Koocanusa that may be impacted by water quality constituents of potential concern; and 2) develop water quality criteria/objectives for Lake Koocanusa based on science-based water quality research plans/studies. The Participants **will seek consensus** in order to align water quality criteria/objectives with the intent of approving the same targets in both jurisdictions and achieving "one lake-one number."[2]

The Subcommittee, made up of some of the top selenium experts in North America, was convened to determine whether the target of 2 micrograms per liter was protective of uses in Lake Koocanusa.[3]

During the course of the Committee and Subcommittee's work, in 2016, the U.S. EPA updated its own national recommended selenium criteria.[4] The EPA update came after more than ten years of study, research and collaboration, relying on many of the same experts convened in the Subcommittee. The EPA recommended fish tissue criteria at 15.1 mg/kg dry weight egg/ovary, 8.5 mg/kg dry weight whole body, and 11.3 mg/kg dry weight muscle. Additionally, the EPA recommended a water column criterion of 1.5 micrograms per liter for lentic, or still water, systems. Although EPA published the guideline in 2016, Montana has not yet adopted the EPA guideline and the Montana water quality standard remains without fish tissue criteria, with only a water criterion set at 5 micrograms per liter for all waterbodies throughout the state.

The Committee work continued and generally included meetings each spring and fall from late 2015 through mid-2019. The Subcommittee met in person once every year from 2016 through 2019 and convened multiple teleconferences each year. Throughout this process, Montana and the B.C. government remained committed to collaborative work. In a Committee Work Plan updated in May 2020, the two governments reiterated their shared priority to approve "aligned water quality criteria/objectives for selenium for Lake Koocanusa".[5] A key step in the process was a commitment to "confirm status of **consensus agreement** on the proposed water

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[2] Committee and Subcommittee documents are available on DEQ's website at https://deq.mt.gov/DEQAdmin/LakeKoocanusa and the companion website at http://lakekoocanusaconservation.pbworks.com/w/page/100633354/FrontPage. All documents and information from those websites are important to and should be considered in this rulemaking.

[3] Draft Statement of Work for Lake Koocanusa selenium Technical Subcommittee, p. 2. As noted in the Subcommittee's Draft Statement of Work, the term "protective" was not defined and remains undefined for purposes of the Subcommittee's work.

[4] The EPA guidelines are a "non-regulatory, scientific assessment of ecologic effects." EPA, *Aquatic Life Ambient Water Quality Criterion for Selenium – Freshwater* (June 2016).

[5] *B.C. – MT 2020 Work Plan – Revised May 1, 2020* (available at http://lakekoocanusaconservation.pbworks.com/w/file/fetch/139880349/2020%20BC-MT%20WorkPlan_01May2020.pdf).

quality criteria/objective prior to moving forward with separate engagement and regulatory processes. If consensus is not reached, determine next steps."[6]

The Work Plan also provided timelines for development of a model to estimate selenium parameters for Lake Koocanusa and review of that model, including a June 2020 deadline by which United States Geological Survey (USGS)[7] was to release the "compiled data going into the model" (Model Inputs) to the public, followed by publication of the "final scientific investigations report (Modelling Report)" in August 2020.[8] This would have allowed the Subcommittee to review the USGS inputs and report and would have allowed the B.C. Government to review the model results with the Ktunaxa Nation Council and with Teck prior to the full Committee meeting planned for August/September 2020.[9]

Instead of the collaborative, orderly process designed and agreed upon in the Committee and Subcommittee, the USGS model inputs were not released to the public until August 11, 2020, at the same time as the Modelling Report. The Subcommittee members and Committee members then had a mere two weeks to review the information prior to the Committee meeting held on August 25, 2020. Comments regarding the model were due to the Subcommittee Co-Chairs by August 28, with no following meeting in which the comments could be reviewed and discussed. This was not an appropriate way to wrap up six years of cooperative study and work by some of the top experts in this field. Additionally, this represents a sharp deviation from DEQ's past practices of rulemaking, including the last site-specific rulemaking completed by the Board in June 2020.

Only four of the seven Subcommittee experts provided recommendations and of those, neither a consensus nor even a majority agreement was reached. One member, Joe Skorupa, requested additional time to review and provide comments, but his request was denied. A second member, Dr. David Janz, who provided expert review of the EPA guideline in 2014, did not provide comments and it appears that none were specifically sought from him.

Joe Beaman, U.S. EPA, Office of Water, Office of Science and Technology, Health and Ecological Criteria Division, Washington, D.C., who led EPA's development of the 2016 national guideline for selenium, reviewed the USGS model inputs and Modelling Report and had several critical comments, ultimately reaching a very different conclusion than DEQ did. Mr. Beaman disagreed with using a fish tissue concentration of 5.6 mg/kg dry weight whole body in the model, as DEQ has done in the Derivation Document.[10] Instead, he considered the fish species specific to Lake Koocanusa (including burbot), concluded that they were "comprehensively represented" by the EPA selenium toxicity database and other existing data and calculated a fish tissue criterion specific to the lake species of 9.2 mg/kg dry weight whole

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[6] *Id.*, p. 2 (emphasis added).
[7] While the USGS holds two seats on the Subcommittee, the modeling work was completed independent of the Subcommittee, under a contract with DEQ.
[8] *B.C. – MT 2020 Work Plan – Revised May 1, 2020*, p.1, 2.
[9] *Id.*, p. 2.
[10] DEQ, *Derivation of a Site-Specific Water Column Selenium Standard for Lake Koocanusa*, p. 41 (September 2020).

body tissue.[11] Because this level is greater than the EPA criterion of 8.5 mg/kg, Mr. Beaman recommended that the USGS model input should be the EPA criterion of 8.5 mg/kg which was demonstrably protective of all fish species in Lake Koocanusa.[12]

Using a "more refined species-specific approach applying more toxicological knowledge about the resident fish community," Mr. Beaman observed that a water column standard nearer the EPA guideline of 1.5 micrograms per liter would be "protective of the fish assemblage at Lake Koocanusa."[13] To evaluate protectiveness of downstream uses, Mr. Beaman analyzed data from white sturgeon eggs. He concluded that "selenium concentrations in sturgeon eggs do not show an increasing trend between 2015 and 2019" in the Kootenai River downstream from Lake Koocanusa.[14] Mr. Beaman noted that important data gaps existed. He recommended that a water quality standard for Lake Koocanusa be chosen such that it balances between protection of fish in Lake Koocanusa with protection of the white sturgeon downstream of the lake, is based on current conditions, and provides the "opportunity to refine regulatory thresholds in the future based on future monitoring actions targeted on refining the USGS model."[15]

Mr. Dave DeForest, who has decades of experience with selenium and is recognized as an expert who peer-reviewed the EPA guideline in 2014, reviewed site-specific data for Lake Koocanusa and concluded that the EPA guideline of 1.5 micrograms per liter "is protective of fish in Koocanusa Reservoir" and "protective of white sturgeon in the Kootenai River downstream of the Libby Dam."[16] Mr. DeForest considered the B.C. Environment Selenium Guidelines for fish tissue, which are lower than the EPA guidelines for fish tissue, and noted that the B.C. guidelines rely upon an "uncertainty factor of 2" which is "overly conservative and not supported by the science."[17] Mr. DeForest went on to explain how the EPA guidelines use a conservative approach based on the most sensitive species, resulting in protective criteria that do not require application of an uncertainty factor.[18]

Mr. DeForest attempted to validate the model outputs by comparing predicted fish tissue concentration to actual fish selenium data from Lake Koocanusa. He found that the USGS model "consistently over-predicted measured fish selenium concentrations."[19] Thus, the model was not properly calibrated to real Lake Koocanusa conditions. The model's over-prediction was due, in part, to model inputs for some factors (k_d values) that were not site-specific and "that are over-predicting selenium exposure in Koocanusa Reservoir." He noted that even using site-specific model inputs for other factors resulted in "consistent over-prediction of fish selenium concentrations," leading him to conclude that "the multi-step modeling approach appears to have

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[11] Exhibit A, attached (J. Beaman comments), p. 4; *see also* oral testimony and written comments to the Proposed Rule from Dr. Anne Fairbrother.
[12] *Id.*
[13] *Id.*, p. 7.
[14] *Id.*, p. 8.
[15] *Id.*, p. 9.
[16] Exhibit B, attached (D. DeForest Comments), p. 34.
[17] *Id.*, p. 6.
[18] *Id.*, pp. 5-8.
[19] *Id.*, p. 34.

too much uncertainty to support, by itself, recommendations for a site-specific selenium criterion for Koocanusa Reservoir."[20]

Despite this lack of consensus (or even a majority decision), despite requests from the experts for additional time, and despite delays that prevented full review and discussion among the experts, DEQ pressed forward, relying on the unreviewed Modelling Report to develop its Derivation Document and the Proposed Rule. The draft Proposed Rule was released to the public on September 11, but the supporting Derivation Document was not released until September 16, just eight days prior to initiation of the rulemaking.

Throughout September, DEQ hosted public meetings and provided virtual presentations about a draft Proposed Rule. During a meeting with local stakeholders, Montana legislators and Lincoln County commissioners requested additional time to consider the proposal, but that request was denied by DEQ. During their presentations, DEQ implied that the draft rule was being established jointly with the B.C. government and that the two governments had reached consensus. However, on September 28, 2020, the B.C. government issued a statement clarifying that they had "not yet selected a proposed water-quality objective for selenium" and that they would only establish such an objective after being "fully confident that the process has met this high standard" of "a science-based process informed by the best data available."[21]

Despite ample evidence that no consensus had been reached, DEQ requested initiation of rulemaking, which the Board agreed to on September 19, 2020, just eight days after the draft rule and Derivation Document had been released for public review.

III. The Process and Timing of this Rulemaking Are Wrong.

The rulemaking process employed for this Proposed Rule has been problematic and unreasonable because it short-circuited and then bypassed the planned, consensus-driven, collaborative, science-based process established through the Committee and Subcommittee, it did not allow time for expert dialogue and consensus, it is inconsistent with previous water quality standard rulemakings, and it disregarded requests from, and concerns raised, by Montana legislators and Lincoln County commissioners.

A. This Rulemaking is Neither Informed by Nor Considers Appropriate Expert Input.

As detailed in the Background section above, in August, DEQ cut short six years of collaborative, consensus-based dialogue with some of the best selenium experts in North America. Not only was the Subcommittee deprived of the opportunity to directly answer the very question for which they had been convened (is the B.C. Guideline of 2 micrograms per liter protective?), but the Subcommittee was not allowed adequate time for meaningful expert consultation. Although requested, DEQ refused to allow the experts more time to review and provide comments on the USGS model inputs and Modelling Report that serve as the basis for

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[20] *Id.*, p. 34.

[21] Exhibit C, attached, (B.C. Bulletin, available at https://news.gov.bc.ca/23207).

the Proposed Rule. Thus, the experts were never provided the opportunity to review and consider each other's comments. In fact, the Subcommittee comments on the model were not provided until the end of August, *after* the last Subcommittee and Committee meetings. It was therefore impossible for either the Subcommittee or the Committee to review and discuss the expert recommendations regarding the model inputs and the use of the model. This missed opportunity counsels against any conclusion that the Modelling Report upon which the Proposed Rule is based is the best available science. Given the time, effort and expense already devoted to this project, it does not make sense for DEQ to abandon that process, deny requests for additional time and abruptly end six-years of collaborative work without reaching a final consensus or even a majority decision – indeed without even receiving input from two of the specially recruited experts (Dr. Janz and Mr. Skorupa).

B. More Time is Needed for Review by Stakeholders, the Public and Government Officials.

The timing of this rulemaking is particularly bad – the world is in the midst of a pandemic that severely challenges many individuals' work performance for a variety of reasons (health issues, new childcare and education responsibilities, lack of an established working environment, to name a few) and prevents the face-to-face meetings that would normally be held by the Committee and Subcommittee to enable consensus-building dialogue. The pandemic also created obstacles for public and stakeholder participation and understanding of the Proposed Rule. These circumstances resulted in requests to DEQ for additional time, yet, DEQ again denied the requests.

The issue is complex enough that local legislators requested additional time in early September – even before the draft rule was provided to the public and before the Derivation Document was released for public review. At that point in time, when only preliminary information was presented by DEQ, it was obvious that the proposal was complicated and marked a drastic turn of events from DEQ's previous positions. For example, during the last public meetings held in Lincoln County in November 2019, DEQ presented information that did not indicate any pressing issues with selenium in the lake and did not indicate that an overly conservative standard - nearly half the federal guideline - would be proposed.[22] The overly conservative proposed standard, provided for the first time in early September, was unexpected and unexplained, yet DEQ afforded no additional time for consideration by even the local stakeholders.

C. This Rulemaking is Inconsistent with Previous Rulemakings.

Departing from normal procedures, DEQ requested that the Board convene a special meeting in September to initiate the rulemaking. The reason given by DEQ was that they wanted to finish the rulemaking before the change in administration at the end of the year. DEQ's

[22] Exhibit D, attached (DEQ's November 2019 Meeting Handout).

statements indicate that this rulemaking is not aligned with normal, expected and required scientific and technical motivations.

Contrary to previous water quality standard rulemakings, this Proposed Rule was not discussed with the Montana Legislature's Water Policy Interim Committee (WPIC) in a timely fashion. Previous rulemakings have been discussed with WPIC prior to their initiation. But again, in a significant departure from established procedures, DEQ did not present information to WPIC prior to rulemaking initiation. Instead, WPIC had to request information from DEQ, hold a special meeting, and receive the information after the rule had already been initiated. The WPIC members were concerned enough that half of them voted to invoke statutory rule review authority to ensure that additional time was provided for the rulemaking. This indicates that the state's policy-makers are hesitant to support this rushed rulemaking.

By comparison, the EPA took more than ten years and sought extensive expert and other collaboration, including outside expert peer review of their proposal, before updating the federal selenium guidelines. Here, DEQ had an opportunity to collaborate with some of North America's best experts on selenium, yet failed take the time to finish that collaboration. Additionally, DEQ published their Derivation Document just eight days prior to initiative of rulemaking – no expert review, peer review, or any review was sought. This is contrary to reasoned rulemaking and contrary to DEQ's own established protocols for rulemaking.

Recent water quality standard rulemakings related to numeric nutrient criteria and arsenic took years of collaboration and did not proceed to rule initiation without significant review and multiple efforts at stakeholder collaboration. For example, the most recent site-specific water quality standard rulemaking was completed by the Board in June 2020 (arsenic levels for the Yellowstone River). That process took two and a half years *after* modeling was completed and *after* the first publication of DEQ's technical support documents. The documents were revised at least twice, and multiple stakeholder groups were consulted prior to DEQ's use of the technical support documents to draft a proposed rule. Here, the modeling was completed and released to the public in August, just one month before the draft rule was released on September 11. The technical support document for this Proposed Rule, DEQ's "Derivation Document," was not even provided until September 16 and the rulemaking was initiated just eight days later, on September 24. For arsenic, DEQ allowed two and half years after the modeling was completed, held multiple stakeholder meetings and revised the documents at least twice before proposing a rule. Here, DEQ allowed just one month after the modeling was completed, refused requests for additional time and provided no opportunity for revisions to be made to the Derivation Document. Here, the entire process from completion of modeling to initiation of the rule took just one month. This is inconsistent with previous rulemakings and is unreasonable because it provides no time for any type of transparent or meaningful public process to take place.

IV. There is No Valid Basis for this Rulemaking

There is no threat to Lake Koocanusa that warrants this rulemaking. Neither the public notice of the Proposed Rule nor the Derivation Document clearly or thoroughly demonstrates any reasonable necessity for the Proposed Rule. DEQ's 2012 assessment of the lake has been proven wrong over time and DEQ presents no water quality data or fish tissue data that warrant

this rulemaking. Further, no legal metric indicates any threat to the lake that would warrant promulgation of this Proposed Rule now.

A. The 2012 "Threatened" Assessment of Lake Koocanusa is Wrong.

DEQ has not completed a Water Quality Assessment for Lake Koocanusa since 2012, and even that assessment has been proven wrong over time. In 2012, DEQ projected, based on estimates from the Elk River, that Lake Koocanusa would exceed the current water quality standard of 5 micrograms per liter by 2015. Now, in 2020, DEQ reports that the water quality in Lake Koocanusa is approximately 1.0 microgram per liter for selenium. Clearly, the estimates upon which DEQ based its 2012 "threatened" listing were wrong, making the listing itself wrong.

B. The Data Presented Does Not Support the Proposed Rule.

From 2013 to 2019, 633 water samples were collected from Lake Koocanusa. That robust dataset shows selenium concentrations ranging from 0.23 micrograms per liter to 2.3 micrograms per liter, with an average of 1.0 micrograms per liter.[23] That dataset shows the lake to be in compliance with not only the Montana standard of 5 micrograms per liter, but also the more restrictive EPA guideline of 1.5 micrograms per liter and the British Columbia Water Quality Guideline of 2.0 micrograms per liter. The 30-day monthly average is less than or equal to the EPA's guideline of 1.5 micrograms per liter for all months. Importantly, the data, as graphed by DEQ, does not show an increasing trend in selenium levels in the lake.[24]

Neither an upward trend in selenium levels, nor any harm is shown by DEQ's presentation of fish tissue data. As detailed by Mr. DeForest in his comments to the Subcommittee, there are issues with the lack of composite samples and improper reliance on unripe ovary data. EPA guidance on fish tissue sampling uses a composite of 3 to 10 individual samples when comparing fish tissue samples to the criterion. Here, neither the Proposed Rule nor the derivation document refer to composite samples. It seems that DEQ counts three individual fish as three data points, contrary to EPA guidance that would consider those three individual fish as one data point. Additionally, the stage of development of the ovaries is important to egg/ovary data collection; however, the stage of development was not recorded in the fish tissue samples taken from Lake Koocanusa. Because reliance upon immature ovary data may lead to falsely high data, the ovary fish tissue data presented by DEQ is not conclusive and worse, likely presents an inaccurate, falsely elevated, view of fish tissue in Lake Koocanusa.

Each fish species has different sensitivity to selenium. The EPA guideline of 15.1 mg/kg dry weight is based on the most sensitive species, but when considering fish tissue data, DEQ failed to consider the species-specific sensitivity levels. This leads to misinterpretation of the data presented for redside shiners, which are not sensitive to selenium. Of the 915 fish tissue samples collected and analyzed, only egg/ovary data from three individual redside shiners were above the EPA guideline of 15.1 mg/kg dry weight. However, all redside shiner results were

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[23] Derivation Doc., p. 20.
[24] *Id.*

below the species-specific No Observed Effects level of ≥28 mg/kg dry weight. This data does not suggest any troublesome trend or adverse effects caused by selenium in Lake Koocanusa. This comports with statements made by DEQ and FWP, noting that no adverse impacts to aquatic life on a population scale have been observed in Lake Koocanusa.[25]

C. The Proposed Rule Sets Up a Confusing Situation Impossible to Resolve.

It would be misguided to finalize the rule as proposed and establish a water column standard for selenium in the lake at 0.8 micrograms per liter. Per DEQ's data, the lake already exceeds that level much of the time. Therefore, the lake may automatically be considered "impaired" because it will not always meet the new water quality standard. An "impairment" listing implies that harm is occurring, yet none has been noted. Further, because DEQ has no permitted sources within Montana to regulate, the lake will apparently remain impaired in perpetuity. Not only is such an automatic "impairment" listing contrary to the data and evidence before the Board, it also serves no valid purpose in terms of state laws and rules.

Also alarming, DEQ is using a criterion for fish tissue that does not apply in Montana to conclude that there is harm occurring such that adoption of that criterion is warranted. This is circular reasoning at best. DEQ has no authority to assess Lake Koocanusa by relying upon the federal guideline that has not yet been adopted in Montana. Any assessment determination (i.e.: concluding there is harm) based on the EPA guideline for fish tissue is not legal under the Montana Water Quality Act.

Even more distressing is the fact that Montana has no publicly reviewed and/or DEQ-adopted assessment methodology for assessing waterbodies based on fish tissue data. Assessment methodologies are important to proper administration of the Montana Water Quality Act because they provide a protocol for collecting data that conforms to specific data quality requirements and they provide consistent, reliable methods for assessing waterbodies throughout the state. Here, there is no formal assessment piece specific to fish tissue - there is nothing that the public can look to in order to figure out what data was supposed to be collected and in what manner, or how it was supposed to have been evaluated and how it was supposed to have been used to determine whether aquatic life is supported in Lake Koocanusa. This is a problem. DEQ has proclaimed that there are issues with aquatic life in the lake, but there is no assessment method by which DEQ can properly and consistently make that determination. An assessment methodology must be prepared, publicly reviewed and adopted by DEQ before any conclusion about harm based on fish tissue data can be made and before a rule can be proposed or initiated for fish tissue.

DEQ recently provided two assessment methods for public comment – one for salinity parameters and one for *E. coli*. Those assessment methods provide detailed descriptions of data considerations, including data currency, the time of year and time of day it should be collected, spatial and temporal sampling requirements, data quality requirements, data analysis methods,

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[25] *See* Records of September 9, 2020 Public Meeting and September 11th WPCAC Meeting.

and assessment decision framework.[26] The assessment methods are important because, as DEQ notes, they "present the required data, analyses, and decision frameworks used to make [] parameter-specific impairment listing decisions."[27]

There is no assessment method in Montana for fish tissue analyses, yet this appears to be the first, and only, standard in Montana that is dependent upon fish tissue data. The Proposed Rule therefore introduces an entirely new regulatory scheme for Montana, but without any dependable, reliable or consistent method for gathering data necessary for implementation, ensuring that it is appropriate data, or providing a framework for appropriately using the data to assess a waterbody. This, too, is inconsistent, improper, and problematic – especially in this case. As noted above, if the rule is finalized as proposed, the lake could automatically be considered as exceeding the standard and therefore may be considered "impaired." Yet Montana does not even have a publicly vetted or formally adopted assessment method to truly determine, scientifically and through a publicly vetted technical process, whether the lake really is impaired. In this case, it is improper for DEQ and the Board to set up a regulation dependent on fish tissue data without a publicly vetted and legally adopted assessment methodology. Any impairment assessment or conclusion of harm is premature and not based on any process grounded in Montana law or policy.

The legally enforceable metric for assessing Lake Koocanusa is the current Montana standard of 5 micrograms per liter, for which there are no exceedances. Reliance upon a federal criterion to imply some harm or problem in Montana, when that federal criterion does not apply in Montana, is wrong. Promulgation of a standard that may automatically result in an impairment determination, without having a valid assessment methodology for fish tissue on record, is also wrong.

V. The Proposed Rule Will Cause Harm with No Benefit

As noted above, if the rule is finalized as proposed, and the lake is subsequently listed as "impaired" because its current condition exceeds the proposed standard much of the time, then specific actions may be required – including development of a Total Maximum Daily Load (TMDL) or other regulatory controls to ensure progress toward meeting the standard. But here, there is no way for Montana to ensure progress toward the standard because there is nothing for Montana to control or regulate. DEQ agrees that there are no point sources of selenium for it to regulate and DEQ has even asserted that there are no nonpoint sources of selenium. Because Montana is left with nothing to regulate to ensure compliance with the standard, the proposed rule will set up a scenario of perpetual impairment, which does not benefit anybody or anything.

Because it is not clear how DEQ could or would enforce a site-specific standard, the Proposed Rule creates uncertainty at both the local and international levels. The local stakeholders will not have any means to remove an "impairment" listing from the lake. This

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[26] Both draft assessment methods are available on DEQ's Water Quality Integrated Report webpage at https://deq.mt.gov/Water/Resources/report (last accessed November 21, 2020).

[27] *Id.*

may create a situation that strains Teck's partnership with Montana companies and negatively impacts Teck's employment of more than 4,000 men and women in the Elk Valley, many of whom recreate and spend money on both sides of the border. Internationally, Montana's unilateral action upends its historic commitment to collaboration with B. C. on the issue, which may have unintended consequences, particularly when the Proposed Rule is aimed solely at foreign operations of a foreign company, in tension with fundamental principles of U.S. and international law and policy.

A. The Proposed Rule Inappropriately Focuses on Teck's British Columbia Operations.

The Derivation Document is awkwardly focused on Teck – a Canadian corporation. No other Montana water quality standard rulemaking process has been, nor should be, premised on a single corporation's operation, let alone a corporation that operates on the other side of an international border and is wholly regulated by a foreign government.

Teck, of course, is already required by British Columbia to manage selenium in the Elk Valley area. In establishing this requirement, British Columbia noted that a plan that includes new and emerging treatment technologies, while protecting the regional economy, would be appropriate to address water quality concerns.[28] Since the Ministerial Order was issued in 2013, Teck has been progressing as rapidly and prudently as possible to appropriately address water quality concerns. In fact, Teck has been a leader in selenium treatment, employing expert scientists from Montana to deploy cutting-edge technology on a large-scale basis in the Elk Valley.[29]

As noted above in the Background section, DEQ has been involved in the regulatory result of Ministerial Order No. M113, which is the 2014 Elk Valley Water Quality Plan. To the extent that the Proposed Rule aims at impacting the Elk Valley Water Quality Plan and implementation of it, or otherwise to govern Teck's operations in Canada, DEQ lacks legal authority to do so. Such efforts threaten to impair and/or interfere with Teck's legal operations.

B. Teck's Operations Are Appropriately Regulated by British Columbia.

B.C. is already appropriately regulating selenium issues that may, arguably, impact Lake Koocanusa. Since issuance of the Ministerial Order in 2013, Teck has completed the West Line Creek Active Water Treatment Facility and has worked with top scientists to develop a novel and comprehensive treatment technology through Saturated Rock Fills.[30] A Saturated Rock Fill (SRF) facility was added as a pilot project at Elkview and will be fully operational later this year. Even more treatment is planned – a tank-based treatment facility at Fording River will be online in the first quarter of 2021 and additional SRFs will come online later. Currently, some 17.5 million liters are treated annually. By 2021, Elk Valley Water Treatment capacity is on track to

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[28] Province of British Columbia, Ministerial Order No. M113.

[29] See written comments and oral testimony provided by Dr. Lisa Kirk.

[30] See written comments and oral testimony provided by Dr. Lisa Kirk; see also Exhibit E attached (Report of the Independent Peer Review Panel for F2 Saturated Rock Fill Project at Elk View).

reach 47.5 million liters. By 2024, capacity is expected to reach 77.5 million liters total. Teck will have invested approximately $742 million by the end of 2020 to implement the Elk Valley Water Quality Plan and estimates spending a further $350-$400 million on water treatment from 2021 to 2024. Teck is spending millions of dollars every year and is pursuing treatment for selenium as rapidly and prudently as possible – all in accordance with the objectives of the Elk Valley Water Quality Plan imposed by the agency that actually has jurisdiction over Teck.

There is no evidence, nor even any suggestion that Teck could move any more quickly. Not only does this progress prove DEQ's statements of increasing loads and increasing trends wrong, it also illustrates that this Proposed Rule is unnecessary and unreasonable in light of the regulatory controls and progress being made under Canadian law. Teck has and continues to make significant progress toward achieving the objectives of the Elk Valley Water Quality Plan, which was developed with input from DEQ. Yet DEQ ignores this progress and fails to appreciate the operational practicalities, feasibilities and economics of bringing treatment facilities online.

VI. The Proposed Rule is Unworkable

The proposed rule inserts new concepts in the Montana Water Quality Act that are poorly defined and not understood. Fish tissue criteria are a new concept that are problematic because no accompanying assessment methodology has been provided, as noted above. Additionally, "Steady State" is a new concept, poorly understood and poorly defined. The new rule includes no time component or other guidance regarding how and when "steady state" will be determined, how and when such determinations will be reviewed and by whom, nor does it specify what "stabilized" means in qualitative terms. Although the proposed rule provides that steady state will be determined during the triennial review, it is not clear who will fund and complete the monitoring.

As noted by DEQ and the Committee, "[b]etween 1977 and 2000 drawdowns of the reservoir averaged 111 feet and dramatically affect the biological life in the reservoir."[31] The fluctuating water elevations resulting from Libby Dam operations, by default, create a non-steady state, and implementation of upstream water treatment by Teck will also, by default, result in "changing" (e.g., decreasing) selenium loads. As a result, the proposal to rely only on water column data until "steady-state" has been achieved is flawed.

The Proposed Rule is also unworkable because it provides no mechanism for determining how violations will be determined or how enforcement will take place. It states that "fish tissue standards are expressed as instantaneous measurements not to be exceeded," but elsewhere acknowledges that selenium bioaccumulates over time. It is illogical for an "instantaneous measurement" of something that bioaccumulates over time to be used for compliance and enforcement. The Proposed Rule provides no logical means for determining liability for water quality exceedances. Further, DEQ states that it has no sources in Montana to regulate; therefore, not only does DEQ lack anything to regulate, it has not described how it will regulate

[31] Committee Terms of Reference – Draft, p. 6 (*citing* Dunnigan et al., 2012).

anything or control any water quality exceedances. These are not questions that should be kicked down the road until sometime *after* rulemaking.

The rule provides a new trigger limit of 0.02 micrograms per liter, indicating that the nondegradation limit for selenium in Montana Pollutant Discharge Elimination System (MPDES) permits will be 0.02 micrograms per liter, which is the detection limit. Therefore, detection of any amount of selenium will exceed the permit limit. There is no room for any background and no room for a higher detection limit should one be needed, making the rule impractical and unworkable.

VII. The Derivation Document is Technically Deficient

Several experts have already pointed out deficiencies in the USGS model and in the development of the Proposed Rule. Teck references and incorporates those deficiencies noted in documents provided by Joe Beaman, Dave DeForest, and Teck in response to the USGS modelling report,[32] as well as comments provided by Dr. Anne Fairbrother with regard to this rulemaking. DEQ has not responded to, nor explained, its deviation from the expert recommendations offered by the Subcommittee members, which is unreasonable, arbitrary and capricious given the high level of expertise recruited for the Subcommittee and the technical acuity of their recommendations. Notably, the Subcommittee could have, but was not requested to review or provide input on either the Proposed Rule or DEQ's Derivation Document. Without review and input from the Subcommittee, the Proposed Rule cannot be said to incorporate the best available science.

In addition, we note that DEQ unexplainably varies the use of model inputs under different scenarios. For example, when DEQ uses the overly-conservative fish tissue threshold of 5.6 mg/kg dry weight, they use the Subcommittee recommended enrichment factor and a site-specific bioavailability factor, but when DEQ uses the more appropriate fish tissue threshold of 8.5 mg/kg, the enrichment and bioavailability factors are increased without explanation.[33] The results of the scenarios cannot be legitimately compared because too many variables have been changed without explanation. DEQ has failed to explain why the bioavailability and enrichment factors have been changed in the modeling scenarios and no rational explanation exists. Where valid site-specific factors are available, they should be incorporated into all modeling scenarios. The result here is that the Proposed Rule presents an overly conservative and falsely low selenium standard that does not actually incorporate site-specific data.

Based on DEQ's use of the model, a water column value average of 1.0 micrograms per liter should result in fish tissue levels exceeding the whole body level of 8.5 mg/kg dry weight. Yet the data collected so far does not reveal whole body fish tissue levels anywhere near that high.[34] Therefore, using existing data to check the model shows that the model is wrong.

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[32] Exhibits A, B, and F.
[33] Derivation Document, p. 41.
[34] *Id.*, App. A, p. 102.

The Derivation Document wrongly relies on data from the Elk River from the 1980s through 2019 to establish increasing selenium trends.[35] The most recent data (after water treatment began in 2014) is different enough from the previous data that only the smaller data set beginning in 2014 should be presented when considering selenium trends in waterbodies upstream from Lake Koocanusa. Additionally, Elk River data and trends do not equate to Lake Koocanusa data and trends because the Elk River does not provide the majority of the water in the lake.

The Proposed Rule and Derivation Document also fail to consider natural background levels of selenium in tributaries to Lake Koocanusa. Data from 2016 presented by DEQ shows selenium in all of the tributaries that discharge to and are upstream of Lake Koocanusa. Levels range from 0.04 µg/L at Gold Creek at mouth to 0.5 µg/L at Bristow Creek, Jackson Creek, McGuire Creek and Warland Creek.[36] Data from EPA's Water Quality Exchange indicates that tributary levels are "non-detect;" however, that data is dependent on a detection limit of 0.9 micrograms per liter, which is greater than the background levels discovered in the 2016 and greater than the proposed water column standard in the Proposed Rule. So that "non-detect" data does not affirmatively establish whether or to what extent background levels impact Lake Koocanusa's exceedance of the water column standard in the Proposed Rule.[37] Neither the Derivation Document nor the Proposed Rule consider natural background levels or other potential sources of selenium.

Finally, the Derivation Document fails to account for naturally-occurring selenium contributed to the water from bank sloughing events along the reservoir. As documented in DEQ's "Analysis of 2013 Lake Koocanusa Sediment Data," selenium exists in the soil along the banks and shoreline of Lake Koocanusa.[38] As the reservoir water levels change and as a result of wind and water movement caused by recreation, the shoreline and banks become susceptible to erosion and sloughing that adds soil and therefore selenium to the lake. Given that soil levels may be near the proposed standard, such an addition is significant enough to warrant consideration in the Derivation Document and/or proposed rule.

The Proposed Rule and Derivation Document fail to consider these important technical issues; therefore, the rulemaking is incomplete, technically deficient and does not support proper promulgation of a final rule.

VIII. 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 Mont. Code Ann. § 75-5-203(2). There must be evidence in the record that the proposed standard protects public health or the environment. Here, contrary evidence exists, in part because the proposed rule does not account for naturally-occurring and background levels of selenium. There must also be evidence in the

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[35] *Id.*, p. 20.
[36] Exhibit G, Lake Koocanusa Tributary Sampling, 2016 Montana.
[37] Data available at https://www.waterqualitydata.us/portal/.
[38] Exhibit H, attached, Analysis of 2013 Lake Koocanusa Sediment Data.

record that the standard can mitigate harm to the public health or environment. Here again, contrary evidence exists. In fact, DEQ cannot regulate any of the alleged sources of selenium to Lake Koocanusa; therefore, even if there was any harm to the public health or environment, the rule would not be able to mitigate that harm anyway. There must be evidence in the record that the standard is achievable, but here, there is none. Neither the Proposed Rule nor the Derivation Document provides any assessment of mitigation or achievability, as required by law.

The final rule must include information regarding the costs of the regulated community, yet no such information was provided with the Proposed Rule so that the regulated community could review and offer comments on the information. As noted above, the Proposed Rule is not practically or operationally achievable, even without considering costs. The cost of compliance is incalculable because it is not clear how compliance would be measured or when it would or could be achieved.

The Proposed Rule states that EPA guidance "includes a recommendation that states and tribes develop site-specific selenium standards, whenever possible, due to the local environmental factors affecting selenium bioaccumulation in aquatic ecosystems." This language, specifically "whenever possible" is not found in the EPA guidance.

There has been no consideration of the economics of waste treatment and prevention, as required when adopting water quality standards. Mont. Code Ann. § 75-5-301(2). The level of treatment required to achieve the proposed standard is undefined and undefinable because the standard is not achievable. Both DEQ and EPA have stated that they have not and do not consider economic impacts. This position appears incongruent with the Clean Water Act. When resolving issues arising from differing water quality standards between States and Indian Tribes, the EPA must consider "relevant factors including, but not limited to, the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of the waters subject to such standards. Such mechanism should provide for the avoidance of such unreasonable consequences in a manner consistent with the objective of this chapter." 33 U.S.C.A. § 1377(e).

DEQ has also indicated a need to enact the strict standard otherwise the State of Montana may be liable to the State of Idaho for selenium pollution. There appears to be no legal basis for this statement. Upstream states may be liable to downstream states for water pollution caused by the upstream state's *permitted* discharges, but here, DEQ has admitted and Idaho appears to acknowledge, that DEQ has no permitted discharge to regulate. *Arkansas v. Oklahoma*, 503 U.S. 91 (1992). Upstream states may be required to manage nonpoint sources of pollution within their state to meet a downstream state's water quality standard. 40 C.F.R. § 131.10(b). But here again, Montana has asserted that it has no nonpoint sources of selenium pollution. Therefore, the legal authority upon which DEQ seems to rely is not apparent for this type of situation, where Montana has no regulatory authority over the point source and has avowed that no nonpoint sources exist in the watershed.

DEQ has portrayed the need for the rule as based on a "concern" that the current standard is not protective and on "uncertainty" of what standard is protective. Neither provides a legal basis for setting a water quality standard. Mont. Code Ann. § 75-5-301(2); Admin. R. Mont.

17.30.601. Alternatively, DEQ has asserted the need to enact a "protective" standard. Such statements, together with the fact that the proposed standard is less than the condition of the lake during much of the time, imply that the lake requires protection now and that there is some current harm against which the lake must be protected. But that simply is not the case, as pointed out above.[39] Although the protection of designated uses is a concept of the Montana Water Quality Act, it is not unbounded. The protection must be balanced by considering the economics of waste treatment as well as "the inalienable rights to pursue life's basic necessities and possess and use property in lawful ways." Mont. Code Ann. §§ 75-5-101(3); 75-5-301(2).

IX. Conclusion

For the last six years, Teck, under the jurisdiction of its own regulators, in consultation with DEQ, has been focused and deeply committed to treating selenium and reducing selenium loading in the Elk Valley. Teck has become an industry leader globally, on the cutting edge of technology for selenium treatment.[40] The Proposed Rule fails to acknowledge this reality and fails to consider B.C. regulation of Teck's operations. The Proposed Rule also ignores the existing data for Lake Koocanusa, which does not indicate any harm or any need for the extreme standard change presented in the Proposed Rule. The Proposed Rule is based on a technically deficient support document and unworkable text in the rule. Worse, the proposed rule is contrary to DEQ's procedures and governing statutes. While Teck remains committed to the science-based, collaborative process initiated by the Committee and the Subcommittee, Teck is opposed to this proposed Montana standard for all the reasons set forth in this letter. In the event the Proposed Rule is adopted, Teck reserves all of its rights, including regarding the lack of jurisdiction of Montana to enact a standard targeting its Elk Valley operations. We urge the Board to send this rulemaking back to DEQ to finish the scientific, collaborative process and obtain appropriate consensus among the experts.

Sincerely,

For: Victoria A. Marquis
Associate
for Holland & Hart LLP

VAM:asf
Enclosures

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[39] Notably, DEQ could have avoided some uncertainty had they allowed the Subcommittee to complete its task of determining whether 2.0 micrograms per liter was protective of Lake Koocanusa.
[40] See written and oral comments from Dr. Lisa Kirk.

EXHIBIT B

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8
1595 Wynkoop Street
Denver, CO 80202-1129
Phone 800-227-8917
www.epa.gov/region8

February 25, 2021

Ref: 8WP-CWQ

Steven Ruffatto
Chair, Montana Board of Environmental Review
Montana Department of Environmental Quality
Metcalf Building, 1520 East Sixth Avenue
P.O. Box 200901
Helena, Montana 59620-0901

Subject: EPA's action on Montana's Revised Selenium Criteria for Lake Koocanusa and the Kootenai River (ARM 17.30.632 & ARM 17.30.602(32))

Dear Mr. Ruffatto:

The U.S. Environmental Protection Agency (EPA) has completed its review of Montana's revised water quality standards (WQS) and is approving the Administrative Rules of Montana (ARM) 17.30.632 and 17.30.602(32) as described in the enclosure to this letter. Receipt of the submission on December 28, 2020, initiated EPA's review of the revised WQS pursuant to Section 303(c) of the Clean Water Act (CWA) and the implementing federal WQS regulation (40 C.F.R. Part 131). The submission included: (1) the revised WQS adopted by the Board of Environmental Review on December 11, 2020 now codified at ARM 17.30.632 and 17.30.602(32); (2) rulemaking documents including a Technical Support Document, public notices, public comments, and response to comments; (3) transcript of the public hearing on November 5, 2020; and (4) Special Assistant Attorney General's certification that the WQS were duly adopted pursuant to state law. Although the new and revised rules took effect under state law on December 25, 2020, the EPA's approval under CWA Section 303(c) is required before the WQS are effective for CWA purposes.

Clean Water Act Review Requirements

CWA section 303(c)(2), requires states and authorized Indian tribes[1] to submit new or revised WQS to EPA for review. EPA is required to review and approve, or disapprove, the submitted standards. Pursuant to CWA § 303(c)(3), if EPA determines that any standard is not consistent with the applicable requirements of the Act, the Agency shall, no later than the ninetieth day after the date of submission, notify the state or authorized tribe and specify the changes to meet the requirements. If such changes are not adopted by the state or authorized tribe within ninety days after the date of notification, EPA is to promptly propose and then promulgate such standard pursuant to CWA section 303(c)(4). The Region's

[1] CWA section 518(e) specifically authorizes EPA to treat eligible Indian tribes in the same manner as states for purposes of CWA section 303. *See also* 40 C.F.R. § 131.8.

goal has been, and will continue to be, to work closely with states and authorized tribes throughout the water quality standards development process to ensure that statutory and regulatory requirements are clear. Pursuant to 40 C.F.R. § 131.21(c), new or revised state standards submitted to EPA after May 30, 2000, are not effective for CWA purposes until approved by EPA.

Today's Action

Montana adopted revised selenium criteria for the protection of the Class B-1 designated uses[2] for the portions of Lake Koocanusa and the Kootenai River (summarized in Table 1) in Montana. 40 C.F.R. § 131.11 describes the regulatory requirements for water quality criteria. Today's action addresses submitted changes to ARM 17.30.602(32) and 17.30.632 that include new or revised WQS requiring EPA's review and action under CWA section 303(c). EPA is approving ARM 17.30.602(32) and 17.30.632, except for portions of ARM 17.30.632(4) and 17.30.632(6) that EPA has determined are not new or revised WQS requiring EPA action pursuant to CWA section 303(c). The rationale for EPA's decisions is in the enclosure.

Selenium criteria adopted by Montana for Lake Koocanusa and the Kootenai River

Media Type	Fish Tissue		Water Column
Criterion Element	Egg/Ovary	Whole Body or Muscle	Monthly Average Exposure
Magnitude	15.1 mg/kg dw	Whole Body 8.5 mg/kg dw Muscle 11.3 mg/kg dw	Lake Koocanusa 0.8 µg/L Kootenai River 3.1 µg/L
Duration	Instantaneous measurement	Instantaneous measurement	30 days
Frequency	Not to be exceeded	Not to be exceeded	Shall not be exceeded more than once in three years, on average

Endangered Species Act Requirements

EPA's approval of Montana's revised selenium criteria submitted on December 28, 2020 is in compliance with the Endangered Species Act (ESA), 16 U.S.C. § 1536 *et seq*. Under Section 7(a)(2) of the ESA, EPA must ensure that its approval of these modifications to Montana's WQS is not likely to jeopardize the continued existence of threatened and endangered species or result in the destruction or adverse modification of designated critical habitat of such species. EPA initiated consultation with the US Fish and Wildlife Service (USFWS) regarding the potential effects of this action on April 28, 2020 via an email sent to Jacob Martin, Assistant Field Supervisor, Montana Ecological Services Field Office. EPA kept the USFWS apprised of the state's development of the criteria throughout 2020. EPA sent a final Biological Evaluation to the USFWS on February 18, 2021. EPA received a letter from the USFWS on February 25, 2021 concurring with EPA's determination that approval of Montana's revised water quality standards for selenium "may affect, but is not likely to adversely affect" either the bull trout and its designated critical habitat or the white sturgeon within the action area.

[2] Class B-1 includes the following designated uses: drinking, culinary, and food processing purposes after conventional treatment; bathing, swimming, and recreation; growth and propagation of salmonid fishes and associated aquatic life, waterfowl and furbearers; and agricultural and industrial water supply. See ARM 17.30.609 and ARM 17.30.623.

Indian Country

EPA's approval of Montana's submitted WQS does not extend to Indian country as defined in 18 U.S.C. §1151. Indian country generally includes (1) lands within the exterior boundaries of the following Indian reservations located within Montana: the Blackfeet Indian Reservation, the Crow Indian Reservation, the Flathead Reservation, the Fort Belknap Reservation, the Fort Peck Indian Reservation, the Northern Cheyenne Indian Reservation, and the Rocky Boy's Reservation; (2) any land held in trust by the United States for an Indian tribe; and (3) any other areas that are "Indian country" within the meaning of 18 U.S.C. §1151. Today's action is not intended as an action to approve or disapprove WQS for waters within Indian country. EPA, or eligible Indian tribes, as appropriate, retain responsibilities under CWA section 303 in Indian country.

Conclusion

EPA commends Montana for collaborating with multiple stakeholders for over five years to develop a site-specific selenium water column element for Lake Koocanusa consistent with the approaches recommended by EPA for developing site-specific selenium criteria. The adoption of fish tissue criterion elements for Lake Koocanusa as well as fish tissue elements and a water column criterion element for the Kootenai River that are the same as the current EPA recommended selenium criterion elements are also important improvements. We thank Montana for your work to protect and improve these waters and look forward to continued partnership in this watershed. If you have any questions, please contact Tonya Fish on my staff at fish.tonya@epa.gov.

Sincerely,

JUDY BLOOM Digitally signed by JUDY BLOOM Date: 2021.02.25 15:31:06 -07'00'

Judy Bloom
Manager, Clean Water Branch

Enclosure

Rationale for the EPA's Approval of Revised Selenium Criteria for Lake Koocanusa and the Kootenai River (ARM 17.30.632 and ARM 17.30.602(32))

Water quality standards (WQS) include: (1) designated uses; (2) water quality criteria that support the designated uses; (3) antidegradation requirements; and optional general policies. 40 C.F.R. Part 131. At issue in this action are water quality criteria for selenium adopted by Montana for the protection of the Class B-1 designated uses[3] in Lake Koocanusa and the Kootenai River (ARM 17.30.632 and ARM 17.30.602(32)).[4]

1. Clean Water Act and 40 C.F.R. Part 131 Requirements Relevant to Water Quality Criteria

Clean Water Act (CWA) section 101(a)(2) establishes as a national goal the achievement of water quality that provides for the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water. CWA section 304(a)(1) requires EPA to develop and publish and, from time to time, revise national recommended criteria for protection of water quality and human health that accurately reflect the latest scientific knowledge. Water quality criteria developed under CWA section 304(a) are based solely on data and scientific judgments on the relationship between pollutant concentrations and environmental and human health effects. CWA section 304(a) criteria do not reflect consideration of economic impacts or the technological feasibility of meeting pollutant concentrations in ambient water.

EPA uses Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses (1985) (commonly referred to as the "1985 Guidelines" or "Aquatic Life Guidelines" and hereafter referred to in this document as "Aquatic Life Guidelines") to derive 304(a) criteria recommendations to protect aquatic life from the effects of toxic pollutants. These Aquatic Life Guidelines describe an objective way to estimate the highest concentration of a substance in water that will not present a significant risk to the aquatic organisms in the water. This EPA method relies primarily on acute and chronic laboratory toxicity data for aquatic organisms from eight taxonomic groups reflecting the distribution of aquatic organisms' taxa that are intended to be protected by water quality criteria.

EPA's WQS regulation at 40 C.F.R. Part 131 interprets and implements CWA sections 101(a)(2) and 303(c). 40 C.F.R. § 131.11(a)(1) requires that water quality criteria adopted by states and authorized tribes[5] "be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use." For waters with multiple use designations, the criteria must support the most sensitive use. Designated uses are those uses specified in WQS for each water body or segment whether or not they are being attained (40 C.F.R. § 131.3(f)). In other words, designated uses establish the environmental objectives for each water body (*e.g.*, aquatic life, recreation, drinking water, agriculture,

[3] Class B-1includes the following designated uses: drinking, culinary, and food processing purposes after conventional treatment; bathing, swimming, and recreation; growth and propagation of salmonid fishes and associated aquatic life, waterfowl and furbearers; and agricultural and industrial water supply. See ARM 17.30.609 and ARM 17.30.623.

[4] See www.mtrules.org/gateway/Subchapterhome.asp?scn=17%2E30.6.

[5] CWA section 518(e) specifically authorizes the EPA to treat eligible Indian tribes in the same manner as states for purposes of CWA section 303. See also 40 C.F.R. § 131.8.

etc.). Numeric criteria may be based on EPA's CWA section 304(a) guidance, CWA section 304(a) guidance modified to reflect site-specific conditions, or other scientifically defensible methods (40 C.F.R. § 131.11(b)). CWA section 510 and EPA's CWA implementing regulations allow states to adopt water quality standards that are more stringent than may be strictly necessary under federal law.[6]

2. Background

Montana's revised selenium criteria are applicable to the surface waters of Lake Koocanusa and the Kootenai River within Lincoln County, Montana. The Kootenay River (note different spelling in British Columbia) originates in southeast British Columbia and flows south into Montana near the town of Eureka. The river is impounded by Libby Dam, creating Lake Koocanusa. Downstream of Libby Dam, the Kootenai River flows west into Idaho and then north into British Columbia, forming Kootenay Lake (see Figure 1).

Selenium is an essential micronutrient and low levels of selenium in the diet are required for normal cellular function in almost all animals. However, selenium at amounts not much above the required nutritional levels can have toxic effects on aquatic life and aquatic-dependent wildlife, making it one of the most toxic of the biologically essential elements. Egg-laying vertebrates have a lower tolerance for selenium than do mammals, and the transition from levels of selenium that are biologically essential to those that are toxic for these species occurs across a relatively narrow range of exposure concentrations. Elevated selenium levels above what is nutritionally required in fish and other wildlife inhibit normal growth and reduce reproductive success through effects that lower embryo survival, most notably teratogenesis (i.e., embryo/larval deformities). The deformities associated with exposure to elevated selenium in fish may include skeletal, craniofacial, and fin deformities, and various forms of edema that result in mortality. Elevated selenium exposure in birds can reduce reproductive success including decreased fertility, reduced egg hatchability (embryo mortality), and increased incidence of deformities in embryos.

Scientific studies indicate that selenium toxicity to aquatic life and aquatic-dependent wildlife is driven by diet (i.e., the consumption of selenium contaminated prey) rather than by direct exposure to dissolved selenium in the water column. Unlike other bioaccumulative contaminants such as mercury, the single largest step in selenium accumulation in aquatic environments occurs at the base of the food web where algae and other microorganisms accumulate selenium from water. The vulnerability of a species to selenium toxicity is determined by a number of factors in addition to the amount of contaminated prey consumed. A species' sensitivity to selenium, its population status, and the duration, timing and life stage of exposure are all factors to consider. In addition, the hydrologic conditions and water chemistry of a water body affect bioaccumulation; in general, slow-moving, calm waters or lentic waters enhance

[6] *See* 40 C.F.R. 131.4(a) ("As recognized by section 510 of the Clean Water Act, States may develop water quality standards more stringent than required by this regulation."); *see also City of Albuquerque v. Browner*, 97 F.3d 415, 423 (10th Cir. 1996) (noting "states' inherent right to impose standards or limits that are more stringent than those imposed by the federal government").

the production of bioavailable forms of selenium (selenite), while faster-moving waters or lotic waters limit selenium uptake given the rapid movement and predominant form of selenium (selenate).[7]

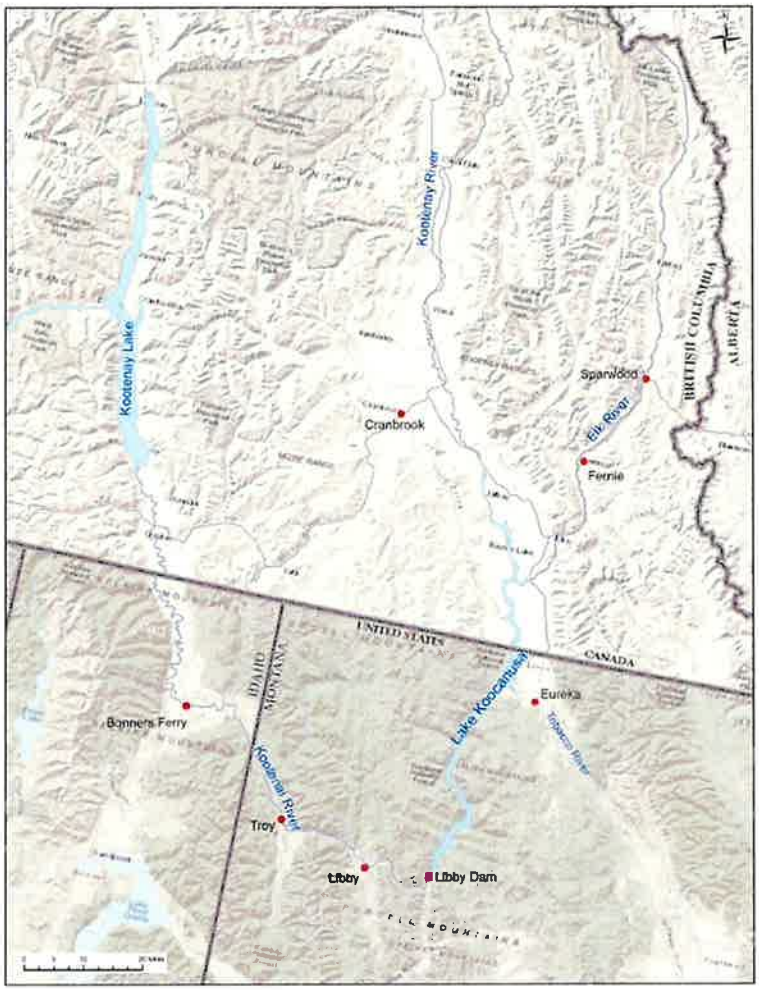

Figure. 1 Map of Lake Koocanusa and the Kootenai River

3. EPA Recommended Selenium Criterion

EPA's national recommended water quality criterion for selenium (EPA 2016),[8] developed by EPA in accordance with CWA section 304(a), provides recommendations to states and authorized tribes to establish WQS pursuant to the CWA. EPA 2016 recommends states/authorized tribes adopt one selenium criterion composed of four criterion elements: two fish tissue criterion elements (egg/ovary and whole body and/or muscle) and two water column criterion elements (30-day average and intermittent exposure). The water column criterion elements are further refined into values for lentic

[7] Excerpt from 83 Fed. Reg. 64063 (December 13, 2018).
[8] See www.epa.gov/wqc/aquatic-life-criterion-selenium.

waters (e.g., lakes/reservoirs) and lotic waters (e.g., streams/rivers) because selenium bioaccumulates differently in these two water body types. Adopting all four criterion elements ensures protection when fish tissue data are unavailable (See Table 1 below).

Table 1. Summary of EPA's Freshwater Selenium Ambient Chronic Water Quality Criterion for Protection of Aquatic Life.

Media Type	**Fish Tissue[1]**		**Water Column[4]**	
Criterion Element	**Egg/Ovary [2]**	**Fish Whole Body or Muscle [3]**	**Monthly Average Exposure**	**Intermittent Exposure[5]**
Magnitude	15.1 mg/kg dw	8.5 mg/kg dw whole body or 11.3 mg/kg dw muscle (skinless, boneless filet)	1.5 µg/L in lentic aquatic systems 3.1 µg/L in lotic aquatic systems	$WQC_{int} = \frac{WQC_{30-day} - C_{bkgrnd}(1 - f_{int})}{f_{int}}$
Duration	Instantaneous measurement[6]	Instantaneous measurement[6]	30 days	Number of days/month with an elevated concentration
Frequency	Not to be exceeded	Not to be exceeded	Not more than once in three years on average	Not more than once in three years on average

1. Fish tissue elements are expressed as steady-state.

2. Egg/Ovary supersedes any whole body, muscle, or water column element when fish egg/ovary concentrations are measured.

3. Fish whole body or muscle tissue supersedes water column element when both fish tissue and water concentrations are measured.

4. Water column values are based on dissolved total selenium in water and are derived from fish tissue values via bioaccumulation. Water column values are the applicable criterion element in the absence of steady-state fish tissue measurements.

5. Where WQC30-day is the water column monthly element, for either a lentic or lotic waters; C_{bkgrnd} is the average background selenium concentration, and f_{int} is the fraction of any 30-day period during which elevated selenium concentrations occur, with fint assigned a value ≥0.033 (corresponding to 1 day).

6. Fish tissue data provide instantaneous point measurements that reflect integrative accumulation of selenium over time and space in fish population(s) at a given site.

EPA recognizes selenium bioaccumulation potential depends on the structure of the food web, hydrology, and several biogeochemical factors that characterize a particular aquatic system. Therefore, site-specific water column criterion element values may be necessary at aquatic sites with high selenium bioaccumulation to ensure adequate protection of aquatic life. In its CWA section 304(a) criterion, EPA

provided two methods[9] for translating the recommended fish tissue criterion elements into site-specific water column criterion elements:

- Mechanistic model – uses scientific knowledge of aquatic system food webs to establish a relationship between the concentration of selenium in the water column and the concentration of selenium in fish tissue. EPA worked with the United States Geological Survey (USGS) to derive a translation equation utilizing a mechanistic model of bioaccumulation previously published in peer-reviewed scientific literature to derive recommended water column criterion elements.
- Empirical Bioaccumulation Factor (BAF) model – uses direct measurement of selenium concentrations in both the water column and fish tissue to calculate the ratio of the two concentrations. The ratio (BAF) can then be used to estimate the target concentration of selenium in the water column as related to the target fish tissue criterion element.

4. Montana's Revised Selenium Criteria for Lake Koocanusa and the Kootenai River

Montana adopted revised selenium criteria to protect Class B-1 designated uses in Lake Koocanusa and the Kootenai River that are consistent with the recommendations in EPA 2016 for fish tissue and water column criterion elements (summarized in Table 2). For the Kootenai River, Montana adopted the EPA 2016 recommended water column criterion element for lotic waters. For Lake Koocanusa, Montana used the EPA 2016 recommended mechanistic model method for translating the recommended fish tissue criterion elements into a site-specific water column criterion element. The selenium criteria in Department Circular DEQ-7 of 5 µg/L (chronic) and 20 µg/L (acute) continue to apply for CWA purposes for the rest of Montana.[10]

Table 2. Selenium criteria adopted by Montana for Lake Koocanusa and the Kootenai River

Media Type	Fish Tissue		Water Column
Criterion Element	Egg/Ovary	Whole Body or Muscle	Monthly Average Exposure
Magnitude	15.1 mg/kg dw	Whole Body 8.5 mg/kg dw Muscle 11.3 mg/kg dw	Lake Koocanusa 0.8 µg/L Kootenai River 3.1 µg/L
Duration	Instantaneous measurement	Instantaneous measurement	30 days
Frequency	Not to be exceeded	Not to be exceeded	Shall not be exceeded more than once in three years, on average

The egg/ovary criterion element supersedes the whole body or muscle criterion element. The fish tissue criterion elements supersede the water column elements only when the water bodies are in steady state (see section 5.2).

[9] Appendix K provides recommendations and examples for developing site-specific selenium criteria at www.epa.gov/sites/production/files/2016-07/documents/aquatic_life_awqc_for_selenium_-_freshwater_2016.pdf.
[10] See deq.mt.gov/Portals/112/Water/WQPB/Standards/PDF/DEQ7/DEQ-7.pdf.

5. EPA Analysis and Rationale for Approval

5.1 Selenium Criteria

40 C.F.R. § 131.11(a)(1) requires that water quality criteria adopted by states and authorized tribes "be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use."[11] For waters with multiple use designations, the criteria must support the most sensitive use. For the reasons discussed below, EPA has concluded that Montana's revised selenium criteria are both supported by a sound scientific rationale and based on EPA's 304(a) national recommended criteria as permitted by 40 C.F.R. 131.11(b)(1).

5.1.1 Protection of Designated Uses

Both Lake Koocanusa and the Kootenai River are designated Class B-1, which includes the following designated uses: drinking, culinary, and food processing purposes after conventional treatment; bathing, swimming, and recreation; growth and propagation of salmonid fishes and associated aquatic life, waterfowl and furbearers; and agricultural and industrial water supply.[12] Montana determined in *Derivation of a Site-Specific Water Column Selenium Standard for Lake Koocanusa* (MT TSD) [13] that the most sensitive designated use for selenium is growth and propagation of salmonid fishes and associated aquatic life (see MT TSD sections 1.31, 2.3.5 and 3.6).

EPA's CWA section 304(a) recommended selenium criteria for the protection of human health are 170 µg/L (consumption of water + organism) and 4200 µg/L (consumption of organism only),[14] and are much less stringent than the CWA section 304(a) recommended water column criterion element for the protection of aquatic life in EPA 2016 of 1.5 µg/L (lentic) and 3.1 µg/L (lotic) (See Table 1). Montana adopted the Maximum Contaminant Level established by EPA under the Safe Drinking Water Act of 50 µg/L for the protection of human health[15] (see Department Circular DEQ-7), which is less stringent than the EPA 2016 water column criterion element. Therefore, selenium criteria adopted by states/authorized tribes that protect aquatic life are expected to also protect humans.

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[11] For the reasons explained herein, EPA has concluded that the state's water quality standard submission is supported by a sound scientific rationale. EPA notes that its charge under federal law is to review state water quality criteria submissions only to ensure that sound science shows they are protective of the designated use, not to determine whether the precise value selected by the state is the most scientifically rigorous number possible. EPA's regulations at 40 C.F.R. 131.4(a) expressly preserve states' right to "develop water quality standards more stringent than required." Accordingly, once EPA has determined that sound scientific rationale shows that a state submission is protective of the designated use, its role under the cooperative federalism framework of the CWA is not to second guess the state's scientific analysis. *See City of Albuquerque v. Browner*, 97 F.3d 415, 426 (10th Cir. 1996) ("If the proposed standards are more stringent than necessary to comply with the Clean Water Act's requirements, the EPA may approve the standards without reviewing the scientific support for the standards"); *Ctr. for Regulatory Reasonableness v. United States Envtl. Prot. Agency*, No. CV 16-1435, 2019 WL 1440303, at *10 (D.D.C. Mar. 31, 2019) ("States are expressly empowered to adopt criteria substantially below any hypothetical 'impairment threshold'").

[12] See ARM 17.30.609 and ARM 17.30.623.

[13] See deq.mt.gov/Portals/112/Water/WQPB/Standards/Koocanusa/TSD_Lake%20Koocanusa_Sep2020_Final.pdf.

[14] See www.epa.gov/wqc/national-recommended-water-quality-criteria-human-health-criteria-table.

[15] See www.epa.gov/ground-water-and-drinking-water/national-primary-drinking-water-regulations.

Analyses conducted for the derivation of EPA 2016 concluded that available data indicates fish are more sensitive to selenium than amphibians, aquatic invertebrates, and plants. The EPA 2016 criterion is based on reproductive effects on fish and this is expected to also protect the less sensitive taxa in the aquatic community.

In addition, EPA completed a review of scientific literature related to the toxicity of selenium to aquatic-dependent wildlife, of which aquatic-dependent birds were determined to be the most sensitive taxa. EPA concluded that since the translated water column values for aquatic-dependent wildlife are equal or extremely close to EPA's 2016 selenium water column criterion elements, the EPA's 2016 selenium water column elements would also protect aquatic-dependent wildlife.[16]

In summary, EPA agrees with DEQ's identification of growth and propagation of salmonid fishes and associated aquatic life as the most sensitive designated use for Lake Koocanusa and the Kootenai River.

5.1.2 Sound Scientific Rationale

EPA criteria recommendations consist of three components: (l) magnitude - how much of a pollutant (or pollutant parameter such as toxicity), expressed as a concentration, is allowable; (2) duration - the period of time (averaging period) over which the instream concentration is averaged for comparison with criteria magnitudes (limits the duration of concentrations above the criteria magnitudes); and (3) frequency - how often criteria can be exceeded.[17] EPA 2016 recommends states/authorized tribes adopt one selenium criterion composed of four criterion elements: two fish tissue criterion elements (egg/ovary and whole body and/or muscle) and two water column criterion elements (30-day average and intermittent exposure).

5.1.2.1 Magnitude

Fish Tissue Criterion Elements

EPA developed a chronic criterion reflective of the reproductive effects of selenium concentrations on fish species, consistent with consensus recommendations of expert panels and with peer review and public comments on draft criteria. Based on the available dietary exposure data from lab studies and field exposures, the egg/ovary criterion element concentration is 15.1 milligrams selenium per kilogram dry weight (mg Se/kg dw) based primarily on 17 reproductive studies representing 12 fish species (10 fish genera). EPA applied the sensitivity distribution concepts from the *U.S. EPA Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and their Uses*[18] to derive the national selenium criterion. The Lake Koocanusa fish assemblage is represented in the EPA 2016 selenium toxicity database by quantitative reproductive toxicity values for 3 of 10 fish

[16] See *Aquatic Life* and *Aquatic-Dependent Wildlife Selenium Water Quality Criterion* for *Freshwaters* of *California* (Part 4), at www.epa.gov/sites/production/files/2019-03/documents/ca_statewide_se_tsd_508_compliant.pdf.
[17] See *Technical Support Document for Water Quality-based Toxics Control* (Section 2.2.1) at www3.epa.gov/npdes/pubs/owm0264.pdf.
[18] See www.epa.gov/wqc/guidelines-deriving-numerical-national-water-quality-criteria-protection-aquatic-organisms-and.

genera (13 fish species) that reside in Lake Koocanusa (Dolly Varden (surrogate for bull trout), rainbow trout, and Westslope cutthroat trout), and 1 genera (that resides in the Montana portion of the Kootenai River (white sturgeon). Although white sturgeon, the most sensitive species in the EPA 2016 dataset, do not reside in Lake Koocanusa, per 40 C.F.R. § 131.10(b), the criteria for Lake Koocanusa must provide for the attainment and maintenance of the WQS in the Kootenai River. Also, qualitative species or genus surrogate level tissue values for an additional 5 species (mountain whitefish, kokanee, largescale and longnose sucker, and redside shiner), were considered in the derivation process, leaving only 4 of 13 species unrepresented in the toxicity database. One of the important principles for site-specific criteria development established by the Selenium Technical Subcommittee during that process was that all fish species without toxicity data should be considered equally sensitive to the white sturgeon. Therefore, the white sturgeon tissue values would be applicable to the burbot, northern pikeminnow, peamouth chub, and yellow perch. The fish genera present in the Kootenai River are similarly represented by EPA's 2016 dataset, with a majority of the species in the river represented by either quantitative data for the specific species or qualitative data for species or genus level surrogates, and all fish species without toxicity data considered equally sensitive to the white sturgeon.

Selenium concentrations measured either in fish whole body or muscle tissue in non-reproductive studies (typically evaluating juvenile growth and survival), were available for 8 genera. Several studies measured whole body and muscle concentrations in reproductive studies concurrent with measurements in egg or ovary tissues resulting in directly measured chronic values for 2 genera. Whole body and muscle criterion elements were derived using these directly measured tissue concentration data, or by applying conversion factors (*CF*) to egg or ovary concentrations to derive species-specific whole body or muscle tissue concentrations. Then the sensitivity distribution concept was applied to distributions of whole body and muscle tissue concentrations to derive the whole body (8.5 mg Se/kg dw) and muscle (11.3 mg Se/kg dw) criterion elements. EPA determined that the egg/ovary criterion element was most relevant to the toxic manifestations of selenium in fish resulting in a hierarchal application of the tissue criterion where the egg/ovary criterion supersedes the whole body or muscle tissue criterion when fish egg/ovary concentrations are measured at a site.

Montana's revised selenium criteria in ARM 17.30.632 include fish tissue criterion elements that are the same as the recommended magnitudes in EPA 2016 for both Lake Koocanusa and the Kootenai River: egg/ovary 15.1 mg/kg dw, muscle 11.3 mg/kg dw, and whole body 8.5 mg/kg dw. EPA 2016 provides the basis for EPA's approval of these criterion elements.

Water Column Criterion Element for the Kootenai River

The water column criterion element (30-day average) that Montana adopted for the Kootenai River is the same as the recommended water column value in EPA 2016: 3.1 µg/L total dissolved selenium for lotic waters. EPA 2016 provides the basis for EPA's approval of this criterion element

Water Column Criterion Element for Lake Koocanusa

The site-specific water column criterion element for Lake Koocanusa was developed through a five year collaboration between DEQ and British Columbia Ministry of Environment and Climate Change Strategy (BC-ENV). The Lake Koocanusa Monitoring and Research Working Group and a Selenium

Technical Subcommittee were established to coordinate this work. Presser and Naftz (2020)[19] and the companion data release[20] that includes a comprehensive set of site-specific data compiled from public databases (Federal, State, and Provincial) and reports by Teck Coal Ltd., provided the foundational selenium modeling for both DEQ and BC-ENV to use to develop a protective water column criterion element for Lake Koocanusa that both Montana and British Columbia could then adopt through their respective regulatory processes.

For Montana, the culmination of this work was the adoption of the water column criterion element (30-day average) for Lake Koocanusa (0.8 µg/L total dissolved selenium). As described in more detail below, this criterion element was derived consistent with the mechanistic model method in EPA 2016 for translating the recommended fish tissue criterion elements into site-specific water column criterion elements.

The mechanistic model approach uses scientific knowledge of the bioaccumulation dynamics and aquatic food webs of a site to establish a relationship between the concentration of selenium in the water column and the concentration of selenium in fish tissue. Selenium dissolved in surface water enters aquatic food webs by assimilating into trophic level 1 primary producer organisms (e.g., algae) or adsorption to other biotic (e.g., detritus) and abiotic (e.g., sediment) particulate material. Organic particulate material is consumed by trophic level 2 organisms (usually aquatic invertebrates, but also some fish species that are herbivores/detritivores) resulting in the accumulation of selenium in the tissues of those organisms. Trophic level 2 organisms are then consumed by trophic level 3 organisms (typically fishes) resulting in accumulation of selenium in the tissues of those fish (and so on up the food web). The transfer of selenium up the food web can be characterized by a number of parameters and modeled with an equation. An enrichment factor (*EF*) characterizes the assimilation of dissolved selenium into the base of the food web by quantifying the partitioning of selenium between the dissolved and particulate state. Bioaccumulation of selenium from one trophic level to the next is quantified by a trophic transfer factor (*TTF*). A conversion factor (CF), which establishes the ratio of selenium concentrations between different fish tissues, may also be used if the fish tissue being modeled is muscle or egg/ovary rather than whole body. These parameters are used in the mechanistic model with a target protective fish tissue selenium concentration (e.g., egg/ovary 15.1 mg/kg dw, muscle 11.3 mg/kg dw, or whole body 8.5 mg/kg dw), to derive a selenium water column criterion element that will ensure the protective fish tissue criterion element is met and will therefore be protective of the site-specific ecosystem.

EPA 2016 describes six steps for deriving a site-specific water column criterion element from the selenium egg/ovary criterion element using EPA's mechanistic model approach. Following is a summary of how the work of Presser and Naftz (2020) and additional work by Montana is consistent with the six steps.

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[19] Presser, T.S., and Naftz, D.L., 2020, Understanding and documenting the scientific basis of selenium ecological protection in support of site-specific guidelines development for Lake Koocanusa, Montana, U.S.A., and British Columbia, Canada: U.S. Geological Survey Open-File Report 2020–1098, 40 p., doi.org/ 10.3133/ ofr20201098.

[20] See Presser, T.S., and Naftz, D.L., 2020, Selenium concentrations in food webs of Lake Koocanusa in the vicinity of Libby Dam (Montana) and the Elk River (British Columbia) as the basis for applying ecosystem-scale modeling, 2008–2018: U.S. Geological Survey data release, doi.org/10.5066/P9VXYSNZ.

1) Identify the appropriate target fish species.

The overall goal of Presser and Naftz (2020) was to provide an ecosystem-scale model that illustrates the site-specific range of potential selenium exposure and bioaccumulation that can inform the basis for regulatory decision-making by Montana and British Columbia. Therefore, they did not select one target fish species and instead provided generalized food webs based on fish species present that could be further refined by the respective governments. Presser and Naftz (2020) used available Lake Koocanusa data including fish species abundance and fish catches to identify fish species present. Based on recommendations from the Selenium Technical Subcommittee, twelve species of fish were considered as potential target species for the modeling: bull trout, burbot, kokanee, longnose sucker, largescale sucker, mountain whitefish, northern pikeminnow, peamouth chub, rainbow trout (wild strain), redside shiner, Westslope cutthroat trout, and yellow perch. Species-specific dietary data summarized as percentage of taxa-specific invertebrate biomass, recent selenium concentrations for invertebrate taxa in 2018, and a study of the contents of the stomachs of fish species caught in 2017 were used to assign each fish species to a generalized food-web category to reduce the number of modeling scenarios. Two generalized food-web categories were identified and modeled: an invertebrate to fish model (IFM) and a trophic fish model (TFM). The IFM is based on fish consuming only invertebrates (i.e., zooplankton and/or insects) and protects a community of rainbow trout, Westslope cutthroat trout, redside shiner, longnose sucker, peamouth chub, largescale sucker, mountain whitefish, and kokanee. The TFM is based on forage fish (trophic level 3 (TL3)) consuming invertebrates and predator fish (trophic level 4 (TL4)) consuming forage fish and protects a community of bull trout, burbot, and northern pikeminnow.

In general, EPA recommends selecting fish species in the aquatic system with the greatest selenium sensitivity and bioaccumulation potential. Presser and Naftz (2020) provided a qualitative vulnerability ranking for Lake Koocanusa fish species. The most vulnerable species include the redside shiner, peamouth chub, and northern pikeminnow based on sensitivity and burbot based on its demersal feeding and winter spawning period. Given this, Montana followed the recommendation of the Selenium Technical Subcommittee to use the more conservative TFM model food web for protection of potentially sensitive piscivorous species and species of cultural importance (see MT TSD section 5.1.3).

2) Model the food web of the targeted fish species.

Presser and Naftz (2020) used available Lake Koocanusa data including dietary metrics for fish and invertebrate taxa in fish stomachs to develop two primary food web models: IFM and TFM. Montana selected the TFM for modeling the water column value. Montana then selected the version of this model that resulted in the greatest bioaccumulation potential. This was the model that represents TL4 fish consuming 100% TL3 fish which consume 100% aquatic insects (chironomids).

3) Identify appropriate trophic transfer factor (*TTF)* values by either:
   a. selecting the appropriate *TTF* values from a list of EPA 2016-derived values, or
   b. deriving *TTF* values from other existing data, or
   c. deriving *TTF* values by conducting additional studies, or
   d. extrapolating *TTF* values from existing values.

Following option b and Presser and Naftz (2020), Montana used previously published laboratory-derived *TTFs* from Presser and Luoma (2010)[21]: 2.8 (aquatic insects), 1.5 (zooplankton), and 1.1 (fish). The mean "all insect" *TTF* (2.8) that Presser and Naftz (2020) used to model Lake Koocanusa is composed of: mayfly, caddisfly, cranefly, stonefly, damselfly, corixid (waterboatmen), and chironomid (midge). The zooplankton *TTF* reflects a zooplankton composite and the fish *TTF* is the mean of all fish species included in Presser and Luoma (2010). These *TTFs* are not identical to those that EPA used in EPA 2016 but are close in magnitude to those in EPA 2016 and scientifically defensible. Montana did not use site-specific *TTFs* due to data limitations identified in Presser and Naftz (2020).

4) Determine the appropriate value of *EF* (enrichment factor) by either:
   a. deriving a site-specific *EF* value from current field measurements, or
   b. deriving an appropriate *EF* value from older existing data, or
   c. extrapolating from *EF* values of similar waters.

Montana derived site-specific *EF* values from field measurements (option a above). Presser and Naftz (2020) and Montana used the term K_d instead of *EF* to describe the relationship between selenium concentrations in particulate and dissolved phases. EPA 2016 indicates that the K_d (or *EF*) is the most influential model parameter and therefore the most critical element for which to use site-specific data. Available data included a robust dataset of 87 matched samples for particulate and dissolved selenium collected over multiple years (2015-2019), seasons, and water depths. Rather than selecting a single representative value from the K_d dataset to use in the model, Presser and Naftz (2020) present each K_d calculation as an independent scenario (n=87), resulting in 87 predicted dissolved selenium concentrations for each model scenario. Montana used this distribution of K_d*'s* and resulting dissolved selenium concentrations to derive their water column criterion element.

5) Determine the appropriate *CF* (conversion factor) value by either:
   a. selecting the appropriate *CF* value from a list of EPA 2016-derived values, or
   b. deriving a *CF* value from other existing data, or
   c. deriving a *CF* value by conducting additional studies, or
   d. extrapolating a *CF* value from existing values.

[21] Presser, T.S., and Luoma, S.N., 2010, A methodology for ecosystem-scale modeling of selenium: Integrated Environmental Assessment and Management, v. 6, no. 4, p. 685–710, doi.org/ 10.1002/ ieam.101.

A conversion factor (*CF*) quantifies the relationship between the concentration of selenium in the eggs and/or ovaries and the concentration of selenium in the whole body or muscle tissues of fish. Montana used EPA's whole body tissue guideline (8.5 mg/kg dw) in their modeling, therefore no *CF* was needed.

6) Translate the applicable fish tissue element into a site-specific water concentration value.

To derive a site-specific water column criterion element for Lake Koocanusa that is protective of the chosen fish tissue criterion elements, Montana used the mechanistic model to translate the whole body fish tissue criterion element into a water column criterion element using the following equation:

$$C_{water\ column\ criterion\ element} = \frac{C_{whole\ body\ criterion\ element}}{TTF^{composite} \times (Kd/1000) \times \text{SPM \% bioavailability}}$$

$C_{water\ column\ criterion\ element}$	=	translated site-specific water column criterion element (µg/L),
$C_{whole\ body\ criterion\ element}$	=	whole body fish tissue criterion element (µg/g),
$TTF^{composite}$	=	product of the trophic transfer factor (TTF) values in each trophic level of the food web of the target fish model (no units of measurement),
K_d	=	environmental partitioning factor (L/g),
SPM % bioavailability	=	percent bioavailability of suspended particulate matter

Montana used the following values to populate the equation:

$C_{whole\ body\ criterion\ element}$	=	8.5 µg/g,
$TTF^{composite}$	=	$TTF^{TL4Fish}$ x $TTF^{TL3Fish}$ x $TTF^{aquatic\ insects}$ = 1.1 x 1.1 x 2.8 = 3.39
K_d	=	75th percentile of distribution
SPM % bioavailability	=	60%

The use of these values results in a water column criterion element of 0.8 µg/L. Although this criterion element is more stringent than the recommended water column criterion element for lentic aquatic systems in EPA 2016 (1.5 µg/L), based on the state's technical documentation included in its submission, summarized above, EPA concludes that it is supported by a sound scientific rationale.[22]

As Montana adopted the EPA 2016 recommended fish tissue criterion elements, the whole body criterion element that was used in this translation was the value of 8.5 µg/g dw. The $TTF^{composite}$ used in this translation was calculated using the TFM and fish and invertebrate *TTFs* from Presser and Luoma 2010. As presented in step 3 above, the use of existing *TTFs* is an approach recommend in EPA 2016.

As presented in Presser and Naftz (2020), Montana also included a bioavailability factor for suspended particulate matter in the model, which reflects the bioavailability of selenium from particulate matter to organisms in the ecosystem. In validation runs of the model, Presser and Naftz (2020) showed that a

[22] As noted above, the possibility that this criterion element may be more stringent than necessary to protect the designated use would not provide a valid legal justification under Section 303(c) of the CWA or EPA's implementing regulations for disapproval. *See* 40 C.F.R. 131.4(a).

60% bioavailability factor better represented the measured invertebrate and zooplankton selenium concentration in Lake Koocanusa than a 100% bioavailability factor.

Lastly, Montana selected the 75th percentile of the K_d distribution for the translation. This is a conservative K_d value protective of a majority of the scenarios observed in Lake Koocanusa.

Intermittent Criterion Element

In addition to the monthly exposure water column criterion element discussed above, EPA 2016 includes a recommended intermittent exposure water column criterion element. Montana did not adopt an intermittent exposure water column criterion element for either Lake Koocanusa or the Kootenai River. The state's rationale in the response to comments is "The intermittent exposure element is unnecessary because MPDES [Montana Pollutant Discharge Elimination System] rules do not differentiate between intermittent and continuous discharges for purposes of developing water quality-based effluent limits. When calculating the reasonable potential for a discharger to cause or contribute to an exceedance of a water quality standard, DEQ methods treat continuous and intermittent dischargers the same."[23] The MPDES program uses the maximum effluent concentration during the period of record to evaluate reasonable potential for a discharge to cause or contribute to an exceedance of a water quality standard.[24] EPA concludes Montana's approach will protect the applicable designated uses without the intermittent exposure water column criterion element. EPA notes that there are currently no public or private entities discharging to the Kootenai River or Lake Koocanusa with MPDES permit effluent limits for selenium.[25]

5.1.2.2. Duration

EPA's recommended duration for the water criterion elements is 30 days. EPA 2016 provides a detailed analysis for the derivation of a 30-day averaging period. This differs from typical criteria averaging periods based on EPA's 1985 Guidelines, where the basis for the criterion averaging period is a time period less than or equal to the "characteristic time," which describes the toxic speed of action due to direct waterborne toxicity of metals. The derivation of the averaging period for the selenium water column concentration was based on the kinetics of bioaccumulation and depuration rates for different trophic levels. The duration for Montana's water column criterion elements for Lake Koocanusa and the Kootenai River is specified as "30-day average" in ARM 17.30.632(7), which is consistent with EPA 2016.

EPA's recommended duration for the fish tissue criterion elements is instantaneous because fish tissue data provide point measurements that reflect integrative accumulation of selenium over time and space in the fish populations(s) at a given site. The fish reflect bioaccumulation of selenium that has already occurred and reflect the extended exposure to selenium in the water body. The duration for Montana's fish tissue criterion elements for Lake Koocanusa and the Kootenai River is specified as "instantaneous" in ARM 17.30.632(6), which is consistent with EPA 2016.

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[23] Notice of Amendment and Adoption p. 2394, response to comment #186.
[24] September 4, 2020 email from Myla Kelly to Tonya Fish.
[25] Notice of Amendment and Adoption p. 2343, response to comment #26.

5.1.2.3 Frequency

The recommended frequency in EPA 2016 of once in three years on average is based on the ability of an aquatic ecosystem to recover when pollutant impacts are associated exclusively with water column exposure.[26] The frequency for Montana's water column criterion elements for Lake Koocanusa and the Kootenai River is specified as "shall not be exceeded more than once in three years, on average" in ARM 17.30.632(7), which is consistent with EPA's recommendations in the 1985 Guidelines for water column criteria and in EPA 2016.

The recommended frequency of exceedance in EPA 2016 for the fish tissue criterion elements of the selenium criterion is "not to exceed." Selenium is a bioaccumulative pollutant; therefore, elevated levels in various ecological compartments (e.g., biota, surficial sediments) require a long period to decrease, and the associated aquatic community requires a long time to recover following reduction or removal of an elevated selenium exposure to a given system. As selenium is bioaccumulative and the pathway for exposure is through the food web, the typical criteria return frequency of once in three years on average is not appropriate for selenium in fish tissue as this could lead to sustained ecological impacts. As fish tissue has a much longer recovery time than water column concentrations, a frequency of "not to exceed" is appropriate for the tissue criterion element. The frequency for Montana's fish tissue criterion elements for Lake Koocanusa and the Kootenai River is specified as "not to exceed" in ARM 17.30.632(6), which is consistent with EPA 2016.

5.2 Definition of Steady State and Criteria Element Hierarchy

Montana adopted ARM 17.30.602(32) and added this definition:

> "Steady state" means, for the purposes of ARM 17.30.632, conditions whereby there are no activities resulting in new, increasing, or changing selenium loads to the lake or river aquatic ecosystem, and selenium concentrations in fish living in the aquatic ecosystem have stabilized.

EPA 2016 does not include a definition of "steady state," but does recommend fish tissue elements of the selenium criterion supersede water column elements under steady state conditions because the selenium concentrations in fish tissues are a more sensitive and reliable indicator of the negative effects of selenium in aquatic life. EPA 2016 also states that fish tissue concentrations do not fully represent potential effects on fish and the aquatic ecosystem in areas with new selenium inputs:

> "New inputs are defined as new activities resulting in selenium being released into a lentic or lotic waterbody. New inputs will likely result in increased selenium in the food web, likely resulting in increased bioaccumulation of selenium in fish over a period of time until the new or increased selenium release achieves a quasi-'steady state' balance within the food web. EPA estimates that concentrations of selenium fish tissue will not

[26] See *Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses* (1985 Guidelines) at www.epa.gov/sites/production/files/2016-02/documents/guidelines-water-quality-criteria.pdf.

> represent a 'steady state' for several months in lotic systems, and longer time periods (e.g., two to three years) in lentic systems, depending upon the hydrodynamics of a given system such as the location of the selenium input related to the shape and internal circulation of the waterbody, particularly in reservoirs with multiple riverine inputs, hydraulic residence time, and the particular food web. Estimates of steady state under new or increased selenium input situations are expected to be site dependent, so local information should be used to better refine these estimates for a particular waterbody. Thus, EPA recommends that fish tissue concentration not override water column concentration in these situations until these periods of time have passed in lotic and lentic systems, respectively, or steady state conditions can be estimated." (EPA 2016 pp. 101-102).

Consistent with this, EPA 2016's Table 1 (also Table 1 of this enclosure) footnotes 1 and 4 specify that the fish tissue elements are expressed as steady-state and water column values are the applicable criterion element in the absence of steady-state condition fish tissue data.

The language above from EPA 2016 was intended to address the scenario where fish tissue data are not exceeding those criterion elements, but the water column data are exceeding that element. However, another scenario DEQ raised in discussions with EPA is how to address the situation where fish tissue data are exceeding those criterion elements, but the water column data are not. EPA advised that in that scenario, EPA would still consider the water body impaired.[27] In other words, if a water body is not in steady-state, it is considered impaired if either the fish tissue or water column elements are exceeded. As a result, Montana adopted the following language in ARM 17.30.632(2): "When the aquatic ecosystem is in steady state and selenium data is available for both fish tissue and the water column, the fish tissue standards supersede the water column standard. When the aquatic ecosystem is in non-steady state, both the fish tissue and water column standards apply." ARM 17.30.632(3) specifies that Lake Koocanusa and the Kootenai River are in non-steady state and the Department will reassess the status triennially and amend the rule if necessary.

EPA concludes that the definition of "steady state" in ARM 17.30.602(32), the criteria element hierarchy in ARM 17.30.632(2), and the statement in ARM 17.30.632(3) that Lake Koocanusa and the Kootenai River are not in steady state are consistent with EPA 2016.

5.3 Protection of Downstream Waters

40 C.F.R. § 131.10(b) requires that criteria provide for the attainment and maintenance of the WQS of downstream waters. Montana addressed this in section 6.2 of the MT TSD. The Kootenai River is downstream of Lake Koocanusa. The fish tissue criterion elements are the same for both water bodies: egg/ovary 15.1 mg/kg dw, muscle 11.3 mg/kg dw, and whole body 8.5 mg/kg dw. Lake Koocanusa's water column criterion element of 0.8 µg/L is more stringent than the water column criterion element of

[27] See September 2, 2020 email from Tonya Fish to Lauren Sullivan.

3.1 µg/L in the Kootenai River. Fish tissue and water column criterion elements are the same for the Kootenai River in Montana and the downstream segment of the Kootenai River in Idaho.[28]

Based on the information above, EPA concludes Montana's revised selenium criteria will provide for the attainment and maintenance of downstream uses.

5.4 EPA's Action

Based on the information above, EPA approves the revised selenium criteria in ARM 17.30.632 because they are "based on sound scientific rationale and … contain sufficient parameters or constituents to protect the designated use" as required by 40 C.F.R. § 131.11. The selenium criteria also provide for the attainment and maintenance of the WQS of downstream waters consistent with 40 C.F.R. § 131.10(b). In addition, EPA approves the definition of "steady state" in ARM 17.30.602(32) because it informs application of the revised criteria consistent with 40 C.F.R. § 131.11. As with all WQS, these provisions are subject to state review at least every three years pursuant to 40 C.F.R. § 131.20(a).

Today's action is limited to waters under Montana's jurisdiction and Montana's revised WQS that apply to Lake Koocanusa from the US-Canada international boundary to the Libby Dam as specified in ARM 17.30.632(6) and 7(a). EPA remains committed to continued collaboration with Montana, British Columbia, the Confederated Salish and Kootenai Tribes, Kootenai Tribe of Idaho, First Nations, and other interested parties.

6.0 Provisions That EPA Has Determined Are Not WQS

EPA has determined the following provisions are not WQS:[29]

- In ARM 17.30.632(4): "Permit conditions and limits developed from the water column standards comply with the fish tissue standards." This language does not describe a desired ambient condition of a waterbody to support a particular designated use. Rather, these statements provide information related to permit conditions.
- ARM 17.30.632(5): "No person may violate the numeric water quality standards in (6) and (7)." This language does not describe a desired ambient condition of a waterbody to support a particular designated use. Rather, these statements provide information related to criteria implementation.
- In ARM 17.30.632(6): "Fish tissue sample results shall be reported as a single value representing an average of individual fish samples or a composite sample, each option requiring a minimum number of five individuals from the same species." This language does not describe a desired ambient condition of a waterbody to support a particular designated use. Rather, these statements provide information related to sampling and monitoring for compliance with the criteria. The state has flexibility in how it interprets discrete fish samples, and it is reasonable to apply the

[28] See IDAPA 58.01.02.210.01 at adminrules.idaho.gov/rules/current/58/580102.pdf.
[29] See *What is a New or Revised Water Quality Standard Under CWA 303(c)(3)? Frequently Asked Questions* at www.epa.gov/sites/production/files/2014-11/documents/cwa303faq.pdf.

instantaneous fish tissue elements to a composite sample or average of individuals of the same species, as adopted by MT.

7.0 Conclusion

EPA commends Montana for collaborating with multiple stakeholders for over five years to develop a site-specific selenium water column element for Lake Koocanusa consistent with the approaches recommended by EPA for developing site-specific selenium criteria. The adoption of fish tissue criterion elements for Lake Koocanusa as well as fish tissue elements and a water column criterion element for the Kootenai River that are the same as the current EPA recommended selenium criterion elements are also important improvements. The adopted criteria are based on sound science including robust site-specific data for Lake Koocanusa showing that they protect the applicable designated uses of Lake Koocanusa and the Kootenai River.

EXHIBIT C

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW

OF THE STATE OF MONTANA

BOARD MEETING)

DECEMBER 11, 2020)

TRANSCRIPT OF PROCEEDINGS - VIA ZOOM

December 11, 2020

9:00 a.m.

BEFORE CHAIR CHRIS DEVENY,

BOARD MEMBERS JOHN DEARMENT,

CHRIS TWEETEN, DEXTER BUSBY, JEREMIAH LYNCH

and DAVID LEHNHERR

PREPARED BY: LAURIE CRUTCHER, RPR

COURT REPORTER, NOTARY PUBLIC

lauriecrutcher@gmail.com

initiate rulemaking, the point was made, I believe -- I think I recall this correctly --- that the geology that exists on the Montana side of the border makes it highly unlikely, I guess, that activity, commercial activity on this side of the border would trigger releases that would drive the selenium values in the lake and the lower part of river in Montana above the standards. Do I have this right?

CHAIR DEVENY: George, go ahead.

MR. MATHIEUS: Madam Chair, this is George Mathieus. I'll pass that question to Myla Kelly.

MS. KELLY: Board Member Tweeten, that is correct. There is substantially different geology in the Elk Valley than in Lincoln County or in Montana.

BOARD MEMBER TWEETEN: Okay. Thank you. My second question I think maybe Director McGrath or Tim Davis might be the appropriate person to speak to this.

If you could remind us how the adoption of a standard like this on this side of the border can affect commercial mining activity in British Columbia. They are upstream. We have no

sovereign jurisdiction to control what they do in British Columbia.

I'm just curious, because Teck operates in BC. I don't believe they mine in the drainage that's involved in this matter in Montana. So I'm just curious as to how this standard in Montana affects what Teck is able to do in BC.

DIRECTOR McGRATH: Madam Chair and Board Member Tweeten, I'll take a shot at answering that, and then may also defer to Tim Davis if he wants to weigh in.

Two things that I would say, Board Member Tweeten. First off is that this issue has come up a number of times over the last couple months, you know, how does this impact enforcement over in British Columbia, and you're right. DEQ cannot enforce our standard on Teck Coal.

But as Ayn Schmit from EPA spoke to in her brief comments here today, and has said also, Montana standard does empower our Federal government to work with Canada to make sure that water that's coming out of Canada into Montana meets our standards. So without a standard in place, that conversation is not going to happen. That's the first thing.

The second thing is we have been coordinating with British Columbia with our counterparts in the Administrative Environment Climate Change, to try to align our standards, and ideally what we want to get to is that British Columbia and Montana have aligned standards, which then puts British Columbia in the place of being able to enforce their standard, which by way of having an aligned standard would also be protective for Montana.

By us adopting this standard today, what that does is continue to put the pressure on British Columbia to indeed adopt their own standard that is aligned with us.

Tim, anything else that I missed that you might add?

MR. DAVIS: No, Madam Chair, members of the Board. No, I think you hit on the two main things that I would have brought up, Director.

CHAIR DEVENY: Chris, does that answer your questions?

BOARD MEMBER TWEETEN: It does. And Madam Chair, just a couple of observations, I guess.

One, the question of whether it's

BOARD MEMBER BUSBY: No. My phone is on. I do have one small comment to make, though.

CHAIR DEVENY: Go ahead.

BOARD MEMBER BUSBY: I think I probably will support the elected officials from the area, because I'm not sure their questions and their concerns have been waylaid in any way by the data that's been presented. So personally I'm going to support that, along with the idea it can't be enforced. I spoke last time that I don't like regulations that are for regulation only, and can't be enforced, so I'm probably not going to support this.

CHAIR DEVENY: Duly noted, Dexter. Thank you.

BOARD MEMBER LYNCH: Madam Chair, Board Member Lynch. I don't want to step out of bounds. I would think given the nature of this vote we're about to take, it may be appropriate, if you will, to ask each member individually how they wish to vote, rather than a yea or nay, if you're in agreement with that.

CHAIR DEVENY: I think that's a good idea. We will take a voice vote when we're ready.

David Lehnherr, did you have a question?

EXHIBIT D

DEQ
Montana Department of Environmental Quality

December 31, 2020

International Joint Commission
U.S. Section
1717 H Street NW, Suite 835
Washington, DC 20006
United States

RE: Montana's Interest in an International Joint Commission Reference

Dear Commissioner/Chair Corwin, Commissioner Sisson, and Commissioner Yohe:

The Montana Department of Environmental Quality (DEQ) is pleased to share that on December 11, 2020, Montana's Board of Environmental Review adopted rules to establish a site specific selenium standard for Lake Koocanusa as well as a selenium standard for the Kootenai River. These standards include criteria for both the water column and fish tissue and are the culmination of years of scientific research, trans-boundary collaboration, and extensive tribal, agency and stakeholder partnerships. A scientifically accurate water quality standard is a first and critical step in ensuring Montana's beneficial uses, namely aquatic life, are protected.

In the future, Montana will be assessing both water quality and fish tissue in Lake Koocanusa and the Kootenai River to determine whether the standards are being met, or whether the waters are impaired for selenium. Idaho has recently identified the Kootenai River immediately downstream of the Montana-Idaho border as impaired for selenium based on exceedances of Idaho's fish tissue standards. EPA has approved Idaho's listing of the Kootenai River as impaired for selenium. It is also important to note that Idaho has identified the source of selenium causing the impairment as being primarily Elk River valley mining operations in British Columbia.

Montana has worked collaboratively with British Columbia (BC) to develop a protective selenium standard for Lake Koocanusa on both sides of the U.S. and Canadian border. Montana intends to continue to work collaboratively with British Columbia in the future. However, Montana recognizes that the state does not have regulatory authority over actions in Canada, and there is no existing framework for ensuring that waters entering Montana comply with our water quality standards.

The observed impacts from Elk River valley mining operations are far reaching and impact waters regulated or managed by multiple U.S. federal, tribal, state, and local agencies in addition to similar agencies in Canada. DEQ does not have the resources to coordinate data and information amongst all of the impacted agencies for this watershed. We believe this coordination needs to be done so that U.S. agencies can manage water resources appropriately. Given that this is a transboundary watershed, Montana believes that this task would be best handled by the International Joint Commission (IJC). Control of transboundary pollution is the role of the U.S. Department of State and the IJC. Article IV of

the 1909 Boundary Waters Treaty (BWT) states that "*...boundary water and water flowing across the boundary shall not be polluted to the injury of health or property of the other.*"

In light of the impacts and concerns outlined, this letter requests that the U.S. Department of State (DOS) pursue a BWT reference to the IJC for the Kootenai watershed to strengthen existing coordination efforts and improve accountability for monitoring of impacts and acceleration of progress in reducing the amount of pollution entering the U.S.

We suggest the following could be addressed through a reference to the IJC:

- Engagement from the IJC could help to increase Canadian federal and provincial partners' support for monitoring in this watershed in the future. This would relieve U.S. monitoring entities from having to disproportionally expend resources to monitor impacts from Canadian sources. Montana and Idaho are working with EPA, the U.S. Geological Survey, the Confederated Salish and Kootenai Tribes, Kootenai Tribe of Idaho, and other partners to identify priority future monitoring needs for the watershed.
- Completion of a comprehensive assessment to determine the magnitude or extent of transboundary mining impacts to U.S. waters and aquatic dependent wildlife is needed so that agencies can properly manage impacted waters and make informed decisions.
- Engagement from the DOS with the Canadian federal government is needed to ensure actions are taken to effectively curtail and reduce pollution of Montana and U.S. waters as well as ensuring that new and expanding coal mines do not contribute to existing pollution entering Montana. Montana's newly adopted selenium standards provide the basis for determining whether or not the province and Canada have effectively met this goal. We believe that a reference to the IJC provides an accountable mechanism for achieving this outcome.
- DEQ and BC Ministry of Environment and Climate Change Strategies have co-led the efforts of the Lake Koocanusa Monitoring and Research Working Group over the past several years. The Working Group has served as a valuable forum for sharing data and information, and its Selenium Technical Subcommittee has been essential to the establishment of a strong scientific basis for Montana and BC's joint effort to develop a site-specific standard for Lake Koocanusa. However, its governance structure and reservoir-specific scope limit its ability to: serve as an adequate forum to assure implementation of the criteria; provide adequate oversight of Elk Valley coal mining activities; and oversee coordination of Kootenai watershed monitoring in the future. An IJC water quality reference that provides for the establishment of a watershed body would more effectively provide these assurances in the future in an accountable and transparent manner to protect water quality and aquatic resources in the Kootenai watershed. It is important to note that pollution in the Kootenai watershed impacts not only Montana, Idaho, and the United States but also British Columbia and Canada when the Kootenai River flows back into Canada and into Kootenay Lake.

In order to meet these important objectives in the Kootenai watershed, the State of Montana requests DOS and other federal partners to engage with Canadian federal and provincial governments, and to move forward with a water quality reference to the IJC.

Thank you for your consideration.

Sincerely,

Shaun McGrath
Director
Montana Department of Environmental Quality

cc:

Kevin Jardine, Deputy Minister, British Columbia, Ministry of Environment and Climate Change Strategies
Laura Lochman, Director, Office of Canadian Affairs, U.S. Department of State
Deb Thomas, Acting Regional Administrator, Region 8, U.S. Environmental Protection Agency
Shelly Fyant, Chairwoman, Confederated Salish and Kootenai Tribes

Sidner, Regan

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

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

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

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

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

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
[redacted]
www.montanatu.org [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

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.

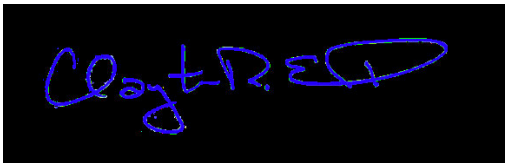
For more than half a decade, the collaborative work of the Department of Environmental Quality (DEQ), Montana Fish, Wildlife, and Parks (FWP), United States Environmental Protection Agency (EPA), United States Geologic Survey (USGS), United States Fish and Wildlife Service (USFWS), multiple Tribal nations 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 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

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

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

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.

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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.

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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.

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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

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 6th Ave, Legal Unit
Helena, MT 59601
[redacted]

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**

IN THE MATTER OF: THE REVIEW OF THE STRINGENCY OF ARM 17.30.632 PERTAINING TO SELENIUM STANDARDS FOR LAKE KOOCANUSA	**Case No. BER 2021-04 WQ**

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 67th 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. 6th 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
wwmercer@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

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]?)
Conservation Assistant
Idaho Conservation League
PO Box 2308, Sandpoint, ID 83864
[redacted]
http://www.idahoconservation.org [idahoconservation.org]

Become a member [idahoconservation.org]

IDAHO CONSERVATION LEAGUE

208.265.9565 • PO Box 2308, Sandpoint, ID 83864 • www.idahoconservation.org

Regan Sidner
Board Secretary
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901
Submited via email to 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
208.345.6933, ext. 402

Sidner, Regan

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 [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

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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[1]."

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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[1] 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.").

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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 that 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:

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> 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

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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
313 East Main Street
P.O. Box 4743
Bozeman, MT 59772-4743
406.426.9649
shernandez@earthjustice.org

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]

HOLLAND&HART [hollandhart.com]
[linkedin.com] [twitter.com]

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
wwmercer@hollandhart.com
vamarquis@hollandhart.com

ATTORNEYS FOR TECK COAL LIMITED

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: **ADOPTION OF NEW RULE I PERTAINING TO SELENIUM STANDARDS FOR LAKE KOOCANUSA**	**CAUSE NO. BER 2021-04 WQ** **Teck Coal Limited's Comments on the Petition Process**

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[1] 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

[1] 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	[ ] U.S. Mail [ ] Overnight Mail [ ] Hand Delivery [ ] Facsimile [X] E-Mail
Arlene Forney Assistant to William W. Mercer and Victoria A. Marquis aforney@hollandhart.com	[ ] U.S. Mail [X] E-Mail

/s/ Victoria A. Marquis

17424061_v2

Sidner, Regan

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
Paralegal
MT Dept. of Environmental Quality
1520 E 6th Ave, Legal Unit
Helena, MT 59601
[redacted]

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**

IN THE MATTER OF: THE REVIEW OF THE STRINGENCY OF ARM 17.30.632 PERTAINING TO SELENIUM STANDARDS FOR LAKE KOOCANUSA	**Case No. BER 2021-04 WQ**

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 29th day of September 2021.

/s/ Kirsten Bowers
Kirsten H. Bowers
Attorney
Montana Dept. of Environmental Quality
1520 E. 6th Avenue
Helena, MT 59601
kbowers@mt.gov

Certificate of Service

I hereby certify that on this 29th 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
Board of Environmental Review
1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440
KOrr@mt.gov

Regan Sidner, Board Secretary
Department of Environmental Quality
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901
Deqbersecretary@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
wwmercer@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

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
T [redacted]

HOLLAND&HART [hollandhart.com]
[linkedin.com] [twitter.com]

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
wwmercer@hollandhart.com
vamarquis@hollandhart.com

ATTORNEYS FOR TECK COAL LIMITED

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW OF THE STATE OF MONTANA

IN THE MATTER OF: **ADOPTION OF NEW RULE I PERTAINING TO SELENIUM STANDARDS FOR LAKE KOOCANUSA**	**CAUSE NO. BER 2021-04 WQ** **Teck's Response to Comments on the Petition Process**

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.[1] 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

[1] 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. l *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.[2]

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

[2] 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	[ ] U.S. Mail [ ] Overnight Mail [ ] Hand Delivery [ ] Facsimile [X] E-Mail
Arlene Forney Assistant to William W. Mercer and Victoria A. Marquis aforney@hollandhart.com	[ ] U.S. Mail [X] E-Mail

/s/ Victoria A. Marquis

17457215_v2

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

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

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

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

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

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

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

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

From: Stacee 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,
Stacee Anderson
6325 N Monroe St
Spokane, WA 99208

Sidner, Regan

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

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

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

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

From: Savanah 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

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

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

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 [nam04.safelinks.protection.outlook.com]

EARTHJUSTICE

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.

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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.[1] 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

[1] 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.

EARTHJUSTICE

> 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).

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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

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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,[2] 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

[2] 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.

Montana Department of Environmental Quality

TO: Katherine Orr, Board Attorney
Board of Environmental Review

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

DATE: October 15, 2021

SUBJECT: Board of Environmental Review Case No. BER 2021-08 WQ

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: ADOPTION OF NEW RULE 1 PERTAINING TO SELENIUM STANDARDS FOR LAKE KOOCANUSA	Case No. BER 2021-08 WQ

On October 14, 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.

Angelie Colamaria
Chief Legal Counsel
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901
Angela.Colamaria@mt.gov

Attachments

Murry Warhank
JACKSON, MURDO & GRANT, P.C.
203 North Ewing Street
Helena, MT 59601
Telephone: (406) 442-1308
Fax: (406) 443-7033
mwarhank@jmgm.com

Attorneys for the Board of County Commissioners of Lincoln County

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW OF THE STATE OF MONTANA

IN THE MATTER OF: **ADOPTION OF NEW RULE I PERTAINING TO SELENIUM STANDARDS FOR LAKE KOOCANUSA**	**CAUSE NO. _____** **PETITION TO REVIEW ARM 17.30.632 FOR COMPLIANCE WITH MONTANA CODE ANNOTATED § 75-5-203**

Pursuant to Montana Code Annotated § 75-5-203(4)(a) and Administrative Rule of Montana 1.3.227, the Board of County Commissioners of Lincoln County, Montana ("Lincoln County") petitions the Board of Environmental Review ("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 waterquality standard for selenium in Lake Koocanusa of 0.8 micrograms per liter, is more stringent than the comparable federal guideline for selenium of micrograms per liter. Lincoln County reserves, and by filing this petition does not waive, any of its legal rights or causes of action.

LEGAL BACKGROUND

1. Pursuant to the Montana Water Quality Act, the Board may not adopt a water quality standard "that is more stringent than the comparable federal regulations or guidelines that address the same circumstances" unless a specific written finding has been made regarding the need to protect "public health or the environment of the state" the standard's ability to mitigate harm to the public health or the environment, the achievability of the standard "under current technology," and "the costs to the regulated community." Mont. Code Ann. § 75-5-203(2) and (3).

2. The statutorily required written finding "must reference pertinent, ascertainable, and peer-reviewed scientific studies" contained in the rulemaking record. Mont. Code Ann. § 75-5-203(3).

3. Expressing a desire to reduce "redundant and unnecessary regulation"and to ensure that "the public [is] advised of the agencies' conclusions" regarding standards set more stringent than federal requirements, the Legislature intended that "the board or department include as part of the initial publication and all subsequent publications of a rule a written finding if the rule in question contains any standards or requirements" more stringent than the comparable federal regulations or guidelines. 1995 Mont. Laws Ch. 471 (Mont. HB 521, 54th Leg. Sess. (April 14, 1995)). Further, the Legislature intended that the written finding

"must include but is not limited to a discussion of the policy reasons and an analysis that supports the board's or department's decision." *Id*.

4. Mont. Code Ann. § 75-5-203 is "triggered" when EPA has promulgated a federal regulation or approved a guideline or criteria "addressing the particular parameter involved" or the specific discharge at issue." *Pennaco Energy v. Mont. Bd. of Envtl. Review*, 2007 Mont. Dist. LEXIS 513, ¶ 69 (reasoning based on legislative intent upheld in *Pennaco Energy, Inc. v. Mont. Bd. of Envtl. Review*, 2008 MT 425, ¶¶ 43-44, 347 Mont. 415, 199 P.3d 191).

5. "EPA's recommended water quality criteria are scientifically derived *numeric values* that protect aquatic life or human health from the deleterious effects of pollutants in ambient water." 81 Fed. Reg. 45285, 45286 (July 13, 2016) (emphasis added). For selenium, the EPA-recommended numeric value that protects aquatic life in lentic water (still or slow-moving fresh water) is 1.5 micrograms per liter. *Id*.; EPA, *Aquatic Life Ambient Water Quality Criterion for Selenium – Freshwater 2016* (June 2016) (the "2016 EPA Guideline"), Table 1. The 1.5 micrograms per liter water column criterion, combined with fish tissue criteria, comprise EPA's "guidance to States and Tribes authorized to adopt water quality standards under the Clean Water Act (CWA), to protect aquatic life from toxic effects of selenium." 2016 EPA Guideline, p. vii.

6. The 2016 EPA Guideline noted that "site-specific water column criterion element values *may* be necessary at aquatic sites with high selenium bioaccumulation." 2016 EPA Guideline, p. xiii (emphasis added).

FACTUAL BACKGROUND

7. On October 9, 2020, the Board proposed setting a water quality standard of 0.8 micrograms per liter selenium for Lake Koocanusa, which is a lentic water system.[1] 19 Mont. Admin. Register, Not. 17-414 (Oct. 9, 2020); DEQ, *Derivation of a Site-Specific Water Column Selenium Standard for Lake Koocanusa* (September 2020) (the "Derivation Document"), p. 15 ("construction of the Libby Dam in 1972 converted the Kootenai (Kootenay) river from a lotic to a lentic system"). The initial publication of ARM 17.30.632 did not indicate that the proposed rule was more stringent than the federal guideline nor did it provide the statutorily required written finding in accordance with Mont. Code Ann. § 75- 5-203. Instead, the initial publication stated that the 2016 EPA Guideline "included a recommendation that states and tribes develop site-specific selenium standards, *whenever possible.*" 19 Mont. Admin. Register, Not. 17-414 (Oct. 9, 2020) (emphasis added). That differs from the 2016 EPA Guideline, which states that "site-specific

[1] [1] The rulemaking at issue here was completed under the Board's authority prior to the July 1, 2021 effective date of Montana Senate Bill 233 from the 67th Legislature (2021). Therefore, the rulemaking record for ARM 17.30.632 is the Board's rulemaking record.

water column criterion element values *may* be necessary at aquatic sites with high selenium bioaccumulation." 2016 EPA Guideline, p. xiii (emphasis added).

8. In response to a comment raised about the "whenever possible" language in the initial publication, the Board offered no further explanation conforming the rule to the 2016 EPA Guideline. 24 Mont. Admin. Register, Not. 17-414, Bd. Resp. to Cmt. No. 197.

9. At the rulemaking public hearing on November 5, 2020 and during the written public comment period that ended on November 23, 2020, public comments were submitted by Lincoln County and others 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; therefore, the written finding was required pursuant to Montana Code Annotated § 75-5-203, and such finding had not been and could not be made. Teck's Comment Letter, pp. 15- 16; *see also* written public comments submitted by Lincoln County Commissioners; Sen. Mike Cuffe and Rep. Steve Gunderson, state legislators representing Lincoln County; Mr. Donavan Truman, Kootenai Sand & Gravel, Inc.; Dr. Anne Fairbrother, Exponent; Mr. Mark Compton, American Exploration & Mining Association; Mr. Todd Butts, Mountain River Consulting; Mr. Alan Prouty, J.R. Simplot Company; Ms. Tammy Johnson, Montana Mining Association; Ms. Peggy Trenk, Treasure State Resources Association; and Dr. Lisa Kirk Environmin.

10. In response, the Board asserted that it "is not required to make written findings required by 75-5-203(2), MCA" because the proposed 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." 24 Mont. Admin. Register, Not. 17-414, Bd. Resp. to Cmt. No. 200. Therefore, the Board adopted the new water quality standard of 0.8 micrograms per liter selenium in Lake Koocanusa without making the written finding required by Montana Code Annotated § 75-5-203. *Id*.; ARM 17.30.632(7)(a).

11. On December 28, 2020, the rule, including the rulemaking record and other documents, was submitted to the EPA for approval or disapproval pursuant to the federal Clean Water Act.

12. In its rationale for approval of the rule, EPA noted that the new rule sets a water quality standard for selenium in Lake Koocanusa of 0.8 microgram per liter which "*is more stringent* than the recommended water column criterion element for lentic aquatic system in EPA 2016 (1.5 µg/L)." EPA Rationale (February 25, 2021), p. 12 (pdf p. 15); n. 22 (emphasis added); *see also* p. 2 (pdf p. 5), n. 6; p. 6 (pdf p. 9), n. 11. EPA's conclusion makes clear that the Board erred when it promulgated the rule without the required written finding. Therefore, the Board's review of its prior action and its rulemaking record is appropriate under Montana Code Annotated § 75-5-203(4)(a), necessary, and imperative.

13. For water quality standards set more stringent than the federal guideline, Montana Code Annotated § 75-5-203(2)(a) requires there to be evidence in the Board's rulemaking record that the proposed standard protects public health or the environment. For ARM 17.30.632, contrary evidence exists, in part because the new rule does not account for naturally occurring and background levels of selenium. Teck's Comment Letter, p. 15. Additionally, the "fluctuating water elevations resulting from Libby Dam operations," bank sloughing events along the reservoir which addselenium from soil to the lake, and tributary contributions of selenium were not appropriately considered. *Id*., pp. 13-14.

14. Montana Code Annotated § 75-5-203(2)(b) requires there to be evidence in the rulemaking record that the proposed standard can mitigate harm to the public health or environment, but the Board's rulemaking record for ARM 17.30.632 is devoid of any evidence of an ability to mitigate any alleged harm. *Id*.,pp. 15-16.

a. The six most recent years of data revealed selenium levels in Lake Koocanusa that are within the Montana state-wide selenium standard of 5 micrograms per liter, the 2016 EPA Guideline of 1.5 micrograms per liter selenium, and the British Columbia Water Quality Guideline of 2.0 micrograms per liter selenium. *Id*., p. 9. The Board acknowledged Lake Koocanusa's compliance with the various selenium standards and that

"[t]here have been no documented reproductive effects on fish in Lake Koocanusa." 24 Mont. Admin. Register, Not. 17-414, Bd. Resp. to Cmt. No. 136; 143.

b. Any conclusion about harm based on standards inapplicable in Montana during the Board's rulemaking (e.g., the proposed rule itself, the 2016 EPA Guideline which has not been adopted in Montana, or the British Columbia Water Quality Objective) does not provide a legal basis for finding harm in support of the rulemaking. Teck Comment Letter, p. 10.

c. Fish tissue criteria are an important part of the newly promulgated rule (*see* ARM 17.30.632(6)), but Montana does not have a vetted, approved, or written methodology for using fish tissue data to assess water quality pursuant to Title 75, Section 5, Part 7 of the Water Quality Act. Thus, there is no water quality assessment completed pursuant to the Water Quality Act that shows harm based on fish tissue data.

d. Even when considering fish tissue data in compliance with the new rule and the 2016 EPA Guideline, no harm caused by selenium is revealed. When considering fish tissue samples, both the new rule and the 2016 EPA Guideline require use of an "average" or a "composite sample" of "a minimum number of five individuals from the same species". Teck's Comment Letter, pp. 9-10; ARM 17.30.632(6). Instead of considering average

or composite samples, the Board focused on three *individual* egg/ovary samples for redside shiner and one for peamouth chub. 24 Mont. Admin. Register, Not.17-414, Bd. Resp. to Cmt. No. 146; Derivation Document, p. 25.

Additionally, for egg/ovary fish tissue samples, the "only appropriate time to collect egg-ovary tissue from suitable species is when the female is gravid inthe pre-spawn stage, just before mating and spawning." USGS Open File Report 2020-1098, Table 2, p. 23. If unripe tissue is used, the results "will not be representative for monitoring and assessment." *Id*. The Board acknowledged egg/ovary fish tissue sampling issues, specifically that "it has been a challenge to collect eggs from gravid females" but did not explain its reliance on unripe ovary data. 24 Mont. Admin. Register, Not. 17-414, Bd. Resp. to Cmt. No. 141; 143. Even so, individual egg/ovary samples collected for the most sensitive species in Lake Koocanusa (Cutthroat trout) remain below the EPA criteria. *Id*. Thus, no credible evidence of harm based on fish tissue samples has been presented in the Board's rulemaking record. The Board did not respond to comments with any proof of harm, but rather a statement that "detrimental impacts *may* have already begun." 24 Mont. Admin. Register, Not. 17-414, Bd. Resp. to Cmt. No. 136 (emphasis added). However, no fish tissue samples exceeded the 2016 EPA Guideline's muscle criterion and "of

the four whole body samples collected on the Montana portion of the reservoir, all were below [the 2016 EPA Guideline's whole body criterion]." 24 Mont. Admin. Register, Not. 17- 414, Bd. Resp. to Cmt. No. 146; Derivation Document, p. 25.

e. The 2012 assessment of Lake Koocanusa as "threatened" was premised on projections that have proven wrong over time. Teck's Comment Letter, p. 9; *see also* public comment letter from Rep. Steve Gunderson.

f. Board Members noted that there are no alleged sources of selenium within the state's regulatory jurisdiction; thus, even if harm is occurring (which it is not) the standard cannot be used by Montana to mitigate any alleged harm. *Id*., pp. 11-13, 16; Dec. 11, 2021, Bd. Trans., 107:25-108:2; 108:16-17; 128:9-13.

15. Montana Code Annotated § 75-5-203(2)(b) requires there to be evidence in the rulemaking record that the proposed standard "is achievable under current technology." No such evidence exists in the rulemaking record. Teck's Comment Letter, p. 16.

a. The Board stated that "[a]chievability will depend on the degree of work undertaken in Canada to control the elevated selenium loads coming out of the Elk River." 24 Mont. Admin. Register, Not. 17-414, Bd. Resp. to

Cmt. No. 78. However, as noted above, Board Members recognized the inability of Montana to regulate work in Canada.

b. Naturally occurring selenium levels in Lake Koocanusa, as well as selenium contributions from other tributaries and other sources were not considered; therefore, the standard might never be achievable. In response to comments about tributary and background selenium contributions, the Board contradicted itself, stating that "all available data suggest that [tributary] contributions are lower than the proposed standards," but also admitting that the tributary sampling had limited sensitivity and could not accurately report selenium levels lower than 0.9 micrograms per liter.
24 Mont. Admin. Register, Not. 17-414, Bd. Resp. to Cmt. No. 129; 134; 132; 131. Because that reporting level of 0.9 micrograms per liter is greater than the new standard of 0.8 micrograms per liter, there is no assurance that the tributaries do not contribute selenium at levels near, at, or even slightly higher than the new standard. The Board referenced DEQ's 2016 tributary data, which indicates that the Montana tributaries contributing to Lake Koocanusa contain between 0.04 and 1.1 micrograms per liter selenium.

c. Selenium contributions and impacts from operation of the Libby Dam, including bank sloughing within the reservoir, were not considered; therefore, the standard might never be achievable. Despite the

significant water flow regimes caused by operation of Libby Dam and comments emphasizing the variable and drastic flows, the Board did not consider how the operation of Libby Dam affects water-column selenium levels in Lake Koocanusa. 24 Mont. Admin. Register, Not. 17-414, Bd. Resp. to Cmt. No. 152-155; Derivation Document, p. 15; *see also* written comments from Sen. Mike Cuffe). Nor did the Board consider how bank- sloughing along the shores of Lake Koocanusa affects sediment and water- column selenium levels in Lake Koocanusa, despite evidence collected by DEQ indicating the presence of selenium in soils along the banks and shoreline of the lake. Teck's Comment Letter, pp. 13, 15 (referencing 2013 DEQ analysis and information that Libby Dam drawdowns average 111 feet and significantly impact aquatic life).

16. Montana Code Annotated § 75-5-203(3) requires there to be "information from the hearing record regarding the costs to the regulated community" yet no such information was provided for public review and comment. Instead, the Board asserted that "existing or proposed permitting or development activities within the State of Montana, are *irrelevant* to the development of the criteria." 24 Mont. Admin. Register, Not. 17-414, Bd. Resp. to Cmt. No. 96 (emphasis added). An analysis of impacts to small businesses was provided within the Board's December 11, 2020, meeting materials,upon which the public was

provided limited opportunity to review and comment. The Board assumed, without any supporting analysis, that construction activities would be able to meet the standard using existing best management practices. 24 Mont. Admin. Register, Not. 17-414, Bd. Resp. to Cmt. No. 51.

17. Montana Code Annotated § 75-5-203(3) requires the Board to reference "pertinent, ascertainable, and peer-reviewed scientific studies." Many technical issues with the rule remain unresolved, including, notably, the fact that although the generic model provided by the U. S. Geological Survey was peer-reviewed, the new rule's technical support and derivation documents, including the model as it was applied to Lake Koocanusa, have not been peer-reviewed. Teck's Comment Letter, pp. 6-8, 14-15.

PARTIES

18. The Board is a quasi-judicial board consisting of seven members appointed by the Governor, attached to DEQ for administrative purposes. Mont. Code Ann. § 2-15-3502. The Board, pursuant to its statutory authority, promulgated the rules at issue in this litigation. 24 Mont. Admin. Register, Not. 17-414; Mont. Code Ann. §§ 75-5-301; 75-5-310.

19. Pursuant to Montana Code Annotated § 75-5-203(4)(a), the Board has authority to determine whether the rule at issue in this petition "is more stringent than comparable federal regulations or guidelines." If the Board declares that the rule is

more stringent than the federal guidelines, the rule must be revised to conform to the federal regulations or guidelines, or written findings must be made based on the Board's rulemaking record "within a reasonable period of time, not to exceed 8 months after receiving the petition." Mont. Code Ann. § 75-5-203(4)(a).

20. Lincoln County is a political subdivision of the State of Montana. That portion of Lake Koocanusa located in the United States is located within Lincoln County.

21. Lincoln County participated in the rulemaking for ARM 17.30.632 by attending public meetings, submitting formal written comments and delivering oral comments at public meetings.

22. Lincoln County is a "person affected by" the standard who may petition the Board to review the rule Mont. Code Ann. § 75-5-203(4)(a) as discussed above and because the rule has a significant impact on industry and development within the County.

23. As required pursuant to Admin. R. Mont. 1.3.227(2)(h), Lincoln County is aware that other public comments raised the same or similar concern (*see Supra* ¶ 2) regarding the new rule's stringency, which exceeds the 2016 EPA Guideline and triggers the requirements of Mont. Code Ann. § 75-5-203.

RELIEF REQUESTED

THEREFORE, Lincoln County respectfully requests that the Board:

1. Declare that ARM 17.30.632 is more stringent than the federal guideline for selenium in lentic water; therefore, the provisions of Montana Code Annotated § 75-5-203 apply.

2. Find that neither the initial nor subsequent publication of ARM 17.30.632 provided the requisite notice to the public, since the water quality standard for selenium in Lake Koocanusa was more stringent than the federal guideline.

3. Find that neither the initial nor subsequent publication of ARM 17.30.632 provided the requisite written finding, discussion of policy reasons, or analysis that supports the Board's decision to promulgate ARM 17.30.632, as required by Montana Code Annotated § 75-5-203.

4. Find that the Board's rulemaking record for ARM 17.30.632 does not support the written finding required by Montana Code Annotated §§ 75-5-203(2) and (3).

5. Initiate 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 by replacing the current 0.8 micrograms per liter water column standard for selenium in Lake Koocanusa with the federal guideline of 1.5 micrograms per liter.

DATED this 14th day of October, 2021.

Jackson, Murdo & Grant, P.C.

/S/ Murry Warhank

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Murry Warhank
Attorneys for the Lincoln County Bd. of County Commissioners