

**BOARD OF ENVIRONMENTAL REVIEW  
AUGUST 13, 2021**

**TABLE OF CONTENTS**

<b>AGENDA</b>	pg 0001
<b>ADMINISTRATIVE ITEMS</b>	
I.A.1. JUNE 11, 2021 MEETING MINUTES	pg 0009
<b>BRIEFING ITEMS</b>	
II.A.2.h. BER 2021-01 WQ: STIPULATION FOR DISMISSAL In the matter of the Notice of Appeal and Request for Hearing Regarding DEQ's Issuance of a Final Section 401 Water Quality Certification #MT4011079 to Transcanada Keystone Pipeline LP for the Keystone XL Pipeline Project, BER 2021-01 WQ	pg 0012
II.A.2.j. BER 2020-08 OC: STIPULATION FOR DISMISSAL In the Matter of Notice of Appeal and Request for Hearing Regarding DEQ's Approval of Riverside Contracting, Inc.'s Opencut Mining Permit #3234 (Arrow Creek Site), BER 2020-08 OC	pg 0017
II.A.3.b. BER 2021-03 OC: STIPULATION FOR DISMISSAL In the matter of the request for appeal and hearing of the permit revocation order for the Lucy Sandbox Gravel Pit (Permit # 2328, Lucy's Sandbox Gravel Pit, Richland County, MT), BER 2021-03 OC	pg 0020
<b>ACTION ITEMS</b>	
III.1. STIPULATION FOR FINAL AGENCY DECISION In the Matter of the Notice of Appeal and Request for Hearing by City of Great Falls Regarding Issuance of MPDES Permit No. MT0021920, BER 2019-07 WQ	pg 0022
III.2. BER 2016-07 SM: BRIEFING ITEMS An appeal in the matter of amendment application AM3, Signal Peak Energy LLC's Bull Mountain Coal Mine #1 Permit No. C1993017, BER 2016-07 SM	pg 0029
III.3. BER 2021-04 WQ: PETITION TO REVIEW ARM § 75-5-203 Review of Administrative Rule 17.30.632 pertaining to selenium standards for Lake Kooconusa	pg 0103
<b>NEW CONTESTED CASES</b>	
IV.1. BER 2021-05 WQ: NOTICE OF APPEAL In the matter of the notice of appeal and request for hearing by Westmoreland and Rosebud Mining LLC regarding issuance of MPDES Permit No. MT0023965, (BER 2021-05 WQ)	pg 0171
IV.2. BER 2021-06 SWP: NOTICE OF APPEAL In the matter of: Notice of Appeal and Request for Hearing by Oreo's Refining Regarding Solid Waste License Expiration (License #574)	pg 0176

BOARD OF ENVIRONMENTAL REVIEW  
AUGUST 13, 2021  
9:00 AM  
DEQ ZOOM CONFERENCE

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

**9:00 AM**

**I. ADMINISTRATIVE ITEMS**

**A. REVIEW AND APPROVE MINUTES**

1. The Board will vote on adopting June 11, 2021, meeting minutes.

Public Comment.

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

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

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

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

**II. BRIEFING ITEMS**

**A. CONTESTED CASE UPDATES**

1. Enforcement cases assigned to the Hearing Examiner

- a. **In the matter of violations of the Water Quality Act by Reflections at Copper Ridge, LLC, at Reflections at Copper Ridge Subdivision, Billings, Yellowstone County (MTR105376), BER 2015-01 WQ and In the matter of violations of the Water Quality Act by Copper Ridge Development Corporation at Copper Ridge Subdivision, Billings, Yellowstone County (MTR105377), BER 2015-02 WQ.** On April 17, 2015, Copper Ridge Development Corporation and Reflections at Copper Ridge, LLC, filed a Notice of Appeal and Request for hearing with the Board.

- i. **District Court Case:** This matter is before the District Court on judicial review following an intermediate agency ruling. DEQ began separate

enforcement actions against Copper Ridge Development Corp. and Reflections at Copper Ridge, LLC, for violations of the Montana Water Quality Act. The enforcement actions were followed by separate administrative appeals. The cases were consolidated before a hearing examiner at Petitioners' request. Following an evidentiary ruling that would allow for the admission of certain photographs, Petitioners moved to separate the cases again because the evidence to be admitted pertained to only one Petitioner. The motion was denied. The hearing examiner also denied Petitioners' subsequent motion in limine. Petitioners then filed a petition for judicial review of the hearing examiner's intermediate rulings and named the BER and DEQ as Respondents. BER filed a motion to dismiss on the grounds that BER should not have been named in the petition since it was not a party to the underlying contested case hearing. The motion was briefed and argued on October 7, 2020. On March 17, 2021, Judge Harada denied BER's motion to dismiss. She determined that while BER is not a required party, it may be named as a party on judicial review. She has not yet issued a decision on the underlying petition for judicial review. In the interim, the remainder of the case that was pending before the BER was dismissed, and DEQ has not appealed. As such, even if Petitioners were to prevail in District Court, there is no case before BER to which the matter could be remanded. DEQ is currently trying to determine if Petitioners will dismiss the District Court case for that reason.

- b. **In the matter of Notice of Appeal and Request for Hearing by Westmoreland Resources, Inc. Regarding October 27, 2020 Notice of Violation and Administrative Compliance and Penalty Order, BER 2020-06 SM.** On November 25, 2020, the Board received a Notice of Appeal from Westmoreland Resources. At its December 2020 meeting, the Board assigned this case to former Hearing Examiner Sarah Clerget. The parties filed a Joint Motion for Stay on January 12, 2021 which was granted the same day. On January 20, 2021, Hearing Examiner Jeffrey Doud took responsibility for this matter as a hearing officer. The parties filed a Joint Status Report on March 12, 2021 indicating that they are working toward settlement. The parties then, filed a second motion to extend the stay of the proceedings, seeking to extend the stay for 45-days. On May 28, 2021, the parties filed a joint scheduling order that Hearing Examiner Doud granted on June 1, 2021. The parties recently filed a joint motion to extend the deadlines for filing of expert disclosures and exhibit lists. In that Motion, the parties reiterated their position that they were working towards a resolution of this matter.
- c. **In the matter of the notice of appeal by Duane Murray regarding the notice of violations and administrative compliance and penalty order (Docket No. SUB-18-01; ES#36-93-L1-78; FID 2568), BER 2020-01 OC.** At its April 2021 meeting, the Board remanded this matter back to Hearing Examiner Lindsey Simon for further proceedings. On May 17, 2021, Hearing Examiner Simon issued an Order on Remand setting the remaining procedural deadlines in this case. On May 28, 2021, DEQ filed a "Motion to Amend the Scheduling Order and to Reopen Discovery for a Limited Purpose." On June 1, 2021, William Holahan took responsibility of this matter as a hearing examiner and on June 4, 2021 issued an Order granting DEQ's Motion to Amend. Hearing Examiner Holahan also issued an Amended Scheduling Order that same day. Discovery will close in early August 2021 and the parties may file dispositive motions by the end of August.

2. Non-enforcement cases assigned to the Hearings Examiner
  - a. **In the matter of the Notice of Appeal and Request for Hearing by Alpine Pacific Utilities Regarding Issuance of MPDES Permit No. MTX000164, BER 2019-06 WQ.** At the Board's October 9, 2020 meeting it voted to adopt the parties Stipulation and Request for Retention of Board Jurisdiction. On May 3, 2021, the parties filed an update with Hearing Examiner Lindsey Simon stating that pursuant to the Stipulation, Alpine had submitted the monitoring well plan to DEQ, that DEQ has approved the monitoring well installation plan, and that the monitoring well has been installed. On June 11, 2021, William Holahan took responsibility for this matter as a hearing examiner. On August 2, 2021, the parties filed a Joint Status Report with Hearing Examiner William Holahan. Alpine Pacific Utilities has not exercised its discretion under the Stipulation that would trigger reporting of additional activities at this time to the Board. The Board retains jurisdiction in the case that the stipulated terms are not implemented and approved by DEQ. Status reports are due every three months. The Board's jurisdiction extends at the latest to July, 2024 by the terms of the Stipulation.
  - b. **In the matter of Westmoreland Resources, Inc.'s, appeal of final MPDES permit No. MT0021229 issued by DEQ for the Absaloka Mine in Hardin, Big Horn County, MT, BER 2015-06 WQ.** On September 25, 2015, Westmoreland Resources, Inc. filed a notice of appeal and request for hearing and former Hearing Examiner Sarah Clerget took responsibility for this matter as a hearing officer on September 8, 2017. The case was stayed pending a Montana Supreme Court decision, which was issued in September 2019. On April 24, 2020, the parties filed a Joint Motion for Stay indicating that they are working toward settlement of the case. That motion was granted on April 28, 2020, and the case was stayed until July 24, 2020. The parties filed a Joint Motion to Continue Stay on July 24, 2020, and September 9, 2020, which was granted on July 29, 2020, and September 9, 2020. On September 30, 2020, the parties filed a "Joint Motion to Remand and Suspension of Proceedings." The BER granted that Motion on October 9, 2020, and issued its Order granting remand on November 16, 2020. The parties filed a joint status report on June 30, 2021 stating that they continue to work through the settlement agreement provisions and update to the permit renewal information.
  - c. **In the Matter of the Notice of Appeal and Request for Hearing by Spring Creek Coal, LLC Regarding Issuance of MPDES Permit No. MT0024619, BER 2019-02 WQ.** On April 12, 2019, the BER appointed former Hearing Examiner Sarah Clerget to preside over this contested case. On May 8, 2020, the parties filed a Joint Motion to Substitute, requesting that Navajo Transitional Energy Company, LLC replace Spring Creek Coal as a party, as it had replaced Spring Creek Coal as the permit holder. The motion to substitute was granted on May 13, 2020, and an Amended Scheduling Order was issued on May 12, 2020. On January 21, 2021, Hearing Examiner Andrew Cziok took responsibility for this matter as a hearing officer of this contested case. The parties filed a Joint Motion for Remand of permit and Suspension of Proceedings on March 17, 2021. Hearing Examiner Cziok granted that Motion, and the parties filed a status report on June 30, 2021 stating DEQ had notice the draft modification of permit to the public on June 14, 2021. The public was able to comment on the draft permit modification through July 15, 2021. DEQ will respond to the public comments within 45 days and issue a final administrative decision on the modified permit.

- d. **In the Matter of the Notice of Appeal by the Rippling Woods Homeowners Association, et al., Regarding Approval of Opencut Mining Permit No. 2949, Moudy Pit Site, Ravalli County, MT, BER 2019-08 through 21 OC.** Between November 8, 2019, and November 29, 2019, the Board received fourteen appeals from various parties regarding the approval of Opencut Mining Permit No. 2949. On December 13, 2019, the Board consolidated for procedural purposes BER 2019-08 through 21 OC. Several parties were dismissed from the appeals and a Scheduling Order was issued on January 31, 2020. DEQ filed a Partial Motion for Summary Judgment on September 29, 2020. The remaining appellants filed a response on October 21, 2020, and DEQ filed a reply on November 4, 2020. Former Hearing Examiner Eckstein held Oral argument on DEQ's Partial Motion for Summary Judgment on February 11, 2021. Hearing Examiner Snowberger issued a "Notice of Substitution" on March 12, 2021. On April 12, 2021, Ms. Snowberger issued a Disclosure and Status Conference stating that she had a potential conflict and set a status conference for April 15, 2021. Ms. Snowberger issued a Notice of Recusal on May 13, 2021, and Hearing Examiner Caitlin Buzzas issued a Notice of Substitution that same day. Hearing Examiner Buzzas is reviewing the file and will issue a decision on DEQ's Motion for Partial Summary Judgment by October 1, 2021.
- e. **In the Matter of Notice of Appeal and Request for Hearing by Western Energy Company Regarding Approval of Surface Mining Permit No. C2011003F, BER 2019-05 OC.** On May 31, 2019, the BER appointed former Hearing Examiner Sarah Clerget to preside over the contested case for procedural purposes only. At the Board's August meeting, it voted to assign the case in its entirety to Ms. Clerget. The parties cross moved for partial summary judgment, and Westmoreland also filed a Motion to Dismiss. On November 24, 2020, Ms. Clerget issued an order denying Westmoreland's Motion to Dismiss, denying Conservation Groups' Motion for Partial Summary Judgment, and granting Westmoreland's and DEQ's Motions for Partial Summary Judgment. Ms. Clerget held a status conference on December 4, 2020, at which all parties could not agree to bring the motions decision before the Board. Therefore, the case proceeded to a hearing on the one remaining issue. Former Hearing Examiner Clerget issued an Amended Scheduling Order on January 14, 2021. Hearing Examiner Jeffrey Doud took responsibility for this matter as a hearing officer as of January 20, 2021. A four-day hearing took place on June 2-4 and 21, 2021. The parties are to file their proposed findings of fact and conclusions of law in September with responses due in October, 2021.
- f. **Montana Environmental Information Center, and Sierra Club v. Montana Department of Environmental Quality, Montana Board of Environmental Review, and Western Energy Co. (DV-2019-34, Rosebud County) (District Court).** In July 2019, MEIC and the Sierra Club filed a petition for judicial review of BER's decision to approve a permit to expand the Rosebud Mine. BER filed a motion to dismiss on the grounds that BER should not have been named in the petition since it was the deciding agency, not a party to the underlying contested case proceeding. Judge Bidegaray denied the motion on March 12, 2020. The Montana Supreme Court denied BER's petition for writ of supervisory control to have the Order reviewed before the case was fully decided by the District Court and remanded the case.

The petition for judicial review has been fully briefed, and the parties presented oral argument on December 16, 2020. Petitioners recently submitted supplemental authority, and the Respondents ( other than BER) responded.

The matter has been fully submitted, and we are just waiting for a decision from Judge Bidegary. Once a decision is issued, we will have an opportunity to appeal the Order requiring the BER to remain in the case and will need to discuss how to proceed at that time.

- g. **In the Matter of Notice of Appeal by Signal Peak Energy LLC, Regarding Purporting to Rule on An Alleged Impairment of Water Rights Permit No. C1993017, Roundup, Musselshell County, MT, BER 2020-04 SM.** On October 9, 2020, the BER appointed former Hearing Examiner Sarah Clerget to preside over this contest case hearing. On November 10, 2020, Ms. Clerget issued a Prehearing Order. The parties filed a Stipulation to Stay Proceedings on November 13, 2020. Ms. Clerget stayed the proceedings on November 20, 2020. Hearing Examiner Andrew Cziok took responsibility for this matter as a hearing officer on January 21, 2021. On February 11, 2021, the parties filed a Stipulated Motion to Extend Stay of Proceedings Pending Settlement Negotiations. Mr. Cziok issued an Order granting the stay on February 12, 2021. The parties filed a Joint Stipulation for Dismissal on May 14, 2021. On May 27, 2021, Hearing Examiner Cziok issued an Order dismissing this case without prejudice pending the District Court's final disposition of the SPE District Court Appeal and final resolution of any appeals from the District Court's final disposition.
- h. **In the matter of the Notice of Appeal and Request for Hearing Regarding DEQ's Issuance of a Final Section 401 Water Quality Certification #MT4011079 to Transcanada Keystone Pipeline LP for the Keystone XL Pipeline Project, BER 2021-01 WQ.** On January 4, 2021, the Northern Plains Resource Council and Sierra Club filed a "Notice of Appeal and Request for Hearing." At its February 2021 meeting the Board appointed Agency Legal Services as Hearing Examiner of this contested case. Katherine Orr was assigned as Hearing Examiner of this matter and on March 9, 2021, she issued an Order to Set Scheduling Conference. The scheduling conference was held on March 15, 2021, and the parties agreed to stay this matter until further indication the case should go forward pursuant to decisions made by the Federal government regarding the Keystone XL Pipeline Project. A Status Conference was held on April 20, 2021, with both parties being represented by counsel. Parties agreed to continue the stay of this matter and set another Status Conference for July 12, 2021. A status conference was held on July 12, 2021, wherein the parties agreed to continue the stay and set another Status Conference for September 10, 2021. The parties discussed that recent decisions made by the Army Corp of Engineers would likely make this matter moot. A Stipulation for Dismissal has ben filed and the Hearing Examiner will issue an Order of Dismissal upon request of the parties.
- i. **In the Matter Indigenous Environmental Network's and North Coast Rivers Alliance's Appeal of the Montana Department of Environmental Quality's Final Determination to Issue a 401 Water Quality Certification for the Keystone XL Pipeline, DEQ Application No. MT4011079, BER 2021-02 WQ.** On February 1, 2021, the Indigenous Environmental Network and North Coast Rivers Alliance filed a "Notice of Appeal and Request for Hearing." At its February 2021 meeting the Board appointed Agency Legal Services as Hearing Examiner of this contested case. Katherine Orr was assigned as Hearing Examiner of this matter and on March 9, 2021, she issued an Order to Set Scheduling Conference. The scheduling conference was held on March 15, 2021, and the parties agreed to stay this matter until further indication the case should go forward pursuant to decisions made by the Federal government

regarding the Keystone XL Pipeline Project. A Status Conference has been was held on April 20, 2021, with both parties being represented by counsel. Parties agreed to continue the stay of this matter and set another Status Conference for July 12, 2021. A Status Conference was held on July 12, 2021, wherein the parties agreed to continue the stay and set another Status Conference for September 10, 2021. The parties discussed that recent decisions made by the Army Corp of Engineers would likely make this matter moot.

- j. **In the Matter of Notice of Appeal and Request for Hearing Regarding DEQ's Approval of Riverside Contracting, Inc.'s Opencut Mining Permit #3234 (Arrow Creek Site), BER 2020-08 OC.** On December 23, 2020, Appellants filed a "Notice of Appeal and Request for Hearing." At its February 2021 meeting, the Board appointed Agency Legal Services as Hearing Examiner of this contested case. On March 12, 2021, Hearing Examiner Cziok issued a Prehearing Order to the parties. Riverside Contracting filed a Petition to Intervene on March 25, 2021. DEQ and the Appellants filed a Joint Proposed Schedule on March 26, 2021, the Petition to Intervene and the Proposed Schedule were granted on April 1, 2021. The parties were proceeding according to the Scheduling Order with discovery closing December 2021. A stipulation for Dismissal Under Rule 41(a)(1)(A)(ii) stipulating to dismiss without an order has been filed.
  - k. **In the Matter of Contest and Request for Hearing by Talen Montana, LLC Regarding the Selection of a Remedy and Setting of Financial Assurance for the Colstrip Steam Electric Station Units 1 & 2 by the Montana Department of Environmental Quality, BER 2020-07 MFSA/WQA.** On December 17, 2020, Talen Montana LLC filed a Request for Hearing and Protective Notice of Contest. The parties requested the proceeding be stayed pending completion of dispute resolution. That request was granted by former Board Chair Deveny on December 18, 2020. Katherine Orr was assigned as Hearing Examiner for this matter and issued an Order to Set Scheduling Conference on March 9, 2021. The parties filed a Joint Request to Continue Stay of BER Proceedings on March 18, 2021. Ms. Orr signed an Order Continuing Stay and Delaying Scheduling Conference Until Expiration of Stay Order on March 19, 2021. This matter will be stayed until DEQ Director's final decision following dispute resolution. This matter continues to be stayed pending DEQ Director's final decision.
  - l. **In the matter of notice of appeal and request for hearing by the Western Sugar Cooperative regarding its Montana Pollutant Discharge Elimination System Permit No. MT0000281 issued October 29, 2020, BER 2020-05 WQ.** On November 24, 2020, the Board received a Notice of Appeal from Western Sugar Cooperative. At its December meeting, the Board assigned this matter to former Hearing Examiner Clerget. Ms. Clerget issued a Prehearing Order on January 4, 2021. Hearing Examiner Andrew Cziok took responsibility for this matter as a hearing officer on January 21, 2021. Mr. Cziok issued a Scheduling Order on March 16, 2021. On June 28, 2021, Western Sugar Cooperative filed a Motion for Declaratory Ruling. The Department of Environmental Quality requested an extension of time in which to respond to the Motion, which was granted. The matter should be fully briefed in the beginning of August upon submission of a reply brief at which time Mr. Cziok will rule on the Motion.
3. Contested Cases not assigned to a Hearing Examiner.

- a. **In the matter of the notice of appeal and request for hearing by Western Energy Company (WECO) regarding its MPDES Permit No. MT0023965 issued for WECO's Rosebud Mine in Colstrip, BER 2012-12 WQ.** This matter has been stayed pending resolution of Montana Environmental Information Center and Sierra Club v. Montana DEQ and Western Energy Company (now on remand to the First Judicial District Court as Cause No. CDV 2012-1075). On September 10, 2019, the Montana Supreme Court reversed the First Judicial District Court on decisions of law and determined that DEQ properly interpreted rules implementing the Montana Water Quality Act (specifically ARM 17.30.637(4)). The Court recognized that DEQ has the flexibility to exempt ephemeral waters from certain water quality standards applicable to Class C-3 waters without BER reclassifying the waters. The Court also determined that DEQ lawfully permitted representative sampling of outfalls under Western Energy Company's MPDES permit. The Montana Supreme Court remanded the case back to the District Court for further proceedings to determine certain issues of material fact, specifically whether DEQ acted properly regarding a stretch of East Fork Armells Creek that is potentially impaired and intermittent, whether it is necessary for DEQ to adopt a TMDL for impaired segments of East Fork Armells Creek, and whether the representative monitoring selected by DEQ is factually supported. On July 6, 2021, First Judicial District Court Judge Abbott granted DEQ's and Westmoreland Rosebud Mining, LLC's (formerly WECO) joint motion to stay the litigation due to the fact that a renewed version of MT0023965 took effect on August 1, 2021. On or before August 15, 2021, the parties are to either move to dismiss First Judicial District Court Cause No. CDV 2012-1075 or move for a status conference to determine future proceeding in the case.
- b. **In the matter of the request for appeal and hearing of the permit revocation order for the Lucy Sandbox Gravel Pit (Permit # 2328, Lucy's Sandbox Gravel Pit, Richland County, MT), BER 2021-03 OC.** On May 17, 2021, the Board received a request for hearing. The case was presented as a new contested, which came before the Board at its June 11, 2021 meeting. The board tabled the matter pending further information from the Appellant. On August 6, 2021, DEQ and the Appellant filed a Joint Stipulation for Dismissal under Mont. R. CivP. 41(a)(1)(A)(ii) requesting dismissal with prejudice without an order. This matter is dismissed pursuant to the Parties' stipulation.

### III. ACTION ITEMS

1. **In the Matter of the Notice of Appeal and Request for Hearing by City of Great Falls Regarding Issuance of MPDES Permit No. MT0021920, BER 2019-07 WQ.** On November 25, 2020, DEQ and the City of Great Falls filed a "Stipulation for Final Agency Decision". At its December 2020 meeting, the Board approved the Stipulation and on January 5, 2021 issued a "Board Order for Final Agency Decision" resolving appeal issues No. 1, 3, 4, and 5. The parties continued to update Hearing Examiner Doud and on June 14, 2021 filed a "Stipulation for Final Agency Decision" resolving appeal issue No. 2. The Board can decide to either accept or reject the stipulation.
2. **An appeal in the matter of amendment application AM3, Signal Peak Energy LLC's Bull Mountain Coal Mine #1 Permit No. C1993017, BER 2016-07 SM.** On August 18-21, 2020, the parties participated in the contested case hearing. The parties filed their Proposed Findings of Fact and Conclusions of Law on December 18, 2020. On January 21, 2021, Hearing Examiner Andrew Cziok took responsibility



for this matter as a hearing officer of this contested case. As of March 31, 2021, Hearing Examiner Caitlin Buzzas has taken responsibility for this matter as a hearing officer. On May 27, 2021, Signal Peak filed a Motion for Board to Reclaim Jurisdiction. Ms. Buzzas issued an Order on Signal Peak's motion on July 30, 2021 and subsequently, her proposed findings of fact and conclusions of law on July 30, 2021. The parties may file exceptions which necessitate a final hearing by the Board on adoption, amendment or reversal of the Findings of Fact and Conclusions of Law at the Board's meeting on October 8, 2021. Signal Peak has requested that this matter be put on the agenda for this meeting to consider its motion for the Board to reclaim jurisdiction.

3. **Review of Administrative Rule 17.30.632 pertaining to selenium standards for Lake Koochanusa.** On July 1, 2021, the Board received a request 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 can decide to assign review to a rule reviewer within Agency Legal Services Bureau or retain responsibility itself to review the rule and determine whether the rule is more stringent than comparable federal regulations or guidelines. If the Board retains responsibility, it will determine a process and timeframe for the rule review upon written comment by the affected parties to be submitted by October 8, 2021.

#### IV. NEW CONTESTED CASES

1. **In the matter of the notice of appeal and request for hearing by Westmoreland and Rosebud Mining LLC regarding issuance of MPDES Permit No. MT0023965, (BER 2021-05 WQ).** On July 8, 2021, the Board received a request for hearing. The Board can decide to assign a hearings examiner for procedural issues in this case, hear the case itself, or assign a hearing examiner for all or a portion of the case.
2. **In the matter of: Notice of Appeal and Request for Hearing by Oreo's Refining Regarding Solid Waste License Expiration (License #574).** On July 29, 2021, the Board received a request for hearing. The Board can decide to assign a hearings examiner for procedural issues in this case, hear the case itself, or assign to a hearing examiner for all or a portion of the case.

#### V. BOARD COUNSEL UPDATE

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

#### VI. 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.

#### VII. ADJOURNMENT



**BOARD OF ENVIRONMENTAL REVIEW  
MEETING MINUTES**

**JUNE 11, 2021**

**Call to Order**

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

**Attendance**

**Board Members Present**

By Zoom: Chairman Ruffatto; Board Members, David Lehnherr, David Simpson, Julia Altemus, and Joseph Smith

A quorum of the Board was present.

**Board Attorney(s) Present**

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

**DEQ Personnel Present**

Board Liaison: George Mathieus

Board Secretary: Regan Sidner

DEQ Legal: Angie Colamaria, Kirsten Bowers, Aaron Pettis, Sarah Clerget, Sarah Christopherson, Catherine Armstrong

Water Protection: Joanna McLaughlin

Mining: Chris Cronin, Emily Lodman, Martin VanOort

**Other Parties Present**

Laurie Crutcher, Laurie Crutcher Court Reporting

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

Catherine Laughner - representing Western Sugar Cooperative

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

Derf Johnson - Montana Environmental Information Center

Julia Griffin

## I. ADMINISTRATIVE MATERIALS

### A. REVIEW AND APPROVE MINUTES

#### I.A.1. The Board will vote on adopting the April 23, 2021 meeting Minutes

There was no board discussion and no public comment.

Board member Simpson moved to approve the April 23, 2021 meeting minutes; Board Member Smith seconded. The motion passed unanimously.

## II. BRIEFING ITEMS

### A. CONTESTED CASE UPDATES

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

II.A.1.c. **In the matter of the notice of appeal by Duane Murray regarding the notice of violations and administrative compliance and penalty order (Docket No. SUB-18-01; ES#36-93-L1-78; FID 2568), BER 2020-01 OC.** Katherine Orr provided an update to the Board. There were no questions from the Board members.

II.A.2.f. **In the Matter of Notice of Appeal and Request for Hearing by Western Energy Company Regarding Approval of Surface Mining Permit No. C2011003F, BER 2019-05 OC.** Katherine Orr provided an update to the Board. There were no questions from the Board members.

II.A.2.h. **In the Matter of Notice of Appeal by Signal Peak Energy LLC, Regarding Purporting to Rule on An Alleged Impairment of Water Rights Permit No. C1993017, Roundup, Musselshell County, MT, BER 2020-04 SM.** Hearing Examiner Cziok clarified that the briefing should have stated, "On May 27, 2021, Hearing Examiner Cziok issued an Order dismissing this case *without* prejudice pending the District Court's final disposition of the SPE District Court Appeal and final resolution of any appeals from the District Court's final disposition."

II.A.2.i. **In the Matter of the Notice of Appeal and Request for Hearing by City of Great Falls Regarding Issuance of MPDES Permit No. MT0021920, BER 2019-07 WQ.** Angela Colamaria gave an update to the Board on behalf of the lead DEQ attorney on this matter.

## IV. NEW CONTESTED CASES

IV.1. **In the matter of the request for appeal and hearing of the permit revocation order for the Lucy Sandbox Gravel Pit (Permit # 2328, Lucy's Sandbox Gravel Pit, Richland County, MT), BER 2021-03 OC.** Chair Ruffatto shared that he does not feel that there is enough information in front of the Board to decide whether or not to hear the case or assign it to a hearing examiner. DEQ Counsel Sarah Clerget explained that she did not feel comfortable supplementing the record as nothing further is in the record than is in front of the Board at this time. Ms. Clerget requested that the matter be kept with the Board for the purpose of the Board hearing the entire matter, in the interest of resolving the matter quickly and providing an opportunity for the Board to practice its judicial authority. Board members discussed the merits of tabling the matter until August vs. keeping the matter with the Board, and unanimously voted to end the discussion.

Chair Ruffatto moved to table the matter until there is further information available to the board; Dave Simpson seconded the motion. The motion passed four to one with Board Member Lehnerr dissenting.

Ms. Clerget clarified that since the issue of assigning the case was tabled until August, in the intervening time if DEQ need submit motions, it would be appropriate to submit to the Board. Chair Ruffatto confirmed.

III.A.2. In the matter of the notice of appeal by Duane Murray regarding the notice of violations and administrative compliance and penalty order (Docket No. SUB-18-01; ES#36-93-L1-78; FID 2568), BER 2020-01 OC.

Mr. Murray was not present or represented at the meeting.

Board Member Lehnherr moved to approve the dismissal of the appeal recommended by the Hearing Examiner; Boarded Member Reiten seconded. The motion failed one to four with Chair Ruffatto and Board Members Simpson, Reiten, and Smith dissenting.

Chair Ruffatto moved that the appeal be remanded to the Hearing Examiner; Board Member Simpson seconded. The motion passed by four to one with Board Member Lehnherr dissenting.

#### V. BOARD COUNSEL UPDATE

Ms. Orr gave an update to the Board on Senate Bill 233. Based on some precedent, the Board will retain authority for rule making over itself for procedural reasons.

Board Member Simpson shared some thoughts on the way that the Board approaches new contested cases. Board Liaison George Mathieus asked that the Board work with him as they are planning on working on procedural changes from a budgetary standpoint. Board member Smith and Vicki Marquis provided some comments.

Lindsey Simon has left ALSB. The three cases she had assigned to her have been reassigned to other hearings examiners. There were no questions from Board members regarding this.

#### VI. GENERAL PUBLIC COMMENT

No public comment was offered.

#### VII. ADJOURNMENT

Board Member Altemus moved to adjourn; Board Member Lehnherr seconded. The motion passed unanimously. The meeting adjourned at 9:43 AM.

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

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

\_\_\_\_\_  
 DATE

Kurt R. Moser  
 Department of Environmental Quality  
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*Attorney for the Department*

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 (406) 570-2202  
 GuyAlsentzer@gmail.com

*Attorney for Northern Plains Resource Council and Sierra Club*

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
 OF THE STATE OF MONTANA

IN THE MATTER OF: NOTICE OF  
 APPEAL AND REQUEST FOR  
 HEARING REGARDING MONTANA  
 DEPARTMENT OF  
 ENVIRONMENTAL QUALITY'S  
 ISSUANCE OF A FINAL SECTION  
 401 WATER QUALITY  
 CERTIFICATION #MT4011079 TO  
 TRANSCANADA KEYSTONE  
 PIPELINE LP FOR THE KEYSTONE  
 XL PIPELINE PROJECT

Case No. BER 2021-01 WQ

**STIPULATION FOR DISMISSAL**

COME NOW the parties, by and through counsel of record, and pursuant to Rule 41(a)(1)(A)(ii) of the Montana Rules of Civil Procedure, hereby submit this Stipulation for Dismissal. The federal application which was the subject of the Department of Environmental Quality's ("DEQ") 401 Certification decision was

administratively withdrawn by the U.S. Army Corps of Engineers on May 4, 2021. In response, DEQ withdrew its 401 Certification decision on July 12, 2021. As a result, there is no longer a live controversy and the parties have stipulated to dismissal.

A proposed order of dismissal is attached.

DATED this 5<sup>th</sup> day of August, 2021.

/s/ Kurt R. Moser  
KURT R. MOSER  
Department of Environmental Quality

*Attorney for the Department*

DATED this 5<sup>th</sup> day of August, 2021.

/s/ Guy Alsentzer  
GUY ALSENTZER  
Upper Missouri Waterkeeper

*Attorney for Northern Plains Resource Council and Sierra Club*

## CERTIFICATE OF SERVICE

I hereby certify that this 5th day of August, 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:

Guy Alsentzer, Esq. P.O. Box 128 Bozeman, MT 59771 (406) 570-2202 GuyAlsentzer@gmail.com	<input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Personal Delivery
Regan Sidner, Secretary Board of Environmental Review MT Department of Environmental Quality P.O. Box 200901 Helena, MT 59620-0901 Regan.Sidner@mt.gov	<input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Personal Delivery
Jon Kenning, Bureau Chief MT DEQ - Water Protection Bureau 1520 E. Sixth Avenue/P.O. Box 200901 Helena, MT 59620-0901 (406) 444-0420 jkenning@mt.gov	<input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Personal Delivery
Katherine J. Orr, Hearing Examiner Agency Legal Services Bureau 1712 Ninth Avenue P.O. Box 201440 Helena, MT 59620-1440 korr@mt.gov akraske@mt.gov	<input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Personal Delivery

/s/ Kurt R. Moser  
 Kurt R. Moser  
 MT-Department of Environmental Quality

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

<p><b>IN THE MATTER OF: NOTICE OF APPEAL AND REQUEST FOR HEARING REGARDING MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY'S ISSUANCE OF A FINAL SECTION 401 WATER QUALITY CERTIFICATION #MT4011079 TO TRANSCANADA KEYSTONE PIPELINE LP FOR THE KEYSTONE XL PIPELINE PROJECT</b></p>	<p><b>CASE NO. BER 2021-01 WQ</b></p>
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**(PROPOSED) ORDER OF DISMISSAL**

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On August 5th, 2021, Northern Plains Resource Council, Sierra Club, and the Department of Environmental Quality (DEQ) filed a Stipulation for Dismissal, pursuant to Rule 41(a)(1)(A)(ii) of the Montana Rules of Civil Procedure. The undersigned finds that the parties have stipulated to dismiss this contested case under Mont. R. Civ. P. 41(a)(1)(A)(ii).

Therefore, **IT IS ORDERED:**

That this contested case is **DISMISSED.**



DATED this \_\_\_\_ day of August, 2021.

---

KATHERINE J. ORR  
Hearing Examiner  
Agency Legal Services Bureau  
1712 Ninth Avenue  
P.O. Box 201440  
Helena, MT 59620-1440

- c: Guy Alsentzer, Esq.  
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- Jon Kenning, DEQ Bureau Chief  
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Lee M. McKenna  
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*ATTORNEY FOR DEQ*

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

<p><b>IN THE MATTER OF: NOTICE          OF APPEAL AND REQUEST          FOR HEARING REGARDING          DEQ'S APPROVAL OF          RIVERSIDE CONTRACTING,          INC.'S OPENCUT MINING          PERMIT #3234 (ARROW          CREEK SITE)</b></p>	<p><b>Case No. BER 2020-08 OC</b></p>
<p><b>STIPULATION FOR DISMISSAL</b></p>	

On August 2, 2021, Appellants filed a Motion to Dismiss Appeal in Case No. BER 2020-08 OC. The Department of Environmental Quality ("DEQ") does not object to Appellant's Motion to Dismiss. DEQ has also contacted counsel for Intervenor, who also does not object. Under Rule 41(a)(1)(A)(ii), M.R.Civ.P., a Cause of Action may be dismissed without a court order by a Stipulation of

Dismissal by all parties who have appeared. Therefore, this case can be dismissed without a court order.

DATED this 5th day of August 2021.

/s/ Lee M. McKenna  
LEE M. McKENNA  
Department of Environmental Quality  
*Attorney for the Department*

## Certificate of Service

I hereby certify that on this 5th day of August 2021, I caused to be served a true and correct copy of the Notice of Substitution of Counsel to all parties or their counsel of record by electronic mail, addressed as follows:

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Regan Sidner  
 Secretary, Board of Environmental  
 Review  
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By: /s/ Catherine Armstrong  
 CATHERINE ARMSTRONG  
 Paralegal  
 Department of Environmental Quality

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*ATTORNEY FOR DEQ*

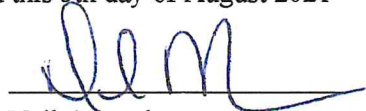
**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
 OF THE STATE OF MONTANA**

<b>IN THE MATTER OF: THE          REQUEST FOR APPEAL AND          HEARING OF THE PERMIT          REVOCATION ORDER FOR THE          LUCY SANDBOX GRAVEL PIT          (PERMIT #2328, LUCY'S          SANDBOX GRAVEL PIT,          RICHLAND COUNTY, MT)</b>	<b>Case No. BER 2021-03 OC</b>
--	--------------------------------

**STIPULATION OF DISMISSAL WITH PREJUDICE**

Under Rule 41(a)(1)(A)(ii), M.R.Civ.P., a Cause of Action may be dismissed without a court order by a Stipulation of Dismissal by all parties who have appeared. Pursuant to Rule 41(a)(1)(A)(ii), M.R.Civ.P., Neil Amondson and the Department of Environmental Quality hereby stipulate to dismiss the above-captioned matter with prejudice.

Dated this 5th day of August 2021



Neil Amondson,  
 formerly Hunter-Light-ND, LLC

*/s/ Sarah M. Clerget*

Sarah M. Clerget  
 Attorney for DEQ

**Certificate of Service**

I hereby certify that I caused a true and correct copy of the foregoing to be e-mailed to the following: *on August 6, 2021.*  
*CAA.*

Katherine Orr, Board Attorney  
 Board of Environmental Review  
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 P.O. Box 201440

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KOrr@mt.gov

0021

Regan Sidner, Board Secretary  
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By: /s/ Catherine Armstrong  
CATHERINE ARMSTRONG  
Paralegal  
Department of Environmental Quality

STIPULATION OF DISMISSAL WITH PREJUDICE - 2

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6/14/21 at 12:23 PM

By: *Aleisha Krasko*

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ATTORNEY FOR THE  
DEPARTMENT OF  
ENVIRONMENTAL QUALITY

ATTORNEYS FOR CITY OF GREAT  
FALLS

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

<p><b>IN THE MATTER OF:</b></p> <p><b>THE NOTICE OF APPEAL AND REQUEST FOR HEARING BY CITY OF GREAT FALLS REGARDING ISSUANCE OF MPDES PERMIT NO. MT0021920</b></p>	<p><b>CAUSE NO. BER 2019-07-WQ</b></p> <p><b>STIPULATION FOR FINAL AGENCY DECISION</b></p>
--	--

COME NOW Appellant City of Great Falls (“City”) and the Montana Department of Environmental Quality (“DEQ”), collectively (“Parties”), and hereby stipulate and agree as follows:

1. Pursuant to Mont. Code Ann. § 75-5-403, the Board of Environmental Review (“Board”) has authority to hear contested case appeals of DEQ’s Montana Pollutant Discharge Elimination System (“MPDES”) permitting decisions, such that the Board may affirm, modify, or reverse a permitting action of DEQ.

2. DEQ is a department of the executive branch of state government, duly created and existing under the authority of Mont. Code Ann. § 2-15-3501. DEQ has statutory authority to administer Montana's water quality statutes, including the review and issuance of MPDES Permits under Mont. Code Ann. § 75-5-402 and ARM 17.30.1301.

3. The City is a municipality within the State of Montana and owns a "Publicly Owned Treatment Works" ("POTW") as that term is defined in ARM 17.30.1304(58) which is an MPDES permitted facility serving the City. The City has been issued MPDES Permit No. MT0021920 for the POTW.

4. MPDES Permit No. MT0021920 was renewed on July 12, 2019 and included an effective date of September 1, 2019 (the "2019 Permit").

5. On August 9, 2019, the City timely filed with the Board a Notice of Appeal and Request for Hearing, appealing certain provisions of the 2019 Permit. *See* Notice of Appeal (August 9, 2019).

6. Four of the five issues identified in the City's Notice of Appeal and Request for Hearing have been resolved under the terms of a previous Stipulation executed by the parties on November 25, 2020 and reflected in the and Board Order for Final Agency Decision issued January 5, 2021.

7. The last remaining issue, concerning City's Notice of Appeal Issue No. 2 regarding di(2-ethylhexyl) phthalate ("DEHP"), continued as the sole



remaining issue in this contested case, but was stayed pending further settlement discussions between the Parties.

8. The remaining Notice of Appeal Issue No. 2 may be completely resolved under the terms of this Stipulation, should the Board adopt a final agency decision as specified herein and as further set forth in the Modified Permit attached as **Exhibit A**. Under the terms of this Stipulation, the City's Notice of Appeal Issue No. 2 would be fully resolved.

9. Should the Board accept this Stipulation and approve the Proposed Board Order for Final Agency Decision, the City will dismiss this contested case in its entirety.

10. The City has provided, and DEQ has considered, additional monthly and quarterly monitoring data of the City's discharge and the ambient condition of the receiving water, specific to DEHP, including additional data extending back to September 2019.

11. DEQ agrees that it is appropriate to use a dilution factor of six percent of the receiving water's 7Q10 flow when considering the reasonable potential for the City's discharge to cause or contribute to an exceedance of the DEHP standard. Great Falls maintains that a higher dilution factor would be appropriate, but for purposes of this permit term, and in light of the modified permit terms, Great Falls

accepts DEQ's use of the six percent dilution factor. Nothing in this stipulation limits the consideration of appropriate dilution in a future permitting action.

12. The presence of DEHP in the City's reported effluent discharge has been intermittent and infrequent.

13. The 2019 Permit's effluent limits for DEHP in Section I.B. are removed and effluent monitoring requirements on page 5 of the 2019 Permit are modified to require monthly monitoring for 11 consecutive months, beginning September 2019, followed by quarterly monitoring thereafter.

14. Nothing in this Stipulation shall prohibit the City or DEQ from exercising any rights or authority under the Water Quality Act.

15. The Modified Permit attached hereto as Exhibit A appropriately incorporates modifications to the appealed 2019 Permit as contemplated in this Stipulation.

16. **Exhibit B**, a track changes/redline version of the Modified Permit, has been attached to this Stipulation to better highlight the Parties' proposed changes to the 2019 Permit.

17. The Parties request the Board adopt, as the final agency decision concerning the City's Notice of Appeal Issue No. 2, the Modified Permit attached as Exhibit A, pursuant to its authority to hear contested case appeals of MPDES Permits under Mont. Code Ann. § 75-5-403(2) and ARM 17.30.1370(4).

18. Each of the signatories to this Stipulation represents that he or she is authorized to enter this Stipulation and to bind the Parties represented by him or her to the terms of this Stipulation.

19. The City's Notice of Appeal Issue No. 2 has been fully and finally compromised and settled by agreement of the Parties and the Parties herein stipulate to and respectfully request the Board's entry of a final agency decision as set forth herein.

20. Pursuant to its authority to hear contested case appeals of MPDES Permits under Mont. Code Ann. § 75-5-403(2) and ARM 17.30.1370(4), the Board may adopt, as its final agency decision, the Modified Permit attached hereto as Exhibit A, as well as the attached (Proposed) Board Order for Final Agency Decision.

21. All conditions of the Modified Permit, attached hereto as Exhibit A, will be fully effective and enforceable upon Board approval.

22. The Parties shall each pay their own attorney fees and costs.

23. The Board's Decision as to the City's Notice of Appeal Issue No. 2 shall represent the FINAL AGENCY DECISION for purposes of the Montana Administrative Procedure Act, Section 2-4-623, MCA.

DATED this 14<sup>th</sup> day of June, 2021.

/s/ Victoria A. Marquis

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ATTORNEY FOR CITY OF GREAT  
FALLS

/s/ Kurt R. Moser

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ATTORNEY FOR THE  
DEPARTMENT OF  
ENVIRONMENTAL QUALITY

## CERTIFICATE OF MAILING

I hereby certify that on this 14<sup>th</sup> day of June 2021, I caused to be served a true and correct copy of the foregoing document to all parties or their counsel of record as set forth below:

<p>Regan Sidner Secretary, Board of Environmental Review Montana Department of Environmental Review P.O. Box 200901 Helena, MT 59620-0901 Regan.Sidner@mt.gov</p>	<p><input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail</p>
<p>Jeffrey Doud, Hearing Examiner Agency Legal Services Bureau 1712 Ninth Avenue P.O. Box 201440 Helena, MT 59620-1440 jdoud@mt.gov akraske@mt.gov korr@mt.gov</p>	<p><input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail</p>
<p>William W. Mercer/Victoria A. Marquis Holland &amp; Hart LLP 401 North 31st Street, Suite 1500 P.O. Box 639 Billings, MT 59103-0639 Phone: (406) 252-2166 wwmerc@hollandhart.com vamarquis@hollandhart.com</p>	<p><input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail</p>
<p>Jon Kenning, Bureau Chief Montana Department of Environmental Quality Water Protection Bureau P.O. Box 200901 Helena, MT 59620-0901 jkenning@mt.gov rdevaney@mt.gov</p>	<p><input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail</p>
<p>Arlene Forney Assistant to Victoria A. Marquis aforney@hollandhart.com</p>	<p><input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail</p>

*/s/ Kurt R. Moser*

MT-Department of Environmental Quality

5/27/21 at 1:43 PM

By: Alcisha Kraska

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Steven Wade  
John Tietz  
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*Attorneys for Intervenor-Respondent Signal Peak Energy, LLC*

**MONTANA BOARD OF ENVIRONMENTAL REVIEW**

<p>IN THE MATTER OF:</p> <p>APPEAL AMENDMENT APPLICATION AM3, SIGNAL PEAK ENERGY LLC'S BULL MOUNTAIN MINE NO. 1, PERMIT NO. C1993017</p>	<p>Case No. BER 2016-07 SM</p> <p><b>REQUEST FOR THE BOARD OF ENVIRONMENTAL REVIEW TO RECLAIM JURISDICTION OF CONTESTED CASE PROCEEDING</b></p> <p><b>ORAL ARUGMENT REQUESTED</b></p>
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## INTRODUCTION

Five years and five hearing examiners later, Signal Peak Energy, LLC (“Signal Peak”) is still without a final decision in this contested case proceeding. Now, more than nine months after the close of the evidentiary hearing, a replacement hearing examiner (the “Replacement Hearing Examiner”) has been tasked with deciding this contested case and shepherding it to a final order. The appointment of the Replacement Hearing Examiner at this late stage is inefficient and gives rise to redundant steps. Signal Peak moves the Board of Environmental Review (the “Board”) to reclaim jurisdiction of this contested case proceeding and issue a final order without further delay. Signal Peak requests this matter be considered on the record at the Board’s earliest convenience.<sup>1</sup>

## BACKGROUND AND PROCESS

On August 11, 2016, Montana Environmental Information Center (“MEIC”) challenged the Department of Environmental Quality’s (the “Department”) approval of an amendment to Signal Peak Energy’s Mine Permit SMP C1993017 (“AM3”). MEIC’s Notice of Appeal requested a contested case hearing before the Board pursuant to 82-4-206(1)-(2), MCA and ARM 17.24.425(1). The Board assigned this contested case proceeding to a hearing examiner, and, on September

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<sup>1</sup> Petitioners MEIC/Sierra Club have indicated that they will oppose this request. The Department does not join and takes no position on this request; DEQ defers to the judgment of the Board.

30, 2016, Signal Peak intervened. The Board initially appointed Mr. Benjamin Reed as the hearing examiner. Mr. Andres Haladay replaced Mr. Reed, and, on September 8, 2017, Ms. Sarah Clerget replaced Mr. Haladay. In August 2020, Hearing Examiner Clerget conducted a four-day virtual evidentiary hearing on the remaining issue in the case: the physical and legal availability of the Deep Underburden Aquifer to serve as a source of replacement water for beneficial uses lost or diminished by the mine expansion.

At the hearing, MEIC presented testimony from three witnesses: Mr. James Jensen (standing), Mr. Mark Hutson (qualified expert in geology, hydrogeology, and fluvial sedimentology), and Mr. Martin Van Oort (fact witness). The Department presented testimony from Mr. Van Oort (qualified expert in geology, surface and groundwater hydrology, and groundwater modeling), and Signal Peak presented testimony from Mr. Judd Stark (qualified expert in in coal mining, coal mine permitting, permit compliance, environmental monitoring, and reclamation) and Dr. Michael Nicklin (qualified expert in surface water and groundwater hydrology and groundwater modeling).

After the conclusion of the evidentiary hearing, the Parties proposed findings of fact and conclusions of law, lodged objections to the same, and requested oral argument. Prior to accepting oral argument or issuing a proposed decision, Hearing Examiner Clerget withdrew from the contested case proceeding, and, as a



result, the Board appointed a replacement hearing examiner. Before his could take any action on the matter, this replacement hearing examiner withdrew. On March 31, 2021, the Board appointed the Replacement Hearing Examiner.<sup>2</sup> To date, the Replacement Hearing Examiner has taken no action on this matter.

### **ARGUMENT**

The unique procedural posture of this contested case proceeding makes the appointment of the Replacement Hearing Examiner inefficient and redundant. The Board should reclaim jurisdiction and see this matter to a final order. Not only must the Replacement Hearing Examiner begin at square one in analyzing the record, but she will have to do so without complete information on the prior hearing examiner's procedural and evidentiary rulings and without the ability to call forth additional information or argument from the parties. The Replacement Hearing Examiner is obligated to review the complete record of the contested case proceeding and propose a final decision to the Board. The Board is then statutorily mandated to consider exceptions and oral argument from the Parties on the proposed decision. Notably, the Board may not reject or modify the Replacement Hearing Examiner's proposed decision until the Board – just like the Replacement Hearing Examiner – reviews the complete record of the contested case proceeding.

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<sup>2</sup> On January 21, 2021, Mr. Andrew Cziok replaced Ms. Clerget as the hearing examiner, and, on March 31, 2021, Ms. Caitlin Buzzas replaced Mr. Cziok.

Were the Board to reclaim this matter from the Replacement Hearing Examiner, the redundant reviews of the complete record of the contested case proceeding would be eliminated and a final order most efficiently reached.

**I. THE BOARD SHOULD RECLAIM JURISDICTION OF THIS CONTESTED CASE PROCEEDING TO AVOID REDUNDANT, INEFFICIENT PROCEDURE.**

More than seven months after the conclusion of the evidentiary hearing, on March 31, 2021, the Board appointed the Replacement Hearing Examiner. The Replacement Hearing Examiner is now tasked with proposing a final order to the Board. *See* § 2-4-621(1)-(2), MCA (Montana Administrative Procedure Act (“MAPA”). Because a different Hearing Examiner conducted the evidentiary hearing, the Replacement Hearing Examiner must start at zero in reviewing the entire record before developing a proposed decision. *Id.* The Replacement Hearing Examiner’s “proposed decision must contain a statement of the reasons for the decision and of each issue of fact or law necessary to the proposed decision[.]” The parties then may file exceptions to the proposed findings and conclusions and present briefs and oral argument before the Board.” § 2-4-622(1), MCA; § 2-4-621(1), MCA.

Having heard the parties’ arguments, the Board may adopt the Replacement Hearing Examiner’s proposed decision as the Board’s final order. § 2-4-621(3), MCA. However, the Board’s ability to reject or modify the Replacement Hearing Examiner’s proposed findings of fact and conclusions of law is statutorily limited.

Under MAPA, the Board “may not reject or modify the findings of fact unless the [Board] first determines *from a review of the complete record* and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential elements of law.” § 2-4-621(3), MCA (emphasis added). Likewise, the Board may not summarily “reject or modify” conclusions of law (§ 2-4-621(3), MCA), but instead must “particularize which of the hearing examiner’s findings of fact” supported the rejected conclusion and justify rejecting those factual findings based upon a lack of substantial evidence. *Ulrich v. State ex rel. Bd. of Funeral*, 1998 MT 196, ¶¶29, 40-42.<sup>3</sup> Thus, the unusual timing of the change in hearing examiners in this case yields an inefficient process under which the Replacement Hearing Examiner must learn the entire record starting at zero, and the Board may then be required to do the same.

By reclaiming jurisdiction from the Replacement Hearing Examiner, the Board can correct the procedural redundancy caused by the withdrawal of the former hearing examiner and expedite the issuance of a final order. Five years and five hearing examiners is too much. In the interest of judicial economy and the

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<sup>3</sup> To date, the Replacement Hearing Examiner has not submitted a proposed decision to the Board.

conservation of the Parties' resources, the Board should reclaim jurisdiction of this contested case proceeding and see that a final order is issued in a timely fashion.

**II. THE BOARD HAS THE EXPERIENCE AND EXPERTISE NECESSARY TO DISPOSE OF THIS COMPLEX CONTESTED CASE PROCEEDING.**

This nearly final contested case proceeding requires the application of highly technical facts to an obscure MSUMRA regulation. It does not appear that the Replacement Hearing Examiner has particular experience or expertise applicable to underground mining, the Montana Strip and Underground Mining Reclamation Act, or MAPA, that would justify requiring both the Replacement Hearing Examiner and the Board learning this case and its voluminous record from scratch.

Moreover, the Replacement Hearing Examiner necessarily lacks the personal knowledge supporting Hearing Examiner Clerget's request that the Parties forgo presenting various information and evidence, including information on the permitting process and witness qualifications.<sup>4</sup> Had the Parties known that a hearing examiner without the benefit of Ms. Clerget's background and institutional knowledge would be tasked with deciding this contested case proceeding, the Parties would have presented additional evidence and argument. It is unfair to the

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<sup>4</sup> For comparison, Ms. Clerget served as the hearing examiner in this contested case proceeding for more than three years and thus had a strong grasp of the facts and the law in this dispute. Ms. Clerget had further served as hearing examiner in other contested case proceedings for the Board, including those concerning the interpretation and application of MSUMRA in which she had observed many of the Parties' witnesses and was familiar with their expertise.

Parties and to the Replacement Hearing Examiner and contrary to § 2-4-611(1), MCA to proceed with two layers of review that start at square one in this complex proceeding, at this late hour.

The Board is well-positioned to reclaim jurisdiction from the Replacement Hearing Examiner and proceed directly to a final decision. This is not a case where the Board requires technical or other support from a Hearing Examiner to distill the scientific or legal questions at issue. The Board comprises members with the relevant experience and expertise to tackle the legal and scientific questions at the heart of this case. The Board's hydrologists, environmental scientists, and mining lawyers are well-equipped to address the central issue in this case — whether the Deep Underburden Aquifer can serve as a source of replacement water for water uses lost or diminished by subsidence.

Having not conducted the contested case proceeding, the Replacement Hearing Examiner is not in a position to provide added expertise or insights to the Board. Making the Replacement Hearing Examiner learn this entire case and propose a final decision to the Board simply adds another layer of review and further delay without adding any material value to the decisionmaking process. Thus, the Board should reclaim jurisdiction from the Replacement Hearing Examiner and see that a final order is issued without further delay.

## CONCLUSION

For the foregoing reasons, Signal Peak respectfully requests the Board reclaim jurisdiction from the Replacement Hearing Examiner. Signal Peak further requests this matter be considered on the record at the Board's earliest convenience pursuant to § 2-4-611(4), MCA.

DATED: May 27, 2021.

*/s/ John C. Martin*

---

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## CERTIFICATE OF SERVICE

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/s/ Trisa J. DiPaola

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

---

**IN THE MATTER OF:  
APPEAL AMENDMENT APPLICATION  
AM3, SIGNAL PEAK ENERGY LLC'S  
BULL MOUNTAIN MINE NO. 1, PERMIT  
NO. C1993017**

**CASE NO. BER 2016-07 SM**

---

**NOTICE OF STATUS CONFERENCE**

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The parties are given notice that a status conference is scheduled for **June 2, 2021, at 8 a.m.** Parties are to appear either in person at 1712 Ninth Avenue, Helena, Montana 59620-1440 or electronically via Zoom. Parties should be prepared to discuss Intervenor-Respondent Signal Peak Energy, LLC's Request for the Board of Environmental Review to Reclaim Jurisdiction of Contested Case Proceeding. Parties may join the status conference via Zoom utilizing the following methods:

- a. Electronically:** <https://mt-gov.zoom.us/j/86885752425?pwd=UnlHc25TZlFwcitqZExqSVhldjlvZz09>  
Meeting ID: 868 8575 2425  
Password: 720077
  
- b. Telephonically**  
(406) 444 9999  
Meeting ID: 868 8575 2425  
Password: 720077



DATED this 1<sup>st</sup> day of June, 2021.

/s/Caitlin Buzzas

Caitlin Buzzas

Hearing Examiner

Agency Legal Services Bureau

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P.O. Box 201440

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I hereby certify that I caused a true and accurate copy of the foregoing to be mailed to:

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DATED: 6/1/21 \_\_\_\_\_ /s/ Aleisha Kraske  
Aleisha Kraske, Paralegal

6/2/21 at 5:0 PM

By: Aleisha Kraske

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*Attorneys for Respondent Montana  
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Air, Energy and Mining Division*

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

---

**IN THE MATTER OF: APPEAL  
AMENDMENT APPLICATION AM3,  
SIGNAL PEAK ENERGY LLC'S  
BULL MOUNTAIN MINE NO. 1,  
PERMIT NO. C1993017**

**CASE NO. BER 2016-07 SM**  
**DEPARTMENT OF  
ENVIRONMENTAL QUALITY  
STATUS REPORT**

---

On June 2, 2021, the Parties in the above-captioned matter appeared before the Hearing Examiner to discuss Intervenor-Respondent Signal Peak Energy, LLC's Request for the Board of Environmental Review to Reclaim Jurisdiction of Contested Case Proceeding (SPE Motion). During the Conference, the Hearing Examiner directed the Parties to notify her whether their positions regarding SPE's Motion had changed by the end of the day (June 2, 2021). As an update was provided to the Parties by the Hearing Examiner regarding expected timing of the

issuance of the Hearing Examiner's Proposed Findings of Fact and Conclusions of Law, DEQ noted that it would like to go back to its client to determine whether its position on SPE's Motion has changed. Counsel for DEQ was unable to discuss this matter with their client today due to unavailability. However, Counsel for DEQ will be able to meet with their client tomorrow (June 3, 2021), and provide a notice to the Hearing Examiner as to DEQ's position on SPE's Motion by 5:00pm tomorrow.

DATED this 2nd day of June 2021.

Respectfully submitted,

*/s/Sarah Christopherson* \_\_\_\_\_

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*Attorneys for Respondent*

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The undersigned hereby certifies that on the 2nd day of June 2021 a true and correct copy of the foregoing was served by electronic mail to the persons addressed below as follows:

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

**IN THE MATTER OF: APPEAL  
AMENDMENT APPLICATION AM3,  
SIGNAL PEAK ENERGY LLC'S  
BULL MOUNTAIN MINE NO. 1,  
PERMIT NO. C1993017**

**CASE NO. BER 2016-07 SM  
  
DEPARTMENT OF  
ENVIRONMENTAL QUALITY  
SECOND STATUS REPORT**

On June 2, 2021, the Parties in the above-captioned matter appeared before the Hearing Examiner to discuss Intervenor-Respondent Signal Peak Energy, LLC's Request for the Board of Environmental Review to Reclaim Jurisdiction of Contested Case Proceeding (SPE Motion). During the Conference, the Hearing Examiner directed the Parties to notify her whether their positions regarding SPE's Motion had changed by the end of the day (June 2, 2021). As explained in DEQ's June 2, 2021 Status Report, Counsel for DEQ was unable to discuss this matter



with their client before the end of the day on June 2, 2021. Since then, Counsel for DEQ has met with their client and hereby notifies the Hearing Examiner that DEQ has not changed its position with respect to SPE's Motion. As noted in SPE's Motion, DEQ takes no position. SPE Motion, 1 n.1.

DATED this 3rd day of June 2021.

Respectfully submitted,

*/s/Sarah Christopherson* \_\_\_\_\_

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*Attorneys for Respondent*

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*Air, Energy and Mining Division*

**CERTIFICATE OF SERVICE**

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6/9/21 at 5:20 PM

By: Aleisha Kraske

**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
Cause No. BER 2016-07 SM**

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**IN THE MATTER OF:  
APPEAL AMENDMENT APPLICATION AM3, SIGNAL PEAK ENERGY  
LLC'S BULL MOUNTAIN MINE NO. 1, PERMIT NO. C1993017**

---

**2-4-211(4), MCA AFFIDAVIT OF JOHN C. MARTIN**

John C. Martin swears and affirms as follows:

1. I give this affidavit based on personal knowledge and submit it for the purpose of supporting the pending *Request for the Board of Environmental Review to Reclaim Jurisdiction of Contested Case Proceeding* filed by Signal Peak Energy, LLC (“Signal Peak”) in this matter on May 27, 2021 pursuant to § 2-4-611(4), MCA.

2. I represent Signal Peak Energy, LLC, (“Signal Peak”) in the above captioned matter. The mine at issue in this litigation employs approximately 260 employees and Petitioners’ action seeks to shut down its operations.

3. This case has an unusual procedural background and, for the practical reasons outlined in Signal Peak’s May 27, 2021 motion, this Board should reclaim its jurisdiction and decide the case.

**Relevant Background**

4. On August 11, 2016, Montana Environmental Information Center (“MEIC”) challenged the Montana Department of Environmental Quality’s (the “Department’s”) approval of an amendment to Signal Peak Energy’s Mine Permit SMP C1993017 (“AM3”).

5. MEIC’s Notice of Appeal requested a contested case hearing before the Board of Environmental Review (the “Board”) pursuant to § 82-4-206(1)-(2), MCA and ARM 17.24.425(1).

6. The Board assigned this contested case proceeding to a hearing examiner, and, on October 3, 2016, Signal Peak intervened.

7. The Board initially appointed Mr. Benjamin Reed to serve as hearing examiner; Mr. Andres Haladay subsequently replaced Mr. Reed, and, on September 8, 2017, Ms. Sarah Clerget replaced Mr. Haladay.

8. In August 2020, Ms. Clerget conducted a four-day virtual evidentiary hearing on the remaining issue in the case: the physical and legal availability of the Deep Underburden Aquifer to serve as a source of replacement water for water that might be lost or diminished by the mine expansion.

9. At the hearing, MEIC presented testimony from three witnesses: Mr. James Jensen (standing), Mr. Mark Hutson (qualified expert in geology, hydrogeology, and fluvial sedimentology), and Mr. Martin Van Oort (fact witness); the Department presented testimony from Mr. Martin Van Oort (qualified expert in geology, surface and groundwater hydrology, and groundwater modeling); Signal Peak presented testimony from Mr. Judd Stark (qualified expert in in coal mining, coal mine permitting, permit compliance, environmental monitoring, and reclamation) and Dr. Michael Nicklin (qualified expert in surface water and groundwater hydrology and groundwater modeling).

10. After the conclusion of the evidentiary hearing, the Parties proposed findings of fact and conclusions of law, lodged objections to the same, and requested oral argument.

11. Prior to accepting oral argument or issuing a proposed decision, Ms. Clerget withdrew from the contested case proceeding.

12. Upon information and belief, Agency Legal Services assigned the contested case proceeding to Mr. Andrew Cziok on January 21, 2021 without Board authorization as prescribed by the Montana Administrative Procedure Act (“MAPA”) and its implementing rules.

13. Mr. Cziok withdrew prior to taking any action on the matter.

14. Upon information and belief, Agency Legal Services assigned the contested case proceeding to Ms. Caitlin Buzzas on March 31, 2021, again without Board authorization as prescribed by MAPA and its implementing rules.

### **Signal Peak’s Request**

15. On May 27, 2021, Signal Peak requested, given the unique procedural posture of this contested case proceeding, that the Board reclaim jurisdiction from Ms. Buzzas and issue a final order without delay. Since Ms. Buzzas did not

participate in the proceedings prior to or during the virtual hearing and because the current course will necessarily result in redundant reviews of the contested case record – from both the Hearing Examiner and the Board – Signal Peak has asked that the Board decide the matter.

16. Signal Peak further requested the matter be considered on the Board's record and at the Board's earliest convenience as contemplated by § 2-4-611(4), MCA.

17. As of May 27, 2021, Ms. Buzzas had taken no action on the record in this matter.

18. The contested case provisions of MAPA govern this proceeding. § 82-4-206(2), MCA.

19. Pursuant to MAPA, the Board "may appoint hearing examiners for the conduct of hearings in contested cases." § 2-4-611(1), MCA.

20. However, a hearing examiner "must be assigned with due regard to the expertise *required for the particular matter*." § 2-4-611(1), MCA (emphasis added).

21. The Board ordinarily advises all parties of the appointment of a hearing examiner to manage the case as illustrated in *Sample Form 218a: Order Appointing a Hearing Examiner*. ARM 1.3.218(3).

22. Upon information and belief, the Board did not appoint Ms. Buzzas in compliance with § 2-4-611(1), MCA and ARM 1.3.218.

23. Upon information and belief, Agency Legal Services assigned the contested case proceeding to Ms. Buzzas without due regard to the expertise required for this particular matter.

24. Upon information and belief, Ms. Buzzas does not have experience with underground mining, the Montana Strip and Underground Mining and Reclamation Act, MAPA, the technical factual issues involved in the case, or the unwritten bases for evidentiary rulings made by Ms. Clerget in the hearing.

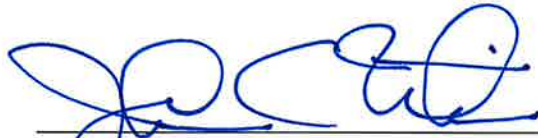
25. By contrast, Board members have extensive experience with the requirements of MAPA and MSUMRA, as well as a substantive knowledge that could be brought to bear on the technical issues of this case. The Board has members whose experience covers environmental law, environmental sciences,

hydrology, and government planning. The most sensible approach to this case would be for the Board to decide the matter without the procedural delay attendant to a newly assigned Hearing Examiner's decision and repetitive exceptions, briefing and argument.

26. On the filing of a party of an affidavit seeking disqualification by law or other disqualification of a hearing examiner, the Board "shall determine the matter as a part of the record and decision in the case." § 2-4-611(4), MCA.

FURTHER AFFIANT SAYETH NOT

Dated this 9<sup>th</sup> day of June 2021.



John C. Martin





## CERTIFICATE OF SERVICE

The undersigned certifies that on June 9, 2021, the original or a copy of the foregoing was delivered or transmitted to the persons named below as follows:

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<p>Aleisha Kraske Paralegal to Andrew J. Cziok, Hearing Examiner akraske@mt.gov</p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile Transmission</p>
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**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA**

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

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

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

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

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

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

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

## **BACKGROUND**

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

## DISCUSSION

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

Judicial estoppel is intended to "prevent the use of inconsistent assertions and to prevent parties from playing fast and loose with the courts." *Nelson v.*

*Nelson*, 2002 MT 151, ¶ 20, 310 Mont. 329, 50 P.3d 139.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

### CONCLUSION

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

Respectfully submitted this 14th day of June, 2021.

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

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was delivered

via email to the following:

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/s/ Shiloh Hernandez  
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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

IN THE MATTER OF: )  
APPEAL AMENDMENT ) CASE NO. BER 2016-07 SM  
APPLICATION AM3, SIGNAL )  
PEAK ENERGY LLC’S BULL )  
MOUNTAIN MINE NO. 1, PERMIT )  
NO. C1993017 )

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**SIGNAL PEAK ENERGY, LLC’S REPLY IN SUPPORT OF REQUEST  
FOR THE BOARD OF ENVIRONMENTAL REVIEW TO RECLAIM  
JURISDICTION OF CONTESTED CASE PROCEEDING**

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Pursuant to Paragraph 9 of the March 1, 2018 Scheduling Order,  
Respondent-Intervenor Signal Peak Energy, LLC (“Signal Peak”) replies in  
support of its request that the Board reclaim its jurisdiction over this matter.

## ARGUMENT

### **I. SIGNAL PEAK’S REQUEST MUST BE HEARD BY THE BOARD AND ON THE RECORD.**

As a threshold matter, Signal Peak’s request must be heard, on the record, by the Board of Environmental Review (the “Board”). The Montana Administrative Procedure Act (“MAPA”) allows a party to request<sup>1</sup> that the Board replace a hearing examiner as a matter of law.<sup>2</sup> § 2-4-611(4), MCA. Upon notice of such request, only the Board may consider the request. The statute is not susceptible to a different reading: upon filing a motion seeking replacement, “the Board shall determine the matter as part of the record and decision in the case.” § 2-4-611(4), MCA.<sup>3</sup> Not surprisingly, the provision cannot be read to allow the Hearing

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<sup>1</sup> The statute requires that the request “be filed not less than 10 days before the original date set for the hearing.” § 2-4-611(4), MCA. Petitioner Montana Environmental Information Center (“MEIC”) argues that Signal Peak’s request is untimely because the evidentiary hearing has concluded. But, in this instance, the Hearing Examiner was appointed after the hearing. Hence, Signal Peak simply could not have objected before the hearing. MEIC’s reading of the statute yields an absurd result, i.e., a party could never seek disqualification of a hearing examiner for any reason after the close of the evidentiary hearing, even if the hearing examiner was appointed after the hearing. Moreover, an absolute prohibition against a party seeking to disqualify a hearing examiner post-hearing raises the question of whether MAPA authorizes the Board to appoint a hearing examiner after the close of the evidentiary hearing in any instance.

<sup>2</sup> Signal Peak’s request was timely filed for purposes of appearing on the Board’s June agenda. However, the request was not included on the Board’s agenda. Presumably, the Board will consider the motion at its next meeting.

<sup>3</sup> Section 2-4-611(4), by its plain terms, does not contemplate motion practice or otherwise invite input from opposing parties. While the Board may well seek the views of other parties in proceedings under the statute, nothing in its text



Examiner – whose very appointment is at the heart of the inquiry – to decide the request on briefings by the Parties. For the reasons stated in Signal Peak’s request and supporting affidavit, the appointment of the Hearing Examiner by Agency Legal Services and without the Board’s due consideration was improper and violated MAPA. Only the Board is authorized to hear Signal Peak’s request and correct the procedural and substantive flaws identified.

**II. SIGNAL PEAK IS NOT ESTOPPED FROM SEEKING RELIEF UNDER § 2-4-611(4), MCA.**

**A. MEIC’s Prior Attempts to Displace the Hearing Examiner Have No Bearing on this Issue.**

MEIC advances a novel argument: that Signal Peak is estopped from moving to replace a hearing examiner because Signal Peak objected to MEIC’s attempts (i) to prevent Hearing Examiner Clerget from deciding the summary judgment and overseeing further proceedings and (ii) to appeal the Hearing Examiner Clerget’s summary judgment decision before the hearing. Setting aside the inapplicability of judicial estoppel (discussed below), this is hardly a process analogous to what is currently before the Board. There, the issue was whether the Board had intended to grant Hearing Examiner Clerget authority to resolve the entire case as opposed to pretrial issues. Hearing Examiner Clerget took the matter

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authorizes parties to treat the matter as a motion brought before the Hearing Examiner.

*to the Board* for resolution. Perhaps understandably, the Board determined the extent of its delegation and decided that Hearing Examiner Clerget should proceed.

What animated the Board's decision does not apply here. There, the Board determined that the matter could most efficiently be addressed by Hearing Examiner Clerget. The Board rejected MEIC's argument otherwise, concluding instead that it made no sense to retain jurisdiction over a proceeding required motion practice, a summary judgment decision, and ultimately a trial. "Following that decision, during a scheduling conference held on November 14, 2019, the parties raised a jurisdictional question as to whether the [Board had] retained jurisdiction [for further proceedings] or whether the [Board] delegated that authority to the hearing examiner." Scheduling Order at 1 (Nov. 27, 2019) (Attached as Exhibit A). The Board addressed the matter at its next meeting and determined that it had intended to delegate the matter, in its entirety, to Hearing Examiner Clerget.

Here, by contrast, the hearing is now concluded; a new Hearing Examiner has been appointed without the benefit of the process MAPA requires. Moreover, to avoid redundant process, the most practical approach would be for the Board simply to decide the matter. This has nothing whatever to do with MEIC's ill-fated attempt to have the Board hear the case, including summary judgment and trial. Nor does it involve an interlocutory appeal of a decision made prior to trial. Here,

discovery is complete, summary judgment has been entered, and the trial has been held. No efficiency is achieved by having a Replacement Hearing Examiner review a record that was developed by Hearing Examiner Clerget: regardless of whether the Parties obtain an initial decision from the Replacement Hearing Examiner, the Board will be required to review the video and decide the matter. Unlike MEIC's request, Signal Peak does not seek to have the Board preside over discovery, decide pre-trial motions, or conduct a trial.

In any event, in the two examples cited, Hearing Examiner Clerget recognized that the extent of the Board's delegation is a decision that only the Board can make. Certainly, the prior process is not precedent for MEIC's current opposition to the Board determining whether to avoid the cumbersome repetition inherent in MEIC's approach.

**B. Judicial Estoppel Does Not Apply.**

Judicial estoppel has no bearing on this matter. It is an equitable doctrine intended to protect the integrity of the judicial process from manipulation by litigants who seek to prevail twice, on opposite theories. *Kucera v. City of Billings*, 2020 MT 24. The doctrine of judicial estoppel precludes a party to an action from taking a position inconsistent with the party's prior judicial declarations. *State v. Darrah*, 2009 MT 96. Before judicially estopping a party, the court must first find that "the party being estopped sought to intentionally

manipulate the courts by taking inconsistent positions.” *Dovey v. BNSF Ry.*, 2008 MT 350. The party claiming judicial estoppel – here, MEIC – must show that (i) the estopped party had knowledge of the facts at the time it took the original position, (ii) the estopped party succeeded in maintaining the original position, (iii) the position presently taken is inconsistent with the original position, and (iv) the original position misled the party so that allowing the estopped party to change its position would injuriously affect the adverse party. *Vogel v. Intercontinental Truck Body*, 2006 MT 131. Each of these elements must be established by the party seeking to apply judicial estoppel. *In the Matter of Raymond W. George Trust*, 1999 MT 233. MEIC makes no such showing.

MEIC argues that Signal Peak’s request is not consistent with positions espoused by Signal Peak on May 31, 2019 and November 26, 2019. As discussed above, both occasions concerned efforts by MEIC to shift jurisdiction away from Hearing Examiner Clerget to the Board in a setting where no efficiency could be achieved. Neither of these cases dealt with replacement of a hearing examiner after the hearing was held. Nor did either of MEIC’s requests concern deficiencies in compliance with Section 2-4-611(4).

The May 31, 2019 matter concerned MEIC’s request that the Board (as opposed to the Hearing Examiner Clerget) rule on the Parties’ pending motions for

summary judgment.<sup>4</sup> Signal Peak and the Department of Environmental Quality (the “Department”) opposed the Board reclaiming jurisdiction for the limited purpose of ruling on summary judgment given (i) Hearing Examiner Clerget’s familiarity with the issues and the law, (ii) summary judgment would likely not conclude the contested case proceeding because an evidentiary hearing was all but assured, and (iii) an interlocutory appeal was inefficient and time consuming. The question was presented to the Board, and the Board declined to grant MEIC’s request; the Board instructed to Hearing Examiner Clerget to issue her summary judgment ruling.

The November 26, 2019 matter also concerned summary judgment. Having received an adverse ruling on summary judgment the week prior, MEIC again sought Board intervention in the form of an interlocutory review of the summary judgment ruling. Once again, Signal Peak and the Department opposed MEIC’s efforts to pursue an interlocutory appeal of the summary judgment decision. And, once again, the question was presented *to the Board* and the Board declined MEIC’s invitation to pause the contested case proceeding and conduct a piecemeal review.

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<sup>4</sup> Because the extent of the Board’s assignment to the Hearing Examiner was not clear, Hearing Examiner Clerget issued an order vacating a scheduled oral argument and placed the matter on the Board’s agenda for its next meeting. *See* Order at 1 (May 17, 2019). Attached as Exhibit B.

The positions espoused by Signal Peak and the Department are not inconsistent with the current request. First, neither of MEIC's efforts concerned or otherwise implicated Section 2-4-611(4). Because Signal Peak's opposition to MEIC's efforts to relitigate summary judgment before the Board in no way concerned the disqualification of Hearing Examiner Clerget, such opposition is hardly a basis to estop Signal Peak from exercising its rights under this statute. Second, Signal Peak's present request is not, by any measure, comparable to MEIC's efforts to obtain interlocutory relief from the Board. Because Signal Peak does not seek to displace a hearing examiner early in the litigation or to obtain some sort of interlocutory relief, the positions taken on May 31, 2019 and November 26, 2019 are irrelevant and the doctrine of judicial estoppel simply does not apply. Third, the appointment of a replacement hearing examiner *after* the close of an evidentiary hearing has never previously occurred.<sup>5</sup> The arguments raised in Signal Peak's request regarding the role and value of a hearing examiner appointed after the evidentiary hearing are entirely novel and, as such, decidedly not subject to judicial estoppel.

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<sup>5</sup> Neither of the Parties is able to cite a precedent for this unusual procedural setting. Respectfully, Signal Peak submits that there likely is no authority on the subject.

### III. SIGNAL PEAK DOES NOT SEEK DISQUALIFICATION OF THE HEARING EXAMINER FOR PERSONAL BIAS OR LACK OF INDEPENDENCE.

MEIC seeks to label Signal Peak's request that the Board reclaim jurisdiction as an "attack" on the Replacement Hearing Examiner. First, this motion is not an ad hominem attack on the Replacement Hearing Examiner, and Signal Peak continues to believe that the Replacement Hearing Examiner does not suffer from some personal defect that would disqualify her.<sup>6</sup> Although the Replacement Hearing Examiner cannot be privy to the unwritten bases for evidentiary rulings made by the former hearing examiner, and appears to lack experience with underground mining, the Montana Strip and Underground Mine Reclamation Act, MAPA, and the technical issues involved in this case, this is not the crux of Signal Peak's request. Rather, these are matters that the Board must address in its appointment of any hearing examiner. Here, Signal Peak seeks disqualification of the Replacement Hearing Examiner *as a matter of law* based on the procedural and substantive flaws underlying the Hearing Examiner's appointment.

Procedurally, Agency Legal Services cannot appoint hearing examiners. While Agency Legal Services can serve as a pool from which the Board may select a hearing examiner, it cannot assume the Board's statutory authority to select, vet,

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<sup>6</sup> Extended logically, MEIC's argument would suggest that their attempts to displace Hearing Examiner Clerget were "attacks" on her.

and assign a hearing examiner to a contested case proceeding. Substantively, the Board did not give due regard to the Hearing Examiner's qualifications and the subject matter of the contested case proceeding prior to accepting Agency Legal Services' appointment. The fact that Agency Legal Services informed the Board *after* the appointment that the Replacement Hearing Examiner has "science and environmental policy" experience is not enough. Resp. at 18. *Before* the Board appoints a hearing examiner, it has a statutory obligation to give "due regard to the expertise required for the particular matter." § 2-4-611(1), MCA. Because the Board unlawfully ceded the vetting and appointment of the Replacement Hearing Examiner to Agency Legal Services, the appointment of the Replacement Hearing Examiner is procedurally and substantively flawed. Accordingly, the Board should reclaim the contested case proceeding, and reinitiate the process to appoint a replacement hearing examiner, or, as argued by Signal Peak, the Board can simply reclaim the contested case proceeding and, in the interest of efficiency, issue a final order.<sup>7</sup>

### **CONCLUSION**

For the reasons stated, Signal Peak respectfully requests that the Board grant

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<sup>7</sup> Here, the Board members have extensive experience with applicable legal requirements and substantive knowledge that could be brought to bear on the technical issues of the case. This Board has broad knowledge of environmental law, environmental science, hydrology, and government planning.



its Request for the Board of Environmental Review to Reclaim Jurisdiction of  
Contested Case Proceeding.

DATED this 28th day of June, 2021.

/s/ John C. Martin

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ATTORNEYS FOR RESONANT-  
INTERVENOR SIGNAL PEAK ENERGY,  
LLC

### CERTIFICATE OF SERVICE

The undersigned certifies that on June 28, 2021, the original or a copy of the foregoing was delivered or transmitted to the persons named below as follows:

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<p>Caitlin Buzzas, Hearing Examiner Agency Legal Services Bureau 1712 Ninth Avenue P.O. Box 201440 Helena, MT 59620-1440 CaitlinBuzzas@mt.gov</p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Personal Delivery</p>
<p>Aleisha Kraske Paralegal to Caitlin Buzzas, Hearing Examiner akraske@mt.gov</p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile Transmission</p>
<p>Shiloh Hernandez Western Environmental Law Center 103 Reeder's Alley Helena, MT 59601 hernandez@westernlaw.org</p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Personal Delivery</p>
<p>Mark Lucas Sarah Christopherson Montana Department of Environmental Quality 1520 East Sixth Avenue P.O. Box 200901 Helena, Montana 59620-0901 Mark.Lucas@mt.gov Sarah.Christopherson@mt.gov</p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Personal Delivery</p>
<p>Derf Johnson Montana Environmental Information Center P.O. Box 1184 Helena, MT 59624 djohnson@meic.org</p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Personal Delivery</p>

/s/ John C. Martin

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

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**IN THE MATTER OF:  
APPEAL AMENDMENT APPLICATION  
AM3, SIGNAL PEAK ENERGY LLC'S  
BULL MOUNTAIN MINE NO. 1, PERMIT  
NO. C1993017**

**CASE NO. BER 2016-07 SM**

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**ORDER DENYING REQUEST FOR THE BOARD OF ENVIRONMENTAL  
REVIEW TO RECLAIM JURISDICTION OF CONTESTED CASE  
PROCEEDING**

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On May 27, 2021, Intervenor-Respondent Signal Peak Energy, LLC ("SPE") filed a "Request for the Board of Environmental Review to Reclaim Jurisdiction of Contested Case Proceeding" ("Request"). A Status Conference was held on June 2, 2021 to discuss SPE's Request. The Montana Environmental Information Center ("MEIC"), Department of Environmental Quality ("DEQ") and SPE (collectively "the parties") were present, represented by counsel, and gave arguments. The DEQ took no position on the Request.

The undersigned informed the parties that a decision in this matter was imminent and a Proposed Findings of Fact Conclusions of Law ("proposed FOFCOL") had already been drafted and would be finalized and served on the

parties in August; likely putting this matter in front of the Board of Environmental Review ("BER or Board") at its October meeting. SPE was given the option of withdrawing their request, which they declined. The parties were given an opportunity to fully brief SPE's Request and this matter is fully briefed and before Hearing Examiner Buzzas.

## **I. Summary of the Parties Arguments**

### **a. Signal Peak Energy**

Signal Peak Energy points to three reasons why the Board should reclaim jurisdiction:

1. The appointment of the "Replacement Hearing Examiner at this late stage is inefficient and gives rise to redundant steps." Request p. 1 (May 27, 2021).
2. The "Replacement Hearing Examiner" lacks the experience to rule on the contested case.
3. The appointment of the hearing examiner by Agency Legal Services was improper and the Board must hear SPE's Request.

### **b. Montana Environmental Information Center**

MEIC argues that SPE's Request should be denied for the following reasons:

1. SPE's Request is procedurally precluded and has no merit.
2. There is no statutory basis for the Board to reclaim jurisdiction.

3. SPE claims to want expedited resolution of this case, but expedited resolution would be hindered by SPE's Request.

4. SPE's allegations regarding the expertise of the hearing examiner are improper and false.

## **II. Inefficiency and Redundant Steps**

The crux of SPE's argument is that the procedural posture of this contested case proceeding makes the appointment of the "Replacement Hearing Examiner" inefficient and redundant. They state that "[n]ot only must the Replacement Hearing Examiner begin at square one in analyzing the record, but she will have to do so without complete information on the prior hearing examiner's procedural and evidentiary rulings." Request p. 1. SPE further argues that if the hearing examiner were to issue her proposed decision, the Board would then be statutorily limited if it were to reject or modify any of the proposed findings of fact unless it reviewed the complete record. SPE claims, "this yields an inefficient process under which the Replacement Hearing Examiner must learn the entire record starting at zero, and the Board may then be required to do the same." Request p. 5.

In response to these arguments, MEIC argues that SPE is judicially estopped from making this request as it has twice argued for a hearing examiner to retain jurisdiction of this contested case proceeding despite the "two different layers of review" and prevailed. MEIC Resp. p. 10 (June 14, 2021). MEIC cites to

statements made by SPE's counsel during a BER meeting (May 31, 2019) and Status Conference (November 26, 2019) which confirm that SPE argued for a hearing examiner to decide summary judgment and after judgment was rendered, declined to take the summary judgment ruling to the Board for disposition, arguing instead that the hearing examiner should prepare a proposed FOFCOL for Board review. It is clear from these statements that SPE's counsel was well aware that a two-tiered review process was contemplated by the Montana Administrative Procedure Act and the Board, and that by advocating for a hearing examiner, a two-tiered review process would occur in this case.

SPE's claim that the hearing examiner must start at "zero" without complete information on the prior hearing examiner's procedural and evidentiary rulings is not accurate as there is a full and complete record of this case from its inception. This record includes videos of the hearings and case proceedings, all the documents that have been filed over the last five years, and all the previous Hearing Examiners notes and records. To say that there is not complete information is a fallacy. Additionally, arguing against the appointment of a hearing examiner because they would have to "begin at square one in analyzing the record" is misplaced. Not only is that the job of the entity that decides this case, it is what every Hearing Examiner will have done or will have to do to make an informed

decision on all of the Board's cases that were assigned to Agency Legal Services ("ALS") after the departure of any of its hearing examiners.

SPE claims "[t]o date, the Replacement Hearing Examiner has taken no action on this matter" and that "[i]n the interest of judicial economy and the conservation of the Parties' resources, the Board should reclaim jurisdiction of this contested case." Request p. 3-6. As stated at the status conference regarding this matter, the undersigned has already drafted and can finalize and serve her proposed FOFCOL on the parties in August. This would likely put this matter in front of the Board at its October meeting. If the Board were to reclaim jurisdiction at this juncture, the Board members would have to review the materials the undersigned has already reviewed, hold a public meeting to discuss drafting of a proposed FOFCOL, write the proposed FOFCOL (the Board, in its discretion, could assign a hearing examiner to write the proposed FOFCOL necessitating that hearing examiner to attend any meetings the Board held to discuss the drafting of the proposed FOFCOL and likely review the record), hold a second public meeting to discuss any edits and finalization of the proposed FOFCOL, issue the proposed FOFCOL to the parties, allow the parties adequate time to file exceptions, and then hear oral arguments on the exceptions. The above process assumes that the Board would only need to meet once to discuss the drafting and finalization of the proposed FOFCOL, which given the complexity of the case, seems unlikely. Given

the above it is likely, if not certain, the parties would not receive a final order from the Board until mid to late 2022. The undersigned struggles to see how the Board deciding this matter is more efficient than the hearing examiner finalizing and issuing her already drafted proposed FOFCOL.

### **III. Hearing Examiner qualifications**

Next SPE argues that this "contested case proceeding requires the application of highly technical facts to an obscure MSUMRA regulation" and that the undersigned "lacks the personal knowledge supporting the former examiner's request that the parties forgo presenting various information and evidence." Request p. 6. SPE claims that "[t]his is not a case where the Board requires technical or other support from a hearing examiner" and that "[t]he Board's hydrologist, environmental scientists, and mining lawyers are well-equipped to address the central issue in this case." Request p. 7.

SPE's arguments are flawed for multiple reasons. First, SPE argued at the June 3, 2021 status conference that it was not challenging the undersigned's qualifications stating multiple times that its position was not based on the undersigned's competence level, "as there is no question...you're a competent lawyer." Video of Status Conference at 5:12 to 5:34 (June 2, 2021). Next SPE filed an affidavit of its counsel, Mr. Martin, in which they request the Board "reclaim



jurisdiction" under Mont. Code Ann. §2-4-611(4). Aff. of John C. Martin ¶ 16 (June 9, 2021). Mont. Code Ann. § 2-4-611(4) states,

On the filing by a party, a hearing examiner, or agency member in good faith of a timely and sufficient affidavit of personal bias, lack of independence, disqualification by law, or other disqualification of a hearing examiner or agency member, the agency shall determine the matter as a part of the record and decision in the case. The agency may disqualify the hearing examiner or agency member and request another hearing examiner pursuant to subsection (2) or assign another hearing examiner from within the agency. The affidavit must state the facts and the reasons for the belief that the hearing examiner should be disqualified and must be filed not less than 10 days before the original date set for the hearing.

Nowhere in SPE's briefing or in its statement during the status conference concerning this matter did SPE raise any argument as to the hearing examiner's personal bias, lack of independence, or disqualification by law, other than their mistaken belief that ALS did not have jurisdiction to appoint the hearing examiner and their preference to now have the Board decide this case. SPE cannot have its cake and eat it too. It cannot argue that the undersigned is a competent attorney, but not competent enough to discern "highly technical facts" and apply those to "an obscure MSUMRA regulation." Further, as stated previously, the undersigned has access to the prior hearing examiner notes, full contested case file, and a hearing assistant, who also attended the full hearing. If it is true that the undersigned lacks the personal knowledge supporting the former examiner's request that the parties forgo presenting various information and evidence, then it is also true that the

Board would lack the same knowledge and would have to review the same materials the undersigned has already reviewed.

Finally, SPE's argument that the Board has technical knowledge making it more qualified to decide this case is absurd. The Board, as a quasi-judicial body cannot rely on its personal expertise to decide a contested case. The Board, like the hearing examiner, must rely on the evidence that was presented in the contested case hearing. If either entity needed clarification from any of the parties regarding any subject matter presented in the contested case, either could re-open the hearing to take additional evidence. Further, as is clear from Mont. Code Ann. § 2-4-611(4) SPE's request **must be filed not less than 10 days before the original date set for the hearing**. The hearing in this matter has come and passed and the undersigned cannot insert what has been omitted from a statute. SPE has not cited any authority for what it is proposing and in this instance Mont. Code Ann. § 2-4-611(4) does not apply. For these reasons, SPE's arguments concerning the Board reclaiming jurisdiction fail.

**IV. The appointment of the hearing examiner by Agency Legal Services was improper and the Board must hear SPE's Request.**

SPE claims that "[p]rocedurally, Agency Legal Services cannot appoint hearing examiners" and that "the Board did not give due regard to the Hearing Examiner's qualifications and the subject matter of the contested case proceeding

prior to accepting Agency Legal Services' appointment." SPE Reply p. 9. SPE's argument is fatally flawed because at its October 9, 2020 meeting the Board unanimously voted to assign all of its contested cases at that time to Agency Legal Services (ALS).

Former Hearing Examiner Clerget brought to the Board's attention the fact that they had been assigning cases directly to her jurisdiction and sought to clarify this jurisdictional issue. Ms. Clerget stated, "I just would like, because of the sort of extended nature of the assignments of Hearing Examiners throughout the life of these cases, I would like to have clarification in one place on the record that **all contested cases before the Board are assigned to ALS as a Hearing Examiner, and not me personally**. And I would appreciate a motion from the Board that clarified that, so that any prior assignments might-**we don't have to fight about it essentially**." Board Meeting Transcript 45:11-46:21 (October 9, 2020). The Board subsequently made a motion assigning all its contested cases to ALS, that motion passed unanimously.

Finally, SPE argues that the undersigned is barred from deciding this matter and that the Board must hear its Request. However, as discussed above, SPE does not cite to any authority to support its request other than Mont. Code Ann. § 2-4-611(4), which as explained above is inapplicable in this case. SPE's request came after the hearing had concluded and SPE does not seek to disqualify the

undersigned on any of the listed provision in § 2-4-611(4). Rather, SPE seeks to disqualify the undersigned on the mistaken belief that she was inappropriately appointed by ALS. As stated before, ALS was vested with jurisdiction of all cases before the Board in October 2020.

Based on the Foregoing, IT IS HEREBY ORDERED that Signal Peak Energy's Request for the Board of Environmental Review to Reclaim Jurisdiction of Contested Case Proceeding is DENIED.

DATED this 30<sup>th</sup> day of July, 2021.

*/s/ Caitlin Buzzas*

CAITLIN BUZZAS

Hearing Examiner

Agency Legal Services Bureau

1712 Ninth Avenue

P.O. Box 201440

Helena, MT 59620-1440

### **CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy of the foregoing to be mailed to:

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DATED: July 30, 2021 /s/ Aleisha Kraske  
Aleisha Kraske, Paralegal



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July 30, 2021

**VIA EMAIL**

Katherine Orr  
 Counsel to the Montana Board of Environmental Review  
 c/o Regan Sidner, BER Board Secretary  
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 1520 E 6th Ave.  
 Helena, MT 59601  
 Regan.Sidner@mt.gov

**RE: Placement of Signal Peak Energy's Request that the Board Reclaim Jurisdiction on the Board's Agenda for its August 13, 2021 Meeting**

Dear Ms. Orr:

On behalf of Signal Peak Energy, LLC, I write to formally request that, consistent with § 2-4-611(4), MCA, Signal Peak's request that the Board reclaim jurisdiction in contested case number 2016-07 be placed on the agenda for the Board's August 13, 2021 Board Meeting. We enclose the briefing material and ask that it be distributed to the Board Members. I further request that Signal Peak be provided an opportunity to address the Board on this issue.

Thank you for your courtesy.

Sincerely,

A handwritten signature in blue ink, appearing to read "John C. Martin", with a stylized flourish at the end.

John C. Martin

Attachments:

- A: Signal Peak Energy's Request to Reclaim Jurisdiction
- B: Affidavit of John C. Martin
- C: Petitioner's Response
- D: Signal Peak Energy's Reply

cc: Caitlin Buzzas, Hearing Examiner  
 Regan Signer, Board Secretary  
 Shiloh Hernandez



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 petition for review via mail. Please serve copies of pleadings and correspondence on me and on the following DEQ representatives in this case.

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Attachments



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 LIMITED

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

<p><b>IN THE MATTER OF:</b></p> <p><b>ADOPTION OF NEW RULE I          PERTAINING TO SELENIUM          STANDARDS FOR LAKE          KOOCANUSA</b></p>	<p><b>CAUSE NO.</b> _____</p> <p><b>PETITION TO REVIEW ARM          17.30.632 FOR COMPLIANCE          WITH MONTANA CODE          ANNOTATED § 75-5-203</b></p>
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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 Env’tl. Review*, 2007 Mont. Dist. LEXIS 513, \*44 (reasoning based on legislative intent upheld in *Pennaco Energy, Inc. v. Mont. Bd. of Env’tl. 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.<sup>1</sup> 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,

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<sup>1</sup> 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 Koochanusa 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. Donovan 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 reidside 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

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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 ( <b>original</b> ) Board of Environmental Review 1520 E. Sixth Avenue P.O. Box 200901 Helena, MT 59620-0901 Regan.Sidner@mt.gov BER@MT.GOV	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail
Arlene Forney Assistant to William W. Mercer and Victoria A. Marquis aforney@hollandhart.com	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

*/s/ Victoria A. Marquis* \_\_\_\_\_

# **EXHIBIT A**



**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 Koochanusa 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 Koochanusa 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

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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 Koochanusa 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 Koochanusa 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.<sup>1</sup>

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 Koochanusa. 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 Koochanusa. The

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<sup>1</sup> 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 Kooconusa that may be impacted by water quality constituents of potential concern; and 2) develop water quality criteria/objectives for Lake Kooconusa 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.”<sup>2</sup>

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 Kooconusa.<sup>3</sup>

During the course of the Committee and Subcommittee’s work, in 2016, the U.S. EPA updated its own national recommended selenium criteria.<sup>4</sup> 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 Kooconusa”.<sup>5</sup> A key step in the process was a commitment to “confirm status of **consensus agreement** on the proposed water

<sup>2</sup> Committee and Subcommittee documents are available on DEQ’s website at <https://deq.mt.gov/DEQAdmin/LakeKooconusa> and the companion website at <http://lakekooconusaconservation.pbworks.com/w/page/100633354/FrontPage>. All documents and information from those websites are important to and should be considered in this rulemaking.

<sup>3</sup> Draft Statement of Work for Lake Kooconusa 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.

<sup>4</sup> The EPA guidelines are a “non-regulatory, scientific assessment of ecologic effects.” EPA, *Aquatic Life Ambient Water Quality Criterion for Selenium – Freshwater* (June 2016).

<sup>5</sup> B.C. – MT 2020 Work Plan – Revised May 1, 2020 (available at [http://lakekooconusaconservation.pbworks.com/w/file/fetch/139880349/2020%20BC-MT%20WorkPlan\\_01May2020.pdf](http://lakekooconusaconservation.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.”<sup>6</sup>

The Work Plan also provided timelines for development of a model to estimate selenium parameters for Lake Koochanusa and review of that model, including a June 2020 deadline by which United States Geological Survey (USGS)<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> Instead, he considered the fish species specific to Lake Koochanusa (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

<sup>6</sup> *Id.*, p. 2 (emphasis added).

<sup>7</sup> While the USGS holds two seats on the Subcommittee, the modeling work was completed independent of the Subcommittee, under a contract with DEQ.

<sup>8</sup> *B.C. – MT 2020 Work Plan – Revised May 1, 2020*, p.1, 2.

<sup>9</sup> *Id.*, p. 2.

<sup>10</sup> DEQ, *Derivation of a Site-Specific Water Column Selenium Standard for Lake Koochanusa*, p. 41 (September 2020).

body tissue.<sup>11</sup> 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 Koochanusa.<sup>12</sup>

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 Koochanusa.”<sup>13</sup> 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 Koochanusa.<sup>14</sup> Mr. Beaman noted that important data gaps existed. He recommended that a water quality standard for Lake Koochanusa be chosen such that it balances between protection of fish in Lake Koochanusa 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.”<sup>15</sup>

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 Koochanusa and concluded that the EPA guideline of 1.5 micrograms per liter “is protective of fish in Koochanusa Reservoir” and “protective of white sturgeon in the Kootenai River downstream of the Libby Dam.”<sup>16</sup> 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.”<sup>17</sup> 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.<sup>18</sup>

Mr. DeForest attempted to validate the model outputs by comparing predicted fish tissue concentration to actual fish selenium data from Lake Koochanusa. He found that the USGS model “consistently over-predicted measured fish selenium concentrations.”<sup>19</sup> Thus, the model was not properly calibrated to real Lake Koochanusa 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 Koochanusa 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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<sup>11</sup> Exhibit A, attached (J. Beaman comments), p. 4; *see also* oral testimony and written comments to the Proposed Rule from Dr. Anne Fairbrother.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*, p. 7.

<sup>14</sup> *Id.*, p. 8.

<sup>15</sup> *Id.*, p. 9.

<sup>16</sup> Exhibit B, attached (D. DeForest Comments), p. 34.

<sup>17</sup> *Id.*, p. 6.

<sup>18</sup> *Id.*, pp. 5-8.

<sup>19</sup> *Id.*, p. 34.



too much uncertainty to support, by itself, recommendations for a site-specific selenium criterion for Kooacanusa Reservoir.”<sup>20</sup>

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.”<sup>21</sup>

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

<sup>20</sup> *Id.*, p. 34.

<sup>21</sup> 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.<sup>22</sup> 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

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<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup>

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 redbase shiners, which are not sensitive to selenium. Of the 915 fish tissue samples collected and analyzed, only egg/ovary data from three individual redbase shiners were above the EPA guideline of 15.1 mg/kg dry weight. However, all redbase shiner results were

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<sup>23</sup> Derivation Doc., p. 20.

<sup>24</sup> *Id.*

below the species-specific No Observed Effects level of  $\geq 28$  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.<sup>25</sup>

### **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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<sup>25</sup> See Records of September 9, 2020 Public Meeting and September 11th WPCAC Meeting.

and assessment decision framework.<sup>26</sup> 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.”<sup>27</sup>

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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<sup>26</sup> 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).

<sup>27</sup> *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.<sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup> 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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<sup>28</sup> Province of British Columbia, Ministerial Order No. M113.

<sup>29</sup> See written comments and oral testimony provided by Dr. Lisa Kirk.

<sup>30</sup> 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."<sup>31</sup> 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

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<sup>31</sup> 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,<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup> Therefore, using existing data to check the model shows that the model is wrong.

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<sup>32</sup> Exhibits A, B, and F.

<sup>33</sup> Derivation Document, p. 41.

<sup>34</sup> *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.<sup>35</sup> 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 Koochanusa. Additionally, Elk River data and trends do not equate to Lake Koochanusa 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 Koochanusa. Data from 2016 presented by DEQ shows selenium in all of the tributaries that discharge to and are upstream of Lake Koochanusa. 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.<sup>36</sup> 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 Koochanusa's exceedance of the water column standard in the Proposed Rule.<sup>37</sup> 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 Koochanusa Sediment Data," selenium exists in the soil along the banks and shoreline of Lake Koochanusa.<sup>38</sup> 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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<sup>35</sup> *Id.*, p. 20.

<sup>36</sup> Exhibit G, Lake Koochanusa Tributary Sampling, 2016 Montana.

<sup>37</sup> Data available at <https://www.waterqualitydata.us/portal/>.

<sup>38</sup> Exhibit H, attached, Analysis of 2013 Lake Koochanusa 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.<sup>39</sup> 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.<sup>40</sup> 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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<sup>39</sup> 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.

<sup>40</sup> 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 Koochanusa 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<sup>1</sup> 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

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<sup>1</sup> 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<sup>2</sup> 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
<b>Criterion Element</b>	Egg/Ovary	Whole Body or Muscle	Monthly Average Exposure
<b>Magnitude</b>	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
<b>Duration</b>	Instantaneous measurement	Instantaneous measurement	30 days
<b>Frequency</b>	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.

<sup>2</sup> 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 Kooconusa consistent with the approaches recommended by EPA for developing site-specific selenium criteria. The adoption of fish tissue criterion elements for Lake Kooconusa 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](mailto: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 Kooconusa 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<sup>3</sup> in Lake Kooconusa and the Kootenai River (ARM 17.30.632 and ARM 17.30.602(32)).<sup>4</sup>

**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<sup>5</sup> "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,

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<sup>3</sup> 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.

<sup>4</sup> See [www.mtrules.org/gateway/Subchapterhome.asp?scn=17%2E30.6](http://www.mtrules.org/gateway/Subchapterhome.asp?scn=17%2E30.6).

<sup>5</sup> 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.<sup>6</sup>

## 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 Kootenai 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).

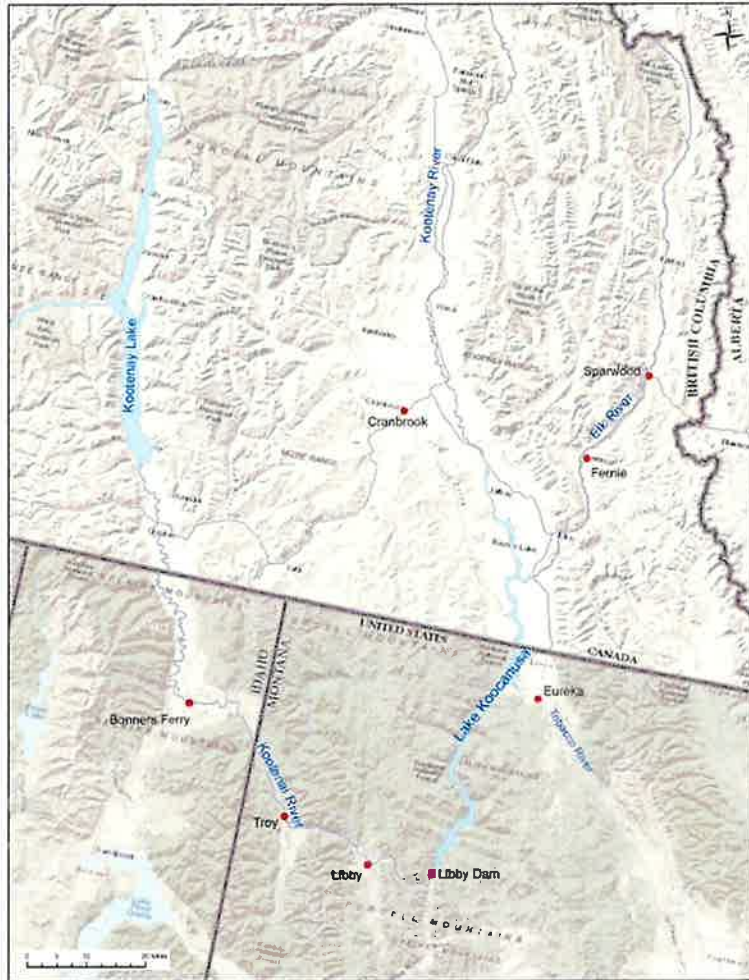
Selenium is an essential micronutrient and low levels of selenium in the diet are required for normal cellular function in almost all animals. However, selenium at amounts not much above the required nutritional levels can have toxic effects on aquatic life and aquatic-dependent wildlife, making it one 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

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<sup>6</sup> 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).<sup>7</sup>



**Figure. 1 Map of Lake Kootenai and the Kootenai River**

### 3. EPA Recommended Selenium Criterion

EPA's national recommended water quality criterion for selenium (EPA 2016),<sup>8</sup> 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

<sup>7</sup> Excerpt from 83 Fed. Reg. 64063 (December 13, 2018).

<sup>8</sup> See [www.epa.gov/wqc/aquatic-life-criterion-selenium](http://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 <sup>1</sup>		Water Column <sup>4</sup>	
	Egg/Ovary <sup>2</sup>	Fish Whole Body or Muscle <sup>3</sup>	Monthly Average Exposure	Intermittent Exposure <sup>5</sup>
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 <sup>6</sup>	Instantaneous measurement <sup>6</sup>	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  $WQC_{30-day}$  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  $f_{int}$  assigned a value  $\geq 0.033$  (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<sup>9</sup> 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.<sup>10</sup>

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

Media Type	Fish Tissue		Water Column
<b>Criterion Element</b>	Egg/Ovary	Whole Body or Muscle	Monthly Average Exposure
<b>Magnitude</b>	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
<b>Duration</b>	Instantaneous measurement	Instantaneous measurement	30 days
<b>Frequency</b>	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).

<sup>9</sup> 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](http://www.epa.gov/sites/production/files/2016-07/documents/aquatic_life_awqc_for_selenium_-_freshwater_2016.pdf).

<sup>10</sup> See [deq.mt.gov/Portals/112/Water/WQPB/Standards/PDF/DEQ7/DEQ-7.pdf](http://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.”<sup>11</sup> 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.<sup>12</sup> Montana determined in *Derivation of a Site-Specific Water Column Selenium Standard for Lake Koocanusa* (MT TSD)<sup>13</sup> 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),<sup>14</sup> 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<sup>15</sup> (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.

<sup>11</sup> 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 Envil. 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’”).

<sup>12</sup> See ARM 17.30.609 and ARM 17.30.623.

<sup>13</sup> See [deq.mt.gov/Portals/112/Water/WQPB/Standards/Koocanusa/TSD\\_Lake%20Koocanusa\\_Sep2020\\_Final.pdf](http://deq.mt.gov/Portals/112/Water/WQPB/Standards/Koocanusa/TSD_Lake%20Koocanusa_Sep2020_Final.pdf).

<sup>14</sup> See [www.epa.gov/wqc/national-recommended-water-quality-criteria-human-health-criteria-table](http://www.epa.gov/wqc/national-recommended-water-quality-criteria-human-health-criteria-table).

<sup>15</sup> See [www.epa.gov/ground-water-and-drinking-water/national-primary-drinking-water-regulations](http://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.<sup>16</sup>

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: (1) 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.<sup>17</sup> 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*<sup>18</sup> 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

<sup>16</sup> 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](http://www.epa.gov/sites/production/files/2019-03/documents/ca_statewide_se_tsd_508_compliant.pdf).

<sup>17</sup> See *Technical Support Document for Water Quality-based Toxics Control* (Section 2.2.1) at [www3.epa.gov/npdes/pubs/owm0264.pdf](http://www3.epa.gov/npdes/pubs/owm0264.pdf).

<sup>18</sup> See [www.epa.gov/wqc/guidelines-deriving-numerical-national-water-quality-criteria-protection-aquatic-organisms-and](http://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 redbreast 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 hierarchical 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)<sup>19</sup> and the companion data release<sup>20</sup> 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 Koochanusa 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 Koochanusa (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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<sup>19</sup> 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 Koochanusa, Montana, U.S.A., and British Columbia, Canada: U.S. Geological Survey Open-File Report 2020–1098, 40 p., doi.org/ 10.3133/ofr20201098.

<sup>20</sup> See Presser, T.S., and Naftz, D.L., 2020, Selenium concentrations in food webs of Lake Koochanusa 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), redbside 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, redbside 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 redbside 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:
- selecting the appropriate *TTF* values from a list of EPA 2016-derived values, or
  - deriving *TTF* values from other existing data, or
  - deriving *TTF* values by conducting additional studies, or
  - 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)<sup>21</sup>: 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 Koochanusa is composed of: mayfly, caddisfly, crane fly, stonefly, damselfly, corixid (waterboatman), 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:
- deriving a site-specific *EF* value from current field measurements, or
  - deriving an appropriate *EF* value from older existing data, or
  - 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<sub>d</sub>* instead of *EF* to describe the relationship between selenium concentrations in particulate and dissolved phases. EPA 2016 indicates that the *K<sub>d</sub>* (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<sub>d</sub>* dataset to use in the model, Presser and Naftz (2020) present each *K<sub>d</sub>* calculation as an independent scenario (n=87), resulting in 87 predicted dissolved selenium concentrations for each model scenario. Montana used this distribution of *K<sub>d</sub>*'s and resulting dissolved selenium concentrations to derive their water column criterion element.

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

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<sup>21</sup> 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:

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

$C_{\text{water column criterion element}}$	=	translated site-specific water column criterion element ( $\mu\text{g/L}$ ),
$C_{\text{whole body criterion element}}$	=	whole body fish tissue criterion element ( $\mu\text{g/g}$ ),
$TTF_{\text{composite}}$	=	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),
$\text{SPM \% bioavailability}$	=	percent bioavailability of suspended particulate matter

Montana used the following values to populate the equation:

$C_{\text{whole body criterion element}}$	=	8.5 $\mu\text{g/g}$ ,
$TTF_{\text{composite}}$	=	$TTF^{\text{TL4Fish}} \times TTF^{\text{TL3Fish}} \times TTF^{\text{aquatic insects}} = 1.1 \times 1.1 \times 2.8 = 3.39$
$K_d$	=	75 <sup>th</sup> percentile of distribution
$\text{SPM \% bioavailability}$	=	60%

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

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  $\mu\text{g/g}$  dw. The  $TTF_{\text{composite}}$  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

<sup>22</sup> 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 75<sup>th</sup> 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."<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup>

#### **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.

<sup>23</sup> Notice of Amendment and Adoption p. 2394, response to comment #186.

<sup>24</sup> September 4, 2020 email from Myla Kelly to Tonya Fish.

<sup>25</sup> 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.<sup>26</sup> 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

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<sup>26</sup> 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](http://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.<sup>27</sup> 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

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<sup>27</sup> 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.<sup>28</sup>

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 Koochanusa 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:<sup>29</sup>

- 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

<sup>28</sup> See IDAPA 58.01.02.210.01 at [adminrules.idaho.gov/rules/current/58/580102.pdf](http://adminrules.idaho.gov/rules/current/58/580102.pdf).

<sup>29</sup> 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](http://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

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

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BOARD MEETING )  
DECEMBER 11, 2020 )

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TRANSCRIPT OF PROCEEDINGS - VIA ZOOM

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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

107

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

10 CHAIR DEVENY: George, go ahead.

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

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

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

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

1 sovereign jurisdiction to control what they do in  
2 British Columbia.

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

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

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

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

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

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

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

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

20                 CHAIR DEVENY: Chris, does that answer  
21          your questions?

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

25                 One, the question of whether it's

128

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

3 CHAIR DEVENY: Go ahead.

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

14 CHAIR DEVENY: Duly noted, Dexter.  
15 Thank you.

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

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

25 David Lehnerr, did you have a question?

# **EXHIBIT D**





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 disproportionately 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-lead the efforts of the Lake Kootenai 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 Kootenai. 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



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 2021-05 WQ

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

IN THE MATTER OF: THE NOTICE OF  
APPEAL AND REQUEST FOR HEARING BY  
WESTMORELAND AND ROSEBUD MINING LLC  
REGARDING ISSUANCE OF MPDES PERMIT  
NO. MT0023965

Case No. BER 2021-05 WQ

On July 8, 2021, the BER received the attached request for hearing via mail. Please serve copies of pleadings and correspondence on me and on the following DEQ representatives in this case.

Kirsten Bowers  
Legal Counsel  
Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901  
kbowers@mt.gov

Attachments

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ATTORNEYS FOR WESTMORELAND  
ROSEBUD MINING LLC

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

<p><b>IN THE MATTER OF:</b></p> <p><b>THE NOTICE OF APPEAL AND REQUEST FOR HEARING BY WESTMORELAND ROSEBUD MINING LLC REGARDING ISSUANCE OF MPDES PERMIT NO. MT0023965</b></p>	<p><b>CAUSE NO. _____</b></p> <p><b>NOTICE OF APPEAL</b></p>
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Pursuant to Mont. Code Ann. § 75-5-403(2) and Admin R. Mont. 17.30.1370(4), Westmoreland Rosebud Mining LLC (“Westmoreland”) appeals the issuance of, and requests a hearing before the Board of Environmental Review (“Board”) on Montana Pollutant Discharge Elimination System (“MPDES”) Permit No. MT0023965 (“Permit”) issued by the Montana Department of Environmental Quality (“DEQ”). This appeal is limited to the electrical conductivity effluent limitation for discharges into Lee Coulee. Westmoreland does not challenge other aspects of the Permit. Pursuant to Admin. R. Mont. 17.30.1379, Westmoreland understands that all other aspects of the Permit, which are severable from the electrical conductivity effluent limitation challenged here, will become effective on August 1, 2021. The Board has authority to hear contested case appeals of DEQ’s MPDES permitting decisions, such that the Board may affirm, modify, or reverse DEQ’s permitting action.

In Westmoreland’s view, the record does not support DEQ’s decision to impose the Permit’s limitation on electrical conductivity. Westmoreland submits this notice of appeal, in part, as a protective measure to preserve its ability to negotiate resolution of its disagreement over this particular effluent limitation.

DATED this 7th day of July, 2021.

*/s/ Victoria A. Marquis* \_\_\_\_\_

Victoria A. Marquis

Holland & Hart LLP

401 North 31st Street

Suite 1500

P.O. Box 639

Billings, Montana 59103-0639

ATTORNEYS FOR WESTMORELAND  
ROSEBUD MINING LLC

**CERTIFICATE OF MAILING**

I hereby certify that on this 7th day of July, 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 ( <b>original</b> ) Board of Environmental Review 1520 E. Sixth Avenue P.O. Box 200901 Helena, MT 59620-0901 Regan.Sidner@mt.gov BER@MT.GOV	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail
Kirsten H. Bowers Montana Department of Environmental Quality 1520 East Sixth Avenue P.O. Box 200901 Helena, Montana 59601-0901 kbowers@mt.gov	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail
Arlene Forney Legal assistant to William W. Mercer and Victoria A. Marquis aforney@hollandhart.com	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

*/s/ Victoria A. Marquis* \_\_\_\_\_





Board of Environmental Review

Memo

TO: Katherine Orr, Hearing Examiner  
Board of Environmental Review

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

DATE: July 29, 2021

SUBJECT: Board of Environmental Review Case No. BER 2021-06 SWP

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

IN THE MATTER OF: NOTICE OF APPEAL  
AND REQUEST FOR HEARING BY OREO'S  
REFINING REGARDING SOLID WASTE  
LICENSE EXPIRATION (LICENSE #574)

Case No. BER 2021-06 SWP

On July 29, 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.

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

Attachments

## Sidner, Regan

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**From:** Shelly Mitchell <oreosrefining@gmail.com>  
**Sent:** Thursday, July 29, 2021 3:01 PM  
**To:** Sidner, Regan  
**Subject:** [EXTERNAL] Hearing Request  
**Attachments:** Letter from DEQ.JPG

Good afternoon,

I am writing to request a hearing with the Board of Environmental Review on the grounds that two individuals within the DEQ acted against me as a business owner.

I was granted permission by Missoula County and the DEQ to operate a mobile business and I have done so for almost three years. At the end of October of 2018 I was granted permission to have my e-waste recycling business become mobile. Meaning, I can dismantle e-waste in a trailer at various locations. Operating a mobile business has saved me money because I do not have to pay for a commercial space and allows me to service a greater demographic of clients.

On July 16th 2021, I received a letter from the DEQ revoking my recycling license due to an address discrepancy. Prior to July 16, I had received no warning or notification before having my recycling license revoked. Upon receiving the letter I called Andrea Staley because she had sent the letter. I reached out to Rick Thompson to identify steps to remedy this situation on July 21st and then again July 23rd 2021. I received no response. Because Rick Thompson and Dusti Johnson have refused to communicate with me I believe this action was taken with malice and intent to destroy a sustainable business. I offered alternatives, which they have ignored and when I have tried to reach out to fix this issue, they have been unwilling to communicate with me. No one informed me that I had a right to request a hearing in front of the Board of Environmental Review, again my rights are being withheld.

Since Montana Law Annotated gives the DEQ permission to modify a recycling license I believed I was in compliance since the DEQ granted me permission to make my business mobile. Now I am trying to remedy this situation and receiving zero communication From Dusti and Rick. My business contributes value to the community it serves. Individuals are able to conveniently and safely recycle electronics which would otherwise end up in the landfill. My business poses no danger to public health or safety and causes no adverse environmental effects. So to have this harsh action taken seems completely unreasonable. Losing my business will put me into severe financial hardship. Due to the lack of response from the DEQ I am struggling to make timely payments on my vehicle which is an integral part of my business.

To summarize what will be in the documentation:

- I was approved to be mobile at the end of October 2018.
- One year ago( 2020) Dusti contacted me for an inspection but never did one.
- Two years later (2021)the DEQ decides there is a problem and they do not share that with me.
- July of this year (2021) I got a letter terminating my license.
- Rick Thompson and Dusti Johnson have not communicated or shown any signs of good faith to fix this issue.

Sincerely,

Shelly  
 Oreos Refining  
 July 29, 2021



July 16, 2021

Shelly Mitchell  
OREO'S REFINING  
P.O. Box 1195  
Missoula, MT 59806

RE: FY 2021 LICENSE EXPIRATION AND UPDATED ADDRESS REQUEST

Dear Shelly:

The current solid waste license #574 for Oreo's Refining is expired.

A solid waste license is issued for 12 months. The license is valid on July 1 and expires on June 30. We received your renewal application on May 17, 2021.

On June 17, 2021, Dusti Johnson visited 2206 Missoula Avenue in Missoula to conduct an inspection. This address is on your renewal application and is the address we have on file. The residents of that address noted that no such business was conducted there.

Please provide the Solid Waste Program the permanent address where you are conducting business immediately. We are withholding your license until we receive your new address.

Until then, you may not operate. If you are operating without a FY 2022 license, you are doing so in violation of § 75-10-221(1), Montana Code Annotated, which could result in enforcement action.

Sincerely,

A handwritten signature in blue ink that reads "Andrea Staley". The signature is written in a cursive style.

Andrea Staley  
Waste and Underground Tank Management Bureau  
Solid Waste Section  
Phone: 406-444-3493