

The following comments from interested members of the public were received after the September 24, 2021 1:00 PM deadline, and therefore may not be considered by the Board of Environmental Review:

Sidner, Regan

From: Molly Trautman <[REDACTED]>
Sent: Wednesday, September 29, 2021 1:15 PM
To: DEQ BER Secretary
Subject: [EXTERNAL] Selenium pollution limits must stay.

Dear Montana Board of Environmental Review,

Thank you for the opportunity to provide comments on this issue. We all know that pollutants need to be going down not up. These companies must find other ways to deal with their waste instead of dumping them in the lap of our planet to clean up.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Regards,
Molly Trautman
1838 Broadmoor Dr
Boise, ID 83705

Sidner, Regan

From: Alida Bockino <[REDACTED]>
Sent: Wednesday, September 29, 2021 1:16 PM
To: DEQ BER Secretary
Subject: [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

Thank you for the opportunity to provide comments on this issue.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

A good decision was made last year and must continue to be enforced.

Regards,
Alida Bockino
1104 Pine Crest Rd
Moscow, ID 83843

Sidner, Regan

From: Linda Roche <[REDACTED]>
Sent: Wednesday, September 29, 2021 1:18 PM
To: DEQ BER Secretary
Subject: [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

Please continue with these protections!
Thank you for the opportunity to provide comments on this issue.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Kootenai and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Regards,
Linda Roche
12889 Willow Ave
Grant, MI 49327

Sidner, Regan

From: Kristen DeAngeli <[REDACTED]>
Sent: Wednesday, September 29, 2021 1:21 PM
To: DEQ BER Secretary
Subject: [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

Thank you for the opportunity to provide comments on this issue.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Thank you for your time and consideration!

Regards,
Kristen DeAngeli
371 N Arcadia St
Boise, ID 83706

Sidner, Regan

From: Charles Kilpatrick <[REDACTED]>
Sent: Wednesday, September 29, 2021 1:25 PM
To: DEQ BER Secretary
Subject: [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Kootenai and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Regards,
Charles Kilpatrick
18289 S Woodland Shores Dr
Coeur D'alene, ID 83814

Sidner, Regan

From: Barclay Hauber <[REDACTED]>
Sent: Wednesday, September 29, 2021 1:30 PM
To: DEQ BER Secretary
Subject: [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

Thank you for the opportunity to provide comments on this issue.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Kootenai and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition. Thank you.

Regards,
Barclay Hauber
160 Old Pollock Rd
Pollock, ID 83547

Sidner, Regan

From: Andrew Taylor <[REDACTED]>
Sent: Wednesday, September 29, 2021 1:36 PM
To: DEQ BER Secretary
Subject: [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

Thank you for the opportunity to provide comments on this issue. Please be a good neighbor.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Kooncanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Regards,
Andrew Taylor
4626 Mountain Park Rd
Pocatello, ID 83202

Sidner, Regan

From: Stacey Anderson <[REDACTED]>
Sent: Wednesday, September 29, 2021 1:43 PM
To: DEQ BER Secretary
Subject: [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

Thank you for the opportunity to provide comments on this issue.

Please stand strong against water pollution! Water of course is one of our most important resources! Mining is one of the dirtiest, devastating enterprises for the environment and yet the cleanup is often more costly than the minerals obtained!

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Regards,
Stacey Anderson
6325 N Monroe St
Spokane, WA 99208

Sidner, Regan

From: Dave Pietz <[REDACTED]>
Sent: Wednesday, September 29, 2021 1:51 PM
To: DEQ BER Secretary
Subject: [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

Thank you for the opportunity to provide comments on this issue.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

As a citizen of Idaho, I am concerned about the protection of the Kootenai River water quality. I grew up in Bonner's Ferry many years ago, and have returned to the Northern Idaho area after being elsewhere. I feel fortunate to live where our water resources are better than many other areas.

Regards,
Dave Pietz
110 Spur Dr
Sandpoint, ID 83864

Sidner, Regan

From: Susan Bistline <[REDACTED]>
Sent: Wednesday, September 29, 2021 2:00 PM
To: DEQ BER Secretary
Subject: [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

Thank you for the opportunity to provide comments on this issue.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Kooncanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition. Time to stop polluting our planet-our only place to live.

Regards,
Susan Bistline
957 W Garfield Bay Rd
Sagle, ID 83860

Sidner, Regan

From: Daniel Roper <[REDACTED]>
Sent: Wednesday, September 29, 2021 2:10 PM
To: DEQ BER Secretary
Subject: [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

Hello,

Last year, the Montana Board of Environmental Review vote to approve new selenium limits for Lake Kootcanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Regards,
Daniel Roper
2556 9th Ave E
Twin Falls, ID 83301

Sidner, Regan

From: Lana Weber <[REDACTED]>
Sent: Wednesday, September 29, 2021 2:21 PM
To: DEQ BER Secretary
Subject: [EXTERNAL] Please decline to adopt a process to review Teck's petition

Dear Montana Board of Environmental Review,

Thank you for the opportunity to provide comments on this issue.

As an Idahoan who has spent a great deal of time in North Idaho and Montana, I have been watching this issue closely.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Regards,
Lana Weber
1017 E Jefferson St
Boise, ID 83712

Sidner, Regan

From: Brad Lancaster <[REDACTED]>
Sent: Wednesday, September 29, 2021 2:33 PM
To: DEQ BER Secretary
Subject: [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

Thank you for the opportunity to provide comments on this issue.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Kooncanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Let's not allow the greedy & irresponsible actions of a few executives destroy our wild places, wild fish populations, & wildlife for the remaining 99.99% of us & our children & grandchildren.

Regards,
Brad Lancaster
10395 Nighthawk Cir
Reno, NV 89523

Sidner, Regan

From: Savannah Perry <[REDACTED]>
Sent: Wednesday, September 29, 2021 2:46 PM
To: DEQ BER Secretary
Subject: [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

Thank you for the opportunity to provide comments on this issue.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Kooncanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

I believe that it is the responsibility of the lawmakers to review these policies and protect the people and animals that cannot protect themselves. I respect the decisions made and ask for good judgement that will protect us all.

Regards,
Savannah Perry
4909 Sunflower Ave
Pocatello, ID 83202

Sidner, Regan

From: Todd Davis <[REDACTED]>
Sent: Wednesday, September 29, 2021 3:00 PM
To: DEQ BER Secretary
Subject: [EXTERNAL] Protecting our waters

Dear Montana Board of Environmental Review,

I appreciate the opportunity to provide comments on this issue. Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Regards,
Todd Davis
3855 Collister Dr
Boise, ID 83703

Sidner, Regan

From: Ebony Yarger <[REDACTED]>
Sent: Wednesday, September 29, 2021 3:15 PM
To: DEQ BER Secretary
Subject: [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

Thank you for the opportunity to provide comments on this issue.

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake Koocanusa and the Kootenai River. The selenium limits were put in place to protect Montana and Idaho waters from the toxic pollution spewing from Teck Resources' mining operations. I was happy that Montana was taking steps to protect Idaho's water quality and fish populations.

As a downstream waterbody, the Idaho portion of the Kootenai River is vulnerable to the detrimental effects of selenium pollution. In fact, we are already seeing levels of selenium in fish tissue that are higher than what the national and state limits allow. Montana has an obligation to continue protecting Idaho water quality.

I support the comprehensive process that was carried out by the Board to review and adopt the selenium limits. I urge the members of the Board to respect the decision and good judgment the Board made last year and decline to adopt a process to review Teck's petition.

Thank you for your time and willingness to respond to my concerns. I look forward to hearing from you soon, take care.

Regards,
Ebony Yarger
357 Blue Lakes Blvd N
Twin Falls, ID 83301

The following response to comments from members of the public was received after the September 29, 2021 1:00 PM deadline, and therefore may not be considered by the Board of Environmental Review:

Sidner, Regan

From: Shiloh Hernandez <[REDACTED]>
Sent: Wednesday, September 29, 2021 4:41 PM
To: DEQ BER Secretary
Subject: [EXTERNAL] In re Review of Selenium Standards for Lake Koocanusa
Attachments: 2021-9-29 - Resp to Teck petition comments - Earthjustice, MEIC, Clark Fork Coalition.pdf

Secretary Sidner,

Please see the attached response to comments submitted on September 24, 2021, in the above-referenced matter. Please let me know if you have any questions or concerns.

Sincerely,

Shiloh Hernandez
He/Him
Senior Attorney
Northern Rockies Office
313 East Main Street
P.O. Box 4743
Bozeman, MT 59772-4743

T: [REDACTED]
F: [REDACTED]
earthjustice.org [nam04.safelinks.protection.outlook.com]



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September 29, 2021

Montana Board of Environmental Review
Regan Sidner, Board Secretary
Department of Environmental Quality
deqbersecretary@mt.gov

Re: Teck Coal Limited petition to review whether new ARM 17.30.632 setting selenium standards for Lake Koocanusa is more stringent than federal guideline

To whom it may concern,

Pursuant to the Board of Environmental Review’s (Board) notice regarding Teck Coal Limited’s (Teck) petition to weaken Montana’s Selenium standards (Selenium Rule) for Lake Koocanusa, Earthjustice submits these comments together with the Montana Environmental Information Center (MEIC) and Clark Fork Coalition. These comments respond to the comments submitted by Teck and other parties.

I. TECK’S REQUEST CONFUSES RULEMAKING, ADJUDICATION, AND JUDICIAL REVIEW.

Our prior comments demonstrated that Teck’s petition improperly invites the Board to act beyond its jurisdiction and ultra vires. In its comments on procedure, Teck further muddles the picture, demonstrating that the best course of action is for the Board to simply dismiss the petition.

Initially, it appears that Teck has abandoned its request that the Board issue a declaratory ruling pursuant to Montana Code Annotated § 2-4-501 and ARM 1.3.227. Teck’s comments do not refer to any of the processes related to declaratory rulings, even though its petition was supposedly a request for such a ruling. Compare Pet. at 1 (citing ARM 1.3.227), with Teck Cmts. at 1-6 (failing to mention rules related to declaratory rulings at all). This makes sense because the declaratory ruling laws plainly do not apply, as explained in our initial comments—Teck does not seek a ruling on the applicability of the Selenium Rule, but a ruling that the rule is “void.” See Teck. Cmts. at 4.

Having abandoned its declaratory ruling theory, Teck fails to anchor its petition to any other administrative procedure authorized by law, either an adjudication (i.e., a contested case) or a rulemaking. Worse, the company cobbles together disparate fragments of administrative law, which it presents as a Frankenstein-monster-like request to the Board to limit public participation and act beyond its statutory authority. Teck’s proposal should be rejected.



At various points Teck asks the Board to “review” the “rulemaking record,” “including evaluation and determination of facts contained in the rulemaking record.” Teck Cmts. at 2, 4.¹ Teck requests that this review of the administrative record culminate in a “declar[ation]” that “the Rule [is] void.” *Id.* at 4. Teck asks this to occur pursuant to the Board’s “quasi-judicial authority.” *Id.* But that process is judicial review, which is not available to the Board, but reserved for state courts. Mont. Code Ann. §§ 2-4-305, 506.

Teck’s reference to the Board’s “quasi-judicial authority” also suggests the contested case proceedings provided for in the Montana Administrative Procedure Act (MAPA). *See* Mont. Code Ann. §§ 2-4-601 to -631. But at the Board’s August meeting, Teck represented to the Board that it was not seeking a contested case proceeding. BER Tr. at 22:3-8 (Aug. 13, 2021) (“It’s filed pursuant to the statute 75-5-203 subparagraph (4), so it’s not a contested case.”). Moreover, the process suggested by Teck—by which no other parties are permitted, no discovery occurs, no briefs are filed—is wholly inconsistent with the trial-type provisions of contested cases. *See* Mont. Code Ann. §§ 2-4-601 to -631.

Ultimately, the process recommended by Teck resembles notice-and-comment rulemaking, in which the Board “holds a public hearing to receive comments” and “publishes [a] decision” that repeals (“declare[s] void”) a rule. Teck Cmts. at 4-5. But, again, the Montana Legislature removed rulemaking authority from the Board. 2021 Mont. Laws Ch. 324, § 31 (Senate Bill 233).

It is Teck’s duty, as the proponent of a petition, to identify a lawful vehicle by which the Board may consider its petition. Teck’s having failed to do so, the Board should dismiss its petition and decline the invitation to act beyond its authority.

II. TECK’S INSISTENCE THAT THE BOARD ACT BEYOND ITS JURISDICTION BY FOLLOWING LAWS THAT HAVE BEEN REPEALED IS FURTHER REASON FOR DISMISSING ITS PETITION.

It is clear that Teck is inviting the Board to act pursuant to the now-repealed provisions of Montana Code Annotated § 75-5-203(4) (2019). That provision, however, is no longer the law. The Board no longer has authority to follow the procedure set out in Montana Code Annotated § 75-5-203(4) (2019). Consequently, Teck’s petition should be dismissed.

Montana Code Annotated § 75-5-203(4) (2019) provided:

A person affected by a rule of the board that that person believes to be more stringent than comparable federal regulations or guidelines may petition the board to review the rule. If the board determines that the rule is more stringent than comparable federal regulations or guidelines, the board shall comply with this

¹ Confusingly, Teck alternatively refers to the administrative record as “evidence already contained in the rulemaking record,” Teck Cmts. at 6, and as “the documents submitted to EPA for approval of the Rule and EPA’s response to that submittal.” *Id.* at 2.



section by either revising the rule to conform to the federal regulations or guidelines or by making the written finding, as provided under subsection (2), within a reasonable period of time, not to exceed 8 months after receiving the petition. A petition under this section does not relieve the petitioner of the duty to comply with the challenged rule. The board may charge a petition filing fee in an amount not to exceed \$250.

Teck asserted at the Board’s August hearing that it had submitted its provision pursuant to this now-repealed provision. BER Tr. at 25:6-11 (Aug. 13, 2021) (“This was filed before the effective date of the Senate Bill [233] which removed the rulemaking authority, to provide an opportunity for the Board to own this rulemaking and direct actions going forward.”). Consistent with that assertion, Teck’s comments request the Board, not only to issue a determination of whether the Selenium Rule is more stringent than the federal rule, but also to revise and repeal the rule. Teck Cmts. at 4 (stating that the Board has authority to “revise the Rule” and requesting that the Board go farther and “declare the Rule void”). Teck then asserts that the Board must revise or repeal the rule in eight months, as provided by the now-repealed version of the law. Id. at 5.

The problem with Teck’s position is that is premised on a statute that has been repealed. The provisions of Montana Code Annotated § 75-5-203(4) (2019) were amended last year by Senate Bill 233:

(4)(a) A person affected by a rule ~~of the board that~~ that the person believes to be more stringent than comparable federal regulations or guidelines may petition the ~~board~~ board to review the rule. If the ~~board~~ board determines that the rule is more stringent than comparable federal regulations or guidelines, the ~~board~~ department shall comply with this section by either revising the rule to conform to the federal regulations or guidelines or by making the written finding, as provided under subsection (2), within a reasonable period of time, not to exceed 8 months after receiving the petition. A petition under this section does not relieve the petitioner of the duty to comply with the challenged rule. The ~~board~~ department may charge a petition filing fee in an amount not to exceed \$250.

2021 Mont. Laws Ch. 324, § 32. Thus, the authority to revise or repeal the Selenium Rule, which Teck now invokes, no longer resides with the Board, but instead resides with the Department of Environmental Quality (DEQ). See Mont. Code Ann. § 2-4-302(1)(a); id. § 2-4-102(11)(a) (defining “rule” to include “amendment or repeal of a prior rule”). This is not changed by the fact that Teck filed its petition one day prior to the effective date of Senate Bill 233. That is because Senate Bill 233 had a transition provision by which any rulemaking authority or rules under the jurisdiction of the Board on the effective date of the law would be transferred to DEQ. 2021 Mont. Laws Ch. 324, § 112 (“Rulemaking authority and existing rules under the jurisdiction of the board of environmental review are transferred to the department of environmental quality on [the effective date of this act].”). Thus, any authority the Board previously possessed to revise or repeal rules (within an eight-month period) under Montana Code Annotated § 75-5-203(4) (2019), was transferred to DEQ under the new law. See Mont. Code Ann. § 75-5-203(4) (2021).



Montana Code Annotated §75-5-203(4)(a) (2021) provides:

A person affected by a rule that the person believes to be more stringent than comparable federal regulations or guidelines may petition the board to review the rule. If the board determines that the rule is more stringent than comparable federal regulations or guidelines, the department shall comply with this section by either revising the rule to conform to the federal regulations or guidelines or by making the written finding, as provided under subsection (2), within a reasonable period of time, not to exceed 8 months after receiving the petition. A petition under this section does not relieve the petitioner of the duty to comply with the challenged rule. The department may charge a petition filing fee in an amount not to exceed \$250.

Under the current law, the Board does not have authority to address the following questions posed by Teck:

- “Did the initial and subsequent publications of the Rule provide the requisite notice to the public that the Rule was more stringent than the federal guideline?”
- “Did the initial and subsequent publications of the Rule provide the findings, discussion of policy reasons, and analysis required by Montana Code Annotated § 75-5-203?”
- “Does the rulemaking record contain appropriate support for the findings, discussion of policy reasons, and analysis required by Montana Code Annotated § 75-5-203?”

Teck Cmts. at 3. Under the current law, answering these questions is the authority of DEQ or judicial review. The only question that the Board has authority to answer is whether the Selenium Standard is more stringent than the federal standard. And the Board already answered that question nine months ago with a resounding no. 24 MAR 2336, 2398 (Dec. 24, 2020).

In sum, the Board lacks jurisdiction to consider all but one of the questions posed by Teck and lacks jurisdiction to grant the remedy requested by Teck. And the Board has already answered the one question it has authority to address. There is nothing within the Board’s authority that remains to be done. As such, the Board should decline Teck’s invitation to act beyond its jurisdiction and dismiss Teck’s petition.

III. IF THE BOARD ADDRESSES WHETHER THE SELENIUM STANDARD IS MORE STRINGENT THAN THE FEDERAL STANDARD, IT SHOULD FOLLOW THE PROCEDURE PROPOSED BY DEQ.

As noted, the Board only has authority under Montana Code Annotated § 75-5-203(4) to determine whether the Selenium Rule is more stringent than the federal criteria. Also as noted, the Board already made this determination only nine months ago. Teck has provided no basis for revisiting this rule in any non-arbitrary fashion. But assuming arguendo that the Board opted to entertain this single question (that it already resolved), it should do so by the process outlined by



DEQ: setting a schedule for intervention, compilation of the record, filing dispositive briefing, and oral argument. This would be, at minimum, consistent with the constitutional mandates for due process, public participation, and clean and healthful environment, Mont. Const. art. II, §§ 3, 8, 17,² and the minimum standards for an informal contested case proceeding. Mont. Code Ann. § 2-4-604.

Teck’s one-sided proposal for the Board to limit public participation should be rejected. If the Board chooses to entertain the only issue that it has jurisdiction to consider—whether the Selenium Rule is more stringent than the federal criteria—it should follow the procedure proposed by DEQ.

CONCLUSION

Teck boldly requests this Board to act beyond its jurisdiction and redo a determination that has already been made. The Board should decline this invitation and dismiss Teck’s ill-conceived petition to void Montana’s laws that protect its fisheries from toxic pollution.

Respectfully,

/s/ Shiloh Hernandez

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² The substantive right to a clean and healthful environment includes procedural protections. See Park Cty. Env’t Council v. DEQ, 2020 MT 303, ¶¶ 70-89, 402 Mont. 168, 477 P.3d 288.