

## Sidner, Regan

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**From:** Lynn Savonen [REDACTED]  
**Sent:** Saturday, September 18, 2021 12:30 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

(PLEASE PROVIDE YOUR NAME AND MAILING ADDRESS HERE)

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

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

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

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

Regards,  
Lynn Savonen  
6210 McCall St  
Bonners Ferry, ID 83805

## Sidner, Regan

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**From:** Sharon Burdick [REDACTED]  
**Sent:** Sunday, September 19, 2021 9:00 AM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

(PLEASE PROVIDE YOUR NAME AND MAILING ADDRESS HERE)

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

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

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

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

Regards,  
Sharon Burdick  
420 Last Chance Rd  
Sandpoint, ID 83864

## Sidner, Regan

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**From:** Laurie Foutty [REDACTED]  
**Sent:** Sunday, September 19, 2021 4:30 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

(PLEASE PROVIDE YOUR NAME AND MAILING ADDRESS HERE)

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

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

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

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

Regards,  
Laurie Foutty  
6146 N Harcourt Dr  
Coeur D'alene, ID 83815

## Sidner, Regan

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**From:** John Hastings [REDACTED]  
**Sent:** Sunday, September 19, 2021 9:30 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

(PLEASE PROVIDE YOUR NAME AND MAILING ADDRESS HERE)

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

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

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

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

Regards,  
John Hastings  
2002 Aspen Ln  
Sandpoint, ID 83864

## Sidner, Regan

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**From:** Arthur Buswell [REDACTED]  
**Sent:** Monday, September 20, 2021 7:30 AM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

(PLEASE PROVIDE YOUR NAME AND MAILING ADDRESS HERE)

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

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

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

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

Regards,  
Arthur Buswell  
32 Park cri,  
Wardner, ID 83837

## Sidner, Regan

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**From:** Gayla Moseley [REDACTED]  
**Sent:** Tuesday, September 21, 2021 10:00 AM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

(PLEASE PROVIDE YOUR NAME AND MAILING ADDRESS HERE)

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

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

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

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

Regards,  
Gayla Moseley  
742 E Timber Ln  
Coeur D'alene, ID 83815

## Sidner, Regan

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**From:** Clayton Elliott [REDACTED]  
**Sent:** Tuesday, September 21, 2021 2:19 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] MTU Comments on review process for stringency of state Selenium standard, ARM 17.30.632  
**Attachments:** 2021-09-14 MTUCommentsSeleniumBERReviewProcess FNL.pdf

Members of the Board of Environmental Review:

Please find attached comments from Montana Trout Unlimited concerning the request for public comment on potential review of the stringency standard pertaining to Montana's selenium standard in ARM 17.30.632. Do not hesitate to reach out to me if you have comments, questions, or need additional information.

Thank you in advance for your consideration,  
Clayton

**Clayton Elliott**  
*Conservation and Government Affairs Director*  
**Montana Trout Unlimited**

[REDACTED]  
[www.montanatu.org](http://www.montanatu.org) [[montanatu.org](http://montanatu.org)]





September 24, 2021

Montana Trout Unlimited  
312 North Higgins, Suite 200  
P.O. Box 7186  
Missoula, Montana 59807

Montana Board of Environmental Review  
ATTN: Regan Sidner, Board Secretary  
P.O. Box 200901  
Helena, Montana 59620-0901

Sent by email to: [deqbersecretary@mt.gov](mailto:deqbersecretary@mt.gov)

Re: In the matter of the Review of Stringency of Rule Pertaining to Selenium Stands for Lake Koocanusa, pursuant to ARM 17.30.632

Board of Environmental Review Members:

Thank you for the opportunity to provide written comments on the proposed process for reviewing the stringency of the adopted selenium standards for Lake Koocanusa and the Kootenai River that is currently in front of the Board of Environmental Review (BER). We appreciate the thorough and transparent public process that brought us to the point of having an adopted rule, and we wish to go on record calling for an equally public process for any duplicative review that the BER may or may not choose to embark on now.

Founded in 1964, Montana Trout Unlimited (MTU) is the only statewide grassroots organization dedicated solely to conserving, protecting, and restoring Montana's coldwater fisheries. MTU is comprised of 13 chapters across the state, including in northwest Montana, and it represents approximately 4,500 Trout Unlimited members and supporters in the state. Our chapter leaders in the affected area have helped inform our comments to the Board.

For more than half a decade, the collaborative work of the Department of Environmental Quality (DEQ), Montana Fish, Wildlife, and Parks (FWP), United States Environmental Protection Agency (EPA), United States Geologic Survey (USGS), United States Fish and Wildlife Service (USFWS), multiple Tribal nations in the United States and Canada, the Province of British Columbia, and university scientists has been aimed at addressing the ongoing, long-term selenium pollution in the transboundary waters of Lake Koocanusa and the Kootenai River. MTU has reviewed, participated in, and encouraged this process with an emphasis on the goal of having DEQ set a site specific standard for selenium in the lake and river that is based on sound science in the interest of protecting one of northwest Montana's most valuable and intact wild



and native trout fisheries. The current standards adopted by DEQ in Administrative Rules of Montana (ARM) 17.30.632 do just that. Further, the process for adopting those rules involved considerable public deliberation, participation, and review.

For the purposes of these comments, we will refrain from discussing the substance of the petition of Teck Coal's duplicative request for review as well as the extensive public record that substantiate the rule, including on the specific questions posed by Teck Coal in their request. Rather, we first wish to formally request that the Board deny the duplicative request for review submitted by Teck Coal. On its face, the issue at question has been robustly considered and the standard of review met during the adoption of the rule. If the board should choose to not deny the request, MTU formally requests that any review process by which the Board chooses to move forward with such petition include meaningful public participation and review provided for in Title 2, Section 4 of the Montana Code Annotated (MCA) and afforded by the protections in Article II, Sections 8 and 9 of the Montana Constitution. We specifically ask that any such process of review include publicly noticed comment periods of at least sixty days and include at least one public meeting in Helena.

Please do not hesitate to contact us with any questions, or if you need additional information regarding the comments that we have submitted (via email at [clayton@montanatu.org](mailto:clayton@montanatu.org) or by phone at 406-543-0054). Again, we thank you for the opportunity to comment on this important topic.

Respectfully,



David Brooks  
Executive Director  
Montana Trout Unlimited



Clayton Elliott  
Conservation Director  
Montana Trout Unlimited

cc:

The Honorable Jon Tester, United States Senator  
The Honorable Steve Daines, United States Senator  
The Honorable Matt Rosendale, United States House of Representatives  
The Honorable Greg Gianforte, Governor of Montana  
Chris Dorrington, Director of Montana Department of Environmental Quality

## Sidner, Regan

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**From:** Audrey Hopkins [REDACTED]  
**Sent:** Tuesday, September 21, 2021 7:49 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] protect our waters

Dear Montana Board of Environmental Review,

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

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

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

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

Regards,  
Audrey Hopkins  
411 Deinhard Ln  
Mccall, ID 83638

## Sidner, Regan

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**From:** Nicole Erickson [REDACTED]  
**Sent:** Tuesday, September 21, 2021 8:30 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

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

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake 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,  
Nicole Erickson  
15317 Gleneden  
Spokane, WA 99208

## Sidner, Regan

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**From:** Joi Marker [REDACTED]  
**Sent:** Thursday, September 23, 2021 8:17 AM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Please please continue your bold stance protecting our waters

Dear Montana Board of Environmental Review,

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

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake 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,  
Joi Marker  
4711 W Hillcrest Dr  
Boise, ID 83705

## Sidner, Regan

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**From:** Alexa Fay [REDACTED]  
**Sent:** Thursday, September 23, 2021 3:31 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

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

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake 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,  
Alexa Fay  
1507 N 39th St  
Seattle, WA 98103

## Sidner, Regan

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**From:** Rhea Verbanic [REDACTED]  
**Sent:** Thursday, September 23, 2021 7:09 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

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

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake 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,  
Rhea Verbanic  
175 Goat Mountain Rd  
Bonners Ferry, ID 83805

## Sidner, Regan

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**From:** Patrick Rice [REDACTED]  
**Sent:** Thursday, September 23, 2021 7:30 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Thank you for protecting our waters

Dear Montana Board of Environmental Review,

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

Last year, I witnessed the Montana Board of Environmental Review vote to approve new selenium limits for Lake 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,  
Patrick Rice  
16808 E Mission Pkwy  
Spokane Valley, WA 99016

## Sidner, Regan

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**From:** Armstrong, Catherine  
**Sent:** Friday, September 24, 2021 11:10 AM  
**To:** DEQ BER Secretary; Steinmetz, Amy; wwmerc@hollandhart.com; Vicki A. Marquis; Arlene Forney  
**Cc:** Bowers, Kirsten  
**Subject:** Re: Lake Koocanusa, Case No. BER 2021-04 WQ  
**Attachments:** Comments on BER Process 9-24-21.pdf

Good morning,

Per the instructions of Kirsten Bowers, please see the attached DEQ Comments Regarding the Process the BER Should Undertake in Reviewing ARM 17.30.632 for Compliance with § 75-5-203, MCA. Copies will be sent per the Certificate of Service. If you have any questions, please do not hesitate to contact me.

Catherine Armstrong  
Paralegal  
MT Dept. of Environmental Quality  
1520 E 6<sup>th</sup> Ave, Legal Unit  
Helena, MT 59601



Kirsten H. Bowers  
Montana Department of  
Environmental Quality  
1520 East Sixth Avenue  
P.O. Box 200901  
Helena, MT 59620-0901  
Telephone: (406) 444-4222  
kbowers@mt.gov

*ATTORNEY FOR DEQ*

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

|  |                                |
|--|--------------------------------|
| <b>IN THE MATTER OF: THE<br/>REVIEW OF THE<br/>STRINGENCY OF ARM<br/>17.30.632 PERTAINING TO<br/>SELENIUM STANDARDS FOR<br/>LAKE KOOCANUSA</b> | <b>Case No. BER 2021-04 WQ</b> |
|--|--------------------------------|

**MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY'S  
COMMENTS REGARDING THE PROCESS THE BOARD OF  
ENVIRONMENTAL REVIEW SHOULD UNDERTAKE IN REVIEWING  
ARM 17.30.632 FOR COMPLIANCE WITH § 75-5-203, MONTANA CODE  
ANNOTATED**

On June 30, 2021, Teck Coal Limited (Teck) filed a petition with the Board of Environmental Review (BER or Board) to review ARM 17.30.632, the site-specific water quality standard for selenium in Lake Koocanusa, to determine whether that rule is more stringent than comparable federal regulations or guidelines that address the same circumstance. By notice posted on the BER's

website, the BER is requesting written comments from interested parties “as to the process the Board should undertake in reviewing the stringency of ARM 17.30.632 pursuant to Mont. Code Ann. § 75-5-203, as amended.”

The Montana Department of Environmental Quality (DEQ) is the state government agency that administers the Montana Water Quality Act and the administrative rules adopted under that Act including ARM 17.30.632. Therefore, DEQ is an interested party in this matter and, through counsel, submits the following comments concerning the process the BER should undertake in reviewing ARM 17.30.632 for compliance with Mont. Code Ann. § 75-5-203:

1. The review process should include a deadline for joinder/intervention of additional parties.
2. The review process should include a deadline for the BER to compile an electronic copy of the BER’s administrative record supporting the amendment of ARM 17.30.602 and the adoption of NEW Rule I (codified as ARM 17.30.632) pertaining to selenium standards for Lake Koocanusa and the Kootenai River. *See Montana Administrative Register Notice 17-414, No. 24 (December 24, 2020).* The administrative record should be made available to interested parties in a PDF format that is searchable and has consecutively Bates numbered pages.

3. The review process should include a deadline for the interested parties to review the BER's administrative record and submit motions to supplement or amend the record. Any such motion to amend or supplement the BER's record must state the basis for supplementation or amendment. Supplementation or amendment of the record should only be allowed when necessary to complete the record that was before the Board when it amended ARM 17.30.602 and adopted of NEW Rule I (codified as ARM 17.30.632) and submitted to EPA for review and approval or disapproval pursuant to § 303(c)(3) of the Clean Water Act.
4. The review process should include a timeframe for the interested parties to stipulate to any facts, to the content of the administrative record, or to narrow the issues for the Board's review. The interested parties may request the assistance of the Board or its appointed Hearing Examiner to resolve any issue necessary for the parties to file dispositive motions on the issue whether ARM 17.30.632, the site-specific water quality standard for selenium in Lake Koocanusa, is more stringent than comparable federal regulations or guidelines that address the same circumstance.
5. The review process should include deadlines for:
  - a. filing dispositive motions including briefs in support;

- b. filing responses to dispositive motions;
  - c. filing replies to dispositive motions, and
  - d. hearing, if requested, to hear oral argument on any dispositive motions.
6. After, completion of briefing and oral argument, the BER should prepare a proposed written determination whether ARM 17.30.632 is more stringent than comparable federal regulations or guidelines.
  7. The BER should open a public comment period on its proposed determination whether ARM 17.30.632 is more stringent than comparable federal regulations or guidelines. The BER may accept written comments and take oral comment at either a regularly scheduled BER meeting or during a special meeting of the BER. The BER will only consider comments from the public that are relevant to its proposed determination whether ARM 17.30.632 is more stringent than comparable federal regulations or guidelines that address the same circumstance.
  8. After considering comments from the public, the BER should finalize its determination whether ARM 17.30.632 is more stringent than comparable federal regulations or guidelines.

9. If the BER determines ARM 17.30.632 is more stringent than comparable federal regulations or guidelines, the department shall either revise ARM 17.30.632 to conform to the applicable federal regulation or guidelines or the department shall make the written findings in § 75-5-203(2), MCA. *See* § 75-5-203, MCA as amended by Sec. 32 of Senate Bill 233 (adopted by the 67<sup>th</sup> Montana Legislature and effective July 1, 2021).

Respectfully submitted this 24th day of September 2021.

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

**Certificate of Service**

I hereby certify that on this 24th day of September 2021, I caused a true and correct copy of the foregoing to be e-mailed to the following:

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

Amy Steinmetz  
Division Administrator  
Department of Environmental Quality  
1520 East Sixth Avenue  
P.O. Box 200901  
Helena, MT 59620-0901  
asteinmetz@mt.gov

William W. Mercer  
Victoria A. Marquis  
Holland & Hart LLP  
401 North 31st Street, Suite 1500  
P.O. Box 639  
Billings, Montana 59103-0639  
Telephone: (406) 252-2166  
wwmerc@hollandhart.com  
vamarquis@hollandhart.com  
aforney@hollandandhart.com

ATTORNEYS FOR TECK COAL  
LIMITED

By: /s/ Catherine Armstrong  
CATHERINE ARMSTRONG  
Paralegal  
Department of Environmental Quality

## Sidner, Regan

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**From:** Ellie Hudson-Heck [REDACTED]  
**Sent:** Friday, September 24, 2021 11:18 AM  
**To:** DEQ BER Secretary  
**Cc:** Marie Kellner  
**Subject:** [EXTERNAL] Comments related to the process the Board should undertake in reviewing the stringency of ARM 17.30.632 pursuant to Mont. Code Ann. § 75-5-203, as amended.  
**Attachments:** 21.9.24 ICL Comments to Montana Board of Environmental Review (1) (1).pdf

Hi Regan,

On behalf of the Idaho Conservation League I would like to submit the following comments in regard to the process the Board should adopt to review the stringency of ARM 17.30.632 pursuant to Mont. Code Ann. § 75-5-203, as amended. Please feel free to reach out with any questions.

Thank you,

--

**Ellie Hudson-Heck**

She|Her|Hers ([what's this \[mypronouns.org\]?](https://www.mypronouns.org/))

Conservation Assistant

Idaho Conservation League

PO Box 2308, Sandpoint, ID 83864

[REDACTED]  
<http://www.idahoconservation.org> [[idahoconservation.org](http://www.idahoconservation.org)]



[Become a member \[idahoconservation.org\]](http://www.idahoconservation.org)



208.265.9565 • PO Box 2308, Sandpoint, ID 83864 • [www.idahoconservation.org](http://www.idahoconservation.org)

Regan Sidner  
Board Secretary  
Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901  
Submitted via email to [deqbersecretary@mt.gov](mailto:deqbersecretary@mt.gov)

September 24th, 2021

**Subject: Comments related to the process the Board should undertake in reviewing the stringency of ARM 17.30.632 pursuant to Mont. Code Ann. § 75-5-203, as amended.**

Dear Chairman Ruffatto and Members of the Board:

I am writing on behalf of the Idaho Conservation League to provide comments regarding the petition filed by Teck Coal Limited and the process the Board of Environmental Review (Board) should follow to review the stringency of ARM 17.30.632 pursuant to Mont. Code Ann. § 75-5-203. The Idaho Conservation League has been Idaho's leading voice for conservation since 1973. As Idaho's largest state-based conservation organization, we represent over 30,000 supporters, many of whom have a deep personal interest in protecting human health and the environment. The Idaho Conservation League works to protect these values through public education, outreach, advocacy and policy development.

As you know, the site-specific selenium criteria was derived from over 6 years of data collection in a collaboration between the Environmental Protection Agency (EPA), US Geological Survey (USGS), Montana Department of Environmental Quality (DEQ), the Kootenai Tribe of Idaho (KTOI), and the Confederated Salish and Kootenai Tribes (CSKT). It was incredible to witness such an inclusive, multi-governmental process, that resulted in the Board adopting a water quality criteria that not only protects Montana's Lake Kootenai and the Kootenai River, but also the downstream portion of this watershed in Idaho.

No one in Montana or Idaho benefits from a review of the EPA approved Montana selenium criteria. All of the selenium pollution entering Montana and Idaho comes from Canadian coal mines owned and operated by Teck Coal. The Board's decision to approve the Montana selenium criteria provided an important stepping stone to successfully hold Teck accountable for polluting our downstream U.S. waterways. A review of this criteria threatens to weaken Montana's ability to protect U.S. waterways and only serves to benefit Teck Coal. As such, ICL requests that the Board of Environmental Review decline to adopt a process to review the stringency of ARM 12.30.632 pursuant to Mont. Code Ann. § 75-5-203.



ICL would like to reiterate that the state of Montana is obligated by the Clean Water Act to meet downstream water quality standards in Idaho. Idaho's current selenium criteria were approved by the Environmental Protection Agency (EPA) in 2019. The standards that apply to the Kootenai River require that the concentration of selenium in fish eggs and ovaries is not to exceed 15.1 mg/kg dry weight (IDAPA 58.01.02.210.01a, Table 1 footnote I). However, current water quality and fish tissue data (USGS <https://doi.org/10.5066/P9YYVV7R>) demonstrate that the Kootenai River is not in compliance with Idaho's selenium criteria. Indeed, this waterbody has been designated as 303(d) for selenium, requiring the development of a TMDL to achieve water quality standards and protect designated beneficial uses. The State of Idaho may assign a selenium waste load limit to the State of Montana. A reversal of Montana's recently adopted selenium standards for Lake Kootenai and the Kootenai River would jeopardize Montana's ability to meet downstream water quality standards in Idaho. If the State of Montana chooses to repeal the new selenium standards for Lake Kootenai and the Kootenai River, the Idaho Conservation League is prepared to pursue all administrative and legal avenues to protect water quality in Idaho's reach of the Kootenai River.

In addition, the process to review the stringency statute was completed as part of last year's adoption process and rulemaking. Therefore, there is no need for a process to be established. Furthermore, this past legislative session, Montana removed rulemaking authority from the Board, effective July 1, 2021. Senate Bill 233 transferred the review authority from the Board of Environmental Review to the Department of Environmental Quality, thus obviating the need for the Board to review this, much less establish a process to review it.

Adopting a process to review the stringency of the selenium criteria raises the question of whether the Board supports a Canadian mining company's interests over protecting Montana and Idaho's water quality and fish. In the best interest of Montana and Idaho, we urge you to not indulge in Teck's petition and simply decline to adopt a process to review the stringency of ARM 12.30.632 pursuant to Mont. Code Ann. § 75-5-203.

Sincerely,



Ellie Hudson-Heck, Conservation Assistant  
Idaho Conservation League  
ehudsonheck@idahoconservation.org  
208.345.6933, ext. 402

## Sidner, Regan

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**From:** Shiloh Hernandez [REDACTED]  
**Sent:** Friday, September 24, 2021 11:20 AM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] In re Review Selenium Standards - public comment  
**Attachments:** 2021-9-24 - comment on process for Teck Se Petition - MEIC CFC.pdf

Secretary Sidner,

Please see the attached comments of the Montana Environmental Information Center and Clark Fork Coalition on the process that the Board should employ to dispose of Teck Coal Limited's petition regarding the Board's 2020 Selenium Rule.

Sincerely,

Shiloh Hernandez  
*He/Him*  
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September 24, 2021

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

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

To whom it may concern,

In response to the Board of Environmental Review’s (Board) notice to interested members of the public regarding Teck Coal Limited’s (Teck) petition to weaken Montana’s Selenium standards (Selenium Rule) for Lake Koocanusa, Earthjustice submits these comments on behalf of the Montana Environmental Information Center (MEIC) and Clark Fork Coalition. The Board requests public input on the process that the Board should follow to review Teck’s petition.

In short, as elaborated below, the appropriate process should be simply to reject Teck’s misguided petition out of hand. First, Teck raised the identical issue with the Board in 2020, and the Board specifically determined that the Selenium Rule was no more stringent than the federal standard. If Teck believed that the Board erred in that determination, the proper procedural recourse was judicial review. Having failed to pursue that remedy, the coal company’s brazen request for this Board to conduct a do-over must be rejected.

Second, the Board should further reject Teck’s petition because it is procedurally improper and beyond the jurisdiction of the Board. Teck has fashioned its petition as a petition for a declaratory ruling, under ARM 1.3.227, and in substance, the company asks the Board to reopen and review the rulemaking process. The Board, however, has no jurisdiction address these requests. Ultimately, Teck is seeking a remedy that is only available in district court or at the Montana Department of Environmental Quality (DEQ). Because Teck’s petition is procedurally unavailing, it must be rejected.

**I. THIS BOARD EVALUATED TECK’S “STRICTER THAN FEDERAL” ARGUMENT WHEN IT PROMULGATED THE SELENIUM RULE IN 2020 AND DETERMINED THAT THE RULE WAS NOT MORE STRINGENT THAN THE FEDERAL STANDARD.**

The Board should reject Teck’s illegitimate attempt to reopen the rulemaking record for the Selenium Rule. The core of Teck’s request is for this Board to determine whether its Selenium Rule is more stringent than the freshwater Selenium Criteria established by the U.S. Environmental Protection Agency (EPA). Pet. at 1 (petitioning the Board to “review its new rule ARM 17.30.632 to determine whether the rule, specifically ARM 17.30.632(7)(a) which sets a



water quality standard for selenium in Lake Koocanusa of 0.8 micrograms per liter, is more stringent than the comparable federal guideline for selenium of 1.5 micrograms per liter<sup>[1]</sup>.”

As Teck acknowledges, it raised this very complaint in its comments on the Board’s rulemaking in October 2020. Pet. at 5, ¶ 9. The Board specifically rejected Teck’s argument, when it promulgated the final rule in December 2020, and instead determined the rule was not more stringent than federal criteria, which allow for site-specific standards:

COMMENT NO. 200: The proposed rule is illegal. The proposed rule is more stringent than the federal guideline for the water column concentration portion, but without the required compliance with 75-5-203(2), MCA. There must be evidence in the record that the proposed standard protects public health or the environment.

RESPONSE: The board disagrees that the proposed rule is illegal because it did not comply with 75-5-203(2), MCA. EPA’s 2016 selenium criterion document for freshwater contains an appendix, Appendix K. Appendix K describes methods by which site-specific selenium standards may be developed for individual waterbodies. Appendix K is discussed in twelve different locations throughout EPA’s 2016 selenium document. EPA is very clear that “states and tribes may choose to adopt the results of site-specific water column translations as site-specific criteria...” Montana chose this approach.

The selenium standards in proposed NEW RULE I are not more stringent than currently recommended federal criteria. The proposed water column standard for the mainstem Kootenai River (3.1 µg/L) corresponds to the current (2016) EPA 304(a) criterion for lotic (flowing) waters. The proposed water column standard for Lake Koocanusa (0.8 µg/L) is based on EPA 304(a) fish tissue criteria and sitespecific bioaccumulation modeling, following site-specific procedures set forth by EPA in its current 304(a) guidance. The fish tissue standards in NEW RULE I include egg/ovary, muscle, and whole body, expressed as mg/kg dry weight, correspond to EPA’s currently recommended 304(a) fish tissue criteria. Therefore, the proposed Kootenai River and Lake Koocanusa water column and fish tissue standards are no more stringent than currently recommended EPA 304(a) criteria because they correspond to federal standards or were developed using federally recommended site-specific procedures. Therefore, the board is not required to make written findings required by 75-5-203(2), MCA.

24 MAR 2336, 2398 (Dec. 24, 2020).

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<sup>1</sup> Teck misrepresents the federal standard, which, as EPA has explained, expressly permits more protective “site-specific water column criterion.” EPA, Aquatic Life Ambient Water Quality Criterion for Selenium—Freshwater (2016) (“All four elements of the freshwater selenium criterion may be modified to reflect site-specific conditions where the scientific evidence indicates that different values will be protective of aquatic life and provide for the attainment of designated uses.”).



The law values finality. E.g., Kristine Davenport v. Odlin, 2014 MT 109, ¶ 12, 374 Mont. 503, 327 P.3d 478 (explaining the “strong policy favoring finality” that underlies the law of the case doctrine). Generally, adjudicative bodies, like the quasi-judicial Board, only revisit their prior decisions if doing so is supported by weighty interests. Kisor v. Wilkie, 139 S. Ct. 2400, 2422, (2019) (explaining that because stare decisis, or adherence to precedent, is the “foundation stone of the rule of law” because it promotes “the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions and contributes to the actual and perceived integrity of the judicial process,” departure from prior decisions is only warranted if there is a “special justification” (internal citations omitted)); June Med. Servs. L. L. C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (“The legal doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike.”). It would be arbitrary for the Board to reverse its prior legal determination when there has not been any change in the law or facts underlying that determination. Waste Mgmt. Partners of Bozeman, Ltd. v. Montana Dep’t of Pub. Serv. Regulation, 284 Mont. 245, 257, 944 P.2d 210, 217 (1997).

Here, Teck has offered no special justification for the Board to revisit its determination made just nine months ago that the Selenium Rule is not more stringent than the federal criteria that specifically allow site-specific standards. Indeed, in comments at the Board’s August meeting, counsel for Teck explained that Teck wishes to present no additional evidence and rely entirely on the “closed” rulemaking record to support its petition. BER Tr. at 23:12 to 23:24 (Aug. 13, 2021). As Board Member Lehnherr observed at the August meeting, “[T]his case is a great case of a real waste of the Board’s time. This issue was dealt with last year, and came to a very scientifically sound conclusion that was in the best interests of Montana and its water ways, and that now we have a corporation trying to circumvent the DEQ.” Id. at 27:21 to 28:2. Teck simply asks the Board to reverse its prior decision based on the same record, which it may not do. Waste Mgmt. Partners of Bozeman, Ltd., 284 Mont. at 257, 944 P.2d at 217.

Instead, if Teck was dissatisfied with the Board’s determination in December 2020 that the Selenium Rule is no more stringent than the federal standard, the company had the opportunity to seek judicial review. Mont. Code Ann. §§ 2-4-305, 506. Having failed to avail itself of the statutorily prescribed route for relief, Teck may not now be heard to ask the Board to engage in an arbitrary reversal of its prior determination.

The proper procedure for the Board is to dismiss Teck’s petition.

**II. THIS BOARD HAS NO JURISDICTION EITHER TO ISSUE A DECLARATORY RULING ON THE VALIDITY OF THE SELENIUM RULE OR TO REOPEN THE 2020 RULEMAKING PROCESS, AS TECK REQUESTS.**

In addition to being foreclosed by this Board’s prior determination on this very issue just nine months ago, Teck’s petition is procedurally flawed. Teck has fashioned its petition as a request for a declaratory ruling pursuant to ARM 1.3.227, but that rule is not a proper vehicle for Teck’s request. Declaratory rulings under MAPA are limited to assessing whether a statute or a rule applies to a party:



Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. A copy of a declaratory ruling must be filed with the secretary of state for publication in the register. A declaratory ruling or the refusal to issue such a ruling shall be subject to judicial review in the same manner as decisions or orders in contested cases.

Mont. Code Ann. § 2-4-501; ARM 1.3.226 (same). This grant of authority is strictly limited to determining the applicability of statutes or rules. It is not a sweeping authorization to issue declaratory judgments on any given topic. Thus, in Thompson v. State, 2007 MT 185, ¶ 16, 338 Mont. 511, 167 P.3d 867, workers sought a declaratory ruling from the Workers Compensation Court (WCC) under Montana Code Annotated § 2-4-501 that certain statutes were unconstitutional. The WCC concluded that it had jurisdiction and issued the declaratory ruling, but the Montana Supreme Court reversed. Thompson, ¶ 35. The Court explained that Montana Code Annotated § 2-4-501 is limited to issuance of “declaratory rulings . . . only as to the applicability of any statutory provision, rule or, order of the agency to that dispute.”

Here, as in Thompson, Teck does not seek a declaration as to the applicability of the Selenium Rule. Indeed, the company acknowledges that the rule does not directly apply to its coal mining operations in Canada, but contends that it indirectly affects the company by creating political pressure to limit its pollution. Pet. at 15, ¶ 23. As such, there does not appear to be any dispute about the applicability of the rule to Teck. Consequently, the Board does not have jurisdiction to issue a declaratory ruling on Teck’s petition that the rule violates Montana Code Annotated 75-5-203.

Further, at this Board’s August meeting, counsel for Teck asserted that the company was also not requesting a contested case hearing. BER Tr. at 22:3-8 (Aug. 13, 2021) (“It’s filed pursuant to the statute 75-5-203 subparagraph (4), so it’s not a contested case.”). This is fatal to Teck’s petition because the Montana Legislature removed the Board’s only other relevant authority, its rulemaking authority, in the past legislative session. 2021 Mont. Laws Ch. 324, § 31 (Senate Bill 233). Teck mistakenly suggested at the August Board meeting that this limitation did not apply because it filed its petition on the day before Senate Bill 233 became effective. BER Tr. at 25:6-11 (Aug. 13, 2021) (“This was filed before the effective date of the Senate Bill [233] which removed the rulemaking authority, to provide an opportunity for the Board to won this rulemaking and direct actions going forward.”). Senate Bill 233, however, was clear that any rulemaking process before the Board at the effective date of the law (July 1, 2021) would be transferred to DEQ upon the effective date of the law. 2021 Mont. Laws Ch. 324, § 112 (“Rulemaking authority and existing rules under the jurisdiction of the board of environmental review are transferred to the department of environmental quality on [the effective date of this act] [July 1, 2021].”). Consequently, the fact that Teck filed its petition on June 30, does not alter the fact that the Board no longer has authority to issue, amend, or revise rules.

In short, the Board does not have jurisdiction to grant Teck’s petition and should, therefore, dismiss the petition. The Board does not have jurisdiction to issue declaratory rulings on the lawfulness of the Selenium Rule, and it does not have the rulemaking authority to “[i]nitiate and/or direct further proceedings consistent with Montana Code Annotated § 75-5-203(4) to



revise ARM 17.30.632 so it conforms with the federal guideline for selenium in lentic water.” Pet. at 17, ¶ 5. If Teck wanted to seek review of the Selenium Rule, it could have sought judicial review, and if it wants to petition to amend the rule, it must do so through DEQ. Its current maneuver to convince the Board to revisit its 2020 determination that the Selenium Rule is no more stringent than the federal standard is procedurally improper and should be dismissed.

### CONCLUSION

It was only nine months ago that this Board rejected the issue at the core of Teck’s petition—that the Selenium Rule is more stringent than the federal criteria. Teck has presented to basis to justify revisiting that determination. Further, Teck’s petition is a procedurally improper request to this Board to act beyond its jurisdiction. As such, Teck’s petition should be dismissed.

Respectfully,

/s/ Shiloh Hernandez

Shiloh Hernandez

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## Sidner, Regan

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**From:** Arlene Forney [REDACTED]  
**Sent:** Friday, September 24, 2021 11:31 AM  
**To:** DEQ BER Secretary  
**Cc:** Vicki A. Marquis; Bill Mercer  
**Subject:** [EXTERNAL] In the Matter Of: Adoption of New Rule I Pertaining to Selenium Standards for Lake Koochanusa, Cause No. BER 2021-04 WQ  
**Attachments:** Teck's Comments on the Petition Process.pdf

Please see attached Teck Coal Limited's Comments on the Petition Process regarding the process the BER should undertake in reviewing ARM 17.30.632 for Compliance with § 75-5-203, MCA. Copies will be distributed as noted on the Certificate of Service.

---

*Arlene S. Forney*

*Legal Assistant*

T [REDACTED]

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LIMITED

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

|   |  |
|---|--|
| <b>IN THE MATTER OF:</b><br><br><b>ADOPTION OF NEW RULE I<br/>PERTAINING TO SELENIUM<br/>STANDARDS FOR LAKE<br/>KOOCANUSA</b> | <b>CAUSE NO. BER 2021-04 WQ</b><br><br><b>Teck Coal Limited’s Comments<br/>on the Petition Process</b> |
|---|--|

In accordance with the Board of Environmental Review’s (“Board’s”) public notice seeking comments on “the process the Board should undertake in reviewing the stringency of ARM 17.30.632,” Teck Coal Limited (“Teck”) submits the following comments.

## I. PROCESS CONSIDERATIONS

1. Pursuant to Montana Code Annotated § 75-5-203(4)(a), Teck<sup>1</sup> petitioned the Board “to review the rule” (ARM 17.30.632, the “Rule”) that was promulgated in December 2020. Such review requires consideration of the rulemaking record, which is comprised of the documents submitted to EPA for approval of the Rule and EPA’s response to that submittal. Because the Rule is final and approved by EPA, the rulemaking record is complete; therefore, no additional evidentiary hearing is allowable as part of the review.

2. The statute provides that a petition may be filed by “a person affected by the rule.” Mont. Code Ann. § 75-5-203(4)(a). The statute then indicates that the Board makes a determination and a remedy follows, as appropriate. *Id.* Rather than set up an adversarial proceeding, the statute simply allows a person to request the Board to make a determination. The statute does not anticipate intervention by opposing parties and intervention is not necessary because the Board has authority to “hold hearings necessary for the proper administration” of the statute, including hearings in which all interested members of the public may participate. Mont. Code Ann. § 75-5-202. This conforms with other provisions within the Water

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<sup>1</sup> Teck is “a person affected by” the Rule because Teck is a company that participated in and provided resources for the truncated collaborative process between DEQ and British Columbia that preceded and provided input for the rulemaking and because the Rule was designed to, has been used to, and does target Teck. *See* Petition, ¶¶ 20-23.

Quality Act that allow for petitions to the Board. Mont. Code Ann. §§ 75-5-312; 75-5-316 (allowing petitions for rulemaking to establish temporary water quality standards and outstanding resource water classifications, respectively, but not providing any adversarial process for the petition itself).

3. Teck's Petition presents the Board with four separate questions:

a. Is the Rule's water column criteria more stringent than the federal guideline for selenium in lentic water? If this question is answered in the negative, it is dispositive of the case and the Board need not proceed to the remaining questions. If, however, this question is answered in the affirmative, the Board then proceeds to the remaining three questions.

b. Did the initial and subsequent publications of the Rule provide the requisite notice to the public that the Rule was more stringent than the federal guideline?

c. Did the initial and subsequent publications of the Rule provide the findings, discussion of policy reasons, and analysis required by Montana Code Annotated § 75-5-203?

d. Does the rulemaking record contain appropriate support for the findings, discussion of policy reasons, and analysis required by Montana Code Annotated § 75-5-203?

4. If any one or more of the last three questions posed above (3.b, c, or d) is answered in the negative, the Board then considers an appropriate remedy. Pursuant to Montana Code Annotated § 2-15-3502, the Board serves a “quasi-judicial function,” which is defined as “an adjudicatory function exercised by an agency, involving the exercise of judgment and discretion in making determinations in controversies.” Mont. Code Ann. § 2-15-102(10). This includes “interpreting, applying, and enforcing existing rules and laws” and “evaluating and passing on facts,” which in this case involves the requirements of Mont. Code Ann. § 75-5-203. *Id.*

Because the Board has quasi-judicial authority and because the Board promulgated the Rule, the Board may interpret the Rule, including evaluation and determination of facts contained in the rulemaking record, and determine whether the Rule may be applied or enforced given the statutory mandate in Mont. Code Ann. § 75-5-203. That quasi-judicial authority does not limit, nor is it limited by, the statutory duty to either revise the Rule or make the requisite written finding if the Rule is found to be more stringent than the federal guideline. Therefore, if the Rule is found to be more stringent than the federal guideline, the Board has authority to, and should, declare the Rule void such that it cannot be applied or enforced absent the statutorily required revision or written finding.

## II. PROCESS OPTIONS

Considering all of the above, specifically the statutory provisions that allow petitions for Board action, the Board's authority, the process already provided by the Board for these comments, and the short time frame by which the petition process is to be completed (8 months per Mont. Code Ann. § 75-5-203(4)(a)), two options, accompanied by specific rules of engagement, emerge for consideration:

**A. Board Draft Followed by Hearing.** In this first option, the Board considers the Petition, drafts its determinations of the four questions posed by the Petition and proposes a remedy, if required. The Board then publishes its draft decision and holds a public hearing to receive comments on the draft. After consideration of the comments and revision of the draft (if and as appropriate), the Board then publishes its final decision.

**B. Hearing Followed by Board Decision.** Alternatively, in this second option, the Board holds a hearing first to receive comments from Petition proponents and Petition opponents. After consideration of the comments, the Board then publishes its final decision.

**C. Rules of Engagement.** Neither option provides for intervention of additional parties, but instead encourages broad participation through a public hearing. The hearing should be managed by allotting equal total time to proponents and opponents. Additionally, acknowledging the completed

rulemaking and the narrowness of Montana Code Annotated § 75-5-203, the comments received should be limited to: (1) evidence already contained in the rulemaking record and (2) comments relevant to the four questions posed by the Petition and the resulting remedy.

DATED this 24th day of September, 2021.

/s/ Victoria A. Marquis

William W. Mercer

Victoria A. Marquis

Holland & Hart LLP

401 North 31st Street

Suite 1500

P.O. Box 639

Billings, Montana 59103-0639

ATTORNEYS FOR TECK COAL LIMITED

## CERTIFICATE OF MAILING

I hereby certify that on this 24th day of September, 2021, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties or their counsel of record as set forth below:

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

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