Sidner, Regan

From: Armstrong, Catherine
Sent: Wednesday, September 29, 2021 12:44 PM
To: Orr, Katherine; DEQ BER Secretary; [redacted]; Vicki A. Marquis; Arlene Forney
Cc: Bowers, Kirsten
Subject: DEQ's Response to Teck's Comments Re: BER Process
Attachments: DEQResptoTeckCommentson BERProcess.pdf

Good afternoon,

Per the instructions of Kirsten Bowers, please see the attached DEQ's Response to Teck's Comments Regarding BER Process. Copies will be sent per the Certificate of Service. Should you have any questions, please do not hesitate to contact me.

Best regards,

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

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

ATTORNEY FOR DEQ

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

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

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

The Montana Department of Environmental Quality (DEQ) submits the following responses to comments from Teck Coal Limited (Teck) concerning the process the BER should undertake in reviewing ARM 17.30.632 for compliance with Mont. Code Ann. § 75-5-203 pursuant to the Board of Environment Review

(BER) public notice allowing responses to written comments from interested parties:

1. DEQ agrees with Teck that the BER's review of ARM 17.30.632 will require consideration of the rulemaking record and that the rulemaking record should include documents submitted to EPA for approval of the rule and EPA's response to that submittal. However, the rule review process should include a deadline for the interested parties to review the BER's rulemaking record and submit motions to supplement or amend that record. Such motions to amend or supplement the rulemaking record should only be granted when necessary to complete the record that was before the BER when it amended ARM 17.30.602 and adopted of NEW Rule I (codified as ARM 17.30.632) and submitted the rule amendment and adoption to EPA for review and approval or disapproval pursuant to § 303(c)(3) of the Clean Water Act.
2. DEQ disagrees that Teck is a person affected by the Rule. DEQ has no jurisdiction to regulate Teck's mining operations in Canada.
3. DEQ disagrees with Teck's assertion that this is a petition for "rulemaking." Teck is requesting the BER to review its rulemaking record and reconsider its prior determination under § 75-5-203, MCA

that ARM 17.30.632 is not more stringent than comparable federal regulations or guidelines addressing the same circumstance.

4. DEQ disagrees with Teck's assertion that intervention of interested parties should not be allowed. DEQ should be allowed to intervene in this process pursuant to Rule 24(b)(2), M. R. Civ. P. Teck's claim is based on § 75-5-203, MCA and on ARM 17.30.632 and DEQ administers the Montana Water Quality Act and administrative rules adopted under that Act. Furthermore, the BER cannot grant Teck its requested relief, which is to revise the rule or make the required findings under §75-5-203(2) and (3), MCA. As of July 1, 2021, DEQ rather than the BER has sole authority to adopt rules for the administration of the Montana Water Quality Act, subject to the provisions of §75-5-203, MCA. *See* Senate Bill 233 (SB 233), Sections 31, 32, and 34. Under § 75-5-203, MCA, as amended by SB 233, DEQ may not adopt a rule that is more stringent than the comparable federal regulations or guidelines that address the same circumstances unless DEQ makes the written findings in § 75-5-203(2) and (3), MCA. A person affected by a rule that the person believes to be more stringent than comparable federal regulations or guidelines may petition the BER to review the rule. If the BER determines that the rule is more stringent than comparable federal

regulations or guidelines, DEQ must either revise the rule to conform to federal regulations or guidelines or make the written findings in § 75-5-203(2) and (3), MCA. *See* SB 233, Sec. 32.

5. DEQ disagrees that the BER has authority to void ARM 17.30.632 even if the BER should reverse its prior determination and find that ARM 17.30.632 is more stringent than comparable federal regulations or guidelines addressing the same circumstance. Under § 75-5-203(4), MCA "[a] petition under this section does not relieve the petitioner of the duty to comply with the challenged rule."

Respectfully submitted this 29th day of September 2021.

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

Certificate of Service

I hereby certify that on this 29th day of September 2021, I caused a true and correct copy of the foregoing to be e-mailed to the following:

Katherine Orr, Board Attorney
Board of Environmental Review
1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440
KOrr@mt.gov

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

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

ATTORNEYS FOR TECK COAL LIMITED

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

Sidner, Regan

From: Arlene Forney <[redacted]>
Sent: Wednesday, September 29, 2021 12:50 PM
To: DEQ BER Secretary
Cc: Vicki A. Marquis; Bill Mercer
Subject: [EXTERNAL] In the Matter Of: Adoption of New Rule I Pertaining to Selenium Standards for Lake Koocanusa, Cause No. BER 2021-04 WQ
Attachments: Teck's Response to Comments on the Proposed Process.pdf

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

Arlene S. Forney
Legal Assistant
T [redacted]

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

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

ATTORNEYS FOR TECK COAL LIMITED

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW OF THE STATE OF MONTANA

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

In accordance with the Board of Environmental Review's ("Board's") Notice to Interested Members of the Public (the "Board's Notice") seeking comments on "the process the Board should undertake in reviewing the stringency of ARM 17.30.632," Teck Coal Limited ("Teck") submits the following responses to public comments received and provided on the Board's website on September 24, 2021. The process is necessary to evaluate the petition filed by Teck on June 30, 2021 (the "Petition") asking the Board to review the new rule ARM 17.30.632, specifically ARM 17.30.632(7)(a), pursuant to Montana Code Annotated § 75-5-203.

The Board posted six unique comments on the process by which the Petition should be reviewed by the Board. *See* 39-page .pdf document posted on the Board website's link entitled "Read Public Comments" (the "Comments"). Twelve commenters provided the same form-type comment by email (collectively, the "Form Comments"). Montana Trout Unlimited, Montana Department of Environmental Quality, the Idaho Conservation League, Earthjustice on behalf of the Montana Environmental Information Center and the Clark Fork Coalition (collectively, "MEIC/CFC"), and Teck submitted individually unique comments.

RESPONSES TO COMMENTS BEYOND THE SCOPE OF THE NOTICE

The Board's Notice was expressly limited to "the process the Board should undertake in reviewing the stringency of ARM 17.30.632 pursuant to Mont. Code Ann. § 75-5-203, as amended." Board Notice, p. 1. Further, "none of the comments submitted in September 2021 should address substantive bases for the Board to evaluate the stringency of suggested outcomes and supporting reasons for the Board at this juncture." *Id*., p. 2.

The Form Comments as well as comments filed by the Idaho Conservation League and MEIC/CFC include assertions and arguments beyond the scope of the Board's Notice and irrelevant to the process by which the Board should review the Petition. Those irrelevant comments include: (1) comments opining about discharges from Teck's mining operations, (2) comments opining about

downstream water quality in Idaho, and (3) comments mischaracterizing the federal requirement. Comments, pp. 1-6, 10-15, 24-25, 28. Teck respects the appropriate scope of the Board's Notice and only provides the following brief responses to state its position on the record and ensure that it does not waive any arguments on issues raised beyond the scope of the Board's Notice. Teck reserves the right to provide additional factual and legal briefing on the matters, as appropriate.

A. Teck's Mining Operations.

Comments that negatively characterize Teck's mining operations ignore the robust and comprehensive regulatory scheme by which Teck must abide. *See* Petition, ¶ 20 (referring to Ministerial Order M113, the 2014 Elk Valley Water Quality Plan, and Permit 107517, which includes enforceable selenium water quality compliance limits and site performance objectives). Implementation of the Elk Valley Water Quality Plan has prompted more than $1 billion in Teck expenditures and installation of what is believed to be the largest water quality management program of its kind anywhere in the world. Teck currently treats 12.5 million gallons per day and is on track to expand to 20.8 million gallons per day by 2024 and 31.7 million gallons per day by 2031. Teck's water treatment facilities include conventional tank-based water treatment plants as well as cutting edge technology developed by premier scientists at Montana State University using

saturated rock fills to remove selenium.[1] Contrary to the comments, Teck is on the right path and will remain there, as required by British Columbian regulators. Should the Board desire further information, much is readily available online and at the Board's request, Teck would be happy to provide additional briefing and information.

B. Water Quality in Idaho's Portion of the Kootenai River.

The waterbody immediately upstream from Idaho is the Montana portion of the Kootenai River, not Lake Koocanusa. The water quality standards for the Kootenai River are not at issue in the Petition. Administrative Rule of Montana 17.30.632 contains eight standards: three fish tissue standards and one water column standard for the Kootenai River and three fish tissue standards and one water column standard for Lake Koocanusa. Of those eight standards, the Petition is limited to just one – the water column standard for Lake Koocanusa. Petition, p. 1. The standards set for the Kootenai River are not at issue in the Petition.

The water column standard for the Montana portion of the Kootenai River immediately upstream of Idaho is set at the federal guideline of 3.1 micrograms per liter and is the *same* as Idaho's water quality standards for selenium in the Kootenai River and nearly *four times higher* than the 0.8 micrograms per liter

[1] Additional information about Teck's water treatment is available on their website at https://www.teck.com/responsibility/sustainability-topics/water/water-quality-in-the-elk-valley/.

water column standard for Lake Koocanusa. *Compare* IDAPA 58.01.02.210.01a, Table 1, n. l *with* Admin. R. Mont. 17.30.632(6) and (7)(b). Given that the standards for selenium in the Kootenai River are the same on both sides of the Idaho-Montana border, and (whether set at 0.8 or the federal guideline of 1.5 micrograms per liter) a more stringent standard applies further upstream in Lake Koocanusa, it is not reasonable to allege that Montana has somehow violated requirements with respect to downstream water quality.[2]

Assertions that "Montana is obligated by the Clean Water Act to meet downstream water quality standards in Idaho" and implied threats of future "administrative and legal avenues" are irrelevant and misplaced. Comments, pp. 1-6, 10-15, 25. Any implication that Montana could or would somehow be liable to the State of Idaho is wrong, as explained in Teck's comment letter provided during the rulemaking. Petition, Ex. A, p. 16.

C. The Federal Requirement.

The federal requirement is a substantive basis of the review requested by the Petition. Despite the Board Notice's statement that none of "the substantive bases for the Board to evaluate stringency or suggested outcomes and supporting

[2] Teck presumes comments about an "obligation" are premised on 40 CFR 131.10(b), which is different and requires a state "to take into consideration the water quality standards of downstream waters" and that water quality standards "provide for the attainment and maintenance of the water quality standards of downstream waters."

reasons" should be included in the process comments, MEIC/CFC delve into the merits by providing their interpretation of the federal requirement. Comments, p. 28, n. 2. MEIC/CFC are wrong. As outlined in the Petition, focusing on additional procedures provided for site-specific standards instead of on the numeric values provided by EPA is misguided. Petition, ¶¶ 4-6, 12; Ex. B.

MEIC/CFC wrongly characterizes the guidance as a "federal standard." Comments, p. 28, n. 2. The distinction is important, and the confusion is understandable because the public was led to believe that EPA recommended development of site-specific selenium standards "whenever possible." 19 Mont. Admin. Register, Not. 17-414 (Oct. 9, 2020). That is plainly wrong, as noted in the Petition, supported by Montana case law, and echoed by the term "may" which appears throughout the portions of the EPA Guideline cited by MEIC/CFC and in the Board's Response to Comment No. 200. Petition, ¶¶ 4-7; Comments. p. 28. Nothing in the EPA's permissive statements allows a water quality standard rulemaking process to circumvent Montana law.

While the Board, in response to comments during the rulemaking, stated that the rule is "not more stringent than currently recommended federal criteria," the federal agency that wrote the federal criteria disagreed. *Compare* Comments, p. 28 *with* Petition, Ex. B, p. 12, n. 22; p.2, n. 6; p. 6, n.11. The contradictory statements highlight the need for resolution of the Petition.

RESPONSES TO RELEVANT COMMENTS ON THE PROCESS

Comments on the actual process include comments that no process should be adopted at all, but that if a process is adopted, it should be public, that the process should include a litigation-type schedule, and Teck's comments proposing a public process. Most of the comments request no process and Teck opposes and argues against those comments first. Teck has no objection to comments advocating for a public process, so long as the process is reasonable, focused on the issues raised in the Petition, and allows for timely decision.

A. Comments Requesting Dismissal of the Petition Without Review.

Regarding the process by which the Board should handle the Petition, the Form Comments provide just one sentence urging the Board to "decline to adopt a process to review Teck's petition." Comments, pp. 1-6, 10-15. Montana Trout Unlimited, the Idaho Conservation League and MECI/CFC similarly request denial of the Petition, stating, respectively, that "the issue at question has been robustly considered and the standard of review met during the adoption of the rule," "the process to review the stringency statute was completed," and "the Board specifically determined that the Selenium Rule was no more stringent than the federal standard." Comments, pp. 9, 25, 27.

1. Dismissal, without Review, would be Contrary to the Law.

Declining to review the Petition is tantamount to declining to perform the Board's statutorily prescribed duties. The Board, whose members must meet specific qualifications, be appointed by the Governor and confirmed by the Montana Senate, is an "agency" – an "entity or instrumentality of the executive branch of state government." Mont. Code Ann. § 2-15-102(2). The Board's function is "quasi-judicial," meaning that it "exercise[s] … judgment and discretion in making determinations in controversies." Mont. Code Ann. § 2-15-102(10). One such "controversy" that the law places within the Board's authority is, upon petition, to review a rule to determine whether it is "more stringent than comparable federal regulations or guidelines." Mont. Code Ann. § 75-5-203(4).

Teck properly petitioned the Board, as allowed and in accordance with Montana Code Annotated § 75-5-203(4). Review of the petition falls squarely within the Board's statutorily described duties. Therefore, suggestions that the Board simply decline to review the petition are contrary to Montana law. The Board can no more decline to review the Petition than a district court can decline to review a piece of litigation brought before it.

Furthermore, the very statute at issue in the Petition is at the heart of multiple regulatory schemes within the Board's purview. In addition to Montana Code Annotated § 75-5-203(4) in the Water Quality Act, the Clean Air Act of

Montana, the Public Water Supply statutes, and the Waste and Litter Control statutes all contain nearly identical statutes requiring specific findings be made when promulgating requirements that are more stringent than the federal rule or guideline. Mont. Code Ann. §§ 75-2-207; 75-2-301(4); 75-6-116; 75-10-107. All of those provisions also include a petition process by which the rule may be reviewed to ensure compliance with the statute. The concept of providing limits on requirements set more stringent than federal requirements is important enough that the Legislature enacted laws on the topic at least four different times in our environmental statutes and provided a petition process in each one. The issue is important to Montana; therefore, the Board should review the Petition.

2. The Petition Process is Necessary and Supports the Rule of Law.

Some comments assert that the Petition "only serves to benefit Teck Coal," places the Board in a position of "support[ing] a Canadian mining company's interests over protecting Montana and Idaho's water quality and fish" and is an "illegitimate attempt to reopen the rulemaking record." Comments, pp. 24, 25, 27. Those comments go too far. The Petition is, by statute, limited to review of the rule for compliance with the law. Mont. Code Ann. § 75-5-203(4)(a). Compliance with the law benefits everyone – the rule of law is a fundamental principle of our society. Nothing is gained, and much is jeopardized by an unlawful rulemaking process. No one benefits from unlawful rulemaking.

The rulemaking process is of great importance in Montana. Specific rights and protections associated with rulemaking and legislating are provided throughout Montana's Constitution and statutes. *See e.g.* Mont. Const., Art. II, § 8 (Right of Participation), § 9 (Right to Know); Mont. Const., Art. III, §§ 4, 5 (providing the rights of Initiative and Referendum); the Montana Administrative Procedure Act (Mont. Code Ann., Title 2, Chapter 4, Parts 2, 3, and 4); and the Montana Negotiated Rulemaking Act (Mont. Code Ann., Title 2, Chapter 5). Montana also established specific provisions for rulemaking processes in the context of environmental protections, specifically including *multiple* provisions addressing state requirements that are set more stringent than federal requirements or guidelines. Mont. Code Ann. §§ 75-2-207; 75-2-301(4); 75-5-203(4); 75-6-116; 75-10-107. Ignoring those provisions serves no benefit and undermines the very foundation of our society – the rule of law. The Petition is about the Board's rulemaking process by which it promulgated the water column standard for Lake Koocanusa and ensuring that the Board's rulemaking process was correct and in compliance with Montana law – which cannot be ignored.

3. The Petition Will Not Weaken Montana's Standards.

Some comments erroneously assert that review of the Petition "threatens to weaken Montana's ability to protect U.S. waterways;" therefore, the Petition should not be reviewed at all. Comments, pp. 17, 24.

Nothing in the Petition prevents a water quality standard that is more stringent than the federal guideline and nothing in the Petition prevents the water column standard for Lake Koocanusa to be set at 0.8 micrograms per liter. The Petition only seeks compliance with Montana law that dictates the process and findings required for such a standard. The very statute invoked by the Petition provides a clear path to setting a standard more stringent than the federal guideline – make a "written finding after a public hearing and public comment and based on evidence in the record" that confirms" (1) the standard "protects public health or the environment of the state," (2) it "can mitigate harm," and (3) it "is achievable under current technology." Mont. Code Ann. § 75-5-203(2). The Petition seeks clarity on whether the Board's rulemaking process complied with those requirements. The Petition is about the Board's rulemaking process; it does not prevent any particular numeric standard from being set, so long as it is set in accordance with the law. Likely we all agree that lawful standards are best, so review of the Petition should go forward to consider the lawfulness of this standard.

4. Consideration of the Issue During Rulemaking Does Not Exempt the Rule from Statutory Review.

The statute does *not* say that if, during rulemaking a comment is made about stringency and the Board provides a response, then no petition may be filed. No exemption is provided for final rules or for rules approved by the relevant federal

agency. In fact, the law specifically contemplates that a final rule would be in place before a person petitions the Board for review. Mont. Code Ann. § 75-5-203(4). If final rules were *per se* exempt from the statute, then the statute becomes meaningless. No one benefits from rulemaking that presents no opportunity for review – especially after EPA found, contrary to the rulemaking, that the rule *is more stringent* than their federal guideline. *See* Petition, ¶ 12 (*citing* EPA Approval and Rationale provided at Ex. B).

MEIC/CFC cite to a line of judicial cases for the premise that "*stare decisis*" and the "law of the case doctrine" prevent the Board from considering the Petition. Comments, p. 29. Far from the judicial setting of those cases, nothing in the Petition asks the Board to overturn a "long line of [judicial] precedents – each one reaffirming the rest and going back 75 years or more" as was at issue in the U.S. Supreme Court case cited by MEIC/CFC. *Kisor v. Wilkie*, 139 S.Ct. 2400, 2422 (2019). Here, no judicial or quasi-judicial authority has been exercised at all yet; only rulemaking authority, which is legislative in nature, not judicial. Mont. Code Ann. §§ 2-15-102(10) and (11) (specifically defining quasi-legislative authority, including rulemaking, as separate from quasi-judicial authority).

Judicial "methods and philosophy" are distinguished from "those of the political and legislative process" by the "constraint of precedent" embodied in *stare decisis*. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2134 (2020).

Thus, according to case law cited by MEIC/CFC, the Petition, which is reviewed pursuant to quasi-judicial authority, would only be constrained by previous judicial or quasi-judicial decisions, not by the legislative (rulemaking) process. Because no judicial or quasi-judicial decision has been made on this issue, there are no *stare decisis* or law of the case constraints. As noted above, this makes sense because if all final rules were exempted from review, the statute (and the four other similar statutes) become meaningless.

Further, the only reason "special justification" was needed in *Kisor* was because throughout the "75 years or more" of consistent judicial decisions, Congress had not legislated on the issue. *Kisor*, 139 S. Ct. at 2423. In contrast, here, the Legislature *has* legislated – it empowered the Board to review the rule; not just the proposed draft rule, but the finally promulgated rule. Simply refusing to even consider the Petition, as commenters advocate, is equivalent to refusing to exercise the power delegated to the Board. In the face of contradictory statements from EPA (received in February 2021, after the final rule promulgation in December 2020), which affirm that the water column standard set for Lake Koocanusa **is more stringent** than the federal guideline, the need to review the Petition is even greater.

5. Senate Bill 233 Does Not Exempt the Rule from Review.

The Idaho Conversation League and MEIC/CFC allege that since the Board no longer has rulemaking authority pursuant to Senate Bill 233, it need not review the Petition. Comments, p. 25, 30. But Senate Bill 233 specifically left responsibility for review of petitions filed under Montana Code Annotated § 75-5-203(4) with the Board.

The Board completed the rulemaking, it is the Board's rulemaking record that will be subject to the review requested in the Petition, and the Board retains authority to review the Petition. Senate Bill 233 changes none of that.

Nothing in Senate Bill 233 prevents the Board from reviewing its own previous actions to determine whether those actions complied with the law, making appropriate findings and declaring its previous actions void and/or unenforceable as appropriate. *See* Teck's Comments on the Petition Process, p. 4 (the Board has inherent authority to "interpret[], apply[], and enforc[e] existing rules and laws" and "evaluat[e] and pass[] on facts" *citing* Mont. Code Ann. § 2-15-102(10)).

If the Board voids the Rule, then a future rulemaking process can set the standard at whatever level it sees fit in compliance with the laws and rules. Assuming *arguendo* that a future standard may seek to be more stringent than the federal requirement, and acknowledging that the rulemaking process for such a standard requires additional process and findings, the Board may recommend that

its Rule be replaced with the federal numeric guideline of 1.5 micrograms per liter to ensure clarity on what standard applies after the Rule is voided and until a later rule is promulgated. The other option if the Rule is found to be void, would be to allow the current state-wide standard of 5 micrograms per liter for Selenium to govern.

6. Teck is not Limited to Judicial Review.

MEIC/CFC's implication that Teck is limited to judicial review of the rulemaking also ignores and negates the statute. Comments, p. 29 ("Having failed to avail itself of the statutorily prescribed route for relief, Teck may not now be heard to ask the Board" to review the Petition). Nothing in the statutes cited by MEIC/CFC provides an exclusive remedy by judicial review. Nothing in those statutes forecloses judicial review subsequent to or contemporaneously with review of the Petition. Nothing in those statutes provides a lawful reason to wholly ignore the statutorily provided petition process. Judicial review of a rule and a petition pursuant to Montana Code Annotated § 75-5-203 are not mutually exclusive.

7. The Board has Statutory Authority to Review the Petition, in Conjunction with or Independent of the Declaratory Ruling Provision.

MEIC/CFC's next assertion, that the Board only has contested case authority and nothing more is plainly wrong and, once again, ignores the specific power delegated to the Board by the Legislature to hear petitions in accordance with

Montana Code Annotated § 75-5-203. As noted above, (*Supra*, § B.4.) and in Teck's Comments on the Petition Process (p. 4), regardless of Senate Bill 233, the Board retains authority to review the Petition, interpret the Rule, including evaluation and determination of facts contained in the Board's rulemaking record, and determine whether the Rule may be applied or enforced. Mont. Code Ann. § 2-15-102(10).

MEIC/CFC next focus only on the declaratory judgment provision cited in the Petition, completely ignoring the statutory provision that authorizes a person to file a petition and empowers the Board to decide the petition. Comments, p. 30; Mont. Code Ann. § 75-5-203. The petition at issue in *Thompson v. State*, 2007 MT 185, was reviewed pursuant to the Uniform Declaratory Judgments Act, not Mont. Code Ann. § 2-4-501 as MEIC/CFC assert. *Thompson*, ¶ 17. The Montana Supreme Court held that the Workers Compensation Court did not have authority pursuant to the Uniform Declaratory Judgments Act because it was "a court of limited jurisdiction" with "only such power as is expressly conferred by statute." *Thompson*, ¶¶ 24-25. Neither the statute nor the rule cited by MEIC/CFC was at issue in *Thompson*; however, the Court analyzed what power the Workers Compensation Court did have and found that the statutory authority to provide a declaratory ruling (conferred by Montana Code Annotated § 2-4-501) and the court's statutory authority (conferred in that case by Montana Code Annotated

§ 39-71-2905(1)) when "taken together … authorize the WCC to issue declaratory rulings only in the context of a dispute concerning benefits under the Workers' Compensation Act and only as to the applicability of any statutory provision, rule, or order of the agency in dispute." *Thompson*, ¶ 25. In that case, because there was no dispute at issue except the constitutionality of certain statutes and because no issue arose from the application of the statutes, the Court held that the WCC did not have jurisdiction to issue a declaratory judgment holding the statutes unconstitutional. *Thompson*, ¶ 26.

Here, unlike *Thompson*, the statute specifically authorizes the Board to review the Petition. Mont. Code Ann. § 75-5-203(4). Further, the applicability of the Rule is at issue, specifically the Rule's application to Lake Koocanusa, which does affect Teck. Teck never "contend[ed] that it indirectly affects the company by creating political pressure" as MEIC/CFC falsely allege. Comments, p. 30. Teck contended that the Rule "was designed to, has been used to, and does target Teck." Petition, ¶ 23. The only reference to "pressure" was in a citation to DEQ's explanation of the rule. The Board's declaratory ruling authority specifically extends to rules that affect a party's legal rights and even the Board has acknowledged that the Rule affects Teck. Admin. R. Mont. 1.3.226; Petition, ¶ 23. The Board's declaratory ruling power allows review of the Petition.

B. DEQ Comments.

In general, Teck does not object to the process proposed by DEQ but notes that it contains several steps that seem to require briefing, consideration and decision by the Board prior to decision on the merits of the Petition. Given that the statute only provides eight months for the Petition to be decided and three months of that time has already run, DEQ's proposed process may not lead to a timely decision. Joinder or intervention of parties is not required, does not seem to be contemplated by the statute, and might frustrate public participation. *See* Teck's Comments on the Petition Process, pp. 2-3.

Teck agrees with DEQ's suggestion that the Board compile an electronic copy of the rulemaking record that would be available to interested persons in a searchable format that includes consecutive Bates numbered pages. Having such a marked, available and searchable record would be of great use to the interested parties and likely to the Board. However, motions or requests to supplement or amend the record should be limited in recognition that the rulemaking is complete and has been approved by EPA. The record should be confined to the documents submitted in the rulemaking packet provided to EPA by DEQ on December 28, 2020 and EPA's February 25, 2021 letter to the Board approving the Rule.

Teck does not agree that the Board should merely determine whether the Rule is more stringent than comparable federal regulations or guidelines and then

abdicate further decisions to DEQ. Instead, if the Board determines that the Rule is more stringent than the federal regulations or guidelines, the Board should admit its error, recognize the invalidity of the Rule and declare it void, unenforceable and inapplicable until and unless the statutory requirements are met.

CONCLUSION

Comments advocating that the Board do nothing with the Petition are contrary to the law and should be rejected. Mont. Code Ann. § 75-5-203(4). Instead, the Board should adopt a reasonable public process that enables decision on the Petition and fashions a remedy within the statutorily prescribed eight-month deadline.

DATED this 29th day of September, 2021.

/s/ Victoria A. Marquis

William W. Mercer
Victoria A. Marquis
Holland & Hart LLP
401 North 31st Street, Suite 1500
P.O. Box 639
Billings, Montana 59103-0639
ATTORNEYS FOR TECK COAL LIMITED

CERTIFICATE OF MAILING

I hereby certify that on this 29th day of September, 2021, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties or their counsel of record as set forth below:

Regan Sidner, Board Secretary Board of Environmental Review 1520 E. Sixth Avenue P.O. Box 200901 Helena, MT 59620-0901 deqbersecretary@mt.gov	[ ] U.S. Mail [ ] Overnight Mail [ ] Hand Delivery [ ] Facsimile [X] E-Mail
Arlene Forney Assistant to William W. Mercer and Victoria A. Marquis aforney@hollandhart.com	[ ] U.S. Mail [X] E-Mail

/s/ Victoria A. Marquis

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