

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