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Environmental Review
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By: Sandy Moisey Scherer
Docket No: BER 2021-04 WQ and
BER 2021-08 WQ

KC Becker
Administrator
U.S. Environmental Protection Agency
Region 8
1595 Wynkoop Street
Denver, CO 80202-1129

RE: Montana's December 2020 Submittal, and EPA's 2021 Approval of Lake Kooconusa and Kootenai River Selenium Water Quality Standards.

Dear Administrator Becker:

The Board of Environmental Review (the "Board") writes to inform EPA of a legal error in the Board's previous rulemaking that purported to establish a site-specific water column standard for Lake Kooconusa. The legal error renders the standard invalid by operation of law for both state and federal purposes. The legal error is limited to Montana Administrative Rule 17.30.632(7)(a) which purports to establish a water column standard for "Lake Kooconusa from the US-Canada international boundary to the Libby Dam" at 0.8 µg/L selenium (the "Lake Water Column Standard"). The remaining seven criteria established, including the three fish tissue standards for Lake Kooconusa, are not impacted by the legal error and therefore are valid.

The Board's Authority

Montana law requires the Board to adjudicate petitions seeking the Board's review and determination of compliance with Montana's statute that prohibits standards from being set more stringent "than the comparable federal regulations or guidelines that address the same circumstances" absent a specific rulemaking process and completion of specific findings. Section 75-5-203, MCA (the "Stringency Statute"). For the Lake Water Column Standard, the Board was presented with petitions submitted pursuant to the Stringency Statute in 2021. After nearly a year of deliberations, the Board reached a Final Agency Action on April 19, 2022 ("Order"), attached. The Board denied a motion to amend its Order by written decision dated December 9, 2022, attached.

EPA's Authority

Pursuant to Section 303(c) of the Clean Water Act and the implementing federal regulations at 40 C.F.R. Part 131, EPA “is to review and to approve or disapprove State-adopted water quality standards.” 40 C.F.R. 131.5(a). The review involves a determination of “[w]hether the State has followed applicable legal procedures for revising or adopting standards.” 40 C.F.R. 131.5(a)(6).

Background on the Lake Water Column Standard

Prior to July 1, 2021, the Board had authority to set water quality standards for Montana’s waters. Section 75-5-301(2), MCA (2019). Pursuant to that authority, on October 9, 2020, the Board formally initiated rulemaking for the Lake Water Column Standard by publication in the Montana Administrative Register. In both the initial publication and in response to comments the Board misinformed the public that the Lake Water Column Standard was not set more stringent than the federal guideline and that the Stringency Statute, therefore, did not apply. The Lake Water Column Standard was made effective as a purported rule on December 25, 2020.

On December 28, 2020, the Montana Department of Environmental Quality (“DEQ”) forwarded the newly promulgated rule to EPA for review. In the submission, former DEQ Director Shaun McGrath noted that DEQ certified that “the rules were adopted pursuant to state law” and included a letter from DEQ’s chief legal counsel certifying the same.

By letter to the Board dated February 25, 2021, EPA approved ARM 17.30.632, including the Lake Water Column Standard. EPA noted that the Lake Water Column Standard “is more stringent than the recommended water column criterion element for lentic aquatic systems in EPA 2016 (1.5 µg/L).” EPA Letter, p. 12.

The Petition Process

In 2021, two petitions were filed with the Board seeking its review of the Lake Water Column Standard pursuant to the Stringency Statute. The review process included wide public participation at each Board meeting and at a public hearing held by the Board. The petitions were decided through an open, public

process, which generated active participation from citizens from within and outside Montana, as well as non-governmental environmental organizations, state agencies, and EPA. The Board's records, including public comments and filings received, as well as meeting and public hearing transcripts, are available on the Board's website at <https://deq.mt.gov/about/ber> for your review.

After nearly a year of considerations and deliberations, the Board issued its Order concluding that the "Board erred, as a matter of law, when it concluded the [Lake Water Column Standard] was not more stringent than the comparable federal guideline and that it did not need to make the written findings required by [the Stringency Statute]." Order, pp. 19-20. The Board also concluded that the Lake Water Column Standard "and the rulemaking upon which it is based fail to comply with the Stringency Statute." Order, p. 20. Finally, the Board concluded that "Because the Board's rulemaking failed to comply with [the Stringency Statute], in order to have a valid and enforceable lake water column standard, new rulemaking must be initiated." Order, p. 20.

Impact of the Board's Legal Error

Pursuant to federal and state law, the legal error and failure to comply with the Stringency Statute mean that by operation of law the Lake Water Column Standard has been invalid since its inception. *See Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005); *Action on Smoking & Health v. Civil Aeronautics Bd.*, 230 U.S. App. D.C. 1, 713 F.2d 795, 797 (D.C. Cir. 1983); *Clark Fork Coalition v. Tubbs*, 2016 MT 229, ¶ 25, 384 Mont. 503, 380 P.3d 771; *Northwest Airlines v. State Tax Appeal Bd.*, 221 Mont. 441, 445, 720 P.2d 676 (1986); *State v. Vainio*, 2001 MT 220, ¶ 27, 306 Mont. 439, 35 P.3d 948; *Rosebud County v. Dept. of Rev.*, 257 Mont. 306, 310-11, 849 P.2d 441, 720 P.2d 676 (1993). This result is clear under the Montana Administrative Procedure Act. § 2-4-305(6), MCA ("adoption... of a rule is not valid or effective unless it is... consistent and not in conflict with the statute").

The legal error also carries over to EPA's approval of the standard, issued February 25, 2021, which relied, in part, on an erroneous legal certification by DEQ that the standard was "duly adopted" under the Montana Water Quality Act and the Montana Administrative Procedures Act.

After an adjudicatory proceeding that lasted more than a year, the Board

concluded and affirmed its conclusions that the Lake Water Column Standard was not duly adopted pursuant to the Montana Water Quality Act because both the Lake Water Column Standard and the rulemaking violated the Stringency Statute, making the standard invalid from its inception as a matter of law. The Board now seeks recognition that the legal error also rendered the Lake Water Column Standard invalid for federal purposes.

Conclusion

Based upon the Cooperative Federalism principles of the Clean Water Act and the error committed by the Board in 2020, the Board asks that, in accordance with the federal Clean Water Act, including 40 C.F.R. 131.5(a)(6), and 131.21, EPA vacate its prior approval of the Lake Water Column Standard. EPA may wish to consider again the December 2020 submission from Montana, this submission, the Board's Final Agency Action and Order, as well as the online record supporting it, to support vacatur of that portion of EPA's prior approval that applies to the Lake Water Column Standard found at ARM 17.30.632(7)(a).

As noted above, this action does not impact the remainder of ARM 17.30.632 that was approved by EPA. The Board respectfully requests confirmation that EPA has vacated its prior approval of the Lake Water Column Standard within at least 90 days.

Sincerely,

/s/ Steven Ruffatto

Steven Ruffatto

Chair, Montana Board of Environmental
Review

Enclosures: *Final Agency Action and Order of the Board of Environmental Review*, Cause Nos. BER 2021-04 and 08 WQ (April 19, 2022); *Order Denying DEQ's Motion to Alter or Amend* (December 9, 2022)

cc: Tonya Fish, EPA Montana Operations Office
Darcy O'Connor, Director, Water Division, Region 8
Chris Dorrington, Director, Montana Department of Environmental Quality