

**BOARD OF ENVIRONMENTAL REVIEW
MEETING MINUTES**

JUNE 10, 2022

Call to Order

Chairman Ruffatto called the meeting to order at 9:00 a.m.

Attendance

Board Members Present

By Zoom: Chairman Steven Ruffatto; Board Members Julia Altemus, David Lehnherr, Jon Reiten, David Simpson, and Joseph Smith.

Roll was called and a quorum was present.

Board Attorney Present

Michael Russell

DEQ Personnel Present

Board Liaison: James Fehr

Board Secretary: Sandy Moisey Scherer

DEQ Legal: Kirsten Bowers, Nicholas Whitaker, Sarah Christopherson, Jon Morgan, Kurt Moser, Loryn Johnson, Jeremiah Langston

Public Policy: Rebecca Harbage

Water Quality: Galen Steffens

Other Parties Present

Laurie Crutcher, Crutcher Court Reporting

Aislinn Brown, Caitlin Buzzas, Elena Hagen - Montana DOJ Agency Legal Services Bureau

Sarah Bordelon, Sam Yemington (Holland and Hart) – Signal Peak Energy

Malcolm Gilbert, Amanda Galvan (Earth Justice) – MEIC

Derf Johnson - MEIC

Murray Warhank (Jackson Murdo & Grant) – Board of County Commissioners of Lincoln County, MT

Ray Stout, Kootenai Valley Record

I. ADMINISTRATIVE MATERIALS

A. Review and Approve Minutes

A.1. The Board will vote on adopting the April 8, 2022, Meeting Minutes and the May 23, 2022, Special Meeting Minutes

Board member Smith MOVED to approve the April 8, 2022, meeting minutes and the May 23, 2022, special meeting minutes. Board member Simpson SECONDED. The motion PASSED unanimously.

There was no board discussion or public comment.

II. BRIEFING ITEMS

A. CONTESTED CASE UPDATES

A.5.a. In the Matter of: Petitions of Teck Coal Limited and the Board of County Commissioners of Lincoln County, Montana, for Review of ARM 17.30.632(7)(A) Pursuant to Mont. Code Ann. Section 75-5-203 – Stringency Review of Rule Pertaining to Selenium Standard for Lake Kooconusa, BER 2021-04 and 08 WQ. Ms. Bowers, legal counsel for DEQ, asked if the Board would like an update on stringency findings and if the Board would be addressing a pending motion in today’s meeting or at the August meeting.

Chairman Ruffatto said the Board would not be deciding nor discussing the matter today, but asked DEQ to give a brief update.

Ms. Bowers said that DEQ is still finalizing its responses to comments on stringency findings and will give another update in August when DEQ finalizes the findings. In response to the Board’s finding that the Lake Kooconusa water column standard is more stringent than comparable federal regulations or guidelines, DEQ began drafting findings as required in Mont. Code Ann. § 75-5-203(2) and (3) to support the more stringent standard. The statute provides that DEQ implement the remedy, which could be either revising the rule or making findings under the stringency statute. DEQ is complying with stringency provisions in the Water Quality Act by making the stringency findings based on evidence in the rulemaking record.

DEQ’s proposed stringency findings were made available for public review and comment. DEQ held a public hearing on its proposed stringency findings on April 26, 2022, and took comments at the hearing and written comments through May 4, 2022. DEQ will respond to all substantive comments from the public on the stringency findings and the findings will be finalized June 14, 2022.

DEQ received nearly 150 comments and is still reviewing/responding to the comments. Comments overwhelmingly support DEQ’s stringency findings and the Lake Kooconusa water column standard. The Lake Kooconusa water column standard is necessary to protect aquatic life from the toxic effects of selenium, and that the level of protection meets the protection goals defined for Lake Kooconusa. The standard is consistent with best available science for selenium toxicity and to protect the selenium sensitive aquatic life in the watershed. The standard to be imposed can mitigate harm to the environment and is achievable under current technology.

Egg ovary tissue through 2020 for the Montana portion of Lake Koocanusa show selenium levels above the 15.1 milligrams per kilogram in fish egg and ovary tissue. Downstream, the Kootenai River in Idaho has been listed as impaired due to selenium that is found in high levels in fish tissue. The Water Quality Act standard is set to protect those beneficial uses, prevent further impacts and protect downstream uses.

DEQ went through the process of reviewing permits and activities on and around Lake Koocanusa. DEQ determined that there are no point sources and no dischargers with selenium as a pollutant of concern. Land disturbing activities are better known to contribute to selenium in the watershed. Current treatment technology for those activities are best management practices such as prevention of stormwater from coming into contact with pollutants and measures that would minimize impervious surface area and retain runoff. Also, runoff can be treated through infiltration and riparian buffers, reducing erosion to protect surface waters from any direct site runoff that may contain pollutants.

Mines or industrial sites in the area would have to document potential pollutants in a storm water pollution prevention plan and provide adequate control measures to avoid impacts to water quality. This is what is currently required, and no owner operator or permittee is expected to incur substantially increased treatment costs.

There are currently no planned point source discharges to Lake Koocanusa with selenium as a pollutant of concern. Based on geology on the Montana side of the border, there is no naturally occurring source of selenium. DEQ believes that treatment technologies could remove 90 percent or more selenium but that depends on the level of concentration discharged. Selenium control would be done by best management practices required under general permits issued by DEQ, such as storm water discharges associated with construction activity, multi-sector general permits for storm water discharges associated with industrial activity, or general permits for sand and gravel operations.

Any written findings must reference pertinent, ascertainable, and peer reviewed scientific studies contained in the record for the basis of DEQ's conclusions. Written findings include information from the hearing record regarding costs to the regulated community that are directly attributable to the proposed standard, and there is no cost to the regulated community directly attributable to the Lake Koocanusa standard. The regulated community for purposes of this rule is within Montana's borders because this is a site-specific water column standard for Lake Koocanusa, Montana.

There is no evidence in the record to suggest that the standard would result in increased treatment costs for Montana regulated owners or operators of land disturbing activities or facilities that would discharge to Lake Koocanusa.

Board member Simpson asked if DEQ's determinations included the economic impact. Ms. Bowers said that the economic impact for Lake Koocanusa and lake impairment are yet to be finalized. Board member Simpson asked if there are any other water body specific standards nationwide for selenium that would compare with what DEQ is proposing. Ms. Bowers said possibly San Francisco Bay but she would provide more information at the August board meeting.

III. ACTION ITEMS

- III.a. **An appeal in the matter of amendment application AM3, Signal Peak Energy LLC's Bull Mountain Coal Mine #1, Permit No. C1993017, BER 2016-07 SM.**

The Board began discussion regarding the draft final order based upon decisions made during the prior meetings. The draft final order and a redline version with changes were reviewed.

Board member Altemus MOVED to approve the draft final order. Board member Simpson SECONDED. The motion PASSED 5-1, with Board member Lehnherr dissenting.

IV. NEW CONTESTED CASE

- IV.a. **In the Matter of Luke Ployhar, for review of determination made by the Department of Environmental Quality on the Application for Exploration License #00860, BER 2022-03 HR.**

Board member Lehnherr MOVED to assign the case in entirety to Board Attorney Michael Russell as the Hearing Examiner. Board member Reiten SECONDED the motion. The motion PASSED unanimously.

V. BOARD COUNSEL UPDATE

Board Attorney Michael Russell addressed a question from a prior meeting regarding specificity of parties' exceptions to proposed findings of fact and conclusions of law. According to his research, Mr. Russell said that policies and procedures could be revised to include specificity requirements but would need to go through the rulemaking process as set forth in MAPA.

Board member Simpson asked if this item could be discussed in an upcoming Board meeting. Chairman Ruffatto asked Mr. Russell to add this item to the agenda for the next meeting.

VI. GENERAL PUBLIC COMMENT

No public comment was given.

VII. ADJOURNMENT

Chairman Ruffatto MOVED to adjourn the meeting; Board member Simpson SECONDED. The motion PASSED unanimously. The meeting adjourned at 9:40 AM.

Board of Environmental Review June 10, 2022, minutes approved:

/s/ Steven Ruffatto
STEVEN RUFFATTO
CHAIRMAN
BOARD OF ENVIRONMENTAL REVIEW

August 12, 2022
DATE