

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

**IN THE MATTER OF: THE  
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 §75-  
5-203, MCA – STRINGENCY  
REVIEW OF SELENIUM  
STANDARDS FOR LAKE  
KOOCANUSA**

**CASE NO. BER 2021-04 WQ  
and BER 2021-08 WQ**

**ORDER DENYING DEQ'S  
MOTION TO ALTER OR  
AMEND**

This matter comes before the Board of Environmental Review (“Board”) on the Montana Department of Environmental Quality’s (“DEQ”) Motion to Alter or Amend (“Motion”) the Board of Environmental Review’s Final Agency Action and Order dated April 19, 2022 (“Order”). DEQ’s Motion requests that the Order be amended by striking Paragraph IV.6, which reads: “Because the Board’s rulemaking failed to comply with § 75-5-203, MCA, in order to have a valid and enforceable lake water column standard, new rulemaking must be initiated.”

DEQ accepts the Board’s determination that the “Lake Water Column Standard” for Lake Kooacanusa (ARM 17.30.632(7)(a)) is more stringent than the comparable Federal guideline, thus acknowledging that the Lake Water Column Standard violates Subsection (1) of Section 75-5-203, Montana Code Annotated.

(“Stringency Statute”). Although the Lake Water Column Standard violates the Stringency Statute, DEQ argues that the standard is nevertheless valid.

For the reasons stated below, DEQ’s Motion is denied.

The principles at stake here are the rule of law and the imperative that administrative agencies carry out the Legislature’s intent. Whether any particular site-specific lake water column selenium standard for Lake Koocanusa is justified presents a separate question to be resolved through a valid rulemaking process.

DEQ fails to acknowledge or address a fundamental principle of administrative law – a rule promulgated in violation of its enabling statute is invalid from 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 principle is codified in the Montana Administrative Procedure Act (“MAPA”) at Section 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”). Moreover, the legislature did not intend the Stringency Statute to be read in isolation. To the contrary, the Montana Legislature’s

statement of intent for the Stringency Statute expressly states that its provisions are “in addition to all requirements imposed by existing law and rules.” 1995 Bill Text MT H.B. 521.

As the Board fully explained in its Order, the Lake Water Column Standard was promulgated in clear and direct violation of Subsection (1) of the Stringency Statute. DEQ does not challenge this conclusion. Thus, based on the fundamental principle of administrative law described above, the standard was invalid and unenforceable by operation of law from its inception. In order to promulgate a valid site-specific water column selenium standard for Lake Koocanusa, rulemaking in compliance with MAPA and the Montana Water Quality Act, including the Stringency Statute, is required. Section 2-4-305, MCA; Section 75-5-203, MCA.

In its effort to avoid new rulemaking in compliance with MAPA and the Stringency Statute, DEQ relies on the Stringency Statute’s language stating that “[a] petition under this section does not relieve the petitioner of the duty to comply with the challenged rule.” Section 75-5-203(4), MCA. This reliance is misplaced. The clear and plain meaning of this language is that the “petition” does not relieve

the petitioner of the duty to comply. It does not address the effect of a determination that a rule was promulgated in violation of the Stringency Statute.<sup>1</sup>

DEQ's argument that the Stringency Statute allows it to make the required finding after the rule has been adopted in violation of Subsection (1) of the statute fails based on the very language relied on by DEQ. Subsection (4)(a) provides that one remedy is to make the required finding "as provided under subsection (2)." Subsection (2) states that a rule more stringent than the comparable federal guideline may be "adopted" "only if" the department makes the required finding. This clearly places a **precondition on the adoption** of such a rule and thus precludes DEQ's position that the finding can be made **after adoption**.

A primary purpose of the rulemaking provisions of MAPA and the Stringency Statute is to ensure that the public generally and interested parties in particular are fully and accurately informed so that they can meaningfully and effectively participate in the rulemaking process. Section 2-4-101(2); 1995 Bill Text MT H.B. 521. In the present case, the publication initiating rulemaking misinformed the public that the Lake Water Column Standard was not more stringent than the comparable federal guideline. See Order, p. 5. Also, in response to comments in the rulemaking process concerning the Stringency Statute, the

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<sup>1</sup> This matter does not present, and the Board need not address, the effect of a determination that a validly adopted rule is more stringent than a subsequently established comparable federal regulation or guideline under Subsection (4) (b) of the Stringency Statute.

Board again misinformed the public that the Lake Water Column Standard was not more stringent than the comparable federal guidelines and thus that the finding called for by the Stringency Statute was not required. See Order, p. 6. Although the public was seriously misinformed during the rulemaking process, DEQ has attempted to rectify the deficiencies by making the required Stringency Statute finding without undertaking a new rulemaking process. These facts are similar to the facts in *Rosebud County v. Dep't of Revenue*, 257 Mont. 306, 849 P.2d 177 (1993).

In the *Rosebud County* case, the Montana Department of Revenue (“DOR”) adopted an amended “rule” without compliance with MAPA and an attempt by DOR to cure the deficiency after the fact by then conducting a rulemaking proceeding was held to be “in essence, a sham” in which interested parties “were denied their right to participate effectively in the governmental process.” *Id.*, at 311. The course of action undertaken by DEQ in this case is subject to the same criticisms. DEQ’s attempt to justify the Lake Water Column Standard after the fact amounts to “*post hoc* rationalization” which has been repeatedly condemned by the courts in rulemaking proceedings. *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d at 799.

Because the Board has considered and ruled on the merits of DEQ’s Motion, it need not address the arguments regarding the alleged procedural deficiencies of

the Motion. However, the Board's consideration of DEQ's Motion on its merits may not be construed as precedent for considering such motions in other cases.

For the reasons stated above, DEQ's Motion is hereby DENIED.

DATED this 9<sup>th</sup> day of December, 2022.

*/s/Steven Ruffatto*

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STEVEN RUFFATTO

Board Chair

Board of Environmental Review