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**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 Nos. BER 2021-04 WQ and BER 2021-08 WQ
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**MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY’S
PROPOSED DECISION ON 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) UNDER §
75-5-203, MONTANA CODE ANNOTATED**

I. INTRODUCTION

Before the Board of Environmental Review (“the Board”) are two petitions for review of ARM 17.30.632(7)(a) pursuant to § 75-5-203(4), MCA. The first

petition was filed by Teck Coal Limited (Teck) on June 30, 2021, the second was filed by the Board of County Commissioners of Lincoln County, Montana (Lincoln County) on October 14, 2021. The petitions are nearly identical and request the Board's review of the site-specific water quality standard for Lake Koocanusa pursuant to §75-5-203, MCA (Stringency Review).

The petitions were consolidated by the Board at its October 29, 2021 meeting and will be referred to collectively herein as "the Petitions." *See* BER October 29, 2021 Hearing Transcript at 11:18-25. Teck agreed that the timeframe under §75-5-203(4) would be triggered by the date Lincoln County filed its Petition. *See* October 29, 2021 Hearing Transcript at 28:13-22.

On December 11, 2020, the Board adopted ARM 17.30.632 in accordance with the Montana Water Quality Act and the Montana Administrative Procedure Act. As of July 1, 2021, DEQ rather than the Board has 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.

On adoption of ARM 17.30.632, the Board determined the adopted selenium standards for Lake Koocanusa and the Kootenai River are not more stringent than comparable federal guidelines addressing site-specific selenium criteria. The Board considered the requirement at § 75-5-203, MCA that without the written findings in §75-5-203(2) and (3), MCA, the Board may not adopt rules more

stringent than “comparable federal regulations or guidelines that address the same circumstances” and determined ARM 17.30.632 was not more stringent than federal. *See* 75-5-203(1), MCA; BER Rulemaking Record (hereinafter “RR”) at 002294 (BER December 11, 2020 Hearing Transcript adopting selenium standards for Lake Kooconusa and the Kootenai River and adopting DEQ’s stringency analysis under § 75-5-203, MCA).

The record contains comments and materials addressing matters that are not material to the Board’s stringency review, but the only determination currently before the Board is whether ARM 17.30.632(7)(a) is more stringent than comparable federal regulations or guidelines that address the same circumstance. Should the Board reverse its prior determination and find that ARM 17.30.632(7)(a) is more stringent than comparable federal regulations or guidelines, DEQ will make the written findings under §75-5-203(2) and (3), MCA.

DEQ hereby submits the following proposed decision in opposition to the Petitions:

II. DEQ’S FINDINGS OF FACT PERTAINING TO THE BOARD’S STRINGENCY REVIEW OF ARM 17.30.632(7)(a).

The Board received written comments, written responses to comments, and testimony on the Petitions from a variety of public and private entities including representatives of the Petitioners, DEQ, EPA, Tribal First Nations, Montana State Senator Cuffe, Public Interest Groups, and Private Citizens from Canada, Montana,

and Idaho. Based upon the written and oral comments, the rulemaking record, and other evidence admitted in Cause No. BER 2021-04-WQ and BER 2021-08-WQ, the Board, by a preponderance of the evidence, makes the following Findings of Fact:

A. On adoption of ARM 17.30.632, the Board conducted a stringency review, after reviewing an extensive rulemaking record, considering public comment, and other relevant evidence, and concluded the proposed Kootenai River and Lake Koocanusa water column and fish tissue standards are no more stringent than currently recommended EPA 304(a) criteria. See § 75-5-203, MCA. RR 000001-2; 002422-2427.

B. On June 30, 2021, the Board received a petition from Teck requesting review of ARM 17.30.632 for compliance with the requirement in §75-5-203, MCA, that prohibits adoption of a rule that is more stringent than comparable federal regulations or guidelines that address the same circumstances without the written findings in § 75-5-203(2) and (3), MCA (Stringency Review). BER 2021-04 WQ, Docket 1.

C. Teck is not registered to conduct business in the state of Montana. *See* <https://biz.sosmt.gov/search/business> (accessed on February 8, 2022).

D. On October 14, 2021, a second petition requesting Stringency Review of ARM 17.30.632 was filed by Lincoln County. BER 2021-08 WQ, Docket 1.

E. The petitions were consolidated by the Board at its October 29, 2021 meeting and, should the Board determine ARM 17.30.632(7)(a) is more stringent than the federal regulations, the 8-month timeframe under § 75-5-203(4), MCA, to make the findings in § 75-5-203(2) and (3), MCA, is triggered by the date Lincoln County filed its Petition. *See* BER October 29, 2021 Hearing Transcript at 11:18-25 and at 28:13-22.

F. The Lake Koocanusa selenium standard codified at ARM 17.30.632(7)(a) was developed in accordance with EPA's *Aquatic Life Ambient Water Quality Criterion for Selenium – Freshwater* (2016) (herein "EPA's 2016 304(a) Guidance"), which provides a water column range from 0.27 - 52.02 µg/L that is protective for lentic waterbodies depending on site-specific environmental factors. *See* RR000402-407, RR001335 (the Board's Reason Statement in Support of ARM 17.30.632).

G. EPA selected the 20th percentile from the distribution of translated water column values as the current 304(a) criteria of 1.5 µg/L for lentic waterbodies and 3.1 µg/L for lotic waterbodies. RR000407.

H. The current 304(a) criteria of 1.5 µg/L for lentic waterbodies may leave some sites in the United States overprotected and some sites under protected due to the site-specific environmental factors affecting selenium bioaccumulation. *See* RR000087, 000407, 001042, 002354.

I. EPA developed Appendix K to provide site-specific translation guidance. RR001042.

J. The water column criterion at ARM 17.30.632(7)(a) was developed to protect fish in Lake Koocanusa from exceeding the 15.1 mg/kg dw egg/ovary criterion. RR003764-3765.

K. In Lake Koocanusa, the egg/ovary fish tissue standard have exceedances at water column levels below 1.5 µg/L, suggesting Lake Koocanusa would be under protected by a water column standard of 1.5 µg/L. Therefore, DEQ followed the guidance in Appendix K to develop the 0.8 µg/L standard for the Lake Koocanusa water column in ARM 17.30.632(7)(a). *See* RR000057, 001359, 001538, and 003764.

L. The Lake Koocanusa water column standard, 0.8 µg/L, is within the range of EPA's guidance based on translations for lentic waters from the federal 15.1 mg/kg dw egg/ovary criterion. *See* RR000402-407.

M. In the initial publication of the proposed rule, the Board explained in its Reason Statement supporting New Rule I (now codified as ARM 17.30.632) that: "The proposed Lake Koocanusa water column standard (30-day chronic) is no more stringent than the recommended EPA 304(a) criteria because it was developed using federally recommended site-specific procedures . . ." *See* RR001328-1330.

N. DEQ's derivation document further explained that the proposed standards are designed to protect fish as the most sensitive ecological endpoint, including downstream federally listed threatened species, from the effects of elevated levels of selenium. The standards in ARM 17.30.632 reflect the latest science on the toxicological effects of selenium and were developed in accordance with the EPA's 2016 304(a) Guidance and Appendix K. *See* RR000090, 2486, 2544, 4018.

O. EPA's letter approving ARM 17.30.632(7)(a) was based on EPA's determination that Montana followed EPA's guidance for deriving a site-specific water column criterion for Lake Koocanusa. *See* February 25, 2021 letter from EPA Clean Water Branch Manager Judy Bloom to Board Chair Steven Ruffato submitted herein with Teck's Comments as Exhibit H. Ms. Tonya Fish, representing EPA, stated EPA determined that ARM 17.30.632 was based on sound scientific rationale and protected the designated use in testimony at the January 31, 2022 public hearing on the Petitions. *See* January 31, 2022 Transcript at page 24/lines 1-3.

P. There are no current or proposed point source dischargers on Lake Koocanusa. There has been no compelling evidence that any significant levels of selenium exist in the tributaries to Lake Koocanusa. There is no compelling

evidence that industry or future development would be hindered because of adoption of ARM 17.30.632(7)(a). RR002117 - 002118, 002140.

Q. Lincoln County had numerous opportunities to participate in the rulemaking including public meetings and opportunities to provide public comment. Public meetings were held in Lincoln County to inform the community of the proposed rulemaking and public notice was provided via local newspapers in Lincoln County. *See* RR 002107-2109. DEQ received comments from Lincoln County citizens urging adoption of ARM 17.30.632. *See* RR001607, 1611, 1613, 1614 and 002390-2392 (comments from Lincoln County anglers and fishing guides, citizens, and a Troy City Council member).

R. The standards at ARM 17.30.632 protect aquatic life in Lake Koocanusa and may form the basis of pollutant load reduction plans (and avoid an impairment determination) and protect downstream waters and beneficial uses including Endangered Species Act-listed white sturgeon. This is important for tourism and recreation associated with fishing, which plays an important role in the Lincoln County economy and creates direct and indirect jobs for residents. *See* RR002115.

III. DEQ'S CONCLUSIONS OF LAW PERTAINING TO THE BOARD'S STRINGENCY REVIEW OF ARM 17.30.632

Based on the above Findings of Fact, the Board makes the following Conclusions of Law:

A. ARM 17.30.632(7)(a) does not apply to Teck's coal mining activities in Canada. *See* ARM 17.30.632(7)(a),

B. Teck's standing to challenge the Board's stringency analysis is governed by § 75-5-203(4)(a), MCA, which provides "a person affected by a rule that the person believes to be more stringent than comparable federal regulations or guidelines may petition the board to review the rule." *See* § 75-5-203(4)(a), MCA (Emphasis added). Teck has not shown they are affected by ARM 17.30.632(7)(a), which by its plain language provides: "(7) Water column standards are the numeric standards for total dissolved selenium computed as a 30-day average and shall not be exceeded more than once in 3 years, on average. (a) Lake Koocanusa from the US-Canada international boundary to the Libby Dam: 0.8 µg/L. *See* ARM 17.30.632(7)(a) (Emphasis added). The Lake Koocanusa selenium standards do not apply north of the US-Canada international boundary. Teck's own Petition asserts Montana lacks jurisdiction to enact a water quality standard targeting Teck's coal mine operations in Canada's Elk Valley. *See* Teck Petition page 2. DEQ agrees it has no jurisdiction to regulate Teck's mining operations in Canada. Teck's allegations that ARM 17.30.632 "was designed to, has been used to, and does target Teck" is speculative at best. Teck's claims of "targeting" are insufficient to demonstrate Teck is affected by ARM 17.30.632(7)(a), a site-specific water quality standard that applies to surface waters within the State of

Montana. Teck's Petition should be dismissed because Teck lacks standing under §75-5-203(4)(a), MCA. *Williamson v. Mont. PSC*, 2012 MT 32, PP 34-35, 364 Mont. 128, 141, 272 P.3d 71, 82. (Plaintiffs were not property owners in a street lighting district and their claims based on climate change and other theories were dismissed as too attenuated and speculative).

C. As of July 1, 2021, DEQ rather than the Board has authority to adopt rules for the administration of the Montana Water Quality Act, subject to the provisions of §75-5-203, MCA. *See* 2021 MT 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.

D. The only question properly before the Board is whether ARM 17.30.632(7)(a) is more stringent than federal regulations or guidelines that address the same circumstance. § 75-5-203(4)(a), MCA. The Board has no authority to amend or invalidate the rule. §§ 75-5-201, 203(4)(a), MCA. The Board's jurisdiction is limited to a determination of stringency under § 75-5-203, MCA.

E. Neither Petition was properly brought prior to July 1, 2021, under § 2-4-315, MCA to repeal ARM 17.30.632(7)(a). Without rulemaking authority, the

Board cannot repeal or invalidate ARM 17.30.632(7)(a) even if it determines the rule is more stringent than federal.

F. On adoption of ARM 17.30.632 on December 11, 2020, the Board determined ARM 17.30.632(7)(a) was not more stringent than comparable federal regulations or guidelines that address the same circumstance and the Board was not required to make the written findings in § 75-5-203(2) and (3), MCA. *See* § 75-5-203, MCA, RR 000001-2; 002422-2427.

G. On adoption of ARM 17.30.632, the Board conducted a stringency review and properly concluded the proposed Kootenai River and Lake Koocanusa water column and fish tissue standards are no more stringent than currently recommended EPA 304(a) criteria because they correspond to federal standards or were developed using federally recommended site-specific procedures. *See* § 75-5-203, MCA, RR 000001-2; 002422-2427. The Board's conclusion that the Lake Koocanusa water column standard at ARM 17.30.632(7)(a) was not more stringent than federal was made after the Board reviewed an extensive rulemaking record, considered public comment, and considered relevant evidence and other factors. Petitioners point to no new evidence, to no clear error in the Board's previous decision or judgment, and to no breach in rulemaking procedures. Therefore, reversal of the Board's prior stringency determination would be so at odds with the information in the rulemaking record and the information presented in these

proceedings as to be “characterized as arbitrary or the product of caprice.” *North Fork Preservation Ass’n v. Department of State Lands*, 238 Mont. 451, 465, 778 P.2d 862, 871 (1989).

H. The site-specific selenium water column standard for Lake Koocanusa is justified and supported by the rulemaking record. The department followed the methodology outlined in Appendix K of the EPA’s 2016 304(a) Guidance to derive site specific selenium criteria for Lake Koocanusa. The department followed EPA’s mechanistic bioaccumulation modeling approach and determined that 1.5 µg/L is not protective of the aquatic life beneficial use for Lake Koocanusa. *See* RR002484.

I. The selenium standards for Lake Koocanusa protect downstream beneficial uses including the Endangered Species Act listed white sturgeon. *See* RR00129. The state is required to consider and ensure the attainment and maintenance of downstream (including intra and interstate) water quality standards. 40 CFR § 131.10(b). The standards for Lake Koocanusa and the Kootenai River are considered protective of downstream uses including the protection of sensitive downstream species. R002105, 004067.

J. Written findings under § 75-5-203, MCA, are triggered when the State adopts regulations that are more stringent than corresponding federal standards or guidelines. *See Pennaco Energy, Inc v. Mont. Bd. Of Env’tl. Review*, 2008 MT 425,

¶¶43-47. On December 11, 2020, the Board adopted the selenium water column standard for Lake Koocanusa at ARM 17.30.632(7)(a) and determined that standard is not more stringent than comparable federal guidelines. *See* RR002294. The Board was, therefore, not required to make the written findings in §75-5-203(2) and (3), MCA, when it adopted the Lake Koocanusa selenium standard codified as ARM 17.30.632(7)(a). *See* RR002165.

K. If the Board reverses its prior decision and determines that ARM 17.30.632(7)(a) is more stringent than comparable federal regulations or guidelines, DEQ will make the written findings in § 75-5-203(2)(a) and (b) that the proposed standard protects public health and the environment of the state and can mitigate harm to the public health or the environment. *See* § 75-5-203(2), MCA.

L. If the Board reverses its prior decision and determines that ARM 17.30.632(7)(a) is more stringent than comparable federal regulations or guidelines, DEQ will make the written findings that the proposed standard is achievable under current technology. *See* § 75-5-203(2), MCA.

M. If the Board reverses its prior decision and determines that ARM 17.30.632(7)(a) is more stringent than comparable federal regulations or guidelines, DEQ will make the written findings in § 75-5-203(3), MCA, regarding the costs to the regulated community directly attributable to the adoption of ARM 17.30.632. *See* § 75-5-203(2), MCA.

IV. CONCLUSIONS

There are no grounds for reversal of the Board's prior conclusion that the Lake Koocanusa water column standard at ARM 17.30.632(7)(a) is not more stringent than comparable federal regulations or guidelines.

Based on the above Findings of Fact and Conclusions of Law, the Board makes the following FINAL DECISION ORDER:

Teck is not a person affected by ARM 17.30.632 and has no standing to petition the Board to review the rule under § 75-5-203, MCA. Therefore, Teck's Petition is dismissed.

The Board's adoption of ARM 17.30.632(7)(a) was consistent with §75-5-203, MCA. By its plain statutory language, the requirement to make the written findings in § 75-5-203(2) and (3) after a public hearing and public comment is only triggered when the Board adopts a rule that is more stringent than comparable federal regulations or guidelines. The Board correctly determined that ARM 17.30.632(7)(a) is not more stringent than "comparable federal regulations or guidelines that address the same circumstances." § 75-5-203(1), MCA. The Board will not reverse this determination and hereby denies all requested relief.

Respectfully submitted this 11th day of February 2022.

BY: /s/ Kirsten H. Bowers
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Certificate of Service

I hereby certify that on this 11th day of February 2022, I caused a true and correct copy of the foregoing to be e-mailed to the following:

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**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
MONT. CODE ANN. SECTION
75-5-203 – STRINGENCY
REVIEW OF RULE PERTAINING
TO SELENIUM STANDARD FOR
LAKE KOOCANUSA

**[MONTANA ENVIRONMENTAL
INFORMATION CENTER,
CLARK FORK COALITION,
AND IDAHO CONSERVATION
LEAGUE’S PROPOSED] ORDER**

I. INTRODUCTION

Pending before the Montana Board of Environmental Review (the Board) is a petition by Teck Coal Limited (Teck) and the Board of County Commissioners of Lincoln County, Montana (Lincoln County) regarding stringency review of the Selenium Standard Rule for Lake Koocanusa (Selenium Rule). Teck asserts that the water column standard adopted under the Selenium Rule by this Board of 0.8 micrograms per liter is more stringent than the federal guideline of 1.5 micrograms per liter. Teck further asserts that, because the Selenium Rule is more stringent than the federal guideline, the Board is required to issue written findings. Thus, Teck contends that because the Selenium Rule was not accompanied by written findings, the Selenium Rule should be invalidated. Teck's petition is opposed by several individuals and parties.

II. FACTUAL BACKGROUND

A. Original Promulgation of The Selenium Rule

On December 11, 2020, the Board adopted site-specific selenium water quality standards for Lake Koocanusa and the Kootenai River pursuant to its rulemaking authority under the Montana Water Quality Act. See Mont. Code Ann. §§ 75-5-201, 75-5-301 (2019). These selenium criteria protect Class B-1 designated uses including growth and propagation of salmonid fishes and associated aquatic life. See ARM 17.30.609, 17.30.623.

The Montana Department of Environmental Quality (DEQ) chose to develop a site-specific water column criterion as expressly permitted by the U.S. Environmental Protection Agency (EPA) and followed EPA protocol in doing so. DEQ engaged in a more than four-year data collection effort and participated in a bi-national working group. RR_002486, RR_001519. Data from EPA, the U.S. Geologic Survey, DEQ, the Kootenai Tribe of Idaho, and the Confederated Salish & Kootenai Tribes, demonstrated the need for a site-specific selenium criterion to protect Lake Koocanusa's designated uses because the lake is highly susceptible to selenium bioaccumulation. Based on this data and following EPA protocol, DEQ determined that 0.8 µg/L was the value that would be protective of Lake Koocanusa's beneficial uses. DEQ explained, "1.5 µg/L does not meet the protection goals" of "consider[ing] ecologically significant species and the long-term protection for fish in all parts of the reservoir including those with the most sensitive food webs" whereas "0.8 µg/L meets these objectives and protects the beneficial use[.]" Selenium Water Quality Standards for the Protection of Aquatic Life Beneficial Use for Lake Koocanusa & the Kootenai River, RR_001544.

B. Stringency Review of the Selenium Rule

As part of the rulemaking process, under MCA § 75-5-203, the Board may not adopt rules more stringent than "comparable federal regulations or guidelines that address the same circumstances." See MCA § 75-5-203(1)-(3).

During the rulemaking process, Teck raised the issue of whether the proposed standard of 0.8 micrograms per liter is more stringent than the federal guideline of 1.5 micrograms per liter.

COMMENT NO. 200: The proposed rule is illegal. The proposed rule is more stringent than the federal guideline for the water column concentration portion, but without the required compliance with 75-5-203(2), MCA. There must be evidence in the record that the proposed standard protects public health or the environment.

RR_002544.

During the exhaustive process that culminated in the issuance of the Selenium Rule in 2020, the Board acknowledged the statutory mandate under MCA § 75-5-203, and ultimately determined the Selenium Rule “is no more stringent than the recommended EPA” standard. RR_001330. In particular, the Board concluded that:

RESPONSE: The board disagrees that the proposed rule is illegal because it did not comply with 75-5-203(2), MCA. EPA’s 2016 selenium criterion document for freshwater contains an appendix, Appendix K. Appendix K describes methods by which site-specific selenium standards may be developed for individual waterbodies. Appendix K is discussed in twelve different locations throughout EPA’s 2016 selenium document. EPA is very clear that “states and tribes may choose to adopt the results of site-specific water column translations as site-specific criteria...” Montana chose this approach.

The selenium standards in proposed NEW RULE I are not more stringent than currently recommended federal criteria. The proposed water column standard for the mainstem Kootenai River (3.1 µg/L) corresponds to the current (2016) EPA 304(a) criterion for lotic (flowing) waters. The proposed water column standard for Lake Koocanusa (0.8 µg/L) is based on EPA 304(a) fish tissue criteria and site

specific bioaccumulation modeling, following site-specific procedures set forth by EPA in its current 304(a) guidance. The fish tissue standards in NEW RULE I include egg/ovary, muscle, and whole body, expressed as mg/kg dry weight, correspond to EPA's currently recommended 304(a) fish tissue criteria. Therefore, the proposed Kootenai River and Lake Koocanusa water column and fish tissue standards are no more stringent than currently recommended EPA 304(a) criteria because they correspond to federal standards or were developed using federally recommended site-specific procedures. Therefore, the board is not required to make written findings required by 75-5-203(2), MCA.

RR_002544-45.

C. EPA's Approval of the Selenium Rule

EPA approved the Selenium Rule pursuant to the Clean Water Act, 33 U.S.C. § 1313(c)(2)(A), and 40 C.F.R. § 131.21. Changes to the Selenium Rule would require EPA to review any new criterion under the Clean Water Act, 33 U.S.C. § 1313(c)(2)(A) ("Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator."); 40 C.F.R. § 131.21 ("(a) After the State submits its officially adopted revisions, the Regional Administrator shall either: (1) Notify the State within 60 days that the revisions are approved, or (2) Notify the State within 90 days that the revisions are disapproved. Such notification of disapproval shall specify the changes needed to assure compliance with the requirements of the Act and this regulation, and shall explain why the State standard is not in compliance with such requirements. Any new or

revised State standard must be accompanied by some type of supporting analysis.”).

D. Teck’s and Lincoln County’s Petitions for Stringency Review

More than seven months after the adoption of the Selenium Rule, on June 30, 2021, Teck filed a petition with the Board for review of the site-specific water quality standard for Lake Koocanusa pursuant to MCA § 75-5-203(4)(a). The petition raised nearly identical issues as those raised by Teck in the original proceeding. On October 14, 2021, Lincoln County filed a petition for Stringency Review nearly identical to the petition filed by Teck. The Teck and Lincoln County petitions (the Petitions) were consolidated by the Board at its October 29, 2021 meeting. The Petitions ask the Board to reconsider its December 11, 2020 determination that the Selenium Rule—the selenium water column standard for Lake Koocanusa at ARM 17.30.632(7)(a)—is not more stringent than comparable federal guidelines.

E. Board Review Process

The Board received comments on the suggested process for consideration of the Petitions, and on October 29, 2021, the Board determined that it would consider the Petitions in a non-contested case format. The Board consolidated the Petitions and determined, with Teck’s waiver, that the eight-month period provided in MCA § 75-5-203(4)(a) would commence on October 14, 2021, the date Lincoln

County filed its petition. The record supporting the promulgation of ARM 17.30.632 was submitted to the Board and posted on the Board website.

The Board also issued a Notice of Schedule for Implementation of Review, which established the requirements and deadline for the stringency review process. Pursuant to the schedule, the Board received numerous comments, as well as responses to comments, addressing the issues presented by the Petitions from interested parties. On January 31, 2022, a public meeting was held by a hearing examiner to allow for oral testimony by interested parties.

III. LEGAL FRAMEWORK

Under Mont. Code Ann. § 75-5-203(4)(a),

[a] person affected by a rule that the person believes to be more stringent than comparable federal regulations or guidelines may petition the board to review the rule. If the board determines that the rule is more stringent than comparable federal regulations or guidelines, the department shall comply with this section by either revising the rule to conform to the federal regulations or guidelines or by making the written finding, as provided under subsection (2), within a reasonable period of time, not to exceed 8 months after receiving the petition. A petition under this section does not relieve the petitioner of the duty to comply with the challenged rule. The department may charge a petition filing fee in an amount not to exceed \$250.

The Board is not required to make written findings if the Board determines that the Selenium Rule is no more stringent than the federal standard. See id.

Montana courts require agency decisions be reasoned. Friends of the Wild Swan v. DNRC, 2000 MT 209, ¶ 28, 301 Mont. 1, ¶ 28, 6 P.3d 972, ¶ 28 (“While

our review of agency decisions is generally narrow, we will not automatically defer to the agency without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision.” (internal quotations and citations omitted)). When an agency makes an administrative decision or changes its position without adequate justification, courts will deem the action arbitrary and capricious. Clark Fork Coal. v. Montana Dep’t of Env’t Quality, 2008 MT 407, ¶ 21, 347 Mont. 197, 202–03, 197 P.3d 482, 487 (“We review an agency decision not classified as a contested case under the Montana Administrative Procedure Act to determine whether the decision was ‘arbitrary, capricious, unlawful, or not supported by substantial evidence.’” (quoting Johansen v. State, 1999 MT 187, ¶ 11, 295 Mont. 339, ¶ 11, 983 P.2d 962, ¶ 11)); North Fork Pres. Assn. v. Dept. of State Lands, 238 Mont. 451, 465, 778 P.2d 862, 871 (1989) (“In reviewing an agency decision to determine if it survives the arbitrary and capricious standard, we consider whether the decision was ‘based on a consideration of the relevant factors and whether there has been a clear error of judgment.’” (quoting Marsh v. Or. Nat. Resources Council, 490 U.S. 360, 378 (1989))).

This standard parallels federal judicial review of agency action under the Administrative Procedure Act (APA). See Organized Vill. of Kake v. U.S. Dep’t of Agric., 795 F.3d 956, 966 (9th Cir. 2015) (“a policy change complies with the APA if the agency (1) displays ‘awareness that it is changing position,’ (2) shows

that ‘the new policy is permissible under the statute,’ (3) ‘believes’ the new policy is better, and (4) provides ‘good reasons’ for the new policy, which, if the ‘new policy rests upon factual findings that contradict those which underlay its prior policy,’ must include ‘a reasoned explanation ... for disregarding facts and circumstances that underlay or were engendered by the prior policy.’” (emphasis omitted)).

IV. DISCUSSION

A. The Board’s original determination that the Selenium Rule is no more stringent than the federal standard is legally correct and supported by record evidence.

The Board’s original determination that the Selenium Rule is no more stringent than the federal standard is correct. Teck, now joined by Lincoln County, misunderstands the federal standard by claiming that the Selenium Rule is more stringent than the federal standard. Teck’s and Lincoln County’s claims are legally incorrect, as they rely on an illogical and inaccurate interpretation of the federal standard. As the Board has previously stated, the Selenium Rule is “no more stringent than the recommended EPA 304(a) criteria because it was developed using federally-recommended site-specific procedures[.]”

EPA expressly recommends and permits more protective “site-specific water column criterion.” EPA, Aquatic Life Ambient Water Quality Criterion for Selenium—Freshwater (2016) (“All four elements of the freshwater selenium

criterion may be modified to reflect site-specific conditions where the scientific evidence indicates that different values will be protective of aquatic life and provide for the attainment of designated uses.”). EPA explicitly gives states the “site-specific water column criterion” option “[b]ecause the factors that determine selenium bioaccumulation vary among aquatic systems” and the national criteria of 1.5 µg/L may be under protective for some sites. RR_000311, RR_001544 (emphasis added). As the Board’s prior response to Teck’s comments explained, “EPA’s 2016 selenium criterion document for freshwater contains an appendix, Appendix K. Appendix K describes methods by which site-specific selenium standards may be developed for individual waterbodies. Appendix K is discussed in twelve different locations throughout EPA’s 2016 selenium document. EPA is very clear that ‘states and tribes may choose to adopt the results of site-specific water.’” RR_002544, RR_001036-37. (“States and tribes may choose to adopt the results of site-specific water column translations as site-specific criteria[.]”). The purpose of setting water quality criteria is to protect the beneficial uses of waterbodies. Thus, recognizing that “[t]he relationship between the concentration of selenium in the tissues of fish and the concentration of selenium in the water column can vary substantially among aquatic systems[.]” EPA provides the option to set site-specific standards when necessary to protect the designated beneficial uses of waterbodies. RR_001036-37.

Further, EPA states that “If threatened or endangered fish species are present, states and tribes may need to derive alternative water column elements with a refined protection goal that account for site specific bioaccumulation characteristics.” RR_001036-37. DEQ saw this “need” given the existence of ESA-protected bull trout and white sturgeon, when it chose to follow EPA protocol in setting a site-specific water column criterion. Thus, the Selenium Rule necessarily is no more stringent than the federal standard because the Selenium Rule was determined according to EPA protocol and based on EPA’s guidance that a site-specific standard may be necessary when endangered species are present.

Ultimately, EPA’s Aquatic Life Ambient Water Quality Criterion for Selenium sets the protocol for developing site-specific criteria and is the federal standard. DEQ followed this protocol when it developed the Selenium Rule that was approved by EPA. Teck and Lincoln County fail to provide new findings or demonstrate that the Selenium Rule is a “clear error of judgment” in their Petitions. Furthermore, the rulemaking record consistently shows that the Board’s Selenium Rule is reasoned, developed according to federally-recommended site-specific procedures, and based on the best available science. Accordingly, the Board has no “reasoned explanation” that would support a weakening of the Selenium Rule and doing so would be arbitrary and capricious. See Clark Fork Coal., ¶ 21; Organized Vill. of Kake, 795 F.3d at 966.

B. The Board does not need to make written findings.

Under MCA § 75-5-203(4)(a), “[i]f the board determines that the rule is more stringent than comparable federal regulations or guidelines, the department shall comply with this section by either revising the rule to conform to the federal regulations or guidelines or by making the written finding, as provided under subsection (2)[.]” Subsection (2) provides that:

(2) The department may adopt a rule to implement this chapter that is more stringent than comparable federal regulations or guidelines only if the department makes a written finding after a public hearing and public comment and based on evidence in the record that:

(a) the proposed state standard or requirement protects public health or the environment of the state; and

(b) the state standard or requirement to be imposed can mitigate harm to the public health or environment and is achievable under current technology.

MCA § 75-5-203(2). The Board is not required to make written findings if the Board determines that the Selenium Rule is no more stringent than the federal standard because the language in MCA § 75-5-203(4)(a) expressly provides that written findings or a rule revision to conform to the federal regulations or guidelines is required only “[i]f the board determines that the rule is more stringent than comparable federal regulations or guidelines[.]” Here, the operative word is “if.” Because the Board determines that the Selenium Rule is no more stringent

than the federal guidelines providing for a site-specific selenium criterion, no written findings are required.

V. CONCLUSION

Teck’s and Lincoln County’s petitions are without merit. The Selenium Rule establishes a site-specific water column criterion as expressly permitted by EPA, and the site-specific standard was adopted utilizing EPA approved protocols. The Selenium Rule is no more stringent than the federal standards, but rather encouraged and ratified through EPA guidance.

Accordingly, for the above-stated reasons, it is hereby **Ordered:**

Teck and Lincoln County’s Petitions are denied.

Dated this ____ day of _____ 2022.

Approved by:

BOARD OF ENVIRONMENTAL REVIEW

KATHERINE ORR
BOARD COUNSEL

STEVEN RUFFATTO
CHAIRMAN

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ATTORNEYS FOR TECK COAL LIMITED

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

IN THE MATTER OF:	CAUSE NO. BER 2021-04 WQ
ADOPTION OF NEW RULE I PERTAINING TO SELENIUM STANDARDS FOR LAKE KOOCANUSA	SUBMISSION OF PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Attached, per the Board's Notice of Public Meeting and Notice for Submission of Proposed Decision, are the proposed findings of fact, conclusions of law and order, on behalf of Teck Coal Limited.

DATED this 11th day of February, 2022.

/s/ Victoria A. Marquis

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Victoria A. Marquis
Holland & Hart LLP
401 North 31st Street, Suite 1500
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ATTORNEYS FOR TECK COAL LIMITED

CERTIFICATE OF MAILING

I hereby certify that on this 11th day of February, 2022, 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:

Board Secretary Board of Environmental Review 1520 E. Sixth Avenue P.O. Box 200901 Helena, MT 59620-0901 deqbersecretary@mt.gov	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail
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/s/ Arlene S. Forney
Legal Assistant, Holland & Hart

**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 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
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I. PROCEDURAL HISTORY

On June 30, 2021, Teck Coal Limited (“Teck”) petitioned the Board of Environmental Review (“Board”) to review its new rule ARM 17.30.632 (the “New Selenium Rule”) to determine whether the rule, specifically ARM 17.30.632(7)(a) which sets a water quality standard for selenium in Lake Koocanusa of 0.8 micrograms per liter, is more stringent than the comparable federal guideline of 1.5 micrograms per liter. On October 14, 2021, the Board of County Commissioners of Lincoln County (“Lincoln County”) filed a similar petition with the Board. After public comment, review and discussion, the Board adopted a public process by which the petitions would be decided using a non-contested case format. The Board consolidated the two petitions (collectively, the “Petitions”) and determined, with Teck’s waiver, that the eight-month period provided in § 75-5-203(4)(a), MCA, would commence on October 14, 2021, the date Lincoln County filed its petition.

The Board delegated responsibility for compiling the rulemaking record that culminated in passage of the New Selenium Rule (the “Record”) to Board Counsel Katherine Orr. The Record was compiled and made available to the public on the Board’s website on December 15, 2021.

The Board requested “written comments addressing the issues presented by the Petitioners,” submitted on or before January 13, 2022 at 5:00 p.m. The Board received, and posted on its website, comments from the Idaho Conservation League, the Confederated Salish and Kootenai Tribes together with the Kootenai Tribe of Idaho (collective, the “Tribes”), Lincoln County, the Montana Department of Environmental Quality (“DEQ” or the “Department”), the Montana Environmental Information Center together with the Clark Fork Coalition (collectively, “MEIC/CFC”), the U.S. Environmental Protection Agency (“EPA”), Montana Trout Unlimited, the Montana Mining Association, the Treasure State Resources Association of Montana, Wildsight, and Teck.

The Board requested that responses to the January 13 comments be submitted on or before January 21, 2022 at 5:00 p.m. By that deadline, the Board received responses from Teck, DEQ, EPA, and Lincoln County. The responses were made available to the public on the Board’s website.

On January 31, 2022, the Board held a public hearing to receive further comments on the Petitions. The Board’s Hearing Examiner, Drew Cziok, presided

over the public hearing, which lasted nearly two hours and included comments from Montana Senator Mike Cuffe (Senate District 1); Teck; Lincoln County; Mr. John O'Connor from Bonners Ferry, Idaho; Lincoln County Commissioner Jerry Bennett; Lincoln County Commissioner Josh Letcher; EPA; DEQ; the Tribes; the Idaho Conservation League; MEIC/CFC; Wildsight; Idaho Rivers United; Ms. Erin Sexton; Montana Trout Unlimited; Ms. Lexie Defremery from Bonner County, Idaho; Ms. Becca Rodack from Boundary County, Idaho; and the British Columbia and Montana chapters of the Back Country Hunters and Anglers. A transcript of the public hearing was made available to the public on the Board's website. The Board requested and received proposed decision documents by February 11, 2022, which were also made available to the public on its website.

After consideration and discussion of all the records, documents, transcripts, and comments received by the Board in this matter, the Board makes the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

The Board

1. Acting under its authority provided in §§ 75-5-201 and 75-5-301, MCA, the Board initiated rulemaking of the New Selenium Rule by publication in the Montana Administrative Register on October 9, 2020. RR_001326-1331 (19 Mont. Admin. Reg., pp. 1789-1794 (Oct. 9, 2020)).

2. The New Selenium Rule was not promulgated pursuant to the Montana Water Quality Act's site-specific standard provisions found in § 75-5-310, MCA. *Id.*

3. The Board's initiation of rulemaking for the New Selenium Rule asserted that "[t]he proposed Lake Koocanusa water column standard (30-day chronic) is no more stringent than the recommended EPA 304(a) criteria because it was developed using federally recommended site-specific procedures; therefore, it is more accurate than the generally applicable national lentic (lake) number." RR_001330 (19 Mont. Admin. Reg., pp. 1793 (Oct. 9, 2020)).

4. The Board finalized promulgation of the New Selenium Rule by publication in the Montana Administrative Register on December 24, 2020. RR_002482-2546 (24 Mont. Admin. Reg., pp. 2336-2400 (Dec. 24, 2020)).

5. Regarding stringency of the New Selenium Rule compared to the federal guideline, the Board's final promulgation stated that the New Selenium Rule was not more stringent than the federal guideline because "[t]he proposed water column standard for Lake Koocanusa (0.8 µg/L) is based on EPA 304(a) fish tissue criteria and site-specific bioaccumulation modeling, following the site-specific procedures set forth by EPA in its current 304(a) guidance." RR_002544-2545 ((24 Mont. Admin. Reg., pp. 2398-2399 (Dec. 24, 2020)). Therefore, the

Board concluded that it “is not required to make written findings required by 75-5-203(2), MCA.” *Id.*

The Petitions

6. The Petitions sought the Board’s review of the New Selenium Rule pursuant to the Stringency Statute to determine if the New Selenium Rule is more stringent than comparable federal regulations or guidelines that address the same circumstances and, if it is, whether the Stringency Statute’s requisite finding had been or could be made based on the Record. Teck Petition (June 30, 2021); Lincoln County Petition (October 14, 2021).

7. Teck is a company conducting coal mining operations in the Elk Valley area in British Columbia. Teck’s Elk Valley operations are subject to regulation by British Columbia pursuant to, among other laws, Ministerial Order No. M113, the 2014 Elk Valley Water Quality Plan, and Permit 107517 issued to Teck by the B.C. Ministry of Environment under the B.C. Environmental Management Act. Permit 107517 includes selenium water quality compliance limits and site performance objectives for Teck’s discharges that eventually enter the Elk River, which is a tributary to Lake Koocanusa. RR_000087-88, 91-92; 94-99 (DEQ, *Derivation of a Site-Specific Water Column Selenium Standard for Lake Koocanusa* (September 2020); *see also* Teck Petition, pp. 14-15.

8. Teck participated in collaborative efforts, initiated by Teck's Canadian regulators, to consider whether British Columbia's Water Quality Objective of 2.0 micrograms per liter is protective of Lake Koochanusa. DEQ participated in the collaborative efforts. Some of the information and data used, developed, and considered during that process, including information and data provided by Teck, are referenced and relied upon in the technical support documents that serve as the basis for the new rule, ARM 17.30.632. *Id.*

9. Teck participated in the rulemaking for ARM 17.30.632 by attending public meetings, submitting formal written comments and delivering oral comments at public meetings, including the November 5, 2020 public hearing. RR_001269-1273 (Board Transcript (Sept. 24, 2020)); RR_001465-1471 (Board Transcript (November 5, 2020)); RR_001894-2091 (Teck Comment Letter (November 23, 2020)). Teck's comments included its assertion that the New Selenium Rule failed to comply with the Stringency Statute. *Id.*

10. On December 31, 2020 DEQ Director McGrath wrote to the International Joint Commission, which has authority to enforce the Boundary Waters Treaty, requesting action against transboundary pollution stemming from Elk River valley mining operations. Teck Petition, Ex. D.

11. On December 11, 2020, DEQ Director McGrath testified before the Board that “[b]y us adopting this standard today, what that does is continue to put

the pressure on British Columbia to indeed adopt their own standard that is aligned with us.” RR_002402 (Board Transcript (Dec. 11, 2020)).

12. When promulgating the rule, the Board acknowledged and did not dispute that “[o]nly Teck is affected by the standard.” RR_002491 (24 Mont. Admin. Reg., p. 2345 (Resp. to Cmt. No. 30)).

13. The Board of County Commissioners of Lincoln County is a political subdivision of the State of Montana. That portion of Lake Koocanusa located in the United States is within Lincoln County. Lincoln County Petition, p. 14.

14. Lincoln County participated in the rulemaking for ARM 17.30.632 by attending public meetings, submitting formal written comments and delivering oral comments at public meetings. RR_001796-1801 (Lincoln County Comment Letter); RR_001439-1443 (Board Transcript (Nov. 5, 2020)).

15. When promulgating the New Selenium Rule, the Board “recognize[d] that the lake will probably be considered impaired for selenium.” RR_002505 (20 Mont. Admin. Reg., p. 2359 (Resp. to Cmt. No. 76)).

16. When promulgating the New Selenium Rule, the Board noted that if Lake Koocanusa is listed as impaired for selenium, “then new projects would need to discharge at concentrations equal to or less than the proposed standard of 0.8 [micrograms per liter].” RR_002497 (20 Mont. Admin. Reg., p. 2351 (Resp. to Cmt. No. 50)).

The Federal Guideline

17. There is no federal standard for selenium, but there is a federal guideline. RR_000306 (2016 EPA Guideline, explaining the distinction between a CWA Section 304(a)(1) guideline, which “represents a non-regulatory, scientific assessment of ecological effects” and a water quality standard which is associated with a specific designated use and adopted by a state or tribe). EPA approval of the New Selenium Rule does not make it a federal standard. *Pennaco v. Bd. of Env'tl. Review*, 2007 Mont. Dist. LEXIS 513, ¶¶ 68-69 (rejecting the argument that EPA approval “federalizes” a state water quality standard).

18. On July 13, 2016, EPA announced the release of final updated guidelines to states and tribes for selenium. 81 Fed. Reg. 45285, 45286 (July 13, 2016). “EPA’s recommended water quality criteria are scientifically derived numeric values that protect aquatic life or human health from the deleterious effects of pollutants in ambient water.” 81 Fed. Reg. 45285, 45286 (July 13, 2016). For selenium in lentic water (still or slow-moving fresh water), EPA recommends a water column numeric value of 1.5 micrograms per liter, a fish whole body tissue numeric value of 8.5 mg/kg dw, a fish muscle tissue numeric value of 11.3 mg/kg dw, and a fish egg/ovary numeric value of 15.1 mg/kg dw. *Id.*; RR_000313 (EPA, *Aquatic Life Ambient Water Quality Criterion for Selenium – Freshwater 2016*, Table 1).

19. The 2016 EPA Guideline was “derived for the protection of 95% of species nation-wide,” specifically including white sturgeon in the Kootenai River, from impacts of selenium, including selenium released by “resource extraction activities.” RR_000090 (DEQ Derivation Document); RR_000320; 455-456 (2016 EPA Guideline).

20. The 2016 EPA Guideline noted that “site-specific water column criterion element values may be necessary at aquatic sites with high selenium bioaccumulation.” RR_000311 (2016 EPA Guideline).

The New Selenium Rule

21. The New Selenium Rule provides “[n]umeric selenium standards” including a “water column standard” for Lake Koocanusa of 0.8 micrograms per liter, which is less than (or more stringent than) the federal guideline of 1.5 micrograms per liter. ARM 17.30.632(7)(a). The New Selenium Rule also sets a water column standard for the Kootenai River immediately downstream of the lake at 3.1 micrograms per liter. ARM 17.30.632(7)(b). Fish tissues standards equal to the 2016 EPA Guideline are also provided. ARM 17.30.632(6).

22. DEQ and EPA agree that the water column standard in the New Selenium Rule is a water quality standard for Montana Water Quality Act and federal Clean Water Act purposes. Public Hearing Transcript, 23:3-6 (January 31, 2022).

23. The New Selenium Rule’s water column standard is supported by modeling scenarios that use a whole-body fish tissue threshold of 5.6 mg/kg dw, which is more stringent than the federally recommended level of 8.5 mg/kg dw. RR_000127. A model scenario using the federally recommended level of 8.5 mg/kg dw was also presented, but that scenario altered other model inputs (bioavailability and Kd percentile) to be more “conservative” (i.e., more stringent) than the distribution of calculated protective values relied upon in the 2016 EPA Guideline. RR_000127; *see also* RR000125-126 (DEQ acknowledging use of more stringent bioavailability factor and partitioning coefficient (Kd) when using the federally recommended level of 8.5 mg/kg dw).

24. In its rationale for approval of the rule, EPA noted that the New Selenium Rule sets a water quality standard for selenium in Lake Kooconusa of 0.8 microgram per liter, which “is more stringent than the recommended water column criterion element for lentic aquatic system in EPA 2016 (1.5 µg/L).” *See* EPA Letter to Board, EPA Rationale (February 25, 2021), p. 12 (pdf p. 15); n. 22; *see also* p. 2 (pdf p. 5), n. 6; p. 6 (pdf p. 9), n.11.

The Stringency Statute

25. Concerned that “Montana must simultaneously move toward reducing redundant and unnecessary regulation that dulls the state’s competitive advantage while being ever vigilant in the protection of the public’s health, safety, and

welfare,” the Montana Legislature enacted House Bill 521 in 1995, which was codified as the Stringency Statute. 1995 Mt. HB 521.

26. In enacting House Bill 521, the Legislature intended that the agency promulgating a standard or requirement must “include as part of the initial publication and all subsequent publications a written finding if the rule in question contains any standards or requirements that exceed the standards or requirements imposed by comparable federal law.” *Id.*

27. The Legislature intended that the “written finding must include but is not limited to a discussion of the policy reasons and an analysis that supports the board’s or department’s decision that the proposed state standards or requirements protect public health or the environment of the state and that the state standards or requirements to be imposed can mitigate harm to public health or the environment and are achievable under current technology.” *Id.*

The Record

28. The Board did not make the written finding required by § 75-5-203, MCA, when it promulgated the New Selenium Rule. RR_002544-2545 (24 Mont. Admin. Reg., pp. 2398-2399 (Dec. 24, 2020)).

29. The Record contains evidence that the natural condition of Lake Kooacanusa may already exceed or be very near the water column standard established in the New Selenium Rule. A 2016 DEQ presentation indicated that

upstream tributary levels ranged from 0.04 micrograms per liter selenium at Gold Creek to 0.5 micrograms per liter selenium at Bristow Creek, Jackson Creek, McGuire Creek, and Warland Creek. RR_001908; RR_001891. While the Board originally stated that “all available data suggest that [tributary] contributions are lower than the proposed standards,” it also admitted that the tributary sampling had limited sensitivity and could not accurately report selenium levels lower than 0.9 micrograms per liter. RR002518; RR_002520; RR_002519 (Bd. Resp. to Cmt. No. 129; 134; 132; 131).

30. The Record shows that the Board acknowledged the New Selenium Rule cannot be used to mitigate harm because Montana has nothing within its jurisdiction to regulate with the New Selenium Rule. RR_001904-16; RR_002400-01; RR_002421.

31. The Record contains water quality data indicating that selenium levels in Lake Kooconusa are within the 2016 EPA Guideline of 1.5 micrograms per liter, within the British Columbia Water Quality Objective of 2.0 micrograms per liter, and within Montana’s statewide selenium standard of 5 micrograms per liter. RR_000106; RR_002481; RR_002520 (Dec. Resp. to Cmt. No. 136).

32. Regarding fish tissue data, the Board stated that “impacts could already be occurring,” that “detrimental impacts may have already begun,” and that “some species show elevated [selenium] levels, increasing over time,” without

citing to evidence in the Record and without acknowledging that no Montana Water Quality Act-compliant fish tissue assessment method exists. RR_002520 (Resp. to Cmt. No. 136); RR_002524 (Resp. to Cmt. No. 146).

33. The Record confirms that “the most sensitive species to elevated selenium” in Lake Koocanusa is “the native westslope Cutthroat trout” and that three individual fish “have been sampled with egg/ovaries and concentrations averaged 11.43 mg/kg dw,” which is less than the 2016 EPA Guideline and New Selenium Rule standard of 15.1 mg/kg dw. RR_002523 (Dec. Resp. to Cmt. No. 143); ARM 17.30.632(6).

34. The Board confirmed that the Record shows no whole body fish tissue exceedances in Montana’s Lake Koocanusa. RR_002524 (Dec. Resp. to Cmt. No. 146).

35. The Record confirms that “2018 fish muscle tissue samples were found to be at comparable concentration as MT FWP’s 2008 results” and that “[a]ll samples were below the EPA fish muscle criterion of 11.3 mg/kg dw.” RR_000111-112 (DEQ Derivation Document).

36. For fish tissue, EPA recommends using a “larger sample size,” specifically, “three to ten individuals for each target species.” K-36; EPA, 2021 *Draft Technical Support Document*, pp. 11, 12.

37. EPA notes that “[r]eproductively mature (ripe or gravid) females would be needed for measures [of] selenium in eggs and/or ovary tissue for comparison to the egg-ovary tissue criterion element.” RR_001045 (2016 EPA Guideline).

38. USGS states that “[t]he only appropriate time to collect egg-ovary tissue from suitable species is when the female is gravid in the pre-spawn stage, just before mating and spawning” and noted the “ovary ripeness uncertainty” of Montana egg/ovary samples. RR_001164; RR_001184.

39. The Record confirms the inadequacy of the egg/ovary fish tissue sampling, specifically that “it has been a challenge to collect eggs from gravid females” and that “the stage of development [of ovary samples] was not noted.” RR_002523 (Resp. to Cmt. No. 141; 143); RR_000118 (DEQ Derivation Document).

40. The Record states that “three redbreasted sunfish egg/ovary samples exceeded the [2016 EPA Guideline] of 15.1 mg/kg dw along with one sample from peamouth chub,” without confirming whether the samples were from ripe or unripe ovaries and without considering the need for a sample size of at least five individuals from the same species to create one data point. RR_000111 (DEQ Derivation Document); ARM 17.30.632(6).

41. The Board noted that DEQ “originally listed selenium as a threat to aquatic life use in Lake Kooconusa in 2012” and the lake is “currently listed as threatened for selenium” without acknowledging or addressing the fact that the threatened listing is wrong because it is based on a prediction made in 2012 that has proven wrong over time. RR_002496 (Resp. to Cmt. No. 48); RR_001888; RR_001902. In 2012, DEQ predicted that selenium levels in Lake Kooconusa would reach 5 micrograms per liter by 2015. Teck Resp. to Comments, Ex. J, p. 27 (DEQ Water Quality Standards Attainment Record for Lake Kooconusa). However, by 2020, selenium levels in Lake Kooconusa were between 1.0 and 1.5 micrograms per liter, proving the prediction wrong. RR_00106; RR_002481.

42. The Record contains little information about the current technology available to treat selenium discharges and what levels such treatment could achieve.

43. The only analysis of whether the New Selenium Rule is achievable in Lake Kooconusa is the Board’s statement that “[a]chievability will depend on the degree of work undertaken in Canada to control the elevated selenium loads coming out of the Elk River.” RR_002505-06 (Bd. Resp. to Cmt. No. 78).

44. Operation of Libby Dam and its effect on water-column selenium levels in Lake Kooconusa were not considered during the rulemaking. RR_002526-28 (Bd. Resp. to Cmt. No. 152-155); RR_000101 (Derivation

Document); RR_001822-28 (written comments from Sen. Cuffe); RR_001906; RR_001908 (referencing 2013 DEQ analysis and information that Libby Dam drawdowns average 111 feet and significantly impact aquatic life).

45. Bank-sloughing along the shores of Lake Koocanusa and its effect on water-column selenium levels in Lake Koocanusa were not considered during the rulemaking, despite evidence collected by DEQ indicating the presence of selenium in soils along the banks and shoreline of the lake. RR_002068 – 002091 (RR_002080 reveals shoreline soil with selenium levels at 0.21 micrograms per gram).

46. The Record lacks information regarding the costs to the regulated community.

47. The Board erroneously asserted that “existing or proposed permitting or development activities within the State of Montana, are irrelevant to the development of the criteria.” RR_002510 (Bd. Resp. to Cmt. No. 96).

48. Lincoln County was misinformed that “By law – economic data is not used in establishing the standard.” RR_001503 (Presentation to Lincoln County, slide 3 (November 12, 2020)); § 75-5-301(1), MCA.

49. An analysis of impacts to small businesses was provided with the Board’s December 11, 2020 meeting materials, but the public had no meaningful opportunity to review and comment on it. RR_002357-58.

III. CONCLUSIONS OF LAW

The Board Has Authority to Review the Petitions and Order Relief.

1. The Board is an “agency” – an “entity or instrumentality of the executive branch of state government.” § 2-15-102(2), MCA.

2. Pursuant to § 2-15-3502, MCA, the Board serves a “quasi-judicial function,” which is defined as “an adjudicatory function exercised by an agency, involving the exercise of judgment and discretion in making determinations in controversies.” § 2-15-102(10), MCA. This includes “interpreting, applying, and enforcing existing rules and laws” and “evaluating and passing on facts.” *Id.*

3. One such “controversy” that the law places within the Board’s authority is, upon petition, to review a rule pursuant to § 75-5-203(4), MCA (the “Stringency Statute”). Therefore, the Board has a statutory duty to review the Petitions and issue final agency action on them.

4. Prior to July 1, 2021, setting water quality standards, including the New Selenium Rule, was solely within the Board’s authority. § 75-5-301(2), MCA (2019); 2021 Mt. SB 233; § 75-5-301(2), MCA (2021). Pursuant to that authority, the Board created the Record and promulgated the New Selenium Rule.

Findings 1 and 2. Therefore, the Board is well situated and has authority to “interpret” the New Selenium Rule, make decisions about its application and

enforceability, as well as declare what may or may not be supported by the Record.
§ 2-15-102(10), MCA.

Petitioners Are Persons “Affected By” the New Selenium Rule.

5. Unlike judicial standing determinations made by courts, administrative standing determinations made by quasi-judicial agencies (such as the Board) depend “on the language of the statute and regulations which confer standing before that agency.” *Williamson v. Mont. PSC*, 2012 MT 32, ¶ 30, 364 Mont. 128, 272 P.3d 71. Administrative standing “may permissibly be less demanding than the criteria for judicial standing.” *Id.* In this case, the statute that confers standing requires that the person be “affected by” the New Selenium Rule. § 75-5-203(4)(a), MCA. The statute does not condition the amount or type of effect required. It simply requires that the person be “affected by” the New Selenium Rule, providing a relatively low bar for standing. A “person” is defined in the Montana Water Quality Act to include a “firm, corporation, partnership, individual, or other entity and includes persons resident in Canada.” § 75-5-103(26), MCA.

6. Teck’s Petition and the Record demonstrate that it is affected by the New Selenium Rule because its Canadian coal mining operations, monitoring data and other information, and the regulatory requirements placed upon it by provincial and Canadian authorities were used during rulemaking. The Board

admitted that the New Selenium Rule was aimed at Teck, and the New Selenium Rule was immediately used by DEQ in a manner adverse to Teck. Findings 7-12.

7. Lincoln County's Petition and the Record demonstrate that it is affected by the New Selenium Rule because Lake Koocanusa is in Lincoln County and, as the Board recognized, an impairment listing of the lake is probable and would impact discharge limitations for new projects in Lincoln County. Findings 13-16.

The New Selenium Rule Is More Stringent Than the Federal Guideline.

8. The New Selenium Rule's water column standard is a water quality standard subject to the Stringency Statute. Findings 21, 22, 25-27; ARM 17.30.632(6); § 75-5-302, MCA. Neither site specific features of the New Selenium Rule nor allegations regarding its impact on downstream water quality exempt it from the Stringency Statute. Findings 25-27; § 75-5-203, MCA (specifically stating its applicability to standards set pursuant to § 75-5-310, MCA, which allows site specific standards); 1995 Mt HB521 (establishing the intent of the Legislature to apply the bill to all standards). The federal guideline that would apply to Lake Koocanusa (1.5 micrograms per liter) is less than and therefore more protective than the water column standard immediately downstream in the Kootenai River (3.1 micrograms per liter). Additionally, fish tissue standards are the same both upstream and downstream, indicating that downstream water quality

standards would not require a standard more stringent than the federal guideline. ARM 17.30.632(6) and (7); 40 C.F.R. § 131.10(b).

9. The 2016 EPA Guideline of 1.5 micrograms per liter selenium in lentic (lake) waters “address[es] the same circumstances” as the New Selenium Rule’s water column standard because both address the same “particular parameter,” which is selenium, both address lentic/lake waters, and both aim to protect aquatic life from the effects of selenium, including the release of selenium related to resource extraction. Findings 18-21; § 75-5-203(1), MCA; *Pennaco Energy v. Mont. Bd. of Env’tl. Review*, 2007 Mont. Dist. LEXIS 513, *44 (reasoning based on legislative intent upheld in *Pennaco Energy, Inc. v. Mont. Bd. of Env’tl. Review*, 2008 MT 425, 347 Mont. 415, 199 P.3d 191).

10. The New Selenium Rule’s water column standard is more stringent than the federal guideline because it is mathematically lower than the federal guideline and it was derived by use of modeling factors that are more stringent than those used in the federal guideline. Findings 21, 23, 24.

The New Selenium Rule Violates the Stringency Statute.

11. No written finding, as required the Stringency Statute, was provided for the New Selenium Rule; therefore, the New Selenium Rule violates the Stringency Statute. Findings 25-28; § 75-5-203, MCA.

12. Because the initial publication of the New Selenium Rule failed to inform the public that the New Selenium Rule is more stringent than the federal guideline and failed to provide the written finding required by the Stringency Statute to the public for review and comment, the rulemaking for the New Selenium Rule violates the Stringency Statute. Findings 3, 26, 27; 1995 Mt. HB 521; § 75-5-203, MCA.

The Record Cannot Support the Written Finding Required by Montana Code Annotated §§ 75-5-203(2) and (3).

13. The Stringency Statute requires there to be evidence in the Board's rulemaking record that "the proposed state standard or requirement protects public health or the environment of the state." § 75-5-203(2)(a), MCA.

14. Natural conditions are not considered to impair a waterbody's existing uses. Natural conditions are considered protective of public health and the environment. §§ 75-5-306; 75-5-222, MCA (state regulation for natural conditions). Evidence in the Record suggests that the natural condition of selenium in Lake Koocanusa may be near, at, or greater than the water column standard of the New Selenium Rule, indicating potential conflict between the natural condition and the water column standard in the New Selenium Rule. Findings 29, 44, 45. Therefore, a written finding that "the proposed state standard or requirement protects public health or the environment of the state" cannot be made based on the Record. § 75-5-203(2)(a), MCA.

15. The Stringency Statute requires there to be evidence in the Record that the proposed standard can mitigate harm to public health or the environment. § 75-5-203(2)(b), MCA. The New Selenium Rule cannot mitigate harm because there is nothing within the Board's or DEQ's jurisdiction that either can regulate with the New Selenium Rule. Finding 30. Because harm is not indicated at the current selenium water quality levels in Lake Koocanusa, which are greater than the water column standard of the New Selenium Rule, the New Selenium Rule is not designed to and does not mitigate harm. Findings 31- 41. While the Board need not "require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked," there must be some evidence or "demonstration" supporting the rulemaking. *Mont. Env'tl. Info. Ctr. v. Dep't of Env'tl. Quality*, 1999 MT 248, ¶¶ 78, 79, 296 Mont. 207, 988 P.2d 1236. Here, the water quality data, fish tissue data, and previous determinations about threatened impairments do not support the Board's previous assumptions about current or threatened harm; therefore, the assumptions are invalid and insufficient to support the New Selenium Rule.

16. There is no evidence in the Record that the proposed standard "is achievable under current technology" as required by the Stringency Statute. § 75-5-203(2)(b), MCA. Findings 42, 43. In contrast, evidence in the Record suggests that operation of Libby Dam and the natural condition of selenium might prevent

the water column standard of the New Selenium Rule from being achieved.

Findings 29, 44, 45.

17. No “information from the hearing record regarding the costs to the regulated community” is in the Record and no such information was provided for meaningful public review and comment. Findings 46-49; § 75-5-203(3), MCA.

The Record reveals that “the economics of waste treatment and prevention” were not considered, contrary to both the Stringency Statute and § 75-5-301(1), MCA.

18. The Record cannot support the written finding required by §§ 75-5-203(2) and (3), MCA.

IV. ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the New Selenium Rule is more stringent than comparable federal regulations or guidelines. The Board erred when it concluded the Rule was not more stringent than the federal regulations or guideline and that it did not need to make written findings required by § 75-5-203(2), MCA, which could not have been made in any event based upon the Board’s administrative record.

Therefore, IT IS ORDERED that the New Selenium Rule’s water column standard, ARM 17.30.632(7)(a), is invalid and may not be applied or enforced.

DATED this _____ day of February, 2022.

Steven Ruffatto
Chairman
Board of Environmental Review

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